Owners Corporation No. 1 PS438893N v Kakos (Owners Corporations) - [2017] VCAT 762

VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

OWNERS CORPORATIONS LIST

VCAT REFERENCE NO. OC1959/2016

CATCHWORDS

Whether lot owner breached rules when he installed shade sails and a clothesline on his terrace – whether he was entitled to install shade sails under section 12 of the *Subdivision Act 1988* (Vic) – whether he was entitled to install shade sails and clothesline under section 132 of the *Owners Corporations Act 2006* (Vic) – whether rules valid – what orders to make where breaches found.

FIRST APPLICANT	Owners Corporation 1 Plan PS438893N
SECOND APPLICANT	Owners Corporation 5 Plan PS438893N
RESPONDENT	John Kakos
WHERE HELD	Melbourne
BEFORE	A Dea, Senior Member
HEARING TYPE	Hearing
DATE OF HEARING	3, 4 and 5 April 2017
DATE OF ORDER	30 May 2017

CITATION Owners Corporation No. 1 PS438893N v Kakos (Owners Corporations) [2017] VCAT 762

ORDER

1. The respondent's application for an order for summary dismissal under section 75 of the *Victorian Civil and Administrative Tribunal Act 1988* (Vic) (VCAT Act) is dismissed.

2. Under section 124 of the VCAT Act , the Tribunal declares that the respondent has breached the rules of Owners Corporation 1 Plan PS438893N and Owners Corporation 5 Plan PS438893N (the rules).

3. Under section 165(1)(b) and (j) of the *Owners Corporations Act 2006* (Vic) (OC Act), the respondent must comply with the rules by performing the following work by qualified and insured contractors within 28 days of this order:

   (a) The wall mounted shade sails and clothesline to be removed permanently and any related damage to the concrete wall to be rectified to the satisfaction of the applicants, to be paid for by the respondent; and

   (b) On receiving reasonable notice, the respondent to permit access to lot W406 for the applicants or their representatives to inspect the work performed in paragraph (a) of this order.

4. Under section 124 of the VCAT Act , the Tribunal declares that the respondent must not perform any works in future affecting the applicants' common property without first complying with and obtaining all necessary proper consent and approval(s) required pursuant to the rules.

5. Any application for costs in this proceeding is to be made in writing to the Tribunal, together with any supporting material in relation to liability for costs, and served on the other party, by **27 June 2017**.

6. The other party may file and serve any submissions in reply to such a costs application, by **25 July 2017.**

7. Any costs application is to be listed before me after **1 August 2017.** Allow half a day.

A Dea
Senior Member

APPEARANCES:

For Applicants Ms N Wilde, solicitor

For Respondent Mr T Zervas, solicitor

REASONS

1. Soon after purchasing an apartment in Docklands in September 2015, Mr John Kakos installed two shade sails over the apartment terrace area and a small clothes line on one of the terrace walls. These items are all fixed to the apartment building external walls or structures.

2. This proceeding concerns whether or not Mr Kakos has breached the rules which govern the use of those areas of the apartment building.

3. The applicants say the shade sails and clothesline are attached to common property owned by them and they should be removed as no permission for them was sought or granted. Accordingly, the applicants claim Mr Kakos is in breach of the rules.

4. Mr Kakos says the applicants were not entitled to bring this proceeding and, in any event, he was entitled to undertake the works mentioned.

5. I have decided that Mr Kakos has breached valid rules. I have further decided the shade sails and clothesline must be removed and appropriate rectification works are to be undertaken at Mr Kakos' cost.

6. In these reasons, I first describe the apartment building, identify the owners of relevant parts in and around Mr Kakos' apartment in the context of the *Owners Corporations Act 2006* (Vic) (OC Act) and the *Subdivision Act 1988* (Vic) (SD Act) and identify the locations of the shade sails and the clothesline. I next discuss the preliminary jurisdictional issues raised by Mr Kakos and then turn to the substantive issues.

The Palladio building and Mr Kakos' lot

7. The apartment in issue is within the Palladio building in Docklands. That building is one of three – the others are called the Boyd and the Sant'Elia. The three structures have been built between Newquay Promenade, Saint Mangos Lane, Aquitania Way and Caravel Drive. The Sant'Elia overlooks the waterfront. The Palladio sits behind that building and to the west. The Boyd sits behind the Sant'Elia and to the east.

8. The three buildings are subject to a plan of subdivision under the SD Act comprising 71 sheets – plan number PS 43889N (the plan).[1] The plan was prepared by Bosco Johnson Pty Ltd, a firm of surveyors (Bosco Johnson). The plan carries various notations including the name *'Newquay Docklands'*.[2] Individual sheets of the plan which carry drawings for one of the three buildings use notations such as *'The Palladio – Newquay Docklands'*.[3]

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[1] Page 15 and following of the Tribunal Book (TB).

[2] For example, pages 18 to 23.

[3] For example, TB pages 17 and 24 – see page 16 for *'The Sant'Elia – Newquay Docklands'* and page 26 for *'The Boyd – Newquay Docklands'*.

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9. Individual apartments and car spaces are identified by lot numbers and those within the Palladio carry the letter 'W' before the relevant number. Mr Kakos' apartment is located on level four. It has a large terrace area and together with the internal apartment, it is known as lot W406. Lot W406 overlooks Saint Mangos Lane. In closing submissions, Mr Kakos' solicitor, Mr Zervas, stated that the internal space of the lot is around 70 square meters and the external terrace is around 80 square meters. Those estimates were not disputed. Attached to these reasons and marked 'A' is sheet 32 of the plan which shows an aerial view of the Palladio and the location of lot W406.[4]

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[4] TB page 46.

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10. The terrace area is accessed from the living space. It is separated from the neighbouring terraces by structural walls which are around six foot high – partly made of a concrete sheet material and partly steel fencing. The Saint Mangos Lane end of the terrace has large built in raised concrete planter boxes with a glass fence boundary. There is a vertical space between the glass fence and a large boundary structure which is painted blue (blue beam). The terrace is tiled.

11. Immediately above and outside Mr Kakos' living room doors is the underneath face of the balcony of the apartment immediately above on level five (level 5 balcony). Once past that overhang, there is airspace above the remainder of the terrace. The upper apartments extend to level 23.

The Owners Corporations

12. Those areas which are not within individual lots are contained in owners corporations. The plan created five owners corporations for the three buildings and their surrounds. Three of those are relevant to this proceeding.

13. There was no dispute between the parties that:

- The first applicant, Owners Corporation 1 Plan PS438893N (OC1), was created as an unlimited statutory owners corporation;
- Owners Corporation 4 Plan PS438893N (OC4) and the second applicant, Owners Corporation 5 Plan PS438893N (OC5), are both limited statutory owners corporations;
- OC 1 is the owner of all of the common property described as common property 4 on the plan (CP4);[5]
- OC 1 is the owner of all of the common property described as common property 5 on the plan (CP5);[6]

- All owners of lots on the plan are members of OC1 as tenants in common consistent with their lot liability; and
- The owner of lot W406 is a member of OC1, OC4 and OC5.

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[5] TB page 234.
[6] TB page 235.

Lot W406's boundaries and the common property

14. While at the beginning of the hearing there was some dispute about lot W406's boundaries, and particularly where W406's boundaries ended and the boundaries for CP4 and CP5 commenced, by the end of the hearing those matters were agreed. The agreement was the result of evidence given by the surveyor who drew the plan, Mr Ross Nicholson, on a summons issued by Mr Kakos. At the end of Mr Nicholson's evidence, I invited him and the parties to comment on a drawing I had made which reflected my understanding of the evidence. Mr Nicholson made some additions and alterations and it was then agreed the boundaries of the terrace area as shown in that drawing were correct.[7] A copy of the drawing is attached to these reasons and marked 'B'.

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[7] Exhibit R8 - The Nicholson Drawing.

