IN THE SUPREME COURT OF VICTORIA
AT MELBOURNE
COMMON LAW DIVISION
JUDICIAL REVIEW AND APPEALS LIST

Not Restricted

S CI 2018 00375

ELWICK 9 PTY LTD (ACN 610 147 290)
T/AS 9 ROUND ELSTERNWICK — Applicant

v

ELLIOT FREEMAN — First Respondent

LI SUN — Second Respondent

HEATHER SHEARER — Third Respondent

JUDGE:	QUIGLEY J
WHERE HELD:	Melbourne
DATE OF HEARING:	16 March 2018
DATE OF JUDGMENT:	11 May 2018
CASE MAY BE CITED AS:	Elwick 9 v Freeman
MEDIUM NEUTRAL CITATION:	[2018] VSC 234

ADMINISTRATIVE LAW – Application for leave to appeal – Whether reasons were written or oral – Whether reasons were inadequate – Whether order of the Tribunal failed to make a final determination – *Victorian Civil and Administrative Tribunal Act 1998* ss 117, 148 – *Owners Corporation Act 2006* ss 1, 4, 162, 165

STATUTORY INTERPRETATION – Inconsistency between planning permit and owners corporation rules – Whether a planning permit confers a right for the purposes of the *Owners Corporation Act 2006* s 140 – Whether a planning permit confers a right under an Act – *Owners Corporation Act 2006* s 140 – *Planning and Environment Act 1987* ss 3, 4, 47–68, 87–91, 114–130

APPEARANCES:	Counsel	Solicitors
For the Applicant	Mr E Nekvapil with Ms E Golshtein	Fairweather Legal
For the Respondents	Mr D Freeman, solicitor	David Freeman Lawyer

HER HONOUR:

Introduction

1 This is an application for leave to appeal pursuant to s 148 of the *Victorian Civil and Administrative Tribunal Act 1998* ('*VCAT Act*') and, if leave is granted, the appeal from a decision made on 9 November 2017 in proceeding OC1085/2017 in the Owners Corporations List of the Victorian Civil and Administrative Tribunal ('the Tribunal').

2 The applicant, Elwick 9 Pty Ltd ('Elwick 9'), is the operator of a gymnasium business ('the Gym'), located at the ground floor premises of a mixed use commercial and residential apartment building in Glen Eira. The first respondent, Dr Freeman, was at the time of the Tribunal hearing a resident and owner of one of the residential apartments above the Gym. The rules of the Owners Corporation AM781949T ('the Rules') for the Plan of Subdivision PS701454B ('the Plan of Subdivision') set a number of rules for the management and amenity of the building which apply to all owners an occupiers, including Elwick 9 and Dr Freeman.[1]

3 The Tribunal's orders dated 9 November 2017 directed, *inter alia*, compliance with the Rules and also restricted the hours of operation of the Gym operated on the premises of Elwick 9 ('the Orders'). The restriction was inconsistent with the opening hours authorised under a planning permit, which authorised the use of the Elwick 9 premises as a gym between the hours of 6.00am and 11.00am Monday – Friday. The Orders also purported to grant liberty to Elwick 9 to return to the Tribunal and seek removal of the operational hours restriction that the Tribunal had imposed.

4 Between 10 November 2017 and 29 November 2017, Elwick 9 complied with Order 2 as made on 9 November 2017 and did not operate the Gym between the hours of 6.00am and 8.00am. Elwick 9 claimed that the revenue of the Gym business was

[1] Mr David Freeman, is the solicitor for the respondents, including for the first respondent who is Dr Elliot Freeman.

being significantly affected by patrons being unable to use the Gym due to compliance with the 8.00am opening hour imposed by the Orders.

5 On 8 February 2018, an application brought by Elwick 9 for an extension of time in which to bring the leave application and an application for a stay of the Tribunal's order restricting the operation of the Gym until 8.00am was heard by this Court. The application for a stay was refused due in part to the ability to bring the application for leave and the appeal hearing on expeditiously so as to limit any potential detriment to the Elwick 9 whilst preserving the benefit of the Tribunal's ruling in Dr Freeman's favour.

6 The proceeding was listed for trial on 16 March 2018. During the course of the hearing Mr Freeman, on behalf of the respondents, conceded that there was sufficient material before me to grant leave, though the substance of the appeal remained in issue. I am satisfied that leave ought be granted.[2]

The questions on appeal

7 The questions of law which form the basis of the appeal fall into three categories:

(a) the adequacy of the Tribunal's reasons, as raised by Question 1. This question concerned whether the Tribunal's reasons were consistent with s 117 of the *VCAT Act*;

(b) the legality of the Orders made by the Tribunal, as raised by Question 2. This question concerned whether the Tribunal had made a final determination or whether the Orders had some form of ongoing supervisory effect inconsistent with the power conferred by sub-s 165(1) of the *Owners Corporation Act 2006 ('OC Act')*; and

[2] See *Secretary to Department of Premier and Cabinet v Hulls* [1999] 3 VR 331; *Myers v Medical Practitioners Board of Victoria* (2007) 18 VR 48, [28]. This test has been amended by *Justice Legislation Amendment (Court Security, Juries and Other Matters) Act* s 31, which applies to applications made after 1 May 2018.

(c) the correctness of the Orders made by the Tribunal, as raised by Questions 3 to 5 inclusive. The key issue here was whether the effect of the order restricting the hours of operation of use of the Gym ordered by the Tribunal was inconsistent with, or limited a right contrary to s 140 of the *OC Act*.

8 For the reasons which follow, I have determined to grant the appeal on the grounds that the Order of the Tribunal restricting the hours of operation of the Gym is inconsistent with, and has the effect of limiting, a right under the *Planning and Environment Act 1987* (*'PE Act'*) which is breach of s 140 of the *OC Act*.

Background

9 The dispute before the Tribunal arose from the complaint made by Dr Freeman, an owner and occupier of a residential apartment which is part of a building at 37 Park Street and 320-324 Glen Eira Road, Elsternwick ('the Building'). The Building is a mixed use development with shops and commercial uses at ground floor level and residential apartments occupying the two floors above. Since August 2016, Elwick 9 has operated a Gym from unit 3/324 Glen Eira Road, which is located on the ground floor of the Building. The Building has over 30 residential apartments in the two upper floors.

10 Owners Corporation for the Plan of Subdivision was created for the Building affecting all lots on the Plan of Subdivision and the common property. Dr Freeman owned Lot 204 of that Plan of Subdivision and Elwick 9 conducts his Gym business from Lot T3. The Owners Corporation is one to which the *OC Act* applies. The complaint by Dr Freeman (and supported by two other Lot owners) was that there was excessive noise and vibration emanating from the Gym. It was said that this activity was in contravention of Rules. The relevant Rules are set out below.

The relevant owners corporation rules

11 The relevant Rules relied upon by Dr Freeman were:

> **2. USE AND BEHAVIOUR BY PROPRIETORS, OCCUPIERS AND INVITEES**

A Member, must not, and must ensure that the Occupier of a Member's Lot does not:

2.1

……

(d) use or permit any Lot, the Common property or Common facilities to be used for any purpose which may be illegal or injurious to the reputation of the development or may cause a nuisance or hazard to any other Member or Occupier of any Lot or the families or visitors of any such Member or Occupier;

……

4 NOISE

A Member must not and must ensure that the Occupier of a Member's Lot does not:-

(a) make or permit to be made any undue noise in or about the Common Property or any Lot affected by the owners corporation;

(b) make or permit to be made noise from music, machinery or other, including social gatherings, musical instruments, television sets, radios, stereos, CD players or the like which may be heard outside the owner's Lot between the hours of 10.00pm and 8.00am;

(c) create upon the Members Lot any noise likely to be objected to or which would be likely to interfere with the peaceful enjoyment of the Proprietor or Occupier of another Lot or of any person lawfully using Common Property;

(d) not to hold any social gathering or create noise likely to be objected to in the Common Property or on balconies, courtyards or patios and must ensure that any such noise is minimised by closing all doors, windows and curtains of his or her Lot and also such further steps as may be within his or her power to effect between the hours of 10.00pm and 8.00am;

The planning permit

12 On 8 December 2015, Elwick 9 sought a planning permit for the use of the ground floor unit for the purposes of a gym.[3] The application was advertised in accordance with the relevant provisions of the *PE Act* and the *OC Act*. Pursuant to cl 34.01 of the

[3] Described in the permit as a 'restricted recreational facility' consistent with the definition in Clause 74 of the Planning Scheme.

