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| **JURISDICTION** | **:** | STATE ADMINISTRATIVE TRIBUNAL |
| **ACT** | **:** | STRATA TITLES ACT 1985 (WA) |
| **CITATION** | **:** | THE OWNERS OF NORTHWOOD RISE STRATA PLAN 50673 and MILL POINT FINANCIAL CENTRE PTY LTD [2019] WASAT 140 |
| **MEMBER** | **:** | MS C BARTON, MEMBER |
| **HEARD** | **:** | 15 NOVEMBER 2019 |
| **DELIVERED** | **:** | 23 DECEMBER 2019 |
| **FILE NO/S** | **:** | CC 308 of 2019 |
| **BETWEEN** | **:** | THE OWNERS OF NORTHWOOD RISE STRATA PLAN 50673<br>Applicant<br><br>AND<br><br>MILL POINT FINANCIAL CENTRE PTY LTD<br>Respondent |

*Catchwords:*

Alteration to lot without strata approval - Installation of shade sail and balustrade in courtyard - Minutes of AGM record approval of alterations - No resolution without dissent - Historical approval process - Significant inconvenience or detriment - Structures not in keeping with design - Order for removal

*Legislation:*

*Strata Titles Act 1985* (WA), s 3, s 3AC, s 3C, s 3CA, s 7, s 7B, s 7(1), s 7(2),

s 7(5), s 81(7), s 83, s 103G, s 103G(1), s 103G(3)(b), s 103G(4)(b)

*Result:*

Application successful

*Category:* B

**Representation:**

*Counsel:*

| | | |
|---|---|---|
| Applicant | : | Mr P Monaco |
| Respondent | : | Mr M Procopio |

*Solicitors:*

| | | |
|---|---|---|
| Applicant | : | GV Lawyers |
| Respondent | : | Procopio Legal |

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

Hamilton v Thompson (1999) 23 SR(WA) 41
The Owners of 216 Barker Road, Subiaco, Strata Plan 8596 and Stirling Brass Founders (WA) Pty Ltd [2011] WASAT 161
The Owners of St John's Court - Rivervale Strata Plan 6052 and Clark [2010] WASAT 126
The Owners of The Views, Strata Plan 6669 and Larralee Pty Ltd [2006] WASAT 126
Uta Pty Ltd v Celenza & Anor [2002] WASCA 360

**REASONS FOR DECISION OF THE TRIBUNAL**:

1 Mill Point Financial Centre Pty Ltd (**respondent**) is the owner of a commercial unit at Northwood Rise, 135 - 139 Cambridge Street, West Leederville, being the whole of the land comprised in Certificate of Title Volume 2620 and Folio 675 (**premises**).

2 In early 2017, the respondent undertook works to the external courtyard of its commercial unit, being Lot 13 of the premises (**Unit 13**). The works included enclosing the courtyard by the installation of a slatted balustrade and construction of a shade sail (**structural alterations/works**). The respondent also installed a business sign on the exterior wall of Unit 13 (**signage**).

3 The applicant is The Owners of Northwood Rise Strata Plan 50673 (**Strata Company/applicant**) which is the Strata Company for the strata scheme known as Northwood Rise (**Scheme**), created by the registration of Strata Plan 50673.

4 The Strata Company applied to the Tribunal for the removal of the structural alterations under s 103G(1) of the *Strata Titles Act 1985* (WA) (**ST Act**). The Strata Company contends that the works were undertaken without its prior approval in breach of s 7(2) of the ST Act and have caused significant detriment to the other lot owners.

5 The nature of discussions held at an Annual General Meeting of the Strata Company on 8 December 2016 (**AGM**) (and the recording of the outcome of those discussions in the minutes of the AGM) were matters at the centre of the dispute between the parties.

***The issues for determination***

6 The issues for determination by the Tribunal are as follows:

1. Has the respondent breached s 7(2) of the ST Act?

2. Has the respondent demonstrated that the work done will not cause any significant inconvenience or detriment to the other proprietors?

