VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

VCAT REFERENCE NO. BP1275/2017

BUILDING AND PROPERTY LIST

CATCHWORDS

Domestic building – s75 *Victorian Civil and Administrative Tribunal Act 1998* – standing of owners corporation to bring proceeding on behalf of private lot owners – s9 *Domestic Building Contracts Act 1995* – s12 *Owners Corporations Act 2006* – whether architect owes duty of care to the owners corporations

APPLICANTS	Owners Corporation 1 PS523454S, Owners Corporation 2 PS523454S, Owners Corporation 3 PS523454S
FIRST RESPONDENT	L.U Simon Builders Pty Ltd (ACN: 006 137 220)
SECOND RESPONDENT	Plus Architecture Pty Ltd (ACN: 091 690 336
WHERE HELD	Melbourne
BEFORE	Deputy President C. Aird
HEARING TYPE	Directions Hearing
DATE OF HEARING	20 June 2018
DATE OF ORDER	12 July 2018
CITATION	Owners Corporation 1 PS523454S v L.U Simon Builders Pty Ltd (Building and Property) [2018] VCAT 987

ORDERS

1. The applicants' claims insofar as they include claims on behalf of private lot owners and/or in relation to private lots are struck out.
2. The second respondent's application under s75 of the *Victorian Civil and Administrative Tribunal Act 1998* insofar as it relates to the applicants' claims in relation to alleged common property defects is dismissed.
3. By 2 August 2018 the applicants must file and serve substituted Points of Claim having regard to these Reasons.

4. **This proceeding is listed for a further directions hearing before Deputy President Aird on 9 August 2018 at 10.30am at 55 King Street Melbourne, at which time the Tribunal will hear the respondents' applications for compensation under s75(2) of the *Victorian Civil and Administrative Tribunal Act 1998* and make directions for its further conduct – allow 2 hours.**

5. Liberty to apply.

6. Costs reserved.

DEPUTY PRESIDENT C. AIRD

APPEARANCES:

For the Applicants	Mr J. Forrest of Counsel
For the First Respondent	Mr P. Murdoch QC with Mr Ward of Counsel
For the Second Respondent	Mr D. Klempfner of Counsel

REASONS

1 On 2 October 2007 a Certificate of Occupancy was issued for an apartment building in Cremorne constructed by the first respondent builder. This proceeding was commenced, in September 2017, by the applicant owners corporations ('the OCs'), shortly prior to the expiration of the 10 year limitation period for building actions. The OCs claim damages from the builder and the second respondent architect for the rectification of defects in the common property ('the Common Property Claims') and in private lots ('the Lot Claims'). A significant part of the claim concerns water ingress into the lot owners' apartments. The lot owners are not parties to this proceeding. The exact location of the alleged defects is not before me, and no findings are made as to whether they are in common property or private property.

2 The builder filed an Application for Directions Hearing or Orders on 26 April 2018 seeking orders under s75 of the *Victorian Civil and Administrative Tribunal Act 1998* ('the VCAT Act') that the OCs' claims, insofar as they concern private lots, be summarily dismissed or struck out as *misconceived or lacking in substance*. The architect filed an Application for Directions Hearings or Orders on 10 May 2018 in which it joins with the builder's application. On 24 May 2018, the architect's solicitors wrote to the OCs' solicitors confirming that, in accordance with its Statement of Facts and Contentions dated 10 May 2018, it was seeking to have the whole of the OCs' claims against it struck out or summarily dismissed under s75 on the basis that they are misconceived or lacking in substance.

3 The builder and the architect contend that the OCs do not have standing to bring the Lot Claims. Further, the architect contends that the OCs' claims are otherwise misconceived or lacking in substance because first, there is no allegation that it owes a duty of care to the lot owners, and secondly, that it does not owe a duty of care to the OCs.

