
JURISDICTION : STATE ADMINISTRATIVE TRIBUNAL

ACT : STRATA TITLES ACT 1985 (WA)

CITATION : THE OWNERS OF BOUVARD VILLAS STRATA
PLAN 11315 and EVES [2019] WASAT 138

MEMBER : MS R PETRUCCI, MEMBER

HEARD : 25 NOVEMBER 2019

DELIVERED : 20 DECEMBER 2019

FILE NO/S : CC 630 of 2019

BETWEEN : THE OWNERS OF BOUVARD VILLAS STRATA
PLAN 11315
Applicant

AND

PETER EVES
Respondent

Catchwords:

Strata titles - Breach of by-law 3 - Meaning of 'garden' - Common property - Section 83(1) of the *Strata Titles Act 1985* - Section 81(10) of the *Strata Titles Act 1985* - Turns on own facts

Legislation:

Strata Titles Act 1985 (WA), s 3(1), s 17(1), s 32, s 35(1)(a), 35(1)(b), s 35(1)(c), s 42(2), s 81, s 81(1), s 81(5), s 81(10), s 83, s 83(1), s 84(1)(b), Sch 1, Sch 2

Result:

Application is successful
Orders made under s 83(1) and 81(10) of the *Strata Titles Act 1985* (WA)

Category: B

Representation:

Counsel:

Applicant : Mr T Brennan and Ms L Fair (acting as agents)
Respondent : In Person

Solicitors:

Applicant : N/A
Respondent : N/A

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

Wong v Reid [2016] WASC 59

REASONS FOR DECISION OF THE TRIBUNAL:

Introduction

1 This proceeding concerns a dispute about mowing grass, the planting of trees, shrubs and plants, the planting of stakes around seedlings and the watering of a patch of grass that is not reticulated (the **works**) all on the common property.

2 Mr Peter Eves (the **respondent**) is the registered proprietor of a strata lot, in the strata scheme known as 'Bouvard Villas' (the **strata scheme**). The strata scheme comprises 50 single storey brick and tile residential units. The Owners of Bouvard Villas Strata Plan 11315 (**applicant**) is the strata company of the strata scheme.

3 The strata company's position is that the by-laws of the strata scheme prohibit Mr Eves from doing any of the works (as described in [1]) because he does not have approval of the strata company. It therefore seeks an order from the Tribunal under s 83(1) of the *Stata Titles Act 1985 (WA)* (**ST Act**) that:

[P]eter Eves is not permitted to carry out any mowing or gardening duties on the common property.

SAT to impose any fine or penalty applicable.

4 Mr Eves' position is that he will carry on doing the works on the common property, apart from the planting of the trees, shrubs and plants which he stated he did not do.

Proceeding in the Tribunal

5 The strata company lodged its application with the Tribunal on 1 May 2019. At the first directions hearing held on 17 May 2019, the matter was programmed through to a final hearing for 25 November 2019. The reason for the six month delay in hearing the matter was due to Mr Eves being away travelling outside of Western Australia.

6 Mr Tom Brennan, the Chairman of the Council of Owners, and Ms Laraine Fair, the Strata Manager, appeared in person for the strata company.

7 Mr Eves and his wife, Mrs Anne Eves, appeared in person.

8 Besides the strata company's application, which included the s 77B certificate, the strata plan, a copy of each notification of change to the by-laws, and a copy of the resolution authorising the strata company to make the application, the Tribunal accepted the following documents into evidence filed by the parties with the Tribunal:

- written submissions and various documents submitted by the applicant on 2 May 2019; and
- written submissions and various documents submitted by the respondent on 31 October 2019.

9 Following the hearing on 25 November 2019, the Tribunal reserved its decision.

The issue to be determined

10 The issue that requires determination by the Tribunal is whether Mr Eves had the requisite approval to carry out the works on the common property.

11 Before considering the issue for determination, the Tribunal will set out the relevant law which it is required to apply and to summarise the position of the parties.

