

VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

OWNERS CORPORATIONS LIST

VCAT REFERENCE NO. OC2511/2020

CATCHWORDS

Owners Corporation List - Application to strike out — Owners Corporation — Common property — Claim for damages or compensation quantum meruit — Appropriate forum to hear dispute County Court or Tribunal — *Victorian Civil and Administrative Tribunal Act 1998* — s 77 — more appropriate forum — linked claims — inappropriate for two concurrent proceedings — Respondent should be given choice whether Tribunal or County Court is appropriate forum — application struck out.

FIRST APPLICANT	Anitra Nelson,
SECOND APPLICANT	Jane Aubrey
THIRD RESPONDENT	Sarah Grayburn
RESPONDENT	Bobsled Properties Pty Ltd ACN: 623 493 256
WHERE HELD	Melbourne via videoconference
BEFORE	Judge Hampel, Vice President
HEARING TYPE	Jurisdictional hearing
DATE OF HEARING	13 May 2021
DATE OF ORDER	24 May 2021
CITATION	Nelson v Bobsled Properties Pty Ltd (Owners Corporations) [2021] VCAT 512

ORDER

- 1 The section 77 *Victorian Civil and Administrative Tribunal Act 1998* application is struck out.
- 2 The matter is listed for further directions hearing before any member on 11 August 2021 at 11:00am.

Judge Hampel
Vice President

APPEARANCES:

For Applicant Mr. I Bracken, Solicitor
For Respondents Mr. C Wright, Solicitor

REASONS

Background

- 1 The applicants and the respondent are all lot owners in a development in Lygon Street, Brunswick East. The respondent's lot is on the ground floor, and it operates a piano bar from it. The applicants are owners of apartments in a multi storey complex above the piano bar. The respondent wanted to provide direct access from the piano bar, to the East Brunswick Hotel next door, which it also owned. This required creation of a doorway in a wall which was common property, and an alteration to the use of the common property space between the between the common property wall and the hotel which would permit patrons from the hotel and piano bar to move directly between the two venues without walking along Lygon Street.
- 2 The respondent sought the approval of the Owners Corporation for the construction of the doorway in the common property wall and use of the common property space to permit access between his venues. It was unsuccessful. The special resolution required to alter the use of the common property failed to secure sufficient votes to be passed.
- 3 The respondent nonetheless proceeded with the works. The applicant lot owners allege the respondent has breached the *Owners Corporation Act 2006* (OC Act) and rules in carrying out the works and in its proposed use of the common property without permission. They also allege the Owners Corporation has breached its duties in not enforcing existing common property rights by directing the respondent to reinstate the wall and not use the common property to permit patrons to move between its two venues.
- 4 The respondent was not the only lot owner unsuccessful in obtaining a resolution of a sufficient number of members of the Owners Corporation to do what it wanted. The applicants were unsuccessful in their attempts to have a special resolution of members passed directing the Owners Corporation to take proceedings in the Tribunal seeking rectification of the wall, and enforcement of existing common property rights.
- 5 They have applied to the Tribunal for orders authorising them to stand in the shoes of the Owners Corporation to bring proceedings against the respondent to enforce the owners corporation rules in relation to what it alleges are the respondent's breaches in respect of the common property.

Alleged representation of approval

- 6 The respondent says, after the failed special resolution which would have permitted it to alter the common property as it wanted to, the Owners

Corporation promised to approve the works, provided the respondent performed, or paid for, certain other works for the benefit of the Owners Corporation. The respondent says, reliance on that assurance, it performed or paid for the other works, and believing it had permission to do so, performed the works it wanted to do to make a doorway to provide access between its lot and the hotel.

- 7 However, it has been prevented from using the doorway, and allowing patrons to pass through the common property between the hotel and the piano bar.
- 8 Although it is no doubt inconvenient, there is no impediment to patrons walking along Lygon Street to go from one venue to another if they wish to do so.
- 9 After the VCAT proceedings were issued, the respondent issued County Court proceedings against the Owners Corporation claiming damages or compensation on a quantum meruit,¹ alleging it had approval to do the works and or believed it had, the approval to do the works and has suffered detriment as a result.

