

**VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL**

**CIVIL DIVISION**

**OWNERS CORPORATIONS LIST**

VCATREFERENCE NO. OC489/2020

**CATCHWORDS**

Section 109 of the Victorian Civil and Administrative Tribunal Act 1998; Costs.

<b>FIRST APPLICANT</b>	Aumeca Owners Corporation (ACN: 613 901 492)
<b>SECOND APPLICANT</b>	Owners Corporation Plan No PS 737965W - Removed from proceedings on 28 May 2020
<b>RESPONDENT</b>	Atlas Partners Pty Ltd (ACN: 631 886 578)
<b>WHERE HELD</b>	Melbourne
<b>BEFORE</b>	D. Calabro', Member
<b>HEARING TYPE</b>	Hearing
<b>DATE OF HEARING</b>	28 May 2020
<b>DATE OF SUBMISSIONS</b>	12 & 15 June 2020
<b>DATE OF DECISION</b>	24 September 2020
<b>CITATION</b>	Aumeca Owners Corporation v Atlas Partners Pty Ltd (Owners Corporations) [2020] VCAT 1019

**ORDER**

Order the Applicant, Aumeca Owners Corporation (ACN: 613 901 492) to pay the Respondent, Atlas Partners Pty Ltd (ACN: 631 886 578) costs of this application, such costs if not agreed, to be assessed by the Victorian Costs Court on a standard basis in accordance with the County Court Scale.

D. Calabro'  
**Member**

**APPEARANCES:**

For Applicant

Mr Wang, Solicitor

For Respondents

Mr Lipshutz, Solicitor

## REASONS

- 1 This is an application by Atlas Partners Pty Ltd (the Respondent) for costs to be ordered against Aumeca Owners Corporation (the first named Applicant – not the second named Applicant was removed from the proceedings at the request of the first named applicant ) arising from a hearing for an urgent injunction on 28 May 2020.
- 2 On 8 May 2020 the Tribunal made an order in chambers pursuant to section 60 of the *Victorian Civil and Administrative Tribunal Act 1998* (VCAT Act) substituted the original respondent Resi Body Corporate Management with Atlas Partners Pty Ltd as the respondent.
- 3 A brief history of the application is as follows.
- 4 The first and second named Applicants made an application for the sum of \$23,870.50 against the respondent. Aumeca (first named applicant) was the owners corporation manager for Owners Corporation Plan No PS 737965W.
- 5 The claim relates to damages for loss against the respondent for arranging a vote by the lot owners of the owner's corporation and changing the owners corporation manager. It also alleged irregularities in the voting procedure, telling lot owners not to pay levies to the Applicant and other matters.
- 6 On 20 April the first named Applicant wrote to the Tribunal requesting that the second named Applicant be removed from the application.
- 7 On 6 May, Mr Lipshutz, solicitor wrote to the Tribunal confirming he acted on behalf the Respondent, seeking an urgent directions hearing because of the 'unacceptable dysfunctionality' of the Owners Corporation (there being two managers and two committees), insurance premiums due in June and the failure by the Applicant to hand over records and funds.
- 8 On 21 May 2020 the Tribunal received from the Applicants solicitor (Mr Wang), an urgent application for an injunction against the Respondent. The reason for the urgency was that due to confusion by lot owners, caused by the Respondent, there was insufficient funds to pay for insurance and management fees. He also sought to remove the second named Applicant from the proceedings.
- 9 On 21 May the Applicant's solicitor again wrote to the Tribunal confirming the request to remove the second named Applicant because no special resolution passed by the lot owners to take legal action.
- 10 On 26 May Mr Lipshutz again wrote to the Tribunal flagging that the Applicant does not have standing to bring the application on behalf of the owners corporation and the application was misconceived and an abuse of process. He also noted that there was another proceeding in OC 3434/2019 regarding the issues of the vote and other matters.

- 11 On 27 May the Applicant's solicitor served invoices, a statement of contentions and revised the amount of legal fees of \$26,084.70.
- 12 On the morning of the hearing the Applicant's solicitor again wrote to the Tribunal seeking to amend the amount of legal costs against the Respondent to \$29,104.20.
- 13 On 28 May 2020 the Tribunal heard the application for an urgent injunction. At the request of the first named Applicant's solicitor, the second named Applicant (Owners Corporation Plan No PS 737965W) was removed from the proceedings.
- 14 After hearing submissions from both solicitors and noting the evidence before me, I dismissed the application for an urgent injunction and gave oral reasons for my decision. It is important to note that the proceeding in OC3434/2019 was not listed on this day and not before me.
- 15 Mr Lipshutz then sought costs on behalf of his clients. I reserved costs and granted leave for the parties to provide written submissions by 12 June 2020.

