

VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL**CIVIL DIVISION****OWNERS CORPORATIONS LIST**

VCAT REFERENCE NO. OC2069/2014

CATCHWORDS

Fee recovery – bankruptcy of respondent – discharge from bankruptcy – claim for fees accruing after date of bankruptcy – respondent's lot vests in his trustee in bankruptcy – whether respondent is a lot 'owner' – whether fees were provable debts – *Owners Corporations Act 2006 s 28(1)* – *Bankruptcy Act 1966* (Commonwealth) s 82.

APPLICANT: Owners Corporation No. 1 - PS507443P
FIRST RESPONDENT: Frank Iglesias
SECOND RESPONDENT: Daniel Cvitanovic (as trustee of the estate of Frank Iglesias)
WHERE HELD: 55 King Street, Melbourne
BEFORE: Senior Member A Vassie
HEARING TYPE: Hearing
DATE OF HEARING: 15 April 2015
DATE OF ORDER: 29 April 2015
DATE OF REASONS: 29 April 2015
CITATION Owners Corporation No 1 - PS507443P v Iglesias (Owners Corporations) [2015] VCAT 558

ORDER

The Tribunal orders that the first respondent Frank Iglesias must pay to the applicant \$11,840.95 for levies and interest to the date of the final fee notice (the date being 17 April 2014), \$978.00 for interest from the date of final fee notice to the date of hearing, and \$1,500.00 costs (including \$914.90 for reimbursement of fees paid by the applicant), a total of \$14,318.95.

SENIOR MEMBER A VASSIE**APPEARANCES:**

For the Applicant

Ms R Castro, solicitor

For the First Respondent

Mr K Hickey of Counsel

For the Second Respondent

No appearance

REASONS FOR DECISION

- 1 This proceeding is one for fee recovery by the applicant owners corporation against the first respondent Frank Iglesias, who is the registered proprietor of Lot H36 on plan of subdivision 507443P described in Certificate of Title Volume 10759 folio 985. Lot H36 is a storage unit but technically is land. In these reasons I refer to it as ‘the land’.
- 2 Mr Iglesias became bankrupt on his own petition on 22 July 2009. The second respondent Daniel Cvitanovic (‘the trustee’) is his trustee in bankruptcy. The owners corporation does not make any claim against the trustee. He was joined as a respondent at Mr Iglesias’ instigation. The land formed part of Mr Iglesias’ bankrupt estate.
- 3 Mr Iglesias was discharged from bankruptcy on 23 April 2013.
- 4 The issue in the proceeding is whether Mr Iglesias is liable to pay owners corporation fees which accrued after the date of the bankruptcy. For reasons which follow I have decided that he is.
- 5 The proceeding is founded upon a final fee notice given to Mr Iglesias on 17 April 2014. The fees claimed in the final fee notice, plus interest to the date of the notice, totalled \$13,693.43. At the hearing the owners corporation abandoned that part of its claim which included fees that had accrued before the date of bankruptcy. It conceded that those fees had been debts provable in the bankruptcy^[1] and could not be sued for.^[2] The claim in the proceeding became for \$11,840.95 being fees and interest which had accrued after the date of bankruptcy.
- 6 At the hearing on 15 April 2015 the owners corporation appeared through its solicitor Ms Castro. Mr Hickey of Counsel appeared for Mr Iglesias. The trustee did not appear. Mr Hickey told me that the trustee had communicated to Mr Iglesias that the trustee was aware of the hearing and would abide by the outcome.
- 7 The issue to which I have referred can be divided into two sub-issues. The first is whether any liability to pay fees that accrued after the date of bankruptcy was that of Mr Iglesias or of the trustee. Through his Counsel Mr Iglesias argued that he was not the ‘owner’ of the land within the meaning of the *Subdivision Act 1988* and of the *Owners Corporations Act 2006* and so was not liable as an ‘owner’ to pay fees; the trustee was the ‘owner’, he argued. The second sub-issue is whether the fees that had accrued after the date of bankruptcy were also (as were fees that had accrued and were owing as at the date of bankruptcy) debts provable in the bankruptcy; the argument was that they were, despite the discharge from bankruptcy, and so could not be sued for at all.
- 8 The owners corporation satisfactorily proved, and Mr Iglesias did not dispute, the giving of relevant fee notices and all other things necessary to prove the amount of \$11,840.95 claimed, plus interest of \$978.00 from the date of the final notice until the date of hearing. All that Mr Iglesias disputed was his liability to pay those sums.

