VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

VCAT REFERENCE NO. BP214/2014

BUILDING AND PROPERTY LIST

CATCHWORDS

Domestic building – defective building and car park – award made in favour of three applicants - leave reserved to apply for an order as to the division of the amount awarded between the three applicants - owners seeking order that the proceeds of the litigation be divided between the applicants - owners corporation seeking order that the money be used to re-construct the defective buildings - Domestic Building Contracts Act 1995 – s.53(2)(g) - cannot order owner of defective premises to rectify defects - Owners' Corporations Act 2006 – s.165(1)(j) - whether tribunal has power to order that defective works be re-constructed - cannot make such an order in the present proceeding - fresh proceeding to seek such an order necessary

FIRST APPLICANT	Sherif Ahmed
SECOND APPLICANT	Soha Fahmi
THIRD APPLICANT	Owners' Corporation PS 547523Q
FIRST RESPONDENT	Whittlesea City Council
SECOND RESPONDENT	Icon Building Concepts Pty Ltd (ACN 079 372 008)
THIRD RESPONDENT	CGB Consulting Engineers Pty Ltd (ACN 059 161 205)
WHERE HELD	Melbourne
BEFORE	Senior Member R. Walker
HEARING TYPE	Further hearing pursuant to liberty to apply
DATE OF HEARING	13 April 2017
DATE OF ORDER	23 June 2017
CITATION	Ahmed v Whittlesea City Council (Building and Property) [2017] VCAT 915

ORDERS

1. Any application by the third applicant seeking an order pursuant to the *Owners' Corporations Act* 2006, together with any further submissions in support of such an application, must be filed and served by 6 July 2017.
2. Any further submissions on behalf of the first and second applicants in opposition to any such application must be filed and served by 20 July 2017.

3. Liberty to all applicants to apply for any further directions.
4. Costs reserved.

SENIOR MEMBER R. WALKER

APPEARANCES:

For the First and Second Applicants:	Mr D. Noble, Solicitor
For the Third Applicant:	Mr D. Oldham, Solicitor
For the remaining parties:	No appearance

REASONS

Background

1. In this proceeding the first and second applicants ("the Owners") and the third applicant ("the Owners' Corporation") sought damages against the three respondents with respect to the defective construction of a four unit development in East Brunswick.

2. The defects related to the construction of a car park behind the first three units which is roofed by a suspended concrete slab upon which is constructed the fourth unit ("the Unit") belonging to the Owners. Part of the concrete slab under the Unit also belongs to the Owners and the rest of the structure of the car park and the parking area itself are common property and belong to the Owners' Corporation.

3. By the time fixed for the hearing, the claims against the first and third respondent had been settled by agreement. The matter then proceeded against the second respondent only for the damages suffered by all three applicants. A defence was taken by the second respondent that the claim made against it was an apportionable claim within the meaning of Part IVAA of the *Wrongs Act* 1958, and it was necessary to determine what proportion of the loss and damage claimed was just, having regard to the extent of the second respondent's responsibility for that loss and damage.

4. On 23 December 2015 an order was made that the second respondent pay to the applicants damages fixed at $321,970.33, being one third of the total losses assessed on the evidence before me.

5. In the course of assessing the damages to be awarded, I found that the losses suffered by the three applicants were as follows:

Rectification cost	$867,682
Propping of defective slab	$ 14,127
Alternate accommodation	$ 67,977
Removalist's costs	$ 11,125
Loss of amenity	$ 5,000
Total	$965,911

The rectification cost was necessarily suffered by all three applicants, although in different proportions, the propping of the defective slab was an expense incurred by the Owners' Corporation and the alternative accommodation, removalist's costs and loss of amenity were found to have been suffered by the Owners.

6. At the time of the award, I was not asked to determine how the damages awarded should be shared between the applicants and liberty was granted to them to apply for further orders as to the division of the award of $321,970.33 between them.

The hearing

7. The matter comes back before me now for an order as to the division of that amount plus the two amounts that were paid by the first and third respondents to settle the respective claims against them.

8. The application came before me for hearing on 13 April 2017 with one day allocated. Mr D. Noble, solicitor, appear on behalf of the Owners and Mr D. Oldham, solicitor, appeared on behalf of the Owners' Corporation. Highly detailed written submissions were handed up and spoken to and, after hearing oral submissions from the two solicitors, I informed them that I would provide a written decision.

The amount to be divided

9. Although the order of 23 December only contemplated an application for orders as to the division of the single sum received from the second respondent, both parties seek an order for a division of all of the sums recovered from all three respondents.

