JURISDICTION	:	STATE ADMINISTRATIVE TRIBUNAL
ACT	:	STRATA TITLES ACT 1985 (WA)
CITATION	:	DICKINSON and CHARUGA [2021] WASAT 122
MEMBER	:	MS N OWEN-CONWAY, MEMBER
HEARD	:	DETERMINED ON THE DOCUMENTS
DELIVERED	:	13 SEPTEMBER 2021
PUBLISHED	:	13 SEPTEMBER 2021
FILE NO/S	:	CC 896 of 2020
BETWEEN	:	MARK ANDREW DICKINSON Applicant AND IVAN CHARUGA First Respondent GAIL CHARUGA Second Respondent THE OWNERS OF NO'S 10, 12, 14, 16, 18 VISTA CLOSE STRATA PLAN 7772 Third Respondent

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Catchwords:

Costs of withdrawn *Strata Titles Act 1985* (WA) application - Section 87(2) of the *State Administrative Tribunal Act 2004* (WA) - Discretion to be exercised pursuant to s 87(2) of the *State Administrative Tribunal Act 2004* (WA) - Nature

and quantum of claimed costs - Section 87(3) of the *Strata Titles Act 1985* (WA)

Legislation:

State Administrative Tribunal Act 2004 (WA), s 82(7), s 87
Strata Titles Act 1985 (WA) (post 1 May 2020), s 14, s 35, s 35(2), s 209
Strata Titles Act 1985 (WA) (prior to 1 May 2020), s 1(7), s 15, s 32

Result:

Application for costs dismissed

Category: B

Representation:

Counsel:

Applicant	:	N/A
First Respondent	:	N/A
Second Respondent	:	N/A
Third Respondent	:	N/A

Solicitors:

Applicant	:	N/A
First Respondent	:	N/A
Second Respondent	:	N/A
Third Respondent	:	N/A

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

Chew and Director General of the Department of Education and Training [2006] WASAT 248
Pearce & Anor and Germain [2007] WASAT 291(S)
Springmist Pty Ltd and Shire of Augusta-Margaret River [2005] WASAT 143(S)
Western Australia Planning Commission v Questdale Holdings Pty Ltd [2016] WASCA 32

REASONS FOR DECISION OF THE TRIBUNAL:

The application for costs

1 The first respondent's claim for costs comprises the following components:

1) loss of wages totalling $9,551.52 for 16 days as follows:

a) four days for 'Directional Hearings';

b) three days for 'No. 1 Submission';

c) six days for 'Preparation for Hearing'; and

d) three days for 'Preparation for Costs';

calculated at the rate of $596.95 per 'weekday';

2) punitive damages of $40,000 for 'embarrassment and significant emotional and physical toll this has placed upon us' and 'economic loss and suffering'; and

3) an unspecified amount by way of punitive damages for loss of enjoyment of life and loss of reputation to be assessed by the Tribunal.

2 The second respondent's claim for costs comprises the following components:

1) loss of wages totalling $4,800 for 16 days as follows:

a) four days for 'Directional Hearings';

b) three days for 'No. 1 Submission';

c) six days for 'Preparation for Hearing';

d) three days for 'Preparation for Costs';

calculated at $300 per 'weekday';

2) punitive damages of $40,000 for 'embarrassment and significant emotional and physical toll this process has taken'; and

3) an unspecified amount by way of punitive damages 'to cover the impact on my health that this whole process has caused' to be assessed by the Tribunal.

3 Jointly the first and second respondents' claim for costs comprises the following components:

a) laptop computer - $465.29;

b) printer and drivers - $105;

c) Microsoft Office - $159;

d) stationery - $25; and

e) travel expenses 'to and from farm and time (24 hours)' - $2,000;

totalling - $2,754.29.

4 The total claimed by way of costs by both the first and second respondents jointly is therefore $97,105.81.

Background

5 The applicant's application made pursuant to s 35(2) of the *Strata Titles Act 1985* (WA) on 30 July 2020, was dismissed on 27 April 2021 at a directions hearing and following his application for leave to withdraw the proceeding made to the Tribunal on 26 February 2021. There was no final hearing or hearing of a preliminary issue or any substantive issue hearing in this proceeding. The Tribunal only conducted hearings for directions. The first and second respondent notified the Tribunal on 27 April 2021 that they intended to seek an order for costs. On 27 April 2021, the Tribunal made standard orders for the determination of the application for costs including the filing and serving of documents and submissions.

