

## VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

### CIVIL DIVISION

#### OWNERS CORPORATIONS LIST

VCAT REFERENCE NO. OC1289/2018

#### CATCHWORDS

Quantum of fees and special levies awarded in applicant's favour; original orders amended pursuant to s119 of the *Victorian Civil and Administrative Act 1998*; Costs; s109(3)(c); respondent's claim be not tenable in fact or law; indemnity costs; principles; order for costs on a standard basis; fees of the owners corporation manager; manager who appeared for owners corporation found to a professional advocate under s62 of the Act; managers fees costs not disbursements; s111; costs to be assessed by Costs Court.

<b>APPLICANT</b>	Owners Corporation 1 Plan No. SP022776J
<b>RESPONDENT</b>	Flammea Family Pty Ltd ACN: 614 075 811
<b>WHERE HELD</b>	Melbourne
<b>BEFORE</b>	B W Thomas, Member
<b>HEARING TYPE</b>	In Chambers on the papers
<b>DATE OF HEARING</b>	9 December 2019
<b>DATE OF ORDER</b>	30 June 2021
<b>CITATION</b>	Owners Corporation 1 Plan No. SP022776J v Flammea Family Pty Ltd (Owners Corporations) [2021] VCAT 708

#### FINDINGS

1. The Tribunal finds that the Tribunal's Order dated 25 September 2020 contained an error arising from an accidental slip or omission.

#### ORDERS

1. The Tribunal's order is amended so as to state:  
In proceeding OC1289/2018, the Respondent must pay the Applicant:
  - (a) \$30,000.00 in ordinary owners corporation fees from 1 January 2017 to 30 September 2017 to 30 September 2019 plus \$6,057.21 in interest;
  - (b) \$19,200.00 for the 2016 Major Works Levy plus interest of \$5,552.22;
  - (c) \$19,200 for the 2017 Foyer and Front Entrance Works Levy plus interest of \$3,634.85.

2. As at 19 August 2019, the sum payable by the respondent to the applicant was \$70,800.00.
3. The Respondent must now pay the Applicant the sum of \$86,606.76.
4. The Respondent must pay the costs of the Applicant, including the fees of the Applicant's Manager at the rate of \$220.00 per hour including GST and any reserved costs on a standard basis to be assessed by the Costs Court.

BW Thomas

**Member**

## REASONS

### BACKGROUND

1. The Orders further provided that:
  - (a) In event that the parties are in disagreement as to the quantum or interest to be paid to the Applicant, liberty to apply was granted: and
  - (b) Costs were reserved.
2. The following documents have been filed by the parties in response to the Orders:
  - (a) By the OC – Submission on Quantum and Interest Only dated 15 October 2020;
  - (b) By Flammea -Combined Submissions on Quantum and Costs dated 10 March 2021;
  - (c) By the OC - Reply to Combined Submissions on Quantum and Costs dated 19 May 2021.

### THE PARTIES' SUBMISSIONS

#### Quantum and Interest

3. In view of the fact that Flammea has not made any payment pursuant to the Order dated 25 September 2020, the OC submits that consistent with the Final Fee Notice dated 19 August 2019, the quantum of outstanding levies should be increased to \$70,800.
4. The sale of Lot 1 owned by Flammea was settled on 4 May 2020. Penalty interest calculated to that date is \$15,806.76.
5. The final order proposed by the OC is that Flammea must pay to the OC the sum of \$86,606.76 comprising:
  - (a) Ordinary fees to 30 September 2020 in the amount of \$32,400;
  - (b) Special levies in the amount of \$38,400; and
  - (c) Penalty interest on the sum of \$70,800 to 4 May 2020 in the amount of \$15,806.76.
6. Flammea submits that in seeking an increase in the sum payable under the orders of 25 September 2020, the OC is relying on section 119 of the *Victorian Civil and Administrative Act 1998* (the VCAT Act) (the slip rule) which provides:

- (1) The Tribunal may correct an order made by it if the order contains –
  - (a) a clerical mistake; or
  - (b) an error arising from an accidental slip or omission; or
  - (c) a material miscalculation of figures or a material mistake in the description of any person, thing or matter referred to in the order; or
  - (d) a defect of form.
- (2) The correction may be made-
  - (a) On the Tribunal's own initiative; or
  - (b) On the application of a party in accordance with the rules

7. In support of this submission Flammae refers to *Autodesk Inc v Dyson*<sup>1</sup> where, in discussing the slip rule Mason J said –

...; nor is it to be exercised simply because the party seeking a rehearing has failed to present the argument in all its aspects or as well as it might have been put. What must emerge ... is that the Court has apparently proceeded according to some misapprehension of the facts or the relevant law and that this misapprehension cannot be attributed solely to the neglect or default of the party seeking the rehearing.

