
JURISDICTION : STATE ADMINISTRATIVE TRIBUNAL

ACT : STRATA TITLES ACT 1985 (WA)

CITATION : PONTIFEX and SMILLIE [2021] WASAT 163

MEMBER : MS C CONLEY, MEMBER

HEARD : 4 OCTOBER 2021

DELIVERED : 17 DECEMBER 2021

FILE NO/S : CC 920 of 2021

DENISE LYNETTE PONTIFEX
Applicant

AND

DARREN SMILLIE
Respondent

Catchwords:

Four lot single tier strata scheme - Application by one owner for recovery from other owner of share of insurance premium - Extent of strata company's insurance function - Whether share of premium recoverable under either cl 53E(4) of Sch 2A or s 99 of the *Strata Titles Act 1985* (WA)

Legislation:

State Administrative Tribunal Act 2004 (WA), s 60(2)
Strata Titles Act 1985 (WA), s 3, s 3(1), s 3(2), s 3(2)(a), s 3(2)(b), s 10(1), s 10(2), s 14, s 97, s 99, s 99(2), s 100(1)(a), s 120(1), s 120(3), s 122, s 135(1), s 140, s 143, s 143(1), s 144(1), s 145, Sch 2A, cl 1, cl 3, cl 3A, cl 3AB, cl 3AB(1), cl 3AB(2), cl 53A, cl 53B, cl 53C, cl 53D, cl 53E, Sch 5, cl 16

Strata Titles Amendment Act 2018 (WA)

Result:

Application dismissed

Category: B

Representation:

Counsel:

Applicant : In Person

Respondent : Mr S MacFarlane

Solicitors:

Applicant : N/A

Respondent : Lavan

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

Hapgood-Strickland and Watson [2021] WASAT 15

REASONS FOR DECISION OF THE TRIBUNAL:

Introduction

1 The applicant is the owner of Lot 1¹ and the respondent is the
owner of Lot 4 in a four lot strata scheme located in Charles Street,
East Perth (**Scheme**).

2 The Scheme was created upon the registration, on 26 March 2007,
of Strata Plan 52882 (**Strata Plan**).²

3 The Strata Plan sets out the unit entitlements of each lot. The unit
entitlement of Lots 1 and 4 is 26 whereas the unit entitlements of Lots 2
and 3 is 24.

4 The applicant had arranged for insurance for the four lots in the
Scheme over a period of at least 10 years. This was a task that the
applicant inherited when she purchased Lot 1 and which continued
because none of the other owners wanted to undertake the task.

5 In or about May 2021 the applicant received an insurance renewal
notice from RAC Insurance for the period from 13 May 2021 to
13 May 2022 (**Insurance Renewal Notice**). The insurance premium
was \$1,882.52 (**Insurance Premium**). The insurance referred to in the
Insurance Renewal Notice included building cover. The policy holder
was listed as the 'Owners of Strata Plan 52882' (**Strata Company**).

6 The applicant requested the other owners of the lots in the Scheme
to pay, within 14 days, a quarter share of the Insurance Premium for the
renewal of the policy with RAC Insurance (**Insurance Policy**).

7 The applicant paid the Insurance Premium prior to the expiry of
the 14 day time limit.

8 The owners of Lots 2 and 3 each paid a quarter share of the
Insurance Premium.

9 The respondent obtained his own insurance for Lot 4 and did not
pay a quarter share of the Insurance Premium.

10 The applicant applied to the Tribunal under cl 53E of Schedule 2A
(**Sch 2A**) of the *Strata Titles Act 1985 (WA)* (**ST Act**) and s 99(2) of

¹ Exhibit 3.

² Exhibit 2.

the ST Act for recovery of the amount of the share of the Insurance Premium that she paid on behalf of the respondent (**Contended Share**).

Issue for determination

11 The issue for determination by the Tribunal is whether the applicant is entitled to recover the Contended Share under cl 53E of Sch 2A of the ST Act or s 99 of the ST Act.

Tribunal proceedings

12 A final hearing of the application was conducted on 4 October 2021 (**Hearing**).

13 Prior to the Hearing, the parties filed submissions and documents with the Tribunal.

14 The applicant contended that:

- a) the lot insurance determination was given when the owners paid their share of the Insurance Premium into the applicant's bank account; and
- b) notice was given in accordance with cl 53E(1) when the applicant sent the respondent an email.

15 The respondent contended that:

- a) the Tribunal cannot make orders under s 99(2) of the ST Act as the Scheme is a single tier strata scheme and the special provisions in Sch 2A apply to the Scheme;
- b) the Strata Company is not responsible for obtaining insurance over the lots in the Scheme as the Strata Company has not, by ordinary resolution, determined that this is a function of the Strata Company;
- c) the Strata Company is responsible for insuring the common property of the Scheme as the Strata Company has not, by resolution without dissent, determined that the Strata Company is exempt from this obligation;
- d) the applicant has not complied with the recovery process in cl 53E;

- e) even if the applicant has complied with the recovery process, the insurance policy taken out by the applicant:
 - i) does not correspond with the Strata Company's insurance obligations; and
 - ii) is not an insurance policy of the Strata Company because the applicant is not a volunteer strata manager and has not been authorised by the Strata Company to perform scheme functions.

