
JURISDICTION : STATE ADMINISTRATIVE TRIBUNAL

ACT : STRATA TITLES ACT 1985 (WA)

CITATION : BIRCHWOOD CONSOLIDATED PTY LTD (ACN 119 162 211) (RECEIVERS AND MANAGERS APPOINTED) (IN LIQUIDATION) and THE OWNERS OF EQUUS STRATA PLAN 62962 [2020] WASAT 161

MEMBER : MS C BARTON, MEMBER

HEARD : 20, 21 AND 24 AUGUST 2020

DELIVERED : 22 DECEMBER 2020

FILE NO/S : CC 1728 of 2016

BETWEEN : BIRCHWOOD CONSOLIDATED PTY LTD (ACN 119 162 211) (RECEIVERS AND MANAGERS APPOINTED) (IN LIQUIDATION)
Applicant

AND

THE OWNERS OF EQUUS STRATA PLAN 62962
Respondent

FILE NO/S : CC 1056 of 2017

BETWEEN : GLEN KELLY
First Applicant

LEE SHARON BAKER
Second Applicant

STARPHASE PTY LTD
Third Applicant

AND

THE OWNERS OF EQUUS STRATA PLAN 62962
First Respondent

BIRCHWOOD CONSOLIDATED PTY LTD (ACN
119 162 211) (RECEIVERS AND MANAGERS
APPOINTED) (IN LIQUIDATION)
Second Respondent

FILE NO/S : CC 1057 of 2017

BETWEEN : GLEN KELLY
First Applicant

LEE SHARON BAKER
Second Applicant

STARPHASE PTY LTD
Third Applicant

AND

THE OWNERS OF EQUUS STRATA PLAN 62962
First Respondent

BIRCHWOOD CONSOLIDATED PTY LTD (ACN
119 162 211) (RECEIVERS AND MANAGERS
APPOINTED) (IN LIQUIDATION)
Second Respondent

Catchwords:

Strata Titles - By-law requiring conversion of lot to common property - By-law requiring transfer of lot out of scheme - Amalgamation of lot with adjoining land - Whether by-law consistent with special conditions of sale - Whether by-law consistent with provisions of *Strata Titles Act 1985* (WA) - Annual general

meeting held on short notice - Grant of proxy under sale contract - Validity of resolution passed at annual general meeting - Validity of by-law

Legislation:

Interpretation Act 1984 (WA), s 18, s 19(1)(a), s 19(2)

Strata Titles Act 1985 (WA) (as at 1 July 2019), s 3(1), s 3C(1)(a), s 5B(4), s 5C, s 10, s 10(1), s 10(2), s 18, s 19, s 19(2), s 32, s 35(1)(b), s 42, s 42A, s 42B, s 69, s 69(1), s 69A, s 69A(d), s 69B, s 69C, s 69D, s 83, s 83(1), s 83(4), s 93, s 93(2), s 97, s 97(1), s 97(1)(a), s 100, s 114, s 115, Pt II Div 1, Pt IV Div 1, Sch 1, Sch 2, Sch 2A

Strata Titles Act 1985 (WA) (as at 1 May 2020), s 5

Strata Titles Amendment Act 1995 (WA)

Strata Titles Amendment Act 2018 (WA)

Strata Titles General Regulations 1996 (WA), reg 23

Transfer of Land Act 1983 (WA), s 192

Result:

Applications dismissed in CC 1728 of 2016 and CC 1057 of 2017

Application successful in CC 1056 of 2017

Category: B

Representation:

CC 1728 of 2016

Counsel:

Applicant : Mr D H Solomon and Mr J Zeakis

Respondent : Mr N D C Dillon

Solicitors:

Applicant : Solomon Brothers

Respondent : Murcia Pestell Hillard

CC 1056 of 2017

Counsel:

First Applicant : Mr N D C Dillon
Second Applicant : Mr N D C Dillon
Third Applicant : Mr N D C Dillon
First Respondent : Mr N D C Dillon
Second Respondent : Mr D H Solomon and Mr J Zeakis

Solicitors:

First Applicant : Murcia Pestell Hillard
Second Applicant : Murcia Pestell Hillard
Third Applicant : Murcia Pestell Hillard
First Respondent : Murcia Pestell Hillard
Second Respondent : Solomon Brothers

CC 1057 of 2017

Counsel:

First Applicant : Mr N D C Dillon
Second Applicant : Mr N D C Dillon
Third Applicant : Mr N D C Dillon
First Respondent : Mr N D C Dillon
Second Respondent : Mr D H Solomon and Mr J Zeakis

Solicitors:

First Applicant : Murcia Pestell Hillard
Second Applicant : Murcia Pestell Hillard
Third Applicant : Murcia Pestell Hillard
First Respondent : Murcia Pestell Hillard
Second Respondent : Solomon Brothers

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

Banning and The Owners of 106 Terrace Road Perth - Strata Plan 6289
[2006] WASAT 296

Bull v Attorney-General (NSW) (1913) 17 CLR 270
Byrne v Owners of Ceresa Apartments Strata Plan 55597 [2017] WASCA 104;
51 WAR 304
Byrne v The Owners of Ceresa River Apartments Strata Plan 55597
[2016] WASC 153
Casuarina Rec Club Pty Ltd v Owners - Strata Plan No 77971
(2001) 282 ALR 140
Chang v Registrar of Titles (1976) 136 CLR 177
City of Fremantle v Imago Holdings Pty Ltd [2020] WASCA 61
Codelfa Constructions Pty Ltd v State Rail Authority (NSW)
(1982) 149 CLR 337
Fok and Owners of Chartwell Strata Plan 2604 [2016] WASAT 94
Giovannangelo and The Owners of College Park Survey Strata Plan 62783
[2019] WASAT 10
JM Properties Pty Ltd v Strata Corp No 13975 Inc [2006] SADC 12
Mackie v Henderson [2011] WASC 197; 42 WAR 194
Mallock v Tabak [1977] VR 78
Masson v Parsons [2019] HCA 21; 93 ALJR 848
Mohammadi v Bethane [2018] WASCA 98
Project Blue Sky Inc v Australian Broadcasting Authority [1998] HCA 28;
(1998) 194 CLR 355
Radford and The Owners of Miami Apartments, Kings Park Strata Plan 45236
[2007] WASC 250
Tanwar Enterprises Pty Ltd v Cauchi [2003] [HCA] 57; (2003) 217 CLR 315
Westfield Management Ltd v Perpetual Trustee Co Ltd (2007) 233 CLR 528
White City Investments Pty Ltd and The Owners of 43 Kinsella Street Joondanna
Strata Plan 14493 [2015] WASAT 37
White v Betalli (2006) 66 NSWLR 690

REASONS FOR DECISION OF THE TRIBUNAL:

Introduction

- 1 The applicant in CC 1728 of 2016 (**primary proceeding**) is Birchwood Consolidated Pty Ltd (ACN 119 162 211) (Receivers and Managers appointed) (In liquidation) (**Birchwood**), being the proprietor of Lot 216 on Strata Plan 62962 (**Strata Plan**) located at 580 Hay Street, Perth (**Development**).
- 2 The respondent in the primary proceeding is The Owners of Equus Strata Plan 62962 (**Strata Company**). The Strata Company for the strata scheme known as Equus (**Scheme**) was created by the registration of the Strata Plan on 29 August 2011. The Schedule 1 and Schedule 2 by-laws for the Scheme are set out in the management statement registered on the Strata Plan as notification L711880 (**Management Statement**).
- 3 By-laws 64, 65 and 66 of the Schedule 1 by-laws (**Original by-laws 64 to 66**) provide that Lot 216 on the Strata Plan (**Lot 216**) will be converted to common property and transferred out of the Scheme to the owner of the adjoining land (**Lot 31**) (**Transaction**) as anticipated in clause 33 of the Special Conditions of the original contract for sale of lots within the Scheme (**Special Condition 33**). By-law 64 of the Schedule 1 by-laws was subsequently amended by notification L755034 registered on 10 October 2011 (**Amended by-law 64**).
- 4 Birchwood is seeking orders from the Tribunal under s 83(1) of the *Strata Titles Act 1985* (WA) (**Act**)¹ to give effect to the Transaction contemplated by Original by-laws 64 to 66 as altered by Amended by-law 64 (**By-laws 64 to 66**) because the Strata Company has failed to do so. The Strata Company contends, amongst other things, that the Transaction cannot be given effect because By-laws 64 to 66 are inconsistent with the Act or otherwise invalid.
- 5 The applicants in proceedings CC 1056 of 2017 and CC 1057 of 2017 (**related proceedings**) are Mr Glen Kelly, Ms Lee Sharon Baker and Starphase Pty Ltd (**Starphase**). Mr Kelly and Ms Baker are proprietors of lot 70 in the Scheme and Starphase is proprietor of lot 83 in the Scheme. The applicants in the related proceedings are seeking:

¹ There is no dispute that the provisions of the *Strata Titles Act 1985* (WA) that was in force as at 1 July 2019 apply. A proceeding in the Tribunal that was commenced before the commencement of the *Strata Titles Amendment Act 2018* (WA) (**Amendment Act**) on 1 May 2020 is to be dealt with as if the Amendment Act had not been enacted: s 5 current *Strata Titles Act 1985* (WA).