10. Since the subject of this proceeding is a domestic building dispute and since it has not been decided how the amounts that have been recovered from the three respondents should be divided between the applicants, I am satisfied that the tribunal has jurisdiction to deal with an application for orders directing how the fruits of the litigation should be shared.

11. The dispute as to the division of the proceeds was partly settled by a deed entered into by the parties on 31 July 2015. That document provided that, from the monies received from the first and third respondents:

    (a) $70,000 was to be paid to the Owners in full satisfaction of their claims for relocation, removal, storage and temporary accommodation expenses while the Unit is repaired, including any future expenses;

    (b) $24,620 was to be paid to the Owners' Corporation for propping expenses, including any future expenses with the provision that, if the propping costs were any less than that sum, the balance would be applied generally to the rectification works for the common property.

    (c) The balance was to be held in an interest-bearing account pending agreement or determination by this tribunal as to its distribution. Those two amounts total $650,000, being $275,000 received from the first respondent and $375,000 received from the third respondent.

    An agreement was also reached with the first and third respondents as to payment of costs but I am told that I do not have to concern myself with that.

12. Since then, a further $18,000 has been paid out to the Owners' Corporation and an equivalent sum has been paid to the Owners as an "advance".

13. The second respondent did not pay the amount ordered and became insolvent. A claim was then made under the domestic building insurance

policy which resulted in the payment of an amount of $310,756.10 instead of the $321,970.33 that I ordered.

Submissions

14. Mr Noble acknowledged that the determination of an appropriate division was a difficult task and he submitted that it can only be done by reference to the evidence that was led at the hearing. He said that it required an analysis of the costings prepared by Mr Beck on behalf of the applicants which were generally accepted, save that I allowed a builder's margin of only 35% instead of 40%, which he had in his costings.

15. He said that I should go through most of these costings and allocate amounts to either the Owners or the Owners' Corporation according to the ownership of each component.

16. He divided the cost of rectification into separate categories and said that the appropriate proportions of these categories should be as follows.

    (a) All of the cost of reconstructing the Unit to the Owners;

    (b) 29.3% of the cost of replacing the suspended slab to the Owners and 70.7% to the Owners' Corporation. He said that this is the ratio that the volume of concrete in the suspended slab owned by the Owners bears to the volume owned by the Owners' Corporation. He set out details of the calculation in his submission in terms of area and depth and by reference to the plan of subdivision.

    (c) 3.08% of the cost of replacing the ground floor slab to the Owners and 96.92% to the Owners' Corporation. He said that this represented the proportion the area of the ground floor slab owned by the Owners, bears to the area owned by the Owners' Corporation.

    (d) 49.0531312% of the design and project management costs to the Owners and 50.9468688% to the Owners' Corporation. He said that the substantive cost of the demolition and reconstruction was attributable to the Unit and the common property in those proportions and proceeded to justify that proportion.

17. After going through Mr Beck's costings, Mr Noble concluded that, from the remaining moneys held, I should order that the Owners receive $415,988.03 and the Owners' Corporation should receive $414,142.63.

18. Mr Oldham prepared a highly detailed spreadsheet showing his response to each of Mr Noble's suggestions and concluded that, if the amount awarded were to be divided between the parties, the Owners should receive $406,829.32 and the Owners' Corporation should receive $433,444.51. His figures included accrued interest.

19. However, Mr Oldham's primary submission was that I should not make any order for the division of the money between the parties but should make an order for the reconstruction of the car park and the Unit instead. He said that power to make such an order is found in the *Domestic Building*

Contracts Act 1995 and the *Owners' Corporation Act* 2006. I will deal with that submission first.

Power to order rectification

20. Where it is relevant to the submission made, s.53 of the *Domestic Building Contracts Act* 1995 provides as follows:

> "(1) The Tribunal may make any order it considers fair to resolve a domestic building dispute.
>
> (2) Without limiting this power, the Tribunal may do one or more of the following –
>
> (g) order rectification of defective building work."

21. I think from its context that the power referred to in subsection (2)(g) is intended to be exercised against the person responsible for the defective work rather than against the owner of that work. I am not satisfied that it would be an appropriate exercise of the power for me to make an order for rectification against the Owners who were no more responsible for the defective condition of the work than the Owners' Corporation was.

22. Mr Oldham referred me to s.12(2) of the *Subdivision Act* 1988 which, where relevant, states:

> "Subject to subsection (3), there are implied –
>
> (a) over
>
> (i) all the land on the plan of subdivision of the building; and
>
> (ii) that part of the subdivision which subdivides a building; and
>
> (iii) any land affected by an Owners' Corporation; and
>
> (b) for the benefit of each lot and any common property –
>
> all easements and rights necessary to provide –
>
> (c) support shelter or protection;
>
> if the easement or right is necessary for the reasonable use and enjoyment of the lot or the common property and is consistent with the reasonable use and enjoyment of the other lots and the common property."

