JURISDICTION	:	DISTRICT COURT OF WESTERN AUSTRALIA IN CIVIL
LOCATION	:	PERTH
CITATION	:	DE MOL INVESTMENTS PTY LTD -v- THE OWNERS OF STRATA PLAN NO 31757 [2019] WADC 86
CORAM	:	BOWDEN DCJ
HEARD	:	8-10 MAY 2019
DELIVERED	:	5 JULY 2019
FILE NO/S	:	CIV 173 of 2018
BETWEEN	:	DE MOL INVESTMENTS PTY LTD Plaintiff AND THE OWNERS OF STRATA PLAN NO 31757 First Defendant MIDLAND CRESCENT INVESTMENTS PTY LTD Second Defendant THE OWNERS OF STRATA PLAN NO 31757 Plaintiff by Counterclaim DE MOL INVESTMENTS PTY LTD Defendant by Counterclaim

Catchwords:

Strata titles - Application pursuant to s 31 and s 28 to terminate or vary a strata plan - Is demolition of a building on a lot an alteration to which s 7 applies - Effect of demolition on common property - Purported resolution allowing redevelopment of a lot without s 7B particulars being provided - Factors relevant to termination of a strata plan - Factors relevant to variation of strata plan

Legislation:

Strata Titles Act (1985) (WA)

Result:

The plaintiff's application to terminate the strata plan is dismissed
The plaintiff's application to vary the strata plan is dismissed
The defendants' application to vary the strata plan is allowed

Representation:

Counsel:

Plaintiff	:	Mr K de Kerloy
First Defendant	:	Mr H R Robinson
Second Defendant	:	Mr H R Robinson
Plaintiff by Counterclaim	:	Mr K de Kerloy
Defendant by Counterclaim	:	Mr H R Robinson

Solicitors:

Plaintiff	:	Herbert Smith Freehills
First Defendant	:	Haydn Robinson
Second Defendant	:	Haydn Robinson
Plaintiff by Counterclaim	:	Herbert Smith Freehills
Defendant by Counterclaim	:	Haydn Robinson

Case(s) referred to in decision(s):

Commissioner of Taxation v ANZ Banking Group (1979) 143 CLR 499
Crugnale v Commissioner of State Revenue [2019] WASAT 8

Harvey Fields Private Estates Pty Ltd v 33 Malcom Street Pty Ltd [2012] WASC 218
Jago v District Court of NSW (1989) 168 CLR 23
Kasta Nominees Pty Ltd v O'Connor [2016] WADC 16
Kasta Nominees Pty Ltd v O'Connor [No 2] [2017] WADC 3
McHattie v Tuscan Investments Pty Ltd (1997) 18 SR (WA) 231
Minister for Immigration and Citizenship v Li [2013] HCA 18; (2013) 249 CLR 332
Pritpro Pty Ltd v Willoughby Municipal Council (1986) 3 BPR [97224]
Pritpro Pty Ltd v Willoughby Municipal Council (1986) 3 BPR 97224
The Owners of Argosy Court Strata Plan 21513 [2015] WADC 30
Tipene v The Owners of Strata Plan 9485 [2015] WASC 30
Tipene v The Owners of Strata Plan No 9495 [2013] WASAT 186
Tipene v The Owners of Strata Plan No 9495 [2016] WASAT 101
Wise v The Owners of Argosy Court Strata Plan 21513 [2011] WASC 307

BOWDEN DCJ:

1 This action relates to registered Strata Plan 31757 (Strata Plan 31757), upon which is constructed The Crescent Village.

The plaintiff's application

2 The plaintiff seeks an order pursuant to s 31 of the *Strata Titles Act 1985* (WA) (the Act) to terminate Strata Plan 31757 or alternatively an order under s 28 of the Act that the strata plan be varied or substituted with a new strata scheme.

3 The plaintiff says the alternative order of variation of the strata plan is more practical and would have the effect of excising Lot 14 and an area equivalent to 30% of the common property from Strata Plan 31757 and transferring that area (the new lot) to the plaintiff.

4 The plaintiff's aim is to carve off Lot 14 from Strata Plan 31757 so that it has its own title then amalgamate the new lot with other land effectively owned or controlled by them, which is immediately adjacent to Lot 14. Subject to obtaining the necessary approvals the plaintiff could then amalgamate those lands into a new strata plan and construct an eight storey mixed use development on the amalgamated lot.

The defendants' application

5 The defendants seek an order dismissing the plaintiff's application to terminate Strata Plan 31757 and the alternate to carve out Lot 14 and part of the common property. By their counterclaim the defendants apply under s 28 of the Act to vary the strata plan to remove the outline of the now demolished building currently depicted on the strata plan and amend the modified strata plan to reflect those changes.

6 The practical effect of the defendants' counterclaim is to maintain the status quo, which has existed since 2008 when the building depicted on the strata plan was demolished.

The evidence

7 Evidence was given by Mr De Mol on behalf of the plaintiff and the defendants called Mr Carl Aloi, Mr Neil Aloi, Mr Patton and Mr Giles, all directors of the second defendant. Numerous exhibits were tendered.

A general overview - Strata Plan 31757 and the neighbouring lots

8 Strata Plan 31757 comprises an area of approximately 7,024 sqm. Approximately 4,534 sqm is contained within Lots 1 - 15 and approximately 2,490 sqm is common property.

9 Strata Plan 31757 is bounded by The Crescent on its southern border, Sayer Street on its eastern border, The Avenue on the northern border and Midland Oval and other private land to its western border. It is common ground that eventually a road will be built along the western border that will result in some of the strata plan's land being resumed by the city to accommodate that road. The amount of land to be resumed has been the subject of much discussion over the last 25 years and is estimated to be about 160 sqm - 190 sqm.

10 There are three other lots, not associated with Strata Plan 31757, which have The Avenue as their northern border and Strata Plan 31757 as their southern border. I shall refer to these three lots as 'The Western Avenue lot, the Middle Avenue lot and the Eastern Avenue lot.

11 The Eastern Avenue lot's southern and eastern boundary is Lot 14 of Strata Plan 31757. Both the Eastern Avenue lot and Lot 14 of Strata Plan 31757 are owned by companies associated with Mr De Mol.

12 The Middle Avenue lot is currently the subject of an eight storey mixed use commercial development being undertaken by Mr De Mol and/or companies associated with him. This lot has as its southern boundary Strata Plan 31757, the Eastern Avenue lot as its eastern boundary and the Western Avenue lot as its western boundary.

13 The Western Avenue lot is currently the subject of an option to purchase by Mr De Mol or companies associated with him and Mr De Mol's desire is to construct an eight to twelve storey mixed use development on that lot. The Western Avenues lot's southern boundary is Strata Plan 31757, its eastern boundary is the Middle Avenue Lot and its western boundary is land that is not part of Strata Plan 31757.

Background history of Strata Plan 31757

14 In the early 1990s interests associated with the second defendant, primarily driven by Mr Carlo Aloi, amalgamated seven house lots and one vacant lot to form a larger lot.

15 At that time the aim was to demolish the seven houses and build a retail development across all eight lots. It was intended to build the retail development towards the rear of the amalgamated block's boundary and have parking towards the front (The Crescent or southern end) of the lots.

16 By 1994 however the Shire of Swan wished the retail development to be built towards the front (The Crescent or southern end) of the lots and for the parking to be towards the rear of the lots. At that stage the shire planning encouraged single storey buildings with bullnose verandas.

17 The Shire of Swan would only agree to the proposed development if it did not involve building on Lot 44 and Lot 45 (two of the eight lots it proposed to develop) which were situated on the south western end of the proposed development. The shire said those lots could be developed for car parking for the proposed retail development. Apparently it was envisaged by the shire that the Midland Gate Shopping Centre, which is situated on the other side of The Crescent, may ultimately acquire those two lots to facilitate the expansion of that shopping centre (exhibit 1.1).

18 About this time Mr Aloi and his partners changed the name of the corporate entity behind the development to the second defendant's current name, Midland Crescent Investments Pty Ltd (MCI) and purchased a small parcel of land from the Shire of Swan to 'square the boundaries' of the proposed development lot and assist with parking.

19 The second defendant then proceeded to consolidate the eight lots into one lot being the land described as Lot 3 on Certificate of Title Volume 2037 Folio 43.

20 As a condition of approval of the subdivision of Lot 3 into the Strata Plan 31757 the Shire of Swan required provision for permanent access between The Crescent and the common property. This was achieved by way of a deed of access (exhibit 1.3) permitting the registered proprietor of the lots of Strata Plan 31757 and their invitees to have full and free access over Lot 1 between The Crescent and common property. The deed provided that the licence would not be revoked until similar permanent access is created by any further subdivision of the strata plan.

21 Throughout 1995 and 1996 the buildings known as The Crescent Village were constructed on Lot 3.

22 Various regulatory approvals were obtained and Lot 3 was subdivided pursuant to the Act into Strata Plan 31757 which was registered on 30 June 1997.

23 Strata Plan 31757 created 15 lots. Lot 1 has an area of 2,150 sqm, Lots 2 - 13 and 15 have a combined area of 1,165 sqm and Lot 14 an area of 1,219 sqm.

24 The strata plan has the following notation in respect of Lot 1:

> The stratum of Lot 1 extends between 5 m below and 10 m above the upper surface of the ground floor of the part lot comprising the building on Lot 1.
>
> The outer face of the walls of the building form the boundary of the part lots comprising Lot 1.

25 At registration 14 of the lots were owned by the second defendant and one lot (Lot 14) by Mr and Mrs Wallace.

26 Mr and Mrs Wallace subsequently sold Lot 14 to Mr De Mol apparently as trustee for the De Mol Investment Trust.

27 On 22 November 2011 De Mol Investments Pty Ltd became the proprietor of Lot 14.

28 As at the date of this action the second defendant is the registered proprietor of 14 lots of The Crescent Village being Lots 1 - 13 and 15 and the plaintiff is the registered proprietor of Lot 14.

29 The second defendant has 70% and the plaintiff 30% of the aggregate unit entitlements and voting entitlements of the strata company.

The demolition of the building on Lot 1 of Strata Plan 31757

30 When the new retail development was built on Strata Plan 31757 in accordance with the wishes of the Shire of Swan the house which was then on Lot 1 (formally the old Lots 44 and 45) was not demolished.

