VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

OWNERS CORPORATIONS LIST VCAT REFERENCE NO. O**C1178/2022**

CATCHWORDS

Application for costs made by the respondent against the applicant pursuant to ss 74(2)(b) and 109(3) of the *Victorian Civil and Administrative Tribunal Act 1998* (Vic) (*'VCAT Act'*) where the applicant was granted leave to withdraw the proceeding prior to him filing a points of claim – costs sought to be fixed under s 111(a) of the *VCAT Act* – issues considered include the timeframe within which the powers under s 104 of the *Owners Corporations Act 2006* (Vic) must be exercised; the fairness test under ss 74(2)(b), 109(3) and 111 of the *VCAT Act*; the interrelationship between ss 74(2)(b) and 109(3) of the *VCAT Act*; the statutory presumption regarding costs under s 109(1) of the *VCAT Act*; relevance of offers of compromise under ss 74(2)(b) and 109(3) of the *VCAT Act* and clarity of offers; the difference between withdrawal, strike out and dismissal of a proceeding; whether the request for an adjournment in question was refused due to an administrative error by the Tribunal; obligations on applicants when commencing a proceeding; right of parties to appoint a professional advocate; whether it is standard in the Owners Corporations List to fix costs; dispute as to the amount of costs

APPLICANT	Mauro Anselmi
RESPONDENT	Owners Corporation PS739378
WHERE HELD	Melbourne
BEFORE	D Kim, Member
HEARING TYPE	Costs application
DATE OF HEARING	3 August 2023
DATE OF ORDER	22 September 2023
CITATION	Anselmi v Owners Corporation PS739378 (Owners Corporations) (Costs) [2023] VCAT 1106

ORDER

1. The applicant must pay the respondent's costs of the proceeding, including the respondent's costs of the directions hearing on 7 October 2022 and the costs hearing on 3 August 2023, to be assessed by the Costs Court on a standard basis on the County Court Scale in default of agreement.

D Kim
Member

APPEARANCES

For Applicant	Mr S Brnovic of Counsel
For Respondent	Mr A Rollnik of Counsel

CONTENTS

REASONS

THE COSTS APPLICATION

1 Although the facts of this case are not complicated, they have been somewhat protracted by events in the proceeding which have taken approximately a year to unfold. In addition, given the matters raised by the parties in their submissions, these reasons contain considerable detail about the facts and the various legal issues raised by the parties which are relevant to the dispute.

2 The applicant is a lot owner in respect of land in the State of Victoria which includes common property.

3 The respondent, Owners Corporation PS739378 ('OC'), is the owners corporation in respect of the common property.

4 The applicant commenced this proceeding by application dated 16 August 2022 ('Application').

5 On 14 November 2022, the Tribunal made an order granting the applicant leave to withdraw the proceeding and the proceeding was withdrawn as at that date ('Order').

6 The OC has applied for costs against the applicant under ss 74(2)(b) and 109(3) of the *Victorian Civil and Administrative Tribunal Act 1998* ('*VCAT Act*'). The OC seeks its costs to be fixed in the sum of $24,471.42,[1] which it submits amounts to 75% of the total costs it has incurred (or in other words, represents a 25% reduction of its total costs), being $32,628.56.[2] The applicant opposes the application for costs and submits that each party should bear their own costs.

7 In support of its application for costs, the OC relies on:

a. the Affidavit of Amelia Grace Santilli (solicitor for the OC) sworn on 7 October 2022 ('First Santilli Affidavit');

b. the Affidavit of Amelia Grace Santilli sworn on 28 April 2023 ('Second Santilli Affidavit');

c. the Affidavit of Amelia Grace Santilli sworn on 31 July 2023 ('Third Santilli Affidavit');

d. Respondent's Submissions – Costs Hearing dated 31 July 2023 ('OC's Submissions'); and

e. the oral submissions made by its counsel at the costs hearing on 3 August 2023.

8 In response, the applicant relies on:

a. the Affidavit of Alvin Tong Yong Lim sworn on 28 April 2023 ('Lim Affidavit'); and

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1 Affidavit of Amelia Grace Santilli sworn on 31 July 2023, [12] ('Third Santilli Affidavit').
2 Ibid [11], expressed as exclusive of GST.

b. the oral submissions made by his counsel at the costs hearing on 3 August 2023.

9 Prior to considering how I ought to determine the OC's application for costs, it is necessary that I provide a non-exhaustive but sufficiently detailed background of the proceeding, followed by an examination of the parties' submissions.

10 The following background comprises of events which are disclosed in the various documents the parties have provided to the Tribunal.

RELEVANT BACKGROUND

11 By the Application (dated 16 August 2022), the applicant issued this proceeding against the OC. In the Application, it was recorded that the applicant was represented by Mr Silver – a lawyer.[3]

12 In the Application, under the heading, 'What is this dispute about?', the applicant stated:[4]

> At the most recent AGM on Saturday 18th June 2022 a committee of 6 Lot Owners was appointed, including an appointment of Chairperson.
>
> Subsequently on Friday 5th August 2022, 4 of the committee members, including the Chairperson resigned from the committee effective immediately. These resignations occurred as a result of lack of support and guidance from the Owners Corporation.
>
> Since Friday 5th August 2022 the Owners Corporation has continued to operate with only 2 committee members which is below the minimum requirement as per the Owners Corporation [sic] Act. The Owners Corporation has also continued to operate without a Chairperson.
>
> The Owners Corporation has also failed to notify all Lot Owners of these circumstances.
>
> I have been advised today (16 August 2022) that the Owners Corporation Manager allowed the remaining committee members to hold an Owners Corporation Committee meeting today, and resolved to make decisions on behalf of the Owners Corporation.

13 In terms of the orders that the applicant sought in the Application, he stated:[5]

> An order that a party to do or not do something, [sic] An order that a party to comply with the Owners Corporations Act 2006, Regulations or Rules, [sic] An order appointing or revoking the appointment of a manager of an Owners Corporation.

14 On 30 August 2022, the OC Manager sent lot owners an email, stating among other things:[6]

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[3] Application, 2–3.
[4] Application, 5.
[5] Ibid.

> There have been a few events over the past month culminating in the resignation of four Committee Members. The remaining members, in accordance with Section 104 of the Owners Corporation [sic] Act have filled a casual vacancy by appointing Chris Boothroyd, to the Committee. As an independent person, Chris is known to most of you and your Committee is confident that he will bring a steady hand and exceptional expertise …
>
> Lorraine Wadelton has been elected as Chairperson. Lorraine has worked on Committees previously and maintains extensive experience in the operation of Owners Corporations. …

15 By notice of hearing dated 30 August 2022, the Tribunal notified the parties that there would be a directions hearing on 7 October 2022.

16 By letter dated 9 September 2022 to the applicant's then lawyer, Mr Silver ('9 September 2022 letter'), the respondent stated, among other things, the following (with the bold type being the OC's emphasis and my emphasis in underline):

> [2] The purpose of this letter is to encourage your client to withdraw his application to VCAT. The reasons for this are explained below.
>
> [3] At this time, the Owners Corporation is prepared to consent to orders that the Proceeding is dismissed with no order as to costs. However, as explained below, should your client persist with the Proceeding, the Owners Corporation will apply to have the Proceeding struck out and it will seek to recover its costs of doing so against your client. Those costs may run into thousands of dollars.
>
> …
>
> [6] Your client's application is doomed to fail for a number of reasons. This is explained below.
>
> [7] The **first reason** why your client's application will fail is that it has been overtaken by events. In other words, the alleged difficulties your client has identified in his application to VCAT are no longer extant. The committee of the Owners Corporation is fully functional with the following members [identifying three members] … .[7]
>
> [8] Your client's application was filed on 16 August 2022 at which time there were 2 remaining committee members. However, a third member was appointed on 23 August 2022 in accordance with Section 104, subsection 2 of the Act. As you are no doubt aware, that section provides:
>
> > "(2) If there is a casual vacancy on a committee, the remaining members of the committee may:
> >
> > (a) Co-opt another lot owner or a person holding a proxy for a lot owner to be a member of the committee; or

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6 As part of Exhibit 'AGS-2' to the First Santilli Affidavit.
7 Ibid [6]–[7].

(b) If there are 3 or more remaining members, proceed without filling the vacancy."

[9] Section 104(2) was followed by the Owners Corporation committee, and Chris Boothroyd was appointed to that committee. You will see from a reading of section 104(2), as set out above, that there is no time limit for the appointment of (or co-opting of) a new member to the committee upon the resignation of committee members between AGMs. … [T]he usual rule is that where there is no time specified in an Act for something to be done, then that thing must be done within a reasonable time.

[10] In this case, your client's complaint about there being no operating committee since 5 August 2022 falls away because a third member of the committee (Mr Chris Boothroyd) was appointed within a reasonable time (on 23 August 2022) of the resignations of the other members of the committee. It is relevant to note that your client's Proceeding was not brought to the attention of the Owners Corporation until 2 September 2022, when it was received via letter in the post.

[11] Your client, along with all members of the Owners Corporation, was notified of the appointment of Chris Boothroyd on 30 August 2022 (see the attached email from the Owners Corporation Manager on 30 August 2022, which explained the appointment of Chris Boothroyd to the committee). Accordingly, your client has known, since 30 August 2022, that the substance of his complaint has now fallen away.

[12] The **second reason** that your client's application will fail is that it is wrong as to key particulars. …

[15] … [T]he 2-person committee that remained in place between 5 and 23 August 2022 had every right to meet, but did not make any new resolutions, incur expenditure, enter into any contracts or take any substantive action on behalf of the Owners Corporation (including at the meeting on 16 August 2022) that had not been sanctioned by the OC at the AGM or at the previous committee meeting prior to the resignation of the four committee members. The 2 remaining committee members, with the support of the Secretary, had ongoing obligations and responsibilities to continue to conduct the day-to-day business of the Owners Corporation, which they did, and to commence the process of considering who would be most suitable to join the Committee and the election of a Chairperson.

…

[19] The **third reason** your client's application should be withdrawn is that the orders sought appear to be somewhat unclear. …

[20] The Tribunal will not make such an order [i.e., the relief stipulated in the Application] because, with the utmost respect to your client, it is difficult to understand what it means. In any event, there is no proper basis for the removal of the Owners Corporation Manager (if that is what your client seeks).

> [21] For the reasons above, your client's application is inutile and misconceived. It should be withdrawn.

17 The respondent also addressed the issue of costs in the 9 September 2022 letter, stating (with my emphasis in underline):

> [23] The Owners Corporation takes the conduct of its activities seriously and considers the complaints made by your client to be without substance and a (potentially costly and time-consuming) distraction from the business of running the Owners Corporation for the benefit of its members. As such, the Owners Corporation will be legally represented at the hearing of your client's application on 7 October 2022, and counsel may be engaged for the hearing. The cost of briefing lawyers and engaging them to appear at the hearing of the application may be substantial. These costs are likely to amount to thousands of dollars. If the matter goes further to a full trial, then the costs will continue to increase. Given that your client's complaints have no real substance and do not further the interests of the members of the Owners Corporation, the Owners Corporation will seek to recover these costs from your client.
>
> …
>
> [25]. Given your client's claim is misconceived and lacks substance, and given this letter, we anticipate that the Tribunal may well make a costs order against your client if he persists with the application. If such an order is made, then, of course, the Owners Corporation will take whatever steps are necessary to take to recover those costs from your client as a debt owing to it.

18 In terms of an offer, the 9 September 2022 letter stated the following (with the bold type being the OC's emphasis and my emphasis in underline):

> [26] If your client agrees to **withdraw** his claim **within 7 days**, the Owners Corporation will consent to orders that the Proceeding is dismissed with no order as to costs. After that time, the Owners Corporation will have to take steps to brief solicitors and counsel to defend the claim you have made, and any further agreement to discontinue will have to take account of the costs the Owners Corporation has incurred. It is also likely that the Owners Corporation will have to make a claim against its insurance policy, which will ultimately lead to an increase in insurance premiums.
>
> [27] If your client consents to withdraw the Proceeding, please let us know by **5PM on Friday 16th September 2022** [being 7 days after the date of the letter], and we will prepare consent orders, ourselves, in order to save on legal fees, which can be signed by the parties and filed with the Tribunal to bring the matter to an end.

19 On 15 September 2022, Mr Silver emailed the OC Manager referring to the 9 September 2022 letter and stating:

> Please provide a copy of the appointment of Chris Boothroyd to the committee as proxy for DCA Home Pty Ltd. Instructions in relation to the further conduct of the current proceeding will be sought from Mr Anselmi

> [the applicant] upon receipt. Suffice to say, that document would have to be produced in the proceeding in any event.[8]

20 By letter dated 29 September 2022 to Mr Silver ('29 September 2022 letter'),[9] the respondent's lawyers stated, among other things (with the bold type being the OC's emphasis and my emphasis in underline):

> We refer to the above proceeding, which is listed for directions next Friday, 7 October 2022.
>
> We … have recently received instructions to act on behalf of the Respondent … .
>
> We have been provided with copies of the correspondence previously exchanged between our client and your firm.
>
> In response to your request for a copy of the appointment of Chris Boothroyd to the committee as proxy for DCA Home Pty Ltd (**DCA**), please find **enclosed** …
>
> … [O]ur client is not currently under any obligation to provide these documents to you but have done so in an attempt to resolve matters at an early stage. We trust that the enclosed documents provides your client with certainty that appropriate processes have been followed by our client, including with reference to section 104(2) of the Owners Corporations Act 2006.
>
> We do not intend to rehearse the contents of our client's correspondence to you dated 9 September 2022, save to say that in light of the matters set out therein and with the benefit of the Proxy Documents, your client should take steps to withdraw his application.
>
> Whilst our client has been put to the expense of engaging our firm, it will provide your client with one final opportunity to dismiss the proceeding with no order as to costs. Should your client fail to withdraw his application by 4**:00pm on Monday, 3 October 2022** [i.e., 4 days after the date of the letter], we confirm we hold instructions to make an application to strike out your client's proceeding. In such circumstances, our client will seek to recover its costs from your client. …

21 The above extract of the 29 September 2022 letter contains most of its substantive contents.

22 On 3 October 2022, Mr Lim, a lawyer, emailed the OC Manager that the applicant had retained new lawyers.[10] Mr Lim relevantly stated (with my emphasis in underline):

> Please note that we only receive instructions to act today and are still in the midst of obtaining documentation from our client.
>
> We note there is a VCAT (direction?) hearing listed for this Friday, 7 October 2022.