Glen Eira Planning Scheme ('the Planning Scheme') the land is zoned Commercial 1 and a permit for use of the premises for a gym is required.

13 There were a number of objections to the permit application, including from some of the occupiers of the Building. The Owners Corporation did not object, but did record its support subject to conditions.[4] The application was considered by the responsible authority, the Glen Eira City Council ('the Council') and a permit was determined to be granted subject to conditions.[5] Planning Permit GE/PP-28823/2015 was issued by the Council on 1 August 2016 ('the Permit').[6]

14 The key conditions of the Permit insofar as they relate to noise and amenity protection are as follows:

> 2. No amplified music may be audible outside the building between the hours of 7pm and 9am, 7 days a week to the satisfaction of the Responsible Authority.
>
> 3. Prior to the commencement of the use, the rubber flooring shown on the endorsed plans must be installed and then maintained to the satisfaction of the Responsible Authority.
>
> 4. No activity associated with the approved use may occur within the car parking area or any other area external to the site. All activity associated with the use must occur solely inside the building.
>
> …
>
> 7. The use must operate only between the following hours:
>
> 6 am – 11 am Monday to Friday
>
> 3pm – 8 pm Monday to Thursday
>
> 7 am – 12 pm Saturday.
>
> …
>
> 10. Noise levels must not exceed the permissible noise level stipulated in State and Environment Protection Policy N-1 (Control of Noise from Industrial Commercial and Trade Premises within the Melbourne Metropolitan Area) and State Environment Protection Policy N-2 (Control of Music Noise from Public Premises).

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4 Affidavit of David Ashley Fairweather sworn 27 February 2018, exhibit DAF-13; exhibit DAF-12.
5 Ibid exhibit DAF-13.
6 Affidavit of David Ashley Fairweather sworn 2 February 2018, exhibit DAF-2.

15 At the end of the seventeen conditions imposed by the Council there were several notes which do not form part of the Permit.

16 In particular, the following note stated:

> C. Nothing in the grant of this permit should be construed as granting any other permission other than planning permission for the purpose described. It is the duty of the permit holder to acquaint themselves, and comply, with all other relevant legal obligations (including any obligation in relation to restrictive covenants and easements affecting the site) and to obtain other required permits, consents or approvals.

The Tribunal proceedings

17 On 1 June 2017, Dr Freeman issued proceedings at the Tribunal in the Owners Corporation List complaining that the noise and vibration emanating from Lot T3 could be heard and felt from his Lot 204, and as such interfered with the peaceful enjoyment of his residential lot. Prior to the initiation of proceedings at the Tribunal, complaints had been made to the Council, the Environmental Protection Authority and to the Owners Corporation by Dr Freeman, all to no satisfaction.

18 The Points of Claim dated 21 September 2017 sought relief, *inter alia*, by way of a declaration that the Gym operator had breached Rules 2.1 (d) and 4 (a) – (d) of the Rules and that pursuant to sub-ss 165(1)(h) and 165(1)(b) of the *OC Act* an order that the Gym owner cease engaging in any conduct which contravenes those rules. Alternatively, orders that the Gym owner not create any nuisance from Lot T3, not create any noise or vibration from Lot T3 that enters Dr Freeman's Lot at a sufficient volume to cause vibration of any object in or forming part of the Lot or interfere with the peaceful enjoyment of Dr Freeman's Lot or any person lawfully using the common property. Further, an order that if the Gym owner did not comply with any part of those orders or with Rules 2.1(d) and 4(a)-(c) that leave be granted to seek further orders including the imposition of civil penalties in respect of each breach after the date of the orders.

19 By way of defence to the Points of Claim, Elwick 9 denied the alleged breaches of the Rules and said that the use was lawful by virtue of the Permit and occupancy

permits granted by the relevant authorities. Section 140 of the *OC Act* was raised in this context.

20 The matter came on for hearing on 9 November 2017. Dr Freeman and two other owner-occupants of the Building gave evidence as to the noise and vibration and the interference with their enjoyment of their properties in contravention of the Rules.

21 The Tribunal made oral findings and gave oral reasons in the course of pronouncing the decision. The relevant provisions of the Orders are set out as follows:

> **Orders**
>
> 1. The respondent is ordered to comply with the Rules of Owners Corporation PS701454B , (the Rules) in particular Rules 2.1(d) and 4(a)-(d)
>
> 2. Until further order of the Tribunal as and from 10 November 2017, the respondent shall commence operation of the respondents business no earlier than 8 am.
>
> 3. The Tribunal notes the stated willingness of Benjamin Gunning, a director of the respondent company in representing it at this hearing, to immediately address the control of noise and vibration from Lot T 3 as it affects any other Lot within PS701454B or the common property. If, and when that control is achieved, the respondent has liberty to apply for the cessation or modification of order 2.
>
> 4. Liberty is granted to the applicant to apply for further and better orders to ensure compliance with orders 1 and 2 and the Rules including but not limited to any orders set out in paragraph 10 of the submission for civil penalties in respect of each breach and for contempt.
>
> 5. …

22 On 18 December 2017, an application to modify Order 2 was sought from the Tribunal. Elwick 9 had obtained a report from JTA Health Safety and Noise Specialists dated 29 November 2017[7] and by letter to the Tribunal dated 1 December 2017 requested an urgent hearing pursuant to the liberty to apply in Order 4. Orders were made by the Tribunal listing the proceeding for hearing on 31 January 2018 adding other residents of the building, Lu Sun and Heather Shearer as parties, and

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7 Affidavit of David Ashley Fairweather sworn 2 February 2018, exhibit DAF-4.

suspending the operation of Order 2 made on 9 November 2017 until the hearing of the proceeding on 31 January 2018.

23 On 31 January 2018, an application to modify Order 2 was listed. Elwick 9 withdrew the application to modify Order 2 and was given an extension of the suspension of the operation of Order 2 until 5.00pm, 2 February 2018 to allow Elwick 9 to immediately seek leave to appeal to the Supreme Court.

Question 1- the adequacy of the Tribunal's reasons

24 The first question of law posed on behalf of Elwick 9 was, 'Did the Tribunal comply with s 117 of the *VCAT Act* in respect of the Orders?'.

25 Section 117 of the *VCAT Act* requires the Tribunal to give reasons for any order it makes in a proceeding within 60 days after making the order. Elwick 9 claimed that the Tribunal failed to give reasons, or the reasons it gave failed to disclose the findings of fact and path of reasoning for the decision and in particular which rule or rules had been contravened and how the orders related to those findings.

Was there a failure to give reasons?

26 It is clear that the Tribunal gave oral reasons. Counsel before the Tribunal conceded that reasons were given at the hearing. This is apparent from the transcript of the Tribunal hearing.[8] Under sub-s 117(6) of the *VCAT Act,* oral reasons form part of the orders.

27 The Tribunal said:

> The decision will have to be typed up, drafted and typed up. So you may not get it for a bit of time, because I'm not back in Melbourne until Tuesday. And it has to be typed and signed.[9]

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8 Transcript of Proceedings, *Elliot Freeman v Elwick 9 Pty Ltd* (Victorian Civil and Administrative Tribunal, OC 1085/2017, J Kefford, 19 November 2017) 147.28–150.35 (J Kefford), 160.35—36 (E Golshtein).

9 Ibid, 161.19-21 (J Kefford).

28 The Tribunal had said that the 'decision' will be typed up. Under sub-s 116(1) of the *VCAT Act* an order must be in writing. Elwick 9 may have had a mistaken belief that this meant that the 'reasons' would also be typed up.[10] Elwick 9 could have requested written reasons under sub-s 117(2) of the *VCAT Act.* No request was made under sub-s 117(2). As such, the Tribunal was not required to give written reasons under sub-s 117(3) of the *VCAT Act* or otherwise.

