VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

OWNERS CORPORATIONS LIST VCAT REFERENCE NO. OC840/2018

CATCHWORDS

Dysfunctional owners corporation; appointment of administrator; allegation of breaches of the Model Rules; claim for rectification of damage to the common property as a consequence of the breach of the Model Rules.

APPLICANT	Alexander Borik
FIRST RESPONDENT	Owners Corporation RP001439
SECOND RESPONDENT	Sean William Cussell
WHERE HELD	55 King Street, Melbourne
BEFORE	Member B. Ussher
HEARING TYPE	Hearing
DATE OF HEARING	5 September 2019
DATE OF ORDER	5 September 2019
DATE OF REASONS	29 October 2019
CITATION	Borik v Owners Corporation RP001439 (Owners Corporations) [2019] VCAT 1459

ORDERS

The Tribunal finds that:

1 The Second Respondent, Sean Cussell, breached Rule 3.1 of the Model Rules of the Owners Corporation, in that in 2016 he stored personal items in the common property storage room without the approval of the Owners Corporation.

2 The Second Respondent, Sean Cussell, breached Rule 3.3 of the Model Rules of the Owners Corporation in that:

a in or about October 2016 he caused four pittosporum trees to be removed from the common area of the property without the written approval of the Owners Corporation; and

b in or about November 2016 he caused a condenser to an air-conditioner to be installed on common property without the prior written approval of the Owners Corporation; and

c in or about November 2016, he altered the colour of the entrance door to his apartment, which is common property, without the written approval of the Owners Corporation.

The Tribunal orders and directs that:

1 The Second Respondent, Sean Cussell, is directed to arrange for a key to the common property storage room to be provided to the Applicant as soon as practicable.

2 The question of whether any, and if so what, rectification of the colour scheme to the front doors of the apartments of the lot owners is referred to the administrator of the Owners Corporation to determine.

3 Costs of the proceeding are reserved subject to the orders below.

4 Any application for costs must be applied for in writing by 28 November 2019. Should any such application be made, the registrar is requested to list the application for hearing before Member Ussher. The party making the cost application is to file with the Tribunal and serve on all opposite parties a written submission, setting out in point form why the Tribunal should depart from the prima facie rule set out in s. 109(1) of the *Victorian Civil & Administrative Tribunal Act 1998*.

5 If no application for costs is received by 28 November 2019, there shall be no order for costs.

6 The proceeding is otherwise dismissed.

B. Ussher
Member

APPEARANCES:

For the Applicant	Mr D. Triaca of counsel
For the Respondents	Ms C. M. Symons of counsel

REASONS

1 The Applicant to this proceeding, Mr Alexander Borik seeks the following relief:

a an order appointing Mr Musumeci of L.R. Reed City as administrator of the Owners Corporation for a period of 12 months, with liberty to apply for a further extension of that appointment;

b an order that the Second Respondent, Mr Sean Cussell, cease and desist from contravening the Model Rules of the Owners Corporation;

c an order that Mr Cussell rectify damage to the common property caused as a result of his breaches of the Model Rules; and

d costs.

The Property

2 The subject property is a four-unit subdivision, comprising four lots (Units 1-4), four accessory (car park) lots (lots 5-8) and common property.

The Parties

3 The Applicant, Mr Borik, is the registered proprietor of lots 2 and 3 and accessory lots 6 and 7. Lot 1 and accessory lot 5 are owned by Mrs J. Power. Lot 4 and accessory lot 8 are owned by the Second Respondent, Mr Sean Cussell.

4 The lot liability and the entitlement of the members of the Owners Corporation is as follows:

• Mrs J. Power	59;
• Mr A. Borik	112;
• Mr S. Cussell	53
TOTAL	**224**

5 The configuration of the entitlements and liabilities of the plan of subdivision means that the Applicant, Mr Borik, holds exactly 50% of the lot entitlements, as do Mrs Power and Mr Cussell, when their holdings are combined. This has resulted in a voting deadlock between the lot holders.

