
JURISDICTION : STATE ADMINISTRATIVE TRIBUNAL

ACT : STRATA TITLES ACT 1985 (WA)

CITATION : THE OWNERS OF ON CENTRO STRATA
SCHEME 38421 and JEDAN PTY LTD [2021]
WASAT 118

MEMBER : MS R PETRUCCI, MEMBER

HEARD : 4 JUNE 2021

DELIVERED : 3 SEPTEMBER 2021

PUBLISHED : 3 SEPTEMBER 2021

FILE NO/S : CC 1733 of 2020

BETWEEN : THE OWNERS OF ON CENTRO STRATA
SCHEME 38421
Applicant

AND

JEDAN PTY LTD
Respondent

Catchwords:

Strata Titles Act 1985 (WA) (post 1 May 2020) - Strata scheme (other than a single tier strata scheme) - Signage by-law - Appearance of lot by-law - Breach of by-law - Whether by-law oppressive or unreasonable - Tribunal's discretion to make orders to enforce by-laws - Penalty for breach of by-law - Order to take specified action - Order to refrain from taking specified action to prevent further contravention of by-law - Tribunal's discretion to make declaration under s 95(1) of the State Administrative Tribunal Act 2004 (WA) - Turns on own facts

Legislation:

State Administrative Tribunal Act 2004 (WA), s 47, s 95(1), s 95(3)(b)

Strata Titles (General) Regulations 2019 (WA), reg 3(3)

Strata Titles Act 1985 (WA) (post 1 May 2020), s 3, s 10, s 39, s 44, s 45, s 45(2), s 45(3), s 45(4), s 46(j), s 47, s 91(1)(b), s 112, Pt 4, Div 4, Pt 8, Div 1, Sch 1, Sch 2

Strata Titles Act 1985 (WA) (prior to 1 May 2020), Sch 1, Sch 2

Strata Titles Amendment Act 2018 (WA)

Strata Titles Amendment Bill 2018 (WA)

Result:

Application partly successful

Category: B

Representation:

Counsel:

Applicant : Mr A McGlue and Mr S Macfarlane

Respondent : In Person

Solicitors:

Applicant : Lavan

Respondent : N/A

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

Cooper v The Owners - Strata Plan No 58068 [2020] NSWCA 250.

Wayde v NSW Rugby League Ltd [1985] HCA 68; 180 CLR 459; 61 ALR 225;
10 ACLR 87.

REASONS FOR DECISION OF THE TRIBUNAL:

Introduction

1 This matter concerns the display of an A-frame sandwich board sign
(**Sign Frame**).¹

2 The respondent, Jedan Pty Ltd (**owner**) is the owner of lot 11 of the
strata scheme (**Lot 11**) created by the registration of Strata Plan 38421
(**strata scheme**). Lot 11 is a ground floor commercial lot that faces
towards the public footpath along Centro Avenue, Subiaco,
Western Australia. On the 'Location Plan' which is part of the strata plan
the notation, '0.1 wide pedestrian accessway' appears along the boundary
of the parent lot including Lot 11 where it meets Centro Avenue.² This is
described more simply as a 10 centimetre wide strip between the physical
building and the public footpath on the strata plan which is part of the
common property³ of the strata scheme (**common property**).

3 A set of rules (known as by-laws) establishes the conduct and
governance standards for the strata scheme. The by-laws apply to
owners, tenants, occupiers and the strata company.⁴ In the absence of
any notification of any amendment or repeal of or any addition to the
by-laws, the by-laws that apply are the 'standard' by-laws in Sch 1 and
Sch 2 of the *Strata Titles Act 1985 (WA)* (**ST Act**).⁵ In this case the
strata company repealed the standard by-laws and replaced them with
Sch 1 by-laws 1 to 28 and Sch 2 by-laws 1 to 20 (**by-laws**) as set out
below at [19].

4 The applicant (**strata company**), alleges the owner, has breached
and continues to breach the by-laws of the strata scheme by permitting
the tenant of Lot 11 which trades as Intense Health (**tenant**) to:

- i) display the Sign Frame on the common property
contrary to Sch 1 by-laws 21(a) and 21(b) (**by-law 21**)
and Sch 2 by-laws 9(a) and 9(b) (**by-law 9**) when the
tenant is open for business; and

¹ Exhibit 1, Hearing Book (**HB**) at pages 85-86.

² Exhibit 1, HB at page 9.

³ The term 'common property' is defined in s 10 of the ST Act. Major amendments to the ST Act came into operation on 1 May 2020 under the Strata Titles Amendment Act 2018 (WA). In this case as the application was filed with the Tribunal post 1 May 2020, the provisions of the ST Act, as they are after the amendments, apply to the determination of this application. All references to the provisions of the ST Act in these reasons are to those in the ST Act as it is post 1 May 2020 unless expressly stated otherwise.

⁴ Section 45 of the ST Act.

⁵ Section 39 of the ST Act.

- ii) display the Sign Frame inside of Lot 11 behind the window adjacent to the door of Lot 11 so that the Sign Frame is visible outside Lot 11 contrary to by-law 9 and by-law 21 when the tenant is not open for business.

5 Because of the tenant's alleged continuing breach of by-law 9 and by-law 21, the strata company made an application to the Tribunal. The application was made under s 47(1)(b) of the ST Act which is found in Div 4 of Pt 4 of the ST Act entitled 'Scheme by-laws'. Section 47(1)(b) of the ST Act allows a strata company to apply to the Tribunal for an order enforcing scheme by-laws if:

- (i) the contravention has had serious adverse consequences for a person other than the person alleged to have contravened the scheme by-laws; or
- (ii) the person has contravened the particular scheme by-law on at least 3 separate occasions; or
- (iii) the person has been given notice under paragraph (a) and has contravened the notice.