‘Owners’

- 9 Section 28(1) of the *Owners Corporations Act 2006* provides:

28 Liability of lot owners

- (1) The owners for the time being and any purchaser in possession of,

and any person entitled to receive the rents and profits from, a lot are liable to pay any outstanding fees, charge, contribution or amount owing to the owners corporation in respect of that lot.

By s 3 of that Act, 'owner' in that Act has the same meaning as it has in the *Subdivision Act 1988*. The definition of 'owner' in s 3(1) of the *Subdivision Act* is, so far as presently relevant:

owner means –

- (a) ...;
- (b) for land in an identified folio under the **Transfer of Land Act 1958**, a person who has an estate in fee simple in the land (except a mortgagee), or is empowered by or under an Act to convey an estate in fee simple in the land.

10 The argument that Mr Iglesias, although the registered proprietor of the land, is not the 'owner' of it for the time being, proceeded as follows:

- (a) When Mr Iglesias became bankrupt all his property vested in the trustee.^[3] His property included the land.
- (b) The vesting in the trustee was a vesting in equity. The land would remain vested at law in Mr Iglesias until a transmission of the land to the trustee was registered.^[4] That has not occurred.
- (c) So, upon his bankruptcy, Mr Iglesias had a bare legal estate in the land, as registered proprietor, and the trustee gained an equitable estate in the land.
- (d) Upon Mr Iglesias' discharge from bankruptcy the land remained vested in the trustee. The discharge did not have the effect of divesting the trustee.^[5] So the trustee is still the owner of the land in equity. That state of affairs will continue until 23 April 2019, the sixth anniversary of the date of discharge, when the land will become vested instead in Mr Iglesias.^[6]
- (e) The trustee has a power to sell the land. He is empowered by or under an Act to convey an estate in fee simple in the land.^[7] Mr Iglesias cannot sell it or convey an estate in fee simple in it without the trustee's consent.
- (f) Moreover the trustee, not Mr Iglesias, is the person entitled to receive the rents and profits from the land.
- (g) Accordingly the 'owner' of the land, within the meaning of the *Subdivision Act* and of the *Owners Corporations Act*, is the trustee, not Mr Iglesias.
- (h) The owner of the land for the time being is the person liable to pay any outstanding owners corporation fees and expenses in respect of the land. Because the trustee, not Mr Iglesias, is the owner of the land for the time being, Mr Iglesias cannot be liable to pay the outstanding fees.

11 Points (a) to (d) in the argument are correct. Point (e) is correct, but the practical reason why Mr Iglesias cannot sell the land without the trustee's consent is that the trustee has lodged a caveat to protect his equitable interest. Point (f) is correct, but there has been no evidence of whether anyone is receiving rents and profits from the land.

12 It is at point (g) that the argument breaks down, in my opinion. Section 28(1) of the *Owners Corporations Act* commences with the words 'The owners for the time being'.

The words admit of there being more than one owner for the purposes of the section. In my view, both Mr Iglesias and the trustee are ‘the owners for the time being’ within the meaning of the section. Mr Iglesias is an owner in his capacity as registered proprietor having a legal estate in fee simple in the land. The trustee is an owner too, having an equitable estate in fee simple vested in him; the equitable estate has remained vested in him even after Mr Iglesias’ discharge from bankruptcy.

13 The owners corporation was entitled to choose, as it has done, to give fee notices to Mr Iglesias only and to commence this proceeding against Mr Iglesias only. That might have been an unjust choice if the trustee has been receiving rents and profits from the land. Had he been receiving them, one would have expected him to have been paying outgoings in respect of the land, including the owners corporation fees, whether or not he had any personal liability to pay them.^[8] I repeat that there has been no evidence about whether there have been any rents and profits.

Provable Debts?