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15. Accordingly, it was agreed that the external boundaries of Mr Kakos' lot are:
    - The face of the underside of the level 5 balcony from the living room doors to the terrace to the end of that balcony (the balcony face);
    - The face of all walls from the floor tiles of the terrace to the height of the balcony face;
    - The face of the walls dividing Mr Kakos' lot from his neighbouring lots' terraces;
    - The face of the glass wall at the Saint Mangos end of the terrace, the airspace between that and the blue beam and the face of the blue beam; and
    - The airspace above the terrace from the floor tiles to the point where an imaginary horizontal line could be drawn from the end of the balcony face to the face of the blue beam.
16. It was also agreed that the following areas fell within CP5:
    - The structure between the balcony face and the upper face of the level 5 balcony;
    - The structure below the tiles on the terrace floor;

- The structure of the blue beam from inside the face of Mr Kakos' terrace to the outer boundary of that structure; and

- The slice of airspace between the space from the balcony face to the blue beam and the upper face of the level 5 balcony – that is the airspace contained in two imaginary horizontal lines running from the bottom of the level 5 balcony and the top of the level 5 balcony across to the blue beam.

17. It was further agreed that the airspace contained within the area bounded by the outer face of the vertical walls from level 5 to level 23 above the imaginary line from the upper face of the level 5 balcony to the external boundary of the Palladio was CP4. I will refer to that area as the *'CP4 airspace'*.

The location of the shade sails

18. The two shade sails together have nine fixing points. Six of those points are on the building side of the terrace and three are on the Saint Mangos Lane side. The parties and the Tribunal made use of photographs which showed each fixing point, each of which was identified by a number. The St Mangos Lane side points are referred to as fixings 1 to 3 and the building side points are referred to as fixings 4 to 9.

19. While the builder who installed the shade sails did not give evidence and there were no drawings or diagrams relating to its installation, it appeared they were installed in around December 2015. It was apparent from the evidence and the Tribunal's view of the property on the first hearing day, that the shade sails were attached by eyelets to ring bolts which were in turn attached to the wall or blue beam. It was also apparent that the ring bolts were attached to the wall by being screwed into either an anchor or other device located within the relevant structures.

20. By the end of the evidence, there was no dispute that:

    - Fixing points 1 to 3 come into contact with the face of the blue beam which is within Mr Kakos' lot and penetrate into CP5;

    - Fixing points 4, 5, 7, 8 and 9 all come into contact with and penetrate the walls of CP5;

    - Fixing point 6 comes into contact with the face of the concrete structure under the level 5 balcony which is within Mr Kakos' lot and penetrates into CP5; and

    - The shade sails themselves sit partly within the airspace within Mr Kakos' lot, partly within the slither of airspace of CP5 and partly within the CP4 airspace.

21. Attached to these reasons and marked 'C' are photographs of the shade sails and their fixing points.

The location of the clothesline

22. There was no dispute that the clothesline is fixed to a wall which is within CP5. The clothesline can be folded out or down and is attached with bolts which penetrate the wall. A photo of the clothesline is attached and marked 'D'.

23. The evidence indicated the clothesline was installed by a friend of Mr Kakos in around December 2015.

Preliminary issues

24. On 9 February 2016, a notice to rectify breach was sent to Mr Kakos.[8] The notice alleged that Mr Kakos had breached his obligations under the Owners Corporation Rules (rules). In a section headed *'Description of Breach'* the following appeared:

> Unauthorised installation of shade sails & clothes Line (sic) on Balcony. Both items are wall mounted to the surface wall of the common property.

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[8] TB page 264 ff.

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25. Consistent with the usual form, the notice set out the rule number or section of the OC Act relied on and either the section or rule verbatim or in summary. The notice gave Mr Kakos the required 28 days to rectify the breaches.

26. A final notice to rectify breach was sent to Mr Kakos on 16 June 2016.[9] For all practical purposes its contents were the same as the 9 February 2016 notice. The notice required rectification by way of removal of the shade sails and clothesline within 28 days and for evidence of such to be provided.

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[9] TB page 298 ff.

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27. The first notice was signed by a person described as the *'Assistant OC Manager'* and the second by the *'OC Manager'*. Both notices stated they were from *'New Quay Apartments – Owners Corporation PS 438893N'*.

Mr Kakos' submissions

28. In his closing submissions, Mr Kakos' solicitor, Mr Zervas, contended that the notices were void ab initio or voidable for a number of reasons.

29. The first contention was that the notice was not given by the proper owners corporation. It appeared either to have been given by OC1 only or by all five owners corporations.

30. As I understood it, the objection to the notices purportedly being issued by OC1 arose because Mr Kakos contended they ought to have been issued by the owners corporations affected by the shade sails and clothesline, namely OC4 and OC5 and perhaps OC1 as owner of all common property.

The alleged failure to distinguish between the owners corporations related to orders made by the Tribunal on 3 June 2016 in another proceeding involving a lot owner and OC1, OC5 and Owners Corporation 3 PS438893 (OC3). I will come to those orders shortly.

31. Mr Zervas relied on minutes of a meeting of the OC4 committee on 20 October 2016 which passed a resolution to the effect that it did not believe it was required to grant permission for the shade sails but if it was so required, OC4 resolved to grant such permission.[10] Accordingly, if the notices purported to have been issued by all five owners corporations, that ought not to have been done in respect of OC4.

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[10] TB 342.

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32. Mr Zervas argued that, if the notices were invalid, the whole proceeding was misconceived, an abuse of process or embarrassing and should be struck out under section 75 of the *Victorian Civil and Administrative Tribunal Act 1998* (Vic) (VCAT Act).

33. Next Mr Zervas contended that, where the notices referred to breaches of the OC Act as well as rules, it was necessary for a special resolution to be passed before proceedings were brought. As conceded by the applicants, no such resolution had been passed.

34. Mr Zervas also objected to the fact that not all of the alleged breaches of individual rules were pressed at the hearing. He contended that an inference ought to be drawn that the applicants knew or ought to have known that the notices were defective at the time the Tribunal application was made.

The applicants' submissions

35. Ms Wilde, solicitor appearing for OC1 and OC5, contended that a typographical or similar error in the notices did not render them invalid under the OC Act or otherwise. She contended that there was nothing in section 155 of the OC Act (which sets out the requirements for breach notices) that meant an error of that kind rendered a notice invalid. She contended that such a finding would be harsh given that notices are prepared on the instructions of voluntary committee members and by managers who are not usually legally qualified.

36. Ms Wilde confirmed that, consistent with the application and the orders sought in the points of claim dated 4 August 2016, the applicants sought to enforce the rules and did not seek declarations or other orders in respect of any alleged breaches of the OC Act.

Decision

37. I am satisfied that the notices can and should be understood as having been issued either by OC1, as the owner of all common property in OC4 and OC5, or on behalf of all of affected owners corporations. Given the references in the plan to the whole and parts of the Newquay Docklands development, it is apparent that the notice concerns those owners corporations. There is nothing in section 155 or otherwise in the OC Act which indicates such a strict approach must be taken to this aspect of a breach notice.

38. I am not persuaded that the earlier Tribunal order changes this position. As I understand the background, a lot owner, Mary Dixon, commenced proceeding OC1442/2016 against OC1, OC3 and OC5 after a dispute about the committee of management of OC1 arose. At the relevant time, the individual owners corporations did not have separate committees. Rather, there was a committee for OC1 which managed issues for all.

39. Ms Dixon sought an injunction requiring elections to be held for committees for each owners corporation. Orders to that effect were made on 3 June 2016. Importantly, order 1(a) made that day stated that the respondents (OC1, OC3 and OC5) *and* Owners Corporation 2 PS438893N and OC4 must *'continue to act under directions and instructions of the Committee elected at the AGM on 30 March 2015'* until new elections were held. I was informed that the committee referred to in the order was that of OC1. The elections were held on 17 August 2016.

