Land and Environment Court
of New South Wales

CITATION :	**Those Best Placed Pty Ltd v Tweed Shire Council [2010] NSWLEC 83**
PARTIES :	FIRST APPLICANT: Those Best Placed Pty Ltd SECOND APPLICANT: Sandra Schultz RESPONDENT: Tweed Shire Council
FILE NUMBER(S) :	40719 of 2009
CORAM:	Biscoe J
KEY ISSUES:	PRACTICE AND PROCEDURE :- Summary dismissal of class 4 proceedings on ground that no reasonable cause of action is disclosed.
LEGISLATION CITED:	Environmental Planning and Assessment Act 1979, ss 79C, 80A, 81, 82, 107, 123, 149 Environmental Planning and Assessment Regulation 2000, cl 97, 279 Land and Environment Court Act 1979, s 20 Local Government Act 1993, ss 68, 77, 82, 89, 99, 100, 176, 179, 440A, 674 Local Government (General) Regulation 2005, cll 16, 46, 47 Supreme Court Act 1970, ss 65, 69, 82 Uniform Civil Procedure Rules 2005, r 13.4
CASES CITED:	Agar v Hyde [2000] HCA 41, 201 CLR 552 McGuirk v The University of New South Wales [2009] NSWSC 1424 Waverley Council v Hairis Architects [2002] NSWLEC 180, 123 LGERA 100 Webster v Lampard [1993] HCA 57, 177 CLR 598
DATES OF HEARING:	4 February 2010; 8 February 2010
DATE OF JUDGMENT:	27 May 2010
LEGAL REPRESENTATIVES:	APPLICANTS: Mr A Crowther (agent) SOLICITORS: N/A

RESPONDENT:
Mr J Ayling SC
SOLICITORS:
HWL Ebsworth

THE LAND AND ENVIRONMENT COURT OF NEW SOUTH WALES

BISCOE J

27 May 2010

40719 of 2009

THOSE BEST PLACED PTY LTD AND ANOR v TWEED SHIRE COUNCIL

JUDGMENT

1 **HIS HONOUR:** This is a motion for summary dismissal of judicial review proceedings filed in Class 4 of the Court's jurisdiction.

2 The respondent, Tweed Shire Council, moves under Part 13 r 13.4(1)(b) of the *Uniform Civil Procedure Rules* 2005 for an order that these proceedings by the applicants, Those Best Placed Pty Ltd and Sandra Schultz, be summarily dismissed on the grounds that the (amended) Summons and Points of Claim filed on 30 November 2009 and affidavits of Andrew Crowther disclose no reasonable cause of action. Rule 13.4 provides:

> "**13.4 Frivolous and vexatious proceedings**
>
> (1) If in any proceedings it appears to the court that in relation to the proceedings generally or in relation to any claim for relief in the proceedings:
> (a) the proceedings are frivolous or vexatious, or
> (b) no reasonable cause of action is disclosed, or
> (c) the proceedings are an abuse of the process of the court,
> the court may order that the proceedings be dismissed generally or in relation to that claim.
> (2) The court may receive evidence on the hearing of an application for an order under subrule (1)."

3 A very clear case is required before a litigant is prevented from pleading a case upon the basis that no reasonable cause of action is disclosed. There has to be a high degree of certainty about the outcome of the proceedings if it were allowed to go to trial in the ordinary way. The test is whether the material before the Court demonstrates that the action should not be permitted to go to trial in the ordinary way because it is apparent that it must fail. See *Webster v Lampard* [1993] HCA 57, 177 CLR 598 at 602-603; *Agar v Hyde* [2000] HCA 41, 201 CLR 552 at [56]; *McGuirk v The University of New South Wales* [2009] NSWSC 1424 at [37]-[39].

4 The proceedings have been conducted, and the applicants were represented at the hearing, by Mr Andrew Crowther who is the managing director of Those Best Placed Pty Ltd and the partner of Ms Schultz. He was the driving force in the pre-litigation communications with the council. He signed the Summons and the Points of Claim (as managing director of Those Best Placed Pty Ltd). He has asserted and tendered documents to the effect that Those Best Placed Pty Ltd is acting as agent for himself and Ms Schultz.

5 Mr Crowther and Ms Schultz own and reside on a rural lot of a little over 1,000m^2 at 49 Upper Crystal Creek Road, Upper Crystal Creek (**the Land**).

6 The applicants have filed a mass of material apparently intended to describe and particularise the claim set forth in the Summons. They and the Summons are generally difficult to understand. The Points of Claim are verbose and repetitive, over 100 pages in length and tend to be in the nature of submissions. They state that they are to be read in conjunction with Mr Crowther's affidavit dated 11 September 2009, and refer to numerous documents, statutory provisions and cases. The Points of Claim refer to the applicant's submission filed on 13 November 2009. This submission is in three volumes and comprises 268 pages. It is necessary to attempt to distil this material and the evidence tendered at the hearing.

7 Based upon what Mr Crowther told me at the hearing and what I have otherwise been able to glean, his main grievance can be simply stated. He applied, through his builder, for development consent for a shed with a bathroom that he wished to build on the Land. In order to consider the application, the council required him to produce a report demonstrating that sufficient land area and site conditions would exist to cope with the additional use to which the septic tank might be subject as a result of the increase in the facilities attached to it. He refused to provide a report. He thought that if he provided a report it would lead to a council condition of development consent for an upgrading of the existing septic system at a cost to him and Ms Schultz which he estimated would be up to $20,000. Because he refused to provide the report, the council refused the development application. He says that the council's request and refusal were unlawful and so were other related decisions of the council. He says that if the existing septic system has to be upgraded, the council has to pay for it, except for 1/80,000th of the cost, being his estimate of the proportion between the cost of that upgrading on the Land and the cost of the provision of such upgrading in the council's whole local government area.

8 In my opinion, the proceedings should be dismissed.

9 Before descending into the detail of the proceedings and my reasons, my conclusions on the main issues may be summarised as follows.

10 First, the applicants seek to quash on the ground of errors of law the council's decision in December 2008 to refuse development application DA 08/0966 lodged by Mr Crowther's and Ms Schultz's builder, The Shed Company, for the construction of a shed, including a bathroom and toilet, on the Land. There has been no merit appeal against that refusal, as permitted within a prescribed period under s 97 of the *Environmental Planning and Assessment Act* 1979 (***EPA Act***). The development application was refused because the applicant - or to be more precise, Mr Crowther, since he took over the conduct of the development application -

had refused to provide the council with an Onsite Sewage Management (**OSM**) Compliance Report, relating to the septic system on the Land, demonstrating that there was a suitable land area for the effective disposal of existing and future hydraulic loads imposed by the proposed shower and toilet facilities which were part of the shed development.

11 The applicants say that the council's request for that report was unlawful and therefore the refusal of the development consent was unlawful. As discussed at [7] above, they say that if such a report were to be provided, it would lead to a condition of development consent to upgrade the septic system on the Land at the cost of Mr Crowther and Ms Schultz. They contend that the council has to bear the cost. The applicants' case ignores the possibility that an OSM Compliance Report, if obtained, might conclude that the existing OSM system was adequate for the proposed development.

12 In my opinion, the council was entitled to request this information under cl 54 of the *Environmental Planning and Assessment Regulation* 2000 (***EPA Regulation***). In my opinion, no reasonable cause of action is disclosed for the proposition that the request for an OSM Compliance Report was unlawful or, if it were to result in the apprehended condition of development consent, that the condition would be unlawful. Indeed, the complaint that such a condition would be unlawful is premature since there has been no development consent and no such condition.

13 Secondly, the applicants are seeking to quash on the ground of error of law the council's "decision" on 22 December 2008 to "cancel" application SEP 08/0087 lodged on or about 15 October 2008 by Mr Crowther under s 68 of the *Local Government Act* 1993 (***LG Act***) for approval of sewer works on the Land. This concept of cancellation had no statutory foundation. The explanation is that, at the time, the council appears to have understood that SEP 08/0087 related to the proposed additional sewer work for the shed, which was understandable because under the "Application Type" on the form Mr Crowther ticked "Additions to existing

building". On that basis, when the council refused DA 08/0966, SEP 08/0087 appeared to be pointless and the council referred to it as "cancelled". However, the council indicated in a letter to Mr Crowther of 19 January 2009 that it had now noticed that it included a requirement for approval of the existing sewer system and that it would proceed to consider whether that approval should be given. On 2 November 2009 the council gave that approval on conditions. As the purported cancellation was treated as of no effect, this claim is pointless and discloses no reasonable cause of action.

14 Thirdly, according to the Summons, the applicants claim that the Court should quash a total of 23 "decisions and determinations" by the council. At the hearing Mr Crowther expanded this number to 24. In fact there were not 23 or 24 decisions or determinations. The Points of claim list 23 matters but, leaving aside DA 08/0966 and SEP 08/0087, they are mostly not decisions or determinations but alleged failures to do things which the applicants allege that the council was obliged to do, relating directly or indirectly to the council's requirement for the OSM Compliance Report or consequential refusal of development consent. In my opinion, no reasonable cause of action is disclosed.

15 Fourthly, the applicants claim "damages" under s 179(1) of the *LG Act* for financial hardship incurred by Ms Schultz and Mr Crowther – even though Mr Crowther is not a named applicant in the proceedings - occasioned by the "vexatious behaviour" of the council in relation to requiring the OSM Compliance Report and in refusing development consent because the report was not provided. In my opinion, no reasonable cause of action is disclosed.

16 Fifthly, the applicants seek orders that the council include several matters in all future certificates issued by the council under s 149(2) of the *EPA Act*. In my opinion, no such orders can be made because, among other things, they are not matters prescribed by legislation for inclusion in such certificates.

TWEED LEP 2000

17 The parcel owned by Mr Crowther and Ms Schultz was created by a subdivision approved, by the council prior to 7 April 2000, the commencement date of the Tweed Local Environmental Plan 2000, and is within a Rural 1(a) zone in which the use of the Land for the purpose of the erection of a dwelling house is permissible with consent where a parcel was so created. Clause 57 of the Plan states in part:

> **"57 Protection of existing dwelling entitlement**
> **Objective**
> - To protect an existing dwelling entitlement on an allotment lawfully created or the creation of which was lawfully consented to before the commencement of this plan.
>
> ...
> (2) Nothing in this plan prevents a person, with development consent, from erecting a dwelling house on an allotment lawfully created, or the creation of which was lawfully consented to, before the appointed day and on which a dwelling house could lawfully have been erected immediately before the appointed day."

