VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

OWNERS CORPORATIONS LIST VCAT REFERENCE NO. OC222/2019

CATCHWORDS

Section 138 *Owners Corporations Act 2006*; enforceability of owners corporation's rule; *Owners Corporation PS501391P v Balcombe* [2016] VSC 384 followed; whether lot owner's renovation works in breach of owners corporation rules; whether injunctive relief or damages; *Shelfer v City of London Electric Lighting Co* (1895) 1 Ch 287 followed.

APPLICANT	Owners Corporation PS341151A
FIRST RESPONDENT	Jacob Gilmore
SECOND RESPONDENT	Ruth Gilmore
WHERE HELD	Melbourne
BEFORE	R. Buchanan, Member
HEARING TYPE	Hearing
DATE OF HEARING	15, 16, 17 and 19 February 2021
DATE OF ORDER	1 April 2021
CITATION	Owners Corporation PS341151A v Gilmore (Owners Corporations) [2021] VCAT 394

ORDER

1 The Tribunal declares that rule 52(a) is void and of no effect.

2 In relation to the works carried out in lot 2, Jacob Gilmore must:

(a) Restore the ceiling to its original height so that it does not encroach on the common property;

(b) Remove the plumbing/sewage pipe that penetrates the common property wall between lots 2 and 16 and reinstate the wall;

(c) Restore the wall located between the kitchen and the formal dining/lounge area; and

(d) Remove the tiles installed on the balcony.

3 The proceeding is dismissed as against Ruth Gilmore.

R. Buchanan
Member

APPEARANCES:

For Applicant	Mr P. Best of counsel
For Respondents	Mr I. Percy of counsel

REASONS

INTRODUCTION

1 This case concerns a subdivision in one of Melbourne's leafy suburbs. The subdivision contains six substantial apartments, which face onto a busy road. Behind them, half an acre of gardens, with pool, run down to the Yarra River and a pair of boating jetties, all common property of the subdivision's owners corporation. The gardens are lush. They generate a great deal of green waste, waste which the owners corporation wants to get rid of.

2 The dispute which gave birth to the present proceeding, arose out of the owners corporation's desire to get that green waste out of the common property and send it off for disposal. The dispute grew and this proceeding came to include a second dispute, relating to renovation works carried out by a lot owner.

3 The parties to the disputes are the owners corporation, one of the lot owners, who is the first respondent (the "lot owner") and the lot owner's wife, who is the second respondent.

BACKGROUND

4 The building which contains the subdivision's apartments and garages occupies the full street frontage of the subdivision. The only way to pass through to the common property gardens at the rear is to pass through the building or through the garages.

5 Looking from the street, one sees at one end of the building, a double garage, hard up against the left-hand boundary of the block. The garage consists of two car park lots, 14 and 15. They belong to the lot owner. Lot 14 lies up against that neighbouring, left side boundary. Behind lot 14, however, the subdivision building is set back from the neighbouring boundary. Accordingly, were it not for the presence of the lot 14/15 garage, one could drive a vehicle from the street, into the subdivision garden and haul away as much green waste as one might wish.

6 Such, indeed, was the intention of the subdivision's developers. Lot 14 was built without a back wall so that, with the street door of the double garage open, one could drive through lot 14 (if the garage were empty) and into the garden. The developers included a rule in the owners corporation's rules, requiring the owner of Lot 14 to allow the owners corporation access for maintaining the garden and pool. The developers did not, however, choose to burden lot 14 with an access easement in favour of the owners corporation.

7 For a number of years, the son of the architect for the subdivision owned lot 14 and the owners corporation was able to access the garden through lot 14 without complaint from the owner. Lot 14 then changed hands and, ultimately, was acquired by the lot owner in February 2017, when he bought apartment 2, together with lots 14 and 15. Initially, the lot owner allowed the

owners corporation to have continued access through lot 14. From October 2018, however, the lot owner and his wife, Ruth Gilmore, have denied the owners corporation access through the lot.

8 After the lot owner bought apartment 2, he carried out renovations to it.

9 On 4 February 2019, the owners corporation brought the present proceeding. It sought interim and permanent injunctions, requiring the lot owner to comply with the access rule, rule 52(a).

10 The application for the interim injunction was refused on 7 February 2019.

11 Subsequently, the lot owner filed a counterclaim, seeking a declaration that rule 52(a) was invalid and void.

12 On 8 August 2019 the owners corporation amended its Points of Claim to include an order for rectification works, in relation to the renovations carried out by the lot owner in his apartment.

13 Accordingly, this was a proceeding in two parts:

i Was rule 52(a) valid?

ii Should the lot owner be required to undo his renovations?

14 At the hearing, a number of witnesses gave evidence. On behalf of the owners corporation:

- Lester Peters, the chair of the owners corporation's committee
- Robert O'Neill, an expert in Occupational Health & Safety
- Phillip Gardiner, a structural engineer
- Dale Fisher, an architect
- Paul Doupe, the owners corporation's maintenance gardener
- Andrew Bonwick, the manager for the owners corporation.

On behalf of the lot owner:

- Ruth Gilmore, the lot owner's wife
- Roy Gilmore, the lot owner's son
- Mehran Orangi, a structural engineer.

15 The hearing included a view of the subdivision.

16 Some time after the hearing, the lot owner wrote to the Tribunal, seeking to reopen the hearing so as to allow him to adduce further evidence. The Tribunal does not usually allow parties to reopen proceedings and I declined the lot owner's request. In the matter of *Frugtniet v Law Institute of Victoria Ltd* [2012] VSCA 178 the Court of Appeal commented on further submissions sent to the Court Registry a week after hearing an appeal. The Court's remarks apply with equal force to requests to adduce further evidence:

> They should not have been forwarded to the Registry. Neither the Rules of Court nor the applicable Practice Statements gave any authority for them to be forwarded without leave, and the court has not been asked to give or given leave for them to be filed. Moreover, if leave had been sought, we would have refused it, because, if we were to give leave, we would then have to give leave to the respondents to file replies, with consequent delay in the business of the court.
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> As has been said repeatedly in the High Court and in this court, the idea that parties may, without leave, file supplementary written submissions after the conclusion of oral argument is misconceived. The time and place to present argument, whether wholly oral or as supplemented by written submissions, is the hearing of the appeal. Once the hearing of an appeal has concluded it is only in very exceptional circumstances, if at all, that the court will later give leave to a party to supplement submissions.[1]

THE FIRST ISSUE: IS THE 52(a) ACCESS RULE VALID?

17 Initially, the owners corporation sought, in addition to orders about rule 52(a), declarations about the existence of an easement under section 12(2) of the *Subdivision Act 1988* and an implied easement. Those claims were subsequently abandoned. Accordingly, as far as access was concerned, the hearing was only concerned with one question – was the 52(a) access rule valid?

18 By this proceeding, the owners corporation seeks an order requiring the lot owner and his wife, Ruth Gilmore, to comply with rule 52(a). By their Points of Defence, the lot owner and Ms Gilmore say that the rule is void.

