ACT CIVIL & ADMINISTRATIVE TRIBUNAL

LEONARD & ANOR v MICHIE & ORS (Unit Titles) [2019] ACAT 14

UT 25/2017

Catchwords: **UNIT TITLES —** who can bring proceedings against executive committee and executive committee members — can the tribunal remove executive committee members and preclude them from standing for election — can the tribunal decide whether there has been a breach of the Code of conduct for executive committee members — can owners corporation and executive committee maintain gardens on private property — is maintaining private gardens without meeting the statutory requirements a breach of the Code of conduct for executive committee members — can owners claim amount of moneys paid by the executive committee to gardener for work done on private property — dispute about minutes of executive committee — dispute about purchase of plants, gardening and other decisions of the executive committee — complaints of bullying, harassment and unfair gardening practices — whether members and executive committee members entitled to access to the records of the owners corporation

Legislation cited: *Unit Titles Act 2001* (repealed) ss 52, 53, 55, 123, 124, 125
Unit Titles Act 1970 (repealed) s 45
Unit Titles Amendment Act (No 2) 2008 (repealed)
Unit Titles (Management) Act 2011 (ACT) ss 16, 19, 20, 24, 29, 30, 39, 42, 46, 47, 77, 80, 88, 91, 119, 125, 127, 128, 129, Dictionary, Schedule 1, Schedule 2, Schedule 3

Cases cited: *Riley v The Owners Corporation Units Plan 706* [2018] ACAT 99

List of Texts/Papers cited:
ACT Government, *Nature strips* (Access Canberra, 3 December 2018), https://www.accesscanberra.act.gov.au/app/answers/detail/a_id/1379/~/nature-strips
Christopher R Kerin, *Guide to ACT Strata Title Law* (Kerin Benson Lawyers Proprietary Limited, 2017)
DC Pearce and RS Geddes, *Statutory Interpretation in Australia* (LexisNexis Butterworths, 8th edn, 2014)
Cathy Sherry, *Strata Title Property Rights* (Routledge, 2017)
LexisNexis, *Concise Australian Law Dictionary* (LexisNexis Australia, 5th edn, 2014)

Tribunal: Senior Member R Orr QC

Date of Orders: 31 January 2019
Date of Reasons for Decision: 31 January 2019

AUSTRALIAN CAPITAL TERRITORY)
CIVIL & ADMINISTRATIVE TRIBUNAL) UT 25/2017

BETWEEN:

FRANCES LEONARD
First Applicant

MARGARET GRACIE
Second Applicant

AND:

PETER MICHIE
First Respondent

RHONDA DANIELL
Second Respondent

JAMES HOURIGAN
Third Respondent

CHARLES DEARLING
Fourth Respondent

TRIBUNAL: Senior Member R Orr QC

DATE: 31 January 2019

ORDER

The Tribunal:

1. Declares that the applicants have rights under section 119(3) of the *Unit Titles (Management) Act 2011* to inspect the records held by the owners corporation, which include the records of the executive committee, in accordance with the terms of that section.

2. Notes that if requested by the applicants it will make an order as discussed in paragraph 9 of the reasons for decision requiring replacement of plantings outside Ms Gracie's unit on Temperley Street if this has not yet occurred.

3. Orders that the application otherwise be dismissed.

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Senior Member R Orr QC

REASONS FOR DECISION

1. The *Unit Titles (Management) Act 2011* (**Unit Titles Management Act** or **Act**) creates a regime which enables people to live together with others, where they each own units in a building complex, and they each have a share in the common property of the building complex. People in such a relationship sometimes get on and agree on how the building complex should be managed, but sometimes they do not. The Act provides mechanisms for resolving some of these disagreements. These mechanisms are essentially a form of democracy, where the majority decides, though there are some protections for the minority, particularly in relation to decisions which unfairly affect their property or other interests. The operation of these mechanisms, and disagreements which fall outside them, can result in a breakdown in the personal relationships between unit owners, but this is generally beyond the realm of the Unit Titles Management Act to remedy. This case demonstrates these basic propositions.

2. The applicants in these proceedings are Frances Leonard (**Ms Leonard**) and Margaret Gracie (**Ms Gracie**) (jointly the **applicants**) who are each the owners of one of the units in Tristania located within The Gardens in Nicholls, in the Australian Capital Territory. Tristania makes up Units Plan 1636 (**UP 1636**) and contains 27 residential town villas. Within The Gardens there are four such complexes, and the others are Melaleuca, Sequoia and Grevillia. Ms Leonard was a member of the executive committee for UP 1636 in 2017. Ms Gracie was a member of the executive committee for part of 2014.

3. The other members of the executive committee in 2017 are the respondents to these proceedings, namely Peter Michie (**Mr Michie**), Rhonda Daniell (**Ms Daniell**), James Hourigan (**Mr Hourigan**) and Charles Dearling (**Mr Dearling**) (jointly the **respondents**), and they each own a unit in Tristania.

4. Ms Leonard and Ms Gracie allege that there were a number of actions taken by the 2017 executive committee which were in breach of the Unit Titles Management Act or otherwise inappropriate. In summary these included providing for the owners corporation to pay for gardening on private property and government land, making decisions about minutes, purchasing plants for the gardens, arranging for the removal of hedges, organising mulching, planting

camellias, dealing with garbage and providing fencing. There were also general allegations of bullying and harassment by the respondents. It is argued that these actions amounted to a breach of the 'Executive committees — code of conduct' in Part 1.1 of Schedule 1 to the Unit Titles Management Act (**Code of conduct**).

5. Ms Leonard and Ms Gracie seek orders in relation to these actions under section 129(1) of the Unit Titles Management Act, in particular that the respondents be removed from the executive committee, be precluded from standing for the committee, and pay money to the applicants on the basis that the respondents are responsible for the gardener maintaining the private gardens of some unit owners.

Summary of Tribunal decision

6. Most of the issues raised by the applicants were resolved by the democratic decision-making processes provided for by the Unit Titles Management Act. These decisions reflected the views of the respondents, who were the majority on the executive committee. It is clear that relations between the parties deteriorated over these issues, but on the evidence before the Tribunal the respondents did not breach the Act in making the decisions, and there is no other basis for overturning the decisions.

7. For example, when Ms Leonard raised in August 2017 the issue of the owners corporation paying for gardening on private property at Tristania, this longstanding practice was stopped on 20 September 2017. This decision was confirmed at the executive committee meeting of 11 October 2017, notwithstanding the view of the respondents that the practice provided a benefit to the community of unit owners, views which they no doubt expressed forcefully as is often the case in democratic processes. Arguably this issue should have been addressed earlier by other executive committees, or general meetings, but the response by the respondents, the 2017 committee, was in my view appropriate and timely.

8. I do not think that the relevant actions of the respondents amounted to a breach of the Code of conduct, and even if it did I do not think that the Act currently allows for people to be banned from the executive committee by the Tribunal.

There is no basis for the respondents paying to the applicants an amount of money for the gardening on private land. Generally this matter of gardening on private property can now be dealt with by the new executive committee and, if necessary, a general meeting, in accordance with the requirements of the Act.

9. The evidence in relation to the other conduct raised by the applicants similarly does not show inappropriate conduct by the respondents in breach of the Act or the Code of conduct. I do note that the applicants in particular argued that the gardening services were provided in an unfair manner, in that some unit holders were benefitted inappropriately and some received little benefit. In my view it is important that the executive committee allocate such resources and services fairly, and also demonstrate this fairness in the information they provide to unit owners. In relation to one allegation of unfairness, in evidence on 23 May 2018 Mr Michie, the gardening coordinator, appropriately indicated that he would, as soon as possible, replace plantings outside Ms Gracie's unit which had died.[1] If that has not occurred, I am willing to make an appropriate order to require this to occur. The applicants can apply for this in writing, copied to the respondents, who can then express any contrary view also in writing. A declaration is made that the applicants have rights to inspect and take copies of records held by the owners corporation under the terms of section 119(3) of the Act. I do not think there is a basis for any other order, and the application is otherwise dismissed.

Application

10. The applicants relied on an amended application dated 6 December 2017 (**application**). At a preliminary hearing on 13 December 2017, some paragraphs of the application were deleted.

11. The application seeks a range of orders. Ms Leonard as an executive committee member and an owner seeks an order removing the respondents from the executive committee and precluding them from standing for election to the committee for five years.[2] Ms Gracie as an owner also seeks a similar order precluding the respondents from standing for election, and also a review of "the financial benefit and gain to the private properties and adjoining common

[1] Transcript of proceedings 23 May 2018 page 67
[2] Application, attachment 2 paragraphs 1(a), 1(b), 2(a) and 2(b)

properties [of the respondents]".[3] Ms Leonard also raised issues as an executive committee member about the June 2017 executive committee meeting minutes, a resolution at the 11 October 2017 meeting, and the 11 October 2017 meeting minutes.[4] She also raised issues both as an executive committee member and owner concerning the provision of documentation.[5]

12. Ms Leonard, as an owner, also seeks payments from the respondents relating to moneys paid by the owners corporation for gardening on private property.[6] Ms Gracie makes a similar claim, and also seeks an order to review the financial benefit and gain to the private properties and adjoining common properties of the respondents.[7] The applicants also seek any other orders the Tribunal thinks necessary.

13. On 6 February 2018 the applicants sought orders delaying the annual general meeting of the owners corporation for UP 1636, and dealing with related matters, because of these proceedings. This application was declined, but the Tribunal ordered that the applicants could prepare a short document explaining their application for circulation to owners before the annual general meeting and were entitled to raise the matters set out in the document at the meeting. The applicants did prepare such a document and it was circulated.[8]

14. The substantive hearing before the Tribunal took place on 8 March, 4 and 5 April, and 21, 22 and 23 May 2018. The applicants represented themselves. Mr Mark Walsh instructed by Mr Alex Donley of Mills Oakley appeared for the respondents.

15. In addition to the application, Ms Leonard provided a statement of facts and contentions (**exhibit A2**), gave further oral evidence and was cross-examined. Ms Gracie also provided a statement of facts and contentions (**exhibit A20**), gave further oral evidence and was cross examined. Mr Gehrig, a principal of CJ Gardens and Maintenance, the gardener for UP 1636, was the subject of a

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[3] Exhibit A20, part 3 paragraphs [1]-[2]
[4] Application, attachment 2 paragraphs 1(c)-(e)
[5] Application, attachment 2 paragraphs 1(f)-(i) and 2(c)
[6] Application, attachment 2 paragraph 2(d)
[7] Exhibit A20, part 3 paragraphs [3]-[5]
[8] Exhibits R1 and R3

subpoena to give evidence and produce documents, which he did. There was also a subpoena to Ms Daniell, who produced documents and gave evidence as a respondent. A large number of documents were tendered by the applicants including documents in reply to the respondents' case.[9] The applicants also provided written submissions dated 18 August 2018 and a written reply to the respondents' written submissions.

16. The respondents provided submissions in response to the amended application on about 19 February 2018,[10] a statement of facts and contentions[11] and a further outline of submissions dated 8 March 2018. The respondents provided written statements – respectively exhibit R20 (Mr Michie), exhibit R17 (Ms Daniell), exhibit R14 (Mr Hourigan) and exhibit R16 (Mr Dearling) – and gave oral evidence and were cross-examined. A number of documents were tendered by the respondents. The respondents provided an outline of closing submissions dated 6 September 2018.

Standing

Section 125 – owner v owners corporation

17. The respondents raised a range of preliminary issues which it is appropriate to address before looking to the applicants' specific claims. Some of these concerned the standing of the applicants to bring these proceedings. These issues concern the operation of Part 8 of the Unit Titles Management Act in relation to dispute resolution. Section 125 of the Act provides that it applies to a dispute relating to an owners corporation for a units plan between the owners corporation and an owner or occupier of a unit in the units plan or an executive member. The applicants however made no claim against the owners corporation itself.

Section 127 – executive committee member v executive committee

18. Section 127 of the Unit Titles Management Act applies to a dispute relating to an owners corporation for a units plan between the executive committee of the corporation and an executive member (that is, a member of the executive committee).[12] A party to the dispute may apply to the ACAT for an order in

[9] Exhibits A17, A18 and A19
[10] Exhibit R10
[11] Exhibit R11
[12] Unit Titles Management Act, Dictionary

relation to the other party if the application relates to the dispute. Ms Leonard brings her claim in part under this section. Ms Leonard was an executive committee member in 2017 when most of the events relevant to these proceedings took place. The executive committee is not a body corporate with succession. It is therefore only a group of individuals. The proceedings are against the four members of the executive committee in 2017, other than Ms Leonard herself. Ms Leonard does not bring proceedings against the whole committee, but it seems inappropriate to require her to bring proceedings against herself in order to come within section 127.

19. Ms Leonard and two of the respondents, Mr Hourigan and Mr Dearling, are no longer executive committee members.[13] The respondents seemed to argue that the change in the capacity of Ms Leonard, that is that she is no longer an executive committee member, prevented her bringing proceedings under section 127.[14] If the respondents are arguing that Ms Leonard cannot, after she has ceased to be an executive member, pursue her claim, I do not agree with this. The dispute relates to events when she and the respondents were executive committee members. The proceedings were commenced when she and they were executive committee members. The jurisdiction of the tribunal is in relation to a dispute concerning those past events. If the respondents are arguing that there may be little or no utility in making orders given the change in the status of the parties, this is clearly an issue if such orders would otherwise be made. But in my opinion Ms Leonard can pursue her claim against the respondents concerning events in 2017 under section 127 of the Unit Titles Management Act.

Section 128 – unit owner v unit owner

20. Section 128 of the Unit Titles Management Act provides that it applies to a dispute relating to an owners corporation for a units plan between two or more unit owners. A party to the dispute may apply to the ACAT for an order in relation to the other party if the application relates to the dispute. The respondents argued that this section did not provide a basis for the applicants, as owners, to bring proceedings against the respondents, as executive committee members; the

[13] Exhibit R1
[14] Outline of respondents' submissions 8 March 2018 [21]

argument was that proceedings could only be brought against owners as executive members by the owners corporation itself under section 125 or other executive committee members or the executive committee under section 127. Most of the matters raised in these proceedings are between Ms Leonard as an executive committee member against the other executive members, as discussed in the previous paragraph. For the most part the issue in relation to section 128 does not therefore arise in relation to Ms Leonard.

