

VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

OWNERS CORPORATIONS LIST

VCAT REFERENCE NO. OC1290/2016

CATCHWORDS

Claim for damages for cracked internal walls; no breach of duty by owners corporation; claim dismissed; claim for reimbursement of expert report dismissed.

APPLICANT: Neeraj Vats

FIRST RESPONDENT: Owners Corporation 22128

SECOND RESPONDENT: Leone Broad

WHERE HELD: 55 King Street, Melbourne

BEFORE: Member L. Rowland

HEARING TYPE: Hearing

DATE OF HEARING: 27 June 2016

DATE OF ORDER: 6 July 2016

DATE OF REASONS: 6 July 2016

CITATION: Vats v Owners Corporation 22128 (Owners Corporations) [2016] VCAT 1079

ORDERS

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

MEMBER L ROWLAND

APPEARANCES:

For Applicant Mr Vats in person

For Respondent Mr Harper, solicitor

REASONS

Background

1. This proceeding concerns a 1950's block of flats which was subdivided in 1985. The applicant became the owner of Lot 11 in 2008. Lot 11 is a ground floor flat with double brick walls. Since 2014, the applicant has been complaining of cracks to the internal walls of his lot and in this proceeding seeks recovery of the estimated cost of repairing the cracks in the sum of \$800 and the reimbursement of an expert report in the sum of \$1,427.50 from the owners corporation. The owners corporation disputes the claim on the grounds that the applicant is liable to repair his own lot.
2. The applicant also made a claim for his own costs of \$1,000 to prepare his application and what he called a 'grievance penalty' in the sum of \$3,900 for failure to repair the internal cracks. The claim for his own personal costs was dismissed in the course of the hearing because it is well established that the costs that the Tribunal can order in a proceeding does not extend to a litigant's own time in preparing for the hearing. ^[1]

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

3. The claim for a grievance penalty was also summarily dismissed on the grounds that the Tribunal does not generally have the power to penalise a party (with the exception of the civil penalty under section [166](#) of the [Owners Corporations Act 2006](#)).

Issues at hearing

4. The hearing focused on the remaining claims for the cost to repair the walls and reimbursement of the cost of the expert report.
5. The owners corporation contended that the internal walls are the property and responsibility of the individual lot owner and in the absence of any evidence to establish that the owners corporation is in breach of its duty to maintain the common property, it refused to repair the internal walls of the lot.
6. A review of the plan of subdivision confirmed that the title boundary lies in the median of the building wall, so that the internal wall is owned by the lot owner and the external wall is owned by the owners corporation. The cracking falls within the lot. It was not contended otherwise by any of the parties.

7. Ms Leone Broad, chair of the owners corporation, gave evidence that she has owned her flat, also on the ground floor, for more than 25 years. Ms Broad said that her flat has, from time to time, had some minor cracking and that she has repaired it at her cost. Ms Broad said that other lots have also experienced some minor cracking. Ms Broad said that the issue was discussed at an owners corporation meeting. The applicant declined to attend the meeting. The meeting resolved that the applicant should pay for his own repairs as other lot owners had done. The meeting concluded that the cracking was normal for a 60 year old building and there was no evidence that any foundation work needed to be done. Accordingly, the applicant's claim to repair the cracks was refused.
8. The applicant made a complaint to Consumer Affairs. As a consequence of the mediation undertaken with Consumer Affairs it was resolved that the owners corporation would further consider the applicant's claim if he obtained an expert report.
9. On 11 May 2015, the applicant obtained an expert report from Mr Leo Dridan, Building Consultant from Buildspect. The report found that:

The cracking of the masonry walls is consistent with structural foundation movement caused by the expansion and contraction of foundation subsoils with variation of moisture levels.

The external masonry skin of the front wall does not display any visible cracks.

Due to the size and nature of the cracking, I recommend that monitoring of the cracks be carried out over the next 12 months.

