

VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

BUILDING AND PROPERTY LIST

VCAT REFERENCE NO. BP1534/2016

CATCHWORDS

Building and Property List – claims in the nature of personal injury – psychological harm – loss of past and future earnings – *Owners Corporation Act 2006* – whether the Tribunal has jurisdiction– need for Impairment certificate - *Wrongs Act 1958* - impairment certificate – failure to properly plead claim - whether a court is the more appropriate forum - s 77 *Victorian Civil and Administrative Tribunal Act 1998* - whether the application is statute barred –*Limitations of Actions Act 1958*– *Water Act 1989* – *Domestic Building Contracts Act 1995*.

APPLICANT

Margaret Anderson

RESPONDENTS

Holden Peel Projects Pty Ltd (CAN 006 727 073),
Owners Corporation PS603262H

WHERE HELD

Melbourne via videoconference

BEFORE

Vice President Judge Hampel

HEARING TYPE

Directions Hearing

DATE OF HEARING

22 April 2021

DATE OF ORDER

10 June 2021

DATE OF CORRECTION

11 June 2021

28 June 2021

CITATION

Anderson v Holden Peel Projects Pty Ltd
(Building and Property) (Corrected) [2021]
VCAT 407

ORDER

- 1 That part of the applicant's claim which claims damages for personal injury is struck out.

Judge Hampel
Vice President

APPEARANCES:

For the Applicant	Ms Margaret Anderson
For the First Respondent	Ms Jordana Dymond, Solicitor
For the Second Respondent	Mr Greg Doran, Solicitor

REASONS

- 1 Ms Anderson owns an apartment which was extensively damaged by water. In 2016¹ she brought a claim against the builder of the apartment complex and Owners Corporation for damage to her property.
- 2 As against the builder, she claimed a breach of the warranties given by the *Domestic Building Contracts Act 1995* (DBC) and under the *Water Act 1989* (Water Act) for causing an unreasonable flow of water.
- 3 As against the Owners Corporation she claimed a failure to maintain the common property and breach of its obligations under the *Owners Corporations Act 2006* (OC Act) and for causing or allowing an unreasonable flow of water under the Water Act.
- 4 The hearing was a difficult and protracted one, with 22 sitting days between April and October 2019. Final written submissions were filed in December 2019. In May 2020, Senior Member Kirton delivered lengthy and detailed reasons in a 70 page 269 paragraph judgement².
- 5 Senior Member Kirton dismissed all claims against the builder, but found the Owners Corporation liable in order to pay the applicant damages in the sum of \$135,316.86. She granted liberty to apply on the question of interest and costs and reimbursement of fees.
- 6 Senior Member Kirton noted the applicant had sought to amend the particulars of loss and damage to include a claim for \$2,460,000 for loss of future income³. She held a claim for loss of future income is a personal injury claim⁴ and that s 19 (1) of the Water Act specifically excluded from the jurisdiction of the Tribunal the hearing and determination of claims for damages for personal injury⁵. She refused leave to amend the points of claim to include a claim for negligence causing personal injury⁶. Insofar as

¹ On 10 June 2021, orders and reasons were issued to the parties with a typographical error at para [1]. The error has been corrected, and this version replaces the original published reasons.

² *Anderson v Holden Peel Projects Pty Ltd* [2020] VCAT 538.

³ Ibid At [228].

⁴ Ibid At [237 a].

⁵ Ibid At [237 b].

⁶ Ibid At [327 d].

a claim for personal injury was based on breach of statutory duty owed by the Owners Corporation, she held:

“the Tribunal may have jurisdiction to hear this claim, but it has not yet been properly pleaded, the requirements of the Wrongs Act have not been met and no evidence has been led⁷.”

7 Having made those findings, Senior Member Kirton then said:

[237 e] If Ms Anderson takes these steps, I consider it will be appropriate to refer the claim to a judicial member for consideration under section 77 of the VCAT Act as to whether the claim would be more appropriately heard in the County Court or the Supreme Court.

[238] I emphasise that I make no conclusion about whether her personal injury claim will succeed, whether in the courts or in the Tribunal. That is a matter she must discuss further with her solicitors. For her benefit, I note that there are time limits on the bringing of such claims under the *Limitation of Actions Act 1958* and the Wrongs Act contains a cap on the amount that may be ordered (which seems to be much less than the amount she says she could have earned). She should obtain legal advice about these matters before deciding whether to pursue the claim.

