



Civil and Administrative Tribunal New South Wales

Case Name: Prior v The Owners Strata Plan 4382

Medium Neutral Citation: [2019] NSWCATCD

Hearing Date(s): 18 October 2019

Date of Orders: 20 January 2020

Date of Decision: 20 January 2020

Jurisdiction: Consumer and Commercial Division

Before: J A Ringrose
General Member

Decision:

1. Pursuant to s232 of the Strata Schemes Management Act 2015 the respondent is, at its own cost, to engage a qualified engineering, building and/or waterproofing expert to investigate and provide recommendations in the form of an expert report to address the damage and/or moisture affecting the common wall and the internal walls of Lot 18 and the extent to which repairs may be necessary having regard to the original enclosure of the balcony.
2. On receipt of an appropriate expert report the respondents are to engage a licenced contractor to complete the works recommended by the expert in a proper and workmanlike manner and in accordance with the appropriate codes and standards within a period of 8 months from the date of these orders subject to any extension of time which may be granted by the Tribunal upon application being made.
3. In the event that the respondent agrees to accept the scope of works detailed in paragraphs 1.1 – 1.12 of the joint report dated 15 October 2019 then works can be undertaken in accordance with that scope of works.

The Owners Corporation is, at its own cost, to rectify the structural defects associated with the enclosure of the balcony of Lot 18 in Strata Plan 4382 and carry out all necessary incidental work in accordance with

the scope of works contained in the joint report of Greg O'Mara and Sam Eskander dated 15 October 2019, and identified in paragraphs 1.1 to 1.12 therein, including the recommended amendment to 1.7 as proposed by Mr Eskander.

4. Subject to any application to extend time, which application may be made to the Tribunal, the works are to be completed on or before 13 August 2020.

5. Any application for costs by either party is to be made in accordance with the following timetable:

(a) The applicant for costs (applicant) is to file and serve any necessary evidence and submissions within 21 days of the date of these orders

(b) The respondent to any costs application is to file and serve any evidence and submissions in response to the costs application within 42 days of the date of these orders

(c) The costs applicant is to file and serve any submissions in reply within 49 days from the date of these orders.

Catchwords: Strata Schemes – common property- resolution to authorise work to alter common property – obligation to repair.

Legislation Cited: Conveyancing (Strata Titles Act) 1961
Section 103 Strata Schemes Management Act 2015
Strata Titles Act 1973

Cases Cited: Case 809 (1989) NSW Strata Title Cases 31-809.
Owners Strata Plan 50276 v Thoo [2013] NSWCA 270
Davenport v The Owners Strata Plan 536 [2018]
NSWCATAP 301
Seiwa Pty Ltd v Owners Corporation 35042 [2006]
NSWSC1157
The Owners Strata Plan No. 30621 v Shum [2018]
NSWCATAP 15

Category: Principal judgment

Parties: Deborah Prior
Applicant
The Owners SP No. 4382
Respondent

Representation: Solicitors:
Mr Ton of Grace lawyers appeared for the applicant

Mr Feeney of JS Mueller & Co solicitors appeared for the respondent.

File Number(s): SC19/17166

REASONS FOR DECISION

Application

- 1 By an application filed on 9 April 2019 the applicant as the owner of Lot 18 in Strata Plan 4382 sought an order pursuant to s.232 Strata Schemes Management Act 2015 that the balcony area adjacent to Lot 18 on the eastern side be considered common property and be rectified by the Owners Corporation to deal with structural defects, mould and water ingress.
- 2 The matter was initially listed before the Tribunal on 22 May 2019 when Senior Member Thode made orders that the applicant provide the respondent and the Tribunal with a copy of all documents upon which she intended to rely by 3 July 2019 with the respondent to provide all of its documents by 14 August 2019. Leave was granted for both parties to be legally represented.
- 3 The matter was initially listed for hearing in August 2019 but on 3 July 2019 Mr Ton, on behalf of the applicant, sought an extension of time to file and serve his client's documents. He proposed that the time for the applicant to provide her documents be extended to 17 July 2019 and the time for the respondent to reply to that material be extended to 20 August 2019. By an amended application Mr Ton sought orders rectifying the rising damp and/or moisture affecting the common wall and internal walls of Lot 18 together with work to prevent moisture from penetrating the common wall and nearby concrete slab of Lot 18.
- 4 A further order was sought in relation to the repair of damage to Lot 18 including but not limited to the replacement of moisture damaged carpets, re-tiling, removing mould and re-painting of walls.
- 5 In the alternative orders were sought for the repairing of damage along with a claim for loss of amenity during the period of the works and alternative accommodation, transportation and storage costs as required while the work was being completed.