THE EVIDENCE

Section 149 EPAA certificate 22 November 2007

18 On 22 November 2007, the council issued a certificate under s 149 of the *EPA Act* on the application of the solicitors acting for the then owners of the Land.

Dwelling entitlement search 27 November 2007

19 On 27 November 2007, the council provided Mr Crowther with a letter in response to his application for a dwelling entitlement search in relation to the Land, which included the following:

> "The lot was created as part of a Council approved subdivision and therefore meets the dwelling entitlement protection provisions of clause 57 of the Tweed Local Environmental Plan 2000. Any proposal to replace existing structures, or to erect a dwelling and ancillary buildings would have to meet Council's usual requirements including the lodgement of a Development

Application and an application for Construction Certificate or an application for a Complying Development Certificate, whichever may be applicable, and would be subject to merit assessment under S 79C of the Environmental Planning and Assessment Act, 1979."

DA 08/0966 20 August 2008

20 On 20 August 2008, Mr Crowther and Ms Schultz's builder, The Shed Company, with their owners' consent, made a development application under the *EPA Act* to the council for a "garage". The application was accompanied by plans and a statement of environmental effects which described the proposed development as "construction of a shed" and stated that the shed would be "used for storage purposes only and will not be used for any habitable, commercial or industrial purposes". Plans were enclosed. The council designated this development application "DA 08/0966".

Council requires an OSM Compliance Report September/October 2008

21 On 9 September 2008 the council wrote to The Shed Company reporting that a site inspection disclosed the existence of drainage lines, then in place, to provide toilets, shower and washbasin facilities in the proposed shed. It stated that prior to assessment of the development application an OSM Compliance Report was required, to determine the suitability of the existing on-site sewage management system to meet the demands of the proposed new bathroom in the shed.

22 On 11 September 2008 the council wrote to The Shed Company again requesting (among other things) an OSM Compliance Report "indicating how the existing OSM system meets the requirements of AS 1547/2000. The information is required to determine the suitability of the existing on-site sewage management system (including the existing effluent land application area and any reserve area) for your proposed

development...The compliance report shall address the following criteria..."

23 On 13 October 2008 Mr Crowther entered the stage, which he thereafter dominated, by emailing the council amended plans and stating that he considered the OSM system to be the subject of existing use rights provided for by Division 10 of the *EPA Act* because it undoubtedly would have predated (inter alia) the *EPA Act.* He quoted from s 107(1): "Except where expressly provided in the Act, nothing in this Act or an environmental planning instrument prevents the continuance of an existing use"; and from s 107(2): "Nothing in subsection (1) authorises...any enlargement or expansion or intensification of an existing use". He submitted that it was almost certain that his existing system did not comply with AS 1547/2000 (which it predated) and that it followed that the undertaking of an OSM Compliance Report would "prevent the continuance" of his "existing use".

24 A council officer's report dated 15 October 2008 noted that he had inspected the Land and stated:

> "...because the existing effluent land application area...appears to be located outside the property boundary it is considered the applicant shall provide to Council a report from a suitably qualified person showing adequate suitable land area is available within the property for the application/disposal of effluent...The construction of a shed or swimming pool is not supported until such time as the applicant is able to demonstrate there is adequate land available for on-site effluent application/disposal."

Section 68 LGA Application SEP 08/0087 15 October 2008

25 On 15 October 2008 Mr Crowther applied to the council for approval to operate a sewage system as required by s 68 of the *LG Act.* The council designated this application "SEP 08/0087". On the application form Mr Crowther ticked the box "Additions to Existing Building". This was capable of creating the impression that it was referable only to the proposed bathroom in the shed, and appears to have been so understood by the council for some time. In fact, it was also referable, to the existing sewage

system, as the council eventually understood and approved: see [13] above and [48]–[49] below.

26 On the same day Mr Crowther emailed the council apologising for failing to seek council approval for sewerage works and stating that that had been remedied by his lodgement of application SEP 08/0087.

Council Again Requests an Effluent Report 5 November 2008

27 On 5 November 2008 a council officer issued instructions to write a letter to Mr Crowther (a) requesting an effluent consultant's report describing a suitable waste management system contained wholly within the subject site taking into account the proposed shed location; (b) advising that the shed application would be held in abeyance pending a satisfactory effluent report; and (c) advising that existing use matters did not extend to the adequacy or otherwise of a waste management system associated with the use of the site.

Section 82 LGA Objection 7 November 2008

28 On 7 November 2008 Mr Crowther wrote a letter to the council headed "Objection To Application Of Regulations And Local Policies: Section 82 Local Government Act 1993". In the letter he objected to the application of "any" regulations under the *LG Act* which would prevent the continuance of his claimed existing use rights in his existing septic system. He wrote that he refused to provide an OSM Compliance Report on the grounds that (a) it may incriminate him; (b) it was an irrelevant consideration because it would inevitably lead to replacement of the existing OSM system for the public good; (c) the requirement was for an improper purpose because the inevitable outcome would be that he would be required to assume full responsibility for environmental remediation; and (d) the council had failed to comply with the principles of ecologically sustainable development. The letter was in the following terms:

"I am required by a condition on my Development Application (DA) by Tweed Shire to undertake an On-site Sewerage Management (OSM) Report of my existing septic system at my home.

I object to the Application of any Regulations in and under the Local Government Act 1993 which would prevent the continuance of my claimed existing use rights in my existing septic system (if any).

I also refuse to comply with this requirement on the grounds that it may incriminate me.

Moreover, I allege that the imposition of this requirement on my DA is at error in law through irrelevant considerations and improper purpose.

Specifically, it is alleged that the imposition of such a requirement on my DA is, in and of itself, an irrelevant consideration because the outcome of undertaking such an OSM Compliance Report would inexorably and inevitably lead to the replacement of that existing OSM System for the public good. I allege that the OSM Compliance Report is an irrelevant consideration because I agree that the existing OSM System should be replaced for the public good.

It is further specifically alleged that the requirement on my DA, in and of itself, would similarly inexorably and inevitably lead to the outcome that I would be required to assume the full responsibility for the environmental remediation. I allege that this is an improper purpose.

More specifically again, I allege that in the implementation of the principles of ecologically sustainable development and polluter pays, Council is at error at law through alleged failure to comply with the precautionary principle by undertaking 'a risk weighted assessment of various options' which neglects to place Council itself at risk."

29 Section 82 of the *LG Act* provided:

> **"82 Objections to application of regulations and local policies**
>
> (1) An applicant for an approval may lodge with the council an objection:
>
> (a) that the regulations or a local policy adopted under Part 3 by the council relating to the activity for which approval is sought do not make appropriate provision with respect to that activity, or
>
> (b) that compliance with any provision of those regulations or such a policy is unreasonable or unnecessary in the particular circumstances of the case.
>
> (2) The applicant must specify the grounds of the objection.

(3) If the objection relates to the regulations and the council is satisfied that the objection is well founded, it may, with the concurrence of the Director-General, in determining the application, direct that:

(a) such provisions of any regulation relating to that activity as are specified in the direction:

(i) are not to apply, or

(ii) are to apply with such modifications as are specified in the direction,

in respect of the carrying out of that activity, or

(b) such requirements as are specified in the direction are to apply to the carrying out of that activity,

or give directions under both paragraphs (a) and (b).

(3A) If the objection relates to a local policy adopted under Part 3 by the council and the council is satisfied that the objection is well founded, it may, in determining the application, direct that:

(a) such provisions of any local policy relating to that activity as are specified in the direction:

(i) are not to apply, or

(ii) are to apply with such modifications as are specified in the direction,

in respect of the carrying out of that activity, or

(b) such requirements as are specified in the direction are to apply to the carrying out of that activity,

or give directions under both paragraphs (a) and (b) and the council must give the reasons for its direction or directions.

(3B) An objection is well founded for the purposes of subsection (3A) only if the council is satisfied that no person or the public interest will be adversely affected by the variation and that any variation is consistent with the principles of ecologically sustainable development.

(4) Any direction given by the council under subsection (3) or (3A), if the council's approval to the application concerned is granted, has effect according to its tenor and, in the case of a direction referred to in subsection (3) (a) (ii) or (b) or subsection (3A) (a) (ii) or (b), is a condition of that approval."

Further Correspondence November 2008

30 On 12 November 2008 the council received a letter from Mr Crowther which said (among other things) that he understood himself to have made some very serious allegations of improper conduct against the council and that this was no longer a simple matter between the council and himself.

31 On 17 November 2008 Mr Crowther wrote to the council stating that the principles of ecologically sustainable development were driving some important and necessary social and environmental initiatives, and that he

was in dispute with the council about who pays for those initiatives as they relate to his septic system on the Land. He requested a written statement of reasons "which is sufficient for a Court to decide if Council's decisions are or are not at error in law". He put numerous interrogatories to the council under the headings "Polluter Pays", "User Pays", "Existing Use Rights", "Apprehended Bias", "Bad Faith" and "Wednesbury Unreasonableness". The council did not answer the interrogatories.

32 On 20 November 2008 the council wrote to Mr Crowther stating that (a) the dwelling had existing use rights under Division 10 of the *EPA Act* which the council did not challenge but the Division did not authorise further development without consent; (b) the s 82 objection was irrelevant in relation to assessment of his development application; and (c) as the site had limited area for the installation of an on-site sewage system, the council could not approve the project until it could be demonstrated by way of an OSM Compliance Report that suitable area and site conditions existed for the disposal of the effluent or, alternatively, he might wish to investigate an arrangement with the adjoining landowner which would permit the disposal of effluent. The letter was in the following terms:

> "I refer to the abovementioned application and your correspondence received in relation to Council's request for further information.
>
> As you have indicated the dwelling which currently exists on the site appears to have existing use rights as defined under Division 10 of the Environmental Planning and Assessment Act 1979 however this Division does not authorise further development on the site without the prior consent of Council.
>
> During my review of the file, which relates to your application for the erection of a shed structure at the rear of your land, it is noted that an inspection of the site by Council officers identified certain works had already been undertaken in relation to the proposal which had not yet been approved by Council. It was also noted that the absorption trench for the existing tank may be located on the adjoining land to the west and therefore in considering your application for the shed Council must identify whether or not there will be sufficient area on your land should the current owner or any future owner request the removal or disconnection from the existing absorption trench, a matter of which Council would have no control over unless some formal arrangement is made with the current property owner which would carry over onto any future owner of that land.