4 On 23 May 2018 the OCs filed an Application for Directions Hearings or Orders seeking leave to file and serve Amended Points of Claim ('APOC') dated 24 May 2018.

5 All applications were listed for hearing together at this directions hearing. At the directions hearing I considered it appropriate to hear from Mr Murdoch QC for the builder, and Mr Klempfner of Counsel for the architect in relation to their strike out applications, before hearing from Mr Forrest of Counsel for the OCs. Mr Klempfner confirmed that the architect adopted the builder's submissions in relation to the OCs standing to bring the Lot Claims and accordingly, I will primarily consider the builder's submissions on this point.

6 For the Reasons which follow I am satisfied that the OCs do not have standing to bring the Lot Claims, and therefore their claims against the builder and the architect insofar as they relate to the Lot Claims will be

struck out. However, I am satisfied that it is arguable that the architect owes a duty of care to the OCs and accordingly its s75 application in relation to the OCs claims insofar as it concerns alleged common property defects is refused.

7 As it will be necessary for the OCs to amend their claim, their application for leave to file and serve the APOC, which includes the Lot Claims, is refused. In considering the s75 applications I will have regard both to the Points of Claim and the proposed APOC. I will note the OCs' further foreshadowed amendments but am unable to make a final ruling on them without a formal pleading to consider. The OCs will be ordered to file and serve amended Points of Claim having regard to these Reasons. For the convenience of the parties and the Tribunal I suggest that these be substituted Points of Claim rather than amendments to the current Points of Claim being marked up.

SECTION 75

8 Section 75 of the VCAT Act provides:

> (1) At any time, the Tribunal may make an order summarily dismissing or striking 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.
>
> (2) If the Tribunal makes an order under sub-section (1), it may order the applicant to pay any other party an amount to compensate that party for any costs, expenses, loss, inconvenience and embarrassment resulting from the proceeding.
>
> …
>
> (5) For the purposes of this Act, the question whether or not an application is frivolous, vexatious, misconceived or lacking in substance or is otherwise an abuse of process is a question of law.

9 The power under s75 is discretionary. It is well established that any exercise of this discretion must be approached with caution, noting that the hurdle to be overcome by a party making an application under s75 is very high. As Judge Bowman said in *Arrow International Australia Pty Ltd v Indevelco Pty Ltd*[1] at [32 and 34]:

> 31. There have been a number of decisions of the courts generally and of this Tribunal in relation to the principles which operate when applying a provision such as S.75 of the Act. In relation to this Tribunal, these were summarised by Deputy President

[1] [2005] VCAT 306

McKenzie in *Norman v Australian Red Cross Society* (1998) 14 VAR 243. One such principle is 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. This is consistent with the approach adopted by the courts over the years. As was stated by Dixon J in *Dey v Victorian Railways Commissioners* (1949) 78 CLR 62:-

> "The application is really made to the inherent jurisdiction of the court to stop the abuse of its process when it is employed for groundless claims. The principles upon which that jurisdiction is exercisable are well settled. A case must be very clear indeed to justify the summary intervention of the court to prevent a plaintiff submitting his case for determination in the appointed manner by the court …".

…

34. Whether or not a burden of proof in the strict sense exists in proceedings before this Tribunal, I am also of the view that the party making an application such as this is required to induce in my mind a state of satisfaction that the claim is obviously hopeless, unsustainable, and bound to fail, and that it is "very clear indeed" that this is so. [emphasis added]

10 Justice Garde in considering a s75 application in *Owners Corporation No. 1 PS537642N v Hickory Group Pty Ltd*[2] considered recent authorities:

8. In *Forrester v AIMS Corporation*, Kaye J considered the principles applicable to s 75(1) applications. Before a proceeding can be summarily dismissed:

   (a) it must be 'very clear indeed' that the action is 'absolutely hopeless'; or

   (b) the action must be 'so clearly untenable that it cannot possibly succeed'.

