

VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

OWNERS CORPORATIONS LIST

VCAT REFERENCE NO. OC1801/2018

CATCHWORDS

Claim by lot owner for its removal from the owners corporation – *Subdivision Act 1988* – sections 32, 32AE, 33 and 34D considered – consideration of what is *just and equitable* – lot and its relationship to the plan of subdivision previously considered – application dismissed.

APPLICANT	LH Corporation Pty Ltd (ACN 615 596 453)
RESPONDENT	Owners Corporation SP028481W
INTERESTED PARTIES	Chris Farmakis, Alex Farmakis, WEOS Super Pty Ltd, Francis Griffa, Noella Tsung, Leon Slonim
BEFORE	K. Campana, Member
HEARING TYPE	Final Hearing
DATE OF HEARING	30 April 2019
DATE FOR FINAL SUBMISSIONS	18 July 2019
DATE OF ORDER AND REASONS	14 October 2019
CITATION	LH Corporation Pty Ltd v Owners Corporation SP028481W (Owners Corporations) [2019] VCAT 1624

ORDER

For the reasons provided in writing, the Tribunal orders that –

- 1 The application is dismissed.
- 2 The Respondent's costs are reserved. Any application for costs must be made in writing to the Tribunal, and on notice to the Applicant, by 15 November 2019 and be supported by written submissions. If any application for costs is received, then the principal registrar is directed to refer the file to Member K. Campana for further directions.

K. Campana
Member

APPEARANCES:

For Applicant	Jason Kane, Barrister
For Respondent	Dan Slattery, Solicitor
For Interested Parties	Dan Slattery, Solicitor

REASONS

- 1 The owners of land occupied by a car wash, are seeking to remove their lot from liability to an owners' corporation at the Goldfields Plaza shopping centre in Warrandyte (**the Complex**).
- 2 The applicant, LH Corporation Pty Ltd (ACN 615 596 453) (**LH**), says its lot (**Lot 12**) receives no benefit from the common property, due to its distance from the other eleven lots that are within the shopping centre. It says its patrons don't even use the common property carpark and as such it should be removed from Owners Corporation SP0248481W (**the OC**).
- 3 Alternatively, to the complete removal of Lot 12 from the OC, LH seeks to reduce lot liability and lot entitlement to 1.
- 4 The other lot owners within the OC are opposed to the removal of Lot 12 or any reduction to its lot liability or entitlement. While most concerns arise due to an increase in the amount each lot will pay towards the costs of services to the common property, the other lot owners are also concerned about their lack of control over the use of Lot 12 in the future if it is removed from the OC.
- 5 Any change to lot liability or entitlement requires a change to the schedule of lot liability and lot entitlement on Plan of Subdivision 0428481W (**the PoS**).
- 6 The OC submits that LH has made the application under the wrong section of the *Subdivision Act 1988* (**the Act**). It says the Tribunal needs to consider the wishes, interests and impact on the other eleven lot owners in its consideration of what is *just and equitable*.
- 7 LH disagrees and submits that the amendment it is seeking does not require the strict assessment proposed by the OC. But says in any event, it would be unfair for it to continue to contribute to expenses it does not receive the benefit of.
- 8 For the reasons that follow, I find that the Tribunal is bound to take into account the impact of any reduction in liability to the OC of the Lot, on all other lot owners. As such I have determined that it is not '*just and equitable*' to remove or make any change to Lot 12's liability to, or entitlement from, the OC.

BACKGROUND TO THE ORDERS SOUGHT

- 9 In mid-2018, LH requested a ballot of members of the OC seeking a unanimous resolution to amend the PoS to remove Lot 12 from the OC.
- 10 Only six members of the OC responded to the ballot, one in favour of the resolution, the other five opposed.
- 11 LH then lodged this application on 24 August 2018. Subsequently directions were made, including a requirement that LH give notification of the proceeding to the other lot owners.