8. Flammae also referred to *Cosgriff v Housing Guarantee Fund Ltd*<sup>2</sup> where Walker SM said –

The section cannot be used as a substitute for an appeal. It is there to fix a mistakes (sic) that has been made and it must be a mistake such that, had it occurred to me at the time I would not have made it, I would have picked it up and fixed it at once.

9. Flammae submits the question is whether the Tribunal is satisfied that it made a mistake of its own volition, rather than because of an error in the OC's submissions. However, the OC contends that the Tribunal also intended to award the August 2017 levy of \$19,200.00 payable in two equal shares.
10. The primary consideration for the Tribunal is what the party said in their written closing submissions and what material was before the Tribunal when it considered those submissions, not what is said now.
11. At the conclusion of its Closing Submissions dated 23 March 2020, the OC sought the following Orders:

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<sup>1</sup> (No.2) (1993) 176 CLR 300, 302-3.

<sup>2</sup> [2006] VCAT 463 at [6].

- (a) The Respondent is ordered to pay the Applicant \$30,000.00 in ordinary owners corporation fees from 1 January 2017 to 30 September 2017 to 30/9/2019 plus \$6,057.21 in interest.
- (b) The Respondent is ordered to pay to the Applicant \$19,200.00 for the 2016 Major Works Levy plus interest of \$5,552.22.
- (c) The Respondent is ordered to pay the Applicant \$19,200 for the 2017 Foyer and Front Entrance Works Levy plus interest of \$3,634.85.

12. At paragraphs 42 - 46 of my Orders and Reasons dated 25 September 2020, I stated:

42. On 15 November 2017, the solicitors acting for Flammea in the purchase of Lot 1, were provided with a certificate detailing the outstanding fees and special levies relevant to that lot.

43. The Certificate stated that the outstanding fees for Lot 1 included –

- a. \$9,600.00 for standard fees;
- b. \$115.50 for service fees; and
  - i. special levies in the amounts of –
    - \$9,600.00 “Major works levy” due 1/4/2017;
    - \$9,600.00 “Major works levy” due 1/7/17;
    - \$4,472.85 interest on arrears to 11/7/17;
    - \$4,625.25 interest on arrears to 4/10/17;
    - \$323.20 interest on arrears to 13/11/17;
    - \$9,600.00 “foyer and front entrance work levy” due 1/4/18; and
    - \$9,600.00 “foyer and front entrance work levy” due 30/6/18.

44. An email from Flammea’s solicitors to the OC dated 13 November 2017, stated –

Our client has instructed however that it has it has experienced a short fall in available funds. ...the vendor (may) be agreeable to settlement today in any event, the terms of which will include our client assuming liability for the outstanding owners corporation fees and any applicable interest.

As such, we are requesting that the owners corporation agree to receiving outstanding fees plus any applicable interest by no later than 15 December 2017. (emphasis added)

45. A further email from Flammea's solicitors to the OC dated 13 November 2017 stated –

... the minimum payment the Owners Corporation can expect to receive on the Payment Date is \$49,573.30 which takes into account all special works levies owing and to date be paid.

For the avoidance of doubt, we are instructed that our client acknowledges that it will assume liability for payment of any interest that accrues up until the Payment Date.

46. An email from Mr Louey to Flammea's solicitors of the same date stated –

As discussed, we can confirm that the Owners Corporation accepts the proposal outlined in your email and accordingly looks forward to receiving all outstanding owners Corporation fees and applicable interest by no later than 15 December 2017.

We confirm that the initiation of legal proceedings to recover the debt will remain on hold until after 15 December 2017.

