Civil and Administrative Tribunal

New South Wales

Case Name:	The Owners - Strata Plan No. 36613 v Doherty; Doherty v The Owners - Strata Plan No. 36613
Medium Neutral Citation:	[2021] NSWCATAP 285
Hearing Date(s):	7 September 2020, 3 December 2020
Date of Orders:	22 September 2021
Decision Date:	22 September 2021
Jurisdiction:	Appeal Panel
Before:	K Rosser, Principal Member G K Burton SC, Senior Member
Decision:	1. In AP 20/17302, leave to appeal is refused and the appeal is dismissed. 2. In AP 20/21354: (a) To the extent necessary, time to file the appeal is extended to and including 12 May 2020 and leave to appeal is granted; and (b) The appeal is allowed. 3. The Owners – Strata Plan No.36613 by its agents, employees and contractors is to undertake all works required to place the balustrade on and about the perimeter of the courtyard of lot 17 in SP 36613 into a state of repair that is compliant with the currently applicable provisions of the National Construction Code, applicable Australian Standards and all other applicable laws and codes, with such works to be completed within four months after the date of these orders or such later date as the parties agree or as a Member of the Tribunal determines, on application by a party supported by appropriate evidence and

submissions.

4. The following orders are made in substitution for orders 1 to 4 made in SC 19/1250 on 18 March 2020:

(a) Deborah Doherty and Rajiv (Rahu) Parrab are to obtain updated quotations in respect of replacement of the fence and the landscaping and are to provide those quotations to the Strata Committee no later than 28 days after the date of completion of the balustrade replacement works specified in order 3 above.

(b) The Strata Committee is to consider and select which quotations will be accepted in relation to the replacement fence and the replacement of the landscaping no later than 42 days after the date of completion of the balustrade replacement works specified in order 3 above.

(c) The contractors are to be engaged and the fencing and landscaping works are to commence no later than seventy days after the date of completion of the balustrade replacement works specified in order 3 above.

(d) The fencing and landscaping works are to be completed no later than 3 months after the date of completion of the balustrade replacement works specified in order 3 above.

5. Any application for costs, together with evidence and submissions in support of the application, is to be filed and served within 14 days after the date of these orders.

6. Any evidence and submissions in response to an application for costs is to be filed and served within 28 days after the date of these orders.

Catchwords: Strata and community schemes – duty of owners corporation to maintain and repair common property – reinstatement duty in respect of damage to or removal of lot property in course of access to fulfil duty in respect of common property – costs protection for

	successful lot owners under SSMA ss 90, 92, 104
Legislation Cited:	Act (NSW) Civil and Administrative Tribunal Act 2013 (NSW) Civil and Administrative Tribunal Rules 2014 (NSW) Environmental Planning and Assessment (Savings and Transitional) Regulation 1998 (NSW) Home Building Act 1989 (NSW) Interpretation Act 1987 (NSW). Local Government Act 1919 (NSW) Ordinance 70 Strata Schemes Management Act 1996 (NSW) Strata Schemes Management Act 2015 (NSW) Strata Titles Act 1973 (NSW)
Cases Cited:	Athens v Randwick CC (2005) 64 NSWLR 58 Carli v Owners SP 56120 [2018] NSWCATCD 55 at [101]-[103] Collins v Urban [2014] NSWCATAP 17 Coulton v Holcombe (1986) 162 CLR 1 Glenquarry Park Investments PL v Hegyesi [2019] NSWSC 425 Hyder Consulting (Australia) PL v Wilh Wilhemsen Agency PL [2001] NSWCA 313 McElwaine v Owners SP 75975 [2017] NSWCA 239 Northcott v Owners SP 31143 [2020] NSWLEC 62 Owners SP 345042 v Seiwa Australia PL [2007] NSWCA 272 Owners SP 4983 v Canny [2018] NSWCA 275 Owners SP 50276 v Thoo [2013] NSWCA 270 Owners SP21702 v Krimbogiannis [2014] NSWCA 411 Pollak v Owners SP 2834 [2020] NSWSC 784 Prendergast v Western Murray Irrigation Ltd [2014] NSWCATAP 69 Ridis v Owners SP 10308 (2005) 63 NSWLR 249, [2005] NSWCA 246 Riley v Owners SP 73817 [2012] NSWCA 410 Seiwa PL v Owners SP 345042 [2006] NSWSC 1157 Stolfa v Hempton [2010] NSWCA 218 Trevallyn-Jones v Owners SP 50358 [2009] NSWSC 694 Vickery v Owners SP 80412 [2020] NSWCA 284 Yates Property Corp PL v Boland (1998) 89 FCR 78
Texts Cited:	Macquarie Dictionary (2nd rev)

Category:	Principal judgment
Parties:	The Owners - Strata Plan No. 36613 (OC) (appellant in AP 20/17302, respondent in AP 20/21354)) Deborah Doherty and Rajiv (Rahu) Parrab (owners) (respondents in AP 20/17302, appellants in AP 20/21354)
Representation:	Counsel: A R Lovas with A Palmer (OC) A S Mueller, Solicitor (owners) Solicitors: Chambers on Riley, Lawyers (OC) J S Mueller & Co, Lawyers (owners)
File Number(s):	AP 20/17302 (2020/370732), AP 20/21354 (2020/370779)
Decision under appeal:	
Court or Tribunal:	Civil and Administrative Tribunal
Jurisdiction:	Consumer and Commercial Division
Citation:	N/A
Date of Decision:	18 March 2020
Before:	G Meadows, Senior Member
File Number(s):	SC 19/12580

REASONS FOR DECISION

Introduction

1 These are internal appeals by both parties against a decision made in the Consumer and Commercial Division of the Tribunal on 18 March 2020, concerning an application brought against the owners corporation (OC) by the lot owners (owners) under the *Strata Schemes Management Act 2015* (NSW) (SSMA): SC 19/12580.

2 In SC 19/12580, the Tribunal ordered the OC to undertake works, being replacement fencing and landscaping, within a timetable for steps in that process, but dismissed the owners' application for remedial work to the balustrade of the courtyard that formed part of the owners' lot.

3 Both parties appealed the Tribunal's decision. The OC's appeal is AP 20/17302 and was filed on 17 April 2020 pursuant to an extension of time sought 6 April 2020, with an amended notice of appeal foreshadowed at the time of filing and subsequently filed. The owners' appeal is AP 20/21354 and was filed on 12 May 2020. There was no objection pressed concerning the time of filing of the owners' appeal. To the extent necessary, we extend the time for filing of the owners' appeal to and including 12 May 2020.

4 For the reasons set out below, we have allowed the owners' appeal and dismissed the OC's appeal.

Background to appeal

5 The OC was created on registration of SP 36613 on 11 April 1990. Construction of the seven-storey mixed commercial and residential scheme in Surry Hills, NSW, comprising 22 lots and the common property, was completed in late February 1990, on a building approval dated 18 May 1988.

6 On 1 April 2003 the owners purchased one of the three top floor lots (Lot 17) on the north-eastern side of the building. Their lot has the benefit of a large rooftop courtyard of approximately 70 square metres along the entire length of the eastern side of the lot. It is common ground that the courtyard, which formerly contained well-established landscaping, is within lot property. In these reasons we have referred to this area as the courtyard.

7 The courtyard is surrounded by a balustrade that comprises a masonry wall topped by a post-and-rail fence. The fence has tubular metal uprights which are fixed into the masonry wall. The rails are comprised by two horizontal timber rails fixed to the uprights, with gaps between the rails. The gap between the top of the masonry wall and the lower rail is about 290mm.

8 The Tribunal recited in its reasons that other balcony balustrades in the building have a third rail on top of the two rails and infill mesh in the gap

between the masonry wall and the lowest rail. That does not appear to be a finding challenged on appeal. In the owner Ms Doherty's affidavit there is a description of the other balcony balustrades on the top and other levels of the building, which have a third rail higher than the top rail on the owners' balustrade and wire mesh that covers the gap between the top of the masonry wall and the lowest rail.

9 Additionally, there are different forms of balustrade, constructed at different points in time, to open access routes within the building structure and to stairs, including the external stairs that lead to a gate in the owners' courtyard which is the entry to the owners' lot.

10 We have referred to the balustrade surrounding the owners' courtyard in these reasons as "the balustrade" and have used different descriptors when referring to other balustrades.

11 For significant portions of the length of the balustrade that borders the courtyard, particularly at its northern and eastern aspects, there are immediately adjacent planter boxes. The external masonry wall into which the posts (to which the rails are attached) of the balustrade are fixed forms the rear wall of the planter boxes. The other sides or edges of the planter boxes are formed by a hob of masonry which is significantly lower than the rear external masonry wall. At the southern end of the courtyard near the entry gate to the owners' lot there is no hob in some locations, and the soil slopes from the masonry wall down to the height of the tiling on the courtyard. The soil within the planter boxes, with or without a hob, is of variable height but the degree of variation is necessarily constrained by the height of the external masonry wall, the hob and the tiling just mentioned.

12 The evidence varies at different points in time and in different locations on the height of the external masonry wall, the hob, the tiling and the balustrade, but the relativity between them is as we have just described. We discuss the measurements to the extent relevant to the appeals later in these reasons.

13 Although not the subject of an express finding, it was common ground that the planter boxes and their content were lot property, although that necessarily must exclude the external masonry wall of the building, beyond any surfacing

or waterproofing treatment inside the planter boxes that was applied to the external masonry wall.

14 It was contentious as to when the planter boxes were constructed. The owners said that this occurred at the time of construction of the building and referred in closing submissions to a landscape plan that formed part of the Council building approval of 18 May 2018. The plan showed planter beds and landscaping on the perimeter of the owners' courtyard. The OC said that, unlike planter boxes in adjacent Lots 15 and 16, the planter boxes in Lot 17 were not part of the strata scheme when registered. The OC pointed to an approved plan that showed the present-day tiling, sauna, courtyard and planter boxes as having been constructed or changed prior to 1994. There were some further changes for which development consent was given in February 1995. It was not definitive in the evidence whether the later developments were new (eg, tiling on the courtyard surface) or replaced existing features, or the degree of change to existing dimensions in any replacement.

15 The Tribunal accepted that the current basic structural state of the courtyard, including the fencing and landscaping, pre-dated 1994 but did not make an express choice between the competing contentions. The Tribunal recorded as to date of construction: "the planter garden was constructed at the time the building was completed or at the latest prior to 10 May 1994": at [42] of the Tribunal's reasons for decision (Reasons).

16 There was no challenge on the appeal to that factual finding and a reference to a later date of construction in the OC's written submissions on appeal was corrected at the appeal hearing. For at least the purposes of this appeal it appears to be common ground that the current basic state of the courtyard, including the fencing and landscaping, was constructed before the change of building regulation referred to below.

17 The Tribunal collated a chronology from the parties' separate chronologies. That chronology was annexed to the reasons and referred to at Reasons [11] as follows: "In order to explain succinctly how these proceedings arise, it will be helpful to refer to a chronology which I have extracted and collated for this purpose from the chronologies provided separately by each party".

18 In light of that description we consider it appropriate to treat the chronology as background to the Tribunal's findings. The chronology recorded some duplication in description of events as drawn from each party's chronology which mainly differed in terms of expression, interpretation or perception of evidence. In those circumstances we have focused on the documentary and photographic evidence rather than the description in the chronology.

