**VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL**

**CIVIL DIVISION**

**OWNERS CORPORATIONS LIST**

VCAT REFERENCE NO. OC1294/2018

## CATCHWORDS

Validity of additional rules made under the *Subdivision (Body Corporate) Regulations 2001*; application of *Interpretation of Legislation Act 1984; Owners Corporation PS 501391P v Balcombe; Owners Corporation RP 3454 v Ainley;* and *Sulomar v Owners Corporation No 1 PS511700W* considered and followed; whether conduct of the Owners Corporation in purported enforcement of those rules *ultra vires*; claim for damages for loss and damage caused by the actions of the Owners Corporation; *Stockwell v State of Victoria* [2001] VSC 497 followed.

| | |
|---|---|
| **APPLICANT** | Building Services West Victoria Pty Ltd (ACN: 124 313 168) |
| **RESPONDENT** | Owners Corporation PS507524P |
| **WHERE HELD** | Melbourne |
| **BEFORE** | Member L Johnson |
| **HEARING TYPE** | Hearing |
| **DATES OF HEARING** | 16, 17 and 18 September 2019, 27 February 2020 |
| **DATE OF ORDER AND REASONS** | 19 January 2022 |
| **CITATION** | Building Services West Victoria Pty Ltd v Owners Corporation PS507524P (Owners Corporations) [2022] VCAT 64 |

## ORDER

The Tribunal orders

1 The Tribunal declares that additional rules 1, 2.1, 2.2, 2.3, 2.5, 2.7, 2.8, 5.1, 5.3, 5.4, 5.6, 5.7, 5.9, 5.10. 5.11, 6.6 and 6.7 of Owners Corporation No 1 PS507524P recorded with the Registrar of Titles on 6 February 2006 are invalid and are therefore void and of no effect.

2 The Tribunal orders the respondent to pay the applicant the sum of $467,721.29 in damages for loss or damage suffered by the applicant by reason of the respondent's conduct in purported application of the rules declared invalid.

3 Any application for costs and/or reimbursement of any fees paid to the Tribunal must be made in writing to the Tribunal (and copy to the other party) **by 11 February 2022**.

4 Any response to an application for costs and/or reimbursement of any fees paid to the Tribunal must be made in writing to the Tribunal (and copy to the other party) **by 25 February 2022**.

5 In the absence of any objection, any application for costs and/or reimbursement of any fees paid to the Tribunal will be determined 'on the papers'; that is, based on the parties' written submissions alone. Written submissions should only address the question of liability. If costs are awarded the quantum is to be determined by the Costs Court in the absence of agreement between the parties.

6 **I direct the principal registrar to direct any application for costs to Member Johnson.**

L Johnson
**Member**

## APPEARANCES:

| | |
|---|---|
| For Applicant | Mr A Schlicht, of counsel,<br>with Ms C Dawes, of counsel |
| For Respondent | Mr N Jones, of counsel |

## REASONS

### Background

1 The applicant, Building Services West Victoria Pty Ltd (**BSWV**) is a company carrying on the business of property development, and, at the time of the events giving rise to this dispute, was the registered proprietor of, and intended to develop, several lots within the subdivision affected by the respondent owners corporation (**Owners Corporation**). The subdivision is located in Creswick, Victoria, around the redeveloped golf course.

2 BSWV says the Owners Corporation issued Cease Work Notices, and required amendments to the plans for developments on two lots owned by BSWV, lots 27 and 57, in purported reliance on Owners Corporation Rules that BSWV says were ultra vires, void, of no effect, and unenforceable against BSWV. BSWV says the Owners Corporation's conduct was in breach of its duties under the *Owners Corporations Act 2006* (**OC Act**).

3 BSWV says that, as a result of the conduct of the Owners Corporation, development of BSWV's lots was delayed, and that delay led to BSWV being unable to obtain finance for the further development of its other lots.

4 BSWV seeks

a. A declaration that the Owners Corporation Rules (**Rules**), and the Forest Resort Design Guidelines are not binding and enforceable on Members of the Owners Corporation;

b. Damages of $740,114.66;

c. An Order that the Respondent pay the Applicant's Costs of the Proceeding; and

d. Such other or further Order the Tribunal deems fit.[1]

5 The Owners Corporation denies that it has acted in breach of its duties under the OC Act, and denies that it has caused loss or damage to BSWV. The Owners Corporation says that at all material times it was carrying out the functions conferred on it, including enforcing the Rules, pursuant to section 4 of the OC Act. The Owners Corporation maintains that the Rules are valid, and binding on BSWV as the registered proprietor of lots in the subdivision affected by the Owners Corporation.

6 In the alternative, the Owners Corporation says that, even if the Rules were not valid, there has been no loss or damage as a result of the Owners Corporation's actions to enforce the Rules. The Owners Corporation says that, independently of any action by the Owners Corporation, BSWV was obliged to comply with the Forest Resort Design Guidelines by virtue of the terms of the restrictive covenant on the title to the lots, and by virtue of planning controls contained in the Hepburn Planning Scheme.

[1] Applicant's Points of Claim dated 19 June 2021, page 13.

7 I conducted a three day hearing on 16, 17 and 18 September 2019. I heard evidence from:

- Peter Thompson, director of the applicant
- Matthew Bush, director of the applicant
- Daniel Gabriel, senior banking manager with Bendigo and Adelaide Bank
- Alison Blackettt, planning officer at Hepburn Shire Council
- Paul Burrows a lot owner and sometime chair of the Owners Corporation committee
- Steven Fawkner a lot owner and sometime chair of the Owners Corporation committee
- Ian McKenzie a lot owner and sometime member of the Owners Corporation committee
- Paul Cummaudo of Roscon Property Services an expert witness for the Owners Corporation

8 At the end of the hearing, I made orders for the filing of written submissions.

9 In October 2019, the applicant sought leave to reopen its case in relation to the loss and damage claimed. In a further affidavit, dated 10 October 2019, Mr Bush stated that the calculations set out in the spreadsheet he had relied upon as an *aide memoire* in the hearing in September 2019 were unclear or contained errors. A further 2 days' hearing was held on 27 February 2020, for the purpose of receiving the amended evidence.

10 Mr Bush, Mr Gabriel and Mr Cummaudo were recalled, and evidence was given by Mr Brent Simpson, Director of Hotondo Homes Pty Ltd (**Hotondo**).

11 At the conclusion of that day's hearing, the proceeding was adjourned, and I made orders extending the times by which the parties were to file and serve written submissions, and an agreed document index.

12 The parties' ability to comply with the timelines for filing and serving written submissions was affected by public health workplace restrictions due to COVID19, and the timelines were extended, by consent, on the joint application of the parties.

13 Although the parties filed and served their written submission on or shortly after the extended dates permitted by the Tribunal's orders, this fact was not brought to my attention until September 2021. For much of 2020 and 2021, the Tribunal has functioned with greatly reduced registry functionality, and Members were working remotely. The usual "bring up" systems were, unfortunately, not fully functioning during this period. The Tribunal

apologises to the parties for the regrettable delay in determining this proceeding.

14 Having considered the evidence, and the parties' submissions, I now give my decision and reasons for decision.

## The subdivision

15 Before setting out the details of the dispute, it will be helpful to set out some of the history of the subdivision, as that history provides context for the dispute.

16 The land is located in Creswick, around the redeveloped Golf Club. Mr Thompson gave uncontested evidence of the history of the development. It was Mr Thompson's evidence that the initial developer was The Forest Resort Pty Ltd, the promoter of which was a Mr Jim Walsh. Mr Thompson is an architect, and was engaged in the 1990s by Mr Walsh to provide consultancy services in connection with the land.

### Section 173 Agreement

17 One of the early steps taken by The Forest Resort Pty Ltd was to enter into an agreement in the form of an agreement under section 173 of the *Planning and Environment Act 1987* (**PE Act**) with Hepburn Shire Council "to provide appropriate planning controls" for the development (**the Agreement**).[2]

18 The Agreement was executed by the developer and the Council on 28 December 2001,[3] and, although s 181 of the PE Act required the Council to register the Agreement with the Registrar of Titles, the parties agree that this did not occur. The consequence of not registering a s 173 Agreement is that the burden of any covenant in the agreement does not run with the land, and the Council is not able to enforce any covenant in the agreement against any persons deriving title from the original parties to the agreement. Further, subsequent registered proprietors of the land do not become parties to the agreement. [4]

19 As the Agreement was not registered, I have referred to it simply as "the Agreement" as it does not have the status of a registered s 173 Agreement under the PE Act.

20 In the Agreement, The Forest Resort Pty Ltd, the developer, and associated entities were referred to as "the Owners". Clause 6 of the Agreement, is in the following terms:

> 6.1 The Owners shall to the satisfaction of the Council, prior to the issuing of any building on the Land, establish a committee to be known as The Creswick Golf Club Architectural Review Committee ("the Committee"). The Committee shall comprise a representative of

[2] Witness Statement of Peter Thompson dated 21 May 2019, paragraphs 3-7.
[3] Tribunal Book Volume 4 pp1377-1345.
[4] See ss 181, 182, 182A of the *Planning and Environment Act 1987.*

the Owner, two representatives of the Council and an architect appointed by agreement between the Owner and the Council and at no cost to the Council. The Committee shall prepare and maintain to the satisfaction of the Council the Creswick Golf Club Design Code ("the Code"). The Code shall establish appropriate architectural standards for all buildings and works on the Land.

6.2 Matters contained in the Code shall be provided to all prospective purchasers of any part of the Land.

6.3 The Code may be varied from time to time and may be required to maintain and enhance the quality of development on the Land to the satisfaction of the Council.

6.4 The Owner shall maintain representation on the Committee and continue to fund the appointment of an architect referred to in Clause 6.1.

6.5 The Owner acknowledges that the Council shall assess any application for a dwelling on a lot created by a subdivision of the Land having regard to the provision of the Code in addition to the relevant provisions of the planning scheme with the objective that buildings and works shall be designed and carried out to meet the objectives and standards set out in the Code. The covenants imposed upon the Owner under Clause 6.1 hereof shall not apply to the Owner of any of the lots created on any part of the subdivision of the Land.

21 Mr Thompson gave evidence, that was not contradicted, that he was appointed as the initial architect on the Architectural Review Committee.[5]

22 I note here that subclause 6.5 explicitly states that the obligation to establish the Architectural Review Committee and to develop the Design Code were obligations of the Developer only, and those obligations did not, and do not apply to the owner of any of the lots created in the subdivision. That the Agreement was not registered by Council would appear to be consistent with the apparent intention of the parties that the obligations relating to the Architectural Review Committee were not intended to bind future lot owners.

23 I note, also, that the Agreement deals only with the respective obligations of the developer and the Council, and contains no clauses about the role of the Architectural Review Committee, other than the requirement that it "prepare and maintain" the Design Code "to the satisfaction of the council".

24 The parties to the Agreement were The Forest Resort Pty Ltd and Hepburn Shire Council. There were no other parties. Subsequent lot owners have not become parties to the Agreement because it was not registered. The Body Corporate for the Plan of Subdivision PS507542P (now the Owners

[5] Mr Burroughs gave evidence that he understood that Mr Thompson was town architect in 2007 (when Mr Burroughs first became a lot owner) and continued to be so until Mr Murfett became the town architect, see Transcript 19.9.2019 P-27 ln 38 and P-28 ln8.

Corporation) was not a party to the Agreement. The Agreement does not refer to the Body Corporate, and contains no provision contemplating that the Body Corporate (or the Owners Corporation) would be a member of the Architectural Review Committee.

## Forest Design Guidelines

25 It was Mr Thompson's evidence that, as contemplated by the Agreement, the Architectural Review Committee appointed consultants, Kaufman Property Consultants, of Ballarat North, to prepare design guidelines for the Forest Resort development. As the appointed architect to the Committee, Mr Thompson says he was actively involved in that process.[6]

26 The consultants prepared a document titled "Forest Resort Design Guidelines" which was submitted to, and approved by Council in early 2005.[7]

27 Although the Agreement had referred to the "Creswick Golf Club Design Code" it seems generally agreed that the "Forest Resort Design Guidelines" approved by the council, in 2005, are the design guidelines contemplated by the Agreement. In these written reasons I have referred to this document as the **2005 Design Guidelines**.

28 From early 2005 to 2008, Mr Walsh, assisted by Mr Thompson, controlled the sign off of new developments within the estate, but, in early 2008, the Mr Walsh's company experienced financial difficulties, and controllers were appointed around April 2009.[8]

29 As will be seen below, another version of the Forest Resort Design Guidelines was prepared in or around 2011. The parties do not agree about the status of the 2011 document.

## Restrictive Covenants

30 In addition to the s173 Agreement, a restrictive covenant was registered on title of many lots, requiring development on the lot to comply with "the Forest Design Guidelines". The parties agree that there were a number of different versions of restrictive covenant used. The terms of the restrictive covenant which is on title of each of the lots that are the subject of these proceedings, is as follows: [9]

> Creation and/or Reservation of Easement and/or Covenant:
>
> The Transferee with the intention that the benefit of this covenant shall be attached to and run at law and in equity for each and every lot on Plan of Subdivision 507524P other than the lot hereby transferred

[6] Evidence of Peter Thompson Tx 16.0.2019 P-35 ln28-30.
[7] Witness Statement of Peter Thompson dated 21 May 2019, paragraph 9; The copy of the Forest Resort Design Guidelines at Tribunal Book page C91 bears the stamp of Hepburn Shire Council recording "Plans Approved" and the date 21 January 2005.
[8] Witness Statement of Peter Thompson dated 21 May 2019, paragraph 9; Witness Statement of Paul Burrows dated 28 August 2019, paragraphs 18-19.
[9] Applicant's Tribunal Book Volume 1 pp 77-79.

> and that the burden of this covenant shall be annexed to and run at law and equity with the lot hereby transferred does hereby for himself, his heirs, executors, administrators and transferees and as separate covenants, covenant with the Transferor and its respective assigns and transferees and the registered proprietor for the time being of every lot on the said Plan and every part or parts thereof other than the lot hereby transferred and the said Transferee, his heirs, executors, administrators and transferees shall not at any time, erect, construct or build or cause to be erected, constructed or built on the lot herby transferred or any part or parts thereof any building other than a private dwelling house not in accordance with the Forest Design Guidelines.[10]

## The Owners Corporation Rules

31 The Owners Corporation came into existence, as a body corporate under the *Subdivision Act 1988* (**Subdivision Act**), on registration of plan of subdivision PS507524P on 7 November 2002.[11]. The then applicable Standard Rules applied on registration. Initially, Mr Thompson said, Mr Walsh was appointed as the body corporate manager.

32 In December 2005 the body corporate passed a special resolution under regulation 220 of the *Subdivision (Body Corporate) Regulations 2001* (**SBC Regulations**), authorising the making of additional rules of the body corporate (the Rules).[12] The additional rules came into effect when they were recorded by the Registrar of Titles, as required by r 220(5) of the SBC Regulations on 6 February 2006.