40. As a consequence of the Tribunal's 3 June 2016 order, all of the owners corporations were required to act under the directions of OC1 until individual committees were elected. Accordingly, when the final notice was issued to Mr Kakos on 16 June 2016, OC1's committee was entitled to direct it be issued either in its own name or on behalf of all owners corporations. I am not persuaded the earlier Tribunal proceeding rendered the notices invalid.

41. While I note the resolution passed by OC4 on 20 October 2016, it did not purport to, nor could it, have retrospective effect.

42. Finally, I refer to section 153(2)(b) of the OC Act which empowers an owners corporation to apply to the Tribunal for an order requiring a lot owner to rectify an alleged breach of the rules. Section 153(3) requires the rules' dispute resolution process to be followed and to have been unsuccessful before commencing an action in the Tribunal. Section 164 of the OC Act provides that the Tribunal *may* make an order dismissing or striking out an application by an owners corporation for an order requiring the rectification of a breach referred to in section 153 if it is satisfied that the owners corporation has not complied with that section. I also refer to section 18 of the OC Act which says that a special resolution of the owners corporation is required before it may bring legal proceedings *unless* the proceedings are to recover fees and other money or to enforce the rules.

43. The consequence of these provisions is that the issue of a breach notice is not a pre-condition to the commencement of a proceeding in the Tribunal. There was no disagreement before me that a dispute resolution process had been followed before the Tribunal application was made[11] and no application for strike out or dismissal was made under section 164 of the OC Act. As the applicants have brought the proceeding in order to enforce the rules, no special resolution was required.

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[11] Mr Kakos witness statement, para 25.

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44. There is no basis under the OC Act for me to conclude that the references to sections of the OC Act and the model rules as well as the particular OC1 rules, made the notices invalid or otherwise barred the bringing of the proceeding. Similarly, the fact that the applicants have elected not to pursue each and every breach alleged in the notices cannot disentitle them to bring the proceeding.

45. The application for an order for summary dismissal under section 75 of the VCAT Act is dismissed.

Overview of the issues regarding the shade sails

46. The applicants said that the installation of the two shade sales breached a number of rules, largely because they have been installed into common property without OC1 and OC5's consent, causing damage and affecting the appearance of the Palladio. The applicants also contended that a building permit was required for the installation and that amounted to a further breach of the rules.

47. Mr Kakos denied that a building permit was required. He contended that the rules relied on by the applicants are invalid. In any event, Mr Kakos said that the shade sails have been installed consistent with express provisions of the OC Act and the SD Act which override any applicable rules.[12]

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[12] See section 140(b) of the OC Act.

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48. I will deal with Mr Kakos' last point first.

Implied easement

49. Section 12(2) of the SD Act relevantly provides a lot owner with an implied right or easement:

> (a) over -
>
> (i) all the land on a plan of subdivision of a building; and
>
> (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*;
>
> (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 (my emphasis).

50. Mr Kakos contended that the installation of the shade sails was necessary for the reasonable use and enjoyment of his lot. While he originally appeared to contend that the shade sails were necessary for sun protection, that aspect of his argument was not pursued at the hearing.

51. Mr Kakos said the shade sails were necessary because items regularly fall and land on his terrace including lit cigarettes, cans, bottles and other debris. These items come from lots situated above and around his terrace. On one occasion in May 2016 a clothes horse from an upper level balcony was caught by the wind and landed on the shade sails.[13] I heard evidence about a lit cigarette landing on the arm and leg of one of Mr Kakos' visitors, Ms Elena Tsapatolis.[14] Ms Maria Norris gave evidence that she no longer uses her terrace, which is two doors down from Mr Kakos', because of the risks posed by falling items, such as lit cigarettes and butts, other rubbish and even a shoe.[15] Her oral evidence before the Tribunal was that she used to complain about these matters to the building manager but had given up doing so many years ago.

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[13] Witness statement signed 3 April 2017 – Exhibit R3.
[14] Witness statement signed 4 April 2017 – Exhibit R7.
[15] Witness statement signed 3 April 2017 – Exhibit R1.

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52. A former strata manager of the buildings, Ms Priscilla Chang, gave evidence that she recalled Mr Kakos informing her about the clothes horse incident and other debris landing on his terrace stating that, because of the occupational health and safety aspects, he had erected a sail to prevent that happening again.[16] Of course, as the shade sails were erected in December 2015, the clothes horse incident could not have been the reason for their installation.

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[16] Witness statement signed 3 April 20917 – Exhibit R2.

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53. Mr Kakos contended that, when he installed the shade sails for these purposes, he exercised his SD Act section 12 implied right or easement to the relevant parts of common property.

54. In support of this contention Mr Kakos' solicitor Mr Zervas referred me to the Victorian Court of Appeal's decision in *Body Corporate No 413424R v Sheppard*. [17] That case concerned access to the

roof of a building and whether the owner of the rooftop apartment was required to allow service and other personnel access through their apartment to allow for the servicing of lifts and other building equipment to be undertaken. The court affirmed the decision below which found that there was another way for the roof area to be accessed, albeit a more expensive option, and so the access was not within section 12 of the SD Act.

[17] [2008] VSCA 118 .

55. The court found that the word *'necessary'* in the phrase *'all easements and rights necessary'* bears its ordinary meaning of *'essential'*. The court said that the word *'necessary'* is not to be construed in isolation, but taking into account the qualifying concept of reasonable use and enjoyment of the benefited property. The court also found that it is the easement, rather than the function it secures, which must be *'necessary'*. Dodds-Streeton JA said *'The reasonable use and enjoyment of the property not only clearly exceeds mere use, but also admits consideration of the effect on the reasonable use and enjoyment of property if the function to be achieved by the easement is unavailable and of the costs or detriments of securing the function by means other than the easement.'* [18]

[18] Paragraph 80.

56. Mr Zervas also contended that the applicants had a duty of care to exercise due care to protect the health and safety of lot owners and occupiers from hazards under section 5(b) of the OC Act. Mr Zervas contended complying with that duty meant allowing the shade sails to remain in place.

57. Mr Zervas noted that, in his report, Mr Nicholson of Bosco Johnson, commented that section 12 of the SD Act would include and recognise support from and use for shelter of all interior and exterior walls, as well as the balcony.[19]

[19] Report dated 7 March 2016, TB page 273.

58. Ms Wilde for the applicants submitted that section 12 of the SD Act was intended to allow for access for services to be connected during construction and to provide gas, electricity, water, sewerage and the like to lots. She contended the section ought also to be read in the context of the requirement that lot owners obtain the consent of the owners corporation before undertaking works on common property. Ms Wilde noted that section 12 does not state that the right referred to applies irrespective of any provision of the SD Act, the OC Act or any rule and so must be read in the context of provisions and rules which deal within common property.

59. Ms Wilde referred me to rule 2.6 which prohibits lot owners and their occupiers from disposing of cigarette butts or ash over balconies. When cross-examining Ms Norris, Ms Wilde asked about notices in Palladio lifts requesting that lot owners and occupiers ensure that cigarette butts and other items are not thrown from their balconies onto other properties. Ms Norris' evidence was that, since the notices had gone up, she had decided she did not need to complain to the building manager as the notice was sufficient. Ms Norris also commented that it was very difficult to monitor where items came from.

60. I accept that the debris and other items which fall from above the terrace cause a nuisance and carry the risk of causing injury. I accept that Ms Norris has decided that her terrace area is unsafe for her use. While I accept that Mr Kakos and Ms Norris believe that other lot owners take the same view, I did not hear from those other owners, so I cannot be satisfied that those views are universally held.

61. If Mr Kakos' contentions regarding section 12 of the SD Act are correct, then he was not obliged to obtain OC 1 and/or OC5's permission before installing the fixing points because section 12 creates an automatic right directed at his protection.

