

IN THE SUPREME COURT OF VICTORIA
COMMON LAW DIVISION
JUDICIAL REVIEW AND APPEALS LIST

Not Restricted

S ECI 2025 03582

BETWEEN:

TOME DAMJANOVSKI

Applicant

v

OWNERS CORPORATION 1 PLAN NO. PS503570D

First Respondent

OWNERS CORPORATION NO 2 PS503570D

Second Respondent

<u>JUDGE:</u>	Harris J
<u>WHERE HELD:</u>	Melbourne
<u>DATE OF HEARING:</u>	15 April 2026
<u>DATE OF JUDGMENT:</u>	8 October 2026
<u>CASE MAY BE CITED AS:</u>	Damjanovski v Owners Corporation 1 Plan No. PS503570D
<u>MEDIUM NEUTRAL CITATION:</u>	[2026] VSC 656

OWNERS CORPORATIONS – Apartment building on land affected by owners corporation
– Apartments constituting individual lots – Water ingress arising from areas of external balcony to an apartment – Whether floor of balcony lot property or common property – Interpretation of plan of subdivision and notations on plan of subdivision – Where boundaries constituted by buildings – Where location of relevant boundary is ‘interior face’ – Meaning of ‘interior face’.

Owners Corporation Act 2006 (Vic) ss 4(b), 46, 47, 48, 49, 129 – Owners Corporation Regulations 2018 (Vic) – Subdivision (Procedures) Regulations 2000 (Vic) – Subdivision (Registrar’s Requirements) Regulations 2011 (Vic) – Subdivision (Registrar’s Requirements) Regulations 2021 (Vic).

<u>APPEARANCES:</u>	<u>Counsel</u>	<u>Solicitors</u>
For the Applicant	Dr J Wyatt, solicitor	Abrahams Meese Lawyers
For the Respondents	Mr A Blunt of counsel	CLP Lawyers

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HER HONOUR:

Introduction

- 1 The applicant, Tome Damjanovski, is the owner of an apartment on the fifth floor of a five storey building in Maribyrnong, Victoria. Mr Damjanovski and his late wife purchased the apartment 'off the plan' in 2002. The apartment is Lot 502 in an apartment building which is one of several buildings on **Plan of Subdivision** PS503570D, which was registered on 15 July 2003. The apartment has been let to tenants at all times.¹
- 2 At some time commencing in around 2007, the Owners Corporation manager reported to Mr Damjanovski that there was an ingress of water to apartments below his apartment.² In 2010, the owner of an apartment below Mr Damjanovski's apartment first complained of water ingress to his apartment, and communications with respect to water ingress continued between them up until 2020.
- 3 A cause of the water ingress was identified as being the state of the tiles on the large open **Balcony** of Mr Damjanovski's apartment, which were in disrepair. Mr Damjanovski carried out some repair works, but the water ingress into the apartment below Mr Damjanovski's apartment continued.
- 4 Mr Damjanovski and the respondents, being two Owners Corporations which own different areas of common property the subject of the Plan of Subdivision, are in dispute as to who is responsible for the repairs to the Balcony. Mr Damjanovski contends that the repair and maintenance of the Balcony, including the tiles, is the responsibility of one of the two Owners Corporations. The Owners Corporations contend that the Balcony forms part of Mr Damjanovski's lot, and that he is responsible for keeping it in a state of good and serviceable repair.
- 5 In November 2022, the manager of the Owners Corporations issued to Mr Damjanovski a **Notice to Repair** that required him to carry out repair works to

¹ Reasons of the Tribunal in *Damjanovski v Owners Corporation 1 Plan No. PS503570D (Owners Corporations)* [2025] VCAT 484 (**Tribunal Reasons**), [9]; Affidavit of Julian Wyatt affirmed 27 June 2025 (**Wyatt Affidavit**), [7].

² Tribunal Reasons, [10].

the Balcony's tiles, balustrade and walls.³ The notice stated that it was issued pursuant to ss 48 and 49 of the *Owners Corporation Act 2006* (Vic), the *Owners Corporation Regulations 2018* (Vic) and the 'Owners Corporation Rules'. The Owners Corporations served a Second Notice to Repair on Mr Damjanovski in March 2023, which required him to undertake specific repairs to the Balcony tiles and waterproof membrane.⁴

6 In August 2023, Mr Damjanovski issued a claim in the Victorian Civil and Administrative **Tribunal**,⁵ seeking various orders including that the Notices to Repair were invalid (or alternatively that Mr Damjanovski need not comply with them), that the Owners Corporations be required to carry out repair work and that Mr Damjanovski be reimbursed for repair works that he had carried out. In a proceeding commenced by counterclaim,⁶ Owners Corporation 1 as owner of common property sought orders requiring Mr Damjanovski to carry out works to repair the tiled Balcony to address the water ingress to other apartments, and to repair an area of Balcony balustrade which had become loose and unsafe. By the time of the hearing before the Tribunal, Owners Corporation 1 had accepted that the balustrade was common property and was to be repaired by the Owners Corporation.⁷

7 Both parties retained experts, Mr Robert Quick for Mr Damjanovski and Mr Clinton Eldridge for the Owners Corporations. The experts prepared reports and gave evidence at the Tribunal hearing. The experts agreed that there were three areas of water ingress, and that all three emanated from Lot 502.⁸ These points as identified by the experts were described in the Tribunal Reasons as follows:

- (a) An inadequately sealed penetration through the floor slab of level 5 for a downpipe located next to an external wall of Mr Damjanovski's apartment, which carries rainwater from the roof and which penetrates through the tiles

³ Tribunal Reasons, [16]. 'Notice of owners corporation repairs/maintenance' dated 11 November 2022, Wyatt Affidavit, [13], Exhibit JGW-01, pp 89-91. The Notice was expressed to state a requirement by 'the owners corporation' without identifying either Owners Corporation specifically.

⁴ Tribunal Reasons, [16]. 'Notice of owners corporation repairs/maintenance' dated 30 March 2023, Wyatt Affidavit, [17], Exhibit JGW-01, pp 101-102.

⁵ VCAT Proceeding Number OC475/2023.

⁶ VCAT Proceeding Number OC927/2023.

⁷ Tribunal Reasons, [3]-[4].

⁸ Tribunal Reasons, [96]-[100].

and slab of the Balcony and continues under it through a cavity between the fifth floor slab and the fourth floor ceiling to an external rain head on the outside of the building. The experts agreed that there was no water escaping from the drainpipe itself, but, rather, that there was inadequate sealing of the hole through which the drainpipe passes through the tiles and the slab which has permitted rainwater to enter between the tiles, travel through the substrate, through the cavity below the slab to the fourth floor ceiling.⁹

- (b) Water moving through the juncture of the floor tiles of the Balcony and an upright wall, which permits water to run down a wall of the balcony of Lot 407 beneath.¹⁰
- (c) Water ingress to Lot 407 is also occurring through a ‘core hole’ drilled through the base of the northwestern wall which is perpendicular to the external wall of the Balcony (and which also forms the wall at one end of the balcony of Lot 407).¹¹

8 The evidence was to the effect that there was a thin layer of screed and a waterproof membrane between the concrete slab of the Balcony floor and the tiles.¹² There was no clear statement in the evidence of how the screed and membrane were applied, and in what sequence, but it appears most likely that on the Balcony there was a layer of screed, then a waterproof membrane on top of which the tiles were applied. Although there was no evidence as to when the screed, membrane and tiles were laid, it appeared to be common ground between the parties that the Balcony was constructed and tiled by the time the Plan of Subdivision was registered.¹³

9 The Senior Member concluded, in summary, that:

⁹ Tribunal Reasons, [97].

¹⁰ Tribunal Reasons, [98]–[99].

¹¹ Tribunal Reasons, [100].

¹² Mr Eldridge gave evidence that there appeared to be a ‘thin screed’ as well as the waterproof membrane, below the tiles. See Tribunal Hearing Transcript 15/11/2024 (unnumbered pages), lines 9–17, **Court Book** dated 13 March 2026, p 367. The Senior Member accepted that there was screed below the tiles: Tribunal Reasons, [81]–[83]; [86]; [112]; [114].

¹³ See Mr Damjanovski’s Written Closing Submissions dated 2 December 2024, [51]; Tribunal Hearing Transcript 14/11/2024 (unnumbered pages), lines 25–28, **Court Book**, 320; Tribunal Hearing Transcript 15/11/2024 (unnumbered pages), **Court Book**, 349–350.

- (a) the surface of the concrete structural slab floor and wall of the Balcony formed the boundary of Mr Damjanovski's lot, and that the fixtures to the slab of the waterproof membrane and screed were in that lot and were not common property;¹⁴
- (b) the passage of rainwater over the Balcony was not a 'service' within the meaning of the *Owners Corporations Act* so as to make it the responsibility of the Owners Corporation;¹⁵
- (c) the Notices to Repair issued to Mr Damjanovski were not defective, and he had failed to comply with the obligation in s 129 of the *Owners Corporation Act* to maintain his lot in a state of good and serviceable repair insofar as it affected the use or enjoyment of other lots;¹⁶ and
- (d) Mr Damjanovski was responsible for works to address the water ingress, whether because it relates to work on his own lot, or that even if it was (contrary to the Senior Member's conclusion) common property, as lot owner he will have the benefit of that work, so he should meet the cost, pursuant to s 24(2A) of the *Owners Corporation Act*.¹⁷

10 The nature of the works required was the subject of expert evidence. Both experts expressed the opinion that the tiles on the Balcony were in poor condition, with some having lifted from the waterproofing base; and that the grout between the tiles was damaged.¹⁸ The Tribunal made the following observations and findings on the expert evidence on the work which was required to address the water ingress:

Although, in his written report prepared before the hearing, Mr Quick expressed the view that "there is no evidence that the patch of lifting tiles is allowing rainwater to enter the apartments below" Mr Damjanovski's lot, in the hearing he agreed with Mr Eldridge that water may travel below the tiles, accumulate under the tiles in the screed, and find its way to the lots below. Mr Eldridge opined further that "blistered waterproofing" visible under the broken tiles indicated "moisture in the substrate below".

¹⁴ Tribunal Reasons, [48]-[64]; [81]-[83].

¹⁵ Tribunal Reasons, [65]-[80].

¹⁶ Tribunal Reasons, [84]-[95].

¹⁷ Tribunal Reasons, [115]; [120]-[121].

¹⁸ Tribunal Reasons, [101].

Mr Eldridge also noted that carpet in Mr Damjanovski's lot had been replaced in areas adjacent to areas of defective waterproofing, and expressed the opinion that water ingress had also occurred laterally into Mr Damjanovski's lot. Mr Eldridge was of the view that the waterproofing to Mr Damjanovski's balcony has generally failed and that resulting water movement is causing water damage to lots 407 and 408.

Mr Eldridge considered that all the tiling on the balcony needs to be replaced, and recommended full removal and replacement of the waterproofing in accordance with current waterproofing and tiling standards. Mr Quick initially expressed the view that it would be sufficient to remove the perimeter tiles, install waterproofing that continued up the walls, install conforming over flashing and replace the tiles. In the hearing, however, Mr Quick agreed that the ultimate solution required, is to "pull it all up and start again".

