



Civil and Administrative Tribunal

New South Wales

Case Name: The Owners – Strata Plan No 79633 v Graorovska;
Graorovska v The Owners – Strata Plan No 79633

Medium Neutral Citation: [2021] NSWCATCD 103

Hearing Date(s): 22 October 2021

Date of Orders: 29 October 2021

Decision Date: 29 October 2021

Jurisdiction: Consumer and Commercial Division

Before: G Ellis SC, Senior Member

Decision: In SC 21/157634:
1. The application is dismissed by reason of the orders made in the related proceedings (SC 21/19101).
2. The costs of the application shall be considered when dealing with the costs in those related proceedings.
In SC 21/19101:
1. The applicant (lot owner) must allow access to the respondent (owners corporation) for the purpose of enabling work to be carried out in accordance with Schedule 1 provided 48 hours' notice is given.
2. On or before 28 February 2021 the respondent is to complete the work set out in Schedule 1 in a proper and workmanlike manner using good and suitable new materials.
3. Any application for costs is to be made by written submissions which are to be filed and served by 12 November 2021.
4. Any submissions in response to any such application are to be filed and served by 26 November 2021.
5. Any written submissions filed and served in relation

to costs are to indicate:

- (a) whether the party agrees that costs should be determined on the papers (without the need for a hearing),
- (b) what order, if any, should be made by reason of s 104 of the Strata Schemes Management Act 2015, and
- (c) the total amount of legal costs incurred by the party in respect of the application and cross-application.

Catchwords: LAND LAW – Strata title – Maintenance and repair of common property – Access order – Work order – Consideration of reasonable scope of works

Legislation Cited: Civil and Administrative Tribunal Act 2013 (NSW)
Home Building Act 1989 (NSW)
Strata Schemes Management Act 1996 (NSW)
Strata Schemes Management Act 2015 (NSW)

Cases Cited: Glenquarry Park Investments Pty Ltd v Hegyesi [2019] NSWSC 425
Siewa Pty Ltd v The Owners Strata Plan 35042 [2006] NSWSC 1157

Texts Cited: Nil

Category: Principal judgment

Parties: In SC 21/15634:
The Owners – Strata Plan No 79633 (Applicant)
Ms V Graorovska (Respondent)

In SC 21/19101:
Ms V Graorovska (Cross Applicant)
The Owners – Strata Plan No 79633 (Cross Respondent)

Representation: R Yen (Applicant, Cross Respondent)
R Khan (Respondent, Cross Applicant)

File Number(s): SC 21/15634, SC 21/19101

Publication Restriction: Nil

REASONS FOR DECISION

Outline

- 1 The owners corporation lodged an application dated 08 April 2021 which sought access to a lot in a strata titled property at Erskineville for the purposes of inspection and repairs. The lot owner filed a cross-application dated 01 May 2021 which sought orders for work to be carried out on her lot.
- 2 At the conclusion of the hearing, as it appeared that access was not in issue, the Tribunal provided an opportunity for the parties' legal representatives to submit the orders which they suggested should be made to resolve both applications. The documents that were submitted confirmed that there was no issue as to access and that the real issue was what should be the scope of work. The Tribunal's decision as to the scope of work is set out in Schedule 1.

Issues

- 3 A bundle of documents lodged shortly prior to the hearing, marked for identification MFI 1, comprised:
 - (1) a chronology,
 - (2) a Statement of Agreed Facts,
 - (3) a Statement of Agreed Issues, and
 - (4) a copy of the four-page Joint Scott Schedule that was signed by the expert witnesses.
- 4 The Statement of Agreed Issues is quoted below (emphasis added to indicate the word used later to identify the individual issues):

The primary questions before the Tribunal are:

(a) Which of the following methods would result in the owners corporation's obligation to properly rectify the water proofing and structural defects in the **en suite** in lot 8:

(i) the application of sealant as recommended by the owners corporation's expert witness, or

(ii) the full replacement of the en suite as recommended [the lot owner's] expert witness and by the owners corporation's building consultant.

(b) Which of the following methods would result in the owners corporation's obligation to properly rectify the bathtub and water proofing in the **main bathroom** in lot 8:

- (i) the bathlip works involving the application of villaboard and tiling over two of the existing walls abutting the bathtub as recommended by the owners corporation's expert witness, or
- (ii) the full replacement of the bathroom of the bathroom as recommended by [the lot owner's] expert witness.
- (c) In relation to the **decking** of lot 8:
 - (i) responsibility for the significant deterioration of the decking boards to lot 8;
 - (ii) whether the appropriate method of rectification is the full replacement as recommended by [the lot owner's] expert witness and initially [by] the owners corporation's building consultant.
- (d) The responsibility for the repair of the damaged **flooring** in lot 8 caused by the owner's corporation's defective work.
- (e) Whether the rectification method recommended by [the lot owner's] building consultant would result in the owners corporation's obligation to properly rectify the defect in the lower **bedroom**.

