Civil and Administrative Tribunal

New South Wales

Case Name:	The Owners - Strata Plan No 4393 v Roberts (No.2)
Medium Neutral Citation:	[2024] NSWCATCD 1
Hearing Date(s):	22 August 2023
Date of Orders:	02 January 2024
Decision Date:	2 January 2024
Jurisdiction:	Consumer and Commercial Division
Before:	M Harrowell, Deputy President K Rosser, Principal Member
Decision:	1. In respect of the contraventions of order 4 made 4 March 2022 in application SC 22/08447 the respondent, Mei Lan Roberts, is to pay a civil penalty of 25 penalty units being $2750. 2. In respect of the contraventions of order 1 made 7 June 2022 in application SC 22/24178 the respondent, Mei Lan Roberts is to pay a civil penalty of 50 penalty units being $5500. 3. The penalties in orders 1 and 2 are to be paid to the applicant within 30 days of the date of these orders. 4. The respondent is to pay the applicant' costs of these proceedings, such costs to be as agreed or assessed on an ordinary basis.
Catchwords:	LAND LAW – Strata title – civil penalty – contravention of Tribunal orders – s 247A Strata Schemes Management Act 2015 – multiple breaches of orders – amount of penalty – when maximum penalty might be imposed – whether penalty should be paid to applicant owners corporation

Legislation Cited:	Civil and Administrative Tribunal Act 2013 (NSW) Civil and Administrative Tribunal Rules 2014 (NSW) Strata Schemes Management Act 2015 (NSW)
Cases Cited:	Allanby v Commissioner of Police [2019] NSWCATAD 37 Australian Building and Construction Commissioner v Pattinson [2022] HCA 13 Latoudis v Casey [1990] 170 CLR; 534 HCA 59 Oshlack v Richmond River Council (1998) 193 CLR 72; [1998] HCA 11 Owners Corporation - Strata Plan 41710 v Lee [2015] NSWCATCD 151 The Owners - Strata Plan No 4393 v Roberts [2023] NSWCATCD 57 The Owners – Strata Plan No. 61285 v Taylor (No.2) [2022] NSWCATCD 118 The Owners – Strata Plan No. 61285 v Taylor (No. 3) [2023] NSWCATCD 1 Westbury v The Owners – Strata Plan No 64061 [2021] NSWCATEN 3
Texts Cited:	Nil
Category:	Principal judgment
Parties:	The Owners - Strata Plan No 4393 (Applicant) Mei Lan Roberts (First Respondent) The Commissioner for Fair Trading of the Department of Customer Service (Second Respondent/Intervenor)
Representation:	Counsel: M Cobb-Clark (Applicant) Y Hou - solicitor (First Respondent) No appearance (Second Respondent) Solicitors: Thomas Martin Lawyers (Applicant) Juris Corr Legal (First Respondent) Crown Solicitors Office (Second Respondent)
File Number(s):	2022/00421772 (previously SC 22/26855)

Publication Restriction: Nil

REASONS FOR DECISION

1 On 27 July 2023 we published written reasons concerning whether the first respondent (Ms Roberts) had contravened orders of the Tribunal. Those reasons also dealt with whether the Tribunal could impose multiple penalties if an order is successively contravened and, if so, in what circumstances: *The Owners - Strata Plan No 4393 v Roberts* [2023] NSWCATCD 57 (Primary Reasons).

2 In summary, we reached the following conclusions concerning contraventions:

(1) On 4 May 2022 Ms Roberts contravened the order of the Tribunal made 4 March 2022 (4 March order), such contravention consisting of a plumber employed on behalf of Ms Roberts attending her lot and carrying out plumbing work. We rejected the allegation there was contravening conduct on 5 May 2022: Primary Reasons at [50]-[69].

(2) There was no contravening conduct on 9 May 2022: Primary Reasons at [70]-[75].

(3) On 20 May 2022 Ms Roberts contravened the 4 March order. This contravention consisted of her agents carrying out jack hammering, drilling or other work to the floor of Ms Roberts' lot: Primary Reasons at [76]-[80].

(4) On 9 and 10 June 2022 Ms Roberts contravened the order of the Tribunal made 7 June 2022 (7 June order) by carrying out work that included removal of a kitchen wall in her lot and removal of building debris from the lot: Primary Reasons at [81]-[97].

(5) We formed a prima facie view that there was contravening conduct on 4 July 2022, consisting of painting work being done to Ms Roberts' lot by her agents. However, we noted there were two further issues to be resolved concerning whether this conduct in fact constituted contravention of a Tribunal order. Firstly, there was an issue about whether what we described as "order 4 made 1 July 2022" was in fact a new order or a renewal of the 7 June order. Secondly, by reason of what was described as the September orders, there was an issue of whether order 4 made 1 July 2022 (if it was a new order) was set aside and consequently was of no effect: Primary Reasons at [98]-[120]. Consequently, we reserved a determination in relation to this alleged contravention for further submissions.

