VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

BUILDING AND PROPERTY LIST

VCAT REFERENCE NO. BP1661/2019

CATCHWORDS

Water Act 1989 and *Owners Corporation Act 2006*; claim for damages made under both Acts; some claims allowed under both Acts; claim for loss of amenity allowed under *Owners Corporation Act 2006* even though not allowable under the *Water Act 1989;* claim for an injunction; principles relevant to the grant of an injunction under the *Water Act 1989* discussed; claim for injunction allowed.

APPLICANTS	Andrew Ralph Hill, Merynne Elizabeth Hill
RESPONDENT	Owners Corporation PS524229U
WHERE HELD	Melbourne
BEFORE	C Edquist, Member
HEARING TYPE	Hearing
DATE OF HEARING	8, 9, 10, 11, 12, 15, 16 17 18, 19 and 26 February 2021
DATE OF APPLICANTS' CLOSING SUBMISSIONS:	1 April 2021
DATE OF RESPONDENT'S CLOSING SUBMISSIONS:	13April 2021
DATE OF APPLICANT'S SUBMISSIONS IN REPLY:	30 April 2021
DATE OF RESPONDENT'S CLOSING SUBMISSIONS IN REPLY:	30 April 2021
DATE OF ORDER	5 May 2022
CITATION	Hill v Owners Corporation PS524229U (Building and Property) [2022] VCAT 494

ORDERS

1 Under s 124 of the *Victorian Civil and Administrative Tribunal Act 1998* (**the VCAT Act**) the Tribunal declares that the applicants are entitled to an injunction that the respondent make watertight their apartment (No 19) (**the apartment**) in the apartment building situated at 170/174 St Kilda Road, St Kilda. The scope of the work to be performed by the OC is as summarised in the reasons that follow.

The parties have leave to make an application to the Tribunal for a hearing at which they can be heard as to the terms of the injunction.

2 The Tribunal declares that the applicants are entitled to an order for damages in respect of the cost of rectifying the physical damage to the apartment for which the OC is responsible. The Tribunal assess those damages at $58,750.

3 The Tribunal declares that the applicants are entitled to an order for damages in respect of the cost of disassembling and reassembling the air-conditioner on the northern wall and the kitchen air-conditioner in the apartment, assessed at $600.

4 The Tribunal declares that the applicants are entitled to an order for damages of $31,075 for the rectification of the kitchen in the apartment.

5 The applicants' claim for damages in the sum of $1,930 for replacement of a carpet in the apartment is dismissed.

6 The Tribunal declares that the applicants are entitled to an award of $4,009.50 in respect of mould remediation.

7 The Tribunal declares that the first applicant is entitled to an award of $5,000 in respect loss of amenity.

8 The Tribunal declares that the second applicant is entitled to an award of $5,000 in respect loss of amenity.

9 The Tribunal declares that the applicants are entitled to an award in respect the following consequential losses or expenses arising because they had to move out of the apartment:

(a) the claim for alternate accommodation on a long-term basis, assessed at the rate of $775 per week, to be calculated when the claim has been updated;
(b) the claim for removal and storage costs, assessed at $16,145;
(c) the claim for utility expenses incurred in respect of the apartment while the applicants have not been living there, to be assessed when the claim has been updated;
(d) the claim for owners corporation fees incurred while the applicants have not been living in the apartment, to be assessed when the claim has been updated.

10 The applicants have leave to file and serve an affidavit setting out further evidence about the four claims referred to in Order 9. If the OC wishes to cross examine the deponent, it has leave to make an application for a hearing at which it can do so.

11 The applicants have leave to make an application for damages in the nature of interest. When making such an application they must put forward their claim supported by detailed calculations.

12 Each party has leave to make an application for costs.

13 The applicants have leave to make an application for reimbursement of fees.

14 **By 27 May 2022** the parties are directed to conduct a formal negotiation with a view to formulating consent orders regarding the form of the injunction, outstanding assessments of damage, damages in the nature of interest, costs and reimbursement of fees. If the parties cannot formulate appropriate orders the Tribunal will make orders after hearing from the parties on contentious matters.

15 Any application made under these Orders must be referred by the Principal Registrar to Member Edquist, or Senior Member Farrelly if Member Edquist is not available.

C Edquist
Member

APPEARANCES:

For Applicant	Mr N Philpott of Counsel
For Respondents	Mr J Forrest of Counsel

REASONS

1 Andrew Ralph Hill and Merynne Elizabeth Hill (**the Hills**) purchased Unit 19 (**Unit 19**) in an apartment building at 170/174 St Kilda Road, St Kilda (**the Building**) at auction April 2007 and became the registered proprietors on or around 13 June 2007.

2 The Hills instituted this proceeding in the Tribunal in 2019. They seek damages in respect of water damage sustained in Unit 19. They have brought their action against the registered owners corporation for the Property, Owners Corporation PS524229U (**the OC**),[1] under s 16 of the *Water Act 1989* (***the Water Act***) and s 46 of the *Owners Corporation Act 2006* (***the OC Act***).

3 The apartment building had been constructed more than a decade ago.[2] There were four separate building permits issued between 1999 and 2004. The last permit was issued in October 2004 naming Willesden Group Pty Ltd (**Willesden**) as the builder. Willesden was deregistered in January 2008.

4 The fact that Willesden was registered in January 2008 means that the completion of construction must have been completed prior to that time. The fact that the last building permit was issued in October 2004 suggests that the construction was likely to have been completed by late 2006.[3]

5 Initially the building had gone to only the fifth floor. Several years later, some apartments were added above, creating a sixth floor. Unit 19 was one of those apartments.

6 In about February 2008, the Hills noticed water ingress into the common property stairwell on level 5 of the Property. In particular, Mr Hill noticed a leak in the roof of Unit 19 on the north wall on 12 February 2008. This caused him to write to the manager of the OC. This was the start of a long and sorry history of communications between the Hills and the OC.

OVERVIEW OF THE PROCEEDING

7 In order to succeed in their claim under each of s 16 of the *Water Act* or and s 46 of the *OC Act* they must establish that water has flowed into Unit 19 from common property within the Property in respect of which the OC has responsibilities.

THE HEARING

8 The hearing began before me on 8 February 2021. It continued through the whole of that week, and through the following week 12-19 February 2021.

---

[1] The OC is a body corporate, and is capable of suing and being sued in its own name under s 28 of the *Subdivision Act 1988*.

[2] Michael Weekes gave evidence on behalf of the OC. His witness statement dated 18 December 2020 at Section B traces the development of the Property.

[3] Because the time limit for bringing a building action against a builder for damages for loss or damage arising out of or concerning defective building work is 10 years, under s 134 of the *Building Act 1993*, no action could be commenced against the builder or its insurer by the time this action was initiated.

The proceeding, being part heard, was then adjourned for a further hearing on 26 February 2021. The hearing concluded on that day of. The duration of the hearing was accordingly 11 days.

9 Mr N Philpott of Counsel appeared on behalf of the Hills, and Mr J Forrest of Counsel appeared for the OC.

10 The Hills filed a Tribunal Book comprising 2174 documents contained in six lever arch folders. Both Mr Hill and Ms Hill gave evidence. They called a number of experts including Mr Tom Casamento, Mr John Merlo and Mr Daniel Wood.

11 Mr Casamento was retained by the Hills' solicitors McMahon Fearnley. He is a civil engineer and a registered building practitioner. He had inspected all the property on 7 November 2020 and had prepared a report dated 18 December 2020[4] which he adopted as his evidence will, subject to certain sections being struck out on the basis of objections raised by the OC.

12 Mr Merlo had been engaged initially by the loss adjuster acting for the insurer of the OC. He had described his occupation as a civil and structural engineer. He had prepared 2 reports, the first dated 28 March 2017[5] and a second dated 18 October 2018,[6] both of which he adopted the hearing.

13 Mr Wood is a builder. He inspected the Unit 19 and prepared a report as to the existence of defects and the cost of rectification dated 17 September 2020.

14 The Hills also called as a lay witness Mr Tom Carson of Abode Constructions (**Abode**). Mr Carson described himself as a stonemason and builder. He wrote he runs a building company Abode Restoration (**Abode**). He had prepared a report dated 6 July 2016[7] at the request of Mr Michael Weekes, of Turnbull Cook, the OC manager.

15 The OC called Mr Tim Sherwood of SJA Construction Services and Mr Tim Gibney as experts. Mr Sherwood, a qualified carpenter and building project manager, had been engaged by the OC's lawyers HWL Ebsworth. He had produced reports dated 21 May 2020,[8] 9 July 2020[9] and 3 February 2021[10] which he adopted at the hearing.

16 Mr Gibney, of TGA engineers, was also engaged by HWL Ebsworth. His report was dated 5 February 2021, after the completion of the Tribunal Book. He confirmed the report at the hearing.

17 The OC called as a lay witness Mr Weekes, effectively its managing agent.

---

[4] TB 229.
[5] TB 933.
[6] TB 1225.
[7] TB 770
[8] TB 58.
[9] TB 120
[10] This report was produced after the Tribunal Book had been finalised.

18 After the hearing the parties were ordered to file and serve primary written submissions by 19 March 2021, and file and serve responsive submissions by 16 April 2021. The parties, by consent, sought an extension of this timetable with the effect of that primary written submissions were to be filed and served by 1 April 2021, and responsive submissions would be filed and served by 30 April 2021. The submissions filled 62 pages in total.

19 The parties obtained transcript for 9 days of the hearing. The transcript runs to 891 pages.

20 Regrettably, it was not possible to complete this decision prior to the start of June 2021 when I became heavily involved in a long-running case.

OBLIGATIONS OF THE OC UNDER THE OC ACT

21 The OC acknowledges that it is vested with all powers and functions conferred on it by the OC Act. These include the following powers vested by s 4, which provides:

An owners corporation has the following functions—

(a) to manage and administer the common property;

(b) to repair and maintain—

(i) the common property;

(ii) the chattels, fixtures, fittings and services related to the common property or its enjoyment;

(iii) equipment and services for which an easement or right exists for the benefit of the land affected by the owners corporation or which are otherwise for the benefit of all or some of the land affected by the owners corporation;

(c) to take out, maintain and pay premiums on insurance required or permitted by any Act or by Part 3 and any other insurance the owners corporation considers appropriate;

(d) to keep an owners corporation register; (e) to provide an owners corporation certificate in accordance with Division 3 of Part 9 when requested;

(f) to carry out any other functions conferred on the owners corporation by—

(i) this Act or the regulations under this Act; or

(ii) the Subdivision Act 1988 or the regulations under that Act;

(iii) any other law; or

(iv) the rules of the owners corporation.

22 The obligations of the OC under the OC Act include the following obligations under s 46:

An owners corporation must repair and maintain—

(a) the common property; and

(b) the chattels, fixtures, fittings and services related to the common property or its enjoyment.

23 Importantly, an owners corporation under the OC Act must, in carrying out its functions and powers, exercise the following duties under s5:

(a) act honestly and in good faith; and

(b) exercise due care and diligence;

24 During the course of the hearing, the OC indicated that it was relying heavily on the Tribunal's decision in *Anderson v Holden Peel Project Pty Ltd,*[11] (***Anderson***). The OC said such reliance was misplaced, as the applicant Ms Anderson had relied heavily on S5 of the OC Act in pursuing her claim, and that section had not been pleaded by the Hills. On the ninth day of the hearing the OC applied for an order that the Hills be directed to replead their points of claim. I carefully assessed that application and, after giving oral reasons, declined to make the order required.[12] I noted at the time that Mr Philpott had made his position known, which was that he did not wish to replead the Hills' case. He acknowledged that there was a risk to his clients if the hearing proceeded with the pleading in its current form. I mention this in order to highlight the relatively narrow limits of the Hills' case. I leave to another time the question of whether the manner in which the Hills pursued the case at the hearing opens the door for an order for costs against them.

THE COMMON PROPERTY-SUMMARY OF ISSUES

25 The OC acknowledges that it is the registered proprietor of "Common Property 1" in the Plan of Subdivision PS524229U (**the Plan of Subdivision**) as nominee for the lot owners as tenants in common in shares proportional to their lot entitlement pursuant to s 30(1)(a) and s 3(1) of the *Subdivision Act*.[13]

26 The common property as defined by the Plan of Subdivision (the Common Property) is:

> Common Property 1 is all the land in the plan except the Lots and includes the structure of all external building walls, including balcony parapet walls or balustrades and courtyard walls; where these structures are defining boundaries.

27 Unit 19 straddles both the fifth and sixth floor. As the upstairs of Unit 19 is on the top floor, Unit 19 has a roof. Its north external wall on level 6 faces a balcony. Its south external wall on level 6 also faces a small balcony. The western wall includes a window.

[11] [2020] VCAT 538.
[12] Transcript **(T)** 713, Lines **(L)** 10-11.
[13] OC's second further amended points defence (**OC Defence**) dated 19 February 2021, [2(a)].

28 It is conceded by the OC that the roof of Unit 19, including the roof structure, flashings, roof sheets and box gutters, form part of the Common Property.[14]

29 As the OC also concedes that the exterior boundary façade forms part of the Common Property,[15] the Hills contend that there can be no dispute that the western wall is Common Property. Moreover, the Hills have a fallback position, which is that the western wall is clearly a wall which defines a boundary and is accordingly Common Property.

30 If the position of the OC regarding the western wall was not made clear during the hearing, it certainly is crystallised in the OC's final submissions where, at [7], it is stated "the common property which requires rectification to rectify the source of the water ingress at Lot 19 is limited to the roof and the western wall-neither of which locations have ever been disputed by the Owners Corporation".

31 A critical part of the OCs defence is that the tiles, membranes, timber hobs, windows and doors and the floor slab on the balconies form part of Lot 19, and are accordingly the Hills' responsibility.

32 The major issue concerning Common Property is the status of the north wall and the south wall of the Hills' apartment.

33 We shall return this issue below. In the interim, it is useful to summarise the high-level issues exposed by the case.

OVERVIEW OF THE *WATER ACT* CLAIM

34 The Hills' claim under the *Water Act* is based on s 16(1), which provides:

> (1) If—
>
> (a) there is a flow of water from the land of a person onto any other land; and
>
> (b) that flow is not reasonable; and
>
> (c) the water causes—
>
> (i) injury to any other person; or
>
> (ii) damage to the property (whether real or personal) of any other person; or
>
> (iii) any other person to suffer economic loss—
>
> the person who caused the flow is liable to pay damages to that other person in respect of that injury, damage or loss.

35 The OC contends that as it was created only upon registration of the Plan of Subdivision, and was not the initial occupier of the Common Property, it is entitled to the benefit of the defence created by s 16(5) of the *Water Act*. The

[14] OC Defence, [4(d)].
[15] OC Defence, [4(e)].

OC submits that the builder of the property is "solely and wholly responsible for any and all loss or damage".[16]

36 Sub-section 16(5) of the *Water Act* provides:

> If the causing of, or the interference with, the flow (as the case requires) was given rise to by works constructed or any other act done or omitted to be done on any land at a time before the current occupier became the occupier of the land, the current occupier is liable to pay damages in respect of the injury, damage or loss if the current occupier has failed to take any steps reasonably available to prevent the causing of, or the interference with, the flow (as the case requires) being so given rise to.

