

VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

OWNERS CORPORATIONS LIST

VCAT REFERENCE NO. OC2266/2020

CATCHWORDS

Victorian Civil and Administrative Tribunal Act 1998 s 109 - nature and complexity of the proceeding – relative strengths and weaknesses – Vero Insurance Ltd v The Gombac Group Pty Ltd [2007] VSC 117 - Rodda v OC Management Pty Ltd (Owners Corporations) [2021] VCAT 888 - Sweetvale Pty Ltd v Minister for Planning [2004] VCAT 2000 - JT Snipe Investments Pty Ltd v Hume CC (2008) VCAT 1496 - conduct of ballot and special general meeting by former owners corporation manager after termination of appointment.

FIRST APPLICANT	Graham Rodda
SECOND APPLICANT	Susan McCarthy
RESPONDENT	OCC Management Pty Ltd (ACN: 615 067 046) CBD North Melbourne Pty Ltd
INTERESTED PARTY	
TYPE OF ORDER	Costs Decision in Chambers
BEFORE	Member C Powles
DATE OF ORDER	26 April 2022
CITATION	Rodda & McCarthy v OCC Management Pty Ltd (Costs) (Owners Corporation) [2022] VCAT 450

ORDER

1. The respondent must pay the applicants' costs of the proceeding, other than the applicants' costs of applying to be authorised to bring the proceeding on behalf of the owners corporations the subject of the proceeding.
2. In the absence of an agreement between the parties, the costs are to be assessed by the Costs Court.

C Powles
Member

REASONS

Background

- 1 The applicants are the owners of lots in two owners corporations¹ and were, in February 2021, authorised by the Tribunal to bring proceedings on behalf of the owners corporations under the *Owners Corporations Act 2006* (the **OC Act**) against the respondent, OCC Management Pty Ltd (**OCCM**).
- 2 In August 2021, after several days of hearings held over the previous months, I made orders as sought by the applicants in their proceeding and provided written reasons for doing so.² A summary of the background to and the procedural steps taken in the proceeding are set out at paragraphs [1] - [13] of *Rodda*.
- 3 At the conclusion of my reasons in *Rodda*, I reserved my decision on costs pending written submissions from the parties and set out the timetable by which submissions on costs and any submissions in reply were to be provided. The applicant provided submissions seeking an order for costs of the proceeding against the respondent³ and the respondent in reply submitted there should be no order for costs against the respondent.⁴
- 4 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.
- 5 I have considered the written submissions and materials from both parties and, for the following reasons, find it is fair that OCCM pay the applicants' costs of the proceeding, other than the applicant's costs of applying to be authorised to bring the proceeding on behalf of the owners corporation.

Applicant's claim for costs

- 6 The applicants submits I should exercise my discretion under s 109 of the *Victorian Civil and Administrative Tribunal Act 1998* (Vic) (the **Act**)⁵ by ordering that the respondent pay the applicants' costs of the proceedings in the sum because of:
 - a. the nature and complexity of the proceeding;⁶ and

¹ Owners Corporation No. 1 PS8011118 (**OC1**) and Owners Corporation No. 2 PS 80 011118 (together, **the owners corporations**).

² *Rodda v OC Management Pty Ltd (Owners Corporations)* [2021] VCAT 888 (**Rodda**).

³ Applicants' Costs Submissions dated 6 September 2021 (the **ACS**).

⁴ Respondent's Submissions on the Question of Costs dated 4 October 2021 (the **RSQC**).

⁵ 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).

⁶ See subsection 109(3)(d), which refers to the nature and complexity of the proceeding.