16 The applicant gave evidence to the effect that:

- a) the applicant is the registered proprietor of Lot 1 and has been the registered proprietor since 2009;³
- b) there are four units in the Scheme;⁴
- c) the units are single tier;⁵
- d) there is a common driveway for Lots 2, 3 and 4 and a common letterbox;⁶
- e) the applicant has arranged insurance for units A, B, C and D (Lots 1, 2, 3 and 4 respectively) since about 2010, initially through a broker but subsequently by herself;⁷
- f) the applicant does not get paid to organise the insurance;⁸
- g) the applicant does not have a volunteer strata management agreement;⁹
- h) when the applicant received the Insurance Renewal Notice, payment of the Insurance Premium was

³ ts 10-11, 4 October 2021; see also Exhibit 3.

⁴ ts 10, 4 October 2021.

⁵ ts 13, 4 October 2021.

⁶ ts 10 and 13, 4 October 2021.

⁷ ts 14-15, 4 October 2021.

⁸ ts 29, 4 October 2021.

⁹ ts 29, 4 October 2021.

overdue and she asked for an extension of time for payment;¹⁰

- i) on 11 May 2021, the applicant sent an email to the respondent enclosing a copy of the Insurance Renewal Notice, advising the respondent that an extension for payment had been granted for another two weeks and that his quarter share was \$470.63;¹¹
- j) on 11 May 2021, the respondent sent the applicant an email in which he said that 'I am happy to get my own insurance';¹²
- k) the applicant organised a meeting with the other owners to discuss the issue of the insurance;¹³
- l) a meeting was held on 13 May 2021 with the owners of each lot, other than the respondent, at which meeting insurance was discussed. However, nothing was decided at the conclusion of that meeting;¹⁴
- m) on 14 May 2021 the applicant sent a courtesy copy of an email to the respondent which contained a summary of the minutes of the meeting held on 13 May 2021;¹⁵
- n) on 15 May 2021, the applicant sent an email to the respondent and the owner of Lot 3 (a hard copy of which was delivered to the owner of Lot 2) to advise that after considering the proposal to insure individually she would not be doing so and to seek payment of their quarter share of the Insurance Premium;¹⁶
- o) on 25 May 2021, the applicant paid the Insurance Premium to RAC Insurance from her bank account;¹⁷

¹⁰ ts 16, 4 October 2021.

¹¹ ts 16, 4 October 2021 and Exhibit 5.

¹² ts 17 and 19, 4 October 2021 and Exhibit 6.

¹³ ts 18 and 19, 4 October 2021.

¹⁴ ts 20 and 21 and ts 40, 4 October 2021.

¹⁵ Exhibit 11.

¹⁶ ts 22 and 41, 4 October 2021 and Exhibit 7.

¹⁷ ts 24, 4 October 2021 and Exhibit 9.

- p) on 25 May 2021, the owner of Lot 2 paid a quarter share of the Insurance Premium into the applicant's bank account;¹⁸
- q) on 8 June 2021, the owner of Lot 3 paid a quarter share of the Insurance Premium into the applicant's bank account;¹⁹ and
- s) the applicant has not received any amount from the respondent.²⁰

17 The applicant's evidence outlined above was not contested. I therefore accept that evidence.

18 The respondent gave evidence to the effect that:

- a) the respondent is the registered proprietor of Lot 4 in the Scheme;²¹
- b) when the respondent met the applicant in August 2010, he had his own insurance for Lot 4. The applicant advised him that he could not have his own insurance and that he had to be part of the group insurance, so he cancelled his insurance and paid into 'your insurance';²²
- c) on or about 11 May 2021 the applicant approached the respondent about insurance;²³
- d) on 13 May 2021 the respondent advised the applicant that he would be arranging his own insurance;²⁴
- e) the applicant told the respondent that he could not have his own insurance;²⁵ and
- f) the respondent arranged his own insurance with the RAC.²⁶

¹⁸ ts 23 and 24, 4 October 2021 and Exhibit 9.

¹⁹ ts 24, 4 October 2021 and Exhibit 9.

²⁰ ts 24 and 25, 4 October 2021.

²¹ ts 58, 4 October 2021.

²² ts 64, 4 October 2021.

²³ ts 58, 4 October 2021.

²⁴ ts 59, 4 October 2021.

²⁵ ts 59, 4 October 2021.

²⁶ ts 64, 4 October 2021.

19 The respondent's evidence outlined above was not contested.
I therefore accept that evidence.

The legislative framework

20 The *Strata Titles Amendment Act 2018 (WA) (ST Amendment Act)* came into operation on 1 May 2020 and the amendments made to the ST Act by the ST Amendment Act apply to these proceedings.

21 Section 97 of the ST Act provides:

(1) A strata company must ensure that the following insurance is in place for the strata titles scheme —

(a) all insurable assets of the scheme must be insured against fire, storm and tempest (excluding damage by sea, flood or erosion), lightning, explosion and earthquake -

(i) to replacement value; or

(ii) to replacement value up to, for an event of a specified kind, a maximum amount specified in the contract of insurance that is a reasonable limitation in the circumstances;

and

(b) the strata company must be insured against damage to property, death, bodily injury or illness for which the strata company could become liable in damages to an amount of not less than \$10,000,000 or, if some other amount is determined under the regulations, that amount.

