

JURISDICTION : STATE ADMINISTRATIVE TRIBUNAL

ACT : BUILDING SERVICES (COMPLAINT
RESOLUTION AND ADMINISTRATION) ACT
2011 (WA)

CITATION : LEEMING and PROUD HOLDINGS PTY LTD
[2021] WASAT 12

MEMBER : MR D AITKEN, SENIOR MEMBER

HEARD : DETERMINED ON THE DOCUMENTS

DELIVERED : 4 FEBRUARY 2021

FILE NO/S : CC 1071 of 2020

BETWEEN : CHRISTOPHER RAYMOND LEEMING
Applicant

AND

PROUD HOLDINGS PTY LTD
Respondent

Catchwords:

Building Services (Complaint Resolution and Administration) Act 2011 (WA) - Strata Titles Act 1985 (WA) - Does an owner of a lot in a strata scheme have standing to make a building service complaint about common property in a strata scheme - Proper construction of phrase 'a person whose interests are being or have been adversely affected by the carrying out of the regulated building service' in reg 5 of the Building Services (Complaint Resolution and Administration) Regulations 2011 (WA) concerning who is permitted to make a building service complaint about a regulated building service on common property in a strata scheme

Legislation:

Building Services (Complaint Resolution and Administration) Act 2011 (WA),
s 5, s 5(1), s 5(1)(a), s 6, s 9, s 11(1)(d)

Building Services (Complaint) Resolution and Administration) Regulations 2011
(WA), Reg 5

State Administrative Tribunal Act 2004 (WA), s 42, s 47(2), s 60(2),

Strata Titles Act 1985 (WA) (prior to 1 May 2020), s 17, s 32(1)

Strata Titles Act 1985 (WA) (since 1 May 2020), s 3, s 10, s 12(1), s 13(7),
s 13(9), s 14(5)(a), s 14(5)(c), s 37(1), s 91, s 91(1)(b), s 91(1)(c), s 91(3),
s 97(1)(a), s 100(1)(b), s 100(1)(c), s 103, Sch 5, cl 2(1)(b), cl 5

Result:

Preliminary issue determined

Applicant does not have standing to bring the proceeding

Application dismissed

Category: B

Representation:**Counsel:**

Applicant : In Person

Respondent : Mr K McFarlane

Solicitors:

Applicant : N/A

Respondent : N/A

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

Mohammadi v Bethune [2018] WASCA 98

REASONS FOR DECISION OF THE TRIBUNAL:

Introduction

1 The question to be decided as a preliminary issue in this matter is whether the owner of a lot in a strata scheme under the *Strata Titles Act 1985* (WA) (**ST Act**) has standing to make a building service complaint under the *Building Services (Complaint Resolution and Administration) Act 2011* (WA) (**BSCRA Act**) about building work which was carried out on the common property in the strata scheme.

2 Significant amendments to the ST Act commenced operation on 1 May 2020. In these reasons references to sections in the ST Act are references to sections as they have been since 1 May 2020, unless indicated otherwise. Where there is a reference to a section of the ST Act as it was prior to 1 May 2020 it will be referred to as a section of the pre 1 May 2020 ST Act.

Background

3 On 5 February 2020 Mr Christopher Raymond Leeming (**Mr Leeming**) made a building service complaint (**Complaint**) to the Building Commissioner under s 5(1) of the BSCRA Act against Proud Holdings Pty Ltd, which trades as 'Proud Constructions' (**Proud**).

4 The complaint is about building work which was carried out by Proud in the construction of a two storey residential development, incorporating 10 residential units, for which Strata Plan 77817 (**Strata Plan**) was registered on 26 February 2018, to create the strata scheme named '64 Fitzroy Road, Rivervale' (**Strata Scheme**). Pursuant to s 32(1) of the pre 1 May 2020 ST Act, upon the registration of the Strata Plan a strata company by the name of 'The Owners of 64 Fitzroy Road Rivervale Strata Plan 77817' (**Strata Company**) was created for the Strata Scheme.

5 Mr Leeming is a co-owner of lot 1 on the Strata Plan (Lot 1) as a joint tenant with his wife, Mrs Winifred Esther Leeming.

