

VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

OWNERS CORPORATIONS LIST

VCAT REFERENCE NO. OC2028/2020,
OC2031/2020
OC2405/2020

CATCHWORDS

Applications for recovery of special levy more than two times the annual fee without a special resolution, sections 3, 5, 23, 24, 30, 31, 36, 40 and 47 of the *Owners Corporation Act 2006* - Regulation 6 of the *Owners Corporation Regulations 2018-Victorian Civil and Administrative Tribunal Act 1998* s109 and 115C.

OC2028/2020

APPLICANT Owners Corporation Plan No. SP036207X

RESPONDENT Rongmei Pty Ltd (ACN: 603 372 685)

OC2031/2020

APPLICANT Owners Corporation Plan No. SP036207X

FIRST RESPONDENT Sandro Mazzei

SECOND RESPONDENT Josephine Versace

OC2405/2020

FIRST APPLICANT Sandro Mazzei

SECOND APPLICANT Oya Baglar (Removed from proceedings)

THIRD APPLICANT Caijuang Fang

FOURTH APPLICANT Frank Gandolfo

RESPONDENT Owners Corporation Plan No. SP036207X

WHERE HELD Zoom Conference

BEFORE Member A Moon

HEARING TYPE Final Hearing

DATE OF HEARING 2 and 3 December 2021

DATE OF ORDER 10 March 2022

CITATION Owners Corporation Plan No. SP036207X v
Rongmei Pty Ltd (Owners Corporation) [2022]
VCAT 266

PROCEEDING OC2028/2020

ORDER

1. The Tribunal orders that the respondent Rongmei Pty Ltd must pay the applicant the sums of:
 - a. \$12,370.800 for the special levy issued on 25 June 2020;
 - b. \$1677.70 for interest from 27 July 2020 (the date of the final fee notice) to 3 December 2021 (the date of hearing); and
 - c. \$311.00 for reimbursement of fees paid by the applicant;

a total of: **\$14,487.50.**

APPEARANCES:

For the First Applicant

Mr J Louey of Binks Associates, Owners Corporation Manager, representing Owners Corporation SP036207X

For the Respondent

Ms C Fang, Director of Rongmei Pty Ltd

PROCEEDING OC2031/2020

ORDER

1. The Tribunal orders that the respondent Sandro Mazzei and Josephine Versace must pay the applicant the sums of:
 - a. \$8904.50 for the special levy issued on 25 June 2020;
 - b. \$1207.59 for interest from 27 July 2020 (the date of the final fee notice) to 3 December 2021 (the date of hearing); and
 - c. \$311.00 for reimbursement of fees paid by the applicant;

a total of: **\$10,423.44**

APPEARANCES:

For the Applicant

Mr J Louey of Binks Associates, Owners Corporation Manager, representing Owners Corporation SP036207X

For the Respondent

Mr Mazzei on behalf of himself and Ms Versace

PROCEEDING OC2405/2020

ORDER

1. The proceeding is dismissed.

NOTE:

The principal registrar is directed to correct the address for service of Frank Gandolfo in the register to be c/o Ms Louise Mure at louise.mure@outlook.com

A Moon
Member

APPEARANCES:

For the First Applicant:	Mr S Mazzei
For the Second Applicant:	Withdrawn from proceedings
For the Third Applicant:	Ms C Fang, Director of Rongmei Pty Ltd
For the Fourth Applicant:	Ms L Mure, observing
For the Respondent:	Mr J Louey of Binks Associates, Owners Corporation Manager, representing Owners Corporation SP036207X

REASONS

- 1 This was the concurrent hearing of three proceedings involving Owners Corporation Plan No. SP036207X (“the Owners Corporation”). Reasons for all three cases are set out below. All three matters revolve around the roof of the premises at 650 Sydney Road Brunswick, the levy issued for replacement of that roof and the claim that levy was invalid and could not be recovered from the lot owners that are party to these proceedings.
- 2 Proceedings OC2031/2020 (“Mazzei SL Claim”) is a claim by the Owners Corporation for payment of a special levy issued on 25 June 2020 to the then registered owners of Lot 11 Sandro Mazzei (“Mr Mazzei”) and Josephine Versace.
- 3 Proceedings OC2028/2020 (“Rongmei SL Claim”) is a claim by the Owners Corporation for payment of a special levy issued on 25 June 2020 to the registered owner of Lot 17 Rongmei Pty Ltd.
- 4 Proceedings OC2045/2020 (“Lot Owners Claim”) is a claim by 3 lot owners (“Claimant Lot Owners”) in OC SP036207X against the Owners Corporation seeking the following declarations:
 - *The SGM dated 10/7/2020 and AGM dated 17/9/2020 (“the AGM”) are invalid;*
 - *That the special levies in question be deemed as void; and*
 - *That the sinking/maintenance levies in question be deemed as void.*
- 5 The Lot Owners Claim was filed on 27 October 2020, apparently in response to the claims for payment of the special levy issued 25 June 2020 to the Claimant Lot Owners.
- 6 One of the Claimant Lot Owners is Rongmei Pty Ltd (“Rongmei”) which owns Lot 17. Rongmei is the respondent in the Rongmei SL Claim. Ms Fang who appeared at the hearing is the director of Rongmei.
- 7 Another Claimant Lot Owner is Mr Mazzei. Mr Mazzei is one of the respondents in the Mazzei SL Claim. Since the Mazzei SL Claim was issued at VCAT Mr Mazzei has become the sole registered proprietor of Lot 11.
- 8 The final remaining Claimant Lot Owner in the Lot Owners Claim is Frank Gandolfo (deceased) (“Mr Gandolfo”). Mr Gandolfo was a lot owner in the Owners Corporation at the time of his death and I am advised the Special Levy has not been paid by his Estate at this time.
- 9 Louise Mure, a daughter of Mr Gandolfo, attended the hearing as an observer for her late father’s estate. Ms Mure only learned of the proceedings shortly prior to the hearing date. At the commencement of the hearing I advised Ms Mure that I was not prepared to grant an adjournment of the proceeding in which she was involved as I could not envisage any