29 Subsection 117(5) of the *VCAT Act* provides that if the Tribunal gives written reasons, it must include in those reasons its findings on material questions of fact. This clearly only applies to written reasons, if written reasons are given. No request under s 117(2) of the *VCAT Act* was made for written reasons.

30 Elwick 9 submitted that because the Tribunal used the word 'Findings' in the Orders, s 117(5) of the *VCAT Act* applies. I do not accept this submission. Section 117(5) applies if the Tribunal gives *written reasons*, which as I have already decided the Tribunal did not and was not required to do.

Were the reasons inadequate?

31 In *SMA Projects Australia Pty Ltd v Jovanovic,*[11] Mandie J considered an appeal from the Tribunal where oral, not written reasons were given. His Honour summarised the procedural background:

> 7. Before considering what occurred before the tribunal and the submissions made on behalf of SMA Projects on this appeal, I should briefly refer to the provisions governing the tribunal hearing and the orders made by the tribunal. The tribunal is required to "act fairly and according to the substantial merits of the case in all proceedings". The tribunal is bound by the rules of natural justice but is not bound by the rules of evidence or any practices or procedures applicable to courts of record (except to the extent that it adopts the same) and may inform itself on any matter as it sees fit. The tribunal must conduct each proceeding with as little formality and technicality, and determine each proceeding with as much speed, as all relevant statutory requirements and a proper consideration of the matter before it permit.

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10 See Elwick 9, 'Applicant's Outline of Submissions', in *Elwick 9 v Freeman,* S CI 2018 00375, 28 February 2018, [17].

11 (2006) 24 VAR 327.

> 8. Section 117(1) of the VCAT Act requires that the tribunal give reasons for any order it makes in a proceeding within 60 days after making the order. In the case of a small claim, as here, a party requiring written reasons must make a request for written reasons "before or at the time of the giving or notification of the tribunal's decision in the proceeding". In the present case, the tribunal gave oral reasons at the time of making its order and no party requested written reasons. Section 117(5) of the VCAT Act provides that, if the tribunal gives written reasons, it must include in those reasons its findings on material questions of fact. There are no express requirements as to the contents of oral reasons. The reasons for an order, whether oral or written, form part of the order. Given that any party to a proceeding may, with leave, appeal on a question of law, it is clear enough that the reasons required by s 117, when oral, must still be sufficient to enable the appeal court to follow, even if in short compass, the conclusions of fact and/or law constituting the basis for the orders made by the Tribunal."[12]
>
> (footnotes omitted)

32 In *Sun Alliance Insurance Ltd v Massoud*,[13] Gray J (with whom Fullagar and Tadgell agreed) said:

> In my opinion, the decided cases show that the law has developed in a way which obliges a court from which an appeal lies to state adequate reasons for its decision. The adequacy of the reasons will depend upon the circumstances of the case. But the reasons will, in my opinion, be inadequate if: -
>
> (a) the appeal court is unable to ascertain the reasoning upon which the decision is based; or
>
> (b) justice is not seen to have been done.[14]

33 Further, in *Franklin v Ubaldi Foods Pty Ltd*,[15] Ashley JA stated:

> Reasons must be such as reveal – although in a particular case it may be by necessary inference – the path of reasoning which leads to the ultimate conclusion. If reasons fail in that respect, they will not enable the losing party to know why the case was lost, they will tend to frustrate a right of appeal, and their inadequacy will in such circumstances constitute an error of law.[16]
>
> (footnotes omitted)

34 In *State of Victoria v Turner*,[17] Kyrou J stated:

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12 Ibid [7]–[8].
13 [1989] VR 8.
14 Ibid 18 (Gray J).
15 [2005] VSCA 317 (21 December 2005) (Warren CJ, Nettle and Ashley JJA).
16 Ibid 12-13 [38].
17 (2009) 23 VR 110, 173 (Kyrou J).

> On the basis of the above decisions and the terms of s 117 of the VCAT Act itself, the position in relation to s 117 is that where the tribunal fails to give reasons or gives reasons which omit a finding on a material question of fact or otherwise fail to disclose its path of reasoning for reaching its decision, it commits a vitiating error year of law.
>
> There are conflicting first instance decisions in this court as to the circumstances, if any, in which the provision of inadequate or deficient reasons by the tribunal constitutes an error of law. For myself, in relation to reasons of the tribunal, which are subject to s 117 of the VCAT Act, I would prefer not to use imprecise expressions such as "inadequate reasons" or "insufficient reasons" as a test for determining whether an error of law exists. I would prefer to state the test in terms set out in paragraph [240] of this judgment.'[18]
>
> (footnotes omitted)

35 The question raised then is whether the Tribunal's decision shows a logical path of reasoning leading to the decision made.

36 I am satisfied that the Tribunal did show a logical path of reasoning leading to the decision made. In making its findings on the evidence the Tribunal stated that:

> It seems to me that this case turns on the question of fact as to whether the noise that has been the crux of Dr Freeman's case has been established, and I'm satisfied that it has. Of course, parties can prepare their cases differently. They are welcome to get expert reports if they choose to. But in this case, we have the evidence on Dr Freeman's side not only of his own testimony but that of Ms Sun, who has come here today and given sworn evidence...[19]

37 The Tribunal also made reference to the affidavit of Heather Shearer and the logs that were kept by the parties which the Member accepted.[20]

38 In relation to noise and nuisance, the Tribunal said:

> Now - so I'm satisfied there has been a breach of the owners corporation rules in relation to noise. Any reference in the rules to nuisance is, I take it, to be a description of a problem rather than talking about a common law remedy, and it's something that VCAT has jurisdiction to look at….does the particular conduct complained of constitute a nuisance? Here, yes, I think it does. I accept that both Dr Freeman and Ms Sun have been considerably inconvenienced by the noise. They've spoken of their lack of sleep and the

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18 Ibid 173.

19 Transcript of Proceedings, *Elliot Freeman v Elwick 9 Pty Ltd* (Victorian Civil and Administrative Tribunal, OC 1085/2017, J Kefford, 19 November 2018) 147.29–44 (J Kefford).

20 Ibid 147.29–44 (J Kefford).

> stress that it has put on them, and I accept that that's plausible and that their evidence is compelling.[21]

39 In relation to the planning permit, the Tribunal said:

> Now, looking at the permit… It seems to me… that… a company or individual… who… has the benefit of a permit [ought] to acquaint themselves with every other requirement, and that would include the owners' corporation rules, the EPA rules and the council health and safety rules et cetera. All of those may not be dealt with in the permit, but the business and the business-operator has to acquaint themselves with that and comply with them.[22]

40 In making its findings, the Tribunal had before it submissions which set out in detail matters of fact and matters of law. When the Tribunal published the Orders, the submissions were incorporated into the findings. The oral reasons, read together with the submissions and the Orders, in the context of the exchanges at the hearing all of which are recorded in the transcript, discloses a path of reasoning which shows that the Member concluded:

(a) that there was a breach of Rules r 2.1(d) in relation to nuisance (but not illegality), r 4(h) in relation to undue noise, r 4(b) in relation to noise between the hours of 10.00pm and 8.00am and r 4(c) in relation to noise likely to be objected to or which would be likely to interfere with the peaceful enjoyment of Dr Freeman and other lot owners; and

(b) that upon consideration of the Permit, the Permit allowed the use of Lot T3 as a gym but did not permit noise. This reasoning lead to the finding that Elwick 9 was required to comply with the Rules and to the making of Order 1.

41 I agree with the submission made by Mr Freeman that it is not necessary for the Tribunal to state with particularity how it reached a conclusion in relation to the breach of each specific Rule.

