
JURISDICTION : STATE ADMINISTRATIVE TRIBUNAL

ACT : STRATA TITLES ACT 1985 (WA)

CITATION : ENGWIRDA and THE OWNERS OF QUEENS
RIVERSIDE STRATA PLAN 55728 [2021] WASAT
17

MEMBER : MR D AITKEN, SENIOR MEMBER

HEARD : DETERMINED ON THE DOCUMENTS

DELIVERED : 9 FEBRUARY 2021

FILE NO/S : CC 732 of 2017

BETWEEN : JENNIFER ENGWIRDA
Applicant

AND

THE OWNERS OF QUEENS RIVERSIDE STRATA
PLAN 55728
Respondent

Catchwords:

Strata Titles Act 1985 (WA) (pre 1 May 2020) - Section 90 orders for inspection of records and documents of strata company excluding documents subject to legal professional privilege - Contention that strata company improperly claimed legal professional privilege - Tribunal to determine whether documents are actually privileged - Preliminary issue - Should the Tribunal determine whether the strata company has improperly claimed legal professional privilege for documents which have now been provided to the applicant with the claim for legal professional privilege waived

Legislation:

State Administrative Tribunal Act 2004 (WA), s 60, s 86, s 95, s 95(1), s 98,
s 100, s 105

Strata Titles Act 1985 (WA) (prior to 1 May 2020), s 43, s 90, Sch 5, cl 30(1)

Result:

Preliminary issued determined

Category: B

Representation:

Counsel:

Applicant : In Person
Respondent : Mr W Robinson

Solicitors:

Applicant : N/A
Respondent : Wotton + Kearney Lawyers (Perth)

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

Engwirda and The Owners of Queens Riverside Strata Plan 55728
[2018] WASAT 15

Engwirda v The Owners of Queens Riverside Strata Plan 55728
[2019] WASCA 190

Schreuder v Murray [No 2] [2009] WASCA 145

REASONS FOR DECISION OF THE TRIBUNAL:

Introduction

1 This proceeding was commenced by an application lodged with the Tribunal by the applicant, Ms Jennifer Engwirda (**Ms Engwirda**) against the respondent, The Owners of Queens Riverside Strata Plan 55728 (**Strata Company**) under s 90 of the *Strata Titles Act 1985* (WA) (**ST Act**) on 1 May 2017, seeking an order that she be allowed to inspect the records of the Strata Company.

2 In the application Ms Engwirda also sought a number of other orders, which did not fall within s 90 of the ST Act and she withdrew the application in respect of those orders at an early stage of the proceeding.

3 Major amendments to the ST Act commenced operation on 1 May 2020. Under cl 30(1) of Sch 5 to the ST Act, a proceeding in the Tribunal under the ST Act commenced before 1 May 2020, such as this proceeding, 'must be dealt with as if the [*Strata Titles Amendment Act 2018* (WA)] had not been enacted', that is under the pre-amendment ST Act. All references to the ST Act in these reasons are to the pre-amendment ST Act.

Tribunal's decision

4 On 6 November 2017 the Tribunal (constituted by then President, Curthoys J) made the following final orders (**2017 orders**):

1. The Respondent is provide the Applicant with a USB containing electronic copies of the requested documentation (excluding those documents subject to legal professional privilege).
2. Before the Respondent provides the Applicant with the requested documentation by USB, the Applicant must provide written confirmation to the Respondent's lawyers (Wotton + Kearney) that it will:
 - (a) not use the information/documentation to contact individual Owners.
 - (b) not publish or disseminate the documentation to third parties; and
 - (c) ensure that the documentation is kept secure.
3. The above Order 2 does not prevent the Applicant from conducting appropriate communication with the Council of

Owners and at Council organised meetings in relation to the documentation provided.

4. Following receipt of the documentation from the Respondent, if the Applicant is still dissatisfied then the Applicant has liberty to make the appropriate application.
5. The Application is dismissed.
6. No order as to costs.

5 The Tribunal provided written reasons for that decision in *Engwirda and The Owners of Queens Riverside Strata Plan 55728* [2018] WASAT 15.

Court of Appeal's decision

6 Ms Engwirda applied to the Court of Appeal (WA) under s 105 of the *State Administrative Tribunal Act 2004* (**SAT Act**) for leave to appeal that decision.

