

## VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

### CIVIL DIVISION

#### OWNERS CORPORATIONS LIST

VCATREFERENCE NO. OC2433/2021

#### CATCHWORDS

Catchwords - ss 76, 85, 111, 117, 122, 89G *Owners Corporations Act 2006* (Vic). Application to lift stay of proceedings stayed due to the owners corporation not passing special resolution to commence proceedings. Ballot conducted to attempt to pass a special resolution to continue proceedings. Allegations that manager and committee members breached provisions of *Owners Corporations Act 2006* (Vic) in the manner in which the ballot was conducted. Sections 85, 117 and 122 of the *Owners Corporations Act 2006* (Vic) breached. Impact on validity of ballot as a result of breaches. Ballot results tainted, ballot invalid, application for lifting of stay dismissed.

#### APPLICANT

Owners Corporation PS 331362S

#### RESPONDENTS

Christopher Rey Domingo, Belinda Barbara Domingo, Reymundo Cuevas, Nathan William Falvo, Stevie Halls, Cadem Pty Ltd ACN 007 171 388, Ying Li, Sammi Suv Leen Huynh, Black & Black Pty Ltd ACN 133342088, Lim Cheng Beng, Toh Hong Sin, Ho Peng Low, Penny May Lomas, Cojan Newhouse, Claire Wong, Elaine Chloe Lockwood, Ouyang Empire Pty Ltd ACN 607 973 482 t/as Ouyang Family Trust, J C Australia Developments Pty Ltd ACN 057 340 351, Joanne Leo, Denis J Martinet, Ronald Winnell Ludlow, Darren Ludlow, Dianne Winifred Phillips, Hee Sing Soo, Katie Mystakidis, Mystico Group Pty Ltd ACN 122 386 001, Nathan Mark Banks, Andy Alimilam, Almilan Almilan, Ooi Hock Meng, Liew Man Moi, C Sivanesan, S Parameswari, Chee Kum Wah, Adrian Ng Gin, B S Choo, S H Fong, Naomi Pett, Lei Qiu, Heng Gee Ta, Stavroula Spiropoulos, G P San, Yunliang Xu, Christopher Charles Harrison, Luke Mitchell Seidler, Peter Dinunzio, Caroline Dinunzio, Yi-Cheng Hong, Zerui Chen, Nagga Pty Ltd ACN 006 587 006, Nickolas Stephen Harris, Lauren Nicole Harris

#### WHERE HELD

Melbourne

#### BEFORE

Senior Member C Price

#### HEARING TYPE

Hearing

#### DATE OF HEARING

3 March 2023

**DATE OF ORDER**

13 April 2023

**CITATION**

Owners Corporation PS 331362S v Domingo  
(Owners Corporations) [2023] VCAT 404

**ORDER**

1. The application for the lifting of the stay made pursuant to the orders of 22 June 2022 is dismissed.

C Price  
**Senior Member**

**APPEARANCES:**

For applicant

Mr M Sharkey, Counsel  
Ms N Hobbs, Solicitor

For third respondents

Mr B Halls, representative

For the fourth respondent

Mr B Halls, representative

For the fourteenth respondent

Mr A Wong, representative

All other respondents

No appearance

## REASONS

### Background

- 1 This is an application by Owners Corporation PS 331362S ('the OC') which seeks orders under s 34D(1)(b) of the *Subdivision Act 1988* (Vic), consenting on behalf of a minority of lot owners to the purchase by the OC of certain lots for inclusion in the common property.
- 2 On 22 June 2022, Senior Member Vassie made orders staying the proceeding until further order as there had been no special resolution authorising the commencement of the proceeding, something which is required under s18(1) of the *Owners Corporations Act 2006* (Vic) ('the Act').<sup>1</sup>
- 3 The orders of 22 June 2022<sup>2</sup> further provide that:  
The applicant may apply for an order that removes the stay of the proceeding:
  - (a) upon filing an affidavit providing evidence of the passing of a special resolution ratifying the proceeding and authorising its further prosecution, or
  - (b) upon filing an application under Division 1B of the *Owners Corporation Act 2006* (Vic) by a lot owner for an order authorising the lot owner to prosecute this proceeding on behalf of the applicant owners corporation.
- 4 By email dated 17 November 2022, the applicant seeks an order removing the stay of this proceeding, and has filed an affidavit of Peter Parsons affirmed on 17 November 2022 in support of the application. The application is made on the basis that the applicant has passed the special resolution required under s 18(1) of the Act.
- 5 At the hearing on 3 March 2023, there was an appearance on behalf of the third, fourth, and fourteenth respondent ('the objectors'). They oppose an order to remove the stay of this proceeding, and raise a number of allegations that they submit establishes that there has been non-compliance with the Act in the steps taken by the applicant to pass a special resolution.
- 6 For the reasons that follow I dismiss the application for the removal of the stay and confirm the orders made by Senior Member Vassie on 22 June 2022.