42 In relation to Order 2, the Tribunal considered the following:

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21 Ibid 148.34–41 (J Kefford).
22 Ibid 149.6–36 (J Kefford).

a) the submissions on behalf of Dr Freeman that Rules r 4(b) prohibited the making of noise from the Gym which may be heard outside Lot T3 between the hours of 10.00pm and 8.00am;[23]

b) the evidence of Dr Freeman and the other Lot owners of been woken up at around the opening time of the Gym each day by noise and vibration caused by the activities of the Gym;[24]

c) the stated willingness of Elwick 9, through Mr Gunning's counsel, to fix the problems;[25]

d) the admission by counsel appearing for Elwick 9 that, 'we're talking about a gym. Everything in there will cause noise';[26] and

e) submissions by counsel for Elwick 9 that in formulating a remedy the Tribunal ought balance the commercial needs and reasonable aspirations of a business operator and the peaceful enjoyment of the rights of a resident.[27]

43 I consider that the Tribunal's decision shows a logical path of reasoning leading to the decision to restrict the opening hours of the Gym in Order 2 and in making that order the Tribunal said:

> I'm not going to close the business down, not at first instance. But I am prepared to curtail the operation of the business….[28]
>
> …
>
> It's risky, running this type of business in this type of premises …… a residential building …. now I am going to make an order that restricts the opening hours - until further order of the Tribunal…. until 8 am.[29]

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23 Ibid 146.15–24 (D Freeman).
24 Ibid 22.7–13, 49.36-38; Affidavit of Heather Shearer sworn 6 February 2018, [6]–[8].
25 Transcript of Proceedings, *Elliot Freeman v Elwick 9 Pty Ltd* (Victorian Civil and Administrative Tribunal, OC 1085/2017, J Kefford, 19 November 2018) 12.23–24, 73.43–47, 78.22–23, 106.36, 116.28–29, 119.41–120.2, 124.9.
26 Ibid 155.28.
27 Ibid 132.3–4; 132.33–36.
28 Ibid 156.2–3.
29 Ibid 158–159.

44 It was submitted on behalf of Elwick 9 that the Tribunal's reasons failed to disclose the Tribunal's determination as to whether the Rules were inconsistent with the Permit and if so, the effect of s 140 of the *OC Act*.[30]

45 As previously stated, my reading of the Tribunal's reasoning is that on the evidence the Tribunal did find that there was a breach of the Rules rr 2.1(d) and 4(a)-4(d) and in this the Tribunal found that there was a noise and vibration emanating from the Gym.[31] The Tribunal accepted that the Permit allowed the operation of the business of a gym but it did not permit noise and therefore it was within its power to make a finding or findings that the Rules had been breached.[32] As the Tribunal noted, 'the gym could open at 6.00am for ballet classes if it wanted but he could not make noise before 8.00am'.[33]

46 Because the reasoning was based on this understanding that the Permit did not permit noise, it was not necessary in the Member's path of reasoning to consider s 140 of the *OC Act*. If the Permit did not permit noise, there was no inconsistency between the Permit and the Rules.

47 I have considered the issue of whether the Permit did permit noise in detail below and I have found that the Permit in fact did permit noise. This is relevant to the s 140 grounds of appeal which are considered later.

48 In relation to Order 3, the Tribunal provided Elwick 9 with an opportunity to revert to the opening hours specified in the Permit on the basis that it could demonstrate solutions could be found to the amenity issues. This was not on the basis of re-litigating the case but to provide solutions.[34]

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30 Elwick 9, 'Applicant's Outline of Submissions', in *Elwick 9 v Freeman*, S CI 2018 00375, 28 February 2018, [16.3].

31 Transcript of Proceedings, *Elliot Freeman v Elwick 9 Pty Ltd* (Victorian Civil and Administrative Tribunal, OC 1085/2017, J Kefford, 16 November 2017) 147.43–44 (Kefford J).

32 Ibid 151.25–31.

33 Ibid 153.44.

34 Ibid 160.32–33.

49 It is clear that Elwick 9 understood the terms of the Orders as it did not open the Gym before 8.00am in accordance with Order 1 from 10 November 2017 and, on 30 November 2017, applied to the Tribunal under the liberty granted by Order 3 to modify the operation of Order 2.

50 Order 4 provided the applicant an opportunity to return to the Tribunal for further and better orders to ensure compliance with orders 1 and 2.

51 Consequently, applying the relevant tests set out in *SMA Projects Australia Pty Ltd v Jovanovic,*[35] *Secretary to the Department of Justice v YEE*[36] and *State of Victoria v Turner,*[37] I conclude that in relation to the adequacy of the reasons question:

a) the Tribunal gave oral reasons at the hearing and made findings after consideration of all material questions of fact;

b) the Tribunal transcript discloses the Tribunals path of reasoning in reaching its decision;

c) the Tribunal's oral reasons and were adequate and sufficient, by a combination of what was expressly stated and in the inference necessarily arising from those statements is sufficient to enable both Elwick 9 and an appeal court to understand the reasoning upon which the Orders were based; and

d) consequently, the answer to Question 1 is yes, the Tribunal did comply with s 117 of the *VCAT Act*.

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35 [2006] VSC 176 (10 May 2006) (Mandie J).
36 [2012] VSC 447 (26 September 2012), [90]–[97].
37 [2009] VSC 66 (04 March 2009) (Kyrou J).

Question 2- did the *OC Act* confer the power to make the Orders?

52 The second question of law posed on behalf of Elwick 9 was, 'Can the power conferred by s 165 of the *OC Act* be exercised from time to time as the occasion requires?'.

53 In effect, this question asks whether the decision was a final decision or an ongoing supervisory decision which does not finally determine the dispute between the parties.

54 It was argued by Elwick 9 that the orders which provided for liberty to apply did not determine the dispute between the parties and had the effect of being an ongoing or supervisory order which was inconsistent with the obligation to bring to finality the issues in dispute.

55 Section 162 of the *OC Act* confers jurisdiction on the Tribunal to 'hear and determine a dispute' arising under the rules of an owners corporation. Subsection 165(1) provides that the Tribunal may make a range of orders '[i]n determining an owners corporation dispute', and that it 'may make any order it considers fair' relevantly including 'an order requiring a party to do or refrain from doing something'[38] or 'an order requiring a party to comply with [the OC] Act or the regulations or the rules of an owners corporation'.[39]

56 When exercising original jurisdiction,[40] the Tribunal has the power conferred upon it by or under the enabling enactment and the *VCAT Act*, regulation and rules.[41] It is always a question of construing the Act in question. For example, 'any order it considers fair' is not conferring jurisdiction to do palm tree justice.[42]

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38 *Owners Corporations Act 2009* s 165(1)(a) ('the *OC Act*').
39 Ibid s 165(1)(b).
40 See *Giurina v Owners Corporation No 1579* [2012] VSC 466, [45]–[47].
41 *Victorian Civil and Administrative Tribunal Act 1998* s 44 (the '*VCAT Act*'). The word 'function' is relevantly defined in s 3 of the Act to include 'power'.
42 See *Christ Church Grammar School v Bosnich* [2010] VSC 476.

57 In the context of ss 162 and 165 of the *OC Act*, the need for finality is a powerful factor.[43]

58 I agree with the submission made on behalf of Elwick 9 that the determination of a dispute means that it ought be brought to finality. In addition, s 98(1)(d) of the *VCAT Act* requires the Tribunal to determine each proceeding with as much speed as the requirements of the *VCAT Act* and any and the enabling enactment[44] and proper consideration of the matters before it permit.

59 It is not uncommon for the Tribunal to grant 'liberty to apply' in respect of its orders. This type of order is commonplace when the Tribunal is dealing with interlocutory matters, directions hearings or where an interim decision is warranted. Further, sub-s 165(3) of the *OC Act* specifically provides that VCAT may make any interim orders and ancillary orders it thinks fit in relation to an owners corporation dispute.

60 As Vice President Bowman explains in *Richardson v Business Licensing Authority*:

> As is said in Williams "Civil Procedure – Victoria" (at I 59.01.20), the words "liberty to apply" are not intended to reserve to a court making a final order a right either to set aside or vary in any material respect the operative and substantive part of the order. The reservation of liberty to apply is simply a device by which further orders may be made when necessary for the purpose of implementing and giving effect to the principal relief already pronounced – see *Nicholson v Nicholson* [1974] 2 NSWLR 59. It is a mechanism which obviates the necessity of a further proceeding being brought to deal with matters that are essentially consequential upon the making of the original order: see *Abigroup Ltd v Abignano* (1992) FCA 39 FCR 74.
>
> Indeed, there are some useful comments contained in the judgment of the Full Court of the Federal Court of Australia in *Abigroup* and particularly at 509. These comments are as follows:-
>
> > "The reservation of liberty to all parties to apply to a court is a provision directed essentially to questions of machinery, which may arise from the implementation of a court's orders ... Historically, orders reserving leave to apply are for limited purposes ... Historically the reservation by the Court of Chancery of further consideration of a decree was intended to cover the circumstance where following the pronouncement of the decree (a final decree) a further hearing was necessary for the court to deal with some outstanding issue sometimes requiring taking further evidence and making further declarations or

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43 See *Kabourakis v Medical Practitioners Board of Victoria* (2006) 25 VAR 449, 463 [47]–[48].