6 On 14 February 2020 Mr Leeming provided to the Building Commissioner an 'Authority to Act', signed by Mr Brendan Hunt as chairman of the council of the Strata Company, which purportedly authorised Mr Leeming to act on behalf of the Strata Company in respect of the Complaint and the Building Commissioner's delegate changed the name of the complainant to 'Owners of Strata Plan 77817', being the incorrect name of the Strata Company stated in the 'Authority

to Act'. The 'Authority to Act' was not supported by a copy of the minutes of a meeting of the council of the Strata Company or the minutes of a general meeting of the Strata Company recording the passing of a resolution authorising the making of the Complaint by the Strata Company.

7 Following an investigation carried out under s 9 of the BSCRA Act, the Building Commissioner's delegate referred complaint items 10, 11 and 14 of the Complaint to the Tribunal on 31 August 2020 pursuant to s 11(1)(d) of the BSCRA Act.

8 Complaint item 10 is that the driveway gate is malfunctioning in opening and closing. Complaint item 11 is that the operation of the driveway gate is producing excessive noise. Complaint item 14 is that the bin area is not drained as required by 'Council regulations'.

9 The driveway gate and the bin area are part of the common property in the Strata Scheme (**Scheme Common Property**).

10 Upon receipt of the referral from the Building Commissioner, the Tribunal listed the matter for a directions hearing on 29 September 2020 and sent a notice of directions hearing to Mr Leeming, the Strata Company and Proud.

11 After the notice of directions hearing was sent, a letter dated 8 September 2020 from Ms Yvonne Harwood of Acton Strata, as the strata manager for the Strata Company, was filed with the Tribunal. That letter states that Acton Strata had been requested by the council of the Strata Company to advise that there has been no authority given to Mr Leeming to act on behalf of the Strata Company in the matter.

12 That issue, amongst other things, was discussed at the directions hearing on 29 September 2020 and the matter was adjourned to a further directions hearing on 27 October 2020 to enable Mr Leeming to consider his position.

Preliminary issue to be determined

13 At the directions hearing on 27 October 2020 the Tribunal made orders providing as follows:

- The applicant was amended to be Mr Leeming, instead of the Strata Company.

- The Tribunal is to determine as a preliminary issue, whether Mr Leeming as an individual (being the co-owner of Lot 1) has standing to bring this proceeding.
- The parties were given the opportunity to provide submissions in relation to the preliminary issue.
- The preliminary issue is to be determined entirely on the documents pursuant to s 60(2) of the *State Administrative Tribunal Act 2004* (WA) (**SAT Act**).

14 Mr Leeming filed submissions in relation to the preliminary issue, but neither the Strata Company nor Proud filed submissions.

Mr Leeming's submissions

Mr Leeming's submissions in relation to the preliminary issue may be summarised as follows:

- Mr Leeming and his wife, as the joint owners of Lot 1, hold 9.7% of the unit entitlements for the Strata Scheme, which brings with it the compulsory requirement to pay contributions for maintenance of the Scheme Common Property. The Scheme Common Property includes the driveway gate which is the subject of complaint items 10 and 11 of the Complaint. Therefore, if Mr Leeming is expected to help pay to maintain that equipment, he must surely have the right to complain about it when it does not work 'within the Laws that cover its operation in order to make the party liable for it that he believes is responsible for it'.
- Mr Leeming is a part owner of the Scheme Common Property, as noted on the certificate of title for Lot 1.
- Mr Leeming, as 'a person' is permitted to make a building service complaint under s 5 of the BSCRA Act.
- Mr Leeming paid the fee for the lodgement of the Complaint, not the Strata Company, and Mr Leeming is entitled as a result to have the Complaint 'processed through to a final outcome'.

Can an owner of a lot in a strata scheme make a building service complaint under the BSCRA Act about common property in the strata scheme?

15 At the heart of the preliminary issue is the question of whether an owner of a lot in a strata scheme can make a complaint under s 5 of the BSCRA Act about a regulated building service (building service complaint) carried out on common property in the strata scheme.

16 If that question is answered in the affirmative, then the preliminary issue will be answered in the affirmative and Mr Leeming will have standing to bring and, therefore, continue this proceeding.

17 If that question is answered in the negative, then the preliminary issue will be answered in the negative and Mr Leeming will not have standing to bring this proceeding and the proceeding will be dismissed pursuant to s 47(2) of the SAT Act as misconceived.

