

VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

OWNERS CORPORATIONS LIST

VCAT REFERENCE NO. OC2892/2019

CATCHWORDS

Application for costs by the Respondent relying on section 109(3) of the *Victorian Civil and Administrative Tribunal Act 1998* (Vic) – proceedings struck out by consent at hearing.

APPLICANT

Owners Corporation PS408909U

RESPONDENT

College House Properties Pty Ltd (ACN: 103 677 149)

WHERE HELD

In chambers

BEFORE

C. Powles, Member

HEARING TYPE

Costs Application on the papers

DATE OF ORDER AND REASONS

22 October 2020

CITATION

Owners Corporation PS408909U v College House Properties Pty Ltd (Costs) (Owners Corporations) [2020] VCAT 1197

ORDER

- 1 The application by College House Properties Pty Ltd for costs under s 109(2) of the *Victorian Civil and Administrative Tribunal Act 1998* is dismissed.

C. Powles
Member

REASONS

- 1 On 14 November 2019, the owners corporation for the building known as Lincoln Park Apartments, Owners Corporation PS408909U (the **OC**), applied to the Tribunal under Part 11 of the *Owners Corporation Act 2006* (Vic) (the **OC Act**) for orders against one of the lot owners affected by the OC, College House Properties Pty Ltd (the **Lot Owner**).
- 2 The OC sought orders from the Tribunal requiring the Lot Owner provide access to the OC to the Lot Owner's lot (the **Lot**) so that the Lot could be inspected as part of the OC's required annual fire detector and alarm system inspection and testing procedures. The orders were sought urgently, and the application lodged was an application for injunctive relief (the **injunction application**).¹
- 3 The injunction application was listed for hearing before me on 25 November 2019 (the **hearing**). At the hearing, before any submissions were made or evidence heard, the parties advised me that the matter had been settled and that they sought orders by consent that the proceeding be struck out with a right on the part of the Lot Owner to make an application for costs (the **consent orders**). I made orders in those terms.
- 4 On 6 April 2020, the Lot Owner submitted material by way of an application for costs (the **costs application**) with the Tribunal.
- 5 On 21 May 2020 and 11 August 2020, I made orders for the making of written submissions by the OC and the Lot Owner on the issue of costs, both parties having consented to the costs application being decided on the papers.
- 6 As well as the material provided with the costs application on 6 April 2020, the Lot Owner provided written submissions dated 19 August 2020 (the **Lot Owner's submissions**).
- 7 The OC provided written submissions dated 25 June 2020, and further written submissions, responding to the Lot Owner's submissions, dated 2 September 2020 (the **OC's submissions**).
- 8 I have considered the written submissions and materials from both parties and, for the following reasons, find it is fair that each party bear their own costs of the proceeding.

The Lot Owner's claim for costs

- 9 The Lot Owner submits that I should exercise my discretion under ss 109(3)(c) and (e) by ordering that the OC pay the Lot Owner's costs of the proceeding on an indemnity basis or, alternatively, on a party/party basis taxed under the County Court's Civil Scale of Costs, to be assessed by the Costs Court in default of agreement.

¹ See s 123 of the *Victorian Civil and Administrative Tribunal Act 1998* (Vic) (the **VCAT Act**). References to sections in this decision are to sections of the VCAT Act unless otherwise specified.

