

JURISDICTION : STATE ADMINISTRATIVE TRIBUNAL

ACT : STRATA TITLES ACT 1985 (WA)

CITATION : GLASBY and THE OWNERS OF 84 CLYDESDALE STREET COMO STRATA PLAN 9012 [2021] WASAT 136

MEMBER : DR B MCGIVERN, MEMBER

HEARD : DETERMINED ON THE DOCUMENTS

DELIVERED : 8 OCTOBER 2021

FILE NO/S : CC 502 of 2021

BETWEEN : IAN BOYD GLASBY
Applicant

AND

THE OWNERS OF 84 CLYDESDALE STREET
COMO STRATA PLAN 9012
Respondent

Catchwords:

Strata titles scheme - Strata company passed resolutions purporting to on-charge debt recovery expenses to lot owner - Powers of strata company to determine whether and what monies are owed to it by a lot owner - Statutory construction - Resolutions invalid - Declaratory relief

Legislation:

Interpretation Act 1984 (WA), s 59(2)
Legal Profession Act 2008 (WA)

State Administrative Tribunal Act 2004 (WA), s 60(2)

Strata Titles (General) Regulations 2019 (WA)

Strata Titles Act 1985 (WA) (Post 1 May 2020), s 3, s 3(1), s 14, s 14(8), s 44, Pt 8, Div 1, s 91, s 100, s 197, s 197(1), 197(1)(a)(iv), s 197(2)(a), s 197(2)(d), s 197(4), s 199(1), s 199(3)(d), s 200, Sch 1, Sch 5, cl 14, cl 23

Strata Titles Act 1985 (WA) (Prior 1 May 2020), s 32, s 36, s 42B, Pt IV, Div 1, Sch 1

Strata Titles Amendment Act 2018 (WA)

Result:

Application allowed

Category: B

Representation:

Counsel:

Applicant : Mr C Johns

Respondent : P Monaco

Solicitors:

Applicant : Legal Aid WA

Respondent : GV Lawyers

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

Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue
[2009] HCA 41

Australian Unity Property Ltd v City of Busselton [2018] WASCA 38

Clark and The Owners of Rosneath Farm - Strata Plan 35452
[2007] WASAT 85

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

Director General of Department of Transport v McKenzie [2016] WASCA 147

Grenside and The Owners of Upper Eastside Apartments Strata Plan 41133
[2008] WASAT 229

Janeba and The Owners of Bulimba Grove Villa Strata Plan 3266
[2020] WASAT 38

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

Rechichi and Johnston [2021] WASAT 79

Redset Nominees Pty Ltd and The Owners of Spinnakers Apartments Strata
Plan 53824 & Ors [2021] WASAT 96

REASONS FOR DECISION OF THE TRIBUNAL:

Introduction

1 The applicant in this proceeding owns a unit in a six-lot strata scheme in Como (**Scheme**). The respondent, the Scheme strata company, has previously brought various debt recovery proceedings against the applicant in the Magistrates Court in connection with allegedly unpaid strata levies. Certain of the amounts the subject of the debt recovery proceedings were levied against the applicant in reliance on resolutions passed by the respondent at successive Annual General Meetings (**AGMs**) in 2017 to 2020. Those resolutions purport to empower the respondent to raise debt recovery expenses as levies against a Scheme owner. In this proceeding, the applicant challenges the validity of each of those resolutions.

2 The proceeding commenced in the Tribunal on 1 April 2021 by an application made under s 197(4) of the *Strata Titles Act 1985* (WA) (**ST Act**).

3 In these reasons, unless otherwise stated, any reference to a statutory provision is a reference to the ST Act as amended from 1 May 2020.¹ The ST Act as it stood prior to 1 May 2020 will be referred to as the **Prior ST Act**.

Issues to be determined

4 To decide whether the resolutions the subject of dispute in this proceeding (**Disputed Resolutions**) are valid, the following issues must be determined:

- (a) what powers does or did the respondent have to determine whether and what monies are to be paid to it by an owner in the Scheme;
- (b) did the respondent have the power to pass the Disputed Resolutions; and
- (c) what orders should be made by the Tribunal?

