

JURISDICTION : STATE ADMINISTRATIVE TRIBUNAL

ACT : STATE ADMINISTRATIVE TRIBUNAL ACT 2004 (WA)

CITATION : PERKINS INVESTMENTS (WA) PTY LTD ATF THE PERKINS INVESTMENT TRUST and AUSTPRO MANAGEMENT SERVICES GROUP PTY LTD [2021] WASAT 71

MEMBER : PRESIDENT PRITCHARD

HEARD : 18 DECEMBER 2020; 2 MARCH 2021

DELIVERED : 4 MARCH 2021

PUBLISHED : 14 MAY 2021

FILE NO/S : CC 749 of 2020

BETWEEN : PERKINS INVESTMENTS (WA) PTY LTD ATF THE PERKINS INVESTMENT TRUST
Applicant

AND

AUSTPRO MANAGEMENT SERVICES GROUP PTY LTD
First Respondent

MILAH HOLDINGS PTY LTD T/A CENTURY 21 ADVANCE REALTY
Second Respondent

Catchwords:

Strike out - Application to dismiss proceedings under s 50 of the *State*

Administrative Tribunal Act 2004 (WA) - Where proceedings have also been commenced in the Supreme Court - Whether Tribunal has jurisdiction to hear matter - Construction of cl 30 of Sch 5 to the *Strata Titles Act 1985* (WA) - Whether matter would be more appropriately dealt with by the Supreme Court - Where Supreme Court proceedings presently stayed

Legislation:

State Administrative Tribunal Act 2004 (WA), s 50, s 50(1), s 50(3)
Strata Titles Act 1985 (WA), s 69, s 69A, s 69A(b), s 69A(f), s 69B(2)(a), s 69B(2)(d), s 69C, s 69D, s 69E, s 70, Sch 5, cl 29, cl 30, cl 30(2)
Strata Titles Amendment Act 2018 (WA)

Result:

Application dismissed

Representation:

Counsel:

Applicant : Mr P Mariotto
First Respondent : Mr DJ Pratt & Ms C Quirk
Second Respondent : No Appearance

Solicitors:

Applicant : Jackson McDonald
First Respondent : Risk Resolution Services
Second Respondent : No Appearance

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

Graham v WA Planning Commission [2014] WASCA 234
Magrath v Goldsbrough, Mort & Co Ltd [1932] HCA 10; (1932) 47 CLR 121
Retirement Care Australia (Hollywood) Pty Ltd and Turpin [2012] WASAT 125
Shergold v Tanner [2002] HCA 19; (2002) 209 CLR 126

REASONS FOR DECISION OF THE TRIBUNAL:

(These reasons were delivered orally at the conclusion of the hearing. They have been edited to correct matters of grammar and infelicity of expression.)

Introduction

1 This is an application (Application) by Austpro Management Services Group Pty Ltd (Austpro) under s 50(1) and s 50(3) of the *State Administrative Tribunal Act 2004* (WA) (SAT Act) to strike out this proceeding on the basis that it would be more appropriately dealt with by the Supreme Court of Western Australia (Supreme Court) and for the Tribunal to refer this matter to the Supreme Court. Austpro seeks an order that the proceedings be dismissed and that Perkins Investments (WA) Pty Ltd (Perkins) pay its costs of and incidental to the proceedings.

2 The second respondent to the proceedings, Milah Holdings Pty Ltd (Milah), advised the Tribunal that it would abide any decision of the Tribunal in the proceedings, did not propose to take any part in the proceedings and did not seek to be heard in respect of the Application.

3 For the reasons which follow, the Application will be dismissed.

4 In these reasons I deal with the following matters:

- (a) background to the proceedings in the Tribunal;
- (b) the disputes between the parties and the background to the litigation relating to those disputes;
- (c) principles in relation to s 50 of the SAT Act;
- (d) the parties' arguments on the Application;
- (e) the proper construction of cl 30 of Sch 5 to the *Strata Titles Act 1985* (WA) (Strata Titles Act); and
- (f) the outcome of the Application.

(a) Background to the proceedings in the Tribunal

5 The background facts to these proceedings are not in dispute. These proceedings arise out of a dispute between Perkins and Austpro in

relation to a contract dated 16 April 2018 (Contract) for the sale of a strata title property in Bunbury (Property). At the time the parties entered into the Contract the Property had not been constructed. The Property was to be one of a number of apartments in a new apartment block.

