

JURISDICTION : STATE ADMINISTRATIVE TRIBUNAL

ACT : STRATA TITLES ACT 1985 (WA)

CITATION : BLASZKIEWICZ and THE OWNERS OF 7
HENDERSON STREET FREMANTLE (STRATA
SCHEME 74918) [2021] WASAT 56

MEMBER : DR B MCGIVERN, MEMBER

HEARD : DETERMINED ON THE DOCUMENTS

DELIVERED : 23 APRIL 2021

FILE NO/S : CC 1503 of 2020

BETWEEN : KAROL BLASZKIEWICZ
First Applicant

IZABELA BLASZKIEWICZ
Second Applicant

AND

THE OWNERS OF 7 HENDERSON STREET
FREMANTLE (STRATA SCHEME 74918)
Respondent

Catchwords:

Application to dismiss proceeding commenced under the *Strata Titles Act 1985* (WA) - Whether proceeding is a 'scheme dispute' - Whether applicants are 'scheme participants' - Proceeding lacks substance or is misconceived - Whether appropriate to award costs

Legislation:

Heritage of Western Australia Act 1990 (WA), s 29

Interpretation Act 1984 (WA), s 61(1)(a)

State Administrative Tribunal Act 2004 (WA), s 9, s 47, s 47(1), s 47(1)(a),
s 47(2), s 60(2), s 87, s 87(1), s 87(2), s 87(4)

Strata Titles Act 1985 (WA), s 3(1), s 14(8), s 43(1), s 91(1), s 99(3),
s 100(1), s 100(2), s 100(7), s 197, s 198(5), Sch 2A, Pt 5, cl 53E

Transfer of Land Act 1893 (WA), s 52(4), s 53, s 82(1A)

Result:

Application to dismiss proceeding allowed

Proceeding dismissed

Category: B

Representation:

Counsel:

First Applicant : In Person
Second Applicant : In Person
Respondent : Alex Shaw

Solicitors:

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

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

Ambrus and Churches of Christ Homes & Community Services Incorporated
[2006] WASAT 141

Asterleigh Pty Ltd as Trustee for the Lahdo Family Trust and Volley
Investments Pty Ltd [2012] WASAT 201

Bhalsod v Perrie [2016] WASC 412

Gill & Ors and Wildnight Pty Ltd [No 2] [2008] WASAT 135

Pearce & Anor and Germain [2007] WASAT 291 (S)

Western Australian Planning Commission v Questdale Holdings Pty Ltd
[2016] WASCA 32

Wilde and Smith [2008] WASAT 310

REASONS FOR DECISION OF THE TRIBUNAL:

Introduction

1 On 12 November 2020, the applicants commenced the primary proceeding (**ST Application**) by lodging an application under s 197 of the *Strata Titles Act 1985* (WA) (**ST Act**). The applicants were, but are no longer, proprietors of lot 6 (**Lot 6**) in a strata scheme (**Scheme**) created upon the registration of strata plan 74918 (**Strata Plan**), known as '7 Henderson St, Fremantle'. The respondent is the strata company for the Scheme and has applied for dismissal of the ST Application on the grounds, essentially, that it is improperly brought (**Dismissal Application**).

2 In very broad terms, the substantive dispute between the parties under the ST Application concerns a claim by the applicants against the respondent for monies they say they have expended on heritage works carried out by them before they sold Lot 6.

Dismissal Application

3 Relevant to the Dismissal Application, pursuant to orders made on 11 December 2020:

- (a) a letter from the legal representative of the respondent, filed with the Tribunal and dated 4 December 2020, is taken to be an application under s 47 of the *State Administrative Tribunal Act 2004* (WA) (**SAT Act**) for the dismissal of the primary proceeding;
- (b) the applicants were, by 18 December 2020, to file any written submissions, further documents or decided cases on which the applicants wish to rely in relation to the Dismissal Application; and
- (c) the Dismissal Application is to be determined entirely on the documents, pursuant to s 60(2) of the SAT Act.

