VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

OWNERS CORPORATIONS LIST VCAT REFERENCE NO. OC1943/2015

CATCHWORDS

Summary dismissal application – dispute resolution process – whether process followed before proceeding commenced – construction of model rule 6 – whether Points of Claim so defective that the proceeding should be dismissed – *Owners Corporations Act 2006* ss 153, 154 – *Victorian Civil and Administrative Tribunal Act 1998* s 75(1).

APPLICANT:	Owners Corporation No. 8 PS422665R
RESPONDENT:	Demian Walton
WHERE HELD:	VCAT 55 King St, Melbourne
BEFORE:	Senior Member A Vassie
HEARING TYPE:	Hearing
DATE OF HEARING:	14 October 2015
DATE OF ORDER:	14 October 2015
DATE OF REASONS:	26 October 2015
CITATION	Owners Corporation No 8 PS422665R v Walton (Owners Corporations) [2015] VCAT 1742

ORDER

1. The respondent's application dated 24 September 2015 is dismissed.

2. By 4 November 2015, the applicant must file and serve Amended Points of Claim which properly particularise each fact matter or circumstance that is alleged to constitute a breach of a rule of the owners corporation and when it occurred, and which properly specifies each item of relief that the applicant seeks.

3. There shall be a further directions hearing on or as soon as is practicable after 12 November 2015, at a time to be fixed, before me with one hour being allowed for the directions hearing, at which time the parties may argue the question of the costs of the hearing today and of the costs reserved on 10 September 2015.

SENIOR MEMBER A VASSIE

APPEARANCES:

For Applicant	Mr D Triaca of Counsel
For Respondent	Mr P Cawthorn QC

REASONS FOR DECISION

1 The applicant Owners Corporation No PS422665R ('the OC') affects land at 800 Chapel Street, South Yarra: a block of apartments. The respondent Demian Walton owns lot 227 shown on the plan of subdivision. In this proceeding the OC alleges that Mr Walton is in breach of several of its rules about noise and about restrictions on doing of building works. It is asking for orders requiring him to refrain from conduct that would breach those rules.

2 The OC commenced the proceeding on 13 August 2015 by filing an application with Points of Claim attached. On 24 September 2015 Mr Walton filed an application seeking an order for summary dismissal or striking out of the proceeding. I heard his application on 14 October 2015 and dismissed it, saying that I would give written reasons.

3 Mr Walton had two main arguments in support of his application. The first was that before applying to the Tribunal the OC had not first followed the dispute resolution procedure required by its own rules, as s 153(3) of the *Owners Corporations Act 2006* ('the OC Act') had obliged it to have done, with the result that there was a fatal defect in the proceeding and it ought to be dismissed under s 164 of the OC Act. The second was that the Points of Claim were inadequate and meaningless, demonstrating that the proceeding lacked substance and ought to be dismissed or struck out.

The Rules

4 As part of the process for registration of the plan of subdivision and creation of 'Body Corporate 8 and 9 – Plan No PS422665R' there was lodged at the Office of Titles a document headed 'Special Rules: SY 21 – PS422665R, Body Corporate Rules – Limited – BC8 and 9'.

5 The special rules provided that a proprietor or occupier of a lot must not:

(a) create noise or behave in a manner likely to interfere with the peaceful enjoyment of the proprietor or occupier of another lot or any person lawfully using the common property (rule 3.1(a));

(b) obstruct the lawful use of common property (rule 3.1(b));

(c) use hammer drills or jack hammers in the lot between the hours of 4.00pm and 9.00am on weekdays nor at any time on weekends and public holidays (rule 3.1(c));

(d) make or permit to be made from music or machinery which may be heard outside the owner's lot between the hours of midnight and 8.00am (rule 3.1(d)).

6 The special rules provided that the proprietor or occupier of a lot must not undertake any building works within or about or relating to a member's lot unless:

(a) all requisite permits, approvals and consent under all relevant laws had been obtained;

(b) such works were undertaken with those permits, approvals and consents; and

(c) such works were undertaken with a minimum of nuisance, annoyance, disturbance and inconvenience to other occupiers of lots (rule 28.1).