That conclusion arises from the experts' agreement that current building standards require exterior tiles to be laid in a screed. That is, tiles cannot be laid without the screed. The purpose of the screed is to provide an even surface onto which the tiles are to be laid, and to provide appropriate grade to the available drainage points. The experts agreed that the existing screed would need to be removed entirely, as it is likely water-logged, and fresh screed laid.

The experts also expressed the view that the balcony has insufficient drainage outlets, and the balcony lacks grade to the outlets that exist.

The experts agreed, also that the absence of an upstand to the waterproofing membrane at points where the floor of the balcony meets vertical walls is allowing water to travel to the lots below. The experts acknowledged that, at the time of construction, the applicable waterproofing standards did not require an upstand to the waterproofing membrane. However, they agree that this is the solution now required to make the balcony waterproof.

Both agreed that the waterproof membrane would need to properly cover the fixings for the glass balustrade which the owners corporation is responsible to repair. I accept the opinions and recommendations of the experts.¹⁹

- 11 The Tribunal went on to consider whether the Balcony constituted a 'service' and issues of responsibility for the individual items of repair required to address the water ingress issue. The Senior Member found that Mr Damjanovski as lot owner had failed to repair his lot, with respect to the repairs required to the Balcony; that the Notices to Repair were not defective, and that there would be grounds to authorise the Owners Corporation to effect the repairs for the purposes of s 48(3) of the *Owners Corporation Act*, or to carry out the works as a service within the meaning of s 12 of the *Owners Corporation Act*.

¹⁹ Tribunal Reasons, [101]–[107].

12 The Senior Member determined that the cost of the repair work to the Balcony to address water ingress was to be met by Mr Damjanovski. However, there was also other work to the Balcony balustrade, which had been referred to in the November 2022 Notice to Repair and was agreed between the parties to be work to common property.²⁰ Further, the repair work that the Tribunal found on the evidence was likely to be required included additional drainage points which may involve drilling holes in external walls which were common property.²¹ The Senior Member observed that the sequencing of work and the work with drainage points which would affect the common property would require the involvement of the Owners Corporations. The Senior Member concluded it was appropriate to give the parties an opportunity to ‘consider the implementation logistics in light of the findings’.²²

13 The Tribunal made the following declaration:

The tribunal declares that Mr Damjanovski has failed to comply with s 129(a) of the *Owners Corporations Act 2006* in that he has failed to properly maintain, in a state of good and serviceable repair, the balcony of his lot such that it adversely affects the use and enjoyment of other lots.²³

14 The Tribunal also made procedural orders to facilitate the making of final orders by consent or following further directions as to ‘the manner in which the necessary repairs to prevent and cease water leaks and damage to other lots and common property are to occur’.²⁴

The application for leave to appeal

15 The application for leave to appeal has been complicated by a Notice of Appeal which states 19 grounds of appeal, many of which involve multiple sub-grounds; and 24 questions of law.²⁵ Some of these grounds of appeal were reformulated in the course of Mr Damjanovski’s written submissions, and other grounds were addressed by groupings of aspects of various different grounds, in a complex way which

²⁰ Tribunal Reasons, [18]; [85]. That Notice to Repair also referred to ‘Cracks on ... balcony walls’. The Balcony walls had been found by the Senior Member to be common property (as external structural walls): see Tribunal Reasons, [62]; [79]; [120].

²¹ Tribunal Reasons, [120]. The Tribunal referred, in the conclusions on this issue, to Mr Damjanovski having responsibility ‘under s 47A(3)’ of the *Owners Corporation Act* for this work.

²² Tribunal Reasons, [124].

²³ Tribunal Orders of 29 May 2025, Order 1.

²⁴ Tribunal Orders of 29 May 2025, Order 2.

²⁵ **Notice of Appeal** filed 26 June 2025.

involved renumbering the grounds of appeal.²⁶ I requested that Mr Damjanovski prepare a simple document identifying the grounds of appeal that he continued to press, by reference to the way in which the grounds were identified in the Notice of Appeal. Unfortunately, the document provided was itself a complex document titled ‘**Table** of Grounds of Appeal’²⁷ which gave the various grounds yet further numbering by reference to a Notice of Appeal number, an Applicant’s Submissions number, and ‘Grouping’ into ‘Series 1’ to ‘Series 3’. This document added to the complexity, however, it did have the advantage of identifying under the description of ‘Series’ three key subjects:

- (a) ‘Balcony Property Ownership Findings’, which were said to engage two grounds of appeal;
- (b) ‘No [Owners Corporation] Responsibility Findings’, which were said to engage four grounds of appeal; and
- (c) ‘Full Lot Owner Responsibility Findings’, which were said to engage eight grounds of appeal.

16 The Owners Corporations’ submissions also identified a limited number of key issues which were relevant to the case put to the Tribunal, the findings made, and the reasons and orders it issued.²⁸

17 Taking into account Mr Damjanovski’s Notice of Appeal, submissions, and the Table, and the Owners Corporations’ submissions, the central matters which are raised in the application for leave to appeal are as follows:

- (a) Who owned the components of the Balcony which were relevant to the water ingress and required repair? Grounds of appeal 1 and 2 relate to this issue.
- (b) Who was responsible for the repair and maintenance of the relevant parts of the Balcony having regard to ss 46, 47 and 48 of the *Owners Corporation Act*? Grounds 3, 4 and 5 and 19 raise matters relating to this issue.

²⁶ Applicant’s Written Submissions on Appeal filed 22 October 2025 (**Applicant’s Submissions**).

²⁷ Table of Grounds of Appeal dated 14 April 2026.

²⁸ Respondents’ Written Outline of Submissions filed 19 November 2025 (**Respondents’ Submissions**), [5]–[14].

- (c) Was the Tribunal obliged to consider any effect of s 16 of the *Water Act 1989* (Vic) on the allocation of the costs of repairs relating to the ingress of rainwater? Ground 19 also raises this issue.
- (d) Did the Tribunal err in determining that Mr Damjanovski breached s 48(2) and s 129(a) of the *Owners Corporation Act*, and that Mr Damjanovski only was required to carry out repair works on the Balcony? Grounds 10 to 18, and a new ground raised prior to hearing relate to this issue.²⁹ Grounds 6 to 9 of the Notice of Appeal were described as having been ‘subsumed’ into grounds 15 and 16 (also described as Ground 3E in submissions and in the Table).

The relevant provisions of the *Owners Corporations Act 2006* (Vic) and *Subdivision Act 1988* (Vic)

- 18 The *Owners Corporations Act* contains provisions which distribute responsibilities of lot owners and owners corporations with respect to land affected by an owners corporation. The term ‘land affected by an owners corporation’ is defined in s 3 of the Act to mean:

the lots the owners for the time being of which are members of the owners corporation together with the common property for which the owners corporation is responsible;

- 19 The term ‘common property’ is defined in s 3 as ‘land shown as common property on a plan of subdivision or a plan of strata or cluster subdivision’.
- 20 The functions and responsibilities of an owners corporation and lot owners include responsibilities with respect to repair and maintenance of the land and structures on it. Section 4 provides:

4 Functions of owners corporation

An owners corporation has the following functions –

- (a) to manage and administer the common property;
- (b) to repair and maintain –
- (i) the common property;

²⁹ Grounds 11 and 12 of the Notice of Appeal were described in the Table as having been ‘combined’.

- (ii) the chattels, fixtures, fittings and services related to the common property or its enjoyment;
- (iii) equipment and services for which an easement or right exists for the benefit of the land affected by the owners corporation or which are otherwise for the benefit of all or some of the land affected by the owners corporation;
- ...
- (f) to carry out any other functions conferred on the owners corporation by –
 - (i) this Act or the regulations under this Act; or
 - (ii) the **Subdivision Act 1988** or the regulations under that Act;
 - (iii) any other law; or
 - (iv) the rules of the owners corporation.

21 Section 46 of the *Owners Corporations Act* imposes on the owners corporation the obligation to repair and maintain common property. It states:

46 Owners corporation to repair and maintain common property

An owners corporation must repair and maintain –

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

22 The Notices to Repair issued to Mr Damjanovski were said to be issued pursuant to ss 48 and 49 of the *Owners Corporations Act*, the *Owners Corporation Regulations 2018* and the 'Owners Corporation Rules'. The Owners Corporation Rules do not appear to have been in evidence before the Senior Member, and were not before the Court in this application for leave to appeal.

23 Section 47 provides that an owners corporation must repair and maintain services that are for the benefit of more than one lot and the common property. It states:

47 Owners corporation must repair and maintain services

- (1) An owners corporation must repair and maintain a service in or relating to a lot that is for the benefit of more than one lot and the common property.
- (2) An owners corporation may, at the request and expense of a lot owner, repair and maintain a service in or relating to a lot if

it is impracticable for the lot owner to repair or maintain that service.

(3) In this section —

service includes a service for which an easement or right is implied over the land affected by the owners corporation or for the benefit of each lot and any common property by section 12(2) of the **Subdivision Act 1988**.

24 Immediately following the text of s 47 is a 'Note' which, pursuant to s 36(3A) of the *Interpretation of Legislation Act 1984* (Vic), forms part of the Act. The Note is as follows:

Note

The easements or rights that may be implied under section 12(2) of the **Subdivision Act 1988** are those necessary to provide —

- support, shelter or protection;
- passage or provision of water, sewerage, drainage, gas, electricity, garbage, air or any other service of whatever nature (including telephone, radio, television and data transmission);
- rights of way;
- full, free and uninterrupted access to and use of light for windows, doors or other openings;
- maintenance of overhanging eaves.

25 The *Subdivision Act 1988* (Vic), which is referred to in the definition of 'service' included in s 47, provides in s 12 that a plan of subdivision must specify easements. Section 12(2) implies certain easements, subject to s 12(3). The relevant subsections provide as follows:

(2) Subject to subsection (3), there are implied —

(a) over —

- (i) all the land on a plan of subdivision of a building; and
- (ii) that part of a subdivision which subdivides a building; and
- (iii) any land affected by an owners corporation; and
- (iv) any land on a plan if the plan specifies that this subsection applies to the land; and

(b) for the benefit of each lot and any common property —

all easements and rights necessary to provide –

- (c) support, shelter or protection; or
- (d) passage or provision of water, sewerage, drainage, gas, electricity, garbage, air or any other service of whatever nature (including telephone, radio, television and data transmission); or
- (e) rights of way; or
- (f) full, free and uninterrupted access to and use of light for windows, doors or other openings; or
- (g) maintenance of overhanging eaves –

if the easement or right is necessary for the reasonable use and enjoyment of the lot or the common property and is consistent with the reasonable use and enjoyment of the other lots and the common property.

- (3) A plan may provide that some, all or none of the easements and rights referred to in subsection (2) are implied as a burden or benefit over all or any of the land on the plan.

- (3A) Subsection (3) does not apply to –

- (a) any part of a plan that subdivides a building; or
- (b) easements or rights for existing services provided to a lot, if the lot and the land on which the service is located are not in common ownership.

26 Section 48 of the *Owners Corporation Act* provides for the repair of lots by lot owners. It provides:

48 Lots not properly maintained

- (1) If a lot owner has refused or failed to carry out repairs, maintenance or other works to the lot owner's lot that are required because –
 - (a) the outward appearance or outward state of repair of the lot is adversely affected; or
 - (b) the use and enjoyment of the lots or common property by other lot owners is adversely affected –

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

- (2) If a lot owner has been served with a notice under subsection (1), the lot owner must carry out the repairs, maintenance or

other works required by the notice within 28 days of the service of the notice.

