

**Collins v Network Pacific Strata Management Pty Ltd (Owners Corporations) -
[2017] VCAT 499**

VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

OWNERS CORPORATIONS
LIST

VCAT REFERENCE NO.OC2841/2016

CATCHWORDS

Application by a committee member for authorizing order to proceed with claim on behalf of owners corporation for an order authorising him to revoke appointment of respondent manager. [Owners Corporations Act 2006](#) s 119(6), s 163(1A), and s165 (1)(ba).

APPLICANT	Damien Collins
RESPONDENT	Network Pacific Strata Management Pty Ltd (ACN:158 476 165)
WHERE HELD	Melbourne
BEFORE	Member D. Calabrò
HEARING TYPE	Hearing
DATE OF HEARING	6 February 2017
DATE OF REASONS	10 April 2017
CITATION	Collins v Network Pacific Strata Management Pty Ltd (Owners Corporations) [2017] VCAT 499

ORDER

1. The application is dismissed.
2. The interlocutory injunction made on 22 November 2016 is vacated.
3. If no party files an application for costs by 15 May 2017 there will be no order for costs. Any application for costs must be supported by submissions in writing with a view to costs being determined on the papers in Chambers by Member Calabrò. The file is to be referred to Member Calabrò after 15 May 2017.

D. Calabrò
Member

APPEARANCES:

For Applicant: Mr D. Slattery, solicitor

For Respondent: Mr K. J. Naish of counsel

REASONS

1. Damien Collins is a lot owner and committee member of Owners Corporation PS 629585L (the 'OC') that affects the development at 46-50 Haig Street, Southbank.
2. Network Pacific Strata Management Pty Ltd was the manager of the OC appointed under a contract. At the AGM in 2016 the previous committee resolved to terminate that contract. The Special General Meeting on 23 November 2016 resolved to reappoint Network Pacific Strata Management Pty Ltd for a period of 3 years from 1 December 2016. This is subject to the interim orders made by Senior Member Vassie (see details below).
3. Mr Collins, on behalf of the owners corporation seeks the following orders;
 - a an amendment to the June 2016 minutes of annual general meeting that limits the otherwise usual delegation to the committee by prohibiting the hiring or firing of the manager of the owners corporation by the committee;
 - b revoking the appointment of the respondent as OC manager;
 - c cancelling the special general meeting scheduled at 2.00pm on 23 November 2016 at which it was proposed to pass the following resolutions (insert proposed resolutions here or say pass a number of resolutions including a resolution to reappoint the manager); and

d costs.

4. An injunction hearing was listed for hearing before Senior Member Vassie on 21 November 2016 to deal with the application seeking the cancellation of the special general meeting on 23 November 2016.
5. Instead of cancelling the meeting, Senior Member Vassie made the following orders:

Until the hearing and determination of this proceeding or until further order the respondent by its servants agents or howsoever otherwise is restrained from doing anything which would put into effect any resolution passed at the special general meeting to be held on 23 November 2016

Amendment of minutes of meeting

6. Mr Collins contests the accuracy of the June 2016 annual general meeting minutes. In particular he disputes item 13(iii) which is as follows:

Delegation to the committee – In accordance with section 11 of the Owners Corporation Act 2006, it was resolved to delegate all powers and functions that are capable of being delegated to the Owners Corporation committee to make decisions on behalf of the Owners Corporation save for the power or function to engage, terminate the Owners Corporation Manager and the powers and functions that require Unanimous or Special Resolution of the Owners Corporation.

7. Mr Collins alleged that the meeting did not pass a resolution that limited the committee's power to revoke or appoint a manager. Mr Collins contends that the committee validly terminated the OC's manager appointment at the meeting prior to the Special General Meeting. He contended that the manager recorded the resolution in its own self-interest.
8. The proper respondent to an application to amend the minutes of meeting is not the manager but the owners corporation. If Mr Collins is successful in his allegations, the ultimate order requires the owners corporation, not the manager, to amend the minutes of meeting.
7. In my view there is no point in pursuing an amendment to the 2016 minutes of meeting because the resolutions on 23 November 2016 supersede Mr Collins application. The committee has now been delegated all the powers which are permitted to be delegated to it including the power to revoke the appointment of the manager. The meeting also resolved to reappoint the manager.
8. The application to amend the 2016 minutes of meeting is dismissed because the proper respondent is the owners corporation.

