

JURISDICTION : STATE ADMINISTRATIVE TRIBUNAL

ACT : STRATA TITLES ACT 1985 (WA)

CITATION : JANUS and ABERNETHY [2020] WASAT 88

MEMBER : DR B MCGIVERN, MEMBER

HEARD : 20 JULY 2020

DELIVERED : 30 JULY 2020

PUBLISHED : 4 AUGUST 2020

FILE NO/S : CC 349 of 2020

BETWEEN : PETER JANUS
Applicant

AND

SUSAN ABERNETHY
First Respondent

PATRICK ABERNETHY
Second Respondent

THE OWNERS OF 7 TEAGUE STREET
BURSWOOD SURVEY-STRATA PLAN 62738
Third Respondent

Catchwords:

Survey-strata scheme - Parking of vehicles - Contended interference with drive line to rear lot - Whether parking in common property or wholly within front lots - Determining lot boundaries - Whether breach of any by-laws - Exercise of

Tribunal's discretion to make orders

Legislation:

Strata Titles Act 1985 (WA), s 3(1), s 32(1), s 35(1), s 42, s 42(2), s 81, s 81(7), s 83, s 83(1), s 83(2), s 83(3), s 90, s 103F(1), s 103H(8), Sch 1, Sch 2, Pt V1, Div 2

Strata Titles Amendment Act 2018 (WA)

Result:

Application dismissed

Category: B

Representation:

Counsel:

Applicant	: In Person
First Respondent	: In Person
Second Respondent	: In Person
Third Respondent	: N/A

Solicitors:

Applicant	: N/A
First Respondent	: N/A
Second Respondent	: N/A
Third Respondent	: N/A

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

Arasi & Anor and The Owners of Beverley Court [2005] WASAT 197
Gawor and The Owners of Dawesville Caravan Park Strata Plan 14644
[2015] WASAT 60
Maguire v Owners of Roslyn Strata Plan 35960 [2014] WASC 28
Squelch and Brooklea Nominees Pty Ltd [2005] WASAT 198
Wong v Reid [2016] WASC 59

REASONS FOR DECISION OF THE TRIBUNAL:

(The application was heard on 20 July 2020. An oral decision was delivered on 30 July 2020. The following reasons comprise the reasons that were delivered orally, subject only to minor editing to improve clarity of expression and set out).

Introduction

1 This proceeding arises out an application made by the applicant on 10 March 2020 which (pursuant to orders made 21 May 2020) is for orders under s 83(1) of the *Strata Titles Act 1985* (WA) (**ST Act**).

2 The applicant is the proprietor of lot 2 on survey-strata plan 62738, which created the survey-strata scheme at 7 Teague Street, Burswood (**Scheme**).

3 The first and second respondents are the proprietors of lots 4 and 5 in the Scheme. The third respondent is the strata company of the Scheme (**Strata Company**). Pursuant to orders made on 21 May 2020, with the consent of the parties, the Strata Company did not participate in the proceeding.

4 In very broad terms, the dispute between the parties concerns areas used for parking within the Scheme property.

Evidence

5 A final hearing was conducted on 20 July 2020 (**hearing**), and adjourned to 30 July 2020 for delivery of these reasons.

6 Each of the respondents and the applicant appeared and were self-represented at the hearing. Each gave oral evidence on affirmation and had an opportunity to cross-examine the other party's evidence. No other witnesses were called.

7 Each party filed submissions and documents with the Tribunal, and the Tribunal prepared a hearing book which was taken into evidence (**Exhibit 1**).

8 Included in the documentary evidence (Exhibit 1, pages 106-111) is a search of Survey-Strata Plan 62738 issued 4 March 2020 on request number 60382243 (**Survey-Strata Plan**).

The statutory framework

9 Importantly, the application was lodged and so the proceeding commenced before 1 May 2020 (being the commencement date of amendments introduced by the *Strata Titles Amendment Act 2018* (WA)), and the determination of the dispute is therefore governed by the ST Act as it stood before 1 May 2020. In these reasons, any reference to legislative provisions or 'the Act' will be a reference to the ST Act as it stood before 1 May 2020.

10 As appears from the Survey-Strata Plan, the Scheme is a survey-strata scheme comprising three lots and common property. Pursuant to s 3(1) of the Act:

(a) the common property of a survey-strata scheme is 'the lot or lots shown on a survey-strata plan as common property'; and

(b) a lot in a survey-strata scheme, is 'land that is shown as a lot consisting of one or more parts on the plan for that scheme, but does not include a lot shown as common property' (or land set aside for a road or reserve).

