VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

BUILDING AND PROPERTY LIST VCAT REFERENCE NO. BP188/2017

CATCHWORDS

Domestic building – whether part of applicants' claim statute barred – *Building Act 1993* – s134 – commencement date of limitation period for bringing of a building action where multiple occupancy permits for staged development – joinder of private lot owners where louvre system partly in private lots and partly in common property – relevant considerations.

FIRST APPLICANT	Owners Corporation No.1 PS526704E
SECOND APPLICANT	Owners Corporation No2 PS526704E (and others according to Schedule)
RESPONDENT	LendLease Engineering Pty Ltd (ACN 000 201 516
WHERE HELD	Melbourne
BEFORE	Deputy President C Aird
HEARING TYPE	Directions hearing
DATE OF HEARING	11 November 2019
DATE OF ORDER	5 December 2019
CITATION	Owners Corporation No.1 PS526704E V LendLease Engineering Pty Ltd (Building and Property) [2019] VCAT 1909

ORDERS

1. The respondent's application under s75 of the *Victorian Civil and Administrative Tribunal Act 1998* is dismissed.
2. Under s60 of the *Victorian Civil and Administrative Tribunal Act 1998* the private lot owners named in the Schedule of Applicants are joined as the third to one hundred and thirty-seventh applicants.
3. By 13 December 2019 the applicants must file and serve Second Further Amended Points of Claim substantially in the form exhibited to the affidavit of Steven Marchesin dated 3 October 2019 omitting paragraphs 30A to 42, and BA in the Prayer for Relief.
4. **The proceeding is listed for a directions hearing before Senior Member Farrelly at 12noon on 25 February 2020 at 55 King Street Melbourne at which time directions will be made for its further conduct – allow 1 hour.**

5. The applicants' application for joinder of the proposed second respondent is listed for an administrative mention on 21 January 2020 at which time the applicants must advise the principal registrar, the respondent and the proposed second respondent if they wish to proceed with the application. If the applicants wish to proceed with the application it will be heard at the directions hearing on 25 February 2020.

   Note:

   You should respond to the administrative mention in writing (by email or letter) by the above date advising the current status of the proceeding. You are not required to attend the Tribunal on this date.

6. Liberty to apply.
7. Costs reserved.

DEPUTY PRESIDENT C AIRD

APPEARANCES:

For Applicant	Mr H Foxcroft QC with Mr R Harris of Counsel
For Respondents	Mr C M Caleo QC with Mr B Reid of Counsel

REASONS

1 The applicant owners corporations ('the OCs') commenced this proceeding in February 2017 claiming damages for the cost of rectification, alternatively an order for rectification, of alleged defective building works at the Chevron apartments, including in relation to the sunshade louvre system ('the louvre system').

2 By Further Amended Points of Claim ('FAPOC') dated 1 March 2019 the OCs seek removal and replacement of the louvre system, the cost of which is estimated at $6,721,803 together with scaffolding estimated to be approximately $2m. Particulars of the cost of rectification of the other alleged defects, and any consequential losses is yet to be advised. The total claim is likely to be approximately $9m.

3 The respondent Contractor contends that the OCs only have standing to bring claims in relation to that part of the louvre system which is on common property. Further, that some of the claims were brought more than 10 years after the relevant occupancy permit, and that accordingly they are statute barred. On 16 May 2019 the Contractor filed an Application for Directions Hearing or Orders seeking the following orders (the application for these orders is the only one which is pressed):

> An order pursuant to section 75(1) of the *Victorian Civil and Administrative Tribunal Act 1998* ('the VCAT Act') that the Applicants' claims in respect of all apartments (and associated common property) of building 2 of the Property except for:
>
> (a) all apartments (and associated common property) situated on levels 7, 8 and 9 of building 2 of the Property; and
>
> (b) apartments G10, 210, 410 and 610 (and associated common property) of building 2 of the Property
>
> be dismissed with costs.

4 By Application for Directions Hearing or Orders dated 4 October 2019 the owners of 137 private lots directly affected by the louvre system seek to be joined as co-applicants.

5 For the reasons which follow, I am satisfied that the proceeding was commenced within time, and that the private lot owners should be joined as applicants.

6 It is convenient to consider the Contractor's s75 application before considering the application for joinder. However, I will first discuss the louvre system.

THE LOUVRE SYSTEM

7 In the submissions filed on behalf of the OCs it is asserted that the OCs always believed that the louvre system was located on common property. After the Contractor raised the issue of the location and ownership of the louvre system, in its defence, the OCs obtained a report from Marc

Centofanti, Licensed Surveyor of Reeds Consulting ('the Reeds Report') dated 7 August 2019. The complexity of the Plan of Subdivision is highlighted in the following statements on page 5 of the Reeds Report (noting that the individual louvres are referred to as 'exterior sunscreens', a term which I will adopt when referring to the individual louvres):

> Almost all the lots contained within the Plan of Subdivision PS526704E have multiple parts. For ease of reading this report the part notation has been omitted and typically refers to that part of the lot which relates to the exterior sunscreens.
>
> When an exterior sunscreen spans/crosses multiple levels my inspection report (Appendix 4) counts and assess the external sunscreen based on the dominant level spanned by the portion of the external sunscreen. For example, Lot 828. The four exterior sunscreens are located on both the ninth and topmost stories. The dominant level spaned by those exterior sunscreens is the ninth storey. Lot 828 has four Type 2a…exterior sunscreens.[1]

8 In paragraph 3 of the Reeds Report a number of different types of exterior sunscreens are identified:

> Type 1 – located wholly within the lot[2]
>
> Type 2 – Median. The exterior sunscreen is the structure that defines the title boundary:
>
> Type 2a – Fixed Median. The title boundary is defined by a structure and the exterior sunscreen is deemed to be the structure that defines the title boundary. The exterior sunscreen is permanently fixed and does not move. The title boundary lies on the median of the exterior sunscreen. Half the screen is within the relevant lot and half is within relevant Common Property.
>
> Type 2*/2# - Fixed Median. The title boundary definition is the same as Type 2a except that on the topmost storeys, lots 704 to 709, 824, 827 to 831 are setback from the edge of the building by Common Property No 2. That part of the exterior sunscreens that extends into the topmost storey no longer defines the boundaries between lots and Common Property. It defines the boundaries between abutting Common Properties. Type 2* exterior suncreens define the title boundaries between Common Property No 1 and Common Property No 2. The part of the exterior sunscreens identifies as Type 2# are wholly located in Common Property No 2.
>
> Type 2b – Sliding Median. The title boundary is defined by a structure and the sliding exterior sunscreen is deemed to be the structure that defines the title boundary. There are no other structure or structures which I believe would correctly represent the title boundary. The exterior sunscreen is affixed to tracks which allow the screen to slide.

