



Civil and Administrative Tribunal  
New South Wales

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Case Name: Worrall v The Owners - Strata Plan No. 43357

Medium Neutral Citation: [2021] NSWCATCD 99

Hearing Date(s): 28 June 2021

Date of Orders: 16 September 2021

Decision Date: 16 September 2021

Jurisdiction: Consumer and Commercial Division

Before: D Robertson, Senior Member

Decision:

- (1) Order pursuant to s 232 of the Strata Schemes Management Act 2015 (NSW) (SSMA) that the Owners Corporation - Strata Plan No 43357, carry out the remedial work set out in the joint report of Michael Ilievsky, John Riad and Daniel Lee dated 21 June 2021 (Joint Report) in respect of Item 2, the cavity flashing defect, within six months of the date of these orders.
- (2) Order pursuant to s 232 of the SSMA that the Owners Corporation - Strata Plan No 43357 undertake, in co-operation with the applicant, the remedial work set out in the Joint Report in respect of Item 3, the inadequate drainage and fall of the roof terrace within Lot 50, within six months of the date of these orders
- (3) Note that the Owners Corporation is responsible for the rectification of that part of the roof terrace which does not form the roof of the balcony to Lot 50.
- (4) Grant the parties liberty to apply for directions in the event the parties cannot agree on the appropriate allocation of the costs of rectification in respect of Item 3 in the Joint Report.

(5) The application is otherwise dismissed.

(6) Unless either party files written submissions within 14 days of the date of this decision seeking an alternative order in relation to the costs of the proceedings there will be no order in relation to the costs of the proceedings.

(7) If either party files submissions in accordance with order (6), the other party may file submissions in response within a further 14 days.

(8) If no submissions are filed in accordance with orders (6) and (7), there will be no order as to the costs of the application.

Catchwords: LAND LAW – Strata title – Common property – whether awning over roof terrace was common property – Common property memorandum – Common property rights by-law requires lot owner to repair and maintain common property

Legislation Cited: Strata Titles (Freehold Development) Act 1973 (NSW)  
Strata Schemes Management Act 2015 (NSW)  
Strata Titles Act 1973 (NSW)

Cases Cited: Stolfa v Hempton [2010] NSWCA 218  
The Owners Strata Plan No 2245 v Veney [2020] NSWSC 134

Texts Cited: Nil

Category: Principal judgment

Parties: Lynne Maree Worrall (Applicant)  
The Owners - Strata Plan No 43357 (Respondent)

Representation: Solicitors:  
Bannermans Lawyers (Applicant)  
Strata Title Lawyers (Respondent)

File Number(s): SC 21/06648

## REASONS FOR DECISION

### Introduction

- 1 The applicant, Ms Worrall, is the owner of Lot 50 in Strata Plan No 43357, a multi-storey strata scheme in Kensington, New South Wales.
- 2 The applicant filed an application on 12 February 2021 seeking orders requiring the respondent Owners Corporation to undertake work on the building.
- 3 By her application Ms Worrall also sought compensation, but that claim was not maintained at the hearing.
- 4 Both parties retained experts, Mr Ilievsky for the applicant, and Mr Lee and Mr Riad for the Owners Corporation.
- 5 The experts met in conclave and produced a joint report in which they identified three elements of the building requiring rectification and agreed a scope of works for the rectification.
- 6 At the hearing the parties were agreed that the agreed scope of works needed to be carried out. They disagreed as to whether the Owners Corporation was responsible for carrying out the work.

### Background

- 7 The strata scheme was registered in 1993 and was at that time regulated by the *Strata Titles Act 1973* (NSW) (renamed the *Strata Titles (Freehold Development) Act 1973* (NSW) in 1996).
- 8 The four penthouse units within the strata plan, Lots 47 to 50, each included both a balcony on level 12 and part of the roof deck on level 13. Originally the roof decks were only accessible from the common property fire stairs. Over time common property rights by-laws have been passed by the Owners Corporation, which enabled the owners of Lots 47 to 50 to construct a direct means of access between their balconies on level 12 and their respective parts of the roof deck on level 13.