7 There were other special rules relating to building works, requiring the proprietor or occupier of a lot to submit plans and specifications to the Body Corporate (rule 28.2 (a)), receive written approval for them from the Body Corporate (rule 28.2(c)), comply with the local laws of the City of Stonnington (rule 28.4(c)), make good all damage to and dirtying of the building (rule 28.7) or reimburse to the Body Corporate the cost of making good (rule 28.8).

8 The special rules did not provide for any dispute resolution process.

9 Under transitional provisions[1] of the OC Act the 'Body Corporate' became the OC and the special rules continued to be in force as rules of the OC to the extent that they were not inconsistent with the OC Act or with the regulations made under the OC Act which included the model rules. By virtue of s 139(3) of the OC Act, rule 6 of the model rules, headed 'Dispute resolution', is deemed to be included in the rules of the OC, the special rules not having provided for that matter.

10 Rule 6 of the model rules provides:

> **6 Dispute resolution**
>
> (1) The grievance procedure set out in this rule applies to disputes involving a lot owner, manager, or an occupier or the owners corporation.
>
> (2) The party making the complaint must prepare a written statement in the approved form.
>
> (3) If there is a grievance committee of the owners corporation, it must be notified of the dispute by the complainant.
>
> (4) If there is no grievance committee, the owners corporation must be notified of any dispute by the complainant, regardless of whether the owners corporation is an immediate party to the dispute.
>
> (5) The parties to the dispute must meet and discuss the matter in dispute, along with either the grievance committee or the owners corporation, within 14 working days after the dispute comes to the attention of all the parties.
>
> (6) A party to the dispute may appoint a person to act or appear on his or her behalf at the meeting.
>
> (7) If the dispute is not resolved, the grievance committee or owners corporation must notify each party of his or her right to take further action under Part 10 of the **Owners Corporations Act 2006**.
>
> (8) This process is separate from and does not limit any further action under Part 10 of the **Owners Corporations Act 2006**.

Requirement to Follow the Process

11 So far as presently relevant, ss 152 and 153 of the OC Act provide:

> **152 Complaints**
>
> (1) A lot owner or an occupier of a lot or a manager may make a complaint to the owners corporation about an alleged breach by a lot owner or an occupier of a lot or a manager of an obligation imposed on that person by this Act or the regulations or the rules of the owners corporation.
>
> (2) A complaint must be made in writing in the approved form.
>
> (3) …
>
> **153 Decision whether to take action in respect of alleged breach**
>
> (1) This section applies if-
>
> (a) a complaint is made under section 152; or
>
> (b) it otherwise comes to the attention of the owners corporation that a lot owner or an occupier of a lot or a manager may have breached this Act or the regulations or the rules of the owners corporation.
>
> (2) The owners corporation must decide-
>
> (a) to take action under this Part in respect of the alleged breach; or
>
> (b) to apply to VCAT for an order requiring the person to rectify the breach; or
>
> (c) to take no action in respect of the alleged breach.
>
> (3) An owners corporation must not take action under this Part or apply to VCAT for an order in relation to an alleged breach unless-
>
> (a) the dispute resolution process required by the rules has first been followed; and
>
> (b) the owners corporation is satisfied that the matter has not been resolved through that process.

12 There is an 'approved form' of complaint for the purposes of s 152(2) and of model rule 6(2), approved by the Director of Consumer Affairs under s 200 of the OC Act. It requires identification of the complainant and requires details of the alleged breach of rules and of the remedy sought. It requires the complainant to make a declaration of the truth of the details given, and to agree to the owners corporation's disclosure of the contents of the form to process and resolve the complaint.

13 In the present case, the decision that the OC took was in accordance with s 153(2)(b): to apply to VCAT for an order requiring Mr Walton to rectify alleged breaches of the special rules. By virtue of s 153(3), the OC was obliged to follow the dispute resolution process required by model rule 6(2), and be satisfied that the dispute had not been resolved thought that process, before commencing any VCAT proceeding.

14 The OC maintains that it did first follow the dispute resolution process before commencing this proceeding and it had been satisfied that that process had not resolved the dispute. Mr Walton challenges both those propositions.

15 Section 164 of the OC Act provides:

164 VCAT may dismiss application

VCAT may make an order dismissing or striking out an application by an owners corporation for an order requiring the rectification of a breach referred to in section 153 if it is satisfied that the owners corporation has not complied with that section.

