

**JURISDICTION** : STATE ADMINISTRATIVE TRIBUNAL

**ACT** : STRATA TITLES ACT 1985 (WA)

**CITATION** : WYBENGA and THE OWNERS OF CHANDLER COURT STRATA PLAN 19347 [2020] WASAT 102

**MEMBER** : MS D QUINLAN, MEMBER

**HEARD** : 10 AUGUST 2020

**DELIVERED** : 31 AUGUST 2020

**FILE NO/S** : CC 271 of 2020

**BETWEEN** : CHARLIE WYBENGA  
Applicant

AND

THE OWNERS OF CHANDLER COURT STRATA PLAN 19347  
Respondent

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*Catchwords:*

*Strata Titles Act 1985 (WA) - Extraordinary General Meeting - Resolution without dissent - Special resolution - Additional or new by-law - Schedule 1 or Sch 2 by-law - Amending budget - Special levy - Turns on own facts*

*Legislation:*

*Strata Titles (General) Regulations 2019 (WA)*  
*Strata Titles Act 1985 (WA) (from 1 May 2020), s 3, Sch 5, cl 30*  
*Strata Titles Act 1985 (WA) (prior to 1 May 2020), s 3AC, s 3AC(3), s 3B, s 3B(2)(a), s 3B(2)(b), s 3B(2)(b)(ii), s 3B(5), s 3B(6), s 3C, s 3C(2), s 36, s 42,*

s42(1), s 42(2), s 47(2)(e), s 97, s 97(1), s 97(2), Sch 1, Sch 2  
*Strata Titles Amendment Act 2018 (WA), Pt 2*

*Result:*

Application dismissed

*Category:* B

**Representation:**

*Counsel:*

Applicant : In Person

Respondent : Mr Dean Reigner (a member of the council of owners)

*Solicitors:*

Applicant : N/A

Respondent : N/A

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

Nil

## REASONS FOR DECISION OF THE TRIBUNAL:

### *Introduction*

1 These proceedings arise in the Tribunal pursuant to an application by Mr Charlie Wybenga (Mr Wybenga) lodged with the Tribunal on 24 February 2020 under s 97 of the *Strata Titles Act 1985* (WA) (ST Act).

2 Mr Wybenga seeks orders from the Tribunal to invalidate resolutions of the strata company at two separate extraordinary general meetings (EGM) on 4 April 2018 and 22 May 2019.

3 Strata Plan 19347 consists of an 11 lot strata scheme, with various unit entitlements between 89 to 93 units. Mr Wybenga owns Lot 4 on Strata Plan 19347 and has a unit entitlement of 91 units.

### *Issue to be determined*

4 The issue to be determined in these proceedings is, if the Tribunal considers that the provisions of the ST Act have not been complied with in relation to a meeting of the strata company, whether the Tribunal should make an order that invalidates any resolution or make an order refusing to invalidate any such resolution.

### *Background facts*

5 The material background facts for the 4 April 2018 EGM can be detailed as follows:

(a) Notice of the EGM was provided by notice dated 6 March 2018.

(b) Motion 5.1 was a proposed amendment to the administrative fund expenditure budget (known as a fund for administrative expenses under s 36(1) of the ST Act and commonly known as the 'budget'). This proposed amendment concerned the budget from 1 July 2017 to 30 June 2018 for further works to be undertaken than had been previously included in the budget approved at the previous annual general meeting. The amount proposed in the notice of the EGM was \$74,880.50. At the EGM the amount was amended to be \$81,880.50 (the amended budget amount) and the minutes record that the resolution of the amended budget amount passed at the EGM.

- (c) Motion 5.2 was a special purpose fund levy contribution (known as a reserve fund in s 36(2) of the ST Act) which was proposed in the notice of the EGM as \$20,000. However, at the EGM this amount was amended to be \$27,000 (the reserve fund levy) and the minutes record that the resolution of the reserve fund levy passed at the EGM.
- (d) Mr Wybenga was not present at the 4 April 2018 EGM.

