
JURISDICTION : STATE ADMINISTRATIVE TRIBUNAL

ACT : STRATA TITLES ACT 1985 (WA)

CITATION : THE OWNERS OF 5 THOR STREET INNALOO
STRATA PLAN 72475 and MAUL
[2020] WASAT 15

MEMBER : MR D AITKEN, SENIOR MEMBER

HEARD : DETERMINED ON THE DOCUMENTS

DELIVERED : 20 JANUARY 2020

FILE NO/S : CC 1418 of 2019

BETWEEN : THE OWNERS OF 5 THOR STREET INNALOO
STRATA PLAN 72475
Applicant

AND

MAEVE MAUL
Respondent

Catchwords:

Strata titles - Single tier strata scheme - Dividing fence between lots - Dividing fence between lot and common property - Whether s 123B *Strata Titles Act 1985* (WA) and *Dividing Fences Act 1961* (WA) exclude jurisdiction of the Tribunal to deal with application under s 103G(1) *Strata Titles Act 1985* (WA) regarding erection of a dividing fence

Legislation:

Dividing Fences Act 1961 (WA), s 5, s 7, s 8, s 9

State Administrative Tribunal Act 2004 (WA), 60(2)

Strata Titles Act 1985 (WA), s 3AB, s 7, s 7(5)(b)(i), s 83(1), s 83(6), s 103F, s 103G, s 103G(1), s 122(1), s 123B, s 123B(1), s 123B(2), Sch 1, Sch 2

Result:

Preliminary issue determined. The Tribunal has jurisdiction to deal with application under s 103G(1) *Strata Titles Act 1985 (WA)*

Summary of Tribunal's decision:

The respondent is the owner of Lot 4 in a four lot single tier strata scheme. Each lot in the strata scheme consists of a part lot which is a building and a part lot which is an area outside and appurtenant to the building. The only common property in the strata scheme is a driveway area along one side of the parcel of land in the strata scheme.

The respondent is proposing to build a rendered brick wall on the boundary between the external area part of Lot 4 and the adjoining external area part of Lot 3 and a gate on the boundary between the external area part of Lot 4 and the common property driveway.

The wall and gate will be built either wholly or partially on the external area part of Lot 4.

The applicant is the strata company for the strata scheme and seeks an order under s 103G of the *Strata Titles Act 1985 (WA)* to prevent the respondent from building the wall and gate because the respondent has not obtained approval from the strata company by resolution without dissent under s 7 of the *Strata Titles Act 1985 (WA)*.

The respondent contended that the Tribunal does not have jurisdiction to deal with the application, due to the provisions of s 123B of the *Strata Titles Act 1985 (WA)* and the *Dividing Fences Act 1961 (WA)*. The respondent contended that the question of whether the respondent is entitled to build the wall and gate must be determined by the Magistrates Court under the *Dividing Fences Act 1961 (WA)*.

The Tribunal decided to determine the question of its jurisdiction as a preliminary issue and determined that, on the proper construction of s 123B of the *Strata Titles Act 1985 (WA)*, the Tribunal has jurisdiction to deal with the application under s 103G of the *Strata Titles Act 1985 (WA)*.

Category: B

Representation:

Counsel:

Applicant : In Person
Respondent : In Person

Solicitors:

Applicant : N/A
Respondent : N/A

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

Barrett and Hamer [2005] WASAT 307

Barrett and Owners of 31 Coode Street South Perth - Strata Plan 15354
[2005] WASAT 306

Bhalsod v Perrie [2016] WASC 412

Cowell & Anor and Somner & Anor [2004] WASTR 14

Re; Ex Parte The Owners of 95 Mandurah Terrace Mandurah - Strata Plan
20610 [2005] WASAT 50

REASONS FOR DECISION OF THE TRIBUNAL:

Introduction

1 The applicant in this matter is The Owners of 5 Thor Street, Innaloo, Strata Plan 72475 (**Strata Company**), which is the strata company of a four lot single tier strata scheme, which is described on Strata Plan 72475 (**Strata Plan**) as being 'four single level brick and colorbond villas'.