37 The significance of the defence created by ss 16(5) of the *Water Act* is reinforced by ss 16(6), which provides:

> (6) The existence of a liability under subsection (5) extinguishes the liability under subsection (1) of the person who caused the flow or the liability under subsection (2) of the person who interfered with the flow (as the case requires).

38 The OC clearly relies on ss 16(5) of the *Water Act,* as it alleges that the causing of the flow was given rise to by the construction of the roof, walls, windows and doors by the builder of the property.[17]

39 The Hills contend that their witness statements demonstrate that there was evidence of the existence of leaks into Unit 19 going back to February 2008, and that the OC received expert reports regarding rectification methods but failed to act upon them in order to protect the Hills from unreasonable flows of water into their apartment from Common Property within a reasonable timeframe. They contend that the defence which might otherwise have been available to the OC under ss 16(5) of the *Water Act* is accordingly not available to it.

THE HILLS' ALTERNATIVE CLAIM UNDER S 46 OF THE *OC ACT*

40 For reasons which will be explained, the Hills contend that the relevant issue is whether the OC was actively prepared to maintain the Common Property during the relevant period. They say that the facts to be taken into account in negativing the defence that would otherwise have been available under ss 16(5) of the *Water Act* apply equally to the claim under s 46 of the OC Act.

THE DEFENCE OF MITIGATION

41 The OC contends that the Hills failed to mitigate their loss by undertaking repairs to Unit 19, including to the balcony and the north and south walls, over a period of 12 years.

42 Investigation of this defence involves a consideration of:

(a) the steps available to the Hills;

---

[16] OC Defence, [12].
[17] OC Defence, [12A].

(b) whether it was reasonable for the Hills to take those steps.

THE DEFENCE OF PROPORTIONATE LIABILITY

43 The contention of the OC in connection with this issue is that the claims made by the Hills are apportionable within the meaning of Part IVAA of the Wrongs Act 1958 (***the Wrongs Act***). This matter is dealt with below.

RELIEF SOUGHT

44 The Hills seek an injunction requiring the OC to take action necessary to prevent the flow of water from the common property into their apartment. They also seek damages in the sum of $288,435.80, together with interest. They also seek an order for costs.

Injunction

45 The principles regarding the granting of an injunction for the purposes of preventing a reasonable flow of water under the Water Act are well-established. They warrant a separate discussion, below.

Damages

46 The claim for damages is large and contains a number of constituent parts. There is an overlap between the claim for an injunction and part of the damages claim. The Hills acknowledge in their final submissions that if the injunction they seek is granted, then their claim for rectification of damage must be limited to the cost of rectifying Unit 19, and must not include any costs associated with rectifying the Common Property. I will return to the topic of damages below.

EXTENT OF THE COMMON PROPERTY

47 As noted above, at [22], the controversy concerning the extent of the Common Property is largely confined to the north wall and the south wall because the OC has conceded that the roof and the western wall are Common Property.

48 The OC contends, in its final submissions at [79];

> [The Hills'] claims against the Owners Corporation must fail because the external walls of Lot 19 abutting the northern and southern balconies are not common property on the correct interpretation of the Plan of Subdivision P S524229U (Plan). They are private property and, therefore, any physical or consequential damage caused to those walls and by those walls (and their componentry (i.e. windows and doors, flashing, timber hobs/baseplates) is damage for which the Owners Corporation is not liable to maintain and repair/or which it has caused in the water/moisture did not flow from land constituted by the common property for the purposes of s 16 (1) of the *Water Act*".

Legislative background

49 As was observed by the Court of Appeal in *Khan v Victorian Civil and Administrative Tribunal* (***Khan***).[18]

> The legal authority to subdivide land is found in, and regulated by, a number of different Acts of Parliament and instruments made under them. Critically for present purposes, the source of authority involves the interplay between the *Planning and Environment Act* and the *Subdivision Act 1988*.

50 The Court of Appeal went on in *Khan* to explain that s 5 of the *Subdivision Act* provides that, subject to two immaterial exceptions, subdivision of land must be done in accordance with the Subdivision Act.[19]

51 A plan of subdivision must be prepared in accordance with the Subdivision Act and regulations.[20]

FEATURES OF THE PLAN OF SUBDIVISION

52 As the Plan of Subdivision was registered on 28 April 2005, the relevant regulations are the *Subdivision (Procedures) Regulations 2000*. Relevantly, they provide as follows:

> 11 Use of buildings to define boundaries
>
> (1) Boundaries may be shown on the plan by reference to a building.
>
> (2) Where a boundary on a plan is defined by reference to a building or part of a building, the plan must specify whether the boundary is—
>
> (a) the interior face of the walls, ceilings and floors of the relevant part of the building; or
>
> (b) the exterior face of the relevant part of the building; or
>
> (c) in some other location.
>
> 12 Method of showing boundaries on a plan
>
> (1) Subject to subregulation (3) a boundary must be shown by a continuous line.
>
> (2) A continuous line must not be used to show a building which does not constitute a boundary.
>
> (3) A broken line must be used where a boundary is a projection of a boundary defined by reference to a building shown on a cross-section.

53 The Plan of Subdivision shows notations and diagrammatical representations identifying private lots, the common property and lot boundaries. It contains this definition of the Common Property:

> Common Property 1 is all the land in the plan except the Lots and includes the structure of all external walls, including balcony parapet

[18] [2018] VSCA 351 at [7].
[19] [2018] VSCA 351 at [11].
[20] *Subdivision Act* s 5(3).

> walls or balustrades and courtyard walls, where the structures are defining boundaries.

All columns, service ducts, pipes, vents and load bearing walls within the building are deemed to be part of Common Property 1. The position of all these columns, ducts, pipes, vents and internal load bearing walls have not necessarily been shown on the diagrams contained herein.

54 The licensed surveyor who prepared the plan provided the following definition to assist in the determination of those building elements which were structures defining boundaries:

> Boundaries shown by thick continuous lines are defined by building structure.
>
> Location of boundaries defined by the building structure:
>
> Median: walls, floors and ceilings defining boundaries between Lots.
>
> Interior face: all other boundaries.
>
> The upper boundaries of Part Lots on Level 1 are 2 metres above the topside of the concrete floor slab defining their lower boundaries.

The Hills' position based on the Plan of Subdivision

55 As noted, Lot 19 straddles Level 5 and Level 6. The Hills contend that the north wall and the south wall on Level 6, which are delineated on the Plan of Subdivision by broken or dotted lines within the thick continuous black lines which define Unit 19, are "load bearing walls within the building" and accordingly are deemed to be part of Common Property 1.

Mr Casamento's view

56 In support of its contention that the north wall and the south wall are load-bearing, they rely on the opinion of Mr Tom Casamento, who opined at [10.5] of his report:

> Even though there are no structural drawings available showing the roof layout and details, roof trusses and beams had to be supported on these walls as they are the only walls available for support.

The Glossary of Building Terms

57 The Hills also refer to The Glossary of Building Terms which is referred to by Senior Member Kirton in *Davies v Owners Corporation 1PS414649K* ***(Davies)***.[21] As Senior Member Kirton remarked, the Glossary is a publication produced by Standards Australia and the National Committee on Rationalised Building. Relevantly, it in respect of walls, the Glossary states:

> *Wall* – vertical construction that bounds or subdivides a space and usually fulfils a load-bearing or retaining function... Walls may be solid (made of stone, brick, concrete, glass, et cetera), framed (made of timber, steel, other metals, EGC), or combinations... The main types of

[21] [2019] VCAT 1159 at [41].

> wall are a) external walls to enclose the sides of a building or structure;
> b) internal walls to partition the interior of a building or structure;...

58 Applying this definition, Senior Member Kirton in *Davies* determined that glazed window and sliding door units were structural elements and formed part of a wall.[22]

59 The Hills submit that the north and south walls are made up of a number of elements including EPS cladding, timber framing, windows and sliding door units, subsills/bottom plates/hobs, waterproofing and plasterboard on the internal face of wall frame. They also note that a portal frame, structural steel and a lintel might be present in each wall but contend that this had not been established by any destructive testing. They submit that the presence of a portal frame, steel and lintel is not determinative of the issue as to how the load of the roof was transferred by one or more of the elements in combination and therefore each of the north and south walls is load-bearing.

***Penniall Enterprises Pty Ltd v Owners Corporation RN4160667X (Penniall)*[23]**

60 In my view, this submission is consistent with the view of which Deputy President Lulham expressed in *Penniall*[24] about how elements of a wall are to be considered:

> The aluminium door frame was an installation in the eastern wall. Of itself, the aluminium door frame was not a structural element of the building, but it was part of a structural wall which was common property. It is the whole of the eastern wall which is common property. One does not purport to distinguish between parts of the wall, for the purpose of identifying common property.

The OC's submission based on the notes in the Plan of Subdivision

61 The OC meets the Hills's case by submitting that the northern and southern walls are not "load bearing walls within the building" because that phrase, where it appears in the notes to the Plan of Subdivision, is qualified by the sentence following in those notes. For clarity, I note that the Hills rely on this sentence:

> All columns, service ducts, pipes, vents and load bearing walls within the building are deemed to be part of Common Property 1.

62 The OC relies on the immediately following sentence which reads:

> The position of all those columns, ducts, pipes, vents and internal load bearing walls have not necessarily been shown on the diagrams contained herein.

63 If that was all there was to the OC's argument on this point, I would reject it the reason that I do not think the final sentence, where it refers to "internal load bearing walls", qualifies the phrase "load bearing walls within the

[22] [2019] VCAT 1159 at [51].
[23] [2012] VCAT 943 at [56].
[24] [2012] VCAT 943 at [56].

building". I think that all the file note does is indicate that internal load bearing walls, amongst other items, have not necessarily been shown on the diagrams.

64 In any event, the OC in its primary written submissions, at [89] submits that the diagrammatical representations for Lot 19 on Levels 5 and 6 respectively disclose a number of matters including that:

(a) the Lot comprises two parts;
(b) it comprises a perimeter boundary depicted as a thick continuous line;
(c) the continuous line around the perimeter of the Lot represents the interior face of the wall;
(d) the boundaries between Lot 19 and its neighbouring Lots lie along the median of the shared walls;
(e) a balcony on each of the northern and southern sides is depicted by reference to the word "balcony";
(f) **a dashed line depicts the existence of an exterior wall abutting the northern and southern boundaries**; and
(g) a dashed line around the stairs and lifts also depicts a physical wall.

65 I have emphasised item (f), as reference to the Plan depicting Level 6 indicates that there is a dashed line inside the northern balcony wall and another dashed line inside the southern boundary wall. Each of these dashed lines depicts the existence of an exterior wall which is within the building. Accordingly, even if the OC is correct in submitting that only "internal" load bearing walls can constitute common property, this requirement is made out.

The OC's submission based on Mr Gibney's evidence

66 However, it is necessary to address the OC's further submission, which is based on the report of the structural engineer they called as an expert witness, Mr Tim Gibney.

67 The OC relies on Mr Gibney's evidence to mount an argument that the north and south walls are not load bearing. The argument is based on Mr Gibney's interpretation of a photo in Mr Casamento's report which he says depicts a parallel phalange channel. He gave oral evidence at the hearing as follows:

> There a PFC, a parallel plange channel, which is part of a steel support system and that's supporting the dwarf wall sitting over the top of that steel channel and that supports the trusses and the wall over the top, hence this wall is non-loadbearing. It's being supported by a steel frame that takes the load down to the level 5 slab. I'm confident that, from these photos, that that's a steel frame, a portal frame which was in the original architectural drawings that were tendered.[25]

68 I am not prepared to accept this evidence as it is based on supposition. Mr Gibney did not carry out any destructive tests to establish the existence of a portal frame. Indeed, he did not attend the site to inspect the Hills's

[25] T429 L23-31, T430 L1.

apartment at all, but prepared his report on the basis of a review of the evidence of others and photographs taken by others.

69 Moreover, when Mr Gibney was asked about the engineering drawings, he acknowledged that the drawings he had seen concerning Level 6 were not clear.[26]

70 Furthermore, when Mr Gibney was referred to the architectural drawings, he said that they showed "glazing all the way along which would have required a portal frame to support that, as there was no wall that apart from glass which is non load bearing and window frames which are non load bearing".[27] It is to be inferred from this evidence that the architectural drawings did not actually show a portal frame.

71 When Mr Casamento was asked about the northern wall, he agreed that it included a lintel (not a portal frame) and that the lintel supported the loads above it.[28]

Consideration of Mr Gibney's evidence

72 Because the basic facts have not been established on the balance of probabilities, I reject the OC's submission that the Tribunal should find that the northern and southern walls were not load-bearing because they included a portal frame.

73 Moreover, Mr Gibney's evidence came out at the hearing. Mr Casamento had to respond on the spot by reference to his photos. He agreed that there was a steel beam across the top of the doors and windows, but couldn't say if it was an actual portal frame.[29] From a photo he identified the potential for a column that was actually supporting the steel beam. He suggested that there might be double or triple timber studs or even a steel post.[30] Later, he indicated that this steel beam or lintel supported the wall and roof above it and was part of the north wall.[31]

74 This evidence segues into the next issue, which is the OC's argument based on the concept of "load bearing wall". Mr Gibney's report refers to the definition of "load bearing wall" in the Glossary of Building Terms. The definition is "wall providing support for vertical load in addition to its own weight". The OC observes that the definition does not include the words "parts of a wall" or "the frame of the wall".

75 I do not think there is anything in this submission. I refer back to Deputy President Lulham's decision in *Penniall* where he expressed the view:

---

[26] T436 L 2331.
[27] T430 L7-11.
[28] T444 that 12-15.
[29] T430 L line 25-28.
[30] T431L 1-14
[31] T433 17-29

> It is the whole of the eastern wall which is common property. One does not purport to distinguish between parts of the wall, for the purpose of identifying common property.[32]

76 I respectfully adopt that approach. I find that it is appropriate to review the wall as a single entity, not as a product of constituent parts.

77 The OC also criticises Mr Casamento's evidence because he did not express an opinion either in his report or in his *vive voce* evidence as to the meaning of "load bearing wall". I reject this criticism as it is I consider that it is misconceived. Mr Casamento may not have attempted to define "load bearing wall" but he did express in his report dated 18 December 2020, at [10.4], a clear view that the external walls shown by the "dotted lines" (by which he must mean "dashed lines") are load-bearing walls 'as- built'. Immediately above this statement, he opines, in [10.3], that the 'as built' roof structure shows the external walls being load-bearing walls supporting the roof trusses. It is accordingly abundantly clear why he says the external walls are "load bearing".

78 The OC invited the Tribunal to draw an inference adverse to the reliability of Mr Casamento's opinion as a result of his failure to address the question of whether the northern and southern walls contained a portal frame in his report. I am not prepared to draw such an inference. I note that Mr Casamento's evidence about the portal frame was given at the hearing in response to evidence given by Mr Gibney at the hearing.

Wind loading

79 I raise a new matter. Mr Gibney, when giving evidence, referred to the wind loading sustained by the northern wall.[33] Mr Casamento also referred to the wind load on the northern wall.[34] Mr Gibney did not refer to the wind loading on the southern wall but because of the height of the Unit 19 (which is situated at the top of the Building) it can reasonably be inferred that wind loading on that wall also is to be expected. It is well-established that in the context of considering whether a wall in a building is load-bearing, it is relevant to take into account wind loads. For this reason also, I consider the northern and southern walls to be load-bearing.