6 All parties to the proceeding now recognise that the situation has become unworkable. By orders made by Senior Member Smithers on 26 June 2019, it was noted that the application for the appointment of an administrator would be a joint application, with the parties being in substantial agreement with respect to the need for the appointment of an administrator but disagreeing as to who should be appointed.

Appointment of Administrator

7 The *Owners Corporations Act 2006* (the ***OCA***), section 174 empowers the Tribunal, on the application of, inter alia, a lot owner, to appoint an administrator for the owners corporation. The administrator, in turn, is empowered to do anything that the owners corporation or the committee can do, subject only to any restrictions imposed on the administrator by the Tribunal or by Court order.[1]

8 While there is no criteria set out in the *OCA* for the appointment of an administrator, the Supreme Court held in *McKinnon v Adams*[2], that the owners corporation must be affected by some incapacity, or be acting so dysfunctionally, that services to lot owners are affected. The Supreme Court held that:

> To justify the appointment of an administrator, the body corporate concerned must be affected by some incapacity, or must be acting so dysfunctionally as to render the provision of the appropriate services to unit holders and/or care of the common property either non-existent, or so beset by difficulties as to render the body corporate unable to function at what the Court considers to be a satisfactory level.

9 Whether an owners corporation is dysfunctional or is incapacitated is a question of fact and each case must be determined on its own set of circumstances. In this instance, there is ample evidence that the owners corporation is unable to function at a satisfactory level. The voting power of the Applicant is equal to the voting power of the other unit holders. If Mr Borik does not support a motion put at a meeting, it cannot be passed. The converse is true. If Mr Cussell and Mrs Power vote against a motion, there can be no resolution.

10 There are numerous examples of the owners corporation being beset by such paralysis. I note, for example, that at both the 2017 and 2018 Annual General Meetings the members were unable to appoint a chairman to the committee. The vote being equally divided between two nominees, Mrs Power and Mr Borik.[3]

11 This form of deadlock has been held by the Tribunal to meet the requisite level of dysfunction to require the appointment of an administrator.[4]

12 The parties to this proceeding acknowledge the need for the appointment of an administrator and, to once more emphasise the functional paralysis of the owners' corporation, have been unable to agree on who should be appointed.

13 At the hearing, counsel for the Applicant made these submissions:

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1 *OC Act* s. 176(c)
2 [2003] VSC 116 at [20] per Bongiorno J
3 See Affidavit of Terence Perera, sworn 14 December 2018, paragraph 23
4 *Gleeson & Ors v Adams & Anor* [2011] VCAT 2012, per Senior Member Vassie

- The Applicant had always sought to appoint Mr Musumeci of L. R. Reed City, as administrator. The Respondents resisted this application and only came to accept the need for the appointment of an administrator in June 2019. Accordingly, all things being equal, and as the Applicant's view has finally prevailed, the Applicant's nominee should be appointed; and
- No sensible argument had been advanced by the Respondents as to why Mr Musumeci should not be appointed. The Respondents were simply disinclined to agree to Mr Musumeci's appointment for no other reason other than he was the Applicant's nominee.

14 Counsel for the Second Respondent conceded that there was a strong element of distrust which continued to divide the members. She did not suggest that Mr Musumeci was in any way disqualified from fulfilling the role but suggested that perceptions were important in terms of rebuilding trust between the respective members.

15 All parties finally agreed that the respective nominees had similar qualifications and experience and nothing really set them apart from each other. The parties also agreed, during the hearing, that Ms Kate Yeowart's management fees were a little more competitive than the other nominees. On that basis, I determined that Ms Yeowart be appointed as administrator and I made final orders to that effect on the day of the hearing. The only remaining matter, is the relief sought against the Second Respondent, Mr Sean Cussell.

The Breach of Rules

16 The Applicant contended that Mr Sean Cussell had breached the following model rules:

- Rule 3.1 – Use of common property;[5] and
- Rule 3.3 – Damage to common property.[6]

17 The Applicant alleged that these rules had been breached by Mr Cussell in the following manner:

a By causing the removal of seven mature trees situated on common property, which had served as a privacy screen, without the written consent of the owners corporation;

b By destroying a grassed area situated on common property by permitting his builder to place building rubble on the grass, without the prior written consent of the owners corporation;

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5 "An owner or occupier of a lot must not obstruct the lawful use and enjoyment of the common property by any other person entitled to use the common property."

