

ASA Nominees Pty Ltd v Owners Corporation PS 513436B and Adamopoulos -  
[2016] VSC 562

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IN THE SUPREME COURT OF VICTORIA Not Restricted

AT MELBOURNE  
COMMON LAW DIVISION  
JUDICIAL REVIEW AND APPEALS LIST

S CI 2014 05653

:BETWEEN

ASA NOMINEES PTY LTD (ACN 084 232 306) (Controllers Appointed) Plaintiff

v

OWNERS CORPORATION PS513436B First Defendant

- and -

IRENE ADAMOPOULOS Second Defendant

:AND BETWEEN

S CI 2016 00366

IRENE ADAMOPOULOS Plaintiff

v

ASA NOMINEES PTY LTD (ACN 084 232 306) (Controllers Appointed) First Defendant

- and -

OWNERS CORPORATION PS 513436B Second Defendant

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JUDGE: Derham AsJ

WHERE HELD: Melbourne

DATE OF HEARING: 6 April 2016

DATE OF JUDGMENT: 20 September 2016

CASE MAY BE CITED AS: ASA Nominees Pty Ltd v Owners Corporation PS 513436B and Adamopoulos

MEDIUM NEUTRAL CITATION: [2016] VSC 562

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ADMINISTRATIVE LAW – Application for leave to appeal to Supreme Court from the Victorian Civil and Administrative Tribunal (‘VCAT’) – Hearing of application for leave and the appeal, if leave granted, at the same time pursuant to the expedition rule Supreme Court (Miscellaneous Civil Proceedings) Rules 2008, r 4.14(3) – Application for leave granted and appeal allowed – Application to extend time to apply for leave to cross-appeal – Time extended – Application for leave refused and appeal denied.

PROPERTY LAW – Ambit of the power of VCAT to make orders under Subdivision Act 1988 s 34D – Owners corporation power under Subdivision Act 1988, s 32 – Transfer of Land Act 1958, s 42 .

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APPEARANCES:

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HIS HONOUR:

### Introduction

1. The plaintiff ('ASA') seeks leave to appeal and if leave is granted, to appeal from orders made by the Victorian Civil and Administrative Tribunal ('VCAT' or 'the Tribunal') the effect of which was to re-align boundaries between two lots on plan of subdivision PS513436B ('the plan of subdivision') to accord with the occupation of those lots, but subject to certain conditions as to the payment of compensation.
2. The boundary ordered to be re-aligned was between Lots 3B and 3C on the plan of subdivision. The position of that boundary drawn on the plan was, through a surveyor's error, three metres west of the physical wall dividing the lots. The result was that the tenant of Lot 3B, Australia and New Zealand Banking Group Ltd ('ANZ') in fact occupied an area 3 metres deep ('the disputed land') on the title of Lot 3C.

3. Lot 3C is owned by Ms Irene Adamopoulos, who is the defendant/respondent in the first proceeding and the plaintiff/appellant in the second proceeding. Lot 3C is partly occupied by a tenant, Westcoast Bakeries Pty Ltd, with the disputed land occupied by ANZ. For many purposes, Lot 3B is known as Shop 3 ('the bank premises') and is owned by ASA and Lot 3C is known as Shop 4 ('the bakery premises') which is owned Ms Adamopoulos.
4. ASA applied to the Tribunal under s [34D](#) of the [Subdivision Act 1988](#) ('the Act') against Owners' Corporation PS513436B ('the OC') and Ms Adamopoulos. The Tribunal's orders required the OC to execute plans that had the effect of moving the boundary on the plan of subdivision to accord with the physical wall between the bank premises and the bakery premises, but subject to conditions, including that ASA compensate Ms Adamopoulos for the loss of the disputed land. ASA seeks leave to appeal – in substance – this condition. [\[1\]](#)

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[\[1\]](#) The decision and reasons are published as [ASA Nominees Pty Ltd v Owners Corporation PS513436B \(Owners Corporation\)](#) [2015] VCAT 1475 ('Reasons').

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5. The application of ASA for leave to appeal under s [148\(2\)](#) of the [Victorian Civil and Administrative Tribunal Act 1998 \(Vic\)](#) ('[VCAT Act](#)') first came before the Court for directions on 4 December 2015. At that time, for reasons expressed in the order made that day, I considered that it was in the interests of justice and in accordance with the overarching purposes prescribed by s [7](#) of the [Civil Procedure Act 2010](#) for the plaintiff's application for leave to appeal to be heard and determined at the same time as the hearing of the appeal. [\[2\]](#)

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[\[2\]](#) Pursuant to the expedition rule, r [4.14\(3\)](#) of the [Supreme Court \(Miscellaneous Civil Proceedings\) Rules 2008](#); See [J G King Pty Ltd v Patel & Or](#) [2013] VSC 530.

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6. At that time, Ms Adamopoulos' counsel informed the Court that she wished to apply to extend the time by which to apply for leave to appeal against the Tribunal's decision on the ground that it had no jurisdiction to entertain the application made by ASA. The OC was represented by its solicitor who sought, and was granted, leave to be excused from further attendance on the footing that it would abide by the orders of the Court.
7. In consequence, directions were made to bring the application by ASA on for trial with a view to any application made by Ms Adamopoulos being tried at the same time. To facilitate the expeditious hearing and determination of both leave applications and any appeal, the hearing and determination of both matters was referred to me by a judge of the Court pursuant to r [77.05](#) of the [Supreme Court \(General Civil Proceedings\) Rules 2015](#) ('the Rules').
8. Ms Adamopoulos duly made an application to extend the time for her to apply for leave to appeal ('the cross-appeal').[\[3\]](#) I have ordered that the cross-appeal be heard and determined at the same time as the applications by ASA for leave to appeal, and the appeal if leave is granted.[\[4\]](#) ASA

does not oppose the extension of time for Ms Adamopoulos to apply for leave to appeal and, in the circumstances, I considered it to be appropriate to extend that time to allow all issues between the parties to be properly argued, heard and determined.<sup>[5]</sup>

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<sup>[3]</sup> By originating motion filed 4 February 2016 supported by her affidavit of the same date.

<sup>[4]</sup> Order made 6 April 2016.

<sup>[5]</sup> In addition, for reason set out in the affidavit of Ms Adamopoulos sworn 4 February 2016, it is appropriate to extend the time for her to apply for leave to appeal (Court Book 454-457).

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### **Agreed Facts in the Tribunal**

9. There was an agreed statement of facts between the parties in the Tribunal as follows:<sup>[6]</sup>

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<sup>[6]</sup> Court Book 185-345.3.

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(a) as at 2005, ASA was the registered proprietor of a heritage building at 184-192 Pakington Street, Geelong West ('the building');<sup>[7]</sup>

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<sup>[7]</sup> Certificate of Title Volume 10923 Folio 235.

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(b) by the first edition of the plan of subdivision registered on 27 January 2006, ASA subdivided the building into three lots, being Lot 1, Lot 2 and Lot 3A. As a result of that subdivision, the OC came into existence;

(c) by the second edition of the plan of subdivision, registered on 18 March 2013, ASA further subdivided the building so that Lot 3A was divided into three lots, 3B, 3C and 3D;

(d) Lots 3B, 3C and 3D comprise three shops within the building;

(e) by a transfer of land dated 16 April 2013, ASA transferred Lot 3C to Ms Adamopoulos. This transfer was made pursuant to a contract of sale of land dated 20 March 2013;

(f) by transfer of land dated 12 April 2013, ASA transferred Lot 3D to Mr Erol Ekinci;

(g) ASA retained Lot 3B which is occupied by a tenant, ANZ;

(h) the second plan of subdivision was prepared by St Quentin Consulting Pty Ltd; and

(i) when Lot 3C was sold to Ms Adamopoulos, it was marketed as Shop 4/183-192 Pakington Street, Geelong West in accordance with the memorandum prepared on behalf of ASA by Mr Darcy Jarman.

10. Attached to the agreed statement of facts and referred to as annexures are a variety of documents, including the two plans of subdivision, the transfers of land, the contract of sale between ASA and Ms Adamopoulos and the marketing memorandum for the sale of Lot 3C which was purchased by Ms Adamopoulos.
11. Senior Member Vassie of the Tribunal heard evidence from a number of witnesses, including the sole director of ASA, Mr Andrew Clifton, the principal of St Quentin Consulting Pty Ltd, the surveyor who drew the second plan of subdivision containing the error, Mr Paul Treloar, Ms Adamopoulos, and Mr Votsaris, who initially signed the contract to purchase Lot 3C and nominated Ms Adamopoulos as substituted purchaser.

### **The Points of Claim and Defence in the Tribunal**

12. It is important to the way in which the issues arose before the Tribunal to refer to the amended points of claim and amended points of defence that were before VCAT.
13. The amended points of claim filed 6 November 2014, included formal matters identifying the parties and the plan of subdivision and alleged that: [\[8\]](#)

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[\[8\]](#) Points of Claim filed 6 November 2014, paras 6 to 14.

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(a) in or about 2005, improvements were constructed on the property at 184-192 Pakington Street Geelong West ('the Property');

(b) the plan of subdivision is inconsistent with the improvements on the Property. The particulars given in relation to this allegation were given by reference to a letter from the Surveyor, Barker Monahan Pty Ltd ('Barker Monahan') to the applicant's solicitor dated 13 October 2014 with an attached proposed plan of subdivision under s [32](#) of the [Act](#);

(c) it is impractical or impossible to alter the improvements so that they are consistent with the plan of subdivision;

(d) Ms Adamopoulos refused consent to amend the plan of subdivision so that the improvements are consistent with the plan;

(e) section [34D\(1\)\(a\)](#) of the [Act](#) provides that a member of an owners' corporation may apply to the Tribunal for an order requiring the owners' corporation to do any of the things set out in s 32 of that Act;

(f) ASA is a member of the OC;

(g) section [34D\(2\)](#) of the [Act](#) provides that the Tribunal may make an order on an application under s [34D\(1\)\(a\)](#) even though there is no unanimous resolution of the owners' corporation authorising the action; and

(h) by reason of the foregoing, ASA has suffered and continues to suffer loss and damage and alternatively, it is in the interests of the parties that the improvements are consistent with the plan.