### The issues

- 7 The objectors allege that s 85 of the Act has been breached by the applicant in conducting the ballot.

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<sup>1</sup> Order 1 of the orders dated 22 June 2022.

<sup>2</sup> Order 2 of the orders dated 22 June 2022.

- 8 Section 85 sets out the requirements for notice in respect of a ballot as follows:

**OWNERS CORPORATIONS ACT 2006 - SECT 85**

**Notice of ballot**

- (1) The person arranging a ballot must give notice in writing of the ballot to each lot owner at least 14 days before the closing date for the ballot.

**Note to s. 85(1) amended by No. 4/2021 s. 40(1).**

**Note**

The **Electronic Transactions (Victoria) Act 2000** enables this notice to be given electronically.

- (2) The notice must include the following—

**S. 85(2)(a) substituted by No. 4/2021 s. 40(2).**

- (a) the closing date for the ballot, being—
- (i) 14 days after the date of the notice; or
  - (ii) if the matter that is the subject of the ballot is urgent, less than 14 days after the date of the notice; and
- (b) the ballot document containing the motion, including the text of any resolution to be voted on in the ballot; and
- (c) a statement that the lot owner has the right to appoint a proxy.

- 9 The affidavit of Peter Parsons, secretary of the applicant's committee, affirmed on 17 November 2022 states that 'On 2 August 2022 I caused a notice of ballot and an accompanying explanatory note regarding the requirement for a special resolution to continue the VCAT proceeding to be sent to lot owners'.<sup>3</sup>

- 10 The questions put in that ballot were as follows:

I/we agree to the commence (sic) of legal proceedings at VCAT to seek orders for the purchase of target lots from the hotel.

I/we understand this will involve the appointment of legal representation.<sup>4</sup>

- 11 He further states that the special resolution ballot closed on 30 September 2022, and the result of the ballot was:

Yes: 55%

No:16.2%

Abstain 3.4%

No Response 24.9%

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<sup>3</sup> Parsons' affidavit affirmed 17 November 2022 at paragraph 5.

<sup>4</sup> Parsons' affidavit affirmed 17 November 2022 at paragraph 7

- 12 Mr Parsons then goes on to say that ‘On 13 October 2022 Michelle Gabriel on behalf of the Applicant gave notice to all lot owners that:
- (a) the special resolution ballot did not achieve the 75% majority required to pass a special resolution pursuant to section 96 of the Owners Corporation Act;
  - (b) as the units of entitlement in favour of the motion exceeded 50% and the units of entitlement opposed to the motion was not more than 25%, the result of the special resolution is an interim special resolution pursuant to section 97(1) of the Owners Corporation Act; and
  - (c) the interim special resolution will become a special resolution after 29 days (29 October 2022) unless lot owners who hold more than 25% of the total votes for all the lots petition the secretary against the resolution pursuant to section 97(4) and (5) of the Owners Corporation Act.<sup>5</sup>
- 13 By 29 October 2022, he did not receive any petition against the resolution from lot owners holding more than 25% of the votes, and the interim special resolution became a special resolution pursuant to s 97(5) of the Act on that date.<sup>6</sup>
- 14 It is not in dispute between the parties that the ballot was open for a period of 60 days. The objectors however submit this is in breach of s 85(2)(a)(i) of the Act. This provision was inserted by way of the *Owners Corporations and Other Acts Amendment Act 2021*, and commenced operation on 1 December 2021.
- 15 The objectors submit that the section (as amended) requires the ballot to be open for 14 days after the date of the notice, and that in leaving the ballot open for a period of 60 days the applicant has failed to comply with the s 85 (2)(a)(i) of the Act.
- 16 The provision as amended appears to impose a requirement upon an owners corporation to issue a notice of ballot which states the closing date of the ballot to be 14 days after the date of the notice. But how does this provision reconcile with s 85(1) which requires the person arranging the ballot to give notice in writing of the ballot at least 14 days before the closing date for the ballot?
- 17 Does s 85(1) of the Act permit the notice of the ballot to state a period longer than 14 days for the closing date of the ballot?
- 18 Both parties directed the Tribunal to the explanatory memorandum for the Bill which states as follows in respect of the amendments to s 85 of the Act:
- Clause 40 amends section 85 of the Act to ensure the notice requirements for ballots of the entire owners corporation are consistent with the notice requirements for special general meetings and committee ballots under the Act (clauses 37 and 48 refer).

