VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

OWNERS CORPORATIONS LIST VCAT REFERENCE NO. OC928/2021

CATCHWORDS

Administrator- agreement with the lot owner to allow air conditioning unit encroaching on common property and a laneway to remain but be repositioned - another owner seeks order preventing the carrying out of the agreement- administrator's duties- carriage way easement- effect of building regulations- owners Corporations Act 2006 s 177.

APPLICANT	Louise Lorkin
RESPONDENT	Owners Corporation PS71064W
FIRST INTERESTED PARTY	Lynda Bourne
SECOND INTERESTED PARTY	Patrick Weaver
WHERE HELD	Melbourne
BEFORE	Senior Member A. Vassie
HEARING TYPE	Hearing
DATE OF HEARING	24 August 2021
DATE OF ORDER	5 October 2021
CITATION	Lorkin v Owners Corporation PS71064W (Owners Corporation) [2021] VCAT 1153

ORDER

The proceeding is dismissed.

A. Vassie
Senior Member

APPEARANCES:

For Applicant	In person
For Respondent	Mr N. Sanders
For the Interested Parties:	Mr P. Weaver

REASONS

The Dispute

1 The applicant Louise Lorkin is the owner of a lot in a four-lot subdivision. Plan of subdivision PS71064W describes the four lots and common property. On the land shown in the plan there is a two-storey block of apartments. There are two apartments (lot 1D and lot 4D) on the ground floor and two apartments (lot 2C and lot 3C) on the top floor.

2 The respondent, Owners Corporation PS71064W, affects all of the land shown in the plan of subdivision. Neville Sanders has been the VCAT appointed administrator of the Owners Corporation at all material times.

3 In this proceeding, Ms Lorkin, the owner of lot 2C, is seeking an order preventing the Owners Corporation from carrying out an agreement made between Mr Sanders, as administrator, and Linda Bourne, the lot owner of 1C. The agreement has the effect of allowing Ms Bourne to keep attached to the external wall of the building an air conditioning unit that protrudes from the wall over common property airspace, but requiring her to raise its position.

The Land, Owners and Occupiers

4 The apartment building faces onto Martin Street, South Melbourne.

5 The owners and occupiers of the lots are:

a. Lot 1D: Lynda Bourne is the owner. She and Patrick Weaver occupy apartment no.1, which is on the ground floor. They have been joined to the proceeding as interested parties.

b. Lot 2C: Louise Lorkin, the applicant, is the owner and occupier of apartment no.2, on the top floor, above Ms Bourne's apartment.

c. Lot 3C: (John) Robert Leared is the owner. He and Annie McNamara occupy apartment no.3, on the top floor.

d. Lot 4D: the registered proprietors[1] and occupiers are persons who have played no part in the dispute about the air conditioning unit.

6 On the left hand (as one faces the building in Martin Street) or western side of the building is a laneway.

7 The western wall of the building forms part of lots 1D and 2C respectively; that is to say, the bottom half of the wall forms part of Ms Bourne's lot 1D and the top half of the wall forms part of Ms Lorkin's lot 2C.

[1] Tim Hunt, Kristina Hunt and 2 Emily Close Pty. Ltd.

8 Beyond the western wall the plan of subdivision shows, as common property, a strip of land that is 35 centimetres wide[2]. The strip and airspace above it are part of the laneway but are also common property within the subdivision.

The Air Conditioning Unit

9 The air conditioning unit, that is the subject of this proceeding, services Ms Bourne's apartment. It is fixed to the external western wall, in such a way that some of the fixing screws penetrate part of the wall that belongs to Ms Lorkin's lot.

10 Ms Bourne did not fix the unit to the wall. The builder of the apartment, a Mr Lordan, fixed it there, as a replacement for an existing unit, between the time that he sold lot 1C to Ms Bourne and the time when the sale was settled.

11 Ms Bourne has had a screen fitted around the air conditioning unit. On 16 October 2015 she obtained a planning permit from the City of Port Phillip for the fitting of the screen.

