

**VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL**

**CIVIL DIVISION**

**OWNERS CORPORATIONS LIST**

VCAT REFERENCE NO. OC931/2019

**CATCHWORDS**

*Owners Corporation Act 2006*; allegation by three lot owners that by replacing their front fence without the approval of the Owners Corporation, the fourth lot owner had breached Model Rule 5.2; whether a lot owner in lieu of the Owners Corporation, can bring an action against another lot to enforce the Model Rules; whether only the Owners Corporation can apply to VCAT under s153 of the Act requiring a lot owner to rectify an alleged breach of the Act, the Regulations or the Rules of the Owners Corporation.

|                                  |   |
|----------------------------------|---|
| <b>FIRST APPLICANT</b>           | Sandy Lai   |
| <b>SECOND APPLICANT</b>          | Daryl Lai   |
| <b>THIRD APPLICANT</b>           | Raymond Tan   |
| <b>FOURTH APPLICANT</b>          | Loretta Tan   |
| <b>FIFTH APPLICANT</b>           | John Kramer   |
| <b>SIXTH APPLICANT</b>           | Carolina Kramer                                       |
| <b>FIRST RESPONDENT</b>          | Anna Beilin   |
| <b>SECOND RESPONDENT</b>         | Greg Beilin   |
| <b>WHERE HELD</b>                | Melbourne   |
| <b>BEFORE</b>                    | Member B. Thomas                                      |
| <b>HEARING TYPE</b>              | Hearing   |
| <b>DATE OF HEARING</b>           | 4 September 2019 and 16 March 2020                    |
| <b>DATE OF ORDER AND REASONS</b> | 22 July 2020  |
| <b>CITATION</b>                  | Lai v Beilin (Owners Corporations) [2020]<br>VCAT 771 |

**ORDER**

1. The proceeding is dismissed.

2. Costs are reserved. Any party may apply for costs by filing and serving an application **by 10 August 2020**. The other party may file and serve any submission in reply **by 7 September 2020**. Any application for costs will be determined by Member Thomas in Chambers.

B. Thomas  
**Member**

## REASONS

### INTRODUCTION

- 1 The parties are the members of the Owners Corporation affected by Plan of Subdivision PS 637761W (**the OC**) for the property situated 8 Dawn Street Highett (**the property**). Units 1 and 4 of the property abut Dawn Street, and Units 2 and 3 are the rear units behind Units 1 and 4.
- 2 The Applicants are the owners of Units 1, 2 and 3 respectively and the Respondents own Unit 4. A common driveway runs from Dawn Street to the rear of the property, separating Units 1 and 2 from Units 3 and 4. The Plan of Subdivision shows that the driveway is the only common property.
- 3 Along the front boundaries of Units 1 and 4 with Dawn Street was a brick and timber fence approximately one metre in height. By an email to the OC Manager dated 15 July 2018, Mr Beilin attached pictures of a fence the Respondents proposed to replace their existing front fence. He advised that the replacement fence would be galvanised powder coated steel with two gates and 1.8 metres in height (**the replacement fence**).
- 4 The Annual General Meeting of the OC held on 28 August 2018 (**the AGM**) resolved not to grant permission for the replacement fence. The Respondents gave notice that they intended to take the matter to the Tribunal.
- 5 On 16 October 2018, the Respondents lodged an application for a Planning Permit for the replacement fence with the City of Kingston.
- 6 By an email to the OC Manager dated 29 November 2018, the Respondents advised that they were applying for a Planning Permit for the replacement fence.
- 7 Between the AGM and March 2019 correspondence regarding the replacement fence was exchanged between the OC Manager, the Applicants, and the Respondents, but a resolution could not be reached.
- 8 On 5 February 2019, a Planning Permit was issued for the replacement fence, and on 3 May 2019 a corrected Planning Permit was issued allowing an increase in the existing fence height to a maximum of 1.6 metres.
- 9 By an Application lodged on 9 May 2019, the Applicants sought orders that the Tribunal resolve the dispute with the Respondents.
- 10 In June 2019, the Respondents replaced their fence with a fence of similar construction to the original fence, but 1.5 metres in height and with a metal pedestrian gate in the middle. The Applicants allege that the Respondents replaced their fence without the approval of the OC.
- 11 In an Application filed with the Tribunal on 17 July 2019, the Applicants sought, inter alia, orders that the Respondents remove the replacement fence and reinstate the previous fence.
- 12 The hearing took place on 4 September 2019 and 16 March 2020. At the first hearing the Applicants were represented by Mr Raymond Tan and the