4 The documents before the Tribunal comprise:

- (a) the ST Application, together with a bundle of supporting documents comprising searches (copies) of:
 - (i) the Strata Plan;

- (ii) the certificate of title for Lot 6, being Volume 2922 Folio 898 (**Lot CT**), as at 19 October 2020 (request number 61154071);
 - (iii) a Management Statement containing the Scheme by-laws, being instrument N573927SM, registered on 10 March 2017 (**Management Statement**);
 - (iv) a document headed 'Heritage Agreement', signed on behalf of the Heritage Council of Western Australia (**Heritage Council**) on 21 August 2017 (**Heritage Agreement**);
 - (v) disclosure statement documentation relevant to the applicants' purchase of Lot 6 (signed by them on 8 August 2017);
 - (vi) a document headed 'Grounds - Attachment 1' comprising email correspondence dated 15 October 2020 (**October Email**) from the applicants to a recipient at 'JD Strata' (which the Tribunal understands to refer to John Dethridge Strata Services); and
 - (vii) a document headed 'Grounds - Attachment 2' comprising email correspondence dated 24 May 2018 passing between Mr Mike Bentham, Director, Heritage Works, Heritage Services and Mr Ravindran Karuppan, Strata Manager, Exclusive Strata Management (and forwarded by Mr Bentham to a group of recipients) (**2018 Emails**);
- (b) the Dismissal Application, which was filed with the following supporting documents:
- (i) a further search of the Lot CT (dated 27 November 2020, request number 61321660); and
 - (ii) a letter dated 14 November 2020 from Foley Birch Conveyancing to John Dethridge Strata Services (**Settlement Letter**); and

(c) an email filed by the applicants on 18 December 2020, containing submissions made by the applicants and attaching:

- (i) a further search of the Lot CT (dated 11 November 2020, request number 61249937); and
- (ii) further searches of the Strata Plan and the Management Statement (both dated 18 December 2020).

5 Having considered the documents outlined above, I called the parties to a directions hearing on 18 March 2021. For the purposes of that hearing, on 16 March 2021 the respondent filed:

- (a) written submissions in support of the Dismissal Application; and
- (b) an affidavit of Linda Venditti, relevantly annexing a copy of a Landgate search undertaken in respect of Lot 6 dated 15 March 2021 (request number 61744946) (**Landgate Search**);

6 Pursuant to orders made at the directions hearing on 18 March 2021, the parties filed further relevant documents and provided further written submissions in relation to the Dismissal Application, as follows:

- (a) applicants' further submissions dated 1 April 2021 and 9 April 2021; and
- (b) respondent's further submissions dated 1 April 2021 and 8 April 2021.

Relevant legislative framework

Section 47 of the SAT Act

7 The Dismissal Application is to be determined under s 47 of the SAT Act, which relevantly provides:

- (1) This section applies if the Tribunal believes that a proceeding -
 - (a) is frivolous, vexatious, misconceived or lacking in substance; or

- (b) is being used for an improper purpose; or
- (c) is otherwise an abuse of process.

(2) If this section applies, the Tribunal may order that the proceeding be dismissed or struck out and make any appropriate orders [.]

8 Further, s 198(5) of the ST Act provides that, in addition to the circumstances specified in s 47 of the SAT Act, that section applies to a scheme dispute if the Tribunal:

- (a) is not satisfied that the nature of the dispute is more than trivial; or
- (b) is not satisfied that the applicant has an interest in the matter that is more than trivial and warrants recourse by the applicant to the Tribunal; or
- (c) is satisfied that the purpose of the application is to harass or annoy, or to cause delay or detriment, or is otherwise wrongful; or
- (d) is satisfied that the nature and gravity of the dispute is such that it is reasonable to expect the parties to resolve the dispute without recourse to the Tribunal.

9 As appears from those provisions, the merits of the ST Application is relevant to the Dismissal Application:

- (a) in relation to the substance of the proceeding for the purpose of s 47(1)(a) of the SAT Act; and
- (b) to the extent that the application of s 47 of the SAT Act is extended by s 198(5) of the ST Act to the primary proceeding, then in relation to any assessment of triviality or gravity for the purposes of sub-sections (a), (b) and (d) of the latter provision.

10 Consideration of the substance or merit of the ST Application requires consideration of certain threshold provisions of the ST Act.

11 In the remainder of these reasons, any reference to a legislative provision is, unless otherwise specified, a reference to a provision of the ST Act.

