

**VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL**

**CIVIL DIVISION**

**OWNERS CORPORATIONS LIST**

VCAT REFERENCE NO. OC960/2017

**CATCHWORDS**

Owners corporation; appointment of manager; terms of manager's engagement; validity of manager's charges; extent of manager's authority

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|-------------------------|--|
| <b>FIRST APPLICANT</b>  | Janeen Renfree   |
| <b>SECOND APPLICANT</b> | Owners Corporation PS520443P   |
| <b>RESPONDENT</b>       | Walter E. Jones Valuers Pty Ltd ACN: 004 756 398                                 |
| <b>WHERE HELD</b>       | Melbourne  |
| <b>BEFORE</b>           | R Buchanan, Member   |
| <b>HEARING TYPE</b>     | Hearing  |
| <b>DATE OF HEARING</b>  | 18 July 2018   |
| <b>DATE OF ORDER</b>    | 18 July 2018   |
| <b>DATE OF REASONS</b>  | 30 October 2018  |
| <b>CITATION</b>         | Renfree v Walter E. Jones Valuers Pty Ltd (Owners Corporations) [2018] VCAT 1701 |

**ORDER**

The proceeding is dismissed

R. Buchanan  
**Member**

**APPEARANCES:**

For Applicants

Ms J. Renfree

For Respondent

Ms H. Birchall, director

## REASONS

- 1 This proceeding was brought by an owners corporation against its former manager. The two applicants in the proceeding are Janeen Renfree, a member of the owners corporation and Owners Corporation POS520443P. The respondent manager is Walter E. Jones Valuers Pty Ltd (“Walter Jones P/L”).
- 2 Prior to the hearing the Tribunal made orders limiting the issues in the proceeding to the following matters:
  - a Whether there was a valid contract of management between the second applicant [the owners corporation] and the respondent [the manager]?
  - b If there was a valid contract of management, what date was this contract terminated?
  - c On the Fee Notice issued to the first applicant [Ms Renfree], dated 16 February 2017, whether the charges for \$176 and \$525 are valid?
  - d What was the extent of the respondent’s authority to act on behalf of the Owners Corporation?
- 3 At the hearing the owners corporation was represented by Ms Renfree and the manager, Walter Jones P/L, was represented by a director, Helen Birchall. Both Ms Renfree and Ms Birchall gave evidence.

### **First issue for decision: Whether there was a valid contract of management between the second applicant and the respondent?**

- 4 The owners corporation has 11 members. Until August 2015 it was self-managed. On 22 September 2015 the owners corporation held its annual general meeting. One of the members, Cheryl McNamara, invited Ms Birchall to attend. Ms Birchall was a director of Walter Jones P/L, which carried on a business called Owners Corporation Management.
- 5 Ms Birchall spoke at the meeting, telling the members about the nature of the services offered by her company and the cost. Appointment of a manager had not been on the meeting agenda. The members voted to appoint Ms Birchall as manager and Ms McNamara provided her with all of the books and records of the owners corporation, which Ms Birchall took away with her.
- 6 From then on, Walter Jones P/L, through Ms Birchall, acted as the manager of the owners corporation, corresponding with the members on letterhead which made it clear that the entity managing the owners corporation was Walter Jones P/L.
- 7 The owners corporation did not sign a formal agreement with Walter Jones P/L. On 24 September 2015, two days after the annual general meeting at which Walter Jones P/L was appointed, Ms Birchall wrote to Ms

McNamara enclosing a copy of Walter Jones P/L's "standard Contract of Appointment" for signature.