The Nature of the Respondent's Application

16 In his application filed on 24 September 2015 Mr Walton sought the following orders:

1. The proceeding be summarily dismissed or struck out pursuant to section 164 of the *Owners Corporation Act 2006* (**OC Act)** for failure to comply with the dispute resolution process in Model Rule 6(5) as required by section 153(3) of the OC Act.

2. Alternatively, the proceeding be dismissed or struck out pursuant to section 75 of the *Victorian Civil and Administrative Tribunal Act 1998*, due to being frivolous, vexatious, misconceived or lacking in substance or otherwise an abuse of process.

17 Section 75(1) of the *Victorian Civil and Administrative Tribunal Act 1998* ('the VCAT Act') provides:

75 Summary dismissal of unjustified proceedings

(1) At any time, the Tribunal may make an order summarily dismissing or striking out all, or any part, of a proceeding that, in its opinion-

(a) is frivolous, vexatious, misconceived or lacking in substance; or

(b) is otherwise an abuse of process.

The section allows for the making of an application under it as an interlocutory application ('at any time'), as Mr Walton has done. Section 164 of the OC Act does not. While in practical terms it matters little, I think that the correct view of his application is as one made under s 75(1) and that the application calls in aid s 164 of the OC Act as a reason why the proceeding should be summarily dismissed.

18 The principles governing the disposition of an application under s 75(1) for summary dismissal or striking out are well established. It is a very serious matter to dismiss or strike out a proceeding summarily, and the power to do so under s 75(1) should be exercised only where it is obvious that the case cannot possibly succeed or where it is obvious that the case is an abuse of process for other reasons. Otherwise an applicant is entitled to have the case fully heard and adjudicated upon at a final hearing.[2] Moreover the application for an order for summary dismissal or striking out should be dealt with on the footing that the Tribunal should assume that all the facts alleged in the claim are able to be proved.[3]

19 Mr Walton's task, therefore, was to establish that it was absolutely clear that the OC had not followed the dispute resolution procedure before commencing the proceeding and that the proceeding was therefore doomed to failure, or that the proceeding was in some other way 'misconceived or lacking in substance or otherwise an abuse of process'.

Notification of the Dispute and of a Meeting

20 By email on 3 June 2015[4] the OC, through its solicitors, told Mr Walton: 'You are hereby placed on notice that you are in breach of the following additional rules'. The email proceeded to list 13 rules or sub-rules and to give 'particulars' of the breach of each of them. It concluded:

> The owners corporation believes that you have breaches [sic] the owners corporation's rules in regards to the above. In accordance with Model Rule 6(5) of the *Owners Corporations Regulations 2007* a grievance meeting is scheduled at 6:00pm, Tuesday 9 June 2015 at the SY21 Gymnasium. Notice of Grievance Meeting **attached**. It is strongly suggested that you attend to respond to this notice. If, at and following the grievance meeting, the owners corporation believes on reasonable grounds that a rule breach has occurred it may resolve to make application to the Victorian Civil & Administrative Tribunal against you in respect to any breach.

Attached to the email was a notice from the OC itself of the date, time and place of the 'Grievance Meeting', reflecting the notice given in the email.

21 I give some examples of how the email described a rule and gave 'particulars' of an alleged breach of it.

22 Examples of rules about noise, alleged to have been breached, were:

3.1(a) A proprietor or occupier of a lot must not create any noise or behave in a manner likely to interfere with the peaceful enjoyment of the proprietor or occupier of another lot or of any person lawfully using common property.

Particulars

(i) 6 February 2015 – noise disturbance.

(ii) 6 February 2015 – dirt deposited and/or left to remain on common property.

(iii) 7 February 2015 – noise disturbance.

(iv) 8 February 2015 – noise disturbance.

(v) 9 February 2015 – dirt deposited and/or left to remain on common property.

(vi) 9 May 2015 – 24 May 2015 inclusive – noise disturbance.

3.1(b) Obstruct the lawful use of common property by any person.

(The same six particulars were given.)

3.1(c) Without limiting the generality of the foregoing use hammer drills or jack hammers in the lot between the hours of 4:00pm and 9:00am on weekdays nor at any time on weekends on public holidays.

Particulars

(i) 6 February 2015 – noise disturbance.

