

VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

OWNERS CORPORATIONS LIST

VCAT REFERENCE NO. OC2751/2017

CATCHWORDS

Whether owners corporation has breached its duties to repair and maintain common property – whether owners Corporation and manager have breached duties to act in good faith – *Owners Corporations Act 2006* ss 5, 46, 122.

FIRST APPLICANT	Jon Langevad
SECOND APPLICANT	Ulla Hiltula
FIRST RESPONDENT	Victoria Body Corporate Services Pty. Ltd. ACN: 007 034 522
SECOND RESPONDENT	Owners Corporation No. PS 324783G
WHERE HELD	Melbourne
BEFORE	J Smithers, Senior Member
HEARING TYPE	Hearing
DATE OF HEARING	9, 10 May 2018
DATE OF ORDER	22 May 2018
CITATION	Langevad v Victoria Body Corporate Services Pty Ltd (Owners Corporations) [2018] VCAT 784

ORDER

1. The application is dismissed.

J Smithers
Senior Member

APPEARANCES:

For the applicants

Mr Jon Langevad

For the first respondent

Mr Quentin Thomas

For second respondent

Ms Nicole Wilde, solicitor

REASONS

INTRODUCTION

- 1 At 27A Brighton Road St Kilda, is a block of 10 flats of unique character constructed in the late 1930s. The owners of one of the flats (**the applicants**) have a very different view to the owners of the other nine about the level of maintenance which should be done, and the general standard of upkeep which is appropriate. After some years of agitation and disagreements, in December 2017, they commenced this proceeding at VCAT, seeking orders that the Owners Corporation No. PS 324783G (**OC**) has breached its duties to repair and maintain common property under section 46 of the *Owners Corporations Act 2006 (OC Act)*. They also allege that the OC and the second respondent (**Manager**) have breached their duties to act in good faith under s 5 and s 122 respectively.
- 2 The premises relevantly comprise two brick buildings. The south building is larger, and is four levels high. It comprises units 1-6 and 10. The north building is three levels high. It comprises units 7-9. The applicants are owner occupants of unit 9, which is on the top level of the north building. They became joint proprietors of the property on 31 January 2007.
- 3 Over recent years, Mr Langevad has raised numerous issues at length, with the OC committee, the Manager, and the other lot owners. Mr Langevad authored relevant correspondence, presented the case and gave evidence on behalf of himself and Ms Hiltula. I was told that up until mid/late 2017 when his emails commenced to be blocked by some recipients, Mr Langevad had sent perhaps 500 emails over the previous 12 months. Mr Langevad has expressed great frustration that the other owners are not prepared to expend the funds necessary to take what he regards as necessary steps to protect their way of life, and their substantial financial investment. However, the other lot owners regard the level of maintenance undertaken as generally appropriate.
- 4 Mr Langevad has expressed particular concerns about the state of the brickwork, painting, a water leak, a downpipe, gates, pathways, the garden, and the lack of a formal Maintenance Plan.

LEGISLATION

- 5 The primary allegation made by the applicants is that the OC has breached s 46 of the Act. This establishes a statutory duty on owners corporations to repair and maintain common property. Principles similar to those applicable when determining common law claims for negligence are to be applied.¹

¹ *Boyes v Owners Corporation No. 1 PS 514665E* [2009] VCAT 2405.

6 Section 46 provides:

46 Owners corporation to repair and maintain common property

An owners corporation must repair and maintain—

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

7 The secondary allegation made is that the OC and the Manager have acted in bad faith. This is an allegation of breach s 5 and s 122 respectively. These provide:

5 Owners corporation must act in good faith

An owners corporation in carrying out its functions and powers—

- (a) must act honestly and in good faith; and
- (b) must exercise due care and diligence.

122 Duties of manager

(1) A manager—

- (a) must act honestly and in good faith in the performance of the manager's functions; and
- (b) must exercise due care and diligence in the performance of the manager's functions; and
- (c) must not make improper use of the manager's position to gain, directly or indirectly, an advantage personally or for any other person.

