

IN THE SUPREME COURT OF VICTORIA
AT MELBOURNE
COMMON LAW DIVISION
PROPERTY LIST

S ECI 2023 02303

BETWEEN:

OSAMA EL-SHAHAWY & ANOR
(according to the attached Schedule)

Plaintiffs

v

OWNERS CORPORATION 1 PLAN
NO. PS606836R & ANOR
(according to the attached Schedule)

Defendants

<u>JUDGE:</u>	Daly AsJ
<u>WHERE HELD:</u>	Melbourne
<u>DATE OF HEARING:</u>	14 September 2023
<u>DATE OF JUDGMENT:</u>	9 October 2023
<u>CASE MAY BE CITED AS:</u>	El-Shahawy v Owners Corporation 1 Plan No. PS606836R
<u>MEDIUM NEUTRAL CITATION:</u>	[2023] VSC 597

REAL PROPERTY – Caveats – Application to remove caveat pursuant to s 90(3) of *Transfer of Land Act 1958* (Vic) – Subject property is land upon which a community centre for a retirement village is sited – Whether the owners corporation has a *prima facie* case that they have a caveatable interest in the property on the basis of a proprietary estoppel – *Piroshenko v Grojsman* (2010) 27 VR 489 referred to – Whether the owners corporation is able to comply with requirements of s 32(b) of the *Subdivision Act 1988* (Vic) in bringing a proceeding to obtain property – *Real Estate Victoria Pty Ltd v Owners Corporation No 1 PS332430W* [2021] VSC 373 considered – Evidence of representations made by the owner of the land to residents of the retirement village and the owners corporation – Whether a claim by the owners corporation for an interest in the property is defeated by delay or acquiescence – Balance of convenience supports the preservation of the *status quo* and the maintenance of the caveat – Application dismissed.

APPEARANCES:

For the Plaintiffs

For the Defendant

Counsel

Mr B Petrie of counsel

Mr N Dragojlovic of counsel

Solicitors

Mayfair Legal

BD Legal

HER HONOUR:

Introduction

- 1 These reasons concern an application to remove a caveat over a two hectare parcel of land located within an over 55 residential community ('village') in Yarragon in West Gippsland, on which is sited a community centre for the residents of the village.
- 2 The development of the village commenced in 2006 when Rossi Group Pty Ltd¹ ('developer') commenced subdividing the land on which the village was located and constructing villa units on the individual lots. Once subdivided, the freehold title to the individual lots was sold to incoming residents. The planning permit for the land on which the village is located provides for the construction of 60 units, 42 of which have been completed and sold, and the construction of a community centre with outdoor recreation facilities and visitor car parking.² The common property of the village is managed by the first defendant ('owners corporation').³ The owners corporation also manages the community centre, which was completed in 2016, and is reportedly well used by the residents of the village.
- 3 The developer went into liquidation in January 2020. At the time the liquidators were appointed, the developer was the registered proprietor of four unsold 'super lots' plus the lot upon which the community centre was located ('subject lot'). It appears from the documents in evidence that the developer and the residents of the village contemplated that, upon the completion of the development of the village, the subject lot would be transferred to the owners corporation. A critical issue in the current application is whether that expectation gave rise to a proprietary estoppel with respect to the subject lot in favour of the owners corporation.

Chronology of relevant events

- 4 Following their appointment, the liquidators were subsequently appointed as receivers of the super lots and the subject lot (together, 'the land'), and on

1 Now in liquidation.

2 The final layout of the village as contemplated by the planning permit is annexure A to these reasons.

3 The second defendant, the Registrar of Titles, has informed the Court that the Registrar does not wish to take part in this proceeding.

15 February 2022, the liquidators entered into a contract of sale with the first plaintiff for the sale of the land for \$1,063,000. The second plaintiff was subsequently nominated by the first plaintiff to be the purchaser of the land under the contract of sale.

5 The execution of the contract of sale followed efforts by the liquidators to sell the super lots alone. The super lots (but not the subject lot) were offered for sale by public auction in July 2021, but were not sold at that time.

6 On 8 November 2021, the solicitors for the liquidators wrote to the former solicitors for the owners corporation, as follows ('November 2021 letter'):

As you are aware, we act for Anthony Cant and Renee Di Carlo of Romanis Cant in their capacity as the joint and several liquidators of Rossi Group Pty Ltd (in liquidation) (the Company) and court appointed receivers of the property, assets and undertaking of The Rossi Childrens Trust (the Trust).

We are in receipt of correspondence dated 3 November 2021 from Stephen Nippers of Ace Body Corporate Management (Gippsland Region) to Ms Di Carlo enquiring about the sale of the remaining super lots within the development. This letter is in response to that correspondence.

We confirm that our clients are currently in negotiations with a purchaser for each of the parcels in the development still registered to the Company (being lots S8⁴, S14, S15, S16 and S17 - those lots hereinafter together referred to as the Land) with the intention to sell the whole of the Land as one package deal.

We understand that the purchaser our clients are currently negotiating with is a builder whom we understand intends to acquire the Land in order to complete the remainder of the development.

As previously advised, completion of the development and transfer of the community centre to the owners corporation was initially designed to be completed by way of registration of a plan of subdivision wherein the community centre was to be vested in the owners corporation. However, as the permit for the subdivision of the Land has now lapsed, the transfer of lot S8 in this way is not possible without first obtaining a new permit.

Our clients do not intend to obtain new permits for the Land, nor do they intend to undertake development of the Land. As such they have set about seeking a purchaser for the Land who can complete the development.

We expect that in order for the intending purchaser to complete the development of the Land, they will likely need to obtain new permits inter

⁴ Lot S8 is the subject lot.

alia for the subdivision of the Land. Any such permits will necessarily set out the conditions of registration of the subsequent plans and will inform the works required to complete the development.

By selling the Land (including specifically lot S8) as one package deal to a purchaser who intends to complete the development, it is anticipated that any subsequent plans and permits obtained by that purchaser in relation to the Land will deal with the remainder of the development as a whole. Further we anticipate that this will likely result in lot S8 vesting with the owners corporation by registration of a plan.

At this stage, contracts have not yet been executed and exchanged between the parties, however it is our clients' intention to enter into a contract for the sale of the Land within the next fortnight.

We will provide further updates as the matter progresses.

Should you have any queries in relation to the above, please do not hesitate to contact the undersigned.

7 There was no reply to the November 2021 letter in evidence.

8 The first plaintiff is a property investor and developer with a particular interest in retirement villages. His intention is to construct the remaining units on the super lots contemplated by the planning permit, and, once the transfer of the subject lot to the second plaintiff is effected, to complete the works on the subject lot required by the planning permit.⁵ The time for the completion of the works contemplated by the planning permit has been extended on a number of occasions, and the works are now required to be completed by 27 July 2025.

9 The contract of sale provided for a 14 day due diligence period commencing the day after the execution of the contract of sale. Prior to entering into the contract of sale, the first plaintiff was provided with, among other things, a “notice of annual general meeting of the owners corporation” dated 4 November 2021. This notice was included in the owners corporation certificates included in the vendor’s statement prepared with respect to the land (‘vendor’s statement’), and included a statement that:

⁵ The planning permit requires the construction of a BBQ area and visitor car park adjacent to the community centre, and the plaintiffs also want to carry out certain works to upgrade the interior of the community centre.

The community centre is deemed to be an Owners Corporation asset and no determinations have been received (to 31-10-2021). Legal action is still an option to pursue [sic] ownership change if this asset [sic] is not transferred to common property upon any future settlement of [the subject lot].

- 10 On 16 February 2022, the day after the execution of the contract of sale, the first plaintiff spoke with the manager of the owners corporation, who told him that the residents of the village considered that they had paid for the community centre as part of the purchase of their lots, and that the residents believed that the community centre should be transferred to common property.
- 11 To interpose here, the residents' belief was no doubt engendered by the marketing material used by the developer to promote the sale of the individual units. The marketing collateral in evidence promoted the village as offering, among other things:
- Individual Freehold title
 - No entry or exit fees
 - Community Centre owned and controlled by Residents;
 - Free on site storage for caravans or boats
- 12 There was also evidence to the effect that the owners corporation and individual residents paid for the furnishings and other equipment in the community centre, and pay for the ongoing maintenance and operation of the community centre, including utilities and insurance.
- 13 On 21 February 2022 (that is, during the due diligence period provided for by the contract of sale), the first plaintiff met with a group of residents of the village, including the then chairperson and other members of the committee of the owners corporation, to inform them of his plans for the village and to discuss any concerns they may have had about the ownership of the community centre. He told the residents' meeting that he planned to complete the works required to comply with the planning permit (which he estimated would cost approximately \$100,000)⁶ and

⁶ The first plaintiff estimated that the additional proposed refurbishment works (not required to comply with the planning permit) will cost a further \$40,000.

the second plaintiff would lease the community centre to the owners corporation at a rental which would equate to \$15 per week per household. He left the meeting before it was concluded, but was subsequently informed by the chairperson of the committee that a show of hands indicated that a majority of those present favoured accepting his proposal.