3. Did the respondent obtain the necessary approvals for the signage?

4. Is the respondent entitled to costs?

***The statutory framework***

7 Where there are more than two lots in a strata scheme, the erection or alteration of any structure on a lot must be approved by the strata company by a resolution without dissent at a duly convened general meeting unless s 7(1) of the ST Act applies.

8 Section 7 of the ST Act provides, relevantly:

> 7. **Structural erections, alterations and extensions restricted, strata schemes**
>
> (1) This section does not apply to -
>
> (a) a lot in a survey-strata scheme; or
>
> (b) the erection of, alteration to or extension of a structure on a lot in a strata scheme if -
>
> (i) each proprietor of a lot in the scheme has in writing given approval to the erection, alteration or extension; and
>
> (ii) that approval, if subject to conditions, is given by each proprietor subject to the same conditions; and
>
> (iii) a copy of each such approval is served on the strata company.
>
> (2) The proprietor of a lot shall not cause or permit -
>
> (a) any structure to be erected; or
>
> (b) any alteration of a structural kind to, or extension of, a structure,
>
> on his lot except -
>
> (c) with the prior approval of the proprietor of the other lot in the case of a strata scheme in which there are not more than 2 lots; and
>
> (d) in any other case with the prior approval, expressed by resolution without dissent, of the strata company.
>
> …

(5) The grounds on which approval may be refused are -

(a) that the carrying out of the proposal will breach the plot ratio restrictions or open space requirements for the lot ascertained in accordance with section 7A(3); or

(b) in the case of a lot that is not a vacant lot, that the carrying out of the proposal -

(i) will result in a structure that is visible from outside the lot and that is not in keeping with the rest of the development; or

(ii) may affect the structural soundness of a building; or

(iii) may interfere with any easement created by section 11 or 12;

or

(c) any other ground that is prescribed.

(6) In this section -

***structure*** includes any prescribed improvement;

***vacant lot*** means a lot that is wholly unimproved apart from having merged improvements within the meaning of that expression in the *Valuation of Land Act 1978*.

9 Where a lot owner does not receive prior approval for the erection or alteration of a structure in accordance with s 7 of the ST Act, then the strata company may seek an order from the Tribunal under s 103G of the ST Act. Section 103G of the ST Act provides:

**103G. Order granting relief for breach of s. 7(2)**

(1) An application to the State Administrative Tribunal for a finding and an order under this section may be made -

(a) by the proprietor of a lot in a two-lot scheme; or

(b) in the case of any other scheme, by the strata company.

(2) A finding under this section is a finding that the proprietor of a lot in the scheme has committed a breach of section 7(2).

(3) An order under this section is an order that the proprietor -

(a) stop carrying out any work or any specified work in breach of subsection (2) of section 7; or

(b) within a specified time, pull down, remove, or alter anything or any specified thing that is in place as a result of work done in breach of that subsection,

or an order under both of those paragraphs.

(4) On the making of an application under subsection (1), the State Administrative Tribunal shall -

(a) make a finding under this section if satisfied that a breach of section 7(2) has occurred;

(b) make an order under this section unless satisfied that the work done or intended to be done will not cause any significant inconvenience or detriment to the other proprietors.

***Conduct of the proceeding***

10 The Tribunal made standard orders for the filing of witness statements, written submissions, and any documents and decided cases on which the parties proposed to rely.

11 The Strata Company provided to the Tribunal the statements of a number of witnesses, including that of Ms Alexandra Pearce (owner of Unit 5 of the premises and present at the AGM), whose statement was referred to by the respondent at the hearing. The following lot owners were called by the Strata Company to give evidence before the Tribunal:

1. Mr Wayne Ford (owner of Unit 2 and a registered builder);

2. Ms Jacqueline Ceballos-Pabon (owner of Unit 7 and present at the AGM); and

3. Ms Wendy Farrell (owner of Unit 1 and present at the AGM).

12 The respondent provided to the Tribunal a witness statement of Mr John Goldie with a number of attachments, including the outdoor area plan of the proposed works (attachment 'JG-3'), minutes of the AGM (attachment 'JG-4') and a Town of Cambridge development

approval for the works and signage dated 15 April 2019 (attachment 'JG-9'). Mr Goldie is a Director of the respondent and gave evidence at the hearing. The respondent also provided to the Tribunal a witness statement of Mr Michael Milne, an Associate Director of CBRE Pty Ltd, in respect of the quality of the works and their effect on the values of the building and units.