13. I accepted this evidence and at paragraph 208 I stated:

Without any explanation, Flammea failed to make any payment. On 18 June 2018, the OC commenced proceeding OC1289/2018 to recover the outstanding fees and interest.

14. By Orders dated 25 September 2020, (**the Orders**) the Respondent (**Flammea**) was ordered to pay the Applicant (**the OC**):

- (a) Quarterly fee levies from 1 January 2017 to 30 September 2019 in the sum of \$30,000;
- (b) Major works levies in the sum of \$19,200; and
- (c) Interest on the sum of \$49,200 pursuant to section 29 of the *Owners Corporation Act 2006*, to be calculated by the Applicant.

15. The Orders omitted to state that in addition Flammea was required to pay the foyer and front entrance work levies of \$19,200.00.

16. I find that paragraph 1 of the Tribunal's Order dated 25 September 2020 contained an error arising from an accidental slip or omission in that it should have reflected the orders sought by the OC as detailed in paragraph 11 above.

17. Therefore, pursuant to s119 of the *Victorian Civil and Administrative Act 1998 (the Act)* I will order that the Orders be amended to state that:
  - (a) Flammea must pay the foyer and front entrance levies of \$19,200.00;
  - (b) As at 19 August 2019, the sum payable by Flammea to the OC was \$70,800.00.
18. I accept the OC's submission that in view of Flammea's failure to make any payment to the OC since the Tribunal's Orders of 25 September 2020, the sum payable by Flammea to 4 May 2020, the date of settlement of the sale of Lot 1, is now \$86,606, including interest of \$15,787.40.

### Costs

19. Other than references to "fairness", neither party in their Submissions addressed section 109 of the Act and in particular, the factors in 109(3).
20. The explanation may be that Flammea submitted its Submission on Quantum and Costs first, and the OC's Submission was in reply. The other explanation may be that in view of my findings against Mr Flammea, both parties assumed I would make a costs order in favour of the OC.
21. Section 103(3) provides that;

The Tribunal may make an order (for costs) only if it is satisfied that it is fair to do so, having regard to –

...

- (c) the relative strengths of the claims made by each of the parties, including whether a party has made a claim that has no tenable basis in fact or in law;
22. I find that:
  - (a) Without explanation Mr Flammea failed to make payment of the sum of \$49,575.00 by 15 December 2017 in accordance with the undertaking given by his solicitors in the email dated 13 December 2017;
  - (b) In consideration of that undertaking, the OC held off taking proceedings for the recovery of that sum;
  - (c) The OC was therefore obliged to commence proceedings to recover the outstanding fees and interest which it did on 18 June 2018;
  - (d) Mr Flammea's continual failure to pay the undisputed fees, and his admission in cross examination that at the conclusion of the Directions Hearing on 28 August 2019 he was aware the payment of the

undisputed fees would not prejudice his entitlement to contest the special levies, is evidence of simply a strategy to delay paying the sum he had agreed to pay, if at all;

- (e) In not having paid fees or levies since 15 December 2017 whilst the OC has expended the 2016 special levies to upgrade the lift and foyer and painting, Mr Flammea has benefited from a windfall gain.

23. The learned author in *Pizer's Annotated VCAT Act*<sup>3</sup> states that:

... the VCAT is to consider the relative strengths of the claims of the parties, including whether a party has advanced an untenable claim.

24. In failing to comply with its solicitor's undertaking given on 15 December 2017 to make payment of the sum of \$49,575.00, which comprised undisputed fees and special levies, and then filing a counterclaim in reply to the OC's proceeding to recover those fees and levies, I consider that Flammea did not have a tenable claim in fact or in law.

25. Therefore, I find that under section 109(3)(c) Flammea's claim in proceeding OC2260/2018 had no tenable basis in fact or in law, and it is fair to award costs in favour of the OC.

### Indemnity Costs

26. The OC seeks an order that Flammea pay costs on an indemnity basis fixed at \$31,811.00 comprising:

- (a) \$1,500.00 including the application fee, incurred to LFS Legal;
- (b) \$9,604.57 incurred to McKean Park;
- (c) \$18,150.00 in Owners Corporation fees; and
- (d) \$2,556.43 in transcription fees.

