VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

BUILDING & PROPERTY LIST VCAT REFERENCE NO. BP886/2018

CATCHWORDS

Water Act 1989 - Owners corporation; entry of water to two apartments; source of water; whether common property or privately owned lots; whether owners corporation breached duty to repair and maintain under section 46 of the *Owners Corporations Act* 2006; whether owners corporation liable under section 16 *Water Act* 1989; whether owners corporation on notice of flow; whether owners corporation took reasonable steps to prevent the flow of water; nature of damages allowed under the *Water Act;* amount of damage

APPLICANTS	Peta Davies, Karen Ellis
FIRST RESPONDENT	Owners Corporation 1 PS414649K
FIFTH RESPONDENT	Steven John Humphrey and Jun Fan
SIXTH RESPONDENT	Blaise Antony
SEVENTH RESPONDENT	Brian Robert Poskaitis and Susan Mary Kent
EIGHTH RESPONDENT	Maud Investments Pty Ltd (ACN 068 024 046)
WHERE HELD	Melbourne
BEFORE	Senior Member S. Kirton
HEARING TYPE	Hearing
DATE OF HEARING	29, 30 April, 1, 6 May 2019
DATE OF ORDER	2 August 2019
CITATION	Davies v Owners Corporation 1 PS414649K (Building and Property) [2019] VCAT 1159

ORDER

1. By 21 August 2019 (or such later date as may be agreed by the parties) the parties may file and serve written submissions on the appropriate orders to be made in light of these Reasons, and whether they require the matter be listed for a hearing, or orders may be made on the papers.

SENIOR MEMBER S. KIRTON

APPEARANCES:

For the Applicants	Mr S. D. Hay of counsel
For the First Respondent	Mr N. Jones of counsel
For the Fifth, Sixth, Seventh, Eight Respondents	Mr L. Hogan of counsel

REASONS

BACKGROUND

1. The applicants are the owners of two apartments on level 8 of an apartment building in St Kilda Road, known as The Griffin Park Regis. Ms Davies owns apartment 83 and Ms Ellis owns apartment 84. Their apartments have been severely damaged by water flowing from above into their ceiling cavities and then into their living spaces. The extent of the damage was obvious during my view of the properties and from the numerous photographs and expert reports tendered during the hearing. Ms Davies and Ms Ellis gave evidence about the economic, emotional and health effects this flow of water has had on their lives.

2. Destructive testing carried out during the course of this proceeding revealed that the problem of water leaks has existed for a considerable period of time, and must have been known about by persons other than the applicants. For example, at some point in the past, unbeknownst to the applicants, drip trays had been installed in their ceilings to collect the leaks from above. The drip trays were not connected to any drain and are not a permanent solution, as can be seen from the considerable water damage to internal plaster, floors, carpets and mould growth.

3. The applicants commenced this proceeding seeking damages and injunctive and other relief under sections 16 and 19 of the *Water Act* 1989 (Vic) (the Water Act) and under the *Owners Corporation Act* 2006 (Vic) (the OC Act) in order to have the flow of water stopped and to be able to rectify the damage to their apartments.

4. It was not disputed by any party that the flows of water are not reasonable within the meaning of section 16 of the Water Act. The experts for all parties agreed that the flows of water into the level 8 apartments were coming from above, and are caused by a combination of defects in the glazed units on level 9 and defects in the balconies on level 9. The question for this hearing is whether the glazed units and the balconies are common property or are within the property owned by the owners of the level 9 apartments.

5. The first respondent (the OC1), is the owner of the relevant part of the common property, in accordance with ss 30 and 31 of the *Subdivision Act* 1988 (Vic)[1]. The other current respondents are the owners of the apartments on the north face of level 9, with the fifth respondent being the owner of apartment 91, the sixth owning apartment 92, the seventh owning apartment 93 and the eighth respondent being the owner of apartment 94[2].

[1] *Johnston v Stockland Development Pty Ltd* [2014] VCAT 1634 per Jenkins J at [21].
[2] The second and third respondents were other owners corporations on the property, the fourth respondent was the OC manager. The claims against each were withdrawn at an earlier stage of the proceeding.

THE LAYOUT OF THE BUILDING

6. The property was redeveloped from a vacant commercial premises to a residential apartment building between about 1997 and 2000.

7. Levels 1 - 4 of the building are owned and operated as hotel apartments. Levels 5 - 9 are privately owned apartments[3]. Levels 9 and 10 are understood to have been added on to the existing building as a second stage.

8. The northern face of level 8 contains five apartments, numbered 81 to 85. They are located side by side, running from east to west, with apartment 81 on the St Kilda Road side of the building and apartment 85 at the Queens Road side. The applicants' apartments, 83 and 84, are therefore in the middle of the north face of the building.

9. Level 9 comprises four apartments (numbered 91 to 94) on the north side of the building located directly above apartments 81 to 85, and as a result Ms Davies' apartment 83 is underneath part of apartment 92 and part of 93, while Ms Ellis' apartment 84 is underneath part of apartment 93 and part of 94.

10. The north facing facade of level 9 is predominantly glass, made up of a row of aluminium framed glazed panels. The exterior wall of level 10 appears to be a rendered concrete or blockwork structure with traditional windows set into it. However the north facing walls of level 9 are glass panels, which are set about two or three metres forward of the concrete wall above, and a roof has been formed between the two using the same aluminium framework and glass panels, sloped on an approximately 45° angle. The glass walls and roof have the effect of extending the internal space of each of the north facing level 9 apartments by approximately three metres beyond the north face of level 10. There are internal columns and bulkheads in the apartments on level 9 which presumably provide the structure to hold the concrete wall above.

11. The vertical glazed units contain several sets of sliding doors which open onto an external balcony which runs the full width of level 9. Dividing fences have been built across the balcony to delineate between each of apartments 91, 92, 93 and 94. The balcony is made of lightweight timber frame construction with a base of cement sheet covered by tiles. Various modifications have been made to these over time, which I will explain further below.

12. The applicants' apartments (as well as the other apartments on the north side of level 8), are located partly underneath the external balcony and partly underneath the apartments of level 9.

[3] Several of the apartments on level 9 are two stories, meaning there are 10 levels to the building.

THE SOURCE OF THE WATER ENTRY

13. I heard evidence given concurrently by the expert for the applicants, Mr Merlo, and the expert for the OC1, Mr Lorich. Both experts are qualified and experienced in their field and there was no challenge to their expertise. Mr Lorich had been involved in earlier rectification works at the building after a payout was made by the warranty insurer, the Victorian Managed Insurance Authority (VMIA), in respect of a number of defects in the building.

