VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

OWNERS CORPORATIONS LIST VCAT REFERENCE NO. OC1438/2017

CATCHWORDS

Fee recovery – respondent lot owner's bankruptcy – whether respondent is an "owner" liable to pay fees – alleged non-performance of applicants' obligations is no defence – possible set-off is no defence -final fee notice did not include a daily rate of interest – *Owners Corporations Act 2006* ss 4, 5, 28, 32(2)(b)(ii).

FIRST APPLICANT	Owners Corporation No 1 501391P
SECOND APPLICANT	Owners Corporation No 2 501391P
RESPONDENT	K T Cheung
WHERE HELD	Melbourne
BEFORE	Senior Member A. Vassie
HEARING TYPE	Hearing
DATE OF HEARING	27 March 2018, 17 May 2018
DATE OF ORDER	31 May 2018
DATE OF REASONS	31 May 2018
CITATION	Owners Corporation No 1 501391P v Cheung (Owners Corporations) [2018] VCAT 804

ORDER

1. The respondent must pay the applicants $59,206.90 for levies and interest to the date of the final fee notice (the date being 29 March 2017) plus costs fixed at $1,600.00 (including $1,152.90 for reimbursement of fees paid by the applicants), a total of $60,806.90.

2. The operation of this order is stayed until the hearing and determination of proceeding OC2508/2017 or further order.

A. Vassie
Senior Member

APPEARANCES:

For the Applicants:	Mr. T. Hinz, solicitor
For the Respondent:	In person

REASONS

1. The respondent KT Cheung – that is her correct full name – lives in an apartment in the Watergate Apartments building at 8 Waterview Walk, Docklands. She is the registered proprietor of lot 951 on plan of subdivision 501391P which corresponds to her apartment. The number 951 denotes that the apartment is in the south tower (5) of the building and is on the ninth floor (9). The postal address for her apartment is number 901.

2. The two applicants, Owners Corporation No 1 501391P ("OC 1") and Owners Corporation No 2 501391P ("OC 2"), affect Ms Cheung's lot. She is a member of both owners corporations. I refer to them jointly as "the OCs".

3. This proceeding is for fee recovery. The OCs commenced it on 23 June 2017 with an application seeking recovery from Ms Cheung of $65,267.52 for unpaid fees and interest until 29 March 2017 which was the date of a final fee notice given to her. The OCs alleged that she had paid no fees since 21 March 2008.

4. Ms Cheung has defended the proceeding. I began to hear it on 27 March 2018.[1] It was part heard and adjourned to 17 May 2018. The hearing resumed and concluded on that day. I reserved my decision.

5. Three circumstances have complicated this proceeding:

   (i) *Bankruptcy*. Ms Cheung became bankrupt on 17 February 2011. On that date her property, including apartment 901, vested in her trustees in bankruptcy.[2] She was discharged from bankruptcy on 6 March 2016 but the apartment is still vested in her trustees in bankruptcy although she is the registered proprietor of it.[3] The OCs concede that all fees that Ms Cheung owed before 17 February 2011 were debts provable in the bankruptcy and cannot be claimed in legal proceedings against her. However, Ms Cheung contends that the OCs are not able to claim from her the fees which accrued during her bankruptcy.

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[1] Much of the delay, between the lodging of the application and the hearing of the proceeding, occurred because there had been a hearing at which Ms Cheung did not appear, an order was made against her, and she successfully applied for a review of the order and for a re-hearing.
[2] *Bankruptcy Act 1966* (Commonwealth) s 58(1).
[3] *Pegler v Dale* (1975) 24 FLR 401; *Daemar v Industrial Commission of New South Wales* (1990) 22 NSWLR 178.

(ii) *Statute-barred debts*. Recovery of some of the fees claimed in this proceeding is statute-barred. By virtue of s 5(1)(d) of the *Limitation of Actions Act 1958* the OCs cannot recover fees which fell due before 24 June 2011, six years before the date of commencement of this proceeding. Mr Hinz, who appeared for the OCs, conceded that recovery of those fees was statute-barred.

