

JURISDICTION : STATE ADMINISTRATIVE TRIBUNAL

ACT : STRATA TITLES ACT 1985 (WA)

CITATION : MANGLES SMSF PTY LTD and THE OWNERS OF
LINX AT NEXUS STRATA PLAN 47739 [2020]
WASAT 141

MEMBER : MS N OWEN-CONWAY, MEMBER

HEARD : 13 AUGUST 2020

DELIVERED : 13 NOVEMBER 2020

FILE NO/S : CC 1568 of 2019

BETWEEN : MANGLES SMSF PTY LTD
First Applicant

LEANNE SHAW
Second Applicant

AND

THE OWNERS OF LINX AT NEXUS STRATA
PLAN 47739
Respondent

Catchwords:

Request for access to document - Request - Inspection - Wrongful failure -
Section 43(1)(b) and s 90 of the *Strata Titles Act 1985* (WA)

Legislation:

Strata Titles Act 1985 (WA) (as amended 1 May 2020), Sch 5, cl 30(1)

Strata Titles Act 1985 (WA) (prior to 1 May 2020), s 4, s 32(1), s 43, s 90, s 92

Result:

Application is dismissed

Category: B

Representation:

Counsel:

First Applicant : Ms A Fennell (Director)
Second Applicant : In Person
Respondent : Mr M Murphy (Acting as agent)

Solicitors:

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

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

Engwirda v The Owners of Queens Riverside Strata Plan 55728
[2019] WASCA 190
Maguire v Owners of Roslyn Strata Plan 35960 [2014] WASC 28

REASONS FOR DECISION OF THE TRIBUNAL:***The parties***

1 The first applicant is the registered proprietor of Lot 57 on Strata Plan 47739 (strata plan), comprised in Certificate of Title Volume 2729 Folio 93. The first applicant is and at all times has been represented by a director, Ms Annette Fennell. The second applicant is the registered proprietor of Lot 46 on the strata plan, comprised in Certificate of Title Volume 2729 Folio 82. Lot 57 and Lot 46 are positioned on the third (uppermost) and second levels respectively, of the built form of the strata scheme that is the subject of the strata plan.

2 The proceeding was commenced on 3 October 2019 by the applicants' lodgement of the application. The proceeding was therefore commenced prior to the substantive amendments to the *Strata Titles Act 1985* (WA) (ST Act), which came into force and effect on 1 May 2020. The provisions of the ST Act as it was prior to the amendment on 1 May 2020, applies to these proceedings (cl 30(1) of Sch 5 of the ST Act) as amended on 1 May 2020. At all times in these reasons a reference to the ST Act is to be read as a reference to the ST Act immediately prior to the effect of the amendments operative on 1 May 2020.

3 The respondent is the entity that was created by operation of s 32(1) of ST Act upon registration of the strata plan under the ST Act (as provided for by s 4 of the ST Act). The respondent is constituted by the registered proprietors, from time to time, of all of the lots comprised in the strata scheme. The built form of the strata scheme, in conformity with the strata plan, comprises a multiple level building situated at 9 Linkage Avenue, Cockburn Central in Western Australia. The strata scheme identifies 57 lots and common property within the strata plan. The name of the strata scheme comprised in the strata plan is 'Linx at Nexus'.

4 The strata plan was registered under the ST Act on 7 October 2009 in respect of a parcel of land comprised in Certificate of Title Volume 2648 Folio 90.

The application

5 The applicants filed an application on 3 October 2019 in the Tribunal. The applicants elected s 92 of the ST Act as being the basis

of their application. The applicants' application however, states in the section of the application form allocated to identifying orders sought:

S 90: Where, pursuant to an application by a proprietor for an order under the section, the SAT considers that the strata company for the scheme to which the application relates, or the administrator for that scheme, or the chairman, secretary or treasurer of the strata company has wrongfully - (a) withheld from the applicant information to which the applicant is entitled under the Strata Titles Act 1985; or (b) failed to make available to the applicant or to the applicant's agent a record or document that under this Act the applicant is entitled to inspect, the SAT may order that strata company, administrator, chairman, secretary or treasurer to supply, or make available the record or document, as the case may require, to the applicant.

6 On 5 December 2019, the Senior Member presiding at a directions hearing in this proceeding clarified that the applicants sought relief pursuant to s 90 of the ST Act and not s 92 of the ST Act.