The applicant's position

6 The applicant's position is that he opposes any order for costs. The applicant contends the following:

a) neither respondent has provided evidence or information in support to prove any single claim for costs or the quantum and have failed to comply with Order 2 made on 27 April 2021;

b) the proceeding was withdrawn by him;

c) the amount of personal time claimed by each of the respondents - a total of 32 days in lost wages - for four directions hearing, one submission, one preparation for 'hearing' and one preparation for costs submission is excess in any event. Respective claims for punitive damages even if committed as a head of costs have no foundation in fact; and

d) the applicant acted in 'good faith' and 'in the best interests of' the third respondent strata company.

The relevant chronology of events

7 The application was commenced by the applicant (as one of two proprietors of Lot 3 on Strata Plan 7772) (Strata Plan) on 30 July 2020, pursuant to s 35(2) of the *Strata Titles Act 1985* (WA), (ST Act) as amended. The applicant sought an order against the first and second respondents to 'overrule' their objection to re-subdivide the strata plan scheme to a survey-strata plan scheme. The strata scheme is situated at 10 Vista Close, Edgewater. The strata scheme was registered on 14 February 1980.

8 Section 35(2) of the ST Act as amended on 1 May 2020 provides that:

> The Tribunal may, on the application of an applicant's registration of an amendment of a Strata Title Scheme, order that an objection to the amendment of a person with a designated interest be disregarded on the grounds that the objection is unreasonable.

9 The first directions hearing in this proceeding was listed on 14 August 2020 and the first and second respondents and the applicant all attended by telephone. The proprietor of Lots 1 and 4 of the Strata Plan also appeared by telephone. The transcript of the directions hearing established and the Tribunal finds that the directions hearing spanned 3.58 pm to 4.28 pm, a period of 30 minutes, on that day.

10 The proceeding was listed for further directions on 23 October 2020, so that the applicant could obtain legal advice.

11 No attendance took place on 23 October 2020 because the applicant sought to vacate that listing and adjourned the second directions hearing on account of requiring additional time to obtain legal advice. The

applicant wrote to the Tribunal by email on the 13 October 2020 with that request. His email concluded 'I would also like to CC all respondents, but I do not have any email addresses for the [first and second respondents] but will inform them in writing of the new date once confirmed'.

12 By order made on 13 October 2020 the directions hearing listed on 23 October 2020 was vacated and adjourned to 24 November 2020.

13 On 2 November 2020, the second respondent wrote to the Tribunal by email (without copying the same to the applicant) requesting a vacation of the directions hearing listed on 24 November 2020. There is no explanation why this email was not copied to the applicant nor a statement that the first respondent would mail the email to the applicant at his lot.

14 On 27 November 2020 the first and second respondents and the applicant attended a deferred second directions hearing by telephone. That directions hearing spanned 2.31 pm to 3.09 pm, totalling 38 minutes, on that day.

15 On 27 November 2020 the first and second respondents were ordered that by 29 January 2021 they were to file a written response to the applicant's application and copies of all documents upon which they intended to rely and to give copies of both to the applicant.

16 On 31 January 2021 the first respondent on behalf of himself and the second respondent filed a response by email. There is no evidence before the Tribunal that that response was sent to the applicant although it was copied by way of email to the first and second respondents. On 1 February 2021 the first respondent on behalf of himself and the second respondent filed the documents upon which they intended to rely. Again, there is no evidence that the first respondent sent a copy of the same to the applicant.

17 The directions hearing listed on 5 February 2021 was vacated as a consequence of a period of restricted movement ordered by the Western Australian State Government. The proposed third directions hearing was adjourned to 26 February 2021.

18 On 12 February 2021, the applicant sought an adjournment of the third directions hearing on account of his unavailability. His email correspondence to the Tribunal concluded 'I have also been unable to locate the email address of the [first and second respondents] to inform them of these dates, so I will leave a copy of this letter in their mailbox'.

