

# VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

## CIVIL DIVISION

### BUILDING AND PROPERTY LIST

VCAT REFERENCE NO. W15/2014

### CATCHWORDS

*WATER ACT 1989*; an initial claim was made regarding an alleged flow of water from the respondent's unit in an apartment building to the unit below; terms of settlement were entered into at a mediation of the proceeding which required the respondent to carry out waterproofing works to his balcony, but also provided for financial consequences in the event that the waterproofing works were effective, alternatively, were not effective, at the end of an agreed assessment period; after the conclusion of the assessment period the respondent brought a counterclaim asserting that he was entitled to payment under the terms of settlement as the waterproofing works had been effective; waterproofing works found to be effective at end of assessment period; award made in favour of respondent.

<b>APPLICANT</b>	Mem Nominees Pty Ltd (ACN 104 190 070)
<b>RESPONDENT</b>	Chun Jian Cheng
<b>WHERE HELD</b>	Melbourne
<b>BEFORE</b>	C Edquist, Member
<b>HEARING TYPE</b>	Hearing
<b>DATE OF HEARING</b>	10 and 11 October 2018
<b>DATE OF ORDER</b>	23 November 2018
<b>CITATION</b>	Mem Nominees Pty Ltd v Cheng (Building and Property) [2018] VCAT 1805

### ORDER

- 1 The claim of the applicant, Mem Nominees Pty Ltd, is dismissed.
- 2 In respect of the respondent Mr Cheng's counterclaim, the applicant, Mem Nominees Pty Ltd, must pay Mr Cheng the sum of \$36,096.
- 3 Costs are reserved. Each party may make an application for costs within 60 days. Any such application is to be referred by the Principal Registrar to Member Edquist for further directions.
- 4 Reimbursement of fees under s115B of the *Victorian Civil and Administrative Tribunal Act 1998* is reserved. Any such application is to be referred by the Principal Registrar to Member Edquist for further directions.

C. Edquist  
**Member**

**APPEARANCES:**

For the Applicant: Mr P Cadman of Counsel

For the Respondent: Mr D Cafari of Counsel

## REASONS

### INTRODUCTION

- 1 This case arises out of a flow of water from a unit in a two storey apartment block at 43-51 Jeffcott Street, West Melbourne into the unit immediately below.
- 2 The applicant (“**Mem Nominees**”) is the owner of the lower unit. It began proceedings against the respondent (“**Mr Cheng**”), who is the owner of the upper unit, in February 2014. The gist of the action was that water was flowing down from Mr Cheng’s unit into Mem Nominees’ apartment as a result of the defective state of Mr Cheng’s unit. The particulars of claim referred to issues with the waterproof membrane of Mr Cheng’s balcony, the fall of the floor of the balcony, the penetrations made for a hot water service located on the balcony, leaks in the hot water service, a blockage in the outlet drain on the balcony, and a leak in Mr Cheng’s toilet.
- 3 Mr Cheng disputed the allegations, and in particular asserted there was nothing wrong with the hot water unit, that the outlet drain was not blocked, and that the toilet was not leaking. Instead, Mr Cheng suggested that the damage was consistent with the presence of a roof leak and cracks in the common walls. These, of course, would be issues for which the owners’ corporation would be responsible.
- 4 The parties attended a mediation on 16 May 2016, which resulted in the execution of terms of settlement by the parties on that day (“**the Terms of Settlement**”).
- 5 The Terms of Settlement required Mr Cheng to undertake certain works on the balcony in stages. They also made provision for financial consequences which were to arise once it became clear whether Mem Nominees’ contention that the water had been leaking from Mr Cheng’s balcony was justified or not. If after 12 months there were no leaks from the balcony into Mem Nominees’ unit, Mr Cheng would pay Mem Nominees \$50,000. On the other hand, if there were leaks from the balcony into Mem Nominees’ unit at the expiration of 12 months, Mem Nominees would pay Mr Cheng for the rectification works, plus the sum of \$20,000.
- 6 The rationale for the agreement that Mr Cheng pay \$50,000 to Mem Nominees in the event that there were no leaks from the balcony at the end of the assessment period was, it is clear, that the absence of leaks would demonstrate that the past leaks had in fact originated as a result of a faulty waterproofing membrane and an inadequate drain in the balcony. Conversely, it is clear that the rationale for the agreement of Mem Nominees to pay Mr Cheng, if there were leaks after the end of the assessment period, was that the continuation of the leaks would demonstrate that the waterproofing membrane and undersized drain had not been the original problems, as alleged by Mem Nominees.

7 The point of the hearing was to determine whether Mem Nominees was entitled to recover \$50,000 or Mr Cheng was entitled to be paid.

#### **A BRIEF HISTORY OF THE PROCEEDING AFTER THE TERMS OF SETTLEMENT WERE SIGNED**

8 After the works had being carried out, Mr Cheng successfully applied in October 2015 to have the proceeding reinstated so that he could seek payment under clause 2E of the Terms of Settlement.

9 On 19 January 2016 orders were made, including a declaration that Mr Cheng had carried out the works required under the Terms of Settlement. However, no monetary award was made in favour of Mr Cheng at the hearing on 19 January 2016 because he had not filed a counterclaim.

10 A counterclaim was duly filed. Programming orders were made at a directions hearing on 22 July 2016.

11 Mem Nominees had not been present or represented at the hearing on 19 January 2016. At a directions hearing in September 2016, Mem Nominees flagged that an application would be made under section 120 of the *Victorian Civil and Administrative Tribunal Act 1998* (“**the VCAT Act**”) to set aside the orders and findings made on 19 January 2016 in its absence.

12 The s120 application came on for hearing on 3 March 2017, and the orders made on 19 January 2016 were set aside. The proceeding was then referred to a compulsory conference on 21 April 2017.

13 The proceeding did not settle at the compulsory conference, and was referred to a directions hearing in June 2017.

14 At the June directions hearing, a joint inspection of the property was arranged for 30 June 2017, and an order made regarding further expert reports. The proceeding was listed for final hearing on 8 November 2017.

15 At the hearing on 8 November 2017, the Tribunal was advised that the director of the applicant, Mr Max Magnani, was terminally ill. The applicant sought an order that the hearing be adjourned, and ultimately Mr Cheng agreed with this course. It was directed that a preliminary hearing should be conducted “on the papers” as to whether the Terms of Settlement should be set aside.

16 At a compliance hearing on 23 January 2018, the Tribunal was informed that Mr Magnani all had died. The proceeding was fixed for hearing on 26 April 2018.

17 At the hearing on 26 April 2018, I dismissed the applicant’s application that the Terms of Settlement should be set aside, and listed the proceeding for a further hearing on 10 October 2018. The applicant was granted leave to claim from Mr Cheng the sum of \$50,000, pursuant to paragraph 2D of the Terms of Settlement.

## **THE HEARING ON 10 AND 11 OCTOBER 2018**

- 18 The hearing was concerned with the determination of whether, following the performance of waterproofing works on the balcony by Mr Cheng and the delivery of a number of reports by Mr Mladichek, Mr Cheng was entitled to payment under the Terms of Settlement, or whether Mem Nominees was entitled to payment. At the outset of the hearing, it was agreed that Mr Cheng would present his counterclaim first, as he was in effect the applicant.
- 19 Mr Cheng was represented at the hearing by Mr D Cafari of counsel. Mr Cheng's wife, Ms Hai Hong Liu, gave evidence on his behalf, and Mr Cheng called as a witness of fact, Mr Daniel Dudas, who worked for the waterproofing company that had waterproofed the balcony. Mr Cheng also called Mr Branko Mladicheck. The capacity in which Mr Mladichek gave evidence is a matter of contention that will be discussed below.
- 20 Mem Nominees was represented by Mr P Cadman of counsel. The only witness called on behalf of Mem Nominees was Mr Alasdair Macleod, who gave expert evidence.

### **MR CHENG'S COUNTERCLAIM**

- 21 In the application by which Mr Cheng commenced his counterclaim, he sought an order for payment of \$35,136 in respect of building inspection fees, waterproofing of the balcony, and compensation. In final submissions, Mr Cafari clarified that apart from the compensatory payment of \$20,000, and the waterproofing costs of \$10,096, the only other sum claimed as part of the counterclaim was \$1,100 in respect of Mr Mladichek's reports. The total amount claimed accordingly was \$31,196. In addition, a potential claim for costs of the proceeding was flagged, and the Tribunal's attention was drawn to a number of occasions upon which costs had been reserved in the past.
- 22 At the start of the hearing, there was a discussion about whether a claim by Mr Cheng that the Terms of Settlement should be rectified was maintainable. The argument against this raised by Mem Nominees' counsel was that the Terms of Settlement had been prepared during the course of a mediation. As soon as it was pointed out that s92 of VCAT Act precludes the admission into evidence of anything said or done in the course of mediation in any hearing before the Tribunal, unless all the parties agree, Mr Cheng's counsel did not press the point.

### **MEM NOMINEES' CLAIM**

- 23 Mem Nominees' claim for damages under the Terms of Settlement was for \$50,000. During the course of the hearing, an intermediate position was identified, namely that the Tribunal might find that the state of performance of the Terms of Settlement was such that neither party was entitled to any payment.

