

**VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL**

**CIVIL DIVISION**

**OWNERS CORPORATIONS LIST**

VCATREFERENCE NO. OC451/2021

**CATCHWORDS**

Manager- appointed as 'caretaker' after contract of appointment was terminated- whether an informal re-appointment as manager- whether respondent's conduct amounted to a breach of duties- Owners Corporations Act 2006, ss119, 122(1).

**APPLICANT**

Matthew O'Brien

**RESPONDENT**

Proficient Management Pty Ltd

**WHERE HELD**

Melbourne

**BEFORE**

Senior Member A. Vassie

**HEARING TYPE**

Hearing

**DATE OF HEARING**

4, 5 October 2021

**DATE OF ORDER**

4 November 2021

**DATE OF REASONS**

4 November 2021

**CITATION**

O'Brien v Proficient Management Pty Ltd  
(Owners Corporation) [2021] VCAT 1305

**ORDER**

1. The applicant's application for an order authorising him to prosecute this proceeding on behalf of Owners Corporation 1 Plan No RP005378 is refused.
2. The proceeding is dismissed.

**SENIOR MEMBER A. VASSIE**

**APPEARANCES:**

For Applicant:

In person

For Respondent: Ms V. Afonso, Director

### REASONS

1 In these reasons, section references are to sections of the *Owners Corporations Act 2006*, and “the Act” means that Act.

#### A Dispute about Management

- 2 The applicant Matthew O’Brien is the owner of a lot, in a 4 Lot subdivision in Bacchus Marsh. Owners Corporation 1 Plan No RP005378 affects all the land, including common property, in the subdivision.
- 3 The respondent Proficient Management Pty Ltd (“Proficient”) carries on an Owner’s Corporation management business under the name Ace Body Corporate Management (Geelong). Venessa Afonso is a Director of Proficient.
- 4 One **23 August 2019** the members of the Owners Corporation, including Mr O’Brien, resolved at the Owners Corporation’s general meeting to appoint Proficient as its manager. The Owners Corporation proceeded to execute a contract of appointment of Proficient as manager for a term of 3 years beginning on **4 November 2019**. But on that day, **4 November 2019**, Proficient sent to each lot owner a notice of resignation as manager which was effective 28 days after that date, on **3 December 2019**.
- 5 Proficient maintains that it was re-appointed as manager on **4 December 2019**, that there was a second contract of appointment (executed in 2021) of it as manager, and that it remains the Owners Corporation’s manager. Mr O’Brien maintains that Proficient was never re-appointed as manager and that since **4 December 2019** it has been acting as a mere caretaker until another manager or an administrator is appointed for the Owners Corporation.
- 6 At all material time since **23 August 2019** Ms Afonso has been Proficient’s person who has attended to the Owners Corporation’s day-to-day affairs.
- 7 Mr O’Brien is critical of Ms Afonso’s conduct, whether as a manager or as a caretaker. If she is a manager, he says that VCAT should revoke Proficient’s appointment because of her conduct. He alleges that by holding itself out as manager, Proficient has received moneys to which it was not entitled and which it should pay or repay to the Owners Corporation. He also alleges that Proficient’s negligence when attending to the Owners Corporation’s affairs has caused loss to the Owners Corporation and to him.

8 The present lot owners are:

Lot 1: Arnot Hutcheson

Lot 2: Billy Stone

Lot 3: Susan Slack

Lot 4: Michael O'Brien

Except for Ms Slack, they have been the lot owners at all material times. The previous owner of Lot 3 was Annette Bielecki who sold Lot 3 to Ms Slack by a contract that was completed in **April 2020**.

9 The other Lot owners do not share Mr O'Brien's view, they have nothing but praise for Ms Afonso and want Proficient to be, or remain, the Owners Corporation's manager.

10 By his Points of Claim dated **25 August 2021**, as elaborated upon during the hearing of this proceeding, Mr O'Brien seeks orders along the following lines.

- a) A declaration that Proficient has not been since its resignation and is not now, the manager of the Owners Corporation.
- b) Alternatively, to (a), if Proficient is now the manager,
  - i. An order revoking its appointment as manager, and
  - ii. An order cancelling any contract of appointment between the Owners Corporation and Proficient.
- c) Payment by Proficient to the Owners Corporation of all fees, commissions, and other moneys that it has received as remuneration while purporting to be manager of the Owners Corporation.
- d) Payment to the Owners Corporation of \$100.00 which Proficient wrongly paid out of the Owners Corporation's fund to a fencing contractor.
- e) A direction to Proficient to deliver up all the Owners Corporation's funds and records.
- f) An order permitting him access to the Owners Corporation's records.
- g) Damages equal to the amount he would be able to contribute to any award of compensation to Ms Slack against the Owners

Corporation as a result of Ms Afonso having signed an incorrect Owners Corporation certificate given for the purpose of a sale of Lot 3.