19 On 15 February 2021 the Tribunal ordered the third directions hearing listed on the 26 February 2021 be vacated and brought forward to 25 February 2021.

20 On 25 February 2021 the applicant and the first and second respondents attended the third directions hearing by telephone. The directions hearing spanned 10.09 am to 10.59 am, totalling 50 minutes.

21 On 25 February 2021 the Tribunal ordered the third respondent, The Owners of No's 10, 12, 14, 16, 18 Vista Close Strata Plan 7772 (the Strata Company) be joined as a respondent and ordered that a preliminary issue be determined. Both the applicant and all respondents were ordered to file and give to each other submissions, further documents to be relied upon each of them and copies of 'decided cases' to be relied on. The Tribunal further ordered the preliminary decision to be determined on the documents.

22 On 26 February 2021 the applicant wrote to the Tribunal by email and requested that the proceeding he had commenced be withdrawn. On 3 March 2021, the Tribunal sought the first and second respondents' response.

23 On 10 March 2021 the first respondent wrote to the Tribunal by email to inform the Tribunal that 'we feel strongly that the matter should proceed'.

24 On 12 March 2021 the Tribunal ordered that the orders made on 25 February 2021 concerning the preliminary issue, filing of submissions, documents and authorities and the determination of the identified preliminary issue be vacated. The Tribunal ordered the proceeding be listed for a fourth directions hearing on 30 March 2021 'to consider the request by the applicant for leave to withdraw the proceeding'. Following the Tribunal's request to the first and second respondents dated 3 March 2021, there was no utility in the parties preparing for the hearing of the preliminary issue.

25 On 15 March 2021 the applicant wrote to the Tribunal by email (and copied the same to the first respondent), to request the fourth directions hearing listed on 30 March 2021 be vacated on account of his unavailability.

26 On 24 March 2021 the Tribunal ordered the directions hearing listed on 30 March 2021 be vacated and the directions hearing be adjourned to 9 April 2021.

27 On 7 April 2021 the first respondent wrote to the Tribunal by email (and copied that email to the second respondent but not the applicant or any of the third respondents) to request the directions hearing listed on 9 April 2021 by vacated owing to 'unexpected work commitments'.

28 On 8 April 2021, the Tribunal ordered that the fourth directions hearing listed on 9 April 2021 be vacated and listed the fourth directions hearing on 27 April 2021.

29 On 27 April 2021 the directions hearing was conducted by telephone and all parties attended by telephone. The directions hearing spanned 2.32pm to 3.06 pm, being 34 minutes on that day. The Tribunal ordered that:

> Pursuant to s 46(1) of the *State Administrative Tribunal Act 2004* (WA) the applicant has leave to withdraw the proceeding and the proceeding is dismissed pursuant to s 46(2) of the *State Administrative Tribunal Act* 2004 (WA)[.]

30 The first and second respondents were given liberty to apply for costs and if they so applied, they were to file:

> …
>
> (a) a schedule of the costs claimed in sufficient detail to enable the Tribunal to assess and fix any costs which might be awarded together with any supporting documents upon which the first and second respondents wished to rely; and
>
> (b) written submissions addressing the basis upon which it is intended costs should be awarded and the quantum of costs claimed[.]

The applicant's claim and the substantive dispute

31 No decision was made by the Tribunal concerning the merits of the applicant's claim. The applicant asserted that four of five lot proprietors of the five lot strata scheme agreed to sub-divide the strata scheme to a survey-strata scheme. The applicant provided documents that he said were signed by the owners of Lots 1, 2, 3 and 4 (including himself and Ms Dickinson in respect of Lot 3) evidenced that agreement. He asserted only the proprietors of Lot 5, the first and second respondents, had withheld their agreement to the proposal.

32 The applicant also filed a statement signed by four lot proprietors that for the past 15 years:

a) no strata meeting had been held;

b) there was no strata manager and had never been;

c) no strata committee had met or been convened;

d) none of the four had thought they were a strata group;

e) none had considered the five lots to be a strata scheme;

f) there are no by-laws 'special conditions, restrictions or exclusive access or use of any ground';

g) all proprietors believe their fenced areas were their property exclusively.