## THE TERMS OF SETTLEMENT

24 As the case revolves around the issues of whether Mr Cheng had properly performed his obligations under the Terms of Settlement and whether the works performed were in fact necessary, the operative sections are set out below. For consistency, the references in the original text to Applicant and Respondent have been changed to Mem Nominees and Mr Cheng respectively. For privacy, all references to the number of Mem Nominees' unit have been deleted. With these changes made, the Terms of Settlement read:

1. Mem Nominees has commenced this proceeding against the respondent for damages to his property under s16 of the Water Act 1989.
2. The parties have agreed to settle the proceeding on the following terms:
  - A. Mr Cheng agrees to carry out repairs to the balcony of Mem Nominees' unit, 43 – 51 Jeffcott Street, West Melbourne as follows, at his cost and expense:
    - a) demolition of balcony tiles and water roof membrane and replacement with new waterproof membrane finished and certified by an accredited waterproof contractor;
    - b) if there are no leaks after 9 months after the works in (a) the balcony may be retiled at the option of Mr Cheng at his expense;
    - c) larger overflow to be installed – 100 x 100 mm square overflow. (Sic)
    - d) all works are to be done in a proper and workmanlike manner.
  - B. Mr Cheng's building expert Branko Mladishek is to carry out the following inspections prior to, during and following conclusion of the works to ascertain whether the balcony is leaking:
    - a) assessment of damage to Mem Nominees' unit including present levels of dampness and mould by 30 May 2017;
    - b) reinspection of Mem Nominees' unit after the owner Mem Nominees has completed renovation works;
    - c) at the expiration of three months after completion of the works to the balcony;
    - d) at the expiration of 6 months after completion of the works to the balcony;

- e) at the expiration of 12 months after completion of the works to the balcony.
- C. Mr Cheng's building expert will produce a written report of his inspections within 7 days following each inspection. The report is to be sent to Mem Nominees or its solicitors Berry Family Law.
- D. In the event that there are no leaks from the balcony into Mem Nominees' unit, at the expiration of 12 months, Mr Cheng will pay Mem Nominees the sum of \$50,000 for its damages, costs and expenses.
- E. In the event that there are leaks from the balcony into Mem Nominees' unit, at the expiration of 12 months, Mem Nominees will pay Mr Cheng the costs incurred by Mr Cheng in carrying out the works referred to in paragraph A plus the sum of \$20,000 for Mr Cheng's costs.
- F. Mr Cheng will give Mem Nominees full details of all costs and expenses including inspections incurred by him in carrying out the works referred to in paragraph A and will provide invoices for such works.
- G. Subject to the performance of this agreement by the parties, this proceeding is struck out with a right of reinstatement and with no order for costs.

### **What works had to be performed by Mr Cheng?**

25 Both sides paid close attention to Mr Cheng's obligations under the Terms of Settlement.

#### The extent of the works

26 Mem Nominees' counsel contended that the works involved both the carrying out of repairs to the balcony, *and* the progressive inspection of the works by Mr Mladichek, *and* the production of written reports by him, *and* the delivery of those reports to it. This contention underpinned Mem Nominees' principle argument which was that even if the repair works had been properly carried out at the outset - which was disputed - Mr Cheng could never become entitled to payment under the Terms of Settlement because the inspections were not carried out within the time frame contemplated by the Terms, and the respective Mladicheck reports were not delivered within 7 days following each inspection.

27 Mr Cheng's counsel differentiated between the performance of the waterproofing and other works to the balcony, and the process of inspecting and reporting on those works. This argument was the foundation for Mr Cheng's contention that the 12 month time limit for assessment of whether the balcony was leaking was to be measured from completion of the

relevant repair works. On this basis, it was contended that the 12 month assessment period had elapsed by July 2015.

#### Was the tiling part of the works?

- 28 Mem Nominees' counsel also contended that the work to be performed before any assessment could be carried out included not only the work under paragraph 2A(a), namely the "demolition of the balcony tiles and waterproof membrane and replacement with new waterproof membrane ..." plus the work identified in paragraph 2A(c) i.e., the installation of a larger overflow measuring 100 x 100 mm, but *also* the tiling.
- 29 On the other hand, Mr Cheng's counsel contended that the primary work to be carried out by him was that described in paragraphs 2A(a) and 2A(c).
- 30 It was noted that clause 2A(b) provided that if there were no leaks after 9 months after the works "in (a)" then the balcony *may* be retiled at the option of Mr Cheng, at his expense. It was argued for Mr Cheng that the retiling works were optional, and accordingly were not part of the work that had to be completed before the 12 month assessment period was triggered.
- 31 Mr Cheng's counsel acknowledged that if the tiling work was in fact carried out, then it would be subject to the obligation created by clause 2A(d) that it be performed in "a proper and workmanlike manner". However, he maintained the argument that the tiling work, if performed, would still not constitute part of the works that had to be completed before the 12 month assessment period could commence.

#### **Finding regarding definition of the works**

##### Physical works v services

- 32 I address first the issue of whether the works include merely the physical works to the balcony, or also include the services of inspection and reporting.
- 33 From a reading of the Terms of Settlement as a whole, I think it is clear that the physical works are to be differentiated from the services of inspection and reporting. Clause 2B creates an obligation on Mr Cheng to procure his building expert, Mr Mladichek, to carry out inspections "prior to, during and following completion of the works to ascertain whether the balcony is leaking". It follows that "the works" to be inspected and reported upon are the physical works which must be carried out to prevent leaking of the balcony.
- 34 It follows that a distinction is drawn in the Terms of Settlement between the performance of the physical works and the performance of the services of inspection and reporting.

##### Scope of the physical works

- 35 I turn now to the second question, which is whether the physical works which had to be completed before the assessment period began, included



only the works described in clause 2A(a) (demolition of the balcony tiles and membrane, and certified re-waterproofing) plus the works described in clause 2A(c) (installation of a 100 x 100 mm overflow), or also included the tiling referred to in clause 2A(b).

- 36 I observe that an important function of the Terms of Settlement was to procure works to be carried out to ensure that the balcony did not leak. The demolition of the old tiling and waterproofing, and the creation of a new waterproof barrier which was certified, together with the creation of a larger overflow, were clearly relevant to this end.
- 37 Retiling was permissible, provided it was not carried out until at least 9 months after the new waterproof membrane had been finished and certified, in order to ensure that the balcony was leakproof before any tiles were laid. It follows that tiling was not regarded as necessary for the new waterproofing to be effective.
- 38 A further argument in support of Mr Cheng's position, pressed by his counsel, is that if the argument maintained by Mem Nominees was correct, it could easily lead to an absurdity. This is that, if the optional tiling was never laid, then there would be no basis upon which Mr Mladicsek could ever begin his periodic inspections.
- 39 For these reasons, I find that the physical works that Mr Cheng was obligated to procure Mr Mladicsek to inspect and report upon were those works directly related to ensuring the balcony did not leak, referred to in clauses 2A(a) and 2A(c), but *not* 2A(b).

#### **Finding regarding start of the 12 month assessment period**

- 40 As noted, clause 2D of the Terms of Settlement provides that if there are no leaks from the balcony into Mem Nominees' unit "at the expiration of 12 months", Mr Cheng will pay Mem Nominees the sum of \$50,000 for damages, costs, and expenses. Clause 2E provides that if there are leaks from the balcony into Mem Nominees' unit "at the expiration of 12 months", then Mem Nominees will pay \$20,000 plus specified costs.
- 41 In seeking to identify the point at which the 12 month assessment period is to commence, I refer to the process of inspection and reporting contemplated by the Terms of Settlement.
- 42 I accept the contention, made on Mr Cheng's behalf, that the first inspection to be carried out by Mr Mladicsek was clearly aimed at establishing by 30 May 2014 what might be described as a "datum point" regarding the condition of Mem Nominees' unit, including the levels of dampness and mould.
- 43 The second inspection was aimed at a recalibration of that base line after renovation works had been completed in Mem Nominees' apartment.
- 44 Mr Mladicsek was to carry out periodic inspections 3 months after the completion of the works to the balcony, 6 months after completion of the

works the balcony, and 12 months after the completion of the works to the balcony.

- 45 If the proposition advanced by Mem Nominees that the physical works under the Terms of Settlement includes the tiling is correct, then Mr Mladichek's 3 month, 6 month, and 12 month inspections could not have been carried out until after the tiling had been completed. Having regard to the embargo upon the commencement of tiling work until at least 9 months has expired after the completion of the demolition and re-waterproofing works under paragraph 2A(a), then Mr Mladichek could not have carried out the first of the periodic inspections until at least 12 months had passed (i.e., the 9 month embargo period plus the period of 3 months after the completion of the tiling). Such an inspection regime would not be consistent with the intention in the Terms of Settlement, which I consider to be apparent, of assessing the effectiveness of the waterproofing work soon after it had been completed, and twice more after that first inspection.
- 46 For these reasons, I find that the 12 month period referred to in clauses 2D and 2E respectively began on the completion of the works (including the certification) described in clause 2A(a) and 2A(c), but not the tiling.
- 47 I note this finding is consistent with the manner in which the parties conducted themselves after about the waterproofing and ancillary drain works had been carried out by Mr Cheng. Specifically, Mr Mladichek arranged his periodic inspections with Mr Magnani's cooperation - as evidenced by the fact that Mr Mladichek was on 27 August 2014,<sup>1</sup> 12 November 2014,<sup>2</sup> and 20 March 2015<sup>3</sup> given access to Mr Magnani's unit - and there was no evidence that Mr Magnani thought that Mr Mladichek was conducting his inspections prematurely or inappropriately.

## **THE WATERPROOFING WORKS**

- 48 The contractor which attended at the site to carry out waterproofing works to the balcony was AWS Services Vic Pty Ltd ("AWS"). The State Operations Manager of the company, Daniel Dudas, gave evidence on behalf of Mr Cheng. He confirmed the contents of an affidavit he had sworn on 7 June 2018. He deposed that he was responsible for the job, and oversaw it.

### **Evidence regarding the work performed**

- 49 Mr Dudas's evidence was that the task consisted of two parts. The first was to expose the substrate and then waterproof it. The second job was to return after 23 June 2015 to lay tiles.
- 50 The first job involved removing the existing tiles and then inspecting the substrate to see if it was ready to be waterproofed. It was not, and had to be ground down so that the new membrane could be applied. No cracks in the

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<sup>1</sup> See Mr Mladichek's report dated 28 August 2014.

<sup>2</sup> See Mr Mladichek's report dated 17 November 2014.

<sup>3</sup> See Mr Mladichek's report dated 7 April 2015.

substrate could be identified. The existing hot water system was removed, and was replaced by a smaller, suspended hot water service. An existing 100 mm PVC pipe (which formed the conduit for the plumbing for the hot water service through the balcony slab) was treated by the removal of the existing silicon filling, and its replacement with new silicon shaped into a dome. The pipes exiting the dome were caulked.

- 51 Caulking was also placed around a puddle flange that sat on the balcony to allow for drainage through a grate, and an overflow below. At the hearing, Mr Dudas confirmed that a 100 mm grate was installed over the flange, drained by a 90 mm pipe.
- 52 A coat of polyethylene based waterproof membrane was applied to the substrate, and after 24 hours a second coat was applied. Both coats were applied to the silicon dome. Mr Dudas said he inspected the membranes to ensure that there was no blistering or pinholes.
- 53 Next, screed was placed on the membranes and allowed to dry for 2 days before it was primed, and bond breakers at the edges were installed to allow for lifting and movement.
- 54 Then 2 coats of acrylic waterproof membrane were applied on top of the screed. Mr Dudas deposed that he inspected the membranes after each layer had dried to ensure there was no blistering or pinholes.
- 55 In order to protect the top layer of membrane, an ultraviolet stable top coat was applied once the second acrylic membrane had dried. This was to allow Mr Cheng to use the balcony normally even though no tiles had been re-laid.

