Sukeda v Owners Corporation 2 Plan No 529462 (Owners Corporations) - [2016] VCAT 533

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VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

OWNERS CORPORATIONS LIST

VCAT REFERENCE NO. OC1151/2015

CATCHWORDS

Owners Corporations Act 2006 (Vic) – unlimited and limited owners corporations holding different common property – whether certain common property expenses had been properly allocated as between the two owners corporations – whether applicant estopped from making claim.

APPLICANT	Marcos Roberto Dos Santos Sukeda
FIRST RESPONDENT	Owners Corporation 2 Plan No. 529462
SECOND RESONDENT	Victoria Body Corporate Services Pty Ltd (ACN: 007 034 522)
WHERE HELD	Melbourne
BEFORE	A Dea, Member
HEARING TYPE	Hearing
DATE OF HEARING	15 February 2016
DATE OF ORDER	6 April 2016
CITATION	Sukeda v Owners Corporation 2 Plan No 529462 (Owners Corporations) [2016] VCAT 533

ORDER

1. The Tribunal declares under section 124 of the *Victorian Civil and Administrative Tribunal Act 1998* (Vic) (VCAT Act) that the expenses related to the following items are payable by the first respondent for the period 5 May 2010 to 31 March 2015:

   - Taking rubbish bins in and out;
   - Replacement of halogen globes;
   - Internal cleaning;
   - Carpet cleaning;
   - Plumbing related expenses identified by Mr Sukeda in the invoices attached to his application;

- Window cleaning; and
- Fire protection and extinguisher services.

2. By 22 April 2016, the first respondent must permit the applicant to inspect all records in its possession that relate to the items described in paragraph 1 and (at his own expense) to make a copy of any of them he wishes.

3. By 5 June 2016, the applicant may:

    a File with the tribunal minutes of consent orders signed by or on behalf of the applicant and the first respondent, as to the amount that should be paid by the first respondent to Owners Corporation 1 Plan No. 529462 or as to any other or different orders; or

    b Request, in writing addressed to the principal registrar, a renewal of the proceeding so that he may apply for further orders.

4. If the applicant files such minutes of consent orders the tribunal may, without listing any further hearing, make orders in accordance with the minutes, or may list the proceeding for further hearing.

5. If the applicant makes such a request for a further hearing, the principal registrar shall list the proceeding for a one day further hearing before me.

6. The applicant's claims against the first respondent are otherwise dismissed.

7. The application against the second respondent is struck out.

8. The tribunal declines to make any order for costs under section 109 of the VCAT Act and so each party shall bear their own costs of this proceeding.

9. Under section 115B(1)(a) of the VCAT Act , by 5 May 2016, the first respondent shall reimburse to the applicant half of the application fee paid, being $262.80.

A Dea
Member

APPEARANCES:

For Applicant	In person
For First Respondent	Ms N Wilde, solicitor
For Second Respondent	Ms D Rowe, representative

REASONS

1. In February 2014, Mr Sukeda purchased a townhouse in Yarraville. The subdivision in which his property is located has 14 townhouses located on the perimeter of an oval shaped boundary. In the centre of the property there is an apartment building containing 32 apartments. The plan of subdivision for the apartment building stage was registered in May 2006 and the plan for the residential townhouses was registered in July 2009.

2. Under the plan of subdivision there are two owners corporations. Owners Corporation no 1 (OC 1) is unlimited and holds common property in the form of the road/driveway around the apartment building, the garden and external lighting located on the verge of that road/driveway. All 46 lot owners are members of OC 1.

3. Owners Corporation no 2 (OC 2) is limited and holds common property within the apartment building. As I understood it, there was no dispute that, other than an area where rubbish bins are stored and accessed, the common property held by OC 2 does not benefit the townhouse lot owners because they are not members of OC2. They are not entitled to enter the apartment building or otherwise access the OC 2 common property.

4. Mr Sukeda discovered that expenses related to OC 2 were being paid from OC 1 contributions. He believes that is inappropriate where only the OC 2 lot owners and occupiers benefit from the payment of those expenses. The expenses in issue relate to electricity, electrical repairs, fence painting, upkeep of common areas, maintenance of internal fire extinguishers and review of emergency access, window cleaning, overdraft charges, management fees and insurance excess.

5. With the permission of the tribunal, [1] Mr Sukeda brought this proceeding on behalf of OC 1. He filed material showing that he seeks payment by OC 2 to OC 1 of the sum of $31,973.84. At the hearing Mr Sukeda told me he seeks reimbursement for legal costs he incurred in the sum of $1,000. Those costs relate to legal advice he sought about the plan of subdivision and the respective responsibilities of the two OCs. Mr Sukeda provided a copy of that advice to OC2 and the tribunal.

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[1] Order made on 25 November 2015 under section 165(1)(ba) of the *Owners Corporations Act 2006* (Vic) .

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6. The proceeding is also brought against the appointed manager of OC 1 and OC 2, Victoria Body Corporate Services Pty Ltd, (the manager). Mr Sukeda says that the manager failed to take proper care when processing and paying various invoices and that is what has led to OC1 paying costs relating to OC2. He also complained that when he made enquiries about these matters, instead of investigating, the manager was defensive. He says the manager was negligent in undertaking its duties.

7. OC 2 says that it owes no debt to OC 1 because OC 1 is estopped by its own conduct from bringing the claim. In effect, OC 2 says that, by making provision for and approving payments in respect of OC 2 expenses in its budgets from time to time, OC 1 represented to OC 2 that it did not dispute that those expenses are payable by OC 1. OC 2 says, in those circumstances, it would be unjust for its lot owners to be required to repay funds to OC 1. Alternatively, OC 2 says that Mr Sukeda has

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not proved the amounts claimed and that what he has sought is an audit of the accounts of OC 1 and OC 2.

8. OC 2 seeks an order dismissing the application and an order for costs in its favour.

9. In summary, I have decided that estoppel does not apply in this case and so cannot be relied on by OC 2 as a defence. I have decided that some of the expenses and other items queried by Mr Sukeda are properly payable by OC 2 and not OC 1 and will make declarations to that effect. I will also make consequential orders to allow for a proper assessment to be made of any amount now due to OC 1. For the reasons set out below, I have decided to strike out the claim made against the manager.

10. I will first give an overview of relevant provisions of the *Owners Corporations Act 2006* (Vic) (OC Act) and the *Subdivision Act 1988* (Vic) (Subdivision Act).

