

Case Updates - Rules

TISHIER LINER FC LAW

Owners Corporation PS341151A v Gilmore (Owners Corporations) [2021] VCAT 394 (1 April 2021)

Facts:

- This case concerns a subdivision in one of Melbourne's leafy suburbs.
- 6 Apartments (which face a busy road)
- Behind the apartments was half an acre of gardens, with a pool, a run down to the Yarra River and a pair of boating jetties - all common property of the subdivision's owners corporation.
- The only way to pass through to the common property gardens at the rear is to pass through the building or through the garages.
- Lot 14 was built without a back wall so that, with the street door of the double garage open, one could drive through lot 14 (if the garage were empty) and into the garden.
- The developers included a rule in the owners corporation's rules, requiring the owner of Lot 14 **to allow the owners corporation access for maintaining the garden and pool**. The developers did not, however, choose to burden lot 14 with an access easement in favour of the owners corporation.
- In 2017, a new Lot owner purchased Lots 2, 14 and 15.
- From October 2018, Lot 14 have denied the owners corporation access through the lot.
- Lot owner commenced renovations to Lots 2.
- The OC issued proceedings, seeking an injunction and requiring the Lot owner to comply with the access rule.
- Injunction was denied in 2019.
- Lot owner filed a counterclaim, seeking a declaration that rule 52(a) was invalid and void.

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Owners Corporation PS341151A v Gilmore (Owners Corporations) [2021] VCAT 394 (1 April 2021)

Issue:

1. Was rule 52(a) valid?

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IS THE 52(a) ACCESS RULE VALID?

Power to make rules

- Section 138(1) of the OC Act - by special resolution, an owners corporation may make rules for or with respect to any matter set out in **Schedule 1**.
- Section 138(3) of the OC Act - A rule must be for the purpose of the control, management, administration, use or enjoyment of the common property or of a lot.

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Schedule 1-Power to make rules of owners corporation

1.1. Section 138(1) of the OC Act - by special resolution, an owners corporation may make rules for or with respect to any matter set out in Schedule 1.

1.2. Section 138(3) of the OC Act - A rule must be for the purpose of the control, management, administration, use or enjoyment of the common property or of a lot.

The scope of the rule making power conferred on OCs by section 138 of the Act was the subject of a decision of Rordan J in the Supreme Court of Victoria, Owners Corporation PS501391P v Balcombe [2016] VSC 384 ("Balcombe").

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Per Balcombe:

"The proper approach to the determination of the validity of subordinate legislation" as follows:

(a) First, it is necessary to determine the statutory object to be served by, and the true nature and purpose (the Statutory Purpose) of the power to make regulations. The relevant inquiry as to the Statutory Purpose of the power is considered by reference to the scope object and subject matter of the empowering Act.

(b) Secondly, it is necessary to characterise the impugned regulation by reference to the circumstances in which it applies, in particular its operation and effect. The evidence of the circumstances in which the regulation will operate will enable the court to form a view about the nature and apparent purpose of the regulation; and the existence and dimensions of the actual or threatened mischief sought to be addressed by the impugned regulation.

(c) Thirdly, once armed with knowledge of these facts, the court then makes its own assessment of:

(i) whether the connection between the likely operation of the regulation and the Statutory Purpose of the power is sufficiently direct and substantial; or

(ii) whether the regulation could not reasonably have been adopted as a means of attaining the Statutory Purpose, in which case it will be so lacking in reasonable proportionality as not to be a real exercise of the power.

In the latter case the regulation will be invalid, not because it is inexpedient or misguided, but because it is not a real exercise of the power.

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Per Balcombe - Riordan J:

The question of whether there is sufficient connection between the Statutory Purpose and the impugned regulation necessarily involves **questions of degree and judgement**. However, the validity of the impugned regulation is a **question of law** and the appellate **court must determine for itself the sufficiency of the connection**.

Back to the present case...

- the **purpose of the rule** is different from the **purpose of the owners corporation in acquiring the right of access** by means of the rule
- Held:** does not have a sufficiently direct and substantial connection between the likely operation of the rule and the statutory purpose under **Schedule 1**

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IS THE RULE DISCRIMINATORY?

Section 140 of the OC Act:

A rule of an owners corporation is of no effect if it—

- unfairly discriminates against a lot owner or an occupier of a lot; or
- is inconsistent with or limits a right or avoids an obligation under—
 - this Act; or
 - the **Subdivision Act 1988**; or
 - the regulations under this Act; or
 - the regulations under the **Subdivision Act 1988**; or
 - any other Act or regulation.