7 The result of the appeal is set out in *Engwirda v The Owners of Queens Riverside Strata Plan 55728* [2019] WASCA 190 (**Court of Appeal's decision**), which was delivered on 28 November 2019.

8 The background to and the result of the appeal is summarised in the Court of Appeal's decision at [1]-[6] as follows:

- 1 The appellant is the proprietor of one of the 526 strata lots on Strata Plan 55728. The proprietors from time to time of all lots on that strata plan constitute the respondent strata company, which is incorporated by s 32 of the Strata Titles Act 1985 (WA) (Act).
- 2 The appellant sought, and was denied, an inspection of documents and records in the respondent's control or custody. She applied to the State Administrative Tribunal for an order allowing her to inspect any and all strata company records of the respondent.
- 3 The Tribunal ultimately ordered that the respondent provide the appellant with a USB containing electronic copies of the requested documentation, other than documents subject to legal professional privilege. The provision of a USB containing electronic copies of the documents was the respondent's preferred method of providing inspection of those documents. This order in effect gave the appellant the inspection which she sought in the Tribunal proceedings.

4 However, the provision of that inspection was subject to a condition to the effect that the appellant was required to provide an undertaking to the respondent's solicitors. The required undertaking was that the appellant would:

- (1) not use the information/documentation to contact other proprietors;
- (2) not publish or disseminate the documentation to third parties; and
- (3) ensure the documentation is kept secure.

There was an exception permitting the appellant to conduct 'appropriate communication with the Council of Owners and at Council organised meetings in relation to the documentation provided'.

5 A question of law which arises in this appeal is whether the Tribunal had power to require this undertaking as a condition for an order that documents in the respondent's control or custody be made available for the appellant's inspection.

6 In our view, the Tribunal exceeded its power in requiring the undertaking to be given. The orders requiring the undertaking should be set aside. A consequential order should be made releasing the appellant from the undertaking that she gave in order to inspect the requested documents.

9 The orders made by the Court of Appeal are set out at [164] of the Court of Appeal's decision as follows:

1. There is an extension of time to 26 September 2018 for the appellant to make application for leave to appeal from the orders (Orders) of the State Administrative Tribunal made 6 November 2017 in proceedings CC 732 of 2017.
2. The appellant has leave to appeal from the Orders.
3. The appeal is allowed.
4. Paragraphs 2 and 3 of the Orders are set aside.
5. The appellant's undertaking proffered pursuant to pars 2 and 3 of the Orders (as set aside under par 4 above) is released.

10 The result of the decision of the Court of Appeal is explained at [36]-[37] as follows:

36 What remains after the requirement for an undertaking is set aside are the orders of the Tribunal:

- (1) Requiring the respondent to provide the appellant with a USB containing electronic copies of the requested documentation (excluding those documents subject to legal professional privilege);
- (2) Giving the appellant liberty to make 'the appropriate application' if she is dissatisfied following receipt of documentation from the respondent.
- (3) Ordering that the appellant's application is dismissed.
- (4) Ordering that there be no order as to costs.

37 None of the grounds of appeal provide any arguable basis for setting aside or substituting these remaining orders. The first order noted at [36] above gives the appellant the inspection of the non-privileged documents she was seeking. To any extent that the USB provided does not contain the documents ordered by the Tribunal to be made available, the appellant's remedy is to seek to enforce the order in the manner described at [13]-[14] above. To the extent that the respondent seeks to bring itself within the exception in the first order in relation to privileged documents, it must first properly assert the claim by identifying the documents for which privilege is claimed and indicate the basis on which legal professional privilege is claimed in respect of those documents. To any extent that the appellant contends that the respondent is improperly claiming legal professional privilege, then she can exercise the liberty given by the second order to apply to the Tribunal for a determination by the Tribunal as to whether the documents are actually privileged. The third order should be construed as ordering that the application is otherwise dismissed, and to relate to aspects of the application arising otherwise than under s 90 of the Act (which were not ultimately pursued in the Tribunal). Section 81(7) of the Act would preclude the Tribunal from making some different costs order

11 [13]-[14] of the Court of Appeal's decision (which are referred to at [37] of that decision) are as follows:

13 A decision of the Tribunal under s 90 may be enforced under s 86 of the State Administrative Tribunal Act 2004 (WA) (SAT Act). The proprietor seeking to enforce the decision may file in the Supreme Court a certified copy of the decision, an affidavit as to the non-compliance with the decision and a certificate from a judicial member of the Tribunal that the decision is appropriate for filing in the Supreme Court.