Kaye J also held that:

   (c) the strike out power 'may not be invoked where all that is shown is that, on the material currently put before the Tribunal, the complainant may fail to adduce evidence substantiating an essential element of the complaint'; and

   (d) the respondent to a complaint has the onus of showing 'that the complaint is undoubtedly hopeless'.

9 In *Ausecon Developments Pty Ltd v Kamil*, Judge Davis noted that for a strike out application to be successful, the proceeding must:

> … must be obviously unsustainable in fact or in law, can on no reasonable view justify relief, or must be bound to fail. A claim would be regarded as frivolous or vexatious or misconceived if it is

[2] [2015] VCAT 1683

> obviously groundless, made by a person without standing, or in respect of a matter which lies outside the VCAT's jurisdiction. A claim may be regarded as lacking in substance if an applicant cannot possibly succeed in establishing its claim, or the respondent has a complete defence. The power to strike out should be exercised with great caution.
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> 10 In *Fancourt v Mercantile Credits Pty Ltd* ('Fancourt'), the High Court held that:
>
> > … the power to order summary or final judgment is one that should be exercised with great care and should never be exercised unless it is clear that there is no real question to be tried.
>
> 11 In *Lay v Alliswell Pty Ltd*, Balmford J accepted that the High Court's observations in *Fancourt* are applicable to applications under s 75 of the VCAT Act.
>
> [citations omitted]

DO THE OCS HAVE STANDING TO BRING THE LOT CLAIMS?

Section 9 of the DBCA

11 In paragraph 12 of the Points of Claim dated 28 September 2017 ('POC') the OCs allege that they have suffered the loss and damage arising from the water ingress from the balconies into the private lots:

> Pursuant to section 9 of the [DBC Act] the Applicants may take proceedings against [LU Simon] on their own behalves and on behalf of lot owners pursuant to s.12 of the [OC Act] for a breach of the warranties referred to in section 8 as if each of the Applicants was a party to the contract.

12 At this directions hearing, Mr Forrest sought to clarify this pleading and confirmed that the OCs were seeking to bring the claims pursuant to s9 of the DBCA as the subsequent owners of the common property and, that the Lot Claims were brought pursuant to s12 of the OC Act. Notwithstanding this clarification, as the pleading is unclear, it is appropriate to consider whether the OCs have standing to bring the Lot Claims under s9 of the DBCA.

13 The builder contends the right to bring an action for the breach of the warranties in s8 of the *Domestic Building Contracts Act 1998* ('the DBCA'), which are implied into every domestic building contract, is personal to the owner and cannot be brought by another person on an owner's behalf. The builder relies on s9 of the DBCA which provides that the owner for the time being, of the building or land on which domestic building work was carried out, can bring proceedings for a breach of the warranties set out in s8, as if they were a party to the contract. In other words, s9 gives rise to a *chose in action* held by the owner for the time being.

14 The builder relies on the comments by the Full Court of the Federal Court in *Byers v Overton Investments*[3] at [22]:

> …it is trite law that proceedings to vindicate a chose in action can be pursued only by the person who has title to that chose in action or who is entitled to sue in [the] name of the person.

which was approved and applied by the Victorian Court of Appeal in *Chalker v Barwon Coast Committee of Management Inc*.[4]

15 In *Meier v Balbin*[5] the Tribunal held that each breach of warranty in respect of building work gives rise to a separate cause of action for breach of contract, and that the right to sue for a breach is 'personal' to the owner.

16 The builder succinctly summarises the position in its Statement of Facts and Contentions dated 26 April 2018 at [19]:

> In order for a suit for breach of a warranty to succeed, an applicant must prove: (a) that there has been a breach of the warranty; (b) that he or she has suffered a loss arising from the breach; and (c) the amount of the loss. "Once the defect is found and a breach of the building contract is established, damages are recoverable to compensate the applicant for the loss suffered arising from the breach." (*Saleeba v Yarram Court Management Pty Ltd* [2016] VCAT 1157 at [60]).

