VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

OWNERS CORPORATIONS LIST VCAT REFERENCE NO. OC2481/2021

CATCHWORDS

Claim that owners corporation has unreasonably withheld consent to a proposed development of a lot, contrary to Model Rule 5.2 of the Owners Corporations Rules in Schedule 2 of the *Owners Corporations Regulations 2018*; application for appointment of an administrator pursuant to s 173 of the *Owners Corporations Act 2006* (Vic) on the grounds that the failure to give such consent, and other matters has rendered the owners corporation unable to carry out its functions, including the function of giving consent in accordance with Model Rule 5.2 to the proposed works; application for orders of the Tribunal requiring the owners corporation to give consent to the proposed works.

APPLICANT	Stine Neerup
FIRST RESPONDENT	Owners Corporation Plan No. RP009465
SECOND RESPONDENT	Naum Fleishman
THIRD RESPONDENT	Lidya Fleishman
WHERE HELD	Melbourne
BEFORE	Acting Senior Member L. Johnson
HEARING TYPE	Hearing
DATE OF HEARING	19 August 2022
DATE OF ORDER	12 May 2023
CITATION	Neerup v Owners Corporation Plan No. RP009465 (Owners Corporations) [2023] VCAT 537

ORDER

1. The application is dismissed.

Acting Senior Member
L. Johnson

APPEARANCES:

For Applicant	Mr L Stanistreet of Counsel
For Respondents	Mr T Pikusa of Counsel

REASONS

1 This proceeding concerns a two-lot subdivision on a main road in Caulfield North. The applicant, Stine Neerup, owns lot 1, and the second and third respondents, Naum and Lidya Fleishman, (**the Fleishmans**) own lot 2. Lot liability and lot entitlement are shared equally between the two lots, each having 50%.

2 Ms Neerup wishes to re-develop her lot by demolishing the buildings on the lot, and constructing a new 2 storey building with a basement and an in-ground pool (**the proposed works**).

3 Although the height of the proposed new dwelling, and the front fence do not comply with regulations 75, 79, and 80 of the Building Regulations 2018 (**Building Regulations**), Ms Neerup has obtained the report and consent of the Building Appeals Board to the proposed works.[1]

4 Shortly after the Building Appeals Board gave its report and consent, a general meeting of the Owners Corporation was convened, on 16 November 2021, on the instructions of Ms Neerup, for the purpose of voting on a resolution proposed by Ms Neerup that the Owners Corporation consent to the proposed works. The resolution proposed that the Owners Corporation give its consent to the proposed works.[2] The Fleishmans agree that at that meeting, they voted against the proposed resolution. They say that, in voting against the proposed resolution, they were acting reasonably.

5 Ms Neerup commenced this proceeding on 22 November 2021, seeking appointment of an administrator on the grounds that the Owners Corporation is dysfunctional. Ms Neerup says that "by voting against the resolution the Fleishmans have caused the Owners Corporation to unreasonably withhold its consent" to the proposed works.[3]

6 Ms Neerup asserts further, that "the refusal to consent by the Fleishmans [means that] the Owners Corporation cannot resolve to approve straight forward requests for building works in circumstances where the works would be allowed under the planning scheme." She alleges that the Owners Corporation has failed to comply with the requirements of Owners Corporation Model Rule 5.2(2).

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[1] On 30 July 2021, the Building Appeals Board set aside a decision of Glen Eira Council refusing consent for the proposed siting of a two storey dwelling not in compliance with regulations 75, 79, and 80 of the Building Regulations 2018 and substituted its consent to the proposed dwelling and front fence. The findings supporting that decision were: findings that: the proposed development complied with the objective and decision guidelines of MG-12 for "building height", for "side and rear setbacks" and for "walls on boundaries", and that the proposed front fence with a height of 1800 mm in lieu of 1500 mm complied with the objective and decision guidelines of MG-12 for "front fence height. See Building Appeals Board of Victoria Determination dated 30 July 2021 Tribunal Book pages 41-61. Tribunal Book page 200-220.

[2] I set out the text of the resolution later in these reasons.

[3] Applicant's Points of Claim dated 22 November 2021, paragraph 7, Joint Tribunal Book page 11.

7 Ms Neerup seeks orders pursuant to s 174 of the *Owners Corporations Act 2006* (**OC Act**) appointing an administrator to the Owners Corporation "to protect the interests of the members and to facilitate the proper conduct of the Owners Corporation.[4]

8 In Amended Points of Claim filed on 28 January 2022, Ms Neerup sought an alternative order: that the Owners Corporation provide its consent to the applicant undertaking the proposed works.[5] I set out the precise terms of the orders sought, later in these reasons.

9 The Tribunal has jurisdiction under s 173 of the OC Act to hear and determine an application for appointment of an administrator to an owners corporation. The claim for alternative orders, on the grounds that the owners corporation has failed to provide its consent to the proposed works, is an "owners corporation dispute relating to the operation of the owners corporation". The Tribunal has jurisdiction to hear and determine owners corporation disputes by virtue of s 163 of the OC Act.

10 I conducted a hearing on 19 August 2022. As the subdivision is a two-lot subdivision, the Owners Corporation was not separately represented. I heard evidence from the applicant, Ms Neerup, from Marsha Karlick, the daughter of the respondents, from Raymond Dinh, the architect who prepared the plans for the works proposed by the applicant, and from Peter Ferrier, a valuer called by the respondents. Following the hearing, I made orders for the parties to file and serve written submissions, and reserved my decision.

11 The parties filed written submissions on 28 October 2022 and 1 December 2022 in accordance with those orders, and the applicant filed further written submission in reply on 31 January 2023.

12 Having considered the evidence given by the parties in the hearing, and the written submissions, I now give my decision and reasons.

13 The issues to be determined are

a. Has the Owners Corporation unreasonably withheld its consent to the proposed works, contrary to Model Rule 5.2(2)?

b. Should an administrator be appointed to the Owners Corporation, for the purpose of the administrator giving the consent of the Owners Corporation to the proposed works?

c. Should the Tribunal make an order directing the Owners Corporation to give its consent to the proposed works?

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[4] Ibid, [8].
[5] Applicant's Amended Points of Claim dated 28 January 2022; Applicant's Outline of Submissions, dated 5 August 2022, paragraph 2, Joint Tribunal Book page 134.

14 I turn first to the evidence given about the subdivision, the proposed works, and the meeting held on 16 November 2021.

The existing subdivision

15 The documents before the Tribunal include a copy of the plan of subdivision for the land.[6] I set out the following summary of the features of that plan, from my examination of that document.

16 As in many subdivisions, the common property comprises "all of the land in the plan except the lots". Lot one faces the street, which is to the west of the land. Along the southern edge of the land there is a common property driveway, providing street access to lot two, which is located to the rear of the land. There is also an irregular shaped area of common property at the end of the driveway, which provides clear access to the garage and front door of lot two. There are no adjoining walls between lots one and two.

17 The upper boundary of each lot is ten metres above the lot, and the lower boundary is two metres below the lot. Boundaries on the plan of subdivision defined by a structure or a building are shown as thick continuous lines, and all other boundaries are shown as a thick broken line. As is common in subdivisions of this kind, the location of all boundaries defined by structure or building is the median.

18 The building on lot one is set back a little way from the street, and, on its southern side, the building abuts the common property driveway.[7] The southern and eastern boundaries of lot one are shown on the plan of subdivision as a solid line, indicating that the boundary is defined by the building and by a structure, the fence.

