VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

BUILDING & PROPERTY LIST VCAT REFERENCE NO. BP886/2018

CATCHWORDS

Water Act 1989 - *Owners Corporations Act* 2006 - orders made following decision on liability - costs under s.109 *Victorian Civil and Administrative Tribunal Act* 1998 - Sanderson costs order

FIRST APPLICANT	Peta Davies
SECOND APPLICANT	Karen Ellis
FIRST RESPONDENT	Owners Corporation 1 PS414649K
FIFTH RESPONDENT	Steven John Humphrey and Jun Fan
SIXTH RESPONDENT	Blaise Antony
SEVENTH RESPONDENT	Brian Robert Poskaitis and Susan Mary Kent
EIGHTH RESPONDENT	Maud Investments Pty Ltd ((ACN 068 024 046)
WHERE HELD	Melbourne
BEFORE	Senior Member S. Kirton
HEARING TYPE	Hearing
DATE OF HEARING	1 October 2019
DATE OF ORDER	1 November 2019
CITATION	Davies v Owners Corporation 1 PS 414649K (Building and Property) [2019] VCAT 1724

ORDERS

1. The first respondent must pay the first applicant $72,879.80 by 8 January 2020.

2. The first respondent must pay the second applicant $92,240.38 by 8 January 2020.

3. The first respondent must pay interest to the first applicant on $33,068.55 from 2 August 2019 until that amount is paid, at the interest rate currently prescribed by the *Penalty Interest Rate Act* 1983 (Vic). There is liberty to the parties to apply in default of agreement on the calculations.

4. The first respondent must pay interest to the second applicant on $2237.00 from 2 August 2019 until that amount is paid, at the interest rate currently prescribed by the *Penalty Interest Rate Act* 1983 (Vic). There is liberty to the parties to apply in default of agreement on the calculations.

5. The first respondent must not levy any contribution from the first or second applicants in respect of payment of the damages and interest awarded pursuant to Orders 1 - 4.

6. If, as a result of the first respondent not paying the alternative accommodation components of the applicants' damages until 8 January 2020, the applicants suffer further economic loss beyond that dealt with in the order made on 2 August 2019, the applicants have liberty to apply for further orders against the first respondent.

7. The first respondent must pay the sixth respondent $2000.00 by 8 January 2020.

8. The first respondent must pay the seventh respondent $10,768.00 by 8 January 2020.

9. The first respondent must pay the eighth respondent $1815.00 by 8 January 2020.

10. The first respondent must not levy any contribution from the fifth, sixth, seventh and eighth respondents in respect of payment of the damages and interest awarded pursuant to Orders 1 - 4.

11. The first respondent must take all necessary steps and undertake all necessary repair works so as to ensure that water no longer flows into the level 8 apartments including by effecting all necessary repairs and/or modifications to the level 9 balconies and the level 9 glazed units (collectively the Works) which is to include:

    11.1. sourcing and commissioning all necessary building consultants by 22 November 2019;

    11.2. assessing the window and balcony repair options by 6 December 2019;

    11.3. documenting the necessary window and balcony repairs by 20 December 2019;

    11.4. raising the necessary funds by 28 February 2020;

11.5. tendering for the balcony and window repairs by 11 March 2020;

11.6. repairing/replacing the level 9 glazing elements by 12 May 2020; and

11.7. repairing/replacing the level 9 balconies by 12 July 2020 (including reinstating those parts of the level 9 balconies that are owned by the fifth, sixth, seventh and eighth respondents).

12. The first respondent must notify the owners of apartment 83 - 84 and 91 - 94 in writing of the completion of each milestone of the Works set out in Orders 11.1 - 11.7.

13. If the first respondent seeks to extend any milestone date listed in Order 11 in respect of the Works:

13.1. prior to making an application to the Tribunal they must seek the consent of the applicants and the level 9 owners to the alternate dates, which consent must not be unreasonably withheld;

13.2. any application to the Tribunal should be brought prior to the date pursuant to which the relevant milestone is to be completed; and

13.3. the application must be supported by proper affidavit material which:

a) sets out the basis upon which the extension is brought;

b) if the application to the Tribunal is not brought prior to the date pursuant to which the relevant milestone is to be completed, sets out the reasons why the application was not brought sooner; and

c) exhibits all relevant correspondence and/or documents in support.