The OC Act and the Subdivision Act

11. The functions of owners corporations are described in section 4 of the OC Act. They include to manage and administer the common property and to repair and maintain the common property, chattels, fixtures, fittings and services associated with common property or its enjoyment and any equipment or services which benefit the owners corporation.

12. By section 23 an owners corporation has the power to levy fees to cover general administration, maintenance and repairs, insurance and other recurrent obligations of the owners corporation. The fees are required to be levied based on lot liability.

13. Section 28(3) of the OC Act provides an exception to the rule that a lot owner is not required to contribute an amount greater than their lot liability in order to discharge an amount owed by the owners corporation. Section 28(3) allows for a lot owner to be required to contribute an amount greater than their lot liability where the relevant repairs, maintenance or works in respect of common property were wholly or substantially for the benefit of that lot owner or a group of lot owners as compared with all lot owners.

14. Section 27A of the Subdivision Act says that, if a plan of subdivision contains common property, it must provide for one or more owners corporations. Sections 27B and 27C of the Subdivision Act have the effect that, if an owners corporation is not a limited owners corporation, it is by definition an unlimited owners corporation. The plan of subdivision is required to state whether the owners corporation is limited or unlimited. The plans here show OC 1 is an unlimited owners corporation and OC 2 is a limited owners corporation.

15. Section 30 of the Subdivision Act says that any common property affected by an unlimited owners corporation vests in the owners for the time being of the lots affected by that owners corporation. In the case of common property affected by a limited owners corporation, where there is an unlimited owners corporation, that common property also vests in the owners for the time being of the lots affected by the unlimited owners corporation.

16. I will next deal with OC 2's estoppel defence.

Estoppel by conduct

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OC 2's contentions and evidence

17. OC2 says that there is a strong factual foundation to find that the doctrine of estoppel by conduct applies to prevent Mr Sukeda from bringing this proceeding. Ms Wilde, solicitor representing OC2, produced written submissions and also made oral submissions on this matter.

18. Ms Wilde contended that elements required to establish estoppel exist in this case. Those elements are said to be as follows:

- Where one person (the representor) by their conduct, induces another person (the representee) to adopt and act upon:

  - An assumption of fact; or

  - An assumption as to future conduct of the representee; and

- The representee has acted on the assumption in such a way that it will suffer detriment if the representor acts inconsistently with the assumption.

19. Ms Wilde referred me to an extract from an article by Mr Andrew Robertson[2] which included the following:

> In equity, the estoppel prevents the Representor from acting inconsistently with the Assumption, without taking steps to ensure that the departure does not cause harm to the Representee. Those steps might include compensating the Representee for any financial loss, or giving the Representee reasonable notice of its intention to depart from the assumption, so that the Representee can resume his or her original position. If the Representor acts inconsistently with the Assumption without taking any steps, then the court must fashion relief by which to give effect to the estoppel.[3]

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[2] *Reasonable reliance in estoppel by conduct*, Andrew Robertson, University of New South Wales Law Journal, 2000.

[3] Page 88.

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20. Ms Wilde also referred me to a decision of Senior Member Vassie in this list where the Senior Member discussed the application of proprietary estoppel to an owners corporations dispute. [4]

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[4] *Kinson v James & Phillip Woollard Pty Ltd* [2016] VCAT 79, paragraphs 82 ff.

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21. OC 2 says that an estoppel applies in these circumstances because, over the course of the 2009 to 2013 financial years ending 31 March, OC 1 prepared financial statements detailing its expenditure for the relevant financial year, issued a copy of those statements to all lot owners in advance of the

required annual general meeting and, at the relevant meetings, passed resolutions approving and adopting those financial statements. Ms Wilde referred to those actions collectively as the relevant *'assumptions'* for the purposes of the estoppel argument.

22. Ms Wilde submitted that the assumptions amounted to representations by OC 1 to OC 2 that the financial statements, including all expenses paid were approved by OC 1. Ms Wilde submitted that, in reliance on those representations, OC 2 prepared its budgets for the equivalent financial years.

23. Ms Wilde contended that, if OC 1 was able to act inconsistently with the representations, by now claiming the relevant financial statements were not correct, OC 2 would suffer detriment. That detriment would be in the form of a special levy to be raised from members of OC 2 to pay any debt found to be owing to OC 1.

24. Noting that the 32 lot owners of OC 2 are also members of OC 1, it was contended that none support the application and the fact that Mr Sukeda brought the proceeding alone should be taken to mean that no other lot owners support the application and that it is not in the best interests of all members of OC 1 or OC 2 to grant the application. The fact that no other lot owners had applied to join as applicants together with the comparatively small sum which OC 2 believed could possibly be claimed were said to make this an ideal case of estoppel.

25. The written submissions noted that Mr Sukeda became the registered owner of a lot in OC 1 on 10 February 2014 and joined the committee of OC 1 at its annual general meeting held on 2 June 2014. At the 2014 annual general meeting, Mr Sukeda put OC 1 on notice that it had incorrectly paid three invoices which should have been paid by OC 2. The minutes show that matter was investigated and promptly rectified.

26. Since that meeting, where previously only one electricity meter was installed to measure all common property electricity use for OC 1 and OC 2, a second meter was installed to enable separate measures to be made.

27. Since 2009, many lots have changed ownership. OC 2 said, as a consequence, the representations described above have been made to purchasers over time as to the adoption of financial statements. It would be unfair and unjust for OC 1 to now retract from the assumptions because:

- It is reasonable to infer that purchasers of lots reasonably relied upon the assumptions in making their decision to purchase the lots and in negotiating the value/purchase price for their lots;

- If the current owners of the apartment lots and members of OC 2 were to be ordered in this proceeding to raise a special levy to re-pay funds to OC 1 (which includes the apartment lot owners) that would create an inequitable situation because some of the current owners would not have owned the lots for all or part of the period in issue. The current owners of the townhouses would gain a windfall by receiving a payment to OC 1 for a period when they were not members of OC 1. The former owners of apartment lots who allegedly underpaid fees will not be affected by the obligation to repay and the former owners of townhouse lots will receive no benefit from funds they allegedly overpaid.

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28. In support of the reliance contentions Ms Christina Posen, lot owner and committee member gave evidence.