> With respect to your Section 82 objection I must point out that it is not relevant in relation to the assessment of your development application. I should also point out that Council is not challenging the existing use rights of your dwelling however your proposal to erect a shed which includes toilet and shower facilities requires the approval of Council and the possibility of any additional loading on the existing on-site system needs to be established together with the available area should the existing system fail or need to be relocated.
>
> Further investigation of the information contained on the file including your site plan reveals that apart from the dwelling several other structures exist on this site and an excavation is also identified in which a swimming pool is proposed to be located.
>
> Therefore as the site has limited area for the installation of an on-site disposal system Council is in a position where it cannot approve your proposal unless it can be demonstrated, by way of an on-site sewage management report from a suitably qualified person that suitable area and site conditions exist for the disposal of effluent on your land. Alternatively you may wish to investigate some type of formal arrangement with the owner of the adjoining land which will permit the disposal of effluent onto a suitably sized land application area.
>
> It is requested that you [sic] intentions regarding this matter be conveyed to Council within thirty (30) days of the date of this letter otherwise your application for the construction of the garage and storage shed will be determined with the information at hand which will more than likely lead to its refusal."

33 On 24 November 2008 Mr Crowther wrote to the council refusing to provide an OSM Compliance Report unless the council paid for it and for any upgrade or replacement of the existing OSM system; and alleging the council was requiring him to incriminate himself and that its General Manager was biased and acting in bad faith. The letter was in the following terms:

> "I quite agree that the circumstances of my septic system are unknown, and will remain so until (not to mention if) Council in its wisdom elects to conduct an OSM Compliance Report at its own expense, and pay for any upgrade and/or replacement of my existing OSM System at its own expense.
>
> To be quite specific, and as I advised in my Objection under s 82 LGA, 'I also refuse to comply with this requirement' (an OSM Compliance Report) 'on the grounds it may incriminate me'.
>
> Just so I make my position quite clear, I observe that it doesn't take too much effort to work out that if you compare a probably 40

year old septic system to current standards, it isn't going to comply. I allege Council is requiring me to self incriminate, and I believe I am not under any compulsion to do so. This, as I understand, places no obligations on Council, nor are any intended. We don't go a step further (if I can help it) until my dispute with Council as to who will fund the future report and consequent works is resolved.

Please allow me to correct a misapprehension on your part. I am invited by your General manager to use the money I had set aside for my shed to fund a replacement septic system. On the basis of Mr Rayner's alleged apprehended bias and alleged bad faith, I take my DA to be prejudged and predetermined by Tweed Shire Council."

Section 80A EPAA Notice of Modification of Existing Use Rights ("Further DA1") 9 December 2008

34 On 9 December 2008 Mr Crowther wrote a letter to the council annexing a document signed by Mr Crowther and Ms Schultz entitled "Notice of Modification of Existing Use Right Pursuant to Section 80A(5) of the Environmental Planning and Assessment Act 1979 clause 97 Environmental Planning and Assessment Regulation 2000". The letter described this document as a "development application" for "modification of our existing use rights (if any and subject to Council consent) in our On-Site Sewerage Management System pursuant to s 80A" of the *EPA Act*.

35 This notice appears to be the document referred to in the Summons and Points of Claim as "Further DA1".

36 In this document Mr Crowther and Ms Schultz said they gave notice pursuant to cl 97 of the *EPA Regulation* that they:

> "intend to modify any existing use right in our existing On-Site Sewerage Management System provided by section 106 Environmental Planning & Assessment Act 1979 (subject to Council consent)...The intended modification proposed to our existing use right is to vary that right to the extent necessary to give effect to the Objects of the *Environmental Planning and Assessment Act* 1979 pursuant to section 5 of that Act, and particularly to give effect to the Internalisation of Environmental Costs Principles of the Ecologically Sustainable Development provisions of section 6(2)(d)(ii) of the *Protection of the Environment Administration Act* 1991, being: (ii) the users of

goods and services should pay prices based on the full life cycle of costs of providing goods and services, including the use of natural resources and assets in the ultimate disposal of any waste,

And we advise Tweed Shire Council that our On-Site Sewerage Management System is an asset which provides a service to the community of Tweed Shire in protecting water quality and public health, and that the users of that service should pay the full life cycle costs of providing that asset, which cost is an environmental cost pursuant to the Principles of Ecologically Sustainable Development".

37 Clause 97 of the *EPA Regulation* provides the means for giving effect to a condition of development consent imposed pursuant to s 80A(1)(b) and (5) of the *EPA Act*, by providing that the modification or surrender of an existing development consent or existing use right is achieved by delivery of a notice in accordance with cl 97(2): *Waverley Council v Hairis Architects* [2002] NSWLEC 180, 123 LGERA 100 at [26]. Section 80A relevantly provides:

> **"80A Imposition of conditions**
>
> (1) **Conditions—generally**
>
> A condition of development consent may be imposed if:
>
> ...
>
> (b) it requires the modification or surrender of a consent granted under this Act or a right conferred by Division 10 in relation to the land to which the development application relates, or
>
> ...
>
> (5) **Modification or surrender of consents or existing use rights**
>
> If a consent authority imposes (as referred to in subsection (1) (b)) a condition requiring the modification or surrender of a consent granted under this Act or a right conferred by Division 10, the consent or right may be modified or surrendered subject to and in accordance with the regulations."

38 The said notice was misconceived, in my view, because there was no such development consent condition to which it could relate.

Section 96 Application to modify a consent ("further DA 2") 12 December 2008

39 On 12 December 2008 Mr Crowther and Ms Schultz lodged with the council a pro forma "Application to Modify a Consent" under s 96 of the *EPA Act*. The Consent was described as "Existing Use Rights under Division 10". No fee was paid. The copy of this application in evidence is partly obliterated but it appears to refer to "attached notice", which may be the notice of 9 December 2008. They appear to be the documents described in the Summons as "further DA 2". Section 96 provided in part:

> **"96 Modification of consents—generally**
>
> **(1) Modifications involving minor error, misdescription or miscalculation**
>
> A consent authority may, on application being made by the applicant or any other person entitled to act on a consent granted by the consent authority and subject to and in accordance with the regulations, modify a development consent granted by it to correct a minor error, misdescription or miscalculation. Subsections (1A), (2), (3), (5), (6) and (7) do not apply to such a modification.
>
> **(1A) Modifications involving minimal environmental impact**
> A consent authority may, on application being made by the applicant or any other person entitled to act on a consent granted by the consent authority and subject to and in accordance with the regulations, modify the consent if:
> (a) it is satisfied that the proposed modification is of minimal environmental impact, and
> (b) it is satisfied that the development to which the consent as modified relates is substantially the same development as the development for which the consent was originally granted and before that consent as originally granted was modified (if at all), and
> (c) it has notified the application in accordance with:
> (i) the regulations, if the regulations so require, or
> (ii) a development control plan, if the consent authority is a council that has made a development control plan that requires the notification or advertising of applications for modification of a development consent, and
> (d) it has considered any submissions made concerning the proposed modification within any period prescribed by the regulations or provided by the development control plan, as the case may be.
>
> Subsections (1), (2) and (5) do not apply to such a modification.
>
> **(2) Other modifications**

A consent authority may, on application being made by the applicant or any other person entitled to act on a consent granted by the consent authority and subject to and in accordance with the regulations, modify the consent if:

(a) it is satisfied that the development to which the consent as modified relates is substantially the same development as the development for which consent was originally granted and before that consent as originally granted was modified (if at all), and

(b) it has consulted with the relevant Minister, public authority or approval body (within the meaning of Division 5) in respect of a condition imposed as a requirement of a concurrence to the consent or in accordance with the general terms of an approval proposed to be granted by the approval body and that Minister, authority or body has not, within 21 days after being consulted, objected to the modification of that consent, and

(c) it has notified the application in accordance with:
    (i) the regulations, if the regulations so require, or
    (ii) a development control plan, if the consent authority is a council that has made a development control plan that requires the notification or advertising of applications for modification of a development consent, and

(d) it has considered any submissions made concerning the proposed modification within the period prescribed by the regulations or provided by the development control plan, as the case may be.

Subsections (1) and (1A) do not apply to such a modification."

40 In my view, this application was misconceived because it was not referable to any consent granted by the council in relation to the shed.

DA 08/0966 refused: notice 22 December 2008

41 On 17 December 2008 the council's Development Assessment Panel considered a report and resolved to adopt a recommendation that DA 08/0966 for the shed be refused. The report noted that the applicant had refused the council's request to provide an on-site sewage management compliance report demonstrating that there was a suitable land area for the effective disposal of existing and future hydraulic loads imposed by the proposed shower and toilet facilities which were part of the shed development. The report's conclusion was that:

> "The site has limited area for the installation of an on-site sewage disposal system and the proposed shed and non approved

> excavation work reduces this area. Council can not support the approval of the proposed shed and the excavation work until an On Site Sewage Management (OSM) Compliance Report demonstrates that a suitable area and site conditions exist for the effective disposal of effluent on the property".

42 By letter dated 22 December 2008 to Mr Crowther, the council gave notice of its decision that DA 08/0966 had been refused because "Pursuant to s 79C(1) the proposed development has not been supported by information pertinent to its assessment as requested by Council on 11 September 2008 and 20 November 2008". There is also in evidence a notice dated 22 December 2008 from the council to The Shed Company in similar terms with the addition of a statement that if there were dissatisfaction with the decision, s 97 of the *EPA Act* gave a right of appeal to the Land and Environment Court within 12 months after the date of receipt of the notice. In evidence, Mr Crowther admitted that he had received the letter but denied receiving the notice to The Shed Company. He did not deny that The Shed Company received the notice.

43 No appeal pursuant to s 97 of the *EPA Act* was lodged against that decision.

Section 68 LGA SEP 08/0087 "cancelled" 22 December 2008

44 The last-mentioned letter went on to say that "Accordingly, Council cannot give approval for" the associated s 68 application SEP 08/0087, which has been "cancelled". The explanation for this has been discussed at [13] above. In November 2009 the council revived this application and conditionally approved the s 68 application for the existing sewer system: see [48]-[49] below.