### **Testing**

- 56 After the protective top coat had been placed, the balcony was water tested. This was done by blocking the drain and the overflow, and by flooding the balcony with water. The unit below belonging to Mem Nominees was inspected, and no leak was detected.

### **Amounts paid to AWS**

- 57 At the hearing, Mr Dudas confirmed that Ms Liu had paid AWS \$10,096.

### **Attack on the credibility of Mr Dudas**

- 58 At the hearing, counsel for Mem Nominees attacked Mr Dudas's credibility on a number of bases. These included that:
  - (a) he was not an independent witness in so far as his company had a warranty to protect;
  - (b) he had given incorrect dates regarding the quotation and performance of the works in his affidavit;
  - (c) he had not personally performed the works and had only overseen them, and could not be sure what works had been performed; and

(d) a number of diagrams appended to his affidavit which purported to illustrate the works carried out were not contemporaneous, but had been computer-generated recently for the purposes of being appended to the affidavit.

59 In his affidavit, Mr Dudas said that one of the estimators from AWS had attended at Mr Cheng's unit to provide a quote on about 13 January 2014, and that his team had started work on or about 23 January 2014. When it was pointed out to him in cross-examination that this was inconsistent with certification of the works in August 2014, he noted that the events were 4 years ago, and that he would have to look at his "system". In the witness box he checked his phone, and confirmed that the works were commenced on 23 June 2014 rather than 23 January 2014.

60 I comment that the fact that Mr Dudas had made obvious mistakes with the dates is unfortunate for Mr Cheng, because it raises a question as to the care that was put into the preparation of the affidavit. However, having read Mr Dudas's affidavit carefully, and having observed him in the witness box, I accept that two innocent mistakes were made in the preparation of the affidavit in transposing January for June. I regard Mr Dudas generally as a reliable witness.

61 Apart from the evidence of Mr Macleod, who deposed that he had established by a water test in December 2016 that the balcony was leaking into Mem Nominees' apartment below, there is no evidence that the waterproofing works were not successful. Mr Macleod certainly did not carry out any destructive testing of the balcony to establish any failure of the waterproofing works carried out by AWS. Mr Macleod was unable to replicate the leaking from the balcony into Mem Nominees' unit below at a joint inspection which took place on 22 June 2017, and he now accepts that "The area that was leaking has been repaired."<sup>4</sup>

62 I have no reason to doubt that AWS carried out the extensive waterproofing works involving the placement of four waterproofing membranes as well as a protective membrane by 4 August 2014. I also accept that the existing drain was replaced by a larger 100 mm drain.

63 Having made that point, I note that the exact nature of the waterproofing works carried out by AWS is not in issue. What is in issue is whether those works were effective to stop the balcony leaking.

### **Timing of AWS' works**

64 Mr Dudas's clarification that his team had started work on 23 June 2014 rather than 23 January 2014, as he had deposed in his affidavit, brought his evidence about the timing of the work into line with that of Mr Cheng's wife, Ms Hai Hong Liu.

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<sup>4</sup> Mr Macleod's second report dated 10 July 2017, at [2.8].

- 65 Ms Liu at the hearing confirmed the contents of an affidavit she had sworn on 9 April 2018. In this affidavit, Ms Liu deposed that she had obtained a quote from AWS on or about 17 June 2014, and after the quote was accepted, AWS started work on or about 23 June 2014.
- 66 Ms Liu deposed that AWS completed its works around July 2014. The works she deposed she had paid for (and by inference must have accepted were performed), included the quoted waterproofing works, and the replacement of the existing 80 mm drain with a 100 mm drain, and the placing of the protective coating over the waterproof membrane to protect the balcony for the 9 month period before the tiling was replaced. She said the balcony was retiled in around July 2015.
- 67 Ms Liu appended to her affidavit a warranty certificate which AWS issued after completion of the waterproofing works on or around 4 August 2014.
- 68 I accept Ms Liu's evidence about the timing of the works, as it is consistent with the date on the warranty certificate, and find that the works other than the tiling were completed in July 2014, and were certified on 4 August 2014.

#### **Amounts paid by Ms Liu to AWS**

- 69 In her affidavit, Ms Liu deposed that she had been issued with an invoice dated 24 July 2015 for \$8,624 by AWS in connection with the initial scope of works. This aligned with a quotation she had received on 17 June 2014. The invoice and the quotation were exhibited to her affidavit.
- 70 Ms Liu also deposed that she had received a second invoice dated 31 July 2014 in the sum of \$1,518. This related to extra work not included in the original scope, including supplying the top coating over the waterproof membrane, and changing the existing overflow from 80 mm to 100 mm. She received a discount on this invoice, and paid only \$1,472 in respect of it.
- 71 As she paid \$8,624 against the first invoice and \$1,472 against the second, the total amount paid by Ms Liu to AWS was \$10,096. This figure was the figure confirmed by Mr Dudas.
- 72 I accept Ms Liu's evidence that she paid \$10,096 to AWS on behalf of Mr Cheng.

#### **Ms Liu's evidence regarding the hot water service**

- 73 In her affidavit, Ms Liu deposed at [5] that prior to the mediation in May 2014 she had had a hot water service, located on the balcony, inspected. She had been provided with a report that said the unit was not leaking.
- 74 At [24], Ms Liu deposed that the managing agent for her husband's unit had forwarded an email from the tenant requesting that the boiler in the hot water service be replaced, and that she had arranged for a plumber to do this. She exhibited the email from the agent. She also exhibited the invoice

received from the plumber, Cavana Plumbing Pty Ltd, which was dated 23 August 2016. I have no doubt the hot water boiler was replaced as she deposed, and that the replacement was effected on or about 23 August 2016.

- 75 At [26], Ms Liu deposed that in or about June 2017 she arranged to have the hot water system inspected again. She said that this was a service call, and that no work was done. She exhibited a copy of a tax invoice from Cavana Plumbing Pty Ltd dated 15 June 2017 which confirmed that a service fee of \$150 was incurred, but no issue was found with the hot water system.
- 76 At [27], Ms Liu deposed "[t]here has been no work done in relation to the hot water service other than that in September 2016". At the hearing she clarified that the relevant date was "August 2016".
- 77 Ms Liu was asked during cross-examination whether, after AWS had performed the tiling work she, or her husband, or anyone else had performed more works. She answered "No" to each of those questions.

#### **The end of the 12 month assessment period**

- 78 I have found at [46] above that the 12 month period referred to in clauses 2D and 2E of the Terms of Settlement begins on the completion of the works described in clause 2A(a) (certified replacement of membrane on balcony) and 2A(c) (installation of larger overflow), but not the tiling.
- 79 I have found at [68] that the works other than the tiling were completed in July 2014 and certified on 4 August 2014.
- 80 As the Terms of Settlement provided that the waterproofing works on the balcony had to be certified, I find that the 12 month assessment period began on 4 August 2014. It follows, and I find, that the assessment period concluded on 4 August 2015.

#### **MR MLADICHEK'S EVIDENCE**

- 81 When Mr Mladichek gave evidence, he confirmed the contents of an affidavit he had sworn on 9 April 2018. Exhibited to this affidavit were the reports he had prepared in connection with the proceeding. These are discussed in turn.

#### **The first report dated 16 April 2014**

- 82 This was prepared as an "Expert Witness Report" on behalf of Mr Cheng, and made express reference to the Tribunal's Orders made on 28 March 2014 and the "VCAT Statement of Claim" dated 14 March 2014. The report related to an inspection of Mr Cheng's unit only. Apart from Mr Mladichek, Mr Cheng was the only person present. On this occasion, Mr Mladichek did not have access to the unit belonging to Mem Nominees, and in his report he merely stated, in his summary section [at (a)], "I believe content of photos which show water leak damage" to that unit. Mr Mladichek opined

that it was reasonable to assume that those water leaks originated from Mr Cheng's unit.<sup>5</sup>

- 83 Mr Mladichek stated in the report that there was no evidence that the hot water service was leaking, that pipe penetrations had caused water leaks, or that the balcony waterproof membrane had been damaged by the tiling. However, he did note that there were other possible causes of the water leaks, including gaps between walls which lacked sealant.

#### **The second report dated 21 May 2014**

- 84 This report was headed "Building Defect Report" as distinct from an "Expert Witness Report". It related to an inspection of both Mem Nominees' apartment and Mr Cheng's units on 21 May 2014. Conveniently, the report contains an executive summary. This relevantly reads:

Dampness in walls in corners to the rear bedroom of [Mem Nominees' unit] was found and recorded. The two left locations correspond with roof leaks and sealant failure and the right side corner corresponds with the location of the downpipe. At the time of inspection, there were no leaks and there was no dampness from the Hot Water Service. Photos were taken for reference.

- 85 In the body of the report, it was confirmed that dampness was found in the rear corners of the rear bedroom of Mem Nominees' unit, but the middle of the wall in the ceiling under the hot water service was dry. There were found to be no water leaks and dampness from the hot water service. The balcony outlet and overflow were found to be clear. Significantly, dampness was recorded in the toilet walls in Mr Cheng's unit. A pop rivet was found to be missing in the flashing to the roof, and it was suggested that this was the probable cause of water coming down the walls. It was also noted that the sealant between the concrete panels near the hot water service had cracked, and it was suggested that this is the probable cause of the leak in the south-east corner of the bedroom of Mem Nominees' unit.
- 86 The missing pop rivet and the cracks in the sealant between wall panels were demonstrated in photographs appended to the report.

#### **The third report dated 28 August 2014**

- 87 This report was prepared following inspections of the balcony at Mr Cheng's unit on 8 July 2014, and of Mem Nominees' unit below on 27 August 2014. The report was headed "New Home Inspection Report" and did not purport to be an independent expert witness' report. The executive summary read:

On the 8th July, 2014 waterproofing to the balcony was complete and on the 4th August, 2014 was it was certified. I re-inspected the unit below on 27<sup>th</sup> August and found dampness on the walls.