6 The Contract was thus for the purchase of the Property off the plan with settlement after the strata title was issued. Perkins paid a deposit of \$85,000 pursuant to the Contract, which is held by Milah. On 14 May 2020 Perkins issued a notice of avoidance of the Contract (Notice of Avoidance). Austpro rejected the Notice of Avoidance and insisted that Perkins proceed to settlement in accordance with the Contract.

7 Perkins commenced these proceedings in the Tribunal by an application filed on 30 June 2020. It seeks a declaration that the Contract was avoided, pursuant to s 69D and s 70 of the Strata Titles Act, an order that Milah pay the deposit to Perkins, and an order that its costs be paid by Austpro, or by Austpro and Milah. Perkins contends that its right to avoid the Contract arises under Pt 5 of the Strata Titles Act, in the form in which it existed prior to the amendments made pursuant to the *Strata Titles Amendment Act 2018* (WA) (Amendment Act). (I will refer to the Strata Titles Act as it was prior to the amendments made by the Amendment Act as the Former Act.) The substantive provisions of the Amendment Act commenced on 1 May 2020. Perkins thus contends that its statutory rights arose under s 69D and s 70 of Former Act.

8 Perkins contends that it had a right to avoid the Contract pursuant to s 69D of the Former Act because Austpro failed to provide it with certain information as it was required to do under s 69 and s 69C of the Former Act (referred to as notifiable information and notifiable variations respectively). In those circumstances, Perkins says it had a right to avoid the Contract by notice in writing given to Austpro before the settlement of the Contract.

9 It is not necessary for present purposes to set out in any detail the particulars of the alleged failure to provide the notifiable information. In summary, the failures are said to have been a failure to draw particular attention to the proposed lot on the strata plan as required by s 69A(b), a failure to provide prescribed information under s 69A(f), a failure to provide the agreement for the provision of services to the strata company as required by s 69B(2)(a) and a failure to provide details of proprietor contributions as required by s 69B(2)(d) of the Former Act.

10 Insofar as the alleged failures to provide the notifiable variations
are concerned, Perkins contends that Austpro failed to notify it of a
variation to the unit entitlements and of variations to the strata plan.

11 From the outset of the commencement of these proceedings
Austpro has disputed that the Tribunal has jurisdiction to deal with the
parties' dispute.

12 On 31 July 2020 Senior Member Aitken ordered that the question
of whether the Tribunal has jurisdiction to deal with these proceedings
be determined as a preliminary issue. On 22 September 2020 he ordered
that that preliminary issue be determined entirely on the documents.
That order was subsequently vacated by the Senior Member pending the
determination of the Application.

13 The materials before the Tribunal in relation to the Application
comprise the application made by Perkins on 30 June 2020 to commence
these proceedings, together with the annexures to that application,
Austpro's Application, a chronology and outline of submissions filed by
Austpro dated 1 September 2020, Perkins' outline of submissions in
relation to jurisdiction dated 30 July 2020 and further submissions dated
16 September 2020, an affidavit of Mr Matthew John Lang affirmed
17 December 2020 and a further affidavit of Mr Lang affirmed
23 February 2021.

14 The Application was listed before me on 18 December 2020.
On that occasion, counsel for Perkins sought to rely on Mr Lang's
affidavit of 17 December 2020, which counsel for Austpro had not had
the opportunity to consider. It was agreed the hearing would need to be
adjourned for that purpose, however counsel for Perkins was content to
make his submissions on that occasion. Counsel for Austpro indicated
that he would make his submissions when the hearing resumed after the
adjournment. It emerged in the submissions that the adjournment would
also serve the purpose of enabling the parties to inform the Tribunal
about the outcome of an application for security for costs made in related
proceedings in the Supreme Court.

15 The matter was listed for further hearing on 2 March 2021. On
that occasion, counsel for Perkins also relied on an affidavit of Mr Lang
affirmed on 23 February 2021. Counsel for Austpro indicated that he did
not have any instructions to make any submissions at all.