14. Mr Merlo and Mr Lorich agreed that the flows of water into the applicants' apartments were caused as to 80% by the defects in the level 9 glazed units and as to 20% by the defects in the level 9 balcony. In summary, they agree that the sources of water ingress are a combination of the following:

    a. leaks through the sloping glazed roofing of apartments 92, 93 and 94[4], and other leaks through the glazed panels and aluminium frames, probably caused by the lack of movement joints between the panels,

    b. leaking at the toe of the balcony (the northernmost edge) due to inadequate membrane/flashing detail,

    c. the membrane does not extend under the window/door sills of the glazed units on level 9,

    d. the subsills on level 5 were tested during rectification works following the VMIA settlement and were found to be inadequately sealed and were leaking; there is no reason to think level 9 is any different,

    e. a breakdown of the membrane on the level 9 balcony,

    f. the cement sheet substrate forming the floor of each balcony being cracked; this is likely due to the fact that the substrate used was 12mm thick, whereas it should have been 19mm.

15. Mr Merlo also expressed an opinion that the roof above level 9 was contributing to the leaks. The OC1 was not in a position to respond to this opinion, as it was first raised at the view and Mr Lorich had not had a chance to review or provide instructions. The OC1 indicated that Mr Lorich would need to inspect the roof and the plumber who had previously been involved with the rectification of the building, Mr Quick, would need to be consulted. The applicants decided not to press the roof issue at this time, as it does not affect the issues for determination in this proceeding.

THE ISSUES

16. The claim pleaded by the applicants relies on alternate causes of action.

[4] Apartment 91 was not inspected as part of this proceeding and so I am unaware of whether it suffers similar leaks

The Water Act claim against the OC1

17. If it is accepted that the source of the unreasonable flow of water (the glazed units and the balcony) are located within the common property, then it is alleged that the OC1, as the owner of the common property, has the following duties and obligations:

    a. by operation of s.4 of the OC Act, it is charged with the function of repairing and maintaining the common property;

    b. by operation of s.5 of the OC Act, when carrying out its functions and powers, it is under a duty to:

        i. act honestly and in good faith, and

        ii. exercise due care and skill;

    c. by operation of s.46 of the OC Act, it is under a duty to repair and maintain:

        i. the common property, and

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

    d. by operation of s.48 of the OC Act, and if a lot owner refuses or fails to carry out repairs, maintenance or other works to the lot owner's property that are required because the use and enjoyment of the lots or common property is adversely affected, it has a power to:

        i. serve a notice on a lot owner requiring the lot owner to carry out the necessary repairs, maintenance or other works,

        ii. carry out the necessary repairs, maintenance or other works to the relevant lot itself if a lot owner fails to comply with a notice served under s.48(1),

        iii. recover as a debt from a lot owner the cost of repairs, maintenance or other works carried out under this section.

18. In other words, it is alleged that the OC1 has a power under s.48 and a duty under s.46, which when combined, create an obligation on the OC1 to actively repair and maintain the common property, including the glazed units and the level 9 balcony. The OC1 was aware of either the actual leaks or the potential for leaks since at least 2008 (when reports were commissioned at the time of the VMIA claim), but has failed to repair and/or adequately address the defects in the common property, including by failing to exercise any of its powers in respect of the level 9 owners. As a result, the unreasonable flow of water has continued unabated and the OC1

is in breach of its duty to repair (s.46). Further, by reason of its obligation to act honestly and in good faith, and exercising due care and skill (s.5) in managing the common property, it should have taken all necessary steps to prevent the flows from occurring, including exercising its powers against the level 9 owners (s.48), which it has failed to do.

19. The OC1's defence is that the balcony sheeting and the glazed units are owned by each of the level 9 owners, and are not part of the common property. It says that the water flows from underneath the glazed units in part onto the surface of the balconies and in part into the common property (being the void under the balcony sheeting) and then into the level 8 apartments. The water did not flow from land constituted by the common property for the purposes of s 16(1).

20. It says that as they are privately owned, the OC1 was not under a duty to maintain or repair the level 9 glazed units or the balcony membrane. Further, it was not under a duty to exercise any of its powers in circumstances where there is a live issue about the ownership of the property, as there would be no utility in exercising any powers until this proceeding is determined.

21. Alternatively, the OC1 says that if it is found to be liable to the applicants then the level 9 owners are concurrent wrongdoers with it for the purposes of Part IVAA of the *Wrongs Act* 1958 (Vic).

The Water Act claim against the Level 9 owners

22. The applicants' claim against the fifth, sixth, seventh and eighth respondents (the level 9 owners) arises if it is found that the source of the flow of water is located within property owned by them. In that case, they say that the level 9 owners have been aware since at least 2016 or 2017 of the leaks, yet have failed to take all necessary steps to stop the flows from occurring, and to have the balcony and/or glazed units repaired.

23. In their defence, the level 9 owners agree with the applicants that the structures in question are part of the common property. They rely on the OC Act to claim contribution and indemnity from the OC1 for what they have already spent if it is common property.

The OC Act claim

24. The second cause of action against the OC1 arises if the OC1 has no liability under the Water Act. In that event, the applicants rely on Part 11 of the OC Act and allege that:

    a. an "Owners Corporation Dispute" within the meaning of s 162 of the OC Act has arisen between the applicants and the OC1;

b. at all relevant times the OC1 owned the common property and had the functions, duties and powers set out at paragraph 17 above;

c. there are defects in the common property which have caused or allowed the flows of water;

d. the OC1 has failed to properly discharge its function by failing to repair or maintain the common property;

e. the OC1 has breached its duty by failing, when carrying out its functions and powers, to act honestly and in good faith and to exercise due care and skill by failing to carry out necessary repairs to prevent flows from continuing to occur, and by failing to repair and maintain the common property.

25. The OC1 has not filed a defence in respect of this cause of action. The applicants say that the OC1 should be held to its pleadings. Counsel for the OC1 conceded that it had not pleaded a defence, but submitted that the OC1 has no liability under the OC Act if the structures in question are found to be part of the common property. They rely on s 17 of the Water Act which provides that a person does not incur any civil liability in respect of any injury, damage or loss caused by water to which s 16 applies. Accordingly, the remedies available under Part 11 of the OC Act would not be available. I note that Counsel for the applicants conceded this argument may be correct, but only if the Water Act applies to the claim.

Relief sought

26. Ms Davies and Ms Ellis claim that the respondents are liable to pay damages to pursuant to s 16(1) of the Water Act. Further, pursuant to s 19(3), they are entitled to and seek:

a. An injunction requiring the OC1 to take all necessary steps to:

i. prevent the flows of water from continuing

ii. repair and/or adequately address the defects in the balcony and glazed units; and

b. An injunction requiring the level 9 owners to take all necessary steps to:

i. prevent the flows of water from continuing

ii. repair and/or adequately address the defects in the balcony and glazed units; and

c. Damages in the nature of interest in respect of the monies they have spent as a result of the damage and loss they have suffered.

