JURISDICTION	:	SUPREME COURT OF WESTERN AUSTRALIA
TITLE OF COURT	:	THE COURT OF APPEAL (WA)
CITATION	:	ENGWIRDA -v- THE OWNERS OF QUEENS RIVERSIDE STRATA PLAN 55728 [2019] WASCA 190
CORAM	:	MURPHY JA MITCHELL JA VAUGHAN JA
HEARD	:	5 NOVEMBER 2019
DELIVERED	:	28 NOVEMBER 2019
FILE NO/S	:	CACV 96 of 2018
BETWEEN	:	JENNIFER ENGWIRDA Appellant AND THE OWNERS OF QUEENS RIVERSIDE STRATA PLAN 55728 Respondent

ON APPEAL FROM:

Jurisdiction	:	STATE ADMINISTRATIVE TRIBUNAL
Coram	:	JUSTICE J C CURTHOYS (PRESIDENT)
Citation	:	ENGWIRDA and THE OWNERS OF QUEENS RIVERSIDE STRATA PLAN 55728 [2018] WASAT 15
File Number	:	CC 732 of 2017

Catchwords:

Strata Titles Act 1985 (WA) - Appeal against orders of State Administrative Tribunal - Section 90 orders for inspection of records and documents pursuant to s 43(1)(b) - Inspection conditional upon undertaking - Whether Tribunal erred in imposition of undertaking

Legislation:

State Administrative Tribunal Act 2004 (WA), s 105
Strata Titles Act 1985 (WA), s 43, s 90

Result:

Extension of time granted
Leave to appeal granted
Appeal allowed
Orders of Tribunal set aside and substituted in part

Category: B

Representation:

Counsel:

Appellant	:	In person
Respondent	:	No appearance

Solicitors:

Appellant	:	In person
Respondent	:	No appearance

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

Adam P Brown Male Fashions Pty Ltd v Philip Morris Inc [1981] HCA 39; (1981) 148 CLR 170
Ardrey v The State of Western Australia (No 2) [2017] WASCA 41; (2017) 265 A Crim R 317

Centex Australasia Pty Ltd v Commissioner for Consumer Protection [2017] WASCA 79
Comcare v Banerji [2019] HCA 43; (2019) 93 ALJR 900
Commissioner for Consumer Protection v Carey [2014] WASCA 7
Easterday v The State of Western Australia [2005] WASCA 105; (2005) 30 WAR 122
Finance Facilities Pty Ltd v Federal Commissioner of Taxation (1971) 127 CLR 106
Giudice v Legal Profession Complaints Committee [2014] WASCA 115
Harman v Secretary of State for Home Department [1983] 1 AC 280
Hearne v Street [2008] HCA 36; (2008) 235 CLR 125
Jebb v Superior Lawns Australia Pty Ltd [2018] WASCA 123
Johns v Australian Securities Commission (1993) 178 CLR 408
Julius v Bishop of Oxford (1880) 5 App Cas 214
Katsuno v The Queen [1999] HCA 50; (1999) 199 CLR 40
Leach v The Queen [2007] HCA 3; (2007) 230 CLR 1
Maguire v Owners of Roslyn Strata Plan 35960 [2014] WASC 28
Medical Board of Western Australia v Medical Practitioner [2011] WASCA 151
Minister for Immigration and Citizenship v Li [2013] HCA 18; (2013) 249 CLR 332
Northern Territory v Griffiths [2019] HCA 7; (2019) 93 ALJR 327
Nykredit Mortgage Bank plc v Edward Erdman Group Ltd (No 2) [1998] 1 All ER 305
Paridis v Settlement Agents Supervisory Board [2007] WASCA 97; (2007) 33 WAR 361
Re Southern Equities Corporation Ltd (in liq); Bond v England (1997) 25 ACSR 394
Riddick v Thames Board Mills Ltd [1977] QB 881
Secretary, Department of Treasury & Finance v Kelly [2001] VSCA 246; (2001) 4 VR 595
Simonsen v Legge [2010] WASCA 238
Woolworths Ltd v Strong (No 2) [2011] NSWCA 72; (2011) 80 NSWLR 445

MURPHY & MITCHELL JJA:

Summary

1 The appellant is the proprietor of one of the 526 strata lots on Strata Plan 55728. The proprietors from time to time of all lots on that strata plan constitute the respondent strata company, which is incorporated by s 32 of the *Strata Titles Act 1985* (WA) (**Act**).

2 The appellant sought, and was denied, an inspection of documents and records in the respondent's control or custody. She applied to the State Administrative Tribunal for an order allowing her to inspect any and all strata company records of the respondent.

3 The Tribunal ultimately ordered that the respondent provide the appellant with a USB containing electronic copies of the requested documentation, other than documents subject to legal professional privilege. The provision of a USB containing electronic copies of the documents was the respondent's preferred method of providing inspection of those documents. This order in effect gave the appellant the inspection which she sought in the Tribunal proceedings.

4 However, the provision of that inspection was subject to a condition to the effect that the appellant was required to provide an undertaking to the respondent's solicitors. The required undertaking was that the appellant would:

(1) not use the information/documentation to contact other proprietors;

(2) not publish or disseminate the documentation to third parties; and

(3) ensure the documentation is kept secure.

There was an exception permitting the appellant to conduct 'appropriate communication with the Council of Owners and at Council organised meetings in relation to the documentation provided'.

5 A question of law which arises in this appeal is whether the Tribunal had power to require this undertaking as a condition for an order that documents in the respondent's control or custody be made available for the appellant's inspection.

6 In our view, the Tribunal exceeded its power in requiring the undertaking to be given. The orders requiring the undertaking should be set aside. A consequential order should be made releasing the appellant from the undertaking that she gave in order to inspect the requested documents.

A proprietor's entitlement to inspect and copy documents

7 Section 43(1)(b) and (2) of the Act provides for a proprietor's entitlement to inspect documents and records in the custody or control of a strata company, and the strata company's corresponding obligation to make those documents and records available for inspection, in the following manner:

(1) A proprietor of a lot on a strata plan is entitled to apply in writing to the strata company requiring it to make available for the proprietor's inspection any records or documents in the custody or under the control of the strata company.

(2) Upon that application being made, and on payment of the prescribed fee (if any),[1] the strata company is obliged to make the requested records or documents available for inspection by the proprietor.

(3) The strata company is obliged to make the documents or records available for the proprietor's inspection at such time and place as may be agreed. If agreement is not reached within 3 days, the strata company is obliged to forthwith send a notice by post to the proprietor fixing a specified time and date for the making of the inspection. The specified date must not be later than 10 days after the strata company receives the application.

8 When documents are made available for inspection, s 43(5) of the Act gives the proprietor the right to take extracts from, or make a copy of, the documents. However, the proprietor may not, without the strata company's consent, remove the documents from the strata company's custody for that purpose.

9 Further, s 43(1a) of the Act provides for the proprietor to apply in writing for copies of a document that the proprietor is entitled to inspect. The strata company may give the proprietor copies of the document and

[1] No fee is payable by an applicant who is a proprietor: *Strata Titles General Regulations 1996* (WA), sch 1 item 4(b).

may generally require the payment of the prescribed fee for any copy so provided.

10 The above provisions were considered by Kenneth Martin J in ***Maguire v Owners of Roslyn Strata Plan 35960***.[2] As Kenneth Martin J correctly recognised, there is a distinction to be drawn between:

(1) the strata company's obligation to make documents and records available for inspection under s 43(1)(b) of the Act; and

(2) the strata company's discretionary power to provide copies of documents under s 43(1a) of the Act.

The proprietor of a strata lot has an entitlement to inspect documents and records and, when doing so, to take extracts from, or make a copy of, the inspected documents without removing them from the custody of the strata company. However, the proprietor has no entitlement to be provided with copies of documents by the strata company.

Enforcing the obligation to make documents available for inspection

11 Failure by a strata company to comply with its statutory obligation to make requested records available for inspection is an offence. The creation of an offence is signified by the specification of a penalty of $400 at the end of s 43(1) of the Act.[3] However, a proprietor is not able to commence a prosecution for that offence. Prosecution of the offence can only be instituted by one of the persons specified in s 20 of the *Criminal Procedure Act 2004* (WA). In any event, a prosecution, if successful, results in the imposition of a penalty and does not compel the strata company to make documents available for inspection.

12 The means by which a proprietor may enforce the strata company's obligation to make documents available for inspection is to seek, and then enforce, an order from the Tribunal under s 90 of the Act. The power conferred on the Tribunal by s 90 is relevantly to order that the strata company make available a document or record to the proprietor.

13 A decision of the Tribunal under s 90 may be enforced under s 86 of the *State Administrative Tribunal Act 2004* (WA) (**SAT Act**). The proprietor seeking to enforce the decision may file in the Supreme Court a certified copy of the decision, an affidavit as to the non-compliance

[2] ***Maguire v Owners of Roslyn Strata Plan 35960*** [2014] WASC 28.
[3] Section 72(1) of the *Interpretation Act 1984* (WA).

with the decision and a certificate from a judicial member of the Tribunal that the decision is appropriate for filing in the Supreme Court.

14 On filing the above documents in the Supreme Court, the Tribunal's decision is taken to be a decision of the Supreme Court, and may be enforced accordingly.[4] Disobedience of the decision by failing to make the document or record available for inspection is then a contempt of court by the strata company.[5] The proprietor may request the court to deal with the strata company for the contempt.[6]

15 The condition for the existence of the power under s 90 to order the strata company to make available a document or record to the proprietor is that the Tribunal:

> considers that the strata company … has wrongfully … failed to make available for inspection by the applicant or his agent a record or document that under this Act he is entitled to inspect.

16 When that condition is met, s 90 provides that the Tribunal 'may order' that the strata company make available the record or document to the proprietor. Ordinarily, the use of the term 'may' imports a discretion.[7] But that is not always the case. It is not uncommon for the term 'may', used in a statute conferring power on a court, to signify the conferral of a power which is to be exercised upon the court being satisfied of the matters specified in the provision.[8] Further, as is illustrated by the decision in ***Finance Facilities Pty Ltd v Federal Commissioner of Taxation***,[9] that approach to the construction of a statutory power is not confined to powers conferred on courts.

17 In our view, the statutory language of s 90, and the context in which s 90 appears, strongly suggests that it confers a power which the Tribunal is to exercise when the Tribunal is satisfied of the matters referred to in the provision. The power only arises where the Tribunal considers that an applicant has wrongfully been denied a statutory entitlement to inspect a document or record. In a case where the entitlement arises under s 43(1)(b) of the Act, there is no other practical means for the proprietor to enforce the statutory entitlement. It would be incongruous

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[4] Section 86(4) of the SAT Act.
[5] Section 98(3) of the *Civil Judgments Enforcement Act 2004* (WA). Officers of the strata company will also be in contempt unless they satisfy the court of the matters referred to in that subsection.
[6] Section 98(4) of the *Civil Judgments Enforcement Act*.
[7] Section 56 of the *Interpretation Act*.
[8] ***Leach v The Queen*** [2007] HCA 3; (2007) 230 CLR 1 [38]; ***Julius v Bishop of Oxford*** (1880) 5 App Cas 214, 225, 231 - 232, 241.
[9] ***Finance Facilities Pty Ltd v Federal Commissioner of Taxation*** (1971) 127 CLR 106, 134 - 135, 138 - 139.

for Parliament to provide for a statutory entitlement and then leave the only means of recourse for wrongful denial of that entitlement to a broad discretion of the Tribunal to be exercised by reference to matters not expressed in the provision. We doubt that s 90 is properly construed as conferring a discretion on the Tribunal to make an order or decline to make an order when it considers that a strata company has wrongfully failed to make available for inspection a record or document that the proprietor is entitled to inspect under the Act.

18 However, the appellant's argument in this court proceeded on the basis that the power conferred by s 90 is discretionary. The point as to whether s 90 confers a discretionary power was not argued. In those circumstances, it is undesirable to reach any concluded view on the question. For the reasons identified at [29] - [33] below, it is unnecessary to do so in this appeal.

19 Even assuming that the power conferred by s 90 is discretionary, that discretion is to be exercised in a context where the Tribunal is satisfied that the strata company has wrongfully failed to make available for inspection a record or document that the proprietor has an entitlement under the Act to inspect. The scope of the discretion must be assessed in that context.

