

**JURISDICTION** : STATE ADMINISTRATIVE TRIBUNAL

**ACT** : STRATA TITLES ACT 1985 (WA)

**CITATION** : REDSET NOMINEES PTY LTD and THE OWNERS  
OF SPINNAKERS APARTMENTS STRATA PLAN  
53824 & ORS [2021] WASAT 96

**MEMBER** : DR B MCGIVERN, MEMBER

**HEARD** : 28 AND 29 APRIL 2021

**DELIVERED** : 22 JULY 2021

**FILE NO/S** : CC 589 of 2020

**BETWEEN** : REDSET NOMINEES PTY LTD  
Applicant

AND

THE OWNERS OF SPINNAKERS APARTMENTS  
STRATA PLAN 53824 & ORS  
First Respondent

TERENCE ALLAN KNIGHT  
Second Respondent

BRADLEY EDMUND TAME  
Third Respondent

FRANK TERAGNIHAEATA KOTUA  
Fourth Respondent

*Catchwords:*

*Strata Titles Act 1985 (WA)* – Proposal to build enclosure in a part lot located in strata scheme car park and to run power to the enclosure through common property – Whether structural alteration to a lot – Whether service utility easement applies – Whether proposed works reasonable – Unnecessary to determine whether approval of proposed works was unreasonably withheld by respondents

*Legislation:*

*Strata Titles (General) Regulations 2019 (WA)*, reg 73, reg 74

*Strata Titles Act 1985 (WA)* (post 1 May 2020), s 3, s 3(1), s 14(8), s 63, s 86, s 87(2), s 87(5), s 90, s 90(1), s 90(2), s 90(3), s 90(3)(a), s 92, s 93, s 197, s 197(1)(a), s 197(2), s 197(2)(d), s 199, s 200, s 200(2)(c), s 209, s 290, Pt 7, Div 2, Pt 13

*Strata Titles Act 1985 (WA)* (prior 1 May 2020), s 7, s 7(2), s 7(5), s 7A, s 7B, s 103F

*Strata Titles Amendment Act 2018 (WA)*

*Result:*

Application allowed

*Category:* B

**Representation:***Counsel:*

Applicant	:	Mr P. Lafferty and Mr G. Vellacot
First Respondent	:	N/A
Second Respondent	:	N/A
Third Respondent	:	In Person
Fourth Respondent	:	In Person

*Solicitors:*

Applicant	:	Butcher Paull & Calder
First Respondent	:	N/A
Second Respondent	:	N/A
Third Respondent	:	N/A

Fourth Respondent : N/A

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

Attorney-General (SA) v Corporation of the City of Adelaide [2013] HCA 3  
Australian Capital Television Pty Ltd v Commonwealth [1992] HCA 45;  
(1992) 177 CLR 106

Boris and Owners of Observation Rise Strata Plan 24414 [2019] WASAT 112

Commissioner of Police v Thayli Pty Ltd [2020] WASC 43

EDWF Holdings 1 Pty Ltd v EDWF Holdings 2 Pty Ltd [2008] WASC 275

Plunkett v Smith [1911] HCA 58; (1911) 14 CLR 76

Project Blue Sky Inc v Australian Broadcasting Authority [1998] HCA 28;  
(1998) 194 CLR 355

Rechichi and Johnston [2021] WASAT 79

Tipene v The Owners of Strata Plan 9485 [2015] WASC 30

Wholley and The Owners of Vivian's Corner Strata Plan 45979  
[2020] WASAT 69

**REASONS FOR DECISION OF THE TRIBUNAL:*****Introduction***

1 In broad terms, this dispute concerns the proposed construction of a lockable enclosure in two car bay areas of the applicant's lot in a mixed-use strata scheme known as Spinnakers Apartments (**Scheme**) in Rockingham. The applicant also wants to run power to that enclosure through the common property. Certain owners of other lots in the Scheme object to those works being carried out. The applicant seeks orders from the Tribunal that would have the effect of overcoming those objections.

2 The proceeding was commenced in the Tribunal on 20 May 2020 by an application made under s 90(1) of the *Strata Titles Act 1985* (WA) (**ST Act**) by the applicant, Redset Nominees Pty Ltd (**Redset**), which is the registered proprietor of one of two commercial units in the Scheme.

3 The orders sought in, and grounds for, the application were amended on 21 July 2020. The orders sought by the applicant (**Proposed Orders**) are:

1. 'An order pursuant to section 200(2)(n) of the Strata Titles Act 1985 as amended (the Act) that the owners of Spinnaker [sic] Apartments Strata Plan 53824 (the strata company) be taken to have given to Redset Nominees Pty Ltd the registered proprietor (owner) of Lot 19 (Redset) the approval required under section 7 of the Act prior to its amendment by the Strata Titles Amendment Act 2018, namely a resolution without dissent that was sought by Redset at the annual general meeting of the strata company held on Tuesday 4 February 2020 in relation to Redset's plan to enclose a part only of the car parking area that forms part of Lot 19 on Strata Plan 53824 ('First [Proposed] Order')., or in the alternative,

'An order pursuant to section 90 (1) of the Act that the particular structural alteration proposed to be made by the registered proprietor (owner) of Lot 19, Redset Nominees Pty Ltd, to part only of the car parking area that forms part of Lot 19 be exempted from the application of Part 7, Division 2 of the Act ([A]lternative First [Proposed] Order).'

2. 'An Order pursuant to section 200(1) of the Act, consequential upon the First Order or the alternative First Order, that the Owners of Spinnakers Apartments Strata Scheme 53824 forthwith consent to the Applicant's licensed electrical

contractors installing electrical wiring and ducting work that would allow for electricity to be conveyed from the electricity switchboard situated within the Lot 19 commercial building to a general power point to be installed/attached to the proposed enclosed part of the car parking area that forms part of Lot 19 on Strata Scheme 53824, such ducting to be run along and on top of the exhaust ducting that has existed on such wall since about 2009/2010 and that abuts carbay [sic] part lots 1 to 4 inclusive and carbays [sic] part lot 19 at a height of approximately 3 metres from the ground floor slab of the car bays, all as per the plan that is marked with the number 'I' and which is annexed to this amended Application [Second Proposed Order].'

- 4 In these reasons, unless otherwise stated, any reference to a statutory provision is a reference to the ST Act as amended from 1 May 2020,<sup>1</sup> and any reference to a regulation is a reference to the *Strata Titles (General) Regulations 2019 (WA) (Regulations)*. The ST Act as it stood prior to 1 May 2020 will be referred to as the **Prior ST Act**.

***Issues to be determined***

- 5 The following issues must be determined:
- a) what powers may the Tribunal exercise to resolve the dispute and, in connection with this issue, does the application concern:
    - i) a 'scheme dispute' within the meaning of s 197; and/or
    - ii) subject matter covered by s 90 (under which the application was commenced); and/or
    - iii) if not covered by s 90, then subject matter covered by some other provision qualifying the exercise of the Tribunal's general jurisdiction to resolve scheme disputes;
  - b) related to [5](a)(ii) above, do the works the subject of the application (**Proposed Works**) involve the structural alteration of a lot and, if so:

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<sup>1</sup> Pursuant to the *Strata Titles Amendment Act 2018 (WA)*, significant amendments came into effect on 1 May 2020.

