

JURISDICTION : STATE ADMINISTRATIVE TRIBUNAL

ACT : STRATA TITLES ACT 1985 (WA)

CITATION : BYRNETT PROPERTIES PTY LTD and THE OWNERS OF RHYTHM STRATA PLAN 62415 [2021] WASAT 77

MEMBER : MS KY LOH, MEMBER

HEARD : 25 FEBRUARY 2021

DELIVERED : 26 MAY 2021

FILE NO/S : CC 1039 of 2020

BETWEEN : BYRNETT PROPERTIES PTY LTD
Applicant

AND

THE OWNERS OF RHYTHM STRATA PLAN
62415
Respondent

Catchwords:

Strata titles - Power of strata company to raise invoice against individual lot owner - Power of strata company to enforce by-laws - Power of strata company to maintain common property

Legislation:

Strata Titles Act 1985 (WA) (pre 1 May 2020), s 3(1), s 3(2), s 35(1)(a), s 35(1)(c), s 42(6)
Strata Titles Act 1985 (WA) (from 1 May 2020), Pt 13, s 197(4), Sch 5, cl 14(1)

Strata Titles Amendment Act 2018 (WA)

Result:

Application dismissed

Category: B

Representation:

Counsel:

Applicant : S Hassett (as representative)

Respondent : A Wesley and C White (as representatives)

Solicitors:

Applicant : N/A

Respondent : N/A

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

Nil

REASONS FOR DECISION OF THE TRIBUNAL:

Introduction

1 Byrnett Properties Pty Ltd, the owner of a commercial unit in the strata scheme known as 'Rhythm' in Subiaco, disputes an invoice for \$132 issued by the strata company in July 2019 for additional cleaning services performed during office fit-outs to the unit.

2 Despite the trivial amount involved, the parties were not able to settle their dispute. As the strata company did not press for the matter to be dismissed on the basis that it was trivial, and wanted a determination by the Tribunal to confirm its power to charge for cleaning expenses, I did not determine whether the matter should be so dismissed.

3 For reasons set out below, I will dismiss the owner's application as I am satisfied that the additional cleaning expense was properly incurred and passed on by the strata company to the owner and two other lot owners conducting fit-out works at the time.

Issues

4 The issue for determination in this matter is whether the strata company has properly issued the invoice to the owner.

5 In determining this issue, it is necessary to consider whether the strata company had the power to raise the invoice to enforce the by-laws, and alternatively, in exercise of its power to properly maintain common property.

Background

Strata scheme

6 The strata scheme is situated at 215 Hay Street, Subiaco. It is comprised of a parcel of land contained in a building, described on Strata Plan 62415 as being a three storey building known by the same name 'Rhythm' and comprising 27 commercial units and nine apartments.

7 The Schedule 2 by-laws of the strata company are set out in its management statement registered with the strata plan on 24 February 2016.

8 The relevant by-laws in this case are:

- a) by-law 6(2)(d) - which provides that in causing or allowing any structural alterations building or associated works of any kind to be carried out on his lot, an owner shall ensure that any common property damaged as a result of conducting the works is cleaned and restored to the same state and condition as it was prior to the works commencing; and
- b) by-law 3(14)(e) (which applies only to owners of commercial lots) - the owner and occupier shall keep the commercial lot and its entrances and surrounds in a thorough state of cleanliness.

Facts

9 The facts below are gleaned from documentary evidence submitted by the parties and oral testimony of the following witnesses at the hearing:

- a) Mr Simon Hassett - the director of the owner;
- b) Mr Grant Korn - the director of CleanEssence Property Services contracted by the strata company to provide cleaning services at the Rhythm building; and
- c) Mr Pen Fei Zhang - one of the owners of Lot 17 (which adjoins Lot 16), who runs a beauty business from Lot 17.

10 The owner's offer to purchase Lot 16 was accepted on 21 February 2019, and the owner became the registered proprietor on 21 May 2019.

11 It is not in contest that around May and June 2019, office fit-out works were conducted on Lots 12, 16 and 17.

12 Mr Korn gave evidence that his cleaner usually completed her cleaning and mopping work at Rhythm by 8 am. During the office fit-out works, however, she had to come back during the day for extra cleaning so that the walkway would be more presentable in the afternoon. His cleaner had been undertaking extra cleaning at Rhythm for 'weeks and weeks' before she advised Mr Korn about the extra cleaning. During that time, Mr Korn had not charged for the extra cleaning services. The extra cleaning entailed wiping the floor down with a mop and then checking over the surface for streaks.

13 Mr Korn took four photographs on 30 May 2019 of the walkway areas directly outside the entrance to Lot 16. My observation of these photographs is that they show white dusted footprints visible on the walkway areas immediately outside and surrounding the entrance to Lot 16.

