

VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

OWNERS CORPORATIONS LIST

VCAT REFERENCE NO. OC1155/2021 &
OC1686/2021

CATCHWORDS

Application for fee recovery – cross application by lot owner - *Owners Corporations Act 2006 - ss 29, 32 & 153 - Victorian Civil and Administrative Tribunal Act 1998 – ss 109, 111, 109 & 115C - Vero Insurance Ltd v The Gombac Group Pty Ltd [2007] VSC 117.*

IN OC1155/2021

APPLICANT

Owners Corporation Plan NO. RP000865

RESPONDENT

Angela Elizabeth Kokke

IN OC1686/2021

APPLICANT

Angela Elizabeth Kokke

FIRST RESPONDENT

MBCM Strata Specialists Mentone RP000865

SECOND RESPONDENT

OWNERS CORPORATION PLAN NO.
RP000865

WHERE HELD

Melbourne

BEFORE

Acting Senior Member C. Powles

HEARING TYPE

Hearing

DATE OF HEARING

19 November 2021

DATE OF ORDER

19 November 2021

DATE OF REASONS

5 April 2023

CITATION

Owners Corporation Plan NO. RP00086 v
Kokke (Owners Corporations) [2023] VCAT
383

ORDER

OC1155/2021

1. The Tribunal orders that the respondent must pay to the applicant the sums of:
 - a. \$ 1,891.49 for levies and interest to the date of final fee notice (the date being 11 March 2021);
 - b. \$ 122.00 for interest from the date of final fee notice to the

c. \$ 550.00 date of hearing; and costs (including \$93.30 for reimbursement of fees paid by the applicant);

\$ **2,563.49. TOTAL.**

OC1686/2021

1. The application is dismissed.
2. The applicant must pay the respondent costs in the sum of \$3,500.00.

C. Powles
Member

APPEARANCES:

IN OC1155/2021

For Applicant	Ms T Heilbrunn, solicitor
For Respondent	In person

IN OC1686/2021

For Applicant	In person
For First and Second Respondents	Ms T Heilbrunn, solicitor

REASONS

3. On 31 May 2021, **Owners Corporation** Plan No. RP000865 lodged an application with the Tribunal (**OC1155/2021**), seeking to recover fees the Owners Corporation claimed were owed to it by a **lot owner**, Ms Angela Kokke.
4. On 8 August 2022, the lot owner lodged an application with the Tribunal (**OC1686/2021**) against the Owners Corporation seeking orders for payment of damages, for damage to the common property to be repaired and for the appointment of the **manager** of the Owners Corporation to be revoked.
5. After the various interlocutory orders were made, I heard the two applications by teleconference on 19 November 2021.
6. At the conclusion of the hearing, I made orders for the payment of fees by the lot owner to the Owners Corporation and dismissing the lot owner's application against the Owners Corporation in the terms set out above.
7. I provided oral reasons for the orders I made. After I had done so, but before the conclusion of the hearing, the respondent requested written reasons to be provided.
8. I also gave the Owners Corporation an opportunity to make a written submission on costs in relation to the lot owner's application and for the lot owner to provide any submission on costs in response.
9. The Owners Corporation made a written submission on costs by email received 3 December 2021.
10. The lot owner made written submissions in reply by emails received 3, 5, 6 & 7 December 2021.
11. Completion of these written reasons and the order as to costs has been delayed by the effects of the Covid 19 pandemic and other pressures within the Tribunal. I apologise to the parties for the delay.
12. These reasons reflect the reasons given orally at the hearing, with some additional background, and editing, to improve readability and clarity.

OC1155/2021

13. The Owners Corporation sought recovery of fees owed by the lot owner to the Owners Corporation in relation to her **lot**, and interest on those fees, as set out in the final **fee notice** dated 11 March 2021¹ sent to the lot owner by the Owners Corporation in accordance with section 32 of the *Owners Corporations Act 2006*² and the Owners Corporation's "Summary of Proofs" statutory declaration dated 11 July 2021.