44 In this case the *OC Act*.

> orders. But this did not detract from the initial orders as being final orders. Rather it was a mechanism designed by the Court of Chancery to obviate the necessity of a further suit being instituted to deal with matters that were essentially consequential upon the making of the initial final decree ... It all depends upon the circumstances of the case and the particular orders or decrees formulated by the court."[45]

61 Under sub-s 165(3) of the *OC Act*, the Tribunal may make 'any interim orders and ancillary orders it thinks fit in relation to an owners corporation dispute'.[46] The *VCAT Act* defines 'interim order' as meaning an order of an interim or interlocutory nature.[47]

62 On examination of the Tribunal transcript, and given the findings set out previously, I find that the use of the terminology 'liberty to apply' was *intended* not as a final order but as a way of providing the opportunity for Elwick 9 to demonstrate that the Gym could operate in compliance with the Rules. The Orders also provided an opportunity for the applicants to return to the Tribunal for further orders to ensure compliance with Orders 1 and 2 and to seek civil penalties in respect of breach and for contempt.

63 Whilst acknowledging the objectives of the *VCAT Act* and the provisions of 98(1)(d) for timely and efficient justice, the effect of the form of the Orders is that they are not expressed as final orders. This is consistent with the finding of the Tribunal as noted above in that the Tribunal was seeking to limit the operation of the Gym but giving its operator the chance to demonstrate compliance with the Rules as to noise and vibration. It is also consistent with the Tribunal's finding which makes similar reference to Elwick 9 being 'currently prepared to address the issues set out in the submissions'. However, when the application was made pursuant to the 'liberty to apply' the Tribunal refused the opportunity to put the expert evidence before it on the basis that to do so was seeking to re-litigate the matter. As a consequence, Elwick 9 made application to this Court.

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45 *Richardson v Business Licensing Authority* (2005) 23 VAR 456, [11]–[12] (per Bowman J).
46 *OC Act* s 165(3).
47 *VCAT Act* s 3.

64 I have concluded that Orders 3 and 4 are not expressed as final orders. They have an ongoing supervisory effect which is inconsistent with bringing a dispute to a final determination. As a consequence given the real effect of Orders 3 and 4, they are better classified as interim or ancillary orders and there is power in the Tribunal to make interim or ancillary orders pursuant to sub-s 165(3). An appeal from an interim order lies to this Court: *VCAT Act* s 148.

65 The reservation of liberty to apply is a means for a court to manage a proceeding at an interlocutory stage or to assist in implementing and giving effect to the principal relief.[48] If the Tribunal had as its intention to make interim orders it ought to have been expressed them in a more limited manner so that the dispute could be brought to finality in accordance with the expectations implicit in ss 162 and 165(1) of the *OC Act*. The orders made by a Tribunal ought to be expressed either as final orders determining the matter if made pursuant to sub-s 165(1), or if there is some supervisory role that the Tribunal needs to undertake for the purposes of finally determining the matter, an interim or ancillary order may be validly made.

66 However, for the reasons that follow in relation to Questions 3 to 5, my conclusion in relation to Question 2 is not determinative of the appeal.

Questions 3-5 -whether the restriction on the use of the gym ordered by the Tribunal was in its effect inconsistent with section 140 of the *OC Act*

67 Questions 3 – 5 as posed on behalf of Elwick 9 are:

3. Does the grant of a permit under section 61 of the *Planning and Environment Act 1987* authorising a person to do something they would otherwise be prohibited from doing (a planning permit) create a "right" under that Act within the meaning of s 140(b)(v) of the *OC Act* to do the thing authorised by the planning permit?

4. If:

[48] *Richardson v Business Licensing Authority* (2005) 23 VAR 456, [11] (per Bowman J).

(a) by reason of s 140(b)(v) of the *OC Act* a rule of an owners corporation (the rule) does not have the effect of preventing a person from doing a thing authorised by a planning permit (the thing); and

(b) the Tribunal hears and owners corporation dispute relating to an allegation that the person has breached the rules;

does the Tribunal have power to order the person not to do the thing?

5. If the answer to question 4 is "yes" does the Tribunal have power to make such an order if it has misdirected itself on the question whether the rule was ineffective to prevent the person doing the thing?"

68 These questions as framed are somewhat convoluted and were subject of some discussion at the trial. I have taken the issue in question to be (in the absence of a direct challenge to any of the individual rules), that by limiting the hours of operation the effect of the Orders made by the Tribunal allows the Rules to have precedence over the Permit and that such limitation would be inconsistent with s 140 of the *OC Act*. Mr Freeman helpfully framed the legal question as 'for the purposes of interpretation of sub-s 140(1)(b) of the *OC Act*, is a permitted use under a planning permit a 'right' under the *PE Act*?'.[49]

69 This question raises the issue of s 140 of the *OC Act* and the compatibility of the Rules with another right, in this case a planning permit.

70 The Tribunal avoided direct consideration of the effect of the Orders and their consistency with s 140 of the *OC Act* by finding that the Permit did not authorise the making of noise.

71 Section 3 of the P*E Act* provides that 'use' in relation to land includes use or proposed use for the purpose for which the land has been or is being or may be developed. 'Use' therefore has its ordinary meaning in the additional elements included in the definition.

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49 Elliot Freeman, 'Respondent's Outline of Submissions', in *Elwick 9 v Freeman,* S CI 2018 00375, 7 March 2018, 10.

72 The Macquarie Dictionary defines 'use' as 'to employ for some purpose'. Therefore, when people are using land they are doing so with some object or purpose in mind. They are using it, for example, as a gym. In general, use of land means physical use for a purpose which relates to land as a physical entity.

73 The Permit gave Elwick 9 permission and authority, in other words the right to use the land for the purpose of a gym.[50] This means Elwick 9 has permission to do the activities that were part of that use subject to the conditions in the permit.

74 It is inconsistent with common sense that the permission to use land for a specified use is divorced from the usual consequences or incidents of that use. Would a child care facility, a school, a restaurant, or a bar be expected to be effectively silent for all hours of the day within the permitted hours of operation? In my opinion, it is a theoretical construct to divide the use of the land permitted by the Permit as a gym and the activities conducted on the land which make up the use of the land.

75 The activities complained of, which were the cause of the noise and vibration, are common activities associated with a gym and were for the purpose of the permitted use as a gym. These activities were clearly part of the use of the land as a gym.

76 It is a natural and usual incident of the use of the land as a gym that some noise will be created. Provided that the conditions restricting noise are not breached, the activities which are part of the use as a gym, even the incidental noise created by those activities, are allowed and encompassed by the Permit.

How should s 140 of the *OC Act* be applied here?

77 Section 140 of the *OC Act* provides:

> **140 Rules to be of no effect if inconsistent with law**
>
> A rule of an owners corporation is of no effect if it—
>
> (a) unfairly discriminates against a lot owner or an occupier of a lot; or

[50] Described in the permit as a 'restricted recreational facility' in accordance with the land use definitions contained Clause 74 of the Scheme.

(b) is inconsistent with or limits a **right** or avoids an obligation **under**—

(i) this Act; or

(ii) the Subdivision Act 1988; or

(iii) the regulations under this Act; or

(iv) the regulations under the Subdivision Act 1988; or

(v) **any other Act** or regulation.

(emphasis added)

78 It was submitted on behalf of Elwick 9 that if this section were correctly applied, it should have been held that Rules r 4(b), and other rules relating to noise and vibration, were ineffective as they were inconsistent with the use permitted by the Permit.[51]

79 It was argued by Elwick 9 that the Permit created a substantive right to use the land as a gym under the *PE Act* .[52] This, it was submitted, constitutes a 'right' under an Act for the purpose of sub-s 140(b)(v) of the *OC Act* and that therefore the relevant Rules was of no effect to the extent that it was inconsistent with the use permitted by the Permit.