20 In our view, the scope of any discretion which the Tribunal has under s 90 of the Act, once satisfied of the matters referred to in the provision, is more confined than indicated by the following observation of Kenneth Martin J in ***Maguire***:[10]

> The senior member was called upon to exercise the s 90 discretion in a context of rights afforded under s 43(1)(b) of the [Act] to inspect documents, then under s 43(1a) to request copies, all of which should be exercised within reasonable bounds and monitored by SAT to guard against the serious potential of misuse, oppression and pettiness. If a requesting person is perceived by SAT to be acting unreasonably, oppressively or obsessively by invoking such a provision, then it more than falls within the purview of SAT, by the discretion under s 90, to inhibit untoward conduct.

21 First, s 90 has no application to requests for copies of documents under s 43(1a) of the Act. As Kenneth Martin J correctly held, a proprietor has no entitlement to have the strata company provide copies of the documents the proprietor is entitled to inspect. Further, s 90 operates only where the strata company has wrongfully failed to make

[10] ***Maguire*** [62].

documents available for inspection. No power is conferred upon the Tribunal's satisfaction that a strata company has failed to provide the proprietor with copies of a document that the proprietor is entitled to inspect.

22 It may be noted that ***Maguire*** was decided in a context where the applicant had not established that the strata company had wrongfully failed to make any documents available for inspection. The applicant's complaint in ***Maguire*** was rather that he had not been provided with copies of all documents he had requested. That was not a matter to which an order under s 90 could be addressed. The Tribunal was required to dismiss the application in ***Maguire*** as the condition for the existence of the power under s 90 was not satisfied. In these circumstances, Kenneth Martin J's observations as to the existence and scope of the discretion under s 90 of the Act were not necessary for his Honour's plainly correct decision to refuse the application for leave to appeal in ***Maguire***.

23 Secondly, we do not accept that the Tribunal has a role of overseeing whether the entitlement to inspect documents is exercised 'within reasonable bounds'. The Act creates an entitlement of a proprietor to inspect all documents and records of a strata company. The power conferred by s 90 only arises where the Tribunal is satisfied that the strata company has wrongfully denied that entitlement. It is difficult to see how the concept of 'reasonable bounds' has any role to play once that conclusion is reached. Nor is it easy to see how an application to inspect a document which a proprietor has a statutory entitlement to inspect, which entitlement been wrongfully denied, can involve 'misuse, oppression and pettiness'.

24 If there is some implicit requirement of reasonableness, then that must, in our view, be an implicit limit on the entitlement of the proprietor to apply under s 43 to inspect records or documents. To any extent that a proprietor exceeded some implicit limit on the entitlement to apply for inspection, the refusal of the application would not be a wrongful denial of the entitlement. But once the Tribunal considers that there is an entitlement to inspect documents which has been wrongfully denied, there is no scope for concluding that the proprietor's attempt to exercise the entitlement is unreasonable, or involves misuse, oppression and pettiness.

Purposes for which information obtained in inspection may be used

25 Section 43 of the Act does not contain any express statement of the purposes for which information obtained under that section may be used. However, it does not necessarily follow from the absence of any express limitation as to permissible use that there are no limits on the uses to which information obtained by a proprietor under s 43 may be put.

26 The general rule of statutory construction was expressed by Brennan J in ***Johns v Australian Securities Commission***:[11]

> A statute which confers a power to obtain information for a purpose defines, expressly or impliedly, the purpose for which the information when obtained can be used or disclosed. The statute imposes on the person who obtains information in exercise of the power a duty not to disclose the information obtained except for that purpose. If it were otherwise, the definition of the particular purpose would impose no limit on the use or disclosure of the information. The person obtaining information in exercise of such a statutory power must therefore treat the information obtained as confidential whether or not the information is otherwise of a confidential nature. Where and so far as a duty of non-disclosure or non-use is imposed by the statute, the duty is closely analogous to a duty imposed by equity on a person who receives information of a confidential nature in circumstances importing a duty of confidence.

27 There was no argument in the present case as to whether the purposes for which information may be obtained, and thereby the purposes for which the information may be disclosed or used, were implicitly limited by the Act. It is arguable that the purposes for which information obtained under s 43 of the Act may be disclosed and used are impliedly limited by reference to the purposes of the Act. So, for example, it may be that the disclosure of personal information about other proprietors acquired under s 43 to telemarketers, or soliciting customers for the applicant's business not associated with the strata scheme, would be for an impliedly prohibited purpose and could be restrained as a breach of an implied statutory duty of confidence.

28 Again, in the absence of argument, it is undesirable for this court to express any concluded view as to any implicit limits on the purposes for which information obtained by inspection pursuant to s 43 of the Act can be used. For the reasons explained below, it is unnecessary to finally resolve that question to determine the present appeal.

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[11] ***Johns v Australian Securities Commission*** (1993) 178 CLR 408, 424, applied in ***Katsuno v The Queen*** [1999] HCA 50; (1999) 199 CLR 40 [2], [24].

Power to require the undertaking in this case

29 In our view, this appeal can be resolved assuming, without deciding, the following matters in favour of a more expansive view of the Tribunal's power to require an undertaking as a condition of ordering inspection of documents:

(1) There is some discretion to refuse to order inspection of documents where the Tribunal considers that the strata company has wrongfully failed to make available for inspection documents which the proprietor had a statutory entitlement to inspect.

(2) The purposes for which a proprietor may apply to inspect documents in the custody of a strata company are implicitly limited to the purposes related to the ascertainment and exercise of the proprietor's rights under the Act. In that event, adopting the approach in ***Johns***, there would be an implied statutory duty on the proprietor not to use information obtained from the inspection other than for purposes related to the ascertainment and exercise of the proprietor's rights under the Act.

30 On those assumptions, there is arguably a capacity for the Tribunal to require an undertaking limiting the use of information obtained from the inspected documents as a condition to an order requiring the documents be made available for inspection. Such a condition might, on these assumptions, be imposed so that information obtained on inspection is not used for purposes which are implicitly prohibited by the Act.

31 Even on the above assumptions, in our view the requirement for an undertaking made by the Tribunal in the present case was beyond the authority of the Tribunal to impose. The requirement did not simply confine the use which could be made of the inspected documents to those permitted under the Act. The practical effect of the requirement was to prevent the appellant from using the documents at all. She could not show the documents to her legal or financial advisers. She could not discuss them with other proprietors with whom she may have a common interest in relation to matters such as convening and voting at general meetings of the strata company or making an application under Part VI of the Act. She could not use the documents in an application to the Tribunal under Part VI of the Act. The requirement for an undertaking in the terms imposed by the Tribunal could not be justified as limiting the appellant to using the information for purposes permitted by the Act.

32 It is generally an implicit condition for the valid exercise of a statutory discretion that it be exercised reasonably.[12] There is no basis for excluding that implied limitation in the exercise of any discretion conferred by s 90 of the Act. In our view, any discretion could not reasonably be exercised to limit the appellant's use of the inspected documents in the manner provided for by the Tribunal's orders, in circumstances where:

(1) In ordering the respondent to make the documents available for inspection, the Tribunal must have been satisfied that the appellant had an entitlement to inspect the documents which the respondent had wrongfully denied.

(2) The purposes for which the appellant stated she wished to inspect the documents - to determine whether she and other proprietors were being levied for the cost of remedying defects that should have been paid by the developer - was not outside any arguable limit on the permissible use of the information.

(3) There was nothing to indicate that the appellant intended to use the information obtained by inspecting the documents for any impliedly prohibited or improper purpose.

(4) The requirement had the practical effect of precluding the appellant from using information acquired from the inspection for the clearly authorised purposes for which she sought inspection.

33 Assuming (without deciding) that the Tribunal had a discretion to require an undertaking as a condition for ordering inspection of documents under s 90 of the Act, the exercise of that discretion in this case was unreasonable and not authorised by the Act. In our view, the Tribunal erred in law in imposing the requirement in a manner not authorised by the Act. Grounds 18 and 19 of the appellant's grounds of appeal, which in effect contend that the Tribunal erred in law by imposing the requirement, are established. The orders requiring the appellant to give the undertaking should be set aside.

Other grounds of appeal

34 We have found it unnecessary to determine ground 16, which complains that the Tribunal erred in law in drawing an analogy with the

[12] ***Minister for Immigration and Citizenship v Li*** [2013] HCA 18; (2013) 249 CLR 332 [29], [63], [88] - [91]; ***Comcare v Banerji*** [2019] HCA 43; (2019) 93 ALJR 900 [40].

decision of the High Court in ***Hearne v Street***.[13] That decision is clearly not directly applicable in the present case, and to the extent that the Tribunal held that the fact the Tribunal ordered inspection of documents created an implied obligation it erred. However, if the purposes for which a proprietor may apply to inspect documents, and use information obtained from the inspection, are limited in the manner referred to at [29](2) above, then there may be a valid analogy. That is, if information acquired from the inspection may only be used for purposes related to the ascertainment and exercise of the proprietor's rights under the Act, there will be an implied obligation not to use it for other purposes. It is unnecessary to decide whether ground 16 should be upheld when the orders requiring the undertaking are to be set aside for the other reasons explained above.

35 For the reasons explained by Vaughan JA, none of the matters raised in ground 17 (alleging a breach of procedural fairness by the Tribunal) justify interfering with the Tribunal's orders.

36 What remains after the requirement for an undertaking is set aside are the orders of the Tribunal:

(1) Requiring the respondent to provide the appellant with a USB containing electronic copies of the requested documentation (excluding those documents subject to legal professional privilege);

(2) Giving the appellant liberty to make 'the appropriate application' if she is dissatisfied following receipt of documentation from the respondent.

(3) Ordering that the appellant's application is dismissed.

(4) Ordering that there be no order as to costs.

37 None of the grounds of appeal provide any arguable basis for setting aside or substituting these remaining orders. The first order noted at [36] above gives the appellant the inspection of the non-privileged documents she was seeking. To any extent that the USB provided does not contain the documents ordered by the Tribunal to be made available, the appellant's remedy is to seek to enforce the order in the manner described at [13] - [14] above. To the extent that the respondent seeks to bring itself within the exception in the first order in relation to privileged

[13] ***Hearne v Street*** [2008] HCA 36; (2008) 235 CLR 125.

documents, it must first properly assert the claim by identifying the documents for which privilege is claimed and indicate the basis on which legal professional privilege is claimed in respect of those documents. To any extent that the appellant contends that the respondent is improperly claiming legal professional privilege, then she can exercise the liberty given by the second order to apply to the Tribunal for a determination by the Tribunal as to whether the documents are actually privileged. The third order should be construed as ordering that the application is otherwise dismissed, and to relate to aspects of the application arising otherwise than under s 90 of the Act (which were not ultimately pursued in the Tribunal). Section 81(7) of the Act would preclude the Tribunal from making some different costs order.

Orders

38 We agree with Vaughan JA, for the reasons his Honour gives, that the applications for an extension of time in which to appeal and leave to appeal should be granted.

39 For the reasons explained by Vaughan JA, we would not exercise any discretion to require a more limited undertaking in the circumstances of this case, even assuming such discretion existed. The Tribunal's orders requiring the undertaking should simply be set aside.

40 Section 105(9) authorises this court to 'make any other order the court considers appropriate'. In our view, this power encompasses the power, normally implicit in the conferral of appellate jurisdiction, to make orders unravelling the practical consequences of implemented orders which are set aside on appeal.[14] The power to make consequential orders extends to releasing the appellant from the undertaking which the orders to be set aside by this court required her to give in order to exercise her entitlement to inspect the documents. Such an order is appropriate in the circumstances of this case.

41 For the above reasons, we agree with the orders proposed by Vaughan JA.

[14] ***Nykredit Mortgage Bank plc v Edward Erdman Group Ltd (No 2)*** [1998] 1 All ER 305, 314 - 315, referred to in ***Northern Territory v Griffiths*** [2019] HCA 7; (2019) 93 ALJR 327 [136] and applied in ***Woolworths Ltd v Strong (No 2)*** [2011] NSWCA 72; (2011) 80 NSWLR 445 [33] - [35]. This principle was applied by this court in ***Ardrey v The State of Western Australia (No 2)*** [2017] WASCA 41; (2017) 265 A Crim R 317 [124] - [126], [160] - [162] and ***Easterday v The State of Western Australia*** [2005] WASCA 105; (2005) 30 WAR 122 [34] - [35].

VAUGHAN JA:

Nature of the appeal

42 The appellant, Jennifer Engwirda, is the proprietor of a lot within the scheme comprised in strata plan 55728 (Scheme). The respondent, The Owners of Queens Riverside Strata Plan 55728, is the strata company for the Scheme. The strata development comprised by the Scheme is large. It consists of 526 units within an apartment complex in East Perth.

