

VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

OWNERS CORPORATIONS LIST

VCAT REFERENCE NO. OC57/2020 & OC299/2021

CATCHWORDS

Fee recovery from lot owner – related to common property – for the benefit of land affected by the owners corporation – lack of common property - *Owners Corporation Act 2006* (Vic) ss 3, 4, 12, 23, 32, 46 & 47 - *Sulomar & Ors v Owners Corporation 1 Plan No. PS511693Q (Civil Claims)* [2010] VCAT 600 - *Noonan v Owners Corporation No 2 PS 409115E and Anor (Owners Corporation)* [2011] VCAT 1934 - *Owners Corporation No 1 PS511693Q v Sulomar & Anor (Owners Corporation)* [2012] VCAT 944 - *Owners Corporation SP26824D v Saponja (Owners Corporation)* [2011] VCAT 2402 - *Vati v Owners Corporation 1 Plan No. PS548194C (Owners Corporations)* [2016] VCAT 1869 - *Sulomar v Owners Corporation No 1 PS511700W (Owners Corporations)* [2016] VCAT 1502 - *Flew v Lum (Owners Corporations)* [2018] VCAT 1278 - *Owners Corporation No. 1 PS511700W v St Marys Investments Pty Ltd (Owners Corporations)* [2020] VCAT 1443 - *Victorian Civil and Administrative Tribunal Act 1998* (Vic) ss 100, 109 & 115C.

APPLICANT

Owners Corporation No. 1 PS511700W

RESPONDENTS

Sharon Erbacher & Damir Sulomar

WHERE HELD

Melbourne

BEFORE

Senior Member C Powles

HEARING TYPE

Hearing

DATE OF HEARING

3 November 2021

DATE OF ORDER

18 July 2023

CITATION

Owners Corporation No. 1 PS511700W v Erbacher (Owners Corporations) [2023] VCAT 820

ORDER

1. The Tribunal orders that the respondents must pay to the applicant the sums of:
 - a. \$ 21,875.06 for levies and interest to the date of final fee notices (the dates being, in OC57/2020, 6 November 2019 and, in OC299/2021, 5 November 2020); and
 - b. \$ 1,737.31 for interest from the date of final fee notices to the date of hearing;
- \$ 23,612.37 **TOTAL.**

C Powles
Senior Member

APPEARANCES:

For Applicant

Mark Liphсутz, solicitor

For Respondents

Mr D Salomar

REASONS

Introduction

- 1 Owners Corporation No. 1 PS511700W ('the Owners Corporation') is one of several owners corporations created upon the plans of subdivision of land that comprises the Sanctuary Lakes Resort Development in Point Cook.
- 2 Sharon Erbacher and Damir Sulomar ('the respondents') are the owners of Lot 1774 on the plan of subdivision for the Owners Corporation ('the Plan') and are members of the Owners Corporation.
- 3 On 13 January 2020, the Owners Corporation applied to the Tribunal¹ for orders requiring payment of claimed outstanding fees owed by the respondents to the Owners Corporation set out in a final fee notice given under s 32 of the *Owners Corporations Act 2006* (Vic) ('the Act')² dated 6 November 2019 in the sum of \$17,931.88, together with interest on that sum and costs ('the first application'), for the period 1 July 2014 – 30 June 2020.
- 4 On 6 February 2020, the Tribunal made the standard orders for Owners Corporation fee recovery applications for a sum in excess of \$15,000 and listed the application for hearing in person in April 2020.
- 5 Needless to say, the intervention of the Covid 19 pandemic and subsequent ceasing of in-person hearings at the Tribunal meant the April 2020 hearing did not proceed.
- 6 On 9 July 2020, the Tribunal orders made proposing that the application be decided "on the papers" under s 100 of the *Victorian Civil and Administrative Tribunal Act 1998* (Vic) ('the VCAT Act').
- 7 In accordance with the above orders, the respondents objected to the application being decided "on the papers" and so it was listed for hearing on 22 October 2020.
- 8 In July 2020, I heard an application brought by the Owners Corporation against another lot owner in the Plan.³ One of the respondents in this proceeding, Mr Sulomar, represented, with leave of the Tribunal, the respondent in that proceeding. I reserved my decision in that proceeding and had not yet published orders and reasons by 22 October 2020.
- 9 At the hearing on 22 October 2020,⁴ it was agreed by the parties that no further steps would be taken in relation to the first application until I published my orders and reasons in OC3449/2019. As became apparent in these proceedings, this was because the submissions made on behalf of the respondent in OC3449/2019 are largely the same submissions made on behalf of the respondents in these proceedings.