- 9 Special by-law 32 related to Lot 47, special by-law 33 related to Lots 49 and 50 (Ms Worrall's lot), special by-law 34 related to Lot 48. In each case the substantive wording of the by-law was in the following form:

That the Owners [of the relevant lot or lots] are granted the right to exclusive use of that area of Common Property being the concrete slab which forms the roof of the balcony of the Lot and the floor of the Roof terrace above, shown on the Strata Plan as part of the Lot, for the specific purpose of building a metal Spiral Staircase, partially enclosed by a Polycarbonate screen, penetrating the concrete slab to permit access to the Roof Terrace from the Balcony of the Lot subject to the following terms and conditions”.

- 10 The terms and conditions imposed by each by-law included:

(e) that the lot Owners shall maintain and keep the structure and any common property the subject of the exclusive use referred to herein, in a state of good and serviceable repair and shall comply with any reasonable request from the Owners Corporation to carry out repairs or maintenance to the structure and common property.

- 11 Special by-law 35 granted the owner of Lot 47 a further right to exclusive use of the common property in order to carry out further building works including the installation of a lift, the replacement of the “existing patio roof”, and the installation of a kitchen and bathroom. The bathroom authorised by by-law 35 was installed in the south west corner of the roof area of Lot 47 immediately adjacent to the wall dividing Lot 47's roof area from the roof area of Lot 50.
- 12 Special by-law 36 granted Lot 49 exclusive use privileges and exclusive use and enjoyment of common property in order to install a spa and undertake work described as “enclosing the old pergola with full and half sliding windows/doors”.
- 13 A spiral staircase between the balcony on level 12 and the roof terrace on level 13 within Lot 50 was constructed before Ms Worrall acquired that lot. The staircase is located directly adjacent to the edge of the roof terrace, a short distance from the south west corner of the terrace.
- 14 Part of the roof terrace within Lot 50 is covered by a tiled roof which was generally referred to in the evidence as an “awning”.
- 15 The three elements of the building requiring rectification according to the experts were:

- (1) The awning on the terrace within Lot 50 was defective in that it had “an inadequate pitch for a tiled roof”. The rectification work which the experts agreed was required to rectify this issue involved the removal of the tiled roof and its replacement with a metal roof.
- (2) A defect in the cavity flashing in the in the southeast corner of the dividing wall between Lots 47 and 50 in the southeast corner of the roof terrace of Lot 50, causing water ingress to the bathroom constructed on the roof terrace of Lot 47. The rectification work which the experts agreed was required in respect of the cavity flashing defect involved:
  - (a) Removing three to five courses of brickwork within the wall;
  - (b) Supply and installation of cavity flashing and waterproofing.
- (3) Inadequate drainage and fall causing ponding on the roof terrace itself. The rectification work which the experts agreed was required in respect of this item involved:
  - (a) The removal of all paving on the roof terrace;
  - (b) The installation of additional drainage with diversion of the downpipes to drain near the floor waste sump outlets and away from the cavity flashing interfaces;
  - (c) Construct a landing to the spiral staircase for the purpose of drainage;
  - (d) Rescreed over the waterproof membrane, apply an efflorescence barrier, and install new tiles.

16 Ms Worrall asserted that the Owners Corporation was responsible for all of the work which the experts agreed was necessary and that it had, in breach of its obligations pursuant to s 106 of the *Strata Schemes Management Act 2015* (NSW) (SSMA), failed to carry it out.

17 Section 106 of the SSMA provides:

**106 Duty of owners corporation to maintain and repair property**

- (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.