- i) are those works reasonable, within the meaning of s 90; and
- ii) should an order in terms of either the First Proposed Order or the Alternative First Proposed Order be made; and
- c) related to [5](a)(iii) above, do the Proposed Works include the connection of a 'utility service' and:
  - i) if so, are those works divisible in nature from the proposed structural alteration;
  - ii) does s 63 apply to that part of the application; and
  - iii) should an order in terms of the Second Proposed Order be made?

### ***Procedural background***

6 The respondents named in the application are:

- a) the Owners of Spinnakers Apartments Strata Plan 53824 (**Strata Company**) as first respondent; and
- b) as the second, third and fourth respondents, respectively: Mr Terence Allan Knight (a registered proprietor of Lot 9); Mr Bradley Edmund Tame (the registered proprietor of Lot 5); and Mr Frank Teragnihaeata Kotua (a registered proprietor of Lot 4).

7 From an early stage, the Strata Company indicated that it would take no active part in the proceeding.<sup>2</sup> Further, from or around the time of a directions hearing conducted on 29 January 2021, Mr Knight also took no active part in the proceeding.

8 Accordingly, the dispute is essentially between Redset as applicant and Mr Kotua and Mr Tame as respondents. In these reasons, unless otherwise stated, a reference to 'the respondents' is a reference to the third and fourth named respondents.

9 A final hearing was initially listed to commence on 2 February 2021. By email correspondence dated 21 January 2021, the

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<sup>2</sup> As noted in the Tribunal's orders dated 25 August 2020.

respondents applied to adjourn that hearing. The proposed adjournment was opposed by the applicant and was the subject of a directions hearing on 29 January 2021. In the course of the directions hearing, the respondents withdrew their application to adjourn.

10 As it transpired, as a result of Perth going into a period of lockdown, the hearing date of 2 February 2021 was vacated by the Tribunal and the final hearing was rescheduled to commence on 28 April 2021.

11 By email correspondence dated 27 April 2021, Mr Kotua applied for the final hearing to be adjourned on the ground that, as a result of a further lockdown, he was unable to return to Perth from his (remote) workplace. An urgent directions hearing was listed for the afternoon of 27 April 2021, but as Mr Kotua was unable to attend that hearing, the adjournment application was considered prior to the final hearing on the morning of 28 April 2021. At that time, Mr Kotua indicated that he was able to attend the final hearing by telephone and withdrew the application to adjourn.

12 Redset has reserved its position in relation to making an application for costs arising from the two adjournment applications.

13 A final hearing was conducted on 28 and 29 April 2021 (**Hearing**), at which:

- a) the respondents, who were self-represented, appeared (Mr Kotua by telephone) and gave evidence but did not call other witnesses;
- b) the applicant was represented and called four witnesses:
  - i) Ms Flavio Trolio who, with her husband, Mr Bruno Trolio, is a director of Redset;
  - ii) Ms Vanessa Louise Phillipson, director of Rustico Tapas Pty Ltd (**Rustico**);
  - iii) Mr Joseph Ross Bradley, a civil and structural engineer; and
  - iv) Mr Norman John Brooks, an architectural building consultant;

- c) a hearing book prepared by the Tribunal and comprising documents filed in the proceeding prior to 2 February 2021 was taken into evidence (Exhibit 1), relevantly including:
- i) a search (request number 60597445) of:
    - 1) the Strata Plan 53824 (**Strata Plan**);
    - 2) the certificate of title for Lot 19 (being volume 2678 folio 119, register number 19/SP53824) (**Lot CT**); and
    - 3) the Scheme management statement (with by-laws);
  - ii) the applicant's amended orders sought and grounds dated 21 July 2021, including annexures (**Applicant's Grounds**);
  - iii) the respondents' written response to the Applicant's Grounds dated 18 August 2020;
  - iv) the applicant's reply to the response dated 8 September 2020;
  - v) the respondents' further response dated 29 September 2020;
  - vi) further documents filed by each of the applicant (on 8 September 2020) and the respondents (on 29 September 2020) largely comprising:
    - 1) minutes of the Strata Company's annual general meeting (AGM) held on 4 February 2020;
    - 2) minutes of the Scheme's council meeting held on 6 February 2019; and
    - 3) correspondence passing between the respondents (including the Strata Company) and the applicant (and its directors) and their legal representatives; and



- d) colour copies of photographs appearing at pages 104 to 107 inclusive of Exhibit 1 were tendered by the applicant (Exhibit 2).

### *Material facts*

- 14 The following facts are found on the written and oral evidence and are, except as otherwise stated, uncontentious.

### **Background**

- 15 The Scheme was created by the registration on 6 December 2007 of the Strata Plan, and is described therein as:

A Multi Level Building Comprising of [sic] 18 Residential Apartments and 2 Commercial Units situated on Lot 29 on Diagram 30914 having an address of 61 Rockingham Beach Road, Rockingham.

- 16 Lot 19 is one of the two commercial units in the Scheme. In or about 2009, Stonevale Investments Pty Ltd (**Stonevale**), an entity associated with the applicant (specifically, with the directors of Redset, Bruno and Flavio Trolio), purchased Lot 19 'off the plan'. The Lot CT shows that title was transferred to Redset on 19 March 2013.

- 17 Rustico has, from its inception in or around February 2010, leased and operated its business out of Lot 19, and has an option to renew its current lease. It therefore has a longstanding and ongoing commercial association with the premises and the applicant.

- 18 As shown on the Strata Plan, and specifically sheet 9 of the floor plan:

- a) Lot 19 is wholly located on the ground floor of the Scheme and comprises:
- i) a principal part lot occupying 172 m<sup>2</sup> of floor space within the building (**Restaurant**); and
  - ii) a further part lot occupying 70 m<sup>2</sup> of floor space comprising five car bays (**Lot 19 Bays**) located in the partly enclosed (walled) car park on the ground level of the Scheme;
- b) the Restaurant and the Lot 19 Bays are not contiguous; rather, the car bays comprising part lots of Lots 3, 4, 2

and 1 (in that order) separate the Lot 19 Bays from the back (south-eastern) wall of the Restaurant;

- c) the car bays for Lots 3 and 4 are located below part of Lot 5 (which is on the first floor) and are therefore undercover, with the single bay allocated to Lot 3 abutting part of the back wall of the Restaurant; and
- d) the only other two car bays in the ground floor car park are located opposite the Lot 4 car bays and are part of Lot 20, being the second commercial unit. (As appears from sheet 8 of the floor plan, most of the car bays belonging to the residential lots are located in the basement).

19 Ms Phillipson gave evidence, which I accept, that:

- a) Rustico is (and has always been) licensed for 120 people, and operates seven days a week;
- b) within about two years of opening, Rustico began using space external to the Restaurant to store goods, utilising a mobile cool room which she described as 'a cool room panelled box that sits on top of a four wheeled trailer ... [It has] a cooling mechanism and steps to enter it and a front door'; and
- c) because the mobile cool room was the subject of break-ins, from around 2012 Rustico sought to enclose and secure a storage area to house the mobile cool room and to store other goods.

20 It appears that in or about 2012, Stonevale and/or Rustico proposed constructing an enclosure in two of the five Lot 19 Bays. Those car bays were the two furthest from the Restaurant, opposite the ground level car park entrance and abutting the south-eastern car park perimeter wall (**Lot 19 End Bays**).

21 By letter dated 4 September 2012<sup>3</sup> the strata manager then engaged by the Strata Company, Ms Eleanor Logiudice of Logiudice Property Group, conveyed to Ms Phillipson that:

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<sup>3</sup> Exhibit 1, page 148.