- (3) If a lot owner has been served with a notice under subsection (1) and has not complied with the notice within the required time, the owners corporation may carry out the necessary repairs, maintenance or other works to the lot.
- (4) An owners corporation may recover as a debt from a lot owner the cost of repairs, maintenance or other works carried out under subsection (3).

27 Section 49 provides for the recovery of the cost of repairs carried out for the benefit of the lots:

49 Costs of repairs, maintenance or other works

- (1) An owners corporation may recover as a debt the cost of repairs, maintenance or other works carried out wholly or substantially for the benefit of one or some, but not all, of the lots affected by the owners corporation from the lot owners.
- (2) The amount payable by the lot owners is to be calculated on the basis that the lot owner of the lot that benefits more pays more.
- (3) The works referred to in this section may be to the common property or a lot.

28 Section 47A was introduced into the *Owners Corporations Act* with effect from 1 December 2021.³⁰ It provides:

47A Lot owners must not repair, alter or maintain common property or services

- (1) This section is subject to section 56 of the **Equal Opportunity Act 2010**.
- (2) A lot owner must not repair, alter or maintain –
 - (a) the common property of the owners corporation; or
 - (b) a service in or relating to a lot that is for the benefit of more than one lot or the common property.
- (3) Subsection (2) does not apply if a lot owner has been expressly authorised by the owners corporation to carry out the repairs and maintenance in accordance with section 46 or 47 as an agent of the owners corporation.

³⁰ It was introduced by the *Owners Corporations and Other Acts Amendment Act 2021* (Vic), No 4/2021, which had a commencement date of 1 December 2021: see s 2(2).

29 Section 129 imposes duties on lot owners with respect to their property. It states:

129 Care of lots

A lot owner must—

- (a) properly maintain in a state of good and serviceable repair any part of the lot that affects the outward appearance of the lot or the use or enjoyment of other lots or the common property; and
- (b) maintain any service that serves that lot exclusively.

The context of the issues: Mr Damjanovski's arguments before the Tribunal

30 Before the Tribunal, Mr Damjanovski contended that the waterproofing membrane and screed under the Balcony tiles form part of the common property within the scope of s 4(b)(i) of the *Owners Corporations Act* (and are thus the responsibility of Owners Corporation No 2).³¹ He also submitted that the surface of the Balcony is:

- (a) a service related to the common property, within the scope of s 4(b)(ii) of the Act;
- (b) a service for which an easement or right exists for the benefit of the land affected by the owners corporation or which are otherwise for the benefit of all or some of the land affected by the owners corporation within the meaning of s 4(b)(iii) of the Act; or
- (c) a service for which an easement or right is implied within the meaning of s 47(3) of the Act.³²

31 Mr Damjanovski characterised the drainage of rainwater across the Balcony as 'drainage services' that protect the common property and lots below his lot from the effects of falling rain. He submitted that for this reason, the waterproofing of the Balcony through installation of waterproofing membrane and grading of screed

³¹ **Points of Claim** dated 27 April 2023, [10]; [13]. Mr Damjanovski did not positively assert that the tiles were part of the common property. See **Points of Claim**, [9]. Mr Damjanovski did not expressly take the position that the tiles were part of common property in his closing submissions, but submitted that they were 'fixtures' to the common property or related to it: **Mr Damjanovski's Written (Closing) Submissions** dated 2 December 2024, Part C, [58]–[67]; Wyatt Affidavit, Exhibit JGW-01; pp 134–157.

³² **Points of Claim**, [17]–[19]; **Mr Damjanovski's Written (Closing) Submissions**, pp 134–157; **Tribunal Reasons**, [43].

under the tiles to direct rainfall to the drains is repair and maintenance which is the Owners Corporation's responsibility. Mr Damjanovski accepted that replacement of the tiles would be his responsibility³³ but did not expressly identify the basis on which he made that submission, and did not expressly admit that the tiles were lot property.

32 The Owners Corporations submitted that the Balcony tiles, waterproofing membrane, and Balcony walls form part of Mr Damjanovski's lot and are therefore his responsibility to repair and maintain. They submitted that the responsibility of owners corporations with respect to easements and implied easements for drainage purposes was to be understood as referring to drainage facilities constituted by pipes, gutters, surface inlets and subsurface drains, and that the balcony surface was not a 'drainage service'.³⁴

33 The Senior Member considered carefully and in some detail whether the Balcony was common property, and where the relevant boundary lay between common property and the lot on the Balcony. The Senior Member commenced the analysis with the observation that '[t]he boundaries of Mr Damjanovski's lot are defined as being the interior face of the building'.³⁵ The Senior Member observed that the term 'interior face' was not defined in the *Subdivision Act* or regulations made under the Act at the time of the subdivision was created, but did consider a definition introduced in 2011 in the *Subdivision (Registrar's Requirements) Regulations 2011* (Vic) (**2011 Regulations**) which is now found in reg 10(4) of the *Subdivision (Registrar's Requirements) Regulations 2021* (Vic) (**2021 Regulations**). The Senior Member also considered the meaning of 'interior face' in an earlier Tribunal case and of other similar concepts relevant to determination of boundaries in other jurisdictions.³⁶ The Senior Member concluded:

In this subdivision, the Plan of Subdivision expressly states that the common property includes external and internal structural columns walls and slabs, and that the surface of such columns, walls and slabs forms the "interior face" of the lots in the subdivision. Accordingly, the interior face of the walls and

³³ Tribunal Reasons, [45].

³⁴ Respondents/Applicants by Counterclaim Outline of Primary Submissions dated 4 December 2024 (**Owners Corporations Submissions**) Wyatt Affidavit, Exhibit JGW-01, pp 158-170.

³⁵ Tribunal Reasons, [48].

³⁶ See generally Tribunal Reasons, [49]-[61].

slabs, that is, the surface of the concrete, forms the boundary of Mr Damjanovski's lot.

As the interior face is the surface of the structural slab floor and wall, it follows that decoration, fixtures or chattels placed on the interior face, whether by the lot owner in accordance with s132 of the OC Act or otherwise, is the lot owner's responsibility.

I find that the balcony to Mr Damjanovski's lot lies within the lot. It is not common property within the meaning of s4(b)(i) of the OC Act.³⁷

Are the tiles, waterproofing membrane and screed on the Balcony common property in the registered Plan of Subdivision, or part of Lot 502?

34 The two grounds of appeal relevant to this issue are:

G1. The Senior Member of the Tribunal erred in law by failing to determine what was common property and what was part of the Applicant's lot in accordance with the Plan of Subdivision for the relevant land affected by the owners corporation registered on 15 July 2023 [sic] with the plan number PS 503570D (the '**Plan of Subdivision**') before determining responsibility for the repair and maintenance of property affected by the owners corporation and in particular by:

- (a) failing to expressly or consistently determine what parts of the different external and structural walls on the open balcony of the Building abutting the Applicant's fifth-floor apartment (the '**Balcony**') were common property and what parts were part of the Applicant's lot before making orders as to the responsibility to carry out repairs, maintenance or other works on that property; and
- (b) determining what parts of the floor of the Balcony are common property and what parts are part of the Applicant's lot on the basis of considerations not legally relevant to that determination under the relevant definitions of "common property" and "lot" in section 3 of the OC Act.

G2. Further and alternatively to G1, the Senior Member of the Tribunal erred in the construction of the Plan of Subdivision when determining what property was common property and what property was part of the Applicant's lot within the meaning of the OC Act, in particular by construing the expression "the interior face of the building":

- (a) on the basis that "*the Plan of Subdivision expressly states that the common property includes external and internal structural columns walls and slabs, and that the surface of such columns, walls and slabs forms the 'interior face' of the lots in the subdivision*" (VCAT Decision, para. 62 (emphasis added)), when the Plan of Subdivision does not state that the surface of any columns,

³⁷ Tribunal Reasons, [62]–[64].

walls and slabs forms the “interior face” of the lots in the subdivision;

- (b) without determining the meaning of the word “building” or, alternatively, by misconstruing the word “building”; and
- (c) without determining the meaning of the word “face” or the expression “interior face” or, alternatively, by misconstruing the word “face” and the expression “interior face”.

35 Mr Damjanovski submitted that waterproofing membrane and screed, which are located between the concrete slab and the tiles on the Balcony, are not within Lot 502, and so are common property. He submits that the Senior Member failed to determine whether the waterproofing membrane, screed and tiles were common property by reference to the Plan of Subdivision, but instead started from a consideration as to whether the lot owner or Owners Corporation had responsibility for the relevant part of the property.³⁸ He submits in the alternative that the Tribunal erred in construing the Plan of Subdivision, in several ways including that:

- (a) the Senior Member did not focus on the language the Plan of Subdivision and referred to ‘the interior face of the lots’ rather than the ‘interior face of the building’ and did not construe which parts of the structure constituted part of the building; and
- (b) the Senior Member understood the Plan of Subdivision to ‘expressly stat[e] that the common property includes external and internal structural columns walls and slabs, and *that the surface of such columns, walls and slabs forms the “interior face” of the lots in the subdivision*’, where in fact the Plan does not state that the surface of any column, wall or slab forms the ‘interior face’, nor refer to the word ‘surface’.³⁹

36 The Owners Corporations submit that no error of law is identified in the Tribunal Reasons. They submit:

The boundaries on the plan are shown by thick continuous lines. The ‘interior face’ of the buildings are ‘all other boundaries’ not marked either ‘E’, ‘U’, or ‘EG’. As the walls, columns, and slabs of the balcony form the structure of the balcony, the ‘interior face’ is the interior face of the structure of the balcony,

³⁸ Applicant’s Submissions, [28].

³⁹ Applicant’s Submissions, [34] (emphasis in original).

not the upper surface of whatever is fixed to the structure like waterproofing membrane, screed, and tiles'.⁴⁰

