JURISDICTION	:	STATE ADMINISTRATIVE TRIBUNAL
ACT	:	STATE ADMINISTRATIVE TRIBUNAL ACT 2004 (WA)
CITATION	:	HAPGOOD-STRICKLAND and WATSON [2021] WASAT 135
MEMBER	:	MS H M LESLIE, SESSIONAL MEMBER
HEARD	:	22 MARCH 2021
DELIVERED	:	6 OCTOBER 2021
FILE NO/S	:	CC 578 of 2017
BETWEEN	:	RONALD SHAUN HAPGOOD-STRICKLAND First Applicant KERRY-LEIGH HAPGOOD-STRICKLAND Second Applicant AND SUSAN WATSON Respondent

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Catchwords:

Declaration permitting prosecution consideration - Factors relevant to the exercise of discretion

Legislation:

State Administrative Tribunal Act 2004 (WA), s 86, s 95, s 95(1), s 95(3), s 95(3)(b)

Strata Titles Act 1985 (WA), s 83, s 84

Result:

Application dismissed

Category: B

Representation:

Counsel:

First Applicant	:	In Person
Second Applicant	:	In Person
Respondent	:	Non-Appearance

Solicitors:

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

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

Hapgood-Strickland and Watson [2021] WASAT 15
Rogers and The Owners of the Linx At Nexus Strata Plan 47739 [2021] WASAT 70

REASONS FOR DECISION OF THE TRIBUNAL:

Application

1 The applicants seek an order under s 95(3)(b) of the *State Administrative Tribunal Act 2004* (the SAT Act) (the application). Subject to their wishes as expressed later in these reasons, the applicants seek that order to potentially allow the respondent to be prosecuted for failing to comply with an order of the Tribunal dated 30 October 2017.

2 The hearing of the application came before the Tribunal on 25 January 2021. The respondent had filed no evidence or submissions and did not attend. She did however contact the Tribunal requesting an adjournment and providing a medical certificate. The matter was deferred for two months to allow for her recovery.

3 The matter came on again for hearing on 22 March 2021, this time convened by telephone in view of the COVID-19 issue. The respondent did not attend nor had she filed any documents. The matter proceeded essentially undefended, the Tribunal being satisfied that the respondent was on notice and had been provided with the opportunity to be heard. The only evidence and submissions were those filed and given by the applicants. At the conclusion of the hearing the Tribunal reserved its decision.

Background

4 The parties are the owners of two residences in a two unit strata complex.

5 There is an extensive history of dispute between them. That history, and indeed the dispute between the respondent and the prior owners of the applicants' unit, is set out in the transcript of oral reasons for decision delivered on 1 March 2018 in this matter subsequent to the making of final orders on 30 October 2017.

6 On that date, the Tribunal made final orders on the applicants' application for relief under s 83 of the *Strata Titles Act 1985* (WA) (the ST Act). Those orders enjoined the respondent to do and to refrain from doing a number of things set out in eight orders (A1 - A8) made under s 84 of the ST Act. Those orders (the 2017 orders) are set out as follows:

(A) Pursuant to Section 84(1) of the Strata Titles Act (WA) 1985, it is ordered that:

1. Within 56 days, the respondent must, at her cost, ensure that the common property area designated on strata plan 12286 as the carport area adjacent to her lot, is reinstated to the original design for the building and, to this end, she is to

   (a) remove, or arrange for the removal of, the

      (i) the colourbond petition erected between the carport pillar and the shared party wall;

      (ii) the roller door and motor attached to the lot boundary wall and to common property;

      (iii) the colourbond roller door enclosure attached to and cemented into the common property; and

   (b) make good, or have made good, all the common property affected by such removal.

2. Within 28 days, the respondent must, at her cost,

   (a) remove

      (i) the soil and building rubble placed on the quadrant of common property on the corner of Doveridge Drive and Glengarry Drive, Duncraig bounded by the driveways of the two lots and the corner council verge ('the vector' area') by her, or contractors employed by her, at the time of works being performed on her Lot;

      (ii) the sand placed on the verge or vector area beside her driveway by her, or contractors employed by her, at the time of works being performed on her Lot; and

   (b) make good, or have made good, all the common property affected by such removal.