[Y]our proposal to install a shed in the car bays immediately in front of the vehicle gate and the plans submitted by you on 28 August 2012 have been approved by the Strata Council of Spinnakers Apartments ... As per your email of 29 August 2012, the shed will be fully enclosed with colour bond [sic] gates and entire colour is cream to fit in with existing walls. We also understand that you consented to accept all responsibilities in the future maintenance and liabilities associated with the proposed shed.

Please notify us once you have obtained the building license from the City of Rockingham and when you have scheduled work to commence.

22 The enclosure the subject of that letter was never constructed. Rather, Rustico entered into an arrangement whereby the mobile cool room would be parked in one of the undercover car bays belonging to Lot 4, owned by Mr Kotua. There was some contention between the parties as to the precise terms and origins of that arrangement.

23 Mr Kotua gave evidence, which I accept, to the effect that:

- a) in a conversation between Mr Kotua, Ms Phillipson, the then Chair of the Scheme council, Mr Rob McGavin,<sup>4</sup> and the then strata manager, Ms Logiudice, it was agreed between them that:
  - i) it would be preferable for Rustico to utilise one of the Lot 4 car bays to park the mobile cool room, which was undercover and closer to the Restaurant;
  - ii) Rustico would be able to secure the mobile cool room within that area (by the enclosure of the open sides of the car bay with Colorbond fencing panels); and
  - iii) Mr Kotua would continue to park his vehicle in the second Lot 4 car bay and would also utilise the car bay abutting the Restaurant back wall;<sup>5</sup>
- b) that arrangement persisted, with his agreement, over the next four years;
- c) in or about 2016, Mr Kotua and his wife moved to New Zealand; and

<sup>4</sup> The registered proprietor of Lots 8, 10, 14, 15 and 18 (Exhibit 1, page 75).

<sup>5</sup> Which, from the Strata Plan, is part of Lot 3.

- d) around two years later, in or about 2018, Mr Kotua returned to Perth from New Zealand and found that Rustico was by that time utilising both of the Lot 4 car bays and the Lot 3 car bay (for the mobile cool room and storage), and the mobile cool room was connected to a common property power point located on the exterior face of the back (south-eastern) wall of the Restaurant.

24 The was some conflict in the evidence of Ms Phillipson and Mr Kotua about whether Rustico had permission to use the second car bay belonging to Lot 4 during the period 2016 to 2018 and, if so, then whether permission was properly given.

- a) Ms Phillipson said that Mr McGavin had permitted the use of both Lot 4 car bays and had been authorised to do so by Mr Kotua.
- b) Mr Kotua said he had authorised Mr McGavin to make certain arrangements on his behalf in connection with Lot 4, but that such authority did not extend to the use of the second car bay.

Nothing material turns on this part of the arrangement and I do not need to resolve the evidentiary conflict.

25 It was common ground that, following Mr Kotua's return to Perth in 2018:

- a) Mr Kotua was no longer willing to make any part of Lot 4 available for use by Rustico;
- b) the power point to which the mobile cool room had been connected was removed; and
- c) accordingly, Rustico:
- i) removed the Colorbond panels that it had erected in the undercover car bay area; and
- ii) entered into an alternative arrangement with the business operating out of Lot 20, whereby Rustico swapped the use of two of the Lot 19 Bays for its use of the Lot 20 car bays.

That arrangement persisted at the time of the Hearing.

### ***Proposed Works***

26 The Proposed Works:

- a) were the subject of applications made to the Strata Company which were:
  - i) initially made by the applicant and considered by the Strata Company at an extraordinary general meeting (EGM) on 6 August 2019; and
  - ii) subsequently made by the applicant and considered by the Strata Company at an AGM of the Strata Company on 4 February 2020 (**2020 Application**);
- b) are identified in documents annexed to the Applicant's Grounds being:
  - i) a document headed 'Plans and Specifications in Respect of Alterations to be Made Upon Part Only of Lot 19 Owned by Redset Nominees Pty Ltd' (**Specifications**);<sup>6</sup>
  - ii) drawings prepared by Norman Brooks Architectural Draughting & Design (**Drawings**), which include a floor plan of the car parking area on the ground floor of the Scheme depicting a 'proposed garage' in the Lot 19 End Bays;<sup>7</sup> and
  - iii) an annotated copy of sheet 9 of the floor plan on the Strata Plan.<sup>8</sup>

27 It is apparent from the Applicant's Grounds and Proposed Orders that the Drawings annexed to the application marked 'I' reflect the Proposed Works the subject of the application, and prevail to the extent

<sup>6</sup> Exhibit 1, pages 97-100 (marked 'II'). According to the Applicant's Grounds, at para 12, the Specifications were prepared and submitted pursuant to s 7 and s 7B of the Prior ST Act in support of the 2020 Application.

<sup>7</sup> Exhibit 1, page 96 (marked 'I') and page 101 (marked 'A'). The Drawing marked 'A' (printed 27/11/2019) is annexed to the Specifications; the Drawing marked 'I' (printed 13/07/2020) is similar but contains additional detail.

<sup>8</sup> Exhibit 1, page 102 (marked 'B'), which is annexed to the Specifications.

of any inconsistency between those Drawings and descriptions contained in the Specifications. Taking that into account, it appears from the materials outlined in [26](b) above, that the Proposed Works involve:

- a) the construction of an enclosure (**Proposed Garage**) which is to:
  - i) cover part of the Lot 19 Bays, (the applicant gave evidence, which is consistent with the Drawings and which I accept, that the Proposed Garage is to be constructed within the Lot 19 End Bays);
  - ii) measure 1810 millimetres deep, approximately 5000 millimetres wide (being wider at the front than at the rear, following the footprint of the perimeter walls) and up to 3000 millimetres high;
  - iii) be constructed of 0.35 millimetre 'Trimclad' (Colorbond) cladding (described as being 'Surfmist' in colour), fixed to a frame comprising metal beams, girts and columns. The columns are to be fixed to the concrete slab by a base plate and masonry anchors; and
  - iv) have bi-fold doors at the front, an exhaust vent on the roof, and guttering at the rear to allow for downpipe runoff drainage to existing ground level drains;
- b) the installation of a general power outlet (**GPO**) to be:
  - i) fixed to the Proposed Garage frame (to provide a power source for the mobile cool room); and
  - ii) connected to the 'tenancy switchboard' within the Restaurant with wiring to run in an electrical cable conduit along the interior surface of the Restaurant back wall, passing through that wall, and along the top of an exhaust duct that is affixed to the rear perimeter

wall of the ground level car park  
(Proposed Wiring).

***What powers does the Tribunal have to determine the application?***

28 The Tribunal's powers to determine disputes derives solely under statute (in this case, the ST Act), the construction of which is to be approached as follows:<sup>9</sup>

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 importance of construction of legislation is to begin in the text itself by regard to its context and purpose. Statutory context within immediate provisions and the whole of an Act is to be considered from the beginning of the task.

...

[Further], context includes the existing state of the law, the history of the legislative scheme and the mischief to which the statute is directed.