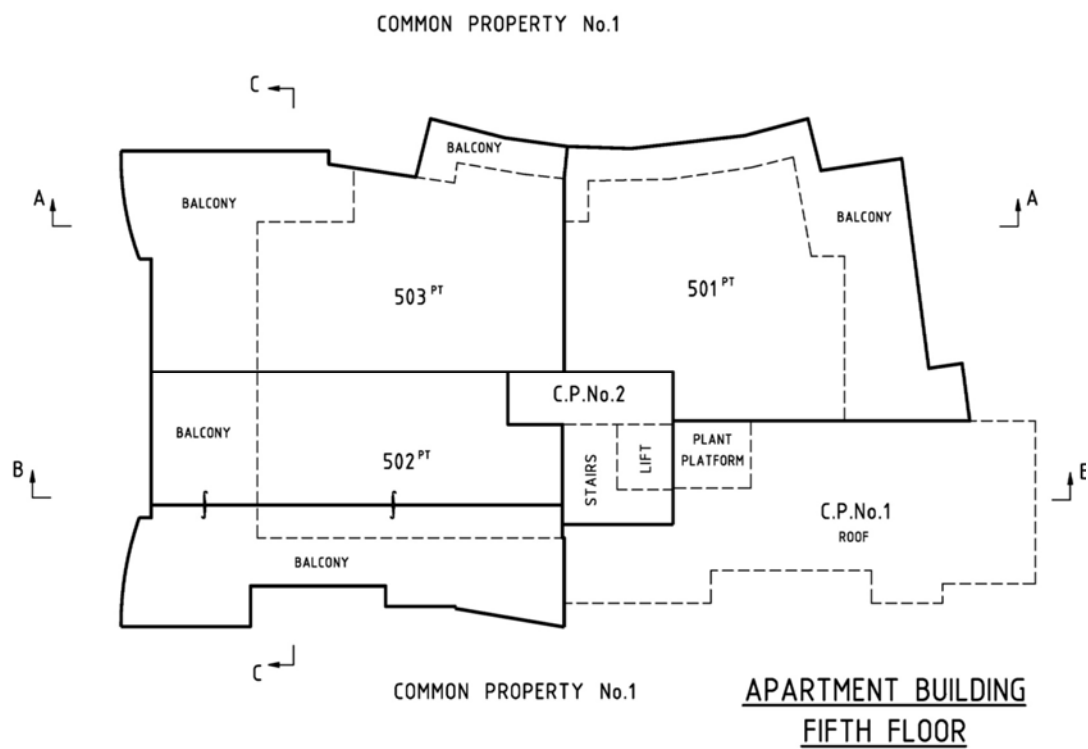
The Plan of Subdivision

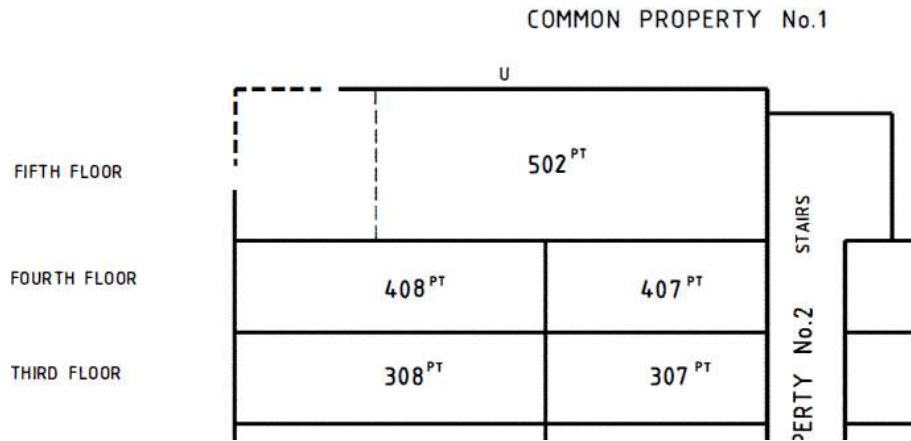
- 37 The definition of 'common property' in s 3 of the *Owners Corporations Act* relevantly refers to the 'land shown as common property on a plan of subdivision'. The determination of the question as to what constitutes common property and what constitutes Lot 502 therefore requires consideration of the Plan of Subdivision applicable to the apartment complex.
- 38 Plan of Subdivision PS503570D applies to a large area of land on which multiple buildings are situated. The Plan of Subdivision shows the land with the buildings and includes a plan for each floor of each of the buildings. Mr Damjanovski's apartment is in the building titled 'Apartment Building',⁴¹ on the fifth floor. The two relevant plans are the aerial view plan and the cross-section diagram:⁴²

⁴⁰ Respondents' Written Outline of Submissions, [20].

⁴¹ In addition to various other buildings, there were also on the Plan of Subdivision 'Apartment Building A' and 'Apartment Building B', which are not relevant for present purposes.

⁴² Sheet 9 and Sheet 36 of the Plan of Subdivision.





- 39 Mr Damjanovski's Balcony is the structure to the left of the space labelled '502', with the partial broken dotted line on the top left corner.
- 40 The **Notations** on Sheet 1 of the Plan of Subdivision state that the lots in the plan may be affected by one or more owners corporations, and include notes as to what part of the land is common property. The Notations relevantly state as follows:

ALL EXTERNAL STRUCTURAL COLUMNS, WALLS & SLABS ARE CONTAINED IN C.P. No.1

ALL INTERNAL STRUCTURAL COLUMNS, WALLS, SLABS & BEAMS AND ALL INTERNAL SERVICE DUCTS & PIPE SHAFTS IN THE BUILDING KNOWN AS "APARTMENT BUILDING" ARE CONTAINED IN C.P. No. 2. THE POSITIONS OF THESE COLUMNS, WALLS, SLABS, BEAMS, DUCTS & SHAFTS HAVE NOT NECESSARILY BEEN SHOWN ON THE DIAGRAMS CONTAINED HEREIN. (SEE SHEETS 4 TO 9).

...

COMMON PROPERTY No.1 IS ALL THE LAND IN THE PLAN EXCEPT THE LOTS, ROAD R-1, ROAD R-3, COMMON PROPERTY No.2, COMMON PROPERTY No.3, COMMON PROPERTY No.4 & COMMON PROPERTY No.5.

...

BOUNDARIES SHOWN BY THICK CONTINUOUS LINES ARE DEFINED BY BUILDINGS.

41 Specifically with respect to boundaries 'defined by buildings', the Notations then state on Sheet 2:

LOCATION OF BOUNDARIES DEFINED BY BUILDINGS:
EXTERIOR FACE - BOUNDARIES MARKED E
UNDERSIDE OF ROOF - BOUNDARIES MARKED U
EDGE OF GROUND FLOOR SLAB - BOUNDARIES MARKED EG
INTERIOR FACE - ALL OTHER BOUNDARIES
--- DENOTES BUILDING STRUCTURE (NON BOUNDARY)
THE UPPER BOUNDARIES OF ANY UNCOVERED OR PARTIALLY UNCOVERED TERRACES/BALCONIES WITHIN BUILDINGS 6, 7 & 8 (LOTS T701 - T732), APARTMENT BUILDING A (LOTS A101-A108, A201-A208, A301-A308, A401-A408, A501-A506) AND APARTMENT BUILDING B (LOTS B1, B2 B101 - B107, B201 - B207, B301 - B307, B401 - B407) ARE DEFINED BY THE PROJECTION OF THE INTERIOR FACE OF THE CEILING OF THE RELEVANT FLOOR LEVEL AT WHICH THE TERRACE/BALCONY IS LOCATED. (SEE SHEETS 21 TO 41)

42 Thus according to the Notations:

- (a) all external structural columns, walls and slabs are Common Property No. 1;
- (b) all internal structural columns, walls, slabs and beams in the apartment building are Common Property No. 2;
- (c) Common Property No. 1 is all the land in the subdivision plan except the Lots, roads and other common property; and
- (d) boundaries shown by thick continuous lines are defined by building, and the boundaries between Common Property and the lots are defined in this way.

43 The effect of the thick continuous lines on the plans being boundaries 'defined by building' is not assisted materially by notations on the Plan of Subdivision. Boundaries marked 'E', 'U' and 'EG' can be put to one side as the floor and walls of the Balcony do not bear those notations. The only relevant guidance in the Notations as to the boundaries relevant to the floor and walls of the Balcony is in the words:

INTERIOR FACE - ALL OTHER BOUNDARIES

44 The effect is that the boundaries between the common property and the lots are 'defined by buildings' and that, for the Balcony floor and walls, the relevant boundaries are the 'interior face'.

45 As a result of the diagrams and the Notations, it is clear that certain parts of the building are common property - essentially, the external and internal structural elements. The Lot property is not defined positively in the same way, but rather by reference to the other elements and in particular the common property. As will

become apparent below, the difficult interpretative question arises with respect to the effect of boundaries being 'defined by building', and the effect of the boundaries being identified simply as 'interior face'. In circumstances where the thick continuous line represents a wall or slab composed of multiple layers, the identification of the 'interior face', and determination of where exactly the boundary lies amongst the layers, presents some difficulty.

Guidance in the regulations on the interpretation of plans of subdivision

46 The *Subdivision (Procedures) Regulations 2000* (Vic) (**2000 Regulations**) applied to plans of subdivision registered with the Office of Titles at the relevant tie. Regulation 11 provided, relevantly:

11. Use of buildings to define boundaries

- (1) Boundaries may be shown on the plan by reference to a building.
- (2) Where a boundary on a plan is defined by reference to a building or part of a building, the plan must specify whether the boundary is –
 - (a) the interior face of the walls, ceilings and floors of the relevant part of the building; or
 - (b) the exterior face of the relevant part of the building; or
 - (c) in some other location.

47 This regulation explains the bald statement in the Notations on the Plan of Subdivision 'Interior face – all other boundaries'. The statement, having regard to reg 11, that unmarked boundaries are the 'interior face' makes clear that the interior face is intended to define a boundary. However the statement, and the regulation, does not provide guidance as to whether the 'interior face' then forms part of the property of which the wall, ceiling and floor is part, or the space bounded by that 'interior face'. 'Interior face' was not defined in the 2000 Regulations.

48 Regulation 10 of the 2011 Regulations introduced new guidance as to buildings defining boundaries, which is in the same terms in the 2021 Regulations. Although that regulation did not apply to the Plan of Subdivision, it was referred to by the Senior Member who observed that the 2021 Regulations:

... considered against the background of the preceding regulations under the Subdivision Act, reflect a clear and long standing intention of the Victorian

legislature that, where a lot boundary is described as interior face, the lot owner is responsible for the repair and maintenance of anything fixed to the interior face of a lot.⁴³

49 Regulation 10 of the 2021 Regulations provides, relevantly, as follows:

10 Use of buildings to define boundaries

- (1) A boundary may be shown on a plan by reference to a building.
- (2) Any building or part of a building that defines a boundary must be identifiable from the plan.
- (3) If a boundary on a plan is defined by reference to a building or part of a building, the plan must specify whether the boundary is one or more of the following —
 - (a) Interior Face;
 - (b) Median (floor and ceiling);
 - (c) Median (wall, window, door, balustrade);
 - (d) Exterior Face;
 - (e) in some other location.
- (4) Unless otherwise specified on the plan, the location of any building boundary defined as —
 - (a) *Interior Face* lies along the interior face of any wall, floor (upper surface of elevated floor if any), ceiling (underside of suspended ceiling if any), window, door or balustrade of the relevant part of the building and any internal coverings, waterproof membranes and fixtures attached to walls, floors, and ceilings are included within the relevant parcel;

Ground 1 — Did the Tribunal fail to determine what was common property and what was Lot 502 by reference to the Plan of Subdivision?

50 By the first ground of appeal, Mr Damjanovski contends that the Tribunal did not ‘expressly or consistently’ determine what parts of the Balcony were common property and what were parts of Lot 502, and did not determine this by reference to the *Owners Corporation Act* definition of ‘common property’ and the Plan of Subdivision.

⁴³ Tribunal Reasons, [61].