Section 82A EPAA request for review of determination: 25 December 2008

45 On 25 December 2008 a letter entitled "Request for Review – DA 08/0966 Section 82A Environmental Planning and Assessment Act 1979" was

written to the council by "Those Best Placed" per Mr Crowther. This was suggestive of, and was the first reference to, the name of the corporate applicant in these proceedings although there was no indication in the letter that "Those Best Placed" was a company. The letter alluded to the council acting beyond its powers, for an improper purpose.

46 Section 82A of the *EPA Act* provides for a review of a determination by a council. Section 82A(3) provides that "The prescribed fee must be paid in connection with a request for a review". The prescribed fee for the subject s 82A application was not paid.

Council response 19 January 2009

47 Following further correspondence from "Those Best Placed" per Mr Crowther, by letter dated 19 January 2009 the council wrote to Mr Crowther responding to the Notice of Modification of Existing Use Rights to the SEP 08/0087 application under s 68 of the *LG Act*, and to the application to modify a consent under s 96 of the *EPA Act*: see [25], [34] and [39] above. The letter was in the following terms:

> "I refer to your correspondence dated 9 December 2008, your application to modify a consent received 12 December 2008 and your request under Section 82A of the Environmental Planning & Assessment Act for a review of Determination dated 25 December 2008 and advise the following:
>
> With regard to the Notice of Modification of Existing Use Right, as you have indicated that your proposal is in relation to the modification of your on site sewage management system, you are advised that it will be necessary to apply for such modification by way of an application under Section 68 Part C of the Local Government Act and not as a modification under Section 97 of the Environmental Planning & Assessment Regulations. In regard to the existing use right of the dwelling which currently exists on the said land, as indicated previously in my letter 20 November 2008 Council is not challenging the existing use rights of your dwelling. Council's records also acknowledge the existence of a dwelling entitlement as identified in its letter to you dated 27 November 2007 however any further development of the site will require the relevant approvals.
>
> With respect to the on site sewage management system that exists on the site, you are advised that a visual inspection of the system failed to identify that the existing system is in any way

defective other than a section of the concrete lid fitted to the treatment tank itself which requires some repair to prevent the entry of rainwater, insects or other matter and reduce the possibility of odours emanating from the tank. Furthermore, after reviewing your recent application under Section 68, which accompanied the Development Application for the shed, it is noted that a request was also made for an approval to operate the existing on site sewage management system and irrespective of your comments to one of Council's officers that the land application area for the system is on the adjoining land, I see no reason why Council cannot consider the issue of an approval to operate given the observations made at the time of inspection and therefore in this regard I have referred the matter to the appropriate officer for consideration.

In regard to your application to modify a consent under section 96 1(a) of the Environmental Planning & Assessment Act you are advised that Council is unable to consider your application as it does not relate to any existing consent issued by Council and as the relevant fee did not accompany the application at the time of lodgement receipt of this application had not be [sic] previously acknowledged.

In regard to your request for a review of determination you are advised that an application fee of $119.50 will be required and it is suggested that further supporting information be submitted which demonstrates that a suitable land application area exists or is available after the construction of the shed as per the second last paragraph of Council's letter 20 November 2008.

Should you require any further information in relation to any of these matters, please do not hesitate to contact me on the number identified above."

Section 68 LGA SEP 08/0087 approved 2 November 2009

48 On 29 January 2009 the council refunded part of the fee paid in respect of SEP 08/0087.

49 On 2 November 2009 the council in relation to SEP 08/0087 issued a conditional approval for the operation of the existing OSM system (septic tank).

THE SUMMONS AND POINTS OF CLAIM

50 I turn to the (amended) Summons dated 27 November 2009 and the Points of Claim dated 23 November 2009. Both are signed by Mr Crowther as managing director of Those Best Placed Pty Ltd. The Points of Claim incorporate by reference his affidavit of 11 September 2009, which attempts to describe what the otherwise obscure headings in the Summons mean. In particular, it describes each of those headings as indicating a "decision" of some sort. That includes alleged decisions to "fail" to do something which Mr Crowther says the council had to do or should have done. Assuming that the council "failed" to do such things, for the most part I think it is erroneous to suggest that the council "decided" to fail to do them.

Summons paragraph 1

51 Paragraph 1 of the Summons is an attempt to summarise what follows, and is in the following terms:

> "1. Appeal by Proponent by virtue of s 97 *Environmental Planning and Assessment Act* 1979 (EP&A), pursuant to s 123 EP&A and s 674 LGA Local Government Act 1993 (LGA), against alleged errors at law in the Determination of Tweed Shire Council to reject DA 08/0966 and cancel SEP 08/0087, advised by Notice pursuant to s 82(1) EP&A, dated 22 December 2008, and including alleged errors at law in a total of 20 other preceding and ensuing related administrative decisions. The alleged errors at law are alleged to represent 'serious corrupt conduct', pursuant to s 440A LGA and it is alleged that 'council has acted vexatiously' pursuant to s 179(1) LGA. The Appeal is lodged by virtue of s 20(1)(c) and (d) of the Land and Environment Court Act 1979, under Class 4 of the Court's jurisdiction."

52 The reference in the first sentence of paragraph 1 to "Notice pursuant to s 82(1) EP&A dated 22 December 2008" is referable to the notice of determination of DA 08/0966: see [42] above. The notice of determination was required by s 81 not s 82.

53 The first sentence of paragraph 1 appears to characterise the proceedings as an appeal by virtue of s 97 of the *EPA Act*. Section 97 provides for appeals within a prescribed time against refusals of development applications. There has been no such appeal. Therefore s 97 is irrelevant. Appeals under s 97 are in Class 1 of the Court's jurisdiction.

54 Inconsistently with the first sentence of paragraph 1, the last sentence says that the appeal is lodged by virtue of s 20(1)(c) and (d) of the *Land and Environment Court Act* 1979 under Class 4 of the Court's jurisdiction. Section 20(1)(c) and (d) provide that the court has jurisdiction to hear and dispose of proceedings under s 123 of the *EPA Act* and s 674 of the *LG Act* (referred to in the first sentence of paragraph 1). They are open standing provisions which enable any person to bring proceedings for an order to remedy or restrain a breach of those Acts.

55 Paragraph 1 of the Summons alleges that errors of law represent "serious corrupt conduct pursuant to s 440A of the" *LG Act*, which provides:

> **"440A Definition of "serious corrupt conduct"**
>
> In this Division:
>
> ***serious corrupt conduct*** means corrupt conduct (within the meaning of the Independent Commission Against Corruption Act 1988) that may constitute a serious indictable offence, being:
>
> (a) in the case of conduct of the holder of a civic office—conduct in connection with the exercise or purported exercise of the functions of the civic office, or
> (b) in the case of conduct of a member of staff of a council—conduct in connection with exercise or purported exercise of the duties of the member of staff."

56 The "errors of law" are not specified in paragraph 1 and presumably are those alleged in paragraph 4 (see below).

57 Paragraph 1 of the Summons then alleges that the council has acted vexatiously pursuant to s 179 of the *LG Act*. Section 179 empowers this Court to award compensation to an applicant for an approval for any

expense incurred by the person as a consequence of refusal to grant or delay in granting the approval if (inter alia) the Court considers that the council has acted vexatiously. Section 179 is in the following terms:

> **"179 Awarding of compensation concerning approvals**
>
> (1) The Land and Environment Court, on the hearing of an appeal or otherwise, has a discretion to award compensation to an applicant for an approval for any expense incurred by the person as a consequence of:
> (a) a council's refusal to grant the approval, or
> (b) a council's delay in granting the approval,
> if the Court considers that the council would not have acted in the way it did but for the fact that it was unduly influenced by vexatious or unmeritorious submissions made by members of the public or that the council has acted vexatiously."

58 Section 179(1) is the basis of the claim for "damages" referred to in paragraph 3 of the Summons: see [63] below. There is a threshold question not addressed in submissions, which it is unnecessary to resolve for present purposes, whether the applicants in the proceedings have standing to make this claim given that the applicant for DA 08/0966 (refused by the council) was The Shed Company which is not a party. There is a notice of motion pending by the applicants in the proceedings seeking an order that the council pay interim compensation pursuant to s 82 of the *Supreme Court Act* 1970, which presumably is intended to be anchored to s 179(1) of the *LG Act*.

Summons paragraph 2

59 Paragraph 2 of the Summons describes the relief sought as follows:

> "The relief sought by the plaintiffs is for the Court to issue multiple Orders pursuant to ss 65 and 69 Supreme Court Act 1970 in the nature of Writs of Certiorari and Mandamus to respectively quash the 23 impugned decisions and determinations by the Respondent, and require Tweed Shire Council to perform its statutory duties pursuant to the EP&A and LGA in the Determination and Re-Determination of the impugned Decisions and Determinations of the Respondent which would revert to the Respondent, subject to those possible Orders."

60 The "23 impugned decisions and determinations" appear to be the 23 matters listed in paragraph 4 of the Summons, which, in my view, are mostly not decisions or determinations but alleged failures to do things: see [67] and following below.

61 Sections 65 and 69 of the *Supreme Court Act* provide in part as follows:

> **"65 Order to fulfil duty**
>
> (1) The Court may order any person to fulfil any duty in the fulfilment of which the person seeking the order is personally interested.
> (2) The Court may, on terms, make an interlocutory order under subsection (1) in any case where it appears to the Court just or convenient so to do.
> (3) The powers of the Court under this section are in addition to any other powers of the Court.
>
> **69 Proceedings in lieu of writs**
>
> (1) Where formerly:
> (a) the Court had jurisdiction to grant any relief or remedy or do any other thing by way of writ, whether of prohibition, mandamus, certiorari or of any other description, or
> (b) in any proceedings in the Court for any relief or remedy any writ might have issued out of the Court for the purpose of the commencement or conduct of the proceedings, or otherwise in relation to the proceedings, whether the writ might have issued pursuant to any rule or order of the Court or of course,
> then, after the commencement of this Act:
> (c) the Court shall continue to have jurisdiction to grant that relief or remedy or to do that thing; but
> (d) shall not issue any such writ, and
> (e) shall grant that relief or remedy or do that thing by way of judgment or order under this Act and the rules, and
> (f) proceedings for that relief or remedy or for the doing of that thing shall be in accordance with this Act and the rules..."

62 "Court" in these sections means the Supreme Court of New South Wales: s 19(1). However, in Class 4 proceedings, s 20(2)(d) of the *Land and Environment Court Act* confers the same jurisdiction on this Court as the Supreme Court would, but for s 71, have to hear and dispose of proceedings to review, or command, the exercise of a function conferred or imposed by a planning or environmental law.