11 The common property in the Scheme is shown on the Survey-Strata Plan, marked 'CP3'. When the Scheme was first registered it comprised, in addition to the common property, lots 1 and 2. Upon further sub-division (by instrument M582848 registered on 6 May 2014), lot 1 became two separate lots being lots 4 and 5 (so the Scheme now comprises only lots 2, 4 and 5, and CP3).

12 Section 32(1) provides that upon registration of a strata or survey-strata scheme, the proprietors from time to time shall comprise a strata company.

13 The obligations of a strata company include the duty, under s 35(1), to 'properly repair, maintain, renew, replace, control and manage the common property in the Scheme for the benefit of all proprietors'.

14 Default by-laws contained in Sch 1 and Sch 2 of the Act are deemed to be the by-laws of every strata company: s 42(2). Although provision is made for those default by-laws to be amended or replaced by by-laws passed and registered in accordance with the requirements

of s 42, that has not been done in relation to the Scheme, and so the unamended default by-laws apply.

15

Relevant to the dispute:

(a) Schedule 2 contains the following:

1. Vehicles

A proprietor, occupier, or other resident of a lot shall not park or stand any motor or other vehicle upon common property except with the written approval of the strata company.

2. Obstruction of common property

A proprietor, occupier, or other resident of a lot shall not obstruct lawful use of common property by any person[.]

(b) Schedule 1 contains the following:

By-law 1 Duties of proprietor, occupiers etc.

(2) A proprietor, occupier or other resident of a lot shall -

- (a) use and enjoy the common property in such a manner as not unreasonably to interfere with the use and enjoyment thereof by other proprietors, occupiers or residents, or of their visitors; and
- (b) not use the lot or permit it to be used in such manner or for such purpose as causes a nuisance to any occupier of another lot (whether a proprietor or not) or the family of such an occupier; and
- (c) take all reasonable steps to ensure that his visitors do not behave in a manner likely to interfere with the peaceful enjoyment of the proprietor, occupier or other resident of another lot or of any person lawfully using common property; and
- (d) take all reasonable steps to ensure that his visitors comply with the by-laws of the strata company relating to the parking of motor vehicles.

16 Pursuant to orders made 21 May 2020, the application (as filed on
10 March 2020) was amended so that:

- (a) the application is brought under s 83(1), rather than s 103F(1); and
- (b) the orders sought, and the grounds for the application, are those filed by the applicant on 19 May 2020 (subject to some minor modifications to the first proposed order, as outlined at [27] below).

17 Section 83(1) 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 on any person entitled to make an application under this subsection or on the council or the chairman, secretary or treasurer of the strata company.

18 Further, s 83(2) and (3) contain particular provisions concerning the exercise by a strata company of any discretionary power, authority, duty or function under the Act. A strata company is only deemed to have failed or refused to exercise a discretion where the procedural requirements contained in sub-section (3) are satisfied.

19 Section 83 is contained within Pt VI Div 2 of the Act. Any orders made under that Division are subject to s 81 which provides, in sub-section (1), that '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'.

20 In relation to determining the substance of the orders sought, the Tribunal should have regard to the orders sought at the hearing (to the extent that they are different from the relief sought in the application document) in making its orders disposing of a matter: **Wong v Reid** [2016] WASC 59 at [32], per Beech J.

21 The Tribunal's power to make an order pursuant to s 83(1) is discretionary: **Arasi & Anor and The Owners of Beverley Court** [2005] WASAT 197 (*Arasi*).

- (a) In exercising its discretion the Tribunal must act in accordance with the provisions of the Act, the

principles of fairness and reasonableness, the interests of the parties, equity and due consideration of all the information at its disposal: *Arasi* at [24]-[28].

- (b) In relation to a similar discretion granted to the Tribunal under s 90 of the Act, the Supreme Court has commented that the exercise of such discretion must guard against misuse, oppression and obsessiveness in an application: *Maguire v Owners of Roslyn Strata Plan 35960* [2014] WASC 28 at [62], applied in *Gawor and The Owners of Dawesville Caravan Park Strata Plan 14644* [2015] WASAT 60 at [12].
- (c) The Tribunal must therefore be satisfied that the nature of the breach and the circumstances surrounding it justify the making of an order for relief: *Squelch and Brooklea Nominees Pty Ltd* [2005] WASAT 198 at [28]-[29].