Provisions relevant to the substance of the ST Application

12 The Tribunal has jurisdiction under s 197 to resolve 'scheme disputes'. Pursuant to s 3(1), 'scheme dispute' takes its meaning from s 197 itself which, by reference to both subject matter and parties, relevantly describes various classes of dispute as:

- (a) in sub-section (1), being scheme disputes; and
- (b) in sub-section (3), not being scheme disputes.

13 The dispute the subject of the ST Application (see [2] above) does not meet the description of any of the classes of dispute described in s 197(1)(b)-(h) or those prescribed pursuant to s 197(1)(i). The only potentially relevant category is that described in s 197(1)(a), relevantly being a dispute *between scheme participants* about matters including:

...

- (ii) the performance of, or the failure to perform, a function conferred or imposed on a person by this Act or the scheme by-laws; or

...

- (vi) any other matter arising under this Act or the scheme by-laws[.]

14 'Scheme participants' is limited by s 197(2) to the following:

- (a) the strata company for the strata titles scheme;
- (b) for a leasehold scheme, the owner of the leasehold scheme;
- (c) a person who is appointed as an administrator of a strata company for the strata titles scheme;
- (d) a member of the strata company for the strata titles scheme;
- (e) the occupier of a lot in the strata titles scheme;
- (f) the registered mortgagee of a lot in the strata titles scheme;
- (g) a member of the council of a strata company, or an officer of the strata company, for the strata titles scheme, who is not a member of the strata company.

15 Relevant to the Dismissal Application, pursuant to s 3(1) the term 'member of a strata company' takes its meaning from s 14(8), which

provides that 'owners for the time being' of lots in a strata titles scheme are members of the strata company.

16 The classes of dispute specified in s 197(3) not to be scheme disputes relevantly include:

...

- (e) a contractual dispute, or a dispute about an estate or interest in land, between -
 - (i) a scheme participant and a person who is not a scheme participant[.]: (s 197(3)(e)); and
 - (f) a dispute about an amount owed as a debt (other than a debt owed under s 99(2) or cl 53E): s 197(3)(f).

Parties' contentions

17 The respondent's contentions in relation to the Dismissal Application may be summarised as follows:

- (a) the applicants sold Lot 6, with settlement effected at 11:24 am on 12 November 2020;
- (b) the applicants filed the ST Application at 12.01 pm on 12 November 2020;
- (c) accordingly, at the time the applicants lodged the ST Application, they were not 'scheme participants' within the meaning of the ST Act;
- (d) alternatively, the applicants' claim:
 - (i) is for a liquidated sum, based on an asserted entitlement arising under a combination of a clause of a Heritage Agreement and a by-law;
 - (ii) therefore is, in effect, one based in contract for a specified sum, being a debt; and
 - (iii) by reason of s 197(3), is not a scheme dispute;
- (e) ST Application ought to be dismissed as being entirely misconceived and incompetent; and

- (f) the respondent seeks its costs on the ground that the ST Application 'could only have been made for the purpose of causing annoyance and expense to the respondent'.

18 The applicants' contentions in relation to the Dismissal Application may be summarised as follows:

- (a) the ST Act does not specify how units of time should be calculated for the purposes of determining 'owners for the time being';
- (b) on the business day that the ST Application was lodged, being 12 November 2020, the applicants were the registered proprietors of Lot 6;
- (c) the respondent relies on a 37 minute time difference between the transfer of title of Lot 6 and the filing of the ST Application;
- (d) the 37 minute delay was caused by the applicants seeking to achieve a negotiated outcome without recourse to the Tribunal;
- (e) the ST Application was not brought to cause annoyance;
- (f) the applicants had valid grounds for lodging the ST Application and, having tried and failed to reach a negotiated outcome with the respondent, sought resolution of their dispute in the Tribunal;
- (g) by the ST Application, the applicants seek a determination of the interpretation of the Heritage Agreement and Scheme by-laws, which fall within the jurisdiction of the Tribunal; and
- (h) if and to the extent the claim for reimbursement of monies is not, by reason of s 197(3), within the jurisdiction of the Tribunal, then the applicants 'will seek reimbursement with relevant court jurisdiction [sic]'.

Issue to be determined

- 19 The issues to be determined by the Tribunal are:
- (a) whether the ST Application falls within the scope of s 47(1) of the SAT Act, or within the scope of s 198(5) of the ST Act; and if so
 - (b) whether, pursuant to s 47(2) of the SAT Act, the proceeding ought to be dismissed; and if so
 - (c) whether an order for costs in favour of the respondent should be made under s 87 of the SAT Act.