6 "An owner or occupier of a lot must not damage or alter the common property without the written approval of the owners corporation."

c By damaging the garden sprinkler system on the common property without the prior written consent of the owners corporation;

d By installing an air conditioning unit on common property without the prior written consent of the owners corporation;

e By altering the colour of the entrance door to Lot 4 (the outer surface of the door being common property) without the prior written consent of the owners corporation; and

f By storing personal items in the common property store room without approval of the owners corporation by way of a lease or licence.

The Defence

18 Mr Cussell filed Points of Defence wherein he stated that:

- He had caused the removal of two small weed-like bushy trees at the suggestion of the gardener engaged by the owners corporation because the trees were overshadowing the lawn. The removal of these trees was retrospectively approved by the owners corporation.
- He paid for new grass to be laid on the common property. This was approved by the owners corporation.
- He paid for the repair of the garden sprinkler on the common property which had not been working for some time.
- He installed a condenser for an air conditioning unit on the roof of his car-port. This installation had been approved by the owners corporation. All other lot owners had air-conditioning units sited on their car-port roofs.

Summary of Relevant Evidence

Alexander Borik

19 Mr Borik tendered into evidence an affidavit sworn by him on 5 October 2018 and a number of documents, including photographs of the property. In addition, he gave viva voce evidence and was cross-examined. The import of his evidence is set out below:

a. On 24 October 2016, his tenant, who occupied Apartment 2, contacted him to complain that Mr Cussell had removed trees from the common property. He produced an invoice from the gardener which specified that seven trees had been removed. He said that these trees provided a privacy screen which prevented people in the neighbouring house from overlooking the garden. He said that the trees had been removed without the permission of the owners corporation.

b. At about the same time, Mr Cussell's builder placed building rubble on the grassed area of the garden. He said that this rubble had destroyed the lawn.

c. In about November 2016, he learned that Mr Cussell had installed an air conditioning unit on top of the car port that was adjacent to one of his apartments, namely, Apartment 2. He said this apartment was tenanted and the unit was about one metre from a bedroom window. He said that the tenant had expressed a concern about noise from the unit, given its proximity to a bedroom window. He said that all other air-conditioning units were on top of the other car port. He said Mr Cussell had not obtained the permission of the owners corporation to site his air-conditioning unit on Mr Cussell's car-port roof.

d. He said that at this time he also learned that Mr Cussell had stored his personal property in the common property storage room. Subsequently, Mr Cussell installed a lock on the storage room door and Mr Borik has not been able to access this part of the common property.

e. Also at this time, Mr Cussell painted his front door a cream colour. All other entry doors to the apartments were painted brown. This change altered the uniformity of the colour scheme. This also was done without the permission of the owners corporation. He said that Mrs Power had also objected to this change.

20 Mr Sean Cussell gave evidence and tendered some photographs. His evidence can be summarised as follows:

a. He denied that he had removed seven trees. He admitted that he had removed two. He said that they were pittosporum trees which were virtually weeds. He said that the trees were overshadowing the garden and preventing other plants, including the grass from growing. He said the roots were lifting up the garden beds. As a consequence, the garden had become unsightly. He said that the removal of the trees did not diminish the property's privacy as the upper-storey windows of the neighbouring house were frosted glass. He said that he paid for the removal and planted three replacement trees. He said that the replacement trees were selected because they were of a type more suited to the garden's conditions. He also re-seeded the lawn. He did this at his cost. He also offered to plant another Manchurian pear tree, but Mr Borik refused this offer.

b. He denied that he had damaged the garden sprinkler system. He said that the sprinkler system did not operate when he bought and moved into his unit. He said that he paid the gardener to fix the system in 2016. He said that the sprinkler system was still working.

c. He said that he had used the common property storage area to store some of his goods while his apartment was being renovated. He had offered to pay the owners' corporation a rental or licence fee but Mr Borik had refused his request. He said that he had removed all his personal items. He said that a lock had been placed on the door because of recent thefts.

