

## VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

### CIVIL DIVISION

#### OWNERS CORPORATIONS LIST

VCAT REFERENCE NO. OC1309/2019

#### CATCHWORDS

Principles applicable in contractual construction on a question of ambiguity: *Mount Bruce Mining Pty Limited v Wright Prospecting Pty Limited* [2015] HCA 37; *Codelfa Construction Pty Ltd v State Rail Authority of New South Wales* (1982) 149 CLR 337.

Contractual construction principles apply to construing an order of the Tribunal: *Shout Rocks Cafes Pty Ltd & Anor v City of Port Philip & Ors* [2018] VSC 120; *Livingspring v Ng* [2007] VSC 9.

Tribunal's power to conduct a collateral review of a previous consent order: *The Big Apple Group Pty Limited v Melbourne City Council* [2020] VSC 393. Found: no power vested in the Tribunal.

Whether resort to extrinsic material to resolve ambiguity of a Tribunal consent order amounts to a collateral review of the order. Found: such an enquiry amounts to a collateral review and is impermissible.

Whether a finding of no ambiguity in the Tribunal's consent order can be made without conducting a collateral review of the consent order. Found: the conduct of an enquiry according to contractual principles of construction establishing no ambiguity, consistent with a plain reading, is within the power of the Tribunal; such enquiry does not amount to an impermissible collateral review.

<b>APPLICANT</b>	Owners Corporation RP017879
<b>RESPONDENT</b>	Sandra Issa Investments Pty Ltd (ACN: 152 892 656)
<b>WHERE HELD</b>	Melbourne
<b>BEFORE</b>	Member MJF Sweeney
<b>HEARING TYPE</b>	Hearing
<b>DATE OF HEARING</b>	6 July 2020
<b>DATE OF FURTHER SUBMISSION</b>	29 July 2020
<b>DATE OF ORDER</b>	12 August 2020
<b>CITATION</b>	Owners Corporation RP01787 v Sandra Issa Investments Pty Ltd (Owners Corporations) [2020] VCAT 863

#### ORDER

1. On the question of liability for payment of levies and charges for the period 1 April to 30 June 2018, a determination is entered in favour of the applicant.

2. On the question of quantum, subject to order 3 below for any application to be made by no later than 26 August 2020, the respondent must pay the applicant:
  - (a) the sum of \$5,643.29;
  - (b) interest for the period 1 February 2019, being the date of the Final Fee Notice, to 12 August 2020, being the date of these orders, a period of 193 days at \$1.54 per day, being interest of \$297.22, a total of \$5,940.51.
3. If either party disputes quantum or calculation of interest as ordered in paragraph 2 above, liberty to apply is granted, limited to the question of quantum and calculation of interest, any application to be made by no later than 26 August 2020, failing which the orders in order 2 above are confirmed.
4. Unless the parties otherwise reach agreement on the question of costs, costs are reserved upon application to be made by filing with the Principal Registrar, by no later than 11 September 2020, submissions in writing not to exceed three A4 pages in 12 pitch.

MJF Sweeney  
**Member**

**APPEARANCES:**

For Applicant

Mr A Wilkinson, Solicitor

For Respondents

Mr B Fry of Counsel

## REASONS

### INTRODUCTION

- 1 Prior to bringing the present proceeding, the same applicant, Owners Corporation RP017879 had brought proceedings OC392/2018 against the same respondent, Sandra Issa Investments Pty Ltd (Issa Investments), on 8 March 2018 claiming \$52,994.20 for alleged unpaid levies, fees and interest to 31 March 2018 (Initial Proceeding).
- 2 The Initial Proceeding came on for hearing on 14 May 2018. Following settlement discussions between the parties, the parties agreed that Issa Investments would pay the Owners Corporation the sum of \$42,500.
- 3 The parties sought a consent order from the Tribunal. The Member made the following consent order at the hearing on 14 May 2018 (Consent Order):

