

# Fil v Owners Corporation PS332070B (Owners Corporations) [2017] VCAT 661 (2 June 2017)

Last Updated: 2 June 2017

## VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

### CIVIL DIVISION

**OWNERS CORPORATIONS LIST** VCAT REFERENCE NO. OC1454/2016

#### CATCHWORDS

*Owners Corporation Act 2006; owners corporation's duties Section 5 and 46; whether Tribunal should reopen the determination of issues the subject matter of findings in a related proceeding.*

|                        |  |
|------------------------|--|
| <b>APPLICANT</b>       | Veronica Fil   |
| <b>RESPONDENT</b>      | Owners Corporation PS332070B   |
| <b>WHERE HELD</b>      | Melbourne  |
| <b>BEFORE</b>          | Member H. Davies   |
| <b>HEARING TYPE</b>    | Hearing  |
| <b>DATE OF HEARING</b> | 3 May 2017   |
| <b>DATE OF ORDER</b>   | 2 June 2017  |
| <b>CITATION</b>        | Fil v Owners Corporation PS332070B (Owners Corporations) <a href="#">[2017] VCAT 661</a> |

### ORDER

The application is dismissed.

**Hugh T. Davies**  
Member

#### APPEARANCES:

|                    |                           |
|--------------------|---------------------------|
| For the Applicant  | In person                 |
| For the Respondent | Mr. Phillipott of counsel |

### REASONS FOR DECISION

1. On 3 May 2017 the Tribunal gave the parties leave to file further submissions and reserved its decision for the delivery of written reasons. This leave was granted to enable the applicant, an unrepresented litigant, to consider and or obtain legal advice as to the matters raised in a submission counsel for the respondent filed at the hearing.
2. The gist of the respondent's submission was that the Tribunal should dismiss the application because to find in favour of the applicant would disturb the findings of fact in made in a decision of this Tribunal in

*O'Connor v OC PS3320703 (Owners Corporations)* [\[2015\] VCAT 1912](#) (“*O'Connor*”), delivered in December 2015, and that the Tribunal should not so act.

3. Each party subsequently filed further submissions which are addressed below.

4. The background to this application is that, on 13 and 14 September 2014, a unit occupied by the applicant at 7 Drewery Lane Melbourne, which is a block of residential apartments, and at least one other unit at the same block were affected by a water and sewage waste leak (“the leak”) from common property under the control of the respondent. Mr O'Connor, the applicant in *O'Connor*, was the tenant of another unit at the same block.

5. Ms Fil seeks compensation for damage to her possessions and other consequential losses as a result of the leak claiming that the respondent was in breach of various duties it owed to her under *Owners Corporation Act 2006* (“OCA”).

6. Whilst not specifically saying so, Ms Fil claims might arise under Sections 46 or 47 OCA which provide for the respondent’s duties to repair and maintain common property and the chattels, fixtures, fittings and services related to the common property.

7. Ms Fil also claimed that the respondent, in its dealings with her once the leak was discovered, had acted in breach of its obligations under Section 5 OCA by not acting honestly and in good faith and not exercising due care and diligence.

8. Mr O'Connor brought his proceedings in this Tribunal against the same owners corporation as is the respondent in this proceeding seeking compensation on a basis similar to that of the applicant in this proceeding and as arising from the leak. His claim was dismissed on its facts.

9. Ms Fil did not participate in any way in *O'Connor*. In her submission to the Tribunal dated 22 May 2017 the applicant argued that her claim was not the same as was the claim in *O'Connor* because her claim comprises “a unique set of circumstances and that she had no input to *O'Connor*”.

10. In the view of this Tribunal, leaving aside the alleged breaches of Section 5 of the OCA, there is nothing about the fact surrounding this application, insofar as the leak itself is concerned, which is unique to or in any relevant regard different to the facts in *O'Connor* and nothing in the applicant’s evidence suggests otherwise.

11. In his reasons for his decision in *O'Connor* Member Thomas made extensive findings and concluded that the leak did not arise in circumstances which constituted any breach of duty on the part of the respondent nor was it liable to Mr O'Connor under the [Water Act 1989](#) (“TWA”).

12. Whilst I have not heard or read a transcript of the *O'Connor* proceeding, I have had the benefit of reading the entire decision of Member Thomas and of considering his very extensive examination of the evidence. I respectively agree with the findings as to fact and the conclusions he reached. The evidence presented in that case was far more detailed and technical than was the evidence presented here.

13. At the hearing of the current proceeding, rather than accede to counsel’s submission that the applicant’s claim should be dismissed for

the reasons stated above, the Tribunal called upon the applicant to give her evidence, because, again leaving aside her claims as to breaches of [Section 5](#) of the *OCA*, to deny her that opportunity could give the impression that the Tribunal was not prepared to consider whether she had a unique case.

14. In addition to her oral evidence, the applicant presented a submission in which in part dealt with the factual background to the claim as she did again in her submission filed with the Tribunal and dated 22 May 2017.