6 The material background facts for the 22 May 2019 EGM can be detailed as follows:

- (a) Notice of the EGM was provided by notice dated 26 April 2019.
- (b) Under the agenda item special business was a motion for a special resolution to add Sch 2 by-law 15 concerning debt recovery costs.
- (c) The minutes record that the proprietors of Lots 1, 2, 3, 6, 7, 8, 10 and 11 voted (either in person or by proxy) in favour of the motion with a combined unit entitlement of 730 units (out of a total unit entitlement of 1,000 units).
- (d) The minutes record that a quorum was present. The minutes do not note any apologies, however by deduction it can be noted that the proprietors of Lots 4, 5 and 9 with a combined unit entitlement of 270 units were not present.
- (e) The minutes record that the chairperson advised those present at the EGM that any proprietor who was not present and had not cast a proxy vote was entitled pursuant to s 3B of the ST Act to signify his or her agreement or disagreement to the resolution in writing within 28 days. The minutes of the 22 May 2019 EGM have an addendum which states that on 22 June 2019 there were no written indications of agreement or disagreement received by the strata company concerning the special resolution for by-law 15 and that the special resolution was now unconditional.



***Mr Wybenga's case***

7 Mr Wybenga provided oral evidence and documents in support of his application.

8 Mr Wybenga submitted that the Tribunal should invalidate the resolutions regarding motions 5.1 and 5.2 at the 4 April 2018 EGM for the following reasons:

- (a) The strata company did not comply with Sch 1 by-laws 13 (must be entitled to vote to move a motion) and 14(6) (contributions and other monies recoverable under the ST Act must be duly paid before commencement of meeting in order to vote).
- (b) Mr Dean Reigner (Lot 7) who moved the two motions and voted and Ms Todd (Lot 1) who voted had not 'duly paid' their levies prior to the commencement of the EGM as the monies had not yet been received by the strata company into the trust account.
- (c) Mr Wybenga was not present at the 4 April 2018 EGM and he was not notified of the amended budget amount of \$81,880.50 nor the amended levy amount as required under s 3C(2) of the ST Act within seven days of the 4 April 2018 EGM.

9 Mr Wybenga also submitted that the Tribunal should invalidate Sch 2 by-law 15 added by special resolution at the 22 May 2019 EGM for the following reasons:

- (a) By-law 15 is inconsistent with the provisions of the ST Act as by-law 15 should not have been added as a Sch 2 by-law which requires a special resolution. It should have been proposed and voted on as Sch 1 by-law requires a resolution without dissent. By-law 15 is a debt collection by-law and should as such be characterised as a governance by-law. Therefore, Mr Wybenga submitted, by-law 15 should have been added as a Sch 1 by-law rather than as it was added, that being a Sch 2 conduct by-law.
- (b) Even if by-law 15 is correctly characterised as a Sch 2 by-law the requirements to pass a special resolution in

s 3B(2)(b)(ii) have not been satisfied as three out of 11 proprietors, being more than 25% of proprietors, did not cast a vote.

- (c) Mr Wybenga provided oral evidence that he was not provided with the minutes of the 22 May 2019 EGM until sometime after 22 June 2019. He based this oral evidence on the dates provided in the minutes and not his own recollection. Mr Wybenga also did not provide any supporting documentation as to when he was provided with the minutes.

### ***The strata company's case***

10 The strata company provided oral evidence from Mr Reigner, a member of the council of owners as well as Ms Marietta Metzger, the strata manager.

11 The strata company submitted the Tribunal should dismiss the application brought by Mr Wybenga in relation to the resolutions regarding motions 5.1 and 5.2 at the 4 April 2018 EGM for the following reasons:

- (a) Both Mr Reigner (Lot 7) and Ms Todd (Lot 1) paid all their contributions and monies owed as required under the ST Act prior to the commencement of the 4 April 2018 EGM. Ms Todd paid at 3.39 pm on 4 April 2018 and provided a bank receipt of the transaction. Mr Reigner became aware he had contributions owing upon his arrival at the EGM and handed his credit card to Ms Metzger who processed the payment at 6.00 pm on 4 April 2018.
- (b) The ST Act requires the money to be duly paid, which does not mean received. The strata company provided transaction receipts and oral evidence from Ms Metzger in this regard.
- (c) The requirement for notice to be given within seven days of the EGM for an amended resolution in s 3C(2) of the ST Act only applies to resolutions that require a resolution without dissent or a special resolution. The resolutions regarding motions 5.1 and 5.2 were

resolutions in relation to the budget and only required a simple majority vote under the ST Act.

