

VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

OWNERS CORPORATION LIST

VCAT REFERENCE NO. OC2824/2015

CATCHWORDS

Breach of Tribunal Order; Conduct of Owners Corporation and Owners Corporation Committee; Water damage to lot and lot storage space.

APPLICANT	Miralem Basic
RESPONDENT	Owners Corporation SP22934S
WHERE HELD	Melbourne
BEFORE	Dr Rebecca Leshinsky, Member
HEARING TYPE	Hearing
DATE OF HEARING	2 May 2016
DATE OF ORDER	27 May 2016
CITATION	Basic v Owners Corporation SP22934S (Owners Corporations) [2016] VCAT 856

ORDERS

The Tribunal orders that:

1. The application is amended to show the Respondent as Owners Corporation SP22934S. The principal registrar is directed to amend the register accordingly.
2. The application is dismissed.
3. The parties have liberty to apply for costs.
4. Any application for costs must only be by affidavit and very short written submissions (limited to 2 pages) and must be filed with the Tribunal and served on the other party by **10 June 2016**.
5. Any response must be filed with the Tribunal and served on the other party by **24 June 2016**.

6. Unless by 24 June 2016 a party makes a written request for a hearing on the issue of costs, the Tribunal will make a determination on costs in chambers after 24 June 2016.
7. If a party does make such a written request by 24 June 2016, the principal registrar shall fix a costs hearing before me and the party making the request must pay any hearing fee applicable.

Dr Rebecca Leshinsky
Member

APPEARANCES:

For the Applicant: Mr M. Basic, in person

For the Respondent: Ms N. Wilde, Solicitor

REASONS

BACKGROUND

1. The proceeding is brought by the Applicant for breach of Orders made by the Tribunal on 20 August 2012 and other claims against the Respondent.
2. The Applicant is the owner of Unit 2, 1-3 Wells Street, Brighton. The Respondent Owners Corporation ("the OC") is the owner of the common property under plan of subdivision 022934S. The subdivision incorporates the Dendy complex, 10 residential units and 12 professional suites. The commercial complex manages and pays for its own maintenance and insurance. The residential units and professional suites are charged owners corporation fees to cover the costs of the OC in maintaining the common property.
3. In proceeding OC 1242/2012 before the Tribunal on 1 August 2012, the following orders were made:
 1. The respondent must pay the applicant \$4,326 forthwith.
 2. The applicant is authorised on behalf of the Owners Corporation to immediately instruct contractors to commence works to reinstate the garden beds in accordance with the full scope of works set out in the quotation dated 8 June 2012. The respondent is liable to pay for the works. Any variation to the works must first be authorised by the respondent.
 3. The applicant must arrange for the painting of the flashings and the rendering works as set out in paragraph (a) of the Orders dated 17 May 2011. The works are to be completed to a proper and workmanlike standard by 31 December 2012.
 4. The respondent must undertake repair works to restore water to the garden taps by 30 November 2012.

5. The respondent must undertake repair works to restore power to the garden lights by 31 March 2013.
6. The respondent must undertake repairs and maintenance to enable the male and female change rooms, showers, toilet and sauna to be reopened by 30 November 2012.
7. The respondent shall provide the applicant with a copy of the minutes of committee meetings for 2011 and 2012 within 14 days of this order.
8. The parties have liberty to apply to Member Rowland in relation to orders 2, 3, 4, 5 and 6.

TERMS OF SETTLEMENT

4. The parties signed Terms of Settlement on 10 January 2015 (“the Terms of Settlement”) the effect of which was to settle all outstanding matters between the Applicant and Respondent.
5. Under Clause 3, Release of the Terms of Settlement:

“...Basic releases absolutely and discharges the Owners Corporation and all related entities, employees, and agents from all claims, actions, suits, causes of action, demands, liability, damages and costs (whether at common law, in equity or, to the extent permitted, under any Statute) arising or in any way concerning the matters referred to in the Recitals and any act or omission (including alleged act or omission) in connection with the administration and management of the Owners Corporation prior to 30 January 2015 that Basic has had, has now or any time in the future may have if the parties had not executed the Agreement and the parties agree this Clause may be pleaded as a complete defence to any such proceedings, claims, actions, suits, causes of action, demands, liability, damages and/or costs.”

6. The effect of Clause 3 is to release the OC from any claims brought by the Applicant against the Respondent prior to 30 January 2015.
7. Under Clause 5, Obligation of Confidentiality:

“The Owners Corporation and Basic must keep absolutely confidential the terms of this agreement and the discussion leading to the settlement reflected in this agreement and must not disclose these matters to anyone else except:

(a) as required by law;

(b) with the express authority of the other party; or

(c) for the purpose of obtaining confidential medical, account or legal advice.”

8. Whilst there is some disagreement as to whether Clauses 1.11-1.15 were meant to form part of the Terms of Settlement, they do not go to negating the legality of the Terms of Settlement and it is not disputed by the parties that Clauses 3 and 5 form part of the Terms of Settlement.

