VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

BUILDING AND PROPERTY LIST

VCAT REFERENCE NO. BP1534/2016

CATCHWORDS

Application for leave to file amended defence and witness statement and to discover further documents made late in a proceeding; grounds to be considered.

APPLICANT	Ms Margaret Anderson
FIRST RESPONDENT	Holden Peel Projects Pty Ltd (ACN 006 727 073)
SECOND RESPONDENT	Owners Corporation PS603262H
JOINED PARTY	Capco Industries Pty Ltd (ACN 115 035 811)
WHERE HELD	Melbourne
BEFORE	Senior Member S. Kirton
HEARING TYPE	Interim application
DATE OF HEARING	1 - 17 April 2019
DATE OF ORDER	17 April 2019
DATE OF REASONS	31 May 2019
CITATION	Anderson v Holden Peel Projects Pty Ltd (Building and Property) [2019] VCAT 801

INTERIM ORDER

Leave to the second respondent to file its proposed Points of Defence to Further Amended Points of Claim dated 15 April 2019, the proposed witness statement of Mr S. Read, and the bundle of documents provided by it on 11 April 2019 is refused.

SENIOR MEMBER S. KIRTON

APPEARANCES:

For the Applicant	Ms M. Anderson in person
For the First Respondent	Mr B. Reid of counsel
For the Second Respondent	Mr J. Wilkinson of counsel
For the Joined Party	Mr B. Hall, solicitor on 1 April 2019, excused from further attendance

REASONS

1 On 15 April 2019, which was day 11 of the 13 days originally allocated for the hearing, the Second Respondent (the OC) made an application for leave to file the following:

a. proposed Points of Defence to Further Amended Points of Claim dated 15 April 2019 (proposed APoD),

b. the proposed witness statement of Mr S. Read, and

c. the bundle of documents numbered 1 to 201 provided by it on 11 April 2019 contained in a Tribunal Book (proposed OCTB).

2. The application was opposed by the applicant (Ms Anderson) and the First Respondent (the builder). I commenced hearing submissions that day and then further submissions occupied most of the day on 17 April 2019.

3. On 17 April 2019, at the conclusion of oral submissions, I refused the application for leave. I informed the parties I would deliver reasons as soon as possible thereafter. These are those reasons.

Background

4. Ms Anderson commenced her claim in the Tribunal against the builder in November 2016. The OC was joined to this proceeding in June 2017, in circumstances where Ms Anderson had been complaining of water ingress to her apartment to the OC since at least 2012. The OC was legally represented throughout the proceeding, particularly by solicitors HWL Ebsworths (HWLE) until they filed a Notice Ceasing to Act on 27 March 2019.

5. In 2018 the OC commenced proceeding BP1093/2018 against the builder for its loss and damage caused by the water ingress problems. The Tribunal has case-managed the two proceedings, as well as a third proceeding brought by other owners (BP1407/2018), so that they have been dealt with together.

6. The OC failed to comply with orders made during the course of this proceeding and BP1093/2018, including most relevantly the Orders :

a. to file an Amended Defence in BP1534/2016: made 26 October 2017 (filed 42 days late)

b. to file a Further Amended Defence in BP1534/2016: made 20 March 2018 (filed 22 days late), 20 December 2018 (not filed), 1 March 2019 (not filed)

c. to file expert reports: made 14 February 2018 (13 days late), 10 July 2018 (7 days late)

d. to file affidavits of documents: made 23 April 2018 (20 days late), 5 March 2019 (not filed)

e. to file witness statements: made 1 March 2019 in BP1534/2016 and 5 March 2019 in BP1093/2018 (not filed)

f. to file witness statements in reply: made 1 March 2019 in BP1534/2016 and 5 March 2019 in BP1093/2018 (not filed).

7 I also note there was a delay of at least 9 months by the OC in commencing proceeding BP1093/2018. At the directions hearing on 26 October 2017 Mr T Graham, solicitor with HWLE, advised that the OC was considering bringing a claim against the builder. The proceeding was not issued until 24 July 2018. The cause of the delay has not been explained.