### **Application for an Authorising Order**

- 11 The orders numbers (b)(ii), (c), (d) and (e) in paragraph 10 are ones that seek to enforce rights that the Owners Corporation, not Mr O'Brien personally, may have against Proficient. The Owners Corporation could bring a proceeding of its own to enforce those rights if it was authorised by a special resolution to do so (s 18(1)). There has been no such special resolution. No Lot owner except Mr O'Brien would vote in favour of a motion for such a special resolution.
- 12 The Act, however, empowers a Lot owner to apply "on behalf of an Owners Corporation" to resolve an Owners Corporation dispute (s163(1A)) and empowers VCAT, upon such an application, to make an order authorising that Lot owner to prosecute specified proceedings on behalf of the Owners Corporation (s 165(1)(ba)). When I drew Mr O'Brien's attention to these matters at the beginning of the hearing, he told me that he wished to make the application for the authorising order.
- 13 So, when considering his claims for those final orders, I must first decide whether to make the authorising order, and if I do make it, then decide whether to make the final order.

### **A Manager's Duties**

- 14 Section 122(1) of the Act provides;  
**122 Duties of manager**
  - 1) A manager-
    - a) must act honestly and in good faith in the performance of the manager's functions; and
    - b) must exercise due care and diligence in the performance of the manager's functions; and
    - c) must not make improper use of the manager's position to gain, directly or indirectly, an advantage personally or for any other person.
- 15 To support the claims he makes for the orders numbered (b), (c), (d) and (g) in paragraph 10, Mr O'Brien alleges that Proficient's conduct-whether as manager or as a caretaker has breached one or more of those duties.

## How A Manager Is Appointed

16 To the extent that it is relevant to this proceeding, s119 of the Act provides:

### 119 Appointment and removal of manager

(1) An Owners Corporation may appoint a person to be the manager of the Owners Corporation.

(3) An instrument or contract of appointment must be in the approved form.

(6) An Owners Corporation may revoke the appointment of a manager.

17 The section draws a distinction between the appointment and the formal instrument or contract of appointment. An Owners Corporation may appoint a manager without there being any formal instrument or contract of appointment. Commonly an Owners Corporation, upon appointing a manager, will proceed to execute a contract of appointment which sets out clearly the terms of the appointment, including how the manager is to be remunerated. If there is no formal contract or no express agreement as to how the manager is to be remunerated, the manager is entitled to such remuneration as is fair and reasonable in the circumstance of the appointment and the services performed.

18 While the Owners Corporation may revoke a manager's appointment (s119(6), VCAT may upon the application of the Owners Corporation or of a Lot owner make an order revoking the appointment (s165(1)(i)(ii). Ordinarily VCAT would not make such an order without there being evidence of breaches of the duties imposed by s 122 (1). An individual lot owner like Mr O'Brien is able to apply for a revocation order because the manager's duties under s 122(1) are owed at large, to individual Lot owners as well as to the Owners Corporation, and arguably to others.

## The Hearing

19 The hearing of the proceeding took place by teleconference on **4 and 5 October 2021**. Mr O'Brien was self-represented. Ms Afonso represented Proficient. They, Mr Hutchinson, Mr Stone and Ms Slack all gave evidence. Mr O'Brien cross-examined all of the witnesses, especially Ms Afonso at length.

20 For the hearing Mr O'Brien tendered as evidence a lever-arch folder of documents on which he was relying, paginated 1 to 243. At the start of the second day of the hearing he tendered some additional documents, paginated 244 to 275 for inclusions in the Tribunal book.

- 21 At the end of the hearing, I reserved my decision and said I would give written reasons for it. There is other litigation involving the Owners Corporation which is still on foot. I did not want there to be any room for argument about what I was, and was not, deciding in this proceeding.
- 22 After the hearing, Proficient forwarded to VCAT some additional documents. I had not given Proficient any permission to do that. I have ignored those documents.
- 23 Even though the attitude of Proficient and of the other three Lot owners to Mr O'Brien's application is diametrically opposed to his, there was very little, if any, conflict in the evidence about factual matters. Rather, the conflict was about whether Ms Afonso's conduct that the evidence described was a breach of duty or was improper, and about what legal consequence flows from the events described. Accordingly, except where I say otherwise, all of the events that I set out below represent my findings on fact based upon contradicted evidence that I accept.