3. The Respondent is to refrain from doing any thing or taking any action that will have the effect of preventing

the Applicants, or their agents, from restoring, at their cost, the brickpaved hardstand area adjacent to the carport adjacent to their lot ('the hardstand area') to its former state and, in particular, from

(a) replacing paving bricks that were temporarily removed during the excavation of tree roots; and

(b) replacing the original wooden sleeper edging with limestone bricks or other suitable durable edging material.

4. The Respondent is to refrain from doing any thing or taking any action that will have the effect of preventing the Applicants, or their agents, from re-landscaping, at their cost, the vector area, including, but not limited to landscaping steps to

(a) level, prepare and mulch the soil in preparation for planting new vegetation;

(b) plant a medium-sized tree to replace the two large trees removed by the respondent as a shade tree;

(c) remove a tree which has grown perpendicular to the ground; and

(d) plant new shrubs and other vegetation selected to provide a low maintenance, water-wise, native garden area with a small useable area of grass or other suitable ground cover.

5. If the respondent wishes to have any input into the selection of plants by the applicants for planting in the vector area, she is to provide such input in writing to the applicant by email or by post, within 28 days.

6. The respondent is to refrain from removing or damaging by any means, any plantings or landscaping undertaken by the applicants under order 4 hereof.

7. Within 28 days, the respondent must, at her cost, remove from the vector area and from the hard stand area, all items of her personal property, including any vehicle or any chattels or other objects and including any unwanted or discarded items or other rubbish.

8. Save as provided herein, the respondent is to refrain from placing any of the items referred to in Order 7

> hereof on the vector area or on the hard stand area at any time in the future. The Respondent may park a vehicle from time to time on the hardstand area provided that she obtains the permission of the Applicants on each occasion prior to doing so.
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> (B) Pursuant to section 81 (10) of the Strata Titles Act 1985 (WA) 1985, order (A)1 to 8 shall continue to have force and effect beyond the expiration of the period of two years that next succeeds the making of this order[.]

7 The matter in 2017 had proceeded essentially undefended. Perhaps predictably, the 2017 orders did not resolve the dispute and the Applicants were required to take proceedings for enforcement of the 2017 orders in the Supreme Court.

8 A Certificate of Appropriateness of Enforcement was issued by the then President of the Tribunal under s 86 of the SAT Act on 29 November 2017.

Compliance / enforcement steps

9 The uncontested evidence lodged in support of the application is, in summary, as follows.

10 Separate enforcement proceedings in relation to different aspects of the 2017 orders were instituted by the applicants on no less than three occasions (including at least on the first occasion a request that the respondent be dealt with for contempt).

11 On the first occasion (Supreme Court matter SAT 3/2017) the parties reached agreement as to the particular disputed matters and by consent, the enforcement proceedings were dismissed with no order as to costs on 28 March 2018. It is noted that the respondent was represented by counsel who signed the consent minute filed.

12 On the second occasion (Supreme Court matter SAT 2/2018), having brought the enforcement proceedings, the applicants sought to discontinue after obtaining legal advice and by consent, the enforcement proceedings were dismissed with no order as to costs on 12 September 2018. Again the, respondent was represented by counsel who signed the consent minute filed.

13 On the third occasion (Supreme Court matter SAT 3/2018) again the parties reached agreement as to the particular disputed matter. Again, by consent, orders were made on 5 December 2018 dismissing

the enforcement proceedings, this time with a consent order that the respondent pay the applicants' costs fixed at $1,100. On this occasion, the applicants were represented by counsel who signed the consent minute. The respondent signed the filed consent minute in person.

14 Each of the enforcement proceedings related to differing alleged breaches of the 2017 orders claimed by the applicants. Each was resolved by consent. However, the disharmony between the parties seems to have continued.

15 During 2018, there were restraining order proceedings in the Magistrates Court and orders were made enjoining all parties to do and to refrain from doing an agreed list of things.

16 There were further contested proceedings in the Tribunal between the parties in early 2021 concerning issues in relation to insurance costs (CC 1057 of 2020); ***Hapgood-Strickland and Watson*** [2021] WASAT 15).