Summons paragraph 3

63 Paragraph 3 of the Summons identifies a claim for "damages" under s 179(1) of the *LG Act* and is in the following terms:

> "The Plaintiffs seek relief pursuant to s 179(1) Local Government Act 1993 for the damages specified in the Points of Claim, allegedly incurred by the Plaintiffs through financial hardship occasioned by the vexatious behaviour of the Respondent."

64 Section 179(1) is set out at [57] above.

65 The reference to the "Points of Claim" referred to in paragraph 3 of the Summons appears to be a reference to p 101 of the Points of Claim where there is a heading "Compensation for Vexation". Under this heading appears the following:

> "The plaintiffs submit to the Court that in the construction of the Local Government Act 1993 s 179 LGA expresses in 'words of plain intendment' the entitlement of the plaintiffs to seek remedies from the Court, pursuant to s 176 LGA. The plaintiffs allegations are founded on allegations of mala fides on the Respondent's behalf, where the failure to determine the s 82 LGA Objection, the failure to Determine two other Development Applications, failure to provide consent to claims of Existing Use Rights in the land, dwelling and OSMS and the cancellation of SEP 08/0087 allegedly and cumulatively represent circumstances where the respondent may have 'acted vexatiously' through failure to exercise the Respondent's discretion to undertake a statutory duty for an improper purpose."

66 In my opinion, on the material before the Court, the proposition that the council's behaviour has been vexatious or mala fides is not reasonably arguable. Therefore, paragraph 3 of the Summons discloses no reasonable cause of action.

Summons paragraph 4

67 Paragraph 4 of the Summons is headed "Relief Claimed by the Plaintiff". Thereunder are 23 numbered headings (some with subheadings), as follows.

(i) and (ii) FAIL 149 LGA and Fail 77 LGA.

68 The first heading in paragraph 4 of the Summons is "FAIL 149 LGA". This is a mistake for "FAIL 149 EP&A" (see p 16 of the Points of Claim). Under this heading the applicants say they claim remedies under ss 65 and 69 of the *Supreme Court Act*. The second heading is "Fail 77 LGA", the particulars of which are "As per Fail 149 EP&A".

69 In his affidavit Mr Crowther describes "Fail 149 LGA" as a "decision" by the council "to fail to take practicable and reasonable steps" pursuant to s 77 to notify an intending applicant for approval to operate an OSM system (pursuant to s 68) in a s 149 certificate of the council's statutory responsibility pursuant to clauses 46 or 47 of the *Local Government (General) Regulation* 2005 and a council policy for upgrades to systems built prior to 2002. He also says that the "decision" is contrary to advice in the Tweed Shire Council OSM Strategy. Mr Crowther describes "Fail 77 LGA" similarly but without reference to s 149. If there was any such failure, I cannot see anything to support the proposition that there was a "decision" to "fail".

70 During the hearing I understood Mr Crowther to abandon these claims. In case he did not, I will address them.

71 Section 149 of the *EPA Act* provides:

> "**149 Planning certificates**
>
> (1) A person may, on payment of the prescribed fee, apply to a council for a certificate under this section (a planning certificate) with respect to any land within the area of the council.
> (2) On application made to it under subsection (1), the council shall, as soon as practicable, issue a planning certificate specifying such matters relating to the land to which the certificate relates as may be prescribed (whether arising under or connected with this or any other Act or otherwise).
> (3) (Repealed)
> (4) The regulations may provide that information to be furnished in a planning certificate shall be set out in the prescribed form and manner.

(5) A council may, in a planning certificate, include advice on such other relevant matters affecting the land of which it may be aware.

(6) A council shall not incur any liability in respect of any advice provided in good faith pursuant to subsection (5). However, this subsection does not apply to advice provided in relation to contaminated land (including the likelihood of land being contaminated land) or to the nature or extent of contamination of land within the meaning of Part 7A.

(7) For the purpose of any proceedings for an offence against this Act or the regulations which may be taken against a person who has obtained a planning certificate or who might reasonably be expected to rely on that certificate, that certificate shall, in favour of that person, be conclusively presumed to be true and correct."

72 The prescribed matters to be specified in a s 149(2) planning certificate are set out in Schedule 4 to the *EPA Regulation*: cl 279. Mr Crowther focuses on cl 2(c) of Schedule 4 which provides;

> "For each environmental planning instrument or proposed instrument referred to in clause 1 (other than a SEPP or proposed SEPP) that includes the land in any zone (however described):
>
> ...
>
> (c) the purposes for which the instrument provides that development may not be carried out within the zone except with development consent,"

73 Mr Crowther submits that a relevant environmental planning instrument under the last-mentioned provision is the Tweed LEP and in particular cl 8(1)(c) which provides:

> **"8 Consent considerations**
> (1) The consent authority may grant consent to development (other than development specified in Item 3 of the Table to clause 11) only if:
> ...(c) it is satisfied that the development would not have an unacceptable cumulative impact on the community, locality or catchment that will be affected by its being carried out or on the area of Tweed as a whole."

74 Section 77 of the *LG Act* provides:

> **"77 Relevant regulations and local policies to be brought to notice of intending applicants**
>
> A council must take such steps as are reasonably practicable to bring the existence of any relevant regulations and any relevant local policy adopted under Part 3 to the notice of any person it knows to be an intending applicant for an approval."

75 Clauses 46 and 47 of the *Local Government (General) Regulation* provide:

> "**46 Approval to operate system of sewage management extends to concurrent owners and occupiers**
> If an owner or occupier of land is the holder of an approval to operate a system of sewage management on the land (being an approval that is in force), any other owner or occupier of that land may operate the system of sewage management (without obtaining a further approval) in accordance with the conditions of the approval.
>
> **47 Temporary exemption for purchaser of land**
> (1) Despite the other provisions of this Regulation, a person who purchases (or otherwise acquires) land on which any sewage management facilities are installed or constructed may operate a system of sewage management without the approval required under section 68 of the Act for the period of 3 months after the date on which the land is transferred or otherwise conveyed to the person (whether or not an approval is in force, as at that date, in relation to the operation of a system of sewage management on that land).
> (2) Further, if the person duly applies, within the period of 2 months after the date on which the land is transferred or otherwise conveyed to the person, for approval to operate the system of sewage management concerned, the person may continue to operate that system of sewage management without approval until the application is finally determined."

76 In the Points of Claim at pp 17-18 under the sub-heading "Failure to Notify", it is said that "there is in reality no remedy available to the Plaintiffs for what has already passed" save for writs of mandamus to protect the public by compelling the council to perform its statutory duty in the following six respects, the first five of which are worded similarly to those set out in the Summons:

> "(1) **Failure to Notify**
>
> Since the Court cannot order time to run backwards, there is in reality no remedy available to the Plaintiffs for what has already passed, saving for possible issue of future Writs of Mandamus by Orders of the Court which would protect the public of NSW by compelling the Respondent to perform its statutory duty in relation to the scheme of the Acts below, by which to end the alleged failure of the Respondent to:
> (a) `...issue a planning certificate specifying such matters relating to the land to which the certificate relates as may be prescribed (whether arising under or connected with this or any other Act or otherwise)' (s 149(2) EP&A), which
> (b) `...take such steps as are reasonably practicable to bring the existence of any relevant regulations and any

relevant local policy adopted under Part 3 to the notice of any person it knows to be an intending applicant for an approval' (s 77 LGA – see also FAIL &&LGA), and to

(c) advise the requirement under Regulation 47 LGAREGS empowering Council to impose civil penalties under the provisions of s 626 LGA against an `Intending Applicants for Approval' to `...operate a system of sewage management without the approval required under section 68 of the Act for the period of 3 months after the date on which the land is transferred or otherwise conveyed to the person (whether or not an approval is in force, as at that date, in relation to the operation of a system of sewage management on that land) (Regulation 47 LGAREGS), or to

(d) follow the due process provided for by s 80A(5) EP&A and Regulation 97 EP&AREGS, for the modification or extinguishment of the `Intending Applicant' property rights in the OSMS pursuant to the Respondents Local Policy for: `Modification or surrender of consents or existing use rights if a consent authority imposes (as referred to in subsection (1)(b)) a condition requiring the modification or surrender of a consent granted under this Act or a right conferred by Division 10, the consent or right may be modified or surrendered subject to and in accordance with the regulations.' (s 80A(5) EP&A, and Regulation 97 EP&AREGS),

(e) Comply with the Responsibilities for Council under the `Tweed Shire On Site Sewerage Management Strategy' Local Policy to provide `Advice on Section 149(2) Certificates regarding the requirement for a property owner to have an approval to operate an on-site sewage management system (Chapter 8.1, `Tweed Shire On Site Sewerage Management Strategy').

(f) Advise an `Intending Applicant' for `Approval to Operate OSMS', which is a s 68 LGA Table Item C6, that they are wasting their money, because it is also the Respondent's Local Policy for `...upgrade of pre 2002 systems', and the only Application the Respondent is empowered to provide by that Local Policy is an `Approval to Alter/Modify OSMS', which is a s 68 LGA Table Item 5."

77 Subparagraphs (a) to (c) quoted above indicate an allegation of breach of the *EPA Act* by reason of the issue by the council of a s 149 certificate (although to whom, when and in what circumstances is not stated) which, contrary to s 77, did not give notice of the "existence of any relevant regulations and any relevant local policy adopted under Part 3 to any person it knows to be an intending applicant for an approval", the relevant regulation being cl 47 of the *Local Government (General) Regulation* (to

which in his affidavit Mr Crowther added a reference to cl 46). Mr Crowther may have intended to relate this alleged breach to an alleged s 149 certificate attached to the contract of sale which Ms Schultz and he as purchasers entered into for the Land. It is unclear whether this was the same s 149 certificate in evidence referred to at [18] above. In my opinion, no reasonable cause of action is pleaded or exists in relation to these matters for at least three reasons. First, the prescribed matters to be specified in a s 149 certificate are set forth in the *Environmental Planning and Assessment Regulation* Schedule 4: cl 279. The prescription does not extend to matters arising under cll 46 or 47 of the *Local Government (General) Regulation*. Secondly, the evidence establishes that there is no adopted local policy under Part 3 to which s 77 of the *LG Act* might apply. Finally, in terms of s 77, there is no pleading or evidence capable of establishing that the council knew that Mr Crowther or Ms Schultz was an "intending applicant for an approval" of any kind until the development application for the shed was made.

