IN THE SUPREME COURT OF VICTORIA
AT MELBOURNE
COMMON LAW DIVISION
JUDICIAL REVIEW AND APPEALS LIST

Not Restricted

S ECI 2019 05851

LENDLEASE ENGINEERING PTY LTD
(ACN 000 201 516) — Applicant

v

OWNERS CORPORATION NO.1 PS526704E
(and others according to the Schedule) — Respondents

JUDGE:	Forbes J
WHERE HELD:	Melbourne
DATE OF HEARING:	19 March 2021
DATE OF JUDGMENT:	10 June 2021
CASE MAY BE CITED AS:	Lendlease Engineering Pty Ltd v Owners Corporation No.1 & Ors
MEDIUM NEUTRAL CITATION:	[2021] VSC 338

JUDICIAL REVIEW – Building actions - *Building Act 1993* (Vic), s 134 – Limitation of actions period – Commencement date of limitation period – Occupancy permit – Staged development – When limitation period begins when multiple occupancy permits issued – *Victorian Civil and Administrative Tribunal Act 1998* (Vic), s 60 – Application for joinder – Whether circumstances permitted joinder after the expiry of the limitation period – *Brisbane South Regional Health Authority v Taylor* [1996] 186 CLR 541 – *Brirek Industries Pty Ltd v McKenzie Group Consulting (Vic) Pty Ltd (No 2)* (2014) 48 VR 558 – *Bridge Shipping Pty Ltd v Grand Shipping SA* (1991) 173 CLR 231 – *Agtrack (NT) Pty Ltd (Trading as Spring Air) v Hatfield* (2003) 7 VR 63 – *LU Simon Builders Pty Ltd v Victorian Building Authority* [2017] VSC 805 – *Owners Corporation PS447493 v Burbank Australia Pty Ltd* [2013] VCAT 191 – *Owners Corporation PS517029T v Hickory Group Pty Ltd* [2016] VCAT 731.

APPEARANCES:	Counsel	Solicitors
For the Applicant	Mr C Caleo QC with Mr B Reid	Thomson Geer
For the Respondents	Mr H Foxcroft QC with	Marchesin & Co. Lawyers

Mr R Harris

HER HONOUR:

1 This is an appeal from orders made by the Victorian Civil and Administrative Tribunal (**VCAT**) in a dispute under the *Domestic Building Contracts Act 1995* (Vic) . The Owners Corporations of Chevron Apartments in St Kilda Rd (**Owners Corporations**) applied to VCAT seeking relief from the respondent Contractor[1] who had provided the statutory warranties as to the building work. The Owners Corporations sought orders for rectification of alleged defective building work relating to a system of louvres around the exterior of the building.

2 The proceeding was commenced on 13 February 2017. On 16 May 2019, the Contractor filed an application seeking orders that most of the claim be summarily dismissed under s 75(1) of the *Victorian Civil and Administrative Tribunal Act 1998* (**VCAT Act**) (**dismissal application**). There were two bases for the dismissal application. First was the contention that the Owners Corporations only had standing to bring the claim in relation to defects of those parts of the louvre system which were on common property. Second, the Contractor contended some of the claims brought by the Owners Corporations were brought more than 10 years after the relevant occupancy permit had been issued and were thus statute barred pursuant to s 134 of the *Building Act 1993* (Vic) (**Building Act**). The argument was met with an application for joinder of additional applicants, the 137 individual owners of the private lots (**private owners**) affected by the defective louvre system (**joinder application**).

3 The Tribunal refused the dismissal application on the basis that the Tribunal was satisfied that the proceeding was commenced within time. The Tribunal was invited to and did reach a concluded view on the expiry of the relevant time limit as this was one basis for contending that the claims were untenable or bound to fail. In so doing it had in fact determined this argument against the Contractor, foreclosing argument

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1 At VCAT, Points of Claim and the Reasons of the Tribunal refer to Lendlease as the Contractor and I have adopted the same description in these reasons.

at the final hearing.

4 The Tribunal then permitted the joinder application. The private owners claims were statute barred, time having expired at the very latest on or about 16 February 2017 and the joinder application not made until 2019. The Tribunal nevertheless permitted the joinder application on the basis that when the Owners Corporations commenced its action in 2017 (which it had determined was within time) it did so not only on its own behalf but on behalf of the affected private lot owners. This determination of the limitation issue and the joinder meant that the issue of standing was not determined.

5 The Contractor takes issue with the outcome of both applications.

Questions of Law

6 The parties were agreed that the application for leave raises three matters as identified by the applicant and that those three matters involve a question of law. The three questions of law raised are:

(a) First, whether by proper construction of s 134 of the Building Act, in cases where multiple occupancy permits are issued in respect of a particular building project, a building action cannot be brought more than 10 years after the date of issue of:

(i) the occupancy permit issued in respect of the allegedly defective building work in respect of which the claim for damages is based; or

(ii) the last occupancy permit issued in respect of the entire building project?

(b) Second, whether the joinder application of the private lot owners ought to have been dismissed as, pursuant to s 134 of the Building Act, the owners' claims were:

(iii) out of time and statute-barred; and thus were

(iv) doomed to fail?

(c) Thirdly, whether there was evidence to support the Tribunal's finding that the Owners Corporations were acting on behalf of the private lot owners with respect to the claims the owners then sought to bring. Alternatively, whether that finding of the Tribunal was unreasonable or perverse?

The evidence before the Tribunal about the way in which the building works were conducted and occupancy permits issued

7 The building work at the Chevron apartments complex covered a refurbishment of the existing Chevron Hotel building (**Building 1**) resulting in 67 apartments over three levels and the construction of a new apartment building (**Building 2**), comprising 232 further apartments over nine levels and a three level basement carpark which could be accessed from both the existing and the new building. On Building 2, louvered metal shade screens are attached to the building perimeter. They are bolted and screwed to the exterior of the building. The Tribunal described the louvre system in this way:

> The exterior sunscreens are installed vertically; some 'form' the face of the building, in that they are seeming installed between brick walls and effectively form part of the wall; others appear to enclose balconies, windows and doors (with some opening like doors).[2]

8 The affidavit of the solicitor for the Contractor sworn in support of the application before VCAT set out her information and belief as to the contractual arrangements for the building project:

> 8. …the construction program included in the Contract contemplated that the Works would be completed in two separable portions; namely Building 1 would be separable portion 1 and Building 2 would be separable portion 2.
>
> 9. By letter dated 20 December 2006, the Principal's Representative directed the Respondent to complete the Works which were the subject of separable portion 2 as two further separable portions, portion 2A and separable portion 2B."[3]

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2 *Owners Corporation No.1 PSS526704E v Lendlease Engineering Pty Ltd (Building and Property)* [2019] VCAT 1909 ('VCAT Decision') [13].

