

VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

OWNERS CORPORATIONS LIST

VCAT REFERENCE NO.OC939/2016

CATCHWORDS

Claim for damage to unit caused by tree roots; not sufficient proof tree roots caused damage; owners corporation not liable.

FIRST APPLICANT: Ian D'Monte

SECOND APPLICANT: Sharmoin D'Monte

RESPONDENT: Owners Corporation 22639

WHERE HELD: 55 King Street, Melbourne

BEFORE: Member L. Rowland

HEARING TYPE: Hearing

DATE OF HEARING: 12 October 2016

DATE OF ORDER: 9 November 2016

CITATION: D'Monte v Owners Corporation 22639 (Owners Corporations) [2016] VCAT 1879

ORDER

1. The application is dismissed.
2. There is no order for costs.

MEMBER L ROWLAND

APPEARANCES:

For Applicant: Mr and Mr D'Monte in person

For Respondent: Mr Geary and Ms L Wilson, owners corporation manager

REASONS

1. The applicants allege that the owners corporation failed to maintain a large tree on common property which contributed to movement in the footings of their unit, causing extensive cracking to the western wall. The applicants claim \$22,440 from the owners corporation for the costs of underpinning their unit. The owners corporation resists the claim on the grounds that the cause of the failure of the footings is more likely to have been caused by a leaking storm water system which the applicants were liable to maintain.

Background

2. The owners corporation was created in 1985 when the plan of subdivision for the development was registered with the Office of Titles. The plan created eight lots, each with a unit and back yard, but no car parking. The common property comprises a long driveway with a wide strip of garden/lawn on each side of the driveway. Each lot owner owns their building, the upper boundary is 15 metres from ground level and the lower boundary is 2 metres below ground level. Six of the lots are identical. Each of the identical six lots has similar cracking to some degree on the northern wall of the unit. There was a large 7 metre high melaleuca or paper bark tree within 4 metres of the unit on lot 4 which, the applicants claim, contributed to the failure of the footings and consequent cracking of the western wall.
3. In May 2015, whilst on a routine inspection, the owners corporation manager, Ms Lesley Wilson, noticed some large cracks in the north wall of Unit 4. She immediately telephoned Mrs D'Monte.

Mrs D'Monte wasted no time in engaging an engineer. On 23 June 2015 the engineer prepared a written report recommending underpinning works and removal of the tree. On 30 June 2015, the applicants requested the owners corporation remove the tree. Within 24 hours, the owners corporation manager agreed to removal of the tree. The tree was removed on 15 July 2015. Underpinning works were completed in November 2015. Since that date, the applicants have been seeking recovery of the cost of the underpinning works from the owners corporation. The owners corporation has resisted the claim.

4. The lots are mostly, owner occupied. Most of the owners are recent owners with the applicants and two other lots having been held for more than 5 years. The applicants have owned their lot for more than 15 years. No-one could say whether the tree was planted by the owners corporation or whether it existed before the subdivision came into being. The owners corporation is small and no committee has been elected, meaning that all decisions are made at general meetings or delegated to the manager. Fees are currently \$220 per quarter per lot. It is a modest contribution and the activities of the owners corporation are kept to a minimum. The applicants have attended every owners corporation meeting since they purchased their lot. The applicants had not requested the owners corporation to undertake any maintenance to the tree until they asked for its removal in June 2015.

Expert evidence and repair work

5. The owners corporation did not rely upon any expert report. The reports relied upon by the applicants indicate that the tree may have contributed to the damage to the footings. The reports fail to address the cause of the cracks in the other identical units and the impact of the poor maintenance and leaking stormwater pipe for Unit 4.
6. On 23 June 2015, Mr Chelvadurai, consulting civil and structural engineer reported:

As per inspection I have found that there is a down pipe close to the problem location which may be leaking. All down pipes and gutters must be checked and cleaned or fixed by the drainer.

I have also found that 4m away from the problem area is an approximately 7m high tree. This tree has caused lifting of the footings. This tree must be removed.

A minimum of 3 underpins must be constructed.

7. On 23 July 2015, Mr Marc Smith of the DMS Tree Company reported:

Attended unit 4 at 269 Canterbury Road, Bayswater on Wednesday 15 July to remove a large tree at the front of the property and grind the stump.

Damage has been caused to the corner edge of the building, possibly by the tree. When grinding the stump there were 2 very large roots approx. 80mm in diameter heading from the stump toward the house where the damage has occurred.

Once excavation occurs on site I suggest a close inspection next to the property walls, to see if these roots have indeed caused the damage.

8. GTS Reblocking undertook the works to underpin the unit in late November 2015. The initial quotation for the underpinning works was \$8,250 for three pins. However, once works

commenced the scope of works was expanded to include a further 5 underpins. The additional works were detailed as follows:

Installed 5 underpins to existing brick veneer unit in accordance to engineers drawings.

Removed excess dirt

Fixed broken storm water pipe

Lifted footing back to original levels best as possible.

Council permit obtained.

9. The summary of works from GTS Reblocking did not report any tree root involvement around the footings.
10. On 8 September 2016, the applicants commissioned a further report from Mr Chris Moran of John Gardener & Associates, consulting engineers, who reported as follows:

Our office has not inspected the subject site and all of our advice is based on experience in the area and on engineering principles.