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<sup>5</sup> Parsons’ affidavit affirmed 17 November 2022 at paragraph 14.

<sup>6</sup> Parsons’ affidavit affirmed 17 November 2022 at paragraphs 16 & 17.

19 The provisions in the Act which relate to the notice requirements for special general meetings and committee ballots are s 76 and s 111 respectively.

20 Section 76 states that:

**Notice of special general meetings**

- (1) The person convening a special general meeting must give notice in writing of the meeting to each lot owner at least 14 days before the meeting.

**Note to s. 76(1) amended by No. 4/2021 s. 37.**

**Note**

The **Electronic Transactions (Victoria) Act 2000** enables this notice to be given electronically.

- (2) The notice must include the following—
  - (a) the date, time and place of the meeting; and
  - (b) the Agenda for the meeting; and
  - (c) the text of any special resolution or unanimous resolution to be moved at the meeting; and
  - (d) a statement that the lot owner has the right to appoint a proxy.

21 Section 111 states that:

**Ballots**

- (1) A ballot held by a committee must be held in accordance with this section.

**S. 111(2) substituted by No. 4/2021 s. 48.**

- (2) The chairperson or the secretary must give notice in writing of the ballot to each member of the committee.

**Note**

The **Electronic Transactions (Victoria) Act 2000** enables the notice to be given electronically.

**S. 111(3) substituted by No. 4/2021 s. 48.**

- (3) The notice must state—
  - (a) the resolution to be voted on by the members of the committee; and
  - (b) the closing date for the ballot, being—
    - (i) 14 days after the date of the notice; or
    - (ii) if the matter that is the subject of the ballot is urgent, less than 14 days after the date of the notice.

- (4) A resolution for which a ballot is held is passed only if a majority of the members of the committee state that they are in favour of the resolution before the closing date for the ballot.
- 22 Section 111 relates to committee ballots, and specifies that the notice must state that the closing date for the ballot is 14 days after the date of the notice. In determining that s 85 of the Act also requires that the closing date for the ballot to be 14 days after the date of the notice, that is clearly consistent with the intention of the legislature as enunciated in the explanatory memorandum, and makes those two provisions consistent in terms of notice periods.
- 23 Section 76 relates to notice of special general meetings. Whilst clearly giving a convenor flexibility as to the date and time of the meeting, the section requires the convenor of the meeting to give lot owners at least 14 days notice in writing of the meeting. The note to s 76(1) states that the notice can be given electronically.
- 24 This is consistent with s 85(1) of the Act which states:  
The **Electronic Transactions (Victoria) Act 2000** enables this notice to be given electronically.
- 25 In my view s 85(1) is concerned about ensuring that a lot owner is given the notice at least 14 days prior to the closing date of the ballot.
- 26 This would require an owners corporation to post (if an email address were not available) with sufficient time to ensure that it is given, so that the lot owner has at least 14 days notice of the end of the ballot to consider and cast their vote. The reference to the Electronic Transactions (Victoria) Act 2000 provides us with the requisite understanding that s 85(1) (and s 76(1)), is concerned with ensuring that whether given electronically or by other means, the lot owner would have this 14 day period to consider and cast their vote. It is not in my view drafted in such a way as to modify the provision in s 85(2) that the closing date for the ballot must be 14 days after the date of the notice.
- 27 The applicant relies upon *Barintore Nominees Pty Ltd v Owners Corporation Plan PS SP 22934S* [2019] VCAT 406<sup>7</sup> in which the owners corporation submitted that because of the large number of lot owners, one month's notice in writing of the ballot should be given to lot owners, rather than the minimum 14 day period required by s 85 of the Act. Garde J. accepted that submission and made orders accordingly.
- 28 The objectors, quite rightly in my view submit that the decision in *Barintore* predates the amendment to s 85 of the Act. That is s 85(2)(a)(i) which states that the notice of the ballot must include the closing date being 14 days after the date of the notice was not a provision in force at the time the decision was written.