62. In *Project Blue Sky v Australian Broadcasting Authority* ,[20] the High Court majority said the primary object of statutory construction is to construe the relevant provision so that it is consistent with the language and purpose of all the provisions of the statute. That meaning must be determined by reference to the language of the whole of the legislative instrument. The Court said:

> The meaning of the provision must be determined 'by reference to the language of the instrument viewed as a whole'. In *Commissioner for Railways (NSW) v Agalianos*, Dixon CJ pointed out that 'the context, the general purpose and policy of a provision and its consistency and fairness are surer guides to its meaning than the logic with which it is constructed'. Thus, the process of construction must always begin by examining the context of the provision that is being construed.
>
> A legislative instrument must be construed on the prima facie basis that its provisions are intended to give effect to harmonious goals. Where conflict appears to arise from the language of particular provisions, the conflict must be alleviated, so far as possible, by adjusting the meaning of the competing provisions to achieve that result which will best give effect to the purpose and language of those provisions while maintaining the unity of all the statutory provisions. (footnotes omitted)[21]

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[20] [1998] HCA 28 .
[21] At paragraphs 69 to 70.

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63. Section 12 of the SD Act is in Part 2 which addresses the certification of plans. The preceding sections set out the responsibilities of councils in relation to plans submitted for certification, referrals of plans, alterations and amendments. Section 12(1), (1A) and (1B) set out requirements as to which easements are to be shown on plans and when they are required to describe their

purpose and the land they are intended to benefit. Those requirements do not apply to those rights and easements referred to in section 12(2)(i), (ii) and (iii).

64. One of the purposes of the SD Act is to regulate the management of and dealings with common property.[22] Part 5 deals with subdivisions with owners corporations. Division 2 deals with common property. As discussed in greater detail below, as a consequence of the SD Act and the *Subdivision (Body Corporate) Regulations 2001* (Vic) (SD Regulations), the purpose of the statutory powers given to bodies corporate include the repair and maintenance of the common property, the management and administration of the common property and the making and enforcement of rules. As all lot owners have an interest in the common property, the collective interest of those owners is an important consideration in how an owners corporation undertakes those purposes. The same may be said of the owners corporations responsibilities under the OC Act.

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[22] Section 1(b).

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65. Returning to section 12 itself, I am not satisfied that Mr Kakos has demonstrated that it is necessary in the sense that it is *essential to the reasonable use and enjoyment* of his lot that he be entitled to attach fixings to common property to support shade sails over his terrace.

66. I have given weight to the fact that no protective structure of this kind was included in the building design or plan. That is despite the following. The Palladio is 23 levels high and, other than the car parking levels, each lot has a balcony or terrace. It is located close to the related buildings and others. It is inevitable that the effect of wind and rain would from time to time disburse items from one balcony to another and to the terraces. Those items may come from the Palladio itself or other buildings.

67. Whether or not rule 2.6 is valid, I accept that the underlying intention of the rule is reflected in recent requests directed to lot owners and occupiers to be careful with cigarette butts and other debris. That evidence shows that there is an alternative way to manage the problem: other lot owners and occupiers can take care in the manner in which they use their balconies.

68. When considering the balancing task set by section 12(2) in this case it is necessary to determine whether Mr Kakos' claimed right or easement to provide protection to the terrace part of his lot is consistent with the reasonable use and enjoyment of the other lots and the common property. The latter part of the test is directed at the other lot owners who are the beneficial owners of the common property and who also have rights and easements over the common property used for the fixing points.

69. I am not persuaded that the use of common property to create what is effectively a roof like structure over the terrace is consistent with the interests of the other lot owners. If Mr Kakos is correct then he and all other lot owners have an implied right to make use of common property to install whatever protective structure they think necessary. I am not satisfied that section 12 intended that the implied right or easement extended to supporting changes or use of common property of this kind without any need to seek consent from the relevant owners corporation

which owns the common property. The installation of shade sails or like structures goes well beyond relying on walls and balconies for shelter in the way discussed in the Bosco Johnson report.

70. For the reasons given above, I cannot find that section 12 of the SD Act may be relied on by Mr Kakos.

Right to decorate and attach fixtures or chattels

71. Section 132 of the OC Act says:

> (1) If a boundary of a lot is shown on a plan of subdivision as being the interior face of the building, the lot owner has the right to decorate or attach fixtures or chattels to that face.
>
> (2) This section permits works such as curtaining, painting, wallpapering and installing floor coverings, light fittings and other chattels.

72. Mr Kakos contended that he could rely on section 132 in relation to the installation of the shade sails at fixing points 1, 2, 3 and 6 and the clothesline. Mr Zervas' submission emphasised that the section was not confined to decorative items but also allowed for the attaching of fixtures or chattels. He contended that the list in section 132(2) is not exhaustive and is a guide only.

73. Mr Zervas referred me to Member Rowland's decision in *Owners Corporation PS508732B v Fisher*.[23] That case concerned a dispute about liability for repairs to a leaking boundary. The starting point was that the lot owner owned the tiles on the balcony and the balcony structure was part of the common property. The question was who owned the waterproof membrane in between and that turned on what was the interior face of the common property balcony. Member Rowland decided that the relevant interior face was the upper face of the concrete structure and not the tile placed on the concrete. Member Rowland stated she was supported in reaching that view by section 132 . After setting out the words of the section, Member Rowland said it gave the lot owner the right to fix *'anything'* to the interior face of the lot.[24] Accordingly, Mr Zervas contended that Mr Kakos was entitled to attach the shade sails to the face of the relevant structures where they form the boundaries of his lot. As discussed above, the relevant faces are on the blue beam and the balcony face (see paragraph 20). He commented that section 132 must allow for more than affixing to the external face and some penetration into common property given items such as light fittings and curtains cannot be attached only to the face.

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[23] [2014] VCAT 1358 .
[24] Paragraph 22.

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74. Ms Wilde for the applicants contended that section 132 contemplated decorative works and so the words *'decorate'* and *'attach'* were coloured by that concept. Ms Wilde referred me to His Honour Justice Bell's decision in *Shearman v Owners Corporation No 1 417405Y* ,[25] in which the court found that the installation of windows which involved both the interior and exterior face of the building extended beyond decorative work to include structural work. Ms Wilde contended that I should accept evidence given by a registered building surveyor as to the risk the shade sails posed to the

building structure given they would be subject to wind loads. Ms Wilde accepted that the attaching of items such as light fittings and curtains will require some penetration beyond the face of a surface but suggested that the internal placement of those surfaces and items within the lot might be relevant.

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[25] [2016] VSC 551 .

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75. There was no suggestion that the word *'interior'* in section 132(1) precluded decorating or attaching fixtures or chattels to the face of the terrace boundaries which are not common property.

76. I note that in *Fisher* Member Rowland was not required to make findings about how section 132 ought to be properly interpreted. I understand Member Rowland's comments to be directed to illustrating why the tiles in issue fell within the lot boundaries. Her comments about being able to fix anything were predicated on items being fixed to the interior face and did not raise whether an item went beyond the face.

77. I do not consider it necessary for me to express a view about the impact of wind loads on the fixing points and so the common property structure. That is because the evidence was that the fixings protruded into the common property structures. As discussed earlier, the shade sails are attached by eyelets to ring bolts which were in turn attached to the wall or blue beam. The ring bolts are attached to the wall by being screwed into either an anchor or other device located *within* the relevant structures. I am satisfied that the method by which the shade sails are attached to the common property exceeds what could be considered to be decoration or attaching *to* an interior face even if the section allows for some degree of penetration.