29 In *Rechichi and Johnston* [2021] WASAT 79 (*Rechichi*), I considered the nature and sources of the Tribunal's powers to deal with scheme disputes involving proposed structural alterations and:

- a) noted that the ST Act confers, broad jurisdiction on the Tribunal to determine scheme disputes (under Pt 13), but also confers specific powers to deal disputes concerning particular subject matter;
- b) held that the Tribunal's jurisdiction to resolve 'scheme disputes' under s 197 (which is in Pt 13) is so broad as to include and incorporate (at least in disputes between scheme participants) the jurisdiction conferred under other more specific provisions (relevantly, s 90) of the ST Act; and
- c) however, determined (at [26]) that:
  - a) where a dispute is properly characterised as being a dispute about subject matter falling under a specific provision or provisions of the ST Act (in this case, s 90), then the jurisdiction of the Tribunal to deal with

<sup>9</sup> *Commissioner of Police v Thayli Pty Ltd* [2020] WASC 43 at [29] and [31].

that dispute is limited by the terms of that provision / those provisions; and

- b) where the subject matter of the dispute in question and/or the relief sought falls outside the scope of any specific provisions, then the Tribunal must decide:
  - i) whether the Act, properly construed, evinces an intention to 'cover the field' of the subject matter within the constraints of the specific provisions; or
  - ii) whether it has 'residual' power to deal with it under its broad jurisdiction in Pt 13.

30 That approach and reasoning is consistent with established approaches to statutory construction, which include:

- a) where statutory provisions intersect, a construction that favours the greatest congruity or coherence between those provisions is to be favoured;<sup>10</sup>
- b) each provision in a legislative instrument should have 'work to do';<sup>11</sup> and
- c) accordingly, if it is clear that a specific provision was intended to deal with a topic, it will usually prevail over general provisions in relation to that topic.<sup>12</sup>

31 It follows from the above that it is important in each case to:

- a) characterise and identify the subject matter of the dispute in question and the relief sought;

<sup>10</sup> *Project Blue Sky Inc v Australian Broadcasting Authority* [1998] HCA 28; (1998) 194 CLR 355 (*Project Blue Sky Inc*) at [70]: 'A legislative instrument must be construed on the prima facie basis that its provisions are intended to give effect to harmonious goals ... Reconciling conflicting provisions will often require the court to determine which is the leading provision and which the subordinate provision, and which must give way to the other'. In *Rechichi*, for example, the limits imposed by s 90 could not simply be by-passed by determining the dispute under s 197. To do so would be inconsistent with the purpose evinced in s 90.

<sup>11</sup> *Project Blue Sky Inc* at [71].

<sup>12</sup> And will certainly do so where it is intended to deal with that topic exhaustively: *Australian Capital Television Pty Ltd v Commonwealth* [1992] HCA 45; (1992) 177 CLR 106 at 213, Gaudron J. In the context of considering conferrals of specific and general power, see: *Plunkett v Smith* [1911] HCA 58; (1911) 14 CLR 76 at 81, Griffith CJ and at 83, O'Connor J. Caution must be exercised however, and ultimately purpose prevails: *Attorney-General (SA) v Corporation of the City of Adelaide* [2013] HCA 3.



- b) determine whether there are any specific provisions governing the resolution of disputes concerning that subject matter; and
- c) determine the dispute in accordance with the requirements and limitations (if any) of the relevant provisions conferring power on the Tribunal.

32 Of course, a proceeding may involve a dispute between parties that concerns more than one matter. In each case, it will be necessary to consider whether the subject matter in dispute is divisible or indivisible. That identification is a practical exercise; it is undertaken in the context of, and with regard to, the legislative framework and language.

### **Does the application concern a 'scheme dispute'?**

33 In this case, there is no doubt that the proceeding meets the description of a 'scheme dispute' under s 197(1), being:

- a) between a dispute between 'scheme participants' within the meaning of s 197(1)(a) and s 197(2), namely:
  - i) the applicant, who is a member of the strata titles scheme (being an owner for the time being of a lot in the Scheme);<sup>13</sup> and
  - ii) the first named respondent which is the Strata Company,<sup>14</sup> and the second, third and fourth named respondents who are each members of the Scheme; and
- b) about matters contemplated within the broad ambit of s 197(1)(a), being:
  - i) arguably (noting the applicant's submissions), a resolution or decision of a strata company or the council of a strata company, including its validity;<sup>15</sup> or

<sup>13</sup> ST Act, s 197(2)(d) read with s 3(1) and s 14(8).

<sup>14</sup> ST Act, s 197(2)(a).

<sup>15</sup> ST Act, s 197(1)(a)(iv). However, see [54]-[55] below.

- ii) any other matter arising under this Act or the scheme by-laws.<sup>16</sup>

34 The question then becomes whether all or any part of that dispute must be determined in accordance with a more specific provision of the ST Act which might operate to limit or qualify the exercise of the Tribunal's general power under s 197 to resolve scheme disputes. As observed in *Rechichi*:

16 Subject-matter specific provisions deal with (amongst other things) orders that may be made, and limitations in respect of making orders, concerning the core subject matter to which they are directed. They will usually be silent on additional, incidental orders that may be sought or required.

...

18 Incidental matters may arguably:

- a) be more squarely dealt with in other specific provisions under the ST Act ... and/or
- b) fall under broader powers of the Tribunal to resolve strata scheme disputes[.]

### **Does the application concern subject matter governed by s 90?**

35 Given that the present application was commenced under s 90, it is logical to begin with that provision which, along with the other provisions in Pt 7 Div 2, deals with the structural alteration of lots.

36 When identifying whether a dispute concerns subject matter to be determined under Pt 7 Div 2, and whether that subject matter is divisible or indivisible from any other part of the dispute, regard may be had to:

- a) the nature of the proposed works;
- b) the connection between those works and a lot; and
- c) the legislative language and structure.

37 The key provisions (for these purposes) of Pt 7 Div 2 are set out below.

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<sup>16</sup> ST Act, s 197(1)(a)(vi).

- a) Pursuant to s 86, 'structural alteration of a lot' means 'the erection of a structure within the lot', or 'an alteration of a structural kind to, or extension of, a structure within the lot'.
- b) Relevantly, under s 87(2), the owner of a lot in a strata scheme must not cause or permit the structural alteration of the lot without the prior approval, expressed by resolution without dissent, of the strata company.
- c) Section 86 defines 'structure' by reference to the Regulations, and reg 73 in turn provides that a 'structure' includes any:

[G]arage, carport, shed or other building or improvement (whether free standing or annexed to or incorporated with any existing building on the lot) -

- (a) the construction or erection of which is required to be approved by the local government or any other authority; or
- (b) the area of which is to be taken into account for the purposes of determining the plot ratio restrictions or open space requirements for the lot.

38 As to what constitutes a lot:

- a) pursuant to s 3(1):
  - i) the common property of a strata scheme is that part of the land which does not comprise the lots on the strata plan; and
  - ii) 'lot' in relation to a strata scheme<sup>17</sup> relevantly means:

one or more cubic spaces forming part of the parcel subdivided by the strata scheme, the base of each such cubic space being designated as 1 lot or part of 1 lot on the floor plan forming part of the scheme plan, being in each case, but subject to clause 3AB, cubic space the base of whose vertical boundaries is as delineated on a sheet of that floor plan and

<sup>17</sup> Other than in relation to a single tier scheme (which this is not) to which s 3AB may apply.

which has horizontal boundaries as ascertained under subsection (2)[;]

- iii) 'floor plan' is relevantly defined as a plan, consisting of one or more sheets, which defines by lines the base of each vertical boundary of every cubic space forming the whole of a proposed lot, or the whole of any part of a proposed lot, to which the plan relates; and
- b) the boundaries of a cubic space are always to be determined in accordance with a description<sup>18</sup> included in the relevant sheet of the floor plan for a strata plan. That is because:
  - i) the 'default' boundary definitions contained in s 3(2)(a) are stated to be subject to s 3(2)(b), which in turn refers to 'such boundaries as are described on a sheet of the floor plan relating to that cubic space'; and
  - ii) pursuant to s 3(2A), where a strata plan creates a boundary external to a building, the boundaries of that space are defined by any dimensions included in the floor plan in relation to that boundary.

