IN THE SUPREME COURT OF VICTORIA
AT MELBOURNE
COMMON LAW DIVISION
JUDICIAL REVIEW AND APPEALS LIST

Not Restricted

S CI 2016 04634

ENERGY TECHNOLOGY AUSTRALIA PTY LTD — Plaintiff

v

OWNERS CORPORATION PS 439401J — Defendant

JUDGE:	Daly AsJ
WHERE HELD:	Melbourne
DATE OF HEARING:	22 February 2017
DATE OF JUDGMENT:	6 April 2017
CASE MAY BE CITED AS:	Energy Technology Australia Pty Ltd v Owners Corporation PS 439401J
MEDIUM NEUTRAL CITATION:	[2017] VSC 145

JUDICIAL REVIEW – Review of VCAT decision – Whether Tribunal gave adequate reasons – Whether path of reasoning disclosed – Whether reasons allow for inferences to be drawn as to the findings of the Tribunal – Whether recitation of the law is sufficient – *Secretary to the Department of Justice v YEE* [2012] VSC 447 referred to and applied – Insufficient reasons given

OWNERS CORPORATIONS – *Owners Corporations Act 2006* (Vic) ss 12, 47, 48 50, 52, 53, 165, 167 – Defendant owners corporation passed special resolutions to install fire alarm system to allow residential use of some lots – Premises otherwise used for industrial purposes in industrial zone – Plaintiff occupied lot for industrial purpose – Whether any benefit to plaintiff – Whether owners corporation has power to enter onto lot to install fire alarm system – Liability for costs of installation – Whether alarm service is a 'system' or 'alteration to common property' such as to enable the owners corporation to impose a levy upon lot owners – Powers of VCAT under s 165 – Powers under s 165 not 'at large' – *Christ Church Grammar School v Bosnich* (2010) 34 VAR 23 followed and applied.

APPEARANCES:	Counsel	Solicitors
For the Plaintiff	Mr N P Jones	HWL Ebsworth
For the Defendant	Ms J A Findlay	CLP Lawyers

HER HONOUR:

1 This proceeding raises interesting questions regarding the scope of the powers of owners corporations tasked with the management of multi-unit developments. It is an application seeking leave to appeal from an order made in the Victorian Civil and Administrative Tribunal ('VCAT' or 'Tribunal') on 24 August 2016, reasons for that order having been provided on 14 October 2016. For the reasons which follow, I will grant leave to appeal and allow the appeal.

Factual background to the dispute

2 This dispute concerns a multi-unit premises located at 5–15 Mayfield Street, Abbotsford ('premises'). The respondent to this appeal is the owners' corporation for the premises ('owners corporation').

3 The premises are in an area subject to the Yarra Planning Scheme and currently zoned as an 'Industrial 3 Zone'. Some lot owners are seeking to have this zoning changed to allow for mixed use (including for residential accommodation), although no regulatory approval has yet been given for this change. Documents in evidence before the Tribunal suggest that the City of Yarra is opposed to the encroachment of residential development in this neighbourhood, which is close to the Carlton United Breweries' operations.

4 Nevertheless, some lots in the premises have been unlawfully used for residential accommodation at different times, including, in the past, by the applicant ('ETA'). This has resulted in enforcement orders and building orders being issued by the City of Yarra, and disputes coming before this Court and the Building Appeals Board.

5 In August 2015, the Building Appeals Board determined that residential use would be permitted at the premises if interim works were carried out within three months of that date. These works included the installation of a fire alarm system ('alarm system') in each of the lots being used as 'sole occupancy units'. These works have not yet been carried out.

6 Four special resolutions were passed at a meeting of the owners corporation on 26 October 2015, by twelve votes to two in each case ('resolutions'). The resolutions provided for the imposition of a special levy and the installation of the alarm system. It appears that the functioning of the alarm system depends upon installation of equipment in each and every lot, of the premises.

7 The levy authorised by the resolutions amounted to $6,598.25 in respect of ETA. Before the Tribunal, the owners corporation sought (by way of cross-claim) to recover that sum. The owners corporation also sought orders compelling access to ETA's lot to enable the owners corporation to install the alarm system.

8 ETA is opposed to the change from industrial use, and the imposition of the levy. It claims that the alarm system will benefit some lots within the premises, but not its own. ETA intends to use the lot only for industrial (rather than residential) purposes.

The Tribunal decision

9 In her reasons for decision ('reasons'), Tribunal member Leshinsky found that:

> The OC had power to install the fire alarm system either pursuant to s 12 or s 52 of the *Owners Corporation Act 2006* (Vic) (OC Act), providing [that] lot owners approve of the fire alarm system by special resolution. [1]

10 Section 12 of the *Owners Corporations Act 2006* (Vic) ('Act') provides as follows:

> (1) An owners corporation, by special resolution, may decide—
>
> (a) to provide a service to lot owners or occupiers of lots or the public; or
>
> (b) to enter into agreements for the provision of services to lot owners or occupiers of lots.
>
> (2) An owners corporation may require a lot owner or occupier to whom a service has been provided to pay for the cost of providing the service to the lot owner or occupier.