(ii) 7 February 2015 – noise disturbance.

(iii) 8 February 2015 – noise disturbance.

(iv) 9 May 2015 – 24 May 2015 inclusive – noise disturbance.

23 Rules prohibiting noise from music or machinery between midnight and 8.00am (rule 3.1(d)) and prohibiting 'undue noise' (rule 3.1(c)) were set out with the same four particulars of breach beneath each rule as had been given for the alleged breach of rule 3.1(c) as set out in the document.

24 An example of a rule about building works, alleged to have been breached, was:

> 28.1 The proprietor or occupier of a lot must not undertake any building works within or about or relating to a Body Corporate Member's lot unless:
>
> (a) all requisite permits, approvals and consent under all relevant laws have been obtained and copies of them have been given to the secretary of the Body Corporate; and
>
> (b) such works are undertaken with those permits, approvals and consents referred to in paragraph (a); and
>
> (c) such works are undertaken with a minimum of nuisance, annoyance, disturbance and inconvenience to other occupiers of lots.
>
> **Particulars**
>
> (i) 6 February 2015 – works undertaken; noise disturbance.
>
> (ii) 6 February 2015 – dirt deposited and/or left to remain on common property.
>
> (iii) 7 February 2015 – works undertaken; noise disturbance.
>
> (iv) 8 February 2015 – works undertaken; noise disturbance.
>
> (v) 9 February 2015 – dirt deposited and/or left to remain on common property.
>
> (vi) 1 May 2015 – eight council bins filled with refuse.
>
> (vii) 9 May – 24 May 2015 inclusive – works undertaken; noise disturbance.

25 Rules requiring the submission of plans and specifications to, and the receipt of approval from, the OC before proceeding with building works (rules 28.2(a), (c) and (d)), requiring compliance with the laws of the City of Stonnington (rule 28.4(c)) and requiring the making good of all damage to common property from those works (rules 28.7 and 28.8) were set out with the same seven particulars of breach beneath each rule as had been given beneath rule 28.1 was set out in the document.

26 Mr Walton received the email but did not read it until 7 June 2015, four days after it had been sent. On 9 June 2015, the same day as had been fixed for the 'Grievance Meeting', Mr Walton sent two emails to the OC's solicitors. In the first he protested that he had been given insufficient notice of the meeting and insufficient particulars of the alleged breaches of the rules. In the second he stated that he wished to resolve any dispute but needed particulars of what he was alleged to have done, and that he would be unable to attend the meeting.

27 The OC's representatives attended on 9 June 2015 at the appointed place and time. Mr Walton did not attend. The OC's committee resolved to commence a VCAT proceeding.

28 At the hearing, Mr Cawthorn QC for Mr Walton spoke to a written submission which included the following paragraphs on the issue of compliance with the dispute resolution process:

> 9. Whilst Model Rule 6 does not expressly require a copy of the complaint in the approved form to be given to the person about whom complaint is made, the form requires the complainant to declare that the information provided is true and correct and to agree that the information given in the form may be used or disclosed by the owners corporation to process and resolve the complaint.
>
> 10. In this case, the applicant neither produced a copy of any complaint in the approved form to the respondent, nor did the applicant disclose to the respondent the information which would have been required to be given in the approved form, including a description of each alleged breach and the remedy sought from the respondent.
>
> 11. Rather, the letter from the applicant's solicitors to the respondent of 3 June 2015 (exhibit DW-1) contained 5 pages of assertions, not descriptions, of alleged breaches, and failed to state what was sought from the respondent to remedy any such breaches (if any breach existed).
>
> 12. Model Rule 6(2) was therefore either not complied with at all, with no complaint having been prepared in the approved form, or it miscarried, because the information in the approved form was not used or disclosed by the applicant for the purpose of articulating the complaint against respondent and resolving any dispute.
>
> 13. There was no meeting of the parties to the dispute as required by Model Rule 6(5). Whilst the letter of 3 June 2015 gave notice to the respondent of a meeting of the grievance committee to be held on 9 June 2015, the notice was defective because it was unreasonably short and gave insufficient information to the respondent about the complaint.

