VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

OWNERS CORPORATIONS LIST VCAT REFERENCE NO. OC55/2020 & OC852/2020

CATCHWORDS

Fee recovery — "owners corporation fee" levied and used for community-wide features of Sanctuary Lakes, not for common property within the subdivision that includes the respondent's lot — whether levying the fee is within the functions and powers of the owners corporation — whether a special resolution is required before such a fee may be levied — whether the fee should be levied in accordance with lot liability or under the benefit principle — whether previous Tribunal decisions should be followed — whether payment of fees has been proved — *Owners Corporations Act 2006* (Vic) ss 4, 6, 12, 24, 56, 47.

Cross-claim by lot owner — prohibited debt collection practices — whether the owners corporation engaged in conduct "in trade or commerce" — whose obligation it is to mow nature strip which is common property — whether the owners corporation followed dispute resolution and reporting requirements — *Owners Corporations Act 2006* (Vic) Part 10 — *Australian Consumer Law and Fair Trading Act 2012* (Vic) ss 45, 46.

PARTIES TO PROCEEDING OC55/2020

APPLICANT	Owners Corporation No. 1 PS401009W
RESPONDENT	Barbara Helen Anderton

PARTIES TO PROCEEDING OC852/2020

APPLICANT	Barbara Helen Anderton
RESPONDENT	Owners Corporation No. 1 PS401009W

DETAILS OF THE PROCEEDINGS

WHERE HELD	Melbourne
BEFORE	A Vassie, Senior Member
HEARING TYPE	Hearing by videoconference
DATE OF HEARING	22-23 February 2023
DATE OF ORDER	20 April 2023
CITATION	Owners Corporation No 1 PS401009W v Anderton (Owners Corporations) [2023] VCAT 426

ORDERS FOR PROCEEDING OC55/2020

ORDER

1. The respondent must pay the applicant $19,734.01 for levies and interest to the date of the final notice (the date being 6 November 2019) plus $6,800.00 for interest from the date of the final notice to the date of the hearing, a total of $26,534.01.
2. Costs reserved.

ORDERS FOR PROCEEDING OC852/2020

ORDER

1. The proceeding is dismissed.
2. Costs reserved.

A Vassie
Senior Member

APPEARANCES FOR PROCEEDING OC55/2020:

For Applicant	Mr M Lipshutz, solicitor
For Respondent	Mr P Anderton

APPEARANCES FOR PROCEEDING OC852/2020:

For Applicant	Mr P Anderton
For Respondent	Mr M Lipshutz, solicitor

REASONS

Sanctuary Lakes

1 Sanctuary Lakes, within the City of Wyndham, in the western suburbs of Melbourne, is a resort-style gated community. Altogether there are 26 plans of subdivision that describe the land within Sanctuary Lakes, 2549 separate lots, and common property. The land includes a recreation centre which has a gymnasium and other sporting facilities. The land also includes a large ornamental lake, parks and gardens, and streets and footpaths. There are 44 separate owners corporations that affect various parts of the land.

2 One of those owners corporations, Owners Corporation 1 PS 401009W ("this OC"), is a party to two proceedings which I heard together on 22 and 23 February 2023. This OC affects 43 lots and common property. There is a separate gated entry to these lots, so that they comprise a distinct part of Sanctuary Lakes.

3 Barbara Anderton, the other party to the two proceedings, owns Lot 126, a house property the street address of which is 4 Cooks Mews, Point Cook. Cooks Mews is a cul-de-sac. Ms Anderton's house has a frontage that is at the end of the cul-de-sac.

4 The first of the two proceedings, numbered OC55/2020, is a fee-recovery proceeding by this OC against Ms Anderton. The second, numbered OC852/2020, is a cross-claim by Ms Anderton against this OC, seeking remedies which I describe below.

5 Sanctuary Lakes Resort Services Limited ("SLRS") is the owners corporation manager appointed by each of the owners corporations. SLRS is also the owner of the ornamental lake.

6 An unusual feature of the land that this OC affects is that the streets within it, including Cooks Mews, are common property.

A Controversial Fee

7 Each year, throughout the Sanctuary Lakes community, the relevant owners corporation levies each owner for three separate fees. SLRS sends fee notices to the owners. The fees are described in the notices as

(a) an "owners corporation fee";

(b) a "common property fee", which in this OC's case is for the maintenance of the common property within subdivision 401009W; and

(c) a "maintenance fund fee", levied for a sinking fund for future maintenance expenditure.

8 Fees (b) and (c) are not controversial. Fee (a), however, the "owners corporation fee", is controversial. It has been the subject, either directly or indirectly, of several VCAT proceedings between a lot owner and one of the Sanctuary Lakes owners corporations. The controversy has arisen from the

purposes for which the fee is levied and from the absence of any special resolution of members of the relevant owners corporation for the levying of the fee.

9 The purposes for which the "owners corporation fee" is levied are repairs to and maintenance of features of Sanctuary Lakes that are community-wide: the ornamental lake, the recreation facilities, the parks and gardens and the infrastructure for their irrigation, amongst other things. The fees that each owners corporation levies for those purposes are pooled and SLRS applies them for those purposes. The controversy is whether an owners corporation may permissibly levy fees for those purposes without first obtaining a members' special resolution authorising the levy.

10 There have been at least two previous Tribunal decisions, in contested proceedings, in favour of a Sanctuary Lakes owners corporation on the issue. Both of them have involved a lot owner named Damir Sulomar and an owners corporation that is not this OC. Ms Anderton asks me not to follow those decisions but to determine that this OC was not entitled to levy her for such an "owners corporation fee" when there has never been a special resolution of this OC's members that has authorised such a levy.