financial detriment arising to her father's estate if the matter proceeded without her taking an active part in the hearing. There are no proceedings for debt recovery against Mr Gandolfo by the Owners Corporation at this time. Further if the Claimant Lot Owners' argument was successful then it might remove the potential liability of the Estate for the unpaid Special Levy. Ms Mure indicated she would remain as an observer for her family and advised that there is, as yet, no administrator or executor appointed for the Estate of Mr Gandolfo.

- 10 Mr Mazzei presented the Claimant Lot Owners case on behalf of the applicants to the Lot Owners Claim. He was assisted by a Ms Teresa Nguyen. Mr Mazzei filed written submissions on behalf of the three remaining applicants to the Lot Owners Claim.
- 11 Mr Mazzei objected to Mr Julian Louey, an employee of the Owners Corporation Manager Binks & Associates, appearing on behalf of the Owners Corporation. Mr Mazzei wanted proof of appointment of Mr Louey as the representative of the Owners Corporation to defend the Lot Owners Claim.
- 12 Mr Louey advised he is a professional advocate under the Owners Corporation Act and entitled to appear as such. He produced emails from 3 of the 4 members of the committee of management authorising him to appear for the Owners Corporation. Mr Louey also produced Minutes of the Annual General Meeting of 17 September 2020 ("the 2020 AGM") that demonstrated the appointment of the three authorising committee members as committee members of the Owners Corporation. I was satisfied that Mr Louey had authority to represent the Owners Corporation in all three proceedings.
- 13 Mr Louey objected to Ms T Nguyen appearing for the party Rongmei. He demonstrated to the Tribunal that Ms Nguyen was neither a director nor officer of Rongmei nor a professional advocate and that he did not consent to her appearing on behalf of Rongmei.¹
- 14 I accepted Mr Louey's objection to Ms Nguyen representing Rongmei. As a result of that objection Ms Fang, in her capacity as director appeared for the company herself. Mr Fang advised me that she totally relied upon the written submissions filed by Mr Mazzei in respect to both the Rongmei SL Claim and the Lot Owners Claim against the Owners Corporation.

Although Ms Fang spoke English to me I believed it would be to her and the Tribunal's benefit for an interpreter to be available to translate discussions about any complex issues that Ms Fang might like explained in more detail. It would also ensure that I fully understood any of her concerns that she wanted explained in more detail. At regular times throughout the hearing I confirmed with Ms Fang that she did not have any concerns about understanding the discussions occurring. At those times I also confirmed

¹ *Victorian Civil and Administrative Tribunal Act 1998* (Vic) ("VCAT Act") section 62.

that she did not have any questions she wished to raise through the interpreter and did not seek any interpretation of any issues. On a few occasions Ms Fang sought the assistance of the interpreter. Mostly she indicated that she was not in need of any further assistance.

Pre-Hearing Questions About the Member Hearing the Proceedings

15 On 25 November 2021 the former solicitor for the Owners Corporation in all proceedings, LFS Legal, filed a Notice of Solicitor Ceasing to Act and also advised that Mr Julian Louey of Binks & Associates Owners Corporation Manager would represent the Owners Corporation at the hearings.

16 On 30 November 2021 Mr Mazzei wrote to VCAT as follow:

“It has been brought to our attention that Mr Julian Louey immediately prior to his engagement as an employee of Binks and Associates as a Senior Owners Corporation Manager spent some substantial time as a permanent employee of VCAT in an administrative role.

Mr Louey socialised with some members in an office setting, inclusive of work related travel, and as such one assumes out of hours as well.

Whilst we believe that the integrity of the members is of the highest standard, we would feel comfortable if VCAT would assure us that whichever member presided over our case had absolutely no prior interaction with Mr Louey during the time of his VCAT employment and after leaving VCAT.”

17 At 1.22 pm on 30 November 2021 the registry responded to Mr Mazzei’s email in accordance with my instructions as follows:

“We refer to the email from Sandro Mazzei — sent Tuesday 30 November 2021 12.31 pm.

Member Moon has asked that we advise you that she does not recall any interaction with Mr Louey, but if he believes that the Member’s memory is faulty we ask that such information be brought to the Tribunal’s notice as soon as possible so that consideration can be given to changing the Member listed to hear the proceeding.”

18 At 1.36 pm on 30 November 2021 Mr Louey sent an email to the Tribunal and Mr Mazzei as follows:

“To whom it may concern,

I do not recall any relevant interactions with Member Moon during my employment at VCAT and I do not believe there would be any reason for Member Moon to excuse herself.

I note that for the last three years of my employment at VCAT (from 2013-May 2016) I was the Judge’s Associate to Judge Pamela Jenkins and worked almost exclusively for Her Honour.”

- 19 Prior to commencement of hearing the substantive case I asked Mr Mazzei if he had any objection to my hearing the proceedings. He responded that he had no objection to me presiding. I regarded the question of my suitability to hear the matter as closed and in reliance on that assurance proceeded to hear the proceedings.