- 5 The Statement of Agreed Facts indicates that the owners corporation accepts responsibility in relation to four of those five matters with the exception being the decking.

Evidence

- 6 What was said to comprise the joint tender bundle was a folder containing the documents of the owners corporation (pages 1-317), which were admitted as Exhibit A, plus three folders containing the documents of the lot owner (pages 1 - 930), admitted as Exhibits 1, 2 and 3. It must be noted that only about 30 of those more than 1,200 pages of documents were referred to during the hearing.
- 7 There was lay evidence from nine people. The evidence of the owners corporation contained witness statements from Jennifer Richardson (A38, ie page 38 in Exhibit A) and Robbie Ghamrawi (A42), who were briefly cross-examined, and from Mr Carr (A44), Mark Finkelde (A252), Mel Meek (A41) and David Mogford (A39), who were not cross-examined. The lot owner's evidence contained two affidavits of the lot owner (3/643 and 3/735) and witness statements from John Ligas (3/745) and Lachlan Roots (3/747). The lot owner and Mr Ligas were cross-examined but Mr Roots was not.

- 8 The expert evidence that was the subject of cross-examination was that of Mr Coombes for the lot owner and Mr Ilievski for the owners corporation. It is convenient to set out the expert reports in chronological order:

26 Sep 14 Report of Mr Ilievski (A268)

06 Jun 18 Scope of Works and Tender Documents of Mr Ilievski (A260)

12 Jun 21 Initial report of Mr Coombes (not included)

26 Jul 21 Report in reply of Mr Ilievski (A1)

29 Sep 21 Revised report of Mr Coombes (3/850)

Undated Joint Scott Schedule of Mr Coombes and Mr Ilievski (3/927)

Submissions

- 9 Mr Khan, on behalf of the lot owner, briefly dealt with the five issues. In relation to the decking, he submitted there was nothing more than a suggestion the lot owner had applied a coating to that decking timber. In relation to each of the five items, he contended for the scope of works suggested by Mr Coombes who he noted had suggested further investigation was required in relation to the flooring issue.
- 10 The lot owner's case was said to be that there were defects which had not been addressed and which constituted breaches of the obligation to maintain and repair that is imposed on the owners corporation by s 106 of the SSMA. He also referred to three proposals of the lot owner which were defeated at the Annual General Meeting held on 16 May 2019 (A301) and to the question of whether the lot owner had been served with an access notice.
- 11 Mr Yen, who represented the owners corporation, suggested that the lot owner's (cross-)application should be referred to mediation because mediation was required before it was filed. He also complained that directions were made on 28 April 2021 for an application that did not exist at that time and contended that, in the interest of justice, the cross-application should be dismissed.
- 12 In the course of referring to the five issues, it was contended that the lot owner carried out unauthorised work on the decking and that further investigation was needed in relation to the porch (ie flooring) issue. Mr Yen also referred to the

history of the owners corporation obtaining access to lot 8 and also suggested there was a degree of latitude in relation to the obligation imposed on the owners corporation by s 106 of the SSMA, plainly a reference to what was said in *Glenquarry Park Investments Pty Ltd v Hegyesi* [2019] NSWSC 425 (*Glenquarry*) at [71] which is quoted below.

- 13 Submissions in reply from Mr Khan noted that the lot owner agreed to access to repair defective work. He noted that the cross-application was initially lodged on 28 or 29 April but had to be amended which was why it was dated 01 May 2021. The suggestion that mediation was required was disputed as was the suggestion that the lot owner had carried out unauthorised work on the deck. Mr Khan summarised the situation as a stalemate which required resolution of what work was required to address defects.

Jurisdiction

- 14 As these proceedings relate to premises at Erskineville which are the subject of a strata scheme that was registered on 19 October 2007, the *Strata Schemes Management Act 2015* (the SSMA) applies, and the Tribunal has jurisdiction to hear and determine the proceedings. References to a section in what follows should be read as a reference to a provision in the SSMA unless otherwise indicated.

Relevant law

- 15 The obligation to repair and maintain common property is set out s 106 of the SSMA which is set out in full below:
- (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 special 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.

(4) If an owners corporation has taken action against an owner or other person in respect of damage to the common property, it may defer compliance with subsection (1) or (2) in relation to the damage to the property until the completion of the action if the failure to comply will not affect the safety of any building, structure or common property in the strata scheme.