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<sup>7</sup> Applicant's written submissions dated 20 February 2023 at para [20].

- 29 I agree with the submission of the objectors, and consider that it would not now be open to the Tribunal to make orders in those terms given the provisions of s 85 of the Act as amended.
- 30 I find that in keeping the ballot open for a period of 60 days the applicant has breached s 85 of the Act.
- 31 The objectors also allege that in the conduct of the ballot by the owners corporation through its committee, and the manager, that sections 117 and 122 of the Act have been breached.
- 32 Section 117 provides:

**Duties of members of committees and sub-committees**

- (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.

- 33 Section 122 of the Act provides:

**Duties of manager**

- (1) A manager—
- (a) must act honestly and in good faith in the performance of the manager's functions; and
  - (b) must exercise due care and diligence in the performance of the manager's functions; and

**S. 122(1)(c) amended by No. 4/2021 s. 53(1)(a).**

- (c) must not make improper use of the manager's position to gain, directly or indirectly, an advantage personally or for any other person; and

**S. 122(1)(d) inserted by No. 4/2021 s. 53(1)(b).**

- (d) must take reasonable steps to ensure that any goods or services procured by the manager on behalf of the owners corporation are procured at competitive prices and on competitive terms; and

**S. 122(1)(e) inserted by No. 4/2021 s. 53(1)(b).**

- (e) must not exert pressure on any member of the owners corporation in order to influence the outcome of a vote or election held by the owners corporation; and

**S. 122(1)(f) inserted by No. 4/2021 s. 53(1)(b).**



- (f) before a contract is entered into for the supply of goods or services to an owners corporation under which a manager is entitled to receive a commission, payment or other benefit, must give written notice to the chairperson of the owners corporation disclosing the commission, payment or other benefit in accordance with section 122B.

(2) A manager—

- (a) holds all money held on behalf of an owners corporation on trust for the owners corporation; and

**S. 122(2)(b) substituted by No. 4/2021 s. 53(2)(a).**

- (b) if subsection (3) applies, must account separately for the money held by the manager for each owners corporation on the plan of subdivision; and

**S. 122(2)(c) inserted by No. 4/2021 s. 53(2)(b).**

- (c) subject to subsection (3), must hold all money held on behalf of separate owners corporations on trust in separate bank accounts; and

**S. 122(2)(d) inserted by No. 4/2021 s. 53(2)(b).**

- (d) must comply, as soon as practicable, with any reasonable request made by an owners corporation to provide copies of financial statements of bank accounts—
  - (i) that contain money held by the manager on behalf of the owners corporation on trust; and
  - (ii) for any period within 3 years immediately preceding the request.

**S. 122(3) inserted by No. 4/2021 s. 53(3).**

- (3) Despite subsection (2)(c), a manager may hold money on behalf of separate owners corporations on trust in the same bank account if—
  - (a) each owners corporation—
    - (i) is on the same plan of subdivision; and
    - (ii) has consented to the money being held in the same account with the funds of other owners corporations; or
  - (b) the bank account is a statutory trust account held by—
    - (i) a licensed estate agent under the **Estate Agents Act 1980** ; or
    - (ii) an Australian legal practitioner within the meaning of the Legal Profession Uniform Law (Victoria); or
    - (iii) a licensee under the **Conveyancers Act 2006** .

**S. 122(4) inserted by No. 4/2021 s. 53(3).**

- (4) Money held by a manager on behalf of an owners corporation on trust for the owners corporation includes any interest earned.