80 In summary, I confirm that I find:

(a) each of the northern external walls and the southern external walls is to be viewed as a single entity;
(b) each wall is structural in so far as it helps to support the roof and accordingly provides support for vertical loads in addition to its own weight;
(c) each wall is also load bearing as each is exposed to wind loading;

[32] [2012] VCAT 943 at [56].
[33] T434 L7-8.
[34] T444 L16.

(d) each wall is "within" Lot 19 as each is located inside the external boundaries of the Lot.
(e) each wall is an internal load bearing wall.

81 It follows that I must find that each of the northern and southern external walls is part of Common Property 1.

82 I acknowledge that the OC argues in its primary written submissions, at [102], that the licensed surveyor who prepared the Plan of Subdivision must have been aware of the OC's obligations under the *Owners Corporation Act* and that if the northern and southern walls were part of the Common Property, then this would impinge upon the lot owner's usual right to possession, control and ownership over those walls. I think there is nothing in this argument, as the rights of an individual lot owner in a subdivision development are inevitably compromised to some extent in respect of those parts of the development to which they have access but which are, at the same time, part of the Common Property.

83 In this connection it is relevant to note that although before 1 December 2021[35] the *OC Act* did not grant a right of access to a privately owned lot in order to carry out repairs to common property, s 47-s 51 did give an OC a basis to apply to the Tribunal for an order requiring the lot owner to allow entry and access. The existence of this right of the OC to apply for access highlights the compromise of the private rights of the owner of an individual lot in a subdivided building to which I have referred above.

THE HILLS'S CLAIM UNDER THE *WATER ACT*

84 Sub-sections 16(1) and 16(5) of the *Water Act* has been set out above. The interrelationship of these objections was conveniently summarised by Senior Member Kirton in *Davies*[36] as follows:

> 115. It is well established that in order to succeed in a claim under s 16(1) of the Water Act, the applicants must satisfy me that:
>
> a. there is a flow of water from the land of another person onto their land; and
>
> 2. that flow is not reasonable; and
>
> i. the flow has caused them injury, loss or damage; and

[35] Amendments to the *Owners Corporation Act* that came into operation on 1 December 2021 amended ss 50 and 51. The amendment to section 50(2) now permits an OC to authorise a person to enter a lot to carry out repairs on the common property (ie, no longer limited to repairs to services, repairs at the request of a lot owner, or lot owner failure to repair). A new s 165(1)(n) was introduced at the same time to allow the Tribunal to make an order requiring an occupier of a lot to grant entry to a lot or a building on a lot to a person authorised by the owners corporation for the purposes of s50.

[36] [2019] VCAT 1159 at [115-116].

a. the flow was caused by the respondents; or

b. if the respondents are subsequent occupiers, they have failed to take any steps reasonably available to them to prevent the flow (ss 5).

116. Further, under subsection 16(5):

a. if the cause of the flow was given rise to by works constructed or any other act done or omitted to be done on the common property before the OC1 became the occupier of the land, then:

2. the current occupier is liable to pay damages in respect of the injury, damage or loss

i. if the current occupier has failed to take any steps reasonably available to prevent the causing of ... the flow...

85 The Hills contend that each of the required elements in ss 16(1) is established on the evidence, and that the OC has no defence under ss 16(5). I address each issue in turn.

Flow of water from the roof and western wall

86 The Hills submit that the evidence establishes that water flowed from the roof, the western wall and window and from the north and south walls into Unit 19 at various times from February 2008.

87 Regarding the roof, the Hills draw the attention of the Tribunal to paragraph 4(d) of the OC's defence and submit that the OC has admitted the flow of water through the roof. Paragraph 4(d) reads:

> The roof structure, flashings, roof sheets and box gutters form part of Common Property. The OC has rectified any potential cause of water ingress into the building based on the various expert reports…

88 They contend this amounts to an admission of the flow of water through the roof.[37] I accept this contention. I also accept that it constitutes a concession that the roof is part of the common property.

89 With respect to the western wall, the Hills highlight paragraph 4(e) of the defence, which states:

> The exterior boundary façade of the building forms part of [the] Common Property. The OC has rectified any potential cause of water ingress into the building based on various expert reports…

90 The Hills contend that this amounts to an admission of the flow of water through the western wall and window.[38] I accept this contention also.

[37] The Hills's primary submissions at [28].
[38] The Hills's primary submissions at [28].

Flow of water from the northern and southern walls

91 The OC disputes that actionable flows of water from either the northern or southern walls have been established. They say that water has penetrated Unit 19 from the balcony on the north side and from the balcony on the south side. The OC contends that as both balconies are private property, it is not the OC's responsibility to repair and maintain them.

92 The Hills's answer is complex. Firstly, they say that is established by the evidence of Messrs Wood, Merlo, Carson and Sherwood that cracks in the rendered the EPS cladding on the north and south walls were a source of water ingress to Unit 19. Secondly, they contend that the sub-sill of the sliding doors and windows installed in the walls (and therefore part of the Common Property) was inadequate. Finally, they say that there was a lack of, or damaged waterproofing to, the timber hobs under the sliding doors (which are also Common Property), which allowed the timbers to swell and absorb water and consequently allow the ingress of water into Unit 19.

93 In response to the OC's contention that water entered into Unit 19 from the north balcony and the south boundary, the Hills say a number of things.

94 They point to investigations carried out by Focus in July 2013 which demonstrated that the balconies were not leaking at that point.

95 Having made that point, Mr Hill deposed that Abode undertook an inspection and destructive testing of the walls and balconies of Unit 19 on 30 June 2016. The work included cutting out pieces of the balconies. Mr Hill says that this work compromised the balconies, but that as at the date of his statement (23 December 2020) this had not been rectified by the OC.[39] In conjunction with this point, Mr Hill observes that when John Merlo inspected the property at the request of the OC, he reported that the destructive testing undertaken by Abode was "unnecessary" and "… the membrane in these areas had been compromised and effective localised reinstatement will not be possible."[40]

96 The Hills argue that if, as a result of that destructive testing, the balconies now need to be rectified, that expense must be borne by the OC as Mr Carson was the OC's contractor.

97 Next, they contend that even if water does emanate from the balconies, the balconies are not the sole cause of the water ingress and that only rectification of the north wall as well as the north balcony, together with rectification of the south wall and the south balcony, will provide a satisfactory outcome.

98 Most importantly, they contend that the OC has failed to prove that water entered into Unit 19 from the balconies. Ultimately, the OC conceded this

[39] Mr Hills's statement at [84].
[40] Mr Hills's statement [125].

was the case. On 31 May 2018, the OC's lawyer wrote to the Hills' lawyers advising that a report has been received from Abode.[41] One conclusion reached by Abode was that the causes of water entry into the Hills' Property were problems with the roof system, inadequate water overflow systems and the fact that the outer edge of the balcony was higher than the balcony level at the door/window frames. Replacement of the balcony tiles was **not** required. The lawyer confirmed his understanding was that the cost of all outstanding works would be shared between the OC and its insurer. In those circumstances, it was proposed that a mediation which had been planned should be cancelled.

99 The evidence relied on by the Hills regarding water entry into Unit 19 from the north and south walls (referred to above) must be weighed in the light of this concession made on behalf of the OC. I have no difficulty in finding that the OC was responsible for water entry into the Hills Unit from the north and south walls.

Is water still entering Unit 19?

100 Establishing that there have historically been flows of water from the roof and the western, northern and southern wall does not necessarily assist the Hills in the prosecution of their case. This is because the OC insists that the leaks from the roofs and from the walls have been fixed.

101 The Hills dispute this. They say that save for minor works to the roof performed by Aarden's Construction and Plumbing (**Aarden's**) in March 2012 and work on parts of the façade by Abode in March 2018, the OC has not repaired and maintained the Common Property at all. The Hills say that the roof, the western wall window and the north and south walls still leak and cause water to flow into their Unit. I now examine the evidence about this topic.

ARE THE FLOWS OF WATER CONTINUING?

The evidence of the Hills

102 There is much evidence of continuing leaks from the roof to be found in the respective witness statements of Mr Hill and Ms Hill. In this respect I note the following:

(a) Ms Hill reported further water entry above the doorway through the hole left by Abode to Michael Weekes (the managing agent) on 27 April 2017.[42] On 1 May 2017 Ms Hill also advised Mr Weekes in an email of black mould appearing on the ceiling above the front door.[43]

(b) By an email dated 4 December 2017, Mr Hill informed Mr Weekes that water had come into the ground floor of Unit 19 during a rainstorm on

[41] Exhibit AH 18 TB 114051141.
[42] Ms Hill's witness statement at [17].
[43] Ms Hill's witness statement at [18 all all].

the previous Saturday night.[44] A further incident of water ingress was reported on 8 January 2018 by Ms Hill. In this email, Ms Hill pleaded for a rectification plan to stop the ingress of water and the removal of mould.[45]

(c) Ms Hill sent an email on 14 January 2018 to Mr Weekes about a further incident of water entry into the Hills apartment on the previous day.[46] Health and safety issues arising from the presence of water on the stairs and mould were mentioned.

(d) On 7 June 2018 Ms Hill advised Mr Weekes that there was black mould growing on the newly replaced plaster above the stairwell.

(e) Ms Hill wrote to Mr Weekes on 18 June 2018 advising that significant rainfall had caused water entry into their Unit on 17 June 2018.[47]

(f) Mr Hill advised on 4 July 2018 that their Unit still leaked when it rained.

(g) On 15 September 2018 Mr Hill advised Mr Weekes and the chair of the OC committee that the new roof was leaking.[48] This was the roof which had been rectified in March 2018.

(h) On 12 December 2018 Ms Hill was still asking the OC to remove mould from the Hill's Unit.[49]

(i) On 18 January 2019 Ms Hill advised Mr Weekes that the new roof was leaking and that water was dripping onto the ceiling of the kitchen.[50]

103 The fact that leaks were continuing from the roof into 2020 is contested by the OC. In particular, the OC attacks the Hills' evidence that there was water damage to the ceiling after the roof was repaired on the basis that the assertion was not backed up by expert evidence. In this connection it is noted that Mr Wood in his September 2020 report opines "During [my] inspection, water damage was visible to the ceiling level and high on the walls in the Level 5 staircase."[51] The OC submits that this is consistent with the damage which had existed prior to Abode carrying out repairs in 2018. The OC contends that the report did not refer to any water damage or leak in the kitchen ceiling, which had been referred to by Ms Hill.[52]

---

[44] Exhibit AH 116 TB 1079
[45] Exhibit AH 117 TB 1084; Exhibit MH 11 TB 1784.
[46] Exhibit MH 12 TB 1812.
[47] Mr Hill's witness statement [173].
[48] Exhibit AH 139 TB 1235.
[49] Exhibit MPH 25.
[50] Exhibit M age 27 TB 1963.
[51] TB 206.
[52] Exhibit MH 27 TB 1963.

104 I do not accept this criticism of Mr Wood's evidence. Firstly, the passage quoted can be seen to be ambiguous. The reference to water damage to the ceiling level may well be a reference to damage in the kitchen area. Moreover, elsewhere in his report, Mr Wood is clear that "The rectifications have not prevented water ingress, as it continues to leak into the Level 5 common property staircase and Unit 19."[53] That statement is consistent with continuing water damage, as asserted by the Hills.

105 In order to reject the Hills's direct evidence that there was continuing water damage after the roof was repaired in the middle of 2018, I would have to make a finding that both Mr Hill and Ms Hill were to be rejected as witnesses of credit. There is no basis for me to make such a finding. I found them both to be credible witnesses. Moreover, their evidence is supported by the chain of contemporaneous correspondence which they created. I accept their evidence that water damage from the roof continued after the roof had been repaired in 2018.

106 Relevantly, the OC did not dispute the reports of water leaks at the times that the Hills reported them. Indeed, on a number of occasions, the OC arranged for cosmetic work such as the replacement of plaster to be carried out, as chronicled below.

107 Accordingly, I find that the flows of water from the roof continued after March 2018 when an attempt was made to rectify the roof.

Continuing flows from the north and south walls

The evidence of Mr Merlo

108 Mr Merlo provides direct evidence that the OC did not effectively rectify all the causes of water entry into the Hills' property. As noted, Mr Merlo was engaged by DL Brown Adjusting, the loss adjuster who had been appointed by the OC's insurer. He first inspected the property in March 2017 and produced a report dated 28 March. His key findings were that there were problems to the roof, poor panel joints to the rendered external façade panels and poor surface coating allowing moisture ingress internally. He also found faulty balcony construction.

109 Mr Merlo inspected the property again in September 2018 and on 16 October 2018 produced a report concerning units 19, 20 and 21. Again the report was addressed to DL Brown. This report noted that the issues with the roof, the panel joints and the poor surface coating of the walls had been repaired, but the balconies and walls had not. In particular, the timber hobs remained water damaged. This defect permitted water to penetrate through the base of the door and window frame.

[53] TB 204.

110 Although the OC, in its final submissions, attacks Mr Merlo's evidence about continuing ingress of water from the rain head in the box gutter,[54] and the Hills concede that his evidence under cross examination was at times confused, I have no difficulty in accepting his evidence of the continuation of water penetration under the hobs in September 2018. I note that Mr Merlo was engaged on behalf of the OC's insurer and not by the Hills. He did not present his evidence in a partisan manner. I have no doubt that he was endeavouring to assist the Tribunal in an objective manner.

The other expert evidence regarding causes of the leaks

Mr Casamento

111 Mr Casamento's report of 18 December 2020 was primarily concerned with the question of whether the north and south walls were load-bearing. Of relevance to the issue of continuing flows of water are a number of photographs were appended to his report, which demonstrated amongst other things:

(a) that there had been water damage to the sill and hob in the balcony doorways;

(b) that high on the corner of the west wall there had been a patch installed;

(c) window sills were not sloped away from the building;

(d) there was cracking in the external walls;

(e) wall/balcony joints were water damaged;

(f) hobs under a doorway were improperly sealed;

(g) there was a leak on the internal south wall window;

Mr Sherwood

112 The expert witness called by the OC in respect of defects was Mr Tim Sherwood of SJA. He inspected Unit 19 and provided a report dated 9 July 2020, which he adopted the hearing. This report updated in a report Mr Sherwood prepared dated 21 May 2020. He identified issues in Unit 19 including the following;

(a) construction of the hobs on the north boundary was by the use of two pieces of timber covered by insufficient membrane but the top section of the hobs was exposed and this was a construction fault;
(b) the hobs had sustained water damage causing swelling and separation;
(c) movement of the hob had in turn caused the membrane to split and fail;

[54] OC's final submissions, at [55-56].

(d) there was evidence of moisture ingress at the slab level, below the wall, suggesting failure of the junction between the slab and wall on the western side of the north balcony;
(e) the west window in the west wall is likely leaking at the sub-sill end and damage was observed to the skirting board and plasterboard in this area;
(f) the south hob could not be examined as it was not visible but there was evidence of water damage, and high moisture readings were observed to the skirting board and the timber floor below the sliding door which were suggested to come from a leaking sub-sill, gaps within the wall, and a failed membrane at the slab level on the external side of the balcony;
(g) high moisture readings were observed to the plasterboard walls in the alcove below the window in the stairwell which were suggested to come from the junction of the slab and wall frame on the external side of the balcony;
(h) there is damage to the ceiling in the entry hallway which appears to emanate from a water leak above the window alcove.