- 8 On 28 July 2016 Ms Birchall wrote to Ms Renfree, the first applicant, advising that she would ask the members to approve a "Management authority" at the coming annual general meeting. When the annual general meeting was held, no such approval was given by the members. Subsequently no written agreement was ever executed by the owners corporation.
- 9 Legally binding agreements do not need to be in writing (unless they are contracts of guarantee or contract for sale of land). It is clear that Ms Birchall was appointed as the owners corporation's manager at the annual general meeting of the owners corporation on 22 September 2015. The minutes of the meeting make it plain that the members were voting about the appointment of Ms Birchall. The fact that the members gave Ms Birchall the books and records of the owners corporation to take away with her confirms that fact. That the question of appointing a manager was not on the meeting agenda does not invalidate the appointment.
- 10 On 22 September 2015 the members may not have understood that Ms Birchall represented a company, Walter Jones P/L, but it is well understood in Australia that the vast majority of businesses are conducted by corporate entities. After 22 September 2015 Ms Birchall dealt with the members, using Walter Jones P/L letterhead. It should have been obvious to the members that they were dealing with the company, rather than with Ms Birchall, alone. If the members did not wish to deal with a company, they could have raised objections with Ms Birchall. They did not do so and it is plain that the members accepted that their manager was the company, Walter Jones P/L, rather than the individual, Ms Birchall.
- 11 I find that Walter Jones P/L was validly appointed as the manager of the owners corporation on 22 September 2015.

**Second issue for decision: If there was a valid contract of management, what date was this contract terminated?**

- 12 In late 2016 the owners corporation conducted a ballot, which closed on 4 December 2016, on a resolution terminating its management agreement with Walter Jones P/L.
- 13 On 28 December 2016 the owners corporation wrote to Walter Jones P/L terminating the management agreement.
- 14 Walter Jones P/L argued that the ballot was invalid, on a number of grounds and continued to act as manager.
- 15 The owners corporation then held a special general meeting on 23 February 2017 where the members voted to terminate Walter Jones P/L's management agreement. Walter Jones P/L accepted that termination.

- 16 It appears probable that the ballot which closed on 4 December 2016 was valid. In any event, Walter Jones P/L continued to act as manager, only stopping after the termination resolution was passed at the special general meeting on 23 February 2017.
- 17 I took the owners corporation's position to be that Walter Jones P/L was not entitled to any remuneration after the ballot. The fact is that, between the ballot and the subsequent resolution, Walter Jones P/L continued to work for the benefit of the owners corporation. It would be inequitable for the owners corporation to receive the benefit of that work without payment. Indeed, Walter Jones P/L continued to do necessary work on behalf of the owners corporation after the resolution, until Walter Jones P/L handed over to the owners corporation's new manager.
- 18 Walter Jones P/L was entitled to payment for that work, on what the law calls a quantum meruit basis. In plain language, that means that Walter Jones P/L was entitled to be paid on a reasonable commercial basis. The owners corporation adduced no evidence about what a reasonable commercial basis might be. Walter Jones P/L charged for the work at the rate set out in the contract previously sent to Ms McNamara. Those rates appear to me to be reasonable and I find that in the period between the ballot and the handover, Walter Jones P/L was entitled to payment for its services at the rates for which it did in fact charge.

**On the Fee Notice issued to the first applicant, dated 16 February 2017, whether the charges for \$176 and \$525 are valid?**

- 19 Both of the charges in question were charges to Ms Renfree.
- 20 The charge of \$176 related to a handyman's charge in investigating the source of a water leak into Ms Renfree's lot, in May 2016. The manager had sent the handyman out after it received a request from Ms Renfree. The service had been charged by the handyman to the owners corporation and had been paid by the owners corporation. The service was only for the benefit of Ms Renfree's lot. The owners corporation was entitled to recover the handyman's charge from Ms Renfree. Ms Renfree expressed concern that the owners corporation may have been paid the \$176 by its insurer, after a claim was made on the owners corporation's insurance. She was, however, unable to provide any evidence that such was the case.
- 21 The charge of \$525 was the amount which Walter Jones P/L's reconciliation of the owners corporation's accounts showed to be outstanding by Ms Renfree, by way of the owners corporation's fees. Ms Renfree expressed doubts about the correctness of the reconciliation carried out by Walter Jones P/L but was unable to give any evidence to show a valid basis for those doubts.
- 22 In the absence of any evidence to the contrary from or on behalf of Ms Renfree, I find that the owners corporation's charges of \$176 and \$525 to Ms Renfree were valid.

