

**VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL**

**CIVIL DIVISION**

**OWNERS CORPORATIONS LIST**

VCAT REFERENCE NO. OC1289/2018 AND  
OC2260/2018

**CATCHWORDS**

Application by the Owners Corporation for unpaid fees and special levies struck before the Respondent became the owner of the subject Lot and unpaid by the previous owner; the sum payable by the Respondent at settlement reduced by the quantum of the unpaid fees and levies; the Respondent undertook to pay the outstanding fees and levies by a specified date post the settlement of its purchase of the lot, in consideration of the Owners Corporation forbearing to issue recovery proceedings; the Respondent failed to make payment; the Owners Corporation issued recovery proceedings; the Respondent counterclaimed alleging the special levies were not lawfully struck; held that the Respondent breached the agreement with the Owners Corporation without just cause; Counterclaim dismissed.

**PROCEEDING OC1289/2018**

**APPLICANT**

Owners Corporation Plan No. 22776

**RESPONDENT**

Flammea Family Trust Pty Ltd (ACN: 614 075 881)

**PROCEEDING OC2260/2018**

**APPLICANT**

Flammea Family Trust Pty Ltd (ACN: 614 075 881)

**RESPONDENT**

Owners Corporation Plan No. 22776

**WHERE HELD**

Melbourne

**BEFORE**

Member B. Thomas

**HEARING TYPE**

Hearing

**DATE OF HEARING**

9 and 10 December 2019

**DATE OF ORDER**

25 September 2020

**DATE OF REASONS**

25 September 2020

**CITATION**

Owners Corporation Plan No. 22776 v Flammea Family Trust Pty Ltd (Owners Corporations) [2020] VCAT 1079

**ORDER**

- 1 In proceeding OC1289/2018, the Respondent must pay the Applicant:
  - (a) Quarterly fees levies from 1 January 2017 to 30 September 2019 in the sum of \$30,000.00;

- (b) Major works levies in the sum of \$19,200.00; and
  - (c) Interest on the sum of \$49,200.00 pursuant to section 29 of the *Owners Corporation Act 2006*, to be calculated by the Applicant.
- 2 In proceeding OC2260/2018, the Counterclaim is dismissed.
  - 3 If the parties dispute the quantum or the interest to be paid by Flammea Family Trust Pty Ltd to Owners Corporation Plan No. 22776, liberty to apply is granted, limited to the issue of quantum and interest.
  - 4 Costs are reserved, but any application must be filed with the Principal Registrar by no later than 21 days after the date of this Order and must not exceed three A4 pages in 12 pitch. Any such Application will be determined in Chambers.

B. Thomas  
**Member**

**APPEARANCES:**

**In Proceeding OC1289/2018**

For Applicant: Mr J. Louey, Owners Corporation Manager  
For Respondent: Mr J. Silver of counsel

**In Proceeding OC2260/2018**

For Applicant: Mr J. Silver of counsel  
For Respondent: Mr J. Louey, Owners Corporation Manager

## REASONS

### INTRODUCTION

- 1 Flammea Family Trust Pty Ltd (**Flammea**) is the owner of Lot 1 in Plan of Subdivision SP022776J (**the POS**), being Apartment 1, 171 Fitzroy Street, St Kilda known as ‘Ritz Mansions’ (**the building**).
- 2 Owners Corporation Plan No. 22776 (**the OC**) is the Owners Corporation affected by the POS. Julian Louey of Binks & Associates is the Manager of the OC (**the OC Manager**).
- 3 Ritz Mansions is covered by Heritage Overlay HO129 in the Schedule to Clause 43.01 of the Port Phillip Planning Scheme.
- 4 In proceeding OC1289/2018, the OC seeks to recover from Flammea a sum “in excess of \$10,000.00 for unpaid levies”.
- 5 In proceeding OC2260/2018, by way of Counterclaim Flammea alleges that certain resolutions of the Committee to raise the levies are invalid.
- 6 Flammea seeks the following orders –
  - a A declaration that the resolutions of the Committee of the OC of 20 October 2016, 4 April 2017 and 27 August 2017 are void;
  - b A declaration that it is not liable to pay the monies the subject of the resolutions;
  - c The OC waive all interest claimed against the Applicant; and
  - d The appointment of Binks & Associates, or alternatively Julian Louey, as Manager of the Respondent be revoked.
- 7 The hearing took place on 9 and 10 December 2019. Mr J Silver of counsel appeared for Flammea and Mr J Louey, the OC’s Manager, appeared for the OC.
- 8 At the conclusion of the hearing, Orders were made for the filing and serving of Final Submissions by Flammea, Submissions in Reply by the OC and Submissions in Reply by Flammea.

### THE PLEADINGS

#### **Flammea’s Amended Points of Counterclaim (APOC)**

- 9 In its APOC Flammea raises the following matters –

#### The Resolution dated 20 October 2016

- 10 The Resolution states –

It was noted that the building refurbishments (sic) works had been delayed for various reasons and that there are works required to the property that are necessary to ensure that the condition of the property does not deteriorate further.

It was noted that the OC holds approximately \$500,000.00 in funds that it can allocate towards the cost of the building refurbishment works and that the OC committee can strike levies of twice the amount of annual fees (\$192,000.00).

Resolved after much discussion to strike a levy of \$192,000.00 due in two equal instalments on 01/04/2017 and 30/06/2017 so that the Owners Corporation can complete works up to the value of \$700,000.00. It was resolved that the priority for the works include the roof, facade and the lift.

It was further resolved that NMBW be asked to prepare a schedule of works up to the value of \$700,000.00 including allowances for professional fees, and a contingency amount for any unforeseen works.

- 11 The Minutes do not record a specific 'resolution' considered by the Committee, or the 'voting' on the resolution, as required by section 114 of the *Owners Corporations Act 2006* (the OCA).
- 12 The Resolution does not identify the specific 'extra ordinary items of expenditure' the special levies are designed to cover, as required by section 24 of the OCA.
- 13 Therefore, the special levy purported to be struck on 20 October 2016 was invalid and of no effect, and the OC cannot recover or demand any sum from Flammea in respect of the levy.

#### The Resolution dated 4 April 2017

- 14 The Committee resolved to undertake two items of expenditure using the funds purportedly obtained by special levy –
  - (a) 'Lift upgrade contract' in the sum of \$123,362.52 (plus GST); and
  - (b) 'IG Parker Heritage Building Restorations' contract in the sum of \$463,100.00 (including GST), ... together with project manager Brian Miller at 'approximate cost of 5% of the project works (not including the lift)'.
- 15 The Resolution concerned upgrading works requiring a planning permit within the meaning of section 53 of the OCA and were required to be approved by special resolution.
- 16 The OC failed to put the Resolution to a special resolution, and therefore it is invalid.

#### Resolution dated 29 August 2017

- 17 The Minutes of the Committee Meeting of that date show that the Committee resolved to pass a special levy under section 24 of the OCA as follows –

The Owners Corporation has received NMBW's quality surveyor report setting out the costing options for refurbishment and upgrade of the entrance and foyer.

The full upgrade is costed at approximately \$400,000.00. It was noted that full upgrade was not feasible given the current budget. Resolved that the committee would narrow the scope and identify approximately \$192,000 worth of works.

Resolved that the Owners Corporation would strike a special levy ("Foyer and front entrance upgrade levy") in the amount of \$192,000, with \$96,000 due on 1 April 2018 and the other \$96,000 due on 30 June 2018.

- 18 The Minutes do not record a specific 'resolution' or 'voting' on the resolution as defined in section 114 of the OCA.
- 19 The Resolution does not identify the specific '*extraordinary items of expenditure*' the levy is intended to cover, and therefore does not comply with section 24 of the OCA.
- 20 The works to be included in the 'narrow' scope of works were upgrading works and were not put to a special resolution as required by section 53 of the OCA.

#### Failure to Act in Good Faith

- 21 Flammea has offered to pay the undisputed fees. The OC has stated to Flammea that if it wishes to avoid paying interest on the unpaid levies, Flammea must pay the levies 'under protest'.
- 22 In refusing to allow Flammea to pay the undisputed fees, the OC has acted in bad faith in breach of section 6 of the OCA.

#### Removal of the Owners Corporation Manager

- 23 In passing the resolutions and levying the fees referred to in the resolutions, the OC acted, and continues to act, on the advice and direction of the OC Manager, Julian Louey of Binks & Associates. Furthermore, the OC Manager was responsible for the preparation of the Minutes of Committee Meetings.
- 24 The OC Manager has failed –
  - a to properly advise the OC on the requirements for passing a resolution under section 24 of the OCA;
  - b to properly minute the business of the Committee of the OC (including recording resolutions) to a standard required by section 114 of the OCA; and
  - c has compromised the proper functions of the OC, and its appointment should be revoked.

#### **The OC's Points of Defence to Flammea's Counterclaim**

- 25 In response to Flammea's APOC, the OC says that as Flammea did not become the registered proprietor of Lot 1 until 13 November 2017, it was not the owner of Lot 1 when the fees and special levies were struck.