¹ OC57/2020.

² References to sections in this decision are to sections of the Act, unless otherwise stated.

³ OC3449/2019.

⁴ I did not conduct the hearing on 22 October 2020.

- 10 On 21 December 2020, I provided my orders and reasons in OC3449/2019, published as *Owners Corporation No. 1 PS511700W v St Marys Investments Pty Ltd (Owners Corporations)* [2020] VCAT 1443 ('*St Marys*').
- 11 In January 2021, the Tribunal made orders listing the first application for hearing on 29 March 2021.
- 12 On 19 February 2021, the Owners Corporation applied to the Tribunal⁵ for orders requiring payment of claimed outstanding fees owed by the respondents to the Owners Corporation set out in a final fee notice given under s 32 dated 5 November 2020 in the sum of \$2,666.61, together with interest on that sum and costs ('the second application'), for the period 1 July 2020 – 30 June 2021.
- 13 In March 2021, orders were made by consent that the first and second application be heard together on 24 May 2021 and then, for operational reasons, that date was vacated and the proceedings were heard by me on 3 November 2021.
- 14 The Owners Corporation provided a number of documents in support of the applications, including:
 - a. a copy of the Plan;
 - b. the relevant fee notices and final fee notices, Annual General Meeting minutes; and
 - c. a Summary of Proofs.⁶
- 15 The respondents also provided a range of documents in support of their position in relation to the applications, including:
 - a. written submissions;
 - b. supplementary submissions ('respondents' further written submissions');
 - c. Points of Defence; and
 - d. contracts of appointment between the Owners Corporation and its manager ('the management contracts') and other documents referred to in their submissions and Points of Defence.
- 16 At hearing, the Owners Corporation advised that the total amount being sought in both proceedings was \$21,875.06 for unpaid fees and \$1,737.31 for interest until the date of hearing.
- 17 At the end of the hearing on 3 November 2021, I reserved my decision.
- 18 Unfortunately, resource demands placed on the Tribunal as a result of backlogs arising from the Covid 19 pandemic and other operational

⁵ OC299/2021.

⁶ A Summary of Proofs is required to be provided by the applicant in fee recovery applications: see *Practice Note – PNOC1 Owners Corporations List (fee recovery disputes) – General Procedures*.

requirements has delayed the provision of my decision and reasons until now. I apologise to the parties for the delay.

- 19 For reasons set out below, having considered to the material provided by the parties and the submissions made at hearing, I am satisfied that the respondents must pay to the Owners Corporation the amounts in each proceeding set out in the orders above.

St Marys decision

- 20 As noted above, the respondent's position in relation to the applications in this proceeding are the same as the position taken by the respondent in *St Marys*. That is, they:
- a. do not claim that the fee notices or final fee notices are not in the proper form or have not been given to the respondents in accordance with the requirements under the Act; but
 - b. do claim that the application should be dismissed because the payment of the fees sought in the applications cannot be validly sought under the Act.
- 21 The respondents' written submissions provided 14 August 2020 are in the same terms as the submissions made on behalf of the respondent in *St Marys*.
- 22 The respondents' supplementary written submissions provided 5 February 2021 refer to the decision in *St Marys*, state that the respondents disagree with the decision and set out further submissions on why the findings in *St Marys* should not be followed.
- 23 The respondents at hearing indicated that they were not expecting me to make different findings or follow different reasoning from the findings and reasoning in *St Marys*.⁷
- 24 After hearing from the parties at hearing, I am satisfied that the respondents' supplementary written submissions do not raise any new claims or defences not raised in *St Marys* but rather are a re-iterative response or, in some cases, further clarification of the respondent's position in *St Marys*.
- 25 Given the centrality of the reasons in *St Marys* to the reasons in this decision, this decision adopts the reasons and findings in *St Marys* subject to the differences and clarifications set out below.