- 1) in CC 1056 of 2017, a declaration pursuant to s 93 of the Act that the Original By-laws 64 to 66 included in the Management Statement and as may have been amended at the first annual general meeting of the Strata Company held on 2 September 2011 (**First AGM**) are invalid; and
- 2) in CC 1057 of 2017, a declaration pursuant to s 97(1)(a) of the Act that a resolution to hold the First AGM on short notice is invalid given the requirements of s 3C(1)(a) of the Act and reg 23 of the *Strata Titles General Regulations 1996* (WA) (**Regulations**), and/or that all resolutions passed at the First AGM are invalid or, alternatively, the resolutions in terms of items 6 and 8 of the agenda to the First AGM (**Resolutions**) are invalid.

6 The first respondent in the related proceedings is the Strata Company. The second respondent in the related proceedings is Birchwood.

7 Pursuant to orders made by the Tribunal on 26 June 2017, the related proceedings are to remain as separate proceedings but heard and determined together with the primary proceeding.

Chronology of events

8 The parties do not contest that the following events are relevant to the determination of the primary proceeding.

9 On 29 August 2011, the Management Statement was lodged with Landgate (as notification L755034) for registration with the Strata Plan under s 5C of the Act. The Management Statement was entitled, 'Lot 200 on Deposited Plan 66447 (formerly Lot 32 on Plan 12711 Volume 1657 Folio 653)'.
10

The Management Statement set out the proposed Schedule 1 by-laws for the Scheme that were to have effect upon registration of the Strata Plan. Original by-laws 64 to 66 of the Schedule 1 by-laws which relate to Lot 216 were as follows:

64. Removal of Lot 216 From Strata Scheme

Under the Strata Titles Act 1985 (WA) (**Act**) Lot 216 of the Strata Scheme (otherwise known as the 'ANZ site') will be converted into

Common Property for the purpose of it then being immediately transferred out of the Strata Scheme and amalgamated with the adjoining land lot (now lot 31) as anticipated in Clause 33 of the Special Conditions of the standard contract for sale of Lots within the Strata Scheme.

65. Initial General Meeting

The Proprietors acknowledge that the Original Proprietor will pass at the initial General Meeting of the Strata Company the required resolutions without dissent allowing Lot 216 to be converted into Common Property and transferred out of the Strata Scheme in accordance with the above By-law 64.

66. Agreement to Convert and Transfer

The Proprietors agree to do all things necessary and covenant to take no action to prevent the conversion of Lot 216 into Common Property and its transfer from the Strata Scheme as allowed by above By-laws 64 and 65.

11 On 1 September 2011, Birchwood as the original and sole proprietor of all lots in the Scheme gave notice of the convening of the First AGM to be held on 2 September 2011 (**short notice**).

12 As at 2 September 2011, Birchwood was the proprietor of all of the lots in the Scheme (and, as observed by the Strata Company, was subject to the rights and interests of purchasers who had entered into the sale contract in relation to the Development as at that date (**first sale contract**)).²

13 Relevantly, the first sale contract provided in clause 6.1 to clause 6.3 of the Special Conditions (**clause 6.1 to clause 6.3**):

6. Management Statement and Proxy

6.1 The Buyer authorises the Seller to amend the Management Statement if such amendment is required to complete the Development, to allow for the registration of the Strata Plan, or to comply with any requirement of any Authority.

6.2 The Buyer irrevocably:

² The first sale contract was entered into in respect of Lot 33 on the Strata Plan on 17 December 2007 and included the proposed Management Statement without By-laws 64 to 66 (Attachment H). The form of the first sale contract was different after the First AGM held on 2 September 2011 as it included the Management Statement with By-laws 64 to 66 (Attachment G) and the minutes and agenda for the First AGM and the Resolutions (Attachment L).

- (a) appoints the Seller to be the proxy of the Buyer, in the name of and for and on behalf of the Buyer to do each of the following:
 - (i) attend and vote at the first Annual General Meeting of the Strata Company even to the exclusion of the Buyer, if present at the meeting, for the purposes of dealing with any matter arising at such meeting dealt with by this Contract, including but not limited to any matters enabling the Seller to proceed with or complete the Development;
 - (ii) to do all such things and execute all such documents as may be necessary to give effect to any resolution passed at such meeting or any matter required by this Contract;
 - (iii) to propose and vote for any By-Law or the repeal, substitution or variation of any By-Laws including the Non-Standard By-laws;
- (b) agrees to ratify and confirm as necessary all that the Buyer does pursuant to this clause; and
- (c) will sign the proxy form attached as Attachment R or as to give effect to this clause and for the proxy to provide as necessary to the Strata Company at any meeting.

6.3 The Buyer unconditionally:

- (a) approves the By-Laws;
- (b) consents, if required, to the Strata Company adopting By-Laws; and
- (c) approves the resolutions set out in Attachment P that are to be proposed and passed at the first annual general meeting of the Strata Company.

14 The Minutes of the First AGM record that, on 2 September 2011:

- a) there was a quorum;
- b) the meeting was properly constituted by agreed short notice; and
- c) Birchwood resolved unanimously and without dissent to pass each of the Resolutions on the agenda, including,

'special business item 6' (**resolution 6**) in respect of the Transaction as follows:

- i. Lot 216 of the Strata Scheme (otherwise known as the 'ANZ site') will be converted into Common Property for the purpose of it being then immediately transferred out of the Strata Scheme and amalgamated with the adjoining land lot (now lot 31) as anticipated in Clause 33 of the Special Conditions of the standard contract for sale of Lots within the Strata Scheme.
- ii. The Common Property formerly known as Lot 216 of the Strata Scheme be transferred to the registered proprietor of the adjoining land lot (now lot 32)³ as anticipated in Clause 33 of the Special Conditions of the standard contract for sale of Lots within the Strata Scheme.

15 On 10 October 2011, Landgate registered Amended by-law 64 which reflects resolution 6 passed at the First AGM. Amended by-law 64 provides:

- (a) Lot 216 of the Strata Scheme (otherwise known as the 'ANZ site') will be converted into Common Property for the purpose of it being then immediately transferred out of the Strata Scheme and amalgamated with the adjoining land lot (now lot 31) as anticipated in Clause 33 of the Special Conditions of the standard contract for sale of Lots within the Strata Scheme;
- (b) The Common Property formerly known as Lot 216 of the Strata Scheme be transferred to the registered proprietor of the adjoining land lot (now lot 32)⁴ as anticipated in Clause 33 of the Special Conditions of the standard contract for sale of Lots within the Strata Scheme.

16 On 6 April 2016, the Strata Company was provided with a suite of documents to give effect to the Transaction through its legal advisers.

17 On 12 August 2016, Birchwood sent an email to the strata manager, Richardson Strata Management Services (**Richardsons**), requesting that the Strata Company include on its agenda for the next Strata Council meeting a resolution to the effect that:

The Strata Council approves the Sale Documents and agrees to take all reasonable steps to give effect to the transaction that was unanimously

³ There is no dispute between the parties that resolution 6(b) of the First AGM agenda should refer to Lot 31.

⁴ There is no dispute between the parties that Amended by-law 64(b) should refer to Lot 31.

approved without dissent on 2 September 2011 at the first annual general meeting of the Equus Strata.

18 At the Strata Council meeting held on 5 September 2018, the resolution was not put to a vote.

19 Neither the resolution, nor any similar resolution which would constitute compliance with by-law 66 has been put or passed.

Issues for determination

20 The parties acknowledge that the same issues arise for determination in more than one proceeding. The Tribunal has listed the issues identified by the parties below without reference to the specific proceeding in which they arise:

- 1) What is the proper construction of By-laws 64 to 66? Are they consistent with the Act for the purposes of s 42 of the Act and otherwise valid?
- 2) What is the effect of Special Condition 33 and clause 6.1 to clause 6.3? Are they relevant to the Tribunal's construction of By-laws 64 to 66 and the determination of their validity?
- 3) Was notice of the First AGM given in accordance with the Act?
- 4) Were the Resolutions passed at the First AGM invalid?
- 5) Were the purchasers entitled to vote at the First AGM (or appoint a proxy to vote) because of the effect of clause 6.1 to clause 6.3?
- 6) Does the Tribunal have power under s 97(1) of the Act to invalidate the Resolutions?
- 7) Should the Tribunal exercise its discretion to invalidate By-laws 64 to 66 under s 93(2) of the Act?
- 8) If By-laws 64 to 66 and the Resolutions are valid, does the Tribunal have power to give effect to the Transaction under s 83(1) having regard to the operation of 83(4) of the Act?

The statutory framework

The making of by-laws

21 Part IV Div 1 of the Act deals with the making of by-laws in strata schemes.

22 Section 42 of the Act provides that a strata company may make by-laws, not inconsistent with the Act, for its corporate affairs, any matter specified in Sch 2A, and other matters relating to the management, control, use and enjoyment of the lots and any common property.

23 Schedule 2A contains a list of matters for which a strata company may make by-laws. The list of matters includes item 3, being any additional by-law that may be made under s 42 of the Act.

