VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

OWNERS CORPORATIONS LIST

VCAT REFERENCE NO.OC60/2016

CATCHWORDS

Air conditioning equipment installed on common property; application for authorising order under s 165(1)(ba) *Owners Corporations Act 2006* for removal; no evidence of majority support; order refused. Application to declare special rules invalid; no evidence of invalidity.

FIRST APPLICANT:	Robert Carmignani
SECOND APPLICANT:	Sharyn Palmer
THIRD APPLICANT:	Janice Warren
FOURTH APPLICANT:	Preema Katheresan
FIRST RESPONDENT:	Owners Corporation No. 1 PS349389V
SECOND RESPONDENT:	Wayne Banks Smith
THIRD RESPONDENT:	David Stevens
FOURTH RESPONDENT:	Chloe Stevens
FIFTH RESPONDENT:	Dennis Jones
SIXTH RESPONDENT:	Victoria Body Corporate Services Pty Ltd
WHERE HELD:	55 King Street, Melbourne
BEFORE:	Member L. Rowland
HEARING TYPE:	Hearing
DATE OF HEARING:	28 November 2016
DATE OF ORDER:	28 November 2016
DATE OF REASONS:	19 December 2016
CITATION:	Carmignani v Owners Corporation No 1 PS349389V (Owners Corporations) [2016] VCAT 2155

ORDERS

1. The application against the fifth respondent is withdrawn at hearing with leave of the Tribunal.

2. The application against the sixth respondent is struck out with a right of reinstatement.

3. The application for an authorising order under s 165(1)(ba) of the *Owners Corporations Act 2006* is dismissed.

4. The application for an order declaring the special rules registered 20 December 2014 are invalid by reason of non-compliance with s 97 *Owners Corporations Act 2006* is dismissed.

5. Any application for costs must be applied for in writing by 13 January 2017. Any application for costs will be heard and determined by Member Rowland in chambers. If necessary, further directions may given. If no application for costs is received by 13 January 2017 there shall be no order for costs.

MEMBER L ROWLAND

APPEARANCES:

For the First Applicant	Ms Warren in person
For the Second Applicant	In person on second day of hearing
For the Third Applicant	Mr and Mrs Warren in person
For the Fourth Applicant	In person
For the First Respondent	Ms Wilde, solicitor
For the Second Respondent	Mr Dear, professional advocate

For the Third Respondent	Mr Dear, professional advocate
For the Fourth Respondent	Mr Dear, professional advocate
For the Fifth Respondent	In person
For the Sixth Respondent	Mr Q Thomas, owners corporation manager

REASONS

Introduction

1 This owners corporation dispute concerns the location of air-conditioning condensers and associated duct work. The applicant lot owners seek removal of the respondent lot owners' air-conditioning condenser units and duct work from the common property roof. The respondent lot owners wish to maintain the air-conditioning equipment on the common property. The respondent lot owners contend that they had the consent of the owners corporation to install the air-conditioning equipment on the common property roof. The applicants assert that they did not have the owners corporation consent or approval.

Background

2 The development created almost 20 years ago, consists of 11 townhouses and 1 commercial lot and 9 apartments in a 4-storey tower. Below the townhouses and the tower is a basement car park. The development was originally designed for a 5 kilowatt condenser for each lot to be located in the basement. The weight of the evidence is that the condensers for most of the lots have underperformed for two main reasons. Firstly, the 5 kilowatt system is grossly undersized for the lots and in particular the 3-storey townhouses and secondly, the ventilation system in the basement does not create sufficient ventilation to permit the existing condensers to operate effectively. As a consequence, most of the lots and in particular the much larger townhouses have insufficient air-conditioning.

3 Over the years, the owners corporation has been unable to come to an acceptable solution to the lack of air-conditioning throughout the development. Some lot owners, including the applicant lot owners, wish to upgrade the ventilation system in the basement so that all the condensers can be located in the basement. The cost of the upgrade of the ventilation system would be upwards of $70,000 and possibly more than $100,000. Other lot owners would be content with condensers on the lot owners' respective balconies or on the common property roof above the respective townhouses. If more condensers were relocated out of the basement, the existing ventilation system, if properly maintained, could probably cope with a smaller number of condensers.