(iii) *The cross-claim*. On 11 December 2017 Ms Cheung commenced a cross-claim, proceeding no. OC2508/2017, in which she is the applicant and the OCs are respondents. That proceeding has progressed only to the stage of a directions hearing, which I held on 17 May 2018 immediately after the conclusion of the hearing in this fee-recovery proceeding. Amongst other things, Ms Cheung alleges in the cross-claim that the OCs have failed to exercise due care and diligence when carrying out their functions of managing and administering the common property in the subdivision and of repairing and maintain the common property, and that their failure has caused her monetary loss. She has sought to raise as defences to this proceeding many of the allegations she makes in the cross-claim.

The Witnesses

6. Four persons gave evidence during the hearing:

(a) Julie Darray, who as an employee of the OCs' manager, Kingston Management Group Pty Ltd, looks after the day-to-day management of the OCs and has done so for the past seven years. Ms Darray swore an affidavit on 27 July 2017 which exhibited various documents including a large number of fee notices addressed to Ms Cheung and a final fee notice addressed to her. Ms Cheung cross-examined Ms Darray on her affidavit and generally.

(b) Lee Krygger, a certified practising accountant who as a sub-contractor does accounting work for the OC's manager. His evidence was of calculation of the total amounts owing for fees and for interest.

(c) Ms Cheung. She had prepared and produced to me at the hearing a document dated 17 April 2018 and headed "affidavit" although it was unsworn. I received it as her witness statement, after she verified it on oath. She also gave oral evidence.

(d) Barbara Francis, who has been a committee member of the OCs from time to time. Ms Cheung called her as a witness. I allowed Ms Cheung to elicit evidence from her but did not permit Ms Cheung to cross-examine her. Ms Francis's evidence did not advance the case of either the OCs or of Ms Cheung and there is no need for me to mention any of it.

7. In addition to the documents exhibited to Ms Darray's affidavit, Mr Hinz tendered and I received minutes of various annual general meetings of the OCs and a copy of the plan of subdivision. Set out in the plan of subdivision are the lot entitlements and lot liabilities. For OC1 Ms Cheung's lot liability for her lot is 32 units out of 10186 total units of lot liability. For OC2 Ms Cheung's lot liability for her lot is 34 units out of 10000 total units of lot liability.

8. *The final fee notice*. A fact which an owners corporation must prove before it can succeed in a fee-recovery application is the giving to the lot owner of a final fee notice in accordance with s 32 of the *Owners Corporations Act 2006* ("the Act"). By virtue of s 163(2) of the Act, a fee-recovery application can be made only if the amount claimed in a final notice is not paid within 28 days after the final notice is given. If the owners corporation does not satisfactorily prove the giving of the final notice, there is no point in it attempting to prove anything else.

9. In her affidavit Ms Darray gave hearsay evidence of the assistant building manager for the Watergate Apartments having left the final notice (a copy of which she exhibited to the affidavit) at Ms Cheung's apartment on 29 March 2017. That was not satisfactory proof of the giving of the final notice. However, in her oral evidence Ms Darray stated that an email sent by Ms Cheung to the manager on 29 March 2017 Ms Cheung had acknowledged receipt of the final notice. Ms Darray showed me on her lap-top computer the email and one of the attachments to the email which was the final notice; she also produced to me a hard copy of the email. It had stated, "No fees are owed to body corporate …… Please see attached documents and read them".

10. The final notice dated 29 March 2017 had alleged that $65,267.52 was owing. Because some of that amount included statute-barred fees it was over-stated. The notice complied with the requirements of s 32 of the Act. Because of Ms Cheung's acknowledgment, in her email of the same day, of her receipt of it the OCs have satisfactorily proved the giving of it to her.

11. *Proof of the amount owing*. Mr Krygger, the accountant, gave evidence of having calculated the total of all the fees that had been claimed in fee notices by the OCs to Ms Cheung between 17 March 2011 and 17 March 2017 (the date of the final notice) and of interest that had accrued on unpaid fees to 17 March 2017. His calculation was $37,913.59 for fees levied and $24,153.82 for interest, a total of $62,067.41. But fees and interest from 17 March 2011 to 24 June 2017 were statute-barred. His calculation of those was $2,466.51 for fees and $394.00 for interest. After deduction of those from the total, the balance was $59,206.90 for levies and interest to the date of the final notice.

12. I accept Mr Krygger's arithmetic. For the OCs to prove that that amount of $59,206.90 was owing, however, it had to show that the fees levied were correctly levied and that interest upon them was properly payable.

