VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

OWNERS CORPORATIONS LIST

VCAT REFERENCE NO. OC1535/2019

VCAT REFERENCE NO. OC2357/2019

CATCHWORDS

Whether particular sinking fund levies require ordinary or special resolution under s 23 or s 24 of the Owners Corporation Act 2006, whether resolutions are ultra vires under s 4 or s 5, failure to comply with s 78(2), meaning of "owners corporation dispute" in s 162, claim for penalty interest on judgment debt, whether matters previously before VCAT are res judicata, relevance of VCAT final orders, Owners Corporation Act 2006 ss 4, 5, 23, 24, 78, 162, 165, Magistrates Court Act 1989 s 100(7), Penalty Interest Rates Act 1983 s 2, Victorian Civil and Administrative Tribunal Act 1998 ss 119, 120, Jenkins v OCVM Commercial Pty Ltd (Owners Corporations) [2019] VCAT 1078, Fullarton v Holmes [2013] VCAT 24, Cruddas v Owners Corporation PS611940S (Owners Corporation) [2012] VCAT 683, The Big Apple Group Pty Limited v Melbourne City Council [2020] VSC 393, Owners Corporation 4PS539033E v Bensons Property Group (Owners Corporation) [2018] VCAT 1769.

PROCEEDING IN OC1535/2019

APPLICANT	Owners Corporation Plan No SP32607X
FIRST RESPONDENT	Hoang Lam Nguyen
SECOND RESPONDENT	Nga Nguyen

PROCEEDING IN OC2357/2019

FIRST APPLICANT	Nga Nguyen
SECOND APPLICANT	Hoang Lam Nguyen
RESPONDENT	Owners Corporation Plan NO SP32607X
WHERE HELD	Melbourne
BEFORE	Member J Klingender
HEARING TYPE	Hearing
DATES OF HEARING	3 and 4 June 2021
DATES OF FINAL SUBMISSIONS	20 July 2021 and 16 September 2021
DATE OF ORDER AND REASONS	15 February 2022
CITATION	Owners Corporation Plan No SP32607X v Nguyen (Owners Corporations) [2022] VCAT 164

ORDERS

1 In OC1535/2019, the respondents Hoang Lam Nguyen and Nga Nguyen shall pay to the applicant Owners Corporation Plan No. SP036207X the sum of $8281.95 in fees, together with interest of $1731.21 and $311.00 being reimbursement of the filing fee.

2 In OC2357/2019 the respondent Owners Corporation Plan No. SP036207X shall pay to the applicants Nga Nguyen and Hoang Lam Nguyen the sum of $3616.28 in interest on the judgment debt, together with warrant costs of $185.80, with all other claims being dismissed.

3 Liberty to apply on the question of costs, noting that if no applications are made by 15 March 2021 costs will be ordered in accordance with these reasons.

J Klingender
Member

APPEARANCES:

For Applicant (Respondent in OC2357/2019):	Ms Castro, RC & Co Lawyers
For Respondents (Applicants in OC2357/2019):	Ms Nguyen Mr Banasik of Counsel Ms Tran, interpreter

REASONS

BACKGROUND

1. These claims are between an Owners Corporation and some lot owners, siblings Mr and Ms Nguyen. They have a long history before the Tribunal and have been agitated over some years, with the current proceedings having first been lodged in 2019 in pre-pandemic days. Since then they have been the subject of a number of interlocutory proceedings, including a compulsory conference, and there have been multiple iterations of points of claim and defence submitted by the parties over the last few years. The Tribunal has some 8 lever arch files of documents, many of which have been superseded, and despite the best efforts of registry some documents appear to have gone missing over time.

2. I heard the substantive applications in these matters on 3 and 4 June 2021. At the conclusion of the hearing Ms Nguyen requested written reasons and so I reserved my decision, subsequently ordering that the parties submit summaries of their final positions to VCAT by 10 July 2021. Both parties later requested and were granted extra time to provide these summaries. The delays caused by the parties have obviously been further compounded by the many challenges occasioned by the COVID-19 pandemic and its effect on all of VCAT's operations.

3. Put simply, the OC seeks orders relating to unpaid levies and fees. The Nguyens' response is both by way of defence and counter claim, or "equitable set off" as it is put in their submission. Although they concede that they owe some of the fees sought by the OC, they dispute the validity of the "sinking fund" fees charged, so that position may be seen as simply a defence to an application for fee recovery. In addition, they say that they have a "set off or counterclaim" comprised of a debt they say is owed to them by the OC in relation to an arrangement they made with a third party regarding cleaning of the lots between 2006 – 2008; and an unpaid judgment debt in relation to an earlier proceeding, together with enforcement costs and penalty interest.

4. As mentioned above there have been a plethora of documents submitted over the years in these claims, many of which are duplicates and some of which raise new issues or depart from the positions outlined in the initiating proceedings. Even the quantum of both parties' claims has changed over time, even at the final hearing. I do not intend in these reasons to track the changes that have been made since 2019, or to deal with matters that have been raised and later abandoned, but rather will rely on the comprehensive and very helpful summaries submitted by the parties following the June 2021 hearing as complete statements of their final position, and I will deal with the claims on that basis. These summaries are dated 19 July 2021 (from the OC) and 12 September 2021 (from the Nguyens) and include the following documents (excluding copies of authorities):

Submitted by the OC:

Points of Claim dated 19 October 2020.