Relevant law

12 The common property of a strata scheme is that part of the land (and improvements to it) which is not comprised in the lots on the strata plan (see definition of 'common property' in s 3(1) of the ST Act). Section 17(1) of the ST Act provides that common property shall be held by the proprietors as tenants in common in shares proportional to the unit entitlements of their lots under the strata scheme.

13 Upon registration of a strata plan, the proprietors constitute a strata company, which is a body corporate (s 32 of ST Act). The strata company has responsibility to enforce the by-laws and to control and manage the common property for the benefit of all the proprietors (s 35(1)(a) and (b) of ST Act). Further, the strata company must keep in good and serviceable repair, properly maintain and, where necessary, renew and replace the common property (s 35(1)(c) of the ST Act).

14 The application proceeded in the Tribunal on the basis that the 'standard by-laws' apply, that is, the provisions set out in Sch 1 and Sch 2 of the ST Act applied to the strata scheme (s 42(2) of the

ST Act). In addition, changes were made to the by-laws in 1997 by the addition of by-laws 15, 16 and 17 and in 2010 by amendments to by-laws 15, 16 and 17. The relevant by-laws for the current matter are by-laws 3 of Sch 2 of the ST Act and by-law 16.

- 15 In accordance with by-law 3 of Sch 2 to the ST Act, a lot owner has certain obligations in relation to 'Damage to lawns etc. on common property'. By-law 3 of Sch 2 (referred to in these reasons as **by-law 3**) provides that:

3. Damage to lawns etc. on common property

Except with the approval of the strata company, a proprietor, occupier, or other resident of a lot shall not -

- (a) damage any lawn, garden, tree, shrub, plant or flower upon common property; or
- (b) use any portion of the common property for his own purposes as a garden.

- 16 By-law 16 was added to the by-laws by Instrument G473580 on 13 May 1997. By-law 16 relevantly provides:

CONTROL OF COMMON PROPERTY

16. (1) B.B.Q AREA

All owners/Leasees to leave this area clean after use.

...

(3) GARDENS

Where an owner creates a garden in the front of their unit on common property they will keep this garden from being overgrown or unkempt.

....

(6) RETICULATION

No owner is to interfere with the reticulation without the Council's approval[.]

17 Finally, by-law 16 was amended by Instrument L300815 on 30 April 2010. The amendment relevantly provides:

CONTROL OF COMMON PROPERTY

16. ...

(3) GARDENS

Will be the responsibility of each individual owner to maintain.

18 Section 83 of the ST Act sets out the general powers of the Tribunal to make orders. Section 83(1) of the ST Act provides that the Tribunal:

[*M*]ay ... make an order for the settlement of a dispute, or the rectification of a complaint, with respect to the exercise or performance of, or the failure to exercise or perform, a power, authority, duty or function conferred or imposed by this Act or the by-laws in connection with that scheme[.]

(Emphasis added)

19 In considering the application, the Tribunal must take account of the requirements of the ST Act and all relevant information related to the application. Hence, the discretion in s 83(1) is that the Tribunal *may* make an order for the settlement of a dispute upon an application made by the strata company.

20 Finally, s 81(1) of the ST Act provides that the 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. His Honour, Beech J in considering s 81 of the ST Act in *Wong v Reid* [2016] WASC 59 (*Wong v Reid*) concluded at [32] that:

...

In exercising its power to make orders under s 81(1), the Tribunal is not limited to making of orders that are in substance the same as the orders set out in the initiating application.