78 Sub-paragraph (d) quoted at [76] above from the Points of Claim refers to lack of "due process" provided for by s 80A(5) of the *EPA Regulation* arising out of an attempt by Mr Crowther to have the council endorse his "Notice of Modification of Existing Use Rights" of 9 December 2008 (see [34] above) which, in some unexplained way, he believed would modify or extinguish "existing use" rights allegedly concerned with the existing domestic septic tank or which would compel the council to treat it as a development application of some kind. The document had no statutory or regulatory basis. It has nothing to do with the heading "Fail 149 EPA". In any event, Mr Crowther seems to have been under the impression that by lodging such a document he could affect such existing use rights as he might have had in relation to the septic tank. Section 80A of the *EPA Act* and cl 97 of the *EPA Regulation* (quoted or summarised at [37] above) respectively empower a council to impose conditions to development consents by requiring the applicant to surrender an existing consent or existing use right, and prescribe the means by which such a condition may be complied with. There was in this case no consent and no condition.

The attempt to call up s 80A was misdirected, pointless and ineffective. No cause of action, including the one called "FAIL 149 EPA", arose or could arise.

79 Sub-paragraph (e) quoted at [76] above from the Points of Claim refers to Chapter 8.1 of the Tweed Shire Council "On-site Sewage Management Strategy" and describes it as a "Local Policy". A document bearing this title was among the documents tendered by the applicants, although the parties did not take me to it. Chapter 8.1 includes the statement that: "Tweed Shire Council is required to implement the Local Government Act requirement that approval is to be obtained to operate all on-site sewage management systems, and that the operation of these systems is supervised. To assist in this Council undertakes to provide....Advice on Section 149(2) Certificates regarding the requirement for a property owner to have an approval to operate an on-site sewage management system." The document also contains the statement "This draft Strategy was approved for community consultation at Council's meeting held on 16 October 2002. It is the Council's intention to incorporate the On-Site Sewage Management Strategy within its Management Plan". There is one section 149 certificate in evidence obtained in 2007 by the former owners of the Land (see [18] above) which does not appear to contain the advice referred to in chapter 8.1 of the document quoted above.

80 The reference to "local policy" in sub-paragraph (e) quoted at [76] above from the Points of Claim may be a reference to a "local Policy" referred to in s 68(1) of the *LG Act* which provides that: "A person may carry out an activity specified in the following Table only with the prior approval of the council, except in so far as this Act, the regulations or a local policy adopted under Part 3 allows the activity to be carried out without that approval". Part 3 (ss 158-167) is concerned with the adoption of local policies concerning approvals under s 164. There is nothing to suggest that the said Strategy, is such a local policy. Further, if the council failed to provide the OSM systems advice referred to in the strategy on a s 149 certificate relating to the Land, it is not apparent that that could have legal

consequences of the type asserted in sub-paragraph (e) quoted above. No private cause of action is pleaded here but if the s 149 certificate in issue relates to Mr Crowther's purchase of the Land, the amount of interaction between him and the council indicates that he could have had no doubt as to the council's powers.

81 Sub-paragraph (f) quoted at [76] above from the Points of Claim does not of itself raise or allege any cause of action.

82 Under the heading "Fail 149 EP&A" in the Points of Claim at pp 18-19, in particular under subheading "(2) Alleged Errors at Law by the Respondent", the allegation is made that "the various failures to Notify in relation to Fail 149 EP&A have (a) denied the Plaintiffs Procedural Fairness, and (b) represent narrow substantive ultra vires with regard to the provisions of" s 77 *LG Act*, s 149(2) *EPA Act*, Regulations 46 and 47 of the *Local Government (General) Regulation*, s 80A(5) of the *EPA Act* and Regulation 97 of the *EPA Regulation*. On the material before the Court, there is no arguable basis for these allegations.

83 Paragraph 1(3) in the Points of Claim is titled "Alleged Damages caused to the Plaintiffs". It does not disclose the existence of any "expense" incurred by a person as a consequence of refusal or delay to grant an approval under the *LG Act*: s 179(1) (set out at [57] above. In any case, no logical connection is evident between any "damages" claimed under this sub-heading and the matters pleaded in support of "FAIL 149 EPA".

84 Under the heading "FAIL 77 LGA" in the Points of Claim at p 22, the allegation appears to be that once Mr Crowther and Ms Schultz (not the applicants in these proceedings, Those Best Placed Pty Ltd and Ms Schultz) became owners the council did not (immediately) comply with s 77 of the *LG Act* by telling them something – presumably about their obligation in due course to obtain an approval under s 68 of the *LG Act* to operate the existing septic tank at the premises.

85 Clause 47 of the *Local Government (General) Regulation* entitles a purchaser of land to continue to use a sewage management system which does not have a s 68 approval for three months after the transfer and, if application for such approval is made within two months of the transfer, until it is finally determined. Mr Crowther's application for a s 68 approval appears to have been made outside that time: see [25] above. However, although subsequently "cancelled", it was revived, granted and is in force. No proceedings by council were taken for a penalty for having an unlicensed septic tank, nor were they threatened. No damages were incurred and no loss sustained. This claim is without foundation and will not attract any remedy.

86 On the first day of the hearing Mr Crowther indicated that he did not press the s 149 certificate issue. On the second day of the hearing he said that he was "tackling it from a different direction" and spoke to new written submissions. He submitted that the council was under a statutory duty to specify the following matters in all future s 149 certificates and that the Court should order it to do so:

(a) subject to cl 8 of the Tweed LEP, an existing OSM system may "have an unacceptable cumulative impact on the community, locality or catchment that will be affected by its being carried out or on the area of Tweed as a whole";

(b) subject to s 68 of the *LG Act*, the provisions of cl 47 of the *Local Government (General) Regulation*;

(c) pursuant to s 626 of the *LG Act* any person who continues to use an existing OSM without having obtained the prior approval of council under the *LG Act* required for the carrying out of that activity is guilty of an offence carrying a maximum penalty of 20 penalty units;

(d) pursuant to cl 8 of the Tweed LEP, if council is not "satisfied that the development would not have an unacceptable cumulative impact on the community, locality or catchment that will be affected by its being carried out or on the area of the Tweed as a whole", the owner of an existing OSM system may be required to make further

application to council for approval to alter/modify the OSM system, and to upgrade or replace the existing OSM system to protect public health and water quality "of Tweed as a whole".

87 In my opinion, the council was not under a statutory duty to specify any of those matters in a s 149(2) certificate because they were not prescribed matters. Section 149(2) refers to matters that are prescribed for inclusion in a certificate. Mr Crowther selected cl 2(2) of the prescribed matters in cl 2 of schedule 4 to the *EPA Regulation*: see [72] above. That is a reference to the planning instrument and the land use table within the instrument. In this case the use of the Land for the purpose of a dwelling house is permissible in the zone with consent, and the s 149 certificate in evidence and, indeed, the council letter of 27 November 2007 to Mr Crowther provide that information. Mr Crowther may not fully appreciate the difference between permissible with consent and prohibited. Under the Tweed LEP cl 57 it is lawful for land within the relevant zone to be used for the purposes of a dwelling house so long as the subdivision was created before a particular date, which this one was. Mr Crowther referred to cl 8(1)(c) of the Tweed LEP. However, that provision refers to matters to which the council must direct its attention when considering a development application, not matters required to be included in a s 149 certificate: see [73] above. It is not the existence or non-existence per se of an unacceptable cumulative impact etc that matters but the council's satisfaction in relation to those matters which gives it jurisdiction to determine an application. Further, the matters to which Mr Crowther refers are not relevant to the factual circumstances of any justiciable dispute between the applicants (or Mr Crowther) and the council (except perhaps in a tenuous way), although they may raise political or policy questions as to whether such matters should be required by legislation to be included in s 149 certificates.

(iii) FAIL 54 EP&A Regs

88 Mr Crowther describes this heading in paragraph 4 of the Summons as a "decision" by the council "to fail to comply" with cl 54 of the EPA Regulation. If this was a failure to comply, there is no evidence that there was a "decision" to fail to comply. Clause 54 provides:

> **"54 Consent authority may request additional information**
>
> (1) A consent authority may request the applicant for development consent to provide it with such additional information about the proposed development as it considers necessary to its proper consideration of the application.
> (2) The request:
> (a) must be writing, and
> (b) may specify a reasonable period within which the information must be provided to the consent authority.
> (3) The information that a consent authority may request includes, but is not limited to, information relating to any relevant matter referred to in section 79C (1) (b)–(e) of the Act or in any relevant environmental planning instrument.
> (4) However, the information that a consent authority may request does not include, in relation to building or subdivision work, the information that is required to be attached to an application for a construction certificate.
> (5) Instead of providing the information requested, the applicant to whom a request is made under this clause may notify the consent authority in writing that the information will not be provided.
> (6) If the applicant for development consent has failed to provide any of the requested information by the end of:
> (a) any period specified as referred to in subclause (2) (b), or
> (b) such further period as the consent authority may allow,
>
> the applicant is taken to have notified the consent authority that the information will not be provided, and the application may be dealt with accordingly."

89 The Summons then says that orders are sought to quash the decision of the council "to formulate an increased hydraulic loading arising as a consequence of DA 08/0966 by virtue of the Plumbing and Drainage Code of Practice". This is incomprehensible.

90 The Summons says that the applicants seek an order that the council fulfil a statutory duty to register and determine "Further DA1". This appears to be a reference to Mr Crowther's Notice of Modification of Existing Use Rights of 9 December 2008: see [34] above.

91 The Points of Claim at pp 23–24 under the heading "Fail 54 EP&A Regs", appear to allege that cl 54 did not empower the council to request an OSM Compliance Report and therefore the council had no power to reject DA 08/0966 on that basis. The argument seems to be that cl 54(4) precluded the request because it related to a matter which had to be, or could be, dealt with later at the construction certificate stage. The legal basis for the argument is not explained.

92 The capacity of the existing septic tank to handle potential additional waste generated by the proposed development was a highly relevant matter for the council to consider at the development application assessment stage. If the existing tank were shown to be inadequate, the council would have to decide whether to approve the new bathroom facilities in the shed or to approve them conditionally upon the upgrade of the septic tank. This is not the kind of matter which could or should be left to the construction certificate stage. A certifier could not impose a condition requiring upgrading of sewer management works. If the existing system needed to be upgraded, the applicant would need a s 68 approval, as the council advised, to modify or alter it appropriately.