Amended Points of Defence dated 26 May 2021

Affidavit of Jennifer Margaret Stevenson sworn 30 August 2019

Affidavit of Julian Louey sworn 4 February 2020

Statutory Declaration of Rochelle Castro executed 4 February 2020

VCAT orders 8 February 2010 in proceeding C9574/2009

VCAT orders 7 June 2010 in proceeding C9574/2009

VCAT orders 7 August 2010 in proceeding C9574/2009

VCAT application in proceeding C10737/2009 dated 30 November 2009

VCAT orders 24 March 2010 in proceeding C10737/2009

VCAT orders 2 August 2010 in proceeding C10737/2009

VCAT orders 22 September 2010 in proceeding C10737/2009

VCAT orders 2 December 2010 in proceeding C10737/2009

VCAT orders 31 January 2011 in proceedings OC2/2011 and OC5/2011

VCAT hearing notice 22 March 2011 in proceeding OC2/2011

VCAT hearing notice 22 March 2011 in proceeding OC5/2011

VCAT orders 22 March 2011 in proceeding OC2/2011

VCAT orders 22 March 2011 in proceeding OC5/2011

Nguyens' Summary for proceeding numbers OC2/2011 and OC5/2011

Nguyens' Amended Summary for proceeding numbers OC2/2011 and OC5/2011

Minutes of Annual General Meeting held 24 March 2010

Letter from Walsh and Whitelock (former manager) to owners dated 15 March 2011

Minutes of Special General Meeting held 10 July 2020

Plan of Subdivision

Amended submissions on behalf of the Owners Corporation dated 16 May 2021

Submitted by the Nguyens

Points of Claim in OC1535/2019 dated 19 October 2020

Amended Points of Defence in OC1535/2019 dated 12 April 2021

Amended Points of Claim in OC2357/2019 dated 12 April 2021

Amended Points of Defence in OC2357/2019 dated 26 May 2021

First Affidavit of Nga Nguyen dated 17 September 2019

Second Affidavit of Nga Nguyen dated 30 January 2020

Third Affidavit of Nga Nguyen dated 12 April 2021

5. In addition to the documents listed above I have considered and referred to a transcript of the hearing, as my notes of the hearing were missing from the files.

THE OC'S CLAIM

6. The subject development is in Sydney Road, Brunswick, and comprises 17 commercial units and 9 car spaces. The Nguyens are the owners of units 7 and 17, together comprising 100 units of lot liability out of a total of 1780 units. The Owners Corporation seeks $8291.95 for outstanding levies to the date of the final fee notice dated 2 May 2019 together with interest and costs. The Schedule of Claim details the claim as follows:

Item	Amount $	Description
A	1109.00	Claim - Contribution Levies 6 May 2013 to 5 May 2014
B	208.00	Claim - Contribution Levies Adjustment 15 August 2013
C	1317.00	Claim - Contribution Levies 6 May 2014 to 5 May 2015
D	1317.00	Claim - Contribution Levies 6 May 2015 to 5 May 2016
E	1317.00	Claim - Contribution Levies 6 May 2016 to 5 May 2017
F	1317.00	Claim - Contribution Levies 6 May 2017 to 5 May 2018
G	1966.00	Claim - Sinking Fund Levies 5 November 2017 to 4 November 2018
H	289.00	Claim - Contribution Levies adjustment 6 May 2017 to 5 May 2018

I 1606.00 Claim - Contribution Levies 6 May 2018 to 5 May 2019

J 1966.00 Claim - Sinking Fund Levies 5 November 2018 to 4 November 2019

K 12412.00 Subtotal Claim

L -4130.05 Credit to Respondents

(Reference to orders made by the Tribunal in OC5/2011 on 22 March 2011)

$8281.95 Total Claim

The OC also seeks $1731.21 interest from 2 May 2019 to 3 June 2021, and costs of $790.00, including reimbursement of the filing fee of $311.00.

THE LOTS OWNERS' CLAIM

7. The Nguyens say they are not liable to pay the items listed as G and J, being the sinking fund levies, for a number of reasons. They acknowledge liability for the contribution levies, but say they have a "set off or counterclaim" comprising:

   $13,728.00, being money owed to them by the OC in relation to an arrangement they made with a third party regarding cleaning of the lots (the quantum of this claim was reduced at the final hearing, having initially been pleaded as $23,452.00 in the Points of Claim dated 12 April 2021)

   $4130.05 being an unpaid judgment debt in relation to an earlier proceeding, together with enforcement costs of $185.80 and interest that has accrued on that judgment debt to the date of VCAT's determination of the matter.

They seek declarations pursuant to s 165 of the *Owners Corporation Act 2006* (Vic) (the OC Act) that:

- The resolution purporting to levy the sinking fund is void and of no effect

- The amounts relating to the cleaning arrangement and the judgment debt be set off against past and future debts

THE ISSUES TO BE RESOLVED

8. There are three broad issues requiring resolution.

   The first question, which arises out of the OC's claim – is whether the Nguyens are liable to pay the sinking fund levies? The Nguyens say by way of defence to the OC's claim that they do not owe these levies because the OC did not have the power to raise them.

   There are two further areas of enquiry, which arise out of the Nguyens' claim. These involve the correct categorisation and treatment of two separate

amounts of money the Nguyens say should be counted in their favour as either an "equitable set off" or a "counterclaim", and which are referred to herein as the "cleaning fees" and the "judgment debt", both of which will be further explained and explored below.