14 In cross-examination, Mr Korn considered that some dusted footprints originated to and from Lot 16 as he observed these footprints ending at the doorway to Lot 16.

15 Mr Zhang gave evidence that while his lot was being renovated, he would come in after 5 pm to mop the floor area outside his lot as his builder had not adequately cleaned the area. He observed white footprints extending beyond his lot all the way to the elevator, passing Lot 16. He said that his renovations works were undertaken at about the same time as that for Lot 16.

16 In cross-examination, Mr Zhang agreed that members of the public could walk past the entrance to Lot 16. However, he considered it was more likely that the tradespeople working on Lot 16 contributed to the footprints outside Lot 16, as he observed tradespeople for Lot 16 bringing things from the elevator and also observed footprints going in and out of Lot 16.

Owner's case

17 The owner disputes that the white dust originated from Lot 16 as the floors of its office were fully tiled and carpeted as at settlement date. Indeed, its carpets were covered with plastic during the fit-out.

18 Whilst some plaster works was undertaken when they installed a gyprock wall, this occurred the week before the photographs were taken on 30 May 2019, and therefore could not account for the white dust observed in the photographs.

19 At the time the photographs were taken, the only cutting works required in the fit-out was for metal, and that the only potential mess created was of metal shavings. Mr Hassett testified that that the fit-out works to Lot 16 were otherwise quite clean and there was minimal mess in the office.

20 Alternatively, the owner submits that the cleaners had gone over and above by cleaning multiple times a day, and by-law 6(2)(d) did not state when any mess should be cleaned.

21 Further, if the movements of tradespeople to and from Lot 16 are taken to have contributed to the white dust on the floor, the owner contends that all owners, tenants and visitors who walked through the common area walkways should also be liable for the extra cleaning expense.

Strata company's case

22 The strata company contends that the three lots undertaking fit-out contributed to the mess that required additional cleaning services, and so it was reasonable for the strata company to allocate the cost of those additional services equally across the three lots.

23 The invoice issued to the owner encompassed not only additional cleaning required on 30 May, but was an accumulation of additional cleaning conducted over other days.

24 The strata company did not issue the cleaning invoice randomly to the owner, but attributed the extra cleaning charge directly to the fit-out works being undertaken by the owners of Lots 11, 16 and 17, for which the remaining lot owners should not have been responsible.

Legal framework

25 These proceedings commenced following the major amendments to the *Strata Titles Act 1985* (WA) (**Strata Act**) coming into operation on 1 May 2020 under the *Strata Titles Amendment Act 2018* (WA) (**Amendment Act**), namely, as an application for resolution of a scheme dispute under s 197(4) of the Strata Act (as amended).

26 All references to the provisions of the Strata Act in these reasons are to those in the Strata Act coming into operation from 1 May 2020.

27 All references to the provisions of the *Strata Titles Act 1985* (WA) immediately prior to 1 May 2020 will be referred to as those in the **pre-amendment Act**.

28 Whilst the disputed invoice, and the circumstances giving rise to the invoice, occurred prior to the commencement of the major amendments, cl 14(1) of Sch 5 to the Strata Act makes clear that such dispute can still be dealt with as a scheme dispute under Pt 13 of the Strata Act.

29 The pre-amendment Act remains relevant, however, to the extent
that the dispute relates to elements of the strata scheme constituted, or
to powers or obligations imposed, under the pre-amendment Act.

30 The strata scheme was created by the registration of the strata plan
on 24 February 2016 under the pre-amendment Act.

31 Clause 2(1) of Sch 5 to the Strata Act confirms that the following
relevantly continues in existence notwithstanding the coming into
operation of the Amendment Act:

- a) a strata scheme;
- b) a lot or common property in a strata scheme;
- c) an estate or interest in a lot or common property in a
strata scheme;
- d) a strata company, its council or its officers.

32 Section 3(2) of the pre-amendment Act defines the boundaries of
each lot in this strata scheme as the upper surface of floors, the inner
surface of walls and the under surface of ceilings of the building.

33 'Common property' in this strata scheme is relevantly so much of
the land comprised in a strata plan as from time to time not comprised
in a lot shown on the plan: s 3(1) of the pre-amendment Act.

34 Hence, the walkways between each office constitutes common
property as they fall outside of the lots on the strata plan.

35 The relevant functions and powers of the strata company in the
present case are:

- a) to keep in good and serviceable repair, properly
maintain and, where necessary, renew and replace the
common property, and to do so whether damage or
deterioration arises from fair wear and tear, inherent
defect or any other cause (s 35(1)(c) of the
pre-amendment Act); and
- b) to enforce the by-laws (s 35(1)(a) of the
pre-amendment Act).

36 Under s 42(6) of the pre-amendment Act, a lot owner must comply with the scheme by-laws as if they were a deed containing mutual covenants to observe and perform the matters set out in the by-laws.

