

VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

OWNERS CORPORATIONS LIST

VCATREFERENCE NO. OC1077/2020

CATCHWORDS

Rules — additional rule prohibiting erection of storage units in accessory lots without consent of owners corporation which shall not be unreasonably withheld — whether a model rule applies also — lot owners installs storage unit without consent — withholding is not unreasonable — whether it is fair not to make, or not to make, an order — *Owners Corporations Act 2006* (Vic) ss 162, 165(1), 167.

APPLICANT

Owners Corporation No. 1 PS502321G

RESPONDENT

Ms R

WHERE HELD

Melbourne

BEFORE

Senior Member A. Vassie

HEARING TYPE

Hearing

DATE OF HEARING

3 February, 13 July 2021; 24 March 2022

DATE OF ORDER

14 July 2022

DATE OF REASONS

14 July 2022

CITATION

Owners Corporation No. 1 PS502321G v R
(Owners Corporations) [2022] VCAT 779

ORDER

1. By 30 June 2023, the respondent must remove from her accessory lot 1507 the storage unit that she has installed there.
2. Unless the Tribunal orders otherwise, no person other than a party or an authorised lawyer for a party may inspect the Tribunal's file in this proceeding.

A. Vassie
Senior Member

APPEARANCES:

For Applicant

Ms D. Andronaco, solicitor

For Respondent

In person

REASONS

- 1 The respondent, whom I anonymise by calling her Ms R, has asked, for a good reason, not to be identified by name in these reasons. She is the owner of lot 1507 in a multi-storey apartment building in Southbank. Within the driveway on levels of the building there are accessory lots for use as car parking spaces. Ms R owns and occupies one of those accessory lots, also numbered 1507. It is on level 2.5 of the building. She parks her car in the space.
- 2 The applicant, owners corporation, ("the OC") affects all the lots, accessory lots and common property in the building. As a lot owner, Ms R is a member of the OC.
- 3 Against the wall which is at one end of Ms R's car parking space, accessory lot 1507, Ms R has placed a metal storage unit. Information which she has obtained from the unit's manufacturer gives the unit's dimensions as 2.025 metres high, 2.510 metres wide and 1.110 metres deep. Half of its height consists of four metal legs which stand on pads on the concrete surface. The unit is designed so that the bonnet of a car parked in the space fits beneath the unit.
- 4 Ms R does not have the OC's consent to her placing and keeping the storage unit within her car parking space. The OC alleges that she is therefore in breach of its rules. In this proceeding the OC has applied for an order requiring Ms R to remove the storage unit from her car parking space.

THE RULES

- 5 The OC relies upon one of the model rules set out in Schedule 2 to the Owners Corporations Regulations 2018, made under the *Owners Corporations Act 2006* (Vic) ("The OC Act") and also upon one of the "additional rules" recorded by the Registrar of Titles on 27 October 2011 which took effect on that day.¹ If the model rules provide for a matter and the "additional rules" 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.² Ms R is bound by, and must comply with, the OC's rules.³
- 6 Model rule 5.2, on which the OC relies, provides:

5.2 External appearance of lots

- (1) An owner or occupier of a lot must obtain the written approval of the owners corporation before making any changes to the external appearance of their lot.
- (2) An owners corporation cannot unreasonably withhold approval, but may give approval subject to reasonable conditions to protect quiet

¹ OC Act s 142(4).

² OC Act s 139(3).

³ OC Act s 141, s 128.

enjoyment of other lot owners, structural integrity or the value of other lots and/or common property.

The OC alleges that Ms R did not seek, and did not obtain, its written approval, or any approval, before placing the storage unit in her car space.

- 7 Additional rule 3 is headed “Vehicles, Driveways and Car Park Areas”. It provides for what any member of the OC must not do. Sub-rule (j) of rule 3, on which the OC relies provides:
 - (j) No structures including storage cupboards are to be erected within the accessory Unit areas without the written consent of the Body Corporate. No flammable products may be stored within the Accessory Unit areas.

There are two introductory paragraphs to the additional rules. The second of them provides:

Wherever consent is required for the doing of an act or thing, then such provision shall be deemed to be subject to a proviso to the effect that such consent shall not be unreasonably Withheld and to a further proviso that such consent shall not be given if the use or enjoyment of any other member or occupant of his lot or the common property would be unreasonably prejudiced or affected thereby. Such consent should be in writing.

