VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

OWNERS CORPORATIONS LIST VCAT REFERENCE NO. OC891/2020

CATCHWORDS

Owners Corporations Act 2006 s 52, significant alteration to common property, definition of significant alteration. Turns on own facts.

FIRST APPLICANT:	Belinda Tsao
SECOND APPLICANT	Eng Meng Lim
RESPONDENT	Owners Corporation SP 021983J
WHERE HELD	Melbourne
BEFORE	O. Mahoney, Member
HEARING TYPE	Hearing
DATE OF HEARING	15 July 2020
DATE OF ORDER	22 October 2020
DATE OF REASONS	22 October 2020
CITATION	Tsao v Owners Corporation SP 021983J (Owners Corporations) [2020] VCAT 1184

ORDERS

The Tribunal declares that:

1 The proposed Stage 1 works, which were the subject of an ordinary resolution passed by casting vote on 3 November 2019, require a special resolution under section 52 of the *Owners Corporations Act 2006*.

The Tribunal orders and directs that:

2 The stay of proceedings in relation to file numbers OC890/2020 and OC884/2020 is lifted.

3 Both proceedings are adjourned to an administrative mention on **13 November 2020** by which date if the principal registrar has not received a written notification from either party that they wish to proceed the applications will be marked struck out.

(Note: You should respond to the administrative mention in writing via email to civil@vcat.vic.gov.au by the above date advising if you wish to proceed. You must clearly identify the proceeding numbers (OC890 and OC884/2020)

in the email subject line You are not required to attend the Tribunal by telephone on this date.)

4 **Should either party give written notification that they wish to proceed, the principal registrar is directed to refer the file to a Head of List for appropriate listing directions.**

5 The costs of the proceeding are reserved.

O. Mahoney
Member

APPEARANCES:

For Applicants	Mr C. Bird, authorised representative
For Respondent	Mr O. Polichtuk, solicitor

REASONS

Background

1 The context of this dispute is astutely summarised in the orders and directions of Member Rowland dated 2 June 2020:

> **NOTE**
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> The Tribunal notes:
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> 1. The Tribunal is currently operating under restrictions due to the Covid-19 emergency. The Tribunal has limited ability and resources to conduct mediations and hearings. With this in mind, the parties have agreed to initially limit the dispute to one issue with a view to resolving all issues.
> 2. The owners corporation affecting 2 Hood Street, Elwood is a 4-lot subdivision where the lot owners are divided 50:50 over whether to undertake works to the rear yard.
> 3. The Chairperson, who was elected by majority vote, exercised a casting vote to approve the rear yard works.
> 4. The applicants in this proceeding object to the yard works. They contend that the yard works are upgrade works which require a special resolution under sections 24, 52 or 53 of the Owners Corporations Act 2006. Alternatively, they argue the casting vote was not cast in good faith when 50% of the lot owners were opposed to the works.
> 5. The remaining lot owners contend that the yard works are maintenance works.
> 6. As a consequence of this dispute the applicants have lodged a claim seeking 6 rulings.
> 7. The respondent owners corporation has appointed a lawyer to act on behalf of the owners corporation. The applicants challenge the appointment of a lawyer. Without ruling on the appointment of the lawyer (which is not formally before the Tribunal), it is noted that the appointment of the chairperson was by majority vote. The extraordinary meeting of 2017 appointing the chairperson also delegated all the powers and functions that can be delegated to the chairperson be delegated to the chairperson. The delegation of power entitles the chairperson to appoint lawyers on behalf of the owners corporation.
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> **ORDERS**
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> The Tribunal orders:
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> 1. The proceeding is listed for a video conference hearing on Wednesday 15 July 2020 at 10.00am before any member. It is anticipated that the video conference will take place over 2 to 3

hours, but a whole day has been allowed in the event that the presiding member determines that a view is required.

2. The hearing is limited to the applicants' application for a declaration that the proposed rear yard works require a special resolution under sections 24, 52 or 53 of the *Owners Corporations Act 2006*.
3. By 23 June 2020 the parties must send to the other parties and file with the Tribunal, all documents, invoices, quotations, photographs, witness statements, and reports upon which that party intends to rely at the hearing. The documents must be indexed and numbered for ease of reference at the hearing.
4. The remaining claims are struck out with a right of re-instatement following determination of the declaration application in Order 2.
5. Proceedings OC890/2020 and OC884/2020 are stayed pending determination of the application for declaration in Order 2.
6. Costs reserved.