19 Apart from narrow contests specifically referred to below, there were no challenges to findings of primary fact on appeal and no contest on issues of fact as depicted or described in the documentary and photographic evidence, although the inferences to be drawn from potentially incomplete and at some points indistinct historical documents was debated.

20 At Reasons [25] and [28] the Tribunal referred to the considerable amount of contemporaneous email correspondence but observed that it was not possible to ascertain how complete these records were, given the period of time since the earliest events at the time of the building's construction. At Reasons [26] the Tribunal found that there was sufficient documentary evidence to support its determinations on the matters in issue, including the strata plan, development conditions and "numerous documents in relation to various investigations and works covering the period since about 2013". At Reasons [27] the Tribunal recorded as in evidence contemporaneous reports in relation to works and proposed works over the same period.

21 As to the two-day hearing followed by extensive written submissions:

(1) At Reasons [30]-[31] the Tribunal referred to cross-examination of the two lay witnesses and the two experts, one for each party in each case, and provision of transcript.

(2) At Reasons [32] the Tribunal found it unnecessary to review in detail the witnesses' oral evidence because of the nature of the determinations but referred to it briefly where considered necessary and appropriate to do so.

(3) At Reasons [33] the Tribunal found both experts to be truthful witnesses who made appropriate concessions where necessary and rejected submissions that either expert acted as an advocate.

(4) At Reasons [34] the Tribunal found Ms Doherty, who gave the lay evidence for the owners, "to be a persuasive and truthful witness". Without going into unnecessary detail, the Tribunal found the treasurer

> of the OC (the lay witness for the OC) "to be somewhat negative in his attitude to the [owners] and in particular in relation to a tendency to interpret some matters, including legislation, in a way that would not assist the [owners]". The Tribunal did not expand on that because it was satisfied that the interpretation of the documents including the legislation did not require a consideration of the treasurer's opinions.

22 There appears to be no challenge on appeal to the findings and observations in the preceding paragraph. To them we add that the text of the OC treasurer's affidavit was largely an argument or commentary on matters of fact and also sought to cavil with or qualify two determinations, in 2013 and 2015, of the Tribunal and a consent order (including by consent of the OC) in the District Court in 2013 on appeal from one of those Tribunal determinations. In the District Court consent order, the Tribunal order that the OC repair a glass block wall remained unchanged except for extended time for performance and an additional order which registered an exclusive use by-law in favour of the owners in respect of the glass block wall.

23 On 17 January 2007 the Council issued a fire safety order to the OC, with which the OC sought to comply during 2007 with completion mid-February 2008, to make safe balustrades in the common area stairways and the internal access routes by increasing their height, because they posed a safety risk. Item 3 of the order stated the following reason for issuing the order:

> "The exit stairways and paths have balustrades which have gaps between them which are greater than the acceptable maximum requirements specified in the Building Code. This deviation with the Building Code poses a risk to the livelihood [sic] of a person falling from a pathway or stairway."

24 The evidence, both descriptive and photographic, clearly showed that the internal access route balustrades the subject of the order had, before the ordered work, the same type of two-rail construction as the balustrades in issue in these proceedings, but the owners' balustrade was not upgraded. The OC made this point and said that the order related to fire escape areas.

25 The work added a top rail, increasing the height of the changed balustrades to 1200-1400mm above the immediate surface below (up from 970mm) and added a bottom rail to narrow the bottom gap between that surface and the

existing lower rail from 250mm to 100mm. No infill between the horizontal rails was added.

26 Following earlier contested proceedings in the Consumer, Trader and Tenancy Tribunal (predecessor to the Tribunal) in which the owners were successful on 24 June 2013, on 9 October 2013 the OC's appeal to the District Court concluded on the basis, referred to above, that the OC would carry out repairs to a glass block wall adjacent to the courtyard and near to some of the external masonry wall, balustrade and planter boxes so as to prevent water ingress to the owners' lot.

27 In mid-November 2013 the owners provided to the OC a quotation for $25,700 for the glass block wall work on 8 November 2013. The quotation was from the builder mentioned below. When challenged in cross-examination, Ms Doherty said she had contacted a builder she knew because the OC had not yet obtained a builder.

28 By letter dated 25 July 2014 the OC received advice (being general advice to property owners) from the Council which recommended that balustrades have a height of at least one metre, have no openings between bars more than 100mm and no horizontal parts that allowed children to climb.

29 The project consulting engineer CPC (the consulting engineer) retained to draw the specification and to project manage the glass wall works inspected the works in late 2014. n his report dated 1 December 2014 he recommended replacement of the glass wall rather than repair. This was because the investigatory stage in repair might show that replacement was required in any event and repair also was likely to have ongoing maintenance costs.

30 The builder gave the OC a revised quotation dated 28 March 2015 for $38,084.

31 On 15 April 2015 the Tribunal appointed a compulsory strata manager (referred to below as "the strata manager" unless the context requires more precise description). The strata manager was given all the powers of the OC and its strata committee (SC) for the maximum period of two years. Lack of attention to repair of common property and financial reporting issues were the expressed reasons for the appointment.

32 On 17 June 2015 the strata manager issued a work order for the glass block wall replacement at the quoted cost of $38,084, with a request for a home building contract and home owners warranty insurance. This was the subject of a special levy struck on the same date.

33 On 26 August 2015 the OC's engineer (SiE) appointed to report on required works to be financed by sinking fund contributions, reported to the strata manager based on an inspection 19 August 2015:

> "The building is [in] need of urgent repairs due to the lack of maintenance over the life time of the property. There have been various items identified by [the OC's consultant engineer (CPC)]".

34 The works programme in that report allowed $80,360 (variable depending on product) to replace balustrades and handrails "to meet current BCA requirements" within three years.

35 A revised quotation of $68,538.80 including GST for the glass block wall replacement was provided by the builder on 25 May 2016. That quotation included remedial works on the rooftop parapet above the glass block wall "which has been assessed as degradation of the reinforced concrete" and waterproofing over the parapet following repairs.

36 The OC and the builder signed a works agreement dated 17 June 2016. The Project was defined as "Glass Wall Replacement as detailed in Schedule 1". The scope of works was set out in Schedule 1, which summarised the project as "the replacement of glass block wall, minor concrete repairs and application of waterproof coating to the parapet above the glass block wall". The contract price was the same as in the quotation which was a contract document.

37 On 19 July 2016 the owners requested, by email to the strata manager, an increase in the balustrade height, as had occurred with other balustrades in the building, at the same time as the glass block wall was being replaced. On the same date the strata manager requested from the consulting engineer a "quote/spec" to make the balustrade compliant with the BCA requirements consistent with the 2014 Council recommendation.

38 On 20 July 2016 the consulting engineer said that there was no legal requirement to upgrade the balustrade to current BCA requirements "unless

maintenance works are proposed to the balustrade or there is a change of use (increase of risk)". The consulting engineer went on to state "[g]iven we are now undertaking works adjacent and all other balustrades have been upgraded for compliance, we recommend that the balustrade also be upgraded if not compliant".

39 In a report issued to the OC on 19 August 2016 following inspection of balustrades on Lot 17 and in the building, on 11 August 2016, the consulting engineer confirmed that the balustrade was compliant with standards at the time of construction but not with current BCA requirements. First, there was non-compliance with BCA climbability prevention requirements, since the masonry wall top provided a step between 150mm and 760mm. Second, the BCA minimum was one metre above floor level at the base of the barrier and the balustrade was 885mm above planter soil level. Third, the consulting engineer pointed to corrosion in spot welding on the rails and posts in an added steel post and rail system embedded within the planter box soil so the base connection was not visible, with associated weakening additional to undersized steel members. The report said that this was not structurally adequate to meet BCA requirements for imposed loadings, having presumably been an attempt to make the balustrade compliant.

40 Since remedial works were planned, the report "strongly" recommended replacement of the existing 32m balustrade with "a new, BCA compliant balustrade, aesthetically in keeping with balustrades elsewhere on the complex". The report stated:

> "Given the high risk of non-compliant balustrades to building occupants (particularly their children), we recommend upgrading the balustrade. To not do so, may make the Body Corporate liable should there be an accident in the future."

41 The report also pointed out that the other balustrades installed previously were not compliant with the BCA at the time because they had toe-holds at 550mm and 695mm within the climbing range of 150mm to 740mm and noted "it is surprising that the recently-installed balustrade was not compliant with the BCA".

42 In cross-examination the owners' expert, who was the consulting engineer and author of the 2016 report just described, accepted that he had changed his view in his expert report for the proceedings. At the time of his 2016 report the courtyard landscaping had limited his ability to take the same scope of measurements of the height of the balustrade, and to inspect the added post-and-rail system within the planter box that he had for his current report where the changes described below to the courtyard landscaping had occurred.

43 The owners' expert now accepted that the added post-and-rail system was to support the brushwood fencing. He also said that his more complete measurements showed the balustrade was not uniformly compliant with Ord 70 and consent condition 85 at time of original construction. He said that his measurements of the balustrade were congruent with those of the OC's expert at substantially coincident locations; the variance of 25mm or so between them was a function of the location. We return to this topic when dealing with one of the appeal grounds, below.

44 On 22 August 2016 the strata manager instructed the consulting engineer to proceed with the recommendations in its report to replace the balustrade on the basis that it "affects the safety of the residents in the complex".

45 On 14 September 2016 the consulting engineer requested the builder to provide a variation quotation for remediation of the balustrade and for removal of existing fencing and landscaping. The consulting engineer advised that the Council did not require a DA for balustrade upgrade.

46 On 10 October 2016, based on an inspection that took place on 15September 2016, the OC's engineer SiE produced its Initial Safety Report. It said that it was engaged by the OC to produce a report "identifying site-specific physical hazards to persons on the common property".

47 The safety report identified as the major hazard for immediate attention the installation of a balustrade not less than one metre in height and otherwise compliant with current guidelines to the external stairs to the courtyard "as this represents a falling hazard". It said that the inspection to produce the report was visual, of two balustrades only, against current safety standards, and comment may be made on general issues of safety, even if the balustrade was

compliant. No ranking or recommendation would be given as the balustrade "will in most circumstances be assumed to have been compliant at time of construction".

48 The report went on to state as follows:

> "A fall over a Balustrade represents one of the most severe risks which can occur on common property, often leading to brain damage or even death (see for example the case of *Toomey v Scolaro's Concrete Constructions PL (in liq) & Ors (No 2)* [2001] VSC 279). Balustrades built under the Building Code of Australia since 1 July 1997 have a height requirement of 1000mm.
>
> Although older buildings only have to comply with the requirements which existed at the time of construction, we will strongly recommend you consider replacing them with balustrades which meet modern standards. Particularly if your balustrades are below 865mm at any point, there is a good chance that your balustrades are not compliant with the requirements at the time of construction and need to be replaced."

49 In early 2017 the builder removed the fencing and portions of the landscaping, along with a metre of balustrade next to the glass block wall. Ms Doherty was present during the removal but the scope of her consent to the removal was contentious.

50 In March 2017 the consulting engineer commissioned - and on 7 April 2017 received from an architect - drawings for frameless glass to be patch-fitted in the balustrade. The architect's report said that the balustrade was, at 900mm "above the nominal ground level", non-compliant with the current BCA.

51 The strata manager instructed the consulting engineer to obtain quotations based on the architect's drawings. The builder provided the quotation on 13 April 2017 for $62,172. A quotation was also obtained for reinstating the fencing and landscaping.