- 18 The Owners Corporation disputed that the awning was common property and submitted that the obligation to repair the awning fell upon the applicant. The Owners Corporation submitted that by-law 33 casts the obligation to repair and maintain the concrete slab constituting the roof terrace upon the owner of Lot 50 and that, accordingly, the responsibility for rectifying the inadequate fall lay upon the applicant. The Owners Corporation further submitted that the responsibility for rectifying the cavity flashing in the wall between Lots 47 and 50 lies upon the owner of Lot 47, by virtue of by-law 35 which authorised the owners of Lot 47 to undertake the works which included the installation of the bathroom.

### **Evidence**

- 19 The parties produced a joint tender bundle for the hearing which was admitted into evidence without objection.
- 20 Mr Ilievski and Mr Lee gave oral evidence at the hearing. To the extent the experts' evidence is relevant to the issues to be determined, I will deal with it in considering those issues.
- 21 The issue which I need to determine in respect of each building element is whether it is the Owners Corporation or the applicant who is responsible for carrying out the work which the experts agree is necessary. I will address each of the building elements in turn.

## First element – the awning

- 22 The first issue for determination in relation to responsibility for the awning is whether the awning is, or is not, common property.
- 23 Section 5(1) of the *Strata Titles Act 1973*, as in force at the time of registration of the strata plan, provided a definition of floor plan as follows:
- floor plan** means a plan, consisting of one or more sheets, which:
- (a) defines by lines (in paragraph (c) of this definition referred to as **base lines**) the base of each vertical boundary of every cubic space forming the whole of a proposed lot, or the whole of any part of a proposed lot, to which the plan relates,
  - (b) shows:
    - (i) the floor area of any such cubic space, and
    - (ii) where any such cubic space forms part only of a proposed lot, the aggregate of the floor areas of every cubic space that forms part of the proposed lot,
- 24 Sub-section 5(2) of the *Strata Titles Act 1973* provided:
- (2) The boundaries of any cubic space referred to in paragraph (a) of the definition of **floor plan** in subsection (1):
    - (a) except as provided in paragraph (b):
      - (i) are, in the case of a vertical boundary, where the base of any wall corresponds substantially with any line referred to in paragraph (a) of that definition—the inner surface of that wall, and
      - (ii) are, in the case of a horizontal boundary, where any floor or ceiling joins a vertical boundary of that cubic space—the upper surface of that floor and the under surface of that ceiling, or
    - (b) are such boundaries as are described on a sheet of the floor plan relating to that cubic space (those boundaries being described in the prescribed manner by reference to a wall, floor or ceiling in a building to which that plan relates or to structural cubic space within that building).
- 25 The applicant noted that the relevant sheet in the strata plan contained a notation “the stratum of the terraces where not covered is restricted to 2.5 metres above the upper surface of their respective floors.”
- 26 The applicant submitted that description by way of notation on the strata plan is “normally the way the upper horizontal boundary of a part of a lot which is not covered by any structure is defined”.
- 27 The applicant submitted that the notation on the strata plan defined the upper horizontal boundary of the roof terrace except where it was covered by a

structure. The applicant submitted that, where the terrace was covered by a structure, by virtue of sub-paragraph 5(2)(a)(ii) of the *Strata Titles Act 1973*, the lot was defined by the point where the ceiling of that structure joined a vertical boundary of the area.

28 The applicant also submitted that:

“The part of the roof top terrace beneath the awning is clearly covered by the awning within the meaning of the notation on the strata plan. This means that the upper horizontal boundary of the roof top terrace where it is covered by the awning is the under surface of the ceiling or roof of the awning.”

29 The applicant submitted that the pillars supporting the awning were relevantly structural cubic space as that term was defined in the *Strata Titles Act*, that is “cubic space occupied by a vertical structural member, not being a wall, of a building”.

30 The applicant submitted that the awning was therefore common property and that the responsibility for repairing the awning lay upon the Owners Corporation.

31 The Owners Corporation submitted that “the awnings contained within the air space of the lot do not appear to be on the strata plan as common property and they only serve and benefit Lot 50”.