93 In my opinion, cl 54 empowered the council to request the information it requested from Mr Crowther. The development application was ultimately refused because he refused to provide it. At that point a right of appeal arose under s 97 of the *EPA Act*. Mr Crowther was aware of this (he was informed in the notice of determination) but did not avail himself of that right. That is the end of the matter. The council's actions were orthodox and no breach of the Act is demonstrated.

(iv) FAIL 82 LGA

94 In relation to this heading in paragraph 4 of the Summons, Mr Crowther says that there was a "decision" by the council to make a deemed determination to reject his s 82 *LG Act* objection of 7 November 2008 (see [28] above). I note that on 20 November 2008 the council replied stating correctly that the s 82 application was irrelevant to the assessment of the development application: see [32] above. Section 82 is set out at [29] above.

95 Under this heading the Summons says:

> "Provided for in the event the Court Orders the impugned Decisions and Determinations to revert to the Respondent for Re Determination and Determination of FURTHER DA1 as a precondition to the exercise of the Respondents powers in Determining DA 08/0966 and SEP 08/0087."

96 I do not propose to make any such "revert" order.

97 The Points of Claim at p 33 and following deal with this aspect under the heading "Fail 82 LGA, Fail 99 LGA, Fail 100 LGA, Fail 176 LGA". These allegations are placed together, apparently on the basis that they all relate to the same subject matter.

98 Under this heading in the Points of Claim in subparagraph (1) there is quoted Mr Crowther's letter to the council of 13 October 2008 (referred to at [23] above) in which he stated that the undertaking of an OSM Compliance Report would prevent the continuance of his existing use, apparently because of his apprehension that if he provided the report he would be required to update the existing sewage system to comply with AS 1547/2000 as a condition of development consent.

99 Section 82(1) of the *LG Act* provides for the applicant for an approval under s 68 to lodge an objection either to the effect that any adopted local policy or relevant regulations "do not make appropriate provision with respect to" the activity for which approval was sought, or that compliance

with the regulations or policy is "unreasonable or unnecessary in the particular circumstances of the case". Section 82(3) and (3A) allow a council to make a direction effectively dispensing with the application of an adopted local policy or (with the Director General's concurrence) to dispense with or adjust the application of the regulations in question. In either case, the council must be satisfied that the objection is "well founded".

100 Mr Crowther's letter of 13 October 2008 was not an objection under s 82. In the first place, it preceded any application for approval under the *LG Act* by two days, so at the time it was written he was not an applicant for approval. Secondly, there was no local policy adopted under Part 3 in existence, nor any relevant regulations to which the objection could or was expressed to apply. Thirdly, the letter was intended to persuade the council to withdraw its request for information because he wrote that it was "almost certain that my existing OSM system" did not comply with the relevant Australian Standard, and that the preparation of a report on compliance would prevent the continuance of an existing use – that is, the septic tank. Those submissions had nothing to do with s 82. The second of these reasons applies also to the s 82 objection of 7 November 2008. Arguable failure to comply with s 82 is not demonstrated.

101 As for the reference to "Fail 99 LGA" in the Points of Claim, s 99 of the *LG Act* is a machinery provision which obliges the council to give an applicant notice of determination of the application. The Points of Claim do not explain how this section is said to be breached. Leaving aside the question of the status of the letter of 13 October 2008, the fact is that the council did (much later, on 2 November 2009) give the s 68 SEP 08/0087 approval, and gave notice of its determination. It had not previously refused this application, but had purported to "cancel" it and had refunded the fee, on the basis of its belief that the application related to the continued operation of the OSM system subsequent to the installation of the new bathroom, which it had refused, and so was devoid of subject matter. As Mr Crowther has the approval he sought, the s 99 argument is

pointless. In any event, there were appeal rights which Mr Crowther chose not to invoke.

102 As for the reference to "Fail 100 LGA" in the Points of Claim, s 100 of the *LG Act* affords an applicant a right to request a review of a decision, as long as the request is made within 28 days of the decision and the approved fee, if any, is paid. In the present case the relevance of this provision is unclear. A request for review was made albeit not ostensibly under s 100 and not relative to the s 68 application, but citing "DA 08/0966" and "s 82A" of the *EPA Act:* see [45] above. The council appears to have treated this application as including a s 100 application, and approval of the s 68 SEP 08/0087 application was ultimately granted. In the meantime, no attempt was made by the council to prosecute and Mr Crowther was fully protected by cl 47(2), which allowed him lawfully to continue to operate the OSM system "until the application is finally determined": see [75] above. No reviewable error is demonstrated.

103 As for the reference to "Fail 176 LGA" in the Points of Claim, s 176 of the *LG Act* is the provision which affords a right of appeal within a 12 month period if an applicant is dissatisfied with respect to the applicant's application for approval, including an application under s 68. There was no such appeal. The Points of Claim do not explain what breach (if breach there could be) of the Act is alleged. The facts do not demonstrate any breach.

104 Subparagraph (2) at pp 36-38 of the Points of Claim contains confusing allegations of denial of procedural fairness and ultra vires. It is clear that no remedy is available to the applicants on any basis there sought to be explained.

105 Subparagraph (3) at pp 38-43 of the Points of Claim appears to be pleaded upon the basis that the alleged breaches of ss 82, 99, 100 and 176 of the *LG Act* have resulted in financial loss to Mr Crowther (who, however, is not named as an applicant) Ms Schultz (who is) and the

company (which is, but which does not appear to have ever conducted any business with the council).

106 Subparagraph (3)(b) discloses that the proposed erection of the shed (and its bathroom) was not for residential purposes and that Mr Crowther (and the applicants) intended to use it for industrial purposes (recycling pallets), which "enterprise was obviated by the rejection of DA 08/0966". The council was not informed of this intended change of use nor asked for development consent for it. It cannot be assumed that the "enterprise" was one which could ever have been lawfully conducted. Subparagraph 3(b) then says that Mr Crowther decided to "build a business in Ecologically Sustainable Development, in order that [he] could better defend the Plaintiffs against the Respondent's allegedly improper purposes and virtually absolute powers and discretions". From what follows, it does not appear that Those Best Placed Pty Ltd has ever traded or had any revenue, nor has it been shown to have foregone any revenue. In any event, only "expenses" are recoverable under s 179 of the *LG Act*, and no "expenses" have been incurred by Mr Crowther or Ms Schultz. "Expenses" incurred by Those Best Placed Pty Ltd are not recoverable as the company was never "an applicant for approval".

107 This group of claims does not disclose any cause of action.

(v) DA 08/0966, (vi) SEP 08/0087, (xiii) Fail 97 EPA Regs

108 Under these headings, paragraph 4 of the Summons says:

> "The Plaintiffs note the provisions of s 69(1) Supreme Court Act 1970, and seek the remedies at law provided by that Sub Section (1), in substitution for the prerogative writs, including Writs of Mandamus and Certiorari.
>
> We seek Orders from the Court pursuant to the Court's jurisdiction in Class Four matters, according to the provision of s 20(4) Land and Environment Court Act 1979, and s 65 and s 69 Supreme Court Act 1970."

109 Mr Crowther says in his affidavit that these headings refer to, respectively, the decision to refuse DA 08/0966, the decision to "cancel" SEP 08/0087, and the "decision" to "fail to notify" pursuant to clause 97 of the *EPA Regulation* "the council's intent to modify/extinguish EUR OSMS".

110 The Points of Claim group these three headings together and address them at pp 60-98.

111 Under the subheading "Failure to Provide Proper, Genuine and Realistic Consideration or Due Process", the Points of Claim at pp 60-93 make submissions under numerous sub-headings including (but not limited to) those referring to financial hardship, improper delegation, irrationality, mandatory statutory considerations, manifest unreasonableness, improper purpose, procedural fairness, bias and ultra vires. Then the Points of Claim at pp 93-98 allege errors of law described as denial of procedural fairness and ultra vires of numerous types.

112 This section of the Points of Claim is very difficult to understand, if not incomprehensible. In my view, no reasonable cause of action is disclosed in these respects. In relation to alleged improper purpose, as I understood Mr Crowther, at one point of submissions he asserted that the proposed bathroom in the shed would not cause any increase in the hydraulic loading of the existing septic system and, therefore, that the improper purpose of the council was to require an upgrading program at the expense of septic tank owners; and at another point he asserted that council's approval of his s68A *LG Act* application was in order to conceal in his case that the council generally had an improper purpose to require septic tank owners to upgrade at their expense. There is nothing before me to reasonably support Mr Crowther's assertions of improper purpose. Indeed, his assertions are difficult to reconcile with council's refusal of the development application, which is the only basis on which council could have made a demand by way of a condition for such expenditure in his case. Further, there is no council decision requiring such an upgrade at a

septic tank owner's consent upon which the Court can adjudicate as to its validity.

113 The remedies sought in the Points of Claim at pp 97-98 appears to require the council to determine "Further DA1" as a precondition (the determination of the claims for existing use rights being a further precondition) to a determination of DA 08/0966 and SEP 08/0087. Neither alleged "precondition" relates to a development application. DA 08/0966 and SEP 08/0087 have both been lawfully determined. No appeals were lodged. SEP 08/0087 was resolved in favour of conditional approval. These claims are insupportable.

(vii) EUR Land, (viii) EUR Building, (ix) EUR OSMS

114 "EUR" is an acronym for existing use rights. In relation to these headings in the Summons, Mr Crowther says in his affidavit that they refer to a "decision" by the council " to fail to provide consent for existing use rights" for, respectively, the Land, his home and the existing OSM system.

115 Under these headings, paragraph 4 of the Summons at p 5 says that the plaintiffs seek the following orders to restore their property rights: "(a) Order in the nature of Writ of Certiorari to quash the Deemed Rejection of the Plaintiffs Property Rights occasioned by the Respondent's failure to Determine the Plaintiff's claims for existing use rights in their land, building and OSMS which rights are provided for by Division 10 of Part 4 EPA, and are subject to the consent of the consent authority which has not been provided (b) Order the Respondent to Fulfil a Duty in the Nature of Writs of Mandamus to give proper, genuine and realistic consideration to the claims of existing use rights for the subject land, building and OSMS and Determine them by either providing the consent of the Consent Authority to those uses, or by proving those uses do not exist, or have been abandoned".