52 All consultant and builder invoices for the foregoing work were paid by the strata manager.

53 In response to an email of 18 April 2017 from the consulting engineer asking whether the strata manager approved the quotation delivered 13 April 2017, on 26 April 2017 the now-former compulsory strata manager said it no longer had authority to make the decision on the balustrade.

54 In July 2017 a Council officer inspected the balustrade and reported significant gaps between the railings. The report advised the OC to make the balustrade safe.

55 Whether the strata manager approved remediation of the balustrade was in contest. The owners submitted to the Tribunal that the available evidence (mainly emails between the strata manager, the engineer and the builder) supported approval by the strata manager. The OC said there was no formal record of actual decisions by the strata manager and that a request to confirm such approval was not positively responded to after the conclusion of the strata manager's term.

56 On 30 June 2017, after inspecting the balustrade, the Council emailed the new strata manager noting compliance with standards when built but advising "immediate action to make building safe from any fall".

57 In relation to the situation after the compulsory strata manager's appointment ended:

(1) The glass balustrade was not installed;

(2) No other work was done on the balustrade or the fencing or landscaping by the OC except for replacing the missing metre of balustrade with 1290mm-high balustrade;

(3) The temporary fencing, which was not continuous, was left in planter beds which were not re-planted;

(4) The owners installed chicken wire in the gap between the top of the external masonry wall and the lower rail in the balustrade; and

(5) Communications between the parties and their legal representatives did not resolve the matter.

58 In the second half of 2017 or early 2018, the balustrades upgraded in 2007 were heightened by the addition of a new horizontal top rail and the installation of a new lowest rail between the existing lowest rail and the permanent base. On 5 April 2018 the OC paid $17,796 to the installer.

59 On 8 March 2019 the owners filed the originating application from the decision in which these appeals are brought. The following orders were sought (in summary unless otherwise indicated by quotation marks):

1. An order that the OC “install a glass balustrade in accordance with, and carry out the other works described and shown in,” specified architectural drawings [described below] “on and about the common property in connection with the courtyard” of the owners’ lot.

2. Further or in the alternative to order 1, an order that the OC “undertake all necessary remedial works to place the balustrade on and about the perimeter of the Courtyard [defined in order 1] (Balustrade) into a state of good and serviceable repair and make the Balustrade safe and compliant with the applicable provisions of the [BCA] that are currently in force”.

3. An order that the OC “reinstate or replace in the Courtyard the brushwood fencing (Fencing) and the trees, plants and shrubs (Landscaping) that the contractor of the [OC] removed from the Courtyard in about January and February 2017 without the consent of [the owners]”.

4. In the alternative to order 3, an order to pay the owners compensation or damages “in an amount equal to the cost to [the owners] of replacing the Fencing and Landscaping in the Courtyard”.

5. An order that the OC complete all works ordered “by appropriately qualified and licensed contractors, in a proper and competent manner, using materials that are good and suitable for the purpose for which they are used, within 28 days of the date of these orders (or such other period determined by the Tribunal)”.

Tribunal principal findings and orders

60 In respect of the OC’s appeal, the Tribunal’s findings relevantly included the following, in summary:

(1) The OC by the then compulsory strata manager instructed the OC’s contracted builder to remove the fencing and landscaping (Reasons [59]).

(2) The removal was carried out under access gained by the OC’s rights under SSMA s 122 for the purpose of attending to the OC’s duties with respect to the common property balustrade under SSMA s 106 (Reasons [59], [62], [64]).

(3) The removal was, despite the vigorous contest on this issue of fact, not with the consent of the owners, even if in the presence of Ms Doherty (Reasons [60]-(61]); the scope and extent of the finding on consent was contested as discussed below.

(4) The OC was liable under SSMA s 122(6) for any damage to lot property (Reasons [65]) which rendered it liable to reinstate the fencing and landscaping (Reasons [69]).

61 The relevant Tribunal orders were as follows:

(1) The owners were to obtain and supply to the OC treasurer quotations within 28 days after date of orders.

(2) The SC was "to consider and select which quotations will be accepted in relation to the replacement fence and the replacement of the landscaping" within 42 days after date of orders.

(3) "[T]he contractors are to be engaged and the works are to commence" within 70 days after date of orders.

(4) The works were to be completed within 3 months after date of commencement of the works.

62 In respect of the owners' appeal, at Reasons [62]-[63] the Tribunal found as follows:

> "62 While I find the evidence proves on the balance of probabilities that [the compulsory strata manager] and therefore the owners corporation intended and directed that the fence and landscaping be removed so as to properly inspect the balustrade, I find also that it does not prove on the balance of probabilities that a decision had been made to 'improve' the balustrade. It is not merely that there is no formal record of such a resolution having been made by [the strata manager] but there is also a lack of contemporaneous evidence that the various investigations had moved beyond the stage of presenting a proposal to install glass sheets as recommended by the architects. This does not amount to a decision that the balustrade will be improved or replaced.
>
> 63 It follows, in my opinion, that there is no current requirement that the owners corporation proceed to implement such a decision to improve the balustrade. It is a matter for the owners corporation to make such a decision or not."

63 This built on earlier findings that relevantly are set out in the following paragraphs.

64 First, as set out in Reasons [36], the parties agreed that at the time of construction the balustrade was required to be compliant with the relevant provision of *Ordinance 70* made under the *Local Government Act 1919* (NSW) in its current form at time of construction, which was supplied as the form in force as reprinted at 1 June 1983.

65 The relevant provision in that form was said to be cl 24.27(3) which relevantly read as follows:

> "(3) Required handrails shall be fixed at a vertical height of not less than 865mm above – … (b) The floor surface of ramps, landings, corridors, hallways, external access balconies, bridges and the like, … "

66 Consent condition 85 of the Council’s building approval issued on 18 May 1988 required all accessible roof areas to be enclosed by handrails a minimum of 1150mm high.

67 Second, as set out in Reasons [37], the issue resolved to whether the height of the balustrade was to be measured from the level of the slab, from the level of any permanent fixtures on top of the slab such as tiles or from the top of the soil in the planter garden.

68 Third, at Reasons [38] the Tribunal found that cl 24.27(3)(b) by its reference to “floor surface” meant that the measurement was to be taken from the surface of the slab or the surface of any permanent covering such as tiles: “That is, the balustrade is to be at a height of at least 865mm above the slab or covering surface as the case may be”.

69 Fourth, at Reasons [39] the Tribunal, in rejecting the owners’ submission that height was to be measured from the surface of the soil in the planter garden, accepted the OC’s submission that:

> “in such a case the balustrade could be rendered non-compliant simply by dumping a bucket full of soil and measuring from the top of the resulting pile. I find that was not the intention of the Clause”.

70 Fifth, at Reasons [40], the OC’s expert’s measurements were accepted (with the Tribunal commenting that there was a lack of clarity in presentation of measurements in light of the varying covering of the courtyard over time) as showing that the top of the balustrade was equal to or more than 865mm above the courtyard surface.

71 Sixth, at Reasons [41], while the balustrade was accepted as common property by both parties, the strata plan made clear that the planter garden was not common property and was not shown on the plan unlike some other planter boxes.

72 Seventh, at Reasons [42], it was most likely that the planter garden was constructed at the time the building was completed or at the latest prior to an architectural drawing dated 10 May 1994.

73 Eighth, at Reasons [43], "In any case it is not disputed that the planter garden and anything contained in it is lot property of Lot 17 *up to the inner boundary of the balustrade*" [emphasis added].

74 Ninth, at Reasons [44], "On that basis I find that the balustrade complied with Ordinance 70 when it was constructed".

75 Tenth, at Reasons [45], *Ridis v Owners SP 10308* [2005] NSWCA 246 was authority, together with other case law cited by the OC, that the duty of an owners corporation to maintain and repair common property under SSMA s 106 and its predecessor s 62 of the *Strata Schemes Management Act 1996* (NSW) (the 1996 Act) does not require that the common property be improved or upgraded to current safety standards, and the BCA was not retroactive. This was despite the obvious conclusion (Reasons [50]-[51]) from the evidence that a number of relevant professionals, including the engineer and the architects who proposed a design to add glass plates to the balustrade, "were of the very clear opinion that the balustrade, by today's standards at least, is unsafe".

76 Eleventh, at Reasons [46]-[49], the OC's expert's measurements showed also compliance with consent condition 85 of the building approval which applied to this area as an "accessible roof area", which was a roof area designed to be and which was accessible to any person with a legal right to be there. There was no authority that the Tribunal had found or the parties had provided as to the consequence if consent condition 85 had been found to be breached.

77 For the foregoing reasons, at Reasons [52] the Tribunal concluded that the OC was not required to replace, repair or change the balustrade to bring it into compliance with the BCA or NCC.

Scope and nature of internal appeals

78 Internal appeals may be made as of right on a question of law, and otherwise with leave of the Appeal Panel: s 80(2) *Civil and Administrative Tribunal Act* 2013 (NCAT Act).

79 In *Prendergast v Western Murray Irrigation Ltd* [2014] NSWCATAP 69 the Appeal Panel set out at [13] a non-exclusive list of questions of law:

(1) Whether there has been a failure to provide proper reasons;

(2) Whether the Tribunal identified the wrong issue or asked the wrong question;

(3) Whether a wrong principle of law had been applied;

(4) Whether there was a failure to afford procedural fairness;

(5) Whether the Tribunal failed to take into account relevant (i.e., mandatory) considerations;

(6) Whether the Tribunal took into account an irrelevant consideration;

(7) Whether there was no evidence to support a finding of fact; and

(8) Whether the decision is so unreasonable that no reasonable decision-maker would make it.

80 The circumstances in which the Appeal Panel may grant leave to appeal from decisions made in the Consumer and Commercial Division are limited to those set out in cl 12(1) of Schedule 4 to the NCAT Act. In such cases, the Appeal Panel must be satisfied that the appellant may have suffered a substantial miscarriage of justice on the basis that:

> (a) the decision of the Tribunal under appeal was not fair and equitable; or
>
> (b) the decision of the Tribunal under appeal was against the weight of evidence; or
>
> (c) significant new evidence has arisen (being evidence that was not reasonably available at the time the proceedings under appeal were being dealt with).

81 In *Collins v Urban* [2014] NSWCATAP 17 (*Collins v Urban*), the Appeal Panel stated at [76] that a substantial miscarriage of justice for the purposes of cl 12(1) in Schedule 4 may have been suffered where:

> … there was a "significant possibility" or a "chance which was fairly open" that a different and more favourable result would have been achieved for the appellant had the relevant circumstance in para (a) or (b) not occurred or if the fresh evidence under para (c) had been before the Tribunal at first instance.

82 Even if an appellant from a decision of the Consumer and Commercial Division has satisfied the requirements of cl 12(1) of Schedule 4, the Appeal Panel must still consider whether it should exercise its discretion to grant leave to appeal under s 80(2)(b).

83 In *Collins v Urban*, the Appeal Panel stated at [84] that ordinarily it is appropriate to grant leave to appeal only in matters that involve:

(a) issues of principle;

(b) questions of public importance or matters of administration or policy which might have general application; or

(c) an injustice which is reasonably clear, in the sense of going beyond merely what is arguable, or an error that is plain and readily apparent which is central to the Tribunal's decision and not merely peripheral, so that it would be unjust to allow the finding to stand;

(d) a factual error that was unreasonably arrived at and clearly mistaken; or

(e) the Tribunal having gone about the fact finding process in such an unorthodox manner or in such a way that it was likely to produce an unfair result so that it would be in the interests of justice for it to be reviewed.

