

**VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL
CIVIL DIVISION
OWNERS CORPORATIONS LIST**

VCAT REFERENCE NO. OC636/2019

CATCHWORDS

Application under section 34D of the *Subdivision Act 1998* to vary the lot liability and lot entitlement of a lot in a plan of subdivision; no resolution obtained nor sought of lot owners; meaning of “consent” in section 34D(3)(c) of the *Subdivision Act 1998*.

APPLICANT	RN Saines Pty Ltd (ACN 147 164 609)
FIRST RESPONDENT	Owners Corporation No PS304164A
SECOND RESPONDENT	Highland Park Investments Pty Ltd (ACN 107 369 004)
THIRD RESPONDENT	Arlene Ewan
FOURTH RESPONDENT	Midvale Properties Pty Ltd (ACN 056 148 175)
FIFTH RESPONDENT	Noel Stewart
SIXTH RESPONDENT	Margaret Stewart
SEVENTH RESPONDENT	Shane Stevens
EIGHTH RESPONDENT	Mastermind Training Company Pty Ltd
NINTH RESPONDENT	Costanzo Puppa
WHERE HELD	Melbourne
BEFORE	Acting Deputy President L. Warren
HEARING TYPE	Hearing
DATE OF HEARING	9 December 2020
DATE OF APPLICANT'S FINAL SUBMISSIONS	11 August 2021
DATE OF RECEIPT OF NINTH RESPONDENT'S FINAL SUBMISSIONS	2 September 2021
DATE OF APPLICANT'S REPLY TO NINTH RESPONDENT'S SUBMISSIONS	15 September 2021
DATE OF ORDER	22 April 2022

CITATION

RN Saines Pty Ltd v Owners Corporation No
PS304164A (Owners Corporations) [2022]
VCAT 441

ORDER

1. The application is dismissed.
2. Any party who wishes to make an application for costs may do so on notice to the principal registrar by no later than 31 May 2022. Upon any party giving such notice in writing the principal registrar is directed to set the matter down for a directions hearing before Acting Deputy President Warren on a date and time to be fixed with an estimation of duration of not less than two hours.

L. Warren
Acting Deputy President

APPEARANCES:

For the Applicant

Mr A Berger of Counsel
Mr G Hills, Solicitor
Mr R Saines, director

For the First Respondent

Mr A Whitelaw, Solicitor

For the Second – Eighth
Respondents

Mr G Honeyman, Owners Corporation
Manager

For the Ninth Respondent

In person, assisted by Ms E Brothers

REASONS

- 1 This proceeding relates to Lot 13 on Plan of Subdivision PS304164A (“the Plan”). Lot 13 is owned by the applicant.
- 2 The first respondent is the owners corporation that operates in relation to the Plan (“the OC”).
- 3 Initially the applicant sought orders from the Tribunal that Lot 13 be excised from the Plan and in the alternative, that the lot liability for the Plan be varied, specifically by way of a reduction in lot liability for Lot 13 with a corresponding increase in lot liability for all other lots within the Plan.
- 4 By the time the proceeding came on for hearing the applicant only sought an order for variation in the lot liability; the claim for the excision of Lot 13 from the Plan being abandoned.
- 5 The proceeding has had somewhat of a tortuous path through the Tribunal, particularly after the conclusion of the hearing in December 2020. For the reasons more fully set out below, the applicant has been unsuccessful in its application.

The Plan

- 6 The location of Lot 13 on the Plan and its location within the Plan is important in understanding this proceeding.
- 7 The land comprised in the Plan is situated on the corner of White Horse Road and Geelong Road, Mount Clear. The lots on the Plan comprise the Midvale Shopping Centre.
- 8 The Plan comprises 11 lots, of which Lot 13 is one. Lots 1, 2, 3, 4, 5, S2, 9, 10, 11 and 12 form a L-shaped building along the northern and western boundaries of the main part of the site. Southeast of the L-shaped building is common property which is used as a carpark (“the Common Property Carpark”).
- 9 Lot 13 sits to the west of the L-shaped building. It is not joined to the L-shaped building and is separated from it by a driveway that is part of the common property. This driveway is separated from Lot 13 by a 6 foot high timber paling fence which sits on the common boundary between Lot 13 and the driveway. The driveway provides rear access to Lots 1-4.
- 10 Lot 13 does not have direct access to the Common Property Carpark.
- 11 Pedestrian access to Lot 13 is directly off White Horse Road. All other lots in the Plan have pedestrian access via the Common Property Carpark.
- 12 To the west of Lot 13 is a further strip of common property which is also used as a driveway. This driveway allows access to undercroft carparking within Lot 13 for 5 vehicles and provides access to a large carpark situated on adjoining land which services a supermarket.¹

¹ The other carpark and the supermarket are not a part of the Plan.

- 13 Lot 13 has a separate street address; it is known as 8 White Horse Road, Mt Clear rather than Lot 13/1172-1174 Geelong Road, Mt Clear.²
- 14 The ninth respondent owns lot 5 on the Plan ("Lot 5").
- 15 Except for Lot 13, the lots on the Plan are used for a mixture of retail uses.

The Claim

- 16 The Plan contains a table that sets out the lot entitlement and lot liability for each of the lots contained in the Plan. This table reads as follows:

Land Parcel	Entitlement	Liability
Common Property	0	0
Lot 1	67	67
Lot 2	44	44
Lot 3	44	44
Lot 4	37	37
Lot 5	41	41
Lot 9	37	37
Lot 10	34	34
Lot 11	34	34
Lot 12	41	41
Lot 13	175	175
Lot S2	446	446
Total	1000.00	1000.00

- 17 The amended points of claim dated 21 September 2020 ("the APOC") filed on behalf of the applicant seeks an order pursuant to section 34D(1)(a) of the *Subdivision Act 1988* ("the SA") that the owners corporation apply to the Registrar of Titles to vary the lot liability of Lot 13. Paragraph 12 of the APOC contains the following table setting out the variation in lot liability sought by the applicant:

² Valuation Report of Adrian Doyle dated 4 June 2021, page 22.