19 The access rule in its current form, rule 52(a), was introduced into the owners corporation's rules in 2008. It says:

> The Owners Corporation and the owners of units 1 to 6 have the right of access through and over Lot 14 for the purpose of the service and maintenance of the Common Property including the garden area and pool located north of the building (and included in the case of the lessees thereof, the leased area known as the Rose Garden and the leased area known as the Pool House) upon giving the proprietors of Lot 14 twelve (12) hours notice of the requirement for access.

20 Under the *Owners Corporations Act 2006*, an owners corporation may make rules. But only in relation to certain matters.

> **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).

[1] At [45]–[46] (citations omitted).

(3) A rule must be for the purpose of the control, management, administration, use or enjoyment of the common property or of a lot.

21 The scope of the rule making power conferred on owners corporations by section 138 of the Act was the subject of a decision of Riordan J in the Supreme Court of Victoria, *Owners Corporation PS501391P v Balcombe* [2016] VSC 384 ("*Balcombe*").

22 *Balcombe* dealt with a rule made under the *Subdivision Act 1988*. That Act controls rules which are made at the time when a subdivision is created and the rule with which *Balcombe* was concerned was made at that time. Once subdivisions are created, however, the *Owners Corporations Act 2006* ("the Act") takes over and controls rule making by owners corporations. It is that Act which controlled the making of rule 52(a).

23 In *Balcombe*, in addition to dealing with the question of the validity of the rule in question, under the provisions of the *Subdivision Act 1988*, His Honour considered whether the rule in question might be validly made under the Act. In doing so, His Honour a provided detailed consideration of the rule making power under the Act, which guidance this Tribunal has consistently followed.[2]

24 In that decision, His Honour set out, "The proper approach to the determination of the validity of subordinate legislation" as follows:

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

(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. 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; and the existence and dimensions of the actual or threatened mischief sought to be addressed by the impugned regulation.

(c) Thirdly, 'once armed with knowledge of these facts', 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 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.

[2] See, eg, *Owners Corporation No. 1 PS438839N v Kakos* [2017] VCAT 762; *Owners Corporation RP3454 v Ainley* [2017] VCAT 470; *Sulomar v Owners Corporation No 1 PS511700W* [2016] VCAT 1502.

> 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.[3]

25 His Honour went on to say:

> The question of whether there is sufficient connection between the Statutory Purpose and the impugned regulation necessarily involves questions of degree and judgement. 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.[4]

The statutory purposes of the Act

26 In *Balcombe*, Riordan J identified the statutory purposes of the Act as follows:

> (a) The main purposes of the Act include 'to provide for the management of powers and functions of owners corporations'. … [T]he 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) This section 4 of the Act sets out the functions of owners corporations which are, for practical purposes relevantly the same as those set out under reg 201 of the *Subdivision (Body Corporate) Regulations 2001* (Vic). … [Earlier in his decision at [109]], His Honour had summarised the functions of bodies corporate which are set out in those regulations, as follows:
>
> (i) to repair and maintain the common property;
>
> (ii) to manage and administer the common property;
>
> (iii) to take out, and to pay premiums on insurance on the common property and otherwise; and
>
> (iv) to ensure compliance with the rules of the body corporate.]
>
> 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 …
>
> (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.

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[3] [2016] VSC 384, [85] ("*Balcombe*") (citations omitted).
[4] Ibid [87] (citations omitted).

> (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. … Schedule 1 includes powers that relate to governance, organisation, management, administration, the use of common property and conduct matters.[5]

The owners corporation's arguments

27 The owners corporation asserted that section 138 of the Act empowered it to make rule 52(a), since the rule was for, "the control, management, administration, use or enjoyment of the common property or of a lot".

28 The owners corporation further asserted that rule had a sufficiently direct and substantial connection between the likely operation of the rule and the statutory purpose of the Act embodied in the following heads of power, set out in Schedule 1:

> 1.1 Health, safety and security of lot owners, occupiers of lots and invitees.
>
> 1.4 Waste disposal.
>
> 3.1 Management and administration of common property and services.
>
> 3.3 Repair and maintenance of common property and services.

1.1 Health, safety and security of lot owners, occupiers of lots and invitees

29 The owners corporation argued that in its operation, the rule was connected with this statutory purpose because it promoted safety, by allowing an emergency exit into the street, from the common property at the rear of the subdivision building. Clearly, the rule would not have that effect. Access would only be physically possible on the relatively infrequent occasions when trades persons were passing through lot 14. Further, the rule states that the access is only for "the purpose of the service and maintenance of the Common Property", not otherwise.

30 The owners corporation also argued that access through lot 14 would allow trades to safely move tools and equipment and garden waste into and from the common property.

31 It is true that trades persons accessing the rear common property through lot 14 would be able to move over a flat, sealed surface which, to that extent, would make it safe to walk and to carry loads into and out from the common property. I do not, however, consider that object constitutes a sufficiently direct and substantial connection with the statutory purpose to make it a valid exercise of the power.

32 Accordingly, I find on the face of the rule that there is no connection between the rule and the statutory purpose expressed in head 1.1 of Schedule 1.

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[5] Ibid [175].

1.4 Waste disposal/3.1 Management and administration of common property and services/3.3 Repair and maintenance of common property and services

33 The stated purpose of the **access** granted by the rule is servicing and maintaining the common property. And since the common property which will be serviced and maintained is mostly large gardens, that common property will generate green waste. Accordingly, the purpose of that access is connected to the three Schedule 1 heads of power cited by the owners corporation.

34 The purpose of the access granted by the rule may well be connected to the statutory purposes expressed in heads 1.4, 3.1 and 3.3 of Schedule 1. But such a connection does not make the rule valid. As *Balcombe* makes clear, it is the purpose of the **rule itself** which must have a clear connection to the statutory purpose.

35 Historically, the courts have been reluctant to find that legislation allows the cutting across of people's property rights. In *Balcombe*, Riordan J made the following comments, which apply with equal force to the *Subdivision Act 1988*, under which the present owners corporation was created and the *Owners Corporations Act 2006*:

> A review of the development of the strata title legislation demonstrates that it was always intended that unit owners would retain the registered freehold interest in their respective lots. Accordingly, it is fundamentally important that persons are entitled to conduct themselves on their land and buildings as they like, subject to prohibitions created by the common law, such as nuisance, or by legislation, such as planning and environmental regulations. Indeed, there is a presumption, in the interpretation of statutes, against an intention to interfere with vested property rights and such legislation is 'not to be construed as interfering with vested interests unless that intention is manifest'.[6]

36 The words quoted by His Honour are part of a passage in the 1901 decision of the High Court in *Clissold v Perry*. The full passage reads:

> In considering this matter it is necessary to bear in mind that it is a general rule to be followed in the construction of Statutes such as that with which we are now dealing, that they are not to be construed as interfering with vested interests unless that intention is manifest.[7]

37 The passage in *Clissold v Perry* was cited with approval in the High Court decision of *R & R Fazzalari Pty Ltd v Parramatta City Council* (2009) 237 CLR 603, by French CJ, who went on to say:

> The terminology of "presumption" is linked to that of "legislative intention". As a practical matter it means that, where a statute is capable of more than one construction, that construction will be chosen which interferes least with private property rights.[8]

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[6] Ibid [123] (citations omitted).
[7] (1904) 1 CLR 363, 375.
[8] *R & R Fazzalari Pty Ltd v Parramatta City Council* (2009) 237 CLR 603, [43].