OC's grounds of appeal

84 An original issue at hearing and on appeal has been resolved, directly and consequentially, by the decision of the NSW Court of Appeal in *Vickery v Owners SP* [2020] NSWCA 284. Under SSMA s 232 the Tribunal has jurisdiction to award compensation for breach of the duty to maintain and repair the common property set out in SSMA s 106. By parity of reasoning, it was accepted (by the OC's not pressing submissions to the contrary after the *Vickery* decision in the Court of Appeal) that the Tribunal has jurisdiction and power to make a work order or money order under SSMA s 232 in respect of damage to lot contents arising from exercise of power of entry to carry out works in accordance with s 122(6). This is consistent with *Owners SP21702 v Krimbogiannis* [2014] NSWCA 411 at [15], [24].

85 The OC pressed as a ground of appeal that the owners' application was out of time, being filed more than 28 days after the removal of the fence and landscaping and in the absence of a specific limitation provision in SSMA s 122 unlike SSMA s 106(5): *Civil and Administrative Tribunal Rules 2014* (NSW) r 23(3)(b). There was no application for extension of time under NCAT Act s 41 which relevantly provides as follows:

> "(1) The Tribunal may, of its own motion or on application by any person, extend the period of time for the doing of anything under any legislation in respect of which the Tribunal has jurisdiction despite anything to the contrary under that legislation.
>
> (2) Such an application may be made even though the relevant period of time has expired."

86 The OC also pressed that it was denied procedural fairness because, without the opportunity for submissions:

(1) The form of orders specified acceptance of quotations provided by the owners;

(2) The form of orders might require the OC to break the law by engaging an unlicensed builder if all offered quotations were unlicensed. In relation to this, several of the owners' landscaping quotations were said to not show that they were from licensed sources.

87 The foregoing were pressed as errors of law. The last ground was also pressed as an error of exercise of discretion which may be an error of law or an error of fact.

88 The OC did not appeal the findings of the Tribunal set out above beyond these grounds. As was pointed out in the owners' submissions, these findings included those already summarised above as follows:

(1) The OC by the then compulsory strata manager instructed the OC's contracted builder to remove the fencing and landscaping (Reasons [59]).

(2) The removal was carried out under access gained by the OC's rights under SSMA s 122(2) for the purpose of attending to the OC's duties with respect to the common property balustrade under SSMA s 106 (Reasons [59], [62], [64]), in this case to investigate whether repair to the common property balustrade was required.

(3) The removal was, despite the vigorous contest on this issue of fact, not with the consent of the owners, even if in the presence of Ms Doherty (Reasons [60]-[61]); the scope and extent of the finding on consent was contested as discussed below.

(4) The OC was liable under SSMA s 122(6) for any damage to lot property (Reasons [65]) which rendered it liable to reinstate the fencing and landscaping (Reasons [69]).

Owners' grounds of appeal

89 The owners challenged the Tribunal's finding that the existing balustrade complied with Ord 70 and consent condition 85. First, the Tribunal was said to have erred in interpreting Ord 70 to require measurement of the minimum height from the courtyard surface (floor or tiles) rather than from the surface directly beneath the balustrade. The immediately adjacent surface was said to be the intended measuring point because the purpose of Ord 70 and consent condition 85 was to ensure sufficient height that a balustrade was safe.

90 Second, the Tribunal was said to have erred in denying the owners procedural fairness by permitting the OC to raise the courtyard surface as the appropriate point of measurement only in closing written submissions “that were made more than 10 weeks after the hearing”. As a consequence, the owners were denied the opportunity to lead further evidence to contest compliance even from this measuring point.

91 Third, there was said to be no evidence or no sufficient evidence to support the primary finding that the height of the balustrade was more than 865mm and was about 1150mm above the courtyard surface, when the OC’s own expert assessed parts of the balustrade as less than 865mm above the courtyard surface and virtually the whole of the balustrade was less than 1150mm in height above that surface.

92 Fourth, the Tribunal ought to have found that the balustrade was operating inadequately as a safety barrier and was unsafe from the outset because it did not comply with consent condition 85 and accordingly it was the OC’s duty to replace the balustrade under SSMA s 106.

Consideration of and conclusions on OC's appeal grounds

Application lodged out of time

93 The duty to repair common property, with which rights of access and associated liability to remediate damage to lot property were connected, was continuous until repair occurred, with the dispute being over the scope of that duty. The duty to remediate damage to lot property was also continuous in its own right, in that any work order or compensation was remedial for breach of that continuous duty, not a breach of the duty on a single occasion as occurs with some breaches of duty of care causing loss or damage.

94 Accordingly, the limitation expiry issue that remained pressed for the OC fails.

Denial of procedural fairness / Form of orders

95 The owners’ response to the OC’s objections to the Tribunal’s orders was that:

(1) The orders met the claim for relief put forward by the owners;

(2) Could have been the subject of closing submissions by the OC as to the form of orders, and that any further opportunity would not be consistent

with the Tribunal's guiding principle and objective, in NCAT Act ss 36 and 38(4) (to which we add the objective in s 3(d)).

96 In our words and in accord with our understanding of the legislative context, those provisions require the just, quick and cheap disposal of the real issues in the proceedings on the substantial merits, in accord with equity and good conscience within legal principle and with as little formality as the circumstances of the proceedings permitted.

97 It seems to us that the focus of the inquiry is on the terms of the orders compared with the OC's complaint. There is no doubt that the Tribunal's orders dealt with the subject matter of the owners' claim for relief, which was expressed in general terms. There is also no doubt that the Tribunal's orders specified a particular method of dealing with the claim for relief as to process and time. No party suggested that the requirements for substantive specification for a work order under SSMA s 106 as set out in *Glenquarry Park Investments PL v Hegyesi* [2019] NSWSC 425, and applicable by analogy to a work order under s 122, had not been met.

98 However, within that particular method the orders themselves did not restrict the OC to the quotations put forward by the owners if the OC considered that it was seriously prejudiced or jeopardised by those quotations in amount, form or underlying circumstances such as licensing of the contractor.

99 The Tribunal clearly stated at Reasons [69] that the history of the relationship between the owners and the OC made it appropriate to order that the owners obtain quotations and the OC decide which of those quotations it accepted. Given the factual history which had been extensively canvassed during the hearing and in the findings, including on the evidence of the principal lay actors that we have earlier recorded, this was a reasonable approach that in our view could reasonably have been anticipated if findings such as the Tribunal made were made.

100 However, if the OC had the concerns that it has expressed in its appeal, there was nothing, in the orders themselves or in the reasons which provided their context, that required the OC not to raise such concerns with the owners and, if still not satisfied, to obtain and seek to use its own quotations. If the owners

were dissatisfied with the process and considered that it did not comply with the orders, including by the OC obtaining its own quotations in the circumstances just described, the avenue was available under NCAT Act Sch 4 para 8 to seek leave to renew the proceedings. The only possible challenging party would be the owners, as it would be the OC insisting on obtaining its own quotation that would prompt such application if the owners objected.

101 In those circumstances, we do not accept that there was any procedural unfairness to the OC or any failure by the Tribunal properly to exercise its discretion in a principled manner on the form of the orders, once it had determined that the owners were entitled to orders within the ambit of their claim for relief.

102 As a further support to the provision for timing in the Tribunal orders, we accept the owners' submission that in the usual course a submission as to such timing would be reasonably expected to be made within the OC's closing submissions, either expressly or by reservation of the opportunity to make any further submission on proposed timing. Provision of timing is a usual incident of proper primary orders and would reasonably be expected to be the subject of submissions if such were sought to be made.

103 On the specific matters debated on the form of the orders beyond what has already been said, we agree with the owners' submission that the key to the primary orders is "the replacement fence and the replacement of the landscaping" (as expressed in order 2). To "replace" has a clear meaning, namely, to provide for a substitute or equivalent or to restore something to its previous condition, making it good: *Ridis v Owners SP 10308* (2005) 63 NSWLR 449 (CA) at [169].

104 As we have just recognised, the Tribunal's reasons, and evidence in the proceedings as dealt with in those reasons, give context for interpretation of the orders: *Athens v Randwick CC* (2005) 64 NSWLR 58 at [133]; *Yates Property Corp PL v Boland* (1998) 89 FCR 78. That context included evidence on the type, size and location of the fencing and landscaping and a requirement, at Reasons [69], to "update" quotations in evidence, not quote for wholesale change.

105 If the OC considered that such were not adequately provided for in the quotations provided to it, it was not prevented from obtaining its own quotations. If it obtained its own quotations then the owners may have challenged those grounds on a renewal application.

106 If we are not correct in our primary conclusion that the orders left open to the OC to obtain its own quotations, then we agree with the owners' submission that the Tribunal was not required to give an independent opportunity to the OC to obtain its own quotations, at least initially. As already said, the Tribunal's findings were premised on the fencing and landscaping being lot property (at Reasons [65] and throughout the Tribunal's reasons).

107 It will be clear from the foregoing that we also agree with the owners' submission that the Tribunal's orders were soundly based in the Tribunal's findings about the relational difficulties between the parties and about the OC treasurer (Reasons [11]-[15], [34], [69]).

108 We further agree with the owners' submission concerning the timing of performance of orders. As already said, the time for performance is inherent in the nature of orders and a party ought reasonably to include a submission on it if the party wished to do so. All the more so is that the case when the application for relief nominates a time for order performance which was substantially shorter than that in the orders as made. That said, as a consequence of the orders we have made in disposing of the owners' appeal and in accordance with s 81 of the NCAT Act, we have decided to vary the time for performance of the Tribunal's orders relating to the replacement of the fencing and landscaping.

109 We agree that, given the destruction of the fencing and landscaping, it is inevitable that the replacement will be "new for old" with associated betterment. That is a function of replacement which has been ordered because of the breach of duty by the OC and does not attract a discount: *Hyder Consulting (Australia) PL v Wilh Wilhemsen Agency PL* [2001] NSWCA 313 at [47], [54], [107].

110 It is also not a useful exercise to adduce evidence of the quotations obtained pursuant to the orders to reinforce a critique of the orders. The orders will

either have the potential for the criticism made, or not. Whether or not the potential allegedly actualises is irrelevant. Whether or not there is the potential will not be the only factor to be taken into account, as the preceding analysis in these reasons shows. We have already expressed the view that such potential either is not present or ought to have been the subject of submissions without further prompting if it was to be agitated and, if it is alleged that it has actualised, is capable of review by the appropriate mechanism.

111 There is accordingly no utility or purpose in determining whether the point of criticism (that is, the potential for exploitation) is or is not made out on the further evidence sought to be put before us on this aspect. We reject the application by the OC to adduce that evidence.

112 We similarly reject the OC's submission that the orders require the OC to engage in illegal activity and the associated application for further evidence. That submission falls away if our primary interpretation of the Tribunal orders is correct.

113 If, contrary to our primary interpretation, the Tribunal orders require the OC to accept a quotation put forward by the owners under order 1, then no order of the Tribunal could be interpreted to require a party to act illegally. If it was established that the quotation was for an amount and was of a type that came within the definition of "residential building work" under the *Home Building Act 1989* (NSW) (HBA) or otherwise required any form of statutory compliance which was not evident, then the OC would be entitled to refuse to accept the quotation on that basis and that decision, if contested, would be open to the renewal procedure under NCAT Act Sch 4 rule 8 previously described.