Land Parcel	Entitlement	Liability
Common Property	0	0
Lot 1	74.3	74.3
Lot 2	51.3	51.3
Lot 3	51.3	51.3
Lot 4	44.3	44.3
Lot 5	48.3	48.3
Lot 9	44.3	44.3
Lot 10	41.3	41.3
Lot 11	41.3	41.3
Lot 12	48.3	48.3
Lot 13	102.0	102.0
Lot S2	453.3	453.3
Total	1000.00	1000.00

The effect of the variation in lot liability sought by the applicant is to reduce the lot liability for Lot 13 from 175 units of liability to 102 units of liability, with a corresponding increase in the lot liability of all other lots in the Plan.

- 18 The first to eighth respondents do not oppose the orders sought by the applicant.
- 19 The ninth respondent opposes the orders sought by the applicant.
- 20 Paragraph 12 of the APOC sets out that the applicant “seeks an order requiring the OC to apply to the Registrar of Titles to reduce the lot liability” of Lot 13.
- 21 Paragraph A of the Relief sought by the applicant again makes reference to the seeking of an order to “reduce the lot liability” of Lot 13.
- 22 The table set out in paragraph 17 of these Reasons (and being the table set out in paragraph 12 of the APOC) inferred that the applicant was also seeking to vary the lot entitlement of all lots within the Plan. The APOC did not specifically seek the making of such an order.
- 23 In determining disputes, the Tribunal is bound by the rules of natural justice,³ is required to conduct each proceeding with as little formality and technicality and with as much speed as a proper consideration of the matters

³ Section 98(1)(a) of the *Victorian Civil and Administrative Tribunal Act 1998*.

permit⁴ and is required to act fairly and according to the substantial merits of the case.⁵

- 24 With these principles in mind, it was necessary for the Tribunal to be clear as to the orders that the applicant was seeking; was it seeking to vary lot liability only or was it seeking to vary both lot liability *and* lot entitlement. It was not until after the hearing on 9 December 2020 had concluded that this conflict within the APOC became apparent.
- 25 Taking in to account the evidence presented by the parties in the hearing on 9 December 2020, this proceeding could have had significantly different outcomes depending on the exact orders that the applicant was seeking. With this issue in mind, I directed the principal registrar to list the proceeding for a directions hearing to place the issue before the parties and to seek clarity as to the exact claim being made by the applicant.
- 26 At the directions hearing on 15 March 2021 the applicant made it clear that it was seeking orders for the variation of both lot liability and lot entitlement. The applicant sought leave to amend the APOC to make this clear.
- 27 The ninth respondent strenuously opposed the granting of leave to amend the APOC. The remaining respondents did not oppose leave being granted.
- 28 Noting again the principles under which the Tribunal has a statutory obligation to act as set out in paragraph 24 above, I decided it was appropriate to grant the applicant leave to amend the APOC and furthermore, to grant leave for the applicant to file and serve an expert valuation report if it chose to do so. To ensure procedural fairness for all the respondents, I made procedural orders permitting any respondent to request a further hearing to cross examine the author of any expert valuation report that the applicant filed and served and put in place a timetable for each party to file and serve any written submissions she, he or it wished to rely upon.
- 29 On 19 March 2021 the applicant filed and served its Further Amended Points of Claim ("FAPOC") to clarify that it was seeking orders in this proceeding to vary both lot liability and lot entitlement.
- 30 On 25 June 2021 Her Honour Justice Richards of the Supreme Court of Victoria handed down the decision in *Real Estate Victoria Pty Ltd v Owners Corporation No 1 PS332430W & Ors* ("REV").⁶
- 31 REV marked a departure from an earlier decision of the Tribunal⁷ in the way in which section 34D of the SA is to be interpreted and applied.

⁴ Section 98(1)(d) of the *Victorian Civil and Administrative Tribunal Act 1998*.

⁵ Section 97 of the *Victorian Civil and Administrative Tribunal Act 1998*.

⁶ [2021] VSC 373.

⁷ The earlier decision of the Tribunal is *Conroy v Owners Corporation Strata Plan 30438* [2014] VCAT 550 per Justice Garde sitting as the President of the Tribunal. ("Conroy").

- 32 Noting that REV was handed down by the Supreme Court after the date of the hearing but prior to the final determination of this proceeding, I directed the principal registrar of the Tribunal to write to all parties and to draw their attention to the decision in REV and to invite any written submissions any party wished to make.
- 33 In response the applicant submitted that the decision in REV necessitated a “minor reformulation” of its case and sought leave to file and serve a Second Further Amended Points of Claim (“SFAPOC”). Again, the ninth respondent strenuously opposed leave being granted to the applicant, and the remaining eight respondents did not oppose leave being granted.

Second Further Amended Points of Claim

- 34 By an order made in chambers on 17 August 2021 I directed that any written submissions made by any respondent by 1 September 2021⁸ were to include any submissions a respondent wished to make in response to the applicant’s application for leave to file and serve the proposed SFAPOC. I further ordered that I would determine the applicant’s application for leave on the papers pursuant to section 100(2) of the *Victorian Civil and Administrative Tribunal Act 1998* (“the VCAT Act”). The intention being to avoid having to list a further directions hearing and as such seek to avoid any party incurring unnecessary costs.
- 35 The first to eighth respondents consented to the applicant being granted leave to file and serve its proposed SFAPOC.
- 36 The ninth respondent filed written submissions on 2 September 2021 objecting to the applicant being granted leave to file and serve its proposed SFAPOC.
- 37 The ninth respondent’s written submissions were emailed to the Tribunal at 10.32 pm on 1 September 2021. Pursuant to Regulation 4.32 of the *Victorian Civil and Administrative Tribunal Rules 2018* a document that is lodged or filed after 4.00 p.m. is taken to have been lodged or filed on the next day the registry is open. Accordingly, the ninth respondent’s written submissions are deemed to have been filed on 2 September 2021 and as such were filed out of time. However, it could not rationally be argued that any party has been prejudiced by the ninth respondent being deemed by the Rules to have filed his submissions one day late. I have decided it is appropriate to take the ninth respondent’s written submissions in to account notwithstanding the failure to file them in accordance with the Tribunal’s orders.
- 38 No respondent objected to the application by the applicant for leave to file and serve its SFAPOC being determined on the papers pursuant to section 100(2) of the VCAT Act.