38 In the present case, the purpose of the **rule** is different from the purpose of the owners corporation in acquiring the right of access, by means of the rule. The purpose of the rule is to grant to the owners corporation an easement, namely a right of passage. In short, rule 52(a) confers a property right upon the owners corporation. It is the rule which must have the connection to the statutory purpose. Yet there is nothing in the Act or Schedule 1 which reveals a statutory purpose of granting property rights. In broad terms, the purpose of the Act is control, not allowing the acquisition of rights which, by rule 52(a), the owners corporation seeks to do.

39 I therefore find that, on its face, rule 52(a) does not have a sufficiently direct and substantial connection between the likely operation of the rule and the statutory purpose of heads 1.4, 3.1 and 3.3 of Schedule 1.

The presence of alternative access

40 While, on its face, rule 52(a) is not a valid exercise of a power conferred by the Act and therefore invalid, it faces another problem, which is specific to this particular owners corporation.

41 The problem which rule 52(a) seeks to address is the one of accessing the rear common property from the street. While access through lot 14 is the owners corporation's preferred solution to that problem, passing through lot 14 is not the only way access can be gained to the common property at the rear.

42 A great deal of evidence was given for the owners corporation about the owners corporation's need for garden access through lot 14.

43 The subdivision's land slopes down towards the river and the apartment building steps down that slope.

44 As well as through lot 14, access to the garden from the street can also be gained down a long flight of stairs, as well as by a lift from the main garage. Both go from the main garage, down to garden level. The owners corporation argued that the flight of stairs was unsafe for workers carrying loads, and that use of the lift was inappropriate. It was inappropriate, the owners corporation said, for a number of reasons; it was small and its finishes were deluxe, while at garden level, it was reached via a passage with high-quality floor tiles. Allowing garden trades to use the lift could make the lift fail and would endanger those deluxe finishes. An architect, Dale Fisher, gave evidence about the nature of the lift and tiles, but there was no evidence to support the owners corporation's claim that trades' use of the lift might make it fail. In cross-examination, Mr Fisher agreed that, with curtains and floor protection, the lift could be used to carry loads.

45 I accept that the stairs may well be unsafe for routine use by garden and other trades, but do not see why the lift would not be suitable for their use. At the view, I observed that the lift was nicely finished, but was just a lift. As is done routinely in office buildings, curtains could be hung to protect the lift walls, while matting could be laid to protect the lift floor and the passageway

tiles. Further, the lift is no puny weakling. It is of a good size and can carry 812 kilograms, or 12 people. Chain saws could cut things into manageable sizes and wheelie bins and hand trucks could transport in the lift whatever waste the garden might produce.

46 In addition, while the stairs may not be suitable for the routine carrying of loads in and out, the stairs could, with appropriate care, be used for carrying in or out lengths of material or items which were too long to fit in the lift.

47 The owners corporation argued that using the lift would inconvenience those apartments which use the lift for access to the main garage, or the lot owners using the sauna situated in the lower corridor; the lift might not be available at moments when lot owners wanted it, while dirt from the lift might enter the apartments served by the lift. To my mind, those are minor inconveniences, when compared with the effect of rule 52(a) on the lot owner.

48 In *Balcombe,* Riordan J said that "once armed with knowledge of these facts", one must assess "whether the regulation could not reasonably have been 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".[9] He concluded:

> The question of whether there is sufficient connection between the Statutory Purpose and the impugned regulation necessarily involves questions of degree and judgement. 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.[10]

49 In the present case, I am of the clear view that rule 52(a) could not reasonably have been adopted as a means of attaining the statutory purposes of the three heads of power in Schedule 1, on which the owners corporation relies. I say that because the stairs and lift present a practical alternative means of access to the rear common property of the subdivision.

50 The inconvenience and risk to the lot owner in the owners corporation's having the access that the rule seeks to give it, are significant. When trades used lot 14 for access, the garage door would be open. The garage opens directly onto the footpath. No doubt the door would be left open for extended periods of time. The contents of the garage would be exposed to the view of both the curious and the light-fingered. Loads would be carried through the narrow gap between cars and garage wall, risking damage to the lot owner's cars. As the view revealed, parking in the vicinity of the subdivision is heavily congested and, no doubt, trades persons would park their vehicles on the crossover, blocking the lot owner's entry and exit. By contrast, the disadvantages of accessing the rear common property by means of the main garage and the lift and stairs, are minor.

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[9] *Balcombe* (n 3) [85].
[10] Ibid [87] (citations omitted).

51 In summary, rule 52(a) does not have a sufficiently direct and substantial connection with the statutory purpose. Furthermore, rule 52(a) is not a reasonable means of obtaining the statutory purpose. I therefore find that rule 52(a) is beyond power and invalid.

Is rule 52(a) discriminatory?

52 The matters set out above are relevant to another issue. Under section 140 of the Act, owners corporations' rules are invalid if they discriminate against a lot owner. The section says as follows:

> **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;
>
> …

53 It is plain that rule 52(a) does discriminate against the lot owner. There are at least two practical ways in which the owners corporation can access the rear common property. Each has its disadvantages, but by rule 52(a), the owners corporation unfairly chooses to impose heavy burdens on the lot owner alone, where it could easily use another option which would impose, at most, very slight burdens on other lot owners.

54 Accordingly, I find that if rule 52(a) were not beyond power and invalid, as I have found above, the rule unfairly discriminates against the lot owner and would, therefore, be of no effect.

THE SECOND ISSUE: THE LOT OWNER'S RENOVATION WORKS

55 The second issue in this proceeding was the claims which the owners corporation made in relation to the lot owner's renovation works.

56 The lot owner bought the lot 2 apartment and lots 14 and 15 in February 2017. In July 2017 he began renovation works in the apartment, which were concluded in about December 2017.

57 The rules of the owners corporation required that an owner must not:

- Cause structural damage to the subdivision without the owners corporation's consent (rule 3(n));
- Damage common property without the owners corporation's consent (rule 3(o));
- Interfere with the owners corporation's personal property without the owners corporation's consent (rule 3(p)); and
- Make structural alterations without the owners corporation's consent (rule 25).

58 In addition, the rules also required an owner to "comply with all laws relating to the Lot", which would extend to obtaining any necessary building permit (Rule 9).