(5) An owner of a lot in a strata scheme may recover from the owners corporation, as damages for breach of statutory duty, any reasonably foreseeable loss suffered by the owner as a result of a contravention of this section by the owners corporation.

(6) An owner may not bring an action under this section for breach of a statutory duty more than 2 years after the owner first becomes aware of the loss.

(7) This section is subject to the provisions of any common property memorandum adopted by the by-laws for the strata scheme under this Division, any common property rights by-law or any by-law made under section 108.

(8) This section does not affect any duty or right of the owners corporation under any other law.

- 16 As the obligation imposed by the *Strata Schemes Management Act 1996* (the 1996 Act), which applied prior to the SSMA, is in the same terms as the wording of s 106(1), what was said in *Seiwa Pty Ltd v The Owners Strata Plan 35042* [2006] NSWSC 1157 (*Seiwa*) at [3] is still relevant:

That duty is not one to use reasonable care to maintain and keep in good repair the common property, nor one to use best endeavours to do so, nor one to take reasonable steps to do so, but a strict duty to maintain and keep in repair.

- 17 However, more recently, in the 2019 judgement in *Glenquarry*, at [71], it was said (citations omitted):

There is force in the contention that practicality requires allowing a degree of judgment and latitude to an owners' corporation in determining how far to go with repair and replacement work in a maintenance context. Often, the replacement of an old and obsolete item may be cheaper and more effective in the long run than continuing to try to patch it up. There is also a textual basis for allowing a degree of latitude to an owners' corporation in deciding what and when should be replaced. Maintenance is not necessarily confined to responding to a breakdown; the term usually also includes preventative maintenance,

that is, replacing something which has reached the end of its service life before it fails ...

18 While s 108 deals with changes common property by providing a procedure for authorising changes to common property and for ongoing maintenance, s 109(1) removes the need for compliance with that section by permitting a lot owner to “*carry out cosmetic work to common property in connection with the owner’s lot without the approval of the owners corporation*” and cosmetic work is defined in s 109(2) to include painting.

19 The opening words of s 111 are as follows:

An owner of a lot in a strata scheme must not carry out work on the common property unless the owner is authorised to do so-

(a) under this Part ...

20 Since s 109 is in the same Part of the SSMA at s 111, the prohibition imposed by s111 does not apply to cosmetic work which falls within s 109.

21 As to when mediation is required, it is necessary to consider s 227 which is in the following terms:

(1) A registrar must not accept an application made to the Tribunal under this Act unless-

(a) mediation by the Secretary under Division 2 or otherwise has been attempted but was not successful, or

(b) a party refused to participate in the mediation, or

(c) the registrar considers that mediation is unnecessary or inappropriate in the circumstances.

(2) The registrar must inform an applicant that the applicant should arrange for mediation if the registrar rejects an application under this section.

(3) The applicant may arrange for mediation under Division 2 or otherwise.

(4) This section does not apply to applications for the following orders-

(a) an order to appoint, or requiring the appointment of, a strata managing agent,

(b) an order varying or revoking an order that varies or revokes another order by the Tribunal,

(c) an order with respect to waiving, varying or extinguishing a restriction relating to the initial period,

- (d) an order allocating unit entitlements,
- (e) an order with respect to access to a lot by the owners corporation to inspect or repair common property,
- (f) an order seeking provision of records to an owners corporation by a former strata managing agent for the strata scheme,
- (g) an order with respect to the inspection of records of an owners corporation,
- (h) an order imposing a monetary penalty and any associated order as to the payment of costs.

Consideration

- 22 It is convenient to first consider the submission that mediation was required. The application, which sought an order for access, did not require mediation prior to being lodged by reason of s 227(4)(e). Given that the application sought an order for access so that work to be carried out and the cross-application sought an order for work to be carried out, the application of the lot owner was not only in relation to the same strata scheme and between the same parties but sought related orders in relation to the same subject matter. In other words, the lot owner's cross-application sought the investigation and repair or matters which formed the basis of the owners corporation's application for an access order.
- 23 In those circumstances, it is understandable that the Tribunal's registrar would consider that mediation is unnecessary or inappropriate in the circumstances, as provided in s 227(1)(c), and a perusal of the Tribunal's file in relation to the cross-application reveals that such a decision was made.
- 24 Further, a suggestion that an application should be dismissed, at the end of a contested hearing, when the Tribunal is ready to rule on the issues, so that a party can seek mediation before then lodging an application for the same relief is contrary to the Tribunal's guiding principle, set out in s 36 of the *Civil and Administrative Tribunal Act 2013 (CATA)*, namely: "*to facilitate the just, quick and cheap resolution of the real issues in the proceedings.*" If that point was to be taken, it should have been taken earlier.
- 25 For those reasons, the suggestion that the cross-application be referred to mediation or be dismissed by reason of there being no prior mediation is rejected.