31 The house was used primarily as the office for Mr Carl and Neil Aloi's building company. The building was in poor condition. From 1993 to 2008 the deteriorating building was neither fixed nor maintained.

32 By 2007 the Alois had moved their office to another location and on 27 June 2007 the building was damaged by fire. It appears that combustible material within the building, furniture and carpet had been set alight. The fire damage caused part of the roof to collapse and caused extensive damage to other rooms.

33 It was decided by at least the second defendant that the building needed to be demolished. A fence was erected around the building so vagrants and others could not have access to the house. The building was subsequently demolished in 2008. The second defendant received an insurance payout of $70,000 in relation to the damaged house which of course had been on the lot it owned.

34 It is not disputed that the second defendant's intent was always to demolish the building on Lot 1 of Strata Plan 31757 whenever and if they were able to further subdivide Strata Plan 31757 and redevelop Lot 1, however the fire caused the building to be demolished earlier than it would have otherwise been.

35 Mr De Mol places some significance on the demolition of the building. Basically he says that if the demolition of the building was an 'alteration' pursuant to s 7 of the Act, s 7(1)(b) of the Act was not complied with as his written approval to the demolition was not obtained and an application under s 7B(1) setting out the details of the proposal to demolish was not made and therefore the first defendant's approval was not obtained.

36 On the other hand Mr De Mol says that if the demolition of the building was not an alteration to which s 7 applied, the second defendant did not make an application or obtain an order under s 28 of the Act allowing it to demolish the building and the second defendant should not benefit from such failures by being successful in their counterclaim.

37 Section 7(2) of the Act provides:

> **7. Structural erections, alterations and extensions restricted, strata schemes**
>
> …
>
> (2) The proprietor of a lot shall not cause or permit —
>
> (a) any structure to be erected; or

(b) any alteration of a structural kind to, or extension of, a structure,

on his lot except —

(c) with the prior approval of the proprietor of the other lot in the case of a strata scheme in which there are not more than 2 lots; and

(d) in any other case with the prior approval, expressed by resolution without dissent, of the strata company.

38 In ***Tipene v The Owners of Strata Plan 9485*** [2015] WASC 30 (***Tipene No 2***) Justice Corboy's obiter dicta suggests that where the demolition of a building that is part of a strata plan is to occur, the requirements of s 7(2) do not need to be complied with as the demolition and destruction of a building on a lot is not an alteration within s 7(2) where the structure in question is an entire building which is part of the strata plan.

39 The second defendant says the demolition of the building on Lot 1 was an alteration to which s 7 of the Act applies because ***Tipene No 2*** can be distinguished. The defendants say that ***Tipene No 2*** related to the destruction of a boundary building which is different to the fact situation in this case. In ***Tipene No 2*** the demolition did affect the boundaries of the lots within the strata plan because the demolished building was entirely within the cubic space specified in the strata plan.

40 The defendants argue that the cubic space for Lots 2 - 15 is determined under s 3(2)(a) of the Act and if a demolition of any of those buildings occurred s 7(2), following ***Tipene No 2***, would not apply and a s 28 application would be required.

41 However, the defendant says that the cubic space of Lot 1 is determined under s 3(2)(b) of the Act. They say Lot 1's cubic space is not confined to an area bounded by the boundaries of the part of the lot within Lot 1 that comprising the building but consists of the entirety of the area depicted on the plan for Lot 1 being the total sum of 2,150 sqm plus the strata extending between 5 m below and 10 m above the upper surface of the ground floor of the part of the lot comprising the building on Lot 1 as is clearly stated on the strata plan.

42 The defendants say that the demolition of the building in this case does not destroy the structure by which the cubic space forming Lot 1 are bounded nor does it destroy the cubic space within which the lot

had previously formed. They say the destruction of the building did not destroy the basis upon which Lot 1 could be measured or mean that the entitlement to undivided share in the common property could be not be calculated

43 Secondly, the second defendant argues that s 7(2) was complied with as a resolution without dissent of the first defendant approving of the demolition of the building which had been on Lot 1 was passed at the annual general meeting (AGM) of 28 June 2007 (the minutes of that meeting are exhibit 1.25) and therefore they had the approval to demolish the building.

44 I reject the defendants' submissions that s 7 applies. ***Tipene v The Owners of Strata Plan No 9495*** [2013] WASAT 186 (***Tipene No 1***); ***Tipene No 2***; ***Tipene v The Owners of Strata Plan No 9495*** [2016] WASAT 101 (***Tipene No 3***) and ***Crugnale v Commissioner of State Revenue*** [2019] WASAT 8 support the proposition that the demolition of a boundary building will obliterate the cubic space that constitutes a lot and the lot will be destroyed with the building.

45 This is because a lot in a strata scheme is a statutory construct created in relation to three dimensional space. The dimension of that space are fixed by the surfaces for the wall, floor and ceilings of a building or parts of a building or by other physical features of the building in the case of a structural cubic space.

46 The demolition of a party wall that forms a boundary between the two lots will destroy one part of the structure that defines the cubic space that forms the lot and the lots would cease to exist as a statutory construct once the walls had been demolished. The destruction of a building in those circumstances means the basis upon which a lot is measured no longer existed and a lot holder's entitlement to their undivided share in the common property could not be calculated and therefore the lot no longer exists.

47 This results in the area formally part of the lot becoming part of the common property of the strata plan and that is why it is necessary to apply to the District Court pursuant to s 28 or s 31 of the Act to obtain consequential orders. Those sections enabled the District Court to approve the demolition of a structure and the erection of the new structure and to deal with the consequences to the lot owners and third parties such as registered mortgagees: ***Tipene No 2*** (Corboy J).

48 Justice Corboys remarks in ***Tipene No 2*** may be obiter and non-binding, however his Honour's reasoning is compelling and I adopt and apply those remarks.

49 A boundary for cubic space, which is external to a building, may be described by reference to the location in relation to the building. Section 3(2)(a) permits a strata plan to create a boundary of a lot, which is external to a building, and that boundary may be a parcel boundary. Section 3(2)(b)(a) and reg 37AA(1)(b) provides that the boundaries of a cubic space, which is external to a building, may be described by reference to the location in relation to the building: ***Tipene No 3***.

50 An examination of Lot 1 of Strata Plan 31757 reveals a part lot that is outside the building boundary and a part lot defined by the building boundary. Lot 1's stratum as endorsed on the plan states, inter alia, the outer face of the walls of the building form the boundaries of the part lots comprising Lot 1.

51 The boundaries of both part lots of Lot 1 are therefore defined by the outer face of the walls of the building. Once the outer face of the walls are destroyed, then the part lot defined by the building no longer exist and the part lot outside the building boundary no longer exists as its cubic space is calculated from the outer face of the walls of the building which no longer exist.

52 The destruction of the building's walls on Lot 1 results in the cubic space that constitutes the part lot constituted by the building and the part lot outside of the building ceasing to exist. The effect of the demolition is in fact, to create more common property: ***Tipene No 1, Tipene No 2 and Tipene No 3***. The plaintiff is in effect entitled to 30% of the undivided common property constituted by the area that was formally Lot 1.

53 I find therefore that s 7 does not apply as the demolition of the building is not an alteration within s 7. The demolition causes Lot 1 to cease to exist and a s 28 application is required.

54 Irrespective of this finding, it is necessary to examine the defendants' contention that s 7(2) was complied with as a resolution without dissent of the first defendant approving the demolition of the building, which had been on Lot 1, was passed at the AGM on 28 June 2007 (the minutes of that meeting are exhibit 1.25) and therefore, the defendants have the approval to demolish the building.

55 It is necessary to examine that issue, in case I am in error, by finding that demolition of the building meant that Lot 1 ceased to exist.

56 The defendants say Mr De Mol attended that meeting where the demolition was discussed and gave his prior approval to the demolition by what was in substance, a resolution without dissent. The defendants submit that the minutes of the AGM of 3 March 2010 (exhibit 1.31) make it impossible for Mr De Mol to deny the accuracy of the minutes of the meeting of 28 June 2007 (exhibit 1.25).

57 Item 6 of the minutes of the meeting of 28 June 2007 states (exhibit 1.25):

> It was discussed in relation to strata Lot 1 – and in particular in the event of destruction or damage to this building. It was agreed by all committee members that in the event that total destruction occurred the owners of strata Lot 1 would more than likely not seek replacement reinstatement and should that occur they would endeavour to negotiate a settlement with the insurer through the strata company and the settlement would be passed onto the proprietors of the strata Lot 1. The amount suggested for this part of the building was $70,000.

58 Item 9.3 of those minutes read 'Demolish the old house ASAP'.

59 The minutes record that Mr Steve De Mol was present at the meeting.

60 Mr De Mol recalled attending that meeting. He said there was a discussion about the old house amongst the other strata members (ts 89). Mr De Mol said he had only settled on his property two weeks earlier and it did not affect his part of the strata and did not affect him at that point. He said he would not have taken any interest in the discussion as his portion of the strata plan was at the furthest end away from the house and he was only interested in his lot. He said there was a general discussion, but no proposal put to the meeting in relation to the demolition of the building and no approval given for the demolition.

61 Mr Giles' evidence in this regard was that Mr De Mol was present and agreed to demolish the house as soon as possible saying 'Yes asap it's a sore eye'. Mr Giles said he particularly remembered Mr De Mol's contribution to the meeting because he 'thought' he remembered Mr De Mol nominating somebody to remove graffiti and suggesting the type of lighting to be installed when the lighting was discussed.

62 Mr Patton said the demolition was discussed and it was agreed that the old house would be demolished as soon as possible. He could not recall if Mr De Mol contributed to the discussion. Mr Patton said there was a discussion about the house including matters such as the insurance company's report and the damage to the property and he recalled Mr De Mol saying words to the effect of 'I agree with the proposal to demolish the house'.

63 I accept the evidence of Mr Giles and Mr Patton on this issue in preference to Mr De Mol's evidence.

64 Firstly, Mr Giles' and Mr Patton's evidence supports the others' evidence. Secondly, it is supported by the minutes of the meeting. Thirdly, Mr De Mol accepted that he was present at the meeting and the house was discussed and at that stage he had no interest in issue relating to Lot 1 and was only concerned with his lot.