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<sup>5</sup> Mr Mladichek's first report, page 8 at (a).

- 88 In the body of the report, a damp spot in the wall at the rear left corner of the bedroom was revealed by thermal imaging. A moisture reading also found dampness in the bedroom walls, mainly at the rear corners and at the skirtings. A new floor had been installed, and excessive dampness was found in the floor corresponding to the thermal image of dampness in the wall. The new floor was already showing bulging as a result of dampness.
- 89 Mr Mladicheck drew some conclusions including these:
- (a) residual dampness is too high and may indicate continuing ingress of moisture from sources other than the balcony waterproofing; and
  - (b) the thermal image of dampness in the wall has not been stopped by the installation of new balcony waterproofing.

#### **The fourth report dated 17 November 2014**

- 90 Mr Mladicheck reinspected Mem Nominees' unit on 12 November 2014. This report was headed "Building Defect Report (Reinspection)" and accordingly did not purport to be an expert witness' report. The executive summary was:

Visual inspection revealed staining on new timber floor from fresh water leaks. Dampness in timber was confirmed with Tramex moisture meter.

- 91 The timber stains referred to were illustrated by photos appended to the report. It was noted in the body of the report that the inspection had been carried out approximately two weeks after a significant rainfall event. Mr Mladicheck opined that water leaks were persisting despite the new balcony waterproofing, and that the water stains on the new flooring came from fresh water leaks. In his view, the source of the current water leaks was other than the balcony.

#### **The fifth report dated 7 April 2015**

- 92 Mr Mladicheck reinspected Mr Cheng's apartment on 20 March 2015 but dated his report 7 April 2015. The report was headed "New Home Inspection Report" and accordingly was not intended to be read as an expert witness' report. The executive summary was:

Final inspection revealed extensive dampness to new floor. Thermal imaging camera revealed serious dampness in walls. Conclusion is that installation and certification of New Balcony Waterproofing Membrane has not stopped water leaks and dampness.

- 93 Regrettably, this report refers to the number of Mr Cheng's unit, not Mem Nominees' unit, and in this way suggests that it was Mr Cheng's unit that was the subject of the inspection.
- 94 In the body of the report, it was recorded that the inspection revealed extensive dampness in the floor and wall of a unit in the rear bedroom. Inspection of the waterproof membrane revealed that it was intact.



Inspection of the toilet above this unit revealed further deterioration in the plaster walls due to dampness.

- 95 I comment that the references to the dampness in the floor and wall of the unit and to the toilet “above this unit” make it clear that it is Mem Nominees’ unit that is being referred to.
- 96 Mr Mladichek opined [at page 12]:
1. I am satisfied that balcony waterproofing is maintained intact.
  2. I am satisfied that new flooring is damaged by water ingress and has over time become worse.
  3. [In] my view installation of new balcony waterproofing membrane has not solved the problem of water ingress into [the unit].
  4. In my view allegations that defective balcony waterproofing is the cause of damage to [the unit] is false and that the evidence from inspections has proved it to be so.
- 97 Again, Mr Mladichek’s conclusions No. 3 and No. 4 above referred to the number of Mr Cheng’s unit, not Mem Nominees’ unit. Nonetheless, the reference to the new flooring makes it clear that the unit he was referring to was Mem Nominees’ unit.

#### **The sixth report dated 10 March 2017**

- 98 This report was prepared by Mr Mladichek following an inspection on 10 February 2017 of Mr Cheng’s apartment. It was prepared as an expert witness report. The executive summary was:
- I have reinspected this property after allegation that the balcony was leaking even after new waterproofing membrane was applied and certified and for the purpose of response to applicant’s expert report.
- 99 The body of the report makes it plain that Mr Mladichek is responding to Mr Macleod’s report (from BSS) dated 5 December 2016. The report appended a number of photographs taken by Mr Mladichek which were said to graphically represent “significant issues”.
- 100 Mr Mladichek opines that the main cause of the leak is the crack of the sealant at the junction of two structural panels that are common property.
- 101 The report contains a section where Mr Mladichek discusses quotations taken from Mr Macleod’s report. For present purposes, it is sufficient to note that Mr Mladichek joins issue with Mr Macleod’s view that Mem Nominees’ unit was still experiencing water penetration from the western deck of Mr Cheng’s unit immediately above it.

#### **The seventh report dated 13 July 2017**

- 102 Mr Mladichek attended a joint inspection of the balcony at Mr Cheng’s apartment again on 22 June 2017. Apart from Mr Mladichek, present were Ms Liu, Mr Macleod, and a person identified by Mr Mladichek as Mr

Mangana (sic) of Mem Nominees and Daniel, who was identified as the waterproofing contractor (no doubt Daniel Dudas).

103 Mr Mladichek prepared an expert witness report dated 13 July 2017 following this inspection. The executive summary indicated that a site water test was “positive”, and confirmed a fresh water leak coming from the common wall junction. A water test performed by Mr Macleod was “negative” and could not confirm his allegation that the balcony was leaking.

104 In the body of the report, Mr Mladichek explained the methodology of the water test as follows:

In order to prove a water leak it was considered necessary to firstly establish that water is actually being absorbed in through the sealant crack. This was to avoid a possibility that even though there was sealant crack visible there may have been a second application of sealant (as second line of defence) that may have been intact.

To do so sand barrier was placed around suspected area and water would be poured to see if it was absorbed.

105 After carrying out this test, it was found that the suspected area was absorbing water, “indicating that the sealant has failed and there was no second line of defence”.

106 Mr Mladichek appended a photograph to his report which he said confirmed that water was coming from the common wall junction.

107 Mr Mladichek said that the crack in the sealant between panels leaked, notwithstanding that some unidentified person had gained access to the balcony and applied sealant to the area. He opined that had this been done professionally, it would have sealed this water ingress point.

108 Mr Mladichek confirmed that he had inspected the newly laid balcony waterproofing shortly after it was done and on 3 follow-up inspections, and had always found it intact. In his opinion, the waterproofing did not and could not have leaked.

109 Mr Mladichek noted that Mr Macleod had reported that he had conducted a water test on 1 December 2016 in his absence, and although Mr Macleod had said he had established leaking from the balcony on that day, Mr Macleod could not replicate the result on 22 June 2017.

### **The eighth report dated 8 October 2018**

110 Mr Mladichek conducted his final inspection of Mr Cheng’s unit on 5 October 2018 and published this report following that inspection. He explained the purpose of the inspection in the executive summary as follows:

I have re-inspected this property after allegation that the balcony HWS penetration through the floor was leaking and to determine if there is evidence of tampering with waterproofing.

There was nothing that I detected that indicated there was recent or any tampering with the waterproofing of the HWS pipes entering domed cap of the floor penetration.

### **THE ATTACK MADE ON MR MLADICHEK'S INDEPENDENCE**

- 111 During his final submissions, counsel for Mem Nominees attacked Mr Mladichek's independence, saying that at the time he prepared his three reports following the completion of the waterproofing works, he was not acting as an expert witness, but as a consultant engaged by the applicant. On this basis, it was contended that it was not appropriate to give to the reports subsequently prepared by Mr Mladichek *as an expert* the same weight as would ordinarily be accorded to an independent expert. Accordingly, it was appropriate, where there was a clash between the evidence of Mr Macleod and Mr Mladichek, that the evidence of Mr Macleod should be preferred.
- 112 I comment that the statement that Mr Mladichek did not make the three reports as an expert witness is accurate. His third report dated 28 August 2014, prepared following inspections of the balcony at Mr Cheng's unit on 8 July 2014, and of Mem Nominees' unit below on 27 August 2014, was headed "New Home Inspection Report". The fourth report dated 17 November 2014 was headed "Building Defect Report (Reinspection)". The fifth report dated 7 April 2015 was headed "New Home Inspection Report".
- 113 In response to Mem Nominees' contention, it was argued for Mr Cheng that Mem Nominees could not complain because it had agreed in the Terms of Settlement that Mr Cheng's "building expert Branko Mladichek" was to carry out nominated inspections prior to, during, and following the completion of the works.
- 114 I think this response misses the point, which is that Mem Nominees is justified in asserting that an expert witness must be independent. The Tribunal's relevant practice note PNVCAT2, at paragraph 1, states "it is important that the expert's opinion is soundly based, complete, impartial, dispassionate, and within the scope of his or her expertise."
- 115 I think there is something in the view that Mr Mladichek was so closely involved with Mr Cheng's case that an outside observer might take the view that his independence had been compromised. I say this because Mr Mladichek had first become involved as an independent witness on 16 April 2014. In this report, he was dismissive of the theories regarding the cause of leakage into Mem Nominees' unit that involved culpability on the part of Mr Cheng. Rather, he indicated that failed sealant in the gaps between the walls could have allowed the water leaks. Shortly after preparing that report, Mr Mladichek attended the mediation with Mr Cheng and Ms Liu. Under the Terms of Settlement signed at the mediation Mr Mladichek was engaged to prepare in his capacity as Mr Cheng's "building expert" five further reports.

- 116 In these circumstances, it was not ideal for Mr Mladichek to have prepared his reports of 10 March 2017, 13 July 2017, and 8 October 2018 on the basis that he was again an independent expert. There is a clear argument that he was too heavily invested in the dispute from the time that he had completed his three reports regarding the effectiveness of the waterproofing works.
- 117 Having made that point, I observe that it was not contended on behalf of Mem Nominees that there was actual bias or dishonesty exhibited in any of Mr Mladichek's reports, and no such suggestion was put to him in cross-examination. Indeed, the cross-examination of Mr Mladichek about his reports was very limited.
- 118 In these circumstances, I think the appropriate approach is not to dismiss Mr Mladichek's later expert reports out of hand and ignore them, but to exercise caution with respect to them, particularly where his conclusions conflict with those of Mr Macleod.