11 Section 52 of the Act provides as follows:

> An owners corporation must not make a significant alteration to the use or

[1] Paragraph [8] of the reasons.

appearance of the common property unless –

(a) the alteration is—

(i) first approved by special resolution of the owners corporation; or

(ii) permitted by the maintenance plan; or

(iii) agreed to under section 53; or

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

12 Section 53 of the Act provides that:

(1) An owners corporation may by special resolution approve the carrying out of upgrading works for the common property and the levying of fees on lot owners for that purpose.

(1A) Subject to subsection (1B), the fees must be based on lot liability.

(1B) Fees for upgrading works carried out wholly or substantially for the benefit of some or one, but not all, of the lots affected by the owners corporation must be levied on the basis that the lot owner of the lot that benefits more pays more.

(2) In this section 'upgrading works' means building works for the upgrading, renovation or improvement of the common property where—

(a) the total cost of the works is estimated to be more than twice the total amount of the current annual fees; or

(b) the works require a planning permit or a building permit before they can be carried out—

but does not include works that are provided for in an approved maintenance plan or works referred to in section 4(b).

13 In the reasons, the Tribunal member set out ss 12 and 52 and stated that:[2]

> I am satisfied that the fire alarm system is either a service pursuant to s 12 OC Act or an alteration to the common property, within the meaning of s 52 of the OC Act.

14 The Tribunal member noted that there was no dispute as to the validity of the resolutions, and said that the circumstances in which the Tribunal would find that valid resolutions would not be enforced were limited.[3] While ETA had 'raised

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2 At [11].

3 In this regard, the Tribunal referred to *Boswell v Forbes* [2008] VCAT 1997.

concerns about the motivation for the special resolutions', the Tribunal member found that there was no reason to interfere with the resolutions, stating as follows:[4]

> The Tribunal will not ordinarily interfere with a validly passed resolution. It is the nature of the owners corporation that each lot owner will vote in accordance with their own self-interest, and I am satisfied that in regard to these four special resolutions, there is nothing contrary to sections 5 or 167(d) of the OC Act. It is not for the Tribunal to invalidate these special resolutions, which were validly passed by the majority of lot owners on 26 October 2015.
>
> I am satisfied, on balance, that the four special resolutions allowing for the installation of the fire alarm system, will provide a safety benefit to the subdivision as a whole. Accordingly, the effect of these special resolutions is not "oppressive to, unfairly prejudicial or unfairly discriminates against" the respondent. I am satisfied that the owners corporation has acted honestly and in good faith.
>
> I find therefore, that the owners corporation was entitled to strike a special levy for the fire alarm system and to install the fire alarm system.

15 The Tribunal member then went on to order entry into ETA's lot for the purpose of the installation of the alarm system, relying on ss 165(1)(a) and 167 of the Act. Section 165(1) of the Act provides, relevantly:

> (1) In determining an owners corporation dispute, VCAT may make any order it considers fair including one or more of the following –
>
> (a) an order requiring a party to do or refrain from doing something…

16 Section 167 provides that:

> VCAT in making an order must consider the following –
>
> (a) the conduct of the parties;
>
> (b) an act or omission or proposed act or omission by a party;
>
> (c) the impact of a resolution or proposed resolution on the lot owners as a whole;
>
> (d) whether a resolution or proposed resolution is oppressive to, unfairly prejudicial to or unfairly discriminatory against, a lot owner or lot owners;
>
> (e) any other matter VCAT thinks relevant.

[4] At [18]-[20].

17 In relation to these provisions, the Tribunal member concluded as follows:[5]

> In determining an Owners Corporation dispute, s 165 of the OC Act provides that the Tribunal may make any order it considers fair. This wide discretion is tempered by s 167 which provides that the Tribunal must consider, among other things, the conduct of the parties, the impact of the orders on the lot owners as a whole and whether the order is oppressive or unfairly discriminates against a lot owner or lot owners.
>
> I will order entry into the respondent's lot pursuant to s 165(1(a) [scil: (1)(a)] OC Act. Such entry, however, must be on notice to the respondent and the installation of the fire alarm system on a mutually agreed location in the respondent's lot.

The proceeding before this Court

18 In this application for leave to appeal, ETA seeks to set aside the findings and orders of the Tribunal member. The current proceeding was issued on 21 December 2016, seeking leave to appeal pursuant to s 148(1) of the *Victorian Civil and Administrative Tribunal Act 1998* (Vic), and other orders as set out in the draft notice of appeal.

19 ETA seeks that the Court set aside the decision of the Tribunal and make orders declaring the resolutions void or, alternatively, orders that the resolutions be varied so as not to require ETA to contribute any funds towards the installation of the alarm system. Alternatively, ETA seeks to have the matter remitted to the Tribunal with such directions as the Court thinks fit. The latter course is not preferred by ETA: it seeks the final determination of the dispute by this Court.

20 In relation to s 12 of the Act, the draft notice of appeal identifies the following questions of law:

(a) whether the Tribunal erred in finding that there was a power to install the alarm system under that provision;

(b) whether the alarm system could be considered a 'service' under s 12 of the Act;

(c) whether the Tribunal member erred in failing to consider ETA's submission

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5 At [23]-[24] of the reasons.

that s 12 does not compel ETA to accept, or to pay for, an unwanted service; and

(d) whether the Tribunal member erred in ordering that ETA pay the special levy in circumstances where the levy was charged on the basis of lot liability rather than as a fee for service, and in circumstances where the service had not yet been provided.