Ms Posen's evidence

29. Ms Posen has owned an apartment lot since the end of 2012 and is a committee member for both OC 1 and OC 2, having joined each late in 2012. She has consistently attended annual general meetings for the two owners corporations and suggested that it was usual for only six to eight lot owners to regularly attend.

30. Ms Posen gave evidence that, as is usual, she received the financial statements for the relevant year in advance of the annual general meetings. She was able to review them and ask questions before or at the meetings.

31. She explained that, when invoices come in for payment, they are referred to the committee and the committee has the opportunity to ask questions and discuss the invoices amongst themselves before approving them for payment. She described the committee as taking collective responsibility for checking what was going through the books. Ms Posen said that she was clear about what should be paid by OC 1 as opposed to OC 2 but also described it as a learning process which required the application of common sense. When asked whether she was aware of OC 2 acting in bad faith by trying to have OC 1 pay for its expenses, she said no. She said the committees tried to do the right thing. She accepted that mistakes had been made and that they were trying to address that.

32. Ms Posen gave evidence that, if she was required to pay a special levy to repay OC 1, that would impose a financial burden on her.

33. In cross-examination, Mr Sukeda asked if she agreed that, where all lot owners of OC 2 were also members of OC 1, there would be a benefit to all lot owners if funds were repaid to OC 1 because there would be more funds available to OC 1. Ms Posen did not agree, noting that any benefit would depend on how the OC 1 committee decided to apply the funds. She recalled questions being asked by Mr Sukeda at the 2014 annual general meeting and adjustments being made for what she called *'genuine mistakes'*. At the time accounts were approved for payment by OC 1, she was not aware of the detail of specific accounts and issues later raised by Mr Sukeda.

34. I asked Ms Posen whether she had regard to the owners corporations fees payable when she purchased her apartment lot in 2012. She said she did take that into account and thought as a matter of common sense others would have done the same.

Mr Sukeda's response

35. Mr Sukeda disputed the proposition that, by passing resolutions approving financial statements, OC 1 or the individual lot owners made representations to OC 2. He noted that the lot owners were not experts in reading such documents and relied upon the expertise of the manager.

36. Mr Sukeda contended that there would be a benefit to apartment lot owners and townhouse owners alike if funds were repaid to OC 1 by OC 2 because OC 1 would have more funds to allocate to expenses and other matters in future, thereby reducing calls on lot owners. He was concerned

about what is fair to all lot owners in respect of their liabilities for common property. Where the townhouse owners only benefit from the road/driveway and surrounding garden area common property and have no access to the apartment building common property, he considered it unfair for the townhouse lot owners to be required to contribute to OC 2 common property costs and expenses. He suggested that any necessary payments could be made by OC 2 lot owners over time in case the amount compromised their financial position.

37. Mr Sukeda sent the tribunal copies of emails from other townhouse owners which supported the action he was taking. He noted that many of the lot owners did not live in the subdivision, rather living interstate and overseas. Accordingly, few have actively participated in meetings or raised concerns about these matters.

Discussion and decision

38. Generally speaking I accept as accurate OC 2's description of the nature and application of the doctrine of estoppel. However, what the submissions do not sufficiently emphasise is an important underlying basis for the doctrine – that is to prevent unconscionable or unconscientious departure from an assumption which has been adopted by the other party as the basis of a course of conduct which would operate to that party's detriment.

39. Mr Robertson's article explains that there have been discussions in legal literature about whether estoppel is based on promise or unconscionable conduct and the role of reliance under these two theories. He says that the article will *'explore the nature of the requirement of reasonable reliance and the role it plays in common law and equitable estoppel.'* While questioning whether the test is one of reasonableness or unconscionability, the article accepts that two questions must be considered: does the representor deserve blame and does the representee deserve protection? Those questions require an assessment of what are acceptable standards of behaviour.

40. While the distinctions discussed in the article are of academic interest, I have found it of greater assistance to look to what the High Court of Australia has said about estoppel by conduct.

41. In *The Commonwealth v Verwayen* ,[5] Deane J identified what he saw as the conceptual foundation and essential operation of the doctrine of estoppel by conduct. His Honour said relevantly:

> 2. The central principle of the doctrine is that *the law will not permit an unconscionable – or, more accurately, unconscientious – departure* by one party from the subject matter of an assumption which has been adopted by the other party as the basis of some relationship, course of conduct, act or omission which would operate to that other party's detriment if the assumption be not adhered to for the purposes of the litigation.
>
> …
>
> 4. The question whether such a departure would be unconscionable relates to the conduct of the allegedly estopped party in all the circumstances. *That party must have played such a part in the adoption of, or persistence in, the assumption that he would be guilty of unjust and oppressive conduct if he were now to depart from it.* The cases indicate four main, but not exhaustive, categories in which an affirmative answer to that question may be justified, namely, where that party: (a) has induced the assumption by express or implied representation; (b) has entered into contractual or other material relations with the other party on the conventional basis of the assumption; (c) has exercised against the other party rights which would exist only if the assumption were correct; (d)

knew that the other party laboured under the assumption and refrained from correcting him when it was his duty in conscience to do so. Ultimately, however, the question whether departure from the assumption would be unconscionable must be resolved not by reference to some preconceived formula framed to serve as a universal yardstick but by reference to all the circumstances of the case, including the reasonableness of the conduct of the other party in acting upon the assumption and the nature and extent of the detriment which he would sustain by acting upon the assumption if departure from the assumed state of affairs were permitted. *In cases falling within category (a), a critical consideration will commonly be that the allegedly estopped party knew or intended or clearly ought to have known that the other party would be induced by his conduct to adopt, and act on the basis of, the assumption.* Particularly in cases falling within category (b) actual belief in the correctness of the fact or state of affairs assumed may not be necessary. Obviously, the facts of a particular case may be such that it falls within more than one of the above categories. (my emphasis)

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[5] [1990] HCA 39 per Deane J at paragraph 21 .

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42. If I assume for the moment that the representations alleged were in fact made and that OC 2 or its lot owners can establish detrimental reliance, it is still necessary for me to be satisfied that OC 1 *'played such a part in the adoption of, or persistence in, the assumption that [it] would be guilty of unjust and oppressive conduct if [it] were now to depart from it'*. Further, I must consider whether OC 1 knew or intended or ought to have known that OC 2 would be induced to rely on OC 1's conduct. These matters must be considered in the light of the facts surrounding the representations and the reasonableness of OC 2's conduct.

