

# VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

## CIVIL DIVISION

### DOMESTIC BUILDING LIST

VCAT REFERENCE NO. D192/2009

### CATCHWORDS

Allegation proceeding commenced by lawyers without authority – application for proceeding to be stayed – whether Owners Corporation competent to institute proceeding concerning the common property – whether individual unit holders should be co-applicants.

<b>APPLICANT</b>	Owners Corporation No 514665E and the persons named in Schedule 1
<b>RESPONDENT</b>	Sunland Constructions (Vic) Pty Ltd (ACN 106 170 843)
<b>WHERE HELD</b>	Melbourne
<b>BEFORE</b>	Deputy President C Aird
<b>HEARING TYPE</b>	Hearing
<b>DATE OF HEARING</b>	21 May 2009 and 7 July 2009
<b>DATE OF ORDER</b>	30 July 2009
<b>CITATION</b>	Owners Corporation No 514665E v Sunland Constructions (Vic) Pty Ltd (Domestic Building) [2009] VCAT 1443

### ORDER

- 1 The claims by the applicants set out in schedule 1 to the application filed on 2 April 2009 are struck out and all parties save for the first-named applicant are removed as parties to the application.
- 2 **The proceeding is referred to a directions hearing before Deputy President Aird on 19 August 2009 at 9.30 a.m. at 55 King Street Melbourne - allow 1 hour.**
- 3 Costs reserved with liberty to apply.

### DEPUTY PRESIDENT C AIRD

#### APPEARANCES:

For Applicant	Mr V Ruta of Counsel with Mr J Bock, solicitor
For Respondents	Mr P Wood with Mr M Snow, solicitors

## REASONS

- 1 On 2 April 2009 an application was filed in relation to alleged defective works at the Yve Apartments. The applicants are the relevant owners corporation and the individual lot owners. The applicants claim that the defective works concern the common property and that the estimated cost of rectification is \$22,550,668.56.
- 2 At the first scheduled directions hearing on 21 May 2009, Mr Wood, solicitor, appeared on behalf of the respondent builder and filed an Application for Orders/Directions:
  - Application for order that all claims of all applicants be struck out or alternatively stayed.
  - Such other orders as the Tribunal thinks fit.
- 3 The application is supported by an affidavit by Matthew Jonathan Snow, solicitor, sworn on 21 May 2009 in which he deposes in paragraphs 4 and 5 to having been advised by two of the individual lot owners that they have:
  - (a) not retained Jack Bock Lawyers to act for it [him] or provided Jack Bock Lawyers or anyone else with instructions or authority to be named as an applicant to the Proceeding;
  - (b) does not wish to continue to be named as an applicant to the Proceeding;
  - (c) does not recall being notified of a special resolution authorising Jack Bock Lawyers to bring the Proceeding in the name of the Owners Corporation No 514665E.
- 4 Mr Wood confirmed that the application had been made at the earliest possible opportunity having regard to the comments of Starke J in *Australian Workers Union v Bowen* [1946] HCA 24 where he said:
  - The proper procedure for a defendant who wishes to challenge the retainer of the solicitor for the plaintiff is to file a substantive motion and not to raise the want of authority by way of defence to the proceedings.
- 5 Although the applicants had not been served with a copy of the application prior to the directions hearing, Mr Wood urged me to hear his submissions before adjourning the directions hearing to give the applicants an opportunity to consider the submissions and respond. This seemed a sensible approach and following the hearing of the respondent's submissions I adjourned the directions hearing for one week. Unfortunately I was indisposed on the next return date, and then on leave, and so the directions hearing was further adjourned to 7 July 2009.
- 6 At the commencement of the directions hearing on 7 July 2009, Mr Ruta of counsel, who appeared on behalf of the applicants, filed and served affidavits from his instructor, Mr Bock, solicitor, and from Neville Arthur Sanders of TEYS Melbourne Pty Ltd, the manager appointed by the owners

corporation. These affidavits were sworn on 26 May 2009 and, whilst it is true that orders were not made on 21 May requiring any affidavit material to be filed and served by the applicants, no plausible explanation for the failure of the applicants to file and serve affidavits in the intervening period was forthcoming. Being mindful of the provisions of ss97 and 98 of the *Victorian Civil and Administrative Tribunal Act 1998* I suggested that I hear from the parties in relation to the legal issues, and allow the respondent a further period in which to raise any concerns if it could not be satisfied that the owners corporation was duly authorised, under s18 of the *Owners Corporation Act 2006* ('the *OC Act*'), to bring these proceedings. At the conclusion of the directions hearing I made the following orders:

1. By 22 July 2009 the respondent must advise the first named applicant's solicitor and the principal registrar whether it takes issue with paragraph 6 of the affidavit of Mr Neville Arthur Sanders sworn 26 May 2009. If it takes issue with paragraph 6 any material in the form of affidavit/s and submissions must be filed and served by the respondent by 22 July 2009.
2. By 29 July 2009 the first named applicant must file and serve any material in reply.
3. The issue will be determined on the papers unless a party requests further hearing. I direct the principal registrar to refer any further material contemplated by orders 1 and 2 to Deputy President Aird in chambers with priority.
4. Costs reserved.

7 At the time, it seemed to me that had the affidavits been served in good time, any issues concerning the authority of the owners corporation to commence these proceedings might well have been capable of resolution prior to the directions hearing on 7 July. However, it has not proved as simple as one might have been expected, and there has been a flurry of correspondence between the parties' solicitors over the past week with various concerns being raised by the respondent's solicitors who, on 22 July, sent a facsimile to the principal registrar requesting an extension of the dates set out in the orders of 7 July to '*allow the parties to determine whether the issue of the special resolution needs to be examined in further detail at the Tribunal*'. Subsequently, on 24 July the respondent's solicitors again wrote to the principal registrar advising in paragraph 2:

For the purposes of this application, we do not make any objection to paragraph 6 of Mr Neville Arthur Sanders' affidavit [in which he sets out details of the special resolution authorising the commencement of these proceedings by the Owners Corporation]. We do however reserve our rights generally concerning this issue on the wider issue of responsibility.

8 Accordingly, I make no findings as to whether there is a valid special resolution authorising the owners corporation to institute these proceedings.

## Should the individual lot owners be co-applicants

- 9 The current applicants are the relevant owners' corporation and each of the individual unit holders. Although the respondent no longer takes issue with paragraph 6 of Mr Sanders' affidavit it contends that the applicants' legal representatives do not have authority to act on behalf of each of the individual unit holders.
- 10 Further, that the individual lot owners must be applicants because they are the legal owners of the common property as tenants in common, and will benefit from any award of damages. Section 30 of the *Subdivision Act 1988* provides:

- (1) In addition to section 24, when a plan containing common property is registered-
  - (a) any common property that is 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.

- 11 Counsel for the applicants submitted that the role of the owners corporation, under the *OC Act* is no more than that of agent for the individual lot owners which has been authorised to institute these proceedings, on behalf of the individual lot owners, by virtue of the passing of the special resolution deposed to by Mr Sanders. Further, that by virtue of the provisions of ss4 and 9 of the *OC Act* it does no more than manage the common property. Section 4 provides:

An owners corporation has the following functions-

- (a) to manage and administer the common property;
- (b) to repair and maintain –
  - (i) the common property;
  - (ii) the chattels, fixtures, fittings and services related to the common property or its enjoyment.

Section 9 provides:

An owners corporation may appoint or employ persons to assist the owners corporation in carrying out its functions.

Further, that the owners corporation had engaged the applicants' legal representatives to assist it in carrying out its management functions.