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[1] A consideration of Appendix 4 to the Reeds Report shows that Lot 828 has 5 exterior sunscreens described as 'median' which are 50% in common property and 50% wholly within the private lot, and 4 exterior sunscreens which are wholly within common property – a total of 9 exterior sunscreens.

[2] Accordingly it is not necessary to set out the three sub categories here

The title boundary lies on the median of the exterior sunscreen in the closed position. Half of the screen is within the relevant lot and half is within relevant Common Property

Type 3 – Wholly within Common Property No 1. The exterior sunscreen is not the structure which defines the title boundary.[3]

Type 4 – Outside the Plan of Subdivision boundaries. The exterior sunscreen is not the structure that defines the title boundary; is not contained within the relevant lot or Common Property and is located outside the title boundaries, within the Council Road, Alfred Lane. [Refer to] The registered s173 Agreement regarding these exterior sunscreens …

9 At paragraph 6 of the Reeds Report Mr Centofanti states:

I can confirm that some of the exterior sunscreens, or part thereof are located within common property. Please see the Inspection Report – Appendix 4, which defines the lot location of the exterior sunscreens and associated type.

Those exterior sunscreens which form part of Common Property No 1 are Type 2a, Type 2b, Type 2*, Type 3a and Type 3b. Those exterior sunscreens which form part of Common Property No 2 are Type 2a (lots 830 and 831 only), Type 2* and Type 2#.

10 At paragraph 7 of the Reeds Reports, type 4 sunscreens are discussed.

The exterior sunscreens categorised as Type 4 are not included in any lot or common property. They are wholly located outside the Plan of Subdivision and within Alfred Lane.

The registered s173 Agreement … defines these structures as "Projections: The meaning from the agreement states "those parts of the development which project over Alfred Lane". (sic) Clause 5.1 defines "Maintenance" conditions and states:

"The owner shall

a) be solely responsible for all care, repair, replacement, maintenance or other works of any kind required in relation to or to be carried out on any Projection which is associated with the use and enjoyment of any part of the Land on which that Owner is or is entitled to be registered proprietor."

My opinion is that the lot that directly abuts the Projection is the owner of the Projection and that lot shall be responsible for the Maintenance.

No Lot "owns" the projection as it is not contained within any registered title plan or diagram.

(sic – although the last two sentences appear to be inconsistent).

11 Appendix 4 includes a Screen Schedule and reveals that there are 922 screens as follows:

[3] Accordingly it is not necessary to set out the sub categories for Type 3

Entirely within a private lot boundary	411
Median	330
Entirely within common property	138
'Projected' screens[4]	43
TOTAL	922

There is a qualification in relation to 109 'additional' screens:

> Already counted as part of the dominant level spanned (not included in Overall Total) (Type 2* - 67, Type 2# - 13, Type 4 – 29).

12 Accordingly, less than half of the sunscreens are entirely within a private lot boundary, and 468 are either entirely within common property or have a median boundary. It is by no means clear who has the responsibility for the 'projected' screens.

13 Appendix 3 to the Reeds Report helpfully contains photographs[5] illustrating which type of exterior sunscreen is installed for a number of sample lots. The lot boundaries are also shown on each photograph. The exterior sunscreens are installed vertically: some 'form' the face of the building, in that they are seeming installed between brick walls and effectively form part of the wall; others appear to enclose balconies, windows and doors (with some opening like doors).

14 When considered in conjunction with the Screen Schedule in Appendix 4 the photographs demonstrate the absurdity of attempting to delineate the claims between exterior sunscreens on common property and those on individual lots. As noted above, 138 exterior sunscreens are entirely within common property and 330 have a median lot boundary which means that 468 exterior sunscreens are either wholly or partly within common property. A consideration of the Screen Schedule shows that not all lots are affected by exterior sunscreens. Further, the lot boundaries delineated on the photographs show that in some instances, the lot boundary passes horizontally through an exterior sunscreen such that the part of the exterior sunscreen above the lot boundary is in common property and the part below is in a private lot.[6]

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[4] The 'Projected Screens' are the Type 4 screens

[5] The photographs designated Diagram 2, 5, 6 and 8 are Annexure 1-4 respectively to these Reasons (I have traced over the 'Type' descriptions to make them easier to read, as the typed colour was very faint).

[6] For example:

(i) Diagram 2 shows 3 exterior sunscreens installed vertically. In relation to the exterior sunscreens for Lot 15 on the ground floor it visually appears that approximately 1.25 of 3 exterior sunscreens are in Lot 15, and 1.57 are in common property adjacent to Lot 115 on the first floor.

(II) Diagram 8 shows a similar configuration for three exterior sunscreens forming part of, and adjacent to, Lots 9 and 109.

SECTION 75

15 I have previously set out the principles to be applied in considering a s75 application[7] and I restate them here.

16 Section 75 of the VCAT Act provides:

> (1) At any time, the Tribunal may make an order summarily dismissing or striking out all, or any part, of a proceeding that, in its opinion—
>
> (a) is frivolous, vexatious, misconceived or lacking in substance; or
>
> (b) is otherwise an abuse of process.
>
> (2) If the Tribunal makes an order under sub-section (1), it may order the applicant to pay any other party an amount to compensate that party for any costs, expenses, loss, inconvenience and embarrassment resulting from the proceeding.
>
> …
>
> (5) For the purposes of this Act, the question whether or not an application is frivolous, vexatious, misconceived or lacking in substance or is otherwise an abuse of process is a question of law.