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- Held:**
 - Rule 52(a) does discriminate against the lot owner.
- There are at least 2 practical ways in which the OC can access the rear common property.
- Under Rule 52(a), the OC unfairly chooses to impose heavy burdens on the lot owner alone, where it could easily use another option which would impose, at most, very slight burdens on other lot owners.
- Member Buchanan held, in the alternative: if Rule 52(a) was **not beyond power** and **invalid**, in the alternative, that the rule unfairly discriminates against the lot owner and would be of no effect.

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Case Updates – Keeping of OC records



TISHER LINER FC LAW

Owners Corporation PS 419696X v Goh (Owners Corporations) [2021] VCAT 573 (1 June 2021)

Facts:

- This case concerns an application made by the Respondents for discovery.
- The OC has discovered 17 separate sets of minutes of meetings held on 15 January 2019, 3 February 2019 and 5 September 2019. Each of those meetings are recorded as having been held by email. The Respondents also sought orders that the OC discover the emails that constituted the meetings conducted through email regarding the raising of a Special Levy in 2019. (**"Category 1 Documents"**)
- The OC had purportedly entered into deeds of indemnity with each of the second, third and fourth applicants in the proceeding.
- The Respondents sought orders that the OC discover the emails and/or correspondence exchanged between members of the OC committee approving the entry into each deed, and minutes of any meeting of the applicant approving entry into the deed. (**"Category 2 Documents"**)
- The production of these documents was relevant to the Respondents' allegation in their counterclaim that the applicant is being conducted in a dysfunctional manner.
- The OC has refused to discover those emails on the basis that the emails do not form part of the records of the applicant.
- The OC has not asserted that it is not in possession of the emails (which of course, it must be given the production of minutes of meeting constituted by those very emails).

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Case Updates – Keeping of OC records



TISHER LINER FC LAW

Owners Corporation PS 419696X v Goh (Owners Corporations) [2021] VCAT 573 (1 June 2021)

Issues:

- Principles of Discovery
- What constitutes the "Keeping of Records" under section 144 of the OC Act?

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Case Updates – Keeping of OC records



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Owners Corporation PS 419696X v Goh (Owners Corporations) [2021] VCAT 573 (1 June 2021)

OCs arguments:

- It was a "fishing exercise"
- The emails are not the property of the Owners Corporation, but are the property of the individual committee members, and do not form part of the records of the Owners Corporation.
- Internal discussions as between members of the committee of the Owners Corporation cannot be relevant to the objective determination as to whether or not the alleged Special Levies and alleged Special Further Levies are due and owing in accordance with, inter alia, s24(2) of the Owners Corporations Act 2006.
- The OC submits that the documents sought "are not in any way relevant to an issue in dispute as defined by the pleadings", and are not documents of the OC.

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Case Updates – Keeping of OC records



Owners Corporation PS 419696X v Goh (Owners Corporations) [2021] VCAT 573
(1 June 2021)... see paragraphs [19] to [23].

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What does the law say on discovery & how does it apply in the context of VCAT?

The established approach to discovery in civil proceedings in the High Court is that all documents that relate to the matters in question in the proceeding are discoverable. This is often referred to as the "train of enquiry test" or "Peruvian Guano test", in reference to the comments of Lord LJ in *Compagnie Financière et Commerciale du Pacifique v Peruvian Guano Co* (Peruvian Guano), where he said:

"every document relates to the matters in question in the action... which, it is reasonable to suppose, contains information which may – not which must – either directly or indirectly – enable the party requiring the affidavit either to advance his own case or to damage the case of his adversary."

- When the Tribunal adopts the more formal approach of requiring pleadings, the general procedural rules that apply in the courts should be followed (see *Cobaw Community Health Services Ltd v Chastan Community Health Centre Ltd* [2010] VCAT 103 at [24]).
- The Tribunal is bound by the rules of natural justice, and obliged to ensure that all parties have a fair hearing.
- The Tribunal must also allow a party a reasonable opportunity to call or give evidence, question witnesses and to make submissions to the Tribunal.
- It is an essential requirement of a fair hearing that each party be given a reasonable opportunity of presenting its case, and of knowing the case it must meet before the hearing commences.
- The Tribunal is also required to ensure that proceedings are conducted with as little formality and technicality, and determine each proceeding with as much speed, as the requirements of the relevant legislation, and a proper consideration of the matters before it permit.
- To that end, it is appropriate that orders for discovery, if required, should be focussed on documents that are directly relevant to the issues in dispute in the proceeding.