14 Accordingly, on 22 February 2022, the first plaintiff instructed his solicitors to write to the manager of the owners corporation. This letter confirmed that the first plaintiff had entered the contract of sale for the land, and stated as follows:

This letter sets out a proposal for the continued use of the Community Centre by residents in the event that the Contract proceeds to settlement. Settlement is expected to occur on 1 August 2022. In the event that the Contract proceeds to settlement, our client intends to nominate a corporate entity (Owner) to take a transfer of the Property.

Lease Proposal

The Owner will grant a lease of the Community Centre to Owners Corporation Plan No PS 606836R. The terms of the lease will be as follows:

- Landlord: The registered proprietor for the time being of Lot S8 on Plan of Subdivision PS 606836R.
- Tenant: Owners Corporation Plan No PS 606836R.
- Permitted use: recreational, leisure and community use by residents of 53 Rodier Street, Yarragon and their guests.
- Rent: \$46,800 per annum, payable monthly in advance. GST will be charged in addition to the rent if the Owners Corporation is registered for GST (and would receive an input tax credit for GST charged).
- Rent review: rent to be increased by CPI annually.
- Term of lease: 99 years, commencing on 1 August 2022.
- Maintenance and capital works: The Tenant will be responsible for regular maintenance (other than items of a capital nature) relating to the Community Centre.

Next Steps

We request that the lease proposal is put forward to the members of the Owners Corporation. Under section 15 of the *Owners Corporations Act 2006*, a special resolution is required for the Owners Corporation to enter a lease. We attach a proposed form of ballot for this purpose.

- 15 The first plaintiff's solicitors did not receive a reply to this letter. Some days later, at the conclusion of the due diligence period, the first plaintiff paid the deposit for the land to the liquidators.
- 16 However, on 10 March 2022, the members of the owners corporation formally met and voted by a substantial margin to reject the first plaintiff's offer. On 27 July 2022, a few days before the scheduled settlement of the contract of sale, the owners corporation lodged a caveat prohibiting all dealings with the subject lot, describing the caveatable interest claimed as a 'freehold estate' on the grounds of an 'implied, resulting or constructive trust'.
- 17 Accordingly, the first plaintiff and the liquidators entered into a supplementary deed, which provided for the super lots to be transferred to the second plaintiff on 20 September 2022, with consequential adjustments to the purchase price.⁷ The developer remains the registered proprietor of the subject lot.
- 18 On 24 August 2022, the liquidators served a lapsing notice pursuant to s 89A of the *Transfer of Land Act 1958* (Vic) ('TLA') upon the owners corporation.
- 19 On 27 September 2022, the owners corporation issued an originating process in the Corporations List of this Court seeking leave to commence a proceeding against the developer pursuant to s 471B of the *Corporations Act 2001* (Cth) ('leave application'). Further, on 10 October 2022, the owners corporation and the chairperson of its committee, Ms Norma Garner, issued an application in the Victorian Civil and Administrative Tribunal ('VCAT') for an order under s 169J of the *Owners*

⁷ The first plaintiff deposed that he has 'expended' \$965,777.11 in receiving the super lots. The supplementary deed excised the subject lot into a separate contract of sale at a price of \$50,000, reduced the price of the super lots to \$763,000, and provided for certain adjustments to be made at the settlement of the sale of the super lots and, ultimately, the subject lot. The supplementary deed also included terms by which the first plaintiff agreed, in consideration for the reduction in the purchase price for the land, to indemnify the liquidators in respect of any claims by the owners corporation and/or residents of the village with respect to the subject lot, and the liquidators agreed that the plaintiffs would have the conduct of any proceedings arising out of any such claim or claims.

Corporation Act 2006 (Vic) to retrospectively grant leave to Ms Garner to commence the leave application on behalf of the owners corporation ('VCAT application').⁸

20 The leave application was stayed by Efthim AsJ on 22 November 2022 pending the hearing and determination of the VCAT application. In turn, the VCAT application has been put on hold pending the outcome of this proceeding.⁹

The owners corporation's claim for a proprietary interest in the subject lot

21 The affidavits filed in the leave application and the VCAT application included a draft statement of claim dated 26 September 2022. After identifying the parties and recounting other formal matters, the draft statement of claim:

- (a) alleged that between August 2006 and November 2021 the developer represented to the owners corporation and the residents of the village that the developer would construct a community centre on the subject lot for the benefit of the residents of the village, and to transfer the title of the subject lot to the owners corporation;
- (b) provided particulars of the alleged representations, which, insofar as they were said to be in writing, were said to have been contained in:
 - (i) the public advertisements and other marketing collateral prepared by or on behalf of the developer between 2006 and 2020;
 - (ii) an email sent by the former director of the developer ('Mr Rossi') to a prospective purchaser in August 2006;
 - (iii) a draft plan of subdivision which identified the subject lot as 'common property no 1'; and

⁸ The VCAT application was necessary because the second plaintiff said that it would use its voting entitlements in the owners corporation to block the passage of a special resolution authorising the commencement of the leave application.

⁹ The parties have agreed that if the plaintiffs' application to remove the caveat is unsuccessful, consent orders will be filed in the VCAT application granting Ms Garner leave to pursue the leave application on behalf of the owners corporation.

- (iv) the November 2021 letter;
- (c) provided particulars of the representations which were said to have been made orally, being conversations between 2006 and 2020 between Mr Rossi and prospective purchasers of units within the village, residents of the village, and members and representatives of the owners corporation;
- (d) alleged that the developer constructed the community centre on the subject lot in 2016;
- (e) alleged that the owners corporation and the residents reasonably believed and/or expected that the owners corporation would acquire the fee simple title to the subject lot, and the developer knew and/or intended that the owners corporation and the residents of the village held that belief, and would act in reliance upon that belief;
- (f) alleged that from 8 October 2009,¹⁰ the owners corporation and the residents of the village reasonably acted to their detriment and changed their position in reliance upon the representations and their expectation and belief that the owners corporation would acquire the title to the subject lot;
- (g) provided the following particulars of detriment:

The amount of consideration paid by the Lot Owners to Rossi to acquire their respective lots within the Development reflected the assumption that Lot S8 and the Community Centre would be owned by the OC. The OC has paid and continues to pay all costs and expenses associated with the set-up, operation and maintenance of the community centre located on Lot S8, including the cost of furnishings, water, electricity, gas, building insurance, public liability insurance and compliance with essential safety measures. Further particulars of the consequences of the OC and Lot Owners' reliance on the expectation that Lot S8 would be transferred to the OC will be provided prior to trial.

- (h) alleged that if the subject lot is not transferred to the owners corporation, the owners corporation will suffer loss from being deprived of the title of the

¹⁰ The date of the incorporation of the owners corporation.

subject lot, and there will be a diminution in the value of the lots owned by the residents;

- (i) said that, in the circumstances, it would be unconscionable for the developer to fail to transfer the title of the subject lot to the owners corporation; and
- (j) seeks an order that the developer and the liquidators do all things necessary to transfer the title of the subject lot to the owners corporation.

22 The draft statement of claim also seeks damages pursuant to s 236 of the *Australian Consumer Law* for the alleged misleading and deceptive conduct of the developer, but that claim is not relevant to the current application, given that such a claim does not give rise to any proprietary interest in the subject lot.

The evidence

23 This proceeding, which seeks the removal of the caveat pursuant to s 90(3) of the TLA, was commenced on 31 May 2023.

24 The plaintiffs relied upon an affidavit affirmed by the first plaintiff on 29 May 2023. In his affidavit, the first plaintiff deposed, in summary, as follows:

- (a) as to the background facts summarised earlier in these reasons, including his entry into the contract of sale for the land, and his activities during the due diligence period, including his meeting with the residents of the village;
- (b) as to the anticipated cost of the completion of the works required on the subject lot to comply with the planning permit;
- (c) as to the refurbishment works he proposes to carry out at the community centre, he deposed as follows:

In addition, I decided to proceed with the Contract on the basis the Community Centre requires a significant upgrade. Among other things, it will be necessary to:

- a. install floor coverings (the Community Centre presently has bare concrete floors only);

- b. install lighting and emergency lighting (the Centre currently has only very basic lighting and it is not clear whether it complies with applicable regulations);
- c. install window furnishings;
- d. install kitchen appliances.

As an experienced property developer, I estimate the cost to upgrade the Community Centre will be in excess of \$40,000.

The Owners Corporation does not have funds in reserve to cover the costs of the necessary upgrade to the Community Centre, and I do not know of any intention to levy the necessary funds from the resident members.