14 On filing the above documents in the Supreme Court, the Tribunal's decision is taken to be a decision of the Supreme Court, and may be enforced accordingly. Disobedience of the decision by failing to make the document or record available for inspection is then a contempt of court by the strata company. The proprietor may request the court to deal with the strata company for the contempt.

12 Also, at [45], the following is stated about the issue of whether the materials on the USB which the Strata Company gave to Ms Engwirda are in full compliance with the 2017 orders:

45 The undertaking was provided. Ms Engwirda has been provided with the USB. There is some dispute as to whether the materials on the USB are in full compliance with the Tribunal's order. That is not a matter for determination in this appeal. This appeal solely concerns the condition imposed by the Tribunal for provision of the documentation on the USB. Ms Engwirda complains about the undertaking condition and seeks, by this appeal, to have the undertaking 'voided'. In substance that should be understood as seeking that this court make orders providing for the release and discharge of the undertaking. Ms Engwirda seeks to have access to the documentation without the burden of the undertaking.

Relief sought by Ms Engwirda from the Tribunal following the Court of Appeal's decision

13 On 20 April 2020 Ms Engwirda filed a submission with the Tribunal in which she seeks the following relief:

- The Strata Company be required to obtain the Tribunal's determination as to whether any documents withheld were actually privileged; and
- The Strata Company be required to provide electronic copies of all withheld documents which are not privileged.

14 The Tribunal listed that submission for a directions hearing, which was held on 26 May 2020 at which the Tribunal made orders for:

- the Strata Company to file with the Tribunal and give to Ms Engwirda a written statement identifying the documents which were not included on the USB referred to in order 1 of the 2017 orders on the grounds of legal professional privilege and indicating the basis

on which legal professional privilege was claimed in respect of each of those documents; and

- Ms Engwirda to file with the Tribunal and give to the Strata Company a written statement identifying the documents listed in the Strata Company's statement in respect of which the Ms Engwirda contends that the Strata Company has improperly claimed legal professional privilege and the basis for those contentions by Ms Engwirda.

15 The Strata Company filed with the Tribunal and gave to Ms Engwirda a written statement dated 12 June 2020 (**Strata Company's statement**) which lists 15 documents (**documents 1-15**) not included on the USB referred to in order 1 of the 2017 orders on the grounds of legal professional privilege.

16 The Strata Company's statement states that privilege was claimed over documents 1-15 'as they were documents containing or related to legal advice obtained by the [Strata Company] and/or its Strata Manager(s) / Agent(s)'. However, the Strata Company's statement further states that since the USB was prepared and provided to Ms Engwirda, documents 1-7 listed in the Strata Company's statement (**documents 1-7**) have been provided to Ms Engwirda and the Strata Company's claim for legal professional privilege has therefore been waived over these documents. The Strata Company's statement then states that the Strata Company maintains its claim for legal professional privilege over documents 8-15 listed in the Strata Company's statement (**documents 8-15**), because those documents 'contain legal advice obtained by the Strata Manager in relation to matters concerning [Ms Engwirda]'.
17

Ms Engwirda filed with the Tribunal and gave to the Strata Company a written statement dated 10 July 2020 in which Ms Engwirda contends that each of documents 1-15 are not privileged.

18 Ms Engwirda contends that, even though documents 1-7 have been provided to her, the Tribunal must determine whether or not the Strata Company has improperly claimed legal professional privilege for each of those documents.

Preliminary issue to be determined

19 The Tribunal has therefore decided to determine pursuant to s 60 of the SAT Act, entirely on the basis of written submissions filed by the parties, the following preliminary issue:

Is the task of the Tribunal in this matter to determine whether or not the Strata Company has improperly claimed legal professional privilege for each of documents 1-15, as contended by Ms Engwirda, or just documents 8-15, which the Strata Company has not provided to Ms Engwirda, as contended by the Strata company?