21 In relation to s 52 of the Act, ETA queries whether s 52 provides a power to install the alarm system on its lot. Given that the lot is not 'common property', this raises the question of whether such an installation could be considered an 'alteration to common property' under that provision, as found by the Tribunal member.

22 In relation to s 165(1)(a) of the Act, the notice of appeal queries whether the Tribunal member erred in failing to consider the matters listed under s 167 when exercising her power under s 165 of the Act, and whether the Tribunal member erred in failing to consider whether the order made under s 165(1)(a) was 'fair'. ETA also queries whether s 165(1)(a) can be used to allow the owners corporation to enter its lot, when no such power is provided by ss 12 or 52.

23 The final ground of appeal queries whether the Tribunal failed to give any (or adequate) reasons, or to disclose its path of reasoning, in its findings concerning the application of ss 12, 52 and 165(1)(a) to the dispute between ETA and the owners Corporation.

ETA's submissions

24 ETA's submissions focused on two broad grounds of appeal: first, that the Tribunal member's reasons were lacking or inadequate, and failed to disclose her path of reasoning, and, secondly, that the Tribunal member wrongly construed the relevant provisions of the Act.

25 In relation to the Tribunal member's reasons, ETA says that '[n]o reasons were given' for the findings that ss 12 and 52 empowered the owners corporation to install

the alarm system, that the system was a 'service' (s 12) or that it was an 'alteration to common property' (s 52), notwithstanding that substantial submissions were made on these points at the Tribunal hearing. ETA says that the 'reasons' given by the Tribunal were simply those in paragraphs 8 and 11 of the reasons, as in extracted in paragraphs 9 and 13 above. These paragraphs are said to be conclusions or findings, rather than a disclosure of the path of reasoning.

26 A similar submission is made in relation to the Tribunal member's order under s 165(1)(a). ETA says that, while the Tribunal member set out the relevant legislative provisions, 'the Tribunal did not provide any reasons for the application of those provisions to allow the orders to be made'. ETA's written submissions also repeat the point raised by the notice of appeal—that the Tribunal member failed to consider whether the order under s 165 is 'fair', which is a precondition of exercising of the s 165 power. Similarly, the Tribunal member set out the s 167 factors without going on to consider or explain how they might apply to the case before her.

27 ETA relies on decisions of this Court and the Court of Appeal which hold that the Tribunal's failure to disclose its reasoning constitutes an error of law.[6]

28 The second category of submissions concern the allegedly erroneous construction of ss 12, 52 and 165 of the Act.

29 First, ETA says that neither s 12 nor s 52 empowers the owners corporation to install an alarm system on its lot. ETA says that, on a plain reading of these provisions, there is no power to enter upon a lot and install equipment in that lot.

30 ETA referred to the statement of the plurality of the High Court in *Project Blue Sky Inc v Australian Broadcasting Authority*[7] to the effect that ordinarily, the legal meaning of a statutory provision will correspond with the grammatical meaning of the provision. ETA submitted that, in the current case, there is no reason not to give the provisions of the Act their ordinary meaning. At paragraph 21 of its written outline,

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6 *Secretary, Dept of Treasury and Finance v Dalla-Riva* (2007) 26 VAR 96, 102 [23]; *State of Victoria v Turner* (2009) 23 VR 110.

7 (1998) 194 CLR 355, 384.

ETA submitted as follows:

> S 12 and s 52 of the [Act] do not empower an Owners Corporation to:
>
> (a) enter upon a lot;
>
> (b) install equipment in a lot;
>
> (c) compel a lot owner to accept a service from an owners corporation that it does not want; and
>
> (d) compel a lot owner to pay for services from an owners corporation that it does not want to use.

31 ETA says that s 12 allows the owners corporation to provide a service to lot owners and charge lot owners for doing so, but does not compel a lot owner to accept (or pay for) a service which is offered, much less to enter the lot to install it. ETA points to the lack of express powers in s 12 to do these things.

32 ETA submits that s 12 of the Act allows services to be offered also to occupiers (e.g. tenants) and the public. Clearly, the legislature would not intend that these groups be compelled to accept services. It would, then, be an 'absurd' proposition to read s 12 as authorising compulsion of some of the groups listed in s 12, but not all.

33 ETA submitted that s 12 can be contrasted with s 48 of the Act, which applies to lots which are not properly maintained. Section 48(3) of the Act is the only provision in the Act which expressly empowers an owners corporation to enter a lot to carry out works and recoup the costs from the lot owner. Similarly, s 53 allows for recovery by an owners corporation of the cost of upgrading *common property* (on the basis of lot liability or according to the relative benefit to each lot), but there is no equivalent provision with respect to alterations or upgrades to individual lots.