17 The uncontested evidence is that during 2018, 2019 and 2020 the respondent has continued to breach Order A8 of the 2017 orders:

> 1) in the main, by placing some or all of her council rubbish/recycling/green waste Sulo-style 'wheelie' bins on the front corner quadrant of the common property garden area or on the paved hardstand area adjacent to the applicants' carport which is used by them to park their second vehicle and/or a trailer. At times the council wheelie bins have been chained together and/or chained to fixed uprights.
>
> 2) on a few occasions, by placing cardboard boxes or other rubbish items on the hardstand or quadrant garden area.
>
> ('the breach behaviour')

18 The uncontested evidence of the applicants is that they sought assistance from the police and the local authority but without success; further that they have endeavoured to correspond with the respondent but without success as she will not communicate with them.

19 Rather than returning to the Supreme Court in further enforcement proceedings, the applicants have approached the Tribunal seeking an order under s 95(3)(b) of the SAT Act.

The applicants' position

20 The applicants submit that their reason for making the application is that making 'repeated applications to the Supreme Court is a waste of public and judicial resources, particularly if the matter is capable of being settled in another manner'. In evidence, they stated that it is not their wish that the respondent in fact be prosecuted. Rather, their hope is that the threat of a prosecution occurring will be a sufficient deterrent to prevent further breach behaviour by the respondent thus resolving the dispute. Their submission is that they did not know at the time of the 2017 orders that a s 95 order could be sought and, in any event, that they had 'not even considered the possibility that the respondent would refuse to comply' with any orders that the Tribunal might make.

The legislation

21 Section 95(1) of the SAT Act provides that a person who fails to comply with a decision of the Tribunal commits an offence punishable by a fine of up to $10,000.

22 Section 95(3) provides that s 95(1) does not apply unless:

> (a) the Tribunal in the original decision has declared that subsection (1) applies; or
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> (b) after a person fails to comply with the decision, the Tribunal makes an order declaring that subsection(1) applies and the failure continues after notice of that declaration is served on the person.

23 Several observations can be made about s 95(3)(b). It clearly requires the exercise of discretion by the Tribunal, informed by the opinion of the member reached on all the evidence, as to whether the provisions of s 95(1) should be made applicable to the order in respect of which the non-compliance is alleged.

24 In my view, the question is directed to whether an order should be made the effect of which is to elevate the issue of the alleged non-compliance from the civil jurisdiction (inter partes) to the criminal jurisdiction where the matter moves into the hands of the State for potential prosecution with all of the consequences that flow from that. That question clearly has to be considered having regard to all of the

circumstances of the case viewed at the time of the exercise of the discretion.

Authorities

25 There is little authority on s 95 of the SAT Act. It is however instructive to consider the decision of Pritchard J, President of the Tribunal, in ***Rogers and The Owners of the Linx At Nexus Strata Plan 47739*** [2021] WASAT 70 (***Rogers***) and, in particular, her analysis of the appropriate considerations when the Tribunal is asked to issue an enforcement certificate under s 86 of the SAT Act. In that case, Her Honour identified a number of matters relevant to the exercise of discretion which, in my view, usefully transpose into a s 95 matter. Those matters might be conveniently summarised as follows:

1) evidence as to the compliance or otherwise with the order;

2) the nature of the orders made by the Tribunal;

3) whether there has been a complete failure to comply with the orders, or a partial failure;

4) whether the failure to comply is due to any sort of ambiguity which might render enforcement inappropriate;

5) whether the party entitled to the benefit of the order has agreed to accept performance in a different way which might render enforcement inappropriate; and

6) what other means of securing performance exist.

26 In the way described by Her Honour in ***Rogers*** with respect to s.86 Certificates, my view is that the purpose of a s 95(3)(b) declaration is to provide a 'filtering or screening' mechanism to be used in identifying which orders of the Tribunal should be the subject of potential prosecution as criminal offences where there is ongoing non-compliance, and which should not.

27 Applying Her Honour's language and logic in ***Rogers***, if it had been intended that every claim of non-compliance with a Tribunal order could be pursued under s 95, there would have been no need for the requirement that the Tribunal make a declaration under s 95(3)(b) that s 95(1) of the SAT Act applies.

Consideration

28 In this instance, having taken into account the history of the matter, the evidence given and the submissions and documents filed, I am of the view that a s 95(3)(b) declaration is not appropriate for the following reasons:

29 Firstly, it is now almost four years since the original orders were made. The effluxion of time is a factor to consider when seeking to add to an order made in the past which addition could have been sought at the time.