19 Accordingly, I find that, as the southern boundary of lot 1 is defined by the wall that is constructed there, the boundary is located in the median of that wall, and the external face of the southern boundary wall is common property.

The proposed development

20 In giving his opening at the start of the hearing, counsel for Ms Neerup stated that the wall adjacent to the common property driveway was to be rebuilt in exactly the same location as the existing wall. Counsel agreed that this would mean that the new wall, just like the existing wall, would be common property to the median.

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[6] Plan of Subdivision RP00009464, Joint Tribunal Book page 16 ff.

[7] The building on Lot one does not occupy the entire Lot and the location of external walls not on the boundary with common property or Lot two are shown by fine black lines, hatched to the internal face. The location of those walls is not relevant to this proceeding.

Evidence of Mr Ray Dinh, architect

21 Mr Raymond Dinh was called to give evidence about the proposed works. He adopted his Witness Statement dated 31 May 2022.[8]

22 Mr Dinh is an architect and a member of the design team at Austin Maynard Architects, the firm engaged by Neerup to prepare plans for the proposed works. Mr Dinh gave evidence that he prepared "a contemporary design … which focused on the building footprint being located towards the southern end of Lot 1 to ensure, amongst other things, that any perceptions of visual bulk from the adjoining property at Lot 2 were minimised when comparing the footprint of the existing built form on the Lot 1". Mr Dinh confirmed that the plans he prepared were relied upon by Ms Neerup in her application to the Building Appeals Board.

23 Mr Dinh described the works as "a proposed new two storey dwelling, garage, swimming pool, side gate and alterations to the front fence at Lot 1." Mr Dinh referred to draft construction drawings having been prepared in early 2020 and the preparation, on 30 June 2020, of further architectural drawings regarding elevation, proposed demolition, sewerage, hot water services and air conditioning at Lot 1.[9]

24 It was Mr Dinh's evidence that "neither the garage nor the pool will exceed the lower boundary of Lot 1 which is two metres below that part of the site and the upper boundary of Lot 1 will not exceed10 metres above the part of the site in accordance with the [plan of subdivision]".[10]

25 I note here that the existing buildings on the lots are both single storey dwellings, with garages.

26 In his Witness Statement Mr Dinh gave evidence that

> the building does not impinge on common property only within the Applicant's private lot property
>
> and
>
> the existing southern wall of the building, which is considered partially common property, will be replaced in approximately the same location but within the legal boundaries of Lot 1, with the new wall slightly shorter in length than the existing wall.[11]

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[8] Tribunal Book pages 275 ff.
[9] Ibid page 276-277.
[10] Witness Statement of Ray Dinh dated 31 May 2022; Tribunal Book pages 275-279 and exhibits. Mr Dinh was quoting from the relevant text on the Plan of Subdivision, which reads "The upper boundary of Lots 1 and 2 is ten metres above that part of the site of the relevant lot. The lower boundary of Lots 1 and 2 is two metres below that part of the site."
[11] Transcript page 48 ll 22-30.

27 It was Mr Dinh's evidence that he had informed Ms Neerup, on 11 April 2022, that "a building permit for construction cannot be finalised until the Owners Corporation had approved the Resolution"[12]

28 Of course, on 11 April 2022, the proposed general meeting had not been called, and the "Resolution" had not yet been put to the Owners Corporation. In fact, the copy letter exhibited to Mr Dinh's Witness Statement does not refer to any "Resolution". It simply states, 'we cannot progress to finalise the building permit "For Construction" documentation and ABIC Contract until there is clarity on the timeline for construction.'

29 Forming exhibits to Mr Dinh's Witness Statement there were copies of correspondence he sent to Ms Neerup dated 5 May 2022 in which he advised "the building surveyor cannot issue a building permit without receipt of the builder's warranty insurance" and informed Ms Neerup that the proposed builder had declined to enter into a building contract and obtain insurance while there was an uncertain timeline for the works.

30 Mr Dinh confirmed, in cross examination, that the plans prepared by him were not drawings for construction, and that foundation levels shown on the plans were indicative only, and were not indicating dimension.[13] He conceded that it would not be possible to determine, from his plans alone, whether the proposed works exceeded the 2 metre depth limitation. Mr Dinh observed that one would need an engineering report.[14]

31 After the lunch break, Mr Dinh was recalled to give further evidence about the title boundary. Mr Dinh confirmed that the present boundary of Lot 1 where there is a building on the boundary, is the median of the existing brick wall. He confirmed that the plans he had prepared showed that

> the new wall that is being constructed is not in the exact same location [as the existing wall]. It is approximately in the same location. And the outer face of the new brick wall is on that median line or the title boundary line. So, in effect, we are not constructing a new wall in the same location, that is, half common property, half Lot 1 property. We are constructing a new wall on the title boundary that is wholly within the Lot 1 boundary. [15]

32 It can be seen from this explanation, that an apparently intended consequence of the proposed works is that the boundary of Lot 1 would no longer be the median of the southern wall of the building on Lot 1. In response to my query, Counsel for Ms Neerup confirmed that it is intended that all of the southern wall on Lot 1 will be within Lot 1. Of course, that is different from the understanding Counsel conveyed in his opening.

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[12] Ibid paragraph 20.
[13] Transcript page 40 ll 15-31.
[14] Transcript page 42 ll 2-3.
[15] Transcript page 48 ll 22-30.

33 In her Closing Submissions, Ms Neerup concedes that

> if the wall is reconstructed in a slightly more northerly location to ensure that it rests entirely within the private property of the applicant (Lot 1) as is indicated on the plans, this may have a consequence on the interpretation of the current plan of subdivision and the net effect of the "relocation" of the wall may result in the Owners Corporation gaining additional land and acquiring part of a different wall. Our client understands this and acknowledges that if the plan is to be amended a separate application will be required to do so at the Applicants' cost in order to register at Land Victoria such amendment. However, from an Owners Corporation's perspective, given the benefit principle, the costs of repair and maintenance of that wall (whether private lot property wholly or part common property) will still wholly rest on the Applicant. The Applicant agrees to any reasonable condition imposed by the Tribunal on behalf of the Owners Corporation that the Applicant's lot be wholly responsible for the costs of repair and maintenance of that wall moving forward.[16]

34 I will return to this issue later. I note here that, although the evidence before me is that what is apparently proposed is to build the new wall in a slightly different location from the existing wall, it is nevertheless the case that, in order to arrive at that outcome, the proposed works will require demolition of a wall that is, by the definition on the plan of subdivision, partly common property.

The general meeting held on 16 November 2021

35 The parties agree that the question of whether the Fleishmans unreasonably withheld their consent to Neerup's proposed resolution at the general meeting on 16 November 2021 is a threshold issue to both the application for appointment of an administrator and the application for Orders directing the Owners Corporation to consent.[17]

36 Neerup says that, on 28 October 2021, she instructed her solicitors to prepare and issue a Notice of Owners Corporation General Meeting to all lot owners, to be held on 16 November 2021.[18]

37 The notice was dated 28 October 2021, addressed "to the lot owner" for a meeting, by zoom at 2.30 pm. The agenda for the meeting was described as

> To review the enclosed proposed plans designed by Lot 1 on the Plan of Subdivision No RP9465 and pass a resolution that the registered owner of Lot 1 can undertake renovations by way of resolution in the form set out in page 2.[19]

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[16] Applicant's Closing Submissions dated 28 October 2022, paragraph 38.
[17] Applicant's Closing Submissions dated 28 October 2022, paragraph 3. Respondent's Amended Closing Submissions dated 2 December 2021 paragraph 3.
[18] Witness Statement of Stine Neerup dated 31 May 2021 paragraph 28.
[19] Exhibit to the Witness Statement of Stine Neerup dated 31 May 2021 SN-1 page 70; TB 87.

