Civil and Administrative Tribunal

New South Wales

Case Name:	The Owners - Strata Plan No 68255 v Downs; Downs v The Owners - Strata Plan No 68255
Medium Neutral Citation:	[2021] NSWCATCD 34
Hearing Date(s):	17 August 2020, 18 August 2020, 30 October 2020 and 6 November 2020, final written submissions received 14 December 2020
Date of Orders:	22 July 2021
Decision Date:	22 July 2021
Jurisdiction:	Consumer and Commercial Division
Before:	D Robertson, Senior Member
Decision:	(1) Order that Helena Marie Downs carry out, within the area identified as Area 2 in the Surveyors Report dated 16 August 2017 prepared by Mr Gary Medway of Geographic Solutions Registered Surveyors, the works identified in the scope of works in Section 5.0 of the report of Tim Sherwood of SJA Construction Services Pty Ltd dated 27 May 2020 (except the works referred to in items 6(29), 9(44), 14(68), 15(80), 16(81-83), 17(84), 18(85-89), 19(90-94) and 20(95-110) of that scope of works) (Reinstatement Works) in order to remove alterations and additions undertaken by her or on her behalf to the common property in connection with Lot 15 in Strata Plan No. 68255 and reinstate that common property to its previous condition. (2) Order that Helena Marie Downs ensure that the Reinstatement Works are carried out in a proper and competent manner, by appropriately qualified, licensed and insured contractors, in a manner that does not disturb the peaceful enjoyment of the owners or occupiers of the other lots in Strata Plan No. 68255 and in accordance with all applicable laws and by-laws, and

	are completed within 12 months of the date of this order. (3) Order that, in the event that Helena Marie Downs fails to comply with orders 1 and 2 above, The Owners – Strata Plan No 68255 be permitted to enter Lot 15 in Strata Plan No. 68255 and carry out the Reinstatement Works in accordance with section 120 of the Strata Schemes Management Act 2015. (4) Order that both applications be otherwise dismissed. (5) Direct that either party may file and serve written submissions within 14 days of the date of this decision seeking an order in relation to the costs of the proceedings. (6) Direct that, if either party files submissions in accordance with order (5), the other party may file submissions in response within a further 14 days. (7) Direct that any submissions filed in accordance with orders (5) and (6) must address the question whether the question of costs may be determined on the papers and without a hearing pursuant to s 50(2) of the Civil and Administrative Tribunal Act 2013 (NSW)
Catchwords:	LAND LAW – Strata title – Common property – Identification of common property – Delineation of boundaries between lot and common property – Interpretation of strata plan – Whether order should be made restraining a lot owner from exclusively occupying common property LAND LAW – Strata title – Owners corporation – Meetings of owners corporation – Whether the Civil and Administrative Tribunal has jurisdiction to order an owners corporation to convene a general meeting
Legislation Cited:	Strata Schemes (Freehold Development) Act 1973 (NSW Strata Schemes (Freehold Development) Regulation 1997 (NSW) Strata Schemes Management Act 1996 (NSW) Strata Schemes Management Act 2015 (NSW) Strata Titles Act 1973 (NSW)
Cases Cited:	Bate v The Owners - Strata Plan No 60549 [2018] NSWCATCD 36 Glenquarry Park Investments Pty Ltd v Hegyesi [2019] NSWSC 425

	Lin v The Owners - Strata Plan No 50276 [2004] NSWSC 88; (2005) NSW ConvR 56-105 Melani v The Owners - Strata Plan No 22214 [2017] NSWCATCD 73 Owners Corporation - Strata Plan No 22607 v Yang [2018] NSWCATCD 3 Symes v The Owners - Strata Plan No 31731 [2001] NSWSC 527 Symes v The Proprietors Strata Plan No 31731 [2003] NSWCA 7 The Owners - Strata Plan No 37762 v Pham [2006] NSWSC 1287 The Owners - Strata Plan No 63731 v B & G Trading Pty Ltd [2020] NSWCATAP 202 The Owners – Strata Plan 85044 v Murrell [2020] NSWSC 20 The Proprietors - Strata Plan No 9616 v Knaggs (1982) NSW Titles Cases 13-037; 12 February 1982 Vickery v The Owners - Strata Plan No 80412 [2020] NSWCA 284 Walsh v The Owners - Strata Plan No 10349 [2017] NSWCATAP 230 Westfield Management Ltd v Perpetual Trustee Company Ltd [2007] HCA 45, 233 CLR 528
Category:	Principal judgment
Parties:	The Owners - Strata Plan No 68255 (Applicant in SC 20/08127; Respondent in SC 20/12151) Helena Marie Downs (Respondent in SC 20/08127; Applicant in SC 20/12151)
Representation:	Counsel: V Kerr SC (The Owners - Strata Plan No 68255) M Ashurst SC and F Forgacs (Ms Downs) Solicitors: J S Mueller & Co Lawyers (The Owners - Strata Plan No 68255) Grace Lawyers Pty Ltd (Ms Downs)
File Number(s):	SC 20/08127; SC 20/12151
Publication Restriction:	NIL

REASONS FOR DECISION

Introduction

1 The parties to these applications are the owners corporation of Strata Plan No 68255 (the Owners) and Ms Helena Downs

2 Strata Plan No 68255 is an apartment building in Cronulla, New South Wales consisting of fifteen units over six levels with basement parking. The strata plan was registered on 1 July 2002.

3 Ms Downs owns Lot 15 in Strata Plan No 68255, which she acquired in June 2016.

4 Lot 15 is the penthouse apartment. The registered strata plan identifies four areas as constituting Lot 15 – a basement garage and a small area on level 4, which are not of significance in these proceedings, and areas on levels 5 and 6. For ease of reference, a copy of Sheet 7 of the strata plan, which includes the floor plans delineating Lot 15 on levels 5 and 6, is appended to these reasons.

5 Levels 5 and 6 are serviced by a lift, which is keyed so that only Lot 15 can access those levels. On level 5, Lot 15 is shown as consisting of the western end of level 5, part of which is occupied by the body of a swimming pool, accessible from level 6. At the eastern end the plan shows Lot 15 extending a distance past the lift. One issue between the parties in these proceedings is the delineation of the eastern boundary of Lot 15.

6 On the approved plans, level 5 was identified as “Service floor level” and, on the strata plan, the area of Lot 15 on level 5 not occupied by the swimming pool is marked “PC Service Area”. The letters PC refer to a positive covenant in favour of the Sutherland Shire Council requiring that the “area of Part Lot 15 shown on level 5 as service area is designated as non-habitable as defined in the Building Code of Australia”. This positive covenant was required by Condition 8 of the conditions of consent issued by Sutherland Shire Council on 11 June 2002. However on 7 December 2017 Ms Downs obtained from the Council a Development Consent to convert that area into habitable space and the positive covenant has been released.

7 The eastern end of level 5 within the building envelope does not appear on the registered strata plan. It is not in dispute that the area at the eastern end of level 5 is common property. At the eastern end of level 5 there is a void, open to the level below. The common property area on level 5 extends on either side of the void to the eastern end of the building. The void is walled off from the Level 5 East Area on the north, west and south sides.

8 On level 6 the strata plan identifies Lot 15 as the area enclosed within the exterior walls of the building, together with two balconies, and a terrace at the western end, including the swimming pool.

9 At the western end of the internal area of Lot 15 on level 6 is an atrium, the ceiling of which is at least 5 metres in height. At the eastern end of level 6 there is a mezzanine level which extends westward from the eastern wall about two thirds of the way across the internal area. The mezzanine level consists of an internal area and a balcony on each of the north and south sides. The mezzanine level (including the balconies) does not extend the full north-south width of level 6. The roof of level 6 along its north and south boundaries, outside the area below the balconies, consists of glass skylights.

10 The western end of the mezzanine level is separated from the atrium by a wall which is penetrated by a substantial window.

11 The mezzanine level is not identified on the registered strata plan but it is apparent from the approved plans and other evidence, and not contested before me, that the mezzanine level was constructed at the same time as the balance of the building and at all times connected to level 6 by a staircase within the building envelope. There is no other access to the mezzanine level.

12 Sheet 7 of the strata plan includes the notation “All area above level 5 is for the exclusive use of Lot 15”.

13 A second issue between the parties in these proceedings is whether the mezzanine level is part of Lot 15 or common property. I note that the Owners preferred to refer to the mezzanine level as level 7. In this decision I will use the description “mezzanine level” or “mezzanine area”. My use of that

description does not indicate any presumption or preliminary conclusion regarding whether the mezzanine level is part of Lot 15 or common property.

14 Ms Downs acquired Lot 15 from Mr Daile Banning who was associated with the original developer of the building and had owned Lot 15 since the completion of construction.

15 It was not in issue that, at the time Ms Downs acquired the property, Ms Downs and her husband, Martyn Downs, understood that the eastern area of level 5 and the mezzanine level were part of Lot 15. Mr Downs gave evidence that on his inspection of the property prior to purchase, there had been “a plant room, communications room and cellar/pantry” and “an office/living space outfitted with lighting and plumbing” to the east of the lift-well on level 5. Mr Downs described the mezzanine level at that time as “partially fitted as a master bedroom”.

16 Ms Downs settled the purchase in November 2016 and engaged a builder, G Webster Constructions Pty Ltd, to carry out repairs and renovations. Those works included work within the eastern area of level 5. The work within the eastern area of level 5 is the subject of a stop work order issued by the Sutherland Shire Council on 7 April 2017.

17 In March 2017 the Downs were advised that the level 5 eastern area was common property and they should seek a common property rights by-law to enable them to have exclusive use of that area.

18 Correspondence then ensued between the Owners and the Downs relating to Ms Downs either acquiring, or having exclusive use of, the Level 5 East Area.

19 In September 2017 the Owners raised the proposition that the mezzanine level (level 7) was common property.

20 During 2018 Ms Downs submitted a draft proposed exclusive use by-law for the eastern area of level 5.

21 The parties attended mediation with Fair Trading NSW on 26 November 2018.

22 An Extraordinary General Meeting of the Owners, to consider a by-law proposed by Ms Downs for the exclusive use of the eastern area of level 5,

was held on 16 October 2019. The events of that meeting are the subject of contest but, critically, a resolution to enact the by-law proposed by Ms Downs was put to the meeting and defeated.