113 In summary, Mr Sherwood considered that there was water ingress via the timber hobs, the balcony membranes, the sub-sills of the sliding doors to the balconies and the west window

Mr Wood

114 Mr Dan Wood of Sherwood undertook inspection of the Building on 3 August 2020. From his report the following expert evidence may be gleaned:

(a) in respect of the north and south balconies, the hobs were compromised; (in this conclusion he agreed with the report prepared by Mr Sherwood);
(b) there was no stepdown in the concrete slab between the internal and external balcony;
(c) the timber hobs were deemed not fit for purpose;
(d) the external EPS walls showed signs of cracks and gaps which might allow water ingress; (he believed the external walls needed to be repaired but in this, he disagreed with Mr Sherwood);
(e) if there was no sarking installed between the EPS and the timber frame as had been reported by Abode, this would be a non-compliant defect;
(f) the EPS walls were missing expansion joints and this might have contributed to the cracking of the cladding;
(g) correct termination details are missing at the base of the EPS walls;
(h) window frames are missing sealant in multiple locations;
(i) there are cracks surrounding some windows and door frames;
(j) a small section of the wall has been patched with timber ply, which is an unsuitable material;

(k) although Mr Wood did not carry out a water test of the west wall window from the north balcony, he noted that the window sub-sill was showing signs of water damage and on this basis Mr Wood agreed with the opinion of Mr Sherwood that water was potentially entering via the sub-sill end;

(l) Mr Wood did not inspect the roof, but noted water damage was visible to the ceiling level and high on the walls in the level 5 common staircase and he suggested the water was seeping into the external walls.

115 In summary, Mr Wood concluded that the causes of water ingress to the Hills's Unit were a combination of the following:

(a) cracks in the EPS cladding;

(b) wall installation other than in accordance with a typical manufacturer's installation guide;

(c) possibly a lack of sarking;

(d) unsealed windows and failed sub-sills on the north and south balconies and on the west wall;

(e) the north balcony membrane has been turned up onto the timber hobs and has cracked and deteriorated;

(f) there is no structural stepdown in the concrete slab between the balconies and the internal flooring;

(g) the hobs have been constructed from timber, which is not appropriate, and they are rotting;

(h) there was possibly still water ingress via the roof.

116 Mr Wood highlighted that in a number of respects he agreed with Mr Sherwood but disagreed with him on a number of points including:

(a) whether the south balcony membrane had deteriorated in a similar rate to the north balcony;

(b) whether the balconies had failed;

(c) whether the external EPS walls needed to be rectified;

(d) whether that was a significant problem with the west window which required rectification.

Mr Carson

117 Much of Mr Carson's evidence at the hearing was concerned with work he had carried out in the adjacent apartment (Unit 18) under joint instructions from the owner, the OC and the OC's insurer. This evidence was not relevant to the Hills's case.

118 However, one finding he made when investigating the Hills's Unit on instructions from the OC in 2016 was that no "building wrap" or sarking had been installed between the rendered EPS and the timber frame.[55]

Conclusion about the continuing flows of water

119 It is to be noted that there is a degree of agreement between the experts concerning the existence of defects which are causing ingress of water. On the basis of the above review, I find that there is ample evidence that water is still ingressing Unit 19 from the roof, the western wall, the western window and the sliding door/ window units in the north and south walls

THE FLOW IS NOT REASONABLE

120 Section 16 of the water act was considered by the Supreme Court in *Spagnolo v Body Corporate Strata Plan 418979Q*[56] *("**Spagnolo**").* In this decision, Robson J, at [30], highlighted that the *Water Act*, like the *Drainage of Land Act 1975* before it, involved the concept of "reasonable". He stated:

> The Act contemplates the flow of water from one property to another is either reasonable or is not reasonable. It is the flow of water which has to be characterised as reasonable or unreasonable and not the conduct of the person sought to be held liable.[57]

121 Relevantly, ss 20(1) of the Water Act provides:

> (1) In determining whether a flow of water is reasonable or not reasonable, account must be taken of all the circumstances including the following matters:
>
> (a) whether or not the flow, or the act or works that caused the flow, was or were authorised;
>
> (b) the extent to which any conditions or requirements imposed under this Act in relation to an authorisation were complied with;
>
> (c) whether or not the flow conforms with any guidelines or principles published by the Minister with respect to the drainage of the area;
>
> (d) whether or not account was taken at the relevant time of the likely impact of the flow on drainage in the area having regard to the information then reasonably available about the cumulative effects on drainage of works and activities in the area;

[55] Letter from Abode to Mr Weekes, 6 July 2016.
[56] [2007] VSC 423.
[57] [2007] VSC 423 at [30].

(e) the uses to which the lands concerned and any other lands in the vicinity are put;

(f) the contours of the lands concerned;

(g) whether the water which flowed was—

(i) brought onto the land from which it flowed; or

(ii) collected, stored or concentrated on that land; or

(iii) extracted from the ground on that land and if so, for what purpose and with what degree of care this was done;

(h) whether or not the flow was affected by any works restricting the flow of water along a waterway;

(i) whether or not the flow is likely to damage any waterway, wetland or aquifer;

(j) in the case of a flow of, or interference with, water caused by the construction, removal or alteration of a levee in accordance with section 32AC of the **Victoria State Emergency Service Act 2005**, whether or not that construction, removal or alteration occurred in response to an emergency within the meaning of section 3 of the **Emergency Management Act 2013**.

122 In *Penniall,*[58] Deputy President Lulham indicated that in the context of considering a flow of water from common property in a subdivided block of apartments it was relevant to take into account the contours of the building.[59] In the present case, I consider that the potential for water to flow from a wall onto the floor of an apartment is obvious. Deputy President Lulham held that a flow of water in sufficient quantity to cause physical damage and loss to the occupants, was not reasonable.

Loss and damage

123 The Hills have sustained property damage to Unit 19 including water damage to timber floors, architraves and plasterboard.

124 In addition, it was not disputed by the OC that water penetration caused mould in Unit 19 was causative of economic loss as it ultimately will require removal and the Unit will have to be treated.

Summary so far

125 Because I accept that the Hills sustained resultant damage to their Unit, and that the water penetration caused mould and therefore economic loss, I find that, adopting the test propounded by Deputy President Lulham in *Penniall,* the flow of water was not reasonable.

Strict liability

[58] [2012] VCAT 943.
[59] [2012] VCAT 943 at [64].

126 Section 16(1) of the *Water Act* is one of strict liability. As Deputy President Macnamara remarked in 2007 in *Turner v Bayside City Council (**Turner**)*[60]*:*

> It is important at this stage to keep steadily in mind precisely the question that is being addressed. The applicant relies upon a statutory cause of action in the Water Act. Where the necessary facts are made out, the cause of action under Section 16(1) appears to be one of strict liability, that is, it is not necessary to demonstrate any want of reasonable care. The mere proof of causation seems to be enough. Nor are we seeking to answer the question whether the respondents owed a duty of care in accordance with the Common Law tort of negligence to Mr Turner.[61]

127 Another case in the Tribunal that held that s 16(1) of the *Water Act* imposes strict liability is *Tryclaca Importers & Wholesalers Pty Ltd v Growmac Importers Pty Ltd*. [62]

Who caused the flow?

128 In *Turner*, Deputy President Macnamara also observed:

> Reference in section 16 (1) to "the person who caused the flow" is presumably to be read as meaning the person whose acts or omissions caused the flow.[63]

129 I respectfully agree. I note this proposition also found favour with Senior Member Kirton in *Davies*.[64]

130 This leads us to consider the question: what was it that the OC did, or did not do, to cause the flow? The answer is that it caused the flow by failing to repair and maintain the roof and the western wall and also the northern and southern walls, as it was bound to do under the *OC Act*. It is to be emphasised that this duty arose under that legislation, not by operation of the common law. Negligence in the normal sense is not a necessary ingredient for a finding of causation under the *Water Act.*

THE DEFENCE UNDER S 16(5) OF THE *WATER ACT*

131 The OC alleges that as the causing of the flow of water from the Common Property was given rise to by the construction of the Building by the builder, before it became the owner of the Common Property, it is not liable to pay damages in respect of the Hills's injury, damage or loss as it took the steps reasonably available to it to prevent the causing of the flow. By way of particulars, it says it engaged consultants and experts to investigate the cause of the flow, it obtained and considered advice from experts and lawyers, and it undertook repairs to the roof of the property from time to time to stop the flow of water into Unit.[65]

---

[60] [2000] VCAT 399. All
[61] [2000] VCAT 399 at [19].
[62] [2001] VCAT 1455.
[63] [2000] VCAT 399 at [16].
[64] [2019] VCAT 1159 at [121].
[65] Second Further Amended Points of Defence dated 19 February 2021 at [12A].

132 Under ss 16(5) of the *Water Act,* the regime of strict liability created by ss 16(1) persists, even where the causing of the flow has been given rise to by works constructed on the land at a time before the current occupier became the occupier of the land, if the current occupier fails to take any steps reasonably available to prevent the causing of the flow.

133 Put another way, there is in ss 16(5) of the *Water Act* a carveout from the regime of strict liability in circumstances where the causing of the flow is given rise to by works constructed on the land before the current occupier took possession, provided that the current occupier does take steps reasonably available tto it to prevent the causing of the flow.

134 The Hills place reliance on the following passage appearing in the decision of Senior Member Young in *Connors v Bodean International Pty Ltd* (***Connors***)[66], at [51]:

> I consider that the words "*steps reasonably available"* includes a requirement that the current occupier has a sufficient and reasonable time in which to carry out those steps after being given notice or constutive (sic) notice of the unreasonable flow is imputed. Further, that their liability in the event of them not taking reasonable steps to cease the flow after such notice is limited to the time from which such steps should reasonably have been taken.

135 Senior Member Young in *Connors* then referred to ss 16(6) of the *Water Act,* which provides that the existence of a liability under ss 16(5) extinguishes the liability under subsection (1) of the person who caused the flow.[67] He said:

> 52.In relation to subsection 16(6) of the Act the impact of this subsection is much fairer and more readily understandable if it is interpreted to mean that whatever is the extent of liability of a subsequent occupier, to that extent the liability of the original creating occupier is extinguished.
>
> 53.Therefore, I find that "*reasonable steps*" in the Act infers that the current occupier takes the necessary steps within a reasonable time….

136 In *Leung v Harris*[68] (***Leung***) Senior Member Walker had to deal with a situation where the slab, membrane and tiling of a defective balcony of a unit in an apartment building which had been built by the builder shortly before the respondent became an occupier. Having referred with approval to *Connors***,** he went on to summarise its effect in these terms:

> In summary, the subsequent owner must, within a reasonable time after becoming aware of the existence of the flow of water from his land, investigate the problem, ascertain what positive steps are reasonably available for him to take in order to prevent the flow and take those steps. If he fails to do so, he will be liable for any injury, damage or loss

[66] [2008] VCAT 454.
[67] Previously referred to above at [27].
[68] [2018] VCAT 1630.

> suffered by the other party which would not have been suffered but for such failure. I should add that, so long as the flow is prevented, it does not matter how the subsequent owner does it.[69]

137 Senior Member Kirton in *Davies* said:

> I respectfully agree with other members of this Tribunal who have adopted the proposition that the phrase "reasonably available" steps in the Act requires the current occupier to take the necessary steps within a reasonable time.[70]

138 I too, respectfully, adopt this approach.

The Hills's submission that the OC cannot invoke ss 16(5)

139 The Hills refer to their witness statements and submit that they demonstrate that the OC has been on notice regarding flows of water from the common property since February 2008. They dispute that the OC can rely on ss 16(5) of the *Water Act* because it engaged consultants and experts to investigate the cause of the flow, considered advice from experts and lawyers, and undertook repairs to the roof from time to time. They submit, simply, that the OC did not take reasonable steps within a reasonable time. On the contrary, they submit that what little was done since February 2008 was not enough, nor was it done quickly enough.

140 The Hills gave copious evidence in support of this submission. I note the following.

THE EVIDENCE CONCERNING FLOWS OF WATER AND THE OC'S RESPONSES

141 The OC contends that it acted on the Hills's early complaints about water penetration into their unit. It engaged one consultant, Buildcheck, in 2008 and another, Build Assess in 2011. Aarden undertook rectification works to the roof in March 2012. Mr Hill gave evidence that the next leak was in February 2013.[71] Mr Hill deposed that this was repaired by Focus Plumbing and that the repair was effective until Abode Restoration undertook destructive testing in June 2016.[72]

142 Mr Hill in his witness statement made reference to a report from Roscon concerning unit 18 which referred to waterproofing issues with the southern and western external walls. The report was based on an inspection in September 2015.

143 Mr Hill then outlined over a number of paragraphs that the OC had taken out a loan of $50,000 for rectification works at unit 18. There is disagreement on OC committee meeting in January 2016 about the extent of the works, but at an OC committee meeting on 1 February 2016, rectification work for unit 18

---

[69] [2018] VCAT 1630 at [85].
[70] [2019] VCAT 1159 at [123].
[71] Mr Hills's statement at [53].
[72] Mr Hills's statement at [59].

including works to the balcony tiling, waterproofing and rendering were approved. The works were to be paid for by the OC.

144 In March 2016, the exterior wall and cladding to unit 18 on level 6 was replaced.[73]

145 Mr Hill went on to depose that at an OC committee meeting on 11 April 2016, a report was provided regarding the works in unit 18. The damage to the Hill's Unit was also discussed.[74] The minutes of the meeting disclosed that it was reported that Tom (Carson) from Abode had attended at the Hill's Property that day. Mr Carson was quoted as saying:

> With unit 19 there has been an attempt to fix the problem which seems to have worked. But perhaps that has now failed. I think we need to cut a whole (sic) out of the floor material so that it can be inspected.[75]

146 The minutes of the minutes of the OC committee meeting held on 9 May 2016 evidence that the proposal for a loan for rectification work was put forward.[76]

147 Mr Hill continued to press the managing agents Turnbull Cook regarding repairs to his apartment. Water leaks to his apartment were noted in the minutes of a meeting of the OC committee on 16 June 2016.[77]

148 Abode inspected the Hills's Property on 22 June 2016 and afterwards prepared a quotation for the opening up of a large section of the wall and floor to establish the source of water entry. Mr Hill informed the managing agent that he was to proceed with the work proposed by Abode and Michael Weekes of Turnbull Cook confirmed approval of the quotation to Mr Carson and Abode on 24 June 2016.[78]

149 Abode undertook an inspection and destructive testing of the walls and balconies of Unit 19 on 30 June 2016. As already noted, Mr Hill argues that this work compromised the balconies.

150 According to Mr Hills's statement, a decision by the OC regarding the repair to Unit 19 was postponed in July 2016 in order to obtain further information from Abode and details from an insurance assessor.[79]

151 On 15 July 2016, a proposal regarding the splitting of costs for the rectification works in units 19, 20 and 21 was sent to members of the OC committee.[80] For present purposes it is sufficient to note that the proposal assigned responsibility to the lot owners for repairs to the balconies.