38 The text of the proposed resolution was

> Owners Corporation Plan No RP9456 unanimously resolves to consent to the proposed renovations to be conducted by the owners of Lot 1 on Plan of Subdivision No RP9456 generally in accordance with the plans prepared by the registered owner of Lot 1 and referred to in the Building Appeals Board matter 453100 (including any structures, walls or fences on the boundary of Lot 1) as varied and approved by the responsible authority and the owner of Lot 1.[20]

39 Attached to the Notice of General Meeting were a further 17 pages of plans which are copies of the plans prepared by Mr Dinh and which were submitted to the Building Appeals Board.[21]

40 A transcript of the general meeting was included in the Tribunal Book.[22] Although Ms Neerup did not attend the meeting, the transcript is attached to her Witness Statement dated 17 June 2022 and described as "a true copy of the transcript of the special general meeting held on 16 November 2021".[23]

41 The parties proceeded on the basis that the transcript is an accurate record of the meeting. No submissions were made to the contrary. I note that the Fleishmans' Amended Closing Submissions quote extensively from the Transcript, and I take that reliance to indicate that the Fleishmans do not dispute the accuracy of the Transcript.[24]

42 The Transcript of the meeting records that Mr Leaman attended as proxy for Neerup, and Mr R McKay attended as proxy for the Fleishmans. Mr A Vicendese is recorded in the Transcript of the meeting as having attended with Mr McKay "as an associate of Best Hooper Lawyers".

43 At the start of the meeting there was discussion between Mr Leaman, Mr McKay and Mr Vicendese about proxies. Mr McKay stated that the Fleishmans had authorised him as their proxy for the meeting. Mr Leaman confirmed that this was so, and confirmed that he held a proxy for Neerup. There was no challenge to either proxy.

44 Mr Leaman then "opened" the meeting. He conducted himself as chair of the meeting, although there was no formal motion to that effect. Mr Leaman recited the purpose of the meeting from the Notice of Meeting, and that the relevant documents were attached to the Notice. He then asked, "Anyone want to discuss anything in respect to the proposed plans for resolution that is set out on page 27 [sic]".

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[20] Exhibit to the Witness Statement of Stine Neerup dated 31 May 2021 SN-1 page 71; TB 89.
[21] Tribunal Book pages 89-103.
[22] Tribunal Book pages 380-383. There is no record on the transcript of who prepared the transcript or from what source.
[23] Tribunal Book pages 379ff.
[24] See Respondents' Amended Closing Submissions paragraphs 12 and 13.

45 Mr McKay asked whether the proposed works, including the pool and garage, are "entirely within the lot or do they exceed below the depth that brings them into common property". Mr Leaman replied, "They are entirely within the lot".

46 Mr McKay asked for the depth of the pool and garage. Mr Leaman replied, "Okay, well, I've got the plans, that's the best I can do in relation to that. It's what is disclosed in the plans, but also, note that you have had, your client has had copies of the full materials that has been provided to the Building Appeals Board in relation to the proposed [sic] and may provide further detail for you."

47 Mr McKay sought further clarification: "So it is the position though that it doesn't exceed, the works are entirely within the private lot?" Mr Leaman responded "Yeah, I mean the lower boundary is two (2) metres below the part of the site, so there is an impact on the side wall on the common property but other than that I believe it is within the lot".

48 There was a short exchange while Mr McKay then indicated that he was searching for the original meeting notice.

49 Mr Leaman then put the resolution to a vote, with Mr McKay's agreement. Mr Leaman voted in favour. Mr McKay voted against the resolution. Mr Leaman pronounced that the resolution had not passed and closed the meeting.

50 I note here, that Mr Leaman's statement "there is an impact on the side wall on the common property" is imprecise. He did not describe the impact on the side wall common property. In the context of Mr McKay's query, which was whether the works would extend into common property, Mr Leaman's response seems to convey that the wall on the southern boundary would extend into common property. Viewed in light of the opening statements of Mr Stanistreet, I am inclined to the view that this was Mr Leaman's intended meaning at the time.

The orders sought

51 Ms Neerup seeks that the Tribunal make the following orders:

1. A declaration that Owners Corporation Plan No. RP009465 is considered dysfunctional.
2. An order under section 174 of the *Owners Corporations Act 2006* that Owners Corporation Plan No. RP009465 is placed under administration and Matthew Elmer of Victoria Body Corporate Services Pty Ltd is appointed as its administrator.

3. An order under section 176(c) of the *Owners Corporations Act 2006* that during his term the administrator may do anything that Owners Corporation Plan No. RP009465 can do.
4. The appointment of an administrator is subject to the following further conditions:
   a. The administrator is appointed for 12 months from the date of this order;
   b. The administrator is required to keep a written record of decisions made.
5. An order that all proper costs and charges incurred by the administrator, including the administrator's fees, be costs in the administration and payable by all lot owners in proportion to their lot liability.
6. An order that the remuneration and expenses of the administrator be payable by all lot owners in proportion to their lot liability.
7. An order that the Respondent reimburse the Applicant's filing fee of this proceeding pursuant to section 115B of the *Victorian Civil and Administrative Tribunal Act 1998*;
8. An order under section 109 of the *Victorian Civil and Administrative Tribunal Act 1998* that the Respondent pay the Applicant's costs of this proceeding on a County Court scale basis;
9. An order under section 115B of the *Victorian Civil and Administrative Tribunal Act 1998* that the Respondent reimburse the Applicant's legal fees on a County Court scale basis; and
10. Any other order that the Tribunal deems fit.

52 The Fleishmans submit that

(a) [they] do not seek to unreasonably interfere with the Applicant's redevelopment, and they note that they had made 'an open offer to approve it on lawful terms';[25]

(b) [Ms Neerup]'s application was premature and misconceived;

(c) the conduct of the parties does not justify the appointment of an administrator;

(d) the Tribunal must be cautious to ensure that the redevelopment does not impinge on common property, as this would be unlawful. In the absence of proper information at the time of the SGM, it was reasonable for them to object;

[25] Respondents' letter of offer Tribunal Book 583 at [5].

(e) there is uncontested evidence that the redevelopment is going to diminish their land value (and an open offer for payment of this diminution by the Applicant has been made) which is a statutory basis to oppose the proposal under model rule 5.2(2);

(f) [Ms Neerup], despite being given opportunity to amend, has not pressed alternative relief that enables the Resolution to be amended by the Tribunal to account for valid objections raised against it. The appropriate course is therefore that the application, as it is presently framed, must fail; and

(g) they seek to be heard on the question of costs. Did the owners corporation unreasonably withhold approval for the proposed works

Parties' submissions

53 Ms Neerup says that the Fleishmans have unreasonably withheld their consent for her to carry out renovation works to Lot 1.[26] She submits that "the plain and ordinary words of Model Rule 5.2(2) provide that an owners corporation cannot unreasonably withhold approval to an owner making changes to the external appearance of a lot".[27] I set out the text of Model Rule 5.2 later in these reasons.