78. I find that section 132 cannot be relied on by Mr Kakos.

79. I will now turn to the alleged rule breaches.

The rules in issue

80. Leaving aside the rules referred to in the breach notices but not pressed at the hearing,[26] the applicants allege that Mr Kakos breached rules 4.1, 21.3, 24, 26 and 27. I will discuss each individually in due course but summarise them as follows:

- Rule 4.1 concerns damage to common property;
- Rule 21.3 concerns the installation of awnings;
- Rule 24 concerns clothes drying, the appearance of lots and the construction or erection of sheds, enclosures or structures on a lot;
- Rule 26 deals with compliance with laws, in this case the law concerning building permits; and

- Rule 27 deals with requirements for building works within or about or relating to a lot.

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[26] Rules 1.1 (support and provision of services) and 9.1(compensation to body corporate).

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81. As the rules applied after the OC Act commenced, I have used interchangeably the terms *'lot owners'* and *'proprietors'* and *'owners corporations'* and *'body corporates'*.

82. Mr Kakos contended that the rules relied on by the applicants are invalid relying on the decision of Justice Riordan in *Owners Corporation PS 501391P v Balcombe*. [27]

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[27] [2016] VSC 384 .

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83. There was no dispute that rules were not lodged with the plan but that the rules for OC1 and OC5 were registered two months later, on 19 February 2002.[28] Relying on *Balcombe*,[29] the applicants contended that nothing turns on the timing of registration of the rules. Mr Kakos took no issue with that position.

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[28] The rules are at TB pages 119 to 127.
[29] At paragraph 132.

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84. The transitional provisions in clause 5 of Schedule 2 of the OC Act provide that rules of a body corporate in force immediately before the commencement of the OC Act are deemed to be rules of the relevant owners corporation under the OC Act to the extent that they are not inconsistent with that Act or regulations made under the OC Act. Clause 5 can only apply if the rules were validly made – that is if on 19 February 2002 they were valid under the SD Act and the SD Regulations. The OC Act came into force on 31 December 2007. [30]

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[30] *Balcombe* at paragraphs 143 to 144.

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85. In *Balcombe*, Riordan J set out a three step approach to determine the validity of a rule. First, it is necessary to determine the relevant purpose of the statutory power, then to characterise the rule

and finally to make an assessment of whether there is a sufficiently direct and substantial connection between the relevant statutory purpose and the rule.

86. The purposes of the SD Act include regulating the management of and dealings with common property and the constitution and operation of bodies corporate.[31] The regulation of these matters is dealt with in the SD Regulations applicable at the time.[32]

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[31] SD Act, section 1.

[32] SR No 28/2001 – version as at 17 April 2001.

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87. SD Regulation 201 said that a body corporate had the following functions:

> (a) to repair and maintain—
>
> (i) the common property;
>
> (ii) the chattels, fixtures, fittings and services related to the common property or its enjoyment;
>
> (iii) the equipment and services for which an easement exists for the benefit of the land affected by the body corporate;
>
> (b) to manage and administer the common property;
>
> . . .
>
> (e) to take any action necessary or desirable to ensure that these Regulations and the rules of the body corporate are complied with;
>
> (f) to carry out any other functions conferred on the body corporate by the Act, these Regulations or any other law.

88. Regulation 202 said a body corporate has all the powers that are necessary to enable it to perform its functions including powers conferred by the Regulations or the rules.

89. Regulation 219 stated that the rules set out in Form 1 to the SD Act, being the *'Standard Rules'*, applied to all bodies corporate.

90. Regulation 220 provided that, by special resolution, the body corporate could make rules in addition to the Standard Rules and could also amend or revoke any of those Rules.

91. Regulation 207 said the body corporate must keep the common property in a state of good and serviceable repair.

92. Regulation 208 deal with repair and maintenance of lots. It provided that:

> · If a member has

- refused or failed to carry out repairs, maintenance or other works to the member's lot that are required because the outward appearance or outward state of repair of the lot is adversely affected; or

- the use and enjoyment of the lots or common property by other members is adversely affected;

the body corporate may serve a notice on the member requiring the member to carry out the necessary repairs, maintenance or other works;

- If a member has been served with a notice, the required repairs, maintenance or other works must be completed within 28 days of the service of the notice; and

- If a member has not complied with the notice within the required time, the body corporate may carry out the necessary repairs, maintenance or other works to the lot.

93. Regulation 209 gave a body corporate power to recover costs of repairs, maintenance or other works from those lot owners who benefit more from those works. Regulation 210 authorised entry onto a lot to carry out repairs, maintenance or other works. Regulation 211 required seven days written notice of intention to enter to be given.

94. Regulation 501 said that a member must properly maintain the lot in a state of good and serviceable repair.

95. Regulation 502 said that a member must not use or neglect the common property or permit it to be used, or neglected in a manner that is likely to cause damage or deterioration to the common property.

96. Riordan J found that there was nothing in the legislative framework for bodies corporate that indicated their functions included regulating the conduct of lot owners, specifically, by lot owners being required to have reasonable regard for the interests of other persons.[33]

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[33] Paragraph 110.

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97. Relevant to this dispute, I find the purpose of the statutory power given to bodies corporate was to:

- Repair and maintain the common property;

- Manage and administer the common property;

- Compel repairs when a lot owner's actions have adversely impacted on the outward appearance of the lot; and

- Make and enforce rules.

Rule 4.1

98. Rule 4.1 says a lot owner shall not mark, paint or the like, or otherwise damage or deface, any structure that forms part of the common property *'with the approval in writing'* from the owners corporation.

99. The phrase *'with the approval in writing from the owners corporation'* was not the subject of discussion at the hearing but it strikes me as either a case of inelegant drafting or a typographical error. It was agreed that OC1 and OC5 had at no time given approval for the installation of the shade sails and clothesline and the hearing proceeded on the basis that the applicants contended that Mr Kakos' actions amounted to damaging the common property. That approach makes grammatical sense and is consistent with the way similar concepts are discussed in other parts of the rules. Accordingly, I have proceeded on the basis that the rule contains a clear typographical error and the word *'with'* should read *'without'*.

100. I find that the character of the rule is a rule directed towards ensuring that the structures of the common property are maintained in good repair and not damaged and in doing so the rule protects the interests of all members of OC1 and OC5.

101. I am satisfied that the rule has a substantial connection with the purpose of maintaining and managing the common property. Accordingly, the rule is valid.

102. Mr Kakos contended that rule 4.1 was concerned with wilful damage and graffiti type activities and that it does not apply here. I do not accept that is a fair reading of the rule. While it does cover activities of the kind described by Mr Kakos, I consider the breadth of the phrase *'or otherwise damage or deface, any structure'* indicates that the rule contemplates activities which went beyond marking the face of the common property but which cause some form of damage to a structure. If the rule was concerned only with paint, marks or graffiti on the outward face it could have been so confined.

103. Having regard to the evidence about the manner in which the shade sails have been fixed to the common property, I am satisfied that there has been a breach of rule 4.1. To install a fixing or bolt not just *to* but *into* the concrete common property wall using a drill amounts to damage of the kind covered by rule 4.1.

104. While the fixings used to attach the clothesline did not appear likely to protrude as far into the common property wall, for the same reasons as expressed above, I am satisfied that its installation has caused damage to that wall and so is in breach of rule 4.1.

Rules 21.3, 24.1 and 24.2

105. Rule 21.3 says that a lot owner must not install or permit the installation of any awnings other than as permitted by the owners corporation. The word *'awnings'* is not defined in the rules however Mr Kakos did not take issue with it applying to the shade sails.

106. The heading to rule 21 is *'Signs, Blinds and Awnings'*. Rule 21.1 prohibits the affixing of a sign or notice to any part of the common property or a lot where it can be seen from any exterior position, except as required by law. Rule 21.2 prohibits the installation of window coverings other than those specified. Rule 21.4 prohibits the erection of any sale or lease boards on common property or on a lot. Rule 21.5 allows for the erection of business related signs for retail lots.