13. The minutes of the annual general meeting of each of the OCs between 2011 and 2017 show that in each year the members of each of the OCs voted to approve two budgets: one for an administration fund and the other for a maintenance fund. Goods and services tax (GST) had to be added to each approved budget. To set fees correctly and to achieve the funds budgeted for, the OCs ought to have levied from each lot owner such proportion of each budgeted figure, plus GST, as accorded to the lot liability for the owners lot when compared to the total lot liability for all lots.

14. Fees were levied quarterly, in accordance with the resolutions approving the budgets. The fee notices addressed to Ms Cheung were for four different quarterly fees: for OC1's administration fund, for OC1's maintenance fund, for OC2's administration fund and for OC2's maintenance fund. A correct calculation of each quarterly fee, in accordance with her lot liability, required the application of the ratio 32/10186 to each budgeted figure for OC1 and by the ratio 34/10000 to each budgeted figure for OC2, and a division by 4. As seven years of fees were the subject of this proceeding, 28 separate calculations were therefore required.

15. Neither Ms Darray nor Mr Krygger was involved in the setting of the fees or in a checking of the correctness of each quarterly fee identified in a fee notice addressed to Ms Cheung. Mr Hinz relied upon a letter addressed to his firm from the OCs' auditor, Michael Burhela of MWB Accountants, dated 6 April 2018. The letter stated that MWB Accountants had audited the OCs' financial reports for each financial year between 2011 and 2017: more specifically, between the year ending 31 August 2011 and the year ending 31 August 2017. The letter went on to say: "I wish to advise that we have verified that the owners corporation levies for each year for the above period have been validly set in accordance with lot liability under the *Owners Corporation Act 2006*."

16. That letter from Mr Burhela the auditor was evidence that all the fees levied and identified in fee notices given to Ms Cheung between 2011 and 2017 were correctly calculated. In all the circumstances, however, including the very considerable amount of total fees and interest being claimed, and the fact that Ms Cheung was self-represented, I took the view that something more was required than an acceptance of a broad assertion, albeit by an expert, that the fees were correctly calculated. I did not consider it necessary to undertake 28 calculations of my own. I did, however, make four spot-checks of the quarterly fees claimed in fee notices. They were:

    (a) for 2011, the fees for the OC2 maintenance fund;

    (b) for 2013, the fee for the OC1 administration fund;

    (c) for 2015, the fee for the OC1 maintenance fund;

    (d) for 2015, the fee for the OC2 administration fund.

17. The results of the spot-checks were:

Year	Fund	Budget[4]	OC Fee in Notice	My Calculation
2011	(a)	$155,000	$144.91	$144.90
2013	(b)	$830,000	$720.61	$720.60
2015	(c)	$169,250	$148.35	$146.93
2015	(d)	$581,796	$549.20	$543.98

18. My calculations for the years 2011 and 2013 matched the fees that were in the fee notices but my calculations for the year 2015 did not quite match the fees that were in the fee notices. The difference is not significant. An expert auditor is more likely to be right in his calculations than a mere lawyer. I am satisfied, on the evidence of the auditor's letter, largely borne out by the spot-checks, that the fees claimed in the fee notices addressed to Ms Cheung were the correct fees.

19. By virtue of s 29 of the Act an owners corporation may charge interest on unpaid fees at a rate of interest which does not exceed the maximum rate of interest payable under the *Penalty Interest Rates Act 1983*. For each of the years relevant to this proceeding the OCs resolved to charge interest upon unpaid fees at the maximum rate of interest. Ms Cheung drew my attention to the fact that at the 2004 annual general meeting of the OCs, when they were controlled by the developer of the Watergate Apartments, the

[4] GST needs to be added to the budgeted figure.

resolution passed was that interest on unpaid fees should be charged at the *Penalty Interest Rates Act 1983* maximum rate less 2%. In later years the members of the OCs were entitled to resolve differently. I accept Mr Krygger's evidence of his calculation of interest payable by Ms Cheung on unpaid fees to the date of the final notice (after deduction of interest on statute-barred fees).

20. So, subject to any defence that Ms Cheung might have been able to make out, I consider that the OCs have proved that the amount owing by her for fees and interest up to the date of the final notice, 17 March 2017, was $59,206.90.

Bankruptcy: Who is the "Owner"?

21. Ms Cheung has maintained that because upon her bankruptcy her apartment was property that vested in her trustees in bankruptcy, and is still vested in them, she is not the owner of her lot for the purposes of the Act, and that fee recovery proceedings should have been taken against her trustees in bankruptcy, not against her.