21. But the claim by Ms Gracie is as an owner, against other owners in their capacity as executive committee members. This raises the question as to whether section 128 allows this. On balance I think it does, for the following reasons. First, the plain words of section 128 provide for this; there is no express limitation in section 128 or elsewhere. In contrast there are some express limitations in section 126(3). Second, it will sometimes be difficult to determine whether the claim by an owner is against another owner as owner or as executive committee member, as it is in this case. Third, as discussed below, while the Act contains a Code for executive committee members, it provides no specific provisions as to how the Code is enforced. A broad view of section 128 would enable owners to do this.

22. But the principle argument against this view is that it renders section 127 unnecessary; generally all provisions are to be given some effect, and there is a presumption against treating provisions as superfluous.[15] If section 128 allows an owner, who is an executive committee member, to bring proceedings against other owners who are executive committee members, what is the point of section 127? It is important to look therefore at the purpose of section 127. Section 127 has been in the Unit Titles Management Act since its commencement. The explanatory statement for the Bill that became the Act in 2011 stated that the section "**clarifies** that an executive committee may take action against an executive committee member or vice versa" [emphasis added]. It was said that this provision was equivalent to sections 123 and 124 of what was then the current *Unit Titles Act 2001* (**UTA**), but that the table there was "difficult

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15 DC Pearce and RS Geddes, *Statutory Interpretation in Australia* (LexisNexis Butterworths, 8th edn, 2014) [2.26]

to read", and the new sections "make it easier to determine who may apply to the ACAT for an order in relation to a dispute".[16] The relevant table in section 123 of the UTA clearly provided that ACAT disputes included ones between the executive committee and a member of the executive committee, as well as ones between the owner or occupier of a unit and another owner or occupier of a unit.

23. These remedies evolved from those in the UTA at its commencement in 2001. This included section 55 which provided that the Magistrates Court may make orders against an executive committee or owners corporation if they fail to exercise a function under the UTA, on the application of a unit owner or anyone else with an interest in a unit or the common property. The Court could order the corporation or executive committee to exercise the function or make any other order it considers just. This section was omitted by the *Unit Titles Amendment Act (No 2) 2008*, and the explanatory statement for the Bill that became that Act stated at page 8 that this responded to the creation of the ACAT, with the functions dealt with by the Magistrates Court now to be dealt with by the ACAT. New provisions, now in Part 8 of the Unit Titles Management Act, provided for those matters that may be dealt with by the ACAT and who may apply to the ACAT. There is no suggestion that the pre-existing right of owners to bring proceedings against an executive committee was to be removed.

24. The UTA also included provisions for dead lock orders to be made by the Magistrates Court in relation certain special motions of an owners corporation, later amended to also allow orders against an executive committee, which could be brought by the owners corporation, a member or a mortgagee's representative (sections 123 to 125). These provisions have now also been folded into Part 8 of the Unit Titles Management Act, but again there is no suggestion that the pre-existing right of owners to bring proceedings against an executive committee was to be removed.

25. Therefore, reading a limitation into section 128 of the Unit Titles Management Act would be a significant reduction of the express rights owners had under the UTA, and I can find no suggestion that that was intended, or any articulation of a

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16 Explanatory Statement, Unit Titles (Management) Bill 2011 page 30

rationale for introducing such a limitation. Reading in the limitation would mean that members cannot directly challenge executive committee decisions, or raise Code issues, even where these have a significant impact on them. As noted in the explanatory statement quoted in paragraph 22 above, it may be that section 127 rather simply clarifies that an executive committee may take action against an executive committee member or vice versa, rather than limiting the general rights of owners to bring proceedings against other owners for things they do as executive committee members.

26. I have therefore proceeded on the basis that the claims by Ms Gracie as an owner can be made against the respondents as owners in relation to things they have done as executive committee members under section 128. This issue was however not fully argued. Given that Ms Leonard can bring the proceedings under section 127, and that she raises many of the same issues as Ms Gracie, and the outcome of the proceedings, this issue does not need to be fully determined.

Responsibilities of executive committee members

27. Another preliminary point involves section 46 of the Unit Titles Management Act which provides that an executive committee member must comply with the Code set out in Part 1.1 of Schedule 1 to the Act. The Code deals with the obligations of an executive committee member concerning understanding of the Act and Code, honesty and fairness, care and diligence, acting in the owners corporation's best interests, complying with the Act and the Code, nuisance, unconscionable conduct, and conflict of interest. These obligations fall on executive members individually; they do not fall on the committee as a whole.

28. The Act says nothing about how these obligations are enforced. Breach of the duties does not appear to be a criminal offence or give rise to a statutory civil penalty regime. It may be that it could be relevant to negligence claims.[17] In contrast, if there is a failure to comply with some operational obligations (such as keeping minutes, and records and accounts), each executive committee member commits an offence (Schedule 2, sections 2.1(4), 2.2(4) and 2.3(2)).

[17] Christopher R Kerin, *Guide to ACT Strata Title Law* (Kerin Benson Lawyers Proprietary Limited, 2017) [11.06]

29. In their very general terms the provisions in the Act in relation to the orders the Tribunal can make (section 129) can extend to some claims in relation to the Code. These on their face may allow proceedings for an order requiring an executive member to do something required by the Code, or refrain from doing something in breach of the Code (section 129(1)(a) of the Unit Titles Management Act), particularly in light of the clear statutory obligation to comply with the Code in section 46. It may allow for breaches of the Code to be taken into account in proceedings concerning motions and decisions, especially of the executive committee (section 129(1)(f) and (g)). It may allow for declarations that an executive committee member has breached the Code (section 129(2)).

30. But the respondents argued that the Tribunal could not make orders removing and banning them from holding the position of executive committee member for breach of the Code, or anything else. I think this is correct, for the following reasons. It is true that section 129(2) provides that the Tribunal may make any other order it considers reasonably necessary or convenient to resolve a dispute. But this power is limited by the context and purpose of the Unit Titles Management Act. Part 8 concerns dispute resolution, and sections 125, 127 and 128 make it clear that these are disputes "relating to an owners corporation" between various people. Section 129 generally provides for orders requiring a party to do or not do something, or in relation to resolutions. This focusses on disputes about whether people should or should not do certain things, and management of the owners corporation. Removing and banning a member from holding a position on the executive committee generally does not resolve the type of disputes set out in Part 8 of that Act. Such an action would not be about whether a person should or should not do something under the Act, or about management decisions. Rather this would be an action which in effect punishes the person for past behaviour and prevents future, but unspecified, behaviour.

31. It is true that section 129(1)(k) provides for the appointment of an administrator, who can exercise the powers of the executive committee or an office-holder in the committee. Past actions of the committee or member may be relevant to such an appointment. But such an order is primarily aimed at providing a circuit breaker for decision-making and a better decision-making regime. Removing and

banning particular executive committee members does not do this; it would provide no guarantee about who the replacement members would be. But most importantly there is an express statutory power for taking the significant step of appointing a manager. There is no express statutory power for removing or banning executive committee members, notwithstanding that such a power would have very significant consequences for the executive members concerned.

32. Further, such a power would significantly interfere with the democratic processes of the owners corporation, which are clearly pivotal provisions in the Act and reflect the underlying purpose of the legislation. Owners corporations operate as 'mini-democracies', with all owners automatically members of a governing body, which generally by a majority of votes makes rules and elects the executive committee to act on their behalf, and which executive committee in turn generally operates on the basis of a majority of votes.[18] The removal of executive committee members and banning of owners from these positions would remove a democratically elected executive committee member, prevent them from standing for re-election, and prevent the members of the owners corporation from electing them to the executive committee. This would be a significant interference with the rights of the members concerned to continue and stand again for election, and the rights of all members to have their past choice honoured, and have a free and full choice in future elections.

33. The Unit Titles Management Act specifically provides in section 39(5) that an executive committee member may be removed by the ordinary resolution that elects another member of the corporation to replace the removed member until the next annual general meeting.[19] This is the appropriate process for removal of an executive committee member, which reflects the democratic nature of the owners corporation. Such a resolution can be subject to review in the tribunal.

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[18] Cathy Sherry, *Strata Title Property Rights* (Routledge, 2017) page 48

[19] The Queensland legislation specifically provides that if a member of a committee breaches the Code the body corporate can remove the member from office at a general meeting: see for example the *Body Corporate and Community Management (Standard Module) Regulation 2008* (Qld), sections 34 and 35

34. I think that the tribunal could only make orders removing an executive committee member and banning them from standing for re-election on the basis of an express statutory power. There is currently no such power. However, given the outcome of these proceedings, in which no finding is made of a breach of the Code, this issue is not directly relevant. But as discussed above at paragraph 29 it seems that the tribunal may order an executive member to do something required by the Code, or refrain from doing something in breach of the Code, allow for breaches of the Code to be taken into account in proceedings concerning motions and decisions, and allow for declarations that an executive committee member has breached the Code. The allegations in relation to breaches of the Code are considered on this basis.

35. It is also noted that the tribunal can under section 129(1)(e) declare that a resolution of an executive meeting is void for irregularity. The applicants seek such orders. Section 129(1)(f) allows the tribunal to make an order repealing or amending a resolution of an executive committee meeting based on a merits review. Although it was not always clear whether issues were raised on this basis, in effect it seems that in some cases the applicants also sought such orders in relation to some decisions. One potential basis for doing so is if the action of the majority at the meeting was oppressive or unfairly prejudicial to some owners. But the majority of decisions raised by the applicants in these proceedings do not give rise to such issues; rather most of the decisions challenged are of a routine administrative nature in relation to the day to day management of the complex, in particular in relation to gardening. These were decisions made by majority vote of the committee in accordance with section 2.10 of Schedule 2 to the Act. In such circumstances the applicants need to show that the decision was not the correct and preferable one for the tribunal to intervene. Where the decision is one which chooses a reasonable option, from a range of such options, in relation to routine administration, in my view the fact that it has majority support makes it difficult for the applicants to succeed in such a claim. In these proceedings the issues of whether an action breached the Code and whether a related decision should be amended became intertwined, so both are often addressed.

2018 annual general meeting

36. Another preliminary point which should be noted is that, as discussed above, the Tribunal ordered that the applicants could prepare a short document explaining their application for circulation to owners before the 2018 annual general meeting and were entitled to raise the matters set out in the document at the meeting. The applicants did prepare such a document and it was circulated. This document was tendered by the respondents in these proceedings. It outlined these proceedings, and indicated that if they were successful "this will very likely mean that within a matter of months a general meeting will need to be held" as acknowledged by the applicants and the respondents' legal representatives. It indicated that some of the matters brought before the Tribunal included meeting minutes, gardening related matters – in particular gardening undertaken on private property – irrigation laid on private property, purchasing a large number of plants, removal of plants, acceptance of an expensive quote for mulching, purchase of a nail gun, and possible non-compliance with the Unit Titles Management Act.[20]

37. The respondents also tendered a statement of agreed facts in relation to the annual general meeting which indicated it was held on 15 February 2018, that Ms Leonard and Ms Gracie were in attendance and exercised their voting rights, that a new executive committee of seven members was elected effective from 15 February 2018, and that Ms Leonard and Ms Gracie were not elected to the executive committee but that Mr Michie and Ms Daniell were.[21] The respondents emphasised that many of the issues raised by the respondents were now in the hands of the new and democratically elected executive committee.

38. The particular issues raised by the applicants are now considered.

Minutes of 7 June 2017 meeting

39. The executive committee for the owners corporation of UP 1636 met on 29 March 2017. According to the minutes, Ms Leonard was an apology. The chair was Mr Hourigan, and Mr Michie, Mr Dearling and Ms Daniell were also present. The minutes noted under the heading "7. Gardens", "Temperley Street: Dead

[20] Exhibit R3
[21] Exhibit R1

Camellias to be removed by gardener. Crepe Myrtle to be replacement planting when water available. Approved. Action: Peter [Mr Michie]". The minutes also noted under the heading "10. Inventory", "Works required for Tristania for 12 month period for common areas. – Garden – Minor Works – Major Works Approved. Action: Fran [Ms Leonard]".[22]

40. The executive committee met again on 7 June 2017. The chair was Mr Hourigan; the secretary, Ms Leonard. Mr Michie and Ms Daniell were also present.[23]

41. A document was considered at that meeting, which I will call 'the inventory of garden tasks.' There are a number of versions of this document in evidence, which appears to have been the one requested by the March meeting under item 10. Ms Leonard said that she sought assistance from Mr Michie in relation to preparing a version of this document for the June meeting. She said that on 4 June 2017 she and Mr Michie walked around the complex to compile a list of gardening work to be undertaken over the next 12 months to be added to the inventory. She said that as soon as Mr Michie mentioned items on areas she believed to be on private property she questioned Mr Michie. This was the beginning of her concern that the executive committee was arranging and paying for gardening works on private property, which is discussed further below at paragraphs 58 to 97.[24]

42. It is clear that the version of the inventory of garden tasks before that meeting on 7 June stated for item 26 under the heading "Task (description)" as follows: "Temperley st – (Common property) – Purchase seven crepe myrtle – (plant at unit 19 – Rhonda, plant between unit 18 and 17 – Margaret and Gillian, plant two in front of unit 15 – DHA, plant two in front of unit 14, plant in front of unit 11) …". It then, under the heading "BCC – person responsible", stated "Peter [Mr Michie] to co-ordinate" and for action stated: "Undertaken at condusive time for plant survival – Spring?"[25]

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[22] Exhibit R12 page 2
[23] Exhibit A2 [65]-[69]
[24] Exhibit A2 [58]-[62]
[25] Exhibit A3 page 3

43. Ms Leonard said that she met with Mr Hourigan sometime after the meeting to work on the minutes. Mr Hourigan agreed with this. Ms Leonard said that in relation to the crepe myrtles she "clearly asked Mr Hourigan that wouldn't we be getting a quote … and he said yes" and on that basis she changed the inventory of garden tasks document with the agreement of Mr Hourigan to read: "Quote for …" instead of "Purchase …"[26] In oral evidence Ms Leonard characterised this as Mr Hourigan instructing her to change the document.[27]

44. Mr Hourigan stated that Ms Leonard asked him if they should make the change; he stated that "as the record was only a draft, and I was not aware of the significance of the change, I said words to the effect 'ok'".[28] He stated that his impression was that Ms Leonard was typing the minutes and he knew that "we had time to check any variations to any discussions we had in the minutes".[29] There was therefore some minor disagreement as to the process for making the change, but agreement that Ms Leonard made the change in consultation with Mr Hourigan.[30] Ms Leonard agreed that the version of the inventory of garden tasks before the meeting said "purchase" not "quote".[31]

45. Pausing here, it is noted that minutes are the official written record of the proceedings of a meeting. There is no dispute that the document before the meeting stated "purchase seven crepe myrtle". In my view this should have been the document referred to in the minutes. Of course the inventory of garden tasks could subsequently be developed and changed for other purposes, but the document in the minutes should have been the document before the meeting.