Position of the parties

- 21 It was accepted from the outset by the parties that the works on common property has occurred for many years (ts 14, 25 November 2019). It is also common ground that at no time had the strata company authorised Mr Eves to undertake the works on common property.
- 22 The strata company is concerned that Mr Eves has continued to do the works on the common property, without permission. Further, according to the strata company, the works done by Mr Eves, for example the edges on the verge of the common property area in front of his lot, stand out and are not in keeping with the rest of the strata scheme. The strata company submitted that it is concerned that other proprietors and residents may get the idea that they may go across the road on to the common property and do what they like.
- 23 Mr Eves conceded that he planted grass towards the centre of the central park area which is common property about six or seven years ago, at his own expense. Mr Eves stated he did this in an effort to control the weeds and to stop the dust from the sand blowing everywhere. Further, Mr Eves conceded that he watered the grassed area by hand as there is no reticulation in place (ts 37 - 38, 25 November 2019). Mr Eves stated that he had the approval of the then caretaker.
- 24 Further, Mr Eves conceded that he planted jarrah stakes near seedlings, such as peppermint gums and marri trees, in order to give the seedlings a chance to grow without being trodden on or mowed down (ts 31, 25 November 2019). Mr Eves said he wanted to preserve the native flora in the area (ts 32, 25 November 2019). However, Mr Eves was adamant that he had not watered the trees and that since about January 2019 he had not fertilized the grass as he understood that the fertilizer may affect the trees (ts 39, 25 November 2019).
- 25 Mr Eves rejected any suggestion that he planted shrubs, trees or plants on the common property. Rather, he stated that his wife, Mrs Eves and others had planted shrubs and trees and plants around the shed and barbecue area on the common property but they have all since been removed. Further, Mr Eves strongly denied that he pruned any native trees or shrubs on common property (ts 29 – 30, 25 November 2019).

26 Mr Eves strongly disputed that he must not mow the grass. His position is that when the grass is allowed to grow for a couple of weeks without mowing, it breeds mosquitoes and that prevents him from using and enjoying the area. Mr Eves said other proprietors or residents mow the grass also (ts 29, 25 November 2019).

27 Mr Eves had not put any motions to the annual general meeting about the maintenance of the common property and in particular the mowing of the grass (ts 45, 25 November 2019).

28 In conclusion, Mr Eves submitted that the Tribunal should dismiss the strata company's application. This is because Mr Eves is adamant that he is not doing any damage to the common property. Rather, he is strongly of the view that anything he has done has been 'to improve it, make things a bit better' (ts 31, 25 November 2019).

29 Next, the Tribunal considered the evidence before it.

Consideration by the Tribunal

30 In relation to the dispute currently before the Tribunal, the strata company noted that Mr Eves had previously lodged an application with the Tribunal in 2014 (CC 56 of 2014) seeking the following order:

We apply to be given consent to have our garden plot opposite our house reinstated.

We apply for damages and the costs of this application.

31 That matter was not determined by the Tribunal because, on 6 February 2014, Mr Eves withdrew his application (as he is entitled to do pursuant to s 81(5) of the ST Act). The Tribunal therefore closed that matter.

32 Mr Eves thought he had reached a turning point on 20 March 2018 when after encouraging discussions with Mr Ernie Cruickshank, the caretaker, he and Mrs Eves requested approval from the strata company to do maintenance work on the common property as follows:

[I] am writing to request permission to do maintenance work in the park that is not currently undertaken by the committee, this includes things like pruning bushes and trees that are getting out of hand, clearing dead branches out of the trees (nothing that can't be reached from the ground), chopping down any dead trees, protecting naturally seeded and growing native trees and shrubs, clearing away fallen branches that

litter the area and any other minor jobs that need to be done as they arise.

Obviously we can only do these jobs while we are here but we're here during the summer months and that is when these things need attention. It goes without saying that this will be voluntary work.

- 33 The strata company stated that it has had ongoing issues with Mr Eves breaching the by-laws by continuing to do the works on the common property which it describes as the 'central park area'. The strata company replied to Mr Eves via the strata manager on 18 April 2018 stating:

... permission to carry out maintenance work in the park, like pruning bushes & trees, clearing dead branches, chopping down dead trees etc, your request is denied. The Strata Council have a tree lopper who inspects all trees & bushes in this area on a regular basis & they will carry out any necessary works.

Also, a mowing contractor is employed by the Strata Company to maintain the central park area & you have previously been request to cease interfering by mowing a small section opposite your unit. This detracts from the overall appearance of the complex.

