

**VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL
CIVIL DIVISION**

BUILDING AND PROPERTY LIST

VCAT REFERENCE NO.D809/2013

CATCHWORDS

Registered proprietor of an apartment in a multi-lot plan of sub of subdivision; Applicant alleges defects to common property directly affecting her lot and seeks rectification costs; No Special resolution by the Owners Corporation for the commencement of legal proceedings; Strike out application; Whether Applicant has standing; Contractual rights against the Vendor under the Contract of Sale; An arguable case that the Applicant may make directly against the builder; Proposed order that the Applicant is authorised to institute and prosecute the subject proceedings on behalf of the Owners Corporation; Strike out applications dismissed.

APPLICANT	Fiona Ruth Johnston
FIRST RESPONDENT	Stockland Development Pty Ltd (ACN 000 064 835)
SECOND RESPONDENT	LU Simon Builders Pty Ltd (ACN 006 137 220)
WHERE HELD	Melbourne
BEFORE	Judge Jenkins, Vice President
HEARING TYPE	Preliminary Hearing
DATE OF HEARING	24 July 2014
DATE OF ORDER	29 August 2014
CITATION	Johnston v Stockland Development Pty Ltd (Building and Property) [2014] VCAT 1634

ORDER

- 1 The Respondents' respective applications to strike out parts of the Applicant's Points of Claim, as detailed in the Reasons for Decision, are dismissed.
- 2 There shall be a further hearing at 10.00 am on 2 September 2014 before me, so that the parties may make submissions as to the form of the proposed orders foreshadowed in these Reasons for Decision.

Judge Jenkins
Vice President

APPEARANCES:

For Applicant	Mr B Carr, instructed by F.R.E. Dawson & Son Barristers & Solicitors
For First Respondent	Mr P Graham, instructed by HWL Ebsworth Lawyers
For Second Respondent	Mr R Andrew, instructed by Giannakopoulos Solicitors

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REASONS

NATURE OF APPLICATION

- 1 The Applicant is the registered proprietor of an apartment in a Melbourne suburb (the 'Property') which she purchased as part of a multi-lot plan of subdivision.
- 2 The First Respondent carries on business as a developer of real estate (the 'Developer'); and the Second Respondent carries on business as a builder of domestic and commercial premises (the 'Builder').
- 3 The Applicant claims damages against both Respondents for defective building work.
- 4 Each Respondent makes a preliminary application as follows:
 - (a) The Developer seeks an Order of the Tribunal, pursuant to sub-s 75(1) of the *Victorian Civil and Administrative Tribunal Act 1998* (the 'VCAT Act') to strike out from the Further Amended Points of Claim:
 - (i) The particulars identified as 'i)' and 'v)' and subjoined to paragraph 12;
 - (ii) Sub-paragraph 25(iv);
 - (iii) The allegations contained in paragraph 26; and
 - (iv) The Prayer for Relief to the extent that the Applicant alleges defects in and rectification costs for the exterior glazing and external balustrade.
 - (b) The Builder seeks an Order of the Tribunal, pursuant to sub-s 75(1) or alternatively s 76 of the VCAT Act, to strike out from the Further Amended Points of Claim the claims in paragraphs 12, 17, 25 and 26, insofar as they relate to the alleged defects located in the windows and the concrete floor slab.
- 5 The primary objection raised by both Respondents is that the alleged defects are in the common property, which the Applicant does not own. Accordingly, the Applicant has no standing to bring any claim.
- 6 The Respondents also state that the Owners Corporation, which owns the common property, has not passed a special resolution authorising the bringing of legal proceedings against either of the Respondents.¹

BACKGROUND

- 7 The Applicant purchased the Property from the Developer, as Vendor, 'off the plan' under a contract of sale dated 6 October 2010 (the 'Contract of Sale'). For the purpose of this application the following terms of the Contract of Sale are relevant:

¹ As required by sub-s 18(1) of the *Owners Corporations Act 2006*. The Owners Corporation is not a party to this proceeding.

- (a) Building Works were to be constructed under a separate contract, which was a Major Domestic Building Contract for the purposes of the *Domestic Building Contracts Act 1995* (the ‘DBC Act’), between the Vendor (Developer) and the Builder (Builder);²
- (b) The term ‘Building Works’ is defined as follows:
- Building Works means all construction works substantially as contemplated by the Plans and Specifications to the extent only that those works contemplate construction of the Property...
- (c) ‘Property’ is identified in the Particulars of Sale as:
- ... The property to be located at and known as [Lot number and address of property specified].
- (d) The Vendor (Developer) must ensure that the Builder rectifies any omission or defect in the Building Works due to defects in materials and/or workmanship notified in writing to the Vendor by the Purchaser (Applicant) during the Defects Period;³ and
- (e) Defects Period is defined as three months after the date of issue of the Occupancy Permit.⁴

8 On 11 February 2011, the Occupancy Permit was issued by the relevant building surveyor; and on 29 March 2011 the Applicant paid the balance of the contract price and entered into occupation of the Property.

9 Following occupation of the Property, the Applicant identified alleged defects in the workmanship and/or materials and provided to the Developer defects lists dated 14 April 2011, 17 May 2011, and 8 June 2011.

10 The Applicant alleges, against the Developer, that the defects particularised under clause 12 of her Further Amended Points of Claim have not been rectified, including:

defective windows which allow the condensation of excessive amounts of moisture on both windowpanes and window frames [clause 12 i)].

scratched and defective glass installed in the balcony and main bedroom window frames [clause 12 v)].

11 The Applicant further alleges, against the Builder, that it is in breach of the warranties which operate in favour of the Applicant pursuant to s 9 of the DBC Act; and for the purpose of this application that:

the concrete floor laid in the lounge area is uneven and has not been installed in a proper and workmanlike manner [clause 25 i)].

the glass in the main bedroom has become calcium stained due to efflorescence from above [clause 25 iv)].