The Two Present Proceedings

11 Proceeding OC55/2020, the fee-recovery proceeding, is based upon a final notice by this OC to Ms Anderton dated 6 November 2019. The final notice claimed fees allegedly owing from and including the financial years 2014–2015 and the financial year 2019–2020. The fees claimed included the controversial "owners corporation fee" for each year, and the other two uncontroversial fees for each year except 2014–2015. The total sum claimed in the final notice was $24,887.35. However, the sum claimed in this OC's application, including interest to the date of the final notice, was $19,734.01.

12 Ms Anderton's principal defence to the proceeding is that the "owners corporation fee" for each year is not owing because there was no special resolution authorising a levy for it. A second defence is that the fee should not have been levied on a lot-liability basis, as it was, but should have been levied on the basis of the benefit principle: that a lot owner who benefits more from the fee should pay more, and she obtains no benefit from it. There are other defences, referred to below, which can be disposed of readily, as I do below.

13 Proceeding OC852/2020, Ms Anderton's cross-claim against this OC, claims

(i) compensation, including exemplary damages, for this OC's debt collecting methods which she alleges, amount to practices prohibited by s 45 of the *Australian Consumer Law and Fair Trading Act 2012* (Vic) ("the ACLFT Act");

(ii) compensation for this OC's failure to maintain (by mowing) the nature strip on the common property (Cooks Mews) onto which her home fronts;

(iii) declaratory orders against this OC based upon its alleged failure to comply with provisions of the *Owners Corporation Act 2006* (Vic) ("OC Act") concerning dispute resolution and reporting to an annual general meeting of complaints made against the OC;

(iv) (despite SLRS not being a party to either proceeding) orders relating to SLRS's contractual relationship with Melbourne Water and with Wyndham City Council; and

(v) other miscellaneous relief.

The Fee-Recovery Proceeding

14 In its initiating application this OC set out the fees claimed, and interest claimed, as follows.

2014/15 Owners Corporation Fee: $1,997.50

2015/16 Owners Corporation Fee: $2,464.00

2015/16 Common Property Fee: $205.70

2015/16 Maintenance Fund Fee: $110.00

2016/17 Owners Corporation Fee: $2,497.00

2016/17 Common Property Fee: $215.00

2016/17 Maintenance Fund Fee: $269.50

2017/18 Owners Corporation Fee: $2,552.00

2017/18 Common Property Fee: $170.00

2017/18 Maintenance Fund Fee: $269.50

2018/19 Owners Corporation Fee: $2,596.00

2018/19 Common Property Fee: $172.00

2018/19 Maintenance Fund Fee: $269.50

2019/20 Owners Corporation Fee: $2,640.00

2019/20 Common Property Fee: $175.00

2019/20 Maintenance Fund Fee: $269.50

Interest: $2,861.81

Total: $19,734.01

15 Amanda Farrell, SLRS's finance manager since 2019, prepared a summary of proofs and verified the summary by a statutory declaration made on 2 December 2021. This OC filed the summary of proofs and relied upon it as evidence in the proceeding. According to the summary, the amount Ms Anderton owed for fees and interest to the date of the final notice was $20,987.65. I explain below why I find that the correct amount was $19,734.01, the amount claimed in this OC's application.

16 The summary of proofs satisfactorily proved the giving to Ms Anderton of the various fee notices for the fees claimed, the giving to her of the final notice on 6 November 2019, and the fact that the fees had been levied in accordance with her lot liability as shown on the plan of subdivision.

17 This OC had also filed and served upon Ms Anderton minutes of the various annual general meetings that had set the fees, and copies of the fee notices, the final notice and the summary of proofs. One set of minutes, for the annual general meeting that adopted the budget that led to the calculation of the fee for 2014–2015, had not been filed. During the hearing, which took place by video conference, this OC's solicitor Mr Lipshutz displayed those minutes on his computer screen in a way that Peter Anderton, who was representing his wife Ms Anderton, and I could see.

18 There was one discrepancy between the final notice and the figures set out in the application. As the minutes for the relevant general meeting showed, the "owners corporation fee" for 2014–2015 was $2,420.00. The applicable fee notice and the final notice both recorded $2,420.00 for that fee. In the application the amount claimed for it is $1,997.50. Ms Farrell, who gave evidence at the hearing, said that the correct amount was $2,420.00 and that the claim for the smaller amount of $1,997.50 was a "human error". I am satisfied on the balance of probabilities, however, that the correct amount was $1,997.50. In an email from SLRS to Peter Anderton dated 3 December 2015 – an email that has importance in relation to Ms Anderton's cross-claim – SLRS stated that the amount then owing by her for fees included "the nett amount outstanding for the 2014/15 financial year of $1,997.50 (being $2,777.50 less two payments of $390.00)". The author of the email in 2015 is more likely than Ms Farrell, who did not become involved until 2019, to be correct about what was owing in 2015.

19 The fee notices all complied with s 31 of the OC Act and stated that interest at the rate of 10% per annum would be payable in respect of overdue fees and charges. Resolutions passed at annual general meetings, as evidenced by the minutes, had authorised the charging of interest at that rate.

20 The final notice complied with s 32 of the Act. In her Points of Defence Ms Anderton alleged otherwise, asserting that the final fee notice had not complied with the Act because it did not include details of the dispute resolution process that applied under this OC's rules. The allegation revealed a misunderstanding of the two sections. The requirement for including details of the dispute resolution process applies, under s 31, to fee notices, not to a final notice. Nothing in s 32, which relates to final notices, contains such a requirement.

21 Subject to the defences on which Ms Anderton relies, I am satisfied that this OC has proved the amount of $19,734.01 claimed in the application.

22 Mr Lipshutz told me, and I accept, that in making a calculation of interest at the rate of 10% per annum payable from the date of the final notice to the date of the hearing he had used the reckoner available on the internet and had

calculated $6,923.05. I would accept that figure as being correct if Mr Lipshutz had made the starting-point for his calculation the fees owing as itemised in the application. I have been left with a doubt whether he did that or instead made the starting-point the figures in the final notice, which overstated by $422.50 (the difference between $2,420.00 and $1,997.50) the fees due. I give Ms Anderton the benefit of the doubt and, with a broad brush, adjust Mr Lipshutz's figure to $6,800.00. I find that the amount owing in interest from the date of the final notice to the date of the hearing is $6,800.00.