23 The Owners commenced proceedings in the Tribunal on 17 February 2020.

24 Ms Downs commenced her own proceedings in the Tribunal on 10 March 2020.

25 After the exchange of evidence the proceedings were listed for hearing on 17 and 18 August 2020. The evidence could not be completed on those days and the proceedings continued on 30 October 2020 and 6 November 2020, the week's delay between the last two dates being intended to give the parties the opportunity to have written submissions ready for presentation on 6 November 2020.

26 Ultimately the evidence did not conclude on 30 October 2020 and some evidence continued on 6 November.

27 On 6 November 2020 the parties presented both written and oral submissions and each party was given leave to respond to the other party's written submissions (to which they had not had access prior to the hearing on that date).

28 Those final written submissions were received by the Tribunal on 14 December 2020.

The Applications

29 Shortly before the first day of hearing on 17 August 2020, both parties filed amended applications. The hearing proceeded on the basis of those amended applications.

30 At the commencement of the hearing on 30 October 2020 the Owners sought to file a further amended application. By that application the Owners sought orders in relation to a further area identified as the "covered outdoor winter-garden" at the eastern end of level 6, which, like the mezzanine level, is only accessible through Unit 15.

31 Ms Downs submitted that she would be prejudiced by the amended application and leave to reply upon the further amended application was refused.

32 By its amended application, the Owners sought, pursuant to sections 132, 229, 232 and 241 of the *Strata Schemes Management Act* 2015 (NSW) (SSMA):

> An order that the Respondent remove the alterations and additions undertaken by her or on her behalf to the common property in connection with lot 15 in Strata Plan No. 68255 that are identified in Annexure "B1" **(Renovations)** and reinstate the common property affected by the Renovations to the condition it was in immediately before commencement of the renovations **(Reinstatement Works).**
>
> 1A. In the alternative to order 1, an order that the Respondent carry out the works identified in the scope of works in Section 5.0 of the report of Tim Sherwood of SJA Construction Services Pty Ltd dated 27 May 2020 (except the works referred to in items 6(29), 9(44), 14(68), 15(80), 16(81-83), 17(84), 18(85-89), 19(90-94) and 20(95-110) of that scope of works) **(Reinstatement Works)** in order to remove alterations and additions undertaken by her or on her behalf to the common property in connection with Lot 15 in Strata Plan No. 68255 and reinstate that common property to its previous condition.
>
> An order that the Respondent ensure that the Reinstatement Works are carried out in a proper and competent manner, by appropriately qualified, licensed and insured contractors, in a manner that does not disturb the peaceful enjoyment of the owners or occupiers of the other lots in Strata Plan No. 68255 and in accordance with all applicable laws and by-laws, and are completed within 2 months of the date of this order.
>
> An order that in the event that the Respondent fails to comply with orders 1 or 1A and 2 above, the Applicant be permitted to enter lot 15 in Strata Plan No. 68255 and carry out the Reinstatement Works in accordance with section 120 of the *Strata* Schemes Management Act 2015.
>
> An order that the Respondent vacate, and deliver up to the Applicant vacant possession and control of, the following parts of the common property in Strata Plan No. 68255:
>
> the area of common property to the east of the lift on level 5 of Strata Plan No. 68255 that is marked in hatching in the plan of Geographic Solutions Registered Surveyors dated 16 August 2017, a copy of which appears in Annexure "B2" (Level 5 Eastern Area); and
>
> the area of common property above level 6 of Strata Plan No. 68255 that is marked in hatching on the plan of Geographic Solutions Registered Surveyors dated 16 August 2017, a copy of which appears in Annexure "B3" **(Level 7** Mezzanine Area).
>
> An order that the Respondent be restrained from residing in, using for residential accommodation or exclusively occupying, or permitting any person to reside in, use for residential accommodation or exclusively occupy:
>
> (a) the Level 5 Eastern Area; and
>
> (b) the Level 7 Mezzanine Area.

6. An order that the Respondent remove from the Level 5 Eastern Area and the Level 7 Mezzanine Area all of the chattels and goods, including any furniture and equipment, and any fixtures or fittings, belonging to her or her family, and make good any damage caused by such removal.

7. An order that the Respondent pay the Applicant's costs.

33 By Ms Downs' amended application Ms Downs sought orders:

Pursuant to Section 227(1)(c) of the Strata Schemes Management Act 2015 (NSW), this strata application be accepted as mediation is unnecessary or inappropriate in the circumstances.

Pursuant to Section 149(1) of the *Strata Schemes Management Act 2015* (NSW), the Tribunal orders the by-laws for strata plan 68255 are changed to include the common property rights by-law in favour of Lot 15 in the form contained at annexure **"D1"** hereto or as ordered by the Tribunal.

Pursuant to Section 229(a) of the *Strata Schemes Management Act 2015* (NSW), the Tribunal orders that the respondent is to forthwith and at its own cost do all things necessary to record on the common property title for strata plan 68255 the common property rights by-law in favour of Lot 15 contained at annexure **"D1"** hereto.

4. In the alternative:

(a) Pursuant to Section 126(2) of the *Strata Schemes Management Act 2015* (NSW), the Tribunal orders the making of a work approval order approving the minor renovations and alterations to the common property completed by the owner of Lot 15 to common property east of the lift well on Level 5 of strata plan 68255; and/or

(b) Pursuant to Section 126(1) of the *Strata Schemes Management Act 2015* (NSW), the Tribunal orders that the respondent to consent to the proposed works by the owner of Lot 15 to the common property east of the lift well on Level 5 of strata plan 68255;

(c) Pursuant to Section 229(a) of the *Strata Schemes Management Act 2015* (NSW) the respondent is to forthwith and at its own cost do all things necessary to register a copy of these orders on the common property title for strata plan 68255.

5. In the alternative, pursuant to section 232(1)(a) and/or (e) of the *Strata Schemes Management Act 2015* (NSW) the Tribunal orders that the Respondent convene and hold an extraordinary general meeting to consider the motions at Annexure **"B"** hereto, such meeting to be held by no later than 30 days after the making of this order.

6. In the alternative, pursuant to s 232(1)(a) and/or (e) of the *Strata Schemes Management Act 2015* {NSW) the Tribunal orders that the Respondent convene and hold an extraordinary general meeting to consider motions in the form of the motions at Annexure **"B"** hereto, other than that the definition of "Compensation" reflect such amount as is determined by the Tribunal to be the value of the common property east of the lift well on Level 5 of strata plan 68255.

7. Costs.

8. Such further or other orders as the Tribunal sees fit.

34 In written submissions filed on 6 November 2020 by Mr Kerr SC, Counsel for the Owners, the Owners identified seven issues for the Tribunal to determine in the proceedings. They are as follows:

(1) Where is the western boundary of the Level 5 East Area situated?

(2) Is the level 7 mezzanine area part of the common property?

(3) Should Ms Downs be ordered to reinstate the common property altered during the renovation under either s 132(1)(a) or ss 232(1)(a) and 241 of the Strata Schemes Management Act 2015?

(4) Did the Owners Corporation unreasonably refuse to make the By-Law within the meaning of s 149(1)(a) or consent to the works within the meaning of s 126(1) and (2)?

(5) If so, should the Tribunal order the by-laws be changed to make the By-Law under s 149(1) (or compel the Owners Corporation to consent to the future works under s 126(1) or approve the past works under s 126(2))?

(6) Does the Tribunal have power to order the Owners Corporation to convene an extraordinary general meeting to consider alternative motions to approve Ms Downs' past and future works and exclusive use of the Level 5 East Area, and if so, should the Tribunal order the Owners Corporation to do so?

(7) Should Ms Downs be ordered to cease exclusively using and enjoying the Level 5 East Area and the level 7 mezzanine area?

35 In written submissions filed on 6 November 2020 by Mr Ashurst SC and Mr Forgacs, Counsel for Ms Downs, Ms Downs withdrew her submission that the Owners had unreasonably refused to make a common property rights by-law in respect of the Level 5 East Area, but submitted:

> "However it is apparent from the evidence given by members of the Owners Corporation that Ms Downs' request did not receive proper consideration by the Owners Corporation, and Ms Downs should be given an opportunity to place a further common property rights by-law before the Owners Corporation."

36 By reason of the withdrawal of the application for a common property rights by-law, the issues identified by Mr Kerr as issues (4) and (5) no longer concern the Tribunal. However, the parties remain at issue in relation to issues (1) to (3), (6) and (7).

The Evidence

37 Each party filed a bundle of evidence, consisting in each case of a number of lever arch folders. The bundles included affidavits from a number of witnesses and a number of experts' reports

38 The bundles of documents, including the affidavits and experts' reports, were admitted without objection. Additionally, some further documents were tendered in the course of the hearing.

39 The Tribunal also received oral evidence from:

- Mr Paul Booth, the Chair of the Owners Corporation;
- Eight other lot owners, being: Mr Paul Leighton, Ms Anne Marie Lyon, Mr Warren Sawyer, Ms Marie Kelly, Mr Stephen Marstaeller, Ms Dianne Griggs, Mr Ian Holland and Mr Garry Tambree;
- Mr Martyn Downs, Ms Downs' husband;
- Mr David Highland, a real estate agent, who attended the extraordinary general meeting on 16 October 2019 on behalf of Ms Downs;
- Mr Glen Webster, the director of the builder who carried out construction works within Lot 15 and the Level 5 East Area commencing in November or December 2016.

40 One other lot owner, Ms Leanne Woods, provided an affidavit but was not required for cross-examination.

41 The Tribunal received oral evidence from a number, although not all, of the experts who had provided reports, being:

- Mr Neal Smith, a valuer, called by the Owners;
- Mr Brandtman, a quantity surveyor, called by the Owners;
- Mr Rick McConnell, a valuer, called by the Owners;
- Mr Mark Casemore, a valuer, called by Ms Downs.
- Mr Mark Andrew, a surveyor, called by the Owners;
- Mr Peter Friedmann, a surveyor, called by Ms Downs.

42 Mr Friedman and Mr Andrew gave evidence concurrently.

43 Because Ms Downs no longer presses her application for orders that the Owners have unreasonably refused to make a by-law and that the Tribunal direct the registration of a by-law, much of the evidence (both written and oral)

received in the course of the hearing is no longer directly relevant. It is convenient to deal with the remaining issues identified by Mr Kerr (set out at [34] and [36] above) in turn. To the extent there remain any areas of contest, either of fact or of expert opinion, which are relevant to the remaining issues, I will address those contested areas when considering the relevant issue.

Issue 1 – Delineation of the eastern boundary of Lot 15 on level 5

44 Strata Plan 68255 was registered under s 7(2) of the *Strata Schemes (Freehold Development) Act 1973* (NSW) (the 1973 Act).

