

VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

OWNERS CORPORATIONS LIST

VCAT REFERENCE NO. OC1503/2018

CATCHWORDS

Owners Corporation fees – whether the benefit principle applies – claim for restitution of that part of the fees from which the applicant allegedly obtained no benefit – “recurrent obligations” of the owners corporation – *Owners Corporations Act 2006* ss 23, 46.

APPLICANT	Emma Tucker
RESPONDENT	Owners Corporation 1 Plan No. PS 702525Y
WHERE HELD	Melbourne
BEFORE	Senior Member A. Vassie
HEARING TYPE	Hearing
DATE OF HEARING	21 November 2018
DATE OF ORDER	18 January 2019
DATE OF REASONS	18 January 2019
CITATION	Tucker v Owners Corporation 1 Plan No. PS 702525Y (Owners Corporations) [2019] VCAT 53

ORDER

The proceeding is dismissed.

A. Vassie
Senior Member

APPEARANCES:

For Applicant	In person
For Respondent	Mr. N. Jones of Counsel

REASONS FOR DECISION

1. The applicant Emma Tucker is the owner of lot B on plan of subdivision PS 702525Y. The plan of subdivision describes:
 - (a) 7 lots, numbered 1 to 7 inclusive, which are residential premises;
 - (b) 3 other lots, numbered A, B and C, which are commercial premises; and
 - (c) two areas of common property, numbered Common Property 1 and Common Property 2.
2. The respondent, the correct name of which (according to the plan of subdivision) is Owners Corporation 1 Plan No. PS 702525Y (“the OC”), affects all the land in the subdivision and has the obligation under the *Owners Corporations Act 2006* (“the Act”) to repair and maintain the common property. Ms Tucker, as the owner of lot B, is a member of the OC.
3. There is another owners corporation, Owners Corporation 2 Plan No. PS 702525Y. Ms Tucker is not a member of that owners corporation.
4. Ms Tucker has leased lot B to a tenant, which conducts restaurant business there, on the corner of Bay Street and St Andrews Street, Brighton.
5. In this proceeding Ms Tucker is disputing her liability to pay owners corporation fees in the amounts that the OC is demanding from her. The fees have been paid but she is claiming restitution of part of those fees which have been paid since 2014. The components of the fees that she is challenging are these:
 - (i) maintenance of a car stacker;
 - (ii) the cost of rubbish bin collection;
 - (iii) electricity supplied to the residences,
 - (iv) maintenance of other things to do with the residential areas; lift, lift telephone, mechanical ventilation, fire panel maintenance, fire services, intercoms, front glass door, garage door.
6. The residences are on more than one level. The car stacker enables each resident to have his or her car carried to the resident’s car parking space. The OC owns the car stacker. When it operates, the car stacker’s machinery protrudes into part of the garage which is common property. Ms Tucker does not have a car parking space and does not need the use of the car stacker. She says that she gets no benefit from its maintenance.

7. The OC has engaged a contractor to collect and dispose of rubbish which is in rubbish bins supplied for occupiers to use. The rubbish bins are kept in a room which is part of the common property. Ms Tucker's restaurant tenant has its own rubbish bin which is the size of a skip, too big to fit in the room. The restaurant tenant makes its own arrangements for rubbish disposal. Ms Tucker says that she and her tenant get no benefit from the OC's rubbish disposal arrangements yet she is required to pay fees struck in accordance with budgets that include the cost of those arrangements.
8. As to the electricity and the maintenance of things to do with the residential areas, Ms Tucker says that she has no access to any of those areas or to Common Property No. 1. Access to the restaurant is gained by traversing part of Common Property No. 2. So she obtains no benefit from those things, she says.
9. The fees in question are the annual fees struck each year, levied against the lot owners on the basis of lot liability. For lot B, the lot liability is 220 units out of 1180 total units.
10. Ms Tucker, who herself is an owners corporation manager by occupation, argues that by virtue of s 49 of the Act the OC ought to have levied the fees not in accordance with lot liability but on the basis that the lot owner who benefits more pays more ("the benefit principle"). Section 49 provides:

49 Cost of repairs, maintenance or other works

- (1) An owners corporation may recover as a debt the cost of repairs, maintenance or other works undertaken wholly or substantially for the benefit of one or some, but not all, of the lots affected by the owners corporation from the lots owners.
 - (2) The amount payable by the lot owners is to be calculated on the basis that the lot owner of the lot that benefits more pays more.
 - (3) The works referred to in this section may be to the common property or a lot.
11. Ms Tucker has misunderstood the meaning and effect of s 49. The provision which governs the setting of annual fees is s 23 of the Act, which provides:

23 Owners corporation may levy fees

- (1) An owners corporation may set annual fees to cover—
 - (a) general administration; and
 - (b) maintenance and repairs; and
 - (c) insurance; and
 - (d) other recurrent obligations of the owners corporation.

- (2) If the owners corporation has an approved maintenance plan, the annual fees must include fees that are—
 - (a) designated for the purpose of the maintenance plan; and
 - (b) sufficient to allow the maintenance plan to be implemented.
 - (3) The fees set must be based on lot liability.
 - (3A) Subsection (3) applies to the setting of fees relating to repairs, maintenance or other works even if the works are wholly or substantially for the benefit of some or one, but not all, of the lots affected by the owners corporation.
 - (4) The owners corporation may determine the time for payment of fees.
- 12. As Mr Jones of Counsel for the OC correctly submitted, s 49 of the Act applies to the cost of repairs, maintenance or other works which are not included in the annual fees but are an additional cost. Only to that additional cost does the benefit principle apply. When annual fees are set following approval by members of a budget which may make provision for estimated cost of general administration, maintenance and repairs, insurances and other recurrent obligations, the fees must be set in accordance with lot liability, and there is no room for the application of the benefit principle.
- 13. By s 46 of the Act the OC must repair and maintain the common property and the chattels, fixtures, fittings and services related to the common property or its enjoyment. I leave aside for the moment the cost of rubbish bin collection. In respect of all other matters from which Ms Tucker says that she obtains no benefit, they are matters which involve the repair and maintenance of common property and so the estimated cost of them is properly included in a budget for the setting of annual fees, in accordance with lot liability, as they must be. The fact, if it is a fact, that Ms Tucker obtains no benefit from them is irrelevant.
- 14. At all events, I am satisfied that Ms Tucker does obtain a benefit from maintenance of the car stacker. When it is in operation its machinery protrudes into the garage and over the cover of a grease trap which is in place to carry waste from the restaurant and which needs to be serviced from time to time. Any failure to maintain the car stacker could result in it breaking down and becoming immobile over the grease trap, preventing access to the grease trap. The benefit to her from repair of and maintenance to the car stacker is the minimising of that risk.

15. The OC's chairman, Ilya Ferman, is the owner of lot C in the subdivision. He conducts a solicitor's practice there. Mr Ferman gave evidence that lots A, B and C in the subdivision are zoned for commercial use and are subject to a planning permit which includes a condition that the OC must arrange for a regular collection of waste. This is done by engaging a private contractor to collect and empty the rubbish bins and remove the waste. Neither he nor Ms Tucker produced the planning permit during the hearing, but Ms Tucker acknowledged that the permit existed and was subject to that condition about regular rubbish collection.
16. The contract for the rubbish collection has no connection with common property other than the fact that the rubbish bins sit in a room which is part of the common property. In making the arrangements for the rubbish collection and in paying the contractor for its service the OC is not maintaining common property or anything related to the common property or to the enjoyment of common property.
17. There are two ways of looking at the OC's position when enabling the rubbish bin collection and rubbish removal and including the payment for it in fees that it charges the lot owners. One way, to which I was attracted during the hearing, was that the OC has been providing a service to lot owners or managers, for entering into an agreement for the provision of a service to lot owners or occupiers, which it may decide to do by special resolution in accordance with s 12 of the Act. It may require a lot owner to whom the service has been provided to pay for the cost of providing the service to that lot owner. If that were the correct way of looking at the matter, Ms Tucker would be entitled to say that the service was not being provided to her or to her tenant and so s 12 did not impose upon her any liability to pay for it.
18. The other way of looking at the matter is to regard the rubbish collection as one of the "recurrent obligations of the owners corporation" within the meaning of s 23(1)(d) of the Act, which I have set out in paragraph 11 above. It is a recurrent obligation because the planning permit given to the OC imposed that obligation. On that view, the OC was correct in setting annual fees in a way that covered the recurrent obligation and in setting them in accordance with lot liability.
19. The "recurrent obligations" view is the better view. The functions of an owners corporation are set out in s 4 of the Act. They include, of course, management and administration of the common property, and the facilitation of the common property, and the facilitation of insurance as required by the Act. They also include, in s 4(f)(iii), "any other functions conferred on the owners corporation by...any other law". The planning permit does not confer any function upon the OC, but the OC may carry out other functions according to law only if it meets the condition in the planning permit by arranging for regular rubbish collections and by paying for it. Meeting the condition involves the meeting of a recurrent obligation that is essential for the lawful carrying out of the OC's other functions.