27. They seek similar orders under s 165 of the OC Act in relation to the alternate cause of action.

THE PLAN OF SUBDIVISION

28. The plan of subdivision is unfortunately lacking in precision or detail. If it had been more accurately drawn, this proceeding may have been unnecessary. Page 1 of the plan defines the common property and the private lots as follows:

> The Common Property No.1 is all the land in the plan except Lots… 81 to 89, 91 to 94…
>
> Boundaries are shown by thick continuous lines are defined by buildings [sic]
>
> Location of boundaries defined by buildings:
> Interior face: all boundaries
>
> All structural columns, walls, slabs and beams and ducts whether or not shown on this plan are contained in Common Property No 1.

29. Diagram 14 on sheet 15 depicts level 9 from a bird's eye view. It shows the outline of each apartment with a thick continuous line (for the most part), with the north face of the building being one continuous line on the outside of the building. The balcony which runs along the north face of apartments 92, 93 and 94 is marked inside the thick continuous line by a dotted line and a vinculum at each lot. Where each lot's east and west boundaries cross the balcony, the thick continuous lines have been changed to thin lines, to mark the boundaries between apartments 91, 92, 93 and 94. Counsel could not explain this change from thick to thin lines.

30. Regrettably the only cross-section of the relevant areas does not reflect what is actually built. There is no mention of the glazed roof or walls. Section E-E on sheet 20 shows part of apartment 91 sitting above part of apartment 82. However it describes a "projection" over the "balcony" of apartment 91, which is presumably the glass roof. In reality, of course, the balcony sits outside the glass walls and roof of apartment 91, not underneath the "projection".

31. Section E-E also defines the boundaries between the ceiling of apartment 82 and the floor of apartment 91 with a thick continuous line.

32. The applicants contention is that by reason of the definitions "The Common Property No.1 is all the land in the plan except Lots… 81 to 89, 91 to 94…" and the location of each boundary as the "interior face", everything shown on the plan of subdivision is common property no. 1 unless it is extracted from the definition by its inclusion in one of the listed lots. If it is not referred to in another lot, it remains common property no. 1.

33. Further, by reason of the phrase "All structural columns, walls, slabs and beams and ducts whether or not shown on this plan are contained in Common Property No 1", any structural element of the building must be common property.

34. The OC1 contends that the glazed units and the cement sheet floor of the balcony are not structural and therefore are excluded from the common property 1.

35. The parties agreed that the interpretation of the plan of subdivision is a legal task, but that I should take a practical approach[5], which may include a consideration of technical opinion.

ARE THE LEVEL 9 GLAZED UNITS PART OF THE COMMON PROPERTY?

36. The first issue for consideration is whether the level 9 glazed windows, sliding doors and roof (including the aluminium frames in which they sit) form part of the common property. The OC1 contends that they do not, while all other parties say that they do.

37. As described above, the north face of level 9 is predominantly glazed. The vertical walls are made up of glass windows and sliding doors set in aluminium frames, with a horizontal glass roof set on an angle between the glazed walls and the concrete rendered wall of level 10 above. There are no internal walls between the living areas and the glazed external walls. For all intents and purposes, the outside shell of each of the level 9 apartments I viewed can be described as being constructed of three solid walls (to the east, south and west) with one glass wall (to the north). On the outside of the north wall is the balcony. The internal floor of each apartment is a concrete slab, covered by carpet or floating boards. The roof or ceiling of each apartment is partly solid (presumably concrete covered by plasterboard), and partly glass.

38. The OC1 submits that sheet 15/25 of the plan of subdivision makes it clear that the glazed walls and roof are part of each lot, as they are within the boundary of each lot as defined by thick continuous lines. It follows that the glazed units can only be part of common property if they fall within the definition of "all structural columns, walls, slabs and beams and ducts whether or not shown on this plan".

39. The crucial difference between the parties is the meaning of the word "structural". As was noted by Senior Member Riegler (as he then was) in *Bretair Pty Ltd v Cave*[6]:

> 'Structure' of course is a word of which the meaning varies considerably according to the context, and the phrase 'structural character' or 'defect of a

[5] *Di Francesco & Ors v Blantrix Pty Ltd* [2004] NSWLEC 669 at [53]
[6] No.2 [2013] VCAT 1808 at [20]

> structural character' varies correspondingly. Literally 'structure' mean something which has been constructed … With particular reference to buildings in common parlance we refer to the bare building as the structure…

40. Mr Lorich's opinion in the present case is that the word "structural" used on the plan of subdivision means that the building element must be load-bearing, in the sense that it can be removed without needing to support other elements in the building. Mr Lorich said that as the glazed units can be removed, leaving the beams to hold up the wall above, they are non-structural. Instead, they are "cladding", as they are a non-load-bearing covering to a structure, which provides protection from the elements.

The definitions

41. The OC1 relies on the Glossary of Building Terms[7], which was referred to by Mr Lorich in his evidence. This is a publication produced by Standards Australia and the National Committee on Rationalised Building. The relevant definitions are as follows:

> *Structural* – describing an element or part of the building or structure that carries or transfers a load in addition to its own weight, as opposed to partitions, joinery or finishes
>
> *Structural element* – physically distinguishable part of a structure, for example, wall, column, beam, connection
>
> *Structural member* – means a component or part of an assembly which provides vertical or lateral support to a building or structure
>
> *Structure* – organised combination of structural elements designed to provide some measure of rigidity
>
> *Structure (building)* – load-bearing part of a building, comprising the primary elements
>
> *Primary Building Element* – means a member of a building designed specifically to take part of the loads specified in B1.2 and includes roof, ceiling, floor, stairway or ramp and wall framing members including bracing members designed for the specific purpose of acting as a brace to those members
>
> *Cladding* – non-load-bearing covering to a frame
>
> *Cladding, external* – external, non-load-bearing covering to a structure, which typically provides protection from the elements
>
> *Roof* – construction that encloses a building from above

[7] 5th edition, 2004, National Committee on Rationalised Building and Standards Australia

> *Wall* – vertical construction that bounds or subdivides a space and usually fulfils a load-bearing or retaining function… Walls may be solid (made of stone, brick, concrete, glass, et cetera), framed (made of timber, steel, other metals, EGC), or combinations… The main types of wall are a) external walls to enclose the sides of a building or structure; be) internal walls to partition the interior of a building or structure;…

42. The level 9 owners also referred me to the following dictionary definitions[8]:

> *Structural* – relating to a structure; something that is built such as buildings, bridges, frameworks that carry loads and resist forces
>
> *Force* – the physical power or strength of something, e.g. the strength of the wind measured on the Beaufort scale

43. Mr Lorich relies on the narrow definition of "structural" set out above, being "an element or part of the building or structure that carries or transfers a load in addition to its own weight".