33 The applicant's position is that all four lot proprietors had operated in fact as if the strata scheme were a survey-strata scheme and now sought the re-subdivision to give effect to that position. It appears that upon purchase or prior to purchase none of the four lot proprietors had given consideration to the fact that they had purchased a lot in a survey-strata scheme which had no exclusive use by-laws demarking areas that were fences as exclusive use for the lot physically connected with that fenced area. The lots comprised the buildings from the external surface of those buildings, the strata scheme being a single tier strata scheme. All land and air space beyond the external boundaries of each lot comprise common property. That is clear from the strata plan and the endorsement of the strata plan.

34 There are no notifications of changes to the by-laws or introduction of exclusive use areas by-laws registered on the strata plan. There is no management statement registered on the strata plan indicating the existence of any by-laws lodged with the strata scheme plan on 14 February 1980.

35 The first respondent, spoke for the first and second respondents, and in the first directions hearing asserted that he had resided in Lot 5 'since 1978' and had been 'chairman of the body corporate'. The first respondent asserted that the strata scheme had operated the same way for 41 years and he saw no need for that to change. The first respondent asserted he did not 'trust' the applicant and complained he had received 'a pile of correspondence, probably eight or nine letters in the last two months and probably … five in the last three days'. The first respondent

objected to the applicant because 'he [the applicant] is not the speaker, as such, for the strata and I don't know why he takes it upon himself, as such': (ts 8, 14 August 2020).

36 The first and second respondents' address as registered proprietors of Lot 5 is identified on the record of Certificate of Title Volume 1555 Folio 172 pertaining as 10 Vista Close, Edgewater as joint tenants. However, in his submissions on costs the first respondent refers to his farming duties. This is a matter to which the Tribunal will return.

37 The first and second respondents' response filed 31 January 2021 confessed that the first and second respondents:

> … are now aware that under the Strata Title (sic) Act that our strata group/company is required to hold Annual General Meetings and vote on appointing Managers, Treasurers etc. Our Strata Group has not done this; there has been no AGM, minutes or election of office holders. We have never voted to agree on any articles …

38 The first respondent then reasons that, as a consequence, 'this matter cannot be brought for review by SAT'. The first and second respondents do not recognise that the applicant or collectively the four lot proprietors may call a general meeting of the third respondent. The first respondent asserts that the applicant is acting in the position of unappointed and unauthorised 'strata manager' and that the applicant has a 'conflict of interest'. He incorrectly asserts that, as the proprietors of Lot 5, the first and second respondents would lose a minimum of 40m^2 if the proposed survey-strata scheme would proceed. This statement is incorrect because outside the building comprising Lot 5, the proprietors of Lot 5 do not own exclusively and are not entitled to exclusively use any of the area adjacent to that building, it being common property and owned by all lot proprietors collectively and jointly in the shares as provided for by the strata plan that is in equal one-fifth shares.

39 The first and second respondents asserted in their response that the applicant claimed 'in a threatening manner that costs he has incurred should be covered by all tenants'. The first respondent accused the applicant of 'intimidation … to force us to agree to the changes he wants. He has clearly threatened us with losing our home because the strata company has no public liability insurance'. The first respondent complained that the applicant has 'not threatened other tenants' for the same action and one would or should 'question his motives'. The first respondent accuses the proprietor of Lot 1, Mr Peer, to have caused a number of major constructional additions to his home without 'tenants'

authorisation or 'without Shire approval'. He reasons that this is why Mr Peer is 'fully prepared to go with the proposal as it is to his advantage and to the other four common land owners loss'. The first respondent has accused the applicant and an unidentified other from attending 'on our property directly outside our bedroom window' (which is in fact common property), 'without permission and trampled all over our garden breaking things and stealing our plants'.

40 The first respondent objects to the proposed re-subdivision because all proposed survey-strata lots are not proposed to be equal in size and Lot 5 will be the subject of an easement which is unacceptable to the first and second respondents.

41 The application and the first and second respondents' response and submission on costs establishes a clear dispute concerning the re-subdivision proposed by the applicant, to which all other lot proprietors have agreed.