114 We accordingly do not need to determine whether or not the fencing and landscaping constituted "residential building work" within the meaning of the HBA or was otherwise subject to the requirements in the HBA or other statutes, or if the quotations obtained by the owners were legally compliant. The further evidence on this topic sought to be adduced by the owners was responsive only to the further evidence of the OC that we have rejected and to the issues that we do not need to determine.

115 In its written submissions in reply, the OC raised that the hiring of the contractors was left to the owners. We do not read the process in orders 1 to 4, set out above, in that way. Those orders contain incidents of the overall obligation on the OC to replace the fencing and landscaping. Implicit in the timetabling in the orders is that the obligations are on the party who is obliged to undertake the works; the other party would not require the incentive of timetabling.

116 We do not accept the reading of the Tribunal findings in Reasons [61], which was foreshadowed in the OC's written submissions in chief and developed in the OC's written submissions in reply, that it contained irreconcilable statements. The Tribunal found, in the course of rejecting the OC's submissions at Reasons [60], that any absence of objection to removal of the fencing and landscaping was in the expectation or hope of the owners that the removal would be linked to the rectification of the balustrade. It did not constitute an instruction or consent to removal simpliciter or permanently, or even conditionally, in the sense contended for by the OC. This is clear from the wording of Reasons [60], [61] and the first part of [62]:

> "60 The respondent [OC] submits with some vigour that Ms Doherty did not object to the removal of the fence and landscaping and indeed should be found to have given her consent to that work. The [OC] also submits that in September 2016 Ms Doherty referred to the brush fence or screen as 'junk' and noted that it would have to be removed to enable a new balustrade to be installed. The [OC] submits that that evidence shows that the [owners] intended to permanently remove the brush fence in any case.
>
> 61 I do not accept that submission of the [OC]. I find it is self-evident that if Ms Doherty was expecting or even merely hoping that the [OC] would rectifiy the balustrade that she would not object to the removal of the fence and landscaping, but that does not amount to an instruction to do so nor to consent that it be done. Ms Doherty, whom I found to be an impressive witness and a truthful witness, was annoyed that some of the landscaping was removed which she intended should be retained.
>
> 62 While I find the evidence proves on the balance of probabilities that [the builder] and therefore the [OC] intended and directed that the fence and landscaping be removed so as to properly inspect the balustrade,".

117 We conclude that the OC's grounds of appeal are not established. The OC's appeal is therefore dismissed.

Consideration of and conclusions on owners' appeal grounds

Interpretation of Ord 70 and consent condition 85

118 We deal first with what we regard as the Tribunal's error of law expressed at Reasons [38], namely, the interpretation of Ord 70 cl 24.27(3) to find that "floor surface" meant the measurement was to be taken from the surface of the balcony slab or any permanent covering such as tiles.

119 We note that the reference to height in consent condition 85 is non-specific as to the measuring base. In those circumstances, we consider that the most appropriate inference is that the measuring base is the legal requirement in Ord 70, which deals with the same topic and was the relevant governing subordinate legislation at the time.

120 The two provisions work together because Ord 70 set a minimum handrail height. Consent condition 85 set, as a Council requirement for building approval, a different minimum height that exceeds the regulatory minimum and has its own regulatory source.

121 For the purposes of the immediately following analysis, we assume that the balustrade was compliant with Ord 70 and consent condition 85 as they operated at the time of construction of the balustrade and the time of approved construction of the current form of the planter boxes. We deal later with the challenge to that measurement assumption.

122 As said earlier, the external wall of the relevant planter boxes was formed by the masonry exterior wall immediately below the balustrade and was part of common property (see the italicised words in Reasons [43], reproduced above).

123 Ord 70 and consent condition 85 do not distinguish between common property and lot property in considering the floor surface from which measurement is taken. Of the descriptors of floor surface in Ord 70 cl 24.27(3), while "external access boundaries" is the closest, the words "and the like" expressly invoke the common characteristic of a level that forms the permanent base into which, or immediately adjacent to which, the handrail is fixed or on which it sits. This is consistent with the ordinary meaning of "floor" and "surface" and is reinforced

by the juxtaposition and combination of those terms. More importantly, it appears consistent with the immediate context in cl 24.27(3).

124 The immediately adjacent permanent base is the top of the masonry walls of the planter boxes which form the external wall, which is common property, with any inner skin (as described earlier) being approved lot property.

125 Alternatively, if the external masonry wall is regarded as part of the balustrade rather than the base for it, the immediately adjacent permanent base varies between the top of the hob, the tiling on the courtyard surface and the soil in the planter boxes.

126 The planter boxes form a significant part of the permanent base over the entire balcony, and an even more significant part of the permanent base adjacent to the balustrade. Ordinance 70 cl 24.27(3) and consent condition 85 set a minimum.

127 In this respect, we disagree with the Tribunal's acceptance, described above, of the OC's argument that the soil level in a planter box as part of the measuring base could be manipulated by accident or design to render the balustrade non-compliant, and therefore could not be considered part of a permanent base and the relevant measuring base.

128 There is no indication that the soil in the planter boxes could be made significantly higher than the surrounding permanent structures that form the planter boxes, being the lower hob or tiling at the inner edge and the external masonry wall. The soil content of the planter boxes at that maximum level either forms part of the measuring base or does not detract from the surrounding permanent structures as the measuring base. This appears to be consistent with the building approval landscape drawings of 18 May 1988.

129 By contrast, plants within the planter boxes do not form an immediately adjacent permanent base within the requirements of Ord 70 and consent condition 85. They are what are put within the permanent base.

130 While there may be some relatively small areas where the balustrade would dip down if the minimum height in Ord 70 and consent condition 85 were uniformly adopted because there is no planter box, there is no requirement that it dip

down in Ord 70 and consent condition 85 themselves, which, as already stated, provide for minimum heights.

131 We accept that a major, arguably the dominant, purpose of the regulatory provisions in Ord 70 cl 24.27(3) and consent condition 85 was to reduce the safety risk by providing some form of protection or security (including by way of secure handhold) above the surface adjacent to the edge of the accessible balcony. No other major purpose was reasonably suggested. Indeed, the OC's written primary submissions in chief, which were repeated on appeal, accepted that "the evident purpose of [Ord 70 cl 24.27(3)] is to enhance the safety of persons using these areas". It may have been an imperfect protection compared with later regulation with arguably the same major or dominant purpose. That does not change the purposive intent.

132 We do not consider that any particularly dispensational reading for strata by-laws or council consent conditions is required in the context to arrive at and apply to interpreting cl 24.27(3) the purpose of the provisions: *Pollak v Owners SP 2834* [2020] NSWSC 784 at [57] and cases there cited; *Owners SP 4983 v Canny* [2018] NSWCA 275 at [63]. To the extent such an approach applies to consent condition 85, it reinforces the conclusion that we have reached.

133 The purposive intent would not be achieved if "floor surface" was not interpreted by reference to the immediately adjacent permanent structure as the measuring base.

134 In this regard, we do not agree with the OC's expert's interpretative view which at points (although not consistently in his various opinions and cross-examination) said the appropriate surface was the slab or tiling on it because climbability was not an element in Ord 70's requirements on the topic, unlike the present BCA (which we discuss below). In our view such an interpretation does not follow from and is not required to interpret the text of Ord 70 cl 24.27(3).

135 With reference to both Ord 70 cl 24.27(3) and consent condition 85, the OC submissions contained a focus, both at primary hearing and on appeal, on accessibility. There was reference to "densely planted garden beds" providing an "effective barrier" that took them outside the dictionary definition of

approachability ("readily reached") and focused on the "ordinary walking areas of the roof top". We do not consider that "accessible" should be so limited. There was no evidence to suggest that a planter box bed could not be accessible, particularly to a small person such as an inquisitive child.

136 In any event, the phrase appears to us to be a reference to the area which is required to have the specified handrail, being the entire courtyard because it an area lawfully accessible. It does not define the parts within that accessible area which must have the handrail. Once that is understood, then the best available inference is that the handrail (in this case, the balustrade) must have the required height measured from the adjacent permanent base to achieve the object of safety.

137 If, contrary to our view above, consent condition 85 must be determined on its own wording concerning the measuring base without reference to Ord 70 cl 24.27, then the planter box structure and its usual contents would be the immediately adjacent and logical measuring base. The planter boxes are clearly an accessible area in themselves given the low nature of their front edge, be it hob or tiling. More accurately, they form an integral part of the accessible area which is the courtyard.

138 Accordingly, we consider the Tribunal made an error of law in its interpretation of the correct measuring base. In the alternative, it made an error of fact in applying the law on the correct measuring base to the facts. This in our view constituted a substantial miscarriage of justice for being against the weight of evidence and otherwise satisfied the criteria that we have already set out for a grant of leave to appeal in favour of the owners.

OC's change of case on appeal on applicability of Ord 70 cl 24.27

139 In its written submissions on appeal the OC submitted that its express concession at the Tribunal hearing that Ord 70 cl 24.27 applied to the balustrade when it was approved by Council "may have been erroneous". It was said "It is only raised at this late juncture only because cl 24's context has come to the writer's [OC's changed counsel on appeal] attention".

140 No authority was cited by the OC for how to deal with this matter. On the one hand it raised a question of law being the interpretation of the applicability of

Ord 70. On the other hand the case before the Tribunal had been entirely conducted on the basis of the express concession. It was also not clear the extent to which the OC pressed the matter.

141 The first new submission was that the correct wording of Ord 70 cl 24.27 may not have been the one presented at the Tribunal hearing. We have checked the relevant wording of the provision as presented with the OC's appeal submissions against the original version of Ord 70 apparently given to the Tribunal and amendments prior to the date of building approval. We see no relevant difference to cl 24.27(3) and its relevant context (the addition of sub-para (5) does not appear relevant in this context). We read the OC's appeal submission as implicitly acknowledging that matter.

142 The second new submission, acknowledged by the OC to be the more significant of the two, was that the express concession did not do justice to the context of cl 24.27. When one considered the headings and sub-headings to the part of Ord 70 in which cl 24.27 appeared, the context was submitted to be "handrails on balustrades in fire escapes" because the context was fire safety, rather than "general balcony balustrades of the kind presently before the Appeal Panel".

143 The "required handrails" were said to cross-refer to cl 24.27(1) which were handrails required "along the side of any … external access balcony … leading to an exit". The balcony was said to be external but not "an external access balcony [emphasis supplied in submission] as contemplated in cl 24. It does not need a handrail and, while it has an uppermost horizontal-paling, it does not have a handrail as such". It was also pointed out that the requirement in cl 24.27(3) required an absence of obstruction above the rail that would tend to break a hand hold:

> "Read in its complete context, cl 27(3) is concerned with handrails which one may have to keep hold of when seeking to exit a building in an emergency or in the dark. It did not regulate the balustrade in question".

144 It should be noted that the submission did not affect the requirement in consent condition 85, which clearly applied to the balustrade.

145 In those circumstances, and although there is some arguable force in the submission, we have continued to consider Ord 70.

146 First, it is not clear the degree to which the new submissions are advanced by the OC, as opposed to counsel rightly putting to us the possible position on the law.

147 Second, on the *Coulton* test discussed further below (*Coulton v Holcombe* (1986) 162 CLR 1 at 7-9), it seems to us clear that there was the possibility that further evidence may have been led, in addition to use of secondary materials and other matters affecting interpretation under ss 28 and 33-35 of the *Interpretation Act 1987* (NSW). In particular we cannot see, and were not pointed to in Ord 70, any definition of “external access boundary” that informed the submission.

