VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

OWNERS CORPORATIONS LIST VCAT REFERENCE NO. OC1773/2019

CATCHWORDS

Lot owner in breach of Rules – alteration to common property – owners corporation acting in good faith and with due care and diligence – sections 5, 18, 139, 153 - 158, 162 - 165 & 167 *Owners Corporation Act 2006* (Vic) – *Shearman v Owners Corporation No 1 417405Y* [2016] VSC 551 – urgent repairs – section 3 *Residential Tenancies Act 1997* – sections 109, 115B & 115C *Victorian Civil and Administrative Tribunal Act 1998*

APPLICANT	Owners Corporation PS29001K
RESPONDENT	Merian Waks
WHERE HELD	Melbourne
BEFORE	C. Powles, Member
HEARING TYPE	Hearing
DATE OF HEARING	17 March 2020
DATE OF ORDER AND REASONS	24 September 2020
CITATION	Owners Corporation PS29001K v Waks (Owners Corporations) [2020] VCAT 1068

ORDER

1 Under s.165 of the *Owners Corporations Act 2006* (Vic), the Tribunal:

(a) declares that the respondent has breached rule 3.3(1) of the Model Rules; and

(b) orders that the respondent, within 60 days of the date of this order, in a workmanlike manner, remove the gas hot water installation for Lot 10 from the common property and reinstate the external common property wall to the condition it was prior to the installation.

2 The respondent must reimburse the applicant the application fee and hearing fee, in the sum of $611.70.

3 Subject to any further orders the Tribunal may make, the applicant's claim for costs is to be determined on the papers based on the following:

(a) **By 4:00 pm on 15 October 2020**, the applicant is to provide the respondent and the Tribunal, by email, a copy of a written submissions for costs.

(b) **By 4:00 pm on 29 October 2020**, the respondent is to provide the applicant and the Tribunal, by email, a copy of her written submissions in reply to any submissions by the applicant.

(c) It is intended that a decision on costs shall be made on the basis of the above submissions, but if it deems it necessary the Tribunal may list a hearing on the question of costs.

4 If the applicant does not make any submissions for costs in accordance with order 3(a), this paragraph has the effect that there is no order as to costs.

C. Powles
Member

APPEARANCES:

For Applicant	Mr J. Louey, Owners Corporation manager
For Respondent	Mr H. Nair, solicitor

REASONS

Background

1 The applicant is the Owners Corporation responsible for the management of the strata title premises described in Plan of Subdivision 29001K (the **Plan**), also known as 23 – 27 Docker Street, Elwood (the **property**).

2 The Plan has 45 lots in total across three buildings at the property. There are 24 units across the three buildings.

3 The applicant has not made or revoked any rules. Accordingly, the applicant's rules (the **Rules**) are the model rules in force at the time of its creation.[1]

4 The respondent was at all material times and is the sole registered proprietor of Lot 10 of the Plan. Lot 10 (the **unit**) is one of four units on the ground floor of the middle of the three buildings at the property (the **building**).

5 In or around July 2018, the applicant became aware of a new gas hot water service installation (the **HWS**) on the common property of the property (the **common property**). The HWS services the unit.

6 Rule 3.3(1) of the Rules stipulates that an owner or occupier must not damage or alter the common property without the written approval of the applicant.

7 The respondent had not sought or obtained written approval from the applicant for the installation of the HWS on the common property.

8 The applicant decided to take action under Part 10 of the Act against the respondent on the basis that it had come to the attention of the applicant that the respondent may have breached Rule 3.3(1) by installing the HWS on the common property without the applicant's approval.

9 On 30 August 2018, the Committee of the applicant (the **Committee**) resolved by ballot to issue a notice to rectify a breach[2] to the respondent. That notice was sent to the respondent on 19 September 2018.

10 On 2 November 2018, the Committee considered that the respondent had not rectified the alleged breach and so resolved to issue a final notice to rectify a breach.[3] That notice was sent to the respondent on 3 November 2018.