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[8] Exhibit 'AGS-3' to the First Santilli Affidavit.
[9] Exhibit 'AGS-4' to the First Santilli Affidavit.
[10] Exhibit 'AGS-5' to the First Santilli Affidavit.

> We confirm we are in receipt of your letter dated 9 September 2022 and to avoid incurring further costs for the OC, we propose adjourning this Friday VCAT hearing for a minimum period of 2 weeks for us to review this matter and advise our client.
>
> If you agree to this matter being adjourned, please provide the OC's consent in writing so we can write to VCAT to seek an administrative adjournment.

23 On 4 October 2022, Ms Santilli, the OC's solicitor, had a telephone discussion with Mr Lim. In respect of the substance of the discussion, the parties agree that Mr Lim requested for an adjournment and Ms Santilli told Mr Lim that she would seek instructions in respect of that request.[11]

24 On 5 October 2022, at approximately 8:56am, Ms Santilli sent an email to Mr Lim stating, among other things, that the OC consented to the adjournment provided that (with my emphasis in underline):

> The adjournment is without prejudice to our client's rights to issue a strike out application. We note that if your clients [sic] do not withdraw the application within 14 days, we will take steps to file a strike out application and will be seeking costs against your clients [sic] on the basis that they [sic] have had ample opportunity to withdraw before costs associated with the application are incurred.[12]

25 On 6 October 2022, at approximately 10:18am, Mr Lim emailed the Tribunal in respect of the directions hearing listed for 7 October 2022. Mr Lim informed the Tribunal that the parties were 'in discussion with a view of resolving this matter', and that the applicant sought an adjournment of the directions hearing, which was with the OC's consent.[13]

26 This was followed by an email from the OC's solicitors to the Tribunal (in response to an email from the Tribunal) confirming that the OC consented to the request to avoid the parties from incurring costs for an appearance.[14]

27 On the same day, the Tribunal replied to the parties noting the lateness of the adjournment request and informed them that they were still required to appear at the directions hearing.[15]

28 On 7 October 2022, Ms Santilli swore the First Santilli Affidavit and provided the same to the OC and the Tribunal prior to the hearing that morning. In these reasons, I have not separately summarised the full contents of the First to Third Santilli Affidavits as the majority of the matters that I have mentioned in this section have been ascertained from the affidavits.

29 On 7 October 2022, the parties appeared before the Tribunal by telephone where the Senior Member presiding over the directions hearing made orders, among other things, for:

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[11] First Santilli Affidavit, [10]; Lim Affidavit, [10].
[12] Exhibit 'AGS-6' to the First Santilli Affidavit.
[13] Exhibit 'AGS-7' to the First Santilli Affidavit; Exhibit 'AL-05' to the Lim Affidavit.
[14] Exhibit 'AGS-9' to the First Santilli Affidavit; Exhibit 'AL-08' to the Lim Affidavit.
[15] Exhibit 'AGS-10' to the First Santilli Affidavit; Exhibit 'AL-09' to the Lim Affidavit.

a. The applicant to provide a Points of Claim by 18 November 2022, which set out: the precise Order or Orders that the applicant sought; against which person or persons the claim was made; the concise factual grounds relied upon in support of the claim; and the breach or breaches of the *Owners Corporations Act 2006* (Vic) ('*OC Act*'), the Owners Corporation Rules ('OC Rules') or the *Owners Corporations Regulations 2018* (Vic) ('Regulations') or any other law that the applicant relied upon.

b. The OC to provide a Points of Defence by 31 January 2023.

c. The parties to exchange and provide to the Tribunal a list of documents by 31 January 2023.

d. The parties to attend a compulsory conference on 4 April 2023.

e. The parties to have leave to be represented by a professional advocate.

f. Costs to be reserved.

30 In the order, it was noted that the OC had sought to apply for costs due to the applicant's request for an adjournment and the Tribunal had determined that any application for costs would be heard and determined at a later date.

31 On 26 October 2022, Mr Lim telephoned Ms Santilli to inform her that the applicant would make an application to withdraw the proceeding. Mr Lim requested that she take instructions as to whether the OC would press for costs.[16]

32 On 27 October 2022, Mr Lim emailed Ms Santilli stating, among other things, that the applicant proposed that he send an email to the Tribunal stating that the parties had resolved the matter, the applicant sought leave to withdraw the proceeding, the OC consented to the withdrawal, and for each party to bear their own costs.[17]

33 On 28 October 2022, Ms Santilli emailed Mr Lim, relevantly stating:[18]

> … [O]ur client is disappointed that it has taken this long for your client to withdraw his application, given the prior opportunities. In circumstances where your client was previously represented, we do not consider much will turn on the fact of your late engagement.
>
> Your client was put on notice by our correspondence dated 29 September 2022 that despite our client engaging our firm, it was prepared to afford your client one final opportunity to dismiss the proceeding with no order as to costs. This correspondence was provided to you on 5 October 2022.
>
> At the hearing on 7 October 2022, your client sought orders which would allow him to file a Points of Claim and the matter was timetabled to a

[16] Second Santilli Affidavit, [12]; Lim Affidavit, [24].
[17] Exhibit 'AGS-7' to the Second Santilli Affidavit.
[18] Exhibit 'AGS-8' to the Second Santilli Affidavit; Exhibit 'AL-11' to the Lim Affidavit.

compulsory half-day conference. It was not until 26 October 2022, some three weeks after receiving our correspondence, did your client inform us that he intended to withdraw his application.

Taking in to consideration the matters above, we are instructed to seek our client's costs in relation to this matter.

In an attempt to avoid the need to prepare for and attend a cost hearing, our client is prepared to accept recovery of 75% of its costs incurred to date, being $8,103.29. If your client is not prepared to consent to a costs order being made in our client's favour in the sum of $8,103.29, we put your client on notice that we will seek to recover all costs incurred by our client in relation to this proceeding, including those incurred in relation to recovery of our client's costs.

34 On 31 October 2022, Mr Lim sent a reply email to Ms Santilli, stating:[19]

> … [W]e note our client's previous solicitor requested confirmation of Chris Boothroyd's appointment on 15 September 2022 but your client only responded via your office on 29 September 2022. As indicated earlier, neither our client nor our office was in receipt of your letter dated 29 September 2022 and the OC proxy form until same was provided to our office on 5 October 2022.
>
> Furthermore, at the hearing on 7 October 2022, despite [the presiding member's] apology that it was an administrative error on the part of VCAT that necessities "physical appearance" for the purpose of our adjournment request (at the 1st Directions Hearing), your Counsel nonetheless persisted on a cost application.
>
> We note the hearing on 7 October 2022 could have been adjourned with minimum cost to both parties if your client has chosen to attend in person for the purpose of the adjournment and not embarked on a last-minute cost application. We note your client was in attendance at the hearing on 7 October 2022.
>
> Regardless, we would be pleased if you would provide a breakdown of your cost being $8,103.29 so that we can properly advise our client. …

35 On 4 November 2022, the OC's lawyers sent a reply email to Mr Lim, stating, among other things (with my emphasis in underline):[20]

> We confirm our costs of $8,103.29 are broken down as follows: <u>solicitor fees of 8,596.06 incl GST plus Counsel fees of $2,208.33 GST total $10,804.39, 75% of which is $8,103.29</u>
>
> Our time relates to work performed between <u>20 September 2022 and 26 October 2022</u>, including:
>
> …

[19] Exhibit 'AGS-9' to the Second Santilli Affidavit.
[20] Exhibit 'AGS-10' to the Second Santilli Affidavit.

> It is important to reiterate that your client had plenty of opportunities to withdraw the proceeding before legal costs were incurred by our client. Your client was on notice of the issues in his application from as early as 9 September when he was informed that a third committee member had been appointed. The proxy document was provided to your client's legal representative (as he then was) on 29 September, some 8 days prior to the directions hearing. Even after the provision of the proxy document, you indicated that your client intended to amend his claim and did not indicate an intention to withdraw the application for a further period of 3 weeks. Any alleged delay on the part of our client is entirely unfounded. Further, the criticisms of our client for being represented at the directions hearing are surprising in circumstances where your client was similarly legally represented.
>
> …
>
> We note that our client has put forward an offer to discount its legal costs. It maintains that a claim for $8,103.29 is reasonable in the circumstances and the offer was made to avoid the costs associated with further hearings. If your client does not accept the offer, our client reserves the right to push ahead with a claim for 100% of its costs, including the costs associated with any future hearing.

36 On the same day, Mr Lim emailed the OC's lawyers stating (with Mr Lim's emphasis in underline):[21]

> To resolve this matter strictly on a commercial basis and without admissions of any kind, we are instructed to make a final offer that our client pay your client the sum of $2,000.00 within 7 days of acceptance of this offer in full and final settlement of this matter, including your client's consent to our client's withdrawal of this present Tribunal application and with no orders as to costs.
>
> This offer is available for acceptance until 4:00pm on 11 November 2022 [i.e., in 7 days' time] and will thereafter expire.
>
> Our client will nonetheless submit an application for leave to withdraw this application on the basis that:
>
> a) your client had only appointed the third committee member in response to our client's application; and
>
> b) the proxy document was only provided shortly before the directions hearing, and this has led our client no longer disputing that the proxy requirements set out in the Owners Corporations Act 2006 (Vic) were carried out in this instance in response to the application made by our client. …

37 On 9 November 2022, Ms Santilli emailed Mr Lim, stating that the OC rejected the applicant's offer and responding with a counteroffer for payment

[21] Exhibit 'AGS-11' to the Second Santilli Affidavit.

of $7,500.00 by way of instalments.[22] The counteroffer was open for 7 days. Ms Santilli also stated (with the OC's emphasis in bold type and underline):

> It is disingenuous and misleading for your client to assert that the third committee member was only appointed in response to your client's application. As your client would be well aware, our client was not on notice of his application until 2 September 2022. Chris Boothroyd was nominated by proxy to join the committee on 18 August 2022, with the nomination being resolved by the committee on 23 August 2022, at which time Mr Boothroyd was formally appointed. Mr Boothroyd's appointment was not a reactive appointment by our client. Our client knew what steps it was required to undertake in accordance with the Owners Corporation Act 2006 (the **Act**) to ensure the committee of the Owners Corporation was fully functional. As prescribed by the Act, the committee appointed a third member within a reasonable period of time (emphasis added) following the resignations of other members of the committee.
>
> Your client (along with all members of the Owners Corporation), were notified of the appointment of Mr Boothroyd on 30 August 2022. It is immaterial that a copy of the proxy document was provided shortly before the directions hearing on 7 October 2022. Your client had ample opportunity to withdraw his application once he was aware of Mr Boothroyd's appointment.

38 On 10 November 2022, at approximately 2:14pm, Mr Lim emailed Ms Santilli stating, among other things, that the applicant rejected the OC's counteroffer and an application for leave to withdraw would be filed shortly.[23]

39 By email from Mr Lim on 10 November 2022, the applicant provided the Tribunal with an application for leave to withdraw dated 10 November 2022.[24] In the application, the reason for applying to withdraw was stated as:

> Since this VCAT application was lodged, the Respondent has provided information to the Applicant as to the process of appointing the third Owners Corporation committee member, which has resulted in the Applicant being satisfied that it need no longer dispute the appointment by way of this application. The Applicant considers this resolves the application such that there is no further merit in proceeding.

40 On 11 November 2022, the OC's solicitors emailed the Tribunal confirming that the OC sought costs against the applicant and requested that the matter be set out down for a half day hearing.[25]

41 By an in-chambers order made on 14 November 2022, the Tribunal made the Order, which gave leave for the applicant to withdraw and ordered that the proceeding was withdrawn.

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[22] Exhibit 'AGS-12' to the Second Santilli Affidavit.
[23] Exhibit 'AGS-13' to the Second Santilli Affidavit.
[24] Exhibit 'AGS-14' to the Second Santilli Affidavit.
[25] Exhibit 'AGS-15' to the Second Santilli Affidavit.

42 The parties' lawyers then engaged in further correspondence, and:

a. On 28 February 2023, the applicant made an offer to pay $3,000.00 within seven days of acceptance if the OC withdrew its costs application.[26] The offer was open until 14 March 2023 and purported to be made as a *Calderbank* offer.

b. On 1 March 2023, the OC rejected the applicant's offer and made a counteroffer in the sum of $7,500.00 with a requirement that the applicant provide a draft Deed of Settlement which set out 'standard terms and releases for resolving the issue of costs'.[27] The counteroffer was open until 3 March 2023 and purported to be made as a *Calderbank* offer. The counteroffer lapsed.