59 The text of the rules on which the owners corporation relied, was as follows:

> A member or occupier must not: …
>
> 3(n) do or permit anything which might cause structural damage to 110 – 116 St Georges Road, Toorak including, without limitation, bringing any heavy article, appliance equipment or vehicle onto 110 to 116 St Georges Road, Toorak without the consent of the body corporate;
>
> 3(o) do anything to damage or deface Common Property, however this rule does not prevent a Member from making minor alterations to the Common Property for the purposes of occupy, fitting out or refurbishing the Lot provided the approval of the Body Corporate is first obtained;
>
> 3(p) interfere with any personal property vested in the Body Corporate;
>
> 9A Member must at the Member's expense promptly comply with all laws relating to the Lot including any requirements, notices and orders of a Governmental Agency;
>
> 25 No structural alteration or external addition shall be made to any lot (including any alteration to gas, water or electrical installations and including the installation of any air-conditioning system or work for the purpose of enclosing, adding to or altering in any manner whatsoever the balcony or other external area of a lot) without the prior permission in writing of the Committee.

60 The renovation works carried out by the lot owner to apartment 2 included:

- Raising a ceiling;
- Knocking a sewer connection through a wall;
- Removing a wall; and
- Tiling a balcony.

61 By its Points of Claim, the owners corporation alleged that, in carrying out the renovation works, the lot owner breached a number of the owners corporation's rules. In addition the owners corporation alleged that, by the works which involved raising a ceiling and in knocking a sewer connection through a wall, the lot owner had encroached onto common property.

62 The lot owner denied that he had breached the owners corporation's rules and said that the owners corporation had consented to his renovation works.

63 In relation to the renovation works, the relief which the owners corporation sought was only against the lot owner and not his wife. The owners corporation sought an order requiring the lot owner to carry out the following rectification works:

> a Restore the ceiling to its original height so that it does not encroach on the common property;

b Remove the plumbing/sewage pipe that penetrates the common property wall between lots 2 and 16 and reinstate the wall;

c Restore the wall located between the kitchen and the formal dining/lounge area; and

d Remove the tiles installed on the balcony.

64 An application for an order requiring the owner to install a handrail was withdrawn.

65 The owners corporation also sought orders about door opening mechanisms in lots 14 and 15, with which I will deal separately.

Did the owners corporation consent?

66 The lot owner alleged that the owners corporation had consented to the renovation works. The works were carried out between July 2017 and about December 2017. The lot owner's daughter-in-law, Sophie Gilmore, acted as the architect for the works and his son, Roy Gilmore, was the site supervisor. In addition, Roy Gilmore was a member of the owners corporation committee between February 2017 and January 2018. Relations between the lot owner, his son and the committee were cordial.

67 The only evidence about the renovation works given on behalf of the lot owner was that of his wife, Ruth Gilmore, and his son. Roy Gilmore said that he had provided specific information to the committee about the renovation works. He gave evidence to the effect that, "I could not have been clearer. I told them exactly what we would change". Mr Gilmore asserted that there were committee minutes recording that fact. No such minute had been discovered and when the owners corporation called for the minutes, none was produced.

68 Roy Gilmore appears to have been the lot owner's primary contact with the owners corporation. He appears to have down-played the scope of the renovations to the owners corporation and its committee. Thus, on 12 December 2016, he sent a text message to Dale Fisher[11] referring to the renovations as, "a few changes to the interior". In early 2017 he told Lester Peters, the chair of the owners corporation's committee, that minor renovations of the property were planned before the unit was occupied. On 4 July 2017, in a text message to Lester Peters, Roy Gilmore said that builders, "are starting earlier than expected on our cosmetic renovation".

69 The lot owners works began in July 2017. On 18 August 2017 the committee met, concerned about the noise, dust and waste material being removed from unit 2. Roy Gilmore was present at the meeting, but did not volunteer any information to the meeting about the scope of the works. The committee concluded that the works were not minor renovations and that it needed to

[11] Mr Fisher is an architect who held the original plans for the building. Mr Fisher's father, Dale Fisher Snr, had designed the building and, as a young man, Dale Fisher Jr had worked in his father's office when the building was constructed. Mr Fisher's parents are lot owners.

see the plans for the works, to get a complete picture of what the works were. Roy Gilmore agreed to provide architectural and building works plans to the committee. In October 2017 Lester Peters reminded Roy Gilmore about the promised plans and Roy Gilmore again agreed to provide them. Neither he nor anybody else on the lot owner's behalf did provide such plans. In evidence, Roy Gilmore said the plans had not been provided, because none existed.

70 Other than Roy Gilmore's evidence, there was no evidence to show that the owners corporation knew the nature of the works or consented to them. By contrast, clear evidence was given by Lester Peters and another committee member, Peter Brombury, that the owners corporation did not know that the lot owner's works would be anything other than "minor" and "cosmetic". That evidence, which I accept, was supported by the text messages and minutes to which I have referred above.

71 I found Roy Gilmore to be an unsatisfactory witness:

- He gave evidence about the existence of a committee minute which supported his evidence, but when called to produce the minute, failed to do so;
- He was combinative and argumentative;
- He was unwilling to make concessions on obvious facts; and
- When questioned about a committee minute requiring his production of the lot owners plans, he said that that he had only told the committee that he would produce such plans if they were prepared, which evidence I found improbable.

72 Accordingly, in this matter I prefer the evidence of the owners corporation and I find that, while the owners corporation's committee may have passively acquiesced in the lot owner's carrying out "some minor", "cosmetic" work, the committee and the owners corporation did not consent to any particular works and was not asked for its consent, nor was it given any relevant information sufficient to allow it to give an informed consent to the works carried out by the lot owner.

Estoppel

73 In his Points of Defence the lot owner pleaded that the owners corporation was estopped from pursuing its claim in relation to his renovation works. At the hearing, however, that claim was not pressed.

Breach: Raised ceiling

74 In the renovation works, the lot owner raised the ceiling in a substantial part of the large room he created by knocking the living/dining room and kitchen into one.

75 The owners corporation alleged that by raising that ceiling, the lot owner had encroached on common property. That encroachment, it said breached rules

3(n) (to not do anything which might cause structural damage), 3(o) (not to damage or interfere with common property), and 3(p) (not to interfere with any personal property vested in the body corporate).

76 Under the plan of subdivision, Lot 2's upper limit extends up to the interior (i.e. bottom) face of the ceiling. Thus, the ceiling itself above its bottom face and the area above the ceiling are common property.

77 By his defence, the lot owner admitted that the ceiling had been raised. In cross-examination, Roy Gilmore also admitted that the ceiling had been raised.

78 At the view, the raised ceiling was obvious.

79 The architect, Mr Fisher, gave evidence that in his opinion, the ceiling height had been raised by about 200 mm.

80 It is plain and I find, that by raising the ceiling in question, the lot owner has indeed damaged common property (the ceiling) and also encroached on common property. I further find that by the encroachment, the lot owner has breached rules 3(n), 3(o) and 3(p).

Breach: Sewer connection knocked through wall

81 When carrying out the renovation work, the lot owner knocked a hole through a wall between his lot 2 and his neighbour's lot 16. Inside the cavity so created, the lot owner installed a sewer pipe.

82 It was the owners corporation's allegation that, in doing so, the lot owner had encroached on common property and had breached rules 3(n), 3(o) and 3(p).[12]

83 Under the plan of subdivision, the internal faces of the boundary walls of each lot demarks the lot. The area outside the internal faces of those walls is common property. In other words, the wall itself is common property.