7 The application form itself does not identify any specific information, record or document in respect of which the Tribunal order is sought.

8 Although it is poorly identified in the application form, the applicants confirmed during the course of a further directions hearing on 7 February 2020 that the applicants relied on an email from Ms Fennell for the first applicant addressed to the respondent dated 24 September 2019 as being the written request made by both applicants for access to the documents identified in the categories described therein. The applicants contend that the documents requested were not provided to the applicants and they were not provided with the opportunity to inspect the same.

9 The applicants now seek an order pursuant to s 90 in respect of the documents that they say fall within the request dated 24 September 2019 and in respect of which they assert the respondent wrongfully refused them an opportunity to inspect.

The request email of 24 September 2019

10 It is common cause between the parties and confirmed by the order for directions made on 7 February 2020, that the applicants relied on the written request for documents or access to inspect documents identified in Ms Fennell's email of the 24 September 2019 addressed to the respondent's strata manager and legal representatives (request email). The Tribunal notes that the request email is not

addressed directly to the respondent nor was the respondent provided directly with copy of the same. After referring to s 43 of the ST Act pursuant to which the request email was issued by the applicants, the request email follows:

Can I please request a time to view Documents for,

- A. CCC 1046-2019 as per the attached letter
- B. Section 43 at the same time including CC 658-2018 as per the AGM minutes attached

[Item] 1 Strata company accounts from 31 October 2018 to date of viewing

[Item] 2 All invoices from 20 July 2018 to date of viewing

[Item] 3 All units that have had mould removal 20 July 2018 to date of viewing

[Item] 4 All units that have had water ingress repairs from 20 July 2018 to date of viewing

[Item] 5 Council Of Owners minutes from February 2019 all to current (data of last meeting)

[Item] 6 All common property repairs in compliance with order CC 658-2018 not included in the Struterre Report

[Item 7] Plumber and works as carried out (chairman's PowerPoint presentation addressed to owners ...[2019]...AGM) indicating what drains as described by Mr McCann at the AGM 'It was[]required for us to test the flows of the drains to a satisfactory standard' and when asked by Mr Giardini[] ['] did anyone go and check the drain on the north facing bedroom or words to that affect, Mr McCann replied along the line[s] of 'the drain had broken the rectifications[]and been blocked off. This is not provided within the Struterre report.

[Item 8] Architect correspondence as mentioned by Mr McCann in his address at the AGM on the main roof and the Architect being 'happy' with the proposal

[Item 9] Electrician correspondence as per the removal of lights and electrical decommissioning on the roof top garden and relevant sign off's

Annette Fennell

Leanne Shaw

cc Alex Shaw

- 11 It was clarified during the course of the hearing that the applicants did not seek any documents in relation to category 'A.CCC 1046-2019 as per the attached letter'. Therefore it is not necessary for the Tribunal to canvas which letter was intended to be attached or what the category related to.

The principles

- 12 Section 43(1)(b) of the ST Act obliges a strata company to make available for inspection various categories of documents, relevantly, to a lot proprietor when that person makes a written request for access. The relevant categories of documents relevant in this proceeding are:

- (a) minutes of general meetings of the strata company and meetings of the Council of Owners (s 43(1)(b)(iv) of the ST Act);
- (b) the books of account of the strata company (s 43(1)(b)(vi) of the ST Act); and
- (c) any other record or document in the custody or under the control of the strata company (s 43(1)(b)(ix) of the ST Act).

- 13 Section 43(5) of the ST Act permits the person for whom the inspection is provided, or that person's agent, to either copy the document or make an extract of that document. Section 43(1)(a) of the ST Act confers a discretion on the strata company to provide a copy of such a document to a lot proprietor who makes a request.

- 14 Section 90 of the ST Act confers a power on the Tribunal to make an order that the strata company make the requested document available for inspection. This provision applies, obviously, if a request for inspection has been made for the document pursuant to s 43 of the ST Act. Section 90 of the ST Act does not confer on the Tribunal any power to make an order for the respondent to produce a copy of any documents identified in s 43(1)(b) of the ST Act to an applicant. The power conferred on the Tribunal, by s 90 of the ST Act is a discretionary power: see ***Maguire v Owners of Roslyn Strata Plan***

35960 [2014] WASC 28 (*Maguire*) and it may only be exercised if the Tribunal concludes that the person who made the request has an entitlement to inspect the requested document and the strata company to which the request was made 'wrongfully' failed to make the requested document available (*Engwirda v The Owners of Queens Riverside Strata Plan 55728* [2019] WASCA 190 (*Engwirda*) at [23]-[24]).