17 The power under s75 is discretionary. It is well established that any exercise of this discretion must be approached with caution, noting that the hurdle to be overcome by a party making an application under s75 is very high. As Judge Bowman said in *Arrow International Australia Pty Ltd v Indevelco Pty Ltd*[8] at [32 and 34]:

> 31. There have been a number of decisions of the courts generally and of this Tribunal in relation to the principles which operate when applying a provision such as S.75 of the Act. In relation to this Tribunal, these were summarised by Deputy President McKenzie in *Norman v Australian Red Cross Society* (1998) 14 VAR 243. One such principle is that, <u>for a dismissal or strike out application to succeed, the proceeding must be obviously hopeless, obviously unsustainable in fact or in law, on no reasonable view justify relief, or be bound to fail</u>. This is consistent with the approach adopted by the courts over the years. As was stated by Dixon J in *Dey v Victorian Railways Commissioners* (1949) 78 CLR 62:-
>
> > "The application is really made to the inherent jurisdiction of the court to stop the abuse of its process when it is employed for groundless claims. The principles upon which that jurisdiction is exercisable are well settled. A case must be very clear indeed to

[7] *Owners Corporation PS No. 1 PS 519798G v May* [2016] VCAT 399; *Owners Corporation PS 542601Y v Phenix Holdings Pty Ltd* [2017] VCAT 1235; *Owners Corporation 1 PS538430Y v H Building Pty Ltd (Under external administration) and Ors* [2019] VCAT 1485

[8] [2005] VCAT 306.

justify the summary intervention of the court to prevent a plaintiff submitting his case for determination in the appointed manner by the court …".

…

34. Whether or not a burden of proof in the strict sense exists in proceedings before this Tribunal, I am also of the view that the party making an application such as this is required to induce in my mind a state of satisfaction that the claim is obviously hopeless, unsustainable, and bound to fail, and that it is "very clear indeed" that this is so. [emphasis added]

18 Justice Garde in considering a s75 application in *Owners Corporation No. 1 PS537642N v Hickory Group Pty Ltd*[9] considered recent authorities:

8. In *Forrester v AIMS Corporation*, Kaye J considered the principles applicable to s 75(1) applications. Before a proceeding can be summarily dismissed:

   (a) it must be 'very clear indeed' that the action is 'absolutely hopeless'; or

   (b) the action must be 'so clearly untenable that it cannot possibly succeed'.

Kaye J also held that:

   (c) the strike out power 'may not be invoked where all that is shown is that, on the material currently put before the Tribunal, the complainant may fail to adduce evidence substantiating an essential element of the complaint'; and

   (d) the respondent to a complaint has the onus of showing 'that the complaint is undoubtedly hopeless'.

9 In *Ausecon Developments Pty Ltd v Kamil*, Judge Davis noted that for a strike out application to be successful, the proceeding must:

> … must be obviously unsustainable in fact or in law, can on no reasonable view justify relief, or must be bound to fail. A claim would be regarded as frivolous or vexatious or misconceived if it is obviously groundless, made by a person without standing, or in respect of a matter which lies outside the VCAT's jurisdiction. A claim may be regarded as lacking in substance if an applicant cannot possibly succeed in establishing its claim, or the respondent has a complete defence. The power to strike out should be exercised with great caution.

10 In *Fancourt v Mercantile Credits Pty Ltd* ('Fancourt'), the High Court held that:

> … the power to order summary or final judgment is one that should be exercised with great care and should never be exercised unless it is clear that there is no real question to be tried.

[9] [2015] VCAT 1683

> 11 In *Lay v Alliswell Pty Ltd*, Balmford J accepted that the High Court's observations in *Fancourt* are applicable to applications under s 75 of the VCAT Act.
>
> [citations omitted]

19 I also note the comments by Judge Davis VP in *Ausecon Developments Pty Ltd v Kamil*[10] at [19] relied on by the Builder:

> For a strike out application to succeed under section 75 of the VCAT Act, the proceeding must be obviously hopeless, must be obviously unsustainable in fact or in law, can on no reasonable view justify relief, or must be bound to fail. A claim would be regarded as frivolous or vexatious or misconceived if it is obviously groundless, made by a person without standing, or in respect of a matter which lies outside the VCAT's jurisdiction. A claim might be regarded as lacking in substance if an applicant cannot possibly succeed in establishing its claim, or the respondent has a complete defence. The power to strike out should be exercised with great caution.
>
> [citations omitted]

When does the 10 year limitation period run from?

20 This proceeding is only concerned with Lots in Building 2 (Building 1 having been the conversion of the Chevron Hotel building into apartments and retail premises), with the work have been carried out in stages. Four Occupancy Permits were issued in relation to the development – two concern Building 1 only. The Contractor contends that the 10 year limitation period for the bringing of a building action as set out in s134 of the *Building Act 1993* ('the B Act') runs from the date of the Occupancy Permit ('the OP') issued in respect of the relevant stage of works. The Owners contend that the relevant date is the date of the last OP.

21 Section 134 of the B Act limits the time for the bringing of building actions to 10 years from the date of the occupancy permit, or where an occupancy permit is not issued, from the date of issue of the certificate of final inspection.

22 Section 134 of the B Act provides:

> **134 Limitation on time when building action may be brought**
>
> Despite any thing to the contrary in the Limitation of Actions Act 1958 or in any other Act or law, a building action cannot be brought more than 10 years after the date of issue of the occupancy permit in respect of the building work (whether or not the occupancy permit is subsequently cancelled or varied) or, if an occupancy permit is not issued, the date of issue under Part 4 of the certificate of final inspection of the building work.

[10] [2015] VCAT 12474

The Contractor's position

23 The Contractor submits that in considering its s75 application I should determine when the 10 year limitation period for the commencement of a building action commences when there are multiple occupancy permits. It relies on my comments in *Owners Corporation 1 Plan No PS543073S v Eastrise Constructions Pty Ltd*[11] where I said at [18]:

> Not only would the Builder be put to considerable cost in defending claims to which it has a clear defence because they are statute barred, the Owners would also be put to the considerable cost of prosecuting claims which have no prospect of success.