#### ORDER BY CONSENT

1. The Tribunal orders that the respondent must pay to the applicant the sum of \$42,500 for levies, interest and costs to 14 May 2018; such sum to be paid by 14 July 2018.
- 4 On 16 July 2018, Issa Investments paid the Owners Corporation the sum of \$42,500 under the Consent Order.
- 5 By a Fee Notice, issued 11 April 2018, the Owners Corporation sought payment of \$10,926.44 for levies for the quarter 1 April to 30 June 2018 (April Quarter) due on 10 May 2018.
- 6 By Final Fee Notice, issued 25 May 2018, the Owners Corporation sought payment of unpaid levies for the April Quarter referred to in the above paragraph plus other fees and charges alleged to be outstanding.
- 7 By a second Final Fee Notice, issued on 1 February 2019, the Owners Corporation sought payment of \$10,926.44 for levies and interest for the April Quarter less adjustments to reflect payments made, including a previous adjustment for the payment of \$42,500. The adjusted balance for the April Quarter as claimed pursuant to the second Final Fee Notice and as claimed in the present VCAT application, dated 23 May 2019, is \$6,292.92.
- 8 At the hearing, in accordance with the affidavit of Deanna Wendt, sworn 1 July 2020, and the Owners Corporation's outline of submissions,<sup>1</sup> the Owners Corporation amended its claim by not claiming part levies and interest for the period 1 April to 14 May 2018. In reducing the amount of its claim, the Owners Corporation did not resile from its asserted legal right to claim for the full April Quarter. The reduced claim, pro rata, for the period 15 May to 30 June 2018 is \$5,643.29 for levies. In addition, interest is claimed at the rate of \$1.54 per day.<sup>2</sup>

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<sup>1</sup> Applicant's outline of submissions dated 3 July 2020, paragraph 10.

<sup>2</sup> Applicant's affidavit of Deanna Wendt sworn 1 July 2020, paragraphs 12 to 16.

- 9 Issa Investments denies any monies are payable for the April Quarter saying the sum claimed for the April Quarter was fully included as part of the agreed settlement of \$42,500 pursuant to the Consent Order. The Owners Corporation rejects this and says that the Initial Proceedings and subsequent Consent Order did not include any claim in respect of the unpaid April Quarter.
- 10 The dispute is concerned with whether the Consent Order is ambiguous and, if so, what is its proper construction.

### **PARTIES' CONTENTIONS**

- 11 The Owners Corporation contends that there are two possible interpretations of the Consent Order, neither of which is the contention put by Issa Investments. The first is that the Consent Order means the payment of \$42,500 is in respect of levies to 31 March 2018 and interest and costs to 14 May 2018 with no part of the April Quarter forming part of the Consent Order.
- 12 The alternate Owners Corporation contention is that the Consent Order means the payment of \$42,500 included a proportion in respect of the April Quarter levies from 1 April to 14 May 2018 and interest and costs to the same date. This alternate contention means that, included in the payment of \$42,500, was an amount for levies for the April Quarter, pro rata to 14 May 2018.
- 13 Issa Investments contends that the reference to 'levies, interest and costs to 14 May 2018' in the Consent Order means levies, interest and costs which were due and payable as at 14 May 2018. It contends that as the April Quarter levies and fees were already the subject of an issued Fee Notice, they were due and payable at the time settlement was agreed and thus were included in the settlement as recorded by the Consent Order. That is, its liability for the full April Quarter was included in the settlement sum of \$42,500.
- 14 The parties referred to the exchange between the Member and the legal representatives at the time of agreeing the Consent Order. An extract of the audio was presented as a 'transcript' by the respondent which was not objected to.<sup>3</sup> It is repeated for convenience:  

Member:	How much is it (the Order) for ... levies and interest to the final fee notice or some other point?
Respondent's counsel:	I think the parties have come to a resolution.
Member:	How much is it for ... levies and interest to the final fee notice or to some other point?
Respondent's counsel:	Today.
Applicant's solicitor:	To today ... umm yes to today maam.