24 Relevantly, s 42(6) of the Act provides:

Without limiting the operation of any other provision of this Act, the by-laws for the time being in force bind the strata company and the proprietors and any mortgagee in possession (whether by himself or any other person) or occupier or other resident of a lot to the same extent as if the by-laws had been signed and sealed by the strata company and each proprietor and each such mortgagee, occupier or other resident respectively and as if they contained mutual covenants to observe and perform all the provisions of the by-laws.

Registration of strata plans and management statements

25 Section 5C(1) of the Act provides that when a strata plan is lodged for registration a management statement in the prescribed form that complies with s 5C(3) of the Act may be lodged for registration with it. Section 5C(3) of the Act provides that a management statement must be signed by the person who is registered as proprietor of the fee simple for the parcel and each person who has a registered interest in, or is a caveator in respect of, the parcel.

26 Section 5C(2) of the Act provides that a management statement is a document setting out the by-laws of the strata company that are to have effect under s 42, s 42A and s 42B, amendments and repeals referred to in s 42(2), and may include by-laws in relation to any matter specified in Sch 2A.

27 Section 5C(5) of the Act provides that upon registration of a management statement, the by-laws set out in the statement, and any amendments and repeals, have effect for the purposes of s 42.

By-laws set out in the management statement may be amended in accordance with s 42 or as otherwise provided by the Act: s 5C(6) of the Act.

- 28 Section 5B(4) of the Act provides that '[w]hen a strata/survey strata plan is lodged for registration the Registrar shall allocate a number to the plan, and, if it complies with the Act and the regulations, shall register it in the prescribed manner'.

Conversion of lots into and transfer of common property

- 29 Under s 10(1) of the Act, a lot may be converted to common property by the registration of a transfer executed by the proprietor of the lot and the Strata Company. Section 10(2) provides that a transfer under s 10(1) of the Act cannot be registered unless:

- (a) it is accompanied by a certificate given by the local government consenting to the conversion into common property effected by the transfer; and
- (b) it is accompanied by a certificate under seal of the strata company certifying that the strata company has by resolution without dissent (or unanimous resolution, in the case of a two lot scheme) consented to the conversion effected by the transfer; and
- (c) every mortgage, charge, current lease, caveat or other interest recorded in the Register in relation to the lot or each lot to which the transfer relates has, in so far as it affects any such lot, been discharged or surrendered or withdrawn or otherwise disposed of, as the case may be.

- 30 Section 19 of the Act provides that a strata company may transfer common property, pursuant to a resolution without dissent, and where satisfied that all persons concerned have consented in writing to the transfer.

Notifiable variations

- 31 Section 69(1) of the Act provides that a purchaser of a lot or proposed lot in a scheme must be given the notifiable information, as provided by s 69A and s 69B of the Act, before he or she signs a contract to buy the lot or proposed lot.

- 32 Section 69A of the Act lists the notifiable information that must be given by every vendor to a purchaser. Relevantly, s 69A(d) of the Act provides that the notifiable information includes the contents of the by-laws for the scheme that are in force or resolved to be made but not

yet in force by virtue of s 42(4) of the Act, but only so far as they amend, repeal or add to the by-laws set out in Sch 1 and Sch 2. Where s 69B of the Act applies, the notifiable information referred to in the provision must be given by the original proprietor to a purchaser in addition to the notifiable information under s 69A of the Act.

33 Under s 69C(1) of the Act, the vendor under a contract to sell a lot or proposed lot must by notice in writing given to the purchaser inform the purchaser of the particulars of any notifiable variation. Relevantly, s 69C(3)(b) provides that a notifiable variation occurs if, before the registration of the purchaser as proprietor of the lot or proposed lot or earlier avoidance of the contract, the strata company or the original proprietor in his own right or exercising the power of the company makes a by-law or amends or repeals any by-law. Section 69C(2) of the Act provides that notice under s 69C(1) must be given as soon as the vendor becomes aware of the variation.

34 Under s 69D of the Act, a purchaser has a right to avoid a contract by notice in writing given to the vendor before settlement of the contract, if a vendor has failed to give to a purchaser information that substantially complies with s 69 or s 69C and at the time required by that section.

The Tribunal's powers to make orders

35 The applicant in the primary proceeding is seeking orders from the Tribunal under s 83(1) of the Act. Section 83 relevantly provides:

83. General powers of SAT to make orders

(1) The State Administrative Tribunal may, pursuant to an application of a strata company, an administrator, a proprietor, a person having an estate or interest in a lot or an occupier or other resident of a lot, in respect of a scheme, 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.

...

(4) Nothing in subsection (1) empowers the State Administrative Tribunal to make an order under that subsection 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 on the strata company by this Act where that power, authority, duty or function may, in accordance with any provision of this Act, only be exercised or performed pursuant to a unanimous resolution, resolution without dissent or a special resolution.

36 The applicant in related proceedings CC 1056 of 2017 is seeking a declaration pursuant to s 93(1) of the Act that By-laws 64 to 66 are invalid. Section 93(1) of the Act provides that any person entitled to vote at a meeting of a strata company (including both a first mortgagee and a proprietor who is a mortgagor of a lot) may apply to the Tribunal for an order under this section. Section 93(2) provides that an order under s 93(1) is an order for one or more of the following:

- a) a declaration that a by-law or an amendment or repeal of a by-law is invalid;
- b) the repeal of a by-law;
- c) the repeal of an amendment to a by-law; and
- d) the reinstatement of a by-law that was repealed or deemed by subsection 93(4) of the Act to be repealed or any provision of a by-law that was amended or deemed by s 93(4) of the Act to be amended.

37 The applicant in related proceedings CC 1057 of 2017 is seeking a declaration pursuant to s 97(1)(a) of the Act that a resolution to hold the First AGM on short notice is invalid. Section 97 of the Act provides:

97. Power of SAT to invalidate a resolution or election

- (1) Where, pursuant to an application by a proprietor or first mortgagee of a lot for an order under this section, the State Administrative Tribunal considers that the provisions of this Act have not been complied with in relation to a meeting of the strata company, the State Administrative Tribunal may, by order -
 - (a) invalidate any resolution of, or election held by, the persons present at the meeting; or
 - (b) refuse to invalidate any such resolution or election.
- (2) The State Administrative Tribunal shall not make an order under subsection (1) refusing to invalidate a resolution or election unless it considers -

- (a) that the failure to comply with the provisions of this Act did not prejudicially affect any person; and
- (b) that compliance with the provisions of this Act would not have resulted in a failure to pass the resolution, or have affected the result of the election, as the case may be.

Summary of the parties' contentions

38 A summary of the contentions in respect of the main issues in dispute between the parties is provided below. A number of further contentions that arose in the primary and related proceedings are referred to by the Tribunal in making its findings.

The validity of By-laws 64 to 66

39 In the primary proceeding, the Tribunal must be satisfied that By-laws 64 to 66 are valid before giving effect to the Transaction under s 83(1) of the Act. The validity of By-laws 64 to 66 is also a central issue in related proceedings CC 1056/2017. The applicants in CC 1056/2017 seek a declaration from the Tribunal under s 93(2) of the Act that Original by-laws 64 to 66 and Amended by-law 64 are invalid.

40 Birchwood contends that by-law 64 and Amended by-law 64 are the only material by-laws for consideration by the Tribunal because by-law 66 does no more than repeat the effect of the mutual obligations under by-law 64 and Amended by-law 64. Under by-law 64 and Amended by-law 64, Lot 216 will be converted into common property for the purpose of it being immediately transferred out of the Scheme and amalgamated with Lot 31.

41 Birchwood points to s 5C of the Act as being a critical provision in the determination of the validity of by-law 64. Birchwood contends that by-law 64 formed part of the Management Statement that was lodged with the Strata Plan under s 5C(1) of the Act in the prescribed form and signed in accordance with s 5C(3) of the Act. Section 5C(5) of the Act provides that '[u]pon registration of a management statement, the by-laws set out in the statement, and any amendments or repeals, have effect for the purposes of s 42 of the Act'. Birchwood contends that by-law 64 is valid because the Registrar of Titles registered the Strata Plan (and with it the Management Statement following examination referred to in the Registrar's requisition)⁵ pursuant to s 5B(4) of the Act

⁵ Birchwood referred the Tribunal to a requisition notice that was issued on 22 August 2011 which Birchwood contends establishes that the Registrar reviewed, under s 5B(4), whether the original form of the Strata Plan

and, under that provision, the Registrar must be satisfied that the Strata Plan 'complies with' the Act and the Regulations.

42 Birchwood contends that there is a statutory duty on the Registrar to determine whether the Strata Plan (and accompanying Management Statement) complies with the Act and the Regulations. Birchwood further contends that arising from that duty is a presumption of regularity that applies to the decision of the Registrar of Titles in an official position performing a statutory duty and that the Registrar is presumed to have duly performed it unless there is evidence to the contrary; ts 26, 20 August 2020. If the Registrar considers that the strata plan or management statement does not comply with the Act or Regulations, the Registrar has power to issue a requisition notice under s 192 of the *Transfer of Land Act 1893* (WA).