Consideration**Approaching questions of substance in dismissal applications**

20 The respondent's stated grounds for the Dismissal Application are to the effect that the ST Application is misconceived or lacking in substance within the terms of s 47(1)(a) of the SAT Act.

21 In line with the approach of Chaney J in *Ambrus and Churches of Christ Homes & Community Services Incorporated* [2006] WASAT 141 (*Ambrus*) (at [8] and [44] - [45]), an application for dismissal under this limb should be approached:

- (a) in a manner analogous with a strike out proceeding, such that:

The decision to dismiss an application as lacking in substance is one that should only be taken after very careful consideration of the case and where it is clear that there is no realistic prospect of success of an application[.]

- (b) but with the objective 'to work fairness to both sides' having proper regard to the prejudice, if any, to the respondent if the proceeding were permitted to continue.

22 The determination of the Dismissal Application requires consideration of the meaning and application of key provisions of the ST Act and the SAT Act. That task is to be approached in accordance with the general principles of construction, relevantly summarised by

Le Miere J in *Bhalsod v Perrie* [2016] WASC 412 (*Bhalsod*) at [19] as follows:

The applicable principles of statutory construction include the following. The language which has actually been employed in the text of legislation is the surest guide to legislative intention. The context and purpose of a provision are important to its proper construction because 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. The legal meaning of the relevant provision is to be decided by reference to the language of the instrument viewed as a whole. The purpose of the statute resides in its text and structure. The purpose of legislation must be derived from what the legislation says, and not from some a priori assumption about its purpose or any assumption about the desired or desirable reach or operation of the relevant provisions.

23 The Tribunal may make findings of fact, based on whatever materials are before it, relevant to its assessment of whether the proceeding is misconceived or lacking in substance: *Asterleigh Pty Ltd as Trustee for the Lahdo Family Trust and Volley Investments Pty Ltd* [2012] WASAT 201; following *Wilde and Smith* [2008] WASAT 310.

Material facts – the 'Heritage Scheme'

24 The background to the dispute includes that the Scheme incorporates heritage listed buildings known as the Warders Cottages situated at 7 - 17 Henderson Street in Fremantle.

25 The applicants became the registered proprietors of Lot 6 on 24 October 2017, having bought it from the Heritage Council.

26 The encumbrances listed on Lot CT include two memorials (L571907 and N750973) lodged under the *Heritage of Western Australia Act 1990* (WA) (**Heritage Act**). The memorial numbered L571907 is also listed as an encumbrance on the Strata Plan.

27 The Heritage Agreement filed by the applicants:

- (a) is incomplete in that it:
 - (i) purports to be an agreement between the Heritage Council and an 'owner', but no details of the second party are included; and

- (ii) is not properly executed, having been signed on behalf of the Heritage Council but not by a second party.
- (b) was nevertheless the subject of disclosure to the applicants at the time they purchased Lot 6 and, in the 2018 Emails, Mr Bentham states: 'in the end each of the six owners [in the Scheme] signed a Heritage Agreement individually';
- (c) includes a 'Schedule' which identifies, at Item 2, areas of the property that constitute 'Significant Fabric' which are sub-classified as elements of:
 - (i) exceptional significance (which include, for example, the original limestone building envelope, fireplaces and chimneys, floorboards and front verandah);
 - (ii) considerable significance (which include, for example, the rear verandah and laundry block); and
 - (iii) some significance (which include, for example, dividing fences and Metters stoves);
- (d) pursuant to clauses 3.2 and 3.4 thereof, imposes obligations on a contracting owner to undertake:
 - (i) conservations works, described in Annexure A, including 'urgent works' (comprising sanding and oiling the floorboards of the rear verandah) and 'short terms works' (including replacement of split boards, sanding internal floorboards, and refurbishment of windows and doors); and
 - (ii) maintenance activities, described in Annexure B, including cleaning and gardening as needed, annual works (such as cleaning chimneys and conducting termite inspections) and five yearly works (such as inspecting and repairing external glazing and paintwork).

28 The Scheme by-laws (**by-laws**) are those contained in the Management Statement, which was registered upon registration of the Scheme itself: s 39(b).