***Has the respondent breached s 7(2) of the ST Act?***

13 Section 7(2) of the ST Act requires a lot owner to obtain the approval of the strata company before the erection or alteration of a structure on the owner's lot. The approval of the strata company must be expressed by resolution without dissent.

14 A 'resolution without dissent' is defined in s 3 of the ST Act to mean a resolution that complies with s 3AC and s 3C and also has the meaning given by s 3CA. In short, a 'resolution without dissent' is a resolution passed at a duly convened general meeting of the strata company (of which sufficient notice has been given and at which a sufficient quorum is present) and against which no vote is cast by a person entitled to exercise the powers of voting on the resolution: s 3AC of the ST Act.

15 The Strata Company provided evidence to the Tribunal of discussions that took place at the AGM. The following information was recorded in the minutes of the AGM dated 8 December 2016 by Mr Joe Carbone, the strata manager from Richardson Strata Management Services, who chaired the AGM:

> Mr Goldie also requested the installation of a shade sail awning to be held up by supporting beams and a screening on top of the wall to surround the courtyard area of Unit 13.
>
> It was agreed to and approved by the meeting that Mr Goldie proceed with the requests.

16 Ms Ceballos-Pabon, the owner of Unit 7 and a member of the Council of Owners, stated in evidence that she was present at the AGM. She stated that Mr Goldie had raised the issue of a planter box to be repaired outside his unit and then mentioned that he was planning to build a structure in the outdoor area adjacent to Unit 13. He presented a document at the end of the meeting but there was no discussion of the proposed works. It was not an agenda item and it was not put to a vote. In light of the limited amount of information that was presented at the AGM by Mr Goldie, Ms Ceballos-Pabon did not

consider it a request for approval and thought that more detailed information would follow.

17 The version of events recounted by Ms Ceballos-Pabon was supported by the evidence provided by Ms Farrell. Ms Farrell is the owner of Unit 1 and also a member of the Council of Owners. She stated in evidence that she recalled the AGM vividly. At the end of the AGM, after discussing the planter box, Mr Goldie stood up with a piece of paper in his hand and said something to the effect of, 'by the way, we (the owners of Unit 13) are thinking of making a few changes to our outdoor area with some sail cloth'. Mr Goldie then tossed the sheet of paper on the table. Ms Farrell stated that she did not look at the paper because she was in discussions with other owners but some owners did view the document. Ms Farrell understood that it was a concept that the owners of Unit 13 were contemplating. It was not an agenda item and it was not voted on at the AGM. She was quite shocked when she saw that the works had been constructed.

18 Ms Pearce, the owner of Unit 5 and a member of the Council of Owners, was also present at the AGM. Ms Pearce stated in her witness statement that during the AGM, Mr Goldie produced concept drawings for the courtyard of Unit 13. It was not a tabled item on the agenda and was informally raised by Mr Goldie after the discussion about the planter box. Mr Goldie advised that they were having problems in the courtyard with vagrancy, stealing and defacing of property. Ms Pearce observed in her statement that the subsequent erection of the sun shade and screened area came as a surprise to her as the works had neither been voted on, nor approved, by the Council of Owners.

19 The respondent contends that the Strata Company approved the respondent's application for the structural alterations as evidenced by the minutes of the AGM. The minutes of the AGM were subsequently confirmed as a true record of the proceedings at the AGM of the Strata Company held on 7 December 2017.

20 The Strata Company contends that the exchange at the AGM did not constitute a resolution without dissent as required by s 7(2) of the ST Act and does not comply with s 3AC of the ST Act.

21 At the hearing, the respondent acknowledged that the works had not been approved by a resolution without dissent at the AGM. Notwithstanding this concession, the respondent asserted that the Strata Company has not historically required compliance with the approvals

process under s 7 and s 7B of the ST Act and, therefore, the works should be taken as approved by the Strata Company for the purposes of s 7(2) of the ST Act.