- b. the relative 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.⁷
- 7 In relation to the nature of the proceeding, the applicants submit the proceeding concerned matters of significant importance to the applicants and to the owners corporations because:
 - a. the proceeding concerned whether or not the appointment of OCCM as the manager of the owners corporations had been revoked by resolution of the owners corporations' committee in September 2020 (the **termination resolution**), in circumstances where OCCM refused to accept that its appointment had been terminated;
 - b. an owners corporation manager performs an important function in the management of an owners corporation and, accordingly, it is important there is no confusion or dispute as to the identity of the manager; and
 - c. the owners corporations were faced with the prospect of being denied the manager of their choice and of having OCCM continue to hold itself out as manager even though the owners corporations had appointed a different manager.
- 8 In relation to the complexity of the proceeding, the applicants submit that:
 - a. the proceeding involved a number of complex issues particularly because OCCM raised a number of technical issues concerning the application and meaning of various provisions of the OC Act;
 - b. the proceeding was made more complex because the applicants needed to be authorised to bring the proceeding on behalf of the owners corporations in circumstances where OCCM opposed the applicants' authorisation;
 - c. the proceeding related to "a major issue affecting the welfare of the applicants"⁸ and the owners corporations;
 - d. the range of services OCCM or another owners corporation manager were to provide as owners corporation manager, including establishing and operating a bank account, keeping books of account, preparing financial statements, issuing notices for fees and levies, paying invoices and insurance premiums, arranging for insurance, issuing owners corporation certificates, maintaining the register and arranging for maintenance and repairs, were of great significance to the owners corporations such that they would be unable to properly function if those services were not performed;
 - e. the annual fee paid to OCCM by the owners corporations under the contract of appointment was \$80,000 and, accordingly, the question of

⁷ See subsection 109(3)(c), which 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.

⁸ ACS [17].

- whether the contract with OCCM had been revoked involved a large sum of money;
- f. the applicants succeeded in their claim in circumstances where:
 - i. the proceeding was required to be brought because of unlawful or improper conduct by OCCM which warranted redress;
 - ii. OCCM failed to deliver to the owners corporations all books, records and funds as required under s 127 of the OC Act after the termination resolution was passed;
 - iii. therefore it may be inferred that if the applicants had not brought the proceeding OCCM would have continued to unlawfully purport to act as manager of the owners corporations and continue to breach its obligations under s127; and
 - iv. the failure of OCCM to comply with s 127 was a matter of significance to the owners corporations because it prevented the owners corporations from delivering its funds and records to another manager;
 - g. the proceeding was conducted in a manner similar to court proceedings, with affidavits, pleadings and cross examination of witnesses, each party being legally represented and the hearing being conducted over five days;
 - h. the conduct of OCCM contributed to the complexity of the proceeding because:
 - i. shortly after the termination resolution was passed, OCCM circulated a ballot seeking a resolution affirming its appointment as owners corporation manager (the **ballot**);
 - ii. in February 2021, OCCM gave notice of a special general meeting at which resolutions would be put revoking the termination resolution and electing new members to the committee of the owners corporations (the **SGM**); and
 - iii. the validity of the ballot and the SGM became part of the subject matter of the proceeding.
- 9 In relation to the relative strengths of the claims made by each of the parties, the applicants submit OCCM sought to defend the proceeding by:
- a. relying on a clause of the contract which the Tribunal found to be void;
 - b. claiming the owners corporations' committee could not revoke OCCM's appointment other than under that clause, contrary to previous decisions of the Tribunal about the capacity of an owners corporation's committee to revoke management appointments; and
 - c. OCCM's defence on this basis was untenable.
- 10 In response, OCCM submits that:

- a. its appointment as manager of the owners corporations, being a “large development”⁹ was as of significant importance to OCCM as it was to the applicants and the members of the owners corporations;
- b. OCCM had grounds to believe its appointment had been improperly terminated;
- c. OCCM resisted the termination resolution by defending the proceeding;
- d. while OCCM does not dispute the proceeding was made more complex because OCCM conducted the ballot and the SGM, it did so at the request of the interested party to resolve the dispute by putting the matter to decision by all the members of the owners corporations, in order to avoid the costs of further litigation and bring the proceeding to an early close;
- e. due to the complexity of the issues in dispute, it was not clear that OCCM’s appointment had been lawfully terminated and so it was not unreasonable for OCCM to resist the termination resolution and defend the proceeding;
- f. legal representation is a routine feature of cases in the Owners Corporations List;
- g. while the proceeding was conducted in a manner similar to court proceedings, this is not sufficiently unusual in cases in the Owners Corporations List to justify an award of costs;
- h. the argument the termination resolution could not properly made by the owners corporations’ committee was only one of several defences put in the proceeding and was not pursued at final hearing;
- i. OCCM had submitted the termination resolution was not valid to due to non-compliance with the OC Act and, even though it found the committee’s non-compliance to be so trivial that the termination resolution remained valid, the Tribunal found there were technical procedural defects in the termination resolution;
- j. because the Tribunal found termination resolution was valid, the Tribunal found that OCCM had no authority to arrange the ballot and the SGM and so the Tribunal did not need to consider whether the ballot and the SGM were properly conducted; and
- k. OCCM had legitimately sought to defend its position in accordance with the OC Act so it would not be fair that costs be ordered against it because of the complexity of the issues arising under the OC Act or for any other reason.