39 In this case, sheet 9 of the floor plan forming part of the Strata Plan relevantly contains the following descriptions:

THE STRATUM OF THE CAR BAYS EXTENDS FROM THE UPPER SURFACE OF THE GROUND FLOOR SLAB OF THE CAR BAY TO 3 METRES ABOVE THE UPPER SURFACE OF THE GROUND FLOOR SLAB, EXCEPT WHERE COVERED.

THE BOUNDARIES OF THE LOTS OR PARTS OF THE LOTS WHICH ARE BUILDINGS SHOWN ON THE STRATA PLAN ARE THE INNER SURFACES OF THE WALLS, THE UPPER SURFACE OF THE FLOOR, AND THE UNDER SURFACE OF THE CEILING, AS PROVIDED BY [S] 3(2)(A) OF THE [ST ACT].

Accordingly, the Proposed Works will only be within Lot 19 to the extent that they do not occupy floor space falling outside the

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<sup>18</sup> Subject to that description meeting the requirements prescribed by the Regulations (relevantly, reg 6).

dimensions depicted on the Strata Plan as the Lot 19 Bays, and do not exceed 3 metres in height.

40 As regards subject matter, the present proceeding is distinguishable in kind from *Rechichi*. That case:

- a) concerned the question of whether, as a preliminary issue, the Tribunal had jurisdiction to determine the application;
- b) involved a dispute about the proposed the construction of a second storey to a unit in a single tier strata complex. That work would have entailed the removal of a large part of the existing roof of, and the alteration of the height of, the building. In that context, I concluded that:
  - i) the structural alteration in question, which would have had the effect of extending the boundaries the lot and incorporating an area presently comprising common property, was not an alteration 'within a lot' and therefore did not fall within the scope of s 90; and
  - ii) s 90 was intended to cover the field of the subject matter of the dispute,<sup>19</sup> which subject matter was a structural alteration affecting a strata lot and involving the alteration of lot boundaries. Accordingly, that subject matter could not be dealt with inconsistently under other provisions of the ST Act; and
- c) was wholly concerned with a single, integrated structural alteration extending beyond the boundaries of the lot. In that case, the structure itself, and therefore the subject matter of the dispute, was not divisible in nature (that is, no sensible distinction could be drawn between the principal structure - a second storey extension - and any other part of the proposed works).

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<sup>19</sup> See, in particular, *Rechichi* at [62].

41 In this case, the position is different. The Proposed Works include the erection of a structure, and the running of power to that structure. While they are associated works, they are of a distinct character.

42 I find that:

- a) the Proposed Garage falls within the meaning of 'structure' under s 86 and reg 73 (being a garage or shed that requires local government approval);<sup>20</sup>
- b) the GPO, which is to be affixed to the frame of the Proposed Garage, forms part of the structure; and
- c) those works therefore constitute a 'structural alteration' pertaining to a lot, which is the subject matter dealt with (comprehensively) by s 90.

43 Accordingly, the limits of the power conferred by s 90, and the grounds for exercising that power, govern the resolution of the dispute and the grant of any relief concerning the Proposed Garage (and GPO).

44 The Proposed Wiring is divisible and distinguishable in nature because:

- a) it connects to, but does not constitute, the principal structural alteration (being, in this case, the Proposed Garage);
- b) it can sensibly be discerned and dealt with distinctly from the construction of the Proposed Garage;
- c) wiring in conduit does not constitute a structure within the meaning of reg 73, and the running of such does not therefore constitute a 'structural alteration';
- d) of particular relevance, insofar as the Proposed Wiring is to run through (and therefore beyond the inner surface of) the back wall of the Restaurant and along the ducting on the rear perimeter wall of the car park, it is not work affecting a lot (in the sense that that phrase was used in *Rechichi*). Rather, it is work involving the use of and/or interference with common property for

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<sup>20</sup> It was submitted by the applicant, and it was not contentious, that such approval has been sought from the City of Rockingham (although that application did not form part of the bundle of documents filed with the Tribunal).

the benefit of a lot (that benefit being the provision of power to a part lot); and

- e) having regard to the statutory context, the ST Act contains provisions that deal separately with:
  - i) the use of and/or interference with common property; and
  - ii) utility services.

45 Accordingly, insofar as the dispute concerns the Proposed Wiring, it is not subject matter governed by s 90. Rather, it is an incidental matter that may:

- a) be more squarely dealt with in other specific provisions; and/or
- b) fall under the broad powers of the Tribunal to resolve strata scheme disputes under Pt 13.

Those issues are dealt with later in these reasons.

### ***Can and should the Proposed Garage be exempt from Pt 7 Div 2?***

46 Under s 90, the Tribunal may make an order exempting a proposed structural alteration from Pt 7 Div 3. However, the discretion of the Tribunal to make such an order is:

- a) enlivened only if the proposed structural alteration is 'to a lot' (that is, within a lot);<sup>21</sup> and
- b) should only be exercised if the Tribunal is satisfied that the structural alteration of the lot is reasonable, having regard to the merits of the alteration and the interests of all of the owners of the lots in the use and enjoyment of their lots and the common property.<sup>22</sup>

### **Is the power to exempt enlivened?**

47 In this case, the Proposed Garage is, as reflected in the Drawings and as found above, intended to be built within the vertical boundaries of the Lot 19 Bays. Further, the proposed maximum height of 3 metres is within the horizontal boundaries of the Lot 19 Bays. It is unclear

<sup>21</sup> See *Rechichi* at [29] and [34].

<sup>22</sup> ST Act, s 90(3).

whether the exhaust vent depicted on the Drawings is included within the proposed maximum height. To the extent that it is, then:

- a) the application concerns a structural alteration within Lot 19; and
- b) the Tribunal's power under s 90 is enlivened.

### Exercise of discretion

48 An application may be made to the Tribunal for an order under s 90 whether or not approval for the alteration has been sought from the strata company and even if such approval has been validly refused.<sup>23</sup>

49 In this case, the applicant had sought approval of the Proposed Works (see [26](a) above), which approval was refused. Specifically:

- a) I find that at and following the AGM held on 4 February 2020:<sup>24</sup>
  - i) the Proposed Works were not approved by resolution without dissent of the Strata Company;<sup>25</sup>
  - ii) four lot owners (including the respondents) voted against the proposal on the stated ground that the Proposed Works would 'result in a structure that is visible from outside the lot and that is not in keeping with the rest of the development'; and
- b) it is asserted by the applicant,<sup>26</sup> and it was not contested by the respondents, that an application for approval of the Proposed Works was refused on the same ground at the EGM held on 6 August 2019.

50 The ground stated for the refusal reflects the limitation under s 87 that, if an application for approval is made under that section, then the grounds upon which the owner of another lot may refuse to give approval are circumscribed by s 87(5),<sup>27</sup> as follows:

<sup>23</sup> ST Act, s 90(2).

<sup>24</sup> Recorded in the minutes of that meeting (Exhibit 1, pages 77-79).

<sup>25</sup> As required by s 87(2) of the ST Act and, at the time of the meeting, by s 7(2) of the Prior ST Act.