44. On the other hand, Mr Merlo's opinion is that the glazed units are a "structural element" in their own right, as they are part of the building element. Although they do not bear the load of the concrete walls above, they bear their own load. Each unit is made up of an aluminium frame which supports the glass panels and acts as a brace to those panels, which is within the definition of "primary building element". Each vertical frame supports the glazed roof units above.

45. Further, Mr Merlo said that the glazed units keep the wind and weather out of the building. The phrase 'load-bearing' can include wind loads. It would not be possible to live in each apartment without the glazing in place. They seal the building.

46. The OC1 disputes this interpretation, as all external windows of a building keep out the weather. If the plan of subdivision had intended that all external windows were to be part of common property it could have said so by simply using the words "all windows". There would be no need for the word structural to be used. In other words the meaning given by Mr Merlo does not give the word "structural" any work to do.

47. I do not accept that the word "structural" used in the plan of subdivision has the narrow interpretation suggested by Mr Lorich that it must be load-bearing. The Glossary of Building Terms provides a number of definitions involving the word "structure". Some of these definitions involve load-bearing, and some do not.

[8] A Dictionary of Construction, Surveying and Civil Engineering, Oxford University Press, online version 2013

48. While the term *Structure (building)* is defined as "load-bearing part of a building…" and the definition of *Primary Building Element* is "a member of a building designed specifically to take part of the loads …", I note the term *Structural element* is a "physically distinguishable part of a structure.." and a *Structure* is an "organised combination of structural elements designed to provide some measure of rigidity". The latter two definitions do not import the notion of load-bearing.

49. In taking a practical approach to the interpretation of a phrase used in a plan of subdivision, which on its face is not drawn with precision, I am not satisfied that it would be appropriate to adopt the narrow definition of structural (meaning load-bearing) contended by the OC1. In my opinion, the word "structural" used in the description of the common property is used in the sense of a "structural element", being a "physically distinguishable part of a structure, for example, wall, column, beam, connection". The glazed units are clearly a physically distinguishable part of the building. They fall within the definition of *Wall*, being a "vertical construction that bounds … a space and usually fulfils a load-bearing or retaining function… Walls may be … made of … glass…, framed (made of …steel, other metals…) … The main types of wall are a) external walls to enclose the sides of a building or structure…".

50. If I am wrong about that, and I should apply the load-bearing test, I am also satisfied that the glazed units are structural. The definition of *Structure (building)* is the "load-bearing part of a building, comprising the primary elements". *Primary Building Element* means a "member of a building designed … to take … loads and includes roof … and wall framing members including bracing members designed for the specific purpose of acting as a brace to those members".

51. On the basis of those definitions, I am satisfied that at least the aluminium frames in which the glass panels sits, are a structural element. The frames are a "primary building element" designed to take the load of the glass and to provide bracing for the glass panels.

52. Further, the vertical glazed panels (the walls) bear the load of the glazed roof above, and so they are "structural".

53. Further, based on the dictionary definition linking "structural" to the ability to resist forces, including wind, I am also satisfied that since the glazed units serve this function in keeping out the weather, they are "structural".

The authorities

54. The OC1 referred me to the decision of *Pennial Enterprises Pty Ltd v Owners Corporation RN4160667X*[9] in which the description of the common

[9] [2012] VCAT 943

property on the plan of subdivision was similar to the description in this case. In *Pennial Enterprises*, the Tribunal was dealing with leaks from an apartment above into the apartment below. The source of the leak was found to be located in the sliding door which opened onto the balcony. The sliding door was set into a wall, which formed the physical boundary between the apartment and the balcony, but which was shown on the plan of subdivision by a hashed line inside the title to the lot. The Tribunal considered whether the eastern wall was a structural wall as otherwise it was within the lot and was not common property. Accordingly the factual scenarios in both that case and the present are similar. The difference is that the wall in question in *Pennial Enterprises* was solid, not glass.

55. In *Pennial Enterprises* the Tribunal found that the wall was a structural wall and was therefore part of the common property. The finding was made in part on the evidence given by a surveyor that an internal non-load-bearing wall would not be structural but the eastern wall was structural because it supported the roof. The aluminium door frame was considered to be an installation in the wall and so is not in itself a structural element because it is part of the structural wall.

56. The OC1 suggests that in the present case, because the windows are attached to the external sides of the north wall, they do not form part of the wall but are attached to the wall. This differs from a door which is built into the actual wall. Accordingly the present case is distinguishable to *Pennial* in that the windows do not form part of the load-bearing wall but are attached to it. They themselves are not load-bearing.

57. In my view the decision in *Pennial Enterprises* does not support the OC1's contention; instead it assists the applicants in the present case. The crucial evidence of the surveyor in *Pennial Enterprises* was that the eastern wall was structural because it supported the roof. In the present case, the vertical glazed units (i.e. the walls) are supporting the horizontal glazed units (i.e. the roof). If there were no vertical glazed units (i.e. walls) there would be no roof. Further, this is not a case where there is a sliding door or window installed into a wall. Instead the wall is itself a glazed unit.

58. The applicants rely on the decision of *Thurston v Campbell*[10] in which Senior Member Lothian considered whether a roof was a structural element. She acknowledged that:

> In common building parlance a structural element of a building is one which supports not just itself, but other elements of the building as well. However a failed roof threatens the integrity not just of itself, but also of the remainder of the building.

She then cited the High Court in *Bryan v Maloney* where Brennan J said:

[10] [2007] VCAT 340 at [65]

> … structural defects in a building could be classified as physical damage where the defects posed a danger to health and safety …

59. I respectfully agree with the views expressed by Senior Member Lothian, which echo the views of Senior Member Riegler in *Bretair Pty Ltd v Cave*, that when considering the meaning of the word "structural", circumstances may require a consideration of concepts broader than whether it is load-bearing.

ARE THE LEVEL 9 BALCONIES PART OF THE COMMON PROPERTY?

60. The level 9 balcony is one long structure, running the width of the building. While each apartment has applied a different surface to the balcony, its substrate appears to be as originally constructed. The experts agreed that the balcony is constructed by use of the following materials from the top-down:

    a. tiles or cosmetic covering (some of the owners have attempted rectification or modifications to the covering of their balcony, so that apartment 94 now has decking above the tiles and apartment 92 has a membrane coating on top of the existing tiles), which are on top of

    b. a screed, which is on top of

    c. a painted on membrane, which is on top of

    d. 12 mm structural substrate compressed cement sheeting, which covers

    e. joists to which the cement sheeting is attached.