4 In May 2013, the second respondent, Mr Wayne Banks Smith installed a condenser and associated duct work on the common property roof above his townhouse. He contends that he did so with the consent of the owners corporation. In November 2013, the third and fourth respondents, the Stevens, installed an identical condenser and duct work on the common property roof above their townhouse. Mr Stevens alleges he did so with the consent of the owners corporation.

The parties

5 It is necessary to briefly describe all the parties and the orders sought in these proceedings.

6 The first applicant, Mr Carmignani, is the owner of a townhouse. He did not attend the hearing but authorised Ms Warren to appear on his behalf.

7 The second applicant, Sharyn Palmer, is the owner of an apartment. Ms Palmer attended on the second day of hearing. Her specific concern is that the air-conditioning equipment is visible from her apartment.

8 The third applicant, Janice Warren, is the owner of an apartment. Ms Warren appeared with her husband, Mr Phillip Warren. The Warrens were concerned to achieve an air-conditioning plan for the benefit of all lot owners.

9 The fourth applicant, Ms Preema Kathersesan, is the owner of a townhouse.

10 The applicants are generally opposed to anything being installed on the common property roof for the very good reason that any installation is likely to cause a maintenance issue in the future. Their concern is that the common property roof, instead of being free of equipment and roof penetrations will be replete with installations and penetrations. There is also a concern that the condensers and ducting are not aesthetically pleasing. They cannot readily be seen from ground level, but they can be seen from some parts of the apartment tower.

11 The first respondent, Owners Corporation PS349389V, was joined to the proceeding as a necessary party. The owners corporation was represented by Ms N Wilde, solicitor.

12 The second, third and fourth respondents are the respondent lot owners with air-conditioning equipment on the common property roof. The respondent lot owners also brought their own proceeding OC2069/2016 against the owners corporation, seeking, amongst other things, the appointment of an administrator. The respondent lot owners' application was withdrawn in its entirety during the hearing.

13 The fifth respondent, Mr Dennis Jones, owns two townhouses. He was joined as a respondent because the applicants sought his removal from the committee and an order in relation to the condenser installed on his balcony. At the hearing, the applicants withdrew their claim against Mr Jones. Mr Jones made a short submission to the Tribunal supporting the second, third and fourth respondents and thereafter, Mr Jones was excused from further attending the hearing.

14 The sixth respondent, Victoria Body Corporate Services Pty Ltd, was represented by Mr Quenton Thomas, owners corporation manager. The applicants were seeking an order for removal of the manager. The manager agreed to abide by any decision of the owners corporation or the Tribunal regarding its appointment. The parties resolved to put the manager's

appointment to a motion at the next annual general meeting. The application against the manager was struck out with a right of reinstatement.

15 The only applications remaining for determination were the application for an order under s 165(1)(ba) of the *Owners Corporation Act 2006* ('the OC Act 2006') authorising the applicants to commence proceedings on behalf of the owners corporation to seek an order for removal of the equipment and an application for an order declaring that the new rules lodged with the Registrar of Titles on 20 December 2014 are invalid.

Application under section 165(1)(ba) of the *Owners Corporations Act 2006*

16 Section 165(1)(b) enables a lot owner to apply to the Tribunal for an order authorising the lot owner to prosecute an application in the name of the owners corporation. The Tribunal does not readily grant an application under s 165(1)(ba). In *Grima v Quantum United Management Pty Ltd* (Owners Corporations) Senior Member Vassie set out the matters the Tribunal should consider in either refusing or granting leave under s 165(1)(ba) of the OC Act 2006.