43 On 28 April 2023, Ms Santilli swore the Second Santilli Affidavit.

44 On 28 April 2023, Mr Lim swore the Lim Affidavit. In the Lim Affidavit. Mr Lim deposed, among other things, that:

a. On 30 September 2022, he was contacted by the applicant's partner as to whether he could assist the applicant in the proceeding.[28] At the time, Mr Lim was told that the applicant had engaged a lawyer and the lawyer was unavailable for the directions hearing listed for 7 October 2022.[29]

b. He was told that Mr Silver had emailed the OC Manager on 15 September 2022 requesting further information about the appointment of a committee member but there had been no response.[30]

c. As he was unable to obtain 'proper instructions with respect to the nature of the application', and given that the hearing was days away, he informed the applicant's partner that the applicant's lawyer could seek an adjournment.[31]

d. On 3 October 2022, at approximately 3:57pm, he received an email from the applicant's partner that 'they had terminated the services' of Mr Silver and wished to appoint his firm.[32]

e. On 3 October 2022, at approximately 5:24pm, he emailed the OC Manager seeking an adjournment of the directions hearing.[33] Parts of the email have been mentioned above and the email is also exhibited to the First Santilli Affidavit.[34]

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[26] Exhibit 'AGS-18' to the Second Santilli Affidavit.
[27] Exhibit 'AGS-19' to the Second Santilli Affidavit.
[28] Lim Affidavit, [4].
[29] Ibid [5].
[30] Ibid [6].
[31] Ibid [7].
[32] Ibid [8].
[33] Ibid [9]; Exhibit 'AL-03' to the Lim Affidavit.
[34] Exhibit 'AGS-5' to the First Santilli Affidavit.

f. What followed between 4 and 6 October 2022 were emails between the parties and the Tribunal in respect of the adjournment request.[35] In this regard, save for one additional email,[36] the Lim Affidavit exhibited copies of the same emails exhibited to the First Santilli Affidavit.

g. In the morning of 7 October 2022, less than two hours before the directions hearing, he received a copy of the First Santilli Affidavit and it became apparent to him that the OC sought costs in the sum of $2,400.00 due to the applicant's failure to request an adjournment well prior to the hearing.[37] He did not have time to brief counsel so appeared at the directions hearing.[38]

h. At the directions hearing, the Tribunal informed the parties that 'it was an administrative error on the part of the VCAT Registry requesting appearances from both parties on a first return date when the adjournment request was by consent'.[39] The member presiding over the hearing apologised on behalf of the Tribunal and 'measures had been put in place to ensure such error [did] not occur again and that the adjournment application would be granted'.[40]

i. In response, the OC 'persisted in its costs application', to which the member 'expressed concern that the matter was only allocated for 30 minutes', and the parties might not have time to make submissions on a cost application.[41]

j. Mr Lim then submitted to the Tribunal that given parties were in attendance and the hearing of costs 'would most likely exceed the time provided, to avoid wasting time', the applicant was content for the matter to proceed as a directions hearing, and the matter proceeded as a directions hearing by the consent of the parties.[42]

k. On 26 October 2022, Mr Lim received instructions from the applicant to withdraw the proceeding and he contacted Ms Santilli to seek consent.[43]

l. On 28 October 2022, Mr Lim received an email from Ms Santilli where she stated, among other things, that the OC sought costs, which had increased from $2,400.00 to $8,103.29.[44] A copy of the

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35 Ibid [10]–[16].
36 Exhibit 'AL-07'to the Lim Affidavit.
37 Lim Affidavit, [18].
38 Ibid [19].
39 Ibid [20].
40 Ibid.
41 Ibid [21].
42 Ibid [22]–[23].
43 Ibid [24].
44 Ibid [25].

email is exhibited to the Lim Affidavit as well as to the Second Santilli Affidavit.[45]

45 On 31 July 2023, Ms Santilli swore the Third Santilli Affidavit, the substance of which was in essence to depose that further legal costs had been incurred by the OC and to seek costs in the amount that the OC now seeks.

46 On or about 31 July 2023, the OC provided the Tribunal with the OC's Submissions.

47 Other than the two orders of the Tribunal mentioned above, the only other order made by the Tribunal in this proceeding was an in-chambers order made on 1 May 2023, which adjourned the hearing of the costs application to a later date given issues with member availability.

48 Eventually, the hearing of the OC's costs application was listed for 3 August 2023 ('costs hearing').

49 On 3 August 2023, I presided over the costs hearing. At the hearing, neither party sought to question either Ms Santilli or Mr Lim as to the matters that they had deposed to in their respective affidavits.

50 I now turn to the substance of the parties' submissions.

PARTIES' SUBMISSIONS AS TO COSTS

51 I have summarised the parties' submissions in the order that the parties advocated their positions at the costs hearing. Where I have summarised the OC's initial submissions, I have incorporated the substance of the OC's Submissions.

The OC's initial submissions

52 The OC relies on both ss 74(2)(b) and 109(3) of the *VCAT Act* to seek costs.[46] Among the authorities that it relies on, it refers to the Tribunal's recent decision in *Yanik v Thomas* ('*Yanik*').[47]

53 The OC submits that:

a. In the circumstances, it would be fair for the Tribunal to make a cost order against the applicant and it should do so (referring to this as the 'liability issue').

b. The Tribunal should fix the quantum of the OC's costs at $24,471.42, reflecting 75% of the total costs incurred by the OC in the proceeding, which includes costs of the costs hearing (referring to this as the 'quantum issue').

54 In terms of the liability issue, at the costs hearing the OC initially submitted that:

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[45] Exhibit 'AL-11' to the Lim Affidavit; Exhibit 'AGS-8' to the Second Santilli Affidavit.
[46] OC's Submissions, [10].
[47] (Building and Property) [2023] VCAT 850.

a. Where a proceeding has been withdrawn under s 74(1) of the *VCAT Act*, s 74(2)(b) gives the Tribunal a broad discretion to award costs 'depending on all the circumstances of the case'.[48] The underlying threshold for the Tribunal is that it is fair to order costs.[49]

b. The circumstances which may give rise to a costs order under s 74(2)(b) may include the matters under s 109(3) of the *VCAT Act*.[50] However, under s 74(2)(b), unlike s 109(1), there is no presumption that each party bears their own costs.[51]

c. Under s 109(3) of the *VCAT Act*, the Tribunal may also award costs if it is fair to do so by having regard to matters under s 109(3)(a)–(e) and may also consider any other matters which it considers are relevant,[52] and must consider all matters together to determine that it would be fair to order costs.[53]

55 The OC initially submitted that the following matters weigh in favour of the Tribunal exercising its discretion to award costs whether under s 74(2)(b) or s 109(3) of the *VCAT Act*:

a. The applicant conducted the proceeding vexatiously which has unnecessarily disadvantaged the OC, referring to s 109(3)(a)(vi) of the *VCAT Act* and drawing analogies to the situation faced by the Tribunal in *Yanik*.[54] In referring to the Tribunal's findings in *Yanik*, the OC contends that the applicant's claim was 'vaguely expressed, without legal foundation and no evidentiary basis for them [was] provided', and 'obviously untenable and manifestly groundless, such that they were utterly hopeless'.[55]

b. The applicant's claim had no basis in fact or law and the claim was doomed to fail, referring to s 109(3)(c) of the *VCAT Act* and the comments in *Yanik*.[56] The claim should not have been issued at all. The OC contends that, as the Tribunal found in *Yanik*, the applicant's claim in this instance was 'vaguely expressed, without legal foundation and no evidentiary basis for them [was] provided'.[57] Further, a claimant's right to make a claim needs to be exercised responsibly and it would be unfair for the Tribunal to permit parties to pursue, with impunity and to the bitter end, any

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48 OC's Submissions, [9].
49 Referring to *Yanik v Thomas* (Building and Property) [2023] VCAT 850, [11] ('*Yanik*').
50 Ibid [9], citing *De Jonk v Aumeca Owners Corporation Pty Ltd* [2020] VCAT 1439, [11].
51 *Yanik*, [11](b)].
52 OC's Submissions, [5], citing *Vero Insurance Ltd v The Gombac Group Pty Ltd* [2007] VSC 117, [20(iii)] ('*Vero*').
53 Ibid [6], citing *Vero*, [22].
54 *Yanik*, [14(a)]–[16].
55 Ibid [16].
56 Ibid [14(b)], [19].
57 Ibid [19].

claim, no matter how 'hopeless, manifestly weak, irrational or quixotic such a claim might be'.[58]

c. The substance of the Application lacked particulars in that there was no mention of the specific provisions of the *OC Act*, the OC Rules or the Regulations which the applicant alleged the OC had contravened and no mention of the specific relief sought against the OC. Therefore, the applicant's claim that the OC was operating unlawfully was a bare allegation, and the Application was nonsensical and so vague that it was meaningless.

d. It appeared that the 'nub' of the applicant's claim, as stated in the Application, was that the OC had only two committee members yet it was continuing to operate, which was below the minimum three members prescribed under s 103 of the *OC Act* and was acting without a Chairperson. However, s 104 of the *OC Act* permitted the OC to coopt another owner or proxy to be a member of the committee, which is what happened. The appointment of Mr Boothroyd was made on 23 August 2022, a week after the Application was lodged, and which was not in response to the Application. The respondent only became aware of the proceeding on 2 September 2022.

e. As s 104 of the *OC Act* does not prescribe a time when an appointment must be made, the law requires the appointment to be made within a reasonable time. In making this submission, the respondent indicated that it was not able to ascertain any cases which have dealt with the timeframe under s 104 of the *OC Act*.

f. Considering the time required to contact any eligible person for the purposes of an appointment, for that person to agree to the appointment, for arrangements to be made, and for the appointment to take place, the time taken by the OC was reasonable. The OC further submits, which I consider is more related to a *functus officio* issue,[59] as opposed to a 'reasonable period of time' issue, that the OC could not have been in breach of the *OC Act* when the committee only had two members, as s 104 of the *OC Act* anticipates, and expressly authorises, the OC to coopt someone else to join the OC Committee when it does not have the minimum number of committee members as required under s 103 of the *OC Act*.

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[58] Ibid [20], citing *McCarthy v Dandenong Region Body Corporate Services (Aust) Pty Ltd* [2009] VCAT 1898, [67]–[68].

[59] The Latin term refers to a situation where, for example, a decision-making body no longer holds office and therefore has no further powers to act. See *Kabourakis v Medical Practitioners Board of Victoria* [2005] VSC 493, where Gillard J considered the operation of s 40 of the *Interpretation of Legislation Act 1984* (Vic) in respect of whether the board in question was *functus officio*.

g. As evidenced by the reasons the applicant provided in his application to seek leave to withdraw the proceeding, the applicant admitted that there was no merit to his claim.[60]

h. The applicant was responsible for prolonging unreasonably the time taken to complete the proceeding, in reference to s 109(3)(b) of the *VCAT Act*.

i. When the applicant commenced the proceeding, he was represented by a lawyer and continued to have legal representation.[61] The OC's first lawyer was in receipt of the 29 September 2022 letter (and the documents requested) on that day, and the applicant 'had everything he needed to make an informed decision about whether to continue with or discontinue the proceeding'.[62] The applicant was not a self-represented litigant 'bumbling along' but had lawyers assisting him from the inception of the proceeding.

j. The OC made two offers of compromise – one by the 9 September 2022 letter, and other by the 29 September 2022 letter.

k. By the 9 September 2022 letter, the OC provided detailed reasons as to why the applicant's claim should be withdrawn, and gave the applicant the opportunity to 'consent to orders that the claim be dismissed with no order as to costs'.[63] Had the applicant accepted the offer, he would not have been subject to any costs order.

l. By the 29 September 2022 letter, the OC provided the applicant with documents requested on 15 September 2022 and gave the applicant 'a further opportunity to withdraw his claim' with no order as to costs.[64] In this regard, Mr Silver's email on 15 September 2022 did not seek an extension of time to consider the OC's offer in the 9 September 2022 letter but only sought information as to Mr Boothroyd's appointment. The information that was sought was legally irrelevant as the appointment took place on 23 August 2022, a week after the Application was filed, and the OC was not obliged to provide the information given that it was a committee document.

m. The applicant should have realised the legal difficulties with his case and withdrawn within seven days of the 9 September 2022 letter, or at the very least, by 3 October 2022, being the deadline provided under the 29 September 2022 letter,[65] as by this time, the applicant was able to properly assess his prospects.[66] The fact that

[60] OC's Submissions, [21].
[61] Ibid [35].
[62] Ibid.
[63] Ibid [13].
[64] Ibid [14].
[65] Ibid [17], [19].
[66] Ibid.

the applicant pressed on with the proceeding was unreasonable and unnecessarily disadvantaged the OC.

n. Correspondence between the parties' solicitors from 26 October 2022 to 1 March 2023 were, although not expressly stated as such, by their nature, on a 'without prejudice save as to costs' basis.[67] It was unreasonable for the applicant to have rejected the OC's offers and this is a factor that the Tribunal can consider in respect of costs.[68]

o. In terms of the directions hearing on 7 October 2022:

   i. Although the Senior Member mentioned at the hearing that it would have been better if the Tribunal had granted the adjournment so as to avoid the need for the parties to appear, it was not the Tribunal's fault that the parties incurred costs that day.

   ii. The reason why the parties incurred costs that day was due to the applicant's unreasonable conduct prior to the hearing, including in seeking the adjournment too late. At the hearing, the applicant also withdrew his application for adjournment.

   iii. Even if costs had been incurred due to the fault of the Tribunal, which is not conceded, ultimately, the applicant caused the OC to incur costs as his claim had no merit.[69]

56 In respect of the quantum of costs sought, the OC contended that:

a. Under s 111(a) of the *VCAT Act*, the Tribunal has the power to fix costs and ought to do so.[70]

b. Whilst it would be open to the Tribunal to refer the quantification of costs to the Costs Court, the Tribunal had all the evidence to quantify the costs of any order and to avoid any additional costs which would 'likely [to] add thousands of dollars to the costs already incurred'.[71] In fact, 'it is quite common for the Tribunal to use its experience to fix costs so as to avoid additional costs being incurred by the parties in a taxation'.[72]

c. As it was reasonable for the applicant to have withdrawn his claim seven days from receiving the 9 September 2022 letter, the Tribunal should award the respondent costs from 16 September 2022.[73]

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67 Ibid [37].
68 Ibid [43].
69 Ibid.
70 Ibid [28], citing *Metricon Homes Pty Ltd v Sawyer* [2013] VSC 518, [13].
71 Ibid.
72 Ibid [29], citing *D'Agostino v Greater Shepparton CC* [2017] VCAT 1205, [47].
73 Ibid [30].

d. As the respondent seeks only 75% of its actual costs, the Tribunal should have 'comfort that the award sought is fair and appropriate'.[74]

57 In respect of the calculation of the amount of costs, the respondent exhibited to the Second and Third Santilli Affidavits copies of tax invoices from the respondent's solicitors and counsel. Based on the affidavit material, the total costs at the end of the cost hearing is $32,628.56 (exclusive of GST), comprised of:[75]

a. Actual costs of $25,774.01.

b. Anticipated cost of $6,854.55 from the time of Ms Santilli swearing the Third Santilli Affidavit up to and including the costs hearing.