18 To answer the question of whether an owner of a lot in a strata scheme can make a building service complaint about common property in the strata scheme it is necessary for the Tribunal to consider particular provisions in the BSCRA Act, the *Building Services (Complaint Resolution and Administration) Regulations 2011* (WA) (**BSCRA Regulations**) and the ST Act.

The relevant provisions of the BSCRA Act and the BSCRA Regulations

19 Section 3(1) of the BSCRA Act provides that 'building service complaint' means a complaint under s 5(1) of the Act (**building service complaint**).

20 Section 5(1) of the BSCRA Act provides

Subject to the regulations, a person may make a complaint to the Building Commissioner about a regulated building service not being carried out in a proper and proficient manner or being faulty or unsatisfactory.

21 It is not in dispute in this proceeding that complaint items 10, 11 and 14 of the Complaint are in respect of a 'regulated building service' carried out by Proud.

22 Regulation 5 of BSCRA Regulations provides:

A building service complaint about the carrying out of a regulated building service may only be made by a person whose interests are

being, or have been, adversely affected by the carrying out of the regulated building service.

The relevant provisions of the ST Act

23 Under s 10 of the ST Act the common property in a strata scheme is that part of the parcel of land subdivided by the strata scheme that does not form part of a lot in the strata scheme.

24 The common property in a strata scheme is owned by the owners of the lots in the strata scheme as tenants in common in shares proportional to the unit entitlements of their respective lots; s 17 of the pre 1 May 2020 ST Act, Sch 5 cl 2(1)(b) of the ST Act and s 13(7) of the ST Act. Unit entitlements are explained in [28] below.

25 Section 91 of the ST Act provides:

(1) A strata company must -

[(a) deleted]

(b) control and manage the common property for the benefit of all the owners of lots; and

(c) keep in good and serviceable repair, properly maintain and, if necessary, renew and replace -

(i) the common property, including the fittings, fixtures and lifts used in connection with the common property; and

(ii) any personal property owned by the strata company,

and to do so whether damage or deterioration arises from fair wear and tear, inherent defect or any other cause.

[(d)-(k) deleted]

(2) A strata company may improve or alter the common property in a manner that goes beyond what is required under subsection (1).

Note for this subsection:

Expenditure above a certain amount incurred for the purposes set out in subsection (2) must be authorised by special resolution, except for expenditure on

sustainability infrastructure, which may be authorised by ordinary resolution: see section 102.

- (3) A strata company may sue and be sued for rights and liabilities related to the common property in the strata titles scheme as if it were the owner and occupier of the common property.

26 Section 100(1)(a) of the ST Act provides that a strata company must establish an administrative fund for the payment of the expenses of controlling and managing the common property, the payment of insurance premiums and the discharge of any other obligations of the strata company.

27 Sections 100(1)(b) and (c) of the ST Act provide that the strata company must determine the amounts to be raised for payment into the administration fund and raise those amounts by levying contributions on the owners of the lots in the strata scheme in proportion to the unit entitlements of their respective lots, unless the scheme by-laws provide for a different basis for levying contributions.

28 Section 12(1) of the ST Act provides that the 'scheme documents' which are registered for a strata scheme must include a 'schedule of unit entitlements' and s 37(1) of the ST Act provides that the schedule of unit entitlements must allocate a whole number (a 'unit entitlement') to each lot in the strata scheme and state the number which is the sum of the unit entitlements of all the lots in the strata scheme. Sch 5 cl 5 of the ST Act provides that the schedule of unit entitlements registered for a strata scheme immediately before the commencement of the amendments to the ST Act on 1 May 2020 continues as the schedule of unit entitlements after that date.

Principles of statutory construction

29 In *Mohammadi v Bethune* [2018] WASCA 98 (*Mohammadi*) at [31] - [36] the Court of Appeal (WA) outlined the principles of statutory construction as follows:

- 31 The principles of statutory construction are well known and do not require detailed exposition. Statutory construction requires attention to the text, context and purpose of the Act. While the task of construction begins and ends with the statutory text, throughout the process the text is construed in its context. Statutory construction, like any process of construction of an instrument, has regard to context. As Kiefel CJ, Nettle and Gordon JJ recently explained in *SZTAL*:

The starting point for the ascertainment of the meaning of a statutory provision is the text of the statute whilst, at the same time, regard is had to its context and purpose. Context should be regarded at this first stage and not at some later stage and it should be regarded in its widest sense. This is not to deny the importance of the natural and ordinary meaning of a word, namely how it is ordinarily understood in discourse, to the process of construction. Considerations of context and purpose simply recognise that, understood in its statutory, historical or other context, some other meaning of a word may be suggested, and so too, if its ordinary meaning is not consistent with the statutory purpose, that meaning must be rejected.