24 The Contractor relies on the comments by the Court of Appeal in *Brirek Industries Pty Ltd v McKenzie Group Consulting (Vic) Pty Ltd*[12]

> 113. Section 134 addresses a 'building action'. Section 129 of the *Building Act* defines that term to mean 'an action (including a counter-claim) for damages for loss or damage arising out of or concerning defective building work'…
>
> 114. Section 134 does not contain any express limitation that confines its application to cases in contract or in tort. It does not contain any reference to some distinction between limitation periods for actions in negligence as opposed to those in contract. It does not contain any reference to patent or latent faults. It does not contain any suggestion that its operation is limited to physical loss and damage. What it does is to limit the period within which 'building actions' may be brought generally.
>
> …
>
> 135 The words of s 134 of the *Building Act* should not be read down so that they are confined in their operation to claims in tort in such a way that is only those claims that have the benefit of, and are subject to, the 10-year limitation period stipulated. The construction given to s 134 by the trial judge imposes unwarranted limitations on the scope and applicability of the section. In our opinion, actions founded in contract, independent of any tort claim, fall within the scope of s134 and may be brought within 10 years from the date of issue of the occupancy permit.

25 At paragraph 16 and 17 of its submissions the Builder contends:

> 16. The legislative purpose of s. 134 of the Act is clear: it is to limit building actions being instituted more than 10 years after the occupancy permit in respect of the building work to which the occupancy permit relates. Section 134 contemplates the issuing of more than one occupancy permit for the same building work by the use of the phrase *"whether or not the occupancy permit is subsequently cancelled or varied".* This time limit is expressly

[11] [2019] VCAT 1639
[12] [2014] VSCA 165

identified as commencing from the issue of the first occupancy permit not the subsequent, varied or replacement permit.

17. Further, given the phrase *"whether or not the occupancy permit is subsequently cancelled or varied"*, if there are multiple permits for the building work, time must commence to run from the date of issue of the first permit that relates to the building work the subject of complaint in the proceeding. If, by the express words of the provision, the cancellation or variation of an occupancy permit does not impact the commencement or running of the limitation period, it would be anomalous if a subsequent occupancy permit which, as a matter of form, covered all building work the subject of earlier plus more, were construed to impact the commencement or running of the limitation period. Once the 10 year period commences, it is not paused, or re-started, because a subsequent occupancy permit dealing with additional building work is issued.

The OCs' position

26 The OCs contend that the date of the last OP is the commencement date of the 10 year limitation period. In their Further Submissions dated 18 November 2019 the OCs refer to the comments by Cavanough J in *LU Simon Builders Pty Ltd v Victorian Building Authority*:[13] at [29] – [30]

29. Appropriately, in my view, the plaintiffs also invoke[14] the principle that a construction that would produce inconvenient, improbable or irrational consequences should be avoided if there is a competing construction that is reasonably open and would not produce such consequences.[15]

30. Further, the plaintiffs rely on the principle of legality, which requires (to use the language of the Court of Appeal in *Victorian WorkCover Authority v BSA Ltd*[16]) that statutes 'be construed — in circumstances where constructional choices are open — so as to avoid or minimise encroachment upon rights or freedoms at common law'. I accept that there is room in this case for the application of this principle, too.[17]

27 The OCs say that the absurdity of the interpretation urged upon me by the Contractor is illustrated by the following example referred to during the hearing, and set out at paragraphs 6 and 7 of their Further Submissions:

6. …that water damage caused to apartments situated below Level 7 of Building 2 after 6 December 2016, but before 16 February 2017, caused by a building defect to that part of Building 2 situated above

[13] [2017] VSC 805
[14] Plaintiffs' written submissions dated 20 November 2017, [62], citing *CIC Insurance Ltd v Bankstown Football Club Ltd* (1997) 187 CLR 384, 408. See further below.
[15] See also *Cooper Brookes (Wollongong) Pty Ltd v Commissioner of Taxation* (1981) 147 CLR 297, 305, 320-1 and the other cases cited for this proposition by the Court of Appeal in *Victorian WorkCover Authority v BSA Ltd* [2017] VSCA 276, [19].
[16] [2017] VSCA 276, [16].
[17] See further below.

Level 7, while actionable by the OC and Private Lot Owners who suffered property damage to Building 2 above Level 7, would not on the Respondent's hypothesis be actionable by the OC and those Private Lot Owners in respect of property damage caused to that part of Building 2 below Level 7.

7. This would not only be *inconvenient*, but lead to an *irrational consequence* if the Tribunal was to accept the Respondent's limitation defence hypothesis in respect of s134 of the *Building Act.*

The Occupancy Permits

28 The first two OPs concern Stage 1 – Building 1. There were two OPs issued which refer to lots in Building 2:[18]

6 December 2006 ('OP1')	Appendix C sets out the Special Occupancy Permit Conditions, which exclude certain apartments: 1. This Occupancy Permit excludes Building 2 Apartments Levels 7, 8 & 9 and Apartments G10, 210, 410 & 610. 2. This Occupancy Permit excludes Building 1 Apartments G04 & GO5 3. … Appendix G sets out the Lots to which the Occupancy Permit applies commencing at Basement Level Lot 7, through to Seventh Storey Lot 623. It also includes the Building 1 lots listed in the relevant Appendix to the first two OPs.
16 February 2007 ('OP2')	This OP is headed 'STAGE 3 – FINAL'. There are no Special Occupancy Permit Conditions in Appendix C. The Lots to which it applies are set out in Appendix G and include all of the Lots in Buildings 1 and 2.

29 The following paragraph appears in each of the four OPs:

> **Suitability for Occupation**
>
> The building or part of a building to which this certificate applies is suitable for occupation.

30 The 'Building Details' are listed in a table, annexed to each OP, with the following headings: 'Part of the Building', 'Lot No', 'Use', 'Class of Occupancy', 'No of People deemed accommodated'. For present purposes

[18] As discussed with the parties at the directions hearing, the two occupancy permits concerning Building 2 will be referred to as OP1 and OP2 for ease of reference.

the information under the heading 'Use' is relevant. Next to the lot numbers of residential apartments, which are organised by building and storey appears the following:

> Residential Apartments & Associated Common Property.