148 Further in this regard, we note the owners’ written reply submission on appeal that, if the concession had not been the basis on which the primary hearing proceeded, the owners could have given further evidence directly to demonstrate (beyond the incidental indications in existing evidence) that the courtyard leads to an exit and therefore was within the definition of “external access balcony”.

149 We also note that the non-applicability of Ord 70, and the continuing applicability of consent condition 85, may assist the owners’ case. There would be no inference from Ord 70 cl 24.27 as to the measuring base for “a minimum of 1150mm high” in consent condition 85. In that situation, it is strongly arguable that the measuring base may vary with the content of approved plans from time to time.

150 In this case, assuming the OC’s case that the planter boxes were installed later than construction under approved plans, the measuring base may well have changed. If they were installed as part of the approved plans, even if such installation was later in time than the building construction, then their structure would be the immediately adjacent and logical measuring base. They are clearly an accessible area in themselves given the height of the hob or the tiling, as we have already discussed. More accurately, they form an integral

part of the accessible area which is the courtyard as we have also already discussed.

151 If, contrary to the interpretation in the preceding paragraph, consent condition 85 did not apply to other than the form of the balcony at time of construction covered by the development consent, then there would be no regulation of height from a historic regulation with which compliance could be said to have been achieved, so affecting the scope of the duty under what is now SSMA s 106.

152 As discussed in the succeeding section of these reasons, that may even more directly focus the scope of the OC's duty on safety once it became aware or ought to have become aware of a risk to safety.

Scope and application of duty of OC under SSMA s 106 and its predecessor

153 Alternatively, and even if all or part of the balustrade did meet Ord 70 and consent condition 85 with the correct measuring base, in our view the Tribunal erred by holding that was sufficient for the OC not to be required to undertake work on the balustrade. Once work was required to be undertaken, that work was required to comply with current regulatory requirements in applicable law, codes and standards.

154 We have already referred to the Tribunal's findings, at Reasons [45] and [51], agreeing with the OC's written submissions and interpretation of case law in this respect, that "the mandatory duty of the owners corporation to maintain and repair the common property does not require that it be improved or upgraded to comply with current safety standards".

155 We conclude that the Tribunal misapplied the conclusions and underpinning reasoning in *Ridis* and other authority referred to. The result was an error of law in the application of the principle to these facts or an error of fact in the findings from such application which was within the criteria for a grant of leave to appeal.

156 *Ridis v Owners SP 10308* (2005) 63 NSWLR 249, [2005] NSWCA 246 concerned a residential strata scheme. The claimant occupied a unit in the building. He sustained injury when he put out his hand to prevent the front door

of the apartment building, which was common property, closing and locking him out. The glass pane in the door shattered and severely lacerated his right forearm.

157 It was found that:

- The glass pane was not safety glass;
- Safety glass had not been required to comply with applicable regulations at time of construction of the building;
- There was no system of inspection of common property in place and no evidence that the glass had ever been inspected;
- There had been no previous incident with the glass pane on the front door;
- Ordinary annealed or plate glass was known to shatter into dangerously sharp shards when impacted;
- The current regulations required the glass pane to be safety glass in new buildings and if the existing glass was replaced but were not otherwise retroactive (here the companion front door panel was covered by a shatter-proof film); and
- Safety glass would not have shattered in the manner causing injury.

158 The primary judge found no breach by the owners corporation of its common law duty of care nor of its statutory duties under s 62 of the *Strata Schemes Management Act 1996* (NSW) (the 1996 Act), which for relevant purposes contained, in s 62(1) to 62(3), the same wording as the current SSMA s 106(1) to 106(3) operative from 30 November 2016.

159 The operative wording is as follows:

> (1) An owners corporation for a strata scheme must properly maintain and keep in a state of good and serviceable repair the common property and any personal property vested in the owners corporation.
>
> (2) An owners corporation must renew or replace any fixtures or fittings comprised in the common property and any personal property vested in the owners corporation.
>
> (3) This section does not apply to a particular item of property if the owners corporation determines by consent resolution that—
>
>> (a) it is inappropriate to maintain, renew, replace or repair the property, and
>>
>> (b) its decision will not affect the safety of any building, structure or common property in the strata scheme or detract from the appearance of any property in the strata scheme.

160 The primary judge found as the basis for his conclusion (as set out at [36] in Tobias JA's reasons):

> "There is no evidence that the [owners corporation] had been aware of any danger with regard to the glass and there is no evidence of any earlier problems with regard to the glass. There is clear evidence of the defendant adopting a reactive approach to maintenance rather than a proactive one. There is nothing on the evidence to suggest any factor that should have led the defendant to have an inspection of the doors by a glazier, nor indeed is there any evidence as to whether or not an expert glazier would have recommended replacement of the glass. The Standard, after all, does require that if the glass is replaced it should be replaced with safety glass. There was no evidence to suggest that a prudent owners corporation would have regular inspections of glass doors and, if so, with what degree of regularity."

161 The NSW Court of Appeal upheld the primary judge's conclusion, by majority (Hodgson and McColl JJA; Tobias JA dissented on the application of principle and outcome).

162 Hodgson JA at [5] found that the "absolute" obligations under the equivalent of s 106 of SSMA (s 62(1) and (2) of the 1996 Act) meant that an owners corporation, acting reasonably, should have a monitoring system for maintenance and repair of common property with particular regard under s 62(3) to safety issues associated with such maintenance and repair, but (at [9]-[12]) the evidence in the present case did not establish that such inspections would, on the balance of probabilities, have "made the owners' corporation aware of the problem", in contrast to the "obvious" but minor problem and risk of injury with the "erratic behaviour" of the door closer.

163 As to the interaction of s 62(1) and s 62(2) of the 1996 Act, his Honour said at [4]:

> "4 Accordingly, in my opinion, either words such as "where necessary" or "where appropriate" must be implied, or alternatively subsection (2) must be read together with subsection (1) to the effect that renewal or replacement must be undertaken whenever appropriate in the course of properly maintaining the common property and keeping it in a state of good and serviceable repair, as required by subsection (1). It probably makes little difference in this case which of the two alternatives is chosen, but in my opinion the latter is the preferable view."

164 As to the content of the "absolute" obligation under s 62(1) and s 62(2) of the 1996 Act, his Honour said at [6]-[8]:

> "6 However, in my opinion, this does not mean that the owners' corporation must from time to time hire specialist experts to inspect every aspect of the common property that could possibly give rise to safety issues. Certainly, if it has reason to believe that any such aspect could be dangerous, such as electrical wiring, then it should engage the appropriate expert. But in the absence of any such reason, in my opinion an owners' corporation, acting reasonably, would have in place a system of periodic inspection by someone with appropriate general skills, such as an experienced managing agent or a person with general building maintenance skills, and need not in that event have a system involving regular inspection by more specialised experts.
>
> 7 Turning to the facts of this case, I accept that, if the owners' corporation had actually been aware that the glass in the door was such that it could shatter into dangerous shards in circumstances such as those of this accident, then the exercise of reasonable skill and care would have required precautions such as those taken after the accident in relation to the other door. However, it was not established that the owners' corporation was aware of this, and the crucial question is whether, acting reasonably, it should have been aware of this.
>
> 8 In my opinion, it is not established that, s 62 aside, it should have been so aware. The question is whether s 62 makes a difference to this position."

165 Tobias JA at [49]-[51], [66] said that the obligation to "renew" or "replace" a fixture or fitting under s 62(2) of the 1996 Act arose only where "appropriate", which was broader than "necessary" or "needed". "Where necessary" in the equivalent provision in the preceding *Strata Titles Act 1973* (NSW) was regarded as being deliberately omitted. It would be appropriate to replace a fixture or fitting even though it was neither broken nor patently defective if it presented a reasonably foreseeable safety risk because, for example, it did not comply with current safety standards that, if adopted, would avoid the risk. It was not limited to renewing or replacing parts of the common property that were no longer in repair.

166 This gave rise to an obligation under s 62(2) of the 1996 Act, over and above the general obligation to keep the common property in a satisfactory state of repair, to inspect common property from time to time for the purpose, among others, of replacing any item if it presented a reasonably foreseeable safety risk, not being merely reactive: "It could not escape its obligations by simply hiding its head in the sand" (at [55], [57], [63], [73], [80]). The failure to inspect and replace the front door glass was a breach of s 62(2) which could not have

been cured under s 62(3) because of the obvious danger (at [56], [58]) and replacement would have been recommended on inspection by an appropriately experienced person (at [61]-[63], [80]). Such matters were also relevant to considering standard of care (at [67]-[69], [79]).

167 McColl JA said that nothing in the text of s 62 of the 1996 Act imposed a standard of care higher than the general law of negligence on occupiers which, in taking such care as was reasonable in the circumstances, did not require inspection for the purpose of discovering unknown and unsuspected defects (at [133], [175], [186]). This did not mean that an owners corporation could "turn a blind eye" to issues of maintenance and repair, but the prima facie question to be answered on discharge of duty under s 62(1) and s 62(2) of the 1996 Act was whether an ordinary person in the owners corporation's position would or should have known that there was any risk, of steps that could be taken in response to that risk and the reasonableness of such steps (at [187]).

168 At [158] her Honour referred to the *Macquarie Dictionary* (2nd rev) definition of "maintain" as "… to keep in existence or continuance; preserve; retain … to keep in due condition, operation, or force; keep unimpaired", and to keep something "in repair" as restoring the object to "good or sound condition after decay or damage": "Prima facie, therefore, the obligations of maintenance and repair in [106(1)] are directed to keeping the common property operational and to restoring something which is defective".

169 Her Honour accordingly said that s 62(1) and 62(2) of the 1996 Act are directed to circumstances where something in the common property is no longer operating effectively, is deteriorated, defective or damaged or has fallen into disrepair (at [158], [169], [177]). The *Macquarie Dictionary* definition of "renew" meant "to make new, or as if new, … restore to a former state", while "replace" carried both the connotation of providing a substitute or equivalent or restoring or making good.

170 Her Honour concluded at [188] that the question whether s 62 of the 1996 Act had been breached in such circumstances as to constitute a breach of the owners corporation's duty of care "will depend on the circumstances of each case". In *Ridis* those circumstances were found by the primary judge to be no

evidence that: the owners corporation had been aware of any danger or earlier problems with regard to the glass pane or of any factor which should have led to inspection of the doors by an expert (a glazier); a glazier would have recommended replacement of the glass pane; a prudent owners corporation would have inspected the glass doors regularly or at all: at [189].

171 Her Honour found that, in the circumstances in *Ridis*, those provisions did not require new glass in a door which was relevantly operating as intended and therefore did not require maintenance or repair (at [157], [171], [178]). Nor was the owners corporation obliged to conduct or procure the conduct of an expert assessment of every possible source of danger in the common property and, if so advised, to upgrade that property to accord with contemporary safety standards (at [156], [174]-[177]). The occupier's argument recognised "that there was nothing about the entrance door glass that alerted, or ought to have alerted, the [owners corporation], without the benefit of expert advice, to any danger associated with that glass" (at [124]). See also the reference to "nothing which would have caused the occupier to believe such an [expert] examination was warranted" in the context of assessing breach of the duty giving rise to occupier's liability (at [127]) and the reference in the same context to "inspection for the purpose of discovering unknown and unsuspected defects" (at [129], [149]), in contrast with sufficient knowledge or suspicion to make it unreasonable to fail to act including requiring expert assistance (at [151]).