6 The main signage across the double windows of Lot 11 with the wording 'Intense Clinic of Exercise and Nutrition' along with the opening hours and mobile phone number on the glass door is not in contention.⁶ It is only the display of the Sign Frame that is contention between the parties (see above at [4]).⁷ I will therefore limit my determination of the issues for this matter (see below at [16]) to the Sign Frame.

7 In this proceeding, the strata company seeks the following orders from the Tribunal:⁸

- 1) under s 47(5) of the ST Act the owner must:
 - a) pay the amount of \$2,000 by way of penalty to the strata company for each contravention of by-law 9 and by-law 21, being a combined penalty of \$4,000;
 - b) direct the tenant to remove the Sign Frame from:

⁶ Exhibit 1, HB at page 86.

⁷ ts 33, 4 June 2021.

⁸ Exhibit 1, HB at pages 7-8.

- i) the window of Lot 11; and
 - ii) the common property.
 - c) otherwise comply with the by-law 9 and by-law 21 with effect from the date specified in the order; and
 - d) direct the tenant to refrain from installing, erecting or displaying the Sign Frame and any signs within Lot 11 or on the common property in contravention of by-law 9 and by-law 21; and
- 2) the Tribunal exercise its discretion under s 95(1) of the *State Administrative Tribunal Act 2004* (WA) (**SAT Act**) to make an order that if the owner fails to comply with a non-monetary decision of the Tribunal made in connection with this matter, then the owner will have committed an offence, the penalty of which is \$10,000.

8 The owner strongly opposes the orders sought by the strata company arguing the by-law 9 and by-law 21 are oppressive and unreasonable.

9 For the reasons given below, I conclude that the strata company's application is partly successful.

Relevant procedural history and evidence

10 I heard the matter on 4 June 2021. Counsel for the strata company attended the hearing. Mr Hayden Smith, a director of the owner, also attended the hearing. The Tribunal had the benefit of receiving submissions from counsel for the strata company and from Mr Smith for the owner.

11 The owner did not file any documents with the Tribunal. Rather at the directions hearing held on 15 January 2021, Mr Smith stated that the owner proposed to rely on its letter to the legal representative for the strata company dated 28 October 2020 which is one of the documents in the strata company's bundle of documents filed with the Tribunal, as its response to the orders sought and the grounds in the strata company's application to the Tribunal.

12 In accordance with the Tribunal's usual practice in matters of this nature, the hearing was conducted on the basis that all of the documents and submissions filed with the Tribunal would be regarded as being in evidence, subject to any proper objection. There was no objection regarding the admission of the documents and written submissions, and therefore, at hearing on 4 June 2021, I accepted into evidence the hearing book prepared by the Tribunal in advance of the hearing and provided to the parties as Exhibit 1. In summary, Exhibit 1 contains:

- application dated 16 December 2020 and annexure together with the strata plan and notification of change of by-laws; and
- strata company's bundle of documents.

13 The strata company's witness list and summary of evidence is dated 28 January 2021 and was filed with the Tribunal.⁹ Mr John Arthur Sullivan was called as a witness by the strata company. Mr Sullivan is the owner of a residential apartment in the strata scheme and is the current Chairman of the council (**council**).¹⁰ Mr Sullivan gave his evidence in a frank manner. His evidence is summarised as follows:¹¹

- The Sign Frame appeared without any proposal put to the council to consider. The owner has never sought approval from the council for the Sign Frame.
- Following a signage issue in respect of another commercial lot in the strata complex (Lot 12), the council adopted the signage policy which 'gives broad outlines to future tenants or people wanting to erect signs, to give them an indication of what would be acceptable and acknowledging that signage is required'.
- The council accepts that '[c]ommercial tenancies need to, obviously, put up some signage to indicate what they're on about, what they do, but within certain limits'. Paragraph 4 of the signage policy sets out what 'professional appearance' is not.
- When the business which operates from Lot 11 is closed, the Sign Frame is leant up against the glass window next

⁹ Exhibit 1, HB at pages 166-167.

¹⁰ 'Council' is defined in s 3 of the ST Act and means the governing body of the strata company.

¹¹ ts 15-26, 4 June 2021.

to the entry door and visible from outside. That is not acceptable, not because of the size of the Sign Frame but because there is already signage on the window of Lot 11 and the signage policy only allows a business to advertise once on the windows of the lot.

- When the business which operates from Lot 11 is open, the Sign Frame is out on the walkway in front of Lot 11 and placed against the glass window panel adjacent to the front door. The back legs of the Sign Frame leans against the glass panel which are on the common property of the strata complex.
- Each time he walks out onto Centro Avenue (every day) he sees the Sign Frame in the manner described above and he has not seen the Sign Frame in any different position.
- Other lot owners (Lot 9 and Lot 10) have sought approval for signage from the council which were approved with a slight amendment.
- None of the commercial tenancies, apart from Lot 11, display signage outside of the lot on the common property.
- If the owner was to make an application for the Sign Frame, his initial view would be that the application would be unlikely to be supported because it departs from the signage policy, however, the application would, at the least, be assessed on its merits.
- The strata manager on behalf of the council issued written notices to the owner about the Sign Frame. The owner did not respond to the notices from the strata manager apart from an email in which the owner stated it would do nothing. As the owner did nothing about the Sign Frame, the council decided to take the matter to the Tribunal for resolution.
- The council has incurred costs in seeking to enforce the by-laws.