**CONCLUSION TO BE DRAWN FROM MR MLADICHEK'S REPORTS  
REGARDING LEAKING FROM THE BALCONY AT THE ASSESSMENT  
DATE OF 4 AUGUST 2015**

- 119 Reference to Mr Mladichek's reports indicate that the first five were dated earlier than the conclusion of the assessment period. The next report from Mr Mladichek is dated 10 March 2017. It follows that there is accordingly no direct evidence from Mr Mladichek regarding the question of whether the balcony was leaking as at 4 August 2015.
- 120 What we do know from Mr Mladichek's first inspection report after the completion of the waterproofing works, namely the report of 28 August 2014, is that he identified dampness in Mem Nominees' unit, and opined that it was possible that moisture from sources other than the balcony was entering that unit.
- 121 We also know that at the next inspection on 17 November 2014, he found "fresh water leaks" in Mem Nominees' unit which he considered came from sources other than the balcony.
- 122 Furthermore, we know that after what he thought was his final periodic inspection on 20 March 2015, Mr Mladichek confirmed that the waterproofing membrane had been "maintained intact".
- 123 From these findings we can surmise that Mr Mladichek would have been surprised if he had inspected the balcony around 4 August 2015 and found that the waterproofing works had failed. But that is all we can do. On the basis of the direct evidence from Mr Mladichek's reports up to and including the report of 7 April 2015, no finding can be made that the balcony was not leaking as at 4 August 2015.

## **RELEVANCE OF MR DUDAS'S EVIDENCE REGARDING THE WATER TEST ON 6 JULY 2015**

124 Importantly, Mr Mladichek was not the last person to inspect the balcony before the expiration of the 12 month assessment period. Ms Liu gave evidence about an email she had sent on behalf of Mr Cheng to Mem Nominees' solicitors on 2 July 2015. This email asserted that Mr Cheng had done the waterproofing on the balcony and had received a certificate, had the reports from the independent building inspector, had waited for more than 9 months to retile, and was now expecting payment under the Terms of Settlement. The email noted that Max (Mr Magnani) "wanted the people who did the job [to] visit the property to see the result" and a meeting was scheduled for 6 July 2015 at which the project manager from AWS would attend.

125 Mr Dudas in his affidavit at [24] deposes as follows:

I was called back to the site after the completion of the first job by [Mr Cheng] because there were complaints by [Mem Nominees] that there was still water ingress. I attended the site on or about the 6 July 2015. At that time, the deceased Director of [Mem Nominees] was present. I again performed a water test by flooding the balcony. Again, there was no leak detected.

126 As the waterproofing works had been completed by July 2014, and as the retiling was permissible 9 months after that, the tiling would have been completed well before this inspection.

127 As noted, at [60] I consider Mr Dudas generally to be a reliable witness, and I accept his evidence about the water test on 6 July 2015. I note further that no evidence was put forward on behalf of Mem Nominees that the balcony was leaking at around this date. I accordingly find that the balcony as waterproofed and retiled by AWS was not leaking as at 6 July 2015.

## **BREACH OF THE TERMS OF SETTLEMENT IN RESPECT OF INSPECTIONS AND REPORTS**

128 Mem Nominees argued that Mr Cheng was not entitled to recover under the Terms of Settlement because he had breached them. He had breached the Terms, firstly, because the time periods after which Mr Mladichek's reports were to be produced had not expired at the time they were produced.

129 This proposition was underpinned factually because, it was argued, on Mr Cheng's very best case the waterproofing was not completed until 8 July 2014. Ms Liu, on behalf of Mr Cheng, had sent an email on 2 July 2015 to Mem Nominees' solicitors asserting that they had performed their part of the deal and asking those solicitors to remind their client to get ready for settlement. That email was sent earlier than the 12 month anniversary of the completion date, namely 8 July 2015.

- 130 Further, it was said that there had been a breach of the Terms because Mr Cheng had failed to ensure that the respective reports were delivered in accordance the Terms of Settlement within 7 days of each inspection.
- 131 It was argued on behalf of Mem Nominees that strict performance of the Terms of Settlement was a condition precedent to relief.
- 132 It was also said that the breaches were not minor, they were fundamental.
- 133 In anticipation that arguments of acquiescence or waiver might be raised on behalf of Mr Cheng, counsel for Mem Nominees argued that these matters had not been pleaded. It was submitted that Mr Cheng's case had, to this point, been put on the basis that the reports had been produced and served in accordance with the Terms of Settlement. If it was now being put that Mem Nominees failed to do something which it ought to have done - such as assert that the Terms of Settlement had been breached - an issue of natural justice would arise.
- 134 Mr Cheng's counsel, in response, argued that there had been no denial of natural justice. Mr Magnani had opened his unit on several occasions to Mr Mladichek and had acquiesced to the inspection being carried out earlier than strictly required by the Terms of Settlement. It was conceded that the reports had technically been served late, but if that was an issue, Mr Magnani could have asked for them earlier.

#### **Acquiescence and waiver**

- 135 It is convenient to deal with the argument concerning acquiescence and waiver first, before dealing with the argument as to breach.
- 136 I do not think there is anything in Mem Nominees' contention that it will be denied natural justice if Mr Cheng is allowed to rely on these arguments.
- 137 The basis upon which Mr Cheng mounted his counterclaim was telegraphed in the email in which he (through his wife Ms Liu) indicated that he was pressing for the payment he said was due under the Terms of Settlement. Reference to the email sent by Ms Liu to Mem Nominees' solicitors dated 2 July 2015 opened with these words:
- Based on VCAT agreement (w15/2014), we have redone the waterproof of our balcony, have the certificate from the professional, have a report from the independent building inspector, and wait for more than 9 months to retille, please remind your client get ready for the VACT settlement. (Sic)
- 138 I comment that it must have been abundantly clear from that email that reliance was being placed on Mr Mladichek's reports, even though they had been prepared early, and had also, technically, been sent to Mem Nominees later than the Terms of Settlement required.
- 139 There is no indication in the evidence that Mem Nominees in July 2015 contended that the Terms of Settlement had been breached because Mr

Mladichek had not carried out the required inspections, or that his reports had not been delivered in a timely manner.

- 140 On the contrary, the available evidence suggests that Mem Nominees was not concerned about these matters, but with the effectiveness of the waterproofing works carried out. As already noted, Ms Liu highlighted in her email of 2 July 2015 to Mem Nominees' solicitors that Mr Magnani wanted "the people who did the job [to] visit the property to see the result", and set up a meeting on 6 July 2015 for Mr Dudas to attend.
- 141 When Mr Cheng filed his application for reinstatement of the proceeding on 28 July 2014 so that he could enforce the Terms of Settlement, he referred to a list of supporting documents, which included the Terms of Settlement, the building inspection reports from Mr Mladichek, the warranty certificate obtained from AWS, and the email of 2 July 2015. In his application Mr Cheng set out the background of the matter, and asserted at [7] that he had done everything according to the agreement contained in to the Terms of Settlement.
- 142 From the application to reinstate, it is patently clear that compliance with the Terms of Settlement was being alleged. However, the reinstatement of the proceeding was not opposed on this or any other basis. Indeed, there was no appearance on behalf Mem Nominees at the reinstatement hearing on 21 October 2015.
- 143 It was only when Mem Nominees filed its Points of Defence to Counterclaim in August 2016 that it asserted, at [4], that the 12 month assessment period did not commence until the repair works to the balcony had been completed on or about 24 July 2015, and that Mr Cheng had accordingly applied for reinstatement of the proceeding approximately 6 months after the new membrane was applied, which was "a serious and substantial breach of the Terms of Settlement". Similarly, it was only in this document that it was asserted for the first time that apart from Mr Mladichek's inspection report dated 20 March 2015, Mr Cheng had not provided any of Mr Mladichek's reports to Mem Nominees as required by the Terms of Settlement.
- 144 In these circumstances, I do not think Mem Nominees can complain that it has been taken by surprise at the hearing by an assertion by Mr Cheng that it had acquiesced in Mr Mladichek's conduct, and that it had waived any entitlement to strict compliance with the Terms of Settlement in terms of the timing of the reports and the timing of their delivery. True it is that neither Mr Cheng's application to reinstate, nor his counterclaim, formally asserted that there had been such acquiescence and waiver. However, the Tribunal is not a court of pleadings, and the thrust of Mr Cheng's case must have been clear to any objective reader.
- 145 If there is a natural justice point arising out of the issues of acquiescence and waiver, it is one which operates in Mr Cheng's favour. I consider that to lock Mr Cheng out from relying on arguments relating to acquiescence

and waiver at the hearing that he was clearly relying on in July 2015, merely on a pleading point, would be unfair to Mr Cheng. At the relevant time, that is to say, July 2015, no complaint was made by Mem Nominees to the effect there had not been compliance with the Terms of Settlement arising from premature production of the inspection reports by Mr Mladichek, or their delivery. If such a complaint had been raised, then Mr Cheng would have been in a position to do something about it. By the time Mem Nominees raised these issues in August 2016, the metaphorical train had long since left the station, and the only issue alive between the parties was whether the waterproofing works themselves had been effective.

### **The breach argument**

146 I now turn to Mem Nominees' contention that Mr Cheng cannot recover under the Terms of Settlement because he has breached fundamental terms within them. However, before I address the matter in detail, I comment that the repudiation argument was disposed of at the hearing of the preliminary point in April this year. I found on that occasion that Terms of Settlement were not to be set aside on the basis they had been repudiated, and allowed Mem Nominees to bring a claim at the hearing for \$50,000 under the Terms of Settlement. Nonetheless, as counsel for Mr Cheng did not take this point at the hearing, I take this opportunity to set out my reasoning regarding the arguments presented.

147 As noted, Mem Nominees' position as expressed in the Points of Defence to Counterclaim is that Mr Cheng's application for reinstatement of the proceeding to enforce the Terms of Settlement only about 6 months after the new membrane was applied amounted to a "serious and substantial breach of the Terms of Settlement". Mem Nominees continued at [5] in these terms:

[Mem Nominees] says further that taking all of [Mr Cheng's] breaches of the Terms of Settlement into account, [Mr Cheng] has evinced an intention not to be bound by the Terms of Settlement. As such [Mem Nominees] says that [Mr Cheng's] conduct is repudiatory and [Mem Nominees] accepts such repudiation with the service of these Points of Defence to Counterclaim.

148 The law relating to repudiation of contract has been addressed in many cases. It is convenient in the present context to refer to the relatively recent consideration of the matter by the High Court of Australia in *Koompahtoo Local Aboriginal Land Council v Sanpine Pty Limited*.<sup>6</sup>

149 The majority (comprising Gleeson CJ, Gummow, Hayden and Crennan JJ), at [44] said:

The term repudiation is used in different senses. First, it may refer to conduct which evinces an unwillingness or an inability to render substantial performance of the contract. This is sometimes described as conduct of a party which evinces an intention no longer to be bound

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<sup>6</sup> [2007] HCA 61



by the contract or to fulfil it only in a manner substantially inconsistent with the party's obligations. It may be termed renunciation. The test is whether the conduct of one party is such as to convey to a reasonable person, in the situation of the other party, renunciation either of the contract as a whole or of a fundamental obligation under it. ... Secondly, it may refer to any breach of contract which justifies termination by the other party.