58 The OC seeks an order for costs in the sum of $24,471.42, which is 75% of the actual and estimated costs to be incurred (excluding GST), to be payable within 30 days.[76]

Applicant's initial submissions in reply

59 The applicant's submissions were made orally by his counsel on 3 August 2023. Although some of the submissions were at times repetitive in their nature, as they were expressed slightly differently during the submissions, I have included those contentions. In summary, the applicant contended that:

a. Whether the Tribunal ought to order costs is a question of fairness considering all the circumstances of the case.

b. It would be 'manifestly unfair' for the Tribunal to depart from the statutory presumption under the *VCAT Act* that the parties bear their own costs, noting that the respondent has incurred in excess of $32,000.00 in costs, and where the majority of the amount has been incurred in pursuit of its costs application.

c. The primary or 'umbrella' reason why it would not be fair to award costs is because nothing substantive occurred in the proceeding to have caused any unnecessary disadvantage to the respondent. The proceeding was withdrawn before any substantive work had been undertaken by either party. No points of claim or defence were filed, and no compulsory conference was held. The lack of work was also demonstrated by the Tribunal's file being 'thin' and the fact that there was only one hearing where the parties had to appear.

d. The proceeding was not 'pressed' and the applicant had sought an adjournment of the directions hearing so that proper consideration could be had to the Application and proper instructions taken by

[74] Ibid [33].
[75] Third Santilli Affidavit, [11].
[76] Ibid [12].

Mr Lim. The applicant sought the adjournment 'with a view of resolving the matter', as reflected by Mr Lim's email on 6 October 2022.[77]

e. The applicant had tried to minimise the impact of costs to the parties by seeking an adjournment early in the proceeding. All actions taken by the applicant were taken to minimise costs and wastage of Tribunal's time.

f. In respect of Mr Lim's request to the Tribunal for an adjournment of the directions hearing, it was never intended that the applicant sought to press the merits of the matter. Rather, the applicant wished to have the matter resolved and the adjournment was sought so that that could occur outside of the Tribunal's processes. This was not a case where the applicant's claim was 'positively put because it was a strong one', but rather it was a case where adjournment was sought to allow for resolution and to allow the applicant time to consider whether or not he ought to continue, which is what happened. The applicant was interested in ensuring that if the Application was not meritorious, that he would withdraw at the earliest opportunity. The earliest time that the applicant could have sought leave to withdraw was in early October 2022, which is what had occurred.

g. At the directions hearing, the applicant initially requested an adjournment and the OC, whilst not objecting to the request, sought costs thrown away. It was unnecessary and unreasonable for the OC to have made a costs application at the directions hearing.

h. To avoid the day being wasted and to avoid the need for a costs hearing, it was agreed to have the hearing proceed as a directions hearing. The Senior Member was not interested in hearing the costs application. The Senior Member was sympathetic that the parties were required to appear and did not wish to have the hearing wasted. The Tribunal's requirement for the applicant to file a points of claim was a response to the OC's costs application raised at the directions hearing and to give some utility to the hearing.

i. At the time of seeking the adjournment, neither the applicant nor Mr Lim had received a copy of the 9 September 2022 letter from Mr Silver. This allegation was not included in the Lim Affidavit.

j. In any event, it was reasonable for the applicant not to take the OC's allegations on face value and to take the time to consider the options available to him. There were attempts made by the

[77] Exhibit 'AL-05' to the Lim Affidavit; Exhibit 'AGS-7 to the First Santilli Affidavit.

applicant so that proper instructions and a proper position could be formed.

k. The OC's costs claim consists of costs incurred by the OC as part of the proceeding, and costs incurred in prosecuting its costs claim. Neither fell within what the Tribunal ought to consider as unnecessarily disadvantaging the OC.

l. The proper opportunity for the applicant's claim to be identified and for it to crystalise was at the filing of the points of claim and not necessarily at the Application. This did not occur as it was intended that the matter would resolve before the deadline for the applicant to file a points of claim.

m. At no stage in the proceeding did the applicant say that he was 'going to win' or that his case 'has merit'. The applicant did not vexatiously conduct the proceeding as the applicant had not advanced that the Application had merit or that the applicant would win. The applicant wished to have more time to consider whether or not to continue with the Application.

n. The various factors pertaining to the applicant's case put his case in a different category to the cases that the OC relied on.

o. The bulk of the work in the proceeding related to the 7 October 2022 directions hearing and the subsequent claim for costs. The manner in which the costs application was pressed was excessive. For example, only one affidavit should have been sufficient.

p. It was unnecessary for the OC to have engaged counsel and in the manner that it did, especially as from the start, the OC had alleged that the applicant's claim was doomed to fail. Further, the applicant's claim was not fiercely contested and it was not a complex claim.

q. The applicant himself prepared the Application and put down Mr Silver as his contact.

r. The applicant realised that it was not a meritorious claim and then sought withdrawal and not for other reasons. It was done before any substantive costs were incurred. The OC was not disadvantaged by this.

s. The offers that the OC made were not unreasonably rejected. The offers were unfair given that the applicant was acting towards, and did obtain, a withdrawal of the proceeding, and considering that the amount of costs claimed was unreasonably high. Further, the applicant referred to the Court of Appeal's decision in *Hazeldene's Chicken Farm Pty Ltd v Victorian Workcover*

Authority [No 2] ('*Hazeldene's*'),[78] where (at [25]) the Court made the following statements:

> It is neither possible nor desirable to give an exhaustive list of relevant circumstances. At the same time, a court considering a submission that the rejection of a *Calderbank* offer was unreasonable should ordinarily have regard at least to the following matters:
>
> (a) the stage of the proceeding at which the offer was received;
>
> (b) the time allowed to the offeree to consider the offer;
>
> (c) the extent of the compromise offered;
>
> (d) the offeree's prospects of success, assessed as at the date of the offer;
>
> (e) the clarity with which the terms of the offer were expressed;
>
> (f) whether the offer foreshadowed an application for an indemnity costs in the event of the offeree's rejecting it.

t. There was an 'access to justice point' in that parties should be able to issue where they think their case has merit and then withdraw when they realise that their claim does not have merit. The applicant referred to the Tribunal's comments in *McCarthy v Dandenong Region Body Corporate Services (Aust) Pty Ltd* ('*McCarthy*') at [67]:[79]

> Parliament has decided to confer upon VCAT the jurisdiction to hear and determine owners corporation disputes. The provisions of the VCAT Act encourage self-representation. Most individual lot owners who want to ventilate a grievance at VCAT will be self-represented. It is important that would-be applicants in the jurisdiction are not deterred from airing genuine grievances, and making genuine claims, by the fear that VCAT will award costs against them if they lose.

u. The applicant was an individual 'fighting the might' of the OC. In terms of relative strengths of the parties, the OC's strength far outweighed the applicant's.

v. The applicant had not issued the proceeding for reasons of private motivation but as a concerned member of the OC to facilitate the OC's compliance with the *OC Act* and the OC Rules.

w. The OC's reduction of its actual costs was similar to the Tribunal's approach in *Francis v Stonnington CC*,[80] where in that case the Tribunal had opined (at [18]) that standard basis was

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[78] [2005] VSCA 298.
[79] [2009] VCAT 1898.
[80] (Costs) [2021] VCAT 1192.

'approximately 2/3 to 75% of the costs incurred'. However, unlike that case, there had been no substantive work undertaken by the parties in this proceeding.

x. The applicant's application to withdraw ought to be considered as the applicant conceding that his claim had no merit to begin with. However, as I have mentioned below, this submission was later withdrawn in response to the respondent's reply submissions.

y. The OC was not unnecessarily disadvantaged as the applicant did not conduct the proceeding vexatiously. Accordingly, this was not a case similar to *Yanik*.

z. The directions hearing took place due to an administrative error by the Tribunal. Accordingly, it would be unfair for the Tribunal to order that the applicant pay the OC's costs in respect of the hearing.

aa. The OC's costs comprised of costs incurred in the proceeding prior to the applicant seeking leave to withdraw and costs in pursuing a costs order. Much of the work that the OC's lawyers undertook was not work which had been required. It was excessive for the OC to have filed three affidavits. The costs sought were unnecessary incurred and unnecessarily high.

bb. The applicant never received the 9 September 2022 letter.

cc. The reason for any delay by the applicant seeking leave to withdraw was because the applicant needed the time to consider his position, particularly in waiting for the OC to provide the requisite documentation about the appointment of Mr Boothroyd.

dd. It could not be expected for a lay person, such as the applicant, to know the law.

ee. There was a realisation by the applicant that his claim did not have merit. The applicant withdrew his claim early and it was reasonable.

ff. The fair decision was for the Tribunal to order that parties should bear their own costs.

The OC's submissions in reply

60 In response to the applicant's initial submissions, the OC submitted that:

a. As initially submitted, under s 74(2)(b) of the *VCAT Act*, there is no presumption that each party must bear their own costs.

b. The applicant's submission that he did not receive the 9 September 2022 letter was not supported by any evidence and was a new allegation put by the applicant that day.

c. In respect of the applicant's submission that there ought not to be any allowance for counsel's fees where the case is totally without merit, the law is complex and the OC was entitled to obtain proper legal advice including advice from counsel in order to defend the case. For example, the 9 September 2022 letter set out in some detail the reasons why the applicant's claim was doomed and 'genuine legal advice' was required to set out precisely why the claim was doomed.

d. In respect of the applicant's submission that he needed time to consider his position, the time to consider the merit of his claim was before making the Application and the applicant had since 9 September 2022 to consider the merits of his claim and had decided not to accept the OC's offer.

e. In referring to the applicant's reliance on *McCarthy* to contend that where a claim is genuine there can be no order for costs under s 109 of the *VCAT Act*, the applicant's claim was unmeritorious from the 'get go'.

Applicant's further submissions in reply

61 Finally, and despite the OC's objections that I ought not to permit the applicant to make further submissions in reply, I allowed the applicant to respond to the respondent's oral submissions in reply. I saw no hindrance to my power to do so. Indeed, the Tribunal's power to conduct a proceeding in a manner as the Tribunal sees fit is wide,[81] provided that in doing so, it is not in contravention of its obligations, most notably under ss 97 and 98 of the *VCAT Act* (which cover matters such as natural justice and due process).

62 The only reply submissions that the applicant made were that:

a. The applicant's counsel sought to withdraw his earlier submission that the applicant conceded that his claim had no merit from the outset. Rather, the Application did have merit at the outset and the OC had subsequently cured the issue, and it was the curing that satisfied the applicant that there was no further merit to his claim.

b. At the time that the applicant sought leave to withdraw, he was aware that his claim was without merit, but at the time that he had commenced the proceeding he thought that his clam had merit.

ISSUES TO BE DETERMINED

63 Given the above matters, the underlying issues that I must determine are:

a. Should the OC be awarded costs under s 74(2)(b) and/or s 109(3) of the *VCAT Act*?

b. If the OC should be awarded costs, should the amount of costs be:

[81] See, eg, *Victorian Civil and Administrative Tribunal Act 1998* (Vic) s 80 ('*VCAT Act*').

i. fixed by the Tribunal as the respondent seeks under s 111(a) of the *VCAT Act*; or

ii. determined by the Costs Court pursuant to s 111(b) of the *VCAT Act* in default of the parties' agreement?

64 Before I determine the above issues, I must consider the relevant law, including the operation of ss 103 and 104 of the *OC Act*, ss 74(2)(b), 109(3) and 111 of the *VCAT* Act, as well as what transpired at the directions hearing on 7 October 2022.

THE RELEVANT LAW

The operation of ss 103 and 104 of the *OC Act*

65 Section 103 of the *OC Act* relevantly states:

> **Membership of committees**
>
> (1) A committee of an owners corporation must have at least 3 and not more than 7 members.
>
> …
>
> (2) The members of the committee must be lot owners or hold proxies on behalf of lot owners.
>
> (3) There must not be more than one member of the committee from any one lot.
>
> (4) A lot owner or a proxy for a lot owner may nominate for election as a member of the committee—
>
> (a) in writing; or
>
> (b) orally if the lot owner is present at the annual general meeting.

66 Section 104 of the *OC Act* states:

> **Casual vacancies on a committee**
>
> (1) A casual vacancy is a vacancy that occurs between annual general meetings.
>
> (2) If there is a casual vacancy on a committee, the remaining members of the committee may—
>
> (a) co-opt another lot owner or a person holding a proxy for a lot owner to be a member of the committee; or
>
> (b) if there are 3 or more remaining members, proceed without filling the vacancy.

67 As the OC has submitted, there is no timeframe stipulated under s 104 of the *OC Act*. The OC contends that in the absence of a timeframe, the law implies that the person who is required to undertake the relevant act is given a reasonable time to do so. It submits that it has complied with s 104 of the *OC Act* as the appointment of Mr Boothroyd was made within a reasonable time.

68 In situations where the legislation in question does not specify a period for doing a particular act, the common law position has been to require that the act be done within a reasonable period of time or that a reasonable time be allowed for the act to be done.[82] This statutory construction has been referred to as the 'ordinary rule'.[83] What is deemed as a reasonable time will depend on all the facts.[84]

69 However, Pearce and Geddes state that the ordinary rule has been superseded in Queensland and Western Australia, where under their respective Interpretation of Act legislation, where there is no time specified in an Act, the act or thing in question must be done 'with all convenient speed and as often as occasion arises'.[85]

70 In Victoria, the only provision under the *Interpretation of Legislation Act 1984* (Vic) ('*IL Act*') (which is under Part IV—Provisions applicable to Acts and subordinate instruments) which deals with a situation where a timeframe is to be implied in construing a provision which gives a power or duty to perform, is s 40. Section 40 states:

> **Exercise of powers and performance of duties**
>
> Unless the contrary intention appears, where an Act or subordinate instrument confers a power or imposes a duty, the power may be exercised and the duty shall be performed—
>
> (a) from time to time as occasion requires; and
>
> (b) if conferred or imposed on the holder of an office or position as such, by the person for the time being holding, acting in or performing the duties of the office or position.