20. On that view, Ms Tucker has been liable to pay annual fees that include a provision for the cost of rubbish collection, even though she and her tenant obtain no benefit from that cost. If that result appears to be unfair, it is because of the tenant that Ms Tucker has chosen to have: a restaurant business that needs a larger waste disposal container than the room where the rubbish bins are kept can accommodate.
21. For those reasons I am dismissing Ms Tucker's application. Although I do not need to, I deal with two further matters that have arisen.
22. One is the amount of compensation that Ms Tucker was seeking. In her application she had claimed sums totalling \$3,125.36 for restitution of fees charged for car stacker maintenance and \$1,194.19 for restitution of fees charged for rubbish bin collection. When cross-examined during the hearing Ms Tucker was unable to explain how she arrived at those figures. She was not sure whether she had calculated them on the basis of actual expenditure upon car stacker maintenance and upon rubbish bin collection each year or on the basis of budgeted expenditure for those things in the following year. She had the onus of proving, on the balance of probabilities, that she is entitled to compensation in a particular amount. She did not discharge that onus.
23. The other matter is the fact that Ms Tucker's tenant has a liability to Ms Tucker to pay the owners corporation fees charged to Ms Tucker's lot. Her evidence was that when she notifies the tenant of the fee notice from the OC the tenant pays the amount of the fee to her managing agent who in turn pays it to the OC. I infer that this happens because, as is commonly the case with commercial leases, the lease contains a term which obliges the tenant to pay owners corporation fees or reimburse the landlord if the landlord pays the fees.
24. It having emerged during the hearing that the fees were paid in that way, Mr Jones for the OC submitted that Ms Tucker had no right to restitution for any fees paid to the OC because she did not pay them: her tenant did. He was not in a position to develop that argument so, when I reserved my decision at the conclusion of the hearing, I allowed the OC to file and serve a written submission on the point within 7 days. Within that time the OC did file a written submission. I also allowed Ms Tucker to file and serve within a further 14 days a written submission in reply. She did file and serve a written submission. I have considered both of the written submissions.
25. I do not accept the submission that Ms Tucker had no right to claim restitution. While it is true that the tenant is the source of the funds for which fees are paid to the OC, that does not mean that they are paid by the tenant not by Ms Tucker. Payment is made by Ms Tucker's managing agent from funds held on her account. They are paid by Ms Tucker, via her

agent. She is the proper applicant in a proceeding which seeks restitution of part of the fees. If she were to have succeeded in this proceeding she no doubt would have an obligation to return to the tenant whatever she recovered from the OC, but that circumstance would not alter the fact that Ms Tucker was the person who paid the fees.

26. Mr Jones made an additional submission: that Ms Tucker's claim for restitution depends upon her having made a mistake of law, but Ms Tucker did not give any evidence that she paid fees because she mistakenly thought that she was liable to pay them. I do not accept that submission either. Ms Tucker's restitutionary claim does not arise from a mistake of law. If the OC did receive from her fees that it was not entitled to charge her, the restitutionary claim is for money had and received to Ms Tucker's use.
27. Ms Tucker's written submission included assertions of fact about which she had given no evidence during the hearing, so I cannot take those assertions into account. The outcome of the case would have been the same, however, if she had included those assertions of fact in her evidence.
28. For reasons given above there will be an order that the proceeding is dismissed.

A Vassie
Senior Member

18 January 2019