It is crucial for me to build the carpark, barbecue area, and to upgrade the Community Centre, in order to sell the Unit Lots. Without these works and upgrades, the Unit Lots (as well as existing lots belonging to current residents) would be of significantly less value. I estimate that:

- a. The Unit Lots (once completed) would be worth approximately \$500,000 each in the absence of the above works being carried out;
- b. The Unit Lots (once completed) would be worth approximately \$550,000 each if the above works are carried out.

(d) as to what took place after the expiry of the due diligence period, including the lodgment of the caveat on behalf of the owners corporation, his entry into the supplementary deed with the liquidators on 20 September 2022, and the second plaintiff's objection to a special resolution of the owners corporation passed by a ballot on 1 September 2022 relating to the commencement of legal proceedings in support of the caveat;

(e) as to the initiation and progress of the leave application and the VCAT application; and

(f) under the heading 'Consequences for Plaintiff', he deposed as follows:

At the time of signing the Contract, I was not aware of any representations relating to the Community Centre, other than the vague statement contained in the vendor's statement that I refer to at paragraph 26 above. Although the Defendant claims that its proprietary rights in the Land arose from representations made as early as 2006, there was no way that I could have been made aware of such claimed rights before signing the Contract in the absence of the owners corporation members lodging a caveat, making a legal claim, or taking some other step that would have brought their claimed proprietary interest to my attention. Even after the November 2021 Letter, which I now know explicitly informed the Defendant that the Land would be

sold to a third party, the Defendant took no action to give notice of its alleged proprietary interest until 27 July 2022.

I intend to complete the development in accordance with the Planning Permit, which would require additional construction works on the Land to complete car parking, a barbecue area, landscaping and stormwater detention [sic] works on the Land. If such works are not completed, I am concerned that this will result in a breach of the conditions of the Planning Permit, with serious adverse consequences for the entire retirement village.

Specifically, I am concerned that a failure to complete the requirements of the Planning Permit could result in regulatory or prosecution action from the responsible authority (Baw Baw Shire Council). I am also concerned that I may not receive occupancy or subdivision permits for the units I am constructing on the Unit Lots.

25 The first plaintiff also deposed that on 3 November 2022 he instructed his solicitor to send a letter to the current solicitors for the owners corporation seeking confirmation that, if the owners corporation was successful in establishing a proprietary interest in the subject lot, it would carry out the necessary works on the subject lot, as well as confirmation that the owners corporation would provide an undertaking for damages. He deposed that no such confirmation has been provided.

26 Finally, under the heading 'Attempted Resolution', the first plaintiff deposed as follows:

On 11 November 2022, I instructed Mr Fisher to write to Mr Drenen to put an open proposal to the Defendant on a proposed resolution to the dispute. ... The proposal contained in the letter would have resulted in:

- a. each current lot owner paying a net amount of \$7.50 per week (\$390 per year) while they remain a lot owner, adjusted annually with inflation;
- b. the Second Plaintiff contributing \$40,000 towards upgrades to the Community Centre; and
- c. a resolution of all current and pending litigation concerning the Community Centre.

The offer I made to the Defendant was considered by the members of the Defendant at an extraordinary general meeting on 30 November 2022, at which time the members voted to reject the proposal.

27 The first plaintiff exhibited the following documents to his affidavit:

- (a) the plan of subdivision for the village;

- (b) the caveat lodged on behalf of the owners corporation on 27 July 2022;
- (c) the contract of sale for the land dated 15 February 2022;
- (d) the planning permit and site development plan for the village;
- (e) minutes of the owners corporation meetings on 10 March 2022 and 30 November 2022;
- (f) the supplementary deed dated 20 September 2022;
- (g) the draft statement of claim;
- (h) the documents relied upon by the owners corporation to support the representations alleged in the statement of claim; and
- (i) selected correspondence between his solicitors and the solicitors for the liquidators and the solicitors for the owners corporation.

28 The owners corporation relied upon an affidavit sworn by its solicitor, Mr Christopher Drenen, on 29 June 2023. Mr Drenen exhibited to his affidavit documents filed and orders made in the leave application and the VCAT application. Mr Drenen deposed as follows:

In summary, by reference to the documents filed in the various legal proceedings (described in further detail below), the OC contends that the Developer made numerous representations over an extended period to the OC and various owners of lots within the Plan of Subdivision (prior to them acquiring such lots and afterwards), that Lot S8 would comprise of a community centre for the use and benefit of all lot owners within the Plan of Subdivision, and that the ownership of Lot S8 would be transferred to (or vested in) the OC and/or each of the lot owners within the Plan of Subdivision. The lot owners relied upon such representations to purchase the lots within the Plan of Subdivision and otherwise conduct their affairs (individually and through the OC) on the basis of such representations. The OC thereby claims an entitlement to Lot S8 on the basis of proprietary estoppel, and it seeks orders to give effect to the representations made by the Developer which requires Lot S8 to be transferred to, or otherwise vested in, the OC.

29 Documents filed in the leave application included:

- (a) the originating process;
- (b) an affidavit sworn by Mr Drenen on 27 September 2022;
- (c) an affidavit sworn by the solicitors for the first plaintiff in this proceeding;
- (d) the written submissions filed by the parties in the leave application; and
- (e) orders made by Efthim AsJ on 14 October 2022 and 28 October 2022.

30 Documents filed in the VCAT application included:

- (a) the VCAT application and points of claim seeking retrospective approval for Ms Garner to bring the leave application on behalf of the owners corporation;
- (b) affidavits sworn by Mr Drenen on 10 October 2022 and 8 November 2022; and
- (c) affidavits made by 15 residents of the village in early November 2022, including Ms Garner, which, among other things, exhibited contracts of sale and vendor's statements relating to the purchase of their individual units, and advertisements and other marketing material viewed by them prior to and after purchasing their units.

31 Documents relied upon by the owners corporation to support its contentions regarding the representations said to have been made by the developer and the detriment incurred by it in reliance upon those representations included:

- (a) an email from Mr Rossi to prospective residents of the village on 27 August 2006, which stated:

Properties will be sold with a freehold title; it means you own your own bricks and mortar as well as [sic] common owner the community centre.
- (b) an unsigned and unstamped plan of subdivision titled 'Stage 8' included in a vendor's statement provided to purchasers of a lot in the village on or about

16 September 2015, which describes the subject lot as 'Common Property No 1';¹¹

- (c) a 'Q&A' sheet included in the vendor's statement referred to above. In response to the question 'Who insures the dwellings and the Community Centre?', the following response was given:

The Body Corporate includes all of the buildings in the Body Corporate included the Community Centre. The Body Corporate also insures the Common Land including the Community Centre.

- (d) a brochure provided to a resident in 2012 which referred to one of the features of the village as being a 'Community Centre owned and controlled by residents';¹²

- (e) photographs of the residents carrying out landscaping works in the immediate vicinity of the community centre;

- (f) affidavit evidence to the effect that the owners corporation had spent funds to buy and install blinds at the community centre;

- (g) the memorandum in respect of the proposed sale of the super lots by the liquidators in mid 2021, which showed that, among other things, stage 13 of the subdivision of the village had been completed, and the owners corporation certificate in the vendor's statement included, under the heading 'Additional Information', the following statement (in red text):

****Lots currently in liquidation and OC has a claim over S8 -
Community Centre - This is common area but not yet reflected on title
****;

- (h) the Body Corporate Rules included in a vendor's statement from about July 2016, which stated that residents must:

¹¹ This vendor's statement also included what appear to be draft plans of subdivision for the remaining stages of the development of the village, which shows common property (being the internal roadway) being added at each stage of the subdivision.

¹² Such statements were made in many of the brochures and public advertisements in evidence.

observe and perform any regulations the Body Corporate may make from time to time as to the use of any facilities including the Community Centre as the Common Land provided for use in common by the members and occupiers of the lots.

(i) minutes of a meeting of the committee of the owners corporation held on 15 November 2016, which referred to, among other things, the following matters being discussed:

- George obtained prices on the cleaning items for the community centre, however it was decided by the committee members to wait until the title or lease to the community centre has been received.
- Jim has offered to get prices for the flywire screens, this matter also awaits further instruction until the title or lease has been received.
- Kerrie followed up on last meeting's minutes in regards to the fire extinguishers, this matter has also put on hold until the title or lease has been received.
- Origin Energy Bill – Stephen Nippers is getting touch with the ombudsman on our behalf in regards to the outstanding origin energy electricity bill at no charge to the residents.

