



## VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

### CIVIL DIVISION

OWNERS CORPORATIONS LIST

VCAT REFERENCE NO. OC1292/2016

#### CATCHWORDS

Validity of rule excluding short-term occupiers from gymnasium; exclusion from all recreation areas not permitted by rule; order to give access to recreation areas.

APPLICANT: Paul Kenneth Salter

FIRST RESPONDENT: Owners Corporation PS501391P

SECOND RESPONDENT: Matthew Barker

WHERE HELD: VCAT 55 King Street, Melbourne

BEFORE: Member L. Rowland

HEARING TYPE: Hearing

DATE OF HEARING: 15 August 2016

DATE OF ORDER: 15 August 2016

DATE OF REASONS: 7 September 2016

CITATION: Salter v Owners Corporation PS501391P (Owners Corporations) [2016] VCAT 1395

### ORDERS

1. The Tribunal declares that Owners Corporation PS501391P does not have the power under its rules, to exclude lot owners, residents or occupiers from the recreation area comprising the swimming pool, sauna, change rooms, podium garden and business centre (subject to booking the business centre in accordance with the rules).

2. The Tribunal declares that Owners Corporation PS501391P may not charge owners or occupiers an hourly rate for the use of the business centre (also known as the common room).
3. The Owners Corporation PS501391P must immediately activate the applicant's building pass(es) for lot 1708 to enable access to the recreation area including the swimming pool, sauna, change rooms and podium garden.
4. The application against the second respondent is dismissed.
5. Pursuant to s 115C of the Victorian Civil and Administrative Tribunal Act 1998 , Owners Corporation PS501391P must reimburse the applicant the Tribunal application fee in the sum of \$576.20.
6. The application is otherwise dismissed with a right to the applicant to reinstate the application in order to amend the application to seek orders for activation of the building passes for all of the lots in his control.

MEMBER L ROWLAND

APPEARANCES:

For Applicant	Mr Salter, in person
For First Respondent	Mr Bacon, solicitor
For Second Respondent	No appearance

REASONS

Background

1. In this proceeding the applicant, Mr Salter, seeks an order that the owners corporation for the Watergate building give Mr Salter's guests access to the common property recreation area. The owners corporation claims that it is entitled to restrict access to the common property recreation area in circumstances where Mr Salter's guests have not undertaken a professional induction on the use of the gymnasium equipment.
2. The Watergate building in the Docklands precinct consists of two 18-storey apartment towers, joined by a four-storey podium, in total comprising 349 residential lots and 12 retail lots. Above the podium/car park is a recreation area accessed from the fifth floor of both towers. The recreation area consists of an outdoor 25-metre swimming pool, a spa, a roof-top garden area, a sauna, a modest gymnasium and a business centre which can also be used as a common room. Approximately 30% of the apartments are owner occupied with the remaining 70% tenanted.

3. Mr Salter operates a short stay letting business from his own apartment and up to 14 other apartments he rents from other lot owners. The apartments are let mostly for between two and seven nights with an average of a four-night stay. The owners corporation has refused access to the recreation area on level 5 to the short stay occupiers of these apartments on the grounds that they have not undertaken an induction on the use of the gymnasium equipment and therefore, under the rules, the owners corporation may exclude the short stay occupier access to those areas.

#### The hearing

4. This proceeding concerns only lot 1708. The second respondent, Mr Barker, is the owner of lot 1708. He was joined by the Tribunal as a respondent to the proceeding. Mr Barker did not participate in the hearing other than by his property manager emailing the Tribunal on 20 April 2016 as follows:

... We are aware our tenant operates an exceptional short stay business with high reputation.

We have known Paul Salter for 10 years and he is of the highest standard. We support Paul's request to have his key swipes re activated and further, a ruling that the strata cannot stop the supply of water (hot or cold) to our apartment without our strict consent.