Discussion

31 Although s134 clearly provides that the commencement of the limitation period is unaffected by the subsequent amendment or cancellation of an occupancy permit, it is silent about the commencement date where there are multiple occupancy permits. The clear purpose of s134 as stated in *Brirek* is to *limit the period within which 'building actions' may be brought generally.*[19] In other words, the 10 year limitation period provides the latest date for the bringing of a building action. It does not impact on the earliest date on which a building action may be commenced, as suggested by the Contractor. The commencement of proceedings is not dependent on an occupancy permit having been issued.

32 Relevantly, the second OP for Building 1, issued on 19 October 2006, includes the lots which were listed in Appendix D[20] of the OP dated 23 June 2006 Appendix C of both OPs sets out the Special Occupancy Permit Conditions and relevantly confirms that they exclude all Apartment Levels of Building 2, and in the case of the OP dated 19 October 2006 that it excludes Apartments GO4 and GO5 [of Building 1].

33 OP2 (the last OP) is headed 'Stage 3 – Final' and certifies that the entirety of both Buildings 1 and 2 are suitable for occupation. In my view, the date of the final OP must be the date of commencement of the 10 year limitation period. In a staged development, any other interpretation would lead to uncertainty, and a potentially unworkable situation. As with the example given by the OCs,[21] even if the date of installation of each of the screens can be identified, to have different limitations periods in respect of claims concerning what are, in effect, part of the external fabric of the building (at least aesthetically) would be an absurdity.

34 If I am wrong in determining that the date of the final OP is the commencement of the 10 year limitation period, I am nevertheless satisfied it is arguable, that the limitation period commenced on that date: 16 February 2007. Under s46 of the B Act, an occupancy permit is *evidence that the building or part of a building to which it applies is suitable for occupation* and that it is *not evidence that the building or part of a building to which it applies complies with this Act or the building regulations.* An occupancy permit is not, of itself, evidence that all work has been completed – only that the building work to which it relates is fit for occupation. Therefore, having regard to the description set out below of the location of the various types of exterior sunscreens comprising the sunshade

[19] Ibid at [114]
[20] Although headed Appendix D it appears that this should have been headed Appendix F
[21] See paragraph 28 above

louvre system, and noting that a significant proportion are either wholly or partly in common property, it is impossible to tell from each OP which exterior sunscreens were installed as at the date of OP1. The only certainty is that they had all been installed by the time of OP2.

THE APPLICATION FOR JOINDER

35 137 owners of the private lots ('the Owners') where exterior sun screens are wholly or partly installed within their lot boundary have applied to be joined as applicants to this proceeding. The application is opposed by the Contractor which contends that any claim by the Owners is statute barred, the 10 year limitation period for the bringing of a building action having expired, at the very latest on or about 16 February 2017.

36 Section 60 of the VCAT Act provides:

> (1) The Tribunal may order that a person be joined as a party to a proceeding if the Tribunal considers that—
>
> (a) The person ought to be bound by, or have the benefit of, an order of the Tribunal in the proceeding; or
>
> (b) the person's interests are affected by the proceeding; or
>
> (c) for any other reason it is desirable that the person be joined as a party.
>
> (2) The Tribunal may make an order under sub-section (1) on its own initiative or on the application of any person.

37 In *Owners Corporation PS 517 029T v Hickory Group Pty Ltd*[22] I discussed my earlier decision in *Owners Corporation PS447493 v Burbank Australia Pty Ltd.*[23]. At [14] I said:

> In *Burbank* the owners corporation issued proceedings within the 10 year limitation period in relation to a number of identified defects, but there was no differentiation between those that related to common property and those that related to individual lots. After the expiration of the 10 year limitation period the individual lot owners were joined as parties and Points of Claim filed in relation to common property and individual lot defects but did not differentiate between them. In refusing an application to strike out the individual lot owners' claims I observed:
>
> > The claims by both the Owners Corporation and the individual lot owners are closely intertwined arising from the alleged defective works in both common property and private property and consequential damages to both common and private property caused by those defective works. This is not a case where the individual lot owners claims are independent to and distinct from the claims by the Owners Corporation.[24]

[22] [2016] VCAT 731
[23] [2013] VCAT 1911.
[24] At [40].

38 In my view, the situation here is even clearer than *Burbank*. In *Burbank* there were a number of alleged defects, primarily concerned with damage to common property and some private lots caused by water ingress, which the owners alleged were the result of defective building works. As I noted in *Burbank* the Amended Points of Claim filed after joinder of the individual lot owners did not differentiate between the claims made by the Owners Corporations and the individual lot owners.

39 Here, the claim concerns the total louvre system installed throughout Building 2. To find that the claims in relation to part of the louvre system should have been brought at an earlier date, or by different persons, particularly in circumstances where, as discussed above, lot boundaries run through individual exterior sunscreens, would create an absurd and unworkable situation.

40 Not only is the claim that the entire louvre system needs to be replaced, it is not the case that part only of a screen can be rectified. In those circumstances it was entirely reasonable for the application to have been brought by the OCs. Joining the affected private lot owners as applicants, is in my view, in the unique circumstances of this proceeding, simply a formality.

41 I reject the Contractor's submission that my decision in *Burbank* has been criticised in two other decisions of the Tribunal.

42 In *Adams v Clark Homes Pty Ltd.*[25] Judge Jenkins VP distinguished my decision in *Burbank* when she said at [82]:

> Applicants' Counsel submitted that DP Aird appears to have endorsed an interpretation of s 134 that would permit a party to be joined to the same proceeding after the limitation period has expired, if the claims made by that party are not independent to and distinct from the claims made within time. In my view, this decision is limited to its particular factual circumstances and does not assist in the resolution of issues raised in the current application.

43 As Judge Jenkins observed, *Burbank* was a decision confined to its particular factual circumstances. Unlike *Adams* the owners in *Burbank* were not seeking to bring separate, distinct claims from those which were already before the Tribunal. By contrast, in *Adams*, the applicant owners sought to amend their Points of Claim, after the expiration of the 10 year limitation period, to include claims against the architect. The second and third respondent architect had been joined to the proceeding, within the 10 year limitation period, upon application by the builder for the purposes of a proportionate liability defence under Part IVAA of the *Wrongs Act 1958*.