12 The bottom of the screen is 2.1 metres above the surface of the laneway. There is no dispute about that measurement. Ms Lorkin has given evidence, which was not contradicted and which I accept, that the screened air conditioning unit protrudes 660 millimetres from the wall into the air space above the laneway. It protrudes over the 350 millimetres which is the width of the strip of common property land and a further 310 millimetres beyond the strip.

The Laneway

13 The laneway has a width of 2.44 metres[3]. It runs from Martin Street, alongside the western wall of the building, and ends at the right angle to a passageway which leads to the rear of the properties that face onto the next parallel street, Howe Crescent. When the common property strip's width is added to the width of the laneway, there becomes a width of 2.79 metres for access through the laneway.

14 All four of the lots 1D, 2C, 3C, 4D in Martin Street have the benefit of a carriageway easement over the laneway[4], and the registered proprietors of those lots have the right of carriageway. Irrespective of the easement, all lot owners are entitled to use the common property strip next to the western wall.

15 On the certificate of title that relates to the four lots, the laneway is shown as a "road". Mr Weaver's research has revealed that in its Road Register the

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[2] The measurement appears in Plan of Subdivision PS 71064W
[3] The measurement appears in Title Plan TP951476E and originally in Title Plan TP515258A where it is given as 8 feet.
[4] The easement (right of carriageway) is described as Lot 1 in Title Plan TP515258A.

City of Port Phillip has discontinued the classification of the laneway as a public laneway, and that the laneway is now privately owned[5]. Those facts have no significance in this proceeding. All that they mean is that members of the public do not have right of carriageway over the laneway. The carriageway easement exists for the benefit of the four lots, whether the laneway is a public laneway or is privately owned.

16 Three lots of land[6] in Howe Crescent - the lots which have street numbers 10,11 and 12 Howe Crescent - also appear to have the benefit of a carriageway easement over the laneway. I say "appear to have" because Mr Weaver presented an elaborate argument that the rights over the laneway that attach those lots are very limited. I refer below to that argument and to the reason why I make no decision about it.

17 Photographs of the laneway show that ordinary sedan cars are able to move along it without being hindered by the presence of the air conditioning unit even though the bottom of the screen is only 2.1 metres above the surface of the laneway. However taller vehicles such as furniture removalist vans could be well hindered by, and be in danger of colliding with, the air conditioning unit in its present position or in the raised position which the agreement between Ms Bourne and Mr Sanders (described below) contemplates.

Earlier proceedings

18 Both Ms Lorkin and Mr Leared have objected to the presence of the air conditioning unit on the wall and to its protrusion over common property. They agitated for its removal.

19 When the Owners Corporation's administrator wrote to Ms Bourne demanding that she remove the air conditioning unit, she began at a proceeding, numbered OC3091/ 2019, against the Owners Corporation seeking an injunction restraining the Owners Corporation from removing the unit. On 12 December 2019 she obtained an interlocutory injunction to that effect.

20 In turn, the Owners Corporation by its administrator[7] began a proceeding numbered OC3/2020 against Ms Bourne seeking an order requiring her to remove the air conditioning unit.

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[5] Certificate of Title volume 11407 folio 513 shows that the registered proprietor of Lot 1 in Title Plan TP951476E (see footnote 3) is Andrew Lyell.

[6] Title Plans TP831699D (Certificate of Title volume 08136 folio 560), Certificate of Title volume 08136 folio 561 and Certificate of Title volume 07655 folio 107 respectively.

[7] The administrator who began the proceeding was Joel Chamberlain, appointed on 19 October 2018 by order in proceeding numbered OC1373/2018. By an order in that proceeding dates 5 March 2020 Mr Sanders was appointed as administrator instead, and by a further order dated 18 November 2020 Mr Sanders' appointment as administrator was extended until 30 April 2021.