61. There is a void extending between the bottom of the joists and the top of the ceiling space of the level 8 apartments (which contains cables, pipes, drip trays and the like).

62. As set out above, the plan of subdivision provides that the location of each boundary is the "interior face". The applicants contend that as Section E-E on sheet 20 of the plan shows a thick continuous line between apartments 91 and 82, the internal face on either side of that thick continuous line is privately owned. However the space between each interior face forms part of the common property, because it has not been extracted from the definition of common property.

63. As a result, the applicants say that the membrane, screed and tiles (or decking) on each section of the balcony are owned by the owners of the level 9 apartments, but the structure which forms the boundary between the apartment above and the apartment below is common property. That is, the cement sheet and the joists on which they sit and the ceiling space and the top side of the plasterboard which forms the ceiling below are all common property.

64. All parties agreed that "internal face" means the membrane, screed and tiles above the cement sheet and joists are owned by each individual lot owner. However, the OC1 contends that the cement sheet is also part of the internal face. They say it is only the joists below the cement sheet which are common property.

65. Both parties referred me to paragraph 21 of the decision of Member Rowland in *Owners Corporation PS508732B v Fisher*[11] in support of their contentions, where she held:

> I am of the view that the interior face of the building means the interior face of the structure of the building rather than the top surface of whatever is fixed to the structure of the building. So that where balconies are constructed of concrete and then tiled over, interior face means the upper face of the concrete structure not the tile.

66. The OC1 submits the effect of this finding is that it is necessary to distinguish between the structure of the balcony and its top surface. The OC1 says it is the joists located under the cement sheet which form the structure of the balcony, as they support the cement sheet, the tiles and the membrane. The cement sheet itself is not part of the structure of the building as it is supported by the joists.

67. I do not agree with that analysis of the decision or the structure of the balcony. In my view, both the joists and the cement sheet are part of the structure of the balcony. Together they make the horizontal plane which forms the boundary between one lot and the other. While the OC1 contends that it is the joists which are the crucial structural element (as without the joists any person stepping on the balcony would fall through), the same argument applies to the cement sheet: without the cement sheet, any person stepping on the balcony would fall through the gaps between the joists. Without a horizontal surface to the balcony, there would only be a hole down to level 8.

68. My analysis is consistent with that of Member Rowland's finding that "where balconies are constructed of concrete and then tiled over, interior face means the upper face of the concrete structure". Whether the balcony is constructed by joists covered by cement sheet, or a concrete slab, those are the structures which create the balcony. Without a horizontal surface to the balcony, there can be no interior face.

69. I was also referred to the decision of Senior Member Walker in *Leung v Harris*[12] where he considered a claim for water damage from a leak through the balcony above the applicant's unit. In that case the question concerned the location of the internal face when the applicant had a suspended plaster

[11] *Owners Corporation PS508732B v Fisher* [2014] VCAT 1358
[12] [2018] VCAT 1630 at paragraphs 98 – 100

ceiling. Senior Member Walker referred to the statement of Member Rowland set out above and continued:

> I respectfully agree with that statement. However, with a concrete slab that is an interior face upon which one may affix other things, such as a membrane and tiles. With a ceiling, you don't get an interior face until you have hung your plaster on the joists, battens or whatever else supports it. I think that the word 'ceiling' in the normal sense means more than just the battens and other components that hold the plaster up. The ceiling is the plaster surface that separates the roof space from the room below. That is what you paint and attach your light fittings to.
>
> That view is consistent with s.132 of the *Owners Corporation Act* 2006…
>
> I therefore accept [the] submission that the upper boundary is the underside of the ceiling and so the affected plasterboard on the ceiling is the property of the Owners' Corporation and not the Applicant.

70. It is my view that the construction of the balcony in the present case is analogous to the construction of the suspended ceiling referred to by Senior Member Walker. In order to create an interior face of a suspended ceiling, the structure required plasterboard, joists and battens. Similarly with the balcony: in order to create an interior face, the structure requires cement sheet, joists and "whatever else supports it" (to adopt the language of Senior Member Walker).

71. I note that Mr Lorich for the OC1 expressed the opinion that the cement sheet was common property, as it is part of the structure of the balcony. While the OC1 disagreed with that opinion and pointed out (correctly) that the interpretation of the plan of subdivision is a question of law, not a matter of expert opinion, I take comfort from Mr Lorich's technical expertise on the elements required for the construction of a balcony.

72. Accordingly, I find that the void between the floors, the joists and cement sheet form the structure of the balcony, and are common property, while the membrane, screed and tiles or decking are privately owned.

WHEN WAS THE OC1 AWARE OF THE LEAKS AND WHAT STEPS DID IT TAKE?

The applicants' evidence

The evidence of Ms Davies

73. Ms Davies provided a detailed history of her ownership of apartment 83. She purchased her apartment in 2012, and lived there with her daughter. There were no signs of damage or water ingress at the time of purchase. On or about 26 January 2016 she first noticed signs of a leak, when water began seeping through a crack in the plaster board affixed to a column in

the bedroom. From that date forward, every time it rains, water enters her apartment.

74. Mould was noticed growing on the curtains from September 2016. Ms Davies obtained a report from a mould expert in March 2017, and was advised by the strata insurer to immediately evacuate the apartment because it was not safe for her daughter and her to continue to live there, due to the mould contamination.

75. Ms Davies and her daughter moved out and have not been able to live in apartment 83 since that time. She entered into a lease for an apartment in Caroline Street South Yarra with a monthly rent of $3454 on 10 August 2017. She then entered into a lease for their current accommodation on 10 May 2018 with a monthly rent of $2173.

76. All the mould infested soft furnishings, manchester and clothing in apartment 83, which were unable to be cleaned, have been destroyed. The apartment has been completely gutted. Until the water entry is stopped, Ms Davies is unable to take any steps to eradicate the mould and reinstate her apartment.

77. Ms Davies also explained how these problems have taken a significant toll on her mental health.

The evidence of Ms Ellis

78. Ms Ellis purchased her apartment 84 in April 2014. She initially rented the apartment to tenants, but moved in with her son in November 2016. The apartment is and has been her primary place of residence since that date. She explained that she is unable to afford to move elsewhere, and so has been unable to evacuate her apartment, unlike Ms Davies.

79. There were no signs of damage or water ingress at the time of purchase. On or about 24 December 2016 Ms Ellis first noticed signs of water entry, hearing water dripping onto the ceiling in the bedroom and shortly after, the plaster ceiling in the living room bulging and the paint beginning to flake.

80. She said that since that time, water continues to flow into apartment 84 every time it rains. On about 27 April 2017 black mould became visible in the ceiling plaster. In January 2018 the OC1 manager advised Ms Ellis that the water ingress had caused the electricity to her apartment to be cut.