65 I find it inherently more probable that in the circumstances where the house had been damaged by fire and all parties agree that the house was discussed, that the resolution that the house be demolished was discussed and passed. At that time Mr De Mol had little interest in anything other than his lot. I find that the resolution without dissent allowing for the demolition of the house was passed. The Act however required that a s 28 application be made.

66 I find that the demolition of the building destroyed the structure by which the cubic space forming Lot 1 are bounded and an application under s 28 should have been made to the District Court by, at least, the first defendant within a reasonable time after the damage or destruction. The defendants make a s 28 application by their counterclaim.

67 The defendants argued that I should deal with their s 28 application to vary the strata plan first and then, having determined that application, consider the applications made by the plaintiff.

68 The plaintiff points out that the defendants' s 28 application had been made until approximately 10 years after the building was actually demolished, and the appropriate course of action is not to compartmentalise each application but rather to consider the evidence in its entirety and then determine the plaintiff's applications and the defendants' applications.

69 The order in which the competing s 28 applications are dealt with make no difference to the result.

The plaintiff's application to terminate the strata scheme

70 Section 31 of the Act provides as follows:

> **31. Termination of scheme by order of District Court**
>
> (1) The District Court may, on an application by the strata company or by a proprietor or a registered mortgagee of a lot within a scheme, make an order terminating the scheme.
>
> …
>
> (3) An order made under this section shall include directions for or with respect to the following matters —
>
> (a) the sale or disposition of any property of the strata company; and
>
> (b) the discharge of the liabilities of the strata company; and
>
> (c) the persons liable to contribute moneys required for the discharge of the liabilities of the strata company and the proportionate liability of each such person; and
>
> (d) the distribution of the assets of the strata company and the proportionate entitlement of each person under that distribution; and
>
> (e) the administration, powers, authorities, duties and functions of the strata company; and
>
> (f) the voting power at meetings of the strata company of persons referred to in paragraph (c) or (d); and
>
> (g) any matter in respect of which it is, in the opinion of the District Court, just and equitable, in the circumstances of the case, to make provision in the order; and
>
> (h) the winding up of the strata company (including the appointment, powers, authorities, duties and functions of any person to carry out the winding up).
>
> (4) An order made under this section may include a direction that money received by the strata company from an insurer of the building shall be paid directly to a mortgagee of a lot.

(5) The District Court may from time to time amend any order made under this section.

(6) Where the District Court is of the opinion that an order should not be made under this section —

(a) it may, upon application made by any person entitled to appear and be heard on the hearing of the application made under subsection (1) or of its own motion, direct that the application be treated as an application for an order under section 28; and

(b) where it makes such a direction —

(i) the application the subject of the direction shall be deemed to be an application made under section 28 by a person entitled to make the application; and

(ii) the applicant under subsection (1), as well as any other person entitled to appear and be heard under section 28, is entitled to appear and be heard on the hearing of the application.

(7) On any application under this section, the District Court may make such order for the payment of costs as it thinks fit.

(8) Upon the making of an order under this section terminating a scheme, the strata company shall immediately lodge a copy of the order with the Registrar of Titles.

(9) Upon receipt of the copy of the order terminating a scheme, the Registrar of Titles shall make an entry on the relevant registered strata/survey-strata plan and, where applicable, on the relevant certificates of title in the manner prescribed.

(10) On the making of an entry under subsection (9) —

(a) in the case of a strata scheme, subsections (2) to (5) of section 30 apply; and

(b) in the case of common property in a survey-strata scheme, subsections (4) and (5) of section 30A apply,

as if the scheme had been terminated by unanimous resolution under section 30(1) or 30A(1) as the case may require.

71 Section 31 permits an application by a proprietor of a lot within a scheme and permits the court to either terminate the strata scheme or

pursuant to s 31(6) make an order under s 28 of the Act for the existing strata scheme to be varied or substituted with a new strata scheme.

72 The Act does not provide any criteria by which the court is to exercise its unfettered statutory discretion to terminate the strata scheme. Accordingly, the statutory discretion is to be exercised judicially by reference to the text, context, scope and purpose of the Act: ***Jago v District Court of NSW*** (1989) 168 CLR 23.

73 The purpose scope and context of the Act includes recognising that there are on occasions deadlocks or disagreements between lot proprietors and that those deadlocks and disagreements are to be resolved by the District Court or the State Administrative Tribunal (SAT). Section 28, s 31 and s 85 – s 103R are all examples were the District Court or SAT can in effect break deadlocks which exist between the parties.

74 The discretion must be exercised with due consideration to those who might be affected by the exercise of the discretion: ***Commissioner of Taxation v ANZ Banking Group*** (1979) 143 CLR 499 and must be exercised reasonably: ***Minister for Immigration and Citizenship v Li*** [2013] HCA 18; (2013) 249 CLR 332 [63].

75 Whilst the manner in which a judicial discretion is to be exercised is often subject to principles or guidelines laid out in prior decisions, each case must be considered on its own merits.

76 The exercise of the court's discretion under s 31 of the Act is a broad discretion. In ***Pritpro Pty Ltd v Willoughby Municipal Council*** (1986) 3 BPR [97224] Young J said:

> Just as the creation of a Strata Scheme drastically alters rights in respect of the land in question, so does the termination of such a Scheme, so much so that the legislature has provided that it is only with the sanction of the Supreme Court that such should be possible.

77 In ***The Owners of Argosy Court Strata Plan 21513*** [2015] WADC 30 McCann DCJ stated termination is a drastic matter, a fortiori, drastic reasons should be apparent. His Honour recognised that the termination of a strata plan drastically alter the property rights of the parties.

78 The plaintiff says the following facts are particularly relevant to the exercise of my discretion to terminate.

Changed circumstances

79 Since the registration of Strata Plan 31757 the City of Swan has adopted the Midland Oval Redevelopment Precinct Business Plan (ts 230) (the business plan). The business plan was prepared pursuant to s 3.59 of the *Local Government Act 1995* (Local Government Act) which requires the city to prepare a business plan in regard to major land transactions for future disposals or acquisitions.

80 The business plan identifies the land within Strata Plan 31757 as designated for redevelopment for mixed use that is residential housing, retail and hospitality use (exhibit 1.56).

81 The business plan refers to the creation of a new junction in the heart of Midland which it envisages will provide new energy and bring new life to make Midland and Swan's heritage new again (exhibit 1.56, page 4). The business plan estimates the redevelopment will take between 10 to 15 years with both public and private development.

82 The business plan acknowledges that the city owns significant land holdings within the new junction and identifies 17 properties currently under private ownership, nine of which are of strategic importance to the city to ensure orderly and proper planning and facilitation of key development sites.

83 The new junction identified by the business plan, and crucial to it, is 11 ha of land bounded by Morrison Road, Keane Street, The Crescent and Sayer Street. Strata Plan 31757 is within the area designated as the new junction as are the Western Avenue lot, the Middle Avenue lot and the Eastern Avenue lot.

84 The business plan states (exhibit 1.56, page 14) that part of the city's commitment to the new junction development is to reduce fragmented ownership in the precinct to ensure that the redevelopment is coordinated and the aim is to deliver a quality built environment for the community and says that the city will continue to purchase property to deliver the outcomes of the business plan

85 The properties within the new junction precinct are indicated on a map in the business plan. The plan states (exhibit 1.56, page 14):

> In the future, the city may resolve to acquire the properties either by negotiations or compulsory acquisition in order to facilitate the Midland Oval Development Masterplan that was adopted by the Council on 30 January 2017.

86 Mr De Mol wishes to develop Lot 14 of the strata plan by amalgamating it with the Eastern Avenue lot and develop both lots in accordance with the business plan.

87 The second defendant also intends and has always intended to develop Lot 1. Such development could now only be in accordance with the business plan.

88 Mr de Kerloy correctly points out that pursuant to s 7(5)(b)(1) of the Act the plaintiff can validly withhold consent to any development proposed by the second defendant on Lot 1 which results in a structure that is visible from outside the lot that is not in keeping with the rest of the current development. The current development is a single storey building with bullnose verandas. Similarly, the second defendant can validly withhold consent to any development on Lot 14 that is not in keeping with the rest of the current development. Although the second defendant's position seems to be that they do not need the plaintiff's approval in relation to the development of Lot 1. I deal with this issue later in these reasons.

89 It is not disputed that the plaintiff has made offers to the second defendant that would allow them to develop Lot 14, however these offers have not been accepted. Mr Giles' evidence was that the second defendant is not prepared to provide any consent to any of the proposals put forward by Mr De Mol to develop Lot 14 in relation to building an 8 to 12 storey mixed use development.

90 The bottom line of the plaintiff's submissions is that since the strata plan was registered, the business plan has been adopted by the City of Swan and that plan encompasses the land contained within the strata plan and envisages that the land encompassed by the strata plan will ultimately be mixed use retail, residential and hospitality. Mr De Mol's proposals to redevelop Lot 14 in a way which complies with the business plan have been rejected by the second defendant.

Animosity and distrust between the parties

91 The plaintiff says that there is animosity and distrust between the parties beyond mere disagreements about their proposal to redevelop Lot 14.

92 In this respect the plaintiff relies on five discrete limbs to establish animosity and distrust.

93 Firstly, they say that the second defendant has unreasonably relied on a resolution without dissent made at the AGM on 26 June 2006 (the minutes of which are exhibit 1.22) as establishing that the plaintiff had agreed to the second defendant proceeding with any development proposal on Lot 1 without the need to notify or obtain approval from the plaintiff as required by the Act.

94 The second defendant's position is they do not need the plaintiff's approval in relation to the development of Lot 1, as is evidenced by their submission and the evidence from their witnesses detailed below.

95 The defendants' written closing submissions state that on 26 June 2006 Mr De Mol as the buyer of Lot 14 attended the AGM of the first defendant at which he was elected as a committee person and a motion passed without dissent to enable Lot 1 to be redeveloped without the need to call a special meeting.

96 Mr Carlo Aloi's evidence was that he does not believe the second defendant needs the plaintiff's consent to any redevelopment of Lot 1 because the second defendant believes it has Mr De Mols consent to any redevelopment of Lot 1 as a result of the AGM in 2006.

97 Mr Carlo Aloi said the second defendant (ts 207) relied on resolution 9.3 made at the AGM on 26 June 2006 to redevelop Lot 1 without the plaintiff's consent, although he also stated that while the second defendant believed they do not need the plaintiffs approval, they are prepared to ask for his approval and if it is not forthcoming take the matter to the District Court.