The Building Structure

- 20 The plan of subdivision for Strata Plan No. SP036207X comprises 17 commercial lots on a single level together with an arcade in the centre of the building. There are also 9 car park lots external to this main building. The 17 lots and the central arcade are under the cover of one roof structure.
- 21 The Legend on the Strata Plan states the *“Upper Boundary of each of units 1-17 (both inclusive) is eight metres above the Lower Boundary.”* Accordingly I was satisfied that each of the 17 lot owners therefore owns the area of roof structure over their lot. In some ways you could describe the roof as a checkerboard, with imaginary property title lines on each box that comprises a lot sitting under each box. Some boxes are owned by individuals and the centre is common property of the Owners Corporation.
- 22 The common property roof over the arcade area is, in effect, like a large oblong in the centre of a group of boxes (being the individual titles). The individual lot owners’ roof area are almost shaped in a “U” around the common property roof area.
- 23 There have been problems with the roof documented by the Owners Corporation for at least 10 years. The documents provided to the Tribunal demonstrated that there have been numerous debates within the membership as to what to do about the roof problems and a variety of solutions proposed and accepted by the membership over the years. Sometimes those proposed resolutions to carry out works on the roof have been actioned, and at other times the decisions have not been acted upon or even overturned at a subsequent annual general meeting or special general meeting of the owners corporation.
- 24 The parties provided Minutes of various Annual General Meetings and Committee Meetings to the Tribunal which demonstrated that there have been leaks in the roof, internal damage to ceilings and walls, as well as water leaking onto the floor of various parts of the complex. Luckily to date there have been no personal injury claims against the Owners Corporation. There have been property claims however. These issues have occurred on common property and some individual lots. The Minutes also confirmed a number of repairs have been carried out over the last 10 years, some funded privately by individual owners and some by the Owners Corporation as a whole. Questions of replacement of the whole roof have been debated regularly by the lot owners and the various appointed Owners Corporation Managers from time to time.

- 25 Since 2011 there have been 3 different Owners Corporation Managers appointed to manage the Owners Corporation. As is the way with a change of management there has also been a difference in opinion amongst at least two of the management companies as to the law applicable to the powers and duties of both the Owners Corporation, and individual lot owners, in relation to the roof.
- 26 Part of the problems in dealing with the roof have arisen because some lot owners believed that there was nothing wrong with the roof area above their individual lot on the strata plan. Further some of the lot owners, with what they claimed was an undamaged roof, believed that they had no liability to contribute to the replacement of the whole roof. They held the view that they only had to contribute to the maintenance of their roof square on the checkerboard. The Claimant Lot Owners hold those beliefs.

Proceedings OC2031/2020: Owners Corporation Claim Against Lot 11 (Mr Mazzei and Ms Versace)

- 27 The Fee Notice the subject of the proceedings was issued for Lot 11 on 25 June 2020 for an amount of 8,904.50 (“the Fee Claim”). I will refer to the Lot Owner as Mr Mazzei as Ms Versace took no part in the proceedings and was represented by Mr Mazzei throughout. Mr Mazzei had no dispute with the service of the notice. He disputed its validity as a basis to raise funds for roof repairs/replacement. The Final Fee Notice was issued on 30 July 2020 and the application for recovery of \$8904.50 fees, interest and costs was filed with VCAT on 7 September 2020.
- 28 Interest on the Fee Claim between the date of Final Fee Notice and 3 December 2021 was claimed at a rate of 10% in an amount of 1,207.94 together with costs of \$750.00 (inclusive of a \$311.00 application fee).
- 29 The summary of proofs filed with the Tribunal was declared to be true and correct by Ben Commerford of Binks & Associates Owners Corporation Manager on 3 February 2021. The summary of proofs included the usual required proofs in support of the Owners Corporation Fee Claim as follows:
- a. The annual fee was struck in accordance with lot liability;
 - b. A resolution passed the extraordinary fee levy on 10 July 2020;
 - c. The Fee notice was served on Mr Mazzei’s address for service in the register; and
 - d. Interest was approved by resolution at the annual general meetings and was therefore recoverable by the Owners Corporation.
- 30 At the hearing the final amount claimed by the Owners Corporation from Mr Mazzei comprised:
- a. \$8904.50 special levy
 - b. \$1207.94 interest calculated from the date of the Final Fee Notice to 3 December 2021; and
 - c. Costs (inclusive of the Tribunal application fee) at 750.00
- Total: \$10,862.44

Proceedings OC2028/2020: Owners Corporation Claim Against. Lot 17: (Rongmei Pty Ltd)

- 31 The Fee Notice was issued for Lot 17 to Rongmei on 25 June 2020. Again there has been no attack on the service of the Fee Notice rather just on its validity to raise funds for roof repairs/replacement. The Final Fee Notice was issued on 30 July 2020 and the application for recovery of \$12,370.80 fees, interest and costs was filed with VCAT on 7 September 2020.
- 32 Interest on the Fee Claim between the date of Final Fee Notice and 3 December 2021 is claimed at a rate of 10% in an amount of \$1,677.70 together with costs of \$750.00 (inclusive of the \$311.00 application fee).
- 33 The Rongmei summary of proofs filed with the Tribunal was declared to be true and correct by Ben Commerford of Binks & Associates on 16 November 2020 and again provided the following additional proofs in support of the Owners Corporation Fee Claim:
 - a. The annual fee was struck in accordance with lot liability;
 - b. A resolution passed the extraordinary fee levy on 10 July 2020;
 - c. The Fee notice was served on Rongmei's address for service in the register; and
 - d. Interest was approved by resolution at the annual general meetings and was therefore chargeable.
- 34 At the hearing the final amount claimed from Rongmei comprised:
 - a. \$12,370.80 special levy
 - b. \$1677.70 interest from the Final Fee Notice to 3 December 2021; and
 - c. Costs inclusive of application fee at \$750.00Total: \$14,798.50

Submissions at Hearing for both the Rongmei and Mazzei Fee Claims

- 35 The Owners Corporation claims the 25 June 2020 fee notices issued to both Rongmei and Mr Mazzei's lots are valid and enforceable. It also submits that the resolution of the Owners Corporation on 10 July 2020 approving a special levy to allow the Owners corporation to construct a roof over the common property and the private lots is valid.
- 36 Accordingly the Owners Corporation submits that its claims for payment of the special levy to construct a new roof over the private lots and the common property is valid under the *Owners Corporation Act 2006* (Vic) ("OC Act").