14 So far as is presently relevant, s 82 of the *Bankruptcy Act 1966* (Commonwealth) provides:

82 Debts provable in bankruptcy

(1) Subject to this Division, all debts and liabilities, present or future, certain or contingent, to which a bankrupt was subject at the date of the bankruptcy, or to which he or she may become subject before his or her discharge by reason of an obligation incurred before the date of the bankruptcy, are provable in his or her bankruptcy.

...

(4) The trustee shall make an estimate of the value of a debt or liability provable in the bankruptcy which, by reason of its being subject to a contingency, or for any other reason, does not bear a certain value.

(5) A person aggrieved by an estimate so made may appeal to the Court not later than 28 days after the day on which the person is notified of the estimate.

(6) If the Court finds that the value of the debt or liability cannot be fairly estimated, the debt or liability shall be deemed not to be provable in the bankruptcy.

(7) If the Court finds that the value of the debt or liability can be fairly estimated, the Court shall assess the value in such manner as it thinks proper.

15 As an alternative to the argument that Mr Iglesias was not an ‘owner’, Mr Hickey for Mr Iglesias submitted that all owners corporation fees in respect of the land that became due after the date of the bankruptcy were provable debts or liabilities and so the owners corporation could not recover them in this proceeding. The reason that they were provable debts or liabilities is that it was Mr Iglesias’ acquisition of the land, in 2004, before the date of the bankruptcy, that had given rise to an obligation to pay owners corporation fees as and when the owners corporation levied them.

16 Owners corporation fees, and interest upon them, become present debts upon which the owners corporation may sue once the following sequence of events occurs.

(a) The owners corporation sets annual fees. If they are set in accordance with lot

liability, as the *Owners Corporations Act* requires,[\[9\]](#) they are validly set and become due.

- (b) The owners corporation gives a lot owner a fee notice that complies with the Act. Once it does, the fee becomes payable within 28 days after the date of the notice. [\[10\]](#) The notice may state that interest at a specified rate will be payable in respect of any overdue fees.[\[11\]](#)
- (c) The owners corporation gives the lot owner a final fee notice that complies with the Act. Once it does, any interest to the date of the notice properly stated to be payable becomes due and continues to accrue.[\[12\]](#)
- (d) An elapse of 28 days after the giving of the final fee notice, without there having been payment of the overdue fees and interest, gives rise to a right in the owners corporation to commence proceedings in VCAT under Part 11 of the Act to recover the fees and the interest.[\[13\]](#)

- 17 Usually the fees are set at an annual general meeting of members of the owners corporation on which a budget for its coming expenditure is approved. The fees for which a claim is being pursued in this proceeding, however, were not set in that way. On the application of various lot owners, VCAT had appointed an administrator of the owners corporation by an order dated 12 March 2009. In a report to members dated 14 October 2009 the administrator determined an operational budget for the financial year 2009-2010. The administrator proceeded to levy fees in accordance with that budget and lot liability and gave fee notices to the lot owners. All of those things occurred after 22 July 2009, the date of Mr Iglesias' bankruptcy. So none of the fees ever became due until after that date. But if Mr Iglesias became subject to an obligation, with respect to those fees, before that date they would have been a future or contingent liability provable in the bankruptcy, unless they were deemed not to be provable.
- 18 An example of an obligation incurred before the date of a bankruptcy to pay a debt, even though the debt only becomes due and its amount ascertained after the date of the bankruptcy, is an obligation to pay income tax. If a person earns income before the date, but the amount of taxation upon that income is assessed and notice of assessment is given after the date, the amount assessed is provable in the bankruptcy, because the very act of earning income gives rise to an obligation to pay tax upon it even though one does not know at the time that the income is earned what the amount of the tax will be.[\[14\]](#)
- 19 The owners corporation fees for which a claim is now being pursued in this proceeding are a marked contrast to that example. For two reasons, I consider that they were and are not debts provable in Mr Iglesias' bankruptcy.
- 20 The first reason is that I do not accept that a person incurs an obligation to pay owners corporation fees merely by becoming the owner of land affected by an owners corporation and thereby becoming a member of the owners corporation. Although every plan of subdivision creates an owners corporation as soon as the plan is registered in the Land Titles Office,[\[15\]](#) not every owners corporation fulfils its statutory functions[\[16\]](#) of maintaining, insuring and administering the common property. Some owners corporations remain dormant. Their members never hold meetings. Their members take out public liability insurance individually for the common property. The need to set owners corporation fees never arises. That this particular owners corporation, the present applicant, did in fact set fees in years before Mr Iglesias

became bankrupt is not to the point. An obligation to pay owners corporation fees in future is never the automatic consequence of becoming the owner of land affected by an owners corporation.

