VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

BUILDING AND PROPERTY LIST VCAT REFERENCE NO. BP62/2015

APPLICANT	Dr Anne-Marie Pellizzer
RESPONDENT	Mrs Helen Joy Buckley
WHERE HELD	Melbourne
BEFORE	Senior Member R. Walker
HEARING TYPE	Hearing
DATE OF HEARING	14-16 October 2015
DATE OF ORDER	24 February 2016
CITATION	Pellizzer v Buckley (Building and Property) [2016] VCAT 255

Order

Further submissions having been received from the parties in regard to the issue of double recovery and other matters and those submissions having now been considered, the following final orders are made:

1. The Respondent, whether by herself, her servants and agents or otherwise howsoever, is restrained from allowing any water to enter the shower recess of her unit being Unit 603, 13 The Esplanade, St Kilda 3182, until further order or until such time as the said shower recess has been made watertight by an appropriate tradesman.
2. This proceeding is otherwise dismissed.
3. No order as to costs.

SENIOR MEMBER R. WALKER

REASONS FOR DECISION

Background

1. The substantive decision in this proceeding was handed down on 3 December 2015. In the accompanying order I directed that any further submissions in regard to the issue of double recovery be filed and served by 18 December 2015.

2. A short submission was filed and served on behalf of the Second Respondent suggesting that I should award no damages to the Applicant on the basis that she has already been adequately compensated by the amount that she received from the Owners Corporation. Reliance was placed upon the case of *Townsend v. Stone Toms & Partners* (1984) 27 B.L.R. 26 that I referred to in the reasons that I handed down.

3. The submissions received on behalf of the Applicant were lengthy and sought the award of substantial damages and costs. Although the leave that I gave to file further submissions had been confined to the issue of double recovery, the submissions filed on behalf of the Applicant dealt with substantially more than that and asked me to revisit the assessment of damages that I made.

4. Although I gave no leave to make such further submissions I will respond to the matters raised.

"Testing" the Applicant's expert evidence

5. Mr Mason submitted that I had assumed the role of "testing" the Applicant's expert evidence. As I pointed out in the Reasons for Decision, the fact that the Second Respondent had called no expert evidence to contradict the Applicant's experts was no reason to discount the evidence of those experts. However, in the absence of any contradictory expert evidence I was required to look carefully at the expert evidence that I had together with the other evidence, including the site visit, always bearing in mind that there was no expert to point out any matters that might have favoured the Second Respondent's case.

6. In the course of receiving the evidence of the Applicant's experts I asked questions concerning matters that I thought required clarification or explanation and gave them the opportunity to address matters about which I was concerned. It was not for me to test their evidence in any other sense, nor did I assume such a role.

Damages

7. Mr Mason submitted that the reasons that I provided "… do not adequately consider the unchallenged evidence led during the hearing in this proceeding regarding the cost of repairing the Applicant's apartment."

8. Although that evidence was unchallenged, the question was, and is, not what it will now cost the Applicant to renovate her unit but what damages, if any, should be ordered to be paid to her by the Second Respondent? That depends upon the extent to which the present state of the Applicant's Unit is proven to

have been caused by flows of water from the Respondent's Unit that she caused and which occurred within the limitation period. That issue was gone into very carefully and in great detail in the Reasons for Decision that I gave.

9. Mr Mason submitted that Mr Naughton's evidence was that, given the nature of the vermiculite ceiling, a satisfactory finish cannot be achieved if attempts are made to replace only segments of it. As I pointed out in the reasons, the repair of the crack in the concrete slab between the two units, which was not the fault of the Second Respondent, will necessitate the replacement of the vermiculite ceiling above the shower recess in any case and there is no evidence that the flows of water complained of have added to the cost of that.