Findings

11 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.¹⁰ Should the

⁹ RSQC [5].

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.

- 12 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.¹¹

Nature and complexity of the proceeding

- 13 In relation to the nature and complexity of the proceeding, the submissions from both parties refer to the decision of then President Morris in *Sweetvale Pty Ltd v Minister for Planning* [2004] VCAT 2000 (*Sweetvale*). President Morris considered it more likely that the nature and complexity of the proceeding would make it fair to make an order of costs if:
- a. the proceeding was in the Tribunal’s original jurisdiction, not its review jurisdiction;¹²
 - b. the proceeding involved a large number of issues, or a small number of particularly complex issues;
 - c. the proceeding involved a large sum of money or a major issue affecting the welfare of a party or the community;
 - d. the proceeding succeeded and was of a type that was required to be brought, either by reason of a statutory duty or by reason of some unlawful or improper conduct by another party that warranted redress;
 - e. the proceeding failed and was of a type where a party has asserted a right which it knew, or ought to have known, was tenuous; and
 - f. a practice has developed that costs are routinely awarded in a particular type of proceeding, thus making an award of costs more predictable for the proceeding in question.
- 14 It has been noted that s 109(3)(d) is “neutral” as to how a finding in relation to the nature and complexity of the proceeding should result in an order for costs,¹³ which is an issue that potentially “cuts both ways” in the consideration of costs.¹⁴
- 15 On balance, I am satisfied that the nature and complexity of this proceeding weighs in favour of an award of costs to the applicants for the following reasons:

¹⁰ 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.

¹¹ See *Vero Insurance Ltd v The Gombac Group Pty Ltd* [2007] VSC 117 (*Vero*) at [20] per Gillard J.

¹² It is obviously not disputed by either party that this proceeding is in the Tribunal's original jurisdiction.

¹³ *Vero* [23].

¹⁴ *JT Snipe Investments Pty Ltd v Hume CC* (2008) VCAT 1496 at [8].

- a. the nature of the proceeding involved a major issue affecting both parties but in particular the applicants and other members of the owners corporations given the central role of an owners corporation manager in the operation of an owners corporation: the question of whether an owners corporation committee has correctly terminated the appointment of an owners corporation manager so that it can appoint another owners corporation manager has significant, fundamental consequences for the operation of that owners corporation and for the interests of the lot owners in the owners corporation properly functioning;
- b. the proceeding involved a number of complex legal issues arising in relation to the interpretation of provisions of OCCM's contract of appointment, previous resolutions of the owners corporations' election of members of its committee, the status of current and previous members of the committee and the convening of the September 2020 committee meeting at which the termination resolution was passed;
- c. these legal issues were all unsuccessfully raised by OCCM as part of its defence in the proceeding;
- d. while it is not unusual for parties to be legally represented in proceedings in the Owners Corporations List, the degree to which this proceeding had "court like" features was substantial given the range of affidavit material and legal submissions put;
- e. the proceeding was brought in response to, and its complexity greatly increased by, OCCM's conduct in not accepting the termination resolution and conducting the ballot and the SGM, which I found in *Rodda* to have no lawful basis;
- f. in particular, I found that it was precisely *because OCCM's ongoing misrepresentations about its status as owners corporation manager sufficiently prejudiced any outcome of the ballot or the SGM* that it was not necessary for me to otherwise assess the validity of the outcomes of the ballot and the SGM; and
- g. while costs are not routinely awarded in proceedings in the Owners Corporations List,¹⁵ it is not uncommon for costs to be awarded to lot owners where, as in this case, to fail to do so would mean that other lot owners not party to the proceeding gain a benefit (in this case, the proper functioning of the owners corporations with the manager of the owners corporations' committee's choice) without having to pay any of the costs for which the applicants are liable to their legal representatives if no order for costs is made in their favour; and
- h. for reasons set out below, OCCM's position in relation to the validity of the termination resolution was tenuous at best.