#### **Background of Proficient Appointment**

- 24 From time to time the Owners Corporation had appointed professional managers but in 2017, its members decided to self-manage. Ms Bielecki became the volunteer manager.
- 25 In 2018, following water entry into his premises, Mr O'Brien began a VCAT application against the Owners Corporation seeking an order for the performance of repairs to prevent further water entry. The proceeding came on for hearing on **17 May 2018**. A solicitor, Mr Free of LFS Legal, announced his appearance for the Owners Corporation. On its behalf he consented to an order that the Owners Corporation perform certain work by **31 May 2018**. I have not seen the order. Mr O'Brien did not tell me precisely what work had been specified in the order.
- 26 It turned out that one of the Owners Corporation's previous managers had wrongly given instructions to Mr Free to appear at the hearing. He was not properly authorised to appear or to consent to the order. Once he realised the mistake, Mr Free wrote a gracious letter of apology to VCAT and a similar letter to Mr O'Brien.
- 27 In the meantime, a plumbing firm, PSD Plumbing Pty Ltd ("PSD") had been engaged presumably by LFS Legal to do the work that had been specified in the order. For the work that PSD performed it charged the Owners Corporation \$25,740.00. Its bill was not paid promptly, and PSD brought a proceeding in the Magistrates' Court claiming that amount. According to the particulars in the Magistrates' Court Summons, PSD performed the work between **24 and 31 May 2018**. On

**17 April 2019** PSD obtained a default judgment against the Owners Corporation for \$25,740.00 plus costs. LFS Legal had filed the Magistrates' Court Summons for PSD, which is why I said "presumably" earlier in this paragraph.

- 28 Mr O'Brien was dissatisfied with PSD's work. It had agreed to replace a pipe with a copper pipe but instead had installed a polyvinylchloride (PVC) pipe. Mr O'Brien took the stance that PSD should not be paid until it installed the copper pipe. He obtained a quotation for \$9,600.00 from another plumber for the cost of completing the work with a copper pipe. When the Magistrates' Court Summons was served upon the Owners Corporation, Mr O'Brien wanted to defend it and to counterclaim. The other three Lot owners at the time did not want to defend it. Despite there being an inferior type of pipe installed, they were satisfied with the outcome that the work had achieved. They each contributed one quarter share of the amount due to PSD. Mr O'Brien refused to contribute one quarter share and so the amount was only partly paid.
- 29 By its solicitors LFS Legal PSD applied to VCAT for an order appointing an administrator to the Owners Corporation. Mr O'Brien, considering that the Owners Corporation had failed to comply with the repair order made on **17 May 2018**, made his own application for appointment of an administrator. Both those proceedings are still on foot.
- 30 In the hope of avoiding the need for appointment of an administrator, the Lot owners attempted to find an Owners Corporation manager who was willing to accept appointment as manager. Mr O'Brien approached Ms Afonso. He disclosed to her the outstanding legal proceedings and other difficulties that she might face. She said that her firm would be willing to accept appointment. She told me that she took it on as a challenge.

### **History of Appointment of Proficient**

- 31 On **23 August 2019** Ms Afonso chaired an annual general meeting for the Owners Corporation. All four Lot owners were present. They passed the following resolution, unanimously.

#### "Appointment of Manager

The Contract of Appointment (a standard agreement drafted by Strata Community Australia) was tabled by the Manager and was received by the members at the meeting and it was RESOLVED that Proficient Management Unit Trust Trading as Ace Body Corporate Management (Geelong) be appointed Manager in accordance with section 119 of the *Owners Corporation Act 2006* and that the Owners Corporation execute the Contract of Appointment Owners Corporation Manager (as tabled).

They also resolved that there be a committee and that they all were elected to the committee.

32 The standard form contract of appointment that was tabled at the meeting specified a term of appointment of three years commencing on **4 November 2019**. It set out services for which Proficient agreed it charged \$880.00 per year as a management fee and other services for which Proficient would charge an “hourly rate”, but the hourly rate was not specified. Mr O’Brien, Mr Stone and Ms Bielecki all signed the contract on behalf of the Owners Corporation, and it was dated **4 November 2019**.