Owners Corporation Case: Entitlement to Maintain and Repair Private Property as well as Common Property

- 37 Owners corporations have various functions and duties placed on them by the OC Act as do individual lot owners. All references in this case to sections are references to the OC Act unless stated to the contrary. I have summarised, or quoted in full (*Italics*), the relevant sections of the OC Act

that the Owners Corporation claims to have relied upon in setting the fees that it is seeking to recover from Mr Mazzei and Rongmei.

Functions of an owners corporation

38 OC Act Section 4.

An owners corporation has the following functions-

- (a) *to manage and administer the common property;*
- (b) *to repair and maintain-*
 - (ii) *the common property;*
 - (iii) *the chattels, fixtures, fittings and services related to the common property or its enjoyment;*
 - (iv) *equipment and services for which an easement or right exists for the benefit of the land affected by the owners corporation or which are otherwise for the benefit of all or some of the land affected by the owners corporation;*

Owners corporation may levy fees

39 An owners corporation may set annual fees to cover maintenance and repairs which are based on lot liability.²

Extraordinary fees Required to Fund Unbudgeted Expenses

40 An owners corporation has the power to raise funds to meet additional expenses not budgeted for at the annual general meeting each year. The relevant sub-sections of section 24 are as follows:

1. *An owners corporation may levy special fees and charges designed to cover extraordinary items of expenditure.*
 - (4) *A special resolution is required when exercising a power under subsection (1) if the amount involved is more than twice the total amount of the current annual fees set under section 23.*
 - (5) *Subsection (4) does not apply if the fees are levied to pay for or recoup the cost of repairs or maintenance carried out to any part of the property for which the owners corporation is responsible where immediate expenditure is or was necessary to ensure safety or to prevent significant loss or damage to persons or property.*

Extraordinary Payments for Urgent Matters

41 An urgent matter is defined in section 45(2)(a) to be a situation where payments are required to:

“repair or maintain any part of the property for which the owners corporation is responsible where there are reasonable grounds to believe that an immediate expenditure is necessary to ensure safety or prevent significant loss or damage to persons or property;”

² OC Act section 23 subsections (1) (3) and 3(A).

Property an Owners Corporation Has a Liability to Repair

42 Section 46 states that an “owners corporation **must** (my emphasis) *repair and maintain both the common property and chattels, fixtures, fittings and services related to the common property or its enjoyment.*” The legislation expands further on these duties of all owners corporation in section 47 which mandates that the owners corporation “**must repair and maintain any service in or relating to a lot that is for the benefit of more than one lot and the common property.**” (my emphasis again).

43 A section 47 “service” which an owners corporation **must maintain and repair** (my emphasis again):

“includes a service for which an easement or right is implied over the land affected by the owners corporation or for the benefit of each lot and any common property by section 12(2) of the Subdivision Act 1988.”

44 The OC Act goes on to make sure that users are in no doubt what easements and rights are implied over land covered by an owners corporation by inserting a Note to section 47 referring us to the *Subdivision Act 1988*. I have set out the parts of the Note relevant to this case below.

“Note

The easements or rights that may be implied under section 12(2) of the Subdivision Act 1988 are those necessary to provide-

- *Support, shelter or protection;*
- *Passage or provision of water----*”

45 The submissions of the Owners Corporation to validate the levies claimed in the Rongmei SL Claim and the Mazzei SL Claim are based on the provisions summarised in paragraphs 39-45 above.

46 In paragraphs 38-40 of the Claimant Lot Owners Submissions Mr Mazzei claimed that the Owners Corporation could not legally repair the whole roof over the building because much of the roof was private property.

47 The Owners Corporation’s submissions were that the roof, although spread over the private lot owners’ properties and the common property provides a “service” for the benefit of more than one lot and the common property and that the Owners Corporation was therefore legally required to repair and maintain the whole roof.³

48 The relevant “service” is “*provision of shelter and protection from rain and the elements*”.⁴

49 At the hearing Mr Louey for the Owners Corporation played a video showing the roof over the arcade that comprises the land contained in the

³ s47(1) paragraph 45 The relevant “service” is “*provision of shelter and protection from rain and the elements*”.

⁴ s47(3) Note to s47(3) and section 12(2) of the *Subdivision Act 1988*.

Owners Corporation. The video showed a continuous expanse of roofing covering all the private lots and the common property.