15 In this proceeding there is no dispute about copies being provided (*Maguire*) or that the applicants' request exceeded any 'implicit limit' of the entitlement to request the access and inspection of the documents identified (*Engwirda* at [24]).

16 In order for the Tribunal to conclude that it has the power to and should make an order pursuant to s 90 of the ST Act, the Tribunal must be satisfied that, relevantly in this proceeding, the respondent wrongfully 'failed to make available for inspection by the [applicants] ... a record or document that under this Act [the applicants are] entitled to inspect'. The applicants' entitlement to inspect the records or documents arises in this case from the request for access to and inspection of the documents made pursuant to s 43 of the ST Act. If the record or document in issue was not the subject of an eligible person's request or does not fall within the categories identified in s 43(1)(b) of the ST Act, the Tribunal cannot conclude that a strata company has wrongfully failed to provide an eligible person access to and inspection of the same. Similarly, if an eligible person's request has been made for a category of documents and that category of documents has been produced for inspection, the Tribunal cannot generally conclude that the strata company has wrongfully failed to provide the eligible person access to and inspection of the same. In that situation the Tribunal could not make an order pursuant to s 90 of the ST Act.

Some background and CC 658 of 2018

17 There is a dispute concerning the construction of the built form of the strata scheme. The Tribunal is not aware of the nature of the dispute. The Tribunal had before it an order made on 24 September 2019 referring the proceeding in CC 658 of 2018 to mediation. That proceeding involved an application made pursuant to the ST Act for the 'Settlement of a dispute or rectification of a complaint'. The Tribunal has had no other detail before it. As stated above the request email refers to 'A.CCC 1046-2019' which appears to be a reference to another Tribunal proceeding. The Tribunal has very little

detail about any construction disputes, although there are records indicating the involvement of engineers and some remedial work to the buildings within the strata scheme.

The request email and the revised items

18 On 7 February 2020 the Senior Member conducting the directions hearing in this proceeding made an order as follows:

1. By 14 February 2020 the applicants must file with the Tribunal and give to the respondent a written statement specifying the particular documents listed in the email sent by Annette Fennell to the respondent's strata manager (ESM) on 24 September 2019 at 1.41pm which the applicants claim have not been made available by the respondent for the applicants to inspect.

19 The request email identified categories of documents (and information) requested on behalf of the applicants. By order 1, referred to above, the applicants were obliged to specifically identify the document or documents within the category requested, which the applicants allege was not made available to them for inspection by the respondent.

20 Consequentially to order 1 above, the Senior Member ordered that the respondent was to file a written response indicating whether each specified document identified by the applicants, pursuant to the order referred to above:

- (a) was made available by the respondent for the applicants to inspect and in each case to identify the date, time and place that that had occurred; or
- (b) was not made available by the respondent for the applicants to inspect and in each case to identify the reasons for the same.

21 On 14 February 2020, the applicants filed a 31 page bundle of documents (February list) but the documents and comments did not identify which specific documents within the requested categories had not been made available for their inspection.

22 It is evident that some of the specified documents referred to in the February list were new requests (for example, references made to requests made on 21 and 29 January 2020 and a copy of a further request dated 30 January 2020). The respondent objected to the

February list on the basis that there was no specificity of what was allegedly not provided by the respondent and that the list referred to new requests that were not before the Tribunal in this proceeding. This was raised at a Tribunal directions hearing on 5 March 2020. The time for compliance with order 1 above, was extended by an order made on 5 March 2020.

23 On 16 April 2020, the applicants filed another list (April list). It is evident that some of the documents identified in the April list are beyond the scope of the request email. For example, the April list sought 'quotes' for work to the buildings, product warranties, correspondence between third parties and details of building contractors, which comprise new categories of documents not referred to in the request email.

24 On 28 April 2020 the respondent identified its position in relation to the request email.

25 The applicants noted in their February list that they had had been given access to the respondent's accounts, the respondent's invoices from 20 July 2018 to date of viewing and the Council of Owners minutes from February 2019 to the last meeting. The applicants' request email for original items 1, 2 and 5 referred to was granted by the respondent and they were no longer in issue generally. However, as referred to below, at the final hearing the applicants asserted that some invoices in the category of original item 2 could not be located by the applicants during inspection meetings.