43 Ms Engwirda sought that the respondent make numerous documents available for inspection pursuant to s 43(1)(b) of the *Strata Titles Act 1985* (WA). When the respondent failed to do so Ms Engwirda made application to the State Administrative Tribunal for orders under s 90 of the Act requiring the respondent to make the records and documents available for inspection. Interim orders requiring that some of the documents be made available for inspection were made on 18 July 2017. Later, on 6 November 2017, final orders were made for the respondent to provide Ms Engwirda with a USB containing electronic copies of the documents (other than where the documents were subject to legal professional privilege). However, that further order was subject to the provision of an undertaking on the part of Ms Engwirda.

44 In order to obtain provision of the documentation by USB, Ms Engwirda was required to undertake:

1. not to use the information or documentation to contact individual strata owners;

2. not to publish or disseminate the documentation to third parties; and

3. to ensure that the documentation was kept secure.

45 The undertaking was provided. Ms Engwirda has been provided with the USB. There is some dispute as to whether the materials on the USB are in full compliance with the Tribunal's order. That is not a matter for determination in this appeal. This appeal solely concerns the condition imposed by the Tribunal for provision of the documentation on the USB. Ms Engwirda complains about the undertaking condition and seeks, by this appeal, to have the undertaking 'voided'.[15] In substance

[15] Orders wanted, par 3; WAB 28.

that should be understood as seeking that this court make orders providing for the release and discharge of the undertaking. Ms Engwirda seeks to have access to the documentation without the burden of the undertaking.

46 The respondent has not taken part in the appeal. By a notice of intention dated 15 March 2019 the respondent has said that it will accept any order made other than as to costs.[16]

Background facts and procedural history

47 On 1 May 2017 Ms Engwirda made application to the Tribunal under s 90 of the *Strata Titles Act 1985* (WA) seeking various orders including an order in accordance with s 43 of the Act to allow her to inspect 'any and all' strata company records of the respondent.

48 The matter first came before the Tribunal on 16 June 2017.[17] In the course of that hearing Ms Engwirda explained orally why she sought to inspect the documents.[18] In substance Ms Engwirda wished to inspect to identify whether she and other proprietors were being levied by the strata company to pay for building defects that should have been paid by the developer of the building.[19] At that time the respondent appeared by counsel. Counsel for the respondent informed the Tribunal that there was no objection, in principle, to the provision of the documents,[20] but mentioned potential privacy concerns.[21] Ms Engwirda withdrew all aspects of her application other than the order for inspection.[22] The matter was stood over to 23 June 2017.

49 On 23 June 2017[23] Ms Engwirda sought to join other proprietors to the application.[24] The presiding member expressed a reluctance to do so.[25] It does not appear that any orders were made. The extracted orders of 23 June 2017 do not contain any order dismissing a joinder application.

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[16] WAB 2.
[17] GAB 1 - 42.
[18] GAB 16 - 17.
[19] A matter which the respondent understood to be a concern to Ms Engwirda: GAB 59.
[20] GAB 23.
[21] GAB 13 - 14.
[22] GAB 40.
[23] GAB 43 - 79.
[24] GAB 45.
[25] GAB 46, 55 - 57.

50 By the hearing on 23 June 2017 a further issue had developed as to Ms Engwirda's entitlement to inspect any documents that were subject to legal professional privilege.[26] Counsel for the respondent informed the Tribunal that the documents comprised six gigabytes of data - which would equate to 120,000 pages of documents.[27] Accordingly, it was suggested that some time would be taken to compile the documents. Ms Engwirda informed the Tribunal that she was willing for some documents - such as those going to disputes between proprietors - to be excluded.[28] The respondent's position was that it was willing to provide Ms Engwirda with access to all documents other than those the subject of legal professional privilege and private communications between individual proprietors and the strata manager.[29] Nevertheless, it proved difficult to reach agreement as to how the matter might be resolved.

51 In the face of those difficulties in determining a pathway to resolution the presiding member of the Tribunal determined that the matter should be listed for directions before the President of the Tribunal.

52 There was a directions hearing before the President on 18 July 2017.[30] The President, noting that the respondent had proposed orders allowing partial inspection, made an interim order. Those orders required the respondent to make available for inspection all documents falling within classes corresponding with the descriptions in s 43(1)(b)(i) to (viii) and (x) of the *Stata Titles Act 1985* (WA).[31] As to documents within the description in s 43(1)(b)(ix) of the Act, the orders provided that the respondent must make available for inspection:

> any other record or document in the custody or under the control of the respondent save for:
>
> (i) those records or documents of the respondent that are subject to legal professional privilege;
>
> (ii) all written communications (including email communications) between:
>
> A. the respondent and/or the respondent's strata manager and/or the council of owners of the respondent; and

[26] GAB 49, 53, 58.
[27] GAB 48.
[28] GAB 59, 69 - 70. See also GAB 51, 53.
[29] GAB 68.
[30] GAB 80 - 92.
[31] That provision is reproduced at par 73 below.

> B. a proprietor or occupier of a lot within the scheme comprised within Strata Plan 55728 (Scheme),
>
> relating to matters personal to any proprietor or occupier of a lot within the Scheme;
>
> (iii) all written communications (including email communications) between one or more proprietors or occupiers of lots within the Scheme, relating to matters personal to any proprietor or occupier of a lot within the Scheme.

53 Accordingly, the respondent was to make available for inspection all documents falling within the descriptions in s 43(1)(b) save that, as to s 43(1)(b)(ix) (the 'any other record or document in the custody or under the control of the strata company' class), there were three exceptions. The exceptions concerned documents the subject of legal professional privilege and certain documents in relation to matters personal to any proprietor or occupier of a lot.

54 The President informed Ms Engwirda that, if after she had inspected the documents she still wished to pursue the other matters, then the application would be listed for hearing as to whether Ms Engwirda should have access to the other documents.[32] Ms Engwirda took the opportunity to repeat the reason she sought access to the various records. Among other things it was again mentioned that there was a belief that levies had been charged to rectify defects that should have been remedied by others. Other issues as to levies were also voiced.[33]

55 The matter came back before the President on 12 September 2017.[34] The President understood that the remaining issues concerned the outstanding questions of legal professional privilege and privacy.[35] There were, however, suggestions that the previous physical inspection - which took place on a laptop at the strata manager's office - had been problematic and Ms Engwirda had not been able to inspect satisfactorily.[36] Counsel for the respondent suggested an alternative: that the material, excluding the privileged and private material, could be converted to PDF and provided to Ms Engwirda on a USB.[37]

[32] GAB 86.
[33] GAB 87 - 90.
[34] GAB 93 - 106.
[35] GAB 95.
[36] GAB 96, 98 - 99.
[37] GAB 96 - 97, 99, 102 - 104.

Notwithstanding that an intention to do so was confirmed on behalf of the respondent, the Tribunal adjourned the application for hearing.[38]

56 The matter was re-listed for 6 November 2017.[39] The President observed that it was the final hearing. However, when Ms Engwirda said that it was to be a directions hearing so that the matter could be set down for a final hearing, the President said the hearing would proceed on that basis (ie as a directions hearing).[40] Counsel for the respondent suggested that it could be the final hearing[41] and Ms Engwirda also expressed a preference for it to be the final hearing.[42] After there was further debate before the President, Ms Engwirda informed the President that she would like the application decided on the papers. Ms Engwirda stated that she did not want to come back any more and did not think there was anything more she could say.[43]

57 The President concluded that there was no need to deal with the matter on the papers as he was in a position to deal with the matter immediately. His Honour proceeded to give brief oral reasons determining the application. In the course of delivery of those reasons Ms Engwirda left the hearing room.[44]

58 It remained the position on 6 November 2017 that the respondent was prepared to provide Ms Engwirda with a USB containing the documents. A USB had been prepared. This was said to contain all the records or documents with the exception of any documents to which legal professional privilege attached. Also, counsel for the respondent having considered the matter further, the Tribunal was informed that the privacy issue was no longer maintained by the respondent. But it was sought that Ms Engwirda provide an undertaking as to the use that might be made of the materials. Counsel for the respondent handed up the form of the proposed undertaking, which had previously been set out in a letter to Ms Engwirda.[45]

[38] GAB 105.
[39] GAB 107 - 119.
[40] GAB 108.
[41] GAB 109.
[42] GAB 108.
[43] GAB 117.
[44] GAB 117 - 119.
[45] GAB 109 - 111.

59 As to the question of legal professional privilege, the following exchange took place:

> HIS HONOUR: What about the legal professional privilege? Is that …
>
> RESPONDENT'S COUNSEL: So that - those documents we will take out, but the - it's really the personal information …
>
> HIS HONOUR: All right.
>
> RESPONDENT'S COUNSEL: … that we're concerned about here. And as I understand it, the applicant doesn't object to the documents that are subject to legal professional privilege being removed.
>
> HIS HONOUR: All right. So …
>
> ENGWIRDA, MS: If any exist. And given what has transpired, there wouldn't be much that does.
>
> HIS HONOUR: All right. So (indistinct)[46]

60 The respondent, by its counsel, accepted that the materials being sought were 'clearly for a purpose'.[47] It was accepted that Ms Engwirda should be able to discuss the materials with the council of the respondent and raise them at meetings.[48] The concern that was expressed was as to dissemination more broadly; for example, that it might be used to contact individual proprietors.[49]

61 Ms Engwirda considered that data was missing.[50] She also objected to the undertaking. Ms Engwirda said that it was an 'attempt to gag me'.[51] Ms Engwirda said, however, that she was prepared to provide a form of undertaking.[52] That was expressed orally as:

> I will not share the information obtained with anyone not personally entitled to inspect the records in accordance with the Strata Titles Act or use it to contact owners about anything unrelated to the strata company.[53]

62 Ms Engwirda submitted that it was not fair or reasonable for a proprietor, such as herself, to be bound to not ever talk about or show strata records to another strata owner. She went on to say that the

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[46] GAB 110.
[47] GAB 116.
[48] GAB 116.
[49] GAB 116. See also GAB 115.
[50] GAB 110 - 112.
[51] GAB 112.
[52] GAB 112 - 113.
[53] GAB 113.

purpose was to obtain access to records that were being withheld from the owners generally, not just her.[54] (There was support for that wider purpose based on what Ms Engwirda had submitted at the directions hearings on 16 and 23 June 2017.[55] Indeed, at that time the member of the Tribunal had suggested that, after obtaining copies under s 43(1a) of the Act, Ms Engwirda would be free to show or distribute the documents to other owners.)[56] Ms Engwirda went on to submit that the *Strata Titles Act 1985* (WA) did not bar or preclude a proprietor making appropriate use of strata company records and documents as obtained through inspection.[57]

63 There was debate between Ms Engwirda and the President as to Ms Engwirda's entitlement to access to strata company records and documents under the *Strata Titles Act 1985* (WA). Ms Engwirda accepted that there was a discretion under s 90 but submitted that she was entitled to inspect under s 43(1)(b) of the Act (and that every other owner had the same entitlement).[58]

64 It is convenient to come back to the Tribunal's reasons after examining the relevant statutory framework. For now it suffices to state that the President was satisfied that an exercise of the Tribunal's power under s 90 of the *Strata Titles Act 1985* (WA) should be conditioned by imposing a requirement that Ms Engwirda provide an undertaking in the form sought by the respondent.

65 The formal orders as made by the Tribunal provide:

> 1. The respondent is to provide [Ms Engwirda] with a USB containing electronic copies of the requested documentation (excluding those documents subject to legal professional privilege).
>
> 2. Before the respondent provides [Ms Engwirda] with the requested documentation by USB, [Ms Engwirda] must provide written confirmation to the respondent's lawyers (Wotton + Kearney) that [she] will:
>
> (a) not use the information/documentation to contact individual owners.

[54] GAB 113.
[55] GAB 6, 26, 53 - 55, 70, 73.
[56] GAB 56.
[57] GAB 116.
[58] GAB 113.

> (b) not publish or disseminate the documentation to third parties; and
>
> (c) ensure that the documentation is kept secure.
>
> 3. The above order 2 does not prevent [Ms Engwirda] from conducting appropriate communication with the council of owners and at council organised meetings in relation to the documentation provided.
>
> 4. Following receipt of the documentation from the respondent, if [Ms Engwirda] is still dissatisfied then [Ms Engwirda] has liberty to make the appropriate application.
>
> 5. The application is dismissed.
>
> 6. No order as to costs.

66 Ms Engwirda had sought orders that the strata company records and documents be made available for inspection. In substance Ms Engwirda sought to vindicate her entitlement under s 43(1)(b) of the *Strata Titles Act 1985* (WA). The respondent offered to make the materials available for inspection by providing a USB which contained electronic copies of the materials. Paragraph 1 of the Tribunal's orders gave effect to that method of resolution of the application for inspection. Although order 1 was expressed in terms of supplying copies of strata company records and documents in the form of a USB it was in substance an order to make the materials available for inspection. Production on the USB was simply a more convenient means by which the strata company records and documents were to be made available for inspection.