- 26 On 4 April 2017, the OC resolved to undertake two items of expenditure funded by special levies being –
- (i) IG Parker Heritage Building Restorations contract quoted on 22 February 2017 for \$463,100.00 (including GST) and the fees of Brian Miller, the Project Manager, at approximately 5% of the cost of the project works (not including the lift); and
  - (ii) Lift upgrade contract for \$123,362.52 plus GST executed on 31 May 2017.
- 27 Despite not being the owner of Lot 1 at the time the special levies were expended, Flammea has benefitted from the lift upgrade, the façade restoration and painting.

The Resolution dated 20 October 2016

- 28 The Resolution complies with section 114 of the OCA.
- 29 The Minutes record the following resolutions –
- Resolved after much discussion to strike a levy of 192,000.00 ...
- ... resolved that priority for the works includes the roof, the façade and the lift.
- ... further resolved that NMBW be asked to prepare a schedule of works up to the value of \$700,000.
- 30 At the end of the Minutes under the heading Definition, the Minutes state that –
- The word “resolved” means either agreement without dissent or agreement by a majority of votes.
- 31 The Minutes clearly reference works required to the *roof, façade and the lift*:
- a The meaning of *the roof, the façade and the lift* is documented in previous Minutes and the history is well-known to Committee members. The history of maintenance or lack of, dates back several years and did not need to be set out at length in the Minutes.
  - b Although lot owners of the OC are entitled to inspect Minutes of Committee Meetings, the intended ‘audience’ for the Minutes is the Committee members themselves.
- 32 In determining an owners corporation dispute, the Tribunal must consider what is fair (section 165 of the OCA) and what orders will resolve the dispute (section 163 of the OCA).
- 33 If the levy was technically invalid, it would be unfair for Flammea to be excused from contributing to the levy because –
- all other lot owners have contributed to the levy;
  - the money has been spent on urgent repairs and maintenance as intended;

- Flammea did not raise any objection at the time the levy was struck, or prior to the money being spent; and
- Flammea enjoys the benefit of the lift upgrade works and the façade restoration and painting.

#### The Resolution dated 4 April 2017

34 Flammea has not provided any particulars as to how the works are “upgrade works” –

- The requirement in section 53 the OCA for a special resolution relates to the striking of the levy (which occurred in October 2016), not the expenditure of the funds (which occurred in April 2017). The OCA does not require a special resolution to authorise the expenditure of funds in this in this context.
- Neither the lift upgrade works, nor the façade restoration and painting were “upgrading works” as defined in the OCA.
- The definition of “upgrading works” in section 24 of the OCA *does not include works that are provided for in an approved maintenance plan or works referred to in section 4(b).*
- Works referred to in section 4(b) involve repairing and maintaining:
  - (i) the common property; and
  - (ii) the chattels, fixtures, fittings, and services related to the common property or its enjoyment.

35 The façade and lift works clearly comprise repair and maintenance of common property and do not constitute upgrade works as defined in section 24. Therefore, a special resolution was not required to strike a special levy or expend the funds.

#### Resolution dated 29 August 2017

36 The Minutes contain a resolution as required by section 114 of the OCA –

a As well as noting various historical but relevant background information, the Minutes clearly record the two following resolutions –  
Resolved that the committee would narrow the scope and I identify approximately \$192,000.00 worth of works ...

... Resolved that the Owners Corporation will immediately strike a special levy (“Foyer and front entrance upgrade levy”) in the amount of \$192,000, with \$96,000 due on 1 April 2018 and the other \$96,000.00 due on 30 June 2018.

b The Minutes also show the voting –

In these minutes, the word “resolved” means either agreement without dissent or agreement by a majority of votes. The four votes present voted in favour of all resolutions.

- 37 The Resolution identifies an object of expenditure, and therefore complies with section 24 of the OCA –
- a The resolution to strike levies was expressly for the foyer and front entrance works.
  - b To ascertain the details of those works, the reader needed to view the NMBW report and costings which are referred to in the Minutes –  
The Owners Corporation has received NMBW’s quality surveyor report setting out the costing options for refurbishment and upgrade of the entrance and foyer.
  - c On 17 August 2017, NMBW issued a memorandum to the OC entitled “COST OPTIONS REVISED” which noted the due to budgetary constraints the OC wish to consider the “Front-Focused Option” which was limited to “Entry”, “Entrance Hall”, “Entrance Lobby”, “Lobby Court + Utility Walkway” and one upper level fire door.
  - d The Minutes show that the OC was striking a special levy for “Foyer and front entrance” works, which clearly is a reference to the “Front-Focused Option” referred to in the NMBW memorandum dated 17 August 2017.

#### Failure to Act in Good Faith

- 38 The OC has advised Flammea both verbally and in writing that –
- a The standard quarterly fees are not in contest at the Tribunal;
  - b It should pay the uncontested fees to avoid having to pay interest at the conclusion of the VCAT proceedings; and
  - c The special levies should be paid to avoid having to pay interest if its challenge is unsuccessful.
- 39 The OC has resolved at a general meeting to charge penalty interest on fees outstanding after the due date of payment at 10%.
- 40 In advising and cautioning Flammea of the potential consequences of not paying the standard quarterly fees and the special levies, the OC has acted in good faith.

#### Removal of the Owners Corporation Manager

- 41 The removal of the Manager is not justified because –
- a Flammea has not particularised any “advice or direction” from either Binks & Associates or Julian Louey that the OC has acted upon;
  - b Flammea was not represented at either committee meeting in which it infers that wrong advice or direction was provided;
  - c The Committee unanimously, and a majority of the lot owners, support retaining Binks & Associates as the Manager, and reject the assertion that it has provided incorrect advice or direction.;



- d Section 119 of the OCA provides that the OC may appoint or revoke the appointment of a manager;
- e Flammea's application to remove Binks & Associates is an attempt to subvert the majority will of the OC;
- f Binks & Associates is not a party to this proceeding. If Flammea wishes the Tribunal to make orders against Binks & Associates, it must make application under section 60 of the *Victorian Civil and Administrative Tribunal Act 1998*.

#### Other Matters

42 On 15 November 2017, the solicitors acting for Flammea in the purchase of Lot 1, were provided with a certificate detailing the outstanding fees and special levies relevant to that lot.

43 The Certificate stated that the outstanding fees for Lot 1 included –

- a \$9,600.00 for standard fees;
- b \$115.50 for service fees; and
- c special levies in the amounts of –
  - \$9,600.00 “Major works levy” due 1/4/2017;
  - \$9,600.00 “Major works levy” due 1/7/17;
  - \$4,472.85 interest on arrears to 11/7/17;
  - \$4,625.25 interest on arrears to 4/10/17;
  - \$323.20 interest on arrears to 13/11/17;
  - \$9,600.00 “foyer and front entrance work levy” due 1/4/18; and
  - \$9,600.00 “foyer and front entrance work levy” due 30/6/18.

44 An email from Flammea's solicitors to the OC dated 13 November 2017, stated –

Our client has instructed however that it has it has experienced a short fall in available funds. ...the vendor (may) be agreeable to settlement today in any event, the terms of which will include our client assuming liability for the outstanding owners corporation fees and any applicable interest.

As such, we are requesting that the owners corporation agree to receiving outstanding fees plus any applicable interest by no later than 15 December 2017. (emphasis added)

45 A further email from Flammea's solicitors to the OC dated 13 November 2017 stated –

... the minimum payment the Owners Corporation can expect to receive on the Payment Date is \$49,573.30 which takes into account all special works levies owing and to date be paid.

For the avoidance of doubt, we are instructed that our client acknowledges that it will assume liability for payment of any interest that accrues up until the Payment Date.

46 An email from Mr Louey to Flammea's solicitors of the same date stated –

As discussed, we can confirm that the Owners Corporation accepts the proposal outlined in your email and accordingly looks forward to receiving all outstanding owners Corporation fees and applicable interest by no later than 15 December 2017.

We confirm that the initiation of legal proceedings to recover the debt will remain on hold until after 15 December 2017.

47 To date, the OC has not received any payment from Flammea.

Flammea is estopped from resiling from its promise to pay \$49,573.30 by 15 December 2017

48 The OC has suffered detriment having relied on Flammea's promise –

- a The OC has been delayed in its ability to recover the debt and is being subjected to defending Flammea's Counterclaim;
- b By reason of the ongoing failure of Flammea to pay the outstanding fees and levies, the OC has been obliged to increase its annual budget in 2018 to 150% of the previous amount; and
- c Despite most lot owners having paid the special levies in 2018, the OC has been unable to carry out the foyer and front entrance works.

49 It would be inequitable to allow Flammea to resile from its promise which has resulted in delay in recovering fees required to meet costs and expenses of the OC.

Flammea seeks a windfall gain

50 Section 28 of the OCA stipulates that a purchaser of a lot is liable to pay any outstanding fees, charge, contribution, or amount owing to the owners corporation in respect of that lot.

51 The Certificate issued by the OC to Flammea stated the amount of outstanding levies as detailed above.

52 Flammea received a reduction in the purchase price of Lot 1 specifically to accommodate the fact that there were outstanding levies attached to the Lot.