8 The hearing of the three proceedings commenced on 1 April 2019, at which time the Chairperson of the OC applied for an adjournment. The grounds for the adjournment were that the OC was no longer legally represented and required time to prepare to run the case itself. These issues had been canvassed at a compliance hearing on 27 March 2019, when orders were made that the hearing should commence as scheduled on 1 April 2019, but that some flexibility in the way the hearing was run would be required. I note that Ms Anderson also required flexibility in order to provide further evidence during the hearing. The OC's application for an adjournment was refused, although with the consent of all parties it was agreed that the running of the hearing would be ordered so that the OC had at least a week before it had to provide an opening, or cross-examine any witnesses other than experts.

9 By 3 April 2019 the OC had directly engaged Mr Wilkinson of Counsel, and he foreshadowed that the OC's witness statement was being finalised. He also foreshadowed that there were some documents which had not yet been discovered, which he wanted to insert into the Tribunal Book.

10 It was not until 11 April 2019 that the proposed OCTB was provided. The witness statement and the proposed APOD were provided on 16 April 2019.

The OC's position

11 The OC relies on sections 98(2) and 102(1)(a) of the *Victorian Civil and Administrative Tribunal Act* 1998 (VCAT Act) which provide as follows:

> 98(2) Without limiting subsection (1)(b), the Tribunal may admit into evidence the contents of any document despite the non-compliance with any time-limit or other requirement specified in the rules…

> 102(1) The Tribunal must allow a party a reasonable opportunity-
>
> (a) to call or give evidence …

12 The main reason given by the OC for failing to serve the proposed APOD, OCTB and witness statement prior to the commencement of the hearing is that, unbeknown to them at the time, HWLE had a "pens down" policy from about 19 February 2019 and did not actively work on their case from that date. Once they formally ceased acting on 27 March 2019 the OC committee took over the running of the proceedings. Mr Wilkinson submitted that he and they had been working diligently throughout the first week of the hearing to get the documents prepared. The committee are all volunteers and are not sophisticated litigants.

13 They say that the proposed APOD had been substantially prepared by HWLE as at the date they ceased working. The document seeks to bring the pleadings into conformity with the case that is already underway. That is, it seeks to plead a defence to Ms Anderson's and the builder's allegation that the OC failed to properly maintain the building.

14 The Chairperson of the OC, Ms Haydon, deposed[1] that it was only after hearing the opening submission of the builder's Counsel (Mr Reid) on 1 April 2019 that the OC appreciated all the history of maintenance is in dispute. They then set about finding all maintenance records and put these into their proposed OCTB, which was finalised by 11 April 2019. She explained that prior to this, the OC had relied on their solicitors. They responded to requests made by HWLE to provide documents as part of the discovery process in 2018. They produced a series of emails passing between the OC manager, their solicitor and the committee which they say show that the OC committee directed its attention to documents in the 2015 - 2017 date range because that is what they were asked to do by their solicitor. When HWLE later asked them to provide documents in the 2011 - 2014 period, Ms Haydon provided these on 7 February 2019. However HWLE did not discover these, perhaps due to its "pens down" policy.

15 As for the witness statement, throughout the first 2 weeks of the hearing Mr Wilkinson advised the Tribunal that the OC was trying to identify the appropriate person to give evidence on its behalf, and that a witness statement was being prepared. However I note that no details or affidavit were offered to explain these difficulties.

16 The OC submits that the Tribunal is required to give the parties a fair hearing. Section 98(1)(d) of the VCAT Act provides for hearings to be conducted with as little formality and technicality and as much speed as a proper consideration of the matters before it permits. Further, section 98(2) allows the Tribunal to admit into evidence documents despite any non-compliance with orders. They say that parliament has turned its mind to a

[1] Affidavit of Belinda Ann Haydon in proceeding BP1093/2018 affirmed 15 April 2019

positive inference when there is non-compliance by making these sections act as a safety net for cases such as this.

17 It is more important to hear the real issues than to comply with procedural orders. As the hearing is not yet completed, it is not too late to do that. The builder says this case is all about causation, which the OC agrees with, and the proposed APOD and documents in the proposed OCTB are necessary "to get to the bottom of causation".

18 Ms Anderson will only receive "justice and honesty" if all issues are dealt with openly. Further, as she is a member of the OC, she remains liable for the extra levies that may be required if the OC is found liable to rectify the building. It would be prejudicial to her if the OC's evidence was not allowed.