The "sinking fund" levies

9. At the AGM on 26 June 2017 the OC passed an interim resolution (there being no quorum) which read:

> SINKING FUND CONTRIBUTION
>
> Discussion was held in relation to implementation of a sinking/maintenance fund which is designed to raise funds over time (payable in addition to the annual administration contribution) that is held separately and used to contribute to larger maintenance items on the common property.
>
> The main concern and large expense that is expected is renewal of the existing roof.
>
> It was resolved by members that a sinking/maintenance fund is necessary.
>
> It was further resolved that an annual contribution of $35,000 for the 2017-2018 period be raised and payable on 5 November 2017 (to be raised 6 months after the fees are due and next fees are raised).
>
> There will be further discussion and review to the level of contribution and requirement for this fund at the next annual general meeting.

10. The OC relies on this resolution in support of its claim for item G. The claim for item J is based on the resolution passed at the subsequent AGM which was held on 12 November 2018, at which there was a quorum, and the matter of a sinking fund was again considered. Those minutes relevantly record:

> 5.0 REPORTS
>
> **5.2 Finance**
>
> Members resolved to keep the admin and Sinking Fund Fees the same….
>
> …
>
> 7.0 GENERAL BUSINESS
>
> **Roof Repairs**
>
> A quote was presented and discussed. The quote was noted as inaccurate and requires updating. Members present requested another 2 quotes for roof replacement in addition to the updated quote….

11. The Nguyens say that they are not liable to pay the fees listed as items G and J in the OC's claim, because the OC lacked the power to raise them. In their submissions the Nguyens have focussed on the content of and circumstances surrounding the resolution passed at the 2017 AGM. Presumably, their position is that if the 2017 resolution is found to be invalid then the subsequent resolution will be tainted for the same reasons.

12. The Nguyens rely on four grounds in support of their claim: that the OC did not have the power to make the resolution under s 23 of the OC Act, that the resolution was ultra vires under s4, that the OC did not comply with s 78(2) and that in raising the levy the OC did not act honestly and in good faith as required by s 5(a).

Ground 1 - No power under s 23

13. Section 23(1)(b) of the OC Act allows an OC to set annual fees to cover maintenance and repairs, which fees may be passed by ordinary resolution. This is to be compared with s 24 of the OC Act which empowers an OC to levy 'special fees and charges designed to cover extraordinary items of expenditure', which must be passed by special resolution.

14. The Nguyens say the sinking fund falls within s 24 as it is an extraordinary item of expenditure raised for the singular purpose of renewing the roof. They submit that the resolution must be read in context and with regard to the surrounding circumstances, which they say are as follows:

    (a) There was a previous, unsuccessful ballot to raise a levy for the repair of the roof in 2016

    (b) The OC had obtained a quote from Harrison Roofing in March 2016 for $122,990 for "New Metal Roofing"

    (c) The minutes of the 2017 AGM state that "the main concern and large expense that is expected is renewal of the existing roofing"

    (d) No maintenance items other than the roof were identified

    (e) No maintenance plan was prepared. Whilst conceding that a maintenance place was not a statutory requirement, the Nguyens say that the absence of a maintenance plan supports the inference that the levy was raised for a single item of expenditure.

    (f) General maintenance and repairs were previously paid out of the administration fund and continued to be paid out of the administration fund following the raising of the sinking levy.

15. It is common ground that in 2016 the OC circulated a postal ballot regarding to the renewal of the roof and decommissioning of the sprinkler system, accompanied by a quote for the proposed works in excess of $122,000. That resolution failed and the then OC manager advised lot owners by mail accordingly. Counsel for the Nguyens urged me to infer that the resolution passed at the 2017 AGM was intended to achieve by stealth what had failed in 2016. As he put it at the hearing *'the Owners Corporation has attempted to in 2016 raise a special levy for the renewal of the roof in the proper way, and that failed. And so the next year, they come around and say, well let's try and do this a different way. Let's try and do this as a sinking fund, not as a special levy and maybe then we'll be able to pass it'* (transcript p 16).

16. The OC says that this position is nothing more than 'hunches' and 'guesses' of the Nguyens and that the levies were raised in accordance with s 23(1) of the OC Act to set annual fees to cover common property maintenance expenses. The OC says that the funds were not raised solely for roof renewal, noting that the funds were expressed in the resolution '*to be used to contribute to larger maintenance items on the common property*'. They point out further that the issue of the roof was considered by the OC at a Special General Meeting held on 10 July 2020, which passed a resolution in accordance with s 24 of the OC Act**.** The minutes of that meeting relevantly record:

> Roof Replacement
>
> The Owners Corporation resolved to accept the quotation from Rainshield Roofing to replace the roof and to proceed with the works as soon as possible and resolved to confirm the special levy of $183,500 to cover the cost of the works.
>
> It was noted that replacement of the leaking roof was urgent to ensure the safety of occupants, members of the public visiting the arcade and to prevent further ongoing water damage to the property.

The OC does not claim these levies in this proceeding.

17. Overall, I am not persuaded that the Nguyens have proved that this resolution was in fact directed at an extraordinary item of expenditure, being renewal or replacement of the roof. The amount cited ($35,000.00) bears little resemblance to that sought to be raised in 2016 ($122,990) and that actually raised in 2020 ($183,500.00). The wording of the resolution is somewhat ambiguous, with its references to both "larger maintenance items" and "renewal of the existing roof" but it is equally capable of being read in the way the OC says it should be as in the way the Nguyens say it should be. The facts surrounding the resolution also support the OC's position – the 2017 levies were not in fact spent on the roof, the 2018 minutes record that the same fees were levied, while treating the issue of the roof separately, and the later 2020 resolution, passed under s 24 of the Act, deals only and specifically with the issue of roof replacement. The fact that there is no maintenance plan is simply not relevant as the OC is not a prescribed corporation and therefore is not required to have one, and accordingly I draw no inferences from that.