(j) a 'Q&A sheet' annexed to a vendor's statement prepared on behalf of the developer in about 2010, which stated, among other things:

The members of the Body Corporate being the registered proprietors will decide the level of maintenance and determine how the community centre is to be used and whether any fee will be charged for private use etc;

(k) affidavit evidence from a resident who deposed that prior to purchasing his lot in 2012, Mr Rossi told him that the residents would all have a share in the community centre, and when the construction of the community centre was completed, it would be handed over to the residents;

(l) affidavit evidence from a resident who deposed that the reasons why he and his wife bought their lot was because they had freehold title to their lot, there was a common area to be used for caravan parking, and there was a community centre to be owned and controlled by the residents;

- (m) a vendor's statement prepared on behalf of the developer in 2010, which included a draft plan of subdivision for the village upon its completion, which identified the subject lot as common property;
- (n) affidavit evidence from the former chairperson of the owners corporation, who deposed that at the residents' meeting held on 21 February 2022, the first plaintiff told the assembled residents that he had acquired the community centre and proposed to rent to the owners corporation on a long term lease. She deposed as follows:

We said that why would we rent it when the OC owns it. He told us not to waste our money, that he owned it now and if the OC wanted it back it would have to buy it from him at a price of \$1.5 million. He said that he knew that the Community Centre was supposed to [sic] transferred over to the OC but that he had no intention of doing that.

- (o) a letter from the committee of the owner's corporation to the Victorian Ombudsman dated 27 May 2022 which, among other things, stated as follows:

The builder was required by the council to build the Community Center after he had finished twenty units, but he continued to build further units before the council consequently told him to build the center before they would issue more permits. (This was confirmed by Mr. Rossi). Unfortunately, by that time he was facing some financial strain and had to take a mortgage out over the building. (Again, this was confirmed by Mr. Rossi.)

When the Community Centre was completed, Mr. Rossi could not sign it over since it was mortgaged to the Westpac bank. Although not officially in our name, Mr. Rossi gave the residents exclusive control over the Community Center both financially and in the manner of its use, from April 2016. Since that time the Owners Corporation have paid all costs associated to setting up and running of the Community Center, including furnishing and the upkeep, water, power, gas, insurance, both public liability and building. The Owners Corporation pay everything associated with the center such as checking fire extinguishers, checking of safety lighting etc. The Owners Corporation has for the last six years spent a considerable amount of money on the Community Center as they had the expectation that they were spending money on a facility that was to have been transferred in title to the Owners Corporation PS606836R. Mr. Rossi had no further participation in the Community Centre from April 2016.

32 Ms Garner, in her capacity as the current chairperson of the committee of the owners corporation, also exhibited to her affidavit selected records held by the owners corporation, including minutes of committee meetings held over the course of 2021 and 2022, and a draft lease with respect to the subject lot between the developer and the owners corporation and associated correspondence in November and December 2016.

33 In relation to the proposed lease in 2016, on 3 November 2016 the manager of the owners corporation wrote to Mr Rossi, as follows:

Hi Joe,

Can you please advise when titles for the community centre will be revised to be on common area. If this is still some time off can the owners enter into a lease agreement to ensure governance.

Also can you please advise the timing for the air-conditioning to be installed in the community centre.

34 Mr Rossi agreed, and on 23 November 2016 the manager wrote to Mr Rossi as follows:

Hi Joe,

The committee have authorised the attached lease. This is only a very brief version of the lease, and only required until you are able to transfer Lot S8 to common area.

35 The draft lease provided as follows:

- | | | |
|---------|-------------------------|--|
| Item 1: | Landlord: | Joe Rossi (Rossi Group Pty Ltd: ACN 104 037 498) |
| Item 2 | Tenant: | Owners Corporation PS 606836R |
| Item 3: | Guarantors | N/A |
| Item 4: | Premises: | Community Centre 18 - 53 Rodier Road
Plan of Sub Division PS 606836R (S8) |
| Item 5: | Landlord Installations: | (Fixtures): Nill - all items and fittings installed, including air conditioner
Will remain with the Tenant when the building is transferred to Common Property. |

Item 6:	Rent:	\$1.00 - Unlimited Term until ownership transfers to PS 606836R
Item 7:	Tenant Installations:	All fittings and fixtures
Item 8:	Term of Lease:	Unlimited Term until ownership transfers to PS 606836R
Item 9:	How rent paid:	Held by PS 606836R in trust in their bank account
Item 10:	Building Outgoings:	All services to be connected and paid by tenant.
Item 11:	Building Insurance:	As Covered under Tenant's Strata Insurance
Item 12:	Public Liability:	As Covered under Tenant's Strata Insurance
Item 13:	Period of loss:	N/A
Item 14:	Interest Rate:	N/A
Item 15:	Permitted Use:	As determined by Tenant subject to zoning
Item 16:	Review Date:	N/A

Landlord Obligations:

The landlord agrees for the tenant to use the premises without any interruption by the landlord or anyone connected with the landlord as long as the tenant does what [sic] it must under this lease.

The landlord and tenant must keep the structure of the building in a condition that is consistent with their condition at the start of the lease.

The landlord has agreed to install split systems in the hall area. This is to be installed by consent between the parties

The landlord and tenants will complete the landscaping within S8.

The tenant will continue to use the premises (as determined by the OC committee) until the landlord transfers lot S8 to common area on PS 606836R as the earliest opportunity.

36 Mr Rossi then provided some comments upon the draft lease, which the owners corporation were prepared to accept, but it seems that the entry into the lease was derailed by a dispute between Mr Rossi and some of the residents about residents allegedly harassing tradespeople engaged by the developer to construct the units.

The relevant legal principles

37 The legal principles governing applications of the current kind are well settled, and have been accurately summarised in the following extract of the plaintiffs' written outline of submissions (omitting citations):¹³

- (a) the application is in the nature of a summary procedure analogous to the determination of interlocutory injunctions. The procedure is consequently interlocutory in substance, even though it may give rise to a final order;
- (b) the Court's power under s 90(3) of the TLA is discretionary;
- (c) the caveator bears the onus of establishing a *prima facie* case that it has an estate or interest in land as claimed;
- (d) if the caveator establishes a *prima facie* case to be tried in relation to the estate or interest claimed, the caveator must further establish that the balance of convenience favours the maintenance of the caveat until trial;
- (e) there is a relationship between the strength of the case in establishing a *prima facie* case to be tried and the extent to which the caveator must establish that the balance of convenience favours the caveator. The stronger the *prima facie* case, the more readily the balance of convenience might be satisfied. It is sufficient that the caveator show a sufficient likelihood of success that, in the circumstances, justifies the practical effect which the caveat will have on the ability of the registered proprietor to deal with the land in question in accordance with its normal proprietary rights;
- (f) the *prima facie* case test is to be preferred. That does not mean that the caveator must show that it is more probable than not at trial that the plaintiff will succeed. The caveator must demonstrate a *prima facie* case with sufficient likelihood of success to justify the maintenance of the caveat, and the preservation of the status quo pending trial.

38 The plaintiffs' submissions also observed that when determining whether to remove a caveat:

- (a) first, the caveator must establish that there is a *prima facie* case. That is, it must be demonstrated that there is a probability, on the evidence before the Court, that the caveator will be found to have asserted legal or equitable rights or interests in the land;
- (b) second, having done so, the caveator must establish that the balance of convenience favours the maintenance of the caveat on the title until trial and "that probability is sufficient to justify the practical effect

¹³ In their submissions, the plaintiffs referred to the decisions of this Court in *Goldstraw v Goldstraw* [2002] VSC 491; *Piroshenko v Grojsman* (2010) 27 VR 489; and *Hermiz v Yousif* [2019] VSC 160.

which the caveat has on the ability of the registered proprietor to deal with the property in question in accordance with their normal proprietary rights.”

39 The owners corporation did not dispute the plaintiffs’ summary of the principles applicable to the current application, but observed further that, when determining whether to accede to an application to remove a caveat, s 90(3) of the TLA confers upon the Court a wide discretion, and a broad range of circumstances may be taken into account when determining how to exercise that discretion.¹⁴

40 The owners corporation’s submissions also stated as follows:

The caveator is not required to show that it is more probable than not that at trial it will succeed. Instead, the caveator is only required to show that they have a *prima facie* case with sufficient likelihood of success to justify the maintenance of the caveat, and the preservation of the status quo pending trial.

The parties’ submissions

41 The plaintiffs submitted that the owners corporation cannot establish that it has a *prima facie* case that enjoys a sufficient likelihood of success to justify the maintenance of the caveat, given that:

- (a) an insuperable obstacle to the success of the owners corporation’s proprietary estoppel claim is that the owners corporation will be unable to satisfy the requirements of s 32(b) of the *Subdivision Act 1988* (Vic) (*Subdivision Act*), which provides that an owners corporation may purchase or otherwise obtain land for inclusion in or to become common property, but only if there is a unanimous resolution of the members for it to do so;
- (b) the leave application is a proceeding to ‘otherwise obtain land’ within the meaning of s 32(b) of the *Subdivision Act*;
- (c) as the second plaintiff is a member of the owners corporation as the registered proprietor of the super lots, there is no prospect of there being unanimous

¹⁴ *Piroshenko v Grojsman* (2010) 27 VR 489 [11].

support for the issue of the proposed proceeding in the event the leave application is granted;

- (d) the terms of s 34D of the *Subdivision Act* will not assist the owners corporation as the negotiated proprietor of the super lots, because the owners corporation will be unable to satisfy the requirements in s 34D(3) of the *Subdivision Act*, which would permit VCAT to dispense with the requirement for a unanimous resolution to pursue the leave application;
- (e) the owners corporation will not be able to establish the reliance or detriment necessary to make out its proprietary estoppel claim; and
- (f) the doctrines of *laches* and/or acquiescence will defeat the owners corporation's proprietary estoppel claim, and in any event, the conduct of the owners corporation has been such as to postpone any equitable interest it has in the subject lot to the equitable interest of the first plaintiff as the purchaser of the subject lot under the contract of sale.