Note for this subsection:

1. The owner of a lot in a survey strata scheme is responsible for insurance of the kind referred to in paragraph (a) for infrastructure on the lot.

2. The owner of a lot is responsible for insurance of the kind referred to in paragraph (b) for damages for which the owner could become liable.

(2) However, if a strata company has taken all reasonably practicable steps available to it to obtain the required insurance but no insurer is willing to enter into a contract of insurance on reasonable terms that meets the requirements, the strata

company must obtain whatever insurance it can obtain on reasonable terms that most closely meets the requirements.

- (3) The Tribunal may, on application by a strata company, exempt it from compliance with this section subject to conditions specified in the exemption.
- (4) A strata company may enter into a contract of insurance relating to the insurable assets of its strata titles scheme and execute documents relating to the contract in its own name, as if it were the owner of the assets.
- (5) Subject to subsection (6), if a strata company receives money from an insurer in the event of damage to or destruction of an insurable asset of the strata titles scheme, that money must be applied by the strata company in rebuilding, replacing, repairing or restoring the insurable asset so far as that may lawfully be done.
- (6) Subsection (5) does not apply if -
 - (a) the strata titles scheme is a survey strata scheme; and
 - (b) the strata company passes a resolution without dissent -
 - (i) determining that a specified part or all of the money is not to be used for the purposes of rebuilding, replacing, repairing or restoring the insurable asset of the strata titles scheme; and
 - (ii) specifying how that money is to be distributed amongst members of the strata company or used;and
 - (c) the insurable asset of the strata titles scheme or, if the insurable asset has been destroyed or removed, the area affected by the damage or destruction, is left in a safe condition.
- (7) Nothing in this section derogates from -
 - (a) any other requirement imposed on a strata company to obtain insurance (for example, for workers' compensation or by resolution of the strata company); or
 - (b) the power of the strata company to obtain other insurance in its capacity as a body corporate.

Note for this section:

Schedule 2A contains special provisions for a single tier strata scheme for the required insurance.

22 Section 99 of the ST Act relevantly provides:

- (1) If a strata company fails to comply with section 97, a member of the strata company may effect and maintain, in the name of the strata company, such insurance as the strata company ought to effect and maintain under that section.
- (2) Costs incurred by a member of a strata company under subsection (1) may be recovered, on application to the Tribunal, as a debt owed to the member by the strata company[.]

23 Clause 53A of the ST Act provides:

References in this Part -

- (a) to *scheme* are to a single tier strata scheme; and
- (b) to *strata company* are to a strata company for such a scheme; and
- (c) to an *owner of a lot* are to an owner of a lot in such a scheme.

24 Clause 53B of the ST Act provides:

- (1) For the purposes of this Act -
 - (a) whether there is insurance in respect of -
 - (i) insurable assets within a lot in a scheme; or
 - (ii) damage to property, death, bodily injury or illness for which the owner of a lot in a scheme could become liable in damages;and
 - (b) the occurrences to be insured against by the owner of the lot in relation to those matters; and
 - (c) the terms on which insurance is obtained,are, subject to this clause, at the discretion of the owner of the lot.
- (2) A strata company for a scheme may determine, by ordinary resolution, that it is a function of the strata company to insure in respect of the matters referred to in subclause (1), and may at any time, by ordinary resolution, revoke that determination.

- (3) While such a resolution is in force, the strata company must comply with clause 53D.
- (4) If insurable assets are wholly within common property, whether there is insurance in respect of the assets is not at the discretion of the owner of a lot.

25

Clause 53C of the ST Act relevantly provides:

- (1) The strata company for a scheme must -
 - (a) insure and keep insured insurable assets that are within the common property; and
 - (b) effect and maintain insurance in respect of damage to property, death, bodily injury or illness for which the owners of lots in the scheme could become liable in damages as holders of the common property.
- (2) The strata company does not have the obligations described in subclause (1) if -
 - (a) there is no common property in the scheme except -
 - (i) cubic space in which there are no insurable assets above or below the horizontal boundary of any lot; or
 - (ii) fencing on the boundary of the parcel or any lot or on the boundary of temporary common property;
 - or
 - (b) the strata company has by resolution without dissent determined that subclause (1) is not to apply to the scheme.
- (3) A resolution under subclause (2)(b) remains in force until -
 - (a) it is revoked; or
 - (b) it ceases to have effect under subclause (5).

26

Clause 53D of the ST Act provides:

- (1) This clause applies if -
 - (a) a resolution is in force under clause 53B(2); or

- (b) in accordance with clause 53C, a strata company has the obligations described in subclause (1) of that clause.
- (2) This clause also applies if a strata company passes an ordinary resolution to insure common property that it is not obliged to insure by reason of clause 53C(2)(a).
- (3) In those cases the strata company must -
 - (a) insure and keep insured insurable assets to which its obligation extends against fire, storm and tempest (excluding damage by sea, flood or erosion), lightning, explosion and earthquake -
 - (i) to replacement value; or
 - (ii) to replacement value, up to, for an event of a specified kind, a maximum amount specified in the contract of insurance that is a reasonable limitation in the circumstances;
 - and
 - (b) effect and maintain insurance in respect of damage to property, death, bodily injury or illness for not less than \$10 000 000 or such other amount as may be specified in the regulations in place of that amount.