172 Nothing in *Ridis*, which focused on the contribution s 62 of the 1996 Act to the standard of care in assessing alleged breach of duty in negligence, detracted from the nature of the owners corporation's duty under what is now s 106 as a strict liability: *Seiwa PL v Owners SP 345042* [2006] NSWSC 1157 at [3]-[7], [21]-[23]; and in subsequent authority such as, for example, *Trevallyn-Jones v Owners SP 50358* [2009] NSWSC 694 at [128] et seq, esp at [154]-[156]; *Riley v Owners SP 73817* [2012] NSWCA 410 at [75]-[76], referring to the same content of duty in s 62 of the 1996 Act.

173 Brereton J in *Seiwa* at [4] expressly referred to the duty as including keeping the premises "in proper order by acts of maintenance before it falls out of condition, in a state which enable it to serve the purpose for which it exists".

This encompasses preventative maintenance and repair and financial provision for such preventative work. Reasonable steps is not a defence, nor is contributory negligence a consideration: *Owners SP 345042 v Seiwa Australia PL* [2007] NSWCA 272 at [46]. The statutory provision is not in itself cast in the form of a duty on an owners corporation to take reasonable care. It does not embody a range of reasonable excuses for inaction.

174 There was no qualification to what was said in *Seiwa* at first instance in relation to the strict nature of the duty in s 62 of the 1996 Act. The CA in *Seiwa* and in *Owners SP 50276 v Thoo* [2013] NSWCA 270 dealt with whether s 62 of the 1996 Act gave rise to a private right of claim for damages which (contrary to the primary decision on this point) was found not to be the case, and what fell within the concept of maintain and repair within the strict duty. The private right of claim for damages is now the subject of express statutory endorsement in SSMA s 106(5). Hodgson JA at [5] referred to the strict nature of the duty in similar terms to Brereton J in *Seiwa*, as did Tobias JA at [49], [52], [54], [73], [75] and [79].

175 Alleged restriction of access to, or interference with or resistance to, remediation by a lot owner as a matter of law does not qualify the OC's performance of its strict duty: *Seiwa* at first instance at [21]-[23]; *Carli v Owners SP 56120* [2018] NSWCATCD 55 at [101]-[103]. In accordance with SSMA as currently in force, as already canvassed, the OC can seek orders for access and non-interference: SSMA ss 122, 124. If faced with what it regarded as obstruction and interference it ought to seek orders for access and non-interference, which is a concomitant of performance of its strict duties under SSMA s 106.

176 It is clear that an owners corporation does not require approval by the owners in general meeting to carry out its strict statutory duty under SSMA s 106, although it can gain dispensation from the strict statutory duty by a consent resolution under what is now SSMA s 106(3) and was formerly s 62(3) of the 1996 Act: *Stolfa v Hempton* [2010] NSWCA 218 at [9]-[10].

177 The principles concerning the owners corporation’s obligations under s 62 of the 1996 Act referred to above apply equally to SSMA s 106. They are not

qualified by the decision in *Glenquarry Park Investments PL v Hegyesi* [2019] NSWSC 425 at [57]-[74] et seq, [100]-[114]. In *Glenquarry Park* there were jurisdictional deficiencies in the formulation of the orders for remediation, because the formulation potentially imposed on the owners corporation in that case, without basis in the findings, a scope of works which went beyond the owners corporation's strict duty. It was not a dispensation from the strict duty. Rather, it recognised a degree of flexibility in the form of compliance by the owners corporation with the strict duty, which, on the authorities canvassed extensively by Parker J (*Ridis*, *Thoo* and *Stolfa*) may include replacement if that is reasonably necessary because the item has come to the end of its serviceable operating life and can no longer be kept in a state of good and serviceable repair.

178 The observations and conclusions on application to the facts in *Ridis* were directed to the content of what was strictly liable to be done, particularly in relation to inspection for the purposes of pre-emptive discovery and degree of safety. Once discovered or able, acting reasonably, to be discovered, there was a strict obligation to act to maintain, repair, renew or replace, as appropriate, including to a standard of reasonable but not absolute safety. But, as Hodgson JA said at the passage already cited:

> "this does not mean that the owners' corporation must from time to time hire specialist experts to inspect every aspect of the common property that could possibly give rise to safety issues. Certainly, if it has reason to believe that any such aspect could be dangerous, such as electrical wiring, then it should engage the appropriate expert. But in the absence of any such reason, in my opinion an owners' corporation, acting reasonably, would have in place a system of periodic inspection by someone with appropriate general skills, such as an experienced managing agent or a person with general building maintenance skills, and need not in that event have a system involving regular inspection by more specialised experts."

179 It is not necessary in the present case to resolve the common ground and areas of departure between aspects of the reasoning in the majority and minority in *Ridis* and the way those matters impacted on the evidence as found. There are arguably, for example, matters of commonality of reasoning between Hodgson JA and Tobias JA but a difference of outcome on the basis of what the evidentiary findings revealed.

180 The clear distinction between the application of principle in *Ridis* and the application of principle in the present case which was not adverted to, or given reasoned consideration, in the Tribunal's decision was that in the present case the height and associated risk were obvious or patent and, even more strongly, were known to the OC or ought reasonably to have been known, either directly or by existing knowledge prompting reasonable inquiry which then revealed the risk. By contrast, in *Ridis*, it was held by the majority not to be obvious or something of which the owners corporation, on reasonable scope of investigation as part of the performance of its strict duty, would become aware or ought reasonably to have become aware.

181 Once that distinction is appreciated, it becomes apparent that the application of the legal principles in *Ridis* leads to a different factual conclusion. The obligation under SSMA s 106 extends maintenance and repair and associated replacement and renewal beyond physical deterioration in condition or operation, if it is obvious, or becomes obvious on what would reasonably be investigated, that there is a safety risk in condition or operation.

182 The Building Code of Australia (BCA) replaced Ord 70 on and from 1 January 1993. The modernised and arguably extended equivalent to Ord 70 cl 24.27(3) and consent condition 85 is in cl D2.16 deemed-to-satisfy provisions:

> "Barriers to prevent falls
>
> (a) A continuous barrier must be provided along the side of –
>
> > (i) a roof to which general access is provided; and
> >
> > (ii) a stairway or ramp; and
> >
> > (iii) a floor, corridor, hallway, balcony, deck, verandah, mezzanine, access bridge or the like; and
> >
> > (iv) any delineated path of access to a building,
> >
> > if the trafficable surface is 1m or more above the surface beneath. …
>
> …
>
> (c) A barrier required by (a) must be constructed in accordance with Table D2.16a."
>
> Table D2.16a provides for a barrier with a minimum height of 1m, and the following Note: "1. Heights are measured vertically from the surface

> beneath, except that for stairways the height must be measured above the nosing line of the stair treads."
>
> Barrier openings are restricted so that a 125mm sphere must not be able to pass through the lowest rail and the floor of the landing, balcony or the like and the opening between rails must not be more than 460mm.
>
> For floors more than 4m above the surface beneath, the climbability requirements are that any horizontal or near horizontal elements between 150mm and 760mm above the floor "must not facilitate climbing".

183 It appeared to be common ground, at least on the expert evidence, that the purpose of Ord 70, consent condition 85 and its replacement BCA cl D2.16 and associated table is safety from falling.

184 As already stated, and unlike in *Ridis*, the OC complied with the Council order of 17 January 2007 to upgrade other common area balustrades. It ought to have been reasonably obvious at that point, or at least have given a basis for reason to believe, that the balcony balustrade in question should also have been investigated for similar risks to those that led to the imposition of the Council order. Apparently nothing was done and there was no evidence of any consent resolution against action under what was then s 62(3) of the 1996 Act.

185 The same analysis can be applied to each stage of the events between 2007 and April 2017 that have been comprehensively recited at the outset of these reasons.

186 In this respect, we would arrive at the same conclusion even if the OC's submission that the 2007 Council order was a fire upgrade was correct and/or the OC's late submission had been fully advanced and was correct; namely, that Ord 70 cl 24.27 applied in the context of fire escape handrails, and consent condition 85 did not apply to subsequent structures that changed the measuring base, even if the change was approved.

187 The very fact that handrails and safety were raised between 2007 and 2017 in the form already described, by statutory authority recommendation, should reasonably have prompted the OC to investigate the applicability of such concerns to other structures containing barriers.

188 Further, even if the OC initially disagreed with the proposition they put forward, the owners' requests were not unreasonable and should have prompted appropriate investigation to resolve the expressed safety concern.

189 The result of that investigation, when it was carried out by expert engineering consultants appointed by the compulsory strata manager, was to reinforce the implications of the 2007 order. There was an obvious safety risk that ought to be addressed even if the consultants advised that the balustrade complied with applicable standards when built. Such an obvious safety risk was clearly required to be addressed under the OC's duties in SSMA s 106(1) and 106(2) on the reasoning of the majority in *Ridis*.

190 Following the end of the period of compulsory management, and apart from the limited matters earlier referred to, the work was not progressed by the OC. It was incumbent on the OC, even if there had been no finalised commitment by the compulsory strata manager, to proceed to deal with the obvious safety risk promptly, either by progressing the existing and quoted proposal or by carrying forward a reasonable alternative. The fact that the OC, once out of statutory management, did not proceed was a continuing breach of duty under SSMA s 106(1) and (2).

191 The Tribunal erred in law by not applying the legal principles as we have described them. Alternatively, the Tribunal erred in fact in its application of the legal principles to the present case in a manner that, on the foregoing tests, justify a grant of leave to appeal on the basis that the Tribunal's findings were against the weight of evidence. We are satisfied that the owners may have suffered a substantial miscarriage of justice because there is a significant possibility that the owners would have achieved a more favourable result if the Tribunal's findings had not been against the weight of evidence. The exercise of discretion to grant leave to appeal is justified by the severity that the Tribunal's decision has on the owners. That arose from the clear recognition, in the activity of the strata manager and the consultants engaged by the OC through the strata manager, of the need to investigate the safety risk and, arising from that investigation, to remediate the balustrade to current standards.

192 We note for completeness that the foregoing analysis is not based on the OC's duty of care, which is beyond the jurisdiction of the Tribunal and is distinct from compliance with the statutory duty in SSMA s 106 and its relief: SSMA s 106(8); *McElwaine v Owners SP 75975* [2017] NSWCA 239 at [48]-[71].

Absence of reasons on OC's commitment to remediation

193 The same facts in our view further give rise to the conclusion that the Tribunal erred in law by not making a finding on a material question of fact; that is, on the owners' contention that the OC by its then compulsory strata manager approved and committed to remediation of the balustrade and restoration of lot property removed or affected by and during remediation. The absence of a formal resolution, referred to by the Tribunal, was not of itself conclusive in the context of the evidence we have just described and in particular in circumstances where the strata manager exercised all of the functions of the OC.

194 We particularly refer to the events of 22 August 2016 and 14 September 2016 described above. There seems to us to be no basis for doubt that the OC's consulting engineer was authorised by the strata manager on behalf of the OC to progress, not only the glass wall remediation, but also the balustrade replacement together with any required works that affected the fence and landscaping to obtain access for the other works. The consulting engineer within that authority commissioned the builder to quote, having contracted to go ahead with the adjacent glass wall remediation.