¹ Pursuant to the *Strata Titles Amendment Act 2018* (WA), significant amendments came into effect on 1 May 2020 (referred to as the commencement day).

Procedural background

5 Pursuant to an order made on 25 June 2021 and s 60(2) of the
State Administrative Tribunal Act 2004 (WA), the matter is to be
determined entirely on the documents.

6 Those documents relevantly include:

- (a) the application, which was lodged together with:
 - (i) the applicant's orders sought and applicant's grounds for seeking orders (**Grounds**);
 - (ii) minutes of the AGMs held respectively on 13 November 2017, 16 November 2018, 18 November 2019 and 16 November 2020;
 - (iii) a search of strata plan 9012 (**Strata Plan**);
 - (iv) a search of instrument L879967 (**Notification**) registered against the Strata Plan on 13 March 2012;
 - (v) a search dated 29 March 2021 of the certificate of title for lot 1 of the Scheme, being Volume 1586 Folio 601;
- (b) a bundle of documents filed by the respondent on 9 April 2021 (**Respondent's Bundle**);
- (c) a statement of agreed issues and facts dated 17 May 2021 (**Agreed Statement**);
- (d) the applicant's written submissions dated 3 June 2021 (**Applicant's Submissions**); and
- (e) the respondent's written submissions dated 18 June 2021 (**Respondent's Submissions**).

Preliminary matters

Material facts

7 The following findings of fact are, except as otherwise stated, uncontentious.

8 The Scheme, known as 84 Clydesdale Street, Como, was created
by the registration on 6 March 1981 of the Strata Plan. It comprises six
single storey brick and tile units and common property.

9 Each of the six lots in the Scheme is allocated one
unit entitlement.

10 One notification of a change of by-laws is registered against the
Strata Plan, being the Notification, pursuant to which new governance
by-laws (**New By-Laws**) were added to the statutory by-laws that
applied to the Scheme under Sch 1 of the Prior ST Act.

11 No other amendments to the statutory by-laws apply to
the Scheme.

12 At all material times, the respondent engaged a strata manager
(**ESM**) for the Scheme.

13 The applicant is, and has since 11 May 1998 been, the registered
proprietor of lot 1 of the Scheme.

14 As demonstrated by the documents contained in the Respondent's
Bundle² the respondent (including by ESM) has taken a number of
steps to recover overdue and unpaid 'standard' levies³ from the
applicant, and has incurred legal and other expenses in relation to
taking those steps (**Debt Recovery Expenses**).

15 The respondent pays, and has paid, Debt Recovery Expenses by
drawing on its administrative fund.⁴

16 At each of the AGMs, the respondent passed resolutions⁵
regarding the 'on-charging' of Debt Recovery Expenses, together
comprising the Disputed Resolutions.

17 The following wording is representative of each of the
Disputed Resolutions:⁶

Debt Collection On Charging

² Specifically, an Owner Transaction Summary for the period 30 June 2014 to 16 September 2020 relating to the applicant, letters from the respondent's legal representative to and concerning the applicant, as well as email correspondence passing between representatives of the respondent and the applicant.

³ 'Standard' levies in this context refers to amounts levied against each owner of the Scheme, in proportion with their unit entitlements, as contributions to the administrative and reserve funds.

⁴ Agreed Statement, para 12.

⁵ Being Resolution 6 of the 2017 AGM, Resolution 6 of the 2018 AGM, Resolution 7 of the 2019 AGM and Resolution 6 of the 2020 AGM: Agreed Statement, paras 1-4.

⁶ Agreed Statement, para 11.

On a motion ... it was resolved that all costs associated with debt recovery from an Owner (including ESM Strata's internal recovery costs) will be payable by the relevant Owner. The strata company acknowledges its liability to pay the costs incurred by such debt recovery in the first instance, however the debt will remain with the lot until the strata company is reimbursed.

