VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

OWNERS CORPORATIONS LIST VCAT REFERENCE NO. OC1563/2021

CATCHWORDS

Victorian Civil and Administrative Tribunal Act 1998 s 109 - *Vero Insurance Ltd v The Gombac Group Pty Ltd* [2007] VSC 117 - *Stanbrook Pty Ltd trading as Gardner Homes v East* [2015] VCAT 417 - *Sixty-Fifth Eternity Pty Ltd v Boroondara CC* [2010] VCAT 310 – *Owners Corporations Act 2006* s 162

APPLICANT	Lev Botvinik
RESPONDENT	Paul Hyman
TYPE OF ORDER	Costs Decision in Chambers
BEFORE	Member C Powles
DATE OF ORDER	26 April 2022
CITATION	Botvinik v Hyman (Costs) (Owners Corporation) [2022] VCAT 449

ORDER

1. The respondent's application for costs is dismissed.
2. Each party bears their own costs of this proceeding.

C Powles
Member

REASONS

Background

1 The applicant is a lot owner in Owners Corporation No. 516260W (the **owners corporation**) that has previously been managed by DB Body Corporate Management Pty Ltd (the **OC manager**). The respondent is a director of the OC manager.

2 On 24 July 2021, the applicant lodged an application with the Tribunal seeking orders affirming a resolution the applicant claimed was passed at a special general meeting of the owners corporation held on 12 March 2021 terminating the appointment of the OC manager and appointing another company as the manager of the owners corporation.

3 On 12 August 2021, the Tribunal made orders listing the proceeding for a directions hearing on 22 December 2021 and requiring:

a. the applicant to provide Points of Claim by 30 September 2021; and

b. the respondent to provide Points of Defence by 30 October 2021.

4 On 26 August 2021, the Tribunal received an email from the respondent's legal representative advising of their appointment to represent the respondent in the proceeding and requesting a copy of the application.

5 Later on the same day, the Tribunal emailed the legal representative in reply, CCing the applicant, and providing a copy of the application.

6 On 31 August 2021, at 11:16 am, the Tribunal received by email an application for leave to withdraw from the applicant stating the reason for the withdrawal being that the "matter has recently been resolved".

7 Later on 31 August 2021:

a. the Tribunal was CCed on an email exchange between the applicant and the respondent's legal representative in which the applicant sent "attached documentation" to the respondent's legal representative and the respondent's legal representative replied reminding the applicant of the need to submit Points of Claim by 30 September 2021 (the CCed email the Tribunal received did not have attached the documentation referred to in the applicant's email);

b. the Tribunal replied to the applicant's email lodging the application to withdraw, CCing the respondent's legal representative; and

c. the respondent's legal representative emailed the Tribunal advising that the respondent had incurred legal expenses in the sum of $2,200.00 in responding to the application and seeking orders that:

i. the application be struck out; and

ii. the applicant pay the respondent's costs in the sum of $2,200.00.

8 On 7 September 2021, I made orders in Chambers granting the applicant leave to withdraw the application, noting the correspondence from the respondent's legal representative advising that they would seek an order for costs if the application were withdrawn and giving:

a. the respondent until 6 October 2021 to provide submissions on costs; and

b. the applicant until 27 October 2021 to provide any submissions in reply.

9 On 8 October 2021, the Tribunal received correspondence from the applicant responding to the respondent's legal representative's last email sent on 31 August 2021.

10 On 26 October 2021, the respondent's legal representative provided a written submission on costs in response to the applicant's correspondence.

11 On 27 October 2021, the Tribunal advise the parties by email that a decision on the costs application would be made on the papers unless either party objected and wish to have the matter addressed at hearing, with any objection to be made by 27 November 2021.

12 By 27 November 2021, neither party had objected to the costs application being decided on the papers.

13 On 25 March 2022, the Tribunal received an email from the applicant referring to a recent application it was submitted was relevant to this proceeding. The applicant had not been granted leave to make any further submissions after 27 November 2021 and so I have not considered the contents of this email in assessing the respondent's application for costs.

14 Unfortunately, the effect of the Covid 19 pandemic and related lockdowns on the Tribunal's procedures and resources has delayed the provision of these reasons until now.

15 I have considered the written submissions and materials from both parties and, for the following reasons, find it is fair that each party bear its own costs.

Respondent's claim for costs

16 The respondent submits I should exercise my discretion under s 109 of the *Victorian Civil and Administrative Tribunal Act 1998* (Vic) (the **Act**)[1] by ordering that the applicant pay the respondent's costs of the proceedings in the sum of $2000.