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1 Under s 139(2) of the *Owners Corporations Act 2006* (Vic) (the **Act**), if an owners corporation does not make or revoke any rules, the prescribed Model Rules apply as the rules for the owners corporation. References to sections in these reasons are references to sections of the Act unless otherwise specified.

2 Under s 155, if an owners corporation decides to take action in respect of an alleged breach, it must give notice of the allegation to the person alleged to have committed the breach and require that person to rectify the breach within 28 days.

3 Under ss 156 & 157, if a person given a notice under s 155 does not rectify the breach, the owners corporation may give the person a final notice again requiring the breach to be rectified within 28 days and stating that the owners corporation may apply to the Tribunal requiring rectification of the breach.

11 On 9 July 2019, the applicant applied to the Tribunal for an order requiring the respondent to rectify the alleged breach by, within 28 days, removing the HWS from the common property, repairing brickwork damaged by the installation of the HWS and making good the area in which the HWS was installed.[4]

12 On 4 September 2019, the application was listed for hearing before a different member of the Tribunal. That hearing was adjourned to enable the respondent to seek the approval of the applicant for the installation of the HWS on the common property.

13 On 18 September 2019, the respondent sent a letter to the applicant setting out her reasons for why she was seeking approval for the HWS to be installed on the common property.

14 On 22 November 2019, a letter was sent on behalf of the applicant to the respondent advising that the applicant would not retrospectively approve the installation of the HWS on the common property.

15 The applicant and the respondent provided written submissions to the Tribunal before the application was heard.

16 By the time of the hearing of the application, the HWS remained installed on the common property but the respondent had repaired brickwork damaged by the installation of the HWS so the applicant no longer sought orders in relation to that.

17 I heard the application on 17 March 2020. The applicant and the respondent's representative made further submissions at the hearing. Two witnesses gave evidence at the hearing on behalf of the applicant. Several photographs and other documents were submitted by both parties at the hearing. At the conclusion of the hearing, I reserved my decision.

18 The respondent agrees that she has altered the common property by installing the HWS without the approval of the applicant. In response to the application, the respondent has made submissions about why the HWS should remain on the common property and she should not be required to remove the HWS from the common property. The success of the application turns on whether I accept those submissions.

19 Accordingly, I set out below the respondent's submissions first and the applicant's submissions in response.

Respondent's submissions

20 The respondent's submissions can be summarised as follows:

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[4] Under ss 162 & 163, an owners corporation may apply to the Tribunal to resolve an owners corporation dispute, which includes a dispute relating to an alleged breach by a lot owner of the rules of the owners corporation.

(a) the Act required the applicant to be authorised by a special resolution to apply to the Tribunal, no special resolution was passed authorising the application and so the application should be dismissed;

(b) in 2018,[5] the respondent had a tenant living in the unit and the tenancy was managed on the respondent's behalf by a real estate agent;

(c) on 26 June 2018, the respondent was advised by the real estate agent that the hot water system (the **old HWS**) at the property was not working;

(d) on the same day a licensed plumber and gas fitter from PlumbMaster Pty Ltd (**PlumbMaster**) attended the property and assessed the hot water system as being in poor repair and needing complete replacement;

(e) the old HWS was located in the roof of the building;

(f) PlumbMaster advised the respondent that:

(i) the old HWS could not be safely removed from the roof and the HWS could not be installed in the roof because it would be inaccessible; and

(ii) the old HWS could not be maintained without breaching occupational health and safety requirements;

(g) PlumbMaster deemed the safest area the HWS could be installed was on the external wall outside the unit near pre-existing gas lines and gas metres that had been installed for other members of the applicant;

(h) the HWS is "slim line", is of a similar colour to the bricks on the building and does not hinder or obstruct any other lot owners;

(i) a similar system has been installed at the back of one of the other of the three buildings on the property (the **similar system**) to service Lot 3 and has not been prohibited by the applicant;

(j) the applicant has not issued breach notices to other lot owners for the placement of gas lines and gas metres on common property or for the installation of the similar system; and

(k) in singling out the respondent by issuing breach notices to her and not to other lot owners, the applicant has "applied a subjective criteria" and so not carried out its functions in good faith or with due care and diligence as required by s 5 in light of the Supreme Court of Victoria decision, *Shearman v Owners Corporation No 1 417405Y* (***Shearman***).[6]

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5 The respondent's written submissions dated 31 January 2020 state the installation of the HWS on the common property occurred in June 2019. However, the invoice and compliance certificate provided to the respondent for the works confirm the work was done in 2018.