29 By-law 2, headed 'Heritage Scheme':

- (a) provides that the Scheme's strata company and the proprietors are bound by and must comply with the conservation policies and the maintenance and other requirements in the Conservation Plan and the Heritage Agreement (those terms defined in by-law 1, with the latter meaning an agreement under s 29 of the Heritage Act): by-law 2(2);
- (b) provides that the proprietors assign to the strata company all obligations arising under the Heritage Agreement with respect to the common property: by-law 2(1)(b);
- (c) identifies 'elements of significance' in similar terms to Item 2 of the Heritage Agreement Schedule (see [27](c) above): by-law 2(1)(d);
- (d) provides that 'the strata company must establish and maintain an administrative fund and a reserve fund that is sufficient to meet its obligations to comply with the Conservation Plan and the Heritage Agreement': by-law 2(3);
- (e) requires the strata company to 'levy contributions into its reserve funds totalling at least \$27,000 per annum': by-law 2(4).

Material facts - substantive dispute between the parties

30 The matters giving rise to the ST Application may be discerned from the October Email, from which it appears that:

- (a) at the date of the October Email:
 - (i) the strata company had levied amounts totalling \$16,068.15 against the applicants, which the applicants were yet to pay (described by the applicants as 'pending contributions') (**Outstanding Levies**); and

- (ii) the applicants had, in relation to Lot 6, undertaken works (**Works**) which they understood to be in accordance with their obligations to undertake conservation works under clause 3.2 and Annexure A of the Heritage Agreement;
- (b) the Works comprised oiling and sanding the rear verandah floorboards (at a cost of \$1,000) and the internal timber floors (at a cost of \$5,354.80), door and window refurbishment (at a cost of \$7,520) and repair and replacement of hardware (at a cost of \$500);
- (c) the applicants sought to 'draw from the Reserve Fund contribution' for the Works; and
- (d) in effect, the applicants sought to offset the costs associated with the Works, being a total of \$14,374.80, against the Outstanding Levies.

31 It is unclear when the applicants contracted to sell Lot 6; however, the searches of the Lot CT show that:

- (a) the applicants were the registered proprietors of Lot 6 on 11 November 2020; and
- (b) on 12 November 2020, persons other than the applicants (**Purchasers**) became the registered proprietors of Lot 6.

32 The Settlement Letter:

- (a) notes that settlement in relation to the sale of Lot 6 was effected on 12 November 2020 (**Settlement**), but does not state the exact time of Settlement;
- (b) states that, in the course of Settlement, an amount of \$17,691.65 was paid:

... for outstanding levies & a credit for levies to 30 April 2021 (paid as part of an agreement between the Buyer [being the New Owners] and Seller).

33 Based on the above, I find that:

- (a) prior to Settlement, the respondent had levied against the applicants, and the applicants owed to the respondent, contributions towards the Scheme's administration fund and reserve fund; and
- (b) upon Settlement, pursuant to an agreement between the applicants and the Purchasers, the Outstanding Levies were paid by or on behalf of the applicants to the respondent.

34 The applicants lodged the ST Application with the Tribunal at 12:01 pm on 12 November 2020, seeking the following:

Strata Council of Owners to authorise release of funds from the Reserve Fund to reimburse owner for the costs of a conservation carried out on the fabrics specified by the title's conditions in order to upkeep heritage significance of the common property.

Is the dispute a 'scheme dispute' under s 197(1)(a)?

35 The functions and obligations of a strata company include that it:

- (a) must establish an administrative fund that is sufficient 'for the control and management of the common property, for the payment of any premiums of insurance and the discharge of any other obligation of the strata company': s 100(1);
- (b) may (in schemes with fewer than 10 lots) establish a reserve fund to meet contingent expenses, other than those of a routine nature, and other major expenses of the strata company likely to arise in the future: s 100(2) and s 100(7);
- (c) for the above purposes, shall determine the amounts to be raised and levy contributions from owners in proportion with their unit entitlements: s 100(1) and s 100(2);
- (d) must control and manage the common property for the benefit of all the owners of lots, and maintain and keep the common property in good and serviceable repair: s 91(1); and
- (e) may enforce the scheme by-laws: s 47.