80 The purposes of the *OC Act* are set out in s 1:

1 Purposes

The main purposes of this Act are—

(a) to provide for the management, powers and functions of owners corporations; and

(b) to provide for appropriate mechanisms for the resolution of disputes relating to owners corporations; and

(c) to amend the Subdivision Act 1988 in relation to the creation of owners corporations.

81 Also relevant to understanding the role of the *OC Act* and the Rules is s 4.

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51 Elwick 9, 'Applicant's Outline of Submissions', in *Elwick 9 v Freeman,* S CI 2018 00375, 28 February 2018, [41].

52 Ibid [39.1].

4 Functions of owners corporation

An owners corporation has the following functions—

(a) to manage and administer the common property;

(b) to repair and maintain—

(i) the common property;

(ii) the chattels, fixtures, fittings and services related to the common property or its enjoyment;

(iii) equipment and services for which an easement or right exists for the benefit of the land affected by the owners corporation or which are otherwise for the benefit of all or some of the land affected by the owners corporation;

(c) to take out, maintain and pay premiums on insurance required or permitted by any Act or by Part 3 and any other insurance the owners corporation considers appropriate;

(d) to keep an owners corporation register;

(e) to provide an owners corporation certificate in accordance with Division 3 of Part 9 when requested;

(f) to carry out any other functions conferred on the owners corporation by—

(i) this Act or the regulations under this Act; or

(ii) the Subdivision Act 1988 or the regulations under that Act;

(iii) any other law; or

(iv) the rules of the owners corporation.

82 The term 'right' is not defined within the *OC Act*, and its meaning within the context of sub-s 140(b)(v) has been the subject of little judicial consideration since its introduction into law in late 2007.[53]

83 In the context of sub-s 140(b)(v) of the *OC Act*, by referring to a 'right' *under* an Act or regulation, it is clear that the section affords explicit protection to statutory rights, as distinguished from common law rights (although that is not to say that common law rights are not protected).

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53 See *Owners Corporation PS 501391P v Balcombe* [2016] VSC 384 (22 July 2016), [181]-[193] ('*Balcombe*'); *Owners Corporation RP 3454 v Belinda Ainley* [2017] VSC 790 21 December 2017), [85]-[86] ('*Ainley*').

84 Rights accrued under statute are similarly protected by the *ILA*, of which there has been extensive judicial consideration. Section 14(2)(e) uses similar wording to the *OC Act*, stating that where an Act, or a provision of an Act, is repealed, amended, expires, lapses or otherwise ceases to have effect, this shall not (unless the contrary intention expressly appears), affect any right, privilege, obligation or liability acquired, accrued or incurred under that Act or provision. The very same protection is given to rights accrued or incurred under subordinate instruments.[54] This legislation supplements the common law presumption against retrospectivity.[55]

85 The judiciary has been broad in its interpretation of 'rights' in this context, taking care not to confine the protection of the law as to 'rights' narrowly.[56] This approach has been taken due to the legal and constitutional principle which sits behind the general protection of accrued rights, being the principle that where Parliament seeks to end an accrued right, it must be clear and unambiguous in its intention.[57] To this end, it is an established principle that even an inchoate or conditional right can be preserved under the relevant legislation.[58]

86 In this context it has also been established that terms like 'right', 'interest', 'title', 'power' or 'privilege' must be construed by reference to the relevant statute,[59] and that the context and the whole circumstances must be considered.[60]

87 Additionally, accrued rights which have been held to be substantive, rather than procedural, have attracted a greater level of protection.[61]

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54 *Interpretation of Legislation Act 1984* s 28(2)(e).

55 *Maxwell v Murphy* (1957) 96 CLR 261.

56 *Carr v Finance Corp of Australia Ltd* (1982) 150 CLR 139, 151 (Mason, Murphy and Wilson JJ).

57 *Chang v Laidley SC* (2007) HCA 37, [5].

58 *Mathieson v Burton* (1971) 124 CLR 1, [23] (Gibbs J); *Esber v Commonwealth* (1992) 174 CLR 430 quoting *Free Lanka Insurance Co. Ltd v Ranasinghe* [1964] AC 541, 552.

59 *Western Australian Planning Comm v Temwood Holdings Pty Ltd* (2004) 221 CLR 30; *Chang v Laidley SC* (2007) 234 CLR 1, [117].

60 *George Hudson Ltd v Australian Timber Workers' Union* (1923) CLR 413, 434 (Isaacs J); *Baker v Australian Asbestos Insulations Pty Ltd* (1985) 3 NSWLR 280, 289.

61 See generally *Maxwell v Murphy* (1957) 96 CLR 261, 267, 278. The difference was described by Mason CJ in *McKain v R W Miller & Co (SA) Pty Ltd* (1991) 174 CLR 1, 26–7 where it was stated that rules which are directed to governing or regulating the mode or conduct of court proceedings are procedural and all other provisions or rules are to be classified as substantive, endorsed in *John Pfeiffer*

88 These principles assist in understanding the meaning of the term 'right', and in discerning whether something which could be said to be a 'right under statute' would be protected by s 140(b)(v) of the *OC Act*.

Is a planning permit a 'right'?

89 It is necessary to determine for the purposes of Questions 3-5 whether a planning permit is a 'right' which is protected by virtue of s 140 of the *OC Act*.

90 The *PE Act* is the legislation which governs the use and development of land in Victoria.

91 The objectives of the *PE Act* are set out at section 4.

> **4 Objectives**
>
> (1) The objectives of planning in Victoria are—
>
> (a) to provide for the fair, orderly, economic and sustainable use, and development of land;
>
> (b) to provide for the protection of natural and man-made resources and the maintenance of ecological processes and genetic diversity;
>
> (c) to secure a pleasant, efficient and safe working, living and recreational environment for all Victorians and visitors to Victoria;
>
> (d) to conserve and enhance those buildings, areas or other places which are of scientific, aesthetic, architectural or historical interest, or otherwise of special cultural value;
>
> (e) to protect public utilities and other assets and enable the orderly provision and co-ordination of public utilities and other facilities for the benefit of the community;
>
> (f) to facilitate development in accordance with the objectives set out in paragraphs (a), (b), (c), (d) and (e);
>
> (g) to balance the present and future interests of all Victorians.
>
> (2) The objectives of the planning framework established by this Act are—

Pty Ltd v Rogerson (2000) 203 CLR 503.

(a) to ensure sound, strategic planning and co-ordinated action at State, regional and municipal levels;

(b) to establish a system of planning schemes based on municipal districts to be the principal way of setting out objectives, policies and controls for the use, development and protection of land;

(c) to enable land use and development planning and policy to be easily integrated with environmental, social, economic, conservation and resource management policies at State, regional and municipal levels;

(d) to ensure that the effects on the environment are considered and provide for explicit consideration of social and economic effects when decisions are made about the use and development of land;

(e) to facilitate development which achieves the objectives of planning in Victoria and planning objectives set up in planning schemes;

(f) to provide for a single authority to issue permits for land use or development and related matters, and to co-ordinate the issue of permits with related approvals;

(g) to encourage the achievement of planning objectives through positive actions by responsible authorities and planning authorities;

(h) to establish a clear procedure for amending planning schemes, with appropriate public participation in decision making;

(i) to ensure that those affected by proposals for the use, development or protection of land or changes in planning policy or requirements receive appropriate notice;

(j) to provide an accessible process for just and timely review of decisions without unnecessary formality;

(k) to provide for effective enforcement procedures to achieve compliance with planning schemes, permits and agreements;

(l) to provide for compensation when land is set aside for public purposes and in other circumstances.

92 The *PE Act* is the statutory source of the power to grant a planning permit. Part 4 of the *PE Act* sets out the process for obtaining a planning permit.[62] Once granted a permit confers the right to use and develop land in accordance with the conditions

62 *Planning And Environment Act 1987* ss 47-68 ('the *PE Act*').

imposed on the permit. The process for amending the right is set out in the *PE Act*.[63] A planning permit can be enforced under the *PE Act* and a person who uses or develops the land in breach of the permit can be prosecuted or subject to the processes to enforce compliance with the permit which are set out in the *PE Act*.[64]

93 The right to use and develop the land granted by the planning permit is a substantive one which can be relied upon by an owner or occupier of the land. It runs with the land.[65]

94 Two cases heard before the Tribunal have addressed the question whether a permit creates a 'right', albeit in a different context.