98 Mr Neil Aloi (ts 249) and Mr Patton (ts 266, 267) stated that they did not have to go back to Mr De Mol to get the plaintiff's permission because of what was agreed at the meeting on 26 June 2006. Mr Giles gave similar evidence at ts 288.

99 The minutes of the AGM of 26 June 2006 provide (exhibit 1.22):

> 9.3 A motion was moved that the redevelopment of Strata Lot 1 could occur without the need of the Owners of Strata Lot 1 having to call a special meeting to discuss this development and that the Strata by-laws be amended to reflect this and this was agreed by resolution without dissent.

100 Mr De Mol says he was certain he was not at that meeting (ts 87). The minute's record that he was (exhibit 1.22). Mr Giles says he is sure that Mr De Mol was at the meeting. Mr Patton, Mr Carl Aloi and Mr Neil Aloi were not at that meeting.

101 It is not necessary for me to determine whether Mr De Mol was at the meeting because even if he was, he was not the registered proprietor of Lot 14 at that time and could not have voted on the resolution. Mr De Mol became the registered proprietor on 30 June 2006. The then proprietors of Lot 14 Mr and Mrs Wallis were not at the meeting according to the minutes.

102 However, as Mr de Kerloy points out resolution 9.3 by its very terms says that the strata by-laws be amended to reflect what had been resolved. The evidence overwhelmingly establishes that the by-laws have not been amended in this regard. Of greater significance, even if such amendments had been proposed the amendments would be inconsistent with s 7 of the Act as contrary to s 42(1). Section 42(1) basically provides that the strata company may make by-laws but those by-laws must not be inconsistent with the Act.

103 Any by-laws reflecting the wording of resolution 9.3 would be inconsistent with s 7 as that section states that the erection of, alteration to or extension of a structure on a lot requires the written approval of each proprietor of the lot in the scheme or a resolution without dissent of the strata company approving the development. No written approval has been given and for a resolution without dissent approving the erection of, alteration to or extension of a structure to be passed, an application setting out the details of the proposal must be provided: s 7, s 7B.

104 Motion 9.3 is inelegantly worded. It refers to 'redevelopment could occur without the need to call a special meeting' to 'discuss the development'. If the motion be interpreted as meaning a special meeting is not required to discuss the development it is unobjectionable.

105 If it is interpreted as meaning a special resolution was not required to redevelop Lot 1, as the second defendant's four witnesses' evidence shows in the way they interpreted the motion, it cannot override the provisions of s 7, s 7B which require written approval of each lot proprietor or the prior approval expressed by resolution without dissent of the strata company.

106 The idea that a special resolution without dissent approving the erection of, alteration to or extension of a structure on a lot can give pre-approval to that development before an application is served on the strata company setting out the details of the proposal, is not in keeping with the provisions of s 7B.

107 Section 7B(1) requires a proprietor seeking approval of a s 7 proposal to serve an application on the strata company which set out details of the proposal and such other information as the regulations prescribed. The details required are extensive as illustrated by ***Tipene No 3***. The regulations require the provision of plans and specifications for the construction of the new improvements, the materials to be used, the method of construction to be used and an estimated work plan, engineering and structural details: reg 34(1), reg 34(5)(a), reg 34(5)(c).

108 Neither Mr De Mol nor the plaintiff have provided written approval to any proposed erection of, alteration to or extension of a structure on Lot 1. The prior approval of the strata company can only be given after the strata company is served with the application setting out the details of the proposal and containing the information by the reg 34 and s 7B.

109 The defendant's position in relation to these matters is somewhat confusing. At ts 305 and ts 306 it is said that the resolution of 2006 meant the 'deal' was 'it's agreed that we can develop Lot 1 without having to go to you'. Then it is said at ts 307 that 'we are allowed to develop and negotiate without involving you'. Contrary to this approach it is said at ts 307 'at the time we need to get approval to build yes got to get your approval'. Then at ts 308 it is said 'not only did they honestly belief it they were right because of the resolution and they were right legally because of the Strata Title Act'.

110 I reject the proposition that resolution 9.3 of 26 June 2006 means that the second defendant could develop Lot 1 without the proprietor of Lot 14's written approval or without the prior approval expressed by resolution without dissent of the strata company made after an application is served on the strata company setting out the details of the proposal and containing the reg 34 information. Such a proposition is contrary to s 7B of the Act. I leave aside issues in relation to the change of registered ownership from Mr De Mol to the plaintiff as that does not affect the conclusions I have reached.

111 Neither Mr De Mol nor the plaintiff was at the time of 26 June 2006 meeting a lot proprietor and the supposed resolution cannot override s 7 and s 7(B) of the Act.

112 The Act requires the written approval of the other lot proprietors or a resolution without dissent of the strata company in circumstances where the strata company has been served with the application setting out the details of the proposal and containing the reg 34 information. As a matter of common sense and statutory construction, the resolution must be a resolution consenting to the development set out in the application: see also ***Kasta Nominees Pty Ltd v O'Connor*** [2016] WADC 16.

113 Mr Robinson however says the real issues are that even if Messrs Aloi, Patton and Giles belief that the 'redevelopment could occur without the need for a special meeting to discuss the development' was erroneous, which I find it clearly was, their belief was honestly held and therefore they were not knowingly disregarding the plaintiff's rights.

114 Two observations need to be made in relation to that submission. First, the second defendant, irrespective of any beliefs held by their directors, did run a proposal for the redevelopment of Lot 1 (the tavern proposal) past Mr De Mol at the 2012 AGM. Subsequently, when his opposition was clear, he abandoned that proposal. Mr De Mol says variously that he first became aware of the tavern redevelopment proposal at the AGM but he then says he had been told by a City of Swan planning officer that a submission had been put in (ts 69 - 70). It is not clear from the minutes or the evidence if the meeting was dealing with a potential resolution to approve the redevelopment.

115 Secondly, the second defendant needed Mr De Mol's written approval or a resolution without dissent of the strata company. This does not mean that they had to discuss the planning of their proposal with him. They are quite entitled not to involve Mr De Mol in discussions about the redevelopment of their lot.

116 I accept that the beliefs held by Messrs Aloi, Giles and Patton were honestly held. However, it was negligent or at best recklessly careless of them to have the unreasonable belief that they could redevelop essentially without Mr De Mol's approval because of resolution 9.3 passed at the 2006 meeting. They have clearly been

shown to be negligent or recklessly careless in their knowledge of the *Strata Title Act* over an important issue.

117 Mr de Kerloy says this demonstrates a disregard for the rights and interests of the plaintiff. More than demonstrating disregard for the rights and interests of the plaintiff, it demonstrates a lack of understanding of the Act. The basis for the second defendant's belief is their belief that Mr De Mol was only interested in Lot 14 and was happy to let the second defendant do whatever they wanted on Lot 1, and they were only interested in Lot 1 and up until this dispute had let Mr De Mol do what he wanted on Lot 14.

118 Irrespective of the beliefs Messrs Aloi, Giles and Patton held the fact that the tavern redevelopment proposal was raised at the AGM in 2012 mitigates against a finding that the second defendant's actions showed a flagrant disregard for the rights and interests of the plaintiff as alleged by Mr de Kerloy.

119 The second limb relied upon by the plaintiff to show that there was animosity and distrust between the parties is the allegation that the second defendant had,

> snubbed the reasonable concerns of the plaintiff in relation to important matters that affect the strata scheme as a whole in particular disregard of the plaintiff's concern relating to the first defendant's potential non-compliance with local and government Regulations as evidenced by the dismissive approach taken by them at the extraordinary general meeting of the 17 January 2019.
>
> (paraphrased)

120 The defendants say that I should have no regard to what occurred on that date because it occurred after the issue of the writ. I reject that submission. In my view the court in determining whether it should exercise its discretion is entitled to take into account all matters occurring up until the date of the trial.

121 In any event at the extraordinary general meeting on 17 January 2019 (the minutes of which are exhibit 1.58) the second defendant moved not to discuss a number of matters raised by Mr De Mol and which were noted in the agenda in effect saying these items would have to be resolved by SAT. The matters raised by Mr De Mol had been placed on the agenda effectively at his request (exhibit 1.57). The minutes of that meeting (exhibit 1.58) and the evidence of all parties establish that the second defendant moved not to discuss these

items stating that they had to be resolved in SAT. The motion was passed because of the second defendant's 70% voting rights.

122 It is put by me by Mr de Kerloy that the fact that the second defendant was not prepared to discuss matters legitimately placed on the agenda by a lot proprietor was a flagrant disregard of that lot holder's rights.

123 In one sense the second defendant's approach, which essentially was that there could not be an agreement between the parties because they had 70% and Mr De Mol 30% of the votes, and they would not be able to reach an agreement so the matters would have to be dealt with by SAT, is a practical and time expedient approach.

124 However, if a proprietor does have legitimate concerns about various issues and those items are placed on the agenda, those matters should not be dismissed without giving the proponent the opportunity to address those matters.

125 The second defendant's approach, exemplified by Mr Neil Aloi's evidence that the meeting was to discuss other topics, overlooks the fact that those other topics and Mr De Mol's motion were on the agenda and reeks of an approach by the second defendant that they will only discuss the matters that they wish to. This was a flagrant disregard of the plaintiff's rights.

126 Mr de Kerloy also points to events surrounding the tavern redevelopment proposal raised at the AGM of 14 August 2012 (the minutes of which are exhibit 1.35) as evidence of a flagrant disregard of the plaintiff's rights.

127 Mr De Mol said he had serious concerns about the proposal which he had noted in the minutes, in particular how it would affect the parking access of the property and how it would affect the other strata lots. Mr De Mol says that Mr Giles agreed that he would get back to him to discuss the issues he raised but did not do so.

128 It is accepted by Mr Giles that he said that he would get back and discuss the matter with Mr De Mol. Mr Giles' explanation was that he did not do so essentially because the second defendant abandoned the redevelopment, and in those circumstances there was nothing to get back to Mr De Mol about.