Ground 2 –ultra vires s 4

18. The Nguyens argue, correctly, that the power in s 23 is subject to the power in s 4 which relevantly defines the OCs functions to repair and maintain common property. Activities that fall outside s 4 would therefore be beyond power.

Common property

19. The Plan of Subdivision depicts 26 lots in total, of which 17 are units in a single story building and 9 are car spaces. Relevantly, the lower boundary of the units is described as being one metre below that part of the site which lies within the vertical or near vertical boundaries of the relevant unit, with the upper boundary being 8 metres above the lower one. The common property is all the land in the parcel except the land contained in units 1 to 26.

20. The Nguyens say in their submissions that the roof is not common property and that the resolution is therefore ultra vires in that it purports to cover maintenance and repair of roofs of private lots. The OC says that the roof is common property. Both are partly right, or partly wrong. The Nguyens point to the minutes of the 21 May 2011 AGM wherein the OC confirms that the roofs above each of the lots on site are part of individually titled property and not common property, so that may be read as an admission by the OC that not all of the roof is common property. And, at the hearing the Nguyens conceded that part of the roof, that is, the area between the units, is common property. So to that extent the parties agree that at least part of the roof is common property.

21. It does not seem to me that the resolution was intended to apply to anything other than those parts of the roof that are common property. Indeed, an OC can only make resolutions relating to common property. Owners corporations exist only to deal with common property and it is difficult to imagine that any OC would purport to raise levies regarding private property. Indeed, the resolution itself specifies that the funds are to be used '*to contribute to larger maintenance items* ***on the common property***' (emphasis added). In these circumstances I am of the opinion that this resolution is not ultra vires and invalid on the basis that it purports to deal with private property.

Repairs and maintenance

22. The Nguyens press the further point that even if part of the roof is common property the resolution is ultra vires in that it is not for 'repairs and maintenance' as contemplated by s 4. The Nguyens argue that the use of the word 'renewal' in the resolution supports their contention, in that 'renewal' does not have the same meaning as 'maintenance' or 'repair'. They say in their submissions that there is a distinction between repairing the roof and renewing the roof, in that *'the former contemplates no more than the essential work necessary to keep the functionality eg patching over holes or replacing only those parts of the roof in need of replacing, whilst the latter contemplates replacement of the whole roof even if not all of it is in need of replacement'* at [18].

23. At the hearing, counsel for the Nguyens conceded that the OC could raise levies to repair those parts of the roof that form common property. He summarised their position as follows *'if the levy has been struck, which it hasn't been struck, but if it had been struck simply to keep that part of the*

roof maintained by, you know, patching over holes or that sort of things, they would've been fine. But that's not what was done.' (transcript p 22)

24. The OC says that the levies raised at the 2017 AGM were for general maintenance. They rely on the fact that the monies have not been used for roof repairs, and are just 'sitting there' for future use (transcript p 19). They say further that the issue of the roof replacement was put squarely before the OC later at the SGM held on 10 July 2020 which resolved to impose a roofing levy.

25. In my view, when the resolution is considered in all the surrounding circumstances it is more likely than not that it was not intended to raise monies to replace the roof, but rather for maintenance issues. This is because:

- the wording of the resolution makes it clear that the primary purpose is of the levy is to *'to contribute to larger maintenance items on the common property.'*.
- The reference to 'renewal' of the roof in the resolution is more in the nature of a comment on potential maintenance items, as opposed to a statement of primary purpose.
- In fact the money raised was not spent on the roof, either in repairing or replacing. The levies are according to the OC still 'sitting there for future use.
- The monies raised were far short of the amounts flagged for roof replacement in 2016 and approved in 2020.
- The OC seemed well aware of the need to pass any extraordinary items by special resolution, which was what was proposed in 2016, and later done in 2020.
- The 2018 minutes, which effectively adopt the 2017 resolution, deal with the issue of roof replacement as a separate and distinct item.

Ground 3 - contravention of s 78(2)

26. Only 4 of the 17 lots were present at the 2017 AGM, and so no quorum was reached and the resolution passed was an interim one. Section 78(2) of the OC Act requires that consequently the minutes should have been provided to lot owners within 14 days of the meeting. Ms Nguyen has sworn that she did not receive a copy of those minutes, and was therefore unable to exercise her rights to call a SGM. She says that she knew nothing about these minutes until September 2019.

27. Other than Ms Nguyen's sworn statement that she did not receive a copy of the minutes there was no further documentary material submitted by the parties regarding the distribution of the 2017 minutes, although the OC opined at the hearing that they would have been sent to lot owners by post.

The OC relies on the minutes of the 2018 AGM (at which there was a quorum, 12 of the 17 lots being represented) in support of its position that the 2017 minutes had in fact been sent to lot owners as required. The minutes of the 2018 meeting make it clear that administration and sinking fund fees had previously been struck, that they would remain the same, and that no-one sought to further agitate the issue. The Nguyens did not say that they did not receive minutes of the 2018 AGM so it is unclear why they say that they first they knew of the levies was in September 2019. The fact that for whatever reason a lot owner has not received a copy of the minutes of a meeting is not proof that the OC has failed to distribute them. It can be reasonably inferred from the minutes of the 2018 AGM that other lot owners must have been notified about the levies raised at the 2017 meeting, presumably by receiving copies of the minutes, and that no one sought to challenge them; to the contrary, the decisions made in 2017 were endorsed by the lot owners present.