53 If the levies were invalidly struck or expended without authority, Flammea has not suffered any loss and if it obtains a favourable order from the Tribunal, it will achieve a windfall gain because it has received –

- a a reduction or adjustment of the purchase price of the lot; and
- b the benefit of the lift and façade works.

## THE EVIDENCE

### Mr. Johnny Flammea

54 In evidence-in-chief Mr Flammea said he was a Director of Flammea Pty Ltd. He denied that in commencing the Counterclaim, it was his intention to deny the OC funds to which it was properly entitled, or to “rip anybody off”. He agreed that once the Tribunal had issued its Determination, he would follow its orders.

55 In cross-examination he agreed that –

- The Notice of Acquisition for Lot 1 was dated 13 November 2017.
- He engaged Evans Ellis Lawyers to handle the purchase.
- The Owners Corporation Certificate dated 15 November 2017 provided to his lawyers listed the outstanding fees and major works levies.
- The list of settlement cheques on the back page of the Statement of Adjustments shows a cheque to the OC for \$49,575.30 and a cheque to the vendor for \$1,481,587.00.
- The purchase price for the Lot was reduced by \$49,575.30.
- He was unable to settle the purchase on 13 November 2017 and he requested his solicitors to seek an extension.
- The email from his solicitors to the OC Manager on that date stated that the outstanding fees plus applicable interest would be paid by no later than 15 December 2017.
- A second email of the same date from his solicitors to the OC Manager - referred to a conversation with Mr Louey which;
  - confirmed that the OC was agreeable to receiving all outstanding fees and applicable interest by 15 December 2017 (the payment date);
  - the minimum payment to the OC would be \$49,575.30; and
  - Flammea acknowledges that it will assume liability for payment of interest that accrues up until the payment date.
- The second email evidenced that an agreement had been reached that the OC would wait until 15 December to receive \$49,575.30, and in exchange the OC would not get in the way of the settlement of the purchase.
- On 19 December 2017, the OC emailed Flammea’s solicitors requesting confirmation when payment would be received and advising that formal recovery action would be commenced on 20 December 2017.

- On 8 January 2018, his solicitors by email requested the OC Manager to “provide an invoice for fees to date”, which was provided on 19 January 2018.
- When his solicitors queried why the OC was still asking for money, he instructed them to request the OC Manager to contact him direct.
- He did not tell his solicitors why he withheld payment.
- Not receiving any contact from the OC, he did not email the OC in December or January.
- Because he had not received any quarterly statements, in June 2019 he emailed the OC Manager requesting an update of what was due and payable.
- At some date in 2019, he orally sought to pay the undisputed fees but at the Directions Hearing on 28 August 2019, Mr Louey said to pay the fees and if he was found to be right, he would receive a refund.
- He did not pay the oldest quarterly fee for the period 1 January to 31 March 2019 for \$2,400.00 because he understood that the debt was higher than the quarterly fees and intertwined with the major works levies.
- At the conclusion of the Directions Hearing, he was aware that paying the uncontested fees would not prejudice his right to contest the special levies, but as the proceedings were listed for final hearing in December, he did not pay the uncontested fees because he did not trust the OC to make a refund if the Tribunal determined in his favour.
- He considered that the foyer and front entrance was “a little bit old looking”, the letter boxes need replacing, and there are cracks in the marble floor, but “some people may think that’s character”.

### **Ms. Mary Grande**

56 In examination-in-chief, Ms Grande said that –

- She purchased her apartment in 2009, and has been a member of the Committee since;
- She has been involved in the foyer and entrance works since the beginning;
- NMBW was the architect engaged by the Committee to do an analysis of the building, the state it was in, and what needed to be done to bring the building back to a well-maintained level;
- In 2016, NMBW did an extensive research and design of an expensive upgrade of the building. There was external and internal work, but the internal work involved structural changes. The external work involved the repair of concrete cancer, replacement of downpipes, and repair of

windows and the canopy. The cost of the work would probably have been \$2 million;

- Their report was presented to the lot owners, but at least 50 per cent objected because of the expense;
- In May 2016, John Denby, the Chairman, stood down and she took his place;
- At a meeting on 26 October 2016, the Committee decided that the priority was to seal the building externally, repair the lift and upgrade the fire services at an estimated cost of \$750,000.00;
- At that stage, the Committee held \$500,000.00 from the auction of long term leases of six carpark spaces in the building, pursuant to a ballot of lot owners conducted in 2014. The explanatory memoranda that accompanied the ballot stated that the purpose of the auction was to raise funds to conduct urgent maintenance and repairs as described in materials distributed to lot owners for the 2014 Annual General Meeting;
- At the 26 October 2016 meeting, the Committee resolved to raise a levy of \$192,000.00 for the balance of the funds required up to \$700,000.00 payable by two equal instalments on 1 April and 30 June 2017. The Minutes of that meeting record that the priority for the works were the roof, the façade works, and the lift, which were the same works referred to in the explanatory memoranda that accompanied the ballot papers for the 2014 auction of the car spaces;
- The estimate of \$700,000.00 for the works was based on quotations NMBW had obtained, assisted by a quantity surveyor. In addition, the Committee sourced its own quotations; for example, from Otis for the lift;
- The foyers are in poor condition and in disrepair. She produced photographs taken by her showing the handrails along the stairs detaching from the wall, erosion and chips in the plaster along the stairwell, chips and worn out treads in the stairs, low and inefficient lighting in the foyer, discoloured and peeling floor tiles, holes in the dado, and damaged wall cladding. In addition, the intercom is falling out, and the left hand side of the front door glass needs replacing;
- The Minutes of the Committee Meeting of 27 August 2017 record that NMBW's estimate for the cost of the entrance and foyers is \$400,000.00, a full upgrade was not feasible in the current budget, and it was resolved to narrow the scope of works to \$192,000.00 and raise levies for the foyer and front entrance upgrades with \$96,000.00 due on 1 April and 30 June 2017; and

- The works have not been put out to tender because more than \$150,000.00 of the special levies is outstanding, and it was decided to await the outcome of the VCAT cases.

57 In cross-examination, Ms. Grande said –

- As a result of the 2014 Annual General Meeting (**2014 AGM**), the only special resolution that went out to the lot owners was regarding the sale of the car parks. The resolution in the Minutes to raise a levy of \$626,000.00 to fund initial repair and refurbishment works as per Item 6 of the report circulated with the meeting agenda, was a reference to a January report;
- The reference in the Minutes of the 26 October 2016 Committee Meeting that the building refurbishment works had been delayed for various reasons was after John Denby resigned from the Chairmanship, and people walked away. Nothing happened until the Committee had another meeting;
- Before opting to raise the levy, it was clear what had to be done and what the money would be spent on;
- As Chairperson she was not aware that the building was covered by a heritage overlay; only that a planning permit would be required and was obtained.
- The Committee's priority was to keep the scope of works to repairs and maintenance because that was the most essential work that had to be done;
- At the 29 August 2017 meeting, the Committee had an extensive list of what needed to be done and with the funds it had, the most important items;
- The foyer is old, in disrepair and deteriorating, and needs to be replaced. It is not functional;
- The Committee had the money from the sale of the carparks, knew how much the works would cost and then struck a levy;
- John Denby wanted a total upgrade of the interior of the building involving significant structural changes. When it was not wanted by a majority of the lot owners, there was no point at looking at that idea further; so the Committee had to take a new approach because the building was deteriorating.
- There are substantial works that need to be done to the building that cannot be ignored;
- There are no similarities between what Mr Denby was proposing and what the Committee is now proposing;

- The Committee did not conduct information sessions for lot owners prior to passing the resolutions for levies in 2016 and 2017;
- There was no formal resolution to stop the process; the Committee decided to stop because there was so much heat and the OC is \$150,000.00 behind in fees, but no funds received have been returned;
- Some items are renovation, upgrades, and improvement, but the Committee was looking at better security in the building;
- At some stage she and Mr Louey discussed the need for a planning permit and a building permit; and
- NMBW may have applied to the City of Port Phillip with the scope of works for the refurbishment of the foyer.

58 In re-examination, Ms Grande said –

- The first works involved repairing and painting the exterior of the building, fixing the windows, and repairing the lift which were all part of John Denby's project;
- The second works involved painting, adding an extra light in the foyer, a new floor, new security and changing the dado;
- After the meeting of lot owners confirmed that the John Denby project was not going to proceed, the Committee decided that the essential work was to repair and paint the building, take care of the lift and address the Building Order that had been served;
- At the Committee meeting on 20 October 2016, the lot owners were provided with a document detailing a new scope of works and those items that were the most important, which was voted on;
- A handyman could not undertake the works required because the building has badly deteriorated and certain items required replacement, not just repair. Furthermore, the apartments are worth more than a million dollars and the lot owners would not accept a job poorly or cheaply done, particularly the Ground foyer. Specifically, the letter boxes, the front security door, the intercom and the foyer floor need to be replaced; and
- She believed that Mr Louey did not give wrong advice regarding section 53 of the OCA, and that the OC is well managed by Binks & Associates.