129 I accept Mr Giles' evidence in this regard.

130 The Act does not requires the second defendant to discuss any redevelopment proposal with the plaintiff. They simply need his approval (either because he is a lot proprietor or because he has 30% of the votes under his control and unless he supports the proposal a resolution without dissent cannot pass). It is polite and good politics to involve the other proprietors in discussions relating to any proposed redevelopment, however the second defendant is quite entitled to put their proposal to the plaintiff for his approval without having discussed it with him beforehand. It may not be the polite way of doing business but I do not consider it shows a flagrant disregard for his rights.

131 Similarly, it would have been polite of Mr Giles to report back to Mr De Mol and tell him the second defendant was not proceeding with the redevelopment, and while the failure to do so was disrespectful to Mr De Mol, it was not a flagrant disregard of his rights.

132 The third limb relied upon by the plaintiff to show animosity and distrust between the parties is what Mr De Mol says were ongoing issues from day one to do with the allocation of parking permits between the second defendant and the plaintiff.

133 Mr De Mol's evidence in this regard was that the second defendant allotted themselves 28 permits and allowed the plaintiff two permits. He said his queries and concerns in relation to parking issues were dismissed. De Mol explained that he had five tenancies within Lot 14 and the tenants wanted specific car bays. Mr De Mol said that in 2007 they tried to get reserved bays but the strata management would not agree. In another part of his evidence Mr De Mol said there were some 50 car bays 23 of them were unallocated, 25 were the subject of permits given to the second defendant (and/or I assume their tenants) and two were given to the plaintiff.

134 This evidence was contradicted by Mr Carlo Aloi's. He said that he understood Mr De Mol had 11 car bays and the second defendant 14. He said the plaintiff's problem was self-inflicted because when he purchased Lot 14 he divided it into smaller offices which put pressure on the parking because each tenant of the smaller offices wanted a reserved bay. Mr Carl Aloi said there was no parking problems and no one who wanted to go to their tenancy was denied parking.

135 Mr Neil Aloi said he did not take any interest in issues relating to car parking and car parking permits. He said 11 of the bays were allocated to the plaintiff and 14 to the second defendant and the rest

were public space. He said Mr De Mol had concerns about parking, but he did not agree with those concerns. He said that there a total of 40 bays on the common property and approximately 40 bays on Lot 1.

136 Mr De Mol's evidence was that the plaintiff was allocated only two permits and the second defendant 25 – 28 permits. Both Mr Neil and Carlo Aloi said 14 permits were allocated to the second defendant and 11 to the plaintiff. Mr de Kerloy accurately and succinctly stated the position when he said 'I am not sure that we ever really got to the bottom of – it was one of you against the other' (ts 357). Parking was clearly a weeping sore and as Mr De Mol stated had been an issue from day one.

137 I find there were ongoing issues with parking, however I am not satisfied that there is inequitable allocation of parking permits as stated by Mr De Mol. Whilst parking was an issue it does not in my view show animosity and distrust between the parties. The issues simply reflect the tendency of each party pursuing their own interests.

138 The fourth limb relied upon by the plaintiff to show animosity and distrust is what Mr De Kerloy described as the defendants' contemptuous and insulting attitude towards Mr De Mol demonstrated by:

(a) Mr Carlo Aloi's evidence describing Mr De Mol's concerns as 'concocted', 'red herrings' and a 'load of rubbish' (ts 211);

(b) Mr Carlo Aloi's evidence that the second defendant did not have the 'time' or 'inclination' to discuss the matters raised by Mr De Mol at the extraordinary general meeting in January 2019 (exhibit 1.58); and

(c) Mr Patton's evidence that he 'did not care' about Mr De Mol's concerns (ts 264) at the extraordinary general meeting in January 2019 (exhibit 1.58).

139 I find that the expressions used by Mr Aloi such as 'concocted', 'red herrings' and 'load of rubbish' are a colourful way of indicating that he disagreed with Mr De Mol's assertions.

140 In relation to Mr Aloi's and Mr Patton's evidence as to the events occurring at the extraordinary general meeting of January 2019 this is really just rehashing matters already dealt with under the second limb. I have already found that the failure at that meeting to give Mr De Mol

the opportunity of discussing the matters that he be put on the agenda was a flagrant disregard of his rights.

141 The fifth limb relied upon by the plaintiff to show animosity and distrust is what Mr de Kerloy described as the second defendant's attempt to paint Mr De Mol as an unreliable witness because he challenged the veracity of the minutes of meetings of the first defendant.

142 It is said this shows lack of trust between the parties particularly bearing in mind the second defendant's witnesses admissions that the minutes contained inaccuracies.

143 Mr Giles' and Patton's evidence was that the minutes of the meeting of 28 June 2007 were correct (exhibit 1.25). Mr Giles even went so far as to say that he did not believe there were any errors in the minutes of the meetings.

144 This is demonstrably incorrect. The minutes of 28 June 2007 meeting read (exhibit 1.25) item 6 'it was discussed in relation to strata Lot 1 – and in particular in the event of the destruction or damage to this building'. At the time of the meeting (28 June 2007) the fire had already damaged the building so it was wrong for the minutes to refer to 'in the event of the destruction or damage to the building'. Both Mr Giles' and Patton's agreed that they had provided earlier statements which accepted that those minutes were incorrect. The sworn evidence of both Mr Giles and Mr Patton that all the minutes were accurate was incorrect.

145 I find that the minutes of the meeting (exhibit 1.25) are inaccurate and I accept that there has not been a satisfactory explanation for the inaccuracies. Neither Mr Giles nor Mr Patton were able to satisfactorily explain why they had made statements inconsistent with their evidence over the accuracy of the minutes. However, it seems to me it is a relatively small point easily explainable by the pressure of cross-examination.

146 The second defendant's attempts to paint Mr De Mol as an unreliable witness as he challenged the veracity of the minutes of the meeting of the first defendant is just the inevitable by-product of litigation.

147 In any event Mr De Mol has been shown to give evidence which was simply incorrect in relation to roadworks. In relation to the road to be built along Strata Plan 31757 western boundary, Mr De Mol said the City of Swan were 'now constructing a road' stating the tender had been awarded and there had already been a track cut through the road (ts 112). When specifically questioned as to whether they were physically doing work on the road he replied that they were (ts 74 - 75).

148 Mr Carl Aloi's evidence was that he inspected the site on 8 May 2019 and no work had been done on the north and south road. He said he drove right to the end and there had been 'no work done at all' (ts 174).

149 Mr Neil Aloi said he had inspected the site on 8 May 2019 and there was no evidence of machinery, nor of any disturbance of the earth's surface or anything to indicate machinery had been there. He said that he examined the site from both the north and south sides (ts 238).

150 I prefer the evidence of the Alois in this regard. It is supported by the other brother's evidence. Mr De Mol may be correct in stating that the tender has been awarded, but I do not accept his evidence that the road works have commenced to the extent of cutting a track through. The second defendant's attempts to paint Mr De Mol as an unreliable witness find some factual base on this relatively minor point. However, that by itself falls a long way short of establishing that the relationship of mutual trust and confidence has broken down.

The inability to break the deadlock

151 Another factor Mr de Kerloy says is to be considered is that the deadlock which currently exists between the parties cannot be broken without the court's intervention.

152 The deadlock exists because the second defendant objects to the redevelopment of Lot 14 in the manner proposed by Mr De Mol and clearly one can infer a reasonable expectation that Mr De Mol will not provide his consent to any development on Lot 1 because of the impact that development would have on his lot.

153 Mr de Kerloy says that there is no other mechanism under the Act to break this deadlock.

154 Section 51 provides inter alia:

> Where a resolution without dissent is necessary before an act can be done and that resolution is not obtained but the resolution is supported to the extent necessary for a special resolution then a person included in the majority in favour of the resolution may apply to the District Court to have the resolution as so supported declared sufficient to authorise that particular act.

155 For a resolution to be supported to the extent necessary for a special resolution more than 50% of the aggregate unit holders in the lots have to vote in favour of it, and those voting against it must hold less than 25% of the aggregate unit entitlement: s 3B(2)(b). The plaintiff holds 30% of the aggregate unit entitlement, so in effect s 51 could not be used by either the plaintiff or the second defendant to have a resolution to subdivide the lot or to alter any structure on the lot passed as if it had have been a resolution without dissent.

156 Section 103F relates to dispensing with the approval required under s 7(2) or s 8(a)(2) by an application to SAT. However, SAT's ability to dispense with the approval required under s 7(2) or s 7(a)(2) is dependent upon being satisfied the approval of the other lot proprietor has been unreasonably withheld.

157 Section 7(5) of the Act specifically allows the lot proprietor to withhold approval if the carrying out of the proposal would result in a structure that is visible from outside the lot and that it is not in keeping with the rest of the development.

158 Therefore if the proposed development is for anything other than a single storey bullnose building, a lot proprietor could withhold approval because the carrying out of the proposal would result in a structure that is visible from outside the lot and that it is not in keeping with the rest of the development. The State Administrative Tribunal could not say that approval was unreasonably held and therefore could not dispense with approval.

159 Mr de Kerloy points out that if the second defendant was to propose to erect a structure on Lot 1 which was in keeping with the rest of the current development, being single storey bullnose verandas, it would not be approved by the relevant planning authorities because it is not consistent with the business plan.

160 Therefore Mr de Kerloy argues that there is no other alternate but for the court to exercise its discretion under either s 31 and terminate the plan or exercise its discretion under s 28 and vary the strata plan, otherwise there could be no sensible development taking place on Lot 1 and no redevelopment of Lot 14 could be undertaken.

161 I agree with the submission that the inability to resolve a deadlock between proprietors is a relevant matter to consider when determining a s 31 termination application, and I agree that for the reasons advanced above, s 51 and s 103F in the circumstances of this case would not assist to resolve this deadlock.

162 Mr Robinson submits that any difficulties which exist between the plaintiff and the defendants exists solely because the second defendant has 70% of the unit entitlements and the plaintiff has 30%. Mr Robinson correctly points out that the plaintiff knew this when they purchased their lot and it is just an inevitable consequence of purchasing a lot in a strata title.

163 Mr Robinson points out that the strata scheme works effectively. The plaintiff is able to use and has been using Lot 14 in the manner in which they wish and the second defendant have been using their lots in the manner they wish. Mr Robinson says that if the strata plan is working, the desire of the plaintiff to terminate the strata plan so he can redevelop his lot is not a basis for termination.