14 The owner did not file any witness statements with the Tribunal. However, at hearing Mr Smith gave evidence for the owner and was cross-examined by counsel for the strata company. Mr Smith stated in summary:¹²

- The owner has owned Lot 11 and Lot 12 for about 21 years.
- He has worked in real estate for more than 35 years and his real estate business operated from Lot 12 for about five years after the strata complex was built.
- Intense Health became the tenant of Lot 11 in about 2017.
- The small setback recorded by the surveyor on the strata plan is probably a safety buffer that was allowed for by the builder in order to avoid the risk of any encroachment issues.
- The Sign Frame is not on common property. When the business operated from Lot 11 is closed, the Sign Frame stands on its own in the foyer area inside Lot 11. When the business operated from Lot 11 is open, the Sign Frame sits on the City of Subiaco's land outside and not on common property and therefore falls under the domain of the City of Subiaco. The owner has not authorised any signage to be installed on common property.
- The Sign Frame complies with the City of Subiaco's signage policy and he has previously explained to the strata manager that it is not his job to 'police' the Sign Frame sitting on the City of Subiaco's land and if the strata manager has an issue then the strata manager should take it up with the City of Subiaco.
- The owner has not ignored, or been belligerent in its responses to the strata manager or to the council. The current proceeding before the Tribunal goes back to the 2017 dispute which concerned the signage for commercial Lot 12.

¹² ts 35-36, 4 June 2021.

- By-law 9 and by-law 21 and the signage policy are oppressive and unreasonable for the following reasons:
 - i) the town planning for the precinct required the ground floor to be commercial for offices or consulting rooms or similar uses, not retail. Above the ground level the town planning required residential lots. This was to create an activity centre with accommodation where people could live near where they worked. Centro Avenue was identified as the entry statement to Subiaco from the north, being the extension of Harbourne Street with exposure to passing traffic;
 - ii) a business should be able to have signage to 'expose' its business to people going past, or for people trying to find the business. The tenant of Lot 11 should be able to display under its name the services it provides. If he moved back into Lot 12 as a real estate agent, a permitted use for the area, he should be allowed to advertise the properties it has for sale in the window; and
 - iii) a large portion of surrounding buildings which have commercial lots on ground level and residential lots above ground level have signage on the outside of the building.
- The owner accepts that when signage is erected on the interior glass window of a lot it is visible from outside that lot and is therefore, in relation to the appearance of the lot, a breach of by-law 9.
- The owner does not accept the Sign Frame has breached by-law 21.
- The other commercial tenancies (Lot 9 and Lot 10) have far more significant signage on their respective glass windows and on the façade of the building than does Lot 11. The consequence is that those lots do not need to have a Sign Frame outside their respective lots. The tenant of Lot 11 has put out the Sign Frame because of the constraints placed on it with the window signage.

- It is not viable to run the business from Lot 11 without the Sign Frame. The Sign Frame at the front of the business is to attract attention and make it easy for people to find the business premises.
- A person walking down the street would not be able to identify the business name or hours of operation. This is because if you are in a car on the other side of the Centro Avenue, you are at least 15 metres away and it is too far away to read the signage on the glass door and windows. However, he accepts that the font size on the glass windows is roughly the same as that of the Sign Frame and therefore a passing motorist possibly would be able to see both of them equally, apart from some reflection in the window.
- It may be that on the day the photographs were taken (as shown on pages 85 and 90 of Exhibit 1), the rear legs of the Sign Frame had been within the 10 centimetre 'buffer' which is common property or the rear legs may have been sitting just on the line or just outside of the common property. However, the Sign Frame is intended to be entirely on the footpath and not the common property.
- The signage policy is detrimental to the value of his investment (Lot 11 and Lot 12) in the strata complex.

15 I will now set out the issues to be determined in this matter, followed by the legal framework relevant to these proceedings by reference to the relevant provisions of the ST Act and the terms of by-law 9 and by-law 21, and I will then make relevant findings of facts and set out the parties' main contentions. Finally, I will address each of the issues for determination in turn.

Issues

16 The issues to be determined in this proceeding are as follows:

Issue 1: Which of the by-laws, if any, has the owner contravened?

Issue 2: If the owner has contravened a by-law, did the owner contravene that by-law on at least three

separate occasions? Alternatively, did the strata company give the owner written notice and the owner contravened that notice?

Issue 3: If the answer is 'yes' to issue 2, should the Tribunal exercise its discretion to make one or more of the orders sought by the strata company (see above at [7])?

17 It is necessary to set out the regulatory framework and factual background against which the consideration of the above issues must be made.

Regulatory framework

The strata plan, the ST Act and by-laws

18 The strata plan registered on 25 July 2000 was endorsed with the wording '0.1 wide pedestrian accessway' on the Location Plan¹³ which the parties agreed is common property. It is a strip of about 10 centimetres.

19 A notification of change of by-laws (by instrument I002415) was registered with Landgate on 1 February 2002. The notification repealed the by-laws as contained in Sch 1 and Sch 2 of the ST Act (as it was prior to 1 May 2020) and replaced them with a new Sch 1 by-laws 1 to 24 and a new Sch 2 by-laws 1 to 15. A further notification to the by-laws (by instrument M488831) was registered with Landgate on 10 December 2013. That notification added new Sch 2 by-laws 16 to 20. Finally, a further notification to the by-laws (by instrument M839086) was registered with Landgate on 27 November 2014. That notification added new Sch 1 by-laws 25 to 28. In summary, the current by-laws of the strata scheme comprise Sch 1 by-laws 1 to 28 and Sch 2 by-laws 1 to 20 (**by-laws**).

20 The strata company relies on by-law 21 and by-law 9 in these proceedings. The terms of each of these by-laws are set out below.