⁸ Such written submissions were allowed pursuant to orders made by the Tribunal on 15 March 2021 and varied by further orders made on 28 May 2021 and further varied by the orders made on 17 August 2021.

- 39 Having considered the submissions of the applicant and the ninth respondent, I granted the applicant leave to file and serve its proposed SFAPOC by an order made in chambers on 27 September 2021 and stated that I would provide written reasons for so doing at a later date. I now set out my reasons. My order made on 27 September 2021 allowed the ninth respondent to file and served an amended points of defence if he chose to do so.
- 40 Pursuant to section 127(1) of the VCAT Act the Tribunal may order at any time that a document in a proceeding be amended. As noted above, the Tribunal is required to conduct proceedings with as little formality and technicality as the proper consideration of the matters permit.
- 41 In its written submission dated 11 August 2021 the applicant submitted that the proposed amendment to its FAPOC has been necessitated by the decision in REV handed down after the hearing in this proceeding had concluded.
- 42 In his written submissions received on 2 September 2021 the ninth respondent submits that leave should not be granted to the applicant to amend its claim. The ninth respondent submitted that the applicant should have taken in to account the possibility that a court or Tribunal decision could be made at any time that could alter the interpretation of legislation. He submits that the applicant chose to only apply under section 34D(1)(a) of the SA and that this was a calculated risk that the applicant chose to take. The amendment is a significant amendment, and the applicant should not be allowed to amend its claim in this way.
- 43 Prior to the decision in REV section 34D of the Subdivision Act ("SA")⁹ was interpreted in accordance with the decision of Justice Garde in Conroy. In Conroy, His Honour found that each of the paragraphs of section 34D(1) were alternative and cumulative. This decision has been relied on by parties to make an application for the variation of liability and/or entitlement under section 34D(1)(a) without any application being made at the same time under section 34D(1)(b). The practical effect of not requiring an application under section 34D(1)(b) as well as section 34D(1)(a) meant that the factors in section 34D(3) do not need to be proved by an applicant. In Conroy, Justice Garde cited with approval the Tribunal's earlier decision in *Paolucci*¹⁰ that decided that the factors in section 34D(3)(c)(ii) were relevant (although not decisive) considerations even in circumstances where an application is brought under section 34D(1)(a) alone.
- 44 In REV Justice Richards disagreed with Justice Garde in Conroy and held that the interpretation of section 34D(6) of the SA is such that the Tribunal could not make an order on an application brought under section 34D(1)(a) without also making an order as if on an application under section 34D(1)(b), and without being satisfied as to the factors set out in section

⁹ The relevant sections of the *Subdivision Act 1988* are set out in full below.
¹⁰ [2018] VCAT 940.

34D(3). The practical effect of Justice Richards' decision in REV is that the factors set out in section 34D(3) of the SA are no longer simply relevant, they are decisive.

- 45 The determination of the applicant's application for leave to file and serve its SFAPOC is in part dependent on whether this Tribunal is bound by the decision of Garde J in Conroy or the decision of Richards J in REV. If the Tribunal is bound by the decision in Conroy, then no further amendment to the applicant's FAPOC would be required. If, however the Tribunal is bound by the decision in REV then, subject to further discussion below, an amendment to the FAPOC would be necessary as the proper interpretation of section 34D of the SA has only become known after the conclusion of the hearing of 9 December 2020 and prior to the Tribunal's final decision. Adopting a football analogy, the goal posts would have moved whilst the ball was in mid-flight.
- 46 Our legal system is based on the doctrine of precedents. In summary this doctrine provides that in a hierarchical system of courts the decision of a higher court is binding on all courts or tribunals at a lower rank in the hierarchy.
- 47 Within this Tribunal, the doctrine would operate to say that non-judicial members of the Tribunal are bound by the decisions of judicial members of the Tribunal and by the decisions of the courts that are higher in rank in the judicial hierarchy.
- 48 Both Richards J and Garde J are Judges of the Supreme Court of Victoria and I am bound by the decisions of both.
- 49 In Conroy, Garde J was sitting as the President of this Tribunal and although a Judge of the Supreme Court, he was not on that occasion constituting the Supreme Court of Victoria. By contrast, in REV Richards J was sitting as a Judge of the Supreme Court of Victoria and was constituting the Court for the purpose of hearing an appeal from a decision of this Tribunal.
- 50 The decision of REV represents a decision by a higher court in the hierarchical system of courts that operates in this State. Accordingly, for that reason I am bound to follow and apply the interpretation of section 34D of the SA as established in REV handed down by Richards J on 25 June 2021.
- 51 The principles relating to the amendment of documents during the course of a proceeding were established by the High Court of Australia in *Aon Risk Services Australia Ltd v Australian National University*¹¹ ("Aon"). The relevant factors to consider were set as follows:
 - (i) Whether there will be substantial delay caused by any amendment;
 - (ii) The extent of any wasted costs;

¹¹ (2009) 239 CLR 175.

- (iii) Whether there is an irreparable element of unfair prejudice caused by any amendment;
- (iv) Concerns of case management arising from the stage in the proceedings when the amendment is sought;
- (v) Whether the grant of the amendment will lessen public confidence in the judicial system; and,
- (vi) Whether satisfactory explanation has been given for seeking the amendment at the stage when it is sought.