Jurisdictional issue

- 10 The respondent has made application under section 77 of the *Victorian Civil and Administrative Act 1998* (VCAT Act), seeking orders that the VCAT proceedings be stayed or struck out.
- 11 It submits both proceedings involve determination of the question of whether the respondent had permission to undertake the works. If the respondent had permission, it submits, then there is no breach of the OC Act or rules, the respondent is entitled to damages from the Owners Corporation and the applicants' claim falls away. If there was a breach, and orders for rectification are sought, it submits they are best dealt with by way of defence and counterclaim by the Owners Corporation as part of the County Court proceedings.
- 12 In my view, it is not as simple as that. The respondent's claim as pleaded is that it had, or was entitled to believe it had permission to carry out works, and acted to its detriment. It may be able to make good its claim for damages against the Owners Corporation even if it is established the Owners Corporation did not have authority to give permission for the works. On the other hand, if the Owners Corporation did not have authority to give the respondent permission to carry out the works, and the applicants are successful in their application to stand in the shoes of the Owners Corporation, they are entitled to apply for orders reinstating the wall and protecting and enforcing common property rights.
- 13 Owners Corporation disputes fall within the jurisdiction of the Tribunal. The applicants, who issued their proceedings before the respondent issued its

¹ 'A reasonable sum of money to be paid for services rendered or work done when the amount due is not Stipulated in a legally enforceable contract.'

County Court proceeding, should not be lightly denied their right to seek the relief they claim under the OC Act, under the procedures, practices and cost rules applicable in the Tribunal.

- 14 I note also the respondent's solicitor, frankly acknowledged he was not sure if the County Court had jurisdiction to hear and determine matters falling in the exclusive jurisdiction of the Tribunal under the OC Act. A party should not be prevented from prosecuting its claim in the Tribunal, if there is a doubt about whether another court has jurisdiction to hear and entertain it.

Threshold issue of representation

- 15 In addition, there is a threshold question as to who represents, or is authorised to give instructions on behalf of the Owners Corporation in proceedings relating to the works carried out by the respondent on the common property. The applicants allege the Owners Corporation had failed in its duty to enforce compliance of the OC Act and rules. That is at the heart of its proceedings in this Tribunal. Whether the Owners Corporation approved the works, and if so, whether it had authority to do so is equally at the heart of the County Court proceedings.
- 16 If the Owners Corporation did not have authority to give permission, or did not give the permission the respondent alleges it did, the applicants are entitled to seek orders in relation to the enforcement of their rights under the OC Act and rules. That will be the case, whether or not the respondent is able to make good a claim for damages on the basis it reasonably believed, having failed to secure permission to proceed by a special resolution of the members of the Owners Corporation, that it could rely on a verbal promise that Owners Corporation approval would be forthcoming if they undertook the additional works.
- 17 There is force in the respondent's submission it would be unfair to litigate the same issue in respect of whether permission to conduct the works was, or could have been given in separate proceedings in two different places. There is a risk of different evidence, different findings, and of course, additional and unnecessary additional costs.
- 18 The respondent has failed to establish that the County Court is the appropriate forum for the conduct of both claims. It has also failed to establish the respondent's claim against the Owners Corporation should be heard and determined before the applicant's claim proceeds.
- 19 In my view, having regard to the matters I have already canvassed, the best solution seems to me is to permit both claims to be litigated at the same time, before the same decision maker. It is for the respondent to determine whether it can raise its quantum meruit claim in proceedings before the Tribunal, or make application for the County Court proceedings to be heard at the same time as the Owners Corporation proceedings, by a decision maker who can exercise both County Court and VCAT decision making powers.
- 20 The section 77 application will be dismissed.

- 21 Consistently with the orders made by Senior Member Vassie on 18 March 2021, the mater will be listed for a further directions hearing before any member on 11 August 2021 at 11:00am.

Judge Hampel
Vice President