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VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

OWNERS CORPORATIONS LIST

VCAT REFERENCE: OC1259/2017, OC1483/2017 and OC1484/2017

CATCHWORDS

Administrator – decision to raise special levy to fund a proceeding against one lot owner – decision to consent to other lot owners joining in the proceeding – levy paid by mistake – whether decisions void – claim for restitution – *Owners Corporations Act 2006* ss 12, 24(1), (2) and (2A).

APPLICANT:	Ms Vicky May
RESPONDENT:	Owners Corporation No. 1 PS519798G
WHERE HELD:	55 King Street, Melbourne
BEFORE:	Senior Member A. Vassie
HEARING TYPE:	Fee Recovery Hearing
DATE OF HEARING:	20 September 2017
DATE OF ORDER:	2 November 2017
DATE OF REASONS:	2 November 2017
CITATION:	May v Owners Corporation PS519798G (Owners Corporations) [2017] VCAT 1759

ORDERS

1. Each of the proceedings OC1259/2017, OC1483/2017 and OC1484/2017 is dismissed.

2. The respondent's application for costs is refused.

A. Vassie
Senior Member

APPEARANCES:

For the Applicant:	Mr. D. Noble, Solicitor
For the Respondent:	Mr. N. Jones of Counsel

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REASONS FOR DECISION

1. The applicant Vicki May is the owner of three lots in a nine-lot subdivision. The respondent owners corporation affects the nine lots and common property shown on the plan of subdivision, numbered PS519798G. According to the other six lot owners, Ms May was the builder of the apartments on the subdivided land, as well as being the owner of her three lots, and so is liable for the cost of rectification of defects in the apartments and in the common property. In an affidavit Ms May has given her occupation as "medical practice manager". So, if she was a builder of the apartments, I assume that she was an owner-builder who sub-contracted out the various construction tasks to others.

2. Claire Foley was appointed administrator[1] of the owners corporation for a period between 3 December 2014 and 31 January 2015. She was appointed as administrator on the application of the other six lot owners. Because Ms May controlled three of the nine votes, the members of the owners corporation could not muster the 75% vote needed to pass a special resolution to commence legal proceedings against Ms May for damages for the cost of rectification of defects in the common property. Once Ms Foley was appointed administrator, she decided to commence a proceeding, as she was empowered to do, and the proceeding is under way in the Tribunal's Building and Property List.[2]

3. To gain the funds needed for paying lawyers, for paying building consultants for the purposes of that proceeding, and for paying the costs of the administration, Ms Foley decided on 27 January 2015 to raise a special levy on lot owners of $25,000.00: $2,777.80 per lot. She sent fee notices to the lot owners accordingly.

4. Unwittingly, Ms May paid the levy upon her of $2,777.80 per lot, a total of $8,333.40. That happened because Ms May had sent money to the owners corporation's manager which she intended was for payment of other regular quarterly fees of which she had received notice. But she did not appropriate or earmark that money for payment of the ordinary fees. So the owners corporation itself appropriated the money for payment of the oldest outstanding debt, which it was entitled to do.[3] The outcome was that Ms May had paid the special levy on each of her three lots, although she had never intended to pay it, and still owed the ordinary quarterly fees which she had intended to pay and thought she had paid.

5. Ms Foley is an employee of Turnbull Co, the owners corporation's manager both before and after the period of her administration. So she is in the position of having been a manager for the owners corporation and also its administrator for a short intermediate period.

[1] By order made in proceeding OC886/2014, see paragraph 7 below.
[2] Proceeding BP1381/2015.
[3] *Chitty on Contracts*. 28th edition (1999) at paragraph 22-059 onwards.

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6. Ms May had commenced three separate proceedings, numbered OC1259/2017, OC1483/2017 and OC1484/2017: one for each of her three lots. Although it was not apparent from the face of her application in each proceeding, it became apparent during the course of the hearing of the three proceedings on 20 September 2017 that in each she was asking for an order for repayment of $2,777.80, as restitution for money paid by mistake. She maintains that the special levy for each lot was something which, under the provisions of the *Owners Corporation Act 2006* ("the Act"), she was not liable to pay.

7. The order appointing Ms Foley as administrator of the owners corporation, made on 3 December 2014 in proceeding OC886/2014, was as follows:

   1. Claire Foley of Level 1, 608 St Kilda Road, Melbourne ("the administrator") is appointed as administrator of Owners Corporation No. 1 – PS519798G from 3 December 2014, to 31 January 2015 pursuant to section 174 of the *Owners Corporations Act 2006*.