81. Since heavy rainfall in November and December 2018, the deterioration of apartment 84 has accelerated significantly. The carpet is saturated and has developed a mouldy odour. The plaster walls in the bedroom are crumbling. Ms Ellis has cut out sections of the ceiling and carpet that are most affected by mould, however she is unable to take any steps towards eradicating the mould until the water entry is stopped.

Documents tendered by the applicants

82. The applicants rely on a series of minutes of meetings of the OC1 and correspondence with the OC1 manager which show that the OC1 was aware of leaks from the level 9 balcony and water entering into the level 8 apartments for many years. In particular, the OC1 received a settlement from the VMIA in 2011 of $750,000. According to advice given by the then manager of the OC1[13], one of the defects identified in the claim was the need to reconstruct the level 9 balconies and "the fixing of water leaks".

83. In April 2013 the owners of apartment 94 sent a letter to the then chairperson of the OC1 (Mr Michael Ball - who was also the general manager of Park Regis Griffin Suites) in which they said they had been told of leaks in apartments 85 and 84. They had had their balcony inspected and the air conditioner on the balcony was ruled out as being a cause of the leak. The cause was identified as the balcony floor, noting that the cement sheeting was "not to code, it should be 16mm" and was "broken and cracked cement sheet". Further, the timber used to construct the entire balcony was "rotted out pine, not treated pine". Mr Su asked the OC1 to arrange for the full length of the balcony to be rebuilt.

84. In April 2013 solicitors acting on behalf of either the OC1 or Park Regis Griffin suites advised Mr Ball to inspect the leaks in apartment 84.

85. In November 2013 the OC1 manager approved the caulking of the balcony in unit 93 in an attempt to stop the leaks in apartment 83.

86. In July 2014 the OC1 received a decision from its insurer to exclude indemnity for water damage, on the basis that the cause was "long-term seepage from known pre-policy defects, gradual/developing flaws, faulty workmanship etcetera".

87. In February 2016 Ms Davies sent an email to the OC1 chairperson (Mr Phillips – who was also the general manager of Park Regis Griffin suites) advising him of water damage in her apartment. The OC1 manager suggested to Mr Phillips that the committee would need to decide whether they wanted to have the cause of the cracks in apartment 83 investigated at its cost or "put that back on the lot owner".

88. It was raised at the OC1 committee meeting on 26 April 2016 that the owner of Lot 83 had reported a leak into the apartment, and it was resolved that when a lot owner advises of a leak within their lot, they should engage a plumber to identify where the leak is coming from, submit that report to the manager who would "confer with the plan of subdivision" and advise the owner whether the leak is in common property or another lot. If the leak

[13] letter 17 June 2011 and attachments

is from common property then the committee would consider reimbursing the owner and undertake rectification works.

89. In January 2017 the OC1 manager notified each owner that evaporation trays had been installed in the ceiling space throughout the entire property prior to 2008. They advised all owners that it was their responsibility to regularly check the trays and ensure they do not overflow, and offered to investigate if the trays were not emptying by natural evaporation.

90. A flood test report was apparently obtained in March 2017 which indicated that "these issues have existed for a very long time". In April 2017 Ms Ellis advised the OC1 manager that she has a "waterfall of water running down the inside of the living room window" and the manager arranged for a plumber to inspect. She also advised that "with regards to the balcony issues, the committee are still discussing the process on how and who should move the process along".

91. In April 2017 the OC1 received legal advice to the effect that the owners of the relevant balconies should pay for all rectification works to the balconies. At the committee meeting on 23 May 2017 Ms Davies' advice that her apartment was uninhabitable due to mould growth was tabled.

92. In June 2017 the OC1 manager provided a copy of Mr Merlo's first report (which had been prepared for the OC's insurer) to the owners of lots 82, 83, 84, 91, 92 and 93. Mr Merlo identified that the existing cement sheet was 12mm thick, non-compliant and cracked. He also identified the existing window system was leaking and needs to be totally replaced. He had been instructed there had been a history of extensive leaks in the window system and attempted ad hoc repeated caulking without success.

93. On 7 August 2017 the OC1 made an offer[14] to the owners of apartments 91 – 93 that it would be responsible for all costs associated with the replacement of the window systems and 35% of the costs of the balcony repairs and damage to the common property below, with the remaining 65% being borne by the owners of apartments 91 – 93. It appears this offer was not accepted.

94. The minutes of the committee meeting held on 17 January 2018 record that OC1 resolved:

> "to appoint Roscon to undertake the project management of window works to rectify water leaks into common area and private lots on level 8" and
>
> "to undertake all window repair works as noted in the report of Mr Merlo ... including damage to level 8 as a result of the window defects on level 9".

[14] The letter was marked without prejudice, however the respondents did not object to the letter being tendered

95. The OC1 committee noted that it considers:

> "these rectification works are urgent and of the highest importance given the impact on further deterioration the defective windows on level 9 are having on the building and level 8 lot owners".

96. Further, the OC1 committee resolved to test the existing windows:

> "to see whether they be rectified and made watertight without their complete replacement, if this proves to be the case works will proceed on that basis and if not it will proceed on a full replacement basis as estimated with all works will begin as soon as practicable following this resolution and approval of final scope of works by no later than February 2018… with all works to be completed by no later than 31 August 2018."

97. The committee also resolved that the OC1 is to be

> "responsible for all costs associated with the window repair works including damage to level 8 lots as a result of the window defects on level 9… [The OC1] will not change the method used to calculate proportionate cost allocation across lots for the purposes of collecting any administrative or maintenance or other special levies as a result of these works".

98. This proceeding was commenced in January 2018. The OC1 appears to have taken no further action in terms of arranging rectification works and at the AGM on 8 March 2018 it was noted that discussion around the level 9 window leaks would be inappropriate as the matter was before VCAT.

The evidence of the level 9 owners

Blaise Anthony

99. Mr Anthony gave evidence that he is the owner of apartment 92. In 2008 he first heard his balcony was leaking and causing damage below. He and the owner of apartment 91 arranged to have another membrane laid over the existing surfaces at their own expense at that time. Several months later they were told that the balcony was still leaking and so they had the membrane reapplied.

100. Sometime after that, he received a telephone call from the manager of the OC1, Victorian Building Corporate Services, who advised of further leaks. Mr Anthony attended a meeting of the OC1 and suggested that the problem was more than a membrane issue. The OC1 committee then decided to have the balconies of apartments 91 and 92 re-membraned at its cost, which they did.