- 26 For the same reasons, the Tribunal also rejects any suggestion that directions should not have been made in relation to the cross-application before it was filed. It is commonly the case that the Tribunal makes directions in anticipation of a cross-application being filed to avoid unnecessary delay and this save both time and costs for all concerned, consistent with the Tribunal's guiding principle, set out above.
- 27 As there is no issue as to an order being made for access, it remains to consider the five matters listed in the Statement of Agreed Issues, which are "*the real issues in the proceedings*".

En suite

- 28 This issue is item 3 in the Joint Report where it was recorded that there is agreement that the shower leaks and that the owners corporation bears the responsibility for rectification. Mr Ilievski agrees with the scope of works and cost proposed by Mr Coombes. Accordingly, this is a topic where the experts agree on many but not all the matters requiring a decision.
- 29 The only remaining matter is whether to adopt Mr Ilievski's suggestion that a sealant product called Megasealed should be used on a performance basis. His opinion is based on two other bathrooms having been remediated using that option.
- 30 In his report, Mr Coombes noted that Mr Ilievski had previously revised his methodology from partial repair to full restoration. However, he disagreed with the use of a sealant, saying it was a temporary measure and the leaking will re-occur. Another reason he gave was that an application of sealant to tiles as the only waterproofing mechanism does not address defects in the water proofing membrane or the structural defects. His view was that the rectification method he proposed would ensure compliance with AS 3740, AS 3958.1, the *Building Code of Australia* (BCA) and s 18B of the HBA.
- 31 When cross-examined in relation to this topic, Mr Coombes expressed the view that, although Megasealed would cost less, it was not durable for a shower recess. The submissions of the parties' lawyers did not add to this topic.

32 The evidence provided by the owners corporation does not provide sufficient support for acceptance of the Megasealed option and there was no effective challenge to the opposition of Mr Coombes to that option, either in the report of Mr Ilievski or in cross-examination of Mr Coombes. Accordingly, the scope of works suggested by Mr Coombes for this item is adopted by the Tribunal.

Bathroom

33 This issue is item 2 in the Joint Report. As far back as 26 September 2014 it was observed that the bathtub had not been recessed into the abutting walls (A270). That was, at that time, assessed to have involved a breach of the *Building Code of Australia* and a breach of the statutory warranties provided by s 18B of the *Home Building Act* 1989. Not surprisingly, the experts agree that the bathtub was installed incorrectly, and it is agreed that this is a matter which is the responsibility of the owners corporation.

34 In his report, Mr Coombes noted that silicone was used on the bathtub lip as the sole waterproofing mechanism and that it had failed, allowing water to enter the void underneath the bath podium.

35 The Tribunal is satisfied that the failure to address this issue over a period of more than 7 years amounts to a breach of s 106. It only remains to consider the reasonable method of rectification.

36 From the expert reports, Mr Ilievski suggests a method of applying a water-resistant lining, namely Villaboard, to the existing tiles and then attaching new tiles to the Villaboard while Mr Coombes disagreed with that method because it does not address any damage behind the existing structure that has occurred over the last 8 years. In the joint report, each expert agrees with the scope of work or cost of rectification of the other expert.

37 Thus, the sole issue for this topic is which method of rectification should be followed.

38 Cross-examination of Mr Coombes revealed his view that (1) the method proposed by Mr Ilievski would result in taps being recessed into a wall which may render them more difficult to operate or repair, (2) the grout joints would not line up and (3) the chance of being able to obtain the same tiles was low.

The second of those three matters is a cosmetic issue and, as to the third, similar tiles appear to be achievable and that would be a reasonable outcome.

39 Submissions from the legal representatives did not take the topic further other than to remind the Tribunal of the need to consider both cost and effectiveness.

40 It is noted that the 26 September 2014 document provided in the owners corporation's evidence (A270) recorded that: "*This water entry will result in damage being cause within the confined space and adjacent areas.*" Although that page also says: "*Refer to remedial methodology under clause 3.1.15 of this report*", the page containing that clause does not appear to have been provided to the Tribunal. The document prepared on 06 June 2018 and revised on the 25 June 2018 suggests, under a heading "*Bathroom Remediation Methodology*": "*Remedial Repair – Complete Bathroom Waterproofing*" (A261)

41 The Tribunal considers the lot owner has established that the method of rectification should be that proposed by Mr Coombes for four reasons. First, that will address any damage which has occurred over the past eight years unlike the 'tiles over tiles' method, albeit with a water-resistant layer of Villaboard in between. Although the method proposed by Mr Ilievski will undoubtedly be cheaper and may be effective, based on its use in other bathrooms within the property, the owners corporation's evidence is that it was advised in 2014 that "*water entry will result in damage being cause within the confined space and adjacent areas*". Secondly, the method now proposed by the lot owner was previously proposed in reports provided to the owners corporation. Thirdly, overlooking cosmetic matters, such as grout lines and tile colours, the recessing of taps into a wall may well be problematic. Fourthly, it is noted that Mr Ilievski, in relation to the en suite shower, changed his proposed method of rectification from partial repair to full restoration.