² Clause 7.1 of the Special Conditions.

³ Clause 7.7 of the Special Conditions.

⁴ Clause 1.2(19) of the Special Conditions.

- 12 For the purpose of this application, the Applicant acknowledges that:
- (a) the concrete floor, the balcony balustrade and external windows all fall within the common property of the Owners Corporation;⁵ and
 - (b) upon registration of the Plan of Subdivision under the *Subdivision Act 1988*, the common property vests in the Owners Corporation.

RELEVANT LEGISLATION

- 13 Section 75 of the VCAT Act authorises the Tribunal to summarily dismiss or strike out all or any part, of a proceeding that, in its opinion:
- (a) is frivolous, vexatious, misconceived or lacking in substance; or
 - (b) is otherwise an abuse of process.
- 14 Section 76 of the VCAT Act authorises the Tribunal to summarily dismiss or strike out all or any part of a proceeding for want of prosecution. The Developer did not press an application under this provision.
- 15 In the case of s 75, the power to order summary dismissal includes a power to dismiss or strike out one or more claims in an applicant's Points of Claim⁶ but in any event should be exercised with great care and only where it is clear that there is no real question to be tried.⁷
- 16 In *Arrow International Australia Pty Ltd v Indevelco Pty Ltd (Domestic Building)*⁸ His Honour Judge Bowman acknowledged that for a dismissal or strike out application to succeed:
- ...the proceeding must be obviously hopeless, obviously unsustainable in fact or in law, on no reasonable view justify relief or be bound to fail...consistent with the approach adopted by the courts over the years.
- 17 Finally, in *Towie v State of Victoria*⁹ which concerned an appeal from the Tribunal, Kyrou J confirmed that:
- It is clear that a high threshold must be met before the VCAT can exercise its power under s 75 ... to summarily dismiss or strike out ... and that the VCAT should only exercise this power with great care.
- ... the respondent to a complaint has an onus of showing "that the complaint is undoubtedly hopeless".
- 18 Accordingly, it is not the role of the Tribunal in the current application to determine the merits of the Applicant's impugned claims or their likelihood

⁵ I note also the expert report of Timothy Baird, Licensed Surveyor dated 23 June 2014. See also the careful analysis of DP Lulham in *Owners Corporation PS508732B v Fisher & Lee* VCAT 28 April 2014, as to the need to examine the terms of the Plan of Subdivision and the relevant Regulations under the *Subdivision Act 1988*; to determine the boundaries of the common property.

⁶ *Martin v Fasham Johnson Pty Ltd* [2008] VSC 289 at [30].

⁷ At [27] *Fancourt v Mercantile Credits Ltd* [1983] HCA 25.

⁸ [2005] VCAT 306 at [32].

⁹ [2008] VSC 177 at [29] and quoting Forrester J at [30] in *State Electricity Commission v Rabel* [1991] 1 VR 102 at [25], [28].

of success. Taking the claims at their highest, the Tribunal will only dismiss any one or more of the contested Points of Claim, to the extent that a claim is utterly hopeless, misconceived or without any legal basis.

- 19 There are a number of specific provisions in the *Subdivision Act 1988* and *Owners Corporations Act 2006* (the 'OC Act') relevant to this application.
- 20 Section 24 of the *Subdivision Act 1988* provides that the registration of a plan of subdivision takes effect from the time that the registrar (of Titles) records that the plan has been registered. It also provides for the effects of registration upon the creation of easements or rights implied by sub-s 12(2) and for other things.
- 21 Sections 30 and 31 of the *Subdivision Act 1988* together provide that the owners corporation is the legal owner of the common property but the lot owners are the beneficial owners as tenants in common in shares proportional to their lot entitlements.
- 22 As a tenant in common, a lot owner has an undivided share in the common property. However, a lot owner's right to deal with their share in the common property is in turn limited by s 31A, which provides to the effect that a share in the common property of a member of the owners corporation can only be dealt with as part of a dealing with that member's lot; or in accordance with the procedure for alteration of a subdivision or consolidating or re-subdividing land affected by one or more owners corporations; or as otherwise prescribed.
- 23 Accordingly, the owners corporation holds the legal title and is the registered proprietor of the common property, while the equitable or beneficial ownership is vested in the lot owners.¹⁰ By s 46, s 28 and s 49 of the 'OC Act', the owners corporation is authorised to recover as a debt from lot owners the cost of repairs, maintenance and other works in proportion to a lot owner's liability [usually equivalent to unit entitlement], except where any repairs, maintenance and other works are wholly or substantially for the benefit of some only of the lot owners, in which case they will pay more.
- 24 By s 18, s 90 and s 96 of the OC Act, the owners corporation cannot bring legal proceedings, except to recover fees and other money, and to enforce its rules, without authorisation by special resolution.
- 25 Sub-section 163(1A) authorises a lot owner to apply to the Tribunal to resolve 'an owners corporation dispute'.¹¹
- 26 Subsection 165(1) sets out the orders which the Tribunal may make in determining an owners corporation dispute, which it considers fair including:

¹⁰ *Body Corporate No 1/PS 40911511E St James Apartments v Renaissance Assets Pty Ltd* [2004] VSC 438 Mandie J at [30] & [40], when referring to sub-s 28(d) of the *Subdivision Act 1988*, as it then was.

¹¹ Defined in s 162 of the OC Act.

- (ba) an order authorising a lot owner to institute, prosecute, defend or discontinue specified proceedings on behalf of the owners corporation.

27 I will return to these provisions shortly.

RESPONDENTS' POSITION

28 The Respondents both allege that the Applicant has no right or entitlement to claim against either Respondent to the extent that such claim relates to the common property. In support of this proposition, I was referred to a number of authorities with which I will deal briefly.