3 Applicant, Affidavit of Persa Buchanan, Affidavit in *Lendlease Engineering Pty Ltd (ACN 000 201 516) v Owners Corporation No. 1 PS526704E & Ors*, S ECI 2019 05851, 19 December 2019 ('*Affidavit of Persa*

9 The letter of 20 December 2006 which was exhibited[4] made clear that in respect of Building 2 the division into separable portions 2A and 2B broadly divided work levels between ground level and level 4 (2A) and level 5 and above (2B) with other common areas divided. It also included two apartments from Building 1 as part of separable portion 2B.

10 The building works were completed in separable portions and four occupancy permits were issued on separate dates, being:

(a) **23 June 2006**: Occupancy Permit BS14426/2005/0074/1P, which certified (inter alia) that all apartments and associated common property of Building 1 were suitable for occupation, excluding Retail Tenancy 3, Apartments G04 & G05 (**Permit 1**);

(b) **19 October 2006**: Occupancy Permit BS14426/2005/0074/2P, which certified (inter alia) that all apartments (and associated common property) of Building 1 excluding Apartments G04 and G05 were suitable for occupation (**Permit 2**);

(c) **6 December 2006**: Occupancy Permit BS14426/2005/0074/3P, which certified (inter alia) that all apartments and associated common property were suitable for occupation excluding:

(v) Apartment Levels 7, 8 and 9 and Apartments G10, 210, 410 and 610 of Building 2; and

(vi) Apartments G04 and G05 of Building 1 (**Permit 3**).

(d) **16 February 2007**: Occupancy Permit BS14426/2005/0074/4F, which certified (inter alia) that all apartments and associated common property of both Buildings 1 and 2 were suitable for occupation (**Permit 4**).

11 Permit 3 and Permit 4 relate to the alleged defective works, which were undertaken

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Buchanan'), which exhibited her affidavit sworn on 16 May 2019 in the VCAT proceeding as Exhibit PB3.

4 *Affidavit of Persa Buchanan* (n 3), an exhibit of PB3.

on Building 2 and are therefore the relevant permits for the purposes of this appeal.

12 In the joinder application the Owners Corporations submitted that they always believed the louvre system was located on common property, and it was not until the Contractor in its defence raised the issue that parts of the louvre system were located on individual lots that the Owners Corporations obtained evidence from a licenced surveyor of Reeds Consulting (the **Reeds Report**).[5] That evidence disclosed that 411 louvres were entirely within private property, 468 were either wholly or partly within common property, a further 43 were "projected screens" which lay outside the plan of sub-division and were owned neither as common property nor private lot.

13 The Owners Corporations argued that s 60 of the VCAT Act governed the power to join a person as a party. The relief sought by the private owners was said to be the same as that sought by the Owners Corporations and the joinder has the effect of correctly identifying all the appropriate owners. No prejudice arises from the joinder.

14 The Contractor opposed the private owners' application arguing that any claim by the private owners is statute barred pursuant to s 134 of the Building Act, with the 10 year limitation period expiring at the very latest on or about 16 February 2017 so joinder should not be permitted. The Contractor contended that the Tribunal should not rely on *Owners Corporation PS447493 v Burbank Australia Pty Ltd*[6] as permitting joinder after the expiry of the limitation period if that person's claim is sufficiently connected with an existing claim.

15 In its reasons dated 5 December 2019, the Tribunal made, amongst others, the following orders:

(a) The respondent's application under s 75 of the VCAT Act is dismissed; and

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5 *Affidavit of Persa Buchanan* (n 3), Exhibit PB5, which exhibited the Affidavit of Steven Marchesin dated 3 October 2019, VCAT No. BP188/2017 to which in turn the report titled 'Reeds Report' was Exhibit SM3.

6 [2013] VCAT 1911 ('*Burbank*').

(b) The private lot owners named in the Schedule of Applicants are joined as the third to one hundred and thirty-seventh applicants.

Section 134 Building Act - the applicable limitation period

16 The Tribunal was set the task of deciding upon the proper construction of s 134 of the Building Act when multiple occupancy permits have been issued in respect of a building.

17 Section 134 of the Building Act provides:

> **134 Limitation on time when building action may be brought**
>
> Despite any things to the contrary in the **Limitation of Actions Act 1958** or in any other Act or law, a building action cannot be brought more than 10 years after the date of issue of the occupancy permit in respect of the building work (whether or not the occupancy permit is subsequently cancelled or varied) or, if an occupancy permit is not issued, the date of issue under Part 4 of the certificate of final inspection of the building work.

18 The Owners Corporations submitted that the preferable construction was that commencement date of the 10 year limitation period was the date when the last occupancy permit was issued for the building project, being 16 February 2007. This position was ultimately supported by the Tribunal's interpretation.

19 To the contrary, the Contractor submitted that s 134 operates to limit building actions being instituted more than 10 years after issue of an occupancy permit in respect of the building work to which that occupancy permit relates. The Act contemplates more than one occupancy permit in respect of a building, and an interpretation that maintains the connection between an occupancy permit and the building work to which it refers for limitation purposes is to be preferred. It submitted:

> If, as in this case, there are multiple permits issued for the works performed under a building contract, time must commence to run from the date of issue of the first permit that relates to the building work the subject of complaint in the proceeding. If, by the express words of the provision, the cancellation or variation of an occupancy permit does not impact the commencement or running of the limitation period, it would be anomalous if a subsequent occupancy permit which, as a matter of form, covered all building work the subject of earlier permits plus more were construed to impact the commencement or running of the limitation period. Once the 10 year period

commences, it is not paused or re-started because a subsequent occupancy permit dealing with additional building work is issued.[7]

20 The Owners Corporations disputed this and submitted this would produce inconvenient and confusing consequences. They relied upon the comments by Cavanough J in *LU Simon Builders Pty Ltd v Victorian Building Authority* at [29] – [30]:

> 29. Appropriately, in my view, the plaintiffs also invoke the principle that a construction that would produce inconvenient, improbable or irrational consequences should be avoided if there is a competing construction that is reasonably open and would not produce such consequences.
>
> 30. Further, the plaintiffs rely on the principle of legality, which requires (to use that language of the Court of Appeal in *Victorian WorkCover Authority v BSA Ltd*) that statutes 'be construed – in circumstances where constructional choices are open – so as to avoid or minimise encroachment upon rights or freedoms at common law'. I accept that there is room in this case for the application of this principle, too.[8]

21 They submitted that the interpretation urged by the Contractor would result in uncertainty with owners needing to look behind to all occupancy permits to determine the applicable time limit and a further absurdity in this case due to the overwhelming complexity associated with delineating the parts of the louvre system which are subject to each respective occupancy permit.