21 By-law 21 concerns signage. It provides:

No sign or hoarding will be erected, installed or painted on, any part of the parcel so as to be visible from outside a lot contained within the strata scheme without the prior written consent of the council; and a proprietor

¹³ Exhibit 1, HB at page 9.

or other resident of a lot shall not except without the prior written consent in writing of the council:

- (a) erect any promotional material, display or similar thing on any part of the common property without first obtaining written permission from the council or the duly appointed Strata Company manager; or
- (b) display any sign, advertisement, placard, banner, pamphlet or like manner on any external part of this lot or the common property without first obtaining written permission from the council or the duly appointed Strata Company manager.

22 By-law 9 deals with the appearance of the lot. It provides:

A proprietor, occupier or resident of a lot shall maintain the appearance of the lot in such a manner that it is in keeping with the appearance of the other lots within the scheme in respect to tidiness and landscaping contained within the lot and shall not:

- (a) display any sign, advertising, placard, banner, pamphlet or like matter on any external part of his lot;
- (b) maintain within the lot anything visible from outside the lot that, when viewed from outside the lot, is not in keeping with the rest of the building;
- (c) permit any tree, shrub or other plant contained within his lot, external to the building to exceed a height of 4 metres or grow in a manner such that it restricts the outlook from any other lot or encroaches into any other lot.

23 The power to make by-laws is set out in s 44 of the ST Act which provides that the strata company may, by resolution of the strata company, make governance by-laws or conduct by-laws for the strata scheme (including by-laws that amend or repeal the by-laws it is taken to have made on registration of the strata scheme). Conduct by-laws may provide for:

- 1) the conduct of an owner or occupier in the strata scheme; and
- 2) the management, control, use or enjoyment of a lot or common property.

24 As noted earlier, by-laws apply to the strata company, owners, tenants and occupiers. This is provided for in s 45 of the ST Act which is headed 'Application of scheme by-laws'. Importantly, each person to

whom the by-laws apply, must comply with the by-laws as if the by-laws were a deed (signed and sealed by each person to whom they apply) containing mutual covenants to observe and perform the matters set out in the by-laws (s 45(2) of the ST Act). Further, a lease of a lot in a strata scheme is taken to contain an agreement by the lessee that the lessee will comply with the scheme by-laws (s 45(3) of the ST Act). Finally, the owner, occupier or lessee of a lot in a strata scheme must take all steps that are reasonable in the circumstances to ensure that every person who they permit to use or who they invite on to the lot or common property complies with by-laws that apply to the owner, occupier or lessee (s 45(4) of the ST Act).

- 25 Part 8 of the ST Act is headed 'Strata company' and Div 1 of Pt 8 is headed 'Functions'. Div 1 sets out, amongst other things, the duties of strata companies. Relevant to this proceeding is the duty of the strata company to enforce the by-laws of the strata titles scheme (s 112 of the ST Act) and to control and manage the common property for the benefit of all owners (s 91(1)(b) of the ST Act).

Factual background

- 26 I note the key facts are quite limited and not in any real dispute. Having considered all the evidence before the Tribunal, I make the following findings of fact which are relevant to the issues to be determined in these proceedings:

- a) The strata complex comprises four commercial strata lots on the ground floor and eight residential strata lots above ground level.
- b) The owner has owned two of the four commercial lots (Lot 11 and Lot 12) in the strata complex for about 21 years.
- c) While the owner remains the proprietor of one or more lots in the strata complex, the owner is a member of the council.¹⁴
- d) On 22 January 2002 the owner as a member of the council signed off on by-law 21 and by-law 9 as at that time the owner found them to be reasonable.

¹⁴ Sch 1 by-law 4(3)(b).

- e) Neither the owner nor the tenant have made an application to the council seeking approval for the Sign Frame.
- f) The tenant became the tenant of Lot 11 in about 2017.
- g) The 10 centimetre wide strip between the physical building and the public footpath on the strata plan is part of the common property of the strata scheme.

Parties' contentions

27 The strata company's main contentions may be summarised as follows:

- The owner has not made an application to the council seeking approval for the Sign Frame, contrary to by-law 21.
- The Sign Frame when outside Lot 11 is on common property.
- The Sign Frame when inside Lot 11 is visible from outside Lot 11 and is not in keeping with the rest of the building, contrary to by-law 9.
- The other commercial tenancies in the strata complex comply with by-law 9 and by-law 21.
- By-law 9, by-law 21 and the signage policy are not oppressive or unreasonable.
- The strata company has incurred costs in pursuing compliance by the owner with the by-laws. The costs include the costs of the three letters sent by the strata manager and one letter from the strata company's legal representative.

28 The owner's main contentions may be summarised as follows:

- The Sign Frame is not on common property.
- The Sign Frame complies with the City of Subiaco signage policy.

- By-law 9 and by-law 21 and the council's signage policy are oppressive and unreasonable.
- The other commercial tenancies (Lot 9 and Lot 10) have far more significant signage on their respective windows and on the façade of the building than does Lot 11. It is not viable to run the business from Lot 11 without the Sign Frame.

29 Finally, I turn to address each of the issues identified at [16] above.

Issue 1 - Which of the by-laws, if any, has the owner contravened?

30 The strata company contends that the owner is in breach of by-law 9 and by-law 21 by permitting the placement by the tenant of the Sign Frame on both the owner's Lot 11 and on part of the common property as reflected in the photographs at pages 85 to 86 of Exhibit 1. Counsel for the strata company explained that the photograph on page 85 of Exhibit 1 shows where the Sign Frame is generally located in front of Lot 11 by the front door or on common property when the business is open. Further, counsel for the strata company explained that the photograph on page 86 shows that when the business is not open, the same Sign Frame is displayed, albeit entirely within Lot 11, up against the glass window next to the front door that is visible from outside Lot 11.