- 52 The amendment sought to be made by the applicant in the proposed SFAPOC is to add an application pursuant to section 34D(1)(b) of the SA in addition to the current application pursuant to section 34D(1)(a). The amendment sought to be made has only come about as a result of the handing down of the decision in REV after the conclusion of the hearing and prior to the final determination of this proceeding.
- 53 The Tribunal notified the parties of the REV decision and invited written submissions from the parties. To have sought to decide this proceeding without taking REV into consideration could well have resulted in public confidence in the judicial system being brought in to question. Conversely, to have decided this proceeding taking REV in to account but without having notified the parties of that decision and without giving them an opportunity to make submissions would also potentially have lessened public confidence in the judicial system, but in addition would have denied the parties natural justice and procedural fairness.
- 54 I was satisfied that if the proposed amendment sought by the applicant was allowed there would be no unfair prejudice to the respondents, and in particular, the ninth respondent. All respondents were given an opportunity to make submissions to the Tribunal in relation to REV and in response to the applicant's application to amend its FAPOC.
- 55 The written submissions of the applicant state that it did not require an opportunity to call any additional evidence if the amendment was allowed. The submissions of the ninth respondent did not seek to introduce or call any further evidence. Accordingly, allowing the amendment sought by the applicant would not result in any delay in the conduct of this proceeding and would not raise any issues or concerns with case management of the proceeding overall.
- 56 Having considered the factors set out in Aon, the timing of the handing down of the decision in REV, the granting of an opportunity for any respondent to file and serve any amended points of defence and noting the Tribunal's statutory obligations to accord all parties natural justice and procedural fairness, I was satisfied that it was appropriate in all the circumstances to have granted the applicant leave to file and serve its proposed SFAPOC.

The Law

- 57 Section 32 of the SA allows an owners corporation to alter a plan of subdivision in a number of different ways if there is a unanimous resolution of all lot owners. Specifically, section 32(k) sets out the power for an owners corporation to alter lot liability and or lot entitlement, again, if there is a unanimous resolution of all lot owners.
- 58 Section 33 of the SA sets out how the lot entitlement and lot liability may be altered, and the matters to which regard must be had. Section 33(1) of the SA provides that if there is a unanimous resolution of the members of an owners corporation in relation to an alteration to lot entitlement and lot liability, the owners corporation must apply to the Registrar of Titles to alter the lot entitlement and lot liability.
- 59 Where a unanimous resolution of lot owners is not achievable, a lot owner, amongst others, may apply to the Tribunal for an order under section 34D(1) of the SA requiring the owners corporation to make an application to do any of the things set out in sections 32 or 33 of the SA.
- 60 At the date of commencement of this proceeding the relevant provisions of section 34D of the SA read as follows:

34D Applications relating to plans

- (1) A member of the owners corporation, an owners corporation, an administrator of an owners corporation or a person with an interest in the land affected by the owners corporation may apply to the Victorian Civil and Administrative Tribunal for—
 - (a) an order requiring the owners corporation to do any of the things set out in section 32 or 33; or
 - (b) an order consenting on behalf of a member or group of members of an owners corporation to the doing by the owners corporation of any of the things set out in section 32 or 33; or
 - (c) ...
- (2) The Victorian Civil and Administrative Tribunal may make an order on an application under subsection (1)(a) even though there is no unanimous resolution of the owners corporation authorising the action.
- (3) The Victorian Civil and Administrative Tribunal must not make an order on an application under subsection (1)(b) unless it is satisfied that—
 - (a) the member or group of members cannot vote because the member is or the members are dead, out of Victoria, or cannot be found; or
 - (b) for any other reason it is impracticable to obtain the vote of the member or members; or
 - (c) the member has or members have refused consent to the proposed action and—

- (i) more than half of the membership of the owners corporation having total lot entitlements of more than half of the total lot entitlement of the members of the owners corporation consent to the proposed action; and
 - (ii) the purpose for which the action is to be taken is likely to bring economic or social benefits to the subdivision as a whole greater than any economic or social disadvantages to the members who did not consent to the action.
- (4) For the purposes of sections 32 and 33, an order made on an application under subsection (1)(b) is to be treated as a vote by the member in favour of the proposed action of the plan.
- (5)
- (6) Subject to this section, the Victorian Civil and Administrative Tribunal may make any order it thinks fit on an application under this section.

61 On 1 December 2021 the *Owners Corporations Act and Other Acts Amendment Act 2021* came into operation (“the Amending Act”). Section 91 of the Amending Act amended section 34D(3)(c) of the SA to read as follows:

- “(c) the member has or the group of members have refused consent to the proposed action and—
- (i) the member owns or the group of members own more than half of the total lot entitlement; and
 - (ii) all other members of the owners corporation consent to the proposed action; and
 - (iii) the purpose for which the action is to be taken is likely to bring economic or social benefits to the subdivision as a whole greater than any economic or social disadvantages to the member or the group of members who did not consent to the action.”

62 Thus, pursuant to section 34D of the SA as it read as at the date of commencement of this proceeding or as it read as at 1 December 2021, if it considers it appropriate to do so, the Tribunal may order the OC to apply to the Registrar of Titles to vary the lot liability and lot entitlement notwithstanding the opposition of the ninth respondent.

63 An issue then potentially arises as to whether this proceeding should now be determined pursuant to section 34D of the SA as it read as at the date of commencement of this proceeding and the date of the hearing, or as it read as at 1 December 2021.

64 The Amending Act did not contain any transitional provisions in relation to the amendment to section 34D(3)(c) of the SA.¹² Arguably therefore, this

¹² The Amending Act contained transitional provisions in relation to the amendments to the OC Act but did not set out any transitional provisions in relation to amendments to the SA.

proceeding should now be determined based on section 34D(3)(c) of the SA as it became on 1 December 2021.

- 65 However that is not necessarily the end of the matter. There are complex rules of statutory interpretation that have been applied by the courts to determine whether an amendment to legislation should operate retrospectively or only prospectively.¹³
- 66 Having considered the evidence and submissions of the parties under section 34D(3)(c) of the SA as it existed both prior to and post 1 December 2021, I have come to the conclusion that the outcome of this proceeding is the same. As such, I propose for completeness to set out my reasoning under both the pre and post 1 December 2021 versions of section 34D(3)(c), and as such it is not necessary to determine precisely which version of section 34D(3)(c) of the SA should apply to this proceeding.
- 67 As a result of the SFAPOC the relief sought by the applicant is for orders pursuant to both sections 34D(1)(a) and (b) of the SA. The addition of a claim pursuant to section 34D(1)(b) brings into operation the factors set out in section 34D(3) of the SA.