32 The Owners Corporation submitted that the notation on the strata plan, to the effect that the stratum of the terraces where not covered, is restricted to 2.5 metres above the upper surface of the respective floors, does not have the effect of excluding the awning, which the Owners Corporation submitted was located within that 2.5 metre air space.

33 The Owners Corporation also relied upon the common property memorandum, which the Owners Corporation had adopted as part of the by-laws pursuant to s 107 of the SSMA. The common property memorandum provided that lot owners were responsible for maintenance, repair or replacement of:

“1(a) Awnings, decks, pergola, privacy screen, louvres, retaining walls, planter walls, steps or other structures within the cubic space of the balcony or courtyard and not shown as Common Property on the strata plan.”



- 34 The Owners Corporation submitted that the awning was “within the cubic space of the balcony or courtyard” and was not shown as common property on the strata plan.
- 35 In response, the applicant submitted that clause 1(h) of the section of the common property memorandum listing the Owners Corporation’s responsibilities for maintenance, repair or replacement included “awnings within common property outside the cubic air space of a balcony or courtyard”. The applicant submitted that “this sub-clause reinforces the duty the Owners Corporation owes under s 106 of the *Strata Schemes Management Act* to maintain and repair the awning’s roof”.

### **Consideration**

- 36 The evidence tended to suggest that the awning on the roof terrace of Lot 50 had been there at the date of registration of the strata plan. Neither party submitted otherwise. As such, as the applicant submits, the area occupied by the awning was “covered” within the meaning of the *Strata Titles Act*. In consequence the limit of Lot 50 is the underside of the ceiling of the awning and the awning above that ceiling therefore constitutes common property.
- 37 However, in my view, the common property memorandum allocates the responsibility for maintenance and repair of the awning to the lot owner. The applicant did not seek to establish that the awning was “outside the cubic space” of the courtyard, in the sense that it was more than 2.5 metres above the upper surface of the floor.
- 38 I recognise that it might be argued that the “cubic space” of Lot 50 excluded the area above the lower surface of the ceiling under the awning, as that was the boundary of the lot.
- 39 However, in my view, that interpretation would render irrelevant or superfluous the inclusion of Item 1(a) within the list of lot owners’ responsibilities in the common property memorandum. The clear intention of the common property memorandum is to impose upon lot owners the responsibility for maintenance of awnings on balconies and terraces within the height limit fixed as the upper limit of the cubic space for areas which are not covered.

40 Accordingly, I conclude that responsibility for rectification of the roof of the awning falls upon the applicant and it is not appropriate to make an order requiring the Owners Corporation to rectify the roof of the awning.

**Second Element - Cavity flashing within the wall between Lots 47 and 50**

41 The Owners Corporation did not dispute that the wall between Lots 47 and 50 was common property. However, the Owners Corporation's submission was that the responsibility for rectifying the cavity flashing lay upon the owner of Lot 47 by virtue of special By-law 35. Paragraph 3.4 of special by-law 35 provides that:

"The Owner [of Lot 47]:

- (a) (b) is responsible for the ongoing maintenance of the alterations of additions to new structures erected on the common property resulting from the Works;
- (b) is responsible for the proper maintenance of and keeping in a state of good and serviceable repair, the Exclusive Use Area and the Works;
- (c) ...
- (d) (e) remains liable for any damage to any lot or common property arising out of the Works; [and]
- (e) must promptly make good any damage to any lot or common property arising out of the Works.

42 The Owners Corporation also relied upon s 144(3) of the *Strata Schemes Management Act* which provides:

- (3) To the extent to which a common property rights by-law makes a person directly responsible for the proper maintenance of, and keeping in a state of good and serviceable repair, any common property, it discharges the owners corporation from its obligations to maintain and repair the property under this Act.