45 As in force on 1 July 2002, the time of registration of the strata plan, s 7(2) provided:

> "Land, including the whole of a building may be sub-divided into lots, or into lots and common property, by the registration of a plan as a strata plan."

46 Section 5(1) of the 1973 Act defined a number of terms used in the Act as follows:

> **common property** means so much of a parcel as from time to time is not comprised in any lot.
>
> **floor** includes a stairway or ramp.
>
> **floor plan** means a plan, consisting of one or more sheets, which:
>
> (a) defines by lines (in paragraph (c) of this definition referred to as **base lines**) the base of each vertical boundary of every cubic space forming the whole of a proposed lot, or the whole of any part of a proposed lot, to which the plan relates,
>
> (b) shows:
>
> (i) the floor area of any such cubic space, and
>
> (ii) where any such cubic space forms part only of a proposed lot, the aggregate of the floor areas of every cubic space that forms part of the proposed lot, and
>
> (c) where proposed lots or parts thereof to which the plan relates are superimposed on other proposed lots or parts thereof to which the plan relates:
>
> (i) shows the base lines in respect of the proposed lots or parts thereof that are so superimposed separately from those in respect of the other proposed lots or parts thereof upon which they are superimposed, and
>
> (ii) specifies, by reference to floors or levels, the order in which that superimposition occurs.
>
> **lot** means one or more cubic spaces forming part of the parcel to which a strata scheme relates, the base of each such cubic space being designated as one lot or part of one lot on the floor plan forming part of the strata plan, a

strata plan of subdivision or a strata plan of consolidation to which that strata scheme relates, being in each case cubic space the base of whose vertical boundaries is as delineated on a sheet of that floor plan and which has horizontal boundaries as ascertained under subsection (2), but does not include any structural cubic space unless that structural cubic space has boundaries described as prescribed and is described in that floor plan as part of a lot.

wall includes a door, window or other structure dividing a lot from common property or from another lot.

47 Sub-sections 5(2) to (4) of the 1973 Act provided:

(2) The boundaries of any cubic space referred to in paragraph (a) of the definition of **floor plan** in subsection (1):

(a) except as provided in paragraph (b):

(i) are, in the case of a vertical boundary, where the base of any wall corresponds substantially with any line referred to in paragraph (a) of that definition—the inner surface of that wall, and

(ii) are, in the case of a horizontal boundary, where any floor or ceiling joins a vertical boundary of that cubic space—the upper surface of that floor and the under surface of that ceiling, or

(b) are such boundaries as are described on a sheet of the floor plan relating to that cubic space (those boundaries being described in the prescribed manner by reference to a wall, floor or ceiling in a building to which that plan relates or to structural cubic space within that building).

(3) A reference in this Act to cubic space includes a reference to space contained in any three-dimensional geometric figure which is not a cube.

(4) The fact that any boundary is defined in a plan in terms of or by reference to:

(a) a wall that is not vertical, or

(b) a floor or ceiling that is not horizontal,

does not prevent that plan from being a floor plan.

48 Section 8(1) of the 1973 Act provided that a plan intended to be registered as a strata plan must include, as sheets of the plan: (a) a location plan, (b) a floor plan, and (c) a schedule of unit entitlements.

49 Schedule 1A of the 1973 Act set out the requirements with which a strata plan was required to comply (see s 8(2)(c)). Clause 1 of Schedule 1A provided:

1 Floor plans

(1) Each wall, the inner surface or any part of which corresponds substantially to a line shown on the floor plan as a boundary of a proposed lot, must exist.

(2) Each floor or ceiling, the upper or under surface or any part of which forms a boundary of a proposed lot, must exist.

> (3) Each wall, floor, ceiling or structural cubic space, by reference to which any boundary of a proposed lot is determined, must exist.

50 The regulations made under the 1973 Act (the Strata Schemes (Freehold Development) Regulation 1997 (NSW) (the 1997 Regulation), as in force in 2002, provided by regulation 8(1):

> 8 Floor plans: sections 8, 8A, 9
>
> (1) A floor plan must show the following:
>
> (a) by continuous lines, the boundaries of lots or whole separate parts of lots, so that boundaries defined by walls or other structural features are clearly distinguished from boundaries defined by lines only,
>
> (b) if the boundary of a lot is defined by reference to the surface of a wall, linear connections to that surface and such linear dimensions of that boundary as the Registrar-General may require,
>
> (c) if the boundary of a lot is defined by reference to the surface of a floor or ceiling, such vertical connections and notations as are necessary to define that boundary,
>
> (d) notations sufficient to ensure that each cubic space forming the whole of a lot or a whole separate part of a lot is fully defined (provided that if it is intended that a lot boundary is to be defined in accordance with the formula set out in section 5 (2) (a) of the Act, but not otherwise, no notation need be made for the purpose of defining that boundary).

51 The transitional provisions in the SSMA preserve the operation of those provisions in relation to pre-existing strata schemes such as Strata Plan 68255.

52 The determination of the location of the eastern boundary of Lot 15 on level 5 requires the application of those provisions in light of evidence as to the state of the premises at the time of registration of the strata plan.

53 Mr Carl Banning, an air conditioning and electrical contractor, provided an affidavit stating that he had worked on the building during its construction and that, at the time he worked on the building, level 5 was divided by a masonry wall situated to the east of the lift shaft. Mr Banning was not required for cross-examination.

54 Mr Gary Medway, a surveyor retained by the Owners Corporation, attempted to identify the precise location of the eastern boundary of Lot 15 on level 5. It is apparent that by August 2017, when Mr Medway undertook his survey, the wall referred to by Mr Banning was no longer present. Nevertheless, Mr Medway was able to identify what he suggested were the remains of a pre-existing wall.

55 Mr Medway was asked to measure and calculate the area of the common property on level 5. Mr Medway provided three alternative calculations: one (Area 1) based on the assumption that the wall currently in place, which I understand is the wall adjacent to the void, is the boundary of Lot 15; the second (Area 2) on the basis that the original wall was constructed where the remains of a wall were apparent in August 2017; and thirdly (Area 3) by scaling from the original strata plan.

56 Mr Medway noted that the third option "revealed discrepancies in scaling". I note that each sheet of the registered strata plan includes the statement "all areas are approximate only". Mr Medway also noted that no records locating the position of the wall could be provided by Mr Dennis Smith, the registered surveyor who had prepared the strata plan.

57 The Owners submitted that:

> "The strata plan shows the vertical boundaries of Lot 15 on level 5 by a continuous line. That line was required by clause 8(1)(a) of the 1997 Regulation".

58 The Owners submitted that, accordingly, the eastern boundary of Lot 15 must have been defined by a wall at the time of registration of the strata plan. The Owners submitted that:

> "Given there is no better evidence concerning the precise location of the original dividing wall, the Tribunal should accept Mr Medway's extrapolation from the remains of the existing wall as depicting the eastern boundary."

59 The Owners' submissions also noted that Ms Downs' own proposed by-law had identified the proposed exclusive use area, the subject of the proposed by-law, by reference to Mr Medway's Area 2, that is the area defined by the remains of a pre-existing wall.

60 Ms Downs did not address this issue in her submissions.

61 The eastern boundary of Lot 15, as drawn on Sheet 7 of the strata plan, is not drawn in such a way as to suggest that it is a boundary defined by a line only, as would have been required by Clause 8(1)(a) of the 1997 Regulation as in force in 2002, if the boundary was so defined.

62 Accordingly, to the extent that there was, at the time of registration of the strata plan, a wall to the east of the lift-well but west of the wall adjacent to the void, that wall would have constituted the eastern boundary of Lot 15.

63 Mr Carl Banning's evidence suggested that a wall to the east of the lift shaft and to the west of the wall of the void had existed at the time of registration of the strata plan. Mr Medway was able to identify the remains of a wall in that general location. On the evidence before me, I am satisfied that the wall of which Mr Medway identified the remains was a wall which existed in 2002.

64 In the circumstances I am satisfied that the eastern boundary of Lot 15 on level 5, to the extent it is necessary for me to determine that boundary for the purposes of these proceedings, is the line delineated in Mr Medway's report by reference to the remains of a pre-existing wall, which identifies the common property area as Area 2, with a total area of 153m2.

65 I note that, by reason of the provisions of s 239 of the SSMA, I have jurisdiction to determine the question of title to land but only for the purpose of deciding the matter under the SSMA. Accordingly, my determination as to the eastern boundary of Lot 15 on level 5 will have effect only for the purposes of, and to the extent that I make, an order requiring Ms Downs to undertake the restoration of the Level 5 East Area and/or cease to exercise exclusive occupation of the Level 5 East Area.

Issue 2 – Level 7 mezzanine area

Issue 2 – Owners' submissions

66 The Owners submitted that the mezzanine area was common property. The Owners noted that the mezzanine area is not shown as a separate floor plan on the strata plan. The Owners submitted that whether the mezzanine area is part of Lot 15 or part of the common property depends upon:

> "Whether there are notations on the strata plan that describe the upper horizontal boundary of Lot 15 on level 6 in the prescribed manner by reference to a wall, floor or ceiling, namely by vertical connections and notations necessary to define the ceiling boundary, in accordance with s 5(2)(b) of the 1973 Act and Clause 8(1)(c) of the 1997 Regulation"; and
>
> "If not, where the ceiling above level 6 adjoined a vertical boundary of Lot 15 shown on Sheet 7 when the strata plan was registered, in accordance with s 5(2)(a)(ii) of the 1973 Act, since the under-surface of that ceiling will comprise

> the upper horizontal boundary of the part of Lot 15 located on level 6 adjacent to that boundary."

67 The Owners noted that the mezzanine level comprises an internal area and two external balconies, that, while the internal area is covered by the roof, the balconies are not, and that, although the level 7 mezzanine area is located above the eastern part of level 6, its floor footprint does not cover the entirety of the eastern part of level 6:

> "In particular there are parts of level 6 to the south, north and two protrusions to the east that are not covered by the level 7 mezzanine area footprint – and axiomatically also not covered by the roof at the top of the building".

68 The Owners noted that there are notations on Sheet 7 that describe the upper horizontal boundary of the balconies and terraces, where uncovered, on levels 5 and 6, namely 2.5 metres above the upper surface of the adjoining floor, and, in respect of the swimming pool, 2.5 metres above the pool coping. The Owners noted that those notations comply with s 5(2)(b) of the 1973 Act and clause 8(1)(c) of the 1997 Regulation.