P Chelvadurai of VC Gallagher Pty Ltd found that a 7 metre tall tree was 4 metres from the subject building. This tree is within the zone of influence of the building and would likely have had a detrimental effect on the building.

A tree in such proximity of a building will amplify the seasonal movement of the clays which the building is founded on. These clays shrink and swell as the moisture content changes between seasons; generally a footing system is designed to accommodate this movement without significant damage to the walls of the building. With a tree present this movement can be significantly increased.

Given our experience in the area it is likely the clays are moderately reactive with a seasonal surface movement differential (γ_s) of 20mm to 40 mm. With a tree present, the site would likely be classified as a Problem site given the abnormal moisture conditions as a result of the tree.

11. The applicants also rely upon the CSIRO's Homeowner's Guide to Foundation Maintenance and Footing Performance in support of their claim. In relation to trees, the guide states:

Where a tree is causing a problem of soil drying or there is the existence or threat of upheaval of footings, if the offending tree roots are subsidiary and their removal will not significantly damage the tree, they should be severed and a concrete or metal barrier placed vertically in the soil to prevent future root growth in the direction of the building. If it is not possible to remove the relevant roots without damage to the tree, an application to remove the tree should be made to the local authority. A prudent plan is to transplant likely offenders before they become a problem.

12. Immediately before the advice given in relation to trees, the Homeowner's Guide details the necessity for good plumbing around the footings and the recommendation for an apron of paving around the perimeter of the building. The guide advises against a garden up against the building. Contrary to the Homeowner's Guide, the unit has a garden around the perimeter of the building

and a broken stormwater pipe was found by GTS Reblocking. In addition, the owners corporation tendered photographs of the spouting for Unit 4. The photographs showed the spouting to be in a generally poor condition with evidence of leaking. The guide supports the owners corporation's contention that the cause of footing subsidence was excessive water around the footings.

Conclusion on reports

13. The reports fail to consider the impact of the broken stormwater pipe and the similar cracking on the identical units. The first report, from Mr Chelvadurai finds that the footings had lifted, but the work undertaken by GTS Reblocking found a broken stormwater pipe and that the footings had subsided. There was no report from GTS Reblocking that tree roots were involved. The report obtained from John Gardener & Associates only relied on the report of Mr Chelvadurai and failed to mention the scope of works carried out by GTS Reblocking.
14. On the evidence, I find that insufficiency of the footings, the broken stormwater pipe and the tree were all possible causes of the failure of the footings and the subsequent damage to the western wall. I am not satisfied that the tree was the sole or even major cause of the footing failure. At best, the material discloses that the tree may have been a contributing factor. The report from GTS Reblocking found a broken stormwater pipe and that the footings had subsided. There was no evidence of tree root involvement. The absence of evidence that the tree roots were actually involved in the failure of the footings is fatal to the applicants' claim. On the balance of probabilities, I am not satisfied that the tree played any material role in the failure of the footings and consequent cracking.

Breach of duty by owners corporation

15. Having found that the applicants have not proved that the footing failure was caused by the tree roots, it is not necessary to consider whether the owners corporation was in breach of its duty to maintain the common property. The allegation that the owners corporation failed to maintain the common property was the central to the applicants' claim so I will say something about it.
16. The applicants claim that the owners corporation failed in its duty to maintain the common property by failing to trim the tree and to take remedial action to prevent damage to the applicants' unit. The applicants allege that the owners corporation ought to have known that a tree of that size could have potentially caused damage to their unit and should have taken remedial action. The applicants did not argue that the owners corporation should have removed the tree at earlier date.

Liability under the [Owners Corporations Act 2006](#).

17. Under the [Owners Corporations Act 2006](#) ('the [OC Act](#)'), the owners corporation must maintain the common property. It must do so with due care and diligence.
18. Section 46 provides:

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.

19. Section 5 provides:

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.

20. The lot owners, in carrying out the duties and functions of the owners corporation must act honestly and in good faith and exercise due care and diligence. The standard of care is that of a reasonable lot owner. The lot owners are not expected to have the knowledge of an arborist or an engineer. None of the lot owners, including the applicants, perceived the risk of the tree damaging Unit 4 and the risk was not brought to their attention.
21. Whilst an engineer or arborist is likely to appreciate the risk a large tree may pose to a building, it is not necessarily the case that a lay person would appreciate the risk.
22. I am not persuaded on the evidence and circumstances of this case that the owners corporation failed to do anything. There was no evidence that the tree roots were involved in the failure of the footings requiring the owners corporation to do anything. The opinions of Mr Chelvadurai, Mr Smith, arborist, and Mr Chris Moran were all predicated on the assumption that tree roots were probably involved. That assumption was reasonable at the time, but as was suggested by Mr Smith, an investigation ought to be conducted once excavation of the footings occurred. GTS Reblocking undertook the excavation work but did not make any report of the presence of tree roots. Instead, the summary of work performed evidenced a broken downpipe and that the footings had subsided which is the opposite of what would be expected if the tree roots had undermined the footings.

Conclusion

23. The claim will be dismissed with no order as to costs.

MEMBER L ROWLAND