43. As I understood it, the financial statements were prepared by the manager and circulated ahead of the annual general meetings. Lot owners would therefore have had an opportunity to ask questions and clarify individual or categories of expenses. The notice for the meetings set out the resolutions to be voted on and they included the amount of the proposed budgets for the following year.

44. There was no suggestion or evidence that the means by which particular expenses or invoices were allocated between the two owners corporations was explained or described. The financial statements filed by OC 1 for the financial years 2010 to 2013 were all in similar form. Expenses are grouped under headings such as *'Administrative'*, *'Building Operations'* and *'Repairs and Maintenance'*. Some of the entries are specific (eg *'locksmith'*) but others are general such as *'Overdraft Charges'*, *'Common Area Upkeep'*, *'Electricity'*, *'Fire Protection'* and *'Insurance'*.[6] There is nothing about the way these entries appear that would alert anyone to whether they concern OC 1 or OC 2 common property. If anything, the fact the entries appear in OC 1's financial statements would seem to suggest that they concern only OC 1 common property. The OC 2 financial statements are in the same form and contain similar headings and entries.

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[6] Financial statement for OC 1 for financial year ended 31 March 2010 – Exhibit R2.

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45. There is nothing on the face of the documents to put anyone on notice that any expenses or items relate to common property other than that owned by the relevant owners corporation. To put it another way, an objective reading is more likely to lead to an understanding that the entries only relate to the relevant owners corporation's common property. It is difficult to draw from the entries a representation that OC 1 had decided to pay expenses which benefitted OC 2.

46. In 2010, the OC 1 meeting was scheduled at 6pm and the OC 2 meeting was scheduled for 7pm, both on the same day and at the same venue. Thereafter, the meetings were scheduled at the same time. I will assume that the OC 1 meeting was held first and the OC 2 meeting followed.

47. OC 2 says that OC 1's passing of resolutions which approved the financial statements were assumptions for the purposes of establishing an estoppel by conduct. OC 2 next says that the assumptions amount to representations by OC 1 to OC 2 that *'the financial statements, including all expenses paid therein, were approved'* for the relevant financial year.

48. I have little difficulty with the proposition that the passing of the resolutions can be understood to contain that representation. There is no question the resolution was that the financial statements as prepared were approved and adopted. That resolution was passed.

49. OC 2 contends that, in reliance on that representation, OC 2 prepared its budgets for the next financial year.

50. As I understood it, implicit in the suggested representation was that relevant expenses had been properly allocated to OC 1 and so were payable by OC 1. Further, there appeared to be a suggestion that, by confirming expenses have been properly paid by OC 1 rather than OC 2, future expenses of a similar kind would also be payable by OC 1 and not OC 2.

51. I have discussed above the absence of detail about the two owners corporations comparative expenses or responsibilities in the financial statements.

52. There was no evidence before me that OC 2 collectively or any individual lot owner who attended a relevant annual general meeting was aware of the particular representation. While I can accept that a representation that the financial statements had been approved and adopted was communicated by the fact that the resolution was passed and recorded in the minutes, I have difficulty with the proposition that representation communicated anything about which of the two owners corporation was liable for specific common property expenses. Also, the notice of annual general meeting contained a proposed budget for OC 2. There was no evidence that changes were made to that budget after the OC 1 resolutions were passed. In these circumstances, I am not satisfied that the contention that the budget was prepared in reliance on OC 1's resolution can be sustained.

53. Given the manner in which the meetings were scheduled and the fact that the financial statement and proposed budget for OC 2 had been prepared by the manager in advance of the meeting, presumably on instructions from the OC 2 committee, they are likely to have been prepared on the basis that the OC 1 financial statements and budget would be approved.

54. In these circumstances, I do not accept the proposition that OC 2 or its lot owners present at the meeting, turned their minds specifically to the allocation of expenses as between OC 1 and 2 in the previous financial year, how that might impact on the OC 2 financial statements and the

upcoming budget and made a decision to rely on the representation OC 2 alleged OC 1 made in the form of the financial statements. While I accept Ms Posen's evidence that the committee took collective responsibility for accounts generally, I also accept it is likely to be true that most lot owners relied on the expertise of the manager which prepared the accounts.

55. As to reliance by future purchasers of lots, I am not satisfied that by, from time to time, passing resolutions approving financial statements, OC 1 represented to future purchasers of lots that the fees payable for OC 2 would remain the same. As discussed above, the resolutions themselves did not describe or comment on the relationship with OC 2. Also, there could be no safe basis on which it could be concluded that a decision about past expenses amounted to a representation or promise about future expenses. Common property can require significant maintenance and renewal from time to time. Unexpected events can occur which cause damage and lead to higher than usual costs being passed on to lot owners.

56. Separate from the question of reliance on the alleged representations, there is nothing about the circumstances described above which indicates that, in passing the various resolutions, OC 1 induced OC 2 to adopt an assumption related to the allocation of common property expenses such that it would be guilty of unjust and oppressive conduct if OC 1 sought reimbursement for some expenses. Where the financial statements and surrounding information did not disclose anything about the interrelationship between the common property expenses and the two owners corporations, I cannot conclude that OC 1 knew or intended or ought to have known that OC 2 would be induced to rely on OC 1's conduct and assume that all expenses had been properly allocated in the past and would continue to be in the future.

57. As will become apparent from the discussion below, I have found that errors of allocation of expenses may have been made and require correction. The mere fact of those mistakes having to be paid for by newer lot owners and other new lot owners deriving a benefit from those payments does not enliven the equitable remedy of estoppel. It is not uncommon for individuals and other entities to find they must meet debts or expenses not incurred or referrable to their own conduct but rather arising from past events.

58. I am not satisfied that OC 2 has demonstrated that the alleged representations found a basis for an estoppel or that OC 1 engaged in the necessary unconscientious, unjust or oppressive conduct. Accordingly, OC 2 cannot rely on estoppel as a defence to the claim.

59. I will now turn to Mr Sukeda's substantive claim.

Claimed discrepancies

60. Essentially, Mr Sukeda said that categories of expenses had been inappropriately allocated to OC 1 or that specific accounts for works or repairs had been misallocated as between OC 1 and OC 2. He relied on a table he prepared and set out in an affidavit he swore on 9 September 2015 and also on invoices he produced to the tribunal. The expenses relate to the period 2009/2010 to 2014/2015. Mr Sukeda concedes that he may not claim a debt incurred before 5 May 2010, six years before he made his application to the tribunal. In essence he relies on a similar concept as that contained in section 28(3) of the OC Act – that is, lot owners who have not benefitted from repairs, maintenance, works or other expenses ought not to be required to contribute to their cost.