34 ETA submitted that the Tribunal member failed to consider ETA's submission that s 12 does not empower the owners corporation to compel the plaintiff to accept and pay for services it does not want or use. ETA says that 'substantial submissions' were made on this question. These were not considered in the brief reasons given by

the Tribunal member, and this failure amounts to an error of law.[8]

35 ETA also disputes the imposition of the levy under s 12. It contends that costs imposed under s 12 are intended to be imposed on the basis of a user-pays system, rather than by lot and irrespective of usage. ETA relies in this respect on the following passage from *Noonan v Owners Corporation No 2 PS 409115E* ('*Noonan*'),[9] that 'services' under s 12(2):

> have no necessary connection with the common property or its use, and the incidence of payment for them is in accordance with a user-pays principle rather than in accordance with lot liability.

36 ETA argued before the Tribunal that those using the alarm service were those lot owners who required the alarm service in order to enable them to reside in their lots. It submitted that it cannot be forced to become a user of the alarm system against its will.

37 Moreover, s 12(2) is said to allow for charges only where a service has already been provided, not for the prospective provision of services. To the extent that the installation of the alarm system can be considered to be a service, installation of the alarm system had not occurred prior to the hearing before the Tribunal.

38 In relation to the Tribunal member's findings in relation to s 52 of the Act, ETA says that this provision is expressed to apply only to common property, and that its lot is clearly not 'common property'.

39 To the extent that ETA's contentions concerning the construction of ss 12 and 52 are correct, it contends that the special resolutions were necessarily invalid and void.

40 ETA also submits that the Tribunal member erred in her deployment of s 165(1)(a) to enable the owners corporation to enter ETA's lot to install the alarm system. At paragraph 42 of its written submissions, ETA submitted as follows:

> S 165(1) of the *Owners Corporation Act 2006* sets out the orders that the Tribunal may make in determining an owners corporation dispute. It is

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8 see *Aitken v Victoria* (2013) 46 VR 676, 686 [37].

9 [2011] VCAT 1934, [50].

> submitted that for the Tribunal to invoke the power to make an order under s. 165(1) of the *Owners Corporation Act 2006* a legal right pursuant to a cause of action needs to be established. That is, to make an order under s 165(1) of the *Owners Corporation Act 2006* to allow the owners corporation to enter upon the plaintiff's lot the owners corporation needed to establish that such a legal right existed independently of s 165(1)…

41 This right, ETA says, did not exist: neither ss 12 nor 52 support it, and the Tribunal member did not find that those sections supported the right. The Tribunal member relied instead solely on s 165. In support of its submissions, ETA referred to the decision of Sifris J in *Christ Church Grammar School v Bosnich*.[10] There, his Honour considered s 109 of the *Fair Trading Act 1999* (Vic) ('FTA'), which provided that the Tribunal 'may make any order it considers fair', including certain enumerated orders listed in that section. His Honour held as follows in considering the scope of this power:

> In my opinion, although the matter is not free from difficulty, the tribunal is required, when deciding the merits of a case, to apply the law and not merely be guided by it. Any flexibility relates only to the *form* of the order and of course, to procedural and evidential matters. If this was not the case absurd results could follow…. Further, such a result would encourage idiosyncratic notions of fairness and justice. If the intention was to exclude the operation of the law (as a matter of substance and not merely procedure or form) a specific section to such effect, clear and unambiguous, should have been inserted. [11]

42 Accordingly, applying the approach of Sifris J to the Tribunal's powers under the FTA to the powers of the Tribunal under s 165 of the Act, in the absence of an independent legal right of the owners corporation to enter the lot, it is said by ETA that the Tribunal's exercise of the power under s 165 miscarried.

Owners Corporation's submissions

43 The owners corporation submits that the reasons of the Tribunal member were adequate. The owners corporation referred to authority to the effect that the requirement to give reasons must be 'proportionate to the importance and

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10 (2010) 34 VAR 23 ('*Bosnich*').

11 Ibid 32 [40] (emphasis in original).

complexity of the subject-matter of the proceedings and the fact that the preparation of reasons does involve a cost to the Tribunal'. The Appeal Panel of the New South Wales Civil and Administrative Tribunal in *Herrady v Raccani*[12] held that a Tribunal member would ordinarily be required to:

> (1) Identify each relevant claim for relief and the statutory provision or common law principle supporting the claim;
>
> (2) Identify each of the relevant elements of the causes of action which must be satisfied in order to justify granting the relief sought;
>
> (3) Make material findings of fact and law in respect of each of those elements;
>
> (4) Explain what relief, if any, should be granted and why.[13]

44 The owners corporation says that while the Tribunal member's reasons were brief in this case, they were proportionate to, and appropriate for, a claim for $6,598.25.

45 Moreover, the material findings are said to emerge by inference from the Tribunal member's reasons. The material finding in relation to s 12 was that the alarm system was a 'service' and, in relation to s 52, that the alarm system was an 'alteration to common property'. Submissions were made on these questions before the Tribunal, and the owners corporation infers that its submissions were accepted and those of ETA rejected.

46 Similarly, the owners corporation points to the Tribunal member's reference to the limitations upon s 165(1)(a) by the factors set out in s 167 of the Act, and her imposition of conditions on the order allowing the owners corporation to enter ETA's lot, inferring that the Tribunal member considered these conditions, and made an order which was 'fair' and in accordance with the matters referred to in s 167 of the Act.