152 This became an issue, as Mr Hill disputed liability for the cost of repairing his balconies. In this connection he sent an email to the OC enclosing

---

[73] Mr Hills's statement at [60-70].
[74] Mr Hills's statement at [71].
[75] Exhibit (to Mr Hills's statement) AH 57 TB
[76] Exhibit AH 59
[77] Exhibit AH 64
[78] Mr Hills's statement at [81-83].
[79] Mr Hills's statement at [88-91].
[80] Mr Hills's statement at [92].

minutes of the OC meeting of 1 July 2013 which stated that Focus had found that the balconies had not at that time failed at the Hill Property.[81] He also attributed the subsequent damage to his balcony to the destructive testing which had been carried out.[82]

153 A proposal for extensive rectification works at the Building was prepared, totalling $300,105.88. Of this total, $53,000 was to be paid in respect of repairs to water leaks from the ceiling in level 5 at the top of the stairwell in Units 19 and 20.[83]

154 According to Mr Hill, Mr Carson of Abode became involved in the negotiations with between himself, the managing agent and the OC committee chair regarding the proposed works to the Hills's Property.[84]

155 The managing agent was active in obtaining further quotations from mid October 2016.

156 Mr Hill deposed that he attended a further OC committee meeting on 13 December 2016. It was resolved that Abode would be engaged to undertake the rectification works at the Hill's Unit and at Unit 20. Mr Hill was disappointed to learn that there would be a delay as advice was to be obtained from a lawyer.[85]

157 On 23 January 2017, Mr Hill attended an OC committee meeting. Legal advice from Legal & Mediation Services (**LMS**) was referred to which was to the effect that the balconies were not common property and that the lot owners were required to pay for the works on their balconies.[86] Mr Hill continued to contest this liability.[87]

158 On 27 April 2017, as noted already, Ms Hill informed Michael Weekes of further water entry above the doorway through the hole left by Abode[88] and on 1 May 2017 Ms Hill also advised Mr Weekes of black mould appearing on the ceiling above the front door.[89]

159 Mr Hills' evidence is that the dispute between the OC and himself as to the liability to repair his balconies remained unresolved throughout May, June and July 2017.[90] Indeed, the dispute appears to have become more entrenched as the OC obtained legal advice from LMS, who wrote to Mr Hill on 15 June 2017 asserting that Mr Hill was liable for all water entry coming from his defective balconies. Reference to that letter indicates that LMS was relying on the report from Mr Merlo of 28 March 2017 which criticised the

[81] Mr Hills's statement at [95].
[82] Mr Hills's statement at [97].
[82] Exhibit AH 79, at TB 830.
[83] Mr Hills's statement at [102].
[84] Mr Hills's statement at [103],[106],[108-111].
[85] Mr Hills's statement at [113].
[86] Mr Hills's statement at [118].
[87] Mr Hills's statement at [118], [120] and [123].
[88] Ms Hill's witness statement at [17].
[89] Ms Hill's witness statement at [18 all all].
[90] Mr Hill's witness statement at [133-136].

method of construction of the balcony, noting that there was only one membrane under the tiles, not two.[91]

160 The 2017 Annual General meeting of the OC was held on 18 July. At this meeting, amongst other things, the strata loan required to carry out rectification work was discussed. The minutes record the Hills refusal to pay for the repairs to their balcony. The minutes noted:

> It was noted that lot 19 has engaged a solicitor to progress the matter and until this matter is resolved the timing for the drawdown to the strata loan cannot be determined as this may impact on original amount allocated to various work. (Sic)[92]

161 Mr Hill obtained a quotation from a builder, Russell Pickens, for the works required to the balconies at his Unit. On 21 September 2017, he emailed this quotation to the OC.[93]

162 Mr Hill had engaged Sherwood Construction Solutions to provide advice regarding the water ingress into the Hill Property. Mr Ed Muggleton of that firm had inspected the property on 2 March 2017. That consultant produced a report which appears on its face to be undated but which Mr Hill says was issued 6 October 2017.[94]

163 Mr Hill instructed his lawyers, McMahon Fearnley, to send a letter dated 17 October 2017 to the then lawyer for the OC, contending that the damage to the Hills' Property had been caused by the damaged walls, which were Common Property. The letter called upon the OC to pay for all the rectification work required and for all ancillary costs including alternative accommodation, storage and relocation costs.[95]

164 The stand-off between the Hills and the OC continued throughout the balance of October and November 2017. At the start of December 2017, the OC, through Mr Weekes, proposed a mediation chaired by an independent mediator to discuss the balcony issue. Mr Hill responded positively, asking for a set of dates and a set of proposed mediators.[96]

165 As already noted, Mr Hill on 4 December 2017 informed Mr Weekes of water penetration into the ground floor during a rainstorm on the previous Saturday night[97] and a further incident of water ingress was reported on 8 January 2018 by Ms Hill.[98]

---

[91] Exhibit AH 106, TB 971-975.
[92] Exhibit AH 109, TB 1011.
[93] Exhibit AH 111, TB 1018.
[94] Exhibit AH 112, TB 1043-1051.
[95] Exhibit AH 113 TB 1053-1058.
[96] Exhibit AH 117 TB 1081.
[97] Exhibit AH 116 TB 1079
[98] Exhibit AH 117 TB 1084; Exhibit MH 11 TB 1784.

166 Mr Weekes' response was that he had requested the OC committee to approve the replacement of plaster, but said that sealing work to stop the water entry was "still pending as to who is liable".[99]

167 As noted, on 13 January 2018 there was a further incident of water entry into the Hills' Unit which Ms Hill notified to Mr Weekes on 14 January.[100]

168 On 15 January 2018, Mr Weekes confirmed that the OC had approved a contractor to remove the mouldy plaster and repaint the affected area. The relevant works order was sent to Mr Hill.[101]

169 The parties continued to correspond in January and February 2018 concerning the appointment of a mediator.[102]

170 In March 2018, the OC commenced rectification work to the roof of the property. Although scaffolding was installed, no arrangement was made to carry out maintenance works at Unit 19.[103]

171 On 9 April 2018 Ms Hill wrote an email to Mr Weekes complaining of damage to the tiles on their lower balcony "as a result of the common property tile removal works."[104]

172 An arrangement was made for the mediation to take place on 19 April 2018. However, on 18 April 2018, Mr Weekes advised that the mediation would be adjourned to 3 May 2018.[105]

173 Mr and Ms Hill attended a mediation with the OC on that date. According to Mr Hills' witness statement, the OC requested further time to consider the issues and obtain further information, and the mediation was adjourned to 31 May 2018.[106]

174 On 31 May 2018, the OC received advice from Mr Carson of Abode that the balconies to Unit 19 were *not* the cause of the water ingress into that Unit. In a report to the chair of the body corporate committee, Mr Carson advised

> Since working on the building in the last 3 months and because of a previous experience with apartment 18 we have now concluded very confidently that the water is getting into the apartments on level 5 through the north and south walls is primarily through the window/door trays (the ingress of water is always present where there is a door) and possibly down through the wall from the roof.[107] (Sic)

---

[99] Exhibit AH 118 TB 1085.
[100] Exhibit MH 12 TB 1812.
[101] Exhibit AH 119 TB 1094.
[102] Exhibit AH 120
[103] Mr Hill's witness statement, [158], [160].
[104] Exhibit MH 14 TB 18.
[105] Exhibit AH 125 TB 1120
[106] Mr Hill's witness statement [167]
[107] TB 1142.

175 Mr Carson went on:

> The roof problem is now fixed. What is left to do is repair the window trays so that they shed water instead of leaking into the wall. We also have to replace the bottom plate, create a differential between the balcony slab and the inside slab and flash the bottom plate so that it protects the wall and the inside from any water ingress.
>
> The bottom plates on the balconies of apartments 19 and 20 are completely rotted out. These need to be replaced.[108]

176 As a result of Mr Carson's opinion the lawyers engaged on behalf of the OC communicated to the Hills that they did not require their balconies to be re-tiled and that the cost of all outstanding works would be shared between the OC and its insurer, but still no repairs or maintenance was undertaken to the north and south walls. In those circumstances, it was proposed that the mediation be cancelled.

177 As noted, on 7 June 2018 Ms Hill advised Mr Weekes of the growth of black mould on the new plaster above the stairwell. She requested that the plaster be removed and replaced. The managing agent responded immediately by issuing a works order to a contractor.[109]

178 Mr Hill deposed that significant rainfall caused water entry into their Property on 17 June 2018.[110] As noted, Ms Hill wrote to Mr Weekes the following day advising of the problem. When doing so, she referred to mould. She provided photographs.[111]

179 Between 20 June 2018 and 8 August 2018 the Hills' lawyers and the OC's lawyer exchange correspondence. An email from the OC's lawyer 20 June 2018 indicates that the question of which party was to pay for what had not yet finally been resolved and an urgent report from the OC's insurer was being sought.[112] The fact that Abode was not by 21 June attending to works at Lot 19 "due to the current mediation process" became clear from an email to Mr Weekes to Ms Hill sent on that day.[113]

180 On 2 July 2019 Mr Weekes emailed Mr Hill advising that the scaffolding was being taken down even though further work was required to the Hills' unit. Mr Weekes noted that the OC was still waiting on its insurer to advise what was being covered, and that when this information was to hand a mediation would be held.[114]

---

[108] TB 1144.
[109] Exhibits MH 15 and MH 16 respectively.
[110] Mr Hill's witness statement [173].
[111] Exhibit MH 18 TB 1885.
[112] MH 20 TB 1895.
[113] MH 131 TB 1895
[114] Exhibit AH 132 TB 1191.

181 As mentioned, Mr Hill on 4 July 2018 noted that the apartment still leaked when it rained. He complained about the lack of a plan to address the OC's responsibility for the walls and windows.[115]

182 On 12 July 2018 all the lot owners including the Hills received a letter from the OC. The letter confirmed that it was the OC's intention to repair Units 19, 20 and 21 at the same time in order to manage costs. The letter also made a reference to Mr Hill being responsible for building defects.[116] Mr Hill circulated his own letter in response to other individual lot owners.[117]

183 Mr Hill deposes that he contacted Mr Weekes to seek confirmation that the OC had actually contacted its insurer. Upon receiving no response, he contacted the loss adjuster used by the insurer, David Brown of DL Brown Adjusting. He says that Mr Brown informed him that he had not been engaged by the OC to prepare a report.[118]

184 Mr Hill and Ms Hill continued to communicate with the OC regarding water damage in their apartment in late July 2018.

185 Ms Hill sent a further email to Mr Weekes on 11 September 2018 requesting that mouldy plaster above the stairwell be removed.[119] Four days later Mr Hill advised Mr Weekes and the chair of the OC committee that the new roof was leaking.[120]

186 The OC caused a works order to be issued to a contractor to cut out the mouldy plaster, and a quotation for the work was sent a month later by Mr Weekes to the chair of the OC committee for approval.[121] The works were performed in the middle of November 2018.

187 On 16 October 2018 Mr Merlo provided his further report to the OC regarding the Hills' Property which contained his finding that moisture was still ingressing unit 19 including via a water damaged hob.[122]

188 The 2018 annual general meeting of the OC was held late, on 12 December.

189 On 12 December 2018 Ms Hill sent an email to the OC concerning the removal of mould from the Hill's Property.[123]

190 Mr Weekes responded by arranging for a contractor to install a drip tray and drainage pipe in the roof space of Lot 19.[124]

---

[115] Exhibit AH 133.
[116] Exhibit AH 135.
[117] AH 136 TB 121.
[118] Mr Hill's witness statement [187].
[119] Exhibit MH 22 TB 1900.
[120] Exhibit AH 139 TB 1235.
[121] Exhibit AH 140.
[122] Mr Hill's witness statement [190).
[123] Exhibit MPH 25.

191 As mentioned above, Ms Hill advised Mr Weekes on 18 January 2019 that the new roof was leaking and water was dripping onto the ceiling of the kitchen.[125]

192 The response was that a contractor from Scotia Maintenance was sent to the Hills' Property to inspect the mouldy plaster and skirting on 22 January 2019.[126] The contractor went away to prepare a report.

193 In or about January 2019 the Hills engaged a Dr Cameron Jones, to inspect their property and report. Two reports from Dr Jones's firm, Biological Health Services, were received dated 31 January 2019.[127]

194 Mr Hill deposes that after he and Ms Hill received Dr Jones's reports, they felt they had no choice but to move out of their Unit. On 1 February 2019 they moved into Mr Hill's stepmother's property on a temporary basis. On 10 February 2019, the family moved into their investment property in Cheltenham.[128]

195 At the start of February 2019, the OC obtained quotations from law firms regarding the provision of advice regarding fixing defective common property and balconies.[129]

196 On 8 February 2019, Scotia Maintenance provided advice regarding mould removal. Their recommendation was to have a mould specialist attend to do an inspection.[130]

197 At this point the Hills instructed their lawyer to send a copy of each of the Biological Health Services reports to the OC's lawyer. The covering letter indicated that the Hills were instituting proceedings in the Tribunal and asked whether the OC's lawyer had instructions to accept service.[131]

198 On 20 February 2019, Mr Weekes circulated to the relevant Lot owners advice from the OC's insurer regarding the insurer's proposals for settlement.[132]

199 On 20 February 2019, Mr Hill attended an OC committee meeting. Mr Hill's evidence is that at this meeting the OC decided not to proceed with repairs to

[124] Mr Hill's witness statement [204 & 205].
[125] Exhibit MH 27 TB 1963.
[126] Mr Hill's witness statement [209].
[127] Exhibit AH 151 1305-1362.
[128] Mr Hill's witness statement [213].
[129] Mr Hill's witness statement [214-215].
[130] Mr Hill's witness statement [218].
[131] Exhibit AH 155
[132] Exhibit a page 157.

the Hills' Unit as they had moved out.[133] That this is the position is not entirely clear from the minutes of the meeting.[134]

200 This proceeding was commenced on 25 June 2019.

Consideration

201 The Hills make a number of specific allegations. The first proposition advanced by the Hills is that the OC had knowledge of the water entry into their unit (Unit 19) from least February 2008. On the basis of Mr Hill's direct evidence of this contained in his witness statement,[135] I accept this was the fact.

202 The next proposition advanced is that from the experts' report it had received by December 2008, the OC knew how to rectify the water flows but did not act upon the recommendations. A difficulty facing the Hills in proving this proposition is the reports received by the OC, including one prepared by Buildcheck[136], were not put into evidence because the authors were not going to be called. However, Mr Hill gives direct evidence in his witness statement, at [17], that he received a copy of the Buildcheck report on 16 January 2009. Minutes of the meeting of the OC committee on 4 February 2009 indicate that the OC manager was to put the rectification work detailed in the reports out to tender. From this it can be reasonably inferred that the OC had received advice as to work to be done.

203 The next point made by the Hills is that, in contrast to how the OC dealt with their Unit (19), the OC arranged for and partly paid for Abode to perform rectification of the exterior walls and cladding of Lot 18 in 2016. In my view this is clearly established by the evidence of Mr Carson of Abode.[137]

204 The next issue highlighted is that on 22 January 2017, the OC obtained legal advice that the north and south walls were Common Property[138] but notwithstanding that advice, no repairs or maintenance to those walls was undertaken. Indeed, in its final submissions, the OC continues to dispute that the north and south walls are Common Property.

