

Owners Corporation PS 447493 v Burbank Australia Pty Ltd (Building and Property) - [2016] VCAT 2004

VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

BUILDING AND PROPERTY LIST

VCAT REFERENCE NO. D1166/2012

CATCHWORDS

DOMESTIC BUILDING – application for a preliminary hearing to determine a separate question – application refused

APPLICANTS Owners Corporation PS 447493 & Others

RESPONDENT Burbank Australia Pty Ltd (ABN 19 007 099 872)

WHERE HELD Melbourne

BEFORE Deputy President C Aird

**HEARING
TYPE** Directions Hearing

**DATE OF
HEARING** 20 October 2016

**DATE OF
ORDER** 1 December 2016

CITATION Owners Corporation PS 447493 v Burbank Australia Pty Ltd (Building and Property) [2016] VCAT 2004

ORDERS

1. The respondent's application that there be a preliminary hearing to determine a separate question is dismissed.
2. **This proceeding is listed for a directions hearing before Deputy President Aird on 24 January 2017 at 9:30 a.m. at 55 King Street Melbourne.**
3. Liberty to apply.
4. Costs reserved with liberty to apply.

DEPUTY PRESIDENT C AIRD

APPEARANCES:

For Applicant Mr N Moss of Counsel

For Respondent Mr N Phillpott of Counsel

REASONS

1. The respondent was the builder ('the Builder') of the Waterford Towers development, construction of which commenced in or about 2000-2001. On 8 November 2003, the applicant Owners Corporation ('the OC') came into existence when Plan of Subdivision 447493 was registered. The last of the occupancy permits was issued on or about 19 May 2003. These proceedings, seeking rectification of alleged defective works and rectification of consequential damage, were commenced in November 2012. A number of individual lot owners were joined as applicants to the proceeding by order of the Tribunal dated 6 August 2013.
2. Following the refusal by the Tribunal of an application by the builder under s 75 of the [Victorian Civil and Administrative Tribunal Act 1998](#) ('the [VCAT Act](#)') to strike out the claims by the individual lot owners as being statute barred, the individual lot owners withdrew their claims.
3. On 26 August 2016 the builder filed an Application for Directions Hearing or Orders, together with a supporting affidavit by its solicitor Daniel John Oldham dated 25 August 2016, seeking the following order:

The matter be listed for a preliminary hearing on the following separate question, namely:

By reference to Schedule A of the Applicant's further amended Points of Claim dated 11 August 2016, does the Applicant own the defects claimed in the proceeding?

4. Mr Phillpott of Counsel appeared on behalf of the builder. This application is opposed by the OC which relies on two affidavits by its solicitor, Liam James Murray dated 8 and 26 September 2016 respectively. Mr Moss of Counsel appeared on behalf of the OC and spoke to the written submissions he handed up at the commencement of the directions hearing.

WHEN SHOULD A PRELIMINARY HEARING BE ORDERED?

5. In *Murphy v State of Victoria & Anor* [1], Nettle AP, Santamaria and Beach JJA set out, with approval at [28], the trial judge's summary of the principles for determining whether a separate trial of a discrete question should be ordered:

[1] [2014] VSCA 238.

It is evident from the judge's ruling of 8 August 2014 [2] that his Honour was aware of the care which must be exercised before making an order for separate trial of discrete questions. He cited extensively from authority which, as his Honour said correctly, makes clear that:

[2] [2014] VSC 363 ('First Reasons').

- 1) A separate trial should be ordered under r 47.04 only with great caution and only in a clear case. [3]
- 2) The attraction of trials of issues rather than of cases in their totality, 'are often more chimerical than real', so that separate trials should 'only be embarked upon when their utility, economy and fairness to the parties are beyond question'.
- 3) The advantages of trying separate questions for one party may unfairly disadvantage another party, including because the questions will be determined without the benefit of all the evidence relevant to the proceeding. [4]
- 4) There should be no trial of a separate question on the basis of assumed facts unless the facts are agreed or can readily be determined judicially. Otherwise, the parties remain free to dispute the relevant facts at any later trial. [5]
- 5) As a general rule, it is inappropriate to order that a preliminary issue be isolated for determination unless the determination of the issue in favour of the plaintiff or the defendant

will put an end to the action, or where there is a clear line of demarcation between issues and the determination of one issue in isolation from the other issues in the case is likely to save inconvenience and expense. [6].