29 In *Owners Corporation Strata Plan 74249 v County Projects Pty Ltd and West Highland Projects Pty Ltd*¹² a proceeding before the NSW Consumer Trader & Tenancy Tribunal, the applicant owners corporation sought compensation from the builder and developer in relation to defective and incomplete building work. In the course of his reasons for judgment Senior Member Meadows dealt with an objection that the applicant could not commence an action on behalf of individual lot owners, as follows:¹³

A defect in common property which affects an individual lot is properly brought by the applicant. For example, water leaking through a ceiling slab or a common property wall may only affect one individual lot, but it is the involvement of the common property which means the applicant has standing to bring the claim. In any event I agree that each item must be carefully examined to ensure that the cause is a defect in common property ...

30 There are two limitations to the relevance of the *County Projects* case in the current context. First, interstate cases are applying their own State legislation. A proper consideration of such cases would require a much closer analysis of the corresponding legislation in NSW and Victoria, than was forthcoming at the hearing, before unqualified notice can be taken. Secondly, while the tribunal member found that the relevant owners corporation did have standing to sue the builder in respect of alleged defects in the building work, which affected the common property, the case did not directly consider or expressly exclude the interest of a particular unit owner. However, the point is well made that although alleged damage may ostensibly be confined to one unit owner's property, the involvement of the common property invokes the interest of all unit owners.

31 In *The Owners Strata Plan 32735 v Swan*,¹⁴ the dispute between a unit owner and the owners corporation concerned the extent of repairs to common property, which comprised defective tiles on the unit owners balcony. The Court considered the effect of s 62 of the *Strata Schemes Management Act 1996* (the 'SSM Act') which, in part, is in equivalent terms to s 46 of the OC Act. Furthermore, s 140 of the SSM Act provides a

¹² [2010] NSWCTTT 186 (7 May 2010).

¹³ At p 7.

¹⁴ [2012] NSWSC 383.

regime, for which there is no direct equivalent under the OC Act, whereby an Adjudicator may require the owners corporation to consent to work proposed to be carried out by an owner if the Adjudicator considers that: the work concerns alterations or repairs to common property which directly affects the owner's lot; and the owners corporation has unreasonably refused its consent to such work.¹⁵

- 32 The Court noted that the question, whether a breach by the owners corporation of its duty under the SSM Act gives rise to a private cause of action by a lot owner who suffers damage, is settled law to the effect that the duty of an owners corporation is a statutory duty owed to each lot owner and its breach gives rise to a private cause of action under which damages may be awarded to a lot owner.¹⁶ Accordingly, the issue before the Court was whether, in the event of a breach of an owners corporation duty under s 62, an individual lot owner is at liberty, without an order under s 140 and without the consent of the owners corporation, to proceed to perform maintenance or repair work upon common property and then recover the cost or expense of the work.¹⁷ The short answer was No.
- 33 The Court noted that the unit owner had, without the consent of the owners corporation and without abating a nuisance, entered the balcony (common property), removed existing tiles and engaged a contractor to lay tiles she had chosen. The Court found that:¹⁸

The [SSM] Act ...does not authorise a lot owner to undertake repair or rectification work on common property. The Act, however, provides lot owners with a statutory process by which an order under s 140 may be sought under which an owners corporation may be required to give consent to work of the kinds specified in s 140(1)(a) or (b).

Additionally ... the provisions of the Act preserve the right of a lot owner to apply for mandatory injunctive relief under the general law.

The rationale or purpose for ensuring that all work referred to in ss 62 and 140 remains under the control of an owners corporation accordingly may be readily identified. If an individual lot owner was free to have his or her contractor enter upon common property where an owners corporation has failed to rectify a defect and perform work on it, the integrity of a particular strata scheme could be readily undermined. Repairs or rectifications undertaken by an individual lot owner could result in strata safety issues or impact on the convenience of other owners or result in visual or structural features or other matters that are out of keeping with the style and integrity of the unit building itself.

The statutory scheme under the Act, in other words, centralises the control of common property in an owners corporation in 'Key

¹⁵ At [51].

¹⁶ At [161].

¹⁷ At [53].

¹⁸ At [176], [180] & [182].

Management areas' and confers both powers and functions on it to be exercised in accordance with the Act.

- 34 Section 62 of the SSM Act clearly provides a regime for which there is no counterpart under Victorian legislation. Accordingly, *Swan's* case has little direct relevance to any issue in the current application. However, the rationale given in the extract quoted above, for why an individual unit owner should not be at liberty to undertake unilateral repairs or rectification of the common property, is equally relevant to the Victorian regime.
- 35 In *Cordon v Lesdor*¹⁹ the plaintiff developer and defendant land owner had entered into a joint venture agreement to develop property, which was to include new residential units to be registered on a strata plan. The NSW Supreme Court was concerned, amongst other related issues, with a dispute in respect of the developer's performance of its contractual obligations to rectify certain defective, incomplete and non-conforming building work, all or much of which was in common property. For the purpose of the current application, the Respondents rely upon findings as to the ability of the defendant [in the position comparable to the Developer in this proceeding] to require the plaintiff to complete the building works on the common property, once the strata plan has been registered.
- 36 I do not propose to deal with *Cordon's* case in any depth as it raised many complex issues and arose in quite unusual factual circumstances. The findings of the trial judge, confirmed on appeal, were to the effect that rectification work would never be undertaken and there was no indication of complaint or likely claim by the owners corporation. Accordingly, there was no loss relevant to the common property and the defendant was only entitled to recover damages to the extent relevant to lots which it owned. I do not consider that this case throws any greater light on the issues raised in the current application.
- 37 The following Victorian cases have greater relevance to the current application. In particular, they demonstrate some of the circumstances where the authority vested in the Tribunal may be invoked to resolve an impasse between an individual unit owner and other unit owners; and to authorise a unit owner to take or defend legal proceedings on behalf of the owners corporation, even where such proceedings are entirely for the benefit of such unit owner.
- 38 In *Owners Corporation 1 Plan No PS440878V & Ors v Dual Homes Victoria Pty Ltd*²⁰ the respondent was the builder of homes in the subdivision and was also a lot owner. The majority of lot owners unsuccessfully sought a special resolution from the owners corporation to institute proceedings against the respondent builder to rectify building defects in the common property. The respondent had voted against the special resolution and also failed to pay levies raised to cover the cost of the

¹⁹ [2010] NSWSC 1073; confirmed on appeal [2012] NSWCA 184 at [214]-[217].