   2. During her term the administrator may, pursuant to section 176(c) of the *Owners Corporations Act 2006* do anything that Owners Corporation No. 1 – PS519798G can do.

   3. All proper costs and charges incurred by the administrator of and in connection with any proceeding brought by the administrator, including the employment of solicitors, barristers and suitably qualified expert witnesses will be costs in the administration and payable by all lot owners in proportion to their lot liability.

   4. Whenever the administrator's expenses exceed $3,000.00 the administrator must give to each lot owner a statement setting out particulars of those expenses.

   5. The remuneration of the administrator will be calculated at the rate of $250.00 per hour, including GST.

   6. The remuneration and expenses of the administrator are payable by all lot owners in proportion to their lot liability.

   7. The parties have liberty to apply.

   8. The Tribunal's decision in relation to the applicants' costs of the proceeding is reserved.

8. The applicants' costs of the proceeding, reserved by paragraph 8 of that order, were determined on 9 June 2015. The presiding Member ordered the owners corporation to pay the applicants' costs "on a standard basis of the County Court scale, to be assessed by the Victorian Costs Court in default of agreement".

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9. On 27 January 2015 Ms Foley, as administrator, made five written decisions, and notified each lot owner on that day of those decisions by a letter which accompanied the text of each of the decisions. Ms Foley described her decision as "resolutions." The word "resolution" is more apt to describe an affirmative result of a vote of members at a meeting, than to describe a decision of an administrator. There was no need for Ms Foley to have framed each of her decisions as a "resolution", but there was no error in her having done so. For the sake of simplicity I shall adopt her language and describe those five decisions as resolutions.

10. The first resolution was a "special resolution" to commence a proceeding against "the Builder, the Developer and any concurrent wrongdoer" in relation to defects in the common property and to instruct HWL Ebsworth Lawyers to act for the owners corporation in that proceeding.

11. The second resolution was a "special resolution" to provide a "service" to lot owners. Because of the emphasis which Ms May's lawyers have placed upon this second resolution – more emphasis than is justified, in my opinion – I set it out in full:

> It is resolved as a special resolution within the meaning of section 96 of the *Owners Corporations Act 2006* (OCA) to provide a service pursuant to section 12 of the OCA to all owners of lots in owners corporation 1 on plan of subdivision 519798C (owners corporation) of instituting legal proceedings in the Victorian Civil and Administrative Tribunal and/or a Court of competent jurisdiction against the builder, developer and any prospective concurrent wrongdoer for the rectification or alternatively the costs of rectification of all building and design defects within lots and of all services servicing individual lots exclusively insofar as all such defects are identified in any relevant building inspection report and any other consultant or expert engaged by the Owners Corporation including HWL Ebsworth Lawyers to act on behalf of the owners corporation in providing that service, including instructions to settle or compromise any legal proceedings, the costs and expenses of which shall be paid by all owners on the basis of their lot liabilities.

I refer to that second resolution as "the service resolution."

12. The third resolution was as follows:

> It is resolved by Ordinary Resolution in accordance with Section 24 of the *Owners Corporations Act 2006* (OCA) to raise a Special Levy to the value of $25,000.00 in accordance with the estimated expenses (as provided below) associated with these proceedings which shall be paid by all owners on the basis of their lot liabilities, for the purpose of funding professional fees such as legal representation, professional consultant/s and associated reports, administrator charges an management fee disbursement costs.

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HWL Ebsworth Legal Expense (per cost agreement estimate)	$15,000.00
Building Defect Report and Professional Fees	$ 5,000.00
Administrator Charges at $250.00 (incl GST) per hour - 5 hours	$ 1,250.00
Management Disbursement Fees at $190.00 (incl GST per hour – 6 hours	$ 1,140.00
Contingency allowance	$ 2,610.00
TOTAL	**$25,000.00**

I refer to that third resolution as "the special levy resolution".

13. Ms Foley filed and served an affidavit sworn on 18 September 2017[4] in which, amongst other things, she explained how she arrived at the figures that were set out in the special levy resolution. At the hearing on 20 September 2017 she was cross-examined on her affidavit. I shall refer below to some of her evidence in the affidavit and evidence given orally at the hearing.

14. The claim which Ms May expressed in each of her three initiating applications was for orders declaring void the service resolution and the special levy resolution; but, as I stated above, she is also asking for monetary orders that would reflect the consequences of those declarations, if made.

