

VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

OWNERS CORPORATIONS LIST

VCATREFERENCE NO. OC744/2022

CATCHWORDS

Owners corporation; decision on preliminary issue; Tribunal jurisdiction; *Thurin v Krongold* [2022] VSCA 226 considered; whether monies paid out by an insurer held on trust for insurer; whether owners corporation had power or duty to impose conditions on release to lot owner of monies paid by insurer.

APPLICANT

Zemma Ivy Joy Powell

FIRST RESPONDENT

Owners Corporation 537738Y

SECOND RESPONDENT

Strata Connect Pty Ltd ACN:143 294 900

FIRST INTERESTED PARTY

Ms Denise Brooks

SECOND INTERESTED PARTY

Peter Van Santen

WHERE HELD

Melbourne

BEFORE

R Buchanan, Member

HEARING TYPE

Hearing

DATE OF HEARING

30 May 2023

DATE OF ORDER

29 August 2023

CITATION

Powell v Owners Corporation 537738Y
(Owners Corporations) [2023] VCAT 1006

ORDER

- 1 The first respondent must pay \$240,528.23 to the applicant.
- 2 Costs reserved.

R Buchanan
Member

APPEARANCES:

For the Applicant	Mr J Cyngler, solicitor
For the Respondents	Mr P Leaman, solicitor
For the First Interested Party	No appearance
For the Second Interested Party	No appearance

REASONS

Background

- 1 This case is about flooding in a subdivision. But this decision deals only with a preliminary issue, which emerged after the present proceeding was issued.
- 2 The subdivision in question is located in Upwey. The subdivision contains five residential lots, one of which is owned by the applicant, Ms Powell. The owners corporation for the subdivision is the first respondent in this proceeding.
- 3 The subdivision is located in hilly country and it is prone to flooding.
- 4 Ms Powell bought her lot off the plan in 2007. It was flooded twice in December of that year and, in December 2016, it was flooded again.
- 5 After the 2007 floods, Ms Powell made a claim on the insurance policy which had been arranged for the subdivision by the owners corporation. Ms Powell made the claim directly on the insurer and receive a payment out of \$57,670.
- 6 After the 2016 flood, Ms Powell made a further claim (in early 2017) on the owners corporation's insurance, again claiming directly on the insurer.
- 7 On both occasions, the insurer accepted that Ms Powell was entitled to claim on the policy taken out by the owners corporation.
- 8 In 2007, when Ms Powell made her first claim and in 2017, when she made her second claim, the policy of insurance against which she claimed had been taken out by the owners corporation to cover, not only the common property, but also the properties of the owners of the five lots. This type of insurance arrangement is pretty much standard for residential subdivisions within Victoria.
- 9 Between 2017 and 2019, the insurer engaged in a process with Ms Powell to finalise a scope of works and repair her unit. The scope of works included both repairs to the building on Ms Powell's lot and flood abatement works on the lot. The insurer made various offers to settle the claim and made its final offer on 11 November 2019.
- 10 Ms Powell was unhappy with the insurer's final offer and she made a complaint to the Australian Financial Complaints Authority ('AFCA') about, among other things, the quantum of the insurer's final offer. That offer consisted of an amount of \$220,054.15 for repairs and \$10,000 for non-financial loss.
- 11 On 11 February 2020 AFCA handed down a determination in which it ruled that the insurer's offer was fair in all the circumstances and made an order in the following terms:

Within 14 days of [Ms Powell]'s acceptance of this determination, the insurer is required to cash settle the claim under the terms and conditions of the

policy and in accordance with its most recent offer for repairs to the unit totalling \$220,054.15. The insurer is to settle the complainant directly for the non-financial loss compensation amount of \$10,000.

- 12 Ms Powell, in compliance with the AFCA determination, accepted the determination (albeit under protest) and the insurer complied with AFCA's order, making payment to the owners corporation. The insurer in fact paid \$240,528.23, some \$20,000 more than the amount which the insurer had been ordered to pay by AFCA. The parties were unable to explain why a larger sum had been paid, but the hearing proceeded on the basis that the sum which would be the subject of the Tribunal's interim determination was the larger amount (the 'Insurance Monies').
- 13 Since the flood in 2016, Ms Powell's lot has remained uninhabited and Ms Powell has not carried out any repairs to the building or any flood abatement works.
- 14 The owners corporation has refused to pay the Insurance Monies to Ms Powell unless Ms Powell signs a contract with a start date for repair works to her lot. Which, for her part, Ms Powell has refused to do.