¹ Due to a clerical error, the orders made on 19 November 2021 stated that the date of the final fee notice was 5 July 2021. The orders made with these reasons include an amendment to the orders made 19 November 2021 under s 119 of the *Victorian Civil and Administrative Tribunal Act 1998* to correct the date of the final fee notice.

² References to sections in these reasons are references to sections of the Act, unless otherwise stated.

14. The lot owner claimed that the fee notice was not properly given to her because it was sent to the address of the lot and not to the address which she had advised the Owners Corporation was her current address.
15. The Tribunal was not satisfied this was the case. The Tribunal was satisfied that the most recent address provided by the lot owner for the purposes of the giving of fee notices was the address in the Owners Corporation register, being the address of the lot. The Tribunal was not satisfied that the lot owner provided any updated address to the Owners Corporation or its manager for the purposes of the giving of fee notices.
16. The lot owner also claimed that the Owners Corporation could not bring the fee recovery proceedings because the grievance and dispute resolution procedures of the Owners Corporation had not been followed by the Owners Corporation before bringing the fee recovery proceedings.
17. The Tribunal rejected this claim because the grievance and dispute resolution process referred to by the lot owner, as set out in Part 10 of the Act, relate to the resolution of complaints about a breach by an occupier or owner of a lot or an owners corporation manager of the Act, *Owners Corporations Regulations 2018* or the rules of the owners corporation. It is not a process that prevents an owners corporation from undertaking fee recovery proceedings at VCAT.³ Fee recovery proceedings are independent from the kind of proceeding that may be affected by the grievance and dispute resolution procedures set out in the Act.
18. Accordingly, the fee notice was correctly given to the lot owner at the address of the lot.
19. The Tribunal was satisfied that the amounts set out in the fee notice for which payment was sought were amounts:
 - a. recoverable for the standard charging of owners corporation fees in accordance with a lot liability as approved by resolution at annual general meetings of the Owners Corporation for the Owners Corporation budget to be met; and
 - b. for interest on arrears that the Owners Corporation was entitled to charge under s 29 as authorised by resolution at a general meeting of the Owners Corporation.
20. There were no other special levies or penalty amounts for which payment was being sought.
21. Accordingly, the Tribunal was satisfied that the Owners Corporation was entitled to recover the amounts sought, being **\$1891.49**.
22. The Tribunal was also satisfied that the Owners Corporation was entitled to recover an amount for interest on the fees owed from the date of the fee

³ While this provision was not in force at the time of the decision made in this proceeding, the Tribunal notes that the current version of the Act includes an express provision at s 153(1A) that the complaints process set out at Part 10 does not apply to the recovery of fees owing to an owners corporation.

notices until the date of hearing, correctly calculated by the Owners Corporation as the sum of **\$122.00**.

23. Having considered the factors set out in sections 109(3) and 115C(2) of the *Victorian Civil and Administrative Tribunal Act 1998* (the **VCAT Act**) in relation to OC1155/2021, being an application by an owners corporation against lot owner seeking recovery of unpaid fees, the Tribunal was satisfied it was fair in all of the relevant circumstances⁴ to order that the lot owner pay the Owners Corporation's costs of that proceeding in the sum of **\$550.00**, inclusive of reimbursement of the application fee of \$93.30.⁵
24. Accordingly, the Tribunal ordered that the lot owner must pay the Owners Corporation the total of the above three sums, being **\$2,563.49**.