(b) *The disputes between the parties and the background to the litigation relating to those disputes*

16 I turn next to outline the broader dispute between the parties which
is being pursued in the Supreme Court.

17 Austpro contends that the dispute in these proceedings in relation
to compliance with the notification requirements under the Former Act is
merely one component of a broader dispute between the parties to these
proceedings and other related entities.

18 It is not necessary to delve too deeply into the detail of that
broader dispute, but it is useful to sketch out the range of the disputes
between the parties and the entities said to be related to them. In doing
so, I do not make any findings about any of those matters, but merely
refer to them to give a sense of the scope of the broader dispute said to
be relevant to the determination of the Application, as that informed
Austpro's argument on the Application.

19 Austpro says that the main project contractor for the construction
of the apartment building was a company called Perkins (WA) Pty Ltd
(PPL). Austpro says that it entered into a building contract with PPL for
the construction of the apartments (building contract). Austpro contends
that PPL is a company related to Perkins in that each shares a sole
director in common. Austpro contends that the terms of the building
contract contemplated that Perkins would be the main contractor for the
construction of the building and that the purchase of the Property
under the Contract was consideration for PPL being awarded the
building contract.

20 Construction of the apartment building commenced, but it appears
that some months later a dispute arose between PPL and Austpro in
relation to PPL's entitlement to the final payment due under the building
contract. Austpro says that that claim was adjudicated and the
adjudication outcome, which was in PPL's favour, was registered in the
District Court. Austpro says PPL then issued a notice of termination for
the building contract and demanded the return of security given pursuant
to an unconditional undertaking.

21 Austpro also says that PPL applied for adjudication of a second
claim, namely for the return of a security bond and an additional
payment from Austpro (the second adjudication). That resulted in a
determination that Austpro pay just over \$40,000 plus interest to PPL
and that it return the post-completion security to PPL also.

22 Turning now to the Contract the subject of these proceedings, Austpro disputes Perkins' entitlement to avoid the Contract on the basis of any failure to notify Perkins of notifiable information and notifiable variations. It is not necessary to determine that issue for present purposes. Rather, it suffices to note that Austpro's argument appears to be that because Perkins and PPL shared a common sole director, it is not possible that Perkins was not aware of the alleged notifiable information and notifiable variations. Austpro's argument appears to be that PPL would have been responsible for the implementation of any relevant changes during the construction of the apartments and its sole director, who was also Perkins' sole director, must, therefore, have been aware of those changes.

23 As a result of all of these disputes, three proceedings have been commenced in the Supreme Court. These were identified in the affidavit of Mr Lang affirmed on 17 December 2020. The first and most significant for present purposes is that Austpro has commenced proceedings in the Court by a writ of summons against Perkins, PPL and Mr Daniel Perkins, the director of both companies, in CIV 1964 of 2020 (Austpro proceedings).

24 Secondly, there are proceedings in the Supreme Court in relation to the second adjudication and the enforcement thereof, particularly as it concerns delivery of the post-completion security. Thirdly, there is an interpleader proceeding concerned with the post-completion security, the purposes of which is to identify the party with entitlement to that security.

25 With respect to the Austpro proceedings, the relief sought in those proceedings, as identified in the writ, includes a declaration that the Contract is binding in its terms, a declaration that Perkins, PPL and Mr Perkins are estopped from denying that they are bound by the Contract, specific performance of the Contract, an account for the profit received by PPL pursuant to the building contract and, alternatively, damages or equitable compensation. The endorsement to the writ, such as it is, does not permit the causes of action that Austpro relies upon to be discerned with any certainty. Austpro filed a statement of claim, but was ordered to file a substituted statement of claim by 29 January 2021. It has not complied with that order. The terms of the statement of claim originally filed are unclear, and consequently it is exceedingly difficult to work out what causes of action are relied upon by Austpro.

26 The statement of claim referred to various aspects of the disputes between the parties, not limited to the dispute concerning the validity of the Contract.

27 The relief sought in the statement of claim included: a declaration that the Notice of Avoidance was not validly issued in accordance with the Strata Titles Act, a declaration that Perkins was not entitled to avoid the Contract, a declaration that Perkins was not entitled to bring an application to the Tribunal for the purpose of reclaiming the deposit, a declaration that the Contract was not validly avoided and remained in force and an order for specific performance of the Contract.