You do not have Strata permission to engage in any gardening activities in this area.

- 34 Mr Eves said he does not understand why he got 'knocked back' other than this is 'more personal than anything else' because 'anybody with a bit of sense would turn around and say, "This bloke is going to do this work for nothing. Why don't we just make use of it?"' (ts 33 - 34, 25 November 2019).

- 35 The strata company stated that Mr Eves continually ignored the recommendations of the mowing contractors and the arborist who is engaged to advise the Council of Owners as the common property is in a tree preservation area. The Strata Manager sent a letter to Mr Eves on 3 December 2018 which stated in part:

The Strata Council, once again, request that you refrain from digging, planting, mowing etc in the central park area.

This is a common area & must not be used by any owner as a private garden.

The City of Mandurah recently wrote to all owners regarding the preservation & protection of the native vegetation. This clearly outlines the harmful issues that can be caused to the trees & shrubs from overwatering.

If you continue to ignore the Strata Council's requests not to interfere with the common property area, they are considering engaging a lawyer to make application to the State Administrative Tribunal to issue an Order for breach of the Strata Titles Act & to impose any relevant fines.

36 It was explained by the strata company that because of Mr Eves' ongoing non-compliance, in particular his non-compliance with by-law 3, they engaged a lawyer who issued a 'Notice of breach of strata by-laws' (**notice**) to Mr Eves on 8 January 2019. The notice stated in part:

[Y]ou have been observed mowing a section of lawn opposite your unit, trimming trees and planting shrubs and plants around the bottom of several trees within the Park Area, and that over the last 3-4 months you have encouraged several other unit owners to participate in these activities.

... the City of Mandurah inspected the trees in the [common property] on 9 October 2018 and advised the Strata Council that several have already been affected by disease and/or are dying from contributing factors such as overwatering and incorrect trimming. ... the City of Mandurah's Environmental Department issued a letter dated 9 November 2018 to all owners in the strata complex informing them of the situation in an effort to discourage owners from interfering with the [common property].

...

We are instructed that at no time has the Bouvard Villas strata company approved your actions in respect of the [common property].

Our client hereby gives you notice of breach of the above By-Law (By-law 3) and requires that you immediately cease and refrain from engaging in any conduct in breach of this By-law, including but not limited to mowing the lawn, trimming trees, and planting shrubs and plants within the [common property].

37 In reply to the lawyer, Mr Eves stated in part on 13 February 2019:

[T]his persecution has to stop, the allegations and insinuations in your letter are defensible and as I do not intend to change what I do in the complex I would suggest that either you initiate the legal action you are suggesting as soon as possible to settle the matter either way or send me a letter withdrawing the allegations now and forever.

38 Mr Eves asserted that the strata company does not maintain the common property properly (ts 27, 25 November 2019). He reiterated that his use and enjoyment of the grassed area of the common property in front of his lot has been taken away from him because the grass, if it is not mowed regularly, breeds mosquitoes. Mr Eves stated that he mowed the grass once a month with a catcher whereas when the contractor mows the grass without a catcher it causes a very bad weed problem including burr, bindi-eye and other weeds which blow straight across the road into his front yard and garden.

39 Mr Eves explained that he understood (ts 26, 25 November 2019):

[T]he strata company or the strata council are supposed to maintain the common area in good order. And that is not good order and it does get like that quite often. Now, if I want to enjoy this common area, I've got to do something about it, because they won't.

40 Further, he stated (ts 36 - 37, 25 November 2019):

[T]his is more of a vendetta against me. ... But I have always, always, with anyone I've done in the place is try to do the best by the villas, try to do what I can to make it better. I've assisted two of the lawn mowing contractors in their jobs to help them get things done. What else can I do. I mean, I've got the interest of the villas at heart and obviously myself, because the better the place looks, the more valuable the properties.

