

**VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL**

**CIVIL DIVISION**

**OWNERS CORPORATIONS LIST**

VCAT REFERENCE NO.OC1762/2016

**CATCHWORDS**

Fee recovery application; manager's administrative costs, costs of Court warrants, fees and allowances in answer to summons.

**APPLICANT:** Owners Corporation RP002044  
**RESPONDENT:** Jo-anne Laura Finch  
**WHERE HELD:** 55 King Street, Melbourne  
**BEFORE:** Member L. Rowland  
**HEARING TYPE:** Fee Recovery Hearing  
**DATE OF HEARING:** 13 December 2016  
**DATE OF ORDER:** 20 December 2016  
**DATE OF REASONS:** 20 December 2016  
**CITATION:** Owners Corporation RP002044 v Finch (Owners Corporations) [2016] VCAT 2166

**ORDERS**

The Tribunal orders:

1. The respondent must pay to the applicant \$1,293.00, being \$600 for costs (including Tribunal application fee of \$174.10) of the proceeding and \$693 for fees and allowances allowed for Ms J Russell, owners corporation manager under s 104 *Victorian Civil and Administrative Tribunal Act 1998*.
2. The respondent must pay to Mr S Taylor, Unit 1, 3 Hutchison Avenue, Beaumaris, Victoria 3193, \$300 for fees and allowances under s 104 *Victorian Civil and Administrative Tribunal Act 1998*.
3. The respondent must pay to Mr P Costa, c/- Unit 3, 3 Hutchison Avenue, Beaumaris, Victoria 3193, \$41 for fees and allowances under s 104 *Victorian Civil and Administrative Tribunal Act 1998*.

4. The owners corporation must remove all manager's legal cost recovery charges, debt collection charges, letter of demand charges and like charges and corresponding interest charges from the respondent's account forthwith.
5. All five witnesses are excused from further attendance or production of any documents to the Tribunal pursuant to the summons to witness served by the respondent in this proceeding.
6. The principal registrar is directed to send a copy of this order to each of Ms J Russell, Mr S Taylor and Mr P Costa.
7. The application is otherwise dismissed.

**MEMBER L ROWLAND**

**APPEARANCES:**

For Applicant:

Ms Wilson, solicitor

For Respondents:

In person

Other:

Mr Donaldson, solicitor for Ms J Russell,  
owners corporation manager

## REASONS

### Background

- 1 In this proceeding, the owners corporation claims outstanding fees in the sum \$4,096.32. The respondent, Ms Finch disputes the owners corporation's claim on numerous grounds. There will not be an order on the claim, because she has paid the outstanding fees claimed in this proceeding.

### History

- 2 This is the second Tribunal fee recovery proceeding the owners corporation has brought against Ms Finch. The owners corporation is a 4 lot subdivision in Beaumaris. It is a modest subdivision with annual fees of approximately \$2,000. Ms Finch holds her lot as an investment property and rents it out on the open market. Ms Finch has been in arrears of her owners corporation fees since early 2014. The non-payment of owners corporation fees by one lot owner in a small subdivision has a deleterious impact on the owners corporation's ability to carry out its essential functions including insuring and maintaining the common property.

### Defence to the application

- 3 The claim for outstanding fees was for the period 1 October 2015 to 1 April 2016 as set out in a final fee notice dated 27 April 2016. Ms Finch did not dispute the actual owners corporation fees. She contended that the manager, the other lot owners and the solicitor for the owners corporation had a duty to act in her best interests and therefore ought not to have commenced legal proceedings. She argued they should have accepted her offer to repay the arrears and current fees at the rate of \$70 per week. Very little time needs to be spent on this aspect of the defence. The alleged failure to accept an offer of settlement or to take any steps beyond the requirements set out in the *Owners Corporations Act 2006* is not a legal impediment to commencing or maintaining a legal proceeding. However, that alleged failure may have costs consequences.