27. *Pizer* notes that costs allowed on an indemnity basis "are all costs except insofar as they are of an unreasonable amount or have been unreasonably incurred".<sup>4</sup>

28. In respect of indemnity costs, *Pizer* notes that:

- Such an order will only be made in the "most exceptional circumstances" – "for instance where a party has engaged in contumelious or high-handed conduct";<sup>5</sup> and

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<sup>3</sup> (6<sup>th</sup> Edition) at [109.200].

<sup>4</sup> *Southage v Vescovi* [2014] VSC 176 at [41].

<sup>5</sup> *Seachange Management Pty Ltd v Bevnol Constructions & Developments Pty Ltd* [2011] VCAT 1406 at [13].



- VCAT will not award costs on a full indemnity basis “unless the conduct of the culpable party has been so extreme as to be quite vexatious or bloody-minded”.<sup>6</sup>

29. Whilst I have found that Flammea did not have a tenable claim in fact or in law, I do not consider that the conduct Mr Flammea in this proceeding as the director of Flammea, has been high-handed, vexatious, and bloody-minded, to the extent that an order or the payment of the OCs costs on an indemnity basis is justified.

### **The fees of Binks & Associates Pty Ltd**

30. The OC has incurred costs to the Manager, Binks & Associates Pty Ltd, at the rate of \$220.00 per hour including GST in regard to:
- (a) Preparation for and representation of the OC at the Compulsory Conference on 10 December 2018;
  - (b) Representation of the OC at the Directions Hearings on 24 April, 28 August, and 4 December 2019;
  - (c) Drafting the OC’s Points of Defence to Counterclaim dated 21 October 2019 (23 pages);
  - (d) Preparation for and representation of the OC at the hearing on 9 and 10 December 2019;
  - (e) Drafting the OC’s Closing Submissions dated 23 March 2020 (43 pages); and
  - (f) Drafting the OC’s Submissions on Quantum and Interest and Costs.
31. Section 62 of the Act (Representation of parties) provides (insofar as it is relevant):
- (1) In any proceeding a party-
    - (a) may be represented by a professional advocate if –
      - (i) ...; or
      - (ii) another party to the proceeding is a professional advocate; or
      - (iii) ...
  - (8) In this section –

***Professional advocate*** means -

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<sup>6</sup> *Melbourne CC v Upmark Pty Ltd* [2009] VCAT 11 at [16].

- (a) ... a person who is or has been a legal practitioner; or
- (b) ... a person who is or has been an articulated clerk or law clerk in Australia; or
- (c) a person who holds a degree, diploma or other qualification in law granted or conferred in Australia; or
- (d) a person who, in the opinion of the Tribunal, has had substantial experience as an advocate in proceedings of a similar nature to the proceeding before the Tribunal –

other than a person who is in a class of persons disqualified by the rules from being a professional advocate.

32. Flammea was represented by Mr J Silver of counsel. Mr Julian Louey, an employee of the Manager, appeared on behalf of the OC and drafted the documentation referred to above. I am satisfied that Mr Louey “holds a degree, diploma or other qualification in law” and is a professional advocate as defined by section 62 (8).

33. Where a party is represented by a professional advocate, there is authority to suggest that the fees of the professional advocate can be claimed as costs. In *Aussie Invest Corporation Pty Ltd v Hobsons Bay CC*<sup>7</sup> Justice Morris P said:

In *Re Cardinia Shire Council v Stoilkovic* (2002) 12 VPR 61 the Tribunal concluded, albeit without the benefit of argument, that “costs” in section 109 extended to the costs of non-lawyers who were “professional advocates” under section 62 of the Act. In my opinion, this conclusion must be regarded as correct having regard to the constitution, purpose, and practices of the Tribunal.

34. In *Owners Corporation No. 711686W v Sceam Construction Pty Ltd*,<sup>8</sup> Member Edquist at [80] said:

Although the correctness of this opinion is questioned by the learned author of *Pizer’s Annotated VCAT Act* (Sixth Edition) at p595, I am, respectfully, disposed to agree with Justice Morris for the reason that his conclusion that “costs” includes the fees of non-lawyers who are “professional advocates” is this result is consistent with the rights of certain parties to be represented by a professional advocate and also with the power of the Tribunal to grant leave to any party to be represented by a professional advocate.

