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

Not Restricted

S CI 2017 01795

OWNERS CORPORATION RP 3454 Plaintiff

v

BELINDA AINLEY Defendant

JUDGE:	Derham AsJ
WHERE HELD:	Melbourne
DATE OF HEARING:	2 November 2017
DATE OF JUDGMENT:	21 December 2017
CASE MAY BE CITED AS:	Owners Corporation RP 3454 v Ainley
MEDIUM NEUTRAL CITATION:	[2017] VSC 790

ADMINISTRATIVE LAW – Application for leave to appeal to Supreme Court from the Victorian Civil and Administrative Tribunal ('VCAT') – Hearing of application for leave and the appeal, if leave granted, at the same time – Validity of rules preventing construction of a second storey on owner's lot without the consent of the members of the Owners Corporation – Whether a rule prohibiting construction of a second storey on owner's lot a prohibition of a matter to be regulated – Application for leave granted and appeal dismissed – *Owners Corporation PS 501391P v Balcombe* [2016] VSC 384 applied and followed.

STATUTORY INTERPRETATION – Owners Corporation's power under *Owners Corporation Act 2006,* s 138 – Determination of the validity of subordinate rules made by Owners' Corporation.

APPEARANCES:	Counsel	Solicitors
For the Plaintiff	Mr M Y Bearman with Mr D R Diaz	Mr R Warren
For the Defendant	Mr N Jones	Clements & Co

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HIS HONOUR:

Introduction

1 This matter concerns the powers of an Owners Corporation under the *Owners Corporation Act 2006 ('OC Act')* to make rules preventing an owner of a lot in the subdivision from constructing a second storey on that owner's lot without the consent of the members of the Owners Corporation ('OC'). The Victorian Civil and Administrative Tribunal ('VCAT' or 'Tribunal') decided that such a rule was invalid because it was beyond the power of the OC under the *OC Act*.[1]

2 The plaintiff, an OC, seeks leave to appeal and, if leave is granted, to appeal the *VCAT Decision* on two questions of law pursuant to section 148(1)(b) of *the Victorian Civil and Administrative Tribunal Act 1998* ('*VCAT Act*'). The two question of law proposed are:[2]

> 1. Was Special Rule 2 made by the appellant within the power conferred on it by section 138 of, and items 5.2 and 6 of Schedule 1 to, *the Owners Corporations Act 2006?*
>
> 2. Are the *Planning and Environment Act 1987* and *Building Act 1993* exclusive sources of regulation as to whether a building is permitted to be built on private property to the exclusion of any operation of those provisions of *Owners Corporations Act 2006* (Vic)?

3 For the reasons that follow, the application for leave to appeal should be granted, but the appeals must be dismissed.

Background

4 The plaintiff was incorporated in 1973 under the *Strata Titles Act 1967* in respect of 47 Abbott Street, Sandringham, Victoria pursuant to Registered Plan RP3454 ('the subdivision'). The *Strata Titles Act 1967* was repealed following the enactment of the *Subdivision Act 1988* ('*Subdivision Act*'). In turn, those parts of the *Subdivision Act* dealing with what were then known as 'bodies corporate', were repealed and

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1 *Owners Corporation RP3454 v Ainley (Owners Corporations)* [2017] VCAT 470 (Member L Rowland) ('*VCAT Decision*').

2 Exhibit EJW-4 'Draft Notice of Appeal', Affidavit of Elisha Jane Warren, filed 22 May 2017.

replaced by the *OC Act*. The transitional arrangements regarding the *Subdivision Act* are set out in sch 2 of that Act and provide for, among other things, a deeming of 'subdivision bodies corporate' (defined to mean 'bodies corporate'), to be an 'owners corporation' within the meaning of the *OC Act*. The plaintiff is therefore now an OC within the meaning of the *OC Act* and is governed by the *OC Act*.

5 The subdivision is at 47 Abbott Street Sandringham, Victoria, a suburb of Melbourne. It consists of six attached villa units (lots 1 to 6) and six accessory car park units. The lots are attached in a single-storey brick residential building with gabled roof. Each lot has a private backyard. The common property is predominantly a pedestrian walkway and a driveway giving access to the car park lots.

6 The defendant purchased lot 1 in the subdivision in June 2014.[3] Lot 1 has two bedrooms and is at the front of the subdivision nearest to Abbott Street. It has its own driveway and relatively large front yard, as well as an accessory car park lot at the rear of the property. Access to the lot is via a pedestrian walkway on common property on the eastern side of the property. The lot shares a party wall with lot 2 to the north.[4] The party wall is 'double skin brick hard rendered'.[5] The lower boundary of lot 1 terminates at ground level and the upper boundary is 20 feet (6.096 metres) above the lower boundary.[6]

7 In March 2015, the defendant advised other lot owners that she intended to build a second-storey extension on her lot and provided them with proposed plans.[7] The other lot owners were strongly against the proposal. The defendant applied to Bayside City Council for a planning permit to allow her to construct a second-storey on her lot and notice of that application was given to the plaintiff. The five other lot owners in the subdivision objected. The Bayside City Council refused the

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3 *VCAT Decision* [2017] VCAT 470 [1].
4 Statement of Belinda Ainley [3].
5 Report of RI Brown Pty Ltd, 2 February 2017, p.3, Joint Court Book 77.
6 Statement of Elisha Jane Warren, Annexure 'A'.
7 *VCAT Decision* [2017] VCAT 470 [2].

application.[8] The defendant then appealed to the Planning Division of the Tribunal. The other five owners, represented by counsel, opposed the defendant's application to the Tribunal. The hearing was held on 29 April 2016.[9] On 18 August 2016, the Tribunal set aside the decision of the Council refusing to grant the planning permit and directed the issue of a permit for the proposed second storey development, subject to conditions.[10] It is noteworthy that the date of hearing of the application was 29 April 2016, before lodgement of the special rule, referred to below, on 27 July 2016.

8 On 7 July 2015, the plaintiff passed special rules which had the effect of prohibiting a lot owner from building a second storey on their lot without the consent of the plaintiff. Special rule 2 provides:[11]

> No member shall:
>
> a. construct a second story on their unit
>
> b. alter the external façade of their unit, including windows and entrance porches from the existing cream colour and brickwork
>
> c. erect any structure or appurtenance on the exterior of their unit,
>
> without the consent of members as required by the Act.

9 A copy of RP 3454's rules ('the Rules') including 'special rule 2' was lodged with Victorian Land Registry, as required under s 142 of the Act, on 27 July 2016.[12]

10 On 8 August 2016, the plaintiff issued proceedings in the Tribunal. By its amended points of claim, it sought orders, amongst other things, that the defendant comply with special rule 2.[13] The plaintiff sought orders to restrain her from building a second storey on her lot.

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8 Ibid [3].
9 *VCAT Decision* [2017] VCAT 470 [2]–[3].
10 *Peter Wright & Associates Pty Ltd v Bayside CC* [2016] VCAT 1389 (Senior Member Ian Potts).
11 Affidavit of Elisha Jane Warren, filed 22 May 2017, Exhibit EJW-2 'Applicant's Rules'.
12 Ibid. The *VCAT Decision* [2017] VCAT 470 refers to the passing of the special resolution adopting the new rules as occurring on 13 July 2015. Under the *Owners Corporations Act 2006 (Vic),* ss 142(4)-(5), the earliest the rule could have come in to effect is 27 July 2016
13 Affidavit of Elisha Jane Warren of 22 May 2017, ('*Warren Affidavit*') Exhibit EJW-1, 6 [A]; Joint Court Book 35, 40.

11 On 19 December 2016, the defendant filed amended points of defence in the proceedings below. Amongst other things, the defendant contended that special rule 2 was invalid.[14]

12 The plaintiff's application in VCAT was heard on 21 March 2017 and Member L Rowland made orders supported by reasons on 18 April 2017. She found that special rule 2 was ultra vires, in that it was beyond the power of the plaintiff under the Act.[15]

Owners Corporation Act provisions

13 Section 4 of the *OC Act* sets out the functions of an owners corporation as follows:

> **4 Functions of owners corporation**
>
> An owners corporation has the following functions—
>
> (a) to manage and administer the common property;
>
> (b) to repair and maintain—
>
> (i) the common property;
>
> (ii) the chattels, fixtures, fittings and services related to the common property or its enjoyment;
>
> (iii) equipment and services for which an easement or right exists for the benefit of the land affected by the owners corporation or which are otherwise for the benefit of all or some of the land affected by the owners corporation;
>
> (c) to take out, maintain and pay premiums on insurance required or permitted by any Act or by Part 3 and any other insurance the owners corporation considers appropriate;
>
> (d) to keep an owners corporation register;
>
> (e) to provide an owners corporation certificate in accordance with Division 3 of Part 9 when requested;
>
> (f) to carry out any other functions conferred on the owners corporation by—
>
> (i) this Act or the regulations under this Act; or

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14 Warren Affidavit, Exhibit EJW-1; Joint Court Book, 41.