- 4 Ms Finch has a more cogent defence. It was a defence she did not pursue in the hearing. Ms Finch's defence was evident from the documents I ordered the owners corporation to provide on 2 November 2016. The documents and evidence provided by the owners corporation proves that the sums that were properly owing by Ms Finch in the final fee notice have now been paid.

- 5 I set out below a reconciliation of Ms Finch's account:

Balance owing as at 27 April 2016 as claimed in the final fee notice:	\$ 4,096.32
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Less legal recovery costs charged - 9

March 2014 (Note 1: manager's charges)	\$ 220.00
Less legal recovery costs charged - 30 September 2014 (Note 1: manager's charges)	\$ 240.00
Less preparing for VCAT charge - 29 December 2014 (Note 1: manager's charges)	\$ 225.00
Less legal recovery charge - 25 October 2015 (Note 2: legal costs)	\$ 2,912.20
Less interest charged on final fee notice (Note 3: interest)	\$ 82.25
<b>Sub total</b>	<b>\$ 416.87</b>
Add legal costs ordered by VCAT - 6 February 2015	\$ 600.00
Add Magistrates' Court warrant costs - 16 April 2015	\$ 306.40
Supreme Court warrant costs To be determined	
Total owing as at 27 April 2016	\$ 1,323.27
Payments after 27 April 2016 – 19 instalments @ \$70 per week (Note 4: payments)	\$ 1,330.00
Amount owing for fees on final fee notice as at the date of hearing (13 December 2016)	<b>Nil</b>

**Note:** Supreme Court costs allowed on a warrant would not form part of a fee recovery order made by the Tribunal.

**Note 1: Manager's charges**

- 6 Ms Finch's unit statement shows that the manager has debited \$685 to her account (and a further \$702 has since been debited since the final fee

notice) for the manager's administration costs in the fee recovery proceedings.

- 7 Whether those costs are paid directly to the manager or the owners corporation is seeking recovery of those costs from the lot owner, neither the manager nor owners corporation is entitled to recover those costs from the lot owner.
- 8 The manager does not have a contract with the lot owner and therefore has no legal right to require the lot owner to pay the manager's costs in relation to fee recovery work.
- 9 There is no power under the *Owners Corporation Act 2006*, Regulations or Rules which enables an owners corporation to require a lot owner to pay an administrative or legal cost on a user pays basis. There is also no power under the *Owners Corporation Act 2006*, Regulations or Rules to enable an owners corporation to validly pass a special rule or a resolution requiring a lot owner to pay the owners corporation's administrative and legal costs of debt collection against that lot owner. The scheme of the *Owners Corporations Act 2006* requires all administrative costs to be paid by lot owners in accordance with lot liability.
- 10 The administrative costs form part of the balance which is being claimed in these proceedings. Those costs must be removed from Ms Finch's account to enable me to determine what amount is properly owing to the owners corporation by Ms Finch.

**Note 2: Legal costs**

- 11 On 25 October 2015, \$2,912.20 was debited to Ms Finch's account for legal costs and disbursements.
- 12 In order to understand the legal costs and disbursements, it is necessary to give a brief history of the legal proceedings undertaken to date.
- 13 On 21 November 2014, the owners corporation lodged its first application with the Tribunal claiming \$1,816.76 for unpaid fees plus interest and costs. On 6 February 2015, the Tribunal made the following order:

The respondent must pay to the applicant the sums of \$1,596.76 for levies and interest to the date of the final fee notice; \$52.36 for interest from the date of the final fee notice to the date of hearing and \$600 for costs (including reimbursement of VCAT fees paid by the applicant), a total of \$2,249.12.
- 14 On 27 March 2015, the order was registered with the Magistrates' Court and on 24 April 2015 a Magistrates' Court warrant was issued for \$2,568.46 including interest and \$306.40 costs. The Sheriff's warrant was returned unsatisfied on 5 June 2015 but on 2 June 2015 Ms Finch had paid the owners corporation \$2,000.
- 15 On 18 September 2015, the solicitor for the owners corporation lodged a Supreme Court warrant of seizure and sale in respect of the balance of

\$249.12 and interest of \$50.42 owing under the original VCAT order. The warrant was issued for a total of \$2,206.14 of which \$1,906.60 related to the costs and fees of the warrant. Not surprisingly, Ms Finch objects to the disproportionate action to recover \$300 of outstanding fees and interest.