²⁰ [2011] VCAT 211.

rectification, potentially leaving innocent unit owners to bear the cost, without recourse against the respondent builder.

- 39 Deputy President Lulham found that the respondent had a clear conflict of interest which rendered the owners corporation dysfunctional and failing to act in the interests of owners as a whole.²¹ To resolve the impasse, DP Lulham ordered an Administrator be appointed for a limited period (being the party who was also manager of the owners corporation). Orders were also made to the effect that the proceeding have effect *nunc pro tunc* as if filed pursuant to a special resolution of the owners corporation and that the costs of the administrator be payable by all lot owners, in proportion to their lot liability.
- 40 In *Muir v Owners Corporation PS1663*²² DP Lulham ordered the owners corporation to remove and bear the expense of removing a tree on common property which was accepted as posing an unacceptable risk to the applicant's property. In default, the respondent was ordered to pay the expense of a contractor to remove the tree, engaged by the applicant as agent for the owners corporation.
- 41 In *Muir's* case, DP Lulham found that the removal of the tree does benefit all lot owners because, by removing the likelihood of catastrophic failure of the tree and the 40% chance of it falling toward the applicant's unit, the owners corporation and therefore the unit owners, were relieved from an exposure to substantial damages. In this context it would be unfair for the cost of removal to fall upon one or a few lot owners only.
- 42 In *Cruddas v Owners Corporation PS611940S*²³ DP Lulham had to consider whether the cost of an engineer's report, obtained by the applicants in relation to drainage defects in the common property, ought be reimbursed by the owners corporation, with the effect that each of the 6 lot owners would contribute an equal share. There was no resolution of the owners corporation authorising the applicants to act on its behalf although the issue of the drainage problem was minuted at an AGM as follows:²⁴

Building defects: (The applicants) informed the meeting that they were awaiting notification from (the Building Commission) ... with regard to the drainage issue ... It was stated that this would affect the common property and will eventually affect other units. Once the (Building Commission) meeting has taken place and a report²⁵ is received, (the applicants) will send a copy of it to the manager to circulate to all other owners.

- 43 When the engineer's report was received, it was circulated to lot owners as foreshadowed. When the builder conceded liability to fix the drainage

²¹ Paragraphs [10] and [12].

²² [2012] VCAT 1982.

²³ 2012 VCAT 683 (24 February 2012).

²⁴ At [14].

²⁵ Being the Engineer's report, in contention.

problem, the owners corporation conducted a ballot and resolved to allow the builder to do the work. DP Lulham found that:²⁶

...the applicants were suffering compensable damage from the defect in common property: the owners corporation was liable to the applicants under the Water Act; and even though it was early days, had the owners corporation refused to repair the drainage defect it would have been in breach of the Owners Corporation Act.

- 44 DP Lulham further acknowledged that the owners corporation had legal rights against the builder, by virtue of being the current owner of the common property and therefore the building owner, for the time being, for the purposes of the DBC Act. Therefore, it was entitled to sue the builder for breach of warranties under the relevant building contract. However, DP Lulham dismissed the applicants' claim on the basis that they had acted prematurely in incurring expense, albeit that it benefited the owners corporation (by preventing it from being sued) and the Lot owners (by preventing them from suffering water damage):

Whilst the applicants have been ill treated, there is no legal principle which entitles them to recover the cost of the engineer's report. The applicants are not 'agents of necessity', because they are not agents of the owners corporation at all. The applicants have not relied on a representation given by [the owners corporation volunteer manager] or recorded in the minutes of the AGM to the effect that they would be reimbursed. There was no promise or indication that the owners corporation would pay.

- 45 The result in the *Cruddas* case may seem harsh, particularly where the cost of the engineer's report would likely have been to the account of the owners corporation if the applicants had followed the correct procedure. However, the interests of all unit owners cannot be unilaterally overridden by one or a few unit owners, without all unit owners at least having an opportunity to consider and approve costs proposed to be incurred on their behalf.
- 46 In *J & G Knowles & Associates Pty Ltd v Owners Corporation RP12247 (Owners Corporations)*²⁷ the applicant owned lots on a plan of subdivision which were comprised in a separate building and included common property. The applicant wished to develop the building which required alteration to the plan of subdivision and the transfer of ownership of part of the common property to the applicant. The applicant was unsuccessful in obtaining the requisite unanimous resolution of the owners corporation. Accordingly, the applicant sought orders from the Tribunal, pursuant to s 34D of the *Subdivision Act 1988* consenting on behalf of non-consenting members, to the applicant's proposal.
- 47 The Tribunal may make an order granting the application if it is satisfied as to certain matters set out in ss 32 and 34D of the *Subdivision Act 1988*.

²⁶ At [19].

²⁷ [2014] VCAT 98.

After considering such matters in detail, the Tribunal indicated that it would order consent to the applicant's proposal subject to conditions.

- 48 The *Knowles* case, which dealt with many other objections of unit owners not referred to above, is nevertheless a good example of one explicit regime provided in the *Subdivision Act 1988* for the resolution of conflict between members of an owners corporation.