67 Order 2 did not, in terms, use the expression that Ms Engwirda must provide an undertaking as a pre-condition to the requirement that the respondent provide Ms Engwirda with the USB. However, that is how the order must be understood. The discussion before the Tribunal on 6 November 2017 was in terms of an undertaking.[59] That is also the language used in the Tribunal's oral reasons[60] as then reproduced in the Tribunal's eventual written reasons.[61]

[59] GAB 109 - 113.
[60] GAB 118.
[61] ***Engwirda and The Owners of Queens Riverside Strata Plan 55728*** [2018] WASAT 15 [22], [32], [35], [37], [39] (Primary decision).

68 At the hearing before this court Ms Engwirda expressed some confusion as to the effect of the orders of 6 November 2017. It is necessary to construe the orders in context. The orders should be understood as follows:

1. By order 1, in requiring the respondent to provide a USB containing electronic copies of the requested documentation, it was necessary that the respondent include on the USB electronic copies of all records or documents within s 43(1)(b) of the *Strata Titles Act 1985* (WA) as existed as at 6 November 2017. Accordingly, excepting the privileged documents, there ought not to have been any strata company records or documents of the respondent that were not included on the USB.

2. The proviso in order 1 that excluded 'those documents subject to legal professional privilege' must be understood as those documents *properly* subject to legal professional privilege. Otherwise the respondent would be entitled to unilaterally withhold documents on the basis of a mere claim for privilege. For the orders to have utility Ms Engwirda had to be entitled to test any claim for privilege on the part of the respondent. Insofar as order 1 allowed the respondent to withhold documents based on a claim for privilege it must be read with order 4 which grants Ms Engwirda liberty to make a further application. Under order 4 Ms Engwirda is permitted, among other things, to make further application to the Tribunal to seek determination as to any claim for legal professional privilege on the part of the respondent. It would be expected that for the purpose of any such claim the respondent would describe the documents in respect of which privilege is claimed, and the basis for the claim of privilege, so as to enable the Tribunal to determine whether the claim for legal professional privilege is properly made.

3. There is some tension between order 5's apparent dismissal of the application and that which is provided for in order 1 (production to facilitate inspection) and order 4 (liberty to apply where Ms Engwirda is dissatisfied following inspection of the documents on the USB). Order 1, in providing for production so as to facilitate inspection in accordance with s 43(1)(b) of the *Strata Titles Act 1985* (WA), effectively saw Ms Engwirda succeed in her application. Order 5 must be understood as providing for the application to be *otherwise* dismissed.

69 Also left unstated was the relationship between the orders of 18 July 2017 and the orders of 6 November 2017. It appears, however, that the orders of 18 July 2017 were intended only as interim orders.[62] On that basis the final orders of 6 November 2017 must supersede and replace the interim orders of 18 July 2017.

Statutory framework

70 The *Strata Titles Act 1985* (WA) provides for the incorporation of the proprietors of a strata plan from time to time to constitute a strata company (s 32). A strata company has various statutory duties (s 35). By s 35(1) these include:

> (f) [to] cause to be kept … proper books of account in respect of moneys received or expended by the strata company showing the items in respect of which the moneys were received or expended;

71 The strata company must also, by s 35(1)(h) of the Act, cause various records to be retained for the prescribed period. These include the books of account (s 35(1)(h)(ii)) and copies of correspondence received and sent by the strata company (s 35(1)(h)(iv)). There is a separate requirement that the strata company maintain a roll containing various particulars including the name and address of each proprietor (s 35A).

72 The functions of the strata company are, generally speaking, to be performed by its council (s 44).

73 Section 43 of the Act is important to Ms Engwirda's appeal. Accordingly, despite the length of the provision, it is necessary to set out s 43 in full:

> **Supply of information and certificates by strata company**
>
> (1) Upon application made in writing to a strata company by a proprietor or mortgagee of a lot, or by a person authorised in writing by such a proprietor or mortgagee, and on payment of the prescribed fee (if any), the strata company *shall* do such one or more of the following things as are required of it in the application:
>
> (a) inform the applicant of the name and address of each person who is the chairman, secretary or treasurer of the strata company or a member of the council;

[62] Primary decision [4]; GAB 118 - 119. See also *Strata Titles Act 1985* (WA), s 82.

(b) make available for inspection by the applicant or his agent and for the exercise of the rights conferred by subsection (5):

(i) a copy of the schedule of unit entitlement as recorded on the strata/survey-strata plan; and

(ia) the roll maintained under section 35A; and

(ii) the notices and orders referred to in and the records kept under section 35(1)(e); and

(iii) the plans, specifications, drawings, certificates, diagrams and other documents delivered under section 49(3); and

(iv) the minutes of general meetings of the strata company and meetings of the council; and

(v) the record of unanimous resolutions, resolutions without dissent and special resolutions passed by the proprietors; and

(vi) the books of account of the strata company; and

(vii) a copy of the statement of accounts of the strata company last prepared by the strata company in accordance with section 35(1)(g); and

(viii) every current policy of insurance effected by the strata company and the receipt for the premium last paid in respect of each such policy; and

(ix) *any other record or document in the custody or under the control of the strata company*; and

(x) the by-laws for the time being in force;

at such time and place as may be agreed upon by the applicant or his agent and the strata company and, failing agreement, at the parcel at a time and on a date fixed by the strata company under subsection (2);

(c) certify, as at the date of the certificate, in respect of the lot in respect of which the application is made:

(i) the amount of any regular periodic contributions determined by the strata company under section 36 and the periods in respect of which those contributions are payable; and

(ii) whether there is any amount of any contribution determined under section 36 due and payable and, if so, the amount due and payable and, in the case of a contribution levied under section 36(2), the date on which any such contribution was levied; and

(iii) whether there is any amount due and payable by a proprietor under a by-law referred to in section 42(8); and

(iv) whether there is any amount recoverable from the proprietor, mortgagee in possession or occupier of that lot under section 38(4) or (5) and, if so, the amount recoverable; and

(v) any amount and rate of interest payable under section 36(4) in respect of any unpaid contribution referred to in that section; and

(vi) whether any penalty imposed on a proprietor under section 103I is due but unpaid, and if so the amount unpaid; and

(vii) where the lot has a submeter for measuring the amount of gas, electricity or water supplied whether there is any amount due but unpaid for gas, electricity or water, and if so the amount unpaid;

(d) certify, as at the date of the certificate:

(i) details of insurance policies maintained by the strata company, including the name of the insurer, the policy number, the type and amount of cover, and the expiry date; and

(ii) whether any transfer, lease or other disposition has been entered into or exclusive use by-law made in favour of any person in respect of the common property but not registered by the Registrar of Titles, and if so the name of the person and the nature and effect of the transaction or by-law.

Penalty: $400.

(1a) On application made in writing to a strata company by a proprietor or mortgagee of a lot, or by a person authorised in writing by such a proprietor or mortgagee, the strata company *may* provide to the applicant copies of:

> (a) any document referred to in subsection (1)(b); or
>
> (b) the roll maintained by the strata company under section 35A,
>
> and, except for one copy of minutes of general meetings of the strata company provided to each proprietor or mortgagee of that lot, may require the applicant to pay the prescribed fee for any copy so provided.
>
> (2) Where an applicant and a strata company fail to reach agreement in accordance with subsection (1)(b) within 3 days after the receipt of the application by the strata company, the strata company shall forthwith send by post to the applicant a notice fixing a time, specified in the notice, between 9 a.m. and 8 p.m. on a date so specified, being a date not later than 10 days after the receipt of the application by the strata company, for the making of the inspection referred to in subsection (1)(b).
>
> (3) Information referred to in subsection (1)(a), and a certificate referred to in subsection (1)(c), shall be provided by the strata company not later than 14 days after receiving the application for the information or certificate, as the case may be.
>
> Penalty: $400.
>
> (4) In favour of a person taking for valuable consideration an estate or interest in any lot, a certificate given under subsection (1)(c) by the strata company in respect of that lot is conclusive evidence, as at the date of the certificate, of the matters stated in the certificate.
>
> (5) A person entitled to inspect a document made available under subsection (1)(b) may take extracts from, or make a copy of, the document but may not, without the consent of the strata company, remove the document from the custody of the strata company for the purpose of inspecting the document, taking extracts therefrom, or making a copy of it.
>
> (6) A strata company shall comply with any reasonable request for the name and address of each person who is the chairman, secretary or treasurer of the strata company or a member of the council of the strata company. (emphasis added)

74 By s 43(1) of the Act the strata company *shall* do various things as are required of it by a proprietor in a written application. The reference to shall is imperative. It imports that the strata company must do those things.[63] The things which must be done include making available for

[63] *Interpretation Act 1984* (WA), s 56(2).

inspection the documents mentioned in s 43(1)(b).[64] Inspection is to occur at such time and place as may be agreed or, failing agreement, at a place and time specified by the strata company in accordance with s 43(2) (to be no later than 10 days after the application). Failure to make the materials available for inspection exposes the strata company to a potential penalty. At inspection the proprietor may take extracts from, or take a copy of, the document; but the proprietor may not remove the document from the custody of the strata company for that purpose (s 43(5)). Separately, on application the strata company *may* (thereby importing a discretion)[65] provide a proprietor with a copy of a document referred to in s 43(1)(b) (but may require payment of a prescribed fee) (s 43(1a)).[66]

75 Part VI of the *Strata Titles Act 1985* (WA) is concerned with resolution of disputes. The Tribunal is given various powers. Where the Tribunal's jurisdiction is invoked by an application being made to it for an order under pt VI in relation to a scheme the strata company has the same duties under s 43 as it has under that section in relation to a proprietor (s 78(1)).

76 As to the orders the Tribunal may make, s 81 provides:

> (1) The State Administrative Tribunal may make an order sought by the applicant and an order made may be expressed in terms different from the order sought, so long as it does not differ in substance from the order sought.
>
> (2) An order made may include such ancillary or consequential provisions as the State Administrative Tribunal thinks fit.

77 Ms Engwirda made application to the Tribunal under s 90. Section 90 provides:

> **Order to supply information or documents**
>
> Where, pursuant to an application for an order under this section, the State Administrative Tribunal considers that the strata company for the scheme to which the application relates, or the administrator for that scheme, or the chairman, secretary or treasurer of that strata company has wrongfully:

[64] This is subject to payment of the prescribed fee. However, where the applicant for inspection of records under s 43(1)(b) is a proprietor the prescribed fee payable to the strata company is nil: *Strata Titles General Regulations 1996* (WA), sch 1 item 4(b).
[65] *Interpretation Act 1984* (WA), s 56(1).
[66] The prescribed fee is $40 for the first five pages and $1 for each subsequent page: *Strata Titles General Regulations 1996* (WA), sch 1 item 4(d).

> (a) withheld from the applicant information to which he is entitled under this Act; or
>
> (b) failed to make available for inspection by the applicant or his agent a record or document that under this Act he is entitled to inspect,
>
> the State Administrative Tribunal may order that strata company, administrator, chairman, secretary or treasurer to supply or make available the information or to make so available the record or document, as the case may require, to the applicant.

78 Section 90 was considered by Kenneth Martin J in ***Maguire v Owners of Roslyn Strata Plan 35960***.[67] His Honour observed, correctly, that:[68]

> 1. The word 'wrongfully' conditions both sub-pars (a) and (b) of s 90 (eg for an order under s 90(b) the strata company must have wrongfully failed to make a record or document available for inspection notwithstanding that the applicant was entitled to inspect it under the Act).
>
> 2. The power of the Tribunal to make orders under s 90 is discretionary.

79 ***Maguire v Owners of Roslyn Strata Plan 35960*** was not on all fours with the present case. In ***Maguire*** inspection had been permitted. Subsequently the applicant sought copies of all of the documents of the strata company. 4,000 pages of photocopied documents were provided. The argument concerned a further 800 pages of documents allegedly not received. Accordingly, ***Maguire*** was not a case where there had been non-compliance with s 43(1)(b) of the Act. Kenneth Martin J correctly identified that there was a distinction between the right of a proprietor to inspect books and records (s 43(1)(b)) and the different right of a proprietor to request that the strata company provide copies of inspected documents (s 43(1a)).[69]

80 As to the discretion under s 90 of the Act, his Honour observed that:

> The [tribunal] member was called upon to exercise the s 90 discretion in a context of rights afforded under s 43(1)(b) of the *Strata Titles Act* to inspect documents, then under s 43(1a) to request copies, all of which should be exercised within reasonable bounds and monitored by SAT to

[67] ***Maguire v Owners of Roslyn Strata Plan 35960*** [2014] WASC 28.
[68] ***Maguire v Owners of Roslyn Strata Plan 35960*** [21(a), (b)].
[69] ***Maguire v Owners of Roslyn Strata Plan 35960*** [40], [43], [58].

