

# VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

## CIVIL DIVISION

### BUILDING AND PROPERTY LIST

VCAT REFERENCE NO. BP863/2014

### CATCHWORDS

Domestic building – *Victorian Civil and Administrative Tribunal Act 1998* – s75 – application by respondent for claims in relation to common property and unit no longer owned by the applicant to be struck out as being misconceived – *Owners Corporations Act 2006* s165(1)(ba) – application by lot owner to be authorised to institute and prosecute proceeding on behalf of the Owners Corporations – *Domestic Building Contracts Act 1996* ('DBCAs') – whether unit owner entitled to reply on s9 of DBCA to bring proceeding in relation to common property as beneficial owner – whether order can be made under s53 of DBCA allowing unit owner to bring proceedings in relation to common property.

<b>APPLICANT</b>	Mission Express Pty Ltd (ACN 086 078 319)
<b>RESPONDENT</b>	Hewcon Pty Ltd (ACN 070 289 011)
<b>FIRST JOINED PARTY</b>	Owners Corporation 1 Plan No 703939
<b>SECOND JOINED PARTY</b>	Owners Corporation 2 Plan No 703939
<b>THIRD JOINED PARTY</b>	Owners Corporation 3 Plan No 703939
<b>WHERE HELD</b>	Melbourne
<b>BEFORE</b>	Deputy President C Aird
<b>HEARING TYPE</b>	Directions hearing
<b>DATE OF HEARING</b>	31 March 2016
<b>DATE OF ORDER</b>	4 May 2016
<b>CITATION</b>	Mission Express Pty Ltd v Hewcon Pty Ltd (Building and Property) [2016] VCAT 699

### ORDERS

1. Paragraphs 8E to 8J and Items B and D in the Prayer for Relief of the Amended Points of Claim dated 7 December 2015 are struck out.
2. The applicant has leave to amend its claims in relation to Unit 21.
3. By 23 May 2016 the applicant must file and serve proposed further Amended Points of Claim having regard to these Orders and Reasons.
4. **This proceeding is listed for a directions hearing before Deputy President Aird on 30 May 2016 at 9:00 a.m. at 55 King Street Melbourne when the tribunal will hear from the parties, including the**

**owners corporations, as to the orders to be made having regard to the attached Reasons – allow 1 hour.**

5. I direct the Owners Corporations to send a copy of these orders to each of the Lot owners by 18 May 2016 and thereafter to file proofs of service.
6. Liberty to apply.
7. Costs reserved.

**DEPUTY PRESIDENT C AIRD**

**APPEARANCES:**

For Applicant	Mr T Sedal of Counsel
For Respondent	Mr L Connolly of Counsel

## REASONS

- 1 In October 2015 the applicant developer entered into a domestic building contract with the respondent builder for the construction of a multi-storey residential and retail building in Moonee Ponds. On 19 February 2014 the certificate of practical completion was issued by the Superintendent appointed under the contract.
- 2 On 19 December 2014 the developer lodged an application with the Tribunal claiming '\$244,092.33 + damages'. The application was accompanied by Points of Claim in which, amongst other things, the developer alleged the works were defective, by reference to an expert report of Dr Ian Eilenberg dated 19 December 2014. The builder has foreshadowed a counterclaim for an amount exceeding \$320,000 including claims for unpaid contract works, the wrongful cashing of its bank guarantee, unpaid variations, delay costs and interest.
- 3 At the first directions hearing on 10 March 2015, the developer's standing to make claims in respect of defects in the common property ('the common property defects') was discussed. I ordered the developer to advise the relevant owners corporation of the proceeding. Further, that the developer was to advise the tribunal the details of the relevant owners corporation so that it could be joined as a party to the proceeding, under s60 of the *Victorian Civil and Administrative Tribunal Act 1998* ('the VCAT Act') as a person whose interests were affected by the proceeding, and who should be bound by and have the benefit of any decision.
- 4 The first owners corporation ('OC 1') was joined as a party by order dated 27 March 2015. At a directions hearing on 28 July 2015, when it became clear there was more than one owners corporation, I ordered the applicant to notify them of the proceedings, and to provide the tribunal with their details, so that they too, could be joined.
- 5 On 25 August 2015 the developer's solicitors advised the tribunal that they had been instructed to act on behalf of the three relevant owners corporations ('the OCs'), and providing details of each of them. Further, that the OC *has commenced processes to seek consent from its membership for the joinder of the Owners Corporations to this proceeding as applicants. We are instructed that the position of the members will not be known until 8 October 2015.*
- 6 The interlocutory orders were amended by consent a number of times to allow for the completion of these processes. In [Amended] Points of Claim ('the APOC') dated and filed on 7 December 2015, the developer pleads that the special resolutions were not passed by the OCs. The developer also seeks an order under s165(1)(ba) of the *Owners Corporations Act 2006* ('the OC Act') authorising it to institute and prosecute the proceedings on behalf of the OCs in relation to the common property defects.