33 To that date, there had been an appointment of Proficient as manager on **23 August 2019** and the execution of a formal contract of appointment operative from **4 November 2019**.

34 On **4 November 2019** Proficient sent a letter of resignation as manager, signed by Ms Afonso, to each Lot owner. The letter gave “28 days’ notice”, meaning that the resignation would occur 28 days after the giving of the letter. The letter stated that eight breach notices had been served since the appointment and that there was a dispute about some granite material that had been placed on Mr O’Brien’s driveway. Ms Afonso told me that those matters, and the number of emails that Mr O’Brien was sending to her, were too oppressive.

35 Accordingly, the appointment, and the contract of appointment, terminated on **3 December 2019**.

36 On **4 December 2019** there was an exchange of emails between Ms Afonso and Mr O’Brien. They were not in the Tribunal book, I asked Mr Afonso to read them aloud. In her email she pointed out that the 28 days has passed and asked for instructions as to what to do with the Owners Corporation’s funds. As best as I was able to note Mr O’Brien’s reply, it was as follows:

“I am happy for you to hold the records until either a manager or an administrator is appointed. If you are assuming the position of caretaker, I am also happy for you to charge fees as per the contract.”

Ms Afonso sent her email to the other owners in the same terms as received replies to a similar effect to Mr O’Brien’s reply.

37 Mr O’Brien put to me, correctly, that the Act does not recognise a position of “caretaker”. He argued that Proficient would not be entitled to charge remuneration for its services unless it was appointed as manager.

38 On **29 January 2020** Ms Afonso sent an email to all Lot owners as follows:

“Please advise if you wish me to issue your January levies so that you do not get behind on your levies the time you make alternative arrangements for the management of your

Owners Corporation. Please let me know if you are happy for me to raise these levies and I will send out the notices today.”

Mr O’Brien’s reply by email on the same day, so far as it is presently relevant, was as follows:

“I agree with you raising levies and receipting funds... Again, thank you for all your efforts during this uncertain situation of caretaking mode.”

The other owners also agreed to the levy notices being sent.

- 39 Because of COVID related restrictions on physical meetings in 2020, Ms Afonso decided to hold the 2020 annual general meeting by postal ballot. In August 2020 she sent to each Lot owner (Ms Slack by that time being owner of Lot 3) a ballot paper with a notice stating that the closing date for the ballot was **1 September 2020**. The ballot paper set out six proposed solutions, the second of which was:

**Ordinary resolution 2: (50%approval required to carry)**

“The Owner’s Corporation RESOLVED that Proficient Management Unit Trust t/a Ace Body Corporate Manager Werribee continue in the caretaker role and issue levies and pay approved invoices to fulfil the obligation of the Owners Corporation and charge the Owners Corporation as per the original Contract of Appointment.

**For Against Abstain”**

The ballot paper invited each lot owner to circle one of the three options. Three of the four Lot owners voted ‘For’.

- 40 In my opinion the events set out above produced the following legal result. Despite the use of the word ‘caretaker’, to describe Proficient’s role, the Owners Corporation on **4 December 2019** had re-appointed Proficient as a temporary manager for limited purposes, these purposes being for the holding of the Owners Corporation’s records and funds, the preparation and issue of fee notices, and the collection of the fees. By the ballot that had closed on **1 September 2020** it re-appointed Proficient as temporary manager for the same purposes and for the additional purpose of paying creditors. In each case the remuneration was to be in accordance with the contract of appointment which had been terminated in early November 2019. By Implication, because in my view it would go without saying, the temporary and limited appointment was also for the purpose of carrying out the statutory obligations of convening annual general meetings and effecting public liability insurance cover. Because the Lot owners were agreeing that Proficient could charge the remuneration that as a manager it would have been entitled to charge under the terminated contract of appointment as manager, and because the services that they were authorising Proficient to perform were services of a kind that a manager customarily would perform, I consider that the parties’ intention, viewed objectively, was to re-appoint Proficient as a manager and to adopt the description “caretaker” only to emphasis the temporary and limited nature of the appointment.

- 41 On **25 January 2021**, at a directions hearing in four proceedings together (but not in this proceeding), the question of Proficient's status apparently arose. Mr O'Brien was present, and Ms Afonso attended as an observer, not as a representative of the Owners Corporation. The presiding Member made a number of findings, one of which was:

"The Owners Corporation Manager Proficient Management Pty Ltd ATFT Proficient Management Un ABN 27 1549 11 032 trading as Ace Body Corporate Management (Geelong/Surf Coast/Werribee) ("Ace Geelong") gave 28 days' notice of its resignation to the Member on **4 November 2019**. The management contract terminated in December 2019."