17 The builder also drew my attention to s50 of the DBCA which gives the Director [of Consumer Affairs] the right to prosecute an action on behalf of an owner, if the owner has a good cause of action, as confirmation that a proceeding for a breach of the s8 warranties must be brought by the person who has the cause of action. Relevantly, s50 does not contemplate the Director bringing the proceeding in his or her own name, but rather gives the Director the power to prosecute a claim on behalf of an owner, with any damages awarded being payable to the owner.

18 Accordingly, I find that the OCs do not have standing to bring the Lot Claims insofar as they seek to rely on s9 of the DBCA.

Is an owners corporation able to bring a legal proceeding on behalf of lot owners under the OC Act?

19 The OCs contend that in making claims in this proceeding on behalf of the lot owners they are providing the lot owners with a *service* as contemplated by s12 of the *Owners Corporations Act 2006* ('the OC Act') and, in particular, s12(1) which provides:

> **12 Provision of services to members and occupiers**
>
> (1) An owners corporation, by special resolution, may decide—

[3] (2001) 109 FCR 554
[4] [2005] VSCA at [29]
[5] [2015] VCAT 306

(a) to provide a service to lot owners or occupiers of lots or the public; or

(b) to enter into agreements for the provision of services to lot owners or occupiers of lots.

(2) An owners corporation may require a lot owner or occupier to whom a service has been provided to pay for the cost of providing the service to the lot owner or occupier.

20 Section 12 enables an owners corporation, authorised by special resolution, to provide services, outside its normal obligations of administration and maintenance, to lot owners, occupiers and the public. Section 12 services are provided on a 'user pays' basis whereas administrative and maintenance costs must be charged on a lot liability basis. Although 'service' is not defined in the OC Act, I accept it should be read widely and endorse the comments by DP Lulham in *Owners Corporations SP26824D v Saponja*[6] where he said at [28]

> "Service' is not defined for the purposes of section 12. The word is defined in section 47(3), but only for the purpose of section 47 which is irrelevant here. Whilst that definition refers to utilities, it is an inclusive definition. The word's ordinary meaning is very wide, and there is no doubt that procuring insurance is a service".

21 The arranging and co-ordinating of legal services for private lot owners who are parties to a legal proceeding, might be regarded as being a similar service to procuring insurance, and is, arguably, a s12 service. However, in my view, a s12 service does not include the bringing of a proceeding on behalf of lot owners. Generally, only the person in whom the cause of action vests can bring a legal proceeding. I would expect that any provision in any Act which enables a person to bring a legal proceeding on behalf of another person would be in clear terms. For example, under s165((1)(ba) of the OC Act the Tribunal may authorise an individual lot owner to bring proceedings on behalf of an owners corporation. In *Johnston v Stockland Development Pty Ltd*[7] the Tribunal made an order authorising an individual lot owner to bring proceedings on behalf of the owners corporation in relation to alleged common property defects which, she claimed, were causing internal damage to her unit. There are no similar provisions in the OC Act enabling the Tribunal to authorise an owners corporation to institute proceedings on behalf of an individual lot owner.

22 Accordingly, I find that the Lot Claims, insofar as the OCs rely on s12 of the OC Act are misconceived.

[6] [2011] VCAT 2402
[7] [2014] VCAT 1634

The OCs claim related to sections 4(b)(ii), 46(b) and 47(1) of the OC Act

23 The proposed APOC rely on the OCs obligations under the OC Act, and in particular, sections 4(b)(ii) and 46(b) of the OC Act which impose certain obligations on an owners corporation to maintain and repair common property and *chattels, fixtures, fittings and services*. Each of the proposed amendments is either 'further or alternatively'.