- 50 I am satisfied that each private lot owner's section of roof provides shelter and protection to other lot owners and the common property (ie to the rest of the land contained in the Owners Corporation). Rainwater must run across more than one lot in the subdivision to get to the ground. I do not accept Mr Mazzei's submissions that the Owners Corporation cannot carry out repairs over private property where, as here, each lot owner's section of roof must provide protection to all private lots and the common property.
- 51 Given that I am satisfied that each lot owner's roof area and the common property roof area provides shelter to more than that party's property I also find that the Owners Corporation has a duty to "*repair and maintain*" that "*service*".⁵

Repair and Maintain: Does it include Replacement

- 52 Mr Mazzei and Ms Fang both maintained that even if there was a duty to maintain and repair the roof as claimed by the Owners Corporation that did not permit the Owners corporation to decide to replace the roof.
- 53 Mr Louey submitted that practicality and common sense require an ability to replace broken items that can no longer be repaired. How else can they be "maintained" as required by the OC Act? He gave some examples of things that can be repaired but may finally break and be unrepairable such as an electrical fuse board and an intercom.
- 54 Mr Louey referred the Tribunal to two cases to support the Owners Corporation's position that the expression "repair and maintain" must include "replacement".
- 55 In *Circle Developments Pty Ltd v Owners Corporation PS1897*⁶ Member Wentworth quoted from some decisions of other courts and Tribunals in relation to the issues of repairs and maintenance under section 46 as follows:

27. In the context of the obligations of an owners corporation under equivalent New South Wales legislation, Brereton J⁵ observed that:

"The duty to maintain involves an obligation to keep the thing in proper order by acts of maintenance before it falls out of condition, in a state which enables it to serve the purpose for which it exists."

His Honour considered that the obligation included attending to malfunctions, taking preventative measures to ensure that there not be a malfunction, and remediation of defects in the original construction of the common property.

⁵ Section 47(1).

⁶ [2012] VCAT 1941 at paragraphs 27 and 28.

28. In the context of the meaning of “maintenance” in a licence agreement, Bowman J, then Vice President, made the following observation in *Gainard v Cavendish Properties PL (Civil Claims)*⁷

“Common sense should also be applied in relation to what is meant by “maintenance”. Essentially I agree with the submissions made by Mr Bingham in this regard. The definition of “to maintain” provided by Shaw LJ in *Haydon v Kent County Council* [1978] OB 343 is useful. That definition is “to keep something in existence in a state which enables it to serve the purpose for which it exists”. I also agree with Mr Bingham’s submission that maintenance includes the replacement of worn out items or items which no longer serve the purpose for which they exist.”

- 56 I find Mr Louey’s quotes from Member Wentworth extremely helpful in this matter. I do not accept the Claimant Lot Owners submission that repair and maintenance cannot include replacement. It is neither practical nor common sense to believe that a duty to maintain does not include the need to replace worn out items. I find that the duty to repair and maintain includes as a necessary concomitant replacement of worn out items/services that can no longer be repaired.
- 57 I find that the Owners Corporation is empowered to replace the roof and substructure as part of its duty to repair and maintain where the roof and substructure are worn out.

Was the Resolution Raising the Levy Valid and Enforceable?

- 58 Both sides agree that the resolution raised on 10 July 2020 to replace the roof was not a special resolution, even though the resolution was passed at a special general meeting. The Claimant Lot Owners allege that a special resolution is required to raise a special levy and as there was no special resolution the levy is ultra vires and of no effect. The Owners Corporation of course denies this.

Did the Owners Corporation need a special resolution to raise the levy to replace the roof?

- 59 All parties acknowledge that the levy raised was more than twice the annual fee. This brings into play the provisions of section 24.

Section 24: Extraordinary Fees

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

(4) A special resolution is required when exercising a power under subsection (1) if the amount involved is more than twice the total amount of the current annual fees set under section 23.

⁷ [2006] VCAT 445 (24 March 2006):

(5) Subsection (4) does not apply if the fees are levied to pay for or recoup the cost of repairs or maintenance carried out to any part of the property for which the owners corporation is responsible where immediate expenditure is or was necessary to ensure safety or to prevent significant loss or damage to persons or property.

60 The Owners Corporation claims that no special resolution was required to validate the levy because the levy was raised to carry out maintenance to part of the property for which the Owners corporation was responsible (the roof) and where immediate expenditure was necessary to ensure safety and prevent significant loss or damage to persons or property.⁸

61 I have already found that the Owners Corporation was responsible for the roof and had a duty to repair and maintain it, including replacing it as required. Therefore the next question for me to decide is whether immediate expenditure was necessary to ensure safety or to prevent significant loss or damage to persons or property.⁹

Was Immediate Expenditure Necessary?

62 The evidence presented by both sides was of serious roof problems for at least 10 years.

Owners Corporation Submissions About the Risk of Significant Loss or Damage if the Roof was not Replaced Immediately

63 The Owners Corporation Submissions included extracts from the Owners Corporation's records about the history of the roof. They also included reports from two plumbers that inspected the roof over the last few years. Some of these relevant comments and extracts from the Owners Corporation Records and plumbers' reports are set out below.

64 The history of the roof provided included a statement that the roof had blown off in sections in the past including: *"The roof leaks into the arcade whenever it rains, causing water damage to the plaster ceilings and leaving puddles of water in multiple locations on the arcade tiles."*¹⁰

65 The Owners Corporation plumbing report of Emmanuel Al-Jinavo ("Jinavo Plumbing Report") prepared after a roof inspection in June 2020 was filed with the Tribunal.¹¹ Relevant extracts from that report included the following:

- *"Site inspection has revealed over 100 issues with roof----*

The roof has recently had roof work conducted, These works are incompetent, non-compliant, extremely lacking workmanship, wrong

⁸ ss24(5).

⁹ ss24(5).

¹⁰ Paragraphs 22 and 23 of the Owners Corporation Submissions.

¹¹ Paragraphs 24 of the Owners Corporation Submissions.

materials have been used as well as making the roof leak issue worse instead of better”¹²

The roof has had some works conducted recently, this work is nothing short of atrocious and has not made any improvements to roof leak issue but has made the issue worse than what it may have been before.