The finding was about the termination of the formal contract of appointment: "the management contract". It was not a finding that Proficient was not the manager at all, as Mr O'Brien seems to have thought. There is no inconsistency between that finding and the conclusion I have come to that there had been a less formal re-appointment of Proficient as a manager temporarily after the termination of the management contract.

- 42 On **15 March 2021**, at an annual general meeting of the Owners Corporation which Ms Afonso chaired, the members resolved to appoint Proficient as manager "until revoked by a general meeting" and to execute an agreement accordingly. Three members voted in favour of the motion. One abstained from voting.
- 43 On **26 March 2021**, the Owners Corporation executed a contract of appointment which was in the same terms as the contract that had been executed in 2019 except that the annual management fee was \$1000.00 instead of \$4880.00 and the hourly rate was specified as \$150.00. Ms Slack was one of the two members who executed it. Like the contract executed in 2019, the term was expressed to be for three years beginning on **4 November 2019**, so that it will expire on **4 November 2022**.
- 44 Mr O'Brien submitted that the backdating of the commencement date to **4 November 2019** was evidence of misconduct on Ms Afonso's part. There was no misconduct. The backdating was probably ineffective to bind the Owners Corporation to the terms of that second contract of appointment since **4 November 2019**. Ms Slack, one of the signatories, was not a member of the Owners Corporation on that date. But it accorded with the wishes of the majority of the member and the backdating prejudiced no-one. The document amounted to a contract of appointment from the date of execution, **26 March 2021**, to **4 November 2022**. Proficient is the duly appointed manager of the Owners Corporation until **4 November 2022**.

## Insurance

- 45 The most serious allegation that Mr O'Brien has made against Proficient and Ms Afonso is that, when changing the Owners Corporation's insurer in 2020 and using the services of an insurance broker to do so, they were not acting in the Owners Corporation's best interests but were making improper use of their position to gain an advantage and further their own interests. The allegation, if proved, would amount to a breach of duty imposed by s112 (1) (c) of the Act.
- 46 While the Lot owners were self-managing the Owners Corporation's affairs, there was a building and public liability insurance cover in place. It fell due for renewal in 2020, with **1 May 2020** being the deadline for renewal. The insurer sent the renewal notice to Mr Stone. Proficient having become the "caretaker", Mr Stone sent the notice back to the insurer and asked it to send it to Ms Afonso.
- 47 Through an automatic reminder system that Proficient had, Ms Afonso became aware on **28 April 2020** that the insurance renewal deadline was **1 May 2020**. She acted quickly. She asked an insurance broker, Resolute Property Protect Pty Ltd ("Resolute"), to source three quotations for insurance. They did. Ms Afonso selected the quotation from CHU Underwriting Agencies Pty Ltd because it was less expensive than the existing insurer and because it offered an office-holder's liability cover which the existing insurer did not. She did all this without seeking the Lot owner's instructions or preferences.
- 48 Proficient has a financial interest in Resolute. Proficient owns units in a unit trust by which Resolute operates. Each year it receives a dividend from Resolute's business, as well as commission from the insurers. It is one single dividend, not attributable to any particular insurance policy that Proficient organises. Mr O'Brien makes no complaint about the commission. He recognises that it is very common for Owners Corporation managers to obtain commissions from insurers. He does complain about the dividend, alleging that Proficient had its eye upon the dividend, not the Owners Corporation's best interests, when it engaged the broker and change the insurance cover.
- 49 The minutes of the annual general meeting of **23 August 2019**, when Proficient was appointed, show that Ms Afonso disclosed to all four Lot owners who attended the meeting, not only that Proficient would receive commission on insurance premiums paid but also that Proficient would "receive dividends for being a unit holder in Resolute". The disclosure said nothing about the amount of the dividends, but any figure given could only have been an estimate or prediction. The minutes of the annual general meeting held on **15 March 2021** show that Ms Afonso made the same disclosures. On that occasion Proficient

could have given a figure based upon previous dividends, but in my opinion, it had no obligation to do so. In my opinion the disclosures that Proficient made about the right to receive dividends were proper and adequate.