22. By virtue of s 28(1) of the Act, the "owners for the time being" of a lot are liable to pay any outstanding fees in respect of that lot. In *Owners Corporation No 1 – PS50744P3 v Iglesias*[5] I decided that, as a consequence of the proprietor of the lot becoming bankrupt and having the lot vested in trustees in bankruptcy, both the registered proprietor and the trustees were "owners" within the meaning of s 28(1) – the registered proprietor being the legal owner and the trustees being the equitable owners – and so the registered proprietor was liable to pay fees that related to the lot if the owners corporation chose to demand payment of them from the registered proprietor. Ms Cheung was aware of this decision. In the draft "affidavit" that I accepted as her witness statement she made reference to it and quoted a passage from it in which I had decided that owners corporation fees accruing after a bankruptcy were not debts provable in the bankruptcy.

23. I adhere to the view I expressed in the *Iglesias* case that the registered proprietor of a lot is one of the "owners" of it who is liable to pay owners corporation fees after the registered proprietor has become bankrupt. It follows that I reject Ms Cheung's defence by which she maintained that she was no longer an owner after her bankruptcy. It is true, as she said in her witness statement, that the OCs could have sent fee notices to the trustees in bankruptcy and demanded that they pay the outstanding fees, for they were

[5] [2015] VCAT 558.

"owners" of the lot too. But they were not receiving any rent or other income from the lot from which they might have paid the fees. They have allowed Ms Cheung to remain in possession of the lot. There is nothing unfair about the OCs choosing to send fee notices to her demanding that she pay the fees and taking this proceeding against her because she has not paid.

The Cross-Claim

24. In her witness statement and in her oral evidence Ms Cheung mentioned some of the matters which are the subject of her cross-claim in proceeding OC2508/2017 and which, she maintains, afford a defence for her in this proceeding. I will list some of them. The list is not exhaustive:

    (a) The OCs have not properly cleaned and maintained the building. One instance of this is their failure to replace promptly lights which had malfunctioned in the refuse room, where rubbish bins are kept.

    (b) The OCs have entered into contracts with third parties without care as to whether rates charged by contractors were excessive. Some of those third parties have relationships with committee members or with the building manager, Marshall Delves.

    (c) Fees charged to lot owners are excessive and inflated by the cost of expensive legal proceedings which the OC took against lot owners who engaged in short-term letting of their apartments in breach (it was alleged) of the OC's rules.

    (d) She has been denied access to level 5 of the building, where meetings are held, and so has been prevented from attending annual general meetings.

    (e) The committee has not been validly elected, because there was insufficient notice of meetings at which they were elected. It follows that contracts into which the committee members have entered on behalf of the OCs are invalid.

    (f) The building manager has allowed a process server to enter the building's car park and wait beside her car space so that he could serve bankruptcy papers upon her, and has allowed repossession agents into the car park to repossess a car she had hired. Those actions, she alleges, were a "trespass".

25. For the purpose only of determining whether those allegations afford a defence for Ms Cheung in this proceeding, I shall assume that she will be able to prove the allegations. I shall also assume (difficult though it is to do so) that she will also prove that all or some of those events or circumstances are the cause of financial loss to her.

26. One of the ways in which Ms Cheung puts her defence is that the OCs have not been performing properly the duties and functions which the Act requires them to perform and for which she is being asked to pay fees. In short, she says, she and other lot owners are not getting value for money.

27. Non-performance, or poor performance, by an owners corporation of its duties and functions might, in an appropriate case, justify an order for the revocation of the appointment of a manager or of committee members. Non-performance or poor performance cannot be and is not a defence to a claim by that owners corporation for payment of fees or charges. If it were a defence the capacity of an owners corporation to function properly would be put at risk.

28. The OCs have obligations under the Act to administer and manage the common property, to repair and maintain the common property, and to insure the common property.[6] They also have obligations to act honestly and in good faith and to exercise due care and diligence when carrying out their functions and powers.[7] They may set annual fees to cover the estimated cost of performing their obligations. They rely upon lot owners' payment of those fees to obtain the funds so that they may perform their obligations. The lot owners' obligation is to pay those fees once they are levied in accordance with the Act.