164 I do not accept the proposition that just because a strata plan is working and the proprietors are able to use their lots in the manner envisaged by the strata plan, the strata scheme can never be terminated. Nor do I accept the proposition that the mere desire alone of a lot holder to redevelop his lot in accordance with the business plan of the local authority by itself would never be sufficient grounds to grant termination.

Relevant factors

165 The changed circumstances constituted by the City of Swan's business plan which encompasses the land within the strata plan is a relevant factor to consider.

166 It is also relevant that there is no other mechanisms than termination of the plan pursuant to s 31 or variation pursuant to s 28 to break the current deadlock between the parties. However, that deadlock exists simply because Mr De Mol wishes to redevelop Lot 14

and effectively amalgamate it with other property he either owns or controls.

167 It is a relevant factor that each lot proprietor has been able to use their lots in the manner envisaged by the strata plan and envisaged by them at the time they purchased their lots. The existing strata plan 'works' and The Crescent Village functions in the manner envisaged by the parties at the time of the purchase of their lots and currently.

168 It is a relevant factor that the plaintiff wishes to redevelop their lot which has an area of 1,219 sqm in a manner consistent with the business plan.

169 It is a relevant factor that the second defendant also plans at some unspecified date to redevelop Lot 1 which originally had an area of 2,150 sqm of the total strata plan area of 7,024 sqm of which approximately 2,490 sqm is common property (leaving aside the common property issue relating to Lot 1 that arose following the demolition of the house, a position which appears not to have been recognised by any of the parties). The total area of Lots 1 - 15 is 4534 sqm. The effect of this is that the plaintiff as owners of Lot 14 wishes to redevelop 1,219 sqm of the strata plan and the second defendant as owners of Lot 1 (again leaving aside the common property issue) wish to develop at some unspecified date 2,150 sqm. Thus at total of 3,369 sqm is earmarked for development being approximately 74% of the total area of the lots, excluding common property. Any redevelopment of Lot 1 or Lot 14 could only occur in accordance with the business plan.

170 It is also a relevant fact that a lot proprietor is entitled not to redevelop his unit and is entitled to use his lot in accordance with its current use. This is a fundamental right of the lot proprietor. A lot proprietor may choose to redevelop his lot but is not obliged to.

171 It is also a relevant factor that all the lots on the strata plan are owned by the second defendant and plaintiff.

172 It is a relevant factor that I have found there is some evidence of animosity, distrust and flagrant disregard for the plaintiff's rights as evidenced by the second defendant's attitude towards dealing with matters that Mr De Mol placed on the agenda of the 2019 meeting. The defendants have also been negligent or recklessly careless in their knowledge of the *Strata Title Act* over an important issue as evidenced by the unreasonable reliance on the resolution of 26 June 2006.

However, I have found notwithstanding the director's beliefs as to the legal effect of that resolution, their actions as exemplified by their discussion of the '2012 Tavern Redevelopment Proposal' with Mr De Mol shows they did not always acted in accordance with those beliefs.

173 It is a relevant factor that I find that generally during the period of the strata plan there have been no significant issues between the parties, other than the second defendant's tavern redevelopment proposal in 2012 and Mr De Mol's current desire to redevelop Lot 14.

174 It is a relevant factor that the aim sought to be achieved by the plaintiff's termination application can be achieved in a less invasive way that is by variation of the strata plan.

175 I do not consider that the parking issue is anything other than a normal parking disputes, which would arise from time to time in strata complexes.

176 In relation to the allegations of contemptuous and insulting attitude towards Mr De Mol, as evidenced by some of the answers given in cross-examination by the directors of the second defendant, these are the same answers that have led me to reach the conclusions referred to in relation to the extraordinary general meeting of 2019.

177 In relation to the allegation that the defendants have attempted to portray Mr De Mol as an unreliable witness because he challenged the minutes of some of the meetings in circumstances, where the minutes of at least one meeting are demonstrably incorrect, I attach little weight to this point in the scheme of things. Similarly, my findings that Mr De Mol's evidence is not to be accepted on some issues, such as the roadworks and whether a resolution authorising demolition was passed, is of little if any significance.

178 Whilst ***Kasta Nominees Pty Ltd v O'Connor [No 2]*** [2017] WADC 3 was factually different from this case and involves different sections of the Act, it is useful to examine the factors his Honour Birmingham DCJ QC took into account.

179 In ***Kasta Nominees Pty Ltd v O'Connor [No 2]*** the applicants sought to change the zoning of some ground floor units so they could be used as offices. It was common ground that it had not been possible to use those units as either a tavern or restaurant during the life of the building. The City of South Perth ruled that the proposed change

would require additional car parking bays. The applicants wished to allocate parking bays essentially from common property to the unitholders of the ground floor units to meet the requirements of the City of South Perth.

180 An application was made to his Honour pursuant to s 51 for approval of the subdivision on the strata plan in circumstances where the resolution approving the subdivision had failed to pass unanimously.

181 His Honour considered both ***McHattie v Tuscan Investments Pty Ltd*** (1997) 18 SR (WA) 231, 235 and ***Harvey Fields Private Estates Pty Ltd v 33 Malcom Street Pty Ltd*** [2012] WASC 218 saying the relevant factors included inter alia,

- The benefits and detriments to the proprietors occasioned by the resolution.
- Any derogation that would result to the proprietary rights which were in the proprietor's contemplation at the time of the purchase by him of the unit and the effect on their voting entitlements.
- Whether the land had met or satisfied its intended purpose in whole or in part in the period since the strata titled development was completed.
- Whether there had been changes to the zoning.
- Whether previous intended use could no longer be enjoyed by the unitholders (or some of them) due to change in the environment or society amenity in the vicinity of the subject property.

182 The effect of termination of the strata plan on the amenities of the lots in the strata plan would normally be a very significant and crucial factor to consider. However, in this case the defendants have not put this in issue either by its defence or by its counterclaim.

183 In their closing written submission the defendants criticise the plaintiff for not addressing issues relating to the strata plans amenity (defendant's closing written submissions par 90).

184 The submissions also say that it cannot be concluded that a termination of the strata plan will facilitate a practical and commercial outcome which is at best to the advantage of both parties, and not to the detriment of the second defendant. The submissions also refer to the proposed redevelopment of Lot 14 potentially creating traffic problems, potentially being detrimental to the tenants of the second defendant, introducing complex landlord and tenant problems, destroying all the strata titles and requiring rerouting of services.

185 This submission must be viewed in light of a pre-trial ruling made by his Honour Gething DCJ on 9 April 2019. The plaintiff had proposed to adduce expert evidence about the effect of termination on the amenities. The defendants opposed the introduction of that evidence. His Honour ruled that there was to be no amenity evidence led at the trial in circumstances where the defendant did not wish to put any issue of the amenities of the properties in dispute.

186 His Honour stated (ts 16 – 17):

> … And is it then the case that the – from the defendants' prospective the defendant is happy to proceed on the basis that no one is going – no one from the defendants' side is going to be giving evidence as to the potential impact of the sub-division.
>
> **ROBINSON, Mr:** Yes.

187 Mr Robinson later responded to a questions from his Honour that 'consequences of the subdivision are just not raised' by replying 'No not at all so we say get rid of this distracting evidence its not the lynchpin of the case by any means, its not the pleaded case …' (ts 18).

188 His Honour Judge Gething stated:

> Now ,on the pleadings as they stand ,the issue of what I might call the town planning – or the consequence of a dissolution is not raised and it is not raised that I can see in the defence and counterclaim (ts 20).
>
> … and on the pleadings it is not apparent to me that there is a need for – the issue of the amenity consequence of the dissolution is raised by the pleadings. So therefore it was not a relevant issue. (ts 21)

189 His Honour Judge Gething therefore did not allow the proposed evidence from the plaintiff's expert as to the effect of the termination on the values of the strata units stating that the 'amenity consequences of dissolution is outside the framework of the pleadings' (ts 22).

190 It is therefore somewhat surprising that the defendants, the plaintiffs in the counterclaim, who successfully opposed the introduction of amenity evidence by the plaintiff on the basis that it was a distraction and thus irrelevant, then criticises the plaintiff for not leading amenity evidence. The defendant specifically argues that the redevelopment may be detrimental to the tenants (of which there is no evidence), create traffic problems (of which there is no evidence), introduce complex, landlord and tenant problems (of which there is no evidence) and may require rerouting of services (of which there is some evidence) and it would affect the interest of the City of Swan and the ANZ Bank.

191 The narrow view urged upon me by the defendants is that the plaintiff has pleaded in par 11 of the statement of claim that long-term animosity between the parties and a long-term absence of mutual trust and confidence between the parties justifies the termination of the strata plan and that defines the issues I am to consider, such that if the plaintiff does not establish that matter, there is no basis to exercise the statutory discretion.

192 The wider view is that an application can be made by a lot proprietor under s 31. Therefore the court has jurisdiction and all evidence heard on that application is to be considered in determining if the discretion should be exercised in favour of the plaintiffs.

193 In my opinion the wider view is clearly correct

194 Irrespective of whether the narrow or wider view is taken, the result is the same.

195 On the narrow view, I am not satisfied the plaintiff has proven there was long-term animosity between the parties and a long-term absence of mutual trust and confidence between the parties as pleaded in par 11 of the statement of claim as would justify terminating the strata plan.

196 Generally during the period of the strata plan there have been no significant issues between the parties, other than the second defendant's tavern redevelopment proposal in 2012 and Mr De Mol's current desire to redevelop Lot 14.

197 Clearly there were issues relating to the items placed on the agenda of the 2019 extraordinary meeting. However, those matters can ultimately be resolved by applications being made under other provisions of the Act to SAT.

198 The second defendant's negligent or reckless carelessness in relation to its knowledge of the Act as evidenced by their unreasonable reliance on the resolution of 26 June 2006 is mitigated by the fact that notwithstanding the directors' beliefs, they did not always act in accordance with those beliefs.

199 In any event those matters alone, in combination with each other or in combination with the other matters that I have referred, do not persuade me that the plaintiff has proven there was long-term animosity or long-term absence of mutual trust and confidence between the parties as pleaded in par 11.

200 Taking the wider view and considering all the matters raised by the evidence individually and cumulatively, I do not consider that any basis justifying termination has been established by the evidence.