41 Also, Mr Eves said: (ts 37, 25 November 2019):

The other thing is that it says in the Guide to Strata Titles that I am to enjoy the common area. If it's not looked after properly, I can't enjoy it. So I think that I'm well within my rights[.]

42 In determining if Mr Eves had approval to carry out the works, the Tribunal needs to consider whether the relevant by-laws, in this case by-laws 3 and 16, have been breached by Mr Eves.

43 In regards to by-law 16 Ms Fair explained that the by-law was added at a time when proprietors had gardens or a lawn in the front yards (or backyards) of their lots which were part of the common property and so by-law 16 required them to maintain those gardens or lawns. However, according to Ms Fair, both the front yards and backyards are no longer part of common property as the lots were resurveyed and the front yards (and backyards) became part of the respective lots. Ms Fair said that a motion is due to be put to the next

annual general meeting to repeal by-law 16 as far as it concerns the gardens as it is no longer relevant.

44 Mr Eves did not contest Ms Fair's explanation of by-law 16. In any event, the Tribunal concludes that the amended by-law 16(3) read with by-law 3 requires Mr Eves to first have the strata company's approval to have a 'garden' on common property. If that approval is given, then Mr Eves would have the responsibility of maintaining that garden. As no approval has been given by the strata company to Mr Eves, by-law 16 does not require any further consideration in this matter.

45 Turning to by-law 3. This by-law requires that Mr Eves, or an occupier or resident of his lot, not to use any portion of the common property for his own purposes as a 'garden' or to damage any lawn, garden, tree, shrub, or flower upon common property, except with the approval of the strata company.

46 The term 'garden' is not defined in the by-laws or in the ST Act. It therefore takes on its ordinary meaning.

47 The *Macquarie Dictionary* defines the noun 'garden' as:

1. a plot of ground devoted to the cultivation of useful or ornamental plants.
2. a piece of ground, or other space, commonly with ornamental plants, trees etc., used as a place of recreation: a botanical garden, a roof garden.
3. a fertile and delightful spot or region.

48 The *Oxford English Dictionary* defines the noun 'garden' as:

1. a. A piece of ground, usually enclosed, where flowers, fruit, or vegetables are cultivated. In later use chiefly (esp. British): a piece of ground adjoining a building (esp. a private property), often with grass, flowers, trees, etc., and generally used for recreation;

...

c. In *singular and plural*. An enclosed park or grounds ornamented with plants and trees, or with other displays or exhibits, used for public recreation or entertainment. Often with the type of display, entertainment, etc., specified.

49 The Tribunal accepts what the strata company referred to as 'the central park area' to be a 'garden' as that term is ordinarily defined. That is, a ground or space with grass, flowers, trees etc. and generally used for public recreation. Mr Eves accepted that the central park area was common property. He did not dispute that the central park area was a 'garden'.

50 The strata company's argument for not authorising Mr Eves to undertake the works on the common property including the mowing of the grass, planting jarrah stakes beside seedlings and watering the grass on the common property is because the strata complex is a tree preservation area and it has been advised by the City of Mandurah that several trees have been affected by disease and/or are dying from contributing factors such as overwatering and incorrect trimming. Further, the strata company does not want Mr Eves to mow a portion of the grass and do the edges of the common property across from his lot because they already have a mowing contractor who mows the grass regularly for the benefit of all the proprietors.

51 As already noted, the strata company is obliged under the ST Act to enforce the by-laws (s 35(1)(a) of the ST Act) and is also required to control and manage the common property for the benefit of all the proprietors (s 35(1)(b) of the ST Act).

52 The Tribunal finds that the strata company did not give Mr Eves approval to undertake the works on the common property. This means that Mr Eves is in breach of by-law 3 and therefore the Tribunal may order Mr Eves, to perform in a manner and at a standard required by the ST Act, unless the Tribunal finds that he did not undertake the works.