The parties informed the Tribunal that these costs are subject to an application to the Costs Court for an assessment of costs.

- 16 The charge of \$2,912.20 to Ms Finch's account represents an invoice from Ms Wilson to the owners corporation for her costs and disbursements for the first VCAT proceeding, the Magistrates' Court warrant and the Supreme Court warrant. The details of the invoice are follows:

Professional fees	\$ 1,909.00
Search fee	\$ 44.20
VCAT application fee	\$ 158.90
Fee to file Magistrates' Court warrant	\$ 15.90
Fee for execution Magistrates' Court warrant	\$ 181.50
Fee for certificate for Supreme Court	\$ 44.90
Filing fee for Supreme Court	\$ 371.30
Fee for execution of Supreme Court Warrant	\$ 1,003.20
<b>Total:</b>	<b>\$ 2,912.20</b>

- 17 Although \$2,912.20 is claimed for legal costs in these proceedings, the Tribunal does not have the jurisdiction to make an order for any of these costs. The Tribunal made an order for \$600 costs (including the Tribunal fee) in the first application to Tribunal. The Tribunal does not have the power to make a second order for the same costs in these proceedings. The Tribunal does not have the power to make an order for costs in relation to Magistrates' Court and Supreme Court proceedings.
- 18 However, it is necessary for me to ascertain what costs Ms Finch must properly pay in respect of previous Tribunal proceedings and any Court proceedings, so that I may calculate the balance owing on her account for the purposes of this proceeding. So whilst I do not adjudicate what the Magistrates' Court or Supreme Court costs should be, if they are properly payable, I need to take those costs into account to calculate the balance outstanding.

- 19 The costs ordered by the Tribunal and costs allowed by the Courts are as follows:

Fees ordered by VCAT - 6 February 2015	\$ 600.00
Scale costs and fees on Magistrates' Court warrant - 24 April 2016	\$ 306.40
Scale costs and fees on Supreme Court warrant - 18 September 2016	\$ 1,906.60
<b>Total:</b>	<b>\$ 2,813.00</b>

- 20 The invoice rendered by Ms Wilson for the legal costs is commensurate with the costs order and scale costs allowed apart from a \$99.80 difference. Ordinarily, I would find that the owners corporation is entitled to debit Ms Finch's account for \$2,813. However, as previously mentioned, the \$1,906.60 Supreme Court costs are subject to an application to the Costs Court for assessment. Accordingly, the costs are not yet owing so they need to be removed from Ms Finch's account.<sup>1</sup> The Supreme Court warrant costs may be added to Ms Finch's account following assessment by the Costs Court.

### Note 3: Interest

- 21 Interest will need to be recalculated from 2014. The owners corporation has claimed interest on the administrative charges and the legal costs.
- 22 The owners corporation is entitled to interest on outstanding fees under the *Owners Corporations Act 2006* and on any judgment under the *Supreme Court Act 1986*. For the purposes of this hearing, the interest on the Supreme Court warrant costs must be removed until after the assessment of costs.
- 23 I have determined not to allow the interest claimed in the final fee notice of \$82.25 because it mainly relates to interest on the \$2,912.20 (and therefore cannot be the basis of a fee recovery order in any event) and because the owners corporation has not proved what interest is owing for the purpose of these proceedings. I am not finding that the owners corporation is not entitled to charge interest, but rather, that no sum for interest has not been proved to enable me to make an order for interest.

### Note 4: Payments

- 24 Since 9 August 2016, Ms Finch made payments totalling \$1,330. According to my reconciliation Ms Finch has now paid all the owners

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<sup>1</sup> See section 101 *Supreme Court Act 1986*.

corporation fees due under the final fee notice and, accordingly, there will be no order on the claim because it has been paid.