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<sup>3</sup> Affidavit of Sandra Issa McGuiness, affirmed 11 June 2020, paragraph 7.

Member: So I will put to 14 May 2018.

Applicant's solicitor: Yes, maam.

Member: Is it an all-inclusive order?

Applicant's solicitor: It's an all-inclusive order.

- 15 The Owners Corporation submits that the above exchange demonstrates a possible ambiguity, but only an ambiguity between the alternate interpretations it has contended for above.
- 16 Issa Investments submits, as its primary submission, that a reading of the text of the order presents no real controversy or ambiguity. It submits the order is susceptible of only one meaning by reference to the text of the order, its context and purpose. In the alternative, it submits that if there be any ambiguity, an objective examination of the surrounding circumstances, including having regard to extrinsic material, also proves the position contended for. In either case, it submits that its contention is made out that the April Quarter under the Consent Order was included in its payment of \$42,500.

#### **CONSTRUING CONSENT ORDERS MADE BY THE TRIBUNAL**

- 17 The principles to be applied in the construction of consent orders was considered in *Shout Rocks Cafes Pty Ltd & Anor v City of Port Philip & Ors.*<sup>4</sup> J Forrest J found:

Although it is not entirely clear, in my opinion, there is authority for the proposition that in construing consent orders, a Court may have regard to evidence of the circumstances surrounding the making of such orders. The circumstances which can be considered are those that would be 'used to construct a contract' ... where the language of the instrument is susceptible to two meanings, evidence of surrounding circumstances is admissible.<sup>5</sup>

- 18 His Honour referred to *LivingSpring v Ng*<sup>6</sup> where Cavanough J observed that, outside the context of contempt, courts appeared 'relatively free' to take into account extrinsic material to resolve ambiguities in an order.
- 19 The principles of contractual construction and the position when an ambiguity may arise were reviewed by the High Court in *Mount Bruce Mining Pty Limited v Wright Prospecting Pty Limited*.<sup>7</sup> The decision is confirmatory of the principles enunciated in *Codelfa Construction Pty Ltd v State Rail Authority of New South Wales*.<sup>8</sup> In *Mount Bruce* the court held that the rights and liabilities of parties under a provision of a contract are determined objectively. This is determined by reference to its text, the context of the entire contract as well as any document or statutory provision

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<sup>4</sup> [2018] VSC 120.

<sup>5</sup> *Ibid.* at [14] citations omitted.

<sup>6</sup> [2007] VSC 9 (5 February 2007).

<sup>7</sup> [2015] HCA 37 (14 October 2015) per French CJ, Kiefel, Bell, Gaegler, Keane, Nettle and Gordon JJ.

<sup>8</sup> (1982) 149 CLR 337, 352.

referred to in the text, and its purpose.<sup>9</sup> The court further held that, if an expression in a contract is unambiguous or susceptible of only one meaning, evidence of surrounding circumstances and things external to the contract cannot be adduced to contradict its plain meaning.