14. In the relief claimed, an order was sought that the OC do all things and execute all documents as may be necessary to effect the registration of alterations to the plan of subdivision in accordance with the proposed plan prepared by Barker Monahan, [\[9\]](#).

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[\[9\]](#) Points of Claim filed 6 November 2014, pg 5; a number of other orders were sought which, the Senior Member rightly pointed out, were not capable of being made by the Tribunal under s [34D](#) of the [Act](#): See [\[2015\] VCAT 1475](#) at [\[35\]-\[38\]](#) and [\[49\]](#).

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15. Ms Adamopoulos' amended points of defence filed 19 August 2015, made relevant admissions and denied the essential ingredients of ASA's claim and also alleged that:[\[10\]](#)

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[\[10\]](#) Amended Points of Defence, para 15-24.

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(a) if the Tribunal makes orders for the alteration of the boundaries between the two lots in accordance with the proposed plan, the disputed land will be transferred to ASA;

(b) ASA does not propose to pay for the land to be acquired by it from Ms Adamopoulos;

(c) the effect of s [42](#) of the [Transfer of Land Act 1958](#) ('[TLA](#)') is that Ms Adamopoulos holds Lot 3C free of all encumbrances other than those recorded under title;

(d) ASA's claim in respect of the disputed land is not recorded on the title;

(e) in the circumstances, ASA cannot obtain an order that has the effect of transferring a part of Ms Adamopoulos' land to ASA as to do so would be contrary to s [42](#) of the [TLA](#);



(f) alternatively, ASA has no right to claim the disputed land and in this proceeding has not asserted any such right;

(g) in the circumstances, ASA cannot obtain an order that has the effect of transferring the disputed land to ASA;

(h) further, or in the alternative, in exercising the power under s [34D\(1\)\(a\)](#) of the [Act](#), the Tribunal should have regard, amongst other things, to the following considerations:

(i) the operation of s [42](#) of the [TLA](#);

(ii) Ms Adamopoulos, the registered proprietor of Lot 3C, purchased it for valuable consideration from ASA;

(iii) ASA seeks to have the disputed land transferred to it for no consideration;

(iv) ASA uses the disputed land to derive rental income from the bank; and

(v) ASA seeks to derive a commercial and economic benefit by having the disputed land transferred to it –

having regard to these matters, ASA's application should be dismissed;

(i) further or alternatively, there are presumptions of law that legislation is presumed not to alienate or interfere with vested proprietary interests without compensation unless the legislation manifests such an intention. Section [34D](#) of the [Act](#) does not manifest such a legislative intention;

(j) in the circumstances, s [34D](#) of the [Act](#) should not be construed so as to allow the Tribunal to make an order which has the effect of transferring the disputed land to ASA; [\[11\]](#)

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[\[11\]](#) Amended Points of Defence, para 20 to 22.

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(k) further or alternatively, s [32\(c\)](#) of the [Act](#) does not allow an owners' corporation to compulsorily transfer a lot or part of a lot from one lot owner to another;

(l) further or alternatively, ASA represented to Ms Adamopoulos, or ASA and Ms Adamopoulos acted on the agreed assumption and understanding, that: [\[12\]](#)

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[12] The representations or assumptions were contained in the contract of sale and associated documents: particulars to 23A of the Points of Defence.

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- (i) ASA's title in Lot 3C (including the disputed land) was as disclosed in the contract of sale dated 20 March 2013 and in the plan of subdivision attached;
  - (ii) any transfer from ASA to Ms Adamopoulos of ASA's title to Lot 3C would accord with what was disclosed in the contract of sale;
  - (iii) the area of Lot 3C had been exclusively occupied by and would after settlement of the sale of it by ASA to Ms Adamopoulos, continue to be exclusively occupied by a commercial tenant, namely Westcoast Bakeries; and
  - (iv) further or in the alternative, Lot 3C had a lettable or floor area of about 150m<sup>2</sup>;
- (m) Ms Adamopoulos acted in reliance upon those representations and on the basis of those assumptions; [13].

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[13] By instrument of Transfer Lot 3C was transferred from ASA to Ms Adamopoulos for the sum of \$375,000.00 and settlement of the contract of sale occurred on or about 16 April 2013 and Ms Adamopoulos was registering as sole proprietor of Lot 3C under the TLA on or about 7 June 2013; Particulars to para 23B, Amended Points of Defence.

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- (n) about 12 months after settlement of the purchase of Lot 3C, Ms Adamopoulos was advised of a request made by or on behalf of ASA to change the plan of subdivision arising from a surveyor's error in relation to the location of the boundary between Lots 3B and 3C and by the application in the Tribunal, ASA sought to amend the plan of subdivision by altering the boundary between Lots 3B and 3C so as to acquire at no cost part of Lot 3C;
- (o) in the circumstances, ASA is estopped from denying representations or departing from the assumptions acted upon by Ms Adamopoulos because it would be unconscionable and/or unjust to do so as Ms Adamopoulos has suffered or would continue to suffer detriment if the representations were not adhered to or the assumptions were departed from; and

(p) if the Tribunal is able to make the orders sought by ASA (which is denied) such orders should only be made on condition that Ms Adamopoulos be compensated for the loss of the disputed land.[\[14\]](#)

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[\[14\]](#) Amended Points of Defence, para 24(a)–(c).

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### **The Tribunal's Findings of Fact**

16. The Tribunal stated the uncontested evidence and made findings of fact which, so far as relevant to the proposed questions of law and grounds of appeal, are set out in the following paragraphs. In addition to the facts set out below, there were facts found in relation to Ms Adamopoulos' claim that an estoppel operated to prevent ASA from obtaining the orders sought. There is no question raised relevant to that issue.
17. The building in which the bank and bakery premises are situated, consists of an original structure and an extension. The original structure is a two-storey red brick building. The extension is a one-storey elongation which adjoins the rear part of the brick building.[\[15\]](#)
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[\[15\]](#) Reasons [9].

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18. The plan of subdivision as originally registered described five lots, numbered 1, 2, 3A, 4 and 5. Lots 4 and 5 were on the top floor of the brick building. Lots 1 and 2 were shops within the ground floor of the brick building. Lot 3A was Shop 3 (within the brick building, on the ground floor) plus the whole of the extension. The common property was, and still is, a paved area which is used for vehicle access and parking.[\[16\]](#)
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[\[16\]](#) Reasons [10].

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19. At the time of the plan's registration, ASA owned Lot 3A. Within the extension were Shop 4 and Shop 5. The occupiers of the land within Lot 3A were the then tenants of Shop 3, Shop 4 and Shop 5, respectively.[\[17\]](#)
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[\[17\]](#) Reasons [11].

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20. In 2008, West Coast Bakeries became the tenant of Shop 4 under a lease with options for renewal. There had been one renewal for three years which commenced on 1 July 2011, with options for three further terms of three years each. There was no evidence of whether it had exercised the first option. It is still in possession of Shop 4, as a tenant on some basis. The schedule to the renewal of lease described the leased premises as 'Shop 4, 184-192 Pakington Street, Geelong West 3218' and did not include any title particulars as Shop 4 was only part of Lot 3A at the time.[\[18\]](#).

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[\[18\]](#) Reasons [12]-[13].

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21. In 2012, ASA's sole director, Mr Clifton, intended to subdivide Lot 3A so that ASA could sell Shop 4 and, in time, Shop 5. On 7 May 2012, Mr Clifton gave a written instruction to ASA's surveying firm, in effect, to prepare a proposed amended plan of subdivision that subdivided Lot 3A into three separate lots that corresponded with the areas that were Shops 3, 4 and 5 and their occupation boundaries.[\[19\]](#).

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[\[19\]](#) Reasons [14].

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22. The surveying firm prepared the proposed amended plan of subdivision. It described seven lots. Lots 1, 2, 4 and 5 were the same as on the originally registered plan. Lot 3A on that plan became divided into three new lots, numbered 3B, 3C and 3D. There was no longer to be any Lot numbered 3A. The intention was that Lot 3B should correspond to Shop 3 (the bank), Lot 3C should correspond to Shop 4 (the bakery) and Lot 3D should correspond to Shop 5.[\[20\]](#).

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[\[20\]](#) Reasons [15].

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23. That intention was not realised. The proposed amended plan showed the boundary between Lot 3B and Lot 3C as a line which corresponded to the east wall of the two-storey brick building. It is probable that the draftsman of the amended plan assumed that that wall was the occupation boundary between the bank and the bakery. In fact, the bank, at all material times, occupied not only part of the brick building but also the disputed land. A wall within the extension, about 3 metres east of the brick wall, was the occupation boundary. To realise the intention, the draftsman should have put the boundary between Lot 3B and Lot 3C on a line that corresponded to the internal wall.[\[21\]](#).

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24. Pending the registration of the amended plan of subdivision, ASA's real estate agent, Darcy Jarman Pty Ltd prepared an information memorandum to market Shop 4 (the bakery premises) for sale. The information memorandum referred to the 'subject property' as 'Shop 4', gave details of the lease, stated 'We understand the building area measures approx 150 square metres in size', described the land as:[22]

The property is described as Lot 3C on approved Plan of Subdivision 513436B being part of the land contained within Certificate of Title Volume 10923 and Folio 235, which shows a frontage of approximately 20 metres to Weller St.

A copy of Approved Plan of Subdivision is attached as *Appendix I*.

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25. Appendix I included a register search statement for Certificate of Title Volume 10923 Folio 235 being Lot 3A on Plan of Subdivision 513436B and a copy of the proposed amended plan of subdivision, and included the following disclaimer:

All descriptions, dimensions, references to conditions and necessary permission's for use and occupation and other details are given in good faith, intending Purchasers should not rely on them as statement of representation of fact but must satisfy themselves by Inspection or otherwise as to the correctness of them. A draft Agreement for Sale of Land is available for inspection at the offices of the agents. In the event of inconsistency between the Information Memorandum and the Agreement for Sale of Land the provisions of the Agreement of Sale of land shall apply.

26. The information memorandum accorded with the agreed fact that:

When lot 3C was sold, it was marketed as shop 4/184 – 192 Pakington Street, Geelong West in accordance with the memorandum prepared on behalf of ASA Nominees by Darcy Jarman (the full terms of which will be referred to at the hearing).