- 51 I do not accept that the Tribunal did err in this way. As noted above, the Senior Member considered carefully and in some detail the effect of the Plan of Subdivision. The Senior Member set out details of the development in which Mr Damjanovski's apartment is located, and of the Plan of Subdivision at [37]–[42] of the Tribunal Reasons, and after setting out the parties' submissions, turned to the question: 'Is Mr Damjanovski's balcony common property within the meaning of s 4(b)(i)?'.⁴⁴ The Senior Member clearly understood that the *Owners Corporations Act* was the starting point for the analysis. Although s 4(b)(i) is the section which refers to the owners corporation's function of repairing and maintaining common property, this did not mean that (as submitted by Mr Damjanovski) the Senior Member's analysis of whether the Balcony was common property or part of Lot 502 started from a consideration of who is generally 'responsible' for balcony tiles and underlying layers.⁴⁵ Rather, the Tribunal Reasons commence with an analysis of the meaning of 'interior face', which is clearly engaged by the Plan of Subdivision.
- 52 The Senior Member acknowledged that at the time of the creation of the subdivision, there was no definition of 'interior face' in the *Subdivision Act* or regulations made under that Act. There is then a consideration of the new definition of 'interior face' in the 2021 Regulations, and the consideration of its materially identical predecessor definition in the Tribunal's decision in *Owners Corporation PS508732B v Fisher*,⁴⁶ which the Senior Member recognised did not apply to the Plan of Subdivision. The Reasons refer to the content of the Plan of Subdivision with respect to common property before applying the concept of interior face to the structural slab floor and wall.⁴⁷
- 53 The Senior Member does refer, in this context, to the rights under the *Owners Corporations Act* and the *Subdivision (Body Corporate) Regulations 1989* to affix chattels and fixtures to the interior face of a lot, and the responsibility of a lot owner for such fixtures and chattels.⁴⁸ That is not directly relevant to the determination of what property in a specific plan of subdivision is common property or lot property,

⁴⁴ Tribunal Reasons, p 11, heading before [48].

⁴⁵ Cf Applicant's Written Submissions on Appeal, [28].

⁴⁶ *Owners Corporation PS508732B v Fisher* [2014] VCAT 1358.

⁴⁷ Tribunal Reasons, [62]–[63].

⁴⁸ Tribunal Reasons, [59].

and is not (as discussed further below) an appropriate guide to the construction of the Plan of Subdivision. However, it is relevant in that it constitutes context against which plans of subdivision are prepared. It was a relevant contextual matter to consider in interpreting the Plan of Subdivision, a task for which there is limited assistance in the Plan itself or the regulations applicable at that time.

54 I grant leave to appeal on this ground, but dismiss the ground of appeal.

Ground 2 – Did the Tribunal err in construing the Plan of Subdivision?

55 The task of construing the Plan of Subdivision is a difficult one. As noted above, the Notations on the Plan itself are limited and in some ways opaque as to the exact meaning and effect, at least with respect to their effect in determining questions of ownership of common property and lot property. The Senior Member considered the Plan of Subdivision and the Notations, in the context of the limited guidance in the 2000 Regulations which were applicable to the Plan. The Senior Member also considered the definition of ‘interior face’ introduced in regulations made subsequent to the preparation of this Plan of Subdivision, and the extent to which that reflected the appropriate construction of references to ‘interior face’ in earlier regulations. The Senior Member also considered a decision of the Tribunal in which the concept of ‘interior face’ was considered in the context of a balcony in an apartment, and an authority of the New South Wales Court of Appeal in which a similar issue was considered albeit in the context of a different statutory scheme.

56 The Senior Member determined, taking these matters into consideration, that:

- (a) ‘where a lot boundary is described as interior face, the lot owner is responsible for the repair and maintenance of anything fixed to the interior face of a lot’;⁴⁹
- (b) ‘the Plan of Subdivision expressly states that the common property includes external and internal structural columns walls and slabs, and that the surface of such columns, walls and slabs forms the “interior face” of the lots in the

⁴⁹ Tribunal Reasons, [61].

subdivision. Accordingly, the interior face of the walls and slabs, that is, the surface of the concrete, forms the boundary of Mr Damjanovski's lot';⁵⁰

- (c) 'As the interior face is the surface of the structural slab floor and wall, it follows that decoration, fixtures or chattels placed on the interior face, whether by the lot owner in accordance with s 132 of the OC Act or otherwise, is the lot owner's responsibility';⁵¹ and
- (d) 'the balcony to Mr Damjanovski's lot lies within the lot. It is not common property within the meaning of s 4(b)(i) of the OC Act'.⁵²

57 After careful consideration, given the difficult issues presented in construing the Plan of Subdivision, I have concluded that the Senior Member did misconstrue the Plan. I consider that the better view is that the effect of the Plan of Subdivision is that the concrete slab floor of the Balcony, and the slab, membrane and tiles affixed to it, is common property. I consider that the Senior Member erred in finding that it followed from the fact that the surface of the columns, walls and slabs forms the 'interior face' of the lots in the subdivision, that fixtures placed on that surface form part of the Lot. My reasons for this are as follows.

58 The guidance as to what is common property and what is lot property is provided in the part of the Plan of Subdivision Notations which states that:

- (a) All external structural columns, walls and slabs are contained in Common Property No. 1.
- (b) All internal structural columns, walls, slabs and beams in the Apartment Building are contained in Common Property No. 2.
- (c) Common Property No. 1 includes all the land except the lots, certain roads and other common property. 'Lots' are not otherwise defined.
- (d) Boundaries shown by thick continuous lines are 'defined by buildings'.
- (e) The location of unmarked boundaries defined by building is 'interior face'.

⁵⁰ Tribunal Reasons, [62].

⁵¹ Tribunal Reasons, [63].

⁵² Tribunal Reasons, [64].

- 59 The aerial view plan shows the walls of the Balcony, and the outer edge of the Balcony, drawn with a thick continuous line, as well as a wall dividing it from the adjoining apartment 503. The cross-section diagram shows thick continuous lines along the floor of the Balcony. There is also a perpendicular line to a point that is part way up the space where the Balcony is, which I take to be the balustrade. There are therefore boundaries defined by building along the upright walls and the floor, or to use a more neutral term given the parties' positions as to where in the layers of the floor the boundary is located, the horizontal plane of the Balcony.
- 60 The structural concrete slab of the walls and the floor of the Balcony are, applying the express guidance in the Notations, common property. There is nothing in the Plan of Subdivision from which I can discern whether the structural components of the Balcony floor and walls are regarded as external (and so Common Property No. 1) or internal (and so Common Property No. 2). Given that the Balcony is open, and that parts of the walls and floors form the exterior of the Apartment Building as a whole, the better view is that they are external. In any event, on the present issue of whether they form part of Lot 502 or common property, that question is immaterial.
- 61 No further issue arises with the Balcony walls, given that they do not have further affixed layers.
- 62 The question is to identify where the location of the boundary between common property and Lot 502 lies on the Balcony's horizontal plane or floor, taking into account the concrete structural slab, which is undoubtedly common property, and layers of surface affixed to it, in this case the screed, waterproof membrane, and tiles. The simple statement in the Notations that the location is 'interior face' does not resolve the question with respect to the unmarked thick line along the Balcony floor.⁵³ Mr Damjanovski says that the 'interior face' is the face above the tiles, and that the tiles (and membrane and screed below it) are to be regarded as part of the structure to which they are affixed, the concrete slab. On that basis he says that the tiles, membrane and screed are common property. The Owners Corporations submit

⁵³ There are no notations along the horizontal plane of the Balcony. This can be contrasted with the small section of roof which overhangs the Balcony, which is drawn in a thick continuous line marked 'U'. The notations expressly provide that in the case of that surface marked 'U', it is the 'underside of roof' which is the location of the boundary.

that the concrete slab alone is defined as common property, and everything else is lot property. They submit that the interior face is the face of the concrete slab, between the slab and the screed which is affixed to it.

63 In resolving this issue, it is important first to identify the matter to which the words 'interior face' relate. That is not clearly stated in the Notations which simply state 'Location of boundaries defined by buildings' and then list certain boundaries with notations, then the statement: 'Interior face – all other boundaries'. In context, I consider that the reference to 'interior face' is to be understood as the 'interior face of the building'. This follows from the boundary being defined by buildings, and the precise location of the boundary being then identified by reference to the interior face. The interior face of the building is used by contrast to the 'exterior face' which is also used in the notations, for boundaries marked 'E': that is, the notations invite a consideration of the exterior and interior faces of the *building*. It does not invite consideration of the interior face of other elements in the Plan of Subdivision, such as the 'structural' features expressly identified as common property. That is, however, the effect of the Owners Corporations' submissions.

64 To understand the concept of 'interior face' as applying to the visible face of the interior, as opposed to the exterior, of the building itself is consistent with the ordinary meaning of 'face' which suggests something open to view. It is also consistent with reg 11(2) of the 2000 Regulations, which applied to the Plan of Subdivision, and provided:

Where a boundary on a plan is defined by reference to a building or part of a building, the plan must specify whether the boundary is –

- (a) the interior face of the walls, ceilings and floors of the relevant part of the building; or
- (b) the exterior face of the relevant part of the building; or
- (c) in some other location.

65 The contrast between a boundary located at 'the interior face of the walls, ceilings and floors of the *relevant part of the building*', and the exterior face or 'in some other location' indicates that 2000 Regulations when referring to 'interior face' are contemplating the *face* of walls, floors and ceilings, and not 'some other location', such as a layer under that face, or a mid-point between the interior and exterior face.

66 On this basis, I consider that the Senior Member's interpretation that the interior face is 'the surface of the structural slab floor and wall'⁵⁴ was incorrect. The Senior Member observed, in arriving at this conclusion, that:

In this subdivision, the Plan of Subdivision expressly states that the common property includes external and internal structural columns walls and slabs, and that the surface of such columns, walls and slabs forms the "interior face" of the lots in the subdivision. Accordingly, the interior face of the walls and slabs, that is, the surface of the concrete, forms the boundary of Mr Damjanovski's lot.⁵⁵

67 This is not a correct description of what the Plan of Subdivision states. Although the Plan does state that the common property is internal and external structural walls and slabs and internal columns, it does not in terms state that 'the surface of such columns, walls and slabs forms the interior face of the lots in the subdivision'. The Notation relating to 'interior face' is not expressed by reference to any 'surface'. It is also not expressed by reference to columns, walls or slabs. Although the Notations are not as clearly expressed as they readily have could been, the phrase 'interior face' must, as discussed above, be understood as being the interior face of the *building*, not individual elements. Further, and contrary to what may be implicit in the Senior Member's observation, the phrase 'interior face' is not expressed in the Plan of Subdivision by reference to what forms part of the lots, as distinct from what forms part of the common property. 'Interior face' is a concept relevant to the location of the boundary, which is equally relevant to the lots as to the common property. These misconstructions of the Plan of Subdivision contributed to the Tribunal's incorrect conclusions that the surface of the concrete formed the boundary between Lot 502 and the common property, and that the Balcony 'lies within the lot' and is not common property within the meaning of s 4(b)(i) of the *Owners Corporations Act*.

68 Equally the Owners Corporations' submissions on appeal that the location of the boundary on the Balcony floor is the 'interior face' of the concrete slab because the concrete slab is common property, and 'anything else is interior face' and thus 'lot property',⁵⁶ is incorrect. The fact that the concrete slab is expressly defined as

⁵⁴ Tribunal Reasons, [63].

⁵⁵ Tribunal Reasons, [62].

⁵⁶ Respondents' Submissions, [20]; Transcript 15/04/2026, T117.13-118.12 (Respondents' Submissions). The Respondents contended that 'the plan of subdivision tells us that [the precast panel slab is] common property and that anything else is interior face which is lot property.'

common property and the Notation that ‘Common Property No. 1 is all the land in the plan except the lots...’ does not have the consequence that everything beyond it is necessarily lot property. There is an additional question: where, exactly, in the structural element of the building which is denoted on the Plan of Subdivision by the thick continuous line, is the location of the boundary between Common Property No. 1 and the lots? That is resolved by the Notation that the relevant boundary is the ‘interior face’ of the *building*. The Owners Corporations’ interpretation treats the Plan of Subdivision reference to ‘interior face’ as if it specifically identifies the interior face as belonging to the lots, rather than treating it as a *boundary* between the two as the Notations require. The term ‘interior face’ is intended to identify the location of that boundary, and where, as here, the thick continuous line denoting the building and the boundary consists of multiple layers, there is no basis in the Plan of Subdivision to assume that the entirety of the boundary is lot property rather than common property. The answer to that question depends on the proper interpretation of where the interior face lies. As discussed above, it lies on the interior face of the building, in this case being the face of the Balcony floor, at the tiles.