22 If the Strata Company has not consistently required lot owners to obtain the necessary approvals, the respondent contends that this is a relevant factor to be considered by the Tribunal in determining whether or not there has been a breach of s 7(2) of the ST Act. The respondent referred the Tribunal to ***The Owners of the Linx at Nexus Strata Plan 47739 and Mangles SMSF Pty Ltd*** [2018] WASAT 101 (***Linx***) at [66] - [67] and [72] which dealt with an application under s 83 of the ST Act in respect of a dispute concerning alterations to common property.

23 The Tribunal does not accept the respondent's contention regarding the application of ***Linx*** to the circumstances of this case. Section 7(2) of the ST Act is prescriptive in nature. A breach of s 7(2) will occur if a lot owner fails to obtain the prior approval of the Strata Company, by resolution without dissent, for the erection or alteration of a structure on the owner's lot. The purpose of the provision is to prevent a proprietor of a lot from erecting or altering any structure on that lot without first obtaining the required approval of the Strata Company. The process that the Strata Company has historically applied in approving works (whether in respect of individual lots or common property) is not a relevant factor to be considered by the Tribunal in determining if a breach of s 7(2) of the ST Act has occurred. The only question for the Tribunal is whether or not prior approval of the Strata Company was obtained for the works by resolution without dissent.

24 Mr Goldie conceded in cross-examination that no motion was put to the owners at the AGM to vote to alter Unit 13. He also admitted that there was no resolution without dissent presented to the Strata Company at the AGM in respect of the structural alterations. Neither party called Mr Carbone to give evidence in relation to the minutes he prepared following the AGM. In light of the respondent's concession, it is not necessary for the Tribunal to consider whether any inference can be drawn from the fact that Mr Carbone was not called as a witness.

25 In respect of the works referred to in the minutes of the AGM as 'agreed to and approved', the Tribunal finds that the respondent did not obtain prior approval from the Strata Company by a resolution without dissent at the AGM. Accordingly, the Tribunal is satisfied that the

respondent has breached s 7(2) of the ST Act because the works were erected without the required approval of the Strata Company. The Tribunal also finds that the proprietors had not given their written approval to the works for the purposes of s 7(1) of the ST Act.

26 Where the Tribunal finds that the erection or alteration of a structure has occurred without the required approval of the Strata Company, the Tribunal must make an order granting relief for a breach of s 7(2) of the ST Act unless satisfied that the work done will not cause any significant inconvenience or detriment to the other proprietors: s 103G(4)(b) of the ST Act.

***Has the respondent demonstrated that the work done will not cause any significant inconvenience or detriment to the other proprietors?***

27 Under s 103G(4)b) of the ST Act, the respondent carries the onus of demonstrating that there has been no significant inconvenience or detriment to the applicant: ***Uta Pty Ltd v Celenza & Anor*** [2002] WASCA 360 at [15] and [40] (***Uta***).

28 Because the words 'inconvenience' and 'detriment' are not defined in the ST Act, they must be given their natural meaning and each case needs to be assessed on its merits as to whether or not they apply: see ***Hamilton v Thompson*** (1999) 23 SR(WA) 41 at [50] and [51] which was cited with approval in ***Uta***.

29 The Tribunal considered the meaning of the words 'significant inconvenience or detriment' in the decision of ***The Owners of 216 Barker Road, Subiaco, Strata Plan 8596 and Stirling Brass Founders (WA) Pty Ltd*** [2011] WASAT 161 (***Barker Road***). The Tribunal stated at [29]:

> 'Inconvenience' necessitates a disadvantage and connotes something that is troublesome and impedes prosperity. 'Detriment' is ordinarily defined as damage, loss, harm, prejudice or a disadvantage. Section 103G of the Act refers to 'significant' and therefore the inconvenience or detriment cannot be immaterial or of no import; it must be material and of consequence.

30 The grounds of refusal set out in s 7(5) of the ST Act are relevant in determining if there has been significant detriment to the applicant: ***The Owners of The Views, Strata Plan 6669 and Larralee Pty Ltd*** [2006] WASAT 126 at [20]. To disregard the grounds in s 7(5) of the ST Act would, in effect, encourage strata lot proprietors to by-pass the

prescribed approval process and to 'get in the back door': ***Barker Road*** at [28]. One of the grounds in s 7(5) of the ST Act is whether the carrying out of the proposal will result in a structure that is visible from outside the lot and that is not in keeping with the rest of the development.