29 Mr Triaca of Counsel for the OC submitted that the dispute resolution process set out in rule 6 'was followed to the letter', and that, even if it was not, the Tribunal has a discretion, which it could exercise at a final hearing of the proceeding, not to dismiss the proceeding, particularly if there had been a merely technical non-compliance with the rule or if the evidence at the final hearing established that it would have been futile for the OC to have followed the process.

Construing the Rule

30 The principles which govern the construction of rules of an owners corporation include these. The rules should be read fairly and their import derived from a reasonable interpretation of the language which they employ. They should not be construed narrowly or pedantically, but as an enduring and flexible document. They should be construed in a way that gives them business efficacy; a construction which would make them unworkable should be avoided if possible.[5]

31 The reference in model rule 6(2) to a 'complaint' echoes the reference in s 152 to a complaint made to an owners corporation by a lot owner or occupier. The reference in model rule 6(2) to a 'written statement in the approved form' echoes the reference in s 152(2) to the complaint having to be 'in writing in the approved form'. The requirement in model rule 6(2) that there be a 'written statement in the approved

form' is apt when a lot owner or occupier has made a complaint to the owners corporation: a case that comes within s 153(1)(a). It is not apt in the case that comes within s 153(1)(b): where 'it otherwise comes to the attention of the owners corporation' that there may have been a breach, and where the owners corporation of its own motion makes one of the three possible decision referred to in s 153(2). In such a case a requirement for the owners corporation to make a written statement to itself would be pointless. In my opinion the rule should not be read so narrowly as to require the owners corporation to make a written statement to itself.

32 The evidence at the hearing of the application for summary dismissal did not reveal whether there had been a complaint made by some other lot owner or occupier about Mr Walton or whether it had otherwise come to the attention of the OC that he may have breached the special rules. The latter possibility is just as open as the former. Indeed it is more likely, because there was no evidence that a third-party complainant attended the meeting on 9 June 2015. Accordingly the absence of a 'written statement in the approved form' does not mean that the grievance procedure set out in model rule 6 had not been followed.

33 As Mr Cawthorn conceded, the rule does not require that the 'written statement', if there is one, be given to the person who is allegedly in breach. Nevertheless, to give business efficacy to the rule, and to comply with ordinary notions of procedural fairness, it ought to be construed so as to require an owners corporation to give to that person some kind of notice, before any meeting and discussion held in accordance with model rule 6(5), of what the dispute is, and what the alleged breach is, about which the meeting and discussion will be. Because model rule 6(5) requires that the meeting and discussion occur within 14 days after the dispute comes to the attention of the parties, it does not contemplate a legalistic document drawn with exquisite particularity. It is enough, in my opinion, if the person alleged to be in breach is given some reasonable notice, before the meeting, of the conduct that is alleged to be in breach of a rule or rules.

34 The fact, if it is a fact, that one of the parties to the dispute does not attend a meeting of which the parties had been notified cannot mean that there has been no compliance with model rule 6(5) because there has been no meeting. Such a construction of the rule would make it unworkable. A party could thwart the grievance procedure by refusing to attend the meeting. In my opinion, there has been a compliance with model rule 6(5) if one of the parties attends a meeting of which both have had notice but the other does not.

Whether the Process was Followed

35 Mr Cawthorn made some legitimate criticisms of the contents of the email dated 3 June 2015. Even within the 14-day time frame that rule 6 created the OC could well have been more specific, in that email, about the conduct which was allegedly in breach of the rules that it set out. But I was not persuaded that the document did not give adequate notice to Mr Walton of what was being alleged against him. For example, even though the 'particulars' given for breaches of rules 3.1(a) to (e) – the 'noise' rule – were repetitive and not especially enlightening, any reasonably attentive reader of the document ought to have understood that what was being complained of was noise, whether from hammer drills or jack-hammers or from

music or machinery or from some other source, which had occurred on the dates or during the period set out in the particulars.

36 The objection that Mr Walton was not given a document that, in accordance with the approved form for a lot owner's or lot occupier's complaint, declared that the information given was correct, agreed that the information given could be disclosed by the owners corporation and described the remedy sought, is met by my repeating that the complaint form (where there has been a complaint) and reasonable notice of what the dispute is about are not necessarily the same.