42 The first respondent complains that the process has been 'a great imposition, especially as we are both in our mid 60s and having to work with an electronic courts system, in Covid is very very difficult, especially when not everyone has access to all the electronic tools required'.

43 It should be noted that the Tribunal accepts service and lodgement of hard copy responses and submissions by post or other delivery. The first respondent further contends that 'we have received mountains of correspondence from Mr Dickinson with changes at random. We do not want all of this correspondence dropped into our letter box during these uncertain Covid times' which statement of preference is inconsistent with the purpose of a letter box. The first respondent reasons that as there is no 'formal set up of the strata group' and so the applicant's proposed changes 'appear to be unlawful'.

The Tribunal's jurisdiction

44 An application made to the Tribunal pursuant to s 35(2) of the ST Act falls within the Tribunal's original jurisdiction (s 209 of the ST Act as at 1 May 2020 and s 15 of the ST Act prior to 1 May 2020). An order that one party pay the other party an amount of money as compensation for the costs incurred by that first party arising from the Tribunal proceeding is governed by the enabling Act (ST Act) and the *State Administrative Tribunal Act 2004* (WA) (SAT Act). The Tribunal is no longer limited in making an order for costs in any proceeding commenced pursuant to the

ST Act (cf s 1(7) of the ST Act prior to 1 May 2020). The issue of costs therefore in this proceeding is governed by s 87 of the SAT Act.

The statutory framework

45 Section 87(1) of the SAT Act directs that unless otherwise specified in:

- the SAT Act;
- the relevant enabling Act;
- in any other order of the Tribunal made pursuant to s 87(2) to s 87(6) of the SAT Act;

the parties bear their own costs in a proceeding of the Tribunal. In this proceeding, s 87(4) to s 87(6) of the SAT Act have no application.

46 Relevantly, s 87(2) of the SAT Act confers a discretionary power on the Tribunal to make an order for the payment by a party of all or any of the costs of another party.

47 The Tribunal stated in ***Chew and Director General of the Department of Education and Training*** [2006] WASAT 248 (***Chew***) at [85] that in exercising the discretion conferred on the Tribunal by s 87(2) of the SAT Act:

> [T]he Tribunal should not generally make an award for costs unless a party has conducted itself in such a way as to unnecessarily prolong the hearing; has acted unreasonably or inappropriately in its conduct of the proceedings, has been capricious; or the proceedings in some other way constitute an abuse of process. The Tribunal might also make an order as to costs where a matter has been brought vexatiously or for improper purposes.

48 ***Chew*** is a proceeding that fell within the Tribunal's review jurisdiction. ***Pearce & Anor and Germain*** [2007] WASAT 291(S) (***Pearce***) is a proceeding that fell within the Tribunal's original jurisdiction. At [24] the Tribunal in ***Pearce*** stated:

> [W]here, however, there is a genuine dispute between the parties ... their respective rights are unclear and one or both seek determination of their rights in the Tribunal, the starting point remains that each party should expect to pay their own costs, unless there are circumstances of the type identified in ***Chew***.

49 The Tribunal's statements in ***Chew*** and ***Pearce*** are consistent with the principles stated in the frequently cited decision of ***Western Australia Planning Commission v Questdale Holdings Pty Ltd [2016] WASCA 32*** (***Questdale***), where the Court of Appeal gave consideration to the operation of s 87(1) of the SAT Act and the exercise of the discretion conferred upon the Tribunal by s 87(2) of the SAT Act. The following relevant principles apply to the resolution of the costs dispute in this proceeding:

1) The facts which the Tribunal is bound to consider and is precluded from considering are to be determined by implication from the subject matter, scope and purpose of the SAT Act properly construed (***Questdale*** per Murphy JA (with whom Martin CJ and Corboy J agreed) at [48]).

2) The discretionary power is to be exercised judicially. That is, not arbitrarily, capriciously or so as to frustrate the legislative intent (***Questdale*** per Murphy JA (with whom Martin CJ and Corboy J agreed) at [48]).

3) The 'judicial nature' of the exercise of the scheme of the SAT Act indicates that, although not expressed in s 87(2) of the SAT Act or elsewhere, the power to order costs is to be exercised if it is fair and reasonable in all the circumstances of the case to do so. (***Questdale*** per Murphy JA (with whom Martin CJ and Corboy J agreed) at [49]).