29. The OCs' obligations on the one hand, and the lot owners' obligations to pay fees on the other, are independent. Legal requirement for the performance of one is not dependent upon performance of the other. The fact that the OCs need fees to be paid to enable them to discharge their obligations compels that conclusion. Nothing in the Act provides any foundation for considering the obligations to be interdependent so that non-performance or poor performance by the owners corporation relieved a lot owner from the obligation to pay fees.

[6] The Act ss 4, 46, 60.
[7] The Act s 5.

30. Another way in which Ms Cheung puts her defence, and could put her cross-claim, is that actions for which the OC is responsible have caused financial loss to her which she is entitled to set off against the fees that the OC is claiming. Again, because the parties' respective obligations are independent, not interdependent, there is no basis for any such claim being permissible as a set-off against unpaid owners corporation fees. If the law were otherwise – that a lot owner could raise non-performance or poor performance of an owners corporations as a defence to a claim for fees, or that a lot owner could set off a claim for monetary loss against unpaid fees – it would be practically impossible for an owners corporation to set a budget for a following year without factoring into the budget a large amount by way of contingency for such a defence possibly being raised in that following year. It is not difficult to foresee that the members of many owners corporations would decline to approve of such a budget and the higher fees that approval of it would lead to. Members of owners corporations need to be in a position to estimate the likely expenditure for the following year on maintenance, management and insurance, and to set accordingly the fees they have to pay. If defences to claim for fees, based on alleged lack of performance or on a set-off, were legally permissible, they would usually not be in that position.

31. So I conclude that none of the matters about which Ms Cheung is cross-claiming affords any defence to the OCs' claims in this proceeding.

Interest After the Date of the Final Notice

32. I have concluded that Ms Cheung is liable to pay to the OCs $59,206.90 for fees and interest up to the date of the final fee notice, 29 March 2017. Mr Hinz applied for an award of interest, upon the unpaid fees, from that date until the second day of the hearing. An owners corporation is entitled to interest in that way if in the final notice identifies a daily amount of interest that will accrue until payment of the overdue fees and charges.[8] The final notice given on 29 March 2017 did not identify any daily amount of interest. So I do not allow the application for interest until the hearing date.

Costs

33. Mr Hinz also applied for an order that Ms Cheung pay the costs of the proceeding. There is a general rule that parties to a proceeding in VCAT should bear their own costs, although there is a discretion to allow costs if the Tribunal is satisfied it is fair to do so.[9] On the other hand, there is a

[8] The Act s 32(2)(b)(ii).
[9] *Victorian Civil and Administrative Tribunal Act 1998* ("VCAT Act") s 109.

presumption that a party which substantially succeeds in an application brought under the Act is entitled to be reimbursed by the other party for filing fees or hearing fees that the successful party has paid to the Tribunal.[10]

34. For this proceeding the OCs have paid a filing fee of $655.20 and a hearing fee (for the second day) of $497.70, a total of $1,152.90. They have substantially succeeded in the proceeding. Although the immediate reasons for the adjournment of the hearing after the first day was that the OCs needed to produce the minutes of the annual general meetings for the relevant years, in view of Ms Cheung's desire to cross-examine Ms Darray (of which she had given no notice before the first hearing date) and of the length of her own evidence it was always inevitable that the hearing would extend into a second day. In my view the presumption operates and the OCs are entitled to an order that Ms Cheung pay $1,152.90 for those fees.

35. As the Tribunal has said numerous times, in most fee-recovery cases that have been successful the Tribunal considers it fair to make an order for the respondent lot owner to pay as costs a nominal figure which takes into account the fees paid and which is designed to have the defaulting lot owner bear a greater proportion of the overall costs than is borne by the other lot owners who are not in defence. This case is no exception.

36. I am satisfied that it is fair to make an order that Ms Cheung pay the OCs costs fixed at $1,600.00, including $1,152.90 for reimbursement of fees paid the OCs.

Stay

37. Ms Cheung asked me to stay the operation of any order in this proceeding until her claim in proceeding OC2508/2017 has been heard and determined. This was a reasonable request, particularly in view of the many years that it has taken the OCs to bring a fee recovery proceeding. She must, however, pursue proceeding OC2508/2017 with all reasonable speed, otherwise the OCs will be entitled to ask that the stay is lifted.

A. Vassie
Senior Member

31 May 2018

[10] VCAT Act ss 115B, 115C(1)(c), (2), (4).