VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

OWNERS CORPORATIONS LIST VCAT REFERENCE NO. OC2699/2020

CATCHWORDS

Fee recovery – whether authority delegated to the committee to set fees and levies – sufficiency of applicant's evidence – *Owners Corporations Act 2006* s 11.

APPLICANT	Owners Corporation PS419696X
RESPONDENT	SCJAR Mandorla Pty Ltd ACN: 126 374 641
WHERE HELD	Melbourne
BEFORE	Senior Member A. Vassie
HEARING TYPE	Hearing
DATE OF HEARING	17 June 2021
DATE OF ORDER	27 July 2021
DATE OF REASONS	27 July 2021
CITATION	Owners Corporation PS419696X v SCJAR Mandorla Pty Ltd (Owners Corporations) [2021] VCAT 795

ORDER

The respondent must pay the applicant $980.04 for fees and interest to the date of the final fee notice, 3 July 2020, plus interest of $93.84 to the date of the hearing, plus costs of $500.00 (including $93.30 the filing fee) a total of $1,573.88.

A. Vassie
Senior Member

APPEARANCES:

For Applicant	Mr. S. Merrylees, solicitor
For Respondents	Mr. S. Mandorla, director

REASONS

1. The applicant owners corporation has brought this fee recovery proceeding against an owner of a lot in the relevant subdivision, the respondent SCJAR Mandorla Pty Ltd. By its director Salvatore Mandorla the respondent has defended the proceeding.

2. The application that the owners corporation had filed had claimed $1,710.25 as fees owing. By the time that I heard the application on 17 June 2021 the amount claimed had become $980.04 plus interest and costs. At the hearing Mr Merrylees, solicitor represented the applicant and Mr Mandorla represented his company, the respondent. I reserved my decision but made directions I shall refer to below.

3. For the purpose of the hearing the owners corporation's manager had filed a summary of proofs, verified by one of the manager's employees and by an independent accountant, each by statutory declaration made on 5 February 2021. The summary adequately proved the service upon the respondent of a fee notice on 3 June 2020, of a final fee notice on 3 July 2020, and of a copy of the application on 12 January 2021. There was no dispute about those matters. The fees claimed in the final fee notice were $9,511.16. According to a table that was attached to the final fee notice those fees included a deficit levy of $1,009.43.

4. The proceeding was first listed for hearing on 27 April 2021. Before that date Mr Mandorla had filed a copy of a letter from his company to the manager that complained about the deficit levy of $1,009.43 and also asserted that the manager had not given any explanation of the amount claimed in the application, $1,710.25, despite having been asked for an explanation. At the hearing on 27 April 2021 the presiding Member adjourned the proceeding but directed the applicant to file and serve upon the respondent "written submissions about the deficit levy the subject of the application."

5. The applicant's solicitors filed its written submission dated 21 May 2021. The submission was directed to two arguments that Mr Mandorla evidently had made at the hearing on 27 April 2021. One argument was that the deficit levy, having been levied by the owners corporation's committee, was invalid because the committee did not have power to levy extraordinary fees. Mr Mandorla repeated that argument at the hearing before me.

6. The applicant's submission about the deficit levy was that at an annual general meeting on 21 August 2018 the owners corporation's members voted to delegate to the committee the power to raise the levy. Attached to the submission was a copy of the minutes of that general meeting. There is nothing in the minutes to show that any such delegation was made. There was a heading "Committee Membership and Authority to Committee" but nothing

beneath the heading to indicate exactly what was delegated. Nevertheless, for a reason different from the reason in the submission, I consider that the committee did have a power delegated to it to make the levy in question. The reason is that s 11(5) of the *Owners Corporations Act 2006* ("the Act") operated to give the committee that delegated power.

7. So far as it is presently relevant, s 11 provides:

> **11 Management of owners corporation and power to delegate**
>
> (1) An owners corporation is to be managed by or under the direction of the lot owners.
>
> (2) Subject to subsection (3), an owners corporation may, by instrument or by resolution at a general meeting, delegate any power or function of the owners corporation to—
>
> (a) the committee of the owners corporation;
>
> (b) the manager of the owners corporation;
>
> (c) a lot owner;
>
> (d) the chairperson of the owners corporation;
>
> (e) the secretary of the owners corporation;
>
> (f) an employee of the owners corporation.
>
> (3) An owners corporation must not delegate any of the following powers or functions under subsection (2)—
>
> (a) a power or function that requires a unanimous resolution, a special resolution or a resolution at a general meeting.
>
> (b) the power of delegating under that subsection.
>
> **Note**
>
> See section 82.
>
> (4) A resolution under subsection (2) is only effective if it is recorded in the minutes of the general meeting.
>
> (5) If no delegation is in force under subsection (2)(a), the committee of the owners corporation is delegated all powers and functions that may be exercised by the owners corporation, except for—
>
> (a) those powers and functions set out in subsection (3); and
>
> (b) those matters which must be determined at a general meeting under section 82.

8. I have rejected the submission that a delegation was in force under s 11(2)(a) of the Act. It follows that s 11(5) effected a delegation to the committee of the owners corporation's powers and functions, unless one of the two exceptions expressed in s 11(5) applied.

9. The first exception is where a power or function is involved that required a unanimous resolution, a special resolution or a resolution at a general meeting. The respondent in a written submission asserted that a special resolution was required because s 44 of the Act permits money to be paid out of a maintenance fund only if the owners corporation by special resolution approves the payment. But the respondent did not demonstrate that the owners corporation's claim for fees had anything to do with a payment out of its maintenance fund; it was claiming for a sum payable to it, not for something that involved a payment out of a maintenance fund or any fund it had.