- 50 It is good practice for an Owners Corporation manager to put forward to the members all insurance quotations received and to ask the member to choose, if there is time to do that. In late April 2020 there was not time to do that. In my opinion Ms Afonso acted properly, to safeguard the Owners Corporation's interests and to avoid the risk of it being left without insurance, when she obtained new and additional insurance cover quickly even though she did not consult the Lot owners.
- 51 For those reasons I reject the allegations that in that matter Proficient subordinated the Owners Corporation's interest to its own interests.

### Plumbing Contractor

- 52 I have already referred to Mr O'Brien's complaints that a PVC pipe, not a copper pipe, had been installed, contrary to the scope of works that the plumber had been engaged to do. When at the general meeting held **on 23 August 2019** Ms Afonso told the members about a letter from the plumber's solicitors, Mr O'Brien raised the complaint and urged the other Lot owners to sue the plumber. The minutes show how the matter was left:

"The manager stated that already the Owners Corporation has already incurred legal costs and proposed that the Owners Corporation seek a quote to replace a poly pipe with copper and seek a quote for legal costs to take action against the plumber and then make decision purely on a commercial basis to resolve the copper pipe issue.

Matt insisted that even if the costs outweigh the gain of getting copper pipes installed that the Owners Corporation should still pursue the plumber under consumer law. The other owners present do not see the need to incur additional costs.

After some discussions, it was resolved that the manager will seek quotes of the replacement of the copper pipes and that the legal costs involved to pursue the plumber under consumer law and send to the committee for review. "

- 53 Despite that resolution, Proficient did not seek quotes. Only Mr O'Brien did.
- 54 Mr O'Brien's idea of suing the plumber was then, and is now, unrealistic. The plumber had obtained a default judgement on **17 April 2019**. To agitate the matter the Owners Corporation would have needed to succeed in having the default judgement set aside and then to counterclaim. It's prospects of getting the default judgement set aside were poor. The Lot owners could not say that they had overlooked defending the plumber's claim. The majority of them had made a deliberate decision not to defend it. That same majority indicated

during the hearing before me that they were satisfied with the result of the plumbing work and wanted to leave the matter along. The fact that Proficient did not obtain quotes in accordance with the resolution has no significance in view of the majority's wishes.

### **Fencing Contractor**

- 55 The Owners Corporation and a neighbour engaged a contractor in to replace a dividing fence. The arrangement was for payment of half the cost each. The neighbour's payment was \$100.00 short. To satisfy the fencing contractor Proficient paid the contractors an extra \$100.00 out of the Owners Corporation's funds. Mr O'Brien wants the Owners Corporation to recover the \$100.00 from the manager if the neighbour will not pay.
- 56 The attitude of the other Lots owners, particularly Mr Hutcheson, expressed during the hearing was this. The fencing contractor did a good job and deserved to be paid in full. The matter of the \$100.00 is trifling and they do not want to pursue it.

### **Solicitors for Fee recovery**

- 57 The Owners Corporation claims that Mr O'Brien owes Owners Corporation fees. To take VCAT proceedings against him. Proficient, on the Owners Corporation's behalf, engaged solicitors, LFS legal. They charged \$539.00, plus the filing fee of \$311.00, a total of \$850.00. Ultimately the VCAT proceeding was withdrawn. The Owners Corporation is suing him in the Magistrates' Court instead.
- 58 Mr O'Brien complains that Proficient engaged LFS Legal without having obtained authority from the other Lot owners to do so. Ms Afonso's response as I understood it was that the "caretaker" authority that she had had to raise levies for fees implied an authority to engage solicitors to sue for unpaid levies. I do not agree. She needed specific authority, which she did not have, to engage solicitors and to incur their costs. Ms Afonso also said that the costs could be recovered from Mr O'Brien once payment was obtained. That remains to be seen.
- 59 The other three Lot owners want Mr O'Brien to be pursued for unpaid fees and have raised no objection at all to the engagement of solicitors for the purpose. So the absence of authority to engage the solicitors has no practical consequence. The Owners Corporation has suffered no loss thereby.
- 60 Mr O'Brien also alleged that Ms Afonso and Proficient were conflicted because LFS Legal acted for the plumber PSD against the Owners Corporation, yet she engaged LFS Legal to act for the Owners Corporation against Mr O'Brien. From what I have said above about

the prospects of the Owners Corporation pursuing the plumber further it follows that for practical purposes there is no conflict at all.