47 The Tribunal's power under s 165 of the Act is said by the owners corporation to be

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12 [2016] NSWCATAP 67, [43] ('*Herrady v Raccani*').
13 Ibid [52].

independent of any separate power of the owners corporation to enter ETA's lot. The owners corporation has power to install the alarm system, and s 165 enables the Tribunal to order that this be done. The owners corporation says that ETA cannot show that the discretion under s 165 was affected by error.

48 The owners corporation's substantive submission in relation to s 12 of the Act is that 'the installation of the alarm system clearly falls within the ordinary meaning of "services"'. The owners corporation also refers to the decision of Senior Member Vassie in *Noonan*, that 'services' under s 12 'have no necessary connection with the common property or its use'.[14]

49 The owners corporation also says that there is no need for the lot owners to consent to receiving services. Section 12(1)(b) allows an owners corporation to enter into agreements to provide services, whereas s 12(1)(a) allows it to 'provide' services simpliciter. The former requires provision of consent, but the latter provision does not.

50 The owners corporation submitted that the costs recoverable under s 12(2) are not limited to cases where a lot owner has provided consent to the services being provided. Despite the fact that s 12(2) is phrased in the past tense ('to whom a service *has been provided*'), the section must be read in light of the apparent purpose of the provision, which is that the owners corporation be paid for the provision of services. It would be absurd to require the owners corporation to institute proceedings before the Tribunal to gain entry and then, at a later time, issue further proceedings to recover its costs. Equal payment by all lot owners meets the 'user-pays' principle in this case, as the alarm system would be installed on each lot.

51 The owners corporation's submissions noted that the power of the Tribunal member under s 165 of the Act is discretionary, and thus the principles in *House v R*[15] apply. As such, in the current case, ETA can only establish error by showing that:[16]

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14 [2011] VCAT 1934, [50].
15 (1936) 55 CLR 499, 505.
16 Paragraph 28 of the owner's corporation's outline of submissions.

> The Tribunal has acted on the wrong principle, given weight to irrelevant matters, failed to give weight to relevant considerations, made mistakes as to the facts or the order is so unreasonable and plainly unjust that the Court may infer that there has been a failure to properly exercise the discretion.

52 Finally, the owners corporation submitted that the exercise of the power under s 165 of the Act is independent of any power of the owners corporation to enter ETA's lot. It stated:

> the defendant was empowered to decide to provide services to the lot owners and the Tribunal has the power pursuant to s 165 of the Act to make orders to enable this to occur in any manner it considers fair, which power it duly exercised.

53 Accordingly, the special resolutions were valid, and the application for leave to appeal, and the appeal, should be dismissed.

ETA's submissions in reply

54 ETA's written submissions in reply largely recapitulated its primary submissions, but added further, in summary, as follows:

(a) in relation to the adequacy of the Tribunal's reasons, ETA notes that there is no indication given as to how its submissions were dealt with by the Tribunal. One should not have to read the Tribunal's reasons alongside the parties' submissions. Inferential reasoning is not adequate in this case, as the reasons are simply too sparse to enable a reader to draw inferences about the Tribunal member's path of reasoning. ETA says that the requirements for reasons set out above in *Herrady v Raccani*, even if this was the applicable test in proceedings heard by the VCAT, were not met in this case;

(b) nor were the reasons given proportionate to the issues at stake. The case is not only one of the monetary charge, but also the significant right to control who comes onto one's property and who may make alterations to one's property;

(c) the Tribunal member's findings that the alarm service was a 'service' under s 12 and an 'alteration to common property' under s 52 were nothing more than

mere conclusions. ETA cited the following statement of Kyrou J (as he then was) in *Secretary to the Department of Justice v YEE*:[17]

> In general, the mere recitation of evidence followed by a statement of findings, without any commentary as to why the evidence is said to lead to the findings, is insufficient to disclose a path of reasoning.[18]

(d) ETA says that it would not be absurd to require two proceedings in a case such as this. The owners corporation ought to have sought orders allowing it to enter the lot for the purposes of installation along with a declaration that it would then be entitled to payment. It instead sought the entitlement to payment before the Tribunal, which it was not empowered by the terms of the Act to demand;

(e) ETA rejected the owners corporation's assertion that s 12(1)(a) of the Act would become redundant if the consent of affected parties was always required. Rather, s 12(1)(a) would still allow for the provision of services to those lot owners who wanted services. The text of s 12(2) implicitly accepts that services may be provided to some lot owners and not others. Nor is s 12(2) a proper vehicle for the imposition of a special levy on the basis of lot liability. Section 24 provides for that type of charge: s 12 is instead confined to payments for services provided;

(f) ETA relied on its prior written submissions in relation to s 165, and noted further that it was difficult to determine whether the discretion under s 165 had miscarried because of the inadequacy of the reasons given by the Tribunal member; and

(g) finally, ETA accepted that while the resolutions were validly *passed* (that is, there were no procedural irregularities in the meeting passing the resolutions), they were nevertheless invalid as being beyond the power of an owners corporation under the Act.

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17 [2012] VSC 447.