18 The respondent has, and has previously, commenced legal proceedings in the Magistrates Court for the recovery of, amongst other things, Debt Recovery Expenses.⁷

19 It is contended by the applicant in the Grounds, is not disputed in the Respondent's Submissions, and I accept that:

- (a) on 5 August 2019, the respondent commenced a general procedure claim 10916/2019 in the Magistrates Court, claiming the sum of \$2,058.41 against the applicant, which sum included a claim of \$410.64 for Debt Recovery Expenses (to 10 June 2019);
- (b) on 18 October 2019, the respondent was granted default judgment on claim 10916/2019;
- (c) on 28 January 2021, the respondent commenced general procedure claim 785/2021 in the Magistrates Court, claiming the sum of \$6,829.85 against the applicant, which sum includes \$4,723.03 for Debt Recovery Expenses (to 18 November 2020);
- (d) at the time of the application in this proceeding, claim 785/2021 was unresolved; and
- (e) the respondent relied and is relying on the Disputed Resolutions as the basis for those parts of the claims that pertain to the Debt Recovery Expenses.

20 In this proceeding, the applicant challenges the validity of the Disputed Resolutions and seeks declarations under s 199(1) that each is invalid.

Parties' contentions

21 The applicant's contentions may be broadly summarised as follows:

⁷ Agreed Statement, para 16.

- (a) the respondent's powers to determine amounts to be raised for payment into its administrative and reserve funds, and to levy contributions on a lot owner, are limited under the ST Act (and, before 1 May 2020, were limited under the Prior ST Act);
- (b) the powers of a strata company to raise funds from lot owners are generally limited to levying contributions on owners in proportion to the unit entitlements of their respective lots;⁸
- (c) a strata company may only levy contributions on an owner other than in proportion to the unit entitlement of their lot under and in accordance with a Sch 1 governance by-law;⁹
- (d) unless otherwise provided in a scheme by-law, a strata company must pass resolutions to exercise its functions in relation to establishing, determining monies to be raised for, and levying contributions to be paid into its administrative and reserve funds. Any such resolution is subject to the limitations in sub-paragraphs (b) and (c) above;¹⁰
- (e) in this case, no Scheme by-law provides (or has ever provided) for an alternative method of raising levies;
- (f) in the circumstances, the respondent did not have power to pass each of the Disputed Resolutions; and
- (g) accordingly, each of the Disputed Resolutions is invalid, and the Tribunal should make declarations to that effect.

22 The respondent's contentions may be broadly summarised as follows:

⁸ Applicant's Submissions, paras 18-21, 57-59 citing: Prior ST Act, s 36(1)(c), s 36(2)(c); ST Act, s 100(1)(c)(i), s 100(2)(c); *Grenside and The Owners of Upper Eastside Apartments Strata Plan 41133* [2008] WASAT 229 (*Grenside*) at [90].

⁹ Applicant's Submissions, paras 19-20, 28-30, 58-60, 67-68 citing: Prior ST Act s 36(2)(c)(ii), s 42B, Sch 1; ST Act s 3 (governance by-law), s 44, s 100(1)(c)(ii), Sch 1; *Grenside* at [90].

¹⁰ Applicant's Submissions, paras 20, 31, 59 citing: Prior ST Act s 36(3); ST Act s 100(3).

- (a) in the absence of a debt recovery by-law, the respondent relies on s 36 of the Prior ST Act and s 100 of the ST Act to recover its Debt Recovery Expenses;¹¹
- (b) the respondent is required to establish administrative and reserve funds. Contributions to those funds are to be raised by the respondent, and paid by each owner of the Scheme, as levies;
- (c) in order to recover unpaid strata levies, the respondent incurs, and it is reasonable to expect that it will incur, administrative costs and legal costs. Those costs are paid from the administrative fund;¹²
- (d) the governance of the strata company requires the respondent to take action to recover unpaid strata levies in order to meet its approved budgets;
- (e) the Disputed Resolutions are specific to a defaulting lot owner being responsible for Debt Recovery Expenses incurred by the respondent in doing so, and are reasonable;¹³
- (f) the Disputed Resolutions were properly presented, deliberated upon and passed at the AGMs;¹⁴
- (g) requiring the respondent to introduce a governance by-law to address payment of Debt Recovery Expenses would produce 'an unjust outcome' and be 'unfair to other owners'. That is because such a by-law would require resolution without dissent to pass, and could be defeated by a defaulting owner's dissent;¹⁵ and
- (h) the Disputed Resolutions should not be struck down.