26 Further, the applicants asserted that their inspection opportunity had been cancelled and later at the hearing said the information - especially original item 2 in the request email - was provided in such a way that they could not use the inspection opportunities effectively.

27 By its response dated 28 April 2020, the respondent complied with the request for information in respect of original items 3, 4 and 6 of the request email (said to be for documents but really was a request for information). As to original items 7, 8 and 9 of the request email, the respondent stated that it did not have documentation beyond the Structerre report of 30 January 2019 and that in the case of original item 7 of the request email it had sent the applicants a letter written by the plumber who performed the relevant works.

28 The respondent's position as at 28 April 2020 was that the respondent had provided access to all documents and information that fell within the request email categories that it had in its possession and control, to the applicants.

29 At the directions hearing on 1 May 2020 the Senior Member ordered:

The applicants file and give to the respondent all documents upon which the applicants intended to rely on the final hearing that were not already filed in the Tribunal, together with a list of the parties or individuals whom they intended to call to give evidence together and a summary of their evidence.

30 The applicants filed their documents on 28 May 2020. At the directions hearing on 30 June 2020, the Senior Member ordered:

The applicants to file with the Tribunal and give to the respondent an indexed and paginated bundle of the documents upon which they proposed to rely at the final hearing, in substitution of the bundle of documents which the applicants filed with the Tribunal and gave to the respondent on 28 May 2020.

The Senior Member ordered that the bundle filed on 28 May 2020 be 'disregarded'.

31 The applicants filed their bundle of documents under the cover of an email dated 21 July 2020 (July bundle). The applicants' July bundle was the basis of the applicants' position at the commencement of the hearing. The first seven pages of the July bundle comprises a schedule referred to as table of contents (Table). The Table identifies the documents allegedly requested by the applicants and withheld from them by the respondent that they now pursued in this proceeding. The applicants did not relate each document in the Table to the category identified in the request email. Above each requested document in the Table is a reference to 'proof of document' to establish that the document exists. The 'proof' comprises references to documents that the applicants have obtained from their inspections of the respondent's documents. In many instances the documents identified in the Table constituted new requests for documents and information pursuant to s 43 of the ST Act.

32 The list of documents in issue extracted from the Table comprises the following:

- 1 The sign off to Australian Standards for the 2018-2019 completed works to comply with CC658-2018
- [2] The report (Project Reference S8941281) as described above and all related correspondence to any member of the Council of Owners, working party or the strata manager
- [3] Request the Strata Company provide a copy of
 - [a] The agreement for Structerre to project manage along with Cliff McCann
 - [b] The dilapidation reports for all units inspected prior to commencement of Auswest Works
 - [c] The Cockburn Council approvals for the alteration of the roof to allow for a larger box gutter.
 - [d] The certification from Auswest from the disconnection and deletion of electrical to planter boxes.
- [4] Request the Strata Company provide
 - [a] All communication with Mr Zurhaar-Zedcon Services and the Strata Company
 - [b] All communication between Dr Ahmand Zurhaar and the working party
 - [c] All Dr Zurhaar-ZedCon Services communication to Strata Company or ESM on findings of the expert consultant
 - [d] The quotes as presented to the Strata Company
 - [e] All communication Dr Zurhaar-ZedCon Scientific Services from any member of the Strata Company and Working Party
 - [f] The agreement to have Dr Zurhar Project Manage
 - [g] Communication re-Dr Zurhaar no longer to be the project manager
 - [h] All quotes presented to the Strata Company
 - [i] SOW for Unit 46 and Dr Zurhaar finalised SOW for Strata Scheme Roof
- [5]
 - [a] The professional advice provided Invoice WA 312013