35. I respectfully agree with Member Edquist, and I find that Mr Louey was a professional advocate in the sense recognised by section 62 the Act.

36. Accordingly, I find that the fees of Binks & Associates charged to the OC are costs, and not a disbursement.

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<sup>7</sup> [2004] VCAT 2188 at [11].

<sup>8</sup> ([2021] VCAT 390.

### **The amount of costs**

37. Flammea submits that the detail of costs and disbursements submitted by the OC is insufficient to allow a fixed sum for the following reasons:
- (a) The costs and disbursements incurred to August 2019 are intermingled with related proceedings OC2132 and OC1520;
  - (b) The legal costs claimed are based on lump sum bills in proceedings against multiple owners, not just Flammea, with no ability to ascertain time spent on particular tasks or on which matters;
  - (c) The OCs fees include duplicate amounts appearing in initial and follow-up invoices with no indication whether certain costs were paid from trust when requested;
  - (d) There is no breakdown of the OC Manager's time and on which proceedings time was spent or what the Manager was doing;
  - (e) It is arguable that some costs, particularly for transcripts, were unnecessarily or unreasonably incurred;
  - (f) Certain matters in Flammea's proceeding including the validity of levies, remain active under consideration in Proceedings OC 2132 and OC1520. Any award for costs should be limited to the extent that costs incurred in this proceeding including time spent on submissions, are relevant to the related proceedings; and
  - (g) The grounds on which the OC succeeded were raised in October 2019, and it would not be fair to award costs incurred before that time when the proceeding revolved around different contentions. If the successful grounds were articulated earlier, Flammea could have received advice on the issue of standing far earlier and considered the merits. If the Tribunal deems it is "fair" to award costs, costs should only be payable from October 2019.
38. Flammea therefore submits that the Costs Court is the appropriate forum to determine the issue of costs.
39. In reply the OC submits that referral to the Costs Court:
- (a) will necessitate retaining a solicitor with extensive briefing work in preparation for the assessment, and would involve the Manager's been charged to the OC;
  - (b) would be an unfair outcome for the OC as, in a deliberate effort to save on costs the OC has been represented by its manager for the majority of the proceedings;

- (c) runs counter to the Tribunal's mantra of 'fair, efficient and affordable justice', and more specifically the requirement in section 165 of the *Owners Corporation Act 2006* that it makes orders it "considers fair";
- (d) is unnecessary because under sections 109(2) and 111(a) of the Act, the Tribunal has power to fix the quantum of costs, and from its knowledge of this proceeding and understanding of owners corporations and management fee structures, is uniquely suited to do so; and
- (e) as there is no applicable scale of costs for owners corporation managers, is not suited to that Court.
40. As to the amount of costs, section 111 of the Act provides:  
If the Tribunal makes an order for costs, the Tribunal-
- (a) may fix the amount of costs itself; or
- (b) may order that costs be assessed, settled, taxed, or reviewed by the Costs Court.
41. As to the Tribunal's discretion under section 111, *Pfizer* makes the following observations:
- fixing costs "has certain dangers" and is an approach that should only be adopted "with some reluctance";<sup>9</sup>
  - it is only if the amount of costs is small or certain that VCAT will ordinarily determine the amount itself;<sup>10</sup> and
  - where the amount of costs is not small or certain, VCAT's usual practice is to order that they be assessed by the Costs Court.<sup>11</sup>
42. In view of the quantum claimed by the OC as indemnity costs and the issues raised by Flammea as to items comprising those costs, I will order that those costs, including the Manager's fees of be assessed by the Costs Court.
43. The OC submits that if the Tribunal is of the view that referral to the Costs Court is appropriate, the Managers fees be assessed at the rate of \$220 per hour including GST.
44. Having found that the Manager's fees are legal fees, I will so order.

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<sup>9</sup> *Hobsons Bay CC v Haouli* [200] VCAT 433 at [30].

<sup>10</sup> *Metricon Homes Pty Ltd v Sawyer* [2013] VSC 518 at [13].

<sup>11</sup> *Ibid.*

**Member B W Thomas**