> An application for an authorising order under s 165(1)(ba) is not simply an optional alternative to the fulfilment of the requirement for a special resolution in accordance with s 18(1), and is not granted as a matter of course. The applicant for the authorising order must persuade the Tribunal that it ought to be made and that the applicant is not seeking to subvert the responsibility that the owners corporation has under the OC Act to achieve a special resolution before being able to begin a proceeding. In the exercise of its discretion to grant or refuse the application for the authorising order the Tribunal will consider, first, the reason why no special resolution was obtained or (as in the present case) attempted; secondly, the degree of support amongst the other members of the owners corporation for the application, even though the degree of support is less than the 75% support that would have achieved a special resolution; thirdly, what benefit there would be for the owners corporation as a whole if the order were made, and what disadvantage it might suffer if the order were not made; fourthly, whether the proceeding for which authority is sought has a prospect of success, or, at the very least, is not bound to fail. That list of factors that might be considered is not exhaustive.

17 In the *Grima* proceedings a special resolution was required to commence the proceedings. In these proceedings the owners corporation requires only an ordinary resolution to commence proceedings for a breach of an owners corporation rule.[1]

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[1] Section 18(2) of the *Owners Corporations Act 2006* provides that 'a special resolution is not required for an application to VCAT under Part 11 to recover fees and other money or to enforce the rules of the owners corporation.

18 It is convenient to deal with Senior Member Vassie's fourth consideration first. That is, what is the prospect of the owners corporation succeeding in an application to remove the air-conditioners from the common property roofs.

Are the respondent lot owners entitled to install equipment on the common property roof?

19 The respondent lot owners do not have a general right to put anything on the common property roof above their townhouses. In 2013, when the equipment was installed, special rules and the model rules governed damage to common property.

20 The rules which regulated damage to common property were special rule 4 (new rules registered on 20 December 2014 replaced the former special rules) and model rule 3.3.

21 Special rule 4 provided as follows:

> 4.1 A proprietor or occupier of a lot shall not mark, paint or the like, or otherwise damage or deface, any structure that forms part of the common property without the approval in writing from the body corporate.

22 Model rule 3.3 provides:

> **3.3 Damage to common property**
>
> (1) An owner or occupier of a lot must not damage or alter the common property without the written approval of the owners corporation.
>
> (2) An owner or occupier of a lot must not damage or alter a structure that forms part of the common property without the written approval of the owners corporation.
>
> (3) An approval under sub rule (1) or (2) may state a period for which the approval is granted, and may specify the works and conditions to which the approval is subject.

23 In addition to requiring consent to damage common property, the respondent lot owners also required the owners corporation's consent to the encroachment. The air-conditioning equipment is an encroachment on common property. Upon installation, the equipment did not become an owners corporation's fixture. It remains the property of the respondent lot owners.

24 The OC Act 2006 and the rules are silent on encroachment. General property law governs an encroachment. The general principle of law is that the owner of the land which has been encroached upon has a right (with limited exceptions) for removal of the encroachment. In *Owners Corporation 11672 v Moore* (Owners Corporations) [2014] VCAT 1538 Senior Member Vassie stated the general rule as follows:

> One starts with the general rule that a person (in this case the OC) whose legal right has been invaded by the encroaching building is entitled to a mandatory injunction requiring its removal. That rule may be relaxed when the wronged person's own conduct disentitled the person to an injunction, or when, in certain limited circumstances, the appropriate remedy is damages instead of an injunction.

25 In order to install the air-conditioning equipment, the respondent lot owners required the written approval of the owners corporation to damage the common property and the owners corporation's consent to the encroachment.

Did Mr Banks Smith obtain consent/written approval from the owners corporation?

26 For the reasons that follow, I find that Mr Banks Smith did not have the written approval to damage common property or the owners corporation's consent to the encroachment for any agreed period of time.

27 Between 2 and 3 May 2013, Mr Banks Smith sent a series of emails to the other 9 owners corporation committee members requesting urgent consent to his proposal to install a condenser and duct work on the common property roof above his townhouse. The information provided to the committee fully disclosed the works he proposed on the roof.