- [b] Request the Strata Company provide Invoice WA 318058
 - [c] The certification to Australian Standards (page 2-3)
 - [d] Confirmation between Strata Company for Structerre / Cliff McCan to Project Manage (EGM page 26-par 1)
 - [e] All communication, quotes, and selection process for Auswest Scope of Works
- [6] Request the Strata Company provide
- [a] The terms and conditions of the loan as signed by the Strata Company
 - [b] Invoices as paid by the Strata Company to Principal Finance Insurance
 - [c] The legal advice obtained is described in the April 2019 AGM mail out letter from the Chairman
 - [d] AGM minutes - All supporting documentation for
 1. Recommendations by qualified and professional advisors for Insurance
 2. Hydrolic Test results and invoice payments
 3. Request from Council of Owners after hydrolic testing for inspection of units;
 4. Communication from Cliff McCan COO members on receiving the signed letter from Leanne Shaw
 5. The inclusion of the Leanne Shaw letter and Chairman's response in COO minutes
- 7 Request the Strata Company provide
- [a] The legal advice provided by Atkinson Legal to the Strata Company for the Deed of Release for Unit 46
 - [b] All communication between Atkinson Legal and any member of the Council of Owners or the Working Party
 - [c] Why Brad Kneebone had been requested to send the Deed of Settlement to Unit 46
8. Any previous inspection report, findings and pictures as undertaken or organised by the Strata Company for water

ingress repairs and mould within Lot 47 from 11 October 2018-24 September 2019 for compliance with CCC658-2018

9. The pictures taken by Mr Murphy on 8 May 2019 within Lot 57.

33 During the course of the hearing the respondent asserted that many of the newly requested documents identified in the Table, were beyond the scope of the request email, the subject of the application. Faced with that objection, the applicants revised their position.

34 During the course of the hearing the applicants informed the Tribunal that the following items comprised the revised list of documents in respect of which the applicants sought an order pursuant to s 90 of the ST Act in this proceeding, and that the revised items list entirely replaced other lists advanced by the applicants. The applicants contended that the revised list of items fell within the scope of the categories of documents requested by them in the request email. The following will be referred to as the revised list of documents, the subject of this proceeding:

1. The photographs referred to in the Strutterre report dated 30 January 2019 being described as photographs of the works carried out on the roof frame that were emailed to Strutterre's office.
2. The email to which those photographs were attached
3. Any document or record in respect of which or containing advice given to Strutterre that 'there were no signs of water leaking issues in the units below the balcony' referred into Strutterre's reported dated 30 January 2019.
4. Correspondence between the respondent and its solicitors concerning the respondent's instructions to prepare a deed of release to be executed by the second applicant and which deed of release document was forwarded to the second applicant under the cover of an email dated 24 March 2019 from Mr McCann, the then Chair of the respondent's Council of Owners.
5. Invoices concerning the recarpeting of two bedrooms in Unit 46 owned by the second applicant
6. The photographs taken by Mr Murphy, the current Chair of the respondent's Council of Owners, on the 8 May 2019 of the internal aspects of Unit 57.

7. The record of the Powerpoint presentation undertaken at the Annual General Meeting on the 4 April 2019 by the then Chair of the Council of Owners, Mr Cliff McCann
8. Insurance invoice for July 2018
9. The document concerning the electrician's decommissioning of emergency lighting to the balcony.

The hearing, the evidence and findings

35 The respondent's position in relation to revised items 1 and 2, is that there is no evidence to support the contention that the photographs referred to in item 1 and the email referred to in revised item 2 are documents within the control of the respondent for the purposes of s 43(1)(b) of the ST Act. Mr Murphy stated that there is no evidence before the Tribunal that the respondent has ever received those photographs or the email. In respect of this submission the applicants conceded that they had assumed that the photographs had been taken by or on behalf of the respondent and that the respondent had sent the email. The Tribunal finds that there is no evidence the respondent received or held either the photographs referred to by the engineer or the email attaching the same.

36 In relation to revised item 3 the respondent asserts that there is no evidence that the stated information in the Strutterre report was the subject of a document or a record that is held or should be held by the respondent. There is no evidence that the respondent knows what constituted the statement or who made the statement. The applicants conceded that they had assumed that the advice referred to in the Strutterre report was written advice. The Tribunal finds that there is no evidence that the respondent (or the engineer) received any information concerning the subject of revised item 3 in documentary form.

37 In respect of revised item 4, the respondent's submission is that its instructions to its solicitors about litigious issues is the subject of legal professional privilege. It became evident to the Tribunal from the statements by the second applicant in particular that at all times the applicants assumed that the deed of release document provided by Mr McCann on behalf of the respondent under the cover of his email to the second applicant dated 24 March 2019, was a document prepared and drafted by a solicitor upon instructions by the respondent. There is no evidence that a solicitor drafted the deed on instructions from the respondent or that a solicitor drafted the deed at all. The documents before the Tribunal do establish that a proposed deed was the subject of

a meeting of the respondent's Council of Owners. However, there is no evidence about who was to draft the same or who did draft the same.