42 In relation to the owners corporation's proprietary estoppel claim, the plaintiffs submitted that there are 'real conceptual problems' with the way in which the claim is currently pleaded in the draft statement of claim. Among other things:

- (a) most of the alleged representations were said to have been made to the residents, not the owners corporation, and some were said to have been made prior to the incorporation of the owners corporation;
- (b) similarly, the detriment pleaded in the draft statement of claim was said to have been suffered by the residents, not the owners corporation;
- (c) it appears that the owners corporation is only concerned about the land on which the community centre is sited, not the subject lot as a whole;
- (d) no representation is made in the November 2021 letter that the subject lot would be transferred to the owners corporation. Indeed, in the

November 2021 letter, the liquidators' solicitors informed the owners corporation's solicitors that the subject lot would be sold to another party;

- (e) to the extent that the draft lease agreement circulated in 2016 is relevant to the current application, it confirms that the developer is the owner of the subject lot; and
- (f) there is no direct evidence of payment by the owners corporation of the insurance and other expenses associated with the community centre.

43 As for the delay, acquiescence, and other postponing conduct on the part of the owners corporation, the plaintiffs submitted as follows:

- (a) the representations were said to have been made as long ago as 2006, but the owners corporation did not lodge the caveat until July 2022;
- (b) the vague reference in the owners corporation certificates and annual general meeting notice enclosed in the vendor's statement to a claim with respect to the subject lot does not stand as an express notice of a claim to an interest in land;
- (c) the alleged representations and other matters referred to in the residents' affidavits were not known to the first plaintiff at the time he acquired his equitable interest in the subject lot pursuant to the contract of sale;
- (d) the owners corporation was represented by solicitors at the time it was informed by the November 2021 letter that the liquidators intended to sell the subject lot, but it took no action;
- (e) nothing was raised at the residents' meeting in February 2022 attended by the first plaintiff about a claim by the owners corporation for an interest in the subject lot; and

(f) the assertion by the owners corporation that damages would be an inadequate remedy if the caveat is removed is a reason why the owners corporation should have pressed its proprietary claim long ago.

44 The plaintiffs submitted that even if, contrary to the above, the owners corporation is found to have a good *prima facie* case on the merits, the balance of convenience weighs heavily in favour of the removal of the caveat. The plaintiffs submitted as follows:

First, if the Caveat is removed, this will not prevent the Caveator from pursuing its proprietary estoppel claim and misleading and deceptive conduct claim, as against the Vendor. In this regard, there is no danger, and no suggestion, that the Community Centre will be damaged or disposed of. To the contrary, Mr El-Shahawy's evidence is that he intends to expend significant sums to renovate the Community Centre for the use of the residents, and to commence works to build a car park and BBQ area as required by the Planning Permit.

Secondly, the owners corporation itself does not appear to have the funds that are necessary to build the BBQ area and carpark as required by the Planning Permit. Accordingly, it is doubtful that, even if the Caveator is successful on its substantive claim, it would be able to meet the requirements of the Planning Permit or, for that matter, to maintain the Community Centre.

Thirdly, the Purchaser has already acquired all the other Unit Lots under the Contract of Sale. Mr El-Shahawy has deposed that he would not have purchased those lots if he could not also have acquired the Disputed Land. In circumstances where the Caveator has engaged in postponing conduct in any event, the Purchaser should not be further prejudiced by the maintenance of the Caveat which prevents him from improving the Community Centre.

Fourthly, Mr El-Shahawy, who is an experienced property investor, has deposed that if he is able to develop the Disputed Land and improve the Community Centre, that the value of each residential lot will likely increase by at least \$50,000 in value.

Fifthly, and more broadly, the Plaintiffs have the resources to carry out all necessary works on the Disputed Land and to improve Yarragon Village generally. There is no evidence from the owners corporation, on the other hand, that it has the resources or ability to develop the Disputed Land or to maintain or improve the Community Centre.

Sixthly, and in accordance with the open offer which the Plaintiffs have already put, Yarragon will lease the Community Centre to the residents at a modest rate, for their use and enjoyment.

Seventhly, despite being asked, the Caveator has not provided an undertaking as to damages. In this regard, it is not clear how the owners

corporation could meet a damages claim in the absence of levying the individual lot owners.

For each of these reasons, the balance of convenience favours the removal of the Caveat. In view of the very weak *prima facie* case, the Court should be more ready to determine that the balance of convenience favours the Purchaser.

45 At the hearing of the application, counsel for the plaintiffs observed that the owners corporation had not adduced any evidence to contradict the plaintiffs' contentions regarding where the balance of convenience lies in the current application.

46 The owners corporation submitted that, as for the requirement that a caveator establish a *prima facie* case that it has the claimed interest in the relevant land, the owners corporation's claim against the developer is set out in a detailed draft statement of claim, and the plaintiffs have not adduced any evidence to contest or rebut the voluminous evidence relied upon by the owners corporation to support its claim for an equitable interest in the subject lot.¹⁵

47 Further, to the extent that the draft statement of claim contains some inconsistencies, it should be noted that it was prepared prior to the assembly of the evidence relied upon in the VCAT application, in particular, the affidavits made by the residents. And, while some of the pleaded representations were made to individual residents, others were made to the world at large, and in any event, the owners corporation could be considered to be the alter-ego of its constituent members. Further, the November 2021 letter is relied upon for the purpose of providing support for an inference that someone has previously made representations to the effect that title to the subject lot would be vested in the owners corporation, not necessarily as a representation of itself.

48 The owners corporation also relied upon the various draft plans of subdivision showing the subject lot as common property, along with its minimal lot entitlement of "1" (despite its size), as support for the contention that it was always intended that the subject lot would be transferred to the owners corporation. Counsel for the

¹⁵ Referring to the evidence summarised at paragraphs 31 to 36 of these reasons.

owners corporation rejected the submission to the effect that the terms of s 32(b) of the *Subdivision Act* precluded the owners corporation from bringing the leave application, noting that there was no evidence that the owners corporation was required to pass unanimous resolutions to accept additional common property at each stage of the subdivision.

49 Further, the terms of the draft lease agreement prepared in 2016 and the associated correspondence constitute a representation made directly to the owners corporation: it is clear from these documents that a tenancy arrangement was only ever intended to be an interim arrangement.

50 The owners corporation submitted that there is no evidence or proper legal basis to support the plaintiffs' contention that the owners corporation's claims could be defeated by the doctrines of *laches* and/or acquiescence, or that the owners corporation's interest in the subject lot should be postponed to the plaintiffs' equitable interest in the subject lot pursuant to the contract of sale, given the terms of the correspondence between the owners corporation and the liquidators, and given the reference to the owners corporation's claim in the certificates supplied by the owners corporation and included in the vendor's statement.

51 Counsel for the owners corporation submitted that the alleged delay on the part of the owners corporation in asserting its rights to the subject lot has been overstated by the plaintiffs. While there is evidence of representations having been made as early as 2006, one of the reasons why the owners corporation took no action to assert its claim (apart from referring to the claim in the notices included in the vendor's statement) is that it received assurances that the subject lot would ultimately be transferred to it. Finally, the more recent period of delay can be explained, at least in part, by the fact that the residents of the village are largely elderly pensioners, with limited resources and often no access to electronic communication, which impedes the decision making process of the owners corporation.

52 The owners corporation submitted as follows:

Having regard to the matters set out above, the Court must conclude there to be at least a reasonable probability that the OC will be found to have an interest in Lot S8 pursuant to trust in its favour which arises by reason of proprietary estoppel.

53 As for the balance of convenience, the owners corporation submitted as follows:

The OC has spent considerable resources to already commence two separate legal proceedings (the Leave to Proceed Proceeding and the VCAT Leave Proceeding), and it has committed to commencing a further proceeding in this Court (the Proposed Substantive Proceeding) in order to seek to enforce its rights in relation to Lot S8. The only factors which have precluded it being able to do so is the opposition and delay occasioned by the plaintiffs in the context of the VCAT Leave Proceeding.