**S. 122A inserted by No. 4/2021 s. 54.**

- 34 On 2 August 2022, an email with a subject of ‘Purchase of Lots from Hotel – Vote Now to Approve Legal Representation at VCAT’ was sent by Michelle Gabriel of Civium (‘the manager’). This email notified the lot owners of the ballot and stated it must be completed before 30 September 2022. The email starts by saying ‘We are the Owners Corporation Manager for Grand Central and write to you in that capacity and on behalf of the committee’ It also states ‘The purpose of this Special Resolution is to approve the commencement at VCAT so that the proceeding may continue. And further in bold **‘Your committee recommends voting in favour of the proposed Resolution’**. Below that it says **‘Are you being harassed?’** Some owners have complained about receiving unsolicited correspondence from Mr Brice Halls (who is not an Owner) about this matter. You may request Mr Halls to cease communication with you. If the harassment is serious/threatening and/or criminal in nature, you should report it to the police’.
- 35 On 5 August 2022, a reminder notice of ballot was sent to all lot owners who had not voted. A hyperlink was provided that allowed the lot owner to vote electronically. The document had the Civium Property Group banner on it.
- 36 On 9 August 2022, a further reminder was sent to lot owners who had not voted in the ballot. It was sent by the manager. The correspondence said in part:

Re: Purchase of Lots from Hotel – Vote to Approve Legal Representation at VCAT

Some questions have been raised during the current ballot to seek the consent from VCAT for the purchase Lots (sic) from the Hotel (i.e. gym, swimming pool changing rooms, sauna, various rubbish rooms and other access Lots) to convert them into Common Property. Attached are the answers.

**Purpose of Special Resolution**

The purpose of this Special Resolution (i.e. 75% majority vote) is to approve the commencement of the proceeding at VCAT so that the proceeding may continue (see below).

**Should You Vote?**

Your YES vote to commence the proceeding at VCAT is critical to achieve a favourable decision and convert these Lots into Common Property.

The conversion of the Lots into common property will remove the uncertainty of access to the gym, swimming pool changing rooms and toilets, rubbish rooms, and other areas.

The Committee has received estimates of duplication of these amenities and relocation of many electrical meters that far exceed the cost of purchasing the Lots.

To achieve a Special Resolution, 75% support is required in the ballot attached to this letter.

Your Committee Recommends You Vote in Favour of the Proposed Resolution.

**Did these communications breach sections 122(1)(e) or 117 of the Act?**

37 Mr Parsons' affidavit confirms that he, as secretary of the committee, caused this communication to be sent, and the exhibits to his affidavit confirm that these communications were forwarded by the manager.

38 It is the applicant's submission that there is no basis for the objectors' allegations. That 'these correspondences merely constitute encouragement to vote in the best interests of the Owners Corporation by approving the special resolution. Clearly, this correspondence is in accordance with the obligations of the Owners Corporation committee and manager'.<sup>8</sup>

39 The applicant also relies upon the Benson case<sup>9</sup> in which contacting lot owners who had submitted invalid, or possibly invalid votes was considered by the Tribunal to be appropriate and gave lot owners an opportunity to properly express their will or view.

40 In respect of the duties owed by a manager pursuant to s 122(1)(e) of the Act; I am of the view that the conduct of the manager was in breach of its obligations under the Act. This provision was included pursuant to the *Owners Corporations and Other Acts Amendment Act 2021*, and commenced operation on 1 December 2021.

41 Part of the second reading speech in relation to the amending Act states as follows:

The fiduciary duties of managers will also be expanded in relation to the procurement of goods and services on behalf of owners corporations, influencing of voting, and owners corporations' access to their financial records, helping ensure lot owners are aware of any beneficial relationships or other issues

42 The correspondence from the manager to the lot owners was not simply to encourage lot owners to vote, or to follow up those lot owners who had cast an invalid vote. It was three sets of correspondence from the manager during the course of an open ballot on 2, 5 and 9 August 2022. The correspondence

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<sup>8</sup> Applicant's outline of submissions dated 20 February 2023 at para 27.

<sup>9</sup> *Owners Corporation 4 PS 5398033E v Bensons Property Group Pty Ltd* [2019] VCAT 652 at [91].

on the 2 August 2022 was the initial communication about the ballot, and then two reminders followed in quick succession. Coupled with this flurry of communication, was the flavour of the correspondence on 2 and 9 August 2022. On both occasions the subject matter of the correspondence was in effect 'Vote Now to Approve Legal Representation at VCAT', and in both communications were the words highlighted in bold '**Your committee recommends voting in favour of the proposed Resolution**'. The correspondence of 9 August 2022 goes even further than this stating: Your YES vote to commence the proceeding at VCAT is critical to achieve a favourable decision and convert these Lots into Common Property.