28 By 5 May 2016, five committee members (excluding Mr Banks Smith), responded with an email giving support to Mr Banks Smith's proposal. Upon receiving the fifth email, Mr Banks Smith sent an email to all committee members as follows:

> Hi everyone, the I's have it with no dissention so thank you. And I hope my scoping out this solution and fact finding will assist others going forward to alleviate the current unsatisfactory situation many of us now have with the current units and the issues in the car park. …

29 The rules and model rules contemplate that at the time approval is given to damage common property, the owners corporation will set out the period of time and conditions upon which approval is granted. The owners corporation did not specify the conditions or the time for which approval was granted.

30 Shortly after the 5 May 2013, Mr Banks Smith installed the air-conditioning equipment on the common property roof. He did not have the written approval of the owners corporation. The terms and conditions of the approval had not been considered or resolved. At most, he had the agreement of the majority of the committee to his proposal. The difficulty he has placed himself in is that there is no agreed period for which the equipment may remain on the common property roof. The consent is given to him personally, and so that when he sells his townhouse, the purchaser could not rely on that consent. Technically, at any time, the owners corporation could withdraw its consent and demand that the equipment be

removed from the roof. The agreement of the majority of the committee does not, in the manner in which it was given, entitle Mr Banks Smith to any specified period of time for which the encroachment may remain. On the other hand, the consent of the majority of the committee may amount to conduct which disentitles the owners corporation to an order requiring removal of the encroachment.

31 I find that the Mr Banks Smith has the barest of consent for installation of his air-conditioning equipment on the common property roof above his townhouse. If at some point in the future, the owners corporation determines that the equipment should be removed, I consider that the owners corporation would have reasonable prospects of success in seeking an order for its removal.

Did Mr and Mrs Stevens obtain consent/written approval from the owners corporation?

32 There was no documentary evidence that the Stevens sought or obtained approval for the installation of equipment upon the common property roof above their townhouse. Mr Stevens gave sworn evidence that he recalls emailing the committee for approval and that he obtained that approval. Mr Stevens was unable to produce an email to or from the committee and the owners corporation manager did not have any record of the approval. Mr Stevens' email of 7 November 2013 to the manager, following installation of the equipment on the common property roof for his lot, supports the conclusion that he decided not to seek the approval of the committee:

> We have followed all due diligence to date, using the same company and specification as unit 10, to avoid further complication.
>
> This did receive the support of the majority of the committee and thereby we felt a precedent for future installations.
>
> At the same time we do and have always supported due process with any change to or impact on the building at 105, and are supportive of a clear and measured approach to guide us all on this important topic. It is just that faced with a newborn life at risk and Summer around the corner we couldn't wait for the machinations of a less than functional and at times far from reasonable committee …

33 I find that the Stevens' did not have the consent or written approval from the owners corporation for the installation of the equipment on the common property roof. The owners corporation would have very good prospects of success in seeking an order for removal of the equipment.

Conclusion on whether the owners corporation would have reasonable prospects of the success

34 I am satisfied that the owners corporation would have reasonable prospects of success in obtaining an order for removal of the equipment against the

respondent lot owners on the grounds that there was either limited or no consent given for the equipment.

35 The applicants also relied on other arguments, contending that the respondents were in breach of other rules of the owners corporation which made their case for an authorising order an imperative. For the reasons that follow, the other arguments advanced by the applicants fail.

Other arguments by the applicants

(i) Additional rule 1.1

36 The applicants argued that the installation of the air-conditioning equipment was prohibited by additional rule 1.1 (which was in force at the time). I agree with the applicants' contention that if additional rule 1.1 applied, then the owners corporation committee could not have consented to it. However, I am not satisfied that additional rule 1.1 applied to the installation of air-conditioning equipment upon the common property roof. Additional rule 1.1 provided:

> 1. SUPPORT AND PROVISION OF SERVICES
>
> 1.1 Except for the purposes of maintenance and renewal and with the written consent of the body corporate, a proprietor or occupier of a lot must not do anything or permit anything to be done on or in relation to that lot or the common property so that:
>
> (a) any support or shelter provided by that lot or the common property for any other lot or the common property is interfered with;
>
> (b) the structural and functional integrity of any part of the common property is impaired.