- 6 On 4 September 2019 the solicitors for the applicant requested that the matter be listed for a further directions hearing to consider the question of leave to amend the original application.
- 7 The matter was listed before Senior Member Charles on 2 October 2019 when leave was granted to the applicant to amend her application and the experts engaged on behalf of the applicant and the respondent were required to meet and prepare a joint report indicating areas of agreement and disagreement with such report to be filed no later than 16 October 2019.
- 8 The matter was ultimately listed for hearing on 18 October 2019 and the decision was reserved on that date with directions that the applicant file and serve her written submissions by 25 October and the respondent file and serve its submissions in reply by 1 November 2019. The applicant was to provide submissions in reply to the respondent's submissions by 8 November 2019. Final submissions were ultimately received by 13 November 2019.

Applicant's Evidence and Submissions

- 9 At the commencement of the proceedings Mr Ton, on behalf of the applicant, indicated that an order was now being sought pursuant to s.232 of the Act requiring the respondent to undertake the works set out in the joint report of the experts Greg O'Mara and Sam Eskander dated 15 October 2019 as required under s106 of the Act. He further sought an order for rectification or cost of rectification of consequential damage to the balcony area when it was used as an internal space.
- 10 The experts, Mr O'Mara and Mr Eskander, were both available for cross-examination and the reports of Mr O'Mara on behalf of the applicant dated 17 July 2019 and 10 August 2019 were tendered along with the joint report dated 15 October 2019.
- 11 Mr O'Mara was called for cross-examination and he indicated that the Strata Plan was registered in 1969 and he believed that the balcony area was enclosed in 1990. He agreed that he did not possess the qualifications in

structural design, he noted that the wall around the balcony area was laterally displaced by some 32 centimetres, although he made no reference to this displacement in his reports or on the photographs which formed part of his reports.

- 12 Mr Ton, on behalf of the applicant, noted that Strata plan 4382 was registered in 1969. The Plan comprised some 28 lots on seven levels as well as two levels of car parking. The premises were situated at 8 Trafalgar Street, Brighton-le-Sands.
- 13 The applicant purchased her property on 23 May 2003 and became the registered owner of Lot 18. She claimed that at the time of purchase in 2003 the northern and eastern balconies of Lot 18 had been enclosed for some time which, she suggested, was 24 years since 1979. It was pointed out that at the time of the present application the eastern balcony had been enclosed for some 40 years without any complaint from the respondent.
- 14 It was submitted that the Tribunal should find that the balconies were enclosed probably between 1972 and 1979. The enclosures were similar in appearance and reference was made to the correspondence between the lot owners and the Council in 1979.
- 15 On 1 March 1979 Mr Angelo De Marco, the then owner of Lot 18, submitted an application for development consent of his lot. The development proposed was the enclosing of a balcony off the bedroom on the eastern side of the dwelling using aluminium frames and grey tinted glass. That application, which is part of an attachment to the first statement of Ms Prior, was signed off by the Chairperson and Secretary of Strata Plan 4382 and was affixed with the seal of the Strata Plan.
- 16 The Plan, apparently submitted with the application, showed an existing brick wall 0.9 meters high with windows of some 2.032 metres to be attached to the top of that wall.

- 17 On 7 September 1979 Mr and Mrs De Marco appear to have filed a further development application seeking authority for the proposed development work to be undertaken by B & W Miranda Home Improvements for enclosure of the balcony. They were advised that the application was approved provided the balcony enclosures complied with others in the building. From the material provided it appears that, although the balcony area was common property, the building works were undertaken at the request of the lot owners Mr and Mrs De Marco and were paid for by them at the time. The work was described in the plan as a proposed enclosure of an existing verandah or balcony using aluminium frames and grey tinted glass.
- 18 In her statement dated 17 July 2019 Ms Prior states that in about early 2014 she noted water to be entering her lot from the eastern balcony and she observed over the years that there was an increase in the water entering her Lot. It is noted that in paperwork provided on behalf of the Owners Corporation there were complaints made concerning internal renovation works within Unit 18 in a period from about December 2006 through to about February 2007. Although Mr Feeney on behalf of the respondent did not seek to rely on Statutory Declarations from several witnesses it is noted that a request made by the Strata Manager in early 2007 concerning works being undertaken was not ever replied to. Ms Prior has not seen fit to refer to any of that issue in her statement and although she states the timber floors were changed to tiled floors no further information has been provided in that regard.
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- 19 In January 2014 she sent an email to the Strata Managing Agent advising of water ingress issues in her lot. An inspection was to be arranged some time after late January 2014. Between 15 January 2014 and December 2017 she moved out of the lot and her son, who was a carpenter, had moved in. During the period he was tenanting the property it is claimed that he was unable to reside in the main bedroom due to moisture as a result of water ingress in the lot. She notes that on 7 December 2017 she sent an email to the Strata Manager indicating that she was continuing to experience water ingress issues and resultant damages.