101. Mr Anthony was not aware of any further water problems until late 2016 or 2017. He had been present at the meeting when the OC1 manager had advised of the settlement reached with VMIA and was aware that part of the settlement monies were in respect of leaking balconies. He was asked if the

OC1 had spent any of these monies on the level 9 balconies and responded that they had carried out some caulking of the window frames on level 9 and on level 8 and had added some flashing recently. He was not aware of the OC1 having undertaken any other repairs to the balconies or glass panels.

102. When asked why he had not carried out any repairs to his balcony in or since 2017, he answered that by that time the OC1 had engaged experts and lawyers to address the leaks. He had seen his neighbour at apartment 93 replace the membrane and install new tiles at his own cost, but the balcony continued to leak. In those circumstances he had no duty to carry out repairs that were likely to have been either not his responsibility or likely to fail.

103. Mr Anthony said he was never asked by the OC1 to fix the glass walls. The one direction he did receive from the OC's lawyers was on 4 May 2018 and that was "your respective balconies continue to allow water ingress to adjoining properties… Kindly take immediate steps to prevent future water travel and ingress to lots owned by third parties".

104. He was not aware of the recommendation by Mr Merlo that all level 9 glass panels should be replaced until he first saw Mr Merlo's report. He said that as he did not commission the report, it was up to others to tell him what he should do after they received the report.

105. When he was asked if others had told him to replace the windows and the balcony cement sheet what he would have done, his answer was he would have taken advice about the ownership of the structures. He feels a moral obligation to the owners below, but says that the issue is an OC1 problem.

Brian Poskaitis

106. The Tribunal heard evidence from the owner of apartment 93, Mr Poskaitis, by telephone as he resides overseas. He has owned his apartment since 2005. In 2008 he was told about leaks from his balcony to the apartment below. The then OC1 manager asked for access to his apartment which he provided, but he is not aware of what work was actually carried out, if any, at that time. In late 2010 he was again contacted by either the OC1 or the previous owner of apartment 84. At that time he put polysheeting on the balcony. In around 2016 the OC1 manager proposed to Mr Poskaitis and Mr Anthony to lay fibreglass sheeting over the tiles. Mr Poskaitis did not accept that proposal, although Mr Anthony did.

107. Instead, Mr Poskaitis arranged at his own cost to have the existing balcony surface removed and a new polyurethane coating and tiles laid. He said once the existing tiles were removed, he could see cracks in the cement sheet.

108. Mr Poskaitis said he was also at the meeting when the OC1 manager advised of the VMIA settlement. He recalls being told that the OC1 was investigating the balcony repairs and liability issues at that time. He said no repairs have been carried out to the glass panels, other than a cracked glass pane being replaced under insurance.

109. When asked about his response to the letter of 4 May 2018 from Mr McPhee directing him to "prevent future water travel and ingress", his evidence was that he did nothing because he thought he had done that work already by having his own balcony membrane and tiles replaced in 2016. He was never directed to take any steps regarding the cement sheet, the joints in the balcony or the glass panels.

110. When he was asked what he would have done if he had been asked to replace all glass panels, he said he would not have complied with such a notice as this is not his responsibility. As for the balconies, his view is that the OC1 is responsible for the structure, which is what they told him when they repaired the balconies on the south side of the building following the VMIA settlement.

Sara Su

111. Mr Su, through a company, is the owner of apartment 94. In 2013, when he first occupied the apartment, he heard about water leaks from the previous owner. There had been a suggestion that an air conditioning unit on the balcony had allowed water to leak into the apartments below. The previous owner wrote a letter for Mr Su disputing this suggestion and also told him that the balconies on the south side of his apartment had previously been repaired by the OC1.

112. Despite this, Mr Su arranged to have two coats of membrane applied over the tiles on the balcony in 2013. At a later time, he arranged to have a floating deck built on top of the membrane.

113. He next heard that water was still leaking in August or September 2017 from Ms Davies. He had received no direct complaints from Ms Ellis (whose apartment is directly below his). The OC1 did not direct him to carry out any works until he received the letter from Mr McPhee on 4 May 2018. Mr Su's evidence was that this was the first time he was ever told to do anything. He was never directed to do anything to the cement sheet or balcony structure or to the glass panels. The OC1 never attempted to repair the balcony. In 2017 the OC1 had carried out some caulking to the glass ceiling of apartment 94, at Mr Su's request, as it was leaking into his apartment.

114. When he was asked what he would have done if the OC1 had given him a notice to replace all the glass panels, he said he would not have done that. His view is that the window structure is part of the common property. When

asked what he would have done if Mr McPhee had asked him to replace the tiles at his expense, he said he probably would not have done that because he knew the OC1 had replaced the south balcony of his apartment previously at its cost. Further, as this proceeding was already on foot at that time, he would have waited for the outcome.

CONCLUSION ON THE WATER ACT CLAIM

115. It is well established[15] that in order to succeed in a claim under s 16(1) of the Water Act, the applicants must satisfy me that:

    a. there is a flow of water from the land of another person onto their land; and

    b. that flow is not reasonable; and

    c. the flow has caused them injury, loss or damage; and

    d. the flow was caused by the respondents; or

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

116. Further, under subsection 16(5):

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

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

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

117. I need not determine whether the failures in the common property which caused the flow were present since construction or have occurred since the OC1 came in to existence, as either ss 1 or ss 5 will apply.

118. In the present case, it was not disputed that there is a flow of water from the land of another person onto the applicants' land. For the reasons set out above, I am satisfied that the land from which the water is flowing is common property, and accordingly is owned by the OC1.

119. I note that there is no statutory definition of "land" in the Water Act, but it was not disputed by the respondents that the common property (including

[15] For example, most recently *Barter v Bushett* [2019] VCAT 774 at [81], [94] – [96]; *Jasen v Demaio* [2019] VCAT 712 at [54], [94] – [95]

the balcony cement sheets and/or the ceiling voids) is "land" for the purposes of s 16(1)[16].

120. It was not disputed that the flow was unreasonable or that it has caused loss and damage to the applicants[17].

121. As for whether the OC1 is "the person who caused the flow" within the meaning of ss 1, I respectfully agree with the comments of Deputy President Macnamara (as he then was) in *Turner v Bayside City Council*[18]:

> Reference in section 16(1) to "the person who caused the flow" is presumably to be read as meaning the person whose acts or omissions caused the flow…
>
> Where the necessary facts are made out, the cause of action under section 16(1) appears to be one of strict liability; that is, it is not necessary to demonstrate any want of reasonable care. The mere proof of causation appears to be enough.

122. In the case of *Connors v Bodean International Pty Ltd*[19] Senior Member Young considered ss 5 in the following terms:

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

123. I respectfully agree with other members of this Tribunal who have adopted the proposition that the phrase "reasonably available" steps in the Act requires the current occupier to take the necessary steps within a reasonable time[20].