- In paragraph 16 of the proposed APOC the OCs allege:

  The waterproof membrane, the screed and the external tiles laid on the floor and the physical structure of the balconies are:

  (a) chattels, fixtures, fittings and services related to the common property of the building; and/or

  (b) equipment and/or services in or relating to a lot that is for the benefit of more than one lot and the common property; and/or

  (c) a service in or relating to a lot that is for the benefit of more than one lot and the common property.

- In paragraph 17 they allege that as a result of water leaks, and in accordance with their obligations under ss4(b((ii) and 46(b) of the OC Act they must repair and maintain the waterproof membrane, screed and external tiles laid on the balcony floors and the physical structure of the balconies.

- In paragraph 18 they allege that they are obliged to repair and maintain the common property which includes the non-compliant balcony fall levels and defective steel balustrades.

- In paragraphs 18 and 19 they allege that they are obliged to repair the absence of floor wastes in the individual apartments, which they contend are a service or equipment which is for the benefit of more than one lot and the common property. This claim relies on the OCs obligations under s47(1) of the OC Act.

24 The OCs allege that because of their obligation to repair and maintain the private lot defects that they have therefore suffered loss and damage, being the cost of rectification of the defects, which they contend they are entitled to recover from the builder and the architect. No legal cause of action is identified. Rather, the OCs appear to be alleging that the builder and architect caused it to incur the cost of rectification and therefore this allows the OCs to recover the cost of carrying out the rectification work from them. However, sections 4(b)(ii) and 46(b) of the OC Act must be read in conjunction with s49 which gives the OCs a right to recover the cost of works carried out by them in accordance with their repair and maintenance obligations from the relevant private lot owners.

25 Even if it is accepted that the OCs have an obligation to maintain and repair the defects in the private lots I am not persuaded this gives them a right to

bring the Lot Claims because these sections must be read in conjunction with s49.

26 Section 49 allows the owners corporation to recover the cost of carrying out any repairs and maintenance from lot owners, whether the repairs are to private lots or to the common property. Accordingly, in the usual course, one would expect that a lot owner required to reimburse an owners corporation for works carried out to his or her lot would then sue the builder and/or other building practitioners who they allege was responsible for the defective work.

27 I therefore find that the OCs claims insofar as they relate to the Lot Claims are misconceived and accordingly, they will be struck out.

THE OCS FORESHADOWED CLAIMS

28 At the directions hearing Mr Forrest foreshadowed a number of possible alternative claims by the OCs related to the Lot Claims including:

- claims under s19 of the *Water Act*;
- breach of a statutory duty by the builder; and
- a claim under the *Fair Trading Act 1999* or the *Australian Consumer Law*

29 During the directions hearing Mr Forrest identified other possible causes of action which the OCs might seek to rely upon. Until the substituted Points of Claim are filed and served I am unable to finally rule whether these are arguable. However, I consider it appropriate to make some observations.

Alleged statutory duty owned by builder to OCs

30 It was suggested that the builder and the architect owed a statutory duty to the OCs. Any statutory duty would need to be clearly identified in the substituted Points of Claim, including how it would give the OCs a cause of action in relation to the Lot Claims.

Alleged consumer/trader dispute?

31 It was submitted by Mr Forrest that, alternatively, the Lot Claims could be brought by the OCs under the *Fair Trading Act 1999* (or possibly the *Australian Consumer Law and Fair Trading Act 2012)* as a 'consumer/trader dispute. A consumer /trader dispute concerns the purchase or possible purchase or the supply or possible supply of goods or services by or to a consumer. It is difficult to conceive how the OCs, which did not exist at the time the apartments were built, could possibly be a purchaser or possible purchaser of goods and services, concerning property which they did not purchase and do not own.

THE ARCHITECT'S APPLICATION

Is it arguable that the architect owes a duty of care to the OCs?

32 The claim against the architect is brought in negligence. As I have found that the OCs do not have standing to bring the Lot Claims, it is unnecessary to consider whether it is arguable that the architect owes them a duty of care.