OC1686/2021

25. The lot owner's application against the Owners Corporation included an application seeking payment of damages by the manager to the lot owner.
26. That part of the lot owner's application was dismissed because there is no contractual agreement between the lot owner and the manager. The manager's contract of appointment is a contract between an owners corporation and its manager. Accordingly, there is no basis on which a lot owner can seek compensation or damages for breach of the contract between an owners corporation and its manager.
27. Further, the manager acts as agent of the owners corporation and the conduct of the manager is therefore deemed conduct of the owners corporation unless it can be shown the manager was acting without authority of the owners corporation.
28. Accordingly, the Tribunal considered the matters raised by the lot owner in her application as claims brought against the Owners Corporation for conduct of the manager acting as agent for the Owners Corporation and whether the conduct of the manager amounts to a breach of the duties owed by the Owners Corporation to its lot owners under the Act.
29. The lot owner claimed that she suffered financial loss as a result of the Owners Corporation not meeting their obligations under the Act in relation to its duty to maintain common property and its failure, through the manager, to properly respond to complaints or otherwise treat the lot owner accordance with its duties under the Act.
30. In particular, the lot owner claimed flooring in the lot suffered water damage as a result of the owners corporation failing to maintain, as part of the

⁴ See *Vero Insurance Ltd v The Gombac Group Pty Ltd* [2007] VSC 117, [20] & [22].

⁵ Due to a clerical error, the orders made on 19 November 2021 stated that the application fee was \$315.60. The orders made with these reasons include an amendment to the orders made 19 November 2021 under s 119 of the *Victorian Civil and Administrative Tribunal Act 1998* to correct the amount of the application fee.

common property, pipes through which storm water would flow and the guttering and eaves around the lot and related lots.

31. The Tribunal considered all the evidence submitted and was satisfied that:
 - a. there was **work** to be done on the pipes, guttering and eaves around the lot, all being common property which the Owners Corporation had an obligation to maintain;
 - b. the need for the work was raised with the Owners Corporation by March 2019;
 - c. the works were completed by August 2019, as set out in the invoice submitted to the Owners Corporation by Roofline Roof Restoration Pty Ltd.
32. The lot owner submitted evidence:
 - a. of damage to the floor of her lot; and
 - b. that in November 2020 she had works done to restore and replace floorboards in her lot, which cost \$4,200.00.
33. The lot owner claimed that she should be paid this amount by the Owners Corporation because the damage to her floors were as a result of flooding caused by the Owners Corporation failing to undertake the work.
34. The Tribunal, in hearing applications of this sort, makes findings on the balance of probabilities; that is, whether something is more than likely than not to be the case.
35. In this case, the Tribunal was satisfied that by March 2019 the work was required to be done in order for the common property to be adequately maintained and that the work was not done until August 2019, particularly in relation to the guttering and the eaves.
36. The Tribunal was also satisfied that the lot owner undertook works to restore and replace floorboards in the lot in November 2020. The question then arose as to whether the works done in November 2020 were to repair damage to the lot as a result of flooding before the eaves, guttering and pipes on the common property were repaired in August 2019.
37. On balance, the Tribunal was unable to be satisfied that this is more likely than not to be the case.
38. Correspondence from the lot owner to the Owners Corporation submitted by the lot owner and the Owners Corporation in this proceeding included an email from the lot owner sent 26 May 2019, in which she stated:

... rain has only just begun and is set to continue all week. As you can see, this is coming in on my windows and the rain from the gutters already and its flooding the pathways so will be coming in my door also any time impacting my newly polished floors and potentially furniture and other contents ...