d. He said that he placed an air-conditioning condenser on the top of his car port. He said that the condenser made little to no noise and did not constitute a nuisance. He said that it could only be located at that spot. He said that the other unit holders had placed air-conditioning units on the roof of the other car port. These units were not condensers but cooling units, that is, they are far larger, far more unsightly and noisy. He said that the tenants in Apartment 2 had never complained to him about the siting of the condenser.

e. He said that he had repainted the front door to his apartment. He said that the colour was the same colour as the walls and the service doors. As such, it matched the pre-existing colour scheme. He said that the front doors to the other apartments could not be seen from his front door, hence the issue of uniformity did not arise.

f. Finally, he said that in 2017, the owners corporation had retrospectively approved his actions and had determined that no rectification works were required. He admitted that Mr Borik had not agreed with that decision and that, accordingly, these issues had not been resolved.

21 Mrs Power gave the following evidence:

a. She was initially concerned about the removal of the trees by Mr Cussell. However, she now considers that the garden has been improved by the removal of the trees. She did not require any remedial action other than that which had already been undertaken.

b. She did not know if the sprinkler system had been damaged or whether it was functional.

c. The common property storage room only contained cleaning equipment owned by the owners corporation. A lock had been placed on the door to deter thieves.

d. She denied that she had ever expressed dismay that Mr Cussell had altered the colour of his front door. She said that she preferred the change and would have no objection if all the front doors were changed to that colour.

e. She said she inspected the air conditioning condenser with staff from the owners corporation management company. She said that when the condenser was turned on, she could not detect any noise. All the other persons present agreed that the condenser made no discernible noise.

Findings

Liability

22 I find that Mr Cussell did not damage the garden sprinkler system. Mr Cussell gave evidence that the sprinklers were not operable when he purchased his apartment. After removing the trees, Mr Cussell paid to

restore the system. He said that, from that time, the sprinkler system has remained operable. None of that evidence was contested by the other witnesses.

23 I find that Mr Cussell did permit his builder to place building rubble on the garden area while renovations were carried out to his apartment. I do not accept that this caused any material damage to the grassed area of the common property. That area was heavily overshadowed by the pittosporum trees and, consequently, had very little grass coverage.[7] The placement of building rubble would have had a minimal and transitory impact. I accept Mr Cussell's evidence that he re-seeded the grassed areas some three years ago. If this common area still has some bare patches, I consider that, that is because there are environmental conditions that inhibit the growth of grass on those patches.

24 I find that Mr Cussell did remove four trees from the garden area adjacent to Apartment 2. This was the number recorded by the Stonnington City Council and I regard the Council's report to be the most credible evidence with respect to the number of trees removed.

25 I accept the evidence that Mr Cussell paid for the tree removal and further planted three replacement trees and offered to plant a further Manchurian pear tree (an offer also consistent with the finding that four trees were removed). I accept the evidence of both Mr Cussell and Mrs Power that the replacement trees are more suited to the locality than the trees removed. I also accept that the replacement of the four pittosporum trees has enhanced the common area, in that more light can now penetrate to the grassed areas. I find that the privacy of the occupants of Apartment 2 has not been infringed because the neighbouring house has frosted glass windows on that side and because the replacement trees have now grown above the fence height. In any event, privacy is relative. The garden area is not a concealed area. It is directly overlooked by the occupants of Apartments 2 and 4.

26 I find that Mr Cussell did cause an air-conditioner condenser to be placed on the roof of his car-port. I find that it is positioned about a metre from a bedroom window of Apartment 2. I accept the evidence of Mr Cussell and Mrs Power that the condenser makes little if any noise when operating and would not constitute a noise nuisance. Mr Borik gave no evidence about the alleged noise level. He simply said that his tenant had raised a concern. It was not clear if the tenant had found the condenser to be noisy or whether the tenant was concerned that it might be noisy when in operation. Mr Borik did not obtain any statement from his tenant on this point. Accordingly, I accept the uncontradicted evidence of Mr Cussell and Mrs Power on the issue of noise. I also accept the evidence that the condenser has been placed in the most appropriate position for that type of air-conditioning unit and that it is far less obtrusive and far less unsightly than the pre-existing air-conditioning coolers located above the other car port.