18 Ibid [95].

The hearing before this Court

55 The submissions made during the course of the hearing largely canvassed the matters referred to above in relation to construction of the Act and the adequacy of the Tribunal member's reasons. It is unnecessary to repeat those here and I note below only those matters raised in the parties' oral submissions which have not already been traversed in these reasons.

56 ETA noted that s 50 of the Act provided the only basis for an owners corporation to allow a person to enter a lot to carry out works. That section refers to works done in accordance with ss 47(1), 47(2) or 48(3). ETA submitted that none of these provisions applied in this case.

57 Taking s 48 as the starting point, that provision reads as follows:

> (1) If a lot owner has refused or failed to carry out repairs, maintenance or other works to the lot owner's lot that are required because—
>
> (a) the outward appearance or outward state of repair of the lot is adversely affected; or
>
> (b) the use and enjoyment of the lots or common property by other lot owners is adversely affected—
>
> the owners corporation may serve a notice on the lot owner requiring the lot owner to carry out the necessary repairs, maintenance or other works.
>
> (2) If a lot owner has been served with a notice under subsection (1), the lot owner must carry out the repairs, maintenance or other works required by the notice within 28 days of the service of the notice.
>
> (3) If a lot owner has been served with a notice under subsection (1) and has not complied with the notice within the required time, the owners corporation may carry out the necessary repairs, maintenance or other works to the lot.
>
> (4) An owners corporation may recover as a debt from a lot owner the cost of repairs, maintenance or other works carried out under subsection (3).

58 ETA submitted that s 48(1)(a) is clearly inapplicable to the current matter. Section 48(1)(b) was unavailable because it was not ETA's failure to carry out works which affected the use and enjoyment of the lots but, rather, the operation of the planning scheme and building regulations which prevent residential use. Moreover, there

had been no notice issued under s 48(1) and, therefore, the power under s 48(3) was not available.

59 The owners corporation submitted that, in fact, a notice had in effect been issued which required ETA to allow access to ETA's lot within 28 days. That letter was put before the Tribunal, but was not before this Court. Counsel for the owners corporation informed the Tribunal that the letter 'is not in the form of a notice to repair, as would be like the consumer affairs website, but it's a notice to rectify a breach'.[19] Section 48(1)(b) was said to apply because the lack of an alarm system would 'inherently' have an adverse effect upon the use and enjoyment of the common property.[20]

60 ETA submitted that s 47(1) was unavailable to enliven the owners corporation's power to enter ETA's lot under s 50 because this section allows only for maintenance or repair of a service. The installation of a new service or upgrading of a lot is not 'repair' or 'maintenance'. Section 47(2) is not applicable because the operation of that provision depends upon the lot owner making a request for maintenance or repair, which did not occur in this case.

61 A further submission made by counsel for ETA concerned the definition of 'services' in s 47(3), which is expressed to apply for the purposes of that section as follows:

> 'service' includes a service for which an easement or right is implied over the land affected by the owners corporation or for the benefit of each lot and any common property by section 12(2) of the Subdivision Act 1988.

62 As noted by counsel for the owners corporation, this is an inclusive definition, rather than being exhaustive. Section 12(2) of the *Subdivision Act 1988* (Vic) ('*Subdivision Act*') provides as follows:

> (2) Subject to subsection (3), there are implied—
>
> (a) over—
>
> (i) all the land on a plan of subdivision of a building; and

19 T105.
20 T104.

(ii) that part of a subdivision which subdivides a building; and

(iii) any land affected by an owners corporation; and

(iv) any land on a plan if the plan specifies that this subsection applies to the land; and

(b) for the benefit of each lot and any common property—

all easements and rights necessary to provide—

(c) support, shelter or protection; or

(d) passage or provision of water, sewerage, drainage, gas, electricity, garbage, air or any other service of whatever nature (including telephone, radio, television and data transmission); or

(e) rights of way; or

(f) full, free and uninterrupted access to and use of light for windows, doors or other openings; or

(g) maintenance of overhanging eaves—

if the easement or right is necessary for the reasonable use and enjoyment of the lot or the common property and is consistent with the reasonable use and enjoyment of the other lots and the common property.

63 ETA submitted that the alarm system did not fall within the terms of s 12(2) of the *Subdivision Act*. Moreover, looking to the text before sub-s (2)(c), any easement would have to be 'necessary' for a property zoned 'Industrial 3', not for some other status which the premises does not have. No evidence, ETA submitted, had been put before the Tribunal as to the scope of any easement. The owners corporation submitted to the contrary, that the easement could fall under the provisions dealing with transmission of data, electricity or protection referred to in s 12 of the *Subdivision Act*.

64 Counsel for the owners corporation made the point that, aside from these provisions, there was a 'service' in the ordinary meaning of that term in s 12 of the Act by virtue of the alarm system being able to provide warning of a fire. This also constituted a benefit to ETA's lot, irrespective of whether ETA itself intended to use the service. This is significant because s 24 of the Act uses the concept of 'benefit' in determining

liability for 'extraordinary items of expenditure'. Special levies ought ordinarily to be charged on the basis of lot liability: s 24(2). However, s 24(2A) provides that, where repairs, maintenance or other works are 'undertaken wholly or substantially for the benefit of one or some, but not all, of the lots', those lots who benefit more must pay more of the total cost. The factual finding that the installation of the alarm system will benefit all lots is also a necessary logical step towards the Tribunal member's determination under s 165 of the Act. As no such power was conferred under s 12 of the Act, the Tribunal member invoked the facilitative provisions of s 165 of the Act to enable the alarm system to be installed.