44 Although the Contractor contends that *Burbank* was criticised in *Tsobanis v Katsouranis.*[26], as pointed out by the OCs it was not discussed. Again, the situation in *Tsobanis* was quite different to this proceeding. In *Tsobanis*, the

[25] [2015] VCAT 1658
[26] [2015] VCAT 739.

Tribunal held that the applicant could not maintain, nor bring distinct claims against parties who were not included in her original application, after the expiration of the 10 year limitation period. Here, the private lot owners simply seek an order joining them to a current building action, in circumstances where they are members of the OCs, their interests are clearly affected, and they should have the benefit of any decision made by the Tribunal.

Conclusion

45 This is an unusual situation where the Louvre System is an integral part of the exterior fabric of Building 2. The complexity of the lot boundaries and ownership of each exterior screen is demonstrated by the Contractor initially denying liability for the claim on the basis that the Louvre System was all located on private lots.[27] The Contractor subsequently filed Amended Points of Defence alleging that the OCs had no standing to bring claims in relation to the exterior sunscreens (referred to in the Points of Defence as 'Louvre Blades') in relation to those located on individual balconies, and further that any claim in relation to the fixed Louvre Blades is limited to 50% of the total loss as they are jointly owned by the relevant OC and the relevant private lot owners.[28]

46 However, as can be seen from the Reeds Report the ownership of the exterior sunscreens is more complex than the Contractor contends in their most recent Points of Defence.

47 In the peculiar circumstances of this case, I am satisfied that the OCs in commencing the proceeding were acting on their own behalf and on behalf of their members: the private lot owners. The claim has always been that the entire louvre system needs to be replaced: not that some only of the screens are faulty. The building action, which as defined in s129 of the B Act is a claim for loss or damage arising from defective building work, was commenced within the 10 year limitation period.

'The Townshend Claim'

48 In the FAMPOC the OCs allege, in summary, that:

a) the Contractor failed to execute the Warranty and Guarantee Deed and/or Deed of Warranty ('the Warranty') with Townshend Contracting Pty Ltd ('Townshend') (as required by the Design and Construct Contract it entered into with the developer), the sub-contractor which supplied and installed the louvre system, or

b) to ensure that it was executed and assigned to the Developer (a Warranty and Guarantee Deed was annexed to the subcontract but was apparently never executed),

[27] Points of Defence dated 30 January 2019
[28] Points of Defence 16 May 2019

c) so that the Developer, in turn, could have assigned the benefit of the Warranty to the OCs.

d) the failure of the Builder to ensure the Warranty was executed to enable the benefit of it to be assigned, deprived the OCs of the opportunity to rely on it to require Townshend to rectify the louvre system.

49 This has been described by the OCs as the 'Townshend Claim'. It is a claim in negligence arising from the Contractor's alleged failure to ensure the Deed of Warranty was executed by the sub-contractor so that the benefit could be assigned to the Developer who could then assign it to a third party –the OCs. In circumstances where neither party addressed me as to the Tribunal's jurisdiction to hear and determine a claim in negligence, had I not otherwise ordered joinder of the Owners, I would not have ordered their joinder for the purposes of the Townshend claim without hearing further from the parties on jurisdiction.

CONCLUSION

50 Accordingly, orders will be made dismissing the Contractor's s75 application, and for joinder of the private lot owners. I will also reserve the question of costs with liberty to apply.

