

JURISDICTION : STATE ADMINISTRATIVE TRIBUNAL

ACT : STRATA TITLES ACT 1985 (WA)

CITATION : THOMPSON and THE OWNERS OF BLUMARINE
APARTMENTS STRATA SCHEME 57889 [2021]
WASAT 120

MEMBER : MS V HAIGH, MEMBER

HEARD : 2 JULY 2021

DELIVERED : 7 SEPTEMBER 2021

PUBLISHED : 7 SEPTEMBER 2021

FILE NO/S : CC 22 of 2021

BETWEEN : JENNIFER THOMPSON
Applicant

AND

THE OWNERS OF BLUMARINE APARTMENTS
STRATA SCHEME 57889
Respondent

Catchwords:

Lot boundaries on registered strata plan incorrectly shown - Failure to pass unanimous resolution approving amendment to strata plan and schedule of entitlement

Legislation:

Strata Titles Act 1985 (WA) (post 1 May 2020), s 3, s 14(8), s 35, s 35(5),

s 35(1)(e)(i), s35(1)(e)(ii), s 37, s 37(1), s 37(2), s 37(5), s 38, s 38(1)(a), s 197, s197(1)(a)(i), s 197(2), s 197(4), s 200(1), s 200(2)(n)
Strata Titles Act 1985 (WA) (prior to 1 May 2020), s 3(5)
Strata Titles Amendment Act 2018 (WA)

Result:

Application successful

Category: B

Representation:

Counsel:

Applicant : In Person
Respondent : In Person

Solicitors:

Applicant : N/A
Respondent : N/A

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

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

REASONS FOR DECISION OF THE TRIBUNAL:

Introduction

1 This application is brought by Ms Jennifer Thompson
(**Ms Thompson**) against The Owners of Blumarine Apartments Strata
Scheme 57889 (**strata company or respondent**) for resolution of a
strata dispute.¹

2 Ms Thompson is the owner of Lot 9 on strata plan 57889
(**scheme plan**), comprising nine lots in a multi-level residential
building.

3 Ms Thompson contends that the boundaries of her lot on the
registered scheme plan are incorrectly shown, and do not correspond to
the building. She is seeking to have the scheme plan amended to reflect
the footprint of her lot.

4 For this reason at the Annual General Meeting (**AGM**) on
27 August 2020 Ms Thompson proposed a motion that the strata
company resolve by unanimous resolution to approve the registration of
the amendment to the scheme plan as detailed in the proposed scheme
plan and revised schedule of unit entitlements, both documents being
annexed to the agenda for the AGM (the proposed amendment of the
scheme plan).

5 Ms Thompson's motion did not pass by unanimous resolution at
the AGM.

6 Ms Thompson is seeking orders that a 'unanimous resolution is
passed to correct an error noted in the strata plan to unit 9, Blumarine
Apartments.'

The evidence

7 The evidence in this case comprises the:

- Certificate of Title for Lot 9;²
- the registered strata plan 57889;³
- the 26 pages of by-laws for the strata scheme;⁴

¹ Section 197(4) of the *Strata Titles Act 1985* (WA).

² Exhibit 1.

³ Exhibit 2.

- the agenda for the AGM on 27 August 2020 (which included the proposed amended strata plan comprising Annexure A to the agenda and the proposed schedule of unit entitlements comprising Annexure B to the agenda);⁵ and
- the minutes of the AGM on 27 August 2020.⁶

8 Ms Thompson and Mr Bowyer (a licensed surveyor and Cadastral Manager from RM Surveys) gave oral evidence at the hearing on 2 July 2021.

9 There was no evidence or arguments presented by the respondent. This was unsurprising given that at a directions hearing on 6 April 2021 the respondent stated that it would not participate in these proceedings, and further it was noted at that hearing that none of the proprietors of the lots in the strata scheme had requested to be joined as a party to the proceedings, having been given the opportunity to do so by the orders made by the Tribunal at a directions hearing on 26 February 2021.

Legal framework

10 Pursuant to s 197(1)(a)(i) of the *Strata Titles Act 1985* (WA) (ST Act) the Tribunal is empowered to resolve 'scheme disputes' between 'scheme participants' about 'scheme documents'. All sections of the Act to which I refer are in respect of the ST Act.

11 Pursuant to s 197(2) 'scheme participants' include the strata company for the strata titles scheme and a member of the strata company for the strata titles scheme.

12 Pursuant to s 14(8) a strata company is comprised of the owners for the time being of the lots in the strata titles scheme (who are the members of the strata company).

13 On the basis of the Certificate of Title I find that Ms Thompson is the owner of Lot 9 on strata plan 57889 and hence a scheme participant.