(6) We should record at this point that at [115] of the Primary Reasons we referred to the evidence of Ms Aleixo. As made clear at [98], this reference should have been to the evidence of Mr Weihen.

3 We also concluded that s 247A of the *Strata Schemes Management Act 2015* (NSW) (SSMA) "only permits the Tribunal to impose a single penalty where an order of the Tribunal is contravened on multiple occasions after it is made": Primary Reasons at [138] and following. In so concluding, we said at [161]:

> As raised in submissions, there is an antecedent question as to what orders had in fact been made. Where there are separate orders requiring separate action, which should properly be considered as imposing discrete obligations, we see no reason in principle why a penalty could not be imposed by the Tribunal under s 247A of the SSMA in relation to a contravention of each order. Of course, the principles in *Pattinson* remain applicable in determining the amount of individual penalties and the total amount of penalties which should be imposed by reason of the contravening conduct.

4 We made directions permitting any further evidence from Ms Roberts on the question of what, if any, penalty should be imposed, as well as directions for submissions on penalty, costs and the outstanding issue of contravention to which we have referred above. The Commissioner for Fair Trading of the Department of Customer Service as Second Respondent/ Intervenor did not wish to be heard on this aspect of the proceedings and took no further part in the proceedings.

5 The hearing of the outstanding issues occurred on 22 August 2023. These reasons relate to that hearing.

6 It is convenient to deal with the outstanding issues under the following headings:

(1) Was there a contravention on 4 July 2022? If so, what order was contravened?

(2) In light of the findings of contraventions, what, if any, penalty or penalties should be imposed and to whom should the penalty or penalties be paid?

(3) What, if any, order should be made in respect of costs of these proceedings?

Was there a contravention on 4 July 2022? If so, what order was contravened?

7 Ms Roberts' position was that order 4 made 1 July 2022 is not a new order. Rather, it is a "reiteration or notation of the previous stop work order made 7 June 2022 which remained in force until the determination of the substantive proceedings in file number SC 22/08452". To the same effect, the applicant's (owners corporation's) position was that order 4 made 1 July 2022 "is properly

construed as a notation that the stop work order made 7 June 2022 remained in force until the determination".

8 As recorded in the Primary Reasons at [14], order 4 made 1 July 2022 was in the following terms:

> 4. Interim order #1 dated 7/6/22 and made in SC 22/24178 continues to bind the respondent either until further order or until the conclusion of the substantive proceeding namely SC 22/08452.

9 We accept the parties' position as a correct statement of the effect of the order. Order 4 does not purport to be a new order but simply states that an existing order, the 7 June order, "continues to bind [Ms Roberts]".

10 The operation of the 7 June order was unaffected by the orders made 30 September 2022 (September orders), in particular by point 4 of the Minutes of Order dated 30 September 2022 (incorporated by reference in the September orders), which states:

> 4. Set aside any extant stop work orders in proceedings SC 22/08447, SC 22/08452 and SC 22/24178.

11 This is because the 7 June order expired 3 months after it was made, namely on 7 September 2022, in accordance with s 231(6)(a) of the SSMA. This subsection provides:

> (6) An interim order continues in force until—
>
> (a) the end of the period of 3 months that commenced with the making of the order or any earlier date specified in the order, or
>
> (b) if application is duly made for its renewal—until the renewal is granted or refused, or
>
> (c) if it is renewed—the end of the period of 6 months that commenced with the making of the order or any earlier date specified in the order.

12 There is no suggestion the order was renewed or that an application was made to renew the order after 7 June 2022. Consequently, it was no longer "extant" as at 30 September 2022.

13 It follows that we are satisfied the work carried out on 4 July 2022, being painting work identified in the Primary Reasons at [99], was a contravention of the 7 June order.

In light of the findings of contraventions, what, if any penalty or penalties should be imposed and to whom should the penalty or penalties be paid?

14 As recorded above, Ms Roberts contravened orders of the Tribunal on the following dates:

(1) In relation to the 4 March order: on 4 and 20 May 2022.

(2) In relation to the 7 June order: on 9 and 10 June and 4 July 2022.

(3) The conduct constituting each contravention is summarised above.

15 Having regard to our decision concerning whether multiple penalties can be imposed, it seems to us that a separate penalty could be imposed limited to a maximum of 50 penalty units or $5500 for breaches of each of the 4 March order and 7 June order. That is, a total of two penalties may be imposed in respect of the contravening conduct which we have identified.

16 The fact that each order was breached on multiple occasions is a matter to be taken into account when deciding if penalties should be imposed and, if so, how much. Neither party contended to the contrary.