(2) A manager—

- (a) holds all money held on behalf of an owners corporation on trust for the owners corporation; and
- (b) must account separately for the money held for each owners corporation by the manager.

THE EVIDENCE

8 Mr Langevad relies on his own (lay) evidence about the state of the premises, and on two expert reports produced in February and March 2018, for the purposes of this hearing.

9 The first of these was a report by Mr Paul Dee of Houspect Building Inspections, dated 22 February 2018. Mr Dee was formerly a licensed builder, and is now a Building Inspector (Limited). His report dealt with the state of the brickwork, the windows, gates and fencing, paving, downpipes and under-stair storage.

- 10 Mr Dee's most significant conclusion was that immediate repairs are required to the brickwork comprising the parapets above lots 9 and 10. He said this is a safety issue.
- 11 Mr Dee's report also stated that downpipe repairs and stormwater systems maintenance is recommended within three months, and that windows require prompt preparation and painting, in order to avoid costly timber repairs.
- 12 In giving his oral evidence (by telephone), Mr Dee stated his opinion that overall, the buildings are in fair condition for their age. The condition of the mortar is consistent with what would be expected for a property of this age and proximity to Port Phillip Bay. Apart from the parapet, he said it is not urgent for repairs to be done to the brickwork. In relation to the painting, he said that if he was fussy, he would have done it by now, however, it would probably be another three or four years before costly repairs would be required.
- 13 Mr Langevad also produced a report by Mr Damian Wood, of Specialist Garden Services, dated 5 March 2018. However, this was in the nature of a quote for additional work which could be done to improve the garden, if the OC desired that, rather than an expert report relating to the statutory obligation to repair and maintain.
- 14 The OC provided a report dated 1 May 2018 by Mr Paul Bugaj, of Meyer Consulting Pty Ltd. Mr Bugaj is a civil engineer, specialising in structural engineering. His report dealt with the brick parapet walls only, on the basis that these had been identified by Mr Dee as requiring urgent make safe works. Mr Bugaj gave oral evidence and was cross-examined. His opinion was that immediate make safe works were not required, however the steel lintels below the top two courses of bricks on the parapets needed to be replaced within a year.
- 15 Mr Stephen Davies, a committee member, also gave evidence on behalf of the OC. Mr Matt Elmer, the employee of the Manager with responsibility for the premises, gave evidence and conducted the case on behalf of the Manager.
- 16 The OC also produced statutory declarations by eight of the other nine owners at the property. All stated they did not support the applicants' claim or any of the orders the applicants seek from VCAT. The statutory declarations were in standard form, however, four of the owners made additional statements emphasising their disagreement with the applicants and their support for the OC, and the Manager.
- 17 The applicants raised numerous concerns about particular items of maintenance which they believe have not been attended to adequately. However, in the light of all the evidence, I have concluded these reflect differences of approach as between the applicants on the one hand, and the other lot owners on the other, as to the appropriate level of maintenance and

upkeep. None demonstrate a breach of the obligation to repair and maintain under s 46.