10. The second exception is where the owners corporation, by an ordinary resolution at a general meeting, has determined that a matter or type of matter may be determined only by another ordinary resolution at a general meeting; s 82 of the Act. There has been no evidence or suggestion that that state of affairs has arisen in this case.

11. As neither of those exceptions applies, by virtue of s 11(5) a delegation to the committee existed, empowering it to strike a levy or set fees.

12. The other argument to which the applicant's written submission replied was that the owners corporation acted in bad faith, contrary to its obligation under s 5 of the Act to act in good faith; it acted in bad faith by striking the levy when it could have used funds in hand, $687,418.00. Mr Mandorla did not repeat this argument during the hearing before me. The applicant's submission had an attachment which was a circular letter to all lot owners explaining why the owners corporation needed to raise funds to defend itself in litigation brought by persons named Goh and to pursue an appeal to the Building Appeals Board. There was no evidence that gave any support at all to the respondent's argument of bad faith.

13. That argument about bad faith was one of a number of features of the case that confirmed an impression that this dispute is about more than a relatively small claim for fees. The respondent's written submissions strayed into complaints about how the maintenance fund was being treated, whether amounts paid to a cleaning contractor were excessive, and the size of the legal costs that were being incurred. If Mr Mandorla's company wishes to make applications of its own to the Tribunal about those matters it may, but this proceeding is not the appropriate vehicle for them.

14. At the hearing before me Mr Mandorla raised another defence to the application. He alleged that his company had paid the amount of $980.04 claimed to be outstanding. That defence led me to examine the final fee

notice. It seemed to include nothing that showed how that sum was calculated. Mr Merrylees said that the final page of the summary of proofs included the

calculation. The hearing was being conducted by teleconference so it was difficult to know whether I and Mr Merrylees were, quite literally, on the same page. The filed copy of the summary of proofs did not seem to include the page he was telling me about.

15. So I reserved my decision but made these directions:

    (a) by 1 July 2021 the applicant was to file what it says was the final page of the summary of proofs which explains the calculation of $980.04;

    (b) by 8 July 2021 the respondent was to file and serve any document on which it relies to show that it has paid the amount of $980.04 in full or in part and (if it was the fact) that the respondent had earmarked the payment to go towards payment of the $980.04; and

    (c) I would make a decision on the papers after 8 July 2021.

16. Direction (b) described in the previous paragraph was made to accord with principle that unless a debtor with a running account appropriates a particular payment to a particular debt the creditor is entitled to appropriate the payment to the oldest debt or to any other debt.

17. Each party complied with those directions by filing a document. Neither was of any assistance. The page that I thought was missing from the summary of proofs turned out to be an attachment to the final fee notice of which I had been aware. That page did not show any calculation of $980.04 or throw any light upon how that figure may have been arrived at. Mr Mandorla's letter to VCAT dated 25 June 2021 made no mention of any payment that corresponded to $980.04; it stated only (on the matter of payments) that the respondent had made payments on 1 July 2020 and 2 March 2021 respectively for amounts that satisfied what was claimed in a fee notice for September 2020 for an administrative levy and for a maintenance levy, but gave no evidence of appropriation of those payments to any particular debt. Mr Merrylees endeavoured to explain to me orally how the calculation of $980.04 was made. I could not follow the explanation. I think that both the respondent and the Tribunal were entitled to expect better by way of an explanation. It is one thing to ask the Tribunal to rely, in an undefended proceeding, upon a bare summary of proofs. That is not adequate in a proceeding when the applicant knows, well before the hearing date, that the respondent will be defending the proceeding and has been asking for an explanation of the figures in the summary.

18. I have had to consider whether I should dismiss the proceeding because of the lack of a proper explanation for the calculation of the amount claimed, or should allow the claim because there is evidence to support it even though the explanation is lacking.

19. The summary of proofs was verified not only by a person from the manager's office but also by an independent accountant, whose statutory declaration dated 5 February 2021, attached to the summary of proofs, was in the following terms:

> I, Michael Jensen, of 241 Bridge Road, Richmond, Chartered Accountant, make the following statutory declaration under the **Oaths and Affirmations Act 2018**:
>
> 1. I was engaged by the applicant in this proceeding, Owners Corporation PS41969tX, to calculate the amount of various levies owing and interest per lot entitlement, specifically excluding special levies and to check for any errors in calculating same by the then Owners Corporation Manager's software system.
> 2. The contents of the Summary of Proofs, in so far as the Orders sought are concerned and the annexed Amended Financial Figures are concerned, are true and correct.
> 3. This document was witnessed by audio-visual link in accordance with the *COVID-19 Omnibus (Emergency Measures) (Electronic Signing and Witnessing) Regulations 2020*.
>
> I declare that the contents of this statutory declaration are true and correct and I make it knowing that making a statutory declaration that I know to be untrue is an offence.

The "annexed Amended Financial Figures" were on the page to which I referred in paragraph 17 above and which meant little to me.

20. I have decided to accept that evidence at its face value. The respondent has not made out any defence to the claim. Therefore I make an order that the respondent must pay the applicant $980.04 for levies and interest to the date of the final fee notice given on 3 July 2020.

21. Despite my criticisms of the way in which the applicant's case has been presented I will also accede to the application for interest and costs. Mr Merrylees calculated the interest from the date of the final fee notice to the date of hearing to be $93.84. Because the amount claimed to be owing at the time that the application was filed exceeded $1,700.00 I shall order the respondent to pay costs of $500.00 which include $93.30 as the application fee. It is fair that the contribution towards the costs of the proceeding borne by the respondent is greater than the portion that is borne by other lot owners who have paid their fees.

A. Vassie
Senior Member

27 July 2021