17 The owners corporation's position was that a penalty of $3,300 should be imposed for Ms Roberts' contraventions of the 4 March order and the maximum penalty of $5,500 should be imposed for Ms Roberts' contraventions of the 7 June order. This represents 30 penalty units and 50 penalty units respectively.

18 Ms Roberts accepted that penalties should be imposed having regard to the findings of contravention of each of the orders. However, Ms Roberts's position was that a penalty of 17 penalty units ($1,870) should be imposed for contraventions of the 4 March order and 25 penalty units ($2,750) should be imposed in connection with contraventions of the 7 June order.

Applicant's submissions

19 In written submissions, the owners corporation referred to various authorities, including *Australian Building and Construction Commissioner v Pattinson* [2022] HCA 13, *Westbury v The Owners – Strata Plan No 64061* [2021] NSWCATEN 3 (*Westbury*) and *The Owners – Strata Plan No. 61285 v Taylor (No.2)* [2022] NSWCATCD 118 (*Taylor (No 2)*) which deal with how the amount

of a civil penalty is to be assessed. The owners corporation made submissions under various topics to which we refer below.

Defiance was contumelious and contemptuous

20 The owners corporation submitted:

> Ms Roberts's defiance of the Tribunal's orders was contumelious and contemptuous. This warrants a stronger deterrent: Pattinson at [50].

21 In relation to the 4 March order, the owners corporation noted that on 4 May 2022, when Mr Weihen, on behalf of the owners corporation, "took steps to bring [the] stop work order to the attention of Ms Roberts's contractor, Ms Roberts abused him and said words to the effect "I am Chinese and I do what I like": Joint Bundle (JB) 275 at [43] . The owners corporation also relies on the previous statement made by Ms Roberts to Ms Han where she said "I do not care about obtaining the owners corporation's consent. I have already commenced the works and have no intention to stop them". The statement was made on 18 February 2022: see Joint Bundle (JB) 20-21 at [32] of the affidavit.

22 As to the contraventions of the 7 June order, the owners corporation submitted that contravening conduct, being the removal of the wall in the kitchen, occurred two days after the order was made. The owners corporation says this work was carried out in circumstances where "Ms Roberts frankly told the Tribunal that the work would occur on 9 June 2022 and she would accept the consequences if she was found to be in contravention of the order". Reference was made to JB 986.

23 Of this conduct, the owners corporation submitted that Ms Roberts chose to adhere to the strategy of paying a penalty in preference to complying with the Tribunal's orders.

Nature and extent of contravention

24 As to the nature and extent of the contravention, the owners corporation submitted that the works done on 4 May and 20 May 2022 were significant contraventions. The owners corporation said:

> Both plumbing work and works of the flooring have the capacity to affect common property. There had already been water flooding into neighbouring

> apartments from Ms Roberts's lot as a consequence of her renovations: Weihen 31 May 2022 [23] [JB] 273.

25 As to the removal of the kitchen wall in June 2022, this was structural in nature, requiring Council approval and certification. The owners corporation said this was the most serious of the contraventions.

26 The owners corporation also said that because there was no by-law in place to regulate the work done by Ms Roberts, the owners corporation would have been primarily liable for any damage suffered by others. Although no damage has yet arisen as a consequence of the works done by Ms Roberts, this should not be given significant weight in any determination of the amount of penalty imposed.

Loss suffered or benefit gained

27 The loss identified as having been suffered by the owners corporation is the costs of proceedings and "experts to inspect the work carried out by Ms Roberts", those fees having been born by all lot owners "including the 11 individuals who are entirely innocent and who have nothing to do with Ms Roberts's egregious conduct".

28 As to advantage gained by Ms Roberts, the owners corporation says:

> She usurped the decision of the owners corporation's extraordinary general meeting to refuse permission to carry out the renovations until their concerns about Council approvals were addressed. Her actions exposed the Owners Corporation to significant risk of damage to the common property.

Pattern of behaviour

29 Referring to [136] of *Westbury*, the owners corporation submitted that the findings of the Tribunal that two separate orders have been contravened on multiple dates demonstrates a pattern of behaviour.

General deterrence

30 The owners corporation submitted there is "a strong need for general deterrence". This is because there are numerous residential strata plans in the State and renovations by lot owners are a frequent occurrence. Without a strong deterrent there is a real risk that future renovators "will view the risk of a

civil penalty as simply a cost of obtaining their renovations without the inconvenience or expense of body corporate approval".