71 I was not provided with any authority which identifies the permitted timeframe under s 104 of the *OC Act*. I have not been able to locate such authority.

72 As the words of s 104 of the *OC Act* indicate, s 104 is not a duty provision but confers the power to appoint committee members. It follows that under s 40(a) of the *IL Act*, the power to appoint under s 104 of the *OC Act* may be exercised 'from time to time as [the] occasion requires'. Given the broad

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[82] *Koon Wing Lau v Calwell* (1949) 80 CLR 533, 573–4 ('*Koon*'). See also, Pearce and Geddes, *Statutory Interpretation in Australia*, (LexisNexis Butterworths, 7th ed, 2011) [6.52] ('Pearce and Geddes'), citing, among other authorities, *Koon* and *BTR PLC v Westinghouse Brake v Signal Co (Australia) Ltd* (1992) 34 FCR 246, 272–3.

[83] *Koon*, 573.

[84] Ibid.

[85] Pearce and Geddes, [6.52]. See *Acts Interpretation Act 1954* (Qld) s 38(4), which states: 'If no time is provided or allowed for doing anything, the thing is to be done as soon as possible, and as often as the relevant occasion happens.'; *Interpretation Act 1984* (WA) s 63, which states: 'Where no time is fixed or allowed within which an act or thing shall be done, such act or thing shall be done with all convenient speed and as often as occasion arises'. It should be noted that at the time of Pearce and Geddes' 7th edition, the authors noted that the Interpretation of Acts legislation in South Australia had a similar approach to that taken in Queensland and Western Australia. Subsequently, South Australia has repealed its former legislation. Section 44(3) of the *Legislation Interpretation Act 2021* (SA) now states: 'If no period of time is provided or allowed for doing a thing that is required to be done, the thing must be done as soon as is reasonably practicable'.

manner in which the power can be exercised under s 40(a) of the *IL Act*, and the ordinary rule which exists under the common law, I am satisfied that the 'occasion requires' in exercising the power of appointment under s 104 of the *OC Act* must be considered under the lens of what would be a reasonable period of time, depending on the particular facts of the case.

73 Further, in considering the operation of ss 103 and 104 of the *OC Act*, I am satisfied that the power to appoint a committee member under s 104 of the *OC Act* may be exercised in circumstances where, contrary to s 103, an owners corporation committee has less than three members. Accordingly, the exercise of the power under s 104 of the *OC Act*, for the purposes of complying with the obligations under the *OC Act*, would not be one where the doctrine of *functus officio* would apply. Indeed, s 35(a) of the *IL Act* requires a statutory construction which promotes the purpose or object underlying the *OC Act* (whether or not expressly stated).

74 I now turn to the relevant costs provisions under the *VCAT Act*.

Sections 74(2)(b) and 109(3) of the *VCAT Act*

75 Section 74 of the *VCAT* Act relevantly states:

> **Withdrawal of proceedings**
>
> (1) If the Tribunal gives leave, an applicant may withdraw an application or referral before it is determined by the Tribunal.
>
> (2) If an applicant withdraws an application or referral—
>
> …
>
> (b) the Tribunal may make an order that the applicant pay all, or any part of, the costs of the other parties to the proceeding; …

76 Section 74(2)(b) relevantly gives the Tribunal the power to exercise discretion to award costs where it has given an applicant leave to withdraw an application, which in effect, as the title of the s 74 indicates, would amount to a withdrawal of the relevant proceedings. Indeed, there can be no proceeding in the absence of any application or claim. The section itself does not provide any express limitations or guidance as to how that discretion may be exercised.[86] However, the authorities state that the discretion must be exercised in compliance of s 97 of the *VCAT Act*. That is, the Tribunal must exercise its discretionary power 'fairly and according to the substantial merits of the case in all proceedings'.[87]

77 In *De Jonk v Aumeca Owners Corporation Pty Ltd* ('*De Jonk*'),[88] the respondent sought costs under s 74(2)(b) where the Tribunal granted the applicants leave to withdraw their proceeding. The Tribunal ordered costs in favour of the respondent, considering that it was fair to do so.[89] In reaching

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[86] Cf *VCAT Act* s 75.
[87] *VCAT Act* s 97.
[88] (Owners Corporations) [2020] VCAT 1439.
[89] Paragraph 2 of the Order made on 17 December 2020.

his decision, Member Sweeney considered the various authorities in respect of a costs order under s 74(2)(b) and held that the exercise of the Tribunal's discretion under s 74(2)(b) was governed by s 97 of the *VCAT Act*.[90]

78 In addition to s 74(2)(b), where the Tribunal has ordered that the application or proceeding has been withdrawn, a respondent may be able to seek costs under s 109(2) of the *VCAT Act*, provided that the requirements under s 109(3) are met.

79 Section 109 states (with my emphasis in underline):

> **Power to award costs**
>
> (1) Subject to this Division, each party is to bear their own costs in the proceeding.
>
> (2) 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) The Tribunal may make an order under subsection (2) <u>only</u> if satisfied that <u>it is fair to do so</u>, having regard to—
>
> (a) whether a party has conducted the proceeding in a way that unnecessarily disadvantaged another party to the proceeding by conduct such as—
>
> (i) failing to comply with an order or direction of the Tribunal without reasonable excuse;
>
> (ii) failing to comply with this Act, the regulations, the rules or an enabling enactment;
>
> (iii) asking for an adjournment as a result of (i) or (ii);
>
> (iv) causing an adjournment;
>
> (v) attempting to deceive another party or the Tribunal;
>
> (vi) vexatiously conducting the proceeding;
>
> (b) whether a party has been responsible for prolonging unreasonably the time taken to complete the proceeding;
>
> (c) 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;
>
> (d) the nature and complexity of the proceeding;
>
> (e) any other matter the Tribunal considers relevant.

80 As words of s 109 of the *VCAT Act* indicate, the power to award costs under s 109(2) is discretionary and in order for the Tribunal to exercise its discretion, the Tribunal must find that in the circumstances, 'it is fair to do so'. The matters stated in s 109(3) are those that the Tribunal has regard to in

[90] *De Jonk v Aumeca Owners Corporation Pty Ltd* (Owners Corporations) [2020] VCAT 1439, [2], [5].

determining whether it is fair to award costs. The matters that the Tribunal can take into account are very broad and, in essence, only limited by whether or not the matters are relevant. This is because one has to only consider s 109(3)(e) to appreciate that by that subsection, the Tribunal 'may make an order under subsection (2) only if satisfied that it is fair to do so, having regard to— (e) any other matter the Tribunal considers relevant'. Such breadth in what the Tribunal can consider may include any offers that a party has made in the proceeding.

81 Accordingly, despite the fact that s 109(3) provides further guidance than s 74(2)(b) as to the matters that the Tribunal may consider in respect of the issue of costs, at their core, both sections require that the Tribunal's discretion to award costs *may* be exercised *only* if it is fair to do so in considering any *relevant* matter pertaining to the circumstances of the case. Considered in this light, the matters that a party may rely on in seeking costs under s 74(2)(b) may be the same matters that the party relies on under s 109(2) of the *VCAT Act*. As the authorities demonstrate, the fact that s 74(2)(b) is governed by s 97 of the *VCAT Act* sits harmoniously with the fairness requirement under s 109(3) of the *VCAT Act*.

82 In *De Jonk*, Member Sweeney highlighted the interaction between ss 74(2)(b) and 109(3), stating (with footnotes omitted):

> [3] There is an interrelationship between a costs application made under s74(2)(b), an empowering provision for the Tribunal to award costs triggered by a party withdrawing, and under s109(3), the general head for seeking to rebut the presumption against an order for costs, setting out factors to be considered. That is, the considerations that may be relevant to exercising the discretion to award costs under s74(2)(b) include the matters listed in s109(3).
>
> …
>
> [8] In respect of the operation of s74(2)(b) of the VCAT Act [Deputy President McKenzie in *Asgari v SBS Radio* [2001] VCAT 1755] said:
>
> > Section 74(2)(b) is a separate power to order costs on the withdrawal of a proceeding. There is no rule here that costs lie where they fall, unless the Tribunal considers it fair to order otherwise. Here the Tribunal has an unfettered and broad discretion as to costs … . However, the fact that there is a broad and unfettered discretion under s 74(2)(b) of the VCAT Act also means that there can be no automatic rule that costs will always be awarded against the withdrawing party. The decision as to costs must be based on the particular circumstances of each case. … These factors include whether a complaint has been instituted vexatiously, that is, predominantly to embarrass the Respondent, or place an unreasonable burden on a Respondent, or … whether the applicant has conducted the proceeding unreasonably; whether the applicant has made or persisted in a claim in which he or she had no genuine belief, or in circumstances where, although he or she may have genuinely believe the complaint to be well founded,

> the claim had no foundation and no reasonable person would have believed that it had. … .
>
> [9] … The discretionary power to award costs under s74(2)(b) of the VCAT Act is governed by the overarching obligation on the Tribunal to act fairly and according to the substantial merits of the case, imposed by s97 of the VCAT Act. Section 74(2)(b) does not establish a 'policy' in favour of granting an order for costs [citing *Transport Accident Commission v Busuttil* [2001] VSC 325]. Again, the decision to award costs must depend upon all the circumstances of the case.

83 Likewise, when considering a costs application under s 74(2)(b) and s 109(3) of the *VCAT Act*, Senior Member Kirton (as her Honour then was) in *Yanik* stated (at [11]):

> As I said in *Culvenor v Casey*, it is well established that the following principles should be considered in an application under both s 74(2)(b) and s 109:
>
> a. Section 74(2)(b) confers a power to award costs upon withdrawal that is separate from the Tribunal's general costs power under s109.
>
> b. When awarding costs under s 74(2)(b) there is no rule (as there is under s 109) that costs lie where they fall unless the Tribunal considers it fair to order otherwise.
>
> c. The discretionary power to award costs under s 74(2)(b) is governed by the overarching obligation on the Tribunal to act fairly and according to the substantial merits of the case, imposed by s 97.
>
> d. There is no automatic rule that costs will always be awarded against the withdrawing party. The decision as to costs must be based on the particular circumstances of each case.
>
> e. The circumstances set out in s 109(3) may be relevant to the exercise of discretion to award costs under s 74(2)(b).
>
> f. The general rule in s 109 is that each party is to bear their own costs unless the Tribunal considers it fair to order otherwise (s 109(1)).
>
> g. The Tribunal has a broad discretion to award costs after taking into account the factors in s 109(3).
>
> …
>
> Other relevant factors include subparagraph 109(3)(e), which allows the Tribunal to take into account any other matter that it considers relevant

84 One point of difference that the above authorities identify between s 74(2)(b) and s 109(3), and one which the parties have raised, is the fact that under s 74(2)(b), there is no presumption that each party bears their own costs, as it exists under s 109(1). In this regard, although the presumption must be rebutted in order for the Tribunal to award costs under s 109(2), the presence

or absence of the presumption appears to be a moot point in this case. This is because:

a. The underlying threshold to award costs under ss 74(2)(b) and 109(3) is that it must be fair to do so. Rather than relying on the presumption, the Tribunal is required to consider the particular circumstances of the case to determine whether it would be fair to order costs.

b. At its core, the presumption under s 109(1) exists to reflect the reality that, unless contrary intentions appear elsewhere in the *VCAT Act*, costs do not follow the event and are not in the cause in the Tribunal.

85 One situation where a presumption can have a significant impact on the Tribunal's decision to award costs is under s 112 of the *VCAT Act*. Section 112 gives rise to a positive presumption for an order for costs if a settlement offer which complies with ss 113 and 114 is rejected. The OC does not rely on s 112. In any event, I note that none of the offers that the OC relies on complied with all the requirements under s 114 of the *VCAT Act*.[91]

Section 111 of the *VCAT Act*

86 Once the Tribunal determines that it is fair to order costs, s 111 of the *VCAT Act* empowers the Tribunal to determine the quantum of costs to be awarded. Section 111 states:

> **Amount of costs**
>
> If the Tribunal makes an order for costs, the Tribunal—
>
> (a) may fix the amount of costs itself; or
>
> (b) may order that costs be assessed, settled, taxed or reviewed by the Costs Court.

87 In *Metricon Homes Pty Ltd v Sawyer* ('*Metricon*'),[92] Garde J made the following comments in respect of s 111 (at [13] with my emphasis in underline):

> This provision gives the Tribunal <u>two alternatives</u> when making an order for costs. It can fix the amount of costs itself; or it can order that the costs be assessed, settled, taxed or reviewed by the Costs Court. <u>It is only if the amount of costs is small or certain that the Tribunal will ordinarily determine the costs itself</u>. Where costs orders are made in other circumstances, the Tribunal's practice is to order that they be assessed by the Costs Court [under ss 17D and 17J of the *Supreme Court Act 1986* (Vic)].

88 Further, in respect of the Tribunal fixing costs under s 111, the authorities highlight the following:

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[91] For example, under s 114(2) of the *VCAT Act*, an offer must be open for acceptance for at least 14 days.
[92] [2013] VSC 518.

a. The Tribunal's power to determine the amount of costs or how the amount will be determined under ss 111(a) or (b) of the *VCAT Act* is discretionary.[93]

b. In fixing costs pursuant to s 111(a), the Tribunal can specify a period by which costs are to be paid.[94]

c. Fixing costs 'has certain dangers' and it should be adopted 'with some reluctance'.[95]

d. Costs may be fixed 'in order to minimise costs and provide certainty to the parties'.[96]

e. The costs sought should be 'in a format which is simple and convenient for the Tribunal and other parties to follow', and although it is not a requirement, 'it is good practice' to provide the Tribunal with a copy of the relevant bills.[97]

89 In addition, like s 74(2)(b), the operation of s 111 is governed by the Tribunal's obligation to act fairly under s 97 of the *VCAT Act*. In *Martin v Fasham Johnson Pty Ltd* ('*Martin*'),[98] Bell J at [27], held that the Tribunal's powers under ss 109(1)–(3), 111 and 78(2)(c) of the *VCAT Act* had to be exercised 'fairly, impartially and by reference to relevant considerations and not arbitrarily, capriciously or by reference to irrelevant considerations and not in a manner that frustrates the legislative intent'. Consistent with Bell J's decision, prior decisions of the Tribunal on whether to order costs to be taxed on a standard basis pursuant to s 111(b) of the *VCAT Act* have been determined based on fairness.[99]

Withdrawal, dismissal and strike out of proceedings

90 As it will be apparent from my reasons below, it is necessary that I provide the following distinctions between a withdrawal, dismissal and strike out of a proceeding in the context of a VCAT proceeding.