- 20 Thus, the construction of an order is by reference to the principles for construction of a contract, having regard to its text and context. If the order is unambiguous or susceptible of only one meaning based on its text and context, including reference to any referenced statutory provision, that is the end of the matter and no enquiry into external or extrinsic material is permissible to contradict the plain meaning. A consent order stands and operates in accordance with its terms.
- 21 If a consent order is found to suffer from ambiguity so that an examination of extrinsic material is required, this raises an anterior question. Whilst the position is clear in respect of the Supreme Court, does the Tribunal have jurisdictional power to conduct a collateral review of a consent order? By collateral review, I mean a re-examination of a decision as contained in a consent order and whether the conduct of such a collateral or secondary review is permissible under the *Victorian Civil and Administrative Tribunal Act 1998* (VCAT Act).
- 22 In *Shout Rocks Cafes and Livingspring* (above), the jurisdictional power to review a consent order of the court did not arise for consideration given the court's inherent jurisdiction. However, the power of the Tribunal to conduct a collateral review of a consent order is confined by the powers provided under the VCAT Act, the Tribunal being a creature of statute.
- 23 It seems to me that, in the case of ambiguity, where an examination is required in order to resolve doubt and ascertain the true intent or meaning of a consent order made in a separate proceeding, it necessarily involves an objective examination of extrinsic material and circumstance giving rise to the consent order.
- 24 In the present case, it is urged upon me by the parties' submissions<sup>10</sup> supported by their respective affidavit material that I should have regard to the factual matrix and underlying material external to the Consent Order, on which it is contended the requested Consent Order was based.
- 25 In my opinion, the process urged upon me, to determine any question of ambiguity, necessarily involves the collateral review of the Consent Order. In contrast, employing principles of construction that might lead to a determination of no ambiguity, which does not permit examination of extrinsic material, does not involve a collateral review of the Consent Order.
- 26 Whether the Tribunal has the jurisdictional power to conduct a collateral review was considered by Ginnane J in a recent decision *The Big Apple Group Pty Limited v Melbourne City Council*.<sup>11</sup> In that case, the appellant

<sup>9</sup> *Mount Bruce Mining Pty Limited v Wright Prospecting Pty Limited*, above, [46] to [52].

<sup>10</sup> In respect of Issa Investments, its alternative submission for the case of ambiguity.

<sup>11</sup> [2020] VSC 393.

sought leave to appeal under s148 of the VCAT Act against the orders of a Senior Member of the Tribunal. The decision appealed against was a determination by the Senior Member, as a preliminary question, that the Tribunal did not have jurisdiction to set aside consent orders, which had been made in Tribunal proceedings over five years earlier. The Supreme Court refused the application for leave to appeal and dismissed the proceeding.

- 27 Ginnane J considered the source of the Tribunal's power to make consent orders. As in the present case, the power arose under s93 of the VCAT Act.

93(1) If the parties agree to settle a proceeding or any part of it at any time, the Tribunal may make any orders necessary to give effect to the settlement.

- 28 *The Big Apple* was concerned with the appellant seeking to set aside a consent order, alleging that there was no agreed settlement due to it having been affected by fraud. His Honour held that VCAT does not have jurisdiction and is not empowered to conduct a collateral review of its previous decision to make the complained of consent orders, when the Tribunal had been asked to make them by the parties because they had settled the proceeding. Ginnane J observed the only power of the Tribunal to reconsider previous orders are under s119 and s120 of the VCAT Act.<sup>12</sup>

- 29 The decision should not be viewed as being confined to its facts, those involving the setting aside of a consent order. His Honour elaborated his finding as follows:

44. If Big Apple's construction of s93 were accepted, the Tribunal would have to conduct an inquiry or investigation into whether the settlement agreement was genuinely formed. This 'trial within a trial', to adopt Warren CJ's description in *Sudi*,<sup>13</sup> is inconsistent with the legislature's intention for the Tribunal to be a speedy and inexpensive forum for dispute resolution.

45. The Big Apple's submissions would also mean that Consent Orders made under s93(1) would always be conditional and cease to have any effect if the parties' agreement was later found to have been induced by fraud or misrepresentation or mistake or misunderstanding. This outcome would affect the finality of Tribunal orders and the capacity to give immediate and permanent effect to them.'

46. The right of a party to seek leave to appeal under s148 [VCAT Act] against orders, including those made under s93, is a further significant matter supporting the Senior Member's conclusion. A party aggrieved by s93 orders can seek to appeal to this Court and if required, can seek an extension of time. Alternatively it can commence a separate proceeding seeking to set aside the agreement.

48. Parliament's choice of words in s93, when read as part of the VCAT procedures established by the VCAT Act, make clear that VCAT has neither power nor obligation to inquire into whether the parties had reached

<sup>12</sup> *The Big Apple Group Pty Limited v Melbourne City Council*, above, at [41]

<sup>13</sup> *Director of Housing v Sudi* (2011) 33 VR 559 at 567 [34] – [36], 569 [43].

agreement enlivening s93(1), when they inform the Tribunal they have. Section 93(1) enlivens the jurisdiction of the Tribunal when the parties inform it that they have agreed to settle the dispute and consent to the making of orders to give effect to the settlement.