- 20 Ms Prior complained that other lot owners had a mediation with the Owners Corporation concerning water issues but she has not provided evidence from other owners in this regard and her comments must simply be regarded as hearsay.
- 21 In January 2018 Ms Prior engaged a firm of engineers known as Eskander Consultants Pty Limited to provide an expert opinion in relation to water ingress. A copy of that report appears to be the only expert report provided by the respondents although it was clearly prepared for Ms Prior at her request.
- 22 It appears therefore that the joint report filed by the applicant's solicitors is a document prepared by two experts both of whom were consulted by and on behalf of the applicant.
- 23 Mr Ton on behalf of the applicant submitted that in this matter the Tribunal should adopt a similar approach to that of the Appeal Panel in the matter of *Davenport v The Owners Strata Plan 536* [2018] NSWCATAP 301 and infer from the available evidence that the more probable scenario was that enclosing for 41 balconies had been approved by the Owners Corporation within the requirements of the Strata Titles Act 1973.
- 24 It was claimed that under the Conveyancing (Strata Titles Act) 1961 and the Strata Titles Act 1973 mechanism was provided to add by-laws but neither Act contained an express provision for approving additions to the common property as is now found in s.65A of the 1996 Act. The Appeal Panel in *Davenport* relied upon the presumption of regularity principally based on Council recording it had been informed the balcony had been approved by the Owners Corporation and that the work to the common property was clearly visible to all owners and could not have been done without the unanimous approval of all owners.
- 25 It was submitted in respect of the eastern balcony of Lot 18 that Council records disclosed that the Council was satisfied that the respondent had

agreed to the enclosing of that balcony and that the presumption of regularity should apply and the inference should be drawn that there was evidence before Council to reach that conclusion.

- 26 It was submitted that the record keeping of the respondent was poor and inconsistent and that evidence from a Mr Sultan to the effect that none of the balconies had been approved should be disregarded.
- 27 Mr Ton submitted that the experts engaged by both parties were in agreement on the defects in the common property area and the scope of works necessary to fix the common property. That submission appears to be incorrect in that both of the experts who prepared the joint report were engaged by the applicant, Ms Prior, and there was no independent expert engaged by or on behalf of the respondent.
- 28 It was submitted further that the only way an Owners Corporation could avoid an obligation to maintain the common property was
- (a) By passing a special resolution under s. 106(3), or
 - (b) By passing a resolution to remove the addition rather than maintain it.

It was argued that it was not open to the respondent to do nothing in circumstances where both experts agreed that the balustrade wall had suffered structural damage and required repair.

In relation to the damages claim made by the applicant, My Ton referred to the decision of the Appeal Panel in *The Owners Strata Plan No. 30621 v Shum* [2018] NSWCATAP 15 where the Appeal Panel held that a lot owner was entitled to recover damages so long as one of the causes was the Owners Corporation continuing in breach of its obligations under s.106. of The Strata Schemes Management Act 2015. It was claimed in the present case that the applicant is seeking damages arising from a water leak in September 2017 and continuing to date. The claim is based on evidence from the

applicant and a receipt from Quality Constructions Management Pty Limited in respect to the previous repainting of all damaged areas in September 2017.

Respondent's Evidence and Submissions

- 29 The initial submission made by Mr Feeney on behalf of the respondent was that the duty to repair and maintain under s.106 of the Strata Schemes Management Act only required the Owners Corporation to attend to defects in the original construction of the building and that repairs and maintenance were only required to reinstate the building to the standard that the building was at on the date the Strata Plan was registered, namely on 11 December 1969. He claimed further as of that date the balcony of Lot 18 was open to the elements wind and rain and it did not comprise an internal habitable room.
- 30 He conceded that at some point after 1979 the eastern balcony was enclosed by, among other things, windows and aluminium structures to make an enclosed room. He submitted that there was no evidence that the respondent consented to any addition to its common property, although the documentary material provided with the applicant's papers which bore the signature of the Chairperson and Secretary, and was affixed with the seal of the Owners Corporation suggests otherwise.
- 31 It was conceded that at some time before the applicant purchased the property in 2003 works had been done by a person other than the applicant. It would appear clear that these works were undertaken by the predecessor in title of the applicant Mr De Marco.
- 32 Reference was made to a manufacturer's label on a window in the applicant's unit which had a nine digit Australian telephone number for a business which was located in Kirrawee. It was claimed that nine digit telephone numbers came into operation in January 1991 and accordingly it was suggested that the windows were installed after that time.
- 33 Reference was made to the evidence of Mr Eskander suggesting that at the time the building was first constructed it was likely to have complied with the

relevant Building Codes and Standards of that time. He had observed that the enclosure works were performed with little or no attention to the construction of the external walls and without upgrading external wall structure to introduce a dry wall and cavity to prevent water penetration. It was claimed that any water penetrating through the eastern balcony wall would prevent the enclosure being used as an internal habitable room due to defects in the construction of the eastern balcony enclosure works.