5. At the hearing, Mr Salter abandoned his claim for damages and only sought orders that the owners corporation activate his building passes to enable access to the recreation area. He also sought a ruling that the owners corporation was not permitted to charge \$50 per hour to 'hire' the business centre to lot owners and occupiers.
6. The owners corporation was represented by Mr Bacon, solicitor at the hearing. The facts were uncontroversial and the hearing proceeded by way of submissions and a view of the recreation area.
7. Mr Salter contends that it is unfair of the owners corporation to exclude his guests from the common property recreation area. He does not necessarily dispute the requirement that gymnasium users undergo an induction on the use of the equipment, but questions the practicality of the rule. Mr Salter said that very few of his guests are likely to use the gymnasium, but if they did, they are likely to be experienced gymnasium users rather than first time users. Mr Salter was content for any of his guests to be inducted into the use of the gymnasium equipment if there was a need. However, Mr Salter said that the gymnasium equipment was very basic and it was unlikely that an induction on the use of the equipment would be beneficial to anyone. Mr Salter did not dispute any other owners corporation rule except to dispute the \$50 per hour charge to use the business centre.
8. Mr Bacon contended that the additional rules enabled the owners corporation to exclude Mr Salter's guests because rule 25.1(j) requires occupiers to be inducted on the use of the gymnasium equipment before entry to the gymnasium is granted. Mr Bacon contended that the rule extended to the entire recreation area because the gymnasium was not separated from the other recreation areas.

#### Operation of the owners corporation rules

9. The additional rules of the owners corporation were made pursuant to the [Subdivision Act 1988](#) and Regulation 220 of the [Subdivision \(Body Corporate\) Regulations 2001](#). The additional rules were

recorded with the Registrar of Titles on 28 September 2004 and on that date became the rules of Body Corporate PS 501391P as it was then known.

10. Rule 25.1 provides as follows:

#### **25GYMNASIUM**

25.1 Children under the age of 16 are only permitted to use the gymnasium whilst under direct Adult supervision, (This includes personal trainers etc);

- (a) Glass objects, drinking glasses and sharp objects are not permitted in the gymnasium;
- (b) The gymnasium is for use by the Proprietor or Occupier of a Lot only;
- (c) Alcohol and food are not allowed in the gymnasium;
- (d) Smoking is not permitted in the gymnasium;
- (e) All users of the gymnasium must carry a towel at all times and wipe down equipment after use;
- (f) Hours of use are from 6:30am to 9:00pm on weekdays and between 7:00am and 7:00pm on weekends;
- (g) Suitable footwear must be worn to and from the gymnasium and whilst in the gymnasium, socks and gym shoes are to be worn at all times;
- (h) Suitable clothing (i.e. gym attire) to be worn whilst in the gymnasium;
- (i) The last user of the gym in the evening must turn off all lights and air conditioning;
- (j) Users of the gymnasium must be professionally inducted on the equipment prior to the Body Corporate granting access to the gymnasium area;
- (k) All users of the gymnasium do so at their own risk;
- (l) No music, other than that provided by the Body Corporate is allowed in the gymnasium;

11. Rule 41 relates to the swimming pool area. It is as follows:

#### **41SWIMMING POOL AREA**

41.1 The following conditions apply to the use of the swimming pool area which must be observed by the Proprietor or Occupier of a Lot and persons under their control:

- (a) Children under the age of 16 may use the swimming pool only if supervised by an adult at all times;
- (b) A maximum of 2 guests are permitted in the pool area who must be accompanied by a resident at all times.

- (c) Glass objects, drinking glasses and sharp objects are not permitted in the swimming pool area;
- (d) Alcohol and food are not permitted in the swimming pool areas;
- (e) The swimming pool areas are for use by residents and no more than two guests per Lot at any one time, although guests are to be accompanied by a resident at all times;
- (f) Smoking is not permitted in the swimming pool areas;
- (g) For the hygiene of all users of the swimming pool you must shower before swimming;
- (h) Jumping, diving, running, ball playing, noisy or hazardous activities are not permitted in the swimming pool area;
- (i) Spitting is not permitted in the swimming pool or in the swimming pool area;
- (j) Hours of use are Monday to Sunday 6:30am to 9:00pm;
- (k) All users of the swimming pool area must dry off before leaving this area;
- (l) Footwear must be worn to and from the swimming pool areas;
- (m) A Proprietor or Occupier of a Lot and persons under their control must ensure that when in the swimming pool areas appropriate attire is worn at all times. Nude bathing is prohibited and females must wear a bathing top in the pool and adjoining areas i.e. Common Property areas;
- (n) All users of the swimming pool areas do so at their own risk;
- (o) A Proprietor or Occupier of a Lot must not breach nor permit persons under his or her control to breach these Rules.