33 As far as is relevant to the dispute in this proceeding, the Rules provide:

> Rule 1
>
> The Forest Resort Body Corporate Rules are to be interpreted having regard to the following objectives of the Developer:
>
> 1.1 Ensuring compliance with the Forest Resort Guidelines;
>
> 1.2 Enhancing the amenity of every Lot and Sub-Lot on the Plan of Subdivision and every other lot and sub-lot on other plans of subdivisions forming part of the Forest Resort Development;
>
> 1.3 Maintaining and enhancing any landscaping for which the Body Corporate is responsible and other relevant landscaping requirements;

---

[10] The use of the double negative in the restrictive covenant, "not … build … any building other than a private dwelling house not in accordance with the Forest Design Guidelines" raises a question as to its proper effect. However, I do not need to determine the question of the proper meaning of the restrictive covenant as that issue is not before me for determination.

[11] See BSWV Points of Claim [16].

[12] Tribunal Book Tab 10 pp 59-73: Dealing AE161169A lodged with the Registrar of Titles on 6 February 2002, attaching a copy of the Minutes of the First General meeting of the body corporate on 7 December 2005 at which a special resolution is recorded as having been passed, adopting additional rules of the body corporate. Both Mr Jim Walsh, of Forest Resort, and Mr Michael Darby, then of PGA Links Management Pty Ltd, are listed as in attendance.

1.4 Maintaining and enhancing all Water and Environment Features that are located on Common Property for the benefit of all Members; and

1.5 Empowering the Developer to act on behalf of all Members to achieve all of the above, until such time as the Developer ceases to be the owner of a Lot on the Plan of Subdivision.

Rule 2

In these Rules unless the context otherwise requires the following definitions apply:

2.1 "Body Corporate" means the Body Corporate created by the Plan of Subdivision or if more than one the unlimited Body Corporate created by the Plan of Subdivision.

2.2 "Builders' Site Guidelines means the guidelines for the control of building sites and the control of building refuse on all Lots as amended from time to time by the Body Corporate.

2.3 "Code" means the Forest Resort Design Guidelines for the design, development and use controls for all lots on the Plan of Subdivision as amended from time to time by the Forest Resort Architectural Review Committee.

…

2.5 "Committee" means the Forest Resort Architectural Review Committee comprising one representative of the Developer, the Manager and a qualified architect for the purposes of assessing compliance by Members with the Code.

…

2.7 "The Developer" means The Forest Resort Pty Ltd or its successors or assignees.

2.8 "Development" means the development known as "Forest Resort";

…

2.13 "Manager" means the Manager of the Body Corporate who is appointed by the Members at a meeting of the Body Corporate

…

Rule 5 Development of a Lot

Each Member of the Body Corporate must do the following on each lot of that Member –

5.1 Forest Resort Guidelines

Comply with the Forest Resort Guidelines

5.2 Waste Management Plan

Comply with the Waste Management Plan and any other guidelines created from time to time by the Body Corporate, to ensure the

adequate control and removal of rubbish from lots that form part of the Plan of Subdivision.

5.3 Construct a Residence

Commence Construction of a Residence on each and every Lot of the Member within 2 years of the Settlement Date for that Lot.

5.4 Complete construction of a Residence

Expeditiously complete construction of a Residence on a Lot within 12 months from the commencement of its construction to the satisfaction of the Committee.

5.5 Maintenance

Maintain the Lot and the nature strip by cutting grass and keeping the Lot and the nature strip in a safe and tidy condition to the satisfaction of the Body Corporate before and after completion of the Residence on that Lot; Make good after construction and complete any nature strip to the satisfaction of the course superintendent.

5.6 No development other than a Residence

Do not develop the Lot for any purpose other than as one Residence with a garage and any necessary outbuildings and improvements.

5.7 No Works without Approval of Plans and Specifications

Do not commence any works or external improvements or alterations on a Lot unless and until plans and specifications of such works have been submitted to and approved of in writing by the Committee. All plans submitted for approval by the Committee must be submitted in accordance with the requirements of the Committee and the Forest Resort Design Guidelines.

…

5.9 Regular inspection of Works

Allow a representative of the Committee to conduct inspections as deemed necessary of any Works in progress on a Lot for the purpose of ascertaining compliance with the approved plans and specifications for such works and with any of the rules of the Code.

5.10 Rectification of Non-Compliances

Rectify any non-compliance with the approved plans and specifications for the works in accordance with any notice in writing served on the Member by the Committee.

5.11 Cease Construction on Demand

Cease construction of works of a lot if required by notice in writing served by the Committee pending resolution of any dispute about non-compliance with these Rules or non-compliance with the approved plans and specifications for the Lot.

….

Rules 6 Restrictions on Development of a Lot

> Each Member of the Body Corporate must not do or allow the following to be done on any Lot owned by that Member:
>
> 6.1 Install television antennae or satellite dish
>
> 6.2 Erect or allow to be erected on a lot … an antennae or satellite dish… unless the equipment is fully screened from the streetscape and golf course and the Member has obtained the written approval of the Committee …
>
> …
>
> 6.5 Prior to construction of a residence allow the Lot to be unkempt, unsightly or allow the accumulation of rubbish …
>
> 6.6 Subdivide the lot or cause or permit the lot to be subdivided;
>
> 6.7 Construct any part of a Residence in such a way as to contravene the Code. Any part of a Residence constructed on a Lot must be in accordance with the Code.

34 There are many references in the Rules to the "Forest Resort Design Guidelines", either by that title, or using the defined term "Code". It is not in dispute that the Rules recorded in the Register did not include a copy of the Forest Resort Design Guidelines.

35 The body corporate became an owners corporation subject to the OC Act on commencement of that Act on 31 December 2007.

36 The Owners Corporation says that the Rules, although made under the SBC Regulations, continued in operation by virtue of Clause 5 of Schedule 2 to the OC Act, and became Rules of the Owners Corporation under the OC Act. I return to this issue later.

37 Although a number of the Rules refer to, and purport to authorise a body described as the "Architectural Review Committee", it is the conduct of the Owners Corporation, through its manager and the architect appointed by it, directed to enforcing the Rules, and through the Rules, the Forest Resort Design Guidelines, that gives rise to the claim made by the applicant.

### Purported Amendment of the Design Guidelines

38 Both the Agreement and the Rules contemplate that the Design Guidelines might be amended, from time to time, by the Architectural Review Committee. I have already referred to Mr Thompson's evidence regarding the Design Guidelines made by the Architectural Review Committee and approved by Hepburn Shire Council in 2005.

39 There is also a version of the Design Guidelines dated 2011 in evidence before the Tribunal (the **2011 Design Guidelines**).

40 Mr Darby, the manager of the Owners Corporation from 2008[13] until 2017, gave evidence about the development of the 2011 Design Guidelines. Mr

[13] In his Witness Statement dated 30 August 2019 paragraph 3 it is Mr Darby's evidence that his company was the manager of the Owners Corporation from 2008 until 2017. However, in correspondence dated 5

Darby stated that, at the Owners Corporation Annual General Meeting in February 2010, there was discussion about the developer's desire "to create a more user friendly and simplified set of guidelines". Mr Darby gave evidence that Mr Murfett, of Mitsuori Architects, had been "asked by the administrator to come up with a revised set of design guides, to simplify them a little more", which Mr Darby circulated to the members of the Owners Corporation in December 2010 for comments.[14]

41 The documentary evidence before the Tribunal tends to confirm the conclusion that the review of the Design Guidelines was not instigated by the Owners Corporation, but by the developer. The Minutes of the Owners Corporation Annual General Meeting on 23 February 2010 record that Wellington Capital, at that time the controller of the developer, had been in discussion with Hepburn Shire Council regarding revised Forest Resort Design Guidelines.[15] Correspondence dated 4 February 2011 prepared by Mr Darby at the direction of the Committee stated that "Forest Resort Pty Ltd (Controllers Appointed) are reviewing the current design guidelines and have drafted an amended version that is required to be submitted Hepburn Council for review and approval".[16] The Minutes of the Owners Corporation Committee on 26 July 2012 record that "the Developer" had lodged amended Design Guidelines with Council 12 months prior, but Council had declined to consider the changes.[17]

42 It was Mr Darby's evidence that, in about May 2011, Mr Murfett issued the 2011 Design Guidelines at the directions of the developer.[18] There is no documentary evidence before me of the 2011 Design Guidelines being "issued" then, or at any other time.

43 The status of the 2011 Design Guidelines is unclear. It appears that the 2011 Design Guidelines were not ultimately approved by Hepburn Shire Council.

44 Nevertheless, as Mr Fawkner confirmed, in cross examination, [19] and the documentary evidence before the Tribunal indicates, it was the 2011 Design Guidelines that were applied to the assessment of the BSWV developments the subject of this proceeding.

---

September 2014 in Exhibit MD10 to Mr Darby's Witness Statement, Mr Darby stated that Quantum United Management Pty Ltd had been the manager of the Owners Corporation since 2006. Mr Darby is also recorded as having been present at the first annual general meeting of the body corporate on 7 December 2005, representing a different company – see footnote 12 above.

[14] Transcript 17 September 2019, P-177 ln 33-35.

[15] See Exhibit MD1 to the Witness Statement of Michael Darby dated 30 August 2019, Minutes of the Committee 23 February 2010.

[16] See Exhibit MD7 to the Witness Statement of Michael Darby dated 30 August 2019.

[17] Applicant's Tribunal Book Volume 1 p519.

[18] Witness Statement of Michael Darby dated 30 August 2019, paragraph 29.

[19] Transcript 18 September 2019, P-98 ln12-14, 25 and 29.

## The BSWV Developments

45 Matthew Bush and Peter Thompson formed BSWV with the intention of developing a number of sites in the Forest Resort development as an investment.[20] In July 2007 BSWV acquired Lots 27, 35, 36, 53, 57, 58 and 59.[21]

46 BSWV obtained development and building approvals and constructed a three bedroom home on Lot 36.[22] This was apparently intended as a "display home" for future developments. Construction on that lot appears to have proceeded without incident.

47 In 2012 BSWV resolved to develop its other Lots. It obtained a funding facility with the Bendigo Bank, a condition of which was that not all lots were to be developed at the same time, but that the development would be carried out in three stages, the first stage being development of Lots 27 and 57.[23]

48 In late 2013 BSWV obtained quotations from a builder, Hotondo Homes Pty Ltd to construct buildings for the first stage, on Lot 27 and Lot 57 and for the second stage, Lots 53 and 58.[24] Contracts for construction of the first stage were signed with the builder in February 2014. The builder then applied to Hepburn Shire Council for planning and building approvals.[25]

49 Planning approval for development and use of Lots 27 and 57, each for two dwellings was obtained in August 2014.[26] The plans for the development were endorsed by Mr Thompson, purportedly in his capacity as Town Architect under the Agreement, as complying with the Design Guidelines. Mr Thompson confirmed in the hearing that he was referring to the 2005 Design Guidelines in making that endorsement.

50 The Planning Permits included conditions relating to layout (of the site, and the size and internal layout of the buildings), soil erosion, waste water and engineering conditions. Condition 3 referred explicitly to the covenant on Title:

> The approval hereby given does not in any way obviate the need the necessity [sic] to comply with covenant [sic] that affects the land. An owner must not commence any works until plans and specifications of such works have been submitted to and approved in writing by the Forest Resort Architectural Review Committee.[27]

---

[20] Witness Statement of Peter Thompson dated 21 May 2019, paragraphs 12 and 13.
[21] Witness Statement of Peter Thompson dated 21 May 2019, paragraphs 13 and 15.
[22] Ibid paragraph 15.
[23] Ibid paragraph 17. Witness Statement Matthew Bush paragraphs 6-14.
[24] Witness Statement of Peter Thompson dated 21 May 2019, paragraph 18.
[25] Witness Statement of Peter Thompson dated 21 May 2019, paragraph 19. See also Planning Permit PA515 Supplementary Tribunal Book Tab 7 and PA516 at Tabs PS507524P/DS and Filleted Tribunal Book pages 138 and 141.
[26] Planning Permit PA-516 for Lot 27, PS 507524P dated 6 August 2014, see Tab 25 p731; and Planning Permit PA-515 for Lot 57, PS 507524P dated 8 August 2014, see Tab 7 of the Applicant's Supplementary Tribunal Book.
[27] Ibid.

51 The Building Permit issued on 24 September 2014 was also subject to conditions, Condition 1 of which read

> All works to comply with the conditions contained within the Planning Permit PLNPA 00516 issued by Hepburn Shire Council.[28]

52 Accordingly, the planning and building permits required the plans and specifications for the works to be submitted to, and approved in writing, by the Forest Resort Architectural Review Committee for the purpose of avoiding authorising anything that would result in a breach of the restrictive covenant by issuing the permit. The permit made no reference to the Owners Corporation having such a role.

### Actions of the Owners Corporation

53 The Owners Corporation agrees that it issued the following Notices: [29]

i. Written notice dated 25 September 2014 (First Stop Work Notice).

ii. Written notice dated 21 October 2014 (Notice of commencing work without approval of the Architectural Review Committee).

iii. Written notices dated 3 November 2014 of its Preliminary Assessment reports dated 3 November 2014 (the Refusal Decisions).

iv. Written notice dated 29 May 2015 (cease work notice for Lot 27, the Second Stop Work Notice).

#### The First Stop Work Notice

54 On 25 September 2014, the day following the issuing of the building permits, Mr Darby wrote, "for and on behalf of the Owners Corporation" to Mr Thompson. In the letter, Mr Darby referred to a meeting in the week before at which Mr Thompson had asserted that he was the Architect on the Architectural Review Committee. Mr Darby stated that this assertion had been "communicated to the O/C Committee". The letter informed Mr Thompson that FTI Consulting (one of the earlier controllers of The Forest Resort Pty Ltd) had "engaged" Mitsuori Architects in November 2010 as the Architect on the Architectural Review Committee. Mr Darby noted that the involvement of Mitsuori Architects in a review of the Design Guidelines had been communicated to lot owners, including BSWV, in December 2010. Mr Darby stated that it was the Owners Corporation's "strong view" that Mr Thompson was no longer the Architect on the Architectural Review Committee, and all plans for development were required to be submitted to Mitsuori Architects for approval for the Architectural Review Committee.

55 The letter asserted that BSWV was in breach of Owners Corporation Rules 5.1 and 5.7, by not having complied with the Forest Resort Design

---

[28] See Building Permit BS-U 1273 20142286/0 dated 24 September 2014.
[29] Submissions of the Owners Corporation dated 7 August 2019 at [25].