33 In relation to the OCs claim the architect relies on the High Court decision in *Brookfield Multiplex Ltd v Owners Corporation Strata Plan 61288*[8] and the decision of the NSW Supreme Court in *The Owners – Strata Plan No 74602 v Brookfield Australia Investments Ltd*[9]. For the purposes of these Reasons only I will refer to these as 'Brookfield Multiplex' and 'Brookfield Investments'.

34 In Brookfield Multiplex, the High Court held that the builder which constructed a serviced apartment complex, under a design and construct contract, did not owe a duty of care to the owners corporation to avoid pure economic loss. Mr Klempfner submitted, on behalf of the architect, that applying the same reasoning as the High Court in Brookfield Multiplex, that an architect does not owe a duty of care to an owners corporation.

35 In Brookfield Investments the court held that no duty of care was owed to the owners corporation by Brookfield, which once again constructed an apartment building under a design and construct contract.

36 In Brookfield Investments, Stevenson J, in discussing the High Court's determination that no duty of care was owed to the owners corporation relevantly said at [111]

> Each member of the Court concluded that the owners corporation was not relevantly vulnerable, essentially because those that the owners corporation represented were adequately protected by contract and were sophisticated investors.

37 In particular, the court held that the owners corporation was not in a position of vulnerability because the statutory warranties under the *Home Building Act 1989* (NSW) (similar to the s8 warranties) enured for the benefit of subsequent owners. However, once again, Brookfield Investments is concerned with a duty of care owed by a builder under a design and construct contract where the OC had the benefit of the statutory warranties owed to it by the builder. It is not concerned with a duty which may or may not be owed by an architect.

38 Mr Forrest referred me to *Chan v Acres*[10], where McDougall J held that whether an engineer, engaged to prepare structural drawings and to carry out inspections as requested, owed a duty of care to a subsequent owner

[8] (2014) 254 CLR 185
[9] [2015] NSWSC 1916
[10] [2015] NSWSC 1885

could only be determined after the relationship between the parties had been examined.

39 In *Chan* the applicant home owner brought a claim against the owner-builder vendor who had renovated the home, the engineer who had been engaged by the vendor to prepare certain structural drawings and to carry out inspections of the structural work, as requested, and the local council which had been engaged by the vendor as the Principal Certifying Authority.

40 At [98] his Honour said:

> Knowing that the other person may suffer loss is saying, in different words, that the other is, in the general sense of the work "vulnerable" to that loss. What is required to convert vulnerability from its generally accepted English meaning to the more limited and precise meaning that it has in this field of discourse? The answer is to be found, not at some abstract level of principle, but through detailed examination of the relationship.

And at [99]

> What, then, are the detailed features of the relationship that create vulnerability in this special sense? Again, in my view, the question is not capable of answer at a high level of abstraction. Again, it requires analysis of all salient features of the relationship, with that analysis informed analogically, by reference to precent.

And at [118]

> The judgments in *Brookfield [Multiplex]* reinforce the importance of examining "the salient features of the relationship"… It is only in doing so … that the Court can determine whether one party was vulnerable, in the relevant sense and whether the other owed it a duty of care.

And at [125]

> To my mind the reasoning in *Brookfield* shows that, in determining whether to impose a common law duty of care to avoid pure economic loss, in facts for which there is not precise authority (that is, where the precise duty of care has not been recognised in decided cases) the Court must look at the relevant features of the relationship between the plaintiff and the defendant. An essential feature is that the plaintiff must be shown to have been "vulnerable" in the sense explained, Reliance on the defendant and knowledge by the defendant of that reliance, will be at least an important and perhaps a necessary condition of vulnerability.

41 Justice McDougall confirmed the necessity of considering the precise facts to determine the existence of a duty of care in *Owners Corporation SP 80609 v Paragon Construction (NSW) Pty Limited*[11] at [11].