34 It was argued that the Tribunal should not accept that the eastern boundary had been enclosed for some 24 years or that the balconies were enclosed approximately 40 years prior to the date of the present application. It was argued that, at highest, evidence established that the eastern balcony may have been enclosed some time between 1979 and 1990 but there was no persuasive evidence as to the time it occurred. Mr Feeney accordingly submitted that the applicant had failed to discharge her onus of proof on these matters.

35 Mr Feeney submitted further that the Tribunal could not accept any submission that was to the effect that because the eastern balcony enclosure had been in place for about 40 years it had somehow become an authorised addition to the common property.

36 In relation to the alleged displacement of the eastern balcony balustrade wall it was noted that Mr O'Mara made no reference to the displacement in his reports and that Mr Eskander had not referred to a displacement in the order of 30 centimetres, although he did concede that if displacement was there to that extent then the respondent would be obliged to rectify it. It was argued further that the applicant's main complaint was water ingress rather than lateral displacement of the wall, and that Mr O'Mara during cross-examination gave evidence to the effect that lateral displacement was not the cause of water ingress.

37 The Tribunal was referred to the decision of the Supreme Court in *Seiwa Pty Ltd v Owners Corporation 35042* [2006] NSWSC1157 where Brereton J noted

that the duty to maintain involved an obligation to keep the thing in proper order by acts of maintenance before it fell out of condition in a state which enabled it to serve the purpose for which it existed. It was suggested that the purpose for which that area existed could be determined from a Strata Titles Board decision in *Case 809 (1989) NSW Strata Title Cases 31-809*. That case related to water penetration into a garage when the Board held that there was no mandatory Local Government or other requirement for a garage to be sealed against water penetration and the Board ultimately held that failure to repair was not a breach of the section which is now equivalent to S.106 of the Act.

38 Mr Feeney sought to distinguish the Appeal Panel decision in *Davenport v The Owners Strata Plan No. 536* (supra) by indicating that the decision in *Davenport* was to the effect that at the time of construction of the balconies the co-owners of each lot were the same group of persons as they each owned other lots and the Conveyancing (Strata Titles) Act 1961 did not vest legal ownership of the common property in the Body Corporate but rather left it in the hands of the owners. It was said that the distinction arose because the Appeal Panel referred to the owner's power by unanimous resolution to approve the construction of the balcony. It was said this could be distinguished because the owners of lots retained legal ownership of the common property under the Conveyancing (Strata Titles) Act 1961 whereas under subsequent legislation it was vested in the Owners Corporation. It was suggested that the respondent had appointed Mr De Marco as its representative for the purposes of making the application and with that appointment being represented by a seal affixed to the document and witnessed by the Chairperson and Secretary. It is claimed there was no evidence at all of any subsequent approval by the Council or the Owners Corporation at a meeting.

39 Since 30 November 2016 section 108 of the Strata Schemes Management Act has governed the procedure that applies when an additional alteration or erection to a new structure on common property is proposed that it is difficult

to understand how that section can relate to an alleged approval for works to be done in 1979.

40 Mr Feeney submitted that before 7 February 2005 there was no equivalent to section 108 or section 65 of the previous legislation and therefore there was no express provision in the strata legislation that dealt with how an Owners Corporation or an owner could add to or alter or erect a new structure on common property. It is claimed that the applicant has not been able to point to such a provision.

41 It was argued that in the event that a work order was to be made that an allowance of some 12 months should be made bearing in mind that a Development Application may be required at the present time and that there is no evidence at the present time as to whether the Owners Corporation would need to raise a levy in order to authorise the commencement of works.

42 It was finally submitted that if the Tribunal does order the respondent to carry out rectification of the lateral displacement then it should only be on the condition that

- (a) The obligation to do so arises from the time that the applicant removed the windows in the balcony;
- (b) The respondent had no less than 12 months to do the works and up to the standard required of an open balcony;
- (c) The respondent was not required to reinstate the windows and render the walls;
- (d) The applicant was not permitted to reinstate the windows and render the walls on the balcony.