Basic facts and chronology

2 The great majority of the relevant facts were not in dispute. Indeed both the applicants and respondent relied, in the main, on substantially the same documentary material. As will be seen the issues for determination are not so much what the objective facts are, but what interpretation should be placed upon them.

3 The following chronology is of the basic facts that are not in dispute and provide some further detail to the basic summary already provided above.

1. The rear yard is common property.
2. In about November 2017 discussions commenced between lot owners with a view to works being carried out said to be required to "improve and make safe" the communal areas including the rear yard.
3. On 26 September 2018 Kelly Royle Landscape Architecture (KRLA) was engaged to provide landscape design development and documentation.
4. On 22 October 2018 Simon Reed plumbing provided a quote with respect to works to renew the sewer across the rear of the property. This quote provided that the existing brick paving was to be stacked but not reinstalled. This plumbing work was completed in about September 2019 and the brick paving was reinstalled in about April or May 2020.
5. A number of iterations of the design by KRLA were provided with a final revised quote of $26,048 produced on 1 September 2019
6. On 20 September 2019 the OC manager requested that KRLA "provide a breakdown of the quote with a view to having works

undertaken in parts so that essential works required for the maintenance and upkeep of the property could be commenced and additional landscaping works be undertaken at a later date".

7. On 20 September 2019 KRLA provided a further revised quote in the total sum of $26,048[1] dollars structured as follows: Stage one $16,280, Stage 2 $6677 and Stage 3 $1980 with sundry items of $1111.

8. Importantly, Stage 1 contained all the site preparation, drainage, paving and garden bed creation work.

9. Stage 2 related to the supply of soil and plants

10. Stage 3 relate to the installation of a back gate in the boundary fence and of a screen to create a new bin enclosure

11. On 11 October 2019 the OC manager wrote to the lot owners contending that the sewer works in particular have exacerbated the safety issue relating to "the trip and slip hazard" and included a ballot paper in respect of an ordinary resolution for repair and maintenance works on the common property seeking approval for the stage one works outlined in the quotation of KRLA

12. As outlined above the ballot was tied and ultimately carried with the Chair's casting vote.

13. Fee notices were subsequently raised and the applicants in this proceeding have not paid those fees which are the subject of fee recovery proceedings stayed by operation of order 5 above.

14. As the Owners Corporation is not in receipt of the necessary funds the proposal is at stalemate and no works have commenced.

The current appearance of the rear yard

4 The parties agreed that the photographs filed with the Tribunal prior to hearing reflected an accurate representation of the design and state of repair of the rear yard save for two exceptions.

5 The first exception is that the unpaved area of exposed soil running north to south adjacent to the residences had been repaired by the date of the hearing by re-laying the bricks in situ. This unpaved area (the trench) was a consequence of necessary sewerage works and the aligned decision of the Owners Corporation (**OC**) not to re-lay the brick pavers after that plumbing work was completed.[2]

6 The second exception is that in the 48 hours prior to the hearing a medium sized tree had fallen in the yard dislodging one brick paver on the edge of the garden bed in which the tree was planted.

7 Otherwise what the photographs depict is a predominantly paved yard with 2 larger garden beds - one delineated with bluestone blocks and containing a

[1] It was agreed at hearing that the quote calculated as $26,084 contained a transposition error and that it should have read $26,048.

[2] See point 4 above.

lemon tree towards the rear of the property - and another running parallel to the garage wall on the eastern side. There is another garden bed described as the vegetable patch which appears to have been an ad-hoc addition to the original design – it is located somewhat centrally. All the beds are of a non-linear design reflecting the path that contains them.

8 The paving is constituted of red house bricks laid end to end. The path takes a meandering non-linear, almost spiral course, through the site which is bordered by the residences on the western side and the garages on the eastern side. The path diverts at a Y-junction with one 'tributary' headed northwest and the other to the east (to the garages and clothesline). There is a 'terrace' delineated by a semi-circular pattern of pavers adjacent to the residences. My overall impression is of a design reminiscent of the late 1980's in terms of landscape design.

9 A small number of bricks can be seen to have been dislodged. One by the fallen tree, and two or perhaps three others of the bricks used as path edging by being laid vertically. In one or two places there are gaps between pavers where the sand or whatever material had been laid between them has washed or otherwise eroded away. As might be expected of a path that is at least 20 years of age, the surface of the path is no longer uniformly flush – that is, there are some variations in the heights of the pavers with respect to each other in some areas of the path. It is observable that, in patches, the path is showing the effects of wear and tear consistent with apparent age.