Guidelines and in not submitting plans to the Committee as required. The letter concluded by seeking BSWV's confirmation that works would not proceed on the BSWV lots and that written approval of the plans would be sought from Mitsuori Architects before proceeding with the works.[30]

56 On 21 October 2014 Mr Darby wrote again to Mr Thompson. In that letter, Mr Darby stated that the Owners Corporation Committee had sought and received legal advice "in relation to the structure and operation of the Architectural Review Committee". Mr Darby advised that the advice had confirmed that the Agreement had not been registered on title, and stated that

> the Architectural Review Committee is Mitsuori (the qualified Architect), Forest Resort Pty Ltd or its successors or assignees and the O/C Manager.
>
> All approvals need to be submitted to and approved by this Committee.
>
> … if it is observed that construction has commenced without the approval of the Architectural Review Committee a cease works notice will be issued pursuant to section 5.11 of the owners corporation Rules that are registered on title.
>
> …
>
> Subdivision of Lots: the owners corporation has received and is considering further advice received from our lawyers in relation to the subdivision of residential lots. [31]

57 BSWV says that, as a commercial decision, it did not, at that time, take action to challenge the notice, but attempted to negotiate with the Owners Corporation, in the hope that it could reach a resolution with the Owners Corporation, and resume its building program as quickly as possible.[32]

58 Mr Thompson submitted BSWV's plans for development of Lots 27 and 57 to Mr Murfett of Mitsuori Architects.

59 Two "Preliminary Assessment" documents were prepared by Mitsuori Architects on 3 November 2014 in respect of Lot 27 and Lot 57 respectively. These documents outlined the issues that were deemed not to comply with the Design Guidelines, or to require further information. (**the Refusal Decisions**).

60 Over the next few months, Mr Murfett communicated further amendments he required, and further plans were submitted to him by BSWV.

61 The Owners Corporation agrees that the parties attempted to negotiate between November 2014 and January 2015 and agrees that BSWV prepared

a. a second version of Plans for Lot 57

[30] See Applicant's Tribunal Book Volume 3 Tab 5 page 980-982.
[31] Witness Statement of Michael Darby dated 30 August 2019 paragraph 41, Exhibit MD-12.
[32] Witness Statement of Peter Thompson dated 21 May 2019, paragraph 22 and Transcript 16.9.2019 P-92 ln 43-46.

b. a second version of the Plans for Lot 27; and

c. a third version of the Plans for Lot 27.[33]

62 In the meantime, the Owners Corporation considered its position further. The Owners Corporation had received and considered the legal advice referred to in Mr Darby's letter of 21 October 2014 to Mr Thompson. That advice had confirmed that the Design Guidelines were not enforceable under the Agreement, and that any amendments to the Guidelines would need to be made in accordance with the Rules.[34] Supplementary email advice given on 31 October 2014 had advised that

> the registered rules incorporate by reference the Forest Resort Design Guidelines however the Design Guidelines were not registered with the rules. … The risk is that because the Design Guidelines are not registered, that they do not form part of the Rules.[35]

63 Mr Bush and Mr Thompson attended the meeting of the Owners Corporation Committee held on 6 November 2014 to report on their developments and submission made to Mitsuori Architects. The Minutes record that the following resolutions were passed after Mr Thompson and Mr Bush left the meeting:

- that the owners corporation engage the manager to review the rules in relation to the subdivision of lots;
- that Mitsuori Architects is confirmed as the current qualified architect serving on the Forest Resort Architectural Review Committee; and
- that the Committee adopts the ARC members and framework as outlined in the OC registered rules.[36]

## The variations required by the Owners Corporation

64 Mr Thompson gave evidence that the plans he had prepared complied with the 2005 Design Guidelines,[37] and it was only when he was informed by Mr Darby in October 2014 that the Owners Corporation required compliance with the 2011 Design Guidelines, that he received a copy of the later Guidelines[38].

65 It was Mr Thompson's uncontested evidence that the building setback requirements imposed by the Owners Corporation were inconsistent with, and greater than, the building envelopes for the lots that had been approved by the Council in the overall development plan for the development, reducing the available area for the building. [39]

---

[33] Owners Corporation's Points of Defence paragraphs 19 20 21.
[34] See Exhibit MD-11 to the Witness Statement of Michael Darby dated 30 August 2019.
[35] Applicant's Tribunal Book Volume 3, page 1092.
[36] Tribunal Book pages 577-582.
[37] Transcript 16 September 2019 -P-34 ln 44.
[38] Transcript 16 September 2019 -P-48 ln 21-22.
[39] Transcript 16 September 2019 P-45 ln43-45.

66 The copy of the 2011 Design Guidelines in evidence before me differs in a number of significant respects from the 2005 Design Guidelines. Among other things, the additional matters specified in the 2011 Design Guidelines included: imposition of a greater set back requirement for buildings; stipulation of a permitted "fill height" limited to 1 metre; a statement that "single level flat slab house designs are inappropriate for sloping sites and will not be permitted"; required designs to include eaves and shading; and required natural ground level to be maintained for a minimum of 2m from the front boundary.

67 Mr Thompson's evidence about the extent of changes required by the Owners Corporation was as follows:

a. Alter street façade to rock face and timber rather than brick;

b. New requirements about retaining walls and height not in the original guidelines which had the effect of pushing it down into the ground destroyed the aspect from the street and gave quite an acute driveway entrance which limits the vehicles that can get in there easily; [40]

c. Set backs from the front of the block were increased from 4.5m to 6m, with a consequential shortening of the length of the building, resulting in a smaller master bedroom;[41]

d. floor levels had to be stepped, which meant the intended single slab construction could not be used;[42]

e. Pergolas and shed had to be moved in so they were 1m from boundary although the planning controls would have permitted them to be located on the boundary;[43]

f. Required to add eaves and external shade[44]. Mr Thompson asserted that Mr Murfett did not point to any requirement in the Forest Design Guidelines that required this;[45]

g. Single driveway to access the two lots A and B instead of 2 driveways. Mr Thompson asserts that there was no basis for this requirement;[46]

h. Screening air conditioning condensers;[47]

i. Alteration design of letterbox – which Mr Thompson asserted was not a requirement of the Design Guidelines.

---

[40] Transcript 16 September 2019 P-45 ln 33-38.
[41] Transcript 16 September 2019, P-45 ln43-44; P-46 ln1-2,6.
[42] Transcript 16 September 2019 P-46 ln 10,11; P-54 ln19-22.
[43] Transcript 16 September 2019 P-54 ln 46-47; P-55 ln7-8, 17-18.
[44] Transcript 16 September 2019 P-56 ln 21-22, 26-27.
[45] Transcript 16 September 2019 P-56 ln 38.
[46] Transcript 16 September 2019 P-59 ln39-45.
[47] Transcript 16 September 2019 P-61 ln 6-25 and 27-29.

68 It is relevant to note here the evidence, also uncontested, given by the Hepburn Shire Council planning officer, Ms Blackett, that the Design Guidelines "are not a reference document or an incorporated document in the scheme"[48]

69 Ultimately, documents entitled Design Approval were issued by Mitsuori Architects, for Lot 27 on 25 March 2015. The approval for Lot 27 included the statement "assessment of this Design Approval is based on this property not being subdivided and therefore subdivision is not permitted by this Design Approval". Following this, the amended plans were lodged with Council for approval. [49]

70 On or about 25 March 2015, following instructions from the Committee, Mr Murfett issued a Design Approval for Lot 57.[50]

## The Second Stop Works Notice

71 On 29 May 2015, the Owners Corporation issued a cease works notice for Lot 27.[51]

72 Michael Darby gave evidence that "on or about 29 May 2015, following instructions received from the Committee, [the owners corporation manager] issued to [BSWV] a Notice to Immediately cease construction - owners corporation (**Cease Work Notice**) pursuant to s 141(b) of the *Owners Corporations Act 2006,* the former *Owners Corporations Regulations 2007* and Rules 5.1 and 5.11".[52]

73 The Cease Work Notice, was sent by Mr Darby under cover of an email to Matthew Bush and Peter Thompson, with the subject line "Forest Resort: Lot 27 – ARC Cease Works Notice":

> "Hello Peter and Matthew
>
> I am writing to advise that we have been instructed to issue a Cease Works Notice from the Forest Resort Architectural Review Committee in relation to Lot 27 at Forest Resort for a breach of the O/C Rules, Design Guidelines and your approved plans that is attached or your urgent attention please.
>
> Regards
>
> Michael Darby
>
> Managing Director
>
> Quantum United Management Pty Ltd".[53]

74 The Cease Work Notice is headed "Notice to immediately cease construction – owners corporations" followed by the reference "*Owners*

---

[48] Transcript 18 September 2019, P66 ln1,2.
[49] Witness Statement of Peter Thompson dated 21 May 2019, paragraph 23.
[50] Witness Statement of Michael Darby dated 30 August 2019, paragraph 60.
[51] BSWV's Points of Claim paragraph 24.
[52] Witness Statement of Michael Darby dated 30 August 2019 paragraph 45.
[53] Exhibit MD 20 to the Witness Statement of Michael Darby dated 30 August 2019.

*Corporations Act 2006 Section 141(b), Owners Corporations regulations 2007 and Owners Corporation Rule 5.1, 5.11"*[54]

75 Section 141 of the OC Act provides that the rules of an owners corporation are binding on the owners corporation, the lot owners, any lessee or sub-lessee of a lot and any occupier of a lot. Part 10 of the OC Act sets out the process that should be followed by an owners corporation where it comes to the attention of the owners corporation that a lot owner may have breached the Act, or the regulations or the rules of the owners corporation. Section 153 of the OC Act requires the owners corporation to decide whether to take action in respect of the alleged breach, and, if it decides to take action, to give notice, in the approved form, of the alleged breach in accordance with s 153 of the OC Act. The Cease Work Notice, appears to be more or less in the form approved by Consumer Affairs Victoria for the purposes of s 155 of the OC Act.[55]

76 In the body of the Cease Work Notice in the details given about the person giving the notice, it says the Notice is from "Quantum United Management Pt (sic) Ltd for an (sic) on behalf of the Forest Resort Architectural Review Committee". As I have noted above, the Owners Corporation agrees that it issued this Notice.

77 The details given of the alleged breaches are set out in the Cease Work Notice, in a table, as follows

| | |
|---|---|
| Rule 5.1 | Works do not comply with the approved plans in relation to fill heights. |
| | There is also concern around the split level height specifications in relation to the two properties. |
| Rule 5.11 | Works have commenced that do not have the approval of the Architectural Review Committee, that do not match the approved plans for this lot. |
| Design Guidelines Section 3.6 | A substantial amount of external fill has [been] added to the site which is in contravention of this section (sic). |
| Design Guidelines Section 3.6 | Maximum Cut and fill height is considerably in excess of 1m as stated in the approved plans and guidelines. |

78 I note here that the references to "section 3.6" of the Design Guidelines, concerning "cut and fill" is a reference to the 2011 Design Guidelines. Part

[54] Tribunal Book Volume 1 page 806.

[55] I note, in passing, that as BSWV decided, for commercial reasons, to co-operate with the Owners Corporation, no Final Notice was given in accordance with s 157 of the OC Act, and it was not necessary for the Owners Corporation to commence any proceeding in this Tribunal requiring BSWV to rectify the alleged breach.

3 of the 2005 Design Guidelines is divided into paragraphs numbered (a) to (g), and contains no reference to external fill or maximum fill height.

79 Paragraph 3.6 of the 2011 Design Guidelines states

> Houses must respond to the natural topography of the site to minimise the requirement for cut and fill. Single level flat slab house designs are inappropriate for sloping sites and will not be permitted.
>
> Cut and fill must be balanced to ensure no earth is removed from or added to the site. Natural ground level must be retained for a minimum of 2m from the front boundary.
>
> Maximum Cut or Fill Height: 1m

80 The action required of BSWV is described in the Notice as:

> Pursuant to section 5.11 of the Registered owners corporation Rules: due to noncompliance breaches outlined above you are required to cease works on this lot pending resolution of the disputes about a noncompliance with these Rules and on compliance with the approved plans and specifications for the Lot
>
> If you do not believe you are [in] breach of the above matters please confirm this in writing detailing your reasons to the owners corporation within the next 7 working days.

81 Michael Darby gave evidence that on or about 4 June 2015, following instructions from the Committee, his company issued to the Applicant a Compliance Report[56] . Following this Mr Darby says that "on or about 21 July 2015 Chantel Pearson of Quantum emailed the Committee amended Lot 27 Plans", with comments from Mr Murfett of his review that the Committee's concerns had been addressed by the Applicant.[57]

82 Mr Darby says, "subsequently, on or about 27 July 2015 following instructions from the Committee and (sic) Mr Murfett issued to the applicant a further Design Approval for Lot 27."[58]

### Submissions of BSWV

83 BSWV says the Owners Corporation's actions were not authorised, or within the power conferred by the SBC Regulations. BSWV says that the Rules and the Guidelines relied upon by the Owners Corporation are both invalid and ultra vires.

84 BSWV says the Rules are ultra vires and invalid because they

a. refer to Guidelines that are not incorporated in the Rules and are subject to arbitrary amendment;

b. promote a subjective assessment of applications for development and are proscriptive;

---

[56] Witness Statement of Michael Darby paragraph 47.
[57] Ibid paragraph 48.
[58] Witness Statement of Michael Darby paragraph 49.

c. do not relate to or touch on any of the powers conferred on the Owners Corporation under the SBC Regulations or the OC Act and are inconsistent with the *Planning and Environment Act*;

d. relate only to Owners Corporation 1, and not to Owners Corporations 27 and 57.[59]

85 In relation to point d, I note that, although Owners Corporations 27 and 57 were created in relation to Lots 27 and 57, the Land Use Victoria Search Reports in the Tribunal Book record that Lots 27 and 57 are also affected by Owners Corporation 1.[60] It is not necessary to consider this issue further.

86 In relation to the Guidelines relied upon by the Owners Corporation, BSWV says that, as the Guidelines were not registered with the Rules, the Guidelines do not form part of the Rules, and are therefore not enforceable under the Rules.

87 BSWV says that the Owners Corporation's actions amount to a breach of its duties under the OC Act, in particular, the duties in sections 5 and 17 of the OC Act to

a. act honestly and in good faith;

b. exercise due diligence and care in the performance of its functions;

c. not to make improper use of its position; and

d. [not act] contrary to legal advice.[61]

88 BSWV says, in its Points of Claim, paragraph 27:

> *By reason of the Decisions requiring that the Applicant develop Lots 27 and 57 in accordance with Owners Corporation Rules and the Forest Resort Design Guidelines, the Respondent: -*
>
> a. *failed or refused to act honestly and in good faith*
>
> b. *failed or refused to act with due care and diligence in the performance of its functions as a member of the ARC Sub-Committee of the Owners Corporation;*
>
> c. *acted ultra vires to the powers and obligations of a member of the ARC and/or the Owners Corporation and thereby breached the duty set out at paragraph 16 above* (cross reference is incorrect)*;*
>
> d. *acted without proper basis;*
>
> e. *acted in contravention of the legal advice;*
>
> f. *caused delays in the construction of the dwellings on the Lots;*
>
> g. *caused the cost of construction for the dwellings to increase by reason of the variations;*

[59] Submissions of BSWV dated 21 May 2019.
[60] See, for example, Tribunal Book pp 149 – 157.
[61] Applicant's Points of Claim dated 19 June 2018, paragraphs 17, 24, and 27.

h. *caused the Applicant to lose its funding for future construction of the remaining lots.*

89 BSWV refers to the authorities of *Owners Corporation PS 501391P v Balcombe* (**Balcombe**) [62] *Owners Corporation RP 3454 v Ainley* (**Ainley**)[63] and *Sulomar v Owners Corporation No 1 PS511700W* (**Sulomar**) [64], as supporting its submissions that the Owners Corporation lacked the power to make Rules that substantially interfere with lot owners proprietary rights or that operate contrary to permissions granted by a planning or building permit.