- *Domestic grade roof sheets have been used*
- *Untreated timber supports have been installed which have begun to rot and weaken because of moisture, this is a major issue for integrity of roof install as in due time they will continue to weaken and may collapse*
- *Flashings install is incorrect in all ways and forms, Folds are incorrect, Install is incorrect*
- *Measurements are all incorrect*
- *Gapping more than 100mm clearly visible, Obviously a cause for water entry during rains*

I cannot find one part of any of these installs that comply, in short, I am speechless and horrified that a install like this can be conducted”¹³

- Clear signs of water holding on roof due to bowing in structural timber supports holding roof up, Unfortunately this is unrepairable without removing sheets and renewing supports. Water holding areas have caused sheets to rust as well.”¹⁴

- 66 On page two of the Jinavo Report Mr Al-Jinavo reported that the whole roof needed replacement and the cost would be more than 600,000.00 but that he understood this could not be achieved due to financial constraints so he provided a quotation for repair alternatives.
- 67 The Owners Corporation did not proceed with the quotation for repairs from Mr Al-Jinavo. I note that the replacement quote was estimated to be about \$600,000.00 (a lot more than the quotation from Rainshield referred to below).
- 68 The Tribunal was also presented with a copy of the Rainshield Report on the roof which was prepared in March 2019. Some of the relevant observations from the Rainshield Report included with the Owners Corporation Submission include the following statements. The **bolding** in the extracts below shows my emphasis on comments that I find relevant to demonstrating compliance with section 24(5) requirement for “*immediate expenditure being necessary to prevent significant loss or damage*”.

Rainshield Report

- *The roof has galvanised steel deck roof sheets which are severely rusting. There are many areas where the steel has rusted through **which has caused serious damage to the interior of the building**. As there are down lights in the ceiling, there is also a **risk of electrical fire** that can be*

¹² Page 2 Jinavo Plumbing Report.

¹³ Page 9 Jinavo Plumbing Report.

¹⁴ Page 17 Jinavo Plumbing Report.

caused by water getting into the wiring.

- *The central arcade has multiple leaks that are causing the ceramic tiles to become wet. This presents **a serious slip hazard to the arcades customers**. As the roof has had serious issues for many years, and little or nothing has been done to prevent this water ingress, **injuries sustained from the slip hazard would most likely be deemed as negligence by WorkSafe.** ---*
- *The roof is holding huge quantities of water. As the roof continues to perforate, **catastrophic instances of water ingress can be expected**. The **structure of the building is also likely to become compromised as the ingress will begin to rot structural timbers**. The arcade ceiling is severely –will collapse in the near. **Replacement of this roof should be considered as critical and urgent.***
- *The pitch of the roof is non-compliant. It fluctuates from 0.5 to negative 0.6 in areas where ponding is occurring. The minimum fall for a roof under current building regulations is 1.0 degrees. The roof structure will require reframing when the reroof takes place. Failure to bring the roof into line with current codes will void both the warranty and the buildings insurance.*
- *The central ridge is causing a lot of the most serious damage. **As it is not possible to replace this area without the rest of the roof also being replaced**, the roof replacement should be deemed as a common property issue.*
- *The box guttering is rusting and requires replacement*
- *In summary, the roof on this arcade is in a terrible condition. It is causing issues with both the shops and the main thoroughfare.--- **The water ingress is not only causing damage to the structure, it is also causing a serious risk of injury** that will have very negative ramifications to the owners of the property.*

69 The Rainshield quotation for roofing works was dated 26 June 2020 for the amount of \$189,200.00 to carry out the works recommended in its 2019 report which included complete roof replacement.

70 After reading both the Jinavo and Rainshield reports of the quantum and seriousness of issues with the roof and sub-structure and the damage that those already existing defects were causing to the interior of the property I find that it was reasonable to make the decision that the roof and immediate substructure needed not just continuing bandaid repairs but rather a full replacement.

71 I also find that the replacement of the roof required immediate expenditure to ensure safety and prevent significant loss or damage to persons or property.¹⁵

Refusal of Insurance

72 The Owners Corporation provided the Tribunal with various documents relating to the refusal of its insurer to renew the insurance in 2020 unless

¹⁵ 16 Section 40(2).

the roof was repaired. Both sides agreed that the insurer did not require replacement of the roof.

- 73 Although there was quite a lot of discussion at the hearing about correspondence with the insurer I did not find the correspondence with the insurer relevant to the questions that needed a decision from the Tribunal in these applications.
- 74 Lack of insurance cover would cause substantial loss to members of the Owners Corporation if there was no insurance policy in existence to cover valid damage claims against the Owners Corporation. One could imagine claims being made for loss sustained as a result of water incursion into the building causing damage to the fabric of the building, or injury to persons using the property. The risk of such an uninsured claim is not however determinative of the issues that must be proved by the Owners Corporation to justify the special levy without a special resolution of the Owners Corporation preceding the levy.
- 75 Given the time devoted to issues of insurance by the Claimant Lot Owners I believe it is appropriate for me to note that I am satisfied that the Owners Corporation Manager had a duty to notify any potential insurer of the condition of the roof and the high risk of damage to the property of the Owners Corporation and Lot Owners as well as to persons using the property. I agree with the comments as reported in both the Jinavo and Rainshield Reports that failure to disclose known risks to an insurer can lead to denial of claims. Any Owners Corporation Manager who did not take all reasonable steps to arrange insurance cover would be failing in their duty of care to lot owners.