46. Ms Leonard said she sent out the minutes while with Mr Hourigan.[32] She provided a copy of an email from Mr Hourigan to the committee enclosing the minutes dated 9 June 2017, an email between her and Mr Hourigan about the minutes dated 13 June 2017, then copies of multiple emails from Mr Hourigan to the

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[26] Exhibit A3 page 7; transcript of proceedings 8 March 2018 page 54
[27] Transcript of proceedings 8 March 2018 page 135
[28] Exhibit R14 (statement of Mr Hourigan) [8]
[29] Transcript of proceedings 21 May 2018 page 83
[30] Transcript of proceedings 17 March 2018 pages 54-56, 135 and 145-147; transcript of proceedings 21 May 2018 page 83
[31] Transcript of proceedings 17 March 2018 page 58
[32] Exhibit A2 [67]

executive committee members attaching the minutes dated 14 June 2017, and a copy of an email from Mr Hourigan to the committee with the minutes dated 26 June 2017.[33] No explanation was given as to why this occurred, but as noted below, executive committee members stated that the minutes document was corrupted and could not be opened. There was some dispute about these emails, but in my view it is not necessary to resolve this issue.

47. Section 42 of the Unit Titles Management Act provides that the functions of the secretary are, "on behalf of the executive committee", to prepare and send out to executive members minutes of executive meetings. It is clear however that it is the executive committee itself which finally determines the terms of the minutes. Section 2.10 of Schedule 2 to the Unit Titles Management Act provides that at meetings of an executive committee, all matters must be decided by a majority of the votes of the executive members present and voting.

48. A further meeting of the committee was held on 1 August 2017. The chair was Mr Hourigan the secretary, Ms Leonard. Mr Michie and Ms Daniell were also present. Ms Leonard said that the minutes of the meeting of 7 June 2017 were accepted by the executive committee members at the meeting.[34] Mr Hourigan said that he could not open the email containing the 7 June minutes, and that when he asked at the meeting for a copy, "Rhonda [Ms Daniell] and Peter [Mr Michie] advised me that they could not open the minutes and that they did not have a copy."[35] Ms Daniell confirmed this.[36]

49. Ms Leonard stated that the minutes of the August meeting were sent out on 2 August 2017. These provided in item 2 that the "Minutes of previous Meeting …" were "Accepted".[37] There were a range of comments in relation to these minutes. It is in this period that Ms Leonard tendered her resignation as secretary, but not as member of the committee. She stated that she had had enough, and was tired of the run around she had been given and the way in which business was

[33] Exhibit A2, attachments 6-8; transcript of proceedings 22 May 2018 pages 2-21
[34] Exhibit A2 [65]-[69]
[35] Exhibit R14 (statement of Mr Hourigan) [12]
[36] Exhibit R17 (statement of Ms Daniell) [15] and [16]
[37] Exhibit A5

undertaken where matters were discussed with little action and remain outstanding.[38]

50. A further meeting was held on 11 October 2017 at the offices of City Strata, the manager for Tristania. Ms Leonard stated that at this meeting there was still no resolution in regard to the minutes of 7 June 2017, and now of 1 August 2017. Ms Leonard stated that she believed both minutes had been agreed. She noted that Mr Hourigan, Mr Michie and Ms Daniell were disputing this. The minutes of this meeting on 11 October were produced by Ms Deb George from City Strata. There is said to be a range of versions. The version provided by the respondents stated in relation to the minutes of the meeting of 1 August 2017: "Pending provision to the Strata Manager of the approved 7 June 2017 Minutes for filing with the Owners Corporation records. The Strata Manager noted that these Minutes had not previously been received by City Strata".[39] There is a further issue in relation to item 5 which is discussed below at paragraphs 98 to 108.

51. There was a meeting on 14 December 2017, attended by Mr Hourigan, Ms Leonard, Mr Michie and Ms Daniell. The minutes recorded that the majority of the Committee accepted what was a new version of the 7 June 2017 meeting minutes with the attachment, as distributed to the executive committee by the Chairperson on 5 December 2017. The minutes of 14 December 2017 stated that Ms Leonard noted her strong disagreement with the copy of the new minutes for the June meeting tabled, as the minutes from the June meeting were part of the current ACAT dispute.[40] The minutes as accepted stated that a matter discussed at the June meeting was "Inventory attached" and the outcome was "Accepted". The inventory of garden tasks attached provided in relation to item 29: "Temperley st (Common property) – Purchase seven crepe myrtle". There was then an indication as to where these were to be planted. The inventory stated "Peter to co-ordinate" and then "undertaken at condusive time for plant survival – Spring?"[41]

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[38] Exhibit A2 [70]-[91]
[39] Exhibit R12 page 9
[40] Exhibit R12 page 14
[41] Exhibit R12 pages 4-5

52. The minutes of the 14 December 2017 meeting also indicated that the majority of the committee accepted the 1 August 2017 minutes with the amendment that the 7 June minutes be shown as deferred rather than accepted. It is noted that Ms Leonard stated her strong disagreement with adopting the 1 August 2017 minutes as they were part of the current ACAT dispute.[42] The majority of the committee also accepted the minutes from the 11 October meeting with some amendments.[43]

53. Ms Leonard seeks an order that her version of the 7 June 2017 minutes be accepted, and that orders be made in relation to the executive committee members in light of their conduct in this matter. The Tribunal will not do so for the following reasons.

54. First, Ms Leonard's version of the minutes are on her own evidence incorrect. They do not reflect the inventory of garden tasks which was before the meeting. Second, it is for the executive committee to determine the minutes of the meeting. This was finally done at the meeting of 14 December 2017. Even if Ms Leonard's version of the minutes of the 7 June meeting were accepted at the 1 August meeting, which she asserts but the respondents disagree with, the committee can revisit this and change this decision. Ms Leonard disagreed with this decision on 14 December, as she was entitled to do, and this is appropriately noted in the minutes, but she was in a minority. The Unit Titles Management Act provides, as noted, for the resolution of disputes in the committee to be decided by a majority of votes. It is true that in so acting the committee members are required to comply with the Code of conduct for executive committee members. But I see no basis for saying that the relevant members did not do so. In particular, as I have noted, I think Ms Leonard's version of the minutes was wrong, and it was clearly open to the other members of the committee to take the same view. Similarly it was open to the majority to accept the version of the minutes of the 11 October meeting which they thought most appropriate.

55. Third, the fact that issues were before the Tribunal did not prevent the committee with dealing with them. There was no order of the tribunal, or any court or other

[42] Exhibit R12 page 14
[43] Exhibit R12 page 4-5

body with authority, preventing this. Fourth, it is true that there was some delay in finally resolving the relevant minutes, but this was not unreasonable in the circumstances.

56. Fifth, if the substantive issue is whether the crepe myrtle should in fact have been purchased, the executive committee meeting on 29 March 2017 had approved that the dead camellias were to be removed by the gardener and replaced by crepe myrtle and that Mr Michie was to attend to this.[44] In my view there can be no criticism of Mr Michie implementing this resolution, or with the executive committee supporting this implementation of its decision. The decision was confirmed again on 11 October, and is discussed further below at paragraphs 98 to 108.

57. On this basis, I do not see any basis for an order under section 129(1)(e) or (f) of the Unit Titles Management Act in relation to the decisions of the executive committee in this regard; the applicants have shown no basis on which to find the decisions void for irregularity, nor any basis for finding on a merits review of the decision that they were incorrect or not the preferable decisions. I do not see any basis for a finding that that the respondents breached the Code in relation to these decisions.

Gardening on private property

58. Ms Daniell and Mr Michie gave evidence that there was a longstanding practice which existed at Tristania where gardening services were provided by the owners corporation for the private property areas internal to the complex, outside and adjacent to the private property courtyards of units, and abutting the common property gardens.[45] Mr Michie said that he advised new owners of this practice.[46] The respondents stated that this practice was based on a view that there was a resolution which had been passed allowing this when the complex was formed.[47]

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[44] Exhibit R12 page 2
[45] Exhibit R20 (statement of Mr Michie) [12]-[13]; exhibit R17 (statement of Ms Daniell) [36]-[39]
[46] Transcript of proceedings 23 May 2018 page 83
[47] Exhibit R10 [15] and [25]

59. Mr Michie stated that the aim of the practice was to ensure the integrity of the overall appearance of Tristania.[48] Ms Daniell stated that she believed the custom had been implemented in a motion and that there was great utility in the practice as many plantings on common property were continuous to private property, for example hedges and carpet roses. She believed that the hedging and pruning of these at the same time was reasonable and in the best interest of the owners corporation.[49] There was evidence that this practice was also in place in Sequoia, another complex similar to Tristania, and had been formalised there in the current House Rules which provided that maintenance of the front gardens of units, along with the common property, is done by the gardener employed by the owners corporation, unless otherwise arranged.[50]

60. Mr Dearling indicated that he had understood that a previous executive committee had formally put in a rule to acknowledge this arrangement, though he had subsequently been informed this was not the case, and also that "the owners corporation has always voted to allow the arrangements to continue through their approval of the budgets and levies at each year's annual general meeting". He stated that each resident received a benefit from this arrangement, and that the gardener did an excellent job of maintaining the appearance of Tristania.[51]

61. Ms Gracie stated that in 2014, when she was a member of the executive committee, she raised with it that the gardener should not be engaged by the committee to look after private property gardens. However she said that the gardener under the instruction of the committee continued to maintain private property. Ms Gracie resigned from the committee in September 2014, and the email doing so raises a range of issues, but not the gardening on private land or the unfair allocation of gardening resources (though the construction of garden beds for vegetables on common property was raised).[52]

62. Ms Gracie stated that she made attempts to have motions added to the agenda at two annual general meetings, but that the executive committee refused on both

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[48] Exhibit R20 (statement of Mr Michie) [18]
[49] Exhibit R17 (statement of Ms Daniell) [38]-[39]
[50] Exhibit R18; exhibit R19
[51] Exhibit R16 (statement of Mr Dearling) [10]-[13]
[52] Exhibit A19, attachment 4; exhibit A20 page 3 [6]

occasions.[53] The minutes of the annual general meeting held on 18 February 2015 indicate that at the meeting Ms Gracie had expressed "no confidence in the elected committee members as … they had breached the Unit Titles (Management) Act 2011 in relation to the code of conduct and breaking rules of the act (sic)". The gardening on private land or the unfair allocation of gardening resources is not specifically mentioned in the minutes, but this is clearly a short summary of what was said. The minutes indicate that the strata manager advised that for a motion — presumably a no confidence motion — to be added to the annual general meeting agenda it must have the support of the executive committee or 25% of the owners who are entitled to vote, and Ms Gracie had not advised she wished to add a motion and it did not have support via either method.[54]

63. Mr Michie agreed with Ms Gracie's evidence to some extent. He stated that he recalled that Ms Gracie raised this issue in 2013 or 2014, and it was explained to her that this was a "custom which was adhered to by the complex" though he admitted that Ms Gracie advised that she did not agree with it. Mr Michie stated that at that time there was "no suggestion of illegality or that the rule had not been properly ratified."[55] It is noted that the minutes of the annual general meeting on 18 February 2015 show that Ms Gracie did raise general issues of illegality, though they do not provide specifics of that illegality.

64. When a member of the executive committee, Ms Gracie could have moved a motion at an executive committee meeting, and as an owner with other owners she could have required a general meeting on the issue (see section 3.5(2) of Schedule 3 to the Unit Titles Management Act). She could have sought review of any failed motion, or more generally the practice, in the tribunal, but did not do so.