38 In relation revised document item 6, the photographs taken by Mr Murphy on the 8 May 2019, the respondent asserts that the respondent did not consider this document to fall within any of the categories identified in the request email because Mr Murphy had taken the photographs on his personal mobile phone. However, the respondent conceded during the course of the hearing that the respondent was prepared not only to provide an inspection but to provide electronic copies of those photographs to the applicants. At the conclusion of the hearing Mr Murphy, for the respondent, informed the Tribunal that he had sent the electronic copies of the relevant photographs taken by him on behalf of the respondent on 8 May 2019 to Ms Fennell for the applicants. Ms Fennell acknowledged to the Tribunal that that had in fact occurred.

39 In respect of revised item 7, the respondent's position is that the respondent has no record of the Powerpoint presentation that Mr McCann presented at the AGM on the 4 April 2019. Mr Murphy stated that Mr McCann produced the Powerpoint presentation himself and the respondent does not have a copy of the same. Mr McCann is no longer a lot proprietor and no longer resides in Western Australia. The applicants did not take issue with the latter statement. The Tribunal finds that the respondent does not have possession or control of the Powerpoint presentation by Mr McCann on 4 April 2019 or that it is a document that never belonged to the respondent.

40 In relation to revised item 8 (insurance invoice), the respondent asserts that the insurance invoices are always provided with relevant AGM agenda. In relation to items 8 and 5 (invoices for carpet to Unit 46) the respondent's position is that all invoices for the period requested in the request email (original item 2 'All invoices from 20 July 2018 to the date of viewing') have been made available to the applicants for their inspection. Mr Murphy gave clear oral and written evidence that he instructed the strata manager to load all of the invoices that the strata company had electronically for that period onto a computer to allow the applicants to inspect the same. The written statements by Mr Kneebone and Mr Karuppan, in particular, in this respect are accepted by the Tribunal. For the reasons stated below the Tribunal is not satisfied that the respondent failed to make these specific documents available. There is no evidence before the Tribunal

that these specific documents were missing from the volume of documents inspected by the applicants.

41 In relation to revised document 9, the respondent asserts that it has no emergency lighting 'decommissioning' certificate in its possession or control. The respondent does not assert that there was no decommissioning document or certificate issued by the relevant electrician engaged to undertake the remedial work to the balcony and the rooftop garden. The respondent asserts that there is no such documentation now in the respondent's possession or control. The Tribunal accepts that evidence and so finds. Mr Murphy gave evidence that the emergency lighting has been now reinstated, the electrician has been paid for that to be commissioned and that he expects to receive the commissioning document from the electrician in due course. Mr Karuppan and Mr Kneebone state in their written statements dated July 2020 that the applicants had been informed (sometime prior thereto) of the respondent's intention to recommission the emergency lighting.

42 It is common cause that the applicants' inspection of the documents provided by the respondent pursuant to the request email and prior requests, took place at the offices of the respondent's strata manager ESM, using an ESM computer. The inspections took place on 8 and 16 March 2018, 3 July 2018, 30 August 2018, 29 March 2019 (all prior to the request email) and 11 December 2019 as indicated by the statements of Mr Kneebone, Mr Karuppan and Mr Klemm (Mr Klemm - 29 March 2019 and 11 December 2019 only). The applicants agree those times are correct and that the detail of the access (electronic access on the ESM computer) is correct. They do not agree some contentious statements as to subjective assessments of the applicants' behaviour during their inspections, which the Tribunal does not consider relevant. The Tribunal finds consistently with Ms Fennell's evidence that she and the second applicant had difficulty in searching for, accessing and opening certain electronic attachments and invoices provided by the respondent to the applicants during those inspection meetings. The Tribunal also finds, as conceded by Ms Fennell, that although she was not particularly skilled at operating data on a computer, ultimately all attachments that she selected did open and she could read them. Ms Fennell's evidence is that she found the organisation of the material difficult to understand, time consuming and cumbersome to inspect. The Tribunal finds that electronic material provided by the respondent was extensive and the applicants did find it difficult to navigate the electronic database of the categories of

documents requested by the applicants. The Tribunal finds however, that the manner of providing the applicants with access to the categories of documents referred to in the request email was reasonable, particularly given the breadth of the categories of documents sought to be inspected.