CLAIMS MADE BY THE APPLICANTS

The brick parapet walls

- 18 The most serious and pressing maintenance issue is in fact not one which Mr Langevad raised prior to commencing the proceeding. It concerns the state of the brick parapet walls on top of his unit 9, and on top of the upper unit on the other building, unit 10. This was only discovered this year, in the course of investigations by Mr Dee, and then Mr Bugaj.
- 19 Mr Dee said in giving his evidence that the top two courses of bricks were in danger of falling, if, for example, a tradesperson were to lean on the wall. This was due to the deterioration of the steel lintels which are in place resting on decorative concrete columns forming part of the outer face of the 1 m high double brick parapet wall. These lintels support the top two courses of bricks. His comments were made in relation to the applicants' unit (no. 9), where access to the parapet area is only required for any tradespersons needing to go onto the roof.
- 20 Mr Dee's similar conclusions in relation to unit 10, at the top of the other building, were by inference and observation from unit 9 only, since he was not able to get access to the unit 10 roof. Unit 10, unlike unit 9, includes an open terrace area surrounded by a parapet brick wall, which is designed to be used by occupants.
- 21 Contrary to Mr Dee, Mr Bugaj inspected the parapet wall on unit 10, but was not able to access the roof, and hence parapet wall, of the applicants' unit (unit 9). In the same way as Mr Dee, he extrapolated from close inspection of the parapet he was able to access (in his case unit 10) and looked across to the parapet on the other building about 10 m away. He said that the unit 9 parapet wall appeared to be in similar condition.
- 22 Mr Bugaj's opinion was that the danger of bricks from the parapet wall falling as a result of accidental pressure from a tradesperson or similar, was not such as to warrant immediate remediation. But he did say replacement of the steel lintels must occur within the next year.
- 23 If it were necessary to make a finding in relation to the differences between the two experts about how urgent works to the parapet are, I would tend to favour the view of Mr Bugaj, as he has the relevant specific qualification and experience – as a civil engineer specialising in structural engineering.
- 24 However, the state of the parapet walls did not form part of the applicants' Points of Claim. In the hearing, the OC agreed these parapet walls do require attention, and Mr Elmer said that in response to the Bugaj report of 1 May 2018, the OC Committee had requested two quotes for the necessary parapet rectification work.

- 25 Mr Dee gave Mr Langevad what I understand was a verbal estimate of \$55,000 – \$85,000 to rectify the brickwork. It was not clear to me whether this related just to the parapets, or to repointing where required throughout the building as well. He did say most of this was scaffolding costs. No written quote was provided. It appears this was just an off-the-cuff estimate. As noted, the OC is seeking formal quotes. There is thus no proper evidence to support Mr Langevad’s contention that the price of rectifying problems with the brickwork has blown out due to the OC and the Manager’s delay.
- 26 The parapet walls are double brick. It is clear from the Plan of Subdivision that only the outer wall is common property. The boundary between common property and private land is the median of the wall – to the top of the parapet walls. The inner brick wall in each case is part of lot 9 and 10 respectively. Thus, it is necessary for the OC to take steps to identify precisely what needs to be done to the parapet walls, and the anticipated cost, *in conjunction with* the owners of lots 9 and 10.
- 27 It was submitted on behalf of the OC if it failed to take appropriate action for say, a year, then perhaps it could be said to be in breach of its obligation. I agree with that submission. In any event, as stated, the condition of the parapets was not an issue relied upon by the applicants in their Points of Claim.
- 28 There is no breach of the OC’s duty to maintain the common property in relation to the parapet walls.

Brickwork other than the parapets

- 29 The condition of the brickwork other than the parapets was raised by the applicants in their application. Mr Langevad expressed concerns that the mortar is in very poor condition such that immediate work is required in order to make the building safe, and prevent disproportionately high expenditure being required later on. Indeed, he had expressed the view that because of delays which have already occurred, the cost had already ballooned out.
- 30 The evidence of Mr Dee did not support this, however. Mr Dee said that apart from the parapets, the building was not presently in a dangerous condition. Mr Dee suggested that if the owners wanted to retain the buildings for another 40 – 50 years, they might consider a maintenance regime whereby some repointing was done each year, so as to spread the cost over time.
- 31 When asked about this, Mr Bugaj’s evidence was quite clear – there is no structural issue at present in relation to the mortar deterioration.
- 32 Accordingly, I find no breach of section 46 in relation to the brickwork other than the parapets.

Painting

- 33 The evidence of Mr Langevad's own expert witness, Mr Dee (referred to above) did not support his claim that the windows have been neglected so badly that disproportionate expenditure will now be required to fix them. Hence no breach of s 46 has been shown in relation to painting.