21 Both of those proceedings were listed for hearing together, by video conference, on 18 March 2021. They came on for hearing before me on that day.

The Agreement

22 Shortly after the hearing began, the administrator, Mr Sanders, and Ms Bourne arrived at an agreement. Ms Lorkin, who was present during the video conference, expressed her unhappiness with the agreement. On that day, 18 March 2021, I made an order in proceeding OC3/2020 that in its second paragraph recorded the agreement that Mr Sanders and Ms Bourne had reached. The first two paragraphs of the order were:

> 1. Unless by 30 April 2021 Louise Lorkin has applied for and obtained an order preventing the carrying out of the agreement referred to in paragraph 2, the following orders have effect.
>
> 2. The Tribunal notes that the parties have agreed that by 18 July 2021, or by any later date that the Tribunal specifies or on which they agree, the respondent will
>
> a. Raise their Air Conditioning unit 300mm, to provide a 2,400 clearance under the screen.
>
> b. Galvanize and powder coat the screen to 'Colorbond Night Sky'.
>
> c. Remove all screw fixings from the Lot 2C wall (fixings to be in Lot 1D walls).
>
> d. Repair all redundant fixing holes and damage.
>
> e. Relocate and augment the existing security light to reduce shadows.
>
> f. Indemnify the OC for any cost or damage arising out of the relocated AC unit that is not covered by the OC insurance policy.

In that order, "2.400" means 2,400 millimetres, that is to say, 2.4 metres, and "the OC" means the Owners Corporation.

23 Each of the two proceedings was struck out with a right to apply for reinstatement.

This proceeding and its Hearing

24 Shortly before 30 April 2021, Ms Lorkin began this proceeding. She did not, before that date, obtain any order preventing the carrying out of the agreement, but nobody has taken any point about that. Because this proceeding has been pending, Ms Bourne has not acted in accordance with the agreement by 18 July 2021 or at all. She and Mr Sanders have agreed

that, if this proceeding fails, 30 October 2021 should be the date by which Ms Bourne is to carry out the agreement.

25 I heard this proceeding on 24 August 2021, by video conference. The persons present during the video conference were:

a. Ms Lorkin, who gave evidence;

b. Shane Leonard, a building surveyor, who gave evidence for Ms Lorkin;

c. Ms Bourne and Mr Weaver; Mr Weaver gave evidence and also made submissions on Ms Bourne's behalf;

d. Mr Sanders, who gave evidence;

e. Mr Leared and Ms McNamara; Ms McNamara gave evidence.

26 At the end of the hearing I reserved my decision.

The Administrator's Powers and Duties

27 By virtue of S 176(c) of the Owners Corporation Act 2006 ("The OC Act") the administrator, subject to any VCAT order or Court order, may do anything that the Owners Corporation can do. It is clear that the administrator had the power to begin, on behalf of the Owners Corporation, proceeding OC3/2020 against Ms Bourne and had the power to compromise the proceeding by entering, on behalf of the Owners Corporation, into the agreement described above.

28 The duties of an administrator are set out in s177 of the OC Act as follows:

> **Administrator to act in good faith**
> An administrator in carrying out any functions and powers conferred by or under this Act or the Subdivision Act 1988 —
> (a) must act honestly and in good faith; and
> (b) must exercise due care and diligence.

The duties are owed to the Owners Corporation and to each of its members, including Ms Lorkin.

29 In my view, Ms Lorkin cannot succeed in this proceeding unless she establishes that Mr Sanders has breached one of those duties. She has not alleged any dishonesty or bad faith. She must establish that Mr Sanders has breached the duty to exercise due care and diligence. It is no part of my function to attempt to decide whether the agreement he reached with Ms Bourne is a good or bad resolution of the dispute concerning the air conditioning unit, or whether the unit could or should be moved somewhere else, even though witnesses canvassed those matters during the hearing.