> guard against the serious potential of misuse, oppression and pettiness. If a requesting person is perceived by SAT to be acting unreasonably, oppressively or obsessively by invoking such a provision, then it more than falls within the purview of SAT, by the discretion under s 90, to inhibit untoward conduct.[70]

The decision in the Tribunal

81 The Tribunal gave brief oral reasons on 6 November 2017. Thereafter Ms Engwirda sought written reasons in accordance with s 78 of the *State Administrative Tribunal Act 2004* (WA). Written reasons, largely in conformity with but partially amplifying the oral reasons, were provided on 27 February 2018.[71] It is appropriate to explain the Tribunal's reasons by reference to the written reasons.

82 The Tribunal summarised the background facts, the procedural history and the statutory framework.[72] Mention was made of the volume of documentation involved which was described, correctly, as enormous.[73] The Tribunal analysed the decision in ***Maguire v Owners of Roslyn Strata Plan 35960***[74] and observed, correctly, that the Tribunal's power under s 90 of the *Strata Titles Act 1985* (WA) is discretionary.[75]

83 The Tribunal said, however, that Ms Engwirda did not accept that the power under s 90 was discretionary.[76] That, with respect, mistook Ms Engwirda's point. Ms Engwirda never suggested that she had an entitlement under s 90 of the Act. To the contrary, as mentioned at par 63 above, Ms Engwirda accepted that there was a discretion under s 90. Ms Engwirda's point was that she had an entitlement to inspection - because the respondent had a corresponding obligation to make available for inspection - under s 43(1)(b) of the *Strata Titles Act 1985* (WA). Ms Engwirda's contention in relation to s 43(1)(b) is correct. As will be seen, s 43(1)(b) provides the proprietor of a lot with a broad and unrestricted right to inspect strata company records and documents. In that regard s 90 refers to failure to make available for inspection a record or document that the applicant is 'entitled to inspect' under the Act. So

[70] ***Maguire v Owners of Roslyn Strata Plan 35960*** [62].
[71] Primary decision.
[72] Primary decision [1] - [7], [13] - [17].
[73] Primary decision [2].
[74] Primary decision [8] - [12].
[75] Primary decision [12].
[76] Primary decision [17]. See also [12], [16], [24].

too s 43(5) refers to a person 'entitled' to inspect a document made available under s 43(1)(b).

84 The Tribunal's written reasons go on to refer to what happened at the hearing on 6 November 2017.[77] In the course of doing so the Tribunal made findings that:

1. Ms Engwirda's reasons for wishing to inspect the large volume of documents were expressed in very broad terms which made it difficult for the Tribunal to find a basis for the proper exercise of its discretion.[78] (This might be questioned given Ms Engwirda's stated purpose before the Tribunal[79] and the respondent's acceptance that Ms Engwirda was seeking the materials for a purpose.[80] It is, however, not necessary to examine this in any more detail. Despite the Tribunal stating that it was difficult to find a basis for the proper exercise of its discretion the Tribunal proceeded to make the order for production of the USB thereby requiring that the respondent's records and documents as a strata company be made available for inspection.)

2. The issue of legal professional privilege was resolved at the hearing on 6 November 2017 (inferentially on the basis that Ms Engwirda no longer pursued the documents the subject of legal professional privilege).[81]

3. There was insufficient evidence for the Tribunal to form the view that the respondent had further documentation beyond that proposed to be provided in the USB.[82] (In context this was with the exception of such documents as were the subject of legal professional privilege.)

85 On the last point the Tribunal noted that, should Ms Engwirda believe the order had not been complied with (because, for example, there were documents omitted from the USB), she could bring an application to enforce the orders.[83] Any such application is made pursuant to s 86 of the *State Administrative Tribunal Act 2004* (WA) and requires application to the Supreme Court for the Tribunal's decision to be taken to be a decision of the court and enforced accordingly. While

[77] Primary decision [18] - [30], [32].
[78] Primary decision [19].
[79] See pars 48 and 54 above.
[80] See par 60 above.
[81] Primary decision [23].
[82] Primary decision [30].
[83] Primary decision [39].

that would be the appropriate course as to apparent omissions generally a different course was appropriate where Ms Engwirda sought to challenge a privilege claim. There, as previously mentioned, it would be appropriate to make application in the Tribunal under par 4 of the final orders.[84]

86 On the undertaking as sought by the respondent, the Tribunal referred to ***Hearne v Street***[85] in observing that 'when documents are produced pursuant to a court or tribunal order, there is an implied obligation not to use them other than for the purpose for which they are provided'.[86] The Tribunal observed that Ms Engwirda was associated with an action group.[87] The Tribunal also said that an application to join other strata owners was dismissed and no review was sought.[88] That was an overstatement. There was no formal dismissal (see par 49 above). The Tribunal stated, however, that if other strata owners wished to inspect the documents then they too could make application and 'it is likely that an order permitting inspection would be made'.[89]

87 The Tribunal concluded that:

> In circumstances where Ms Engwirda proposed to share that documentation with other parties, the Tribunal considered that in the absence of the undertaking she should be denied access to the documents.[90]

88 As a condition of the exercise of the discretion under s 90 the Tribunal was satisfied that Ms Engwirda should provide confirmation in terms of the undertaking sought by the respondent.[91] The Tribunal stated that if Ms Engwirda was not prepared to give the undertaking, then the Tribunal would not order the production of the documentation.[92]

The grounds of appeal

89 Ms Engwirda is a self-represented litigant. She has prepared a written appellant's case. That commences with what are said to be 29 grounds of appeal (one, Ground 17, with 11 sub-parts) over seven pages. Nine of those appear under the heading '[i]njustice of the decision'

[84] See par 65 above.
[85] ***Hearne v Street*** [2008] HCA 36; (2008) 235 CLR 125 [96].
[86] Primary decision [31].
[87] Primary decision [33].
[88] Primary decision [34].
[89] Primary decision [34].
[90] Primary decision [35].
[91] Primary decision [36].
[92] Primary decision [37].

(Grounds 21 to 29) and are by way of explaining why, in Ms Engwirda's submission, she will suffer substantial injustice if the Tribunal's decision remains unreversed; they do not identify error in the Tribunal's decision. While these matters ought to be taken into account on the issue of leave to appeal, they are not true grounds of appeal and need not be dealt with as such.

90 So too, the complaint in Ground 20 that the respondent has failed to comply with the order for production - and allegedly continues to frustrate efforts to inspect or enable the copying of records - does not identify error in the Tribunal's decision. That sort of complaint may provide a ground for enforcement proceedings. It does not constitute a valid ground of appeal.

91 The remaining Grounds may be summarised as follows:

1. The Tribunal erred in law by taking into account irrelevant considerations, namely, the quantity of documents and the discretion under s 90 (Ground 1).

2. The Tribunal erred in law in inferring that the respondent had not wrongfully withheld or failed to make available information or documents (Ground 2).

3. The Tribunal erred in law by exercising discretion prior to establishing jurisdiction or in the absence of jurisdiction (Grounds 3, 4 and 15).

4. The Tribunal erred in law in allowing the respondent to unilaterally determine what, if any, records or documents were subject to legal professional privilege in circumstances where: (a) Ms Engwirda had not accepted that the issue of privilege had been resolved; (b) the respondent bore an onus to establish the claim to privilege; and (c) the respondent should have been required to specify and prove the claim to privilege (Grounds 5 to 9).

5. The Tribunal erred in law in inferring that the strata owners had a right to privacy and that Ms Engwirda accepted that the issue of privacy was resolved (Ground 10).

6. The Tribunal erred in law in misapplying ***Maguire v Owners of Roslyn Strata Plan 35960*** in various particularised respects (Grounds 11 to 13).

7. The Tribunal erred in law in misapplying ***Hearne v Street*** and inferring that ***Hearne v Street*** justified denying Ms Engwirda access to the respondent's records or documents as strata company of the Scheme in the absence of the undertaking as sought by the respondent (Ground 16); and otherwise in requiring as a condition of the exercise of the Tribunal's discretion under s 90 of the *Strata Titles Act 1985* (WA) that Ms Engwirda provide an undertaking in the terms sought by the respondent (Grounds 18 and 19).

8. The Tribunal erred in law by inferring from her conduct at the hearing on 6 November 2017 that Ms Engwirda was seeking that the hearing be treated as a final hearing rather than a request to withdraw the application (Ground 14).

9. The Tribunal erred in law by failing to accord Ms Engwirda procedural fairness in numerous ways as further particularised (Grounds 17.1 and 17.3 to 17.11).

10. There was a reasonable apprehension that the Tribunal's decision was affected by bias (Ground 17.2).

92 Some of the Grounds are plainly misconceived and may be dealt with relatively summarily. Moreover, many of the Grounds - and Ms Engwirda's written submissions - conflate what occurred in the course of one or more of the procedural hearings with error in the Tribunal's reasons which vitiate its final decision. It should be remembered that Ms Engwirda's substantive complaint is the Tribunal's imposition of a requirement that she provide an undertaking as a condition of the order that the respondent provide the strata company records and documents as requested. Only the Grounds that go to that part of the Tribunal's decision are of significance. Otherwise, with the exception of the privileged documents, Ms Engwirda was successful in her application.

93 Indeed, Ms Engwirda achieved success that went beyond what was sought. In substance Ms Engwirda sought orders that all documents within the descriptions in s 43(1)(b) of the *Strata Titles Act 1985* (WA) be made available for inspection. Ms Engwirda in fact obtained orders requiring that the respondent provide her with electronic copies of those strata company records and documents on a USB - Ms Engwirda's inspection is being facilitated by her being provided with electronic copies of the records and documents.

Extension of time and leave to appeal

94 An appeal against the Tribunal's order made 6 November 2017 requires leave.[93] Leave will be granted if, in all the circumstances, it is in the interests of justice.[94] However, as any appeal can only be brought on a question of law,[95] leave will not be granted where an applicant seeks to agitate something other than a question of law.

95 There are no rigid or exhaustive guidelines governing the grant of leave. In general, however, an applicant for leave must show that there is sufficient doubt to justify the grant of leave and that allowing the error to go uncorrected would impose substantial injustice. The latter is more readily satisfied where the decision of the Tribunal that is sought to be appealed is a final decision.[96]

96 In addition to the necessity for leave, Ms Engwirda's application was commenced outside the time provided for under s 105(5) of the *State Administrative Tribunal Act 2004* (WA). In this case, because written reasons were requested, the 28 days for lodgement of the application commenced to run from 27 February 2018. The application should have been lodged by 27 March 2018. However, it was not lodged until 26 September 2018, some six months out of time.

97 The power to grant an extension of time is a broad one to be exercised in the interests of justice having regard to all the circumstances of the case. Those circumstances are often, but not exclusively, organised around the factors of:

1. the length of the delay;
2. the reasons for the delay;
3. the prospects of the applicant succeeding in the appeal; and
4. the extent of any prejudice to the respondent.[97]

98 A short affidavit has been filed in support of the application for an extension of time to make application for leave to appeal.[98] Ms Engwirda deposed that she was initially led to believe that failure to

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[93] *State Administrative Tribunal Act 2004* (WA), s 105(1).
[94] ***Paridis v Settlement Agents Supervisory Board*** [2007] WASCA 97; (2007) 33 WAR 361 [16] - [18].
[95] *State Administrative Tribunal Act 2004* (WA), s 105(2).
[96] ***Centex Australasia Pty Ltd v Commissioner for Consumer Protection*** [2017] WASCA 79 [106].
[97] See ***Simonsen v Legge*** [2010] WASCA 238 [8].
[98] Affidavit of Jennifer Anne Engwirda sworn 26 September 2018.

file a notice of appeal before 27 November 2017 precluded her appealing the Tribunal decision. That misconception is understandable given the terms of r 26(2) of the *Supreme Court (Court of Appeal) Rules 2005* (WA) and the fact that Ms Engwirda is self-represented. Upon appreciating that it was possible for an extension of time to be granted, Ms Engwirda, on 24 May 2018, filed an application with a notice of appeal and supporting documentation. That material was served on the respondent on 24 May 2018. However, ultimately the appeal notice was not accepted for filing as the supporting material did not comply with the requirements of an affidavit.

99 Ms Engwirda was overseas between 25 May and 13 September 2018. It is apparent from the date on which the application was filed that Ms Engwirda attended to the filing within two weeks after her return to Western Australia. In all the circumstances Ms Engwirda's delay has been adequately explained.