Comparable decisions

31 The owners corporation said it was unable to identify comparable cases due to the "wilful and contemptuous disregard of the Tribunal's orders". However, the owners corporation identified the decision of *Owners Corporation - Strata Plan 41710 v Lee* [2015] NSWCATCD 151, where the Tribunal imposed a penalty of 17 penalty units for contravening a stop work order by applying opaque film to external glass windows and covering common property drains with Astroturf.

32 The owners corporation described Ms Roberts' conduct concerning the 4 March order as more serious and warranting a penalty of 30 penalty units or $3,300.

33 As to the 7 June order, the conduct in connection with removing the kitchen wall two days after the Tribunal imposed the latest stop work order "in circumstances where Ms Roberts plainly told the Tribunal she intended to disregard the Tribunal's orders" requires a maximum penalty to be imposed of 50 penalty units, or $5,500, in order to be a sufficient deterrent.

34 In aggregate, the appellant said an amount of $8,800 should be the total of the penalties. That amount should be paid to the owners corporation rather than the Commissioner for the reasons set out in its submissions contained in JB 1043-49 at [116]-[141].

35 In light of our conclusion concerning whether a stop work order was made on 1 July 2022, it is unnecessary to deal with the submission that an additional penalty of 10 penalty units should be imposed for the conduct of Ms Roberts on 4 July 2022.

36 Oral submissions made by the owners corporation at the hearing on 22 August 2023 were to like effect.

37 Finally, when applying the totality principle, the owners corporation said that two penalties totalling $8800 would not, in the circumstances, be excessive or crushing.

Taylor (No 3) incorrectly decided

38 In seeking an order that any penalties imposed in this case should be paid to the owners corporation, the owners corporation submitted that the decision of the Tribunal in *The Owners – Strata Plan No. 61285 v Taylor (No. 3)* [2023] NSWCATCD 1 (*Taylor (No. 3)*) was incorrect insofar as it holds "there is a presumption that any penalty for contraventions of Tribunal orders is payable to the State as opposed to the owners corporation for the civil penalty orders". We understood this submission was separate to a general submission that, in exercising any discretion, any civil penalties imposed in this case should be paid to the owners corporation.

39 Seven propositions were said to support this challenge:

(1) Nothing in the SSMA suggests that resort to s 248 of the SSMA, which permits civil penalties to be paid to an owners corporation, is intended to be exceptional.

(2) The Tribunal in *Taylor (No. 3)* was wrong to interpret the operation of ss 247A and 248 by reference to repealed previous versions of the legislation that predate the introduction of these new sections. In this regard the owners corporation said the second reading speech for the bill introducing s 248 made clear the purpose was to increase access to enforcement of orders made under the SSMA.

(3) "It is entirely contrary to the concept of increasing access to enforcement of orders to infer a presumption that an owners corporation who is aggrieved by a lot owner's contraventions of a stop work order must bear the cost and inconvenience of taking steps to obtain a civil penalty, bear the risk that those costs will not all be recovered pursuant to s 60 of the [*Civil and Administrative Tribunal Act* (NSW) (NCAT Act)] and then see the penalty paid to the State in circumstances where the State did not contribute any of its resources towards enforcement of the order".

(4) Applications of this type will be brought by an owners corporation, not the State. As such, the owners corporation is fulfilling the role of regulator and it should receive the penalty as a result. Here the owners corporation noted the reasons of the Tribunal in *Taylor (No. 3*) at [35].

(5) Proceedings under s 247A are not analogous to contempt proceedings or proceedings brought under s 77 of the NCAT Act, where penalties are paid to the State. In this regard contempt proceedings involve "the public policy of insuring respect for the administration of justice". Proceedings under s 77 of the NCAT Act cannot be commenced without authorisation of the Minister, and therefore they are "imbued with a public purpose".

(6) Refusing an order that a civil penalty be paid to an owners corporation deprives the order of the deterrent effect intended by s 248 of the SSMA. Thus "the subject of the order becomes an unfinancial member until it is paid with consequent limitations on that person's ability to participate in the administration of the owners corporation. This incentivises payment of the penalty, and thus better achieves specific deterrence than payment to the State".

(7) Lastly, it is wrong to hold that one factor that might displace the presumption in favour of the State receiving the civil penalty is whether an owners corporation has suffered damage. Damage is not a prerequisite to, or an essential element of, an application for a civil penalty.

40 The appellant submitted that, in the present case, there are no circumstances which suggest the owners corporation is seeking a windfall, has engaged in the proceedings for profit, or has otherwise engaged in conduct that disentitles it to receive the civil penalty.

41 The owners corporation says it has been put to substantial cost and risk. Therefore the penalty should be paid to the owners corporation.

First Respondent's submissions

42 The First Respondent submitted the Tribunal should impose a modest penalty on her concerning the contraventions of the 4 March order and a medium penalty for her contraventions of the 4 June order. In oral submissions, the appropriate amounts were specified as 17 penalty units ($1,870) and 25 penalty units ($2,750) respectively.