Respondents were represented by Ms Rachelle Castro, solicitor. At the second hearing, the Applicants were represented by Ms Danielle Khalof, solicitor and the Respondents again by Ms Castro.

### THE APPLICANTS' POINTS OF CLAIM

- 13 The Applicants allege that –
- a Without giving notice to the OC, in breach of s 133 of the *Owners Corporation Act 2006* (**the OCA**) the Respondents lodged an application for a Planning Permit for a 1.8 metre high fence.
  - b Despite the Applicants having lodged an Application with the Tribunal, on 18 June 2019 the Respondents commenced construction of the replacement fence.
  - c In breach of Rule 5.2 of the *Model rules for an owners corporation* (**the Model Rules**), the Respondents have made changes to the external appearance of their lot without the written approval of the OC.
  - d Approval of the Respondents' proposal for the replacement was not unreasonably withheld by the Applicants for the following reasons –
    - i The Respondents did not provide sufficiently detailed plans, designs, and other information necessary for the Applicants to make an informed decision;
    - ii Without sufficiently detailed plans and designs of the replacement fence, it is not possible to determine whether the replacement fence has been constructed within the Respondents' lot or on common property;
    - iii The Respondents have not obtained the OC's approval for the replacement fence; and
    - iv The replacement fence may negatively impact on the value of the other lots in the OC.

### THE RESPONDENTS' POINTS OF DEFENCE

- 14 At the AGM the Respondents sought the OC's approval to replace the existing deteriorated 1.5 metre brick fence with a 1.8 metre fence with additional horizontal metal slats on top of the existing brick fence to maintain a degree of transparency onto Dawn Street and vice versa.
- 15 Between July 2018 and March 2019, the Respondents provided to the OC and the Applicants information regarding the proposed fence to enable the Applicants to adjust its design. The Applicants failed or refused to do so.
- 16 The advertisement of the Respondents' Application for a Planning Permit for the replacement fence by the City of Kingston provided the Applicants with details of the proposed fence. By an email to the Respondents dated 20 February 2019, the City of Kingston advised that the Third Applicant had objected to the Application.

- 17 As the works were undertaken within the Respondents' lot and not on common property, they were not required to obtain the consent of the OC prior to applying for the Planning Permit.
- 18 On 4 February 2019, the Respondents' dog was significantly injured because of being able to run through the original fence, and being struck by a motor vehicle. The Respondents, concerned for the security of their children and their dog, compelled them to install the replacement fence in accordance with the corrected Planning Permit dated 3 May 2019.
- 19 Rule 5.2(2) of the *Model rules for an owners corporation* requires the OC to not unreasonably withhold approval for the proposed fence. In this regard the replacement fence –
  - a Does not impact on other lot owners' lawful use and enjoyment of their lots or the common property;
  - b Does not impact on the value of the other lots at the property;
  - c Is installed within the Respondents' property;
  - d Is less than the heights of neighbouring fences at between 1.8 and 2.0 metres;
  - e Is necessary for the safety, security and privacy of the Respondents' children aged 3 and 6 and the family dog;
  - f Replaces the original fence which was in disrepair and did not provide sufficient protection for the safety of the children and the dog;
  - g As approved by the Council, provides sufficient protection for the safety of the children and the dog; and
  - h Improves the value of not only the Respondents' lot but also the lots of the Applicants.