14 On the basis of the strata plan I find that the respondent is the strata company and hence a scheme participant.

⁴ Exhibit 3.

⁵ Exhibit 4.

⁶ Exhibit 5.

15 As discussed, the crux of this dispute is whether the boundaries of
Ms Thompson's Lot 9 on the scheme plan are correctly shown and
whether they correspond with the building.

16 It is clearly a dispute about scheme documents, and I have
jurisdiction, pursuant to s 197, to resolve it.

17 The requirements for registration of amendment of a scheme plan
are set out in s 35.

18 Section 35(5) provides that the notice of resolution for an
amendment of a scheme plan must include details of the proposed
amendment and any associated amendment of the schedule of unit
entitlements, in the approved form.

19 Section 37 of the ST Act sets out the requirements of a schedule of
unit entitlements.

20 The requirements for registration of amendment of a schedule of
unit entitlements are set out in s 38.

21 Section 38(1)(a) provides that an amendment of a schedule of unit
entitlements may only be registered in conjunction with an amendment
of the scheme plan to give effect to a subdivision.

The issues to be determined

22 The issues to be determined by me are:

- i) What are the requirements for the registration of the
proposed amendment of the scheme plan?
- ii) Should I exercise my discretion pursuant to s 200(1)
and make orders in Ms Thompson's favour?

What are the requirements for the registration of the proposed amendment of the scheme plan?

23 There are four types of amendment of a strata titles scheme that
give effect to a subdivision, with varying requirements for resolutions
and consents.

24 Relevantly, s 3 defines a type 4 subdivision to cover what was
formerly referred to as a re-subdivision.

25 Re-subdivision of a lot was defined in s 3(5) of the ST Act as in
force immediately before the *Strata Titles Amendment Act 2018* (WA)
to include the alteration of the boundaries of one or more lots so as to
create one or more different lots and common property.

26 On the basis of the evidence before me, being the registered strata
plan for Lot 9, and the proposed amendments to Lot 9 to create a new
Lot 10, I find that the proposed amendments are a type 4 subdivision.

27 Section 35(1)(e)(i) requires that there be a unanimous resolution in
respect of type 4 subdivisions, such as this.

28 Section 35(1)(e)(ii) sets out the requirements if there is any holder
of a designated interest over the whole or part of the parcel. There is no
holder of such a designated interest here.

***Should I exercise my discretion pursuant to s 200(1) and make orders in
Ms Thompson's favour?***

29 The minutes of the AGM on 27 August 2020 relevantly state as
follows:

Resubdivision of Lot 9 on Strata Plan 57889, as the owner of Lot 9
identified the boundaries of that Lot were incorrectly shown on the
registered Strata Plan.

The Chairman introduced Keith Bowyer, Cadastral Manager from
RM Surveys who provided an explanation as to the error contained with
the strata plan to lot 9, the process to rectify same and referred to the
report attached to the notice from the Valuer in respect of the lot
entitlements. K Bowyer also noted:

- City of Cockburn did not require a new building approval to be issued since the building is built in accordance with the approved plans held by their office;
- The strata plan lodged with Landgate is not correct as the strata plan does not reflect what has been constructed;
- The error of the boundaries shown incorrectly of lot 9 on the strata plan was identified by the purchaser during the settlement process;
- The only way to correct the Strata Plan is to lodge a re-subdivision and go through such process, the various documents are attached to the notice;

- Once the documentation is registered at Landgate, lot 9 will cease to exist and will be reflected as lot 10 on the strata plan documentation;
- The process requires a new unit entitlement certificate to be provided by a licensed valuer and the report from the valuer was referred to;
- The valuer was asked to review his decision however the valuer, based on the reasons stipulated in his report, is unable to alter the unit entitlements to their original values;
- Consent from all owners and anyone with an interest in the scheme is required, this includes any mortgagees;
- The unit entitlements have a bearing on levies and voting rights;
- The strata plan needs to reflect the correct footprint of the building;
- There is no relationship between the valuer and Keith's office;
- There was a settlement established by the current owner of lot 9 with the previous owner in respect of costs that will be incurred, costs for the resubdivision process will not be incurred by the strata company.

M Reilly noted that levies for his unit (lot 2) are significantly high when he does not use the benefit of the lift but contributes towards the costs. It was noted the ground floor units have a considerable sized courtyard which other units do not have and all these factors are taken into account when determining the value and unit entitlements.

It was also noted if the resolution does not pass, then the matter would need to proceed to the State Administrative Tribunal (SAT) for an order. M Reilly and/or any other owners who do not consent have the right to obtain another valuation. K Bowyer noted there is a significant cost for valuers to undertake same.