205 The Hills point out that in January 2017, the OC passed a resolution to obtain a $300,000 loan for repair and maintenance works to the Common Property, including repairs to the north and south walls[139] but the OC never applied that money to engage a contractor to do the necessary work. I accept that this was the case, noting that Mr Hill did not refer to them and no evidence was given by the OC of any such works.

---

[133] Mr Hill's witness statement [2 to 3].
[134] Exhibit AH 158 TB 1396.
[135] Mr Hills' witness statement, [5].
[136] Buildcheck inspected the Building in general and Unit 19 in particular in December 2008.
[137] See for instance Transcript p 643 and pp 649-651.
[138] TB 909
[139] TB 915 and 916, and TB808 and 809.

206 On 31 May 2018, the OC received an opinion from Mr Carson of Abode that the balconies to Unit 19 were not the cause of the water ingress into that Unit. This opinion is reflected in an email sent by the OC's lawyer to the Hills's lawyer dated 31 May 2018[140]. The OC's lawyer communicated that the OC did now not require the Hills's balconies be re-tiled and that the cost of all outstanding works would be shared between the OC and its insurer. Notwithstanding, Mr Hill's evidence is that the OC did not carry out any repairs or maintenance to the north and south walls and the OC itself gave no evidence that it had carried out such works.

207 In support of their allegations, the Hills refer to the evidence of the manager of the OC, Mr Michael Weekes. Relevantly, he deposed that in his experience it was unreasonable for a repair and maintenance issue of this kind to last from 2008 until 2021

Finding

208 I find for the Hills on the issue of whether the OC acted with reasonable speed in rectifying all the causes of water ingress into the Hills' Unit through the Common Property.

209 I acknowledge that with respect to the north and south walls, there was a particular issue, which is that the OC was of the erroneous view for a number of years of these were not Common Property. Putting aside the question of whether the OC should have taken steps earlier to obtain correct advice about the matter, I am satisfied that the OC became aware of that the north and south walls were Common Property after obtaining advice from LMS in January 2017. Even if that is treated as the starting point for the counting of time, I am satisfied that the OC did not take the steps reasonably available to it in order to stop the flow of water under the window trays in the north and south walls within a reasonable time after that point. Indeed, the OC had not done so up to the time of the hearing.

209 In my view the OC is also open to criticism in respect of the repairs it commissioned to the roof. It is clear from the history set out above the roof was repaired unsuccessfully on at least two occasions, but the has OC failed to take action when requested to do so after the last repair. Relevantly, Mr Wood recommends some work to the roof.

Summary and conclusion regarding the *Water Act* claim

210 I confirm that I have found:

1. the roof, the western wall, the north wall and the south wall of Unit 19 are Common Property;
2. there have been unreasonable flows of water from the Common Property to Unit 19;
3. the OC has caused the unreasonable flows of water;

[140] Exhibit AH 128, TB 1140.

4. the OC has failed to take all reasonable steps available to it within a reasonable time to prevent the unreasonable flows; and
5. the Hills have suffered loss and damage as a consequence of the unreasonable flows.

211 As a consequence of these findings, I must also find the Hills are entitled to an award of damages.

ALTERNATIVE CLAIM MADE UNDER THE *OC ACT*

212 The text of s 46 has been referred to above at [15]. The effect of the section has been summarised by Senior Member Steele in *Sevenco Pty Ltd v Victoria Body Corporate Services*[141] as follows, at [4]:

> In my view, section 46 imposes a statutory duty of care on the owners corporation, so that it may be liable for any loss or damage caused to a lot owner by its failure to carry out that duty. The manager's duty is to carry out its functions with due care and diligence. Similarly, a breach of that duty would expose the manager to liability for loss and damage caused to a lot owner by the breach. In order to succeed in most of its claim, the applicant company needed to show that either the owners corporation or the manager (or each of them) had breached its duty and that the breach had caused loss or damage to the applicant.

213 This passage was referred to with evident approval by Senior Member Kirton in *Anderson*.[142] Senior Member Kirton went on to say, at [154]:

> I also repeat what I said in *Davies v Owners Corporation 1 PS414649K*, that an owners corporation has a power under s48 and a duty under s46 of the OC Act, which when combined, create an obligation on the owners corporation to actively repair and maintain the common property. In that case the owners corporation:
>
> > ... was aware of either the actual leaks or the potential for leaks since at least 2008..., but has failed to repair and/or adequately address the defects in the common property, including by failing to exercise any of its powers in respect of the level 9 owners. As a result, the unreasonable flow of water has continued unabated and the OC1 is in breach of its duty to repair (s46).

214 The Hills submit that the Tribunal must consider whether the OC has actively repaired and maintained the common property. They submit that all the facts which apply to the consideration of the OC's liability under ss 16(5) of the *Water Act* apply to this question and they rely on the submissions they have made in respect of ss 16(5).[143]

215 I accept this submission. On this basis, the Hills are entitled to an award of damages in respect of their property damage and economic loss under the *OC Act* as well as under the *Water Act*. Of course, the damages awarded under each Act will be the same damages: they can only be awarded once.

Damages for loss of amenity

[141] [2012] VCAT 374.
[142] [2020] VCAT 538 at [153].
[143] The Hills's primary written submissions at [52].

216 The fact that damages are to be awarded under the *OC Act* opens a new issue, which is whether the Tribunal has jurisdiction to award damages for loss of amenity or inconvenience under the *OC Act* in circumstances where the claim is made under the *OC Act* in parallel to a claim under the *Water Act* in respect of loss or damage caused by a flow of water.

217 The jurisdiction of the Tribunal to make an award of damages for loss of amenity is to be found in s165 of the *OC Act,* which sets out the orders which VCAT can make. Relevantly, it provides:

> (1) In determining an owners corporation dispute, VCAT may make any order it considers fair including one or more of the following—
>
> (a) ….
>
> (b) ….
>
> (c) an order for the payment of a sum of money—
>
> (i) ….
>
> (ii) by way of damages (including exemplary damages and damages in the nature of interest);….

218 In my view, a general power in the Tribunal to award damages which are not limited to compensatory damages for property loss of economic loss is clear.

219 The issue arises because the Tribunal lacks jurisdiction to make an award of damages in personal injury, under ss 19(1) of the Water Act, which provides:

> The Tribunal has jurisdiction in relation to all causes of action (other than any claim for damages for personal injury) arising under sections 15(1), 16, 17(1) and 157(1) of this Act or at common law in respect of the escape of water from a private dam.

220 There are a number of case brought under the *Water Act* where the Tribunal has declined to award damages for loss of amenity or inconvenience arising out of an unreasonable flow of water. The leading decision is that of Deputy President Macnamara in *Kopitschinski v Song* [144] which I followed in *Collins v Greater Geelong City Council* [145] in declaring "the Tribunal has no jurisdiction to determine the applicants' claim for "loss of amenity and use of the land and general inconvenience, worry and anxiety occasioned by the landslide and the ongoing safety risks..." I also followed *Kopitschinski v Song* in *Jasen v Demaio* where I ruled, at [26], that Ms Jasen's claim for damages for "loss of enjoyment of life, inconvenience and mental stress" was not a claim that could be determined by the Tribunal. [146]

221 Senior Member Kirton had to consider in *Davies* a claim made by one of the applicants, Ms Davies, for damages of $34,000 for the physical inconvenience caused by having to live with her son in another apartment

[144] [2007] VCAT 1958.
[145] [2018] VCAT 1873.
[146] [2019] VCAT 712.

during the period she could not live her apartment by reason of the water damage complained of. Senior Member Kirton considered the question of whether, in circumstances where Ms Davies was simultaneously making claims under the *Water Act* and under the *OC* Act, an award for inconvenience could be made. She accepted a submission from the owners corporation that as a result of s 17(1) of the *Water Act* she had no power to award damages for inconvenience under the OC Act [147]. She did so in circumstances where the lack of jurisdiction was, as she remarked "tacitly conceded by the applicants."

222 In the present case, the Hills press their claim for loss of amenity. The lack of jurisdiction of the Tribunal is *not* conceded.

223 The OC did not plead want of jurisdiction as a defence. It was in the OC's closing submissions that they argued, at [83], that "the Tribunal has previously indicated that it has no jurisdiction for claims for physical inconvenience, distress and anxiety under either the *Water Act* or the *Owners Corporation Act*." *Davies* was referred to as the authority for this proposition.

224 The Hills made a complaint in the final paragraph of their reply submissions that the OC in its primary closing submissions had "not developed any substantive submissions in damages, mitigation or the alleged Part IVAA of the Wrongs Act defence." The Hills, anticipating that such submissions might be included in the OC's reply submissions, submitted that if the OC was allowed to do that, it "would be unfair and unjust and a potential breach of the rules of natural justice."

225 I do not ignore the Hills's submission. Ordinarily, it might have been fatal to the OC's position because the Tribunal, bound as it is by the rules of natural justice under s 98(1)(a) of the *Victorian Civil and Administrative Tribunal Act 1998,* must afford procedural fairness to the parties.

226 However, in the present case, I consider that no procedural fairness arises as the issue of the lack of jurisdiction of the Tribunal to award damages for loss of amenity under the Water Act came up during the hearing. For this reason, I propose to deal with the OC's submission on jurisdiction.

227 As noted, the OC's submits that "the Tribunal has previously indicated that it has no jurisdiction for claims for physical inconvenience, distress and anxiety under either the *Water Act* or the *Owners Corporation Act*." That is not an accurate statement. It is true that the Tribunal has said that it lacks jurisdiction in claims brought under the *Water Act* to make an award of damages in respect of "loss of amenity and use of the land and general inconvenience, worry and anxiety occasioned by the landslide and the ongoing safety risks..." in *Collins*[148] and "loss of enjoyment of life, inconvenience and mental stress in *Jasen*[149]. However, the Tribunal has

[147] [2019] VCAT 1159, [134].
[148] [2018] VCAT 1873.
[149] [2019] VCAT 712.

never said that it has no jurisdiction to make such an award under the OC Act.

228 In *Davies*, upon which the OC relies, Senior Member Kirton had to consider the question of whether, in circumstances where an applicant was simultaneously making claims under the *Water Act* and under the *OC* Act, an award for inconvenience could be made. In circumstances where the Tribunal's lack of jurisdiction to make such an award appeared to be conceded by the applicant, Senior Member Kirton determined, without discussion, that no jurisdiction existed.

229 The Tribunal is not bound by its own decisions. At the same time, it is well established that where the Tribunal has to determine a legal issue which has previously been determined by the Tribunal, the Tribunal should as a matter of consistency follow its earlier decision unless there are good reasons for not doing so. If the Tribunal, when determining the subsequent matter, determines not to follow its earlier decision, it should give clear reasons for not doing so.

230 In the present case, the Hills are seeking damages for loss of amenity. I am clearly of the view that the power of the Tribunal to award damages for loss of amenity arising under s 165 of the *OC Act* can be exercised in circumstances where the applicant is making a claim for damages simultaneously both the *OC Act* and the *Water Act*. I can see no reason why the power to award such damages created by the *OC Act* should be read down in circumstances where the *Water Act* also applies. It is to be remembered that the *Water Act* was passed some 17 years earlier than the *OC Act* became law in 2006. If Parliament had intended that the power to award damages for loss of amenity it created under the *OC Act* in 2006 was not to be applied in circumstances where the *Water Act 1989* also applied, it could easily have said so.

231 With genuine respect to Senior Member Kirton, I am not troubled by not following her decision. It must be confined to its facts, which included that the want of jurisdiction to make an award for inconvenience under the OC in the particular circumstances of that case had been conceded by the applicant.

OVERVIEW OF THE CLAIM FOR DAMAGES

232 In overview, the Hills seek in their final submissions an award of $288,435.80 broken down as follows:

(a) $99,530[150] for rectification of damage caused by the flows within Unit 19;
(b) $4,009.50 for mould remediation;
(c) $117,800 for alternate accommodation;
(d) $16,145 for removal and storage costs;
(e) $13,419.42 for utilities paid for at the alternative accommodation;

[150] This was a reduction from the figure of $128,623 set out in their Further Updated Particulars of Loss and Damage filed on 19 January 2021.

(f) $27,531.88 for owners corporation fees that the Hills were required to pay whilst they were not living in Unit 19;
(g) $10,000 for loss of amenity.

233 A number of these claims will fail if it is found that the Hills could have mitigated their loss by carrying out repairs to the disputed north and south walls as well to their balcony

234 For this reason, it is appropriate to deal shortly with the defence of mitigation.

PRINCIPLES GOVERNING CAUSATION AND REMOTENESS

235 Before I review the separate claims made by the Hills, it is appropriate to examine the principles which govern causation and remoteness of damage.

236 In assessing the Hill's claims, the Tribunal is governed by s19(9), which reads:

> In determining a cause of action arising under section 15(1), 16, 17(1) or 157(1) of this Act the Tribunal must apply to the questions of causation and remoteness of damage the same tests as a court would apply to those questions in an action based on negligence.[151]

237 The law regarding causation in a case of negligence has been codified in s 51 of the *Wrongs Act 1958 ("**the Wrongs Act**")*, which provides as follows:

> (1) A determination that negligence caused particular harm comprises the following elements—
>
> - (a) that the negligence was a necessary condition of the occurrence of the harm (**factual causation**); and
> - (b) that it is appropriate for the scope of the negligent person's liability to extend to the harm so caused (**scope of liability**).
>
> (2) In determining in an appropriate case, in accordance with established principles, whether negligence that cannot be established as a necessary condition of the occurrence of harm should be taken to establish factual causation, the court is to consider (amongst other relevant things) whether or not and why responsibility for the harm should be imposed on the negligent party.
>
> (3) If it is relevant to the determination of factual causation to determine what the person who suffered harm (the **injured person**) would have done if the negligent person had not been negligent, the matter is to be determined subjectively in the light of all relevant circumstances.

[151] The relevant tests were examined by me in *Collins v Greater Geelong City Council (No 2)* [2018] VCAT 2044.

> (4) For the purpose of determining the scope of liability, the court is to consider (amongst other relevant things) whether or not and why responsibility for the harm should be imposed on the negligent party.

238 Much could be said about the operation of s 51 of the *Wrongs Act,* but as it was not raised by either party I will proceed on the basis that its application is not contentious.

APPLICATION OF PRINCIPLES OF CAUSATION TO THE PRESENT CASE

239 Applying the "factual causation" test created by s51(1)(a) of the *Wrongs Act*, I consider that the following types of harm claimed by the Hills would not have occurred but for the unreasonable flows of water for which the OC is responsible:

(a) damage to Unit 19;
(b) economic loss directly arising out of an inability by the Owners to remain in the house (eg, rent incurred in respect of alternative accommodation) for a period to be determined;
(c) loss of amenity arising out of having to live in a badly affected environment and having to move out for a period.

240 Applying the "normative" test created by s51(1)(b) of the *Wrongs Act*,[152] I consider that there is no reason why liability should not be imposed on the OC for these losses.

241 These losses are, in my assessment, all reasonably foreseeable consequences of the unreasonable flows of water, and remoteness of damage is accordingly not in issue.