43 It does not seem to be in contest that the owner of Lot 47 would be responsible for the rectification of the works, but that does not excuse the Owners Corporation from its own obligation to maintain and repair the common property. If the Owners Corporation wished to seek orders from the Tribunal requiring the owner of Lot 47 to carry out the relevant works, it should have brought its own proceedings or sought to join the owner of Lot 47 in the current proceedings. The Owners Corporation has done neither.

- 44 Section 144(3) discharges the Owners Corporation from any obligation to maintain and repair common property the subject of a common property rights by-law. However by-law 35 does not grant the owner of Lot 47 exclusive use of the common property wall between Lots 47 and 50. The by-law imposes an obligation on the owner of Lot 47 to make good any damage to common property arising out of the works. Section 144(3) does not exclude the Owners Corporation's obligation to repair the common property consisting of the wall between Lots 47 and 50.
- 45 In my view it is appropriate to make an order requiring the Owners Corporation to undertake works which the experts agree are necessary to rectify the defective cavity flashing in the wall between Lots 47 and 50.
- 46 In the circumstances I consider it appropriate to allow an extended period for that work to be completed to permit the Owners Corporation to seek to require the owner of Lot 47 to undertake the work if it so chooses. Nothing in this decision should be taken as a finding binding upon the owner of Lot 47 in relation to responsibility for that work.

### **Item 3 - Ponding on the roof deck**

- 47 It is not in dispute that the concrete slab and tiling floor of the roof area constituting part of Lot 50 is common property. The issue which I must determine is whether, pursuant to the terms of by-law 33, the responsibility for the maintenance and repair of that part of the common property falls upon the applicant.
- 48 The applicant's submissions referred to the fact that the Owners Corporation had carried out repair work on the roof terrace in the past. The applicant's submissions did not make it clear why that was said to be of significance in determining the meaning of by-law 33. The interpretation of the by-law is a matter of law, and previous conduct of the Owners Corporation in undertaking repair of the roof terrace could not give rise to any estoppel preventing the Owners Corporation from relying upon the terms of the by-law.
- 49 The Owners Corporation relied upon two further propositions in support of its submission that the applicant was responsible for the rectification of the drainage issues on the roof terrace.

- 50 First, the Owners Corporation submitted that by-law 33 imposed the obligation to maintain the entirety of the floor, including the slab beneath it, on the applicant.
- 51 In the alternative, the Owners Corporation submitted that the works carried out in relation to the installation of the spiral staircase had affected the drainage on the roof terrace and that by-law 33 required the applicant to rectify any damage caused by the construction of the spiral staircase.
- 52 In relation to the latter submission, the Owners Corporation relied upon the evidence of Mr Lee. Although Mr Lee acknowledged that “the slab does not slope towards the drains appropriately” and that “the slopes are not only inadequate but also do not facilitate drainage to the outlets and create ponding”, he stated that “the perimeter drainage channel has been cut off by the spiral staircase construction and has insufficient slope”. Mr Lee accepted that he did not have the information necessary to comment whether the falls on the roof deck were affected by the construction of the spiral staircase by a previous owner of Lot 50, he nevertheless stated that he “can say that at the time of the installation of the spiral stairs, some adjustment to the levels have occurred locally to prevent water running down the stairs”.
- 53 As noted above, the experts agreed that the appropriate scope of repair of the terrace drainage was to relevel the deck, to install an additional drain to the deck, to redirect downpipes to drain near the outlets and to construct a landing to the spiral staircase.
- 54 Mr Lee produced a plan of the deck including the contour levels of the slab and screed on the roof terrace which showed three areas where ponding was occurring: one in the north east corner of the roof terrace adjacent to the wall between Lot 50 and Lot 47; one along the south wall of the roof terrace underneath the awning; and the third in a central location along the western edge of the roof terrace, a small distance to the north east of the spiral staircase.
- 55 By reason of the conclusion which I have reached, as set out below, in relation to the applicant’s obligations with respect to the maintenance of the slab, it is not strictly necessary to determine whether the installation of the spiral

staircase is responsible for any of the ponding on the roof terrace.