## **SUBMISSIONS OF THE RESPONDENTS**

### **Enforcement of Rules**

- 20 Pursuant to Part 10 of the OCA, the OC is given power to enforce the Rules, but to do so, the OC must comply with ss 155 and 157. The OC has not acted accordingly.
- 21 The OCA does not give power to a lot owner to enforce the Rules, only the OC and the OC is not a party to the proceeding.
- 22 In *Shearman v Owners Corporation No. 1 417495Y* [2016] VSC 551, Bell J at paragraph 36 said –

the dispute resolution procedure in the Model Rules applies to disputes involving 'a lot owner, manager, or an occupier or the owners corporation' (cl 6(1)).

Therefore, the process may be activated in relation to a dispute between a lot owner and the owners corporation, ... But the process begins with

the preparation of a written statement setting out the complaint in the approved form by '[t]he party making the complaint' (cl 6(2)). Where ... there is no grievance committee, the 'owners corporation must be notified of any dispute by the complainant', regardless of whether it is an immediate party to the dispute (cl 6(4)). The parties must then meet to discuss the matter in dispute within 14 working days (cl 6(5)). If no resolution is achieved, the owners corporation must notify each party of his or her right to take further action under Part 10 of the *Owners Corporation Act*. None of this occurred in the present case because of Ms Shearman did not make a complaint and thereby activate the dispute resolution process. Therefore, before acting under Part 10 or applying to VCAT for an order in respect of the alleged breach, the owners corporation has no obligations under s 153(3).

- 23 The Applicants as lot owners failed to activate the dispute resolution process to file a complaint to the OC in respect of the fence installation. That would have led the OC to determine whether it ought to enforce the rules.

### **Model Rule 5.2**

- 24 Model Rule 5.2 provides that –

- (1) An owner or occupier of a lot must obtain the written approval of the owners corporation before making any changes to the external appearance of their lot.
- (2) An owners corporation cannot unreasonably withhold approval but may give approval subject to reasonable conditions to protect the quiet enjoyment of other lot owners, structural integrity or the value of other lots and/or common property.

- 25 Even if the OC enforced Model Rule 5.2(1), pursuant to Model Rule 5.2(2) the OC cannot withhold approval, and approval must be provided on reasonable conditions to protect the quiet enjoyment of other lot owners or the value of other lots or common property.

### **Fence Installation**

- 26 The Applicants submit that the fence “will possibly negatively impact the value of the other lots”. This is an opinion only and not supported by any independent opinion from a valuer.
- 27 The Respondents have provided the Applicants opportunity to provide feedback in respect of the design of the fence. The Applicants have refused, failed, or neglected to do so.
- 28 Apart from the fact that the original fence required replacement, the replacement fence –
- a Does not alter the common property;
  - b Is installed inside the boundary of Lot 1; and
  - c In height is less than the heights of all the other front fences along Dawn Street.

- 29 The Respondents obtained the necessary permits to install the fence.
- 30 In *Owners Corporation PS 501391P v Balcombe* [2016] VSC 384 (**Balcombe's case**) Riordan J at paragraph 123 states –
- 123(b) A review of the development of the strata title legislation demonstrates that it was always intended that unit owners would retain registered Freehold interest in their respective lots. Accordingly, it is fundamentally important that persons are entitled to conduct themselves on their land and buildings as they like, subject to prohibitions created by the common law, ... Indeed, there is a presumption, in the interpretation of statutes, against any intention to interfere with vested property rights and such legislation is 'not to be construed as interfering with vested interests unless that intention is manifest'.
- ...
- 123(d) ...
- i. There is no indication in the legislation or extrinsic material that Parliament intended that a body corporate could, in effect, second guess an owner's proposed use of a lot that was permitted under the planning scheme.
- ii. ... the stated intention of the *Subdivision Act 1988* ... does not, in my opinion, sit well with inferring a Parliamentary intention that a body corporate would be invested with overriding powers to control the use of the lots on the strata plan.
124. In summary, I do not consider that the Parliament conferred powers on bodies corporate for the Statutory Purpose of substantially interfering with rights and privileges of ledgers usually attendant upon freehold owners.
- 31 The OC, not the Applicants, is given the power to enforce Model Rule 5.2(1) on reasonable grounds and simply not based on the opinion of most of the lot owners.
- 32 In *Ainsworth & Ors v Albrecht & Anor* [2016] HCA 40 (**Ainsworth's case**), the High Court said at paragraph 63 –
- ... opposition to a proposal that could not, on any rational view, adversely affect the material enjoyment of an opponent's property rights may seem unreasonable.
- 33 The Applicants have not demonstrated any adverse effect on their property rights because of the fence installation. The opinion expressed by Briana Gibb, Portfolio Manager, Buxton Real Estate Chelsea, is not independent as she manages a town house in the property owned by one of the Applicants.