90 BSWV says further, relying on the decision of the Victorian Supreme Court in Elwick 9 v Freeman (**Elwick 9**),[65] *the* planning permits issued by Hepburn Shire Council in respect of lots 27 and 57 "conferred rights on BSWV that cannot be interfered with by an OC Rule".[66]

91 BSWV says that on being granted a planning permit by the responsible authority BSWV obtained a building permit. Having obtained a valid Planning Permit and valid Building Permit, the Owners Corporation "could not interfere with the construction of the dwellings in accordance with such permits". BSWV says that any cause of action, if any, on the part of the OC lay against the responsible authority and not BSWV.[67]

92 BSWV asserts that once Council had issued the planning permit then "there can be no further complaint that the Rules or the [Design Guidelines] have not been complied with. The development plan and the [Design Guidelines] are matters which Council takes into account when assessing and issuing the permit". BSWV submits that, once Council had issued the planning permit, "the OC had no further rights" to interfere with the development by [BSWV]".

93 BSWV submits that the Owners Corporation had a duty of care to properly enforce the Rules.

94 In relation to the status of the Architectural Review Committee, BSWV says the Owners Corporation appears to rely on clause 2.5 of the OC Rules to say that it is permitted to create an Architectural Review Committee. BSWV says that

a. clause 2.5 is a definition clause, not a constituting provision; and doesn't give a right to create a separate Architectural Review Committee from that required by the s 173 agreement (which it thought to be enforceable at the time of resolving to adopt the OC Rules).

b. the Developer, The Forest Resort Pty Ltd no longer exists; and

[62][2016] VSC 384, [108] – [110].
[63] [2017] VCAT 470.
[64] [2016] VCAT 1502.
[65] [2018'] VSC 234.
[66] BSWV's Closing Submissions dated 24 August 2020 paragraph 17.
[67] See BSWV submissions dated 21 April 2019, at [27].

c. even if the OC Rules do permit the Owners Corporation to appoint a separate Architectural Review Committee, this did not happen in any valid way.[68]

95 BSWV drew the Tribunal's attention[69] to Minutes of the Committee Meeting of the Owners Corporation on 5 October 2010 which recorded

> the OC Rules clearly outline the members of the Architectural Review Committee [ARC] are a developers (sic) representative, the O/C Manager and a qualified architect
>
> **and**
>
> there were owners contracts of sale that stated the ARC would be formed by a developers (sic) representative, an architect appointed and paid for by the developer, a member of local council and one or two members of the O/C
>
> **and**
>
> it would require a Special Resolution to change the Rules reflecting the members of the ARC [70]

96 BSWV says issuing the Cease Works Letter and Cease Work Notice was done with a lack of good faith or proper basis because the Minutes of 5 October 2010 record an awareness a Special Resolution would be required to reconstitute the Architectural Review Committee and this did not occur, and further, the "improperly constituted" Architectural Review Committee purported to impose requirements that went beyond the Guidelines and the Amended Guidelines.

97 BSWV also relies upon the finding in *Sulomar*, that:

> Given the very limited powers and functions granted to bodies corporate over private lots … there [is] no power to pass a rule requiring compliance with a building code.[71]

98 BSWV notes that the Owners Corporation asserts that *Sulomar* is of no relevance here because the Guidelines or Amended Guidelines are separately enforceable via the restrictive covenant and the development overlay. BSWV says, in relation to the restrictive covenant, the Owners Corporation is not a beneficiary of the restrictive covenant and does not have standing to enforce it. Further, BSWV says that if a beneficiary of the restrictive covenant believed that the requirements of the restrictive covenant were not being met by BSWV on Lots 27 and 57, such an individual could have sought injunctive relief in the Supreme Court. BSWV notes that no lot owners did so at the time.

99 In relation to the development overlay, BSWV says that compliance with s 61(4) of the PE Act is a matter for the Council and not for the Owners

---

[68] See [paragraph 10 BSWV's Closing Submissions 24 August 2020].
[69] See paragraph 11 of BSWV's Closing Submissions dated 24 August 2020.
[70] Tribunal Book Volume 3 Tab 9.
[71] *Sulomar* at [29].

Corporation. BSWV asserts that the standard to be applied by the responsible authority in relation to the requirements of a development overlay is that plans should be "generally in accordance with" those requirements. BSWV asserts that it did comply with the Guidelines "at least to the extent that those guidelines could be lawfully enacted" and that this is demonstrated by the fact that BSWV was granted a Planning Permit.

100 BSWV says it is not an answer to say, as the Owners Corporation appears to say, that it acted on legal advice and therefore did not breach its duty of care even if the legal advice was wrong. BSWV maintains that the Owners Corporation's actions were, at law, in breach of its duties.

101 In any event, BSWV says the legal advice received by the OC dated 13 October 2014 was clear that the Design Guidelines were unenforceable pursuant to the s173 Agreement and that additional rules may only be made by special resolution. BSWV says further, that the legal advice included advice that that there was a real risk that because the FRDG were not registered they did not form part of the Rules.[72]

102 BSWV notes that further legal advice obtained by the Owners Corporation dated 14 August 2018 supports BSWV's contentions that the Owners Corporation had not acted properly and was in breach of its duties to act honestly and in good faith and had acted ultra vires and without a proper basis.

### Submissions of the Owners Corporation

103 The Owners Corporation asserts that "at all material times it carried out the functions conferred on it, including enforcing the Rules pursuant to section 4 of the OC Act. The OC agrees that it made a decision on or about 3 November 2014 that "was due to the Applicant's failure to comply with clauses 5.1 and 5.7 of the Rules".[73]

104 The Owners Corporation denies that its conduct led to delays in the development of Lots 27 and 57.

105 The Owners Corporation asserts that BSWV was itself in breach of rules 5.1, 5.7 and 5.11.[74] (It will be recalled that rule 5.1 required compliance with the Guidelines, rule 5.7 required plans submitted for approval to be in accordance with the Guidelines, and Rule 5.11 required works to stop if a cease work notice was issued). The Owners Corporation contends that, as it had legal advice that the rules would be breached in the absence of approval under rule 5.7 it is therefore "implied" that BSWV had to comply with the Guidelines in order to comply with the Rules.[75]

---

[72] BSWV's Closing Submissions paragraphs 26, 27. See also Tribunal Book Tab 96 at 1092.
[73] Owners Corporation Points of Defence dated 12 September 2018 [17].
[74] Submissions of the Owners Corporation dated 7 August 2019 at [24].
[75] Submissions of the Owners Corporation dated 7 August 2019 at [11].

106 The Owners Corporation says that the Rules were validly made, and were preserved in operation on the commencement of the OC Act.[76]

107 As to the validity of the Rules, the Owners Corporation says that, at the time the Rules were registered there was no restriction or limitation, subject to the operation of general law, on the subject matter in respect to which additional rules were able to be made under the SBC Regulations.

108 As to preservation of the Rules on commencement of the OC Act, the Owners Corporation says they were preserved by the operation of Clause 5 of Schedule 2 to the OC Act.

109 Further, the Owners Corporation relies on the following rule making powers set out in Items 5 and 6 of Schedule 1 to the OC Act as demonstrating that the Rules are not inconsistent with the OC Act:

> 3.1 Management and administration of common property and services.
>
> 5.1 Change of use of lots.
>
> 5.2 External appearance of lots.
>
> 5.3 Requiring notice to the owners corporation of renovations to lots.
>
> 5.4 Times within which work on lots can be carried out.
>
> 6. Design, construction and landscaping.

110 The OC acknowledges that the s173 Agreement between Hepburn Shire Council and the developer is not binding on lot owners, because the agreement was not registered on title.[77]

111 In its Points of Defence, the Owners Corporation asserted that the Architectural Review Committee "is delegated with the role and functions conferred on it by the Rules".[78] The contention appears to be an incomplete restatement of the combined effect of sections 11(5) of the OC Act,[79] and s101 of the OC Act.[80] Section 11(5) of the OC Act provides that if no delegation is in force under s 11(2) of the OC Act, the committee is delegated all the powers and functions of the owners corporation except powers requiring a special or unanimous resolution and matters that the owners corporation requires to be determined at a general meeting.

112 Section 101 of the OC Act provides that, subject to the rules of the owners corporation, a committee has all the powers and functions that are delegated to it by or under s 11 of the OC Act. The reference to the rules in s 101 of the OC Act reflects the terms of subsection 11(5)(b) of the OC Act which

---

[76] Respondents Points of Defence dated 12 September 2018 (Points of Defence) paragraph 6 ff.
[77] Ibid paragraphs 7, 9 and 10.
[78] Points of Defence paragraph 11.
[79] Which provides that if no delegation is in force under s 11(2) of the OC Act, the committee is delegated all the powers and functions of the owners corporation except powers requiring a special or unanimous resolution and matters that the owners corporation requires to be determined at a general meeting.
[80] Section 101 of the OC Act provides that, subject to the rules of the owners corporation, a committee has all the powers and functions that are delegated to it by or under s 11 of the OC Act.

enables an owners corporation to pass a resolution limiting the matters that may be delegated. The flaw in the contention that the Rules delegated powers and functions on the Architectural Review Committee, if relied upon by the Owners Corporation, is that a delegation, if made, must be made by formal resolution of the owners corporation in accordance with s 11 of the OC Act. While the Rules may limit the scope of a delegation, the Rules cannot effect a delegation.

113 The Owners Corporation says that all of the conduct complained of by BSWV was conduct performing "the functions conferred on it, including enforcing the rules pursuant to section 4 of the [OC Act]".[81]

114 The Owners Corporation asserts that the Cease Work Notice dated 21 October 2014 was issued on behalf of the Owners Corporation to BSWV pursuant to Rule 5.11.

115 Rule 5.11 states

> Cease Construction on Demand
>
> Cease construction of works of a lot if required by notice in writing served by the Committee pending resolution of any dispute about non-compliance with these Rules or non-compliance with the approved plans and specifications for the Lot.

116 The Owners Corporation submits that, even if the Rules on which it relied are found to be ultra vires, the actions of the Owners Corporation did not cause any loss or damage to BSWV, because BSWV was in any event required to comply with the Design Guidelines by reason of the restrictive covenant registered on each title.

117 Further, the Owners Corporation says the Applicant is required to comply with Guidelines by virtue of the Development Plan Overlay, DP03 in the Hepburn Planning Scheme, which includes the following requirements:

> Freehold land
>
> Residential lots generally 400 square meter minimum for single detached dwellings.
>
> Generally maximum level dwelling with a height of no more than 9 meters
>
> All development to be in accordance with the Forest Resort Design Guidelines (as applicable).

### Legal Advice on which the Owners Corporation relies

118 The Owners Corporation says that it did not act in breach of its statutory duties, because it obtained legal advice in relation to those actions and acted on that advice. The evidence is not quite as clear as the Owners Corporation suggests.

---

[81] Points of Defence paragraph 17.

119 Mr Darby gave evidence that, during 2013 and 2014 he was in regular email discussion with officers at Hepburn Shire Council, seeking to confirm the status of the Agreement and the Design Guidelines. I note that Mr Darby had been the manager of the Owners Corporation for some 5-7 years at this time.

120 In August 2014 a planning officer at the Hepburn Shire Council informed Mr Darby that the Agreement had not been registered on the titles of the properties in the development, and that therefore the Council was not a member of the architectural review committee.[82]

121 In September 2014, Mr Darby sought legal advice from the Owners Corporation's solicitors about the Architectural Review Committee and the Design Guidelines.[83]

122 Mr Darby summarised the legal advice for the Owners Corporation as follows

a. The Agreement was not registered on title and as such the Guidelines are not enforceable under the Agreement

b. The Council has no role on the Architectural Review Committee and as a result has no role in relation to the review of the Guidelines

c. The Design Guidelines are enforceable under the Rules and any amendments would need to be in accordance with the Rules

d. The Rules do not empower the Committee to approve development of a lot for any purpose other than as one residence or the subdivision of a lot

e. The owners corporation can issue a cease notice pursuant to section 5.7 of the Rules as well as take further action where works have commenced without the approval of the Architectural Review Committee.[84]

123 The legal advice exhibited with Mr Darby's summary is dated 13 October 2014. The advice recorded that advice had been sought in relation to the status and enforceability of the current Forest Resort Design Guidelines, and "how the Guidelines are to be validly amended and the process involved".

124 The advice in relation to amendment of the Guidelines was:

> The Guidelines are not enforceable pursuant to the Agreement. Therefore, any amendments made to the Guidelines must be

[82] Email from Justin Fiddes of Hepburn Shire Council Planning Department to Michael Darby 21 August 2014, Exhibit MD10 to the Witness Statement of Michael Darby dated 30 August 2019.
[83] Exhibit MD10 to the Witness Statement of Michael Darby dated 30 August 2019, page E196.
[84] Witness Statement of Michael Darby dated 30 August 2019 paragraph 33.

undertaken in accordance with any applicable Owners Corporation rules.[85]

125 The advice given included reference to the provisions of the OC Act governing the making of special rules, including that such special rules must be for the purpose of the control, management, administration, use or enjoyment of the common property or of a lot. It expressed the view that there were no limitations under the SBC Regulations, "subject to the operation of general law" to the subject matter of additional rules. Further, the advice opined that the additional rules were preserved by the transitional provisions of the OC Act to the extent that they are not inconsistent with the OC Act, that the rules were not inconsistent with the OC Act "even if there is no longer power to make the rule under Schedule 1", but that the rules were, in any event, within the power of Items 5 and 6 in Schedule 1.

126 The advice given as to action that could be taken by the Owners Corporation if works had commenced, was that Owners Corporation should give notice under Rule 5.7, and could also proceed against the owner for breach of Rules 5.6 and 6.3, and depending on the evidence, 3.3.[86]

127 The inclusion of the advice referred to in point (d) of Mr Darby's summary above, together with the advice that action could be taken for breach of Rule 5.6 suggests that the Owners Corporation's instructions to its lawyers included concern not only with BSWV's compliance with the Design Guidelines, generally, but also concern that BSWV intended to subdivide its Lots. Rule 5.6 states that Lot Owners must not develop their lots other than as one residence with a garage and necessary outbuildings.

128 The Owners Corporation's lawyers provided further advice on 31 October 2014 that "the registered rules incorporate by reference the Forest Resort Design Guidelines however the Design Guidelines were not registered with the rules. The risk is that because the Design Guidelines are not registered, that they do not form part of the Rules".[87]

129 I note that the Owners Corporation received further legal advice, in 2018 to similar effect.

## Issues for determination

130 I turn now to the issues I must determine:

a. Were the Rules valid

i. Were they validly made under the Subdivision (Body Corporate) Rules 2001?