The Applicant's Evidence

- 68 The applicant purchased Lot 13 in 2012. At that time Lot 13 was leased to a financial advice and accountancy business, Midland Business Solutions ("Midland"). The principal of Midland was Robert Hartigan ("Mr Hartigan").
- 69 Mr Hartigan had represented the previous owner of Lot 13 at OC meetings and for a period was a member of the committee of the OC.
- 70 At the 2009 OC annual general meeting a resolution was passed which exempted Lot 13 from approximately 40% of the liabilities of the OC and imposed a liability of 17.5% of the remaining 60% of the liabilities of the OC on Lot 13.¹⁴
- 71 The applicant is of the belief that this arrangement continued at each annual general meeting of the OC in each successive year up to 2016.¹⁵ The Minutes of the Annual General Meeting held on 26 September 2013¹⁶ reflect this. These Minutes record that the levies adopted at this meeting were to remain at the same rate until changed at a future annual general meeting. No other Minutes for annual general meetings for the years between 2009 and 2016 have been provided to the Tribunal by way of evidence.

¹³ Examples of such rules of statutory interpretation include whether the section amended had given rise to a right or obligation or whether the statute is a statute affecting rights or a statute affecting procedure.

¹⁴ Paragraph 15 of the Witness Statement of Ronald Saines set out at Document 4 of the Tribunal Book and Annexure RNS-10.

¹⁵ Ibid paragraph 16.

¹⁶ Annexure RNS-11 to the Witness Statement of Ronald Saines.

- 72 At the 2016 annual general meeting there was a resolution passed that for the 2015-2016 financial year fees charged to Lot 13 would be reduced to the same level as in previous years but thereafter any reduction would cease and Lot 13 would then be invoiced for fees in accordance with the lot liability in the Plan, being 17.5% of the total fees to be invoiced to all lots.
- 73 In or about November 2017 the tenant of Lot 13 sold its business to another financial advice business. This new tenant's main office was in Werribee and the bulk of its clients engaging its services at Mount Clear would do so online. As a result of the change of tenant the number of clients attending Lot 13 decreased, and the use of car parking or other facilities located within the Plan became minimal.¹⁷
- 74 Prior to the 2018 annual general meeting the applicant requested that the committee of the OC consider an alteration to the lot liability for Lot 13. This request was declined by the committee. At the annual general meeting on 9 October 2018 the applicant addressed the meeting to set out its reasons as to why it believed the lot liability attaching to Lot 13 was unfair. The Minutes of the annual general meeting record that it was the consensus of those lot owners present that the committee would discuss the matter further and respond to the applicant thereafter.
- 75 The minutes of the 2018 annual general meeting were tendered as evidence by the applicant.¹⁸ The section of the minutes relating to Lot 13 are headed "Lot Liability issues with Lot 13". The minutes record that Mr Saines addressed the meeting and outlined his proposal for Lot 13 to be from the owners corporation. The minutes further record that in response to a question put to him as to whether the applicant would consider negotiating the lot liability in order to retain Lot 13 within the owners corporation, Mr Saines is recorded as responding that he would agree to consider a negotiation on the basis that Lot 13's lot liability was reduced from its current 17.5% "down to in the vicinity of 4%". The minutes do not record that there was any discussion concerning any variation of lot entitlement for Lot 13 at the same time as any proposed reduction in lot liability.
- 76 On 4 December 2018 the OC manager wrote to the applicant and confirmed that subsequent to the annual general meeting the committee had discussed the issue of the lot liability of Lot 13 and had again refused the applicant's request for any reduction. The grounds stated for the refusal were that the lot liability would have been known to the applicant at the time it purchased Lot 13 and that if there were to be a reduction in the lot liability for Lot 13 it would result in an increase in the lot liability for all other lots affected by the OC. Again, there was no reference to any reduction to Lot 13's lot entitlement.
- 77 The applicant then commenced this proceeding on 15 March 2019.

¹⁷ Paragraph 19 of the Witness Statement of Ronald Saines.

¹⁸ Annexure RNS-13 to the Witness Statement of Ronald Saines.

- 78 The applicant tendered a copy of a document relating to a ballot of lot owners conducted in 2009.¹⁹ The postal ballot was in relation to a proposal to reduce certain specified budget items for lot 13 and to “re-allocate” such items to the remaining lot owners. The budget items referred to were:

Centre cleaning annual budget
 Centre gardening annual budget
 Common power annual budget
 Common water annual budget
 Bin cleaning annual budget.

- 79 The Minutes of the 2009 annual general meeting held on 16 September 2009 record that 6 lot owners voted in favour of the proposal, 3 lot owners voted against it, and 2 lot owners did not return the ballot.²⁰ The ballot was determined to have passed. The minutes do not reveal which lot owners voted in favour of the proposal and which voted against it.
- 80 The minutes of the 2009 annual general meeting sets out the lot owners who were present at or represented at that meeting. A comparison of the listed lot owners and the parties to this proceeding indicates that the second, fifth, sixth and seventh respondents to this proceeding were lot owners back in 2009. None of the remaining parties to this proceeding were lot owners back in 2009.
- 81 The ballot was intended to “re-allocate” certain specified budget items to lots other than Lot 13 but was not a ballot seeking to formally vary the lot liability or entitlement of Lot 13.

The First Respondent’s Evidence

- 82 The first respondent did not give any evidence nor make submissions at the hearing.

The Second to Eighth Respondents’ Evidence

- 83 None of the second to eighth respondents gave any evidence nor made any submissions at the hearing.

The Ninth Respondent’s Evidence

- 84 The ninth respondent tendered a witness statement dated 29 November 2019.
- 85 In his witness statement the ninth respondent says that any reduction in the lot liability of Lot 13 would have a “severe and negative financial impact” on the ninth respondent and make his investment “not viable now or in the future”. The ninth respondent further says that a reduction in Lot 13’s lot liability would create “great difficulty in selling [his] investment” and that he would be “stuck with a lemon for the long term”.