54 Ms Neerup asserts that an owners corporation has an *obligation* not to unreasonably withhold consent, and refers to the decision of the Tribunal of *Lai v Beilin*[28], in support of that submission.

55 The Fleishmans make no submission about the application of Model Rule 5.2, but simply say that they were acting reasonably.

56 The Fleishmans submit that the General Meeting was conducted in a manner which "offends" the Owners Corporation's obligations under section 5 of the OC Act.[29] They say that Mr Leaman pushed on the vote at an early juncture without there being proper engagement or discussion about genuine questions and concerns that the Fleishmans had about the proposed works. They note the meeting was concluded within 3 to 4 minutes of having been opened.

57 They say that the obligation referred to in *Lai v Beilin*, is an obligation to act in good faith and exercise due care and skill in dealing with the resolution. They say Mr McKay acted appropriately as the Fleishmans' proxy raising the questions and concerns at the meeting and in the letter dated 22 April 2021[30]. They say rather than "no reasons" being given by the Owners Corporation,

[26] Witness Statement Neerup page 147
[27] Applicant's Closing Submissions dated 28 October 2022, paragraph 4.
[28] [2020] VCAT 771, at [70]. See Applicant's Outline of Submissions dated 5 August 2022 paragraph 25 and 26.
[29] Respondents' Amended Closing Submissions, [19].
[30] Tribunal Book 197.

the legitimate concerns of the Fleishmans were ignored or rebuffed by Neerup[31]

58 In particular, the Fleishmans say they raised their objection to the proposed works in a letter dated 22 April 2022, several months prior to the General Meeting. They say that Ms Neerup did not engage with or substantively respond to the issues raised in the Fleishmans' letter dated 22 April 2022.

59 The Fleishmans say the relevant paragraphs of that letter are as follows:

> We are writing to you about owners corporation issues that arise the from the proposed development … at Unit 1, 18 Bambra Road, Caulfield North VIC 3161… Our clients' position is as follows:
>
> (1) Our respective clients' properties are affected by owners corporation RP009465 (the OC), which is subject to the model rules set out in Schedule 2 of the Owners Corporations Regulations 2018 (Vic).
>
> (2) Your client's proposed development breaches (or will breach) various model rules, including model rule 5.2, which states:
>
> 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 enjoyment of other lot owners, structural integrity or the value of other lots and/or common property.
>
> (3) Your client's proposed development will substantially and fundamentally change the external appearance of her lot, so she needs to obtain the written approval of the OC before she carries it out, pursuant to model rule 5.2(1).
>
> (4) A unanimous resolution of the OC is required to grant that approval. Our clients are not prepared to vote in favour of any resolution to that effect so, given the OC is a two-lot subdivision, the unanimous resolution will not pass and your client will be unable to proceed with her proposed development.
>
> (5) The OC's foreshadowed withholding of approval is not unreasonable, because your client's proposed development will detrimentally affect the value of our clients' property: our clients' property will be significantly overshadowed by a tall structure that prevents natural light and visual relief to our clients' property, and will cause our clients' property to feel 'boxed in', among other things, all of which will cause a diminution of value to our clients' property.
>
> (6) Your client's proposed development may also be irreconcilable with model rules 1.1 and 4.1(1) because it may affect our clients' health and

[31] Respondents' Amended Closing Submissions [59].

> ability to enjoy the common property, noting that they are elderly Holocaust survivors.[32]

60 Ms Neerup says that there were additional paragraphs in that letter, and she submits that the respondents' omission of the concluding paragraph, paragraph 9, is "telling":

> In the circumstances, we demand that your client undertake or otherwise
>
> confirm in writing:
>
> (a) *not* to carry out her proposed development; and
>
> (b) *not* to engage with our clients except via our office.[33]

61 It is not entirely clear what Ms Neerup means by "telling", however, I reject any implication that this last paragraph should, in some way, be interpreted as a negation of the issues raised by the Fleishmans.

62 The Fleishmans also say that it is reasonable for the Owners Corporation, and the Fleishmans, to refuse consent to encroachment on the common property – and accordingly it was reasonable at the time of the SGM to refuse to pass the resolution.[34]

63 The Fleishmans note that there is no entitlement at law in general to build on another person's land, and that s 7C of the *Limitation of Actions Act 1958* explicitly provides that

> land which is common property affected by the owners corporation is not affected by reason only of any possession of that land adverse to the owners corporation or the lot owner by another owner of a lot affected by the owners corporation, irrespective of the period of that possession.

64 The Fleishmans say also, that the following additional factors are relevant, although they acknowledge that these were not raised by their representative at the meeting on 16 November 2021:

> (a) Any feature and level survey to demonstrate what the natural ground level of the Lot is, which is critical to informing the reading of the proposed plans;
>
> (b) Any geotechnical report showing the soil classification of the Lot, which will inform the footing design for the redevelopment;
>
> (c) Any civil engineering calculations or, or drawings for, the footing design for the redevelopment;
>
> (d) A building permit or building permit application – the Applicant has since confirmed she has not obtained a building permit or made an application for one;

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[32] see paragraph 17 Respondents' Amended Closing Submissions and TB197-198.
[33] Applicant's Closing Submissions [5].
[34] Respondents' Opening Submissions [25].

> (e) Any information showing how the Applicant intends to use or occupy the common property during the construction to facilitate the redevelopment;
>
> and
>
> (f) Any information as to how the Applicant will preserve the Respondents' quiet enjoyment of their lot and the common property during construction (which provides the sole point of both pedestrian and vehicular access to Lot 2) . Noting the age and poor health of the Respondents, this is of some importance.

65 Further, the Fleishmans say, referring to the expert evidence of Peter Ferrier, Valuer, that lot 2 will be diminished in value because of the proposed works. The Fleishmans acknowledge that Mr Ferrier's valuation was obtained well after the meeting on 16 November 2021 (the report is dated 28 April 2022 and the valuation is at 19 April 2022) but say that diminution in value is expressed to be a relevant consideration in Model Rule 5.2(2). The Fleishmans say that Ms Neerup has acknowledged the diminution in value identified by Mr Ferrier, and offered to compensate the Fleishmans in that amount.[35]

Has the Owners Corporation acted contrary to Model Rule 5.2(2)?

66 Ms Neerup submits that Model Rule 5.2 imposes an obligation on an owners corporation not to unreasonably withhold consent. I do not agree with Ms Neerup's submission.

67 Model Rule 5.2 provides

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

68 There is no doubt that Rule 5.2(2) requires an owners corporation to act reasonably in considering a request for approval of a lot owner's proposal to make changes to the external appearance of a lot. The second sentence of Rule 5.2(2) gives guidance to the Owners Corporation about the manner in which it may, acting reasonably, protect quiet enjoyment of other lot owners, protect structural integrity and protect the value of other lots. One way in which the Owners Corporation may do this is by imposing reasonable conditions to that purpose.

69 That is, Model Rule 5.2 contains, within it, a clear indication that, if an owners corporation gives approval subject to reasonable conditions aimed at

[36] TB 551. [1(b)].

protecting quiet enjoyment of other lot owners, structural integrity or the value of other lots and or common property, it will not have unreasonably withheld approval to the proposed changes. It is apparent, however, that an owners corporation is also able to withhold approval reasonably.

