Owners Corporation 40923V v Slater (Owners Corporations) - [2016] VCAT 1170

VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

OWNERS CORPORATIONS LIST

VCAT REFERENCE NO. OC263/2015

CATCHWORDS

Review under s 120 *Victorian Civil and Administrative Tribunal Act 1998* ; whether service effected at the usual or last known residential address; meaning of last known residential address; lot owner not lived at lot for more than 10 years.

APPLICANT:	Owners Corporation 40923V
RESPONDENT:	Nigel MacLean Slater
WHERE HELD:	VCAT 55 King St, Melbourne
BEFORE:	Member L. Rowland
HEARING TYPE:	Review & Re-Hearing (SAME DAY)
DATE OF HEARING:	29 June 2016
DATE OF ORDER:	13 July 2016
DATE OF REASONS:	13 July 2016
CITATION:	Owners Corporation 40923V v Slater (Owners Corporations) [2016] VCAT 1170

ORDERS

The Tribunal orders and directs:

1. The hearing of the review application is adjourned part-heard before Member Rowland.
2. **By 29 July 2016**, the owners corporation may file and serve any further affidavit or submission upon which it intends to rely.
3. The proceeding is to be referred to Member Rowland in chambers **on 3 August 2016.** If further material is filed, directions will be made. If no further material is filed a final order will be made.

MEMBER L ROWLAND

APPEARANCES:

For Applicant	Ms Wilson, solicitor
For Respondent	Mr Slater in person

REASONS

Introduction

1. On 17 March 2015, the owners corporation obtained an order from the Tribunal that Mr Nigel Slater, the respondent lot owner, pay to it $727.60 for arrears of owners corporation fees, interest in the sum of $27.63 and costs of $575; making a total of $1,330.23. Mr Slater applies to set aside the order dated 17 March 2015 having only become aware of the order on 4 April 2016. In the meantime, the owners corporation has incurred significant legal costs in attempting to enforce the order.

Background

2. Mr Slater has been the owner of Unit 2, 403 Toorak Road, South Yarra, since 2004. He gave evidence that he has not lived at the lot since 2006. The address he provided to the owners corporation for service of notices is a post office box.

3. In 2014, Mr Slater decided not to pay his quarterly annual fees of $354.75. He was in dispute with the owners corporation over an incorrect charge for a key to his account and the resultant interest. Mr Slater said that he tried to discuss the charges with the manager, but the manager unreasonably refused to deal with his complaint. Mr Slater was served with the requisite fee notice and final fee notice for the July and October fees, but he did not pay the fees because of the dispute. So, in February 2015, the owners corporation manager instructed solicitors to commence fee recovery proceedings and an application was lodged with the Tribunal on 16 February 2015.

4. The application submitted by the solicitors for the owners corporation provided both the lot address and Mr Slater's post office box address as the address for service. *The Victorian Civil and Administrative Tribunal Act 1998* (the VCAT Act), does not permit service upon a natural person at a post office box.

5. Section 140 of the VCAT Act provides as follows:

> **140 Service**
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> (1) For the purposes of this Act, a notice or other document may be served on or given to a person

(a) if the person is a natural person

(i) by delivering it personally to the person; or

(ii) by sending it by post, facsimile or other electronic transmission to the person at his or her usual or last known residential or business address; or

(iii) by leaving it at the person's usual or last known residential or business address with a person on the premises who is apparently at least 16 years old and apparently residing or employed there.

6. The owners corporation provided the lot address as the usual or last known residential address for service. On 19 February 2016, the Tribunal served Mr Slater at the lot address with the application and the notice of hearing. The application and hearing notice was not returned to the Tribunal. Ms Wilson, the solicitor for the owners corporation, said that she also posted a copy of the application and the hearing notice to Mr Slater's post office box. He said he did not receive it. Nothing turns on whether he was sent or received the Tribunal documents via his post office box address because it is not an address for service under the VCAT Act . Had Mr Slater said he received the documents, that fact would only be relevant to the date at which he became aware of the Tribunal proceedings and order.

7. On 17 March 2015, the fee recovery application was heard by me in the absence of Mr Slater. I made an order on the claim for fees, interest and costs totalling $1330.20. At the review hearing, Mr Slater offered no reasonable defence to the owners corporation's fee recovery claim. He admits owing the fees. He said that had he known of the hearing, he would not have allowed the legal costs to accrue. He would have paid the outstanding fees and tried to negotiate with the manager over the interest dispute separately.