39. As the lot owner stated that her floors were newly polished, the Tribunal was satisfied that by 26 May 2019 there had not been any damage to the floors. The Tribunal found the works were done by August 2019 and there was no further correspondence that brought to the Tribunal's attention from the lot owner to the Owners Corporation between 26 May and August 2019 referring to damage to flooring caused by flooding.
40. Further, given the length of time between when the works were done in August 2019 and when the lot owner had her floorboards replaced in November 2020, the Tribunal was unable to be satisfied that the reason the floorboards were replaced were as a result of flood damage caused by flooding before August 2019.
41. The Tribunal found that if the lot had, in fact, been damaged by flooding before the repairs were done in August 2019, it was more likely than not that the lot owner would have communicated this to the Owners Corporation at the time and would have undertaken the repairs sooner than November 2020.
42. The lot owner submitted photographs that she had taken that she said were evidence of flood damage but was unable to tell the Tribunal when those photographs were taken.
43. In the context of the assessment above, the Tribunal considered it more likely than not that those photographs were taken some time after the works were completed by the Owners Corporation in August 2019.
44. Accordingly, the Tribunal was not satisfied that the lot owner is entitled to any compensation from the Owners Corporation for the costs of replacing her floorboards.
45. The lot owner referred to a number of other costs that she had incurred and that she was seeking recovery of other costs. However, she did not specify those amounts and just simply stated that they all add up. As a result, there was no utility for the Tribunal to go through any particular assessment of what the losses may have been because the lot owner had not particularized to those losses.
46. Accordingly, the Tribunal made no award on those grounds.
47. The lot owner also made a number of claims about the conduct of the manager and the Owners Corporation, which she claimed justified her being authorised⁶ to bring a proceeding for the ending of the Owners Corporation management contract.
48. Clearly, there had been a significant breakdown in communication between, on the one hand, the Owners Corporation, other lot owners and the manager and, on the other, the lot owner. The lot owner raised issues in relation to a back fence, leaking in the eaves and the stormwater pipe, a car park, a letterbox, a pathway and a sensor light. She claimed that there had been a lack of response to her complaints and that she had been treated rudely.

⁶ Under what was then s 163(1A) and is now s 169I.

49. Considering all the evidence before it, the Tribunal was satisfied that while there has clearly been a breakdown in the relationship between the Owners Corporation and the lot owner, there was sufficient evidence to find that:
 - a. the manager when dealing with the lot owner had done so on instructions from the Owners Corporation and its committee;
 - b. the decisions made by the Owners Corporation through its committee about when works were to be done on parts of the common property, including but not limited to the fences, the letterboxes and other matters, had been made in accordance with the Owners Corporation's obligations under the Act.
50. The Tribunal accepted that the letterboxes that form part of the common property clearly required maintenance, given that some of them were unable to be secured and it would appear to be basic requirement of a letterbox that it can be secured. However, an owners corporation is entitled to a certain amount of discretion about the prioritising of works to be done on the common property.
51. Accordingly, while the Tribunal found there was work needed to be done on the letterboxes, it was not satisfied that the failure of that work to yet be done was evidence of anything other than an owners corporation choosing to prioritise the order in which repair and maintenance works needed to be done.
52. In light of the above, the Tribunal was unable to be satisfied that there were sufficient grounds for authorising the lot owner to be appointed to bring proceedings on behalf of the Owners Corporation seeking to end the Owners Corporation's contract with the manager.⁷
53. Further, the Tribunal was satisfied there had been sufficient efforts made by the Owners Corporation, through the manager, to address the complaints of the lot owner.
54. In light of the above, the Tribunal was not satisfied that there were any grounds for finding that the Owners Corporation had failed to comply with its duties under the Act or any grounds for ending the owners Corporation's contract with the manager, or any basis for awarding damages to the lot owner for any other reason.
55. Accordingly, the application was dismissed.

Costs application in OC1686/2021

⁷ The Tribunal noted that the lot owner also made submissions in relation to the status of the individual representing the manager and the title that was being used by that individual. That had no relevance to the question of whether, as submitted by the lot owner, an owners corporation manager isn't a corporation under a contract, which in this case the Tribunal found it was.

56. Section 109 of the VCAT Act relevantly states:

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) only if satisfied that it is fair to do so, 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.

57. Unless the Tribunal finds that s 109(3) applies in a given matter, each party in the proceeding must bear its own costs in the proceeding.⁸ Should the matters stipulated under s 109(3) apply in a given proceeding, the Tribunal has the discretion – not an obligation – to order that a party pay all or a specified amount of the costs of the other party.