65. The current gardening arrangements were put in place under a quote from CJ Gardens and Maintenance dated 23 June 2014. It appears that option 2 in the quote was accepted and it provided for weekly visits by the gardener to undertake

[53] Exhibit A20 page 3, [6.2]
[54] Exhibit A23 pages 3-4
[55] Exhibit R20 (statement of Mr Michie) [14]

"hedging monthly … maintain all garden beds … mowing all internal lawns and nature strip on Temperley Street, edging, blow down all paths and roads … removal of leaves and excess rubbish, disposal of waste".[56] Mr Gehrig provided a document which he said he had compiled which showed in green the areas that he maintained.[57] This included common property and street verges on the external roadside border of the development, and common property and adjacent private property in the internal areas of the development. Mr Gehrig said that he spread the gardening work he did over the year and depending on what gardens needed work. Mr Gehrig said in effect that he could not work on everyone's front garden weekly, that would have been impossible. He said he did a lot of work on the gardens of unit 18, Ms Gracie's unit.[58] In addition Mr Gehrig had a private arrangement with Ms Daniell to do gardening for her.[59]

66. From Ms Leonard's point of view this issue arose when she and Mr Michie walked round Tristania on 4 June 2017 in order to list gardening related matters to be entered on the inventory. Ms Leonard said that she asked Mr Michie why work was being done on private property when the work on common property only should be undertaken. She said that Mr Michie disagreed.[60]

67. Ms Leonard continued to raise this matter. At the meeting on 1 August 2017 the minutes indicate under the heading "Gardens at Tristania, mulching planning for Spring" that "City Strata to provide information as to what is 'common property', along with what is covered under "public liability" in the Strata Insurance Cover".[61]

68. An email from the strata manager dated 7 August 2017 stated that the "gardener for UP1636 should only be undertaking gardening works on common property and not anywhere on gardens which lie within the unit entitlement (private

[56] Exhibit A10; transcript of proceedings 4 April 2018 page 44
[57] Exhibit R9; transcript of proceedings 4 April 2018 pages 13 and 62–63
[58] Transcript of proceedings 4 April 2018 page 16
[59] Exhibit A9; transcript of proceedings 4 April 2018 page 68
[60] Exhibit A2 [135]-[136]
[61] Exhibit R12 page 6

property) … [the] owners corporation is responsible for common areas only and should not be actioning works on private property".[62]

69. Ms Leonard raised this issue, amongst others, in a note to the executive committee dated 4 September 2017 and detailed attachment.[63]

70. On 20 September 2017, Deb George from City Strata wrote to the owners of Tristania and stated as follows:

> *The Tristania Executive Committee wishes to advise that gardening services undertaken by the Owners Corporation (all unit owners) is now being undertaken on the common property only in accordance with the Unit Titles Management Act 2011 (UTMA).*
>
> *Owners are responsible for their own garden areas within their unit entitlement and gardens are to be maintained in accordance with the Tristania House Rules …*
>
> *In the past, the gardener engaged by the Owners Corporation has maintained some private gardens to ensure the integrity of the overall appearance of Tristania. This has been actioned by the Executive Committee in good faith. However, it has been brought to the Committee's attention that there is no formal agreement by the Owners Corporation for this undertaking.*
>
> *Consequently, the Executive Committee are exploring options for a Motion to be presented at the 2017 AGM …*
>
> *Should owners wish to contribute to the process noted above please put any concerns/suggestions in writing …*[64]

71. In response to this letter from City Strata, Ms Leonard (by letter dated 8 October 2017) and Ms Gracie (by letter dated 25 September 2017) provided a range of questions and comments about the situation.[65] Correspondence in response to the letter from City Strata was tabled at the 11 October 2017 meeting, presumably the letters from Ms Leonard and Ms Gracie. The minutes for this meeting indicate that following thorough and considered discussion the committee agreed to revert to the default responsibility of the owners corporation to maintain only the common area gardens. It was indicated that a motion would not be put at the annual general meeting to amend this default responsibility

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[62] Exhibit A2, attachment 14
[63] Exhibit A1, attachment 5
[64] Exhibit R10, attachment 1
[65] Exhibit A18

though the matter may be revisited at some time in the future.[66] Ms Leonard agreed that the gardening on private property had by this point stopped.[67]

72. Mr Gehrig of the gardener gave evidence that he stopped gardening on private land in about August 2017 under the direction of Mr Michie who advised him just to garden the common property.[68] An email from Jess Gehrig of the gardener confirmed that since it commenced gardening, its staff had maintained all grassed area, hedges, and shrubs, and blew down every driveway/path within the complex that was outside private unit fences but that this ceased in mid-August 2017 when they were advised specifically to only maintain common property.[69]

73. In relation to the basic issue it seems to be agreed by the parties that the owners corporation and executive committee had arranged for gardening on internal private gardens outside and adjacent to the private property courtyards of units and abutting the common property gardens from early in Tristania's operation until about August 2017 when this practice was stopped.

74. The applicants also raised a related issue that, in relation to the gardening of private property until about August 2017 and common property adjacent to units, this was undertaken unfairly and for the benefit of particular owners.[70] I return to the second issue about common property further below at paragraphs 167 to 181. The applicants seemed to argue that Ms Daniell and Mr Michie in particular got preferential treatment, and the applicants got poor treatment.

75. Focussing on the work of the gardener on private property gardens adjacent to common property until August 2017, the applicants seemed to suggest it was obvious to them that this was not undertaken fairly. It was said that Defence Housing Authority properties were neglected in this regard, but no other evidence of this was provided, and in particular there was no evidence from the Defence Housing Authority itself supporting this position, or any evidence of a complaint about this by the Authority, or anyone else, other than the applicants.

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[66] Exhibit R12 page 9
[67] Transcript of proceedings 8 March 2018 page 72
[68] Transcript of proceedings 4 April 2018 page 22
[69] Exhibit R2, email of 7 March 2018
[70] Exhibit A20 [7], and attachment 14 (letter from Ms Gracie dated 25 September 2017); transcript of proceedings 4 April 2018 pages 85ff

The applicants provided a range of photos, but leaving aside the photos of the common property on the external side of Ms Gracie's and Ms Daniell's properties, which I discuss further below at paragraphs 176 to 180, these do not show significant differences in treatment.[71] It is true that the letter of 20 September 2017 from the manager stated that in "the past, the gardener engaged by the Owners Corporation has maintained *some private gardens* to ensure the integrity of the overall appearance of Tristania" (emphasis added).[72] This was not fully explained, but it leaves unclear who and on what basis; it may have simply reflected that some owners had asked not to receive the service as discussed further below. A letter from Alan Duncan referred to the allegation of improper gardening activity, and that in his view the dispute needed to be resolved as soon as possible, but provided no evidence of unfair gardening practices.[73]

76. The applicants' position was not supported by the gardener who, as noted, gave evidence that he spread the gardening work he did over the year and depending on what gardens needed work. He said he did a lot of work on the gardens of unit 18, Ms Gracie's unit.[74] This is supported by the actions of Ms Gracie who asked for the work on her private garden to be stopped;[75] it could only be stopped if it was being undertaken.

77. Exhibit R9, which was Mr Gehrig's map showing where he gardened, suggests that he gave attention to all the relevant areas. The email from Jess Gehrig stated that since they had commenced work until August 2017 their staff had maintained "all grassed areas, hedges, shrubs and blew down every driveway/path within the complex that was outside private unit fences."[76]

78. Mr Dearling said that he had witnessed the gardener perform maintenance tasks on the properties of Ms Leonard and Ms Gracie.[77]

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[71] Exhibit A17, attachment 6
[72] Exhibit R10, attachment 1
[73] Exhibit A17, attachment 2
[74] Transcript of proceedings 4 April 2018 page 16
[75] Exhibit A2, attachment 14 (letter dated 25 September 2017); transcript of proceedings 21 May 2018 page 62
[76] Exhibit R2
[77] Exhibit R16 (statement of Mr Dearling) [13]

79. Ms Daniell gave evidence that she had developed her garden over a long period of time, and employed Mr Gehrig in a private capacity to do gardening for her. Ms Daniell said that Mr Gehrig had mowed the front lawns as required, and before Ms Gracie withdrew her request for services, Mr Gehrig would mow her front lawn and maintain the two hedges between the two houses. Ms Daniell also stated that she had seen the gardeners working around Ms Leonard's property before August 2017.[78]

80. Ms Daniell said that the gardener maintained part of the private gardens of all the units, until some people opted out of this arrangement, and until this practice was stopped in 2017. She indicated that this was parts of the "internal front of gardens that face internally to the internal road way", generally adjacent to common property. She marked some of these areas on exhibit R9, the gardener's map.[79]

81. The people who had before August 2017 opted out were said to be Ms Gracie and Mr Michie at a stage when he had redeveloped his front garden.[80] This evidence makes it difficult to see how Mr Michie was getting preferential treatment when he was looking after the garden himself.

82. Mr Michie said that his wife was a keen gardener and that that was why his garden was well maintained.[81] He said he had seen Mr Gehrig performing work on the property of the applicants.[82]

83. It seemed at least for a period that Mr Michie and Ms Leonard were working together on scheduling gardening tasks, as set out in the inventory and email correspondence.[83]

84. Mr Hourigan denied that the gardener showed any favouritism to him by attending to his garden.[84]

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[78] Exhibit R17 (statement of Ms Daniell) [29] and [36]; transcript of proceedings 22 May 2018 pages 78-79
[79] Transcript of proceedings 23 May 2018 pages 52-54 and 58
[80] Transcript of proceedings 23 May 2018 pages 52 and 59
[81] Exhibit R10 [89]
[82] Exhibit R20 (statement of Mr Michie) [8]
[83] Exhibit A3; exhibit A2, attachment 33
[84] Exhibit R14 (statement of Mr Hourigan) [17]

85. It is clear that the applicants thought there was conscious differential treatment beneficial to the respondents and detrimental to them. But there is little evidence of this, and insufficient to make any finding that this occurred. There is little evidence of any difference, apart from the views of the applicants. The respondents deny any differentiation, and further there is no evidence of any direction from the respondents to the gardener to differentiate. The evidence is that the gardener was addressing all gardens, but that it was a large complex and he had limited time. The evidence is that he did work on Ms Gracie's and Ms Leonard's gardens. It seems that Ms Daniell and Mr Michie had nice gardens, but that this was the result of their significant efforts over many years, Ms Daniell acknowledging that she employed the gardener in a private capacity, and Mr Michie acknowledging the work of his wife.

86. The Unit Titles Management Act sets out the functions of the owners corporation. A key function is the control, management and administration of the common property (section 16(1)(b)). The owners corporation generally must maintain the common property, and also other property that it holds, 'defined parts' of any building containing class A units, and facilities associated with some utility services (section 24(1)). In my view these functions and obligations will involve incidental aspects. But there is no general power to manage or maintain private property.

87. Under the current section 29 of the Unit Titles Management Act the owners corporation may:

> *... if authorised by an ordinary resolution, enter into and carry out an agreement with an owner or occupier of a unit for —*
>
> *(a) the maintenance of the unit; or*
>
> *(b) the provision of facilities or services for the unit (or its owner or occupier).*

In my view it is clear that gardening services could be included in any such resolution and agreement. If there is such an agreement, and the owners corporation is not otherwise responsible for the maintenance, the owners corporation may recover the costs of doing so as a debt, and there is a formula for the amount if the agreement applies to a number of units (section 30). In my view it is clear that generally such services will therefore need to be paid for by the

relevant owner or occupier. Such provisions have been in the Unit Titles Management Act since its commencement and, though in different form, were in the UTA before that for a long time, including from when Tristania was established.[85] The respondents had thought that there was such a resolution, but now in effect concede that there was not.[86] No written agreements were provided, nor were the terms of any oral agreements.

88. In these proceedings it was suggested that the previous practice could now be ratified and reintroduced by a general meeting of owners. A range of issues in this regard were raised in the hearing. As these were not fully argued it is not appropriate for the Tribunal to resolve these. However it is noted that there is some capacity in sections 29 and 30 of the Act for the owners corporation to maintain private gardens which are part of a unit under an agreement with an owner or occupier. This is an issue for the new executive committee to consider further, and obtain relevant advice. Ms Daniell indicated that the executive committee would obtain appropriate advice.[87]

89. The practice of the owners corporation maintaining private gardens has now been discontinued, and there was no suggestion it would be implemented in the future outside of the provisions of the Act set out above. There is therefore no basis for any general declaration or order against the respondents as to this practice. There was no challenge to any existing resolution in this regard.

90. The issue raised by the applicants is whether the conduct of the respondents as members of the executive committee in this regard breached the Code of conduct for executive committee members, in particular the obligation to acquire an understanding of the Act, take reasonable steps to comply with the Act and exercise reasonable care and diligence (sections 1, 3 and 5) when acting as an executive member. As discussed the evidence does not support a finding of discriminatory treatment, but there is a question whether simply the continuation

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[85] *Unit Titles Act 2001* (repealed) sections 52 and 53; and before that, *Unit Titles Act 1970* (repealed) section 45

[86] Exhibit R10 [27]

[87] Transcript of proceedings 23 May 2018 page 51

of gardening on private property breached these Code requirements. The Tribunal does not think so for the following reasons.

91. First, the practice had been in place for many years. It is not clear who initiated it, but it seems it was in effect from when Tristania commenced operation and therefore was not initiated by the respondents. It was maintained by a wide range of persons; the respondents may have played some part in the maintenance of the practice, as discussed below, but so did many others. It was seen as providing a general benefit to Tristania and had a legitimate and beneficial purpose. The evidence is that all, or at least many, owners obtained the benefit of the practice, including Ms Leonard and Ms Gracie. It was something that was possible under the Act throughout the period if the relevant resolution and agreements had been in place. In my view it was not a breach of the Code for the executive committee members to continue to implement this long standing practice, at least until its legality was brought into question.

92. Second, the practice was questioned by Ms Gracie when she was a member of the executive committee in 2014. It is arguable that an exercise of reasonable care and diligence (section 3 of the Code), or taking reasonable steps to ensure compliance with the Act (section 5) would have led that committee to investigate the matter further. But the terms on which it was raised by Ms Gracie are unclear. There is no evidence of any motion put by Ms Gracie at an executive committee meeting. And whatever the terms in which it was raised, it was raised with the executive committee then, which was a different executive committee to the current respondents. Some of the members of the 2014 committee were members of the 2017 committee, but not all. No proceedings were taken against that 2014 executive committee. And as discussed in the next paragraph, when the issue was clearly raised with the 2017 executive committee, that is the specific respondents to these proceedings, they ceased the practice. Some issues were raised by Ms Gracie at the 2015 annual general meeting, but again the terms on which this was done are unclear, and that meeting took no action. Ms Gracie did not further pursue the matter. In my view these circumstances do not support a finding of a lack of reasonable care and diligence and failure to take reasonable steps to ensure compliance with the Act by the respondents, the 2017 executive committee.

93. Third, the practice was then questioned by Ms Leonard when she was a member of the 2017 executive committee. When the legality of the practice was clearly raised by Ms Leonard, investigations were undertaken and when it was found that there was no relevant resolution, the practice was stopped. It has not been reintroduced. Rather than failing to comply with the Code of conduct, the actions taken by the respondents were appropriate and compliant with the Code and Act, and in particular demonstrated reasonable care and diligence in exercising their functions and reasonable steps to ensure compliance with the Act. It does seem somewhat anomalous that no proceedings were brought against the executive committees and general meetings which maintained the practice over many years, but proceedings are brought against the executive committee which stopped the practice when the issue was raised. I do not think there was a breach of the Code in what the respondents as members of the 2017 executive committee did.