THE DEVELOPER

- 49 In summary, Counsel for the Developer referred to the Contract of Sale entered into between the Applicant and the Developer and submitted that:
- (a) The obligation of the Developer to ensure that the builder rectified any omission or defect in the Building Works only arises upon completion of the Building Works and notification to it by the Purchaser, during the Defects Period;²⁸
 - (b) 'Rectification of Defects' referred to in clause 7.7 is limited to the Applicant's Property, being the property to which the Applicant as purchaser is entitled to be registered;
 - (c) The Buildings Works were deemed to be completed when the vendor provided to the Purchaser a copy of the Certificate of Completion;²⁹
 - (d) Buildings Works are defined by reference to the construction works for the Property as contemplated by the Plans and Specifications; and Property is defined by reference to the Property being acquired by the Applicant; and
 - (e) The only obligation placed upon the Developer, as vendor under the Contract of Sale, is to require the Builder to rectify the defects.³⁰

THE BUILDER

- 50 In summary, Counsel for the Builder submitted that:
- (a) The Applicant's entitlement to seek redress from the builder, for breach of implied warranties set out in s 8 of the DBC Act derives from the fact that she is the 'owner for the time being of the building or land in respect of which the domestic building work was carried out under the contract';³¹
 - (b) 'Building' for the purpose of s 9 of the DBC Act is the building which the Applicant owns and does not extend to any part of the common property;

²⁸ Special Condition 7.7(1) of the Contract of Sale. 'Defects period' is defined as the period of 3 months after the date of issue of the Occupancy Permit.

²⁹ Special Condition 7.4 of the Contract of Sale.

³⁰ Special Condition 7(iv) of the Contract of Sale.

³¹ Section 9 *Domestic Building Contracts Act 1995*. The contract is the domestic building contract to which the original building owner was a party.

- (c) Section 9 must be so limited otherwise any unit owner could bring an action for an alleged breach of warranty concerning any part of the building complex which falls within the common property;
- (d) Paragraph 8(e) of the DBC Act, which is a warranty that the ‘home will be suitable for occupation at the time the work is completed’ does not connote any element of amenity or quality of building work;
- (e) Section 44 and of the *Building Act 1993* provides to the effect that an occupancy permit must not be issued unless the building is suitable for occupation and once issued is evidence that the building is suitable for occupation; and
- (f) The ‘damage’ by excessive condensation, of which the Applicant complains, is caused by use of the apartment and not water ingress from outside. The solution sought by the Applicant, namely repair or replacement of the external windows, is not available to the Applicant because she has no authority to repair the common property.

THE APPLICANT’S POSITION

- 51 In relation to the Developer, the Applicant simply says that her contractual rights against the Builder extend to the common property in question. The Applicant’s reasoning is as follows: the Building Works, as defined in the Contract of Sale, are all those works that ‘contemplate’ the construction of the Property. Accordingly, although the common property encompasses, in broad terms, the exterior shell of the Applicant’s apartment, the Building Works must encompass all of those items required and necessarily contemplated to complete the construction of the Property, which for the purpose of the current application, must encompass the concrete floor; the external windows and the balcony balustrade. That is, Building Works as defined in the Purchase Contract, are not limited to legal ownership of the Property but extend to all works contemplated for the completion of the Property, which must necessarily include some part of the common property.
- 52 The Vendor (Developer) is obligated to the Purchaser (Applicant) to ensure that the Builder rectifies any defect or omission in the Building Works contemplated by the Contract of Sale. Business common sense and the clear expectation of a purchaser in the Applicant’s position, requires that the Building Works must equate to a completed Property.
- 53 In relation to the Builder, the Applicant relies upon warranties which operate in favour of the Applicant pursuant to s 9 of the DBC Act. Again, the Applicant submits that the warranties set out under clause 22 (a) to (d)³² of the Further Amended Points of Claim apply to the Building Works performed under the building contract. In relation to the warranty set out in clause 22(e), namely, that the apartment would be suitable for occupation at the time the work was completed, the Applicant submits that this warranty

³² Which replicate the warranties under s 8 (a) to (d) of the DBC Act.

is given in relation to the amenity of the completed Building Works rather than the work itself.

- 54 The Applicant submits that the Builder has caused defective windows to be installed as part of the common property, as a result of which large amounts of condensation accumulates on the interior face of the glass windows: that is, damage occurs within the apartment.
- 55 Finally, the Applicant submits that an individual lot owner ought not be limited to enforcing warranties in respect of defective building work within the lot boundaries. Rather, where a defect exists on common property which causes damage to be suffered within an individual's lot entitlement then such individual lot owner ought not be precluded from taking proceedings directly against the builder, particularly where other lot owners have no direct interest in the outcome.
- 56 The Applicant further submits that there is no authority in Victoria which specifically deals with a building owner enforcing the implied warranties against a builder, as distinct from maintenance disputes between a lot owner and the owners corporation. The Applicant also discounts the NSW authorities relied upon by the Respondents on the basis that they are dealing with different enabling legislation.
- 57 The Applicant further submits that, in relation to the s 8 warranties, for the purpose of the current application:
- (a) Paragraphs (a) to (d) all refer to work 'to be done' under the relevant domestic building contract between the developer and builder, which does not exclude work in respect of the common property;
 - (b) Warranties should be interpreted so as to enable a purchaser to enforce them against a builder without enlisting the owners corporation;
 - (c) Paragraph (e) can be described as a warranty of 'amenity'. The reference to 'suitable for occupation' should not be limited to the issue of an occupancy permit as this would render the warranty redundant as the owner cannot take occupation without an occupancy permit having been issued. Accordingly, the warranty arguably encompasses an element of amenity. In the current context, such amenity is not having a defective and uneven floor and not having excessive condensation, both of which may fall within the ambit of health and safety; and
 - (d) Section 9 of the DBC Act is broadly worded and in particular is not limited to actions in respect of property, which the owner for the time being owns, but extends to all property, that is including the common property, vested in the original building owner. However, in this case, the Applicant merely seeks to enforce the warranties to the extent of the common property which directly affects the property now owned by the Applicant.
- 58 There is little authority examining the precise nature of an individual lot owner's interest in common property. In *Body Corporate No 1/PS*

40911511E *St James Apartments v Renaissance Assets Pty Ltd & Multiplex Constructions Pty Ltd*³³ Senior Member Cremean interpreted sub-s 28(d) of the *Subdivision Act 1988* as excluding the possibility of the applicant owners corporation being the owner of the common property. Sub-section 28(d) then provided that when a plan containing common property is registered:

Any common property vests in those owners as tenants in common in shares proportional to their lot entitlement...