Penalty for this subclause: a fine of \$3 000.

- (4) It is a defence to a charge of an offence against subclause (3) for a strata company to prove that, despite having taken all reasonably practicable steps available to it to comply with that subclause, no insurer is willing to enter into a contract of insurance, on reasonable terms, that meets the obligation imposed by that subclause.

27 Clause 53E of Sch 2A of the ST Act provides:

- (1) If -
 - (a) in accordance with section 140, an administrative fund is not maintained by a strata company under section 100(1)(a); and
 - (b) the strata company or the owner of a lot receives notice of the amount of any premium or other charge for insurance under clause 53D,

the strata company, or the owner, may give notice in writing of that amount to the owner of each lot in the scheme, or each other owner, and

require the owner to pay a share of the premium or other charge before a specified time.

- (2) The share payable by the owner of a lot is -
 - (a) a sum equal to the same proportion of the amount as the unit entitlement of the lot bears to the sum of the unit entitlements of all the lots in the scheme; or
 - (b) if applicable, a sum fixed under the scheme by-laws.
- (3) If -
 - (a) notice has been given to the owner of a lot under subclause (1); and
 - (b) the amount of the owner's share has not been paid to the strata company or the insurer before the specified time,

that amount becomes a debt due by the owner to the strata company and may be recovered by it in a court of competent jurisdiction.

- (4) If the amount of an owner's share has become due to the strata company but has not been paid, the owner of another lot may -
 - (a) pay the amount; and
 - (b) recover the amount as a debt on application to the Tribunal

28 The term 'insurable asset' is defined in s 3 of the ST Act as follows:

Insurable asset of a strata titles scheme -

- (a) means -
 - (i) the common property of the scheme (including the fixtures and improvements on the common property); or
 - (ii) the parts of scheme buildings that comprise lots in the scheme (including the paint and wallpaper); or
 - (iii) anything included in this definition by the regulations;
- but
- (b) does not include -

- (i) fixtures or improvements on the common property that are not themselves common property; or
- (ii) carpet and temporary wall, floor and ceiling coverings in a scheme building; or
- (iii) fixtures removable by a lessee at the expiration of a tenancy; or
- (iv) anything excluded from this definition by the regulations[.]

The application for relief under cl 53E of Sch 2A

29 Sch 2A of the ST Act 'contains special provisions that apply to a single tier strata-scheme' and, in the event of an inconsistency between other provisions of the ST Act and Sch 2A, Sch 2A prevails.²⁷

30 Part 5 of Sch 2A sets out the insurance requirements applicable to single tier strata schemes. Clause 53B relates to insurance for lots whereas cl 53C relates to insurance for common property.

31 Pursuant to cl 53E(4) of Sch 2A of the ST Act, a lot owner who has paid another lot owner's share of an insurance premium may apply to the Tribunal to recover the amount.

32 In order to recover an amount under cl 53E(4), the applicant must prove that:

- a) the strata scheme is a single tier strata scheme (since the special provisions in Sch 2A only apply to such schemes);
- b) the strata company for the single tier strata scheme:
 - i) has determined, by ordinary resolution, that it is a function of the strata company to insure in respect of the matters set out in cl 53B(1)²⁸ and the resolution had not been revoked by ordinary resolution;²⁹ or
 - ii) has the insurance obligation described in cl 53C(1) and that obligation extends to

²⁷ Clause 1, Sch 2A, ST Act.

²⁸ Clause 53B(2), Sch 2A, ST Act.

²⁹ Clause 53B(2) and cl 53B(3), Sch 2A, ST Act.

buildings comprising lots because those buildings form part of the common property.

- c) the insurance complies with cl 53D(3);³⁰
- d) in accordance with s 140, an administrative fund is not maintained by the strata company under s 100(1)(a);³¹
- e) the strata company, or a lot owner, received notice of the amount of the premium or other charge for insurance under cl 53D;³²
- f) the amount of a lot owner's share became due to the strata company:
 - i) the strata company, or the lot owner, gave notice in writing of the amount of any premium or other charge to the lot owners in the scheme, or each other lot owner and required them to pay a share of the premium or other charge before a specified time;³³ and
 - ii) the amount of the lot owner's share was not paid to the strata company or the insurer before the specified time;³⁴ and
- g) the applicant paid the amount that had become due to the strata company.³⁵

33 Each of these matters will be addressed in turn.

Strata scheme is a single tier strata scheme

34 As outlined above, the provisions of Pt 5 of Sch 2A apply to a single tier strata scheme.³⁶

35 In Sch 2A, the term 'single tier strata scheme' means:

... a strata scheme -

³⁰ Clause 53B(3), Sch 2A, ST Act.

³¹ Clause 53E(1)(a), Sch 2A, ST Act.

³² Clause 53E(1)(b), Sch 2A, ST Act.

³³ Clause 53E(1), Sch 2A, ST Act.

³⁴ Clause 53E(3)(a) and cl 53(3)(b), Sch 2A, ST Act.

³⁵ Clause 53E(4)(a), Sch 2A, ST Act.

³⁶ Clause 53A, Sch 2A, ST Act.