6) Factors which tell against making order under r 47.04 include that the separate determination of the question:

- a) may give rise to significant contested factual issues both at the time of the hearing of the preliminary question and at the time of trial;
- b) may result in significant overlap between the evidence adduced on the hearing of the separate question and at trial; possibly involving the calling of the same witnesses at both stages of the hearing of the proceeding; and
- c) may prolong rather than shorten the litigation. [7].

[3] *Wells Fargo Bank Northwest National Association v Victoria Aircraft Leasing Ltd (No. 2)* [2004] VSC 341 [181].

[4] *Wardley Australia Ltd v Western Australia* (1992) 175 CLR 514, 533-4.

[5] *Jacobson v Ross* [1995] 1 VR 337, 341-2 (Brooking J).

[6] *Dunstan v Simmie & Co. Pty Ltd* [1978] VR 669, 671.

[7] *Reading Australia Pty Ltd v Australian Mutual Provident Society* [1999] FCA 718, [8],

cited in *Village Building Company Limited v Canberra International Airport Pty Limited*

[2003] FCA 1195, [8].

6. Considering the current application in light of the principles set out in *Murphy*, I am of the view that it would be inappropriate to list the separate question for a preliminary hearing.

THE RESPONDENT'S POSITION

7. The OC's claim is for approximately \$1.2m to \$1.4m, a significant percentage of which relates to what I will describe as the balcony defects. The Builder contends that if it is determined that the balcony defects are in private property, then the OC has no standing to bring the claims. Therefore, as any claims the individual lot owners may have are now statute barred (it being more than 10 years since the date of issue of the occupancy permit) this will determine a significant part of the OC's claim.

8. The Builder relies on extracts from various expert reports which have been filed by the OC, which it contends demonstrate that the balcony defects are the lack of a waterproof membrane, which it contends are defects in the individual lots, not in the common property. In this regard it relies on *Owners Corporation PS508732B v Fisher* [8], where Member Rowland stated at [21]

...where balconies are constructed of concrete and then tiled over, interior face means the upper face of the concrete.

...

25. The 2011 registrar's requirements make it clear that any internal coverings (meaning internal to the lot) including tiles and waterproof membrane are within the lot and not part of common property.

26. ...In my view, interior face always meant the face of the structure. The 2011 registrar's requirements do no more than spell out what was existing practice.

27. The membrane and tiles are within the respondent owners' lot. It is for the respondent lot owners to repair and maintain the waterproof membrane.

[\[8\] \[2014\] VCAT 1358](#)

9. The Builder is yet to file any expert reports although I understand that its expert has carried out an inspection.
10. The OC opposes the listing of a separate question for a preliminary hearing in circumstances where, it contends, the defects are not agreed, and the builder has yet to file a defence to the Amended Points of Claim ('the APoC') filed on 11 August 2016 or any expert report/s. No orders have been made for the filing of a defence pending the determination of this application.

ARE THE DEFECTS AGREED?

11. The Builder contends that the defects comprising the majority of the OC's claim have been agreed including the lack of a waterproof membrane, and that it is the lack of a waterproof membrane is the cause of the leaking balconies.
12. The OC disagrees and contends that the defect is the gap between the balcony slab and the fascia board at the joint of the balustrade and the balcony slab, caused by a failure of the Builder to construct the balconies in accordance with the approved drawings.
13. The defects set out in Schedule A to the APOC describe the balcony defects variously. I have set out some of the descriptions which are illustrative:

Ground floor balcony and other defects

In respect of lots 101, 102 103 (South elevation) the defect is described as *substandard detailing of the fascia panel of apartment [lot number] above and water leaking around the downpipe that passes through the balcony above has caused soffit damage to the balcony.*

In respect of lots 208 and 210 (West elevation) - *between balcony of [lot numbers] unprotected gap between the concrete slab has caused damage to the [direction] end of the soffit.*

Upper floors balcony and other defects

Lots 306, 206 205, 305, 304, 204, 203, 303, 202, 301, 201 (South elevation) *between [lot numbers] unsealed penetration of the downpipe and gap has allowed water ingress between the concrete slab and the back of the fascia panel causing water damage to the soffit linings around the perimeter and downpipe penetration.*

Lot 502 –*unsealed gap (and possible lack of waterproof membrane) between the concrete slab and the back of the fascia panel of the upper 502 balcony has allowed water ingress causing damage between the edge of the balcony structure and the edge of the fascia panel causing water damage to the outer edge of the balcony soffit of the lower level balcony.*

Lots 309, 311, 209 and 211, 410, 311 and 313, (East elevation) – *unsealed gap between the concrete slab and the back of the fascia panel between balconies [lot numbers] has allowed water ingress causing damage [to] the outer edge of the balcony soffit.*

Lots 313, 207 (West elevation) *unsealed downpipe penetration and gap between the concrete slab and the back of the fascia panel between balconies [lot numbers] has allowed water damage [to] the northwest corner of the small balcony.*

...