DEPUTY PRESIDENT C AIRD

DIAGRAM 2

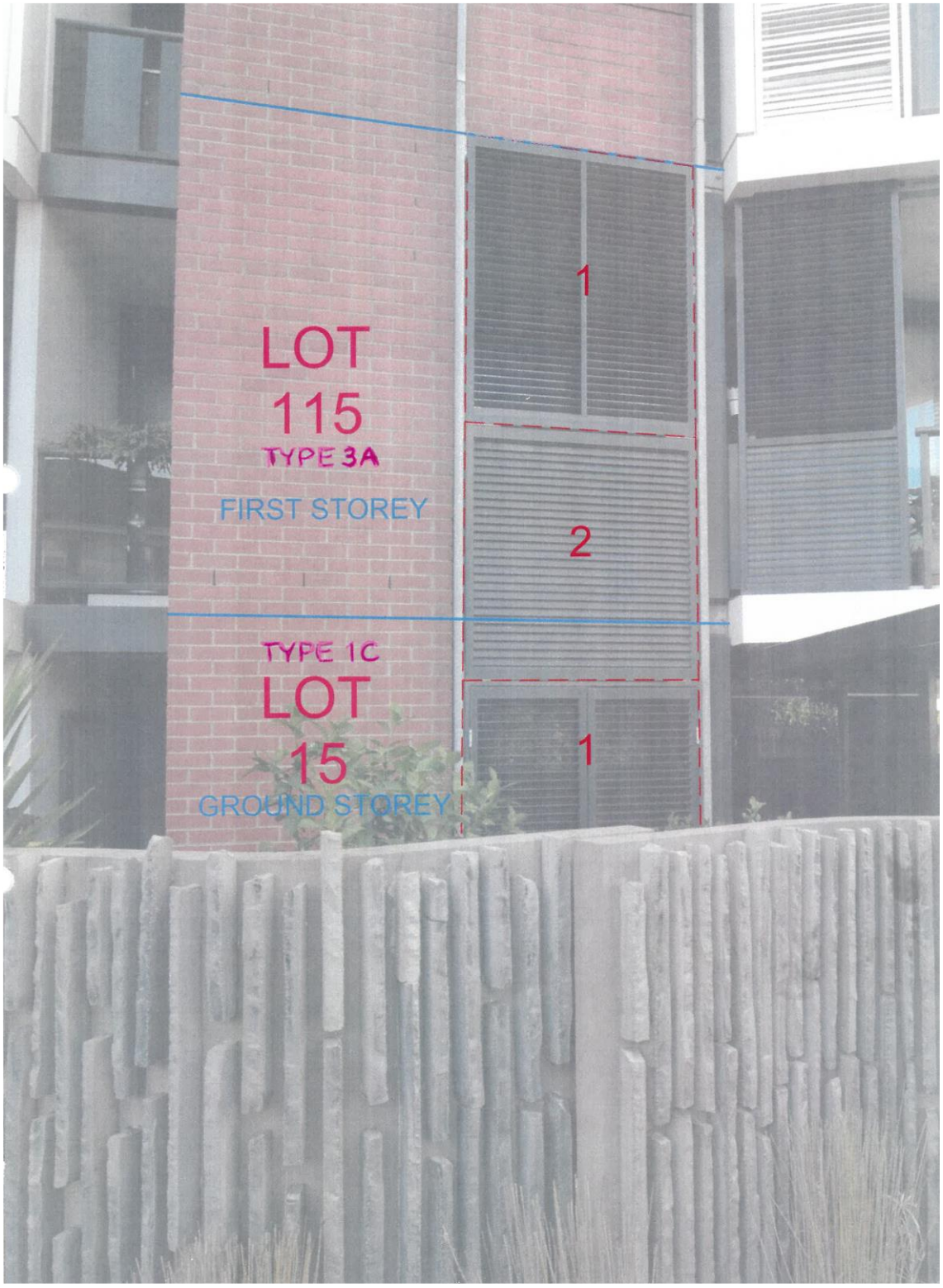
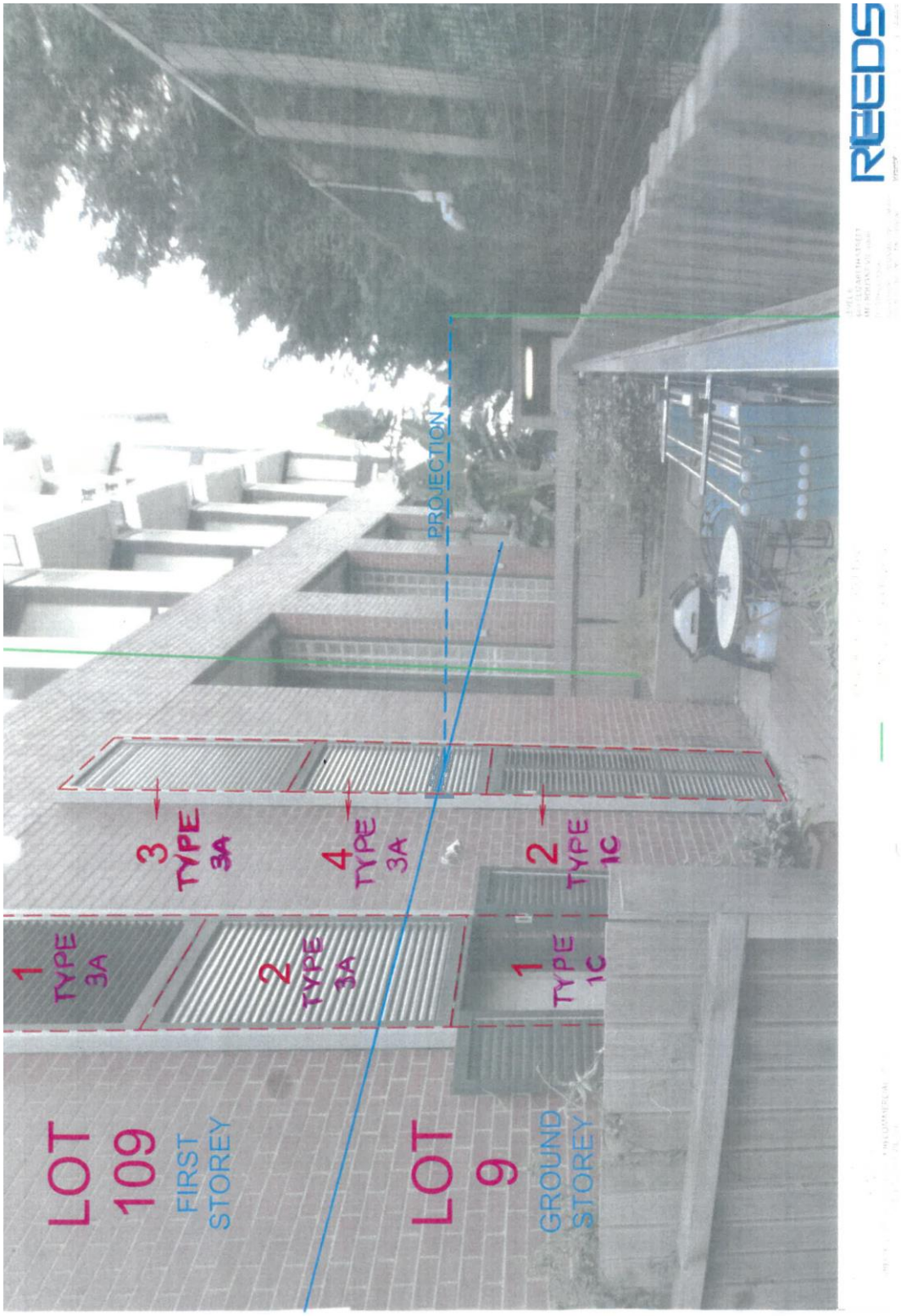


DIAGRAM 5


LOT
104
FIRST
STOREY
1
TYPE 1A
2
TYPE 1A
3
TYPE 1A
4
TYPE 2A
REEDS

DIAGRAM 6


REEDS
PROJECTION
LOT 109
FIRST STOREY
LOT 9
GROUND STOREY
1 TYPE 3A
2 TYPE 3A
3 TYPE 3A
4 TYPE 3A
1 TYPE 1C
2 TYPE 1C

SCHEDULE OF APPLICANTS

BP188/2017

APPLICANT NO.	**OWNER**
1.	Owners Corporation No. 1 PS 526704E
2.	Owners Corporation No. 2 PS 526704E
3.	Victor Raymond Joseph Mascarenhas and Deborah Elizabeth Mascarenhas
4.	Sarath Bandula Delpachitra
5.	Campbell Andrew Blair McKay
6.	Jann Caroline Casey
7.	Wariga Nominees Pty Ltd
8.	Elizabeth Joan Gabriel-Jones and David Gabriel Jones
9.	Vy Thanh Huynh and Jason Pheng Ky
10.	David Campbell Byars
11.	Alpha Minerva Mercado Villegas and Citadel Mercado Villegas
12.	Jedidiah Xavier Gilbert
13.	Vicki Jean Chubb
14.	Sanjeevan Balasingam and Sharmila Krishnamorthi
15.	Claudo Esteban Gallegos Riedelmann
16.	Carmel Mary O'Sullivan
17.	Peter Charles Blumbergs
18.	Paul Anthony Leonard
19.	Nigel Stuart Murray and Jennifer Margaret Murray
20.	Eteme Asime Ali
21.	Sage Jordan Bam-Burton
22.	Mui Kim Low
23.	Yaling Huang
24.	David Wayne Armstrong
25.	Angela Nasso and Michael John Smale
26.	Tunku Alina Binti Raja Muhd Alias
27.	Jennifer Mary Therese Muscat

Schedule of Applicants as at 5 December 2019.