43 In making these submissions, Ms Roberts appeared to challenge the findings concerning item 5 and the contravention we found occurred on 20 May 2022. Our findings about the events of 20 May 2022 as summarised above.

44 Ms Roberts submitted at paragraph 4 of the written submissions dated 16 August 2023:

> 4. Additional to the findings of item 5 Contraventions, [Ms Roberts] submits that contrary to the finding of works on 20 May 2022 in the absence of the respondent's evidence at the hearings, there was [sic] no works carried out to the floor.

45 Having noted that she "did not respond to this item in the previous instance as [she] had no recollection as to her attendance on Lot 12 or her conversation with Mr Weihen", Ms Roberts continued in her written submissions:

6. In terms of the noise on that day, the Respondent clarifies that she had allowed one of her friends to use her premises during the time to quarantine while her friend was contracted with Covid-19. Her friend, who happened to be a carpenter, was using her apartment to do some urgent assembly work. The carpenter took photos of his works at 13:20 on 20 May 2022 showing furniture assembled in Lot 12. Those items were not installed in Ms Roberts' apartment. Attached and marked "1" is a copy of the prescribed photo taken on that day.

7. This evidence was not adduced until the Respondent made further enquiries to her friend and obtained those photos after the two-day hearings [sic] had taken place when she was cross-examined on the specific date and occasion.

8. Apart from the further submissions on the facts stated above, it is the fact of the case that Ms Roberts is the owner of Lot 12 and the person subject to a stop work order. The contraventions were found to be committed by a friend who was allowed access to Lot 12 without knowing the stop work orders.

46 It seems to us this is new evidence, which attempts to contradict findings we have already made. It should be rejected for at least three reasons. First, it should have been provided at the earlier hearing and was evidence available at that time. Secondly, the photograph, which was marked "MFI 1" and the matters otherwise asserted are not admissible evidence having regard to the form in which they have been provided. Thirdly, as is evident from the submission itself, it is a challenge to a finding of fact already made based on the evidence adduced at the hearing.

47 As to amount, Ms Roberts relied on the following matters concerning her personal circumstances:

(1) Having referred to various authorities, it is necessary that the assessment of any penalty be conducted on a case-by-case basis, the circumstances of the contravention and contravener being relevant.

(2) Ms Roberts is 53 years old, of working-class background and a first-generation immigrant with no background in strata or planning law. Her personal circumstances, including in relation to her marriage breakdown, are recorded in her affidavit affirmed 29 June 2022 – paras 9 and 96-107 JB 587 and 596-597).

(3) Renovations were being made to make her property habitable. She is "not a well-resourced contravener" and there was no financial incentive for her to risk incurring the price of a penalty.

(4) Ms Roberts expressed remorse "for her impulse to act upon renovations under pressure".

(5) Any penalty should be appropriate in the sense that it must strike a reasonable balance between oppressive severity and the need for deterrence in the particular case. This may involve consideration of

whether there is an inadvertent contravention or deliberate recalcitrance.

(6) It is unlikely, in terms of Ms Roberts' "financial conditions or personal point of view that she will continue to take any further renovation works or to contravene any further Tribunal Orders as Ms Roberts and her family had settled in her Lot 12. On any view of the law, she did not deserve a maximum or substantial penalty".

48 As to the circumstances of the contraventions, Ms Roberts made the following submissions:

(1) Ms Roberts repeated submissions concerning the events of 20 May 2022 and the additional evidence;

(2) Ms Roberts had no intention as to "wilful recidivism and intentional disobedience of the law". Insofar as it might be accepted that "works carried out on or around the premises by her friend or agent constitute contraventions" Ms Roberts accepted she was "not acting at her best ability to inform each and every friend of hers who entered her apartment about the existing or continuation of a stop work order".

(3) Each incident in respect of items 3, 5 and 9 (the contraventions on 4 May, 22 May and 4 July 2022) were "a 'one-off' act or omission which had immediately ceased upon notice. The impact of the works carried out in the item 3, 5 and 9 contraventions were not of significance in or of themselves, noting the works so concerned are preparatory, cosmetic or minor works. It was not advised as to the degree of disruption caused by the works in or around Lot 12 to the common property."

(4) As to item 7, the contraventions on 9 and 10 June 2022, Ms Roberts relied on various historical matters concerning approvals and her frustration in dealing with the Council. As to the hearing on 7 June 2022, Ms Roberts submits she was "self-represented in a directional hearing. She does not have proficient English skills despite the assistance of an interpreter". In this regard Ms Roberts submits she did not receive a written copy of the orders until 14 June 2022, only a ruling which was "delivered to Ms Roberts verbally".