61. OC 2 said that Mr Sukeda has not demonstrated that each claimed expense was in fact paid by OC 1 rather than OC 2. It noted that the OC 2 accounts show allowances have been made for common

BarNet publication information - Date: Tuesday, 12.04.2016 - Publication number: 1688997 - User: anonymous

property upkeep and the like and so it is possible that some of the claims raised by Mr Sukeda were paid by it and not OC 1. It further said that many of the claims were unclear and no debt had been proved as payable.

62. Mr Sukeda bears the burden of proving that the relevant categories or amounts have been incorrectly allocated in the past and the sums he claims should be paid to OC 1 by OC 2 have been proven. The standard of proof is the balance of probabilities.

63. In applying the burden in this case I have been mindful that Mr Sukeda does not have possession of all of the accounts relevant to his claim. He has relied on individual invoices and OC 1's financial statements. In the material he provided to the tribunal and at the hearing, he explained that over a period of about 12 months he had raised all of these matters with the relevant committees and manager seeking clarification. I accept that in effect Mr Sukeda was asking for an audit of the particular expenses to be undertaken.

64. Section 33 of the OC Act requires an owners corporation to keep proper accounts that cover all expenditure of the owners corporation. Section 145(3) requires those records to be held for at least seven years. Section 146 provides that, on request by a lot owner, an owners corporation must make records available for inspection at any reasonable time, free of charge.

65. Ideally, Mr Sukeda would have inspected the accounts of OC 1 and OC 2 prior to bringing the proceeding or before the hearing so he could identify with greater precision which of the amounts he disputes have been paid by which owners corporation. As will become apparent, I am satisfied that, in respect of some expenses, it is clear that they concern OC 2 rather than OC 1. Because the invoices issued mix some of those expenses with expenses which relate to OC 1, on the face of the materials it seems they were all claimed on and paid by OC 1. There has been no suggestion that any of the claimed amounts are unpaid and there was no denial by OC 2 that some of the amounts may have been paid by OC 1.

66. Where Mr Sukeda is a self-represented litigant, I consider it would be unjust to dismiss his claims because he is unable to identify precisely which entity paid the relevant account or for the relevant expense. While it is not the role of the tribunal to undertake an audit for a party, it does have the power to make declarations. [7]

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[7] Section 124 of the *Victorian Civil and Administrative Tribunal Act 1998* (Vic) .

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67. My approach has been to consider whether it is apparent that the relevant expense can be properly allocated to one or other owners corporation. Where that can be done, I have then reviewed the invoices produced by Mr Sukeda. Where I have found that an expense or group of expenses is payable by OC 2, I have made a declaration to that effect. I have then directed that OC 2 allow Mr Sukeda to inspect the records in its possession relevant to the categories discussed and to allow him to make a copy of any he wishes, at his own expense. That inspection will allow Mr Sukeda to determine whether the relevant amount was paid by OC2. If so, no debt in respect of the item is owed. If the amount had not been paid by OC 2, it is owed to OC 1.

68. At the hearing Ms Wilde for OC 2 expressed concern about the implications for GST payments made by OC 2 if orders were made for refunds to OC 1. Ultimately that will be a matter for the parties on completion of the reconciliation process I have described.

69. I have provided for the process described above to be completed within two months and, if the parties are in agreement, for consent orders as to the final amount OC 2 is liable to repay to OC 1 to be filed. I have made provision for the applicant to seek a further hearing before me in the event of a dispute about particular expenses, amounts or orders. My orders are not to be understood as allowing for new or additional claims or for the production of new evidence about the dismissed claims.

70. I will deal with each category of claim individually.

Electricity supply

71. I mentioned earlier that a new electricity meter had been installed so as to allow for electricity bills for the two owners corporations to be issued. Prior to the new meter being installed all electricity costs associated with the two owners corporations were included in one bill and were paid by OC 1.

Mr Sukeda's position

72. Mr Sukeda said that the only electricity supply to the common area of OC 1 is for external lights. He said those lights are on for 11 hours during summer and 13 hours during winter. There are internal building lights in the common area of OC 2 which he said operate 24 hours per day.

73. Mr Sukeda obtained electricity accounts and consulted with the supplier to calculate the usual daytime average period during which electricity is used in both common areas. He calculated an estimated period during which electricity was used in the OC 2 common areas. Having identified that period of time, he calculated the average consumption of electricity for OC 2. While the calculations ultimately show that the total electricity bills could be allocated 44.44% to OC 1 and 55.55% to OC 2, Mr Sukeda proposed that the expense be shared 50/50.

74. For the period 2009/2010 to 2014/2015, Mr Sukeda calculated that the total due to OC 1 was $13,116.78.

OC 2's position

75. OC 2 noted that the common electricity meter was in place from the time the property was first developed in 2006 until separate meters were installed.

76. At the hearing, OC 2 noted that the lights in the common areas inside the apartment building are not on for 24 hours a day: they are triggered by movement and stay on for confined periods. It contended that often overnight the lights would all be off as no one would be in the hallways.

Discussion and decision

77. I accept that Mr Sukeda has obtained information from the electricity supplier and done his best to calculate a reasonable allocation of the expense. However, I am not satisfied that even the

allocation of 50/50 as between OC 1 and OC 2 can be accepted as a reasonable or appropriate allocation of costs. Proof that the allocation proposed by Mr Sukeda is correct would require expert evidence about the total common property electricity services measured by the meter, the comparative costs of those services including the different forms of lighting and evidence about how a reasonable sum can be ascertained over the relevant periods. I am not satisfied that Mr Sukeda's calculations meet those requirements.

78. The claim has not been proved and will be dismissed.

Electrical repairs

Mr Sukeda's position

79. Mr Sukeda questioned the allocation of various invoices for electrical repairs. The invoices in issue totalled $5,755.70 and Mr Sukeda estimated that the amount owing to OC 1 was $1,500. Mr Sukeda noted that a number of the invoices listed works related to the OC 1 and OC 2 common property and were not itemised. He described the failure to obtain itemised and separate invoices as negligence by the manager. Mr Sukeda contended that the invoices ought to be audited to determine OC 1's true liability.