Are Mr Salter's guests occupiers?

12. The rules do not employ consistent language to identify lot owners and occupiers. Instead, the rules refer to lot owners, members, proprietors, occupiers and residents. Given the recent Supreme Court decision in [Swan v Uecker](#) [2016] VSC 313, in which Croft J held that the agreement for occupation between the AirBnB host and the guest in the circumstances of that case, gave rise to a tenancy, the owners corporation did not pursue an argument that Mr Salter's guests did not come within the meaning of occupier or resident for the purposes of the rules. I will proceed on the basis that Mr Salter's guests are residents or occupiers, but it is noted that no evidence was led about the exact relationship between Mr Salter and his guests and I make no formal finding of fact about it.

Can rule 25.1(j) be used to exclude occupiers from all common recreation areas?

13. Rule 25.1(j) relates only to the gymnasium area, however, the owners corporation contends that it is entitled to exclude occupiers from the entire recreation area, including the sauna, pool and spa,

open roof-top garden and from the business centre because the areas are all connected and once entry is given to the recreation area there is currently no mechanism to prevent occupiers from gaining access, to the gymnasium. However, that does not seem to be an insurmountable problem. The gymnasium could be isolated from the rest of the common recreation areas, although this may affect the amenity of the gymnasium.

14. In my view, the wide interpretation of the rule 25.1(j) to apply to all recreation areas is not justified and not available on a plain reading rule 25.1(j). The rule does not prevent access to other recreation areas, only the gymnasium. There is no justification in giving a wide interpretation to the rule so that the gymnasium is to be read as including the swimming pool, sauna, podium garden and business centre. Each of those areas has been treated separately by the rules. Rule 41 regulates the swimming pool. Rule 6 regulates the business centre. Rule 32 regulates the podium garden.
15. A lot owner is a part-owner of the common property and contributes to the cost of maintenance and administration of the common property. <sup>[1]</sup> Any rule which seeks to exclude an owner (or their assigns) from common property should be read fairly. I do not read rule 25.1(j) as enabling the owners corporation to restrict access to the swimming pool, sauna, podium garden or business centre.

---

<sup>[1]</sup> Upon registration of the plan of subdivision, the common property vests in the owners of the lots as tenants in common in shares proportional to their lot liability s 30 [Subdivision Act 1988](#).

---

16. Mr Bacon also relied on rule 12 to enable the owners corporation to exclude an occupier from common property. Rule 12 provides:

**12 Common Property - Restricted Use of**

12.1 The Body Corporate may take measures to ensure the security and to preserve the safety of the Common Property and the Lots affected by the Body corporate from fire or other hazards and without limitation may:

- (a) Close off any part of the Common Property not required for access to a Lot on either a temporary or permanent basis or otherwise restrict the access to or use by Proprietors or Occupiers of any part of the Common Property;
- (b) Permit, to the exclusion of Proprietors and Occupiers, any designated part of the Common Property to be used by a security person as a means of monitoring security and general safety of the Lots, either solely or in conjunction with other Lots;
- (c) Restrict by means of key or other security device the access of Proprietors or Occupiers;
- (d) Restrict of means of key or other security device the access of the Proprietors or Occupiers of one level of the Lots to any other level of the Lots; and

- (e) Cancel any security card or key issued where a Proprietor is in arrears in payment of Body Corporate Levies in excess of 2 quarters.

17. The purpose of rule 12 (with the exception of 12(e)), is to restrict lot owners and occupiers from parts of the common property on the grounds of security and to protect common property. Restricting access to boiler rooms, lift shafts and the roof would be a fair implementation of the rule. However, employing the rule to exclude an owner or occupier from the common recreation areas is beyond the scope of the rule. I do not consider rule 12 empowers the owners corporation to exclude or restrict a lot owner or occupier from accessing the common recreation area because the exclusion is not for the purpose of security or to protect common property.