22 The Tribunal expressed its conclusions in this way:

> 31. Although s 134 clearly provides that the commencement of the limitation period is unaffected by the subsequent amendment or cancellation of an occupancy permit, it is silent about the commencement date where there are multiple occupancy permits. The clear purpose of s 134 as stated in *Brirek* is *to limit the period within which 'building actions' may be brought generally*. In other words, the 10 year limitation period provides the latest date for the bringing of a building action.
>
> …
>
> 33. …In my view, the date of occupation of the final OP must be the date of commencement of the 10 year limitation period. In a staged development, any other interpretation would lead to uncertainty, and a potentially

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7 Applicant, 'Applicant's Outline of Submissions', Submission in *Lendlease Engineering Pty Ltd (ACN 000 201 516) v Owners Corporation No. 1 PS526704E & Ors*, 5 June 2020 [23] (Emphasis in original).

8 [2017] VSC 805 [29]–[30].

unworkable situation.[9]

23 This uncertainty was in part because an occupancy permit was not of itself evidence of all building work having been completed but only that the building work to which the permit relates as causing the building to be fit for occupation. The Tribunal said it would be impossible to tell from each occupancy permit which louvre screens were in fact installed as at the date of Permit 3 due to the myriad of lot boundaries that overlap throughout the louvre system, including louvres that span multiple levels.

Construction of s 134

24 Construction of s 134 begins with the ordinary and grammatical meaning of the words.[10] It is approached in the context of the Building Act as a whole, and by identification of its legislative purpose.[11] Construction of ambiguity or conflict between provisions is to be resolved by construction that intends the legislation to give effect to harmonious goals.[12]

25 The stated legislative purposes of the Building Act in s 1 relevantly include:

> (a) to regulate building work and building standards; and
>
> …
>
> (c) to provide an efficient and effective system for issuing building and occupancy permits and administering and enforcing related building and safety matters and resolving building disputes; and
>
> …
>
> (h) to limit the periods within which building actions and plumbing actions may be brought.

26 Section 3 provides the following relevant definitions:

> …
>
> **building** includes structure, temporary building, temporary structure and

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9 VCAT Decision (n 2) [31], [33].

10 *Thiess v Collector of Customs* (2014) 250 CLR 664.

11 *Interpretation of Legislation Act 1984* (Vic) s 35; See also *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355.

12 *Independent Commission Against Corruption v Cunneen* (2015) 256 CLR 1.

any part of a building or structure;

…

building work means work for or in connection with the construction demolition or removal of a building;

…

Permit means building permit or occupancy permit.

27 Part 3 of the Building Act deals with building permits. Section 21 provides that the requirement for occupancy permits must be specified in a building permit. It states:

> **21 Requirement for occupancy permit**
>
> (1) The relevant building surveyor must specify in a building permit –
>
> (a) whether an occupancy permit is required under subsection (2) in respect of the building work; and
>
> (b) whether the occupancy permit is required for the whole or part of the building in respect of which the building work is carried out.

28 Subsection (2) provides that an occupancy permit is required in respect of all building work subject to three exceptions, not relevant here.

29 Building work, and the issuing of building permits may be divided into separable portions for a variety of reasons, but s 21 makes clear that each building permit must specify two things; by subparagraph (a) whether an occupancy permit is needed for the building work to which the building permit relates, and by subparagraph (b) whether the whole or part of the building requires the occupancy permit.

30 Part 5 of the Building Act deals with occupancy of buildings. Division 1 deals with the requirement for an occupancy permit. Section 39 states:

> **39 Occupancy permit must be obtained**
>
> (1) If a building permit states that an occupancy permit is required for the whole of a building, a person must not occupy that building unless the occupancy permit has been issued under this Division for the building.
>
> **...**
>
> (2) If a building permit states that an occupancy permit is required for

> part of a building, a person must not occupy that part of the building unless the occupancy permit has been issued under this Division for that part of the building.

31 The language of sections 21 and 39 differentiate between "an" occupancy permit and "the" occupancy permit.

32 Section 45 sets out particular matters that must be specified in an occupancy permit.

33 Section 46 provides:

> **46 Effect of occupancy permit**
>
> (1) An occupancy permit under this Division is evidence that the building or part of a building to which it applies is suitable for occupation.
>
> (2) An occupancy permit under this Division is not evidence that the building or part of a building to which it applies complies with this Act or the building regulations.

34 Within "Part 9 –Liability" of the Building Act where s 134 is found, the following definitions are included at s 129:

> **building action**
>
> means an action (including a counter claim) for damages for loss or damage arising out of or concerning defective building work;
>
> **building work**
>
> includes the design, inspection and issuing of a permit in respect of building work.

35 It was agreed that the VCAT proceeding was a building action to which s 134 applied.[13]

36 The Contractor submitted that the definition of building includes part of a building and, by s 46 of the Building Act, an occupancy permit may be obtained that applies to part of a building. The cumulative effect of issuing occupancy permits including ever expanding portions of building work does not change the fact that each permit is in respect of the work specifically included for the first time by each permit. The

[13] Save in relation to a proposed 'Townsend claim' about which the characterisation of a building action was disputed, but which is not relevant for the purpose of the appeal.

interpretation contended by the Owners Corporations would, in staged developments, potentially extend liability well beyond the ten year limitation period set out in the legislation.

37 The Respondent submitted that the introduction of the ten year limitation period was to give certainty to all parties as to the time within which claims for defective building work could be commenced. In staged developments, multiple occupancy permits might progressively be issued and uncertainty and confusion would arise for purchasers as to which was the relevant occupancy permit and therefore when time might commence to run. An owner or subsequent purchaser could not rely on a final certificate of occupancy and, it was submitted, uncertainty would encourage an adversarial approach between builders and landowners as to how time was to be calculated.

