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## Jalowicki v Owners Corporation Plan No SP35671B (Owners Corporations) [2017] VCAT 50 (16 January 2017)

Last Updated: 16 January 2017

VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

OWNERS CORPORATIONA LIST

VCAT REFERENCE NO. OC1961/2016

### CATCHWORDS

← *Extraordinary fees* → s. 24 Owners Corporations Act; poll vote; validity of resolution.

FIRST APPLICANT	Cheryl Jalowicki
SECOND APPLICANT	Jonathan O'Sullivan
THIRD APPLICANT	Patricia O'Sullivan
FOURTH APPLICANT	Allison Stone
FIFTH APPLICANT	Gail Foster
SIXTH APPLICANT	Karen Pinkerton
SEVENTH APPLICANT	Peter Greenough
EIGHTH APPLICANT	Mark Singleton
NINTH APPLICANT	Mark Singleton
TENTH APPLICANT	Judith Apfelbaum
ELEVENTH APPLICANT	Molwin Super Fund ABN: 52 197 380 529
TWELFTH APPLICANT	Luke Pocock
THIRTEENTH APPLICANT	Charlotte Lack
FIRST RESPONDENT	Owners Corporation Plan No SP35671B
SECOND RESPONDENT	Gesse Saldaneri
WHERE HELD	55 King Street, Melbourne
BEFORE	Dr Rebecca Leshinsky, Member
HEARING TYPE	Hearing
DATE OF HEARING	9 November 2016
DATE OF ORDER	9 November 2016
DATE OF REASONS	16 January 2017

## CITATION

Jalowicki v Owners Corporation Plan No  
SP35671B (Owners Corporations) [\[2017\] VCAT  
50](#)

## ORDER

1. The proceeding is dismissed.
2. No order is made as to costs.

Dr Rebecca Leshinsky  
**Member**

### APPEARANCES:

For the first, second, third, fourth, fifth,  
sixth, seventh, eighth, ninth, tenth,  
eleventh, twelfth and thirteenth applicant: Mr A. Wilkinson, Solicitor  
For the first respondent: No appearance  
For the second respondent: Ms N. Wilde, Solicitor

## REASONS

### *Background*

1. These set of reasons accord with and expand on my oral reasons from 9 November 2016. The first respondent was not represented at the hearing.
2. This proceeding concerns the validity of a resolution passed via a poll vote at the annual general meeting (AGM) held on 8 October 2016 for an extraordinary levy in the sum of \$45,000 to repair the existing verandah.
3. The applicants are registered proprietors of Lots 1, 2, 3,4,5,6,7,8,9,10 and 12 on Plan of Subdivision 35671B (the Plan of Subdivision) for the land situated at 143 Point Nepean Road, Dromana.
4. The first respondent is the owners corporation for Plan of Subdivision 35671B (the owners corporation) and the second respondent is the registered proprietor of lots 11 and 13.
5. The Plan of Subdivision defines common property to be all the land in the Plan except the lots. Bounding the exterior of each lot is a walkway with a verandah that runs the length of the development and is covered by a canopy. This verandah and its canopy shade the walkway used by customers to enter shops from the car park.
6. The extraordinary levy is consequent of a Building Order from Mornington Peninsula Shire dated 30 January 2015 issued to the owners corporation. The Building Order states that it was issued because “the front canopy serving commercial shops is severely deteriorated and a danger to the public and occupants”.
7. It is noted on the legend on sheet 2 of 2 of the Plan of Subdivision:

The upper boundary of each of Units 1 to 13 (both inclusive) is ten metres above that part of the site which is within the vertical or near vertical boundaries of the relevant unit as shown on the diagram on this sheet...

8. I accept that the canopy awning is common property.

9. Total lot entitlement for the subdivision is 1754 and total lot liability is 1754.
10. The second respondent holds lot entitlement of 1003/1754 or a 57% share in total lot entitlement.