28. In any event, even if the OC has failed to comply with s 78(2) such contravention does not necessarily render the resolution invalid. The Nguyens' submission helpfully directed me to that the consequences of a breach of the OC Act on the validity of a resolution, as explained by Member Rowland in *Jenkins v OCVM Commercial Pty Ltd (Owners Corporations)* [2019] VCAT 1078 at [46] – [49] as follows: (footnotes omitted).

> In my opinion, the Act does not provide a consequence for a breach of the provisions of Part 4 (apart from sections 87 and 89), because the Act recognises that a breach may be substantial or trifling. Each breach needs to be examined in its own context to determine what remedy, if any, is fair.
>
> Instead of providing a consequence for a breach, the Act provides that an aggrieved person, entitled to do so, may make a complaint to the Owners Corporation under Part 10 of the Act and/or apply to the Tribunal for any of the remedies set out under section 165 of the Act.
>
> The Tribunal may make any order it considers fair but must act within well-established principles of law. Not every breach will justify a remedy. In deciding whether an order should be made the Tribunal may have regard to; the effect on the outcome of anything done in breach of the Act; whether any lot owner suffered prejudice; whether the decision has been ratified; the impact on third parties and any other relevant matter.
>
> In conclusion, a meeting, resolution or decision made in breach of a provision of Part 4 of the Owners Corporation Act 2006 does not automatically render it void and of no effect. Instead, an aggrieved person, entitled to do so under section 163 of the Act, may apply to the Tribunal for a discretionary remedy. The Tribunal will need to carefully consider the circumstances of each case to determine if a remedy is appropriate and fair.

29. The Nguyens say that because they did not receive copies of the minutes in contravention of s 78(2) they lost the ability to join with other lot owners to

call a SGM to challenge the resolution. This has meant that they and other lot owners are liable to pay fees that they may otherwise have not been liable for. They say in their submissions that the contravention was '*a brazen attempt to disenfranchise the Nguyens and other lot owners*', that the resolution has not been ratified and that it is fair for it to be set aside (at [30]).

30. I agree with and adopt Member Rowland's approach as set out in *Jenkins*. In my view any mischief that arises out of the alleged failure by the OC to send copies of the minutes of the 2017 AGM to the Nguyens is cured by the events of the 2018 AGM, at which 12 of the 17 lot owners were present and at which the sinking fund fees were discussed and effectively ratified. Those minutes establish to my satisfaction that not only were the majority of lot owners aware of the 2017 resolution, but that they agreed with it. I accept that the monies raised pursuant to the special levies remain available for the OC to spend on behalf of the lot owners, and that they have not and will not be used to replace the roof. In these circumstances I find that the Nguyens have failed to establish that the resolution should be declared invalid on the basis of the alleged failure to comply with s 78(2).

Ground 4- failure to act in good faith s 5.

31. The Nguyens say that in raising the sinking fund levy the OC did not act honesty and in good faith, contrary to s 5(a) of the OC Act. The submit that following the failure to pass an extraordinary levy to repair the roof in 2016, the OC acted deliberately '*to circumvent the will of the majority*" by passing an interim resolution in 2017 '*that purported to reclassify the roof renewal as a repair and maintenance issue, rather than an extraordinary item of expenditure*' (at [34]). They say that passing the resolution under s 23 instead of s 24 had the effect of circumventing s 78(5), and meant that the benefit principle did not apply so that lot owners whose roofs were not in need of replacing would be required to subsidise those lot owners whose roofs were in such need.

32. Given my findings above concerning the characterisation of the impugned resolution and surrounding circumstances, I decline to attribute mala fides to the OC based on what I consider to be the misconceived suspicions of the lot owners.

33. For the reasons above I find that the Nguyens have not proved that the resolutions are invalid, and they are therefore liable to pay the sinking fund levies and I will order accordingly. I turn now to their claim.

THE NGUYENS' CLAIM

34. The Nguyens seek declarations pursuant to s 165 of the OC Act that the following two amounts be set off against any debts owed by them to the OC:

- Payments allegedly made by the Nguyens for the OC's benefit, pleaded in the Amended Points of Claim dated 12 April 2021 as $23,452 and later orally

amended at the hearing to $13,728.00. This claim arises out of arrangements made between by the Nguyens and a third party called Shark Cleaning Services Pty Ltd.

- An outstanding judgment debt owed by the OC to the Nguyens of $4130.05, plus warrant costs of $185.80 and penalty interest.

In the alternative the Nguyens seek orders that this latter amount be paid to them by the OC.

The cleaning fees

35. In about 2005 Shark Cleaning began renting a unit from the Nguyens. The cleaner provided services to the OC. In late 2006 the cleaner told the Nguyens that the OC owed them money, and threatened to withhold rent from the Nguyens until the OC paid the outstanding invoices. The Nguyens say that they and the cleaner came to an arrangement, described in their submissions at [37] as follows:

> *The Nguyens saw that the best solution was to set off the invoices against the rent, with those payments to be set off against future OC levies. The Nguyens asked the manager of Shark Cleaning to discuss this arrangement with the OC manager, and Shark Cleaning said they would.* (footnotes omitted).