#### **APPLICANTS' REPLY TO THE RESPONDENTS' SUBMISSION**

- 34 The Respondents were aware that written approval of the OC was required before making any changes to the external appearance of their lot. By

proceeding to construct the fence without approval, the Respondents breached the Rules.

- 35 By an email to the Respondents dated 18 May 2018, the Respondents were requested to postpone the fence work until VCAT issued a determination. On 18 June 2018, the Respondents commenced construction of the fence, which was substantially completed by the Directions Hearing on 26 June 2019.
- 36 The Applicants are entitled to bring their application under Part 11 of the OCA because of the Respondents' failure to rectify their breach by –
  - a Building the fence before the Tribunal had determined the matter;
  - b Refusing to provide information to resolve the matter;
  - c Lodging applications for planning and building permits without approval of the OC;
  - d Repeated assertions that the fence is not an OC matter; and
  - e As evidenced by the emails of escalating aggression and hostility.
- 37 The Applicants are not “a single lot owner” but make up 75% of the lot owners in the OC. Section 163(1) of the Act provides that a lot owner, former lot owner or an occupier may apply to the Tribunal to resolve an owners corporation dispute.
- 38 The Respondents having failed to activate the dispute resolution procedure under Part 10 of the OCA, the Applicants are not precluded by s 153(3) from lodging an application with the Tribunal.
- 39 By building the replacement fence without the written approval of the OC, the Respondents have breached Model Rule 5.2(1).
- 40 The Applicants have not unreasonably withheld approval to the replacement fence because –
  - a Despite requests, the Respondents have failed to provide sufficient information for the Applicants to make an informed decision regarding the replacement fence;
  - b In breach of s 133 of the OCA, the Respondents failed to notify the Applicants of the lodgement of their applications for Planning and Building Permits;
  - c In the absence of a definition of quiet enjoyment in the OCA, the Respondents have failed to substantiate that the replacement fence is “to protect quiet enjoyment” of their lot.
- 41 Ms Gibb was engaged by one of the Applicants as an owner, not based on a personal relationship, to provide an opinion on the effect of the replacement fence on the value of the property. She denies that she was forced to make a statement in support of the Applicants.
- 42 The Applicants deny that the Respondents provided opportunity to provide feedback in respect of the fence design. The Respondents stonewalled efforts



by the Applicants to obtain information and resolve the matter. The Respondents failed to notify the Applicants of their intention to seek a planning permit and proceeded despite the objection of the Applicants to the fence at the Annual General Meeting of the OC. With increasing aggression and hostility, the Respondents repeatedly asserted that the fence was not an OC matter, and at the Directions Hearing on 26 June 2019 rejected the option of a Compulsory Conference suggested by the Senior Member.