19 There has been no real delay in this hearing occasioned by the OC failing to file its witness statement and the proposed OCTB. The hearing was not adjourned. Expert evidence has been given and Ms Anderson's evidence is in progress. It is necessary to adjourn the hearing at this point anyway, as the number of allocated days has been used. Accordingly if an adjournment were required to respond to the OC's documents, that has already been accommodated.

20 The other parties need to demonstrate they would suffer a lasting and final prejudice if the documents are admitted, and that such a prejudice outweighs any prejudice to the OC (including Ms Anderson as a member of the OC) if the documents are not admitted. They concede that the other parties may be inconvenienced, and that the builder will have prepared its case based on the discovered documents, but they have now had possession of the proposed OCTB for five days and no evidence has yet been heard about the maintenance of the building, other than Ms Anderson's. It is not too late for these documents to be admitted into evidence.

21 On the other hand, the final and lasting prejudice to the OC is that it has a leaking building full of occupants waiting to have it fixed. The cost of the defects is at least $190,000. This proceeding is the one and only chance the OC has to recover the money they need for those repairs. The proposed evidence goes to defending the contributory negligence claim. If this is refused then the increased cost to the OC (including Ms Anderson) will make their levies much higher and each apartment much harder to sell.

22 Mr Wilkinson tendered a number of authorities, which set out the established principles, including that the Tribunal does not stand on formalities or regimented procedure[2], section 98 mandates the approach of the Tribunal being to focus on the substance of the situation rather than on technicalities[3], and so long as the substantive objective is ultimately obtained it would not be in the interests of justice to send the entire

[2] *Matsoukatidou & Matsoukatidou v Yarra Ranges Shire Council* [2013] VSC 299 at [27]
[3] *Vidic Group Pty Ltd & Ors v Glenelg CC* [2011] VCAT 172 at [25]

proceeding back to 'go' because the steps have been taken in the wrong order[4].

Ms Anderson's submission

23 Ms Anderson objected to the late service of the material. She made the point that she has been able to act without solicitors and the OC could have done so. She has attended the Tribunal approximately 15 times throughout the course of these proceedings. At no time did the Chairperson of the OC Subcommittee on Building Defects attend.

24 Ms Anderson submitted that the attempt by the OC to now rely on documents not previously discovered is consistent with the way it has ignored her throughout the proceeding. A document in the proposed OCTB indicates that the OC has paid to rectify water ingress at apartment 9, but has ignored her complaints about apartment 10. She says that the OC or its solicitors ignored her requests for them to produce documents relating to meetings, maintenance, proposals to rectify her apartment and points to their failure to comply with the Tribunal's orders.

25 She disputed that HWLE had a "pens down" policy from early February. Ms Haydon deposed that this was from 15 February or 22 February 2019. However Ms Anderson produced correspondence from HWLE sent to her on 4 March 2019 in which Ms M Ang advised "You have requested that I confirm whether Mr Graham is still acting in this matter. I confirm that I am supervised by Mr Graham. Accordingly, both Mr Graham and I have the care and conduct of this matter."

26 Further Ms Ang from HWLE again wrote to Ms Anderson on 5 March 2019 regarding access for inspection of documents. At no time did HWLE say that it had put the "pens down".

27 Ms Anderson said that she would be significantly prejudiced if the documents were admitted into evidence. She said she has five more folders of evidence from other owners about the problems with pigeons in the building from when she was on the OC committee until 2016. She has not produced those documents to date because she understood from the Points of Defence filed by the OC that it did not contest the lack of maintenance allegation. However if the proposed APOD is admitted, then all those documents will become relevant and she will need to discover them.

28 Ms Anderson also said that she would suffer a final and lasting prejudice if she is now required to examine the OC's documents. She said that her health has deteriorated significantly in the last year, since the time the documents should have been discovered. She would have had the physical and mental capacity to examine and deal with the documents a year ago, but has now been told by her doctor that "this stress must stop".

[4] *Sheradar Pty Ltd v Casey CC* [2011] VCAT 1414 at [55]

29 Further, allowing the OC to make these significant changes to its defence would mean the hearing would have to start again. Due to the Tribunal's listing pressures, it is not possible to hear the matter until 2020. This would cause irremediable prejudice to Ms Anderson, as she has been forced to vacate her apartment, rent elsewhere, continue to pay her mortgage and rent, deal with her health issues and give up work.