30 Secondly, the resolution by consent on three occasions of enforcement proceedings is also a relevant factor. The evidence shows that the available enforcement mechanism has been successfully used by the parties in achieving compliance in relation to almost all aspects of the 2017 orders save:

a) as otherwise agreed; and

b) for the breach behaviour currently complained

31 Thirdly, the uncontested evidence is that by agreement the terms of the original 2017 order as it related to the unauthorised carport enclosure were in fact modified to allow the enclosure on terms in the resolution of the first enforcement matter SAT 3/2017. The fact that the 2017 order has been significantly modified by agreement is a factor to be considered when determining whether a s 95 order should be made.

32 Fourthly, ongoing enforcement relief in the Supreme Court as a matter of civil law is available for the applicants in relation to the alleged breaches of Order A8. Enforcement has not yet been sought in relation to the breach behaviour currently complained of albeit that it has been successfully utilised in relation to other breaches of the 2017 orders including of Order A8. In my view the use of that enforcement pathway is preferable to the making of a s 95 declaration which would move the matter into the realm of a potential criminal prosecution by the State rather than the enforcement of an extant civil right available to the applicants, authorised by the Tribunal through its Certificate and, at least in relation to the breach behaviour, as yet not attempted by the applicants. It is accepted that the need for such further proceedings is doubtless frustrating and time consuming for the applicants. It is accepted that such matters tie up the resources of the Supreme Court.

It is nonetheless the method of legal redress provided for within the applicable legislated civil system. As was pointed out by Her Honour in ***Rogers*** at [72], it is not open to the Supreme Court to transfer an enforcement proceeding for a non-monetary order to another court. Given the significant potential consequences for the respondent of escalating the matter from the civil sphere into the criminal sphere, this should only be done as a matter of last resort.

33 Fifthly, as to the applicants' argument about resources, a s 95 declaration requires the use of Tribunal resources, and if made, still requires the use of prosecutorial resources and potentially the use of public resources and judicial time in a prosecution, albeit not in the Supreme Court. To that extent, the applicants' principal argument is not a strong one in my view.

34 Sixthly, there is an inconsistency in the applicants' case. If a s 95 declaration is made, the matter ceases to be one within the control of the applicants. They have already indicated that they are not seeking that the respondent be prosecuted but rather simply that an order be made the deterrent effect of which - a possible prosecution if the breach behaviour continues - will, they hope, resolve the dispute. Unfortunately, the ultimate outcome even following a s 95 declaration is not for them or indeed this Tribunal to determine. Further, it would in my view be inappropriate for the Tribunal to make a declaration that would open the door to action that does not in fact have the backing of the party essentially in the position of the complainant in a criminal matter.

35 It is preferable in a matter that is in essence a civil dispute, that it be for the parties to exercise their enforceable rights rather than that the matter be one of criminal prosecution.

36 Seventhly, even assuming ongoing breach behaviour, the matter would still require an exercise of discretion by the prosecuting authorities to prosecute. A declaration by this Tribunal may not achieve the result that the applicants seek by way of compliance with the order in any event. Further, the prosecuting authorities may decide not to prosecute even in the face of ongoing non-compliance with what is a portion only of the 2017 orders.

37 Eighthly, it is apparent from the documents received by the Tribunal that the respondent has a number of health issues including mental health issues that may be impacting on her behaviour,

her decision-making in the area of the dispute and her apparent decision not to engage in the hearing of this matter. Whilst such considerations do not excuse the apparent breaches of Order A8, they may go some way to explaining some of the behaviours and may be a reason for not progressing the matter under s 95 of the SAT Act.

Conclusion

38 This is not a case where the respondent has failed to comply with the orders at all. It is not in dispute that much of the original 2017 orders have in fact been complied with or modified by agreement. There does appear to be an ongoing issue regarding certain ongoing behaviour by the respondent concerning in particular the placement of her council wheelie bins and on occasions other materials on common property over some of which it has been previously determined by the Tribunal that the applicants have exclusive rights.

39 These current matters have not been the subject of enforcement action as provided by law which is open to the applicants.

40 In my view, the application for a s 95(3)(b) declaration should be refused.

41 If the applicants wish to take action regarding the alleged breach behaviour it is open to them to do so by further enforcement and/or contempt proceedings in the Supreme Court.

Orders

1. The application is dismissed.

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

MS H LESLIE, SESSIONAL MEMBER

7 OCTOBER 2021