APPLICANT CLAIMS BEFORE THE TRIBUNAL

9. The Applicant relies on points of claim in the form of seven items. I will address each of these items, and group them where there is overlap in the claims but I do not repeat them exactly as they are set out in the Applicant's Points of Claim dated 1 March 2016^[1].

^[1] A copy of the Points of Claim filed and served by the applicant are located in the Tribunal's file.

10. In Item 1 there is a claim that the Respondent failed to comply with Tribunal Orders dated 20 August 2012.
11. In particular, this relates to breaches of Orders 4 and 6.
12. Order 4 states:

The respondent must undertake repair works to restore water to the garden taps by 30 November 2012.
13. I accept that water was restored to the garden taps for the whole development by 30 November 2012. I accept further that whilst water was restored to the garden taps in the professional suites area, there are ongoing works to restore the irrigation system to the front garden of the professional suites, which are nearly complete. This has taken time due to the prioritisation of common property works by the Respondent.
14. The Applicant has not provided evidence that the delay in completing the works for the irrigation system to the professional suites area has resulted in detriment to the Applicant.
15. On Balance, I find no breach of Order 4.
16. Order 6 states:

The respondent must undertake repairs and maintenance to enable the male and female change rooms, showers, toilet and sauna to be reopened by 30 November 2012.
17. Photographs of the inside of the change rooms and sauna were tendered during the hearing. I accept that some works have been done to the male and female change rooms, showers, toilets and sauna and there remain some outstanding aesthetic issues including a missing floor tile.
18. An occupational health and safety report for the OC was prepared by Australian Essential Services Group dated 23 October 2013, and I accept it has not identified any occupational health and safety issues in relation to the male and female change rooms, showers, toilet and sauna.
19. A maintenance plan was prepared for the OC by Buildcheck. It is dated 9 July 2015 and states that the shower and change room should be upgraded only in the year 2024.

20. I dismiss the Applicant's claim as set out in Item 2 and find no breach of Order 6. On balance, I find that the Respondent has complied with s. 46 Owners Corporation Act 2006 ("The OC Act") in relation to the male and female change rooms, showers, toilet and sauna.
- s. 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.
21. In respect of Item 3, I accept that the Applicant has been given the opportunity to inspect the OC records three times in the past 24 months and has been provided with documents, at no cost to the Applicant, from the OC records and register.
22. Mr Ellis is Chairman of the OC and is an experienced and now retired accountant who, I accept is very competent in reading financial statements. There is no evidence before the Tribunal to suggest any financial mismanagement by the Respondent. Accordingly, I dismiss the Applicant's claim for an auditor to be appointed to audit the OC records.
23. In respect of Items 4 and 5, I accept that Manly Plumbing visits the development twice a year to maintain the box gutters on common property and that this is a satisfactory outcome for the maintenance of the box gutters.
24. The Applicant has not satisfied the Tribunal in this proceeding that leaf litter in the box gutters has actually caused damage to the Applicant's lot. Webb Plumbing visited the Applicant's lot on 26 May 2015 to carry out a roof leak investigation. I accept the evidence from Webb Plumbing that the damage claimed by the Applicant to his lot was in fact not caused by the box gutter above his lot.
25. In respect of Item 6, I accept that the Respondent has operated at all times under the principle that it will pay for damage to a lot caused by overflowing box gutters.
26. I accept that the "benefits principle" pursuant to s.45 OC Act has never been implemented by the Respondent.
27. A few years ago, the Respondent paid for repairs to the Applicant's roof due to overflowing box gutters. I accept that the Respondent has recently paid for roof repairs for Lots 5-10 due to the overflow of box gutters in a like manner to how it paid for past roof repairs for the Applicant.
28. In respect of the Applicant's claim that OC funds are spent on disconnecting and reconnecting private property heating, cooling units, satellite dishes and TV aerials, I accept that this was required in order to repair the roofs of those lots damaged by the overflowing box gutters.
29. I find the OC to be carrying out its duties and functions in accordance with the requirements of the OC Act.
30. In respect to the Applicant's claim that water leaking from the common property is causing damage to his private storage space, no evidence was provided to the Tribunal to prove that water

from the common property has caused this damage. Photographs were tendered by the Applicant showing water damage to the Applicant's storage space. The Tribunal was not provided with evidence that this damage derives from water leaking from the common property garden, or other common property areas into the storage space belonging to the Applicant.

31. In respect of Item 7, the Applicant raises claims against the Respondent that occurred before 30 January 2015 and consequent of the Terms of Settlement, particularly Clauses 3 and Clause 5, these issues should not have been raised in these proceedings. Accordingly, I am unable to address those issues raised in item 7.

CONCLUSION

32. I am satisfied that that the Respondent is not in breach of the Tribunal orders dated 20 August 2012.
33. The Applicant has raised issues that were resolved as a consequence of the Terms of Settlement and accordingly must not be raised as claims for the Tribunal to address.
34. In relation to the water leak to the Applicant's lot and his storage space, I find no causation proven that water from common property areas have caused this damage.
35. The Applicant has failed to prove his claims – the application is dismissed.
36. Costs reserved.

Dr Rebecca Leshinsky
Member.