31 It is the position of the strata company that the owner was notified in writing by the strata manager for the strata company on three separate occasions alleging a contravention of the by-law as follows. First, on 29 October 2018, the strata manager on behalf of the strata company wrote to the owner requesting the 'boards/A frame [Sign Frame] be removed from display in the windows and that no further signage/advertising be affixed/erected to the external of the lot or affixed to the internal that is visible to the external of the lot'. Further, in that letter the strata manager stated that the 'sandwich board/A frame signage placed in the window of the unit that is visible from the external of the lot containing advertising' is in contravention of by-law 21.¹⁵ Secondly, on 16 November 2018, the strata manager on behalf of the strata company wrote to the owner again requesting the removal of the 'sandwich board/A frame [Sign Frame]'.¹⁶ Finally, on 22 August 2019, the strata manager on behalf of the strata company wrote to the owner

¹⁵ Exhibit 1, HB at pages 72-73.

¹⁶ Exhibit 1, HB at pages 74-75.

again requesting the 'sandwich board [Sign Frame]' be removed from display immediately.¹⁷ In each of these three letters, the terms of by-law 21 were set out in full (as set out above at [21]).

32 Counsel for the strata company's evidence is that on 1 October 2020 the legal representative of the strata company wrote to the owner alleging that the owner contravened by-law 9 and by-law 21 and the signage policy by permitting the tenant of Lot 11 to use the Sign Frame and install the display signage (**Signage**) inside the window of Lot 11 that is visible outside Lot 11. In that letter, notice was given to the owner that within seven working days, the owner must:¹⁸

- 9.1 ensure that the [t]enant:
 - 9.1.1 removes the Sign Frame from the common property and the Signage that is visible from the window of Lot 11; and
 - 9.1.2 desists from placing the Sign Frame or the Signage in Lot 11 or the common property every again;
- 9.2 ensure that any signage placed within Lot 11 or the common property by the [o]wner or any tenant or occupier of Lot 11 is compliant with the scheme by-laws and the [s]ignage [p]olicy; and
- 9.3 provide written confirmation to the [s]trata [c]ompany of the action the [o]wnere has taken to:
 - 9.3.1 rectify the alleged breach of by-laws detailed within this letter; and
 - 9.3.2 avoid any further contravention of [b]y-law 9, [b]y-law 21 and the [s]ignage [p]olicy.

33 It is the submission of counsel for the strata company that the signage policy was adopted by council on or about 10 October 2018 (**signage policy**) and that the signage policy is intended to guide and inform any requests for approval by the council.¹⁹ The policy provides as follows:²⁰

1. The Council acknowledges that Commercial Tenancies require a sign to identify their business.

¹⁷ Exhibit 1, HB at pages 76-77.

¹⁸ Exhibit 1, HB at pages 80-84.

¹⁹ ts 9, 4 June 2021.

²⁰ Exhibit 1, HB at page 87.

2. Compliance with the requirements of Schedule 1 By Law 21 is required before any sign is erected.
3. Council requires the ON CENTRO building complex presents a *'professional appearance'* to Centro Avenue.
4. *'Professional appearance'* prohibits the installation/erection of advertising, marketing or promotional signage including placards, banners and pamphlet holders.
5. Tenancies shall be permitted one sign to identify the company name and logo.
6. The company name and logo shall be either[:]

A wall plaque of maximum dimensions 550mm long x 200mm high mounted on the Tenancy external wall.

and[/]or

Lettering applied to the Tenancy glass door entry door within a maximum frame size of 220 mm high x 750mm long.

Signage shall not be permitted on the Tenancy windows

7. Lettering to identify operating hours may be applied to the entry door with a maximum lettering height of 15mm.
8. Electronic and illuminated signage shall not be permitted.

34 Counsel for the strata company submits that the signage policy encourages a professional appearance of the building. It is Mr Sullivan's evidence for the strata company that if the owner made an application for the Sign Frame, his initial view was that the application would be unlikely to be supported because it departs from the signage policy, however, any application for the Sign Frame would, at the least, be assessed on its merits.

35 The owner concedes the tenant is in breach of by-law 9 as the Sign Frame is visible from outside Lot 11 when the business is not open for business. In relation to by-law 21 the owner refutes that the Sign Frame is on common property and therefore cannot be in breach of by-law 21. In addition, the owner submits that by-law 9 and by-law 21 as well as the signage policy are oppressive and unreasonable and therefore the Tribunal should not make any of the orders sought by the strata company.

36 Counsel for the strata company noted that in the recent decision in *Cooper v The Owners - Strata Plan No 58068* [2020] NSWCA 250

(*Cooper*) referred to by the owner, the New South Wales Court of Appeal found that the by-law banning pets outright was oppressive.²¹ It is the submission of the counsel for the strata company that the case of *Cooper* is distinguishable because in this matter the by-laws and a signage policy do not ban or prohibit signage outright, but rather, they regulate signage in the strata complex.

37 Counsel for the strata company referred the Tribunal to the decision in *Wayde v NSW Rugby League Ltd* [1985] HCA 68; 180 CLR 459; 61 ALR 225; 10 ACLR 87 (*Wayde*) where the High Court had to consider whether the Rugby League's decision to exclude a particular team from the New South Wales Rugby League, was in breach of s 322 of the *Companies (New South Wales) Code* which in summary provided that if the affairs of the company to be conducted in a manner that is oppressive, or unfairly prejudicial to, or unfairly discriminatory against a member or members, the court may make such order or orders as it thinks fit. The majority (Mason, Wilson, Brennan, Dean and Dawson JJ) held at [17]:

... Given the special expertise and experience of the Board, the bona fide and proper exercise of the power in pursuit of the purpose for which it was conferred and the caution which a Court must exercise in determining an application to avoid an unwarranted assumption of the responsibility for management of the company[.]