- 8 In my opinion model rule 5.2 has no application to the circumstances of this proceeding. It is expressed in general terms, and does not deal with car parking spaces — accessory lots⁴ — specifically, nor with “storage cupboards” specifically. Both the model rules and the additional rules are pieces of subordinate legislation.⁵ There is a principle of statutory construction that where legislation contains two similar prohibitions, one wide and the other applying only to a class of case within the wide prohibition, the wide prohibition is to be treated as not applying to cases within the limited prohibition.⁶ So model rule 5.2 should be read as not applying to storage units in accessory lots.
- 9 The second introductory paragraph imports two provisos into the prohibition in additional rule 3(j) against erecting storage cupboards in accessory lots without the written consent of the OC. The first is that the consent must not be unreasonably withheld. The second is that the OC must not consent if any other member’s or occupier’s use and enjoyment of a lot or of common property would be “unreasonably prejudiced or affected” by the giving of consent to the erection of a structure, including a storage cupboard, within a member’s accessory lot. Logically, the second proviso comes first and should be considered first. It gives rise to a question of fact: will the giving of

⁴ There is no dispute that “accessory Unit areas” in additional rule 3(j) means accessory lots designed for use as car parking spaces.

⁵ *Interpretation of Legislation Act 1984* (Vic), s 3, defines “subordinate instrument” in a way that includes the model rules in Schedule 2 to the OC Act and the additional rules made and registered in accordance with Part 8 of the OC Act.

⁶ D.C. Pearce and R.S. Geddes, *Statutory Interpretation in Australia*, 8th edition (2014) at [4.40], citing *No. 20 Cannon St Ltd v Singer Friedlander Ltd* [1974] Ch 229 at 235.

consent unreasonably prejudice or affect another member's or another occupier's use or enjoyment of a lot or of the common property? If the answer is yes, consent must not be given, and there is no room for the first proviso to operate. If the answer is no, the first proviso operates and gives rise to another question of fact: is a withholding of consent unreasonable?

- 10 In this proceeding the OC has alleged that other members' and other occupiers' use or enjoyment of lots and or of common property is unreasonably prejudiced or affected by the presence of the storage unit in Ms R's car space and so it was justified in refusing its consent to the storage unit being place there. Having made the allegation, the onus rests with the OC to prove those facts that would bring the second proviso into operation. As for the first proviso, a member who relies upon it has the onus of proving that the withholding of consent was unreasonable: that a reasonable person would not have acted as the OC has acted by withholding consent. I say that by drawing an analogy with the law concerning a tenant's covenant in a lease not to assign or sub-let the premises without the consent of the landlord when the lease provides that a consent cannot be unreasonably withheld. In such a case the onus is upon the tenant to prove the fact of unreasonable withholding of consent, and the test is whether a reasonable person in all the circumstances would have acted as the landlord did.⁷

THE EVIDENCE

- 11 The OC's evidence took the form of two affidavits, dated 20 January 2021 and 29 April 2022 respectively, of Johannes Francois Botha, a director of the OC's manager. There were numerous exhibits to Mr Botha's first affidavit. Ms R gave oral evidence and tendered several photographs of her accessory lot 1507 and of the adjacent area, documentary information from the storage unit's manufacturer, and correspondence from the City of Melbourne.
- 12 There were two days of hearing, on 3 February 2021 and 13 July 2021. On the second day Ms R's evidence included a matter about which she had not given evidence on the first day. I shall refer to that matter below. By the order made on that second day I gave the OC leave to file and serve a further affidavit of Mr Botha in reply, and directed there should be an on-site inspection of Ms R's car space so that I might observe more than the photographs that the parties had put in evidence had shown. Because of the disruption to the Tribunal's proceedings that resulted from restrictions related to the COVID-19 pandemic the on-site inspection did not occur until 24 March 2022. At the on-site inspection the parties told me that they did not want a further hearing but were content for me to make a decision on the evidence previously given and on what I had observed on site. Some days later, however, Ms R sent to the Tribunal a series of photographs and commentary upon them. The OC objected to my considering those. After I

⁷ *Shanley v Ward* (1913) 29 TLR 714; *Pimms Ltd v Tallow Chandlers in the City of London* [1964] 2 QB 547 at 564; *International Drilling Fluids Ltd v Louisville Investments (Uxbridge Ltd)* [1986] 1 AU ER 321 at 325-326.

then made directions for a further hearing so that the parties could be heard about whether I should consider that further material, Ms R wrote and said that she did not want there to be a further hearing. So I am ignoring that further material.