36

I am satisfied that the subject matter of the dispute giving rise to the ST Application:

- (a) concerns:
 - (i) the respondent having, pursuant to s 100(1) and 100(2) and by-law 2(3), established an administration fund and a reserve fund in respect of the Scheme; and
 - (ii) a claim by the applicants' that the costs of the Works should have been, or should be, paid out of the reserve fund; and
- (b) may therefore be characterised, for the purposes of s 197(1)(a) as a dispute about:
 - (i) the performance of, or failure to perform, a function conferred or imposed on the respondent by the ST Act or the scheme by-laws; or
 - (ii) as to whether (independent of any claim about the performance of the respondent) the cost of the Works ought to be paid from the reserve fund, a matter arising under the Act or scheme by-laws (specifically, by-law 2).

37

The remaining question, however, is whether for the purposes of s 197(1)(a) the ST Application is a dispute 'between scheme participants'. Relevantly, having regard to s 197(2) (see [14] above), that question is to be determined by reference to when the applicants (jointly) were and ceased to be a member of the strata company.

38

Pursuant to s 14(8), members of a strata company are the owners 'for the time being' of lots in a strata titles scheme.

39

The search of the Lot CT relied upon by the applicants in support of that contention shows only that they were the owners of Lot 6 the day before the ST Application was filed (see [4](c)(i) above).

40

The date of registration recorded on the Lot CT shows that on 12 November 2020, the Purchasers became, and the applicants ceased to be, the owners of Lot 6. The Landgate Search shows (and the

applicants do not contest) that the instrument transferring title to the Purchasers was registered at 11:24 am that day.

41 The applicants contend that on the business day that they commenced the ST Application they were still the registered proprietors (see [18](b) above) and, by extension, owners 'for the time being' of Lot 6.

42 In the circumstances, it is necessary to consider the meaning in s 14(8) of 'owners for the time being' in the context of determining whether the applicants are or were scheme participants under s 197(2).

43 The starting point is the language of the ST Act itself.

(a) Owner is relevantly defined in s 3(1) as a person who is registered under the *Transfer of Land Act 1893* (WA) (TLA) as the proprietor of an estate in fee simple in the lot.

(b) Neither the phrase 'for the time being' nor the composite phrase 'owner for the time being' is defined.

44 As to registration under the TLA:

(a) s 52(4) of the TLA provides:

... the person named in a certificate of title ... as the proprietor or as having an estate or interest or power in relation to the land that is the subject of the certificate ... shall be deemed to be the registered proprietor of the land or to have the estate or interest or power in relation to the land, as the case may be.

(b) s 82(1A) of the TLA has the effect that 'upon the registration' of a transfer in an approved form, the estate and interest in the subject land, with all attendant rights, powers and privileges, pass to the transferee; and 'thereupon' the transferee becomes the proprietor of the land; and

(c) the TLA gives priority to competing instruments affecting the same land according to the time they were registered (s 53 of the TLA).

45 Pursuant to s 61(1)(a) of the *Interpretation Act 1984* (WA) (**Interpretation Act**), where a period of time is expressed to begin at, on, or with a specified day, that day shall be included in the period.

46 Reading the above provisions together, I find that:

- (a) the applicants ceased to be the owners of a Scheme lot upon the Purchasers becoming the registered proprietors of Lot 6;
- (b) the search of the Lot CT dated 27 November 2020 refers to the date of registration of the instrument transferring ownership to the Purchasers (T 0552336) as being 12 November 2020;
- (c) taking account of s 14(8), read together with the definition of 'owner' in s 3(1), s 82(1A) of the TLA and s 61(1)(a) of the Interpretation Act, the ownership 'for the time being' of a lot is to be determined in accordance with the date of registration as reflected on the certificate of title (that is, from and including the whole of 12 November 2020);
- (d) in any event, the Landgate Search demonstrates that, at the latest, the Purchasers became the registered proprietors of Lot 6 upon registration of the transfer of title at 11:24 am on 12 November 2020, being shortly before the time that the ST Application was filed;
- (e) accordingly:
 - (i) by reason of s 14(8) and s 197(2), the applicants (jointly) had ceased to be a member of the strata company, and so ceased to be scheme participants within the meaning of s 197(1) when the ST Application was commenced; and
 - (ii) from its inception, the ST Application was not a scheme dispute within the meaning of s 197(1).