43 The Tribunal finds that Ms Fennell and the second applicant concluded that the respondent did not provide the documents now sought by the applicants in the revised list because they could not locate those documents when they inspected the same. The Tribunal is not satisfied that that evidence is sufficient to establish that revised items 5 and 8 were not provided to the applicants to inspect. At the time of inspection the respondent did not know that the applicants sought to inspect revised items 5 and 8 specifically. At the time of inspection the respondent provided the document that fell within original item 2 of the request email for inspection. There was no evidence led by the applicants that all of the document provided by the respondent that fell within original item 2 of the request email were scanned and revised items 5 and 8 were positively not produced by the respondent.

44 Mr White was called by the applicants. Mr White attended the 4 April 2019 AGM as proxy for the first applicant. He gave evidence that he recalled the Powerpoint presentation by Mr McCann and he gave evidence that there were discussions at that AGM about various trades attending the building and information from an architect. In his evidence he said he assumed that the information discussed was contained in documentary form. However, he did not give evidence of the existence of any document now sought. Mr White's evidence took the applicants' contentions no further. The Tribunal is not persuaded by the evidence of Mr White that any of the Powerpoint presentation was a document created and retained by the respondent or that any documents referred to at the AGM have been withheld from the applicants.

The Tribunal's conclusions

45 There is no evidence that revised items 1 and 2 are documents that the respondent has in its possession. It has retained the report by the engineer which refers to photographs and information provided to the engineer. There shall be no order as to revised items 1 and 2.

46 The Tribunal is satisfied that there is no document in the respondent's possession or control that falls within the description of revised item 3 - advice that there was 'no sign of further water leaks' referred to in the Strutterre report dated 30 January 2019.

The substance of what is referred to as advice was given to the engineer and there is no evidence that the information was conveyed to the engineer by way of a document. There shall be no order in respect of revised item 3.

47 As to revised item 4, the Tribunal is not persuaded that the deed of release given by the former Chair of the respondent's Council of Owners to the second applicant was drafted on by solicitors engaged by the respondent. There shall be no order in respect of revised item 4.

48 As to revised item 5, the Tribunal is not satisfied that access to an invoice relating to the recarpeting of two bedrooms in Unit 46 has not been provided. Similarly, in the case of revised item 8, the Tribunal is not satisfied that the insurance invoice dated after July 2018 has not been made available to the applicants. The Tribunal finds, the evidence of Mr Murphy and the agents for the respondent on behalf of ESM, that all invoices between 20 July 2018 and the date of inspection were provided electronically. Further, the applicants' own evidence is that the respondent provided them with electronic access to extensive invoices for the period requested. The applicants' inability to find the specific invoices they had in mind when they requested all of the invoices over a lengthy period does not persuade the Tribunal that it should infer that the respondent failed to provide all the invoices requested by them or the specific ones identified as revised items 5 and 8. The Tribunal shall not make an order in relation to revised items 5 and 8 because the Tribunal is not satisfied they have been withheld by the respondent.

49 There is no need for the Tribunal to make an order in respect of revised item 6 as Mr Murphy for the respondent informed the Tribunal that he had already provided electronic copies of the photographs he had taken on 8 May 2019 and that was acknowledged by Ms Fennell for both applicants during the hearing.

50 The Tribunal finds that the respondent is not in possession and does not have control of a Powerpoint presentation by Mr McCann, the former Chair of the respondent's Council of Owners, at an AGM on 4 April 2019. The Tribunal is satisfied that Mr Murphy's evidence is true on this issue. The Tribunal finds that Mr McCann presented his own Powerpoint presentation and no copy, electronic or otherwise, of that Powerpoint presentation was obtained by the respondent. There shall be no order in respect of revised item 7.

51 As to revised item 9, Mr Murphy gave evidence that the respondent does not possess the electrical certificate concerning the decommissioning of the emergency lighting. There is no evidence to the contrary. Further, the applicants did not produce any evidence or persuade the Tribunal that such a document is one that the respondent is obliged to retain. In any event, the Tribunal is satisfied that the respondent no longer has possession or control of that document. There shall be no order in respect of revised item 9.

52 Finally, the Tribunal is not satisfied on the evidence that the respondent has wrongfully failed to provide the applicant with any documents specifically identified during the final hearing or with the categories of documents identified in the request email.

Order

Accordingly, the Tribunal shall dismiss the proceeding by making the following order:

1. The application is dismissed.

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

MS N OWEN-CONWAY, MEMBER

13 NOVEMBER 2020