- 13 Except for two matters I shall identify below, Ms R did not contest the evidence in Mr Botha's first affidavit. Unless I say otherwise, the history I am about to set out comes from the evidence in Mr Botha's first affidavit, which I accept and which becomes findings of fact. The quotations are from the affidavit.
- 14 At the annual general meeting of the OC held on 1 May 2017, at which Ms R was present, "the members requested that a solution be formulated by which items could be stored in car spaces and requested that a uniform design for above bonnet storage lockers be considered and approved by the OC". The matter was referred to the OC's committee for consideration. The minutes of the meeting, dealing with the reference of the matter to the committee, recorded that "it was noted the [OC] will need to seek legal and engineering advice on how this solution can be effected as at present this would be inconsistent with the rules of the [OC]".
- 15 At the next meeting of the committee, of which Ms R was a member, on 19 June 2017, Ms R said that there was a need for a solution for storage with the car parking areas to be implemented and offered to design some solutions for the committee's consideration. Mr Botha, who was present at the meeting, said that the OC's rules "would need to be changed to allow members to install additional storage facilities in the car park".
- 16 At the next committee meeting on 18 September 2017, at which Ms R and Mr Botha were present, Ben Mitchell of Spacemate Storage Solutions made a presentation and recommendation about over bonnet storage units. Mr Botha advised the committee that "a special resolution would be required to change the OC Rules". The committee resolved that the manager should "obtain specifications and approval regarding the mechanical ventilation and fire service regulations" and then send that information to members together with a survey form "so as to gauge interest from lot owners and residents", and that Ms R would assist with the drafting of the survey.
- 17 On 5 December 2017 the OC sent the survey form, approved by Ms R and by the OC's chairperson, to all lot owners, together with information about Spacemate's over bonnet storage units. The survey form asked members: "in the instance that installation of these storage units be approved by the [OC] at the cost to the lot owners, would you be interested in having these installed within your car park?"
- 18 At a committee meeting on 5 February 2018, at which Ms R was not present, Mr Botha tabled the survey results: 35 lots (15.49% of lot entitlement) said yes, interested in the proposes, and 103 (30.09% of lot entitlement) said no, not interested. The committee resolved "not to proceed with a ballot to amend the OC Rules".

- 19 At the end of a committee meeting on 19 November 2018, Ms R and Mr Botha had a conversation about storage units. This is the matter about which they differ. Mr Botha's version is that Ms R approached him seeking advice about her options for installing a storage unit in her accessory lot. He referred to the results of the survey and told her, "Your options are now to accept that the OC said no or go ahead and install it. However, you run the risk of legal action being taken against you by the OC for enforcement of the rules as they stand". Ms R's version, given in her oral evidence on the second day of the hearing, was that when she asked Mr Botha what her options were in respect of a storage unit in her accessory lot 1507, he looked at his computer and said that if she were to install it the OC probably would not take any action against her.
- 20 Ms R gave evidence that she asked the OC for consent to the installation of a storage unit in her accessory lot and that she did so in December 2018 on the last business day of that year. Although she did not say so, I infer that "by the last business day" she meant the last day in 2018 on which the manager's office was open. She did not say how or to whom she made the request. She did not produce any document in support of this evidence so I infer that her request was not made in writing.
- 21 At some time before 8 January 2019 Ms R installed her storage unit in her accessory lot.
- 22 On 8 January 2019 the OC sent Ms R a notice to rectify a breach of its rules.⁸ The notice alleged a breach of model rule 5.2(1) and of special rule 3(j) and required her to remove "non-approved storage unit" within 28 days.
- 23 On 9 January 2019 Mr Botha and Ms R had an exchange of emails. Mr Botha "reiterated the point made...in our conversation on 19 November 2018" and Ms R "responded acknowledging the OC's position". According to Mr Botha's affidavit, a copy of the email exchange was produced and shown to him and marked "JFB-11". Here there has been an unfortunate clerical error. The exhibit "JFB-11" is not a copy of the email exchange. It is the copy of the final notice to Ms R that was meant to be exhibit "JFB-12". The error has meant that all exhibits from "JFB-11" onwards have been numbered incorrectly and that the email exchange is not in evidence.
- 24 On 5 April 2019 the OC sent to Ms R a final notice to rectify the alleged breach.⁹
- 25 There are storage cages within the building's car park areas but none of those cages is within a car space. I infer that Mr Botha means that none of the storage cages is within an owner's accessory lot.

⁸ The notice complied with the requirements of s 155 of the OC Act.