- 7 On 25 February 2016 the builder filed an Application for Directions Hearing or Orders seeking the following orders:

The Respondent requests that the Tribunal lists the matter for a directions hearing.

At the directions hearing the Respondent will seek the following orders:

1. that the Tribunal make an order pursuant to section 75(1) of the *Victorian Civil and Administrative Tribunal Act 1998* (“**VCAT Act**”) striking out:
    - a) paragraphs 8E to 8J of the Amended Points of Claim dated 7 December 2015;
    - b) those parts of the proceedings arising out of or in connection with any alleged ‘Owners Corporation dispute’; and
    - c) those parts of the proceedings arising out of or in connection with the common property and unit 21 at [the subject property].
  2. the Applicant pay to the Respondent compensation under section 75(2) of the VCAT Act, alternatively costs pursuant to s 109; and
  3. such further order as the Tribunal deems appropriate.
- 8 The application was heard at a directions hearing on 31 March 2016 when the developer was represented by Mr Sedal of Counsel, and the builder was represented by Mr Connolly of Counsel, both of whom handed up written submissions to which they spoke.

### **Section 75**

- 9 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. (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.

- 10 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.
- 11 Justice Garde in considering a s75 application in *Owners Corporation No. 1 PS537642N v Hickory Group Pty Ltd (Building and Property)* [2015] VCAT 1683 helpfully referred to 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’.

### **The builder’s position**

- 12 The builder contends that the developer does not have standing to prosecute claims in relation to the common property defects, or in relation to unit 21, which the developer concedes it has sold. Further, that any application for an order under s165(1)(ba) of the OC Act cannot properly be made in Points of Claim, that the application should be made by way of separate application, to which the OCs should be respondents. During the directions hearing Mr Sedal indicated that if it was necessary to do so he was applying for an order under s165(1)(ba) on behalf of the builder (‘the s165(1)(ba) application).
- 13 Mr Connolly also expressed concern that insofar as the developer was seeking to set-off the costs of defects against the builder’s foreshadowed counterclaim, its interests were in conflict with those of the owners corporations.

### **The developer’s position**

- 14 The developer contends that its claims in relation to the common property defects are *not undoubtedly hopeless* because:
- a The failure of the OCs to obtain a special resolution authorising them to bring legal proceedings means there is an owners corporation dispute within the meaning of s162 of the OC Act;

- b It is fair that the tribunal resolves the owners corporation dispute by making an order under s165(1)(ba) of the OC Act authorising the developer to institute and/or prosecute proceedings on behalf of the OCs because:
    - i. there is evidence of defects in the common property;
    - ii. the OCs are unable to recover the costs of rectifying the common property defects from the builder because they were unable to obtain the necessary special resolutions;
    - iii. if the common property defects are not rectified the developer will continue to suffer a loss of amenity and/or a diminution of the value of the lots it owns;
    - iv. if the order is not made the builder will avoid liability for the common property defects;
  - c. further or alternatively, the developer (along with the OCs and the other unit holders) is the *owner for the time being* of the common property for the purposes of s9 of the *Domestic Building Contracts Act 1995* ('the DBCA') and therefore has standing to bring a claim against the builder in respect of the common property defects;
  - d. further or alternatively, the Tribunal has power under s53 of the DBCA to allow an owner to bring a claim against a builder for defects in the common property, either on behalf of the OC or in its own right, if it is *fair to do so*, and that it would be fair for such an order to be made;
- 15 The developer contends that the builder's s75 application in relation to its claims concerning unit 21, which it concedes it no longer owns, is premature and should be dismissed. It contends it should be given an opportunity to obtain further evidence regarding its loss and damage, and granted leave to further amend its POC insofar as they concern unit 21.