### ***Apportioning repair costs for the verandah***

11. It is common ground that at the Annual General Meeting held on 8 October 2015 the following transpired:

The owners corporation passed an ordinary resolution without dissent or abstention for the raising of an extraordinary levy of \$45,000 to undertake repairs to the verandah.

The owners corporation failed to pass an ordinary resolution for the striking of the extraordinary levy in accordance with lot liability as the second respondent used its majority lot entitlement to call for a poll vote against the resolution.

The owners corporation passed an ordinary resolution with Lots 11 and 13 in favour of the motion and all other lots against the motion to undertake the repairs to the verandah to be "apportioned on the basis of the benefit principle, whereby 20% of the total cost is raised on the basis of lot liability and 80% of the total cost is raised on the basis of benefit, that each lot receives as is determined by the lineal measurement of each section of the verandah as is located in front of each lot."

12. The applicants are seeking for the resolution for this extraordinary levy based on the 20/80 formula be declared invalid, and for an administrator to be appointed to approve works to be done to the verandah and canopy and strike a special levy to fund the works.

### ***Is the resolution invalid?***

13. The resolution passed at the AGM on 8 October 2016 provides:

That the owners corporation resolves that the extraordinary levy raised to undertake the repairs to the verandah be apportioned on the basis of the benefit principle, whereby 20% of the total cost is raised on the basis of lot liability and 80% of the total cost is raised on the basis of benefit, that each lot receives as is determined by the lineal measurement of each section of the verandah as is located in front of each lot.

14. The second respondent used its voting majority to effect the resolution. This was achieved via a poll vote where the lot entitlement belonging to the second respondent of 1003 was in favour and lot entitlement of 685 was against.
15. [Section 92](#) of the [Owners Corporations Act 2006](#) (the OC Act) allows for a vote via a poll as follows:

#### Voting at a meeting

(1) Subject to subsection (3), at a meeting, voting may be by show of hands or in another prescribed manner, unless the meeting resolves otherwise.

(2) All matters other than matters requiring special resolutions and unanimous resolutions must be determined by a simple majority of votes cast at a meeting.

(3) A lot owner present in person or by proxy may, before or after the vote is taken for an ordinary resolution, require that a poll be taken based on one vote for each unit of lot entitlement.

(4) Voting in a poll must be by written vote.

(5) If a poll is required after the vote is taken, the decision taken on the vote has no effect and the decision on the matter is the decision of the poll.

(6) A person who participates in a meeting by means of teleconferencing or another prescribed manner is to be taken to be present in person at the meeting.

16. There is nothing to suggest that the poll vote was not properly conducted and so, I am satisfied that the resolution was passed validly.

***Should the benefit principle be allowed to apply to the extraordinary levy?***

17. The applicants are disgruntled that the resolution specifies that part of the extraordinary levy will be based on the “benefit principle”.

18. [Section 24](#) of the [Owners Corporations Act](#) provides:

**← Extraordinary fees →**

(1) An owners corporation may levy special fees and charges designed to cover extraordinary items of expenditure.

(2) Subject to subsection (2A), the fees must be based on lot liability.

(2A) Fees for extraordinary items of expenditure relating to repairs, maintenance or other works that are undertaken 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.

(3) The owners corporation may determine the times for payment of the special fees and charges.

(4) A special resolution is required when exercising a power under subsection (1) if the amount involved is more than twice the total amount of the current annual fees set under [section 23](#).

(5) Subsection (4) does not apply if the fees are levied to pay for or recoup the cost of repairs or maintenance carried out to any part of the property for which the owners corporation is responsible where immediate expenditure is or was necessary to ensure safety or to prevent significant loss or damage to persons or property.

19. It is common ground that the \$45,000 is an **← extraordinary fee →** designed to cover an extraordinary item of expenditure being for the purposes of the Building Order.

20. The canopy in itself cannot simply be replaced for there to be compliance with the Building Order, as it is connected to the structure being the verandah under the canopy. Order 6.1 of the Building Order requires a structural engineer to inspect the canopy and provide a report detailing structural adequacy of the canopy and rectifications requirements. On 18 February 2015 JV Consulting Engineers Pty Ltd inspected the development and issued a report stating that all steelwork from the canopy on the verandah required replacing.