⁹ The final notice, being exhibit "JFB-11" to Mr Botha's first affidavit that was meant to be exhibit "JFB-12", did not fully comply with s 157 of the OC Act. It did not state that if the breach was not rectified within 28 days the OC may decide to apply to VCAT. This point was not taken during the hearing. I am deciding the proceeding on its merits.

- 26 In his affidavit Mr Botha has alleged that Ms R has breached a condition of the planning permit from the City of Melbourne issued on 4 October 2001 which provides that the use of any land or building or part thereof must not be altered or modified without the prior consent of the responsible authority. Ms R has contested this allegation. She filed and served two letters from planning officers of the City of Melbourne dated 20 March 2020 and 14 April 2021 respectively, addressed to her.¹⁰ In combination, they stated that no planning permission was required for the installation of a storage unit in an accessory lot in the building provided that the gross floor areas was not affected.

THE FACTS THAT WERE IN ISSUE

- 27 Ms R did not give her evidence about her conversation with Mr Botha until the second day of the hearing. The OC had not been given any notice that Mr Botha's first affidavit was going to be contested in relation to that conversation. That is why at the end of that day I gave the OC leave to file and serve a further affidavit of Mr Botha in reply to Ms R's version of the conversation, which I summarised in the order made on that day. Very late, the OC did file and serve the second affidavit of Mr Botha. In that second affidavit he did no more than repeat what he had said in his first affidavit about that conversation.
- 28 Ms R is not claiming that Mr Botha or anyone else gave a consent to her placing a storage unit in her car space. What she is claiming is that Mr Botha gave her reason to believe that the absence of consent would not have adverse consequences for her. To my mind Mr Botha's version of the conversation is more plausible but I do not reject Ms R's version entirely. It has the circumstantial detail of Mr Botha looking at his computer before giving her an answer: a circumstantial detail that Mr Botha did not confirm or deny in his second affidavit, and which gives some credibility to Ms R's version. Moreover Mr Botha's evidence has been by affidavit only, untested at a hearing. Nevertheless, it is improbable that a prudent owners corporation manager would say that probably there would be no action taken against her if she did install the storage unit.
- 29 The finding that I now make reflects what I consider to be the probabilities of the case in the light of the two competing versions. Ms R asked Mr Botha where she stood if she installed a storage unit in her car space. He did not tell her that she could not install it. He looked at his computer and located information about Ms R's accessory lot 1507. He did say, "your options are now either to accept that the OC said no or go ahead and install it". What he went on to say was that if she went ahead and installed it, the OC might take action against her or it might not. Ms R decided to take the risk.

¹⁰ Email from Katherine Smart, Strategic Planner, City of Melbourne to Ms R dated 31 March 2021 and email from Daniel Sanfilippo, Acting Senior Urban Planner, to Ms R dated 14 April 2021. The emails were attached to Ms R's submission dated 26 May 2021.

- 30 Did Ms R request consent, and if so when? If her evidence that she did on the last business day of December 2018 is correct, the timeline is very tight. On 8 January 2019 the OC had sent to her the breach notice. The timeline presupposes the making of a request, the procuring of the storage unit, the installation of the storage unit, its coming to the OC manager's notice, and the preparation and sending of the breach notice, all in the space of a few days over a holiday period. Her evidence about the request for consent is vague and improbable. I do not accept it. On the other hand, she did ask Mr Botha on 19 November 2019 what her options were, or where she stood, in the matter of a storage unit in her car space. While that was not actually a request to the OC for its consent to her installation of the storage unit, it was something that was close to such a request.
- 31 As to the alleged "breach" of a planning permit, I have interpreted Mr Botha's evidence about that to be that Ms R's installation of the storage unit in her accessory lot has put the OC at risk of being prosecuted for an action that was contrary to the planning permit. The letters from the planning officers of the city of Melbourne that Ms R obtained have satisfied me that there is no such risk and that there has been no infringement of planning permission.

THE SECOND PROVISO

- 32 The second proviso applicable to additional rule 3(j) is that consent to the erection of a structure within an accessory lots must not be given if the use or enjoyment of any other member or occupier of a lot or of common property would be unreasonably prejudiced or affected thereby.
- 33 The OC and Ms R each made a written submission about both provisos and spoke to it on the second day of the hearing. Ms R's written submission was in reply to the OC's.
- 34 As to the second proviso, the OC's submission identified six reasons, numbered (a) to (f), why the giving of consent would have unreasonably prejudicial or affected the use or enjoyment of another member or occupier. I set out each reason and Ms R's response to it.
- 35 (a) *It sets a precedent.* The submission was that the giving of consent would set a precedent for other owners and occupiers, demonstrating that they do not need to obtain the OC's consent despite the rules. This submission seems to me to have nothing to do with prejudicing or affecting another's use and enjoyment of a lot or of common property, and would be more appropriately made in relation to the first proviso about not unreasonably withholding consent. I shall defer consideration of it and of Ms R's response to it until I deal with the first proviso.
- 36 (b) *Danger of injury or damage.* The submission was that because the storage unit was not a fixture but was free standing it was a hazard and presented an occupational health and safety risk; if it were to fall it could injure a person or damage a person's property. Although the connection of