49 On the issue of to whom the civil penalty should be paid, Ms Roberts adopted the position of the Tribunal in *Taylor No. 3* and said the penalty should be paid to the State. In this regard she submitted that the penalty is not to provide a windfall to an owners corporation or to provide retribution. At [30] of her written submissions dated 16 August 2023 she said:

> In [38] of Taylor No. 3, the Tribunal also notes that the penalty in the proceedings does not provide a form of compensation to an applicant, either for damage suffered or [as] compensation for costs of bringing proceedings, costs of the proceedings being a separate issue regulated by the costs provision of the NCAT Act.

Decision on penalty amount and to whom it should be paid

50 In light of the contraventions we have found, a penalty may be imposed in connection with each of the following:

(1) contraventions of the 4 March order which occurred on 4 May and 20 May 2022; and

(2) contraventions of the 7 June order which occurred on 9 and 10 June 2022 and 4 July 2022.

(3) The maximum penalty for each contravention is 50 penalty units or $5,500.

51 Factors that might be relevant in determining the amount of a civil penalty include those set out in *Taylor (No 2)* at [43]-[55].

52 As to when the maximum penalty might be imposed, the plurality in *Pattinson* said at [50]:

> 50 This Court's reasoning in the *Agreed Penalties Case* is distinctly inconsistent with the notion that the maximum penalty may only be imposed in respect of contravening conduct of the most serious kind. Considerations of deterrence, and the protection of the public interest, justify the imposition of the maximum penalty where it is apparent that no lesser penalty will be an effective deterrent against further contraventions of a like kind. Where a contravention is an example of adherence to a strategy of choosing to pay a penalty in preference to obeying the law, the court may reasonably fix a penalty at the maximum set by statute with a view to making continued adherence to that strategy in the ongoing conduct of the contravener's affairs as unattractive as it is open to the court reasonably to do.

53 In the case of the 4 March order, there were contraventions on two occasions. The works involved were both plumbing and jack hammering to the floor.

54 The work was carried out in circumstances where Ms Roberts sought to circumvent the required processes for obtaining approval. Having said that, we note that the work carried out was not later the subject of a demolition order. Rather, the proceedings brought by the owners corporation were settled on terms including that various rectification work would be carried out and that any stop work orders then existing would be set aside: see Primary Reasons at [17]-[18].

55 Having said that, the repeated contraventions warrant a penalty reflecting both specific and general deterrence, particularly as there were repeated occasions on which the Tribunal made stop work orders and earlier occasions of contravention: see eg Primary Reasons at [10]-[11] and [2] above.

56 As to the personal circumstances of Ms Roberts, evidence in respect of these matters is in the most general terms, there being no specific evidence concerning her financial position or capacity to pay any penalty which might be imposed. On the other hand, the fact that substantial renovation works were being carried out would suggest Ms Roberts is not impecunious.

57 In respect of the breaches of the 4 March order, it can also be accepted that, by reason of her background, some consideration should be given to the lack of understanding Ms Roberts had as to her legal obligations. In this regard there is no evidence of prior contraventions of obligations under the SSMA.

58 Weighing these factors and taking the multiple contraventions into account, we have come to the view that it is appropriate to impose a penalty of 25 penalty units or $2,750.

59 In respect of the contraventions of the 7 June order, these occurred on 9 and 10 June 2022 and 4 July 2022.

60 The work on 9 and 10 June 2022 included the removal of a kitchen wall. While it is unclear whether this wall was structural in nature, undertaking such work gave rise to the possibility of significant damage to the surrounding structure. However, the fact the wall was not required to be reinstated suggests that no damage was in fact done to common property in and around the area of this work.

61 Ms Roberts relied on the same evidence concerning her personal circumstances and her understanding of the Tribunal processes in connection with the breaches of the 7 June order. In her evidence concerning her personal circumstances, at [109] of her affidavit affirmed 29 June 2022, Ms Roberts said:

> 109 Going through Tribunal proceedings, especially when I sought legal advice from my lawyers, I have known that I should not breach the Tribunal order and I feel completely ashamed have to involve my family and friends and people around me in this.

62 She then continued at [114] – [119]:

> 114 Because of my impulsive actions, I have let my family down.

> 115 I know that because of my mistake, I might face heavy penalties and I might lose the ability to support my child to pursuit (sic) his dream and his study.
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> 116 I have talked to my lawyer and they have corrected me about my opinions in this whole thing.
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> 117 They taught and explained to me the law and the consequences of my actions, and I was shocked and disgusted to learn how many people have been impacted by my behaviours.
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> 118 I think about what would have happened if I had sought legal advice in early-stage and make more effective communications with the Applicant and other involved parties.
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> 119 Again, I want to say I am extremely sorry for my actions.