27. Ms Adamopoulos wanted to buy an investment property. As she was in Sydney, she asked her employer, Vasilios (Bill) Votsaris, an experienced property developer and investor, to look out for a suitable property for her and authorised him to buy it for her if he thought fit. Mr Votsaris learned that Shop 4 was for sale. He met Simon Jarman of Darcy Jarman Pty Ltd and obtained the information memorandum from him. He then met Mr Jarman at the site. He did not enter the bakery; it was closed. Mr Votsaris gave evidence that he noticed the double-storey building's brick

wall that marked the beginning of the extension in which Shop 4 was the first shop, and formed the belief that the brick wall was the occupation boundary for Shop 4.[\[23\]](#).

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[\[23\]](#) Reasons [21]-[22].

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28. Following his site visit, Mr Votsaris recommended to Ms Adamopoulos that she purchase Shop 4. She accepted the recommendation.[\[24\]](#).
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[\[24\]](#) Reasons [23].

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29. On 10 April 2013, Ms Adamopoulos signed a nomination form and thereby accepted Mr Votsaris' nomination of her as the purchaser under the contract. Before signing the form, she too visited the site in the company of her brother and Mr Votsaris. Again, the bakery was closed at the hour of the visit so they did not go inside. Her evidence on the matter was that she formed the belief that the brick wall was the occupation boundary, because Mr Votsaris told her so and from her own observation.[\[25\]](#).
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[\[25\]](#) Reasons [25].

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30. On 18 March 2013, the amended plan was registered. The registered amended plan ascribed to Lot 3C a lot entitlement of 13 units out of 100. The lot entitlement of Lot 3B was 22 units. The other five lots had lot entitlements of 13 units each. Certificates of title were issued for the newly-created lots (precisely when is not clear). Certificate of Title Volume 11410 Folio 416 was issued for the land delineated as Lot 3C on the amended plan of subdivision.[\[26\]](#).
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[\[26\]](#) Reasons [18], [24], [26].

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31. On 20 March 2013, Mr Votsaris signed a contract of sale. The sale price was \$375,000.00. The particulars of sale in the contract named ASA as the vendor and 'Bill Votsaris &/or nominee' as the purchaser, and described the land which was the subject-matter of the sale as the land contained in Certificate of Title Volume 10923 Folio 235, being Lot 3C being part of Lot 3A on plan 513436B. Special condition 8 provided that the contract was subject to and conditional upon the Registrar of Titles registering the plan of subdivision referred to in the particulars of sale. Attached to the contract was a vendor's statement under s [32](#) of the [Sale of Land Act 1962](#), which contained a copy of

the plan which had been lodged for registration as the amended plan of subdivision and a copy of the renewal of lease.[\[27\]](#).

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[\[27\]](#) Reasons [24]-[29].

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32. Ms Adamopoulos paid the balance of the purchase price of \$375,000.00 at settlement and took a transfer dated 16 April 2013 of the land being Lot 3C described in Certificate of Title Volume 11410 Folio 416. The transfer was registered and she became the registered proprietor of that land. ASA remained the registered proprietor of the land which had become Lot 3B. ASA's tenant, the bank, continued to occupy not only Lot 3B but also the disputed land, and Ms Adamopoulos gained title to the disputed land but her tenant, the bakery, does not occupy it.
33. What the parties to the contract intended respectively to sell and buy was the principal matter of dispute. ASA maintained that when it entered into the contract of sale with Ms Adamopoulos it intended to sell the land within the occupation boundaries of Shop 4.[\[28\]](#) Ms Adamopoulos maintained that she intended that she should buy the land within the occupation boundaries. Ms Adamopoulos maintained that she intended to buy Shop 4, the bakery, one of the occupation boundaries of which was believed to be the double-storey brick wall. Land with a boundary in that position turned out to be what, as a result of a surveyor's mistake, the contract of sale described the subject matter of the sale to be.[\[29\]](#) Thus, she intended to buy precisely what the contract of sale and her certificate of title show her as having purchased.
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[\[28\]](#) Reasons [59].

[\[29\]](#) Reasons [74].

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34. There was no mistake common to both parties. There was no failure of registered instruments to reflect a common intention as to the subject matter of the sale, for there was no common intention.[\[30\]](#).
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[\[30\]](#) Ibid.

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35. The present case is different from the 'wrong description' cases of *Pleasance v Allen* [\[31\]](#) and *Michael v Onisiforou*. [\[32\]](#) In each of those cases the contracts of sale had described the land sold by reference to measurements or to occupation characteristics, but the transfers and certificates of title had described the land otherwise. In both those cases, there was a finding that the description in the contracts accorded with the parties' intentions but the descriptions of boundaries in the transfers and certificates of title were wrong because they did not accord with those intentions.[\[33\]](#).

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[31] [\(1889\) 15 VLR 601](#) .

[32] [\(1997\) 1 BPR 9356](#) . The case was cited, with apparent approval, by the Court of Appeal in [Refina Pty Ltd v Binnie](#) [2010] NSWCA 192.

[33] Reasons [75].

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36. In this case:[34]

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[34] Ibid.

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(a) the contract of sale described the land sold by reference to Lot 3C as delineated in the amended plan of subdivision and by reference to title particulars, not by reference to any measurements or occupation characteristics;

(b) although the description in the contract did not accord with the vendor's intention, there was no difference between the description in the contract and what the purchaser believed was being sold; and

(c) ASA would not have succeeded in a court proceeding against Ms Adamopoulos for rectification of the transfer or of the certificate of title or for a declaration that ASA had an estate in fee simple in the disputed land.

37. Senior Member Vassie found that both ASA, on the one part, and Ms Adamopoulos, on the other part, intended that the subject of the sale was the bakery premises.[35] Nevertheless, the Member accepted Ms Adamopoulos' and Mr Votsaris' evidence that they believed that one of the boundaries of the bakery premises was the boundary as depicted on the plan of subdivision. [36] After considering the evidence given by Ms Adamopoulos and Mr Votsaris, who he regarded as truthful witnesses, the Member concluded:[37]

I find, therefore, that what Ms Adamopoulos and Mr Votsaris each intended that she should buy was Shop 4, the bakery, one of the occupation boundaries of which they believed to be the double-storey brick wall. Land with a boundary in that position turned out to be what, as a result of a surveyor's mistake, the contract of sale described the subject matter of the sale to be. That description did not match what ASA intended to sell – the land within the actual occupation boundaries of the bakery – but it matched what Ms Adamopoulos and Mr Votsaris intended that she should buy: the land within what they believed the occupation boundaries of the bakery to be. There was no mistake that was common the parties. There was no failure of registered instruments to reflect a common intention as to the subject matter of the sale, for there was no common intention.



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[\[35\]](#) Reasons [59] and [71].

[\[36\]](#) [Ibid \[71\]](#).

[\[37\]](#) Reasons [74].

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38. As matters stood, the power of both ASA and Ms Adamopoulos to grant or dispose of interests in their land was in doubt. ASA had purported to grant to its tenant, the bank, exclusive possession of land which included the disputed land, to which it had no title and for which it had no right to grant possession. The position of Ms Adamopoulos was just as confounding. Her ability to sell was affected because she could not give to a purchaser vacant possession of the disputed land. Each would benefit from the making of an order under s [34D\(2\)](#) of the [Act](#), if the order could be fashioned so as not to be oppressive to either party.[\[38\]](#)

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[\[38\]](#) Reasons [84].

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39. ASA's tenant, the ANZ has a strongroom that takes up part of the disputed land. Unless some arrangement were to be made for the bank to remain in possession of the disputed land, the alteration of the present occupation boundary would probably involve the strongroom being relocated. The alteration might or might not involve the demolition of the internal wall. It is not hard to envisage that the implementation of this alternative solution to the boundary discrepancy might lead to ASA's liability to compensate its tenant. Whether the amount of the compensation would be more or less than any sum which Ms Adamopoulos could claim to be the value of the disputed land, could not be stated. At all events, there was no evidence that would justify a finding that the alternative solution is feasible or realistic.[\[39\]](#)

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[\[39\]](#) Reasons [90].

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40. It is unlikely that Ms Adamopoulos is exposed to any serious risk from potential claims from her tenant, should the disputed area be excised from the bakery premises.[\[40\]](#) The disputed land must have a value for Ms Adamopoulos.[\[41\]](#)

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[\[40\]](#) Reasons [[91]-[94]].

[\[41\]](#) Reasons [95].

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### Applicable Law

## Leave to Appeal

41. The approach to the question whether or not leave should be granted under s 148(1) of the [VCAT Act](#) was set out comprehensively in the decision of the Court of Appeal in *Secretary to Department of Premier and Cabinet v Hulls*, [\[42\]](#). That approach was conveniently summarised by Warren CJ in *Myers v Medical Practitioners' Board of Victoria*, [\[43\]](#). That summary is as follows:

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[\[42\]](#) [\[1999\] 3 VR 331](#).

[\[43\]](#) [\(2007\) 18 VR 48](#) at [\[28\]](#).

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- (a) Whether leave is granted or not must always depend upon the justice of the particular case;
- (b) if leave is to be granted, the applicant must at least identify a question of law (as distinct from a question of fact) which is important to the substantive appeal's succeeding or failing;
- (c) the applicant need not establish an error below – that is for the appeal itself. Rather, the applicant will be required to show that there is a real or significant argument to be put that error exists;
- (d) although not essential, the applicant may identify a question of law that is of general or public importance. This will weigh in favour of granting leave;
- (e) once a question of law has been identified which bears directly upon the relief which will be sought in the appeal, and once it has been shown that there is sufficient doubt attending that question to justify the grant of leave to appeal, leave will ordinarily be granted if the order below is a final order or final in its effect; and
- (f) where the order sought to be appealed is an interim order, there may be reason bearing on the justice done to both parties for not granting leave to appeal, for example, where granting leave to appeal will result in an unnecessary interruption to the substantive proceedings.

[Footnotes omitted]

42. There was no dispute that these principles were applicable.

## Appeal

### *Nature of the Appeal*

43. Where the statutory right of appeal is restricted, as here, to a question of law, the Court is concerned with the legality of what the Tribunal has done and decided. In those circumstances, the appeal is not an appeal in the strict sense but is equivalent to a judicial review. [\[44\]](#).
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[\[44\]](#) *Roy Morgan Research v The Commissioner of Revenue* (2001) 75 ALJR 1342 at [1345](#); *Bulasa Pty Ltd v Baytown Properties Pty Ltd* [2003] VSC 248, [\[31\]](#).