- 43 In breach of s16(1) of the *Building Act 1993*, the Respondents had not obtained all relevant permits including a building permit, before commencing to construct the replacement fence.
- 44 Regardless of whether, on receipt of the relevant permits the Respondents were obliged to complete construction of the replacement fence, or the height of the fence is less than the heights of other fences in Dawn Street, it significantly changes the external appearance of their lot in breach of Model Rule 5.2.
- 45 The original fence substantially comprised bricks in good condition as evidenced by the fact that the replacement fence was constructed on top of the original fence. Only a few wooden palings in the original fence had deteriorated and could have been replaced without the replacement of the total fence. The inclusion of horizontal slats in the replacement fence has changed its appearance.
- 46 The claim that the replacement fence has increased the value of all four lots is unsubstantiated. The real estate opinions relied upon by the Respondents are merely to the effect that the replacement fence will not impact the value of the other three lots, and that it is impossible to say how much the replacement fence would add to the value of the Respondents' lot.
- 47 Balcombe's case was concerned with the rights of a lot owner to use the lot and is not relevant to this case. This case is concerned with the right of a lot owner to alter the external appearance of the lot.
- 48 This is an owners corporation dispute (breach of Model Rule 5.2), and under s163(1) of the OCA the Applicants as lot owners are entitled to make application to the Tribunal. The Respondents having breached Model Rule 5.2, the Applicants are reasonably seeking compliance with the OCA and the Regulations.
- 49 Ainsworth's case is not relevant to this proceeding. In breaching Model Rule 5.2, the Respondents have adversely affected the Applicants' entitlement to quiet enjoyment of their lots under Rule 5.2(2). An adverse effect on the Applicants' enjoyment of equal rights and treatment under Model Rule 5.2, is significantly more severe than just material enjoyment.

## ORAL SUBMISSIONS MADE ON BEHALF OF THE PARTIES

50 At the hearing on 16 March 2020, Ms Castro made oral submissions on behalf of the Respondents, to which Ms Khalof on behalf of the Applicants replied.

### The Parties in the Proceeding

- 51 Ms Castro submitted that the proceeding is not an application by the OC under Division 1 of the OCA to enforce the Model Rules. The Applicants did not file a complaint with the OC and therefore they did not comply with Division 1. The purpose of filing a complaint is to provide the parties the opportunity to resolve the dispute.
- 52 The Applicants' claim is based on the Respondents' failure to comply with Model Rule 5.2, but the Applicants failed to follow the dispute resolution procedure required by Division 1.
- 53 The OC, being the party to enforce the Model Rules, is not a party to the proceeding. The Applicants failed to apply to the Tribunal under s163(1A) of the OCA to prosecute this proceeding on behalf of the OC. Even if the Applicants had made such an application, the OC would still have been required to comply with Division 1 and serve a Notice of Breach on the Respondents and a Final Notice, or determine not to take any further action.
- 54 Ms Khalof on behalf of the Applicants replied that the Application was not made by the Applicants in their individual capacities, but as the majority members of the OC.
- 55 She relied on the New South Wales Supreme Court decision of *Carre v Owners Corporation – Strata Plan 53020 & Ors* [2003] 58 NSWLR 302 (**Carres case**), in which Barrett J held that there was a fifth exception to the rule in *Foss v Harbottle* ("the proper plaintiff rule"); that is "where justice so requires".
- 56 Ms Khalof submitted that the Applicants would suffer a serious injustice if they were precluded from pursuing their action against the Respondents, or if the proceeding was dismissed, for the following reasons –
- a The action had been brought by the Applicants bona fide on behalf of the OC, and not for any ulterior motive;
  - b The dispute resolution procedures under the OCA had failed to achieve the justice sought; and
  - c The OC Manager had failed to provide any assistance to the Applicants in bringing the action.
- 57 If the Tribunal is of the view that the OC should be a party to the proceeding, it should be so joined as it would be unjust if the OC was obliged to bring a separate action against the Respondents.
- 58 Finally, the issue of the Applicants' standing to bring the proceeding had not been raised at the Directions Hearing or the subsequent hearing.

- 59 In reply, Ms Castro submitted that the Manager's lack of guidance to the Applicants of the need to follow the dispute resolution process is irrelevant. The Manager's role is administrative; not to provide legal advice. In any event, the Applicants should have sought legal advice.