OC 2's position

80. OC 2 noted that Mr Sukeda had not specified which electrical repairs he considered ought to be allocated to OC 2. It further noted that it had obtained a quote for the cost of auditing these and similar items which amounted to between $3,500 and $6,500.

Discussion and decision

81. During the course of the hearing, Mr Sukeda appeared to agree that it was difficult to differentiate the amounts paid and to which owners corporation they related and so he said they could be *'left to one side'*. In any event, taking into account the non-itemised accounts, I am not satisfied that the evidence before me allows me to reach a clear view as to any amounts properly payable by OC 2 rather than OC 1.

82. The claim will be dismissed.

Common area upkeep, garden and road clean

Mr Sukeda's position

83. Mr Sukeda says that the total costs of the common area upkeep for the period March 2009 to March 2015 are $41,862.15 and that $8,115 of that sum relates to OC 2 alone. In his affidavit, Mr Sukeda said that the charges included the costs of OC 2 lot owner's bins being put out and brought back and for the replacement of spot halogen globes and lights. The invoices supplied also showed some cleaning costs and carpet steam cleaning.

84. The invoices also show general maintenance and upkeep of the grounds including mowing and weeding.

OC 2's position

BarNet publication information - Date: Tuesday, 12.04.2016 - Publication number: 1688997 - User: anonymous

85. OC 2 correctly noted that OC 2's budget made provision for common property maintenance and upkeep and so OC 2 may have paid for some of the claimed expenses. OC 2 contended that the claim was too uncertain and would require auditing.

Discussion and decision

86. My review of the invoices produced by Mr Sukeda indicates that monthly caretaking work was undertaken and individually itemised. Some of the work, such as weeding and mowing the gardens and grounds was to the benefit of all members of the two owners corporations and no claim was made about those amounts.

87. The invoices also show that charges were made for taking rubbish bins in and out and maintaining the area in which they are stored. I accept that work benefitted OC 2 lot owners only. I also accept that halogen light globes would have been replaced inside the apartment building. I am satisfied that internal cleaning and carpet cleaning could only have related to OC 2 common property. As the town house owners are not entitled to access OC 2 common property and receive no benefit from the upkeep of the apartment building, they ought not to be required to contribute to its cost.

88. I am satisfied and will declare that expenses related to the following items are payable by OC 2 for the period 5 May 2010 to 31 March 2015:

- Taking rubbish bins in and out;
- Replacement of halogen globes;
- Internal cleaning; and
- Carpet cleaning.

Plumbing

Mr Sukeda's position

89. Mr Sukeda said that several plumbing invoices paid by OC 1 related to work done within the OC 2 common property and that is apparent from the invoices themselves. He claims the sum of $2,497 should be refunded.

OC 2's position

90. As I understand it, OC 2 said this claim was also too uncertain.

Discussion and decision

91. The plumbing related invoices produced by Mr Sukeda and attached to his application make plain on their face that they relate to works in the apartment building. Some are accompanied by a description of the cause of the problems and the work done. Those descriptions show the work was confined to the apartment building and seemed to arise from water leaks from and into the OC 2 common property.

BarNet publication information - Date: Tuesday, 12.04.2016 - Publication number: 1688997 - User: anonymous

92. I am satisfied and will declare that plumbing related expenses identified by Mr Sukeda are payable by OC 2 for the period 5 May 2010 to 31 March 2015.

Window cleaning

Mr Sukeda's position

93. Mr Sukeda said that the $120 paid by OC 1 for window cleaning ought to be refunded as it clearly related to OC 2 and was for the benefit of those lot owners.

OC 2's position

94. As I understand it, OC 2 said this claim was also uncertain.

Discussion and decision

95. The $120 window cleaning invoice produced by Mr Sukeda clearly refers to window cleaning of the east and west entrances – references which can only relate to the apartment building.

96. I am satisfied and will declare that expenses associated with window cleaning are payable by OC 2.

OC 2 fence painting

Mr Sukeda's position

97. There is a fence around the perimeter of the apartment buildings and the associated car parking and garden/store areas. As I understood it, the fence is all of the same construction. In around June 2013, repairs were made to the fence and it was painted. The total cost of the works was $3,993.

98. In the legal advice he obtained, Mr Sukeda was told that the plan of subdivision identified the fence as within private property and so the associated costs ought to have been paid for by the individual lot owners of OC 2. I note that the legal advice also suggested that a survey be undertaken so as to properly identify the common property of both OC 1 and OC 2.

99. Mr Sukeda made enquiries of the surveyor who undertook the original survey work for the subdivision, Mr A Busse of Beveridge Williams. In an email, dated 27 October 2014, Mr Busse told Mr Sukeda that the outside face of the fences were *'located on the lot boundaries i.e. the fences are within the lots.'* In a further email dated 20 October 2015, Mr Busse said that the original intention at the time of subdivision was to have the fences (including the external faces) associated with the apartment building within the lots as opposed to common property. Accordingly, *'the lot boundaries were dimensioned so as to fix them on or close to the external face of the fence keeping the structure of the fence within the lots.'* [8]

OC 2's position

BarNet publication information - Date: Tuesday, 12.04.2016 - Publication number: 1688997 - User: anonymous

[8] Exhibit A2.

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100. OC 2 said that the outside face of the fences forms part of OC 1's common property and so the expense was properly payable by OC 1. Even if the fence did not form part of the common property of OC 1, Mr Sukeda would have to prove it formed part of OC 2's common property as opposed to private property in order to make a successful claim.

101. An email sent on 13 October 2014 from an advisor with the manager, Mr Q Thomas, to Ms Rowe, the person with active responsibility for the two owners corporations was in evidence.[9] That email referred to the plan of subdivision and said in part:

> The fences which are on the boundaries of the lots of the dimensioned areas may be allocated in one of the following positions:
>
> · on the boundary between the lot and common property; or
>
> · within the lot; or
>
> · on common property
>
> depending on the location of the fence as constructed. It would require a land surveyor to determine the particular location.

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[9] Exhibit A3.

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102. The email went on to refer to the *Fencing Act 1968* (Vic) and how liability for maintenance is allocated. Mr Thomas expressed the opinion that the external face was the responsibility of the owners corporation and the inside was the responsibility of the lot owner. Accordingly, he said the owners corporation was responsible for maintenance of the part of the fence which faced common property, including painting.

