

VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

OWNERS CORPORATIONS LIST

VCATREFERENCE NO. OC939/2021

CATCHWORDS

Catchwords – extraordinary fee for pigeon control works, application of the benefit principle, apportionment outside the range of reasonableness, fee recovery proceeding dismissed, *Owners Corporations Act 2006 s 24(2A)*.

APPLICANT

Owners Corporation 1 Plan No. PS629860Q

RESPONDENT

Robert Ian Dunstan

WHERE HELD

Melbourne

BEFORE

C Price, Senior Member

HEARING TYPE

Hearing

DATE OF HEARING

18 November 2021

DATE OF ORDER

18 November 2021

DATE OF WRITTEN REASONS

20 December 2021

CITATION

Owners Corporation 1 Plan No. PS629860Q v Dunstan (Owners Corporations) [2021] VCAT 1545

ORDER

1. The application is dismissed.

C Price
Senior Member

APPEARANCES:

For Applicant

Ms C. Emmerton, Solicitor

For Respondent

In Person

REASONS

Introduction

1. This is a fee recovery proceeding brought by Owners Corporation 1 on registered plan of subdivision PS629860Q ('the OC') against the respondent who is the registered proprietor of Lot 2.
2. The Tribunal heard and determined this proceeding on 18 November 2021, dismissing the application and providing oral reasons for that decision. By email dated 22 November 2021 the OC has requested written reasons for the decision. Those reasons follow, and reflect the oral reasons provided by the Tribunal, with some elaboration, where it is of assistance.

Background

3. The subdivision comprises a multi storey building, which is comprised of retail shops at ground level, three levels of 1 and 2 bedroom apartments, rooftop garden lots, and an underground basement level carpark. The address of this building is 68-72A Acland Street, St Kilda 3182.
4. The subdivision also incorporates an adjoining building in which lots 1 and 2 are located, being tri-level 3 bedroom townhouse apartments. The address of this building is 4 Havelock Street, St Kilda 3182. It is the registered proprietors of lots 1 and 2 who dispute the claim being made by the OC against them.
5. The subdivision comprises of three owners corporations:
 - a. Owners Corporation 1 – of which all of the lots in the subdivision are members;
 - b. Owners Corporation 2 – of which all of the lots in the multi storey building are members; and
 - c. Owners Corporation 4 – of which all of the retail lots in the multi storey building are members.
6. The existence of three owners corporations recognises that the lots in the subdivision benefit from common property services and maintenance to different degrees based on their location within the subdivision and the use of the lot (being commercial or residential).

7. The lot liability of Lot 2 in Owners Corporation 1 is four times that of a one bedroom apartment, and twice that of retail lots located in the multi storey building.¹

8. The respondent's Points of Defence states at paragraph 8:

On 13 September 2017 the OC sent a letter to all owners advising that an Urgent Special Levy was being raised to cover the costs of ridding the Main Apartment Block of pigeons, cleaning the decorative façade of the Main Apartment Block, and also to cover the additional costs of an increase to insurance costs. Accompanying the letter was an invoice for Lot 2 for special levies totalling \$3,656.31.

9. The respondent paid that portion of the levy comprising the increased insurance costs, but disputed the payment of the pigeon levy which remained unpaid.

The claim

10. On 24 November 2020 the OC wrote to the respondent acknowledging that Lot 2 received an indirect benefit from the pigeon control works only, applied the benefit principle and reduced the levy by 50%.²

11. It is this sum, being \$1,292.32 plus interest and that costs that the OC claims by way of this application.

The OC's submissions

12. The OC submits that the respondent received an indirect benefit from the pigeon control works undertaken on the multi storey building as follows:

- potential for reduced insurance premiums;
- reduction in adverse health effects and injury to residents and visitors;
- potential increase in property value;
- improved appearance of the complex; and
- minimised pigeon infiltration

13. The OC's letter to the respondent dated 24 November 2020 further states:

Applying the benefit principle, the Owners Corporation considers that a levy equivalent to 50% of the lot liability levy is appropriate in the

¹ Points of Defence at para 7.

² Points of Defence at para 12.

circumstances; as such, the original levy notices have been withdrawn and replaced with the enclosed new notice.

The respondent's submissions

14. The respondent submits that Lot 2 has received no benefits from the pigeon control works, either directly or indirectly and he should not be liable for the payment of any portion of the levy.

15. He says:

There is no evidence to substantiate any reduction in insurance premiums as a result of the pigeon control works, and that insurance premiums have increased;

There is no risk of adverse health effects and injury to residents and visitors as Lot 2 is located in an adjoining building;

There is no potential increase in property value as Lot 2 presents to the public as a separate building, with an address on a different street;

No works were conducted on Lot 2, which presents as a separate building, so there is no benefit of improved appearance for lot 2, and

There was no pigeon control work undertaken to Lot 2. Works undertaken on a separate building will not minimise infiltration to lot 2 and may potentially drive the pigeons towards the building in which Lot 2 is located.³

THE LAW

The Benefit Principle

16 Section 24 of the Act provides:

Extraordinary fees

(1) An owners corporation may levy special fees and charges designed to cover extraordinary items of expenditure.