37 The rule prohibits anything which interferes with the support or shelter to another lot and prohibits impairing the structural and functional integrity of common property. There was no evidence that the installation of the air-conditioning equipment did either of these things. The applicants asked me to draw an inference that the installation of the air-conditioning equipment would interfere with the support or shelter of other lots and has impaired the structural and functional integrity of the roof. In the absence of any expert or other evidence, I was am not prepared to draw an inference as suggested by the applicants. In my opinion, the installation of the air-conditioning equipment is not in breach of additional rule 1.1 and therefore the rule does not apply.

(ii) Additional rule 24.1

38 The applicants argued that the installation of the air-conditioning equipment was prohibited by additional rule 24.1 (which was in force at the time). I agree with the applicants' contention that if additional rule 24.1 applied, then the owners corporation committee could not have consented to it.

However, I am not satisfied that additional rule 24.1 prohibited the installation of air-conditioning equipment upon the common property roof. Additional rule 24.1 provided:

> 24.1 Painting, finishing etc
>
> A proprietor or occupier of a lot must not paint, finish or otherwise alter the external facade of any building or improvement forming part of the common property or their lot.

39 In my opinion, the installation of equipment on the common property roof does not breach this rule because the roof does not form part of the external façade and the equipment cannot be seen from street level. Therefore, additional rule 24.1 does not operate to prohibit the installation of equipment from the common property roof.

(iii) Special resolution required

40 The applicants contended that a special resolution was required to enable the owners corporation to give approval to the installation of the equipment on the common property roof. The applicants relied upon s 52 of the OC Act 2006 which prohibits the owners corporation from materially altering common property without a special resolution.

41 The applicants' contention is flawed because s 52 only applies to an owners corporation materially altering common property. Section 52 does not apply where a lot owner, at the lot owner's expense, seeks to materially alter common property.

42 In *Martin & Ors v Owners Corporation* 431576 (Civil Claims) [2009] VCAT 2699 Senior Member Vassie found that s 52 did not apply where a lot owner sought to make a material alteration to common property. He said:

> While at first sight it may seem incongruous that (unless other exceptions in section 52 apply) an owners corporation requires the approval of a special resolution of members before it can make a significant alteration to the appearance of common property, but does not need such a special resolution before being able itself to approve a significant alteration which a lot owner proposes to make to the common property, in fact there is no incongruity …

What support do the applicants have?

43 One of the critical matters to consider in determining whether or not to grant an authorising order is the will of the majority. The owners corporation has not voted on whether it should bring a proceeding requiring removal of the equipment from the common property roof.

44 The applicant lot owners holding more than 25 per cent of lot entitlement could have called for a ballot under s 83 of the OC Act 2006. The lot owners should have the opportunity to vote in favour or against commencing the proceeding against the respondent lot owners.

45 Section 165(1)(ba) should not be utilised to enable the minority of lot owners to commence a proceeding for which there is not majority support, unless there is good reason to do so. The applicants have not proven that the majority of lot owners wish to commence the proceeding against the respondent lot owners. The applicants have not demonstrated why they, as a minority, should be given an authorising order.

46 The evidence is that a majority of lot owners voted in favour of granting leases to the respondent lot owners to enable them to retain the equipment on the roof above their townhouses. (The applicants holding just over 25 per cent of lot entitlement voted against the leases, so leases are not in place). I infer from that vote, that the majority of lot owners do not support removal of the equipment from the common property roof.

Refusal to make an authorising order

47 Whilst I am satisfied that the owners corporation has reasonable prospects of success against the respondent lot owners, I am not satisfied that the majority of the lot owners seek an order for removal of the equipment. I therefore decline to make an authorising order.