6 [2016] VSC 551.

Applicant's submissions

21 The applicant's submissions can be summarised as follows:

(a) the applicant was not required to be authorised by special resolution to apply to the Tribunal because the application was brought to enforce the Rules;

(b) the location of gas lines and gas metres on the common property is not relevant because gas metres are installed on the ground, not mounted on external walls, and single pre-existing gas lines are "uncontroversial";

(c) in contrast the HWS sits outside of the wall of the unit and has four separate connections, with four separate lines;

(d) the similar system was installed with approval of the applicant because of "a very unique set of circumstances": a significant presence of moisture and mould in the unit in Lot 3, health concerns of the owner and resident of Lot 3 and potential legal liability to the applicant if the owner of Lot 3 was denied permission to install an "optimal heating solution" to promptly address the mould and moisture in the unit;

(e) none of those circumstances apply to the respondent in this case;

(f) the applicant has previously denied permission for the installation of a hot water service on the common property to another lot owner, in 2015, and after permission was denied that the lot owner installed a hot water service internally;

(g) the applicant is entitled to make decisions to protect the external appearance of the property and is concerned not that the HWS is itself alone a hindrance or obstruction but that if the respondent is permitted to install the HWS on the common property, a precedent would be established and other lot owners could seek to install hot water services, or other services on external common property walls, which would be "aesthetically unappealing";

(h) installation of a hot water service in the roof of the building is not dangerous and will not breach occupational health and safety requirements;

(i) at least one other lot owner has replaced a hot water service in the roof of one of the buildings and the company that carried out those works has confirmed that while replacement of the hot water service in the roof is "a more involved installation" it can still be carried out to meet occupational health and safety requirements;

(j) other lot owners have installed hot water services inside their units;

(k) the respondent did not seek approval from the applicant before installing the HWS, which is relevant because, if permission had been sought, negotiation between the parties may have resulted in the respondent understanding the other options available for installation of

a hot water service before incurring the expense of installing the HWS on common property; and

(l) the respondent does not claim there is any legal error in the applicant's decision to decline the installation of the WHS and so it would not be appropriate for the Tribunal to interfere with the applicant's decision.

Respondent's evidence

22 As noted above, the respondent provided the Tribunal with:

(a) photographs of the property, including the common property;

(b) a copy of the plan of subdivision for the property;

(c) a copy of an email dated 14 November 2018 between two of the real estate agents acting for the respondent in relation to the tenancy at the unit; and

(d) an undated letter from PlumbMaster (the **PlumbMaster's letter**) stating:

> Access to the roof space was problematic as the owner in the apt [sic] would not allow us adequate access (the access to the roof space is via their apt[sic]). They only would offer access after normal business hours unfortunately making the whole exercise difficult.
>
> There are other hot water service mounted to the outside of the building setting a precedent for this to be able to be done.
>
> The tenant was without hot water already for a number of days due to the limitation of access.
>
> As a result we proceeded to install hot water system the only way we had as an option.

23 The respondent also gave evidence at the hearing on her own behalf.

24 During the hearing, the respondent:

(a) referred to the photographs and plan of subdivision as evidence that the area in the common property around the HWS is not seen or used by lot owners and so the installation of the HWS is not a hindrance to lot owners;

(b) provided an account of the advice that PlumbMaster had provided to the respondent about the replacing of the old HWS in the roof: that it would involve removing the roof, using a scissor lift to remove the old HWS and install a new hot water service and that it was "almost impossible";

(c) submitted that because the application was initiated by the applicant rather than any individual lot owner at the property, the Tribunal should assume that none of the other lot owners at the property objected to the installation of the HWS and that the absence of any complaints from

other lot owners support a finding that the applicant acted in bad faith in issuing the notices and making the application; and

(d) the respondent had to act immediately to replace the old HWS in order to meet her duties to her tenant under s 68 of the *Residential Tenancies Act 1997* (the **RTA**) to maintain the premises in good repair and was unable to install the HWS in the roof above the unit because the tenant living in the unit above the unit would not allow access to PlumbMaster for installation during business hours.