¹⁹ Annexure RNS-8 to the Witness Statement of Ronald Saines.

²⁰ Annexure RNS-10 to the Witness Statement of Ronald Saines.

- 86 The ninth respondent places great weight on the legal qualifications of the director of the applicant and that as a lawyer the applicant's director should have fully understood the lot liability imposed on Lot 13.
- 87 He further says that any increase in the lot liability for his lot will have a detrimental impact on the value of his investment. In cross examination Mr Puppa denied that he would be readily able to pass on any increase in owners corporation fees for his lot to his tenant.
- 88 In essence, Mr Puppa's opposition to any change in lot liability for Lot 13 is referable to the detrimental impact on the return on his investment. He further said that if at the time of purchasing lot 5 he had known that the applicant was agitating for a reduction in the lot liability for Lot 13 then he would never have purchased lot 5.
- 89 Mr Puppa in his evidence also raised the issue that there had been no explanation as to how the applicant had "settled" on a reduced lot liability of 10.2%.

The REV decision

- 90 The decision in REV has fundamentally altered the way in which any application made to the Tribunal under section 34D of the SA is to be considered.
- 91 Prior to the REV decision the operation and interpretation were considered settled by the decision of Justice Garde in Conroy. In that decision His Honour held that each of the paragraphs in section 34D(1) were alternative and cumulative. Specifically, an application could, for example be made pursuant to section 34D(1)(a) without there being any requirement to also make an application pursuant to section 34D(1)(b).
- 92 This alternative aspect of applications under section 34D(1) was important when consideration was given to section 34D(3). Section 34D(3) states that the Tribunal must not make an order on an application under section 34D(1)(b) unless it is satisfied of such of the matters set out in paragraphs section 34D(3)(a) – (c). The practical effect of the decision of Justice Garde in Conroy that each paragraph of section 34D(1) was an alternative, was that on an application under section 34D(1)(a) an applicant would not be required to satisfy the Tribunal of the matters set in paragraphs (a) – (c) of section 34D(3).²¹
- 93 Justice Richards in REV disagreed with the decision in Conroy. Justice Richards held that the Tribunal must be satisfied of the matters in section 34D(3) on an application under section 34D(1)(a).
- 94 Her Honour in REV referred to section 34D(6) and the Tribunal's power to make any order it thinks fit on an application under section 34D. Justice Richards held that the power in section 34D(6) is not without limits. It was

²¹ As noted above at paragraph 43, Justice Garde in Conroy endorsed the decision in *Paolucci* that on an application under section 34D(1)(a) the matters in section 34D(3) could be relevant but were not decisive.

held that the power to make any order the Tribunal thinks fit is subject to the specific requirements of section 34D(3).²²

- 95 In her decision in REV, Justice Richards considers the legislative purpose of section 34D.²³ Her Honour states that:²⁴

The evident purpose of s34D is to provide a mechanism for resolving an impasse within an owners corporation, while safeguarding the interests of members who do not consent to a proposed action. ... In the case of a member who has refused to consent to a proposed action, s34D(3)(c) preconditions the Tribunal's consent on it being satisfied that the proposed action is supported by a majority of the owners corporation, and that its overall benefits outweigh any disadvantages to the non-consenting member.

- 96 Her Honour held that legislative purpose of section 34D and the inherent protections of non-consenting members of an owners corporation could be undermined by a construction that would allow a "procedural device" to neutralise the safeguards in the section.²⁵ The "procedural device" to which she was referring was the making of applications under section 34D(1)(a) alone as a means of avoiding the need to satisfy the Tribunal of the matters set out in section 34D(3).

- 97 Finally, at paragraph [85] Her Honour said:

As a result, the Tribunal cannot make an order under s34D(6) requiring an owners corporation to apply to the Registrar under ss 32 or 33 to alter a plan of subdivision on an application under s34D(1)(a), if there is not a unanimous resolution of the members, without also making an order consenting on behalf of the members who did not vote in favour of the resolution. In order for the Tribunal to make the latter order, it must be satisfied of the relevant conditions in s34D(3).

- 98 Accordingly, as a result of the decision in REV, an application made under section 34D(1)(a) must now also satisfy the Tribunal of the matters in section 34D(3).

SECTION 34D(3) PRIOR TO 1 DECEMBER 2021

- 99 Prior to 1 December 2021 section 34D(3) read as follows:

- (3) The Victorian Civil and Administrative Tribunal must not make an order on an application under subsection (1)(b) unless it is satisfied that—
 - (a) the member or group of members cannot vote because the member is or the members are dead, out of Victoria, or cannot be found; or
 - (b) for any other reason it is impracticable to obtain the vote of the member or members; or

²² [2021] VSC 373 at [82].

²³ *Ibid* at [75]-[85].

²⁴ At [78].

²⁵ *Ibid* at [80].

- (c) the member has or members have refused consent to the proposed action and—
 - (i) more than half of the membership of the owners corporation having total lot entitlements of more than half of the total lot entitlement of the members of the owners corporation consent to the proposed action; and
 - (ii) the purpose for which the action is to be taken is likely to bring economic or social benefits to the subdivision as a whole greater than any economic or social disadvantages to the members who did not consent to the action.

100 The Tribunal has previously held that there must be a resolution and a vote for the purposes of an application under section 34D(1)(b), but no resolution was required for an application under section 34D(1)(a).²⁶

101 Taking into consideration the decision of Justice Richards in REV that the matters in section 34D(3) apply as much to applications under section 34D(1)(a) as they do to applications under section 34D(1)(b), in my opinion the necessity for there to be a resolution and a vote will now apply equally to applications under section 34D(1)(a) as it does to applications under section 34D(1)(b).