### **Mr Roger Beeston**

59 In examination-in-chief Mr Beeston said that –

- He is a registered architect for more than 30 years, specialising in conserving significant heritage buildings. Roger Beeston Architects employs architects and historians who assess, document, and oversee conservation works to heritage buildings;

- In 1996, his superannuation fund purchased two apartments in the Ritz Mansions, and he has been a member of the Building Committee for some 20 years;
  - Prior to purchasing his apartments, he was engaged by the OC to assist in dealing with a building notice issued by the City of Port Philip condemning the condition of the building. He found the building to be in an extremely poor condition, with fire safety issues, concrete cancer issues, lift issues and fire egress issues. The OC commissioned and implemented catch up maintenance work valued at \$1.2 million;
  - There has been numerous works to the building undertaken but works that initially needed to be done in the 1990's, such as the escape stairs, concrete cancer, and spooling concrete on the ground, were unable to be completed. They were subsequently completed later and more recently the façade restoration;
  - The OC engaged Roger Beeston Architects to conduct a tender process for the façade works;
  - The two principal façades, in Fitzroy and Paterson Streets, and the other two lesser façades, comprise unpainted face brickwork. In the 1960's the brickwork in parts was painted over. The Fitzroy Street façade was also plastered, which was impossible to remove;
  - The works carried out on the façades in the late 1990's had an expected lifespan of about 10 years. There was the appearance of concrete cancer and rotting timber windows and doors. The building was well and truly overdue for a paint refreshment paint;
  - Three of the downpipes that take away the storm water from the roof to the ground had failed, but it was expensive to replace them using cherry pickers, and these works had been deferred. These pipes were replaced when the scaffolding was in place for the painting;
  - There was extensive timber damage to the windows due to the failure of the paint system, and it becomes expensive to replace or repair the timber as distinct from painting, when that needs to be undertaken;
  - Particularly owners on the Victoria Street frontage, who are subject to prevailing southerly or south-westerly wind, experienced leaking windows; and
  - These works were straight forward repair and maintenance.
- 60 In cross-examination, Mr Beeston said –
- He did a seven year apprenticeship as distinct from studying at University, but lectures in numerous courses around Australia, including Masters course in architecture;
  - His understanding is that the external part of the windows is common property and the window is within the individual lot.



### **Mr Julian Louey**

61 In cross-examination, Mr Louey –

- Agreed that apart from invoices being sent each quarter for fees, between December 2017 and June or July 2019 there was no correspondence between the OC and Mr Flammea following up on the unpaid fees or requesting payment of the uncontested fees;
- Agreed that following the Directions Hearing on 28 August 2019, there was no attempt to follow up Mr Flammea on the uncontested fees;
- Said that when funds are received from a lot owner less than the total amount outstanding, they are not applied in reduction of the oldest amount owed, but simply in reduction of the balance outstanding and interest is calculated on the balance outstanding;
- Said that before the current proceedings commenced, he had given advice to the Committee that section 53 of the OCA for upgrading, renovation or improvement works required a special resolution; and
- He was not the OC Manager when the October 2016 meeting took place.

### **Mr Jason Camenzuli**

62 In examination-in-chief, Mr. Camenzuli said that –

- He is a registered architect and the principal of CLP Architecture, which specialises in commercial fit outs and higher end residential work and he is the current Secretary of the OC;
- He purchased an apartment in the Ritz Mansions in August 2016 and attended his first meeting as a member of the Committee on 31 May 2017;
- He was involved in the implementation of the façade works, as the representative of the OC, in attending the project control meetings with Mr Miller, the project controller. He did not approve invoices, but he was aware of progress and variation claims, and inspected the progress of the works;
- He saw the repair to the external of the building which involved sealing the brick work, and replacement of the down pipes;
- He reviewed the contracts with the specialist consultants for the lift works, and was the signatory to those contracts on behalf of the OC;
- He was involved in the foyer and front entrance works from an early stage, but predominantly his role was to refine the scope to a reasonable cost;
- The foyer entrance is in a dilapidated state and in need of refurbishment or at least maintenance and repair. The letterboxes need replacement,

the marble floor needs replacement by terrazzo tiles, the vinyl coverings to the front steps need replacement; refurbishment of the dado is required, the non-compliant handrail to the half steps needs replacement; the inefficient lighting in the foyer, the foyer mirrors and the intercom system needs replacement; the wooden floor outside the lifts needs replacement by a more resilient product such as a stone or a tile, and painting in the service corridor and the foyers is required;

- Using the Harlock Consulting report dated 15 August 2017, in conjunction with NMBW Cost Options report dated 19 August 2017, the Committee meeting of 29 August 2017 refined the scope of works to focus on the front foyer and reduced the cost from \$400,000.00 to \$192,000.00;
- The concern was not to impose an excessive or onerous cost liability on each of the lot owners and to concentrate on front entrance, the area that needed immediate attention;
- He was lending his experience in defining and prioritising works he regarded as effective, but the decision was consensual across the Committee;
- The project was not put to tender because there were insufficient funds. As most tenders are only valid for 90 days, it would be unwise to do so when the Committee was not able position to immediately proceed with the project; and
- NMBW had quoted \$5,000.00 to \$7,000.00 to conduct a tender, which would have been wasted if the Committee was going to have to repeat the process when it had sufficient funds.

63 In cross-examination, Mr. Camenzuli said –

- Although there were tender documents, some items of work still had to be finalised after the resolution was cast; and
- In the foyer, some elements are capable of being repaired and some must be replaced by something new, but for example, it would be cheaper to replace the letter boxes than attempt to repair them;

64 In re-examination, Mr Camenzuli said –

- Having put an agreed scope of works out to tender, the tenders received could change the scope of works, but negotiation with the preferred tenderers could achieve a 10 – 15% reduction in costs; and
- The Committee's goal is preventative maintenance so that an element will not require costly maintenance in a short period of time. Due to the neglect in maintaining the building over 20 years, the maintenance costs in the last 24 months have been through the roof.

## THE ISSUES

- 65 The issues for determination are whether the OC is entitled to recover –
- a The outstanding ordinary levies for the period 1 January 2017 to 30 September 2019 totalling \$30,000.00?
  - b The special levies of which Flammea's share is \$19,200.00?
  - c If the OC is entitled to recover all or part of the amounts in (a) and (b), is the OC entitled to penalty interest pursuant to section 29 of the OCA?

## THE PARTIES' SUBMISSIONS

### Flammea's Closing Submissions

#### Construing sections 24 and 53 of the OCA

- 66 Section 53 of the OCA distinguishes between approving –

- first, the '*carrying out of upgrading works*'; and
- second, the '*levying of fees ...for that purpose*'.

These can happen together, or works can be approved without a levy; but fees alone cannot be levied because without approved works, the levy is not '*for that purpose*'.

- 67 Section 24 of the OCA expresses the same theme: 'special levies and charges' cannot be 'designed' to 'cover extra ordinary items of expenditure' unless - before or concurrent with a levy motion – the OC approved or has approved the works to which the fees will go towards.
- 68 The OC concedes that the 20 October 2016 and 29 August 2017 levies were both struck before any resolution approving particular works as until it has the money it does not know what it can afford. It concedes this was not done by ordinary committee or special resolution.
- 69 Therefore, neither levy can be valid.

#### Owners corporations must identify spending before levying fees

- 70 An owners corporation can only levy fees in the three prescribed circumstances –
- a to levy annual fees to cover general administration, maintenance and repairs, insurance, and other recurrent obligations under section 23 of the OCA;
  - b to levy '*special fees and charges designed to cover extra ordinary items of expenditure*' under section 24 of the OCA; and
  - c to levy fees to fund '*upgrading works*' under section 53 of the OCA.
- 71 An owners corporation's power to levy fees is founded in statute, not contract. To aid enforcement, an owners corporation may charge penalty interest. In effect it is a limited taxation power.

- 72 Before passing a levy, an owners corporation must consider if it has satisfied the legislated criteria and ensured all steps are taken. To say that it cannot decide what to do until it has the funds is contrary to the OCA. Proposed works, if identified with precision, can be approved by ordinary or special resolution, whether or not the final cost is known.
- 73 Approval must come first, before fees, but the OC did not do so. Whilst it had obtained consultants reports, the OC never endorsed them by special resolution or otherwise. It only passed broadly described levies – ‘*Building refurbishment works*’ levy (**20 October 2016 levy**) and ‘*Foyer and front entrance upgrade levy*’ (**29 August 2017 levy**). The Minutes left the precise works to be ‘narrowed’ by the Committee.
- 74 This process is unacceptable because –
- a it is vague and imprecise; and
  - b it would support the practice of an owners corporation collecting fees which, once the works are decided, should not have been collected without a special resolution.
- 75 The OC’s actions suggest the funds would have been spent on whatever the Committee decided, without considering if a special resolution was needed. The OCA does not contemplate a “take money first, ask questions later” approach.
- 76 The need to decide works before collecting fees (and if a special resolution is required) dictates against allowing an owners corporation to simply collect fees, with the vague levy “read down” to be limited to section 24; once the monies are banked, there is less reason for a committee to consider what the OCA requires.
- 77 The OC has simply taken fees without having decided what to do with them.