- 32 The primary object of statutory construction is to construe the relevant provision so that it is consistent with the language and purpose of all the provisions of the statute.
- 33 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.
- 34 Discernment of statutory purpose is particularly significant in cases, commonly encountered, where the constructional choice presented is from 'a range of potential meanings, some of which may be less immediately obvious or more awkward than others, but none of which is wholly ungrammatical or unnatural'. In such a case, the choice 'turns less on linguistic fit than on evaluation of the relevant coherence of the alternatives with identified statutory objects or policies'. As we will explain later in these reasons, we think this is such a case.
- 35 Thus, the material provisions of the Act must be understood, if possible, as parts of a coherent whole.
- 36 Statutory texts enacted by the same legislature are to be construed, so far as possible, to operate in harmony and not in conflict. Where two or more statutory enactments comprise the overlapping legislative scheme, the enactments should be construed accordingly, and the court should endeavour to produce a rational, sensible, efficient and just operation in preference to an inefficient, conflicting or unjust operation.

The Tribunal's consideration

30 The schedule of unit entitlements in the Strata Plan states that the unit entitlement for Lot 1 (being the lot which Mr Leeming and his wife own) is 97 units of the total of 1000 units for the Strata Scheme.

31 There is no by-law for the Strata Scheme which changes the basis for levying contributions in proportion to the unit entitlements of the lots in the Strata Scheme.

32 The Tribunal accepts the submissions of Mr Leeming that:

- Mr Leeming and his wife hold 9.7% of the unit entitlements for the Strata Scheme and they are required to pay 9.7% of the costs of maintaining the Scheme Common Property, including the driveway gate, by way of the levies which they pay to the Strata Company; and
- Mr Leeming and his wife are part owners of the Scheme Common Property (as tenants in common with the owners of all the other lots in the Strata Scheme).

33 At first glance it might appear that Mr Leeming is a person who, pursuant to reg 5 of the BSCRA Regulations, is able to make a building service complaint under s 5(1) of the BSCRA Act about the driveway gate and the bin area, because Mr Leeming's interests are being, or have been, adversely affected by the carrying out of the regulated building service by Proud since he is a part owner of the Scheme Common Property, and he is required to pay a proportion of the cost of maintaining the Scheme Common Property.

34 One potential meaning of the phrase 'a person whose interests are being or have been adversely affected by the carrying out of the regulated building service' in reg 5 of the BSCRA Regulations concerning who is permitted to make a building service complaint about a regulated building service on common property in a strata scheme is an owner of a lot in the strata scheme.

35 However, another potential meaning of that phrase is the strata company of a strata scheme, because the ST Act contains provisions which give the strata company of a strata scheme both powers and duties regarding the control, management, repair and maintenance of the common property in the strata scheme.

36 It is necessary to discern the statutory purpose of the ST Act regarding the common property in a strata scheme to choose between those potential meanings of the phrase 'a person whose interests are being or have been adversely affected by the carrying out of the regulated building service' in reg 5 of the BSCRA Regulations concerning who is permitted to make a building service complaint about a regulated building service on common property in a strata scheme: *Mohammadi* at [34].

37 Section 13(9) of the ST Act provides that the owner of a lot in a strata scheme cannot separately deal with or dispose of the owner's share in the common property of the strata scheme.

38 Section 14(5)(a) and (c) of the ST Act provides that a strata company is a body corporate and is capable of suing and being sued in its own name.

39 Section 91(1)(b) of the ST Act provides that a strata company must control and manage the common property of the strata scheme for the benefit of all the owners of lots in the strata scheme.

40 Section 91(1)(c) of the ST Act provides that a strata company must keep the common property in the strata scheme in good repair and properly maintain and, if necessary, renew and replace the common property.

41 Section 91(3) of the ST Act provides that a strata company may sue for rights and liabilities related to the common property in the strata scheme as if it were the owner and occupier of the common property.