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44. The legislative policy underlying the restriction on the right of appeal is that: [\[45\]](#).

VCAT decisions should not generally be disturbed where cases have been decided in that forum other than on questions of law and where there is something about the decision bearing upon the question of law which warrants a grant of leave to appeal.

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[\[45\]](#) *Versus (Aus) Pty Ltd v A.N.H. Nominees Pty Ltd* [2015] VSC 515, referring to *Commissioner of State Revenue v Frost* (2011) 83 ATR 832 at [834](#) [\[5\]](#), in turn, referring to *Secretary to the Department of Premier and Cabinet v Hulls* [1999] 3 VR 331 at [335–6](#); *Myers v Medical Practitioners Board (Vic)* [2007] VSCA 163, [\[28\]](#).

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45. It follows that ‘[t]his Court is not entitled to enter into the fact finding exercise which the legislature has deliberately entrusted to a specialist tribunal.’ [\[46\]](#).
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[\[46\]](#) *Boucher v Dandenong Ranges Steiner School Inc* [2005] VSC 400 [\[15\]](#), referring to *Spurling v Development Underwriting (Vic) Pty Ltd* [1973] VR 1; *Whitehorse City Council v Golden Ridge Investments Pty Ltd* [2005] VSCA 198.

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46. In considering applications of this nature, courts have been concerned to respect the role entrusted by the legislature to the particular tribunal and not, in effect, subvert this position by seeking out error. Kirby J in *Roncevich v Repatriation Commission*, said: [\[47\]](#).

Courts conducting this form of review have been repeatedly enjoined by this Court to avoid overly picky examination of the reasons. [\[48\]](#). The focus of attention is on the substance of the decision and whether it has addressed the “real issue” presented by the contest between the parties.

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[47] *Roncevich v Repatriation Commission* (2005) 222 CLR 115 at 136 [64].

[48] *Minister for Immigration and Ethnic Affairs v Guo* (1997) 191 CLR 559 at 575, 597 cf *Minister for Immigration and Multicultural Affairs v Yusuf* (2001) 206 CLR 323 at 348 [74].

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47. This Court is not entitled to interfere with the Tribunal's decision unless it is satisfied that there was in fact a vitiating error of law. [49]. Additionally, on appeal, this Court 'must recognise the forensic realities of the way in which the case was put to the tribunal. It is these realities to which a tribunal must respond in its reasons.' [50].
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[49] *Vegas Nominees Pty Ltd v Werribee Sports & Community Club Inc* (Unreported, Supreme Court of Victoria, Ashley J, 21 December 1994) at 13; Cited in *Versus (Aus) Pty Ltd v A.N.H. Nominees Pty Ltd* [2015] VSC 515, [10].

[50] *Gombac Group Pty Ltd v Vero Insurance Ltd The Gombac Group Pty Ltd v Vero Insurance Ltd & Ors* [2005] VSC 442 [59].

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#### *Questions of Law versus Questions of Fact*

48. It is a truism that a great deal has been written about the distinction between questions of law and questions of fact. [51]. In *Australian Finance Direct*, Ashley JA expressed the position very succinctly by saying: [52]

At the margins, particular difficulties arise. That said, two propositions command general acceptance: first, it will generally be a question of law whether facts found fall within a statutory provision properly construed. Second, a challenge to a finding of fact requires the challenger to contend and establish, for there to be error of law, that the finding was unsupported by evidence, or, perhaps, was perverse.

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[51] *Australian Finance Direct Ltd v Director of Consumer Affairs (Vic)* (2006) 16 VR 131, per Ashley JA, 145 [77] ('*Australian Finance Direct*'); *Cosmopolitan Hotel (Vic) Pty Ltd & Anor v Crown Melbourne Limited* [2014] VSCA 353 per Whelan JA [167] ('*Cosmopolitan Hotel*').

[52] *Australian Finance Direct*, [77].

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49. In *Rugolino v Howard*, [53] Bell J set out the principles which the Court applies in the exercise of its appellate jurisdiction in relation to findings of fact. Remembering the Tribunal is not bound by the rules of evidence and can base its findings on any probative material, those principles apply equally here. [54]. The principles may be summarised as follows:
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[53] [\[2010\] VSC 590](#) .

[54] *Ibid* [10]-[12]; See also [Director of Liquor Licensing v Kordister Pty Ltd](#) [2011] VSC 207, [\[247\]](#) .

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(a) the question whether there is *any* evidence of a particular fact is a question of law. Therefore, a finding of fact is open to challenge as erroneous in law, but only if there is no probative evidence to support it; [\[55\]](#) .

(b) the question is not whether the finding was ‘reasonably open’, for that implies the appeal court could test the finding against a reasonableness standard. The question is whether the finding was open at all. [\[56\]](#) . Put another way, although it is critical to base findings of fact on the evidence, there is no error of law unless it can be shown that there was no evidence to support the finding; [\[57\]](#) . and

(c) whether a finding is open on the evidence, or whether there is any or some evidence to support it, are different ways of expressing the same test. [\[58\]](#) .

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[55] [Transport Accident Commission v Hoffman](#) [1989] VR 197, [199](#) ; [Roads Corporation v Dacakis](#) [1995] 2 VR 508, [517](#), [520](#) per Batt JA; [S v Crimes Compensation Tribunal](#) [1998] 1 VR 83, [90](#) per Phillips JA; [ISPT Pty Ltd v Melbourne City Council](#) (2008) 20 VR 447.

[56] [S v Crimes Compensation Tribunal](#) [1998] 1 VR 83, [90](#) per Phillips JA; [Myers v Medical Practitioners’ Board of Victoria](#) (2007) 18 VR 48, [59](#), [\[43\]-\[44\]](#) .

[57] [Azzopardi v Tasman UEB Industries](#) (1985) 4 NSWLR 139, [151](#) per Kirby P.

[58] [State of Victoria v Subramanian](#) (2008) 19 VR 335, [\[32\]](#) .

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50. Despite involving some repetition, it is also useful to note that in [Cosmopolitan Hotel](#) both Warren CJ and Whelan JA (Santamaria JA agreeing with Whelan JA) [\[59\]](#) adopted the list set out by Dowsett and Gordon JJ in [Federal Commissioner of Taxation v Trail Bros Steel & Plastics Pty Ltd](#) . [\[60\]](#) . The following issues fall within the phrase ‘on a question of law’ (noting that the list is not exhaustive):

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[59] Warren CJ [49], Whelan JA [167] Santamaria JA [206].

[60] [Federal Commissioner of Taxation v Trail Bros Steel & Plastics Pty Ltd](#) (2010) 186 FCR 410, [415 \[13\]](#) (‘*Trail Bros Steel*’).

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(a) whether a tribunal has identified the relevant legal test;

(b) whether a tribunal has applied the correct test;

- (c) whether there is any evidence to support a finding of a particular fact; and
  - (d) whether the facts found fall within a statute properly construed.
51. Not all questions involving mixed questions of law and fact are, or need to be susceptible of one correct answer. Not infrequently, informed and experienced lawyers will apply different descriptions to a factual situation. That is why the test whether legal criteria have been met has been expressed: [\[61\]](#).

[I]f the facts inferred ... from the evidence ... are necessarily within the description of a word or phrase in a statute or necessarily outside that description, a contrary decision is wrong in law. [\[62\]](#).

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[\[61\]](#) *Vetter v Lake Macquarie City Council* (2001) 202 CLR 439 ('*Vetter*').

[\[62\]](#) Ibid 450 [24] quoting Jordan CJ in *The Australian Gas Light Co v Valuer-General* (1940) 40 SR (NSW) 126, at [138](#).

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### **The Subdivision Act**

52. ASA relied on the power in s [34D](#) of the [Act](#), which in turn draws upon the power in s 32 of that Act. So far as relevant, s 32 is as follows:

#### **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 –

...

- (c) alter the boundaries of any land affected by the owners corporation, whether or not the alteration results in an increase or decrease of the area of land affected by the owners corporation;

53. Section [3](#) of the [Act](#) defines 'land affected by an owners corporation' to mean:

the lots the owners for the time being of which are the members of the owners corporation together with the common property for which the owners corporation is responsible.

54. If an owners' corporation exercises the power under s [32](#) of the [Act](#) it must then comply with s [32AD](#), which provides so far as relevant as follows:

#### **32AD Registration of plan**

- (i) If it proceeds under section 32, an owners corporation must submit for certification and lodge for registration a plan showing the changes to be made to any registered plan.

55. Section [34D](#) of the [Act](#) provides, so far as relevant:

#### **34D Applications relating to plans**

- (i) 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
  - ...
- (2) The Victorian Civil and Administrative Tribunal may make an order on an application under subsection (i)(a) even though there is no unanimous resolution of the owners corporation authorising the action.
- ...
- (6) Subject to this section, the Victorian Civil and Administrative Tribunal may make an order it thinks fit on an application under this section.

#### **Transfer of Land Act provisions**

56. As the Tribunal pointed out in the reasons for decision, [\[63\]](#) ss [41](#) and [42](#) of the [TLA](#) express the notion of indefeasibility of title achieved as the result of the registration of a dealing evidenced in a folio of the Register kept by the Registrar of Titles. So far as is relevant to those submissions, s [42\(1\)](#) of the [TLA](#) provides:

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[\[63\]](#) Reasons [34].

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#### **42 Estate of registered proprietor paramount**

- (i) Notwithstanding the existence in any other person of any estate or interest (whether derived by grant from Her Majesty or otherwise) which but for this Act might be held to be paramount or to have priority, the registered proprietor of land shall, except in case of fraud, hold such land subject to such encumbrances as are recorded on the relevant folio of the Register but absolutely free from all other encumbrances whatsoever, except –
  - (a) ...;

- (b) as regards any portion of the land that by wrong description of parcels or boundaries is included in the folio of the Register or instrument evidencing the title of such proprietor not being a purchaser for valuable consideration or deriving from or through such a purchaser.

57. Section 3(i) of the TLA provides:

**3Application of other laws etc.**

- (i) Except so far as is expressly enacted to the contrary no Act or rule of law, so far as inconsistent with this Act, shall apply or be deemed to apply to land under the operation of this Act; but save as aforesaid any Act or rule of law relating to land, unless otherwise expressly or by necessary implication provided by this or any other Act, shall apply to land under the operation of this Act whether expressed so to apply or not.