4) The presumptions as to costs orders that operate in curial litigation have no application, given the provisions of s 87(1) of the SAT Act and the directive contained therein (***Questdale*** per Murphy JA (with whom Martin CJ and Corboy J agreed) at [50]).

5) The onus is on the party seeking an order in its favour to establish that a favourable order should be made (***Questdale*** per Murphy JA (with whom Martin CJ and Corboy J agreed) at [51]).

6) The nature of the dispute is a relevant consideration in any application for costs (***Questdale*** per Murphy JA (with whom Martin CJ and Corboy J agreed) at [58]).

7) It will be relevant to the Tribunal to consider whether and to what extent the party who bears the onus on costs, can establish that the other party's conduct in connection with the proceeding has impaired the attainment of the Tribunal's statutory objectives to have the proceeding determined fairly and in accordance with the substantial merits of the matter, with as little formality and technicality as possible and in a way which minimises the costs of the parties (***Questdale*** per Murphy JA (with whom Martin CJ and Corboy J agreed) at [54]). This is particularly the case if an allegation of unreadable prolonging or delay is made against a party.

8) The mere fact that a party fails on some contentions advanced does not of itself signify that that party has acted 'inconsistently with the objectives in s 9 [of the SAT Act]' (***Questdale*** per Murphy JA (with whom Martin CJ and Corboy J agreed) at [55]).

9) Unmeritorious claims or claims made or pursued involving misconduct or which are vexatious or grossly exaggerated or presented in a way that is unduly burdensome may justify an exercise of the discretion conferred by s 87(2) of the SAT Act.

10) An order for costs made pursuant to s 87(2) of the SAT Act is compensatory and not punitive in nature.

50 The Tribunal concludes that the discretion conferred by s 87(2) of the SAT Act to order costs, is informed by the overarching obligation to exercise the discretion judicially and where it is fair and reasonable in all of the circumstances including a consideration of the nature of the jurisdiction exercised by the Tribunal 'but starting from the position that no order for costs will be made' (***Questdale*** per Martin CJ at [9]).

51 The onus is upon the first and second respondents that the Tribunal should exercise the discretion conferred by s 87(2) of the SAT Act at all; in their favour and to the extent of the sum they claim.

52 Section 87(3) of the SAT Act provides for the extent of the Tribunal's powers to order costs pursuant to s 87(2) of the SAT Act and is expressed to include:

> … the power to make an order for the payment of an amount to compensate the other party for expenses, loss, inconvenience or embarrassment resulting from the proceeding or the matter because of which the proceeding was brought.

53 The first and second respondents' claim for costs does not include those costs that are accepted by courts as compensable costs in litigious proceeding, being:

> … money paid or liabilities incurred for professional legal services and … [does] … not include compensation for time spent by a litigant who was not a lawyer in preparing and conducting his case *Springmist Pty Ltd and Shire of Augusta and Margaret River* (*Springmist*) [2005] WASAT 143 (S) (21 June 2005) at [55] and [56] citing and relying upon *Cachia v Hanes & Anor* [1994] HCA 14 (1994) 179 CLR 403).

54 In considering the ambit of compensable costs contemplated by s 87(3) of the SAT Act in ***Springmist Pty Ltd and Shire of Augusta-Margaret River*** [2005] WASAT 143(S) (***Springmist***) at [64] and [65] the Tribunal stated:

> The effect of s 87(3) is that the expenses that may be recovered are not limited to the traditional notion of legal costs but can include other expenses and loss in connection with the conduct of the proceedings before the Tribunal. For example, the costs may include the costs of a non-lawyer advocate, the expenses of a party having to travel to a hearing or some amount which compensates a party for the inconvenience or expense of its participation in the proceedings.
>
> Section 87(3) does not provide a basis upon which compensation, in the nature of damages, can be awarded because of some negligence or failure on the part of the decision-maker to perform its function diligently and timeously, or because a decision-maker's conduct falls short of the usual expectations of those who seek some consent, approval or permit.