- 69 There will remain questions about how fittings or fixtures applied to the interior face of the building such as carpet and other flooring should be treated. I consider that the better view is that where the building is composed of layers affixed to the structural slab, including screed, a waterproof membrane, and tiles, and that the tiles form the face of the interior of the building, the surface of the tiles is the interior face. There may then be questions as to whether, if the surface of the tiles is the interior face, the tiles themselves form part of the lot or the common property; or whether the lot property starts (as submitted by Dr Wyatt for Mr Damjanovski), ‘along the top of the tiles’, so that the tiles remain part of common property.⁵⁷ For that interpretation Dr Wyatt relied on the New South Wales Court of Appeal judgment in *The Owners SP 35042 v Seiwa Australia Pty Ltd*.⁵⁸ Although I have, with respect,

⁵⁷ Transcript 15/04/2026, T46.12–14 (Applicant’s Submissions).

⁵⁸ *The Owners SP 35042 v Seiwa Australia Pty Ltd*. [2007] NSWCA 272. In that case, the primary issue was a waterproofing membrane which sealed the concrete floor of an external terrace which was in need of repair: [3]–[4] (Tobias JA, with whom Giles JA and Basten JA agreed). Although the tiles would necessarily need to be removed to replace the membrane and then be reinstated (see [5]), it did not appear that the ownership of the tiles was directly in issue, so that while it was found that the boundary was at the ‘surface of the tiles’ (at [37]), there was no need to engage directly with the ownership of or responsibility for the tiles, as opposed to the waterproof membrane.

found the analysis in that judgment of the relevant plan of subdivision and the statutory scheme valuable, it provides limited assistance in determining the specific question of the status of the tiles in this case, given that the language of the legislation in that case engaged the concept of the 'upper surface' of a floor. Although it is a difficult question, I consider that where the interior *face* is the face or surface of the tiles, and that is the boundary, the substantial part of the tiles are on the common property side of that boundary.

70 On that basis, the surface of the tiles may, as a boundary, be regarded as part of both the lot and the common property, or neither, as a boundary surface which is not defined to belong to either side of it. I consider that the better view is that even though both of those alternatives are possible, a realistic and practical interpretation requires that the tiles in their totality be regarded as part of the common property, rather than part of the lot. The layers under those tiles, both the screed and the waterproof membrane, are also common property. I take into account in coming to this conclusion that it was not suggested by either party that the tiles had not been laid on the Balcony by the time of the registration of the Plan of Subdivision, and instead it appeared to be common ground that the tiles (with the underlying screed and waterproof membrane) were laid by the time the Plan was registered.⁵⁹

71 Although this suffices to determine this ground of appeal in favour of Mr Damjanovski, it is appropriate to acknowledge that the interpretation that I have preferred above departs from the interpretation by the Tribunal in *Fisher*, which was referred to by the Senior Member. In *Fisher*, the Tribunal found 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 the (sic) where balconies are constructed of concrete then tiled over, interior face means the upper face of the concrete structure not the tile...⁶⁰

72 For reasons stated above, I do not accept that the interior face in the Plan of Subdivision is the 'interior face of the *structure* of the building', insofar as the

⁵⁹ On this issue see *Seiwa*, [38] (Tobias JA, with whom Giles JA and Basten JA agreed), observing the relevance of considering the state of the building at the time of the registration of the plan of subdivision. Although expressed with respect to the *Strata Schemes (Freehold Development) Act 1973* (NSW), I consider that it is appropriate to approach the interpretation of the Plan of Subdivision in accordance with the *Subdivision (Procedures) Regulations 2000* in the same way.

⁶⁰ *Fisher*, [21].

reference to 'structural' is a reference to the structural elements of walls and slabs referred to in Notations rather than the building, which may be composed of those structural elements and layers affixed to them. In *Fisher*, the plan of subdivision stated 'Location of boundaries defined by buildings – interior face – all boundaries.' It appears from the reference to content of that plan in the reasons in *Fisher* that the reference to 'interior face' was to the interior face of the 'building'. The Tribunal in *Fisher* referred to the fact that this plan was described as being 'based on survey', and concluded that this 'means that the title boundaries seek to depict the building "as built"'.⁶¹ However, the reasons in *Fisher* do not identify the consequences, in the Tribunal's view, of the plan of subdivision depicts the building 'as built'. There was no reference in *Fisher* to what the 'as built' structure was at the time of registration of the relevant plan of subdivision, and no finding as to whether the 'as built' structure included tiles and layers below them installed on the concrete slab, or whether there was no such finished surface. In these circumstances, a reference in a plan of subdivision to 'based on survey' or a conclusion that the plan refers to the building 'as built' does not of itself appear to me to be a notation which assists in determining the issue of where the interior face lies. It is only of assistance if the state of the building 'as built' at the time of the plan is able to be identified.

73 In *Fisher*, as in the present case, the Tribunal relied, in reaching the conclusion that the 'interior face' was the 'interior face' of the concrete structure, rather than the face of the tiles affixed to it, on s 132 of the *Owners Corporation Act*. In this proceeding, the Senior Member noted that reg 507 of the *Subdivision (Body Corporate) Regulations* 'was in exactly the same terms as s 132 of the OC Act'.⁶² Section 132 provides:

132 Right to decorate interior walls, floors and ceilings

- (1) If a boundary of a lot is shown on a plan of subdivision as being the interior face of the building, the lot owner has the right to decorate or attach fixtures or chattels to that face.
- (2) This section permits works such as curtaining, painting, wallpapering and installing floor coverings, light fittings and other chattels.

⁶¹ *Fisher*, [14].

⁶² Tribunal Reasons, [59].

74 In *Fisher*, the Tribunal observed:

Section 132 gives the lot owner the right to fix anything to the interior face of the lot. In my view, section 132 is consistent with the interior face meaning the face of the *structure* of the building.⁶³

75 In the present case, the Senior Member stated, after referring to s 132 and reg 507:

That is, since at least 1989, the Victorian legislation has included an express right to decorate and affix fixtures and chattels to the interior face of a lot, despite it being the boundary of the lot. A lot owner in Victoria has been responsible for such decoration, fixtures and chattels since then.⁶⁴

76 Section 132 of the *Owners Corporations Act* and reg 507 of the *Subdivision (Body Corporate) Regulations* do not, in my view, have the consequence that the interior face of a building must be lot property. If anything, the existence of s 132 and reg 507, in providing for a right of lot owners to affix things to the interior face where the boundary of the lot is the interior face of the building, suggests that the surface constituting the interior face may not otherwise be lot property. If it was lot property, by reason of the interior face being the interior face of the building on a plan of subdivision, the lot owner is entitled to use that surface as they wish and there would be no need of a specific statutory right to that effect. Conversely, if the surface is common property, the statutory provision provides the necessary entitlement for the lot owner to affix fixtures and chattels to the surface. If s 132 cannot be taken as reflecting any position on ownership of the surface constituting the interior face of the building, and is simply intended to clarify entitlements with respect to surfaces constituting boundaries, it remains the case that it does not support a conclusion that the surface and anything between it and the structure of the building constitute lot property.

77 The Tribunal in *Fisher* and the Senior Member in this case also referred to questions of responsibility for the surface of the balconies as supporting the view that everything above the structural slab of the balcony constitutes lot property.⁶⁵ In

⁶³ *Fisher*, [23] (emphasis added).

⁶⁴ Tribunal Reasons, [59].

⁶⁵ Tribunal Reasons, [59]–[61]; [63]; *Fisher*, [20].

Fisher, the Tribunal referred⁶⁶ to reg 10 of the 2011 Regulations, which provides, in reg 10(4), the following guidance with respect to the phrase ‘interior face’:

Interior Face lies along the interior face of any wall, floor (upper surface of elevated floor if any), ceiling (underside of any suspended ceiling if any), window, door balustrade or the relevant part of the building. Any internal coverings, waterproof membranes and fixtures attached to walls, floors, and ceilings are included within the relevant parcel;

78 The Tribunal then observed that:

The 2011 registrar’s requirements make it clear that any internal coverings (meaning internal to the lot) including tiles and waterproof membrane are within the lot and not part of common property. The regulation makes for good sense and practicality. It would be unduly onerous to require an Owners Corporation to repair and maintain the tiles, floor coverings, paint and light fittings within individual lots.⁶⁷

79 It is true that it is practical for lot owners to be responsible for the upkeep of the surface of the interior face of the building which is within the area of their lot, such as tiles (whether internal or external). However, that outcome does not require an interpretation of the Plan of Subdivision which renders everything above the concrete slab as being lot property. Provisions of the *Owners Corporations Act* also have the effect of requiring lot owners to take care of common property or of lot property to the extent that it may affect the use or enjoyment of other lots or the common property. Sections 129 and 130, which were in the same form at the time of the Plan of Subdivision in this case being registered, provide as follows:

129 Care of lots

A lot owner must—

- (a) properly maintain in a state of good and serviceable repair any part of the lot that affects the outward appearance of the lot or the use or enjoyment of other lots or the common property; and

⁶⁶ *Fisher*, [24].

⁶⁷ *Fisher*, [25]. The Senior Member in the present case also observed that the right to decorate a lot includes ‘[t]he right to select the colour and features of the tiles to be laid’ and that it would in her view ‘be an inappropriate derogation from the lot owner’s proprietary interest, and right to decorate, if the owners corporation were to have this responsibility’: Tribunal Reasons, [82]. While this is an important consideration for truly internal spaces, the question of any right to select colour of tiles may involve different consideration in outdoor spaces, such as a balcony, which are external to the building and visible from outside. In such cases, questions of consistency of appearance may favour decisions such as tile colour being made on a building wide basis and would be a factor facilitated by tiles and other surfaces being common property.

(b) maintain any service that serves that lot exclusively.

130 Care of common property

A lot owner must not use or neglect the common property or permit it to be used or neglected in a manner that is likely to cause damage or deterioration to the common property.

80 These obligations, and in particular s 130, will ensure that if a lot owner has use of common property there are obligations to use it with care and not neglect it. Further, in a case such as this where the effect of the Plan of Subdivision is that the boundary is on the face of a floor so that tiles (and underlying layers) may be part of common property, if an owners corporation is required to repair or replace those tiles and underlying layers, this may be 'repairs, maintenance, or other works undertaken wholly or substantially for the benefit of one or some, but not all, of the lots affected by the owners corporation', within the meaning of s 49(1). Such works may, according to s 49(3), be to common property or a lot. In such a case, the cost of such works may be recovered as a debt from the relevant lot owner or owners. The amount payable by the lot owners is, pursuant to s 49(2), to be calculated on the basis that the owner of the lot that benefits more pays more. Consequently, in a case such as the present, a lot owner with private use of a balcony which requires repairs to a floor with tiles, waterproof membranes and screed which form part of common property would be required to pay more of the cost because that lot owner will benefit more.