150 Clearly, Mem Nominees is asserting renunciation of the contract by Mr Cheng. I do not accept this assertion. Mr Cheng has not resiled from his obligations under the contract. He has attempted to fulfil them. Whether he has performed his obligations sufficiently close to the letter of the contract is a different matter. This brings us to the second basis of alleged repudiation, which is whether he has breached the contract in such a manner so as to justify termination.

151 The majority in *Koompahtoo* addressed the second basis of repudiation of contract as follows, at [47]:

For present purposes, there are two relevant circumstances in which a breach of contract by one party may entitle the other to terminate. The first is where the obligation with which there has been failure to comply has been agreed by the contracting parties to be essential. Such an obligation is sometimes described as a condition. In Australian law, a well-known exposition was that of Jordan CJ in *Tramways Advertising Pty Ltd v Luna Park (NSW) Ltd* who, in comparing conditions and warranties, employed language reflected in many statutory provisions.

152 The majority went on to quote sections from the judgment of Jordan CJ, including the following passage:

The nature of the promise broken is one of the most important of the matters. If it is a condition that is broken, i.e., an essential promise, the innocent party, when he becomes aware of the breach, has ordinarily the right at his option either to treat himself as discharged from the contract and recover damages for loss of the contract, or else to keep the contract on foot and recover damages for the particular breach. It is a warranty that is broken, i.e., a non-essential promise, only the latter alternative is available to the innocent party: in that case he cannot of course obtain damages for loss of the contract.<sup>7</sup>

153 In *Koompahtoo*, the majority completed their analysis of the first set of circumstances in which a breach of contract by one party may entitle the other to terminate in these terms, at [48]:

What Jordan CJ said as to substantial performance, and substantial breach, is now to be read in the light of later developments in the law. What is of immediate significance is his reference to the question he was addressing as one of construction of the contract. It is the

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<sup>7</sup> (1938) 38 SR (NSW) 632 at 641-642.

common intention of the parties, expressed in the language of their contract, understood in the context of the relationship established by that contract and (in a case such as the present) the commercial purpose it served, that determines whether a term is “essential”, so that any breach will justify termination.

154 As to the second set of circumstances, the majority in *Koompahtoo* said:

The second relevant circumstance is where there has been a sufficiently serious breach of a non-essential term.

155 It is clear from Mem Nominees’ Points of Defence to Counterclaim and from its final submissions at the hearing that it is not asserted that Mem Nominees was entitled to terminate the contract on the basis of a sufficiently serious breach of a non-essential term. It was breach of an essential term that was relied on. I accordingly do not have to consider this particular aspect further.

156 I have analysed some operative clauses of the Terms of Settlement above, at [32-34]. It follows from that analysis that I regard the most important terms as relating to the performance of the waterproofing works. These terms are clearly essential.

157 The terms relating to the preparation of reports by Mr Mladichek, and the service of those reports, are also essential terms, because they are integral to the operation of the Terms of Settlement. However, the provisions relating to the timing of the preparation of the reports and the timing of their delivery, were matters which were non-essential. To borrow from the language historically used in administrative law,<sup>8</sup> they were ‘directory’ rather than ‘mandatory’. They were not essential to achieving the commercial purpose of the Terms of Settlement, which is the context in which the terms are to be assessed, following *Koompahtoo*. I consider they were matters in respect of which strict compliance could be waived by Mem Nominees without the agreement contained in the Terms of Settlement being rendered unenforceable.

158 Accordingly, I find that it is not open to Mem Nominees to argue that there has been repudiation of the contract by reason of breach of an essential term regarding preparation of the inspection report and service of the inspection reports.

159 The only course open to Mem Nominees, if it wishes to avoid the obligations placed upon it by the Terms of Settlement, is to establish that the waterproofing works have not been effective in the manner contemplated by the Terms.

160 This neatly brings us to Mr Macleod’s evidence.

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<sup>8</sup> See for example *Project Blue Sky v Australian Broadcasting Authority* [1998] HCA 28, at [93].

## **MR MACLEOD'S EVIDENCE**

### **Overview of report dated 5 December 2016**

- 161 When Mr Macleod gave evidence he confirmed, firstly, that he had inspected Mem Nominees' unit on 1 December 2016, and had prepared a report as an expert dated 5 December 2016.
- 162 Reference to that report at [136-138] indicates that he undertook a water test of the balcony on Mr Cheng's unit, focusing on what appeared to be the "obvious weak area which is at the SW corner is tucked behind the new hot water service." The result of this test, recorded at [140-143] was:
- Before long water was found to run down into [Mem Nominees'] unit below and photographs and further damp readings were taken by the writer to prove this fact.
- 163 Mr Macleod's observations following the water test, particularly those at [330-334], [340-343], and [347-349], satisfy me that he did observe water penetrating into Mem Nominees' unit following the test.
- 164 Mr Macleod's opinion, expressed at [144-145] is that the water was coming from "the deck" at Mr Cheng's unit. He elaborated on this view at [474-476] as follows:
- it is certain that the balcony of [Mr Cheng's] unit leaks directly into the SW corner of [Mem Nominees'] unit bedroom 1.

### **Overview of report dated 10 July 2018**

- 165 Mr Macleod also prepared a report dated 10 July 2017 following the joint inspection of 22 June 2017. Mr Macleod's identification of the parties present is almost the same as Mr Mladichek's, as he records that apart from himself and Mr Mladichek, the parties present were Mr Magnani, Ms Liu and Mr Dudas of AWS. However, unlike Mr Mladichek, Mr Macleod also recorded Mr Brad Bailey of AWS as being present.
- 166 In this report, Mr Macleod records that his flood test of the balcony proved that no water came through to Mem Nominees' unit. He went on to say there was a "suspected slight dampening to the slab underside... but certainly no dripping water".
- 167 Mr Macleod also confirmed that Mr Mladichek had undertaken a dye test that proved that "an infinitesimal amount of water came through from the top of the concrete panel junction into the ceiling cavity of Mem Nominees' unit below."
- 168 As Mr Macleod could not replicate on 10 July 2017 the result of the water test he carried out on 1 December 2016, it is not surprising that at [2.8] of his report he noted:
- In my opinion the problem at [Mem Nominees' unit] appear to have been resolved. The area that was leaking has been repaired. (Sic).

169 No doubt in reliance on this view, Mem Nominees at the hearing conceded that the balcony was now not leaking.

### **Relevance of Mr Macleod's opinion**

170 I have formed at [127] above that the balcony as waterproofed and retiled by AWS was not leaking as at 6 July 2015.

171 Mem Nominees did not have any assessment made of the effectiveness of the balcony waterproofing on or about 4 August 2015, and so it could tender no direct evidence that the balcony was leaking at that time. As it was conceded at the hearing by Mem Nominees that the balcony is not now leaking, it would be reasonable to conclude that the waterproofing works performed by AWS for Mr Cheng before 4 August 2014 continued to be effective after 6 July 2015 through 4 August 2015 until the present, unless there is evidence that the balcony began to leak after 6 July 2015.

172 This observation highlights the potential importance of Mr Macleod's first report. His confirmation that a water test of the balcony on 1 December 2016 resulted in water penetration into Mem Nominees' unit below, is the only evidence available that suggests that the balcony was leaking after 6 July 2015.

### **Analysis of the Macleod report dated 5 December 2016**

173 Mr Macleod acknowledged that repair works appear to have been undertaken to Mr Cheng's balcony, but offered a number of explanations as to why those works had not been effective. These observations were the subject of comment by Mr Mladichek in his report dated 10 March 2017. It is convenient to set out Mr Macleod's observations, and Mr Mladichek's respective comments, in turn.

#### Overflow drain

174 Mr Macleod opined at [478-481]:

The drain overflow is approx. 70mm in diameter and is inadequate for the area of water to be collected. It consistently blocked up when the writer was undertaking a water test and water then spilled out the overflow.

175 Mr Mladichek's first response was to query whether Mr Macleod had calculations to justify this statement. The second comment was that Mr Macleod's observations at least confirmed that the overflow did work.

#### Grade of the tiles

176 Mr Macleod commented at [483-485] that the new tile floor of the balcony had not been provided with a proper grade of 1%, causing water to pond in places. Mr Mladichek's response was to ask rhetorically:

How is that relevant when the new waterproof membrane is turned up 100 up the walls?

### Inadequate stepdown

177 Mr Macleod's next point at [486] was that there was an inadequate stepdown at the back door on to the tiled deck. Mr Mladicsek's response was to point out that the stepdown reflected how the building had been built 15 to 20 years ago.

### Hot water service

178 Mr Macleod then pointed out at [490-491] that the "drip" from the new hot water service had not been channelled into a proper drain. Mr Mladicsek's response was that this was not relevant because the new waterproof membrane had been turned up 100 mm up the walls.

### The mortar mound (plinth)

179 Mr Macleod opined at [495-504] as follows:

The tiled area immediately to the south of the hot water service of [Mr Cheng's unit]) has been poorly laid and there was a raised 'mortar' type plinth where the hot/cold pipes and gas supply are channelled through the concrete slab... This is where water testing caused water to run directly into [Mem Nominees' unit].

In my opinion the water is being channelled through the slab by the pipe penetration location to the south of the hot water service.

180 Mr Mladicsek did not contest Mr Macleod's description of the tiled area or the nature of the mound, but did observe that he had not been present at the water test. He contended in the summary to his report of 10 March 2017 at [g] that water was not coming from the balcony but from "unsealed building joints and failed sealants on common walls".

### Comment

181 Mr Macleod's comments in respect of the other potential causes of the leak, namely the allegedly undersized overflow drain, the lack of grade or fall in the new tiles on the balcony, the inadequate stepdown at the backdoor, and the fact that the drip from the hot water service was not properly drained, are not directly linked by him, in this report, to the entry of water into Mem Nominees' unit. Rather, they appear to be raised as theoretical criticisms.