38 Both parties relied on *Brirek Industries Pty Ltd v McKenzie Group Consulting (Vic) Pty Ltd (No 2)*.[14] In that case, the Court of Appeal was asked to decide whether s 134 of the Building Act applied to actions in contract. The Court looked there to the purpose of the limitation provision.

39 Brirek Industries, the owner of a particular property, sued a building surveyor in negligence and for breach of a contract made in 2002 regarding the issue of building permits between 2002 and 2004. The proceeding was issued in 2008 and in 2010 amendment was made to plead an alternative contract in 2004. The surveyor said any cause of action in contract was statute barred by the six year period provided by *Limitation of Actions Act 1958* (Vic) (**Limitations of Actions Act**). Brirek Industries contended that the claim was covered by s 134 of the Building Act and so was within time. The County Court held that the claims in contract were governed by the Limitation of Actions Act and not s 134 of the Building Act.

40 On the limitation question the Court of Appeal concluded:

> … that the applicable limitation period is that provided for by s 134 of the

[14] (2014) 48 VR 558 (*'Brirek'*).

> Building Act, and accordingly that the time for bringing the action in contract and in tort is 10 years from the issue of the occupancy permit.[15]

41 The Court discussed the circumstances and reason for the introduction of s 134. In respect of building work, a claim brought for breach of contract, accrued time from the occasion of breach. By contrast, if brought in negligence, time does not commence until damage is suffered. There had been a long standing controversy as to when time commences for latent defects or for negligent design or construction. A cause of action in contract might have long expired before the defect is known. Conversely a claim in negligence might be available for many years after the contract that gave rise to the duty of care. Against this problem, legislation was enacted to provide, in Victoria, a ten-year limitation period.

42 In interpreting whether or not s 134 applied to contractual claims and concluding that it did, the Court said:

> A solution is best understood with reference to the problem it was designed to solve; an answer with reference to the question that prompted it. However, although 'context' may reveal the mischief which gave rise to the enactment of a particular statutory provision and, possessed of an understanding of that context, a court will be assisted in the interpretation of that provision, care must be taken not to exaggerate the significance of 'context'. Once the mischief or the problem is identified, various solutions to it may become apparent. The task of the court is to identify the solution that recommended itself to Parliament. To that end, it must strive to understand the meaning of the words and phrases in the provision to hand. The task is to construe the statutory provision, not the second reading speech. The court must be astute not to bend the words of the statute to accommodate some other solution to the problem that it may think the more desirable, or which some other jurisdiction has adopted.[16]

43 Both parties contend for a construction the purpose of which they submit promotes certainty. The mischief to which the introduction of s 134 was directed is to constrain widely divergent operations of time limits in building actions depending on how the action might be framed. The time limit now clearly operates from a single date: "the date of issue of the occupancy permit". The Act contemplates multiple occupancy permits by allowing permits for a part of a building and in practice staged

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15 Ibid, 565 [13].

16 *Brirek* (n 14) 586-587 [108].

occupancy permits occur, as here, each one being in respect of different building work.

44 The words of s 134 are clear and unambiguous. However, where the legislation contemplates and allows more than one, even multiple, occupancy permits be issued in respect of a building, the section itself is silent as to how the relevant one is to be identified. Which permit is the operative permit for limitation purposes?

45 It is to be borne in mind that the construction is of a limitation provision, one whose purpose is to limit the time within which a person can bring a cause of action. The rationale for limitation provisions was said by the High Court to be fourfold. In *Brisbane South Regional Health Authority v Taylor,*[17] McHugh J said:

> The effect of delay on the quality of justice is no doubt one of the most important influences motivating a legislature to enact limitation periods for commencing actions. But it is not the only one. Courts and commentators have perceived four broad rationales for the enactment of limitation periods. First, as time goes by, relevant evidence is likely to be lost. Second it is oppressive even "cruel", to a defendant to allow an action to be brought long after the circumstances which give rise to it have passed. Third, people should be able to arrange their affairs and utilise their resources on the basis that claims can no longer be made against them. Insurers, public institutions and businesses, particularly limited liability companies, have a significant interest in knowing they have no liabilities beyond a definite period.[18]

46 The arbitrary nature of a fixed time limitation, balancing the rights of plaintiffs and defendants is often ameliorated by extension provisions such as are found in the Limitation of Actions Act. No such extension provisions are provided for in the Building Act. The provision has operation despite anything to the contrary in the Limitation of Actions Act, making it clear in my view that the legislature turned its mind to questions of longstop provisions or extension provisions and did not include this.[19]

47 The Tribunal began with this observation of silence about the commencement date

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17 [1996] 186 CLR 541 ('*Brisbane South*').

18 *Brisbane South* (n 17), 552.

19 *Brirek* (n 14), 590 [125] - [126]; see also *Moorabool Shire Council v Taitapanui* (2006) 14 VR 55 ('*Moorabool Shire Council*').

where there are multiple occupancy permits. The limitation provision was the legislature's response to the highly variable limitations problems for all parties balancing those competing considerations by fixing a clear start or trigger date and then granting a longer than usual time period. The importance of identifying the start date is that it fixes the commencement of time by an external event, neither by the actions of a builder in undertaking the work, nor the knowledge of an owner or manifestation of a defect.

48 It is apparent that the Tribunal, in accepting that s 134 referred to one occupancy permit and that the legislation was silent where multiple permits existed, then gave a purposive interpretation to the provision, concluding:

> In a staged development, any other interpretation would lead to uncertainty and a potentially unworkable situation. [20]

49 It is necessary to begin with the clear and unambiguous words of the section that one occupancy permit serves to start time for limitations purposes. How then should the correct permit be identified having regard to the language and structure of the Act as a whole in a way that seeks to achieve harmonious goals? Those goals in a limitation context are to fix a time that is fair to both owners who may not be aware of defects until well after construction is finished, and to contractors who are entitled to certainty as to their period of potential liability.

50 The structure and language of the Act as a whole does give direction to the proper construction. Clearly an occupancy permit may attach to the whole or a part of a building and there is a link between an occupancy permit and the work it covers. But that does not necessarily lead to the conclusion that the occupancy permit that first identifies that relevant work is the one that the legislation identifies for limitations purposes.

51 Where an occupancy permit is required for building work, section 21 states that the requirement must be specified in the relevant building permit. By section 20 there

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[20] VCAT Decision (n 2) [33].

are two types of building permit that may be issued:

> A building permit may be –
>
> (a) a permit for the whole of the proposed building work; or
>
> (b) a permit for a stage of proposed building work.