69 The Owners submitted:

> "Conversely, there are no notations on Sheet 7 that describe the upper horizontal boundary of the internal part of Lot 15 on level 6 … it follows that the upper horizontal boundary of the internal part of Lot 15 on level 6 is the ceiling that existed when the strata plan was registered: s 5(2)(a)(ii) of the 1973 Act."

70 The Owners referred to the notation on Sheet 7 that "All area above level 5 is for the exclusive use of Lot 15", but submitted:

> "That does not record vertical connections and notations necessary to describe the surface of a ceiling that comprises the upper horizontal boundary of Lot 15, as required by Clause 8(1)(c) of the 1997 Regulations. It does not assist in identifying the upper horizontal boundary of Lot 15."

71 The Owners submitted that the notation does, however, suggest that at least some area above level 5 was intended to be common property, "since otherwise there would have been no purpose in denoting Lot 15 as having exclusive use of it". The Owners noted that "if that was the intention then it was not achieved, since a right of exclusive use can only be conferred by a common property rights by-law and not by a notation on a strata plan."

72 The Owners identified that the only ceiling over a number of parts of level 6, in particular the skylights along the northern and southern edges and the areas

directly under the balconies on the northern and southern sides of level 7, was the skylights or the ceiling attached to the underside of the level 7 slab. The Owners submitted that the underside of the level 7 slab "also forms a ceiling over the balance of the eastern part of level 6, being that part directly below the master bedroom suite and the level 7 mezzanine area".

73 The Owners submitted that "thus, the gyprock ceiling beneath the level 7 slab, together with the glass skylights, form a continuous, undivided ceiling over the entire eastern part of Lot 15 on level 6".

74 The Owners submitted that it followed that the ceiling under the mezzanine constituted the upper horizontal boundary of Lot 15 in that part of level 6 and that, since the mezzanine area is located above that upper horizontal boundary, it is not part of Lot 15 but rather common property.

75 The Owners also noted that the total floor area of Lot 15 identified on Sheet 7 (477m2) does not include any allowance for the floor area of the mezzanine level. The Owners submitted that, if the mezzanine area was intended to be included in Lot 15, then its floor area should have been included as part of the floor area for Lot 15.

76 The evidence of Mr Friedmann and Mr Andrew was directed to the question whether the mezzanine level was part of Lot 15. Mr Friedmann gave evidence that in his opinion it was. Mr Andrew gave evidence that in his opinion it was not.

77 In my view this evidence is of limited assistance in determining the question whether the mezzanine level is part of Lot 15. That issue depends upon the application of the relevant provisions of the 1973 Act and 1997 Regulation to the registered strata plan, and the evidence of the state of the premises at the time of registration of the strata plan.

78 The evidence of Mr Friedmann and Mr Andrew was strictly relevant only to the extent that it addressed questions relating to the practice of surveyors.

79 The Owners submitted, in reliance upon Mr Andrew's evidence, which Mr Friedmann accepted in his oral evidence, that a prudent surveyor intending to include the mezzanine area within Lot 15 would have provided a separate floor

plan "showing the cubic space on level 7 including relevant notations identifying the horizontal boundaries above balconies and planters".

Issue 2 – Ms Downs' submissions

80 Ms Downs submitted that the mezzanine level was part of Lot 15.

81 Mr Ashurst's written submissions filed on 6 November 2020 emphasised the following particular parts of the definitions of floor plan and lot in s 5(1), and s 5(2) of the 1973 Act:

> Section 5(1):
>
> **floor plan** means a plan, … which:
>
> defines by lines … the base of each vertical boundary of every cubic space forming the whole of a proposed lot, or the whole of any part of a proposed lot,
>
> **lot** means one or more cubic spaces … being in each case cubic space the base of whose vertical boundaries is as delineated on a sheet of that floor plan and which has horizontal boundaries as ascertained under subsection (2)
>
> Section 5(2):
>
> The boundaries of any cubic space referred to in paragraph (a) of the definition of **floor plan** … are, in the case of a horizontal boundary, where any floor or ceiling joins a vertical boundary of that cubic space—the upper surface of that floor and the under surface of that ceiling.

82 Ms Downs submitted:

> "The effect of the definitions of "floor plan" and "lot" is that *each* vertical boundary of a lot, or any part of a lot, must be defined by lines on the floor plan. The horizontal boundaries of the lot (or any part of it) are where a floor or ceiling joins a vertical boundary. If there is no vertical boundary at a particular point, it follows that no horizontal boundary is defined at that point. The horizontal boundary at that point is then determined by reference to the junction of a vertical boundary and a ceiling or floor at another point."

83 Ms Downs submitted that "the critical feature of the [mezzanine] area is the absence of a vertical boundary on the western side".

> "By reason of the absence of a vertical boundary appearing on the strata plan, nothing separates the air space in the living room of Lot 15 from the Mezzanine Area in a legal sense. The wall which runs from north to south is nothing more than an internal wall. As Barrett J observed in *Symes v SP 31731* [2001] NSWSC 527 (Symes) at [40], 'a wall within the boundaries of a lot cannot be common property unless it appears on the floor plan and is there treated in a way which causes it to have that character under the Act'. The Mezzanine Area is analogous to a shelf, open on one side: as it is not separated from the air space of Lot 15 in any way, it forms part of the lot."

84 Ms Downs submitted that the Owners Corporation's argument was that the wall on the western side of the mezzanine area "forms part of the ceiling of Lot 15" and submitted that that contention must be rejected.

85 Ms Downs submitted "Lot 15 has a ceiling … the two storey ceiling above the living space, which continues into the level 7 mezzanine area. The span of that ceiling across the two storey living room space and the mezzanine area can clearly be seen in the plans prepared by Renato D'Ettore Architects". (Renato D'Ettore Architects was a firm which prepared plans for the penthouse apartment (Lot 15) prior to the registration of the strata plan).

86 Ms Downs further referred to the physical features of the space which she submitted clearly indicated "the implausibility of the Owners Corporation's argument and absurdity of its results":

(1) The staircase leading from the living room of Lot 15 to the mezzanine area which had been present since the construction of the building and which was accessible only through Lot 15;

(2) The window in the wall on the western side of the mezzanine area which looks over the living room of Lot 15.

87 Ms Downs submitted:

> "The unlikely result for which the Owners Corporation contends is that an area (i) which only the occupants of Lot 15 can access, via a staircase built specifically for that purpose, (ii) which sits beside air space which is plainly part of the living room of Lot 15, and (iii) which affords a direct view of their living space, is not part of their lot. The argument must be rejected."

88 With respect to the evidence and of Mr Friedmann and Mr Andrew, Ms Downs submitted:

> "The evidence of Mr Andrew … was essentially directed to what a prudent surveyor would do as a matter of best practice. What practice a prudent surveyor might follow or what the intention of a surveyor might be is irrelevant to the questions the Tribunal has to determine."

89 Ms Downs finally submitted:

> "The notation on the strata plan that 'All area above level 5 is for the exclusive use of lot 15' belies any suggestion that the result for which the Owners Corporation contends is one which was intended or envisaged by those who designed and constructed the building."

Issue 2 – Owners' reply submissions

90 In their submissions in reply filed on 14 December 2020, the Owners Corporation submitted that Ms Downs' suggestion that the mezzanine level could be described as a "shelf" or analogous to a shelf was not of assistance in determining whether the mezzanine level was part of Lot 15 or common property.

91 The Owners Corporation submitted that nothing in s 5(2)(a)(ii) requires a ceiling to join all vertical boundaries. The Owners submitted "rather, a ceiling is only required to 'join' 'a' (ie one) vertical boundary" and "Thus the fact that the 'shelf' does not join all vertical boundaries would not prevent it from being a 'ceiling' within the meaning of s 5(2)(a)(ii), or perhaps, more precisely, forming part of the ceiling for the relevant cubic space."

92 The Owners further submitted that, in any event, "the horizontal structure above the eastern internal part of level 6 … could not be described as a 'shelf'. It is 'as a matter of common sense and common parlance' a ceiling."

93 The Owners further noted "even Ms Downs accepts that part of the horizontal structure above the eastern internal part of level 6 is a ceiling that constitutes part of the upper horizontal boundary of Lot 15 on level 6" (referring to the skylights and the areas below the balconies).

94 The Owners submitted that "the simple question the Tribunal is required to answer is as follows: Is the horizonal structure above the eastern internal part of level 6 a 'ceiling' within the meaning of s 5(2)(a)(ii)", and in that regard submitted:

> "2.9.1 There can only be one ceiling;
>
> 2.9.2 Ms Downs accepts that the horizontal structure is a ceiling over the northern and southern components of [the internal area] of level 6 …; [and]
>
> 2.9.3 Ms Downs does not explain why the same structure ceases to be a 'ceiling' at the point at which vertical structures above the ceiling (ie the walls around the mezzanine bedroom) are constructed – the horizontal structure does not change at that point, so there is no reason as a matter of common sense and common parlance to suggest it transmogrifies into something which is no longer a ceiling at that point."

95 In response to Ms Downs' submission that the western end of the mezzanine level, that is the wall between the mezzanine level and the upper level of the

atrium, cannot be part of the ceiling, the Owners submitted that it is not correct to say that a wall can only form part of a vertical boundary and cannot form part of a horizontal boundary.

96 The Owners submitted:

> "There is nothing in the 1973 Act which says a wall cannot form part of a ceiling (in the sense that it is a vertical plane at a point at which the ceiling changes height), and thus define the horizontal boundary of a lot within the meaning of s 5(2)(a)(ii) notwithstanding that the concept might seem counterintuitive."

97 The Owners pointed to s 5(4) of the 1973 Act which provides that a ceiling need not be horizontal and that a wall need not be vertical.

98 The Owners also submitted that Ms Downs' submissions are internally contradictory in that she submitted that the northern and southern walls of the mezzanine main bedroom suite, that is the northern and southern boundaries of the internal area of the mezzanine level, formed the boundary of the cubic space making up Lot 15, regardless that the bases of those walls do not correspond to the base line on the floor plan and thus, on Ms Downs' argument, could not constitute vertical or horizontal boundaries.

99 The Owners submitted that "there is no difference in kind between the northern and southern wall of the level 7 mezzanine main bedroom suite on the one hand and the atrium wall at the western end of the level 7 mezzanine on the other".

100 In response to Ms Downs' reference to the physical features of the space, including the staircase and the window in the western wall overlooking the living room on level 6, the Owners submitted that "this is tantamount to a submission that it was not the intention of the developer for the level 7 mezzanine area to form part of the common property".