### **Invoices for Proficient's Fees**

- 61 On **15 July 2021** Proficient received an invoice to the Owners Corporation claiming \$6775.00 for “additional services” between November 2020 and June 2020. The invoice showed each item and category of the services performed, the number of hours each service took, and a calculation based upon a rate of \$150.00 per hour. Consistently with his assertion that Proficient was not the Owners Corporation’s manager during those months, Mr O’Brien challenged the invoice and contended that the Owners Corporation had no liability to pay it.
- 62 Although the second contract of appointment dated **26 March 2021** specified a rate of \$150.00 per hour for additional services performed by Proficient, that contract was not effective for the period in question, November 2020 to June 2021. I have found that after the termination of the first contract of appointment (which had not specified an hourly rate) there was a less formal re-appointment of Proficient as manager that covered services rendered during those months. I am satisfied that Proficient performed the services described in the invoice for the number of hours recorded in the invoice, and probably (as the invoice stated) for many more hours than those that had been charged for.
- 63 There having been no contractually fixed rate per hour, Proficient was entitled to reasonable remuneration for the services rendered. I accept Ms Afonso’s evidence that \$150.00 per hour is the standard hourly rate charged by management firms in the Act Body Corporate group and that other firms in the industry charge \$220.00 per hour. That evidence about other firms’ hourly rates accords with my experience in hearing cases in VCAT’s Owners Corporations List. The rate of \$150.00 per hour was reasonable.
- 64 One of the items in the invoice was a charge of \$300.00 for two hours spent upon providing access for Mr O’Brien to documents by way of a shared Google drive. Mr O’Brien correctly said that an Owners Corporation manager is not entitled to charge a Lot owner for access to documents, but there is no reason why the manager cannot charge the Owners Corporation for time spent in providing that service, as Proficient has done.
- 65 Three of the four Lot owners have paid their share of the \$6775.00 invoice. Only Mr O’Brien has not. The Owners Corporation is liable to pay the balance, which is Mr O’Brien’s share.

### **Owners Corporation Records and Funds**

- 66 My decision that Proficient is still the Owners Corporation's manager means that Mr O'Brien's claim for authorisation for an order that the Owners Corporation's funds and records be returned to it falls away.
- 67 As an Owners Corporation member Mr O'Brien is entitled under s146 of the Act, upon request, to inspect its records, free of charge. Inspection of records is difficult in the circumstances of the COVID-19 pandemic. Ms Afonso provided access to the documents for Mr O'Brien by sharing with him a Google drive. He alleges that there are other documents to which he has not been given access. Ms Afonso gave evidence that she has given him access to all document of which she was aware. In cross-examination she conceded that it was possible that there were documents about insurance that had escaped her notice. She went on to say that she was willing to make a search and provide Mr O'Brien with any additional documents revealed in the search.
- 68 Mr O'Brien cross-examined Ms Afonso in particular about a lease entered into between the Owners Corporation and Mr Stone, that entitled Mr Stone to occupy exclusively part of the common property and use it as a car parking space. A clause in the lease required Mr Stone to obtain an insurance policy naming the Owners Corporation as an interested party, to cover any additional risks associated with his use of the area. Ms Afonso gave evidence that the Owners Corporation holds no such document. Mr Stone gave evidence that he has not obtained such an insurance policy. I am satisfied that the Owners Corporation holds no such document. Whether Mr Stone should obtain it, and whether the Owners Corporation should hold it once it is obtained, is beside the point.
- 69 Mr O'Brien has the onus of proving that Proficient, and thus that the Owners Corporation, possesses or probably possesses documents to which he has not been given access. He has not proved that. The evidence has given rise to a bare possibility that there are documents to which he has not been given access. To cover that possibility, I included in the order I made reserving my decision, the following paragraph (in which Ms Afonso's given name is mis-spelt):
- “The Tribunal notes that the respondent, by its direction Vanessa Afonso, has stated today that by **19 October 2021** the respondent will notify the applicant in writing whether the following a further search of the records of Owners Corporation 1 Plan No RP 005378, there are any documents concerning insurance for that Owners Corporation that have not been provided already to the applicant, and, if there are any, will provide a copy of them to the applicant.”
- 70 There is a technical matter. Mr O'Brien ought to have brought his claims about access to documents against the Owners Corporation, to which belong the documents for which he is entitled to access, even

though the manager has custody of them. I have, however, dealt with that claim on its merits, and have rejected it.

### **The Owners Corporation Certificate**

71 One of the complaints that Mr O'Brien makes about Proficient's conduct relates to an Owners Corporation certificate that Ms Afonso signed and gave to Ms Biliiecki, the then owner of Lot 3, for the purpose of her sale of the Lot to Ms Slack.