Application to revoke the appointment of the manager

9. Mr Collins sought an order from the Tribunal to revoke the manager's appointment on the grounds of misconduct. The allegations of misconduct were strongly contested by the manager.
10. The manager correctly contended that Mr Collins could not bring this application as he was not authorised by special resolution of the OC and nor had he obtained an authorising order under s165(1)(ba) of the *Owners Corporation Act 2006* ('the OC Act'),

11. On 6 February 2017 I heard, as a preliminary application, Mr Collins' application under s165(1)(ba) of the OC Act for an order authorising him to commence this proceeding on behalf of the OC. After hearing submissions from the applicant and respondent's lawyers I reserved my decision. Due to illness the handing down of my decision was delayed.

12. Sections 163 and 165(1)(ba) permit a lot owner to bring an application on behalf of an owners corporation. The relevant parts of the sections provide as follows:

163. Who may apply to VCAT in relation to a dispute?

...

(1A) A lot owner may apply to VCAT on behalf of an owners corporation to resolve an owners corporation dispute.

...

Section 165(1)(ba) of the OC Act provides that:

165. What orders can VCAT make?

(1) In determining an owners corporation dispute, VCAT may make any order it considers fair including one or more of the following—

...

(ba) an order authorising a lot owner to institute, prosecute, defend or discontinue specified proceedings on behalf of the owners corporation;

What factors should the Tribunal consider in determining whether to authorise a lot owner bring proceedings in this case?

13. The leading decision on point, is the decision of Senior Member Vassie in *Grima v Quantum United Management Pty Ltd (Owners Corporations)* [\[2016\] VCAT 1960](#) (25 November 2016) (Grima's case). In particular paragraph 18 of the decision summarizes the matters that need to be considered:

“An application for an authorising order under s165(1)(ba) is not simply an optional alternative to the fulfilment of the requirement for a special resolution in accordance with s18(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 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..." (my emphasis)

14. Following Senior Member Vassie's approach I will deal with the each of the following questions:

Why was no special resolution obtained or attempted?

15. Mr Collins said he did not seek a special resolution was because there was insufficient time to do so and did not have ready access to the records of the owners corporation to correspond with the lot owners.
16. Mr Naish opined that the reason there was no attempt at a special resolution made by Mr Collins was because it would have been defeated.
17. The resolutions passed at the meeting on 23 November 2016 are strongly indicative that Mr Collins would not have achieved a special resolution to bring a proceeding against the manager.

What is the degree of support amongst other lot owners?

18. Mr Collins has not proved that he has strong support amongst the other lot owners. He has the approval of 6 members of the committee. However, the lot owners at the special general meeting held on 23 November 2016 voted overwhelmingly to support the manager. Less than one fifth of the lot owners supported Mr Collins' position.
19. On balance and having noted the evidence before me, I find that Mr Collins does not have the majority support from the other lot owners.

Does the application have a reasonable prospect of success and benefit for the OC?

20. At the hearing both sides filed a large number of affidavits and this continued after the hearing. I have considered all the affidavits. The affidavits evidence a hotly contested dispute on the facts.
21. The estimate by the legal representative is that a contested hearing could take more than 6 days with more than 14 witnesses. I am unable to find that the hearing of this duration could be in the interests of the owners corporation, in the absence of compelling and strong evidence of wrongdoing by the manager. The affidavits filed by Mr Collins did not support such a conclusion.
22. I am unable to conclude that Mr Collins will have a reasonable prospect of success based on the evidence before me.
23. I am also persuaded not to make an authorising order because at the special general meeting on 23 November, a majority (75%) of lot owners able to vote, including their proxies voted in favour of the reinstatement of the OC manager.

Conclusion

24. I am not persuaded than an authorising order would be in the best interests of the owners corporation.
25. Accordingly, I shall dismiss his application.

D. Calabrò
Member