This proceeding

- 15 Ms Powell issued this proceeding against the owners corporation on 21 June 2022.
- 16 By her Points of Claim, Ms Powell sought two things. First, Ms Powell sought damages by reason of the conduct of the owners corporation in relation to the floods and flood abatement. Secondly, Ms Powell sought the appointment of an administrator to the owners corporation.

The Federal Court proceeding

- 17 Ms Powell was dissatisfied with the AFCA determination, but informed the insurer that she would accept the payment ordered by AFCA without prejudice to her rights to claim further. Then, after the present proceeding was issued, Ms Powell issued proceedings against the insurer in the Federal Court of Australia, claiming that she was entitled under the policy to a greater payout than the amount ordered under the AFCA determination.

The preliminary issue

- 18 On 17 January 2023 Ms Powell applied to the Tribunal for an order that the owners corporation pay out the Insurance Monies to her.
- 19 On 3 March 2023 the Tribunal listed the proceeding for hearing of a preliminary issue, namely "the applicant's application for release to her of funds received by the [first] respondent from the insurer in connection with an insurance claim made in relation to damage to the applicant's lot".
- 20 The Tribunal directed the parties to file Points of Claim and Points of Defence in relation to the preliminary issue, which came on for hearing on 30

May 2023. The Tribunal ordered the parties to file documents and affidavit evidence on which they intended to rely. The owners corporation did not file any documents or affidavit evidence.

Ms Powell's position

- 21 Ms Powell argued that the owners corporation had no power to retain the Insurance Monies or to place conditions on Ms Powell's access to the Insurance Monies. Specifically, she said that the Insurance Monies were paid in relation to repairs to Ms Powell's lot and the owners corporation had no power to direct Ms Powell in what she did about those repairs.

The OC's arguments

Jurisdiction?

- 22 The owners corporation argued that retention of the Insurance Monies depended on whether Ms Powell was or was not a third party beneficiary within the meaning of section 48 of the *Insurance Contract Act 1984* (Cth). As such, the owners corporation said, the Tribunal was required to consider Commonwealth legislation, raising a federal matter. Accordingly, the owners corporation claimed, the decision of the Victorian Court of Appeal in *Thurin v Krongold Constructions (Aust) Pty Ltd* ('*Thurin v Krongold*')¹ applied and the present proceeding should be struck out for want of jurisdiction.
- 23 The argument is misconceived; Ms Powell's status under section 48 is not an issue for decision in the present application.
- 24 Section 48 provides as follows:
- Contracts of general insurance—entitlements of third party beneficiaries
- (1) A third party beneficiary under a contract of general insurance has a right to recover from the insurer, in accordance with the contract, the amount of any loss suffered by the third party beneficiary even though the third party beneficiary is not a party to the contract.
- 25 The issue for decision in the present application is not why or whether Ms Powell was entitled to claim under the policy of insurance. The issue for decision is whether the owners corporation is entitled to retain, or put conditions on the release of, funds paid to it by a third party. Nothing flows from Ms Powell's status when she made the claim, a claim which ultimately resulted in the insurer's paying out the Insurance Monies.
- 26 In making its decision, the Tribunal must first consider whether, when paying those funds, the third party conferred some power or imposed some duty on the owners corporation to act as it has done. Secondly, the Tribunal must consider whether something in the *Owners Corporation Act 2006* (Vic) or the relationship between Ms Powell and the owners corporation conferred a power on the owners corporation which allowed it to act as it has done.

¹ [2022] VSCA 226.

27 Whether or not Ms Powell was third party beneficiary is not a matter about which the Tribunal needs to make a decision. Her being, or not being, a third party beneficiary has no relevance to the question of whether the owners corporation is entitled to withhold the Insurance Monies from Ms Powell. That is because her being, or not being a third party beneficiary cannot confer any power or impose any duty on the owners corporation under which it could or should impose any condition on the release of the Insurance Monies to Ms Powell.