8 The final orders included the following:

3. If the applicant wishes to pursue a claim for damages for loss of future income under the *Owners Corporation Act 2006* in the Tribunal, she must advise the Principal Registrar in writing by 30 June 2020. If such advice is received, the proceeding is to be referred to a judicial member of the Tribunal for consideration under section 77 of the *Victorian Civil and Administrative Tribunal Act 1998* as to whether the County Court or Supreme Court would be a more appropriate forum to deal with the claim.

9 By email dated 29 June 2020 addressed to the Principal Registrar, the applicant advised:

“the applicant seeks to pursue a claim for damages or loss of past and future income (earnings) under the *Owners Corporation Act 2006* by the Tribunal and seeks a referral to a judicial member of the tribunal under section 77 of the *VCAT Act 1998*.”

10 It should be noted the applicant included a reference to a claim for loss of past earnings as well as future earnings. This appears to be something raised the first time after judgement was delivered.

11 Although there have been lengthy and protracted proceedings in relation to questions of interest costs and reimbursement fees, the applicant did not take the steps the Tribunal set out in paragraph 237 of the reasons. Namely, the applicant did not properly plead a claim for damages for personal injury

⁷ Ibid At [237 e].

as a result of breach of statutory duty by the Owners Corporation, did not provide a certificate of impairment under the Wrongs Act, or file the evidence on which she sought to rely to substantiate the claim.

Section 77 application

- 12 Ultimately the matter was listed before me for a section 77 application.
- 13 Section 77 of the *Victorian Civil and Administrative Tribunal Act 1998* (VCAT Act) provides:
 - (1). At any time, the Tribunal may make an order striking out all, or any part, of a proceeding (other than a proceeding for review of a decision) if it considers that the subject-matter of the proceeding would be more appropriately dealt with by a tribunal (other than the Tribunal), a court or any other person or body.
- 14 The applicant appeared in person, although she told me that she had obtained legal advice from solicitors in respect of the personal injury claim. The respondents were both represented by their solicitors.
- 15 Having set out this history, the applicant told me she still wished to pursue her personal injury claim. She acknowledged she had not taken any of the steps which Senior Member Kirton had identified as being necessary if she sought to pursue the personal injuries claim before the Tribunal. It is fair to say there seemed to be some confusion on her part or that of her solicitors as to whether that was necessary before the section 77 claim was determined. The applicant said she had been advised she should bring her claim in the Supreme Court, having regard to the amount of damages she sought, but that she had not taken steps to issue proceedings as her lawyers advised her to wait for the outcome of the proceedings before the Tribunal.
- 16 The applicant spoke of the toll the proceedings have had on her. She expressed a preference for resolving outstanding matters without having to take personal injury proceedings to court. She also expressed her concern about the time the property damage claim had taken to be heard and determined by the Tribunal, and her unhappiness that matters were still not resolved, that her apartment had still not been repaired, and she had not yet been paid the damages ordered. She said she believed her personal injury claim would be dealt with more expeditiously by a court than the Tribunal.
- 17 The obtaining of a Wrongs Act certificate of impairment is a necessary precondition a personal injury claim, whether pursued before the Tribunal or the Supreme Court. There is a real risk of further delay, duplication of effort, and incurring of unnecessary cost if the applicant must obtain a certificate of Impairment, and file the evidence on which she seeks to rely before the s 77 application is determined. Although the water damage is at the heart of both the property damage and personal injury claims, they are discrete issues. The substantive property damage claim has concluded, leaving only ancillary questions of interest and costs and reimbursement of

fees to be determined. The personal injury claim, by contrast, is properly described as little more than foreshadowed.

- 18 I indicated my preliminary view was that a court was a more appropriate forum for hearing and determining the personal injuries claim. I also indicated my preliminary view that, given that the applicant had not filed the materials referred to by Senior Member Kirton as necessary for the personal injury claim before the Tribunal, that this could be an appropriate case to exercise the power under subsection (1) to strike out the personal injuries claim before the Tribunal, but not to proceed to make a referral order under subsection (3) to a court. That is to leave it to the applicant to issue personal injuries proceedings in a court, should she ultimately be advised to do so.
- 19 The applicant supported taking that course.
- 20 Mr Doran for the Owners Corporation submitted the applicant should be required to file the materials referred to by Senior Member Kirton before the Tribunal determined whether it or a court was a more appropriate forum. He pointed out that although claims for personal injury for breach of statutory duty under the OC Act could be heard and determined by the Tribunal or a court, if the applicant wished to revive her claim for personal injury under the Water Act, the Tribunal lacked jurisdiction to hear and determine such a claim. He fairly acknowledged that if the applicant wished to pursue a Water Act claim as well as the Owners Corporation claim, they should be heard together and could only be done so in a court. He acknowledged that if that were the case, there would be further delay and duplication. Nonetheless he submitted that if the Tribunal ultimately determined to strike out the personal injuries claim before it, that it should also exercise the sub-section (3) power and refer the matter as pleaded before the Tribunal to the court.
- 21 The applicant was not in a position to indicate whether she intended, or had been advised to include a claim for damages personal injury under the Water Act, as well as the owners corporation claim.