101 The Owners submitted that the developer's intention is irrelevant to the determination of the question.

Issue 2 – Ms Downs' reply submissions

102 In her submissions in reply filed on 14 December 2020, Ms Downs submitted that:

> "The error in the Owners Corporation's approach is that it fails to recognise the primacy given by the [1973 Act] to the definition of vertical boundaries. It is an inherent characteristic of a 'lot' that vertical boundaries must be identified on the floor plan. The identification of horizontal boundaries is dependent upon the vertical boundaries so identified. It is erroneous to seek to identify the horizontal boundaries of a lot without due regard to the requirement that *all* vertical boundaries – including *all* walls not forming part of the lot – be identified on the floor plan."

103 Ms Downs referred to the judgment of Barrett J in *Symes v The Owners - Strata Plan 31731* [2001] NSWSC 527. Relying on that decision, Ms Downs submitted "it is an inherent requirement of a 'lot' that its vertical boundaries must be identified", and quoted the following passage from Barrett J's judgment:

> 25 … The definition of "lot" goes on to describe the cubic space by reference to three characteristics. First, its base must be designated as one lot or part of one lot on the floor plan forming part of the strata plan. (I shall come to the definition of "floor plan" in a moment.) Second, that base's vertical boundaries must be delineated on a sheet of the floor plan. Third, the horizontal boundaries must be as ascertained under s.5(2).

104 Ms Downs further submitted that "it is an inherent requirement of a floor plan that it defines the base of *each* vertical boundary and referred to paragraph [26] of Barrett J's judgment in *Symes* where his Honour stated:

> 26 "Floor plan" is also defined by s.5(1). One of the characteristics of a floor plan is that it defines by lines the base of each vertical boundary of every cubic space being or forming part of a lot. …

105 Ms Downs referred to his Honour's conclusion at [32]:

> 32 … subject to possibilities about to be mentioned with respect to non-boundary walls, a wall cannot be common property unless two conditions are satisfied. First, the position of the wall must correspond substantially with a line on the floor plan representing the boundary of a lot. Second, that physical situation must pertain at the time the strata plan is registered or, if it comes to pertain at some later time, it must be depicted in a building alteration plan.

106 Ms Downs cited Barrett J's observations at [40] and [42]:

> 40 … a wall which is within the boundaries of a lot cannot be common property unless it appears on the floor plan and is there treated in a way which causes it to have that character under the Act.
>
> …
>
> 42 … The fact that the No 2 wall does not purport to stand on a boundary of the lot means that the question whether it is common property turns entirely on whether the strata plan identifies it as common property in some manner which causes the Act to afford it that character. The answer is clear. That wall is not

> shown or identified on the strata plan at all. It is therefore not common property. It forms part of Lot 32.

107 Ms Downs submitted in respect of paragraph [42] of his Honour's decision:

> "That conclusion is of crucial significance in this case. If the wall between the living room or atrium of Lot 15 and the mezzanine area is lot property, so too must the air space of the mezzanine area be lot property. Unless the mezzanine wall constitutes a vertical boundary of Lot 15, the mezzanine area is not separated from the air space of the atrium (which is indisputably lot property) in any way."

108 I note that the decision of Barrett J in *Symes* was set aside in the Court of Appeal (*Symes v The Proprietors Strata Plan No 31731* [2003] NSWCA 7) on the basis that the question whether the relevant walls were common property was not part of the case stated, which was the subject of his Honour's judgment, and should not have been determined. The Court of Appeal made no criticism of his Honour's analysis of the legal issues.

109 Ms Downs further submitted that the Owners' submissions had not answered the "shelf analogy". Ms Downs submitted that, in the absence of a wall at the western end of the mezzanine slab, that is, in the absence of a vertical connection between the slab and the ceiling at the western end of the slab, it could not be argued that the cubic space of the mezzanine area was common property because "it could not be said that the cubic space of the lot was separated from the alleged common property". Ms Downs submitted that the existence of the mezzanine wall could not change that conclusion.

110 Ms Downs submitted:

> "The Owners Corporation accepts that the vertical boundary of the mezzanine area is not shown on the strata plan and that the mezzanine wall therefore cannot constitute a vertical boundary..
>
> In Ms Downs' submission, that is conclusive: the mezzanine area is part of Lot 15."

111 Ms Downs conceded that if the ceiling extended across the whole of Lot 15 at the height of the mezzanine slab, there would be no doubt that it constituted the horizontal boundary of the lot. However, Ms Downs submitted:

> "It is incorrect to begin by identifying a horizontal boundary without proper regard to the vertical boundaries of the lot. The existence of the atrium and the undoubted fact that its air space constitutes lot property cannot be ignored.

> The Owners Corporation approach of 'beginning' at the eastern end of the lot and seeking to explain the atrium as a 'change in ceiling height' commits precisely that error."

112 Ms Downs further submitted that the wall at the western end of the mezzanine level was a wall under ordinary definitions of that term and would, if it and the mezzanine area were not part of Lot 15, fall within the definition of "wall" in s 5(1) of the 1973 Act.

113 Ms Downs also submitted that that wall could not be a "vertical component of the ceiling" and in particular that, as the wall was a vertical surface, it could not have an under surface so as to constitute the horizontal boundary of the lot.

114 Ms Downs referred to the judgment of Waddell J in *The Proprietors-Strata Plan No 9616 v Knaggs* (1982) NSW Titles Cases 13-037 [12 February 1982], where his Honour rejected a submission that the vertical boundary of an enclosed verandah was the top surface of a wall constructed on the external side of the verandah, holding (at 50,421):

> In my opinion, where the Act speaks of a vertical boundary of a cubic space it means one which is truly vertical except to the extent to which a departure is authorized by its terms. The surface of the top of the wall enclosing the verandah can, I think, only be regarded as part of the vertical boundary of lot 5 if it can be considered as being for the purpose of s 5(2)(a)(i) "the inner surface of that wall". In my opinion it would be straining the ordinary use of the language to describe it as such and there are no reasons of practical convenience or utility which would justify such a description. Accordingly, the vertical boundary of the enclosed verandah should be held to be a vertical continuation of the top of the inner surface of the wall which encloses it.

115 His Honour in that case was referring to the *Strata Titles Act 1973* (NSW) as in force in 1982, prior to its re-naming as the *Strata Titles (Freehold Development) Act* in 1996. Section 5 of that Act was relevantly identical to s 5 of the 1973 Act, including the provisions of s 5(4), of which it must be presumed his Honour was aware.

116 Ms Downs then submitted that if, contrary to her submissions, the western wall of the mezzanine area was not a wall for the purposes of s 5 of the 1973 Act, the wall could not constitute a boundary between Lot 15 and common property unless, in accordance with regulation 8 of the 1997 Regulation, it was defined by notations "sufficient to ensure that each cubic space forming the whole of a lot or a whole separate part of a lot is fully defined".

117 Ms Downs referred to the statement of Barrett J in *Symes* that:

> 29 The scheme of the Act is such that lines on plans and physical features of the building combine to identify a lot and its boundaries. Lines on plans alone are insufficient. If a boundary of a lot does not substantially coincide with a wall, floor or ceiling - such as, for example, where there is an open patio or balcony with no structure above - that boundary must nevertheless be delineated "by reference to" such a physical feature. (I leave to one side for the moment the reference in s.5(2)(b) to "structural cubic space" noting, however, that it too anchors matters back to physical features such as vertical structural members other than walls and is thus entirely consistent with the conceptual approach which pays attention to walls, floors and ceilings.)

118 In respect of the Owners' submissions in relation to the notation "All area above level 5 is for the exclusive use of Lot 15", Ms Downs acknowledged that that notation would be incapable of conferring a right of exclusive use of any common property, and submitted:

> "In light of that fact, the notation should be read as employing the term 'exclusive use' in its non-technical sense, that is, that all area above level 5 was to be accessed only by the occupants of Lot 15 – rather than as referring to common property."

119 Ms Downs submitted that, so read, the notation is consistent with Ms Downs' submission that the mezzanine area has at all times been, and was always intended to be, part of Lot 15.

120 Ms Downs finally submitted that, as the Owners were seeking orders in relation to the mezzanine area, the Owners bore the onus of proving that the mezzanine area was common property and submitted that the Owners Corporation had not established on the balance of probabilities that the mezzanine area was common property.

121 I note at this point that, in the absence of contested factual issues, questions of onus of proof cannot enter into the determination.

Issue 2 – Consideration

122 In seeking to identify whether the mezzanine level is part of Lot 15 or common property, it is appropriate in my view to start from the proposition that the identification of the boundaries of Lot 15 on the registered strata plan was intended to be done in a manner that complied with the provisions of regulation 8 of the 1997 Regulation as in force in 2002.

123 Regulation 8(1)(d) required that the boundaries of Lot 15 be defined by a "notation sufficient to ensure that each cubic space forming the whole of a lot or a whole separate part of a lot is fully defined" unless "it is intended that a lot boundary is to be defined in accordance with the formula set out in s 5(2)(a) of the Act". That is, where the base of a wall corresponds substantially with a line on the plan and where any floor or ceiling joins a vertical boundary of the cubic space.

124 In my view, even if it was the intention that the lot boundary of Lot 15 be defined in accordance with the formula set out in s 5(2)(a) of the 1973 Act, it cannot be said that that intention was achieved. That is because the application of that formula to the internal space of Lot 15 and the mezzanine level does not resolve the question whether the internal space of the mezzanine level is part of Lot 15.

125 The western wall of the mezzanine area not being marked on the floor plan, it is not, in my view, obvious or inevitable that the cubic space of the lot to the west of that wall, which clearly extends to the ceiling directly under the roof, should terminate at that wall rather than continuing across under the roof to the eastern end of the internal space, as defined by the line on the plan representing the eastern wall of the building.

126 At the same time, it is apparent that the vertical boundary of Lot 15 at the northern and southern sides of level 6 under the mezzanine slab terminates at the ceiling under the slab, and there is nothing on the plan to indicate that that horizontal boundary does not continue across the ceiling underneath the mezzanine slab, rather than translating vertically upwards to the ceiling of the mezzanine area at the point where the walls of the internal mezzanine area meet the slab.

127 In circumstances where the lot boundary was not defined in accordance with the formula set out in s 5(2)(a) of the 1973 Act, the requirement of regulation 8(1)(d) was that the boundary of Lot 15 be defined by a sufficient notation. However, it is clear that that requirement was not complied with.