Outcome

48 Unfortunately, the problem created by the equipment installed on the common property roofs remains alive. The respondent lot owners have no security over the time they are permitted to keep the equipment on the roof and they will pass on that problem to any purchaser of their lot. At any time, the owners corporation may resolve to require the respondent lot owners to remove the encroachment and make good the common property. The owners corporation has no agreement from the respondent lot owners to repair and maintain the roofs or contribute to any additional costs of roof replacement or repair by reason of their installations on the roof. The owners corporation sought to remedy that situation by entering into a lease with the respondent lot owners. The special resolution to enter into the leases was defeated by the applicants.

Challenge to validity of special rules

49 The owners corporation registered new special rules to replace the additional rules on 20 December 2014. The new rules took effect after the respondent lot owners installed their equipment on the common property roofs. The effect of the new rules is that approval to damage or alter common property must now be decided by the lot owners at a general meeting and cannot be decided by the committee. If the proposed works will significantly alter the appearance of the common property, the lot owners must pass a special resolution to give approval. The new rules, and in particular where a special resolution is required, will make it more difficult for lot owners to obtain owners corporation approval to install a

hot water service, condenser, duct work, solar panel or flue on the owners corporation roof.

50 The new rules also make rules specifically for air conditioners. The new rules provide that where a lot owner seeks to install air-conditioning equipment in a courtyard or on a terrace or balcony, the owners corporation is required to give consent if the lot owner complies with certain regulatory conditions. The rule specifically relating to air-conditioners does not apply to air-conditioners on the common property roof.

51 The effect of the new rules is to make it more difficult, on the whole, to obtain owners corporation approval to put a condenser or anything on a roof, but requires the owners corporation to give approval where the installation of air-conditioning equipment is in a courtyard or on a balcony or terrace.

52 The applicants contend that the rules are invalid because the lot owners were denied an opportunity to petition against the interim special resolution passing the new special rules. The contention fails on the facts because the procedure required under s 97 of the OC Act 2006 for the passing of a special resolution was followed. The chronology of events is as follows:

> 12 September 2014: Postal ballot to lot owners to vote on the motion to replace the additional rules with new special rules.
>
> 3 October 2014: Ballot closed.
>
> 10 October 2014: Notice to lot owners of interim special resolution with 59% in favour, 16% against and 25% abstained. The notice in compliance with section 97(4) stated that the interim special resolution will become a special resolution at the end of 29 days after it was passed (on 1st November 2014) unless lot owners who hold more than 25% of the total votes for all the lots affected by the owners corporation petition the secretary against the resolution by 31 October 2014.
>
> 31 October 2014: Notice to owners that no petition had been received by the secretary and therefore the interim resolution will become a special resolution on 1 November 2014.

53 The documents sent out with the motion on 12 September 2014 contained a letter from Tisher Liner FC Law, solicitors. The letter contained the information required by s 97(4), but that information was partly illegible due to a printing error.

54 The applicants contended that the failure to give the information under s 97(4) in the postal ballot of 12 September 2014 invalidated the special

resolution because lot owners were not properly informed of their right to petition against the interim special resolution.

55 Ms Wilde, on behalf of the owners corporation, agreed that the information was not entirely legible, but said that the s 97(4) information was not required to be provided with the motion on 12 September 2014. The s 97(4) information was only required to be provided in the notice to lot owners on 10 October 2014 and was so provided.

56 I accept Ms Wilde's submission. I am satisfied that s 97 was complied with so that the interim resolution became a special resolution on 1 November 2014.

57 The application for a declaration that the rules are invalid because the owners corporation failed to comply with s 97 of the OC Act 2006 is dismissed.

Conclusion

58 The application for an authorising order will be dismissed.

59 The application for a declaration that the rules are invalid will be dismissed.

60 At the request of Ms Wilde costs are reserved. Any party may apply in writing for an order for costs. Any application for costs will be considered in chambers by Member Rowland.

MEMBER L ROWLAND