“Repairs and maintenance” is not a guise for refurbishments

- 78 The OC relies on the contention that the works in the consultants’ reports were “repairs and maintenance”, which are an exception to section 53.
- 79 Whether works are “repairs and maintenance” is only significant if section 53 applies; in an owners corporation with no heritage overlay, section 24 levies can be spent on almost any works up to twice the amount of annual fees.
- 80 The OC says that the need to “maintenance proof” the front façade and address neglect of the interior was repair and maintenance works. The consultants’ reports contain possible work, and because no resolution identified the intended items of work, the reports were not adopted, informally or at all.
- 81 Section 46 of the OCA states that an owners corporation must repair and maintain, whereas there is no duty to undertake upgrading works.
- 82 “Repairs and maintenance” cover works in two circumstances –

- **First**, where works preserve the fabric of the building; and
- **Second**, whether works must be completed as a matter of law; for example, pursuant to a building notice.

- 83 The fact that repairs or maintenance may be required does not mean that an owners corporation can simply do whatever it wants, particularly if the proposed work goes beyond preservation and effects betterment.
- 84 The proposed full replacement of the foyer terrazzo because of a few cracked tiles, as distinct from patching or replacing the damaged tiles, could not be said to be “repair and maintenance”.

### Factual Matters

#### *Levies*

- 85 Heritage Overlay HO129 in the City of Port Philip Planning Scheme applies to the Ritz Mansions. This means ‘*extraordinary items of expenditure*’ under section 24 of the OCA are ‘*upgrading works*’ under section 53 and must be passed by special resolution. If works require a permit, approval and fee levies must be by special resolution.
- 86 The OC’s evidence was that it had obtained several consultants reports listing potential works it could undertake, but none of those works were approved by Committee resolution. Instead the Committee levied fees in the expectation of a further resolution.

#### *Interest*

- 87 If Flammea is to pay interest, the amount should be limited to that outstanding on its ordinary fees from the day it took ownership of Lot 1. This is fair within the meaning of section 165 of the OCA. As the special levies are void, it should be excused from paying interest on them.
- 88 Mr. Flammea’s evidence was that it was an oversight on his part not to pay outstanding fees at settlement of the purchase of Lot 1. However, he was not contacted by the OC Manager before fee recovery proceedings were issued; a period of almost 6 months after settlement. When he became aware of the proceedings, the OC Manager refused to speak with him, and the OC’s solicitors refused to provide documents.
- 89 Once the OC issued proceedings, Mr. Flammea was told that if he wished to stop interest running, the uncontested fees had to be paid in full and “under protest”.

### Conclusion

- 90 The Tribunal must find the 20 October 2016 and 29 August 2017 levies void and direct the OC to accept payment of Flammea’s uncontested debts without applying the payment to its contestable debts.

## The Closing Submissions of the Owners Corporation

91 The OC submits that in proceeding OC 1289/2018, it is entitled to recover the following sums from Flammea –

<i>Quarterly fee from 1/1/2017 to 31/3/2017,</i>	<i>due 1/1/2017</i>	<i>\$2,400.00</i>
<i>Major works levy (1 of 2),</i>	<i>due 1/4/2017</i>	<i>\$9,600.00</i>
<i>Quarterly fee from 1/4/2017 to 30/6/2017,</i>	<i>due 1/4/2017</i>	<i>\$2,400.00</i>
<i>Major works levy (2 of 2),</i>	<i>due 1/7/2017</i>	<i>\$9,600.00</i>
<i>Quarterly fee from 1/7/2017 to 30/9/2017,</i>	<i>due 1/7/2017</i>	<i>\$2,400.00</i>
<i>Quarterly fee from 1/10/2017 to 31/12/2017,</i>	<i>due 1/10/2017</i>	<i>\$2,400.00</i>
<i>Foyer and Front Entrance Works Levy,</i>	<i>due 1/4/2018</i>	<i>\$9,600.00</i>
<i>Foyer and Front entrance levy works levy,</i>	<i>due 30/6/2018</i>	<i>\$9,600.00</i>
<i>Quarterly fee from 1/1/2018 to 31/3/2018,</i>	<i>due 1/1 2018</i>	<i>\$2,400.00</i>
<i>Quarterly fee from 1/4/2018 to 30/6/2018,</i>	<i>due 1/4/2018</i>	<i>\$2,400.00</i>
<i>Quarterly fee from 1/7/2018 to 30/9/2019,</i>	<i>due 1/7/2018</i>	<i>\$2,400.00</i>
<i>Budget adjustment,</i>	<i>due 9/7/2018</i>	<i>\$1,200.00</i>
<i>Quarterly fee from 1/10/2018 to 31/12/2018,</i>	<i>due 1/10/2018</i>	<i>\$3,600.00</i>
<i>Quarterly fee from 1/1/2019 to 31/3/2019,</i>	<i>due 1/1/2019</i>	<i>\$3,600.00</i>
<i>Quarterly fee from 1/4/2019 to 30/6/2019,</i>	<i>due 1/4/2019</i>	<i>\$3,600.00</i>
<i>Quarterly fees from 1/7/2019 to 30/9/2019,</i>	<i>due 1/7/2019</i>	<i>\$3,600.00</i>

92 In addition, the OC seeks interest on the unpaid fees pursuant to section 29 of the OCA.

93 In proceeding OC2260/2018, the issues for determination are –

- a Is the OC entitled to recover outstanding ordinary fees of \$30,000.00 for the period 1 January 2017 to 30 September 2019?
- b Is the OC entitled to recover Flammea’s share of the “Major works levy” special levy being \$19,000.00?
- c Is the OC entitled to recover the “Foyer and Front Entrance Works Levy”, of which Flammea’s share is \$19,200.00?
- d If the OC is entitled to recover any or all the fees and levies listed in paragraph 91, is the OC entitled to penalty interest pursuant to section 29 of the OCA?

### The undisputed fees

94 Flammea should be ordered to pay the unpaid ordinary fees from 1 January 2017 to 30 September 2019 totalling \$30,000.00.

### Interest

- 95 Section 29 of the OCA authorises an owners corporation to charge penalty interest on any amount payable by a lot owner that is still outstanding after the due date for payment
- 96 The conduct of Mr Flammea is relevant in the following respects –
- a The Statement of Adjustments for Flammea’s purchase of Lot 1 shows that the purchase price was reduced by \$49,575.00 to take into account the arrears owing by the previous owner;
  - b Despite having the benefit of a reduction in the purchase price, Flammea failed to pay that amount to the OC;
  - c Flammea’s failure to do so, has resulted in the accrual of interest on the outstanding sum;
  - d Flammea reneged on an agreement with the OC to pay the sum of \$49,575.00 by 15 December 2017, and in return the OC would not interfere in the settlement of the purchase;
  - e In cross-examination, Mr Flammea admitted that as at 14 June 2019, the ordinary fees were uncontested, and he knew that paying those fees would not prejudice his right to contest the validity of the special levies; and
  - f Mr Flammea has misled the Tribunal by asserting that he sought opportunities to pay the uncontested fees –
    - (i) At the Directions Hearing on 28 August 2019, despite Mr Louey stating that any payment by Flammea would not be applied towards the special levies, no offer was made by Mr Flammea to pay the uncontested fees;
    - (ii) In cross-examination, Mr Flammea conceded he had never emailed the OC seeking to pay the uncontested fees;
    - (iii) Mr Flammea further conceded that he had never written to, or telephoned, either Mr Louey or Binks & Associates offering to pay anything;
    - (iv) This evidence contradicts paragraph 24 of Flammea’s Points of Claim;
    - (v) Mr Flammea’s evidence changed in that in a telephone conversation with Mr Louey in 2019, he requested to pay fees; and
    - (vi) Mr Flammea did not produce any evidence of his offer to pay fees or that Mr Louey declined to accept any payment.

### The innocent oversight argument

- 97 Mr Flammea gave evidence that there was an oversight on his part regarding payment of fees.

- 98 Apart from the fact that there is no reference to an “oversight” in Flammea’s APOC or its Reply to the Points of Defence, it is an implausible excuse for failing to pay the fees because –
- a When the \$49,575.30 was not paid after settlement of the purchase as agreed on 15 December 2017, Mr Flammea was warned by emails from Mr Louey dated 19 December 2017 and 19 January 2018 that legal proceedings would be commenced if the sum was not paid;
  - b Legal proceedings were commenced on 19 June 2018 and a Compulsory Conference was held on 10 December 2018; and
  - c Every quarter Mr Flammea received fee notices containing an updated balance of the fees owing.

#### Fairness generally

- 99 Flammea has had the benefit of the unpaid ordinary fees since 2017. The fees are part of the annual budget and are required to meet current costs of the OC. Thus, the OC has been deprived of operating funds, or the opportunity to earn interest on that portion of the fees not immediately required. Therefore, Flammea’s request that interest be waived should be rejected.