15 *VCAT Decision* [2017] VCAT 470 [21].

(ii) the *Subdivision Act 1988* or the regulations under that Act;

(iii) any other law; or

(iv) the rules of the owners corporation.

14 Section 6 of the *OC Act* sets out the powers of an owners corporation as follows:

> **6 Powers of owners corporation**
>
> An owners corporation has—
>
> (a) all the powers conferred on the owners corporation by—
>
> (i) this Act or the regulations; or
>
> (ii) the *Subdivision Act 1988* or the regulations under that Act; or
>
> (iii) any other law; or
>
> (iv) the rules of the owners corporation; and
>
> (b) all other powers that are necessary to enable it to perform its functions.

15 Part 7 of the *OC Act* deals with the duties and rights of lot owners and occupiers and s 128 of that part provides that a 'lot owner must comply with this Act, the regulations under this Act and the rules of the owners corporation.' A 'lot' has the same meaning as it has in the *Subdivision Act*. In that Act a lot is defined to mean-

> a part (consisting of one or more pieces) of any land (except a road, reserve or common property) shown on a plan which can be disposed of separately and includes a lot or accessory lot on a registered plan of strata subdivision and a lot or accessory lot on a registered cluster plan.[16]

16 Part 7 includes a number of provisions regulating the duties and rights of lot owners and occupiers, including requiring a lot owner to maintain in a state of good and serviceable repair any part of the lot which affects the *outward appearance* of the lot or the *use or enjoyment of other lots* or the common property (s 129(a)), if a boundary of a lot is shown on a plan of subdivision as being the interior face of the building, entitling lot owners to decorate or attach fixtures or chattels to interior face (such as curtaining, painting, wallpapering and installing floor coverings, light fittings and other chattels) (s 132) and, significantly, requiring lot owners to give notice to the OC

16 *Subdivision Act* s 3(1).

of any application for a building permit or planning permit or the certification of a plan of subdivision affecting the lot (s 133). This provision clearly facilitates the OC as a person affected by such an application objecting to the grant of a planning or building permit under the relevant legislation. It gives it no other rights, and no other provision of the *OC Act* confers any rights that cut across the rights and obligations or duties under that legislation.

17 Part 8 of the *OC Act* is entitled 'Rules of the Owners Corporation'. Section 138 in that Part provides:

> **138 Power to make rules**
>
> (1) By special resolution, an owners corporation may make rules for or with respect to any matter set out in Schedule 1.
>
> (2) By special resolution, an owners corporation may amend or revoke any rules made under subsection (1).
>
> (3) A rule must be for the purpose of the control, management, administration, use or enjoyment of the common property or of a lot.
>
> **Note**
>
> Rules may be made on the registration of the relevant plan under Part 5 of the **Subdivision Act 1988**. See section 27E.

18 There are thus three requirements for a valid rule to be made. First, the rule must be made by a special resolution of the OC in accordance with s 96 of the Act. Second, the rule must have a sufficient connection with a matter set out in sch 1, that is, the rule must be 'for' or 'with respect to' such a matter. Third, the rule must be for the purpose of the control, management, administration, use or enjoyment of the common property or of a lot.

19 Section 139 deals with the model rules. It provides that the regulations may prescribe model rules 'in relation to a matter in respect of which rules can be made'.[17] If an OC does not make any rules or revokes all of its rules then the model rules apply to it.[18] Similarly, if the model rules provide for a matter and the rules of the OC do not,

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17 *OC Act* s 139(1).

18 *OC Act* s 139(2).

the model rules relating to that matter are deemed to be included in the rules.[19] There is no dispute in this case that the model rules prescribed are the rules of the OC.

20 Section 140 of the *OC Act* provides that rules, even if validly made in accordance with s 138, are of no effect in certain circumstances:

> **140 Rules to be of no effect if inconsistent with law**
>
> A rule of an owners corporation is of no effect if it—
>
> (a) unfairly discriminates against a lot owner or an occupier of a lot; or
>
> (b) is inconsistent with or limits a right or avoids an obligation under—
>
> (i) this Act; or
>
> (ii) the Subdivision Act 1988; or
>
> (iii) the regulations under this Act; or
>
> (iv) the regulations under the Subdivision Act 1988; or
>
> (v) any other Act or regulation.

21 Section 141 of the *OC Act* deals with who is bound by the rules:

> **141 Who is bound by the rules?**
>
> The rules of an owners corporation are binding on—
>
> (a) the owners corporation;
>
> (b) the lot owners;
>
> (c) any lessee or sub-lessee of a lot;
>
> (d) any occupier of a lot.

22 The matters set out in sch 1 'for or with respect to' which an owners corporation may make rules cover health safety and security (cl 1), committees and sub-committees (cl 2), management and administration (cl 3), use of common property (cl 4), lots (cl 5), design (cl 6), behaviour of persons (cl 7), dispute resolution (cl 8), notices and documents (cl 9) and common seal (cl 10). Clauses 5 and 6 are relied on in this case and provide:

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19 *OC Act* s 139(3).

5 Lots

5.1 Change of use of lots.

5.2 External appearance of lots.

5.3 Requiring notice to the owners corporation of renovations to lots.

5.4 Times within which work on lots can be carried out.

6 Design

Design, construction and landscaping.

23 The Tribunal is given jurisdiction by s 162 (1)(b) of the *OC Act* to hear and determine disputes or other matters arising under the *OC Act* or the regulations or the rules of an OC that affect an OC ('an OC dispute') including a dispute or matter relating to an alleged breach by a lot owner or an occupier of a lot of an obligation imposed on that person by the *OC Act* or the regulations or the rules of the OC. This is the jurisdiction exercised by the Tribunal in this case. The Tribunal's powers in determining an OC dispute extend to making any order it considers fair including an order requiring a party to do or refrain from doing something, an order requiring a party to comply with the *OC Act* or the regulations or the rules of the owners corporation and an order declaring the meaning of a rule of and OC.[20]

24 The authority of the OC to make rules is a form of delegated rule making power. In *Owners Corporation PS 501391P v Balcombe,*[21] Riordan J considered the power of an OC to make a rule prohibiting short-term letting of apartments. He found that under the *Subdivision Act,* the *OC Act* and the regulations made under those Acts, Parliament did not demonstrate an intention to confer such extensive powers on OCs. In the course of so deciding his Honour identified that:

(a) the 'fundamental question is whether the rule is within the scope of what the Parliament intended when enacting the statute which empowers the subordinate authority to make certain laws';[22]

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20 *OC Act,* s 165(1)(a), (b), (f)(ii).

21 [2016] VSC 384 ('*Balcombe'*).

22 *Balcombe* [2016] VSC 384 [84] citing *Minister for Resources v Dover Fisheries Pty Ltd* (1993) 43 FCR 565, 577 (Gummow J) (citation omitted); approved in *A-G (SA) v Adelaide City Corporation* (2013) 249 CLR

(b) it is not sufficient to conclude that a rule is valid because, on the face of the impugned regulation, there appears to be a connection with the statutory purpose;[23]

(c) it is also not sufficient for a court conclude that a rule is invalid because 'the court itself thinks the regulation inexpedient or misguided'.[24]

25 Riordan J then set out the proper approach to the determination of the validity of subordinate legislation, as follows:[25]

(a) First, it is necessary to determine the statutory object to be served by,[26] and the 'true nature and purpose'[27] ('the Statutory Purpose') of, the power to make regulations.[28] The relevant inquiry as to the Statutory Purpose of the power is considered by reference to the scope, object and subject matter of the empowering Act.[29]

(b) Secondly, it is necessary to characterise the impugned regulation by reference to the circumstances in which it applies, in particular its operation and effect.[30] The evidence of the circumstances in which the regulation will operate will enable the court to form a view about the nature and apparent purpose of the regulation;[31] and the existence and dimensions of the actual or threatened mischief sought to be addressed by the impugned regulation.[32]

(c) Thirdly, 'once armed with knowledge of these facts',[33] the court then makes its own assessment of:

(i) whether the connection between the likely operation of the regulation and the Statutory Purpose of the power is sufficiently direct and substantial; or

(ii) whether the regulation could not reasonably have been

1, 57 [118] (Hayne J);

23 Ibid citing *Williams v Melbourne Corporation* (1933) 49 CLR 142, 155 (Dixon J).

24 Ibid citing *South Australia v Tanner* (1989) 166 CLR 161, 168 (Wilson, Dawson, Toohey and Gaudron JJ).

25 *Balcombe* [2016] VSC 384 [85]–[88].