At paragraph 52 and 53 of its submissions the Owners Corporation gave evidence of various rain events after the fee notice was issued on 26 June 2020 which evidenced further damage occurring to the building prior to the replacement of the roof occurring. These incidents were relied on to further validate the need to pass the levy to replace the roof, without a special resolution.

Evidence from the Claimant Lot Owners that Section 24(5) was not applicable

- 76 The Claimant Lot Owners did not provide the Tribunal with any plumbing or other reports to rebut the contents of the Jinavo or Rainshield reports. As I advised the parties at the hearing the Tribunal was left in the position that the only evidence about the seriousness of the roof problem came from the Owners Corporation. The reports from Jinavo and Rainshield indicated that there was an immediate and continuing risk of significant loss or damage to persons or property if the roof was not repaired.
- 77 I am satisfied that it was entirely appropriate for the Owners Corporation to accept the report and quotation of Rainshield advising that the whole of the roof needed to be replaced. I do not find that it was necessary for the

Owners Corporation to obtain additional quotations for the replacement cost of the roof. The reports of Rainshield and Jinavo were consistent with the 10 year history of problems with the roof.

- 78 I again repeat that there was no evidence to rebut the reports that the roof needed immediate and urgent replacement. Doing some repairs would simply have been another bandaid job similar to the repairs that had occurred during the last 10 years and been found to be unsatisfactory.
- 79 The Jinavo report stated that the roof needed replacement but quoted for repair because he understood there was not enough money. He did not suggest that repairing the roof was adequate.
- 80 I am also satisfied that it was immediately necessary to carry out the replacement to ensure safety and prevent significant loss or damage to persons or property. I have highlighted the relevant extracts from the Rainshield report as to the urgency and risk facing the Owners Corporation if the roof was not replaced.
- 81 I am satisfied that the roof could not be maintained without carrying out a full replacement of the roof and the necessary structural alterations to the roof. This was essential to remove the risk of collapse of the roof over some part of the property. The risk to property was to both common property and privately owned lots.
- 82 I find that the requirement to replace the roof was urgent and necessary and that the Owners Corporation Committee was justified in calling an owners corporation meeting to approve the necessary levy. I also find that the exemption contained in section 24(5) applied to the levy and it was not necessary to pass a special levy pursuant to section 24(4).

Claimant Lot Owners Other Submissions

- 83 The Claimant Lot Owners raised other objections to the validity of the resolution voting for the special levy. Some of these objections were raised in the affidavit of Mr Mazzei sworn 29 November 2021 (“Mr Mazzei’s Affidavit”), some were contained in the submissions of the Claimant Lot Owners filed with the Tribunal and others were raised verbally in the hearing itself.
- 84 I have referred to some of these objections, and my findings on the objections, in paragraphs 47-53 of these reasons.

Additional Submissions of the Claimant Lot Owners

No Pre-existing Sinking Fund

- 85 The Claimant Lot Owners claimed that because there was no sinking fund the Levy could not be raised. This claim fails. The Owners Corporation is not a prescribed Owners Corporation.¹⁶ and accordingly is not required to have a maintenance plan.

¹⁶ s36 and Owners Corporation Regulations 2018 Regulation 6; s 40.

86 As the Owners Corporation is not a prescribed owners corporation there is no requirement for the owners corporation to have a maintenance plan prior to raising the levy in question.¹⁷

Allegation that Private Owners do not have to Contribute to Other Lot Owners and Common Property Roof Replacement

87 The Claimant Lot Owners stated:

- a. An individual lot owner has no liability to contribute to replacement of rooves owned by other lot owners in the subdivision.
- b. I was denied the right to replace my own roof.
- c. There was no right to replace the roof over private lot owners' property.

88 I have set out my reasons for refusing these submission in paragraphs 51 and 52 above and reiterate that I find that there is a duty on all lot owners within the Owners Corporation to maintain the roof areas over both private and common property.

89 At the hearing Mr Mazzei conceded that all lot owners were required to contribute to the cost of repairs of the roof areas over the common property and that he was prepared to voluntarily contribute to that proportion of costs.

Inconsistent Advice as to Liability to Repair Roof Between Different Owners Corporation Managers

90 The Tribunal was told that previous Managers had advised that there was no right or duty of the Owners Corporation to replace the roof areas over private lot owners properties.

91 At the hearing I stated that it is not uncommon for persons to have a different view of the meaning of various provisions of the *Owners Corporation Act 2006*. An opinion of any one person does not bind the Tribunal and it is entirely appropriate for a different Owners Corporation Manager to have a different view of the law to another Owners Corporation Manager (as has happened here). Unfortunately for the Claimant Lot Owners at this time the only person's opinion of the law that counts is the sitting Tribunal Member at the hearing. I agree with the submissions of the Owners Corporation that there is a duty to maintain the roof and the service that roof provides to the Lot Owners property both private and common. I have found that "maintaining" the roof includes the ability to replace the roof. My reasons have been set out earlier and in paragraphs 43-58 (inclusive) of these reasons.

¹⁷ S 36.

Alleged lack of Good Faith in Holding Meetings to Attempt to Obtain a Resolution in Favour of Roof Replacement

- 92 Previous attempts of the Owners Corporation to obtain approval from the Lot Owners at general meetings had failed. As I have stated earlier an owners corporation may change its mind from time to time and most resolutions can be overturned by later meetings and different owners.
- 93 The reports from Jinavo and Rainshield indicate that there were extreme problems with the roof that needed rectification. I find that seeking to obtain agreement of the lot owners on more than one occasion to replace the roof is not a breach of good faith, or demonstrative of a lack of honesty.¹⁸
- 94 For all the reasons stated above I find that the Claimant Lot Owners application is dismissed.