43 Birchwood observes that a person with standing who contends that the Strata Plan and accompanying Management Statement should not have been registered could have applied to the Supreme Court for a writ of certiorari to quash the decision of the Registrar to register the documents; ts 28, 20 August 2020. Further, Birchwood points to the ability of a purchaser who bought into the Scheme and subsequently became a registered proprietor to move that a resolution be passed without dissent for any of the Schedule 1 by-laws set out in the Management Statement to be amended, repealed or added to under s 42(2)(a) and s 5C(6) of the Act.

44 The Strata Company considers that Birchwood's position in relation to the effect of s 5C of the Act is misconceived. The Strata Company contends that the Registrar is not tasked with the function under s 5C of the Act to investigate and make legal determinations on whether the by-laws are consistent with the Act or otherwise appropriate for the corporate affairs of the strata company, matters specified in Sch 2A or matters relating to the management, control, use and enjoyment of the lots and any common property (as referred to in s 42(1) of the Act). The Strata Company further contends that Birchwood's position is in conflict with s 93 of the Act because s 93(2)(a) of the Act expressly provides that the Tribunal (and not the Registrar) is responsible for determining whether a by-law is invalid (for failure to comply with s 42 or otherwise). Finally, the Strata Company observes that by-laws are for

and Management Statement complied with the Act and the Regulations. The Registrar took issue with the land description categorisation of the by-laws in the original form of Management Statement that was lodged and, after amendment and re-execution of the document, the Registrar registered the Strata Plan and Management Statement.

the day-to-day management of the strata property for the benefit of the body of proprietors and the making, repeal or amendment of any by-laws is under their control. The Strata Company contends that if the Registrar was required to review and approve by-laws, it would be inconsistent with that purpose.

45 The Strata Company contends that By-laws 64 to 66 are invalid because of any one or more of the following:

- 1) they were introduced by Birchwood for an improper purpose;
- 2) they are inconsistent with s 42 of the Act;
- 3) they advance Birchwood's own financial interests and benefit rather than the benefit of the owners;
- 4) they impermissibly impose unilateral contractual terms or obligations on the purchasers, which terms are uncertain in relation to their operation including, specifically, because the incorporation by reference of Special Condition 33 the terms of which are, in turn uncertain in relation to their effect and operation;
- 5) they fail to comply with or impermissibly seek to avoid the requirements prescribed by s 19(2) of the Act and the owners' rights to dissent as preserved by that subsection; and
- 6) in any event, on the proper construction they do not include any enforceable terms or any commercial terms regarding the Transaction.

46 The applicants in CC 1056 of 2017 seek an order under s 93(2) of the Act that By-laws 64 to 66 are declared invalid and repealed because they were:

- 1) made without power (that is, there was no authority under clause 6.1 of the Special Conditions for Birchwood to make them);
- 2) not made in accordance with the Act in that they are inconsistent with s 5C, s 42 and Sch 2A; and

- 3) more generally, should not have been made having regard to the interest of all proprietors in the use and enjoyment of their lots or the common property, in that By-laws 64 to 66 were made by Birchwood while acting in conflict or otherwise preferring its interests over those of the owners.

47 Birchwood contends that it is relevant to the Tribunal's exercise of discretion under s 93(2) of the Act that the applicants did not seek to set aside the Resolutions giving effect to Amended by-law 64 within 30 days of the First AGM (under s 100 of the Act)⁶ and delayed in commencing CC 1056 of 2017. The Tribunal accepts that these matters may be relevant to the exercise of its discretion but finds, in the circumstances of this case, that the applicants were entitled to properly respond to the primary proceeding, once initiated, by commencing the related proceedings to challenge the validity of the Resolutions and By-laws 64 to 66.

Special Condition 33

48 Special Condition 33 is referred to in by-law 64 and Amended by-law 64. The Strata Company has raised the effect of Special Condition 33 on the validity of By-laws 64 to 66 for consideration by the Tribunal in the primary proceeding. It is also raised by the applicants and the Strata Company in the related proceedings CC 1056/2017.

49 Special Condition 33 of the first sale contract provides:

The Buyer acknowledges that:

- (a) the Development is not intended to be constructed over all of the land more particularly described as Lot 32 on Plan 12711 being the land contained in certificate of title Volume 1657 Folio 653 and incorporating the proposed Strata Plan because the portion of the land currently leased by ANZ bank, being about 143 square metres in area at the south western corner of Lot 32 on Plan 12711, having approximately a 9.5 metre frontage on Hay Street and abutting Lot 31 on Plan Diagram 55867 to the west which is now occupied by a McDonalds Restaurant is intended to be

⁶ Pursuant to s 100(1) of the Act, the Tribunal may order that a resolution be treated as a nullity if it is satisfied that a particular resolution would not have been passed at a general meeting of a strata company but for the fact that the applicant was improperly denied a vote on the motion for the resolution or not given notice of the item of business pursuant to which the resolution was passed. An application for an order under s 100(1) of the Act may not be made later than 30 days after the day of the meeting at which the resolution was passed: s 100(2) of the Act.

excluded from the Development and to have a separate and unrelated title initially owned by the Seller (**Excised Portion**);

- (b) if the Seller because of any refusal by any Authority, or for other reasons, cannot obtain a separate title for the Excised Portion then it will include the Excised Portion into the Development and the Strata Scheme as Lot 176⁷ with the commensurate rights appurtenant to that Lot and in the common property;
- (c) the Unit Entitlement of the Lots in the Strata Scheme will be subject to change if the Excised Portion becomes a Lot in accordance with clause 33(b); and
- (d) nothing in this clause or its effect will give the Buyer a right to object to the registration of the Strata Plan, avoid the Contract or to seek damages from the Seller.

50 Birchwood contends that by-law 64 and Amended by-law 64 are to be construed objectively by reference to what a reasonable person would understand the language of the instrument to mean. Birchwood further contends that the Management Statement is to be construed without reference to any extraneous document (such as the first sale contract and particularly Special Condition 33) that would not be available to a person searching the Register. It's Birchwood's position that as the Management Statement is on the Torrens Register, the rules of construction as stated in *Codelfa Constructions Pty Ltd v State Rail Authority (NSW)* (1982) 149 CLR 337 (*Codelfa Constructions*), do not apply.

51 The applicants in CC 1056 of 2017 and the Strata Company contend that Special Condition 33, in so far as it is incorporated in by-law 64 and Amended by-law 64, is inconsistent with by-law 64 and Amended by-law 64 because Special Condition 33 obliged the purchasers to accept the inclusion of Lot 216 in the Scheme in circumstances where the seller was not able to obtain a separate title for Lot 216. In contrast, by-law 64 and Amended by-law 64 relate to the excision of Lot 216 from the Scheme.

52 In determining whether By-laws 64 to 66 are valid, the Strata Company contends that the Tribunal should consider the requirements of Special Condition 33 (and clause 6.1 to clause 6.3) when exercising its discretion under s 93(2) of the Act. Section 93(2)(b) of the Act provides that the Tribunal may make an order declaring a by-law to be invalid if satisfied that the by-law 'was not made in accordance with the Act or the

⁷ Lot 176 referred to in Special Condition 33 became Lot 216 on the Strata Plan by notification of change of by-laws L887578 registered at Landgate on 21 March 2012.

regulations or any other requirement that ought to have been observed'. The Strata Company contends that by-law 64 was made without observing the requirement in Special Condition 33 that a purchaser accept the inclusion of Lot 216.

- 53 The Strata Company contends that by-law 64 and Amended by-law 64 are rendered uncertain as a result of the incorporation by reference to Special Condition 33 because the effect of Special Condition 33 was complete or exhausted once Lot 216 was included in the Strata Plan. Further uncertainty is created, the Strata Company contends, because Special Condition 33 does not contemplate Lot 216 being transferred to an adjoining lot (Lot 31) as provided for in by-law 64 and Amended by-law 64. The Strata Company also points to uncertainty in by-law 65 because it refers to the original proprietor passing resolutions without dissent at the First AGM and, therefore, the Strata Company contends that by-law 65 is exhausted or has no effect after the First AGM. The Strata Company observes that by-law 66 is also uncertain because it provides that the owners agree to do all things necessary and covenant to take no action to prevent the conversion of Lot 216 into common property and its transfer from the Scheme but does not clarify the extent of those obligations.

Principles of statutory construction

- 54 The starting point in relation to statutory construction is consideration of the text of the provision, in its statutory context, including the statute's purpose or object. The provision must be construed to that it is consistent with the language and purpose of all the provisions of the statute: *Mohammadi v Bethane* [2018] WASCA 98 (*Mohammadi*) at [32]; *Project Blue Sky Inc v Australian Broadcasting Authority* [1998] HCA 28; (1998) 194 CLR 355 at [69].

- 55 In *City of Fremantle v Imago Holdings Pty Ltd* [2020] WASCA 61 at [66], the WA Court of Appeal referred to the following passage from *Mohammadi*:

...

The objective discernment of the statutory purpose is integral to contextual construction. The statutory purpose may be discerned from an express statement of purpose in the statute, inference from its text and structure and, where appropriate, reference to extrinsic materials. The purpose must be discerned from what the legislation says, as distinct from any assumptions about the desired or desirable reach or operation of relevant provisions[.]