- 12 In a letter to lot owners dated 13 February 2019, LH explained –

An application pursuant to section 32(d) of the Subdivision Act 1988 (Vic) allows an alteration of a plan of subdivision to allow for a reduction of the number of lots affected by an owners corporation. In order to achieve the outcome sought, it is not necessary to remove Lot 12 entirely from the Plan of Subdivision. No diagram alterations to the Strata Plan are necessary. It is only necessary to remove the lots inclusion in the Owners Corporation and this will be reflected in the notations text contained on Sheet 1 of the Plan of Subdivision (enclosed).

After Land Victoria has registered the amended Plan of Subdivision, the Owners Corporation will also be amended to reflect the removal of entitlements and liabilities of Lot 12. We have enclosed an example of what the resulting Owners Corporation Search Report will look like for your consideration. Please be aware that the percentage liabilities and entitlements for each Lot will likely increase as a result. This increase will be proportionately shared among the 11 lots remaining on the Owners Corporation.

- 13 The matter came on for hearing before me on 30 April 2019. Licensed Surveyor, Troy Cooper, provided expert evidence in support of the application. In his written report (**the Cooper Report**), Mr Cooper states that –

If I was subdividing this development today, I would not include Lot 12 in the Owners Corporation, and for these reasons, it seems fair and reasonable to me that Lot 12 be removed from the Owners Corporation.¹

- 14 A number of the other lot owners in the Complex attended the hearing and provided statements addressing their concerns². The owner of lot 5, Alex Farmakis, expressed the view of many and stated-

From a maintenance costs point of view, other than main building works (which directly benefit only the lot owners in the shopping complex), I firmly believe that any gardening, paving, footpaths, general public safety requirements and insurance should include Unit 12 as a well maintained and co-ordinated entrance to the shopping centre is critical to its (Lot 12's) success.

- 15 At the end of the hearing, further directions were made for the filing of additional material relating to a previous amendment of the PoS and submissions on the law.

- 16 The Cooper Report states that –

In order to achieve the outcome sought, it is not necessary to remove Lot 12 entirely from the Plan of Subdivision. No diagram alterations to the Strata Plan are necessary. It is only necessary to remove the lots inclusion in the Owners Corporation and this will be reflected in the

¹ Report of Troy Cooper dated 17 April 2019 at paragraph 15.

² Exhibit JJB-5. Statements from Leon Slonim, John Jalowicki, Alex Farmakis, Francis Jean-Claude Briffa and Noella Tsung were all presented to the Tribunal.

notations text contained on Sheet 1 of my Plan. I have prepared the proposed amended Plan of Subdivision which I have attached to this report.

- 17 In effect LH is seeking an order that the OC be directed to amend the PoS to the extent that Lot 12 is removed from the “*owners corporation, thus reducing the entitlement and liability totals and leaving the other lots entitlements and liabilities unchanged*”.³
- 18 A consideration of the source of the power to amend the PoS, and the matters to be taken into account in exercising such a power, is examined below.

THE LAW

- 19 LH seeks to remove Lot 12 from the OC schedule on the PoS, in accordance with s 32(d) of the Act. Section 32 states, as far as is relevant—

32 Powers to alter subdivision

If there is a unanimous resolution of the members, an owners corporation may proceed under this Division to do one or more of the following—

- (a)–(c)
- (d) increase or reduce the number of lots affected by the owners corporation;
- (e)–(j)
- (k) create, alter or extinguish lot entitlement or lot liability in any way necessary because of the exercise of its other powers under this section
- (m)

- 20 In considering the exercise of a power under s 32 to create, alter or extinguish lot entitlement or lot liability, s 32AE of the Act requires compliance with ss 33(2) and 33(3).

32AE Lot liability and lot entitlement

In exercising its powers under section 32 to create, alter or extinguish lot entitlement or lot liability, an owners corporation must comply with sections 33(2) and 33(3).

- 21 Section 33 of the Act states —

33 How can lot entitlement and liability be altered?

- (1) If there is a unanimous resolution of the members, the owners corporation may apply to the Registrar in the prescribed form to alter the lot entitlement or lot liability.
- (2) In making any change to the lot liability, the owners corporation must have regard to the value of the lot and the proportion that value bears to the total value of the lots affected by the owners corporation.

³ Notation describing the purpose of the amended plan as submitted on the Plan of Subdivision by LH.

