

**VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL
CIVIL DIVISION**

OWNERS CORPORATIONS LIST

VCAT REFERENCE: OC671/2014

CATCHWORDS

[Victorian Civil and Administrative Tribunal Act 1998](#) sections 75(1) and 78(1) and (2).

FIRST APPLICANT: Owners Corporation No. 1 - PS434030V
SECOND APPLICANT: Owners Corporation No. 2 - PS434030V
THIRD APPLICANT: Owners Corporation No. 3 - PS434030V

RESPONDENT: Peter John Carroll

WHERE HELD: 55 King Street, Melbourne

BEFORE: Deputy President I. Lulham

HEARING TYPE: Hearing

DATE OF HEARING: 1 September 2015

DATE OF ORDER: 3 September 2015

DATE OF REASONS: 3 September 2015

CITATION: Owners Corporation No. 1 - PS434030V v Carroll (Owners Corporations) [2015] VCAT 1414

ORDERS

The application made by the Respondent, for orders that the Applicants' claim for damages be dismissed, is refused.

I. Lulham
Deputy President

APPEARANCES:

For the Applicants: Mr A Parlour, legal practitioner
For the Respondent: Mr D Gilbertson QC, of Counsel

REASONS

1. The need for this Order arises in somewhat unusual circumstances.
2. The Respondent is the owner of Apartment 1801 in the apartment building known as “The Arkley” in the Docklands.
3. There has been a problem with the concrete on the external face of the building, which could develop into ‘concrete cancer’ if not rectified. The external face is common property. The Owners Corporations engaged a contractor to carry out rectification work, and the contractor required access to the balconies of certain apartments including the Respondent’s. For present purposes it is sufficient to say that the parties fell into dispute when delays were encountered in having the works performed.
4. At the hearing on 1 September 2015 the Owners Corporations were seeking orders which would compel the Respondent to give them and their contractor access to the balcony in his apartment, for the purpose of carrying out rectification work, and for damages of \$89,037.00 which the Owners Corporations allege they had sustained as a result of the Respondent’s refusal to give access in the past.
5. It became evident during the hearing that it was in all parties’ interests for an arrangement to be made which would enable the Owners Corporations to have the rectification work performed, but with a right for the Respondent to seek intervention of the Tribunal in the event that the rectification work was not performed expeditiously. The parties did not quite get to the point of agreeing to a Consent Order, but in broad terms they agreed to the scope of an Order on the rectification work. It might be said that they “did not oppose” that Order.
6. The sticking point in their discussions on a potential Consent Order was that when the last proposal was made by the Owners Corporations, the Respondent said that he would only agree to a Consent Order if the Owners Corporations abandoned their claim for damages. When the Owners Corporations declined to do so, the Respondent submitted that the claim for damages be dismissed. The Owners Corporations made submissions in reply. In view of the time available, I made an Order which gave the Owners Corporations and their contractor 32 days’ access to the Respondent’s balcony so that the rectification work could be performed, and I reserved the question of whether or not the claim for damages should be dismissed.
7. It is fair to say that the submissions in relation to that issue were not made with particular reference to the [Victorian Civil and Administrative Tribunal Act 1998 \(Vic\)](#). Certainly the Respondent noted that the Owners Corporations had not pleaded certain matters, such as reliance on the Owners Corporations’ Rules or particular sections of the [Owners Corporations Act 2006](#). The Owners Corporations focussed on the cause of delay.
8. The Owners Corporations did not have witnesses available to verify the claim for damages. They had filed a document in the nature of a supplementary submission, to which certain quotations and other documents were annexed. Clearly, the Respondent

is entitled to require witnesses to verify the Owners Corporations' claims and to cross-examine those witnesses. So in that sense, the Owners Corporations' claims for damages could not proceed today. At most, directions could have been made so that the damages claim could become the subject of a further hearing,

9. As to whether the claim for damages should be dismissed, however, the parties are reminded that the Tribunal does not have inherent jurisdiction and so can only exercise powers conferred by legislation. In order to obtain an Order dismissing a claim for damages, the Respondent would have to persuade the Tribunal that section 75(1) or section 78 of the [Victorian Civil and Administrative Tribunal Act 1998 \(Vic\)](#) applied. The former enables a claim to be struck out if it is unsustainable as a matter of law, and the latter applies where a party has acted in a manner which has prejudiced the other party. The particular terms of both sections should be examined by the parties.

75(1) At any time, the Tribunal may make an order summarily dismissing or striking out all, or any part, of a proceeding that, in its opinion—

- (a) is frivolous, vexatious, misconceived or lacking in substance; or
- (b) is otherwise an abuse of process.

78(1) This section applies if the Tribunal believes that a party to a proceeding is conducting the proceeding in a way that unnecessarily disadvantages another party to the proceeding by conduct such as—

- (a) failing to comply with an order or direction of the Tribunal without reasonable excuse; or
- (b) failing to comply with this Act, the regulations, the rules or an enabling enactment; or
- (c) asking for an adjournment as a result of (a) or (b); or
- (d) causing an adjournment; or
- (e) attempting to deceive another party or the Tribunal; or
- (f) vexatiously conducting the proceeding; or
- (g) failing to attend mediation or the hearing of the proceeding.

(2) If this section applies, the Tribunal may—

- (a) order that the proceeding be dismissed or struck out, if the party causing the disadvantage is the applicant ...

10. In my view section 75(1) does not warrant the dismissal of the claim for damages. Briefly, the claim for damages is arguable. The Respondent would need to show that the claim was hopeless. He cannot do so,

11. Similarly, section [78](#) does not justify dismissal of the claim. True it is that the Owners Corporations could have pleaded their claim more formally, and that if they had pressed the matter the Respondent would have been in a good position to seek an adjournment of the hearing. However, this is quite a different matter from a party who so misbehaves in litigation that their claim should be dismissed.

12. In these circumstances I will not dismiss the Owners Corporations' claims for damages. The order I made on 1 September 2015 provided in effect that if that claim was not dismissed, consideration of it would be deferred until a period when, all things going to plan, the rectification work in the vicinity of the Respondent's apartment has been completed. If at that time the Owners Corporations seek to agitate the claim for damages, the Principal Registrar should list a directions hearing so that arrangements can be made for the orderly conduct of that hearing.

I. Lulham
Deputy President

3 September 2015.