<sup>26</sup> At paras 6 to 7 of the Applicant's Grounds.

<sup>27</sup> And, at the time of the meetings, were similarly circumscribed by s 7(5) of the Prior ST Act.



- (a) that the carrying out of the proposal will breach the plot ratio restrictions or open space requirements for the lot; or
- (b) in the case of a lot that is not a vacant lot, that the carrying out of the proposal -
  - (i) will result in a structure that is visible from outside the lot and that is not in keeping with the rest of the development; or
  - (ii) may affect the structural soundness of a building; or
  - (iii) may interfere with a statutory easement;
 or
- (c) any other ground specified in the regulations.<sup>28</sup>

<sup>51</sup> In oral submissions made on behalf of the applicant, I was invited to find that the Strata Company's (and the respondents') approval of the Proposed Works was unreasonably withheld.<sup>29</sup> Counsel for the applicant:

- a) submitted, citing *Wholley and The Owners of Vivian's Corner Strata Plan 45979* [2020] WASAT 69 (*Wholley*) in support, that:

[We] will be arguing that you have to analyse whether or not the refusal is, in fact, reasonable and we say that it's not[;]<sup>30</sup>

- b) however, later conceded (properly, in my view) that, in the exercise of the Tribunal's jurisdiction under s 90, such a finding is not required.<sup>31</sup>

<sup>52</sup> The amendments to the ST Act introduced by the *Strata Titles Amendment Act 2018* (WA) included significant changes to the nature of the jurisdiction exercised by the Tribunal, and the grounds for exercising that jurisdiction, in relation to disputes concerning structural alterations to a lot.

<sup>28</sup> Regulation 74 specifies additional grounds for refusal being that that the carrying out of the proposal: (a) will contravene a specified by-law or specified by-laws of the strata company; or (b) may interfere with a short form easement or restrictive covenant or any other easement or covenant affecting the parcel that is shown on the scheme plan or registered against the parcel.

<sup>29</sup> ts 190-191, 29 April 2021.

<sup>30</sup> ts 86, 29 April 2021.

<sup>31</sup> ts 194-195, 29 April 2021.

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Previously, the Tribunal's jurisdiction to deal with such disputes arose under s 103F of the Prior ST Act, pursuant to which the Tribunal:

- a) was empowered to make an order declaring that the strata company's approval (under s 7 or s 7A of the Prior ST Act) was *deemed to have been given*,<sup>32</sup>
- b) could only make such an order if it was satisfied that that the strata company's approval *should have been given but was unreasonably withheld*; and<sup>33</sup>
- c) exercised its review jurisdiction;<sup>34</sup> pursuant to which it was required to:

[E]xamine the ground or grounds of dissent to decide whether on the balance of probabilities the approval sought pursuant to s 7 and s 7B of the [Prior] ST Act should have been granted 'but was unreasonably withheld' by the respondent ... such as arriving at the decision arbitrarily or without logic or reason[.]<sup>35</sup>

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By way of contrast, it is clear from the language of s 90 that:

- a) the effect of an order made under that provision is to *exempt* a particular structural alteration to a lot from the operation of Pt 7 Div 2 (and therefore to exempt it from the need to be approved by the strata company, rather than to deem such approval);
- b) the exercise of the Tribunal's discretion to make such an order is subject to it being satisfied that the proposed structural alteration of the lot *is reasonable*, having regard to the merits of the alteration and the interests of all the owners of the lots in the use and enjoyment of their lots and the common property;
- c) the jurisdiction exercised by the Tribunal is, by reason of s 209, its original jurisdiction;<sup>36</sup> and

<sup>32</sup> Reflecting the terms of the First Proposed Order.

<sup>33</sup> Reflecting the submission referred to in [51](a) above.

<sup>34</sup> *Tipene v The Owners of Strata Plan 9485* [2015] WASC 30.

<sup>35</sup> *EDWF Holdings 1 Pty Ltd v EDWF Holdings 2 Pty Ltd* [2008] WASC 275 at [191]; applied in *Boris and Owners of Observation Rise Strata Plan 24414* [2019] WASAT 112 and *Wholley*.

<sup>36</sup> ST Act, s 290: unless otherwise provided in the ST Act, a proceeding before the Tribunal under the ST Act comes within the Tribunal's original jurisdiction.

- d) in the exercise of its discretion, the Tribunal is not required to review or consider the merits of any prior decision of the strata company, nor is it limited to the basis upon which any such prior decision was made (indeed, no prior decision is necessary).

55 Construing s 90(3)(a), and having regard to its legislative context within Pt 7 Div 2, it is apparent that the grounds identified in s 87(5) will be among the considerations relevant to - but insufficient to determine - a finding about whether a proposed structural alteration of a lot is reasonable. In considering those matters, the Tribunal must form its own views on the merits; it is not concerned with any prior assessment of those merits by the strata company or others.

**Is the Proposed Garage a reasonable structural alteration to Lot 19?**

56 The respondents' contentions against a finding that the Proposed Garage is a reasonable alteration to Lot 19 may be broadly summarised as follows:

- a) Mr Tame limited his opposition to the Proposed Garage to the ground that it may have an adverse impact on the structural soundness of the building,<sup>37</sup> because:
- i) it may cause or contribute to cracking, which is already evident, of the ground level concrete slab (causing leaking to the basement level car park); and
  - ii) it may not be sufficiently wind rated to withstand the wind gusts to which it would be subjected.
- b) Mr Kotua shared the above objections and added that the Proposed Garage is not a reasonable structural alteration to Lot 19 because:
- i) it would, or may, breach a Scheme by-law, being by-law 23 (which prohibits an owner or occupier from doing or permitting any act or

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<sup>37</sup> ts 26, 28 April 2021.

thing that will result in excessive stress or floor loading to their lot or common property);<sup>38</sup>

- ii) it will be visible from outside Lot 19, including to lot owners using the car park, those entering the car park through the entry gate, and particularly to the three or four lots whose back windows overlook the ground level car park;
- iii) it will not be in keeping with the rest of the development because it will be constructed of Colorbond metal and the building is constructed of concrete and steel;
- iv) it will expand the footprint of the Restaurant, with negative associated implications for noise, aesthetics and car parking which will impact the use and enjoyment of other lots;
- v) its use for storage would not be in keeping with the nature and intended use of the car park; and
- vi) its access by employees of Rustico may contribute to the risk of physical injury.

57 The applicant's contentions in support of a finding that the Proposed Garage is a reasonable alteration to Lot 19 may be broadly summarised in terms that:

- a) Lot 19 is one of only two commercial units in the Scheme and has always been tenanted by a restaurant, which has had a longstanding need and practice in relation to the storage of goods outside the Restaurant part lot;
- b) most lots in the Scheme have undercover parking;
- c) the ground level car park already contains structures, specifically shade sails over certain car bays, that are not part of the building;
- d) the Proposed Garage will:

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<sup>38</sup> Exhibit 1, page 26 (the Sch 1 by-laws having been added to by a Management Statement, instrument number K437117 SM, registered in respect of the Scheme on 6 December 2008).

- i) be in a colour which is closely matched to and compatible with the colour of the building walls;
  - ii) be visible from some but not all of the other lots, and in those instances limited to being viewed from above by lot windows overlooking the car park;
  - iii) in the circumstances, be in keeping with the development;
  - iv) improve the security and amenity of the car park by providing secure storage for Rustico's mobile cool room and other goods;
  - v) be freestanding (albeit fixed to the concrete slab of the car park) and constructed within the boundaries of the lot;
  - vi) not impact adversely on the structural soundness of a building; and
  - vii) not breach any by-law concerning loading; and
- e) an application for a similar structure in the same location was approved by the Strata Company in 2012.