65 Counsel for the owners corporation referred to other VCAT decisions which, she said, established that there may be peripheral benefits to all lots (for example, in terms of safety or aesthetics) even if works are undertaken on only some lots.[21] Moreover, an owners corporation will properly determine that there is a benefit to all lots where it properly considers objections.[22] ETA had the opportunity to put forward its case before the owners corporation, and as such, the owners corporation complied with this requirement.

66 Counsel for ETA submitted that there was no benefit to ETA from these works. The works were being undertaken to comply with the Building Appeals Board determination, which was expressed to apply only to three affected lots (those where the owners seek to reside in the lots): it would not alter the use or zoning of ETA's lot in any way. Indeed, ETA noted that the Building Appeal Board's determination was made in August 2015 and required the works to be done within three months, which time has passed. This casts into doubt over whether any of the lot owners would now benefit from the works.

Conclusion

67 Largely for the reasons advanced by ETA in its submissions, I would give leave to

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21 *Mashane Pty Ltd v Owners Corporation RN328577* [2013] VCAT 118; *Owners Corporation PS 331362S v Boothey* [2014] VCAT 174; *Benron v Nominees Pty Ltd v Owners Corporation SP37179U* [2014] VCAT 1651.

22 Citing *Mashane Pty Ltd v Owners Corporation RN328577* [2013] VCAT 118, [52].

appeal, allow the appeal, and make the declarations sought by ETA. In relation to the application for leave to appeal, I accept that the Tribunal member made arguable errors of law which directly affected the outcome of the proceeding before her. Further, notwithstanding the relatively small sum of the levy sought to be imposed upon ETA by the owners corporation, it is apparent from the evidence before me, including transcript of the hearing below, that if the owners corporation's resolutions are found to be valid, there may be further impositions levied in support of the other lot owners' attempts to alter the use to which the premises may be put. Further, given the prevalence of owners corporations and the proliferation of medium to high density developments in Victoria, the scope of the powers of owners corporations, particularly the extent to which they are permitted to encroach upon the traditional private property rights of lot owners, are of sufficient broader public interest such that the application for leave should succeed.

68 As for the appeal itself, I agree that the reasons are inadequate. They fall squarely within the terms of the statement of Kyrou J referred to in paragraph 51(c) above, and, as noted by counsel for ETA in his submissions at the hearing, it is very difficult for his client to understand why it lost. However, the adequacy of the Tribunal member's reasons are not the critical matter in the determination of this appeal. Indeed, the provision of more expansive reasons may well have more fully exposed the fundamental problems with the Tribunal's decision, being the Tribunal member's error in finding that the resolutions were valid, insofar as they sought to impose a levy upon ETA with respect to the alarm system, and in finding that the Tribunal was empowered to compel ETA to enable access to the lot for the installation of the alarm system in the absence of any right conferred upon the owners corporation in the Act to do so.

69 In relation to the former question, even before reaching the question of whether the owners corporation is empowered by s 12 of the Act to charge prospectively for a service which is not required or consented to by a lot owner, there seems to me to be a real question mark over whether the installation of hardware such as an alarm

system is the provision of a 'service' within the meaning of s 12 of the Act. A 'service' is not defined within the Act (save for the non-exclusive definition within s 47(3) of the Act). It may be that the cost of maintaining and monitoring an alarm system is the cost of providing a 'service' within the meaning of s 12 of the Act, but the owners corporation's reliance upon that provision to compel ETA to contribute to the capital cost of the installation of the necessary hardware to provide any resulting service is shaky at best. I agree that it is difficult to see how the 'provision' of a service can necessarily include the 'installation' of a service. Arguably, the capital cost of installing the hardware necessary for the provision of the alarm service could be amortised by an ongoing service charge, but that was never proposed by the owners corporation, or considered by the Tribunal. Given the above, it is not necessary for me to consider whether it is necessary for a lot owner to consent to or use a service provided by the owners corporation: in my view, neither the Tribunal member or the owners corporation has conclusively established that the installation of the hardware necessary to provide the alarm service is a service within the meaning of s 12 of the Act.

70 I also agree that the proposed installation of the alarm system cannot fall within the terms of s 48 of the Act, because these works are not 'repairs, maintenance or other works'. In *Australian Mutual Provident Society v 400 St Kilda Road Pty Ltd*,[23] McGarvie J approved the following statement of Denning LJ in *Marcom v Campbell Johnson*,[24] concerning the distinction between 'repairs' and 'improvements'.

> If it is only replacement of something that is already there, which has become dilapidated or worn out, then, albeit that it is a replacement by its modern equivalent, it comes within the category of repairs and not that of improvement.

71 As for the contention of the owners corporation that it would be expensive and/or inconvenient to requirement the owners corporation to bring or deal with two proceedings: one to compel entry into ETA's lot and another to compel payment of the levy: this is somewhat beside the point: either the Act empowers the owners

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23 [1990] VR 646, 665.