**What was the extent of the respondent's authority to act on behalf of the owners corporation?**

- 23 At the hearing, it emerged that this question embraced a number of sub issues:
- a Was Walter Jones P/L authorised to take money from the owners corporation's account?
  - b Was Walter Jones P/L entitled to item remuneration for its services, or was it confined to the annual fee of \$132 per lot advised to the members at the annual general meeting on 22 September 2015? If Walter Jones P/L was not entitled to item remuneration, how much should it repay to the owners corporation?
  - c Was Walter Jones P/L authorised to institute fee recovering proceedings against members?
  - d Whether certain charges made by Walter Jones P/L were valid.

(a) Was Walter Jones P/L authorised to take money from the owners corporation's account?

- 24 I find that Walter Jones P/L was authorised to take money from the owners corporation's account. Although no express authority was given, the functions discharged by an owners corporation manager are inextricably linked to the payment out of an owners corporation's funds to the owners corporation's creditors.
- 25 At a bare minimum, the owners corporation was under a statutory obligation to buy insurance for the common property. Arranging such insurance is an essential and unavoidable part of the duties of any manager. In addition, there are usually gardeners and tradespeople to be paid. While Walter Jones P/L did not have an express authority to take money from the owners corporation's account, such authority was clearly implied from the nature of the task undertaken by Walter Jones P/L.

(b) Was Walter Jones P/L entitled to item remuneration for its services, or was it confined to the annual fee of \$132 per lot advised to the members at the annual general meeting on 22 September 2015?

- 26 Ms Birchall gave evidence that the owners corporation had first approached her through Ms McNamara. She said that she understood that the books and records of the owners corporation had been "dumped" with Ms McNamara, upon the departure of Marilyn Nichol - the member who had previously acted as an informal manager of the owners corporation.
- 27 Ms Birchall said that she had advised Ms McNamara about the process for appointing a manager and on 7 September 2015 had written to Ms McNamara enclosing 11 copies of a "summary of service for Owners Corporation Management", as well as a pro forma of the Walter Jones P/L standard management authority and its "current scale of fees for provision of varying services". Ms Birchall tendered a copy of that letter in evidence.

- 28 The tendered copy letter of 7 September 2015 to Ms McNamara set out with great clarity that it would charge on an item basis for work done and precisely what those charges would be.
- 29 Ms Birchall gave evidence that, at the annual general meeting on 22 September 2015 at which Walter Jones P/L was appointed as manager, she would have said that, in addition to the base fee of \$132 per member, Walter Jones P/L would charge for extra work on an item basis. She was frank in her evidence, in that she said she had no specific memory of having said as much, but said that she was confident that she had done so, because it was her practice to do so when addressing new owners corporations. In the case of the present owners corporation, she said that the need for work covered by item remuneration would have been obvious to her; the owners corporation was, in her words, “in disarray”, with concerns about misappropriation of funds and without a committee.
- 30 After Walter Jones P/L’s appointment on 22 September 2015, Ms Birchall wrote to Ms McNamara, on 24 September 2015, enclosing a copy of Walter Jones P/L’s “standard Contract of Appointment for signature. Same is based on pro forma attached to our quote for management services previously provided to you.”
- 31 [The owners corporation argued that the copy of the 7 September 2015 letter tendered by Ms Birchall was not genuine. I need make no finding about that matter; it is plain from the letter of 22 September 2015, which referred to Ms Birchall’s having previously sent a pro forma of the contract of appointment to Ms McNamara, that Ms Birchall had previously sent the contract terms to Ms McNamara.]
- 32 The owners corporation claimed that Ms McNamara had not brought either of the two letters to the attention of the rest of the members and claimed that, therefore, the owners corporation was not bound by their terms, particularly the terms in relation to item remuneration. Walter Jones P/L should, the owners corporation argued, be limited to charging \$132 per member for all of the services provided by Walter Jones P/L to the owners corporation while Walter Jones P/L acted as the owners corporation’s manager.
- 33 I do not agree. Ms Birchall had sent two letters to Ms McNamara, the member whom she saw, understandably, to be acting on behalf of the owners corporation. (Ms McNamara had contacted Ms Birchall about acting as the owners corporation’s manager, had invited Ms Birchall to attend the owners corporation’s annual general meeting and had told Ms Birchall that she, Ms McNamara, was holding the owners corporation’s books and records.) Ms Birchall was entitled to assume that her letter and its enclosures had been distributed to the owners corporation’s members.
- 34 It may be that, in fact, Ms McNamara failed to bring either of the two letters to the attention of the rest of the members. But in communicating with Ms McNamara, Ms Birchall was entitled to believe that she was dealing with