91 As the term conveys, a withdrawal of a proceeding is when an applicant withdraws the proceeding against the respondent. The applicant can do so under s 74 of the *VCAT Act*. If the proceeding in question is a 'small claim', then the proceeding can be withdrawn as of right.[100] If the proceeding is not a

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93 See, eg, *Metricon Homes Pty Ltd v Sawyer* [2013] VSC 518, [13].
94 See, eg, *Maroondah CC v Roundlink Pty Ltd* [2010] VCAT 1078, [35].
95 *Hobsons Bay CC v Haouli* [2001] VCAT 433, [30], cited in Emrys Nekvapil, *Pizer's Annotated VCAT Act* (Lawbook, 6th ed, 2017) [VCAT.111.60].
96 Emrys Nekvapil, *Pizer's Annotated VCAT Act*, (Lawbook, 6th ed, 2017) [VCAT.111.60], citing *Bayside CC v Hunter* [2005] VCAT 2092, [11]; *Seafirst Nominees Pty Ltd v Mansfield SC* [2005] VCAT 1236, [20]; *Greater Dandenong CC v Visser* [2011] VCAT 1812, [12].
97 Ibid, citing *East Gippsland SC v Whadcoat* [2007] VCAT 2312, [18].
98 [2007] VSC 54.
99 See *Caldwell v Cheung* (Domestic Building) [2008] VCAT 1794 and *Jordan v Vuletic* (Domestic Building) [2007] VCAT 1068 where the Tribunal, on both instances, ordered costs to be assessed pursuant to s 111(b) of the *VCAT Act* based on fairness.
100 See *VCAT Act* s 74(1), sch 1 cl 4E .

'small claim', leave to withdraw must be obtained, and the Tribunal may make an order that the applicant pay costs incurred by the other parties.[101]

92 Although there is no determination on the merits of the applicant's claim when a proceeding is withdrawn, the applicant cannot make a further application in relation to the same facts and circumstances without obtaining leave of the Tribunal.[102] There may be further restrictions on the applicant's ability to bring a further application, such as if there are any applicable statute of limitation considerations or terms of settlement that may prevent any future litigation. Accordingly, withdrawing a proceeding is a significant act, which may, if no leave is permitted or no right to re-issue is available, bring about the complete finalisation of a claim.

93 A VCAT proceeding can also be struck out. However, the striking out of a proceeding removes it from the list of cases being dealt with by the Tribunal, and thus leaves open the possibility that the proceeding can be reinstated. The most common situation in which a proceeding is struck out, is where parties have settled the dispute but some of the obligations under the relevant settlement agreement are yet to be performed. The proceeding can also be struck out under s 75 of the *VCAT Act*, if the Tribunal is satisfied that the proceeding is frivolous, vexatious, misconceived, lacking in substance or is otherwise an abuse of process. Unless a party has the right to have the proceeding reinstated, a full (as opposed to a partial) strike out of a proceeding brings finality to the proceeding.

94 A dismissal of a VCAT proceeding brings about its conclusion (sometimes referred to as its 'death'). The Tribunal may dismiss a proceeding if, in considering the evidence and applying the applicable law, it determines that the proceeding should be dismissed. This type of dismissal is often referred to as a dismissal 'on the merits'. At times, the Tribunal is asked by parties to make orders by consent for the dismissal of a proceeding 'without an adjudication on the merits'. There is some debate and uncertainty as to whether the Tribunal, which does not have inherent jurisdiction and derives its powers from enabling enactments, has the power to order a dismissal by consent without any regard to the merits. The issue will not arise if, for example, parties who reach settlement and need to dispose of a proceeding, seek for the proceeding to be struck out.

95 There is also one exception where the *VCAT Act* empowers the Tribunal to dismiss a proceeding without hearing the whole case. For example, in addition to s 75 which gives the Tribunal the power to dismiss a proceeding, where an applicant fails to appear at a compulsory conference, s 87 of the *VCAT Act* provides that the Tribunal may, among other things, dismiss the applicant's claim.

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[101] Under *VCAT Act* sch 1 cl 4I(1), the Tribunal cannot order costs for 'small claims'. Clause 4I(1) states:
(1) The Tribunal cannot order costs in a proceeding relating to a small claim, except in a review of a determination under section 120 in respect of such a proceeding.

[102] *VCAT Act* s 74(2(d).

96 I now address what occurred at the directions hearing.

WHAT TRANSPIRED AT THE DIRECTIONS HEARING?

97 Given the disagreement between the parties as to what precisely occurred at the directions hearing of 7 October 2022, and given that I was not the presiding member, I have taken it upon myself to listen to the audio recording of that hearing to fully appreciate what occurred at the hearing.[103]

98 The following are my observations of what transpired at the directions hearing:

a. It was a short directions hearing, taking a little over 30 minutes.

b. Mr Lim appeared on behalf of the applicant. Counsel appeared on behalf of the OC. There was also a member of the OC committee who was present.

c. At the commencement of the hearing, the Senior Member noted that the parties had sought an adjournment by consent within 48 hours of the hearing and the Tribunal had refused the request.

d. After the OC's counsel provided the Senior Member with a short summary of the events which had led to the hearing, the Senior Member indicated to the parties that the Senior Member apologised on behalf of the Tribunal as the request for an adjournment by consent should have been referred to the Senior Member or one of the other heads of list prior to the hearing, and the adjournment should have been granted, and the matter should not have been required to proceed that day. The Senior Member told the parties that it was an administrative error made by the Tribunal and steps had been taken to ensure that it would not happen again.

e. In response, the OC's counsel indicated that the OC was in a difficult position given that it had incurred legal costs due to appearance being required. It was also submitted that leaving aside the error, the applicant had plenty of time to seek an adjournment and the OC sought a costs order as essentially, 'but for' the applicant's delay, the parties would have provided the Tribunal with consent orders earlier, obviating the need to appear.

f. In response, initially the Senior Member indicated that the member was willing to consider the costs application.

g. Mr Lim then submitted that he had only received the First Santilli Affidavit approximately two hours before the hearing and initially the applicant was going to appear without representation but due to the First Santilli Affidavit, he had been instructed to appear. He

[103] In discharging the Tribunal's obligation to 'act fairly and according to the substantial merits of the case' pursuant to s 97 of the *VCAT Act*, I note that s 98(1)(c) of the *VCAT Act* gives the Tribunal the power to 'inform itself on any matter as it sees fit'.

submitted that his client had also incurred further costs in engaging his services that day and the OC could have appeared on its own especially given that the adjournment was sought by consent. He also referred to the email that Mr Silver had sent on 15 September 2022 requesting documentation as to the proxy for the appointment of a committee member, which was 'what this case was about', but the OC had only responded on 29 September 2022.

h. Mr Lim then indicated that he was in a position to oppose the costs application but if his client's opposition was refused then he also had instructions to request for the matter to proceed as a directions hearing, so that there were no costs thrown away.

i. In hearing the OC's submissions in reply, the Senior Member indicated to Mr Lim that the applicant needed to take a position in that the applicant either needed to seek an adjournment of the directions hearing and oppose the costs application or withdraw the adjournment request and seek directions.

j. In response, Mr Lim told the Senior Member that, 'in this instance, I will have the matter proceed as a directions hearing'. The Senior Member then confirmed with Mr Lim that the applicant was withdrawing his application for an adjournment, to which Mr Lim confirmed that that was the case.

k. In light of Mr Lim's indication, the OC's counsel suggested to the Tribunal that the matter press ahead as a directions hearing and then for the parties to be heard on costs at the end of the proceeding, and that the OC would still press for costs.

l. The Senior Member indicated to the parties the limited time available that day and told them that costs would be reserved.

m. The parties and the Senior Member then proceeded to discuss what interlocutory orders and timeframe would be required, which included a discussion about discovery of documents. The culmination of those discussions was the order that the Tribunal made that day.

n. During the discussions, the OC's counsel submitted that the applicant's claim was 'misconceived', 'bound to fail', and the matter which the applicant had complained about had been 'cured'. He indicated the OC's intention to bring a summary dismissal application. In response, the Senior Member indicated that it would be appropriate to see the applicant's points of claim in respect of the nature of the claim and what the OC would seek in response, with liberty to apply.

99 I now address the underlying issues that I must resolve.

SHOULD THE OC BE AWARDED COSTS?

100 I am satisfied that pursuant to ss 74(2)(b) and 109(2) of the *VCAT Act*, it is fair that I order the applicant to pay the OC's costs of the proceeding, including the costs of the directions hearing and the costs hearing.

101 However, although consideration of the relevant circumstances taken together draws me to conclude that it is fair to award costs, this is not a case where countervailing factors do not exist (I have set out them out further below).

Factors in favour of awarding costs

102 First, I accept the OC's submission that at the time of issuing the proceeding, the applicant's claim had no tenable basis in law as he had not afforded the OC a reasonable time to remedy the issue that the OC committee only had two members.

103 For the reasons that I have mentioned, I accept the OC's submission that s 104 of the *OC Act* gave the OC a reasonable time to appoint Mr Boothroyd. Mr Boothroyd was appointed to the committee on 23 August 2022, which was 18 days after the four committee members resigned. I accept the OC's submission that given the steps that were required to be undertaken and were taken (as evidenced in the First Santilli Affidavit), the fact that Mr Boothroyd's appointment took approximately two and a half weeks from time of the resignations was a reasonable time for the purposes of exercising the power under s 104 of the *OC Act*. Indeed, other than an assertion by the applicant that the OC's conduct was unreasonable, there is no evidence for me to find that the OC had not acted within a reasonable period of time.

104 In this regard, whether or not at the time of lodging the Application the applicant believed he had a meritorious claim is irrelevant. His claim either had or did not have a tenable basis. However, I reject the OC's submission that the applicant's claim had no basis in fact. The parties do not dispute the fact that at the time of commencing the proceeding, the committee did not have the minimum number of members as required under s 103 of the *OC Act* and there was no Chairperson appointed.

105 Secondly, and related to the first point, I am satisfied that it was unreasonable for the applicant to have lodged the Application on 16 August 2022. In addition to the fact that there was no tenable basis in law to allege that the OC had acted unlawfully, the Application was, at the least, issued prematurely.

106 At no stage did the applicant contend nor was there any evidence provided that the applicant had raised any concerns with the OC, the OC Manager or a committee member about the matters raised in the Application prior to issuing the proceeding.

107 The applicant alleges that he issued the Application on 16 August 2022 when he was informed that there had been a committee meeting that day. There is

no indication that the applicant sought to clarify with the OC, the OC Manager or a committee member what had transpired and what, if any, decisions had been made by the committee that day.

108 Rather than embarking on a reasonable enquiry, the applicant considered the first appropriate action in light of what he had ascertained was to commence litigation. In my view, this was not a reasonable course of action to take. It led to the OC engaging lawyers and incurring costs. In addition, the applicant was informed at an early stage by the OC that it would engage lawyers and by the time of the 29 September 2022 letter, it would have been clear to the applicant that lawyers were engaged.

109 Thirdly, given the absence of any evidence to the contrary, I am satisfied that on 30 August 2022, the OC Manager sent an email to the lot owners (not to Mr Silver) informing them of Mr Boothroyd's appointment to the committee and Ms Wadelton as the Chairperson. The applicant did not give any evidence that he had not received the email. Given the substance of the applicant's complaint in the Application, the applicant ought to have known that according to the OC Manager, there were now three members of the committee with a new Chairperson. Yet, there was no evidence before me that the applicant or his lawyer at the time contacted the OC Manager or a committee member questioning or raising any concerns over Mr Boothroyd's or Ms Wadelton's appointment.

110 Fourthly and despite the applicant's submission, I am not satisfied that the appointment of Mr Boothroyd on 23 August 2022 was a reactionary step taken by the OC in response to the Application. Other than the coincidence of the timing, the applicant did not produce any evidence in support of the contention. There was no evidence that the Application was provided to the OC prior to Mr Boothroyd's appointment. In the absence of evidence, I am unable to draw the conclusion that the OC was aware of the proceeding at the time of Mr Boothroyd's appointment.

111 Fifthly, and despite the substance of the 9 September 2022 letter being less than clear at certain points (which I have elaborated on below as a countervailing consideration to awarding costs), I am satisfied that the letter was sufficiently clear in informing the applicant that the underlying issue that he had complained about, being his concern that the committee did not have the minimum three members and the absence of a Chairperson, had been remedied on 23 August 2022. Therefore, to adopt the language of the OC, the applicant's primary concern had been 'cured'.

112 Sixthly, by email from Mr Lim to the OC Manager on 3 October 2022, Mr Lim stated that he was in receipt of the 9 September 2022 letter. Given this, I am satisfied that by this time the applicant was aware of the contents of the 9 September 2022 letter. The reasons provided in the letter as why the Application did not have merit were neither overly complicated nor difficult to understand. Further, the fact that the applicant claims that he did not receive a copy of the 29 September 2022 letter until shortly before the

directions hearing does not assist him. That letter did not set out the reasons as to why the respondent considered the Application was without merit.