95 *Lakkis v Wyndham CC*[66] involved an application to the Tribunal for a declaration that the subject land had existing use rights. Deputy President Macnamara considered the common law presumption against retrospectivity and the *Interpretation of Legislation Act 1984* s 28(2)(e) ('the *ILA'*) and stated:

> In my view the scheme of the Planning and Environment Act is to treat existing uses which are the subject of permit rights separately from other existing uses such as those which were carried on before a scheme existed at all or those which were *"as of right"* under a repealed scheme. Permits are specifically dealt with in section 68 and 208 of the Planning and Environment Act. Permits create substantive rights".[67]

96 This analysis was adopted by President Morris in a later case before the Tribunal in *Simpson v Bass Coast SC*.[68] In this case, the respondent was given notice by the responsible authority of a notice of the decision to grant the permit. This decision was subject to an application for review and prior to the review being heard the relevant zoning was changed from a rural zone to a farming zone. As a consequence, the applicant argued that the proposed use was now prohibited under the new planning scheme. The respondent applied for a declaration on the basis that

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63 Ibid ss 72-76D, 87–91.
64 Ibid ss 87-91, 114–130.
65 *Eaton & Sons Pty Ltd v Warringah Shire Council* (1972) 129 CLR 270, 293 (Stephen J).
66 [2001] VCAT 863 (31 May 2001).
67 Ibid [29].
68 [2007] VCAT 165 (13 February 2007).

a right to be issued with a permit had accrued prior to the change of the planning scheme, and that on that basis the proceeding must continue on the basis of the rural zone, not the farming zone.

97 President Morris applied the common law presumption against retrospectivity and s 28(2)(e) of the *ILA* and stated:

> In my opinion, the decision in *Lakkis* is correct. However, there is *obiter dictum*, of high authority, which suggests that a planning permit is not a right, principally because it has been said that it is not acquired by, or accrued to, an individual but is *a consent to the world at large in relation to the land which it is subject*: see *Eaton & Sons Pty Ltd v Warringah Shire Council*. However these comments are inconsistent with numerous other cases. In *Oppe v Shire of Lillydale*, Anderson J referred to *rights conferred* by a permit. In *Castellano v City of Port Melbourne*, Beach J held that a permit holder had acquired a right by virtue of the issue of a permit. In *Ungar v City of Malvern*, the Full Court of the Victorian Supreme Court uses the word *right* in relation to the grant of a permit. Moreover, in *Day v Pinglen Pty Ltd*, five judges of the High Court of Australia unanimously said, albeit in a different context:
>
> > A building approval [referring to a planning permit], once given, confers a valuable right, and the test by which an owner may be dispossessed of that right should be one that is clearly understood and readily applied.[69]
>
> (footnotes omitted)

98 As referred to above by President Morris, a contrary position can be discerned by the approach taken in *Eton & Sons Pty Ltd v The Council of the Shire of Warringah*[70] where it was argued that as the council had consented to the use of land for storage and reselling of timber, the appellant had an accrued right or privilege under the relevant planning scheme. The ordinance provided that the revocation of the planning scheme 'should not affect "any right, privilege, obligation or liability acquired, accrued or incurred"'[71] under the relevant scheme.

99 Stephen J in his dissenting judgment, rejected the argument by reference to other provisions of the ordinance but also considered the matter on general principles. He considered in the context of the planning scheme provisions that the right being

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69 [2007] VCAT 165 (13 February 2007), [18].
70 (1972) 129 CLR 275.
71 Ibid 276.

referred to by reason of the relevant clause under consideration in that case protected only rights which have been acquired by or have accrued to an individual.

100 He concluded that a planning permit or consent does not confer a personal right on any individual; rather it is a consent in relation to the land – 'a consent to the world at large in relation to the land which it is subject'. [72] He went on to identify permits as 'relaxation of a prohibition imposed' by planning controls. Planning controls, he said:

> … took away the liberty a general law of occupiers of land to use their land is a saw fit but… enabled the renewed exercise of that liberty in a very qualified way if a consent from the responsible authority was first sought and obtained. To describe that situation is one in which a right or privilege had accrued to or been acquired by the appellant under the Scheme appears to me to be a misuse of the language; the effect of the Scheme when a permit is issued under it is merely that users of relevant land are in part remitted to their former liberties at general law.[73]

101 The Queensland Court of Appeal analysed this decision in *Caloundra City Council v Netstar Pty Ltd*[74] stating:

> Stephen J. considered an alleged right could not be protected so long as it was one common to the community as a whole. Those views clearly command respect, but were strictly *obiter* in that appeal, in which His Honour had already held that the provisions of a revoking ordinance, in another clause (cl. 66), made all the provision necessary or intended for preserving rights. In any event, Stephen J dissented in the outcome of that appeal.[75]

102 In my view, consistent with the views expressed by the Queensland Court of Appeal in *Caloundra City Council v Netstar*[76] and those of Morris J in *Simpson v Bass Coast SC,*[77] the observations by Stephen J in this dissenting judgment were obiter and are clearly distinguishable in the context of the question before me.

103 The context in which the term 'right' appears in these circumstances, is that of the *OC Act*.

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72 Ibid 293.
73 Ibid 294.
74 [2008] 1 Qd R 258.
75 Ibid 273.
76 [2008] 1 Qd R 258.
77 [2007] VCAT 165 (13 February 2007).

104 The key issue to determine is whether a permitted use contained within a planning permit could be said to be a 'right' intended to be protected by sub-s 140(b)(v) of the *OC Act*.

Is a planning permit a 'right' which is relevant to s 140 of the *OC Act*?

105 A rule of an owners corporation is of no effect if it is inconsistent with or limits a right or avoids an obligation under any other Act or regulation.[78]

106 As stated, it is notable that the 'right' referred to is limited to a statutory right – a right under 'any other Act or regulation'. This is to be distinguished from reference to a common law right. It makes no reference to a category of 'right' which is personal or proprietary. Thus it is necessary to determine whether that 'right' is one *under any other Act or regulation*.

107 A detailed analysis of the history and purpose of the *OC Act* was set out by Riordan J in *Owners Corporation PS 501391P v Belinda Balcombe*.[79] Upon analysis his Honour was satisfied that the functions and powers of Owners Corporations relate principally to common property issues, rather than the control of conduct or use.[80] His Honour considered whether a rule made under the former *Subdivision (Body Corporate) Regulations 2001* prohibiting the short-term letting of apartments was within the scope of owners corporations rule making powers. In summarising his finding that the relevant rule was invalid, it was said that 'Parliament did not demonstrate an intention to confer such extensive powers on owners corporations ... or for owners corporations to effectively have an unappellable right to overrule uses permitted under planning legislation'.[81]

108 Later, in *Owners Corporation RP 3454 v Belinda Ainley*,[82] Derham AsJ considered whether a rule preventing an owner of a lot from constructing a second storey on

78 *OC Act* sub-s 140(b)(v).
79 [2016] VSC 384 (22 July 2016).
80 Ibid [70].
81 Ibid [1].
82 [2017] VSC 790 (21 December 2017).

that owner's lot was invalid because it was beyond the power of the owners corporation under the *OC Act*. Derham AsJ reinforced the view of Riordan J above.[83] It was stated that:

> Having regard to the requirement cast upon lot owners to give notice to the OC of any application for a building or planning permit, the place in which to seek to enforce a properly made rule designed to maintain some uniformity of appearance is in the processes and proceedings of the lot owner obtaining the necessary permits. Not after that process is over.[84]

And further:

> the rule making power given to OC needs to be considered in the context … having regard to s 140 in the context of the legislative regime established in Victoria relating to planning and building.[85]

(footnotes omitted)

109 There are mechanisms for an owners corporation to engage in the procedures for grant of a permit under the *PE Act* and if dissatisfied they can seek enforcement under the *PE Act*, or seek to have the permit varied.[86]

110 When one looks at the purposes of the respective legislation – the *OC Act* is directed to dealing with the arrangements internally for members of the owners corporation whilst the *PE Act* deals with and regulates the use and development of land at large in Victoria affecting individual land owners and occupiers and the public more broadly. Both pieces of legislation affect a land owners common law rights to use and develop and enjoy their land or premises.