22 The Tribunal observes that other considerations relevant to the exercise of its discretion may include the degree to which the proposed relief corresponds with, and responds to, the grounds proved by the applicant, and the likely efficacy of the proposed relief.

The parties' positions

23 The applicant's principal contention is that the respondents park, or allow their tenants and visitors to park, vehicles:

- (a) in, or encroaching upon, the common property driveway (that contention is contained in the written grounds, as amended, for the application); and
- (b) further and alternatively, in such a way as to interfere with the 'driveline' of the applicant to his property (that contention was made in oral submissions during the hearing).

24 In relation to the latter, the applicant contends that the 'natural driveline' to his property is a straight line running:

- (a) from the crossover, comprising the entry to the Scheme property, to his (rear) lot; and

- (b) commencing at, and extending from, the centre of the paved area between a brick boundary wall enclosing the yard space for lot 4 (**Lot 4 Wall**) and a garden bed running along the right hand side (viewed from the crossover) of the common property driveway,

(that line, as defined, is referred to in these reasons as the **Contended Driveline**).

25 The applicant did not have substantive evidence to support the existence or location of the Contended Driveline beyond saying that it made sense to take the centre-point of the physical entrance to the property as a driveline, and most people would do this. Further, he made reference to email correspondence he received from the respondents, dated 24 October 2019, which contained a statement to the effect that the boundary of lot 5 ran in line with the Lot 4 Wall.

26 The applicant contends that the respondents' alleged conduct is in breach of by-laws 1 and 2 in Sch 2, and by-law 2 of Sch 1.

27 In his written application, the applicant seeks the following orders (as amended by orders dated 21 May 2020):

- (A) That the owners of Lots 4 and 5 on Survey Strata Plan 62738 refrain from parking upon the common property driveway without the written permission of the strata company by means of a resolution without dissent.
- (B) That the owners of Lots 4 & 5 on Survey Strata Plan 62738 take all necessary steps to ensure that the tenants, occupiers and visitors of Lot 4 & 5 refrain from parking upon the common property[.]
- (C) That the Owners of Survey Strata Plan 62738 mark out the boundary of the common property by means of a yellow paint line of minimum 5 cm wide to demarcate the boundary of the common property and Lot 5.
- (D) That the Owners of Survey Strata Plan 62738 mark out on the common property driveway assign in yellow paint saying 'No Parking' in letters made up of lines of minimum 30 mm wide with the words having a height of no less than 200 mm high.

(In these reasons, the proposed orders will be referred to by the letter assigned to them in the application, as appears above).

28

At the hearing, the applicant made submissions in relation to the proposed orders to the following effect:

- (a) in relation to proposed orders (A) and (B), if and to the extent the respondents park, or allow parking, on their own lots in a way that obstructed the Contended Driveline then that is a use or permitted use of their lots that causes a nuisance to an occupier of another lot (being the applicant and his family), in breach of by-law 2(b) in Sch 1, and the orders should be amended to reflect a prohibition of such interference; and
- (b) in relation to proposed orders (C) and (D), which orders are sought against the Strata Company, the substance of those orders is in relation to the demarcation of the common property boundary and the erection of signage, rather than the form of the proposed action.

29

The applicant made further submissions, which took on a subsidiary character in the hearing, to the effect that parking vehicles close to the entrance of lot 5 created an obstruction to the tenant of that lot and a fire escape hazard.

30

The respondents' contentions are to the effect that:

- (a) they only ever park, and have taken all reasonable steps to ensure that their tenants and guests park, within the boundaries of their lots (or otherwise outside the Scheme property);
- (b) the applicant has breached and continues to breach the Scheme by-laws by parking and/or allowing his visitors (including building contractors) to park on the common property driveway;
- (c) the applicant has misdirected himself in relation to the common property - the common property is not coextensive with the paved areas lying outside the brick structures on lots 4 and 5;
- (d) the boundaries of lots 4 and 5 are to be determined in accordance with the Survey-Strata Plan and,

so determined, extend beyond the line corresponding with and extending from the Lot 4 Wall;

- (e) the common property driveway comprises a paved area extending some 3.2 metres from the right garden bed boundary;
- (f) the Contended Driveline is not the centreline of the common property driveway and, if used as a driveline, causes vehicles to encroach upon lots 4 and 5; and
- (g) the parking of vehicles within the boundary of lot 5 does not create a fire escape hazard, and in any event does not relevantly concern the applicant.