The Principal Defence: No Special Resolution

23 Trent Curwood, SLRS's chief executive officer, gave evidence at the hearing about the levying of an "owners corporation fee" from all lot owners within Sanctuary Lakes and the pooling of those fees so that they may be, and are, used for the upkeep of, or otherwise towards, things that relate to the whole of Sanctuary Lakes rather than to any particular subdivision's lots and common property. Those things he said, include:

- the main entrance gate;
- resort maintenance, including irrigation of the parks and gardens;
- the ornamental lake;
- the recreation centre;
- security, including 24-hour patrolling, CCTV and alarm monitoring;
- fountain pumps inside the main gate;
- electricity supply for the gates;
- public liability insurance;
- general administration.

24 The resort maintenance, according to Mr Curwood's evidence, accounted for 65% of the pooled owners corporation fees. He also gave evidence that because SLRS, not the City of Wyndham, was attending to maintenance of the lake, each lot owner was allowed a discount of $200.00 by the City of Wyndham in its municipal rates notices.

(a) The Statutory Provisions

25 So far as is presently relevant, s 4 of the OC Act provides:

> **4 Functions of owners corporation**
>
> An owners corporation has the following functions—
>
> (a) to manage and administer the common property;
>
> (b) to repair and maintain—
>
> (i) the common property;

(ii) the chattels, fixtures, fittings and services related to the common property or its enjoyment;

(iii) equipment and services for which an easement or right exists for the benefit of the land affected by the owners corporation or which are otherwise for the benefit of all or some of the land affected by the owners corporation;

…..

(f) to carry out any other functions conferred on the owners corporation by—

(i) this Act or the regulations under this Act; or

(ii) the Subdivision Act 1988 or the regulations under that Act;

(iii) any other law; or

(iv) the rules of the owners corporation.

26 Section 6 of the OC Act provides:

6 Powers of owners corporation

An owners corporation has—

(a) all the powers conferred on the owners corporation by—

(i) this Act or the regulations; or

(ii) the Subdivision Act 1988 or the regulations under that Act; or

(iii) any other law; or

(iv) the rules of the owners corporation; and

(b) all other powers that are necessary to enable it to perform its functions.

27 From a combination of those provisions it is apparent that an owners corporation has the power to repair and maintain "services related to the common property or its enjoyment" (s 4(b)(ii)) and "services … which are … for the benefit of all or some of the land affected by the owners corporation" (s 4(b)(iii)).

28 Section 12 of the OC Act, on which Ms Anderton relies, provides:

12 Provision of services to members and occupiers

(1) An owners corporation, by special resolution, may decide—

(a) to provide a service to lot owners or occupiers of lots or the public; or

(b) to enter into agreements for the provision of services to lot owners or occupiers of lots.

(2) An owners corporation may require a lot owner or occupier to whom a service has been provided to pay for the cost of providing the service to the lot owner or occupier.

29 Sections 46 and 47 of the OC Act provide:

> **46 Owners corporation to repair and maintain common property**
>
> An owners corporation must repair and maintain—
>
> (a) the common property; and
>
> (b) the chattels, fixtures, fittings and services related to the common property or its enjoyment.
>
> **47 Owners corporation must repair and maintain services**
>
> (1) An owners corporation must repair and maintain a service in or relating to a lot that is for the benefit of more than one lot and the common property.
>
> (2) An owners corporation may, at the request and expense of a lot owner, repair and maintain a service in or relating to a lot if it is impracticable for the lot owner to repair or maintain that service.
>
> (3) In this section—
>
> ***service*** includes a service for which an easement or right is implied over the land affected by the owners corporation or for the benefit of each lot and any common property by section 12(2) of the **Subdivision Act 1988**.

Beneath s 47 is an explanatory note about implied easements under s 12(2) of the *Subdivision Act 1988* (Vic).

30 There is no definition of "service" or "services" that applies to the OC Act generally. There is only the limited definition of "service" that relates to s 47 only.

(b) The Two Previous Decisions

31 In 2010, in a proceeding which I call "*First Sulomar*", because it was the first of several proceedings in which Damir Sulomar has disputed fees levied by a Sanctuary Lakes owners corporation, Mr Sulomar challenged fees in the same way that Ms Anderton has challenged the "owners corporation fee" in this proceeding: that there was no special resolution authorising the levying of the fee, that s 12 of the OC Act required that there be a special resolution, and so there was no obligation to pay the fee.

32 Member (now Senior Member) Moraitis decided the proceeding and gave written reasons for the decision.[1] The Member heard evidence about the uses to which the "owners corporation fee", once collected and pooled, was put: evidence that was similar to Mr Curwood's evidence in the present proceeding.

33 For two independent reasons, the Member decided that the relevant owners corporation was empowered to provide the services for which the "owners corporation fee" was levied and used, that those services did not come within the kind of "service" to which s 12 of the OC Act is directed, and that there

[1] *Sulomar & Ors v Owners Corporation 1 Plan No. PS511693Q* [2010] VCAT 600.

was no requirement that there be a special resolution authorising the levying of the fee.

34 The first reason was that the fee was levied and used for maintaining "services related to the common property or its enjoyment": the function identified in s 4(b)(ii). The Member rejected an argument that the meaning of "services" in s 4(b)(ii) was governed by the preceding words "the chattels, fixtures, fittings", and concluded that a construction of the section that gave "enjoyment" a wide meaning was one that was consistent with the purpose or object underlying the OC Act and therefore should be preferred.