111 In *Boroondara City Council v Sixty Fifth Eternity Pty Ltd*,[87] Emerton J said:

> A planning permit is permissive, but in a limited sense. It entitles the permit applicant to do certain things, but subject to any conditions in the permit and any other restrictions imposed by law on the use or development of the land. The grant of a planning permit will overcome a particular restriction on the use or development of the land, namely the requirement to obtain a planning

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83 Ibid [58].
84 Ibid [82].
85 Ibid [85].
86 Elwick 9 Pty Ltd, 'Applicant's Outline of Submissions', Submission in *Elwick 9 v Freeman,* S CI 2018 00375, 28 February 2018, [39.3(b)].
87 [2012] VSC 298 (10 July 2012).

> permit under the Act, but it will leave other restrictions untouched. As a result, it is not unusual for a planning permit to authorise a use or development that cannot take place until some other legal barrier has been removed, for example, by the grant of a gaming licence or an approval under environment protection legislation. This is a function of the layering of controls over land use and development, including in the Act itself. [88]

112 In this context, a use permitted by a planning permit creates a substantive right to use the land in the manner specified (subject to the conditions). This cannot be displaced by an inconsistent rule of an owners corporation, the purpose of such rules relating principally to common property issues.

113 This interpretation of s 140(b)(v) of the *OC Act* enables it to work harmoniously with the *PE Act*. It is also consistent with the objectives of the *PE Act* found in s 4 of the *PE Act* which are set out previously above at paragraph 91. The proper mechanisms for resolving issues to do with land use are also contained in the *PE Act*.

114 There are mechanisms for an owners corporation to engage in the procedures for the grant of a permit under the *PE Act*[89] and if dissatisfied following the grant of a permit or if there is an alleged breach, this is remedied by seeking enforcement under the *PE Act*, or seeking to have the permit varied.[90]

115 As set out above, a planning permit is a substantive right. It is a valuable right. The planning permit was one which was issued under the provisions of the *PE Act*. The permit, or right is one which is a creature of statute. The right is established by the processes and procedures set out in the *PE Act*.

116 It is not a function or power of the *OC Act* to enforce compliance with the Permit. The *OC Act* is the wrong tool to enforce planning permit. That role is squarely the province of the *PE Act*. The use of the Rules to subvert this scheme of land management is inconsistent with s 140 of the *OC Act*.

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88 Ibid [47].
89 *PE Act* ss 57, 82.
90 See *Ainley* [2017] VSC 790 (21 December 2017), [53]–[89]; *Balcombe* [2016] VSC 384 (22 July 2016).

117 This is not to say that a planning permit is a 'right' for all purposes. It is clearly a 'right' for the purposes of s 140 of the *OC Act* and to the extent that the Rules are inconsistent with or seeks to limit the right granted under another Act, being the *PE Act* the Rule is 'of no effect'.

118 It follows that the interpretation of an owners corporation rule which has the effect of limiting, or is inconsistent with the right granted by way of planning permit will be inconsistent with s 140 of the *OC Act*.

Is the right 'under' statute?

119 The first respondents position is that although a planning permit may confer a right, that the right is not 'under' the *PE Act*, but rather it is created under the relevant Planning Scheme.[91]

120 This interpretation fails to give weight to the relevant provisions of the *PE Act* relating to permits, including that the ability to apply for and have issued a planning permit which is found under the PE Act,[92] as well as enforcement mechanisms.[93]

121 Both the permit and the planning scheme are creatures of the *PE Act*, such both can be said to be 'under' the Act.

122 The planning scheme is a creature of the *PE Act* and that is authorised by the *PE Act.* As such, the right can be said to be a 'right' *under* the *PE Act*.

123 In any event, s 38 of the *ILA* defines a 'subordinate instrument' as an instrument made *under* an Act—

(a) that is a statutory rule; or

(b) that is not a statutory rule but—

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91 Elliot Freeman, 'Respondent's Outline of Submissions', Submission in *Elwick 9 v Freeman,* S CI 2018 00375, 7 March 2018, [36].

92 *PE Act* ss 47–68.

93 Ibid ss 87–91, 114–130.

(i) contains regulations, rules, by laws, proclamations, Orders in Council, orders or schemes; or

(ii) is of a legislative character;

(emphasis added)

124 It is clear from this definition that a planning scheme is a subordinate instrument, which is 'an instrument *under* an Act'.

125 It follows then that if the permit is made under the planning scheme (subject to the *PE Act*), and the planning scheme is made *under* the *PE Act*, the direct nexus between the permit and the *PE Act* is such that the right *is* under the *PE Act* and therefore under an Act for the purposes of sub-s 140(b)(v) of the *OC Act.*

Is there inconsistency between the planning permit and the Tribunal's orders?

126 The planning permit allows the Gym to operate from 6.00am whereas the Orders made by the Tribunal on 9 November 2017 restrict the operation until 8.00am. The Orders clearly limit the right enjoyed by the permit holder to use the land for a gym pursuant to the terms of the Permit and are thus inconsistent with that right. It is both *inconsistent* with and a *limitation* of the planning permission granted pursuant to the *PE Act* to restrict the hours of operation to 8.00am.

127 Consequently, the decision of the Tribunal to make such an Order is beyond the power and extent of the Rules because to interpret the Rules in a manner which overrides or limits the Permit is inconsistent with s 140 of the *OC Act*. To the extent of that excess the Orders cannot stand.

128 The potential for inconsistency with s 140 of the *OC Act* was raised during the hearing before the Tribunal and whilst no direct challenge to the validity of the Rules was put by way of seeking a declaration or otherwise, that is no bar to the Court determining that the extent of the Orders made are in error due to their inconsistency with the right granted by way of planning permit.

129 In the context of this appeal, the Tribunal cannot make an order which would be inconsistent with or limit the terms of the right granted under the *PE Act*. That is not to say that the Rules have no work to do. Rather, they must not override the terms of the Permit and must be read down to the extent of that inconsistency.

Conclusion

130 I have already noted that during the course of the trial I had indicated that I was satisfied that leave to appeal be granted. Leave is formally granted.

131 I have determined to allow the appeal on the basis of the incompatibility with s 140 of the *OC Act* grounds, being grounds encompassed by questions 3-5.

132 In summary, I conclude that:

a) The Tribunal gave oral reasons for the decision and that those reasons disclosed a path of reasoning which is consistent with the legal obligations under s 117 of the *VCAT Act* and otherwise.

b) The Orders made granting liberty to apply have the effect of not finally determining the proceeding. Interim or ancillary orders are permissible in accordance with s 165(3) of the *OC Act*. However, this issue is not determinative of the appeal.

c) The effect of the Orders restricting the hours of operation of the gym to 8.00am is inconsistent with s 140 of the *OC Act*. Insofar as the Orders reflect this limitation or inconsistency with the Permit, the Permit being a right created under statute, the Orders cannot stand. For the purpose of the interpretation of sub-s 140(1)(b) of the *OC Act*, a permitted use under a planning permit is a 'right' under the *PE Act* and s 140 of the *OC Act* operates to restrict the power of the Tribunal to making orders consistent with the limitation imposed by s 140 of the *OC Act*.

133 The relief sought by Elwick 9 is to remit the matter back to the Tribunal to be heard and determined by a differently constituted Tribunal and in accordance with

directions as to the law. Given my findings as set out above, I do not see utility in making that order and in accordance with sub-s 148(7)(a) of the *VCAT Act*, I am of the view that the more appropriate order is to set aside Orders 2, 3 and 4 of the Tribunal made 9 November 2017.[94] However, I will hear the parties further as to the necessity of remitting the proceeding back to the Tribunal.

[94] See *Osland v Secretary, Department of Justice* (2010) 241 CLR 320, 332–333 [20] (French CJ, Gummow and Bell JJ); *Victorian Electoral Commission v Municipal Electoral Tribunal* [2017] VSC 791 (21 December 2017), [76].