this submission to a “use and enjoyment” question is tenuous, and although it would more properly be made in relation to the first proviso about not unreasonably withholding consent, I shall deal with it now.

- 37 Ms R’s response was that the storage unit was a stable steel structure standing firmly on four legs and was specifically designed for placing in car parking spaces. She annexed to her submission a copy of an email from the supplier of the unit, Space Commander Storage Units, which stated that the unit complied with Australia Standards A5 2890 Parking Facilities Regulations in relation to basement car parks and that the company was unaware of any major failure or collapse of such a unit. She submitted that the possibility of the storage unit falling upon a person or property was remote.
- 38 While I would want more properly qualified expert evidence than a mere email from the supplier, my observation of the unit at the on-site inspection, as well as what I could observe from photographs has satisfied me that Ms R’s response was correct. The unit is a sturdy object placed next to a wall. I could not see how there could be a risk of it falling. I doubt whether a person could push it over, but that has not been put to the test. I do not accept the OC’s submission that it creates a risk to safety because it might fall.
- 39 (c) *A crime risk*. The OC asserted that buildings with similar structures in them “have higher crime rate” and that the giving of consent would increase insurance premiums. Neither assertion was supported by any evidence. I reject the submission. It does not support a stance that the OC could not consent, because “use and enjoyment” would be affected if it did consent.
- 40 (d) *Smoke hazard management*. The OC submitted that essential services management conditions of the building’s occupancy permit, in particular the smoke hazard management system installed in the car parking areas, could be affected, because the system was designed on the basis that the accessory lots would only be used to park vehicles. Attached to the submission was a copy of the occupancy permit.
- 41 Common sense suggests that the assertion that the system was designed on the basis that the car spaces would be used for car parking only is correct, even though the assertion was not proved by evidence. I could not see anything in the occupancy permit which supported the submission about the smoke management system, and there was no other evidence that supported it. Ms R’s submission, supported by photographs, emphasised that there were car stackers installed in some of the accessory lots. If storage units in car spaces are said to effect a smoke hazard management system, one wonders what car stackers in car spaces would do to it. The OC has not proved that this alleged effect on essential services management would be a good reason for the OC saying that it was obliged not to consent because “use and enjoyment” would be affected if it did consent.
- 42 (e) *Access to the fire sprinkler system*. The OC alleged that the storage unit impedes access to the fire sprinkler system. This is a much more formidable

submission for Ms R to meet. Even if the submission is made out, I do not think that it would be a relevant reason for the OC saying that it was obliged not to consent because “use and enjoyment” would be affected if it did consent. I shall deal with the submission when I come to deal with the first proviso.

- 43 (f) *Discrimination*. The OC submitted that the giving of a consent to Ms R would be seen as “discriminating against members and occupiers that have previously sought or may in future seek consent to erect a structure on their accessory unit but were or will be denied because the structure will have an adverse impact on turning circles, line of sight, fire services mechanical services and other [essential service management] services due to the location of the accessory lot within the car park”.¹¹ There is no other mention in the submission of impact on turning circles or on lines of sight. If this part of the submission is that, while structures erected on other accessory lots may have such an impact Ms R’s storage unit does not, I would agree with it. My observation of its situation at the on-site inspection confirms that it could not interfere with the safe driving, turning or parking of vehicles in or near other car parking spaces.
- 44 While any decision of an owners corporation that unfairly discriminates against a lot owners would be open to challenge,¹² there is nothing unfairly discriminatory in approving one member’s request for consent to the installation of a structure but refusing another member’s request, provided that each request is considered on its merits with regard being had to the particular structure and the particular accessory lot involved. The fear of an accusation of unfairly discriminatory conduct is not a good reason for the OC saying that it was obliged not to consent because “use and enjoyment” would be affected if it did consent.
- 45 I have concluded that the operation of the second proviso did not and does not oblige the OC to refuse to allow Ms R to install her storage unit in her car space.