### **Does the Tribunal have jurisdiction to hear the dispute?**

- 60 Ms Castro submitted that s 162(b) of the OCA provides that the Tribunal may hear and determine a dispute arising under the Act, the Regulations or the Rules including an alleged breach by a lot owner of an obligation imposed on that person by the Act, the Regulations or the rules of the owners corporation.
- 61 She submitted that the Application does not relate to any direct loss or damage suffered by the Applicants because of the installation of the replacement fence. The OC not being a party to the proceeding, the Applicants seek to enforce the OC's rules on the Respondents. The Application must therefore fail.
- 62 Finally she submitted that the Applicants must convince the Tribunal that, as lot owners, they are entitled to enforce the rules notwithstanding that the third-party, the OC is not a party to the proceeding or they have failed to seek an order authorising them to prosecute the proceeding on behalf of the OC.
- 63 Ms Khalof replied that although ss 155 – 157 of the OCA require a Notice to rectify breach and a Final Notice to be served on the Respondents, the OCA does not state that failure to do so is fatal to the Applicants' application.
- 64 She referred to *Owners Corporation No. 1 - Fairfax House Quest Lodging Pty Ltd* (Owners Corporation) [2012] VCAT 1837 (**Fairfax House case**) as authority for the proposition that the Tribunal has a discretion not to dismiss or strike out a proceeding when there has been non-compliance with s153, and *Owners Corporation No. 8 PS422665R v Walton* (Owners Corporation) [2015] 1742 (**Walton's case**) as authority for the proposition that the Tribunal is not obliged to strike out a proceeding commenced without compliance with s153.
- 65 She submitted that as evidenced by the raft of emails exhibited to the Applicants' Point of Claim, culminating in the Respondents' email of 18 May 2019 that the fence would be built as planned, the OC took all reasonable steps to resolve the situation and, as noted in the Fairfax House case, service of a Notice of Breach would have been futile.

### **OC Unreasonably Withheld Consent to Install the Fence**

- 66 If the Tribunal determines that it is not necessary for the OC to be a party to the proceeding in order to enforce the OC Rules, the OC acted unreasonably when it resolved not to consent to the installation of the replacement fence at the Annual General Meeting held on 28 August 2018.
- 67 Model Rule 5.2(2) of the *Owners Corporation Regulations 2018* which came into effect on 2 December 2018, provides that an owners corporation cannot

unreasonably withhold approval to a lot owner making any changes to the external appearance of a lot.

- 68 The Minutes of the AGM record that Resolution 12 stated that the OC “resolved not to grant permission to unit 1 to build a fence in the front yard of unit 1”. Section 5 of the Act requires the OC to act honestly and in good faith and exercise due care and skill. Therefore, the OC had an obligation at the AGM to explain why it refused to consent to the replacement of the fence. The Minutes do not explain the basis of the AGM’s refusal. The OC acted unreasonably in contravention of Model Rule 5.2(2).
- 69 The Applicants have not produced evidence that the installation of the replacement fence disrupts the quiet enjoyment of their lots, adversely affects the structural integrity of their lots or the common property and adversely affects the value of their lots and the common property.
- 70 It is not simply a matter of most of the lot owners not agreeing to the replacement fence; the OC has an obligation to not unreasonably withhold consent.
- 71 The replacement fence –
- a Was necessary to replace the original rotting fence;
  - b Is necessary to protect the safety of the Respondents’ children and dog when using the front yard of Lot 1;
  - c As a result of increased burglary in the area, is necessary to protect the safety of the Respondents and their children;
  - d Is installed within the boundary of Lot 1 and does not encroach on common property;
  - e Complies with the Planning Permit and the *Building Act 1993*; and
  - f If removed, would significantly compromise the Respondents’ enjoyment of their lot.
- 72 In reply, Ms Khalof submitted that Ainsworth’s case is authority for the proposition that the test of whether consent has been unreasonably held is objective, not subjective.
- 73 It is not unreasonable to withhold consent if property rights are negatively affected. There is consensus amongst the lot owners that the external appearance of the lots should be consistent or uniform. Therefore, the replacement fence does have detrimental effect on the Applicants’ lots.
- 74 The Notice of Breach issued by the Respondents against the owner of Lot 3 in September 2016, was on the same basis.
- 75 The fence is an eyesore as it changes the consistency with the other lots and, as confirmed by the email from Briana Gibb dated 25 June 2019, negatively impacts on the value of the other lots.