Costs

- 95 The law that applies to special levies is extremely complicated and I find that it was not inappropriate for the Claimant Lot Owners to have filed the application in proceedings OC2054/2020 and accordingly section 109(1) of the *Victorian Civil and Administrative Tribunal Act 1998* (Vic) applies. Each party is to bear their own costs in proceeding OC2054/2020.

Mazzei SL Claim Proceedings OC2031/2020

- 96 The Owners Corporation claims the sum of 10,862.44 from Mr Mazzei and Ms Versace in accordance with the calculations contained in paragraphs 28-31 (inclusive) of these reasons. This is for the period 25 June 2020 to 3 December 2021 (inclusive). Interest after that date is chargeable under the OC Act but is not the subject of these proceedings. The claim for the 25 June 2020 fee and interest on that fee to 3 December 2021 totals \$10,112.44
- 97 The costs claimed by the Owners Corporation total 750.00 and comprise the \$311.00 filing fee and a costs claim in the sum of \$439.00. The claim in the amount of 439.00 has often been allowed by the Tribunal as costs for claims of this nature.
- 98 I accept the proof of evidence of Ben Commerford dated 3 February 2021 and find that the sum of \$10,112.44 is due and payable by Mr Mazzei and Ms Versace in respect to the fee notice dated 25 June 2020 and interest on that fee to the date of 3 December 2021.
- 99 For the reasons set out previously I find that the Owners Corporation was entitled to issue the Fee Notice on 25 June 2020 without the requirement for a special resolution. The Fee Notice complied with the requirements of section 31
- 100 As required by section 32 of the OC Act a final fee notice was issued on 30 July 2020. Both the fee notice and the final fee notice were served on the

¹⁸ S 5.

address of the registered lot owners provided to the Owners Corporation by the lot owners.

101 An ordinary resolution authorising the issue of the fee notice was passed at the special general meeting held on 10 July 2020.

102 Resolutions allowing the Owners Corporation to charge interest on fees were passed at annual general meetings of the Owners Corporation in the requisite years.

103 Accordingly I find that the requirements of the *Owners Corporation Act 2006*(Vic) have been complied with in respect to the fee notice dated 25 June 2020 issued to Mr Mazzei and Ms Versace and interest on that fee notice.

Costs Claim in Proceedings OC2031/2020 (Lot Owners Claim)

104 As I have already stated the law that applies to special levies of this nature is extremely complicated and I find that it was not inappropriate for Mr Mazzei to put the Owners Corporation to the test in the Tribunal as to whether the 25 June 2020 fee was recoverable.

105 Accordingly I do not allow the costs claim of 439.00 and follow the general rule that each party is to bear their own costs in proceeding OC2054/2020.¹⁹

Recovery of Application Fee (Lot Owners Claim)

106 However I apply the presumption in section 115C of the VCAT Act that an owners corporation which obtains an order for recovery of owners corporation levies at VCAT is entitled to recover its application fee. Accordingly I order Mr Mazzei and Ms Versace to pay the application fee of \$311.00 to the Owners Corporation.

107 The total amount payable to the Owners Corporation by Mr Mazzei and Ms Versace is \$10,432.44 comprising \$10,112.44 for the fee and interest to 3 December 2021 and \$311.00 for the application fee.

Rongmei SL Claim Proceedings OC

108 The Owners Corporation claims the sum of \$14,798.50 from Rongmei Pty Ltd in accordance with the calculations contained in paragraphs 32-35 (inclusive) of these reasons. This is for the period 25 June 2020 to 3 December 2021 (inclusive). Again I note that interest after 3 December 2021 is chargeable under the OC Act but is not the subject of these proceedings.

109 The costs claimed by the Owners Corporation total 750.00 and comprise the \$311.00 filing fee and a fee claim in the sum of \$439.00. The fee claim is consistent with the costs that have been allowed in many owners corporation fee recovery cases before the Tribunal. The debt and interest component of the claim total 14,487.50.

¹⁹ 20 VCAT Act 2 109(1).

- 110 I accept the proof of evidence of Ben Commerford dated 16 November 2020 and find that the sum of \$14,487.50 is due and payable by Rongmei Pty Ltd in respect to the fee notice dated 25 June 2020 and interest on that fee to 3 December 2021.
- 111 For the reasons set out previously I find that the Owners Corporation was entitled to issue the Fee Notice on 25 June 2020 without the requirement for a special resolution. The Fee Notice complied with the requirements of section 31.
- 112 As required by section 32 of the OC Act a final fee notice was issued on 30 July 2020. Both the fee notice and the final fee notice were served on the address of the registered lot owner provided to the Owners Corporation by the lot owner.
- 113 An ordinary resolution authorising the issue of the fee notice was passed at the special general meeting held on 10 July 2020. I have found that this is all that was required for validity.
- 114 Resolutions allowing the Owners Corporation to charge interest on fees were passed at annual general meetings of the Owners Corporation in the requisite years.
- 115 I find that the requirements of the Owners Corporation Act 2006 (Vic) have been complied with in respect to the fee notice dated 25 June 2020 issued to Rongmei.

Costs Claims in Proceedings OC2028/2020 Rongmei SL Claim

- 116 I repeat my findings in Paragraphs 105 and 106 in relation to the Owners Corporation claims for Costs and refund of the Application Fee.
- 117 The total amount payable to the Owners Corporation by Rongmei Pty Ltd is \$14,487.50 comprising 14,259.50 for the fee and interest claim to 3 December 2021 and \$311.00 for the application fee.

A Moon
Member