The waterproofing installation is contrary to the statutory warranties (including not fit for purpose) as required in section A2.1 Vol 1 Amdt. 8 1996 Edition BCA. Does not comply to the requirements of FO1 and FFL1->FFL2 Vol 1 BCA amdnt. 8 1996.

14. The builder relies on an email from Bill McMahon of Paroissien Grant and Associates Pty Ltd, consulting engineers, dated 11 August 2016, in which he opines that *tiles and membrane are within the lots.*
15. The OC relies on a preliminary report from Andrew Smith, Licensed Surveyor, of Terrain Consulting Group Pty Ltd dated 8 September 2016 in which he states he agrees with Mr McMahon's general advice. Mr Smith opines that the following defects are located within common property:
 - (i) any gap between the end of the [balcony] concrete slab;
 - (ii) the pipe shaft through the concrete slab that contains the drainage pipes from the balconies
 - (iii) the water ingress between the drain pipe and the concrete slab, due to the lack of sealant between the puddle flange (at the top of the pipe) and the concrete slab, is deemed to be within common property.
16. The OC also relies on a letter from its building consultant expert, Rob Lees of Faulkner Lees Constructions Pty Ltd, dated 19 September 2016, in which he makes the following observations:

...

I have relied on the details, particularly the balcony details, shown in the set of architectural drawings that have been provided. Given the as built floor plans have been altered it is reasonable to assume that further sets of Architectural and Service drawings were prepared and

amendments were made to the building permit. Unfortunately these documents have not been forthcoming.

My investigations have found that the balcony construction does not conform to the details that have been provided in the Architectural drawings.

...

The outer edge of the balconies have not been constructed as per the design drawings and leaking has developed in the gap between the balcony structure and the fascia panel which has been classified as "*common property*" by Mr Andrew Smith. In the [4] April report sectional details have been included to show how the balconies were to be constructed and photos of how they have been constructed.

DISCUSSION

17. In circumstances where there is a controversy about the nature and location of the balcony defects, the following comments in [Murphy](#) at [39] are apt:

As it is, because of the parties' inability to agree on facts (which, as we have observed, was hardly surprising); the judge's consequent order that the questions should be tried on the basis of the facts admitted on the pleadings; and then the judge's adopting a course of relying also on facts and inferences drawn from the documents, no one could ever be sure of the facts on which the judge was proceeding until the judge published his reasons for judgment, and even now there is still some doubt about it. The consequences of having so proceeded are wholly unsatisfactory.

18. In this matter there are no relevant facts agreed or admitted in any pleading. Although builder contends that the balcony defects are caused by a lack of a waterproof membrane, and are therefore 'owned' by the individual lot owners, the OC and its experts contend that the defects are construction defects affecting the common property. Whilst it may be that any waterproof membrane and tiling would be within the individual lot, the lack of a waterproof membrane is not, of itself, determinative that this is the only cause of the leaking balconies, or the only balcony defect. Ultimately, this is a question of fact to be determined following the hearing and consideration of all the expert evidence.
19. Accordingly, I am not persuaded that the separate question should be listed for a preliminary hearing.

WOULD AN ALTERNATIVE QUESTION BE APPROPRIATE?

20. After hearing Mr Moss's submissions on behalf of the OC, Mr Phillpott suggested an alternative question be set down for a preliminary hearing:
- (i) Is the defects claimed by the OC:
 - (a) the gap between the slab and the fascia board and therefore a construction defect;
or
 - (b) the failure by the builder to install a waterproof membrane? and

- (ii) Does the OC have standing to bring the claim in relation to the defects it claims?
21. I am not persuaded this is an appropriate question for determination at a preliminary hearing as to identify the nature and location of the balcony defects claimed by the OC it would be necessary to hear all of the expert evidence, and would, in effect, be a hearing of the substantive issues in this proceeding. The proposed alternative questions demonstrate the controversy between the parties.

CONCLUSION

22. As their Honours said in [Murphy](#), a preliminary hearing should be ordered with caution, and then only where the facts are admitted, and the determination of a particular issue will dispose of the proceeding. This is not the case here.
23. The application will therefore be refused. I will reserve the question of costs with liberty to apply.

DEPUTY PRESIDENT C AIRD