Applicant's Written Submissions on REV

102 The applicant does not dispute that the effect of the decision in REV is that the matters in section 34D(3) apply to applications made under both section 34D(1)(a) and (b).²⁷

103 In relation to section 34D(3)(c)(i), the applicant submits that as the paragraph refers to “consent” and not to “vote” or “resolution”, the Tribunal may uphold an application such as in this proceeding without the need for a formal ballot having been held.²⁸

104 The applicant further submits that the “consent” of the lot owners other than the ninth respondent is evidenced by the fact that they took a “passive” position during the hearing and their indications that they did not oppose the applicant’s application to the Tribunal.

Ninth Respondent's Written Submissions on REV

105 The ninth respondent submits that when the applicant first lodged its application that it chose to make the application under section 34D(1)(a) only. He submits that there is no clear and unambiguous evidence of consent of the other lot owners to the variation in lot liability proposed by the applicant. He further submits that it can be inferred that the applicant did not seek to obtain the consent of the lot owners prior to the hearing as it did not think that it needed to do so due to the application being made solely under section 34D(1)(a).

²⁶ *Conroy v Owners Corporation Strata Plan 30438* [2014] VCAT 550 per Garde J at [24].

²⁷ Applicant's written submissions dated 11 August 2021 at paragraph 16.

²⁸ *Ibid* at paragraph 24.

- 106 The ninth respondent submits that there is no evidence that the applicant proposed any resolution seeking consent of lot owners prior to the commencement of this proceeding nor at the two annual general meetings that have taken place since the proceeding was commenced.
- 107 It is submitted that there is no evidence of the consent of the remaining lot owners to the applicant's proposal.

Section 34D(3)(c)

- 108 By reason of the decision in REV, for the applicant's application to the Tribunal to succeed it must be able to satisfy the Tribunal of the matters set out in section 34D(3)(c).
- 109 Paragraph (i) of section 34D(3)(c) requires that the Tribunal be satisfied that more than half of the lot owners having a total lot entitlement of more than one half of the total lot entitlements *consent* to the proposed action (emphasis added).
- 110 As set out above, in my opinion the effect of the decision in REV and Conroy is that the requirement for there to have been a resolution in favour of the proposed variation of lot liability is now necessary for applications under either section 34D(1)(a) or (b). In my opinion this requirement, in so far as it relates to section 34D(1)(a) is supported by the wording of section 34D(2). Whilst this section states that the Tribunal may make an order on an application under section 34D(1)(a) even if there is no unanimous resolution in support, this wording infers that there is a requirement for a resolution to have at least been attempted by an applicant.
- 111 There is no evidence before the Tribunal of a resolution having been obtained, or even sought by the applicant in support of its proposal for the variation of Lot 13's lot liability and entitlement. The only evidence of a resolution having been sought was the applicant's evidence of a postal ballot that took place in 2009, prior to the applicant acquiring Lot 13.
- 112 The postal ballot was in relation to a proposal to reduce certain specified budget items for Lot 13 and to "re-allocate" such items to the remaining lot owners. It was not a ballot to seek approval of the proposal for variation of lot liability and lot entitlement that is the subject of this proceeding.
- 113 Accordingly, I find that there has been no resolution approved or even sought and as such the applicant is unable to satisfy the Tribunal of the matter in section 34D(3)(c)(i).
- 114 I turn now to deal with the applicant's submission that it is open to the Tribunal to make the orders sought by the applicant even though there has been no resolution obtained or attempted and that the wording of section 34D(3) "mechanically gets around" this requirement. The applicant submits that the Tribunal may rely on the support of the lot owners other than the ninth respondent.
- 115 The applicant bases its submission on this point on three grounds, they being:

- (i) the support of the second through eighth respondents' support of this application as orally indicated within the proceeding;
- (ii) the second through eighth respondents not opposing the application; and,
- (iii) the second through eighth respondents not attending the hearing.

- 116 In relation to the first ground set out in paragraph 115(i) above, I do not accept this submission by the applicant. I presided at a directions hearing in this proceeding on 12 November 2020. The first respondent (the OC) was represented by its solicitor, and the second through eighth respondents were represented by the OC Manager. In the course of the directions hearing, I enquired of the solicitor for the OC as to the position of the OC in relation to this proceeding. The solicitor responded that his client was not opposing the applicant's application. When asked to clarify this, the solicitor said that his client was not opposing nor consenting to the applicant's application. He further stated that his client would be observing at the hearing but would take no active part but reserved its rights to be heard on the issue of costs if need be.
- 117 The same question was put to the OC manager who was representing the second through eighth respondents. The manager stated the second through eighth respondents would be observing at the hearing but would not be taking any active part in the hearing.
- 118 The Macquarie Dictionary defines "consent" as meaning to give assent, to agree, to acquiesce. The Cambridge Dictionary defines "consent" as meaning to give permission, to agree to do something, or to allow someone to do something.
- 119 The term "consent" is not defined in the SA. As such, the definition of "consent" becomes an exercise in statutory interpretation. As a starting point, legislation should be considered in the light of its context and purpose by reference to the legislation as a whole. A purposive interpretation that promotes the underlying purpose of the legislation is to be preferred to an equally open interpretation that does not promote that same purpose.²⁹
- 120 In *REV*, Justice Richards in referring to section 34D(3) of the SA said that "the legislature has provided, in s34D(3), specific conditions that must be satisfied before a dissenting member's wishes can be overridden by order of the Tribunal".³⁰ Her Honour further says that the making of an order to alter the property rights of a member of an owners corporation is "no small thing".³¹
- 121 In my opinion, "consent" ought not to be presumed in the absence of an objection and should require something more active and explicit. The first

²⁹ *Project Blue Sky Inc v Australian Broadcasting Authority* (1988) 194 CLR 355.

³⁰ [2021] VSC 373 at [84].

³¹ *Ibid* at [84].

through eighth respondents did not express their *consent* to the applicant's proposal to vary the lot liability of Lot 13. Rather, they expressed by the statements of their respective representatives that whilst they did not consent to the proposal, they also did not oppose it.