128 Notwithstanding that, as I have observed, the registered strata plan does not appear to have complied with the requirements of regulation 8, the plan was

registered and it falls upon the Tribunal, for the purposes of these proceedings, to determine whether the mezzanine area is part of Lot 15 or common property so as to determine whether orders should be made in relation to Ms Downs' occupation of the mezzanine area.

129 In my view, in circumstances where the application of the provisions of the legislation does not provide an unambiguous answer to the question whether the internal area of the mezzanine level is part of Lot 15 or common property, it is necessary to interpret the strata plan, in light of the physical features of the relevant parts of the building which were in existence at the time of registration.

130 In this context it is necessary to note that the registered strata plan is a public document, which will govern the relations between, and may come to be interpreted by, parties who had no connection with the construction of the building or the drafting of the strata plan.

131 As the High Court held, in the context of easements in respect of land under the Torrens system, in *Westfield Management Ltd v Perpetual Trustee Company Ltd* [2007] HCA 45, 233 CLR 528, at [39]:

> The third party who inspects the Register cannot be expected, consistently with the scheme of the Torrens system, to look further for extrinsic material which might establish facts or circumstances existing at the time of the creation of the registered dealing and placing the third party (or any court later seized of a dispute) in the situation of the grantee.

132 For that reason, evidence is not admissible to establish the intention of the parties responsible for the construction of the building or the drafting of the plan, or to establish the factual matrix in which the plan was drawn, or the surrounding circumstances in the contemplation of the responsible parties at the time of registration of the plan.

133 However, the determination whether the internal area of the mezzanine level is part of Lot 15 must ultimately depend upon the assessment of the intention of the drafter of the plan, as expressed through the creation of lines on the plan and the addition of notations to the plan.

134 In light of the significance that the 1973 Act itself placed upon the existence of walls, floors and ceilings in identifying the boundaries of a lot, it must be permissible, in seeking to identify the intention of the drafter of a strata plan, to

take account of the physical characteristics of the building, at the date of registration of the plan. (Cf, in the context of the interpretation of a restrictive covenant, the judgment of Williams J in *The Owners – Strata Plan 85044 v Murrell* [2020] NSWSC 20 at [82] – [86].)

135 In determining whether the mezzanine area is part of Lot 15 or common property, I consider that I am entitled to take into account the features of the construction which were present at the time of registration of the plan. Those features include the fact that the mezzanine area is accessible only through Lot 15, the fact that there has at all times been a staircase from the living area of Lot 15 to the mezzanine level and the fact that there is a window in the western wall of the mezzanine area which permits a person standing at that window within the mezzanine area to overlook the activities of the occupants of Lot 15 in their living area. Each of those features suggests that the internal area of the mezzanine level was intended to form part of Lot 15.

136 I also consider that, although the notation, “All area above level 5 is for the exclusive use of Lot 15”, on Sheet 7 of the strata plan is not well expressed, it is intended to indicate that Lot 15 extends to the roof of the building (or more precisely the ceiling directly under that roof), and that the entirety of the cubic space above level 5 is part of Lot 15. To the extent that that intention is directly contradicted by the terms of the legislation when applied to the strata plan, as I consider is the case with the balconies on the mezzanine level, the notation is not effective to make those areas part of the lot. However, where the plan itself remains ambiguous, I consider the notation is material which is relevant and may be taken into account in support of the conclusion that the internal cubic space of the mezzanine level is part of Lot 15.

137 I note that the strata plan identifies the floor area of Lot 15 as 777m2, which does not include any additional area for the living space on the mezzanine level. However, to the extent that the cubic space of the part of Lot 15 on level 6 includes the entire distance from the floor of level 6 to the ceiling under the roof, it can be said that the strata plan does correctly identify the floor area of the lot. The calculation of the floor area just does not acknowledge that at one

point there is a concrete slab which permits habitation on two levels within that cubic space.

138 I also recognise that the consequences of a conclusion that the internal area of the mezzanine level is part of Lot 15 will be that the slab between the surfaces of the internal walls of the mezzanine level will also be part of Lot 15, notwithstanding that the evidence suggests that the slab has structural significance for other parts of the building.

139 The slab cannot be described as "structural cubic space" for the purposes of the definition of "lot". That term is defined in s 5(1) of the 1973 Act as: "cubic space occupied by a vertical structural member, not being a wall, of a building"; "pipes, wires, cables or ducts that are not for the exclusive enjoyment of one lot"; and "any cubic space enclosed by a structure enclosing any such pipes, wires, cables or ducts".

140 Nevertheless, although, in the event that maintenance is necessary on the mezzanine slab, there may be some inconvenience in having the responsibility for that slab divided between the Owners and the owner of Lot 15, that is not in my view sufficient reason to conclude that the mezzanine level is common property.

141 For the foregoing reasons, I conclude that the internal area on the mezzanine level is part of Lot 15 and not common property.

142 I conclude that the balconies on the mezzanine level are common property, as those areas are above the only ceiling in the relevant part of the lot and are not otherwise identified as part of Lot 15.

143 I will address in due course the consequences of those findings in relation to the orders I make in the proceedings.

Issues 3 and 6 – Reinstatement and convening a meeting

144 It is convenient to deal with these issues together as there is some overlap between them.

145 As I have determined that the internal area of level 7, the mezzanine level, is part of Lot 15, it is not necessary to address issues 3 and 6 in respect of that area.

146 However, it is necessary to address those issues in respect of:

(1) The eastern area of level 5; and

(2) The balconies on the northern and southern sides of the level 7 mezzanine area.

147 Section 111 of the SSMA provides:

> **111 Work by owners of lots affecting common property**
>
> An owner of a lot in a strata scheme must not carry out work on the common property unless the owner is authorised to do so—
>
> (a) under this Part, or
>
> (b) under a by-law made under this Part or a common property rights by-law, or
>
> (c) by an approval of the owners corporation given by special resolution or in any other manner authorised by the by-laws.

148 It was not disputed by Ms Downs that she was not entitled to carry out work on common property (other than "cosmetic work" as defined in and permitted by s 109 of the SSMA) with approval.

149 Ms Downs did not suggest that the work carried out on the Level 5 East Area or the mezzanine level balconies was cosmetic work.

150 Section 132(1)(a) provides:

> **132 Rectification where work done by owner**
>
> (1) The Tribunal may, on application by an owners corporation for a strata scheme, make either of the following orders if the Tribunal is satisfied that work carried out by or for an owner or occupier on any part of the parcel of the scheme has caused damage to common property or another lot—
>
> (a) an order that the owner or occupier performs the work or takes other steps as specified in the order to repair the damage,

151 The Owners submitted that, to the extent the work carried out on Ms Downs' behalf could not be described as "damage", the Tribunal nevertheless had power, pursuant to s 232 of the SSMA, to order the reinstatement of the common property by a lot owner who has made unauthorised alterations.

152 The Owners referred to many cases where the Tribunal has made such orders.

153 It is in my view not necessary to determine whether the Owners are correct as, in my view, the work which the Owners seek to have carried out (which does not require the undoing of the work involved in the replacement of waterproof

membranes and external doors and windows) can be fairly described as work required to repair "damage" to the common property. I see no reason why the term "damage" in this context should be construed narrowly.

154 Ms Downs does not submit that the Tribunal does not have jurisdiction to require the reinstatement of the Level 5 East Area.

155 The Owners' evidence included a report from Mr Tim Sherwood of SJA Construction Services Pty Ltd dated 27 May 2020 (Sherwood report) in which Mr Sherwood described the work carried out on behalf of Ms Downs on levels 5, 6 and 7 and identified the work required to restore the condition of the premises to its previous condition (insofar as Mr Sherwood was able to identify the previous condition).

156 Mr Sherwood recorded:

> "I did not observe any works undertaken by the builder [Webster Constructions] that appeared to be of sub-standard quality or non-compliant with the Building Code of Australia (BCA), or in breach of the statutory warranties under s 18B of the Home Building Act 1989, except for incomplete works. The completed work appears to have been done in a proper and workmanlike manner and/or with due care and skill."
>
> However, I am unable to comment on any works which were concealed and/or not visible at the surface level of the finished elements of the building. It must be noted that I was unable to observe any of the waterproof membranes installed at the property, and I did not undertake any water or flood testing of those membranes and/or associated building elements. Further, none of the plumbing, electrical or mechanical installations, or the like, were inspected or tested for compliance."

157 Mr Sherwood also noted in respect of a number of items of work carried out on behalf of Ms Downs:

> "In my opinion, while it's not practical to remove and replace the new items listed above, as per my instructions, the original items (or similar) should be reinstated."

158 As I understand Mr Sherwood's report, the comment "as per my instructions" reflects the letter of instruction dated 24 April 2020 from the Owners' solicitors in which Mr Sherwood was directed to:

> "include in your report a scope of works identifying each component of work that will need to be carried out to remove the renovations to the common property in connection with the penthouse including the Level 5 East Area and the Level 7 Mezzanine Area and to reinstate the common property to its previous condition."

159 The Owners, sensibly, did not press for the restoration of items in respect of which Mr Sherwood had made comments to this effect. Those items included all work which had been carried out on the balconies on the mezzanine level and work carried out to replace external windows and doors on level 5 and/or the mezzanine level.

160 Accordingly, it is not necessary to address Issue 3 in respect of the balconies on the mezzanine level.

161 Ms Downs did not dispute that the work carried out on the Level 5 East Area fell within s 132 of the SSMA. However, Ms Downs initially submitted (in submissions dated 12 August 2020, prior to the first day of hearing) that the Tribunal should not make an order for the rectification or restoration of the Level 5 East Area because "such works would confer no benefit on the Owners".

162 The foundation for this submission appears to have been that, as the Level 5 East Area was accessible only through lot 15, neither the owners corporation nor any individual lot owner could be affected by the condition of the Level 5 East Area.

163 However, Mr Marstaeller, one of the lot owners who gave evidence, stated that he had been a lift mechanic and that in his opinion it would be possible to install a rear door to the lift so as to enable access to the Level 5 East Area without passing through lot 15.

164 It may also be possible to construct a stairway from level 4, either from the lobby on level 4 or through the void, into the Level 5 East Area if an opening could be created in the floor of level 5 or one of the walls between the void and the Level 5 East Area.

165 In her final submissions Ms Downs did not appear to press the submission that an order for rectification should not be made. Rather, Ms Downs sought that the Tribunal defer the operation of any order requiring rectification until Ms Downs had had an opportunity to put a further resolution for an exclusive use by-law to the Owners at a general meeting.

