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TILES AND MEBRANES - A PRIVATE ISSUE

Private or Common?

One of the most common claims that we deal with for our clients is water leaks caused by defective waterproofing of balconies. Often, rectification works include replacement of tiles and membranes.

This can be very costly and invariably leads to the question as to who is liable for the costs of the rectification works.

On plans where the boundary definition is interior face, there has been considerable debate as to whether the tiling and membranes on the balconies form part of the private or common property of a Lot. More specifically, whether the interior face of the Lot extends to below the tiling and/or membrane or above it.

In 2011 the *Subdivision (Registrar's Requirements) Regulations 2011* ("**Regulations**") made the following clarification:

> *10(4)(a)* ***Interior Face*** *lies along the interior face of any wall, floor (upper surface of elevated floor if any), ceiling (underside of suspended ceiling if any), window, door or balustrade of the relevant part of the building.* ***Any internal coverings, waterproof membranes*** *and fixtures attached to walls, floors, and ceilings* ***are included within the relevant parcel****;*

Accordingly, it is clear the tiling and membrane for an interior face boundary is private property if the Plan of Subdivision was registered after 8 October 2011, being the date the Regulations came into effect.

However, the Regulations do not apply retrospectively and, therefore, do not apply to any Plan of Subdivision predating 8 October 2011. This has caused much uncertainty and been a hot topic amongst Owners Corporation lawyers and managers for a number of years. Thankfully, after a period of uncertainty, the Victorian Civil and Administrative Tribunal has finally provided clarity on this matter in the recent case of *Owners Corporation PS508732B v Fisher* [2014] VCAT 1358 ("**Fisher Case**"), in which we acted for the Applicant Owners Corporation.

Fisher Case

In the Fisher Case, significant water leaks were flowing from Mr Fisher's balcony into the Lot below. Despite being served with a Notice to Repair by the Owners Corporation, Mr Fisher refused to repair the balcony or allow the Owners Corporation to access his balcony to carry out the repairs at his cost. He objected on the basis that the defective tiling and membrane was common property.

Accordingly, the Owners Corporation commenced proceedings against Mr Fisher and his fiancé to compel them to grant the Owners Corporation access to their balcony and to pay $36,006.48, being the quoted cost of the rectification works.

At the Final Hearing, Member Rowland agreed with our submission that the Regulations did not change the law, but rather clarified what it had always been; that tiling and membrane is private property where there is an interior face boundary. Consequently, we were successful in obtaining Orders that Mr Fisher and his fiancé pay the Owners Corporation $36,006.48 and grant access to carry out the rectification works.

Member Rowland was determined to provide clarity on this matter and determined to give written reasons for her decision so as to provide a guide that can be used in future cases.

Impact of decision in Fisher Case

The decision in the Fisher Case will have far reaching consequences on Owners Corporations, as it now makes clear that defective tiles and membranes on private balconies is a private issue.

As a result, it will no longer be the responsibility of the Owners Corporation to carry out repairs to private balcony tiles and membranes where there is an interior face boundary, but rather the responsibility of private Lot owners.

While this may seem a positive result for Owners Corporations, in reality it poses a problem as it is not in the interests of Owners Corporations to have private Lot owners carrying our repairs at height. Ideally, such repairs should be coordinated by the Owners Corporation for insurance purposes and uniformity.

We have developed strategies for dealing with this issue and will be happy to discuss them with you.

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