47 The Tribunal only has the jurisdiction conferred upon it by legislation, in this case being the ST Act read together with the SAT

Act. The Tribunal has no power to enlarge that jurisdiction by an exercise of discretion. Since the applicants are not scheme participants, despite the applicants' submissions at [18](g) above and whether or not the subject matter otherwise falls within the scope of s 197(1)(a), the ST Application is not a scheme dispute and the Tribunal lacks jurisdiction to determine it.

Is the ST Application 'not a scheme dispute' under s 197(3)?

48 Even if the analysis in [46] and the conclusion at [47] above were wrong, then in any event and for the reasons that follow, the ST Application is not a scheme dispute by reason of s 197(3).

49 Reading s 197 as a whole and in context, s 197(3) is determinative in relation to certain matters not being scheme disputes, with the effect that it limits s 197(1). So much appears from:

- (a) the reference in s 3(1) to scheme dispute taking its meaning from s 197, not just s 197(1) (and this is to be contrasted with other definitional cross-references in s 3(1); for example, 'special common property' is defined by reference to s 43(1) and 'member' of a strata company is defined by reference to s 14(8));
- (b) the broad language in s 197(1), which includes within its scope any dispute between scheme participants about any matter 'arising under the Act or by-laws';
- (c) the exclusionary language of, and specific categories of disputes described in, s 197(3) (including in relation to subject matter which might otherwise be said to arise 'under the Act or by-laws'); and
- (d) s 197(3) follows s 197(1) and is not said to be subject to it; read sequentially, s 197(1) is subject to the exclusionary operation of s 197(3).

50 Accordingly, even if the dispute between the parties could be characterised as a dispute between scheme participants falling within s 197(1)(a), it is nevertheless excluded from being a scheme dispute if it falls within the scope of s 197(3).

51 The applicants had planned to pay, and paid, the Outstanding Levies upon Settlement (see [33] above). From the inception of the ST Application, the issue in dispute between the parties was not one

regarding the liability of the applicants to pay the Outstanding Levies, or any associated question of whether some offset against that liability is available to them.

52 Indeed, the ST Application does not seek relief in relation to the applicants' liability to contribute to the Scheme's administrative or reserve funds. Rather, by its own terms, it seeks *reimbursement* of monies paid by the applicants in respect of the Works (see [34] above). At its heart, it is a claim by the applicants that the strata company owes them money.

53 Such a dispute is properly characterised as a dispute about an amount owed as a debt (not being an 'insurance debt' under s 99(3) or cl 53E). That the application is for the monies to be paid out of the Scheme's reserve fund does not detract from the fundamental character of the dispute.

54 It follows, therefore, that by reason of s 197(3)(f), the ST Application is not a scheme dispute.

55 The applicants have in effect submitted, in their final written submissions of 9 April 2021 (see [18](g)-(h)above), that they if the Tribunal cannot order the payment of the monies then they will seek to enforce the debt in a court of competent jurisdiction. They nevertheless seek determination of their entitlement to those monies by the Tribunal. That position is untenable because s 197(3) is expressly directed to claims *about* an amount owed as a debt, which language clearly captures the question of underlying entitlement.

56 Given the findings above, it is unnecessary to determine whether, by reason of the Heritage Agreement and by-law 2(1)(b) (see [27] and [29] above), the dispute might also be characterised as a contractual dispute of the kind described in s 197(3)(e).

Conclusion

57 Based on the evidence before it and for the reasons set out above:

- (a) I have determined that the ST Application is misconceived or lacking in substance within the meaning of s 47(1)(a) of the SAT Act;
- (b) it is therefore unnecessary to determine whether the dispute might otherwise fall within the scope of s 198(5); and

- (c) because the relevant substantive deficiencies go to the threshold requirements of s 197, I am satisfied that it is appropriate (and in accordance with the principles outlined in *Ambros*) to dismiss the proceeding pursuant to s 47(2) of the SAT Act.

Costs

58 As part of the Dismissal Application, the respondent has sought an order for its costs of the proceeding on the ground that the ST Application 'could only have been made for the purpose of causing annoyance and expense to the respondent'.

59 Beyond denying that the ST Application was commenced to cause annoyance, the applicants have not directly addressed the question of costs. Nevertheless, for the reasons that follow, the Tribunal is able to determine that issue without the need for further submissions from the applicants.

