

**Delbridge v Owners Corporation RP12295 (Owners Corporations) - [2016] VCAT
680**

VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

OWNERS CORPORATIONS LIST

VCAT REFERENCE NO. OC66/2016

CATCHWORDS

Alleged breach of duty to maintain hot water supply to apartment block; lot owner claims losses to Airbnb business; claim dismissed; no breach of duty; no evidence of loss caused by unreliable water supply.

APPLICANT	Dianne Delbridge
RESPONDENT	Owners Corporation RP12295
WHERE HELD	Melbourne
BEFORE	L Rowland, Member
TYPE OF HEARING	Hearing
DATE OF HEARING	21 March 2016
DATE OF ORDER AND REASONS	3 May 2016
CITATION	Delbridge v Owners Corporation RP12295 (Owners Corporations) [2016] VCAT 680

ORDER

The Tribunal orders and directs:

1. The application is dismissed.
2. The owners corporation must pay to the applicant \$575.30 in reimbursement of the VCAT application fee.

L Rowland
Member

APPEARANCES:

REASONS

Background and History

1. The applicant seeks compensation from the owners corporation for losses sustained by her Airbnb business on the ground that the owners corporation failed to provide a reliable hot water service from September 2015 until 17 March 2016.
2. The owners corporation concerns a large residential development in North Melbourne. It comprises 92 apartment lots in blocks A, B, C and D and 48 town house lots. The proper functioning of the owners corporation is hampered by a division of lot entitlement and liability which does not reflect a fair distribution of maintenance expenses amongst the lot owners. In short, the town house owners have resisted paying for the maintenance of the apartment blocks. The units of lot liability require the town house owners to contribute a proportionally higher amount to the costs of the owners corporation, but as the town houses largely pay for their own maintenance expenses, this has caused issues in raising funds to maintain the apartment blocks.
3. Generally, the owners corporation raises fees for maintenance on the benefit principle, so that the maintenance costs of each individual block of apartments is shared amongst the lot owners of that apartment block.
4. In 2014, the owners corporation sought to raise over \$1 million in special fees based on the benefit principle to undertake extensive and urgent works to the windows, doors, concourse and patios of the buildings in blocks A, B, C and D. The special levies were challenged in the Tribunal by Ms Helen Burns (the "Burns Proceeding"). In August 2015 the Burns Proceeding resolved on terms of settlement unknown to the Tribunal.
5. In 2015, the owners corporation brought a fee recovery application against the applicant in these proceedings seeking to recover more than \$23,000 in owners corporation fees dating back to July 2014. In November 2015 the parties entered into terms of settlement unknown to the Tribunal.
6. The applicant is one of 20 residential lot owners in block B. In these proceedings the applicant sought orders requiring the owners corporation to repair the hot water system which services all the residential lots in block B. The hot water service was repaired 4 days prior to the hearing. At the hearing, the applicant sought compensation from the owners corporation, (which is comprised of her fellow lot owners) for failing to undertake the maintenance work to the hot water service. The applicant claims loss of rental income from renting out her apartment on Airbnb. She has also claimed a refund of levies and interest and loss of wages. None of the other lot owners in block B have sought compensation from the owners corporation.
7. The claim for a refund of owners corporation levies and loss of wages is misconceived. There is no legal basis for a refund of owners corporation fees levied in accordance with the [Owners](#)

Corporations Act 2006 ('the Act'), As the applicant is not challenging the validity of the levies, the claim for a refund of owners corporation fees must fail. In relation to the applicant's claim for loss of wages it is well established law that a party's personal costs, including loss of wages, to prepare for and attend the Tribunal hearing are not costs which can be recovered in the proceeding. [\[1\]](#).

Statutory Obligation to Maintain Common Property

[\[1\]](#) See *Marshall v Lindeman* (Owners Corporations) [\[2016\] VCAT 362](#).

8. It is not disputed that the owners corporation has a statutory obligation to maintain and repair common property, which includes the hot water service. It must do so with care and diligence, as required by section 5 of the Act. A failure to comply with its statutory obligation may give rise to a damages claim for breach of statutory duty. It was not contended by the owners corporation otherwise.
9. In order to prove the claim, the applicant must prove a breach of duty and that she suffered a loss caused by the breach of duty.
10. For the reasons that follow, the applicant has failed to prove that the owners corporation breached its duty or that the loss of rent suffered by her was caused by the unreliable hot water supply.