37 I do not accept the argument that the notice of the meeting was unreasonably short. The reason why Mr Walton did not know about it until 7 June 2015 was that he did not read his email messages until then. There was evidence that the OC's representatives attended at the time and place of the scheduled meeting; even though Mr Walton did not, his absence did not mean that there had been no compliance with rule 6(5).

38 Mr Walton did not establish that it was clear, beyond any reasonable argument, that the OC had failed to follow the dispute resolution process set out in rule 6. On the contrary, if I were to decide the issue on the footing of the evidence presented at the interlocutory hearing, I would decide that the OC had followed that process.

39 Section 153(3)(b) of the OC Act prohibits an owners corporation from applying to VCAT unless it is satisfied that the matter in dispute has not been resolved through the dispute resolution process. Mr Cawthorn submitted that the owners corporation must act in good faith when it purports to have been so satisfied. As s 5 of the OC Act requires an owners corporation, in carrying out its functions and powers, to act honestly and in good faith, I considered that the submission was correct. Nevertheless there was nothing that suggested that Mr Walton had any prospect of establishing that the OC did not act in good faith when it told Mr Walton, as it did on 15 June 2015 in an email from its solicitors, that it had been so satisfied. The very fact that Mr Walton did not attend the appointed meeting would have been a reasonable basis for the OC's being so satisfied.

40 If my conclusions so far are wrong and the correct view is that the OC commenced this proceeding without the conditions set out in s 153(3)(a) and (b) having been met, it still does not necessarily follow that the proceeding is doomed to failure. I adhere to the view that I expressed in a case which both Counsel cited:[6] that by virtue of s 45 of the *Interpretation of Legislation Act 1984* it is well and truly arguable that s 164 of the OC Act confers upon the Tribunal a discretion not to dismiss or strike out a proceeding commenced without s 153 having been complied with, and does not make it obligatory for the Tribunal to dismiss or strike out in those circumstances. It is not obvious that the Tribunal would exercise its discretion adversely to the OC in this case. The evidence was that Mr Walton declined to attend not only the meeting appointed for 9 June 2015 but also a later meeting appointed for 30 September 2015. Whether he had good reasons for not attending either or both of those meetings, or whether his attendance at the second of them would have achieved any legal or practical purpose, are questions that are not to the point. The very non-attendance is a matter on which the OC could rely in endeavouring to persuade the Tribunal that a proper following-through of the dispute resolution process, if that had not occurred,

would have been futile. It would be entitled to explore that issue at a final hearing of the proceeding, should it become necessary to do so.

41 For those reasons I rejected Mr Walton's first argument: that it is clear that the proceeding is bound to be dismissed because the OC did not follow the dispute resolution process before commencing the proceeding.

The Points of Claim

42 The second main argument in support of Mr Walton's application for summary dismissal or striking out was that the proceeding is so lacking in substance that it is bound to fail. Mr Cawthorn submitted that the Points of Claim attached to the OC's application failed to allege any material facts that could amount to as breach of any of the special rules, and made claims for orders that the Tribunal would never make.

43 One is entitled to have expected more precision and particularity in the Points of Claim than in the email which appointed the meeting and gave Mr Walton notice in broad terms of what the OC was alleging against him. The Points of Claim were not being prepared within the confines of a 14-day dispute resolution process laid down in model rule 6. A rough and ready approach to the preparation of the document is less acceptable in relation to the Points of Claim than it is for the notice given by email.

44 Paragraph 3 of the Points of Claim begins: 'The Respondent is in breach of the following additional rules:'. The rest of the paragraph, however, is a verbatim repetition of all of the rules that were set out in the email dated 3 June 2015 and of the 'particulars' given under each of the rules. The Points of Claim concluded:

> AND THE APPLICANTS CLAIM
>
> A Orders that the Respondent is in breach of the Rules.
>
> B Orders requiring the Respondent to comply with the Rules.
>
> C Orders restraining the Respondent from breaching the Rules.
>
> D Orders requiring the Respondent to reinstate and make good its lot and any common property altered in breach of the Rules.
>
> E Costs.
>
> F Interest.