**The ASA Application for Leave to Appeal, and the Appeal**

58. In ASA's application, leave was sought to appeal from order 3(a), and consequential orders, of the Tribunal made on 8 October 2015, [64] and to stay the orders made until the hearing and determination of the application and appeal. The stay was granted on 4 December 2015 when the application for leave and the appeal (if leave is granted) were ordered to be tried together.

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[64] In proceeding OC2700/2014.

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59. ASA had sought orders from the Tribunal that the plan of subdivision be amended so that the title boundary between Shop 3 and Shop 4 be amended to coincide with the physical boundary. Although the Tribunal ordered the title boundary to be amended, it did so only on condition of compensation being paid to Ms Adamopoulos. The text of the Tribunal's orders is as follows:

1. In this order,
  - (a) 'the new plan' means the plan prepared by Barker Monahan Pty Ltd, a copy of sheet 2 of which is annexed to this order;
  - (b) 'the disputed land' means that part of the land described as lot 3E in the new plan as is not presently contained in lot 3B described in Plan of Subdivision 513436B.
2. Subject to the conditions set out in paragraph 3 of this order having been met, Owners Corporation PS 513436B, by affixing thereto its common seal, must execute all documents necessary to be executed by it



to effect an amendment to Plan of Subdivision 513436B in accordance with the new plan and shall deliver those executed documents to the applicant's solicitors.

3. The conditions subject to which this order is made are:
  - (a) the applicant shall have paid to Irene Adamopoulos such amount (if any) by way of compensation for any loss to her arising from and in respect of the disputed land ('the amount') as it and she have agreed upon or in default of agreement as the Tribunal hereafter determines;
  - (b) upon payment of the amount referred to in sub-paragraph (a), Irene Adamopoulos shall have executed and delivered to the applicant any instrument of transfer to the applicant of the disputed land that the applicant had tendered to her for execution;
  - (c) the consideration expressed in the instrument of transfer shall have been the amount referred to in sub-paragraph (a); and
  - (d) the applicant shall have given to each of the respondents a written undertaking that the applicant will bear the expense of the preparation and lodging at the Office of Titles of all documents referred to in this order and that it will pay to each respondent its or her reasonable costs in connection with the execution and delivery of any documents necessary to be executed and delivered by it or by her to give effect to this order.
4. By 16 November 2015 Iren Adamopoulos shall file and serve particulars of her claim for the compensation referred to in paragraph 3(a) and of how that amount of that claim is calculated or arrived at.
5. The principal registrar is directed to require the parties to attend a further compulsory conference before any Member except me at 9.30am on 3 December 2015 at 55 King Street, Melbourne and to allow half a day for the compulsory conference.
6. If a party wishes to rely upon any expert report at the compulsory conference it must provide each other party with a copy of that report by 4 pm on 30 November 2015.
7. Each party has liberty to apply, by giving notice to the principal registrar and to each other party, for further or other orders, including (without limiting the generality of this paragraph):
  - (a) directions as to how the amount to be paid by the applicant to Irene Adamopoulos in respect of the disputed land is to be determined;

- (b) an order or direction empowering the principal registrar to execute any document on behalf of Owners Corporation PS513436B which it fails or refuses to execute; and
  - (c) an order determining any amount of reasonable costs referred to in paragraph 3.
8. All questions as to the costs of the proceeding including the costs of today are reserved.

### The Questions of Law

60. The questions of law the subject of the appeal are:

- (a) where one party conveys title to a shop and some additional land beyond the boundaries of that shop to another party, in circumstances where they both intended that only the shop be conveyed, can that title be rectified to comprise only the area of the shop?
- (b) where parties to a conveyance both intend that title to a shop be conveyed, but one of those parties is mistaken as to the dimensions and boundaries of that shop, does that preclude a finding that the common intention of the parties is to convey title to that shop?

### The Grounds of Appeal

61. ASA's grounds of appeal are:

- (a) in circumstances where the Tribunal found that:
  - (i) ASA intended to sell Shop 4; [\[65\]](#) and

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[\[65\]](#) Reasons [\[59\]](#).

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- (ii) Ms Adamopoulos intended to purchase Shop 4- [\[66\]](#)

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[\[66\]](#) Reasons [\[71\]](#) and [\[74\]](#).

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the Tribunal erred in finding [\[67\]](#) that there was no failure of registered instruments to reflect the common intention as to the subject matter of the sale, for there was no common intention;

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[\[67\]](#) Reasons [74].

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(b) in circumstances where:

(i) the Tribunal found the matters referred to in paragraphs 61(a)(i) and (ii) above; and

(ii) the contract of sale referred to the Property being sold as Shop 4, tenanted by Westcoast Bakeries, and as Lot 3C being part of Lot 3A, which descriptions were inconsistent-

the Tribunal erred in finding [\[68\]](#) that it was plain from the contract that what was being sold was Lot 3C, not Shop 4 or land defined by reference to occupation boundaries;

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[\[68\]](#) Reasons [29].

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(c) the Tribunal erred in finding [\[69\]](#) that because Ms Adamopoulos was mistaken as to the dimensions of Shop 4, there was no common intention on the part of the plaintiff and Ms Adamopoulos to convey the area comprising Shop 4;

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[\[69\]](#) Reasons [74].

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(d) the Tribunal erred in holding that ASA would not have succeeded in a court proceeding against Ms Adamopoulos seeking rectification of any instrument or declaration that it has an entitlement to the disputed land; [\[70\]](#)

(e) the Tribunal erred in holding that ASA has no legal right to the disputed land and, therefore, Ms Adamopoulos could not be compelled to transfer it; [\[71\]](#) and

(f) the Tribunal erred in holding that it should impose conditions designed to ensure that Ms Adamopoulos is compensated for any loss she suffers as a result of an alteration to the title boundary and her loss of paper title to the disputed land. [\[72\]](#)

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- [\[70\]](#) Reasons [95].
  - [\[71\]](#) Reasons [95].
  - [\[72\]](#) Reasons [96].
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## The Orders Sought

62. ASA sought orders that the Tribunal's orders made on 8 October 2015 be set aside and replaced with the following:
- 1 In this order,
    - (a) 'the new plan' means the plan prepared by Barker Monahan Pty Ltd, a copy of sheet 2 of which is annexed to this order;
    - (b) 'the disputed land' means that part of the land described as lot 3E in the new plan as is not presently contained in lot 3B described in Plan of Subdivision 513436B.
  - 2 Subject to the conditions set out in paragraph 3 of this order having been met, Owners Corporation PS 513436B, by affixing thereto its common seal, must execute all documents necessary to be executed by it to effect an amendment to Plan of Subdivision 513436B in accordance with the new plan and shall deliver those executed documents to the applicant's solicitors.
  - 3 This order is subject to the condition that Irene Adamopoulos shall have executed and delivered to the applicant any instrument of transfer to the applicant of the disputed land that the applicant had tendered to her for execution.
  - 4 The second respondent pay the applicant's costs of and incidental to this proceeding.

## Submissions and Consideration - the Questions

63. In considering the questions posed by ASA, it needs to be steadily borne in mind that the application was made under s [34D](#) of the [Act](#) to alter the boundaries of land affected by the OC. That involved the OC amending the plan of subdivision. It was not an application to rectify the contract of sale or the transfer by which Ms Adamopoulos acquired Lot 3C. The way in which the principles applicable to the equity of rectification arose was a result of the defence raised by Ms Adamopoulos. That defence relied on the indefeasibility of her title arising by virtue of s [42](#) of the [TLA](#), that she purchased the title to Lot 3C for valuable consideration and that the effect of the alteration of the plan of subdivision would be to transfer part of her land to ASA.
64. With this background, it can be seen that the questions of law advanced by ASA concern critical matters decided along the way to the ultimate finding that it was appropriate to compel the OC to alter the boundaries of land affected by the OC, that is the plan of subdivision. The critical matter

was identified by the learned Senior Member as what the parties to the contract (of sale by ASA to Ms Adamopoulos) intended respectively to sell and buy.[\[73\]](#).

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[\[73\]](#) Reasons [30].

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65. Both the questions stated by ASA raise the same basic question, in my view, and that is:

Whether ASA is entitled to rectification of the contract of sale and transfer of land as against Ms Adamopoulos.

This question arises as a question of law because it raises whether the Tribunal identified the relevant legal test applicable to the rectification question and whether the correct test was applied.

66. That question only arises indirectly as a component in the ultimate question whether the Tribunal may order the plan of subdivision to be altered under s [34D](#) of the [Act](#) :

- (a) where the description of the Lots on the plan of subdivision is a product of a mistake in the drawing of the plan;
- (b) where to do so depends upon whether ASA is entitled to rectification of a contract of sale and transfer of land as against Ms Adamopoulos; and
- (c) which in turn depends on whether they held a common intention as to the subject matter of the sale and transfer by which Ms Adamopoulos acquired title to Lot 3C.

67. Thus, the determination of this question directly affects whether there is a basis upon which the plan of subdivision can be altered so that the description of Lot 3C, and the boundaries between Lot 3B and 3C on that plan, can be changed to reflect the physical boundaries between Shops 3 and 4 without the payment of compensation.

68. The second question of law as proposed by ASA highlights the distinction sought to be drawn by ASA between the identified common intention and the collateral mistake made by Ms Adamopoulos as to the dimensions of the shop she intended to buy. That proposed question highlights whether it was an error of law to find that rectification was not available to ASA because of that mistake by Ms Adamopoulos. The learned Senior Member characterised that belief by Ms Adamopoulos (and Mr Votsaris) as to the position of the boundary of Shop 4 as a part of the intention of Ms Adamopoulos rather than a separate and distinct mistake, so as to arrive at the factual conclusion that there was no common intention as a matter of fact.

69. It seems to me that for the purposes of the application for leave to appeal, there is a real or significant argument that the Tribunal fell into error in concluding that ASA was not, or would not in a court of equity, be entitled to rectification of the contract of sale and transfer of land as against Ms Adamopoulos by reason of her mistaken belief as to the dimensions of Shop 4.