The builder's position

30 The builder opposes the admission of the proposed APOD, OCTB and witness statement, on the grounds that they fundamentally change the case which the builder and Ms Anderson have to meet. Counsel for the builder, Mr Reid, provided a lengthy and detailed submission, which I summarise as follows.

The proposed APOD

31 The builder disputes the OC's submission that they were not aware that maintenance was an issue in the proceeding and Mr Reid directed me to the pleadings. Ms Anderson's Points of Claim refer to an alleged lack of maintenance since 2010[5]. In its Points of Defence to the OC claim made against it, the builder relies on a lack of maintenance since 2010 and a failure by the OC to take any steps since the defects were known[6]. The OC did not make any Reply to these pleadings, therefore the OC has never stated as a fact that it undertook repairs or maintenance, or had others do that work. The OC has never alleged or asserted that it did maintain the building, or repair the defects causing the water ingress, or stop the flow of water since the issue was raised in 2017.

32 Despite being given the opportunity to file an amended defence prior to this hearing commencing, the OC elected not to do so. The orders made on 20 December 2018 were made following an amendment by Ms Anderson to her claim. The OC was ordered to file and serve an amended Points of Defence in response by 29 March 2019. HWLE acted for the OC throughout this period, and either the OC made a tactical decision to rely on the original Points of Defence or HWLE were not instructed to, or failed to, file an amended defence.

33 Further, the expert opinions filed by the OC are consistent with the OC's pleaded position. The Scott Schedule prepared by Roscon (the OC's expert) agrees that a lack of maintenance is a significant issue. Expert evidence was given during the hearing (prior to this application being made) by Mr Pullikotil (from Roscon) confirming that the main causes of the water entry are the rain heads, gutters and a lack of maintenance. Therefore the OC's submission that they were not aware that maintenance was an issue until the first day of the hearing is wrong.

[5] TB3, 24
[6] TB308-310

34 Further, the OC's contention that the proposed APOD was well advanced by HWLE, but was not finalised because HWLE ceased working, can be rejected. Discrepancies in formatting, style and content between the proposed APOD and the filed Points of Defence indicate that the former document was not prepared by HWLE. The most obvious example is that the proposed APOD includes the name of a solicitor who has not worked at HWLE for over a year. In the absence of any affidavit evidence from the OC, the Tribunal should not accept the submission from the bar table that the document was well advanced. Without that evidence, the Tribunal should conclude that the proposed APOD is a very recent invention.

35 In any event, the proposed APOD are lacking necessary particulars of when the OC "provided instructions", "proactively engaged" contractors, or "reactively engaged" contractors (alleged at paragraph 24). Before allowing these statements, the OC must marry up each occasion when it provided instructions, or proactively or reactively engaged contractors, with every complaint made, every meeting held and documents which have not yet been discovered. It would put a correspondingly heavy burden on the builder and Ms Anderson to have to investigate these allegations.

36 Further deficiencies in the proposed APOD include the allegation at paragraph 24(f) that the builder somehow can be liable for a breach of the *Owners Corporation Act* 2006. Paragraph 31 relies on Roscon reports as evidence that the OC did investigate the water entry, in circumstances where the OC has failed to discover all the Roscon reports and underlying documents.

The proposed OCTB

37 The next point disputed by the builder is whether the OC made all appropriate efforts to discover the relevant documents when it was ordered to do so. They referred to the documents exhibited to the affidavit of Ms Haydon, which establish the following:

a. On 23 March 2018 HWLE asked the OC to provide them with copies of Notices and Minutes of any AGM or SGM at which defects and maintenance of the property was discussed or resolved, any maintenance plans, details of routine and non-routine maintenance programs and contractors, and relevant correspondence in which defects and maintenance of the property were discussed.

b. On 27 April 2018 HWLE sought further documents, including any further reports, quotations or tax invoices related to any rectification works undertaken from January 2015 to December 2017.

c. On 1 May 2018 the OC's manager, Strata Plan, advised HWLE that it has provided the document list and any relevant invoices to the OC committee "for review". The builder expressed the concern that from this email, it appears that the OC committee was selectively deciding

which documents should be passed from Strata Plan to HWLE.