Decking

42 This issue is item 1 in the Joint Report. It relates to a timber deck in the courtyard at the rear of the apartment which is lot 8. The matters requiring determination are responsibility for the deterioration in the decking boards and the appropriate method of rectification.

- 43 Mr Coombes suggested five causes of premature deterioration: (1) the underside of the decking boards being only 200mm above a concrete slab, (2) no crossflow ventilation as the deck is enclosed on all four sides, (3) a drain being partially blocked, (4) a failure to treat the boards with preservative since November 2016, and (5) a lack of maintenance. He noted that the lot owner had re-applied a stain finish to the upper surface of the decking boards which he said would have been beneficial and that replacement of the decking boards for lots 5 and 6 had been approved and completed, as reflected in minutes dated 17 October 2016. His opinion was that excessive mould and decay on the underside of the decking boards meant they needed to be replaced and not repaired.
- 44 Mr Ilievski suggested that work had been done on the deck since its original installation and that the deck appeared to be in sound condition in November 2016. He referred to a “*deck coating application carried out by others*” and suggested that “*deterioration of the deck coating has subsequently occurred over time as regular maintenance is required*”.
- 45 Cross-examination of Mr Coombes in relation to this topic only revealed that the lot owner had applied a preservative. When questioned on this topic, Mr Ilievski indicated that he did a desktop review. In response to the Tribunal’s question of how often any coating or preservative should be applied he said 12 months and that while the upper surface would be done, the underneath surface would generally not be done.
- 46 In submissions, Mr Khan noted that the owners corporation’s case went no further than a suggestion that the lot owner had applied a coating to the deck. Mr Yen submitted that there had been unauthorised work by the lot owner, contrary to s 108, which was said to have removed the obligation of the owners corporation. He also referred to s 143, being a section dealing with the requirements and effect of common property rights by-laws. However, there was no reference to any such by-law.
- 47 In those submissions, there was also reference to the photos at A28-29 which bore descriptions suggesting they were taken on 11 February 2013 but the Tribunal’s attention was not directed to either what has changed since or who

was responsible for any such change during the ensuing period of more than 8 years.

- 48 The suggestion that an application of a coating by the lot owner was contrary to s 108 is rejected as s 109 permitted that work to be done. Further, the Tribunal considers that work of the lot owner to have been beneficial and not detrimental.
- 49 Despite Mr Ilievski's concession that the decking timbers should be treated with a preservative or coating every 12 months, there is no evidence that the owners corporation carried out such maintenance at any time since November 2016.
- 50 The suggestion that responsibility for the deterioration of the decking timber should be attributed to the lot owner is rejected. There was no effective challenge to the reasons for deterioration suggested by Mr Coombes and the small distance between the slab and the deck plus the lack of ventilation reinforce the need for maintenance, including annual coating of at least the upper side of the decking timbers and ensuring that the relevant drain is not blocked.
- 51 It is the Tribunal's view that there has been a breach by the owners corporation of the obligation to repair and maintain imposed by s 106, even allowing for the "latitude" suggested by *Glenquarry* rather than the strictness suggested by *Seiwa*.
- 52 From the evidence, having regard to the submissions, the Tribunal is satisfied that the reasonable method of rectification is replacement of the decking timbers. The recommendations of Mr Coombes are adopted by the Tribunal and have been included in Schedule 1.

Flooring

- 53 This issue is item 4 in the Joint Report where it is called "*The Front Porch*".
- 54 The report of Mr Coombes suggests the owners corporation undertook partial tiling and water proofing work near the front door of lot 8 and that water is penetrating into the lower bedroom of that lot. After noting the lot owner's information that water ponds around the waste pipe, adjacent to an internal

wall and close to the front door, he determined the fall towards the floor waste was 0.4% in one direction and 0.6% in the other, both less than the 1% (ie 1 in 100) minimum fall requirement of AS3740 which applies to domestic wet areas.