- 43 These are not simply communications to lot owners to encourage them to vote, they are communications to lot owners urging them to vote in a particular way, whilst also suggesting that the conduct of Mr Halls was, or may be inappropriate. There is nothing neutral in the communications, neutral communications urging lot owners to vote would not breach the obligations as set out in the Act.
- 44 The communications have come from the manager, and I accept those communications were authorised by Peter Parsons acting as secretary of the committee. Notwithstanding that the manager was acting on the instructions of a committee member, it has breached s 122(1)(e) of the Act. I find that the manager, in sending the communications in the manner and timeframe it did, and taking account of the contents of those communications, has exerted pressure on members of the owners corporation in order to influence the outcome of a vote held by the owners corporation.
- 45 Owners corporation managers are agents who act upon the instructions of an owners corporation who has engaged them to perform certain functions on its behalf. In imposing this duty upon a manager, I am satisfied that the legislature intended that a manager could be in breach of its obligations by following the instructions of the committee of the owners corporation. If this was not the intention, I am of the view that no such duty would have been imposed by the legislature upon a manager. The introduction of this provision to the Act, was designed to afford protection to lot owners in relation to this conduct.
- 46 I am satisfied s 122(1)(e) of the Act has been breached.

**Has there been a breach by a committee member/s pursuant to their obligations under s 117 of the Act?**

- 47 There is no equivalent duty under s 117 of the OC Act that prohibits committee members from exerting pressure on lot owners to influence the outcome of a vote. There are however obligations to act honestly and in good faith, exercise due care and diligence, and act in the interests of the owners corporation.<sup>10</sup> There is also the requirement that a committee member must

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<sup>10</sup> Section 117(1) of the Act.

not make improper use of the member's position to gain an advantage for the member or any other person.<sup>11</sup>

- 48 The applicant submits that the correspondence authorised by Mr Peter Parsons merely encourages members to vote in the best interests of the owners corporation by approving the special resolution, and further that the applicant ordinarily leaves ballots open for an extended period of time to remind owners to participate and exercise their entitlement.
- 49 I am not persuaded by these submissions. Firstly, I have already found that leaving the ballot open for a period of 60 days is in breach of s 85 of the OC Act and the owners corporation via its committee is not permitted to do so. Secondly, authorising multiple communications to lot owners expressly encouraging them to vote in a particular way is not acting either in the best interests of the owners corporation, or in good faith. There is a dispute between members of this owners corporation as to whether the purchasing of the proposed lots is in the best interests of the owners corporation. The committee may hold views about this, but that is ultimately for determination by the Tribunal. It is not open to the owners corporation via its committee to express those views and encourage members to vote in a particular way.
- 50 In addition the egregious attack on Mr Halls in the correspondence of 2 August 2022 was not communication sent in good faith or in the best interests of the owners corporation. The manager was not acting unilaterally in circulating the communications, it was acting as authorised by the committee, and the owners corporation and its committee are accountable for the communications. I am satisfied that s 117 of the Act has been breached.
- 51 The objectors have made further allegations about the conduct of particular committee members. Firstly, it was alleged that Mr Peter Parsons acting as Secretary, and to whom the votes were forwarded, has attempted to persuade at least one lot owner to change his vote. In this regard, reference was made by the objectors to an email from lot owner Mr Mike Golding to Brice Halls dated 11 August 2022 at 11:33am which says as follows:

Hi Brice

I had a call from PP this morning. He apparently knew that I'd initially voted yes to the first ballot and no to this one. What surprises me is that he has information of the ballot – and I thought it was a secret ballot being run by civium {silly me}!

Just to let you know that he's doing a ring around now to chase up those who voted no! I'll not change my vote!

Cheers good buddy,

Mike

- 52 There is no wrongdoing by Mr Parsons as secretary being aware of and collating the votes. The email does not state that Mr Parsons requested Mr

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<sup>11</sup> Section 117(2) of the Act.

Golding to change his vote, and Mr Golding did not attend the Tribunal to give evidence about this. In those circumstances I am not satisfied that Mr Parsons has breached his obligations pursuant to s 117 of the Act as a result of these communications.