- (a) in which no lot or part of a lot is above or below another lot; or
- (b) that would come within paragraph (a) except for any lot that has a permitted boundary deviation.³⁷

36 At the hearing, the applicant gave evidence that the units 'are all single tier'.³⁸ Further, when asked whether any parts of any of the units were on top of or below another part, the applicant responded in the negative.³⁹

37 It is also clear from an examination of the Strata Plan⁴⁰ that the Scheme is described as four single storey brick residential units and that no part of any of the lots in the Scheme is above or below the other lot.

38 On the basis of the uncontested evidence of the applicant, and the Strata Plan, I find that the Scheme is a single tier strata scheme as that term is defined in cl 3 of Sch 2A. Accordingly, the special provisions in Pt 5 of Sch 2A apply to the Scheme.

Insurance obligations of the Strata Company

Lot insurance determination

39 Clause 53B of Sch 2A sets out a lot owner's obligations in respect of insurance for lots in a scheme.

40 Under cl 53B a lot owner has a discretion in respect of three matters. First, whether there is insurance in respect of insurable assets⁴¹ within a lot in a scheme and damage to property, death, bodily injury or illness for which the lot owner in a scheme could become liable in damages. Second, the occurrences to be insured against by the owner of the lot. Third, the terms on which insurance is obtained.

41 However, the strata company for a scheme may determine, by ordinary resolution, that it is a function of the strata company to take out insurance in respect of the matters referred to in cl 53B(1)⁴² (**Lot Insurance Determination**).

³⁷ See the definition of 'single tier strata scheme' in cl 3, Sch 2A, ST Act; see also the definition of the term 'permitted boundary deviation' in cl 3.

³⁸ ts 13, 4 October 2021.

³⁹ ts 13, 4 October 2021.

⁴⁰ Exhibit 2.

⁴¹ Pursuant to cl 53B(4), if the insurable assets are wholly within common property then the discretion of the owner of the lot as to whether there is insurance is removed.

⁴² Clause 53B(2) of Sch 2A, ST Act; see also s 122, ST Act.

42 The evidence of the applicant was that a meeting had been held on 13 May 2021 to discuss the insurance in respect of the Scheme but that '[n]othing had been decided' at the conclusion of the meeting.⁴³ When cross-examined by counsel for the respondent, the applicant agreed that there were no decisions made about insurance and no determination whatsoever at that meeting.⁴⁴ The minutes of the meeting on 13 May 2021 provide confirmation that no resolutions were made at that meeting in respect of lot insurance.⁴⁵

43 The applicant gave evidence that the owner of Lot 2 had paid her share of the Insurance Premium into the applicant's bank account on 25 May 2021 and that the owner of Lot 3 had paid his share of the Insurance Premium into her bank account on 8 June 2021.⁴⁶ The payments into the applicant's bank account were shown in Exhibit 9.

44 I do not accept the applicant's contention that a Lot Insurance Determination was made by the Strata Company when the owners of Lots 2 and 3 paid their share of the Insurance Premium into the applicant's bank account.

45 The inference to be drawn from the payment of the Insurance Premiums into the applicant's bank account by the owners of Lots 2 and 3 is that they had provided their consent to the applicant organising lot insurance on their behalf. This was confirmed by an email from the owner of Lot 2 dated 4 July 2021⁴⁷ and a letter from the owner of Lot 3 dated 2 July 2021⁴⁸ which were sent to the applicant after the proceedings were commenced in the Tribunal.

46 However, the agreement of the lot owners for Lots 2 and 3 to the renewal of the Insurance Policy (and, by implication, coverage for lot insurance) by making payments of a quarter share of the insurance premium into the applicant's bank account is not the same thing as the making of a Lot Insurance Determination, and did not obviate the need for a Lot Insurance Determination by the Strata Company.

47 The applicant stated in evidence that:

⁴³ ts 21, 4 October 2021.

⁴⁴ ts 40, 4 October 2021.

⁴⁵ Exhibit 11.

⁴⁶ ts 23 and 24, 4 October 2021.

⁴⁷ Exhibit 13.

⁴⁸ Exhibit 14.

... A strata plan cannot get insurance unless the majority rule. The insurance companies will not take part payments. The payments have to be made in one lump sum which means an owner has to take responsibility to pay for the other person. Now, Mr Smillie went ahead and bought his policy before it was decided as a group what the group should do[.]⁴⁹

48 Whilst I am left in no doubt that the applicant genuinely thought that what she was doing accorded with the ST Act, the applicant was operating under the mistaken belief that the respondent could not obtain his own insurance unless and until he had obtained permission from the other owners.⁵⁰ However, this belief does not reflect cl 53B of the ST Act and is not supported by the extract relating to insurance in a single tier strata scheme in the *Guide to Strata Titles* issued by Landgate.⁵¹

49 If a Lot Insurance Determination had been made under s 53B(2) of the ST Act prior to the ST Amendment Act coming into operation, then that Lot Insurance Determination would have had effect under cl 53B(2) of Sch 2A.⁵²

50 There was no evidence before the Tribunal that the Strata Company had made a Lot Insurance Determination under s 53B(2) prior to 1 May 2020. In particular, there was no evidence that a proposed resolution concerning a Lot Insurance Determination had been put to the lot owners in the Scheme (as members of the Strata Company) and no evidence that such a resolution had been voted upon.