20 Each party has filed written submissions in relation to the preliminary issue.

Ms Engwirda's submissions

21 After stating what she believes to be the relevant background information and legal principles Ms Engwirda refers to the statement at [37] of the Court of Appeal's decision that she 'can exercise the liberty given by the second order to apply to the Tribunal for a determination by the Tribunal as to whether the documents are actually privileged'.

22 Ms Engwirda then submits that it is the task of the Tribunal to ensure that:

- It's decisions are correct;
- Strata disputes are resolved;
- Strata companies comply with the Strata Titles Act 1985 by promptly providing owners with the ability to inspect any and all strata records except those for which privilege is established;
- Pursuant to s 98 of the State Administrative Tribunal Act 2004, parties which mislead the Tribunal are held accountable;
- It gives proper consideration to apply s 95(1) of the State Administrative Tribunal Act 2004 after a party 'fails to comply with a decision' before issuing a certificate of appropriateness of enforcement;
- Pursuant to s 100 of the State Administrative Tribunal Act 2004, the President reports to the Supreme Court acts or omissions which would constitute a contempt of the court if a proceeding of the Tribunal were a proceeding in the Supreme Court when applicable.

23 Ms Engwirda then submits that the Tribunal must establish if privilege existed for each of the 15 documents in the Strata Company's statement and determine if grounds exist for it to:

- Apply s 95(1) of the State Administrative Tribunal Act 2004 to the orders made on 6 November 2017 and refer the matter for prosecution if non-compliance continues;
- Declare that William Robinson, Divij Vijayakumar and/or the respondent misled the Tribunal by its assertions in letters dated 7 December 2017 and/or 22 February 2019; and/or
- Report the respondent to the Supreme Court pursuant to s 100 of the State Administrative Tribunal Act 2004.

24 Ms Engwirda concludes by submitting that the preliminary issue must be answered in the affirmative, which the Tribunal takes to be a submission that the task of the Tribunal in this matter is to determine whether or not the Strata Company has improperly claimed legal professional privilege for each of the 15 documents described in the Strata Company's statement.

The Strata Company's submissions

25 After stating what it considers to be the relevant background information and legal principles the Strata Company makes the following submissions:

- The objective of s 43 and s 90 of the ST Act is for proprietors and mortgagees of lots to be able to inspect the documents listed in s 43. Ms Engwirda has been able to inspect documents 1-7 and the claim of legal professional privilege no longer prevents that.
- Accordingly, there is no longer a controversy with respect to documents 1-7.
- However, there remains a claim for legal professional privilege for documents 8-15. That claim prevents Ms Engwirda from inspecting those documents. The claims of privilege over those documents need to be determined to determine whether Ms Engwirda is permitted to inspect those documents.
- Ms Engwirda makes serious allegations of impropriety. However, the 'basal' complaint is that the Strata

Company may have claimed privilege over documents which are not actually privileged.

- It is uncontroversial that the Strata Company provided Ms Engwirda with a USB of documents on 14 December 2018. It has always been the position, as Ms Engwirda well knew, that documents claimed to be privileged were not included on the USB.
- On any objective view of the provisions to which Ms Engwirda has referred, they are not enlivened in circumstances where a party makes a claim for privilege which is later not upheld.
- Ms Engwirda is submitting that the Tribunal should determine whether documents 1-7 were previously privileged so that she can later submit that the Strata Company did not comply with the 2017 orders.
- The compliance or non-compliance with the 2017 orders was a matter for the Supreme Court of Western Australia in proceeding SAT 3 of 2019. Section 86 of the SAT Act requires a non-monetary order to be registered with the Supreme Court and its enforcement, and thereby determination of whether it has been complied with is a matter for the Supreme Court.
- In that proceeding Ms Engwirda alleged that the 2017 orders had not been complied with. The Strata Company submitted that it had complied with the 2017 orders. However, Ms Engwirda discontinued that proceeding.
- The only live controversy is whether documents 8-15 are privileged.

26 The Strata Company concludes by submitting that the preliminary issue ought to be answered as follows: The task of the Tribunal in this matter is to determine whether or not the Strata Company has improperly claimed legal professional privilege for documents 8-15.

The Tribunal's consideration

27 The consequence of the Court of Appeal's decision was that paragraphs (orders) 2 and 3 of the 2017 orders were set aside and Ms Engwirda was released from the undertaking which she had proffered pursuant to those orders.