Basis on which fee recovery is sought

- 26 At [8] – [20] of *St Marys*, I set out the relevant passages from annual general meeting minutes of the Owners Corporation and the contract of appointment of the manager of the Owners Corporation.

⁷ I asked the respondents at hearing whether, given my findings in *St Marys*, they sought that I recuse myself in relation to this proceeding or reconstitution under s 108 of the VCAT Act. They stated that they did not.

- 27 The fees sought to be recovered in *St Marys* were for the period 1 July 2019 to 30 June 2020 whereas the fees sought to be recovered in these proceedings are for a longer period, being 1 July 2014 to 30 June 2021.
- 28 The parties at hearing accepted and, having reviewed the material submitted for these proceedings, I find that the wording of the resolutions passed at annual general meetings and in the management contracts are in substance the same as those set out in *St Marys* and I adopt my findings at [8] – [20] in *St Marys* in these reasons.

Relevant law

- 29 At [21] – [34] of *St Marys*, I set out the law relevant to those proceedings. At hearing I gave the parties an opportunity to advise me of any legal developments, such as Court or Tribunal decisions or legislative amendments, that may be relevant to these proceedings. They stated they were not aware of any.
- 30 Accordingly, I apply the relevant law as set out at [21] – [34] in *St Marys* in these reasons.

Submissions

- 31 At [35] – [36] of *St Marys*, I set out the submissions by the respondent in that proceeding as to why the applicant in the proceeding could not require payment of the fees sought. I categorised those submissions as being the lack of OC obligation claim,⁸ the private lots claim,⁹ the lack of common property claim,¹⁰ the lack of special resolution claim,¹¹ and the lack of severability claim.¹²
- 32 At hearing in these proceedings:
- the respondents, when asked, did not take issue with my characterisation of their submissions into these five categories; and
 - the Owners Corporation stated that it was not relying on the respondent's claim in *St Marys* (which I had not accepted) characterised as the recurrent obligation claim.¹³

Findings

- 33 light of the above, I adopt the categorisation of the respondent's position in *St Marys* as the position of the respondents in these proceedings and the findings in relation to each of the categories as set out in *St Marys*, subject to the following clarifications.

Lack of OC obligation claim

⁸ *St Marys* [35 a].

⁹ *St Marys* [35 b].

¹⁰ *St Marys* [35 c].

¹¹ *St Marys* [35 d].

¹² *St Marys* [35 e].

¹³ *St Marys* [36] & [38] – [41].

- 34 The respondent's further written submissions¹⁴ seek to clarify their submission that the structure of the management contracts created a direct obligation on the lot owners to pay for services, not the Owners Corporation.
- 35 In particular, they refer to Clause 3 of the Special Conditions stating that the "Owners Corporation Fee shall be paid by the Manager" and submit this means there is no role for the Owners Corporation in the payment of funds for services.
- 36 I again do not accept the submission. I find that the reference to the "Manager" in Clause 3 does not displace the clear intention of the management contracts that fees recovered from lot owners are to be paid by the Owners Corporation to the manager for services.
- 37 Accordingly, I adopt my findings at [42] – [44] of *St Marys* in relation to the lack of OC obligation claim.

Private lots claim

- 38 My assessment of the private lots claim in *St Marys* required an interpretation of the wording in s 4.
- 39 The respondents submit in this proceeding¹⁵ that:
- a. the interpretation of s 4 in *St Marys* is "very broad", "seems to the respondents to allow the owners corporation to charge any fee on a lot liability basis if it is said that there is some benefit to the overall development" and "is not correct";
 - b. following the decision in *Noonan v Owners Corporation No 2 PS 409115E and Anor (Owners Corporation)* [2011] VCAT 1934 (7 October 2011) ('*Noonan*'), the functions allowed under s 4(b) are only ones an owners corporation *must* do, which does not include "the maintenance of land and facilities outside the owners corporation and the provision of recreation and security services";
 - c. the "disputed services" do not have sufficient connection to the common property on the plan of subdivision to make them an obligation under s 4(b)(ii), s 4(b)(iii) or s 47; and
 - d. section 4 cannot be construed to mean that the Owners Corporation can charge fees for services on a lot liability basis solely because it can be said the fees are for services of some benefit to the land affected by the owners corporation or the overall development.
- 40 The respondents' further written submissions also make particular reference¹⁶ to:
- a. the notice for the Owners Corporation's 2019 annual general meeting containing a document entitled "Manager's Report to Owners

¹⁴ Respondents' further written submissions [10].