28 In *Thurin v Krongold* the Court of Appeal made it clear that, for this Tribunal to lose jurisdiction over a proceeding because a federal claim is raised, the claim must be genuinely raised as part of the matter in dispute. If the Commonwealth law is “lurking in the background”, or merely an “incidental consideration”, then the matter would not be one arising under that law. At paragraph 111 of its decision the Court adopted and endorsed the authorities in which that proposition has been spelt out:

The cases discussed above are clear authority for the proposition that, where the “very subject” of the dispute is something that owes its existence to a Commonwealth law, then the dispute will be a “matter arising” under that law, even if the cause of action is founded in a State law or the common law. That proposition has since been accepted many times, most recently in *Hobart International Airport*.² ... In that regard, the authorities make clear that if a Commonwealth law is “lurking in the background”,³ or merely an “incidental consideration”,⁴ then the matter will not be one arising under that law.

29 The present case could hardly be a better example of a Commonwealth law lurking in the background. Ms Powell’s having claimed as a third party beneficiary under the *Insurance Contracts Act 1984* (Cth) is nothing more than background to the dispute in this proceeding.

A trust?

30 The owners corporation claimed that the Insurance Monies were held by it “in trust for the repair of [Ms Powell’s] property and held on behalf of the insurer, not [Ms Powell]”.

31 The claim is a curious one, as no evidence was advanced to support the creation of the claimed trust and, in the absence of such evidence, there was no apparent basis for the claim. Seemingly undeterred by the absence of evidence, the owners corporation said, in the course of its submissions, that:

They said to us, You can give it to the applicant if they use it for the works; if it is not being used for the works, you can’t give it to them.

32 There was no evidence of any sort to support that assertion. Materially, there was no evidence to suggest that the insurer sought to impose any condition

² *Hobart International Airport Pty Ltd v Clarence City Council* [2022] HCA 5.

³ *LNC Industries Ltd v BMW (Australia) Ltd* (1983) 151 CLR 575, 582.

⁴ *Moorgate Tobacco Co Ltd v Philip Morris Ltd* (1980) 145 CLR 457, 480.

on the payment out of the funds by the owners corporation. Rather, the evidence pointed to the contrary.

- 33 Nor was there any evidence of any rational basis to explain why the insurer would take an interest in the repair of Ms Powell's property. In the normal course, an insurer does not have any power to impose conditions on how its insured can use the monies paid out under the policy. There is no evidence to suggest that such was not the case here. There was, indeed, nothing to suggest that, from the insurer's point of view, this was anything other than a payout to a successful claimant, with the insurer's interest in the condition of the subject property ending upon its making of the payment.
- 34 That conclusion is reinforced by the following extract from the AFCA determination, in which AFCA considers how the insurer should pay out the funds in satisfaction of AFCA's order:

The panel is not satisfied that the complainant has made clear what method of settlement she wants the insurer to undertake to finalise the claim.

The insurer asked the complainant if she is able to obtain a letter from the owner's (sic) corporation consenting to the payment being made directly to the complainant. In her letter to AFCA dated 1 January 2020, the complainant says she is unable to comply with this request and indicates she does not have a good relationship with the owner's (sic) corporation.

Given the owner's (sic) corporation (of which the complainant is a member), rather than the complainant herself, holds the strata policy which covers the damaged unit, the insurer is to cash settle the above amount in accordance with the terms and conditions of the policy.

- 35 Later in its determination, SFCA found that the insurer's final offer to Ms Powell had been fair and said as follows:

The panel considers that the offer is fair in the circumstances and acceptance of this offer by the complainant will discharge the insurer's obligations and liability in full.