70 Section 5 of the OC Act is also relevant to the manner in which the Owners Corporation must act. Section 5 of the OC Act provides

> An owners corporation in carrying out its functions and powers –
>
> (a) must act honestly and in good faith; and
>
> (b) must exercise due care and diligence.

71 The submissions made by Ms Neerup seem to carry the implication that, in a two lot subdivision, when one lot owner wishes to alter the external appearance of their lot, the other lot owner may not vote according to their assessment of their own interests. That implication is at odds with the decisions of this Tribunal, such as *Barouche v Owners Corporation PS409234V*.[36] In that case the Tribunal considered whether a special resolution to grant 99-year leases over car parks to 24 of the 36 lot owners, amounted to a breach of the owners corporation's duty to act in good faith. The Tribunal found that a lot owner does not have a duty to vote in the interests of the owners corporation or in the interests of other lot owners.[37] The Tribunal referred to s 11 of the OC Act, and observed

> In conferring the power to manage the owners corporation upon lot owners, Parliament has specifically stated that the power does not give rise to any fiduciary or director's duties on the part of lot owners. In my opinion, s11 means that each lot owner is entitled to vote in their own self-interest. However, the lot owner's power to vote in their own self-interest is not an unfettered power. It must not be exercised fraudulently.[38]

72 Ms Neerup relies also on the decision of the Tribunal of *Lai v Beilin*[39], which she says is authority for the proposition that an owners corporation is *obliged* not to withhold consent unreasonably to proposals to alter the external appearance of a lot.

73 The dispute in *Lai v Beilin* concerned an application by the owners of three lots in a four-lot subdivision for orders requiring the respondents, who were owners of the fourth lot, to remove a fence which they had installed to replace the existing front fence to their lot. At an annual general meeting, the Owners Corporation had "resolved not to grant permission to unit 1 to build

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[37] [2017] VCAT 1917.
[37] Ibid at [48].
[38] Ibid at [49], noting that s 5 of the OC Act places on the Owners Corporation itself, has an overriding duty to act in good faith and with diligence in everything that it does.
[39] [2020] VCAT 771, at [70]. See Applicant's Outline of Submissions dated 5 August 2022 paragraph 25 and 26.

a fence in the front yard of unit 1".[40] Unlike the subdivision in this proceeding, in *Lai v Beilin* the only common property was the central common driveway. The fence in question was erected on a lot, and did not form part of common property.

74 The Tribunal in *Lai v Beilin* did not find that an owners corporation has an obligation not to withhold consent unreasonably to proposals to alter the external appearance of a lot. The Tribunal's decision was to dismiss the application brought by the three lot owners on the grounds that they did not have standing to bring the application, and accordingly, the Tribunal did not have jurisdiction to hear the application.[41] The passage relied upon by Ms Neerup, when considered in the context of the whole decision, is not a finding of the Tribunal, but appears in fact to be part of the respondents' submissions.[42]

75 I consider that the proposition that an Owners Corporation has an obligation to consent to proposals for change to the external appearance of a lot is incompatible with an Owners Corporation's obligation, reflected in the factors about which conditions may be imposed that are set out in Model Rule 5.2(2), to protect the fabric of the common property, and the amenity of other lot owners.

76 In my view, Model Rule 5.2 complements the lot owner's duty under section 129(1) of the Act to "properly maintain in a state of good and serviceable repair any part of the lot that affects the outward appearance of the lot or the use or enjoyment of other lots or the common property." That section does not contemplate renovation or alteration of the outward appearance of the lot, it only permits maintenance. Model Rule 5.2 is necessary because there will come a time, in the life of any asset, when mere maintenance is not sufficient, and replacement or upgrading is required. Model Rule 5.2 is facilitative also of improvements that add to the value of the property.

77 Section 138B of the OC Act, which came into operation on 1 December 2021, is also concerned with proposed works to renovate or alter the external appearance of a lot. It permits an owners corporation to make special rules in respect of such works, to protect the quite enjoyment of all other lots and the common property during those works, to protect the structural integrity of any building on the plan of subdivision from [a risk arising from] those works, or to ensure the market value of any other lot does not decrease as a result of those works.

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[40] Ibid, at [4].
[41] [2020] VCAT 771 at [96].
[42] The Applicant's Outline of Submissions dated 5 August 2022 paragraph 25 extracts a copy of paragraph 68 of the Tribunal's decision in *Lai v Beilin*. Paragraph 72 of the decision begins "In reply, [the applicant] submitted.

78 Do these provisions which concern renovation and alteration of the external appearance of a lot apply to the situation, such as that here, where the external face of the lot is, in fact, common property? I do not think so.

79 I have formed that view because an owners corporation does not have any need for this kind of power in subdivisions where the external face is common property. In that situation, the external appearance is entirely within the owners corporations' control. However, there are many subdivisions where the external boundary of the lots does not lie in the median of the external wall. In those subdivisions, lot owners are exposed to the risk that an individual lot owner may act in a way that jeopardises the safety, quiet enjoyment, structural stability, or market value of all the other lot owners. It appears to me that these provisions concerning external appearance are necessary only for those owners corporations where the owners corporation is unable to manage that risk through its custodianship of the common property.

80 In my opinion, Model Rule 5.2 has no application to a proposal to alter common property.

81 I find that the proposed works are not a mere alteration of the external appearance of a lot. The proposed works are properly to be characterised as demolition and rebuilding of common property in conjunction with demolition and rebuilding of a lot. As the boundary wall that Ms Neerup proposes to demolish and rebuild is common property, I consider that neither Model Rule 5.2 nor s 129 of the OC Act has any application to the proposed works.

82 I am satisfied that the Owners Corporation did not have an obligation to give its approval pursuant to Model Rule 5.2(2) to the proposed development, for the reasons that I have set out above. It follows, therefore, and I find, that neither the Owners Corporation, nor the Fleishmans, have contravened Model Rule 5.2(2).

83 However, if I am wrong in my interpretation of Model Rule 5.2(2), I am nevertheless satisfied that the Owners Corporation has not acted contrary to that Rule.

84 In arriving at any decision, an owners corporation must act in honestly and in good faith, and with due care and diligence. An owners corporation that acted unreasonably might well be found not to have acted honestly and in good faith. An owners corporation that did not actively turn its mind to the risks and liabilities that might arise from following a particular course of action, might be found not to have acted with due care and diligence. Not every subdivision is the same; each owners corporation must respond to such proposals according to the circumstances of that particular subdivision.

85 I consider that, although an owners corporation acting reasonably may well wish to record its reasoning or grounds in any resolution in which it refuses to give consent to a request by a lot owner for written approval of proposed changes to the external appearance of their lot, that is not the only way in which an owners corporation could demonstrate that it was not unreasonably withholding approval. The decisions of the owners corporation in *Barouche* provide one example of the manner in which an owners corporation may impose reasonable conditions.

86 In my view, had the Owners Corporation passed the resolution as put by Ms Neerup, the Owners Corporation could not have been said to have been acting in good faith or with due care and diligence. The Owners Corporation has an obligation to consider its responsibility for the common property. There was no acknowledgment of that responsibility in the resolution put to the meeting on 16 November 2021.