26 *A-G (SA) v Adelaide City Corporation* (2013) 249 CLR 1, 59 [122] (Hayne J); *South Australia v Tanner* (1989) 166 CLR 161, 175-176, 178-179 (Brennan J).

27 *Williams v Melbourne Corporation* (1933) 49 CLR 142, 155 (Dixon J).

28 Ibid adopted in *South Australia v Tanner* (1989) 166 CLR 161, 164 (Wilson, Dawson, Toohey and Gaudron JJ).

29 *A-G (SA) v Adelaide City Corporation* (2013) 249 CLR 1, 29 [38] (French CJ); *Water Conservation and Irrigation Commission (NSW) v Browning* (1947) 74 CLR 492, 505 (Dixon J).

30 *A-G (SA) v Adelaide City Corporation* (2013) 249 CLR 1, 59 [122] (Hayne J); *South Australia v Tanner* (1989) 166 CLR 161, 178 (Brennan J).

31 *Williams v Melbourne Corporation* (1933) 49 CLR 142, 156 (Dixon J).

32 *South Australia v Tanner* (1989) 166 CLR 161, 165 (Wilson, Dawson, Toohey and Gaudron JJ).

33 Ibid (Wilson, Dawson, Toohey and Gaudron JJ).

> adopted as a means of attaining the Statutory Purpose, in which case it will be so lacking in reasonable proportionality as not to be a real exercise of the power.[34]
>
> In the latter case the regulation will be invalid, not because it is inexpedient or misguided, but because it is not a real exercise of the power.[35]
>
> If it is determined that there is a sufficiently direct and substantial connection, '[n]o further inquiry into the proportionality of the by-law is permitted or required'.[36] There is no separate question of whether the court considers that the power is disproportionate or so unreasonable that it should interfere. It is not for the court to substitute its judgment for that of the legislator;[37] or to ask whether, in the court's opinion, the by-law is a reasonable and proportionate response to the mischief to which it is directed.[38] The question is whether the by-law is authorised by the relevant Act;[39] and not whether the court should hold the regulation to be invalid because it appears to the court to be an 'unreasonable provision'.[40]
>
> The question of whether there is sufficient connection between the Statutory Purpose and the impugned regulation necessarily involves questions of degree and judgment.[41] However, the validity of the impugned regulation is a question of law and the appellate court must determine for itself the sufficiency of the connection.[42]
>
> Having stated the principles in the abstract, it is apparent that each case will be determined by reference to its own facts relating to the Statutory Purpose of the empowering Act, the provisions of the impugned regulation and the evidence of the circumstances surrounding the making of the regulation and its operation.

26 Riordan J undertook an extensive examination of the history of the legislation culminating in the *OC Act*, including comparing the legislation with comparable legislation in New South Wales, and considering a range of decisions on the scope of the powers of OCs to make rules, and summarised his conclusions as follows:[43]

> The main question in this appeal is whether owners corporations …have the power to make a rule prohibiting short-term letting of apartments. I have

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34 *Williams v Melbourne Corporation* (1933) 49 CLR 142, 155 (Dixon J); *South Australia v Tanner* (1989) 166 CLR 161, 168 (Wilson, Dawson, Toohey and Gaudron JJ).

35 *Williams v Melbourne Corporation* (1933) 49 CLR 142, 155 (Dixon J).

36 *A-G (SA) v Adelaide City Corporation* (2013) 249 CLR 1, 59 [123] (Hayne J).

37 *South Australia v Tanner* (1989) 166 CLR 161, 168 (Wilson, Dawson, Toohey and Gaudron JJ).

38 *A-G (SA)) v Adelaide City Corporation* (2013) 249 CLR 1, 59 [123] (Hayne J).

39 Ibid.

40 *Clements v Ball* (1953) 88 CLR 572, 581 (Fullagar J) approved in *A-G (SA) v Adelaide City Corporation* (2013) 249 CLR 1, 57 [117] (Hayne J).

41 *A-G (SA) v Adelaide City Corporation* (2013) 249 CLR 1, 57 [118] (Hayne J).

42 *South Australia v Tanner* (1989) 166 CLR 161, 181 (Brennan J).

43 *Balcombe* [2016] VSC 384 [1].

found that, under both the *Subdivision Act* …, the *Owners Corporations Act* …and the regulations made under those Acts, Parliament did not demonstrate an intention to confer such extensive powers on owners corporations principally for the following reasons:

(a) A review of the development of strata title legislation indicates the principal role of the body corporate or owners corporation was to manage and administer the common property of a strata subdivision.

(b) The relevant legislation does not disclose any intention for owners corporations to have power to substantially interfere with lot owners' proprietary rights; or for owners corporations to effectively have an unappellable right to overrule uses permitted under planning legislation.

(c) A parliamentary intention to provide to owners corporations powers that could substantially inhibit the conduct of lot owners on their own lot would need to be expressed in clear and unambiguous language.

VCAT Decision

27 In her reasons for decision, Member Rowland adopted the three-step approach to determine the validity of special rule 2 set out in the quotation from the judgment of Riordan J in *Balcombe*[44] set out above.[45]

28 In relation to the statutory purpose of the power to make rules, the learned Member identified that:[46]

(a) the main purposes of the *OC Act* is 'to provide for the management, powers and functions of owners corporations' to enable it to manage and administer the common property;

(b) the *OC Act* confers upon owners corporations wide powers in relation to common property and limited powers in relation to private lots. This is not surprising, because the owners corporation owns the common property and the lots are privately owned property.

29 In relation to the character of special rule 2, Member Rowland said it was to preserve the entire external appearance of the lots by preventing any alteration or addition to

44 *Balcombe* [2016] VSC 384.
45 *VCAT Decision* [2017] VCAT 470 [10].
46 Ibid [11].

the buildings on the private lots without a majority of the lot owners agreeing to the works.[47]

30 In relation to the powers to make rules 'for or with respect to' the 'external appearance of lots' (sch 1 cl 5.2) and 'design, construction and landscaping' (sch 1 cl 6), the learned Member said that, in her opinion, the external appearance power and the design power conferred upon the OC to make rules affecting private lots does not extend to making a rule to arbitrarily determine whether or not a lot owner is permitted to build or alter any structure within their lot.[48]

31 The learned Member then reasoned as follows:[49]

> 15. The power to determine whether a building is permitted to be built on private property is governed by the *Planning and Environment Act 1987* and the *Building Act 1993*.
>
> 16. The process to obtain a planning permit involves submission of detailed plans in accordance with the local planning scheme, notification to affected land owners, a right of objection, community consultation and a determination by local council. There is a right of review to the Tribunal and an appeal from the Tribunal, to the Supreme Court of Victoria on a question of law.
>
> 17. The owner must then obtain a building permit. The building permit process gives affected neighbours an opportunity to object to protection works and an appeal lies to the Building Appeals Board.
>
> 18. The process to obtain both a planning permit and a building permit is a comprehensive process which allows objectors a say and a right of review and appeal. The *Planning and Environment Act 1987* and the *Building Act 1993* and case law relating to both those Acts and Regulations make up a huge body of law. It is inconceivable that the owners corporation, by vote of the lot owners, or by decision of the voluntary committee, whose main function is to administer and maintain common property, could have the power to veto an otherwise legal building proposal, based on less than ten words in Schedule 1 of the OC Act.
>
> 19 In my view, the external appearance power gives the owners corporation a power to make rules with respect to the aesthetic look of the lot, including but not limited to, colour and conformity of appearance to other lots and common property. The power does not extend to what can be built, or how it must be built, but is confined to

47 Ibid [13].
48 *VCAT Decision* [2017] VCAT 470 [14].
49 Ibid [18]–[21].

regulating the appearance of what is built or to be built.