28 The other orders in the 2017 orders remain in place. The Court of Appeal's decision, at [37], states that there was no arguable basis for setting aside or substituting orders 1, 4, 5 and 6 of the 2017 orders.

29 It is clear from the statements at [37] of the Court of Appeal's decision that this left only two possible tasks which might fall to the Tribunal to perform:

- First, to any extent that the USB provided does not contain the documents ordered by the Tribunal to be made available, Ms Engwirda's remedy is to seek to enforce the 2017 orders under s 86 of the SAT Act. That requires a certificate from a judicial member of the Tribunal that the 2017 orders are appropriate for filing in the Supreme Court.
- Second, to the extent that the Strata Company seeks to avoid providing documents to Ms Engwirda on the ground that those documents are legally professionally privileged Ms Engwirda can apply to the Tribunal for a determination as to whether the documents are actually privileged.

30 The Strata Company has pointed out in its submissions that Ms Engwirda took action under s 86 of the SAT Act to enforce the 2017 orders in the Supreme Court in proceeding SAT 3 of 2019, which she discontinued.

31 The only task which remains for the Tribunal to perform is the second task referred to in [29] above.

32 Legal professional privilege is a rule of substantive law. A person may invoke the privilege to resist giving information or producing documents that would reveal confidential communications between a client and his or her lawyer made for the dominant purpose of giving or obtaining legal advice or providing legal services (including

representation in legal proceedings): *Schreuder v Murray [No 2]* [2009] WASCA 145 at [58].

33 The purpose of a person, in this case the Strata Company, claiming legal professional privilege for a document in a proceeding is to avoid it being given to the other party, in this case, Ms Engwirda.

34 Documents 1-7 have been provided to Ms Engwirda by the Strata Company and the claim for legal professional privilege for them waived.

35 This proceeding under s 90 of the ST Act was commenced by Ms Engwirda to be allowed to inspect the records of the Strata Company. Ms Engwirda has now been able to inspect documents 1-7 and therefore she has obtained what she was seeking in her application under s 90 of the ST Act in respect of those documents.

36 The remaining task of the Tribunal after the Court of Appeal's decision is to determine whether any documents which have not been provided by the Strata Company to Ms Engwirda because the Strata Company claims legal professional privilege in respect of them are actually privileged. The only documents which fall into that category are documents 8-15.

37 That task does not include any of the things, described in [22] and [23] above.

Conclusion

38 For the reasons above the preliminary issue is determined as follows:

The task of the Tribunal in this matter is to determine whether the Strata Company has improperly claimed legal professional privilege for all or any of documents 8-15.

39 The Tribunal will determine that question entirely on the documents, pursuant to s 60 of the SAT Act, after giving the Strata Company and then Ms Engwirda, the opportunity to provide written submissions and any affidavits on which they wish to rely in support of their submissions.

Orders

The Tribunal will make the following orders:

1. The preliminary issue described in order 1 of the orders made by the Tribunal on 20 October 2020 is determined as follows:

The task of the Tribunal in this matter is to determine whether the respondent has improperly claimed legal professional privilege for all or any of documents 8-15 of the documents described in the respondent's statement dated 12 June 2020.

2. By 10 March 2021 the respondent must file with the Tribunal and give to the applicant:

- (a) written submissions which:

- (i) properly and sufficiently describe each of documents 8-15 described in the respondent's statement dated 12 June 2020 (without revealing the contents of those documents); and

- (ii) set out the facts relied upon by the respondent to establish the basis on which the legal professional privilege is claimed by the respondent in respect of each of those documents (but those facts should not be set out in such detail as would enable the contents of each document to be ascertained indirectly); and

- (b) any affidavits on which the respondent wishes to rely in support of its submissions.

3. By 9 April 2021 the applicant must file with the Tribunal and give to the respondent:

- (a) written submissions in response to the respondent's submissions; and

- (b) any affidavits on which the applicant wishes to rely in support of her submissions.

4. Subject to further order, the Tribunal will determine the issue described in order 1 above entirely on the

documents pursuant to s 60 of the *State Administrative Tribunal Act 2004* (WA) after 9 April 2021.

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

FM
Secretary

9 FEBRUARY 2021