Leakages/breached downpipe

- 34 Mr Langevad referred to a leak which had occurred through his office and kitchen wall. He said while this was 'not huge', it was due to a lack of maintenance on the drains. Mr Langevad appeared to contend that it arose through the downpipe being blocked at ground level. This was not accepted by the OC or the Manager. But in any event, it was unsupported by any expert evidence.
- 35 Mr Langevad was also concerned that a downpipe on the north side of the North building was not fully connected to the subsoil drainage, and this could damage the foundations. However, when asked about this, Mr Bugaj gave clear evidence that this would not affect the stability of the building structure.
- 36 Hence, these claims are not made out.

Building Notice of 3 January 2017

- 37 A Building Notice was issued by the City of Port Philip dated 3 January 2017. This followed a Council inspection of unit 7, arranged unilaterally by Mr Langevad. He was concerned unit 7 was operating as a backpackers' hostel, or was being converted for operation for such use. At inspection, the Council was apparently satisfied this was not the case. However, the inspector then proceeded to inspect other parts of the premises, and found six matters which required action by the OC.
- 38 Shortly after the Building Notice was issued, there was a special general meeting, on 28 February 2017, at which a new committee was appointed. Mr Langevad, who had previously been a member of the committee, was not elected to the new committee.
- 39 The Manager, Mr Elmer, said that all matters in the Building Notice had been dealt with, save for the issue concerning the balustrades. The building is an old one, and the Council Building Notice indicated that the gaps between the balustrades were too wide to satisfy current safety requirements. Mr Elmer said that proposed plans to deal with this had been drawn up by an engineer, and approved by Council, subject to consideration of heritage issues by the Council.
- 40 Another matter dealt with by the Building Notice was the under-stair storages. The Building Notice required that these be removed. Mr Langevad said he personally conducted negotiations with Telstra and the Council, to enable them to be retained for the use of lot owners. He said he took Telstra to the Ombudsman to try and have asbestos removed.

Ultimately, I understand, it was agreed that these areas be kept locked and empty. It appears that Mr Langevad regarded this more as a symptom of the OC's lack of action and initiative, than a specific ground under s 46.

Essential Safety Measures

- 41 Mr Langevad complained that the OC was slow to act to ensure compliance with relevant fire safety requirements. In cross-examination, however, Mr Langevad accepted that his initial reaction to the Manager's suggestion that a consultant be retained (when he was still a member of the OC committee) was that this was an unnecessary expenditure of funds. In giving his evidence, he accepted now that that view was incorrect.
- 42 In any event, the OC's narrative, that the main issue requiring attention during the course of 2017 was for residents to remove personal items stored on common property, so as to clear fire exits and paths to fire exits, was not refuted by Mr Langevad. This claim was not clearly particularised, and no breach of the obligation to repair and maintain has been shown.

Works involving the front and back gates

- 43 Mr Langevad made a complaint about the lack of lighting near the front gate. He also said that the back gate does not shut properly, and just bangs in the wind. He said this does not affect him, but he expected it would affect those close to the gate. In this context, Mr Langevad said during the hearing that 'No one wants to do anything'. Once again, although these are clearly matters of frustration for the applicants, the other owners do not accord the same significance to them. They do not amount to a basis for finding that the OC has failed in its duty to repair and maintain.

Pathways

- 44 Mr Langevad suggested that pathways on the south side of the south building, adjacent to the fire stairs servicing Mr Davies' unit and others in the vicinity, are dangerous due to cracking. However, Mr Davies said it was not a concern for him; he rarely went there. Further, Mr Langevad's witness, Mr Dee, estimated the cracks at 10 mm, and his evidence was to the effect that these are not of great concern – such cracks have to be 20 mm before a Council will look at grinding them off.