- 122 Other references to "consent" in the SA and the OC Act refer to it as something that carries a positive connotation that must be actively given, and as something that can be refused or withdrawn.³²
- 123 Taking into consideration the fact that the making of an order under section 34D has the effect of altering property rights of lot owners in an owners corporation, in my opinion something more active and explicit than "not opposing" the applicant's application should be required. In my opinion the applicant has not satisfied the Tribunal that more than half of the lot owners having a total lot entitlement of more than one half of the total lot entitlements *consent* to the applicant's application.
- 124 In relation to the ground in paragraph 115(ii) above, for the same reasoning, I do not consider that the fact that the first through eighth respondents do not oppose the applicant's application is sufficient to satisfy the Tribunal that more than half of the lot owners having a total lot entitlement of more than one half of the total lot entitlements *consent* to the applicant's application.
- 125 In relation to the ground in paragraph 115(iii) above, this submission cannot be supported on the facts. The first through eighth respondents were all represented at the hearing on 9 December 2020 and as such were present.
- 126 For the reasons set out, I reject the applicant's submission that consent of the first through eighth respondents can be inferred by the fact that they did not oppose the applicant's application for variation of the lot liability of Lot 13. As such, as the applicant is not able to satisfy the Tribunal of all of the matters referred to in section 34D(3)(c) as that section read prior to 1 December 2021.

SECTION 34D(3)(c) POST 1 DECEMBER 2021

- 127 As set out above, section 34D(3)(c) of the SA was amended by the Amending Act, with the amendment coming into operation on 1 December 2021. As a result of the amendment, section 34D(3)(c) now reads as follows:

- (c) the member has or the group of members have refused consent to the proposed action and—
 - (i) the member owns or the group of members own more than half of the total lot entitlement; and
 - (ii) all other members of the owners corporation consent to the proposed action; and

³² See for example section 9 of the *Subdivision Act 1998* and section 199A(3) of the *Owners Corporations Act 2006*.

- (iii) the purpose for which the action is to be taken is likely to bring economic or social benefits to the subdivision as a whole greater than any economic or social disadvantages to the member or the group of members who did not consent to the action.”

- 128 The Tribunal is bound by the rules of natural justice³³. In theory this would require that the parties be given an opportunity to address the Tribunal in relation to the impact of the amendments to section 34D(3)(c) arising from the Amending Act.
- 129 The issues that arise from section 34D(3)(c) post 1 December 2021 relate to paragraphs (i) and (ii). These issues can be properly and adequately addressed based on the evidence already before the Tribunal, and the submissions of the parties. The issue of “consent” that arises under section 34D(3)(c)(ii) is the same issue that arose under section 34D(3)(c) as it read pre 1 December 2021.
- 130 Paragraph (i) requires that the member or members of the owners corporation who have refused consent own more than half of the total lot entitlements. On the evidence already tendered during the hearing of this proceeding, Mr Puppa as the refusing member does not own more than half of the total lot entitlements of all members of the OC.
- 131 Paragraph (ii) requires that all other members of the owners corporation consent to the proposed amendment to lot entitlement and lot liability. Based on the evidence before the Tribunal it cannot be shown that all lot owners other than Mr Puppa have consented to the proposed alteration to lot entitlement and lot liability. The evidence shows that the second through eighth respondents do not oppose the proposed alteration to lot entitlement and lot liability, but the evidence does not show that they *consent* to the proposed alteration.
- 132 For the same reasons set out in paragraphs 118-123 above, I do not accept the applicant’s submission that to not oppose is the same as to consent. As set out above, in my opinion, consent requires an active or explicit expression and cannot be inferred from a failure to expressly oppose.
- 133 Accordingly, I find that the applicant has not satisfied the Tribunal of the matters provided for in paragraphs (i) and (ii) of section 34D(3)(c).
- 134 Paragraphs (i), (ii) and (iii) of section 34D(3)(c) are separated by the word “and”. On the basis that statutory provisions should be given their plain and ordinary meaning, the word “and” is used in a conjunctive sense. As such, in my opinion, the requirements of paragraphs (i), (ii) and (iii) should be read as being cumulative. The finding on the evidence that Mr Puppa does not own more than half of the total lot entitlements would have been sufficient to have disposed of this proceeding under the wording of section 34D(3)(c) post 1 December 2021. For the purpose of completeness, I

³³ Section 98(1)(a) of the *Victorian Civil and Administrative Tribunal Act 1998*.

considered the requirements of paragraph (ii) as well. Having found that the requirements of paragraph (ii) also could not be met by the applicant, there is no need to consider the requirements of paragraph (iii).

- 135 I find that the applicant has not been able to satisfy the Tribunal of the requirements of section 34D(3)(c) of the SA as that section now reads.

Conclusion

- 136 The applicant having not satisfied the Tribunal of the requirements of section 34D(3)(c) of the SA as that sections read both pre and post 1 December 2021, the applicant's application must be dismissed.

Other Matters

- 137 At the directions hearing conducted on 12 November 2020 the solicitor for the first respondent informed the Tribunal that his client had reached agreement with the applicant on the issue of costs, and the Tribunal was invited to make no order as to costs as between the applicant and the first respondent.
- 138 As the applicant's application is to be dismissed, I consider it inappropriate to make any order in relation to costs without first giving all parties an opportunity to consider their respective positions in light of the reasons set out herein.
- 139 Any party who wishes to make an application for costs may do so on notice to the principal registrar by no later than 31 May 2022. Upon any party giving such notice in writing the principal registrar is to set the matter down for a directions hearing before me on a date and time to be fixed.
- 140 Finally, after the conclusion of the hearing the ninth respondent has sent correspondence to the Tribunal on at least two occasions where such correspondence contained material the ninth respondent sought to have the Tribunal take into consideration in its deliberations. Other than written submissions that were specifically sought by the Tribunal by orders made after the conclusion of the hearing, the ninth respondent had no right to send correspondence of any such nature to the Tribunal. The correspondence has not been read by me and has not been taken in to consideration in any way in the deliberations in this matter or the formulation of these reasons.

L. Warren
Acting Deputy President