14. If an extension of time is granted and the applicants suffer further economic loss beyond that dealt with in the order made on 2 August 2019, the applicants have liberty to apply for further orders against the first respondent.

15. The fifth, sixth, seventh and eighth respondents must provide the first respondent with all necessary access to their respective properties to enable the first respondent to undertake the Works.

16. If the Works cause any of the fifth, sixth, seventh and eighth respondents to suffer economic loss, including if they or their tenants are required to vacate apartments 91 – 94, each of them has liberty to apply for orders against the first respondent.

17. The first respondent must pay the applicants' costs of the proceeding on the standard basis on the County Court scale, to be assessed by the Costs Court of Victoria in default of agreement.

18. The first respondent must pay the costs of the fifth, sixth, seventh and eighth respondents of the proceeding on the standard basis on the County Court scale, to be assessed by the Costs Court of Victoria in default of agreement.

19. The first respondent must not levy any contribution from the applicants in respect of payment of any costs ordered by the Tribunal, or assessed by the Costs Court, or the costs incurred by the first respondent in the proceeding.

20. The first respondent must not levy any contribution from the fifth, sixth, seventh and eighth respondents in respect of payment of any costs ordered by the Tribunal, or assessed by the Costs Court, or the costs incurred by the first respondent in the proceeding.

21. In respect of the level 9 balcony, the common property which is the responsibility of the first respondent includes the joists and the cement sheet forming the structure of the level 9 balcony, and the void between the cement sheet and the ceiling of level 8.

22. The level 9 glazed units are common property and are the responsibility of the first respondent.

23. The membrane, screed and tiles or decking on the level 9 balcony are privately owned.

24. Liberty to apply.

SENIOR MEMBER S. KIRTON

APPEARANCES:

For the Applicants	Mr S. D. Hay of counsel
For the First Respondent	Mr N. Jones of counsel
For the Fifth, Sixth, Seventh and Eight Respondents	Mr L. Hogan of counsel

REASONS

1. The applicants commenced this proceeding seeking damages and injunctive and other relief under sections 16 and 19 of the *Water Act* 1989 (Vic) (the Water Act) and under the *Owners Corporation Act* 2006 (Vic) (the OC Act) in order to have the flow of water stopped and to be able to rectify the damage to their apartments.

2. I made findings in my decision of 2 August 2019[1] (the original decision) and ordered:

> By 21 August 2019 (or such later date as may be agreed by the parties) the parties may file and serve written submissions on the appropriate orders to be made in light of these Reasons, and whether they require the matter be listed for a hearing, or orders may be made on the papers.

3. Each party filed submissions and a draft of the orders they sought, and appeared before me for a half day hearing on 1 October 2019. The applicants and the fifth, sixth, seventh and eighth respondents (the level 9 owners) largely agreed on the orders they said should be made. The first respondent (the OC1) proposed alternate orders.

4. The orders address the following issues in the dispute:

   a. The damages to be paid by the OC1 to the applicants

   b. Damages sought by the level 9 owners against the OC1 for the cost of wasted attempted rectification works

   c. Damages sought by the level 9 owners against the OC1 for the potential cost of future reinstatement works

   d. The timing and method of carrying out the rectification works (the Works) and the levy required to be raised to cover the Works

   e. The costs of the proceeding, and

   f. Ownership declarations.

5. I have considered each parties' submissions and my reasons for making each of the orders in this proceeding follow.

PAYMENT OF DAMAGES TO THE APPLICANTS

6. In light of my findings in the original decision of the amounts due to the applicants by way of damages under s.16(1) of the Water Act, the remaining issues in dispute were:

[1] *Davies v Owners Corporation 1 PS414649K* [2019] VCAT 1159

a. whether the applicants should be required to contribute to the members' levy that will be raised by the OC1 to pay the damages, and

b. the time that should be allowed for the damages to be paid.