94. The applicants also claim moneys from the respondents arising from the benefit obtained by them from the gardener's work on their gardens.[88]

95. Generally such a claim needs to be based on an existing legal liability, and brought as a civil claim. The applicants did not set out any clear legal basis for such a claim against the respondents. No contract, express or implied, was identified as the basis for the claim. The necessary legal bases for a claim in negligence were not identified and addressed, nor were the limitations on such claims. There was no breach of statutory duty claim articulated, leaving aside the allegations of breach of the Code which in my view do not support a damages claim. Given this, it is not possible for the Tribunal to consider or uphold a claim on these bases. Further, such a claim would generally need to be made as a civil claim in the tribunal.[89] Further again, section 47 provides that an executive committee member is not civilly liable for conduct engaged in honestly and without recklessness. The applicants have not made out any acts of dishonesty nor recklessness on the part of the respondents. Rather than acting recklessly, the respondents acted quickly to stop the practice as soon as the issue was clearly raised, even though it had significant support and a beneficial purpose. In these

[88] Application, attachment 2, paragraph 2(d); exhibit A20 pages 2-3, [5.1]-[5.3], pages 4-5, [7.1]-[8.2] and page 5, [9.1]-[9.5]

[89] *Riley v The Owners Corporation Units Plan 706* [2018] ACAT 99 [70]-[71]

circumstances, if there were any civil liability, it attaches to the owners corporation (section 47(2)). No claim was made against the owners corporation.

96. The applicants appeared to rely on an argument that they should be reimbursed for their proportion of fund contributions that were wrongly paid by the executive committee to the gardener in this respect. But there are significant obstacles to such a claim. The applicants were obliged to pay the relevant fund contributions to the owners corporation (sections 80 and 91). No challenge was made to the determination of those contributions, nor the liability of the applicants to pay them. Given this, there does not seem to be a basis for returning part of those payments to the applicants. Further, these payments were made to the owners corporation, and no claim for refund was made in relation to it. Further again, even if particular payments were made for work that could not be properly undertaken by the executive committee and the owners corporation, this does not of itself affect the liability of the applicants to pay the contributions, nor give rise to a right to a refund. A further point is that it is clear that the gardener performed the work for which he was paid. Therefore in my view there is no reasonable basis in law or practice for a reimbursement to the applicants of part of their fund contributions.

97. The applicants also sought an order for a review of the financial benefit and gain to the private properties and adjoining common properties of the respondents. I do not see any basis for such an order.

Purchase of plants

98. The applicants also raised a range of matters in relation to purchases of plants and other gardening products. One concerned ‘invoice 8’ for the purchase of plants to a value of $1,083.47.

99. At the meeting on 11 October 2017 the majority of the committee “approved the reimbursement of the Gardening Coordinator in the amount of $1,083.47 for the cost of purchasing plants which at the time of the meeting had been planted in common property areas”. The minutes also noted that Ms Leonard strongly disapproved of this payment as she did not believe due process had been implemented by the committee for the pre-approval of this expenditure. However

the minutes also noted that it was agreed that future reimbursements to committee members for monies expended on behalf of the owners corporation would require recorded pre-approval by the committee and detailed receipts for expenditure should accompany the claim. There was an exception for repairs to the irrigation system.[90]

100. Ms Leonard said that at this meeting "Mr Michie threatened Ms George [of City Strata] that if payment was not made the next day he will get the debt collector onto her." She stated that the strata manager requested her staff process the payment immediately as there was a majority vote for approval.[91]

101. Ms Leonard did not argue that the reimbursement of Mr Michie was unlawful, however she argued that it was inappropriate and bad governance, in particular it seems because there was no budget and no quote was provided.[92]

102. Mr Michie noted in his statement that he thought this matter had been dealt with at the meeting on 29 March 2017, which Ms Daniell did not attend. The minutes of that meeting state: "Temperley Street: Dead camellias to be removed by gardener. Crepe myrtle to be replacement planting when water available" and it was noted that action was to be by "Peter".[93] This does not contain a reference to the number of plants to be purchased. As discussed above, the inventory of gardening tasks provided at the June meeting, in whatever form, referred to "seven crepe myrtle".

103. Ms Daniell also thought that this matter had been resolved at the March meeting. She said that at this meeting the committee agreed to replace all the camellias that had died in the drought, and to the purchase of a number of other plants, but that no planting would occur until irrigation was laid. She was asked to find suitable plants, she visited three garden centres, in late August the irrigation was completed, and she then proceeded to assist with purchase of the plants from the Heritage Nursery at Yarralumla, which she said were the cheapest and best quality. She noted that in any event the purchases were approved by a majority in

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[90] Exhibit R12 page 10
[91] Exhibit A2 [182]
[92] Transcript of proceedings 8 March 2018 pages 75–76
[93] Exhibit R12 page 2; exhibit R20 (statement of Mr Michie) [29]

October 2017 and "new procedures were put in place to ensure better transparency".[94]

104. Another invoice, 'invoice 9', was for $215.64 for minor repairs to the irrigation system. This was also tabled at the 11 October 2017 meeting with detailed invoices and the majority of the committee approved the reimbursement.[95]

105. I do not think that this demonstrates any behaviour of the respondents in breach of the Code. There was a decision on 29 March 2017 that "crepe myrtle to be replacement planting when water available" and this was clearly to be implemented by Mr Michie. Although the decision was a little vague, it was reasonable of him to think that he should proceed to purchase and plant replacements. This is what he and Ms Daniell did, including visiting three providers and choosing what they thought were the cheapest and best. If there was uncertainty, this was resolved by the decision of 11 October 2017, which was made before the owners corporation incurred any cost and reimbursed Mr Michie. Up till then Mr Michie had purchased the plants at his own cost. Ms Leonard had a right to object as she did to this reimbursement if she thought it not an appropriate use of the owners corporation resources. But the majority of the committee also had a right to disagree with her, especially since Mr Michie acted on the basis of implementing the earlier decision of 29 March 2017. Mr Michie's desire to be reimbursed for his expenditure which he thought had already been authorised was understandable. Ms Leonard also had a right to raise issues in relation to the general process. The respondents admitted that the process should have been better documented.[96] The committee agreed to improve future processes. This indicates that to a large extent the committee took into account Ms Leonard's concerns, though this was not acknowledged by Ms Leonard.[97] I see no basis for criticism or a finding that the respondents breached the Code in relation to this conduct. In particular there is no evidence of any failure to act with

[94] Exhibit R17 (statement of Ms Daniell) [20]-[23]; exhibit R10 [42]
[95] Exhibit R12 page 11
[96] Exhibit R10 [46]
[97] Transcript of proceedings 8 March 2018 page 157

care and diligence in the best interests of the owners corporation (sections 3 and 4 of the Code).

106. The applicants sought a declaration that the decision on reimbursement set out in the minutes of the meeting 11 October 2017 was void "as the process was not followed in accordance with the [Unit Titles Management Act]".[98] It was not clear what process is referred to, and why it is said it was not followed. The decision was apparently made in accordance with Part 4 and Part 2.2 of Schedule 2 to the Act. There are limitations on spending in sections 77 and 88 but there was no evidence or argument that these were not complied with. There is no basis for a declaration of invalidity. It was also said to be void because there was "no prior agreement and approval sought by the [Executive Committee]".[99] In my view there is no legal requirement for prior approval and, at any rate, prior approval was given at the meeting of 29 March 2017. Further I do not think any basis was provided for overturning the decision on a merits review.

107. The position of the applicants is simply that they do not agree with the decision of the majority of the meeting, but this alone is no basis for a finding of invalidity or overturning the decision. This is not a case where the majority is acting oppressively and seeking to interfere with the property or other rights of the minority. Rather this is the committee simply deciding what is the best thing to do in maintaining the common property gardens. In my opinion once such a decision is properly made, the role of the committee members is to work with the outcome of the democratic process.[100]

108. The applicants also raised plantings and laying of irrigation in the garden of unit 12.[101] This seems to relate to the more general issue concerning provision of gardening services to private property, discussed at paragraph 58 and following above, and irrigation, discussed at paragraph 154 and following below.

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[98] Application, attachment 2 paragraph 1(d)
[99] Application, attachment 2 paragraph 1(d)
[100] Transcript of proceedings 23 May 2018 page 23
[101] Exhibit A2 [192]-[193]

Removal of hedge

109. The applicants also raised the removal of hedges at the side of unit 3 and in front of unit 5 on 3 August 2017. They suggested this was not approved and that the gardener should have been undertaking higher priorities.[102]

110. Mr Hourigan lives at unit 4 and he stated that the relevant vegetation was at the top of his driveway and because of it he could not see vehicles at the front of unit 5, nor the driveway of unit 8, and that he had been involved "in a couple of near misses with vehicles" when entering and exiting his driveway. There was also one collision. He stated that on the other side of the driveway beside unit 3 were shrubs similar to those at unit 5. The respondents say that these shrubs were on the public path and had exposed branches which were a danger to pedestrians including schoolchildren. Mr Hourigan stated that there was a discussion between himself, Mr Michie and Mr Gehrig, of the gardener, as to how to improve safety and Mr Gehrig thought that if he cut the plants back they would become very woody and could cause damage, and he suggested they should be removed and replaced with something more suitable. He stated that this was agreed by the executive committee.[103]

111. Notwithstanding this explanation, the applicants maintained their complaint. Given the safety concerns, this action to remove the shrubs seems appropriate. There was some evidence of approval. It also seems that Mr Michie as gardening co-ordinator and the gardener had some discretion as to which tasks were to be undertaken. I do not think that this conduct demonstrates any behaviour of the respondents in breach of the Code of conduct, nor is there any basis for finding the decision is invalid or should be overturned.

112. The applicants also raised the issue of the removal of strawberry shrubs between units 16 and 17. The minutes of the meeting on 11 October 2017 show that this issue was discussed at that meeting; the gardener recommended removal; this was supported by the owner of unit 17; the advantages were that the street light would be revealed and it would allow access to the garbage building. Ms Leonard argued

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[102] Exhibit A2 [184]-[187]; exhibit A20 page 2, [5.1]

[103] Exhibit R14 (statement of Mr Hourigan) [19]-[23]; exhibit R10 [49]-[52]; exhibit R13; transcript of proceedings 21 May 2018 pages 86-88

that a horticulturist should provide information and that she believed the shrubs only needed pruning rather than removal. The majority of members of the committee agreed to removal.[104] Again this demonstrated a disagreement between executive members which was appropriately resolved by a democratic process of decision-making. The decision seems appropriate and reasonable. I do not think that this demonstrates any behaviour of the respondents in breach of the Code of conduct, nor is there any basis for finding the decision is invalid or should be overturned.

Mulching

113. The inventory of gardening tasks document as at 4 June 2017 contained an item no 2, "general - (mulch) – mulch all common property" which provides "Peter [Mr Michie] to co-ordinate."[105]

114. At the meeting on 1 August it was noted that "gardens at Tristania, mulching planning for spring" and, under "comments and action", that "Peter to action – Peter will liaise with the gardener and request mulch is delivered and distributed over the next six weeks on a weekly basis as needed".[106] In the minutes for the meeting on 11 October 2017 it was stated that "Ms Leonard tabled a document noting the utmost priority of mulching" and Mr Michie "advised he had requested a quote from the gardener for this work". The strata manager was asked to follow this up and provide a copy of the quote to the committee.[107]

115. Apparently a first quote of about $814 was obtained from the gardener for 37 cubic metres of mulch.[108] It appears that this was just for the mulch, not the work involved in spreading it.[109] There is an email from Deb George of the strata manager to the committee dated 20 October 2017, no doubt implementing the decision on 11 October that the strata manager follow up this issue, which stated that the gardener had estimated that it would take 4.5 days to complete the mulching works at a cost of $1,056 per day, a cost for labour of $4,752.[110] The

[104] Exhibit R12 page 12
[105] Exhibit R12 page 5
[106] Exhibit R12 page 6
[107] Exhibit R12 page 10
[108] Transcript of proceedings 8 March 2018 page 85; transcript of proceedings 4 April 2018 page 27
[109] Transcript of proceedings 22 May 2018 page 22
[110] Exhibit A2, attachment 32

total cost for the mulching would therefore be $5,566. It appears that this quote was accepted by a majority of the committee, and the respondents noted that the current gardener is a preferred provider of the owners corporation. To date no such mulching has taken place.[111]

116. Mr Hourigan agreed that this quote was a large amount of money for Tristania.[112]

117. Mr Gehrig was questioned about this quote, and the increase from an earlier quote of $2615 in about 2016 for, apparently, 26 cubic metres of mulch. He said in effect that the earlier quote was for an easier job where he could have his trailer parked near the garden and shovel off it; mulching inside the complex was "a lot tighter, there's more plants … it's more time consuming".[113] He stated that he allowed for a layer of 100mm in order for the whole job to be done properly, not half done.[114] He later added that the costs of business were going up every year, and that his quoting varied depending on whether he needed the work.[115]

118. The applicants argued that this was an expensive quote, and that an alternative was to call for volunteers from the owners to spread the mulch. They suggested that this would cost only $857, presumably their estimate of the cost of only the mulch itself.[116] When cross-examined as to the safety of this approach, Ms Leonard suggested she would get the volunteers to sign something to say they acted at their own risk.[117] I note in passing that the suggestion owners should sign such a purported waiver raises significant issues. They also stated that any risk to volunteers may be covered by an existing insurance policy, though no evidence was provided of this, or that insurance could be taken out, or of the cost of this.[118]

119. The evidence was that on a previous occasion, a small amount of mulch had been spread by volunteers after a tree had been cut down in the gardens. The mulch

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[111] Exhibit R10 [53]-[56]; exhibit A2 [220]-[223]; exhibit R11 [38]; transcript of proceedings 22 May 2018 page 31
[112] Transcript of proceedings 22 May 2018 page 25
[113] Transcript of proceedings 4 April 2018 pages 33-35
[114] Transcript of proceedings 4 April 2018 page 41
[115] Transcript of proceedings 4 April 2018 page 56
[116] Transcript of proceedings 8 March 2018 page 85
[117] Transcript of proceedings 8 March 2018 page 127
[118] Transcript of proceedings 21 May 2018 page 38

was apparently spread by Mr Hourigan, Mr Michie, and Mrs Michie.[119] This experience may have informed the views of the executive committee. Indeed Mr Hourigan stated that such work involved a risk of injury, was labour intensive and required a lot of people, and was dangerous for anybody who was inexperienced.[120]

120. Mr Gehrig stated this was heavy work, which involved some risks to those undertaking it, emphasised the importance of 100mm of mulching and the impracticalities and risks of having volunteers spread mulch.[121]

121. The applicants also raised the fact that Ms Daniell advised in an email that mulching only occurs every 3 years, and that there was no budget allocation for mulching in the current year. Ms Leonard stated that she "believes this is another form of victimisation and discrimination for a request put forward by Ms Leonard over 15 months … and punishment … for submitting an application to the ACAT".[122] She suggested there was evidence of more frequent mulching. Ms Leonard agreed that Ms Daniell was correct in saying that there was no budget allocation, but noted that other activities had been conducted without a budget allocation.