[11] [2018] NSWSC 266

42 I accept that to prove their claims the OCs must be able to establish that the architect owed them a duty of care which it breached and that, as a consequence, they have suffered damage. I also accept the submission on behalf of the OCs that whether the architect owed them a duty of care can only be determined after hearing the evidence. In the architect's reply submissions dated 15 June 2018 the architect makes a number of submissions as to why no duty of care is owed by it to the OCs. I consider these submissions should more properly be made during or at the conclusion of the final hearing including addressing matters such as:

- who the architect's contractual arrangements were with; and
- whether the existence of the s8 warranties which enure for the benefit of the OCs mean that the architect does not owe them a duty of care

43 In the OCs Supplementary Statement of Facts and Contentions dated 30 May 2018, the OCs refer to a number of authorities which, they contend, support their allegation that the architect owed them a duty of care.[12]

44 I am not persuaded that this is an appropriate matter to be determined summarily. In considering any application under s75 I am not required to consider or be satisfied of the likely success of the OCs' claims against the architect, or to determine whether or not the architect owes the OCs a duty of care. The architect's s75 application can only succeed if I am satisfied that the allegations made by the OCs are *'frivolous, vexatious, misconceived or lacking in substance*'. This does not contemplate a detailed consideration of the evidence or the relationship between the parties to determine whether or not the architect owed the OCs a duty of care.

45 Not only have I not been referred to any authority where a court has determined that an architect does not owe a duty of care to an owners corporation as the owner of the common property, I accept that whether a duty of care is owed in a particular circumstance cannot be determined until the relationship is fully explored.

46 As Senior Member Cremean observed in *Johnston v Victorian Managed Insurance Authority*[13] at [16]:

> The primary function of the tribunal, apart from alternative dispute resolution, is to conduct hearings. A hearing is a trial of the action. There should not be a trial before a trial. [emphasis added]

47 Accordingly, the architect's s75 application, insofar as it concerns the OCs claims in relation to alleged common property defects, must be refused. For the reasons set out above in relation to s12 of the OC Act, the OCs' claims against the architect insofar as they relate to the Lot Claims will be struck out.

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[12] *Voli v Inglewood* (1963) 56 QLR 256; *Gunston v Lawley* [2008] VSC 97; *Moorabool Shire Council v Taitapanui* [2006] VSCA 30

[13] [2008] VCAT 402

CONCLUSION

48 Whether an owners corporation in bringing proceedings in relation to defects in private lots is providing a service under s12 of the OC Act has long been an issue in this list. However, prior to this application, builders and other building practitioners have been prepared to engage in settlement discussions with owners corporations in relation to common property and private lot defects, as determining the exact location of defects can be difficult. Often there will be defects in both common property and private lots which cause the consequential damage, and the rectification of the defects will require access to both common property and private lots. Not infrequently, the rectification of common property defects will impact on private lots and may, as a consequence, also rectify private lot defects.

49 As noted earlier in these Reasons I make no findings about the location of the defects, and it may be that this will not be possible to determine until all of the expert evidence is before the Tribunal and has been tested. Hopefully, a consideration of the exact location of the defects will not hinder settlement discussions, in circumstances where this apartment building is apparently experiencing significant water ingress issues.

50 Suffice to say, I have determined that the OCs do not have standing to bring the Lot Claims either under s9 of the DBCA or as a service under s12 of the OC Act. Accordingly, their claims insofar as they relate to private lot claims must be struck out.

51 In relation to the architect's application, this is refused insofar as it relates to the OCs' claims in relation to alleged common property defects, as I cannot be satisfied that the OCs claims against it are not open and arguable.

52 I accept that the Tribunal is not a court of pleadings. However, when amending the Points of Claim, the Tribunal and the parties will be assisted by the OCs more clearly articulating their against the architect. As I have determined to strike out the Lot Claims, I consider it appropriate that rather than amending the current POC that the OCs, in effect, start again with a fresh document.

DEPUTY PRESIDENT C. AIRD