31 Based on the evidence of Mr Ford, Ms Ceballos-Pabon, Ms Farrell, and Ms Pearce, the Strata Company contends that the respondent's works at Unit 13 have caused (and will continue to cause) significant inconvenience or detriment to the other proprietors. The evidence of the proprietors' concerns may be summarised as follows:

- The unsightly structure affects the external appearance of the building, by using materials and design that are not consistent with the original design of the building.

- The materials used are of poor quality. The structure appears cheap and craftsmanship is lacking. The installation methods are crude. Consequently, the works are detrimental to the value of the units in an already depressed real estate market.

- The structures have damaged feature finishes which now require repair.

- The slatted screening has darkened the entrance to the foyer of the building.

- The footing of the shade sail raises security issues as it could be used as a ladder to gain access to Unit 3 on the first floor. This has caused the tenants of Unit 3 (which is located directly above Unit 13) a great deal of concern.

- The shade sail is made of combustible material which could create a fire risk.

- The works could create personal safety and public liability issues which are not covered by the applicant's insurance policy.

32 The Strata Company contends that the balustrade and shade sail were fitted to common property and have damaged common property. There was no evidence before the Tribunal that the works are attached to common property.

33 Mr Goldie's evidence was that the balustrade in the courtyard at Unit 13 was installed to prevent vagrancy. He had experienced the homeless sleeping in the courtyard, and there were also signs of their presence including urine odour, vomit, empty aluminium cans and bottles, cigarette butts and, on occasion, faeces. The outdoor odour at times had become so unbearable that it prevented the courtyard from being used by the respondent's employees. The purpose of installing the shade sail was to cover the courtyard for use by employees and to provide shade to the office reception which has a westerly aspect.

34 The respondent contends that fully enclosing the courtyard through the installation of the balustrade had reduced vagrancy issues. Ms Farrell, who gave evidence for the Strata Company, stated that the vagrancy had not diminished and that on occasions, since the works had been completed, she had observed members of the public fornicating in the courtyard. She also stated that the shade sail had darkened the main foyer to the residential building (by blocking street lights at night) which had increased security concerns.

35 The respondent further contends that there has been a delay of at least 18 months since the works were completed before the Strata Company brought the proceeding before the Tribunal. Ms Farrell acknowledged that it had taken 18 months to bring it to the respondent's attention but credibly stated in evidence that she did not voice her concerns sooner because she was intimidated about the process of seeking removal of the structures.

36 The respondent tendered in evidence a number of documents relating to the external wall cladding at Northwood Rise, including a government risk assessment of combustible cladding dated 2 July 2019 (**fire safety report**) and a building order issued by the Town of Cambridge dated 9 September 2019. The risk assessment was conducted as part of a state-wide cladding audit undertaken by the Department of Mines, Industry Regulation and Safety (WA) (**Department**). The Department assessed the risk of the cladding catching fire and contributing to undue fire spread, and the ability of occupants to safely exit the building in the event of a fire. The fire safety report concludes that the cladding of the external walls poses a

high fire risk. The respondent contends that there is no reference in the fire safety report to any fire risk posed by the shade sail. Mr Ford, a witness for the Strata Company, stated in evidence that as a registered builder he had personal experience with shade sail and that he knows it to be combustible because it is made of PVC. The shade sail is located less than a metre from the cladding.

37 Other than issues of fire safety and security, the respondent did not contest the evidence of the Strata Company in relation to the significant inconvenience and detriment that it asserted has been caused by the works. The respondent provided evidence to the Tribunal of the benefits of the works to Unit 13 to curb vagrancy but did not challenge the evidence of the other proprietors concerning the unsightly appearance of the structures, their lack of consistency with the original design of the building, and their potential to reduce the value of the units. Because Mr Milne was not called to give evidence by the respondent, his evidence could not be tested under cross-examination and, accordingly, the Tribunal is unable to afford his statement any significant weight.