51 On the basis of the uncontested evidence of the applicant, I find that no Lot Insurance Determination had been made by the Strata Company by ordinary resolution prior to payment of the Insurance Premium. That being so, the insurance obligation of the Strata Company is confined to insurance for the common property as set out in cl 53C of Sch 2A.

Insurance obligation in respect of common property

52 Clause 53C of Sch 2A sets out a strata company's insurance obligations in respect of the common property.

⁴⁹ ts 68 and 14, 4 October 2021.

⁵⁰ ts 21 and 32, 4 October 2021 and Exhibit 12, paras 14, 15 and 24.

⁵¹ Exhibit 10.

⁵² Clause 16 of Schedule 5, ST Act.

53 The common property in a strata titles scheme is, relevantly, 'that part of the parcel of land subdivided by the strata titles scheme that does not form part of a lot in the strata titles scheme'.⁵³

54 Common property includes, for a strata scheme, those parts of a scheme building that do not form part of a lot.⁵⁴ Conversely, if the parts of a scheme building form part of a lot, then they are not common property.

55 Clause 3AB of Sch 2A fixes the boundaries of lots, other than boundaries that are external to a building, for a single tier strata scheme the strata plan for which is registered on or after 1 January 1998. There are two exceptions: first, if the boundaries are stated on the plan to be those provided for by s 3(2)(a); and second, if the boundaries are fixed by a description shown on the plan under s 3(2)(b).⁵⁵

56 Pursuant to cl 3AB of Sch 2A, the boundaries of the lots are the external surfaces of the building occupying the area represented on the floor plan.⁵⁶ Where two lots have a common or party wall or have buildings on them which are joined, the centre plane of that wall, or the plane at which they are joined, is the boundary.⁵⁷

57 The Strata Plan for the Scheme was registered on 26 March 2007. The Strata Plan contains the following description:

The boundaries of the lots or parts of the lots which are buildings shown on the strata plan are the external surfaces of those buildings, as provided by section 3AB of the Strata Titles Act 1985.

Where 2 lots have a common or party wall or have buildings on them which are joined, the centre plane of that wall, or the plane at which they are joined, is the boundary.⁵⁸

58 It was not in dispute that there was common property in the Scheme.⁵⁹ Accordingly, in light of the description on the Strata Plan at [57], I find that the common property of the Scheme does not include the buildings on each of the four lots⁶⁰ and that those buildings fall

⁵³ Section 10(1), ST Act.

⁵⁴ Section 10(2), ST Act.

⁵⁵ Clause 3A, Sch 2A, ST Act.

⁵⁶ Clause 3AB(1), ST Act.

⁵⁷ Clause 3AB(2), Sch 2A, ST Act.

⁵⁸ Exhibit 2. See also s 3(2), ST Act.

⁵⁹ ts 10, 13, 64 and 77, 4 October 2021.

⁶⁰ Section 10(2), ST Act.

outside the scope of the Strata Company's insurance obligation in respect of the common property under cl 53C(1).

59 Given my findings in [51] and [58] above, to the extent that the Insurance Policy covered the buildings on the lots, I find that the Insurance Policy exceeded the scope of the Strata Company's insurance obligations under Sch 2A.

60 My conclusion in [59] above is sufficient to dispose of the application. However, for completeness, I will address the other matters referred to in [32] above.

Performance of insurance functions

61 The insurance functions of a strata company are, subject to the ST Act and any restriction imposed or direction given by ordinary resolution, to be performed by the council of the strata company (**council**).⁶¹

62 The council may, subject to any restriction imposed or direction given at a general meeting of the strata company, delegate to one or more of its members such of its powers and duties as it thinks fit, and at any time revoke the delegation.⁶²

63 A strata company may, subject to Pt 9, authorise a strata manager to perform a specified scheme function⁶³ including a function of the strata company⁶⁴ or a function of the council.⁶⁵ However, a person is not authorised to perform functions as a strata manager unless, amongst other things, a strata management contract is in force between the strata manager and the strata company.⁶⁶

64 The applicant gave evidence that 'I do not get paid to organise the insurance or anything I do in regard for the strata' and that she did not have a volunteer strata management agreement.⁶⁷ On the basis of the uncontested evidence of the applicant, I find that the applicant was not a strata manager for the Strata Company and, hence, was not authorised to perform insurance functions on behalf of the Strata Company. Accordingly, even if the Insurance Policy complied with the Strata

⁶¹ Section 135(1) and cl 4 of Schedule 1, ST Act

⁶² Clause 8(2)(c) of Schedule 1, ST Act.

⁶³ Section 143(1), ST Act.

⁶⁴ See paragraph (a) of the definition of 'scheme function' in s 3(1), ST Act.

⁶⁵ See paragraph (b) of the definition of 'scheme function' in s 3(1), ST Act.

⁶⁶ Section 144(1) and s 145, ST Act.

⁶⁷ ts 29, 4 October 2021.

Company's insurance obligations under Sch 2A, the Insurance Policy was not the Insurance Policy of the Strata Company.

65 There was no evidence as to whether or not the council of the Strata Company had delegated insurance functions to the applicant. Accordingly, I am not able to make any finding in that respect.