#### A windfall gain

- 100 The 20 October 2016 Committee Meeting resolved to strike a special levy of \$192,000.00 for the “roof, the façade and the lift”.
- 101 Flammea did not become the registered proprietor of Lot 1 until 13 November 2017, some 13 months after the 26 October 2016 resolution.
- 102 On 4 April 2017, the Committee resolved to undertake two items of expenditure funded by the Major works special levies. Flammea did not become a member of the OC until some seven months after the levies had been struck and spent.
- 103 The Statement of Adjustments for Flammea’s purchase of Lot 1 shows that Flammea received a reduction in the sum payable to the former owner of Lot 1, Bazooka Properties Pty Ltd (**Bazooka**), being the amount of the special levy. This adjustment was never paid by Flammea to the OC.
- 104 Flammea has received full benefit of the 2016 special levy in the form of the lift upgrade works, the façade restoration and painting. If Flammea was not ordered to pay the 2016 special levy, it would receive a windfall gain of \$19,200.00.
- 105 The Tribunal can deal with this issue in two ways –
- a simply decline to make an order that Flammea should not have to pay the 2016 special levy, on the ground of fairness; or
  - b find that Flammea does not have standing to seek an order that a special levy which was raised and spent before it became the owner of Lot 1, which it has not paid.



- 106 The validity of the 2016 special levy should have been contested by Bazooka, the owner of Lot 1 when the special levy was applied to its account. The special levy was paid by Bazooka by way of a discount in the purchase price to be paid by Flammea.
- 107 Section 163 of the OCA provides that a former lot owner may apply to VCAT to resolve an owners corporation dispute. If the Tribunal finds that the special levy is invalid, Bazooka, not Flammea, has standing to seek a refund of the special levy. Although Bazooka did not pay the levy to the OC, through the adjustment at settlement it paid the levy to Flammea. Flammea purchased Lot 1 in the knowledge of the improved condition of the façade and operation of the lift, and will continue to enjoy the benefit of those improvements.
- 108 Allowing Flammea to have standing to bring this proceeding would mean that a new lot owner, having inspected the historical records of the owners corporation, could seek to invalidate special levies struck and spent prior to becoming a lot owner.

#### Validity of the 2016 and 2017 levies

- 109 Where a legitimate decision is made by an owners corporation or its committee, the decision is final. The Tribunal ought to be reluctant to interfere with a decision taken by an owners corporation unless there is a legal error.
- 110 Section 167 of the OCA states that –
- “VCAT in making an order must consider the following:
- ...
- (c) The impact of a resolution or proposed resolution on the lot owners as a whole;
- (d) Whether a resolution or a proposed resolution is oppressive to, unfairly prejudicial to or unfairly discriminates against, a lot owner or lot owners;”
- 111 In making an order that it considers fair, the Tribunal must take into consideration the matters listed in section 167.
- 112 Section 24 of the OCA permits an owners corporation to resolve to levy special fees and charges to cover extraordinary items of expenditure. Section 114 requires such a resolution to be recorded in the minutes of the committee meeting. The Committee complied with section 114.

#### The allegation that the OC had not made up its mind

- 113 By reason of the NMBW report of January 2013, the OC had known that works to the roof, the façade, and the lift, which NMBW costed at \$626,100.00, which were required.
- 114 At the 2014 AGM, a resolution to strike a special levy for \$629,100 failed. As a result, the sale of 99 year leases for the carpark raised \$500,000.00.

- 115 The Minutes of the 20 October 2016 Committee Meeting identify the roof, the façade and the lift as priority works.
- 116 The 20 October 2016 special levies were struck pursuant to section 24 of the OCA which requires “extra ordinary items of expenditure” to be identified.

The 2017 foyer and front entrance works

- 117 The Minutes of the 29 August 2017 Committee Meeting record that –
- NMBW’s quantity surveyor’s report costed refurbishment of the entrance and foyer at \$400,000.00;
  - Given the current budget, a full upgrade was not feasible;
  - The scope of works would be narrowed to approximately \$192,000.00; and
  - A special levy would be struck for \$192,000.00 with \$96,000.00 due on 1 April 2018 and \$96,000.00 due on 30 June 2018.
- 118 The instalments were not due until 1 April and 30 June the following year, giving the OC ample time to refine the scope of works.
- 119 Mr Camenzuli explained that the process was done in a professional manner, commencing with a cost plan being provided by Harlock Consulting, which NMBW utilised to provide preliminary cost options of around \$200,000.00 each. The Committee thus had ample information to determine that \$192,000.00 was necessary for the foyer and front entrance works.
- 120 The levy was for a package of works, and not simply individual items. Mr Camenzuli further explained that there are problems with Flammea’s submission that the scope of works needed to be “bolted down”, before the OC strikes a levy –
- a The OC should not proceed to tender unless the funds are available because –
    - (i) conducting a tender involves costs of \$5,000.00 - \$7,000.00;
    - (ii) tender prices are held for only 90 days; and
    - (iii) Tenderers should not be “strung along” that a project is about to happen when it is not.
  - b Knowing the cost of the works is an integral part of determining the final scope of works; and
  - c Once tenders are received, if items are too costly or not feasible, the scope of works is refined, and negotiation is necessary.
- 121 Accordingly, it is not until the final scope of works is contracted, can it be said the scope is “bolted down”. Therefore, an OC would be acting irresponsibly in striking a levy after it had contracted the works; not having the funds available before contracting risks a breach of contract.

- 122 It would have been misleading for the OC to present to the lot owners a purported “final scope of works” at the time of striking a special levy. If the scope changes as a result of tenders received, it could be said that the levy was invalid because it was struck for one purpose, and then used for another.
- 123 The progression of the refinement of the scope of works is evident from the letter to lot owners dated 24 April 2019, which shows that the contemplated works had been reduced to a number of core elements.
- 124 Should the Tribunal find that the front entrance and foyer levy is invalid, it does not follow that the levy should be retrospectively invalidated. To resolve a dispute, the Tribunal can make any order it considers fair. An order requiring refunds to lot owners (or permitting continued non-payment by Flammea), would jettison the works done to date and set the OC back months.
- 125 A fairer order would be that the OC clarify the ambit of the scope of works, enabling any technicality to be rectified but allowing long overdue works to proceed.

Were either levy for “upgrade works” as defined in section 53 of the OCA?

*The definition of “upgrade works”*

- 126 Section 53(2) of the OCA states that “upgrading works” means building works for the upgrading, renovation, or improvement of the common property where –
- a the total cost of the works is estimated to be more than twice the total amount of the current annual fees; or
  - b the works require a planning permit or a building permit before they can be carried out –
- but does not include works that are provided for in an approved maintenance plan or works referred to in section 4(b).
- 127 Works referred to in section 4(b) are described as works involving repairing and maintaining:
- (i) the common property;
  - (ii) the chattels, fixtures, fittings, and services related to the common property or its enjoyment;
  - (iii) equipment and services for which an easement or right exists for the benefit of the land affected by the owners corporation or which is otherwise for the benefit of all or some of the land affected by the owners corporation.
- 128 If works can fall within the definition of repair and maintenance in section 4(b), they are not upgrading works as defined in section 53(2). Even if the works require a planning permit due to a heritage overlay, if the works are repairs and/or maintenance, they do not meet the different definition of upgrade works.

- 129 The exemption for repairs and maintenance acknowledges that funds should be able to be raised for repair and maintenance purposes by ordinary resolution; that is a majority of lot owners support the resolution.
- 130 If a special resolution was required for repairs and maintenance because a planning permit is necessary, 75% of lot owners would be required to vote in favour of repair and maintenance work and 25% could vote against the work.
- 131 As repairing and maintaining common property is a function an owners corporation must undertake, allowing the minority of 25% of lot owners to frustrate repair and maintenance work is clearly an outcome the OCA seeks to avoid.

*What is “repair” and “maintenance” works?*

- 132 Maintenance needs to preserve the purpose for which something exists, and includes but is not limited to, preventative maintenance measures and replacing components.
- 133 In *Owners Corporation No. 1 – PS434030V v Carroll* (Owners Corporations) [2016] VCAT 1863 (**Carroll’s Case**), Senior Member Vassie said –
46. The words “repair” and “maintain” are not synonyms. Nor are the words “repair” and “maintenance”. ... A covenant in the lease to “repair” implies an obligation to put into repair, while a covenant to “maintain” usually implies taking preventative action to prevent the demised premises from falling into a state of disrepair. Dictionary definitions of “repair” are in terms of restoring to a good condition, or mending, whereas dictionary definitions of “maintain” are in terms of preserving, maintaining and keeping in repair.
47. In some contexts, however, the notions of “repair” and “maintenance” overlap. An obligation to “maintain” can extend beyond mere servicing to include positive repair. The Act also uses the word “maintenance” in the overlapping way: s37 provides that where an owners corporation prepares a “maintenance plan”, the plan must set out (among other things) “the present condition or state of repair” of major capital items “anticipated to require repair and replacement within the next 10 years”.
- 134 There is no suggestion that work cannot be regarded as maintenance if it does not result in an outcome that is *identical from year to year*. Carroll’s Case and section 37 of the OCA make it clear that maintenance can incorporate replacement.
- 135 Entrance foyer tiles located at the entrance of a lobby in a heritage building, serve a functional and aesthetics purpose. In leaving non-matching and patched tiles in place, the OC is not maintaining the aesthetic of the building.
- 136 In his evidence, Mr Flammea conceded that the letter boxes needed replacing. The letterboxes, like the tiled flooring, no longer serve their purpose (the storage of mail securely) and have become a detriment to the

aesthetic of the building if not maintained. Repair or replacement falls within section 4(b) because either option preserves their purpose.