Applicant's evidence

25 Two witnesses provided evidence to the Tribunal at the hearing and were cross-examined by the respondent's representative. Mr Louey also provided evidence from the bar table, in his capacity as manager of the applicant.

26 The applicant provided copies of:

(a) the breach notices sent to the respondent;

(b) photographs of another unit at the property, showing the installation of a hot water system under a bench in the kitchen; and

(c) emails between the chair of the Committee and another lot owner about the installation of a hot water system in the roof of the building the unit is in.

27 At hearing, the applicant provided further evidence of the circumstances in which the similar system was installed. The applicant submitted those circumstances were very different from the installation of the HWS, including but not limited to the respondent's failure to properly seek permission from the applicant for the installation of the HWS, unlike the lot owner who sought permission for the installation of the similar system.

28 As set out below, the applicant also submitted evidence that an application for permission to externally install a hot water system made by a lot owner in 2015 was refused in circumstances very similar to that of the respondent.

29 The first of the applicant's witnesses was Irene Mitelman who gave the following evidence:

(a) she is the owner of Lot 21 and has lived at the property since 1996;

(b) she is a member of the Committee and has been for approximately 15 years;

(c) she endorsed the decision of the Committee to refuse the respondent's application for permission to install the HWS externally because she knew that at least 4 other hot water services located in the roof of the property had been replaced either in the roof or relocated within a lot;

(d) the owner of Lot 14 applied to have a hot water service externally installed in 2015 but after the applicant refused to give permission, Committee members explained to the owner that there were

alternatives, including installation within the lot, and the owner of Lot 14 installed the hot water service in the roof cavity;

(e) the Committee refused the respondent's request for permission to install the HWS externally because:

(i) allowing lot owners to install material externally affected the look of the buildings on the property;

(ii) if allowed more generally, the property "would look like Brooklyn"; and

(iii) it was not necessary because, as most other lot owners had, the HWS could be installed in the roof cavity or internally to the lot; and

(f) she understood the decision of the Committee to grant permission to the owner of Lot 3 to install the similar system externally was because:

(i) at the time Lot 3 was suffering significant moisture problems, with excessive mould and condensation;

(ii) it was assessed that hydronic heating was needed to absorb the moisture; and

(iii) the only alternative to installing the similar system was underfloor heating which the Committee was unable to agree to because of lack of clarity of ownership of the area beneath the floor of the ground floor lots.

30 The applicant's other witness was Mr Peter Allan who gave the following evidence:

(a) he is the owner of Lot 5 and the chair of the Committee;

(b) he has been a lot owner for 23 years and has been a member of the Committee for the last 10 years;

(c) he is a registered builder and teaches a construction course at Chisholm TAFE;

(d) he also endorsed the Committee's decision to refuse the respondent's request for permission to install the HWS externally and explained the Committee's rationale as being that:

(i) all hot water services for the lots at the property should be installed either in the roof cavity or internally, most commonly under benches in the kitchen; and

(ii) it did not want to create a precedent for the further installation of hot water systems or other items on external walls of the buildings at the property;

(e) Mr Allen was chair of the Committee when the 2015 request for the external installation of a hot water system was refused and he wrote a

letter to lot owner dated 29 June 2015[7] explaining the Committee's reasons and how the lot owner could arrange for her hot water system to be installed either in the roof cavity or internally;

(f) in relation to the approval for the owner of Lot 3 to externally install the similar system:

(i) he had inspected the lot himself and seen the extent of the mould and moisture problems in the lot, which particularly concerned him as the owner of Lot 3 was heavily pregnant at the time and was required to live in the lounge room of the lot because of the moisture issues;