10. Mr Mason submitted that an allowance should be made for loss of rental that will be suffered over the period during which the repairs will be carried out. The repairs for which I have allowed damages are very minor and there is no evidence that such a small scope of works would require the tenant to vacate the premises. The repairs to the crack in the slab will be much more extensive than the largely cosmetic damage caused by the relevant flows from the Respondent's Unit. The renovation of the forty year old bathroom will be much greater again.

11. Mr Mason submitted that the damages that I assessed do not take into account the water damaged ceiling at the bedroom entrance. That is a reference to some minor staining in the vermiculite that the experts attributed to a continuation of the crack in the slab above the shower recess. The need to repair the crack in the slab is not due to any flow of water from the Respondent's unit and such a repair will necessitate the reworking of that part of the ceiling in any case.

12. Mr Mason submitted that the damages assessed did not take into account the damage to the walls above the shower recess. Such damage as could be attributed to the flows of water complained of were found to be cosmetic only. The experts had not assessed the cost to rectify the very small amount of damage that I found had been caused but I believed that an amount of $1,000.00 would have been sufficient. The alternative would have been to award nominal damages only.

13. Mr Mason pointed out that I did not refer to the evidence of the real estate agent as to the rental value of the Applicant's Unit. That question did not arise because of the findings of fact that I made. I do not propose to repeat the reasons that I gave in regard to the loss of rental claim.

Double recovery

14. Mr Mason submitted that the award of damages against the First Respondent will not give rise to a double recovery because the Applicant's claim against the First Respondent "…did not encompass a claim for loss or damage arising from an alleged breach of section 16 of the *Water Act* 1989". He said that the claim against the First Respondent was based upon an Estoppel.

15. The bases of the respective claims against the two Respondents are not relevant to the question of double recovery. The question is, whether the Applicant, with concurrent claims against two persons, has already recovered all or part of her

loss from the other party. The loss claimed against both Respondents was the same in each case. I do not accept Mr Mason's submission that it is not "…the same damage".

Conclusion

16. I am satisfied that the Applicant has already recovered the full amount of her loss from the First Respondent and that therefore there are no further damages to be awarded against Second Respondent. The claim for damages will therefore be dismissed.

17. Since it is likely that any further use by the Second Respondent of her shower recess will result in further flows into the Applicant's Unit there will be an order restraining her from allowing any water to enter the shower recess until such time as it is properly waterproofed.

Costs

18. Mr Mason submits that the Applicant should be awarded costs of the proceeding. The power to award costs is conferred by s.109(1) of the *Victorian Civil and Administrative Tribunal Act* 1998 which (where relevant) provides as follows:

> "**Power to award costs**
>
> (1) Subject to this Division, each party is to bear their own costs in the proceeding.
>
> (2) At any time, the Tribunal may order that a party pay all or a specified part of the costs of another party in a proceeding.
>
> (3) The Tribunal may make an order under subsection (2) only if satisfied that it is fair to do so, having regard to—
>
> (a) whether a party has conducted the proceeding in a way that unnecessarily disadvantaged another party to the proceeding by conduct such as –
>
> (i) failing to comply with an order or direction of the Tribunal without reasonable excuse;
>
> (ii) failing to comply with this Act, the regulations, the rules or an enabling enactment;
>
> (iii) asking for an adjournment as a result of (i) or (ii);
>
> (iv) causing an adjournment;
>
> (v) attempting to deceive another party or the Tribunal;
>
> (vi) vexatiously conducting the proceeding;
>
> (b) whether a party has been responsible for prolonging unreasonably the time taken to complete the proceeding;
>
> (c) the relative strengths of the claims made by each of the parties, including whether a party has made a claim that has no tenable basis in fact or law;

(d) the nature and complexity of the proceeding;

(e) any other matter the Tribunal considers relevant."

19. Since the substantive claim has failed and the only order that I propose to make is an injunctive order requiring the Respondent to continue to do what she is already doing, I see no reason for departing from the general rule established by s.109(1) that the parties pay their own costs.

SENIOR MEMBER R. WALKER