84 At the view, the cavity in the wall was evident and, by his Points of Defence, the lot owner admitted knocking through the wall as alleged.

85 Accordingly, I find that the owners corporation's claim, that the lot owner installed a plumbing/sewerage pipe that penetrated the common property wall between lot 2 and lot 16 is made out. I also find that the owners corporation's claim that, in doing so, the lot owner breached rules 3(n), 3(o) and 3(p) is made out.

Breach: Removal of the wall

86 When the lot owner bought it, the lot 2 apartment contained a lounge/dining room and an adjoining kitchen, separated by a dividing wall. In the course of the renovation works, the lot owner removed the dividing wall to create one, large room with the kitchen at one end.

[12] 3(n) (to not do anything which might cause structural damage), 3(o) (not to damage or interfere with common property), and 3(p) (not to interfere with any personal property vested in the body corporate).

87 The owners corporation claimed that the removed wall was structural and that the removal breached rules 3(n), 3(o), 3(p) and 9.[13]

88 The lot owner denied that he was in breach of the owners corporation's rules by reason of his removal of the wall and also denied that the wall had been structural.

89 Was the wall structural? The meaning of the word "structural" is fairly self-evident. In *Arlone Pty Ltd v Teller Properties Pty Ltd* [1995] FCA 1051 at [55], Lockhart J defined the word as follows:

> Sometimes it is easy to categorize certain parts of a building as being structural, such as the main walls and roof … because even on the narrow view that structural work connotes work to a part of the building that is load bearing or affects the load bearing capacity or the stability of a building, work of this kind would fall within it.

90 The owners corporation relied on the evidence of the architect, Dale Fisher, as well as well as the evidence of a structural engineer, Phillip Gardiner. Mr Fisher, said in his witness statement of 30 October 2019:

> The internal wall previously dividing the living room and kitchen in unit 2 was a fundamental structural element of the building as it was used as part of the overall bracing and structural support for the building and its roof.

91 In evidence, Mr Fisher explained that the wall supported the ceiling, the roof and the garden façade of the apartment. Steel brackets had been bolted and braced to the top and sides of the concrete block wall. Purlins were bolted to the brackets and the purlins carried the roof, the aluminium ceiling grid and the plasterboard ceiling attached to that grid. The outer end of the wall was connected to and braced the garden façade.

92 Phillip Gardiner was the structural engineer relied on by the owners corporation. Mr Gardiner had been the structural engineer for the development of the subdivision. In his witness statement, Mr Gardiner said:

> I believe that the wall that has been removed fulfilled two structural functions – it supported the roof purlins and provided lateral stability as the shear wall to the upper level.

93 Lateral support was to prevent the exterior garden façade from falling out from the building or into the apartment. The wall was part, but not all, of the system used to provide lateral support.

94 Mr Gardiner said that he thought the purlins could survive without the support of the wall, although the roof may bow and move up and down in the wind.

95 The lot owner argued that the removed wall had not been structural. The evidence provided by the lot owner on this point was the evidence of Roy

[13] 3(n) (to not do anything which might cause structural damage), 3(o) (not to damage or interfere with common property), 3(p) (not to interfere with any personal property vested in the body corporate) and 9 (comply with all laws).

Gilmore and of a structural engineer, Mehran Orangi. Roy Gilmore gave evidence that he and the lot owner's builder had inspected the top of the wall and that there had been nothing resting on it.

96 Mr Orangi said that he had inspected the lot 2 apartment on 13 November 2019, after the renovation works had been completed. He had also been supplied with engineering and architectural drawings from 1995, when the building was first constructed. Mr Orangi said that the lot owner had told him that the wall was not load-bearing, which he had accepted, although he had not been able to see that from the drawings supplied to him. Mr Orangi said that the lot owner had said that he had been told by his builder, who had inspected the ceiling, that the wall was not load bearing.

97 In a report by Mr Orangi, which was tendered in evidence, Mr Orangi said that:

> the removed wall was not a load bearing element and were (sic) designed by Architects for separating the spaces. The Load-bearing part kept in the (sic) place …

98 Mr Orangi said that, with the wall removed, the C150 purlins employed, now spanned 7.6 metres, which they could not support. Accordingly, he would expect the ceiling to have quickly sagged or otherwise shown signs of failure.

99 Mr Orangi said that when he had inspected the ceiling, he had seen "no signs of cracks, Sagging and other structural damage". The absence of signs of damage, failure or stress meant, he said, that some form of structural support for the purlins must have been present. I took this to explain why he had accepted the lot owner's advice that the wall was not load bearing.

100 Mr Orangi's opinion, that the wall had not been structural, in essence rests only on the advice which he received from the lot owner that the wall was not load bearing and on the conclusion which he drew from the absence of signs of ceiling failure.

101 No evidence was given by the lot owner or, most materially, the builder and no explanation given for the absence that evidence. I therefore draw the inference that, if called, the builder's evidence would not have supported Mr Orangi's opinion that the wall had not been load-bearing and that some other support had been installed as part of the renovation works or had been present and left intact.[14]

102 The owners corporation's structural engineer, Mr Gardiner, said in evidence that the survival of the purlins could be temporary; the fact of their survival to date did not prove anything. I therefore take nothing from the fact that no failure has occurred to date. Buildings are properly designed to resist rare, but inevitable, extreme wind and weather. The fact that failure has not yet occurred in the relatively short time since the renovation works were done, tells us nothing.

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[14] *Jones v Dunkel* (1959) 101 CLR 298.

103 Accordingly, I do not accept Mr Orangi's opinion that the removed wall was not load-bearing. Further, none of Mr Orangi's evidence addressed the matter of lateral support to the building and the garden façade.

104 The owners corporation's evidence, given by the architect, Mr Fisher and the evidence of the owners corporation's expert witness, Mr Gardiner, made it clear that the removed wall was a structural element, supporting both the roof/ceiling and lot 2's garden façade.

105 I therefore find that the demolished wall was structural. Its removal was a structural alteration, did cause structural damage and may in the future cause further structural damage, to the building. As such, the removal of the wall was a breach of rule 3(n), rule 3(o) and rule 3(p) of the owners corporation's rules.

106 In addition, the evidence showed that the lot owner had failed to obtain a building permit for the renovation works. On 20 April 2020 the City of Stonington issued a building notice to the lot owner in relation to the works. The notice recorded the opinion of the delegate of the Municipal Building Surveyor that building work was carried out without a building permit being issued and in force under the *Building Act 1993*.

107 The lot owner did not deny that he had failed to obtain a building permit for any of the renovation works and, accordingly, I find that in carrying out the renovation works, the lot owner was in breach of rule 9 of the owners corporation's rules.

Breach: Installation of balcony tiles

108 The owners corporation alleged that, by installing tiles on lot 2's balcony, the lot owner had breached rule 3(n) and rule 25.[15] The owners corporation also alleged that the tiling had been done without a necessary permit, in breach of rule 9.