### **Costs on this application**

25 I am satisfied that when these proceedings were issued on 15 July 2016 Ms Finch owed the owners corporation \$1,315.52. However the payments were allocated, I am satisfied that she was in arrears of owners corporation fees. I will allow costs of \$600 (inclusive of the \$174.10 Tribunal fee) on the application. The claim for costs falls to be determined under s 109 and the claim for fees under s 115B of the *Victorian Civil and Administrative Act 1998*. In ordering costs of \$600 I take into account the following matters:

- (a) that the starting point for costs is that each party should bear their own costs;
- (b) that it is not obligatory or necessary for an owners corporation to engage lawyers to make fee recovery applications to the Tribunal;
- (c) it is not unreasonable for an owners corporation to engage lawyers to make fee recovery applications to the Tribunal;
- (d) Ms Finch is in arrears of fees and has been since 2014;
- (e) the lot is held by Ms Finch as an investment property;
- (f) the subdivision consists of only 4 lots, all with equal lot liability and entitlement;
- (g) that the costs of the proceeding including three hearings, are likely to be substantial;
- (h) that Ms Finch has, since 9 August 2016, made 19 payments of \$70;
- (i) the other 3 lot owners are not at fault;
- (j) it is fair that the defaulting lot owner should contribute more to the costs of the fee recovery application than the innocent lot owners.

### **Witness Summons**

26 Ms Finch served 5 witness summons requiring the attendance of 5 witnesses to attend the Tribunal to produce documents and give evidence. Four of the witnesses responded to the summons. One of the witnesses, Ms Russell, the owners corporation manager, attended the Tribunal with a solicitor, Mr Donaldson to object to the production of privileged documents pursuant to the summons.

27 The relevance of the evidence of these witnesses and summoned documents in a fee recovery application was not clear and an attempt to understand the possible relevance of the witnesses and documents from Ms Finch proved to be futile. The proceeding was scheduled for 11.30am with 90 minutes allowed for hearing, but due to a very heavy list, and four defended hearings which preceded it, the proceeding was not reached until approximately 12.30pm. Given the enormous inconvenience suffered by the summoned witnesses I determined the most expedient course was to allow Ms Finch to interpose three of her witnesses; Mr Taylor, lot owner,



Mr Costa, lot owner and Ms Russell, owners corporation manager, without knowing how their evidence could be relevant to the proceeding. Their evidence was concluded by 2.00pm.

- 28 Examination of the witnesses by Ms Finch revealed nothing which would assist Ms Finch's defence. Mr Taylor, said that he had lost \$300 in wages to attend the Tribunal. Mr Costa said that he was out of pocket \$41 for car parking. Ms Russell said that she would be charging the owners corporation for 4.5 hours @ \$154 per hour for her attendance at the Tribunal.
- 29 Section 104 *Victorian Civil and Administrative Tribunal Act 1998* provides:
- (4) A person who attends in answer to a summons is entitled to be paid the prescribed fees and allowances or, if no fees and allowances are prescribed, the fees and allowances (if any) determined by the Tribunal.
  - (5) The fees and allowances are to be paid—
    - (a) if the person was summoned at the request of a party, by that party; or
    - (b) if the person was summoned on the initiative of the Tribunal, by the parties in the proportion determined by the Tribunal.
- 30 The Tribunal has not prescribed fees and allowances for the purposes of s 104. Pursuant to s 104, I allow the summoned witnesses fees and allowances as follows:
- Mr Taylor - \$300 for loss of wages
  - Mr Costa - \$41 for car parking
  - Ms Russell - \$693 for the time she will charge the owners corporation for attending the Tribunal. The order will require the respondent to reimburse the owners corporation for Ms Russell's attendance at the hearing.
- 31 Pursuant to s 104(5)(a) the respondent must pay the witness fees and allowances.

**MEMBER L ROWLAND**