VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

OWNERS CORPORATIONS LIST VCAT REFERENCE NO. OC1861/2017

CATCHWORDS

Implied easement or right of way s.12(2) *Subdivision Act* 1988 (Vic). Access over apartment terrace.

APPLICANT	Owners Corporation PS507084R
RESPONDENT	Camilla Marley
WHERE HELD	Melbourne
BEFORE	Dr Rebecca Leshinsky, Member
HEARING TYPE	Hearing
DATE OF HEARING	19, 20 & 25 July 2018
DATE OF ORDER	15 October 2018
CITATION	Owners Corporation PS507084R v Marley (Owners Corporations) [2018] VCAT 1598

ORDER

1. The Tribunal finds that no implied easement or right of way under s.12(2) of the *Subdivision Act 1988* exists in relation to the applicant's proposal to cross the respondent's terrace.

2. The proceeding is dismissed.

Dr Rebecca Leshinsky
Member

APPEARANCES:

For applicant:	Mr J.A. Silver of Counsel Mr Sliver called Mr S. Kip, building inspector and surveyor, Mr T. Trainer, anchor points inspector and Ms M. Arturi, owners corporation manager.
For respondent:	Mr P.H. Barton of Counsel. Mr Baton called Mr B. Louden, commercial abseil technician, Mr A. Rodriguez, structural and forensic engineer, and Ms C. Marley.

REASONS

Background

1. The proceeding was part heard across 19, 20 and 25 July 2018. The Tribunal inspected the development on 20 July 2018, and orders were made on 25 July 2018: "The applicant and the respondent must file and exchange final submissions limited to 6 pages at 1.5pt font by 3 September 2018."

2. The respondent, Ms Camilla Marley, is the registered proprietor of Lot 62, a two level penthouse apartment on the fourteenth and fifteenth floors at 341 Ascot Vale Road, Moonee Ponds. The building is known as 'Mondo', and it is affected by Owners Corporation PS507084R (OC).

3. On the fourteenth floor, Lot 62 has an external terrace (terrace). The OC seeks an order that subsection 12(2) of the *Subdivision Act 1988* (Vic) implies a right of way from a door in the common area foyer on level fourteen, across the applicant's terrace, to a ladder (fixed to the south side of the apartment), and the area immediately above anchor points on Mondo's south and west sides.

4. The order sought by the OC was together with any ancillary orders necessary under section 165 of the *Owners Corporations Act 2006* (Vic), including that the respondent provide the applicant with a key to the common area foyer door.

5. An internal perimeter transparent glass wall has been erected within the terrace. On the west of the south side, there is a door which opens onto the area of about 1.2m, between the barriers and Mondo's edge.

6. As was set out in Mr Kip's report, the original design included an additional storey of fire stairs and a larger plant room, which would have provided access to the lightning rod. However, that space is now occupied by Lot 63 at levels fifteen and sixteen which covers three levels and cannot be made available. It is common ground that as built, which is somewhat different to the plan of subdivision, Mondo provides no other means of access to the lightning rod, or the anchor points, other than crossing over Ms Marley's terrace.

7. Access through the terrace has been a point of contention for some time, with a level of tension between the owners corporation and Ms Marley, particularly between Dr Marley, Ms Marley's father, and the OC.

8. The owners corporation claimed it required access via the terrace to carry out the following tasks:

   a. Inspection of the anchor points, twice annually (one day's access, per inspection);

   b. Inspection of the lightning rod, once annually (one day's access);

c. External window cleaning, once annually (five day's access), requiring use or the anchor points;

d. External repair of window leaks, through caulking (as and when required), requiring use of the anchor points; and

e. Repaint the building (once every few years, where the owners corporation deems it necessary), requiring use of the anchor points.

9. Whilst it is common ground that access is required over the terrace, Ms Marley denies the existence of any easement across her property, and is open to granting an access license to the OC.