122. The applicants also argued that it was irresponsible for the committee to accept such a quote without seeking comparative quotes or pursuing the suggested alternative solution of seeking volunteers from the complex.[123]

123. More generally, Ms Daniell stated that obtaining quotes for services to be done on properties such as Tristania had always been difficult. She was answering questions about the arborist and indicated in that regard that they had found someone who was very good so he was used on occasions when required.[124]

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[119] Transcript of proceedings 22 May 2018 page 25
[120] Transcript of proceedings 22 May 2018 pages 38-39
[121] Transcript of proceedings 4 April 2018 pages 67-68
[122] Exhibit A2 [208]-[216]
[123] Exhibit A2 [220]-[223]
[124] Transcript of proceedings 23 May 2018 page 14

It was implied that the gardener was in a similar position, that is that the committee had found someone who was good so they were generally used.[125]

124. In my view this is a matter for the processes under the Act to resolve. Ms Leonard, and Ms Gracie, have a right to express their views, which are that the mulching should be done but the quote was too high and volunteers should be used. The respondents agreed that the mulching should be done and were working towards this. They had a right to express their contrary view as to how it should be done, which was by the established gardener, even though there was a significant cost, and that use of volunteers would be inappropriate and give rise to significant risks. In my view both are reasonable approaches and the decision is one for the majority of the executive committee and, if appropriate, the annual general meeting. I do not think that the decision demonstrates any inappropriate behaviour of the respondents in breach of the Code of conduct, any more than the behaviour of Ms Leonard demonstrates inappropriate behaviour on her part. Rather, people have different views which need to be resolved by the democratic decision-making processes established by the Act. This is not a case where the majority is acting oppressively and seeking to interfere with the property or other rights of the minority. I do not think there any basis for finding the decision is invalid or should be overturned on merits review. As the mulching has not taken place this decision should be reviewed by the new executive committee who can consider the various options in relation to the issue.

Camellias

125. The applicants also raised the purchase and planting but subsequent death of camellias. It was said that in July 2016, 18 camellias were supplied, planted and fertilised and that three camellias were dug out and relocated. Almost all the camellias did not survive. It is said that Mr Michie was the person responsible.[126]

[125] Exhibit A2 [224]-[229]; exhibit A7; exhibit A20 pages 4-5, [7.2]-[7.3]
[126] Exhibit A20 pages 4-5 [7.1]-[8.2]

126. Ms Gracie also raised the issue that the planting of the camellias was not undertaken fairly and favoured particular owners, including Mr Michie and Ms Daniell.[127]

127. Mr Michie stated that he believed that camellias were planted at an appropriate time, however unfortunately they died. He recalled that it was a record breaking January and that lots of plants in the complex died that month or soon after. He stated that they planned to replace those plants in 2018.[128]

128. Ms Daniell stated that Mr Gehrig planted the camellias and she was not responsible for telling him where to do so. She noted that one outside Ms Gracie's home died, that Ms Gracie had requested a replacement, that this was understandable and was on the agenda for the new committee. She did not believe the spending or planting was reckless. She noted that the planting of the camellias was in accordance with the document provided by Ms Gracie — exhibit A21 — which was information from the Horticultural Society of Canberra Inc in relation to the planting of camellias.[129]

129. I return to the issue of the replacement for the camellias outside Ms Gracie's home below at paragraphs 176 to 180. Leaving this to one side, generally, I do not see any breach of the Code of conduct in relation to the camellias. The executive committee and Mr Michie were seeking to improve the gardens. Developing and maintaining gardens is a notoriously difficult task, and is often accompanied by failures, especially in the face of extreme weather events. The applicants have failed to show that the failure of the camellias involved any breach of the Code of conduct by the respondents.

Mowing

130. It appears that the executive committee arranges for the nature strips outside Tristania on Curran Drive and Temperley Street to be mowed by the gardener.

131. The applicants particularly challenged the fact that the executive committee pays for the gardener to mow the nature strip on Curran Drive, that runs along the back

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[127] Exhibit A20 pages 4-5 [7.1]-[8.2]
[128] Exhibit R20 (statement of Mr Michie) [30]
[129] Exhibit R17 (statement of Ms Daniell) [30]-[35]

of four properties in the Tristania complex. It was said that the home of Mr Hourigan directly backs onto Curran Drive. It was alleged that this nature strip is not common property but is the property and responsibility of the ACT government. This appears to be correct.[130] The minutes of the executive committee meeting of 11 October 2017 indicated that the committee agreed to present a motion at the 2017 annual general meeting seeking approval to continue the current arrangement whereby the owners corporation gardener mows the strip of ACT land on Curran Drive that backs onto units 4, 5, 8 and 9 on an as-needs basis. It was noted that while the ACT government had a schedule in place for this mowing it is often overlooked, leaving the area overgrown.[131] It appears that this mowing at the expense of the owners corporation of government land adjacent to Tristania is ongoing.[132]

132. Ms Daniell stated that her understanding was that, as with any home or group of homes in the ACT that has a nature strip in front of it, "it's our responsibility to maintain the area … so … we maintain it". She stated that she thought that Territory and Municipal Services (**TAMS**) was not responsible for Temperley Street, but "does mow Curran Drive once a month", but that the executive committee had made the decision that "they would like it to look good all the time", and therefore have it mowed by the gardener.[133]

133. The applicants also raised the issue that Tristania owners apparently take full responsibility for the mowing of the Temperley Street nature strip. It was said that it is questionable as to whether this is the responsibility of Tristania or of the Joint Consultative Committee (**JCC**) for the four complexes.[134]

134. In my view this gardening activity is of a different nature to that on the private property of unit holders. This gardening takes place on public property adjacent to Tristania. Maintenance by the ACT government in relation to such areas is

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[130] Exhibit A2 [230]-[234]
[131] Exhibit R12 page 10; exhibit A20 page 6 [11]
[132] Transcript of proceedings 8 March 2018 page 72
[133] Transcript of proceedings 22 May 2018 pages 79-80
[134] Exhibit A2 [235]-[249]

limited. It is accepted practice that maintenance such as mowing of grass on nature strips is carried out by the adjacent lessee.[135]

135. The executive committee and owners corporation has power to undertake activities incidental, that is secondary or supplemental, to its specified powers. The mowing of the nature strips outside the complex are in my view such an incidental activity. There was no evidence provided that this mowing was undertaken because the home of Mr Hourigan directly backs onto Curran Drive. In my view there is no basis for a finding that the respondents breached the Code in relation to these matters, or that the relevant decisions are void or should be overturned.

136. It is of course open to the executive committee to seek support for this activity from the other adjoining developments or the JCC, in particular for the nature strip on Temperley Street. Mr Michie stated that his opinion was the same as Ms Leonard's, that mowing of the Temperley Street nature strip should be supported by the JCC.[136] Hopefully this unusual point of agreement will result in joint activity towards a fairer outcome.

Garbage

137. The issue raised in relation to green waste is in my view quite unclear. The applicants say that Brindabella Waste is the current service provider for green waste. They say that Remondis is an alternative service provider which would provide the service at a more competitive cost. The applicants appear to say that this issue has been discussed for five years, has still not been resolved, and this position is reckless, incomprehensible and a misappropriation of expenditure.[137]

138. But the minutes of the executive committee meeting on 11 October 2017 note that Mr Michie reported that green waste bins would not be available in Gungahlin until 2020 at the earliest, that the meeting agreed that Mr Michie should provide the Remondis quote to the committee for final approval and the strata manager was directed to action a work order accordingly, and that prior to engaging

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[135] ACT Government, *Nature strips* (Access Canberra, 3 December 2018), https://www.accesscanberra.act.gov.au/app/answers/detail/a_id/1379/~/nature-strips

[136] Transcript of proceedings 23 May 2018 page 118

[137] Exhibit A2 [250]-[264]

Remondis the strata manager was to advise the committee of the lead time required for cancellation of the existing service agreement with Brindabella Waste.[138] Given this decision there is no basis for the Tribunal to find that the issue has not been resolved, or that the position is reckless, incomprehensible and involves a misappropriation of expenditure.

139. The applicants raised further issues in relation to garbage bins more generally. It appears that the applicants also say that this issue has been discussed for five years, has still not been resolved and this position is also reckless, incomprehensible and involves a misappropriation of expenditure.[139]

140. But in the minutes of the meeting of 11 October 2017 it is stated that "following research by the committee members and tabling by Ms Leonard of an email to Mr Hourigan dated 3 July 2017 detailing research outcomes from discussion with ACT NoWaste" a motion was agreed to that "the Strata Manager request ACT Waste Management to exchange the 10 x 240 litre MGB Recycling Bins for 4 x 1100 litre Hopper Recycling Only Bins – Pickup fortnightly". It is noted that Ms Leonard identified that if this change incurred additional costs, then the matter should be presented to all owners for consideration at the next annual general meeting.[140] Given this decision there is again no basis for the Tribunal to find that the issue has not been resolved, or that the position is reckless, incomprehensible and involves a misappropriation of expenditure.

141. The general issue raised in this regard seems to be that it has taken a significant period of time to resolve these issues. But the nature of unit titles' governance often makes some level of delay necessary. Democratic deliberations and decision-making by a volunteer committee with some but limited support take time. Of course some delays will be unreasonable and not in the owners corporation's best interests. But the applicants have not made out a basis for overturning these decisions. Nor have they made out any relevant breach of the Code by the respondents.

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[138] Exhibit R12 page 11
[139] Exhibit A2 [250]-[264]
[140] Exhibit R12 page 11

Budgets and other gardening issues

142. The applicants also raised a range of additional matters in relation to the gardening. Some of these relate to budgets accepted by the annual general meetings, but little detail was provided in relation to these.

143. Some relate to invoices submitted by Mr Michie and the gardener. Some of these relate to the services provided to private property gardens and the mowing of the nature strips, which are discussed above. But some relate to a more general concern as to the amount of gardening undertaken. It is noted that it is said that the original quote option accepted from the gardener in June 2014 was for approximately 50 visits per year, and then in January 2015 this was revised to every two weeks. However the gardener is said now to come on a weekly basis, with additional hours agreed in June 2016. Ms Leonard stated that there is no evidence to support the additional hours and that Mr Michie as the supervisor of the gardener "has mismanaged the working hours and tasks of Mr Gehrig and consequently the attributing finances associated(sic)."[141]

144. In my view the amount of gardening work purchased by the owners corporation is a matter for the executive committee to decide and, if necessary, the annual general meeting. These are the bodies which should consider and determine whether the gardener is contracted to come every week or every two weeks. There may be extreme examples where it could be argued that committee members have acted without reasonable care and diligence and not in the best interests of the owners corporation in the purchase of services, but this was not made out here. There is no evidence of 'mismanagement of working hours'. There is simply a disagreement as to what those hours should be.

145. I do note that the decisions about gardening in common property should be made fairly and should not benefit some owners over others. I return to this issue below at paragraphs 167 to 181.