[85] Advice of HWL Ebsworth dated 13 October 2014 pages E212-216 of Exhibit MD-1 to the Witness Statement of Michael Darby dated 30 August 2019.
[86] Rule 3.3 requires that members not do or permit anything on a Lot which might invalidate, suspend or increase the premium for any insurance effected by the body corporate.
[87] Applicant's Tribunal Book Volume 3, page 1092.

ii. Were they "preserved on commencement of the OC Act? and

iii. Were they, on commencement of the OC Act, consistent with the OC Act, and the OC Regulations?

b. Was the Owners Corporation acting within its powers in issuing the stop work notices and in requiring BSWV to submit revised plans for approval?

c. If the Owners Corporation was acting beyond power, did BSWV suffer loss or damage as a consequence of the actions of the Owners Corporation?

d. If so, what is the quantum of loss or damage suffered by BSWV for which the Owners Corporation is liable to BSWV?

### Were the Rules validly made?

131 BSWV submits, referring to the authorities of *Balcombe*, *Ainley* and *Sulomar*, that the Rules are *ultra vires* because there is not a sufficiently direct and substantial connection between the statutory purposes vested in a body corporate and the likely outcome of the rule.

132 BSWV says that the cases establish the following propositions:

a. The principal function of an owners corporation is to manage and administer the common property;

b. Rules must have a sufficiently direct and substantial connection between the statutory purposes vested in an owners corporation and the likely outcome of the rule; and

c. Neither the Subdivision legislation nor the OC Act disclose any intention for owners corporations to have power to substantially interfere with the proprietary rights of lot owners;

d. Under the Subdivision Act and the SBC Regulations 2001 and "given the very limited powers and functions granted to bodies corporate over private lots, … there was no power to pass a rule requiring compliance with a building code".

133 BSWV relies also on the decision of the Supreme Court in *Elwick 9* as authority for the proposition that a rule of an owners corporation that is inconsistent with or limits a right conferred by a planning permit is invalid, void and of no effect.

134 The Owners Corporation submits that the authorities of *Balcombe* and *Ainley* are not applicable here because in each of those cases the proposed conduct, or the proposed development, were in accordance with relevant planning obligations. The Owners Corporation submits that the BSWV developments were contrary to the planning obligations contained in the restrictive covenant and in the relevant Development Plan Overlay to the Hepburn Planning Scheme (DPO3). The Owners Corporation says that, as

the Rules required compliance with the Guidelines, and the Guidelines were referenced in the planning controls, the Rules were consistent with planning legislation.[88]

135 I do not accept the submission. On Ms Blackett's uncontested evidence, the Design Guidelines are neither a reference document nor an incorporated document in the relevant planning scheme.

136 The Owners Corporation says also that the decision in *Balcombe* is not relevant to these proceedings, because the case pleaded by BSWV is that the Owners Corporation has acted in breach of its statutory duties. The Owners Corporation submits that an Owners Corporation has only the statutory duties set out in s 5 and, in the case of the Owners Corporation Committee, s 117.

137 However, BSWV's claim is not limited to a claim of breach of statutory duty. BSWV's claim includes the claim that the Owners Corporation has acted beyond power, and that it has acted contrary to legal advice. BSWV seeks orders of the Tribunal declaring that the Rules, insofar as they concern the enforcement of the Forest Resort Design Guidelines, and purport to impose obligations on lot owners relating to compliance with those guidelines, are ultra vires, void and of no effect. The authorities are relevant to the claim made brought by BSWV.

### Application of the principles in *Balcombe* and *Sulomar*

138 In *Balcombe* Riordan J followed well established authorities of the High Court, to the effect that, in determining whether a Rule was a valid exercise of the owners corporation power to make bylaws under the Subdivision Act and the SBC Regulations:

a. the fundamental question is whether the [rule] is within the scope of what the Parliament intended when enacting the statute which empowers the subordinate authority to make certain laws;

b. it is not sufficient to conclude that a rule is valid because, on the face of the impugned regulation, there appears to be a connection with the statutory purpose; and

c. nor may a court conclude that a rule is invalid because "the court itself thinks the regulation inexpedient or misguided".[89]

139 In *Balcombe,* Riordan J set out the proper approach to the determination of the validity of subordinate legislation as follows:

a. First it is necessary to determine the statutory object to be served by, and the 'true nature and purpose' ('the Statutory Purpose') of, the power to make regulations. The relevant inquiry as to the Statutory Purpose of the power is considered by reference to the scope, object and subject matter of the empowering Act.

[88] Owners Corporation Final Submissions dated 6 July 2020 paragraph [54] – [55].
[89] *Balcombe* at [84], citations omitted.

b. Secondly, it is necessary to characterise the impugned regulation by reference to the circumstances in which it applies, in particular its operation and effect. The evidence of the circumstances in which the regulation will operate will enable the court to form a view about the nature and apparent purpose of the regulation; and the existence and dimensions of the actual or threatened mischief sought to be addressed by the impugned regulation.

c. Thirdly, 'once armed with the knowledge of these facts', the court then makes its own assessment of:

   i. Whether the connection between the likely operation of the regulation and the Statutory Purpose of the power is sufficiently direct and substantial; or

   ii. Whether the regulation could not reasonably have been adopted as a means of attaining the Statutory Purpose, in which case it will be so lacking in reasonable proportionality as not to be a real exercise of the power.

   iii. In the latter case the regulation will be invalid not because it is inexpedient or misguided but because it is not a real exercise of the power.[90]

140 *Balcombe* is authority for the proposition that, in 2004, the time when the owners corporation that was the subject of that proceeding, made certain rules, "the principal function of [the body corporate under the *Subdivision (Body Corporate) Regulations*] was to own and manage the common property of the strata development". [91] Accordingly, the Rule making powers set out in the OC Act, and in the subdivision legislation before it, are limited to that function.

141 *Balcombe* is also authority for the proposition that the *Subdivision Act* did not authorise the making of rules that might operate to override the use of lots on the strata plan, nor permit rules that would have the effect of permitting a body corporate to impose an additional and substantially unappellable control over the use to which lot owners intended to put their privately owned property, or interfere with a proposed use of a lot <u>that was permitted under a planning scheme</u> (emphasis added).[92]

142 Although *Balcombe* was concerned with Rules which purported to control the <u>use</u> to which a lot owner put their lot, I consider that the principles that informed the decision in *Balcombe* are equally applicable to purported control of <u>development</u> of lots. His Honour observed that the stated intention of the *Subdivision Act* is to incorporate the subdivision and planning processes by the subdivision being approved through the processes set out in the *Planning and Environment Act 1987*.[93] The *Planning and*

[90] Ibid paragraph [85], citations omitted.
[91] *Balcombe,* paragraph [110].
[92] See *Balcombe*, paragraph 123 and 124.
[93], Ibid, and in particular, paragraph 123 (iii).

*Environment Act* is concerned with both use and development of land. Given that context, it is entirely inconsistent with the scheme of the *Subdivision Act* that it should authorise the making of rules about matters which are properly the responsibility of the responsible authority under the *Planning and Environment Act.* In my view, it does not.

143 In my view, the language of the Rules tends against a finding that the Rules were directed to attaining the statutory purpose of the proper management of the common property and the risks for which the Owners Corporation is responsible.

144 First, the chapeau to Rule 1 states:

> Rule 1
> The Forest Resort Body Corporate Rules are to be interpreted having regard to the following objectives of the Developer:

145 That is, in interpreting the Rules, they are to be interpreted having regard to the objectives of the developer. That instruction necessarily indicates that the statutory purpose required by the Subdivision Act is not the primary object of the Rules. If that is the case, the Rules in their entirety are not a real exercise of the rule making power, and, following the reasoning in *Balcombe*, all of the Rules are invalid.

146 Second, if a more generous interpretation of the Rules should be applied, I consider there are similar difficulties scattered throughout the Rules.

147 The first paragraph of Rule 1 is directed to:

> Ensuring compliance with the Forest Resort Guidelines;

148 Ensuring compliance with the Forest Resort Guidelines is not a rule directed to attaining the statutory purpose of management of the common property and the risks for which the owners corporation is responsible. The rules that relate to Rule 1a are, therefore, not rules that are directed to attaining the statutory purpose.

149 I leave aside consideration of the remaining paragraphs in Rule 1 as questions relating to those objectives are not in contention in this proceeding.

150 The particular Rules that are relevant in this proceeding are the following:

> 5.1 Comply with the Forest Resort Guidelines
>
> 5.6 No development other than a Residence
>
> Do not develop the Lot for any purpose other than as one Residence with a garage and any necessary outbuildings and improvements.
>
> 5.7 No Works without Approval of Plans and Specifications
>
> Do not commence any works or external improvements or alterations on a Lot unless and until plans and specifications of such works have been submitted to and approved of in writing by the Committee. All plans submitted for approval by the Committee must be submitted in

accordance with the requirements of the Committee and the Forest Resort Design Guidelines.

5.9 Regular inspection of Works

Allow a representative of the Committee to conduct inspections as deemed necessary of any Works in progress on a Lot for the purpose of ascertaining compliance with the approved plans and specifications for such works and with any of the rules of the Code.

5.10 Rectification of Non-Compliances

Rectify any non-compliance with the approved plans and specifications for the works in accordance with any notice in writing served on the Member by the Committee.

5.11 Cease Construction on Demand

Cease construction of works of a lot if required by notice in writing served by the Committee pending resolution of any dispute about non-compliance with these Rules or non-compliance with the approved plans and specifications for the Lot.

6. Each Member of the Body Corporate must not do or allow the following to be done on any Lot owned by that Member

6.6 Subdivide the lot or cause or permit the lot to be subdivided;

6.7 Construct any part of a Residence in such a way as to contravene the Code. Any part of a Residence constructed on a Lot must be in accordance with the Code.

151 These Rules are not directed to management of the common property but to control of the development of lots. *Sulomar* concerned the rules of an Owners Corporation in substantially similar terms to those in this proceeding which had also been made under the SBC Regulations. The question before the Tribunal in *Sulomar* was whether such rules were "preserved" by the transition provisions in the OC Act. The Tribunal found, following the reasoning in *Balcombe*, that the OC Act transitional provisions do not save a rule which was made beyond power under the *Subdivision Act 1988*.[94] Further, the Tribunal found that one effect of the commencement of the OC Act was to limit the scope of powers and functions of an owners corporation to those powers and functions specified in the OC Act.

152 While, in *Sulomar*, the Tribunal left open the possibility that an Owners Corporation had power to make rules requiring lot owners to submit building plans to the owners corporation, this was only to the extent that such a rule was directed to protection of common property and only insofar as it enabled the owners corporation to ensure that a proposed construction did not encroach onto common property.

153 Applying the principles enunciated in *Balcombe* and in *Sulomar*, to the extent that the Rules are directed to matters that are beyond the impact of

[94] [2016] VCAT 1502, at [16].

developments on common property, beyond the appearance and aesthetic look of a lot, or the landscaping outcomes on a lot, the Rules were not within the body corporate's rule making power under the SBC Regulations. They were not "in operation" on the commencement of the OC Act.

154 The Owners Corporation's application of the Rules has involved the application of the Design Guidelines. The parties do not agree about whether the Design Guidelines form part of the Rules. I turn now to that question.

### Did the Rules incorporate the Design Guidelines?

155 The Owners Corporation has asserted that the Design Guidelines are enforceable through the Rules.

156 The parties agree that the Design Guidelines were not included with the copy of the Additional Rules recorded on the Register. I have referred to the legal advice given to the Owners Corporation in October 2014 to the effect that there was a risk that, as a consequence of the Design Guidelines not having been registered, they may not form part of the Rules.

157 The OC Act is silent on the question of whether rules may incorporate other documents by reference. However, that is not the end of the matter.

158 One essential resource to the interpretation of statutory provisions is the *Interpretation of Legislation Act 1984* (**IL Act**). The IL Act contains a lexicon of defined terms that apply in the interpretation of Victorian legislation. The Commonwealth *Acts Interpretation Act 1901* serves a similar function for Commonwealth legislation. The Victorian IL Act is divided into parts that apply, as the case may be, to the interpretation of Acts, the interpretation of subordinate instruments, and to the interpretation of Acts and subordinate instruments. Provisions relating to the interpretation of and calculation of periods of "time", the terms "may" and "shall", and service by post are to be found in Part 3 of the IL Act which apply to both Acts and subordinate instruments.

159 Included in Part 3 of the IL Act, in s 38, is the term "subordinate instrument", defined for the purposes of all Victorian legislation:

> **subordinate instrument** means an instrument made under an Act—
>
> (a) that is a statutory rule; or
>
> (b) that is not a statutory rule but—
>
> (i) contains regulations, rules, by-laws, proclamations, Orders in Council, orders or schemes; or
>
> (ii) is of a legislative character;

160 Rules made by an owners corporation under the OC Act are "subordinate instruments". This is because, although rules made under the OC Act do not fall within the definition of "statutory rule", they are, nevertheless, instruments made under an Act: they are required, by s 142 of the OC Act,

to be recorded in a form suitable to be recorded in the Register kept under the *Transfer of Land Act 1958.* Rules made under the OC Act, are, consequently, instruments made under an Act, that although not a statutory rule, contain rules. Accordingly, rules made by an owners corporation fall within the definition of "subordinate instrument", and the rules relating to incorporation of documents in subordinate instruments, set out in subsection 32(2) of the IL Act apply.

161 Subsection 32(2) of the IL Act provides

> (2) If an Act (whether passed before or after the relevant day)[95] authorises or requires provision to be made for or in relation to a matter by a subordinate instrument, the subordinate instrument, if made on or after the relevant day and unless the contrary intention appears in the Act under or pursuant to which it is made—
>
> (a) may make provision for or in relation to that matter by applying, adopting or incorporating, with or without modification, the provisions of—
>
> (i) an Act; or
>
> (ia) a Commonwealth Act; or
>
> (ii) a Code; or
>
> (iii) a statutory rule; or
>
> (iv) a statutory rule (within the meaning of the Statutory Rules Publication Act 1903 of the Commonwealth) made under a Commonwealth Act—
>
> as in force at a particular time or as in force from time to time; and
>
> (b) must not make provision for or in relation to that matter by applying, adopting or incorporating any matter contained in a document (not being an Act, Commonwealth Act, Code, statutory rule or statutory rule made under a Commonwealth Act).

162 The effect of subsection 32(2)(b) is clear: a subordinate instrument must not make provision for or in relation to any matter by applying, adopting or incorporating any matter contained in a document (not being a state or Commonwealth Act, a defined Code, or a state or Commonwealth statutory rule), unless the contrary intention appears in the Act under or pursuant to which it is made. That is, there must be express provision in the authorising Act for a subordinate instrument to incorporate another document by reference.