2 The respondent is Ms Maeve Maul (**Ms Maul**), who owns Lot 4 on the Strata Plan.

3 The owners of the other three lots on the Strata Plan are:

- Ms Nicole Seubert (**Ms Seubert**), who owns Lot 1 on the Strata Plan;
- Mr Thiago Egito (**Mr Egito**), who owns Lot 2 on the Strata Plan; and
- Ms Joy Miduko (**Ms Miduko**), who owns Lot 3 on the Strata Plan and who lodged the application on behalf of the Strata Company.

4 The strata scheme consists of four lots and an area of common property, which is essentially a shared driveway along the southern side of the parcel of land comprised in the strata scheme (**land parcel**).

5 Each of the four lots consists of two parts; firstly, a part lot which is a villa (**building part of lot**) and secondly, a part lot which is an area of space outside and appurtenant to the villa (**external area part of lot**).

6 The boundaries of each building part lot are the external surfaces of the building, as provided by s 3AB of the *Strata Titles Act 1985* (WA) (**ST Act**). The boundaries of each external area part lot are delineated on the Strata Plan and consist firstly, of the face of the building adjoining it, secondly, the external boundary of the land parcel and thirdly, the line where the part lot adjoins the common property area.

7 As a result of the management statement registered on the Strata Plan as Statement N262700, the by-laws of the Strata Company are the by-laws set out in Sch 1 of the ST Act with the additional Sch 1

by-laws 16 - 20 set out in the management statement, and the Sch 2 by-laws 1 - 20 set out in the management statement (which replaced the by-laws set out in Sch 2 of the ST Act).

8 The application was made under s 83(1) of the ST Act and seeks to prevent Ms Maul from building a rendered brick wall on the boundary of the external area part of Lot 4 and the external area part of Lot 3 and a gate on the boundary of external area part of Lot 4 and the common property area (**the proposed wall and gate**).

9 In the application, it is stated that erection of the proposed wall and gate will contravene s 7(5)(b)(i) of the ST Act.

10 Section 7 of the ST Act provides that the owner of a lot in a strata scheme must not cause or permit any structure to be erected on his or her lot except with prior approval by way of a resolution without dissent of the relevant strata company. Section 7 of the ST Act sets out the process to be followed to seek that approval and the grounds on which approval may be refused. One of those grounds is set out in s 7(5)(b)(i) of the ST Act, which is if the carrying out of the proposed works will result in a structure that is visible from outside the lot that is not in keeping with the rest of the development.

11 Upon receiving a copy of the application from the Strata Company, Ms Maul filed a written submission with the Tribunal contending that there are two reasons why the application should be dismissed:

- Firstly, this matter was commenced in the wrong jurisdiction, because Ms Maul has already given a notice to the owners of Lots 1, 2 and 3 on the Strata Plan under the *Dividing Fences Act 1961* (WA) (**DF Act**) stating that she will cause a new dividing fence and vehicle gate to be erected (**DF Act notice**). Ms Maul submits that disputes regarding the erection of dividing fences must be decided by the Magistrates Court of Western Australia pursuant to the DF Act, as per s 123B of the ST Act.
- Secondly, this matter was purported to be commenced on behalf of the Strata Company, without authority.

12 Section 123B of the ST Act provides as follows:

Internal fencing

- (1) The *Dividing Fences Act 1961* applies to fencing between lots in a survey-strata scheme and a single tier strata scheme as if -
 - (a) adjoining lots were adjoining lands to which that Act applies; and
 - (b) a proprietor of a lot held the lot for an estate of freehold in possession; and
 - (c) common property were held by the strata company for an estate of freehold in possession.
- (2) Subsection (1) has effect subject to any by-law of the strata company

13 At the directions hearing which was held shortly after the application was lodged with the Tribunal, the following determinations were made:

- Firstly, the Tribunal decided that the application has been commenced by the Strata Company with the necessary authority, because the Strata Company submitted with the application a copy of the minutes of an extraordinary general meeting of the Strata Company, attended by Ms Seubert, Ms Miduko and Ms Maul, which record the passing of resolutions opposing the proposed wall and gate and authorising an application to be made to the Tribunal.
- Secondly, the application was amended to be under s 103G(1) of the ST Act, because Ms Maul is planning to construct the proposed wall and gate either wholly, or at least partially, on the external area part of Lot 4. The reason for that amendment was that under s 103G(1) of the ST Act an order may be sought by a strata company against an owner of a lot who has carried out or is proposing to carry out work on his or her lot in breach of s 7 of the ST Act and s 83(6) of the ST Act provides that an order cannot be made under s 83(1) of the ST Act in respect of any matter which is dealt with under another section, such as s 103G of the ST Act.

Preliminary issue

14 The Tribunal decided to determine the following issue as a preliminary issue:

Does the Tribunal have jurisdiction to determine this application, considering the provisions of s 123B of the ST Act and the DF Act?

15 The Tribunal drew the attention of the parties to a number of previous decisions of the Tribunal which concerned dividing fences, which are the only previous decisions of which the Tribunal (as constituted for this matter) is aware. Those decisions are:

- *Re; Ex Parte The Owners of 95 Mandurah Terrace Mandurah - Strata Plan 20610* [2005] WASAT 50 (*The Owners of 95 Mandurah Terrace*);
- *Barrett and Owners of 31 Coode Street South Perth - Strata Plan 15354* [2005] WASAT 306 (*Barrett No 1*); and
- *Barrett and Hamer* [2005] WASAT 307 (*Barrett No 2*).

16 The Tribunal also drew to the attention of the parties the decision of the former Strata Titles Referee in the case of *Cowell & Anor and Somner & Anor* [2004] WASTR 14 (*Cowell*).

17 The Tribunal decided that the preliminary issue is to be determined entirely on the documents, pursuant to s 60(2) of the *State Administrative Tribunal Act 2004* (WA) and made orders for each party to file, and give to the other party, written submissions in relation to the preliminary issue and all documents, materials and decided cases on which the party wished to rely in relation to the preliminary issue. Each party has done this.

18 The Tribunal is determining the preliminary issue on those documents, together with the application and the documents lodged with the application.

Strata Company's submissions regarding the preliminary issue

19 Most of the submissions filed by the Strata Company are not relevant to the preliminary issue, because they are in respect of the

substance of the application, rather than the issue of jurisdiction. They will only be relevant if the Tribunal decides that it has jurisdiction to determine the application. The following submissions are the relevant submissions made by the Strata Company regarding the preliminary issue.

20 The Strata Company submits that the Tribunal has jurisdiction to deal with the application under s 103G(1) of the ST Act because s 123B(2) of the ST Act provides that the DF Act is subject to any by-law of a strata company. The Strata Company submits that Sch 2 by-laws 2, 15 and 20 of its by-laws are relevant by-laws for the purposes of s 123B of the ST Act.

21 Schedule 2 by-law 2 provides as follows:

An Owner will not make unreasonable noise likely to interfere in any way with the peaceful enjoyment by other Owners of their Lots or the Common Property.

22 Schedule 2 by-law 15 provides as follows:

The vehicle access way comprising Common Property must at all times be available for access and egress by pedestrians or motor vehicles.

23 Schedule 2 by-law 20 provides as follows:

The Strata Company may, at a duly convened general meeting and by special resolution, approve changes to the external colour scheme and construction materials to the buildings on the Lots.

24 With regard to Sch 2 by-law 2, the Strata Company states that the proposed gate will add noise within the strata scheme by its operation and the noise from idling vehicles waiting for the gate to open.

25 With regard to Sch 2 by-law 15, the Strata Company states that the proposed gate will limit vehicle access to the back section of the common driveway and create a de facto exclusive use area over part of the common property driveway.

26 With regard to Sch 2 by-law 20, the Strata Company states that an extraordinary general meeting was convened to consider and, if thought fit, pass a special resolution in relation to the proposed wall and gate and the result was a vote against the proposed wall and gate, on the basis of s 7(5)(b)(i) of the ST Act.