109 By his Points of Defence, the lot owner admitted that he had installed tiles on the balcony.

110 In relation to the possibility of structural damage, the owners corporation expressed two concerns. First, its belief that that the tiles had been laid on top of the existing tiles, compromising the balcony's load bearing capacity and, secondly, that the tiling work had allowed water to penetrate through the balcony.

111 The lot owner denied that a double layer of tiles had been installed. Photographic evidence, however, made it clear that, at least in part, tiles had been laid on top of the existing tiles.

112 Lester Peters, the owner of an adjoining lot which shared the balcony with lot 2, gave evidence on behalf of the owners corporation and said as follows in his witness statement:

[15] 3(n) (to not do anything which might cause structural damage) and 25 (no alteration to, inter alia, balconies without written permission of the committee).

> I have taken a photo of the tiles that clearly shows new tiles laid over old tiles. I have also taken a measurement. Based on that measurement, the level of the tiles on the balcony of my unit is 30 millimetres lower than the level on the [lot owner's] balcony.

113 The lot owner's witnesses, Ruth Gilmore and Roy Gilmore, both gave evidence that they had not seen the tiles been laid. In cross-examination, Roy Gilmore asserted that any double layering of tiles was limited and was done to allow the tiler to get a proper fall.

114 Relevantly, the lot owner did not call the tiler to give evidence and no explanation was given for that failure. I therefore infer that if the tiler had been called, he would not have given evidence that supported the lot owner's assertion that any double layers of tiles were limited and only present to allow the correct fall.[16] Accordingly, I find that the tiles laid on the balcony in the renovation works were laid on top of the existing tiles.

115 The architect, Mr Fisher, in his witness statement said as follows:

> As part of any proposed alteration of the balcony areas the additional weight added to the balcony should have been considered given it is a cantilevered slab and may now be too heavy to also support people. That should have been considered before laying tiles over the existing tiles.

116 The owners corporation's structural engineer, Mr Gardiner, estimated that the tiles may have used one third of the balcony's load bearing capacity.

117 I therefore find that the laying of the tiles on the balcony was something which might cause structural damage to the building and was therefore something which required the consent of the owners corporation. That consent was not given and, accordingly, the lot owner has acted in breach of rule 3(n).

118 As I have found above, there is no evidence that the owners corporation had given informal or formal consent to any of the lot owner's renovation works. Accordingly, the tiling was carried out in breach of rule 25.

119 Though not pleaded by the lot owner, the validity of the rules 3(n) and 25 was questioned. It is reasonable on at least two bases for an owners corporation to be interested in balconies. First, the question of weight; an over-loaded balcony is a potentially mortal danger. Secondly, the question of drainage. Balconies are a notorious source of water leakage into buildings, typically damaging common property as well as private lots. Two heads of rule making power in Schedule 1 of the Act are relevant:

- 1.1 – Health, safety and security of lot owners, occupiers of lots and invitees.
- 4.5 – Damage to common property.

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[16] *Jones v Dunkel* (1959) 101 CLR 298.

120 I am satisfied that there is a sufficiently direct and substantial connection between the statutory purpose of the Act and rules 3(n) and 25 and, further, that the rules themselves are reasonable; it is clearly reasonable for an owners corporation to seek to be informed about what its lot owners do with their balconies.

121 In addition, the installation of the balcony tiles was not carried out without a necessary building permit and, therefore, those works were done in breach of rule 9 of the owners corporation's rules.

Door latch and door lock

122 As well as seeking orders about the renovation works, dealt with above, the owners corporation also sought orders about a latch and a lock on doors to the lot owner's garage.

Door latch

123 The owners corporation sought an order requiring the lot owner to reinstate a latch on his rear garage door, which opened onto the common property garden at the rear.

124 When the lot owner bought the lot 2 apartment and the lot 14 and 15 garage lots, there had been an electric latch, or push button, near the rear door, on the external wall. Pushing it would open the rear door of the garage. The owners corporation characterised that latch as an "emergency escape latch". The idea behind that characterisation was that access to the lot owner's garage would allow escape from the common property gardens at the rear, in the event of an emergency.

125 The owners corporation submitted that, "The emergency escape latch was an essential requirement of the occupancy permit and in order to comply with regulations for emergency egress".

126 By removing the latch, the owners corporation alleged in its Amended Points of Claim, the lot owner had breached rules 3(n), 3(o) and 3(p) of the owners corporation's rules. Later, in its closing submissions, the owners corporation alleged that the lot owner's action also breached rules 9 and 25 of its rules.[17]

127 In support of its claim, the owners corporation referred to the evidence of the architect, Mr Fisher, who said in his witness statement:

> The carport area of Lots 14 and 15 also included a sliding door to its east which led to a common area and the street. The open access from the rear of the property into the Lot 14 was designed and approved as an emergency escape. In the case of a power failure, one could then escape from lots 14 and 15 through the sliding door in the courtyard and then to the street.

[17] Rule 3(n) (Do not cause structural damage), Rule 3(o) (Do not damage common property), Rule 3(p) (Do not interfere with common property), Rule 9 (Comply with laws relating to the lot and Rule), 25 (Do not make structural alterations without consent of the owners corporation).

> I am informed that at some stage after the final certificate of occupancy was issued for the development a roller door was installed at the open point of access from the rear of the property into Lot 14, without approval. The roller door was fitted with an approved failsafe device or release for its operation to allow people to open the roller door from the rear of the property to gain access to Lot 14 so that the emergency exit could be used, and the sliding door had a failsafe breakable glass box which complied with the Building Control Act at the time. Accordingly, the emergency path of exit travel for Townhouse 4 was deemed compliant.
>
> I am informed that the [Respondents] have fitted a lock to the roller door, making it non-compliant as there is no longer an emergency exit from the rear of the property into Lot 14.
>
> I am also informed that the [Respondents] have fitted a lock to the sliding door without approval. In doing so it changed the carport into a garage. There was no approval for the locks on the roller door or the sliding door from the Owners Corporation, Atrabeck or J Dale Fisher Architects.

128 It may well be that an obligation has been imposed upon the owners corporation to provide an emergency exit out of the common property gardens. Other than Mr Fisher's general evidence, however, the owners corporation has provided no evidence as to how that obligation might arise. But even if such a burden exists, the owners corporation has provided no explanation as to why the burden of satisfying that obligation should fall on the shoulders of the lot owner. None of the rules relied on by the owners corporation imposes such a burden on the lot owner. Even if a rule did so, it would be of doubtful validity as the owners corporation has not explained why the stairs and lift, to which I have referred previously, would not meet the need. I therefore cannot see how the lot owner's failure to comply with the owners corporation's demand could amount to a breach of the owners corporation's rules and this part of the owners corporation's claim is dismissed.

129 I note in passing that, in his closing submissions, the lot owner said that he would install the door latch desired by the owners corporation.

Door lock

130 The order sought by the owners corporation about the door lock was that the lot owner, "remove the magnetic lock on the sliding door on common property connecting lot 15 and the entrance courtyard".