- (3) In making any change to the lot liability, the owners corporation must consider the amount that it would be *just and equitable*⁴ for the owner of the lot to contribute towards the administrative and general expenses of the owners corporation.

22 As there has been no unanimous resolution of the members of the owners corporation, LH has made application under s 34D(1)(a) seeking an order from the Tribunal requiring the OC to take action. Section 34D states –

34D Applications relating to plans

- (1) A member of the owners corporation, an owners corporation, an administrator of an owners corporation or a person with an interest in the land affected by the owners corporation may apply to the Victorian Civil and Administrative Tribunal for –
 - (a) an order requiring the owners corporation to do any of the things set out in section 32 or 33; or
 - (b) an order consenting on behalf of a member or group of members of an owners corporation to the doing by the owners corporation of any of the things set out in section 32 or 33; or
 - (c) an order consenting on behalf of a person whose consent to the registration of a plan is required under section 22; or
 - (d) an order restraining the owners corporation from doing any action under this Act or the regulations.
- (2) The Victorian Civil and Administrative Tribunal may make an order on an application under subsection (1)(a) even though there is no unanimous resolution of the owners corporation authorising the action.
- (3) The Victorian Civil and Administrative Tribunal must not make an order under subsection (1)(b) unless it is satisfied that-
 - (a) the member or group of members cannot vote because the member is or the members are dead, out of Victoria, or cannot be found; or
 - (b) for any other reason it is impracticable to obtain the vote of the member or members; or
 - (c) the member has or members have refused consent to the proposed action and –
 - (i) more than half of the membership of the owners corporation having total lot entitlements of more than half of the total lot entitlement of the members of the owners corporation consent to the proposed action; and
 - (ii) the purpose for which the action is to be taken is likely to bring economic or social benefits to the subdivision as a whole greater than any economic or social disadvantages to the members who did not consent to the action.

⁴ Emphasis added.

- (4) For the purposes of sections 32 and 33, an order made on an application under subsection (1)(b) is to be treated as a vote by the member in favour of the proposed action of the plan.
- (5) The Victorian Civil and Administrative Tribunal must not make an order on an application under subsection (1)(c) unless it is satisfied that-
 - (a) the person whose consent is required is dead or out of Victoria or cannot be found; or
 - (b) it is otherwise impracticable to obtain the person's consent; or
 - (c) it is impracticable to serve the person with the notice under section 22(1B).
- (6) Subject to this section, the Victorian Civil and Administrative Tribunal may make any other order it thinks fit on an application under this section.

23 VCAT has held that it is a matter for an applicant to determine the section under which it seeks to make its claim⁵. This proposition has not been overturned on appeal.

24 LH has made its application to compel the OC to make alterations to lot liability under s 34D(1)(a) of the Act. The OC submits that LH is limited in being able to bring this application, as the proper basis is a claim under section 34D(1)(b) of the Act.

25 The former President of VCAT, Justice Greg Garde, has determined that an application under section 34D(1)(a) of the Act is not subject to any express limitation (such as those provided under ss.34D(1)(b), 34D(1)(c) and 34D(1)(d)).⁶ However His Honour says that does not mean that in considering an application under section 34D(1)(a) the Tribunal can approach the task as if it had a blank canvas –

.... guidance can be obtained from the language of s 32 and s 33 as to the considerations that are relevant to an application made under s 34D(1)(a). Section 33(2) states that “the owners corporation must have regard to the value of the lot and the proportion that value bears to the total value of the lots affected by the owners corporation.” Section 33(3) requires that “in making any change to the lot liability an owners corporation must consider the amount that it would be just and equitable for the owner of the lot to contribute towards the administrative and general expenses of the owners corporation.” These considerations are also significant at the Tribunal level.⁷

⁵ *Conroy v Owners Corporation Strata Plan 30438* (Owners Corporations) [2014] VCAT 550 at paragraph 26 – “It is up to applicants to identify in their application which one or more of the powers contained in s 34D(1)(a)-(d) and (6) they seek to enliven, and then to satisfy the Tribunal that they meet the requirements (if any) imposed by s 34D(2)-(6) on the exercise of that power, and that the Tribunal after having considered all relevant considerations should grant the desired relief.”