103. In her evidence, Ms Posen stated that she could see why Mr Sukeda might have had concerns about OC 1's liability to pay for the fence painting but she said the committee's decision to pay the costs had relied on legal advice. She also noted that the visual presentation of the whole property was affected by the colour the fences were painted – she regarded consistency as preferable.

Discussion and decision

104. I did not have an expert report or other oral evidence from a land surveyor as to how to properly understand the plan of subdivision or as to the placement of the fences. I accept Mr Busse may well have been correct as to the original intention but the issue seems to turn on whether the fences were in fact built within the lots. While I am unaware of Mr Thomas's qualifications, I accept that he has encapsulated the range of options.

105. In the absence of definitive evidence about the precise construction of the fences and how that corresponds to the plan of subdivision, I cannot be satisfied that the fences fall within the lots. The material before me does not indicate that OC 2 holds common property around the perimeter of the fences and the adjoining footpath. It appears more probable than not that, if the fences are not built within the lots, they are located on OC 1 common property. In those circumstances, I cannot conclude that the liability for external repairs and painting falls on OC 2.

106. The claim has not been proved and will be dismissed.

Fire protection and extinguisher service

Mr Sukeda's position

107. Mr Sukeda produced a series of invoices which represent servicing of fire extinguishers and inspections which address access to and from the apartment building. He claims the sum of $1,972.76 is due to OC 1.

OC 2's position

108. As I understand it, OC 2 said this claim was also uncertain.

Discussion and decision

109. Given the invoices concern fire extinguishers and assessment of risk in case of emergency, it is apparent that the invoices relate to the apartment building. My review did not reveal any reference to emergency access or plans in respect of the townhouses or the whole subdivision. In those circumstances, I am satisfied that the invoices relate to costs payable by OC 2.

110. I am satisfied and will declare that expenses associated with fire protection and extinguisher services are payable by OC 2.

Overdraft fees

Mr Sukeda's position

111. Mr Sukeda claims the sum of $659.30 in respect of overdraft fees. He said that, because invoices and expenses had been misallocated between OC 1 and OC 2, any overdraft fees which had been incurred on OC 1's account arose from there being insufficient funds due to the misallocation. No statements of account were included in the materials filed.

OC 2's position

112. As I understand it, OC 2 said this claim was also uncertain.

Discussion and decision

113. While I can understand the rationale for the claim, I am not satisfied that the material before me sufficiently allows me to identify on which account the fees were incurred and whether they relate sufficiently to the other claims Mr Sukeda makes. In effect, in order to find the claim proved a

BarNet publication information - Date: Tuesday, 12.04.2016 - Publication number: 1688997 - User: anonymous

reconstruction of account would be required to understand which payments led to the individual overdraft fees. That goes well beyond the checking I have allowed for in respect of individual expenses.

114. The claim has not been proved and will be dismissed.

Insurance endorsement and claims excess

Mr Sukeda's position

115. At the hearing it appeared that Mr Sukeda objected to OC 1 being required to pay all insurance premiums.

116. In his affidavit, Mr Sukeda complained that insurance excess charges were being paid in respect of claims on OC 1's insurance without regard for whether the losses stemmed from private or common property. He suggested that there had been a failure to make proper enquiries of claimants.

OC 2's position

117. OC 2 said that, as OC 1 is the overarching owners corporation, it is required to hold insurance in respect of the common property of both OC 1 and OC 2. It said that it is a statutory requirement for an owners corporation to hold reinstatement and replacement insurance and that is held by OC 1. OC 2 said that, under the Subdivision Act, OC 1 is the legal owner of all of the common property and so it is the entity which is the responsible for holding insurance. OC 2 said that, in those circumstances only OC 1 could raise a levy in respect of insurance premiums.

118. As to the payment of excess amounts on claims, OC 2 said that the insured is required to pay the excess on claims and there is no power under the OC Act for such amounts to be passed onto OC 2.

Discussion and decision

119. The statutory provisions relevant to insurance are as follows:

- Section 4 of the OC Act says that one of the functions of an owners corporation is to take out, maintain and pay premiums on insurance required or permitted under the OC Act or any other act. As noted earlier, by section 23 an owners corporation has the power to levy fees to cover a range of expenses including insurance;

- Section 27A of the Subdivision Act says that, if a plan of subdivision contains common property, it must provide for one or more owners corporations. Sections 27B and 27C of the Subdivision Act have the effect that, if an owners corporation is not a limited owners corporation, it is by definition an unlimited owners corporation. The plan of subdivision is required to state whether the owners corporation is limited or unlimited. The plans here show OC 1 is an unlimited owners corporation and OC 2 is a limited owners corporation;

- Section 30 of the Subdivision Act says that any common property affected by an unlimited owners corporation vests in the owners for the time being of the lots affected by that

owners corporation. In the case of common property affected by a limited owners corporation, where there is an unlimited owners corporation, that common property also vests in the owners for the time being of the lots affected by the unlimited owners corporation;

- Section 56 of the OC Act says that an owners corporation must be taken to have an insurable interest in the land affected by an owners corporation;

- Section 59 of the OC Act requires an owners corporation to take out reinstatement and replacement insurance for all buildings on the common property and section 60 requires an owners corporation to take out public liability insurance in respect of the common property; and

- Section 64 of the OC Act says that an owners corporation is not required to take out insurance under Part 3, Division 6 of the OC Act if the land affected by the owners corporation is affected by another owners corporation which holds the required insurance.

120. In the circumstances of this case, these provisions mean that:

- The common property held by OC 2 vested in the then members of OC 1;

- OC 1 has an insurable interest in the common property of OC 2;

- In order to comply with the obligations to insure set out in Part 3, Division 6 of the OC Act, OC 1 was required to hold reinstatement and replacement insurance for any buildings on OC 1 and OC 2's common property and public liability insurance on OC 1 and OC 2's common property;

- In order to meet the insurance premiums, OC 1 was entitled to set annual fees which included the cost of those premiums; and

- When recourse was had to the insurance, as the insured, OC 1 was required to pay the relevant excess.

121. OC 2 correctly noted that it would be open to OC 2 to pass a resolution agreeing to contribute to some of the insurance premiums in addition to those already paid by lot owners via the fees payable to OC 1.

122. The question of whether insurance excess amounts are being paid by OC 1 when in fact they ought to be paid by lot owners is a separate question which concerns whether claims are being made on the OC 1 insurance policy which ought to be made under the lot owners' own policy. There is insufficient evidence before me to determine whether that has occurred and if so what the inappropriate excess amount is.