63 The problem with this evidence and the circumstances concerning contravention that might ameliorate the severity of any penalty (at least in connection with the contraventions in June and July 2022) is that, when advised by the Tribunal on 7 June 2022 about the orders and the need to comply, Ms Roberts expressly stated she could not change her schedule and that she will "take the consequences": see Primary Reasons [93]-[94].

64 The only conclusion available from what she said to the Tribunal at the hearing on 7 June 2022 is that she did not intend to comply with the orders the Tribunal made on that date.

65 Ms Roberts' decision to remove the kitchen wall and carry out work after 7 June 2022 is, to quote the plurality in *Pattinson* said at [50], "an example of adherence to a strategy of choosing to pay a penalty in preference to obeying the law". In this regard, the actions of Ms Roberts were deliberate and with knowledge of the consequences.

66 The contrition express in her affidavit does not excuse her deliberate actions in contravening an order. At best, it might reflect the intention of Ms Roberts to comply with her obligations under the SSMA in the future.

67 Both in respect of specific deterrence and general deterrence, and having regard to her history of contravening conduct, in our view the maximum penalty of 50 penalty units or $5,500 should be imposed in respect of contraventions of the 7 June order.

68 In reaching the above conclusions in respect of the contraventions of the 4 March order and 7 June order, we note that the imposition of these penalties

would give rise to a total liability of $8,250 against a possible maximum combined amount of $11,000 (2 x $5,500). There is scant evidence to suggest that this amount would be oppressively severe. Certainly, there is an absence of any specific evidence concerning Ms Roberts' financial capacity to pay. On the other hand, in our opinion it is necessary to give appropriate weight to the need for deterrence.

69 In the context of the conduct we have found as constituting contraventions of the 4 March order and 7 June order, we are satisfied that penalties totalling $8,250 are appropriate and not oppressive.

70 As to whom the penalty should be paid, we do not accept the owners corporation's challenge to the decision in *Taylor No. 3* or that it was incorrectly decided. Rather, we adopt and follow the reasoning in *Taylor No. 3*.

71 As noted in *Taylor No. 3* at [32], in enacting s 247A, there was no provision in that section similar to s 147(6) of the SSMA. The fact that s 248 regulates the position if an order is made in favour of an owners corporation does not lead to the conclusion that s 247A (which relates to an application that can be made by an owners corporation or another person and/or can be made against the owners corporation) prima facie requires a penalty awarded under that section to be paid to an owners corporation if it is the applicant.

72 As to the submission concerning the lack of deterrent effect if a penalty is to be paid to the State rather than to an owners corporation, the "incentivise" argument assumes the penalty will not be paid to and/or will not be collected by the State.

73 As to the submission concerning the possible shortfall in recovering costs of the penalty proceedings, costs are compensatory: *Latoudis v Casey* [1990] 170 CLR; 534 HCA 59 per McHugh J at 567; see also *Oshlack v Richmond River Council* (1998) 193 CLR 72; [1998] HCA 11 per McHugh J at 97. Compensation for costs a party incurs in proceedings is regulated by s 60 of the NCAT Act (and where applicable the *Civil and Administrative Tribunal Rules 2014* (NSW)).

74 Finally, in *Taylor No. 3*, the Tribunal was considering the operation of s 247A in the context of a range of possible applicants. It did so in the context of the purpose of that section to permit a mechanism for enforcing an order. However, the Tribunal did not suggest that "a prerequisite to, or an essential element of, an application for a civil penalty" depended upon damage being suffered by the applicant. The causing of damage may be relevant to the imposition of a penalty and the amount to be imposed. However the point being made in *Taylor No. 3* concerned the question of to whom the penalty should be paid.

75 Notwithstanding our conclusion that *Taylor No. 3* was correct in its analysis, in our view the present case does warrant the penalties being paid to the owners corporation.

76 Quite separately from any costs of these proceedings, it is evident that the owners corporation incurred costs in inspecting the works and carrying out various management functions associated with dealing with issues of non-compliance. In this regard, there is evidence of the owners corporation engaging experts to review both the work being carried out and the effect of that work on surrounding lot and common property: see e.g. email from Mr Vincent Graham, Project Guides AB 489-90.

77 It follows that we are satisfied that the penalties in this case should be paid to the owners corporation.

What, if any, order should be made in respect of costs of these proceedings?

78 The owners corporation seeks an order for costs of the proceedings. A special order, namely on an indemnity basis, was not sought.

79 Section 60 of the NCAT Act applies. That is, the owners corporation must show special circumstances: *Westbury*. Relevant factors include those set out in s 60(3) of the NCAT Act.