12 The strata company submitted the Tribunal should dismiss the application brought by Mr Wybenga in relation to the Sch 2 by-law 15 added at the 22 May 2019 EGM for the following reasons:

- (a) The strata company explained for practical reasons it did not propose by-law 15 as a Sch 1 by-law as it concerned recovery of the costs of debt collection and a proprietor who was facing paying such costs would simply vote in a self-interested way and dissent to a Sch 1 by-law. The strata company submitted this outcome would be unfair to the other proprietors who would continue to bear the burden of such debt recovery against the dissenting proprietor.
- (b) There is an interesting legal argument under the provisions of the ST Act as to whether by-law 15 should be a Sch 1 or Sch 2 by-law.
- (c) However, by-law 15 was duly passed by special resolution as a Sch 2 by-law and has worked effectively in recovering costs associated with debt recovery, in particular recovery of debt owed by Mr Wybenga.

### **Legislation**

13 On 1 May 2020, significant amendments were made to the ST Act with the commencement of Pt 2 of the *Strata Titles Amendment Act 2018* (WA) (Amending Act) and the *Strata Titles (General) Regulations 2019* (WA). The transitional provisions provide in cl 30 of Sch 5 of the current ST Act that proceedings commenced before 1 May 2020 must be dealt with as if the Amending Act had not been enacted. Therefore, for the purpose of determining these proceedings, the ST Act applies in the form it existed when the application was lodged with the Tribunal on 24 February 2020.

14 Relevant to these proceedings, s 97(1) of the ST Act provides that a proprietor can apply to the Tribunal and, where the Tribunal considers that the provisions of the ST Act have not been complied with in relation to a meeting of the strata company, the Tribunal may make an order that invalidates any resolution or make an order refusing to invalidate any such

resolution. Also relevant to these proceedings, s 97(2) of the ST Act provides that the Tribunal shall not make an order under s 97(1) refusing to invalidate a resolution or election unless it considers that the failure to comply with the provisions did not prejudicially affect any person and that compliance with the provisions would not have resulted in a failure to pass the resolution.

15 Schedule 1 by-law 13 of the ST Act provides that a person is not entitled to move a motion at a general meeting or to nominate a candidate for election as a member of the council unless the person is entitled to vote on the motion or at the election.

16 Schedule 1 by-Law 14(6) of the ST Act provides that, except in cases where a unanimous resolution or a resolution without dissent is required, no proprietor is entitled to vote at any general meeting unless all contributions payable in respect of his or her lot have been duly paid. Further, any other moneys recoverable under the ST Act by the strata company at the date of the notice given to proprietors of the meeting must be duly paid before the commencement of the meeting.

17 Section 42(1) of the ST Act provides that a strata company may make by-laws, not inconsistent with the ST Act, for its corporate affairs, any matter specified in Sch 2A and others matters relating to the management, control, use and enjoyment of the lots and any common property. Relevant to these proceedings, s 42(2) of the ST Act provides that Sch 1 by-laws may be added to be by-laws of the strata company by a resolution without dissent. Relevant to an 11 lot strata scheme, s 42(2) of the ST Act provides that Sch 2 by-laws may be added to be by-laws of the strata company by a special resolution.

18 Section 3AC of the ST Act provides for the requirements of a resolution without dissent as follows:

- (1) For the purposes of this Act a resolution without dissent is a resolution -
  - (a) passed at a duly convened general meeting of the strata company of which sufficient notice (as defined by section 3C) has been given and at which a sufficient quorum (as so defined) is present; and
  - (b) against which no vote is cast by a person entitled to exercise the powers of voting on the resolution conferred under this Act -



- (i) voting at the meeting either personally or by proxy; or
  - (ii) voting in accordance with subsection (2).
- (2) A person entitled to exercise the powers of voting conferred under this Act is also to be taken to vote -
- (a) in support of a resolution if he signifies in writing served in accordance with subsection (3) that he agrees to the resolution; or
  - (b) against the resolution if he signifies in writing served in accordance with subsection (3) that he disagrees with the resolution,
- within 28 days after the day of the meeting, whether that writing is signed by the person or by another person who at the time of the signing is entitled to exercise the power of voting in place of that person.
- (3) The writing referred to in subsection (2) is not effective unless it is served -
- (a) on the strata company; or
  - (b) where under section 36A or 36B a roll is not maintained by the strata company, on the other proprietors.