Whether the claim would be statute barred

- 22 Ms Dymond for the first respondent builder, noted that Senior Member Kirton had dismissed all claims made by the applicant against the first respondent, and the foreshadowed personal injuries claim was against the second respondent only. In that sense her client was a passive and disinterested bystander, save that proceedings before the Tribunal could not come to an end until this issue was resolved.
- 23 She pointed out Senior Member Kirton had expressly noted she had drawn no conclusion about whether the personal injuries claim would succeed, whether in a court or the Tribunal, and had expressly drawn to the applicant's attention the existence of time limits on the bringing of personal

injuries claims under the *Limitation of Actions Act 1958* (LAA), and the significantly lower cap on damages awards fixed by the Wrongs Act, than the amount the applicant had foreshadowed she was claiming loss of future earnings.

- 24 The LAA point was a concern. There was a risk the applicant would be disadvantaged if I struck out the personal injuries claim, and left to her and her legal advisers to determine if and when to issue proceedings in a court, if the claim were by then statute barred. If, on the other hand she pleaded her claim for personal injuries in the VCAT proceeding, and I determined a court was a more appropriate forum to hear it, and referred the claim to a court, she would not be statute barred.
- 25 None of the parties were able to advise the Tribunal whether the time to issue a claim for personal injuries had expired. This could be a complex question, having regard to the applicant's claim that the conduct of the Owners Corporation since water damage occurred is the cause of the personal injury giving rise to the loss of future income claim.
- 26 As the applicant is receiving legal advice in respect of her personal injuries claim, but was not represented at the hearing. I adjourned the proceeding and gave her, and the respondents if they wished to make further submissions on the matter, the opportunity to make submissions as to whether the applicant would be statute barred from bringing a claim for personal injuries in the Supreme or County Court if I struck out the personal injury part of her VCAT claim.
- 27 On 3 May 2021, the applicant filed a written submission. She advised the Tribunal the personal injury lawyers who had previously advised her could no longer assist her. Whilst her submissions did not directly address the limitations issue, she indicated a desire, based⁸ in large part on medical advice that it was in her best interests to avoid the stress of further litigation, to resolve outstanding issues through VCAT's processes, such as mediation.
- 28 I sought the submissions of the parties to acceding to the applicant's request for mediation, and dismissing the section 77 application, noting the applicant had not directly addressed the limitations issue. Consistent with the second respondent's position at the hearing, Mr Doran supported that course.
- 29 The applicant then wrote again to the Tribunal, seeking an extension of time to seek further legal advice on the matter. The application was granted. She filed further submissions on 1 June 2021.⁹ She has engaged a new personal injury law firm, and advised she had been advised a Supreme Court personal injuries claim would not be statute barred.

⁸ On 10 June 2021, orders and reasons were issued to the parties with a typographical error at para [27]. The error has been corrected, and this version replaces the original published reasons.

⁹ On 10 June 2021, orders and reasons were issued to the parties with a typographical error at para [29]. The error has been corrected, and this version replaces the original published reasons.

- 30 She requested the Tribunal strike out the personal injury claim from VCAT to enable her to commence a personal injury application, including for previous and future earnings, through either the County or Supreme Court.
- 31 I am satisfied a court is the more appropriate forum for hearing and determining the personal injuries claim. There is no reason in this case why the applicant should be deprived of her right to choose the more appropriate forum.
- 32 I do not consider it necessary for the applicant to file a certificate of impairment or disclose the evidence on which she seeks to rely with the Tribunal before the s 77 application is determined. To require her to do that would in my view cause unnecessary and unreasonable delay and likely a duplication of effort, resulting in additional costs.
- 33 In my view, the personal injuries claim is a discrete cause of action, and there are distinct advantages in separating it out from the property damage claim. The property damage claim has all but ended. The personal injury claim has not even been fully pleaded. Severing the personal injuries claim will not result in delay in finalisation of the property damage claim. To the contrary, it will allow it to come to an end. There is considerable merit in that.
- 34 That part of the applicant's claim which claims damages for personal injury is struck out.

Judge Hampel
Vice President