20 The design, construction and landscaping power enables an owners corporation to prescribe the design and landscaping outcomes for a lot. The construction power does not give an owners corporation the power to make rules to say how or what can be constructed. That power lies with the planning and building authorities. The construction power may give an owners corporation the power to prescribe the type of building materials which may be used. However, it is not an unfettered power. The rule must be for the control, management, administration, use or enjoyment of common property or of a lot.[50]

21 Rules 2(a) and (c) are ultra vires. They are made beyond power because the owners corporation does not have the power to determine what may or may not be built on private lots. Rule 2(b) may have been valid if it extended only to the front facade of the development. Instead, the rule applies to the whole of the unit by referring to the external facade. Because the rule attempts to control the entire external facade of the unit, and thereby prevent any extension or alteration to the buildings on the lots without the consent of the owners corporation, it too, is made beyond power. The special rule goes beyond both what parliament intended owners corporations can regulate and also goes further than the purposes set out in section 138 of the OC Act.

Submissions

Plaintiff

32 The plaintiff accepted that the three step approach adopted by Riordan J in *Balcombe*[51] is appropriate to determining the validity of delegated legislation in this case. The Tribunal set out that approach, but then misapplied it by putting a gloss on the statutory purpose. In particular, the Tribunal said that one of the main purposes of the *OC Act* is 'to provide for the management, powers and functions of owners corporations' *to enable it to manage and administer the common property.*[52] It is true that one of the main purposes set out in s 1(a) of the *OC Act* is as quoted, but the gloss is that the stated purpose is *to enable it to manage and administer the common property*. The purpose as stated is not so confined.

33 The Tribunal then stated that '[t]he *OC Act* confers upon owners corporations wide

50 *OC Act* s 138.
51 *Balcombe* [2016] VSC 384 [85].
52 *VCAT Decision* [2017] VCAT 470 [11].

powers in relation to common property and limited powers in relation to private lots'.[53] That also involves a putting a gloss on the legislation. The matters set out in sch 1 'for or with respect to' which the OC may make rules clearly apply in some cases to the common property only (cls 3, 4, 7.1), others to lots (cl 5) and in some cases to both common property and to lots (cls 1,7.2).

34 The Tribunal erred by failing to have regard to the ordinary and natural meaning of the words of s 138 and sch 1 of the *OC Act*. The Tribunal seems to have approached the construction of those words by reference to their brevity in contradistinction to the huge body of law pertaining to the *Planning and Environment Act 1987* ('*Planning Act*') and the *Building Act 1993* ('*Building Act*'). That is not an approach to statutory construction authorised by authority.[54]

35 The plaintiff contended that when parliament provided in s 138 of the *OC Act* that a rule made by an OC 'must be for the purpose of the control, management, administration, use or enjoyment of the common property or of a lot', it plainly contemplated that provided the governing words are complied with, the rule could concern the lot, even though it is private property.

36 Special rule 2 concerns the 'external appearance', 'the design' and construction of lots in the subdivision, and has purposes concerning the 'control … use or enjoyment of .. a lot'. The plaintiff was expressly empowered to make it within the ordinary and natural meaning[55] of those words in s 138 and sch 1 of the *OC Act*. There can be no question, as a matter of construction, that the external appearance of the lot includes the building of another storey on a lot. The special rule does no more than require a lot owner who wishes to change the external appearance of their lot by adding a second storey, or in any other way as described in special rule 2, to seek the consent of members, meaning the OC. The rule does not contain any prohibition or statement that causes a refusal of such an application. The rule does

53 Ibid.

54 *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 [69] (McHugh, Gummow, Kirby and Hayne JJ); *Colonial Ranges Pty Ltd v CES Queen (Vic) Pty Ltd* [2016] VSCA 328 [47].

55 Ibid.

not say that no external appearance of any lot shall ever be changed. That would be invalid. What it does is govern the way in which external appearance of lots may change from time to time.

37 That being so, special rule 2 would be invalid only if s 140 of the *OC Act* rendered it 'of no effect'; that is, if special rule 2 was inconsistent with or limited a right or avoided an obligation under an Act or regulation within the meaning of s 140(b)(v). Apart from referring to the 'comprehensive process' provided for by the *Planning Act* and the *Building Act* and the regulations under them, the Tribunal did not identify any specific inconsistency between that process, or those Acts and regulations, and special rule 2. To the extent that the Tribunal considered special rule 2 to be inconsistent or to limit a right under the planning permit in the present case, that was in error because the permit is neither an Act nor a regulation as required by s 140(b)(v).

38 Section 140 of the *OC Act* plainly does not invalidate special rule 2 merely because of the actual or potential refusal of consent by members of the owners corporation to the construction of a second-storey for which a planning permit was granted. Contrary to the Tribunal's approach, a planning permit does not grant absolute and indefeasible rights to construction but is a necessary permission; it renders legal what would otherwise be illegal under the *Planning Act*.[56] That is not inconsistent with members' consent also being a necessary permission.

39 To the extent that the Tribunal considered special rule 2 to be inconsistent with the *Planning Act* or the *Building Act*, or the purposes and operation of those Acts, that was in error because those Acts had different purposes to the *OC Act*, and rules made in accordance with s 138 of the *OC Act*. A reason for the very existence of owners corporations is 'to provide some means of ensuring that people who are living close to each other have reasonable regard for the interests of other people'.[57] The stated purpose of the *Planning Act* is to establish a framework for planning the

56 Sections 126, 127.

57 *Balcombe* [2016] VSC 384 [111(a)].

use, development and protection of land in Victoria in the present and long-term interests of all Victorians.[58] There is no inconsistency in requiring the owner of a lot in a subdivision to obtain both a planning permit under the *Planning Act*, and the consent of fellow lot owners under the OC's rules. The purposes are complementary, not inconsistent.

40 The purpose of the *Building Act* is to regulate building processes, including safety, standards and accreditation of building practitioners and plumbers.[59] Special rule 2 is not concerned with any of those matters. No inconsistency arises between special rule 2 and the *Building Act*.

41 It follows that s 140 of the *OC Act* does not apply to special rule 2. Being within power, special rule 2 takes effect in accordance with its terms. As such, special rule 2 has the force of s 128 of the *OC Act* and must be complied with by the defendant.

42 The plaintiff accepted that a statutory rule, made pursuant to a power to regulate a specific activity, which prohibited conduct covering the whole field of the delegated activity, will be invalid.[60] But it submitted that special rule 2 does not, in terms or effect, prohibit all matters delegated by s 138, cl 5.2 or cl 6 of sch 1. As Riordan J observed in *Balcombe,* a power to regulate an activity may include the power to prohibit aspects of that activity.[61]

43 In relation to the argument concerning interference with private property rights referred to by the defendant, the plaintiff submitted that there is no principle that a statute must be construed to limit or prevent interference with private property rights. Rather, it is a presumption in the interpretation of statutes that where a provision may be construed as either interfering with private property rights, or not,

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58 *Planning and Environment Act 1987* s 1.

59 *Building Act 1993* s 1.

60 *Swan Hill Corporation v Bradbury* (1937) 56 CLR 746, 762; *Balcombe* [2016] VSC 384 [125].

61 *Balcombe* [2016] VSC 384 [126] referring to *O'Connell v Nixon* (2007) 16 VR 440, 451 [42] (Nettle JA); *Attorney-General (SA) v Adelaide City Corporation,* (2013) 249 CLR 1 (French CJ, Hayne, Crennan, Kiefel and Bell JJ, Heydon J dissenting).

the latter construction is to be preferred.[62] The presumption has no relevance in this case since the *OC Act*[63] expressly provides for rules concerning private property in the subdivision. Further, nothing in s 138 requires it to be read down as inconsistent with ss 48, 52 or 129. Rather, s 140 of the *OC Act* renders an OC rule that is inconsistent with those provisions to be of no effect. There is no inconsistency between special rule 2 and those provisions, so s 140 is not engaged.

44 Nothing in s 138 of the *OC Act* prohibits an OC from exercising rule-making power in respect of a lot after its purchase or construction. A separate statutory regime existed setting the rules of an OC upon its creation (as a body corporate).[64] Any lot owner purchasing a lot thereafter will be on notice both of the extant rules at that time, and the ongoing rule-making power of the owners' corporation in issue, and is protected by the requirement for a special resolution of members for the power to be exercised. Moreover, contrary to the respondent's submission, the application of any OC rules are subject to review by the Tribunal: see ss 162, 165, 167.