124. Based on the evidence of the applicants and the level 9 owners, I am satisfied that the OC1 was aware of the existence of leaks since at least 2008 (when reports were commissioned at the time of the VMIA claim). The OC1 was unable to show that it spent any of the settlement monies on the north side balconies. By 2013 it was apparent to the OC1 committee and manager that level 8 was still suffering from water ingress. Despite the temporary repairs carried out by the level 9 owners, the OC1 manager and chairperson were aware that the leaks were continuing. By August 2017 the

[16] See Points of Claim and Defences of each respondent at paragraph 21
[17] See Points of Claim and Defences of each respondent at paragraph 22
[18] [2000] VCAT 399 at [16], [19]
[19] [2008] VCAT 454 at [51]
[20] E.g. *Barter v Bushett* [2019] VCAT 774; *Guy v Owners Corporation 416326* [2018] VCAT 2027; *Sidoti v Owners Corporation 633715B* [2016] VCAT 1880

OC1 had resolved to take responsibility to replace the glazed units on level 9 and in January 2018 it had approved the funds to do so. The OC1 provided no explanation as to why it did not proceed with these works.

125. As a result of these findings, I am satisfied that the OC1 is liable to the applicants under s.16 of the Water Act. They are entitled to relief in the form of a declaration, an injunction, as well as damages.

OTHER ISSUES

126. As I have found that the OC1 is liable to the applicants under s 16 of the Water Act, I do not need to consider the claim against the OC1 under the OC Act. Nor do I need to consider the effect of s 17 on the claim.

AMOUNT OF LOSS AND DAMAGE

127. Based on the evidence given by the applicants, which was not seriously challenged, I am satisfied that Ms Davies and Ms Ellis have suffered the following loss and damage, details of which are set out in the Amended Particulars of Loss and Damage dated 29 April 2019.

Apartment 83 – Ms Davies

Mould rectification costs per Merlo report 5.4.19, which was not seriously challenged	$2,000.00
Professional fees, made up of Merlo invoice $4950, Merlo invoice $1920, exit clean for Caroline Street property $968, NLK plumbing report $220	$10,058.00
Alternative accommodation, made up of rent already paid $33,671.55 and future rent expected to be paid until apartment 83 is returned to a habitable state (end August 2020) $35,211.25, less monies received from insurer $10,661	$58,221.80
Loss of contents damaged by mould	$2,000.00
Total	**$72,279.80**

Apartment 84 – Ms Ellis

Mould rectification costs per Merlo report 5.4.19, which was not seriously challenged	$7,000.00
Reinstatement costs per Merlo report 5.4.19, which was not seriously challenged	$40,536.93

Alternative accommodation, made up of future rent expected to be paid until apartment 84 is returned to a habitable state (end August 2020) at $653.33/week	$42,466.45
Loss of contents damaged by mould	$2,237.00
Total	**$92,240.38**

Wasted funds

128. I am not satisfied that either Ms Davies or Ms Ellis will suffer the alleged funds wasted, being payment of the Owners Corporation fees over the period that they have been and/or will be living in temporary accommodation while reinstatement works are carried out. Had their apartments not been affected by water, they would be living there and paying these fees. I have allowed them the cost of living elsewhere by way of rent, but can see no reason why they should not continue to pay the Owners Corporation fees. I note that the fees are used for the ongoing expenses of the building, including insurance, cleaning, maintenance and management, and that these expenses and the benefit derived from these expenses continue even while the apartments are being reinstated.

Damages for physical inconvenience

129. Ms Davies sought an amount of $20,000 for having to evacuate her home with her daughter and live in rented accommodation for a considerable period of time. She conceded in her evidence that part of the amount sought included compensation for mental stress and so the amount claimed should be reduced.

130. Ms Ellis sought an amount of $34,000 for the physical inconvenience caused by having to live with her son in apartment 84 among buckets and towels, continually monitoring the weather, mopping up water and cleaning mould. The amount is based on $500 per week for the 68 week period she has been forced to live in the apartment since water was first discovered in December 2017.

131. The parties agreed that the Tribunal does not have jurisdiction to order damages for personal injury under the Water Act, by virtue of s 19(1). The applicants submit that I can nevertheless award an amount for physical inconvenience, and they rely on the decision of *Thomas v Powercor Australia Ltd*[21], which was part of the bushfire litigation in Victoria. In *Thomas*, J Forest J discussed the distinction between physical inconvenience and mental distress. His Honour noted that "Mr Thomas could not recover damages for anxiety or stress as to do so would be to

[21] [2011] VSC 586 at [118] – [132]

permit him to recover damages for psychological injury which is prohibited absent compliance with Part VBA of the *Wrongs Act* 1958 (Vic)". His Honour then examined the "long line of authority to the effect that inconvenience per se can be the subject of a claim for damages" and concluded that damages for physical inconvenience can be awarded for claims in contract and in tort.

132. This decision was considered recently in *Jasen v Demaio*[22] where Member Edquist followed Deputy President Macnamara (as he then was) and held as follows:

> I observe that J Forrest J in the Supreme Court of Victoria in *Thomas v Powercor Australia Limited* (Damages ruling) acknowledged that in Victoria, a right to recover damages for physical inconvenience is recognised in both contract and in tort. His Honour also recognised that a claim for physical inconvenience could be distinguished from a claim for mental distress, and that a claim for inconvenience per se can be the subject of a claim for damages. These issues are accordingly settled for the purposes of an action in either contract or negligence.
>
> However, we are concerned here with an action under s 16 of the Water Act. The insurmountable issue facing Ms Jasen arises from the words of the statute. As observed by Deputy President Macnamara, in *Kopitschinski v Song* at [46]:
>
> > The $1,000 damages claim being neither an award of damages for economic [loss] nor for damage to property is therefore not available and this claim must be dismissed.
>
> I respectfully adopt (again) Deputy President Macnamara's reasoning and rule that Ms Jasen's claim for damages for "loss of enjoyment of life, inconvenience and mental stress" is not a claim that can be determined by the Tribunal.

133. The $1000 damages claimed in in *Kopitschinski v Song*[23] were for "subjective experience of past discomfort or inconvenience". I respectfully concur with Deputy President Macnamara and Member Edquist and as a result, I accept that the Water Act does not allow me to order compensation by way of damages for inconvenience.

134. I also accept the submission of the OC1 that as a result of s 19 of the Water Act, I have no power to make an order for damages for inconvenience under the OC Act. As noted above, this was tacitly conceded by the applicants.

[22] Op. cit.
[23] [2007] VCAT 1958

CONCLUSION

135. I will invite the parties to provide submissions on the appropriate orders to be made in light of these Reasons.

SENIOR MEMBER S. KIRTON