163 The OC Act does not make provision authorising owners corporation rules to apply, adopt or incorporate matter contained in another document, not being state or commonwealth legislation. No doubt, good policy reasoning underpins the absence of such authorisation. The rules of an owners corporation are intended to bind both the members of the owners

[95] The "relevant day" in section 32 of the IL Act is 16 April 1991 (see subsection 32(1)).

corporation at the time that the Rules are made as well as future lot owners. The Rules must be sufficiently certain on their face to provide certainty to future lot owners as to their meaning and application. The matters about which owners corporations can make rules are limited in subject matter and purpose. It should be possible to make appropriate rules for the owners corporation's permitted purposes without the need to refer to other documents.

164 Accordingly, because the IL Act requires that there be specific legislative authorisation before a subordinate instrument can incorporate another document by reference, and because, appropriately, in my view, the OC Act does not give such authorisation, there is no power to make rules that apply, adopt or incorporate a document such as the Design Guidelines.

165 The relevant provisions of the IL Act, set out above, were in force at the time the Rules were made. There was no power to incorporate the Guidelines by reference into the Rules at the time they were made. The 2005 Guidelines therefore do not form part of the Rules.

166 As the 2005 Guidelines do not form part of the Rules, it is also the case that the 2011 Guidelines do not form part of the Rules.

167 I note, in relation to the 2011 Guidelines, that the Owners Corporation was clearly aware, as early as the Committee meeting on 5 October 2010, that a special resolution is required to amend the Rules of an owners corporation. There is no evidence before me of any such special resolution being passed. To the contrary, as I have noted above, it was Mr Darby's evidence that Mr Murfett "issued" the 2011 Design Guidelines "at the directions of the developer". The Owners Corporation clearly was at all times in a position to appreciate that the 2011 Guidelines were not binding on lot owners.

168 Even if s 32(2) of the IL Act did not apply to Rules made by an owners corporation, I am satisfied that, following the principles in *Sulomar*, the Rules that purport to leave matters to be determined to the satisfaction of the Architectural Review Committee, and that require compliance with the Design Guidelines, are not concerned with the functions of the body corporate to manage and administer the common property of the subdivision.

169 I find that the Rules relied upon by the Owners Corporation as authorising its conduct were not within the Rule making power conferred on the body corporate under the Subdivision Act, and were, as a consequence not sufficiently directly or substantially connected with the Statutory Purpose to be a real exercise of the rule making power conferred by R220 of the SBC Regulations. Such Rules were, accordingly, invalid.

### Were the Rules preserved on the commencement of the OC Act?

170 As I have found that the Rules, when made, were not within the Rule making power conferred on the body corporate by the SBC Regulations, it is not necessary to consider whether those rules were capable of being

preserved on the commencement of the OC Act. Rules that were not validly made were not "in force immediately before the commencement day".

171 However, if I am wrong in my conclusion that the Rules were not within the power of the Body Corporate under the SBC Regulations, I must consider whether the Rules were preserved on commencement of the OC Act.

172 For convenience, I set out here the text of clause 5 of Schedule 2 to the OC Act:

> Any rules of a subdivision body corporate in force immediately before the commencement day, continue in force on and after the commencement and are deemed to be rules of the owners corporation under the new Act to the extent that they are not inconsistent with the new Act or the Regulations made under the new Act.

173 For rules made under the SBC Regulations to be preserved, they must have been "in force" before the commencement day, and not inconsistent with the OC Act.

174 The OC says the Rules were preserved by the transitional provisions in the OC Act because the Rules are not, and were not, inconsistent with the OC Act or the SBC Regulations made under that Act on the commencement date of the OC Act.

175 The Owners Corporation submits that the Rules are within the ambit of the rule making power provided by s 138 of the OC Act and were not inconsistent with the OC Act because they dealt with subject matter that is connected with the following categories in Schedule 1 of the OC Act in respect of which a rule making power is given to an owners corporation:

> 1 Health, safety and security
>
> 1.1 Heath, safety and security of lot owners, occupiers and invitees.
>
> 4. Use of common property
>
> 4.1 Use of common property
>
> 5 Lots
>
> 5.1 Change or use of lots.
>
> 5.2 External appearance of lots.
>
> 5.3 Requiring notice to the owners corporation of renovations to lots.
>
> 5.4 Times within which work on lots can be carried out.
>
> 7. Behaviour of persons
>
> 7.1 Behaviour of owners, occupiers and invitees on the common property.
>
> 7.2 Noise and nuisance control.

176 The Owners Corporation's submission that the Rules were valid because they can be linked to rule making powers in effect skips over the

requirement to consider first the statutory purpose of the relevant provisions in the legislation. It is not sufficient to identify "rule making powers" alone. The rules must be directed to attaining the statutory purpose, which, in the case of the OC Act, is the proper management of the common property and the risks for which the Owners Corporation is responsible.

177 Section 138 of the OC Act gives owners corporations the power to make rules by special resolution for or with respect to any matter set out in Schedule 1 of the OC Act.

178 Subsection 138(3) of the OC Act provides that a rule "must be for the purpose of the control, management, administration, use or enjoyment of the common property or of a lot".

179 Section 140 of the OC Act provides that

> A rule of an owners corporation is of no effect if it –
>
> (a) Unfairly discriminates against a lot lower or an occupier of a lot;
>
> (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.

180 The combined effect of ss 138(3) and 140 is that a rule that is for a purpose other than control, management administration, use or enjoyment of the common property or of a lot, notwithstanding that it may be a rule for or with respect to any matter set out in Schedule 1 of the OC Act, will be inconsistent with the OC Act, and therefore of no effect.

## Rules relied on by the Owners Corporation

181 As I have noted above, the Rules were expressed to be for the purpose of "ensuring compliance with the Forest Resort Guidelines", in addition to purposes relating to the amenity of lots, maintenance of landscaping and water features on common property.[96]

182 To the extent that the Rules are concerned with matters other than the Owners Corporation's functions in relation to the control, management, administration, use or enjoyment of the common property or of a lot, they will be inconsistent with the OC Act. If inconsistent with the OC Act, they could not be preserved by Item 5 of Schedule 2 to the OC Act, and will be of no effect.

---

[96] See paragraph 33 above. An additional purpose, specified in rule 1.5, of empowering the developer to act on behalf of all members relates to Rule 16 "Grant of Proxy and Attorney", which is not relevant to these proceedings.

183 The Rules are, in the main, directed to the objective of compliance with the Design Guidelines. The Design Guidelines contain a regime which is relevant to compliance with the restrictive covenant. The Rules purport to set out a decision making and enforcement regime in relation to the Design Guidelines, that is, in relation to compliance with the obligations of each lot owner under the restrictive covenant. The Owners Corporation does not have standing to enforce the restrictive covenant, and it is not a function of the Owners Corporation to do so. Such a purpose falls well outside the statutory purpose of both the Subdivision Act and the OC Act.

184 Rules 5.1 is not connected to the Owners Corporation's responsibilities for management of the common property or moderation of the behaviours of lot owners to ensure all lot owners are equally able to enjoy use their lots. It is a rule directed to purpose 1.1: "Ensuring compliance with the Forest Resort Guidelines".

185 Rule 5.7 purports to require plans and specifications for all works and external improvements or alterations on a Lot to be submitted to and approved in writing by the Architectural Review Committee. Rule 5.9 requires Lot Owners to permit "a representative" of the Architectural Review Committee to inspect any works for the purpose of checking compliance with the approved plans, and "any of the rules of the Code".

186 The Rules are not limited to the impact of such works on common property or on the risks that are the responsibility of the Owners Corporation. The Rules direct the Lot Owners to submit their plans to a body that is not the Owners Corporation. The Rules purport to confer a power on a body, the Architectural Review Committee, that is a creation of the Agreement between the Developer and the Council, although the Agreement does not give the Architectural Review Committee any such role. Rules 5.7 and 5.9 are plainly beyond the powers conferred on the Owners Corporation by the OC Act.

187 In *Ainley*, the Tribunal found that the external appearance rule making power in Schedule 1 to the OC Act is limited to making rules about the appearance or aesthetic look of a lot and does not extend to making rules about what can be built. Similarly, the design, construction and landscaping rule making power extends to prescribing the design and landscaping outcomes for a lot, but does not extend to how or what can be constructed. That decision was affirmed on appeal.[97]

188 The Rules relied upon by the Owners Corporation offend against s 138, and s 140 of the OC Act. They were therefore incapable of being "preserved" by the transitional provisions that applied to rules of former bodies corporate on commencement of the OC Act. If not invalid from the time they were made, then, at least from the commencement of the OC Act on 2007 those rules were, and are, by operation of s 140 of the OC Act, of no effect. I find that Rules 1, 2.1, 2.2, 2.3, 2.5, 2.7, 2.8, 5.1, 5.3, 5.4, 5.6, 5.7,

[97] [2017] VSC 790.

5.9, 5.10. 5.11, 6.6 and 6.7 are invalid and are therefore void and of no effect.

Standard Rule (c)

189 The Owners Corporation relies also on Standard Rule (c) which, it submits, continued to apply to the body corporate by virtue of r 219 of the Subdivision Regulations, alongside any additional rules made in accordance with r 220 of the Subdivision Regulations. Rule (c) provided as follows:

> A member must not and must ensure that the occupier of a member's lot does not
>
> …
>
> (c) use or permit a lot affected by the body corporate 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.

190 The Owners Corporation submits that, had BSWV continued its development without the Owners Corporation's intervention, BSWV would have been in breach of the requirement, contained in the restrictive covenant registered on title, and by DPO3 in the Hepburn Planning Scheme. The Owners Corporation says development other than in accordance with the requirements of the restrictive covenant and DPO3 would have been "unlawful".[98]

191 BSWV submits that it complied with the requirements of the restrictive covenant, and with the requirements of DPO 3 and that such compliance was demonstrated by the granting of the planning permit by Hepburn Shire Council.

192 The enforcement of a restrictive covenant is a matter for determination in another forum in proceedings instigated by those entitled to the benefit of the restrictive covenant. I do not need to determine whether BSWV's plans complied with the requirements of the restrictive covenant here. The premise of the Owners Corporation's submission, that BSWV would have been in breach of the restrictive covenant is not for me to determine. Equally, however, the Owners Corporation did not have standing to enforce the restrictive covenant, and if it had been the case that the Owners Corporation's conduct were directed to the objective of enforcing the restrictive covenant, its conduct could not be said to have amounted to acting in good faith in the performance of its functions. I make no finding on that point, as the evidence before me points more certainly to enforcement of the Design Guidelines as having been the prime motivating factor for the Owners Corporation's conduct.

[98] Owners Corporation's Submissions dated 6 July 2020, paragraph [58].

193 In any event, I am of the view that Standard Rule (c) did not continue in operation on the commencement of the OC Act, because Model Rule 4, dealing with use of common property, is in quite different terms from Standard Rule (c), and so Standard Rule (c), being inconsistent with Model Rule 4 was not "preserved" by Item 5 of Schedule 2 of the OC Act.

194 However, even if I am wrong in that conclusion, the flaw in the Owners Corporation's submission in relation to Standard Rule (c) is that Standard Rule (c) was concerned with use of a lot for purposes which were illegal, injurious to reputation, or a nuisance, not development of a lot by a lot owner. Development of a lot in accordance with planning permission granted by the responsible planning authority is not an illegal use.

### Were the Rules applied by the Owners Corporation inconsistently with a right conferred by the planning permit?

195 BSWV says that the Owners Corporation had no power to limit the rights conferred on it by the planning permit.

196 BSWV says "The way in which the OC purported to attempt to enforce the Rules went well beyond seeking compliance with the Guidelines or Amended Guidelines. Rather than confining its involvement to matters which were substantially and directly connected to the management and administration of the common property, the requirements sought to be imposed by the Owners Corporation interfered with BSWV's proprietary rights to develop and subdivide its land."[99]

197 BSWV refers to and relies upon the principles enunciated in *Elwick 9*, in which it was held that an owners corporation cannot, through its rules, purport to regulate conduct which is authorised by a planning permit.

198 However, the planning permit issued in relation to the BSWV developments was not absolute, but was expressed subject to Condition 3. This leads me to the question: was the Owners Corporation's Conduct authorised by Condition 3 of the planning permit?

199 In the absence of any provision in the OC Act to the effect that owners corporations also have any powers conferred on them by or under other legislation, an owners corporation has only the powers and functions conferred on it by the OC Act. Accordingly, it is doubtful that the planning permit could have conferred further powers on the OC.

200 I note here that section 61(4) of the PE Act requires a responsible authority, such as the Hepburn Shire Council in this instance, to refuse to grant a permit, if the grant of the permit would authorise anything which would result in a breach of a registered restrictive covenant. Although Ms Alison Blackett, planning officer with Hepburn Shire Council, had no personal knowledge of the decision making in relation to the planning permit, and so was unable to give evidence on the point, the terms of the condition

[99] BSWV's Closing Submissions at [19].

strongly suggest that Condition 3 was intended to address that requirement, by repeating the requirements of the registered restrictive covenant.

201 Of course, the restrictive covenant refers only to the obligation to build in accordance with the "Forest Design Guidelines", and makes no reference to the Forest Resort Architectural Review Committee.

202 This leaves some uncertainty about whether Condition 3 refers to the Architectural Review Committee established under the Agreement or the "Committee" referred to in the Owners Corporation Rules. Of course, Hepburn Shire Council is not a party to, nor governed by, the Owners Corporation Rules. Ms Blackett gave evidence in the hearing that "Council is of the view that the 173 agreement is enforceable and since 2001 it has implemented and applied the s 173 agreement".[100] I understand her evidence to indicate that, although not registered on Title, the Agreement remains binding on the original parties, namely the developer and the Council. However, Ms Blackett was not familiar with the approvals process giving rise to the imposition of Condition 3. She could not give evidence on that point.

203 In my view, given the express reference to the restrictive covenant in Condition 3, and the requirements of s 61(4) of the PE Act, Condition 3 must be understood as relating only to the requirements of the restrictive covenant. It cannot be understood as relating to the requirements of the Owners Corporation's Rules.

204 I agree with the Owners Corporation's submission that BSWV was obliged, at law, to comply with the requirements of the restrictive covenant. That obligation arose from the fact that BSWV is the registered proprietor of the lots. It does not arise by virtue of BSWV being a member of the Owners Corporation. Accordingly, I do not agree with the inference that the Owners Corporation appears to wish me to draw, that the Owners Corporation was the proper entity for ensuing compliance with the restrictive covenant, or that the restrictive covenant required compliance with the 2011 Design Guidelines.

205 I do not need to determine the effect of the restrictive covenant in this proceeding. However, if it were found to be the case that the restrictive covenant is effective to require compliance with Design Guidelines, those Guidelines must have been in existence at the time the restrictive covenant was imposed. In my view, neither Condition 3 of the planning permit, nor the Rules of the Owners Corporation authorised the Owners Corporation to require BSWV to amend its plans to meet the specifications set out in the 2011 Design Guidelines.