116 In the Points of Claim at pp 44-46 there appears the heading "EUR Land, EUR Building, EUR OSMS". This group of claims seems to rest on an assumption by Mr Crowther that the council is under a statutory duty (the source of which is not particularised) to enter into formal consideration of claims of "existing use", even in a context in which such matters are not relevant to the determination of any actual application for planning approval.

117 Whilst the council has confirmed to Mr Crowther that his premises have "existing use rights", the rights can only be those arising under s 109 of the *EPA Act* as the use of the premises as a dwelling-house is permissible in the zone.

118 The council did not respond, and did not have to respond, to the attempt by Mr Crowther to have it confirm that the existing OSM system had "existing use rights". Mr Crowther's understanding of the law relating to continuing use rights is flawed. Such rights relate to land use, not to particular structures or works (except to the extent that the Act limits enlargements etc and rebuilding). In the context of a septic tank, the relevant right is to use the land for residential purposes, the disposal of effluent being ancillary or incidental to that use. That right does not entitle the landholder to retain a particular tank which, because of a change in volumes of waste treated, is inadequate to afford healthy conditions on the land.

119 Mr Crowther says in the Summons at p 5 and the Points of Claim at p 45 (presumably on his own behalf and on behalf of Ms Schultz, but not on behalf of the corporate applicant) that "The Plaintiffs wish to have our property rights restored". But no property rights have been removed, altered or impacted upon. The claim is hopeless.

(x) Alter/Modify, (xi) Approval

120 In relation to these headings in the summons, Mr Crowther says in his affidavit that they respectively refer to (a) a "decision" to "imply an increased hydraulic loading arising from DA 08/0966 by application of formulae in the Plumbing and Drainage Code of Practice, pursuant to Regulation 16 and Part 2 of Schedule 1 of the *Local Government (General) Regulation*"; and (b) the "decision" by the council 'to require an AS1547/2000 Report in relation to DA 08/0966' pursuant to the same Code of Practice, Regulation and Part. At the hearing I was not taken to the said Code of Practice and am therefore unable to say anything about it.

121 Under these headings in the Summons, there appears a statement that "In the event that the Court's judgment in this matter concludes that the Respondent has no lawful entitlement to require an Application for Approval to operate OSMS to undertake an AS 1547/2000 as a precondition to that Application, the Plaintiffs note that the Respondent has recently amended the Application Form for that Application for 'Approval to Operate OSMS' to make an AS 1547/2000 report mandatory. Subject to the judgment of the court in the above matter, the Plaintiffs seek further orders pursuant to s 65 of the Supreme Court Act 1970, which require the respondent to amend that Application Form to provide the Applicant with Notice that the provision of such a Report is elective, not prescriptive, and may mandate that the subject OSMS may require upgrade, and that by providing the Report they may be subject to financial consequences of up to $20,000".

122 The Points of Claim at pp 46-53 deal with these matters under the heading "Alter/Modify and Approval". These pages concern the council's request for information to be supplied to it so as to enable it to determine the development application. They attempt to elevate a simple and proper request for information (in the form of a report by a qualified person, which

might, of course, have indicated either that the existing OSMS was in fact adequate or that it was not) into a "decision" which evidenced a plot by the council to oblige Mr Crowther and Ms Schultz to carry out, at their expense, some unspecified upgrading work on the existing tank. Mr Crowther makes it clear at pp 50-51 of the Points of Claim that he still refuses to supply the report; that if the council wants the report it should get it itself, at its own expense; and that if the Court "reverts" the decision to refuse the development application to the respondent and it still wants an upgrade done, it will be done, but only if the council pays "its fair share". No reasonable cause of action is disclosed. Moreover, the relief sought is in a form which bears no resemblance to any relief in the Court's power to give.

(xiv) Further DA 1, (xv) Further DA 2, (xvi) Submission ESD, (xvii) Submission 96, (xviii) Incompetent 1, (xix) Incompetent 2

123 Mr Crowther's affidavit says that "Further DA1" is the decision to make a "deemed rejection" of his s 80A *EPA Act* notice of modification of existing use rights dated 9 December 2008 (see [34] above); "Further DA 2" is the decision to make a deemed rejection of his application to modify pursuant to s 96 (see [39] above); "Submission ESD" is the decision to give no consideration to his submissions in support of 08/0966, SEP 08/0087 etc; "Submission 96" is the decision to give no consideration pursuant to s 79C(1)(d) of the EPA Act to his submission in support of Further DA 2; "Incompetent 1" is the decision that Further DA 1 was incompetent; and "Incompetent 2" is the decision that Further DA 2 was incompetent.

124 Under the first two of these headings, the Summons says that the plaintiffs seeks the remedies and orders provided by ss 65 and 69 of the *Supreme Court Act* to:

(a) quash the deemed rejection of "Further DA1";

(b) order the council to fulfil a statutory duty to accept the prescribed fee to determine Further DA 1 to invoke the conditioning power provided by s 80A *EPA Act* as a precondition to determination of DA

08/0966 and SEP 08/0087 by giving proper, genuine and realistic consideration to the merits of the application as required by various statutory provisions and by giving mandatory consideration to the matters provided for in s 79C *EPA Act*, s 89 *LGA* etc.

125 Under the third and fourth of these headings the Summons says "Provided for in the event the impugned decisions and the Determination of DA 08/0966 and cancellation of SEP 08/0087 revert to the respondent at the order of the Court". Under the fifth heading the Summons says "Provided for in the event the Court orders the impugned Decisions and Determinations to revert to the respondent for Re Determination and Determination of FURTHER DA 1 as a precondition to the exercise of the Respondent's powers in determining DA 08/0966 and SEP 08/0087".

126 The Points of Claim at pp 53-60 group these headings together. The arguments are difficult to decipher but their thread seems to be that in the event Mr Crowther's OSM system has to be upgraded, the council must pay for it. They do not rest upon any assertion of breach and do not give rise to any cause of action.

(xi) Approval, (xii) Fail 68 LGA

127 Mr Crowther says in his affidavit that "Approval" is the decision to require an AS 1547/2000 report in relation to DA 08/0966. He says that "Fail 68 LGA" is the decision "to fail to notify" pursuant to s 77 of the *LG Act* an intending applicant (pursuant to s 68) that the undertaking of an AS 1547/2000 report on an existing pre 2002 OSM System "would on the balance of probabilities provide Council with documentary evidence of non conformance of that existing OSMS with current health standards, thereby entitling Council to require the OSMS owner to...alter the OSM system".

128 Under each of these headings in paragraph 4 of the Summons appear the words "As per Alter/Modify" – a reference to heading (x). As the heading (x) claims must fail, so too must these claims.

(xx) Duty of Care, (xxi) Retrospectivity, (xxii) Negligence, (xxiii) Fail approval

129 Mr Crowther says in his affidavit that "Duty of Care" is the decision to fail to provide the applicants with a statutory duty of care; "Retrospectivity" is the decision to approve as council policy recommendations of certain consultants; and "Negligence" is the decision by the council's General Manager to ignore the applicants' claim of financial hardship.

130 Under each of the headings, paragraph 4 of the Summons states:

> "Provided for in the event the Court orders the impugned Decisions and Determinations to revert to the Respondent for Re Determination and Determination of Further DA1 as a precondition to the exercise of the Respondent's powers in Determining DA 08/0966 and SEP 08/0087".

131 The Points of Claim at pp 98-101 group together "Retrospectivity, Duty of Care, Negligence and Fail Approval". These pages do not disclose any reasonably arguable cause of action.

132 Although I cannot see it in the Summons or Points of Claim, Mr Crowther in his affidavit of 13 January 2010 said that "Fail approval" refers to the council's approval of SEP 08/0087 (see [49] above); that the approval was an error of law as the council had earlier referred to it as cancelled; and that he considers no lawful approval has been provided by the council to operate the OSM system on the Land. I have earlier rejected this contention: see [13] above.

(xiv) Fail 81 EP&A

133 Although not pleaded, in Mr Crowther's affidavit of 13 January 2010, he alleged a 24th error of law under the heading "Fail 81 EP&A". Given that it was not pleaded, it is unreasonable that this complaint should be entertained.

134 Lest it has to be entertained, I will make the following observations. Mr Crowther alleged in that affidavit that the council letter to him of 22 December 2008 giving notice of determination of DA 08/0966 (see [42] above) was unlawful because it did not advise that the applicant had the right to request a review of the determination under s 82A of the *EPA Act*, as required by s 81 and clause 100(1)(c1) of the *EPA Regulation*. He submitted in the affidavit that the time for appealing under s 97 and for requesting a review of the determination under s 82A has not commenced to run. This may be based on his evidence that he did not receive the notice of determination of 22 December 2008 addressed to the applicant for approval, The Shed Company. That notice (or at least the first page of it) is in evidence. It states that there is a right of appeal under s 97 although it does not refer to a right of review under s 82A. Section 81(1) provides that the consent authority must "in accordance with the regulations" notify its determination of a development application to the applicant. Clause 100(1) of the *EPA Regulation* prescribes what must be included in a notice of determination, including whether the applicant has the right to request a review of the determination under s 82A and whether the Act gives a right of appeal against the determination to the applicant: cl 100(1)(c1) and (j). A notice of determination must be sent to the applicant within 14 days after the date of determination but failure to send the notice within that period does not affect the validity of the notice: cl 102. An applicant who is dissatisfied with the determination may appeal to this Court within 12 months after the date on which the applicant received notice, given in accordance with the regulations, of the determination (or the date on which the application is taken to have been determined under s 82(1)). A determination cannot be reviewed after the time limited for making an appeal under s 97 expires if no such appeal is made against the determination: s 82A(2A). In the present case, if the applicant for development approval, The Shed Company, did not receive notice of determination of the development application given in accordance with the regulations, the time for appealing under s 97 or for applying for a review under s 82A may not have commenced to run.

However, that does not establish any error of law capable of giving rise to relief as claimed in these proceedings.

ORDERS

135 In my opinion, no reasonable cause of action is disclosed. The proceedings should be summarily dismissed, in the interests of all parties, before the associated costs become unmanageable.

136 The orders of the Court are as follows:

1. The proceedings are dismissed.
2. The applicants are to pay the respondent's costs.
3. The exhibits may be returned.

I CERTIFY THAT THIS AND THE 48 PRECEDING PAGES ARE A TRUE COPY OF THE REASONS FOR THE JUDGMENT OF THE HONOURABLE JUSTICE P.M. BISCOE.

.....
Associate

Date 27 May 2019