17 In the email dated 31 August 2021, the respondent's legal representative submitted that the applicant's claim had no tenable basis in fact or law because:

[1] References to sections in this decision are to sections of the Act unless otherwise specified. Subsection 109(3) allows the Tribunal to order that a party pay costs of another party in the proceeding only if it is satisfied that it is fair to do so, having regard to the matters set out in ss 109(3)(a) – (e).

a. the respondent is "merely an employee" of the OC Manager and so there is no contractual relationship between the respondent and the owners corporation;

b. the OC manager had already ceased managing the owners corporation and had transferred all its hard copy files to the committee of the owners corporation by the time the application was lodged; and

c. the applicant is a psychiatrist which "makes him a very intelligent person, and one that is in a financially highly privileged position".

18 In the letter dated 8 October 2021, the applicant submitted that:

a. the respondent was the only person with whom the applicant had dealt on behalf of the OC manager and had introduced himself as a representative of the OC manager;

b. the application "was clearly lodged with VCAT as being against the OC manager, and not an individual";

c. the application was made before the applicant was informed that the OC management had changed and was withdrawn promptly after he was notified of this; and

d. it was not necessary for the respondent to retain a legal representative given that "at VCAT you can present your case yourself, without a lawyer".

19 In the letter dated 26 October 2021, the respondent's legal representative submitted that:

a. the respondent "is a director of" the OC manager;

b. there had been "extensive communications" between the OC manager and the applicant that should have made clear any proceeding about the appointment of the OC manager should have been brought against the OC manager and not the respondent individually;

c. the applicant had, in fact, dealt with other representatives of the OC manager than the respondent;

d. the application was brought "as a means of applying maximum pressure on scandal to" the respondent; and

e. the Tribunal should be guided by the award of costs made in *G J Stanbrook Pty Ltd trading as Gardner Homes v East* [2015] VCAT 417 (***Stanbrook***).

Findings

20 Unless the Tribunal finds that s 109(3) applies in a given matter, each party in the proceeding must bear its own costs in the proceeding.[2] Should the matters stipulated under s 109(3) apply in a given proceeding, the Tribunal has the discretion – not an obligation – to order that a party pay all or a specified amount of the costs of the other party.

21 For the Tribunal to exercise its discretion and make any order for costs, the Tribunal must find that, in the circumstances, "it is fair to do so". Sections 109(3)(a) - (e) are matters that the Tribunal considers in determining whether it is fair to award costs in any given situation.[3]

22 In submitting that the respondent should be awarded costs because the applicant's claim had no tenable basis in fact or law, the respondent is claiming the Tribunal should consider the grounds under s 109(3)(c).[4]

23 In assessing whether the applicant's claim had no tenable basis in fact or law, I note that the assessment is prospective; that is, what the basis of the applicant's claim was when the application was lodged rather than in retrospect.[5] This is particularly relevant in this proceeding where there was just over one month between the application being lodged and the request for leave to withdraw being made.

24 The first part of the respondent's claim that the application had no tenable basis in fact or law is that the respondent is a director or employee of the OC manager when an application for orders against the manager of the owners corporation should have been brought directly against the OC manager itself.

25 On the application form, at page 3:

a. it states the claim is being made against "a manager or former manager of the owners corporation";

b. the respondent's name and address are provided under the heading "Respondent's details";

c. the respondent's name is also listed under the heading "Name/s of contact person"; and

d. the contact email for the respondent provided is "bodycorp@dbrealty.com.au".

26 It is common in applications made against an owners corporation or an owners corporation manager in the Owners Corporations List, particularly where an applicants is self-represented, that the name of an employee or

[2] Section 109(1) states that each party is to be their own costs in the proceeding. Section 109(2) states that at any time, the Tribunal may order that a party pay all or a specified part of the costs of another party in a proceeding.
[3] See *Vero Insurance Ltd v The Gombac Group Pty Ltd* [2007] VSC 117 at [20] per Gillard J.
[4] Subsection 109(3)(c) refers to the relevant strengths of the claims made by each of the parties, including whether a party has made a claim that has no tenable basis in fact or law.
[5] See, for example, *Sixty-Fifth Eternity Pty Ltd v Boroondara CC* [2010] VCAT 310 at [7].

director of an owners corporation management company is recorded as the name of the respondent on the application form. The issue of the correct naming of the respondent is commonly dealt with at the first directions hearing in the proceeding, although may sometimes be dealt with in the initial orders made listing the proceeding for directions.

27 The respondent submits that because the applicant is a psychiatrist he is "highly intelligent" and so should have known the difference between an employee or director of the OC manager and the OC manager itself as a company, particularly where there had been regular communication with lot owners by the OC manager referring to the OC manager by its company name.