d. On 1 and 2 May 2018 the OC provided a number of documents to HWLE, including quotes for proposed rectification works and further reports. Details of these documents are not clear, as they refer to links in a google drive, access to which has not been provided.

e. On 5 June 2018 HWLE asked for any notices and minutes of any meetings held in 2011 to 2014.

f. On 2 September 2018 the OC provided HWLE with a list of OC meetings held in the 2016-2017 period. There are 35 meetings in the list. The majority of these minutes were not discovered in the OC's original list of documents, despite Ms Anderson's regular requests for copies of all minutes. Ms Anderson's evidence was that the solicitor from HWLE stated at a directions hearing that he was instructed that the OC does not meet regularly and so she was "gobsmacked" to now see this evidence of meetings being held every week. Of even more concern is that the majority of these minutes still do not appear in the proposed OCTB.

g. On 7 February 2019 the OC provided additional information to HWLE and its then Counsel, including documents relating to "pigeon eradication program".

38 The builder then submits that even if the OC has an excuse for not discovering the 201 pages of documents earlier, the Tribunal cannot be satisfied that all relevant documents have now been discovered. The builder's lawyers have identified manifest omissions from the proposed OCTB. Examples of relevant documents which appear to exist but are not contained in the proposed OCTB include:

a. a draft report or reports by Roscon referred to in the HWLE email of 23 March 2018,

b. the document called 'Updates to Roscon Holistic Report V2' listed in the email of 1 May 2018,

c. many of the minutes of meetings held in the 2016-2017 period, listed in the email of 2 September 2018,

d. the 'Excel list compiled by Danielle' referred to in the email of 2 May 2019,

e. the invoices referred to in the email of 1 May 2018, and

f. the documents relating to the "pigeon eradication program" and advice from Mr Smith referred to in the email of 7 February 2019.

39 The proposed OCTB also contains many documents which are incomplete. Many of the documents are multiple pages, but it can be seen from the footers that many of the pages are missing. For example one document provided contains the footer 'page 10 of 15' and 'page 11 of 15', while pages 1-9 and 12-15 are missing. There are many examples of such incomplete documents.

40 The builder submits that the Tribunal cannot assess the relevance of the documents in the proposed OCTB, when it is obvious that the book is missing many relevant documents and that many of the documents which are provided are incomplete. Instead, the conclusion to be drawn is that the OC is continuing to be selective in the documents it discovers. Even documents called for by Mr Reid during the hearing on 15 April 2019 have not been provided.

41 Further, a number of pages in the proposed OCTB contain a notation they were printed on 13 February 2019. On that basis the OC's submission that they only located these documents after 1 April 2019 must be rejected.

42 In response to the OC's contention that they should be given an opportunity to be heard, the builder says that they have had that opportunity since 2016. They have been legally represented by HWLE between July 2017 and 27 March 2019. They then directly engaged Counsel on 2 April 2019. Deliberate choices were made in respect of what matters to plead, what documents to discover and what evidence to call. Nothing in the VCAT Act obliges the Tribunal to allow the OC to now re-cast its case, at such a late stage of the proceeding.

The witness statement

43 As for the witness statement, on 13 February 2019 HWLE advised the parties that the witness statement would be ready by 15 February 2019. It was not provided until 16 April 2019. Further, it is not signed and the OC has not confirmed that Mr Scott Read will actually be called as a witness. Given their statements during the first two weeks of the hearing that they were finding it difficult to find someone to give evidence, and the lack of affidavit evidence, it cannot be assumed that Mr Read will attend. Further, the contents of the statement are inconsistent with the minutes of the OC meetings.

Section 97 and the obligation to act fairly

44 While section 97 provides that the Tribunal must act fairly and according to the substantial merits of the case, that section must be read in the context of the OC's conduct. The OC's wilful disregard of orders previously made is a relevant consideration. The fact that even now it has failed to discover all relevant documents indicates that the OC is still selectively choosing the documents it provides in order to present its best case. The first version of Roscon's report has still not been discovered, nor have the notes, revisions

or correspondence passing between the OC and Roscon, despite having been called for during the hearing.