Nevertheless, it is clear from Mr Lee's survey that only one area of ponding, that is the area on the western side of the roof terrace, slightly northeast of the spiral staircase, could possibly have been affected by the works involved in the installation of the spiral staircase.

- 56 The applicant's submissions focussed on the words within by-law 33.2 "for the specific purpose of building a metal spiral staircase partially enclosed by a polycarbonate screen penetrating the concrete slab". The applicant submitted that the obligation of maintenance and repair which the by-law imposed upon the applicant was limited to the spiral staircase.
- 57 The applicant submitted that it could not be the case that an exclusive use right to penetrate the concrete slab for the purpose of installing a spiral staircase could be intended to impose upon the owner of Lot 50 the obligation to maintain the entirety of the slab so penetrated.
- 58 The applicant relied upon the statement of Allsop P (with whom Basten and Young JA agreed) in *Stolfa v Hempton* [2010] NSWCA 218 at [30] in relation to the required degree of specificity required in a resolution authorising alterations to common property:
- 30 Section 65A calls for a special resolution that "specifically authorises the taking of the action proposed." It will be a question of fact or mixed fact and law in each case whether any given special resolution or special resolutions is or are adequate in its or their specificity of authorisation and in its or their particularity as to the action proposed. There is obviously a clear policy in requiring direct and specific attention to the proposed action; at the same time, an overly pedantic attention to detail might frustrate otherwise clear authorisation. Common sense and reasonableness have their part to play in the operation of a provision intended to regulate how people go about dealing with the common property in their units in everyday life.
- 59 The applicant submitted that "the works to install the spiral staircase have nothing whatsoever to do with the original defective gradient of the terrace and insufficient drainage causing the ponding".
- 60 The Owners Corporation pointed to the wording of sub-paragraph (e) which described the obligation of maintenance and repair as being in respect of "the structure and any common property the subject of the exclusive use referred to herein". [Emphasis added]

- 61 The Owners Corporation submitted that, in circumstances where the penetration of a slab had potential waterproofing and structural consequences, it was not an absurd conclusion that an exclusive use right to penetrate the concrete slab for the purpose of installing a spiral staircase should impose upon the lot owner receiving the exclusive use, the obligation to maintain the entirety of the slab so penetrated.
- 62 The Owners Corporation referred to *The Owners Strata Plan No 2245 v Veney* [2020] NSWSC 134 where Darke J held, at [31]-[32:]

31. In *The Owners of Strata Plan No 3397 v Tate* (2007) 70 NSWLR 344; [2007] NSWCA 207, McColl JA (at [34]-[71]) considered the question of characterisation of strata scheme by-laws, and how the nature of such by-laws affected the proper approach to be taken in their interpretation. Her Honour noted that strata scheme by-laws can be seen to possess the characteristics of delegated legislation as well as of statutory contracts (see at [35] and [47]) and, further, that not all principles of contractual interpretation apply unreservedly to statutory contracts (see at [56] and the discussion of the authorities at [57]-[70]). McColl JA stated at [71]:

The following propositions emerge from the foregoing discussion:

1. By-laws are the “series of enactments” by which the proprietors in a body corporate administer their affairs; they do not deal with commercial rights, but the governance of the strata scheme: Bailey;
2. By-laws have a public purpose which goes beyond their function of facilitating the internal administration of a body corporate; cf *National Roads and Motorists’ Assoc Ltd v Parkin*, Lion Nathan Australia;
3. Exclusive use by-laws may be inspected by third persons interested in acquiring an interest in a strata scheme, whether, for example, by acquiring units, or by lending money to a lot proprietor; such persons would ordinarily have no access to the circumstances surrounding their making; their meaning should be understood from their statutory context and language: *National Roads and Motorists’ Assoc Ltd v Parkin*, Lion Nathan Australia.
4. By-laws may be characterised as either delegated legislation or statutory contracts: Dainford; *Re Taylor*; Bailey; *North Wind*; *Sons of Gwalia*;
5. Whichever be the appropriate characterisation, exclusive use by-laws should be interpreted objectively by what they would convey to a reasonable person: *Lion Nathan Australia*;
6. In interpreting exclusive use by-laws the Court should take into account their constitutional function in the strata scheme in regulating the rights and liabilities of lot proprietors inter se: *National Roads and Motorists’ Assoc Ltd v Parkin*, Lion Nathan Australia.
7. Unlike the articles of a company, there does not appear to be a strong argument for saying exclusive use by-laws should be interpreted as a business document, with the intention that they be

given business efficacy: cf *National Roads and Motorists' Assoc Ltd v Parkin* (at 236 [75]). That does not mean that an exclusive use by-law may not have a commercial purpose, and be interpreted in accordance with the principles expounded in cases such as *Antaios Compania Naviera SA*, but due regard must be paid to the statutory context in so doing;

8. An exclusive use by-law should be construed so that it is consistent with its statutory context; a court may depart from such a construction if departure from the statutory scheme is authorised by the governing statute and if the intention to do so appears plainly from the terms of the by-law: *Re Taylor*;

9. Caution should be exercised in going beyond the language of the by-law and its statutory context to ascertain its meaning; a tight rein should be kept on having recourse to surrounding circumstances: *Lion Nathan Australia*.

Mason P expressed his agreement with McColl JA in this regard (see at [1]).

32. Based on the foregoing, it appears that in ascertaining the meaning of Special By-Law 4, it is necessary to consider the language of the by-law, viewed in the statutory context in which it was made; and whilst recourse to surrounding circumstances may be permissible as an aid to construction it is necessary, particularly bearing in mind the public purpose of strata scheme by-laws, to exercise caution in going beyond the language of the by-law itself and its statutory context.

### **Consideration**

63 In my view, the answer to this issue lies in the specific terms of the grant of the exclusive use right, that is “the right to exclusive use of that area of common property being the concrete slab which forms the roof of the balcony of the lot and the floor of the roof terrace above”.

64 It is apparent from the plans included in the experts' joint report and from the strata plan itself that the “concrete slab which forms the roof of the balcony of the lot” does not include the entirety of the floor of the roof terrace. The balcony is limited to the area outside the internal area of Lot 50 on level 12. It is only that part of the slab which is directly above the balcony which could be said to form “the roof of the balcony”.

65 The fact that the reason for the grant of an exclusive use right was for the installation of a spiral staircase does not limit the area in respect of which the applicant was granted exclusive use. It may be noted that, although it may not have been practical to install the spiral staircase in any other location, the by-

law did not specify where within the exclusive use area the staircase was to be installed.

- 66 The question whether the installation of the spiral staircase was responsible for the inadequate drainage of the deck is not to the point. By seeking and obtaining an exclusive use right in respect of the slab which formed the roof of the balcony and floor of the terrace, a condition of which was that the owner for the time being of Lot 50 maintain the area subject to the exclusive use right, the owner of Lot 50 accepted an obligation to maintain that area. Upon acquiring Lot 50 Ms Worrall became subject to that obligation.
- 67 Since the exclusive use right extends to the entirety of the area which constitutes the roof of the balcony, the applicant is obliged to maintain and repair the entirety of that area.
- 68 A plan included by the experts in their joint report (Tender Bundle page 585) discloses that the portion of the slab which constitutes the roof of the balcony on level 12 is a relatively narrow area extending from the south west corner of the roof terrace along the western side and about halfway along the northern side. As so delineated, it excludes all three areas where the ponding is occurring, with the possible exception of a small part of the area on the western side of the deck closest to the spiral staircase.
- 69 Nevertheless, regardless of where the ponding has occurred, rectification is necessary to the entire deck.
- 70 I find that the Owners Corporation is responsible for rectification of the bulk of the roof terrace, but that it is not responsible for the maintenance and repair of the entirety of the roof terrace. Certain parts of the rectification work, such as the installation of an additional drain, can be seen to be the repair of the part of the deck which is the responsibility of the Owners Corporation. Other parts, such as the construction of a landing to the spiral staircase, constitute repair of the part of the deck for which Ms Worrall is responsible.
- 71 In respect of other parts of the rectification work, if it is not possible to assess the cost of rectification of the area the responsibility of the applicant separately from the cost of rectification of the balance of the roof terrace, it would be