If the Court was to grant the plaintiffs' application in this proceeding and order the removal of the Caveat from the title to Lot S8, it would render each of the Leave to Proceed Proceeding, the VCAT Leave Proceeding and the Proposed Substantive Proceeding futile and otiose insofar as it might deny the OC the opportunity to obtain the ultimate relief which is sought (being the transfer or vesting of Lot S8 to the OC). It is clear that a mere award of damages would not be an adequate remedy in the event that the OC is successful in its claims against the Developer.

The plaintiffs have not identified a single element of prejudice that they may suffer by reason of the Caveat remaining on title until such time as the Proposed Substantive Proceeding is finally heard and determined.

This is not a case where the caveator has failed to take any formal legal steps prior to the application under section 90(3) of the TLA to seek to enforce its claimed proprietary rights against the registered proprietor. The OC has actively sought to enforce its legal remedies, notwithstanding the inherent challenges and difficulties it faces by virtue of its elderly constituents and the determined opposition of the Liquidators, Mr El-Shahawy and the Nominee Purchaser.

It would be fundamentally unjust and inappropriate for the Caveat to be removed and thereby deny the opportunity for the OC to obtain final relief which would result in Lot S8 being transferred or vested to it.

In all the circumstances, the balance of convenience significantly favours the maintenance of the status quo until such time as this Court can finally hear and determined the Proposed Substantive Proceeding.

54 Counsel for the owners corporation submitted that the critical question in the current application is whether the *status quo* should be preserved pending the trial of the owners corporation's claim. He submitted that the plaintiffs can point to no prejudice to them by reason of any delay in the transfer of the subject lot caused by the maintenance of the caveat, considering that the development and the subdivision

of the super lots can proceed, and the works required under the planning permit are not required to be completed until mid 2025. On the other hand, if the caveat is removed, and the subject lot is transferred to the second plaintiff, all that the owners corporation will be left with is a damages claim against an insolvent company.

Discussion

55 Turning first to the question of whether the owners corporation has a *prima facie* case that it has an equitable interest in the subject lot on the basis of a proprietary estoppel, I preface my reasons on that issue by observing that it is not necessary for me to determine whether the owners corporation would probably succeed on its claims as articulated in the draft statement of claim. Rather, what I need to determine is whether, on the *evidence* before me, the owners corporation has sufficiently good prospects of establishing that it has the interest claimed in the caveat such as to justify the maintenance of the caveat. In my view, it does, for the reasons which follow.

56 The plaintiffs relied upon the following matters to support their overarching submission that the owners corporation does not have a good case on the merits:

- (a) the inability of the owners corporation to comply with the requirements of s 32(b) of the *Subdivision Act*;
- (b) the inability of the owners corporation to establish the detrimental reliance necessary to establish its proprietary estoppel claim; and
- (c) the plaintiffs' ability to successfully rely upon the defences of delay and acquiescence on the part of the owners corporation, and the likely success of the plaintiffs' contention that the conduct of the owners corporation has been such as to warrant postponing any equitable interest it may have in favour of the plaintiffs' equitable interests as purchasers under the contract of sale.

57 Turning first to the relevant provisions of the *Subdivision Act*, the plaintiffs rely upon s 32(b) of the *Subdivision Act*, which permits the owners corporation to 'purchase or

otherwise obtain land', but only if there is a unanimous resolution of the members of the owners corporation.

58 Further, the plaintiffs contend that the owners corporation will not be able to rely upon the provisions of s 34D of the *Subdivision Act* to authorise it to pursue the leave application in the absence of consent from the second plaintiff.

59 Section 34D of the *Subdivision Act* provides as follows:

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 or authorising 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) an order consenting on behalf of a person whose consent to the registration of a plan is required under section 22; or
 - (d) an order restraining the owners corporation from doing any action under this Act or the regulations.
- (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 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.

...

60 The plaintiffs rely upon the decision of Richards J in *Real Estate Victoria Pty Ltd v Owners Corporation No 1 PS332430W* (*Real Estate Victoria*)¹⁶ in support of their contention that, in order to make an order authorising the owners corporation to commence the leave application (being a necessary step towards the acquisition of the subject lot), VCAT would need to be satisfied that the bringing of such a proceeding would be 'likely to bring economic or social benefits to the subdivision as a whole greater than any economic or social disadvantages to the member... who did not consent to the action'. The plaintiffs submitted that VCAT could not be so satisfied, noting that no application to VCAT under s 34D has even been made or foreshadowed by the owners corporation.

61 In *Real Estate Victoria*,¹⁷ Richards J considered the question of whether an owners corporation could apply to VCAT for an order under s 34D(1)(a) requiring it to alter the members' lot entitlements and lot liability without also applying for an order under s 34D(1)(b) consenting on behalf of members who could not or would not vote in favour of a resolution to do so. Her Honour held that an owners corporation could not evade the strict requirements imposed by s 34D(3) by making an application under s 34D(1)(a) alone.

62 The plaintiffs submitted that the relevant provisions of the *Subdivision Act* erect insuperable obstacles to the owners corporation making good or even bringing its claim for a proprietary interest in the subject lot. However, I am not so confident that this is necessarily the case.

¹⁶ [2021] VSC 373 (*Real Estate Victoria*).

¹⁷ *Ibid.*

63 First, while the reasoning in *Real Estate Victoria*¹⁸ is attractive, it seems to me that the question of whether the requirements of s 34D(1)(b) limit the broad discretion conferred upon VCAT by s 34D(1)(a) (which provides that VCAT may make an order requiring or authorising the owners corporation to do any of the things set out in s 32 of the *Subdivision Act*) remains unsettled. In *Real Estate Victoria*,¹⁹ Richards J disagreed with the conclusion of Garde J (then President of VCAT) in *Conroy v Owners Corporation Strata Plan 30438*²⁰ to the effect that the powers conferred upon VCAT by s 34D(1)(a) and (b) are alternative and cumulative, such that powers conferred upon VCAT by s 34D(1)(a) were not subject to the express limitations imposed upon VCAT by the terms of s 34D(3). While Garde J was sitting at VCAT, he was the President of VCAT and judge of the Trial Division of this Court, such that it is at least arguable that I would be free to follow either decision.

64 It is not necessary for present purposes for me to determine what construction of s 34D I prefer, although I would lean towards the approach taken by Richards J in *Real Estate Victoria*,²¹ despite some reservations as to what work her Honour's preferred construction leaves s 34D(1)(a) to do. However, even if my instincts in that regard are correct, I do not share the plaintiffs' confidence that any application by the owners corporation under s 34D(1)(b) would be bound to fail. It is not immediately apparent to me that VCAT would almost certainly refuse to authorise the owners corporation from bringing any proceeding compelling the developer to vest the subject lot in the owners corporation on the basis that VCAT could not be satisfied that such an action would be likely to confer economic or social benefits to the subdivision as a whole greater than any economic or social disadvantages to the second plaintiff.

65 The evidence filed on behalf of the owners corporation, including the affidavits made by some of the residents, shows that the community centre confers social

18 Ibid.

19 Ibid.

20 [2014] VCAT 1413.

21 [2021] VSC 373.

benefits upon the residents of the subdivision (including future residents who purchase any of the units to be constructed upon the super lots) at minimal cost to the residents. Arguably, given that the second plaintiff is not yet the registered proprietor of the subject lot, the disadvantage to it of not being able to complete the purchase of the subject lot are matters that VCAT is not required and perhaps is not even permitted to take into account. And, even if VCAT did take those matters into account, the restrictions upon the use and development of the subject lot imposed by the planning permit suggests that the disadvantages to the second plaintiff of permitting the owners corporation to pursue its claim to the subject lot might be considered to be relatively modest, particularly given the adjustment to the purchase price for the super lots effected by the supplementary deed, and the renegotiated purchase price of the subject lot under the supplementary deed.

66 Further, in any event, the parties seem to have overlooked a relevant provision of the *Subdivision Act*, being s 37, which provides, relevantly, as follows:

Staged subdivision

- (1) A staged subdivision is a scheme for the subdivision of land in stages.
- (2) If a planning scheme or permit authorises a staged subdivision, that staged subdivision may be done –
 - (a) as a series of separate subdivisions in accordance with the provisions of this Act other than this section; or
 - (b) by using the procedure set out in subsections (3) to (10).
- (3) If a planning scheme or permit authorises a staged subdivision and the procedure in this section is used –
 - (a) a master plan must be submitted for certification and lodged for registration and must specify the lots in the first stage and contain the prescribed information; and
 - (b) a plan for the second or a subsequent stage must contain the prescribed information; and
 - (c) a plan for the second or a subsequent stage may do any one or more of the following –
 - (i) create additional lots on, or alter the lots on, the land in that stage;

- (ii) *in relation to the land in that stage, create an owners corporation, common property, lot entitlement or lot liability;*
 - (iii) create, vary or remove an easement or restriction over land in that stage;
 - (iiia) Set aside additional roads or reserves on the land in that stage;
 - (iv) Amend the master plan or a plan for an earlier stage by –
 - (A) adding to the membership of an existing owners corporation; or
 - (B) adding to existing common property; or
 - (C) Subject to sections 33(2) and (3), changing lot entitlement or liability of existing lots; or
 - (D) showing land on that plan as land benefited by an easement or restriction created over the land in the plan for the second or subsequent stage.
- (4) The amendment of a registered plan under this section does not affect the legal identity or continuity of operation of an owners corporation created on the plan.
- (5) A plan for a second or a subsequent stage may be submitted for certification and lodged for registration by the owner of all the land in that stage or the applicant for the certification and registration of the master plan, and, if an owners corporation is created on the master plan or a plan for an earlier stage, *the unanimous resolution of the owners corporation is not required for any change made to that plan by a plan for a subsequent stage.*

...