(ii) the owner of Lot 3 had consulted 2 different plumbers who had advised her to have underfloor heating installed but the Committee was uncertain as to whether the necessary underfloor pipes could be installed because it was unclear who owned the area beneath the floor of the ground floor units;

(iii) Mr Allan consulted a heating expert who advised that hydronic heating could be installed that would provide "radiant heat" that could dry out the walls of the unit; and

(iv) the owner of Lot 3 provided the Committee with significant details of the proposed external heating system installation, including photographs, models and specifications of the particular location and type of the proposed heating system, after which, in all of the circumstances, the Committee approved her request;

(g) Mr Allen considered that the respondent's claim that there was no practical alternative to installing the HWS on the common property was incorrect and referred to advice he had received from Kilburn Plumbing, a company that regularly provides plumbing services to owners corporations, that other options were available, confirmed in an email[8] stating the following:

> As the preferred plumbers at the above address please find the following information:
>
> Prior to installing a new private appliance on any external wall of any block of units we would seek approval from the owners corporation management. Over the years this issue has presented itself and in fact we have removed and refitted appliances installed by others for this very reason.
>
> At 23 Docker Street we installed a replacement hot water unit for unit 5 some years ago, like for like. There is no question like-for-like is a more involved installation however with the correct

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7 A copy of which was provided to the Tribunal and the respondent at the hearing.

8 From Kilburn Plumbing to Mr Allen dated 27 February 2020, a copy of which was handed up to the Tribunal and provided to the respondent at the hearing.

safety equipment and access equipment the installation can be carried out to meet OHS requirements.

There are also other potential types of hot water units available that could have been considered, possibly an electric unit within the unit itself.

; and

(h) renovations are being undertaken in Unit 23 and Mr Allen arranged for photographs to be taken of the interior of that unit showing their hot water service has been installed internally under a bench in the kitchen.[9]

Findings

31 The respondent has challenged the application on the following grounds:

(a) the application did not comply with the relevant requirements under the Act so that the Tribunal does not have jurisdiction to hear it; and

(b) in refusing to give approval for the installation of the HWS, issuing the breach of duty notices and making the application, the applicant breached its duties under the Act to act in good faith and exercise due care and diligence.

32 I address each of these grounds below.

Did the application comply with relevant requirements?

33 The respondent claimed in her written submission and at the hearing that the applicant did not have power to bring legal proceedings without a special resolution authorising it do so, as required by s 18(1) of the Act. When it was put to her representative at the hearing that s 18(2) allows an owners corporation to bring legal proceedings without being authorised by a special resolution if the proceedings are an application to the Tribunal to enforce the owners corporation rules, he raised the issue of whether s 18(2) was in force at the time the application was made.

34 Section 18(2) has been in its current form since the first version of the Act.[10] The application was lodged on 9 July 2019. Accordingly, s 18(2) was in force when the application was lodged and the respondent's legal representative's submission on this issue is without merit. The applicant was not required to have authorisation by a special resolution to bring these proceedings against the respondent.

35 Under s 164, the Tribunal may dismiss or strike out an application by an owners corporation made under s 153 if the Tribunal is satisfied the owners corporation has not complied with that section.

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9 The photographs were handed up to the Tribunal and provided to the respondent at the hearing.

10 Version as at 31 December 2007, accessible at https://content.legislation.vic.gov.au/sites/default/files/d8fece05-b927-34e0-a29c-39456ab87368_06-69a001.pdf

36 Subsection 153(4) stipulates that an owners corporation must not take action against a lot owner for an order in respect of an alleged breach unless it believes on reasonable grounds that the person has committed the alleged breach.

37 The respondent has not claimed that the applicant did not believe on reasonable grounds that the respondent had committed a breach of the Rules. Rather, her claim is that the applicant has not acted honestly and in good faith or with due care and diligence.

38 However, I consider that her claim can be characterised as including a claim that, because the applicant has not acted honestly and in good faith or with due care and diligence, it did not believe on reasonable grounds that the respondent had committed a breach of the Rules.