43 In relation to the potential damages claimed it was argued that there had been no quantification of these losses.

- 44 Reference is made to an assertion of the applicant that she was carrying out renovations to her kitchen. It was pointed out that no evidence of consent for the various renovation works undertaken by the applicant was ever obtained. The respondent submits that extensive renovation works were carried out on the applicant's lot as set out in the contemporaneous records of lot owners. It also submits that renovation works apparently continued into 2007 when she completely ignored a request to regularise the renovation works which had been carried out.
- 45 The respondent relied on an affidavit of Moshin Sultan dated 27 August 2019 who is the Secretary of the Owners Corporation. He referred to a bundle of documents attached to his affidavit.
- 46 He noted that, of the balconies located within the Strata Plan, 15 balconies were still open and in their original condition whilst 41 balconies had been enclosed.
- 47 The expert report of Eskander Consultants dated 12 March 2018 is an attachment to the affidavit of Mr Sultan and it has not been included in the respondent's evidence as a separate or independent report. It is noted that in a joint report document prepared by the solicitors for the applicant the report of Mr Eskander has been referred to as the report of the respondent's expert whereas this assertion appears to be quite clearly incorrect.

Decision

- 48 Strata Plan No. 4382 was registered in 1969. The scheme comprises some 28 lots located over seven levels at 8-12 Trafalgar Street Brighton-Le-Sands. The applicant is the registered owner of Lot 18 and she purchased that lot on 23 May 2003.
- 49 The amended orders sought by the applicant required the respondent, at its own cost, to carry out rectification works in accordance with a joint report from Mr O'Mara and Mr Eskander dated 15 October 2019.

- 50 The submission made on behalf of the applicant includes an assertion that the parties' experts are in agreement on the defects in the common property and the scope of works necessary to repair the common property and lot property issues. The Tribunal however has considerable difficulty in accepting this assertion because it is clear that the applicant primarily relies upon reports of Mr O'Mara but there is no expert report provided on behalf of the respondent. Mr Eskander prepared his only report on 12 March 2018 at the specific request of the applicant. This report was based on an inspection carried out on 31 January 2018 limited to visual and walk over examination of the building and site and there is no evidence that Mr Eskander either on behalf of the applicant or the respondent had ever attended the property after that date.
- 51 The document described as a joint report was provided by the solicitors for the applicant who no doubt procured the signature of Mr Eskander for the purposes of the joint report.
- 52 The solicitors for the respondent did not provide any expert report which had been obtained at the request of the respondent. Although they acquiesced in the report of Mr Eskander being noted as a respondent's exhibit it would appear that there was never any joint consultation between the experts in their apparent roles of acting on behalf of the applicant on the one hand, and the respondent on the other.
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- 53 The issues which appear to be relevant to the present proceedings include:-
- (a) The circumstances in which the balcony of Lot 18 came to be enclosed;
 - (b) Who constructed the balcony
 - (c) Whether the respondent approved its construction
 - (d) Whether the balcony is common property
 - (e) Who is responsible for repair and maintenance of the balcony

- (f) Whether the respondent is entitled to demolish the aluminium and glass structure enclosing the balcony and to reinstate the building to the position depicted in the original strata plan.

- 54 There seems no doubt that at the time the applicant purchased Lot 18 in 2003 the eastern balcony of the lot had been enclosed. The applicant relies on evidence referred to in her statement of 17 July 2019 and the annexures thereto.
- 55 A Town Planning Development Application was filed with the Rockdale Municipal Council on 16 March 1979 by a Mr Angelo De Marco of 18/8 Trafalgar Street Brighton-Le-Sands. He stated in that application that he was not the owner of the land which was at the time owned by the owners of Strata Plan 4383. Paragraph 4 of the Development Application included an owners authorisation and appointment of Mr De Marco as the representative of the Strata Plan for the purposes of that application. The authorisation was under the seal of the strata plan and was apparently affixed by the Secretary and the Chairperson of the Body Corporate.
- 56 The description of work referred to in the application was an enclosing of the balcony off the bedroom on the eastern side of the building using aluminium frames and grey tinted glass. There was further provision for screens to be fitted.
- 57 After the application had been filed the report by the Town Planner noted that the subject premises were located on the southern side of Trafalgar Street between The Boulevard and Duke Street. The zoning was residential 2(c) under the prescribed Rockdale Planning Scheme. It was noted that the application had been recorded as "seeking permission to enclose a balcony at the above mentioned address and the application had been advertised in accordance with section 342ZA of the Local Government Act with no objections having been recorded. It was noted further that the Body Corporate had given its consent to this proposal and the building application had already been lodged. The document indicated that there was no Town

Planning objections to the balcony enclosure and approval was recommended under delegated authority.