87 Further, if, at the time of the meeting, Ms Neerup had in fact conceived of her development as having no impact on the common property, it would have been a simple matter to record that in the proposed resolution. Mr Dinh's evidence has confirmed that the plans referred to in the resolution do not convey, in any meaningful way, the impact of the proposed works on the common property. For that reason, I consider that the Owners Corporation could, in this case, only have demonstrated that it was acting in good faith and with due care and diligence, if the resolution explicitly recorded the impact of the proposed works on common property and the owners corporation's assessment of that impact. The absence of that detail in the resolution, leads me to conclude that, on its face, the resolution did not reflect the exercise of due care and diligence on the part of the Owners Corporation. I consider the drafting of the resolution to have been inadequate, possibly disingenuous, if not in bad faith.

88 Ultimately, however, the Owners Corporation did not refuse to approve the development: it simply failed to pass Ms Neerup's resolution. The Fleishmans did not vote in favour of the resolution. As lot owners voting at a general meeting, they were entitled to vote in accordance with their perception of their best interests. The Fleishmans were not obliged to vote against their perception of their best interests.

Two Lot Subdivisions

89 Before turning to the remaining issues, a few comments about two lot subdivisions are necessary.

90 The *Subdivision Act 1988* (Vic) provides that whenever common property is created on a plan of subdivision, an owners corporation must also be created. Many two lot subdivisions have some minimal common property. If access

by car to the street is to be provided, creation of common property often cannot be avoided altogether.

91 The OC Act recognises that in two lot subdivisions many of the usual responsibilities of an owners corporation will be unnecessary or excessive. Two lot subdivisions have always been exempt from compliance with a number of obligations. Those exemptions are now found in s 7A of the OC Act.

92 Two lot subdivisions are exempt from the obligation to pass a resolution authorising commencement of legal proceedings, and from the requirements relating to fee notices and final fee notices. They are exempt from the insurance obligations. The provisions requiring establishment of accounts, audit, maintenance plans and maintenance funds do not apply to them. The procedural requirements for convening meetings, quorum, agenda, and minutes do not apply to them. The obligations to maintain particular records and an owners register, and to establish a complaints procedure do not apply.

93 The Owners Corporations of a two lot subdivision are, however, bound by the obligations to repair and maintain common property and services set out in ss 46, 47 and 47A of the OC Act, and the procedural requirements for proxies and decision making. They are also bound by Part 7 of the OC Act, dealing with the duties and rights of lot owners and occupiers, and by the Part 8 of the OC Act dealing with owners corporations rules.

94 It is apparent from these exemptions that the expectation is that two lot subdivisions will operate relatively informally. If there is a dispute, the parties can bring that to the Tribunal for resolution. They do not have to hold a meeting to entrench their dispute further before doing so. The Tribunal regularly enables two lot subdivisions to resolve their disputes satisfactorily through alternative dispute resolution, or through hearing and determining the dispute.

95 It follows, also, from these exemptions, that there is much less "work" for an owners corporation of a two-lot subdivision to do, than would be the case for a tier four or tier three owners corporation, and far less than is required of a tier two or tier one owners corporation.

96 In consequence of these exemptions, the threshold for appointment of an administrator is necessarily quite different for a two-lot subdivision. I turn now to that part of Ms Neerup's application.

Application for appointment of an administrator

97 The OC Act does not prescribe any criteria for the appointment of an administrator. But, in *McKinnon v Adams*:[43], a decision concerning

[43] [2003] VSC at [20]-[21].

appointment of an administrator under section 38(6) of the *Subdivision Act 1988*, Bongiorno J said:

> To justify the appointment of an administrator the body corporate concerned must be affected by some incapacity, or must be acting so dysfunctional as to render the provision of appropriate services to unit holders and/or care of the common property either non-existent, or so beset by difficulties as to render the body corporate unable to function at what the Court considers to be a satisfactory level. There may or may not be financial difficulties or even financial impropriety affecting the body corporate's capacity to function but there must be some deficiency in its operational capacity sufficient to justify the Court's intervention in the interest of some or all of the unit holders.
>
> Thus, the power to appoint an administrator pursuant to s 38 (6) of the Subdivision Act 1988 may be ordered, in the Court's discretion, where the evidence discloses that the body corporate is failing to operate properly in the interests of its members, is being inefficiently or incompetently managed, or the appointment is necessary to protect the interests of the members.

98 The effect of appointing an administrator is to remove all decision making from the control of the lot owners and give the administrator all of the powers of the owners corporation, exercisable without the need to hold a vote of lot owners.

99 The purpose of appointing an administrator is to bring the owners corporation to a functioning level such that it is able to deal with the matters facing the owners corporation.[44]

100 Generally speaking, in a two-lot subdivision, where there may be no need for the provision of services, no requirement to create a budget or issue fee notices and recover unpaid fees, it will be a rare occasion when the high threshold for appointment of an administrator will be met.

Ms Neerup's submissions

101 The allegations relied upon by Ms Neerup in support of her application for the appointment of an administrator to the Owners Corporation are that

a. she and her husband are not able to communicate with the Fleishmans, and since December 2020 all communication has been through lawyers;

b. the Fleishmans are in continual breach of the OC Act;

c. the Fleishmans have unreasonably withheld their consent to the proposed works.

[44] *Scotia Property Maintenance Pty Ltd v Owners Corporation Plan No. PS316440K (Owners Corporations)* [2021] VCAT 123 at [58] Member Kim.

d. Ms Neerup submits that "the owners corporation cannot resolve to approve straight forward requests for building works in circumstances where the works would be allowed under the planning scheme and have already been approved by the Building Appeals Board" demonstrates a level of dysfunctionality that warrants appointment of an administrator.[45]

102 Ms Neerup says that there is a "deadlock between its two members, with neither side being able to command a majority of votes".[46]

The Fleishmans' submissions

103 In response, the Fleishmans submit that the Owners Corporation is not so dysfunctional, or so beset by difficulties that it is unable to function so as to warrant the appointment of an administrator because:

a. there has only been one meeting of the OC, namely the SGM held in November 2021 (SGM)(and given the subdivision is a two-lot subdivision, this is not unusual);

b. the communications between the parties included in the amended claim prior to the SGM (prior communications), do not relate to the behaviour of the OC;

c. the prior communications have been resolved in a neighbourly way despite that the parties may have started in an initial state of disagreement, which is demonstrative of the fact that matters pertaining to the subdivision have been and are capable of being worked through and resolved;

d. the Respondents raised valid and reasonable objections to the redevelopment at the SGM that were not addressed by the Applicant at the SGM or before the initiation of these proceedings.[47]

Allegations of inability to communicate

104 Ms Neerup gave evidence that since 5 May 2017 she has had little to no communication with the Fleishmans. Indeed, despite having lived at the address for many years, Ms Neerup said that although she had met Mr Fleishman, she couldn't recall meeting Mrs Fleishman.[48]

105 Ms Neerup referred to emails sent by Marsha Karlik, the daughter of the Fleishmans. One, dated 5 May 2017 was addressed to Daniel Banyasz, Ms Neerup's husband. It requested that Ms Neerup and Mr Banyasz not approach or speak to the Fleishmans, and not access the common property driveway without giving 24 hours' notice to Ms Karlik. The email stated that

[45] Joint Tribunal Book page 151 [37].
[46] Ibid [38].
[47] Respondents' Outline of Submissions dated [17]
[48] Transcript page 59 line 31 to page 60 line 2.

an application would be made for "a restraining order" if those requests were not met. .[49]

106 Ms Karlik's emails refer to "confrontational conduct" and "screaming verbal abuse" by Banyasz toward Mr Fleishman.[50] Further emails dated 17 February 2020 and 8 July 2020 requested that Ms Neerup's children not play in the driveway, and alleged that Mr Banyasz had removed a tin of paint left out for NBN workers to repaint areas of fence damaged by those workers.[51]