THE FIRST PROVISO

- 46 Because I have decided that the second proviso does not operate to compel the OC to refuse consent, there is scope for the first proviso to operate: the consent of the OC to a structure being erected within an accessory lot shall not be unreasonably withheld.
- 47 When Ms R had approached Mr Botha at the end of the committee meeting on 19 November 2019 for advice about whether she could install a storage unit in her car space, he had referred her to the result of the members’ survey, and had implied that that might be a reason for withholding consent. But there has been no evidence of the OC actually having given her, before this proceeding was commenced, a reason for withholding its consent.

¹¹ The OC’s submission, paragraph 4(f).

¹² OC Act s 167(d).

- 48 Again I draw upon the analogy with the law concerning a tenant's covenant in a lease not to assign or sub-let the premises without the consent of the landlord when the lease provides that a consent cannot be unreasonably withheld. In any litigation about the reasonableness of withholding consent the landlord is not confined to reasons given at the time of refusal of consent but may rely on other reasons, and may do so even if no reason for refusal has been given; however, if no reason is given one might more readily conclude that the withholding of consent is unreasonable.¹³ In this proceeding the OC is entitled to rely upon the reasons that it has put forward in its submission.
- 49 The order in which I deal with those reasons differs from the order in the OC's submission.
- 50 *Repetition of reasons* (b), (c) and (d) given in relation to the second proviso: danger of injury or damage if the storage unit were to fall; creation of a crime risk; risk to smoke hazard management. I repeat what I said in paragraphs 36 and 41 above about those reasons. Ms R's photographs show that several of the car spaces in the building have car stacker machinery in them. One could not reasonably say that a storage unit in a car space created such danger or risk that car stacker machinery in a car space did not. None of those reasons is a justifiable reason for withholding consent to the installation of the storage unit in Ms R's accessory lot.
- 51 *Storage of flammable items.* The OC submitted that the withholding of consent was reasonable because it is unable to control what items are stored in the unit, and the storage of flammable or dangerous items would present a safety concern. The answer to that submission is that additional rule 3(j) itself requires an owner of an accessory lot not to store flammable products in it. Obedience to the rule removes the alleged safety concern. That a lot owner might not obey the rule, or any other rule of the OC, is not a consideration that could reasonably be relied upon to withhold consent to the installation of a storage unit in an accessory lot.
- 52 *Access to the fire sprinkler system.* In the building's driveway and car spaces areas there is a fire sprinkler system that can operate in an emergency. The system consists of pipes (red in colour) which run across the area at roof level. The pipes have sprinkler heads fitted to them. In the pipes that run across the roof of Ms R's accessory lot 1507 there are three sprinkler heads. One of the sprinkler heads is directly above the storage unit.
- 53 The OC argued that the storage unit impedes access to the sprinkler head for servicing or maintenance purposes, and also that the clearance between the top of the storage unit and the sprinkler head is only 300 millimetres whereas the applicable standard for the installation of a sprinkler system is 450 millimetres or greater. The OC attached to its submission a letter from Dan Hanley of Centric Facilities Management which set out a "standard for the

¹³ *Secured Income Real Estate (Australia) Ltd v St Martin's Investments Pty Ltd* (1979) 144 CLR 596 at 609-611, *Kids Campus Holdings Pty Ltd v Kelly* [2007] VSC 282.

installation of sprinkler systems 2019 edition". The OC has put forward that information as a reason for withholding consent to the installation of the storage unit.

- 54 To that argument Ms R in her submission has made several responses:
- (i) "The standard quoted from is not an Australian standard". She does not say how she knows that. The standard quoted does give measurements in imperial units as well as in metric units (e.g. "18 in. (450mm)"), which suggests to me that the source is from the United States of America, but I do not know if what Ms R says about the standard is correct.
 - (ii) Ms R's submission included a photograph of a man, who appears to be of above average height but not exceptionally tall, comfortably reaching the sprinkler head with his right hand while standing in front of the storage unit. The photograph shows, she says, that the storage unit does not restrict access to the sprinkler head for maintenance purposes or for other purposes.
 - (iii) A high vehicle, or a vehicle equipped with roof-mounted storage, parked in a car space would affect access to the sprinkler system more than the storage unit does.
 - (iv) If the need should arise to move the storage unit temporarily, it can be easily dismantled. (I doubt that this is so.)
- 55 There is no escaping the fact that access to the sprinkler head which is directly above the storage unit would be easier if the storage unit were not where it is. I cannot say that the OC's reliance on that fact for the withholding of consent is unreasonable. Like Ms R, I consider that the restriction to access is not serious, but the test is not what she and I think but whether an owners corporation, acting reasonably, could withhold consent because of that fact. I conclude that it could. The withholding of consent has a rational basis. The consequences are that Ms R has not established that the withholding of consent is unreasonable, and that she is in breach of additional rule 3(j).
- 56 It does not follow, however, that the OC is entitled to the order that it seeks. There is a discretion to be exercised. I shall refer to that matter below.
- 57 *Precedent.* As I said in paragraph 35 above, the OC has submitted that it reasonably withheld consent because the giving of consent would set a precedent for other owners and occupiers, demonstrating that they do not need to obtain the OC's consent before erecting a structure within a car space. The submission seeks to characterise Ms R as a person who deliberately breached additional rule 3(j) by placing the storage unit in her car space when she knew that she did not have the OC's consent. The submission is that the giving of consent now would encourage others to behave in the same way.