58 For the reasons that follow, I am satisfied that on balance the Proposed Garage is a reasonable structural alteration to Lot 19 within the meaning of, and for the purposes of, s 90.

59 In relation to questions concerning the design and structural soundness of the Proposed Garage, and its impact on the structural soundness of the Scheme building, the respondent relied on the evidence of Mr Brooks and Mr Bradley, both of whom gave oral evidence at the Hearing.<sup>39</sup>

60 Mr Brooks gave evidence, which I accept, that he:

- a) qualified in structural engineering, civil engineering, and building, at Cambridge University, holds a Diploma in Roads and Railways, a Higher National

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<sup>39</sup> See [13](b) above.

Certificate in Civil Engineering, Structural Engineering and an Ordinary National Certificate in Building Construction, and is a member of the Australian Institute of Engineers and the Society of Civil Engineers Technicians;

- b) is self-employed as an architectural building consultant and, while qualified in structural engineering, does not practise as a structural engineer;
- c) undertook the design of the Proposed Garage and prepared the Drawings; and
- d) initially prepared the Drawings as part of an application submitted, in or about 2019, to the City of Rockingham for building approval for the Proposed Garage, which approval is pending.

61 In relation to the structure and design of the Proposed Garage, Mr Brooks gave evidence to the effect that it:

- a) is to be a lightweight steel-framed construction, bolted to the existing slab but otherwise free-standing;
- b) is to be constructed in Colorbond steel of a 'cement-like' colour (which he thought to be 'Shale Grey');
- c) will comprise two side walls and with bi-fold doors at the front, and a roof sloping 'left to right' with a downpipe that will release water onto the car park to be drained by existing gullies and grates;
- d) will not impact the volume of water flowing into the car park drainage (because that part of the ground level car park is not undercover); and
- e) is designed to house a mobile cool room on a trailer, and will be up to 3 metres in height.

62 In cross-examination, Mr Brooks:

- a) did not accept that the Proposed Garage would be unable to withstand wind gusts, stating that wind loading was a matter for Mr Bradley and that the Proposed Garage would be constructed in accordance

with any wind loading specifications he determined; and

- b) did not accept that the Proposed Garage would not be in keeping with the development, noting that any application for planning approval must address the 'visual aspect' of the proposed design and this had been done as part of the application lodged with the City of Rockingham (which application he understood is to have been provisionally approved); and
- c) opined that the design considerations for a car park (containing, in this instance, a bin store) are distinguishable from areas such as recreation spaces.

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Mr Bradley gave evidence, which I accept, that he:

- a) holds qualifications in civil and structural engineering from Curtin University and has been an engineer for over 50 years;
- b) is self-employed as a civil and structural engineer;
- c) provided the structural certification (forming part of the applicant's documents)<sup>40</sup> for the Proposed Garage (**Certification**);
- d) was engaged to provide a structural engineering opinion in relation to the likely impact, if any, of the Proposed Garage (and associated fixings) in relation to the Scheme building; and
- e) has attended and inspected the site and had regard to the Drawings prepared by Mr Brooks.

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In the Certification, Mr Bradley stated:

- a) in relation to wind loading, and by reference to AS/NZS 1170.2:2011 Structural Design Actions - Wind Action, in conjunction with AS/NZS 1170.2:2002 Structural Design Actions - Permanent, Imposed and Other Actions:

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<sup>40</sup> Exhibit 1, pages 114-115.

The structural members and details nominated including member sizes, and connection details, are structurally adequate to resist loads as specified in the above standards[;]

and

- b) by reference a photograph depicting cracks on the car park floor:

R.C. SUSPENDED FLOOR has several repaired surface shrinkage cracks which will have no structural impact to the Proposed placement of a Garage.

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Mr Bradley gave oral evidence to the effect that:

- a) in relation to floor loading, in his view the intended location of the Proposed Garage is 'ideal', in that:
- i) the car park floor is 300 millimetres thick (approximately twice the thickness of a residential floor) and designed for dynamic loading; and
  - ii) that floor is, in the vicinity of the Lot 19 End Bays, supported by a 'monstrous' beam, being 1200 millimetres wide and 800 millimetres deep;
  - iii) as a result, this area of the car park has an 'enormous' loading capacity;
  - iv) the weight of the Proposed Garage is around 2,350 kilograms so, with the mobile cool room, the total load on the Lot 19 End Bays will be in the order of 2,400 kilograms; and
  - v) there is more than adequate support for the Proposed Garage in the Lot 19 End Bays;
- b) in relation to the cracking evident in the ground level car park slab, those cracks:
- i) are, in his opinion, shrinkage cracks (being cracks resulting, during the curing process,



from heat coming out of the slab breaking the surface tension of the concrete); and

- ii) will not have any impact from a structural perspective on the Proposed Garage; and
- c) in light of the above, the Proposed Garage will not overload the floor or cause any further cracking of or leakage of water through the slab.

66 Mr Bradley explained that, once building approval had been obtained, further structural engineering plans would be required to obtain a building permit for the Proposed Garage. At this stage therefore, the structural engineering design elements were not yet fully incorporated into the design, but would be developed and included as a pre-requisite for obtaining of a building permit. With that qualification, in cross-examination Mr Bradley:

- a) reiterated his view, in relation to wind loading, that the Proposed Garage, being a 2.4 tonne structure over a 15 m<sup>2</sup> area, would be able to withstand predicted wind gusts (within building code requirements for an M2 wind rating), noting that turbulence would be factored in to the structural engineering plan;
- b) conceded that to determine with certainty the cause of the observable cracks in the floor of the ground level car park, any material used to fill the cracks would need to be removed and infrared tests conducted; and
- c) nevertheless, reiterated his view that the cracks were caused by shrinkage and that the Proposed Garage, including the masonry bolts used to fix it, would have no adverse effect on the loading or cracking of the concrete slab.

67 The respondents argued that the evidence of Mr Brooks and Mr Bradley was based on assumptions rather than proof, and by implication could not be relied upon. I do not accept that submission.

- a) Although there were some matters (particularly in relation to the cause of the cracks in the car park floor) that could not be conclusively established, I am satisfied that there was a sufficient basis upon which to

accept the opinion evidence of both Mr Bradley and Mr Brooks.

- b) Each is qualified and experienced in his field and each appropriately confined their opinions to matters within their expertise.
- c) Further, the respondents led no competing independent expert evidence.

68 Supporting Mr Bradley's evidence, I note that the cracking in the ground level car park floor is already evident, including in the vicinity of the Lot 19 End Bays (where, to date, the mobile cool room has not been located). Whatever the cause, therefore, the evidence suggests that the issue is not one of load or the penetration of fixings.

69 I find that the Proposed Garage is, on the evidence before me, unlikely to impair the structural soundness of the building or to overload the car park floor (in breach of by-law 23, or otherwise).

70 Further, although the Proposed Garage will be visible from outside Lot 19 (including from the back windows of some lots), it is generally in keeping with the development, noting that:

- a) it will be in keeping with the colour scheme of the development;<sup>41</sup>
- b) it will be reasonably in keeping with the nature of its location within the development (a car park); and
- c) the car park already has structures constructed of materials other than steel and concrete.