On a motion moved by J Thompson and seconded by G Ridgewell the following motion was put to the meeting that the Strata Company resolve by **unanimous resolution** to approve the registration of the amendment to the Scheme Plan as detailed in the attached Strata Plan (marked Annexure A) and revised Schedule of Unit Entitlements (marked Annexure B).

Votes for the motion:

Lots 4, 5, 6, 7, 8, 9

The chairman noted a proxy was held from unit 8 and the vote would go in favour of the motion.

Note: Unit 4 provided their agreement to the motion in writing prior to the meeting. Unit 3 provided their vote when arriving at the meeting.

Votes against the motion:

Lot 2

The Chairman declared the motion had not passed and voting (for those owners who did not exercise their vote) will remain open for 28 days following the meeting. SA will follow up with the owner of lot 1 as to their vote on the motion.

M Lucas from lot 3 joined the meeting at 6:10 pm and confirmed his vote in favour of the motion.

The Chairman thanked K Bowyer for attending and he left the meeting.

30 On the basis of the minutes of the AGM, and the evidence of Ms Thompson and Mr Bowyer, I am satisfied that the strata company has not passed a unanimous resolution to approve the proposed amendment of the scheme plan (as set out in Annexures A and B to the agenda of the AGM on 27 August 2020).

31 As to the basis of the objections, Ms Thompson gave evidence, which I accept, that the owners of Units 1 and 2 objected as they were concerned about their entitlements changing and having to pay slightly higher strata fees. Her evidence is consistent with Mr Bowyer's recollection as to the reasons for the grounds for objection by the owners.

32 Ms Thompson and Mr Bowyer have both given evidence, which I accept, that sheet 7 of the registered strata plan for Lot 9 does not correspond with the building. Mr Bowyer's evidence is based on his visual inspection of Lot 9 approximately 18 months ago.

33 In broad terms the balcony on the left hand side of Lot 9 on sheet 7 of the registered strata plan is stated to be 14m² and an inverted 'L' shape whereas the balcony as built is rectangular rather than 'L' shaped, and is 11m².

34 Further they have both given evidence that the proposed amendment of the strata plan (Annexure A to the agenda for the AGM

on 27 August 2020) does correspond to the building insofar as Lot 9 is concerned.

35 On the basis of the documentary evidence and the oral evidence of Ms Thompson and Mr Bowyer I make the following findings:

- Mr Bowyer is the surveyor whose signature is affixed to the registered strata plan for Lot 9 dated 16 January 2009;
- Lot 9, as built, does not correspond with the registered strata plan in that the balcony on the left hand side of Lot 9 on sheet 7 of the strata plan is stated to be 14m² and an inverted 'L' shape whereas the balcony as built is rectangular rather than 'L' shaped and is 11m²;
- following his inspection of Lot 9, Mr Bowyer prepared the proposed scheme plan dated 13 May 2020 regarding the re-subdivision of Lot 9 on scheme plan 57889 (being Annexure A to the agenda for the AGM on 27 August 2020) in which Lot 9 is now reflected as Lot 10;
- the proposed scheme plan accurately corresponds with Lot 9 as built, in that it is 11m² and rectangular in shape; and.
- the minutes of the AGM on 27 August 2020, so far as they relate to this dispute, are an accurate record of the meeting.

36 Given these findings I conclude that the proposed scheme plan for Lot 9 (now reflected as Lot 10) correctly reflects the footprint of Lot 9 as built.

37 In *Tipene v The Owners of Strata Plan 9485* [2015] WASC 30 at [73] Corboy J states:

A lot in a strata scheme is a statutory construct created in relation to a three-dimensional space. The dimensions of that space are fixed by the surfaces of the walls, floors and ceilings of the building or parts of a building or by other physical features of the building in the case of structural cubic spaces. A lot is not an abstraction defined, for example, by what is depicted or described on the floor plan forming part of the strata plan for a strata scheme. The floor plan merely describes the cubic space and does so by reference to the physical structures that

bound the space. It is the space created by those structures that constitute the lot in a strata scheme.

38 In the circumstances of this case Lot 9 as it is currently depicted on the floor plan forming part of the registered scheme plan, does not accurately describe the cubic space by reference to the physical structures that bound the space.

39 For this reason, the scheme plan needs to be rectified so that it describes the cubic space by reference to the physical structures.

40 I therefore find that the proposed re-subdivision has merit.

41 I note here that the objections were not to the amended scheme plans per se but rather to the consequential amendments to the schedule of unit entitlements which may result in slightly higher strata fees.