56 Section 18 of the *Interpretation Act 1984* (WA) (Interpretation Act) provides the following guidance:

In the interpretation of a provision of a written law, a construction that would promote the purpose or object underlying the written law (whether that purpose or object is expressly stated in the written law or not) shall be preferred to a construction that would not promote that purpose or object.

57 Extrinsic material may be used to confirm the ordinary meaning conveyed by the text of the statutory provision taking into account its context in the statute and the purpose or object underlying the statute: s 19(1)(a) of the Interpretation Act. It is not necessary for the provision to be ambiguous or obscure before regard is given to extrinsic material. Material that the Tribunal may have regard to includes relevant parliamentary debates, second reading speeches and explanatory memoranda: s 19(2) of the Interpretation Act.

58 The Act does not expressly state its purpose or object by way of an objects clause. The long title of the Act states that it facilitates the horizontal and vertical subdivision of land and the disposition of titles in respect of strata schemes and survey strata schemes. It establishes a framework for ownership, and the making of by-laws to manage development with multiple owners. In *Radford and The Owners of Miami Apartments, Kings Park Strata Plan 45236* [2007] WASC 250 (*Radford*) at [194], Simmonds J accepted that 'Part V - Protection of purchasers' and Part VI - Resolution of Disputes' of the Act can be characterised as remedial legislation. His Honour referred to the following passage from *Bull v Attorney-General (NSW)* (1913) 17 CLR 270 at 384:

In the first place, this is a remedial Act, and therefore, if any ambiguity existed, like all such Acts should be construed beneficially ... This means, of course, not that the true signification of the provision should be strained or exceeded, but that it should be construed so as to give the fullest relief which the fair meaning of its language will allow.

The Tribunal's consideration

59 Birchwood is seeking orders from the Tribunal under s 83(1) of the Act to give effect to the Transaction contemplated by By-laws 64 to 66.

60 Subject to 83(4) of the Act, the Tribunal will have power to make orders giving effect to the Transaction under s 83(1) of the Act if By-laws 64 to 66 (as introduced by the 29 August 2011 Management Statement

and amended on 10 October 2011 by the Resolutions) are within the scope of the by-law making power under s 42 of the Act.

The scope of the by-law making power

61 The Strata Company contends that by virtue of the operation of s 5C, s 42 and Sch 2A, By-laws 64 to 66 fall outside the scope or category of by-laws that can be made by a strata company. Also, the Strata Company contends that the operation of s 83(4) of the Act may prevent the Tribunal from making the orders sought by Birchwood in any event.⁸

62 Section 42(1) of the Act provides that a strata company may make by-laws, not inconsistent with the Act, for its corporate affairs, any matter specified in Sch 2A and other matters relating to the management, control, use and enjoyment of the lots and any common property. Schedule 2A to the Act lists the matters that may be provided for in a management statement which include, relevantly, the amendment or repeal of a Sch 1 or Sch 2 by-law⁹ and any additional by-law made under s 42 of the Act.¹⁰

63 The Transaction contemplated by By-laws 64 to 66 involves the transfer of a lot in the Scheme (once converted into common property) to an adjacent landowner and, therefore, the Tribunal finds that the by-laws do not relate to the corporate affairs of the Strata Company for the purposes of s 42(1)(a) of the Act.

64 In respect of the scope of s 42(1)(c) of the Act, 'other matters relating to the management, control, use and enjoyment of the lots and common property', the WA Court of Appeal has held that they are singularly and collectively words of considerable breadth: *Byrne v Owners of Ceres Apartments Strata Plan 55597* [2017] WASCA 104; 51 WAR 304 (*Byrne*) at [116]. The Court of Appeal in *Byrne* at [117] adopted the comments of Edelman J in *Mackie v Henderson* [2011] WASC 197; 42 WAR 194 (*Mackie*) at [22]:

The starting point is that it is trite that by-laws frequently interfere with the property rights of the owner of a lot. They can also interfere with a myriad of personal rights in relation to the lot. The range of possible by-laws can be extremely broad. For instance, in *Sydney Diagnostic Services Pty Ltd v Hamlena Pty Ltd* (1991) 5 BPR 11,432 the New South

⁸ Birchwood does not agree with the contentions made by the Strata Company in relation to the effect of s 83(4) of the Act because it would render the mechanism under s 5C of the Act redundant.

⁹ Item 1 and 2, Sch 2A to the Act.

¹⁰ Item 3, Sch 2A to the Act. There was no dispute that By-laws 64 to 66 were not made in respect of any of the remaining matters listed in items 4 to 14 to Sch 2A to the Act; ts 234, 24 August 2020.

Wales Court of Appeal upheld a by-law which prohibited the owner of a lot from engaging in any enterprise on the lot other than the medical practice of pathology. This by-law fell within the power to make by-laws 'for the purposes of the control, management, administration, use, or enjoyment of the lots'.

65 The Tribunal finds that the Transaction contemplated by By-laws 64 to 66 is intended to benefit one lot owner (the owner of Lot 216) by the amalgamation of that owner's lot within the Scheme with adjacent land that does not form part of the Scheme. Notwithstanding the broad scope of s 42(1)(c) of the Act, the Tribunal is not satisfied that By-laws 64 to 66 relate to 'the management, control, use and enjoyment of the lots and any common property' because By-laws 64 to 66 do not relate solely to lots (and any common property) within the Scheme.

66 Pursuant to s 42(1) of the Act, by-laws made by a strata company cannot be inconsistent with the Act. The Strata Company contends that By-laws 64 to 66 are inconsistent with the Act and specifically refer to s 10 (conversion from a lot to common property), s 18 (acquisition of additional common property), and s 19 (transfer of common property) in support of its contention. The Strata Company observes that these provisions provide a mechanism for the purchase and transfer of common property by a strata company, each requiring a resolution without dissent, which cannot be circumvented.

67 Birchwood contends that, properly construed, s 5C of the Act permits a management statement to require matters permissible under s 10 and s 19 of the Act to be carried out without the need to hold further general meetings to obtain resolutions of the strata company.

68 Under s 10 of the Act, a lot may be converted to common property by the registration of a transfer executed by the proprietor of the lot but the transfer cannot be registered unless it is accompanied by a certificate under seal of the strata company certifying that the strata company has by resolution without dissent consented to the conversion. Section 19 of the Act provides that a strata company may transfer common property, pursuant to a resolution without dissent, and where satisfied that all persons concerned have consented in writing to the transfer.

69 The process for converting a lot to common property and transferring common property from the Scheme is contained Pt II Div 1 of the Act. At first blush, By-laws 64 to 66 are inconsistent with the Act because the process for converting a lot to common property and the transfer of common property is subject to specific statutory provisions in

Pt II Div 1 of the Act which cannot be avoided (or contracted out of) by the use of the by-law making power in s 42(1) of the Act. Further, s 35(1)(b) of the Act requires a strata company to control and manage common property for the benefit of all proprietors.¹¹ The Tribunal finds that the transfer of common property out of the Scheme, as contemplated by the Transaction, is not for the benefit of all proprietors of the Scheme.

70 Accordingly, having regard to the relevant statutory context, the Tribunal finds that the process in By-laws 64 to 66 for converting Lot 216 to common property and transferring that common property out of the Scheme is inconsistent with the Act for the purposes of s 42(1) of the Act.

The effect of registration of the Management Statement

71 If the Tribunal is correct in finding that By-laws 64 to 66 do not fall within the scope of the by-law making power in s 42(1) of the Act, then By-laws 64 to 66 would prima facie meet the test for invalidity under s 93(3)(a) of the Act because they were made without power. However, Birchwood contends that because the Management Statement was registered with the Strata Plan under s 5C(1) of the Act a presumption of regularity arises in relation to the Registrar's decision to register the Management Statement.¹² Birchwood further contends that there is a duty on the Registrar under s 5B(4) of the Act to determine whether the Strata Plan and accompanying Management Statement comply with the Act and the Regulations.

72 Section 5C(1) of the Act provides that, when a strata plan is lodged for registration, a management statement that is in the prescribed form and complies with s 5C(3) may be lodged with it. The Schedule 1 and Schedule 2 by-laws set out in the management statement (and any amendments and repeals) have effect for the purposes of s 42 upon registration, that is, they are deemed to be the by-laws of the strata company (see s 5C(5) and s 42(2) of the Act). The Tribunal finds that, properly construed, neither s 5C(1) (read with s 5B(4)) nor s 5C(5) have the effect of validating the Schedule 1 and Schedule 2 by-laws upon the

¹¹ See *Banning and The Owners of 106 Terrace Road Perth - Strata Plan 6289* [2006] WASAT 296 at [31].

¹² Birchwood referred the Tribunal to *Mallock v Tabak* [1977] VR 78 at 84-85 which found there to be a presumption of regularity in respect of a blood alcohol sample, and *Masson v Parsons* [2019] HCA 21; 93 ALJR 848 at [32] in which the High Court found a presumption regarding parental status in the *Status of Children Act 1996* (NSW) to be an irrebuttable rule of law determinative of a status to which rights and duties attached.

Registrar's act of registration of a management statement for the reasons that follow.