38 Following *Wayde*, counsel for the strata company urged the Tribunal to exercise caution in determining the matter before it to avoid the unwarranted assumption of the responsibility for the management of the strata company.²²

39 I now turn to consider each of the alleged breaches of the by-laws by the owner.

By-law 21

40 By-law 21 concerns signage (see above at [21]).

41 Counsel for the strata company submits that even though the owner did not concede that by-law 21 had been breached, on a common sense reading of by-law 21 it is plain that by-law 21 had been breached by the owner and the tenant. It is the submission of counsel for the strata company that in respect of limb (a) of by-law 21 that the Sign Frame is clearly promotional material, display or similar thing

²¹ ts 49, 4 June 2021.

²² ts 54-54, 4 June 2021.

and that it was erected on a part of the common property without the written approval from the council or the strata manager. In respect of limb (b) of by-law 21, counsel for the strata company submits that the photographs,²³ together with the strata documents coupled with Mr Smith's acceptance that the common property would extend 10 centimetres from the brickwork of the building, supports the conclusion that the Sign Frame when displayed outside of Lot 11 is displayed on part of the common property.

42 In response to the owner's position that the Sign Frame is placed on the public footpath (and not on common property), counsel for the strata company refuted this relying on Mr Sullivan's evidence that the Sign Frame is routinely placed with its back legs either touching or very near the glass window panel next to the glass entry door to Lot 11 which is common property.

43 The owner did not contest that it had not obtained the written permission from the council or the strata manager to use or display the Sign Frame.

44 There is no evidence before the Tribunal that the owner has received from the local government authority the permission to place the Sign Frame on the footpath or development approval for the placing of advertising in a public location. Further, there is no evidence before the Tribunal, besides Mr Smith's assertion, that the Sign Frame is placed on the footpath (which is not part of common property of the strata complex).

45 Despite Mr Smith stating that the photographs submitted by the strata company to the Tribunal are not clear,²⁴ the owner did not present any photographic, video or other evidence to the Tribunal to displace Mr Sullivan's evidence of where the Sign Frame is routinely placed when the business operated from Lot 11 is open and when it is closed. Consequently, I accept the evidence of Mr Sullivan and find that the Sign Frame is routinely placed with its back legs either touching or very near the glass window panel next to the glass entry door to Lot 11. This leads me to find that at least the back legs of the Sign Frame are also routinely placed on the common property when the business operated from Lot 11 is open.

²³ Exhibit 1, HB at pages 85-86 and 90.

²⁴ ts 43, 4 June 2021.

46 It is common ground that neither the owner, nor the resident of Lot 11 (the tenant) obtained the prior written consent in writing of the council or the strata manager to display any sign or advertisement, which in my view includes the Sign Frame. Consequently, I find the owner to be in breach of by-law 21 as the owner of Lot 11 has not taken all reasonable steps in the circumstances to ensure that the tenant of Lot 11 complies with by-law 21. In my view the reasonable steps would include applying to the council for consent to have and use the Sign Frame.

47 The owner argued by-law 21 and the signage policy are oppressive and unreasonable.

48 Counsel for the strata company invited the Tribunal to reject Mr Smith's submission that by-law 21 (and by-law 9) is oppressive and unreasonable. The reasons counsel for the strata company's position is as follows. First, Mr Smith in cross-examination agreed that he was one of the people who signed off on the very by-laws that he is now contending are unreasonable and that at that time he thought by-law 21 (and by-law 9) were reasonable. Second, Mr Smith provided no explanation as to why by-law 21 (and by-law 9) might have been reasonable at one time but now were no longer reasonable at a time when the tenant of Lot 11 is not abiding by the by-laws. Third, by-law 21 (and by-law 9) had their origin in default by-laws in the ST Act (as it was prior to 1 May 2020). The language of these by-laws has been varied to some extent, but these by-laws have the same basic obligations. Therefore, even if the strata company adopted the default by-laws there would still be prohibitions on displaying signage that is visible in the public realm without consent of the council. By having such default by-laws, the Parliament is of the view that this type of by-law is reasonable. Further, the *Strata Titles Amendment Bill 2018 (WA) (2018 Bill)*, being the Bill that introduced s 46(j) of the ST Act, which Mr Smith seeks to rely on, was passed about two years ago. The Explanatory Memorandum to the 2018 Bill when considering Sch 2 by-law 5 of the ST Act (as it was prior to 1 May 2020) concluded that this by-law which concerned children playing on common property is to be repealed because it is an example of a by-law that is unreasonable. The then signage by-law in Sch 2 by-law 7B and Sch 2 by-law 14 of the ST Act (as it was prior to 1 May 2020) were not repealed by Parliament and it can therefore be inferred that the signage by-law is not oppressive or unreasonable. Fourth, the strata company made the signage by-laws in the proper exercise of its by-law making powers pursuant to s 44 of the ST Act and to facilitate the strata company's duty under s 91(1)(b) of the

ST Act to manage and control the common property for the benefit of all owners within the strata scheme.

49 The previous and current Sch 2 by-law 14 (deemed by-law if not amended or repealed by the strata company) provides as follows:

14. Appearance of lot

An owner or occupier of a lot must not, without the written consent of the strata company, maintain within the lot anything visible from outside the lot that, viewed from outside the lot, is not in keeping with the rest of the building.