166 Ms Downs submitted that, notwithstanding that she acknowledged that she could not maintain that the Owners had unreasonably refused to make the by-law which she had put to the extraordinary general meeting on 16 October 2019, the Owners had not given fair consideration to her proposal to acquire exclusive use of the Level 5 East Area and that she should have the opportunity of having fair consideration before being required to undo the work on which she had expended substantial sums.

167 Ms Downs submitted that:

> "Consideration of whether a common property rights by-law should be made in respect of the level 5 east area has, to date, been clouded by the misunderstanding that the level 7 mezzanine area forms part of the common property. That much is apparent from the evidence of a number of members of the Owners Corporation".

168 Ms Downs referred to the evidence of Mr Booth, Mr Leighton, Mr Marstaeller and Mr Holland. Ms Downs submitted:

> "As a result of that misunderstanding, the Owners Corporation has been unable to give proper consideration to the proposals made by Ms Downs in relation to the level 5 eastern area, particularly as to the amount of compensation which should be payable. …There would be utility in a further by-law being considered by the Owners Corporation once the status of the level 7 mezzanine area has been resolved."

169 Ms Downs also submitted that the Chair of the Strata Committee, Mr Booth, had:

> "In a course of conduct displaying considerable animosity towards Ms Downs, sought to frustrate her attempts to obtain a common property rights by-law. Mr Booth's actions have prevented fair consideration being given to Ms Downs' proposal."

170 Ms Downs referred in 14 sub-paragraphs to alleged conduct on the part of Mr Booth which Ms Downs relied upon in support of this submission.

171 It is not necessary to address the detail of Ms Downs' allegations in relation to Mr Booth. It is sufficient for present purposes to note that a number of technical objections to Ms Downs' proposed by-law were only raised by the Owners after the commencement of the proceedings, and that it is apparent from the evidence of the lot owners referred to at [168] above that consideration of the previous proposal was affected by the view of a number of lot owners that the mezzanine area was common property.

172 I consider it is appropriate, as occurred in *The Owners - Strata Plan No 63731 v B & G Trading Pty Ltd* [2020] NSWCATAP 202, that the orders which I will make requiring Ms Downs to undertake the rectification works not require that work to be completed until sufficient time has elapsed to permit Ms Downs to present her revised exclusive use by-law to a general meeting of the Owners. In that way, in the event that the revised by-law is passed, Ms Downs can enjoy the benefit of the money she has expended on the fit out of the Level 5 East Area. It would be absurd and an inefficient waste of resources to require Ms Downs to remove the work she has carried out within the Level 5 East Area, if she will subsequently be able to achieve the enactment of an exclusive use by-law in respect of that area.

173 Ms Downs submitted that I should make an order directing the holding of an extraordinary general meeting to consider resolutions enacting an exclusive use by-law and authorising the works to the Level 5 East Area. Ms Downs annexed to her submissions dated 6 November 2020, the resolution she proposed be put to that meeting.

174 The resolution attached to Ms Downs' submissions provided for the payment by Ms Downs of the sum of $400,000 to the Owners as compensation for the value of the exclusive use rights.

175 In the alternative Ms Downs sought that the Tribunal assess the value of the exclusive use rights, and direct the holding of a meeting to consider a by-law providing for the payment by Ms Downs to the Owners of the value of the exclusive use rights as so determined.

176 The value to the Owners of lot 15 of the exclusive use rights over the Level 5 East Area was the subject of substantial dispute between the parties and substantial evidence before the Tribunal. I do not consider that any purpose would be served by my purporting to assess that value. Any assessment I made would not bind another Member of the Tribunal who may be called upon to determine whether a subsequent failure to pass a resolution making an exclusive use by-law was unreasonable. It is not appropriate that I express what would be no more than an advisory opinion.

177 Nor do I consider that I should direct the holding of a general meeting to consider any particular by-law.

178 Sections 18 and 19 of the SSMA provide:

> **18 AGM must be held**
>
> An owners corporation must hold an annual general meeting once in each financial year of the corporation.
>
> **19 Other general meetings**
>
> (1) The secretary or a strata committee of an owners corporation may convene a general meeting (that is not an annual general meeting) of the owners corporation at any time.
>
> (2) The secretary of the owners corporation, or another officer if the secretary is absent, must convene a general meeting (that is not an annual general meeting) of the owners corporation as soon as practicable, and not later than 14 days after, receiving a qualified request.
>
> (3) A meeting may be convened on a qualified request even if the first annual general meeting has not been held.
>
> (4) A request is a **qualified request** for the purposes of this section if it is made by one or more owners of a lot or lots in the strata scheme having a total unit entitlement of at least one-quarter of the aggregate unit entitlements.

179 Ms Downs does not control a quarter of the aggregate unit entitlements in Strata Plan 68255. By my calculation she would need the support of at least two other lot owners to submit a "qualified request".

180 However, pursuant to clause 4 of schedule 1 to the SSMA (which by virtue of s 23 governs the procedures for general meetings of an owners corporation) Ms Downs may require a motion to be included on the agenda of the next general meeting and thus, even if the secretary or the strata committee decline to call a general meeting to consider a by-law proposed by Ms Downs, she will be able to put that proposed by-law before the owners at the next annual general meeting (or earlier, if a general meeting is called, even for an unrelated purpose, before the next annual general meeting).

181 Ms Downs relied for the source of power to make an order directing the holding of a general meeting on s 232 of the SSMA, in particular sub-paragraphs 232(1)(a) and (e). Section 232 of the SSMA provides:

> **232 Orders to settle disputes or rectify complaints**

> (1) Orders relating to complaints and disputes The Tribunal may, on application by an interested person, original owner or building manager, make an order to settle a complaint or dispute about any of the following—
>
> (a) the operation, administration or management of a strata scheme under this Act,
>
> (b) an agreement authorised or required to be entered into under this Act,
>
> (c) an agreement appointing a strata managing agent or a building manager,
>
> (d) an agreement between the owners corporation and an owner, mortgagee or covenant chargee of a lot in a strata scheme that relates to the scheme or a matter arising under the scheme,
>
> (e) an exercise of, or failure to exercise, a function conferred or imposed by or under this Act or the by-laws of a strata scheme,
>
> (f) an exercise of, or failure to exercise, a function conferred or imposed on an owners corporation under any other Act.
>
> (2) Failure to exercise a function For the purposes of this section, an owners corporation, strata committee or building management committee is taken not to have exercised a function if—
>
> (a) it decides not to exercise the function, or
>
> (b) application is made to it to exercise the function and it fails for 2 months after the making of the application to exercise the function in accordance with the application or to inform the applicant that it has decided not to exercise the function in accordance with the application.

182 The Owners submitted that the Tribunal had no power to make an order in the terms proposed by Ms Downs.

183 The Owners submitted:

> "The Tribunal is a body created by statute. It has no inherent or general power. Any power to make an order must come from the wording of the relevant legislation. In particular, SSMA s 232 does not give the Tribunal a general supervisory jurisdiction to oversee owners corporations; it does not allow the Tribunal to make an order to settle any dispute or complaint; it does not allow the Tribunal to order an owners corporation to do things just because an owner or the Tribunal considers it desirable to do so. The words in s 232(1)(a) - (f) operate as words of limitation."

184 The Owners referred to *The Owners - Strata Plan No 37762 v Pham* [2006] NSWSC 1287; *Walsh v The Owners - Strata Plan No 10349* [2017] NSWCATAP 230 and *Glenquarry Park Investments Pty Ltd v Hegyesi* [2019] NSWSC 425.

185 Ms Downs referred to three decisions: *Melani v The Owners - Strata Plan No 22214* [2017] NSWCATCD 73; *Owners Corporation Strata Plan No 22607 v Yang* [2018] NSWCATCD 3 and *Bate v The Owners - Strata Plan No 60549*

[2018] NSWCATCD 36, in which she submitted an order directing the holding of a general meeting had been made.

186 In reply, Ms Downs also referred to the Court of Appeal decision in *Vickery v The Owners - Strata Plan No 80412* [2020] NSWCA 284, quoting Basten JA, at [28]:

> It is difficult to understand why this language should be read down to that extent. The statutory scheme must be read as a whole. The terminology adopted in s 232 should be understood to cover claims and disputes with respect to any of the matters identified in subs (1), which are themselves in terms clearly intended to cover the full range of an owners corporation's functions in operating, administering and managing the strata scheme, and exercising or failing to exercise any function under the Act, or the by-laws of the strata scheme.

and White JA at [166]:

> I see no reason to read down the amplitude of the authority conferred on the Tribunal by s 232(1).

187 Ms Downs submitted that:

> "In this case there is plainly a dispute as to the use of the Level 5 Eastern Area, a matter which concerns the management of common property, and is thus within the meaning of 'the management of a strata scheme' in s 232(1). The Tribunal's powers to make orders to settle that dispute are wide. There is no reason why they should be read down to exclude the making of an order that the Owners Corporation consider Ms Downs' proposed by-law."

188 Ms Downs submitted that:

> "To the extent that recent Appeal Panel decisions confine the scope of the power under s 232, those decisions must now be considered to be incorrect in light of *Vickery*."

189 The Owners submitted in response to Ms Downs' reference to *Melani*, *Yang* and *Bate,* that in *Melani* and *Yang* the Tribunal had not identified the source of any jurisdiction to make an order directing the holding of a general meeting and that in *Bate*, although the Tribunal had referred to s 232(1)(a), (e) and (f), it had not explained how those provisions provided it with power to make the orders.

190 I am not persuaded that the Tribunal does have the power to direct the holding of a general meeting where no "qualified request" has been submitted. As Rothman J held, in relation to the jurisdiction of the Consumer Trader and Tenancy Tribunal under the provisions equivalent to s 232 in the *Strata*

Schemes Management Act 1996 (NSW), in *The Owners - Strata Plan No 37762 v Pham* [2006] NSWSC 1287 at [62]-[65]:

> 62 It is clear from the *ex tempore* reasons of the Tribunal and, in particular, the references therein to the exercise of "the function required of them" … that the Tribunal was purporting to exercise jurisdiction under s138(1)(a) of the Act. The Tribunal is not given a general supervisory function to oversee the Owners' Corporation. Nor is the Tribunal given ancillary jurisdiction in relation to matters that come before it.
>
> 63 By s21 of the *Consumer Trader and Tenancy Tribunal Act 2001* the Tribunal only has such jurisdiction to decide matters and such powers to make orders as is conferred on it by that Act or any other Act. Section 138(1)(a) of the *Strata Schemes Management Act 1996* does not allow an Adjudicator, or, in this case the Tribunal, to make any order to settle **any** dispute or complaint. The words in paragraph (a) and (b) confine the subject matter of the dispute and complaint and are words of limitation.
>
> 64 …
>
> 65 … for the jurisdiction under s138(1)(a) of the Act to be enlivened one must point to a function conferred by the Act or under the by-laws for a strata scheme.