36. The Nguyens say that this arrangement was confirmed by a letter sent by Shark Cleaning to the then OC Managers K James and Associates dated 5 December 2006, which refers to 'outstanding invoices' and 'future cleaning payment' and asks the OC to 'please credit these amount (sic) to the contribution of Unit 7'. The Nguyens say that this arrangement continued until April 2009, and they had initially claimed the value of the cleaning service fees until that time. However, Shark Cleaning was deregistered in July 2008 and the Nguyens concede that the OC has no liability to pay for the cleaning services after deregistration of the company, so they now limit their claim to the 24 month period before deregistration, an amount of $13,728 (24 months @ $572.00).

The issues arising from the claim for cleaning fees

37. The OC says the claim for reimbursement of cleaning fees is the subject of res judicata or of an Anshun estoppel because it has already been claimed, agitated and determined in earlier VCAT proceedings (citing *Port of Melbourne Authority v Anshun Pty Ltd* 147 CLR 589 per Murphy J at 605). The Nguyens agree that the claim has been before VCAT, but say that it is not res judicata as the sitting member did not hear evidence on the issue and did not decide it.

38. The OC says the claim is statute barred because the amounts in question were incurred more than six years ago. The Nguyens say that this is not so, as the claim is not relied upon as a positive claim for damages but rather as

an equitable offset which is an equitable defence and therefore not subject to the statute of limitations (citing *Filross Securities Ltd v Midgeley* [1998] 3 EGLR 43 and s 31 of the *Limitations of Actions Act* 1958 (Vic)).

39. The OC questions the veracity of the cleaner's invoices the Nguyens rely upon in support of their claim because they were produced after the company was deregistered on 13 July 2008. The Nguyens say that the fact that some of the invoices post date the deregistration of the company is not significant, an invoice being simply evidence that an amount is payable rather than the source of the obligation to pay.

40. The OC says it has not passed any resolutions agreeing to the cleaning arrangement, and that if the Nguyens paid the cleaner for these services they have done so without any agreement or authority from the OC. The Nguyens disagree. They do not suggest that the arrangement was the subject of any resolution, but say that it was made with the OCs knowledge and approval. They rely on various documents in support of their position, including:

    - the letter from Shark Cleaning to the then OC manager dated 5 December 2006;
    - Ms Nguyen's BAS statements from 2005 - 2009
    - the OC's financial statements for 2006, 2007 and 2008
    - a letter sent to the new OC managers on or about 10 December 2010 by Mr Nguyen, who was the outgoing secretary and which refers to '*1 manila folder which contains invoices of Cleaning Services to be credited as contribution in lieu of payment for Unit 7*.'

41. The Nguyens say further that whether the OC has agreed to the arrangement is irrelevant as their claim is not based on contract but on the doctrine of unjust enrichment. They say that it would be unconscionable to allow the OC to receive a benefit from them paying a debt that the OC owed the cleaner without accounting to them. They rely on the reasoning of SM Vassie in *Fullarton v Holmes* [2013] VCAT 24, arguing that they, like the applicants in Fullarton, were involved in a "co-operative venture" with the OC, that the OC had failed to pull its weight, and that the OC was enriched at their expense. The Nguyens say in the alternative that the OC has failed to act in good faith by taking the benefit of the cleaning services and not reimbursing them. The OC counters by submitting that even if the OC has benefitted from an expense incurred by the Nguyens, absent a promise or indication to pay they have no liability to do so, relying on the reasoning of Deputy President Lulham in *Cruddas v Owners Corporation PS611940S (Owners Corporation)* [2012] VCAT 683 at [22] – [23].

42. As is apparent, much of the evidence is contested and many facts are in dispute. However, it is agreed that the issue of the cleaning fees has already been raised before VCAT. If indeed the matter is res judicata, then VCAT

does not have any jurisdiction to hear the claim, and so cannot determine the other issues raised by the parties.

Res Judicata?

43. Documents submitted by the OC show that on 30 November 2009 the Nguyens applied to VCAT seeking orders against 9 respondents, including the OC. The application effectively sought orders that the Nguyens be reimbursed for payments they had made for the OC, listed as $5243.05 for 'insurance premium paid' and $14,872 for 'cleaning services paid'. The Nguyen's proceeding was allocated reference number C10737/2009 and was the subject of a hearing on 24 March 2010, when various directions were made and the matter was set down for mediation together with C9574/2009, a claim brought earlier by the OC for fee recovery. It is not clear whether the mediation occurred, but if it did it was obviously not successful. There are three subsequent interlocutory orders made in this proceeding, on 2 August 2010, 22 September 2010 and 2 December 2010 when the Nguyens' claim was listed for a compulsory conference on a date after 24 January 2011 to be heard together with C9574/2009.

44. What happened thereafter is not entirely clear. It may be that the proceedings were reissued, but it seems more likely that they continued, with changed reference numbers. There is a copy of a VCAT order dated 31 January 2011 with reference numbers 'OC2/2011 and OC5/2011' which appears to relate to the same claims which had previously been accorded proceeding numbers C9574/2009 and C10737/2009 respectively. The order of 31 January 2011 follows an obviously unsuccessful compulsory conference, and makes directions regarding the further hearing of the claims. The order records that in OC5/2011 the applicants (being the Nguyens) seek various remedies, relevantly including:

- reimbursement of insurance said to have been paid by a family member ($5243.05);
- reimbursement of $17160 said to have been paid (by way of rental set-off) for cleaning;
- a declaration that the appointment of Walsh and Whitelock was invalid and that resolutions passed at the meeting on 6 May 2009 were also invalid

The order further lists OC5/2011 for a full day hearing on 22 March 2011, to be heard with OC2/2011, the OC's claim for fee recovery.