⁶ *Conroy v Owners Corporation Strata Plan 30438* (Owners Corporations) [2014] VCAT 550 at paragraph 17.

⁷ *Ibid.*

26 In the *Concept Developer Pty Ltd v Conroy* [2015] VSC 464 (the **Concept Developer case**), John Dixon J set out the following principles when assessing whether or not to alter lot liability⁸ -

- (1) The consideration takes place in the context of there being a legal obligation of each lot owner to pay a proportion of the owners corporation's administrative and general expenses, as reflected in the concept of lot liability⁹.
- (2) The owners corporation should not start with the assumption that a lot owner's liability is or should be different from that specified in the plan of subdivision.
- (3) In considering the amount that it would be 'just and equitable' for the lot owner to contribute to the administrative and general expenses, the owners corporation should have regard to:
 - (a) the nature of the subdivision;
 - (b) the number of lots;
 - (c) the area, layout and uses of the common property;
 - (d) how the existing lot liability was set;
 - (e) the existing expenses of the owners corporation and how those expenses were incurred in relation to the use of common property; and
 - (f) the existing contribution of each lot owner to the existing expenses.

27 LH submits that the facts in the *Concept Developer* case can be distinguished because that case concerned a reduction of lot liability and not the complete removal of a lot from the OC. LH submits that it seeks an order to reduce the number of lots affected by the owners corporation in accordance with s 32(d) and does not seek to create, alter or extinguish lot entitlement or lot liability under s 32(k).

28 The removal of Lot 12 from the OC necessarily involves the extinguishment of its lot entitlement and lot liability. The operation of the considerations under s 33 are just as applicable to an application to reduce lot liability as they are to the removal of a lot from an owners corporation. The practical effect of removing a lot from an owners corporation is to reduce or extinguish lot liability and entitlement. Quite often it will also involve altering the liability and entitlement of other lots affected by the owners corporation or the total lot liability and lot entitlement of the owners corporation.

29 Additionally, the wording of s 32AE of the Act makes it clear that consideration must be given to the factors set out in ss 33(2) and 33(3), before "*creating, altering or extinguishing lot entitlement or lot liability*". That includes consideration of what is "*just and equitable*".

⁸ Anstat commentary [Su33.03] dated December 2015.

⁹ See sections 3 (definition of lot liability) and 28 of the *Owners Corporations Act 2006*.

- 30 As the Tribunal is being asked to step into the shoes of the OC, and with the guidance of the principles set out above, consideration will be given to the matters identified in the *Concept Developer's* case and ss 33(2) and 33(3) to determine whether the removal of LH from the OC is just and equitable.

IS THE REMOVAL OF LOT 12 FROM THE OC JUST AND EQUITABLE?

(a) The nature of the subdivision.

- 31 The subdivision is a shopping centre surrounded by a carpark, with Lot 12 sitting at the front of the Complex.
- 32 Lot 12, an entirely self-contained lot, is fenced off from the Complex car park and does not share any utilities with the shopping centre building. It is currently the subject of a lease to a car wash business with 23 years remaining on the lease.
- 33 The remaining lots are within the walls of the shopping centre. Lot 1 is the largest of the lots and operates as a supermarket. The other nine lots consist of smaller speciality shops including a chemist, café and butcher. The shopping centre is surrounded by car parking and has a small outdoor plaza and public toilets.

(b) The number of lots.

- 34 There are 11 lots in the Complex. While lot numbers reach the number 12, without explanation, there is no lot 7.

(c) The area, layout and uses of the common property.

- 35 It is agreed that Lot 12 does not make any direct use of the common property. The common property consists of the central courtyard of the shopping centre, the public toilets and the carpark.

(d) How the existing lot liability was set.