42 Section 97(1)(a) of the ST Act provides that the strata company must ensure that all the 'insurable assets' of the strata scheme are insured to the standard prescribed in that section and 'insurable assets' is defined in s 3 of the ST Act to include common property.

43 Section 103 of the ST Act provides that if the owners of the lots in a strata scheme are jointly entitled to take proceedings against a person or are liable to have proceedings relating to the common property taken against them jointly, the proceedings may be taken by or against the strata company.

44 It is clear from the above provisions of the ST Act that the statutory purpose of the ST Act regarding the common property in a strata scheme is that it is to be controlled, managed, kept in good repair,

maintained and insured by the strata company of the strata scheme on behalf of the owners of the lots in the strata scheme, whose share of the common property is not to be dealt with separately by them. The strata company is able to commence and pursue legal proceedings for that purpose.

45 To the extent that s 5(1)(a) of the BSCRA Act and reg 5 of the BSCRA Regulations on the one hand and s 13(9), s 14(5)(a) and (c), s 91(1)(b) and (c), s 91(3), s 97(1)(a) and s 103 of the ST Act on the other hand overlap regarding the question of who is permitted to make a building service complaint about a regulated building service on common property in a strata scheme, those provisions must be construed, so far as possible, to operate in harmony and not in conflict to produce a rational, sensible, efficient and just operation in preference to an inefficient, conflicting or unjust operation: *Mohammadi* at [36].

46 If the phrase 'a person whose interests are being or have been adversely affected by the carrying out of the regulated building service' in reg 5 of the BSCRA regulations in the case of a building service complaint regarding common property in a strata scheme were to be construed to mean an owner of a lot in a strata scheme, that would mean that a person who has carried out a regulated building service on the common property of a strata scheme might face multiple building service complaints by different owners of lots in the strata scheme.

47 Those complaints might be made at different times during the six year period after completion of the regulated building service permitted by s 6 of the BSCRA Act. Those complaints might make different allegations about the regulated building service not having been carried out in a proper and proficient manner or being faulty or being unsatisfactory in respect of the same part of the common property.

48 That would make the task of the person who carried out the regulated building service to respond to those complaints and the task of the Building Commissioner or the Tribunal in dealing with those complaints very difficult and inefficient.

49 It must also be borne in mind that in some strata schemes there are a very large number of lots, so there could potentially be a large number of different complaints made about the regulated building service which was carried out on the common property of the strata scheme.

50 Although Mr Leeming is a part owner of the Scheme Common Property and he is required to pay a proportion of the cost of maintaining the Scheme Common Property, he is not permitted to separately deal with or dispose of his share in the Scheme Common Property: s 13(9) of the ST Act. It is the Strata Company which has the power and duty to control, manage, repair, maintain and insure the Scheme Common Property: s 91(1)(b) and (c), s 91(3), s 97(1)(a) of the ST Act.

51 It would not produce a rational, sensible, efficient and just operation of the BSCRA Act if the phrase 'a person whose interests are being or have been adversely affected by the carrying out of the regulated building service' in reg 5 of the BSCRA regulations in the case of a building service complaint about common property in a strata scheme were to be construed to mean an owner of a lot in a strata scheme.

52 Therefore, the Tribunal has decided that the phrase 'a person whose interests are being or have been adversely affected by the carrying out of the regulated building service' in reg 5 of the BSCRA regulations in the case of a building service complaint about common property in a strata scheme should be construed to mean the strata company of the strata scheme and not an owner of a lot in the strata scheme.

53 Consequently, an owner of a lot in a strata scheme cannot make a building service complaint about common property in the strata scheme.

Conclusion

54 For the reasons above, the preliminary issue of whether Mr Leeming has, as an individual (lot owner), standing to bring this proceeding is answered in the negative and the proceeding will be dismissed pursuant to 47(2) of the SAT Act as misconceived.

55 The fact that Mr Leeming paid the lodgement fee for the Complaint does not have any bearing on the determination of the preliminary issue. The payment of the lodgement fee for an application which is misconceived, does not alter the fact that it is misconceived.

Orders

The Tribunal will make the following orders:

1. The preliminary issue of whether the applicant has standing to bring this proceeding is answered in the negative.
2. The proceeding is dismissed pursuant to s 47(2) of the *State Administrative Tribunal Act 2004* (WA) as misconceived.

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

MR D AITKEN, SENIOR MEMBER

4 FEBRUARY 2021