242 Before we turn to the next topic, it is appropriate to deal with one fundamental submission which appears time and time again in the OC's closing submissions. This is that because the northern and southern walls are the Hills 's private property and are not Common Property, any water damage to Unit 19 caused by the entry of water under or through the northern and southern walls is not damage for which the OC is responsible.

243 That submission falls with my finding that the northern and southern walls are part of the Common Property. The OC is liable for damage caused to Unit 19, whether that be property damage such as damage to the floors, plasterboard and architaves, or economic loss flowing from the need to treat Unit 19 for mould infestation.

MITIGATION

244 The OC submits that if the Hills have suffered any loss and damage, they have contributed to that loss and damage by their own acts or omissions. In particular, the OC says that any loss and damage recoverable must be

[152] The test established was described as "entirely normative" by the High Court in *Wallace v Kam*, at [14].

reduced to the extent that the Tribunal thinks is just and equitable having regard to the Hills's share in the responsibility for the loss and damage, pursuant to s 26 of the *Wrongs Act*. By way of particulars, it is said that the Hills failed to undertake any repairs to their Unit including repairs to the balcony and the north and south exterior walls to stop the ingress of water into their Unit from the Common Property in the 12 years up to the hearing.[153]

245 The first point to be made about the OC's position is that it is misconceived in so far as is based on the proposition that the Hills failed to undertake repairs to the north wall and the south wall. It is misconceived because those walls are, as I found, Common Property.

246 In these circumstances, the issue of mitigation turns on whether it was reasonable for the Hills not to agree to fund the repair of their balconies so that they could be repaired at the same time as the OC carried out other works to Unit 19.

247 The Hills's contention is that it was not reasonable to require them to repair the balconies of Unit 19, in circumstances where each of Messrs Wood, Merlo, Carson and Sherwood that it would have been ineffective to repair the balconies independently of repairing the north and south walls. Relevantly, the Hills point out that from October 2015 at the latest (being the time at which a report from Roscon was received[154], the OC was on notice that the north and south walls required rectification.

248 In my view, the Hills point is well made, but it justifies their stance only up until January 2017 at the earliest, when the OC appeared to accept responsibility for to fund the repair of the north and south walls and May 2018 at the latest when the OC expressly accepted responsibility for these works.

249 The OC contends once it had agreed to fund the repair of the north wall and the south wall, the Hills made an unreasonable choice as they refused to pay for the repair of their balconies. In this connection they submit that it was, and remains, the Hills's responsibility to bear the cost of any balcony repairs.

250 The OC's argument goes on: had the Hills agreed to fund the repair of their balconies, then the OC could have arranged to carry out the other necessary repairs to Unit 19 and it would not have been necessary for the Hills to vacate to live elsewhere on a permanent basis.

251 The OC's argument is supported by the observation that the cost to rectify the north and south walls pales into insignificance against the indirect costs now being incurred by the Hills in respect of the alternative accommodation. In this connection it will suffice to highlight that the opportunity cost the Hills are claiming after having moved into their own rental property is $775 per week, or $117,800 to the date of the final submissions.

---

[153] Second Further Amended Points of Defence dated 19 February 2021 at [12A].
[154] TB 69.

252 The Hills position on the need to repair their balconies is complex. The primary position is that the balconies have not failed of their own accord, and that flood testing carried out in 2013 demonstrated that the balconies were waterproof. I accept that this was the case.

253 I also accept that the waterproofing under the balcony tiles was compromised by the destructive testing carried out by Mr Carson in 2016. Mr Merlo observed that this was the case, as did Mr Wood.

254 The real issue in these circumstances is whether the OC must bear the cost of rectifying the waterproofing in the balconies.

255 The Hills's position to be summarised as follows:

(a) Mr Carson was engaged to inspect their Unit and carry out some tests by the OC. Accordingly, any consequential damage following the destructive testing must be to the account of the OC.

256 The position of the OC is that the arrangement under which Mr Carson went to the site was limited to undertaking testing to the ceiling in the level 5 common Property Foyer. The OC contends that Mrs Hills's evidence is that Mr Carson performed his destructive testing on at her request.

Conclusion on mitigation

257 This finding enables me to complete my analysis of the argument about mitigation. Even though the commitment of the OC to repair the north and south walls was confirmed by their lawyer in May 2018, it was in my view reasonable for the Hills not to accept the offer and get the work to the walls done on the basis that they funded the simultaneous repair of their balconies.

258 I have already referred to Mr Hill's evidence that on 15 July 2016, a proposal regarding the splitting of costs for the rectification works in units 19, 20 and 21 was sent to members of the OC committee which assigned responsibility to the lot owners for repairs to the balconies.

259 Given that the Hill's balcony had just a fortnight before had its waterproofing disturbed by Abode, I consider that the Hill's intransigence from this point on regarding the repairs to their balconies was justified.

260 The final submission made by the Hills is that because the OC "consistently indicated to the Hills that it was going to do the work to the north and south walls" it was not unreasonable for the Hills to wait for the OC to carry out the work on the balconies. I accept this submission, as I consider it was clearly unreasonable for the OC to refuse to accept responsibility to repair the Hills's balconies having authorised Mr Carson of Abode to disturb their waterproofing.

261 I do not overlook that the Hills had to be active partners in the rectification process. In particular, they would have had, if the OC had agreed to get on with the rectification works, to have provided access to the north and south walls and to their respective balconies to the OC's contractor . They no doubt

would have had to move out for a finite period while the works were being carried out.

262 However, there is no evidence that the Hills were not prepared to negotiate with the OC. In this connection, I refer to the repeated references in Mr Hill's evidence regarding his frustration with the proposed mediation process put in place by the OC.

263 I find in all these circumstances that it was reasonable for the Hills to move out when they received the reports concerning mould they had commissioned from Dr Jones. They, at this point, had a legitimate basis to be concerned about the effect of the mould on themselves and their child, and they were at an impasse with the OC. They were justified in taking the view that the OC would not promptly change its position.

DAMAGES CLAIMS CONSEQUENT ON MOVING OUT

264 It follows that I find that the Hills are entitled to an award in respect of some financial claims consequential upon their having to move out of Unit 19. I now examine the claims in turn.

Alternative Accommodation

265 The first claim relates to the opportunity cost incurred when the Hills had to move into their own investment property. They are claiming $775 per week which they say was the amount it was rented out for.

266 The first objection raised by the OC to this claim is that the claim was not supported by documentary evidence. I reject this submission, as the claimant supported by Mr Hills sworn evidence.

267 I now turn to consider whether as a matter of principle that claim is allowable. I start by observing that if the Hills had rented elsewhere, the rent would clearly have been claimable provided the alternative property was similar in quality and location to Unit 19. For that reason, I consider that the opportunity cost arising from losing the ability to rent their own investment property while they live in it is claimable, subject to similar considerations.

268 In connection with the quality of the premises, the OC makes the point that the alternative accommodation is actually a house, with much greater size than Unit 19. Accordingly, it is tempting to assume that the Hills are actually upgrading their accommodation. However, the house is in Cheltenham, not St Kilda. Relevantly, the Hills say they would prefer to be living in Unit 19, rather than in their Cheltenham property.

269 I consider there is a gap in the OC's case on this issue, as it did not tender any evidence as to what the cost of renting another apartment of a size similar to Unit 19 in St Kilda would have been. The cost of the alternative accommodation claimed by the Hills is $775 per week. I am not in position to make a finding that that figure is higher than the rent that the Hills would have had to pay to live in an another apartment in St Kilda, but the rent is not so outlandish that this may not be the case.

270 For these reasons, I am prepared to allow the Hill's claim for alternative accommodation at $775 per week. It has not been demonstrated by the OC that this claim contains an element of betterment or upgrading of the Hills's accommodation.

271 Because of the time which has elapsed since the hearing, the Hills must be given an opportunity to update this claim by filing affidavit material.

The claim for removal and storage costs

272 This claim is made largely on the basis of the Hills had to move most of their items into storage due to the water entry into Unit 19. The only objection the OC raised to this claim was that it was not valid as the need to rectify Unit 19 arose from the rectification of private property. As I have found against the OC in relation to that proposition, this objection falls away. I turn now to the individual parts of the claim.

273 The first limb of the claim is modest. The Hills had to move most of their possessions into storage, but these costs were covered by their insurer, and they do not seek reimbursement. However, the Hills seek the excess they paid of $300. I consider this claim is allowable.

274 The Hills also seek the cost of returning their property when they move back in. In this connection they claim $14,160 based on a quotation from White Glove Removals St Kilda. I consider this claim is made out, and will declare the Hills have an entitlement to that amount respect of it.

275 The final cost claimed is a quotation Alcocks for $1,685 in respect of the reinstatement of the pool table. Although no details were given as to why the reinstatement of the pool table was necessary, the OC did not object to it and I am prepared to allow the claim.

The claim for utilities expenses incurred at the alternative accommodation

276 Mr Hill, in his witness statement, deposes that he and Ms Hill seek reimbursement of the utilities they are paying for both Unit 19 and the alternative accommodation. The claim is documented on the basis of power bills, gas bills and water bills.

277 The OC clearly misunderstands this claim in part. Its contention is that there is no legal basis for the Hills to recover payment of the utilities paid at their alternative accommodation. I agree with that proposition. However, if the Hills are paying utilities that Unit 19 when they are not occupation, then that is a real loss which is compensable.

278 As in respect of some other claims I am giving leave to the Hills to submit further evidence, I will give them leave to submit evidence on affidavit regarding their updated claim for utilities in respect of Unit 19 during the period when they have not been in occupation.

The claim for owners corporation fees incurred while the Hills have not been living in Unit 19.

279 Mr Hill deposes in his witness statement that he and Ms Hill have incurred owners corporation fees while they have been living in alternative accommodation since February 2019. In the Updated Particulars of Loss filed before the hearing this claim was put at $27,531.88.

280 In my assessment, these fees are clearly claimable. The Hills are liable for them irrespective of their view of the OC's performance of its duties, and irrespective of whether they had been living in their Unit. They are incurring this liability while they are deprived of the benefit of being able to live in their Unit.

281 The Hills will be given the opportunity to update this claim by filing affidavit material.

THE CLAIM FOR AN INJUNCTION

282 It is uncontroversial that the Tribunal has power to grant the relevant injunction under ss 19(3)(a) of the *Water Act*. The real issue is whether the injunction should be granted.

Relevant principles

283 In *Leung v Harris*[155] at [130], Senior Member Walker had to consider an application by the applicant for a mandatory injunction that the respondent take certain steps to prevent the causing of an reasonable flow of water. He was referred to the Tribunal's decision in *Reynolds v. Southern Quality Produce Co Operative (**Reynolds**)*.[156] There an injunction had been sought to restrain the construction of a grain terminal until off-site works to enhance the local drainage infrastructure were completed.

284 The Tribunal in *Reynolds* (constituted by Deputy President Macnamara and Member Chuck) said at [108]:

> Turning now to the proceeding under the Water Act. The principal relief sought by Mr Reynolds was a *quia timet* injunction (that is an injunction to restrain future action which it is feared will damage Mr Reynolds' property) to restrain the construction of the proposed development without the offsite works advocated by his expert Mr Berry. All parties were agreed that the proper test to apply to determine whether a *quia timet* injunction should be granted is the one to be found in the joint judgment of Starke, Murphy and Brooking JJ as Judges of the Full Court of the Supreme Court in *Grasso v Love* [1980] 163, 167 where their Honours said at line 25 and following:

[155] [2018] VCAT 1630
[156] [2011] VCAT 692.

> What we are disposed to think is the true position is that, to obtain a quia timet injunction, the plaintiffs must prove that there is a real probability that activities of the defendants are imminent and if performed will cause substantial damage to the plaintiffs.
>
> Senior Member Walker applied this test to the case for him, and found that there was not satisfied that it had been demonstrated that there is a real probability that the applicant would suffer substantial damage if the work scoped by the respondent's expert was not carried out.

285 The OC in its submissions highlights that the order sought by the Hills is a mandatory injunction for the performance of works contained in Mr Wood report. The OC contends that this is different to a *quia timet* injunction, which is to restrain future action on the part of another party which is feared will cause damage to the applicant. The OC says that an application for a *quia timet* injunction involves different discretionary factors that an application for a mandatory injunction, but it does not say what the differences are between the two sets of discretionary factors.

286 The power of the Tribunal to grant a mandatory injunction under the *Water Act* is to be found in ss 19(3) which provides:

> In exercising jurisdiction conferred by subsection (1), the Tribunal—
>
> (a) may by order, whether interim or final, grant an injunction (including one to prevent an act that has not yet taken place) if it is just and convenient to do so;

287 The relevant test accordingly is whether it is "just and convenient" to grant the injunction.

Consideration

288 I think it is clear that if the required works are not carried out to the exterior face of each of the north and south walls then water will continue to ingress into Unit 19. On this basis, I find that it is convenient to grant the injunction.

289 According to Mr Weekes, the OC is awaiting a determination from the Tribunal before it acts. From this, I infer that the necessary work to the common property will not be performed by the OC voluntarily. On this inference I found the conclusion that it is also just to grant an injunction requiring the OC to carry out the work.

290 This conclusion is relevant to another argument raised by the OC, based on the Tribunal's 2018 decision in *Guy v Owners Corporation 416326*.[157] The argument is that because the order sought for injunctive relief will require no more than the OC discharges duty arising under s 46 of the *OC Act*, there is no utility in the Tribunal making the order.[158] In my view, this submission must fail. The history of the dispute between the Hills and the OC strongly demonstrates that unless the order is made, the OC will not discharge its

[157] [2018] VCAT 2027.
[158] [2018] VCAT 2027 at [87].

obligations under s 46. The evidence of Mr Weekes, just referred to, reinforces that this is the case.

291 The OC highlights that there is a difficulty with the scope of the injunction sought by the Hills. In particular, they want an order for the performance of the work required as set out by Mr Wood in his report.[159] However, that work will have to be carried out simultaneously with work to the Hills's balconies, which they contend is not work for which the OC is liable to pay.

292 I reject this argument, on the basis that I have found that the OC is responsible for the cost of rectifying the balconies.

Replacement of the EPS cladding

293 A further submission made by the OC related to Mr Woods's proposed scope of works that included a wholesale change to the external cladding of the northern and southern balcony walls. The OC queried whether such a change was necessary in order to make the walls waterproof, or whether the change was driven by a perception that the cladding is not sufficiently fire resistant, as found in on a report prepared by RED Fire Engineers.[160] Mr Forrest made the argument forcefully at the hearing, pointing out that the Hills's case was about unreasonable flows of water and not about replacement of combustible cladding. However, I consider that this argument misses the point.

294 The real issue is that the OC has a responsibility to prevent water entry into Unit 19 through the Common Property which includes the EPS panels. I am satisfied of the basis of the evidence of the experts that the EPS panels leak. They certainly have to be repaired or replaced.

295 A key matter is that Mr Carson of Abode found on examination that behind the EPS panels there was no sarking. This was also demonstrated by a photo[161]. When it was put to Mr Wood in re-examination, he confirmed it showed there was no sarking. I make a finding to that effect.

296 This finding that there is no sarking behind the EPS panels is important because Mr Wood considered that it was necessary to install sarking as part of the waterproofing works. He included a costing for it in his calculations. Mr Sherwood had based his report on the proposition that there may not be sarking. When it was put to him at the hearing that there is no sarking, he agreed that it would have to be installed.