28 The defendants to the Austpro proceedings made an application for security for costs. In support of that application Mr Lang swore an affidavit dated 2 February 2021 in which he referred, amongst other things, to the fact that Austpro had not sought judicial review of the adjudications to which I have referred, that PPL had served a statutory demand on Austpro on 7 January 2021, and that Austpro had not complied with that statutory demand, or applied to set it aside. Mr Lang also deposed that Austpro did not file any submissions or evidence in opposition to the security for costs application.

29 The application for security for costs was determined by Allanson J on 10 February 2021. His Honour ordered that Austpro give security for the defendants' costs in the sum of \$90,000 by payment into court, that the Austpro proceedings be stayed until such time as security was given, and that the costs of the security for costs application be paid by Austpro.

30 Perkins' solicitors have written to Austpro's solicitors inquiring whether, and if so, when, it proposes to pay the security into court. On 17 February 2021 Austpro's solicitors advised that Austpro had been advised of the order, and that the Austpro proceedings were stayed until such time as the security was paid into court. Austpro's solicitors advised that they were instructed that it intended to pay the security 'as soon as reasonably practicable', but they were not instructed as to an exact date by when that would occur.

31 As at 2 March 2021, when the hearing of the Application resumed before me, it was not disputed that the security had not been paid into court. Counsel for Austpro submitted that he did not have any instructions in relation to that matter, nor did he have instructions to make any oral submissions in relation to the Application.

32 In circumstances where it was agreed that the adjournment of the Application would enable the parties to inform the Tribunal of the progress of the Austpro proceedings, or the result of the security for costs application in the Austpro proceedings, and where counsel for Austpro on the previous occasion had conceded that, if the security for costs application were to be made, 'that would almost be determinative [of the Application]',¹ Austpro's failure to pay the security and the absence of any indication from Austpro that payment of the security was expected to be made imminently, strongly supports Perkins' opposition to the Application.

(c) *Principles in relation to s 50 of the SAT Act*

33 Section 50 of the SAT Act provides as follows:

- (1) The Tribunal may, at any time, make an order striking out all, or any part, of a proceeding if it considers that the matter, or any aspect of it, would be more appropriately dealt with by another tribunal, a court, or any other person.
- (2) The Tribunal's power to make an order under subsection (1) is exercisable only by a judicial member.
- (3) If the Tribunal makes an order under subsection (1), it may refer the matter, or any aspect of it, to the relevant tribunal, court, or person if it considers it appropriate to do so.
- (4) The Tribunal may make an order under subsection (1) on the application of a party or on its own initiative.

34 Section 50 was discussed by the Court of Appeal in *Graham v WA Planning Commission*.² The operation of s 50 was considered by each of the members of the Court. While Buss JA dissented in the result, what his Honour said in relation to the operation of s 50 on the facts of that case was not inconsistent with the views expressed by the other members of the Court, especially Beech J (as his Honour then was).

35 Chief Justice Martin noted that '[t]he section confers a discretion to be exercised by reference to the particular circumstances of the case before the Tribunal'.³

36 Buss JA observed:

In my opinion:

¹ ts 18 December 2020 p 22.

² [2014] WASCA 234.

³ *Graham v WA Planning Commission* [2014] WASCA 234 [57] (Martin CJ).

- (a) s 50(1) and s 50(3) are predicated on the assumption that; and
- (b) the Tribunal's powers under those provisions are conditional upon,

the other tribunal, the court or the other person referred to in s 50(1) and s 50(3) having jurisdiction to hear and determine the matter, or the relevant aspect of the matter, which is the subject of the pending proceeding before the Tribunal and which the Tribunal is giving consideration to striking out.

The existence of jurisdiction in the other tribunal, the court or the other person in question is necessarily implicit in the statutory text of s 50(1) and s 50(3). Further, the apparent purpose or object of those provisions, namely that there is a more appropriate forum in which the relevant matter, or the relevant part of the matter, should be adjudicated upon, would fail or be defeated if the other tribunal, the court or the other person does not have jurisdiction to hear and determine the relevant matter, or the relevant part of the matter.

