

VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

OWNERS CORPORATION LIST

VCAT REFERENCE NO. OC807/2016

CATCHWORDS

Sections 32, 33 and 34D *Subdivision Act 1988*; alteration of lot entitlement and liability based upon discrepancy in valuations by reason of major changes in use of lots since original subdivision; just and equitable justification.

APPLICANT	Owners Corporation 1 Plan No. PS339927A
FIRST RESPONDENT	Adriano Trinchi
SECOND RESPONDENT	Tat-On Donald and Siew Neng Tang
THIRD RESPONDENT	SASA Properties Pty Ltd (ACN: 157 858 109)
WHERE HELD	Melbourne
BEFORE	P Moloney, Member
HEARING TYPE	Hearing
DATE OF HEARING	9 August 2016
DATE OF SUBMISSIONS	22 August 2016
DATE OF ORDER	19 December 2016
CITATION	Owners Corporation 1 Plan No. PS339927A v Trinchi (Owners Corporations) [2016] VCAT 2154

ORDER

1. The applicant shall apply to the Registrar of Titles to amend the Schedule of Lot Entitlement and Lot Liability of Owners Corporation No 1 on Plan of Subdivision PS 339927A to the following:

* Combined value of \$12,800,000 split on the basis of existing ratio of lot entitlements on registered plan i.e. \$8,960,000 and \$3,840,000

LE's are based on values in reports of CKC 16/8/2013, All other Lots are based on valuation of 28/09/2011

LOT ENTITLEMENT AND LOT LIABILITY

LOT	ENTITLEMENT	LIABILITY	LOT	ENTITLEMENT	LIABILITY	LOT	ENTITLEMENT	LIABILITY	LOT	ENTITLEMENT	LIABILITY
1B*	896	896	34C	9	9	204	47	47	413	29	29
1C	9	9	35C	13	13	205	58	58	414	29	29
1D*	384	384	36C	9	9	206	58	58	415	33	33
1S	1	1	37C	9	9	207	58	58	416	33	33
2C	9	9	38C	9	9	208	47	47	417A	34	34
2S	2	2	39C	9	9	209	48	48	418A	32	32
3C	9	9	40C	9	9	210	32	32	501	36	36
4C	9	9	41C	9	9	211A	55	55	502	31	31
5C	9	9	42C	9	9	212	33	33	503	35	35
6C	9	9	43C	9	9	213	31	31	504	29	29
7C	9	9	44C	9	9	214	41	41	505A	40	40
8C	9	9	45C	9	9	215	42	42	506	36	36
9C	9	9	46C	9	9	216	33	33	507	34	34
10C	13	13	47C	13	13	301	52	52	508	34	34
11C	9	9	48C	9	9	302	50	50	509	34	34
12C	9	9	49C	9	9	303	50	50	510	34	34
13C	9	9	50C	9	9	304	45	45	511	30	30
14C	9	9	51C	9	9	305	56	56	512	33	33
15C	9	9	52C	9	9	306	56	56	513	30	30
16	30	30	53C	9	9	307	56	56	514	30	30
16C	9	9	54C	9	9	308	45	45	515	34	34
17	20	20	55C	9	9	309	46	46	516	34	34
17C	9	9	56C	9	9	310	33	33	517	35	35
18C	9	9	57C	9	9	312	33	33	518A	33	33
18F	301	301	58C	9	9	313	31	31	601	36	36
19C	9	9	59C	9	9	314	42	42	602	34	34
20C	9	9	60C	9	9	315	43	43	603	35	35
21C	9	9	61C	13	13	316	33	33	604	29	29
22C	9	9	62C	9	9	401	36	36	605A	40	40
23C	13	13	63C	9	9	402	33	33	606	36	36
24C	13	13	64C	9	9	403	35	35	607	34	34
25C	2	2	65C	9	9	404	28	28	608	34	34
26C	9	9	66C	9	9	405A	39	39	609	34	34
27C	9	9	67C	9	9	406	35	35	610	34	34
28C	9	9	68C	9	9	407	34	34	611	30	30
29C	9	9	69C	9	9	408	34	34	612	33	33
30C	9	9	70C	9	9	409	34	34	613	30	30
31C	9	9	201	52	52	410	34	34	614	30	30
32C	9	9	202	49	49	411	30	30	615	34	34
33C	9	9	203	50	50	412	32	32	616	34	34