## DISCUSSION

- 16 Noting that an order was made under s165(1)(ba) in *Johnston v Stockland Development Pty Ltd*<sup>1</sup> in response to an oral application made during the hearing of a s75 application, I am satisfied the tribunal can consider the oral application made by Mr Sedal on behalf of the developer during the directions hearing, and that a separate application is not required.

### **The developer's claims under s165(1)(ba) of the OC Act.**

- 17 At paragraphs 8E to 8G of the APOC the developer sets out the process undertaken by the OCs to obtain special resolutions authorising them to apply to be joined as applicants to this proceeding, and to make claims in relation to the incomplete and defective building works. Further, that the failure of the OCs to obtain a special resolution means that there is an

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<sup>1</sup> [2014] VCAT 1634

‘owners corporation dispute’ within the meaning of s162 of the OC Act, and that it would be fair for the tribunal to resolve that dispute by making an order under s165(1)(ba) of the OC Act authorising it to institute and prosecute proceedings on behalf of the OCs in relation to the common property defects. In item D of the Prayer for Relief, it seeks that such an order be made.

- 18 First, I accept the builder’s submission that the failure of the OCs to obtain the necessary special resolutions, and the application by the developer for an order under s165(1)(ba) are not properly matters to be pleaded against the builder. They do not relate to or concern any dispute between the developer and the builder, and accordingly, I am satisfied that paragraphs 8E to 8J and item D in the Prayer for Relief of the APOC are misconceived, and should be struck out.

**Should an order be made under s165(1)(ba) of the OC Act?**

- 19 At paragraph 8F of the APOC the developer sets out the results of each of the proposed special resolutions:

- OC1 – 8 members voted in favour, 1 member voted against, and 14 members did not vote;
- OC2 – 9 members voted in favour, 1 member voted against, and 15 members did not vote,
- OC3 – 8 members voted in favour, 0 members voted against, and 9 members did not vote.

- 20 Section 162 of the OC Act defines an owners corporation dispute. It provides:

VCAT may hear and determine a dispute or other matter arising under this Act or the regulations or the rules of an owners corporation that affects an owners corporation (*an owners corporation dispute*) including a dispute or matter relating to—

- (a) the operation of an owners corporation; or
- (b) an alleged breach by a lot owner or an occupier of a lot of an obligation imposed on that person by this Act or the regulations or the rules of the owners corporation; or
- (c) the exercise of a function by a manager in respect of the owners corporation.

- 21 The developer contends and I am satisfied it is arguable, that the failure of the OCs to obtain the necessary special resolutions authorising it to commence legal proceedings constitutes an *owners corporation dispute*. In any event, I am satisfied that the developer’s application for an order under s165(1)(ba) of the OC Act constitutes an owners corporation dispute being

‘[an] other matter arising under the Act...that affects an owners corporation’.

- 22 It is clear from the results, that for OCs 1 and 2 approximately two thirds of members, and for OC3, a little over half of the members did not vote. This seemingly demonstrates a seeming lack of interest amongst lot owners in having the common property defects rectified. The developer contends it should be authorised to bring and prosecute the claims in relation to the common property defects because, it says, if it does not do so, the builder will not be held accountable for them. Further, the developer will continue to suffer loss of amenity and a diminution in value of the lots it still owns. The developer says that it will conduct the proceedings at its own cost, on behalf of the OCs and will not look to the OCs for any contribution.
- 23 Section 165(1)(ba) provides:
- (1) In determining an owners corporation dispute, VCAT may make any order it considers fair including one or more of the following—
- ...
- (ba) an order authorising a lot owner to institute, prosecute, defend or discontinue specified proceedings on behalf of the owners corporation;
- 24 The tribunal’s powers to authorise an individual lot owner to institute and prosecute proceedings on behalf of an owners corporation are entirely discretionary, subject to it first being satisfied that it is fair to make the order sought. In deciding whether it is fair to exercise the tribunal’s discretion it is appropriate to consider the claims in respect of the common property defects in the context of all of the developers’ claims as set out in the APOC.
- 25 A consideration of the developer’s claims as set out in the APOC reveals that this is what might be described as a typical building dispute. It is not a proceeding which simply concerns alleged common property defects.
- 26 At paragraph 6 the developer pleads that the contract works were to be carried out in accordance with, what is defined as the ‘Quality Term’. Further, that, as set out in clause 2A and as implied by s8 of the *Domestic Building Contracts Act 1995* (‘the DBC Act’) the contract contained certain express and implied warranties (as to the quality and performance of the works).
- 27 At paragraph 7 the developer pleads that the builder has breached the Quality Term and the s8 warranties, by reference to two expert reports by Dr Ian Eilenberg dated 19 December 2014 and 8 July 2015. Dr Eilenberg estimates the cost of rectification for the stairwell and stairs at \$75,982.50 and for all other defects he identifies including common property defects and in Units 12, 18, 19 and 21 at \$230,027.11, a total of \$306,009.61.