30 That said, there was enough in the evidence of Mr Weaver to indicate that if the air conditioning unit were not to be situated on the external western wall there would be difficulties in finding another suitable position for it and Ms Bourne and he might be left with no air conditioning facility at all. The wall facing Martin Street is a subject to a heritage overlay. The unit could not be situated in an internal habitable room unless the room has some permanent ventilation for it. It was reasonable for Mr Sanders to investigate, as he said he did, a solution that would not leave Ms Bourne's apartment without any air conditioning, would reduce the extent of any potential or actual obstruction to use of the laneway, and would not harm Ms Lorkin's interest. I repeat that I am not deciding whether that air conditioning unit could or could not be placed elsewhere. I am considering only whether, in entering into the agreement with Ms Bourne, Mr Sanders failed in his duty to exercise the due care and diligence.

Ms Lorkin's Case

31 In short, the agreement entered into on 18 March 2021, was for the raising of the screened air conditioning unit by 300 millimetres so that a clearance above the laneway on 2.4 metres instead of 2.1 metres could be achieved, for the re-fixing of the screen unit in such a way that there would no longer be any penetration of Ms Lorkin's wall, and for Ms Bourne to make good the surface of Ms Lorkin's wall.

32 Ms Lorkin's criticisms of Mr Sanders' conduct, as expressed in her evidence, are these;

a. He did not consult her or consider her interests before making the agreement. In particular, he did not take account of how the raising of the screened unit by 300 millimetres would affect her ability to alter or maintain her window shutters that are above the unit.

b. He entered into the agreement without there being any detailed plan provided as to the feasibility of altering the air conditioning unit's position or as to how the alteration would be achieved.

c. There is no building permit for the unit as presently situated, and there cannot be any building permit for it in the proposed altered position because the width of its protrusion, and the clearance above the laneway, would still not comply with the building regulations. So Mr Sanders is exposing the Owners Corporation to the risk that the City of Port Phillip will take action against it.

d. He entered into the agreement despite his knowledge that two of the three owners of the relevant properties in Howe Crescent with the unit to be removed, and so he has exposed the Owners Corporation to the risk there one or more of those owners will take action against it.

33 I proceed to consider each of those criticisms in turn and decide whether they justify a finding of the lack of due care and diligence.

No Consultation

34 There is no evidence that Mr Sanders consulted Ms Lorkin about the proposed agreement as so I have taken it to be that fact that he did not consult her. As I understand the matter, Mr Sanders put the proposed agreement to Ms Bourne and Mr Weaver shortly before 18 March 2021 and they did not have any opportunity to respond until the day of the hearing, 18 March 2021.

35 The administrator's duties under s 177 of the OC Act are owed to the Owners Corporation as a whole and to each member of it. Mr Sanders ought not to prefer Ms Lorkin's interests to those of Ms Bourne, or vice versa, without good reason. Even if Mr Sanders had been able to consult Ms Lorkin about the proposed agreement, she no doubt would have expressed disapproval; she did not give any evidence of willingness on her part to suggest any alteration or improvement to the proposed agreement. Consultation with her would not have achieved anything except courtesy.

36 Ms Lorkin expressed her concerns about her window shutters in this way. The builder had installed the shutters with their blades facing the wrong way, causing water to enter through the shutters. External access to the shutters would be required if they were to be modified or replaced. I understand that evidence, but I have not been able to understand why the raising of the screened air conditioning unit by 300 millimetres would make external access to the shutter any less easy than it is at present. Questioning of Ms Lorkin by Mr Sanders and by me did not elicit any enlightening answer about that matter. I have concluded that Ms Lorkin's concerns about the matter relate to the presence of the unit at all on the wall, not to anything about the agreement to alter the unit's position on the wall.