55 Consistently with the tenor of that reasoning, s 87(3) of the SAT Act does not provide a basis upon which compensation for other known causes of action may be taken by the party seeking those claims. Further what is relevant is that the costs claimed are the 'costs in a proceeding of the Tribunal' (see ***Springmist*** concerning the interpretation of s 87(2) and (3) of the SAT Act).

The first and second respondent's contentions and the Tribunal's consideration

56 The first and second respondents do not identify clearly the basis upon which the Tribunal's discretion (conferred by s 87(2) of the SAT Act) to make an order for costs is to be exercised. They rely on the fact that the strata scheme was not governed as required by the ST Act. That, it seems is the reason why the applicant brought the proceeding apparently with the agreement of the three other lot proprietors. The Tribunal concludes that there is, as a matter of law, a strata company (the third respondent), but it had not met according to the first respondent's submission for a very long time because his understanding, as the former chairman of the council of the third respondent, was that it did not need to meet. The first respondent's submission that because there had never been any meetings or an agreement to any 'articles', the proceeding could not be brought before the Tribunal, is incorrect. The failure to hold meetings as required by the ST Act, pre and post 1 May 2020, simply means the third respondent, that has existed since the date of registration of the strata plan (14 February 1980) as a matter of laws (see s 32 of the ST Act prior to 1 May 2020 and s 14 of the ST Act post 1 May 2020), has failed to function in accordance with the ST Act. The first respondent's assertion that the third respondent has no 'articles' or by-laws is also incorrect. Unless specifically provided for by way of an management statement lodged with the original strata plan or a resolution that is registered on the strata plan subsequently, all strata companies have by-laws, being the default by-laws as provided by the ST Act as amended from time to time.

57 The merits of the applicant's application for an order pursuant to s 35(2) of the ST Act was not the subject of any decision by the Tribunal. The first and second respondents contend that there was no resolution because there was no meeting. The first respondent also asserts that the signature of the proprietor of Lot 4 is not authentic (first and second respondents' costs submissions). Whether there was a valid notice of meeting, a valid meeting called, a valid quorum for that meeting and a resolution passed by four of five lot proprietors at that meeting has not been determined. Whether the evidence of the 'agreement' of the four of five lot proprietors is true as to its contents and the signatures are authentic has not been determined.

58 The first and second respondents assert that the applicant commenced the proceeding out of vengeance or other ulterior motives and that the proceeding therefore were meritless and a means to cause harm and aggravation to them. The first respondent asserted he was assaulted

by the applicant and evaded prosecution. The applicant denies this and asserts that the police investigated the first respondent's allegations and preferred no charge against him. This, it is said, is the genesis of the applicant's antipathy towards the first and second respondents. The Tribunal concludes that there is no evidence that supports the contention that the applicant's claim and the manner in which he conducted the same is vexatious or an abuse of the Tribunal process because of an alleged assault.

59 When it comes to the merits of the applicant's application the Tribunal is not able to conclude that it has no merit, as it was withdrawn. The application to withdraw was not made upon the basis of a concession of lack of merit and, even if it had, there seems to be a genuine dispute that was before the Tribunal before the proceeding was withdrawn. The applicant's reason for his request for withdrawal of the proceeding is expressed as follows:

> As the costs and effort of any further action would outway (sic) an untested part of the Strata [Titles] Act. Also, the other members of the strata group, although affected by the objection feel that the animosity towards them from certain parties, is not worth the stress of continuing the action.

60 The Tribunal is not persuaded on the evidence and information that the proceeding commenced by the applicant were vexatious or an abuse of process. On the contrary the evidence is suggestive of there being a genuine dispute between a number of lot proprietors and the first and second respondents, the merits of which are untested and unknown.

61 Further, there is no evidence or information that the applicant acted unreasonably in commencing or maintaining the proceeding or acted capriciously, nor that he unnecessarily prolonged the proceeding. There were several adjourned directions hearings instigated by both parties. This caused some delay in the prosecution of the proceeding but not a substantial delay. One of the reasons for the delay was that when the first and second respondents requested a vacation and relisting of directions hearings, they did not send that request to the applicant. The applicant emailed the Tribunal on 29 April 2021 asking for all correspondence from the first and second respondents to the Tribunal as he had not received all emails sent to the Tribunal by them. The applicant was directed to the e-Courts portal to ascertain what had been filed in the Tribunal. The applicant also requested that the Tribunal vacate and relist directions hearings and he acknowledged that as he had no email address for the first and second respondents he would provide a copy of his email

request to the first and second respondents at their known address - at Lot 5. The first and second respondents assert that they were away at their farm but provided no information about that location to enable the applicant to mail them directly there. This resulted in delays, but the delays were not caused by the conduct of the applicant being unreasonable or by the applicant alone.