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[7] See for example, photograph 6 of the photographs tendered by the Applicant

27 I find that Mr Cussell did store some items in the common property storage room for some time. I accept his evidence that, after Mr Borik raised an objection to this storage, Mr Cussell sought to pay rent or a license fee to the owners corporation to continue to store the items. Mr Cussell said that Mr Borik refused to allow that proposal and, consequently, Mr Cussell removed the stored items. I accept that a lock has been placed on this storage room to deter thefts. Mr Cussell said that he would make a key available to Mr Borik. I consider that that should be done as soon as possible.

28 I find that Mr Cussell altered the colour of his front door. I accept the new colour corresponds with the colour scheme for the walls and external service doors at the property. That being so, and given the fact that the other front doors are not in the same line of sight, the lack of uniformity is not readily apparent to visitors. I also note that 50% of the lot holders favour the change. I accept Mrs Power's evidence that she did not express any form of disapproval about the colour change when she observed the door.

29 Finally, I accept that Mr Cussell did not obtain the approval of the owners corporation either before or after removing the trees, positioning his air conditioner condenser or altering the colour of his front door. No approval of the owners corporation could have been granted without the consent of Mr Borik as Mr Borik held 50% of the lot liability and entitlements. I accept Mr Borik's evidence that he gave no such consent and, indeed, was not even consulted by the owners corporation manager, on these matters or on the issue of rectification.

Relief

30 The Applicant sought the following relief against the Second Respondent:

- A declaration that the Second Respondent has breached the Model Rules of the Owners Corporation;
- An order requiring the Second Respondent to rectify the damage to the common property caused as a result of the breaches of the Model Rules including but not limited to:
  - Replanting seven mature pittosporum trees on the fence-line of the property at his expense;
  - Replanting grass at the rear of the property at his expense;
  - Painting the exterior facing door to Unit 4 so that it is the same colour as the doors for the other units at his expense; and
  - Repositioning the encroaching condenser from the common property at his expense.

31 A finding of a breach of the Model Rules does not automatically result in an order for rectification. The Tribunal has a wide discretion under s. 165 of the *OCA*. That section provides that the Tribunal may make any order it

considers fair. In making an order, s.167 of the *OCA* provides that the Tribunal must consider certain matters. This provision relevantly provides as follows:

> VCAT in making an order must consider the following—
>
> (a) the conduct of the parties;
>
> (b) an act or omission or proposed act or omission by a party;
>
> (c) the impact of a resolution or proposed resolution on the lot owners as a whole;
>
> (d) whether a resolution or proposed resolution is oppressive to, unfairly prejudicial to or unfairly discriminates against, a lot owner or lot owners;
>
> (e) any other matter VCAT thinks relevant.

32 It follows, therefore, that the Tribunal may make any order it considers fair and, in doing so, must consider the factors outlined in s. 167 above. The discretion to make any order that the Tribunal considers fair includes a discretion to make no order at all, if the Tribunal considers it fair not to make any order.

33 I accept that the removal of the trees and the installation of the condenser by Mr Cussell constituted brazen contraventions of the Model Rules. The evidence of Mrs Power was that Mr Cussell had raised the issue of the tree removal with the owners corporation but had not been granted permission. He nevertheless went ahead with the removal. With respect to the installation of the condenser Mr Cussell seems to have similarly taken the view that it would be better for him to install the condenser and then seek forgiveness.

34 Such conduct is far from satisfactory, although I note that this conduct, and the immediate aftermath (when rectification works were done), occurred at a time when the owners corporation had a dysfunctional committee. On that point, I note that in 2016, the appointed chairperson of the committee was an employee of Platinum Strata, the management company. As the appointed chairperson was not a lot owner, the chairperson was debarred from having a casting vote by virtue of s. 93 of the *OCA*. As such, the committee could not satisfactorily respond to the concerns of either Mr Cussell or Mr Borik and, as neither had a majority, no resolution could be reached. This situation continued up to the appointment of the administrator.