131 The lot owner's garage had a sliding door from his garage into an area of common property. That area is a small entry courtyard, accessible from the street. The front doors of apartment lot 1 and the lot owner's apartment lot 2 open onto that courtyard. The lot owner had installed a lock on that sliding door.

132 The owners corporation asserted that the door was common property and, as it alleged in relation to the door latch, the owners corporation also alleged by its Amended Points of Claim that that installation of the lock breached rules 3(n), 3(o) and 3(p) of the owners corporation's rules. In its closing submissions, the owners corporation also alleged that the lot owner's action breached rules 9 and 25 of its rules.

133 The lot owner's action is not covered by most of the rules relied on by the owners corporation, but may be caught by rule 3(p), the obligation to not interfere with common property. There was no evidence about the location of the sliding door. If attached to the inside of the garage wall, it would not be common property. If the door were attached to the external wall of the garage or were in a cavity in the wall, the door would be common property. In that case, the lot owner argued, under rule 4.3 of the model rules, he would be entitled to install the lock.

134 The Act confers on all owners corporations a set of model rules. The Act also allows owners corporations to make their own rules. The Act says, in section 139(3) that, "If the model rules provide for a matter and the rules of the owners corporation do not provide for that matter, the model rules relating to that matter are deemed to be included in the rules of the owners corporation".

135 Rule 4.3(4) of the model rules says as follows:

> **Use of Common Property**
>
> 4.3(4) An owner or person authorised by an owner may install a locking or safety device to protect the lot against intruders, or a screen or barrier to prevent entry of animals or insects, or if the device, screen or barrier is soundly built and is consistent with the colour, style and materials of the building.

136 The matter which is the subject of rule 4.3(4) is the making secure of an owner's lot. The owners corporation's rules do not provide for that matter.

137 The lot owner's action in putting a lock on the sliding door is clearly a matter covered by model rule 4.3(4). As the rules of the owners corporation do not provide for the matter, the model rules apply. And, under rule 4.3(4) of the model rules, the lot owner's action is permitted, since it serves, "to protect the lot against intruders".

138 For the sake of completeness, I note that, as it did in relation to the door latch referred to above, the owners corporation relied on Mr Fisher's evidence — about the owners corporation's obligation to provide an exit from the common property gardens — as justifying an order that the lot owner remove the door lock. As with the door latch, the mere fact that an owners corporation has an obligation, does not entitle it to demand of a lot owner that the lot owner must leave his property unsecured, in order to meet the needs of the owners corporation.

139 Accordingly, I find that the lot owner's action in fitting a lock to the sliding door was permitted by model rule 4.3(4) and this part of the owners corporation's claim is dismissed.

Relief: The relief sought in relation to renovation works

140 By its Amended Points of Claim, the owners corporation sought mandatory injunctions, requiring the lot owner to:

- restore the ceiling to its original height so that it does not encroach on the common property;
- remove the plumbing/sewerage pipe that penetrates the common property wall between lot 2 and lot 16 and reinstate the wall between lot 2 and lot 16;
- restore the wall located between the kitchen and the formal dining/lounge area; and
- remove the tiles installed on the balcony.

141 This Tribunal has power to make the orders sought. Section 165 of the Act and sections 123 and 124 of the *Victorian Civil and Administrative Tribunal Act 1998* give the Tribunal power to grant injunctions, make declarations and award damages.

142 While, in relation to the renovation works, the lot owner disputed the validity of the claims made by the owners corporation, he did not make any submission about the appropriateness of the remedy sought in each instance by the owners corporation.

143 The power to make orders which is given to the Tribunal by section 165 of the Act is not unconstrained. The power given by the section is to make orders which the Tribunal "considers fair".

144 In cases such as the present, the Tribunal may make mandatory injunctions, such as those sought by the owners corporation, but alternatively may order the payment of damages. Although damages were not sought by the owners corporation as an alternative to the injunctive relief which it sought, it would, nevertheless be open to the Tribunal to award damages, if the Tribunal thought that were fair and appropriate.

Encroachments on common property

145 In relation to the lot owner's encroachments on the common property, the principles to be applied when deciding whether to grant an injunction or award damages were laid down in the context of applications for mandatory injunctions to restrain trespass to land. In 1895, in the English Court of Appeal decision of *Shelfer v City of London Electric Lighting Co*,[18] AL Smith LJ proposed a "good working rule", which has been consistently applied in the intervening years:

[18] (1895) 1 Ch 287 ("*Shelfer*").

> Many judges have stated, and I emphatically agree with them, that a person by committing a wrongful act (whether it be a public company for public purposes or a private individual) is not thereby entitled to ask the Court to sanction his doing so by purchasing his neighbour's rights, by assessing damages in that behalf, leaving his neighbour with the nuisance … In such cases the well-known rule is not to accede to the application, but to grant the injunction sought, for the plaintiff's legal right has been invaded, and he is prima facie entitled to an injunction.
>
> …
>
> In my opinion, it may be stated as a good working rule that—
>
> (1) If the injury to the plaintiff's legal rights is small,
>
> (2) And is one which is capable of being estimated in money,
>
> (3) And is one which can be adequately compensated by a small money payment,
>
> (4) And the case is one in which it would be oppressive to the defendant to grant an injunction: –
>
> then damages in substitution for an injunction may be given.
>
> There may also be cases in which, though the four above-mentioned requirements exist, the defendant by his conduct, as, for instance, hurrying up his buildings so as if possible to avoid an injunction, or otherwise acting with a reckless disregard to the plaintiff's rights, has disentitled himself from asking that damages may be assessed in substitution for an injunction.[19]

146 In Australia, *Shelfer*'s good working rule has been consistently followed. Thus, the Victorian Court of Appeal, when applying *Shelfer* in its decision in *Break Fast Investments Pty Ltd v PCH Melbourne Pty Ltd* observed:

> Ordinarily, in such circumstances, unless the hardship to the defendant entailed by a specific remedy is out of all proportion to the relief thereby assured to the plaintiff, the plaintiff should not be compelled to exchange or suffer continuing invasion of its proprietary right for a money payment at the behest of the wrongdoer.[20]

The ceiling raised

147 In his witness statement, the architect, Mr Fisher, gave evidence about the effect of raising the ceiling in the lot 2 apartment, as follows:

> Raising the ceiling would necessarily mean alteration of wires, pipes, ducts and insulation within the ceiling all of which is common property. Some of those wires pipes ducts and insulation were for the benefit of Unit 2, and some were also for the benefit of Unit 1, part of which is above Unit 2, and for other parts of the building.
>
> By raising the ceiling height, the ceiling of unit 2 and all of the new electrical works and light fittings are in common property.

[19] Ibid 323.
[20] [2007] VSCA 311 at [49].

> Prior to construction of the Property a building permit was obtained with the common area ceiling and floors between levels 2 and 3 being of a particular width. The width of that common area has now been significantly reduced and the building no longer complies with the building permit.

The sewer pipe knocked through

148 The effect of the sewer pipe's being knocked through the common property wall between lot 2 and the neighbouring lot 16 was addressed in Mr Fisher's witness statement. He said:

> The wall was designed as a firewall in accordance with the regulations. If the wall has been compromised then the wall does not comply with regulations for fire separation.