Gardening

- 45 Mr Langevad said the garden had deteriorated since he and Ms Hiltula purchased their unit in 2006. He complained that hedges had not been trimmed properly. He said the watering system had not worked for years. The manager responsible for this property, Mr Matthew Elmer, gave evidence that several people had previously been employed to maintain the garden. Now the work is being done by one of the owners, Mr Meallin, at no charge to the OC, representing a saving of at least \$12,000 per annum. He said the other owners were happy with the job Mr Meallin did. Mr

Davies, a member of the OC committee, said that in his opinion the garden looks fantastic; people stop to look at it. While the quote by Mr Wood indicates the presence of weeds and some dead vegetation, poor quality soil and lists various improvements that could be made, the photographs attached show a not unattractive garden.

- 46 In the light of this, there is no basis on which to conclude that there has been a breach of the OC's duty to repair and maintain in relation to the garden.

Maintenance Plan

- 47 Mr Langevad contends that the OC should prepare a formal Maintenance Plan. The OC responds that this is a statutory requirement only for prescribed owners corporations, that is, those that levy annual fees in excess of \$200,000 or consist of more than 100 lots. The OC falls well below these requirements.
- 48 Hence the OC's position is correct. It is the OC's choice whether it prepares a formal or informal maintenance plan. A failure to do so does not comprise a breach of s 46.

CONCLUSION – CLAIMS AGAINST THE OC

- 49 In summary, none of the matters relied on by the applicants in their Points of Claim have been shown to amount to a breach of the OC's duty to repair and maintain common property.
- 50 One matter has arisen which does require prompt attention – the brickwork on the parapets above units 9 and 10. However, this issue was not referred to in the Points of Claim. It has only recently come to the OC's attention, and it was submitted it is taking steps to deal with it. The OC has received advice from a structural engineer that the matter does not require immediate make safe works.
- 51 The claims of bad faith against the OC were made on the basis that the alleged breaches of s 46 were particularly serious and deliberate. Since I have found that s 46 has not been breached, there is clearly no basis to go on and make a finding of bad faith or lack of due care and diligence under s 5.

CONCLUSION – CLAIMS AGAINST THE MANAGER

- 52 Similarly, in the light of my findings above, there is no basis for a finding that the Manager, Victoria Body Corporate Services Pty. Ltd, has breached its duty under s 122 to act honestly and in good faith, and with due care and diligence in the performance of its functions. I note that on 27 July 2017, the Manager was reappointed by the OC for a further three-year period.

OTHER RELIEF CLAIMED BY THE APPLICANTS

53 In the light of these conclusions, there is no basis on which to make the various consequential orders sought by the applicants. These include orders for the removal of the current committee, manager, and maintenance contractor, and that various specific works be ordered to be carried out. As stated during the hearing, orders for defamation are beyond the Tribunal's jurisdiction. The applicants also sought orders for an 'extensive property analysis', development of a strategy plan, maintenance plan and heritage protection plan. I can see the benefit in some kind of formal planning for the future. Mr Elmer said that is always a recommendation. But once again, this is dependent on a majority of the OC, or the committee, being in agreement. The Tribunal would certainly not order those things against the wishes of the nine other owners.

FINAL COMMENT

54 It is clear the applicants have a strong belief that the property is not being maintained to what they regard as a proper standard. Some of the concerns expressed by Mr Langevad in correspondence, and in the Points of Claim, have perhaps been alleviated by the evidence given by the experts. However, to the extent these concerns remain, the effect of my findings is that the differences between the applicants' view and those of the other lot owners are within the range where opinions may differ. In that instance it is a case of majority rule. Mr Langevad is clearly motivated by what he regards as the best interests of all lot owners. It appears that relations between him and the other lot owners and the Manager have deteriorated and it has become difficult to work together effectively. Of course, it will be necessary for the owners to continue to work together in the future to manage the premises, which comprise home for some, and a substantial asset for all.

J Smithers
Senior Member