- 10 The Lot Owner also seeks additional costs incurred for the preparation of the costs application.
- 11 The Lot Owner submits the grounds under s 109(3)(c) are relevant to the issue of costs because the injunction application was frivolous, vexatious, misconceived, lacking in substance and an abuse of process, for the following claimed reasons:
 - (a) the OC was not exempt from the requirement to obtain a special resolution to bring legal proceedings because the application was not for the recovery of fees or to enforce the rules of the OC (the **Rules**);
 - (b) the OC was not authorised by special resolution to bring the application and was put on notice of this issue by correspondence from the Lot Owner's solicitor dated 20 November 2019;
 - (c) the application was for injunctive relief and failed to address the required elements of an injunction application and, in particular, did not provide a reason for the need for urgency; and
 - (d) the affidavit provided in support of the OC application was factually inaccurate and misleading.
- 12 The Lot Owner submits there are other matters the Tribunal should consider under s 109(3)(e) as relevant to the OC being ordered to pay the Lot Owner's costs, being the following:
 - (a) the Lot Owner had previously requested that the OC provide evidence of its need to enter the Lot, but the OC had failed to respond to those requests before applying to the Tribunal;
 - (b) the OC sought access to the Lot under ss 50 and 51 of the OC Act but these sections only allow access for repair, maintenance or other works and do not allow access for testing, and the OC was advised of this by the Lot Owner on 25 September 2019;²
 - (c) on 20 November 2019, the Lot Owner's solicitor emailed the OC submitting the OC should withdraw the application and advising the Lot Owner would rely on that email in relation to the issue of costs if the OC did not withdraw the injunction application;
 - (d) on 22 November 2019, the Lot Owner applied to the Tribunal for an order that the hearing be conducted at the Lot or that the Tribunal order a view of the Lot at the hearing;
 - (e) a Municipal Building Surveyor from the City of Melbourne (the **Surveyor**) attended the Lot on 23 August 2019 and confirmed there was no smoke detector³ at the Lot;

² Affidavit of Michelle Ang dated 31 March 2020 (the **MA affidavit**), [7]-[8] & Exhibit MA-2.

³ The submissions and other materials provided by both parties refer at different times to a "smoke detector" and a "fire detector". For ease of reference, in these reasons I refer to the monitoring device in dispute as a "smoke detector".

- (f) the Lot Owner summonsed the Surveyor to appear at the hearing and the Surveyor attended the hearing but was not required to provide evidence because the consent orders were made;
- (g) in an exchange of emails between the parties on 22 November 2019, the OC asked if a smoke detector had been removed from the Lot and the Lot Owner replied that no smoke detector had been removed from the Lot because no smoke detector had been installed at the Lot;⁴
- (h) the parties agreed to the consent orders on the basis that the Lot Owner would provide the OC access to the Lot for a visual inspection at midday on 25 November 2019;⁵
- (i) that inspection took place, at which it was confirmed there was no smoke detector at the Lot; and
- (j) the Lot Owner continues to submit there has never been a smoke detector at the Lot.

The OC's position on costs

- 13 The OC submits the Tribunal should follow the general rule on costs under s 109(1), which provides that each party is to bear their own costs.
- 14 The OC submits that, having regard to the matters set out in s 109(3), there are insufficient grounds for the Tribunal to be satisfied that it is fair to order the OC to pay the Lot Owner's costs. Alternatively, the OC submits that if the Tribunal is satisfied it is fair to order the OC to pay the Lot Owner's costs, indemnity costs should not be awarded, only costs assessed on a standard basis according to the County Court Scale.
- 15 In response to the Lot Owner's submissions,⁶ the OC submits that:
- (a) the OC advised the Lot Owner in writing on 20 September 2019 that the OC required access to the Lot to "inspect and assess" a smoke detector at the Lot and that the OC has an "implied easement of access" for it to "maintain the fire services for the building";⁷
 - (b) on 25 September 2019, the Lot Owner, through its legal representative, refused access to the Lot;⁸
 - (c) by refusing access to the Lot, the Lot Owner was in breach of the Rules because refusal may have "cause[d] a hazard to the health and safety of all other occupants" of the building;⁹

⁴ MA affidavit, Exhibit MA-4.

⁵ MA affidavit, [19]-[21].

⁶ I note that the OC objects to the Tribunal considering the Lot Owner's submissions because they were provided to the Tribunal and the OC on 20 August 2020, a day after the date by which I required the Lot Owner to file and serve written submissions in my orders made 11 August 2020. I do not accept that submission. The OC has not been disadvantaged by the delay nor has the delay caused any inconvenience or additional work for the Tribunal

⁷ Affidavit of Alfio Musumeci dated 14 November 2019 (the **AM affidavit**), Exhibit AM-3.

⁸ AM affidavit, Exhibit AM-4.

⁹ AM affidavit, [14].