35 The second reason was that the fee was levied and used for maintaining "services … which are … for the benefit of all or some of the land affected by the owners corporation": the function identified in s 4(b)(iii). Again, the sub-section was given a wide meaning so that it covered a benefit which was not necessarily related to the land or to the common property but was community-wide.

36 As to s 12, the Member decided that its effect was to enable an owners corporation, by special resolution, to provide services which might be beyond the functions described in s 4: services to lot owners or occupiers generally, or even to the public, and which should be paid or on a user-pays basis rather than the basis of lot liability of lot owners.

37 In 2020, there was a second head-on challenge to another owners corporation's claim to recover the "owners corporation fee". I refer to the decision in that proceeding as "*St Mary's*", an abbreviation of the name of the respondent lot owner.[2] Mr Sulomar represented the lot owner. Member (now Acting Senior Member) Powles heard the proceeding and made the decision. *St Mary's* is not as easy as is *First Sulomar* to compare to with the present proceeding. It seems that Mr Sulomar argued the lot owner's case in *St Mary's* by referring to the contract of appointment of SLRS as manager of the applicant owners corporation, and what provisions of the contract entitled SLRS to do and to charge a management fee for doing, rather than by reference to evidence of anyone from SLRS of the uses to which the "owners corporation fee" was put. The Member's reasons followed suit. In the present proceeding, although this OC filed a copy of the management contract with SLRS, it was barely mentioned during the hearing. At all events, the Member deciding *St Mary's* held, in accordance with the first reason given in *First Sulomar*, that the applicant owners corporation was empowered to levy the "owners corporation fee" because it was for "services related to the common property or its enjoyment" (s 4(b)(ii) and s 6 of the OC Act).

38 So, for the last 12 years, SLRS and all owners corporations that have levied the "owners corporation fee" upon lot owners have organised their affairs, and have continued to levy and/or collect such a fee, in the comfort that the Tribunal has decided that an owners corporation may validly levy and collect such a fee and use it for community-wide purposes.

---

[2] *Owners Corporation No. 1 PS511700W v St Marys Investments Pty Ltd* [2020] VCAT 1443.

39 A Tribunal Member is not bound to follow a decision of another Tribunal Member, but the Tribunal has developed a sound practice that where there has been a carefully reasoned written decision on an issue "principles of comity and consistency of decision-making should apply" and another Member should depart from the decision only if satisfied that it was wrong.[3]

(c) Application to this Proceeding

40 I follow the decision in *First Sulomar* by adopting the second reason referred to above and also the reason why s 12 of the OC Act is not applicable in this proceeding. The second reason was that the "owners corporation fee" was levied and used for maintaining "services … which are … for the benefits of all or some of the land affected by the owners corporation": s 4(b)(iii) of the OC Act, and that this OC was therefore empowered by s 6(b) to perform the functions of providing those services.

41 The reason given in *First Sulomar* for the inapplicability of s 12 to the "owners corporation fee" was that s 12 related to services which might be outside the functions listed in s 4. A comparison of s 12 with other section of the OC Act that deal with an owners corporation's provision of services reinforces the correctness of that reason, in my opinion.

42 An owners corporation "must" repair and maintain "services related to the common property or its enjoyment" (s 46(2)(b)) and "a service in or relating to a lot that is for the benefit of more than one lot and the common property" (s 47(1)). Those imperative sections must be complied with, irrespective of whether there has been a special resolution for compliance with them; s 12 can have no possible application to them. An owners corporation "may", at the request and expense of a lot owner, repair and maintain a service in or relating to a lot if it is impracticable for the lot owner to do so (s 47(2)). That sub-section does not require that there be a special resolution before the owners corporation may act. The service to be repaired or maintained under s 47(2) will be "for the benefit of … some of the land affected by the owners corporation", namely, that particular lot.

43 By contrast, s 12 is expressed widely enough to cover services, or agreements for the provision of services, that have no relation to any particular lot or to common property or do not benefit any particular lot or common property and so are not within any of the functions listed in s 4. Because s 6 does not empower an owners corporation to provide those services or to enter into those agreements, a special resolution is required before the owners corporation may provide such a service or enter into such an agreement. An example of a case in which a special resolution was required but was absent is another case involving a dispute between Mr Sulomar and a Sanctuary Lakes owners corporation.[4] In that case the owners corporation had arranged for its members to have free entry to a golf course and had added to the "owners corporation fee" each lot owner's share of

[3] *Towie v State of Victoria* [2007] VCAT 1489.
[4] *Owners Corporation No 1 PS511693Q v Sulomar* [2012] VCAT 944.

what it had cost the owners corporation to make the arrangement. Nothing in the OC Act except s 12 could empower the owners corporation to do that, but s 12 required a special resolution to do it. There was no special resolution and so that portion of the "owners corporation fee" was invalidly levied.

44 There was no requirement for this OC to have obtained a special resolution before levying the "owners corporation fee". Ms Anderton's principal defence to the fee-recovery proceeding fails.

The Second Defence: The Benefit Principle

45 The general rule that annual fees set must be based upon lot liability is found in s 23 of the OC Act. I will assume that, as Ms Anderton contends, the fee is a special fee or charge within the meaning of s 24 of the OC Act. I do not decide that it is.

46 So far as it is relevant to Ms Anderton's second defence, s 24 of the OC Act provides:

> **24 Owners corporation must repair and maintain services**
>
> (1) An owners corporation may levy special fees and charges designed to cover extraordinary items of expenditure.
>
> (2) Subject to subsection (2A), the fees and charges must be based on lot liability.
>
> (2A) Fees and charges for extraordinary items of expenditure relating to repairs, maintenance or other works that are carried out wholly or substantially for the benefit of some or one, but not all, of the lots affected by the owners corporation must be levied on the basis that the lot owner of the lot that benefits more pays more.

The basis that "the owner of the lot that benefits more pays more" is commonly described as "the benefit principle".