15. Nowhere in her evidence, or in either of these submissions, did the applicant adduce any evidence as to the cause of the leak; at no time did she give or present evidence which would persuade this Tribunal to reach conclusions at odds with those which constitute the findings in *O'Connor*.

16. In *O'Connor* the Tribunal found (at 59) that the cause of the blockage (i.e. the leak) was:

“person(s) unknown flushing inappropriate material down a toilet. In this regard, I consider the statement of Mr Geoff White of Drain Jet to Mr Rochman of ASTA Chartered Loss Adjusters that “Routine inspection of the pipes, even if conducted by the (Owners Corporation), would not have avoided the incident from occurring, unless it was within minutes of the culprit or culprits having flushed the foreign objects down their toilet” of significance”.

17. Whilst the applicant did not make a specific claim under TWA such a claim might lie.

18. [Section 16](#) of the *TWA* provides that:-

“(1) If—

(a) there is a flow of water from the land of a person onto any other land; and

(b) that flow is not reasonable; and

(c) the water causes—

(i) injury to any other person; or

(ii) damage to the property (whether real or personal of any other person; or

(iii) any other person to suffer economic loss—

the person who caused the flow is liable to pay damages to that other person in respect of that injury, damage or loss.”

19. In *O'Connor* the Tribunal (66) found that the respondent did not breach and duty owed to the applicant under TWA as it did not cause the flow of sewerage (i.e. the leak) into Mr O'Connor's apartment.

20. [Section 98\(1\)\(c\)](#) of the *Victorian Civil and Administrative Act 1998* gives this Tribunal power to inform itself on any matter as it sees fit; therefore, other submissions and issues aside, this Tribunal takes the findings in *O'Connor* into account in this proceeding.

21. Nonetheless, the submissions made by counsel for the respondent merit consideration in these reasons.

22. In his submissions, counsel for the respondent referred to *Dore v Housing Guarantee Fund & Ors* [\[2002\] VCAT 1495](#) (12 December 2002) in which Senior Member Cremean stated:-

*“4. This case arises under the House Contracts Guarantee (HH) Act 2001. By s37 of the 1987 Principal Act, as amended by that Act, indemnity is provided for any person who has a claim under an HH policy to the extent allowed under the policy.*

*5. 5. As it happens, the very issue set aside by the member for separate hearing was considering only 2 months or so before by Senior Member Walker in Bulboa v Royal & Sun Alliance Insurance Aust Ltd [\[2002\] VCAT 316](#). That decision was available at the time. To have a point re-argued only two months or so after it was decided by the Tribunal is a wasteful exercise. It is, moreover, an expensive exercise for all concerned including the Tribunal in the allocation of its resources. I consider I am not bound by the Senior Member's decision. But having to re-hear a matter only recently heard is not a practice to encourage. Otherwise, any decision, formally given, might be re-argued again, and again, before different members with differing results. It is all the more embarrassing when this happens only a short time, as in this case, after the pronouncement is given”.*

23. In *Jackman v Cardinia SC* [\[2000\] VCAT 1463](#) Member Liston stated, in a planning matter, that

*“13. As a matter of public policy the Tribunal should not depart lightly from the decision of another division of the Tribunal in respect of the same proposal affecting the same land. Unless there are some exceptional circumstances applying to the particular case, there should be some significant change of circumstances which suggest that a departure from the original decision is warranted.”*

24. This Tribunal respectfully agrees with the decisions in these cases and concludes, in view of all of the evidence, that the applicant in this proceeding does not have a unique case when it comes to the cause of the leak and should not be able to contend that this Tribunal should reach findings as to fact at odds with those in *O'Connor* as to the cause of the leak.

25. Section 5 of the *OCA* provides that:-

“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.

Ms Fil claims that, in delaying reporting to her about the leak after it was known, in not advising her that the leak involved sewerage as well as water, in failing to properly communicate with her about the events surrounding and following the leak, Messrs Martin and McCrae, as representative of the respondent, had breached these duties.

There was evidence before the Tribunal to satisfy it that, that even if these persons were dilatory or incommunicado, they acted dishonestly or in bad faith or that they lacked due care and diligence in a way as to do more than inconvenience the applicant at worst.

26. However the respondent may have acted towards the owners and occupiers of units at the block subsequent to the leak occurring, there was no evidence before the Tribunal to suggest that any loss the applicant may have suffered and claimed arose other than from the leak itself, and that nothing that occurred thereafter contributed to her losses. The applicant has not suffered any loss which might be compensable by reason of Section 5 of the *OCA*.

The evidence leads the Tribunal to conclude that all of the property damage suffered by the applicant was initiated by and caused by the leak; the same is to be said for any expenses she incurred in a clean-up and waste disposal.

27. For the above reasons this application is dismissed.

**Hugh T Davies**  
**Member**