Breach of Duty

11. In early September 2015, several of the lot owners and occupiers of block B, including the applicant, made numerous complaints of unstable and unpredictable hot water supply. The complaints were that the water was not always hot, was sometimes too hot, the water pressure was very low and that sometimes it took 15 minutes for the hot water to run. The applicant asserted that she had no hot water. (This claim is in direct conflict with an Airbnb post in which the applicant denied that there was no hot water and that it only took 3-5 minutes to run rather than 15 minutes). A review of the written complaints, including from the applicant, suggest that the hot water service was unreliable rather than non-existent.
12. A work order for a plumber to attend was issued by the manager to a plumber on 3 September 2015. The plumber attended on at least two occasions, but was unable to fix the issue. By 22 September 2015 the owners corporation manager identified that a new pressure pump was probably required and that the works would cost in the order of \$10,000 to \$15,000. The owners corporation manager sought the advice of a firm of engineers to repair and upgrade the hot water system.
13. On 14 October 2015 the owners corporation manager received a quotation from Lambert & Rehbein, to undertake the engineering work associated with upgrading the hot water system for block B. The quotation was accepted in October 2015.

14. Some non-operational water valves were replaced on 20 November 2015 but unfortunately, the replacement of the water valves did not remedy the lack of hot water.
15. The engineers undertook an inspection of the hot water service in October 2015. The engineers' report was received by the owners corporation on 7 December 2015. There is no explanation why the engineers took so long to prepare the report, but the owners corporation manager acted swiftly in first engaging a plumber, and then obtaining a quotation for engineering services and then engaging the engineers. The executive summary of the report is as follows:

A site inspection was carried out by this office to ascertain the existing services layout to determine the feasibility of upgrading these services. The inspection was based on services that were exposed or could be viewed from within the basement. Original design drawings for this particular building were not available. Based on the results of our site visit and information obtained from on site maintenance personnel it appears that the hot water service pipe work is undersized and not in accordance with current regulations.

We consider upgrading the existing hot cold services and associated valves to achieve acceptable pressures and flows is feasible without significant disruption to the existing building fabric.

The upgrade would be required within the basement area where there is sufficient access to undertake the works.

We note that tempering valves are currently not provided to bathroom fixtures in accordance with current regulations. The provision of these valves has not been addressed in this report and will require further investigation. The investigation would involve a review of existing services and feasibility assessment for fitting tempering valves at the outlet of all sanitary fixtures used primarily for personal hygiene purposes, delivering heated water not exceeding 50 degrees C.

16. The 9-page engineers' report included 3 pages of detailed drawings of the hot water system. It is clear from that report that the works involved were not simply a matter of calling a 24-hour plumbing service to replace the hot water service. The report reveals a detailed analysis of existing conditions and a detailed consideration of how the hot water system may be best upgraded. On 8 December 2015 the manager advised the applicant by email as follows:

Yesterday we received the specifications from the hydraulic engineer. The whole HWS needs an overhaul and now we know what needs to be done. The specifications have been provided to two plumbers, who have been asked to provide quotes as a matter of urgency. Once we have the quotes, they will be forwarded to the COM for decision. With a decision made we then go ahead.

17. On 8 December 2015 the manager forwarded the specifications to two plumbers to provide a quotation, but a response was not received until 8 January 2016. On 8 January, 2016 the owners corporation manager received a quotation for the supply of the pump only. On 19 January 2016 the manager received the full quotation for the works. Given the Christmas and New Year period the delay in the plumbers providing a quotation was, in my view, explicable.
18. On 19 January 2016 the owners corporation manager advised the owners corporation committee that the cost of the booster pump and installation would be \$13,229.70. On the same day, the committee members advised the manager by email they unanimously approved the expenditure

and authorised the special levy to pay for the replacement hot water pump and upgrade of the pipework.

19. On the same day, 19 January 2016 the lot owners of block B were notified of the impending works and a special levy was struck to cover the costs of the work. Under the [Owners Corporations Act 2006](#), the lot owners had 28 days to pay the special levy.
20. Also, on 19 January 2016, the applicant filed her application with the Tribunal seeking an order that the owners corporation maintain the hot water service to the lot owners of block B.
21. Again, the owners corporation, upon receiving the final quotation acted swiftly in obtaining approval and striking a levy.
22. On 4 February 2016 the applicant paid the special levy for the hot water service, but at the same time had more than \$30,000 owing in fees to the owners corporation.
23. On 25 February 2016, having received the funds to carry out the works, the owners corporation manager authorised the work order for the installation of the water pump. The contractor informed the owners corporation manager that the required pump would not be available for 1 to 2 weeks, and gave an estimated completion date of 17 March 2016. The work was completed on 17 March 2016.
24. The applicant was highly critical of the owners corporation for failing to address the issue of the hot water service in a timely way. In particular, she was highly critical of the owners corporation raising a special levy. Instead, she contended, the owners corporation should have used other funds (specifically the window and door funds) to attend to the urgent repair. The manager gave evidence that there were not sufficient funds to fix the hot water service without raising a special levy and that any funds held by the owners corporation were already committed to other projects.
25. The applicant was also critical of the manager failing to raise the special levy at an earlier time. Mr Wilkinson, solicitor for the owners corporation, said that one of the complaints in the Burns Proceeding was that the owners corporation had struck special levies based on estimates for the works to be performed. Against the background of that proceeding, the owners corporation waited until it received a final quotation before striking the special levy on the lot owners of block B.
26. Having regard to the finding that the hot water service was unreliable rather than totally non-existent and that generally the owners corporation is hampered in its operations by an unworkable plan of subdivision, I am not satisfied that the owners corporation was in breach of its duty to maintain the common property. A close review of the timeline, in my view, shows that the owners corporation has acted both carefully and diligently in the circumstances. I do not find that the owners corporation breached its duty to maintain the common property.