- 30 The decision in *The Big Apple* applies in the present dispute to make clear that the Tribunal does not have jurisdiction and is not empowered to conduct a collateral review of its previous decision. This includes not having the power or obligation to inquire into whether there existed some misunderstanding between the parties or whether there was some mistake or misdescription in the settlement agreement purportedly agreed by the parties giving rise to the request under s 93 of the VCAT Act for the Consent Order.
- 31 For the reasons given in paragraphs 21 to 23 above, I have found that the process of an examination of extrinsic material on an issue of ambiguity would amount to a collateral review of the Consent Order. As concluded in paragraph 30, and in answer to the anterior question, unlike the courts, it is beyond the power of the Tribunal under the VCAT Act to conduct a collateral review of the previous Consent Order.
- 32 However, as discussed in paragraphs 19 and 20 above, a determination finding no ambiguity may be made, and moreover must be made, without recourse to the conduct of a collateral review of a consent order. That is because a finding of no ambiguity is determined, under the applicable construction principles, objectively by reference to the text, the context of the entire contract (consent order) as well as any document or statutory provision referred to in the text, and its purpose.<sup>14</sup>
- 33 Without a need to conduct a collateral review of the Consent Order by reference to extrinsic material, a determination that finds an absence of ambiguity does not transgress the Tribunal's absence of jurisdiction to conduct a collateral review of a previous consent order.

### **IS THE CONSENT ORDER AMBIGUOUS?**

- 34 I find that the Consent Order is not ambiguous and is susceptible of only one meaning. The Consent Order reads:
- The Tribunal orders that the respondent must pay to the applicant the sum of \$42,500 for levies, interest and costs to 14 May 2018; such sum to be paid by 14 July 2018.
- 35 The Consent Order was made in the VCAT Civil Division, Owners Corporation List. The Owners Corporation List is solely concerned with disputes arising under the *Owners Corporation Act 2006* (OC Act). In considering the meaning to be attributed to the Consent Order, regard may be had to the text, the context of the entire contract, as well as any document or statutory provision referred to in the text, and its purpose. Thus, relevant to

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<sup>14</sup> *Mount Bruce Mining Pty Limited v Wright Prospecting Pty Limited*, paragraph 19 above.



an understanding of the consent order is the statutory context within which it was made, namely the OC Act.

- 36 Under the OC Act, an application to VCAT for recovery of unpaid fees and levies may only be made if there is compliance with the OC Act, including s31 and s32. Important in the legislative scheme for recovery of levies and fees is the service of a Fee Notice and a Final Fee Notice. Action for recovery may be brought where unpaid levies and fees are not paid within 28 days of the date of the Fee Notice, upon the service of a Final Fee Notice.
- 37 In the Initial Proceeding, the subject of the Consent Order, the Owners Corporation sought recovery of unpaid levies for the period 1 January to 31 March 2018 (January Quarter) pursuant to Fee Notice issued 5 December 2017 and Final Fee Notice issued 6 February 2018.
- 38 The Initial Proceeding was heard on 14 May 2018. By that time a Fee Notice had been issued on 11 April 2018 for April Quarter levies then due (see below). The Owners Corporation VCAT application sought payment of the January Quarter levies but made no claim in respect of the April Quarter levies. A Final Fee Notice in respect of the April Quarter levies was not issued until 25 May 2018.
- 39 It will be recalled that Issa Investments contends the unwritten settlement agreement said to be reflected in the Consent Order included sums due by Issa Investments in respect of the April Quarter.
- 40 Issa Investments submits that the statutory regime of the OC Act supports the proposition that levies and charges accrue by reference to the deadline for payment of fees, which at all times is in advance of the period for which the levies are actually struck.<sup>15</sup> Further, it follows that the only sensible interpretation is that the date expressed in the Consent Order of 14 May 2018 must be referable to liabilities which have actually fallen due for payment (as of that date), and in respect of which fee notices have, or could, issue under s30 to s32 of the OC Act. It submits this analysis is entirely consistent with the statutory scheme.<sup>16</sup>
- 41 I do not accept the analysis submitted. Amongst other matters, the OC Act provides, s32, as follows:

**Final notice**

- (1) If the money owing is not paid within 28 days after the date of the fee notice, the owners corporation may send a final notice in the approved form to the lot owner.
- (2) The final notice must—
  - (a) state that the lot owner has an obligation to pay the overdue fees and charges and interest immediately; and

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<sup>15</sup> Issa Investments, outline of submissions, 1 July 2020, paragraphs 14 to 15.

<sup>16</sup> Ibid. paragraph 16.

- (b) (if applicable) state—
  - (i) the interest that is payable in respect of the overdue fees and charges at the date of the final notice; and
  - (ii) the amount of interest that will accrue daily until the payment of the overdue fees and charges; and
- (c) state that the owners corporation intends to take action under Part 11 to recover the amount due if the overdue fees and charges and interest owing are not paid within 28 days after the date the final notice is given.

**Note**

Section 163(2) provides that an application to VCAT by the owners corporation for an order requiring a lot owner to pay an amount payable by the lot owner to the owners corporation can only be made if the amount is not paid within 28 days after the final notice is given under section 32.

42 Section 163(2) of the OC Act further provides:

An application to VCAT by the owners corporation for an order requiring a lot owner to pay an amount payable by the lot owner to the owners corporation can only be made if the amount is not paid within 28 days after the final notice is given under section 32.

43 The scheme of the OC Act operates by prescribing for the issuing of a Final Fee Notice and, after that, the elapse of 28 days from issuing the Final Fee Notice, before the Owners Corporation may make an application for recovery of unpaid amounts, including unpaid levies.

44 At the hearing of the Initial Proceeding on 14 May 2018, the subject of the Consent Order, the Owners Corporation had no entitlement under the OC Act to seek a determination by VCAT for recovery of any unpaid amounts for the April Quarter. Nor does the Tribunal have power to make a determination for levies not included in a Final Fee Notice properly before it. That is the scheme of the Act.

45 That is not to say that a settlement agreement made between parties to litigation or proceedings before the Tribunal cannot include in a settlement, matters extraneous to the actual dispute before the court or Tribunal. However, in the present proceeding, where the settlement agreed was not recorded in writing, it would be surprising that the parties did not expressly address the April Quarter liability, being a matter extraneous to the proceeding then before the specialist Tribunal.

46 A plain reading of the Consent Order in my opinion is expressed in language that is entirely reflective of the legislative scheme provided under the OC Act. The Member, at the request of the parties under s93 of the VCAT Act, ordered by consent that the respondent must pay to the applicant the sum of \$42,500 for levies.

- 47 If the matter was not the subject of a consent order, but the result of an order following a full determination on the merits, the procedure of the Tribunal is to order payment of the levies which can only be ordered if the applicant has proved, amongst other matters, compliance with the requirements of s32 and s163(2).
- 48 Whilst the Tribunal sitting in the OC List usually refers in its order to levies and interest payable to the date of the Final Fee Notice, no language is necessary to express the date because the Tribunal cannot make an order without proof of the Final Fee Notice nor make an order for levies beyond the date of the Final Fee Notice. In my opinion, the Member's focus on the date of 14 May 2018 (the date of the hearing), is consistent with usual practice, where it is only interest that needs to be addressed for the period from the date of the Final Fee Notice to the date of the hearing.
- 49 The legislative scheme is such that, where as in the present proceeding a Final Fee Notice had not issued in respect of the April Quarter at the time of the Consent Order, the absence of an express reference to inclusion of the April Quarter in the Consent Order being requested, leads to the only reasonable inference that the words of the Consent Order cannot be taken on their plain reading as including an amount due for the April Quarter. Indeed, as stated above, it should be expected that express provision to include the April Quarter would be required to avoid the meaning that clearly flows from a plain reading.
- 50 I have been referred to the extract of the audio of the proceeding recording the exchange between the parties' legal representatives and the Member, in paragraph 14 above. There is nothing in the exchange that would lead to a conclusion that a plain reading of the Consent Order is not open. The exchange is consistent with the legislative scheme of the OC Act which I have referred to above.
- 51 For these reasons, the Consent Order is capable of a plain reading and susceptible of only one meaning. The meaning is that the April Quarter levies were not included in the settlement amount agreed to be paid as ordered by the Consent Order.