31 In relation to the contention outlined at [30(b)] above, the respondents tendered photographs taken from CCTV footage on their premises (Exhibit 1, pages 117-122 and page 155). The applicant does not dispute this evidence, and admitted 'taking liberties' in circumstances where he or his contractors needed to park close to his lot and where he understood the respondents to be absent from the property.

32 In relation to the issue of boundaries, the respondents made reference to the measurements appearing from the Survey-Strata Plan, and tendered as evidence:

- (a) plans and drawings submitted to the local council in the course of obtaining building permits for the construction of dwellings on lots 4 and 5 (Exhibit 1, page 151); and
- (b) additional measurements and figures taken from those drawings in relation to the paved area they say is used for parking for lot 5 (Exhibit 1, pages 113-114); and
- (c) the existence and location of the original survey pegs which were, until recently, still in place at the property (Exhibit 1, page 152).

33 In relation to the proposed orders, the respondents contend that there is no breach to warrant the making of the orders.

34 Specifically in relation to proposed orders (C) and (D), the respondents contend that they have marked out the boundary of lot 5

using screws placed in the paving (the location taken from measurement from the site plans and the location of a survey peg), and that this sufficiently identifies the common property. They oppose the orders sought on the basis that more distinct markings would detract from the aesthetics of the property.

Tribunal's consideration

Material facts

35 The Tribunal considers that both parties were convincing witnesses. They have different views, but they both gave their evidence with candour, including making concessions of fact that were not in their own interest.

36 The applicant bears the onus of proof in relation to any fact or matter on which he relies to support his application.

37 Although there is insufficient evidence for the Tribunal to determine finally the exact location of the Scheme boundary lines and the exact location of vehicles pictured in the photographs tendered as evidence, the Tribunal is satisfied, on the balance of probabilities based on the evidence before it, that:

- (a) the boundary of the common property and lots 4 and 5 is not coextensive or in line with the Lot 4 Wall;
- (b) the areas shaded grey on the drawings provided by the respondent and appearing at page 114 of Exhibit 1 fairly represent (again, without needing to determine the exact boundary) areas included within the boundary of lot 5 (**Lot 5 Parking**);
- (c) the evidence led by the applicant (noting in particular the photographs attached to the application and appearing at page 18 of Exhibit 1) demonstrates at least two instances where a vehicle was parked partly within and partly outside the Lot 5 Parking, thereby encroaching onto the common property;
- (d) the respondents and their tenants otherwise usually park within the Lot 5 Parking area. In this regard, in addition to the photographic evidence tendered by both parties, the Tribunal notes:

- (i) the applicant conceded in his oral evidence that they 'predominantly' park within the Lot 5 Parking area, as pictured; and
- (ii) the applicant's submissions in relation to vehicles parking so close to the entrance of lot 5 as to cause a fire escape hazard support a finding that such vehicles were, more likely than not, within the lot boundary;
- (e) because the Lot 5 Parking area extends beyond the physical boundary of the Lot 4 Wall, parking within that area would have the effect of disrupting the Contended Driveline; and
- (f) the evidence led by the respondents, and conceded by the applicant, demonstrates numerous instances of the applicant and his visitors (including contractors) parking wholly within the common property, and on occasion within the boundaries of lot 5.

Proposed orders

38 As emerged through the course of the hearing, the central pillar of the application is the applicant's understanding and assertion that he is entitled to use the Contended Driveline in the course of accessing his property.

39 The applicant's submissions during the hearing made it clear that his contentions in relation to any breach by the respondents of the by-laws concerning either:

- (a) the use or obstruction of common property (by-law 1 and 2, Sch 1 and by-law 2(d), Sch 2); or
- (b) the use of a lot causing a nuisance (by-law 2(b), Sch 1),

were contentions made in the service of the primary objective being to achieve the unobstructed use of the Contended Driveline.

40 There are several difficulties with that position.

41 First, the extent of the common property and lots in the Scheme are legislatively determined (see [10] above), and are ascertained by reference to the boundary lines marked on the Survey-Strata Plan:

- (a) not by reference to any communication, practice or understanding of or between the parties; and
- (b) not by any physical structure (the extent to which any structure coincides with a boundary may be determined by a surveyor).