Relative strengths of the claims, including whether no tenable basis

¹⁵ other than against lot owners unsuccessfully defending proceedings for fee recovery by an owners corporation.

- 16 In relation to the relative strengths of the parties' claims, I find as follows:
- a. OCCM's defence that the owners corporations' committee did not have power to terminate OCCM's contract of appointment because of the operation of a term of that contract was weak given previous decisions of the Tribunal referred to in my reasons¹⁶ that were not addressed in OCCM's submissions;
 - b. although that part of OCCM's defence was not pressed at the hearing days in February 2021 or subsequently, it did not resile from that part of its defence until hearing, requiring the applicants to respond to that part of OCCM's defence in the material provided by the applicants before the hearing days in February 2021;
 - c. given OCCM resiled from this part of its defence at hearing, I am satisfied that part of its offence was untenable in law;
 - d. OCCM's other claims in relation to the validity of the termination resolution arising from issues about the election of the committee and the conduct of the meeting in September 2020 were, given my findings that there were technical procedural breaches by the committee and owners corporations, not untenable in fact or law;
 - e. however, I am satisfied OCCM's claims in this regard were relatively weak given my findings that the breaches were trivial and should not result in the invalidity of committee decisions made in a fair and transparent process; and
 - f. the legal basis on which OCCM agreed, at the interested party's request, to conduct of the ballot and the SGM was also weak: the owners corporations had, through their committee, made a legally correct decision to revoke OCCM's appointment and yet OCCM conducted the ballot and the SGM representing itself as continuing to be appointed, with no legal basis for doing so.
- 17 In light of the above, I am satisfied that the relative weakness of OCCM's claims, and its untenable claim in relation to the operation of the relevant clause in its contract of appointment, weigh in favour of an award of costs to the applicants.

Other relevant matters

- 18 Under s 109(3)(e), the Tribunal may also have regard to any other matter it considers relevant in deciding whether to make an order for costs.
- 19 I find the OCCM's conduct in conducting the ballot and the SGM in disregard of the owners corporations' committee's decision to revoke its contract of appointment to be a matter that is relevant to whether an award of costs to the applicants should be made and weighs in favour of such an order being made, particularly where an adjournment was required pending the outcome of the SGM.

¹⁶ *Rodda* [23].

- 20 I also find, as a relevant matter, that the need for the applicants to be authorised to bring the proceeding on behalf of the owners corporations was not an issue arising from OCCM's conduct either before or during the proceeding.
- 21 The applicant's claim that OCCM opposed the authorisation of the applicants does not address the underlying issue in any authorisation of a lot owner to bring proceedings on behalf of an owners corporation under the OC Act, which is that the proceeding is not brought by the owners corporation itself, presumably because there is insufficient support, for whatever reason, from the lot owner members more generally for the bringing of the proceeding.
- 22 Accordingly, it is the failure of enough lot owners in the owners corporations to agree to the proceeding being brought that is the cause of the applicants' needing to be authorised to do so, rather than any objection or opposition by OCCM. Put another way, OCCM could not have, under the law, consented to the applicants being authorised to bring the proceeding because, as an owners corporation manager, it does not have any legal power to do so under the OC Act unless instructed to by the owners corporations.
- 23 As a result, while I have found that the nature and complexity of the proceeding and the relative weakness of OCCM's claims in the proceeding weigh in favour of an award of costs to the applicants, I am not satisfied that this applies to the applicants' costs arising from the application to be authorised to bring the proceedings on behalf of the owners corporations.

Conclusion

- 24 In light of the above, having regard to the nature and complexity of the proceeding, the relative weakness of OCCM's claims in the proceeding and other matters I consider relevant, I am satisfied that it is fair, in all of the circumstances, to:
- a. order that OCCM must pay the applicants' costs of the proceedings, other than the costs arising from the application to be authorised to bring the proceedings on behalf of the owners corporations, to be assessed at the County Court scale; and
 - b. exercise my discretion under s 109(2) to make such an order.
- 25 In the absence of an agreement between the parties, the costs are to be assessed by the Costs Court.

C Powles
Member