## **CONCLUSION**

- 52 The defence of Issa Investments for the plain reading contended for, that the April Quarter levies are included under the Consent Order payment, has not been made out. It is unnecessary, and in any event impermissible, to consider a construction based on ambiguity.
- 53 On the question of liability, the Owners Corporation is entitled to an order in its favour on its amended claim for unpaid levies and interest in respect of the April Quarter to the date of the Final Fee Notice issued 1 February 2019, together with interest on the outstanding amount to the date of final orders.

- 54 The sum claimed by the Owners Corporation in its VCAT application for unpaid levies and interest in respect of the April Quarter pursuant Final Fee Notice issued 1 February 2019 was \$6,292.92.<sup>17</sup>
- 55 The sum claimed for unpaid levies and interest was adjusted by the Owners Corporation to take account of payments made, as well as to provide for amendment of its claim, by adjusting pro rata 47/91 days from 15 May to 30 June 2018. The amendment of the Owners Corporation claim (to make an allowance in favour of Issa Investments for part of the April Quarter), does not take way from the force of my findings as a matter of construction of the Consent Order. After the adjustment, the sum claimed under the application as amended, as of 1 July 2020, is \$5,643.29 plus interest of \$1.54 per day.<sup>18</sup>
- 56 At the hearing on 6 July 2020, Issa Investments by its counsel, confirmed in respect of its counterclaim in proceeding OC2140/2019 filed 20 August 2019 (Points of Defence and Counterclaim), that the counterclaim had been withdrawn under Directions Orders made 28 May 2020. The points of defence contained in the Points of Defence and Counterclaim remained as a defence to the claim under this proceeding. The withdrawal of the counterclaim contained in the Points of Defence and Counterclaim is confirmed.
- 57 Evidence was not lead in defence on the quantum claimed in the amended sum of \$5,643.29, plus interest at a daily rate of \$1.54, referred to above.
- 58 On the question of liability, in accordance with paragraph 53 above, my determination is entered in favour of the applicant Owners Corporation.
- 59 On the question of quantum, on the case as presented, subject to paragraph 60 below, I order respondent must pay the applicant:
- (a) the sum of \$5,643.29 in respect of levies and interest, as claimed, to the date of the Final Fee Notice, being 1 February 2019;
  - (b) interest from the date of the Final Fee Notice to 12 August 2020, being the date of these orders, a period of 891 days at \$1.54 per day, being interest of \$297.22,
- a total of \$5,940.51.
- 60 If either party disputes quantum, in paragraph 58(a), or the calculation of interest, in paragraph 58(b) above, as found and ordered, liberty to apply is granted, limited to the question of quantum and calculation of interest as above, any application to be made by no later than 26 August 2020.
- 61 Unless the parties otherwise reach agreement on the question of costs, costs are reserved upon application to be made by filing with the Tribunal by no

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<sup>17</sup> Exhibit DW-3, affidavit Deanna Wendt, sworn 27 May 2020.

<sup>18</sup> Affidavit Deanna Wendt, sworn 1 July 2020, paragraphs 12 to 16.

later than 11 September 2020 submissions in writing not to exceed three A4 pages in 12 point pitch.

MJF Sweeney  
**Member**