Fencing work

146. The applicants also complained that fencing work was given to Mr Hourigan's brother, Mr Terry Hourigan. It is said that only one quote was requested, when at

[141] Exhibit A2 [265]-[279]; exhibit A20 page 2, [4.2]

least two to three should have been obtained, that Mr Terry Hourigan did not have the appropriate tools for the work — instead he charged the owners corporation for the purchase of a nail gun — and that Mr Terry Hourigan was paid $2,905, an equivalent of $107 per unit entitlement.[142]

147. The respondents stated that the matter of repair of fences jointly owned by the owners and the owners corporation had been considered for some time by the executive committee and it was decided that the strata manager should obtain quotes. Unfortunately no quotes were forthcoming, it was said because "it was a limited form of labour and no tradesmen were interested in doing the work." Mr Hourigan suggested that he could contact his brother, Terry, who was semi-retired and doing small jobs and was formerly in the building trade, about the task. Mr Hourigan's brother said he would do the work but it would be expensive and time consuming as he would have to manually nail the new palings to the fence, at a rate of $60 an hour, the general rate for tradesmen. Mr Hourigan's brother suggested a nail gun be purchased which would significantly reduce the time to complete the task. He indicated that if the owners corporation paid for the nail gun he would do the work for $40 an hour. This offer was accepted and it is said that this saved the complex a significant amount of money. It appears that the nail gun was purchased for about $700. It is said that the executive committee approved the process, the matter was raised at an annual general meeting, the nail gun is owned and in the possession of the owners corporation, is used on occasion to help owners when required, and indeed Mr Hourigan's brother did some work for Ms Leonard in which he used the nail gun.[143]

148. Mr Hourigan stated that the decision was approved by the executive committee. He said in oral evidence that he made it clear that Terry was his brother. Under questioning by Ms Gracie, Mr Hourigan was asked whether he declared a conflict of interest in relation to the hiring of his brother, to which he answered "no". I take this to mean that he did not use those words. He made it quite clear in his evidence that he informed the committee that Mr Terry Hourigan was his brother, and that his brother would be paid money for his work repairing the

[142] Exhibit A2 [291]-[295]; exhibit A20 page 3, [95.3]
[143] Exhibit R10 [73]-[80] and attachment 6

fences. He said he worked with his brother for no pay thereby at least halving the time and cost of labour for the job. He stated that at the time he believed the decision to purchase the nail gun was reasonable and he still holds that belief.[144]

149. Ms Daniell also confirmed that it had not been possible to obtain any quotes, and that Mr Hourigan made it quite clear at the meeting that Terry was his brother.[145]

150. One complaint of the applicants was that the nail gun was bought by the owners corporation and then given to Mr Terry Hourigan. It seems clear that the gun was bought by the owners corporation, which maintains ownership. Ms Gracie acknowledged that this information addressed one of her concerns.[146]

151. Ms Gracie gave evidence of a quote she obtained from Kennards Hire of $158 for a week, $41 for a day, to hire a nail gun.[147]

152. Mr Hourigan stated that Kennards Hire was uneconomical given the basis on which the work was to be done. His brother could not do full days and he worked when he was free over a period of weeks and the cost "would have been greater over that period of time."[148]

153. In my view there is no basis for any criticism of the respondents in relation to this matter. The strata manager could get no-one to do the job. In these circumstances Mr Hourigan volunteered to see if his brother could do it. He clearly revealed Terry's status as his brother, as required by the Code of conduct (section 8). Mr Hourigan assisted his brother at no cost to the owners corporation, and Terry Hourigan performed the work at a reduced rate. The executive committee bought the nail gun to assist with the project, a purchase which it believed, and there was evidence which supported this, reduced the cost of the project. Even if there had been no reduction in cost by the arrangement, the reality was that this was the only way the executive committee could get the job done, and therefore engagement of Mr Terry Hourigan would still have been reasonable. The nail gun

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[144] Exhibit R14 [25]-[26]; transcript of proceedings 21 May 2018 page 104; transcript of proceedings 22 May 2018 pages 33-35
[145] Transcript of proceedings 22 May 2018 page 80
[146] Transcript of proceedings 21 May 2018 page 35
[147] Exhibit A16; transcript of proceedings 4 April 2018 pages 123-124
[148] Transcript of proceedings 21 May 2018 page 91

was and remains an asset of the owners corporation, and is used appropriately for the corporation's and its members' benefit. Far from acting inappropriately, the respondents have promoted the corporations interests at a reasonable cost. I do not think that this conduct demonstrates any behaviour of the respondents in breach of the Code of conduct, nor is there any basis for finding the decision is invalid or should be overturned.

Irrigation

154. The applicants also challenged irrigation work, and the placement of irrigation on private property, in particular in unit 12 and unit 8.

155. The respondents pointed out that the minutes of the executive committee meeting of 29 March 2017 dealt with these issues. The minutes stated that "dripper line down Temperley Street being installed by PM [Mr Michie] including Pope timer: Approved," and then "Unit 19 common property irrigation being explored to provide regular watering. Approved. Action: Peter [Mr Michie]," and further, "Unit 12; irrigation being explored, leak to be repaired. New tree to be supplied when irrigation done: Approved. Action Peter [Mr Michie]."[149] Ms Gracie admitted that on the basis of these minutes that the irrigation "seems to have been approved by the committee. Whether a majority or not I don't know."[150]

156. Mr Michie also gave evidence that there were only two taps on common property in Tristania.[151] This was supported by Ms Daniell.[152] This necessitated using private property for the irrigation system. Mr Michie indicated he sought the consent of unit owners to use their private property for the irrigation system and that without their consent he would not do so.[153] This seems an appropriate approach and provides no basis for a finding of a breach of the Code of conduct or decision-making that is invalid or should be overturned.

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[149] Exhibit R12 page 2
[150] Transcript of proceedings 21 May 2018 page 31
[151] Exhibit R20 (statement of Mr Michie) [26]; transcript of proceedings 21 May 2018 page 32
[152] Transcript of proceedings 22 May 2018 page 71
[153] Transcript of proceedings 23 May 2018 page 121

Bullying, harassment and other miscellaneous issues

157. The applicants made a range of allegations of bullying and harassment by the respondents. The specified complaints can be grouped as follows.

Speaking inappropriately

158. First, yelling, speaking inappropriately, and staring during meetings,[154] and other general bullying. In these proceedings this is only relevant to the Code of conduct, which requires executive members to act fairly, with care and diligence and not engage in unconscionable conduct.

159. Some specific examples of alleged inappropriate conduct have been considered above. Ms Leonard sets out some further specific conversations in her evidence, including in the chronology attached to her statement of facts and contentions (exhibit A2). She referred to specific alleged conversations, such as that at the meeting of 7 June 2017 (item no 3). She also raised specific allegations about events at the meeting of 11 October 2017. Ms Gracie made a range of allegations, though some are against people who are not respondents, and most are in very general unspecified terms.[155]

160. Mr Dearling said that he was aware of some tensions between Ms Leonard and the rest of the executive committee, however he did not involve himself too much in these issues. He said he always attempted to remain polite and friendly with all members of Tristania, including the applicants.[156]

161. In his evidence Mr Dearling stated that he had always had a good relationship with Ms Gracie but after he did not support her on an issue the relationship deteriorated. He also gave instances of inappropriate statements to him by Ms Gracie, one of which he remembered because "it shook me", and this was the subject of a near contemporaneous record by him in an email. He also gave evidence of inappropriate actions by Ms Gracie's husband. Mr Dearling denied that he had engaged in bullying or harassment of the applicants. He agreed that

[154] Exhibit A2 [314], dot points 1, 6, 11 and 12
[155] Exhibit A20 pages 3-4
[156] Exhibit R16 [9] and [28]

he usually turned away from Ms Gracie now when he sees her and stated that "I do ignore her basically they ignore me."[157]

162. Mr Michie rejected the suggestion that he had ever bullied or harassed the applicants or any other owners at Tristania, and he stated that he had always attempted to be polite and courteous.[158]

163. Mr Hourigan denied harassment and bullying, stated that he could not remember any occasion where he had said anything derogatory to anybody, and that the respondents' "interest was to keep things flowing in the complex and present an area that the owners would be proud of."[159]

164. As noted the Code of conduct provides that an executive member must act honestly and fairly (Schedule 1, section 2), must exercise reasonable care and diligence in exercising the member's functions as an executive member (section 3), and must not engage in unconscionable conduct (section 7). Particularly relevant is the concept of acting fairly, which generally includes treating people equally and in a way that is right and reasonable.[160] I do not think that the allegations amount to a breach of these Code requirements.

165. It is clear to me that relations between the parties deteriorated over the disputes in the executive committee. This is unfortunate, and I am sure was distressing for the parties. But in my view there is a distinction between disagreements in the committee, and conduct reflecting a breakdown in relations between the parties, on the one hand, and a breach of the Code of conduct on the other.

166. I do not think that any of the specific allegations, even if accepted, constitute acting unfairly, without care and diligence or involve unconscionable conduct. I also do not think that unspecified conduct, such as just "harassment" or "bullying" can support a finding of breach of the Code. I do not think that disagreeing with the position of Ms Leonard or Ms Gracie can of itself amount to

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[157] Transcript of proceedings 22 May 2018 pages 45-49; exhibit A24, email of 17 September 2016; exhibit R16 (statement of Mr Dearling) [16]-[29]

[158] Exhibit R20 [36]

[159] Transcript of proceedings 21 May 2018 page 91

[160] LexisNexis, *Concise Australian Law Dictionary* (LexisNexis Australia, 5th edn, 2014) (definition of fairness)

a breach. I do not think that expressing views contrary to those of Ms Leonard and Ms Gracie can do so, even if those views are strongly expressed. The expression of divergent opinions is essential to the democratic processes which the Act provides. Of course views can and should be expressed respectfully. I do not think that conduct reflecting the breakdown in relations between the parties is of itself a breach of the Code. In Tristania, the parties to some extent live together with each other. In such arrangements people sometimes get on and agree, at other times they disagree but resolve those disagreements by the processes in the Act, but notoriously there are some disagreements which result in a breakdown in relationships. In such breakdowns harsh words are often said, and this seems to be the case here on both sides. I do not think comments in this heated context demonstrates unfairness under the Code. Of course specific proven instances of bullying or harassment would be in a very different position.

Unfair gardening

167. The second group of allegations involves failing to undertake gardening on common property areas in a fair manner.[161] The Code of conduct requires that an executive committee member act fairly (section 2) and in the best interests of the owners corporation (section 4). The concept of fairness suggests that common property gardens, which the owners corporation holds as agent for the unit owners as tenants in common (section 19), should be maintained on a fair basis, and that gardens adjacent to some units should not be better maintained than gardens adjacent to other units. I think that where, as here, personal relationships have broken down, executive committee members need to take special care to ensure that their actions and decisions are not influenced by this, and that they act fairly to all owners.

168. Mr Hourigan stated that he never instructed the gardener to give any property any more attention than another, including his own, and rejected the suggestion that the gardener showed favouritism. He stated that as a member of the executive committee he put others above himself.[162]

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[161] Exhibit A2 [314], dot point 2
[162] Exhibit R14 [16]-[17] and [28]

169. Mr Dearling said that he only ever acted in the best interest of all owners of Tristania and never for his own personal gain.[163]

170. Ms Daniell rejected suggestions that she had gained special privileges, and had used her position of power to gain an advantage. Rather she said that she had always acted in the best interests of the entire owners corporation.[164]

171. Mr Michie rejected the suggestion that he used his position to gain special privileges, or that he had instructed the gardener to either do more work on some properties or neglect others.[165]

172. He stated that he was on the executive committee from 2005 to 2008, and again from 2012 until the present, and from 2013 he was garden co-ordinator. He also said he volunteered his time to install and maintain the irrigation system and perform maintenance tasks and small repairs around the complex. He said he spent on average two days a week on owners corporation gardening and maintenance work, and recently a similar amount of time on JCC work, which had involved refurbishment of the pond, all as an unpaid volunteer.[166] He rejected the allegations that he had used his position to gain special privileges. He said he had seen the gardener do work on both the applicants' properties. He also rejected the allegation that he spent the owners corporation's money recklessly.[167]

173. I note that many of the specific gardening tasks, as distinct from general maintenance, were set out in the inventory of garden tasks. This was compiled by Mr Michie with at least some assistance from Ms Leonard at one point. It was available to other executive committee members to comment on. Ms Daniell indicated that at each annual general meeting at the point of agreeing with the accounts the garden co-ordinator gave a report and those attending are able to ask questions.[168]

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[163] Exhibit R16 [29]
[164] Exhibit R17 [8]-[9]
[165] Exhibit R20; transcript of proceedings 23 May 2018 page 59
[166] Transcript of proceedings 23 May 2018 pages 125-127
[167] Exhibit R20 [7]-[11] and [32]
[168] Transcript of proceedings 22 May 2018 page 71

174. As discussed above, Mr Gehrig said that he spread the gardening work he did over the year and depending on what gardens needed work. He provided a document which he said he compiled which showed in green the areas that he maintained, and this supported the position that all common property areas were subject to his attention.[169] His evidence and documentation provided no basis for the assertion that the respondents directed him to allocate his gardening resources unfairly.

175. As discussed above at paragraphs 75 to 85 in relation to private gardens, the applicants asserted unfairness but provided little independent evidence of this. Ms Leonard had raised issues about a common property near her, but this seems to have been considered by the executive committee.[170]

176. An exception to this were the photographs provided of some common property outside Ms Daniell's unit and outside Ms Gracie's unit on Temperley Street. This showed a contrast between a well-developed and maintained garden outside Ms Daniell's unit, and a sparse area outside Ms Gracie's unit. Ms Gracie argued that this was the result of conscious discrimination against her.[171]

177. Ms Daniell gave details of her private arrangement with the gardener under which she paid separately for work in and around her property. She rejected any claim of privilege arising from this arrangement. Further she noted that she had lived in Tristania since 1998 and had spent significant time over the years looking after her garden and adjacent areas, and that the photos of the area outside her unit showed old trees and plants which have been there for some time and she had cared for over a long period. She stated that in particular she watered that garden regularly, especially when there was no rain; she had planted two hedges; some plants had died and had been replaced by her and her husband. She had done some of this on her own property and some on the common property. She indicated that the good condition of her garden and the common property was the result of a

[169] Exhibit R9; transcript of proceedings 4 April 2018 pages 13 and 62-63
[170] Exhibit R12 (minutes of meeting of 11 October 2017) page 10; exhibit A2, attachment 37
[171] Exhibit A1; exhibit A12

significant amount of work done on it by her, her husband and a paid gardener since the late 1990s.[172]

178. Further she said that there had been a banksia shielding the fence but this had to be removed as it was damaging the fence. It was replaced by camellias which the gardener planted. She noted it was unfortunate that one had died, and that it was understandable that Ms Gracie wanted a replacement, and that this was on the agenda for the new executive committee. She rejected any discrimination or abuse of power on her part.[173]

179. Mr Michie agreed that the garden area outside Ms Daniell's unit was much better than the area outside Ms Gracie's, which was next door. He suggested that the previous owner of unit 18, Ms Gracie's unit, may have removed many of the plants out the front, and that it takes time for new plants to grow.[174] Mr Michie agreed that there had been no replantings outside Ms Gracie's unit since the camellias died. He said in his statement made on 20 May 2018 that "we plan to replace those plants this year."[175] But he also agreed that this replanting was not included in the garden plan presented to the 2018 annual general meeting, and that this was an oversight on his part.[176]

180. In evidence on 23 May 2018, Mr Michie indicated that he would shortly replace plantings outside Ms Gracie's house which had died.[177] I assume that this has occurred. If this has not occurred, that does seem to me to indicate a failure to fairly allocate resources in relation to the common property garden. On this basis, if the new plantings have not occurred, I am willing to make an appropriate order to require this to occur. The applicants can apply for this in writing, copied to the respondents, who can then express any contrary view in writing.