15. The statutory context in which those resolutions were made is ss 12 and 24 of the OC Act. To the extent that they are relevant, they provide:

> **12 Provision of services to members and occupiers**
>
> (1) An owners corporation, by special resolution, may decide—
>
> (a) to provide a service to lot owners or occupiers of lots or the public; or
>
> (b) to enter into agreements for the provision of services to lot owners or occupiers of lots.
>
> (2) An owners corporation may require a lot owner or occupier to whom a service has been provided to pay for the cost of providing the service to the lot owner or occupier.

[4] The affidavit, headed in more than one proceeding, has been filed in proceeding OC946/2017, one of three fee recovery proceedings which I heard at the same time as I heard the three proceedings to which these reasons for decision relate.

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24 Extraordinary fees

(1) An owners corporation may levy special fees and charges designed to cover extraordinary items of expenditure.

(2) Subject to subsection 2A, the fees must be based on lot liability.

(2A) Fees for extraordinary items of expenditure relating to repairs, maintenance or other works that are undertaken wholly or substantially for the benefit of some or one, but not all, of the lots affected by the owners corporation must be levied on the basis that the lot owner of the lot that benefits more pays more.

(3) The owners corporation may determine the times for payment of the special fees and charges.

16. By virtue of s 176(c) of the Act, an administrator may, subject to any order of VCAT or court order, do anything that the owners corporation can do. Thus an administrator may decide to permit the owners corporation to provide a service to lot owners (s 12) or to levy special fees and charges designed to cover extraordinary items of expenditure (s 24).

17. By virtue of s 175 of the Act, the lot owners must pay the remuneration and expenses of the administrator in accordance with the lot liabilities, unless the order appointing the administrator otherwise provides. The order made on 3 December 2014 did not otherwise provide. Paragraph 6 of the order confirmed that the remuneration and expenses were payable in accordance with lot liabilities.

18. At the conclusion of the hearing I reserved my decision and directed, in each of the three proceedings in which Ms May was an applicant, that by 4 October 2017 each party might file and serve a submission as to (amongst other things) whether the administrator ought to have levied against her and other lot owners on the basis that the lot owner who benefits more pays more (s 24(2A)) or on the basis of what service has provided to each lot owner (s 12(2)). Each party filed written submissions by that date.

19. The principal arguments put forward in the written submission for Ms May were these:

(a) The administrator appeared to have been maintaining that her decision to levy Ms May for $2,777.80 per lot was the service resolution, or the special levy resolution, or both.

(b) If the relevant decision was the service resolution, it was wrong in law because under s 12(2) an owners corporation may require a lot owner to pay for the cost of providing a service if the service had been provided to that

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lot owner. By the service resolution the owners corporation was not providing any service to Ms May. It was providing a service only to the other six lot owners, enabling them to join, as co-applicants, in a proceeding that the owners corporation was to bring against Ms May. It was providing to Ms May not a service but a disservice. Because the decision was wrong in law it was void.

(c) If the relevant decision was the special levy resolution, it was wrong in law because it was resolution to levy fees "for extraordinary items of expenditure relating to repairs, maintenance or other works" which were for the benefit of the other six lot owners, not for the benefit of Ms May, and which therefore under s 24(2A) had to be levied on the basis that the lot owner of a lot that benefits more pays more. The levy was required by law to be payable by the other six lot owners, not by Ms May. Because the decision was wrong in law it was void.

20. It is not now, and it has never been, the case that the administrator or the owners corporation is or was maintaining that the service resolution was the decision which led to the levy. I accept the submission on behalf of the owners corporation that there was no connection between the service resolution and the levying of the special fees totalling $25,000.00. All that the service resolution did was to express a decision that the owners corporation was willing to allow the six lot owners to join as co-applicants in a proceeding which the owners corporation proposed to bring against Ms May in relation to building defects, to rely upon any expert report about building defects that the owners corporation commissioned, and to instruct the same solicitor that the owners corporation proposed to instruct. It is quite usual, in a circumstance where there are alleged building defects in individual apartments and also in the common property, for lot owners and the owners corporation to be co-applicants in a single proceeding brought against the builder. The service resolution was really nothing more than a decision whereby the owners corporation (through its administrator) consented to the other six lot owners being co-applicants in a single piece of litigation. It is true that the service resolution conferred a benefit on the other six lot owners and no benefit upon Ms May, but s 12(2) was not infringed because the owners corporation was not requiring her to pay the cost of providing a service. It was requiring her to pay something else: a special fee within the meaning of s 24.