LOT ENTITLEMENT AND LOT LIABILITY

LOT	ENTITLEMENT	LIABILITY	LOT	ENTITLEMENT	LIABILITY	LOT	ENTITLEMENT	LIABILITY	LOT	ENTITLEMENT	LIABILITY
617	35	35	903	36	36	1108	36	36			
618A	33	33	904	30	30	1109	36	36			
701	37	37	905A	41	41	1112	38	38			
702	34	34	906	37	37	1113	36	36			
703	36	36	907	35	35	1114	38	38			
704	29	29	908	35	35	1121	38	38			
705A	40	40	909	35	35	1130	36	36			
706	36	36	910	35	35	1131	36	36			
707	35	35	911	31	31	1135	37	37			
708	35	35	912	34	34	1202	35	35			
709	35	35	913	31	31	1203	39	39			
710	35	35	914	31	31	1204	36	36			
711	31	31	915	35	35	1205	36	36			
712	33	33	916	35	35	1206	36	36			
713	30	30	917A	36	36	1207	36	36			
714	30	30	918A	34	34	1208	36	36			
715	34	34	1001	37	37	1211	38	38			
716	34	34	1002	35	35	1212	36	36			
717A	35	35	1003	36	36	1213	38	38			
718A	33	33	1004	30	30	1221	38	38			
801	37	37	1006	37	37	1229	36	36			
802	34	34	1007	35	35	1230	36	36			
803	36	36	1008	35	35	1234	37	37			
804	29	29	1009	35	35	T01	78	78			
805A	40	40	1010	35	35	T02	78	78			
806	36	36	1011	31	31	T03	77	77			
807	35	35	1012	34	34	T04	77	77			
808	35	35	1013	31	31	T05	78	78			
809	35	35	1014	31	31	T06	92	92			
810	35	35	1015	35	35	T07	498	498			
811	31	31	1016	35	35						
812	33	33	1025	41	41						
813	30	30	1037	36	36						
814	30	30	1038	34	34						
815	34	34	1102	35	35						
816	34	34	1103	37	37						
817A	35	35	1104	30	30						
818A	33	33	1105	36	36						
901	37	37	1106	36	36						
902	35	35	1107	36	36						
						TOTAL	9989	9989			

And the Registrar of Titles is hereby directed to register such application.

2. Pursuant to Section 34 F of the *Subdivision Act 1988* the Registrar is hereby directed to dispense with the delivery or production of any certificate of title or duplicate instrument or other document required to give effect to Order 1.
3. No order as to costs.

P Moloney
Member

APPEARANCES:

For Applicant

Mr Lipshutz, Solitor

For Respondents

No appearance

REASONS

1. This application by OC 1 PS 339927A (“OC”) concerning the premises at 233 Collins St Melbourne (“the property”) sought orders as follows-
 - a) That the OC be required pursuant to S 34 D (1) (a) of the *Subdivision Act 1988* (“SA”) to amend the Schedule of lot entitlement and liability in accordance with a Proposed Unanimous Resolution conducted by Ballot on or about 30 October 2015 seeking approval that the proposed amendment was just and equitable and is likely to bring economic or social benefit to the subdivision as a whole outweighing any economic or social disadvantage to any Lot: or, alternatively;
 - b) pursuant to S 34 D (1) (b) of the SA consenting on behalf of all Members of the Owners Corporation to the Proposed Unanimous Resolution and;
 - c) in accordance with S34 F of the SA directing the Registrar of Titles to dispense with the delivery of any certificate of title or duplicate instrument or other document.
2. The property rises to a level of twelve storeys above ground floor (retail) and basements 1 to 3 (carpark, storage and minor residential). Floor 1 is office space and Floors 2 to 12 are residential apartments. The mix of uses in the property has shifted significantly from that which prevailed after construction when the ratio was 79% commercial to 21% residential. This has resulted in disparity between the lot entitlement and liability as struck initially and that which would be equitable given the change in use.
3. The Ballot referred to in paragraph 1(a) was in two parts. The second part was a Ballot for a Special Resolution authorizing the OC to commence and conduct this application and conferring ancillary authority for the pursuit of mediation of settlement negotiations.
4. The outcome of the Ballot referred to in paragraph 3 was 60.89% in favour and 1.11% against thereby attracting the operation of S 97 (1) of the *Owners Corporations Act 2006* (“OCA”) deeming the resolution passed as an interim special resolution which would become a special resolution unless lot owners holding more than 25% of the total votes for all affected lots petitioned the secretary against the resolution (OCA S 97 (4)).
5. There being no petition, this application proceeded under the authority of the special resolution deemed to be effective on or about 26 December 2015.
6. The outcome of the Ballot for Unanimous Resolution expressed as a percentage of the total lot entitlements of all lots affected by the OC was 68.18% in favour and 1.05% against, thereby necessitating this application if the goals of the Unanimous Resolution were to be realized. I was told that the balance of the recipients of the Ballot were non-responsive so enabling

a calculation that there was a 99% positive response rate from those who did respond. I observe that the 1.05% who voted against comprised the three parties named as respondents to this application being the proprietors of lots 198, 209 and 220.