- 36 The existing lot liability was set as a result of previous litigation before the Tribunal by the former owners of Lot 12.
- 37 Wardyte Pty Ltd brought an application to the Tribunal¹⁰ for a reduction in lot liability and entitlement in 2012, resulting in the following orders being made on 4 December 2012 by consent (**the 2012 Order**) –

1. Pursuant to Section 34D of the Subdivision Act 1988, the schedule of units of lot entitlement and liability for Owners Corporation PS028481W is altered from 9 October 2012 to read as:

Lot	Units of Entitlement	Units of Liability
1	1400	1529
2	100	109
3	60	66

¹⁰ In VCAT proceeding OC554/2011.

4	190	208
5	140	153
6	120	131
8	140	153
9	100	109
10	100	109
11	50	55
12	450	228
Total	2850	2850

2. The reduction in units of lot liability for lot 12 on plan of subdivision 028481W has been determined with reference to the benefit and utility that lot 12 receives from the regular incurrence of the following expenses by Owners Corporation PS028481W:
 - a. Caretaking and hygiene solutions,
 - b. gutter cleaning,
 - c. public lighting and electricity,
 - d. rubbish removal,
 - e. fire protection,
 - f. water and sewerage, and
 - g. general repairs of substantial benefit to the shopping centre part of the development.
3. The alteration in the units of lot liability for Owners Corporation PS028481W is just and equitable.
4. The Applicant shall pay any and all costs associated with applying to and registering the alteration of the schedule of units of lot entitlement and liability.
5. The parties to the proceeding forever mutually release and discharge each other from all claims and or demands that are the subject of this proceeding.
6. No order as to costs.

38 It is clear that in correspondence between the parties dated 4 April 2012¹¹ and in a report dated 3 April 2012¹² (**the Ladner Report**), Lot 12 was already being used as a carwash.

¹¹ The OC notes that – “A fact that is not raised in the report is that the lot 12 used to be a petrol station and has been converted to a car wash. I do not have a copy of the planning permit for the development as a whole and use of land permits for lot 12 as yet. I am in process of obtaining copies of these permits. I am also obtaining copies of the income and expenditure reports for the last five years.”

¹² Document 6 of the Respondent’s documents submitted on 17 May 2019 – report by Geoff Ladner, Licensed Surveyor, Millar Merrigan Land Development Consultants – in particular paragraphs 17, 18, 19 and 20.

- 39 On the basis of the Ladner Report, correspondence and the information contained in the 2012 Order, the following factors were taken into account in determining lot liability and lot entitlement–
- a the manner of use to which Lot 12 was being put,
 - b the absence of any access to or from the common car park to Lot 12
 - c the location of Lot 12 and it's distance physically to the shopping centre, and
 - d the services supplied and used for the benefit of the common property (and not Lot 12).

(e) The existing expenses of the OC and how those expenses are incurred in relation to the use of common property.

- 40 LH says that Lot 12 has its own sewerage, stormwater, gas, electricity and phone connections. It says the tenant of the lot pays for security and rubbish removal associated with the operation of the car wash and has its own insurance. LH maintains and carries out any maintenance and repairs to Lot 12.
- 41 The Tribunal was provided with the OC budget to apply from 1 October 2018, which also included the actual money spent by the OC for the year prior.
- 42 In reviewing the Ladner Report and the expenditure in 2017/2018, there has been a slight increase in spending by the OC. The following comparisons are of note –
- a Caretaking: \$22,000 (2012) - \$25,515.82 (2018)
 - b Fire protection: \$300 (2012) - \$1820 (2018)
 - c Security Patrols: \$8,000 (2012) - \$10,121.36 (2018)
 - d Rubbish Removal: \$9,600 (2012) - \$11,731.40 (2018)
- 43 In the 2018 accounts there was a significant spend of over \$50,000 for painting and finishing works which had not been foreshadowed in the budget. It is not clear if funding for these works was raised by way of a special resolution or if they were apportioned in accordance with the benefit principle.¹³

(f) The existing contribution of each lot owner to the existing expenses.

- 44 The current schedule to the PoS that defines lot entitlement and lot liability contains the following table

Land Parcel	Entitlement	Liability
Unit 1	1400	1529
Unit 2	100	109

¹³ Section 49 of the *Owners Corporations Act 2006*.