21 The second reason why the fees were not provable debts or liabilities is that it would have been impossible to estimate their value, at or shortly after the date of the bankruptcy. One would have had to try to predict not only what the owners corporation's budget for expenditure might be each year after the date of the bankruptcy but also how many years the bankruptcy might continue. That would have been an impossible task, to my mind. A finding under s 82(7) that the value of the debt or liability could not fairly be established would be inevitable, I think.

Conclusion

22 As I have rejected each of the defences put forward, and as the owners corporation has proved its case, I shall order Mr Iglesias to pay it \$11,840.95 for levies and interest to the date of the final fee notice given to him (which was 17 April 2014) and interest of \$978.00 from the date of the final fee notice to the date of hearing.

Costs

23 There is a presumption that the successful applicant is entitled to an order that Mr Iglesias reimburse to it the fees that it has paid in the proceeding,[\[17\]](#) but otherwise there is a general rule that parties to a proceeding bear their own costs.[\[18\]](#)

24 As with many fee recovery claims by owners corporations, it is appropriate and fair in this proceeding to depart from the general rule by awarding a nominal sum in costs to the owners corporation so that the lot owner who is in default in payment of fees bears a somewhat greater burden of the costs than is borne by the lot owners who are not in default.

25 The owners corporation has paid a filing fee of \$525.60. It is entitled to an order for reimbursement of that fee. It has also paid two hearing fees of \$389.30 each, for hearings on 3 March 2015 and 15 April 2015. That is because the proceeding was adjourned on 6 February 2015 and again on 3 March 2015 before it was finally heard on 15 April 2015. The adjournments were apparently caused by the raising of the bankruptcy as an issue and by Mr Iglesias' application to join the trustee as a party. It is unfortunate that neither party asked the presiding Member on either 6 February 2015 or 3 March 2015 to turn the hearing into a directions hearing so that hearing fees were not incurred. They should share the financial consequence. I shall order Mr Iglesias to reimburse only one hearing fee, so that the total fees he has to reimburse is \$914.90.

26 Ms Castro sought an order for costs of \$2,864.20. For reasons given above the costs awarded should include the fees of \$914.60 but should otherwise be nominal. I shall order Mr Iglesias to pay costs of \$1,500.00 including those fees.

SENIOR MEMBER A VASSIE

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- [1] *Bankruptcy Act 1966* (Commonwealth) s 82(1).
- [2] *Bankruptcy Act* s 58(3).
- [3] *Bankruptcy Act* s 58(1).
- [4] *Bankruptcy Act* s 58(2).
- [5] *Pegler v Dale* (1975) 24 FLR 401; *Daemar v Industrial Commission of New South Wales* (1990) 22 NSWLR 178.
- [6] *Bankruptcy Act* s 129AA(2), (3).
- [7] *Bankruptcy Act* s 134(1)(a).
- [8] By virtue of s 139(2) of the *Bankruptcy Act* the trustee is not personally liable for any rates, land tax or other similar statutory charges, except to the extent, if any, of rents and profits received by the trustee after the date of bankruptcy. The Act is silent about owners corporation fees.
- [9] *Owners Corporations Act* s 23.
- [10] *Owners Corporations Act* s 31.
- [11] *Owners Corporations Act* s 32(2).
- [12] *Owners Corporations Act* s 32.
- [13] *Owners Corporations Act* s 163(2).
- [14] *Jones v Deputy Commissioner of Taxation exp Graham* [1998] FCA 1076 affords such an example.
- [15] *Subdivision Act 1988* s 28(1).
- [16] *Owners Corporations Act* s 4.
- [17] VCAT Act 1998 s 115C.
- [18] VCAT Act s 109.