21. The administrator's decision to levy Ms May, and the other six lot owners, $2,777.80 per lot has always been the special levy resolution, and nothing else.

22. The owners corporation's submission was that there is a simple answer to the assertion that the special fee totalling $25,000.00 ought to have been levied on the basis that the lot owner of the lot that benefits more pays more, not on the basis of lot liability. The simple answer, the submission went, is that under s 24(2A) the obligation to levy on the benefit principle relates only to "fees for extraordinary items of expenditure relating to repairs, maintenance or other works". The items of expenditure set out in the special levy resolution did not relate to repairs, maintenance or other works. They related to anticipated costs

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and expenses of commencing a legal proceeding against Ms May. That the proposed proceeding happened to be about "works" that Ms May had performed, and to involve allegations that "repairs" were required to those works, is beside the point. As the fees sought to be levied did not fall within the description of fees in s 24(2A), the effect of s 24(1) and (2) was that they were payable in accordance with lot liability.

23. I consider that that submission is correct, but the answer is not quite as simple as the submission had suggested. There are peculiarities about some of the items set out in the special levy resolution that made up the total of $25,000.00.

24. *HWL Ebsworth Legal Expenses: $15,000.00*. The special levy resolution stated that it was one to raise a special levy of $25,000.00 for "estimated expenses … associated with these proceedings", that is to say, the proposed proceedings against Ms May (and perhaps others) referred to in the first resolution and also in the service resolution. The first item, for legal expenses, was said to be "per cost agreement estimate."

25. Ms Foley's affidavit evidence was that the "estimate" to which she had referred in that item was an estimate which HWL Ebsworth had given to the owners corporation of the likely costs of the proceeding in which the six lot owners had sought the appointment of Ms Foley as administrator. It had nothing to do with the likely costs of commencing the proposed proceeding against Ms May in relation to building defects.

26. In her oral evidence Ms Foley went further. She said that she did not regard the item to be the estimated cost of launching the proposed proceeding against Ms May; instead, it was the estimated cost of the proceeding brought to achieve her appointment as administrator. However, as was correctly submitted on Ms May's behalf, the meaning of the special levy resolution depends upon an objective view of it, not upon what Ms Foley thought it meant or thought she was doing when she made the decision that the special levy resolution expressed. The plain meaning was that the decision was to raise a special levy in accordance with estimated expenses of the proposed proceeding against Ms May.

27. In using the estimate which the solicitors had given for the costs of the earlier proceeding as a yardstick for estimating the costs of the proposed proceeding, Ms Foley was making an apples-with-oranges comparison. I think it highly likely that the estimate of $15,000.00 was an over-estimate of the costs involved in beginning the proceeding in relation to building defects during the short period of administration. There was no evidence of what those costs actually were. Evidence that they were $5,000.00 would not have surprised me. Evidence that they were $15,000.00 or thereabouts would have surprised me greatly. But if Ms

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Foley made a factual error in her estimate of $15,000.00 it did not mean that there was any legal error in a decision to raise the special levy. In my opinion, the decision was valid and effective. If the members of the owners corporation should form the view that the levy was too great because the initial legal expenses were over-estimated, they may resolve upon a refund to each of them if they see fit; of course, Ms May would command only a minority of votes for such a resolution.

28. Ultimately, according to Ms Foley's evidence, the bills that HWL Ebsworth rendered for work done in the proceeding for appointment of the administrator totalled $17,222.75. Turnbull Cook, whose management of the owners corporation had resumed once Ms Foley's administration had ended, paid those bills in September 2016. In the meantime, the Tribunal had ordered on 9 June 2015 that the owners corporation should pay the applicants' costs of the proceeding to appoint the administrator. So payment of those costs was proper. The only possible criticism of what was done in that regard was that the owners corporation did not require the costs to be assessed by the Costs Court before paying them. Whether the owners corporation or the manager sought any independent legal advice about the reasonableness of the costs before paying them is something about which there was no evidence. At all events, whatever criticism may be open about the acceptance of the amounts of costs sought by the solicitors is irrelevant to any issue in the three proceedings which I was determining.

29. *Building Defect Report: $5,000.00*. Ms Foley requested a building consultant, Buildspect Consulting Pty Ltd, to prepare a report about defects in the lots and in the common property. The allowance in the special levy resolution of $5,000.00 was for the estimated cost of a report. As it happened, Buildspect prepared seven separate reports, one about each of six lots and one about the common property. The total cost of the reports was $6,700.00, according to Ms Foley's evidence.