The evidence of Ms Kelly Royle

10 Ms Royle was the principal witness[3] and gave oral evidence. Ms Royle holds an undergraduate degree in Fine Arts and a Masters Degree in Landscape Architecture from Melbourne University.

11 She said that she was invited by Kate Emerson, OC manager, to quote for works to the property. Asked to describe the brief she recounted that it was initially for the rear staircase but became a brief to "re-design the outdoor area including reworking the pavement and plant selection" and "managing stormwater across the site".

12 Asked to explain what the differences between the initial and final quotes were, given the reduction in cost of approximately $7,000, Ms Royle explained that the later design uses only a portion of the brick pavers and replaces those pavers with gravel. Asked whether there was a landscape plan as referred to in her quotation that could assist the Tribunal to understand the works contemplated, Ms Royle revealed that there was such a document.

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[3] Ms Royle was the only witness that was planned to be called by the OC. Unprompted Ms Coggins (lot owner and the Chair who had cast the vote to pass the deadlocked resolution) who had been identified as an observer rather than witness at the outset of the hearing sought to make a clarifying contribution during Ms Royle's evidence and was consequently sworn and gave some brief evidence that is of no consequence to the determination of the matters and need not be recounted in any detail. The evidence given was of her opinion that the total surface area under garden beds was about equal when comparing the status quo with the new design.

13 At this point the matter was stood down for the solicitor for the OC to obtain instructions regarding the existence of this document as its existence was not previously known to him.

14 Ms Royle's evidence recommenced after lunch at which time the document had been provided to the solicitor for the OC by the OC manager who was instructing him. A copy was provided to the applicants and to the Tribunal.

15 Utilising the landscape plan, Ms Royle explained that two thirds of the original path would be disestablished and only one third of the original brick pavers would be retained.

16 In their place the majority of the rear yard would be resurfaced in gravel. A rectangular terrace[4] (in contrast to the semi-circular status quo), adjacent to the residence, would be created by re-laying the brick pavers in a herringbone pattern.

17 Ms Royle described how a series of square stepping-stones created from some of the original bricks would mimic a path[5] centrally on the north-south axis and adjacent to the garages, leading to a new gate in the eastern boundary fence.

18 Ms Royle accepted the characterisation of the change in appearance from a design that was essentially non-liner or circular to a design that is rectilinear.

19 She explained that a similar approach is to be taken to the redesign of the garden beds. The existing beds are to be re-shaped along strict rectilinear design forms and a large new rectilinear garden bed is to be added along the northern boundary.

20 Ms Royle acknowledged that the layout of the boundaries of the path is a process that cannot be treated as distinct from the creation of the garden beds as one forms the boundary for the other – i.e. the works are "inherently inter-related". She further acknowledged that the stages of works outlined as the quotes were more related to the timing of payment than any design imperative and that all the stages were simply a progression of the overall scope of works.

21 Ms Royle also explained that two slit drains were to be installed along the northern boundary of the garage to prevent "a bit of flooding" which occurs in the garages from surface run-off from the yard.

The evidence in relation to safety

22 The respondent's materials contain a risk management report prepared by Property Safe Pty Ltd, dated 25 July 2016. It was acknowledged by the solicitor for the OC that this report was silent as to the condition of the path in the rear yard or of the rear yard more generally.

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4 Ms Royle used the term 'porch'.

5 Her evidence was that the old path was "reflected in the pavers" but acknowledged that there was no structured path with edging akin to the status quo.

23 It was submitted on behalf of the OC that it was nevertheless appropriate for me to use the tests identified at page 22 of that report "trip hazards" in order to make my own assessment having regard to the photographs of the degree of risk attributable to the current state of the path.

24 The only other evidence presented in support of risk issues was a letter from a "friend" of the owners of Lot 1 recounting an occasion in 2017 when their 3 year old son while "running into the property via the back gate…tripped on a raised brick" and "severely grazed his face".[6]

25 With some reservation, which I expressed in the hearing to the solicitor for the OC, as to whether such assessments and conclusions are properly the sole preserve of a relevantly qualified expert witness, I will do my best to grapple with the evidence presented.

26 The potential trip hazards identified at page 22 of the report are described as "unexpected/abrupt change in walking surface that is greater than 10 mm and less than 20 mm with similar surface colour and texture, greater than 20 mm and less than 75 mm regardless of colour and texture, a step/stair height that is greater than 190 mm, step/stair treads less than 240 mm and inconsistent step/stair dimensions".