73 First, s 5B(4) of the Act relates to the registration of strata plans and requires the Registrar to register the plan if 'complies with this Act'. The Tribunal observes that s 5B(4) of the Act does not refer to the term 'management statement'. This supports a finding that there is no positive duty on the Registrar under s 5B(4) of the Act to consider whether a management statement complies with the Act. Second, the Tribunal observes that the sole source of power to declare a by-law or an amendment to a by-law invalid is in s 93(1) of the Act. There is no provision in the Act that confers an express power on the Registrar to determine the validity of a by-law. Accordingly, for these reasons, the Tribunal finds that the act of registering a management statement will not have the effect of validating Schedule 1 and Schedule 2 by-laws that are, in fact, invalid.

The effect of Special Condition 33

74 The applicants in CC 1056 of 2017 have sought an order from the Tribunal under s 93(2)(a) of the Act declaring By-laws 64 to 66 to be invalid. The application in CC 1056 of 2017 was made under s 93(1) of the Act. An application under s 93(1) of the Act can be made by a person who is entitled to vote at a meeting of the strata company. Birchwood contends that the only person who has standing to make an application under s 93(1) of the Act is the original proprietor who lodged the strata plan and management statement for registration. In *Mackie*, Edleman J found that the applicant in those proceedings was entitled to bring an application under s 93(1) because he was a current lot owner (and, therefore entitled to vote at a strata meeting). Accordingly, the Tribunal finds that the applicants in CC 1056 of 2017, who are current lot owners in the Scheme, are entitled to lodge an application under s 93(1) of the Act.

75 The Strata Company contends that, in determining the validity of By-laws 64 to 66, the Tribunal should have regard to the requirements of Special Condition 33 because they were requirements that ought to have been observed in the making of by-law 64 and Amended by-law 64 for the purposes of s 93(3)(b) of the Act. The Strata Company points specifically to the requirement in Special Condition 33 that the purchasers accept the inclusion of Lot 216 when, by contrast, by-law 64 and Amended by-law 64 relate to the excision of Lot 216 from the Scheme. The Strata Company contends that By-law 64 to 66 are

rendered uncertain by the incorporation by reference of Special Condition 33. In contrast, Birchwood contends that By-laws 64 to 66 should be construed objectively without any reference to extraneous material, such as special conditions of sale, which would not be available to a person searching the Register.

76 By-laws made under s 42 of the Act are properly characterised as a statutory contract as opposed to subsidiary legislation: *Byrne v The Owners of Ceresia River Apartments Strata Plan 55597* [2016] WASC 153 at [61]. The correct approach to the construction of a management statement was referred to in *Byrne* at [139]-[140]. The WA Court of Appeal stated in *Byrne*, in obiter, that a management statement is to be construed objectively, by reference to what a reasonable person would understand the language of the instrument to mean. The Court stated that management statements are to be construed in the context of the registered strata plan and in the relevant statutory context. If there are constructional choices properly open, a construction should be preferred which is consistent with s 42(1) of the Act.¹³

77 The Tribunal finds that By-laws 64 to 66 are ambiguous because it is not clear, when construing the by-laws objectively, whether Special Condition 33 alters the effect of the by-laws. However, the Tribunal finds that the reference in by-law 64 and Amended by-law 64 to Special Condition 33 does not in itself render By-laws 64 to 66 void for uncertainty as contended by the Strata Company.

78 Ultimately, it is not necessary for the Tribunal to determine the effect of Special Condition 33 on the interpretation of By-laws 64 to 66 because, for the reasons given below, Special Condition 33 is not a requirement that ought to have been observed in the making of by-law 64 for the purposes of s 93(3)(b) of the Act.

The Tribunal's jurisdiction to make orders relating to by-laws

79 Birchwood contends that s 93 of the Act does not confer jurisdiction on the Tribunal with respect to by-laws set out in a management statement registered under s 5C(1) of the Act (as read with s 5B(4) of the Act). Birchwood points to the use of the word 'made' in s 93(3)(a), (b) and (c) of the Act and contends that the by-laws included in a management statement are not 'made' by the proposed strata company

¹³ The Court of Appeal in *Byrne* also observed at [139]-[140] that an unamended management statement is on the Torrens Register and, therefore, rules of evidence assisting the construction of contracts inter partes of a nature explained by *Codelfa* at 350-352, do not apply to its construction: *Westfield Management Ltd v Perpetual Trustee Co Ltd* (2007) 233 CLR 528 at [37].

prior to its incorporation which occurs upon registration of the strata plan under s 32 of the Act. Birchwood observes that there is no legislative intent that a strata company, which is not in existence when the management statement is registered under s 5C(1) of the Act, has 'made' by-laws.¹⁴ In support of its construction of s 5C(1) of the Act, Birchwood referred the Tribunal to the second reading speech¹⁵ of the *Strata Titles Amendment Act 1995* (WA) by which s 5C of the Act was inserted:

... At present, by-laws can only be made following registration of a strata plan. This creates considerable difficulties where the standard by-laws are inappropriate for the type of strata scheme being introduced. The use of management statements being provided for in this Bill will give flexibility for developers to establish appropriate structures for the management of shared services and facilities across a range of types of strata schemes[.]

This process should reduce the use and extent of complicated contractual arrangements designed to ensure changes to standard by-laws following registration of the plan. The use of such statements will permit a more orderly development of strata schemes and will enable management structures to be kept abreast of innovative developments[.]

80 The Tribunal does not accept that the use of the word 'made' in s 93(3)(a), (b) and (c) of the Act is a reference to by-laws that are made after a management statement is registered. The Tribunal finds that the word 'made' includes by-laws that are made prior to registration of the management statement. This interpretation is supported by s 5C(5) of the Act which provides that upon registration of a management statement, the by-laws set out in the statement, and any amendments and repeals, have effect for the purposes of s 42 of the Act. That is, upon registration of a management statement, the provisions set out in Schedule 1 and Schedule 2 are deemed to be by-laws of the strata company under s 42(2) of the Act and, may be amended, repealed or added to by the strata company. Further, if the word 'made' was construed in the manner contended by Birchwood, no Schedule 1 or Schedule 2 by-law could be the subject of an application to the Tribunal under s 93(1) (whether to declare or the repeal of the by-law under s 93(2)) unless the relevant by-law had been altered by the strata company following registration of the management statement. The Tribunal observes that original Schedule 1 or Schedule 2 by-laws

¹⁴ ts 35, 20 August 2020.

¹⁵ Hansard, 14 June 1995, Legislative Council at 4956 - 4958; Hansard, 1 November 1995, Legislative Assembly at 12559 - 12577.

have been the subject of orders by the Tribunal under s 93 of the Act to invalidate them.¹⁶

81 The Tribunal has already observed that by-law 64 and Amended by-law 64 are inconsistent with the tenor of Special Condition 33. This is because by-law 64 and Amended by-law 64 relate to the excision of Lot 216 from the Scheme while under Special Condition 33 the purchasers acknowledge that Lot 216 may be excluded from the Scheme but if for any reason it is not excluded then it will form part of the Development and retained within the Scheme.

82 In *Radford*, Simmonds J concluded that contractual matters are capable of answering the description in s 93(3)(b) of the Act of a 'requirement that ought to have been observed'.¹⁷ However, his Honour found that the relevant contractual matters must determine how the strata company is to make, repeal or amend by-laws and, therefore, the strata company must be a party to the relevant contract and bound by the requirement.¹⁸

83 In this proceeding, the Tribunal finds that Special Condition 33 does not relate to how the Strata Company is to make, repeal or amend by-laws. Rather, Special Condition 33 relates to the possible exclusion of Lot 216 from the Scheme and the Development. Also, the Tribunal is not satisfied that by-law 64 was made without observing a requirement that ought to have been observed for the purposes of s 93(3)(b) of the Act because the Strata Company was not a party to the first sale contract which contained Special Condition 33 (the first sale contract was between the applicants and Birchwood).

84 The scope of s 93(3)(c) of the Act was also considered in *Radford*. Under s 93(3)(c) of the Act, the Tribunal may exercise its discretion to invalidate a by-law if it is satisfied that the by-law should not have been made having regard to the interests of all proprietors in the use and enjoyment of their lots or common property. The applicants contend that By-laws 64 to 66 should not have been made having regard to the interests of all proprietors because they were made by Birchwood while acting in conflict or otherwise preferring its interests to those of the lot owners.

¹⁶ See, for example, *Giovannangelo and The Owners of College Park Survey Strata Plan 62783* [2019] WASAT 10.

¹⁷ *Radford* at [124].

¹⁸ *Radford* at [128].

85 Simmonds J found in *Radford* that the term 'proprietors' in s 93(3)(c) of the Act 'should be read to refer to only to those who were proprietors at the time of the decision in question'.¹⁹ Birchwood contends that it follows from this interpretation of s 93(3)(c) of the Act that the term 'proprietors' means each registered proprietors for the time being of a lot as defined in s 3(1) of the Act. Therefore, Birchwood contends, and the Tribunal accepts, that the term 'proprietors' in s 93(3)(c) of the Act does not include a prospective purchaser under an uncompleted contract of sale.