Ms Maul's submissions regarding the preliminary issue

27

Ms Maul's submissions, in summary, are as follows:

- The DF Act notice, and the proposed dividing fence described in it, are the sole subject of this application.
- The DF Act, and not the ST Act, applies to internal fencing within a single tier strata scheme as per s 123B of the ST Act.
- Disputes as to the erection of dividing fences must be referred to and decided by the Magistrates Court of Western Australia pursuant to the DF Act. Parliament saw fit to enact the DF Act to codify how boundaries between lots are fenced and granted the Magistrates Court jurisdiction to resolve disputes that arise with respect to them.
- The Tribunal and its predecessor, the former Strata Titles Referee, have previously considered the jurisdictional component of the preliminary issue and consistently determined that jurisdiction lies with the Magistrates Court as held in [27] of *Cowell*, [11] - [14] of *The Owners of 95 Mandurah Terrace*, [1] - [6] of *Barrett No 1* and [9] of *Barrett No 2*. It is in the public interest that consistency continue to apply between Tribunal decisions on this jurisdictional question.
- Although (pursuant to s 123B(2) of the ST Act) s 123B(1) of the ST Act has effect subject to any by-law of the Strata Company, any such by-law must manifest a specific intent to 'obfuscate' s 123B(1) of the ST Act. There are no by-laws of the Strata Company which provide that the DF Act does not apply to internal fencing in this strata scheme.
- Schedule 2 by-laws 2, 15 and 20 of the Strata Company do not manifest the requisite intention to displace the jurisdiction of the Magistrates Court.

Consideration

28 Section 7 of the DF Act provides that the owners of adjoining lands not divided by a 'sufficient fence' (as defined in s 5 of the DF Act) are liable to join in or contribute in equal proportions to the construction of a dividing fence between those lands.

29 Section 8 of the DF Act provides that an owner of land desiring to compel the owner of adjoining land (**adjoining owner**) to join in or contribute to the construction of a dividing fence may give the adjoining owner a notice specifying the boundary to be fenced and a proposal for fencing that boundary, including the kind of fence. The use of the word 'may' in s 8 of the DF Act signifies that an owner has the discretion as to whether or not he or she chooses to compel the adjoining owner to 'join in or contribute to' the construction of a dividing fence.

30 Section 9 of the DF Act gives both the owner who gives the notice and the owner who receives it the right to apply to the nearest court (defined in s 5 of the DF Act as the Magistrates Court) if the owners do not agree on all or any of the matters set out in s 9(1)(a), (b) and (c) of the DF Act and the Magistrates Court may make an order regarding all or any of the matters set out in s 9(1)(d), (e), (f), (g) and (h) of the DF Act.

31 Sections 7, 8 and 9 of the DF Act deal with the issue of the liability of an adjoining owner to either 'join in' or 'contribute' to the construction of a dividing fence where there is either no dividing fence, or there is a fence, but it is not a 'sufficient fence' (as defined in s 5 of the DF Act) if the other owner wishes to compel the adjoining owner to do so.

32 There is no requirement for an owner to give a notice under s 8 of the DF Act to be able to construct a dividing fence where a sufficient fence does not exist, if he or she does not wish to compel the owner of adjoining land to join or contribute to the construction of the fence.

33 Section 123B(1) of the ST Act simply provides that the DF Act applies to fencing between lots and common property in a survey-strata scheme and a single tier strata scheme, subject to any by-law of the strata company of that scheme which may alter that position.

34 It needs to be borne in mind that the DF Act deals with more than just the issue of the contribution of owners of adjoining land for the construction of a dividing fence. The DF Act also deals with the issue of the liability of owners of land on either side of a dividing fence to join in or contribute to the cost of repairing the fence.

35 In the view of the Tribunal (as constituted to deal with this matter), the purpose of s 123B of the ST Act is to allow the issue of the liability of owners of adjoining lots in a strata scheme to contribute to the construction and/or repair of a dividing fence to be dealt with under the DF Act (in the Magistrates Court). There is no reason why that should preclude the Tribunal from exercising its jurisdiction under s 103G (or s 103F) of the ST Act where the construction of a dividing fence falls within s 7 of the ST Act.