81 I also note, and agree with, the Senior Member's observation that if (contrary to her conclusion) the works were works to common property or works to services for which the owners corporation is responsible, they would be 'extraordinary items of expenditure' within the meaning of s 24 of the *Owners Corporation Act*. The Senior Member observed that these works would, pursuant to s 24(2A), be payable by Mr Damjanovski. Section 24(2A) provides:

Fees and Charges for extraordinary items of expenditure relating to repairs, maintenance or other works that are carried out wholly or substantially for the benefit of some or one, but not all, of the lots affected by the owners corporation must be levied on the basis that the lot owner of the lot that benefits more pays more.

82 I do not express a view as to whether the Senior Member was correct to conclude that all of the work which will be required to repair the Balcony and other works to

prevent water ingress were appropriately to be borne by Mr Damjanovski.⁶⁸ That finding is, as discussed below, the subject of ground 17, by which a procedural fairness objection is raised on the basis that no party referred to or was invited to make submissions on s 24(2A). However, it is plainly the case that s 24(2A) may be relevant to the allocation of extraordinary items of expenditure relating to repair or maintenance of common property which is used primarily by a particular lot owner, and which provides a specific benefit to one or more other lot owners but not all lot owners.

83 It may also be relevant to the determination of proper allocation of expenditure to take into account s 24(2B), pursuant to which an owners corporation ‘may levy special fees and charges on a lot owner relating to repairs, maintenance and other works arising from the particular use of a lot by the lot owner’. If a lot owner, or people such as tenants authorised by the lot owner to occupy the lot, use a tiled balcony area in a way which causes damage to tiles, that may mean that the repairs of the tiles arise from the particular use of the lot by the lot owner and that it is open to levy fees or charges on the lot owner for the cost of repair to the tiles notwithstanding that they may constitute part of common property.

84 It is noteworthy that new and more recent plans of subdivision are unlikely to give rise to the kind of difficult issues of ownership of, or responsibility for, property involving boundaries defined by building as have arisen in this case. This is because of the more extensive guidance provided by the 2021 Regulations. By stipulating in reg 10 that points other than interior or exterior faces of a building may be identified as the boundary, including a median of the floor, ceiling, wall, window, door or balustrade or ‘some other location’, these Regulations engage more realistically with the complexity of a boundary defined by building, given the reality of multiple layers of surfaces which may constitute a relevant part of a building. It could also be expected that plans of subdivision will state with precision where these boundaries are located for all relevant parts of a building. Further, there is some guidance provided, with respect to multilayered elements of a building which form a boundary, as to issue of ownership of particular parts of property in the definitions and diagrams provided in reg 10(4).

⁶⁸ Tribunal Reasons, [117].

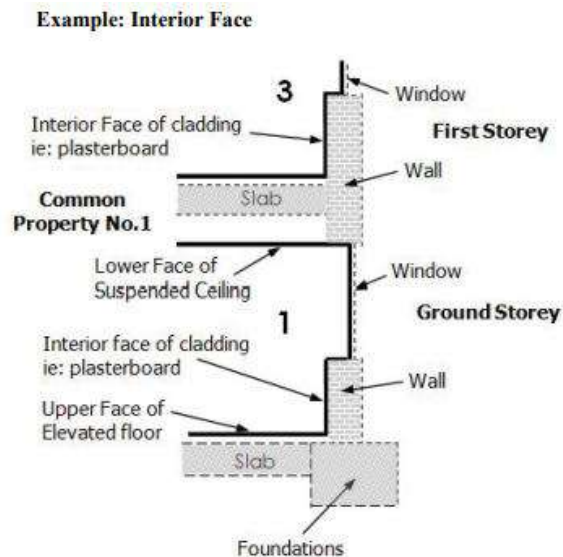
85 I have not considered it appropriate to apply those definitions to the Plan of Subdivision in this case, given that detailed definitions in the 2021 Regulations (and the 2011 Regulations before them) did not apply. However, I do note that I have some reservations as to the Senior Member's interpretation of the definition of 'interior face' in reg 10(4) of the 2021 Regulations. That definition, which includes the statement that 'any internal coverings, waterproof membranes and fixtures attached to walls, floors, and ceilings are included within the relevant parcel', was described by the Senior Member as reflecting a 'clear and long standing intention of the Victorian legislature that, where a lot boundary is described as interior face, the lot owner is responsible for the repair and maintenance of anything fixed to the interior face of a lot'.⁶⁹ Although it may be the case that the various statutory and regulatory provisions relating to plans of subdivision and owners corporations have the effect that lot owners are generally responsible for repair and maintenance of anything affixed to the interior face of a lot, that is not, in my view, the effect of the definition of 'interior face' in reg 10(4) of the 2021 Regulations.

86 That definition, although attempting to stipulate in what property 'internal coverings, waterproof membranes and fixtures attached to walls, floors, and ceilings' are included, involves a problematic element of ambiguity in the statement that those elements 'are included within the *relevant* parcel'. 'Parcel' is defined by reg 4 as meaning 'the land shown on a plan as a lot, road, reserve, common property or residual land', so its meaning in any regulation will fall to be determined by the context.

87 In the case of a boundary between lot property and common property which is defined by building, and which is the floor of a structure composed of concrete slab and then layers of waterproofing and a surface such as tiles or plaster, it is not entirely clear whether the statement that they are 'included within the relevant parcel' means that it is included in the parcel of which the structural element forms part (which in this case is common property), or the parcel of the space on the other side of the interior face (in this case, an individual lot). That is not resolved by the language of the definition in the 2011 and 2021 Regulations which refers to 'internal coverings, waterproof membranes and fixtures attached to walls, floors, and ceilings'

⁶⁹ Tribunal Reasons, [61].

because in the case of screed or a waterproof membrane they are attached to both the slab floor or wall as well as any surface on that floor or wall. The example diagram included in the 2011 and 2021 Regulations is intended to assist in demonstrating the effect of the definition:



88 Unfortunately, the diagram is of limited assistance in resolving the ambiguous reference to ‘relevant parcel’, given that:

- (a) it apparently shows two parcels — the lot property on the inside of the line showing the ‘interior face of cladding ie: plasterboard’ and the common property where the slab is located; and
- (b) it does not engage with layers between a slab and the interior face surface constituted by the plasterboard, such as waterproofing, screed or insulation.

89 The diagram may suggest, at least in the case of that example, that because the dark line of the cladding and interior face shows the boundary, the slab, and potentially layers under or behind that cladding form part of the parcel on the other side. That would be the property of which the slab forms part, and thus the common property. It is unnecessary to resolve this question. However, it does demonstrate the need for the clearest possible labelling of plans of subdivision to avoid the potential for different interpretations. The more detailed requirements in the 2021 Regulations facilitate more informative labelling and notation on plans of subdivision. They reflect the minimum requirements only, and those who prepare plans of subdivision should consider those requirements carefully and whether there is additional

information which can put ownership of elements of buildings affected by an owners corporation beyond doubt.

Conclusions on ground 2

- 90 For the reasons above, I have concluded that the layers constituting the floor of the Balcony were common property, and the Tribunal erred in identifying the Balcony as lot property owned by Mr Damjanovski. It follows that I also consider the Tribunal's conclusion that Mr Damjanovski had failed to comply with the obligation imposed on him by s 129 of the *Owners Corporation Act* by failing to maintain the Balcony is in error, as that obligation is one imposed on lot owners with respect to lot property, and services serving that lot exclusively. It does not apply to common property.
- 91 In these circumstances, I grant leave to appeal on ground 2 and allow the appeal. The declaration to the effect that Mr Damjanovski did not comply with s 129(a) by failing to maintain the Balcony will be set aside.

Remaining grounds of appeal

- 92 The conclusion that the screed, waterproof membrane and tiles on the Balcony floor are common property has consequences for other arguments put to the Tribunal and conclusions on those arguments. Following the conclusion that the Balcony was Mr Damjanovski's lot property, the Tribunal addressed the contentions that the passage of rainwater over the Balcony constituted 'a service' within the scope of ss 4(b)(ii), 4(b)(iii), or s 47 of the *Owners Corporation Act*. Section 4(b) relates to the owners corporation's functions and provides:

to repair and maintain —

- (i) the common property;
- (ii) the chattels, fixtures, fittings and services related to the common property or its enjoyment;
- (iii) equipment and services for which an easement or right exists for the benefit of the land affected by the owners corporation or which are otherwise for the benefit of all or some of the land affected by the owners corporation;

- 93 Section 46 imposes a related duty on the owners corporation, in that it states that the owners corporation must repair and maintain the common property and the chattels, fixtures, fittings and services related to the common property or its enjoyment.
- 94 The Tribunal, having concluded that the Balcony was within Mr Damjanovski's lot, considered the argument that the Balcony provided a 'service' of water drainage and so fell within s 4(b)(ii). The Tribunal rejected that argument on the basis that the 'services' in s 4(b)(ii) must be 'related to the common property or its enjoyment', and the Balcony and water flow over it was not related to the common property or its enjoyment.⁷⁰ The Tribunal also rejected Mr Damjanovski's contention that the Balcony was a service for which an easement exists for the benefit of the land affected by the owners corporation within the scope of s 4(b)(iii).⁷¹
- 95 The Tribunal also concluded that the Balcony tiles, waterproof membrane and screed were not within the scope of the owners corporation's obligation in s 47(1) to repair and maintain services 'in or relating to a lot that is for the benefit of more than one lot and the common property'. The Tribunal rejected Mr Damjanovski's contention that the expanded definition of service in s 47, which 'includes a service for which an easement or right is implied over the land affected by the owners corporation or for the benefit of each lot and any common property by section 12(2) of the Subdivision Act 1988', encompasses 'allow[ing] the passage of surface run off water from his lot and Lot 503 to the drains in the common property at the perimeter of the balcony and into the drains located in the floor of the balcony', for which a drainage easement is to be implied.⁷²
- 96 There are several grounds of appeal relating to the Tribunal's determination of these issues: grounds 3 and 4 relate to the Tribunal's conclusions with respect to s 46(b)

⁷⁰ Tribunal Reasons, [67]–[69].

⁷¹ Tribunal Reasons, [70]–[71].

⁷² Tribunal Reasons, [72]–[79].

(and s 4(b)) of the *Owners Corporation Act*.⁷³ Ground 5 relates to the Tribunal's conclusions with respect to s 47.

97 Having concluded in this appeal that the Balcony tiles, waterproof membrane and screed all constitute common property, the utility in considering arguments relating to ss 4(b)(ii) and (iii) fall away. Section 4(b)(i) provides expressly for the owners corporation function of repairing and maintaining common property. In these circumstances, it is unnecessary to go further and consider whether it is a service related to the common property or its enjoyment, for which an easement exists, so that ss 4(b)(ii) or 4(b)(iii) may apply. It is also unnecessary to consider whether the service would be one 'in or relating to a lot that is for the benefit of more than one lot and the common property' for the purposes of s 47(1). I refuse leave to appeal on grounds 3, 4 and 5.