201 Terminating the strata plan is a drastic step: ***Pritpro Pty Ltd v Willoughby Municipal Council*** (1986) 3 BPR 97224.

202 The plaintiff's desire to redevelop Lot 14 albeit in accordance with the business plan, his desire to amalgamate Lot 14 with other property he owns, the lack of any other mechanism to break the deadlock and the second defendant's desire to eventually redevelop Lot 1, does not cause me to exercise my discretion in favour of termination.

203 Weighing all the competing factors and particularly because the aim sought to be achieved can be achieved in a less invasive way, that is by variation rather than termination of the strata plan, I am not satisfied that I should take the drastic step to exercise my discretion to terminate this strata plan based on the evidence produced.

The plaintiff's application under s 28 of the Act

204 Section 28 of the Act provides as follows:

> **Variation of strata scheme upon damage or destruction of building**
>
> (1) Where a building shown on a registered strata plan is damaged or destroyed, the District Court may, on an application by the strata company or by a proprietor or a registered mortgagee of a lot within the strata scheme, make an order for or with respect

to the variation of the existing strata scheme or the substitution for the existing strata scheme of a new strata scheme.

…

(3) Without limiting the generality of subsection (1), an order made under that subsection may include such directions for or with respect to any one or more of the following matters as the District Court considers necessary or expedient —

(a) the reinstatement in whole or in part of the building;

(b) the transfer or conveyance of the interests of the proprietors of lots that have been damaged or destroyed to the other proprietors in proportion to their unit entitlements;

(c) the substitution for the existing schedule of unit entitlement of a new schedule of unit entitlement;

(d) the application of insurance moneys received by the strata company in respect of damage to or destruction of the building;

(e) the payment of moneys to or by the strata company or any one or more of the proprietors;

(f) manner as the District Court thinks fit, so as to include any addition to the common property;

(g) the payment to a mortgagee of a lot of money received by the strata company from an insurer of the building;

(h) any matter in respect of which it is, in the opinion of the District Court, just and equitable in the circumstances of the case to make provision in the order;

(i) the imposition of such terms and conditions as the District Court thinks fit.

(4) The District Court may from time to time amend any order made under this section.

(5) An order made under this section shall take effect —

(a) except as provided in paragraph (b), on the day specified in the order or the day when the order is lodged for registration with the Registrar of Titles, whichever is the later;

(b) in the case of an order made under this section as applied by section 29, on the day on which the taking referred to in the order takes effect.

(6) Where the District Court is of the opinion that an order should not be made under this section —

(a) it may, upon application made by any person entitled to appear and be heard on the hearing of the application made under subsection (1) or of its own motion, direct that the application be treated as an application for an order under section 31; and

(b) where it makes such a direction —

(i) the application the subject of the direction shall be deemed to be made under section 31 by a person entitled to make the application; and

(ii) the applicant under subsection (1), as well as any other, person entitled to appear and be heard under section 31, is entitled to appear and be heard on the hearing of the application.

(7) On any application under this section, the District Court may make such order for the payment of costs as it thinks fit.

205 As can be seen upon an application under s 31 of the Act, s 31(6) provides if the District Court is of the opinion that termination should not be made, it may upon application made by any person entitled to appear and be heard on the application to terminate the strata scheme direct that the application be treated as an application for an order under s 28.

206 Clearly the plaintiff is a person entitled to make the application to terminate the strata title as he is a lot proprietor and has made the application.

207 I am not satisfied that termination should be ordered.

208 Therefore I direct that the application be treated as an application for an order under s 28.

209 Mr de Kerloy says that where s 31(6) is engaged and the court orders that the application be treated as an application under s 28 the court's powers are not preconditioned by the requirement for the building on a registered strata plan to be damaged or destroyed.

210 It is not necessary for me to determine this point because that precondition has been satisfied as the building on Lot 1 was damaged by fire in 2007 and destroyed by demolition in 2008.

211 Section 28 allows the court to consider any matter in respect of which it is, in the opinion of the District Court, just and equitable in the circumstances of the case to make provision for in the order.

212 Once s 28 is enlivened the District Court has the power to vary the strata plan, maintain the status quo or to make an order, for example reinstating the building that was demolished, or varying the strata plan. The court could determine that, notwithstanding a building has been damaged or destroyed, it does not require anything to be done to the existing strata plan: ***Wise v The Owners of Argosy Court Strata Plan 21513*** [2011] WASC 307.

213 In relation to the plaintiff's application to vary the strata scheme, Mr de Kerloy say that all of the matters that he suggested be taken into account in relation to termination should be considered by me in relation to variation.

214 Mr Robinson's position is that only factual circumstances existing prior to the issue of the writ should be considered and a mere desire by a lot holder to redevelop his lot is not sufficient to justify variation in circumstances where the strata plan is working in the sense that each of the lot proprietors are able to use their lots in a manner envisaged by them at the time of their purchase.

215 I recognise that varying the existing strata scheme or substituting the existing strata scheme for a new strata scheme is not as drastic as terminating a strata scheme, it is still a significant step to take.

216 I consider that all of the factual circumstances existing up until the date of the trial are matters the court is entitled to take into account.

217 I reject Mr Robinson submission that only matters relevant to the workability of the existing strata scheme are relevant and the court should not look at matters extrinsic to that scheme.

218 I reject Mr Robinson's submission that it is not a sufficient reason to justify variation of the strata plan that the plaintiff simply wishes to terminate the strata scheme so that he can amalgamate his lot with other property he owns independent of the strata plan and then redevelop the

amalgamated lot. In some cases that may be sufficient, in other cases it may not be. Each case must be considered on its own merits.

219 If Mr Robinson's submissions, referred to in the preceding two paragraphs, are correct then I accept that there would not be any basis to vary the strata plan in the manner sought by the plaintiff. The reason for that is that the existing strata scheme works.

220 The building is not old or dilapidated and there is no issues relating to the building itself and other than Mr De Mol's desire to subdivide, I find that there are no significant issues in the relationship between the parties other than those referred to below. The strata plan has met and satisfied its intended purpose since the strata titled development was completed. Its use has been entirely consistent with the expectations of the parties when they purchased their lots. The plaintiff has not otherwise been stopped from using Lot 14 in accordance with the strata plan in the manner in which they wish.

221 However, I take the wider view that all circumstance are relevant considerations. I agree that the relevant factors are the same as those considered on the question of termination.

222 I have found that the manner in which Mr De Mol's motion was dealt with at the 2019 extraordinary general meeting showed a flagrant disregard for his rights, but that incident by itself would not cause me to vary the strata title.

223 I have found that the defendants have been negligent or recklessly careless in their knowledge of the *Strata Title Act* over an important issue as evidenced by the unreasonable reliance on the resolution of 26 June 2006. That incident by itself would not cause me to vary the strata title.

224 This is not a case of Mr De Mol just wishing to redevelop Lot 14 in a vacuum. Since the strata plan was passed there has been a significant change in circumstances, namely the adoption by the City of Swan of the business plan.

225 Mr De Mol wishes to develop his lot in accordance with the business plan in circumstances where the business plan envisages that eventually all of the lots and the land encompassed in the strata plan will be redeveloped for the use Mr De Mol wishes his land now to be used.

226 The business plan clearly shows that the current use of the land within the strata plan (single story, bullnose commercial use) does not fall within the proposed future use of the land within the strata plan (mixed use multi story commercial, residential and hospitality use).

227 There is much to commend both views skilfully argued by Mr de Kerloy and Mr Robinson. As always it is a balancing act.

228 The variation sought by the plaintiff will of course affect the property rights of the second defendant. The status quo is that the second defendants have an, inter alia, undivided 70% share of 100% of the undivided common property of the first defendant and the plaintiff has an undivided 30% share of the undivided 100% common property of the second defendant. By the destruction of the building on Lot 1 the area of Lot 1 is now common property.

229 The variation sought by the plaintiff incorporates into the plaintiff's lot an area equivalent to 30% of the undivided common property and incorporates into the second defendant's lot an area equivalent to 70% of the undivided common property (leaving aside the common property issue relating to Lot 1 that arose following the demolition of the house). However, that is a variation and reduction of the second defendant's current rights which is to an undivided 70% share of 100% of the undivided common property.

230 The plaintiff's lot entitlement currently is to a defined cubic space and a 30% share along with the other lot proprietors of the common property. The air above and the ground below the cubic space of the plaintiff's lot is common property.

231 The variation sought by the plaintiff will result in the plaintiff receiving the cubic space which is currently within his lot and the air above and also ownership outright of approximately 30% of the current common property (leaving aside the common property issue relating to Lot 1 that arose following the demolition of the house).

232 In circumstances where I intend to allow the first defendant's variation, the second defendant would, if I allowed the plaintiff's variation, receive outright ownership of the approximately 70% of the pre-demolition common property and receives ownership of the area above the 10.15 m above and 4.85 m below the upper surface of the ground floor of the area, which previously comprised the building in Lot 1 which is currently common property. The area 10 m above and 5m below the upper surface of the ground floor of the area which

previously comprised the building in Lot 1 had before the demolition of the building been part of the second defendant's cubic space.

233 The orders sought by the plaintiff are conditional upon the plaintiff granting the first defendant an easement over the plaintiff's land, allowing access from the current strata plan to The Avenue. That access is in fact wider than the current access provided from the strata plan to the second defendant.

234 Provision is also made that if the area transferred to the plaintiff exceeds the plaintiff's current entitlement of 30% undivided share of the undivided 100% of the common property (by which I assume the plaintiff is referring to the pre-demolition position), the plaintiff is to compensate the first defendant for the fair market value of the excess as determined by an independent valuer, engaged at the plaintiff's expense. If the area of the common property transferred to the plaintiff is less than the plaintiff's current entitlement, no compensation shall be payable to the plaintiff.

235 Further, the orders provide that the plaintiff pay all costs associated with demolishing Lot 14 and making good the boundary wall, roof and walls dividing Lot 13 and Lot 2 from Lot 14, and all costs as a result of the reconnection of the utilities, water, gas, electricity and sewerage on the remaining lots of the existing strata plans, as well as paying all fees, costs and expenses relating to the registration of the varied strata plan 31757.

236 The intent and purpose of the Act in my view clearly envisages by the very existence of s 28 and s 31 that in some circumstances the strata plan can be varied. There is, I find, no reason why it should not be varied in a manner which encourages the use of the land within the strata plan to be developed in a manner which conforms with the relevant local authority's business plan.