60 The question of costs begins with the ordinary position being, pursuant to s 87(1) of the SAT Act, that parties bear their own costs in Tribunal proceedings. Nevertheless, that position is subject to:

- (a) any relevant provision of the enabling Act (in this case, the ST Act, which used to preclude, but no longer precludes, an award of costs); and
- (b) the discretion of the Tribunal under s 87(2) of the SAT Act to 'make an order for the payment by a party of all or any of the costs of another party'.

61 The interplay between s 87(1) and s 87(2) of the SAT Act, and the approach of the Tribunal to the award of costs, was considered by the Court of Appeal in *Western Australian Planning Commission v Questdale Holdings Pty Ltd* [2016] WASCA 32 (*Questdale*), relevantly as follows:

- (a) the presumptive position or starting point under s 87(1) is that the Tribunal is a 'no costs' jurisdiction, and that each party will bear its own costs;
- (b) the discretion of the Tribunal to award costs under s 87(2):

- (i) is to be exercised 'judicially', in that it should not be exercised arbitrarily, capriciously or to frustrate the legislative intent;
 - (ii) is directed to the question of whether, in the particular circumstances of the case, it is fair and reasonable that a party should be reimbursed for the costs it incurred (the legal rationale is not to punish the person against whom the order is made);
 - (iii) is broad, so that the considerations relevant to its exercise are unconfined, except that the Tribunal is bound to take account of the matters specified in s 87(4), and should have regard to subject matter, scope and purpose of the SAT Act;
- (c) factors that may be considered in the exercise of the Tribunal's discretion include (non-exhaustively):
- (i) the nature of the dispute, and the legislative scheme under which it arises; and
 - (ii) whether a party has conducted itself in a manner that has impaired the attainment of the Tribunal's objectives under s 9 of the SAT Act (to determine proceedings fairly and in accordance with the substantial merits, with as little formality as possible, and in a way that minimises costs to the parties);
 - (d) the fact that a party ultimately fails on its contentions does not of itself signify that it has acted inconsistently with the objectives in s 9 of the SAT Act; and
 - (e) the party seeking costs bears the onus of satisfying the Tribunal in relation to the exercise of its discretion.

62

Circumstances in which costs might be awarded include where a party has conducted itself unreasonably or inappropriately, where the weakness of the case is such that it could be described as 'incredible' or 'implausible' or 'obviously unmeritorious', or where an application undermines the integrity of proceedings under the relevant legislative

scheme: *Pearce & Anor and Germain* [2007] WASAT 291 (S) at [22] - [24]; *Gill & Ors and Wildnight Pty Ltd [No 2]* [2008] WASAT 135 at [20].

63 In this case, notwithstanding that I have found, for the purposes of s 47 of the SAT Act, that the ST Application is misconceived or lacking in substance and ought to be dismissed, I am nevertheless not satisfied (taking into account that the applicants are not legally represented):

- (a) that the ST Application was 'obviously unmeritorious' to the applicants; or
- (b) that the conduct of the applicants in bringing or conducting the proceeding was oppressive, vexatious or so unreasonable,

such as to warrant the displacement of the usual position that parties should bear their own costs.

64 Accordingly, I decline to exercise the discretion under s 87(2) of the SAT Act to order that the applicants pay the respondent's costs of the proceeding.

Conclusion

65 For the reasons outlined above:

- (a) pursuant to s 47 of the SAT Act, the Tribunal believes that the proceeding commenced by the ST Application lacks substance or is misconceived because, for the purposes of s 197 of the ST Act (pursuant to which the proceeding is brought):
 - (i) the applicants are not scheme participants; and
 - (ii) further and in any event, the dispute the subject of the proceeding is, by reason of s 197(3), not a scheme dispute;
- (b) however, the Tribunal is not satisfied that it is appropriate to exercise its discretion under s 87(2) of the SAT Act by making an order for costs against the applicants.

Orders

Pursuant to s 47 of the *State Administrative Tribunal Act 2004* (WA), the Tribunal orders:

1. The respondent's application to dismiss the proceeding is allowed.
2. The proceeding is dismissed.
3. The parties bear their own costs.

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

DR B MCGIVERN, MEMBER

23 APRIL 2021