98 Other grounds of appeal relate to the Notices to Repair, including whether they were authorised by or complied with the requirements of s 48 of the *Owners Corporations Act*. Grounds 6, 7, 8 and 9, and 15, 16, 17 and 18 all related to this issue. The Notices to Repair were expressed to rely on s 48 of the *Owners Corporations Act* as well as s 49 and unspecified Owners Corporation Rules. Section 48 relates to the circumstance in which a lot owner has refused or failed to carry out works to the lot owner's lot. Section 49 provides for an owners corporation to recover as a debt the cost of repairs, maintenance or other works carried out wholly or substantially for the benefit of one or some lot owners. The requirements in the Notices were expressed not as a claim to recover the cost of repairs, maintenance or other work already carried out as a debt. They were expressed as requiring Mr Damjanovski and his wife 'to carry out the following repairs/maintenance within 28 days of the Notice'. It could, therefore, only be supported by s 48 and not s 49.

99 In circumstances where I have concluded that the tiles, waterproof membrane and screed on the floor of the Balcony are common property, it follows that s 48, which

⁷³ The Tribunal did not expressly refer in the conclusions to s 46, and focused on the references in s 4(b) to the functions of owners corporations with respect to common property. However, the Tribunal noted that Mr Damjanovski's contentions were that the Owners Corporations had responsibility for repairing the Balcony as a 'drainage service' pursuant to s 46 as well as ss 4(b)(ii), 4(b)(iii) and 47, so it is implicit in the Tribunal's conclusions that it rejected the contention that some or all of ss 4(b)(ii), 4(b)(iii), 46 and 47 had the consequence that the Owners Corporations were responsible for repairs.

applies only to notices to repair a lot owner's lot if not properly maintained, cannot support the Notices. The grounds of appeal stated by Mr Damjanovski do not make this specific objection, but make other objections with respect to the Notices, which in effect assume that some or all of the repairs would relate to lot property. They were not expressly stated as being in the alternative to ground 2 but do in practice to some extent operate in that way. It is unnecessary, and in the circumstances of the way in which the grounds are expressed, would be artificial, to determine grounds 6, 7, 8 and 9, and 15 and 16. I refuse leave to appeal on those grounds.

100 Grounds 17 and 18 relate to the Tribunal's determinations that Mr Damjanovski would be responsible for the costs of the repairs, pursuant to s 24(2A) of the *Owners Corporations Act*. Ground 17 is to the effect that this determination involved a denial of procedural fairness as the parties had not referred to that section in their submissions, and the Senior Member had not invited submissions on that section or its effect before making the findings as to responsibility for costs, based on that section, in her reasons. Ground 18 is to the effect that the Tribunal erred in the interpretation of subsection 24(2A).

101 Section 24(2A) of the *Owners Corporations Act* relates to fees and charges for extraordinary items of expenditure relating to repairs, maintenance or other works which are carried out wholly or substantially for the benefit of some or one, but not all lot owners. It may be repairs to or maintenance of common property or lot property. The section and its application may, therefore, have some relevance notwithstanding my finding (contrary to that of the Tribunal) that the Balcony screed, waterproof membrane and tiles are common property. However, I do not consider that it is appropriate to determine these grounds on the appeal for two reasons:

- (a) First, my determination that the work relates to common property is a materially different application of the law which, if taken into account by the Tribunal, could result in a different conclusion on allocation of expenditure. It is appropriate in light of the success of ground 2 for these issues to be considered anew, without more, and that remains the case whether or not grounds 17 and 18 are considered.

(b) Secondly, although the Senior Member did make findings as to Mr Damjanovski's responsibility for the expense of works pursuant to s 24(2A), no orders were made to that effect, and an opportunity remained to make further submissions on that issue. It is unnecessary, and would be artificial and premature, to make any findings as to procedural fairness which would be called for by ground 17.

102 In light of these conclusions, I would grant leave for these grounds of appeal, but conclude that they are unnecessary to determine.

103 Finally, ground 19 raises whether the Tribunal denied Mr Damjanovski natural justice by failing to consider his 'pleaded claims under section 16 of the *Water Act* including for payment ... by one, other or both of the Respondents if costs were incurred by the Applicant in relation to the ingress of rainwater falling on the Balcony from common property into other lots'.

104 It is true that the Tribunal did not address matters raised by Mr Damjanovski in his points of claim and defence, in reliance on the *Water Act*.⁷⁴ However, he did not address that claim in his written submissions. Dr Wyatt described it, in oral submissions at the hearing of this appeal, as a 'further, further, further, alternative argument'.⁷⁵

105 Section 16 relates to liability arising out of the flow of water from the land of a person on to other land where the flow is not reasonable and causes injury to any other person, damage to the property of any other person or economic loss to any other person. It provides that the person who caused the flow is liable to pay damage to that other person in respect of that injury, damage or loss.

106 I do not consider it appropriate to consider this issue in light of my conclusions that the Balcony screed, waterproof membrane and tiles were common property, which make the contentions on appeal with respect to the *Water Act* inapt to address in any realistic way. However, in light of Mr Damjanovski's failure to address the issue in submissions before the Tribunal, I consider it appropriate to record my conclusion

⁷⁴ Points of Claim, [16], [19]; and **Points of Defence** to Counterclaim dated 28 September 2023, [5].

⁷⁵ Transcript 15/04/2026, T74.26-27.

that there was no procedural fairness failure on the part of the Senior Member in failing to address the issue in the Tribunal Reasons. The matter was raised in a summary way in the points of claim. For example, it was claimed that the water flow was caused by failures on the part of the Owners Corporations to ‘repair and maintain the common property of the Building’, but there was no identification of what that common property was or what the required repairs were.⁷⁶ In the absence of submissions made by Mr Damjanovski to elaborate on exactly how s 16 of the *Water Act* was said to apply, it would have been difficult and speculative for the Tribunal to seek to determine the point. The Tribunal would potentially have been entitled to decide that Mr Damjanovski had abandoned the point if he did not make any submissions to support it.⁷⁷ Reference to an issue without elaboration or submissions may not be sufficient to make it a central or seriously put issue which must be determined by the Tribunal. The *Water Act* argument was not sufficiently articulated in the points of claim that it became an issue that the Tribunal was required to consider notwithstanding that it was not supported by argument.⁷⁸ There was, in my view, no procedural fairness failure on the part of the Tribunal in not addressing the claim under the *Water Act*. For that reason, I would not grant leave with respect to ground 19.

Disposition of the Appeal

107 I have concluded that the Tribunal erred in determining that the Balcony was relevantly part of Mr Damjanovski’s lot, and that he was for that reason responsible for the repairs to the Balcony.

108 The application for leave to appeal was made after the Tribunal had made the declaration and before the Tribunal had made final orders in relation to the carrying out of repairs. The orders made by the Tribunal at the time of making the declaration on 29 May 2025 provided for the parties to file minutes of proposed consent orders ‘in relation to the carrying out of the necessary repairs to prevent and cease water

⁷⁶ Points of Defence, [16].

⁷⁷ See, for example, *SZEIV v Minister for Immigration and Multicultural and Indigenous Affairs* [2006] FCA 1798, [34]–[35] (Bennett J). See also, with respect to the position of Tribunals, *SZSRQ v Minister for Immigration and Border Protection* [2014] FCCA 2205, [59]–[61] (Judge Manousaridis).

⁷⁸ See, eg, *Hong v Minister for Immigration and Border Protection* (2019) 269 FCR 47, 66–67, [70]–[71] (Bromwich and Wheelahan JJ).

leaks and damage to other lots and common property', and if they did not file consent orders, for the matter to be listed for further directions. The Tribunal had facilitated the process of agreeing consent orders for the carrying out of repairs by having made findings with respect to the required repairs and Mr Damjanovski's responsibility for the cost repairs, including by reference to the benefit that the Tribunal found he, as lot owner, would receive from the repairs.

109 I have considered whether it is possible, to avoid the expense and time involved in the matter being remitted to the Tribunal, to make final orders which would address the central questions from the proceedings below, of the carrying out and cost of the repairs and maintenance to address the water ingress issue, having regard to the findings made by the Tribunal. Such a course may potentially be empowered by s 148(7)(b) of the *Victorian Civil and Administrative Tribunal Act 1998* (Vic), which provides that the Court in an appeal under s 148 of the Act, may make 'an order that the Tribunal could have made in the proceeding', and s 148(7)(d), which provides for the Court to make any other order it thinks appropriate. Such a course may potentially be empowered by s 148(7)(b) of the *Victorian Civil and Administrative Tribunal Act 1998* (Vic), which provides that the Court in an appeal under s 148 of the Act, may make 'an order that the Tribunal could have made in the proceeding', and s 148(7)(d), which provides for the Court to make any other order it thinks appropriate. The use of the power in s 148(7)(b), if appropriate, would by avoiding the need for remittal to the Tribunal facilitate the just, efficient, timely and cost effective resolution of the real issues in dispute between the parties, be consistent with the Court's obligation to give effect, in the exercise of its powers to the overarching purpose in the *Civil Procedure Act 2010* (Vic).⁷⁹

110 I have concluded that it would not be appropriate to make final orders to finalise the proceeding below. The Tribunal's factual and legal findings in relation to responsibility for the repairs or the cost of repairs were made against the background of the finding that the Balcony screed, membrane and tiles were lot property. The factual findings as to the repairs required have not been challenged on appeal, and there is no reason why those findings would need to be revisited. However, the Tribunal's findings relating to responsibility for the repairs and their

⁷⁹ *Civil Procedure Act 2010* (Vic), ss 7 and 8.

cost *may* have been different had the Tribunal concluded, as I have concluded on appeal, that the relevant parts of the Balcony were common property.

111 The Senior Member did expressly consider the possibility that she may be wrong in her finding that the repairs were not properly to be characterised as repairs to common property, and expressed the view that if the cost of repairs was required to be paid by one of the Owners Corporations it would constitute an item of extraordinary expenditure pursuant to s 24(2A) of the *Owners Corporation Act*, which is to be levied on the basis that the owner of the lot that benefits more pays more.⁸⁰ I accepted at [82] above that it was open to view the cost of expenditure relating to repair or maintenance of common property which is used primarily by a particular lot owner, and which provides a specific benefit to one or more other lot owners but not all lot owners, as falling within the scope of s 24(2A). However, as noted at [101] and [102] above, a procedural fairness objection was raised to the Senior Member's findings on that issue.⁸¹ I did not formally determine the grounds relevant to that issue, but I do consider it would be appropriate for the Tribunal, in the exercise of its specialist jurisdiction with respect to owners corporations, to hear submissions and determine on the basis of those submissions the issues of responsibility of the cost of the repairs. For me to attempt to determine that issue by reference to the Senior Member's findings, and my own inferences from those findings would, in my view, exceed the scope of the incidental fact finding in which a Court exercising the s 148(7)(b) power may properly engage.⁸²

112 It will, therefore, be necessary to remit the proceeding for the remaining issues to be determined.

113 Before I make formal orders to remit the matter I will, however, hear the parties as to whether they may be able to resolve the issues without remittal, potentially with the assistance of a judicial mediator of the Court. I will also hear them as to the costs of the proceeding.

⁸⁰ Tribunal Reasons, [117].

⁸¹ I note also that it was submitted for Mr Damjanovski that it was not appropriate for the Tribunal to have relied, at [122] of the Tribunal Reasons, on s 47A(3) of the *Owners Corporation Act* for a conclusion that he could have carried out work involving installations or repairs of downpipes on external walls. See Applicant's Submissions, [140]–[146].

⁸² *Victorian Legal Services Commissioner v McDonald* (2019) 57 VR 186, 234 [160] (Tate, Kaye and Emerton JJA).