7. The applicants submitted that it would be unjust and circuitous to permit the OC1 to levy contributions against the applicants to pay the damages award in circumstances where they are the recipients of that award. Although the OC1 formally opposed this argument, it did not directly address this levy, instead focusing its submissions on the nature of the levy for the Works. In my view it is unarguable that the applicants should not be required to contribute to the levy paying the damages they have been allowed. Such an order would defeat the purpose of the damages award. I make that order.

8. As for the length of time that should be allowed in which to make the payment, the applicants contended that 30 days from the date of the original decision was sufficient time for the OC1 to arrange payment. The OC1 submitted that this date is unrealistic, as they first need a decision on whether the applicants may be included in the levy, and then must take steps to raise the levy. They requested 60 days from the date of this order.

9. No evidence was presented by the OC1 to establish the amount of time required to raise the levy. The OC1 has been aware since the original decision of the amount that would be required to be raised. On that basis I am sympathetic to the applicants' contention. However, I am reluctant to make an order that cannot readily be complied with. None of the parties will benefit from the OC1 failing to comply with the order because it was unable to pass the necessary resolution and raise the levy in time. Further delays and costs would undoubtedly ensue. I will allow the OC1 until 8 January 2020 to pay these damages, being 60 days plus 7 days (to allow for the Christmas week) from the date of this decision.

10. I also note that a significant proportion of the damages I have allowed are for amounts which have not yet been spent (mould remediation and reinstatement). A delay in payment of these amounts by the OC1 will not mean the applicants are further out of pocket.

11. As for the amounts they have already spent, I will order the OC1 to pay interest on these items from the date of the original decision until the amounts are paid, at the interest rate currently prescribed by the *Penalty Interest Rate Act*[2]. For the first applicant, this is $33,068.55, made up of Merlo invoice $4950, Merlo invoice $1920, exit clean for Caroline Street property $968, NLK plumbing report $220, rent already paid $23,010.55 (being $33,671.55 less $10,661 received from insurer) and replacement of

[2] As I am empowered to do by s.19 Water Act 1989

contents $2000[3]. The amount for the second applicant is $2237, being replacement of contents.

12. As for the applicants' alternative accommodation costs, I have already allowed these until the end of August 2020. If the delay in payment causes further losses, the applicants have liberty to apply.

THE CLAIM FOR THE LEVEL 9 OWNERS' WASTED COSTS

13. For the same reasons that I found that the applicants are entitled to damages, including economic loss, caused by the failure of the OC1 to prevent the water ingress, I am satisfied that the sixth, seventh and eighth respondents have also suffered economic loss as a result of the inaction of the OC1. A similar fact situation occurred in *Penniall Enterprises Pty Ltd v Owners Corporation RN4160667X*[4], where Deputy President Lulham held:

> My finding that the water ingress emanated from common property results in [the neighbour] being entitled to recover the cost of the work of rectifying the eastern wall and the aluminium sliding door unit from the Owners Corporation. He has borne an expense [in attempting repairs] that should have been borne by the Owners Corporation.

14. Each of the sixth, seventh and eighth respondents gave evidence about the amounts they had spent on failed repairs to the balcony[5]. I am satisfied that these were wasted expenses, as firstly the repairs did not work, and secondly the repaired areas will be thrown away and replaced with new as part of the Works. I will order the OC1 to pay these amounts as damages under s.16(1)(c)(iii) of the Water Act. The date for payment will be 8 January 2020 for the reasons set out above. I do not allow interest on these amounts, as no entitlement to payment accrued until this order.

THE CLAIM BY THE LEVEL 9 OWNERS FOR THE POTENTIAL COST OF REINSTATEMENT WORKS

15. The level 9 owners sought an order that the OC1 indemnify them for any reinstatement works they may have to perform in the future, to replace the screed, membrane and tiles or decking on each of their balconies after the common property is replaced. I am not prepared to make such an order, as I have ordered the OC1 to reinstate the balconies, including the screed, membrane and tiles or decking (as part of Order 11.7). Accordingly, there is no need for an indemnity.