## **COSTS**

- 16 Section s.109 of the *Victorian Civil and Administrative Tribunal Act 1998* ("the Act") deals with the power to award costs. This section provides that:

### **"Power to award costs**

- (1) Subject to this Division, each party is to bear their own costs in the proceeding.
- (2) At any time, the Tribunal may order that a party pay all or a specified part of the costs of another party in a proceeding.
- (3) The Tribunal may make an order under subsection (2) only if satisfied that it is fair to do so, having regard to—
  - (a) whether a party has conducted the proceeding in a way that unnecessarily disadvantaged another party to the proceeding by conduct such as —
    - (i) failing to comply with an order or direction of the Tribunal without reasonable excuse;
    - (ii) failing to comply with this Act, the regulations, the rules or an enabling enactment;
    - (iii) asking for an adjournment as a result of (i) or (ii);
    - (iv) causing an adjournment;
    - (v) attempting to deceive another party or the Tribunal;
    - (vi) vexatiously conducting the proceeding;

whether a party has been responsible for prolonging unreasonably the time taken to complete the proceeding;

- (d) the nature and complexity of the proceeding;
- (e) any other matter the Tribunal considers relevant.”Both solicitors made written submissions to the Tribunal and I have considered them in reaching my determination.
- 18 Mr Lipshutz’s submission sought costs be ordered on several basis’. The submissions are summarised as:
- 19 Costs to be ordered:
- a. on an indemnity basis on the Supreme Court Scale or County Court Scale.
  - b. on a standard basis on the Supreme Court Scale or County Court Scale
  - c. on any other basis that the Tribunal sees fit.
- 20 He also submitted that it was open for the Tribunal to make a costs order against the Applicant’s lawyer but did not make any submissions regarding this, except to quote section 109 of the VCAT Act.
- 21 I do not accept this submission; it suggests that I am able to make a costs order against a Representative but does not advance any reasons. Orders for costs against a Representative of a party are only given in exceptional circumstances and there is no evidence before me to make such an order.
- 22 Mr Lipshutz submitted that the Tribunal dismissed the application for lack of jurisdiction and that the order was made under section 75 of the VCAT Act on the basis that the proceeding was an abuse of process or misconceived.
- 23 The Applicant’s case had no proper basis to seek an injunction and the applicant’s solicitor conceded that the Owners Corporation was no a proper party to the application and should be removed from the proceeding, having previously written to the Tribunal on three occasions seeking it removal.
- 24 He then submitted that given that the Applicant knew that the Owners Corporation was not a proper party to the proceeding, it should have known that the Tribunal had no jurisdiction to hear the application.
- 25 At the hearing the Applicant’s solicitor failed to submit any legal argument to refute the respondent’s submissions about jurisdiction.
- 26 He provided a detailed submission regarding section 109 of the VCAT Act. I will not reproduce all submissions given that they have been given to all parties. I accept part of his submission that the Applicant’s case was misconceived and conducted in such a way as to disadvantage the respondent.
- 27 I accept the respondent’s submission that the Applicant made the application without any special resolution passed by the Owners Corporation or in seeking an urgent injunction not providing points of claim or any affidavit in support of the application. The applicant’s solicitor confirmed that there was

- no resolution prior to the hearing in his letter seeking to amend the application and this was confirmed at the hearing.
- 28 I note that there was three different 'Statement of Contentions' the last of which was served on the evening before the hearing.
- 29 I do not accept the submission by Mr Lipshutz that because of the lack of details in the Applicant's claim that considerable time was required to investigate the claims made by the Applicant when it was clear that there was no jurisdiction to hear this matter and there was another application before the Tribunal that may have required further investigation and research – however, this matter was not before me.
- 30 I do accept that the respondent was put to unnecessary expense in defending the 'urgent' application for an injunction, when it was clear that the application was misconceived.
- 31 If there was no special resolution by the owners corporation for litigation to be commenced, and this is acknowledged by the Applicant in correspondence to the Tribunal and at the hearing. There was no authority for the Applicant as manager to bring the urgent injunction against the Respondent and as such the application for an injunction was misconceived.
- 32 Mr Wang, solicitor for the Applicant submitted that it was appropriate for the Tribunal not to order costs.
- 33 He submitted the proceeding was brought under section 163 of the *Owners Corporations Act 2006* (the OC Act) that permits applications by a manager or former manager. He also noted that section 162 of the OC Act defines an owners corporation dispute to include the exercise of a function by a manager in respect of the owners corporation.
- 34 He also submitted that the Applicant was entitled to bring an action to the Tribunal about the operation of the Owners Corporation by a company purporting to be the new manager. He went on to submit that this belief was supported by the format of the prescribed VCAT application form.
- 35 Mr Wang also submitted that the Applicant was supported by a delegation of the Owners corporation and represented the Owners Corporation.
- 36 I cannot accept the submissions by Mr Wang. The Applicant sought an 'urgent' injunction against the Respondents and then sought to withdraw the application as it related to the Owners Corporation. Once the Owners Corporation was removed from the proceedings, this left the Respondent management company and related to an application for damages and legal costs against the Respondent.
- 37 The application then was an injunction and damages against a company that could not be made under the OC Act. There was no resolution and the Applicant did not have any basis to bring the application under the OC Act. The application was misconceived and any claim for damages and costs for breach of contract would have to be made in the civil jurisdiction not under

the OC Act (I have not made any comment on who the claim should be against). The application for an injunction against the Respondent was bound to fail.