10. The issue before me is whether the OC has a s.12(2) easement or more particularly a s.12(2)(e) right of way over Ms Marley's terrace.

s.12(2) easement or right of way

11. So far as it is applicable to the present proceeding, section 12(2) of the *Subdivision Act 1988* provides that there are implied, over any land affected by an owners corporation, and for the benefit of any common property, all easements and rights necessary to provide rights of way –

> if the easement or right is necessary for the reasonable use and enjoyment of the lot or the common property and is consistent with the reasonable use and enjoyment of the other lots and the common property.

12. The leading authority on s.12(2) is *Body Corporate No 413424 R v Sheppard* [2008] VSCA 118. That case involved a sixteen storey apartment building with plant and equipment located on the sixteenth floor and on the roof. This required regular access (apparently on average once per week) by various contractors to maintain the building and its air-conditioning, lift, boiler and other services. Convenient access (using a lift) to those facilities could only be obtained by walking through the applicant's penthouse apartment. Otherwise, the workers would have to climb up sixteen flights of stairs.

13. The following propositions emerged from the *Sheppard case*:

a. The plaintiff bears the onus of establishing that both the first and the second conditions of s.12(2) are satisfied in order to imply an easement or right [46].

b. 'Necessary' bears its ordinary meaning of 'essential'. It is not, however, to be construed in isolation, but in the context of the composite phrase, in which it is qualified by the broad concept of reasonable use and enjoyment of the benefited property. Further, it is the easement, rather than function it secures, which must be 'necessary'. The reasonable use and enjoyment of the property not only clearly exceeds mere use, but also admits consideration of the effect of the reasonable use and enjoyment of property if the function to be achieved by the easement is unavailable and of the costs or

detriments of securing the function by means other than the easement [80].

c. 'Necessary' was not be construed as 'substantially preferable' [48], [74]. As to necessity the Court of Appeal did not disagree with certain previous formulations or with that of the trial judge, Pagone J, which were:

- That the requirement of necessity in the first condition required something more compelling than convenience and more than a finding of the best or the most desirable means to secure the reasonable use and enjoyment of the property which would benefit from the implied easement or right (Pagone J) [26].
- Necessity was not equivalent to 'absolutely necessary' in the sense that the dominant land could not otherwise be used at all (Pagone J endorsing Osborne J in *Gordon*) [27].
- The concept of necessity required something 'more than the convenient, desirable or preferable option of various ones that may be available' (Pagone J) [29].
- 'Necessary' in the context of s.12(2) was "That which is indispensable; an essential, a requisite; a basic requirement of life as food, warmth." Its adjectival definition includes: "That cannot be dispensed with or done without; requisite; essential, needful, eg a necessary condition." (Beach J in *Burford*) [57]
- 'Necessary' meant that the easement was essential to achieving the specified function, in the sense that no alternative means of achieving the relevant function was feasible or reasonably available. In determining whether an alternative to the easement was reasonably available, all relevant circumstances, including physical factors, legal restrictions, safety considerations and cost should be considered [81]. If the alternative were reasonable, although involving some inconvenience or additional cost, an implied easement would not be necessary in the relevant sense [82].
- It was necessary to balance the risks entailed by the present system of access against other risks which would arise from workers' entry into private property pursuant to the easement (including false allegations of impropriety and carrying toxic chemicals through private residences) [37].
- Detriment caused by implication of the easement was relevant as whether s.12(2) applied [41].

14. In the *Sheppard case*, an appeal was disallowed against the conclusion of Pagone J that there was no easement because:

a. There were alternative, although more costly and less convenient means of accessing the roof, and an implied easement over the respondents' apartment was therefore not essential for the reasonable

use and enjoyment of the other apartments and the common property in the building [3];

b. If service personnel were to access the roof by walking through the respondents' apartment, it would involve a level of intrusion inconsistent with the reasonable use and enjoyment of that property [3].