39 I address the issue of whether the applicant has acted honestly and in good faith or with due care and diligence below. For the same reasons that I am satisfied the applicant has acted honestly and in good faith, and with due care and diligence, I am not satisfied there are grounds for dismissing this application because the applicant has not complied with s 153(4).

40 I am otherwise satisfied the applicant has met the requirements under s 153 and Part 10 of the Act. The applicant has decided to apply to the Tribunal for an order requiring a lot owner to rectify an alleged breach that has come to the attention of the applicant after sending breach rectification notices that complied with the relevant requirements.[11]

41 In particular, I note that an owners corporation must not apply to the Tribunal for an order in relation to an alleged breach unless its dispute resolution process required by the Rules has first been followed and the owners corporation are satisfied that the matter has not been resolved through that process.[12]

42 Rule 6 of the Rules sets out the dispute resolution process for the applicant, which requires the party making a complaint to prepare a written statement to begin what is described as the "grievance procedure".

43 I find that for the dispute resolution to be followed in this matter the respondent needed to make a complaint under Rule 6 at the latest after she received the letter from the applicant sent 22 November 2019 refusing approval for the installation of the HWS. The respondent conceded at the hearing that she had not initiated the grievance procedure under the Rules.

44 As the respondent has not activated the dispute resolution process under the Rules, the applicant was and is not prohibited by s153(3) from bringing this application.[13]

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11 See ss 153 – 158.
12 See s 153(3).
13 *Shearman* [36] – [39].

45 In light of the above, I am satisfied that the applicant has complied with the relevant requirements set out in the Act and that the Tribunal has jurisdiction to hear this application.

Did the applicant act in good faith and exercise due care and diligence?

46 In determining an owners corporation dispute, the Tribunal may make any order it considers fair.[14] In making an order, the Tribunal must consider the conduct of the parties; any act or omission or proposed act or omission by any party and any other matter the Tribunal thinks relevant.[15]

47 I have considered the respondent's claim that the applicant has not acted in good faith or with due care and diligence as:

(a) a matter I should consider as conduct by, and an act of, the applicant and otherwise as a relevant matter under s 167;

(b) a reason for why it would not be fair to make the orders sought by the applicant; and

(c) as noted at [38] above, why there are not reasonable grounds to believe that the respondent has committed the alleged breach.

48 The expression "in good faith" is found in a range of statutes. The precise meaning of the expression will depend upon the context in which it appears.[16] In *Shearman*, Bell J held that in the context of s 5, the term creates an expectation that an owners corporation will "act in an objective manner".[17] The requirement of good faith has also been found to import "notions of not acting capriciously and of not seeking to further an ulterior purpose."[18]

49 The respondent has been unable to satisfy me that the applicant has not acted in good faith or with due care and diligence in issuing the breach of duty notices and refusing to approve the installation of the HWS for reasons I set out below.

Reliance on advice from PlumbMaster

50 The respondent claims the applicant should have accepted that she had no alternative but to follow the advice she received from PlumbMaster that the only way the old HWS could be safely replaced was for the HWS to be installed externally.

51 The PlumbMaster's letter sets out the reasons for why HWS could only be installed externally as being that the HWS could not be installed in the same location as the old HWS because the occupier of the lot above the unit would only offer access outside normal business hours; because there were "other

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14 Section 165.
15 Subsections 167(a), 167(b) & 167(e).
16 *VCAT Owners Corporations Commentary*, ANSTAT, at [5.02].
17 *Shearman* [55].
18 See fn 16.

hot water services" installed externally and because the tenant in the unit had been without hot water for a number of days.

52 The respondent stated she had been told by PlumbMaster that the old HWS could not be safely removed and so the HWS could not be placed safely in the roof cavity. This is not stated in the PlumbMaster's letter. No one was made available to give evidence at the hearing by or on behalf of PlumbMaster.

53 It is agreed between the parties, and I accept, that there are 24 units at the property and all other units have hot water systems either installed internally to the lot or in the roof cavity, except for the HWS and the similar system.