53 On the evidence before it, the Tribunal finds that Mr Eves:

- did not plant any trees, shrubs, plants or gardens on the common property. The uncontested evidence before the Tribunal is that Mr Eves' wife and others planted the trees, shrubs and plants on the common property. However those trees, shrubs and plants have since been removed;
- did not prune any native trees or shrubs on common property. The uncontested evidence before the Tribunal is that Mr Eves did not use a ladder and that the photographic evidence showed trees lopped above ground level; and

- has not, on the uncontested evidence, watered or fertilized the trees on the common property since January 2019.

54 The consequence of the Tribunal finding that Mr Eves did not undertake the above works, means he cannot be in breach of by-law 3 in respect of those works.

55 However, that is not the end of the matter as the Tribunal finds that Mr Eves has, without approval of the strata company:

- planted at his expense many years ago grass towards the centre of the central park area which is common property and that he continues to hand water that area to prevent the grass from dying;
- planted jarrah stakes beside seedlings, such as peppermint gums and marri trees, to prevent them being trodden on or mowed down; and
- mowed the grass and cut the edges of the common property across the road from his lot.

56 Therefore in respect of the above works, the Tribunal finds that Mr Eves is in breach of by-law 3.

57 Even though Mr Eves strongly believes that he will be prevented from using and enjoying the common property if he does not mow the grass regularly as the longer grass breeds mosquitoes, the Tribunal finds that the strata company is controlling and managing the common property for the benefit of all proprietors (as required by s 35(1)(b)) as it has engaged a mowing contractor to do regular mowing of the grass on the common property, which currently occurs about every three weeks (ts 47 - 48, 25 November 2019). The Tribunal finds this is reasonable. The Tribunal will order Mr Eves to comply with by-law 3, and in particular to refrain from mowing grass on any part of the common property including tidying up of the edges.

58 Mr Eves says that he has acted for the benefit of all proprietors, in relation to the planting of the grass at his expense, the hand watering of that grass and the planting of jarrah stakes beside seedlings on the common property. The Tribunal does not agree with Mr Eves. This is because the stakes create a safety hazard as they may cause damage to the mower if the stake is mowed or cause injury to a person if they

do not see the stake in the ground. Further, the watering of the grass may be detrimental to the trees. The Tribunal will order Mr Eves to comply with by-law 3, and in particular to refrain from watering (by hand or otherwise) grass on any part of the common property and to refrain from planting jarrah stakes beside seedlings on any part of the common property.

59 Finally, the strata company seeks an order from the Tribunal for a penalty or fine to be imposed on Mr Eves. The reasons given by the strata company is that after many attempts including engaging a lawyer to issue a notice to Mr Eves, he has ignored the strata company and he continued to do the works on the common property without the required approval.

60 The strata company acknowledged that by-law 3 does not have any penalty or fine. The consequence is that the strata company's application in this regard is misguided and must be dismissed. However, because of the history of difficulties between the parties, which has been ongoing for many years, it is essential that there be compliance with the Tribunal's orders and for that reason the Tribunal will order pursuant to s 81(10) of the ST Act that these orders shall not cease to have force or effect upon expiration of the period of two years that next succeeds the making of the orders.

Orders

61 For the above reasons, the Tribunal makes the following orders:

1. Pursuant to s 83(1) of the *Strata Titles Act 1985* (WA) the respondent shall:
 - (a) by 30 January 2020, at the respondent's own cost, remove all grass and stakes planted on common property by the respondent and make good the common property;
 - (b) comply with by-law 3 of Sch 2 of the *Strata Titles Act 1985* (WA), and in particular:
 - (i) refrain from watering (by hand or otherwise) grass on any part of the common property;

- (ii) refrain from mowing grass on any part of the common property including tidying up of the edges; and
 - (iii) refrain from planting stakes besides seedlings on any part of the common property.
2. Pursuant to s 81(10) of the *Strata Titles Act 1985* (WA) these orders shall not cease to have force or effect upon the expiration of the period of two years that next succeeds the making of the orders.

I certify that the preceding paragraph(s) comprise the reasons for decision of the State Administrative Tribunal.

MS R PETRUCCI, MEMBER

20 DECEMBER 2019