297 The conclusion that sarking has to be installed makes Mr Wood's evidence at the hearing[162] critical. He deposed that in order to install sarking would be necessary to remove the EPS panels. Once this is done, building permission will not be received to put them back, as they are combustible. They must be replaced with non-combustible panels under the current building regulations.

---

[159] TB 226.
[160] TB 340.
[161] Exhibit A19
[162] Transcript, 16 February 2021.

298 Viewed in this light, it can be seen that the replacement of the EPS panels with non-combustible panels is a direct and natural consequence of the OC's obligation to make the external cladding of Unit 19 waterproof. The fact that the Hills will incidentally receive a form of betterment by the upgrade of the cladding is irrelevant to their entitlement to have their Unit made waterproof.

The form of the injunction order

299 I now turn to the form of the injunction. Mr Wood set out a scope of works relevant to the waterproofing and the remediation of the Hills apartment in his September report. Items which would appear relevant to the waterproofing of Unit 19 would appear to include the following:

- item 1-preliminaries
- item 2-demolition of walls, tiles, floor and handrails
- item 3-scaffold
- item 4 -repairs to timber frame and sliding door hobs (north balcony)
- item 5-repairs to timber frames and sliding door hobs (south balcony)
- item 6 replacing insulation and building wrap
- item 7 -balcony tiling
- item 12 -roofing
- item 13 -EPS cladding

300 I will leave it to the parties to work out the precise form of the injunction. It should include the scope of works just outlined. The parties will have leave to come back to the Tribunal if they cannot agree the terms of the injunction.

THE REMAINING CLAIMS FOR DAMAGES

301 The Hills accept that if the injunction they seek is granted, then they can only claim damages for property damage relating to the cost of rectifying the interior of Unit 19. As the junction is to be granted, the Hills will not be able to claim any costs associated with rectifying the Common Property.

The claim for damage to Unit 19

302 The Hills in their submissions, at [1], make it clear that their claim for damages in respect of the rectification of damage caused by the flow of water into Unit 19 has been reduced to $99,530. The new total comprises $64,625 as detailed by Mr Wood in his expert report, $1,900 for reinstatement and replacement of an air-conditioning unit, $31,075 rectification of the kitchen, and $1,930 for replacement of the carpet. I address these claims in turn.

$64,625 as detailed by Mr Wood in his expert report[163]

303 The Hills seek an award of $64,625, and they rely on Mr Woods expert report.

304 Reference to the Hills's closing submissions, [71(a)(i)] indicates that the items they are seeking out of Mr Woods schedule costings are as follows:

- item 1-preliminaries $20,650
- item 8-flooring repairs $8,400
- item 9-painting $10,200
- item 10 -plastering $7,520
- item 11 -carpentry $6,980
- item 14 provisional sum for electrical and mechanical services $5,000

305 The total of these items is $58,750. This is the figure I will start with before I turn to the OC's comments.

306 The OC challenges the figure in its response submissions. It is not clear why the OC's submissions on damages were not contained in their primary closing submissions. Nonetheless, as there was some discussion regarding this head of damages at the hearing when Mr Wood and Mr Sherwwod concurrently gave evidence, I do not think that the Hills can sustain a claim that they have been denied procedural fairness by reason of the fact that the Tribunal is prepared to have regard to the following submissions made by OC.

307 The first submission is that the OC is not liable for the damage as it is consequential upon water entry through the north wall and the south wall. I have dealt with this submission above, as I have found that the north wall and the south wall are common property. The OC is liable for damage caused by the ingress of water through those walls.

308 The next submission is that damage to the plaster ceiling of the entry foyer to Unit 19 was caused by Mr Carson's destructive testing on the southern balcony which is performed at the request of Mrs Hill in 2016. As I have found above that it is the OC, rather than the Hills, which must take responsibility for consequential damage caused by Mr Carson's destructive testing, I find for the Hills in respect of this issue.

309 A fallback submission made by the OC is that any loss caused by the destructive testing could be mitigated by sealing the area of physical damage caused by Abode. I reject this submission as it is not supported by expert evidence.

---

[163] TB 226.

Other submissions about Mr Wood's costings

310 The OC made a number of complaints about the figures constituting Mr Wood's total. Firstly, it attacks his allowance for preliminaries of $20,650 including a site supervisor costing $18,000. It says the figure is unreasonable compared to the preliminaries costed by Mr Sherwood in respect of a larger and more complex job. I acknowledge there may be something in this point, as a figure of $20,650 for preliminaries in respect of trade works valued at $38,100 ($58,750 -$20,650) appears high.

311 However, I make two comments. First, this is a substantive attack on the largest figure included in the Hills's total claim for rectification of the interior of their Unit. In my view, it should not have been inserted in what appears to be an afterthought in the OC's response submissions. This of itself puts the Hills at a procedural disadvantage.

312 Second, this is a matter for the experts. There may be an explanation for the high figure for preliminaries, given that the work will have to be performed by a registered domestic builder. I note that the OC made its submission without reference to the transcript to demonstrate that the issue was put to Mr Wood in cross examination. I have reviewed the transcript for 16 February 2021, when Mr Wood and Mr Sherwood gave concurrent evidence, and I cannot see where this objection to the preliminaries was put to Mr Wood. If Mr Wood was not asked about the issue, then that is also a denial of procedural fairness to the Hills.

313 For all these reasons, I am prepared to accept the figure of $20,650 for preliminaries.

314 The OC attacks the provisional sum allowed respectively by Mr Wood for electrical and mechanical services ($5,000). Although this issue should have been raised in the OC's primary final submissions so that the Hills had a proper opportunity to respond, I acknowledge that the issue was put to Mr Wood at the hearing. He gave what I regard as a satisfactory explanation, which is that although mechanical equipment can work for years when it is untouched, problems may develop if it is moved. For this reason, I accept the provisional sum of $5000 for electrical and mechanical services.

315 The OC makes a general attack on Mr Wood's figures for flooring ($8,400,) painting ($10,200) and plastering ($7,200) and carpentry ($6,980). 277 The OC urges the Tribunal to reject Mr Wood's figures, and to substitute for them the figures identified by Mr Sherwood in his third report as they are "apposite and preferable".[164]

---

[164] OC's response submissions, [62]

316 Again, these are matters for the experts. As with the attack on the figure for preliminaries, the OC made its submission without reference to the transcript. It did not demonstrate that these trade figures had been put to Mr Wood in cross examination. My review of the transcript indicates that they were not. In the circumstances, I am prepared to adopt Mr Wood's respective figures for the trades.

317 In summary, I am prepared to accept Mr Wood's costings in respect of the rectification of the physical damage to the interior of Unit 19, adjusted arithmetically for the reasons outlined above, at $58,750.

$1,900 reinstatement and replacement of the air-conditioning unit[165]

318 The claim here is for the reinstatement and replacement of air-conditioner. A contractor named Splitz -R-Us of other quotation for $1,900 dated 11 July 2018.

319 The OC draws the attention of the Tribunal to the quotation, which shows that this $1,900 comprises $300 for the disassembly and reassembly of the northern boundary air-conditioning unit and a further sum of $1,600 for replacement of the kitchen air-conditioning unit with an LG09.

320 The OC suggests that the replacement of the kitchen air-conditioning has an element of betterment about. I agree. In my assessment, the Hills are provisionally entitled to $300 for the disassembly and reassembly of the air-conditioner on the northern wall and a further $300 for the disassembly and reassembly of the kitchen air-conditioner.

$31,075 for rectification of the kitchen[166]

321 The sum of $31,075 is claimed for the "rectification of the kitchen which has been water damaged and mould affected". I comment that the figure itself is not in issue. The OC's expert, Mr Sherwood, agreed under cross examination that the figure was appropriate for the replacement of a kitchen. The matter in dispute is liability.

322 The OC criticised this claim in its response submissions. This, in my view, might have led to a denial of procedural fairness to the Hills as they did not have a proper opportunity to respond. However, that criticism not fatal to the Hills's case, as I shall explain.

323 Mr Hill gave evidence about the works required in his first statement. Rectification of the kitchen was not included here. When Updated Particulars of Loss and Damage were provided in January before the hearing started, a

[165] TB 1977.
[166] TB 1979.

claim was included for the cost of rectification to the kitchen and reference was made to a quotation which was included in the Tribunal Book. Mr Hill gave no further information in his second witness statement. However, in cross examination, he asserted that it had been "reported in the mould report, and building reports, that need to be done so the mould has gone into the-the mould spores have gone into the wood in the kitchen and also when they do the south wall they possibly have to take the kitchen out anyway."[167]

324 The OC's point is that Mr Hill's evidence indicates a shift from the proposition that the replacement of the kitchen was necessitated by the water damage. His evidence referred only to mould.

325 Given that this is a significant claim monetarily, it is at first glance surprising that Dr Jones was not called to adopt his reports and to comment on mould issues, including the extent to which the kitchen had to be replaced by reason of mould.

326 However, Dr Jones was not called because the claim for $4,009.50 for mould remediation assessed by him was conceded by the OC. The Hills's decision not to call him in these circumstances was reasonable and no inference can be drawn that Dr Jones's evidence regarding mould in the kitchen would not have assisted their case.

327 I must deal with the claim on the basis of the evidence before me. On the one hand, the Hills have some evidence supporting their claim. On the other hand, the OC did not send any mould expert to the apartment, and it has no evidence regarding the degree of mould infestation in the kitchen at all. In these circumstances the Hills, in my view, have met the onus of proof on them. The claim for the cost of replacing the kitchen is allowed at $31,075.

$1,930 for rectification of the carpet[168]

328 The claim here was of the carpet needed to be replaced. The qualifications based on a quotation provided by Carpet Call Mentone in the sum of $1,930.

329 The need to replace the carpet was not referred to in Mr Hills's primary statement. However, the claim was notified in the Updated Particulars of Loss and Damage filed prior to the hearing and it was referred to also in Mr Hill's supplementary witness statement.

330 There is no evidence about the water damage to the carpet. The statement of the Final submission that the carpet has been "water damaged and mould affected" is not evidence. I note also that the Hills did not draw the Tribunal's attention to evidence about water damage to the carpet in the expert reports.

[167] Transcript 156, L4-11.
[168] TB 1999.

331 I find for the OC in respect of this claim.

$4,009.50 mould remediation

332 This claim can be dealt with summarily. The work was deemed necessary by a mould expert, Dr Cameron Jones. He was not called as the OC conceded the claim.[169] The Hills will ultimately receive an award of $4,009.50 in respect of this claim.

The claim for damages for loss of amenity

333 Mr Hill in his witness statement explains the basis of this claim as follows:

> 256 For a number of years, we had to endure living in the Hill Property with water consistently entering the Hill Property. We were living in the Hill Property with mould evident and water damage. I would frequently concerned about the health impacts on my life and a young child bracket five years old). I was also concerned when walking down the stairs as there was often water flowing down the stairs. Myself or Merynne informed the OC on a number of occasions as to these issues but the OC failed to stop the water entry.
>
> 257 We have had to move out of our home into the Alternative Accommodation. Our preference would be to live in our home, the Hill property. We have had to turn our life upside down due to the water entry. Further, consistently dealing with the OC is taken up a lot of our lives and cause a lot of stress, not to mention the money that has been expended on expert reports and legal fees.

334 From these passages, it can be seen that there are a number of separate basis for the claim. They include:

(a) living in a property with mould present;

(b) living in a property where water "often" flowed down the stairs;[170]

(c) living in the property with continuing concern about health impacts on the family;

(d) having to move out of their home into alternative accommodation when the preference would have been to stay in their Unit;

(e) the stress and time involved in managing the litigation; and

(f) incurring the expense of expert reports and hiring lawyers.

335 Clearly an award of damages for loss of amenity is not intended to cover a claim for expensive expert reports and legal fees. Those issues must be dealt with separately.

---

[169] TB 1523.

[170] An incident of water on the stairs is mentioned in an email Ms Hill sent on 14 January 2018 to Mr Weekes. Mould was also mentioned. See Exhibit MH 12, TB 1812.

336 In my view, an award of damages for loss of amenity also is not appropriate to compensate for the stress and time involved in managing the proceeding. I say that as a matter of principle but note that the observation has a practical ramification. If I were to make an award of damages for loss of amenity associated with the stress of running the litigation, then every future claimant in a major case before the Tribunal would be likely to make such a claim.

337 Having made these points, I find that an award of damages is with loss of amenity to each of Mr Hill and Ms Hill is appropriate in respect of the fact that they had to live for a number of years in an apartment which had a number of water leaks and which ultimately became infested with mould and which they have had to move out of until their Unit is rectified.

338 I declare that **each** of Mr Hill and Ms Hill are entitled to an award of $5,000 for loss of amenity.

THE DEFENCE OF PROPORTIONATE LIABILITY

339 As noted in the introduction, the OC contends that the claims made by the Hills are apportionable within the meaning of Part IVAA of the *Wrongs Act*.

340 The Hills point out in their final submissions that s 24AF(1) of the Wrongs Act provides that the relevant Part of the Act applies to:

(a) a claim for economic loss or damage to property in an action for damages (whether in tort, in contract, under statute or otherwise) arising from a failure to take reasonable care; and

(b) a claim for damages for a contravention of section 18 of the Australian Consumer Law (Victoria).

341 The Hills contend that their claim under the *Water Act* is made under a provision that creates strict liability. I accept this submission, noting that in *Turner v Bayside City Council*[171], Deputy President Macnamara (as Judge Macnamara then was), stated at [19]:

> It is important at this stage to keep steadily in mind precisely the question that is being addressed. The applicant relies upon a statutory cause of action in the Water Act. Where the necessary facts are made out, the cause of action under Section 16(1) appears to be one of strict liability, that is, it is not necessary to demonstrate any want of reasonable care. The mere proof of causation seems to be enough.

342 For this reason, I am satisfied that the defence of proportionate liability must be rejected.

343 The OC's argument that its liability is to be reduced by reason of its proportionate liability also fails at another hurdle. The OC's argument regarding proportionate liability is based on the proposition that the unreasonable flows:

---

[171] [2000] VCAT 399.

> were caused by the needed defective construction of its roof, the timber hobs, waterproof membranes in the northern and southern balconies by the builder Wilsden Group P/L (sic)

The OC submits that the failure of the builder to take reasonable care "would, ordinarily, involve a direct claim against the builder but for its de-registration".

344 The submission concludes:

> The fact that the builder has not been joined or had a claim made against it arises from de-registration and its de-registration does not prevent the Owners Corporation, an apportionment of responsibility against pursuant to s 24AI of the Wrongs Act.:

345 I accept that this submission is correct as far as it goes. However, it does not take into account the effect of s 16(6) of the *Water Act*. This provision, as has been seen, provides that the existence of a liability under subsection (5) extinguishes the liability of the person who caused the flow arising under ss 16(1).

346 As I have found that the OC has liability under ss 16(5) because it failed in a reasonably timely manner to take the necessary steps to stop the unreasonable flow of water into Unit 19, the liability of the de-registered builder for the same loss and damage is eliminated by operation of ss 16(6).

347 For this further reason, I confirm that the defence of proportionate liability is to be rejected.

C Edquist
Member