191 Rothman J's decision in *Pham* was applied in relation to s 232 of the SSMA by the Appeal Panel in *Walsh v The Owners - Strata Plan No 10349* [2017] NSWCATAP 230 at [32].

192 In *Glenquarry Park Investments Pty Ltd v Hegyesi* [2019] NSWSC 425 at [109]-[111] Parker J held:

> 109 The power under s 138 may be exercised where there is a dispute or complaint about, among other things, "a failure to exercise" a function conferred or imposed by or under the Act, or the operation, administration or management of a strata scheme under the Act. But sub-section (2) provides that for the purposes of sub-section (1) the owners' corporation is taken to have failed to exercise a function if it decides not to exercise the function where application is made to it to exercise the function and it fails for two months after the making of the application to exercise the function. This suggests that the proposal must be put before the owners' corporation in some sort of formal and concrete way.
>
> 110 Although in a general sense the minority owners had been pressing for repairs to be done, the orders made do not reflect any specific proposals. It is thus doubtful whether there was a "failure" sufficient to enliven the power under sub-section (1). But this is not the only problem.
>
> 111 … the Tribunal is not entitled to order an owners' corporation to do things just because the Tribunal considers it desirable to do so. If, as seems to have been assumed, the justification for the order was that the Strata Corporation had not complied with its obligations under s 62, then the Tribunal's order could go no further than the minimum necessary to comply with that obligation.

193 Although there is a dispute between the parties about the works carried out by Ms Downs within the Level 5 East Area, there is no dispute between the parties concerning the holding of a general meeting. Ms Downs has not submitted a "qualified request" and the Owners have not failed to include any motion submitted by Ms Downs in the agenda for any general meeting.

194 I do not consider that anything said by the Court of Appeal in *Vickery* overrules the propositions set out by Rothman J in *Pham* and Parker J in *Glenquarry Park*.

195 As the Owners submitted, although orders requiring the calling of general meetings were made in *Melani* and *Bate*, neither case included any reasoned assessment of the source of the Tribunal's power to make such an order.

196 The decisions in *Pham* and *Glenquarry Park* are binding on me, and in my view make it clear that the Tribunal cannot make an order requiring the convening of a meeting of an owners corporation unless the owners corporation has failed to do so in breach of an obligation arising under the SSMA.

197 However, I do not consider that Ms Downs should be left at the mercy of the Owners in relation to the calling of a meeting to consider an exclusive use by-law.

198 In my view, the appropriate course is to defer the requirement for Ms Downs to undertake the works to remove the changes she has made to the Level 5 East Area for 12 months, during which time, if the Owners decline to hold an extraordinary general meeting to consider an exclusive use by-law, the Owners will nevertheless be required to hold an annual general meeting at which any by-law proposed by Ms Downs can be considered.

199 The Owners submitted that 12 months was an excessive time, however, in circumstances where the Owners have not indicated a willingness to hold a meeting earlier than the next annual general meeting, and where, as the building is presently configured, no other lot owner can access the relevant area, I consider there is no prejudice to the Owners from the provision of an extended period for the completion of the rectification work.

200 Accordingly, I will make an order in the terms of Order 1A proposed by the Owners in their amended application, which excludes the areas, such as waterproofing and external doors and windows, which Mr Sherwood has indicated cannot reasonably be undone. I will include in that order reference to the delineation of the boundary of Lot 15 which I have outlined above in respect of issue 1. Ms Downs' obligation to undertake restoration or rectification works ends at the boundary between the common property and Lot 15 and it is appropriate that I make clear in my order where that boundary is. I will also make Orders 2 and 3 proposed by the Owners, save that in Order 2 I will change the time within which the work is to be completed from two months to 12 months.

201 As I have determined that the internal area of the mezzanine level is part of Lot 15 there is no basis to make any order concerning the improvements Ms Downs has carried out within that area.

Issue 7 – Restraint on using common property

202 Section 153 of the SSMA provides:

> **153 Owners, occupiers and other persons not to create nuisance**
>
> (1) An owner … or occupier of a lot in a strata scheme must not—
>
> …
>
> (b) use or enjoy the common property in a manner or for a purpose that interferes unreasonably with the use or enjoyment of the common property by the occupier of any other lot (whether that person is an owner or not) or by any other person entitled to the use and enjoyment of the common property, or
>
> (c) use or enjoy the common property in a manner or for a purpose that interferes unreasonably with the use or enjoyment of any other lot by the occupier of the lot (whether that person is an owner or not) or by any other person entitled to the use and enjoyment of the lot.

203 By-law 3 of the by-laws of Strata Plan No 68255 provides:

> "Obstruction of common property
>
> An owner or occupier of a lot must not obstruct lawful use of common property by any person except on a temporary and non-recurring basis.

204 The Owners submitted, citing *Lin v The Owners - Strata Plan No 50276* [2004] NSWSC 88; (2005) NSW ConvR 56-105 at [9] and [32]-[33], that:

> "Under the general law, each owner as an equitable tenant in common with another is entitled, concurrently with all others, to possession of common property and none are entitled to exclude or turn the others out."

205 The Owners submitted that:

> "By using exclusively, or permitting the exclusive use by others of, the Level 7 Mezzanine Area and, if it be the case, the Level 5 East Area, Ms Downs is infringing the general law and s 153 rights of all other owners to use and enjoy the common property in common with each other. Concomitantly, she is breaching her general law and s 153 obligations not to exclude other owners from that common property in the absence of a common property rights by-law conferring that right, as well as her By-Law 3 obligation not to obstruct lawful use of common property except on a temporary and non-recurring basis."

206 The Owners further submitted:

> "The refusal of the relief sought would be tantamount to the Tribunal giving tacit permission to Ms Downs and her family both to exclusively use the Level 5 East Area and the Level 7 Mezzanine Area, notwithstanding the prohibition in Condition 4 of the Subdivision Approval … and to use those areas as residential space even though they have not been approved by the Council for use as residential accommodation. …The Tribunal ought not lightly countenance such a step."

207 Ms Downs submitted in response that, in the context of the mezzanine area, which is accessible only to the occupants of Lot 15, the submission that Ms Downs is not entitled to use that area to the exclusion of other owners "has no meaning".

208 I accept that submission insofar as the Owners' submission is applicable to the balcony areas on the mezzanine level (which is the only part of the mezzanine level to which the order sought by the Owners might be applied). I see no reason to make an order which prohibits Ms Downs from exclusively occupying an area to which no other lot owner could gain access.

209 Moreover, I am not persuaded that there is any warrant for an order of the nature sought by the Owners in respect of the Level 5 East Area. Ms Downs is presently subject to a stop work order restraining her from carrying out work in the Level 5 East Area. It is not the function of the Tribunal to enforce Council orders of that nature.

210 Mr Downs gave evidence that he and Ms Downs were not occupying the Level 5 East Area. No persuasive evidence was tendered by the Owners to suggest that that was not correct.

211 As an owner in the strata plan, Ms Downs is entitled to engage in the use of the Level 5 East Area. Unless and until an exclusive use by-law is passed granting Ms Downs exclusive use of that area, her entitlement to use that area is subject to compliance with the requirements of s 153 and by-law 3.

212 However, unless and until the Owners resolve to undertake works to make the Level 5 East Area accessible to other lot owners, there is no utility in making an order prohibiting Ms Downs from exercising "exclusive use". If such access is installed in the future and the Owners regard any use Ms Downs might then make of the Level 5 East Area as inappropriate or inconsistent with her obligations under s 153 and by-law 3, an application may be brought at that time. There is not at the present time any foundation for an order in relation to Ms Downs' use of the Level 5 East Area.

213 Accordingly, I decline to make any order prohibiting Ms Downs from exercising exclusive use of either the balconies on the mezzanine level or the Level 5 East Area.

Costs

214 Both parties sought costs. I will make orders providing for the parties to make submissions on costs. Subject to hearing from the parties I would propose to resolve the question of costs on the papers and without a further hearing. Any submissions filed by the parties in respect of costs should address the question whether the issue of costs can be resolved on the papers and without a further hearing.

215 My orders will be:

(1) An order that Helena Marie Downs carry out, within the area identified as Area 2 in the Surveyors Report dated 16 August 2017 prepared by Mr Gary Medway of Geographic Solutions Registered Surveyors, the works identified in the scope of works in Section 5.0 of the report of Tim Sherwood of SJA Construction Services Pty Ltd dated 27 May 2020 (except the works referred to in items 6(29), 9(44), 14(68), 15(80), 16(81-83), 17(84), 18(85-89), 19(90-94) and 20(95-110) of that scope of works) **(Reinstatement Works)** in order to remove alterations and additions undertaken by her or on her behalf to the common property in connection with Lot 15 in Strata Plan No. 68255 and reinstate that common property to its previous condition.

(2) An order that Helena Marie Downs ensure that the Reinstatement Works are carried out in a proper and competent manner, by appropriately qualified, licensed and insured contractors, in a manner that does not disturb the peaceful enjoyment of the owners or occupiers of the other lots in Strata Plan No. 68255 and in accordance with all applicable laws and by-laws, and are completed within 12 months of the date of this order.

(3) An order that, in the event that Helena Marie Downs fails to comply with orders 1 and 2 above, The Owners – Strata Plan No 68255 be permitted to enter Lot 15 in Strata Plan No. 68255 and carry out the Reinstatement Works in accordance with section 120 of the *Strata Schemes Management Act* 2015.

(4) Order that both applications be otherwise dismissed.

(5) Direct that either party may file and serve written submissions within 14 days of the date of this decision seeking an order in relation to the costs of the proceedings.

(6) Direct that, if either party files submissions in accordance with order (5), the other party may file submissions in response within a further 14 days.

(7) Direct that any submissions filed in accordance with orders (5) and (6) must address the question whether the question of costs may be determined on the papers and without a hearing pursuant to s 50(2) of the Civil and Administrative Tribunal Act 2013 (NSW).

****

I hereby certify that this is a true and accurate record of the reasons for decision of the New South Wales Civil and Administrative Tribunal.

Registrar

APPENDIX – Sheet 7 of Strata Plan No 68255

I hereby certify that this is a true and accurate record of the reasons for decision of the Civil and Administrative Tribunal of New South Wales.
Registrar