113 Seventhly, by email from Mr Silver on 15 September 2022, the applicant sought information concerning Mr Boothroyd's appointment. In seeking the information, I am satisfied that, at the least, Mr Silver must have reviewed the 9 September 2022 letter, and whether or not Mr Silver had assisted the applicant from the start of the proceeding, he was certainly doing so by this time. Mr Silver did not: seek an extension of time to consider the OC's offer; seek an adjournment of the directions hearing; request any clarification of the offer; or subsequently challenge the validity of Mr Boothroyd's appointment. As Mr Lim deposed, on 3 October 2022, he was informed that the applicant had terminated Mr Silver's services.[104]

114 Eighthly, by email from Ms Santilli to Mr Lim on 5 October 2022, the applicant was given an opportunity to have the proceeding withdrawn with no order as to costs. Unlike the problems which existed with the offers contained in the 9 and 29 September 2022 letters (which I have mentioned below), this offer was clear, although it was made two days before the directions hearing. Notwithstanding this, I am satisfied that by this time, the OC had clearly articulated to the applicant the reasons why the OC considered that the Application would fail.

115 Ninthly, I reject the applicant's submission that it was unnecessary for the OC to brief counsel. I note that the reason Mr Lim gave as to why he appeared at the directions hearing instead of counsel was because he did not have time to brief counsel.[105] I also note that both parties were represented by counsel at the costs hearing. As noted in *Kahraman Transport Pty Ltd v Elite Truck Bodies Pty Ltd* ('*Kahraman*') at [25]:[106] 'it is not uncommon for a respondent to a VCAT proceeding to engage legal advisors upon becoming aware that a dispute has arisen'. I also reject the applicant's submission that the applicant was basically a self-represented litigant at the start of the proceeding. The applicant has also failed to demonstrate any imbalance of power between the parties in the proceeding.

116 Before I provide my next reason, I wish to emphasise that I am not critical of Mr Lim seeking a late adjournment of the directions hearing, given when he began acting for the applicant, and the circumstances that he faced. In fact, once he was engaged, he acted promptly to seek an adjournment. However, in considering what transpired at the directions hearing, I am satisfied that it is fair that the applicant be liable for the OC's costs of that day.

117 Whilst it was certainly unfortunate that the Tribunal refused to grant the adjournment prior to the directions hearing, regardless of whether or not this was an error by the Tribunal, the issues raised by the applicant were superseded by the fact that at the directions hearing, the applicant elected to

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[104] Lim Affidavit, [8].
[105] Lim Affidavit, [19].
[106] (Civil Claims) (Costs) [2023] VCAT 946.

withdraw his adjournment request and pressed ahead with the directions hearing. By doing so, the applicant left himself open to a potential adverse costs order as the Tribunal and the parties then proceeded to discuss what interlocutory orders were appropriate, including an allowance for discovery. Despite the applicant's submissions that the adjournment had been sought to give him more time to provide the necessary instructions and to obtain the requisite advice, this aim was effectively abandoned by the applicant.

118 Further, I reject the applicant's submission that *nothing* substantive occurred in the proceeding. The fact that the applicant filed the Application and the parties appeared at the directions hearing indicates otherwise. However, the substantive nature of the work performed in the proceeding, and where the proceeding was at when it was withdrawn, are relevant considerations when it comes to the quantum issue, which I have dealt with below.

119 Finally, I reject the applicant's submission that there is an 'access to justice' issue which favours him in this matter. First, the applicant engaged a lawyer throughout the proceeding. Secondly, it is clear from the authorities that the time for an applicant to properly consider whether the applicant's claim has any merit in fact or in law is before commencing the proceeding. In *Caspersz v Garry & Warren Smith Proprietary Limited*,[107] Deputy President Lulham at [31] stated (with my emphasis in underline):

> In *Country Endeavours Pty Ltd v Baw SC (No 8)* [[2011] VCAT 2403 at paragraphs 11 and 12] the Tribunal observed that part of the purpose for the basic rule, in section 109(1) that parties are ordinarily to bear their own costs, is that parties should not be discouraged from bringing proceedings for fear of costs orders being made against them "at any rate where they have behaved reasonably and responsibly", but that this does not mean that parties or potential parties are free to abuse the process of the Tribunal or to act unreasonably or vexatiously in bringing or maintaining proceedings.

120 My third response to the 'access to justice' point is that the Tribunal is not a court of pleadings. There is no default requirement that in every case a points of claim must be filed. There is however a requirement that every proceeding must commence with an application. This is because, in the standard course, it is in the application where the applicant sets out the applicant's claim. I therefore reject the applicant's submission that the applicant could have waited until the points of claim to have properly articulated his claim.

Countervailing factors

121 Despite the above matters which are favourable to the OC, I acknowledge that there are countervailing factors.

122 First, I reject the OC's submission that the applicant has conducted the proceeding in a vexatious manner. It has been held that the reference to vexatious conduct under s 109(3)(a)(vi) of the *VCAT Act* is concerned with

[107] (Civil Claims) (Costs) [2023] VCAT 987.

the manner in which the proceeding was conducted,[108] although it has also been held that pursuing a 'hopeless' claim could be separately regarded as vexatiously conducting a proceeding.[109]

123 In the recent case of *Kahraman*, Member Bignell stated in respect of s 109(3)(a)(vi) of the *VCAT Act* that (at [16]):

> The relevant test for this criterion requires an element of ulterior purpose [citing *Country Endeavours Pty Ltd v Cascir Pty Ltd* [2013] VSC 22 at [49]] or conduct that is "seriously and unfairly burdensome, prejudicial or damaging" [citing *24 Hour Fitness Pty Ltd v W&B Investment Group Pty Ltd* [2015] VSCA 216 at [4]].

124 In *Yanik*, Senior Member Kirton (as her Honour then was), in referring to various authorities, highlighted that the test for vexatiousness included proceedings:[110]

a. instituted with the intention of annoying or embarrassing the person against who they are brought;

b. brought for collateral purposes, and not for the purpose of having the decision-maker adjudicate on the issues to which they give rise; or

c. irrespective of the motive of the litigant, which are so obviously untenable or manifestly groundless as to be utterly hopeless. In essence, it is this category that the OC relies on.

125 In my view, the applicant's conduct in the proceeding does not fall within any of the above circumstances that the authorities have indicated. Whilst I have found that the applicant's claim had no tenable basis in law, this is because I have found that the respondent acted within a reasonable time under s 104 of the *OC Act* in the circumstances. On one argument, such a decision is open to interpretation. Further, both parties do not dispute that the resignation of the four committee members gave rise to an issue that the OC had to remedy, and at the time that the Application was filed, the OC did not have the minimum number of committee members as required under s 103 of the *OC Act*, which was the applicant's underlying complaint. That is not to say that the Application was not premature, misguided, vague or untenable in law, all of which I accept the Application suffers from. However, I am not satisfied those factors establish that the applicant conducted the proceeding vexatiously.

126 I also reject the OC's submission that the applicant was responsible for prolonging the time taken to complete the proceeding. It appears that the first time when Mr Lim informed the OC's solicitors that the applicant would

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[108] See, for example, *Straw v Proctor* [2004] VCAT 464, [16]; *Clifford Hallam Healthcare Pty Ltd v Price* [2010] VCAT 1117, [35].
[109] *Clifford Hallam Healthcare Pty Ltd v Price* [2010] VCAT 1117, [35].
[110] *Yanik* [15].

make an application for withdrawal was on 26 October 2022.[111] The Application was filed on 16 August 2022. The first date for compliance under the order of 7 October 2022 was 18 November 2022 (being the points of claim).

127 I also reject the OC's submission that the Application was so lacking in particulars and substance that this disadvantaged the OC or otherwise is a factor favourable to the OC. The clearest example of the OC's submission lacking merit is the substance of the 9 September 2022 letter, which was sent by the committee (not its lawyers). Despite the OC's assertion in the letter that it was difficult to understand what the applicant was seeking, a large part of the letter provided detailed reasons as to why the OC was not in contravention of the *OC Act* in respect of the resignation of the four committee members and the appointment of Mr Boothroyd.

128 Although the Application lacked detailed or clear particulars, there is no doubt from the 9 September 2022 letter that the Application contained enough information for the OC to understand the applicant's underlying complaint. Indeed, although alleging that the applicant had failed to expressly identify the precise statutory provisions that the applicant was relying on, in the 9 September 2022 letter, the respondent identified the precise sections of the *OC Act* which governed the very issue complained of. Further, when Mr Silver sent his email on 15 September 2022, he did not allege that the OC's understanding of the applicant's case was misconceived or incorrect. Neither did Mr Lim. I am also fortified in my view given that the OC was able to articulate the 'nub' of the applicant's claim at the costs hearing despite the applicant having never filed a points of claim and all that the OC could rely on to understand the applicant's claim was the Application. The lack of precision in the Application must also be considered in light of the fact that the Tribunal is not a court of pleadings.[112]

129 Related to this issue is that I am not satisfied that the proceeding was a proceeding which raised overly complex issues. Even based on the imprecise, brief and general language of the Application, the dispute concerned discrete factual and legal issues, as reflected in the 9 September 2022 letter. Further, in accepting the OC's submission that it was not even aware of the Application at the time of Mr Boothroyd's appointment, and the appointment was not a reactionary measure, it follows that the OC, itself, knew what was required to remedy the issue it faced. As it was stated by Ms Santilli in her email to Mr Lim on 9 November 2022, the OC 'knew what steps it was required to undertake in accordance with the [*OC Act*] to ensure

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[111] Second Santilli Affidavit, [12]; Lim Affidavit, [24].

[112] Of course, this must be balanced with the need for respondents to be afforded procedural fairness and the Tribunal's obligations under ss 97 and 98 of the *VCAT Act*. Further, the Supreme Court of Victoria has highlighted the need for the Tribunal to determine the issues before it as disclosed in the 'pleadings' (noting that the Tribunal is not a court of pleadings). See *Teen Entertainment Enterprise Network Pty Ltd v A&H Natoli Pty Ltd* [2020] VSC 388 and *Peter Cunningham v Melbourne Roma Caravans and RVs Pty Ltd* [2022] VSC 25.

the committee … was fully functional'.[113] There is no evidence before me that it needed legal advice to come to realisation that it needed to appoint another member to the committee and a Chairperson.

130 There is also an issue with the manner in which the offer in the 9 September 2022 letter was put to the applicant. The substance of the offer invited confusion and ambiguity. This is because:

a. In the beginning of the letter, the applicant was encouraged to withdraw his application.[114]

b. The respondent then indicated that it was prepared to consent to orders for the proceeding to be dismissed with no order as to costs.[115] As I have explained, a withdraw and a dismissal of a proceeding are not the same. A proceeding cannot be both withdrawn and dismissed at the same time. I also note the debate as to whether VCAT proceedings can be dismissed by consent.

c. The letter then reverted back to allege that the Application should be withdrawn.[116]

d. The letter then concluded by putting the offer as the respondent inviting the applicant to withdraw his claim and then for the parties to consent to orders for the proceeding to be dismissed with no order as to costs.[117] This was an untenable proposition.

131 In the First Santilli Affidavit, Ms Santilli deposes that through the 9 September 2022 letter, the applicant was 'invited … to withdraw' the Application by 16 September 2022.[118] Whilst that is true in part, it is also true that the offer put to the applicant of a withdrawal and a dismissal was incapable of being fully implemented.

132 The problems with the offer contained in the 9 September 2022 letter also tainted the offer contained in the 29 September 2022 letter.

133 The 29 September 2022 letter was a relatively simple document. It relied upon the substance of the 9 September 2022 letter to argue that there was no merit to the applicant's claim.

134 In the First Santilli Affidavit, Ms Santilli deposes that through the 29 September 2022 letter, the respondent provided the applicant with (quoting the letter), '*one final opportunity to dismiss the proceeding with no order as to costs* on or before 3 October 2022' (emphasis added).[119] That is not the only solution that the letter suggested to the applicant.

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[113] Exhibit 'AGS-12' to the Second Santilli Affidavit.
[114] 9 September 2022 letter, [2].
[115] Ibid, [3].
[116] Ibid, [19], [21].
[117] Ibid, [26].
[118] First Santilli Affidavit, [6].
[119] First Santilli Affidavit, [8].

135 Rather, the 29 September 2022 letter stipulated to the applicant that (in the order that it was proposed):

a. He should take steps to withdraw the Application.

b. But then stated that he had one final opportunity to have the proceeding dismissed with no order as to costs.

c. If the applicant failed to withdraw the Application, the OC would make an application to strike out the proceeding.

136 By the 29 September 2022 letter, the applicant was asked to agree to three different scenarios to conclude the proceeding, all at the same time. Regardless of whether or not the 9 and 29 September 2022 letters can be considered as *Calderbank* letters, which I do not regard them as such given the requirements as expounded in *Hazeldene's* that I have provided above which require offers to be clear (and be capable of performance), it is clear that the offers presented, if they were to be fully implemented, were impossible to fulfil.

137 However, in pointing out the flaws in the offers contained in the 9 and 29 September 2022 letters, one clear message that was conveyed to the applicant in both letters was that, whichever method of concluding the proceeding the parties were able to ultimately agree on, the applicant had the opportunity to have the proceeding concluded without any adverse cost consequences. Further, as I have mentioned, the offer contained in Ms Santilli's email of 5 October 2022 did not suffer from the same inconsistencies, as it clearly gave the applicant the opportunity to seek a withdrawal without costs, otherwise the applicant would issue a strike out application.

138 Considering all the relevant circumstances to this case, I am satisfied that, on balance, the factors in favour of a costs order outweigh the countervailing factors, and I am satisfied that it is fair that the applicant pay the OC's costs of the proceeding.

139 The next issue I must determine is on quantum.

SHOULD THE OC BE AWARDED FIXED COSTS OR SHOULD COSTS BE REFERRED TO THE COSTS COURT (IN DEFAULT OF AGREEMENT)?

140 As at the swearing of the First Santilli Affidavit (7 October 2022), the OC claimed that it incurred $1,325.00 in counsel's fees and $1,875.00 in solicitors' fees.[120] These amounts included the drawing of the First Santilli Affidavit and for appearance on 7 October 2022. The total of the two amounts comes to $3,200.00 but in the First Santilli Affidavit, the OC sought the sum of $2,400.00, being a 75% discount of the actual costs estimated to have been incurred.[121] At that stage of the proceeding, the OC had sent the applicant the 9 and the 29 September 2022 letters.

[120] First Santilli Affidavit, [17].
[121] Ibid [18].