7. The first respondent attended the Directions Hearing held 2 June 2016; the second and third respondents did not. None of the respondents attended the final hearing of the matter. The third respondent corresponded with the Tribunal on 23 June 2016 stating that it would like to change its vote (scil. on the Unanimous Resolution) to be in favour of the proposed changes. Although the closing dated for the Ballot issued 30 October 2015 had long passed the correspondence effectively conceded the substance of the application based thereon. The first respondent sent an email on 8 August 2016 conceding receipt of the expert report dated 4 August 2016 of David John Monahan, Licensed Surveyor and taking no objection to it; I infer his consent to its content. It follows that the application is unopposed by the second respondent and consented to by the first and third.
8. S 33(2) of the SA provides as follows:

“In making any change to the lot entitlement, the owners corporation must have regard to the value of the lot and the proportion that value bears to the total value of the lots affected by the owners corporation”
9. S 33(3) of the SA provides:

“In making any change to the lot liability the owners corporation must consider the amount that it would be just and equitable for the owner of the lot to contribute towards the administrative and general expenses of the owners corporation”
10. The genesis for the application was the change in use referred to in paragraph 1 which resulted in the lot entitlement and liability for the residential lots being disproportionately low when compared to those originally adopted for the commercial lots which were shouldering an exorbitant proportion of the overall liability-see the summary below based on the report dated 4 August 2016 of Mr David Monahan, a licensed surveyor with forty years’ experience. Insurance premiums accounted for approximately 80% of the outgoings of this OC, thus justifying in his opinion concentration upon the valuation of the respective valuations of the contributing lots based upon their categories of use and leaving out considerations such as maintenance.
11. It should be noted that the burden of Mr Monahan’s report concerned the “just and equitable” requirement imposed by S33 SA and did not address the “economic and social benefits” test mandated by S34D (3) (c) (ii) SA as evidenced by his conclusion that the “Lot Entitlements and Liability “have been based upon the value of each lot”.
12. For valuation of each lot Mr Monahan relied upon valuations dated 28 September 2011 and 16 August 2013 by Charter Keck Cramer, the authors

of which possessed the appropriate professional qualifications, industry experience and were Associates of the Australian Property Institute.

13. At the Hearing Mr Monahan gave evidence that he addressed the requirements of S 33 (2) and (3) SA by reference to the valuations referred to above.
14. There had been two changes which he took into account when arriving at his final assessments for lot entitlement and liability.
15. Firstly, Lots 211 and 311 were consolidated to a single Lot 211A after the Special Resolution (and after the valuations relied upon). Although not a qualified valuer, Mr Monahan gave evidence of a process of comparison of the area of the larger, consolidated lot with similar-sized lots in the property to arrive at entitlement/liability values varying only slightly from the total for the separate lots originally valued 55 instead of the original 61 (from a total for all lots of 9999).
16. Secondly, the development of residential lots on levels 2 and 3 of the property as built comprised the installation of balconies to Lots 204 to 209. The values assessed for those balconies was based upon plans but the as-built configuration varied by a small amount from the plans. Upon Mr Monahan's assessment the discrepancy accounted for a value of 0.625 of a unit of assessment which he considered immaterial.
17. I accept Mr Monahan's evidence of opinion that both changes are immaterial.
18. Mr Monahan further opined that it was appropriate for Lot Liabilities to be identical to Lot Entitlements because, as noted in paragraph 10 above, the predominant expenditure for contributions was insurance and, in the event of destruction of the property it was just and equitable that each lot owner would recover a proportionate entitlement in keeping with its liability.
19. I adverted in paragraph 6 to the high level of approval of the proposed changes. A further factor favouring approval of the application is that contributions have been levied since 2015 according to the proposed schedule and no lot owner has demurred.
20. Accordingly, based upon the reasons and findings stated I will order:
 1. the applicant shall apply to the Registrar of Titles to amend the Schedule of Lot Entitlement and Lot Liability of Owners Corporation No 1 on Plan of Subdivision PS 339927A to the following:

* Combined value of \$12,800,000 split on the basis of existing ratio of lot entitlements on registered plan i.e. \$8,960,000 and \$3,840,000

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P Moloney
Member