30. The submissions for Ms May have relied upon the fact that Buildspect prepared separate reports for each of six lots to support her contention that the owners corporation was thereby providing a service to each of the six lot owners for which Ms May could not be charged because she obtained no benefit from the reports. Ms Foley, however, did not set out to provide a service to lot owners, if that is what it was, when raising the special levy. She asked for a report, not for seven reports. The raising of $5,000.00 as the estimated cost of a report was for extraordinary expenditure within the meaning of s 24. Again, it did not come within the scope of s 24(2A) because it did not relate to repairs, maintenance or other works; it related to prospective evidence of what would need to be done to rectify defects.

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31. There was also a submission on Ms May's behalf that there was no evidence of Ms Foley having incurred the expense of the reports. I reject that submission. Although her letter to Buildspect requesting a report was not dated,[5] it referred to the special levy resolution as having been made and she described herself in it as the owners corporation's administrator. I infer that she made the request, and incurred the liability on the owners corporation's behalf to pay for the report, during the period of her administration.

32. *Administrator Charges: $1,250.00*. The order made on 3 December 2014 appointing Ms Foley as administrator authorised her to charge for her remuneration at the rate of $250.00 per hour. The item in the special levy resolution for estimated administration charges was at that rate for five hours. Ms Foley gave evidence, and I accept, that she spent five hours upon the administration. The order appointing her also specifically required the lot owners to pay remuneration and expenses in proportion to their lot liability. In the end Ms May did not dispute her liability to pay one-third of the $1,250.00.

33. *Management Disbursement Fees, $1,140.00, and Contingency Allowance, $2,610.00*. These two estimated items of expenditure were never incurred. There were no management disbursement fees. The contingency of the administrator having to spend more than five hours on her task did not arise. On the other hand, the Buildspect reports cost $1,700.00 more than had been allowed for in the special levy resolution, so a contingency allowance was appropriate. Nevertheless, the two items' inclusion resulted in an over-estimate. Again, it is for a majority of members of the owners corporation to decide whether there should be a partial refund to all lot owners.

34. For the above reasons there was no legal error in the making of either the service resolution or the special levy resolution, no justification for declaring either of them invalid or void, and no legal error in the levy upon the lot owners in accordance with their lot liability; on the contrary, s 24(2) of the Act required the administrator to levy on that basis, in the absence of any agreement by the other six lot owners to request the administrator not to levy Ms May's lots. Ms May was bound to pay the levies which she did pay, unwittingly. So each of her three proceedings will be dismissed.

35. Ms May will regard the outcome as being unjust. She has been required to pay money to the owners corporation to put it and the other lot owners in funds to sue her. That, however, is the outcome which the application of s 24 of the Act requires. There is a basis for saying that there is a gap in the legislation because it does not deal with a case like the present, where a levy for special expenditure is raised for the purpose of the owners corporation taking proceedings against one of its members. I must, however, apply the law as it currently stands.

[5] The letter is exhibit "CF 10" to Ms Foley's affidavit.

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36. *Costs*. In its written submission the owners corporation made an application for costs in the event that the three proceedings were dismissed, which has happened.

37. The general rule, in s 109(1) of the *Victorian Civil and Administrative Tribunal Act 1998*, is that each party bears its own costs. By virtue of s 109(2) the Tribunal may make an order that a party pay another's costs if satisfied that it is fair to do so, after having regard to the matters set out in s 109(3). The only specific matter set out in s 109(3) on which the owners corporation relied was the nature and complexity of the proceeding (s 109(3)(d)). The nature of each of these three proceedings was a restitutionary claim for recovery of money paid by mistake. There is nothing unusual or remarkable about a proceeding of that nature. There was nothing unusually complex about the proceedings. A matter which, it was submitted, was relevant (s 109(3)(d)) and persuasive was the small amount involved in each proceeding compared to the legal fees that the owners corporation has incurred in defending them. A more relevant matter, in my view, is the legitimate grievance that Ms May has had about having to pay a special levy for the doubtful privilege of proceedings being brought against her in her alleged capacity as a builder. I am not persuaded that it is fair to award costs against her. On the contrary, in these three proceeding it is fair that the parties bear their own costs. The application for costs is refused.

A. Vassie
Senior Member

2 November 2017

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