- 76 The original fence was not rotting; only a single timber panel was askew and needed replacing.
- 77 The Model Rules require consistency and the flow on effect of the replacement fence is a lack of uniformity, meaning that each lot owner can do what they like. *Colvin v Bowen* [1958] 75WN NSW 262 at [578] is authority for the proposition that the reason for the refusal must address the subject matter of uniformity. *EDWF Holdings Pty Ltd v EDWF Holdings No. 2 Pty Ltd* [2010] WASCA 78 is authority for the proposition that a party is acting unreasonably in refusing to give consent if the grounds for doing so are not reasonably held.
- 78 Model Rule 5.2 applies because objectively, the reasons for the refusal – uniformity and the potential flow-on effect, were not made on a whim.
- 79 The Planning and Building Permits are irrelevant because the replacement fence is an OC issue, not a Council issue.
- 80 Ms Castro replied that the OC Manager’s lack of guidance as to the need to follow the dispute resolution procedure was irrelevant. The Manager’s role is administrative; not to provide legal advice to the OC. The Applicants should have sought legal advice separately.
- 81 If the Applicants do not have standing to bring the Application, the OC should be joined as a party to the proceeding. However, the Applicants should have determined to bring the proceeding before lodging their Application with the Tribunal.
- 82 Ms Khalof noted that the issue of the standing of the Applicants to bring the Application was not raised by the Respondents until the resumed hearing on 16 March 2020.
- 83 Ms Castro submitted that clearly the original fence was in a state of disrepair, and there is no evidence that the replacement fence has affected the property rights of the Applicants. Ms Gibb is not independent as she is the Property manager for Unit 2.
- 84 The replacement fence is not an eyesore; as depicted in the photograph being Exhibit BB-26D to the Respondents’ Points of Defence, the replacement fence is slightly taller than the original fence, with horizontal instead of vertical slats, but the bricks are the same and otherwise it is of similar appearance to the original.
- 85 The front fences of neighbouring properties in Dawn Street are higher than the replacement fence. The OC must consider that a planning permit was issued for the replacement fence and it is unreasonable to insist that the replacement fence must be identical in appearance to the original fence.
- 86 An email from the Respondents to the OC Manager dated 15 July 2018, enclosed photographs of proposed changes to the fence and queried if any changes to the design of the replacement fence were required. Discussions

between the Respondents and the lot owners resulted in the change from vertical to horizontal slats in the replacement fence.

- 87 If the Applicants were still unhappy with the design of the replacement fence, the dispute resolution process should have been followed.
- 88 Ms Khalof responded that the replacement fence changes the external appearance of Lot 1 and discussions between the Applicants and the Respondents would not have avoided the need to lodge the Application with the Tribunal.

## THE ISSUES FOR DETERMINATION

### Do the Applicants have standing to bring this claim?

- 89 The property is a four-lot residential development comprising four town houses. Lots 1 and 4 front Dawn Street, and Lots 2 and 3 sit behind. The Applicants are the owners of Lots 1, 2 and 3, and the Respondents are the owners of Lot 4.
- 90 The Applicants allege that the Respondents, in failing to obtain the consent of the Owners Corporation to the replacement of the front fence of Lot 4, are in breach of Model Rule 5.2.
- 91 Section 138 of the OCA provides that an owners corporation may make rules with respect to any matters set out in Schedule 1. Section 152 (1) provides that –
- A lot owner ... may make a complaint **to the owners corporation** about the alleged breach by a lot owner ... of ... the regulations or the rules of the owners corporation. (emphasis added)
- 92 Section 153(2) provides that –
- The **Owners Corporation** must decide –
- (a) to act under this Part in respect of the alleged breach; or
  - (b) to apply to VCAT for an order requiring the person to rectify the breach; or
  - (c) to take no action in respect of the alleged breach. (emphasis added)
- 93 In my view therefore, it follows that only the owners corporation, not an individual lot owner, has the authority to enforce compliance by the Respondents with Model Rule 5.2 by application to VCAT.
- 94 By way of explanation for their failure to lodge a complaint with the Owners Corporation, the Applicants say that the Owners Corporation Manager failed to provide any guidance as to the procedure to be followed requiring the Respondents to rectify their breach.
- 95 I do not accept this explanation. The Applicants failed to provide any evidence of a complaint being lodged with the Manager, or a request or query as to the process to be followed.