100 The respondent has been aware of Ms Engwirda's intention to seek an extension of time for leave to appeal since 24 May 2018. That was only some two months after the date by which Ms Engwirda could have lodged an application without needing an extension. Importantly, as evidenced by the respondent's decision not to participate in the appeal, it cannot be said that the delay in the application has caused any real or substantial prejudice to the respondent.

101 Ms Engwirda's applications for an extension of time and for leave to appeal turn, in large part, on the merits of the proposed appeal. Accordingly, further consideration of the issues of an extension and leave is best deferred until there has been consideration of the various Grounds. There must also be consideration of whether, if error is established, allowing the status quo to remain would result in substantial injustice.

General observations on the right to inspect under the *Strata Titles Act 1985* (WA)

102 Section 43(1)(b) of the *Strata Titles Act 1985* (WA) provides each proprietor or mortgagee of a strata lot with a broad and unrestricted right to inspect strata company records and documents.

103 The proprietors from time to time constitute the strata company. The strata company is the medium through which the proprietors control and manage the strata scheme for their benefit.[99] In that respect the Act

[99] *Strata Titles Act 1985* (WA), s 35(1)(b). See also s 36(1)(a), s 42(1)(c).

and relevant by-laws impose and confer numerous duties and functions on the strata company. The strata company's record keeping duties have already been identified (see pars 70 to 71 above). As to functions, relevant for present purposes, given the stated reason for inspection, is the power of a strata company to levy contributions on proprietors.[100] However, subject to the Act and any restriction or direction at a general meeting, that function is performed by the council of the strata company.[101] The council of a strata company is a small elected group of proprietors whose principal function is the day to day management of the strata scheme. As well as any permissible restriction or direction at a general meeting, the individual proprietors may bring about changes to the council of the strata company by resolution at a meeting of the strata company.[102]

104 This brief outline suffices to identify the statutory purpose of s 43(1)(b) of the Act.

105 The strata company's primary responsibility is to control and manage the strata scheme for the benefit of the proprietors. As a corollary, by s 43(1)(a) to (d) of the *Strata Titles Act 1985* (WA), the strata company is required to supply information and make records and documents available for inspection to all those who have a legitimate interest in the information and other materials. The persons with such a legitimate interest include the proprietors. The obligation to make strata company records and documents available for inspection is one means by which the proprietors exercise oversight in relation to their strata company - specifically the council of the strata company - and the council and strata company are made accountable to the proprietors.

106 It is not simply that the proprietors constitute the strata company, although this is not unimportant. Insofar as, collectively, the proprietors constitute the strata company, there is a more proximate relationship between the proprietors and the strata company records and documents than that which prevails between a shareholder and the books and records of a company incorporated under the *Corporations Act 2001* (Cth). Apart from the special nature of a strata company, and the relationship that exists between the proprietors and a strata company, the proprietors will often be directly affected by the actions taken by the strata company at the behest of its council. Oversight and accountability are enhanced by a broad and unrestricted right of inspection of strata company books

[100] *Strata Titles Act 1985* (WA), s 36.
[101] *Strata Titles Act 1985* (WA), s 44.
[102] See eg *Strata Titles Act 1985* (WA), sch 1 items 4(4), 4(8), 4(10).

and records. Moreover, in accordance with the normal governance structure of a strata company, the proprietors periodically elect, and may remove, members of the council of the strata company. The ability to gather information - and in particular the right to inspect the strata company's records and documents - enhances the proprietors' ability to impose a restriction or direction on the council, or alternatively, to effect a change in the membership of the council. Inspection facilitates more informed analysis and consideration of the past decision-making of the incumbent council of a strata company.

107 The broad unrestricted right to inspect under s 43(1)(b) of the Act, evincing a statutory purpose of enhancing oversight by and accountability to the proprietors and mortgagees of a strata title lot, becomes more obvious when s 43(1)(b) is compared to its statutory predecessor.

108 The *Strata Titles Act 1985* (WA) was preceded by the *Strata Titles Act 1966* (WA). The 1966 Act required the strata company to make the by-laws available for inspection.[103] That was the only substantial inspection right as against the strata company. There were also duties directed to the council, rather than the strata company, to keep various records and documents,[104] and to make these available for inspection at all reasonable times.[105] But those requirements were contained in the model by-laws and could be removed by the strata company repealing the by-law.[106] Accordingly, the 1985 Act strengthened the right to inspect strata company records and documents in two important ways. First, the obligation to make the materials available for inspection was imposed on the strata company, not merely the council. Second, the obligation became entrenched in the legislation and could no longer be repealed.

109 There is also an important distinction between the scope of the right to inspect under the 1966 Act and that which was subsequently enacted under the 1985 Act.

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[103] *Strata Titles Act 1966* (WA), s 15(5). See also s 13(4)(j) (as to names and addresses of members of the council).
[104] *Strata Titles Act 1966* (WA), sch pt I item 4(10). See also sch pt I item 2(e) (insurances policies and premiums).
[105] *Strata Titles Act 1966* (WA), sch pt I item 4(10)(f).
[106] *Strata Titles Act 1966* (WA), s 15(2) (albeit that a unanimous resolution was required).

110 The right to inspect under the 1966 Act (as against the council only) extended to 'minutes of general meetings, records of unanimous resolutions, books of account and records relating to books of account'.[107] The difference between that and the present-day s 43(1)(b) is significant. In particular, s 43(1)(b)(ix)'s 'any other record or document in the custody or under the control' of the strata company is far wider than the formulation under the 1966 Act.

111 The broad and unrestricted right to inspect under s 43(1)(b) of the *Strata Titles Act 1985* (WA) ought also to be compared with the limited opportunity afforded to a member of a company under s 247A(1) of the *Corporations Act 2001* (Cth). There is no right under s 247A(1). Inspection is only provided if authorised by order of the court on application. There are conditions that must be satisfied before the court will so order. The court must be satisfied that the member is acting in good faith; and the court must be satisfied that the inspection is to be made for a proper purpose. The court may also make ancillary orders under s 247B limiting the use that the member may make of the information obtained during the inspection.

112 The broad and unrestricted nature of the right to inspect under s 43(1)(b) of the *Strata Titles Act 1985* (WA) has implications for the application of s 90.

113 Where a strata company fails to comply with an application that records or documents be made available for inspection under s 43(1)(b) of the Act the disappointed proprietor has two options. First, the proprietor may seek to bring about the issue of penalty proceedings. That may result in a penalty being imposed on the strata company. It will not, however, see the requested materials being made available for inspection. Second, the proprietor may make application in the Tribunal for an order under s 90 of the Act. In this way s 90 provides the proprietor with the only means of vindicating his or her right to inspect under s 43(1)(b) of the Act.

114 The use of 'may' in s 90 of the Act imports a discretion. In an appropriate case the sort of considerations referred to in ***Maguire v Owners of Roslyn Strata Plan 35960*** (ie that the applicant is acting unreasonably, oppressively or obsessively) might justify limitations on the scope of the order for inspection or - in an extreme case - the refusal of an order. It should, however, be remembered that Kenneth Martin J's observations in ***Maguire*** arose in a context where inspection had been

[107] *Strata Titles Act 1966* (WA), sch pt I item 4(10)(f).

provided and the question was one of whether copies ought to be provided.

115 Nevertheless, in the context of an application under s 90(b) where a strata company has wrongfully failed to comply with a proprietor's application under s 43(1)(b), the exercise of the discretion will always be informed by two matters in addition to the specific factual circumstances before the Tribunal. First, the broad unrestricted right that the legislature has seen fit to grant to every proprietor of a lot under s 43(1)(b) of the Act. As between the strata company and the proprietor, the proprietor is entitled to inspect - and the strata company has a correlative obligation to make available for inspection - all documents falling within the various descriptions in s 43(1)(b). The discretion under s 90 ought not to be exercised so as to nullify and render impotent the statutory right conferred by s 43(1)(b) without sufficient reason. Second, that the strata company will have 'wrongfully' failed to make available for inspection materials that the proprietor was entitled to inspect under the Act.

116 The Tribunal's reasons referred to the discretion under s 90 of the Act.[108] There was, however, no apparent appreciation that the discretion fell to be exercised informed by the nature of the broad and unrestricted right to inspect under s 43(1)(b). To the contrary the Tribunal said only that the power under s 90 of the Act was 'quite distinct' from s 43(1)(b) of the Act.[109] That statement is incorrect. As, in the present context, s 90(b) provided a remedial power to redress the respondent's wrongful failure to comply with s 43(1)(b), the power under s 90 was necessarily informed by Ms Engwirda's entitlement to inspect; the power under s 90 was not 'quite distinct' from Ms Engwirda's right to inspect under s 43(1)(b).

The merits of Ms Engwirda's proposed appeal

The grounds without substantive merit (Grounds 1; 2; 3, 4 and 15; 5 to 9; 10; 11 - 13; 14)

117 A number of the Grounds are self-evidently without merit and should be dismissed at the outset.

118 Ground 1 alleges that the Tribunal erred in law by taking into account irrelevant considerations at [2] and [12] of its reasons. Paragraph [2] of the Tribunal's reasons is concerned with the size of the strata development, the amount of data the subject of Ms Engwirda's

[108] Primary decision [8], [12], [16] - [17].
[109] Primary decision [17].

request for inspection and the nature of the logistical exercise to organise the documents and provide them for inspection. Paragraph [12] provides the Tribunal's acceptance of the authority in ***Maguire v Owners of Roslyn Strata Plan 35960*** and its determination that the power under s 90 of the *Strata Titles Act 1985* (WA) is discretionary.

119 The former matter was not taken into account insofar as the Tribunal determined to impose the undertaking condition. Otherwise, so far as an order was made for inspection by requiring the respondent to produce the USB with electronic copies of the strata company records and documents, the matters referred to at [2] of the Tribunal's reasons did not cause the Tribunal's discretion to miscarry: the Tribunal's orders enabled inspection despite the breadth and extent of the records and documents the subject of Ms Engwirda's request. In any case those matters were not irrelevant considerations to the exercise of discretion under s 90. As to the latter matter, there is a discretion under s 90. Ms Engwirda accepted that to be the case before the Tribunal[110] and also before this court.[111]

120 Grounds 2, 3, 4 and 15 are conveniently considered together. Ground 2 asserts that at [9] and [13] of the Tribunal's reasons the Tribunal erred in law by inferring that there had not been a wrongful withholding of information or failure to make available for inspection some record or document that Ms Engwirda was entitled to inspect. The Tribunal did not reach any such conclusion. To the contrary, by par 1 of the final orders of 6 November 2017 the Tribunal exercised the power under s 90 of the *Strata Titles Act 1985* (WA). The Tribunal could only do so if satisfied that the statutory pre-conditions enlivening the power were satisfied. In this regard the Tribunal had directed itself to the relevant statutory integer that a withholding or failure be 'wrongful' as enunciated by Kenneth Martin J in ***Maguire v Owners of Roslyn Strata Plan 35960***.[112] As orders were made it must be inferred that the Tribunal was satisfied that the statutory pre-condition was met.

121 Having regard to the way in which Ms Engwirda's application was presented it should be accepted that the Tribunal was satisfied - in terms of s 90(b) - that the respondent had wrongfully failed to make available for inspection records and documents that Ms Engwirda was entitled to inspect under the Act.

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[110] GAB 113.
[111] Appellant's submissions, pars 52, 54; WAB 14.
[112] Primary decision [8].

122 Grounds 3, 4 and 15 contend that the Tribunal's decision was in error because the Tribunal exercised its discretion before establishing that it had jurisdiction (Ground 3) or in the absence of jurisdiction (Grounds 4 and 15). There is no merit in those Grounds. For the reasons explained in relation to Ground 2 it should be inferred that the Tribunal was satisfied that the statutory pre-condition was met. The wrongful failure on the part of the respondent was obvious and effectively admitted in as much as the respondent consented to the making of orders under s 90 of the Act. In any case, were these Grounds made out - and there was an absence of jurisdiction - Ms Engwirda could not be successful in her appeal. If the Tribunal was without power no order should have been made under s 90 at all. That is not Ms Engwirda's case. Ms Engwirda contends that there should have been an order but that it should not have been conditioned by the requirement that she give an undertaking in accordance with pars 2 and 3 of the orders made 6 November 2017. Ms Engwirda's complaint goes to the exercise of the Tribunal's discretion rather than whether the power under s 90 was enlivened.