Defendant

45 The defendant relied on the approach and reasoning of Riordan J in *Balcombe*.[65] In particular counsel adopted the three step approach and relied on the statement of statutory purpose identified, as follows:[66]

> To determine the Statutory Purpose of the *Owners Corporations Act 2006* (Vic), I have again had regard to the following:
>
> (a) The main purposes of the Act include 'to provide for the management of powers and functions of owners corporations'.[67] As noted above in paragraph [67], the Explanatory Memorandum stated that: 'The Bill provides greater duties, functions, powers and responsibilities for owners corporations to manage common property than are provided by the current *Subdivision (Body Corporate) Regulations 2001* (Vic).'
>
> (b) Section 4 of the Act sets out the functions of owners corporations

62 *R & R Fazzolari Pty Ltd v Parramatta City Council* (2009) 237 CLR 603, 619 [42]–[43].
63 Sections 138(3), 3(1)(definition of 'lot').
64 *Subdivision Act 1988* s 27E.
65 [2016] VSC 384.
66 *Balcombe* [2016] VSC 384 [175].
67 *OC Act 2006* s 1.

which are, for practical purposes relevantly the same as those set out under reg 201 of the *Subdivision (Body Corporate) Regulations 2001* (Vic) as summarised in paragraph [109(b)]. Section 6 provides for the powers of an owners corporation which, although less specific powers are set out, in substance provides an owners corporation with the powers which are necessary to enable it to perform its functions, just as reg 202 of the *Subdivision (Body Corporate) Regulations 2001* (Vic) previously did in respect of bodies corporate.

(c) The balance of Part 2 of the Act provides some powers to owners corporations with respect to the provision of services, the bringing of legal proceedings and the common property. Part 3 deals with financial and asset management together with insurance. Parts 4, 5 and 6 deal with governance and management of an owners corporation including the rules of an owners corporation.

(d) Section 138(1) gives an owners corporation the power to make rules for and with respect to the matters set out in Schedule 1. As set out in paragraph [72] above, Schedule 1 includes powers that relate to governance, organisation, management, administration, the use of common property and conduct matters.

46 In relation to the first question of law sought to be raised by the plaintiff (that special rule 2 was within power), the defendant submitted that:

(a) the rule is beyond the rule making power of the OC because it is an unlawful interference in lot owners' proprietary rights. Prior to the making of special rule 2 each lot owner in the subdivision had the power to carry out such building works on their lots as were allowed under relevant legislation including under the *Planning Act* and *Building Act.* Special rule 2 has removed this legal right. In this regard, the defendant relied on the analysis of Riordan J summarised in his decision in *Balcombe*[68] and quoted above (at [26]);

(b) on its face the purpose of special rule 2 appears to be to prohibit the subject matter of the rule without the consent of the members;

(c) there is not a sufficiently direct and substantial connection between the statutory purpose of the *OC Act* and the likely outcome of special rule 2;

68 [2016] VSC 384.

(d) the only part of sch 1 of the *OC Act* that is relevant in this case is cl 5.2 which allows a rule to be made for or with respect to the 'external appearance of lots;'

(e) special rule 2 does not seek to regulate the 'external appearance of lots.' Special rule 2 seeks to prohibit certain conduct. The prohibition of conduct within a lot is not within the statutory purpose;

(f) the power to make rules concerning the 'external appearance of lots' is limited to the care and maintenance of the external appearance of lots and does not extend to regulating building or changing the external appearance. The only power in relation to the external appearance of lots concerns their repair and maintenance;

(g) a consideration of the whole of the *OC Act* shows that there was no legislative intention to regulate building on lots other than to regulate the repair, maintenance and appearance of lots. In this respect s 48 (Lots not properly maintained), 52 (Significant alteration to common property requires special resolution) and 129 (Care of lots) are relevant;

(h) the legislative history of the *OC Act* as summarised in *Balcombe*[69] shows that the legislature did not intended to allow OCs to interfere with proprietary rights. This is consistent with the principle of statutory interpretation that 'a statutory power will not be interpreted as permitting interference with vested proprietary rights unless that intention is made manifest by express statement or necessary implication';[70]

(i) the making of a special rule such as special rule 2 after a lot owner has purchased their lot, will 'substantially interfere with lot owners' proprietary rights';[71]

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69 [2016] VSC 384.
70 *Balcombe* [2016] VSC 384 [162].
71 Referring to the statement in *Balcombe* [2016] VSC 384 [1(b)].

(j) the OC does not have power to make special rule 2 by reason of the design power contained in cl 6 of sch 1 of the *OC Act.* The Tribunal dealt with this issue appropriately (see [20] of the *VCAT Decision*[72] quoted above at [31]);

(k) the language used in clause 6 of sch 1 does not clearly and unambiguously express a parliamentary intention to allow an owners corporation to make rules after a lot owner has purchased a lot which has a building on it and which would prevent that lot owner from carrying out building works within the lot which otherwise are permissible at law.

47 The defendant also submitted that as a matter of construction of the power to make rules:

(a) the text of the relevant provision in its context, which includes the whole of the instrument, the existing state of the law and the legislative history supports the Tribunal's construction of s 138 and sch 1 of the *OC Act;*

(b) identification of the legislative purpose supports the Tribunal's construction of s 138 and sch 1 of the *OC Act;* and

(c) the Tribunal's construction of s 138 and sch 1 of the *OC Act* promotes the purpose of that Act. It is to be preferred to the construction put forward by the plaintiff which does not promote the purpose of the *OC Act*.

Leave to Appeal

48 The approach to the question whether or not leave should be granted under s 148(1) of the *VCAT Act* was set out comprehensively in the decision of the Court of Appeal in *Secretary to Department of Premier and Cabinet v Hulls*.[73] That approach was conveniently summarised by Warren CJ in *Myers v Medical Practitioners' Board of Victoria*.[74] That summary is as follows:[75]

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72 [2017] VCAT 470.
73 [1999] 3 VR 331.
74 (2007) 18 VR 48 [28].

(a) whether leave is granted or not must always depend upon the justice of the particular case;

(b) if leave is to be granted, the applicant must at least identify a question of law (as distinct from a question of fact) which is important to the substantive appeal's succeeding or failing;

(c) the applicant need not establish an error below – that is for the appeal itself. Rather, the applicant will be required to show that there is a real or significant argument to be put that error exists;

(d) although not essential, the applicant may identify a question of law that is of general or public importance. This will weigh in favour of granting leave;

(e) once a question of law has been identified which bears directly upon the relief which will be sought in the appeal, and once it has been shown that there is sufficient doubt attending that question to justify the grant of leave to appeal, leave will ordinarily be granted if the order below is a final order or final in its effect; and

(f) where the order sought to be appealed is an interim order, there may be reason bearing on the justice done to both parties for not granting leave to appeal, for example, where granting leave to appeal will result in an unnecessary interruption to the substantive proceedings.

49 There was no serious dispute that the questions of law raised by the plaintiff revealed a real or significant argument to be put that error exists in the decision of the Tribunal. The arguments advanced show, at the least, a significant argument that the special rule was within the power of the OC to make. It is appropriate therefore to grant leave to appeal under s 148(1) of the *VCAT Act*.

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[75] Footnotes omitted.

Appeal

50 Where the statutory right of appeal is restricted, as here, to a question of law, the Court is concerned with the legality of what the Tribunal has done and decided. In those circumstances, the appeal is not an appeal in the strict sense but is equivalent to a judicial review.[76]

51 The legislative policy underlying the restriction on the right of appeal is that VCAT decisions should not generally be disturbed where cases have been decided in that forum other than on questions of law and where there is something about the decision bearing upon the question of law which warrants a grant of leave to appeal.[77] It follows that '[t]his Court is not entitled to enter into the fact finding exercise which the legislature has deliberately entrusted to a specialist tribunal.'[78]

52 In considering applications of this nature, courts have been concerned to respect the role entrusted by the legislature to the particular tribunal and not, in effect, subvert this position by seeking out error. Courts conducting this form of review have been repeatedly enjoined by the High Court to avoid overly pernickety examination of the reasons.[79] The focus of attention is on the substance of the decision and whether it has addressed the 'real issue' presented by the contest between the parties.[80] This Court is not entitled to interfere with the Tribunal's decision unless it is satisfied that there was in fact a vitiating error of law.[81] Additionally, on appeal, this Court 'must recognise the forensic realities of the way in which the case was put to the Tribunal.

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76 *Roy Morgan Research v The Commissioner of Revenue* (2001) 207 CLR 72, 79 [15]; *Bulasa Pty Ltd v Baytown Properties Pty Ltd* [2003] VSC 248 [31].

77 *Versus (Aus) Pty Ltd v ANH Nominees Pty Ltd* [2015] VSC 515, referring to *Commissioner of State Revenue v Frost* (2011) 83 ATR 832, 834 [5], in turn, referring to *Secretary to the Department of Premier and Cabinet v Hulls* [1999] 3 VR 331, 335–6; *Myers v Medical Practitioners Board (Vic)* (2007) 18 VR 48 [28].