### **Mr Macleod's comments on the mound in the report of 10 July 2017**

182 In this report, at [2.5], Mr Macleod confirmed that the cause of the cascading water he had identified on his previous inspection on 1 December 2016 was "undoubtedly the mortar mound to the south of the HWS". It was clear from a photograph [No. 1250039] that this mound was the dome which had been created by AWS at the top of the 100 mm PVC pipe which penetrated the slab below the hot water service, through which the hot and cold pipes and gas supply to the hot water service passed.

183 At [2.6], Mr Macleod referred to photographs taken on 22 June 2017 that he said "clearly show that the slab recess around the mortar mound has been

cleaned up and that a hole in the mortar mound had been filled.” This was to be compared with photographs from 1 December 2016, which he asserted “show an untidy and unfinished arrangement to the mortar mound and a hole is evident to the RH side of the mortar mound at the front pipe entry.”

184 In the summary section on page 2 of this report, Mr Macleod indicated that he believed that the firm that had installed the hot water service, or another party, had undertaken repairs around the hot water service.

185 However, Mr Macleod opined that:

If a proper pipe penetration is not undertaken by [Mr Cheng] then it is highly likely that at some time in the future problems of water seeping through to [Mem Nominees’] unit will occur again.<sup>9</sup>

186 At [2.9] of this report, Mr Macleod described the issue in these terms:

I do note that the “mortar mound” system does not comply with good practice and will be bound to leak again soon. The problem is with hot and cold water pipes continually being turned on and off that eventually movement will occur and leakage will recommence.

### **Mr Macleod’s evidence at the hearing**

187 At the hearing, Mr Macleod confirmed the contents of his two reports. He confirmed his view that this mound was the cause of the leaks. His view was not shaken by his acknowledgement that the mound stood 30-50 mm proud of the tiled deck, and that when he had conducted his flood test, he had established a water level of 5 or 8 mm. His explanation was that he attempted to emulate rain by spraying water from a hose over the mound.

188 Mr Macleod was cross-examined about the mound. He confirmed his concern about its construction was that it appeared to be made of mortar or cementitious material which would be prone to expand and contract because hot and cold water pipes passed through it.

189 When Mr Macleod was asked whether he had checked whether the cement had failed in the mound, he conceded that he had not looked.

190 Mr Macleod acknowledged that there had been a gap in the panels, but that he had not tested that gap.

191 At this point, Mr Macleod conceded that all he had done was to establish that there was a leak, but he had not established the cause of the leak.

192 Mr Macleod was asked to comment on the scope of works which Mr Dudas said had been performed. This involved placing two waterproofing membranes over the slab, placing screed over those membranes, and placing two further waterproofing membranes over the screed before topping the membrane with an ultraviolet resistant coating. Mr Macleod responded that this looked like “a Rolls-Royce solution”. He later

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<sup>9</sup> Mr Macleod’s report of 10 July 2017, page 3, paragraph 6.

elaborated that in the industry, a waterproofing solution using two membranes was regarded as “Rolls-Royce”. He agreed that if the works had been carried out, they would be effective.

- 193 When it was put to Mr Macleod that Mr Dudas had given evidence that the PVC pipe had been filled with polyethylene silicon and that caulking had been placed around the pipes exiting the mound, Mr Macleod conceded that he hadn't checked to confirm the mound had been made of cement.
- 194 He agreed that silicon was flexible and would thus be able to expand and contract when the hot and cold water pipes were used, and would not be prone to develop leaks.
- 195 Mr Macleod was also asked about the small hole on the top of the mound next to the pipe that he had identified in his first report, and asked if it would cause a leak.<sup>10</sup> Mr Macleod said that he had not tested it.

### **Discussion**

- 196 I have looked carefully at the photographs appended to Mr Macleod's report of 5 December 2016 [Nos. 1250038, 1250039, and 1250051] and I agree that they show an untidy finish around the mortar mound, and a hole next to the pipe which enters the mound.
- 197 I have also carefully looked at the three photographs that Mr Macleod refers to in his report of 10 July 2017 [Nos. 1250996, 1260001 and 1260003]. These are of poor quality, but the last two do substantiate the points he makes that the surroundings of the mound had been tidied up since he inspected the mound in December 2016, and the hole appears to have been filled.
- 198 Who carried out the work of tidying up the mound and filling the hole is something of a mystery. As noted, Mr Dudas deposed that he was asked to return to the site to inspect the balcony on or about 6 July 2015. He carried out a successful water test. He said nothing about carrying out work to the mound.
- 199 As noted at [77] above, Ms Liu denied that she or her husband or anyone else had had work carried out on the balcony after AWS had completed its work. When she gave this evidence, Ms Liu presumably had in mind works to the balcony membrane and tiling, rather than the hot water service, because, as noted at [74] above, she deposed the hot water boiler had been replaced in August 2016.
- 200 It may well have been the plumber who replaced the hot water boiler in August 2016 who left the mound in the untidy state in which Mr Macleod found it in December 2016.

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<sup>10</sup> A small hole was apparent on the top of a pipe that entered the top of the mound in a photograph [No. 39] appended to Mr Macleod's first report.

201 The point to be drawn from this is that the state of the mound in December 2016 as established by Mr Macleod is not necessarily the state in which AWS had left it following completion of the tiling.

**Finding regarding the issue of whether the balcony was leaking as at 4 August 2015**

202 I have found above, at [127] that Mr Dudas's evidence establishes that the balcony as waterproofed and retiled by AWS was not leaking as at 6 July 2015.

203 In the absence of some intervening cause, there is no reason to expect that the balcony as treated by AWS would have begun to leak by 4 August 2015, being the anniversary of the 12 month assessment period.

204 Mr Dudas says that when he inspected the site on 6 July 2015 to investigate complaints that there was still water ingress from the balcony into Mem Nominees' apartment, the deceased director (Mr Magnani) was present. At this point Mr Magnani was on notice that Mr Cheng considered that he had performed his obligations under the Terms of Settlement and expected to be paid. However, there is no evidence that Mr Magnani challenged the veracity of the water test which Mr Dudas carried out.

205 Mr Macleod did not inspect the balcony until December 2016, that is to say about 17 months after Mr Dudas confirmed that the balcony was not leaking. It has been established that a plumber replaced the hot water boiler in August 2016, which may explain the condition of the mound and its surroundings as identified by Mr Macleod.

206 On the balance of probabilities, I find that the balcony as waterproofed and retiled by AWS was not leaking as at 4 August 2015.

**The mound may not have been the source of the leaking in any event**

207 I accept the evidence of Mr Dudas, and find that the PVC pipe had been filled with polyethylene silicon. I do so because, as noted, I found his evidence credible. Furthermore, there was no evidence from Mr Macleod based on any actual testing of the plinth, as distinct from casual inspection, that it was made of cementitious material.

208 This finding is relevant to the question of the importance of the small hole on the top of the mound evident in the photograph taken by Mr Macleod in December 2016. Mr Macleod agreed that he had not tested the hole. For this reason, there is no direct evidence as to whether it penetrated the silicone all the way through, or if it was merely a "divot" as suggested by Mr Cheng's counsel. When Mr Macleod was asked whether he agreed there would be no leak through the mound if it was covered in silicon, he conceded "you would think so".

209 Given the concession on Mr Macleod's part that silicon would expand and contract and thus would not be prone to develop cracks, and the lack of any evidence that the small hole perceptible on the top of the mound on 1



December 2016 was anything other than a nick, or shallow penetration, in the silicon, I am not satisfied on the balance of probabilities that the mound was the source of the water into Mem Nominees' unit.

### **Summary regarding Mr Macleod's evidence**

- 210 I emphasise that in not making a finding that the mound was the source of the leak, I am not simply preferring Mr Mladichek's view over that of Mr Macleod. Rather, I have been influenced by issues in Mr Macleod's own evidence.
- 211 Mr Macleod had placed great store on his theory that a crack in the cementitious mound had been the cause of the leak. He had not actually established the cause of the leak, and once his theory concerning the mound had been disproved, he was unable to put forward any alternative explanation for the leak.
- 212 I emphasise that in this respect, he was in a very different position to Mr Mladichek, who had proposed an alternative explanation for the leak from the outset of his involvement.

### **THE ALTERNATIVE THEORY OF THE SOURCE OF WATER ENTRY**

- 213 Mr Mladichek, as early as April 2014, had noted that there were other possible causes of the water leaks, including unsealed gaps between walls.<sup>11</sup> Mr Dudas, in his affidavit at [30], also referred to a gap between the precast concrete panels.
- 214 Mr Mladichek returned to this point in his second report, following his inspection on 21 May 2014, when he highlighted that the sealant between the concrete panels near the hot water service had cracked, and opined that this was the probable cause of the leak into the bedroom of the unit below.
- 215 In his report of 5 December 2016, Mr Macleod listed the documents with which he was briefed at [111-117]. Those documents did not include any of Mr Mladichek's reports.
- 216 However, a comment made by Mr Macleod at [455-463] in connection with photograph [No. 55], taken looking up at the external walls, appears to refer to Mr Mladichek's view that the source of water penetration was unsealed gaps in the panels. Mr Macleod acknowledged that the photo showed no seal to the junction of the panels. He added:
- A lack of seal could certainly have exacerbated a water ingress problem. Note however the height of the adjoining building is a significant 'protector' in terms of wind driven rain. A lack of a joint was unrelated to the writer's testing because the joint was sealed and the building did leak at the suspected problem location.
- 217 Mr Mladichek, in his report following the joint inspection, described the dye test that established that a fresh water leak was coming from the common wall junction. He appended a photo to support his point.

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<sup>11</sup> Mr Mladichek's report dated April 2014, page 7.

218 Mr Macleod, in the summary in his second report, acknowledged the dye test undertaken by Mr Mladichek, but said that it proved “that an infinitesimal amount of water came through from the top of the concrete panel junction into the ceiling cavity of [the unit] below.” He later added:

The point of water entry at 01 December 2016 certainly was not the junction in the concrete slabs that were tested by Mladichek as no water was tested by me then to that location. (Sic)

219 At the hearing, Mr Macleod emphatically confirmed this view that the leak did not come from the defective caulking in the external walls of the building.