Findings in relation to validity of By-laws 64 to 66

86 In the event the Tribunal is incorrect in its finding that By-laws 64 to 66 were 'made without power' under the first limb of s 93(3) of the Act, the Tribunal considers below the validity of the by-laws having regard to the second and third limbs of s 93(3) of the Act.

87 The applicants in CC 1056 of 2017 are seeking a declaration under s 93(2) of the Act that By-laws 64 to 66 are invalid. The Tribunal may exercise its discretion under s 93(2) of the Act to declare a by-law invalid (s 93(2)(a)) or to repeal a by-law (s 93(2)(b)). In the context of s 93(2) of the Act, Edelman J in *Mackie* [at 41] referred to the decisions of *White v Betalli* (2006) 66 NSWLR 690 at 46 and *Casuarina Rec Club Pty Ltd v Owners - Strata Plan No 77971* (2001) 282 ALR 140 (*Casuarina*). In *Casuarina*, Young J explained the reason why by-laws are rarely held to be invalid at [51]:

[T]he original by-laws accompany the strata plan and people who buy a lot in the strata scheme buy with notice of the by-law, so that it can hardly ever be said that the by-law creates an injustice....It must be observed that for that very reason it is rare that an original by-law ... will be held to be invalid.

88 It is not disputed that the first sale contract had no reference to the Original By-laws 64 to 66. The Original By-laws 64 to 66 did, however, form part of the Management Statement that was registered on 29 August 2011.

89 The Strata Company contends that Original by-laws 64 to 66 were not made in accordance with 'any other requirement that ought to have been observed' for the purposes of s 93(3)(b) of the Act. The Strata Company asks the Tribunal to consider the requirements of clause 6.1 to clause 6.3 when exercising its discretion under s 93(2) of the Act.

¹⁹ *Radford* at [191].

The Strata Company observes that clause 6.3(b) provided limited power to Birchwood to amend the Management Statement, which is qualified by clause 6.1, and that Original by-laws 64 to 66 are not relevant to the 'Development' referred to in clause 6.1. The Strata Company contends, therefore, that the inclusion of Original by-laws 64 to 66 in the Management Statement are in breach of Birchwood's contractual obligations under the first sale contract.²⁰ In contrast, Birchwood contends that the inclusion of Original by-laws 64 to 66 in the Management Statement fall outside the scope of clause 6.1 to clause 6.3 of the Special Conditions and, in any event, it was open to the purchasers to seek redress under s 69D of the Act and avoid the contract for the failure by Birchwood to give the full particulars of a notifiable variation.

90 The Tribunal finds that clause 6.1 to clause 6.3 of the Special Conditions do relate to how the Strata Company is to make, repeal or amend by-laws as identified in *Radford*. However, the Strata Company was not a party to the sale contract which contain clause 6.1 to clause 6.3 and, therefore, the Tribunal is not satisfied that Original by-laws 64 to 66 were made without observing a requirement that ought to have been observed for the purposes of s 93(3)(b) of the Act. Consequently, the meaning and effect of clause 6.1 to clause 6.3 of the Special Conditions is not a matter that arises for determination by the Tribunal in CC 1056 of 2017.

91 The Strata Company further contends that By-laws 64 to 66 are invalid because 'they should not have been made having regard to the interests of all proprietors in the use and enjoyment of their lots or the common property' for the purposes of s 93(3)(c) of the Act. In relation to the operation of s 93(3)(c) of the Act, Birchwood contends that the term 'proprietors' does not include the applicants in CC 1056 of 2017 because they were not the original proprietors.

92 The Tribunal accepts Birchwood's contention in relation to the meaning of 'proprietors' in s 93(3)(c) of the Act and as espoused by Simmonds J in *Radford*. The Tribunal finds that the applicants in CC 1056 of 2017 are not 'proprietors' for the purposes of s 93(3)(c) of the Act because they were not registered lot owners at the time of registration of the Management Statement. Accordingly, the Tribunal is

²⁰ The Strata Company further contends that the Tribunal should recognise the equitable rights of the purchasers having regard to the concept of fraud on the minority. In *White City Investments Pty Ltd and The Owners of 43 Kinsella Street Joondanna Strata Plan 14493* [2015] WASAT 37 at [18], the Tribunal observed that his Honour in *Radford* at [143] notes that the doctrine of fraud on the minority might have no application to s 93(3)(b) because it is a proscription and not a requirement and because it is subsumed by s 93(3)(a) of the Act.

not satisfied that By-laws 64 to 66 are invalid having regard to the interests of all proprietors in the use and enjoyment of their lots or the common property.

The resolutions amending By-laws 64 to 66

93 The applicants in CC 1057 of 2017 have sought orders from the Tribunal under s 97(1)(a) of the Act that the resolutions passed at the First AGM are invalid. Birchwood contends that the applicants could have sought relief under s 100 of the Act within 30 days of the First AGM and their failure to do so, as well as the delay in commencing 1507 of 2017 are relevant matters for the Tribunal to consider in exercising its discretion under 97(1) of the Act.

94 The Strata Company contends that the applicants had granted only limited rights of proxy to Birchwood under clause 6.2 of the Special Conditions and had not been given notice of the First AGM or, specifically, resolution 6. The Strata Company further contends that resolution 6 is not a resolution to amend by-law 64 but rather a resolution without dissent made pursuant to by-law 64 and by-law 65. The Strata Company observes that resolution 6 does not refer to it being a resolution to amend by-law 64 and, because it is unclear what effect resolution 6 was to have, it should be declared invalid.

95 Birchwood contends that the passing of resolution 6 as set out in the 1 September 2011 agenda was a resolution for the purposes of amending by-law 64 and giving effect to by-law 65. In this context, Birchwood contends that resolution 6 is not deprived of its effect as a resolution without dissent made under by-law 65 because the amendment to the Schedule 1 by-laws was registered. Therefore, Birchwood contends that the amended Schedule 1 by-laws bind the Strata Company. Birchwood observes that if the Resolutions made at the First AGM are set aside for the reasons asserted by the applicants, the original By-laws 64 to 66 would remain.²¹

96 The Tribunal considers that resolution 6 was made pursuant to by-law 64 and by-law 65 and did not amend by-law 64 notwithstanding there was a notification of change of by-laws registered at Landgate. The Tribunal observes that even if the Resolutions are found to have been validly made, Amended by-law 64 would not satisfy the test for validity in s 93(3)(a) of the Act. The Tribunal has already determined

²¹ ts 16, 20 August 2020.

that by-law 64 and Amended by-law 64 are invalid because they were made without power and are inconsistent with the Act.

97 The minutes of the First AGM relevantly record that:

1. Confirmed quorum and meeting properly constituted by agreed short notice.
2. The Strata Company resolved unanimously and, as appropriately, without dissent, passing each of the resolutions the subject of the meeting in accordance with the Agenda of meeting dated 1st September 2011.

98 Section 42(2)(a) of the Act provides that Schedule 1 and Schedule 2 by-laws may be amended by a resolution without dissent. The notice period for a meeting for resolutions to be passed without dissent is at least 14 days' notice.²² It is not contested that on 1 September 2011, Birchwood gave short notice of the convening of the First AGM to be held on 2 September 2011. However, Birchwood contends that the only party entitled to vote at the First AGM was Birchwood as sole proprietor of all lots in the Strata Plan. Birchwood further contends that the doctrine of unanimous assent applies giving the same effect to the decision of the sole proprietor as if a duly convened meeting had been held.²³

99 The Tribunal finds that 14 days' notice of the First AGM was not given by Birchwood and, therefore, the Tribunal is not satisfied that the provisions of the Act have been complied with in relation to the Resolutions passed at the First AGM. In determining whether to exercise its discretion under s 97(1) of the Act, the Tribunal must not make an order refusing to invalidate a resolution unless it considers that the failure to comply with the provisions of the Act did not prejudicially affect any person, and that compliance with the provisions of the Act would not have resulted in a failure to pass the Resolutions.²⁴

100 Birchwood contends that if the Tribunal finds that the notice period for a resolution to be passed without dissent was not complied with, the failure to comply with the Act did not prejudicially affect any person because Birchwood was the sole proprietor of all lots of the Strata Plan at the time that the Resolutions were passed at the First AGM.

²² Section 3AC and s 3C of the Act. Also, reg 23 of the Regulations requires that not less than 14 days' notice be given to each proprietor and each registered first mortgagee of the time, day and meeting place of the first annual general meeting of the strata company.

²³ See *JM Properties Pty Ltd v Strata Corp No 13975 Inc* [2006] SADC 12 at [130]; *Fok and Owners of Chartwell Strata Plan 2604* [2016] WASAT 94 at [21]-[22].

²⁴ Section 97(2) of the Act.

Birchwood further contends that as sole proprietor compliance with the relevant provisions of the Act would not have resulted in a failure to pass the Resolutions as it would have voted in exactly the same manner on 2 September 2011 had it drafted an agenda for itself 14 days prior.