47 Paragraph 14 of Ms Anderton's Points of Defence states:

> Even if services to lot owners are properly authorised the fees for services are on a user pays basis and the respondent cannot be forced to receive services that are not wanted.

48 The last word in that paragraphs reveals the error in this second defence. What Ms Anderton wants or does not want by way of services is beside the point. The relevant question is whether there are lots that benefit more than Ms Anderton's lot benefits from the services. If there are, owners of the lots that benefit more must pay more. If there are not, the fees and charges must be based on lot liability.

49 There has been no evidence that any lot in Sanctuary Lakes, let alone any lot in the subdivision affected by this OC, benefits more than does Ms Anderton's lot from the provision of the services to which the "owners corporation fee" relates. The fact that other lots may have greater geographical proximity to the lake, to the recreation facilities, or to the parks

and gardens, than Ms Anderton's lot has does not mean that there is any greater benefit that those lots gain. The fact, if it is a fact, that Ms Anderton does not wish to take advantage of those features or facilities does not mean that her lot has any less of a benefit from them.

50 The "owners corporation fee" has been correctly levied on a lot liability basis.

The Third Defence: Payment

51 During the hearing Peter Anderton asserted that he or his wife had made large lump-sum payments in advance that had been enough to pay all of the fees that this OC had claimed in this proceeding. There was the bare assertion without reference to any documentary evidence.

52 For another purpose, to which I refer below, at the conclusion of the hearing I allowed Ms Anderton to file with VCAT, by a specified date, any documents on which she wished to rely to prove payments by her to this OC. She did file documents within time. I did not make any directions for service of the documents upon this OC. As I told Mr Lipshutz at the end of the hearing, I would have made further directions later if I thought that there was anything in the documents that called for an answer. I have not thought that there was.

53 The claims for fees in this proceeding began with fees for the year 2014-2015. The documents that Ms Anderton filed show payment by her of sums totalling $17,641.00 between 10 May 2013 and 13 December 2013, and of sums totalling $7,036.20 between 7 May 2024 and 15 December 2014. As to the payments totalling $17,641.00, Ms Anderton's letter that accompanied the documents stated that those payments were "in line with VCAT order of 4 April 2013[5] to pay the amount of $14,023 (including penalty interest) and costs of $2,500". So they had nothing to do with the fees claimed in this proceeding. Only the amounts totalling $7,036.00 could conceivably relate to those fees.

54 A debtor who, as a defence to a proceeding, alleges payment or part payment of the debt claimed to be owing bears the onus of proving payment.[6] There has been no evidence that this OC has failed to take into account those payments totalling $7,036.00 and no evidence that Mr Anderton earmarked or appropriated them towards payment of fees that are the subject of this proceeding in such a way that obliged this OC to apply them in reduction of the fees claimed in this proceeding instead of (for example) any fees that had fallen due for payment after the "VCAT order of 4 April 2013" but before the 2014-2015 fees fell due for payment. If a debtor makes no appropriation when making a payment, the creditor is free to appropriate it to whatever debt it chooses.[7]

---

[5] VCAT proceeding no OC3043/2021.
[6] *Young v Queensland Trustees Ltd* (1956) 99 CLR 560, 562.
[7] H G Beale (ed), *Chitty on Contracts* (Sweet & Maxwell, 28th ed, 1999), para 22-059 onwards.

55 Ms Anderton has failed to make good this third defence.

Other Defences

56 I have already rejected the defence that the final notice relied upon did not comply with the OC Act. I did so in paragraph 20 above.

57 Paragraph 8 of the Points of Defence allege that the disputed fees are not expended on common property within the subdivision that contains Mr Anderton's lot. The reasons I have given for deciding that the "owners corporation fee" had been validly levied are the answer to the allegation.

58 Paragraph 9 of the Points of Defence alleged that the disputed fees are used to pay for maintenance of land owned by Wyndham City Council. There has been no evidence of what land the Council owns. Mr Curwood gave evidence that SLRS has a "10 year contract" with the Council, that the contract does not cover roads which are the Council's responsibility, that under the contract SLRS were doing things which otherwise would have been done by the Council, and that in return each lot owner was given a $200.00 credit against the rates payable by the owner is the Council. That is as far as the evidence went.

59 Paragraph 10 of the Points of Defence alleged that the disputed fees were used to pay for the maintenance of private lots that are outside Ms Anderton's subdivision. There was no evidence of that.

60 Paragraph 11 of the Points of Defence alleged that the disputed fees were used to pay for the maintenance of "facilities owned by the management company". The only evidence of anything that SLRS owned was that it owns the lake. The "owners corporation fee" is used in part for maintenance of the lake, but that is within the scope of a benefit to land affected by this OC, which is empowered to levy and use the "owners corporation fee" for that purpose.

61 Paragraph 12 of the Points of Defence alleged that the disputes fees are "not being charged in accordance with the management contract." Peter Anderton did not explain that allegation during the hearing. Whatever it means, the fact is that whatever SLRS charges this OC under the management contract is something that a lot owner has no standing to challenge; only the OC itself may do so.

62 I have considered and rejected all defences to this OC's claim. I now turn to Ms Anderton's cross-claim against this OC.

The First Cross-Claim: Debt Collection Practices

63 Ms Anderton claims that this OC has engaged in debt collection practices that are prohibited by s 45 of the *Australian Consumer Law and Fair Trading Act 2012* (Vic) ("ACLFT Act"). In her cross-claim she claims that she is entitled under s 46 of the ACLFT Act to damages for humiliation or distress. She claims damages of $10,000.00 plus exemplary damages of $30,000.00.