Compliance with clause 53D

66 During the period that a resolution under cl 53B(3) of Sch 2A is in force, the strata company must comply with cl 53D of Sch 2A.⁶⁸

67 The Insurance Renewal Notice⁶⁹ was tendered in evidence. The insured location on the notice is described as 'A, B, C, D ... Charles East Street, Midland, WA, 6056. The cover is described as 'Building' and the building sum insured is \$1,260,000. There is also a statement on the front of the Insurance Renewal Notice which summarises the effect of the Insurance Policy in respect of the following items: cover for damage caused by a flood, storm, fire and lightning as standard; cover against accidental glass breakage; fusion cover for burn out of electric motors; cover for temporary accommodation.

68 The applicant gave evidence that she had read the Insurance Policy the year before and 'it did cover everything I needed'.⁷⁰ Neither the Insurance Policy itself nor the product disclosure statement were tendered into evidence and no evidence was given as to the contents of either of those documents.

69 The obligation of the Strata Company under cl 53D(3) is to insure, and keep insured, insurable assets to which its obligation extends. Given my conclusion at [59] above, the Strata Company's obligation to insure and keep insured did not extend to the parts of scheme buildings that comprise lots in the scheme.

70 The Insurance Renewal Notice makes it clear that the Insurance Policy covers the buildings on the lots. Accordingly, I find that the Insurance Policy exceeds the scope of the Strata Company's insurance obligation and hence does not comply with cl 53D(3) of Sch 2A.

⁶⁸ Clause 53B(3), Sch 2A, ST Act.

⁶⁹ Exhibit 8.

⁷⁰ ts at page 45.

An administrative fund is not maintained by the strata company

71 Under s 100(1)(a) of the ST Act, a strata company is under a mandatory obligation to establish an administrative fund for administrative expenses that is sufficient in the opinion of the strata company for, *inter alia*, the payment of any premiums of insurance.

72 However, the scheme by-laws for a three, four or five lot scheme may exempt the strata company from the function conferred under s 100(1)(a) of the ST Act.⁷¹

73 The applicant gave evidence that the Strata Company did not have an administrative fund.⁷² However, no evidence was given as to whether there were any Scheme by-laws and, if so, whether those Scheme by-laws exempted the Strata Company from the obligation to establish an administrative fund.

74 Accordingly, I am not able to make a finding that, in accordance with s 140 of the ST Act, an administrative fund was not maintained by the Strata Company under s 100(1)(a) of the Act.

Receipt of notice of amount of premium or other charge for insurance under clause 53D

75 The applicant gave evidence that she had received the Insurance Renewal Notice by way of email.⁷³ The Insurance Renewal Notice sets out the amount of the annual premium as the sum of \$1,882.52.⁷⁴

76 Given my finding that the Insurance Premium was not in respect of the insurance obligation under cl 53D(3), I also find that the Renewal Notice was not in respect of the amount of any premium or other charge for insurance under cl 53D(3).

The amount of the owner's share has become due to the strata company and has been paid by the owner of another lot

77 In *Hapgood-Strickland and Watson* [2021] WASAT 15 (*Hapgood-Strickland and Watson*) Member McGivern said:

48. The ability under cl 53E(4) of a lot owner to pay another owner's share of an insurance premium, and to claim that amount as a debt is premised on the amount having 'become due

⁷¹ Section 140, ST Act.

⁷² ts 24 and 25, 4 October 2021.

⁷³ ts 16, 4 October 2021.

⁷⁴ Exhibit 8.

to the strata company but 'not having been] paid.' Whether the amount claimed is an amount 'due to the strata company' is to be determined in line with the preceding sub-clause. Notably,

- (a) cl 53E(1) relevantly requires that, if an owner receives notice of a premium payable for insurance under cl 53D, then that owner may give notice in writing to another owner requiring payment within a specified time of the latter's share of the premium; and
- (b) if, after receiving such notice, the other owner fails to pay their share of the premium before the time specified, then pursuant to cl 53E(3), that amount becomes a debt due to the strata company.⁷⁵

78 In order to recover an amount under cl 53E(4) of Sch 2A, the owner must show not only have they complied with the requirements of cl 53E but that they have done so in the correct sequence.

79 In *Hapgood-Strickland and Watson*, at the time the applicants paid the contended share of the premium, the respondent had not failed to pay any amount the subject of a notice under cl 53E(1) of Sch 2A of the ST Act. This was because no such notice had been issued and the contended share was not, therefore, an amount that had become due to the strata company.⁷⁶ Accordingly, the payment by the applicants of the contended share of the insurance premium was held not to have been made in accordance with cl 53E(4)(a) of the ST Act.

80 The written notice which the strata company, or the owner of a lot, may give to the owners of each lot in a scheme for the purposes of cl 53E(1) of Sch 2A of the ST Act must state two things. First, the notice must set out the amount of the premium or other charge for the insurance. Second, the notice must require the owner to pay a share of the premium or other charge before a specified time.

81 The share of the premium or other charge payable for insurance by the owner of a lot is fixed as a sum equal to the same proportion of the amount as the unit entitlement of the lot bears to the sum of the unit entitlements of all the lots in the scheme or, if applicable, a sum fixed under the scheme by-laws.⁷⁷

82 The applicant gave evidence that she had sent the respondent an email dated 11 May 2021 (**Notice 1**) notifying the respondent of receipt

⁷⁵ *Hapgood-Strickland and Watson* at [48].

⁷⁶ *Hapgood-Strickland and Watson* at [50].