24 [1956] 1 QB 106, 115.

corporation (and by necessary extension, the Tribunal) to do certain things, or it does not. It seems to me, though, that the critical issue in this appeal is whether the Act empowers the owners corporation to enter upon ETA's lot to install the alarm system. In my view, to the extent that the Act empowers an owners corporation to commit what is otherwise a trespass, it must, given that it is abrogating a traditional, if not ancient common law right attaching to private property, being the right to control entry into one's property, do so in very clear language. This requirement is often expressed in the context of statues overriding the claims of, say, legal professional privilege, or the privilege against self-incrimination, or in the context of statutory provisions seeking to oust the jurisdiction of the Courts. I cannot see how broad facilitative provisions such as s 165 of the Act can be utilised to, in effect, abrogate such an important common law right in the absence of an independent statutory provision to which s 165 can attach.

72 Further, I agree with the submissions advanced on behalf of ETA that s 12 of the Act does not empower the owners corporation to charge for a service (if, in fact, the installation of the alarm system is truly a 'service', about which I have expressed some doubts) which has not already been provided. The language of s 12 of the Act is clear: it empowers the owners corporation to require payment for services which have been provided. No relevant ambiguity in the language of the statute arises such to necessitating embarking upon an examination of what Parliament intended by this clause.

73 Finally, for completeness, I agree that the Tribunal member's reliance upon s 165 of the Act to make orders enabling the owners corporation to enter ETA's lot was misconceived. Section 51(1) of the *VCAT Act 1998* (Vic) provides that:

> In exercising its review jurisdiction in respect of a decision, the Tribunal –
>
> (a) has all the functions of the decision-maker; and
>
> (b) has any other functions conferred on the Tribunal by or under the enabling enactment; and
>
> (c) has any functions conferred on the Tribunal by or under this Act, the regulations and the rules.

74 As noted in the commentary under s 51 of the VCAT Act in Pizers Annotated VCAT Act,[25] the effect of s 51(1) is that VCAT is said to be 'standing in the shoes' of the original decision-maker, and is subject to the 'same legislative constraints' as the decision-maker.

75 As noted by counsel for ETA during the course of his submissions at the hearing, the Tribunal can only apply a remedy if there is a right which can be identified: s 165 does not empower the Tribunal to act 'at large'.

76 In the decision relied upon by the ETA, *Bosnich*, VCAT had made orders under s 109 of the FTA, which provides that:

> the Tribunal, in determining a consumer dispute or a trader-trader dispute, may make any order it considers fair, including declaring void any unjust term of a contract or otherwise varying a contract to avoid injustice.

77 In the dispute before it, the Tribunal determined that it was 'fair' that the consumer be relieved of its contractual obligations to pay a term's school fees, notwithstanding that it made no findings concerning the school's alleged breach of its duty of care, or that any contractual term, or the contract itself, was unjust. Sifris J, when considering whether s 109 of the FTA provided VCAT with jurisdiction to resolve disputes otherwise than in accordance with law, referred to the decision of *R v Small Claims Tribunal and Syme; ex Parte Barwiner Nominees Pty Ltd*,[26] where Gowan J held that:[27]

> clear words are required to abrogate the operation of the common law and I would think equally plain language would have to be used to exclude the operations of the *Goods Act 1958*.

His Honour went on to say:

> The case is authority for the proposition that clear words (in a clear context) are required to oust the operation of the general law and permit the operation of 'palm tree justice'. Indeed, in the construction of statutes there is a presumption that the statute will not alter common law doctrines or invade

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25 Jason Pizer QC & Emrys Nekvapil, Pizer's Annotated VCAT Act (Thompson Reuters, 5th ed, 2015) [VCAT 51.40].

26 [1975] VR 831.

27 Ibid 835, referred to in *Bosnich* [24].

common law rights.[28] (citations omitted)

78 His Honour went on to conclude that s 109 of the FTA was not sufficiently clear and unambiguous in its intention so as to enable the general law to be disregarded if it is considered unfair. For present purposes, I do not consider there is a material distinction between the terms of s 109 of the FTA and s 165 of the Act.

79 Accordingly, consistent with s 51(1) of the VCAT Act, and *Bosnich*, s 165 cannot be utilised to empower the Tribunal to do something the owners corporation is not empowered to do under the Act.

80 As for the relief sought by ETA, I agree that there is limited, if any, utility in remitting the proceeding back to VCAT, notwithstanding the owners corporation's submissions that the proceeding should be remitted in order to enable the owners corporation to advance alternative arguments concerning the validity of the resolutions. The resolutions the subject of the VCAT hearing were expressed to be made pursuant to s 12 of the Act,[29] and as such, were beyond power: a further hearing is not going to alter that position. Presumably, if the owners corporation wishes to rely upon s 24 of the Act to impose a special levy to fund the installation of the alarm system it will need to give appropriate notice to that effect. Accordingly, I will hear further from counsel as to the form of the declarations to be made, and the question of costs.

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28 *Bosnich* [25].

29 See exhibit 'RT-3' to the affidavit sworn by Robert Thornton on 17 November 2016.