- 59 On appeal,³⁴ Mandie J held that the body corporate was ‘the owner for the time being of the building or land’ or the ‘building owner’ of the land comprising the common property for the purposes of sub-s 54(3) of the DBC Act.³⁵ Significantly, for the purpose of the current application, Mandie J found that:

The use of the definite article in the expression “the owner for the time being” in s 54(3) does not to my mind mean that there cannot be more than one owner of the common property ... each of the lot owners is an owner for the time being of a share in the common property as tenant in common - but I do not think that the use of the definite article excludes the possibility that the expression “the owner for the time being” covers both legal and equitable owners.

If the expression “the owner for the time being” includes the lot owners as equitable owners of the common property, it seems to me, both as a matter of reasonable interpretation and in order to serve the purposes of the Domestic Building Contracts Act in a practical way, that the expression must also include the registered proprietor.

The conclusion that the body corporate falls within the expression “the owner for the time being” in s 54(3) of the Domestic Building Contracts Act is also in accord with the definition of “owner” in s 3(1) of the Subdivision Act, the body corporate being “the registered proprietor of the fee simple” in the common property and “a person who is empowered by or under an Act to execute a transfer” of the common property. [emphasis added]

- 60 When the OC Act was introduced, a new part 5 of the *Subdivision Act 1988* was inserted. The former sub-s 28(d) is now incorporated into a new and expanded s 30 which relevantly provides that when a plan is registered:

- (a) any common property affected by an unlimited owners corporation vests in the owners for the time being of the lots affected by the unlimited owners corporation as tenants in common in shares proportional to their lot entitlement; ...

- 61 Accordingly, the Applicant relies upon this provision and the interpretation of Mandie J in the *Renaissance Assets* case as authority for the proposition

³³ 2003 VCAT 1197.

³⁴ *Body Corporate No 1/PS 40911511E St James Apartments v Renaissance Assets Pty Ltd* [2004] VSC 438 at [2].

³⁵ At [41] – [44].

that while an owners corporation holds the legal title in trust for all lot owners, as the beneficiaries of the common property, a lot owner is not excluded from enforcing his or her interest in the common property. The Applicant further submits that the circumstances in which a unit owner may reasonably enforce any claim affecting common property, without recourse to the owners corporation, ought be limited to circumstances in which the common property is an integral part of that unit owner's property.

ANALYSIS AND FINDINGS

What is the nature of a unit owner's interest in common property?

- 62 While there are a number of authorities which have examined the circumstances in which an owners corporation can be required to repair and maintain common property, at the instance of a unit owner, there has been no authority which I could find, confirmed by Counsel during the course of the hearing, which has specifically considered the submissions now being proffered by the Applicant. Counsel for each Respondent reply simply that the law is clear and there is no ability for the Applicant to make the current claims, to the extent that they affect common property. Initially I was inclined to agree. However, on closer analysis, the rights of an individual unit owner are more complex.
- 63 There are certain principles which are clear from the applicable legislation:
- (a) First, upon registration of a plan of subdivision, the common property, as delineated on the relevant plan, vests in the owners corporation which then holds the legal title in trust for all unit owners who hold a beneficial interest as tenants in common in proportion to their respective unit entitlement;³⁶
 - (b) Secondly, the owners corporation is obligated to repair and maintain the common property and may be required to do so at the instance of any unit owner;
 - (c) Thirdly, the interest of any individual unit owner in common property is not limited to that common property which is an integral part of their unit but extends to all common property delineated on the relevant plan of subdivision, that is, all unit owners have a beneficial interest in the whole of the common property where their proportionate liability, as tenants in common, is determined by their unit liability, as set out in the plan of subdivision; and
 - (d) Finally, both the owners corporation, as legal owner, and the unit owners who are members of the owners corporation, as beneficial owners, are the 'owner for the time being of the building or land in respect of which a domestic building contract was made or domestic building work was carried out' which relates in whole or in part to the common property.

³⁶ Section 30 *Subdivision Act 1988*.

What are the rights and entitlements of the Applicant under the Contract of Sale with the Developer (First Respondent)?