- (d) the lodging of the application did not require the passing of a special resolution to comply with s 18 of the OC Act because the injunction application was “incidental” to a claim by the OC that the Lot Owner was in breach of the Rules;¹⁰
- (e) while the Surveyor had confirmed there was no smoke detector in the Lot, the Surveyor did see wiring for a smoke detector in the Lot and considered that further investigation was needed;¹¹
- (f) by agreeing to the consent orders, the Lot Owner prevented the OC from testing the Lot Owner’s evidence, including that of the Surveyor, and from having the opportunity to put its case in full;
- (g) the only evidence the Tribunal should consider in determining the costs application should be that submitted by the date of the hearing and, in particular, the OC does not admit there is or was no smoke detector in the Lot;
- (h) the costs application is not the place for the Tribunal to consider either the strengths and weaknesses of the substantive issues in the proceeding or the nature and complexity of the substantive application when those issues and any submissions have not been heard or tested by the Tribunal at hearing;
- (i) in particular, the Tribunal should not consider the Lot Owner’s submissions about the need for a special resolution to make the application and the required elements for an injunction not being satisfied because those submissions were not pressed at a hearing, which further means the Lot Owner has waived any entitlement to rely on those submissions in this costs application;¹²
- (j) the OC would have made the necessary submissions and given the necessary undertakings to meet the required elements for an injunction if the injunction application had proceeded to hearing rather than settling;
- (k) the OC disputes there are any factual inaccuracies in the affidavit material provided with the injunction application and again submits that the Lot Owner chose not to press its submissions on this issue at a hearing and so should not be entitled to rely on submissions on this issue in this costs application;
- (l) at no point prior to the consent orders being made did the OC change its position about requiring access to the Lot;
- (m) the Lot Owner could have consented to the access requested by the OC at any time after the request was made, or when the application was lodged;

¹⁰ The OC’s submissions, [29].

¹¹ Affidavit of Anthony Charles Demarco dated 22 November 2019, Exhibit ACD-8.

¹² Lot Owner’s submission [27]-[28].

- (n) by consenting to access by the OC to the Lot after the hearing, the Lot Owner was, in effect, conceding that the application for orders for access had merit;
- (o) any costs incurred by the Lot Owner in responding to the application were as a result of the Lot Owner's delay in giving access as requested by the OC;
- (p) it is neither fair nor equitable for a costs order to be made in a proceeding with the merits of each party's position have not been "scrutinised" by the Tribunal;¹³ and
- (q) if the Tribunal does make an order for costs against the OC, it should be assessed on the County Court scale.¹⁴

Findings

16 Section 109 of the VCAT Act relevantly states:

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—
 - ...
 - (c) the relative strengths of the claims made by each of the parties, including whether a party has made a claim that has no tenable basis in fact or law;
 - ...
 - (e) any other matter the Tribunal considers relevant.

17 Unless the Tribunal finds that s 109(3) applies in a given matter, each party in the proceeding must bear its own costs in the proceeding.¹⁵ Should the matters stipulated under s 109(3) apply in a given proceeding, the Tribunal has the discretion – not an obligation – to order that a party pay all or a specified amount of the costs of the other party.

18 For the Tribunal to exercise its discretion and make any order for costs, the Tribunal must find that, in the circumstances, "it is fair to do so". Sections 109(3)(a) to (e) are matters that the Tribunal considers in determining whether it is fair to award costs in any given situation.¹⁶

19 In assessing the grounds on which I may be satisfied that it is fair to order the OC to pay the Lot Owner's costs, both parties' submissions seek that I:

¹³ Ibid [42].

¹⁴ As sought by the Lot Owner, see MA affidavit [22] & Exhibit MA-5.

¹⁵ See s 109(1) of the VCAT Act.

¹⁶ See *Vero Insurance Ltd v The Gombac Group Pty Ltd* [2007] VSC 117 at [20] per Gillard J.