206 In assessing whether an owners corporation has acted beyond its powers, I consider that it is a corollary of the prescription of powers and functions in the OC Act that an owners corporation has no powers other than those that

[100] Transcript P-56 ln 20-21.

are prescribed in the OC Act. It is inherent in that limited conferral of power that an owners corporation has a duty, owed to all lot owners or members of the owners corporation, not to exceed or step outside those powers. I find that, in issuing the stop work notices, and in requiring BSWV to submit revised plans for approval in relation to Lots 27 and 57, the Owners Corporation (and the Committee) acted beyond the scope of their powers, and in so doing, acted in breach of its statutory duty not to act beyond its powers.

### Is the loss and damage claimed by BSWV attributable to the actions of the OC?

BSWV submissions on loss and damage

207 BSWV says the conduct of the Owners Corporation "substantially interfered with Stage 1 of the three-stage development planned by BSWV [of the lots it owned in the subdivision]. Stage 1 involved two lots (Lots 27 and 57) being subdivided into dual occupancies to build a total of four dwellings. Once those four dwellings had been completed, BSWV says it intended to convert its construction finance over those lots into investment home loan finance in order to fund the remaining two stages of the development. Rental income from those properties would also have contributed to the funding.[101]

208 BSWV says the loss and damage claimed by it flows from the steps taken by the Owners Corporation to 'enforce' a version of the Design Guidelines, which had not been properly adopted and was not otherwise enforceable by the Owners Corporation.

209 Further, BSWV says that the Owners Corporation's actions were inconsistent with the substantive rights granted to BSWV to develop Lots 27 and 57 in the manner permitted by the legally issued planning permits because the variations required by the Owners Corporation were inconsistent with the planning permits and approved plans".[102]

210 The loss claimed by BSWV comprises increased building costs on lots 27 and 57 and increased holding costs for all lots arising out of the delay caused by the stop work notices in September 2014 and May 2015.

211 The total loss claimed by BSWV is $765,828.43,[103] calculated as follows:

a. **Holding Costs $249,971.83** This claim comprises interest and fees paid by BSWV in respect of

[101] BSWV's Closing Submissions 24 August 2020 para 2.
[102] Ibid, paragraph 3, referring to the permits at Tribunal Book Tab 46 and Supplementary Tribunal Book Tab 7 and relevant approved plans at Tribunal Book Tabs 51 and 73.
[103] Witness Statement of Matthew Bush dated 10 October 2019, paragraph 6 and amended Summary of Loss Table put into evidence by Matthew Bush on 27 February 2020.

i. **construction facility** with Bendigo Bank for Lots 27 and 57 from June 2015 (the expected completion date) to the date of actual completion in May 2016: $34,520.46;

ii. **supplementary construction facility** with Millbrook Finance for Lots 27 and 57 from June 2015 to May 2016: $32,252.99;

iii. **variation costs construction facility** with Millbrook Finance obtained to cover the costs of variations required by the Owners Corporation for the period April 2015 to 13 February 2017 (the date of refinancing): $18,080.16;

iv. **land loan facility** with Bendigo Bank for the undeveloped lots, from June 2015 until refinancing on 13 February 2017. and **refinanced land loan** with Bendigo Bank for the undeveloped lots from 13 February 2017: $135,018.22.

v. Rollover fees between May 2015 and February 2017 of $27,000, Loan Establishment Fee of $2,000 for the variation costs facility and settlement fees of $1000 for the Variation Costs Facility in March 2015: a total of $30,000.

b. **Land Tax** of $2,441.67 is claimed in respect of lots for the delay period from June 2015 to May 2016.[104]

c. **Council Rates** of $15,368.51[105] and **Water Rates** of $7,105.76[106] are claimed in respect of Lots 27 and 57 for the period from June 2015 to May 2016; on the Stage 2 undeveloped lots from 31 May 2015 when BSWV says Stage 2 should have commenced, and on the Stage 3 undeveloped lots from 31 September 2015.

d. **Variation Works** for Lots 27 and 57, representing the costs of meeting the requirements imposed by the Owners Corporation, have been calculated in two parts: $27,576.00 for building variation works, and $32,398.19 for landscaping works, a total of $59,974.19.[107]

e. **Increased building costs** to develop the undeveloped lots as a result of the delay of commencement of those works, based on estimates provided by Hotondo as at 2019[108]: $402,672.72

f. **Agent's fees** incurred in attempting to sell Lots 27 and 57 to mitigate losses: $2,680.00.

212 BSWV's claim is calculated with respect to two delay periods – the first in relation to proposed Stage 1 of its development, and the second in relation

---

[104] Affidavit of Matthew Bush sworn February 2020 paragraphs 36-40).
[105] Ibid paragraphs 40 to 45.
[106][106] Ibid paragraphs 46 to 51.
[107] Ibid paragraphs 52-53.
[108] Ibid, paragraphs 54-58.

to what it describes as the "indefinite suspension" of proposed Stages 2 and 3.

213 BSWV says it intended construction of Lots 27 and 57 to be completed by May 2015 and for Stage 2 to commence after that. BSWV asserts that, because it could not have commenced Stage 2 until Stage 1 was completed, in May 2016, Stage 2 was delayed approximately 12 months between 31 May 2015 and 31 May 2016.[109] That time frame allowed approximately 6 months for construction to be completed. The Owners Corporation's expert witness, Mr Cummaudo, did not suggest that the period allowed by BSWV for construction was unreasonable.

214 BSWV denies the assertion made by the Owners Corporation, that delays in completion of Stage 1 were a result of "recalcitrance" of the builder Hotondo Homes. Mr Bush gave evidence that tensions between BSWV and Hotondo arose because progress of development and the schedule were thrown out due to the issue of stop work notices by the OC.[110] I note that the contemporaneous emails between Mr Bush and Mr Thompson and Mr Gabriel are not conclusive either way.[111]

215 BSWV submits that the amount claimed to compensate BSWV for the loss it has and will suffer in relation to increased build costs is fair. Firstly, because Stages 2 and 3 have been indefinitely suspended because the actions of the Owners Corporation drained BSWV resources and made progression of development impossible. Secondly because, if BSWV should now seek to develop the undeveloped lots it must do so having regard to current construction prices and not those originally quoted. BSWV submits that the approach they have taken, that is, determining the difference between original and current construction prices by reference to the pricing of identical designs is fair.

### Submissions of the Owners Corporation on Loss and Damage

216 As I have noted above, the Owners Corporation says that it acted in accordance with its duties under the OC Act. The Owners Corporation denies that it acted beyond its powers.

217 The Owners Corporation says, that, even if its conduct was ultra vires, that conduct did not cause any loss or damage to BSWV because BSWV was obliged to comply with the Forest Resort Design Guidelines by virtue of the obligations arising from the restrictive covenant and by virtue of the Hepburn Planning Scheme.[112] .

#### Evidence of Mr Cummaudo

218 The Owners Corporation called Mr Paul Cummaudo, a Building Practitioner with over 32 years' experience in property construction and

[109] BSWV Closing Submissions, paragraph [43].
[110] Transcript 27 February 2020 P-58 ln 38-42 (XXN M Bush).
[111] See Transcript 27 February 2020 P-20 ln 19-26 (XXN D Gabriel).
[112] Submissions paragraphs [71] [75].

management roles, as expert witness on the issue of the costs claimed by BSWV in this proceeding. In his report, he describes himself as "the managing director for the 'Roscon Group of Companies' our group via Roscon Property Services Pty Ltd a company specialising in assisting Owners Corporations and individuals with various building solutions"

219 Mr Cummaudo was asked to review the evidence given by BSWV in relation to holding costs, cost of variation works, increased build costs, roll over fees, council rates and water rates.

220 In summary, Mr Cummaudo assessed the amounts claimed by BSWV as follows:

a. Mr Cummaudo calculated that the increased build costs given by Matthew Bush in evidence was between 19 and 33%. On the basis of industry standard rates and the Rawlinsons Australian Construction Handbook,[113] "an increase of 15.15 is reasonable over the time period of the alleged delay".[114] Although Mr Cummaudo had calculated build cost increases, with reference to the Building Price Index between 2012 and 2018, at $231.053.02 he agreed, in evidence before the Tribunal that the construction costs prepared by Hotondo Homes in 2019 were fair and reasonable.[115]

b. Mr Cummaudo found the landscaping costs of $37,104.80 to be comparable to the industry rate.[116]

c. In relation to the cost of variations claimed, Mr Cummaudo concluded in his report that the extent of the variations was unclear from the materials and that he could not verify the costs of the variations. However, in evidence before the Tribunal, Mr Cummaudo agreed that if a single slab building were split resulting in changes in the roof there would have been an additional cost.[117]

221 I accept Mr Cummaudo's assessment of the claims for increased building costs, and landscaping costs.

222 I accept that Mr Cummaudo was not able to verify the costs claimed in respect of the variations.

223 Mr Cummaudo also gave evidence that on his calculations, the project may not have been feasible,[118] however, as Mr Cummaudo's expertise in

---

[113] In evidence before the Tribunal, Mr Cummaudo described the Rawlinson's Australian Construction Handbook as "a publication that is probably the most commonly used in Australia, to estimate all types of jobs, high rise, homes, townhouses, and specific trades. It's the most commonly used reference book in the country" Tx 27 February 2020 P78, ln 12-14.

[114] Forensic Detailed Costing Report prepared by Paul Cummaudo of Roscon Property Services dated 24 February 2020 (Roscon Report), page 14.

[115] Transcript 27 February 2020 P- 86 ln 1-12 (Cummaudo XXN).

[116]. Roscon Report page 13-15, and Evidence of Mr Cummaudo at Transcript 27 February 2020 P-81 ln 29-30 (Cummaudo XXN).

[117] Transcript 27 February 2020 P-83, ln30.

[118] Roscon Report page 23.

property valuation or real estate sales, was not established, I have not given weight to this aspect of his evidence.

Increased Building Costs

224 The Owners Corporation disputes the claim for increased building costs on several grounds. First, it objects to the costings relied upon having been prepared by the builder Hotondo. Mr Simpson of Hotondo gave evidence of the increase in its building costs in the period 2016 to 2018. The Owners Corporation points to evidence given in the hearing by Mr Gabriel that the bank told BSWV that it would need to engage a different builder.[119] However I accept the evidence of the Owners Corporation's expert witness, Mr Cummaudo, that the costs put forward by Hotondo Homes were fair and reasonable.

225 The Owners Corporation says, further, that the claim for increased building costs in relation to the lots to be developed in its Stages 2 and 3 is based on the incorrect premise that BSWV could not obtain funding for Stages 2 and 3. The Owners Corporation says that BSWV could have obtained funding but did not apply for it. The Owners Corporation submits that the claim, as pleaded by BSWV was that the funding it had sourced with Bendigo Bank was cancelled, but that the evidence given by Mr Bush on 27 February 2020 does not support that pleading. The Owners Corporation says emails produced by Bendigo Bank in response to a summons, and the evidence given by Mr Daniel shows that the directors of BSWV had the capacity to provide the necessary funding to obtain the required finance from Bendigo Bank, but chose not to do so. When this was put to Mr Bush, he responded to the effect that it would be unreasonable to expect him to liquidate an asset that would bring a higher rate of return than was expected for the developments on the lots.[120]

226 BSWV submits that the Owners Corporation's assertion that BSWV could have, but chose not to proceed, is both unreasonable and incorrect. I note that Mr Bush's evidence that BSWV had anticipated having $230,000 to roll over from Stage 1 to Stage 2, but this was eroded by $190,000 or so by the requirements imposed by the Owners Corporation, was unchanged in cross examination.[121]

227 The Owners Corporation submits that the delay caused by compliance with the Rules and Guidelines for Lot 27 was about 6 months, not the 12 months claimed. The Owners Corporation points to the date the building permit was issued, on 24 September 2014, the Preliminary Assessment, identifying amendments required dated 3 November 2014, and the Design Approval given on 25 March 2015. The Owners Corporation submits that any delay arising from the Second Notice to Cease Works (on 29 May 2015), which

[119] Transcript 27 February 2020 P-17-18 ln 35-36.
[120] Transcript 27 February 2020 P-72 ln 32-33.
[121] Ibid ln 30-31.

concerned allegations that excess fill had been brought onto the site, was resolved by 21 August 2015, a period of less than 3 months.[122]

228 The Owners Corporation also submits that there is no evidence to indicate that BSWV intends to proceed with Stages 2 and 3, as planning permits have not been obtained, nor has any application for finance been made.

### Interest claim

229 The Owners Corporation contests the claim made for interest from 14 June 2015 to 13 February 2017 also on the grounds that it considers any delay caused by compliance with the rules was "at best" 6 months, not the 20 months claimed. Further, the Owners Corporation submits that there is no basis for any claim for interest after the Certificates of Occupancy were issued, because after that date, BSWV was able to use the houses constructed on the lots in accordance with its proposal to rent them out.

230 The Owners Corporation makes the same submission in relation to the interest claimed on the supplementary construction facility, the interest claimed on variation costs, and the service fees for each facility.

231 In relation to the interest claim relating to lots 35, 53, 58, and 59 the Owners Corporation submits that there is no basis for this claim of interest. The Owners Corporation submits that BSWV could have developed these lots, but chose not to do so. The Owners Corporation submits that the holding costs in relation to these lots were incurred by reason of BSWV's decision not to proceed with Stages 2 and 3.

### Rates and Land Tax

232 In relation to the claims made for Council Rates, Water Rates and Land Tax, the Owners Corporation says that the claim for Lots 27 and 57 is excessive, and that the period of delay was at best 6 months. In relation to the undeveloped lots, the Owners Corporation repeats its submissions that no claim for holding costs in respect of the undeveloped lots should be allowed, because BSWV chose not to apply for finance for Stages 2 and 3.

### Variations in Plans

233 The Owners Corporation disputes the claim made in relation to variation costs, on the basis that the restrictive covenant placed an obligation on BSWV, owed to each other lot owner, to construct any dwelling in accordance with the Guidelines. The Owners Corporation submits that to do otherwise would have been a breach of the covenant, and that BSWV "cannot claim damages for being required to construct a dwelling in accordance with the Guidelines as it is legally obliged to do so." The Owners Corporation submits that, to award damages "for costs incurred in complying with the Guidelines … would be to award damages for engaging

[122] Closing Submissions of the Owners Corporation paragraph 108.

in unlawful conduct in breach of the covenant".[123] The Owners Corporation asks me to infer that the restrictive covenant required compliance with the 2011 Guidelines. As I have noted above, there is no evidence before me to support the drawing of that inference.

Submissions as to credibility of Mr Thompson and Mr Bush

234 The Owners Corporation submits that emails produced by Bendigo and Adelaide Bank in response to subpoena should have been produced in evidence by BSWV. It says they were patently relevant as they disclose the bank's assessment of BSWV's financial position, and contradict BSWV's pleaded case, that its funding was cancelled.

235 The emails disclosed that, the bank would have been willing to lend 80% of project costs if BSWV had been able to put up the other 20%. I have recorded Mr Bush' evidence that BSWV's capital had been eroded servicing its overheads during the delays caused by the Owners Corporation, and his view that it was not reasonable for its directors to liquidate other assets to enable BSWV to qualify for funding.