52 Staged building permits are contemplated and, in a staged development it is perhaps unsurprising that occupancy permits might follow a similar staging process. It is in this context that s 21, set out above, requires the surveyor to specify in a building permit whether an occupancy permit is required in respect of the work and whether the occupancy permit is required for the whole or part of the building in which the work is to be carried out.

53 Thus even where a building permit is for a stage of work or part of a building, it must specify if the whole building is to be subject to the requirement of occupancy permit. Given the definition of building encompasses part of a building, the inclusion of "the whole or part of the building" in s 21(1)(b) must have some purpose.

54 It is a matter for the person applying for the building permit whether they wish to apply for a single permit or a staged permits. Many factors might influence this decision. Yet the legislation requires the building permit in either case to state whether an occupancy permit is required for the whole of the building as well as whether one is required for the part where the work is to be carried out. The distinction in s 21 between an occupancy permit and the occupancy permit is in my view deliberate. Indeed the whole of Part 5, Division 1 dealing with occupancy permits for building work distinctly and separately uses 'an occupancy permit" and 'the occupancy permit'.

55 An occupancy permit may be required in respect of the building work. That occupancy permit is clearly in respect of identified building work. I accept this submission of the Contractor. If the Contractor's construction was correct, s 134 would logically have referred to an occupancy permit which would then reference

the particular building work. Section 134 refers to 'the occupancy permit' so the limitation provision was not intended to apply from the varying dates of each occupancy permit required under subsection 21(1)(a) but has application from the occupancy permit identified in accordance with subsection 21(1)(b). Consistent with this view is the circumstance where when an occupancy permit is not issued, time runs from the certificate of final inspection.

56 Given that the definition of a building includes part of a building, the purpose of including the words "the whole or part of the building" in s 21(1)(b) in my view is to direct attention to where successive occupancy permits are issued in relation to staged works. It is still relevant to know whether the building as a whole is subject to an occupancy permit. The relevance of this is firstly, because if the whole building does not require an occupancy permit, then the building requires a certificate of final inspection for that part that does not require one. Section 38 provides:

> **38 Certificate of final inspection**
>
> (1) The relevant building surveyor must issue a certificate of final inspection on completion of the inspection following the final mandatory notification stage of building work if –
>
> (a) an occupancy permit is not required for the building work; and
>
> (b) all directions given under this Part in respect of the building work have been complied with.
>
> (2) A certificate of final inspection is not evidence that the building or building work concerned complies with this Act or the building regulations.

57 This regime ensures that at a certain stage close to completion of the building work, either an occupancy permit or a certificate of final inspection will be required over the whole of the building in which the works are undertaken. This favours a construction that the occupancy permit that best reflects the whole of the work in the building covered by either occupancy permit or by the certificate of final inspection identifies the relevant permit and so the date for the purpose of starting time.

58 Such a construction promotes the certainty of time limit for all parties. This is

particularly important where no extension provision exists. It is a construction not dependent upon the way applications for building and occupancy permits might be staged or separated. Whether building work is covered by one permit or ten different permits, the whole building will ultimately either be covered by occupancy permit or a certificate of final inspection. In those circumstances "the occupancy permit" identified in accordance with s 21(1)(b), is distinguished from the effect of "an occupancy permit whose effect is as provided by s 46, and is consistent with "the occupancy permit" as used in s 134.

59 This interpretation would result in the same applicable limitation period whether a contractor chooses to arrange the business of building work by progressive or sequential building and occupancy arrangements, or proceeds in relation to the building as a whole. These are matters entirely within the control of contractors and builders and outside the control of owners and purchasers. The certainty behind the purpose of the limitation provision was surely not amenable to such a variable time limit dependent upon the business choices of those conducting the building work.

60 There is another reason for favouring this construction. While an occupancy permit is issued in respect of identifiable building work, it is not evidence that the building work complies with the act or regulations, only that the building or part thereof is in fact suitable for occupation. The purpose of an occupancy permit, by s 39, is to make it an offence for any person to occupy any part of a building where a permit is required but not issued. By selecting the occupancy permit as identified by s 21(1)(b), or the certificate of final inspection, Parliament's intention and purpose was to fix an identifiable date for time to commence sufficiently proximate with the conclusion of the building work in that building.

61 Where, in accordance with s 39, a building permit states that an occupancy permit is required for the whole of the building, then, notwithstanding that an occupancy permit may provide that part of that building is suitable for occupation under s 46, the whole of the building subject to occupancy is not achieved until the last occupancy permit is granted.

62 On this construction Permit 4, described as "FINAL Occupancy Permit" is the relevant occupancy permit for limitation purposes. The Tribunal was therefore correct to conclude that the proceeding commenced by the Owners Corporations was commenced within time, being within the ten year period from the issue of the occupancy permit of 16 February 2007 that covered the whole of the building.

Joinder

The application to VCAT

63 In Amended points of Defence dated 17 May 2019, the Contractor alleged that the Owners Corporations were not the relevant owners of the louvre blades. The Contractor alleged three categories of louvre blades: fixed and sliding blades on balconies of private owners' apartments and screens on the Winter Gardens of the Penthouse apartments.

64 The Contractor contended that the balcony louvre blades consist of 6 panels, one fixed at either end of each balcony with a glass balustrade in between and four sliding panels which slide across and behind the fixed panels to enclose or open the balcony. It submitted that the boundary was the median line of the fixed louvre blades and a projection of that line across the balcony. The sliding louvres were said to be all on private lot owners property. The Winter Garden screens were said to be entirely on private owners property. The Contractor submitted that the question was an appropriate one for preliminary determination and the only evidence required was the plan of subdivision.

65 In October 2019 the Owners Corporation then made application to join the 137 affected individual lot owners. The application was supported by an affidavit which deposed to obtaining the Reeds Report in response to questions of ownership and therefore standing raised in the Amended points of Defence. The Contractor opposed the application for joinder as all of the private lot owners' claims were statute barred.