107. Reading rule 21.3 in context it would appear it is concerned with items being affixed to the building which affect the building's appearance. The rule makes no express reference to prohibiting attaching awnings to common property.

108. Rule 24.1 says a lot owner must not hang or permit to be hung any clothes or other articles on any balconies, landing, stairway or any other part of the common property or on any part of the exterior of the lot so as to be visible from outside the lot.

109. Rule 24.2 says a lot owner must not construct or erect any shed, enclosure or structure of any nature or description on a balcony, terrace or garden area forming part of the lot without the prior written consent of the owners corporation.

110. I am satisfied rules 21.3, 24.1 and 24.2 are all directed towards the appearance of the building and include prohibitions on how a lot may be used where the use is visible from outside the lot. The prohibitions are not confined to dealings with common property.

111. The character of these rules are all concerned with the outward appearance of the building and indicate a desire to ensure uniformity and consistency. Rules such as these clearly have the capacity to infringe on individual lot owner's use of their own lots and so it may well be the case that aspects of the rules are invalid. An example might be if the rule was relied on to prohibit lot owners or occupiers from placing a clothes drying rack on a balcony.

112. Given the shade sails and clothesline are both fixed to common property, the intrusion into the manner in which Mr Kakos uses his lot applies only to the extent that parts of the shade sails and the clothes line are in the airspace within Mr Kakos' lot.

113. Having regard to Regulation 208, I am satisfied that there is a substantial connection between the body corporate's power to compel repairs, maintenance and other works because the outward appearance of the lot is adversely affected and rules directed towards the look of a lot and its uniformity as compared with other lots and common property.

114. As discussed earlier, only Mr Kakos' terrace on level 4 has shade sails. While I understand that some lots in the Palladio have umbrellas, none have an awning or other like structure. The consequence is that Mr Kakos' terrace has a significantly different outward appearance. The two shade sails cover a significant amount of the area of the terrace. They are sand coloured while the building structure is grey coloured with what seem to be tinted glass on the balconies.

115. In his witness statement Mr Kakos referred to other items attached to common property including a trellis structure attached to a balcony wall and gym equipment attached to another balcony wall. During the site inspection I was shown shade sails which have been installed over a terrace in the Sant'Elia building. There was no evidence or other material to demonstrate whether those items (and bollards in driving spaces in the car space) had been installed with the consent of the relevant owners corporation. As a result, the examples did not assist me to determine whether Mr Kakos' shade sails adversely affected the outward appearance of the building.

116. Mr Kakos contended that, as the shade sails cannot be seen from ground level, they do not affect the outward appearance of the building. In his closing submissions for Mr Kakos, Mr Zervas contended that when considering what amounts to the external appearance, guidance should be

taken from the approach taken in planning cases – that is using sight lines from the street. He was unable to direct me to any authority about that approach being suitable in OC Act matters.

117. While I accept that the shade sails cannot be seen from street level, they are visible from neighbouring terraces and balconies above and around Mr Kakos' lot. The proceeding arose because someone from a building opposite to the Palladio sent photos of the shade sails to the applicants. Given the location of the Palladio amongst a number of apartment buildings in Docklands, I consider that the appearance of the building includes what can be seen from neighbouring buildings.

118. I am satisfied that rule 21.3 is valid to the extent that it seeks to regulate use of lots when that use adversely affects the outward appearance of the building.

119. I find that, where Mr Kakos' shade sails are the only ones installed on level 4 of the Palladio, they detract from the uniformity of the outward appearance of that part of the building. Their colour is inconsistent with the colours of the external faces of the building.

120. I find that the shade sails are an awning under rule 21.3 or a *'structure of any nature'* under rule 24.2 and that they were installed without the required approval. Accordingly Mr Kakos is in breach of rules 21.3 and 24.2.

121. The clothesline is not visible from the street and is largely shielded from view by structural walls. It is, however, visible from above. While I am not necessarily satisfied that the clothesline breaches rule 24.1 (assuming without finding that part of the rule is valid), I am satisfied that it too is a *'structure of any nature'* installed in breach of rule 24.2.

Rule 26

122. Rule 26.1 says a lot owner must, at his or her own expense, promptly comply with all laws relating to the lot including, without limitation, any requirement, notices and orders of any government authority.

123. As I understand it, the applicants said that Mr Kakos required a building permit to install the shade sails and so is in breach of rule 26. Mr Kakos contended that no such permit was required.

124. A rule or part of it will be valid if it is concerned only with matters that either go directly to the use of common property or the external appearance of the relevant lot. If the rule seeks to regulate the use of a lot in the way discussed in *Balcombe*, it might be invalid.

125. The question is whether on the evidence it is apparent that Mr Kakos has acted in a manner which might amount to a breach. No notice or order of any government authority was produced. The only way rule 26 might arise is if the applicants are correct to assert a building permit was required.

126. The applicants relied on the evidence of Mr Alan Lorenzini, registered building surveyor. Mr Lorenzini prepared reports dated 18 March 2017 and 1 April 2017.[34] There was no dispute that a building permit is required for building works in connection with the construction, demolition or removal of a building but that there are exceptions for particular types of work. At the hearing, Mr Lorenzini's evidence was that he believed a building permit was required because the installation of the shade sails did not fall within any of the relevant exceptions, because it altered

the building and, importantly, because the sails would add to the wind load of the existing building structure and so that structure might be adversely affected. He gave evidence that, in order to assess the need for a permit, details of the fixings would be required to be provided to the original engineer who would then consider the impact of the shade sails on the wind load.

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[34] Exhibits A1 and A2.

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127. Mr Kakos relied on evidence from a building consultant, Mr Alan Sherrard and Mr Steven Dempsey, a building surveyor who is employed by the City of Melbourne in its Building Control Group. Both Mr Sherrard and Mr Dempsey expressed the view that no building permit was necessary.

128. In her closing submissions, Ms Wilde for the applicants was critical of a report prepared by Mr Sherrard which did not comply with the Tribunal's practice note for expert reports and she also contended that he was not sufficiently qualified to express an opinion on the question. She noted that Mr Dempsey conceded that he is not a registered building surveyor nor qualified or eligible to issue building permits under the *Building Act 1993* (Vic) (Building Act).

129. The witnesses all made detailed reference to the content of Practice Note 2016-32 issued by the Victorian Building Authority. I was not referred to any provisions of the Building Act or provided with examples of permits issued for like structures. At times the witnesses were questioned in great detail about the correct reading of the practice note and the meaning of certain words and phrases. I found most of that evidence and the reliance on the practice note unhelpful because it is, by its nature, a guide only.

130. I gave most weight to the opinion of Mr Lorenzini but even he was unable to state absolutely that a permit was required. In the course of his report dated 18 March 2017 he explained that he believed that the shade sails added to the wind load and it would need to be shown that they did not adversely affect the structural soundness of the building. In that report and in his oral evidence he referred to the need to have information from an engineer about wind loads and any resulting impact on the building structure in order to address that possible exemption. While in the report he seemed to presume that there would be an impact on the building structure, there was no evidence before me from an engineer to demonstrate that to be correct.

131. Even assuming that rule 26 is valid, I cannot find on the evidence that a building permit was required for the installation of the shade sails.

Rules 27.2, 27.3 and 27.4

132. Rules 27.2, 27.3 and 27.4 all concern undertaking building works within or about a lot. The rules impose requirements on lot owners in relation to such works, the approvals they must have and processes that are to be followed.

133. For completeness I note that rule 27.1 says that the content of rule 27 does not apply to ongoing construction or rectification work at the Palladio and the other two buildings. I am satisfied that it does not create or impose obligations on lot owners and so can be put to one side.