23 The applicant agrees:

- (a) with the respondent's contention at [22](b) above; and

¹¹ Respondent's Submissions, para 6.

¹² Respondent's Submissions, paras 9-11.

¹³ Respondent's Submissions, paras 14, 17-19, 24. The respondent contends that, insofar as Debt Recover Expenses include legal costs, that an owner affected by the Disputed Resolutions has the protection of the *Legal Profession Act 2000* (WA).

¹⁴ Respondent's Submissions, paras 15-16.

¹⁵ Respondent's Submissions, paras 20-23.

- (b) that it is proper for the respondent to pay, in the first instance, the Debt Recovery Expenses from the Scheme's administrative fund.¹⁶

Power and approach

24 As noted earlier in these reasons, the proceeding was commenced by an application under s 197 of the ST Act, which provision confers power on the Tribunal to resolve 'scheme disputes'. That term is defined in s 197(1) to include disputes:

- (a) between 'scheme participants', which term relevantly includes the strata company and a member of the strata company (being a lot owner);¹⁷ and
- (b) about, amongst other things, 'a resolution or decision of a strata company or the council of a strata company, including its validity'.¹⁸

25 The dispute in this case concerns matters that arose both before and after the commencement of the amendments that resulted in the ST Act as it now stands. Specifically:

- (a) at the time of the 2017, 2018 and 2019 AGMs (being the time of each of the first three Disputed Resolutions) the Prior ST Act was in force; and
- (b) at the time of the 2020 AGM (being the time of the last Disputed Resolution), the ST Act had come into operation.

26 Schedule 5 of the ST Act deals with the transition of the Prior ST Act to the ST Act, and relevantly includes that a scheme dispute may involve an event that occurred, or a matter that arose, before the commencement of the ST Act.¹⁹

27 I am satisfied that:

- (a) the dispute properly falls within the scope of, and may be determined under, s 197; and

¹⁶ Applicant's Submissions, paras 11-13, 52-54; Agreed Statement, para 12.

¹⁷ ST Act, s 197(2)(a) and (d). Pursuant to s 3(1) the term 'member of a strata company' takes its meaning from s 14(8), which provides that 'owners for the time being' of lots in a strata titles scheme are members of the strata company.

¹⁸ ST Act, s 197(1)(iv).

¹⁹ ST Act, Sch 5, cl 14.

- (b) if the question of validity of the Disputed Resolutions is determined in the applicant's favour, I may (in addition to any other order under s 200) make a declaration in the terms sought pursuant to s 199(3)(d).

28 I note that, in resolving the dispute, it has been necessary to consider and construe key provisions of the ST Act and Prior ST Act. In do so, the primary object is to interpret each provision in a manner that is consistent with the language and purpose of all the provisions of the statute.²⁰ The following interrelated considerations and approaches have been identified as promoting that objective:

- (a) the construction of legislation is anchored in the text itself, but having regard to its context and purpose;²¹
- (b) statutory context - with regard to both the immediate provisions and the whole of the Act - is to be considered from the beginning of the task;²²
- (c) having regard to context includes having regard to the existing state of the law, the history of the legislative scheme and the mischief to which the statute is directed;²³
- (d) however, identifying legislative purpose is itself an exercise of objective statutory construction - it does not involve a search for what the legislators may have had in mind, nor the superimposition of some 'desirable' policy objective;²⁴
- (e) each provision in a legislative instrument should have 'work to do';²⁵ and
- (f) where statutory provisions intersect, a construction that favours the greatest congruity or coherence between those provisions is to be favoured.²⁶

²⁰ *Director General of Department of Transport v McKenzie* [2016] WASCA 147 (*McKenzie*) at [46]; *Commissioner of Police v Thayli Pty Ltd* [2020] WASC 43 (*Thayli*) at [29].

²¹ *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue* [2009] HCA 41 at [47]; *Australian Unity Property Ltd v City of Busselton* [2018] WASCA 38 (*Australian Unity Property*) at [79], [83].