54 The applicant has provided a range of evidence of how other hot water systems at the property have been replaced in the roof cavity or installed internally to a lot. I accept this evidence and give particular weight to the advice from Kilburn Plumbing about the steps that can be taken for the reinstallation or replacement of a hot water system at the property. That advice notes that installation "like for like" may be "more involved" but that it can still be done to meet any relevant occupational health and safety requirements. It also notes that alternative hot water systems, such as an electric one, could have been considered.

55 The PlumbMaster's letter does not address why the HWS could not have been installed internally to the unit. It also does not state that the HWS could not be safely installed in the roof cavity, only that there were difficulties obtaining access (where the respondent has claimed that access was, in fact, later provided). It does not state external installation was the only safe option. As a result, I am not satisfied that PlumbMabster's advice was that the only safe option for the installation of the HWS was on the common property. I consider it more likely its advice was this was the quickest, and, most likely, least expensive, safe option.

56 I accept that the respondent had an obligation to her tenant under the RTA to ensure that hot water was provided at the unit and that she was required to address that requirement as an urgent repair.[19] However, there is no statutory time limit for when a landlord must complete an urgent repair. It is also common for temporary repairs to be undertaken, or for temporary alternatives to be provided to a tenant, until repairs can be completed.

57 I find that the respondent did have alternatives to the external installation of the HWS at the time she was required to replace the old HWS. I am not satisfied that any obligation she had as a landlord prevented her from making arrangements for the HWS to be installed as a replacement of the old HWS in the roof cavity or for the HWS, or an alternative form of hot water system, being installed internally.

58 As a result, I'm not satisfied that it was unreasonable, capricious or otherwise not objective for the applicant to refuse approval of the external installation

[19] See (h) of the definition of 'urgent repairs', s 3, RTA.

of the HWS despite the respondent having followed the advice of PlumbMaster.

Approval of similar system

59 The respondent claims that because the applicant approved the installation of the similar system externally, it's refusal to approve the installation of the HWS is not reasonable and evidence of not acting in good faith.

60 The applicant provided a detailed account of the assessment process that led to the installation of the similar system. The steps taken by and on behalf of the applicant indicate there was a careful assessment of what alternatives were available for the installation of a heating system at Lot 3 and consent for the external installation of the similar system was only provided after the alternatives had been discounted. I am satisfied that the explanation given by and on behalf of the applicant in this matter for why those alternatives were discounted show the applicant acted with due care and diligence and made a reasonable, objective decision to consent to the external installation of the similar system.

61 I find that the circumstances of the respondent were different from those of the owner of Lot 3 when approval was given for the installation of the similar system. The owner of Lot 3 was suffering particular physical hardship at the time the assessment was made and the applicant had significant concerns about its liability for the condition of Lot 3 at that time. The respondent's circumstances were that she was required to meet her obligation as a landlord and there was no indication that the applicant was in any way liable for the reasons for why the respondent was required to replace the old HWS.

62 Accordingly, I am not satisfied the applicant's decision to refuse approval for the installation of the HWS was inconsistent with decision to approve the installation of the similar system.

63 At hearing, the respondent's representative raised the question of whether the applicant could later have required the owner of Lot 3 to relocate the similar system, particularly after the applicant determined that it was not liable for the condition of Lot 3 and the owner's particular physical hardship had ended. The submission appeared to be that the applicant's failure to require this of the owner of Lot 3 was inconsistent with the refusal of approval to the respondent and so was evidence of a lack of objectivity.

64 I do not accept this submission. First, I am not satisfied that an owners corporation can rescind approval previously given to a lot owner for works to be done altering or damaging common property. Second, the fact that one system has been allowed to be installed externally can equally be reason for why it is consistent with an owners corporation decision to limit further similar alterations. As submitted by the applicant, an owners corporation will need to consider issue of 'precedent-setting". That is, the more lot owners are authorised to alter the common property the harder it may be for an owners corporation to refusal approval for further alteration.

65 Accordingly, I am satisfied that the applicant had and has a rational, objective basis for limiting the external installation of systems on common property to the one installed for Lot 3.