PROGRAMMING OF THE WORKS

16. The applicants and level 9 owners seek detailed orders which prescribe the steps to be taken by the OC1, milestone dates and reporting obligations. The OC1 opposed prescriptive orders, as these would be onerous to comply

[3] Original decision paragraph 127
[4] *Pennial Enterprises Pty Ltd v Owners Corporation RN4160667X* [2012] VCAT 943 at [89]
[5] Original decision paragraphs 99 – 114 and documents tendered

with. Given the history of this matter, I accept the concerns of the applicants and the level 9 owners are genuine. I am also satisfied that the milestones proposed are appropriate, given they were provided by the consultant which the OC1 intends to engage for the Works, John Merlo and Associates.

17. I am satisfied that it is appropriate to make orders which will facilitate the rectification of the building, and this outweighs any administrative burden that such orders may place on the OC1. Having said that, the parties are encouraged to work co-operatively for their mutual benefit.

18. I have varied the dates for each milestone (up until the funds have been raised) to take into account the delay between the date of the draft orders and these orders. I am otherwise satisfied that the proposed dates are reasonable, given the draft schedule prepared by John Merlo and Associates.

CONTRIBUTION TO LEVIES BY THE APPLICANTS

19. The primary contention of the applicants and the level 9 owners is that neither of them should be made to contribute to the cost of the Works. They say it would be unjust and circuitous to permit the OC1 to levy contributions against them for the repair of damage caused by defects in the common property. I do not accept this argument. In the same way as a lot owner must contribute to the maintenance and repair of other areas of the building, there is no reason why the applicants and the level 9 owners should be excused from contributing to these Works.

20. Each party also made submissions about the basis on which the levy to pay for the Works should be raised. The applicants and level 9 owners submitted that each of them should be levied on a lot liability basis, rather than applying the "benefit principle". The OC1's response was that they have not yet made a decision on how the fees and charges will be levied and so the Tribunal does not have the power to make a decision on this issue at present.

21. The OC1 pointed out that s.24(2) of the OC Act sets the default position, that in raising a levy for special fees and charges, the fees must be based on a lot liability. This default position may be altered for extraordinary items of expenditure undertaken for the benefit of some but not all of the lots affected (ss.(2A)). However the OC1 must first determine the manner in which it will levy the cost of repairs before the Tribunal can interfere with the decision.

22. I agree with that submission. I note the applicant's submission that s.123 of the *Victorian Civil and Administrative Tribunal Act* 1998 (VCAT Act) gives the Tribunal power to direct anything needed to resolve a dispute under the Water Act. I am not satisfied that a general powers in relation to

injunctions (s.123) overrides a specific procedure set out in the OC Act (s.24). Moreover, it is well established that courts should not make a declaration which is hypothetical[6]. I will allow the OC to follow the legal requirements set out in s.24 of the OC Act, with liberty to the parties to apply if, after the determination is made, they consider it was made unlawfully.

23. I note with approval the OC1's acknowledgement (in its written submission) of the correctness of the decision of Senior Member Vassie in *Owners Corporation PS407621Y v Grundl*[7], where the Tribunal set out the legal requirements to be followed by an owners corporation in making a determination on owners' liabilities under s.24.

COSTS

24. Each of the applicants and the level 9 owners seek an order for their costs from the OC1 on a full indemnity basis. The OC1 submitted that there should be no order as to costs on the basis that the OC had, in the face of a difficult plan of subdivision, every right to come to the Tribunal for a determination.

25. Section 109 of the VCAT Act provides relevantly:

> s.109:
>
> (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;

[6] AMP Fire & General Insurance Co Ltd v Dixon [1982] VR 833 at 837
[7] [2017] VCAT 1550 at [16]

(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.

26. As emphasized by the Supreme Court in the matter of *Vero Insurance Limited v Gombac Group*[8], the Tribunal should approach the question of entitlement to costs on a step-by-step basis:

(i) The prima facie rule is that each party should bear their own costs of the proceeding.

(ii) The Tribunal should make an order awarding costs being all or a specified part of costs, only if it is satisfied that it is fair to do so; that is a finding essential to making an order.

(iii) In determining whether it is fair to do so, that is, to award costs, the Tribunal must have regard to the matters stated in s.109(3). The Tribunal must have regard to the specified matters in determining the question, and by reason of (e) the Tribunal may also take into account any other matter that it considers relevant to the question.