²² *Thayli* at [29].

²³ *McKenzie* at [47]; *Thayli* at [31].

²⁴ *Australian Unity Property* at [85].

²⁵ *Project Blue Sky Inc* at [71].

Respondent's powers to determine whether and what monies are to be paid to it by an owner in the Scheme

Legislative framework

29 The respondent, as a strata company, is a creature of statute - its existence functions and powers derive from statute, and are subject to its terms.²⁷ It is clothed with such incidental powers as are necessary to give effect to its specified powers and duties under the ST Act.²⁸

30 The functions of a strata company are set out in Pt 8, Div 1 of the ST Act.²⁹ Those functions notably include:

- (a) a 'general duty' to control and manage the common property for the benefit of all the owners of lots, and to keep the common property and any personal property owned by the strata company in good and serviceable repair (with the power also to improve and alter the common property);³⁰
- (b) to ensure that insurance is in place in respect of all insurable assets of the scheme and in respect of any damage to property, death, bodily injury or illness for which the strata company could become liable in damages;³¹
- (c) to undertake the 'financial management' of the scheme;³² and
- (d) to represent the owners of the lots in proceedings taken by or against them jointly.³³

²⁶ *Project Blue Sky Inc v Australian Broadcasting Authority* [1998] HCA 28; (1998) 194 CLR 355 (*Project Blue Sky Inc*) at [70].

²⁷ Pursuant to s 14 of the ST Act, a strata company comprises the owners for the time being of the lots in the strata titles scheme, and is a body corporate which has perpetual succession, is capable of suing and being sued, and has subject to the ST Act, all the powers of a natural person that are capable of being exercised by a body corporate. See also Prior ST Act, s 32.

²⁸ *Interpretation Act 1984* (WA), s 59(2).

²⁹ And similar functions existed under Pt IV Div 1 of the Prior ST Act.

³⁰ ST Act, s 91 (included in the strata company's functions in relation to property set out in Pt 8 Div 1 Subdiv 1).

³¹ ST Act, Pt 8 Div 1 Subdiv 2.

³² ST Act, Pt 8 Div 1 Subdiv 3.

³³ ST Act, Pt 8 Div 1 Subdiv 4.

31 More specifically, the financial management powers and functions of a strata company include under s 100(1)-(2) of the ST Act (and included under s 36(1)-(2) of the Prior ST Act):

- (a) a duty to establish an administrative fund for the control and management of the common property, for the payment of any premiums of insurance and the discharge of any other obligation of the strata company;³⁴
- (b) relevantly in this case, the power to establish a reserve fund for the purpose of accumulating funds to meet contingent expenses, other than those of a routine nature, and other major expenses of the strata company likely to arise in the future;³⁵
- (c) correlative powers to determine the amounts to be raised for payment into the administration fund and any reserve fund;³⁶ and
- (d) the power to raise amounts so determined by levying contributions on the owners:
 - (i) 'in proportion to the unit entitlements of their respective lots';³⁷ or
 - (ii) in accordance with such alternative basis for levying contributions to an administrative fund (only) as the scheme by-laws may provide.³⁸

32 Pursuant to s 100(3) of the ST Act (and s 36(3) of the Prior ST Act), a strata company must³⁹ perform the financial management functions outlined above 'by and in accordance with' resolutions passed by it.

33 Pursuant to s 100(4) of the ST Act (and s 36(4) of the Prior ST Act), any contribution 'levied under' the provisions outlined in [31] above:

³⁴ ST Act, s 100(1)(a); Prior ST Act, s 36(1)(a).

³⁵ ST Act, s 100(2)(a); Prior ST Act, s 36(2)(a).

³⁶ ST Act, s 100(1)(b), s 100(2)(b); Prior ST Act, s 36(1)(b), s 36(2)(b).

³⁷ ST Act, s 100(1)(c)(i), s 100(2)(c); Prior ST Act, s 36(1)(c)(i), s 36(2)(c).

³⁸ ST Act, s 100(1)(c)(ii); Prior ST Act, s 36(1)(c)(ii) (the Prior ST Act refers specifically to a by-law under s 42B of the Prior ST Act).