- 12 The competence of a body corporate (as owners' corporations were previously known) to institute legal proceedings in relation to the common property, in its name alone, was considered by Mandie J in *Body Corporate No 1/PS40911511E St James Apartments v Renaissance Assets Pty Ltd* (2004) 11 VR 41 ('St James') who held:

In my opinion, upon a proper construction of the provisions of the Subdivision Act and the Transfer of Land Act, a body corporate is the

registered proprietor of a fee simple in the common property and it is the equitable or beneficial ownership but not the legal ownership of the common property which is vested in the lot owners by s28(d) of the Subdivision Act [30]

He went on to say:

Section 28(e) of the Subdivision Act requires the Registrar to create folios of the Register for common property "in the name of the body corporate as nominee" for the lot owners. If a folio or folios of the Register must be created for common property, one would expect that the folio would identify the registered proprietor. That is what s27(7) of the Transfer of Land Act in fact requires, by providing that a folio of the Register is created by making a recording of, inter alia, "a description of the proprietor for the time being of the land for which it was created". Reading the two Acts together, the requirement of s28(e) of the Subdivision Act, that a folio for common property be created in the name of the body corporate, should in my view be construed as identifying the entity that is to be described in the relevant folio of the Register as the proprietor of an estate in fee simple in the common property. I do not think that s.28(e) of the Subdivision Act is therefore inconsistent with the requirement contained in s.27(7) of the Transfer of Land Act that a description of the proprietor for the time being be recorded in the relevant folio of the Register.[33] (emphasis added)

- 13 Although ss30 and 31 have since been substituted for s28(d) and (e) of the *Subdivision Act* the wording is substantially unchanged. Section 28 provided:

In addition to section 24, when a plan providing for the creation of one or more bodies corporate or containing common property is registered—

- (a) each body corporate for which the plan provides is incorporated; and
- (b) the owners of the specified lots become the first members of the body corporate; and
- (c) the owners for the time being of the lots are the members of the body corporate while they are owners; and
- (d) any common property vests in those owners as tenants in common in shares proportional to their lot entitlement; [s30] and
- (e) the Registrar must create folios of the Register for any common property in the name of the body corporate as nominee for those owners but must not produce a certificate of title for those folios, and may require submission of and cancel any existing certificate of title for common property [s31] (emphasis added)

- 14 Following *St James* as I am bound to do, I am satisfied the owners corporation is competent to institute these proceedings in its own name and that in doing so it is not acting merely as the manager of the common property, or as the agent of the individual lot owners.

- 15 I am not persuaded there is any reason why the individual lot owners should be co-applicants in relation to a claim concerning the common property, nor am I satisfied the applicants' legal representatives have authority or instructions to act on behalf of any party other than the owners corporation—the first-named applicant. The passing of the special resolution does not authorise the legal representatives to act on behalf of the individual lot owners. A special resolution is required under s18 of the *OC Act* before legal proceedings can be instituted by the owners corporation. As discussed above, it is competent for the owners corporation to institute these proceedings in its own right as the registered proprietor of the common property.
- 16 When read together, it is clear that, in addition to Mandie J's determination in *St James*, the import of the relevant provisions of the *Subdivision Act* and the *OC Act* are that an owners corporation is more than simply the manager of the common property. For instance, Division 3 of the *Subdivision Act* empowers the relevant owners corporation, and not the individual lot owners, to alter a subdivision providing certain pre-conditions are satisfied.
- 17 Once a special resolution has been passed under s96 of the *OC Act* the proper entity for the conduct of litigation concerning the common property is the relevant owners corporation. Although all lot owners are bound by the terms of a special resolution even if they opposed it, this does not mean they are deemed to have authorised the legal representatives engaged by the owners corporation to act on their behalf as individuals.

#### **Whether the claims are limited to the common property**

- 18 There is a dispute between the parties as to whether the claims the subject of this application relate solely to the common property. I have been provided with extracts from the relevant plan of subdivision. However, in my view it would be premature to determine this issue until the parties and the tribunal have the benefit of expert evidence as to the interpretation of the relevant plan.
- 19 Accordingly, I will order that the claims by the individual lot owners, who are named in the schedule to the application filed on 2 April 2009, be struck out and that they be removed as parties to the application. Of course, if they review their position and decide there are claims relating to their individual units, they can apply to be joined as applicants to this proceeding, or institute separate proceedings.
- 20 I will reserve the question of costs with liberty to apply, and refer the proceeding to a directions hearing.

**DEPUTY PRESIDENT C. AIRD**