- (a) consider conduct of the parties before the injunction application was lodged;
 - (b) assess factual matters, including the pre-lodgement conduct of the parties, and legal arguments that were not tested at hearing; and
 - (c) consider the conduct of the parties after the consent orders were made.
- 20 In this case, I accept the OC's submission that I cannot take into account or otherwise consider factual matters and legal arguments that were not "pressed" at hearing. A costs application is not an opportunity to relitigate matters where both parties consented to the matter not being tested at hearing or otherwise determined by the Tribunal.¹⁷ I am unable to make findings of fact where alleged facts remain in dispute that are directly relevant to whether or not the injunction application would have been successful had the parties not agreed to end the proceedings.
- 21 As a result, I find the only factual matters I can consider for the purposes of the costs application are those agreed between the parties are that:
- (a) the OC has not made or revoked any rules so the Rules are the model rules in force at the time of its creation;¹⁸
 - (b) the OC made a written request to the Lot Owner for access to the Lot under s 50 of the OC Act to "inspect and assess" the smoke detector;
 - (c) the OC lodged the injunction application in order to gain access to the Lot for the reasons requested;
 - (d) the Lot Owner did not grant the OC access to the Lot before the hearing;
 - (e) on the day of the hearing, the Lot Owner consented to the OC having access to the Lot; and
 - (f) the OC was subsequently given access to and inspected the Lot.
- 22 I now consider each of the Lot Owner's claims for costs under s 109(3).

¹⁷ For a similar circumstance in a costs application where the Tribunal did not award costs, see *Bogusz v Prestige Strata & Property Solutions Pty Ltd* [2020] VCAT 922.

¹⁸ Under s 139(2) of the OC Act, if an owners corporation does not make or revoke any rules, the prescribed Model Rules apply as the rules for the owners corporation.

The relative strengths of the claims made by each party – s 109(3)(c)

- 23 The Lot Owner submits:
- (a) the injunction application was subject to the requirement under s 18 of the OC Act that an owners corporation must not bring legal proceedings unless it is authorised by special resolution to do so; and
 - (b) the OC cannot rely on the exemption to that requirement in s 18(2) of the OC Act because the injunction application was not made to recover fees or to enforce the Rules.
- 24 Rule 1.1 of the Rules require that a Lot Owner must not use a lot, or permit a lot to be used, so as to cause a hazard to the health, safety and security of an owner, occupier, or user of another lot.
- 25 The OC claims the injunction application was made so the OC could gain access to the Lot under s 50 of the OC Act in order to determine whether the Lot Owner was in breach of Rule 1.1 and so was incidental to a proceeding to enforce the Rules.
- 26 An owners corporation can apply to the Tribunal to resolve an owners corporation dispute under s 163 of the OC Act. An owners corporation dispute includes a dispute relating to an alleged breach by a lot owner of an obligation imposed on them by the OC Act.¹⁹ Arguably, the injunction application is seeking orders that the Lot Owner comply with its obligations under the OC Act to allow entry to the Lot by the OC under s 50 of the OC Act. However, the obligation to allow entry under s 50 of the OC Act is not a rule under the Rules.
- 27 If an owners corporation needs access to a lot to determine whether a lot owner is in breach of the owners corporation's rules but the lot owner refuses access so the owners corporation then lodges an injunction application claiming a breach of s 50, it is a live question whether the injunction application itself is an application to enforce the owners corporation's rules. Persuasive arguments could be made either way.
- 28 However, the parties chose not to have this matter or any of their claims resolved by the Tribunal at hearing. Rather, they agreed to the proceedings being struck out. Without findings by the Tribunal in the injunction application, I cannot now make findings as to the relative strengths of the parties' claims in this proceeding.
- 29 In any event, even if I were able to do so, I am not satisfied the question of whether the OC could rely on the exemption under s 18(2) of the OC Act is one that can be so clearly resolved in favour of the Lot Owner that the OC's position could be considered to be so weak as to be unarguable.²⁰
- 30 The Lot Owner also claims deficiencies in the OC's material provided with the injunction application to justify an award of costs on this ground. In

¹⁹ See s 162 of the OC Act.

²⁰ See *Dennis Family Corporation Pty Ltd v Casey CC* [2008] VCAT 691.

particular, the Lot Owner claims the affidavit in support contains inaccuracies and the materials do not address the elements needed for injunctive relief or show the need for urgency.