³⁹ Except as otherwise provided by the scheme by-laws (which exception does not apply here).

- (a) becomes due and payable to the strata company in accordance with the terms of the decision to make the levy;
- (b) if unpaid when due, bears interest on the amount unpaid (at a prescribed rate);
- (c) may be recovered (with the interest accrued) as a debt in a court of competent jurisdiction.

34 For completeness, I note that the transitional provisions in Sch 5 of the ST Act provide, in relation to financial management matters, that:

Contributions or other arrangements determined under section 36 [of the Prior ST Act] as in force immediately before commencement day for any period that continues on or after commencement day are taken to be contributions or arrangements determined under section 100.⁴⁰

Consideration

35 It is worth emphasising that this matter is concerned solely with whether or not the Disputed Resolutions are valid.

36 Unlike cases such as *Grenside* and *Clark and The Owners of Rosneath Farm - Strata Plan 35452*⁴¹ this is not a dispute about the validity, effect or 'reasonableness' of a by-law. Indeed, it is common ground between the parties that none of the Scheme by-laws apply to the matters in dispute.

37 To the extent that reference has been made to provisions dealing with by-laws, those references are included by way of articulating and considering the relevant legislative context and purpose.

38 The respondent explicitly relies on s 36 of the Prior ST Act and s 100 of the ST Act 'in order to recover' the Debt Recovery Expenses.⁴²

39 It is not contentious, and I find, that:

⁴⁰ ST Act, Sch 5 cl 23(3). In this case, I do not consider the Debt Recovery Expenses the subject of the Disputed Resolutions in 2017, 2018 and 2019 to be 'contributions ...for any period that continues on or after the commencement day' (because even if they could satisfy the meaning of 'contributions', they are 'for expenses incurred prior to 1 May 2020. Arguably, the Disputed Resolutions in those periods might be 'other arrangements determined under s 36 [of the Prior ST Act]' that continue after the commencement day. However, given the congruity between the relevant provisions of the ST Act (specifically, s 100) and Prior ST Act (specifically, s 36), little turns on this point.

⁴¹ [2007] WASAT 85.

⁴² Respondent's Submissions, para 6.

- (a) the respondent's pursuit of outstanding levies (and incurring associated costs) is appropriately characterised as falling within the respondent's 'other obligations' (being incidental to its financial management and representative functions)⁴³ for the purposes of s 100(1) of the ST Act and s 36(1) of the Prior ST Act); and
- (b) it was proper for the respondent to meet the Debt Recovery Expenses from the Scheme's administrative fund in the first instance.⁴⁴

40 However, the respondent does not have a power at large to determine what monies are payable to it by an owner in the Scheme.

41 The respondent's powers to make *determinations* about fund contributions are circumscribed by s 100(1)(b) and s 100(2)(b) of the ST Act (and previously, by s 36(1)(b), s 36(2)(b) of the Prior ST Act). Construed in the context of the provisions of Pt 8 Div 1 of the ST Act (and Pt IV Div 1 the Prior ST Act), those powers are limited to determining the amounts that the strata company will require to meet its obligations in a global, budgetary sense. The power does not extend to determining *who* may be responsible for payment of those amounts.

42 The power of the respondent to *raise* the amounts so determined is circumscribed by s 100(1)(c) and s 100(2)(c) (and previously, by s 36(1)(c), s 36(2)(c) of the Prior ST Act). In the absence of a by-law providing for an alternative method (and it is common ground that there is no such Scheme by-law), that power is to levy contributions on lot owners in proportion with the unit entitlements of their respective lots.

43 Further, there is no incidental power to determine that any particular costs associated with the performance of the respondent's functions are to be borne by a particular owner or class of owners. Such a power is not necessary to give effect to the specified duties of the respondent and, indeed, would be contrary to the express limitations and objective statutory intent of the ST Act (and Prior ST Act).

⁴³ ST Act, s 100(4), s 103; Prior ST Act s 33, s 36(4).