27. The applicants and the level 9 owners rely particularly on s.109(3)(a)(i), (b) and (d): *whether a party has conducted the proceeding in a way that unnecessarily disadvantaged another party by conduct such as failing to comply with an order or direction of the Tribunal without reasonable excuse, whether a party has been responsible for prolonging unreasonably the time taken to complete the proceeding and the nature and complexity of the proceeding.*

28. They also submit that costs should be paid on an indemnity basis as "special circumstances" exist "which lift the case out of the ordinary"[9].

29. They rely on the following findings which they say demonstrate that the OC1 has failed to act in accordance with its duties under the OC Act. Further, they say that it was open to the OC1 to avoid entirely the costs of the proceeding by taking steps to address the water ingress issues:

a. the entire proceeding was unnecessary and has been caused by the OC1 failing to exercise its duties and/or obligations as set out in the OC Act;

[8] [2007] VSC 117 at [20]
[9] Golem v Transport Accident Commission (No.3) 19 VAR 279 at [10]

b. the Tribunal found that the OC1 was aware of the existence of leaks since at least 2008;

c. the OC1 was unable to show that it spent any of the settlement monies on the north side balconies;

d. by 2013 it was apparent to the OC1 committee and manager that level 8 was still suffering from water ingress and that despite temporary repairs carried out by the level 9 owners, the leaks were continuing; and

e. by August 2017 the OC1 had resolved to take responsibility to replace the glazed units on level 9 and in January 2018 it had approved the funds to do so. It provided no explanation as to why it did not proceed with these works.

30. They reject the OC1's defence that it had to come to the Tribunal for a determination of ownership because the plan of subdivision was unclear, and say that the OC1 must have turned its mind to the ownership issues when it made its claim to VMIA for the balconies in 2008, when it determined to replace the glazed units in 2017 and when it raised levies for the cleaning of the level 9 windows. Moreover, had the OC1 genuinely held a belief that the repair should be undertaken by the level 9 owners, it had the powers pursuant to the OC Act to compel them to do so, but did not.

31. The applicants and the level 9 owners also submitted that the OC1's conduct throughout the proceeding was so unreasonable as to warrant an indemnity costs order, and they set out the history of the proceeding in their written submissions.

32. I am satisfied that it is fair to order the OC1 to pay the costs of the applicants and the level 9 owners under s.109(2). I accept the contentions set out above which demonstrate that the OC1 has conducted the proceeding in a way that unnecessarily disadvantaged another party to the proceeding and they have unreasonably prolonged the proceeding. Further, the issues in dispute were complex and required each party to engage competent legal representation.

33. Although the level 9 owners are respondents to the proceeding, they were originally joined as interested parties by consent of the applicants and the OC1. Costs orders, known as "Sanderson" orders[10], can be made which result in the costs of successful defendants being met directly by unsuccessful defendants. I am satisfied that it was reasonable and proper to join the level 9 owners as their interests were obviously affected by the outcome of the hearing. Further, I am satisfied that the conduct of the OC1

[10] Sanderson v Blythe Theatre Co [1903] 2 KB 533

(in defending the claim by attempting to hold the level 9 owners liable) amounts to conduct which makes it appropriate to exercise the discretion to make a Sanderson order.

34. I will order costs on the standard basis. I am not satisfied they should be ordered on an indemnity basis. It is well established that "It will only be in the most exceptional circumstances that an order for indemnity costs will be made; for instance where a party has engaged in contumelious or high handed conduct"[11].

35. I am not satisfied that the circumstances of this proceeding can be regarded as exceptional. I accept that the OC1's conduct has been the subject of significant criticism from the Tribunal throughout the proceeding, but I note that the parties have already received costs orders on an indemnity basis for the most egregious example of non-compliance (orders of 8 March 2019). Further, even though there were delays by the OC1 in the preparation of its case, the original hearing date was not lost.

OWNERSHIP DECLARATIONS

36. These declarations are made in accordance with the findings made in the original decision.

SENIOR MEMBER S. KIRTON

[11] Seachange Management Pty Ltd (ACN 091 443 211) v Bevnol Constructions and Developments Pty Ltd (ACN 079 170 577) and Ors [2011] VCAT 1406