19 Relevant to an 11 lot strata scheme, s 3B of the ST Act provides for the requirements of a special resolution as follows:

- (1) For the purposes of this Act a special resolution of a strata company shall be passed at a duly convened general meeting -
  - (a) of which sufficient notice (as defined by section 3C) has been given; and
  - (b) without limiting subsection (5), at which a sufficient quorum (as defined by section 3C) is present.
- (2) Except where subsection (3) applies, a special resolution is passed if -
  - (a) it is supported by votes, within the meaning in subsections (4) and (5) -
    - (i) having a value of not less than 50% of the aggregate unit entitlement of the lots in the scheme; and

- (ii) of the proprietors of not less than 50% of the lots in the scheme;
- and
- (b) the votes, within the meaning in subsections (4) and (5), against the resolution -
    - (i) do not have a value of 25% or more of the aggregate unit entitlement of the lots in the scheme; or
    - (ii) are not cast by the proprietors of 25% or more of the lots in the scheme.
- ...
- (4) References in subsections (2) and (3) to votes are to the votes of persons entitled to exercise the powers of voting conferred under this Act voting at the meeting either personally or by proxy.
  - (5) Despite subsection (4), a person entitled to exercise the powers of voting conferred under this Act is also to be taken to vote -
    - (a) in support of a resolution if he signifies in writing served in accordance with subsection (6) that he agrees to the resolution; or
    - (b) against the resolution if he signifies in writing served in accordance with subsection (6) that he disagrees with the resolution,

within 28 days after the day of the meeting, whether that writing is signed by the person or by another person who at the time of the signing is entitled to exercise the power of voting in place of that person.
  - (6) The writing referred to in subsection (5) is not effective unless it is served -
    - (a) on the strata company; or
    - (b) where under section 36A or 36B a roll is not maintained by the strata company, on the other proprietors[.]

### ***Consideration***

20 Having considered all of the evidence and submissions presented to the Tribunal in these proceedings by both parties, the Tribunal makes the following findings of fact and law relevant to Mr Wybenga's

application seeking the Tribunal to invalidate specific resolutions made at the 4 April 2018 EGM and the 22 May 2019 EGM.

21 There was little dispute regarding the documentary evidence provided in these proceedings and almost no cross-examination by the parties of the witnesses. The crux of the dispute between the parties is the interpretation of the provisions of the ST Act.

#### **4 April 2018 EGM**

22 The Tribunal finds that the resolutions regarding motions 5.1 and 5.2 were resolutions concerning the budget of the strata company and only required a simple majority vote under the ST Act: see s 36, s 47(2)(e) and Sch 1 by-law 12(6) of the ST Act.

23 It follows, the Tribunal does not agree with Mr Wybenga's submission, in circumstances where he was not present at the 4 April 2018 EGM at which the amounts for the budget and special levy were amended from that proposed in the notice and agenda for the EGM, that s 3C(2) of the ST Act requires notice to be given to him within seven days of the EGM. The Tribunal finds that the requirement for notice to be given within seven days of the EGM for an amended resolution in s 3C(2) of the ST Act only applies to resolutions that require a resolution without dissent or special resolution.

24 It is not disputed by Mr Wybenga that the transactions for Mr Reigner and Ms Todd had occurred on the day and just prior to the commencement of the 4 April 2018 EGM. Mr Wybenga submits, however, that this does not constitute 'duly paid' as required under Sch 1 by-law 14(6) of the ST Act as the funds had not yet been cleared and received by the strata company into its bank account. Mr Wybenga further submitted that as Mr Reigner had also been recorded as owing a \$5.50 administrative fee, which was not paid on 4 April 2018, that he was not entitled to vote or move a motion as he was not 'financial' under Sch 1 by-law 14(6).