Applicant's Loss

27. It is not strictly necessary to examine the claim for economic loss because the claim fails for the reason that the owners corporation is not in breach of its duty to maintain the hot water service. However, for the sake of completeness, I will examine the claim.

28. The applicant claimed that her Airbnb business suffered losses due to the poor hot water supply. In order for the losses to be recoverable, the lack of reliable hot water supply must have been a cause of the loss.
29. The applicant claims loss of rent of \$9,593 together with future monthly losses of \$3,500 and refunds paid to guests of \$570. At the hearing I was critical of the applicant for failing to supply income taxation returns, however, on closer examination of the documents provided to the Tribunal, the applicant has supplied a print-out from Airbnb evidencing income as follows:

For September to December 2014 \$12,306

For September to December 2015 \$7,382

Difference: \$4,924

For January 2015 to March 2015 \$8,283

For January 2016 to March 2016 \$3,614

Difference: \$4,669

Total difference: \$9,593

30. I find that there is a difference in Airbnb income of \$9,593 for the period September 2015–March 2016 compared with the same period in the previous year. However, I am not persuaded that the cause of the difference in income was due to the unreliable hot water supply.
31. The only evidence tendered to the Tribunal to support the cause of the loss of income were the guests' reviews from Airbnb. Excerpts of guest reviews from the Airbnb site were presented to the Tribunal by both the applicant and the owners corporation. Overall, the reviews were very positive and did not mention anything about the hot water. A typical positive review from October 2015 is as follows:

"Dianne was the perfect host and a beautiful person. I really enjoyed my stay at her place, it was perfectly located - close to the city, trams and easy access to everything. The apartment & room was tidy and clean - it has everything I needed during my stay. Thank you for your hospitality and warm welcome."

32. There were very few negative reviews. The applicant presented three edited complaints from the Airbnb site relating to the period in question:

One guest, Latha wrote in December 2015;

"The whole flat was stinking of cigarette and there were cockroaches on the dining table. The general standard of the place was very poor for the amount I paid. ...The en-suite shower and shared toilet didn't have locks. Tiles were coming off near the built in robes. The hot water tap in the shower didn't work properly and in spite of Dianne showing me it took nearly 15 mins each day before I could have a shower. The dryer was broken."

In reply, the applicant wrote:

"The shower has some issues which have been addressed with body corporate, I explained that you had to let it run a little while but it's about 3-5 mins not 15 and I have been assured by body corporate this will be fixed in the new year."

Another guest, Claire wrote in November 2015;

"Dianne was very friendly and welcoming! I stayed for a month and the room with ensuite suited me perfectly. The flat was great for getting to the nearby hospital early in the morning and it was right beside a tram line for easy access into the CBD. Dianne was very quick to get to me if I had any questions and went out of her way to make sure I had everything I needed.

Occasionally if you smoked in your room the smell would drift through which was slightly unpleasant. Also, the shower not working for the last week and was a bit inconvenient because although you offered yours, I didn't want to disrupt you early in the mornings when I had to be up early for the hospital. But otherwise, my stay was perfect, thanks again!"

Another guest, Greg wrote in December 2015 in response to what could improve his experience:

"The shower could do with some minor maintenance."

33. Overall, the impression I gained from the guest reviews was that guests had a high satisfaction with their stay, but of those few people who did complain, their main complaint was not the hot water. I am not satisfied on the evidence presented that the unreliable hot water supply was a cause of the reduction in income earned.
34. The applicant produced one letter from a guest — Julie — seeking a rebate of \$180 for "hot water issues" for the period 2–5 October 2015. Apart from that letter there is no documentary evidence of the applicant providing a refund for hot water issues. The applicant produced a list of persons to whom she claims she has paid a refund, but Julie was not on that list. I am satisfied that the applicant suffered a loss of \$180 to Julie, but otherwise I am not satisfied on the evidence that any refunds were made to any other guests. As I have found that the owners corporation was not in breach of its duty to maintain, the claim for damages for the proven loss of \$180 must fail.
35. The applicant has not proved her claim for compensation. I will order the owners corporation to reimburse the applicant's VCAT application fee, because at the time of issuing the proceeding, the remedy sought by the applicant was repair and maintenance of the hot water service which was completed 4 days prior to hearing. The applicant was in my view justified in commencing the proceeding.