70. ASA submits that in circumstances where the Tribunal found that ASA intended to sell, and Ms Adamopoulos intended to purchase, Shop 4, the Tribunal was in error in finding that there was no common intention as to the subject matter of the sale and thus no entitlement to rectification.
71. The Tribunal found that there was no common mistake between the parties because Ms Adamopoulos made a mistake as to the dimensions of Shop 4. ASA submits this error was a product of the Tribunal holding that ASA would not have succeeded in a proceeding for rectification of the contract of sale and transfer of land because, in effect, the learned Member conflated the mistake made by Ms Adamopoulos as to the dimensions of Shop 4 with the common intention as to the subject matter of the sale.
72. It is clear that by s 42 of the [TLA](#) that Ms Adamopoulos' indefeasible title to Lot 3C is subject to the exception in s 42(1)(b) of the [TLA](#), namely, 'as regards any portion of the land that by wrong description of parcels or boundaries is included in the folio of the Register or instrument evidencing the title of such proprietor not being a purchaser for valuable consideration or deriving from or through such a purchaser.' The decisions in [Pleasance v Allen \[74\]](#) and [Michael v Onisiforou \[75\]](#) confirm and explain the 'wrong description' exception.

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[74] [\(1889\) 15 VLR 601](#).

[75] [\(1977\) 1 BPR 9356](#).

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73. It is also clear from these authorities that a proprietor is not a purchaser for valuable consideration of part of land that was not intended to be transferred, even though it is referred to in the contract of sale and the transfer. The classical example is where there is a surveying error and the transfer includes land outside the actual address.
74. Given that the Tribunal found that the parties' intention was, respectively, to sell and buy Shop 4, the presence of the mistake by Ms Adamopoulos as to the dimensions of Shop 4 does not properly result in a finding that there was no common intention. This involved the application of the incorrect test for rectification. The intention as to the subject matter of the sale being Shop 4 was the governing or predominant intention of both parties and the relevant common intention for the purposes of the equity of rectification.
75. What is the correct test for rectification? In *The Club Schanck Resort Company Limited v Cape Country Club Pty Ltd*, [\[76\]](#) the Court of Appeal regarded as unexceptional the following statement from Dr I.C.F. Spry's *The Principles of Equitable Remedies*:[\[77\]](#)

Where all parties who execute a document intend that the provisions of the document should accord with an agreement entered into by them, or with a common intention possessed by them, but due to a mistake shared by all of them it does not do so, rectification is ordered by the court, in the absence of special circumstances that make this course unjust.

[76] (2001) 3 VR 526; [2001] VSCA 2 ('Club Schanck Resort').

[77] 5<sup>th</sup> ed. (1997), 610.

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76. There are several other propositions that need to be stated in addition to this somewhat generalised statement of the principle. They are that a party seeking rectification:

- (a) bears a heavy onus [78] and must advance convincing proof; [79].
  - (b) must clearly show that the written instrument [80] does not represent the parties' common intention and, as well, what their common intention was; [81], and
  - (c) must show that the antecedent common intention continued through to the time of the execution of the instrument in question. [82].
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[78] *Club Schanck Resort* at 530-531 [14]; *Duoedqe Pty Ltd v Leonq & Anor* [2013] VSC 36, [46] ('Duoedqe').

[79] *Maralinga Pty Ltd v Major Enterprises Pty Ltd* (1973) 128 CLR 336 at 350 per Mason J.

[80] I note that in this case the written instrument is not merely the transfer of land but also the contract of sale.

[81] *Club Schanck Resort*, 530-531 [14].

[82] *Maralinga Pty Ltd v Major Enterprises Pty Ltd* (1973) 128 CLR 336 at 350 per Mason J.

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77. ASA contends that this case falls into the category described by Hodgson J (as he then was) of the Supreme Court of New South Wales in *Bush v National Australia Bank*. [83]. In that case, Hodgson J expressed the notion of a predominant intention. Before setting out the particular passage relied on by ASA, it is well to repeat his Honour's summary of the applicable law: [84].

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[83] (1992) 35 NSWLR 390.

[84] *Ibid*, 405-407.

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I accept, as submitted by Mr Spigelman, that a useful summary of the basic principles concerning rectification is that contained in *Westland Savings Bank v Hancock* (at 29-30), as follows:

...I am of the view that some outward expression of accord is not necessary but that before rectification can be ordered the Court must be satisfied that the following points are established:

- (1) That whether there is an antecedent agreement or not, the parties formed and continued to hold a single corresponding intention on the point in question.
- (2) That such intention continued to exist in the minds of both or all parties right up to the moment of execution of the formal instrument of which rectification is sought.
- (3) That while there need be no formal communication of the common intention by each party to the other or outward expression of accord, it must be objectively apparent from the words or actions of each party that each party held and continued to hold an intention on the point in question corresponding with the same intention held by each other party.
- (4) That the document sought to be rectified does not reflect that matching intention but would do so if rectified in the manner requested.

Furthermore,... in my view, rectification may be available where the common intention does not relate to the words of the document so much as to its legal effect. I think that the preponderance of authority now favours the view that, provided all other requirements of rectification are satisfied, rectification will not be refused merely because the common mistake is as to the legal effect of the words used, rather than as to the actual words used...

I think the view I have expressed is correct as a matter of principle also. If it be the case that both parties have a very clear and obvious intention as to the legal effect to be achieved by a written instrument, but are clearly and obviously mistaken as to the meaning of a word in the instrument, all the reasons which justify the granting of rectification seem to apply. However, I accept that where the mistake is as to the legal effect of a document, rather than its words, it will often be more difficult to satisfy the requirements for rectification. Not only may it be more difficult to have evidence of sufficient clarity as to the common intention and common mistake, but there may be other more particular difficulties as well.

#### 78. And then comes the passage relied upon by ASA:

In such cases, it will often be the case that each party will have conflicting intentions as to the document. It may well be the case that each party intends to give effect to the document as it is worded, but also intends to enter into a transaction with a particular legal effect, which is not the true legal effect of the document as worded. The problem is not unlike that in the case of a mistake as to the identity of a person with whom one is making a contract: one may intend to contract with a person with a particular name and description, but also intend to contract with the very person who is present; and in subsequent legal proceedings, a decision may have to be made as to which intention should prevail. So it may also be with this type of rectification, with the additional complication that the intention and mistake must be clearly proved. So one



needs to be able to say that, although in a sense the parties intended to be bound by a document which included certain words, nevertheless their intention to achieve a legal effect which was not the true legal effect of those words was somehow predominant over that other intention, and clearly predominant.

79. The notion of a governing or predominant intention has been approved in the NSW Court of Appeal in [Commissioner of Stamp Duties \(NSW\) v Carlenka Pty Ltd](#), [85] in the Supreme Court of Victoria in [Duoedqe Pty Ltd v Leong](#) [86], and in the leading text, Dr Spry's *Equitable Remedies*. [87].

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[85] [\(1995\) 41 NSWLR 329](#) per Sheller JA at [344](#).

[86] [\[2013\] VSC 36](#) per Dixon J at [\[47\]](#).

[87] 9<sup>th</sup> Ed at 635.

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80. It is clear that the parties' predominate or governing intention was to transfer Shop 4. The Tribunal found that Mr Clifton, the controller of ASA, intended to sell the land within the occupation boundaries of Shop 4. [88] The Tribunal also found that both Ms Adamopoulos and Mr Votsaris agreed that they intended that Ms Adamopoulos should buy Shop 4 as occupied by the tenant, being the bakery.

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[88] Reasons [59].

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81. The matter that induced the Tribunal to conclude that there was no relevant common intention sufficient to enable orders to be made under s [34D](#) of the [Act](#) was the evidence, which the Tribunal accepted, that both Ms Adamopoulos and Mr Votsaris believed that one of the boundaries of Shop 4 was the brick wall some 3 metres to the west of the actual physical boundary. [89].

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[89] Reasons [71].

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82. ASA submits that on the application of the correct legal test, amendment of the plan of subdivision to move the title boundary between Lots 3B and 3C ought to have been ordered.
83. It is clear from the findings of the Tribunal to which ASA has referred in its submissions, that the parties' predominant and governing intention was to transfer Shop 4 and that the mistake under which Ms Adamopoulos suffered was not a mistake that affected the reaching of that common intention. It is, when properly characterised, a separate and distinct mistake that does not undermine the governing or predominant intention to buy Shop 4.

84. Because it is plain that the parties intended that it was Shop 4 that was to be sold and conveyed by ASA to Ms Adamopoulos, that is to say, Shop 4 as tenanted by the bakery and not as mistakenly recorded on the plan of subdivision, the Tribunal should have ordered that under s 34D of the Act, the OC to do all things necessary to be done to effect an alteration to the plan of subdivision the effect of which was to realign the boundaries between Shop 3 and Shop 4 so as to accord with the physical boundaries in existence.
85. Subject, therefore, to the cross appeal, I consider that the Tribunal fell into error in the application of the law as to the equity of rectification, that it was not simply a question of fact but involved a misapplication of the law on that subject.

### **The Adamopoulos Application for Leave to Appeal and the Appeal**

86. In the cross-appeal, Ms Adamopoulos raised the following questions of law, whether:

- (a) the Tribunal has jurisdiction to make an order under s 34D of the Act where there is no dispute relating to an owners' corporation, but rather a dispute in relation to a contract for the sale of land?
- (b) the Tribunal has jurisdiction under s 34D of the Act to make an order requiring an owners' corporation to execute documents to effect an amendment of a plan of subdivision where that amendment will compel the transfer of land owned by one member of the owners' corporation to another member, where that other member has no legal right to the land?
- (c) the Tribunal has power under s 130(1) of the VCAT Act to make an order that is contrary to the parties' common law rights and obligations?
- (d) the Tribunal made its orders on the basis of an irrelevant consideration, namely, the Tribunal's unsupported finding that Ms Adamopoulos' ability to sell her land is affected because she could not give a purchaser vacant possession of the disputed land?
- (e) the Tribunal made its orders without taking into account relevant considerations, namely:
- (i) that ASA has no legal title to the disputed land;
  - (ii) that Ms Adamopoulos could not be compelled to transfer the disputed land; and
  - (iii) that ASA was seeking to achieve, indirectly, by its application under s 34D of the Act, what it had no legal right to achieve directly, namely the rectification of the contract for the sale of land.