35 On the evidence I am satisfied that the pittosporum trees heavily shaded the garden area adjacent to Apartment 2. The removal of the trees did not appreciably diminish the amenity for the other lot holders. Privacy was barely affected given that neighbouring house had frosted windows and could not, therefore, overlook the garden. Furthermore, the removal has assisted the growth of other plants, including the grass. The evidence put

forward by Mr Borik, went to two issues, firstly, that the pittosporum trees provided a privacy screen and that, consequently, their removal diminished the amenity and secondly, that Mr Cussell's removal of the trees was done, brazenly, without the approval of the owners corporation. Mr Borik gave very little evidence at all about the effectiveness of the rectification work.

36 On the evidence, I find that the removal of the four pittosporum trees has been appropriately remedied by Mr Cussell at his expense. The replacement trees may not have foliage as dense as the four pittosporum trees but I accept the evidence that that is a benefit to the surrounding garden. I consider that on all reasonable measures the rectification work paid for by Mr Cussell is appropriate. That being so, I consider that no further order is required or, indeed, appropriate given my findings set out in paragraph 25 above and the factors listed under s. 167 of the *OCA*.

37 The installation of the condenser on the roof of Mr Cussell's car-port, without the permission or licence of the owner's corporation, constitutes an encroachment onto the common property. The general rule is that the Tribunal ought to order the removal of an encroachment on the common property unless the encroachment is minor and an order to remove the encroachment would be oppressive to the relevant lot owner.[8]

38 I note that Mr Borik did not seek an order for the complete removal of the condenser, but rather an order that it be re-positioned onto the roof of the other car-port. He sought this order for two reasons, firstly, he considered that the condenser constituted a noise nuisance at it had been placed near a bed-room window in Apartment 2 and, secondly, as all other air-conditioning coolers had been positioned on that other car-port roof, it was appropriate that Mr Cussell's condenser also be positioned there. Implicit in this contention were two factual claims, namely, the condenser constituted a noise nuisance and, secondly, that it could be re-positioned to the other car-port roof and still function adequately. I have found these assertions to be wrong.[9]

39 With respect to the general rule set out in paragraph 37 above, I consider that the following factual findings are pertinent: [10]

- the condenser does not constitute a noise nuisance or hazard to the health, safety or security of any lot owner or occupant;
- the condenser does not obstruct the lawful use and enjoyment of the property by any lot owner or occupant;
- the condenser cannot be re-positioned to the other car-port if it is to function as required;

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8 See *Owners Corporation RP003605 v Chung* (Owners Corporation) [2017] VCAT 207 (13 February 2017) and *OC SP0237445 v Scarlett* (Owners Corporation) [2015] VCAT 99 (21 May 2015)

9 See paragraph 26 above.

10 As set out in paragraph 26 above.

- other lot owners have placed air-conditioning equipment above their car-ports; and
- the condenser is less obtrusive than the air conditioning units installed for the other apartments.

40 In circumstances where the position of the condenser will have little or no impact on any other lot owner, any resolution requiring the repositioning of the condenser would, in my view, be oppressive and unfairly prejudicial to Mr Cussell. Accordingly, I will make no order for the re-positioning of the condenser.

41 I see no utility in making any declaration of contravention of the Model Rules against Mr Cussell. A finding of contravention is sufficient in itself. Similarly, I see no utility in making a cease and desist order or an injunction to restrain Mr Cussell from breaching the Model Rules. As a lot holder, Mr Cussell is already required to observe the Model Rules.

42 Given my findings with respect to the adequacy of the rectification works, the negligible impact of the condenser and the limited impact of the change to the colour scheme of a front door and, as three years have passed without any other notable contraventions, I do not consider that it would serve any purpose to make an order that may have the effect of converting any future contravention of the Model Rules into a contempt of the Tribunal.

43 I accept that Mr Cussell no longer stores any of his items in the common property storage room. Mr Borik is entitled to have a key to the common storage area and I will direct that he be provided with a key. I consider no further order is required to deal with that matter.

44 Finally, given the matters set out in paragraph 28 above, I consider that the issue of the colour of the front doors and the requirement for any rectification work should be determined by the administrator, after taking into account the views of all lot owners.

B. Ussher
Member