38 It was misconceived and it is not correct to say that section 162 or 163 of the OC Act gives rise for a manager (current or former) to bring an action under this Act against a manager (current or notional). It is not an Owner's Corporation dispute. It is a dispute for costs or damages against another company. The Owners Corporation dispute was made in another application referred by me above and I am unaware of the details or the determination – but this is not a matter before me.

39 I do not accept the proposition by Mr Wang that the decision in *Wynden Pty Ltd and Ors v Owners Corporation PS 431248H* is relevant to this matter or for that matter on point. The decision in this case related to an application to strike a matter out under section 75 of the VCAT Act and a matter where an Owners Corporation manager was conducting a proceeding against the Owners Corporation. This could quite rightly be characterised as an Owners Corporation dispute arising under the OC Act.

40 This is not the case here. As I have stated above this is not an Owners Corporation dispute arising under the OC Act. It relates to the application for an urgent injunction from one manager against another manager or purported manager and a claim for damages. This, I would characterise a dispute that is a claim for damages in a different jurisdiction. I have noted previously that there is another application on foot relating to the Owners Corporation.

41 I accept the submissions by Mr Lipshutz for the respondent, that given the application was misconceived and did not have a prospect of success that I should make a costs order against the Applicant.

42 Section 109 of the VCAT Act states in part that all parties should bear their own costs in proceedings, however, there are exceptions, and these are listed in the VCAT Act.

43 I do not accept the submission by Mr Lipshutz that the solicitor for the Applicant came to the hearing unprepared or that as a result of this he unreasonably prolonged the hearing. There is no evidence to support his contention.

44 However, I do accept the submission by Mr Lipshutz that under section 109(3)(c) I do have the power to make a costs order as I am satisfied that it is fair to do so and the Applicant's application for an urgent injunction under the OC Act had no tenable basis in law.

45 I have found that the Applicant's application for an urgent injunction was misconceived and by continuing with the application unreasonably prolonged the litigation and put the respondent to unnecessary legal expense. The Applicant should have reasonably expected or known that once its application for the second named Applicant (being the Owners Corporation) be withdrawn had been approved and given its own admission that there was

- no special resolution to bring the claim, it was bound to fail and proceeding with the application was misconceived.
- 46 The applicant must have known that its application was bound to fail prior to the matter being heard, as it requested the Tribunal on at least 2 or 3 occasions to remove the Owners Corporation as an applicant from the application prior to the hearing.
- 47 I am satisfied that the relative strength of the Applicant's claim was poor given that there was no resolution by the Owners Corporation to commence the action in the first place. Given this, I do not accept the Applicant's contention that the Tribunal could not determine the strength of the case because it had not been finally determined.
- 48 I make no findings about the respondent's submission relating to race as set out in paragraphs 33 to 35 in their application for costs. This is not relevant and not a consideration for me to consider. Making the comments regarding race were not helpful and irrelevant to the respondent's submission for costs.
- 49 I do not accept the further submission by Mr Lipshutz that I should make an order for costs on an indemnity basis on either the Supreme or County Court scales. Ordering costs on an indemnity basis are rare and as Mr Lipshutz rightly pointed out such orders should only be made in exceptional circumstances. There are no exceptional circumstances in this matter.
- 50 Mr Lipshutz submitted several decisions of this Tribunal, the Federal Court and of the Court of Appeal and I have noted these decisions. I do not intend to reiterate each decision (but will list them below)
- a. *Barbcraft Pty Ltd v Geobel Pty Ltd [2004] VCAT 747*
  - b. *Pacific Indemnity Underwriting Agency Pty Ltd v Maclaw No 651 Pty Ltd [2005] VSCA 165.*
  - c. *Fountain Selected Meats (Sales) Pty Ltd v International Produce Merchants Pty Ltd [1988] FCA 202; (1998) 81 ALR 397.*
  - d. *Seachange Management Pty Ltd v Bevnol Constructions & Developments Pty Ltd [2011] VCAT 1406*
- 51 I have noted these decisions. I agree with Deputy President Aird's decision in (d above) regarding indemnity costs and note her decision as follows:
- “it will only be in the most exceptional circumstances that an order for indemnity costs will be made; for instance where a party has engaged in contumelious or high handed conduct.”
- 52 Having regard to all the submissions I do not accept that the conduct of the Applicant has been contumelious or high handed and as such there are no exceptional circumstances to order costs against the Applicant on an indemnity basis.
- 53 I accept the Respondent's submission that section 109(2)(3) have been enlivened. I find that it is fair to order costs against the Applicant and order

that the Applicant should pay the Respondent's costs, such costs if not agreed to be assessed by the Victorian Costs Court on a standard basis in accordance with the appropriate County Court Scale.

D. Calabro'  
**Member**