107 In cross examination, Ms Neerup agreed that the correspondence dated 5 May 2017 communicated that Ms Karlik's parents found Mr Banyasz' behaviour confrontational and that Ms Karlik would be the contact in future.[52]

108 In cross examination, Ms Neerup also agreed that there had only been a single occasion since 2017 when a meeting of the Owners Corporation was in fact required, and that was the occasion of the Special General Meeting on 16 November 2021.[53]

Allegations of continual breach of the OC Act by the Fleishmans

109 Ms Neerup alleges that the Fleishmans have damaged and altered common property contrary to the OC Act.[54] Ms Neerup refers to

a. a fence dispute between the Fleishmans and a neighbour resulting in an adjoining boundary fence being constructed on common property in June 2017;[55]

b. an allegation that the Fleishmans painted the boundary fence without seeking the Owners Corporation's consent;

c. an allegation that the Fleishmans installed video surveillance cameras on common property outside their garage, and refused to remove the cameras;[56] and

d. an allegation that the Fleishmans "attempted to damage and alter the common property driveway by instructing contractors to perform major excavations when installing NBN without [Ms Neerup's] prior knowledge or consent and without approval of the Owners Corporation"[57].

[49] Witness Statement of Stine Neerup 31 May 2022 paragraphs 10 and 11 Joint Tribunal Book page 146.
[50] Joint Tribunal Book pages 157.
[51] Ibid, pages 159 and 160.
[52] Transcript page 55 ll 15-19.
[53] Transcript page 63 ll 12-13.
[54] Witness Statement dated 31 May 2022 Tribunal Book page 147.
[55] Amended Points of Claim at [6] TB 64 and email correspondence at TB 81-84.
[56] Amended points of claim at [6] TB64 and email correspondence at TB85-6.
[57] Amended points of claim at [6] TB64.

110 Ms Neerup confirmed in cross examination that the dispute with the neighbour regarding the fence was resolved, "It was rebuilt by builders from lot [sic] 20. ... The issue of rebuilding the fence, of which I didn't have an issue, was resolved, yes."[58]

111 Ms Neerup maintained that she did not know whether the security camera issue had been resolved, commenting that the cameras could be moved.[59]

112 The Fleishmans submit that each of these "issues" has been readily resolved. I note that, in an email exchange between Ms Karlik and Mr Banyasz, dated 15 March 2019, Ms Karlik stated "Security cameras have been checked and they are not in breach of the law and will not be removed".[60]

113 There is no evidence before me that either Mr Banyasz or Ms Neerup took any further action in relation to this issue after that date.

Failure to approve the proposed works

114 As I have recorded above, the Fleishmans submit that it is reasonable for them to refuse consent for the redevelopment where the proposal is to alter the common property of the Owners Corporation or where quiet enjoyment or loss of value question arise.[61]

Have the grounds for appointment of an administrator been made out?

115 I do not consider that an equality of voting power between the members of two lot owners corporation is sufficient "difficulty" besetting the owners corporation to warrant appointment of an administrator. That neither lot owner can "command a majority of votes", is, of course, something many if not most two lot owners corporations experience. It is not particular to this subdivision.

116 It appears that, by and large, the issues requiring communication between the lot owners have eventually been resolved or allowed to fall away. I note that the instances cited by Ms Neerup are neither frequent nor recent. I am satisfied that any further disputes between the lot owners could readily be resolved similarly, or, if required, by one or other making an application to the Tribunal.

117 Similarly, I do not consider the allegations of past breaches by one lot owner, in themselves to warrant the appointment of an administrator.

118 Even taken together, I do not consider these factors to justify appointment of an administrator.

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[58] Transcript page 58 ll 8-9.
[59] T p 62 l 28 T p63 l 13.
[60] Tribunal Book page 95.
[61] Respondent's Outline of Submissions dated 18 August 2022 paragraph 4(c) and (d),

119 This leaves the sole purpose of appointment of an administrator as being to give consent to the proposed works. Is that an appropriate ground for appointment of an administrator?

120 Put another way, and drawing on the language used by Bongiorno J, is the failure to give consent to the proposed works a deficiency in the owners corporation's operational capacity, or a failure to operate properly in the interests of its members?

121 Section s 176(c) of the OC Act provides that an Administrator, once appointed, and subject to any order of the Tribunal or of a court, has power to do anything that the owners corporation or the committee can do. An administrator must act honestly and in good faith, and exercise due care and diligence (see s 177 OC Act). Those duties are owed to the members of the owners corporation, that is, the lot owners collectively, not to individual lot owners.

122 It is correct to say that an administrator is required to act in the interests of the lot owners. In my view, that must necessarily be understood to mean acting in the interests of the lot owners in their capacity as members of the owners corporation. Indeed, it is often the case that an administrator is appointed precisely because the lot owners have been acting solely in their own personal interests, rather than in the interests of the owners corporation as a whole. Protection of the lot owners' collective interest in the common property asset is clearly a relevant interest that should be at the forefront of an owners corporation's collective "mind". In contrast, the protection of the personal interests of the lot owners is not the function of the owners corporation.

123 The obligation of an owners corporation to act in the interests of the owners corporation as a whole has recently been reinforced, by the amendments to s 117 of the OC Act, dealing with the duties of members of committees and subcommittees:

> (1) A member of a committee or sub-committee of an owners corporation must, in the performance of the member's functions –
>
> (a) act honestly and in good faith; and
>
> (b) exercise due care and diligence; and
>
> (c) act in the interests of the owners corporation.
>
> (2) A member of a committee or sub-committee of an owners corporation must not make improper use of the member's position to gain, directly or indirectly, an advantage for the member or for any other person.

124 Who would benefit from the granting of the consent to the proposed works? Certainly, Ms Neerup will benefit personally. Will the Owners Corporation benefit? That question is much harder to answer. Ms Neerup says that, if her

construction is permitted to go ahead, the Fleishmans will benefit because the proposal to demolish and rebuild the southern wall of her lot would 'undoubtedly result in the application of the "benefit principle" dictating that she would be predominantly, if not wholly, responsible to contribute to repairs and maintenance of the wall'.[62] In my view, that is not a new consideration: the same would also be the case with respect to the present wall.

125 If, as I have found, Rule 5.2(2) is limited to proposals to alter the external appearance of a lot, and does not enable authorisation of demolition or alteration of common property, the task of giving written consent in accordance with that Rule is no longer a matter that the owners corporation has to address. If, contrary to my finding, Rule 5.2(2) is not so limited, there may be further occasions for the issue to be put before the owners corporation. Ms Neerup's desire to progress her building project is understandable, but it is apparent that more work is required to place the proposal before the owners corporation. An administrator could not progress this issue today.

126 There remains the issue that Ms Neerup seeks to demolish common property. As I discuss later in these reasons, there is now some doubt that the owners corporation has the power to authorise that. The fact that the southern wall is part common property and part lot is the deliberate outcome of the manner in which the subdivision was created. It is not uncommon in proceedings before the Tribunal for lot owners to be seeking to have the same ability to renovate, to rebuild, or erect structures in the land surrounding their lot, as though they owned freestanding freehold land without common property, unencumbered by an owners corporation. Purchasing a property that is in a subdivision with an owners corporation, where some of the land is common property, and, more particularly, where the external face of the lot is common property, means that the registered proprietor does not have all of the freedoms of a registered proprietor of a free standing house. That is a choice made by the purchaser. That it carries with it certain limitations is not a matter that an administrator can alter.