⁴⁴ These findings do not suggest that it would not be appropriate for a strata company to raise contributions to and to expend monies from the reserve fund for such purposes. That issue does not arise in this case, and I am not required to determine it. See, in relation to this issue under the Prior ST Act: *Grenside; Janeba and The Owners of Bulimba Grove Villa Strata Plan 3266* [2020] WASAT 38.

44 The respondent's appeal to the desirability or convenience of having such a power does not overcome the absence of a statutory basis to support its existence.⁴⁵

45 It follows from the reasons above that at the time of each of the Disputed Resolutions, the respondent lacked the power:

- (a) to determine that any amounts, including in relation to Debt Recovery Expenses it had incurred, were to be paid by the owner of any particular lot; and
- (b) to raise any contributions to its administrative fund, including in relation to the Debt Recovery Expenses it had incurred, other than by levying contributions on owners in proportion to the unit entitlements of their respective lots.

Did the respondent have power to pass the Disputed Resolutions?

46 It is trite that resolutions (at an AGM or other meeting of a strata company or its council) are the mechanism by which certain decisions are made in the *exercise* of the strata company's duties and powers. They are not self-standing sources of power, and cannot enlarge the powers and functions of a strata company.

47 The requirement in s 100(3) of the ST Act (and under s 36(3) of the Prior ST Act) that the respondent pass resolutions *in the performance of* its financial management functions:

- (a) is expressly referable to performance of particular functions of the respondent,⁴⁶ and
- (b) does not operate to empower the respondent by resolution to enlarge its powers in relation to its financial management function.

48 It follows from the conclusion at [45] above that the Disputed Resolutions were not made in the exercise of any power (including any incidental power) conferred on the respondent.

49 The respondent's contentions that the Disputed Resolutions were properly notified to, and voted upon by its members, and are reasonable

⁴⁵ See paragraphs [22](g) and [28](d) above.

⁴⁶ Being those specified in 'in subsections (1)(a), (b) and (c) and (2)' of s 100 of the ST Act (and s 36 of the Prior ST Act).

in their terms, is no answer. Matters of procedure and reasonableness may be relevant to the determining whether a strata company has properly exercised power, but cannot overcome its absence.

50 I find that the Disputed Resolutions are, and were from their inception, invalid.

What orders should be made?

51 The Tribunal exercises a broad discretion in making orders, including any declarations, in the resolution of a scheme dispute.⁴⁷

52 However, it would in my view be inconsistent with the purpose and intention of the ST Act to exercise that discretion in a manner consistent with the respondent's contentions at [22](g)-(h) above.

53 That is, having determined that the respondent lacked the power to pass the Disputed Resolutions, and in circumstances where those resolutions continue to impact upon the interests of the parties, it would be an improper exercise of discretion to refuse to grant the declaratory relief sought by the applicant.

54 I am satisfied that it is appropriate to make declarations that each of the Disputed Resolutions is invalid.

Final comment

55 Finally, I note that a number of the parties' submissions were directed to the issue of whether the respondent could or should make a governance by-law giving effect to the intended operation of the Disputed Resolutions.

56 That issue was not raised on the facts and it has not been necessary for me to determine it (there being no such by-law made or proposed for the Scheme). These reasons should not be read as suggesting either that it would or would not be open for such a by-law to be made. Rather, that issue is to be determined when it is properly raised on the facts before the Tribunal.

Orders

The Tribunal orders:

⁴⁷ See discussion in *Rechichi and Johnston* [2021] WASAT 79; *Redset Nominees Pty Ltd and The Owners of Spinnakers Apartments Strata Plan 53824 & Ors* [2021] WASAT 96

1. The application is allowed.
2. Pursuant to s 199(3)(d) of the *Strata Titles Act 1985* (WA), the Tribunal declares that the following resolutions of the respondent are invalid:
 - (a) Resolution 6 of the Annual General Meeting (AGM) of 13 November 2017;
 - (b) Resolution 6 of the AGM of 16 November 2018;
 - (c) Resolution 7 of the AGM of 18 November 2019; and
 - (d) Resolution 6 of the AGM of 16 November 2020.

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

DR B MCGIVERN, MEMBER

8 OCTOBER 2021