28 I give this submission very little weight. I make no assessment about the intelligence of the applicant other than to find that, as a self-represented litigant, the applicant appears to have made a procedural error on the application form that is commonly made by many self-represented applicants in the Owners Corporation List, which is to record the name of the manager of the owners corporation the subject of the application as an individual employee of the manager rather than with the name of the management company.

29 Having considered how the application form was completed (as set out above), I am satisfied that the applicant intended to lodge the application against the OC manager rather than against an individual employee or director of the OC manager and that it is highly likely orders would have been made confirming this at the first directions hearing, which had been listed for 22 December 2021 in the orders made 12 August 2021.

30 The respondent submits that even if the application had been lodged against the OC manager it still would have had no tenable basis in fact or law because in fact the OC manager had already ceased managing the owners corporation the subject of this proceeding by the time the application was lodged. The applicant claims that he did not know this at the time the application was lodged and withdrew the proceedings after he had been informed that the OC manager had ceased managing the owners corporation.

31 The respondent's submission that the OC manager had already ceased managing the owners corporation by the time the application was lodged appears to be inconsistent with its own account of the circumstances giving rise to this proceeding in its letter dated 26 October 2021. In that letter it states that the OC manager was advised on 27 July 2021 of the decision of the owners corporation made at a special general meeting held on 19 June 2021 to terminate the OC management appointment. The application in this proceeding was lodged on 24 July 2021. It is unclear from the respondent's submissions when, in fact, the OC manager accepted that the appointment had been terminated.

32 I am satisfied, in the circumstances, that:

a. the applicant may have considered that the appointment of the OC manager continued until the OC manager was advised of the termination decision; and

b. there may have been a factual basis for considering that the OC manager would seek to continue to act as manager until advised of the termination decision, if not after that.

33 A lot owner is entitled to seek orders from the Tribunal under the *Owners Corporations Act 2006* (the **OC Act**) against the manager of an owners corporation of which the lot owner is or has been a member in relation to an owners corporation dispute.[6]

34 Given that the management of the owners corporation changed around the time the application was lodged, I am satisfied I can, and so do, infer that the circumstances of the owners corporation at that time sufficiently justified the lodging of an application seeking the revocation of the OC manager, whether or not that application would ultimately have been successful.

35 In light of the above, I am not satisfied that the application had no tenable basis in fact or law in circumstances where:

a. it is highly likely that if the application had not been withdrawn, the name of the respondent would have been amended to be the OC manager and the application would have proceeded against the OC manager from there; and

b. I have inferred that there may have been a factual basis for considering that the OC manager's appointment had not yet been terminated by the time the application was lodged or that the OC manager may not, at the time, have accepted that it had been.

36 In claiming that the application was brought "as a means of applying maximum pressure and scandal", I consider the respondent's submission to be claim that the applicant was vexatiously conducting the proceeding.[7]

37 I have found the applicant intended to lodge the application against the OC manager rather than the respondent and so I am not satisfied that the making of the application was intended to place pressure personally on or scandalise the respondent as an individual. Further, I have found above that I can infer that the circumstances of the owners corporation the subject of the proceeding sufficiently justified the lodging of an application seeking the revocation of the OC manager, whether or not that application would ultimately have been successful.

38 I do not consider the decision in *Stanbrook* to be of any particular relevance to this application given the significantly different factual circumstances in that case, where an applicant in the Building and Property List pursued a

[6] As defined in s 162, OC Act.
[7] See s 109(3)(a)(vi), which allows the Tribunal, in making an award of costs against a party, to have regard to whether a party has conducted the proceeding in a way that unnecessarily disadvantage to another party to the proceeding by conduct such as a vexatiously conducting the proceeding

claim to hearing despite repeated correspondence from the respondent's legal representatives setting out the reasons why the applicant's claim had no tenable basis in law.

39 In this case, there did not appear to have been any communication from the respondent's legal representative to the applicant before the application was withdrawn and the application was withdrawn before the respondent was required to prepare and submit Points of Defence or attend a directions hearing.

40 Accordingly, I am not satisfied that the applicant vexatiously conducted the proceeding by lodging the application and then withdrawing it before any further steps were taken in the proceeding, after the applicant became aware that the OC manager appointment had changed.

Conclusion

41 I am not satisfied that any of the grounds claimed by the respondent under s 109 justify an order that the applicant pay the respondent's costs of the proceeding. I am not satisfied, having regard to all of the circumstances of the proceeding, that it is fair to make such an order.

42 Accordingly, the respondent's application for an award of costs is dismissed and I order that each party bears their own costs in the proceeding.

C Powles
Member