237 The effect of a variation of the strata plan on the amenities of the lots in the strata plan would normally be a very significant and crucial factor to consider in relation to termination or variation of the strata plan. However, in this case the defendant has not put this in issue either by its defence or by its counterclaim and opposed the introduction of expert evidence by the plaintiff as to the effect of the variation on the amenities.

238 I refer to the comments I have made in this regard in relation to the termination application.

239 The variation sought by the plaintiff would enable the plaintiff to develop Lot 14 of the existing strata plan in the manner which conforms with the business plan, and subject to the necessary approvals being granted, would enable the plaintiff to amalgamating Lot 14 with other lots owned by him. That finding does not however compel a finding that the variation be permitted nor does it compel a finding that the variation be refused. It is just one factor to consider.

240 However, factors such as that the business plan encompasses the land within the strata plan, the second defendant eventually wish to develop Lot 1 (a development which must be in accordance with the business plan), that there is no other mechanism to break the deadlock, that all lots within the strata plan are owned by the parties to the litigation are all matters pointing in favour of granting the plaintiff's application.

241 Whilst the disregard for the plaintiff's rights in relation to the 2019 extraordinary general meeting and the reliance of the defendants on the 2006 resolution have been considered, those two factors would not cause me to exercise my discretion in favour of the plaintiff.

242 The fact that the strata plan works and that the lots have been able to be used in the manner the parties envisaged at the time of purchase and there have been no real significant issues between the parties, are considered and point against the exercise of my discretion.

243 In my view it would only be in a rare case that the court would allow a variation in circumstances where it has not heard evidence as to the effect of the variation on the amenities, by that expression I mean amenities in its wider context including the effect on the valuations of the other units. However, in the circumstances where the defendants opposed the introduction of such expert evidence, this is one of the rare cases where I would, but for the matter referred to below, allow the variation.

244 The plaintiff's application is in my view deficient in one critical area.

245 As the draft orders and evidence of Mr De Mol indicates the plaintiff intends to demolish the existing building on Lot 14, which would involve demolishing the boundary wall, roof and floors, dividing Lot 14 from Lot 13 and Lot 2 and would result in interruption to water, gas, and electricity in sewage supplies to the lot.

246 In those circumstances the court needs to be provided with all the information necessary for the court to judge the effect the variation will have on Lot 13 and Lot 2.

247 This information at the minimum should include evidence explaining the plans and specifications advising exactly how the demolition work is going to affect those lots, estimated work plans, the full details of the demolition including a work plan, full details of any likely interruption or interference to Lot 13 and Lot 2, in particular and the proposed manner of dealing with any interruption and interference.

248 This evidence needs to be led on the application so the court can assess their application in light of that evidence. It is not sufficient in my view for the court to be told that the demolition licence or building approvals will protect the tenants of Lot 13 and Lot 2 or that the effected tenants can bring an action in nuisance.

249 Evidence in my view needed to be given on the matters I have just referred to. This is not the type of amenity evidence ruled inadmissible by Gething DCJ which related to the effects of termination on the value of the lots within the strata plan.

250 In the absence of that evidence on this important issue I would not exercise my discretion to vary the strata plan as sought by the plaintiff

The defendants' application under s 28 of the Act

251 The defendants' s 28 application is to vary the strata plan in the manner indicated on Strata Plan 31757 sheet 2 of two sheets handed to the court by Mr Robinson on Friday 10 May 2019 and in their submissions dated 22 May 2019. For the avoidance of doubt that plan is endorsed with the words 'car park and access areas', 'vegetation' and 'sand' on Lot 1 and bearing the indorsement 'note all angles are 90 degrees unless otherwise shown' and 'The strata of Lot 1 extends between 4.85 m below and 10.15 m above the upper surface of the ground floor of the part lot comprising the building on Lot 8'.

252 The reference to Lot 8 is necessary as the building on Lot 1 which has been demolished provided the height datum point. The height datum point is achieved by the use of Lot 8 being the closest lot to Lot 1.

253 The deletion of the words 'vacant land' which previously appeared on the Lot 1 strata plan attached to the defendants' counterclaim removes Mr de Kerloy's concerns that by varying the strata plan for Lot 1 to include the words 'vacant land' the objections that the plaintiff could raise under s 7(5) to any further applications by the second defendant to subdivide or develop Lot 1 would be restricted.

254 I agree with the defendants' submission that a variation of the strata plan can be easily implemented by removing the outline of the building as depicted on the strata plan and amending the notation on the strata plan as indicated above. The deletion ought to be made because the words deleted refer to the outer face of the walls of the building which is no longer in existence. The variation does not affect the deed made between the defendants and the Shire of Swan allowing third party access across Lot 1 nor does it affect the mortgage registered on the title of Lot 1. The words to be inserted reflect the current use of the lot and preserve the pre-demolition stratum heights.

255 The defendants argue that reinstatement by way of rebuilding the building is impracticable as it was always the intention of the second defendant to ultimately demolish the buildings when the redevelopment of Lot 1 occurred and it would be contrary to the Midland Oval redevelopment business plan (exhibit 1.56). I agree with the defendants' submissions in this regard. Reinstatement whilst not impracticable serves no useful purpose.

256 I agree with the defendant's submissions that to implement the defendants' proposed August 2017 subdivision is problematic because of the need for the plaintiff's consent and the road widening issues with the City of Swan.

257 The variation now sought by the defendants recognises the status quo which has existed since 2008 when the house was demolished. It does not affect the plaintiff's use of Lot 14. It does affect their entitlements because it deprives them essentially of an undivided 30% share of the common property being the area that was pre-demolition formally Lot 1.

258 The status quo has existed since 2008 when the building was demolished. The evidence establishes that the second defendant continued to pay all expenses relating to Lot 1. Mr De Mol's own evidence establishes he was present at the AGM of 2007 but took no interest in any discussions about the demolition of the old home

because it did not affect his lot. Mr De Mol had absolutely no, nor has he ever pretended to have any claim in relation to the insurance proceedings for the destroyed building and the effect of his evidence is that they really had no interest in what had occurred in respect of Lot 1, as long as it did not affect his lot. It appears the plaintiff was not, prior to this action aware that the land contained within the former Lot 1 was as a result of the demolition of the building now common property.

259 Mr Del Mol says that I should not make the amendments requested by the second defendant because it would be unjust and inequitable to do so because the demolition of the building was not conducted in accordance with the requirements of the Act.

260 The basis upon which Mr De Mol says demolition on the building was not in accordance with the requirements of the Act has been extensively dealt with in pars 35 – 67 and I need not repeat the parties' arguments or my conclusions in this regard.

261 Further, the plaintiff says that even if the amendment to the strata plan sought by the second defendant was allowed, it would not allow development on Lot 1, which is inconsistent with the business plan because any development which complied with the business plan would exceed the proposed vertical boundary of '10.15 metres above the upper surface of the ground floor of Lot 8' encapsulates in the amendment the second defendant's propose. Whilst this is true, the second defendant is not obliged to redevelop their lots and the strata plan should reflect the realities of the current use of the land.

262 In addition the plaintiff say allowing the variation would circumvent the requirements of Landgate when it gave conditional approval of a proposed resubdivision (exhibit 1.46) as that approval required the consent of all owners within the strata scheme prior to the issue of the new title for the proposed Lot 16.

263 I do not agree with this submission. Exhibit 1.46 refers to 'a conditional approval for the subdivision to create a vacant strata lot as a result of fire damage to the building originally located on Lot 1'. A vacant lot means a lot that is wholly unimproved apart from having merged improvements with the meaning of that expression the *Valuation of Land Act 1978*. Mr Carlo Aloi's evidence is that Lot 1 had improvements, namely bituminising and kerbing for car parking

purposes (ts 213). The second defendant's current application to vary the strata plan recognises that Lot 1 is not a vacant lot.

264 In any event if the strata plan is varied in the manner in which the defendants propose, it effectively produces the same result for the defendants as the varied strata plan. Lot 1 will be essentially the same as the Lot 16 referred to in the WA Planning Commission application.

265 Other arguments advanced by the plaintiff where based on the second defendant's original proposal which involved, inter alia, redescribing Lot 1 as a vacant lot. The second defendant has abandoned that proposal to accommodate the objections of the plaintiff.

266 Amending the strata scheme as proposed by the second defendant would not allow development of Lot 1 in a manner inconsistent with the business plan but it would recognise the existing status quo (leaving aside the common property issue relating to Lot 1 that arose following the demolition of the house) and the manner in which the land has been used for over 10 years. There is nothing unjust or inequitable about allowing the longstanding status quo to be recognised

267 I am satisfied there has been no disentitling conduct by either the first or second defendant which results in it not being just and equitable to allow the variation sought. A s 28 application should have been made when the building was damaged or destroyed, however Mr De Mol was a lot proprietor on 30 June 2006 and the building was not damaged or destroyed until 27 June 2007. Mr de Mol or the plaintiff could have made an application under s 28, although I accept that the primary responsibility for ensuring that an application is made, in my view, must fall on the strata company or the lot proprietor whose building was destroyed.

268 An application pursuant to s 28 ought to have been made as soon as the building on Lot 1 was destroyed. However, I do not consider one party more than the other has engaged in any disentitling conduct such that means the orders proposed by the defendants should not be made.

269 I grant the defendants' application to vary the strata plan for Lot 1 as indicated which as I say recognises the existing status quo (leaving aside the common property issue relating to Lot 1 that arose following the demolition of the house a position which appears not to have been recognised by any of the parties).

270 In accordance with this judgment the orders I propose to make are:

1. The plaintiff's application to terminate Strata Plan 31757 is dismissed.

2. The plaintiff's application to vary Strata Plan 31757 is dismissed.

3. The defendants' counterclaim to vary Strata Plan 31757 is allowed.

4. Strata Plan 31757 is varied by replacing sheets CA4 and CA5 of the existing strata plan with the sheets CA4 and CA5 filed in the District Court registry on 22 May 2015.

5. There be liberty to apply.

271 I shall hear the parties on the precise orders and costs.

I certify that the preceding paragraph(s) comprise the reasons for decision of the District Court of Western Australia.

AO
Associate to Judge Bowden

2 JULY 2019