- 55 Mr Ilievski agreed that the owners corporation undertook partial tiling and water proofing work at the front of lots 7 and 8, in the area of the floor waste due to water penetration into the basement car park area. He suggested the gradient was governed by the adjacent, original floor tiling to prevent lipping which may pose a trip hazard. It was suggested that ponding was due to surface tension and a slow rate of evaporation and that there should be further investigation.
- 56 In the joint report it was accepted that this was an area where responsibility lay with the owners corporation. Mr Ilievski suggested there is no demonstrable loss, that the area is fit for use and is not causing water penetration issues. Mr Ilievski accepted the scope of works proposed by Mr Coombes if the Tribunal was satisfied that rectification was required. However, he suggested that improved waterproofing be included.
- 57 In cross-examination, Mr Coombes disagreed with surface tension as an explanation, suggesting that might be the case if the water that pooled was only about 1 mm deep, but several millimetres could not be due to surface tension. He also suggested that the problem was a lack of drainage not a lack of evaporation. When questioned on this topic, Mr Ilievski indicated that he had not attended this area to inspect this issue but said he was familiar with the area, having been there previously.
- 58 In closing submissions for the owners corporation, it was suggested that this was an area that required further investigation.
- 59 The unchallenged evidence is that there is an insufficient fall in the floor of the front porch. Accordingly, the issue is one of drainage not evaporation and the Tribunal is not persuaded that surface tension is a satisfactory explanation. It appears that the current situation is the result of partial tiling and rectification work. In relation to this topic, the Tribunal is satisfied that what is required is rectification and not further investigation. For that reason, the scope of works suggested by Mr Coombes is adopted with an additional element of

waterproofing since the scope of work proposed by Mr Coombes only covered the removal and replacement of floor tiles.

Bedroom

- 60 This issue is item 5 in the Joint Report. Simply stated, there is water penetrating the timber flooring of the lower-level bedroom, evident from swelling and distortion at the joins between floorboards.
- 61 Mr Coombes obtained elevated moisture readings in those floorboards and noted that the surface of the tiled, external courtyard is 22mm higher than the floor level in the bedroom. Instead of the recommended step-down of 150mm (ie the bedroom floor being 150mm higher than the courtyard surface) there was a timber-cladded hob providing a barrier between those areas.
- 62 Mr Ilievski suggested that Mr Coombes report "*noted possible water penetration*" and said he had yet to carry out any investigation of this topic. That is surprising given that the cross-application has been on foot since 01 May 2021, the initial report of Mr Coombes was dated 12 June 2021 and the final report of Mr Coombes was dated 29 September 2021.
- 63 In the joint report, it is recorded that Mr Ilievski considered that, as Mr Coombes only recorded water penetration on the left side of the bedroom floor, there might be an isolated water leak. As a result, he contended for flood testing and invasive investigation work. Mr Ilievski agreed that water was penetrating the bedroom from the courtyard and accepted that the owners corporation bore responsibility but disagreed with the scope of works proposed by Mr Coombes on the basis that further investigation was required. Mr Ilievski agreed with the cost to rectify, as suggested by Mr Coombes, subject to further investigation.
- 64 When it was put to Mr Coombes that there should be further investigation, his understandable response was that he had done that investigation. During his cross-examination, Mr Ilievski suggested that the balcony "*may not be the final source*", and that if water was penetrating the hob, then it would show along the entire length of that interface.

- 65 The opinions of Mr Ilievski suffer from the fact that his was a desktop review and that he did not visit the site. It is clear there is water penetration and not what Mr Ilievski referred to as "*possible water penetration*".
- 66 However, the lot owner's evidence does not establish a causal link which would render the proposed scope of work appropriate and there may be one or more other causes operating which would mean that carrying out the scope of work proposed by Mr Coombes may not remedy the water penetration effects he observed. This situation arises because there is no evidence that Mr Coombes carried out any flood test in this area to confirm the causation issue.
- 67 In those circumstances, the appropriate course is to make an order for the scope of work for which Mr Coombes contends but make it subject to flood testing being carried out.

Orders

- 68 When the Tribunal requested that the legal representatives provide a document setting out the orders for which they contended, the document submitted for the owners corporation (MFI 2) included further submissions, under a heading "*Reasons*". Such submissions, which should not have been made, have been ignored as it would be procedurally unfair to permit one party to make additional submissions after the time for submissions has closed.
- 69 The orders sought by the owners corporation only addressed the bathroom and en suite, suggested inspection before carrying out any work and did not refer to any scope of work, commencement date or completion date. It was suggested those orders made made in relation to the application of the owners corporation and that the application of the lot owner be dismissed.
- 70 In contrast, the orders for which the lot owner contended (MFI 3) were overly prescriptive in that they sought orders which covered matters such as preparation for the works and contract administration.
- 71 The Tribunal's power to make an order for access for the purpose of carrying out inspections or work is contained in s 124 and s 232(1)f) provides the Tribunal with the power to make an order that work be done in order to

comply with s 106 because that involves an exercise, or failure to exercise a function imposed on the owners corporation.