134. The parts of the rules relied on by the applicants say:

> 27.2 A Proprietor of a residential lot must not undertake any building works within or about or relating to a lot except in accordance with the following requirements:
>
> (a) such building works may only be undertaken after all requisite permits, approvals and consent under all relevant laws have been obtained and copies given to the Manager, and then strictly in accordance with those permit approvals and consents and any conditions thereof; and
>
> 27.3 The proprietor of a residential lot must not proceed with any such works until the Proprietor:
>
> (a) submits to the body corporate plans and specifications of any works proposed by the Proprietor which affects the external appearance of the Building or any of the common property, or which affect the Building structure or services or the fire or acoustic ratings of any component of the Building;
>
> (b) supplies to the body corporate such further particulars of those proposed works as the body corporate may request, and as shall be reasonable to enable the body corporate to be reasonably satisfied that those proposed works accord with the reasonable aesthetic and orderly development of the Building, do not endanger the Building and are compatible with the overall services to the Building and the individual floors;
>
> (c) receives written approval for those works from the body corporate, such approval not to be unreasonably or capriciously withheld but which may be given subject to the condition that the reasonable costs of the body corporate (which cost may include the costs of a building practitioner engaged by the body corporate to consider such plans and specifications) by the Proprietor and such approval shall not be effective until such costs have been paid; and
>
> (d) pays such reasonable costs to the body corporate.
>
> 27.4 The Proprietor of a residential lot must ensure that the Proprietor and the Proprietor's servants agents and contractors undertaking such works comply with the proper and reasonable directions of the body corporate concerning the method of building operations, means of access, use of the common property, on-site management and building protection and hours of work (and the main Building entrance and lobby must not be used for the purposes of taking building materials or building workmen to and from the relevant lot unless the body corporate gives written consent to do so) and that such servants agents and contractors are supervised in the carrying out of such works so as to minimise any damage to or dirtying of the common property and the services therein.
>
> 27.8 The Proprietor of a lot shall immediately make good all damage to, and dirtying of, the Building, the common property, the services thereof or any fixtures fittings and finishes which are caused by such works and if the Proprietor fails to immediately do so the body corporate may in its absolute discretion (or if the Proprietor fails to do so within a reasonable period of time)

must make good the damage and dirtying and in that event the Proprietor shall indemnify and keep indemnified the body corporate against any costs or liabilities incurred by the body corporate in so making good the damage or dirtying.

135. For the reasons given above in the context of rule 26, I am not satisfied a building permit was required for the installation of the shade sails and so, even assuming it was valid, no breach of rule 27.2(a) has been proven.

136. Mr Zervas contended that the whole of rule 27 was subject to the precondition that the works required by law either a permit, approval and/or consent and so, if none of those were required, the rule could be disregarded. He drew my attention to the fact that the term *'building works'* is not defined and different terminology is used throughout the rule. I understood him to contend that rule 27.2(a) must be read as in effect defining the building works which are the subject of the rule.

137. I do not accept those propositions.

138. There are no words in the rule which make that plain and the rule can be read in such a way that a range of building works are covered. The opening words to rule 27.2 refer to *'any building works within or about or relating to a lot'*. Rule 27.2(a) describes requirements directed towards obtaining and providing the manager with '*any requisite*' permits, approvals or consents. The opening words of rule 27.3 refer to *'such works'*. Mr Zervas contends that the phrase *'such works'* must refer back to the works described only in 27.2(a). I disagree and consider that they refer to the words in the opening of 27.2 and that 27.2(a) simply describes a category of works which fall within the broad opening words *'any building works within or about or relating to a lot'*.

139. I am satisfied that the rule as drafted provides for the following:

- Rule 27.2 creates a blanket prohibition on any works being undertaken unless required permits, approvals and/or consents have been obtained, copies of those have been provided to the manager and they are then complied with in full;

- Rule 27.3 says that no building works may *'proceed'* until the owners corporation is supplied with plans and specifications of any works which affect the external appearance or the common property or a structure or services or the fire or acoustic ratings of any component of the building, together with particulars of the kind described in 27.3(b) as required, and the written approval for those works has been given;

- Rules 27.4 to 27.5 describe how the works are to be undertaken including in respect of the timing of work, the use of common property, any potential damage to the building, cleanliness, storage of materials, parking of construction vehicles on common property;

- Rule 27.6 requires appropriate insurance to be held and for a copy of the relevant certificate to be delivered to the owners corporation;

- Rule 27.7 says that access to other lots or common property is prohibited unless the relevant lot owner or the owners corporation has provided consent; and

- Rule 27.8 requires the lot owner undertaking works to make good any damage or dirtying of the building and provides for the owners corporation to do so and claim costs from the lot owner.

140. In my view the rule read in its entirety is intended to cover the various stages of works from planning to completion and is directed at ensuring that the common property and, where relevant, other lots are not adversely impacted or damaged in the process. What is clear is that the owners corporation wishes to be informed about any works which may impact on common property in particular and for those works not to proceed unless the owners corporation has consented. Small works such as the replacement of water damaged carpet in a lot would not need a permit, approval or consent of the kind envisaged by rule 27.2(a) but it could lead to mess or interference with access if the tradespeople used a lobby area to store the old carpet and other tools. It would seem to me incorrect to conclude that rules 27.4, 27.5 and/or 27.8 could not be relied on by the owners corporation in those circumstances.

141. There was no evidence that there had been any act in breach of rules 27.4 or 27.8 and so their validity or otherwise requires no consideration. That leaves rule 27.3.

142. I find that the character of the rule is one directed towards ensuring that any works undertaken by a lot owner are consistent with the interests of the owners corporation particularly in respect of the integrity of the structures of the common property and the interest in ensuring it is not damaged.

143. I am satisfied that the rule has a substantial connection with the purpose of maintaining and managing the common property. Accordingly, the rule is valid.

144. I am satisfied that, by failing to both provide details of the intended works and obtain the consent of the owners corporation to the installation of both the shade sails and the clothesline to the common property, Mr Kakos breached rule 27.3.

Summary of breaches

145. For the reasons given, I am satisfied that Mr Kakos has breached rules 4.1, 21.3, 24.2 and 27.3.

146. I will now turn to the orders to be made under section 165 of the OC Act.

The Tribunal's powers

147. Section 165 of the OC Act says the Tribunal may make any order it considers fair, including orders that a party do or refrain from doing something, orders that a party comply with the OC Act or the rules of the owners corporation and/or orders in relation to damaged or destroyed buildings or improvements. The Tribunal may also make declarations as to the meaning of rules. Section 124 of the VCAT Act empowers the Tribunal to make a declaration concerning any matter in a proceeding instead of any orders it could make, or in addition to any orders it makes in the proceeding.

148. Accordingly, it is not automatic that a finding of breaches of rules will lead to particular orders being made – the Tribunal has a wide discretion under both the OC Act and the VCAT Act when

deciding what orders are appropriate. It is clear that the fairness or otherwise of proposed orders is to be taken into account. The Tribunal may apply flexibility in making an order to achieve a fair remedy where a cause of action has been made out.

149. In summary, the applicants seek the following:

- A declaration that Mr Kakos has breached the rules;
- An order that Mr Kakos comply with the rules by removing the shade sails and clothes line, rectifying damage and allowing for inspection; and
- A declaration that Mr Kakos must not perform any works in future affecting the common property without complying with and obtaining all necessary prior consent and approvals required under the rules.

150. The applicants also applied for orders for reimbursement of the application fee and hearing fees and legal costs. The parties agreed that matters relating to fees and costs ought to be dealt with after I have given my substantive decision and so I have not considered those proposed orders further.

The parties' contentions

The applicants' contentions

151. The applicants contended that there is no factor which indicates that orders other than those sought are fair and appropriate. The applicants rely on evidence about information given by the applicants' manager before Mr Kakos purchased the lot.