¹⁵ Respondents' further written submissions [2] – [4] & [6] – [8].

¹⁶ *Ibid* [9].

Corporation” which refers to “completed rendering of the Boulevard wall north of Gleneagles Estate;

- b. an Owners Corporation newsletter dated 3 December 2019 referring to “Rendering of Boulevard wall along the southern side of the Gleneagles estate”; and
 - c. the land described above as “Gleneagles Estate” not being within the Plan.
- 41 At hearing, the respondents clarified that these references were a further example of works being done within private lots outside the Plan, which, as had been submitted by the respondent in *St Marys*, were not recoverable under s 4(b).
- 42 I’m not satisfied this further example should change my findings in relation to this claim as set out in *St Marys*.
- 43 For the sake of completeness, I find that there is still sufficient nexus between the rendering works described above and the enjoyment of the Owners Corporation’s common property and maintenance work being done for the benefit of land affected by the Owners Corporation for any fees for the rendering works to be recoverable under s 4(b)(ii) and 4(b)(iii).
- 44 Accordingly I adopt my reasoning and findings set out at [46] – [53] in *St Marys* in relation to the private lots claim.

Lack of common property claim

- 45 The respondents repeated the submissions made in *St Marys* in relation to the lack of common property claim and also submitted that:
- a. the common property on the Plan comprises private roads for the exclusive use of Owners Corporations Nos 2 – 6 PS511700W (of which the respondents are not members); and
 - b. the fees for the maintenance of, or services related to, that common property are the full responsibility of those owners corporations and not the Owners Corporation.
- 46 I am not satisfied that the respondents’ further submission about common property being for the exclusive use of lot owners in other owners corporations changing my analysis of when an owners corporation without common property can recover costs for services under s 4 (b)(iii).
- 47 Accordingly, I adopt my findings and reasons set out at [55] – [59] of *St Marys* in relation to the lack of common property claim.

Lack of a special resolution claim & lack of severability claim

- 48 The respondents adopted the submissions made on behalf of the respondent in *St Marys* about the need for the Owners Corporation to pass a special resolution under s 12 before it can provide the Resort Services and Maintenance Services and recover costs of the same.

- 49 The respondents further noted that the lot the subject of these proceedings is a vacant lot and submitted that the provision of security services, such as a monitored alarm, could not be recoverable under Clause 1.2.2, given they would not be required for a vacant lot.
- 50 I am not satisfied that the fact the lot the subject of these proceedings is vacant alters my analysis of the Resort Services and Maintenance Services, or any other services provided to the Owners Corporation under the management contracts, as set out in *St Marys*. Accordingly, I adopt my findings and reasons set out at [62] – [66] in relation to the lack of special resolution and lack of severability claims.

Conclusion

- 51 For the reasons set out above and, overall, adopting my reasons and findings in *St Marys*, I find that the Owners Corporation is entitled to recover from the respondents the full amount of the fees sought to be recovered in the applications in these proceedings.
- 52 At hearing, the Owners Corporation indicated it would seek to recover more than the standard amount of costs likely to be awarded in a fee recovery proceeding against lot owners. I advised the parties I would allow written submissions to be made in relation to costs and decide whether to award costs without hearing further from the parties. The parties did not object to this course of action.
- 53 Accordingly:
- a. if the Owners Corporation seeks to be awarded costs in these proceedings under ss 109 & 115C of the VCAT Act, they must provide written submissions in support of their application for costs, that include an indication of the sum of costs sought, to the Tribunal and the respondents by email by **30 August 2023**; and
 - b. if the respondents object to the sum of costs sought by the Owners Corporation, they must provide written submissions setting out their objections to the Tribunal and the Owners Corporation by email by **27 September 2023**.
- 54 In light of the above, I make the orders set out at the beginning of these reasons and direct the principal registrar to refer the file for this proceeding to me as soon as possible after 27 September 2023 if any submissions on the award of costs have been made.

C Powles
Senior Member