71 I find that the use of the common property car park by other lot owners will not be unreasonably interfered with. Further, given the long (and apparently accepted) practice of the applicant's tenant of having a mobile cool room located in the car park, there is merit in securing that facility in the interests of all users of the car park.<sup>42</sup>

72 Although Mr Kotua led evidence regarding previous noise and amenity difficulties associated with the operation of the restaurant, I do

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<sup>41</sup> Notwithstanding that there was some uncertainty in the evidence about the name of the proposed colour (variously described as 'Surfist' or 'Shale Grey').

<sup>42</sup> Which finding finds support in the approval by the Strata Company of a similar proposal in 2012.

not accept that the Proposed Garage will have any material bearing on those matters.

73 On balance, having regard to the merits of the proposal and the interests of all Scheme owners in the use and enjoyment of their lots and the common property, I am satisfied that the structural alteration of Lot 19 by the erection of the Proposed Garage, is reasonable.

***Is the Proposed Wiring a utility service under s 63?***

74 The Proposed Wiring was not initially the subject of any separate, substantive contentions on the part of the parties. Each party treated the merits of this part of the dispute as being tied to the merits of the application in relation to the Proposed Garage.<sup>43</sup>

75 As noted above:

- a) the question of the Proposed Wiring is incidental to but distinct in nature from that of the Proposed Garage; and
- b) regard must be had to any specific provisions dealing with the subject matter of that part of the dispute.

76 Notably, s 63 provides for utility service easements in strata schemes.

- a) Specifically, pursuant to, s 63(1):

[A] utility service easement exists for the benefit and burden of each lot and the common property in a strata titles scheme to the extent reasonably required for the provision of utility services to each lot and the common property.

- b) Such an easement entitles the strata company, and an owner of a lot in the strata titles scheme to install and remove utility conduits,<sup>44</sup> (although those rights must be exercised, as far as practicable, so as to minimise

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<sup>43</sup> In cross-examination, Mr Tame did however point to the potential consequences of multiple lot owners running power to car bays, suggesting that in such circumstances the impact on the Scheme common property would be unreasonable.

<sup>44</sup> And to examine, maintain, repair, modify and replace utility conduits: ST Act, s 63(2).

interference with the use and enjoyment of lots and common property in the strata titles scheme).<sup>45</sup>

- c) Relevantly, pursuant to s 3, 'utility conduit' means a conduit for the provision of a 'utility service', the latter term including electricity.

77 Given the correlation between the nature of the works involved in the Proposed Wiring and the terms of s 63, I invited the parties to address the Tribunal on the relevance of that provision to the disposition of the dispute and the relief sought.

- a) The respondents, who were self-represented, understandably did not address this issue directly.
- b) Lead counsel for the applicant submitted that:
- i) 'easement' is not defined in the ST Act, but should be understood as applying to land; and
- ii) because the Proposed Wiring was to be attached to ducting and not to the land, s 63 did not apply.
- c) An alternative position was put by co-counsel for the applicant, who submitted that the reference in s 63 to 'the owner of a lot' and to the installation of utility conduits supported the view that s 63 applies to this part of the application.

78 I find that s 63 applies to the dispute concerning the Proposed Wiring for the reasons that follow.

- a) I do not accept the contention that 'easement' is undefined under the ST Act. For these purposes, the only easement in question is a 'utility service easement' the nature and operation of which is clearly defined in s 63(1) and s 63(2).
- b) Further, I do not accept the contention that because the Proposed Wiring is to be fixed to a duct, it does not burden 'land' comprising the common property:

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<sup>45</sup> ST Act, s 63(3).

- i) It is clear from the language of the provision that a utility service easement is not confined to earthworks. In any event, it is trite law that fixtures may form part of the land (and, therefore, an easement can operate over fixtures forming part of a servient tenement); and
- ii) I find that the relevant car park perimeter wall and ducting affixed to it form part of the common property of the Scheme and as such are capable of being subject to a utility service easement under s 63.
- c) The dispute concerns the installation by the owner of a lot (the applicant) of a conduit through which a utility service is proposed to be run through common property for the benefit of Lot 19. The terms of s 63(1) and s 63(2) are therefore engaged.

79 The conclusion above is, however, insufficient to dispose of the dispute about the Proposed Wiring.

- a) As noted above, s 63(4) provides that any rights conferred by a utility service easement must be exercised so as to minimise, as far as reasonably practicable, interference with the use and enjoyment of lots and common property in the strata titles scheme.
- b) Further, s 63(7) clearly contemplates that there may be some dispute about the location of utility conduits under a utility service easement, and provides that such matters are to be resolved with the object of fairness, taking into account the options that are reasonably available to give effect to the easement.
- c) Orders may be made and are contemplated in respect of the above matters under s 200(2)(c).

80 In this case, I am satisfied that, pursuant to s 63, the applicant, as the owner of Lot 19, has the benefit of a utility service easement and should, on the merits, be authorised to run a utility service conduit to connect a power supply to the Lot 19 Car Bays as proposed because:

- a) in light of the determination in relation to the Proposed Garage (at [73] above), it is also reasonable that electricity be run to that structure; and
- b) the intended location of the Proposed Wiring is reasonable, noting that its position along existing ducting is minimally intrusive and there is no evidence that would allow me to conclude that the proposed conduit will interfere with the operation of or access to the ducting, or otherwise interfere with the use and enjoyment of the common property car park or another lot.

### ***Relief***

81 As I noted in *Rechichi*, s 199 and s 200 are remedial and discretionary in nature.

82 In my view, the discretion of the Tribunal under those provisions is properly exercised only once the merits of an underlying dispute have been considered and determined under (other) relevant provisions of the ST Act, and in a manner reflective of those merits.<sup>46</sup>

83 As to the relief sought in this case, it follows:

- a) from the reasoning and conclusions in [43] and [53]-[54] above, that I do not consider it appropriate to make, and decline to make, an order in terms of the First Proposed Order; and
- b) from the conclusions in [73] and [80] above, I consider it appropriate to make orders:
  - i) pursuant to s 90(1) to give effect to the substance of the relief sought in the Alternative First Proposed Order and the Second Proposed Order; and

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<sup>46</sup> Indeed, this is relevantly reflected in relation to disputes concerning utility service easements in the wording of s 63 and s 200(2)(c) (the former dealing with the substantive dispute, and the latter dealing with relief). By way of contrast, s 90 with the substance of a dispute concerning a structural alterations to a lot, and also with the making of orders - in those circumstances orders will usually not be made under s 200 in the exercise of the Tribunal's discretion, except insofar as the application give rise to the need to make incidental orders or give incidental relief.

- ii) pursuant to s 200(2)(c) to give effect to the substance of the relief sought the Second Proposed Order.

84 I note for completeness that the effect of an order made under s 90 is to exempt a particular structural alteration to a lot from the application of Pt 7 Div 2. It does not have the effect of exempting it from any other planning or building approval requirements, or from the operation of any other part of the ST Act.

### **Orders**

The Tribunal orders:

1. The parties are to attend a hearing of 2 hours duration to commence at 2 pm on 5 August 2021 at 565 Hay Street in Perth, to make submissions in relation to:
  - (a) the precise terms of the orders to be made under s 90(1) and s 200(2)(c) of the Strata Titles Act 1985 (WA); and
  - (b) costs.
2. Any party wishing to attend the hearing by telephone must provide to the Tribunal in writing, by no later than 2 August 2021, a telephone number on which they will be available at the time of the hearing.

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

DR B MCGIVERN, MEMBER

22 JULY 2021