36 The principles of statutory construction were conveniently summarised by Le Miere J in *Bhalsod v Perrie* [2016] WASC 412 (*Bhalsod*) at [18] - [19], as follows:

The High Court has confirmed on many occasions in recent years that questions of construction are determined by reference to the text, context and purpose of the Act. See for example *Project Blue Sky Inc v Australian Broadcasting Authority* [1998] HCA 26; (1998) 194 CLR 355; *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue* [2009] HCA 41; (2009) 239 CLR 27; *Australian Education Union v Department of Education and Children's Services* [2012] HCA 3; (2012) 248 CLR 1; *Certain Lloyd's Underwriters Subscribing to Contract Number IH00AAQS v Cross* [2012] HCA 56; (2012) 248 CLR 378.

The applicable principles of statutory construction include the following. The language which has actually been employed in the text of legislation is the surest guide to legislative intention. The context and purpose of a provision are important to its proper construction because the primary object of statutory construction is to construe the relevant provision so that it is consistent with the language and purpose of all the provisions of the statute. The legal meaning of the relevant provision is to be decided by reference to the language of the instrument viewed as a whole. The purpose of the statute resides in its text and structure. The purpose of legislation must be derived from what the legislation says, and not from some a priori assumption about its purpose or any assumption about the desired or desirable reach or operation of the relevant provisions.

37 Section 122(1) of the ST Act provides that nothing in the ST Act derogates from any rights or remedies that a strata company or an owner of a lot may have in relation to any lot or the common property apart from the ST Act. That is consistent with the view of the Tribunal (as constituted to deal with this matter) expressed above.

38 In [25] - [27] of *Cowell*, the former Strata Titles Referee stated as follows:

If the wall in question is proposed to be constructed on the common boundary between Lot 1 and the Lot 2 access way, it would be a 'boundary fence' in the terms of the *Dividing Fences Act 1961*.

Section 123B includes:

1. The *Dividing Fences Act 1961* applies to fencing between lots in a ... single tier strata scheme as if -
 - (a) adjoining lots were adjoining lands to which that Act applies;
 - (b) a proprietor of a lot held the lot for an estate of freehold in possession...
2. Subsection (1) has effect subject to any by-law of the strata company.

The Strata Company has not adopted any by-law in relation to boundary fencing. Accordingly, the question of whether or not a fence or wall is necessary and the type of fence or wall that might be reasonably required are not issues within my jurisdiction. If the Respondents wish to have a boundary fence and wall and cannot reach an amicable agreement in that regard, the Respondents will have to consider commencing proceedings in accordance with the *Dividing Fence Act*.

39 In [13] and [14] of *The Owners of 95 Mandurah Terrace*, the Tribunal (as it was constituted to deal with that matter) stated:

The *Dividing Fences Act 1961* (WA) prescribes what notice must be given by one owner to the owner of adjoining land where there is a dispute concerning the construction of dividing fences (s 8) and, where after such notice has been given, agreement has not been reached, a Court of Petty Sessions may make an order determining the matters in dispute (s 9).

It follows that the Tribunal does not have jurisdiction to determine the questions raised in the application.

40 In [6] and [7] of *Barrett No 1*, the Tribunal (as it was constituted to deal with that matter) stated as follows:

To the extent that the relief sought by the applicant relates to dividing walls and fences, s 123(B) of the *Strata Titles Act 1985* (WA) requires that the dispute be resolved under the *Dividing Fences Act 1961* (WA) and is accordingly beyond the jurisdiction of this Tribunal. I adopt the Strata Titles Referee's reasons for so concluding as set out in his above decision dated 1 December 2004.

In the reasons for the decision when granting the above mentioned interim order, the Strata Title Referee raised the possibility that s 7(6) of the *Strata Titles Act 1985* and reg 30 of the *Strata Titles General Regulations 1996* might have application if the alterations to the walls and fences involved a structure. A structure is defined to mean any building or improvement the construction or erection of which is required to be approved by the local government or any other authority. The applicant did not pursue this aspect, although the issue was raised with her during a directions hearing. The matter thereafter proceeded on the Tribunal's understanding that it was accepted that no approval was required for the works concerned.