Validity of rule 25.1(j)

18. Mr Salter challenged the practicality of conducting an induction on the use of the gymnasium equipment. The on-site view confirmed the evidence of the parties that the gymnasium equipment was more than 5 years old and very basic. At significant cost to the owners corporation, it provides induction sessions conducted by a professional trainer on Monday and Thursday evenings and at midday on Saturday. Occupiers can also book an induction session on demand. No evidence was called about what was involved in an induction session, but a one-page induction sheet was produced. The induction sheet enquired after personal information including physiological and medical history, and provided information about healthy lifestyle choices, a balanced diet, exercise, and stretching and water intake. A relatively small section related to the gymnasium equipment. The equipment was listed with a box next to it. Presumably, the professional trainer discusses the operation and use of the equipment. The equipment is listed as follows:

- Weight machines
- Treadmill
- Bikes
- Rower
  
- Fitballs

19. The induction sessions are not likely to be convenient to Mr Salter's short stay guests. However, the fact that the induction sessions are not convenient and are a barrier to entry to the short stay occupiers does not of itself make the rule invalid.

20. In [Owners Corporation PS 50139IP v Balcombe](#) [2016] VSC 384, Riordan J set out a three step approach to determine the validity of a rule. First, it is necessary to determine the statutory power to make the rule, then to characterise the rule and finally to make an assessment of whether the rule is likely to achieve the statutory purpose. On the face of it, the rule is made within an owners corporation's wide-ranging power to make rules for the control, management, administration, use or enjoyment of common property and for safety. In my opinion, rule 25.1(j) satisfies Riordan J's first two steps, that is, it is a rule which regulates the use of common property and is made within power.

21. The third step is to determine if the rule achieves the statutory purpose. Neither party chose to lead any evidence apart from the induction sheet. I am unable to make any finding of fact as to whether an induction on the use of the gymnasium equipment is likely to prevent harm to the



equipment or to the user. In the absence of any factual evidence, I am satisfied that the rule 25.1(j) is sufficiently connected to the power to make rules relating to common property and safety of occupiers. The fact that the rule may be disproportional to the mischief it is attempting to prevent does not make the rule invalid.

22. Mr Bacon referred me to paragraph 86 of the judgment in [Balcombe](#) where Riordan J, citing a number of authorities on point, stated:

If it is determined that there is a sufficiently direct and substantial connection, [n]o further inquiry into proportionality of the by-law is permitted or required. 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, 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. The question is whether the by-law is authorised by the relevant Act, and not whether the court should hold the regulation to be invalid because it appears to the court to be an 'unreasonable provision'.

23. I find that rule 25.1(j) was made within the power conferred by the [Subdivision Act 1988](#) and the [Subdivision \(Body Corporate\) Regulations 2001](#) to bodies corporate to make rules.

Does rule 25.1(j) unfairly discriminate against short stay occupiers?

24. Rule 25.1(j), although made under the [Subdivision Act 1988](#), is deemed to be a rule under the [Owners Corporations Act 2006](#) ('the [OC Act](#)') by operation of the transitional provisions set out in Schedule 2 of the [OC Act](#). The OC Act and the transitional provisions came into operation on 31 December 2006. Bodies corporate became owners corporations from that date.
25. Under the [OC Act](#), a rule of an owners corporation is of no effect if it unfairly discriminates or is contrary to law. Section 140 of the [OC Act](#) relevantly provides:

**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...
26. In order to determine if a rule unfairly discriminates it must be examined in the context of the relevant subdivision. A rule which may unfairly discriminate in one subdivision may not unfairly discriminate in another subdivision. For example, a rule which prohibits parking large vehicles in a common property car park which has very small parking bays may be justified and therefore does not unfairly discriminate.
27. In the circumstances of this case the enforcement of the rule has the practical consequence that the short stay occupiers are excluded from the gymnasium. That of itself, does not mean the rule unfairly discriminates. The question for determination is whether that exclusion unfairly discriminates against the short stay occupiers. The following factors suggest that the enforcement of the rule does not unfairly discriminate against short stay occupiers:

- (a) It can reasonably be inferred that the rule was passed to minimise a public liability risk to the owners corporation and to protect the safety of occupiers.
- (b) The rule has been enforced since inception.
- (c) The rule applies to every owner and occupier without exception.
- (d) The owners corporation provides induction sessions three times per week and on demand.