236 BSWV submits that the failure to put the emails into evidence by it was due to a misapprehension of their relevance by the directors of BSWV. No evidence to that effect was given by either Mr Thompson or Mr Bush. The Owners Corporation submits that Mr Bush, in particular, represented himself as experienced in financial matters, and submits that the failure to put into evidence emails between himself and the bank that cast doubt on his claim that finance had been cancelled, reflects poorly on Mr Bush's credit. The Owners Corporation submits that the Tribunal should give no weight to any evidence given by Mr Bush if that evidence is not supported by documentary materials.

## Principles for award of damage

237 The starting point for an award of damages is s 165(1)(c) of the OC Act:

> 165(1) In determining an owners corporation dispute, VCAT may make any order it considers fair, including one or more of the following:
>
> (c)an order for the payment of a sum of money
>
> (i) found to be owing by one party to another party;
>
> (ii) by way of damages (including exemplary damages and damages in the nature of interest)'
>
> (iii) by way of restitution.

238 Section 167 outlines what VCAT must consider when making an order. It provides that:

> "VCAT in making an order must consider the following:

[123] Ibid.

(a) The conduct of the parties;

(b) An act or omission or proposed act or omission by a party;

(c) The impact of a resolution or proposed resolution on the lot owners as a whole;

(d) Whether a resolution or proposed resolution is oppressive to, unfairly prejudicial to or unfairly discriminates against, a lot owner or lot owners;

(e) Any other matter VCAT thinks relevant.

239 BSWV claims damages for breach of statutory duty by the Owners Corporation.

240 It has long been established that OC Act confers a cause of action for breach of statutory duty: see *Boyes v Owners Corporation No 1 PS514665E*[124] (***Boyes***). As Deputy President Steele, as she then was, observed in *Boyes*, the factors that are required to establish a breach of statutory duty were helpfully set out by His Honour Justice Gillard in *Stockwell v State of Victoria* [2001] VSC 497, at paragraph 252:

> In order to establish a cause of action against a defendant for breach of a statutory duty, the plaintiff has to establish -
>
> (i) That a statutory instrument imposed a duty of care on the defendant;
>
> (ii) that the statutory duty of care was owed to the plaintiff;
>
> (iii) that the defendant breached the statutory duty;
>
> (iv) that a breach of the statutory duty gave a right to the plaintiff to recover damages in a civil proceeding;
>
> (v) that the breach of the statutory duty was a cause of the damage suffered by the plaintiff; ....."

241 I have found that there was a statutory duty of care owed by the Owners Corporation to BSWV, and that the Owners Corporation breached that statutory duty of care and that it acted beyond the scope of its powers.

242 Section 165(1)(c)(ii) of the OC Act gives the Tribunal power to make an order for the payment of damages, including exemplary damages and damages in the nature of interest.

243 I am satisfied that factors (i) to (iv) identified by His Honour Justice Gillard are satisfied. I turn now to consider whether the breach of statutory duty, the ultra vires actions, were the cause of damage suffered by BSWV.

244 The primary submission made by the Owners Corporation is that BSWV was required to comply with the 2011 Design Guidelines whether by reason of the rules or by reason of the restrictive covenants, that, therefore, obtaining approval of its plans was a legal requirement that BSWV had to satisfy, and that any delay caused by that process would have occurred whether or not the rules were valid.

---

.[124] [2009] VCAT 2405.

245 However, the Owners Corporation has failed to establish that either the restrictive covenant, or the Hepburn Planning Scheme, required compliance with the 2011 version of the Design Guidelines which formed the basis of the Preliminary Assessment Notice, and informed the amendments to the plans required of BSWV.

246 In relation to Lots 27 and 57, BSWV claims losses arising from 12 months delay in achieving the Certificates of Occupancy. The Owners Corporation submits that the delay caused by compliance with the Rules and Guidelines was about six months. Implicit in that submission is a concession that loss claimed by BSWV in relation to that six month period may be loss for which the Owners Corporation is liable. However, the Owners Corporation contests liability for loss in relation to Lots 27 and 57 after that period, and contests entirely the claim for loss in relation to the undeveloped lots.

247 I accept that the actions of the Owners Corporation took place over a period of some six months. However, it is apparent that the consequences of those actions played out over a longer period of time. The consequences of the Owners Corporation's intervention included alterations to the design and construction requirements of the dwellings on Lots 27 and 57 that were not insignificant.

248 It may be, as the Owners Corporation suggests, that it might have taken longer than BSWV anticipated to complete the original plans. The Owners Corporation's submits that Hotondo itself may have been responsible for some of the delay. Mr Bush gave evidence that BSWV did experience difficulties with Hotondo, but attributed these to have their origins in the disruption to construction caused by the stop works notices issued by the Owners Corporation.

249 Although the Owners Corporation submits that Mr Bush's evidence is not reliable, I am satisfied, on this point, that it is not improbable. In the Tribunal's experience, construction timetables are generally finely balanced. Builders, generally, do not plan for the unexpected disruption by third parties once planning and building permits have been obtained. The first stop work notice was issued just as the builder began to prepare the site for construction. There was a further period of delay in relation to Lot 27 from May until mid June 2015. The builder was engaged to complete Lots 27 and 57 at the same time. No doubt the builder had arranged trades and subcontractors to work on the two lots concurrently. The Owners Corporation cannot pass to BSWV the responsibility for the builder's reaction to the stop work notices issued by the Owners Corporation.

250 The Tribunal must make an order it considers fair. BSWV says, therefore, s 165 of the OC Act permits the fair compensation of BSWV for loss and damage incurred by reason of the Owners Corporation's conduct, and BSWV says the Tribunal is entitled to take into account all of the Owners

Corporation's conduct in relation to the dispute, including its knowledge that the Guidelines it sought to enforce had not been properly adopted.[125]

251 In all the circumstances, and having regard to all of the conduct of the Owners Corporation, including its knowledge that the Guidelines it sought to enforce had not been properly adopted, its attempt to "regularise" the appointment of the Architect after the First Stop Work Notice had been issued, and the purported adoption, again, after the fact, of the "OC version" of the Committee, it is fair to make an order for damages against the Owners Corporation.

252 I turn now to an assessment of quantum.

253 Construction facility: I am satisfied that the losses claimed in respect of Lots 27 and 57, associated with the construction facility, the supplementary construction facility and the variation costs construction facility, would not have been suffered by BSWV but for the conduct of the Owners Corporation. BSWV is entitled to damages for loss in relation to those costs d, that is, the construction facility, the supplementary construction facility and the variation costs construction facility.

254 Orders will be made for the Owners Corporation to pay BSWV the sum of $84,809.61 in damages in respect of these amounts.

255 Land loan facility: I am satisfied that, because the construction facility required BSWV to develop its land in stages, the extension from June 2015 to February 2017 of the land loan facility in relation to the four undeveloped lots was a cost consequential on the conduct of the Owners Corporation. I note that BSWV has claimed only half the costs in respect of the land loan, for June, July and August 2015, in recognition that construction would not have commenced on two of the lots during that time.

256 However, it is not as clear that the land loan facility from February 2017 is a loss for which the Owners Corporation should be held liable. The terms of the finance facility provided by the bank to BSWV contemplated that the development would proceed in stages. A necessary implication of that arrangement is that the bank would make a fresh assessment of the loan risk before approving finance for future stages. The claim made by BSWV assumes that the bank would have approved further loan facilities for the second and third construction stages. It is not certain that this would have been the case. If BSWV bore the risk that the second and third stages might not proceed, because of market changes, it is not appropriate to attribute all of the cost associated with that, now realised, risk, to the Owners Corporation. I am not satisfied that an award of damages should be made in respect of the refinanced land loan facility for the undeveloped lots in Stage 3 from February 2017. No award of damages will be made in respect of half of the claim for costs after 13 February 2017. The amount claimed to 13

[125] BSWV's Closing Submissions, paragraph 49.

February 2017 is $42,835.26. Subtracting this amount from $135,018.22 leaves $92,183.73. Half of that is $46,091.86. Adding these two amounts gives $88,927.13.

257 Fees: I am satisfied that the rollover fees, and the loan establishment fee and settlement fee for the variation costs facility are costs which arose because of the actions of the Owners Corporation. The amount of $30,000 is substantiated by the documentary evidence, and an award of damages will be made in respect of this part of the claim.

258 Land Tax, Council Rates and Water Rates: These claims are not expressed to be costs incurred as a result of the actions of the Owners Corporation, but, rather, to be costs that were "wasted" while the development works were delayed because those costs have gone to waste because they could not be developed or generate income.[126] I do not agree. Land Tax, Council Rates and Water Rates are incurred as an incident of being the registered proprietor of the land. In the ordinary course of business, the cost of those outgoings is generally factored into the price charged for developed land. There is no evidence before me of reductions in the value of the land affecting BSWV's ability to recover those costs from future purchasers. Even if there were, I do not accept that this business risk should shift to the Owners Corporation. The claims for land tax, council rates and water rates are refused.

259 Cost of Variation Works: Although Mr Cummaudo was unable to verify the claim for variation costs, he agreed that the variations required would have involved some cost. It is not disputed that the Owners Corporation required changes to be made to the plans, and that those changes were made. The houses that Hotondo had contracted to build were their standard designs.[127] Given the impact of the variations, that included requiring the single slab construction to be split, requiring stepping of floor levels, the addition of eaves and reduction in room sizes, I am satisfied that the amount claimed, $27,576, is reasonable. The Owners Corporation says that the additional landscaping costs of $32,398.19 would have been required in order to comply with the restrictive covenant. In the absence of action by affected lot owners to enforce the restrictive covenant, there is no evidence before me to support that contention. The planning permit was granted in relation to the approved plans. The costs associated with building variations and with additional landscaping works arose directly from the requirements imposed by the Owners Corporation. The total amount claimed, $59,974.19 is reasonable.

260 Increased building costs for undeveloped lots: Although the Owners Corporation disputes the evidence given by Mr Simpson of Hotondo of the calculation of the increased building costs claimed, Mr Cummaudo, the

[126] Affidavit of Matthew Bush sworn February 2020 paragraphs 40-45.
[127] Contract between Hotondo Homes and BSWV dated 14 February 2014, Tribunal Book page 643.

building expert called by the Owners Corporation, gave evidence that the calculation of increased costs by Hotondo was fair and reasonable.

261 The Owners Corporation also maintains that the claim for increased costs only arises from BSWV's claim that it could not obtain funding for Stages 2 and 3. The Owners Corporation asserts that BSWV had the capacity to service the loan required, and therefore could have obtained the necessary funding from the bank, but chose not to do so. It is true that a key element of BSWV's case altered in the course of the hearing. Rather than there being evidence of the bank "cancelling" BSWV's finance, the evidence is that the bank would have been willing to provide the finance, provided that BSWV could contribute 20% of the cost. BSWV says that the losses it incurred during the extended construction period for lots 27 and 57 resulted in BSWV no longer having the capital it could put toward stages 2 and 3.

262 The issue I must determine is whether the loss claimed in relation to increased building costs was a loss "caused" by the Owners Corporation's breach of duty. I am satisfied on the evidence of the costs incurred during 2015/2016 that BSWV itself had incurred expenses that lead me to conclude it is more probable than not that BSWV lacked the capital to contribute 20% of the construction costs for Stage 2. I am satisfied that the directors of BSWV were not under a duty to liquidate their own assets for the purpose of mitigating the losses of the company.[128]

263 Should the conduct of BSWV's directors in not liquidating their assets, be treated as an "intervening force"[129] which has "caused" BSWV's loss in relation to the increased building costs?

264 In *British Westinghouse Electric & Manufacturing Co Ltd v Underground Electric Railways Co of London Ltd* [1912] AC 673 Viscount Haldane stated

> The fundamental basis is thus compensation for pecuniary loss naturally flowing from the breach; but this first principle is qualified by a second, which imposes on a plaintiff the duty of taking all reasonable steps to mitigate the loss consequent on the breach, and debars him from claiming any part of the damage which is due to his neglect to take such steps.
>
> The rationale underlying mitigation is to encourage plaintiffs to be self-reliant and to discourage waste. While it is sometimes referred to as a duty on the plaintiff to mitigate, this is strictly speaking inaccurate as a plaintiff's failure to mitigate does not expose the plaintiff to any legal action, it merely reduces the damages payable to the plaintiff for those losses which the plaintiff could have avoided.

---

[128] See *Burns v MAN Automotive (Aust) Pty Ltd* (1986) 161 CLR 653; [1986] HCA 81; where it was held that the limitation on recovery of loss when the loss might have been avoided by an applicant taking reasonable steps to mitigate the loss, does not deny recovery to an applicant who has suffered the loss by reason of not having the means to avoid the loss.

[129] See *Medlin v State Government Insurance Commissioner* (1995) 182 CLR 1, at 6, per Deane, Dawson, Toohey and Cudron JJ.

> The standard expected of the plaintiff "is not a high one, since the defendant is a wrongdoer". Thus, the plaintiff must act reasonably and take reasonable steps to reduce the loss suffered once the plaintiff is aware of the breach. Reasonableness does not require that a plaintiff must adopt the most effective mitigating course of conduct at an excessive cost…

265 While BSWV was obliged to take steps to keep its losses down as far as reasonable, I do not consider that it would be reasonable for it to liquidate assets with a greater earning capacity than the return on the construction project. Indeed, had the Directors done so such losses may have also formed part of the claim in this proceeding. I am satisfied that this aspect of the claim is reasonable, in relation to Stage 2.

266 However, for the reasons I have given in relation to the claim relating to the refinanced land loan facility, I am not satisfied that the claim made in respect of Stage 3 is made out. It is not clear on the material before me precisely which costs should be attributed to each of the stages. I must do the best I can on the evidence before me. I make the assumption that the costs are equally divided between Stage 2 and Stage 3, and allow $201,336.36.

267 Agents' fees: Mr Bush gave evidence of engagement of a real estate agency in July 2016 in attempt to sell Lots 27A, 27B, 36A, 36B, 57A and 57B.[130] Had BSWV been able to mitigate its losses through such a sale, the costs of advertising might be recovered in damages. I accept that the engagement of the real estate agent was undertaken in accordance with BSWV's duty to take all reasonable steps to mitigate the losses resulting from the Owners Corporation's breach of duty.[131] Even though no sale eventuated, the action on the part of BSWV was reasonable, and it is appropriate to make an award of damages in respect of that cost of $2,680.00.

268 Taking each of these amounts together, I will order the Owners Corporation to pay to BSWV the amount of $467,721.29 in damages.

L Johnson
**Member**

[130] Witness Statement of Matthew Bush dated 10 October 2019 paragraph 59. See Exclusive Sale Authorities were at Tribunal Book Tabs 152, and 154; and invoices issued by the agent Tribunal Book Tabs 153 and 155.
[131] See *E G Falco v James McCune & Co Pty Ltd* [1977] VR 447.