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Case Updates – Keeping of OC records



Owners Corporation PS 419696X v Goh (Owners Corporations) [2021] VCAT 573
(1 June 2021)

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What does OC Act say?

Section 144 of the OC Act prescribes the records that must be kept by an owners corporation, for the purposes of the OC Act. Section 144 states:

- Section 144 of the OC Act states that an owners corporation must keep the following records:
- (a) the full names and addresses of each of the owners;
 - (b) a consolidated copy of each of the:
 - (i) minutes of meetings;
 - (ii) copies of resolutions;
 - (iii) records of the transfer of title;
 - (c) leases;
 - (d) zoning papers or notices;
 - (e) correspondence;
 - (f) accounting records;
 - (g) records of assets and liabilities;
 - (h) financial statements;
 - (i) records (as records of the owners corporation and not records of any:
 - (i) insurance policies;
 - (ii) maintenance plans;
 - (j) notices and orders issued on the owners corporation by a court or tribunal or order in law;
 - (k) notices served by the owners corporation, including notices under Part 10;
 - (l) contracts and agreements entered into by the owners corporation;
 - (m) names and branches of the owners corporation;
 - (n) names and branches of the owners corporation.

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Case Updates – Keeping of OC records



Owners Corporation PS 419696X v Goh (Owners Corporations) [2021] VCAT 573 (1 June 2021)

Per Member Johnson:

[40.] "I consider that, if such a meeting were to be validly conducted by email, the emails exchanged between committee members at such a meeting, to the extent that they contain the record of the resolutions passed and a record of voting at the meeting, would be records of the owners corporation.

It follows, therefore, that to the extent that the emails sought within this category contain the record of resolutions passed and the record of voting at the meeting, they are documents "of the OC" and are documents that the OC is able to call for, and therefore, within their control for the purposes of discovery."

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Case Updates – Cross Application – Removal vs Extension of Administrator



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Scotia Property Maintenance Pty Ltd v Owners Corporation Plan No. PS316440K (Owners Corporations) [2021] VCAT 123 (17 February 2021)



The core issues in dispute in the Removal Application and the Extension Application are addressed by the following questions:

- Should Mr Evans be removed as the administrator?
- If Mr Evans ought not to be removed, should Mr Evans' appointment be extended to 31 October 2021?
- If Mr Evans ought to be removed, should he be replaced by Mr Twellston and if so, what should be the terms of Mr Twellston's appointment?

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Case Updates – Cross Application – Removal vs Extension of Administrator



Scotia Property Maintenance Pty Ltd v Owners Corporation Plan No. PS316440K (Owners Corporations) [2021] VCAT 123 (17 February 2021)

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What does the law say?

Under section 173 of the OC Act:

- An owners corporation, a lot owner, a creditor of an owners corporation or any person with an interest in land affected by an owners corporation may apply to VCAT for the appointment of an administrator for the owners corporation.

Under section 174 of the OC Act:

- On an application under section 173, VCAT may—
 - (a) appoint an administrator and set down terms and conditions of the appointment; or
 - (b) make any other order it thinks fit.

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Case Updates – Cross Application – Removal vs Extension of Administrator



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Scotia Property Maintenance Pty Ltd v Owners Corporation Plan No. PS316440K (Owners Corporations) [2021] VCAT 123 (17 February 2021)

Powers & Responsibilities of an Administrator

Under section 176 of the OC Act:

An administrator

- (a) must lodge with the Registrar a copy of the order of appointment without delay;
- (b) may proceed to alter a plan relating to land affected by the owners corporation in any of the ways set out in section 32 of the Subdivision Act 1988 only in accordance with an order of VCAT or a court order;
- (c) subject to any order of VCAT or court order, may do anything that the owners corporation or the committee can do;
- (d) may delegate in writing any power.

Under section 177 of the OC Act:

An administrator in carrying out any functions and powers conferred by or under this Act or the Subdivision Act 1988 —

- (a) must act honestly and in good faith; and
- (b) must exercise due care and diligence.

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Case Updates – Cross Application – Removal vs Extension of Administrator

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Scotia Property Maintenance Pty Ltd v Owners Corporation Plan No. PS316440K (Owners Corporations) [2021]
VCAT 123 (17 February 2021)

Held:

- The application for the extension of the current administrator is dismissed.
- Pursuant to section 174 of the Owners Corporations Act 2006 (Vic)(OCA):
 - Mr Robert Evans' appointment as the administrator is to cease on 25 February 2021.
 - Mr Matthew Twissell is appointed as the administrator of the OC as of 26 February 2021 until 25 February 2022 or as otherwise ordered by the Tribunal.

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Questions

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