- 31 Again, I prefer the submissions of the OC on this issue. In agreeing to the consent orders, the Lot Owner has chosen not to test the materials provided in support of the injunction application at hearing. The OC does not concede there are any deficiencies in the materials.
- 32 As I have found above, I cannot make findings about the relative strengths of the parties when there have been no findings made by the Tribunal in the injunction application. However, even if I were able to do so, I am not satisfied that the material provided with the injunction application is so deficient that the OC's position at hearing would have been unarguable. I consider it more likely that, at hearing, those materials could have been elaborated upon in a way that may have resolved any deficiencies in the materials as lodged.
- 33 In any event, the Lot Owner's submission that the difference in the strengths and weaknesses of the parties should lead me to conclude that it is fair that I order the OC to pay the Lot Owner's costs is undermined by its decision to allow access to the Lot. At its simplest:
- (a) the OC requested access to the Lot;
 - (b) the Lot Owner refused access to the Lot;
 - (c) the injunction application was for an order to be given access to the Lot;
 - (d) on the day of the hearing, the Lot Owner decided to allow access to the Lot;
 - (e) there is no evidence that the OC's position about why it needed access to the Lot changed from when the request for access was made; and
 - (f) the Lot Owner has not given any reason for why it was justified to delay the granting of access to the Lot from when the request for access was refused until the time when the Lot Owner decided to grant access.
- 34 In light of the above, and of the parties having settled the injunction application without any findings having been made by the Tribunal, I am not satisfied the injunction application was frivolous, vexatious, misconceived, lacking in substance or an abuse of process, or that it had no tenable basis in fact or law.
- 35 As a result, I am not satisfied there are grounds under s 109(3)(c) for an order for costs against the OC.

Any other matter the Tribunal considers relevant – s 109(3)(e)

- 36 The Lot Owner claims there are other matters relevant to whether an award of costs should be made against the OC. These matters largely turn on communication between the parties about whether there is a smoke detector

in the Lot and whether the Lot Owner is entitled to refuse access to the Lot if the OC only seeks access to “test” fire detection systems and not repair or maintain them.

- 37 I consider these matters to be of limited relevance for the following reasons:
- (a) again, whatever reason the Lot Owner may have initially sought to rely on for not providing access to the Lot, the Lot Owner nevertheless eventually granted access to the Lot;
 - (b) the OC did not withdraw the injunction application; it was struck out by consent without the Tribunal having made any findings about the merit of the OC’s claims, and the OC’s position of needing access to the Lot has remained consistent throughout the proceedings;
 - (c) while there are previous decisions of the Tribunal that address the limitations on an owners corporation’s right of access to a lot under ss 50 and 51, particularly where it may involve only the testing of fire and smoke monitoring equipment, the question of how any such limitations may apply in this particular case was not decided by the Tribunal because the parties agreed to the consent orders before there was any hearing or other findings made by the Tribunal;
 - (d) the parties do not agree that there is no smoke detector at the Lot and, by agreeing to the consent orders, the Lot Owner has not “pressed” its claim there is no smoke detector at a hearing and the Tribunal has made no findings in the injunction application about whether there is or was a smoke detector at the Lot; and
 - (e) the Lot Owner’s submissions make a number of assumptions about what findings would be made by the Tribunal if its claims had been heard: for example, it assumes the Tribunal would accept that the Surveyor not only found there was no smoke detector in the Lot but also that the Surveyor assessed that there had been no need for the OC to have access to the Lot to otherwise repair or maintain services, or to determine whether the Lot Owner was in breach of their obligations under Rule 1.1. Hypotheticals of how arguments and evidence would have been dealt with if the Tribunal had made findings after hearing the injunction application are irrelevant.

38 In light of the above, I am not satisfied these matters are of sufficient relevance for it to be fair to make an order for costs against the OC.

Conclusion

- 39 For the reasons given above, the Lot Owner has not persuaded me there are matters that justify the Tribunal departing from the usual position that each party is to bear their own costs in a proceeding.
- 40 I am not satisfied that it is fair, having regard to the matters set out at s 109(3), to make an order under s 109(2) that the OC pay any part of the Lot Owner’s costs in the proceeding.

- 41 Accordingly, the Lot Owner's application for costs is dismissed.
- 42 The Lot Owner also sought an award of costs arising from the costs application. As the costs application has been unsuccessful, I will not make an order as to costs arising from the costs application.

C. Powles
Member