- 58 It is wrong to say that Ms R deliberately breached the rule. In 2017 she was a member of the OC's committee. As Mr Botha's affidavit showed, she was one of the persons actively driving the idea of allowing over-bonnet storage units in car spaces. The OC's members resolved that she should assist in drafting a survey of members to gauge their interest in having storage units in their car spaces. It was Mr Botha's view that the OC's rules needed to be changed before storage units in car spaces should be permitted. That view was wrong. Additional rule 3(j) enables a member to ask for consent to the installation of a storage unit, and the consent is not to be unreasonably withheld. At all events the survey did not ask the members to vote upon a proposed amendment to the rules, or even to say whether they approved or disapproved of a lot owners having a storage unit in a car space. All they were asked was whether they would be interested in having one themselves. The results of the survey showed a lack of interest. That is where the matter rested. When Ms R asked Mr Botha what her options were, he reminded her of the result of the survey and gave an equivocal answer. Whatever be the result of this proceeding, it should not be an encouragement of any member to break the rules, and it should not prevent the OC from treating on its merits any request by a member to be allowed to have a storage unit in a car space. If the results of the survey are anything to go by, it is not likely that there will be many requests.

DISCRETION AND THE PARTIES' CONDUCT

- 59 This proceeding is an owners corporation dispute as defined in the OC Act. It arises under the OC's rules, it affects the OC and it relates to an alleged breach by a lot owner of those rules.¹⁴ In determining an owners corporation dispute, the Tribunal may make any order it considers fair.¹⁵ That means that once the Tribunal has determined the dispute (in this case, it has determined that Ms R has breached one of the OC's rules) there is flexibility in the scope of orders that might be made. The discretion to make any order the Tribunal considers fair includes a discretion not to make any order, even though a breach of a rule has been established.
- 60 There have been several instances in which the Tribunal has considered it fair not to make any order in a case where the breach of a rule has been established; and thus to dismiss the proceeding. In one,¹⁶ a lot owner had installed a door in a common property wall, having obtained informal consent from persons whom he had believed, wrongly, to be office-holders in the owners corporation. Other lot owners knew of the installation and made no objection to it. Although a breach of the owners corporation's rules was proved, the Tribunal considered it fair not to make any order against the lot owner.

¹⁴ OC Act s 162.

¹⁵ OC Act s 165(1).

¹⁶ *Owners Corporation 1 PS 611240K v Brady* [2018] VCAT 645.

- 61 In that case the Tribunal was obliged, as I am in the present proceeding, to consider the conduct of the parties when determining an owners corporation dispute.¹⁷
- 62 The OC's conduct, and other relevant circumstances, that might weigh against the making of an order that Ms R remove her storage unit from accessory lot 1507 are as follows:
- (a) It has taken a wrong view of the operation of its rules. They do not prohibit absolutely the erection of structure in accessory lots. There was and is no need to amend its rules to deal with that matter. It could always be dealt with under additional rule 3(j).
 - (b) Mr Botha gave Ms R an equivocal answer when she asked him what her options were about installing a storage unit in her car space.
 - (c) The OC's members have not made any decision on the issue of storage units in car spaces. They were simply asked whether they were interested in the idea. Although only a minority expressed an interest, the result of the survey should never have dominated the issue of whether Ms R should be permitted to install a storage unit in her accessory lot.
 - (d) Of the several reasons that the OC has put forward for the withholding of consent, only one was a good reason in law, in my view.
- 63 The conduct of Ms R that weighs in favour of the making of the order that the OC seeks are that, although she had reason to believe that the OC might not take action against her if she installed the storage unit, she took the risk that it might, and installed the unit when she knew that the OC had not consented.
- 64 In the end I have decided that the balance has to come down in favour of the OC. The fact that Ms R installed the unit without its consent, to her knowledge, outweighs the matters I listed in paragraph 62 above. This is not a case in which it would be proper to deny the OC an order that Ms R must remove the storage unit from her accessory lot 1507. It is, however, a case in which it is proper to delay the operation of the order for nearly 12 months, until 30 June 2023.
- 65 The storage unit has been in place now for two years, without there having been any evidence of any adverse effect upon any person or upon anything. Delaying for nearly a further year the operation of an order for removal of the storage unit will allow time for the OC to reconsider the matter in a number of ways.
- (a) In the light of these reasons, the OC ought to appreciate that it is not necessary, and it never was necessary, to change its rules before allowing a member to install a storage unit in an accessory lot used as a car parking space. The rules enable consent to be given, except where