- 58 On 7 September 1979 an application was filed by B&W Miranda Home Improvements of 176 Tarren Point Road Tarren Point in respect of Lot 18/8 Trafalgar Street Brighton-Le-Sands. The owners were noted to be Mr and Mrs De Marco and the work proposed was “enclosing of existing verandah with aluminium windows”.
- 59 A letter dated 28 August 1979 from the Secretary of the Strata Scheme to Mr De Marco sought a confirmation that the proposed structure would be in conformity with the other balconies in the building.
- 60 The Town Planner recommended approval of the application again on 24 September 1979 by delegated authority subject to the submission of a separate Building Application. A document purporting to be plans and specifications for the work was then filed by B&W Miranda Home Improvements shortly thereafter. It is noted that the applicant apparently purchased her unit from the estate of the late Mr De Marco (deceased).
- 61 Mr Ton on behalf of the applicant submitted that at the date of these proceedings the eastern balcony had been enclosed for approximately 40 years with no complaint at all from the respondent. He observed that this was the case with the other 40 balconies that had also been enclosed in the Strata Scheme. He submitted that the Tribunal would be likely to find that the balconies were enclosed in the 1970's and that they were generally enclosed in the same way in accordance with Council requirements. Photographs attached to the Expert Report of Mr O'Mara clearly indicate that the balconies appear to have been enclosed in a manner which makes them all uniform.
- 62 It was submitted that the Tribunal should adopt a similar approach to the Appeal Panel in the decision of *Davenport v The Owners Strata Plan 536* [2018] NSWCATAP 301 where the Appeal Panel noted that the Conveyancing (Strata Titles) Act 1961 did not remove the residual rights of the lot owners to

collectively deal with the common property which they held as tenants in common, by unanimous resolution whereby lot owners, whether in General Meeting of the Body Corporate or otherwise, had a power to pass a resolution to permit building work without amending the by-laws generally. It was held that the exercise of such property rights did not require the amendment to the by-laws but simply required a unanimous resolution if approved in General Meeting. There would generally be a minute recording the same.

- 63 In the Davenport decision there was no evidence of any resolution having been passed at a particular General Meeting but the Appeal Panel relied upon the presumption of regularity principle based on the Council's recording that it had been informed that the balcony had been approved by the Owners Corporation and that the work to the common property was clearly visible to all lot owners and could not have been done without approval of all lot owners.
- 64 It was submitted that in respect of the eastern boundary of Lot 18 the Council records disclosed that it was satisfied that the respondent had agreed to the enclosing of the balcony and the presumption of regularity should therefore apply and an inference should be drawn that there was evidence before the Council to reach the conclusion that the respondent had approved the enclosing of the eastern boundary.
- 65 It was observed that the record keeping of the respondent was poor and inconsistent and that the Tribunal should not accept the assertion by Mr Sultan that none of the balconies had been approved. His enquiry was limited to reviewing the records provided to him by the former secretary and he had not inspected the records held by the preceding Strata Manager, Clisdells.
- 66 The Tribunal is bound by the decision of the Appeal Panel in *Davenport v The Owners Strata Plan 536* (supra) and in evaluating the evidence provided on behalf of the applicant the Tribunal is persuaded that the necessary consent has been provided to enable the Tribunal to find that the enclosure of the balcony of Lot 18 with aluminium framework and tinted glass windows in

accordance with the other approved balcony enclosures was done with the consent of the Owners Corporation which indicated its consent under seal on the first application filed for approval of the Council. It is however necessary to consider the nature and extent of the works which had been approved for the purposes of determining the extent of any maintenance repair or replacement which may be necessary. I have taken into account the submissions made by the respondent to the effect that no proper approval had been given and that the decision in *Davenport* could be distinguished but I am satisfied, particularly on the basis of the documentation provided to the Council in 1979 that the necessary approvals to allow the work to be done had been provided.

67 As has already been observed, there is no expert report provided on behalf of the respondent, although to a limited extent the respondent has referred to some parts of the report of Mr Eskander dated 12 March 2018.

68 At the hearing Mr O'Mara gave evidence to the effect that the eastern balcony balustrade wall was laterally displaced by 32cm. The Tribunal was invited to reject that proposition on the basis that the level of displacement had not been referred to in his reports and was not indicated in the photographs. Mr Eskander during cross-examination stated that he had not noticed any displacement when he inspected Lot 18 but he conceded that with the passage of time it was possible that there was some displacement. He also conceded that if displacement was to the extent of 32cm then the respondent would have to rectify it. The applicant has now conceded the displacement was no more than 32mm. Her main complaint was water ingress rather than lateral displacement of the wall and Mr O'Mara during cross-examination gave evidence to the effect that any lateral displacement was not the cause of water ingress.

69 In *Seiwa Pty Ltd v Owners Corporation 35042* [2006] NSWSC 1157 Brereton J observed in relation to the duty to maintain and repair under the previous Act

The duty to maintain involves an obligation to keep the thing in proper order by acts of maintenance before it falls out of condition, in a state which enables it to serve the purpose for which it exists.