141 In the Second Santilli Affidavit sworn on 28 April 2023 (which exhibited a copy of the First Santilli Affidavit), Ms Santilli deposed that the total actual costs incurred by the OC as at the time of her swearing the affidavit was $13,105.07 exclusive of GST, which was comprised of:[122]

a. Counsel's fees of $2,007.57 excluding GST for the period between 29 September 2022 and 7 October 2022, which included counsel's appearing at the directions hearing on 7 October 2022.

b. Solicitors' fees of $11,097.50 excluding GST for the period between 28 September 2022 and 6 March 2023 in respect of communicating with the applicant's solicitor, counsel and the OC regarding the directions hearing, the applicant's withdrawal of his application, settlement offers and the costs application.

142 In addition to the actual amount of costs incurred by the OC at that time, in the Second Santilli Affidavit, Ms Santilli deposed that the OC would incur the sum of $9,818.18 excluding GST on account of the costs hearing to take place, comprised of:[123]

a. Expected counsel's fees of $4,818.18 (excluding GST) to advise on costs, settling the Second Santilli Affidavit, liaising with instructors, preparing for and appearing at the costs hearing.

b. Expected solicitors' fees of $5,000.00 (excluding GST) to communicate with the applicant's solicitors, counsel and the OC regarding the costs hearing, preparing the Second Santilli Affidavit, and preparing for the costs hearing.

143 Accordingly, Ms Santilli deposed that the OC's total costs at the end of the costs hearing was likely to be $22,923.25 exclusive of GST, comprised of:[124]

a. Actual costs of $13,105.07 excluding GST.

b. Anticipated costs of $9,818.18 excluding GST.

144 Ms Santilli deposed that the OC sought an order for the applicant to pay the OC's costs fixed in the sum of $17,192.44 (which is an amount taken from the total GST exclusive amount), which represented 75% of the actual and estimated costs to be incurred, to be payable within 30 days.[125]

145 On or about 31 July 2023, the OC filed the Third Santilli Affidavit. The Third Santilli Affidavit provided an update on the legal costs that the OC had incurred since Ms Santilli deposed to the Second Santilli Affidavit. Ms Santilli deposed in the Third Santilli Affidavit that:

a. The actual costs incurred by the OC at the time of her swearing the Third Santilli Affidavit was $25,774.01 excluding GST.[126]

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[122] Second Santilli Affidavit, [29].
[123] Second Santilli Affidavit, [31].
[124] Ibid [32].
[125] Ibid [33].
[126] Third Santilli Affidavit, [8].

b. In addition to the tax invoices disclosed in the First and Second Santilli Affidavits, the OC's counsel had undertaken work for the period between 7 September 2022 and 29 September 2022 in the sum of $3,445.00 inclusive of GST,[127] and further work in the sum of $4,990.83 inclusive of GST.[128]

c. The OC's solicitors had undertaken further work for the period between 11 April 2023 and 3 May 2023 in the sum of $5,000.00 excluding GST.[129]

d. Taking into consideration all the tax invoices up to that point:[130]

   i. Counsel's fees for the period 13 October 2022 and 30 April 2023 came to $9,676.51 excluding GST.

   ii. Solicitors' fees for the period 28 September 2022 and 3 May 2023 came to $16,097.50 excluding GST.

e. In additional to the updated actual costs incurred, the OC would incur further costs 'on account of the costs hearing', estimated to be $6,854.55 exclusive of GST, comprised of:[131]

   i. Estimated counsel's fees of $3,854.55 excluding GST for settling the Third Santilli Affidavit, liaising with instructors, finalising submissions including reviewing the Lim Affidavit, and preparing for and appearing at the cost hearing.

   ii. Estimated solicitors' fees of $3,000.00 excluding GST for communicating with the applicant's solicitor, counsel and the OC regarding the costs hearing, preparing the Third Santilli Affidavit and preparing for the costs hearing.

f. Therefore, the total costs at the end of the cost hearing were likely to be $32,628.56 (exclusive of GST), comprised of:[132]

   i. Actual costs of $25,774.01.

   ii. Anticipated cost of $6,854.55.

g. The OC sought an order for costs in the sum of $24,471.42, which represented 75% of the actual and estimated costs to be incurred (excluding GST), to be payable within 30 days.[133]

146 Given the above, from the time the Second Santilli Affidavit (28 April 2023) stated the total costs at the end of the costs hearing would be $22,923.25

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[127] Exhibit 'AGS-1' to the Third Santilli Affidavit.
[128] The Third Santilli Affidavit did not exhibit a copy of the referable tax invoice from counsel but the GST exclusive amount was included in the respondent's solicitors tax invoice dated 29 May 2023.
[129] Exhibit 'AGS-1' to the Third Santilli Affidavit.
[130] Third Santilli Affidavit, [9].
[131] Ibid [10].
[132] Ibid [11].
[133] Ibid [12].

exclusive of GST, to the time the Third Santilli Affidavit (31 July 2023) revised the total amount to be $32,628.56 exclusive of GST, there was an increase to the costs estimated of $9,705.31.

147 Further, based on the Third Santilli Affidavit:

a. From the time that the applicant issued the proceeding on 16 August 2022 up to the OC's solicitors' tax invoice dated 28 November 2022 (noting that the proceeding was withdrawn on 14 November 2022), the OC's total costs in the proceeding was $14,701.89 (excluding GST).[134] In her email to Mr Lim on 28 October 2022, Ms Santilli stated that 75% of the OC's costs at the time was $8,103.29.

b. From the period around 28 November 2022 until and including the costs hearing on 3 August 2023, the OC incurred the remaining $17,926.67 (excluding GST) out of the total of $32,628.56 (excluding GST).

148 Despite the fact that on one hand, the OC has provided some certainty as to the precise amount it seeks and has provided copies of tax invoices, and there would be added work and expense if the Costs Court is required to deal with the issue of quantum, I am not satisfied that it would be fair to fix the OC's costs of the proceeding as the OC seeks. This is due to a multitude of reasons.

149 First, it is clear that the bulk of the amount of costs incurred by the OC in this proceeding has been incurred in its pursuit of costs.

150 Granted that whilst I accept that the OC needed to prepare costs submissions and affidavit material to properly inform the Tribunal as to its costs to date, it is still somewhat jarring to me that the majority of the costs the OC incurred was in respect of the issue of costs and not addressing the merits (or lack thereof) of the applicant's claim.

151 Secondly, whilst I accept the OC's submission that in matters before the Owners Corporations List, as opposed to, for example, the Civil Claims List, the Tribunal's usual practice for *certain* disputes is to grant costs, this is not always so. Every order for costs must be considered in its proper context.

152 In respect of owners corporation fee recovery proceedings, it is standard practice to order costs. However, the costs which are fixed in such proceedings are usually of much lower amounts than the amount the OC seeks, and usually do not go much above $1,000.00 for work which would include the relevant application for fee recovery and the production of a summary of proofs with documents in support. Indeed, even in proceedings in the List which are not fee recovery proceedings, it is neither common nor standard to award costs in the magnitude sought by the OC at the stage when the proceeding concluded. The fact that the OC has been able to identify a

[134] Ibid [8].

case or cases where the Tribunal ordered costs in the vicinity of what the OC seeks does not establish that it is a common occurrence, taking into account the vast number of cases determined every year by the Tribunal, most of them unreported.

153 Based on my experience as a member who has presided over cases under this List for close to seven years, I have never ordered costs to the amount that has been sought in this case at the stage of the proceeding in which it concluded, nor do I recall such amounts as common or standard practices.

154 Thirdly, whilst it is true that it was the applicant who put the OC in a position to defend the proceeding, that is but one factor which I must consider. In circumstances where none of the interlocutory steps ordered by the order of 7 October 2022 were carried out, I consider the amount incurred as above the higher end of what the Tribunal may contemplate a party to have reasonably incurred in an owners corporation dispute such as this.

155 Fourthly, the OC submits that given the 25% reduction to its total costs, the amount sought is fair and appropriate.[135] In deconstructing the contention, I take the OC's submission to be this:

a. The default scale of costs that the Tribunal applies is the County Court Scale of Costs.[136] The County Court Scale is set at 80% of the Supreme Court's Scale of Costs.[137]

b. By only seeking 75% of the total costs, in effect, the OC is seeking less than what it would be entitled to under the County Court Scale.

c. Further, given that 'standard costs' under the Supreme Court and County Court rules is defined as 'all costs reasonably incurred and of reasonable amount shall be allowed',[138] and in *Francis v Stonnington CC* ('*Francis*'),[139] the member commented (at [18]) that 'It is more common for costs to be awarded on a standard basis, which results in approximately 2/3 to 75% of the costs incurred being awarded', that in seeking 75% of its costs, the OC was seeking costs essentially on a standard basis.

d. Rather than seeking indemnity costs, the OC has provided a reduction of its costs.

156 I do not consider that the comments made in *Francis* have any great bearing on this case. I consider the 66.66% to 75% range as no more than a non-

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[135] OC's Submissions, [33].
[136] *Victorian Civil and Administration Tribunal Rules 2018* (Vic) r 1.07.
[137] *County Court Civil Procedure Rules 2018* (Vic) r 1.13, which states: "'County Court costs scale" means—
(a) a fee, charge or amount that is 80 per cent of the applicable rate set out in Appendix A to Chapter I of the Rules of the Supreme Court; or
(b) in the case of a circuit fee, the amount set out in Schedule 1.'
[138] See, eg, *Supreme Court (General Civil Procedure) Rules 2015* (Vic), r 63.30.
[139] (Costs) [2021] VCAT 1192.

binding guide or a 'rule of thumb' on what may be considered to be within a standard basis. I do not take the Tribunal's reference to the range as being anything more. Indeed, the member indicated that it was an approximate range. When the Costs Court determines the quantum of costs on a standard basis, the underlying threshold is of reasonableness – both in terms of the amount sought and the item of work. It requires consideration of matters such as the intellectual effort required and whether a type of work ought to fall within a lower scale amount or a higher scale amount, and, for example, whether based on hourly rate or folios. The range is no more than an observation made from experience that, what is reasonable in the circumstances generally ends up being about 66.66% to 75% of the actual costs. However, one cannot simply apply the range in the reverse by concluding that because the amount is 75% of the total costs, it must be reasonable or fair. For the purposes of s 111(a) of the *VCAT Act*, no matter the level of discount, the amount that is sought must be fair.

157 Fifthly, and related to my fourth point, where a party is permitted to be represented by a professional advocate, whilst that party is free to choose the advocate, proportionality of the response may play a part in assessing costs. For example, there is nothing in the *VCAT Act* which precludes a party from engaging a Senior or King's Counsel and a team of solicitors to represent a party in a claim before the Tribunal. However, it does not follow that it would be fair to order some or all of that party's costs if the Tribunal considers such an action as being disproportionate to what one may consider was a reasonable response in that instance.

158 In addition, even where legal representation is permitted, there are instances where the Tribunal does not have the power to order costs. For example, where a claimant has issued a 'small claim' in the Civil Claims List, being a claim which less than $15,000.00, the Tribunal does not have the power to award any costs (as opposed to application fees) other than in respect of s 120 of the *VCAT Act*.[140] In that instance, whilst the party would be free to choose the advocate that party wishes, it ought to come with the understanding that its costs will not be recoverable.

159 Sixthly, in this instance, whilst I have found there were issues with the Application, this was not a complex matter which required any extensive consideration by the parties of the law or a prolonged or detailed resolution of material facts in dispute. Whilst I acknowledge that both parties were granted, and exercised, their right to legal representation, the detailed information the OC has provided demonstrate that most of the work performed was not aimed at addressing the merits of the claim.

160 Seventhly, despite the fact that the OC has set out the amount of costs it seeks in a format that I am able to follow, and I appreciate that the OC's lawyers had to prepare materials in support of the costs application and counsel appeared at the directions and costs hearings, I am not satisfied that

[140] *VCAT Act* sch 1 cl 4I(1).

it would be fair that I fix the OC's costs to an amount alternative to what the OC has sought. In this regard:

a. Whilst the tax invoices provide some brief descriptions of the nature of the work, where I am uncertain as to the exact nature of the work so that I am unclear as to whether the work was reasonable, I do not consider that it would be prudent of me to be making assumptions and undertaking guesswork.

b. Fixing an amount that I may consider as fair may not take into account any difficulties or nuances which are not apparent from the face of the documents. As Bell J stated in *Martin* (at [27]), the powers under s 111 of the *VCAT Act* must be exercised 'fairly, impartially and by reference to relevant considerations and not arbitrarily'.

c. The assessment of quantum in this instance requires something more than a broad-brush approach. If I was to try and fix an amount, I would need to consider item-by-item some aspect of the work. In doing so, I would need to consider whether I ought to allow for certain costs, and how much ought to be allowed. In doing so, I would not be certain whether any amounts would be more or less favourable to the OC than if the matter was assessed by the Costs Court. At that point, I would be effectively engaging in a role which the Costs Court would be in a better position to deal with. As Garde J stated in *Metricon* (at [47(f)]), 'The Costs Court is a specialist and expert court dedicated to the task of carrying out the assessment of legal costs.'

d. By having the quantum assessed by the Costs Court, the Costs Court will determine whether my concerns as to the amount of costs that the OC's has incurred and seeks are unfounded.

161 Eighthly, it is not a mere formality that the issue of costs will need to go to the Costs Court. The parties may, if they so choose, agree on the quantum so as to avoid the need for the Costs Court to deal with the issue.

162 Accordingly, I am satisfied that it is not only open to me to refer the issue of costs to the Costs Court, it is fair that I do so under s 111(b) of the *VCAT Act*. Further, I am not satisfied that there are sufficient reasons for me to deviate from the Tribunal's default position under rule 1.07 of the *Victorian Civil and Administration Tribunal Rules 2018* (Vic). Accordingly, the County Court Scale of Costs will apply to any assessment of costs.

CONCLUSION

163 For the reasons I have provided, I will order that the applicant pay the respondent's costs in the proceeding, including the costs of the directions hearing and the costs hearing, on a standard basis to be assessed by the Costs Court on the County Court Scale in default of agreement.

D Kim
Member