66 In respect of the private owners' joinder application, the relevant section of the

VCAT Act is s 60, which provides:

> **60 Joinder of parties**
>
> (1) The Tribunal may order that a person be joined as a party to a proceeding if the Tribunal considers that –
>
> (a) the person ought to be bound by, or have the benefit of, an order of the Tribunal in the proceeding; or
>
> (b) the person's interests are affected by the proceeding; or
>
> (c) for any other reason it is desirable that the person be joined as a party.
>
> (2) The Tribunal may make an order under subsection (1) on its own initiative or on the application of any person.
>
> …

67 The Tribunal clearly considered that the private lot owners were persons that within s 60 ought be joined as a party. The real question was whether it had power to order their joinder when the time limit for them to have commenced proceedings in their own right had expired. The Tribunal granted the application, and explained its reasons as follows:

> 39 Here the claim concerns the total louvre system installed throughout Building 2. To find the claims in relation to part of the louvre system should have been brought at an earlier date, or by different persons, particularly in circumstances where, as discussed above, lot boundaries run through individual exterior sunscreens, would create an absurd and unworkable situation.
>
> 40 Not only is the claim that the entire louvre system needs to be replaced, it is not the case that part only of a screen can be rectified. In those circumstances it was entirely reasonable for the application to have been brought by the OCs. Joining the affected private lot owners as applicants, is in my view, in the unique circumstances of this proceeding, simply a formality.[21]

68 This may be an unimpeachable observation, had the limitation period not expired. The Tribunal dealt with the limitation issue by concluding:

> 47. In the peculiar circumstances of this case, I am satisfied that the OCs in commencing the proceeding were acting on their own behalf and on behalf of their members: the private lot owners. The claim has

[21] VCAT Decision (n 2) [39]-[40].

> always been that the entire louvre system needs to be replaced: not that some only of the screens are faulty. The building action, which as defined in s 129 of the B (sic) Act is a claim for loss or damage arising from defective building work, was commenced within the ten year period.[22]

69 Joinder was therefore permitted.

70 The reasoning to this conclusion was criticised in three ways on appeal. First, it was said that joinder of a new party after the expiry of a limitation period was not a mere formality. Second, the Tribunal incorrectly relied on an earlier decision of *Burbank* as authority for the proposition that joinder of parties after the expiry of the time limit could occur where their claim was 'closely intertwined' with or was not differentiated from a claim by an existing applicant that had been commenced within time. Third, the conclusion that the Owners Corporations were acting on behalf of their members when proceedings were issued was either wholly unsupported or alternatively contrary to the overwhelming weight of the evidence.

Joinder after the expiry of the limitation period.

(a) A mere formality?

71 As observed above, the Building Act makes no provision for extension of time. Joinder of a new party to a proceeding, be they plaintiff or defendant, has the effect of commencing a new action by or against the new party. Expiry of the limitation period does not preclude an amendment to rely upon a different cause of action between the same parties. *Brirek* considered this in the specific context of the Building Act.

72 In *Brirek,* the Court set out the development of the law when a new cause of action is introduced between existing parties. Rule 36.01(6) of the *Supreme Court (General Civil Procedure) Rules 2015* (Vic) gives the court the power to amend pleadings notwithstanding the expiry of a relevant limitation period. The abrogation of the rule in *Weldon v Neal*[23] by s 34 of the Limitation of Actions Act makes clear a court must

22 Ibid, [47].
23 (1887) 19 Q.B.D 394.

do so if satisfied there is no prejudice to parties that cannot be met. In such circumstances an amendment may be said to 'relate back' or take effect from the time of issue of proceeding.

73 However, the concept of 'relation back' generally does not extend to the joinder of new parties. In *Agtrack (NT) Pty Ltd (Trading as Spring Air) v Hatfield*,[24] Ormiston J considered the concept of relation back of amendments made after the expiry of a limitation period. In *Agtrack*, a claim in contract and negligence was commenced by a widow for the death of her husband in a plane crash. Unfortunately, the claim was not pleaded pursuant to the *Civil Aviation (Carriers Liability) Act 1959* (Cth), which created a statutory cause of action with strict liability and removed actions on any other basis. Such an action had a one-year time limit. The proceeding was issued before the one-year limit had passed but after expiry of that limitation period, therefore, the defendant pleaded that the action could not be maintained. In a lengthy consideration of the nature of the amendment being the addition of a new cause of action on the same material facts, Ormiston J said:

> The "rule" in *Weldon v Neal* would certainly appear to have denied a plaintiff the right to make an amendment as to parties which was "backdated", for a claim against another defendant could never be assimilated with a claim against the existing defendant in that, as has been held, the new defendant only became a party when served.[25]

74 His Honour referenced *Bridge Shipping Pty Ltd v Grand Shipping SA*,[26] where the defendant in an action for damages had joined as a third party a company who it believed to be the carrier of the goods that the plaintiff alleged had been damaged or lost. The third party defence disclosed the carrier to have been a different company. Bridge Shipping then made application under Order 36 to amend its proceeding after expiry of the limitation period seeking to change the identity of an existing third party to the identified carrier arguing it was a substitution and therefore permitted as an amendment. The application was dismissed. The High Court held

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24 (2003) 7 VR 63 ('*Agtrack*').
25 *Agtrack* (n 24) [41].
26 (1991) 173 CLR 231.

that permission to amend was rightly refused because:

> The accepted view now is – particularly having regard to the present form of the relevant rule (R9.11(3)) – that the substitution or addition of a defendant by amendment does not relate back to the commencement of proceedings but takes effect from the time of the amendment. That means that the amendment cannot prejudice any existing right under a statute of limitations (or any other limitation period).[27]

75 The Contractor argues that the application for joinder was not simply procedural but of substance, properly characterised as commencing a new action. This is to be accepted. It is difficult to see how the joinder of a new party can be a simple formality, particularly after the expiry of a limitation period, other than in the factual context of the Tribunal's finding that the Owners Corporations were acting on behalf of the private lot owners. I will return to that issue later.

76 The Owners Corporations submitted that joinder was permitted notwithstanding the operation of s 134, because the Tribunal is obliged to act fairly[28] and is not bound by rules of evidence or practices or procedures applicable to courts of record.[29] As such it has the power to amend the proceeding on foot, including the addition of relevant parties to an otherwise meritorious claim and for relating those claims back to the commencement of the proceeding in order to afford relief. *Brirek* was submitted to be authority to apply to such a situation where the applicable limitation period was s 134 of the Building Act.

77 For the reasons outlined above, *Brirek* does not assist the Owners Corporations where what is sought is not the amendment of claims between existing parties, but the joinder of additional parties. The limitation period in s 134 is expressed to apply "despite anything to the contrary in the *Limitation of Actions Act* or in any other Act or law". In *Brirek*, attention was given to the conclusion in *Moorabool Shire Council*[30] that the time to bring a building action is strictly limited, with there appearing to be no prospect of the operation of extension provisions. This fortified the court in *Brirek*

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27 Ibid, 236 (Dawson J).
28 *Victorian Civil and Administrative Tribunal Act 1998* (Vic) s 97.
29 Ibid s 98.
30 *Moorabool Shire Council* (n 19).

in its conclusion as to the operation of s 134. It would in my view be anomalous and erroneous to conclude that the Tribunal, given jurisdiction to hear and determine building disputes, could have power to join a new party after the expiry of the relevant time limit by application of its own procedural powers to act fairly.