23 Mr Oldham also relied upon s.165 of the *Owners' Corporations Act* 2006 which, where relevant, is as follows:

> "(1) In determining an Owners' Corporation Dispute, VCAT may make any order it considers fair including one or more of the following –
>
> (a) an order requiring a party to do or refrain from doing something;

(b) an order requiring a party to comply with this act or the regulations or rules of the Owners' Corporation;

(j) an order in relation to damaged or destroyed buildings or improvements."

24 Such orders can only be made in determining an owners' corporation dispute. In that regard, s.162 of the *Owners' Corporations Act* provides as follows:

> "VCAT may hear and determine a dispute or other matter arising under this Act or the regulations or the rules of the Owners' Corporation that affects an Owners' Corporation (an owners' corporation dispute) including a dispute or matter relating to –
>
> (a) the operation of an owners' corporation; or
>
> (b) an alleged breach by a lot owner or an occupier of a lot of an obligation imposed on that person by this Act or regulations or the rules of the owners' corporation; or
>
> (c) the exercise of a function by a manager in respect of the owners' corporation."

25 On a first reading, I had doubts as to whether the dispute in this case between the Owners and the Owners' Corporation as to whether or not the Unit and the carpark should be reconstructed could be said to arise under the Owners' Corporations Act, the regulations or the rules of the Owners' Corporation.

26 However, since s.165(1)(j) specifically refers to orders in relation to damaged or destroyed buildings or improvements, Parliament must have intended the tribunal to deal with disputes of that nature. One would expect that an order in relation to damaged or destroyed premises would necessarily have to deal with claims for the repair of the damage or with the consequences of the destruction and also such things as how that should be done and who should bear the cost. I am therefore satisfied that a claim by the Owners' Corporation to have the carpark and the unit reconstructed may well be an Owners' Corporation Dispute within the meaning of s.165.

27 As to the application of s.165(1)(j), the primary meaning of the word "damage" in Macquarie dictionary is: "injury or harm that impairs value or usefulness". In the context of premises which are the subject of a retail lease under the *Retail Leases Act* 2003, premises have been considered to be "damaged" where they are in a want of repair (see for example *Casa Di Iorio Investments Pty Ltd v Guirguis* [2017] VSC 266).

28 However, even if the tribunal has the necessary jurisdiction, it should not order the Owners to do something that they are not legally obliged to do.

29 By s.12(2) of the *Subdivision Act* referred to above, the Owners' Corporation has the benefit of an easement of shelter over the Unit. It is the slab supporting the Unit that provides the roof for the carpark and the

portion of that slab belonging to the Owners is integral with the portion owned by the Owners' Corporation. It is therefore arguable that the Owners' Corporation is entitled to have the slab reconstructed so as to provide the shelter to which it is entitled. Whether that argument would succeed is another matter and whether the Owners' Corporation is entitled to have the Unit re-constructed in accordance with the original plan of subdivision is also something that will need to be considered.

30 The problem now is that I cannot deal with Mr Oldham's submission in the current proceeding. All that I can do in this proceeding is make an order that the amounts recovered be divided in a particular way or refuse to make such an order. I cannot determine an application under the Owners' Corporations Act that is not before me.

31 If an order is sought under the Owners' Corporations Act, and that is the order that Mr Oldham seeks, a fresh application will need to be brought seeking it. Since this is Mr Oldham's primary position I should not give any direction as to the disposal of the proceeds of the litigation until such time as it has been dealt with.

Orders to be made

32 Accordingly I will direct that any application by the Owners' Corporation seeking an order pursuant to the *Owners' Corporations Act* 2006 must be filed and served together with any further submissions within 14 days of the date of this order.

33 Mr Noble should also have the opportunity to put in any further submissions in relation to that application and that should be done within a further 14 days. If the application for an order that the premises be reinstated is successful then that would seem to determine the dispute in this proceeding. If it is unsuccessful I will make a determination as to how the proceeds of the litigation are to be divided and the existing submissions would appear to be sufficient to enable me to deal with that.

34 There will be liberty to both parties to apply for any necessary directions.

35 In the above reasons I have ventured the opinion that the foreshadowed application is arguable but I have not concluded that it will necessarily succeed. If either party objects to me hearing the new application that objection should be included in the submissions. If no such objection is taken I will proceed to determine both applications of the basis of the submissions already made and any further submissions given pursuant to these directions. If another member hears it then the final determination of this matter will be deferred until the result is known.

SENIOR MEMBER R. WALKER