45 Section 97 requires fairness be accorded to all parties. It cannot be fair to Ms Anderson or the builder to allow the OC to now produce evidence relating to maintenance, in circumstances where even as at today, the OC's expert agrees that lack of maintenance is the predominant or major cause of water entry. Ms Anderson's complaint has consistently been there were years of lack of maintenance. The correspondence which she has discovered supports this complaint. Yet the OC now seeks to mount a defence that it has appropriately cleaned and maintained the building, three years after the proceeding was commenced.

46 The builder also denies that leniency should be accorded to the members of the OC Committee because they are volunteers. They were receiving advice from HWLE, including advice about what documents they were required to discover. They may be ordinary people, but if they are on the committee, they are acting as company directors and should be aware of their obligations. Further, they employed Strata Plan to advise them, and carry insurance against any personal liability[7].

47 It is not appropriate to blame their failings on HWLE's supposed inaction. Ms Haydon's initial evidence was that HWLE had effectively ceased working on the matter on either 15 or 19 February 2019. The OC was not aware that this meant it had failed to comply with the orders of 1 March 2019, and had not properly prepared for the hearing. However, Mr Reid disputed Ms Haydon's evidence about the date that HWLE ceased working on the matter. On 1 March 2019 HWLE briefed Counsel to attend the directions hearing and advised that they would be filing and serving a Supplementary List of Documents. They sent emails on 4 and 5 March 2019 indicating they were still acting. They ultimately filed a notice ceasing to act on 27 March 2019. I note that after being shown that documentation the OC conceded that HWLE were still acting for it until 27 March 2019.

Prejudice

48 The builder's solicitor swore an affidavit[8] in which she set out the prejudice to her client if the OC's application were accepted. In summary, she said that further work will need to be undertaken on behalf of the builder, including:

a. briefing its expert to reconsider his position regarding the maintenance of the property and to prepare a supplementary report if required,

b. drafting a further reply witness statement of the director of the builder to address the matters raised in the documents in the proposed OCTB

[7] TB2933
[8] affidavit of Jordana Mary Dymond sworn 17 April 2019

and witness statement,

c. drafting a reply to the proposed APOD,

d. briefing Counsel to settle the reply witness statements and the reply to the proposed APOD, and

e. other enquiries and investigations arising out of the matters raised in the documents, the witness statement and the proposed APOD.

49 The prejudice to the builder and to Ms Anderson will include:

a. the case has been prepared and prosecuted on the basis of the pleadings, expert reports, documents and witness statements filed in the proceeding,

b. the material sought to be relied upon has not been the subject of any expert commentary and/or witness statements,

c. offers and negotiations in proceeding BP1534/2016 have been undertaken on the basis that the OC were not asserting that they had undertaken maintenance work and/or progressively undertaken work to limit and/or minimise water entry into the property,

d. the work undertaken to date will be largely wasted as the builder and Ms Anderson will now have to reconsider the OCs position and redo the work undertaken to date,

e. if the application were allowed, the hearing will in effect have to start afresh. The evidence of the experts, which has already been given concurrently over 2.5 days, will need to start again to take into account the new defence. A further view would be required to point out the areas that were allegedly maintained. Ms Anderson's evidence in chief which has largely concluded, would have to be reopened,

f. the only order that could adequately compensate the builder and Ms Anderson at this stage would be an order for indemnity costs for all costs thrown away by reason of the amendment, which is likely to be most of the costs incurred for the last three years. The builder's costs are estimated to be $169,229, and

g. the builder also submits on behalf of Ms Anderson that the prejudice to her by reason of the costs thrown away would be unsurmountable, as she has been self-represented and so she is not able to recover most of her costs under section 109 of the VCAT Act.

Authorities

50 The builder relied on a number of authorities, including *Aon Risk Services Australia Ltd v Australian National University*[9], where the High Court considered the grant of leave to a party to amend its pleadings, which necessitated an adjournment. The principles set out by the High Court were usefully summarised by Daly AsJ in *Yahome Pty Ltd v Delic & Ors*[10], which was an appeal from the Tribunal's refusal to grant an adjournment when the application was made after the hearing had commenced. These principles are relevant to the present application because, if it is allowed, the effect will be that the hearing must start again. As previously noted, that will not be until 2020. The following principles are particularly relevant to the present matter:

a) where an application is made late in the day, is inadequately explained, necessitates the vacation or adjournment of the dates set down for trial, and raises new claims not previously agitated apparently because of a deliberate tactical decision not to do so, the party making the application bears a heavy burden to show why leave should be granted;

b) there is an irreparable element of unfair prejudice in unnecessarily delaying proceedings; …

f) the requirement to make amendments for the purposes of deciding "the real issues in the proceeding" does not impose some unqualified duty to permit the late edition of any new claim; the real issues in the proceeding are determined by reference to the limited way in which the party deliberately chooses to frame its original claim; …

j) the view that justice cannot always be measured in money and that a judge is entitled to weigh in the balance the strain the litigation imposes upon litigants, is also now generally accepted;

k) personal litigants are likely to feel the strain of litigation more than business corporations or commercial persons;

l) much may depend upon the point the litigation has reached relative to a trial when the application to amend is made. There may be cases where it may properly be concluded that a party has had sufficient opportunity to plead their case and that it is too late for a further amendment, having regard to the other party…;

[9] [2009] HCA 27 at paragraphs 71, 102-103
[10] [2013] VSC 52 at paragraph 66

m) generally speaking, where a discretion is sought to be exercised in favour of one party, and to the disadvantage of another, an explanation will be called for;

n) not only will the party applying need to show that their application is brought in good faith, but they will also need to bring the circumstances giving rise to the amendment to the court's attention, so that they may be weighed against the effects of any delay and the objectives of the [Tribunal's] rules;

o) a party has the right to bring proceedings. Parties have choices as to what claims are to be made and how they are to be framed. But limits will be placed upon their ability to effect changes to their pleadings, particularly if litigation is advanced. That is why, in seeking the just resolution of the dispute, reference is made to parties having a sufficient opportunity to identify the issues they seek to agitate.

51 In *Chiropractic Board of Australia v Hooper*[11], then President of VCAT Justice Garde AO RFD considered an application to file further expert evidence late. I accept that the following proposition is equally relevant to the late filing of a witness statement and documents:

> … The proceeding stands to be conducted in accordance with the directions that have been made as to expert evidence and the expert witness practice note. If a party did not, in the opinion of the Tribunal undertaking the final hearing, comply with directions or the practice note, or leaves its request to call additional expert evidence to such a late stage in the hearing that it cannot be received without disadvantage or prejudice to the other party, the party has only itself to blame. The standard of proof required at the hearing has no bearing on the position that the Tribunal finds itself in or the need to afford justice and fairness to all parties…
>
> Finally, an important factor is the advanced stage of the hearing. Both parties have a considerable stake and investment in the proceeding…

CONCLUSION

52 As stated above, I accepted the submissions made by Ms Anderson and the builder and refused the OC's application. I had particular regard to the following matters:

a. As the High Court held in *Aon,* the "real issues in the proceeding" are to be identified by reference to the pleadings. At no time prior to the commencement of this hearing on 1 April 2019 did the OC positively allege that it had undertaken, or caused to be undertaken, regular maintenance on the building. The proposed APOD and the documents in the proposed OCTB fundamentally change the case

[11] [2013] VCAT 417 at paragraph 34, 37

that had been pleaded by the OC.

b. The issue of lack of maintenance had been raised in the pleadings of Ms Anderson and the builder since 2017. Several orders had been made allowing the OC to file a defence or an amended defence, including most recently the orders of 20 December 2018.

c. I conclude that the decision to not plead that the OC had undertaken, or caused to be undertaken, regular maintenance, was a deliberate strategy taken by the OC and/or its lawyers. The OC was legally represented by HWLE at all relevant times.

d. The application to amend was made on day 11 of a 13 day hearing. Although the hearing was unable to be completed by day 13, I do not accept the OC's contention that the amended case can be run in the further five days which has been allowed. The fundamental change in the OC's case would mean that the hearing would have to start again.

e. Experts would have to be instructed to revisit their opinions to take into account the contention that the property had been maintained. Nearly all the expert evidence has already concluded. They would have to be recalled to give fresh evidence. Further, it is unclear how the OC would now explain the evidence already given by its experts which attributes much of the cause of the damage to a lack of maintenance.