[emphasis added].

67 The evidence suggests that the development of the village has proceeded by way of a staged subdivision pursuant to the pathway prescribed by s 37(2)(b), as the evidence shows that a master plan was registered on 8 October 2010.²² It also appears from the documents in evidence that the developer added to the common

²² I could not locate a copy of the master plan in evidence, but it is presumably consistent with the site development plan approved by the planning permit (see Annexure A). The site development plan shows the community centre, a visitors car park and open space labelled as 'communal area'.

property at each stage of the subdivision, as contemplated by the pathway under s 37(3)(c) up until stage 13.

68 Section 37(5) expressly provides that the unanimous resolution of the numbers of the owners corporation is not required to approve any change made to the master plan, or any subsequent plan which created the owners corporation. As I understand it, if any plan registered upon the completion of a stage of subdivision after the registration of the plan creating the owners corporation confers additional common property upon the owners corporation, a unanimous resolution of the owners corporation is not required to, in effect, accept the additional common property created upon the registration of the plan concerned.

69 Of course, the developer no longer intends to register a plan which designates the subject lot as common property, and the owners corporation is proposing to bring a proceeding to, in effect, compel the developer to do so. It is not necessary for me to reach a concluded view upon whether a proceeding which would, in effect, seek a mandatory injunction compelling the developer to register a plan of subdivision creating common property, falls within the meaning of s 32(b) of the *Subdivision Act* because it is an action to 'otherwise obtain land', given the terms of s 37(5) of the *Subdivision Act*. In the absence of any authority which has considered the question of whether an action to compel a developer to register a plan to give effect to a master plan is an action to obtain land, and in the absence of full argument on the issue, I am not prepared to conclude that the relevant provisions of the *Subdivision Act* impose an impassable barrier to the owners corporation's claim with respect to the subject lot.

70 As for the owners corporation's claim for an equitable interest in the subject lot, I agree that there are some difficulties with the manner in which the claim is currently pleaded in the draft statement of claim. In particular, while I accept that it could be said that the contents of the advertisements and the other marketing material must have come to the attention of the owners corporation and its management, the focus of the representations and the detriment pleaded in the draft statement of claim is

the representations made to and the detriment incurred by the residents of the village, who are not named as plaintiffs in the draft statement of claim, and, more importantly for the purposes of the current application, are not caveators.

71 However, I repeat my earlier observation that the evidence is more important than a draft pleading. Importantly, the evidence of the negotiations between the developer and the owners corporation in late 2016 (presumably just after the community centre had been completed), as summarised in paragraph 33 to 36 of these reasons, shows that it was clearly the developer's intention that the subject lot would be transferred to the owners corporation, and that intention was conveyed to the manager of the owners corporation, in the context of the owners corporation arranging for utility connections and the like for the community centre. Given that evidence, it is unlikely to be very difficult for the owners corporation to establish that it relied upon the developer's representation when assuming the costs of running the community centre shortly after the completion of its construction.

72 I accept there is room for some doubt as to precisely what the owners corporation has paid for the operation and maintenance of the community centre, but the available evidence points to the owners corporation being responsible for all of the recurrent costs of the community centre, including insurance. There is a reference in the minutes of the 2020 Annual General Meeting of the owners corporation to the liquidator being aware of the Strata Policy and coverage of the community centre. Further, an insurance report provided to the same annual general meeting referred to coverage of 'Common Area contents' of \$20,000, which must refer to the contents of the community centre, given that the only other common property in the village is the roadway.

73 Finally, as for the question of whether any claim by the owners corporation for an interest in the property will be defeated by delay or acquiescence, or whether any inaction of the owners corporation amounted to postponing conduct, these matters are quintessentially matters which can only properly be decided after a full trial, rather than on an application of the current kind. While I accept that the owners

corporation must establish more than just a real prospect of success in order to be entitled to maintain the caveat, I can readily understand that any delay on the owners corporation's part in asserting its rights might well be attributable to the ongoing assurances of the developer, and subsequently, the liquidators, such that it could not be said that the owners corporation's claim must inevitably be defeated by its conduct.

74 Further, it seems that the developer relied upon the show of hands at the residents' meeting as amounting to acquiescence. But, as an experienced property developer, he would have understood that any decision of the residents' meeting would have no legally binding effect. I agree with the owners corporation's submissions that it is equally arguable that the first plaintiff could be held to have knowingly accepted the risk that the owners corporation would continue to press its claim when he paid the deposit for the land without the agreement of the owners corporation to the terms of the proposal made in his solicitor's letter dated 22 February 2022.

75 Accordingly, the issues of delay, acquiescence and postponing conduct are somewhat more complicated than that contended for by the plaintiffs. I am not convinced that these issues will be fatal impediments to any claim the owners corporation may have to an interest in the subject lot.

76 To conclude on the first limb of the applicable test, while I accept that the bar facing the owners corporation in the current application is higher than it would be on a summary judgment application, I do not accept that the issues raised by the plaintiffs in their submissions prevent the owners corporation from clearing that bar. The starting point is that the evidence shows that fairly unequivocal representations were made that the subject lot would be transferred to the owners corporation, and that the owners corporation has incurred expenses in establishing and maintaining the community centre. That is a well advanced starting point, and the question of whether the owners corporation's claims will be impeded or derailed by other matters are difficult to resolve on a summary basis. Accordingly, I am satisfied that

the owners corporation has established that it has a *prima facie* case that it has the interest in the subject lot claimed by the caveat.

77 Turning now to the balance of convenience, while I accept that the plaintiffs have a legitimate interest in removing the caveat, and there is some doubt as to the ability of the owners corporation to undertake the works required to comply with the planning permit, the fact that the removal of the caveat would render the owners corporation's claim futile means that the balance of convenience overwhelmingly favours the maintenance of the *status quo* pending trial. Further, as noted by counsel for the owners corporation, the plaintiffs have 18 units to develop on the super lots, and there is nothing the plaintiffs can do with the subject lot apart from constructing the car park and the BBQ area. And, while the funds available to the owners corporation seem to fall well short of the estimated costs of completing the works required by the planning permit, it might well be open to the owners corporation to raise the necessary funds by imposing a special levy upon the residents. Further, while there is no evidence as to what funds have been recovered by the liquidators for the benefit of the developer's creditors, the minutes of the owners corporation in evidence show that the owners corporation is a substantial creditor of the developer, being owed approximately \$146,500 as at 24 November 2020.

78 Finally, I do not propose to impose any conditions upon the maintenance of the caveat. Contrary to the plaintiffs' submissions, there is no requirement or even a usual practice that such an undertaking be given, or required.

79 Accordingly, I will dismiss the application to remove the caveat. I will hear further from the parties on the question of costs, and also the question of whether there is merit in referring the parties to a judicial mediation prior to the resumption of the leave application.