38 The Tribunal finds that the respondent has not discharged the onus of demonstrating that there has been no significant inconvenience or detriment to the applicant. Accordingly, the Tribunal accepts the applicant's evidence about the deleterious effects of the shade sail and balustrade and, on the basis of that evidence, is satisfied that the works have caused significant inconvenience and detriment to the other proprietors of the Scheme for the purposes of s 103G(4)(b) of the ST Act.

39 Mr Goldie stated in evidence that the works cost $6,500 to install. The applicant contends that the respondent is unlikely to suffer financial hardship if the works are removed and the correct procedure is followed for their installation. The Tribunal accepts the evidence of Mr Goldie that the works have reduced vagrancy issues for Unit 13 but, based on the evidence of applicant's witnesses, finds that the works have not reduced vagrancy concerns for the remaining lot owners. On balance, therefore, the Tribunal finds that the hardship that Mr Goldie may experience by removing the structural alterations does not outweigh the inconvenience or detriment the alterations have caused to the applicant.

***Signage***

40 In or around 2014, the respondent installed a sign, 'Paramount Wealth Management', on the exterior wall of Unit 13 facing Northwood Street, West Leederville.

41 The by-laws for the Scheme are set out in the management statement K712395 registered on Strata Plan 50673 (**Management Statement**). By-law 21(3) of the Management Statement permits a commercial lot to display signs or advertising provided approval has been obtained from the local council. A copy of the development approval for the works and sign from the Town of Cambridge dated 15 April 2019 was attached to the witness statement of Mr Goldie. On the basis of this evidence, the Tribunal finds that approval for the signage has been obtained by the local council as required under by-law 21(3). Accordingly, the Tribunal does not propose to make any order in respect of the signage.

***Costs***

42 The respondent's counsel observed at the hearing that very few of the witnesses who prepared witness statements for the applicant appeared at the Tribunal to give evidence. The question raised by the respondent is whether costs can be awarded against the applicant in respect of the time taken by the respondent's solicitors to review witness statements and prepare for cross-examination for the applicant's witnesses who were not ultimately called to give evidence.

43 The Tribunal stated in the decision of ***The Owners of St John's Court - Rivervale Strata Plan 6052 and Clark*** [2010] WASAT 126 at [69]:

> The respondents' application for costs is misconceived. By virtue of s 5 of the SAT Act, in the event of any inconsistency between it and the enabling legislation under which the Tribunal exercises jurisdiction, the provisions of the enabling Act apply. Accordingly, none of the cost provisions of the SAT Act have any application in the face of s 81(7) of the ST Act which provides that the Tribunal cannot make an order for the payment of costs in connection with an application except in two particular circumstances.

44 Section 81(7) of the ST Act provides that the Tribunal cannot make any order for the payment of costs in connection with an application with two exceptions. The first exception operates when an applicant is permitted to amend an application to compensate

persons for time unnecessarily spent in connection with the application. The second applies where an order is sought for a variation of unit entitlements. The Tribunal finds that neither of the two exceptions apply in this case and, therefore, these is no basis for a costs order to be made in favour of the respondent.

***Conclusion***

45 The respondent has breached s 7(2) of the ST Act because no prior approval, expressed by resolution without dissent of the Strata Company, was obtained before the respondent installed the shade sail and balustrade at Unit 13. The works carried out by the respondent have caused significant inconvenience and detriment to the other proprietors and, therefore, the Tribunal will order the removal of the works under s 103G(3)(b) of the ST Act.

***Orders***

The Tribunal orders:

1. The Tribunal finds pursuant to s 103G(2) of the *Strata Titles Act 1985* (WA) that the respondent has committed a breach of s 7(2) of the *Strata Titles Act 1985* (WA).

2. Pursuant to s 103G(1)(b) and s 103G(3)(b) of the *Strata Titles Act 1985* (WA), the respondent is to remove, at its cost, the shade sail and balustrade from Lot 13 on Strata Plan 50673 within 90 days of the date of this order and is to make good the lot.

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

MS C BARTON, MEMBER

23 DECEMBER 2019