Effect on appearance of common property

66 The respondent claims the applicant's refusal to approve the external installation of the HWS is not objectively reasonable because the placement of the HWS on the common property means it is not seen by many lot owners or people passing through the property, because it has a "slim line" appearance and because there are already gas pipes and other fittings on the unit exterior walls.

67 I have reviewed the photographs and plans provided at the hearing and find that:

(a) the installation of the HWS is visible externally and will be particularly noticeable to the residents in lots 17, 18 and 19 who have an entrance to their lots opposite the wall on which the HWS is installed;

(b) while the HWS is of relatively unobtrusive appearance, it is a noticeable alteration to the common property and, as I have found above, the applicant has an objective basis for limiting the number of noticeable alterations to the common property; and

(c) the presence of existing gas pipes and other fittings does not support a claim that further alterations should be allowed given that the presence of those existing fittings is equally a reason for limiting any further noticeable alterations.

68 Accordingly, I find that the applicant had and has an objective, reasonable basis for refusing authorisation of the external installation of the HWS because of its effect on the appearance of the common property.

Application not by lot owner

69 The respondent has submitted that because the application was lodged by the applicant through the Committee and not by an individual lot owner, it should be assumed that individual lot owners do not object to the installation of the HWS on common property.

70 As set out above, two lot owners, albeit members of the Committee, gave evidence at the hearing that they objected to the installation of the HWS on common property. I accept that their objection is genuine. In any event, I am satisfied that the Committee has been elected by lot owners to take action on their behalf in relation to matters relevant to the applicant, including bringing applications to the Tribunal.

71 As a result, in the absence of any specific evidence to the contrary, I consider it more likely than not that the actions of the Committee represent the wishes of the lot owners generally. I do not accept that the fact the breach of duty notices and the making of this application are themselves evidence of the applicant not acting in good faith or with due care and diligence.

Conclusion

72 Having considered the above matters, I am satisfied that the applicant acted in a fair and objective manner in refusing authorisation of the external installation of the HWS, issuing breach of notices and bringing this application, and had reasonable grounds for doing so. As a result, I am satisfied the applicant acted in good faith and with due care and diligence, in accordance with s 5 of the Act and that the respondent's claim that the applicant did not must be rejected.

73 Accordingly, I find that the respondent has breached Rule 3.3 (1) and that, considering the relevant factors set out in s 167, it is fair for me to make orders under s 165 in the terms sought by the applicant, subject to one exception.

74 Since the hearing of this matter, the COVID 19 pandemic lockdown restrictions has significantly limited the ability of tradespeople in Melbourne to work at residential properties and I am satisfied this is likely to continue to be the case for some time. As a result, I consider it fair to give the respondent 60 days to complete the works required in the order, rather than the 28 days sought by the applicant.

Fees and costs

75 The applicant seeks reimbursement of the application fee and hearing fee and the payment of costs fixed at $1000.

76 Under s 115C of the *Victorian Civil and Administrative Tribunal Act 1998* (the **VCAT Act**), a party who has substantially succeeded against another party in a proceeding under the Act is entitled to an order that the other party reimburse the successful party the whole of any fees paid by the successful party in the proceeding.

77 As the applicant has substantially succeeded against the respondent in this proceeding, I find the applicant is entitled to an order under s 115B of the VCAT Act that the respondent reimburse the application fee and hearing fee in the sum of $93.30 and $518.40 respectively.

78 On the issue of costs, the applicant argues that the presumption under s 109 of the VCAT Act that each party is to bear their own costs should not be applied in this proceeding because of the way in which the respondent has conducted the proceedings and the relative strengths of the claims made by each party. The respondent sought an opportunity, if necessary, to make further submissions on costs.

79 I will direct the parties to exchange and provide me with their written submissions, so that I can consider them before I make any decision as to costs. Unless a party specifically requests to be heard and I subsequently decide that a further hearing as to costs should be held, the issue of costs will be determined by me on the papers without the parties needing to appear at a further hearing.

80 Should the applicant fail to make submissions for costs by 4:00 pm on 15 October 2020 there is to be no order as to costs, meaning that the parties are to otherwise bear their own costs of the proceeding

C. Powles
Member