The masonry wall cracking is a result of building foundation movement. Previous repairs suggest that the building has a history of minor movement. Temporary filling of the cracks with a flexible filler will not hide any future crack expansion and close continued monitoring and documenting of the cracking is recommended. Reassessment should be made if the cracking becomes worse.

10. The owners corporation considered the report and confirmed its earlier decision not to repair the internal walls to the applicant's lot. The applicant refused to pay owners corporation fees resulting in a fee recovery application to the Tribunal in May 2016. The applicant commenced these proceedings in June 2016.
11. The applicant contends that movement in the foundations owned by the owners corporation has caused damage to his lot and therefore the owners corporation is liable to the applicant for the resultant damage.

Duty to repair and maintain

12. Section [46](#) of the [Owners Corporations Act 2006](#) provides that an owners corporation 'must repair and maintain common property'. A failure to repair and maintain common property may render the owners corporation liable for breach of statutory duty. In this instance, there is no evidence that the owners corporation has failed to do anything. The report does not recommend that any action be taken other than to monitor the cracks. In the absence of the applicant establishing the owners corporation has failed to do something, the risk of internal walls cracking in a 60 year old solid masonry flat falls on the lot owner.

13. The applicant has the evidentiary burden of proving his case. I am not satisfied that the owners corporation has failed to repair and maintain the common property. The claim for breach of statutory duty must fail.

Claim for expert report costs

14. The applicant sought the expert report costs on the basis that the owners corporation should have commissioned the report and that the agreement reached with Consumer Affairs was that if the applicant obtained an expert report which established that the foundations caused the cracking then the owners corporation would pay the associated costs.
15. There is no provision in the [Owners Corporations Act 2006](#) for a lot owner to be reimbursed for monies spent on behalf or in respect of the owners corporation. A lot owner may be reimbursed for monies spent on behalf of the owners corporation if authorised to do so, or the expenditure is later ratified by the owners corporation. As a general rule, the Tribunal will not order reimbursement of monies incurred by a lot owner in respect of the owners corporation unless there are exceptional circumstances. A lot owner cannot decide how owners corporations' funds are to be spent by unilaterally making the decision to spend the money and then later seeking reimbursement. In this case, the applicant has decided to commission the report. He was not authorised to commission the report on behalf of the owners corporation. The report did not identify any repairs or maintenance to be undertaken by the owners corporation. In my view, there are no exceptional circumstances warranting reimbursement of the expert report. The claim for reimbursement is refused.
16. The applicant has also sought reimbursement of the report costs on the grounds of estoppel. The applicant contended that both Consumer Affairs and the owners corporation represented that if the applicant could prove that the cracking was caused by movement in the foundations, then the owners corporation would reimburse the applicant the expert report costs. Consumer Affairs is not a party to the proceedings so no order can be made against it. The claim for reimbursement against the owners corporation on the grounds of estoppel fails because I find that the agreement reached at conciliation, was not on the terms the applicant contended. The lot owners have known for many years, that there is movement in the foundations. They have come to expect some movement because of the construction of the building and the age of the building. So far, the cracking has been relatively minor and there is no cracking to the external skin of the building. The consensus amongst the majority of lot owners is that no remedial action is required. What is in dispute is whether it is necessary for the owners corporation to undertake repair work to the foundations.
17. Given the background to the dispute, I find that the agreement between the parties was to the effect that if an expert report recommended repairs or maintenance to the foundations, the owners corporation would reconsider its position. As the expert report did not identify any required repairs or maintenance, the owners corporation was not obliged to consider reimbursing the cost of the expert report.
18. The applicant has sought an order for costs being the expert report costs and the application fee of \$575.30. The applicant has not been successful in the claim. On this ground alone, the applicant is not entitled to a costs order.

19. In accordance with s [109\(1\)](#) of the [VCAT Act](#), each party shall bear their own costs of the proceeding. I am not satisfied it is fair to make any costs order having regard to the matters set out in s 109(3) of the Act.

MEMBER L ROWLAND