8. On 8 April 2016, the Tribunal served Mr Slater with the order at the lot address. Ms Wilson said she also sent a copy of the order to the post office box address but Mr Slater said that he did not receive either copy of the order.

9. In or about June 2015, Ms Wilson obtained a certified copy of the order. The order was registered with the Magistrates' Court on 1 July 2015 and thereafter the owners corporation purchased a warrant of seizure and sale. The Sheriff was directed to the lot address. Not surprisingly, because Mr Slater does not live there, the warrant was returned unsatisfied on 26 October 2015.

10. On 13 November 2015, the owners corporation solicitors issued a certificate for the Supreme Court, and thereafter applied for a Supreme Court warrant of seizure and sale.

11. During the latter part of 2015, Mr Slater was in negotiations with the manager over the lease of a car space and in early 2016 had discussions with the manager about the payment of the balance of his fees. Mr Slater said that during these discussions there was never any mention of the fee recovery proceedings. On 4 March 2016, Mr Slater emailed the owners corporation manager seeking resolution of the interest dispute and offering to pay the outstanding owners corporation fees. Mr Slater said that at no time during the conversations he had with the manager did the manager refer to the debt recovery proceedings. Further, none of the subsequent fee notices made any claim for legal costs arising out of the fee recovery proceedings. On 8 March 2016, Ms Wilson replied to Mr Slater's email of 4 March 2016 advising that 'the Sheriff has a Supreme Court

warrant which will enable him to sell this property'. Mr Slater expressed astonishment at the extent of the recovery proceedings which had taken place without notice to him. He immediately sought further information regarding the debt recovery proceedings.

12. By April 2016, the original debt of $727.60 had grown to $3,305.88 with the inclusion of interest and legal costs.

Application for Review

13. On 15 April 2016, Mr Slater applied for a review hearing pursuant to s 120 of the VCAT Act . Section 120 provides:

> Re-opening an order on substantive grounds
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> (1) A person in respect of whom an order is made may apply to the Tribunal for a review of the order if the person did not appear and was not represented at the hearing at which the order was made.
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> (2) An application under subsection (1) is to be made in accordance with, and within the time limits specified by, the rules.
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> (3) The rules may limit the number of times a person may apply under this section in respect of the same matter without obtaining the leave of the Tribunal.
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> (4) The Tribunal may
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> (a) hear and determine the application if it is satisfied that
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> (i) the applicant had a reasonable excuse for not attending or being represented at the hearing; and
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> (ii) it is appropriate to hear and determine the application having regard to the matters specified in subsection (4A); and
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> (b) if it thinks fit, order that the order be revoked or varied.
>
> (4A) For the purposes of subsection (4)(a)(ii), the matters are
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> (a) whether the applicant has a reasonable case to argue in relation to the subject-matter of the order; and
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> (b) any prejudice that may be caused to another party if the application is heard and determined.
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> (4B) The Tribunal may hear and determine an application under this section despite subsection (4A)(b) if the Tribunal is satisfied that any prejudice that may be caused to a party may be addressed by an order for costs under section 109 http://www.austlii.edu.au/au/legis/vic/consol_act/vcaata1998428/s109.html or an order for reimbursement of fees under section 115B or both.

(4C) In deciding to hear and determine an application under this section the Tribunal may require the applicant to give any undertaking as to costs or damages that the Tribunal considers appropriate.

(5) Nothing in Division 3 of Part 3 applies to a review under this section.

Findings on Review Application

14. I am satisfied that Mr Slater applied for the review within 14 days of becoming aware of the order and that Mr Slater had a reasonable excuse for not attending the hearing. I find that Mr Slater has not lived at the lot address for more than 10 years and the application and hearing notice having been sent to the lot address did not come to his attention. I find that Mr Slater has no reasonable case to argue in relation to the subject matter of the order and so, even though I am satisfied he had a reasonable excuse for not attending the hearing, he has no reasonable defence to the claim for fees and on this ground he is not entitled to a review hearing.

15. However, Mr Slater has a reasonable defence to the proceeding on the grounds that the application was not validly served under s 140 of the VCAT Act . It is well established law that if the application has not been validly served the Tribunal has no jurisdiction to hear and determine the application. [1] If the application was not validly served then the order cannot stand. The order must be set aside and the application dismissed because the application has not been served in accordance with the VCAT Act . It is incumbent upon the owners corporation to ensure it has provided a valid address for service in its application to the Tribunal.

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[1] *Apollo Marble & Granite Imports Pty Ltd v Industry and Commerce* [2008] VCAT 2298.