42 But insofar as there is any objection to the proposed re-subdivision, I find that the grounds of objection are unreasonable and ought be disregarded in circumstances where the proposed re-subdivision will ensure that the strata plans correctly reflect the footprint of Lot 9, as built.

43 I now turn to consider the proposed schedule of unit entitlements prepared by Mr Dawson, a licensed valuer, dated 21 May 2020 and attached to the agenda for the AGM (Annexure B) and whether it meets the requirements of s 37.

44 Interestingly, Mr Dawson issued the original certificate (pursuant to s 37) in respect of the schedule of unit entitlements when scheme plan 57889 was registered back in 2009.

45 More recently Mr Dawson issued a certification dated 21 May 2020 in respect of the amended schedule of unit entitlements as set out in Annexure B to the agenda for the AGM on 27 August 2020, and it is the amended schedule that is now under consideration.

46 Mr Dawson's amended schedule is based upon the re-subdivision scheme plan:

After rounding and UE analysis considering +/- variations up/down between floors and Positions etc plus further analysis for access/aspect/views-vista/commercial influences/shadowing/light/main areas/bedrooms/bathrooms/courtyards/road noise/car bays/power line influence etc etc etc plus numerous cross checks and deliberation we have calculated and attach what we believe is the line of best fit for the

UEs in this development based upon a fair and reasonable approach – and within the definition on the form, which allows for a +/- 5% allowance.

47 Pursuant to s 37(1) a schedule of unit entitlements for a strata titles scheme must allocate a whole number (a unit entitlement) to each lot in the strata titles scheme; and state the number that is the sum of the unit entitlements of all the lots in the strata titles scheme.

48 I find that the schedule of unit entitlements complies with s 37(1) as a whole number is allocated to each lot in the scheme and the sum of the unit entitlements is stated to be 1,000.

49 Pursuant to s 37(2) when allocated, the proportion that a unit entitlement of a lot bears to the sum of the unit entitlements of all the lots in the strata titles scheme must not be greater than 5% more, or 5% less, than the proportion that the value of the lot bears to the sum of the value of all the lots in the strata titles scheme.

50 In his certification Mr Dawson certified that:

... the proportion that the unit entitlement of a lot as stated in the Schedule of Unit Entitlements above bears to the sum of unit entitlement of all lots in the strata titles scheme is not greater than 5% more or 5% less than the proportion that the value of that lot bears to the sum of the value of all the lots in the strata titles scheme.

51 On the basis of this evidence I find that Mr Dawson has made the certification as required by s 37(2).

52 Pursuant to s 37(5) a schedule of unit entitlements, or an amendment of a schedule of unit entitlements, for a strata titles scheme must:

...

(a) be in the approved form; and

(b) be prepared and certified by a licensed valuer.

53 I find that Mr Dawson's amended schedule is on the approved form and has been prepared and certified by him in his capacity as a licensed valuer therefore meeting the requirements of s 37(5).

54 In conclusion, on the basis of Mr Dawson's evidence which is not contradicted, I find that the revised unit entitlements as calculated by Mr Dawson and set out in Annexure B, have been calculated in

accordance with s 37 of the Act, as certified by Mr Dawson on 21 May 2020.

55 For these reasons I find that the grounds of objection to the amended schedule are unreasonable and ought to be disregarded.

56 Pursuant to s 200(1) of the ST Act I may make any order I consider appropriate to resolve these proceedings. In particular s 200(2)(n) provides that I may make an order that the strata company is to be taken to have passed or not to have passed a specified resolution required under this Act or the scheme by-laws as an ordinary resolution, special resolution, resolution without dissent or unanimous resolution.

57 The ST Act does not set out any guiding principles for the Tribunal to consider in exercising this discretionary power.

58 I am persuaded to exercise my discretion to make orders in favour of Ms Thompson, for the reason that the floor plan for Lot 9 is not an abstraction defined by the floor plan but rather the floor plan is a description of the cubic space by reference to the physical structures that bound the space.

59 For the reasons I have given I make the following orders to resolve this dispute in favour of Ms Thompson.

Orders

The Tribunal orders:

1. Pursuant to s 200(2)(n) of the *Strata Titles Act 1985* (WA) The Owners of Blumarine Apartments Strata Scheme 57889 are taken to have passed a unanimous resolution authorising the proposed subdivision (as set out in Annexure A to the agenda for the Annual General Meeting (AGM) on 27 August 2020) and the proposed amendment of the schedule of unit entitlements (as set out in Annexure B to the agenda for the AGM on 27 August 2020) for the purposes of s 35(1)(e)(i) of the *Strata Titles Act 1985* (WA).

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

MS V Haigh, MEMBER

7 SEPTEMBER 2021