- 53 The second allegation made by the objectors relates to email correspondence from another lot owner Megan Kappelhoff dated 4 August 2022 at 09:54am to Brice Halls which states:

Hi Brice

I completely agree. I didn't really realise at first.

It wasn't until Dennis knocked on my door and asked me to sign a proxy that gave him my vote, that I realised this all probably wasn't above board.

Also personally I am not fussed either way whether the lots are purchased or not, I don't really use those areas, but at the same time, they are nice to have.

Thanks

Megan

- 54 The objectors state that they believe "Dennis" refers to Denis Croke, a committee member and the proxy holder for the hotel owner.
- 55 Ms Kappelhoff was not present to be cross-examined at the hearing. I am not satisfied that the contents of the email established on the balance of probabilities that there has been any wrongdoing by Mr Croke either pursuant to ss 117 or 89G of the Act, or indeed that the email is even in reference to him.
- 56 Given that the Tribunal has found that breaches of ss 85, 117 and 122 have occurred with respect to the conduct of the ballot, the question for the Tribunal then becomes what orders should the Tribunal make in respect of the application for the lifting of the stay?
- 57 The applicant relies upon *Owners Corporation 4 PS5398033E v Bensons Property Group Pty Ltd* (Owners Corporations) [2019] VCAT 652. Senior Member Vassie says in that decision the following:

The second reason why I did not accept the argument is that it does not follow, as a matter of law, that a failure (if there was one) to give 29 days' notice of the closing date invalidated the ballot or invalidated the interim special resolutions. The OC Act does not specify any consequence of non-compliance with s 85(1), so the purposes of the OC Act must be considered, including the purpose to provide appropriate mechanisms for resolution of disputes.

An act done in breach of a condition regulating the exercise of a statutory power is not necessarily invalid and of no effect. Whether it is depends upon whether there can be discerned all legislative purpose to invalidate any act that fails to comply with the condition. The existence of the purpose is ascertained by reference to the language of the statute, its subject matter and

objects, and the consequences for the parties of holding void every act done in breach of the condition.

Whether the failure to comply with the statutory provision was significant, or trifling, or something in between, is a relevant consideration.<sup>12</sup>

- 58 I cite with approval, the comments made by Senior Member Vassie in that decision. It is then for me to decide whether the failure to comply with ss 85, 117 and 122 of the Act were significant, or trifling, or something in between, and the legislative purpose of those provisions.
- 59 I am satisfied on the evidence and submissions before me that that failures to comply were significant. Keeping the ballot open for a period of 60 rather than 14 days, together with my findings in respect of the number of communications, and the content of those communications, likely resulted in an outcome of the ballot which would not have been achieved had the provisions of the Act been complied with. The flurry of correspondence sent by the manager of behalf of the committee on 2, 5 and 9 August 2022, urging lot owners to vote in favour of the ballot, the egregious comments made about Mr Halls, and the length of time that the ballot was open, in breach of s 85 of the Act, ultimately achieved a vote of 55% of total votes; something that may not have been achieved had the Act been complied with.
- 60 I find it was the intention of parliament in amending s 85 to put in place provision for a short and sharp ballot, one in which the outcome would be known within a short period of time, and in which there would be less of an opportunity for the exertion of pressure on a lot owner as to how to cast their vote. The fact that s 122 (1)(e) was also included in the recent suite of amendments; preventing managers from exerting pressure on lot owners as to how to cast their vote, also leads me to the conclusion that the amendments were designed to limit the opportunity for interference in the conduct of a ballot. One cannot look at each current amendment in isolation without considering the others. That is necessary to have a better understanding of the failings that the amendments were designed to remedy.
- 61 I have found that the ballot was open for 60 days, in circumstances in which it should only have been open for 14 days, and that during this period both the manager and committee of the owners corporation have failed to fulfill their obligations pursuant to ss 117 and 122 of the Act. The conduct of the applicant and its manager in the conduct of the ballot has irreparably tainted the ballot process and invalidates its outcome.
- 62 It is for those reasons that the Tribunal orders that the application be dismissed.
- 63 I note the objectors have raised a variety of other concerns in respect of the ballot including that the ballot results are untrustworthy, and that support amongst owners is dwindling. Having found that the results of the ballot are

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<sup>12</sup> At para [96].

invalid for the reasons provided above, I am not required to consider the objectors' other concerns.

C Price  
**Senior Member**