78 The Owners Corporations relied on *Owners of Strata Plan 30791 v Southern Cross Constructions (ACT) Pty Ltd (in liq) (No 2)*[31] in support of its submission. In *Southern Cross*, the NSW Supreme Court had joined private lot owners after expiry of the limitation period. That joinder was ordered pursuant to s 65 of the *Civil Procedure Act 2005* (NSW) which was interpreted to give the Court power to amend an originating process after the expiry of the relevant limitation period even in circumstances where the effect of the amendment would be to substitute a new party.[32] Joinder was permitted on the basis that the question of the operative date of joinder and whether the claims were statute barred were to be determined by the trial judge. The operative date then related back to the commencement of proceeding by reason of s 65(3) of the *Civil Procedure Act 2005* (NSW) unless the Court otherwise orders. At trial, the court was not persuaded to order otherwise and the joinder of the private lot owners took effect, by operation of statute, from the commencement of the action.

79 I am not satisfied that the statutory provisions as interpreted and applied by the NSW Supreme Court in *Southern Cross* are relevantly analogous to the application of the Building Act and the procedures of VCAT applicable to the conduct of proceedings in the Tribunal.

(b) Is joinder permitted in limited circumstances?

80 The Tribunal approached the question of joinder of a party on the basis that s 60 permitted joinder notwithstanding expiry of the limitation period in some circumstances. It referred to its earlier decision in *Burbank* as clarified by *Hickory*

31 [2019] NSWSC 440 (*'Southern Cross'*).
32 *Civil Procedure Act 2005* (NSW) s 65(2)(b).

Group.[33]

81 In *Burbank* the Owners Corporation had commenced a building action within time but without complying with the requirement that there be a special resolution to do so. The Tribunal by order joined private lot owners to the application. The relevant occupancy permit for limitation purposes was dated 19 May 2003. The joinder was ordered on 6 August 2013 some months after the ten-year limitation period had expired. The respondent builder contended that the application was a nullity and the claims of the private lot owners should be dismissed as statute barred. In a decision refusing the application under s 75 of the VCAT Act the Tribunal determined that any failure to obtain a special resolution was an irregularity that could be cured, and used s 126 of the VCAT Act to ensure that the Owners Corporation's application was valid.[34] On the strike out application the Tribunal's reasons stated:

> 40. *Building action* is defined in s129 of the Building Act as meaning *an action (including a counter-claim) for damages for loss or damage arising out of or concerning defective building work*. Separate proceedings were not commenced by the individual lot owners. Rather, they were joined as co-applicants to this proceeding by order of the Tribunal dated 6 August 2013. The nature of the claim has not changed. The claims by both the Owners Corporation and the individual lot owners are closely intertwined arising from the alleged defective works in both common property and private property and consequential damages to both common and private property caused by those defective works. This is not a case where the individual lot owners claims are independent to and distinct from the claims by the Owners Corporation. 35

82 The circumstances where joinder had been ordered, on its face, after the ten-year limitation is not apparent.[36] In the context of summary dismissal, the Tribunal determined no more than whether the limitation period had in fact expired (or might be extended if relevant) was in some way open and arguable. It was therefore not

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33 *Owners Corporation PS 517 029T v Hickory Group Pty Ltd* [2016] VCAT 731 ('*Hickory Group*').

34 The decision was the subject of an appeal although the issue of the joinder of parties after the limitation period had expired was not part of that appeal see *Burbank Australia Pty Ltd v Owners Corporation (No 2)* [2015] VSC 200.

35 *Burbank* (n 6) [40].

36 It is worth noting however that at the time of joinder and the hearing in *Burbank*, the appeal in *Brirek* was pending and there was no clarity as to whether the six-year limit and extension provisions of the *Limitation of Actions Act* or the ten-year limit of the *Building Act* was applicable.

appropriate to deal with the claim in a summary way but rather allow the claims and loss that were within time and those that were statute barred to be dealt with at trial.

83 In *Hickory Group*, the Tribunal was faced with a different situation; an application after the limitation period to join three further private lot owners and to substitute two named private lot owners with the new owners. Again the defective work alleged affected individual units and common areas. The three new applicants were additional lot owners. Relying on *Burbank*, joinder was said to be in respect of the same defects as set out in the existing proceeding and should be permitted. The Tribunal in *Hickory Group* did not permit joinder or substitution of private lot owners. Deputy President Aird there distinguished the circumstances from *Burbank* on the basis that the claims in *Hickory Group* were specific to defects in each individual lot.[37] Correctly, in my view the Tribunal referred to *Brirek* and the relevant limitation provision to refuse leave saying:

> It is irrelevant that the alleged defects in their units are substantially the same as those forming the basis of the claims in this proceeding or that the general nature of the defects was identified within the ten year period.[38]

84 The distinction as drawn by the Tribunal may be apt to mislead. The real distinction was the different nature of the applications. *Hickory Group* was an application to join parties. *Burbank* an application to summarily dismiss claims of parties already joined. *Burbank* determined that the issues, including any limitations defence that might be raised, could proceed to trial. In such a case, the Tribunal accepted that mixed questions of fact and law, including intertwined or undifferentiated claims on the pleadings, are best determined following a full hearing and not on a summary basis. To the extent it might be thought to be authority for circumstances permitting joinder after expiry of the Building Act limitation period, in my view that reliance is misplaced.

85 Other Tribunal decisions were relied on by the Contractor in argument at VCAT. In

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37 *Hickory Group* (n 33) [15].
38 Ibid [18].

particular *Adams v Clark Homes Pty Ltd* where DP Jenkins refused leave to an applicant to join a party to an existing proceeding, even though they had been joined by the respondent as a concurrent wrongdoer under the Wrongs Act after the ten-year time bar had expired. In *Tsobinas v Katsouranis*,[39] the proceeding was issued ten days before expiry of the limitation period against five respondents. Two of the respondents took issue with whether the proceeding against them was valid when issued and as a consequence any proceeding to correct that was now statute barred. The Tribunal permitted the correction in the name of an intended party but did not permit an amendment that joined a person who was not a party at the time the proceeding was issued. In *Tsobinas*, the Tribunal said that if a claim is not on foot by or against a party on expiry of the limit prescribed by s 134, any power to join a party does not relate back[40] and the power of the Tribunal to extend time, found in s 126 of the VCAT Act, cannot cure late joinder as a procedural matter.[41]

86 The facts of both cases were distinguishable from *Burbank* as the Tribunal pointed out. The submission that those cases criticised *Burbank* was withdrawn before the Tribunal.[42] However, the Contractor submitted both were consistent with the analysis that joinder of a party after expiry of the time limit is impermissible. I accept this submission.