- 36 It is apparent from the quoted passages that AFCA considered that it was Ms Powell's right to say how the Insurance Monies should be paid out; that it was not clear to AFCA how Ms Powell wanted the payment to be made; and that AFCA ordered that the Insurance Monies should be paid to the owners corporation because the owners corporation was the contracting party. There is nothing in the quoted passages or in the AFCA determination to suggest that AFCA considered the fact of payment to the owners corporation suggested that the Insurance Monies came to the owners corporation freighted with any power or duty.
- 37 In light of the above, I find that the owners corporation does not hold the Insurance Monies on trust for the insurer.
- 38 If the owners corporation does not hold the Insurance Monies in trust, how are they held? Policies of insurance such as the one under which the

Insurance Monies were paid out are arranged by an owners corporation to cover both its common property and the property of the lot owners. Such policies are paid for by the lot owners and are for their benefit. In arranging them to cover the lot owners' properties, the owners corporation acts as the agent of the lot owners. Since the owners corporation is the contracting party, it is to the owners corporation that the insurer should make payment after a successful claim by a lot owner.

- 39 Accordingly, I find that the Insurance Monies were received and are held by the owners corporation as the agent of Ms Powell.
- 40 It is well-established that an agent, who holds funds paid to it for the benefit of a principal, holds those funds as a fiduciary and that the funds will be held in trust on behalf of the principal and paid out at the principal's request.⁵

Statutory power?

- 41 The owners corporation argued that it was under a statutory duty to, first, take out reinstatement and replacement insurance for all buildings in the subdivision and, secondly, to ensure that funds paid out after claims on that policy were used "appropriately" and spent on works to repair or replace buildings in the subdivision. Interestingly, the owners corporation said that, in the present case, if that were not done, it would affect the premiums which the owners corporation would be obliged to pay for future insurance.
- 42 The duties to which the owners corporation said it was subject were imposed, the owners corporation said, by section 59 of the *Owners Corporations Act 2006* (Vic) (the 'Act'). The Act does not, however impose any such duties.
- 43 Section 59 of the Act provides as follows:
- Reinstatement and replacement insurance
- (1) An owners corporation must take out reinstatement and replacement insurance for buildings on the common property in accordance with this Division.
- 44 The requirement under the section is merely to take out insurance for buildings on the common property and not, as the owners corporation claimed, for buildings on private lots.⁶ Nothing in the Act requires an owners corporation to insure buildings on private lots. It is true that the universal practice is for owners corporations to arrange insurance which covers all of the buildings in a subdivision. There are obvious reasons why that is done, but owners corporations have no statutory duty to arrange such insurance. Nor is there any power given to owners corporations by the Act to direct how lot owners should spend money received as a result of claims on insurance taken out by the owners corporations.

⁵ *Burdick v Garrick* (1870) LR 5 Ch App 233.

⁶ *Owners Corporation SP26824D v Saponja* [2011] VCAT 2402.

Ms Powell's entitlement to the Insurance Monies?

- 45 The owners corporation argued that Ms Powell was obliged to prove that she was entitled to the insurance monies. It went on to argue that, until Ms Powell's Federal Court proceeding (in which Ms Powell sought more from the insurer than the amount of the Insurance Monies) was determined, her entitlement to the Insurance Monies was unproved.
- 46 The assertion is a curious one, as there is nothing to suggest that Ms Powell was not entitled to the Insurance Monies. She made a claim directly on the insurer; the insurer accepted the claim and offered her money in satisfaction of the claim; AFCA made a determination about the amount to which she was entitled under the policy and ordered that the insurer make payment in satisfaction of the claim.
- 47 It is not apparent how the Federal Court proceeding could have any effect on Ms Powell's entitlement to the Insurance Monies. In any event, if Ms Powell were not entitled to the Insurance Monies, why did the owners corporation offer to pay them to her (albeit, subject to her compliance with the owners corporation's demands about how those monies should be applied)?
- 48 It is quite clear that Ms Powell is entitled to the Insurance Monies and, as I have said above, the only issue for decision remains whether or not the owners corporation has some power or duty to impose conditions on the release of those monies to Ms Powell.

Finding and order

- 49 In light of the above, I find that the owners corporation has no power to withhold the Insurance Monies from Ms Powell or to impose any condition on the release of the Insurance Monies to Ms Powell. I will order that the owners corporation must pay out the Insurance Monies to Ms Powell. As that order will not finally determine the proceeding, I will reserve costs.

R Buchanan
Member