appropriate that the cost of rectification work be shared by the parties in proportion to the respective areas involved.

- 72 Although the plan on page 585 of the Tender Bundle does contain grids which might permit some estimation of the relative proportions of the respective areas, I do not consider it appropriate that I seek to undertake that task. If the parties cannot agree on the allocation of the costs of rectification of the roof deck, the parties may make application for further directions.
- 73 The Owners Corporation made an alternative submission that the Owners Corporation has not breached s 106 of the *Strata Schemes Management Act* in that the Owners Corporation had undertaken investigations which had not supported the applicant's claim that the drainage system was inadequate.
- 74 In circumstances where the applicant has abandoned her claim to compensation in respect of the Owners Corporation's alleged failure to fulfil its duties pursuant to s 106 of the *Strata Schemes Management Act*, it is not necessary to determine that issue. I find that the Owners Corporation's obligation pursuant to s 106 does require it to rectify the inadequate falls on the roof deck, apart from the area which is the responsibility of the owner, and I will so order.
- 75 Both parties sought an opportunity to make submissions concerning the costs of the proceedings. I note that, by the application as originally filed, Ms Worrall sought compensation but did not specify an amount.
- 76 Although the applicant's written submissions referred to the Owners Corporation's submission concerning responsibility for the roof deck as "embarrassing", "misconceived, without merit and lacking in substance" and "ridiculous, frivolous and vexatious", I have found that the Owners Corporation's submission is correct to some extent.
- 77 My preliminary view is that, as both parties have had some success in the proceedings and the issues were not clear cut, it is not appropriate to make any order concerning the costs of the proceedings. Nevertheless, I will make provision for submissions to be filed in the event either party seeks a different

order. The parties were agreed that any question of costs can be dealt with on the basis of written submissions and without a further hearing.

78 My orders are:

- (1) Order pursuant to s 232 of the *Strata Schemes Management Act 2015* (NSW) (SSMA) that the Owners Corporation - Strata Plan No 43357, carry out the remedial work set out in the joint report of Michael Ilievsky, John Riad and Daniel Lee dated 21 June 2021 (Joint Report) in respect of Item 2, the cavity flashing defect, within six months of the date of these orders.
- (2) Order pursuant to s 232 of the SSMA that the Owners Corporation - Strata Plan No 43357 undertake, in co-operation with the applicant, the remedial work set out in the Joint Report in respect of Item 3, the inadequate drainage and fall of the roof terrace within Lot 50, within six months of the date of these orders.
- (3) Note that the Owners Corporation is responsible for the rectification of that part of the roof terrace which does not form the roof of the balcony to Lot 50.
- (4) Grant the parties liberty to apply for directions in the event the parties cannot agree on the appropriate allocation of the costs of rectification in respect of Item 3 in the Joint Report.
- (5) The application is otherwise dismissed.
- (6) Unless either party files written submissions within 14 days of the date of this decision seeking an alternative order in relation to the costs of the proceedings there will be no order in relation to the costs of the proceedings.
- (7) If either party files submissions in accordance with order (6), the other party may file submissions in response within a further 14 days.

(8) If no submissions are filed in accordance with orders (6) and (7), there will be no order as to the costs of the application.

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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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