37 Mr Sanders gave evidence that he had visited the site before 18 March 2021 to see whether he could find a reasonable compromise about the air conditioning unit. There being a clearance between the unit and the laneway surface of only 2.1 metres presents a difficulty. He estimated that if the presented screened unit was to be raised by 300 millimetres to give a greater clearance it would still be well clear of the shutters on Ms Lorkin's windows. He made the estimate by using his experience as a property valuer, knowing the width of a standard brick and counting that there would be a six brick courses between the windows and the air conditioning unit once raised by 300 millimetres. I accept that evidence. I find that Mr Sanders did take into account the effect of the alteration of the position of the unit upon Ms Lorkin's access to her windows.

No Detailed Plan

38 The material which Ms Bourne and Mr Weaver has filed included a photograph of the screened unit as it now is and what I have taken to be a digitally altered version of the photograph that shows the unit in the intended raised position. The photograph suggested to me that no great feat of engineering would be involved in the raising and re-fixing of the unit. No doubt an expert tradesman will be needed to do the work, but I see no reason for any detailed plan or feasibility study and in my view there was no reason for Mr Sanders to have required any.

Building Regulations and Building Permit

39 Regulation 105 of the Building Regulations 2018 provides:

> **Service pipes, rainwater heads and service installations**
> A service pipe, rainwater head or service installation must not project beyond the street alignment—
> a) more than 200 mm horizontally in the case of a service pipe; and
> b) more than 300 mm horizontally in the case of a rainwater head or service installation; and
> c) at any height less than 2·7 m above the level of the street.

If the air conditioning unit is a "service installation" and the laneway is a "street" within the meaning of the regulation, it does not comply with the regulation. It projects more than 300 millimetres horizontally above the laneway and its height is less than 2.7 metres above the level of the laneway. Raising the height to 2.4 metres above the level of the laneway would still not be compliant with the regulation.

40 Regulation 5 defines "street alignment" as meaning the line between a street and an allotment. Neither the 2018 regulations nor the Building Act 1993 under which those regulations are made define "street" or "service installation".

41 Shane Leonard, the building surveyor whom Ms Lorkin called as a witness and whose expertise was adequately proved, gave evidence that an air conditioning unit is generally regarded as a "service installation" within the meaning of regulation 105. I accept that. So far as I am aware, there is no other regulatory treatment of an air conditioning unit. Not to accept that it is a "service installation" would lead to the highly improbable result that the legislature did not intend to regulate the positioning of air conditioning units within or on buildings.

42 Mr Leonard gave evidence, which Mr Weaver did not challenge or contradict, that no building permit (as distinct from planning permit) had been issued for the erection of the screen and that it was possible to seek the consent of the City of Port Phillip to the presence of the screened air

conditioning unit on the wall, but consent would be unlikely if there were objectors.

43 To Mr Weaver's question Mr Leonard agreed that if the laneway was not a "street" regulation 105 would not apply. The question was based upon the proposition that because the laneway is privately owned it is not a "street". I do not accept the proposition. The fact that the laneway is not a public road or public thoroughfare does not determine the issue. The burdening of the laneway with a carriageway easement means that it is a "street", in my opinion.

44 Mr Leonard gave evidence that the mere relocation of position of the air conditioning unit would not require a building permit, but I understood him to mean that if a building permit had been granted in the first place no fresh permit would be required for a relocation which was still within the scope of the permit.

45 The conclusion that the relocation of the position of the air conditioning unit as contemplated by the agreement would still not comply with regulation 105 is, I think, inescapable. There are two reasons, however, why the non-compliance may not have any adverse consequences for the Owners Corporation.

46 The first reason is that there is reason to think that the City of Port Phillip might not take any action to compel removal of the air conditioning unit. In 2017 the City of Port Phillip took action against the builder, Mr Lordan, in the Magistrates Court concerning the air conditioning unit. The proceeding was dismissed. Ms McNamara, who told me that she attended the Magistrates Court throughout the hearing, confirmed Mr Weaver's evidence that the proceeding was dismissed, but did not confirm that the reason was connected to the issuing of a planning permit despite the absence of a building permit. Whatever was the reason for it, the outcome of the action may mean that the City of Port Phillip would be reluctant to pursue the matter of the air conditioning unit again.