149 Clearly, for a firewall to have a large hole in it compromises a mandatory safety feature of the building. Leaving the sewer pipe in place and sealing around it would not answer; a firewall with a large void inside it would not serve its intended purpose.

Other renovation works

The wall removed

150 The wall between the lounge/dining room and the kitchen, which the lot owner removed, was structural. It had served to support the ceiling, the roof and the garden facade.

151 The lot owner adduced no evidence to show that after the wall was removed, any substitute support had been provided, as part of the renovation works. As I said above, from the lot owner's failure to call the builder who did the renovation works, I infer that, if called, the builder would not have given evidence that such substitute support had been installed.

152 The lot owner's expert, the structural engineer, Mr Orangi, the architect, Mr Fisher and the owners corporation's structural engineer, Mr Gardiner, were in agreement that if unsupported, the purlins were now spanning nearly twice their designed span.

153 I therefore find that the removal of the wall left the roof, ceiling and garden facade without their designed support and exposed the building to the risk of significant failure. As I said above, when considering whether the removed wall had been structural, I take nothing from the fact that no failure has occurred to date.

154 From the evidence of the architect, Mr Fisher and of Mr Gardiner, the structural engineer, it would appear that the risk of failure is significant.

The tiles on the balcony

155 I have found above that the laying of the tiles on the balcony may have compromised its carrying capacity. I have also commented on the dangers that balconies can pose.

156 In addition, I note that evidence was given on the half of the owners corporation that laying a double layer of tiles on the balcony of lot 2 threatened the balcony's ability to properly shed water. Mr Fisher said in his witness statement:

> The design of the balconied areas were (sic) carefully designed to incorporate an upstand to prevent water running over the balconies on to balconies and occupants below.
>
> …
>
> The addition of laying new tiles will have changed this design and function. The water shedding over the balcony may now be non-compliant as there is no preventative measure re overflow. In accordance with the NCC 2016 Building Code of Australia part F1 service water on the balcony must be disposed of in a way that avoids the likelihood of damage or nuisance to any other property.

157 Here, I note the evidence of Lester Peters, whose apartment has a patio directly underneath the lot 2 balcony. Mr Peters said in his witness statement:

> I have just noted a crack in the soffit above our back patio associated with water penetration. This is directly beneath a new layer of tiles laid by Gilmore over the existing tiles.

Relief: Effect on the lot owner

158 Were the Tribunal to grant injunctions sought by the owners corporation, the effect of the injunctions on the lot owner would be the cost and inconvenience of carrying out the mandated works. While those works would not be trifling, they would not be massive and the cost involved would not be excessive.

Relief: Summary of effects

159 None of the effects of the renovation works on the owners corporation and its members is trivial. At worst, the roof and ceiling of the building are at risk of collapse and security of the garden facade of the lot owner's apartment is compromised. The intrusions into the ceiling and the firewall present less danger, but are nonetheless serious. The double layer of tiles presents overloading dangers and possible water flow problems.

160 The injury to the owners corporation's rights is not small and is not capable of being estimated in money terms. Nor can the injury be compensated by a small money payment. Finally, the order sought by the owners corporation, while not insignificant, would not be unduly oppressive to the lot owner.

Relief: The conduct of the lot owner

161 The final matter to be considered is the conduct of the lot owner. The Court of Appeal in *Shelfer* made it clear that the conduct of a respondent is a relevant consideration. In addition, section 167 of the Act provides that, when making an order, the Tribunal must consider, among other things:

- the conduct of the parties; and
- any act or omission by a party.

162 The part of this proceeding which concerns the lot owner's renovation works arises directly from the actions of the lot owner, namely his failure to comply with the rules of the owners corporation and give it proper information about the works which he was planning to carry out. That failure is all the more striking in light of the fact that the lot owner's son, Roy Gilmore, was a member of the owners corporation committee (at least until the renovations were completed, when he stopped attending the committee's meetings). Not only did Roy Gilmore fail to inform the owners corporation about the true nature of the works, but the information he did give was positively misleading; he described the works as "cosmetic renovation" and promised to provide plans when none existed (and never did exist).

RELIEF

163 In relation to the owners corporation's claims arising from the lot owners encroachment into the common property ceiling and the firewall, I note that in this Tribunal, Senior Member Vassie considered a case of encroachment into common property in the matter of *Owners Corporation 11672 v Moore*.[21] That case concerned a garage, built so that it encroached between half and one metre into common property, namely the driveway which led to the entrance of the garage. The Senior Member observed that the encroachment was small and that its effect on the legal rights of the other lot owners was also small. Nevertheless, the Tribunal ordered that the lot owner to whom the garage belonged should remove the encroachment.

164 The lot owner's renovation works have had a material and adverse impact on the owners corporation and on the lot owners in circumstances where it could easily have been avoided. I am of the clear view that it is fair to require the lot owner to restore the wall and the ceiling, reinstate the wall between lot 2 and lot 16, including removing the sewer pipe and also remove the tiles on the lot balcony. I will order accordingly.

COSTS

165 This proceeding consisted of two separate parts. In the first, the owners corporation's attempt to enforce the lot owner's compliance with rule 52(a), the lot owner was successful. In the second, the dispute over the lot owner's

[21] [2014] VCAT 1538.

renovations, the owners corporation was mostly successful. In terms of complexity and hearing time, the two were similar.

166 The award of costs in this Tribunal is not a foregone conclusion. The criteria for such awards are set out in section 109 of the *Victorian and Civil and Administrative Tribunal Act 1998* and are well known. Materially, they include, "any other matter the Tribunal considers relevant". The fact that the spoils of victory were evenly distributed between the parties is such a matter. Although the proceeding was relatively complex and lengthy, the even nature of the final result is such that an award of costs would not be appropriate.

167 I note that the lot owner made two open offers, shortly before the hearing. The offers were that the lot owner would allow the owners corporation access through lot 14. The access offered was limited to four occasions a year. As the evidence was that the owners corporation's gardeners do garden maintenance every two weeks, the offered access was not of much practical benefit to the owners corporation and is not sufficient to alter my view that there should be no order as to costs.

ORDERS

168 I will make a declaration about the validity of rule 52(a) and grant the orders sought by the owners corporation in relation to the lot owner's renovation works.

169 In relation to Ruth Gilmore, the rule 52(a) access claim fails and the renovations claim is not brought against her. I will therefore dismiss the proceeding against Ms Gilmore.

OTHER PROCEEDINGS

170 In addition to the present proceeding, two other proceedings are on foot between the parties:

- OC2606/2020, by which the lot owner made his counterclaim. It relates only to rule 52(a) and is dealt with in the orders I will make in the present proceeding. Accordingly, I will make an order dismissing it, without further order.
- OC1970/2020, in which the owners corporation is the applicant. By it, the owners corporation seeks an order for payment of owners corporation fees. The proceeding will be listed for a directions hearing, by telephone, at which the Tribunal will make any necessary orders for the management or disposition of the proceeding.

R. Buchanan
Member