123. The claims relating to insurance have not been proved and will be dismissed.

Management fees

Mr Sukeda's position

124. Mr Sukeda said that an increase in the management fees for OC 1 had been negotiated with the Chairperson and committee members of OC 1 who are also members of OC 2. He said that the fees are usually based on an amount per lot but contended that the amount ought to reflect the work required of the manager to address that particular owners corporation's needs. He suggested that the level of management for OC 1 would be significantly less than that required by OC 2. He complained that the increase had not been explained and details of the work done had not been provided by the manager. He did not know if the OC 2 fees rose or fell when the OC 1 fees were increased.

OC 2's position

125. I understand OC 2's position is that the manager was appointed at the negotiated rate by vote of the lot owners of OC 1 and so this is not a matter the tribunal can consider.

126. Ms Rowe noted that the process for the appointment of the manager was extensive and involved a tender. That was the case for both OC 1 and OC 2. She also commented that, as OC 1 has more lot owners than OC 2, the former requires more time and work in respect of matters such as the issuing of and management of fee notices and circulating materials including in respect of annual general meetings and the like.

127. Ms Posen did not agree with the proposition that the management fees incurred would arise more often in respect of the apartment lots than the townhouse lots. Having said that she properly conceded that she did not know enough about how the costs were allocated and so could not have a clear opinion on the matter.

Discussion and decision

128. I accept the information provided as to the process adopted for appointment of the manager and the negotiations for fees. I accept Ms Rowe's submissions in respect of the comparative work involved in managing the formal requirements for OC 1 as compared to OC 2. Mr Sukeda might be correct to say that OC 2 residents might require more of the manager as common property issues may more often arise for them.

129. In the absence of any evidence that the committee members acted other than in accordance with their duty under section 117 of the OC Act to act honestly and in good faith and to exercise due care and diligence or that the decision of OC 1 was not properly made, these variables of work do not disclose a basis on which I could make any finding in respect of the appropriateness or otherwise of the management fees paid to the manager.

130. The claim has not been proved and will be dismissed.

The claim against the manager

131. As noted earlier, Mr Sukeda complains that the manager failed to properly allocate the invoices and to make proper enquiries before presenting accounts to the committee for approval. He also complained that the manager had not been co-operative or responsive to his questions and concerns.

132. Ms Rowe for the manager, said, since she had been in the role, she had always acted in accordance with the OC Act and on the directions of the committees and the owners corporations. While she

BarNet publication information - Date: Tuesday, 12.04.2016 - Publication number: 1688997 - User: anonymous

accepted that small errors had been made, they had been rectified when raised. She referred to the installation of the separate electricity meter and changes made to charges in relation to the collection of rubbish bins.

133. Ms Rowe stated she had always responded promptly to enquiries from Mr Sukeda. She said that Mr Sukeda had sent around 100 emails in the last two years and she had responded within 48 hours. She noted the expense arising from dealing with so many enquiries.

134. As no specific order has been sought against the manager and all other claims have been considered and addressed as between OC 1 and OC 2, I do not consider it necessary or appropriate for me to make any findings in respect of the conduct of the manager. Where no findings have been made it is appropriate for that part of the proceeding to be struck out rather than dismissed. I will so order.

The roles and functions of the two OCs

135. Mr Sukeda has asked the tribunal to define the roles and functions of each of OC 1 and OC 2. It is not the role of the tribunal to undertake a task of that kind. The roles and functions of owners corporations are set out in the OC Act and, where applicable, the Subdivision Act .

136. Mr Sukeda complained that a majority of the lot owners who are members of the two committees own apartments and so he believes they are more likely to make decisions in favour of OC 2.

137. I first note that committee members are required to act honestly and in good faith. They are required to exercise due care and diligence and are prohibited from using their position for direct or indirect gain.[10] Ms Wilde for OC 2 denied any suggestion that the committee members had acted other than in compliance with their duties. There is no evidence before me that the committee acted contrary to these duties.

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[10] Section 117 of the OC Act.

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138. Second, as discussed at the hearing, democracy rules in owners corporations. Provided that committee members are properly elected, the outcome is final for the relevant period. If the townhouse owners do not feel their interests are properly considered, they ought to nominate for membership of the committee for OC 1.

The claims in respect of legal costs

139. Mr Sukeda has sought reimbursement for the costs associated with the legal advice he obtained. OC 2 sought its costs, presumably if it succeeded in having the matter dismissed in whole or in part. While some of the claims will be dismissed, Mr Sukeda has been successful in respect of others. In those circumstances, the usual position under section 109 of the *Victorian Civil and Administrative Tribunal Act 1998* (Vic) that each party bears its own costs applies. No order for costs will be made.

140. Mr Sukeda expressed concern that, because of the way in which the insurance policy is held, OC 2's legal costs associated with this proceeding will be passed on to OC 1. While I am unable to make an order in respect of what, if any claim, ought to be made on an insurance policy, having regard to section 109 of the VCAT Act and my comments above, OC 2's costs have been incurred on its behalf and ought to be paid by it alone. An outcome which meant that OC 1 paid some or all of OC 2's costs in this proceeding would be contrary to my decision on the costs application as set out above.

The application fee

141. Mr Sukeda paid an application fee of $525.60 to commence this proceeding. Section 115B(1) of the VCAT Act empowers the tribunal to make orders regarding reimbursement of the whole or part of an application fee. It may only make such an order after having regard to the nature of an issues involved in the proceeding, the conduct of the parties in respect of the proceeding and the result of the proceeding. Section 115C creates a presumption that a party who has substantially succeeded against another party in respect of proceedings such as these, is entitled to an order for reimbursement of the whole of the fees.

142. There is nothing about the conduct of either party which is relevant to the exercise of my discretion. As discussed above, in this case I have found in favour of Mr Sukeda in respect of some matters and have dismissed or struck out his other claims. OC 2's primary defence relied on estoppel and that has not succeeded. While I am not satisfied that Mr Sukeda substantially succeeded on the whole of his application so that he is entitled to reimbursement of the whole of the fee under section 115C(2), the underlying basis for his application has been proved to be well founded. In the circumstances, I consider it appropriate that, under section 115B(1)(a) of the VCAT Act , the first respondent reimburse Mr Sukeda half of the application fee and I will so order.

A Dea
Member