45 The Points of Claim do not make forthright allegations that Mr Walton has engaged in particular conduct which breached one or more of the special rules. One is left to infer, from the recitation of the rules and of the 'particulars' given beneath each rule, that that is what is being alleged. The instances of breach set out in the 'particulars' are not expressed precisely or in detail. Moreover, in one instance the Points of Claim omits to allege any chain of facts which would lead to a legal conclusion that there had been a breach of a rule. They recite special rule 28.1, which prohibits the undertaking of building works unless all requisite permits, approvals and consents have been obtained, etc., then set out the same seven particulars in relation to that rule as had been given in the email dated 3 June 2015, as I set out in paragraph 21 above. I accepted Mr Cawthorn's submission that the OC bears the onus of proving the absence of all requisite permits, approvals and consent, and then of proving that Mr Walton has undertaken works despite the absence. The Points of Claim do not

allege fairly and squarely the absence of those things and the doing of works despite the absence.

46 Nevertheless, I did no accept that the Points of Claim do not disclose any cause of action at all. They may not disclose a cause of action in relation to special rule 28.1, but otherwise the factual basis for making out a claim of breach of other rules may be inferred. One should not be left to draw inferences; the factual basis ought to have been specifically and precisely alleged; but that is a different thing from saying that no cause of action at all has been disclosed.

47 The criticisms of paragraphs A and B of the claim for relief in the Points of Claim were justified. Orders that are, in effect, orders for the respondent to obey the law achieve nothing and the Tribunal would not make them. Paragraph C asks for something that the Tribunal might do, although the restraint would be from engaging in particular specified conduct that the Tribunal had found that the respondent had engaged in. The same could be said of paragraph D.

48 It has been often said, however, and I agree, that a summary-dismissal application under s 75(1) should not be treated as if it were a pleading summons.[7] Deficiencies in Points of Claim are not reasons for dismissing a proceeding summarily or striking out the proceeding or the Points of Claim unless they are so serious that no intelligible cause of action can be discerned. The present case is not such a case. But the Points of Claim are not satisfactory. So I made an order requiring the OC to file and serve Amended Points of Claim.

49 Mr Cawthorn made another submission. It arose out of an application which the OC had made for an interlocutory injunction restraining Mr Walton from committing certain conduct in breach of one of the special rules that had been recited in the Points of Claim. At a directions hearing on 10 September 2015 the OC asked me to hear that application. After discussion that arose from vigorous opposition to the application, the OC through its solicitor stated that it would not proceed with the application. Mr Cawthorn, who appeared for Mr Walton at the directions hearing, asked me to dismiss the application. I did. At the hearing on 14 October 2015 Mr Cawthorn submitted that the OC was precluded from maintaining the proceeding insofar as it alleged a breach of that rule, because I had dismissed the application for an interlocutory injunction. I rejected the submission. I had made no determination of the merits of that application when I dismissed it. The reason for the dismissal was the failure to press the application.

Conclusion

50 For reason given above I concluded that Mr Walton had not established that it was clear that the proceeding could not possibly succeed, and I dismissed his application.

SENIOR MEMBER A VASSIE

[1] OC Act s 205. Schedule 2 clauses 3 and 5.

[2] *Forrester v AIMS Corporation* (2004) 22 VAR 97 where Kaye J confirmed that those principles, expressed by the Court of Appeal in *State Electricity Commission of Victoria v Rabel* [1998] 1 VR 102 apply to applications brought under s 75(1).

[3] *Klona v Cummins Engine Co Pty Ltd* [2002] VCAT 733.

[4] The evidence at the hearing was an affidavit of Mr Walton dated 24 September 2015 and an affidavit of the OC's solicitor Xavier James McLaurin dated 9 October 2015. The email dated 3 June 2015 was exhibited to both affidavits; it was exhibit DW-1 to Mr Walton's affidavit. Between them the affidavits exhibited other emails to which I refer in these reasons. Mr McLaurin's affidavit also deposed to the meeting held on 9 June 2015.

[5] *Avranik Pty Ltd v Lloyd & Anor* [2012] VSC 306 at [29]. An appeal from the decision of Garde J was dismissed: [2013] VSCA 244.

[6] *Owners Corporation No 1 – PS336302K v Fairfax House Quest Lodging Pty Ltd* [2012] VCAT 1837 at [34]-[38].

[7] *West Homes (Australia) Pty Ltd v Crebar Pty Ltd* [2001] VCAT 46 at [6], [11]; *Barbon v West Homes (Australia) Pty Ltd* [2001] VSC 405.