27 The report goes on to say "possible solutions include further investigation, replacement, reinforcement or repair of the issue, in some instances to highlight the issue and or install a suitable warning sign adjacent to the area and or inform the occupant of the issue advising them to take suitable care."

28 The only potentially relevant assistance that the report otherwise provides is at page 23 where "inconsistent raised and sunken brick paving adjacent to the rear stairs and rear gate" is discussed. This analysis is presented as "observations"; that is according to the author's interpretative instructions[7] they are "cautionary notes" of identified hazards and it is clear from the report that those hazards have not been given a current risk rating. The report recommends that a potential solution to this hazard that would reduce the resultant risk to "very low"[8] would be action to alert residents "to take extra care when crossing this area". The alternative action proposed to eliminate risk to nil is suggested as being "if practicable, to level the walking surface".

29 Small photographs of the identified hazards discussed at page 23 of the report are presented at page 24. Those photographs do not inform me adequately in order to compare and contrast with the other photographic evidence presented in this case to say that the risk apparent is comparable, such that I could conclude to the relevant standard of proof that a particular risk rating ought be attributed to the rear paving by inference.

30 I am able to observe that in some areas of the rear paving there are some variations in the walking surface that are more than 10mm and even more

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6 Letter dated 16/6/20 authored by M Crombie; respondent's additional documents AD 13.
7 How to Interpret this Report pg 4 - 7 of 48 of the Report.
8 Very low is the lowest risk rating in the author's risk matrix at pg 4 of 48.

than 20mm. I can observe that there may be a small number of instances where the unevenness in the surface of the path is more than 5mm and in one instance more than 75mm. But that is the limit of what I can observe from the evidence that has been presented.

31 I place no weight upon the isolated event of a toddler (who was running) tripping over in the assessment of risk.[9]

32 Beyond those conclusions lies impermissible conjecture into which I will not stray.

Submissions on behalf of the parties

33 At the outset the applicants' submissions were directed at s 24 and s 53 of the *Owners Corporations Act 2006* (**the OC Act**). The applicants submitted that the cost of the works were more than two times the annual fees therefore attracting a special resolution under s 24(4) and also that the works meet the definition of upgrading works under section 53(2)(a) which would likewise require a special resolution.

34 At the outset the respondent's submission was that at the crux of the case was the fact that the proposed works were maintenance works attracting the repair and maintenance exemption in s 53. It was further submitted that because the fee that was struck under s 24 was only in relation to Stage 1 of the works, then arithmetically the amount of the fee is not more than two times the annual fee and therefore does not require a special resolution.

35 Neither party directly addressed the application of s 52 in this matter. Perhaps given that neither party seemed to be aware of the detail contained in the landscape plan this is understandable (though regrettable).

36 After Ms Royle's evidence concluded and her design documentation had been disclosed, the solicitor for the OC conceded that the case would likely fall for determination on s 52 and made the submission set out below.

Section 52 Significant alteration to common property requires special resolution

> An owners corporation **must not make a significant alteration** to the use or **appearance of the common property** unless –
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> (a) **the alteration is –**
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> (i) **first approved by a special resolution of the owners corporation;** or
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> (ii) permitted by the maintenance plan[10] or
>
> (iii) agreed to under section 53 or

[9] A toddler is by definition learning to walk, let alone run.

[10] Section 52 of the *Owners Corporations Act 2006* – emphasis added to highlight that 52(a)(ii) and (iii) were acknowledged as not arising for consideration on the facts of this case.

(b) **there are reasonable grounds to believe that an immediate alteration is necessary to ensure safety or prevent significant loss.**

37 The OC submitted that on the evidence presented it was "open" to the Tribunal to find that the alteration to the common property was not significant. It was submitted that "notwithstanding the changes the character remains the same and that in the context of a multi-storey building overall the changes are not significant". It was further submitted that the alterations could be appropriately characterised as "minor".

38 It was also submitted that the works are necessary for safety reasons such as to attract the operation of s 52(b). In support of this submission it was said that "the movement of the bricks and the history of tripping" and the fact that safety is an "absolute issue", and the fact that the proposed works are "the bare minimum of what needs to be done to maintain and upkeep" were relevant matters. It was conceded by the solicitor for the OC that the respondent's position might well have been strengthened if expert risk assessment reports specific to the path and rear yard had been obtained and submitted in evidence.