- 64 The Contract of Sale, typical of 'off the plan' contracts of this kind, is conditional upon the relevant plan of subdivision being registered. Accordingly, the Applicant, as purchaser of the relevant unit, was not able to settle the purchase until the relevant plan of subdivision was registered and then the occupancy permit issued. In this case, settlement of the purchase contract did not occur and accordingly possession of the unit was not given to the purchaser, until about 6 ½ weeks after the occupancy permit issued. It will remain an issue at trial whether the Applicant can rely upon the Defects Period not commencing until the date possession was given. I also note the correspondence from the vendor's agent granting an extension of time to notify the vendor of defects, by reason of a notice advising of the expiration of the defect period being served at the wrong address.³⁷
- 65 In any event, by the time that the Applicant became the registered proprietor of her Unit, title to the common property had already vested in the Owners Corporation. How then can the Applicant enforce compliance with the Building Works under the Defects Period, to the extent that such Works relate to common property which is an integral part of her unit?
- 66 In my view, the simple answer is that the Applicant has a contractual right against the Vendor under the Contract of Sale. Building Works, consistent with its definition under the Contract, necessarily contemplate more than the limit of the unit to which the Applicant's legal title relates. If it were otherwise the unit would not be structurally complete and a purchaser could never have a direct contractual right to enforce compliance with the Plans and Specifications to the extent that the Building Works contemplate construction of the Property. Accordingly, the Applicant may rely upon its contractual right under Special Condition 7.7(1) to enforce against the vendor its obligation to ensure that the builder rectify any omission or defect in the Buildings Works in materials and/or workmanship, notified to the vendor during the Defects Period. Such notification can extend to any such defect or omission in what strictly falls within the common property, to the extent that such Works are necessarily contemplated by the Contract in accordance with the Plans and Specifications.
- 67 There may indeed be a contest in this case as to whether the Applicant notified the Vendor of the claims now being made in respect of the common property, within the Defects Period. However, it is not necessary for me to determine that matter in the current application. To the extent that it is found that this did not occur and in any event, the interests of other unit owners may be affected.
- 68 In the first instance, the contractual right of the Applicant to have her Unit completed is a matter entirely between the Applicant and the Developer.

³⁷ Exhibit AJJ-2 to affidavit of Andrew Johnston sworn 18 July 2014.

The benefit as between unit owners, is entirely for the Applicant.³⁸ However, it is possible to contemplate a circumstance, involving, as in this case the completion of a Unit, where the interests of one or more other unit owners may also be affected, for instance:

- (a) Where the rectification works to the common property may in fact need to go beyond the original Building Works contemplated by the Contract of Sale; or
- (b) Rectification of omissions and defects to the concrete floor, will be of potential direct interest and benefit to an adjoining unit owner and be of broader interest to unit owners in terms of the structural integrity of the building.

- 69 Accordingly, the contractual right which the Applicant may enforce against the vendor in either of these extended circumstances, does not exclude the right and obligation of the Owners Corporation to repair and maintain common property on behalf of all unit owners.
- 70 I am otherwise satisfied that the Applicant is not precluded from seeking to prove her claims against the First Respondent, pursuant to the Contract of Sale, at least in respect of defects or omissions notified within the Defects Period, notwithstanding that the common property had already vested in the Owners Corporation.

Is there a basis for direct claims against the Builder (Second Respondent)?

- 71 I am also satisfied that the Applicant may prosecute her claims directly against the Builder to the extent to which she can adduce evidence of loss and damage within her unit. In my view, the following claims raised by the Applicant are not, on their face, hopeless or entirely misconceived.
- 72 First, in relation to warranty 8(e) of the DBC Act and the relevance of an occupancy permit, it should be noted that such permit is neither evidence of compliance with the Building Act or regulations;³⁹ nor with the relevant building contract generally. I accept the Applicant's submission that the warranty was intended to do more than satisfy compliance with the pre-requisites for issuing an occupancy permit - that matter being dealt with under the *Building Act 1993*. In my view, it is open to the Applicant to adduce evidence as to loss of amenity, including health and safety considerations, which may arguably constitute a breach of this warranty, that the 'home will be suitable for occupation at the time the work is completed'.
- 73 Secondly, the Applicant proposes in part to base her claim in respect of common property defects or omissions, which relate to the external windows, upon the alleged damage suffered internally to her unit. In my

³⁸ Consistent with sub-s 49(2).

³⁹ Sub-section 46(2).

view, there is at least an arguable case that the Applicant may make directly against the builder, in respect of damage sustained within the Applicant's own unit.

Does the Applicant also need to act on behalf of the Owners Corporation?

- 74 Beyond reliance upon the Contract of Sale and the s 8 warranties as applied to her unit, as defined by the Plan of Subdivision, the position of the Applicant becomes more complicated to the extent to which she seeks to have alleged defects or omissions in the common property rectified.
- 75 The position of a purchaser of an off the plan unit which is part of a strata subdivision is very different to a purchaser of a stand-alone property. The regime provided by the OC Act and *Subdivision Act 1988* clearly recognises the separation of proprietary interests as reflected on the plan of subdivision and the consequential interests of all unit owners. The consequences for a purchaser of an off the plan unit, in seeking rectification of defects and omissions which incidentally fall within the common property, may not be readily apparent from the legislative regime. However, the statutory interpretation proposed by the Applicant, predicated upon the Applicant being able to effectively bypass the Owners Corporation entirely, in my view, is not consistent with the express statutory provisions. Furthermore, such interpretation fails to acknowledge those mechanisms which are available to give effect to the Applicant's objectives, without prejudicing the interests of other unit owners.
- 76 In the first instance, it seems plain enough that any rectification arising from the claims made by the Applicant, which affect any part of the common property, will be wholly or substantially for the benefit of the Applicant. However, the concept of 'benefit' to unit owners, for the purpose of sub-s 49(2) of the OC Act is also broader than mere direct benefit.⁴⁰
- 77 During the course of the interim hearing, it became apparent that the Applicant had not sought a special resolution of the Owners Corporation to bring proceedings against the Respondents by reason that a special resolution would not be successful because:
- (a) it would be opposed by the Developer; and/or
 - (b) the Respondents will argue to other unit owners that the excessive condensation of which the Applicant complains is effectively a self-induced internal problem within her unit and not a matter which affects the common property.
- 78 Accordingly, in anticipation of this likely impasse and to facilitate the orderly management of the Applicant's claims, upon an application being made by the Applicant pursuant to sub-s 163(1A) of the OC Act, I propose

⁴⁰ Refer *Burke v Owners Corporation Plan No RP015000* [2010] VCAT 2055; *Mashane Pty Ltd v Owners Corporation RN 328577* [2013] VSC 417.

to make an order pursuant to para 165(1)(ba) of the OC Act to the effect that the Applicant is authorised to institute and prosecute the subject proceeding on behalf of the Owners Corporation; and that the current proceeding, filed on 9 July 2013 as D809/2013 have effect *nunc pro tunc* as if filed pursuant to this order. It will be a condition of any such order that:

- (a) all costs and charges incurred by the Applicant, on behalf of the Owners Corporation in this proceeding, be payable by the Applicant;
- (b) notice of the proceeding be given to the Owners Corporation, for dissemination to all unit owners; and
- (c) the Owners Corporation may seek to be joined as an interested party or second Applicant, to represent the interests of other unit owners.