- 72 The Tribunal consider that orders should be made in a standard form for matters of this nature, with the scope of work taken from the report of Mr Coombes but with two additional matters. First, the inclusion of a waterproofing step in relation to the flooring issue (ie the front porch). Secondly, an additional investigative step to provide for flood testing in relation to what has been referred to as the lower bedroom.
- 73 It remains to consider the commencement and completion dates which were not addressed by either lawyer during the hearing and only in the orders suggested by the lot owner. The document that was submitted on 22 October 2021 sought commencement by 01 November 2021, which the Tribunal would consider to be short for the commencement of remedial work but not when there is an investigative step included in the orders, being a step that can and should be undertaken promptly. The suggested completion date was 01 February 2022 which allowed a period of three months but included the Christmas period. That, combined with a recent resumption of building activity after restrictions due to the pandemic, is considered an unduly tight time frame.
- 74 The Tribunal considers its work order does not need to specify any date by which the work should commence, only that the work should be completed by 28 February 2022. Rather than merely refer to the portions of the report of Mr Coombes which set out his proposed scope of works, the preferable course is to set those matters out in a schedule so that it can be the point of reference rather than that report.
- 75 It is clear, from the suggested orders submitted by both parties, that it will be necessary to consider an application for costs. Accordingly, the orders will include provision for written submissions to cover that aspect. The application of s 104 of the SSMA to these proceedings has also been raised and will need to be both addressed by the parties and considered by the Tribunal.
- 76 However, as it appears the conduct of these applications may have resulted in costs that will far outweigh the cost of the work covered by the orders, procedural fairness requires that the parties be advised that the Tribunal will be

considering whether there has been compliance with s 36(4) of the CATA which sets the goal of costs being proportionate to the subject matter of the proceedings, noting that s 36(3) of the CATA imposes a duty on both the parties and their lawyers. A direction needs to be included to enable the Tribunal to know the legal costs incurred by the parties when considering the question of proportionality.

77 As the lot owner sought a work order which the Tribunal has determined should be made, and since an order for access is the subject of consent, the convenient course is to dismiss the application and make all the orders in relation to the cross-application.

78 For the reasons set out above, the orders that will be made are as follows:

In SC 21/157634:

1. The application is dismissed by reason of the orders made in the related proceedings (SC 21/19101).
2. The costs of this application shall be considered when dealing with the costs in those related proceedings.

In SC 21/19101:

1. The applicant (lot owner) must allow access to the respondent (owners corporation) for the purpose of enabling work to be carried out in accordance with Schedule 1 provided 48 hours' notice is given.
2. On or before 28 February 2021 the respondent is to complete the work set out in Schedule 1 in a proper and workmanlike manner using good and suitable new materials.
3. Any application for costs is to be made by written submissions which are to be filed and served by 12 November 2021.
4. Any submissions in response to any such application are to be filed and served by 26 November 2021.
5. Any written submissions filed and served in relation to costs are to indicate:

whether the party agrees that costs should be determined on the papers, without the need for a hearing,

what order, if any, should be made by reason of s 104 of the Strata Schemes Management Act 2015, and

the total amount of legal costs incurred by the party in respect of the application and cross-application.

Schedule 1

1 En suite bathroom

Preparation

- (a) Provide protection to existing surfaces from the street to the en suite and remove upon completion.
- (b) Arrange electrician to attend the property to disconnect power from the en suite and re-connect power upon completion.
- (c) Provide temporary lighting to the en suite.

Carpenter

- (d) Carefully remove the door and door architraves and store for re-use.
- (e) Remove en suite fittings and discard.

Plumber

- (f) Remove toilet suite, vanity unit, tapware, and floor wastes and discard.

Demolisher

- (g) Remove and dispose of the mirror.
- (h) Strip out all wall tiling and lining boards and dispose of same.
- (i) Strip out all floor tiling, bedding mix, angles and waterproofing material and dispose of same.
- (j) Clean and prepare the structural floor surface ready to receive new waterproofing and tiles.

Plasterer

(k) Supply and install new water-resistant lining boards.

Waterproofer

(l) Provide a new waterproofing compound to the entire floor turned up a minimum of 150 mm to the walls.

(m) Provide waterproofing to the walls around the shower in strict accordance with Figure C3(b) of AS 3740.

(n) Provide all necessary bond breakers, water stops and angles at the correct locations.

Tiler

(o) Supply and lay bedding mix, screed to floor-wastes at a minimum fall of 1:100.

(p) Supply and lay floor tiles and re-install floor wastes. Supply and lay wall tiles from floor to ceiling.

Glazier

(q) Re-install the shower screen.

(r) Supply and install a new mirror to the original dimensions.