- 28 At paragraph 8 the developer sets out claims arising from alleged defective works for:
- i. the cost of rectification of defective works in the units and the common property;
  - ii. costs incurred by reason of delayed settlements on units 3 and 5, and the ground floor retail property;
  - iii. additional contract and project management costs

- 29 At paragraph 8B the developer pleads that, on or about 23 November 2015, (21 months after issuing the Certificate of Practical Completion) the Superintendent gave the builder written details of work that does not comply with the Contract in relation to:

- 1) the stairwell;
- 2) shop 2;
- 3) the garage;
- 4) the internal hallways;
- 5) unit 21; and
- 6) unit 18 south balcony balustrade

Items a, c, d and f are arguably common property.

- 30 At paragraph 8C the developer pleads that on or about 24 November 2015 the Superintendent:

- (a) directed the Respondent that the Applicant elects to accept the non-complying work referred to in the Defects Notice... and
- (b) provided the Respondent with the Superintendent's assessment of the deemed variation, in the amount of \$117,470.32 in accordance with clause 36.4 of the Contract.

- 31 At paragraph 8D the developer pleads that the sum of \$117,470.32 is therefore to be deducted from the contract sum.

- 32 At paragraphs 9 to 11 the developer disputes variation 42C in the amount of \$17,985.

- 33 At paragraphs 12 to 17 the developer disputes the builders EOT claims

- 34 At paragraphs 18 to 19 the developer alleges practical completion was delayed and claims liquidated damages in the sum of \$220,350.

- 35 In the Prayer for Relief the developer claims:

- A. Damages
- B. Further, or alternatively, an order pursuant to section 53(2)(g) of the *Domestic Building Contracts Act 1995* that the Respondent rectify the defects in the common property;
- C. Further, or alternatively, a declaration that the sum of \$117,470.32 is to be deducted from the contract sum;

- D. Further, or alternatively, an order pursuant to s 165(1)(ba) of the *Owners Corporations Act 2006* authorising the Applicant to institute and prosecute this proceeding against the Respondent on behalf of the Owners Corporations in respect of the defects in the Common Property;
- E. Declarations that:
  - a. The Respondent has no entitlement to:
    - i. any days of EOT 11A
    - ii. any days for EOT 12
    - iii. any adjustment to the contract sum for VO 42B
  - b. *the date for practical completion* under the Contract was 9 October 2013; and
  - c. the Respondent was 133 days late in reaching practical completion and the Applicant has an entitlement to \$220,350.00 in liquidated damages.
- F. Interest
- G. Costs; and
- H. Such further or other order as the Tribunal considers appropriate.

36 In *Johnston v Stockland* the tribunal made an order under s165(1)(ba) 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. The owner's unit was one of a number in a multi storey unit development. Her claims were confined to the external windows, the external balustrade and the concrete floor in the lounge area all of which were common property, but which were, in effect, integrated into her unit. She was not making a claim in relation to all of the external window glazing or all of the external balustrades or all of the concrete floors in the building.

37 In *Johnston v Stockland* Judge Jenkins said at [74-76]

- 74. Beyond reliance upon the Contract of Sale and the s 8 warranties as applied to her unit, as defined by the Plan of Subdivision, the position of the Applicant becomes more complicated to the extent to which she seeks to have alleged defects or omissions in the common property rectified.
- 75. ...the statutory interpretation proposed by the Applicant, predicated upon the Applicant being able to effectively bypass the Owners Corporation entirely, in my view, is not consistent with the express statutory provisions. Furthermore, such interpretation fails to acknowledge those mechanisms which are available to give effect to the Applicant's objectives without prejudicing the interest of other unit owners.