Section 50 does not confer on another tribunal, a court or any other person jurisdiction to hear and determine a matter that is pending before the Tribunal in its original jurisdiction or review jurisdiction.⁴

37 Beech J said:

The power of the Tribunal under s 50 of the [SAT Act] is not a power to invest the transferee court or Tribunal with a jurisdiction it does not otherwise have. In my view, the power in s 50 can only be exercised if there is another court or other Tribunal that would, if the power under s 50 is exercised, have jurisdiction to hear and determine the matter, or the relevant aspect of it, that is the subject of the pending proceedings before the Tribunal.⁵

38 Several observations can therefore be made about s 50. First, s 50(1) presupposes the Tribunal has jurisdiction to deal with the matter before it. That subsection confers a discretion on the Tribunal to strike out a proceeding which it has jurisdiction to determine.

39 Secondly, the exercise of that discretion will arise because the Tribunal forms the view that the matter or any aspect of it would be more appropriately dealt with by another tribunal, a court or any person. If the Tribunal strikes out the proceeding then under s 50(3) it is able to refer the matter or any aspect of it to the other tribunal, court or person, if it considers it appropriate to do so.

⁴ *Graham v WA Planning Commission* [2014] WASCA 234 [134] - [136].

⁵ *Graham v WA Planning Commission* [2014] WASCA 234 [148].

40 Thirdly, it is clear that the exercise of the Tribunal's discretion
must be informed by all of the circumstances of the case. These will
include where the interests of justice lie.⁶

41 Finally, the Tribunal's exercise of discretion is premised on the
existence of jurisdiction in another tribunal, court or person to deal with
the matter, or part of it, that is before the Tribunal.

(d) *The parties' arguments on the Application*

42 The grounds of the Application are that the parties' evidence, the
matters in issue and the relief sought in these proceedings will form part
of the Austpro proceedings, that the Supreme Court has jurisdiction to
deal with all matters in dispute between the parties and to award all
necessary relief, including specific performance of the Contract, and that
the Contract and the building contract are interrelated and must be
considered part of the same overall bargain between the parties.

43 The only submissions filed by Austpro were those in relation to
the preliminary question, but those submissions also dealt with the
Application. In those submissions Austpro contended that these
proceedings should be transferred to the Supreme Court. In the course of
those submissions, counsel for Austpro made clear that Austpro did not
contend that the Tribunal did not have jurisdiction, but rather contended
that the Tribunal did not have jurisdiction to hear all of the matters in
dispute between the parties, and also contended that the Supreme Court
was the more appropriate forum to hear and determine all of the matters
in dispute between the parties.

44 Perkins resists the Application on two bases. First, it contends that
the Tribunal has exclusive jurisdiction to deal with the matter raised in
these proceedings, namely, proceedings under s 69 to s 69D of the
Former Act. As to the Tribunal's jurisdiction, Perkins' case is that cl 30
of Sch 5 to the Strata Titles Act confers exclusive jurisdiction on the
Tribunal.

45 In addition, and in the alternative, Perkins contends that if the
Tribunal considers that the Supreme Court has jurisdiction to deal with
that matter, then the interests of justice do not warrant striking out these
proceeding. As to the interests of justice argument, the circumstances
relied upon by Perkins were as follows.

⁶ *Retirement Care Australia (Hollywood) Pty Ltd and Turpin* [2012] WASAT 125 [19].

46 First, counsel submitted that by compelling a party in the position
of Perkins to commence proceedings in the Tribunal, Parliament was
indicating an intention that disputes such as this should be resolved, at
least in the ordinary course, speedily and with as little formality as
possible, according to the substantial merits of the case, and ordinarily
with each party bearing its own costs.

47 Secondly, counsel submitted that this was a dispute about a
relatively small amount of money (\$85,000) and there was a very real
risk that if the matter was referred to the Supreme Court, the legal costs
would very quickly become disproportionate to the amount in issue.

48 Thirdly, counsel submitted that there was a great deal of
uncertainty about what was actually in issue in the Austpro proceedings
and as to the future conduct of those proceedings. Counsel submitted
that the quality of the pleadings made it difficult to ascertain the issues in
dispute. He submitted that while there was a dispute about the
enforcement of the Contract, the order for the filing of a further
substituted statement of claim, which had not been complied with, meant
that the precise ambit of the issues in the Austpro proceedings could not
be discerned. Counsel for Perkins submitted that there was a disconnect
between the facts alleged in the writ and the relief sought and it appeared
that there was nothing in the writ which would entitle the plaintiff in the
Austpro proceedings to specific performance of the Contract.
Furthermore, in relation to the solvency of Austpro, he referred to the
affidavit of Mr Lang and the information it contained in relation to the
application for security for costs.