47 The second reason is that any further action to compel the removal of the air conditioning unit, whether taken against the Owners Corporation or against Ms Bourne, would have adverse consequences for Ms Bourne but not for the Owners Corporation. Even if Ms Bourne were to refuse to comply with an order for removal of the unit and the Owners Corporation had to attend to its removal, the Owners Corporation could recover the cost of removal from Ms Bourne[8].

The Howe Crescent Properties

[8] OC Act S48

48 Relevant certificate of title[9] for land corresponding to the street addresses of 10, 11 and 12 Howe Crescent show that the registered proprietors are:

a. No 10: Margaret Elizabeth McCulloch and Amy Elizabeth McCulloch;

b. No 11: Anthony Jason Bettanin and Alison Kathleen Bettanin;

c. No 12: Gregory James Dall

49 The Owners Corporation's administrator wrote to each of those persons before beginning the proceeding OC3/2020, notifying them of the position of the air conditioning unit above the laneway and seeking their views about it.

50 Anthony Bettanin replied, objecting strongly to the air conditioning unit and asking for its removal. Gregory Dall has stated in reply, that he would not object if the unit was raised to 2.5 metres above the laneway. As the agreement contemplates a raising to the height of 2.4 metres, I have regarded Mr Dall as an opponent, but a less forceful opponent, to the carrying out of the agreement. Mesdames McCulloch have not replied.

51 While those Howe Crescent properties have the benefit of an easement over the laneway, their owners also have a right of way over the passageway that runs at a right angle to the laneway at the point where the laneway ends. The width of the passageway is only 1.27 metres[10].

52 Mr Weaver relied on those facts in support of the following argument.

a. A right of carriageway is a right to "pass and repass… into and out of and from" a lot owner's land "through, over and along" the carriageway[11].

b. Each owner of the three Howe Crescent properties can exercise a right of carriageway over the laneway by exiting from the owner's property, passing through the passageway, and entering the laneway, but not otherwise.

c. Accordingly, each owner cannot exercise the right of carriageway by having any large vehicle enter it, because a large vehicle could not enter the narrow passageway either before or after having entered the laneway.

d. So in reality the air conditioning unit would not obstruct or hinder each owner's right of carriageway.

53 I do not attempt to decide whether the argument is right or wrong. None of the owners of the three Howe Crescent properties is a party to this

[9] See footnote 6.
[10] The passageway, the right of way and the measurement appear on Title Plan 831699D.
[11] Transfer of Land Act 1958 s72 (3) and the Twelfth Schedule.

proceeding. None of them has had any opportunity to be heard about the argument. It would be wrong to make any decision about a matter that affects their actual or potential property rights without their having been heard. To be fair to them I must assume, without deciding, that their lots have the benefit of a carriageway easement that is not limited in the ways that Mr Weaver has argued.

54 On that assumption, the entry into the agreement exposes the Owners Corporation to a risk of one or more of the Howe Crescent owners taking some kind of action to compel removal of the air conditioning unit from the western wall. That risk existed before the agreement was made, and has not materialised. Again, even if that action were to be taken, for the reason given in paragraph 27 above, it would be Ms Bourne, not the Owners Corporation, that would suffer adverse consequences.

Conclusion

55 Mr Sanders has performed his duty as administrator to exercise due care and diligence. The entry into the agreement was not a breach of that duty to the Owners Corporation or to Ms Lorkin. He properly considered the interests of each member of the Owners Corporation before entering into an agreement which is unlikely to producee any adverse consequences for the Owners Corporation. The proceeding will be dismissed.

56 The continuation of COVID-19 restrictions probably means that the extended date, 30 October 2021, for Ms Bourne's performance of the agreement is now unrealistic. I need not make any order in this proceeding or in proceeding OC3/2020 about a further extended date. The terms of the agreement enable Mr Sanders and Ms Bourne to agree upon a further extension.

A. Vassie
Senior Member