¹⁷ OC Act s 167(a).

by virtue of the second proviso it must not consent. The second proviso did not apply in Ms R's case.

- (b) The members have not decided that no consent should be given for such an installation. The result of the survey was only that it showed that most members did not want to install storage units themselves; the result did not reveal any active opposition to the idea.
 - (c) If an annual general meeting of the OC is held before 30 June 2023, the issue might become an agenda item and the members would then be able to make a relevant decision.
 - (d) The OC and Ms R may be able to agree upon conditions to the giving of consent to the storage unit remain in place.
- 66 So I delay the operation of the order until 30 June 2023, in the hope that the OC never needs to enforce it.
- 67 Ms R relied upon a case¹⁸ that I decided that involved an almost identical type of storage unit and a rule that had some similarities to, but also some differences from additional rule 3(j) in the present proceeding. In that case I decided that the owners corporation had unreasonably withheld consent to a lot owner's request to be allowed to install the storage unit in an accessory lot designed to be a car parking space. The most significant difference between that case and the present case is that in that case the lot owner had not gone ahead and installed the storage unit despite the lack of consent but had brought his application to the Tribunal as a challenge to the withholding of consent.

CONCLUSION

- 68 I make the order that the OC asks for, requiring Ms R to remove her storage unit from her accessory lot 1507, but by delaying the operation of the order until 30 June 2023, I give the members of the OC the opportunity to consider the matter afresh and make a decision that means that the order will not be enforced.
- 69 Pursuant to s 146 of the *Victorian Civil and Administrative Tribunal Act 1988* (Vic), and for reasons relating to my anonymising of the respondent, there will be an order that no person other than a party or a party's authorised lawyer may inspect the file in this proceeding without a Tribunal order permitting the inspection.

POSTSCRIPT: THE MODEL RULE

- 70 In paragraph 8 above I said why in my opinion model rule 5.2 had no application in circumstances of this proceeding. There may be other reasons why the model rule does not apply.

¹⁸ *Hossen v Owners Corporation 440926 M* [2018] VCAT 167.

- 71 The Owners Corporation regulations 2018, which in Schedule 2 contain the model rules, came into force on 1 December 2018.¹⁹ There was no model rule in the Schedule to the previous regulations²⁰ that was like the present model rule 5.2. Although according to Ms R's version of events she installed her storage unit after 1 December 2018 (for she said that she asked "on the last business day" of 2018 for consent to the installation) I have not accepted that version of events.²¹ So it remains unclear whether the installation occurred before or after 1 December 2018. If it occurred before that date, model rule 5.2 would not apply to it.
- 72 Moreover the model rule is about "changes to the external appearance of [a] lot". Does an accessory lot which is a car parking space have an external appearance? Lot 1507's vertical boundary is a wall. Its horizontal boundaries are lines painted onto a concrete surface. An "external appearance" is not the same thing as how the lot appears to someone who is viewing it externally. When a person views the storage unit the person is viewing the accessory lot's internal appearance, not its external appearance. Rules that restrict a lot owner's making of alterations to the exterior of a lot depend for their validity on their going no further than preserving aesthetic conformity with the exteriors of other lots.²² That is a reason for regarding model rule 5.2 as being concerned with the external appearance of a building on a lot and as having nothing to do with car parking spaces.

A. Vassie
Senior Member

¹⁹ Owners Corporations Regulations 2018. reg. 4.

²⁰ Owners Corporations Regulations 2007.

²¹ See paragraph 28 above.

²² Compare *Owners Corporation RP 3454 v Ainley* [2017] VSC 790 at [80].