25 The Tribunal does not agree with the interpretation by Mr Wybenga as to what constitutes 'duly paid' under the ST Act. Mr Wybenga's submissions on this point stretch and widen the ordinary and natural meaning of the term 'duly paid' within the context of the ST Act to incorrectly conclude the meaning of 'duly paid' includes 'duly paid and received'.

26 The *Macquarie Dictionary Online* defines 'paid' as a 'verb past tense and past participle of **pay**' Points 1 to 3 of the definition of 'pay' are as follows:

–verb (t) 1. to discharge (a debt, obligation, etc.), as by giving or doing something.

2. to give (money, etc.) as in discharge of debt or obligation.

3. to satisfy the claims of (a person, etc.) as by giving money due.

27 The *Macquarie Dictionary Online* defines 'duly' as

adverb 1. in a due manner; properly; fitly.

2. in due season; punctually.

3. adequately.

28 In giving consideration to the ordinary and natural meaning of the term 'duly paid' in the context of the ST Act, the Tribunal is satisfied on the oral and documentary evidence provided that both Mr Reigner and Ms Todd were 'duly paid' prior to the commencement of the 4 April 2018 EGM and, therefore, were permitted to move a motion and vote at the 4 April 2018 EGM.

29 The Tribunal also accepts the evidence of Ms Metzger, that just prior to commencement of the EGM she checked the amount owing by Mr Reigner and the \$5.50 administrative fee was not included in the amount paid. Ms Metzger explained that this administrative fee was not strictly recoverable under the provisions of the ST Act and did not make someone 'unfinancial' in the sense he or she were not entitled to move a motion and vote at an EGM. The Tribunal concurs with Ms Metzger's assessment.

30 The Tribunal finds that both Ms Todd and Mr Reigner had both duly paid all contributions payable and any other monies recoverable under the ST Act prior to the commencement of the 4 April 2018 EGM. Thus, both Ms Todd and Mr Reigner were entitled to move motions and vote at the 4 April 2018 EGM.

31 Therefore, the Tribunal is unable to make an order to invalidate the resolutions regarding motions 5.1 and 5.2. This is because the Tribunal does not consider that the provisions of the ST Act have not been complied with in relation to the 4 April 2018 EGM.



## 22 May 2019 EGM

32 Eight of the 11 lot proprietors voted for adding by-law 15 to Sch 2. This constituted 72.72% of lot proprietors and 730 out of 1000 or 73% of aggregate unit entitlement. Three lot proprietors (which included Mr Wybenga) were not present and did not vote at the 22 May 2019 EGM. Those same three proprietors also did not exercise their right under s 3B(5) and s 3B(6) of the ST Act to signify a vote in writing to the strata company in support or against the special resolution within 28 days.

33 Mr Wybenga did not dispute that the 22 May 2019 EGM was duly convened and that sufficient notice and sufficient quorum, as defined under s 3C of the ST Act, were both satisfied. The Tribunal finds on the evidence presented in relation to the 22 May 2019 EGM that sufficient notice was given and sufficient quorum was present.

34 The Tribunal finds that the ST Act does not require the strata company to notify a proprietor who is not present at a duly convened EGM that he or she can exercise a right to vote to support or oppose a special resolution, or a resolution without dissent, in writing within 28 days of the EGM under s 3B or s 3AC of the ST Act. Therefore, the complaint made by Mr Wybenga in relation to the minutes including both the advice by the chairperson at the EGM on 22 May 2019 of this right and the notation that no written indications of agreement or disagreement from the three lot proprietors had been received by 22 June 2019 is irrelevant. The relevant fact is that no such right was exercised by any of the three non-voting lot proprietors, that being the proprietors of Lots 4, 5 and 9.