Whilst there might be a doubt about the efficacy of the induction sessions I am satisfied for the above reasons that the rule 25.1(j) does not unfairly discriminate against short stay occupiers.

Evidence of lack of good faith

28. At the hearing, Mr Salter submitted a copy of a poster displayed in the lifts of the Watergate building by the owners corporation. The poster read as follows:

Short-stay company takes legal action against Watergate

VCAT, Monday 15 August

The corporation operating the short-stay business here is taking legal action against Watergate Owners for access to the Pool and Gym area.

Watergate Pool and Gym facilities have not been designed to accommodate the volume of guests that a hotel-style business operation brings into a building intended for long-term residents.

The short-stay company has admitted it has accommodated more than 10,000 guests for short-stays at Watergate.

If the short-stay company is successful in the [VCAT action](#), overcrowding and the wear and tear on the Pool and Gym facilities will be significantly increased. Any increased costs will be paid for by all owners, not the short-stay company.

This legal action has been initiated by the short-stay company and may cost owners more than \$30,000.

The hearing on Monday at VCAT (King Street) is open to the public.

More information: [info@watergate.net.au](mailto:info@watergate.net.au)

Watergate Apartments, Waterview Walk Docklands Victoria, Plan of Subdivision No 501391P

29. The poster supports a proposition that the owners corporation's main purpose in defending Mr Salter's application is to exclude the short stay occupiers from the recreation areas because (in the opinion of the author of the poster) a short stay occupier is more likely to cause wear and tear in the recreation areas than a long term occupier. There is no suggestion that the owners corporation is concerned about any impact on its public liability insurance policy or premiums, protection of the gymnasium equipment or for the safety of the short stay occupiers. Arguably, the poster is evidence that the owners corporation is enforcing rule 25.1(j) for the purpose of

excluding short stay occupiers from the recreation area, rather than it being an unintended consequence of enforcing a necessary rule.

30. In submitting the poster for my consideration it is not clear whether Mr Salter is alleging a lack of good faith by the owners corporation and if so, what remedy he seeks. I make no criticism of Mr Salter, as the poster only came to light in the days leading up to final hearing. Instead, I will make no finding in relation to the poster and I will reserve Mr Salter's right to make an application in relation to the poster should he wish to do so.

#### Charge for use of the business centre

31. Mr Salter disputes the imposition of an hourly charge to use the common property business centre located in the recreation area. The business centre is an attractive facility with seating, kitchen facilities and a small library with sliding doors leading onto the podium garden. It is referred to as the common room rather than the business centre. I was informed that it was once kept open but it was closed by the owners corporation because a person took up residence in the facility. It is now permanently locked in order to avoid the risk of squatters. The common room may now only be used by occupiers if booked through the building manager. The owners corporation charges occupiers \$50 per hour to use the common room.
32. There is no power under the [OC Act](#) or the rules to charge lot owners and occupiers for the use of common property.<sup>[2]</sup> Mr Bacon argued that the charge was necessary to defray administration and cleaning costs. The costs of maintaining and administering common property are to be charged to owners and occupiers on the basis of lot liability in accordance with the [OC Act](#).<sup>[3]</sup> The owners corporation cannot require owners or occupiers to pay an hourly charge to use the common property.

---

<sup>[2]</sup> The exceptions are where common property has been leased or licensed under the [OC Act](#).

<sup>[3]</sup> The exceptions are extraordinary items of expenditure under s 24(2A) and repairs and maintenance under s [49\(2\)](#) of the [OC Act](#).

---

MEMBER L ROWLAND