64 So far as it is relevant to this claim, s 45(1) of the ACLFT Act provides:

> **45 Prohibited debt collection practices**
>
> (1) A person must not in trade or commerce engage in a prohibited debt collection practice while-
>
> (a) collecting or attempting to collect a debt; or
>
> (b) repossessing or attempting to repossess goods.
>
> Penalty: 240 penalty unites, in the case of a natural person;
>
> 1200 penalty units, in the case of a body corporate.
>
> (2) In subsection (1), prohibited debt collection practice means—
>
> …..
>
> (k) making a false or misleading representation in connection with—
>
> (i) the nature of a debt; or
>
> (ii) the extent of a debt; or
>
> (iii) the consequences of not paying a debt; or
>
> (iv) the method of recovering a debt;
>
> …

65 Section 46 of the ACLFT Act provides, in substance, that a natural person who has experienced humiliation or distress due to a course of conduct (meaning, conduct that occurs on at least 2 occasions) may apply to a court or VCAT for an order that the person engaging in that conduct pay damages of up to $10,000.00.

66 Two emails that SLRS sent to Peter Anderton, on 15 December 2014 and 3 December 2015 respectively,[8] call for comment. As the contents of the emails show, the background to them was that this OC brought a VCAT proceeding numbered OC3043/2012 against Ms Anderton claiming outstanding fees. When the proceeding was heard the Tribunal disallowed some of the fees claimed because, the Tribunal decided, they were statute barred. The fees disallowed for that reason totalled $3,529.11.

67 The email dated 15 December 2014 included an acknowledgement that Ms Anderton had paid in full the amount that the Tribunal had ordered in proceeding OC3043/2012. It continued:

> What remains outstanding is any debt that was present on the account but not ordered in proceedings of OC3043/2012 …
>
> …
>
> We make this point. Even though VCAT did not order for the full amount of the outstanding debt in relation to the Final Notice associated with

[8] The emails are attachments J and L respectively to an application dated 16 August 2021 filed by Ms Anderton in the fee-recovery proceeding OC55/2020.

> OC3043/2012, this does not extinguish the lot owner's obligation to pay all of the outstanding fees and charges. Accordingly, the outstanding fees and charges remain payable by the lot owner and continue to apply to the lot.

68 The email dated 3 December 2015 stated in relation to the amount awarded in proceeding OC3043/2012:

> … An amount equal to $3,529.11 for outstanding fees and interest as shown on the final fee notice was not awarded as it was determined that this amount was statute-barred.
>
> …
>
> What now remains on the lot's accont includes the statute-barred amount of $3,529.11, the debt amount outstanding for the 2014/15 financial year of $1,997.50 (being $2,777.50 less two payments of $390.00), some outstanding interest, as well as the fees levied for the 2015/16 financial year totalling $2,779.70.
>
> Now that the 2015.16 fees are outstanding, and considering that no further payments have been made to clear the account of the 2014/15 and 2015/16 fees, a final fee notice has been issued for the total of the lot's outstanding balance …

69 Peter Anderton gave evidence that he or his wife had paid the amount of $3,529.11 that had been demanded even though the claim for it had been statute-barred. He did not provide during the hearing any documentary evidence of the payment. That is why at the conclusion of the hearing I directed that Ms Anderton could within a specified time file any documents that contained evidence of the payment.

70 Ms Anderton did file some documents within the specified time but they did not support the claim that the statute-barred debt had been paid. Moreover, Mr Curwood of SLRS had given evidence that before this OC had begun this proceeding the statute-barred debt was still being shown in SLRS's records as owing but he had made the decision to write it off. So, I am not persuaded that she has paid it. Because of the conclusion I reach, as explained in paragraphs 76 to 82 below, it does not matter whether she has or has not paid the amount.

71 Although SLRS was the sender of the emails, Ms Anderton's claim that there has been a contravention of the ACLFT Act entitling her to damages has been made against this OC, presumably on the basis that SLRS was acting as this OC's agent when sending the emails. Mr Lipshutz's submissions on the issue did not draw any distinction between this OC and SLRS in this respect but put forward other reasons, which I shall deal with below, why this OC denied that it was liable in law under ss 45 and 46 of the ACLFT Act. So I will treat the emails as having been made by this OC.

72 The conduct of the sender of the emails, demanding that Ms Anderton pay an amount that the Tribunal had found that she was not liable to pay because it was statute-barred, was disgraceful. The conduct comes within the

description s 45(2) of a prohibited debt collection practice because it amounted to the making of a false or misleading representation in connection with the extent of a debt (s 45(2)(k)(ii)).

73 There has been no evidence of any repetition of that conduct since December 2015, or of anything else that could be regarded as a prohibited debt collecting practice.

74 Mr Lipshutz made two submissions as to why no remedy was available to Ms Anderton under the two sections. I reject the first of the submissions but accept the second of them.

75 The first submission was that ss 45 and 46 of the ACLFT Act are not amongst the sections listed in s 199 of the OC Act and so Ms Anderton has no cause of action under them. Section 199 of the OC Act is headed "Application of Australian Consumer Law and Fair Trading Act 2012." It is a lengthy section and its language is sometimes barely penetrable. For practical purposes, however, the effect of s 199(2) and (3) is that a contravention of a provision of the OC Act may be treated as if it were a contravention of a provision of the ACLFT Act, enabling a person who claims to have suffered loss or damage as a result of the contravention to rely on s 212 of the ACLFT Act and bring a claim under that section for recovery. Ms Anderton is not alleging any contravention of the OC Act when she alleges prohibited debt collection practices. She has a cause of action under ss 45 and 46 of the ACLFT Act without needing to invoke s 199 of the OC Act.

76 The second submission was that conduct of this OC could not be a debt collection practice prohibited by s 45 of the ACLFT Act because this OC did not engage in any debt collection practice "in trade or commerce".

77 The starting point for consideration of the submission is that, by s 13(1) of the OC Act, an owners corporation is prohibited from carrying on a business.