79 I consider the proposed orders to be fair and will anticipate the interest of other unit owners, which may arise.

CONCLUSION

80 For the reasons given, I am satisfied that the impugned parts of the Applicant's Points of Claim do raise real questions to be tried and otherwise do not warrant summary dismissal.

81 The applications of both Respondents will be dismissed and the form of further orders as foreshadowed above, will be the subject of further submissions.

Judge Jenkins

Vice President

VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

DOMESTIC BUILDING LIST

VCAT REFERENCE NO. D809/2013

APPLICANT	Fiona Johnston
FIRST RESPONDENT	Stockland Development Pty Ltd
SECOND RESPONDENT	L U Simon Builders Pty Ltd
WHERE HELD	Melbourne
BEFORE	Judge Jenkins, Vice President
HEARING TYPE	Directions Hearing
DATE OF HEARING	4 September 2014
DATE OF ORDER	8 September 2014

Note:

1. The Applicant made application for an Order pursuant to s 165(1)(b) of the *Owners Corporations Act 2006* on the basis of an owners corporation dispute, as evidenced by: the First Respondent's capacity to block a special resolution of the Owners Corporation by reason that its unit entitlement exceeds 25%; and the First Respondent had previously written to all unit owners by letter dated 15 June 2011 to the effect that any excessive condensation being experienced by some unit owners is only a ventilation problem which can be managed internally.
2. Upon hearing submissions from all parties the Tribunal was satisfied that there is a reasonable basis for an owners corporation dispute and that the following orders are justified and will avoid unnecessary delay and expense for all parties.

ORDERS

- 82 Pursuant to the provisions of section 165(1)(ba) of the *Owners Corporation Act 2006* the Applicant is authorised to institute and prosecute this proceeding on behalf of Owners Corporation No. 1 PS612301Y ("the Owners Corporation") *nunc pro tunc* from 9 July 2013.
- 83 All costs and charges which are incurred by the Applicant under Order 1 are payable by the Applicant.
- 84 The Applicant must notify the Owners Corporation of these Orders for dissemination to all Lot owners in the Owners Corporation.

- 85 The Owners Corporation may seek leave to be joined as an interested party, or as the Second Applicant, if it wishes to do so, by 30 September 2014.
- 86 By 30 September 2014 the Applicant must:
- (a) file and serve a list of all documents in her possession or control relevant to the proceeding: and,
 - (b) make such documents available for inspection upon 24 hours written notice.
- 87 By 16 September 2014, the Applicant must advise the Respondents of the categories of documents which she seeks to have discovered.
- 88 By 14 October 2014, the Respondents must:
- (a) file and serve a list of all documents in their possession or control relevant to the proceeding in the categories of documents sought by the Applicant: and,
 - (b) make such documents available for inspection upon 24 hours written notice.
- 89 By 28 October 2014, the Applicant has leave to file and serve:
- (a) any further expert reports on which she intends to rely, and
 - (b) any amendments to her Further Amended Points of Claim dated 12 June 2014.
- 90 By 5 December 2014, the Respondents have leave to file and serve any further expert reports, and any amended Defences.
- 91 The proceeding is referred to a Compulsory Conference at 10.00 am on 17 December 2014 at 55 King Street, Melbourne. The parties must each prepare a document not exceeding 4 A4 pages setting out a summary of their positions and must exchange copies by 4.00 pm on the business day prior to the compulsory conference, and provide the Tribunal with a copy at the commencement of the conference.
- 92 By 13 February 2015 the parties must file and serve Witness Statements. Each statement must consist of a narrative of the evidence to be given by each witness.
- 93 By 27 February 2015 the parties must file and serve Witness Statements in Reply (if any).
- 94 A party will not be allowed to present any evidence at the hearing which is not contained in a Witness Statement without justifying the need to do so to the Tribunal. A party wanting to call such additional evidence may be ordered to pay costs if a hearing is delayed.
- 95 Unless otherwise advised, all witnesses must attend the hearing for cross-examination. If a party does not wish to cross-examine another party's witness, written notice must be given to the party concerned at least seven (7) days before the hearing date.

- 96 This proceeding is set down for hearing on a date to be advised commencing at 10.00 am at 55 King Street, Melbourne with an estimated hearing time of 8 days. Costs may be ordered if the hearing is adjourned or delayed because of a failure to comply with directions.
- 97 The parties may each be represented by professional advocates at the hearing.
- 98 For the purposes of the hearing the following further directions will apply:
- (a) a tribunal book of common documents (indexed and paginated) to be relied on at the hearing must be prepared by the parties in consultation with one another and filed with 7 days of the hearing date,
 - (b) the parties must arrange for a running transcript of the evidence in the proceeding,
 - (c) the costs of preparation of the tribunal book and provision of transcript shall initially be shared equally by the parties but shall thereafter be costs in the cause,
 - (d) the parties must provide a written summary of their respective openings.
- 99 Costs of the applications heard on 24 July 2014 and this directions hearing are reserved.

Judge Jenkins
Vice President

APPEARANCES:

For Applicant	Mr Carr of Counsel
For the First Respondent	Mr Graham, Solicitor
For the Second Respondent	Mr Andrew of Counsel