- 70 In the *Owners Strata Plan 50276 v Thoo* [2013] NSWCA 270 the Court of Appeal held that the section 106 duty involved consideration of the attributes of the original common property at the time the strata plan was registered in order to determine whether or not a specific part of the common property was in need of maintenance renewal or replacement under the duty and Barrett AJ with Preston CJ of LEC agreeing said

In determining how section 62 (2) and section 65(A) apply at any particular time regard must be had to the attributes of the common property at some earlier reference point. The question of what amounts to renewal replacement alteration or addition must be answered by a process of comparison with the position that prevailed at the earlier reference point. The first such reference point is the time at which the strata plan is registered and a common property comes into being. The initial attributes are fixed at that time and it is from that base that the characterisation of renewal replacement alteration or addition is to be approached. Once any addition or alteration is made in accordance with the Act, the attributes of the common property are changed, a new reference point is identified and future questions of renewal, replacement, alteration and addition fall to be addressed by reference to the changed state at the new reference point.

- 71 In his initial report dated 17 July 2019 Mr O'Mara notes that during his inspection of the property he took a series of moisture meter readings. It was noted that the eastern enclosed balcony was accessed via the main bedroom at the south eastern corner of the lot. He observed generally paint finished rendered masonry walls including a low paint finished masonry part balustrade. He observed that a painted hard soffit on the balcony above and he observed floor tiles and perimeter skirting at the wall. He observed an aluminium sub frame into which aluminium frames and glazed windows had been installed by guiding them into the sub head and lowering them into the sub sill. He observed that it was typical of a more structurally substantial aluminium frame section where the aluminium frame and the glass window system allowed water to enter the frame extrusions draining down into the sub sill before discharging externally through weep holes in the sub sill section. He photographed an aluminium sliding window section with a manufacturer's label fitted. That label suggested that the particular window would have been

installed well after 1979 and could well have been an alteration or repair, probably undertaken by the previous lot owner.

72 Mr O'Mara observed discolouration of the external face brickwork forming part of the balustrade which appeared to have been due to mortar smears where some form of rectification work appeared to have been carried out. No explanation has been provided by the applicant as to when or why this work was carried out and it is possible that this work was undertaken prior to her purchase of the property.

73 Upon being given a history that some rain events resulted in water dripping from the aluminium framed and glazed window head along the eastern elevation of the enclosed eastern balcony he suggested that there was a failure of the gasket seal between the window head and the concrete slab soffit of the balcony above.

74 He noted that at the time of the original installation of the aluminium frame to glass window suite that Local Government Ordinance 70 applied and although the balcony balustrade height complied with that Ordinance it was not complying with the current Building Code of Australia.

75 Mr O'Mara claimed that he had identified a number of causes of the uncontrolled water/moisture entry and damage including:-

- (a) Water entry attributable to water saturation and penetration through the unsealed exposed face single skin brick wall
- (b) Water entry into the eastern elevation external cavity masonry wall
- (c) Water penetration from the adjoining balcony of Lot 19 at the same level and 22 on the same level because the construction of the balcony enclosures on the entire property appeared to be very similar

- (d) Water entry through the aluminium framed glazed window suite concentrated internally adjacent to the head of the window at the paint finished hard set soffit level.

76 It is appropriate to note that the building works undertaken, probably, in 1979 appear to have been in accordance with a design which was similar if not identical to the enclosures in other units. The object of the works was to enclose a balcony area with aluminium framed glass windows. There is no suggestion that the works were not carried out in accordance with building requirements at that time and, to the extent that the respondent must accept responsibility for the maintenance and repair of the enclosures, this fact must be taken into account. In *The Owners- strata Plan No. 50276 v Thoo* [2013] NSWCA 270 the Court was required to consider the extent of the obligation to repair and maintain the common property in circumstances where Dr Thoo contended there was an obligation to upgrade a mechanical exhaust ventilation system which was common property to a capacity that met his requirements for use of his lot property, the existing system otherwise operating correctly and in its original design capacity.

77 In respect of the obligations imposed by s. 62(2) of the 1996 Management Act (being in the same terms a s.106(2) of the 2015 Management Act) relating to fixtures and fittings Tobias JA said (at 127)

127 In the present case, as the Owners Corporation correctly submits, the renewal or replacement of the existing ventilation system for the purpose of enhancing its capacity to the point where it will be capable of servicing the anticipated reasonable demands of all lots within the food court and/or the basement area of the building goes beyond the requirements of s.62 (2) and thus cannot proceed without compliance with the requirements of s.65A.

78 In short the Court found the obligation to repair, renew or reinstate was to the state of the relevant property at the “reference point” per Barrett JA). It is on this basis that the work necessary to repair or maintain the enclosure of the balcony area must be considered.

79 Since 30 November 2016 section 108 of the Strata Schemes Management Act has governed the procedure that applies when an addition to, alteration or erection of a new structure on common property. That section provides :-

108 Changes to common property

1. Procedure for authorising changes to common property

- (1) An Owners Corporation or an owner of a lot in a strata scheme may add to the common property, alter the common property or erect a new structure on the common property for the purposes of improving or enhancing the common property
- (2) Any such action may be taken by the Owners Corporation or owner only if a special resolution has first been passed by the Owners Corporation that specifically authorises the taking of the particular action proposed.
- (3) Ongoing maintenance. A special resolution under this section that authorises action to be taken in relation to the common property by an owner of a lot may specify whether the ongoing maintenance of the common property once the action has been taken is the responsibility of the Owners Corporation or the owner.