78 It is well known that in connection with a section in consumer-protection legislation that prohibits a corporation from engaging in misleading or deceptive conduct "in trade or commerce" the High Court has stated that the section is concerned with conduct "in the course of those activities which, of their nature, bear a trading or commercial character".[9]

79 Mr Lipshutz cited a decision of the Judge in the Trial Division of the Supreme Court of Queensland in 2021.[10] One of the issues in the case was whether the plaintiffs had properly pleaded an allegation that the body corporate (as an owners corporation is called in Queensland) was engaging "in trade or commerce" in conduct that was misleading or deceptive. The decision on that issue was that the plaintiff had not pleaded that allegation properly. The case did not decide whether the body corporate actually

[9] *Concrete Constructions (NSW) Pty Ltd v Nelson* (1990) 169 CLR 594, 604.
[10] *Dunlop & Anor v Body Corporate for Port Douglas Queenslander CTS 886 & Ors (No 2)* [2021] QSC 265.

engaged in that conduct "in trade or commerce". It is therefore of little assistance.

80 An owners corporation has statutory obligations to repair and maintain the common property (s 46 of the OC Act), to repair and maintain any service in or relating to a lot that is for the benefit of more than one lot and the common property (s 47(1)) and to take out public liability insurance for the common property (s 60). To obtain the funds necessary for the fulfilment of those obligations the owners corporation may levy fees (s 23) and may levy special fees and charges where necessary (s 24). A fee becomes due and payable once the owners corporation gives a lot owner a fee notice in proper form (s 31). To make the fee recoverable in a court or VCAT the owners corporation must give the lot owner a final notice in proper form (s 32).

81 The making of further demands for payment in correspondence addressed to the lot owner once the final notice has not been complied with is a further step in the process of enabling the owners corporation to have the means to carry out its statutory obligations. The giving of the final notice is a necessary step in that process if the lot owner does not pay in response to the fee notice. It does not take place in the course of any activity or transaction which, of its nature, bears a trading or commercial character. Rather, it is conduct that looks towards fulfilment of statutory obligations. The making of further demands after the final notice is not a necessary step in the process, but it is conduct of the same character as the giving of the final notice.

82 In my opinion, the sending of the two emails referred to above was not conduct in which this OC engaged "in trade or commerce", and so it did not contravene s 45 of the ACLFT Act. Ms Anderton is not entitled to any remedy in respect of that conduct.

83 Paragraph 4 of the Amended Points of Counterclaim begins: "the OC/Manager has breached s 20(1) and s 21 of the Australian Consumer Law." I have taken the allegation to have been one of a breach of these sections in the Australian Consumer Law (Victoria). The paragraph goes on to recite the words of s 20(1) and to summarise the prohibitions upon unconscionable conduct set out in s 21. There was no elaboration in the document, or during the hearing, of the allegation. The only evidence given that could relate to it has been the evidence about the allegedly prohibited debt collection practices. The prohibitions in s 20(1) and s 21 of the Australian Consumer Law are expressed to apply only to engaging in conduct "in trade or commerce." For reasons given above in paragraphs 77 to 82 this OC did not engage in conduct "in trade or commerce" so these two sections in the Australian Consumer Law (Victoria) are inapplicable.

84 Insofar as the allegation is that SLRS breached those sections, the allegation goes nowhere because SLRS is not a party to the proceeding which is Ms Anderton's cross-claim. Because it is not a party, no legal basis exists for the making of any order against it in the proceeding and it has had no opportunity to be heard in answer to the allegation.

The Second Cross-Claim: Mowing of the Nature Strip

85 Mews Close, onto which Ms Anderton's home fronts, is common property. A grass nature strip outside the front of her home is part of the common property. Although I was not told so, I infer from a copy of the relevant page of the plan of subdivision that Ms Anderton attached to her interlocutory application dated 16 August 2021 that all streets and footpaths and nature strips within her gated subdivision are common property.

86 This OC and SLRS have not been mowing the grass on the nature strips. For some years Peter Anderton, twice per month, has been mowing the nature strip outside Ms Anderton's home. She complains that this OC has breached its duty to repair and maintain common property by failing to mow the nature strip. Her cross-claim includes a claim for compensation of $25,000.00. Peter Anderton gave evidence that he calculated that figure at the rate of $45.00 per hour for his labour; $45.00 per hour is less than SLRS is entitled under the management contract to charge this OC.

87 It seems that this OC and SLRS have not been mowing the nature strips because the other lot owners in the subdivision do not wish them to do so but prefer to do the mowing themselves. Members of an owners corporation may decide not to require the owners corporation to repair and maintain a particular part of the common property, but to have the effect of relieving the owners corporation from the obligation to perform its duty the decision must be unanimous; moreover the decision cannot survive a change of ownership of a lot unless the new owner also agrees. Ms Anderton's complaint means that there is no unanimity of members. She is right to say that this OC has failed to repair and maintain the nature strip outside her home, as in law it is obliged to do.

88 The labour that underlies the claim for $25,000.00 is Peter Anderton's labour. The duties that an owners corporation has under the OC Act are duties owed to an occupier of a lot as well as to the lot owner, and the occupier has a cause of action against the owners corporation for any breach of that duty. Peter Anderton is an occupier of his wife's lot. He gave evidence that he enjoys living at Sanctuary Lakes and does not wish to live elsewhere.

89 Any claim that Peter Anderton may have is not properly part of this proceeding. Only Ms Anderton, the low owner, is a cross-applicant. I doubt that the law extends so far as to give a lot owner a cause of action for expense or inconvenience incurred by another occupier of the lot.

90 For that reason I reject this claim.

The Third Cross-Claim: Complaints Not Acted Upon or Reported

91 During the hearing Peter Anderton stated that this OC and SLRS had not acted upon complaints that he and his wife had made and had not reported the complaints to an annual general meeting as required by s 159F of the Act. On the last page of the Amended Points of Counterclaim dated 12 January

2022, Ms Anderton sought "[d]etails of all lodged Owners Corporation disputes in line with the [OC Act]".