80 The owners corporation relies on four factors as constituting special circumstances:

(1) Ms Roberts' prelitigation conduct, namely repeatedly contravening the Tribunal's stop work orders "was the sole matter necessitating these proceedings". Reliance was placed on the decision of *Allanby v*

Commissioner of Police [2019] NSWCATAD 37*.* At [20] the Tribunal said:

> The applicant relied upon a telephone conversation between the parties' representatives in about May 2018 in support of his application for costs. The parties agree that pre-litigation conduct is a relevant factor, at least for the purposes of s 60(3)(g) of the NCAT Act (B & L Linings Pty Ltd v Chief Commissioner of State Revenue (No 5) [2010] NSWADTAP 21). It may also be a relevant factor in relation to the other paragraphs of s 60(3).

(2) The repeated contraventions of orders by Ms Roberts prolonged the proceedings, necessitating proof in respect of multiple contraventions. If she had refrained, there would have been "fewer issues in dispute and the matter would have concluded at an earlier point in time".

(3) There were complex legal issues concerning whether multiple penalties were available. As the Commissioner of Fair Trading acknowledged, the issues were not clear. There were no previous decisions on this issue.

(4) Ms Roberts did not assist in the facilitation of the just, quick and cheap resolution of the real issues in dispute. In this regard she "did not make any effort to contribute to the compilation of the agreed bundle, or otherwise advise the [owners corporation] that she did not intend to contribute". Reliance is placed on correspondence attached to the submissions on this topic.

81 In response, Ms Roberts submitted there should be no order for costs. The reasons are as follows:

(1) Eleven items of contraventions were asserted, however nearly half were withdrawn. This caused unnecessary waste of legal resources for the respondent.

(2) "The decision and strategy of the [owners corporation] to file the application pursuant to s 247A Civil Penalty of the SSMA instead of s 250 continuous offence, had nevertheless led to the complex legal issue of whether multiple penalties shall be imposed".

(3) Because the owners corporation sought an order that it be paid the penalty, "the proceedings is taken by the [owners corporation] to be compensatory in nature if not retribution, instead of for the purpose of specific or general deterrence".

(4) The submission concerning not receiving contributions from Ms Roberts for the agreed bundle should be given little weight. Submissions were provided with pagination and were filed and served in the proceedings "ready to be compiled in the bundle, which cause little or no trouble for the [owners corporation] to combine a joint bundle".

(5) The owners corporation failed to comply with directions concerning the page limit to written submissions. This was said to have caused was Ms Roberts substantial prejudice.

82 As stated in *Westbury* at [211], “the nature of the proceedings, in effect being ancillary to the making of the original orders and for the purpose of penalising the contravener, is a relevant factor to be considered in respect of s 60(3)(d).” It is clear the penalty proceedings were necessary, particular having regard to the time when they were commenced.

83 In addition, these proceedings were complex for the reasons stated by the owners corporation.

84 In our view the matters constitute special circumstances warranting an order for costs in favour of the owners corporation.

85 Ms Roberts submitted that a number of allegations were withdrawn suggesting that the proceedings were frivolous or vexatious or otherwise misconceived or lacking in substance (s 60(3)(d)) or that the withdrawal of those claims indicated they were weak or had no tenable basis in fact or law: s 60(3)(c).

86 It seems to us that evidence about these matters was necessary to understand the context in which those contraventions which we have found occurred. It’s provision do not displace the view that an order for costs should be made, nor, in our opinion, do they provide circumstances warranting a limit to the costs that might be recovered on an ordinary basis.

87 In relation to the point concerning s 250 of the SSMA, penalty notices can only be issued under this section by an authorised officer namely “a person employed in the Department authorised in writing by the Secretary as an authorised officer for the purposes of this section”: s 250(6). Aside from enforcement provisions of the NCAT Act, it was not inappropriate for the owners corporation to take action under s 247A of the SSMA.

88 As to the conduct of the parties during the course of this litigation, we do not consider the actions of either party warrant departing from awarding costs to the owners corporation on an ordinary basis.

89 Finally, the fact that the owners corporation sought payment of the penalty to it, did not change the nature of these proceedings, being for the imposition of a civil penalty, or operate to deprive the owners corporation of an order in its favour.

Orders

90 We make the following orders:

(1) In respect of the contraventions of order 4 made 4 March 2022 in application SC 22/08447 the respondent, Mei Lan Roberts, is to pay a civil penalty of 25 penalty units being $2750.

(2) In respect of the contraventions of order 1 made 7 June 2022 in application SC 22/24178 the respondent, Mei Lan Roberts, is to pay a civil penalty of 50 penalty units being $5500.

(3) The penalties in orders 1 and 2 are to be paid to the applicant within 30 days of the date of these orders.

(4) The respondent is to pay the applicant's costs of these proceedings, such costs to be as agreed or assessed on an ordinary basis.

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

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