15. In the circumstances of that case, the Victorian Court of Appeal found that neither condition of s.12(2) was satisfied. First, it found access via the applicant's penthouse apartment was not necessary for the reasonable use and enjoyment of the other apartments in the complex. The evidence was the workers could in practice carry out necessary servicing by climbing the sixteen flights of stairs. There were reputable companies prepared to provide that service on that basis. Secondly, the Court found the extent of the intrusion was so significant as to be inconsistent with the reasonable use and enjoyment of the penthouse apartment.

Determination

16. Having heard all the evidence and submissions, I find the applicant has not discharged the burden of proof that the easement '...is necessary for the reasonable use and enjoyment of ...the common property...'. Evidence was put by the applicant that a gantry can be built to enable alternate access to the roof and to the abseiling points. Various options were identified, all accessed from the existing louvred grill in the plant room, itself accessible by an unobstructed path through the plant room, which is common property. These options were a gantry from the plant room to the existing ladder, a very short gantry to a new ladder leading to the roof with the existing ladder repositioned next to the plant room grill, and a similar short gantry with repositioned ladder but additionally extended south over the existing internal glass terrace barrier, accessing the abseiling points adjacent to the terrace without going via the roof.

17. The applicant's counsel objected to evidence from the respondent's witnesses, especially from Mr Louden, and even whether Mr Louden should be allowed to appear as an expert witness. The costings raised by Mr Rodriguez were further objected to by the applicant. I note that the Tribunal is not bound by the rules of evidence and may inform itself on any matter as it sees fit (s.98(1) of the *Victorian Civil and Administrative Act 1988*). Even so, it is apparent to the Tribunal from its inspection of the development that there are alternative options for access to the anchor points, albeit, such options may be structurally complex and expensive. Although the applicant argued that abseiling from the roof was prevented for safety reasons (relating to the structural integrity of the balcony barriers) I agree with the respondent's submission that the same logic applies to its claim for an easement from the terrace door to the ladder, then to abseiling points on the roof and then abseiling down to anchor harness points adjacent to the terrace. The exiting window cleaning is already conducted from the roof

over the exiting glass barriers. Mr Kip did not dispute the structural evidence of Mr Rodriguez but raised concerns about difficulty of effecting the gantry option noting in particular that the proposal was 'disproportionately expensive'.

18. Even if the evidence of Mr Rodriquez and Mr Louden should carry little weight, they have raised other alternatives to traversing Ms Marley's terrace.

19. Accordingly, I am satisfied that there are other options for access to the anchor points and the common property areas. The respondent in her evidence submitted that she is prepared to grant a licence for access, at agreed times, which may even provide greater precision than an easement. Ms Marley suggested these may include barriers isolating the licensed area, a new door in the existing glass barrier and agreement on the terms of access through the foyer door. It is noted that the applicant's access to its installations has been to date via licence on various terms agreed with the respondent and two previous owners of the property.

20. As to the emergencies for the applicant to access, where no notice is practicable, I agree with the respondent that there is no need for an easement. Police or Essential services would be entering without notice required. Secondly, Rule 13 of the current OC rules state: '...one days notice in writing by the OC or its manager shall be permitted to inspect the interior of any lot, and test the electrical, gas or water installation or equipment...owners corporation, in exercising this power shall ensure that its contractors cause as little inconvenience to the lot owner or occupier as is reasonable in such circumstances'.

21. My finding that the first condition of s.12(2) is not satisfied is sufficient to determine this case. The parties made further submissions about the second condition. It was submitted that the easement was not consistent with the reasonable use and enjoyment of Ms Marley's lot. For the sake of Ms Marley's privacy, I will not articulate here all details regarding Ms Marley's privacy and security concerns, and I accept her evidence that she would not have purchased her apartment knowing there was an easement over her terrace.

22. Having considered all the evidence and submissions, the Tribunal finds that no implied easement or right of way under s.12(2) of the *Subdivision Act 1988* exists in relation to the applicant's proposal to cross the respondent's terrace.

Rebecca Leshinsky
Member