127 The application for appointment of an administrator must be dismissed.

Orders that the Owners Corporation consent

128 I turn now to the application for orders requiring the Owners Corporation to consent to the proposed works.

129 Ms Neerup submits that, although a special resolution is required by an owners corporation to demolish common property, an ordinary resolution is all that is required if a lot owner demolishes common property.

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[62] Applicant's Closing Submissions dated 28 October 2022 at [50].

130 Ms Neerup refers to the decision of *Martin & ors v Owners Corporation 4315756* (**Martin**).[63] In that case, the applicant objected to approval having been given by ordinary resolution of the committee of an owners corporation to a lot owner to demolish common property. The applicant contended that s 52 of the OC Act required a special resolution to give such approval.

131 In Martin, the owners corporation committee had relied on Rule 3.3 of the Model Rules, then contained in Schedule 2 of the *Owners Corporations Regulations 2007*. The equivalent rule is now Rule 4.3 of the Model Rules. Just as Model Rule 4.3 provides now, Rule 3.3 provided that the owner of a lot must not damage or alter the common property or a structure that forms part of the common property, without the written approval of the owners corporation. Senior Member Vassie found that an ordinary resolution to give such written approval was sufficient.

132 The relevant parts of Model Rule 4.3 are subrules (1), (2) and (3):

> (1) An owner or occupier of a lot must not damage or alter the common property without the written approval of the owners corporation.
>
> (2) An owner or occupier of a lot must not damage or alter a structure that forms part of the common property without the written approval of the owners corporation.
>
> (3) An approval under subrule (1) or (2) may state a period for which the approval is granted, and may specify the works and conditions to which the approval is subject.[64]

133 Prior to 1 December 2021, the only provisions in the OC Act and the *Owners Corporations Regulations 2018* (**OC Regulations**) that governed lot owners' ability to alter common property was Rule 4.3 of the Model Rules for owners corporations, set out in Schedule 2 to the OC Regulations.

> 134 I have referred to the date 1 December 2021, as this is the date on which s 47A of the OC Act came into operation. Section 47A of the OC Act provides
>
> (1) This section is subject to section 56 of the *Equal Opportunity Act 2010*.
>
> (2) A lot owner must not repair, alter or maintain –
>
> (a) the common property of the owners corporation: or
>
> (b) [not relevant here]
>
> (3) Subsection (2) does not apply if a lot owner has been expressly authorised by the owners corporation to carry out the repairs and maintenance in accordance with section 46 or 47 as an agent of the owners corporation.

[63] [2009] VCAT 2699 (Senior Member Vassie) [33].
[64] Model Rules 4.3(4) and (5) are concerned with security doors and the like and are not relevant here.

135 Compared to the situation that applied prior to 1 December 2021, I consider that the scope of Model Rule 4.3 is now significantly altered. An owners corporation may now only authorise a lot owner to repair, alter or maintain common property as an agent of the owners corporation, for the purpose of the owners corporation's general duty to repair and maintain the common property (s 46 OC Act) or services that are for the benefit of more than one lot, and the common property (s 47 OC Act). There is no longer scope for an owners corporation to give approvals that would be inconsistent with s 47A.

136 The prohibition on a lot owner damaging or altering common property is, since the introduction of s 47A of the OC Act, now close to absolute: a lot owner may only be authorised to carry out alterations to common property as an agent of the owners corporation, in accordance with ss 47 or 48 of the OC Act.

137 Given that Model Rule 4.3 is now significantly restricted by s 47A of the OC Act, it appears to me that, although an ordinary resolution will still be sufficient, the scope of approval that may be given can not extend, as it once did, to demolition of the common property.

138 Ms Neerup submits that the decision in *Raso v Owners Corporation PS638800J*[65] is closely analogous to this case. The applicant lot owners in that case sought an order requiring the owners corporation to consent to their proposed plan for a major upgrade and extension of a 7-year old apartment. The plan proposed "numerous intrusions into common property, including the relocation of several supporting columns and penetrations into the common property slab".[66] The owners corporation had not consented to the proposed plan, but had said it would approve the plan subject to there being a special resolution passed approving lease agreements that transferred the risk of the renovation to the applicants and their successors in title.

139 Member Rowland noted that a lot owner, as legal owner has the right to make alterations within the lot, subject to the rules of the owners corporation, and any easement implied over the lot by s 12(2) of the *Subdivision Act 1988*. She noted also that an owners corporation has the right to consent or refuse consent to any alteration, encroachment or intrusion upon its land which must be exercised in good faith and with due care and diligence.[67]

140 Although, in *Raso* the applicant had sought orders that the Tribunal direct the Owners Corporation to give its consent, no such order was made.

141 Rather, Member Rowland reviewed each of the requirements imposed by the owners corporation in granting its approval and made findings about those resolutions of the owners corporation. Member Rowland found that, the

[65] [2020] VCAT 211 (Member L Rowland).
[66] Ibid [4].
[67] Ibid [8] Member Rowland noted that the owners corporation's right to refuse is qualified by any legal right a lot owner may have to alter encroach or intrude on common property.

conditions proposed by the owners corporation were, on the whole, reasonable and proportionate.

142 Member Rowland considered the special rules that were in force in that subdivision. She found that, read as a whole, those rules did not confer a right on individual lot owners to alter common property. The same may be said of the Model Rules.

143 Ms Neerup has not given any authority for the proposition that the Tribunal is able to make orders requiring an owners corporation to give its consent to works proposed by a lot owner. I am not satisfied that s 165 of the OC Act give the Tribunal such a power. However, even if the Tribunal did have express power to make such an order, I would not consider it appropriate in this case.

144 The special rules in *Raso* required a lot owner to obtain all relevant planning and building permits. Those requirements ensured that the owners corporation had detailed information about the proposed works. Even without such special rules, it is apparent that, in order to act with good faith, and with due care and diligence, the owners corporation ought be to be properly and fully informed on matters such as the impact of the proposed works on common property, and on amenity of the lots.

145 Ms Neerup says that the proposed works will be built "inside" the lot, that is, the new southern wall will be placed further north than the present wall, by a margin equivalent to half the dimension of the present wall, and so be located with the "title boundary". In her Closing Submissions, Ms Neerup has acknowledged that, if the wall is moved, there may be a need to amend the Plan of Subdivision. Neither of those issues was explicitly raised at the general meeting on 16 November 2021.

146 There are as yet no plans giving dimensions suitable for construction. Ms Neerup asserts that she is unable to engage a builder to undertake that work because she does not have the approval of the Owners Corporation for work to be carried out on the common property controlled by the Owners Corporation.

147 It would appear that more work may be required to bring the proposal to the point where appropriate conditions could be formulated by the Owners Corporation that adequately protect the relevant interests of the Owners Corporation.

148 The application for orders requiring the owners corporation to consent to the proposed works must be dismissed.

149 The Fleishmans have indicated that they seek to be heard on the question of costs. I will make orders for submissions on costs to be filed and served. Any costs determination will be made on the papers, without further hearing,

in accordance with s 100 of the *Victorian Civil and Administrative Tribunal Act 1998*, unless a party objects to that course of action.

Acting Senior Member L. Johnson