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PROPOSED UNIT NO.	PROPOSED UNIT TYPE	PROPOSED UNIT AREA (SQM)	PROPOSED UNIT PRICE (\$)
1	1	100.00	100,000
2	2	120.00	120,000
3	3	140.00	140,000
4	4	160.00	160,000
5	5	180.00	180,000
6	6	200.00	200,000
7	7	220.00	220,000
8	8	240.00	240,000
9	9	260.00	260,000
10	10	280.00	280,000
11	11	300.00	300,000
12	12	320.00	320,000
13	13	340.00	340,000
14	14	360.00	360,000
15	15	380.00	380,000
16	16	400.00	400,000
17	17	420.00	420,000
18	18	440.00	440,000
19	19	460.00	460,000
20	20	480.00	480,000
21	21	500.00	500,000
22	22	520.00	520,000
23	23	540.00	540,000
24	24	560.00	560,000
25	25	580.00	580,000
26	26	600.00	600,000
27	27	620.00	620,000
28	28	640.00	640,000
29	29	660.00	660,000
30	30	680.00	680,000
31	31	700.00	700,000
32	32	720.00	720,000
33	33	740.00	740,000
34	34	760.00	760,000
35	35	780.00	780,000
36	36	800.00	800,000
37	37	820.00	820,000
38	38	840.00	840,000
39	39	860.00	860,000
40	40	880.00	880,000
41	41	900.00	900,000
42	42	920.00	920,000
43	43	940.00	940,000
44	44	960.00	960,000
45	45	980.00	980,000
46	46	1000.00	1,000,000
47	47	1020.00	1,020,000
48	48	1040.00	1,040,000
49	49	1060.00	1,060,000
50	50	1080.00	1,080,000
51	51	1100.00	1,100,000
52	52	1120.00	1,120,000
53	53	1140.00	1,140,000
54	54	1160.00	1,160,000
55	55	1180.00	1,180,000
56	56	1200.00	1,200,000
57	57	1220.00	1,220,000
58	58	1240.00	1,240,000
59	59	1260.00	1,260,000
60	60	1280.00	1,280,000
61	61	1300.00	1,300,000
62	62	1320.00	1,320,000
63	63	1340.00	1,340,000
64	64	1360.00	1,360,000
65	65	1380.00	1,380,000
66	66	1400.00	1,400,000
67	67	1420.00	1,420,000
68	68	1440.00	1,440,000
69	69	1460.00	1,460,000
70	70	1480.00	1,480,000
71	71	1500.00	1,500,000
72	72	1520.00	1,520,000
73	73	1540.00	1,540,000
74	74	1560.00	1,560,000
75	75	1580.00	1,580,000
76	76	1600.00	1,600,000
77	77	1620.00	1,620,000
78	78	1640.00	1,640,000
79	79	1660.00	1,660,000
80	80	1680.00	1,680,000
81	81	1700.00	1,700,000
82	82	1720.00	1,720,000
83	83	1740.00	1,740,000
84	84	1760.00	1,760,000
85	85	1780.00	1,780,000
86	86	1800.00	1,800,000
87	87	1820.00	1,820,000
88	88	1840.00	1,840,000
89	89	1860.00	1,860,000
90	90	1880.00	1,880,000
91	91	1900.00	1,900,000
92	92	1920.00	1,920,000
93	93	1940.00	1,940,000
94	94	1960.00	1,960,000
95	95	1980.00	1,980,000
96	96	2000.00	2,000,000
97	97	2020.00	2,020,000
98	98	2040.00	2,040,000
99	99	2060.00	2,060,000
100	100	2080.00	2,080,000
101	101	2100.00	2,100,000
102	102	2120.00	2,120,000
103	103	2140.00	2,140,000
104	104	2160.00	2,160,000
105	105	2180.00	2,180,000
106	106	2200.00	2,200,000
107	107	2220.00	2,220,000
108	108	2240.00	2,240,000
109	109	2260.00	2,260,000
110	110	2280.00	2,280,000
111	111	2300.00	2,300,000
112	112	2320.00	2,320,000
113	113	2340.00	2,340,000
114	114	2360.00	2,360,000
115	115	2380.00	2,380,000
116	116	2400.00	2,400,000
117	117	2420.00	2,420,000
118	118	2440.00	2,440,000
119	119	2460.00	2,460,000
120	120	2480.00	2,480,000
121	121	2500.00	2,500,000
122	122	2520.00	2,520,000
123	123	2540.00	2,540,000
124	124	2560.00	2,560,000
125	125	2580.00	2,580,000
126	126	2600.00	2,600,000
127	127	2620.00	2,620,000
128	128	2640.00	2,640,000
129	129	2660.00	2,660,000
130	130	2680.00	2,680,000
131	131	2700.00	2,700,000
132	132	2720.00	2,720,000
133	133	2740.00	2,740,000
134	134	2760.00	2,760,000
135	135	2780.00	2,780,000
136	136	2800.00	2,800,000
137	137	2820.00	2,820,000
138	138	2840.00	2,840,000
139	139	2860.00	2,860,000
140	140	2880.00	2,880,000
141	141	2900.00	2,900,000
142	142	2920.00	2,920,000
143	143	2940.00	2,940,000
144	144	2960.00	2,960,000
145	145	2980.00	2,980,000
146	146	3000.00	3,000,000
147	147	3020.00	3,020,000
148	148	3040.00	3,040,000
149	149	3060.00	3,060,000
150	150	3080.00	3,080,000
151	151	3100.00	3,100,000
152	152	3120.00	3,120,000
153	153	3140.00	3,140,000
154	154	3160.00	3,160,000
155	155	3180.00	3,180,000
156	156	3200.00	3,200,000
157	157	3220.00	3,220,000
158	158	3240.00	3,240,000
159	159	3260.00	3,260,000
160	160	3280.00	3,280,000
161	161	3300.00	3,300,000
162	162	3320.00	3,320,000
163	163	3340.00	3,340,000
164	164	3360.00	3,360,000
165	165	3380.00	3,380,000
166	166	3400.00	3,400,000
167	167	3420.00	3,420,000
168	168	3440.00	3,440,000
169	169	3460.00	3,460,000
170	170	3480.00	3,480,000
171	171	3500.00	3,500,000
172	172	3520.00	3,520,000
173	173	3540.00	3,540,000
174	174	3560.00	3,560,000
175	175	3580.00	3,580,000
176	176	3600.00	3,600,000
177	177	3620.00	3,620,000
178	178	3640.00	3,640,000
179	179	3660.00	3,660,000
180	180	3680.00	3,680,000
181	181	3700.00	3,700,000
182	182	3720.00	3,720,000
183	183	3740.00	3,740,000
184	184	3760.00	3,760,000
185	185	3780.00	3,780,000
186	186	3800.00	3,800,000
187	187	3820.00	3,820,000
188	188	3840.00	3,840,000
189	189	3860.00	3,860,000
190	190	3880.00	3,880,000
191	191	3900.00	3,900,000
192	192	3920.00	3,920,000
193	193	3940.00	3,940,000
194	194	3960.00	3,960,000
195	195	3980.00	3,980,000
196	196	4000.00	4,000,000
197	197	4020.00	4,020,000
198	198	4040.00	4,040,000
199	199	4060.00	4,060,000
200	200	4080.00	4,080,000
201	201	4100.00	4,100,000
202	202	4120.00	4,120,000
203	203	4140.00	4,140,000
204	204	4160.00	4,160,000
205	205	4180.00	4,180,000
206	206	4200.00	4,200,000
207	207	4220.00	4,220,000
208	208	4240.00	4,240,000
209	209	4260.00	4,260,000
210	210	4280.00	4,280,000
211	211	4300.00	4,300,000
212	212	4320.00	4,320,000
213	213	4340.00	4,340,000
214	214	4360.00	4,360,000
215	215	4380.00	4,380,000
216	216	4400.00	4,400,000
217	217	4420.00	4,420,000
218	218	4440.00	4,440,000
219	219	4460.00	4,460,000
220	220	4480.00	4,480,000
221	221	4500.00	4,500,000
222	222	4520.00	4,520,000
223	223	4540.00	4,540,000
224	224	4560.00	4,560,000
225	225	4580.00	4,580,000
226	226	4600.00	4,600,000
227	227	4620.00	4,620,000
228	228	4640.00	4,640,000
229	229	4660.00	4,660,000
230	230	4680.00	4,680,000
231	231	4700.00	4,700,000
232	232	4720.00	4,720,000
233	233	4740.00	4,740,000
234	234	4760.00	4,760,000
235	235	4780.00	4,780,000
236	236	4800.00	4,800,000
237	237	4820.00	4,820,000
238	238	4840.00	4,840,000
239	239	4860.00	4,860,000
240	240	4880.00	4,880,000
241	241	4900.00	4,900,000
242	242	4920.00	4,920,000
243	243	4940.00	4,940,000
244	244	4960.00	4,960,000
245	245	4980.00	4,980,000
246	246	5000.00	5,000,000
247	247	5020.00	5,020,000
248	248	5040.00	5,040,000
249	249	5060.00	5,060,000
250	250	5080.00	5,080,000
251	251	5100.00	5,100,000
252	252	5120.00	5,120,000
253	253	5140.00	5,140,000
254	254	5160.00	5,160,000
255	255	5180.00	5,180,000
256	256	5200.00	5,200,000
257	257	5220.00	5,220,000
258	258	5240.00	5,240,000
259	259	5260.00	5,260,000
260	260	5280.00	5,280,000
261	261	5300.00	5,300,000
262	262	5320.00	5,320,000
263	263	5340.00	5,340,000
264	264	536	

SCHEDULE OF PARTIES

S ECI 2023 02303

BETWEEN:

OSAMA EL-SHAHAWY

First Plaintiff

YARRAGON VILLAGE PTY LTD (ACN 658 165 756)

Second Plaintiff

- v -

OWNERS CORPORATION 1 PLAN NO. PS606836R

First Defendant

THE REGISTRAR OF TITLES

Second Defendant