152. On 25 March 2015, Mr Kakos sent an email to the manager. He explained he was a prospective purchaser of unit 414. He said before committing whether or not to buy, he *'would be grateful if I could have some preliminary indication from the Committee'*. Mr Kakos asked a series of questions about both internal and external improvements he would wish to make. The questions are set out below followed by the answers supplied by the manager two days later (in italics):[35]

> The EXTERNAL improvements I am considering are:
>
> 1) Adding an artificial lawn covering over most of the tiled courtyard. *This was not previously approved when requested by another owner.*
>
> 2) Doing some landscaping by adding trees, small garden lights and a small water feature. *Would need approval as this can affect the drainage and below ground. Also, any reports requested by the Committee would be at your expenses (sic) but at Committee's choice of contractor.*
>
> 3) A gas BBQ and gas heater or heaters (either fixed to an external wall or stand alone). *Gas barbeque would be acceptable. Other items may not get approval. It would need to be considered that this is a high wind area and any items would need to be secured.*
>
> 4) A small wooden pergola with a wooden base (so it does not damage the tiles and so it is heavy enough not to be blown away by the wind) and outdoor furniture. *Not possible – changing the Appearance (sic) of the Lot.*

5) If a pergola is not possible, then a shade sail to protect from the sun (as the terrace is currently totally exposed). *Not possible, again as it changes the Appearance (sic) of the Lot.*

6) If these are not possible, then a garden umbrella (again with heavy weights so it does not get blown away by the wind). *Maybe if it is removed when not in use – dangerous during high winds but would need Committee approval.*

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[35] TB, pages 246 to 249.

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153. Mr Kakos' email went on to say:

> I only ask these questions because outdoor living is important for me, hence my interest in this property with a large terrace, so I don't waste my time and your time if none of these suggestions are possible. Internally, the unit is otherwise fine; however, the external improvements are more important for me, so this will largely form the basis of my purchasing decision.
>
> As someone who has served on numerous Committees and Incorporated Associations myself, I understand that there are rules and procedures that need to be adhered to and followed. This is the reason why I do not wish to make any plans without going through the appropriate channels.

154. The covering email sent by the manager in response attached documents including the building works rules and said this:

> We have had some responses which may be detrimental to your needs.
>
> Please note the responses below in red.
>
> Please also note that changing the appearance of then lot is a very serious consideration and if approved by the Committee, would need a Special Resolution whereby 75% of all owners approve the changes. This would also be at your cost to be carried out and being such a large development, would be cost prohibitive.
>
> Obtaining approvals can take some time as Committee Members work for the Owners Corporation on a voluntary basis and have their own careers.
>
> Hope this helps you make your decision.

155. There was no dispute that the enquiries were made in relation to a lot different to that ultimately purchased by Mr Kakos but the answers still applied to his lot because the terrace was of the same kind. There was also no dispute that the reference to the requirement for a special resolution was not accurate or correct.

156. Mr Kakos was asked whether it would have been prudent to check the legal boundaries of his lot. He said that he knew the blue beam was part of OC5 and believed other areas were within OC4.

Mr Kakos' contentions

157. Mr Kakos' witness statement confirmed the above email exchange took place. He stated that he asked the manager if he could attend a meeting to explain what he was seeking and was told no. He stated that he asked about the special resolution requirement referred to in the email and said the manager referred him to section 52 of the OC Act. Mr Kakos stated that he looked at the section and thought it did not apply to his situation. When he called back and raised this with the manager, he was told that she knew what she was talking about. He then said this:

> In any event, as this was the only impediment she identified, I felt confident that Section 132 [of the OC Act] was clear and unambiguous in giving lot owners the right to attach fixtures to the interior surfaces of their lot, and any rules that limited those rights would be most likely invalid under Section 140 of the Act.[36]

[36] Paragraph 9.

158. Mr Kakos also gave evidence that he contacted the local council about whether a planning or building permit would be required and was told no on both fronts. He stated that he looked at the Victorian Building Authority practice note discussed earlier.[37]

[37] Paragraphs 17 to 18.

159. In cross-examination, Mr Kakos agreed that he did not seek independent professional advice about the lot boundaries or the installation of the shade sails and clothesline from a lawyer although he did speak about it with friends who were lawyers. Mr Kakos confirmed that he was aware of rules 21.3, 24.1, 24.2 and 27.2 before buying the lot. Mr Kakos also gave evidence that he spoke to the builder about whether a building permit would be needed for the installation of the shade sails. The builder said that would not be necessary because it was such a small job.

160. As I understood it, Mr Kakos said in cross-examination that he received advice about the location of the common property and lot boundaries in a phone call with Mr Nicholson. He then agreed that, while he made contact with Mr Nicholson and attended an appointment to discuss the location of his lot boundaries, that was not done until around March 2016, some three to four months after the shade sails had been installed.

161. Mr Zervas, for Mr Kakos, contended that I ought not to require the shade sails or clothes line to be removed. The written submissions noted that at least one of the shade sails fixing points is located under the level 5 balcony and is not readily visible outside the lot. Similarly, as discussed above, the clothes line is only visible from above. Mr Kakos submitted that, as there was no evidence called of complaints by other lot owners or occupiers or showing either item adversely affected other lot owners or occupiers, I should infer that no such evidence exists.

162. Mr Zervas contended that the fixings into the common property were no different to the fixings other lot owners or occupiers had used to install bollards in the car park and that, as they had been allowed, Mr Kakos should be treated in the same way.

163. Based on Mr Sherrard's evidence, Mr Zervas argued that the cost associated with making good the damage would be no more than around $500. I understood this to suggest that the damage was so minimal it did not warrant the making of an order for removal and rectification.

164. Another argument seemed to be that the plan of subdivision and the precise location of the lot boundaries and common property were extremely difficult to understand and so Mr Kakos ought to be excused for making an error. That argument arose through questions about the complexity of the plan being put to Mr Nicholson and Mr Lorenzini.

Discussion and orders

165. I am satisfied that it is fair and appropriate to make orders that Mr Kakos remove both the shade sails and the clothesline and undertake rectification works to the satisfaction of the applicants.

166. Even if I accept that, after receiving the email responses set out above, Mr Kakos read the OC Act and formed his own view about the operation of sections 52 and 132, he still took a significant risk in proceeding. While he may have sought planning advice from the council he did not seek specific legal or other advice about the lot boundaries, the meaning of the rules relied on by the applicants taking into account the actual location of the intended fixing points. Given Mr Kakos declared himself to be an experienced member of OC and Incorporated Association committees, he more than most, ought to have been aware that disputes can arise even when one believes they have the law on their side. Even if he believed his legal position was strong he was on clear notice that the OC manager and at least one member of the OC committee had a different view. Instead of seeking advice he decided to proceed.

167. It is not only the fact that Mr Kakos decided to proceed that leads to my decision to make the orders sought by the applicants. If Mr Kakos is allowed to retain the shade sails and clothesline, it will be near impossible for the applicants to resist other lot owners' requests to install items on and about the common property in a way that affects the outward appearance of the building. Some might see such a decision as permission to proceed on like projects without seeking the applicants' consent. That would not be fair to the applicants and other lot owners who have, to date, complied with the law. I make that comment mindful that I have been unable to determine on the evidence whether certain other fixtures have been installed consistent with the rules.

168. Mr Zervas asked that, when making my decision I give individual consideration to whether one or more of the fixings for the shade sails could remain. Given the reasons set out above, I did not consider it appropriate to do so. Although parts of the shade sails inhabit some of the airspace which falls within Mr Kakos' lot, that does not justify them remaining in place where the fixing points and much of the cloth have been found to be within CP4 or CP5.

169. I will make orders in the terms sought by the applicants on the basis that I consider them to be fair in the circumstances of this case.

Costs applications

170. Both parties indicated they wished to seek costs. In those circumstances, I have made orders for any application for costs to be made and for a response to be provided. Any such costs application will then be listed for hearing before me. The application should only concern liability for costs because, if an order for costs was made, it would provide for assessment by the Costs Court.

A Dea
Senior Member