f. Witnesses from all parties would have to provide further witness statements. Further documents would have to be discovered by Ms Anderson. A new tribunal book would have to be prepared. I note that it is the builder who has borne the cost so far of preparing the Tribunal Book, as the OC failed to comply with orders[12] that it should do this.

g. The new hearing would be estimated to take at least as long as the old hearing, which was 13 days. This cannot be accommodated until 2020.

h. The proposed APOD are lacking particulars. While this could be remedied if the proceeding was in its early stages, I am not satisfied that the OC should receive the benefit of a discretion to grant leave on the basis of incomplete material.

i. Further, the only explanation given for the failure to comply with orders was that, unbeknown to the OC, HWLE had a "pens down" policy. However the OC later conceded that this proposition was

[12] Order 1 March 2019 in this proceeding and 27 November 2018 5 March 2019 in BP1093/2018

untenable, in light of the correspondence sent by HWLE in March 2019.

j. As a result, the OC has provided no explanation for the delay. As set out in *Aon*, this is a fundamental requirement before any application for the exercise of a discretion can be considered.

k. As for the proposed OCTB, it is not clear from the correspondence whether the failure to provide proper discovery lies at the feet of the OC committee, Strata Plan, or HWLE, or a combination of all three. What is clear is that discovery was conducted in a piece-meal fashion. The most charitable interpretation is that no-one turned their mind to the obligation to provide all relevant documents. I note the alternative interpretation promoted by the builder and Ms Anderson, that the OC committee was deliberately selecting which documents it would discover, in order to disguise its lack of action in managing the building. I am not prepared to make that finding this stage, as this issue is part of Ms Anderson's claim against the OC in this proceeding, and the evidence has not yet concluded.

l. The builder correctly points out a contradiction in the OC's argument that "justice and honesty" will only be served if it is allowed to rely on the documents in its proposed OCTB, in circumstances where the OC still has not discovered many of its relevant documents. I am satisfied that the 201 pages in the proposed OCTB are not an accurate record of all relevant documents. As with the proposed APOD, I am not satisfied that the OC should receive the benefit of a discretion to grant leave on the basis of incomplete material.

m. As for the witness statement, much of the evidence goes to matters that are only relevant if the proposed APOD is allowed. Further, no explanation has been given as to why the statement was not provided until 16 April 2019. This is particularly important when HWLE had advised the parties on 13 February 2019 that the witness statement would be ready by 15 February 2019.

n. If the application were allowed, the prejudice to Ms Anderson is irremediable. She has been forced to vacate her apartment, rent elsewhere, continue to pay her mortgage and rent, deal with her health issues and give up work. A costs order under the VCAT Act would not provide a remedy, as these are not legal costs. As Daly AsJ noted in *Yahome*, I am entitled to weigh in the balance the strain the litigation imposes upon litigants, and personal litigants, like Ms Anderson, are likely to feel the strain of litigation more than business corporations or commercial persons.

o. The prejudice to the builder would be substantial. The proceedings have been on foot since 2016. Offers have been made based on the pleaded positions. Two of the three proceedings have now settled. The builder's costs thrown away if the application were allowed, are substantial. This could arguably be remedied by an order for indemnity costs; however in circumstances where the OC Chairperson has deposed that the OC could not raise sufficient funds to pay for HWLE to represent them at the hearing, I am not satisfied that the OC could meet a costs order for approximately $169,000 without major impact on its members.

p. I do not accept the OC's contention that it would suffer a final and lasting prejudice if the proposed APOD, OCTB and witness statement were not allowed. It was submitted that the value of the defects is at least $190,000 and this proceeding is the one and only chance the OC has to recover the money they need for those repairs. That statement is incorrect, now that proceeding BP1093/2018 has settled. There is no claim by the OC in this proceeding (BP1534/2016) against the builder. This proceeding concerns Ms Anderson's claims for the loss and damage she has suffered in relation to the water entry to her apartment. The issue for determination is the quantum of that loss and damage, whether the OC or the builder is responsible, and if so, in what proportions.

q. The prejudice which will flow from allowing the amendment is far greater than the prejudice to the OC if it is not allowed, especially in circumstances where the OC has had sufficient opportunity to plead their case, but elected not to. To quote President Justice Garde in *Chiropractic Board of Australia v Hooper*, the OC has only itself (or its advisors) to blame.

SENIOR MEMBER S. KIRTON