42 As explained to the applicant during the hearing, the Tribunal's powers to make orders exist under legislation - relevantly, the ST Act - and are confined by its terms.

43 The applicant, as the proprietor of lot 2 in the Scheme, has limited rights to use and enjoy Scheme property, those rights extending only to:

- (a) the exclusive use and enjoyment of his own lot; and
- (b) the shared use and enjoyment of the common property.

44 The applicant has no right to the use or enjoyment of any part of lot 4 or lot 5. Accordingly, any contention by the applicant that he is entitled to use a driveline that would have the effect of either:

- (a) treating any part of lot 5 as though it were common property; or
- (b) conferring on him the right to encroach upon it, is misconceived.

45 The Tribunal does not have the power to make any order having the effect of:

- (a) altering the boundary of any lot (and therefore, by necessary extension, the boundary of the common property); or
- (b) to confer any right of use and enjoyment in respect of a lot (noting that any such order would interfere with the legal interest of the lot proprietor).

46 The Tribunal is concerned only with whether the applicant can establish that there has been some '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 the Scheme, such that would warrant the exercise of the Tribunal's discretion in making the orders he seeks.

47 To the extent that the applicant contends that the use by the respondents or their tenants of the Lot 5 Parking area causes a nuisance to him (see [28(a)] above), that contention is without merit. Parking within the lot does not, of itself, give rise to a nuisance (which is unreasonable interference with an interest in neighbouring land) affecting the applicant.

- (a) Parking within lot 5 causes no physical interference with lot 2, and does not interfere with the applicant's use and enjoyment of lot 2 or the common property.
- (b) To the extent that the applicant relies on interference with the Contended Driveline, where use of such a driveline involves any part of a vehicle crossing over the boundary of lot 5 (that boundary being determined by the Survey-Strata Plan), the applicant has no legal interest capable of suffering interference. (Indeed, any interference in such circumstances is material interference with lot 5.)

48 As to proposed orders (A) and (B), as they appear in the written application (and which relate to parking on common property):

- (a) as appears from the Tribunal's findings of material fact, the evidence led by the applicant falls short of demonstrating repeated or unreasonable conduct by the respondents, in breach of the Scheme's by-laws, such as to warrant the making of the orders proposed against them;
- (b) although the Tribunal accepts that there have been isolated instances of vehicles encroaching from the Lot 5 Parking onto the common property, the Tribunal is not satisfied that such conduct is ongoing or that, particularly in light of the applicant's own conduct in relation to parking, the nature of the breach and the circumstances surrounding it justify the making of an order for relief.

49 Similarly, in relation to proposed orders (C) and (D), which orders are sought against the Strata Company, while the Tribunal can see some practical advantage to the parties in marking out the actual boundary between lot 5 and the common property, any such merit is not derived from the case established by the applicant, because he has been unable to satisfy the Tribunal that he has suffered from the management or any failure of the Strata Company to manage the common property, such as to cause him detriment.

50 For all of the reasons outlined above, the application fails.

Costs

51 Finally, towards the end of the hearing, the respondents made oral submissions to the effect that, if the application was unsuccessful, they would seek their costs. I indicated that I would address that matter at the time that I delivered these reasons, and I do so now.

52 While such an application might be entertained (without suggesting that it would succeed) under the ST Act as it now stands, for the reasons outlined earlier (see [9] above), the provisions of the ST Act as they stood before 1 May 2020 apply. Relevantly, s 81(7) provides:

The State Administrative Tribunal cannot make any order for the payment of costs in connection with an application for an order except -

- (a) when allowing an applicant to amend the application, to compensate persons for time unnecessarily spent in connection with the application; or
- (b) under section 103H(8).

53 Although the application was amended by orders dated 21 May 2020:

- (a) no order for costs was made 'when allowing' the amendment; and
- (b) in any event, the amendments were not such as to be productive of costs thrown away by the respondents (noting that the substantive response to the application was filed after that date).

54 Further, the application is not an application under s 103H(8).

55 Accordingly, neither exception under s 81(7) applies and there is no jurisdiction to award costs.

Orders

The Tribunal orders:

1. The application is dismissed.

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

DR B McGivern, MEMBER

4 AUGUST 2020