45. Both matters were heard by VCAT on 22 March 2011 when two final orders were made. In OC2/2011, VCAT ordered the Nguyens to pay the OC $1113.00. In OC5/2011 the OC is ordered to pay the Nguyens $5243.05. I include the text of the order below (words in italics added for clarification):

ORDERS

1. The Tribunal orders the first respondent *[the OC]* to pay to the applicant *[the Nguyens]* the sum of $5243.05.
2. The application against the second to eighth respondents, both inclusive, is dismissed.
3. The order in OC2/2011 that *[the Nguyens]* pay *[the OC]* is set off against this order, so that *[the OC*] is to pay *[the Nguyens]* the sum of $4130.05.
4. See also order in OC2/2011.

46. It is not in dispute that the issue of the cleaning fees were before the Tribunal, along with other matters, on 22 March 2011. That is apparent from the pleadings, subsequent VCAT orders, and the summaries prepared by the Nguyens for that hearing, all of which documents were included with the OC's submissions. This means that the Anshun principles are not applicable, as there is no suggestion that matters now sought to be raised were not agitated in the previous litigation. However, the Nguyens say that while the issues were raised they were simply not dealt with, and there is therefore no res judicata.

47. As I indicated during the hearing, it would seem to me to be improper to seek to look behind a final order of VCAT and to rely on a party's recollection, however genuine, of what took place during a hearing as proof of what occurred. Even if I accept the Nguyens' assertion that unchallenged evidence must be accepted, I note that unchallenged evidence is not the same as sufficient evidence. If the Nguyens felt that VCAT had not considered the issues they had raised appropriately or at all, they had various courses available to them. They could have requested written reasons for the Member's decision, or a transcript of the hearing, but they did not. They could have appealed to the Supreme Court, but they did not. In my opinion it is not open to them now, many years later, to seek to effectively reagitate matters that were clearly before VCAT in 2011.

48. In my view, VCAT does not have jurisdiction to look behind a final order it has made, even if there is some ambiguity on its face. As a creature of statute, it lacks inherent or implied powers to do so, unlike a Court. An investigation of the kind urged by the Nguyens would in effect amount to a collateral review of the earlier decision. That is, it would require VCAT to look into external or extrinsic material and surrounding circumstances in order to construe the meaning or import of the order. The Victorian Supreme Court has recently considered the Tribunal's powers to do so in *The Big Apple Group Pty Limited v Melbourne City Council* [2020] VSC 393. In that case, the appellant had sought leave to appeal against VCAT's decision that it lacked the power to set aside its own consent orders. The orders had been made five years earlier pursuant to s 93 of the VCAT Act, and the appellant had unsuccessfully argued they should be set aside as they were affected by fraud.

49 The Supreme Court refused the application for leave to appeal, with Ginnane J at [41] – [48] reviewing the authorities and holding that VCAT does not have the jurisdiction to conduct a collateral review of a previous decision, and that the only power VCAT has to reconsider previous orders are those conferred by ss 119 and 120 of the *Victorian Civil and Administrative Tribunal Act* (1998) (Vic) (VCAT Act), which sections deal respectively with corrections to VCAT orders and rights of review accorded to absent parties. His Honour cited with approval the comments of the Court of Appeal in *Director of Housing v Sudi* (2011) 33 VR 559 at 568 that in order to entertain a collateral attack on the validity of an earlier decision VCAT would have to conduct a 'trial within a trial' which was inconsistent with the legislature's intention for the Tribunal to be a speedy and inexpensive forum for dispute resolution.

50. In the current circumstances it is apparent from the documents provided by the parties including the earlier VCAT pleadings and orders that the matters relating to the cleaning claim were before the Tribunal at the hearing on 22 March 2011. Indeed, that is accepted by the Nguyens. In short, it is clear from the documentary evidence including VCAT's records that various matters were included in the claim, and that a final order was made on 22 March 2011 awarding a sum to the Nguyens. To entertain the submissions made by the Nguyens, I would have to conduct an inquiry or investigation into the circumstances surrounding the making of the order, or a 'trial within a trial' and am of the view that I lack the power or obligation to do so. The orders have been made and must remain in operation until they are set aside. As the Supreme Court has outlined, VCAT is a creature of statute and lacks the inherent jurisdiction of the superior courts. The source of its powers is to be found in enabling legislation. The VCAT Act prescribes how final orders may be changed - s 119 (the so called 'slip rule') empowers VCAT to correct minor mistakes in an order, s 120 allows VCAT to set aside a previous order made in the absence of a party, and s 148 grants an aggrieved party the right to appeal to the Supreme Court, who can if required seek an extension of time. In the present case, it is only the third of these options that would assist the Nguyens.

51. As canvassed above, there are a number of further issues raised by the parties, all of which go to the substance of the claim for cleaning fees. There is disagreement about whether the arrangement was ever approved by OC, and about the veracity of the invoices. The OC says further that the claim is statue barred, while the Nguyens contend that their claim is not raised by way of contract but as an equitable defence based on unjust enrichment or unconscionable conduct, and is therefore not subject to the statute of limitations. As I have indicated, in my view the claim regarding cleaning fees is res judicata. VCAT has performed its duties, is functus officio, and the Nguyens like any aggrieved parties may pursue whatever remedies the law affords them in the appropriate jurisdiction. Given those findings I do not consider it necessary or possible to further enquire into these issues and I decline to do so.