220 The evident tension between Mr Mladichek’s theory that the source of the leak into Mem Nominees’ unit was the unsealed gap between vertical slabs on the outside of the building, and Mr Macleod’s observation that the leaking from that source was “infinitesimal”, can be resolved by having regard to the evidence contained in Mr Mladichek’s report following the joint inspection, dated 13 July 2017. Here, under the heading “Interference with evidence” he said:

Since my final inspection report of 07/04/2015 there has been interference with evidence that might have perverted the course of this case. Person/s unknown at time unknown have gained access to [Mr Cheng’s] property (without consent) and have applied sealant to the area that I have identified as the cause of water leaks. Had the application of sealant been done professionally it would have sealed water ingress point and my testing result of 22/06/2017 would have been negative. (Sic)

221 Mr Mladichek confirmed this evidence under cross-examination at the hearing.

222 At the hearing, Mr Dudas also confirmed that at the joint inspection in June 2017 he saw new sealant had been placed on the gaps in the precast panels on the balcony, and that this had not been there in 2015.

223 I accept Mr Mladichek’s evidence and Mr Dudas’s evidence regarding these factual matters, and find that the open gap between the wall slabs Mr Mladichek had initially observed had been partially, but not perfectly, sealed by a person unknown prior to the joint inspection in June 2017.

224 From this evidence it is possible to construct the following scenario:

- (a) AWS carried out effective waterproofing works to the balcony by 4 August 2014.
- (b) Those works were found by Mr Mladichek to be effective at his inspections on 8 July 2014, 12 November 2014, and 20 March 2015.
- (c) Those works were also established to be effective as at 6 July 2015 by Mr Dudas.

- (d) When Mr Macleod carried out his water test on 1 December 2016, the gaps between the wall slabs identified by Mr Mladichek had not been filled, allowing significant water penetration into Mem Nominees' unit, as observed by Mr Macleod.
- (e) At some date after 1 December 2016, someone applied sealant, albeit unprofessionally, to the gap between the wall slabs.
- (f) This action almost, but not completely, eliminated the possibility of water passing through the gap between the wall slabs into the building, and ultimately into Mem Nominees' unit. The partial effect of the sealant would explain why a very low amount of water was identified as passing into the lower apartment at the time of Mr Mladichek's dye test.

## **SUMMARY**

- 225 It is conceded by Mem Nominees, on the basis of Mr Macleod's second report, that the waterproofing works performed on the balcony now work.
- 226 I have found at [206] the balcony as waterproofed and retiled by AWS was not leaking as at 4 August 2015.
- 227 Mr Mladichek identified a credible alternative source of water entry into Mem Nominees' apartment after the waterproofing work had been successfully carried out, namely through the unsealed gaps between the external wall slabs.
- 228 I have found, at [223], that the open gaps between the wall slabs Mr Mladichek initially observed had been partially but unprofessionally sealed by a person unknown before the joint inspection in June 2017.

## **Ramifications**

- 229 There is no doubt that at the conclusion of the waterproofing works and at the end of what Mr Cheng and Ms Liu understood to be the assessment period, Mr Cheng expected to be paid by Mem Nominees. This is evident from the email from Ms Liu to Mem Nominees' lawyers dated 2 July 2015.
- 230 The finding at [206] that, as at the conclusion of the assessment period on 4 August 2015 the waterproofing works performed on the balcony were working, means that Mem Nominees' claim for \$50,000 must fail.
- 231 On the other hand, I am satisfied that Mr Cheng has demonstrated that the works he had performed to replace the waterproof membrane and undersized drain on the balcony were unnecessary, as these were not the causes of the leak in the first place.
- 232 I acknowledge Mem Nominees contended at the hearing that if the Tribunal were to find that the leaks came from an unsealed gap between the external walls, then there could be no finding that there were leaks from the balcony so as to entitle Mr Cheng to payment, with the result that neither party would receive an award.

- 233 I consider that such a result would be unfair to Mr Cheng. However, that would not be a sufficient reason to find for Mr Cheng if that was the effect of the Terms of Settlement that he had executed. The duty of the Tribunal to act fairly and in all proceedings, arising under s97 of the VCAT Act, must be performed in accordance with the law. See *Christ Church Grammar School v Bosnich & Sehr*.<sup>12</sup> Although that case was specifically concerned with an appeal from the Tribunal exercising its duty to act fairly under s109 of the *Fair Trading Act 1999* (Vic), there is no doubt that the principle it confirmed at [40], that “the Tribunal is required, when deciding the merits of a case, to apply the law and not merely be guided by it”, will apply equally to the Tribunal’s duty to act “according to the substantial merits of the case”, which also arises under s97 of the VCAT Act.
- 234 The upshot is that this case must be determined in accordance with the standard principles of contract law.
- 235 I consider that the result contended for by Mem Nominees would be inconsistent with the objectively apparent intention of the Terms of Settlement.
- 236 I consider that in the context of the requirement contained in clause 2E that if there were leaks from “the balcony” at the expiration of the 12 month assessment period, Mr Cheng was to be paid, “the balcony” is to be construed broadly so as to include not only its waterproofed deck, but also its walls. The walls, of course, include the external concrete panels near the hot water service which Mr Mladichek identified as a source of the leaks.<sup>13</sup>
- 237 I test this conclusion by considering the alternative. Mr Cheng was obligated under the Terms of Settlement to carry out waterproofing works to the deck. If “the balcony” is construed narrowly so that it is limited to the waterproofed deck, then the Terms of Settlement would be nonsensical. If the waterproofing works were successful, there would in the future be no leaks from “the balcony”, and Mem Nominees would be entitled to receive \$50,000. Only if the waterproofing works were unsuccessful, so that there were leaks from “the balcony”, would Mr Cheng be entitled to payment. This is the exact opposite of what was clearly intended by the Terms of Settlement.
- 238 I accordingly find that “the balcony” referred to in clause 2E of the Terms of Settlement is to be broadly construed.
- 239 This finding facilitates a further finding that Mr Cheng is entitled to payment of his costs of carrying out the rectification works, plus damages of \$20,000.
- 240 I have above at [72] accepted the evidence that Ms Liu paid \$10,096 to AWS on behalf of Mr Cheng. The invoices against which those sums were paid did not include the cost of performing the optional tiling work, which

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<sup>12</sup> [2010] VSC 476

<sup>13</sup> Mr Mladichek’s report of 22 May 2014, at [6] on page 23.

under clause 2A(b) was to be at Mr Cheng's expense. I accordingly find that the cost of doing the works in respect of which Mr Cheng is entitled to be reimbursed is \$10,096.

#### **AMOUNTS PAID TO MR MLADICHEK**

- 241 Ms Liu in her affidavit at [30] said that she had paid \$3,600 to Mr Mladichek. Exhibited to her affidavit as "LC-17" were invoices totalling \$2,100 from Mr Mladichek's firm, A Plus Building Advice, as follows:
- (a) 21 May 2014, for \$540, endorsed as paid;
  - (b) 9 July 2014, for \$560, endorsed as paid;
  - (c) 12 November 2014, for \$500, endorsed as paid; and
  - (d) 23 March 2015, for \$500, endorsed as paid.
- 242 Ms Liu also exhibited to her affidavit, at "LC-17", a copy of a statement from a credit card indicating that on 10 April (year not stated) she had paid A Plus Building Advice \$1,500. This sum obviously brings the total amount evidenced as having been paid to Mr Mladichek's firm to \$3,600.
- 243 It was contended in Mr Cheng's closing submissions that he was entitled to an award in respect of \$1,100. Why this sum was sought is not clear to me. I cannot find a justification for such a claim in the Terms of Settlement. Under clause 2E, Mr Chang is entitled to payment of the costs incurred in carrying out the works referred to in paragraph A, plus the sum of \$20,000. The works referred to in paragraph 2A include the physical works carried out by AWS, but not the services of inspecting and reporting carried out by Mr Mladichek.

#### **IS THE \$20,000 PAYABLE?**

- 244 In its Points of Defence to Counter Claim, Mem Nominees denies that it is liable to Mr Cheng for the payment of \$20,000. It bases this denial on two arguments. The first of these is that Mr Cheng has not provided any invoices for the costs expended, as required by clause 2E of the Terms of Settlement. The second argument is that if the costs are legal costs relating to preparation, drafting of documents or attendances at the Tribunal, they are not allowable at law. Reliance was placed in this regard on the well-known High Court decision of *Cachia v Hanes*.<sup>14</sup>
- 245 These arguments were not raised in final submissions on behalf of Mem Nominees, and it is possible that they had been abandoned. Perhaps this is because at the hearing Mem Nominees was pressing its own claim for \$50,000 under clause 2B of the Terms of Settlement, and presumably such a claim would have been open to attack on the basis of *Cachia v Hanes*. However, in the absence of any formal abandonment of the arguments, I will address them.
- 246 I regard the first argument as factually misconceived as clause 2E provides:

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<sup>14</sup> [1994] HCA 14; (1994) 179 CLK 403.

In the event that there are leaks from the balcony into [Mem Nominees' unit], at the expiration of 12 months, [Mem Nominees] will pay [Mr Cheng] the costs incurred by [Mr Cheng] in carrying out the works referred to in paragraph A plus the sum of \$20,000 for [Mr Cheng's] costs.

247 Under the terms of clause 2E, Mr Cheng is entitled to payment of the sum of \$20,000 in addition to the costs incurred by him in carrying out the works referred to in paragraph A. It is clear that there is no requirement in clause 2E that Mr Cheng should produce receipts or other proof of costs incurred.

248 It is possible that Mem Nominees has confused clause 2E with clause 2F, which requires Mr Cheng to give to Mem Nominees full details of "all costs and expenses including inspections incurred by him in carrying out the works referred to in paragraph A and will provide invoices for such works". This requirement has been complied with, as the relevant invoices were put into evidence at the hearing.

249 I consider the second argument, based on *Cachia v Hanes*, to be irrelevant. The argument would have traction if Mr Cheng was claiming costs in the Tribunal at the conclusion of the hearing for his own time spent in preparing, drafting and attending at the Tribunal. However, he is not doing this. He is seeking damages under a contractual term that he be paid a lump sum of \$20,000 in compensation for his costs, whatever they may be.

250 I find that Mr Cheng is entitled to payment of the \$20,000.

### **SUMMARY**

251 Having regard to Mr Cheng's entitlement to a payment of \$10,096 in reimbursement of carrying out the waterproofing works, he is entitled to a total award of \$36,096. I will make an order accordingly. Costs will be reserved, as will the issue of reimbursement of fees under s115B of the VCAT Act.

C. Edquist  
**Member**