- (4) If a Special Resolution under this section does not specify who has the ongoing maintenance of the common property concerned the Owners Corporation has the responsibility of the ongoing maintenance.
- (5) A Special Resolution under this section that allows an owner of a lot to take action in relation to certain common property and provides that the ongoing maintenance of that common property after the action is taken is the responsibility of the owner has no effect unless the Owners Corporation obtains the written consent of the owner to the making of the by-law to provide for maintenance of the common property by the owner;

- (b) the Owners Corporation makes the by-law
- (6) The by-law
 - (a) may require for the maintenance of the common property, the payment of money by the owner at specified times or as determined by the Owners Corporation and
 - (b) must not be amended or appealed unless the Owners Corporation has obtained the written consent of the owner concerned
- (7) Sections 143 (2) 144 (2) and (3) and 145 apply to a by-law made for the purposes of this section in the same way as they apply to common property rights by-laws.

80 It is to be noted that s.65A of the Strata Schemes Management Act 1996 was in similar terms to the present s.108 and the extent of the maintenance or repair required must be limited in accordance with the observations of the Court of Appeal in *The Owners Strata Plan 50276 v Thoo (supra)*

81 Applying the principles referred to above the Tribunal is satisfied that the Owners Corporation has an obligation to repair or maintain the balcony area including the additional works which were apparently undertaken in 1979. Although the applicant has suggested that the scope of works has been determined by a joint expert report it is clear that the report which has been tendered as a joint expert report was not in fact a report jointly prepared by an expert acting on behalf of the applicant and an expert acting on behalf of the respondent and it would be inappropriate to make orders dictating to the Owners Corporation the way in which rectification or repair works should be undertaken in such circumstances. The material provided on behalf of the respondent contained a report dated 17 February 2014 from Sydney Remedial Builders which included a quotation provided at that time to address structural damage which had occurred to the single skin wall of Unit 18 below

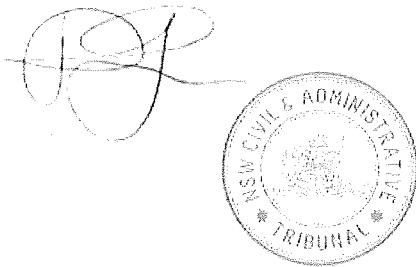
the window. Recommendations were made which included the engagement of a structural engineer such as Mr Eskander to provide a report and specification for repairs. The report was not specifically tendered at the hearing but there is nothing in the respondent's paperwork to suggest that the report of Mr Eskander provided to the applicant is the material to be relied on by the respondent.

- 82 Whilst it can be argued that the opinion of Mr O'Mara is not disputed it is not necessary, or in this case appropriate, for the Tribunal to simply prescribe the method and scope of works based only on the applicant's evidence particularly where the Tribunal is bound by the principles enunciated in *Thoo* (supra) with respect to the extent of repairs and maintenance which may be necessary. It is therefore appropriate to order pursuant to s.232 of the Strata Schemes Management Act 2015 that the respondent, at its own costs engage a qualified engineering, building, mould and/or waterproofing expert to investigate and provide recommendation in the form of an expert report to address the damage and/or moisture affecting the common wall and the internal walls of Lot 18.
- 83 On receipt of an appropriate expert report the respondents are to engage a qualified and licenced contractor to complete the works recommended by the expert in a proper and workmanlike manner and in accordance with the appropriate Codes and Standards within a period of 7 months from the date of these orders subject to any application to be made in first instance to the Tribunal for an extension of time.
- 84 In the event that the respondent agrees to accept the scope of works detailed in paragraphs 1.1 – 1.12 of the joint report dated 15 October 2019 then works can be undertaken in accordance with that scope of works.
- 85 In relation to the claim for damages the Tribunal is not satisfied that any claim for damages has been made out. There is insufficient evidence provided to address any loss or damage suffered since 2017, being the time specified in the orders sought and furthermore there is nothing to enable the Tribunal to

determine whether painting works now claimed would have been necessary in any event having regard to the nature of the enclosure in the area, the fact that timber flooring was put down without regard to the possibility of moisture affecting the area and the limitations on damages having regard to the allowance for depreciation of painting work over the years.

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

Registrar



The image shows a handwritten signature in cursive script to the left of a circular official seal. The seal features the text "NSW CIVIL & ADMINISTRATIVE TRIBUNAL" around its perimeter and a central emblem.