someone who represented the owners corporation. Subsequently, Walter Jones P/L, through Ms Birchall, acted in reliance on that belief. Among other things, it brought fee recovery proceedings in this Tribunal on behalf of the owners corporation and carried out a reconciliation of eight years of the owners corporation's accounts – on which reconciliation the owners corporation was able to make a successful claim against its fidelity insurer, relating to defalcations by the owners corporation's previous, informal manager. It should have been obvious to the members of the owners corporation that the cost of the substantial work being carried out by Walter Jones P/L could never have been covered by the small, \$132 per member fee mentioned at the annual general meeting, when Walter Jones P/L was appointed.

- 35 I find that the owners corporation appointed Walter Jones P/L to act after Walter Jones P/L had disclosed to the owners corporation that it would charge on an item basis for tasks over and above the basic tasks covered by the annual fee of \$132 per member and which were described by Ms Birchall at the annual general meeting on 22 September 2015. I find also that Walter Jones P/L was entitled to item remuneration for its services over and above the annual fee of \$132 per member advised to the members at the annual general meeting of the owners corporation on 22 September 2015.

(c) Was Walter Jones P/L authorised to institute fee recovering proceedings against members?

- 36 Ms Birchall's evidence, which was not contested, was that after she had completed the reconciliation of 8 years of the owners corporation's accounts, at the annual general meeting on 20 April 2016 the members had resolved that the manager was authorised to proceed with VCAT fee recovery proceedings.
- 37 Ms Renfree complained that Walter Jones P/L had begun recovery proceedings against one of the members before the meeting on 20 April 2016. Perhaps. But it is clear that the resolution on 20 April 2016 retrospectively authorised the taking of that proceeding. In simple terms, the members told the manager that they wanted the manager to sue defaulting members to recover outstanding fees.
- 38 Ms Renfree said that the members had believed that they were only authorising limited action, such as letters, not the institution of proceedings. Yet the minutes, which were made available to all of the members, and were tendered in evidence, made it absolutely clear that in fact they were authorising the institution of recovery proceedings. "Manager authorised to proceed with VCAT applications at any time necessary." It is not now open to Ms Renfree to suggest that the members are entitled to believe otherwise.
- 39 I therefore find that Walter Jones P/L was authorised to bring the fee recovery proceedings against members which it in fact brought.

(d) Whether certain charges made by Walter Jones P/L were valid

40 The owners corporation queried a large number of charges made by Walter Jones P/L. The owners corporation did not adduce any evidence to show that any of the charges which it questioned was not valid.

**Conclusion**

41 The questions for decision in this proceeding really amount, in broad terms, to a complaint by the owners corporation that Walter Jones P/L had acted without authority, had levied charges and had received payment to which it was not entitled. It is clear from the findings which I have made that I have found nothing which upholds that complaint. Accordingly, the proceeding is dismissed.

R. Buchanan  
**Member**