181. This is not to suggest that in some part the difference between the two common property areas is not a result of their history, and in particular Ms Daniell's efforts over many years. But part of the difference relates to a current failure to maintain

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[172] Exhibit R17 [11]–[13] and [27]-[35]; transcript of proceedings 22 May 2018 pages 68–69 and 78
[173] Exhibit R17 [11]-[13] and [27]-[35]; transcript of proceedings 22 May 2018 page 80
[174] Transcript of proceedings 23 May 2018 page 123
[175] Exhibit R20 [30]
[176] Transcript of proceedings 23 May 2018 pages 105 and 124
[177] Transcript of proceedings 23 May 2018 page 67

and replant, which the parties seem to agree is unfair. Leaving aside this issue, in my view the evidence does not support any general unfairness in breach of the Code of conduct relation to the actions of the respondents concerning gardening on common property.

182. Ms Leonard also argued there was a conflict of interest in relation to Mr Michie because he was an owner, the treasurer, and the garden co-ordinator, which meant he had a lot of control in relation to gardening matters.[178] I do not think that there is any such conflict of interest in these circumstances. At any rate the Code of conduct provision simply requires disclosure of any conflict (section 8). The garden co-ordinator is responsible and accountable to the executive committee, and the annual general meeting. It is principally for these bodies to raise concern about the performance of relevant activities.

Not communicating appropriately

183. The third group of activities involves not communicating in an adequate manner, in particular blocking emails from the applicants, declining to walk around the complex with the applicants, being unhelpful, ignoring email requests,[179] turning away when the respondents see the applicants, deliberately ignoring well-meant greetings, leaving notes, and speaking ill of the applicants to others.[180]

184. It is clear that Ms Leonard attended all the formal meetings of the executive committee she was able to. There were frank discussions at these meetings of a range of issues. There were also frank discussions outside meetings. I do not think there is any obligation under the Code of conduct on executive members to communicate at any other time and in any other manner with another member of the committee. I do not think that generally blocking emails, declining to walk around the complex, being unhelpful, ignoring email requests, turning away, deliberately ignoring well-meant greetings, leaving notes, and speaking ill of the applicants in personal conversations to others amount to a breach of the Code of conduct. Ms Gracie admitted that she had grown to ignore people occasionally,[181]

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[178] Transcript of proceedings 8 March 2018 page 79
[179] Exhibit A2 [314], dot points 4, 5, 9 and 13
[180] Exhibit A20 pages 3-4, [6.4.1]-[6.4.3] and [6.4.8]
[181] Transcript of proceedings 21 May 2018 page 57

and there were allegations that Ms Gracie and Ms Leonard had themselves not communicated appropriately, and some of these are discussed below.[182]

185. The fourth activity is excluding Ms Leonard from processes that related to the "formation or decision-making of Tristania matters".[183]

186. It is clear that Ms Leonard attended all the formal meetings of the executive committee she was able to. As noted there were frank discussions at these meetings on a range of issues. I do not think that there is any prohibition on members of the committee discussing matters outside these meetings with some other members. This is not a breach of the Code of conduct.

187. The fifth group of activities is that Ms Gracie also complains that Mr Michie was a nuisance by disturbing the privacy of her home. The example given was that in January 2018 Mr Michie came to her property to complain about some water run-off from her lawn to the common property driveway.[184] It is also alleged he took photos of her husband removing a tree.[185]

188. Mr Michie was an executive committee member, treasurer and garden co-ordinator and I do not think it inappropriate for him to raise relevant issues with particular unit owners. I do not think this, or the taking of photographs, are a breach of the Code of conduct.

189. The sixth activity is that Ms Gracie also alleged that her unit letterbox keyhole area had super glue poured into it while all other letterboxes were untouched. Appropriately this was reported to the police.[186] But Ms Gracie did not allege that the respondents were responsible for this.[187]

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[182] Exhibit R10 [11], [17] and [82]
[183] Exhibit A2 [314], dot point 14
[184] Exhibit A2 [310]-[311]; transcript of proceedings 5 April 2018 page 34
[185] Exhibit A20 page 4, [6.6]
[186] Exhibit A2 [312]-[313]
[187] Transcript of proceedings 5 April 2018 pages 42-43

Making complaints

190. The seventh group of activities is that Ms Gracie alleged that a range of complaints were made against her in relation to parking issues and water use.[188]

191. Ms Gracie relied in particular in this regard on a bundle of documents she obtained from the manager. The respondents strongly objected to the admission of these documents as evidence well into the hearing, but they were admitted as exhibit A24, and the respondents were given further time to respond to them.[189] The emails raised a number of issues concerning Ms Gracie, in particular illegal parking by the residents at Ms Gracie's unit and her visitors.

192. Ms Gracie's position was, in summary, that the very existence of the emails with the manager showed bullying and a breach of the Code of conduct, that the complaints were exaggerated, and that many others parked inappropriately.

193. Mr Dearling stated that the roads in Tristania are quite narrow which is a problem if vehicles are parked inappropriately. Also, there are only five visitor parking spots for the 27 units and it became problematic when vehicles were left in these spots for extended periods of time. He stated that the executive committee asked him to address parking issues, and he communicated relevant issues to the manager. He did not regard this as bullying or harassment. This was a dispute between neighbours which he asked the manager to resolve, and he stated that from his perspective it had been resolved.[190]

194. He noted that Ms Gracie was at times hostile towards him, as was Ms Gracie's husband. Indeed one of the emails in exhibit A24 is a nearly contemporaneous note of "comments" by Ms Gracie to Mr Dearling.[191] Ms Gracie denied "using unseemly language towards Mr Dearling".[192] Generally, Mr Dearling stated that he always attempted to remain polite and friendly with all members of Tristania.[193]

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188 Exhibit A20 pages 3-4, [6.4.4]-[6.4.6]
189 Transcript of proceedings 5 April 2018 pages 56-58
190 Exhibit R16 (statement of Mr Dearling) [16]-[27]
191 Exhibit R16 [23]-[26]; exhibit A24 email of 17 September 2016
192 Transcript of proceedings 21 May 2018 page 52
193 Exhibit R16 [28]

195. Mr Dearling stated that he had raised parking issues with people other than Ms Gracie. He said that on one occasion because he had a very good relationship with the relevant people he spoke to them about the issue. On another occasion an issue was raised with the manager, and that the owner involved was quite upset because he got a letter telling him that if the relevant car was not moved, he would be charged.[194]

196. Ms Gracie appeared to concede at one point that Mr Dearling and Mr Hourigan, and perhaps Mr Michie, had not harassed her verbally, but then stated that "if you look at the definition of harassment and bullying exclusion, turning your back on people, ignoring them – all of these things are consistent with bullying behaviour." I have dealt with this type of conduct above. She strongly disagreed with the statement that Ms Daniell had not engaged in harassment or bullying, but gave no evidence of any specific behaviour.[195]

197. I do not think any of the complaints support a breach of the Code of conduct. I do not think that making and investigating apparently legitimate complaints is a breach of the Code. The emails raise what seem to be legitimate issues for the manager and executive committee. Also it is difficult to reconcile Ms Gracie's objection to these complaints, when she herself has raised a large number of complaints against others in these proceedings.

198. The eighth area of activities involved the lack of transparency in relation to executive committee decisions. Ms Gracie stated that a previous executive committee decision had been made to have all minutes located on a portal, but very few minutes and no financial statements had been made available in this way. Provided the statutory requirements are met, in my view it is a matter for the executive committee and the annual general meeting how issues are communicated to unit owners. However I note that some of the issues raised in these proceedings may not have arisen if there had been better communications.

[194] Transcript of proceedings 22 May 2018 page 54
[195] Transcript of proceedings 21 May 2018 pages 52-53

199. Ms Gracie also noted that Mr Michie was the only person allowed to contact the gardener.[196] Again, in my view, it is a matter for the executive committee, manager and the annual general meeting how there is communication with the gardener.

200. The ninth area is that Ms Gracie raises what she alleges is careless and reckless behaviour and failure to complete actions by the executive committee. This includes failure to properly address drainage near units 21 and 22 from 2005, which she said caused her backyard to flood in 2016, and failure to pursue replacement of letterboxes from 2007.[197] There was little evidence about these matters, and certainly not sufficient to support a finding of a breach of the Code of conduct by the respondents or require action by them.

201. In their written reply to the respondents' written submissions the applicants raised a number of new matters and allegations. I agree with the respondents that it would be unfair to the respondents and inappropriate for the Tribunal to deal with these.

Provision of information and access to records

202. The applicants sought answers to the letter of Ms Leonard dated 4 September 2017.[198] It was not clear on what basis the applicants were entitled to answers. It may be that failure to supply answers to such questions is a breach of the Code requirements of honesty, fairness and care and diligence. But at any rate in these proceedings significant information about these issues has been provided to the applicants and it is therefore now not necessary in my view to resolve the details of this claim.

203. The applicants sought documentation in relation to executive committee decisions,[199] and an order that as an executive committee member Ms Leonard can examine the records of the owners corporation "without any limitation."[200] Again, in these proceedings significant information about many issues has been

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196 Exhibit A20 page 2, [4.1]-[4.3]
197 Exhibit A20 page 6, [10]
198 Application, attachment 2 paragraph 1(f)
199 Application attachment 2 paragraphs 1(g) and (h)
200 Application attachment 2 paragraph 1(i)

provided and it is therefore now not necessary in my view to resolve the details of this claim.

204. But it is noted that there is a clear legislative basis for a relevant general order in relation to documents. Part 7 of the Unit Titles Management Act provides significant rights of access to owners corporation records. In particular, section 119(3) provides that on request by an eligible person for a unit or the common property to inspect the records of an owners corporation, the corporation must, within 14 days after the day the request is received, allow the person to inspect the information on the corporate register and any other records held by the corporation, and to take copies of any document inspected.

205. The Dictionary to the Act provides that "*eligible person* for a unit or common property in relation to which access to information is required means the owner, or another person with an interest in the unit, or in an easement over the common property." This is a difficult definition to understand. First, it includes substantive limitations on the right to access. That is, a person can only get access to information in relation to a unit which the person owns or has an interest in. But secondly, it contains ambiguities. In relation to information concerning common property, is the owner of a unit, a person with an interest in the unit, or a person with an interest in an easement over the common property entitled to access to information about the common property, or only a person with an interest in the easement over the common property? In my view it is the former; that is, the owner, or another person with an interest in the unit, can have access to information in relation to the common property. This is the more natural reading of the words. It is also more in accord with the terms of the Act. Section 19 provides that an owners corporation holds the common property as agent for the unit owners as tenants in common in shares proportional to their unit entitlement, and the owners corporation must give all members of the corporation an opportunity for the reasonable use and enjoyment of the common property. There are significant limitations on what the owners corporation can do with common property (section 20). Unit owners therefore have very significant interests in relation to common property; they are in effect owners as tenants in common, and the owners corporation is simply their agent. In this context it

would seem inappropriate that unit owners cannot get access to documents in relation to the common property, which they own, especially where a person with an interest in an easement can do so. This is the view I take, though I note it was not fully argued in the proceedings.

206. There are some limitations on the right to obtain documents. If a dispute exists, the owners corporation may withhold from inspection documents subject to legal professional privilege in relation to the dispute; as this decision makes clear there is a dispute and therefore some documents may be subject to the privilege. Many will not be. Further, a request under this section must be in writing accompanied by the fee. Subject to these limitations, the applicants have a right to inspect the records of the corporation in relation to their units and the common property. Records of the corporation would include records of the executive committee and manager.

207. Given that relevant claims were made in these proceedings, and the clear right under the Act, and the fact that notwithstanding significant documents were provided in these proceedings some documents may be outstanding, I am willing to make a declaration that the applicants had and have rights under section 119(3).

208. Whether Ms Leonard was also entitled to see all the records of the owners corporation when she was an executive committee member is not completely clear. The executive committee of an owners corporation exercises the functions of the corporation, and as such the committee would seem to have this access. The executive committee must keep significant minutes, records and accounts and therefore would have access to these (Part 2.1 of Schedule 2 to the Unit Titles Management Act). It would seem likely that an executive committee member would have a right of access, but this may be subject to decisions of the executive committee. It is not necessary or appropriate to determine this matter, since Ms Leonard has significant express rights as an owner, a significant number of documents were provided in these proceedings and the issue was not fully argued.

Summary

209. Therefore in summary the Tribunal has reached the following conclusions in relation to the specific terms of the Application (summarised at paragraphs 10 to 12 above).

(a) The executive committee has appropriately dealt with the minutes of the 7 June 2017 and 11 October 2017 meetings. There is no basis for interfering with these decisions.

(b) There is no basis for interfering with the resolution of agenda item 5 at the 11 October 2017 executive committee meeting.

(c) There is no basis for interfering with any other decision of the executive committee raised in these proceedings.

(d) The applicants are not entitled to payments from the respondents relating to moneys paid by the owners corporation for gardening on private property. There is no basis for an order to review the financial benefit and gain to the private properties and adjoining common properties of the respondents.

(e) The Tribunal cannot make an order removing the respondents from the executive committee and precluding them from standing for election to the committee for five years.

(f) There is no basis for making an order that the respondents have breached the Code of conduct, and therefore even if it could, the Tribunal would not make the order referred to under (e).

(g) If requested, the Tribunal will order replacement plantings outside Ms Gracie's unit on Temperley Street.

(h) The applicants have a right to documentation under and in accordance with section 119 of the Act. The Tribunal will make a relevant declaration.

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Senior Member R Orr QC

HEARING DETAILS

FILE NUMBER:	UT 25/2017
PARTIES, APPLICANT:	Frances Leonard Margaret Gracie
PARTIES, RESPONDENT:	Peter Michie Rhonda Daniell James Hourigan Charles Dearling
COUNSEL APPEARING, APPLICANT	N/A
COUNSEL APPEARING, RESPONDENTS	Mr M Walsh
SOLICITORS FOR APPLICANT	N/A
SOLICITORS FOR RESPONDENTS	Mills Oakley
TRIBUNAL MEMBERS:	Senior Member R Orr QC
DATES OF HEARING:	8 March 2018 4 April 2018 5 April 2018 21 May 2018 22 May 2018 23 May 2018