41 In [9] of *Barrett No 2*, the Tribunal (as it was constituted to deal with that matter) stated as follows:

In the Strata Titles Referee's reasons for decision the Strata Title Referee found that any dispute involving damage or the repair or replacement of the fences had to be resolved between the adjoining owners under the *Dividing Fences Act 1961* (WA). I agree with and adopt the Strata Title Referee's reasons for so concluding. The Strata Title Referee further stated that it was possible that any intended works would involve a structure within the meaning of s 7(6) of the *Strata Titles Act 1985* (WA) (the ST Act) and reg 30 of the *Strata Titles General Regulations 1996* (WA) if the intended works involved a "structure" being a construction or erection required to be approved by the local government or any other authority. Pending clarification of that issue, the Strata Title Referee considered it appropriate to grant the above interim relief.

42 The Strata Titles Referee's reasons for his decision dated 1 December 2004, which are referred to in [6] of *Barrett No 1* and [9] of *Barrett No 2*, are not included within either of those decisions, so it is not possible to analyse those reasons. However, it should be noted that *Barrett No 1* and *Barrett No 2* concerned a dispute involving damage or the repair or replacement of existing dividing fences, not the construction of dividing fences.

43 The Tribunal notes that the statements of the Tribunal (as it was constituted for those matters) in [7] of *Barrett No 1* and in [9] of *Barrett No 2* refer to the possibility that s 7 of the ST Act may apply if the alterations to the walls and fences in question involved a structure. Those comments are consistent with the approach taken in this matter by the Tribunal (as constituted to deal with this matter).

44 In light of the text used in s 123B of the ST Act the Tribunal (as constituted to deal with this matter), with all due respect, considers that the statements made about the effect of s 123B of the ST Act firstly, by the former Strata Titles Referee in [25] - [27] of *Cowell* and secondly, by the Tribunal (as it was then constituted) in [13] and [14] of *The Owners of 95 Mandurah Terrace*, in [6] of *Barrett No 1* and in [9] of *Barrett No 2*, to the extent that those statements might be understood to indicate that the Tribunal does not have any jurisdiction under the ST Act to deal with a dispute concerning the erection of a dividing fence, were wrong and fell into error by attributing to s 123B of the ST Act a legal meaning, using the words of Le Miere J at [19] of *Bhalsod*, from 'some a priori assumption about its purpose or any assumption about the desired or desirable reach or operation of the relevant provisions'. Accordingly the Tribunal (as constituted to deal with this matter) will not follow nor apply those statements in this matter.

45 For the reasons given above regarding the purpose of s 123B of the ST Act, the Tribunal does not accept Ms Maul's submission that the DF Act 'codifies' how boundaries between lots in a strata scheme are fenced and grants the Magistrates Court jurisdiction to resolve disputes that arise with respect to that, to the exclusion of the provisions of the ST Act.

46 The Tribunal does not accept the Strata Company's submission that the Tribunal has jurisdiction to deal with the application under s 103G(1) of the ST Act due to Sch 2 by-laws 2, 15 and 20 and the provisions of s 123B(2) of the ST Act. Those by-laws do not preclude the operation of s 123B(1) of the ST Act. However, for the reasons given above, the Tribunal has decided that s 123B(1) does not operate to exclude the jurisdiction of the Tribunal to deal with the application under s 103G(1) in this matter.

Conclusion

47 For the reasons given, the Tribunal determines the preliminary issue in the affirmative. The Tribunal has jurisdiction to determine this application under s 103G(1) of the ST Act.

Orders

The Tribunal will make the following orders:

1. The preliminary question: 'Does the Tribunal have jurisdiction to determine this application, considering the provisions of s 123B of the *Strata Titles Act 1985* (WA) and the *Dividing Fences Act 1961* (WA)?' is answered in the affirmative.
2. The matter is to be listed for a directions hearing to program the application to a final hearing.

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

MR D AITKEN, SENIOR MEMBER

29 JANUARY 2020