78 *Boucher v Dandenong Ranges Steiner School Inc* [2005] VSC 400 [15], referring to *Spurling v Development Underwriting (Vic) Pty Ltd* [1973] VR 1; *Whitehorse City Council v Golden Ridge Investments Pty Ltd* [2005] VSCA 198.

79 *Minister for Immigration and Ethnic Affairs v Guo* (1997) 191 CLR 559, 575, 597 cf *Minister for Immigration and Multicultural Affairs v Yusuf* (2001) 206 CLR 323, 348 [74]; *Roncevich v Repatriation Commission* (2005) 222 CLR 115, 136 [64] (Kirby J).

80 *Roncevich v Repatriation Commission* (2005) 222 CLR 115, 136 [64] (Kirby J).

81 *Vegas Nominees Pty Ltd v Werribee Sports & Community Club Inc* (Unreported, Supreme Court of Victoria, Ashley J, 21 December 1994), 13; Cited in *Versus (Aus) Pty Ltd v ANH Nominees Pty Ltd* [2015] VSC 515 [10].

It is these realities to which a tribunal must respond in its reasons.'[82]

Analysis

53 It is undoubtedly correct to say, as counsel for the plaintiff submitted, that the natural and ordinary meaning of the words of s 138 and sch 1 of the *OC Act* clearly do empower the OC to make rules for or with respect to the external appearance of lots or their design, construction and landscaping. However to leave the analysis there disregards the long established principles of statutory construction.

54 The fundamental object of statutory construction in every case is to ascertain the legislative intention. The rules of interpretation are no more than rules of common sense, designed to achieve this object.[83]

55 The discovery of the legislative intent, however, is an objective process ascertained by interpreting the statute.[84] That is, the objective intention of the legislation is revealed by its proper construction.[85] The reach and operation of the law is determined by reference to the language, purpose and scope of the law, viewed as a whole within its context, as well as by reference to considerations of consistency and fairness.[86] The plurality of the High Court in *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue* summarised the approach as follows:[87]

(a) the task of statutory construction must begin with a consideration of the text itself;[88]

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82 *The Gombac Group Pty Ltd v Vero Insurance Ltd & Ors* [2005] VSC 442 [59].

83 *Cooper Brookes (Wollongong) Pty Ltd v Federal Commissioner of Taxation* (1981) 147 CLR 297, 320 (Mason and Wilson JJ).

84 *Wenn v Attorney-General (Vic)* (1948) 77 CLR 84,122 (Dixon J); *Saeed v Minister for Immigration and Citizenship* (2010) 241 CLR 252 [31]; *Momcilovic v R* (2011) 245 CLR 1, 136 [327] (Hayne J) ('*Momcilovic*').

85 *Momcilovic* (2011) 245 CLR 1, 136 [327] (Hayne J).

86 *Momcilovic* (2011) 245 CLR 1, 133 [315] (Hayne J), referring to *Project Blue Skye Inc v Australian Broadcasting Authority* (1998) 194 CLR 355, 381-2 [69]-[70] ('*Project Blue Skye*').

87 (2009) 239 CLR 27; [2009] HCA 41, [47] (Hayne, Heydon, Crennan and Kiefel JJ).

88 *Roy Morgan Research Centre Pty Ltd v Commissioner of State Revenue (Vic)* (2001) 207 CLR 72; 77 [9] (Gaudron, Gummow, Hayne and Callinan JJ), 89 [46] (Kirby J); *Stevens v Kabushiki Kaisha Sony Computer Entertainment* (2005) 224 CLR 193; 206 [30] (Gleeson CJ, Gummow, Hayne and Heydon JJ), 240–241 [167]-[168] (Kirby J); *Carr v Western Australia* (2007) 232 CLR 138, 143[6]; (Gleeson CJ) ('*Carr*'); *Director of Public Prosecutions (Vic) v Le* (2007) 232 CLR 562; 586 [85] (Kirby and Crennan JJ); *Northern*

(b) historical considerations and extrinsic materials cannot be relied on to displace the clear meaning of the text;[89]

(c) the language which has actually been employed in the text of legislation is the surest guide to legislative intention;[90] and

(d) the meaning of the text may require consideration of the context, which includes the general purpose and policy of a provision,[91] in particular the mischief it is seeking to remedy.[92]

56 Section 35(a) of the *Interpretation of Legislation Act 1984* provides that in the interpretation of a provision of an Act or subordinate instrument, a construction that would promote the purpose or object underlying the Act or subordinate instrument (whether or not that purpose or object is expressly stated in the Act or subordinate instrument) shall be preferred to a construction that would not promote that purpose or object. Guidance is then given in s 35(b) regarding the documents to which consideration may be given, being any matter or document that is relevant, and including a number or specified documents. The requirement to look to the purpose or object of an Act is more than an instruction to adopt the traditional mischief or purpose rule in preference to the literal rule of construction. Section 35 requires no ambiguity or inconsistency in a statutory provision before a court is not only permitted, but required to have regard to purpose.[93]

57 There is in my opinion no doubt that the principal functions of an OC is to manage and administer the common property of the subdivision. This is evident from all of

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Territory v Collins (2008) 235 CLR 619; 642 [99] (Crennan J).

89 *Nominal Defendant v GLG Australia Pty Ltd* (2006) 228 CLR 529; 538 [22] (Gleeson CJ, Gummow, Hayne and Heydon JJ), 555–556 [82]-[84] (Kirby J). See also *Combet v Commonwealth* (2005) 224 CLR 494; 567 [135] (Gummow, Hayne, Callinan and Heydon JJ); *Northern Territory v Collins* (2008) 235 CLR 619; 642 [99] (Crennan J).

90 *Hilder v Dexter* [1902] AC 474, 477-478, Earl of Halsbury LC.

91 *Commissioner for Railways (NSW) v Agalianos* (1955) 92 CLR 390,397 (Dixon CJ) quoted with approval in *Project Blue Sky*(1998) 194 CLR 355, 381 [69] (McHugh, Gummow, Kirby and Hayne JJ).

92 *Re Heydon's Case* (1584) 3 Co Rep 7a, 7b [76 ER 637, 638].

93 *Mills v Meeking* (1990) 169 CLR 214, 235. See also Tracey J in *JJ Richards & Sons Pty Ltd v Fair Work Australia* [2012] FCAFC 53, [52] and the cases there cited.

the matters that are identified in the reasons of Riordan J in *Balcombe,*[94] as well as from a review of the provisions of the *OC Act* itself as set out above.

58 In relation to the analysis of the *OC Act* conducted by Riordan J in *Balcombe,*[95] the plaintiff observed that it was obiter dicta. This is no doubt correct, because, as the Judge stated, his finding that the rule made by the OC in that case was not validly made under the *Subdivision Act* was sufficient to resolve that appeal.[96] Nevertheless, the VCAT Member had decided the rule in dispute could not be made under the provisions of the *OC Act* and the correctness of that decision was fully argued by the parties before Riordan J and he considered it appropriate to give consideration to the issue.[97] The reasoning is compelling and I can find no reason to depart from it. Moreover, my own consideration of the *OC Act* reinforces his conclusions as expressed at the commencement of his reasons (quoted above at [26]).

59 Section 4,[98] which provides extensively for the functions of an OC, is entirely concerned with matters relating to the common property. The functions, and concomitant powers, of an OC in relation to the lots in the subdivision is mostly left to the rule making power. It is only in the rule making power given by s 138 of the *OC Act* that there is any reference to control, management, administration, use or enjoyment of a lot being the proper subject of an OC's functions and powers. Section 4 of the *OC Act,* and the history of the legislation reviewed by Riordan J,[99] points strongly to the scope, object and subject matter of the rule making power being principally in relation to the common property and matters relating to it.

60 The structure of the *OC Act* reinforces this focus by showing a demarcation between the rights and duties of lot owners, and occupiers, on the one hand[100] and the OC on

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94 [2016] VSC 384.
95 Ibid.
96 *Balcombe* [2016] VSC 384 [145].
97 Ibid [146].
98 *OC Act.*
99 *Balcombe* [2016] VSC 384.
100 In pt 7.

the other.[101] I have mentioned s 129,[102] which clearly casts upon a lot owner a duty to maintain in a state of good and serviceable repair any part of the lot 'that effects the outward appearance of the lot or the use or enjoyment of other lots or the common property'. That shows a clear distinction in the parliament's intention between matters of private property that are the concern of the lot owners and their occupiers, on the one hand, and matters of group or common concern to all lot owners and occupiers.