The judgment debt

52. By order dated 22 March 2011 in OC 5/2011 VCAT ordered the OC to pay the Nguyens $4130.05. The order was registered with the Magistrates Court on 29 June 2011. On 5 April 2012 the Magistrates Court ordered the OC to pay a further amount of $185.80 in warrant costs. In their most recent Points of Claim dated 12 April 2021 the Nguyens claim the judgment debt, the warrant costs, and penalty interest pursuant s 2 of the Penalty Interest Rates Act 1983 to the date of VCAT's determination of the matter.

53. The OC accepts that it is liable to pay the judgment debt, which it has credited to the amounts it claims are owing by the Nguyens, but it contests the Nguyens' claim for interest and enforcement costs on the basis that in its submission VCAT does not have the power to grant interest on a monetary judgment that it has already made. It argues that the Nguyens' claim for interest should be sought in the appropriate jurisdiction, being the Magistrates Court and not VCAT. The OC relies on the decision of Deputy President Steele in *CIMA Office Services (Vic) Pty Ltd v Hession t/as Hardies (Civil Claims)* [2008] VCAT 585, and her discussion of the provisions of ss 57 and 58 of the *Supreme Court Act* 1986 (Vic), at [23] to [26]. Deputy President Steele concludes that by virtue of these provisions and s 108 of the *Fair Trading Act* 1999 (Vic), VCAT is empowered to order that penalty interest be paid on a debt. The OC submits that there are no comparable provisions that allow VCAT to make orders on costs incurred in another jurisdiction, such as the Magistrates Court.

54. The Nguyens say that the provisions discussed in *CIMA Office Services* concern pre-judgment interest, which require a court order as there is a discretion. They distinguish their claim, correctly in my view, on the basis that it concerns post-judgment interest. They submit that entitlement to such interest is not contingent on a court or Tribunal first making any award of interest, but rather arises by reason of the making of the judgment pursuant to s 100(7) of the *Magistrates Court Act* 1989 (Vic) which provides:

> Every judgment debt carries interest at the rate for the time being fixed under section 2 of the Penalty Interest Rates Act 1983 from the time the order was made.

55. The Nguyens say that VCAT is empowered by virtue of s 162(b) of the OC Act to make an order for interest on the judgment debt. Section 162 relevantly provides that:

> VCAT may hear and determine a dispute or other matter arising under this Act or the regulations or the rules of an owners corporation that affects an owners corporation (**an owners corporation dispute**) including a dispute or matter relating to—
>
> (a) the operation of an owners corporation; or

> (b) an alleged breach by a lot owner or an occupier of a lot of an obligation imposed on that person by this Act or the regulations or the rules of the owners corporation; or
>
> (c) the exercise of a function by a manager in respect of the owners corporation……

56. The Nguyens submit that VCAT should adopt a broad interpretation of the scope of s 162, as they say was given by Senior Member Vassie in *Owners Corporation 4PS539033E v Bensons Property Group (Owners Corporation)* [2018] VCAT 1769. That case involved an allegation by the applicant that the respondent had breached its fiduciary duties. The parties disagreed over whether VCAT had power to determine a dispute about breach of fiduciary duties; the respondent (Bensons) arguing that sub sections 162(a) – (c) illustrate, but do not expand, the words 'arising under this Act…that affects an owners corporation'. Bensons contended that the words do not widen the definition, and that there must a dispute or matter arising under the Act before there can be any jurisdiction for VCAT to hear and determine it. The applicant Owners Corporation's position was that the subsections expand the definition so that if a dispute or matter relates to one of the things identified in paragraphs (a) (b) or (c) of the section, then it is an 'owners corporation dispute' even if it is not a dispute or other matter arising under the OC Act and VCAT has jurisdiction to hear it.

57. Senior Member Vassie agreed with the Owners Corporation, finding that this interpretation promoted a purpose or object underlying the OC Act of providing an appropriate mechanism for the resolution of disputes (at [95]). He noted at [92] that adopting the more restrictive position put by Bensons

> ….would mean that the owners corporation's allegations of a breach of the duties of an initial owner imposed by s 68(1) could be heard and determined in this proceeding, because a dispute arising under the OC Act is involved, but allegations of breach of fiduciary duties could not be but would have to be made in a proceeding in a Court. That multiplicity of proceedings is hardly an appropriate mechanism for resolution of the dispute between the owners corporations and Bensons.

58. I agree with and adopt this approach. In the circumstances I find the judgment debt has been credited to the Nguyens and so I made no order regarding that debt, but I find that I can and should award the interest claimed. I must now consider the date over which interest should be calculated. In their submissions the Nguyens have claimed interest from 29 June 2011 to the date of VCAT's determination of the matter, calculated as at the date of the submissions (12 September 2011) to be $4469.62. I do not think this is an appropriate calculation. I note that at least by 5 February 2020 the OC had indicated that it had reduced the amount claimed from the Nguyens by the judgment debt amount of $4130.05. Its amended Points of Claim and Points of Defence also make it clear that this amount has been credited to the Nguyen's account. That means that the penalty interest should be calculated from 29 June 2011, being the date of the Magistrates Court

order, until 5 February 2020. Using publicly available penalty interest calculators I find that amount to be $3616.28. I also award the warrant costs of $185.80, so that the total amount the OC must pay the Nguyens is $3802.08.

59. The Nguyens in their submissions have asked to be heard on the question of costs. They may wish to reconsider this position, given that they have not been substantially successful in their claim. I will allow the parties to make written submissions to me on the question of costs by 15 March 2022. If none are received by then I would be proposing to award to the OC the standard costs of fee recovery proceedings in the amount of $790.00 (including the filing fee) as requested by them, given that I have allowed their claim in full.

J Klingender
Member