Has the strata company properly raised the cleaning invoice against the owner?

37 For reasons set out below, I find that the strata company has properly raised the cleaning invoice against the owner.

Did the strata company have the power to raise the invoice to enforce the by-laws?

38 Notwithstanding the owner's contention that the source of the white dust determines who should bear the liability for the cost of the additional cleaning, by-law 3(14)(e) simply requires a commercial lot owner to ensure that their entrance and surrounds be in a 'thorough state of cleanliness'.

39 'Thorough' is defined in the *Macquarie Dictionary Online* (as at 26 May 2021) as:

1. carried out through the whole of something; fully executed; complete or perfect[.]
2. being fully or completely (such)[.]

40 The plural to 'surround' under the *Macquarie Dictionary Online* (as at 26 May 2021) is defined as 'surroundings', which in turn is defined to mean 'environing circumstances, conditions, etc; environment.'

41 Based on the evidence of Messrs Korn and Zhang, I am satisfied that the presence of white dust at or near the entrance to Lot 16 indicates a failure by the owner to meet the standard of 'thorough' cleanliness as required under by-law 3(14)(e).

42 Further, it is a reasonable inference drawn by Mr Zhang and the strata company that the attendance by tradespersons at Lot 16 increased the foot traffic to and from Lot 16, and care should have been taken by the owner to maintain a full or complete level of cleanliness of its entrance and nearby floor areas.

43 The owner has not adduced any evidence that it made any efforts during the office fit-out works to endeavour to clean the white dust at or near the entrance to Lot 16. Indeed, by its complaint that the strata

company did not notify the owner of the strata company's intention to clean the dust and thus the owner was not given the opportunity to clean it itself, indicates that the owner was not even aware of the presence of the white dust.

44 There is no foundation to the owner's complaint of the lack of advance notice from the strata company of the additional cleaning requirements, nor that tenants or members of the public who contributed to the footprints should bear responsibility for the additional cleaning charge. The obligation under by-law 3(14)(e) is ultimately on the commercial lot owners, not on any of the abovementioned entities, to ensure that their entrances and surrounding area be completely clean.

45 Whilst the strata company asserts that the owner has failed to comply with by-law 6(2)(d), I am not persuaded that uncleanliness constitutes 'damage' as referred to in that by-law.

46 'Damage' is defined in the *Macquarie Dictionary Online* (as at 26 May 2021) as 'injury or harm that impairs value or usefulness'. The definition connotes a level of permanency in the impairment of value or usefulness that, in my view, does not extend to the circumstance of white dust on the walkways.

47 Instead, I consider that the deficiency in cleanliness indicates a failure by the owner to comply with by-law 3(14)(e).

48 As it was an obligation of the strata company to enforce the by-laws under s 35(1)(a) of the pre-amendment Act, I am satisfied that it fell within the strata company's duty to authorise the additional cleaning services. Given the grace period of 'weeks and weeks' given by the cleaner in undertaking the additional cleaning at or near the entrances to Lot 16 without remedial action taken by the owner, and given the high standard of cleanliness required under by-law 3(14)(e), I find that it was reasonable for the strata company to incur the additional cleaning expense and seek reimbursement from the owner and the other two offending lot owners.

49 I also find it was reasonable to apportion the additional expense equally across the three lot owners. The presence of tradespersons for all three office fit-outs would have made a significant contribution towards the distribution of the white dust, regardless of the origins of the dust, and the most reasonably practical way of apportioning the additional expense was by an equal split between all three lot owners.

Did the strata company have the power to raise the invoice to properly maintain common property?

50 Further, and alternatively, I am also satisfied that it was within the strata company's duty to maintain cleanliness of the walkways as part of its general function to properly maintain the common property in the strata scheme. Where additional cleaning services were deemed necessary to maintain cleanliness, and in circumstances where the services were attributable to specific lot entrances and surrounds, I find that it was within the strata company's power to incur the additional cleaning expense and seek reimbursement from those specific lot owners.

51 No issue has been raised by the owner about the application of expenditure limits, and so I take the additional cleaning expense as properly falling within authorised expenditure limits.

52 I am therefore satisfied that the strata company also had the general power under s 35(1)(c) of the pre-amendment Act to raise the invoice for the additional cleaning expense against the owner.

53 For the same reasons set out in [49] above, I find that the most reasonably practical way was to apportion the additional expense equally across all three lot owners undertaking fit-out works.

Conclusion

54 For the reasons stated above, I find that the strata company properly raised the cleaning invoice against the owner.

55 Accordingly, I will dismiss the owner's application to 'render invalid' the invoice and for costs of the application.

Orders

The Tribunal makes the following orders:

1. The applicant's application is dismissed.

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

MS K Y Loh, MEMBER

26 MAY 2021