61 Similarly, section 133 of the *OC Act* casts a duty upon a lot owner to give notice to the OC of any application for a building permit or a planning permit or the certification of a plan of subdivision affecting the lot. This stops short of giving the OC any particular power under the *OC Act* in relation to that subject matter. What it clearly indicates is, in my opinion, that the rights of the OC in relation to such a matter are to be taken up under the appropriate legislation relating to the issue of planning and building permits, and the like. It might, in addition, enable an OC to enforce, in the processes and proceedings relating to the grant of planning and building permits, rules that are truly rules concerned with the external appearance of lots or their design construction and landscaping, if such rules were properly made under clauses 5 and 6 of sch 1 to the *OC Act*.

62 Other provisions of the *OC Act* also support the proposition that the principal function of an OC is to manage and administer the common property of the subdivision. First, s 48 of the *OC Act* empowers the OC to give notice to a lot owner to carry out necessary repairs, maintenance and other works where a lot owner has failed to do so, in circumstances where 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 lot owners is adversely affected. If the lot owner fails to do the work required, only then can the OC carry out the work and s 50 specifically permits the OC to authorise a person to enter a lot to do the work.

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101 Parts 2–6, 8–9.

102 [16] above.

63 Second, s 52 of the *OC Act* provides that an OC may not make a significant alteration to the appearance of common property except as provided in that provision. There is no provision of the *OC Act* which requires a lot owner to require any approval from the OC to alterations to a lot.

64 Counsel for the plaintiff contended the Tribunal had placed an unwarranted gloss upon the characterisation of the purposes of the *OC Act*, that is, where the Tribunal said:

> One of the main purposes of the *OC Act* is 'to provide for the management, powers and functions of owners corporations' to enable it to manage and administer the common property.[103]

65 This is, in my view, entirely a product of the analysis undertaken by Riordan J in *Balcombe*.[104] Immediately before this statement the Member refers to the three step approach set out in that decision and it is evident upon a reading of the *VCAT Decision*[105] as a whole that the gloss that she does inevitably put on the purposes of the *OC Act* is a product of the statement in *Balcombe*[106] that the principal role of the owners corporation was to manage and administer the common property of the subdivision. This is made evident by the next sentence in the *VCAT Decision* where it is said:

> The *OC Act* confers upon owners corporations wide powers in relation to common property and limited powers in relation to private lots. This is not surprising, because the owners corporation owns the common property and the lots are privately owned property.[107]

66 Read as whole, this statement of the statutory purpose is unexceptional.

67 What, then, is the characterisation of the impugned special rule 2? A rule which regulated, as distinct from prohibited, the external appearance of a lot on which it was proposed to build a second storey may fall within the rule making power of the OC. But, as Dixon J observed in *Williams v Melbourne Corporation:*

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103 *VCAT Decision* [2017] VCAT 470 [11].
104 [2016] VSC 384.
105 [2017] VCAT 470.
106 [2016] VSC 384.
107 [2017] VCAT 470 [11].

> To determine whether a bylaw is an exercise of a power, it is not always enough to ascertain the subject matter of the power and consider whether the bylaw appears on its face to relate to that subject. The true nature and purpose of the power must be determined, and it must often be necessary to examine the operation of the bylaw in the local circumstances to which it is intended to apply. Notwithstanding that *ex facie* there seemed a sufficient connection between the subject of the power and that of the bylaw, the true character of the bylaw may then appear to be such that it could not reasonably have been adopted as a means of attaining the ends of the power. In such a case the bylaw will be invalid, not because it is inexpedient or misguided, but because it is not a real exercise of the power. [108]

68 In this case, the subject matter of the powers is limited to making rules 'for or with respect to'[109] the external appearance of lots and their design, construction and landscaping, providing the rules are 'for the purpose of the control, management, administration, use or enjoyment of the common property or of a lot'.[110]

69 The subject matters of the external appearance of lots and their design, construction and landscaping are matters essentially of appearance to the outside world. This is reinforced by the contrasting power in sch 1, cl 5.3 which enables rules to be made requiring notice, and only notice, to the OC of renovations to lots. The question then arises, does the nature and purpose of the power extend to making a rule that prohibits actions in relation to a lot without consent of the members or the OC? And is a rule prohibiting the construction of a second storey on a lot a rule for or with respect to the appearance of a lot, or its design or construction?

70 Clearly, the words 'the control, management, administration, use or enjoyment …of a lot' must be given their natural and ordinary meaning, in the context of the *OC Act* as a whole. The Macquarie Dictionary[111] gives the following meanings to these nouns:

(a) 'control' means 'the act or power of controlling; regulation; administration or command';

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108 (1933) 49 CLR 142 at 155.
109 *OC Act* s 138(1).
110 *OC Act* s 138(3).
111 *Macquarie Dictionary*, 6th Ed.

(b) 'management' means 'the act or manner of managing; handling, direction or control';

(c) 'Administration' means 'the management or direction of any office or employment';

(d) 'Use' means 'the act of employing or using, or putting into service'; and

(e) 'Enjoyment' means 'the possession, use or occupancy of anything with satisfaction or pleasure'.

71 The dictionary meanings of the first three words clearly overlap. The word 'control' involves administration; 'management' involves control, and 'administration' involves management. The words 'use' and 'enjoyment' stand apart. Thus, the subject matter of any rules must concern, if put in abbreviated form, the management or use of the common property or the lots.

72 In the context of the *OC Act* as a whole and its principal purpose, and the subject matter described in the clauses of sch 1, the limitation of the rule making power to the purposes of 'control, management, administration, use or enjoyment' does not extend beyond regulation in a general sense. It does not extend to preventing, suppressing or prohibiting the thing or course of conduct subject to a discretionary power to dispense with that prohibition.[112] The rule making power does not explicitly authorise rules that extend to prohibiting matters within the field of power, although it is clear enough that as a matter of law, depending on the words of the rule making power and the statutory context, the power to regulate an activity may include the power to prohibit *aspects* of the activity particularly if subject to discretionary dispensation.[113]

73 Special rule 2 is not, however, of that character. Renovating a unit and adding a storey is not an 'aspect' of the external appearance of a lot. An aspect of the external

112 *Swan Hill Corporation v Bradbury* (1937) 56 CLR 746, 762.
113 *O'Connell v Nixon* (2007) 16 VR 440, 451 [42] (Nettle JA); *Balcombe,* [98].

appearance might be prohibiting advertising boards, for example. Adding a second storey is adding a structure on top of the existing unit on the lot. Special rule 2 prevents a lot owner from carrying out building works within the lot which are otherwise permissible at law.

74 Moreover, the making of a rule that prohibits the matters in special rule 2 are not – on the face of the rule - the exercise of a power to make a rule for or with respect to the 'external appearance of lots'. It is about constructing a second storey on the lot, altering the façade in any way and erecting structures on the exterior of the unit on the lot. Naturally that affects the external appearance of the lot. But that is not its subject matter, with the possible exception of special rule 2(b).

75 Given the context of the *OC Act* as a whole, and the matters to which I have referred and which are extensively identified in the reasons of Riordan J in *Balcombe*,[114] the rule making power of the OC in this case does not, in my view, extend to requiring the consent of the members of the OC to the construction of a second storey on lot 1, as special rule 2(a) requires. Having regard to the history of the matter, it is quite obvious that the rule was made to prevent the construction of a second storey altogether. That is the true nature and purpose of the power having regard to the 'local circumstances' in which it is intended to apply.[115]

76 Similarly, special rule 2(c), which prohibits and owner from erecting 'any structure or appurtenance on the exterior of their unit' without the consent of the members of the OC, was made to prevent the *form* of the construction of the second story on lot 1.

77 Special rule 2(b), which prohibits a lot owner from altering 'the external façade of their unit, including windows and entrance porches from the existing cream colour and brickwork'[116] without the consent of the members of the OC is no different to the other rules when properly construed. It may seem to be different because it is obviously concerned with changes to the external appearance from the current

114 [2016] VSC 384.
115 *Williams v Melbourne Corporation* (1933) 49 CLR 142, 155.
116 Special rule 2(b).

uniform appearance of each unit. But properly construed it prohibits any change to the external façade of the building on the lot. The reference to the colour and brickwork is merely included in that prohibition. Perhaps it could be said that the intent of the rule was to regulate the colour and brickwork to maintain uniformity of appearance. But in terms it goes much further than that.

78 I agree with the Tribunal that special rule 2(b) is beyond the rule making power of the OC in its current form. I do not agree, however, that it is right to say that rule 2(b) may have been valid if it extended only to the front facade of the development.[117] I fail to see a distinction between the front façade (facing Abbott Street) and the eastern façade facing the walkway or the western façade facing the neighbouring property (the lot abuts lot 2 on the northern side). The vice in rule 2(b) is the prohibition, despite its subject matter being concerned with the appearance of the lots in the subdivision.