92 The only document that Ms Anderton has filed that is a formal written complaint is one that was dated 6 July 2018[11] addressed to this OC and to SLRS and apparently sent by email to SLRS. It listed 14 items of complaint, all of which anticipated, in one way or another, defences that Ms Anderton has put up in the fee-recovery proceeding, or claims that she has made in her cross-claim proceeding, or both.

93 The written complaint asserted, and the Amended Points of Counterclaim repeated, that this OC ought to have reported, but did not report, to an annual general meeting a decision of the Tribunal in a proceeding ("*Second Sulomar*")[12] involving Mr Sulomar and another owners corporation. The decision was, in part, that certain rules of that owners corporation, including a rule that required a lot owner to maintain a nature strip by cutting the grass, were invalid. As I understood the evidence, all Sanctuary Lakes owners corporations have the same rules. In Ms Anderton's proceeding the validity or invalidity of the nature strip rule does not matter. The nature strip outside her lot is common property. For that reason the OC Act requires this OC to maintain it. The decision in *Second Sulomar* was significant but it did not directly affect this OC. I do not think that there needed to be a report to the OC's members about it.

94 Part 10 of the OC Act, headed "Dispute resolution", contains Division 1 headed "Complaints and procedures". It does not cater for complaints by a lot owner against the owners corporation itself. In particular, a low owner cannot make a complaint under Division 1 to an owners corporation about fees levied.[13] The Division does cater for a complaint by a lot owner against a manager. The written complaint dated 6 July 2016 could be characterised as such a complaint.

95 In the absence of any evidence to the contrary I accept that this OC did not report the complaint to an annual general meeting, as s 159(1) of the OC Act required it to do. To make an order now that would compel this OC to report to the next annual general meeting a complaint made nearly five years ago seems to me to be pointless. The Tribunal's power under s 165 of the OC Act to "make any order it considers fair" includes a power to make no order if it considers it fair to make no order. I do consider it fair to make no order, and I make no order.

The Fourth Cross-Claim: Contracts between SLRS and Third Parties

96 The Amended Points of Counterclaim express dissatisfaction of Ms Anderton with contracts into which she says SLRS has entered into Melbourne Water and with Wyndham City Council. She alleges that the

[11] The complaint is attachment M to the application referred to in footnote 9 above.
[12] *Sulomar v Owners Corporation No 1 PS511700W* [2016] VCAT 1502.
[13] *Owners Corporations Act 2006* (Vic) s 152(4).

contract with Melbourne Water required SLRS to transfer its ownership of the ornamental lake to Melbourne Water but it has not done so. She also alleges that the contract with Wyndham City Council requires Sanctuary Lakes owners corporation to pay for the maintenance of "land outside the plan of subdivision"[14] which ought to be the Council's responsibility. (I repeat that there was no evidence of maintenance of land outside the Sanctuary Lakes subdivisions.)

97 There are two reasons why the Tribunal cannot make any orders that relate to those contracts. The first reason is that SLRS is not a party to the proceeding which is Ms Anderton's cross-claim. I refer to what I said in paragraph 84 above in that regard.

98 The second reason is that Ms Anderton has no standing to interfere, by seeking Tribunal orders, in the contractual relations between SLRS and those third parties. The only standing that she would have to begin any legal proceedings against SLRS would be a claim, which as a lot owner she could bring, that SLRS's appointment as manager of this OC should be revoked because it is in breach of duties that s 122 of the OC Act prescribe. Not for a moment am I suggesting that she should do any such thing.

Other Items in the Cross-Claim

99 The Amended Points of Counterclaim included other matters that Peter Anderton did not mention, or barely mentioned, during the hearing.

(a) Ms Anderton is critical of the way that SLRS's board of directors are appointed and that lot owners have no say in the appointment. The reasons given in paragraphs 97 and 98 above are applicable to this matter also.

(b) She alleges that this OC's financial statements do not comply with the requirements of s 33 and s 34 of the OC Act, and seeks an order for a "true and correct statement of account". The history of debt-recovery proceedings by this OC against Ms Anderton since 2013 provides plenty of scope for confusion about how much she has owed from time to time. Nevertheless, nothing emerged during the hearing (apart from the demands for payment of statute-barred fees) that indicated anything significantly wrong about financial statements or accounts.

(c) She asks that the rules that in *Second Sulomar* were which should be declared invalid in this proceeding also. I have already said why the validity or invalidity of the rule about nature strips does not matter in this proceeding. It is not necessary, and it will neither help nor harm anyone, to make declarations of invalidity a second time or for me to decline to make them.

(d) She asks the Tribunal to order that SLRS refrains from participating in or pursuing "a multi-million commercial redevelopment of

[14] Points of Defence dated 30 April 2020 in proceeding OC55/2020, paragraph 9.

> commercially operated gymnasium, recreation centre and offices" on land "owned by the manager". I repeat that SLRS is not a party to the proceeding and Ms Anderton's standing to make such a claim is doubtful. Great care should be taken before she decides to make such a claim in a fresh proceeding. Making it would have serious consequences for both SLRS and for Ms Anderton who would have to give the Tribunal an undertaking to pay damages if such a temporary order were made.[15]

100 I dismiss all claims made in Ms Anderton's cross-claim.

Conclusion

101 In proceeding OC55/2020 there will be an order that Ms Anderton must pay to this OC $19,734.01 being levies and interest to the date of the final notice, 6 November 2019, plus interest of $6,800.00 from the date of the final notice of hearing, a total of $26,534.01.

102 In proceeding OC852/2020 the order will be that the proceeding is dismissed.

103 In both proceedings I reserve the question of costs.

A Vassie
Senior Member

[15] An applicant who seeks a temporary injunction will not be successful in the absence of an undertaking to pay any damages that the respondent may suffer if the injunction turns out to have been wrongly made.