123 Grounds 5 to 9 are concerned with the carve-out for documents the subject of legal professional privilege as contained in the proviso to par 1 of the Tribunal's orders made 6 November 2017. It can be accepted that the respondent bore the onus of proof in establishing privilege (Grounds 6 and 8) and that the orders as made effectively left the initial determination of privilege in the hands of the respondent (Grounds 5, 7 and 8). However, whether the Tribunal's final decision evinced error in this respect depends on whether, as the Tribunal found at [23] of its reasons, the issue of legal professional privilege had been resolved. This is challenged at Ground 9.

124 Based on the passage reproduced at par 59 above it was open to the Tribunal to conclude that the question of non-production for reasons of legal professional privilege had been resolved. Ms Engwirda did not challenge the statement that she did not object to removal of such documents, stating only that 'there wouldn't be much'.[113] Ms Engwirda's apparent willingness not to agitate this point was readily understandable: under the orders as proposed she would obtain the benefit of receiving electronic copies of the strata company records and document rather than inspection simpliciter. In any case, to the extent that, on inspection, Ms Engwirda considered that non-privileged documents had wrongfully

[113] GAB 110.

been withheld, it would have been possible to make further application in the way that has previously been explained.[114]

125 Ground 10 is misconceived. It asserts that at [5] and [15] of the Tribunal's reasons the Tribunal found that the proprietors in the Scheme had a right to privacy. There are no such findings. At [15], for example, the Tribunal simply reproduces what, in substance, was accepted by Ms Engwirda at the directions hearing on 23 June 2017 (see par 50 above). Further, so far as the issue of privacy was concerned, the Tribunal went on to record at [23] of its reasons that the *respondent* conceded it. In that respect the respondent was prepared to provide all the strata company records and documents in its possession (other than that for which legal professional privilege was claimed).

126 Grounds 11 to 13 complain about the Tribunal's reasons so far as they deal with ***Maguire v Owners of Roslyn Strata Plan 35960***.

127 Ground 11 is in two parts. First, Ms Engwirda takes issue with what is said at [8] of the Tribunal's reasons. That passage is no more than an uncontroversial introduction to the decision of ***Maguire v Owners of Roslyn Strata Plan 35960*** and the circumstance that s 90 imports a discretion. Second, Ms Engwirda takes issue with something that fell from the President orally at the directions hearing on 12 September 2017. The President said that, based on ***Maguire v Owners of Roslyn Strata Plan 35960***, it was for the applicant to establish why the respondent should produce rather than to require the respondent to justify why it should not produce.[115] That was no more than a provisional view expressed in the course of argument, two months before the final decision, and formed no part of the Tribunal's reasons for its final decision. In any case the final orders as made required production of all records and documents (excepting the privileged documents). If the provisional view was maintained it had no effect on the final decision.

128 Ground 12 complains that, at [11] of its reasons, the Tribunal erred in inferring that Ms Engwirda was acting unreasonably, oppressively or obsessively. The Tribunal did no such thing. The Tribunal simply reproduced the passage from ***Maguire v Owners of Roslyn Strata Plan 35960*** that is found at par 80 above.

[114] Primary decision [39]. See also orders of 6 November 2017, par 4; BAB 1.
[115] GAB 95.

129 Ground 13 alleges error at various parts of the Tribunal's reasons (at [12], [24] and [38]) by suggesting that the Tribunal inferred that ***Maguire v Owners of Roslyn Strata Plan 35960*** justified the Tribunal's decision to exercise its discretion so as to prevent a fishing expedition in favour of a respondent who had not complied with s 43(1)(b) of the *Strata Titles Act 1985* (WA). It is difficult to see how that can be drawn from the relevant passages of the Tribunal's reasons. Paragraph [12] does no more than record that the power under s 90 is discretionary. With [24], while there is reference to it not being a proper use of the Tribunal's power to order inspection to allow a fishing expedition, the passage must be read in light of the fact that the Tribunal did make orders for production of all records and documents (other than privileged documents). Paragraph [38] simply confirms that, if Ms Engwirda is dissatisfied with the strata council, she may make an application under s 102 of the Act for the appointment of an administrator.

130 Ground 14 asserts error in the Tribunal inferring that Ms Engwirda was requesting that the hearing on 6 November 2017 be treated as a final hearing rather than an informal request to withdraw the application. This is nothing more than revisionism. Before the President Ms Engwirda stated that she would love the hearing to be the final hearing.[116] Ms Engwirda ultimately requested that the matter be determined on the papers saying that she did not want to come back and she '[didn't] think there's anything more I can say'.[117] There was no mention of withdrawing the application. Given what Ms Engwirda said - and the position of the respondent - it was open to the Tribunal to treat the hearing as a final hearing and proceed to a final decision.

131 For these reasons Grounds 1 to 15 are without merit and should be dismissed. For reasons already given purported Grounds 21 to 29 are not true grounds of appeal. That is also the position with purported Ground 20. There are, however, two categories of Grounds to which closer consideration ought to be given.

The Grounds going to the Tribunal's imposition of the condition that Ms Engwirda provide the undertaking (Grounds 16, 18 and 19)

132 Ms Engwirda's main complaint concerned the imposition of the undertaking condition. Three Grounds were directed to this aspect of the appeal. In substance they were that:

[116] GAB 108.
[117] GAB 117.

1. The Tribunal erred in law in misapplying ***Hearne v Street*** (Ground 16).

2. The Tribunal erred in law in its reasons at [36] and [37] by conditioning the exercise of its discretion in ordering the production of the USB on Ms Engwirda's undertaking in terms of pars 2 and 3 of the orders of 6 November 2017 (Grounds 18 and 19).

133 Grounds 18 and 19 do not identify a specific alleged error independent of Ground 16. The passages in the Tribunal's reasons complained of simply follow on from the Tribunal's earlier reliance on ***Hearne v Street***. Accordingly, the issue need only be considered by reference to Ground 16.

134 While Ms Engwirda properly formulated a ground of appeal in relation to the Tribunal's alleged misapplication of ***Hearne v Street***, she did not identify the question of law which informed Ground 16.[118] In ensuring that any appeal is brought on a question of law this court cannot overlook the requirement to identify the relevant question. The question of law is not to be distilled from the grounds of appeal. The existence of a question of law is both a qualifying condition to the invocation of this court's jurisdiction under s 105 of the *State Administrative Tribunal Act 2004* (WA) and the subject matter of the appeal itself. It is essential that the question of law relied on for the purpose of s 105(2) be identified with precision.[119]

135 When regard is had to the Tribunal's reasons (see pars 86 to 88 above), the terms of Ground 16 and Ms Engwirda's submissions in support of the Ground, the question of law sought to be raised by Ms Engwirda may be expressed in these terms:

> Does the substantive legal obligation as recognised in ***Hearne v Street*** to arise by operation of law when parties to litigation are compelled to disclose documents or information - namely that the party obtaining disclosure cannot, without leave of the court or tribunal, use the documents or information for a purpose unrelated to the conduct of the litigation - apply where the Tribunal makes an order under s 90 of the *Strata Titles Act 1985* (WA) to enable inspection of a strata company's records and documents in circumstances where the strata company has

[118] Cf *Supreme Court (Court of Appeal) Rules 2005* (WA), r 32(4)(e).
[119] ***Commissioner for Consumer Protection v Carey*** [2014] WASCA 7 [165]; ***Giudice v Legal Profession Complaints Committee*** [2014] WASCA 115 [73].

> wrongfully failed to make the records and documents available for inspection in contravention of s 43(1)(b) of the Act?

136 The Tribunal assumed that the answer to this question was yes. In addressing the undertaking the Tribunal referred to ***Hearne v Street*** as establishing the proposition that *whenever* documents were produced pursuant to a court or tribunal order there was an implied obligation not to use them other than for the purpose for which they were provided.[120] From there the Tribunal reasoned that, in circumstances in which Ms Engwirda intended to share the records and documents with other proprietors, the undertaking should be required as a condition of the exercise of the power under s 90.[121] There was no express consideration of whether the principle in ***Hearne v Street*** applied where strata company records and documents were produced by order under s 90 of the *Strata Titles Act 1985* (WA) to enable inspection of such materials in accordance with an entitlement to do so under the Act. Nor was there any consideration of the relevant purpose for which the documents and information were provided.

137 When consideration is given to the nature of the ***Hearne v Street*** implied obligation, and the reason it arises as a matter of substantive legal obligation, it does not apply when an order is made under s 90 of the Act to remedy a strata company's wrongful failure to provide inspection under s 43(1)(b). The answer to the question of law stated in par 135 above is 'no'. The Tribunal was in error in proceeding on the contrary basis that the ***Hearne v Street*** implied obligation was applicable. That error infected the Tribunal's reasoning as resulted in the imposition of the undertaking condition in par 2 of the Tribunal's final orders.

138 In ***Hearne v Street*** the plurality (Hayne, Heydon and Crennan JJ) described as uncontroversial the principle that:

> Where one party to *litigation* is compelled, either by reason of a rule of court, or by reason of a specific order of the court, or otherwise, to disclose documents or information, the party obtaining the disclosure cannot, without the leave of the court, use it for any purpose other than that for which it was given unless it is received into evidence.[122] (emphasis added)

[120] Primary decision [31].
[121] Primary decision [33] - [37].
[122] ***Hearne v Street*** [96].

139 That passage does not specify the permissible purpose for which the documents or information may be used. It is accepted, however, that the purpose for which the disclosure is given is the proper conduct of the legal proceedings in question.[123]

140 Their Honours observed that it was common to speak of the obligation as flowing from an implied undertaking.[124] It was explained, however, that in truth the obligation was an obligation of substantive law arising from the circumstances in which the material was generated and received.[125] The other members of the High Court agreed that the 'implied undertaking' was better understood as a substantive legal obligation.[126]

141 There are many types of disclosed materials to which the implied obligation applies. These include materials disclosed in the course of pre-trial procedures or practices, eg copies of discovered documents, answers to interrogatories, subpoenaed documents, witness statements and affidavits.[127] The implied obligation will also apply where documents and information are disclosed by compulsion due to pre-hearing orders and practices in a tribunal such as the State Administrative Tribunal rather than a court.[128] And the implied obligation has some scope to operate outside compulsion in the context of pre-trial or pre-hearing orders and practices. For example, where an external administrator obtains documents in the course of an examination under div 1 of pt 5.9 of the *Corporations Act 2001* (Cth) he or she is subject to an implied obligation not to use the documents for an ulterior or collateral purpose. However, the use of the documents in the external administration (eg in other proceedings commenced by the external administrator to recover assets on behalf of the company) is not a collateral or ulterior purpose.[129]

142 The implied obligation is owed to the relevant court or tribunal; it has the right to control the obligation and can modify or release a person from the obligation.[130] There is nothing voluntary about the obligation.[131] It arises because of the circumstances under which the

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[123] ***Hearne v Street*** [1]; ***Harman v Secretary of State for Home Department*** [1983] 1 AC 280, 304, 323.
[124] ***Hearne v Street*** [97].
[125] ***Hearne v Street*** [102], [105] - [108].
[126] ***Hearne v Street*** [3] (Gleeson CJ), [56] (Kirby J).
[127] ***Hearne v Street*** [96].
[128] ***Secretary, Department of Treasury & Finance v Kelly*** [2001] VSCA 246; (2001) 4 VR 595 [54]; cf ***Medical Board of Western Australia v Medical Practitioner*** [2011] WASCA 151 [102].
[129] ***Re Southern Equities Corporation Ltd (in liq); Bond v England*** (1997) 25 ACSR 394, 436 - 437.
[130] ***Hearne v Street*** [107].
[131] ***Hearne v Street*** [106].

information or documents were provided - namely, that they were required by reason of a compulsory process in aid or in furtherance of some other proceeding or process that is subject to judicial supervision. That underlying rationale for the imposition of the obligation was explained by Lord Denning MR in ***Riddick v Thames Board Mills Ltd*** in a passage quoted with approval by the plurality in ***Hearne v Street***:[132]

> Compulsion [to disclose on discovery] is an invasion of a private right to keep one's documents to oneself. The public interest in privacy and confidence demands that this compulsion should not be pressed further than the course of justice requires. The courts should, therefore, not allow the other party - or anyone else - to use the documents for any ulterior or alien purpose. Otherwise the courts themselves would be doing injustice.[133]

143 The Tribunal was not making a pre-hearing order for disclosure akin to a discovery order. The order was not made to assist in the proper conduct of some other proceedings before the Tribunal or some process analogous to external administration. The order under s 90 of the *Strata Titles Act 1985* (WA) was to be made to vindicate Ms Engwirda's entitlement to inspect - and remedy the respondent's wrongful failure to make available for inspection - the relevant strata company records and documents answering the description in s 43(1)(b) of the Act. Moreover, as between Ms Engwirda and the respondent there was nothing private or confidential as to the subject records and documents. Any suggestion to the contrary is incompatible with the broad and unrestricted right to inspect granted to a proprietor under s 43(1)(b).