87. Ms Adamopoulos' grounds of appeal are that the Tribunal erred in:

- (a) finding it had jurisdiction to hear the proceeding in circumstances where there was no dispute relating to the OC, rather a dispute in relation to a contract for the sale of land between the ASA and Ms Adamopoulos;
- (b) making the orders where their effect may be to compel a transfer of a part of Ms Adamopoulos' land to ASA in circumstances where the Tribunal found ASA had no legal right to that land and Ms Adamopoulos could not be compelled to transfer it to ASA;
- (c) taking in to account irrelevant considerations, namely:
  - (i) the Tribunal's unsupported finding that Ms Adamopoulos' ability to sell her land is affected because she could not give a purchaser vacant possession of the disputed land;
  - (ii) that the orders would better secure Ms Adamopoulos' right to give a purchaser vacant possession of the whole of Shop 4;
- (d) failing to take into account relevant considerations, namely:
  - (i) ASA had no legal right to the disputed land;
  - (ii) Ms Adamopoulos could not be compelled to transfer the disputed land; and
  - (iii) ASA was seeking to achieve, indirectly, by its application under s [34D](#) of the [Act](#), what it had no legal right to achieve directly, namely the rectification of the contract for the sale of land.

88. Thus, Ms Adamopoulos sought orders that the Tribunal's orders be set aside and replaced by orders that:

- (a) the application under s [34D\(1\)\(a\)](#) of the [Act](#) is dismissed; and
- (b) ASA pay the costs of Ms Adamopoulos and the OC of and incidental to the proceeding in the Tribunal.

### **Submissions and Consideration**

89. Ms Adamopoulos' submissions, dated 11 March 2016, provide an overview of her position. The submissions underscore that the OC must pass a unanimous resolution to affect the transfer, rather than VCAT making orders that require the OC to alter the boundaries of the plan of subdivision under s [32\(c\)](#) of the [Act](#).[\[90\]](#) It is submitted that the OC does not have power under s [32\(c\)](#) of the [Act](#) to compel Ms Adamopoulos (through orders made in VCAT) to transfer any part of the disputed land. Further, VCAT's power to make an order requiring the OC to do things does not extend to VCAT compelling Ms Adamopoulos to transfer any part of the disputed land to ASA [\[91\]](#) and this is not the intention of the legislation.[\[92\]](#) It is also submitted that ASA is asking for

the Tribunal to make orders that are founded in a court's equitable jurisdiction, a jurisdiction that the Tribunal does not possess.[\[93\]](#).

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[\[90\]](#) Adamopoulos Submissions 11 March 2016, [8]–[9] and [12].

[\[91\]](#) Adamopoulos Submissions 11 March 2016, [10].

[\[92\]](#) Adamopoulos Submissions 11 March 2016, [13].

[\[93\]](#) Adamopoulos Submissions 11 March 2016, [14] and [15].

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90. The written submissions also contend that ASA has failed to adequately identify a question of law upon which to appeal pursuant to s [148](#) of the [VCAT Act](#).[\[94\]](#) First, Ms Adamopoulos says that it was open to the Tribunal to come to the factual finding that she intended to purchase all of Lot 3C which included the brick wall.[\[95\]](#) Next, it is submitted that ASA should not be permitted to attempt to invoke the equitable jurisdiction of the Court under the guise of an appeal from the Tribunal on a question of law.[\[96\]](#).
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[\[94\]](#) Adamopoulos Submissions 11 March 2016, [16] and [18].

[\[95\]](#) Adamopoulos Submissions 11 March 2016, [18].

[\[96\]](#) Adamopoulos Submissions 11 March 2016, [20].

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91. ASA's written submissions contend that both of Ms Adamopoulos' key claims can be readily dismissed.[\[97\]](#) First, ASA submit that Ms Adamopoulos' assertion that s [34D](#) of the [Act](#) does not give VCAT power to compel the OC to transfer land from one member to another is false. Section [32](#) of the [Act](#) enables the OC to alter boundaries which may have the effect of increasing or decreasing land, and provides them with the power to deal with the disputed land. ASA concedes that this must occur through a unanimous resolution within the OC. Should a unanimous resolution not be reached, then s [32D](#) of the [Act](#) empowers VCAT to do anything in s [32](#) of the [Act](#) that the OC cannot do.[\[98\]](#) Second, ASA disputes that there was a mistake between the parties as to the plan of subdivision.[\[99\]](#) Rather, this was a manifest error in the plan whereby the subdivision did not accord with the physical boundaries of the Property and as such the appropriate venue to make an application was VCAT.[\[100\]](#).
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[\[97\]](#) ASA Submissions in Reply 18 March 2016, [2].

[\[98\]](#) ASA Submissions in Reply 18 March 2016, [3] and [4].

[\[99\]](#) ASA Submissions in Reply 18 March 2016, [5] and [6].

[\[100\]](#) ASA Submissions in Reply 18 March 2016, [7].

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## The Grounds of Appeal and Corresponding Questions of Law

92. Both parties' submissions address each proposed ground of appeal individually. I have set out below each ground of appeal with the corresponding submissions and my conclusions.

*Ground 1: The Tribunal erred in finding that it had jurisdiction to hear the proceeding where there was no dispute regarding the OC but a dispute regarding the contract of sale*

93. Ms Adamopoulos submits that under s 34D of the Act, the Tribunal has power in relation to disputes relating to owners' corporations.<sup>[101]</sup> The mere fact that the disputed land is affected by the OC does not mean that it can be said that the dispute 'relates to an owners' corporation.'<sup>[102]</sup> This would have the effect of giving VCAT jurisdiction to determine a broad range of land disputes, and nothing in the Act supports this as a construction.<sup>[103]</sup>

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<sup>[101]</sup> Adamopoulos Submissions, 11 March 2016, [23].

<sup>[102]</sup> Adamopoulos Submissions, 11 March 2016, [23].

<sup>[103]</sup> Adamopoulos Submissions, 11 March 2016, [24].

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94. ASA submit that the argument that VCAT did not have jurisdiction to hear the proceeding under the Act has only been put now that the Tribunal has ruled.<sup>[104]</sup> Further, a plain reading of the legislation enables the OC to alter the boundaries of Ms Adamopoulos' land and ASA's land pursuant to s 32(c) of the Act.<sup>[105]</sup> There is agreement between the parties to the extent that a unanimous resolution of the OC could alter the boundaries of the Lots, but ASA adds that s 34D of the Act empowers the OC to apply to the Tribunal for an order that requires the OC to take certain action, any that the Tribunal sees fit, such as dealing with the disputed land.<sup>[106]</sup> ASA submits that the Tribunal has power as the Property clearly 'relates to' the OC.

*Consideration*

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<sup>[104]</sup> ASA Submissions in Reply, 18 March 2016, [9].

<sup>[105]</sup> ASA Submission in Reply, 18 March 2016, [10]-[15].

<sup>[106]</sup> ASA Submission in Reply, 18 March 2016, [13].

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95. It is clear from the reasons of the Tribunal that Ms Adamopoulos submitted below that the Tribunal had no jurisdiction to entertain the application. The basis of the argument is set out in the reasons.<sup>[107]</sup> The bases of the submission was, in summary, that upon registration of the transfer to her and the issuing of a certificate of title to Lot 3C, Ms Adamopoulos obtained a title to the whole of the land in Lot 3C which, generally speaking, is indefeasible as against a person who claims an unregistered interest in Lot 3C or in any part of it. The Tribunal discerned three separate arguments within that submission:

(a) the first argument relied upon s 3(1) of the TLA, which provides that 'no Act or rule of law, so far as it is inconsistent with this Act, shall apply ... to land within the operation of this Act'. The argument was that s 34D of the Act is inconsistent with the TLA and so could not apply to Lot 3C. This submission was rejected for reasons given [108] which have not been challenged in this application;

(b) the second argument relied upon the rule of statutory interpretation that legislation is presumed not to alienate or interfere with vested proprietary interests. [109] The argument appeared to be that s 34D of the Act has no application to a case in which the order sought would have the effect of alienating or interfering with a vested proprietary interest, and that this case is such a case. This submission was rejected for reasons given [110] which have not been challenged in this application; and

(c) the third argument was that s 34D of the Act should not be interpreted and applied in a way that would facilitate (even if it did not effect) the removal of the disputed land from Ms Adamopoulos' title because to do so would subvert the Torrens system of indefeasibility of title obtained through registration. Although s 42(1)(b) of the TLA creates an exception to indefeasibility when there has been 'wrong description' of boundaries in a folio of the Register, the exception does not apply when the registered proprietor is 'a purchaser for valuable consideration', as Ms Adamopoulos was. Alteration of a title boundary to correct an alleged mistake in description of the boundary in the amended plan of subdivision would not be permitted by the proper operation of s 42(1)(b) of the TLA. To permit it by an order made under s 34D of the Act would subvert the Torrens system in the way described (so the argument ran) and so s 34D of the Act cannot confer upon the Tribunal a jurisdiction to make such an order. This submission was rejected for reasons given [111] which have not been challenged in this application.

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[108] Reasons [45]-[47].

[109] D C Pearce & R S Geddes, op cit, paras 5.21 and 5.22.

[110] Reasons [48]-[49].

[111] Reasons [50]-[58].

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96. The law is clear that upon the hearing of an appeal, the appellant is, to an extent, bound by the way in which they conducted proceedings in the Court or Tribunal below. [112]. In *Whisprun Pty Ltd v Dixon*, [113] Gleason CJ, McHugh and Gummow JJ observed that it was inimical to the due administration of justice, if, on appeal, a party could raise a point that was not taken at the trial,

unless it could not possibly have been met by further evidence at the trial. A point may be a new point even though it is in the pleadings or particulars, so it is necessary to look at the actual conduct of the proceeding to determine whether a party is raising a new point.

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[112] see *Coulton v Holcombe* (1986) 162 CLR 1 at 7.

[113] [2003] HCA 48, at [51], [52].