Carpenter

(s) Re-hang the door and install the architraves.

(t) Supply and install new bathroom fittings.

Plumber

(u) Supply and install new vanity unit, toilet suite and tapware.

Painter

(v) Make good and re-paint all affected surfaces.

Cleaner

(w) Remove all debris from the site and clean surfaces, as required.

2 Main bathroom

Preparation

- (a) Provide protection to existing surfaces from the street to the main bathroom and remove upon completion.
- (b) Arrange electrician to attend the property to disconnect power from the main bathroom and re-connect power upon completion.
- (c) Provide temporary lighting to the main bathroom.

Carpenter

- (d) Carefully remove the door and door architraves and store for re-use.
- (e) Remove bathroom fittings and mechanical ventilation vent and discard.

Plumber

- (f) Remove bath, toilet suite, vanity unit, tapware, and floor-wastes and discard.

Demolisher

- (g) Remove and dispose of the cornice and the mirror.
- (h) Strip out all wall tiling and lining boards and dispose of same.
- (i) Strip out all floor tiling, bedding mix, angles and waterproofing material and dispose of same.
- (j) Clean and prepare the structural floor surface ready to receive new waterproofing and tiles.

Carpenter

- (k) Construct a frame to support the bath.
- (l) Provide a recess in the wall framing for the insertion of the bath lip.

Plasterer

- (m) Supply and install new water-resistant wall lining boards.
- (n) Supply and install new cornice where required.

Waterproofer

- (o) Provide a new waterproofing compound to the entire floor area turned up a minimum of 150 mm to the walls.
- (p) Provide waterproofing to the walls around the shower in strict accordance with Figure C3(b) of AS 3740.
- (q) Provide all necessary bond breakers, water stops and angles at the correct locations.

Tiler

- (r) Supply and lay bedding mix, screed to floor waste at a minimum fall of 1:100.
- (s) Supply and lay floor tiles and re-install floor wastes. Supply and lay wall tiles from floor to ceiling.

Glazier

- (t) Re-install the shower screen no less than 900 mm in length.
- (u) Supply and install a new mirror to the original dimensions.

Carpenter

- (v) Re-hang the door and re-install the architraves.
- (w) Install the bathroom fittings.

Plumber

- (x) Supply and install the bath, vanity unit, toilet suite and tapware.

Painter

- (y) Make good and re-paint all affected surfaces.

Cleaner

- (z) Remove all debris from the site and clean all surfaces, as required.

3 Timber deck

- (a) Allow for preliminaries including surface protection and safe work methods.

- (b) Remove and dispose of the existing hardwood decking.
 - (c) Clean the surface of the concrete slab and remove all debris, particularly around the drainage outlet.
 - (d) Check falls to the drainage outlet and eliminate any ponding using Ardit or similar concrete levelling compound.
 - (e) Supply and install Modwood decking or similar composite decking in strict accordance with the manufacturer's instructions.
- 79 (f) Clean up on completion and make good any affected surrounding surfaces.

4 Front porch

- (a) Remove existing floor tiles and bedding mix.
- (b) Provide waterproofing as specified in writing by Mr M Ilievski: (02) XXX or XXX.
- (c) Supply and lay new bedding mix, screed to floor waste at a minimum fall of 1:100.
- (d) Supply and lay new floor tiles.

5 Lower bedroom

Investigation

- (a) Carry out flood testing in the presence of Mr Ilievski and Mr D Coombes: XXX or XXX.
- (b) Depending on the outcome of that flood testing, carry out either the following scope of works or such other written scope of works as may be agreed by Mr Coombes and Mr Ilievski.

Tiler

- (c) Remove floor tiles, skirting tiles and bedding mix from the front courtyard.
- (d) Supply and lay new tiles and bedding mix upon completion of waterproofing.
- (e) Supply and fix new skirting tiles upon reinstatement of external cladding.

Carpenter

- (f) Temporarily remove the stacker door panels to relieve the load on the door threshold.
- (g) Remove the timber panel under the door threshold on the inside of the building and remove the cladding under the threshold on the outside of the building.
- (h) Replace the timber panel and external cladding upon completion of waterproofing.
- (i) Replace the stacker door panels and test for smooth operation.

Waterproofer

- (j) Re-waterproof courtyard substrate, turning the membrane up 150 mm around the perimeter walls.
- (k) Turn the membrane up at the hob, slide it between the hob and the door threshold and terminate at the back of the threshold.
- (l) Take care to include both ends of the hob such that the membrane forms a waterproof tray under the threshold.
- (m) During that process, remove any packers under the door that pose an obstruction and replace upon completion of the membrane.

Painter

- (n) Paint and make good all affected surfaces.

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

Registrar



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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