79 The Tribunal reasoned that the power to make rules for the purpose of the control, management, administration, use or enjoyment of the lot for or with respect to the 'design, construction and landscaping' (which may relate to a lot or the common property),[118] did not give to the OC the power to make rules to say how or what can be constructed because that power lies with the planning and building authorities. The Tribunal construed this power as limited to prescribing the type of building materials which may be used.[119]

80 In my view, the power to make rules for or with respect to design, construction and landscaping has to do, again, with the appearance or the look of the lot in the context of the subdivision. It is conceivable that rules may be validly made under this power that regulate, rather than prohibit, the form of what may be constructed on a lot, in contradistinction to the view of the Tribunal. But, it is evident from the 'local circumstances' in this case that the purpose of special rule 2 was not only to prohibit

117 Ibid [21].
118 Schedule 1 cl 6.
119 *VCAT decision* [2017] VCAT 470 [20].

the construction of a second storey on lot 1, but to prevent the alteration of the external façade of the unit in the way which had been proposed in the planning application and to prevent the erection of a veranda or pergola as a part of that construction work. That too, was beyond power because it went beyond what parliament intended the OC to regulate and further than the purposes set out in s 138 of the *OC Act*.

81 There is another aspect of the operation of the special rule in the context of this case that was not specifically adverted to by either party. The special rule was registered and became enforceable, if validly made, after the hearing of the planning appeal in consequence of which the Tribunal directed the issue of a planning permit for the construction on lot 1 of the second storey in the form approved. The decision of the Tribunal in the planning appeal records that the owners of 'units 2, 3, 4, 5 & 6, Justin Thompson and the Owners Corporation – 47 Abbott Street, Sandringham 3191 (RP 3454)' appeared at the hearing.[120]

82 This gives real context to the observation of the Tribunal that it is 'inconceivable that the owners corporation could have the power to veto an otherwise legal building proposal.'[121] I read this observation, although I have taken it out of its context, as referring to the OC prohibiting the particular building work after the planning approval is given. Having regard to the requirement cast upon lot owners to give notice to the OC of any application for a building or planning permit,[122] the place in which to seek to enforce a properly made rule designed to maintain some uniformity of appearance is in the processes and proceedings of the lot owner obtaining the necessary permits. Not after that process is over.

83 In my view, the reasons of the Tribunal read as a whole do not reveal a finding that the *Planning Act* and the *Building Act* were the exclusive source of regulation of what may be built on a lot in the subdivision. Nor that special rule 2 is inconsistent with

120 *Peter Wright & Associates Pty Ltd v Bayside CC* [2016] VCAT 1389.
121 *VCAT Decision* [2017] VCAT 470 [18].
122 *OC Act* s 133.

those Acts or their purposes and operation. I do not read the Tribunal as denying the plain words of the rule making power. That power may be employed for the purpose of the 'control' or 'management' or 'administration' or 'use' or 'enjoyment' of a lot by setting requirements for the external appearance of lots in the subdivision. However, the power to make rules for those purposes for or with respect to 'design, construction and landscaping' may be more limited than its words indicate. Having regard to the principal purpose of the rule making power, and the other provisions of the OC Act to which I have referred, it could not extend to the design of the interior of the particular construction on a lot, or I would think, the landscaping of a backyard within a lot. It is not necessary to determine in this case how far that power may extend. It is sufficient to find that the power does not support the special rule as formulated.

84 The *VCAT Decision*[123] makes it tolerably clear, in my view, that the Tribunal identified the *Planning Act* and the *Building Act* as the primary or paramount source of the regulatory power relating to building on a lot. This still left a limited power to the OC to make rules. But those rules could not, on their proper characterisation, amount to a prohibition subject to an uncontrolled and arbitrary discretion left with the members or the OC. The reference the Tribunal made to the rule making power not extending to making a rule to 'arbitrarily determine whether or not a lot owner is permitted to build or alter any structure within their lot'[124] is entirely correct when it is understood to refer to the need for there to be criteria or guidelines by reference to which the external appearance, or design, construction and landscaping, is to be measured and determined. It is not a proper exercise of the power to make rules that prohibit the matter to be regulated subject to consent that may be given or refused without any objective criteria governing the giving or refusal of that consent.

85 Additionally, the rule making power given to the OC needs to be considered in the context not only of the *OC Act*, its purpose and history, but particularly having

123 [2017] VCAT 470.
124 *VCAT Decision* [2017] VCAT 470 [14].

regard to s 140 in the context of the legislative regime established in Victoria relating to planning and building. The Tribunal did not, however, rest its decision on there being any inconsistency between special rule 2 and 'any other Act or regulations'.[125] But in the circumstance that special rule 2 was operative only after the planning appeal by the defendant was instituted and heard may have the effect that the rule limits a right under the *Planning Act.* This matter was not, however, argued in the application and appeal, so I say no more about it.

86 It is also a material consideration that special rule 2, properly characterised, amounts to a substantial interference with the proprietary rights of a lot owner by, in effect, prohibiting the construction of a second storey on a lot, and the matters in special rule 2(b) and (c). In this case, the upper limit of lot 1 extends 20 feet from ground level and it is clear that the current gable roof of lot 1 is well below that level. It is, I think, common ground that the second storey to be constructed in accordance with the planning permit will be entirely within the boundaries of lot 1. This then leads to the second of the propositions stated by Riordan J in *Balcombe*[126] that the *OC Act* does not disclose any intention for an OC to have power to interfere with lot owners' proprietary rights; or for an OC effectively to have an unappellable right to overrule uses permitted under planning legislation. The conferral of a power of that kind would require clear and unambiguous language in the *OC Act*.[127] There is no such clear and unambiguous language authorising a rule that would have the effect of prohibiting the construction of a second storey on lot 1 in this case, or prohibiting the matters the subject of special rule 2(b) or (c).

87 Special rule 2, particularly 2(a), effectively removes the right of the owner of lot 1 to develop the lot, which is their property, as they see fit in accordance with the law. So that, having obtained a planning permit and a building permit, both processes at which the members and the OC may raise objections and at which any valid special rules may have to be considered and given effect, the rule imposes an unappellable

125 *OC Act* s 140(b)(v).
126 [2016] VSC 384.
127 *OC Act*, ss 48, 49 and 50 are instances of this clear language.

restriction with the result that it amounts to a very substantial interference with the proprietary rights of the owner of lot 1. That the validity of the rule may be challenged does not make that rule appellable.

88 The statutory purpose of the rule making power is confined, in my view, so that it does not substantially interfere with the proprietary rights of the lot owners. Given that restriction, the construction placed upon the ambit of the power by the Tribunal appears to me to be entirely correct. The Tribunal reasoned that the external appearance power in sch 1, cl 5 to the *OC Act* gives the OC a power to make rules with respect to the aesthetic look of a lot, including, but not limited to, colour and conformity of appearance to other lots and the common property.[128] That seems to me to be a completely acceptable construction of the power. The Tribunal went on to say that the power does not extend to what can be built, or how it must be built, but is confined to regulating the appearance of what is built or to be built. Again, this seems to me to be a proper construction of the rule making power in the context of the *OC Act* as it has been construed in *Balcombe*.[129]

89 The fact that what has been approved at the planning level, as a result of the planning appeal, results in a construction within the property of the defendant, the owner of lot 1, of a second storey that will have a discordant appearance compared with the other lots, is a product of two things. First, the dimension of lot 1 (and all the other residential lots), extending as it does 20 feet above ground level. Second, the failure of the OC to make valid rules relating to the appearance of renovations and additions to the lots in the subdivision before the planning and building permit processes were embarked upon.

Conclusion

90 I have concluded that the arguments advanced by the plaintiff warranted the grant of leave to appeal on the two questions of law advanced. This Court is not entitled

128 *VCAT decision* [2017] VCAT 470 [19].
129 [2016] VSC 384.

to interfere with the Tribunal's decision unless it is satisfied that there was in fact a vitiating error of law.[130] In my opinion, the substance of the decision made by the Tribunal is correct. Special rule 2 is not a valid exercise of the rule making power of the OC.

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130 *Vegas Nominees Pty Ltd v Werribee Sports & Community Club Inc* (Unreported, Supreme Court of Victoria, Ashley J, 21 December 1994) 13; Cited in *Versus (Aus) Pty Ltd v ANH Nominees Pty Ltd* [2015] VSC 515, [10].