72 So far as it is relevant in this proceeding, S151 of the Act provides:

#### **Owners corporation certificate**

(1) Any person may apply to the Owners Corporation for an Owners Corporation certificate.

(4) An Owners Corporation certificate must—

a) contain the prescribed information relating to the Owners Corporation and a Lot which must include the prescribed information relating to—

(vii) liabilities and contingent liabilities of the Owners Corporation including any liabilities or contingent liabilities arising from legal proceedings;

(xi) legal proceedings to which the Owners Corporation is a party.

The "prescribed information" is in the *Owners Corporation Regulations 2018* reg. 16. The regulations materially enlarge upon S 151(4)(vii) and (xi) except that it adds an obligation to include in the certificate details not only of existing legal proceedings but also circumstances of which the Owners Corporation is aware that are likely to give rise to proceedings.

73 Mr O'Brien expressed two complaints about Proficient's conduct in relation to certificate. The first is that Ms Afonso signed it describing Proficient as the manager, when it was not. That complaint has already been answered; Proficient was and is the manager. The second complaint is that Proficient did not include in the certificate information about the various proceedings which were on foot at the time that the certificate was signed and supplied.

74 The slender foundation for the second complaint was some evidence that Ms Slack gave during a defamation proceeding that Mr O'Brien had brought against Ms Bielecki in the County Court and was heard in June this year. Mr O'Brien included in the Tribunal book part of the transcript of the hearing. Ms Slack had been giving evidence of Mr O'Brien having banged on her door and having told her that there was a "VCAT meeting" due to take place that day. Page 87 of the transcript includes the following questions by Ms Bielecki's barrister and Ms Slack's answer.

MR CATLIN: All right. And, what, are the thing- the things that were being discussed by VCAT, they're problems with the premises, are they?

MS SLACK: They were problems overall, and because Matthew O'Brien claiming against the previous owner and against her son and whatever else was going on. I didn't know anything until he came banging on my door. And I was basically thrown into it at that point in time. But apart from that I didn't know anything prior to that.

Mr O'Brien asked me to infer, from her statement that she "didn't know anything" about VCAT matters until he banged on her door, that Ms Slack had received an Owners Corporation certificate that had not included information about pending VCAT proceedings. He contended that he would suffer financial loss from being liable to contribute towards any damage that could be awarded to Ms Slack if she were to bring a claim against the Owners Corporation of having been misled by the certificate.

75 The state of the evidence about that matter was this;

- a) Ms Afonso did prepare and sign an Owners Corporation certificate for the sale of Lot 3.
- b) No-one provided to me a copy of the certificate. I have not seen it.
- c) Ms Afonso gave evidence that she had included in the certificate all details of VCAT proceedings, she having received a copy of the initiating application in each of those matters.
- d) Ms Slack gave evidence that she had been given a copy of an Owners Corporation certificate but did not see it until after she had settled the purchase of Lot 3 in April 2020.

76 Ms Slack's evidence about that is improbable. One would have expected her solicitor or conveyancer to have made her aware of the certificate and its contents, if not before she signed the contract to purchase Lot 3 then at least before she settled. But if her evidence is correct there would be no possible claim that she could make against the Owners Corporation because she would not have relied on the certificate in any way, and so there would be no possibility of financial risk to Mr O'Brien in the way that he expressed it.

77 Not having seen the certificate, I stop short of making a finding that Proficient has complied fully with S 151(4) of the Act. For one thing, Mr Afonso did not give evidence of having included in the certificate information about the outstanding judgement debt to PSD for the plumbing works. What I do say is that Mr O'Brien has failed to establish any conduct of Proficient concerning the certificate that would amount to any breach of its duty as manager.

## Conclusion

- 78 Except for the claim for \$100.00 that arises from the Owners Corporation's overpayment to the fencing contractor, and which all Lot owners other than Mr O'Brien rightly regard as a trifling matter not worth pursuing, Mr O'Brien has failed to show that any benefit to the Owners Corporation is likely to accrue from any authority given to him to prosecute this proceeding on behalf the Owners Corporation. The other three Lot owners have no claim against the manager or any outside person and are content with Proficient's management. I refuse the application for an order authorising Mr O'Brien to pursue this proceeding on behalf of the Owners Corporation.
- 79 Likewise, he has failed to prove his case in those claims that he has brought in his own right, so the proceeding is dismissed.

**SENIOR MEMBER A. VASSIE**