96 I therefore find that the Owners Corporation should have been the Applicant in the proceeding, and the Applicants do not have standing to bring a claim against the Respondents in the Tribunal. It follows that the Tribunal does not have jurisdiction to hear this proceeding

**Can the OC be joined as an Applicant in the proceeding?**

97 Section 60 of the VCAT Act provides that –

- (1) The Tribunal may order that a person be joined as a party in a proceeding if the Tribunal considers that –
  - (a) the person ought to be bound by, or have the benefit of, an order of the Tribunal in the proceeding; or
  - (b) the person’s interests are affected by the proceeding; or
  - (c) for any other reason it is desirable that the person be joined as a party.
- (2) The Tribunal may make an order under subsection (1) on its own initiative or the application of any person.

98 If at least one of the conditions in s 60(1) is satisfied, the Tribunal has a discretion to join a party to a proceeding. That discretion is “unfettered”: *Ioannidis v Glenwill Pty Ltd* [2009] VCAT 2650 at [19] but must be exercised judicially: *Marywell Investments Pty Ltd v Sigma Constructions Pty Ltd* [2006] VCAT 743 at [9]. VCAT has a duty to act fairly when exercising the discretion: *Hardeman v Collingwood Football Club Ltd* [2010] VCAT 801 at [21].

99 The VCAT Act does not specify what factors the Tribunal should consider when exercising this discretion. Clearly, all the circumstances of the case must be considered (including the strength of the factors that are relevant to whether at least one of the conditions in s60(1) are satisfied).

100 Nevertheless, three factors often assume significance –

- Whether there has been any delay in making the application for joinder;
- Whether any prejudice to any party or the person proposed to be joined may result from granting or refusing the grant the application; and
- Whether the person proposed to be joined can protect their interests in some way other than by becoming a party to the proceeding.

See for example *Gregor v Victoria* [2000] VCAT 414.

101 I consider the first two factors are relevant to this proceeding.

102 The Application of the Applicants was lodged with the Tribunal on 9 May 2019. A Directions Hearing was held on 26 June 2019. The Applicants all appeared in person. The Respondents were represented by Ms Castro, solicitor.

103 Accepting that the OC Manager did not provide any advice to the Applicants prior to the lodging of their Application, had the Applicants sought legal

advice before doing, they would have been aware by the date of the Directions Hearing of the need to join the Owners Corporation as an applicant to the proceeding. Although it was not Ms Castro's role to advise the Applicants how to conduct their claim, in an email to the Applicants dated 14 June 2019, Ms Castro said –

I continue to suggest that you seek legal advice on the matter, and should you continue with the proceeding, Mr and Mrs Beilin will seek legal costs against you for bringing a vexatious claim against them.

The Applicants chose to ignore this advice.

- 104 No application was made by the Applicants at the Directions Hearing or subsequently, for leave to continue the proceeding on behalf of the OC under s163(1A) of the OCA, or to join the OC as a party to the proceeding.
- 105 It was not until responding to the Respondents' Further Submissions on 16 March 2020, that Ms Khalof suggested that the Owners Corporation should be joined as another applicant to the proceeding. I consider there was an inexcusable delay in the Applicants making that application.
- 106 Furthermore, I consider that the Respondents would be unduly prejudiced by the Owners Corporation being joined at such a late stage of the proceeding. They have defended the proceeding as pleaded by the Applicants. To join the Owners Corporation would require the claim to be re-pleaded from the outset.
- 107 The claim is dismissed.

B. Thomas  
**Member**