APPLICANT NO.	**OWNER**
28.	Andrew Keith Dwyer
29.	Slobodanka Calic
30.	Fred Pekar
31.	Alexandra Jiselle Yee
32.	Bo Zou
33.	John Sydney Weddell
34.	Chang Elizabeth Wai Quen and Lim Anne
35.	Terry Fogarty Pty Ltd
36.	Angela Lucia Serrano Rodriguez and Alejandro Rojas Silva
37.	Jean Eddy Goodsir
38.	Yanling Zhang
39.	Robert Andrew Cuthbertson
40.	Guek Choo Mary Leng
41.	Eileen Patricia Kealy
42.	St Kilda Holdings (Aus) Pty Ltd
43.	The Sai Meng and The Siew Wah
44.	John Francesco Virgona
45.	Tomazs Piotr Mielnik
46.	Low Mui Ping
47.	Wariga Nominees Pty Ltd
48.	Kylie Anne Russell
49.	Briana Chantal Seaton and Alistair Francis Seaton
50.	Bernard Enrique Collantes
51.	Suzanne Astorino Formica
52.	Ping Zhou and Jianrong Wang
53.	Keryn Anne Topham
54.	Layton Shannos

APPLICANT NO.	**OWNER**
55.	Deirdre Bridget Grantham and Geoffrey Wayne Goldburg
56.	Yatisha Bhagwandeen
57.	Steven Patrick Peterson and Elizabeth Margaret Peterson
58.	Helen Maree Thorneycroft
59.	Neil Andrew Higgins and Kim Marie McMahon
60.	Jian Zhong David Dai
61.	Andrew Craig Colvin
62.	Lynne Louise Dobber and Caitlyn Victoria Dobber
63.	Susan Daniele Holly
64.	Cao Phuoc Minh Tran Nguyen and Andrew Swee Fong Tay
65.	Yit Keng Khoo
66.	Matthew Charles Francis and Caroline Maree Francis
67.	Andrew Siu Ying Fung and Vickie Lai-Lin Ng
68.	Steven Stylianos Karistianis
69.	Evelyn Wei Ying Chan
70.	Kylie Jane Everett
71.	Favio Daniel Henquin and Judith Mariela Bauerberg
72.	Jacinta Marie Baine
73.	Constantinos Vhalos
74.	Gladies Violet Teguh and Jason Teguh
75.	Marianne Elizabeth Robertson
76.	Amanda Natalie Bruton
77.	Vivek Arora
78.	Joanne Maree O'Bree and Gregory Hugh O'Bree
79.	Yeng Hok Alvin Teo
80.	Lisa Nicole Boyd
81.	Sian Elisabeth Miller

APPLICANT NO.	**OWNER**
82.	Sandra Bruch
83.	Angela Martine Allen
84.	Dan Buimistruc
85	Asad Al Kafajy
86.	Kumi Koike
87.	Shun Tsz Yang and Tik Wong
88.	Sven Jack Tan
89.	Neena Chandola and Sandeep Kumar Chandola
90.	Claire Soero
91.	Jane Marie Dowdall
92.	Timothy John Gooding and Robyn Jane Gower
93.	Gail Marie Ashworth and Phillip Alfred Ashworth
94.	Banjamin Ashley Carrucan
95.	Xinxuan Xie
96.	Steven David Carpenter
97.	Edwina Mario Butler
98.	Francis Joseph Bowden and Phillippa Catherine Bowden
99.	Jill Valerie Stansfield-Smith and Ross Stansfield-Smith
100.	Lishuang Gui
101.	Nusa Wijaya
102.	Michael John Abramson
103.	Ziaochuan Mo
104.	Fabian Andres Wolf
105.	Quadriga Project Management Services Pty Ltd
106.	Cedar House Investments Pty Ltd
107.	Robyn Jane Gower and Timothy John Gooding
108.	Supatchara Wattanavekin

APPLICANT NO.	**OWNER**
109.	Djombi Atilio Kop and Marcela Yvonne Kop
110.	David Keith Bradshaw
111.	McDonald Francis Holdings Pty Ltd
112.	Wah Lea Pty Ltd
113.	Leonie Gayle Kronborg
114.	Gregory Brian Hall
115.	Li Jeen Mah
116.	Peixian Huang
117.	Janet Ray Watson and Phillip James Le Geyt
118.	Angelica Maria Correa-Londono and Andrew Glenn McKay
119.	Gregary Totten Chase
120.	Norika Elfriede Miles
121.	Leah Mercedes Klooger
122.	Lynn Beverley Conley and Bruce William Conley
123.	Ian McKenzie
124.	Sally Shaddock and Stephen Ross Shaddock
125.	Nancy Joy Norris
126.	Edwina Marion Butler
127.	Ruscol Pty Ltd.
128.	Anne Elizabeth Simons and Russell Stanley Colman
129.	Andrew William Seditas and David Stewart Wootton
130.	Indah Miranti Wibawa
131.	Pingping Zhang
132.	Andrew Mark Dyduk
133.	Deborah Harding
134.	Felicia Tandiyono and Valencia Tandiyona and Theresia Tandiyong and Anthony Tandiyono

APPLICANT NO.	**OWNER**
135.	Melrob Property Management Services Pty Ltd
136.	Mathew James Keegan and Rohine Alexandra Jannu
137.	Ingrid Margaret Gordon
138.	Kim Vincs and Robert Vincs
139.	Geoffrey Simon Klooger