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16. The application and hearing notice were served at the lot address, an address at which Mr Slater has not lived for more than 10 years. Service is permitted at the person's 'usual or last known residential or business address'. The address supplied by the owners corporation to the Tribunal for service of the application was the lot address. The lot address was not Mr Slater's usual residential address. The issue for determination is whether the lot address was Mr Slater's last known residential or business address within the meaning of the VCAT Act . If it is, then service at that address is valid service even though he did not receive the Tribunal documents sent to that address.

17. The phrase 'last-known address of the person' was considered in the Federal Court decision of *Naipiat Pty Ltd v Salfinger (No 7)*. [2] In that case, Foster J approved the following interpretation of the phrase:

> Upon the true interpretation of reg 16.01(1)(c) of the Bankruptcy Regulations, the meaning of the expression "...last known address of the person..." is that address which has been made known by the person at the time closest to the date when service is said to have been effected. It is not necessary that that address be made known directly by the debtor to the creditor. It is sufficient if

the address comes to the knowledge of the creditor as the last address of the debtor, however, that knowledge is obtained. The debtor must be the source of the address directly, or indirectly. In this sense, it is the debtor who must make known the address.

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[2] [2011] FCA 1322 .

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18. In *Civic Video Pty Ltd v Warburton* ,[3] the debtor in a contested creditor's petition challenged the validity of a 2005 address used in a 2012 bankruptcy notice, the debtor having changed his residential address in 2007. Foster J, in considering the meaning of last known address for the purposes of the bankruptcy regulations, made the following observations:

In my opinion, the effect of these authorities is that the last known address of the person is the address made known by the debtor. So much is clear because the purpose of the rule is that the bankruptcy notice should be brought to the attention of the debtor.

But that does not answer the question posed in Magafas, [4] namely, who is to be the recipient of the intelligence made known by the debtor.

In my view that question is to be determined objectively on all the facts of the case. In some instances it may be information that has been supplied to the world at large, as for example in QBE Insurance (Aust) Ltd v Mahaffy (No 2) [5] where the debtor conducted his practice as an accountant at premises on which there was a sign indicating it to be the office of the debtor's firm. In others it may be the most recent address supplied to the creditor.

It would be wrong to confine the expression, in all instances, to the last address made known to the creditor. That is demonstrated in the present case. How can an address made known by Mr Warburton to Civic in 2005 be the last known address? What is required is a consideration of all the circumstances of the case.

In addition, since the purpose of the rule is that the bankruptcy notice should be brought to the debtor's attention, it seems to me that ordinarily the creditor is under an obligation to take steps to ascertain the debtor's most recent address as made known to him or her in readily accessible public records.

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[3] [2013] FCA 934 .
[4] *Magafas v Carantinos* (2008) 222 FLR 185.
[5] *QBE Insurance (Aust) Ltd v Mahaffy (No 2)* (2012) 271 FLR 1.

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19. More recently, the Court of Appeal in *Stewart v City of Belmont* ,[6] said in relation to service at the last known address:

It is not sufficient for the respondent to say that the documents had been served on the appellant at an address that was merely "the last known recorded address" for him. The address had to be one at which he was last known to reside, work or conduct a business. There was nothing to suggest that he had resided, worked or conducted a business at the Cloverdale property at any

time. Indeed, the information available to the respondent was to the contrary. The word "reside" means to "dwell permanently or for a considerable time, have one's regular home in or at a particular place" (*Shorter Oxford English Dictionary* 5th Ed).

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[6] [2016] WASCA 5 .

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20. The last known address for service is a question of fact, to be determined in all the circumstances. If the respondent has made known to the applicant that he no longer lives at the lot address, it is incumbent upon the applicant to make all reasonable enquiries to ascertain the last known address for service.

21. Mr Slater's evidence is that he has rented his lot for more than 10 years' and that members of the committee and the manager knew that the lot was rented and that he was not living there. Mr Slater admits he has not provided his residential address for service to the owners corporation because he has provided a post office box to which notices are to be sent. Mr Slater said that he has been in contact with the manager by email and telephone and at no time has the manager requested a residential address for service of Tribunal proceedings. Mr Slater said that at all relevant times both the manager and the members of the owners corporation committee knew he did not live at the lot address and made no reasonable attempt to contact him to ascertain his residential address.

22. The owners corporation has not had an opportunity to give evidence or make submissions on the issue of service at the last known residential address. I propose to allow the owners corporation to file any further affidavit or submission upon which it intends to rely before making a determination.

MEMBER L ROWLAND