49 Fourthly, counsel for Perkins referred to the circumstance that this
was a dispute about money and nothing in the writ suggested that
damages could not be a wholly adequate remedy. In those
circumstances, he submitted that, in relation to the return of the deposit,
there would be no prejudice to Austpro if the proceedings in the Tribunal
continued because Austpro would still be left with whatever remedy in
damages it had for any alleged breaches of the Contract.

(e) The proper construction of cl 30 of Sch 5 to the Strata Titles Act - the Tribunal's jurisdiction

50 I turn to the first of the issues raised by Perkins, which concerns
the proper construction of cl 30 of Sch 5 to the Strata Titles Act.
Section 69 of the Former Act, in conjunction with s 69A and s 69C,
required that certain information be given to a purchaser of a strata lot,
either by the vendor before the purchaser signed the contract to buy the

lot (in the case of s 69 and s 69A) or by the vendor, as soon as the vendor became aware of that information (in relation to s 69C).

51 Under s 69D, failure by the vendor to give information that substantially complied with s 69 or s 69C at the time required gave the purchaser a right to avoid the contract by notice in writing given to the vendor before the settlement of the contract. Section 69E of the Former Act provided that upon the effective avoidance of the contract, the vendor was liable to repay to the purchaser all of the moneys paid under the contract and those moneys were recoverable by an action as for a debt by the purchaser. Actions for the recovery of moneys paid in respect of avoided contracts of this kind were commenced in courts of competent jurisdiction, most commonly the District Court.

52 When the Amendment Act was enacted it included transitional provisions. These are set out in Sch 5 to the Strata Titles Act. Clause 29 of Sch 5 to the Strata Titles Act provides that Pt 5 of the Former Act, which was in force immediately before the commencement day, continues to apply, as if the Amendment Act had not been enacted, to a contract for the sale and purchase of a lot in the strata titles scheme entered into before commencement day, to the buyer and seller for the contract and to any person who has been paid money in relation to that contract.

53 In this case the Contract was entered into before the commencement day. Accordingly, the provisions of Pt 5 of the Former Act continue to apply to the Contract.

54 Perkins places reliance on cl 30 of Sch 5. The proceedings in the Tribunal were commenced after the commencement day. Consequently, cl 30(2) applies. It provides:

A proceeding under this Act that could have been, before commencement day, commenced in the District Court must instead be commenced in the Tribunal and the Tribunal has jurisdiction to hear and determine the matter.

55 These proceedings could have been commenced in the District Court. They were correctly commenced in the Tribunal. The question for present purposes is whether the words 'must instead be commenced in the Tribunal and the Tribunal has jurisdiction to hear and determine the matter' confer an exclusive jurisdiction on the Tribunal, to the exclusion of the jurisdiction of any other court or tribunal, to determine the same matter.

56 The question is, what is the 'matter' to which cl 30(2) refers? In this case the matter is an application for an order for the payment of the deposit paid under the Contract. The grant of that relief will depend on the Tribunal forming the view that Austpro did not comply with an obligation to which it was subject, namely to give Perkins the notifiable information or the notifiable variations, that Perkins validly did what it had to do to avoid the contract in compliance with s 69D of the Former Act, and that Austpro is liable to repay the deposit under s 69E of the Former Act.

57 In my view, Perkins was obliged by cl 30(2) to commence the proceedings in the Tribunal. In the case of applications by a purchaser which are concerned solely with the recovery of moneys consequent on avoidance of a contract under s 69E of the Former Act, which applications had not been commenced before 1 May 2020, those applications must now be commenced in the Tribunal. However, in my view, cl 30(2) does not speak to the position of a vendor who seeks to enforce a contract for the sale of land, including a strata lot, particularly by specific performance.

58 A vendor who seeks that relief will need to apply, as Austpro did, for relief in a court with jurisdiction to grant the relief sought, in this case the Supreme Court. That will be so even if the parties' dispute concerns whether the contract was validly avoided by action of the purchaser as a result of the provision of a notice of avoidance. In my view, nothing in cl 30(2) prohibits the purchaser from advancing such an argument, whether by way of defence or counter-claim, in response to proceedings commenced by the vendor, in another court, to enforce performance of the Contract.