(2) Subject to subsection (2A), the fees must be based on lot liability.

(2A) Fees for extraordinary items of expenditure relating to repairs, maintenance or other works that are undertaken wholly or substantially for the benefit of some or one, but not all, of the lots affected by the owners corporation must be levied on the basis that the lot owner of the lot that benefits more pays more.

(3) The owners corporation may determine the times for payment of the special fees and charges.

³ Points of Defence at para 20.

(4) A special resolution is required when exercising a power under subsection 91) if the amount involved is more than twice the total amount of the current annual fees set under section 23.

16. Senior Member Vassie in the matter of Grundl said of section 24:

In my view, in the light of the Mashane decision on appeal and of section 24 as it now is, the law requires an owners corporation to act as follows when it sets special fees to cover extraordinary items of expenditure relating to repairs, maintenance or other works.

It must first turn its collective mind to the question of whether all lots benefit substantially from the works or whether some lots substantially benefit more than others.

If, acting in good faith and exercising due care and diligence, as s.5 of the Act obliges it to do, it decides that all lots substantially benefit, it must set fees in accordance with lot liability. There will be no legal error in the decision, and the Tribunal will not interfere with it on the application of an aggrieved lot owner, unless the decision was one which no members of an owners corporation, acting honestly and reasonably, could have made.

Failure to turn the collective mind to the question is a legal error. The error is unlikely to lead the Tribunal to interfere, on the application of an aggrieved lot owner, with a decision to set fees in accordance with lot liability if in reality all the lots benefit substantially from the works. Otherwise the legal error exposes the owners corporation to the risk that the Tribunal will declare the resolution invalid.

If the owners corporation decides that the works are substantially for the benefit of some, but not all, of the lots, it must set fees not in accordance with lot liability but in accordance with the benefit principle, so that the owner of the lot that benefits more pays more.

The owners corporation must decide the extent to which the various lots benefit and apportion the fees accordingly. In making the decision it must act in good faith and with due care and diligence. If it does, there will be no legal error in the decision, and the Tribunal will not interfere with it on the application of an aggrieved lot owner, unless the decision was outside the range of reasonableness so that it was one which no members of an owners corporation, acting honestly and reasonably, could have made, or unless there has been some other legal error.⁴

Discussion

17. Originally the OC raised a levy in accordance with lot liability. That notice was then withdrawn and the benefit principle applied by the OC in levying upon the respondent an amount equal to 50% of the levy that would

⁴ Owners Corporation PS407621Y v Grundl (Owners Corporations) [2017] VCAT 1550 at para 16.

otherwise have been payable had the special levy been struck in accordance with lot liability.

18. The respondent submits that Lot 2 has gained no benefit either direct or indirect that would justify its liability to make any contribution towards the pigeon control works. The respondent further submits that levies for such works should have been raised by Owners Corporations 2 and 4, whose members comprise of only the registered proprietors of lots in the multi storey building, and that by levying fees to members of owners corporation 1 the applicant has not acted in good faith and with due care and diligence.
19. The first issue for the Tribunal to consider is whether there was an indirect benefit to Lot 2 in the pigeon control works?
20. Firstly, the risk of health issues, slippage, and increased insurance claims is a risk borne by all lot owners in the subdivision, indeed the payment of insurance levies is raised by owners corporation 1, of which all lot owners in the subdivision are members.
21. Lot 2 also received an indirect benefit from the pigeon control works in respect of the appearance of the multi storey building and a potential increase in property values. Although Lot 2 is located in a separate (although attached) building, and has a separate street address, both buildings are part of the same subdivision. Being part of the same subdivision the condition, and appearance of the multi storey building will be of relevance and concern to any potential purchaser – a pigeon infestation or poor appearance of the multi store building is therefore likely in the Tribunal's view to impact on the property values of the building in which Lot 2 is located.
22. I find on balance that there is some indirect benefits to Lot 2 of the pigeon control works.
23. The second issue for the Tribunal to determine is whether in applying the benefit principle, the apportionment of costs amongst the lot owners was 'within the range of what was reasonable' and the decision made in good faith and with due care and diligence.
24. I find on balance that the answer to this question is no. The indirect benefits to Lot 2 are relatively minimal, and certainly not at all reflective of the type of direct benefits received by an apartment in the multi storey building with a balcony that is dealing directly with a pigeon infestation. The OC was required to give proper consideration to the direct benefits to the lots in the multi storey building, which was suffering from a pigeon infestation. In addition to those significant direct benefits, those lots also benefitted indirectly in the same way as Lot 2, therefore the lots in the multi storey building received both significant direct and indirect benefits.

25. Furthermore, in applying the benefit principle in this way, is to apportion to Lot 2 a contribution of twice that of a 1 bedroom apartment, and equal to the contribution of a retail lot in the multi storey building, as a result of the respective lot liabilities of each lot.
26. In those circumstances to apply the benefit principle in such a way as to reduce the liability of Lot 2 by 50% is not within the range of what is considered by the Tribunal to be reasonable, and was therefore not made in good faith with due care and diligence.
27. The special levy raised in therefore invalid, and the application is dismissed.

C Price
Senior Member