76. In the first instance, it seems plain enough that any rectification arising from the claims made by the Applicant, which affects any part of the common property, will be wholly or substantially for the benefit of the Applicant. However, the concept of 'benefit' to unit owners, for the purpose of sub-s 49(2) of the OC Act is also broader than mere direct benefit.
- 38 In *Johnston v Stockland* Judge Jenkins considered it fair to authorise the applicant owner to institute and prosecute proceedings on behalf of the owners corporation in relation to alleged common property defects which, the owner claimed, were causing internal damage to her unit. Her Honour considered that a special resolution authorising the owners corporation to bring the proceedings was unlikely because it would probably be opposed by the developer. Further, that the respondent developer and builder would argue that the excessive condensation complained of by the owner was due to a self-induced internal problem within her unit.
- 39 However, the situation here is quite different. Here, the common property defects claim is but one of a number of claims the developer brings against the builder. The Superintendent has assessed the so called deemed variation arising from the non-complying work at \$117,470.32 which is approximately one third of the developer's current claim, which is only partially quantified. I note that the alleged non-complying work includes both common property defects and defects to shop 2, unit 21 and unit 18. Further, the claim for rectification of the defects is an alternative claim appearing at item B of the Prayer for Relief. The developer also makes alternative claims for damages, and for a declaration that the sum of \$117,470.32 be deducted from the contract sum. These claims are, in my view, inconsistent and support the builder's submission that there is a conflict between the developer's interest and those of the OCs.
- 40 On the one hand the developer claims contractual damages, and/or an order that the builder rectify the common property defects, and/or a declaration that the sum of \$117,470.32 is to be deducted from the contract sum, whilst on the other hand it seeks to make claims on behalf of the OCs in relation to the common property defects.
- 41 Although the developer has indicated it will not look to the OCs for any contribution to the cost of conducting the proceeding, and suggests that there is therefore no disadvantage to the OCs, I am concerned to ensure that the interests of the OCs are not adversely affected by any such order. Rectification to the common property defects, whether by the builder, or arranged by the developer, will require the co-operation of the OCs. For instance, access will be required to the common property to carry out any rectification works, and this can only be, and will need to be facilitated by the OCs, the majority of members of which seemingly lack interest in the rectification of the common property defects. However, if the developer were to be successful in its contractual claims in respect of the common

property defects, the rights of the OCs to claim against the builder for these defects may be compromised.

42 Further, I accept the submission on behalf of the builder, that it would not be fair to the OCs, if an order was made under s165(1)(ba) as any amount awarded as damages, could be set off against the outstanding contract sum, and there can be no certainty it will be used for the rectification of common property defects.

43 Therefore, subject to hearing from the parties and the OCs, I could only be satisfied it would be fair to exercise the tribunal's discretion under s165(1)(ba) if the developer were to agree to the following orders and conditions:

- 1) Leave be granted to it under s74 of the VCAT Act to withdraw its contractual claims in respect of the common property defects, being the claim for damages for the cost of rectification and the claim for a declaration that \$117,470.32 is to be deducted from the contract.
- 2) Any damages awarded in relation to the common property defects not be offset against the contract sum, but instead be paid into the OCs bank accounts to be used by the OCs for rectification of the common property defects.
- 3) It undertake to be responsible for all costs of and incidental to this proceeding insofar as it concerns the common property defects.

44 However, I do not consider it fair or appropriate to make such orders without first hearing from the parties, and the OCs. I will order that a further directions hearing be listed so that I may hear from them, and also require the OCs to serve a copy of these Orders and Reasons on each of the lot owners together with a copy of the expert reports which have been filed.

#### **Can the developer rely on s9 of the DBCA to bring claims for the common property defects?**

45 The developer also relies on s9 of the DBCA which provides that the owner for the time being, of the building or land where domestic building work was carried out, can bring proceedings for a breach of the s8 warranties as if it was a party to the contract. I note there are no pleadings in the APOC relying on s9.

46 There is no doubt that each individual lot owner is a beneficial owner of the common property. However, the individual lot owners hold their beneficial interest as tenants in common in proportion to their respective unit entitlement. I am not persuaded that it is arguable that this beneficial interest gives the developer standing to bring legal proceedings in respect of defects in the whole of the common property. An owners corporation, which is the legal owner of the common property, is the person with standing to bring legal proceedings in respect of the common property defects, but then only if it has obtained a special resolution to do so, as

required by s18 of the OC Act. Accordingly, an attempt by the developer to rely on s9 of the DBCA would be misconceived.