Unit 3	60	66
Unit 4	190	208
Unit 5	140	153
Unit 6	120	131
Unit 8	140	153
Unit 9	100	109
Unit 10	100	109
Unit 11	50	55
Unit 12	450	228
Total	2850	2850

- 45 The application seeks to remove Unit 12 from the table, reducing the Total Lot Entitlement to 2400 and Total Lot Liability to 2622.
- 46 LH says it currently pays about \$10,000 a year in fees to the OC but receives little, if any, benefit from the payment.

Overall Consideration of What is Just and Equitable?

- 47 LH submits that it is just and equitable to remove Lot 12 from the OC. It says that the overall expenditure of the OC should decrease as a result of Lot 12's removal, with less maintenance and a speculative reduction in insurance premiums.¹⁴
- 48 LH further submits that if there is a slight increase in the OC expenditure, then these costs would be dispersed proportionally amongst the other lot owners. In any event LH says that these fees would also be directed towards the ongoing maintenance and operation of the Shopping Centre which will be beneficial for each lot owner. It submits that this will result in an economic and social benefit to the subdivision as a whole.¹⁵
- 49 LH further submits that *“Any perceived financial disadvantage that the other lot owners may incur must also be balanced against the financial disadvantage that LH is currently incurring (and will continue to incur if Lot 12 is not removed from the subdivision).* LH says that Lot 12 derives little benefit from the annual fees that it pays to the OC, and as it already pays for its own utilities, maintenance, insurance and other operating expenses, it is essentially being required to pay these expenses twice.
- 50 During the hearing significant emphasis was placed on the amount spent on security at the Complex, and the little benefit it has to Lot 12. Security was referred to and considered in the Ladner Report. The amount spent in 2012

¹⁴ Neither LH, the OC or any other lot owner had sought any advice from the insurance company about the impact on the premium of Lot 12's removal.

¹⁵ Paragraph 27 of the Applicant's submissions dated 30 April 2019.

on security is not significantly more in 2018, when consideration is given to inflation. With the matter having already been considered in forming the view of what was just and equitable when the current lot liability and lot entitlement was set, this item is not persuasive of any readjustment.

- 51 The OC's other lot owners are concerned about the impact of LH's removal on the financial contributions they will be required to make to the OC. Additionally the lot owners say that Lot 12 receives an indirect benefit of having a shopping complex that is attractive to patrons.
- 52 The second major concern of the OC is the lack of control it will have over any future development of Lot 12. I am not persuaded that this is a relevant matter that should be taken into account. Local government planning processes dictate the use of a premises, not the *Owners Corporations Act 2006*. Removal of a lot from an owners corporation will not impact on the other lot owners rights to object to a *change of use* application by the owners of Lot 12.
- 53 I have given considerable consideration to the matters identified in the Cooper Report, but find they are no different to those highlighted in the Ladner Report and considered by the lot owners of the Complex and the OC in 2012. There has been no significant change to the structure of the OC or to its expenditure, or to the use of, or services supplied to, Lot 12.
- 54 The Tribunal made a determination in 2012, with the consent of the parties, that the lot liability and lot entitlement of Lot 12 would be reduced to 228 and 450, respectively. It made that adjustment, as it stated in the 2012 Order at order 3, because it was "*just and equitable*".
- 55 Considering each of the matters identified in the *Concept Developer's* case as set out above, an overwhelming factor is the 2012 determination that the existing lot entitlement and lot liability for Lot 12 is *just and equitable*. Without any significant change to the considerations that formed that view, I am not persuaded that it is appropriate to exercise my discretion and remove Lot 12 from the OC. Nor am I persuaded in the alternative that there should be any reduction to Lot Liability or Lot Entitlement.
- 56 If Lot 12 is concerned that it is paying for maintenance, repairs or works that it receives no benefit for, then it may have a remedy under s 49 of the *Owners Corporations Act 2006*. Its removal from the OC is not the answer.
- 57 For the above reasons the application by LH is dismissed.
- 58 The costs of the OC will be reserved, with any application for costs to be made by 15 November 2019. If any application for costs is received, then directions will be made for the filing of submissions in support.

K. Campana
Member