62 The various requests to vacate and relist directions hearing made by both parties on account of their respective unavailability, accounts for the delay between the commencement of the application in July 2020 and the directions hearing on 27 November 2020 when the first active management direction was made and 25 February 2021 when further active management directions concerning the issues were made for all parties. The applicant's request to withdraw the proceeding was made immediately following the directions hearing on 25 February 2021.

63 There is no basis for the Tribunal to conclude that the applicant's documentation or material was prolix and oppressive. Mailing information required by the ST Act and the Tribunal's practices and orders does not amount to oppression, as suggested by the first respondent.

64 The Tribunal finds there is no evidence or information that persuades the Tribunal that the applicant's conduct during the proceeding was improper such as to warrant the Tribunal concluding that it should depart from the primary position provided for by s 87(1) of the SAT Act, that each party should pay its own costs of the proceeding.

65 The Tribunal concludes that in the circumstances of this proceeding, the Tribunal shall make no order as to costs and dismiss the first and second respondent's application for costs.

The costs claimed by the first and second respondents

66 In any event the Tribunal is not satisfied that the costs claimed by the first and second respondents are compensable pursuant to s 87(3) of the SAT Act.

67 None of the parties attended any Tribunal directions hearings by physically attending the Tribunal hearing room. All directions hearings were conducted by telephone for the convenience of the parties, rather than the Tribunal. None of the direction hearings warranted a whole day of lost wages as none required travel to the Perth City or were very long (a total of 152 minutes over four directions hearings). The first and second respondents' response comprised only three pages of narrative content and

the documents they relied upon were not substantial. The applicant's documents and application were not substantial in volume. The Tribunal finds that none of the material provided by the applicant and the first and second respondents warranted loss of wages of six days to prepare for directions hearing, the response or the costs submissions. The preliminary issue hearing was vacated very quickly after the order made on 25 February 2021 and there is no justification for any preparation of the same by the first and second respondents in those circumstances.

68 There is no evidence or information to support any of the quantum claimed (as was required by the orders made on 27 April 2021). There is no evidence or information to establish or warrant travel costs of $2,000, considering all hearings were conducted by telephone. If the first and second respondents attended from a country location to their lot to collect mail, that was unfortunately because they did not provide the applicant with their email address so that he could serve any material on them by email. Further, the costs said to have been incurred for a laptop and electronic communication are not supported and in any event are not warranted, as the Tribunal accepts written communications and lodgement and it was not compulsory for the first and second respondents to use email. All other costs are both unsubstantiated and trivial, such as a paper cost of $25.

69 Finally, there is no information or evidence that would justify any compensation for embarrassment or inconvenience as contemplated by s 87(3) of the SAT Act at all that arise from the proceeding or at all. The proceeding was conducted in the most convenient manner that the Tribunal can conduct, and the applicant's claim is demonstrative of a genuine dispute between the parties, albeit that the strength of the same was not tested. There is no basis for the claim for $80,000 collectively for the first and second respondents.

70 The Tribunal finds that the amounts claimed are unsupported and without any foundation for the purposes of an order pursuant to s 87(3) of the SAT Act in any event. Had the Tribunal been persuaded that it ought make an order for costs pursuant to s 87(2) of the SAT Act, there are no claims that are proved to the Tribunal's satisfaction and that could be the subject of compensation as a matter of law by an order made pursuant to s 87(2) and s 87(3) of the SAT Act.

Orders

The Tribunal orders:

1. The first and second respondents' application for costs is dismissed.

2. There is no order as to costs of the proceeding dismissed by order 1 made on 27 April 2021.

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

MS N OWEN-CONWAY, MEMBER

13 SEPTEMBER 2021