101 The Strata Company contends that having agreed to clause 6.2 of the Special Conditions, Birchwood could not, in equity, introduce and vote in favour of resolutions that were contrary to the purchaser's interests. In support of this contention, the Strata Company points to the existence of a constructive trust between vendor and purchaser before completion as referred to in *Chang v Registrar of Titles* (1976) 136 CLR 177 at 184.²⁵ The Strata Company further contends that Birchwood's failure to comply with the provisions of the Act did unfairly prejudice the applicants in that they will lose the benefit of having Lot 216 pay strata fees and levies, and will have to pay the administrative costs to excise Lot 216.

The expert evidence and witness statements

102 Birchwood provided to the Tribunal a witness statement of Mr Jimmy Tsagalis filed on 9 July 2020 and a supplementary statement of Mr Tsagalis filed on 21 August 2020 following the site view. Mr Tsagalis is a director of Equus Property Securities Pty Ltd, the mortgagee in possession of Birchwood. He is also the director of KSZH Pty Ltd as trustee for the KSZH Investment Trust, the registered proprietor of Lot 31, the neighbouring lot to Lot 216. Mr Tsagalis' statements provide background information relating to the First AGM, the passing of the Resolutions and the inclusion of Lot 216 in the Scheme.

103 For the purposes of the related proceedings, the Tribunal was provided with expert witness statements prepared on behalf of the Strata Company from Ms Elizabeth Reiss and Mr Christopher Fare. The witnesses gave evidence in respect of the administrative costs that will be incurred by individual lot owners in undertaking the Transaction to excise Lot 216 from the Strata Plan.

104 The estimate provided by Ms Reiss, who is a licensed conveyancer, was in the order of \$139,700 plus GST for the administrative work in relation to the remaining 215 lots. Mr Fare, a director of Paramount Settlements Pty Ltd, provided evidence that the fees to undertake the

²⁵ See also *Tanwar Enterprises Pty Ltd v Cauchi* [2003] [HCA] 57; (2003) 217 CLR 315 at [47] to [53]. Birchwood contend that this argument is misconceived and, in any event, the enforcement of the asserted trust is not a matter within the jurisdiction of the Tribunal.

necessary amendments to the Strata Plan would be in the order of \$107,500 plus GST. These estimates did not include additional government fees and charges that may be incurred. It was accepted by the witnesses in cross-examination that most of the administrative costs, including the cost of obtaining consent from lot owners and mortgagees could be avoided if Birchwood was successful in CC 1728 of 2016 and the Tribunal made orders under s 114 and s 115 of the Act. Mr Fare observed, however, that some registration fees and a nominal duty on each transfer would apply.²⁶

105 The Strata Company also called Mr Joe Carbone, a strata manager with Richardsons. Richardsons has been the strata manager for the Strata Company since 1 April 2013. Mr Carbone gave evidence that Lot 216 paid the Strata Company \$60,749.35 in administration and reserve fund levies for the period 30 April 2014 to 27 May 2020. In the event Lot 216 is excised from the Strata Plan, Mr Carbone stated that the contributions previously made to the Strata Company would be recalculated amongst the remaining 215 lot owners. Mr Carbone was questioned in cross-examination about the different cost centres provided in by-law 42 of the Management Statement. He conceded that only the retail costs centre would have to pay higher expenses if Lot 216 was excised from the Strata Plan. However, he stated that the reserve fund levies would be distributed amongst all cost centres based on unit entitlement.²⁷

106 Mr Bradley McGregor, a licensed surveyor, was called by the Strata Company to give expert evidence about the costs of re-surveying if Lot 216 is excised from the Strata Plan, the re-valuation of unit entitlements and the preparation of a new Strata Plan. Mr McGregor prepared a witness statement which included as estimate of fees for his surveying services at \$28,003.50 plus GST.

107 The applicants in the related proceedings also gave evidence at the hearing. Ms Baker and Mr Kelly are the registered proprietors of Lot 70 and gave evidence that settlement of the sale of Lot 70 occurred on 15 September 2020. Ms Baker stated that she was concerned that she was not given an opportunity to vote at the First AGM. She acknowledged, in cross-examination, that her solicitor who acted on the sale did not bring to her attention that there was a difference between the Schedule 1 by-laws attached to the sale contract and the Management Statement. She was not given advice from her solicitor that she could avoid the contract but wasn't sure if she would have done so. Mr Kelly

²⁶ ts 192, 24 August 2020.

²⁷ ts 199, 24 August 2020.

adopted the witness statement of Ms Baker and the Tribunal finds that his oral evidence was consistent with that of Ms Baker. However, the Tribunal observes that Mr Kelly was present while Ms Baker gave evidence via telephone and, therefore, the weight that the Tribunal can give to his evidence is limited.

108 Mr Panting, the sole director of Starphase, and an applicant in CC 1056 of 2017, gave evidence that Starphase became the registered proprietor of Lot 83 on 14 September 2011. Mr Panting said that he did not receive notice of the First AGM and that had he been provided with details of the Transaction, and been permitted to vote on them, his company would not have voted for the Transaction to proceed. Mr Panting acknowledged in cross-examination that his settlement agent had not told him that he could avoid the contract because the Management Statement that was registered was different to the form of the management statement that was attached to his sale contract.

109 The Tribunal finds that Starphase became the registered proprietor of Lot 83 on 14 September 2011. The Tribunal further finds that Starphase was a registered proprietor who would have received notice of the First AGM (if there had not been short notice) and would have voted against the Resolutions if it was entitled to vote at the First AGM. The Tribunal is also satisfied that the Strata Company will incur administrative costs if Lot 216 is excised from the Strata Plan, and that the reserve fund levies will be distributed amongst the remaining 215 lot owners.

110 The Strata Company contends that clause 6.2 of the Special Conditions grants only limited rights of proxy to Birchwood. The Tribunal does not accept this contention. Pursuant to clause 6.2 of the Special Conditions, Birchwood was appointed proxy for the applicants for the purposes of dealing with any matter arising at the First AGM dealt with by the first sale contract. The Tribunal finds that Special Condition 33 of the first sale contract refers to the possible exclusion of Lot 216 from the Scheme and, therefore, is a matter 'dealt with' by the first sale contract. In light of the broad rights of proxy granted by the applicants to Birchwood under clause 6.2 of the first sale contract, the Tribunal is not satisfied that compliance with the provisions of the Act, by the giving of 14 days' notice of the First AGM, would have resulted in a failure to pass the Resolutions for the purposes of s 97(2) of the Act. Accordingly, the Tribunal will refuse to invalidate the Resolutions under s 97(1)(b) of the Act.

Conclusion

111 The Tribunal finds that By-laws 64 to 66 are invalid because they were made without power for the purposes of s 93(3)(a) of the Act. By-laws 64 to 66, which give effect to the Transaction, are not within the scope of the by-law making power in s 42 of the Act. The Tribunal finds that By-laws 64 to 66 and, specifically, the Transaction contemplated by them, do not relate to the Strata Company's corporate affairs, any matter specified in Sch 2A, or other matters relating to the management, control, use and enjoyment of the lots and any common property. The Tribunal further finds that By-laws 64 to 66 are inconsistent with the provisions of the Act that provide a specific process for the conversion of lots to common property and the transfer of common property out of a scheme.

112 Accordingly, the Tribunal will decline to make an order giving effect to the Transaction under s 83 of the Act and will make a declaration under s 92(2) of the Act that By-laws 64 to 66 are invalid. Because the Tribunal has declined to make an order under s 83(1) of the Act giving effect to the Transaction, it is unnecessary for the Tribunal to consider the scope and effect of 83(4) of the Act.

113 The Tribunal finds that Starphase, which became a registered proprietor on 14 September 2011, would have voted against the Resolutions if it had the opportunity to attend and was entitled to vote at the First AGM. However, the Tribunal is not satisfied that compliance with the provisions of the Act would have resulted in a failure to pass the Resolutions due to the broad rights of proxy granted to Birchwood under the first sale contract. Accordingly, the Tribunal will make an order refusing to invalidate the Resolutions under s 97(1)(b) of the Act.

Orders

CC 1728 of 2016

The Tribunal orders in CC 1728 of 2016:

1. The application is dismissed.

CC 1056 of 2017

The Tribunal orders in CC 1056 of 2017:

1. Pursuant to s 93(2) of the *Strata Titles Act 1985* (WA), the Schedule 1 by-laws 64, 65 and 66 of the management statement L711880 and amended by-law 64(a) and (b)

of the notification of change of by-laws L755034 registered on Strata Plan 62962 are declared invalid and are repealed.

Note:

Order 1 above must be lodged at Landgate by the applicants in CC 1056 of 2017.

The Tribunal draws the attention of the applicants to the provisions of s 115 of the *Strata Titles Act 1985* (WA) which requires the applicants to obtain a certified copy of the order from the Tribunal and lodge it with Landgate together with its prescribed fee so that the order will be recorded on the Strata Plan.

CC 1057 of 2017

The Tribunal orders in CC 1057 of 2017:

1. Pursuant to s 97(1)(b) of the *Strata Titles Act 1985* (WA), the Tribunal refuses to invalidate resolutions 6 and 8 of the first annual general meeting of the strata company held on 2 September 2011 in respect of Strata Plan 62962.
2. The application is dismissed.

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

MS C BARTON, MEMBER

22 DECEMBER 2020