50 In my view the working of by-law 14 is similar to that of the strata scheme's by-law 9 part (b). Further, in my view, by-law 21 does not ban or prohibit signage outright, but rather it seeks to regulate signage in the strata complex by requiring the owner or other resident of a lot to obtain the prior written consent in writing of the council or strata manager to display any sign (which in my view includes the Sign Frame) on the common property. On that basis I agree with counsel's submission for the strata company that the decision in *Cooper* (see above at [36]) is distinguishable. Finally, the signage policy is just that - a policy (or guidelines) to assist the council in considering relevant applications before it.

51 I agree with the above submissions made by counsel for the strata company that by-law 21 (and by-law 9) are not oppressive or unreasonable.

52 In conclusion, I find that the owner did not seek the prior written consent of the council or strata manager to erect, display or similar thing the Sign Frame on any part of the common property (nor was it given by the council). I therefore find the owner to be in breach of by-law 21. I note it is open to the owner or tenant of Lot 11 to seek the written permission from the council or the duly appointed strata company manager to erect, display or similar thing the Sign Frame on part of the common property.

By-law 9

53 By-law 9 deals with the appearance of the lot (see above at [22]).

54 Mr Sullivan's evidence is that when the business which operates from Lot 11 is closed, the Sign Frame is leant up against the glass window next to the entry door and visible from outside the lot. That is

not acceptable, according to Mr Sullivan, not because of the size of the Sign Frame but because there is already signage on the window of Lot 11 and the signage policy only allows a business to advertise once on the windows of the lot. Further, it is the evidence given by Mr Sullivan that it is only Lot 11 which has the Sign Frame and none of the other three commercial tenancies have signage that is similar to the Sign Frame.

55 As noted earlier, Mr Smith conceded at hearing that by-law 9 has been breached. This is on the basis that when the Sign Frame is placed in the interior of Lot 11, it is visible from outside that lot and the Sign Frame is therefore, in relation to the appearance of the lot, not in keeping with the rest of the building. However, Mr Smith submits that by-law 9 is invalid because it is oppressive and unreasonable (s 46(j) of the ST Act) not to allow a tenant of a commercial lot to have a Sign Frame to advertise its business. For the same reason, Mr Smith submits that the signage policy is oppressive and unreasonable. Mr Smith explained:²⁵

A by-law which restricts the lawful use of a lot on a basis which lacks a rational connection with the enjoyment of other lots and the common property, in my view, is oppressive and unreasonable. Signage in a commercial lot, even if visible from outside the lot, does not affect the use and enjoyment of other occupants of their own lots or the common property. The by-law in question prevents and limits the owner/tenant's ability to use the lot for commercial purposes.

...

The signage policy is oppressive and unreasonable because it prohibits an aspect of the use of lots in the strata plan that is an ordinary incident of the ownership of real property, namely, displaying business signage, and the prohibition provides no material benefit to other occupiers of the building in the use and enjoyment of their lots or the common property. The signage policy, thus, interferes with the lot holders use of their real property in a respect and to an extent that is unjustified in any legitimate concern of others in the building.

56 I find that the Sign Frame is leant up against the glass window next to the glass entry door and visible from outside of Lot 11 when the business which operates from that lot is closed. Further, I find that there is signage on the glass window next to the glass door entry to Lot 11 which is visible from outside the lot and provides the name of the business, the hours of operation with the notation 'By Appointment Only', and the mobile telephone number.

²⁵ ts 44, 4 June 2021.

57 I do not accept the owner's argument that by-law 9 is oppressive and unreasonable. Rather I accept the submission made by counsel for the strata company that by-law 9 (and by-law 21) are not oppressive and unreasonable (see above at [48]).

58 In conclusion, I am satisfied that by-law 9 was breached as the Sign Frame, when placed in the interior of Lot 11 leans up against the glass window next to the glass entry door, is visible from outside of Lot 11 and in relation to the appearance of the lot, is not in keeping with the rest of the building.

What orders should the Tribunal make?

59 The strata company's position is that it brought an application to the Tribunal under s 47 of the ST Act because the owner has breached by-law 9 and by-law 21 on three separate occasions and further and separately that the strata company gave written notice to the owner of the breach of these by-laws. Finally, the strata company's position is that the breaches are continuing.

60 The strata company seeks various orders from the Tribunal as set out above in [7].

61 Mr Smith for the owner opposes any orders stating:²⁶

I strongly object to the proposed [orders by the applicant] that I should be charged, simply because I have chosen to allow the situation to come to [the Tribunal] where there is an unreasonable balance of residential owners dominating any discussions that might have occurred leading up to this situation in relation to what is reasonable signage and what's not.

62 The owner submits that while it is important for strata lots to look tidy and professional, it was not the intention of the town planning authorities for the strata lots to appear the same in mixed use developments and in particular, in the use of signage.²⁷ Mr Smith stated that it is unreasonable for strata lot owners who are aware of the commercial lots at ground level displaying signage in a building before they buy, to later want to use the residential voting majority to apply unreasonable restrictions on the lawful use by the commercial lots including signage.

63 It is Mr Smith's position that the other commercial tenancies (Lot 9 and Lot 10) have far more significant signage on their respective

²⁶ ts 45, 4 June 2021.

²⁷ ts 44, 4 June 2021.

windows and on the façade of the building than does the tenant of Lot 11. Further Mr Smith contends that it is not viable to run the business from Lot 11 without the Sign Frame and that the signage policy is detrimental to the value of his investment (Lot 11 and lot 12) in the strata complex.²⁸

64 No evidence was put forward by the owner and Mr Smith to support these contentions. In any event, in my view, these contentions do not assist the Tribunal in determining what orders to be made for the owner's breach of by-law 9 and by-law 21.

Exercise of discretion under s 47(5) of the ST Act

65 Section 45(5)(a) of the ST Act provides that the Tribunal may, if satisfied that a person has contravened the scheme by-laws, by order require the person to pay a specified amount to the strata company by way of penalty for the contravention.