- 137 Requiring repairs and maintenance to achieve identical or like-for-like results would make the OC's duty to repair and maintain impossible in some instances. Repair and maintenance involve preventative maintenance (the façade works) or replacement of components or the whole (the letterboxes). The pertinent question is whether the work keeps something in a state which enables it to serve the purpose for which it exists.

*There can be no implied requirement of "identical from year to year"*

- 138 Although it is a function and a requirement of an owners corporation to repair and maintain common property, the OCA does not define "repair" or "maintenance".

- 139 Flammea submits that the Tribunal should adopt a narrow view of repair and maintenance; that repair and maintenance must preserve the building so that it remains "*identical from year to year*".

- 140 For good reasons, the OCA does not import such a requirement because –

- a Sections 4(b) and 46 would be unworkable; "*identical*" would make it a function and duty of an owners corporation to repair and maintain the property so that it remains identical from year to year. That would mean that any change to common property would result in the OC breaching its duty to keep the building identical from year to year.
- b Section 52 would not have any function and would be irreconcilable because –
  - (i) An owners corporation must not make a significant alteration to the use or appearance of the common property without a special resolution;
  - (ii) Provided the alteration is not significant, only an ordinary resolution as required; and
  - (iii) Keeping the building identical is inconsistent with the rights to make alterations pursuant to section 52.

- 141 Flammea submits that the OC can only patch, and not replace, damaged tiles even if matching tiles are not available. Patching damaged tiles is not keeping the building identical year by year. Replacing and not repairing the letterboxes is another example.

- 142 Therefore, there are practical reasons why repair and maintenance should not have an *identical from year to year* requirement.

*Was the 20 October 2016 Major Works Levy (for the roof, the façade, and the lift) repairs and maintenance?*

- 143 As stated in its Points of Defence to Counterclaim, the OC has not conceded that the 20 October 2016 levy was struck without any resolution.

- 144 Flammea's submission that "*the 20 October 2016 and 29 August 2017 levies were both struck before any resolution approving any particular works ...*" is an attempt to combine sections 24 and 53 into the one section.
- 145 Flammea submits the works are upgrade works and therefore the levy was struck pursuant to section 53, requiring identification of particular works. Section 24, which states that an owners corporation may levy special fees and charges designed to cover extra ordinary items of expenditure, is the relevant section.
- 146 The OC's position has always been that the works required to the lift, the roof and the façade were repair and maintenance works. Section 53 only becomes relevant if the Tribunal found that the works required to the lift the roof and the façade were upgrade works.
- 147 Therefore, the question is whether the roof, the façade and the lift works are repair and maintenance.

#### The façade works

- 148 The evidence of Mr. Beeston, a registered architect specialising in the conservation of heritage buildings and the owner of two apartments in the building since 1996, was that in 1994 or 1995 he was engaged to assist the OC in dealing with a building notice issued by the City of Port Philip condemning the condition of the building.
- 149 He described the building as being in a "*very, very poor condition*", "*neglected for a very long time*", with "*fire safety issues, concrete cancer issues, malfunctioning lift issues inappropriate fire egress*". He said the façade restoration needed to be completed in the mid-1990's but was not able to be done at the time, and there had been no maintenance to the façade since the more recent works.
- 150 The OC engaged Mr Beeston's firm to conduct the tender for the façade works. He said that the façade painting in the 1990's had an expected lifespan of 10 years, and when he inspected the façade it was "*well and truly overdue for renewal*".
- 151 Mr. Camenzuli attended site meetings as the OC's representative, and inspected the progress of the works. He said he witnessed "*external painting of the site, repairs - quite substantial repairs of faulty render*" and the need to paint and seal the brickwork at the rear of the building.
- 152 The evidence of Mr Beeston and Mr Camenzuli was uncontradicted, and the Tribunal can be satisfied that the façade works constituted repair and maintenance.

#### The lift works

- 153 Ms Grande's evidence was that there were problems with the lift, which is supported by the January 2013 NMBW report, which noted that the control box required replacing. At the date of striking the levy for the lift works, the OC had two quotations.

154 Flammea has not submitted that replacement of the lift control box was not repair or maintenance, and the Tribunal can be satisfied that this was repair and maintenance works.

#### The roof works

155 Ms Grande said that although there was some plumbing works, and replacement of downpipes required, the façade and lift works used up the funds. However, the January 2013 NMBW report makes it clear that repairs or maintenance to the roof were required.

156 Flammea has not submitted that the roof works constitute an upgrade and the Tribunal can comfortably find that the proposed roof works are repairs or maintenance.

#### *Was the 29 August 2017 levy (for the Foyer and Entrance) repairs and maintenance?*

157 Based on its misconceived “identical year by year” requirement, Flammea submitted that the letterboxes, tiles, lighting, mirrors, timber flooring and the steel dado were upgrade works. Flammea further submitted that these were patch up works that could have been done by a handy man.

#### Letterboxes

158 Flammea conceded that the letter boxes needed replacing.

#### Tiles

159 Mr Camenzuli’s evidence was that replacement of the tiles was a cost effective option as attempting to lift and repair the existing tiles could cause the tiles to disintegrate.

160 The advice to the Committee was that repairing the tiles would cost as much as replacement.

#### Lighting

161 Mr Camenzuli said that the lights were wall mounted so the foyer was lit inefficiently, and would not have met the relevant Australian Standard. The existing fittings were star sockets which had either blown or caught fire and needed to be replaced by LED lights which had a 25,000 – 50,000 hours longevity and were more efficient. Lights mounted on the mirrors would also improve the levels of light.

162 Ms Grande’s evidence was that the lighting in the foyer and throughout the building was dark and inefficient.

#### Timber flooring

163 Mr Camenzuli said that the exposed timber floors were 20 plus years old, worn and in state of disrepair.

164 Sanding and re-coating the floors was a cheaper option to replacement, but that process would be required every two years. Replacement engineered floors are more resilient to traffic.

#### Steel dado

165 Ms Grande said that there were holes, scratches, and dints in the dado. Mr Camenzuli said that replacement of the ply dado by a steel dado was preventative maintenance which avoided the need for further expenditure in the future.

#### Intercom

166 Ms Grande said it was falling out of the wall and not functioning for many residents. Mr Camenzuli said the intercom was an old analogue system in a poor state of repair.

#### Summary

167 The evidence clearly is that the need for these works is the result of years of neglect dating back to the 1990's. The foyer and front entrance are in dire need of repair. For those works, replacement is proposed where repair is more expensive, and with longevity and lower maintenance cost a priority.

168 None of these proposed works constitute upgrade works as defined in section 93 of the OCA.

#### *Interest payable by Flammea*

169 Interest should be payable on both the 2016 and 2017 special levies and the uncontested fees.

#### Flammea's Submissions in Reply

##### *Works cannot be "repairs and maintenance" or "upgrading work" until the OC identifies them*

170 The OC submits that –

- While section 53 of the OCA requires identification of specific works to levy fees, that requirement is exclusive to section 53; and
- If a building needs repair generally, that fact is sufficient for fees to be levied for an "item of expenditure" within the meaning of section 24, without approving any specific repairs.

171 The concepts of "upgrading works" and "repairs and maintenance" overlap, and as a matter of common sense, works must be identified to discern if they meet the definition of "upgrading works", before it can be determined if they are "repairs" or "maintenance" and be exempt from section 53.

172 The OC contends that an owners corporation can simply levy fees because it considers there are repairs to be done, without identifying the proposed repairs, because the section 24 requirement to identify an "item of expenditure" is more liberal than in section 53.



- 173 It is not a common sense reading of the OCA to contend that it has “less onerous” and “more onerous” fundraising mechanisms, or why it requires identification for upgrading works, but not repair works.
- 174 The OCA requires process and transparency for an owners corporation to levy fees. This does not require it to engage a contractor; **only decide what will be contracted on**, and perhaps provide an estimate of the cost.
- 175 Neither the October 2016 or the August 2017 resolutions set out the proposed works; at their highest all they did was to identify locations, not what items or components needed repair.
- 176 The August 2017 resolution only identifies the foyer and front entrance, not the items discussed before the Tribunal.
- 177 While mention is made of documents prepared by NMBW and Harlock Consulting, no resolution approved any of their numerous proposals, on bloc or individually.

*Section 37 of the OCA provides a point of reference for what an owners corporation can provide*

- 178 Section 37 provides that a maintenance plan must set out the major capital items anticipated to require repair and replacement within the next 10 years.
- 179 It cannot be that section 37 requires an owners corporation to “set out” the “major capital items” to be repaired and replaced under a 10 year plan, but when the works are done piecemeal in section 24, it is not similarly required to set out the proposed items of repair and maintenance as an “item of expenditure”.