144 In those circumstances the Tribunal was in error in applying ***Hearne v Street*** and proceeding on the basis that an order under s 90 of the *Strata Titles Act 1985* (WA) to produce strata company records (to make so available the records and documents to Ms Engwirda) attracted the type of implied obligation recognised in ***Hearne v Street***.

145 It is true that the proposed order under s 90 of the Act was to have the effect of disclosing documents and information. There were, however, two obvious distinctions between the circumstances before the Tribunal and the circumstances in which the ***Hearne v Street*** implied obligation arises by operation of law. First, this was not a situation where disclosure was being required by order of the Tribunal for the purpose of the conduct of the litigation before the Tribunal or some external administration like process. The order under s 90 was an end unto itself

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[132] ***Hearne v Street*** [107].
[133] ***Riddick v Thames Board Mills Ltd*** [1977] QB 881, 896.

- vindication of Ms Engwirda's entitlement under s 43(1)(b) - rather than being in aid of some other proceeding or process. Second, although the proposed order would compel disclosure, the order was not one which required disclosure of documents and information which were private or confidential as between the respondent strata company and Ms Engwirda. This was not a situation where a litigant or external administrator was seeking by legal compulsion to obtain material to which it was otherwise not entitled. Ms Engwirda, as a proprietor, was 'entitled' and therefore had a right to inspect under s 43(1)(b).

146 The inapplicability of ***Hearne v Street*** - and the lack of any justification for the undertaking condition by reference to the sort of implied obligation confirmed by ***Hearne v Street*** - becomes obvious when consideration is given to the question of purpose.

147 The Tribunal, at [31] of its reasons, stated that when documents are produced pursuant to an order there is an implied obligation not to use them other than for the purpose for which they were provided. There was no consideration of the relevant permissible purposes. As already mentioned, the purpose of use related to the proceedings - which grounds the application of the implied obligation doctrine in ***Hearne v Street*** - is not applicable (partially explaining why the implied obligation does not arise). The relevant purpose of any s 90 order in the context of the application before the Tribunal was to give effect to Ms Engwirda's right to inspect under s 43(1)(b) of the *Strata Titles Act 1985* (WA). Accordingly, the permissible purposes for which Ms Engwirda might use the strata company records and documents as made available for inspection were those that were consistent with the statutory purpose evinced by s 43(1)(b). These included the purposes of oversight and accountability as developed earlier in these reasons.

148 The undertaking condition as imposed by the Tribunal frustrated fulfilment of the statutory purpose of the right of inspection conferred by s 43(1)(b).

149 Ms Engwirda was to undertake not to use the materials to contact other strata lot owners and was required not to publish or disseminate the materials to third parties. So, for example, as a condition of enjoying the right to inspect as provided by the legislature under the Act, Ms Engwirda:

1. Could not use the materials to contact other strata lot owners - even though collective action on the part of the proprietors might

result in a change in the constitution of the council or a restriction being imposed on or direction given to the council at a general meeting.

2. Could not provide the materials - or a summary derived from the materials - to other strata lot owners even though: (a) those owners, as proprietors of lots, were themselves entitled to inspect the materials; and (b) the provision of the materials or a summary derived from the materials might facilitate collective action on the part of the proprietors.

3. Could not provide the materials to a legal practitioner, engaged by her, so as to seek advice as to the actions of the strata company as disclosed by the materials.

4. Could not provide the materials to a court or tribunal - including the Tribunal - or make use of the materials in proceedings before a court or tribunal. There are numerous reasons why a proprietor in the position of Ms Engwirda might wish to rely on materials obtained through inspection under s 43(1)(b) of the Act in proceedings. For example, s 102 of the *Strata Titles Act 1985* (WA) empowers the Tribunal to appoint an administrator in relation to duties imposed on a strata company or the council of a strata company.

150 In each of these respects the Tribunal's undertaking condition could not be justified by reference to the purpose of oversight and accountability that informs s 43(1)(b). The manifest overreach of the undertaking is demonstrated by s 43(5) of the *Strata Titles Act 1985* (WA). The statutory right under s 43(5) to take extracts from, or make copies of, documents made available for inspection during such inspection is not constrained by the sort of limitations found in the undertaking required by the Tribunal's orders. Had the respondent simply complied with its obligations under s 43(1)(b) of the Act, and Ms Engwirda not had to resort to proceedings under s 90, Ms Engwirda might have, on inspection, made copies and then made use of the copies in the various ways illustrated in the previous paragraph.

151 A ***Hearne v Street*** implied obligation would justify the sort of undertaking condition imposed by the Tribunal's orders - one that restricted the use to which the strata company's records and documents might be put and the persons to whom the materials might be disclosed. But no such condition was justified based on the statutory purpose

evinced by the right of inspection provided by s 43(1)(b) of the *Strata Titles Act 1985* (WA). The sort of restriction on use and disclosure of the material as is consequential on the implied obligation in keeping with ***Hearne v Street*** is inconsistent with s 43(1)(b)'s broad unrestricted right of inspection to enhance oversight by and accountability to the proprietors and mortgagors of strata title lots. The function and statutory purpose of s 43(1)(b) - which in turn inform the exercise of the power under s 90 - negates the imposition by operation of law of the implied obligation.

152 Insofar as the Tribunal's order under s 90 was to vindicate Ms Engwirda's entitlement under s 43(1)(b) the order ought to have furthered the statutory purpose which informed s 43(1)(b). There is nothing in s 43(1)(b) which would sustain a restriction akin to the implied obligation.

153 The undertaking condition as imposed by pars 2 and 3 of the Tribunal's final orders cannot be justified by analogy with the ***Hearne v Street*** implied obligation. That sort of implied obligation was not applicable where an order was made under s 90 of the *Strata Titles Act 1985* (WA) to give effect to a proprietor's broad and unrestricted right to inspect strata company books and records under s 43(1)(b) of the Act. The Tribunal was in error in justifying the imposition of the undertaking on the basis that the implied obligation arose so as to thereby condition the making of an order pursuant to s 90 of the Act. Grounds 16, 18 and 19 should be upheld.

The procedural fairness and reasonable apprehension of bias grounds (Ground 17)

154 As Grounds 16, 18 and 19 should be upheld it is unnecessary to examine Ground 17 in detail. The multiple parts of Ground 17 were said to raise issues of procedural fairness and reasonable apprehension of bias. While aspects of the interactions between Ms Engwirda and the presiding members of the Tribunal were imperfect, the complaints made under the heading of Ground 17 cannot justify setting aside pars 2 and 3 of the Tribunal's orders of 6 November 2019.

155 A number of the complaints concern statements attributable to the member of the Tribunal who first dealt with the application at the directions hearings on 16 and 23 June 2017 (Ground 17.2.1). That was irrelevant when the Tribunal's final decision was made by the President. Insofar as complaints were directed to statements of the President (Ground 17.2.2) it might be accepted that some of the language employed

by the President towards Ms Engwirda was very direct. Viewed as a whole, however, the discourse between the President, Ms Engwirda and counsel for the respondent was not of a nature that demonstrated reasonable apprehension of bias. And, to the extent that Ms Engwirda complained of the President's conduct on the earlier directions hearing (Ground 17.3) and in either not taking action or making orders on the earlier directions hearings (Grounds 17.5, 17.8 and 17.10), the conduct complained of was irrelevant to the hearing on 6 November 2017.

156 While advanced as alleged failure to accord procedural fairness, Ground 17 also raised a complaint about accepting statements made by counsel for the respondent as to the volume of documents involved (Ground 17.1). The complaint is misconceived. First, it could only potentially be relevant if the Tribunal relied on that as a reason for refusing to make an order providing for inspection. Second, the rules of evidence do not apply; the Tribunal may inform itself on any matter as it sees fit.[134] Similarly, the complaint that the Tribunal erred in finding that there was insufficient evidence to form a view that there was further documentation (Ground 17.7) is irrelevant when the Tribunal made orders providing for the inspection of all strata company records and documents other than that subject to legal professional privilege.

157 Ms Engwirda also complained that there were aspects of the Tribunal's reasons that suggested that the President did not properly comprehend her case as to entitlement to inspect (Ground 17.4) and purpose for wishing to inspect (Ground 17.6). That should be accepted (see pars 83 and 84.1 above). It does not, however, bespeak lack of procedural fairness. To the extent these matters informed the Tribunal's decision to condition the exercise of its discretion by requiring the undertaking the Tribunal's error is properly considered by reference to the imposition of the undertaking requirement under pars 2 and 3 of the final orders.

158 Finally, Ground 17 argued that there was a lack of procedural fairness in the President proceeding to make an immediate determination (Ground 17.11) and making final orders in the absence of Ms Engwirda (Ground 17.9). Those complaints are unmeritorious in circumstances where Ms Engwirda invited the President to make a decision on the papers and then left the room as his Honour proceeded to deliver oral reasons.

[134] *State Administrative Tribunal Act 2004* (WA), s 32(2), (4).

159 I would dismiss Ground 17.

Conclusion and orders

160 Ms Engwirda's appeal has merit, and should succeed, as to Grounds 16, 18 and 19. The merit of the appeal is such that Ms Engwirda should have an extension of time for her application for leave to appeal. Leave to appeal should be granted. For the reasons given in considering Grounds 16, 18 and 19 the continuation of the undertaking condition results in substantial injustice. Ms Engwirda has been prevented from full enjoyment of the broad and unrestricted right to inspect strata company records and documents accorded by s 43(1)(b) of the *Strata Titles Act 1985* (WA). The Tribunal's orders of 6 November 2017 have the effect of potentially defeating or substantially impairing some of the legitimate purposes to be fulfilled by the exercise of Ms Engwirda statutory right of inspection.

161 The Tribunal should not have made par 2 of the orders of 6 November 2017. In the exercise of its jurisdiction under s 105(9)(a) of the *State Administrative Tribunal Act 2004* (WA) this court should set aside par 2 of the orders. Paragraph 3 of the orders should also be set aside insofar as par 3 is bound up with par 2. In addition, consideration should be given to the circumstance that Ms Engwirda has provided an undertaking pursuant to par 2 of the orders.

162 The Tribunal has the power, as part of its jurisdiction to control its own orders, to release a person from an undertaking given to the Tribunal.[135] That is all the more so where the undertaking is provided in compliance with an order of the Tribunal. It is in the interests of justice to release Ms Engwirda from the undertaking given that the requirement to provide the undertaking has been found to be in error. While, ordinarily, it would be expected that the Tribunal should release the undertaking, this court has power to do so to ensure the effective exercise of its appellate jurisdiction.[136] The release of the undertaking is also authorised by the catch-all in s 105(9) of the *State Administrative Tribunal Act 2004* (WA) that the court 'may make any order the court considers appropriate'. An order should be made releasing Ms Engwirda from the undertaking.

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[135] See by analogy ***Adam P Brown Male Fashions Pty Ltd v Philip Morris Inc*** [1981] HCA 39; (1981) 148 CLR 170, 178.

[136] ***Jebb v Superior Lawns Australia Pty Ltd*** [2018] WASCA 123 [60].

163 Had the Tribunal approached the application correctly a different undertaking might have been imposed as a condition of the exercise of the power under s 90. For example, the undertaking proposed by Ms Engwirda (see par 61 above) was potentially appropriate. In other cases other formulations may be appropriate. I have considered whether a different form of undertaking should now be required as a condition of upholding the appeal. I am not persuaded that it is necessary to do so. Ms Engwirda has a proper purpose in seeking inspection. In stating a preparedness to proffer an undertaking to not share the information beyond those persons who are entitled to inspect under the Act, and to not use the information to contact proprietors about anything unrelated to the strata company, Ms Engwirda has evinced an intention to use the materials appropriately. In circumstances where the respondent has not seen fit to participate in the appeal it is not for this court to fashion an appropriate undertaking to protect the respondent's interests if, contrary to her professed intentions, Ms Engwirda misuses the information.

164 I would make orders that:

1. There is an extension of time to 26 September 2018 for the appellant to make application for leave to appeal from the orders (Orders) of the State Administrative Tribunal made 6 November 2017 in proceedings CC 732 of 2017.

2. The appellant has leave to appeal from the Orders.

3. The appeal is allowed.

4. Paragraphs 2 and 3 of the Orders are set aside.

5. The appellant's undertaking proffered pursuant to pars 2 and 3 of the Orders (as set aside under par 4 above) is released.

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

EP
Research Associate to Justice Vaughan

28 NOVEMBER 2019