66 The strata company seeks an order from the Tribunal requiring the owner to pay a penalty of \$2,000 for breaching each of by-law 9 and by-law 21 (or a total penalty of \$4,000). The owner strongly opposes any penalty.

67 A penalty may only be imposed by an order of the Tribunal provided that it is satisfied:

- a) the owner has contravened the relevant by-law, in this case by-law 9 and by-law 21;
- b) the strata company has applied to the Tribunal under s 47(1)(b) of the ST Act for an order enforcing the scheme by-laws where:
 - i) the owner has contravened each of by-law 9 and by-law 21 on at least three separate occasions; or
 - ii) the owner has been given notice of the alleged breach of by-law 9 and by-law 21 and the owner has contravened the notice; and
- c) the penalty does not exceed \$2,000 (amount fixed by reg 3(3) of Sch 2 of the *Strata Titles (General) Regulations 2019* (WA).

²⁸ ts 44, 4 June 2021.

68 As set out earlier, I find the owner to be in breach of by-law 9 and by-law 21. Further, I find the strata company made its application to the Tribunal under s 47(1)(b)(ii) and (iii) of the ST Act where the owner contravened by-law 21 on at least three separate occasions and separately the strata company gave written notice to the owner on 1 October 2020²⁹ of the alleged breach by-law 9 and by-law 21.

69 In my view, it is not appropriate to exercise the Tribunal's discretion under s 47(5)(a) of the ST Act to impose a monetary penalty in this case. This is because although Mr Smith signed off on by-law 9 and by-law 21 on 22 January 2002 as being reasonable, and there was a dispute in 2017 concerning the signage of another commercial lot (Lot 12) where the parties resolved their dispute through mediation, the current dispute concerns different signage being the Sign Frame and the strata company has sought to enforce compliance with the by-law 9 and by-law 21 shortly after the council adopted a signage policy in 2018.

70 Separately, s 47(5)(b) of the ST Act provides that the Tribunal may, if satisfied that a person has contravened the scheme by-laws, by order require the person to take specified action within a period stated in the order to remedy the contravention or prevent further contraventions. Further, under s 47(5)(c) of the ST Act, the Tribunal may, if satisfied that a person has contravened the scheme by-laws, by order require the person to refrain from taking specified action to prevent further contraventions.

71 In my view, it is appropriate in all of the circumstances of this case to exercise the Tribunal's discretion under s 47(5)(b) of the ST Act to make an order requiring the owner to direct the occupier of Lot 11 to: (a) remove the Sign Frame from the glass window of Lot 11 and the common property; and (b) to refrain from installing, erecting or displaying the Sign Frame within Lot 11 or on the common property in contravention of by-law 9 and by-law 21 and to otherwise comply with by-law 9 and by-law 21. This is because, as set out earlier, I found the owner to be in breach of both by-law 9 and by-law 21. There is also evidence from the strata company that the other commercial tenancies (currently Lot 9 and Lot 10) have signage which complies with by-law 9 and by-law 21.

72 However, it is not appropriate, in my view, to require the owner to refrain from installing, erecting or displaying 'any signs' within Lot 11 or on the common property as sought by the strata company. This is because there is no evidence before the Tribunal that there is 'any signs'

²⁹ Exhibit 1, HB at pages 80-84.

(besides the Sign Frame) installed, erected or displayed within Lot 11 or on common property.

Exercise of discretion to make a declaration under s 95(1) of the SAT Act

73 Finally, the strata company seeks an order under s 95(1) of the SAT Act. That section provides that a person who fails to comply with a decision of the Tribunal (apart from a monetary order) commits an offence. The penalty is \$10,000. In order for the penalty to apply, the Tribunal, in its decision, must declare that s 95(1) of the SAT Act applies.

74 The strata company did not articulate the grounds as to why an order is required under s 95(1) of the SAT Act.

75 Mr Smith made contentions that the by-laws and the signage policy are oppressive and unreasonable and that in his opinion it was a futile process for the owner as the only commercial representative on the council to have discussions with the 'weight of numbers who are residential owners who don't want to see signage on the commercial lots'³⁰ which the owner explained in its letter to the strata company's legal representative on 28 October 2020, its position was to ignore the strata company and wait for the hearing before the Tribunal to argue the case and get an independent decision.³¹

76 In my view, in all the circumstances of this case, it is not necessary to exercise the discretion of the Tribunal to make the declaration under s 95(1) of the SAT Act at this time.

77 However, I note that in circumstances where a party fails to comply with an order of the Tribunal, the strata company may apply to the Tribunal seeking an order declaring that s 95(1) of the SAT Act applies. In that case, s 95(1) applies in relation to the Tribunal's decision provided the failure to comply with its order continues after notice of that order is served on the applicable party (s 95(3)(b) of the SAT Act).

Conclusion

78 For the above reasons, I will make the following orders.

Orders

The Tribunal orders:

³⁰ ts 30-31, 4 June 2021.

³¹ ts 30-31, 6 April 2021.

1. Within 14 days of this order, the respondent, shall pursuant to s 47(5)(b) of the *Strata Titles Act 1985* (WA) (as it applies from 1 May 2020):
 - (a) direct the occupier of Lot 11 on Strata Plan 38421 to:
 - (i) remove the A-frame sandwich board (Sign Frame) from the window of Lot 11 and the common property; and
 - (ii) refrain from installing, erecting or displaying the Sign Frame within Lot 11 or on the common property in contravention of Sch 1 by-law 21 and Sch 2 by-law 9; and
 - (b) otherwise comply with Sch 1 by-law 21 and Sch 2 by-law 9.

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

MS R PETRUCCI, MEMBER

3 SEPTEMBER 2021