*Evidence of potential works*

- 180 The issue is not whether the OC can identify potential repairs in the “foyer and entrance area”, **but rather** whether the levy satisfied the requirements of the OCA under section 24 or section 53.
- 181 The August 2017 resolution did not identify the repair works which is why Flammae began and continued the proceeding. The OC accepts that no scope of works was approved.
- 182 Until a resolution stating the items to be repaired or replaced is passed, there are no grounds to levy fees under sections 24, 53 or otherwise. Evidence of proposed repairs not approved by resolution, stated as evidence for the first time before the Tribunal, is not satisfactory.
- 183 In its letter dated 24 April 2018 to Flammae, the OC concedes there was no approved scope of works.

*Other matters*

**Carroll’s Case**

- 184 In paragraphs 46-47, Senior Member Vassie deals with the distinction between ‘repair’ and ‘maintain’, and notes that section 37 uses them in an

overlapping way, where the OCA talks of a maintenance plan setting out major capital items '*anticipated to require repair and replacement within the next 10 years*'. This does not mean that 'maintenance' includes replacement (because of section 37) or that Carroll's Case stands for such a proposition.

- 185 Carroll's Case does not suggest that this means 'repair' and 'maintain' are influenced by the definition of 'maintenance plan' in section 37, when those terms appear elsewhere in the OCA. The Senior Member merely highlighted the meaning of the words differ in context.
- 186 Nothing in section 37 indicates that the term 'maintenance plan' is intended to inform the meaning of the word 'maintain', other than when used in section 37. The Senior Member observed that the use of the word '*maintenance*' in '*maintenance plan*' reflects that context is the first consideration in deciding if 'maintain' or 'repair' has its grammatical meaning, or otherwise.
- 187 That 'replacement' can be part of a 'maintenance plan' does not mean replacement is synonymous with 'maintain'. Replacing a broken tile with an identical tile is both repairs and replacement but replacing a whole floor with new different tiles is only replacement.

Limiting an owners corporation from replacing building elements (as distinct from repairs and maintenance) ensures owner control

- 188 The rationale for the OCA restricting an owners corporation undertaking pure replacement, as opposed to repairing or maintaining through like-for-like replacement, is that **replacement means change**. Change as opposed to simple repairs requires owner, not committee, approval.
- 189 Limiting repairs and maintenance to what already exists, for example the same type of tiles, in the absence of a maintenance plan, ensures that the owners, not the committee, decide on changes to the building, particularly a designated heritage building.
- 190 If the OC wishes to refurbish the foyer beyond replacing the broken parts with equivalent replacements, it must either have a maintenance plan or a special resolution.

Interest on uncontested fees

- 191 Flammaea should be excused because –
- a Having last corresponded with its solicitor in January 2018, the OC did not contact Mr Flammaea before issuing recovery proceedings in June 2018;
  - b Recovery proceedings having commenced, Mr Flammaea was diverted to the OC's solicitor;
  - c Binks & Associates could not confirm that any payment would be allocated to the non-contested fees.

192 There were discussions between Flammea’s counsel and the OC’s former solicitors, with a view to resolving the matter, including the uncontested fees.

#### Windfall gain

193 Section 32F of the *Sale of Land Act 1962* (vendor statements) requires an owners corporation to provide a certificate under section 151 of the OCA.

194 Section 151(4)(iii) of the OCA provides –

An owners corporation certificate must contain the prescribed information relating to the owners corporation and a lot which must include the prescribed information relating to fees and other money owing in respect of the lot. (emphasis added)

195 If “fees and other money owing” to be paid by adjustment against the vendor are not paid by the purchaser, it is a matter for the vendor to claim in restitution, not the OC.

#### Mr Camenzuli’s evidence

196 Mr Camenzuli gave expert evidence and should have provided a report in accordance with VCAT Practice Note 2, or at least put Flammea on notice to provide, if deemed appropriate, a report in reply.

197 Paragraph 189(f) of the OC’s Defence to Counterclaim states –

The final scope will be decided upon when the tender process is conducted and actual costings (not quantity surveyor estimates) are known.

198 This confirms that the OC did not endorse any works before or when it passed its resolutions but has sought to do so in the Tribunal.

199 This dispute is the result of the OC’s failure to follow a proper transparent process that made it clear to its lot owners why fees were levied.

#### **FINDINGS**

200 The Contract of Sale between Flammea and Bazooka was not produced, but it was not suggested by Mr Flammea that the Vendor’s Statement in the Contract did not contain an Owners Corporation Certificate required by section 151 of the OCA.

201 Section 151 of the OCA requires an Owners Corporation Certificate to state “fees and any other money owing in respect of the Lot”. It was not suggested by Mr Flammea that the Owners Corporation Certificate contained in the Vendor’s Statement did not state the outstanding fees owed by Bazooka.

202 The Statement of Adjustments provided by Bazooka to Flammea stated that the fees owed to the OC, as at the date of settlement of the sale of Lot 1, totalled \$49,575.00. The sum payable by Flammea to Bazooka was reduced by that amount.

- 203 Between the dates of receipt of the section 151 Certificate and the Statement of Adjustments, Mr Flammea did not see fit to request the OC to provide details of, or a breakup of the sum owed by Bazooka to the OC.
- 204 Settlement of the sale of Lot 1 to Flammea took place on 13 November 2017, so Flammea did not become the registered owner of Lot 1 until after that date, some thirteen months after the 20 October 2016 levies were struck and two weeks after the 29 August 2017 levies were struck.
- 205 On the date of settlement, Flammea's solicitors emailed the OC Manager advising that –
- Flammea was unable to pay the OC the sum of \$49,575.00 on that day; and
  - *... the vendor may be agreeable to settlement today ..., **the terms of which will include our client assuming liability for the outstanding owner's corporation fees and any applicable interest.***
- As such we are requesting that the owner's corporation agree to receive the outstanding fees plus any applicable interest **by no later than 15 December 2017.*** (emphasis added)
- 206 Later the same day, Flammea's solicitors emailed the OC Manager stating –
- ... the minimum payment the Owners Corporation can expect to receive on the Payment Date is \$49,573.30 ...
- ... our client acknowledges that it will assume liability for payment of any interest that accrues up until the Payment Date.
- 207 Mr Louey responded –
- ... the Owners Corporation accepts the proposal outlined in your email and accordingly looks forward to receiving **all outstanding owners Corporation fees and applicable interest by no later than 15 December 2017.**
- We confirm that the initiation of legal proceedings to recover the debt will remain on hold until after 15 December 2017.** (emphasis added).
- 208 Without any explanation, Flammea failed to make any payment. On 18 June 2018, the OC commenced proceeding OC1289/2018 to recover the outstanding fees and interest.
- 209 I was not impressed by Mr Flammea as a witness. As detailed in paragraph 55 above, I consider he made concessions damaging to his credibility. Despite stating in examination-in-chief that it was not his intention to deny the OC funds to which it was entitled, or "rip anybody off", I consider his actions after 15 December 2017 demonstrate a strategy to delay paying the sum he had agreed to pay by that date, if at all.
- 210 I consider that Mr Flammea's continual failure to pay the undisputed fees, and his admission in cross-examination that at the conclusion of the

Directions Hearing, he knew payment of the undisputed fees would not prejudice his entitlement to contest the special levies, is evidence of that strategy.

- 211 I do not accept his evidence that initially it was an oversight on his part not to pay the agreed sum, or that he sought opportunities to pay the uncontested fees. His evidence was that he did not pay those fees because, if the Tribunal made an order in Flammea's favour, he did not trust the OC to refund to Flammea any payments it had made.
- 212 I find that Mr Flammea had an agreement with the OC to pay the sum \$49,575.30 plus interest by no later than 15 December 2017, and in consideration of that agreement, the OC agreed to forbear from commencing proceedings against Flammea to recover that sum plus interest. Without notice, explanation or justification, he simply resiled from that agreement.
- 213 The result is that Flammea has had the benefit of –
- the unpaid fees and levies since 15 December 2017, and
  - the expenditure by that OC of the 2016 special levies upgrade to the lift and the foyer, and painting.

To that extent, Flammea has benefitted from a windfall gain.

- 214 Finally, I accept the OC's submission that as Flammea was not the registered owner of Lot 1 when the 2016 and 2017 levies were struck, it does not have standing to take issue with these levies. Bazooka, as the owner of Lot 1 when those levies were struck and having given Flammea a reduction in the sum payable at settlement for those outstanding levies, is the only entity that has standing to do so.
- 215 Having found that Flammea breached an agreement with the OC to pay the sum of \$49,575.30 by 15 December 2017, I further find that the OC is entitled to recover –
- a the outstanding ordinary levies for the period 1 January 2017 to 30 September 2019 totalling \$30,000.00;
  - b the special levies of which Flammea's share is \$19,200.00; and
  - c penalty interest on the sum of \$49,575.30 pursuant to section 29 of the OCA.

**B. Thomas**  
**Member**