58. For the Tribunal to exercise its discretion and make any order for costs, the Tribunal must find that, in the circumstances, “it is fair to do so”. Sections 109(3)(a) to (e) are matters that the Tribunal considers in determining whether it is fair to award costs in any given situation.⁹

59. The Owners Corporation submits it is entitled to an award of costs under s 109. It submits it is fair for the Tribunal to make such an award because:

⁸ See s 109(1) of the VCAT Act.

⁹ See *Vero Insurance Ltd v The Gombac Group Pty Ltd* [2007] VSC 117 at [20] per Gillard J.

- a. the lot owner conducted the proceeding in a way that unnecessarily disadvantaged the Owners Corporation by:
 - i. including the manager as a party to the proceeding without proper authority to do so;
 - ii. providing voluminous documents in support of the submission that the manager ought to be removed; and
 - iii. providing documents in support of additional submissions that were not referred to in the original application or Points of Claim;
 - b. the lot owner's application had no tenable basis in law and so the relative strengths of the claims made by the parties weighed in favour of an award of costs;
 - c. the Tribunal should take into account another relevant factor, being that unnecessary legal costs expended by the Owners Corporation for which individual lot owners, as members of the Owners Corporation with no connection to the proceedings, will be required to pay.
60. The Owners Corporation submits an award of costs should be made to be assessed on a standard basis on the County Court Scale or, if the Tribunal decides to fix the amount of costs, in the sum of \$4,094.20.
61. As noted above, the lot owner made submissions in reply to the Owners Corporation's application for costs across several emails received by the Tribunal in December 2021. Those submissions attempted to readdress the matters considered by the Tribunal at hearing and did not substantively address the application for award of costs, beyond denying that any amount of costs should be awarded to the Owners Corporation because the lot owner did not accept the decision made by the Tribunal at hearing.
62. Having considered all the relevant factors under s 109(3), the Tribunal is satisfied that it is fair to order that the lot owner pay the Owners Corporation a fixed amount for costs incurred by the Owners Corporation in defending the application in this proceeding for the following reasons:
- a. while the lot owner has not been legally represented in this proceeding and so cannot be required to have prepared an application and participated in the hearing of that application in the same way a legally represented party would, the lot owner provided a range of documentation and made a wide range of allegations that were unnecessary and irrelevant to the matters in issue which the Tribunal is satisfied caused an unreasonably greater amount of work for the Owners Corporation in preparing its response than was necessary;
 - b. while the Tribunal found that works on the common property remained to be completed by the Owners Corporation, which might

otherwise be a basis for finding that it was reasonable for the lot owner to apply to the Tribunal for orders about the completion of those works, the Tribunal found the Owners Corporation had complied with its obligations under the Act when deciding the timing of the completion of those works made by the Owners Corporation;

- c. the lot owner sought compensation from the Owners Corporation for works done to flooring in the lot for which there was no basis whatsoever;
 - d. if the Owners Corporation is required to bear its own costs, those costs will be paid by other lot owners who are members of the Owners Corporation as part of their fees and levies to be paid to the Owners Corporation where those lot owners have had no involvement in and will receive no benefit from the outcome in this proceeding; and
 - e. the Tribunal is satisfied it is not fair for those other lot owners to have to pay those costs when it has only been the conduct of the applicant lot owner, by bringing this application and conducting it in the way that she has, that has led to those costs being incurred.
63. Section 111(a) of the VCAT Act allows the Tribunal to fix the amount of costs awarded itself. The Tribunal is satisfied it is appropriate to do so in the circumstances.
64. The Tribunal notes the Owners Corporation's submission that if the Tribunal chose to fix the amount of costs to be awarded, the amount should be \$4,094.20. The Owners Corporation does not explain how this figure is reached. In all of the circumstances, the Tribunal finds it is appropriate to fix the amount of costs to be paid by the lot owner to the Owners Corporation for costs incurred in this proceeding at \$3,500.00.
65. For the reasons set out above, the orders set out at the beginning of these reasons were and have been made.

C. Powles
Acting Senior Member