39 As to the delays in action and the specific conduct of the OC in delaying (for several months) the relaying of the pavers after the sewer works, it was submitted that these delays should not foreclose a finding that immediate alteration is necessary because the lot owners have been deadlocked as to cost.

Does Stage 1[11] of the proposed works involve a significant alteration to the appearance of the common property?

40 I was not referred to any previous decisions of the Tribunal elucidative of the phrase "significant alteration" as used in s 52 of the OC Act.

41 In my view the analysis of Member Price[12] in *Leonie Burke Pty Ltd v Owners Corporation 15762* [2016] VCAT 2053 is instructive; "significant is suggestive of an alteration which is **important, noticeable or of consequence**".[13]

42 Upon the evidence of Ms Royle and comparison of the photographs of the status quo and the design drawings of the proposed works, it is beyond question that the proposed works will render significant alteration to the common property – they are as chalk and cheese.[14] It will be recalled that the evidence given was that the surface material of two thirds of the rear yard is to be altered from bricks to gravel. The submission that the changes proposed are minor is so at odds with the evidence presented as to be devoid of merit.

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[11] It was conceded by the OC that Stage 2 and Stage 3 of the works would attract the operation of s 52 and would require special resolutions.

[12] Now Senior Member Price, Deputy Head of the Owners Corporations List.

[13] *Leonie Burke Pty Ltd v Owners Corporation 15762* [2016] VCAT 2053 at para 13.

[14] Earliest citation is in John Gower's Middle English text *Confessio Amantis*, 1390: Lo, how they feignen chalk for chese.

On the evidence presented, I am satisfied on the balance of probabilities that the proposed works involve a significant alteration to the appearance of the common property.

Are there reasonable grounds to believe that an immediate alteration is necessary to ensure safety or to prevent significant loss or damage?

43 As discussed above there was insufficient evidence before the Tribunal to allow me to conclude what degree of risk does or does not attach to the current state of repair of the rear path.

44 It stands to reason that if the risk contended for is not capable of classification then it is incapable of supporting a reasonable belief of the type that s 52 requires.

45 Here I find the analysis of Senior Member Vassie as outlined in *Martin and Ors v Owners Corporation 431576* (Civil Claims) [2009] VCAT 2699 to be of great assistance –

> Section 52 is contained within *Part* Division 5 of the Act, entitled "Asset Management". Within Division 5, section 46 sets out the owners corporation's obligation to repair and maintain common property. In order to fulfil that obligation, an owners corporation may set fees and levy special fees and charges, which must be based on lot liability (see sections 23 and 24) and which lot owners must pay in proportion to their respective lot liabilities. If as part of its "asset management" the owners corporation wishes to make alterations to the use or appearance of common property, the alterations will have financial consequences for all lot owners, for the owners corporation will be looking to them to share the cost of the alterations in proportion to their respective lot liabilities. It is for that reason, in my opinion, that section 52 includes, as an exception, approval by a special resolution. The members have the safeguard that the alterations, for which they will all be expected to pay, cannot be made unless by special resolution the members approve them.[15]

46 So it can be seen that the safeguard provided at s 52 is of a special resolution of the lot owners (who are the beneficial owners of the common property). It is a democratic protection and self-evidently one set at a higher threshold than simple majority to ensure that when significant change to the appearance or use of common property is contemplated the harmony of the owners corporation is served by such potentially controversial decisions being arrived at by an overwhelming rather than a bare majority.

47 Departure from this safeguard, such as that provided at s 52(b), should in my view be read as only being justified in genuinely exigent circumstances such that the suspension of the democratic process is warranted.

48 On the evidence presented, I am not satisfied on the balance of probabilities that there are reasonable grounds to believe that an immediate alteration to

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[15] *Martin and Ors v Owners Corporation 431576* (Civil Claims) [2009] VCAT 2699 at para 33 (emphasis added).

the appearance of the common property is necessary to ensure safety or prevent significant loss or damage.

Conclusion

49 The proposed Stage 1 works which were the subject of an ordinary resolution passed by casting vote on 3 November 2019 require a special resolution under s 52 of the OC Act. A declaration to that effect will issue with such sundry orders as are necessary for the management of this proceeding and the related proceedings.

Post script

50 An email containing materials which might be thought to be capable of influencing this decision were sent to Tribunal registry by the OC Manager (apparently without the knowledge of the solicitor for the OC). It was forwarded for my attention prior to the conclusion of these reasons. I have had absolutely no regard to the email or the attached materials in the formulation of these reasons.

O. Mahoney
Member