(c) Was it open to say that the Owners Corporations were acting on behalf of their members?

87 The Tribunal concluded that:

> 44. …. Here, the private lot owners simply seek an order joining them to a current building action, in circumstances where they are members of the OCs, their interests are clearly affected, and they should have the benefit of any decision made by the Tribunal.
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> 45. This is an unusual situation where the Louvre System is an integral part of the exterior fabric of Building 2. The complexity of the lot boundaries and ownership of each exterior screen is demonstrated by the Contractor initially

39 *Tsobanis v Katsouranis trading as CT Properties (Building and Property)* [2015] VCAT 739 ('*Tsobanis*').
40 *Agtrack* (n 24), 225; see also *Tsobinas* (n 39) [73].
41 *Brirek* (n 14).
42 Transcript of hearing at 39.26, *Owners Corporation No. 1 PS526704E & Ors v Lendlease Engineering Pty Ltd (ACN 000 201 516)*, BP188/2017, Deputy President Aird, 5 December 2019; found at *Affidavit of Persa Buchanan* (n 3), Exhibit PB10.

> denying liability for the claim on the basis that the Louvre System was all located on private lots. The Contractor subsequently filed Amended Points of Defence alleging that the OCs had no standing to bring claims in relation to the exterior sunscreens (referred to in the Points of Defence as 'Louvre Blades') in relation to those located on individual balconies, and further that any claim in relation to the fixed Louvre Blades is limited to 50% of the total loss as they are jointly owned by the relevant OC and the relevant private lot owners.[43]

88 It is abundantly clear from the Reeds Report that the individual lot boundaries and the ownership of the louvre system is factually complex. The extent to which the louvre system is owned by private lot owners, or the Owners Corporations, or jointly owned, and the consequences of those findings as to standing and loss and damage recoverable are matters for trial in due course.

89 The joinder application was supported by two affidavits sworn by the Owners Corporations' solicitor. They described the reason for the joinder as being the Owners Corporations having considered their position in light of the Amended points of Defence dated 16 May 2019 and the commissioning of the Reed's report as a result of those Amendments. In short the reason was reactive to the Contractor's amended pleading that the relevant owners of the louvre blades were private lot owners and the Owners Corporations could only maintain a claim insofar as they were the relevant owner.

90 Because the Owners Corporations also sought joinder of a further respondent, being the firm of solicitors who gave legal advice as to the applicable limitations period, the affidavit also set out various documents, largely an email trail between the law firm and the Owners Corporations' manager between June 2016 and February 2017. The joinder of the further respondent was adjourned and is yet to be pursued. Its relevance here is only to demonstrate how the documents were before the Tribunal.

91 Those documents demonstrated that the Owners Corporations sought advice on ownership given the problem identified as "rust issues" (as the problem was initially identified) was on an external structure involving private balconies. Advice was

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43 VCAT Decision (n 2), [45] – [46] (citations omitted).

sought and given as to the division of ownership as between the relevant Owners Corporations and the private lot owners. In relation to steps to be taken in light of the advised limitation period, the law firm identified a number of steps that the Owners Corporations might consider taking. Those steps clearly contemplated the need for a special resolution for the Owners Corporations to commence proceedings, that private lot owners should be advised of their options, and advice that the Owners Corporation and any affected lot owners need to have commenced a claim before the statute expired.[44] There was also discussion between the Owners Corporations Manager and the law firm as to the relative responsibility as between private owners and the Owners Corporations in pursuing the builder.[45]

92 The documentation before the Tribunal demonstrated that the proposed wording for the special resolution necessary articulated common property defects and private property defects. This proposed wording was not used and the information that was circulated and described did not articulate the way in which private lot owners might be implicated or need to seek advice or redress. It asserted that outstanding defects were on common property and sought authorisation of the members for it to commence legal proceedings if necessary. The explanatory email made no explicit reference to taking action on behalf of private lot owners in respect of any interest or redress that they may separately have.

93 The Owners Corporations submitted that as there was no evidence that the private lot owners were aware of the advice of the law firm and because no reliance was placed on those documents for the purpose of the joinder application, the Contractor's reliance on the material is misguided. I disagree. To the extent it was relevant and before the Tribunal it could and should inform any factual finding as to whether the action was commenced on behalf of the private lot owners. The absence of any attempt in pleadings or otherwise to identify affected members when the

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44 *Affidavit of Persa Buchanan* (n 3), Exhibit PB5, in particular the email dated 30 August 2016 at Exhibit SM5 to the Affidavit of Steven Marchesin dated 3 October 2019, VCAT No. BP188/2017.

45 *Affidavit of Persa Buchanan* (n 3), Exhibit PB5, in particular the email dated 30 August 2016 at Exhibit SM5 to the Affidavit of Steven Marchesin dated 3 October 2019, VCAT No. BP188/2017.

action was commenced, lessens rather than strengthens the submission of the Owners Corporations.

94 The Respondents submitted that the Tribunal's reasons properly understood were that they were acting on the basis that the entirety of the louvre blades required rectification or replacement, not merely those aspects of which it was the owner. This in my view could not be sustained as a basis for joinder in light of the factual information available to it prior to issuing the proceeding as outlined above. I make no observation as to whether the Owners Corporations have standing to obtain rectification or replacement beyond that of which it is an owner which remains an issue and may be a matter for trial.

95 On this basis it was not open to the Tribunal, at least on the weight of the evidence, to conclude that as a matter of fact the Owners Corporations were acting on behalf of relevant private lot owners. No argument that they were doing so as a matter of law was advanced in the Tribunal or before me. Indeed, as the Tribunal's reasons by reference to the 'peculiar circumstances of this case' make clear, it was a factual rather than a legal conclusion.

96 For these reasons I will grant leave to appeal the orders of VCAT of 5 December 2019. I will allow the appeal on the questions of joinder and dismiss the appeal on the limitation question.