195 The fact that the development of the type of balustrade remediation and its quoted cost was an iterative process does not affect the commitment to the process and its development and completion. The communications in that process were about achieving the objective, not whether the objective should be implemented.

196 The OC's approval for that process was confirmed by the strata manager's iterative involvement in the communications in the process and payment of the consultant engineer's, builder's and architect's invoices for work throughout that process.

197 Alternatively, the Tribunal's decision erred in fact in its application of the legal principles to the present case in a manner that, on the foregoing tests, justified a grant of leave to appeal, on the basis that the finding that the strata manager had not approved the work was against the weight of evidence. We are satisfied that this may have caused a substantial miscarriage of justice by the substantial prospect of an alternative result and justified exercise of discretion by the severity of that outcome. In our view, the Tribunal should have found that the strata manager by itself and its consultants had committed to making safe an obvious risk from the then height of the balustrade or from what was sufficiently obvious reasonably to prompt investigation that confirmed the risk.

198 The upshot of the foregoing conclusion is that the OC was bound to the remediation in the final form that was developed and which complied with current laws, codes and standards, whether or not it was obliged as a matter of law (as we have found) as part of its duty under SSMA s 106 to commit to such remediation.

199 It also follows that the appropriate relief is the form of relief sought by the owners in their second claim rather than the first claim which is tied to the 2017 architect drawings. That is not intended as a criticism of the architect drawings which may well form the basis for what is done. It is simply recognition of the passage of time and the stage in the process reached before it was (we have found) halted when it should not have been.

Procedural fairness and further evidence on measuring base

200 We accept the owners' submission that the owners' objection to what was said to be the OC's raising in closing submissions for the first time that the base measure was the slab or tiling of the courtyard was not the subject of findings by the Tribunal at first instance. In our view the objection should have been the subject of an express finding.

201 That said, in our view the finding, if made on a reasoned basis, would not have changed the outcome and accordingly there was no denial of procedural fairness in not making the finding.

202 In that respect, we accept the force of the OC's submission, based on the references given to the owners' application, the extracts from transcript of

opening and the nature of the evidence led at the primary hearing, that the measuring base for the height of the balustrade was a sufficiently live issue from the outset that measurements from any point that could be argued to be the courtyard surface for the purposes of the relevant statutory instruments was relevant evidence. Such measurements at least were relevant to support the owners' contention as to non-compliance with Ord 70 cl 24.27(3) and consent condition 85 from whichever point was found to be the correct measuring base under those instruments.

203 Indeed, the owners' analysis of the expert evidence in support of another appeal ground, below, shows that the expert evidence canvassed a range of points for the measuring base.

204 Linked with the procedural unfairness complaint was the owners' application to adduce on this appeal further evidence by way of measurement from the courtyard slab or tiling on the slab and a survey, as a means of both illustrating and curing the alleged procedural unfairness. An analogy was sought to be drawn with the raising of new issues on appeal that possibly would have been the subject of evidence had they been raised at the primary hearing: *Coulton v Holcombe* (1986) 162 CLR 1 at 7-9.

205 We note that the owners did not, after receipt of the OC's closing submission raising the argument to which they objected, seek leave to re-open as part of their objection or as an alternative to the objection and to put into evidence, subject to further cross-examination, what is now sought to be put forward.

206 While not conclusive, as a party can seek to have a submission not taken into account as part of the case, on which the party may or may succeed, it does tend to cut the ground from under the current application to adduce further evidence and weaken the complaint of absence of procedural fairness. It infers a forensic decision. It illustrates that the evidence was reasonably available at the time of the primary proceedings, since the further evidence is measurements of existing surfaces and a survey of existing areas.

207 Further, it does not advance the complaint about procedural fairness since it highlights the ability to obtain and seek to use the evidence at the hearing before the Tribunal. This reinforces the necessary rejection of the owners'

objection, which we have already established as necessarily the outcome on other bases of reasoning.

208 We accordingly reject the owners' application to put before us on the appeal this aspect of further evidence. We reach this conclusion without needing to rule on the OC's objections to the further evidence as not meeting the requirements for expert evidence, or the OC's submission on prejudice.

Actual expert measurements and non-compliance

209 We accept the owners' submission that the Tribunal did not refer to the evidence when making its findings at Reasons [5], [40], [44] and [47] that the height of the balustrade complied uniformly with Ord 70 and consent condition 85.

210 The analysis of both experts' evidence (for the OC and the owners) showed that there was a significant variance in height between the eighteen locations measured by the OC's expert. We have already pointed to the owners' expert's acceptance of congruence of his measurements with those of the OC's expert and correction of his 2016 measurements when he had better access.

211 Focusing on the OC's expert's measurements, of the three locations where the measure was from the courtyard slab or tile, only one complied with both Ord 70 and consent condition 85, one complied with Ord 70 but not consent condition 85, and one complied with neither. There was no means of extrapolating from the other measuring bases (top of soil, top of planter box wall or hob and so on) the extra dimension to the courtyard slab or tiling.

212 Accordingly, the absence of reference to the evidence produced findings of uniformity that were clearly not in accord with the OC's expert's evidence, with which the final position of the owners' expert was congruent, and constituted an error of law. Findings ought to have been made on the clear existing evidence that the majority of the balustrade did not comply with consent condition 85, and much of the balustrade did not comply with Ord 70.

213 If we are wrong in concluding that the Tribunal's failure to refer to the evidence constitutes an error of law, we accept that the Tribunal's decision erred in fact in a manner that, on the foregoing tests, justifies a grant of leave to appeal;

namely, that the Tribunal's findings concerning the measurements were against the weight of evidence. We accept that such findings against the weight of evidence may have caused a substantial miscarriage of justice by the substantial prospect of an alternative result and justified exercise of discretion by the severity of that outcome.

214 We also accept that the non-compliance with consent condition 85, contrary to the Tribunal's findings, was clear. A building approval issued under the *Local Government Act 1919* (NSW) is taken to be a construction certificate by force of cl 46(1) of the *Environmental Planning and Assessment (Savings and Transitional) Regulation 1998* (NSW). The deemed construction certificate is taken to form part of the development consent by operation of *Environmental Planning and Assessment Act 1979* (NSW) (EPA) s 4.16(12); *Northcott v Owners SP 31143* [2020] NSWLEC 62 at [15]. EPA s 9.44 gives legal force to a consent condition; a breach can be restrained by order of the Land and Environment Court under EPA s 9.46.

215 Original non-compliance also cuts ground from under the premise on which the Tribunal decided the OC's performance of its duty under SSMA s 106.

Outcome on appeals

216 The appeal in AP 20/17302 is dismissed because the OC has not succeeded in establishing any of its grounds of appeal that were pressed.

217 To the extent necessary, leave to appeal in AP 20/21354 is granted and the appeal is allowed on the various bases and for the reasons set out above.

218 Several matters arise from the foregoing that affects the orders upheld on appeal. We address that in the following section.

Appropriate relief

219 NCAT Act s 81 provides that, in determining an internal appeal, the Appeal Panel may make such orders as it considers appropriate in light of its decision on the appeal. The section sets out a list of available orders which is not exhaustive. That list includes: allowing the appeal; re-determining the matter on the existing evidence with or without any further evidence from the parties; setting aside the primary decision and remitting the whole or any part of the

case to the original jurisdiction of the Tribunal for reconsideration, either with or without further evidence and in accord with the Appeal Panel's directions.

220 We are dismissing the OC’s appeal so no further relief is required to be considered. The orders of the Tribunal that were challenged in the OC's appeal stand.

221 In the present case we consider it to be in the interests of justice to re-determine the matter the subject of the owners’ appeal on the existing evidence. That evidence was comprehensive. We have considered it in detail in determining the outcome of the appeal. The outcome encompasses, in allowing the appeal, what the reasoned consideration of the weight of evidence leads to as the result.

222 We have not included, in considering the existing evidence to re-determine the matter, the further evidence sought to be put before us on the appeal by the owners, for the same reasons in substance as we have refused leave to adduce that further evidence on appeal. For the same reasons in substance, we do not consider that the significance of such evidence requires remission so that it can be adduced and answered.

223 For the reasons we have given in coming to our conclusion on the outcome of the appeal, we consider that the existing evidence required the OC, in performance of its duties under SSMA ss 106(1) and (2), to investigate the balustrade and, once the outcome of the investigation was known, to proceed to renew the balustrade to bring it into compliance with the current requirements of the BCA.

224 We have already said that the Tribunal ought to have found that the compulsory strata manager had committed the OC to that course of work. It has not been carried through. The owners are entitled to the work order they seek to have that work carried through.

225 Given our conclusion concerning the balustrade, it is clear that the timetable set by the Tribunal in its orders concerning replacement of the fencing and landscaping requires variation. We have substituted orders for those made by the Tribunal in this regard, on the basis that the balustrade should reasonably

be replaced before work is undertaken to replace the fencing and the landscaping. Further, due to the passage of time, the quotations for that work are likely to be out of date. We have allowed for updated quotations to be obtained.

Costs of appeal

226 NCAT Acts 60, together with rule 38 of the *Civil and Administrative Tribunal Rules 2014* (NSW), provide that the ordinary costs rules apply, even in the absence of consent circumstances required by s 60, where "the amount claimed or in dispute in the proceedings is more than $30,000".

227 In accordance with Rule 38A the costs rules that were applicable at first instance apply to costs of the appeal.

228 We shall give an opportunity to the parties to make submissions on costs including in respect of seeking a further oral hearing.

229 The Tribunal concluded at Reasons [51], which also referred to its earlier findings, that there were no special circumstances justifying an award of costs in favour of either party.

Orders

230 We make the following orders:

(1) In AP 20/17302, leave to appeal is refused and the appeal is dismissed.

(2) In AP 20/21354:

(a) To the extent necessary, time to file the appeal is extended to and including 12 May 2020 and leave to appeal is granted; and

(b) The appeal is allowed.

(3) The Owners – Strata Plan No.36613 by its agents, employees and contractors is to undertake all works required to place the balustrade on and about the perimeter of the courtyard of lot 17 in SP 36613 into a state of repair that is compliant with the currently applicable provisions of the National Construction Code, applicable Australian Standards and all other applicable laws and codes, with such works to be completed within four months after the date of these orders or such later date as the parties agree or as a Member of the Tribunal determines, on application by a party supported by appropriate evidence and submissions.

(4) The following orders are made in substitution for orders 1 to 4 made in SC 19/1250 on 18 March 2020:

(a) Deborah Doherty and Rajiv (Rahu) Parrab are to obtain updated quotations in respect of replacement of the fence and the landscaping and are to provide those quotations to the Strata Committee no later than 28 days after the date of completion of the balustrade replacement works specified in order 3 above.

(b) The Strata Committee is to consider and select which quotations will be accepted in relation to the replacement fence and the replacement of the landscaping no later than 42 days after the date of completion of the balustrade replacement works specified in order 3 above.

(c) The contractors are to be engaged and the fencing and landscaping works are to commence no later than seventy days after the date of completion of the balustrade replacement works specified in order 3 above.

(d) The fencing and landscaping works are to be completed no later than 3 months after the date of completion of the balustrade replacement works specified in order 3 above.

(5) Any application for costs, together with evidence and submissions in support of the application, is to be filed and served within 14 days after the date of these orders.

(6) Any evidence and submissions in response to an application for costs is to be filed and served within 28 days after the date of these orders.

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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

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