21. Section 24(2) requires that **← extraordinary fees →** be levied on the basis of lot liability unless subsection 24(2A) is more relevant as to how the apportionment of the **← extraordinary fee →** should be distributed. The second respondent claims that fairness as to the distribution of the extraordinary levy comes via the benefit

principle, and in calling for a poll vote, the second respondent used his majority vote to pass a resolution that accords more with the benefit principle.

22. The resolution for the 20/80 formula is in fact not based entirely on the benefit principle as this principle is understood in the body of case law which has developed for the benefits principle (See for instance, *Mashane Pty Ltd v Owners Corporation RN 328577 [2013] VSC 417*, *Owners Corporation PS 331362S v Boothey [2014] 174*; *Michael v Owners Corporation No. 1 PS438902Q [2014] VCAT 1359*).
23. The formula adopted by the owners corporation, via the poll vote, is one which is a type of hybrid arrangement which I accept, on balance, allows for a more equitable distribution of the sharing of the cost of the repairs. All lots gain a benefit from the verandah and all lots are responsible for its repair and maintenance. Based purely on lot liability, the second respondent would be required to pay a significant proportion of the \$45,000 whilst not gaining that much more benefit than other lot owners.
24. Ms Wilde, legal representative for the second respondent submits that the spirit of the recent amendments to the [Owners Corporations Act](#) in respect of the benefit principle was to achieve fairness. The Tribunal accepts this submission as is evidenced in the Hansard debates regarding the introduction of the amendment. In particular, in Legislative Council Hansard from Thursday, 28 November 2013, at page 3924, The Honourable G.K. Rich Philips (Assistant Treasurer) stated:

The primacy of the lot liability principle is reinforced by [section 28\(2\)](#) of the act, which sets out that lot owners cannot be required to contribute to discharging a liability of the owners corporation in an amount that exceeds their lot liability.

However, [section 28\(3\)](#) of the acts seeks to introduce an element of fairness by excepting from the operation of [section 28\(2\)](#) amounts payable for repairs, maintenance or other works undertaken wholly or substantially for the benefit of some only of the lots. As Mashane case made clear, those amounts are required to be collected on the basis of the principle of who benefits more, pays more, described as the benefits principle.

25. The *Boothey case*<sup>[1]</sup> is to be distinguished from the proceedings now before the Tribunal. In *Boothey* the owners corporation claimed that the cost of restoration of an historic dome on a former Railways heritage building (now a hotel and apartment building) was the entire responsibility of the owners of the lot directly beneath the dome. The copper dome was over 90 years old and required expensive restoration costs. The owners corporation relied on the benefit principle, asserting that the sole purpose of the dome was to provide shelter for the particular lot and that the dome was within the boundaries of the lots. The Tribunal found that both of these assertions were wrong: the dome formed part of the roof system of the whole building and it was not within the lot boundary, but was instead part of the common property, immediately above the lot. Accordingly, the benefit principle could not apply.
26. In these proceedings, whilst all lots have use of the walkway, the verandah and canopy are more a convenience structure and not essential to the development to extent was the roof in the *Boothey case*.
27. A valid resolution has been passed by the owners corporation, which I find to be a fair and equitable approach for all lot owners. I do not see it as being of prejudice to any lot owner but rather, it distributes in a communal manner, the cost for repairs ordered by the municipality.
28. Accordingly, the Tribunal has no reason to invalidate the resolution based on the 20/80 formula passed via poll vote at the AGM on 8 October 2015. There will therefore be no need for any discussion on the need to appoint an administrator.

## **Conclusion**

29. The proceeding is dismissed.
30. No order is made as to costs.

Dr Rebecca Leshinsky  
**Member**

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<sup>[1]</sup> *Owners Corporation PS 331362S v Boothey* [2014] 174.

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