- 47 An arguable exception arises where a lot owner makes a claim for rectification of common property defects which directly affect that lot owner's property. In *Johnston v Stockland* Judge Jenkins held at [73]:

...the Applicant proposes in part to base her claim in respect of common property defects or omissions, which relate to the external windows, upon the alleged damage suffered interally to her unit. In my view, there is at least an arguable case that the Applicant may make directly against the builder, in respect of damage sustained within the Applicant's own unit.

- 48 However, the claims the developer seeks to make concern common property defects which for the most part are separate from the units it still owns.

### **Can an order be made under s53 of the DBCA?**

- 49 The developer contends that the tribunal can make an order under s53 of the DBCA authorising it to bring proceedings in relation to the common property defects because it would be 'fair to do so'.

- 50 Section 53 of the DBCA provides:

- (1) The Tribunal may make any order it considers fair to resolve a domestic building dispute.
- (2) Without limiting this power, the Tribunal may do one or more of the following—
  - (a) refer a dispute to a mediator appointed by the Tribunal;
  - (b) order the payment of a sum of money—
    - (i) found to be owing by one party to another party;
    - (ii) by way of damages (including exemplary damages and damages in the nature of interest);
    - (iii) by way of restitution;
  - (ba) order the payment of a sum of money representing a part payment under a major domestic building contract if—
    - (i) the requirement in paragraph (b) of section 42 has been met but the requirement in paragraph (a) of that section has not; and
    - (ii) the Tribunal is satisfied that the work required to complete the contract (including rectifying any defects) is minor in nature and not such as would prevent the owner from occupation and quiet enjoyment of the building;
  - (bb) order payment of a sum of money representing the amount of any money in dispute (including an amount on account of costs) to be paid into the Domestic Builders Fund pending the resolution of the dispute;
  - (bc) order payment of a sum of money to be paid out of the Domestic Builders Fund representing the amount of any sum paid into the

- Domestic Builders Fund in accordance with an order under paragraph (bb);
- (c) vary any term of a domestic building contract (including the completion date, the contract price, a provisional sum or the amount to be paid for any prime cost item);
  - (d) declare that a term of a domestic building contract is, or is not, void under section 132;
  - (e) declare void any unjust term of a domestic building contract, or otherwise vary a domestic building contract to avoid injustice;
  - (f) order the refund of any money paid under a domestic building contract or under a void domestic building contract;
  - (g) order rectification of defective building work;
  - (h) order completion of incomplete building work;

...

- 51 Although s53(2) provides that the tribunal's powers are not limited to the matters set out in its subsections, they can only be exercised by the tribunal to resolve a 'domestic building dispute' as defined in s54 of the DBCA. The definition of a 'domestic building dispute' does not include a dispute between a former owner of land and a builder. I am not persuaded that s53 enables the tribunal to give standing to a person to institute proceedings, simply because it would be fair to do so. Any person bringing a claim to the tribunal must be able to demonstrate they have a legal cause of action against the respondent.
- 52 Accordingly, item B of the Prayer for Relief in the APOC is misconceived and will be struck out.

## **Unit 21**

- 53 The developer concedes that it has sold unit 21, with settlement having occurred on 19 February 2016. However, it says that the s75 application in relation to its unit 21 claim is premature. Further, as its director was overseas for a significant period during February and March 2016, it seeks further time in which to obtain evidence in support of a claim for diminution of value and seeks leave to re-plead its unit 21 claim. I consider it appropriate to grant leave.

## **CONCLUSION**

- 54 If the conditions I have suggested, subject to amendment after hearing from the parties, are not acceptable to the developer, then I will order that all claims in relation to the common property defects be struck out from the APOC as being misconceived.
- 55 If the OCs again seek and obtain a special resolution authorising them to institute and prosecute legal proceedings in respect of the common property defects, it would be appropriate for them to commence separate proceedings rather than apply to be joined as applicants in this proceeding, given the apparent conflict between their interests and those of the developer.

- 56 Finally, I reject the submission by on behalf of the developer that if it is not authorised to institute and prosecute this proceeding on behalf of the OCs that the common property defects will necessarily remain. It is always open for the developer, or any other lot owner, to apply to the Owners Corporations List for an order appointing an administrator under s173 of the OC Act.

**DEPUTY PRESIDENT C AIRD**