59 In my view, it is highly unlikely that the Parliament would have intended to bifurcate such proceedings by requiring that questions about a notice of avoidance under s 69D of the Former Act be determined exclusively in the Tribunal, while all other questions in relation to the validity of the contract for the sale of the strata lot would be dealt with in another court.

60 In my view, far clearer words of exclusion would be required to confer jurisdiction on the Tribunal, so as to exclude the Supreme Court's long-standing jurisdiction to deal with questions concerning the validity

of a contract for the sale of land and disputes about the performance of such contracts, and to grant relief including specific performance.⁷

61 Counsel for Perkins relied on the second reading speech given by the Minister in relation to the Amendment Act. In that speech the Minister referred to the objective of the various amendments, namely that the Tribunal was to become a "one stop shop" for strata disputes.⁸ The view I have taken of cl 30(2), which I note is a transitional provision, does not undermine that general approach.

62 In any event, that general purpose or object of the Amendment Act cannot support a construction of cl 30(2) which its words otherwise do not bear. In my view, there can be no doubt that the Supreme Court has jurisdiction to deal with questions about the validity of the Contract including questions as to whether the Contract has been validly avoided. However, the Tribunal also has jurisdiction to deal with the specific question of whether the Contract has been validly avoided pursuant to s 69D of the Former Act, and to order the return of the deposit.

(f) *The outcome of the Application*

63 I turn then to the application of s 50 of the SAT Act. Section 50 is capable of application in this case. The Supreme Court clearly has jurisdiction to deal with the matter which is presently before the Tribunal - whether the Contract was validly avoided by the Notice of Avoidance - as part of dealing with the broader dispute about the performance of the Contract. However, I am not persuaded that, having regard to all of the circumstances of this case, the matter before the Tribunal would more appropriately be dealt with by the Supreme Court.

64 I have reached that view having regard to the fact that the Austpro proceedings have been stayed. Had that not been the case, I may have taken a very different view of the Application in this case. That would have been so because it would be wholly undesirable for the issues in dispute in the Austpro proceedings to be bifurcated by proceedings in this Tribunal, with the potential for costs and confusion if the Tribunal determined that the Contract had been validly avoided, in circumstances where the Supreme Court was also asked to determine the same issue.

65 However, there is no indication that Austpro intends to pursue the Austpro proceedings or that it has the capacity to pay security for costs.

⁷ *Magrath v Goldsbrough, Mort & Co Ltd* [1932] HCA 10; (1932) 47 CLR 121, 134 (Dixon J); *Shergold v Tanner* [2002] HCA 19; (2002) 209 CLR 126 [34].

⁸ Western Australia, *Parliamentary Debates*, Legislative Assembly, 28 June 2018, 4159 (Ms Saffioti).

I draw the inference that it does not have that capacity because, having been ordered to pay security for costs on 10 February 2021, three weeks later there has been no progress in the payment of that sum into court. Furthermore, the failure by counsel for Austpro to make submissions, to the effect that payment was imminent, was telling.

66 In circumstances where the Austpro proceedings are stayed, to grant the Application would be an exercise in futility. More importantly, it would cause a very significant injustice to Perkins because it would be deprived of the opportunity to ventilate its case for the return of the deposit and, if successful, to recover that deposit at a minimum cost. The interests of justice, in my view, warrant the refusal of the Application in those circumstances.

67 As I am not persuaded that the matter in the Tribunal would more appropriately be dealt with by the Supreme Court, in all of the circumstances, the Application should be dismissed.

Orders

1. The first respondent's application under s 50 of the *State Administrative Tribunal Act 2004* (WA) is dismissed.
2. By 31 March 2021 the first respondent is to file and serve a response to the applicant's application together with copies of all documents upon which it wishes to rely in support of the matters set out in the response.
3. The proceeding is adjourned to a further directions hearing at 2.30 pm on 6 April 2021 to program the matter for a final hearing including by a hearing on the papers if appropriate.

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

JK

Research Associate to the Honourable Justice Pritchard

14 MAY 2021