35 The Tribunal accepts, as does the strata company, that the issue raised by Mr Wybenga as to whether by-law 15 should have been added as a Sch 1 or Sch 2 by-law may be an interesting point of law. However, that point is not going to be determined by the Tribunal in these proceedings for two reasons. Firstly, the point would be better considered in the context of all of the significant new provisions in the Amending Act to the ST Act as it now stands after 1 May 2020, in particular as it specifically defines in s 3 that Sch 1 by-laws are 'governance by-laws' and Sch 2 by-laws are 'conduct by-laws'. Secondly, and more importantly, it is ultimately a moot point as the Tribunal has concluded in the reasons which follow that the voting that occurred to add by-law 15, ultimately complied with both the requirements to pass a resolution without dissent for a Sch 1 by-law under s 3C and to pass a special resolution under s 3B of the ST Act for a Sch 2 by-law. Therefore, the Tribunal finds that by-law 15 does

not contravene s 42 in that by-law 15 is not inconsistent with the provisions of the ST Act

36 As a Sch 2 by-law, the Tribunal finds that the requirements to pass a special resolution for by-law 15 pursuant to s 3B(2)(a) of the ST Act have been satisfied. This is because the special resolution was supported by more than 50% of the aggregate unit entitlement and more than 50% of the lot proprietors.

37 As a Sch 2 by-law the Tribunal finds, contrary to the submission by Mr Wybenga, that the requirements to pass a special resolution for by-law 15 in s 3B(2)(b) of the ST Act have also been satisfied. Section 3B(2)(b)(ii) of the ST Act provides that a special resolution is passed if the votes against the special resolution do not have a value of more than 25% of aggregate unit entitlement or the votes against are not cast by the proprietors of 25% or more of the lots. At the 22 May 2019 EGM and in the 28 days which followed, more than 25% of the lot proprietors and more than 25% of the aggregate unit entitlement did not vote against the special resolution; they simply did not vote at all.

38 Section 3B(2)(b)(ii) of the ST Act has a prerequisite that the vote cast is a vote against the special resolution. Failing to vote at all cannot constitute voting against a resolution. If that were the case, a resolution without dissent would have no operative effect in the ST Act. The Tribunal finds as there were no votes against the special resolution, s 3B(2)(b)(ii) of the ST Act does not support Mr Wybenga's application to invalidate that special resolution. The Tribunal finds that the special resolution to add Sch 2 by-law 15 met the requirements of s 3B of the ST Act as eight proprietors voted in favour and none of the other three lot proprietors exercised their right to cast a vote within 28 days.

39 If by-law 15 was characterised as a Sch 1 by-law, the Tribunal finds in any event in the circumstances of this case that the requirements to pass a resolution without dissent in s 3AC of the ST Act would also be satisfied. No dissent was noted at the 22 May 2019 EGM. Indeed all those present duly voted in favour of the resolution. Further, none of the three lot proprietors who were not present at the EGM exercised their right within 28 days to express support or dissent to the resolution. Therefore, there was no dissent to by-law 15.

40 Therefore, if by-law 15 is characterised as a Sch 1 by-law, once the 28 days had passed from the EGM and no dissent was signified in writing and served in accordance with s 3AC(3) of the ST Act, the

Tribunal finds that it would have been duly passed meeting the requirements in s 3AC of the ST Act as a resolution without dissent. Therefore, the question of whether by-law 15 should be a Sch 1 or Sch 2 by-law is immaterial as the Tribunal could not consider that the provisions of the ST had not been complied with in relation to a meeting of the strata company.

### ***Conclusion***

41 The Tribunal concludes that the threshold question under s 97 of the ST Act has not been satisfied. The Tribunal does not consider on the evidence provided that the provisions of the ST Act have not been complied with in relation to the EGM's on 4 April 2018 and 22 May 2019. In circumstances where the Tribunal has found Mr Wybenga's application cannot satisfy the threshold question under s 97 of the ST Act, no order can be made to invalidate (or an order to refuse to invalidate) the resolutions regarding motions 5.1 and 5.2 at the 4 April 2018 EGM or the special resolution adding by-law 15 at the 22 May 2019 EGM.

42 In these circumstances, the appropriate order for the Tribunal to make is to dismiss the application.

### ***Orders***

Accordingly, the Tribunal will order as follows:

1. The application is dismissed.

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

MS D QUINLAN, MEMBER

31 AUGUST 2020