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97. In my view, this principle stands as a direct barrier to Ms Adamopoulos now seeking to raise as a question of law on appeal that the Tribunal erred in finding that it had jurisdiction. The question simply did not arise before the Tribunal that it lacked jurisdiction in the way now advanced. The only related issue was the question of the extent of the power under s 34D of the Act, but that is a different question. The fact that it was not run as an argument below means that by failing to consider it, the Tribunal did not fall into appealable error.
98. If, however, I am wrong in that conclusion, I will proceed to consider the point as raised by Ms Adamopoulos, which in my view is a question of the scope of the jurisdiction conferred by s 34D of the Act.
99. Section 1 of the Act sets out the purposes of the legislation:
- (a) to set out the procedure for the subdivision and consolidation of land, including buildings and airspace, and for the creation, variation or removal of easements or restrictions; and
  - (b) to regulate the management of and dealings with common property and the constitution and operation of bodies corporate.
100. The sections critical to the question of power of the Tribunal are both in Part 5 of the Act, which is headed 'Subdivisions With Owners Corporations.' Section 32 is in Division 3 of that Part, which is entitled 'Alteration of a subdivision.' Section 34D is in Division 5 of that part and is entitled 'Disputes and other proceedings relating to owners corporations.'
101. There is no question that under s 32 of the Act that the OC can, pursuant to a unanimous resolution of the members, alter the boundaries of any land 'affected by the Owners' Corporation.' I have set out above the meaning given to 'land affected by an Owners' Corporation' which shows that it includes the lots owned by the members of the OC for the time being as well as the common property. It is therefore clear that under s 32 of the Act, the boundary between Lots 3B and 3C can be altered by a unanimous resolution of the members of the OC whether or not the alteration results in an increase or decrease in the area of land in either Lot, that is in the area of land affected by the OC. The very thing sought to be done in this case falls within the clear wording of s 32 of the Act. The submissions of Ms Adamopoulos seek to take the matter outside the scope of s 32 by re-characterising what is being done by reference to its effect. It remains, nonetheless, within the clear words of the section.

102. Given that the alteration of the boundaries by unanimous resolution is within the OC's power under s 32 of the Act, it follows that the Tribunal has the power under s 34D of the Act where application is made by, amongst others, a member of the OC. There was no dispute that ASA is a member of the OC. Moreover, it is clear from s 34D(2) of the Act that it is not necessary that there has been a unanimous resolution of the OC authorising the particular action for which application is made.
103. There is thus no warrant for the contention by Ms Adamopoulos that the power in s 34D of the Act can only be exercised in relation to disputes relating to the OC. To the extent that the contention by Ms Adamopoulos is supported by the heading of Division 5 of the Act, 'Disputes and other proceedings relating to Owners' Corporations' the presence of 'other proceedings', that heading makes clear that the division is concerned with more than disputes relating to owners' corporations.
104. In any event, I agree with ASA's submission that an application to amend the plan of subdivision so that it accords with the physical boundaries on the land does raise a dispute relating to an owners' corporation. But the true answer to Ms Adamopoulos' contention is that the plain words of s 34D of the Act empower the Tribunal to make orders of the kind that it has made in this case requiring the OC to alter the boundaries in the plan of subdivision.
105. This conclusion means that I consider there is no real or significant argument that the Tribunal lacked jurisdiction to make the orders that it did. If there is a real or significant argument sufficient for the grant of leave in relation to the first proposed question of law, I reject that argument and find that the Tribunal did not fall into error in exercising the jurisdiction under s 34D of the Act because the application sought an order requiring the OC to 'alter the boundaries of any land affected by the' OC within the meaning of s 32 of the Act. It involved a finding that the plan of subdivision was mistaken and the product of error. That seems to me to be clearly within the remit of the combined effect of ss 32 and 34D of the Act. The fact that the application involved determining a dispute in relation to a contract for the sale of land along the way, so to speak, does not negative the jurisdiction.

***Ground 2: the Tribunal erred in making the orders where the effect was to compel the transfer of the disputed land where the Tribunal Found that ASA had no right to that land and that Ms Adamopoulos could not be compelled to transfer the land to ASA***

106. Ms Adamopoulos submits that if VCAT possesses powers to compel the OC to transfer the disputed land to ASA, then such power must be exercised judicially according to legal principles. She adds that as the Tribunal found that there was no common mistake between the parties, it was not open to the Tribunal to effectively rectify the contract of sale. Contracts cannot be rectified where there has been a unilateral mistake, yet Ms Adamopoulos says that the Tribunal's orders effectively result in rectification.<sup>[114]</sup>

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<sup>[114]</sup> Adamopoulos Submission, 11 March 2016, [26].

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107. ASA contends that the Tribunal formed the wrong conclusion of law on the facts and the transfer did not reflect the parties' intentions and the plan of subdivision ought to be amended.<sup>[115]</sup> ASA submits that the Tribunal ought to have found that it had a legal entitlement to the disputed land and therefore it could compel Ms Adamopoulos to transfer it.<sup>[116]</sup>

*Consideration*

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<sup>[115]</sup> ASA Submission in Reply, 18 March 2016, [16].

<sup>[116]</sup> ASA Submission in Reply, 18 March 2016, [17].

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108. My conclusion in relation to the ASA appeal puts to rest this ground and means that the second and third proposed questions of law should be rejected. Should I be found wrong in that conclusion, namely that the Tribunal did form the wrong conclusion of law on the facts as found, then I consider that nevertheless the Tribunal was correct to find as it did. That is because it was clear that there had been a mistake by the surveyor in the preparation of the plan of subdivision, that the correction of that mistake was within the jurisdiction of the Tribunal to correct under the combined operation of ss 32 and 34D of the Act and it was, for the reasons given by the Tribunal, much more beneficial to the parties to correct that error and bring the boundaries of the two Lots into conformity with the physical boundaries between the Lots as to leave the situation as it was. It was a much more just outcome than to leave the Lot owners to bring further proceedings to force major building operations to bring the boundaries into line with the plan of subdivision and the titles.

***Ground 3: the Tribunal erred in taking into account irrelevant considerations such as Ms Adamopoulos' ability to sell her land and giving a purchaser vacant possession***

109. Ms Adamopoulos asserts that the Tribunal erred in finding that making orders would better secure her ability to provide vacant possession of the whole of Shop 4 to a purchaser.<sup>[117]</sup> As the registered proprietor, Ms Adamopoulos has a legal right to possession of all of the land, including the disputed land.<sup>[118]</sup> As such, the Tribunal's orders will have no effect and the Member has erred in law by allowing irrelevant considerations.<sup>[119]</sup>

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<sup>[117]</sup> Adamopoulos Submission, 11 March 2016, [29].

<sup>[118]</sup> Adamopoulos Submission, 11 March 2016, [28].

<sup>[119]</sup> Adamopoulos Submission, 11 March 2016, [29].

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110. ASA submit that Ms Adamopoulos' title is comprised of the bakery premises and 3 metres of the bank premises and therefore it cannot follow that Ms Adamopoulos would be entitled to vacant

possession of the bank premises.<sup>[120]</sup> As such, the Tribunal did not err in having regard to an irrelevant consideration in coming to its decision.<sup>[121]</sup> Accordingly, the Tribunal's order is appropriate in the circumstances.<sup>[122]</sup>

### Consideration

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<sup>[120]</sup> ASA Submission in Reply, 18 March 2016, [20].

<sup>[121]</sup> ASA Submission in Reply, 18 March 2016, [18].

<sup>[122]</sup> ASA Submission in Reply, 18 March 2016, [20].

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111. Once again, the order for the plan of subdivision to be altered falls squarely within the power of the Tribunal under the combined effect of ss 32 and 34D of the Act. Given the finding I have made on ASA's appeal, and the reasoning on which that finding proceeds, it is now unnecessary to consider this question. If, however, I am wrong in my conclusion on ASA's appeal, it seems to me that the response by ASA is correct. It is highly relevant to the alteration of the plan of subdivision to take into account the ability of the members of the OC to deal with their land. The impossibility of selling Lot 3C, or even reletting Shop 4 occupied by the bakery, was plainly seriously affected by the fact that the bank occupied a part of the title to Lot 3C. The considerations taken into account by the Tribunal were all plainly relevant.
112. In consequence, the fourth proposed question does not raise any arguable error by the Tribunal.

***Ground 4: the Tribunal erred in failing to take into account relevant considerations including that ASA has no right to the disputed land, Ms Adamopoulos cannot be compelled to transfer the disputed land and that ASA was attempting to achieve rectification of the contract of sale for the land***

113. Ms Adamopoulos submits that the Tribunal erred in failing to take into account its own findings as to the facts and the law, and made orders contrary to those findings.<sup>[123]</sup> First, the Tribunal found that ASA had no right to the land yet made orders giving ASA a legal right to the disputed land. Second, the Tribunal found that Ms Adamopoulos could not be compelled to transfer the disputed land, but made orders compelling her to transfer. Finally, the Tribunal held that ASA was attempting to indirectly seek rectification of the contract for the sale of land which it had no direct legal right to but allowed ASA to rectify the contract of sale.<sup>[124]</sup>

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<sup>[123]</sup> Adamopoulos Submission, 11 March 2016, [31].

<sup>[124]</sup> Adamopoulos Submission, 11 March 2016, [31].

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114. ASA submit that the Tribunal ought to have found that ASA did have a legal entitlement to the disputed land and could therefore be empowered to compel Ms Adamopoulos to transfer the

disputed land in order to correct the plan of subdivision and reflect the intention in the preparation of the plan and physical reality of the premises.[\[125\]](#)

### *Consideration*

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[\[125\]](#) Outline of Submissions of the First Respondent in Reply dated 18 March 2016, para 21.

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115. My conclusion in relation to the ASA appeal puts to rest this ground and means that the fifth proposed question of law should be rejected. Should I be found wrong in that conclusion, namely that the Tribunal did form the wrong conclusion of law on the facts as found, then I consider that nevertheless the Tribunal was correct to find as it did, for the reasons given in relation to rejecting the other grounds and the corresponding questions of law.

### **Conclusion**

116. ASA has been successful in its application for leave to appeal and in its appeal. The effect of that success is that the condition imposed by the Tribunal for the payment of compensation by ASA to Ms Adamopoulos should not have been imposed, with all the consequential orders and directions. In consequence, the orders sought by ASA should be made and the orders made by the Tribunal on 8 October 2015 should be set aside and replaced with the orders set out above at paragraph 62.
117. Ms Adamopoulos has been unsuccessful in her applications for leave and in any appeal.
118. The parties should prepare and submit minutes of proposed orders (by consent if possible) and, if there is any argument as to the appropriate order as to costs (which at present appear to me should follow the events), my chambers will set a date for argument.