⁷⁷ Clause 53E(2), Sch 2A, ST Act.

of the Insurance Renewal Notice.⁷⁸ In Notice 1, the applicant stated a 'Quarter share is \$470.63' and provided her bank account details.⁷⁹

83 The applicant also gave evidence that she was not aware that each owner's share of the Insurance Premium was meant to be based on unit entitlements and she had incorrectly been undercharging the owner of Lot 4 and herself and overcharging the owners of Lots 2 and 3.⁸⁰

84 The applicant gave evidence that she had sent the respondent an email dated 15 May 2021 (**Notice 2**).⁸¹ Notice 2 stated in part:

The current premium will be paid on Monday 17th 2021.

I therefore wish to give 14 days notice, as of today to pay your quarter share to the provided bank account. Failure to do so will result in the matter being taken up by the SAT.⁸²

85 The reference to the 'provided bank account' in Notice 2 was a reference to the bank account of the applicant (referred to in Notice 1).⁸³

86 Although Notice 1 referred to the Insurance Renewal Notice and to a quarter share, Notice 1 did not state the amount of the Insurance Premium (\$1,882.52) and did not correctly specify the respondent's share of the premium by reference to unit entitlements (\$489.45).

87 Although Notice 2 refers to the current Insurance Premium of which notice had previously been given and seeks payment of a quarter share from the respondent, Notice 2 did not state the amount of the Insurance Premium (\$1,882.52) and did not correctly specify the respondent's share of the premium by reference to unit entitlements (\$489.45).

88 Further, the fact that Notices 1 and 2 required payment into the applicant's bank account rather than payment to the Strata Company or the insurer arguably affects their validity. This is because the applicant was not a strata manager and hence not authorised to perform functions on behalf of the Strata Company⁸⁴ in circumstances where cl 53E(3)(b)

⁷⁸ ts 17-19, 4 October 2021.

⁷⁹ Exhibit 5.

⁸⁰ ts 23 and 35, 4 October 2021.

⁸¹ ts 22, 4 October 2021.

⁸² Exhibit 7.

⁸³ ts 23 and 24, 4 October 2021.

⁸⁴ See s 143, ST Act.

of Sch 2A refers to non-payment of the owner's share to either the strata company or the insurer.

89 Recovery of an amount as a debt on application to the Tribunal under cl 53E(4) of Sch 2A requires the lot owner to have paid the amount after the other lot owner's share has become due to the strata company.

90 The applicant gave the respondent 14 days' notice as at the date of the email (15 May 2021) to pay the Contended Share. This meant that the Contended Share was due by 29 May 2021. However, the applicant gave evidence that she paid the Insurance Premium on 25 May 2021.

91 In light of the uncontested evidence of the applicant, I find that the payment by the applicant of the Insurance Premium on 25 May 2021 was not made in accordance with cl 53E(4)(a) because:

- a) neither Notice 1 nor Notice 2 complied with the requirements for a notice for the purposes of cl 53E(1) of the ST Act; and
- b) the Contended Share was not an amount that had become due to the Strata Company because, at the time the applicant paid the Insurance Premium, the respondent had not failed to pay the amount within the time specified.

The application for relief under s 99

92 If a strata company member effects and maintains, in the name of the strata company, insurance required under s 97 of the ST Act, then the strata company member may apply to the Tribunal to recover any costs they have incurred.

93 In order to recover costs under s 99(2) of the ST Act, the applicant must prove that:

- a) they are a member of a strata company;
- b) the strata company failed to comply with the insurance obligation set out in s 97 of the ST Act; and
- c) upon such failure, the applicant effected and maintained, in the name of the strata company, such

insurance as the strata company ought to effect and maintain under s 97 of the ST Act.

94 It is implicit that an application under s 99(2) of the ST Act may only be brought against the strata company. This is because it is the strata company which is subject to the insurance obligation in s 97 of the ST Act and because s 99(2) contemplates the costs incurred by the member being recovered as a debt owed to the member by the strata company.

95 A strata company is the body corporate established for the strata title scheme on registration in accordance with s 14 of the ST Act. Although the members of a strata company are the owners for the time being of the lots in the strata title scheme, the strata company is a separate legal entity.

96 The Tribunal cannot make an order for recovery of costs by the applicant against the respondent under s 99(2) of the ST Act. This is for two reasons.

97 First, the Scheme is a single tier strata scheme⁸⁵ and the insurance obligations of the Strata Company are set out in Pt 5 of Sch 2A and not s 97 of the ST Act. Sch 2A prevails over section 97 of the ST Act to the extent of any inconsistency.⁸⁶

98 Second, even if the Strata Company is subject to the insurance obligation in s 97 of the ST Act, the applicant did not bring the application against the Strata Company.

Conclusion

99 For the reasons outlined above, the applicant is not eligible to recover a share of the Insurance Premium from the respondent under cl 53E(4)(b) because:

- a) there is no evidence that the Strata Company made a Lot Insurance Determination for the purposes of cl 53B(2) of Sch 2A;
- b) the Insurance Premium paid by the applicant was not for insurance under cl 53D because no Lot Insurance

⁸⁵ See [36]-[38].

⁸⁶ Clause 1 of Sch 2A.

Determination had been made for the purposes of cl 53B(2) of Sch 2A, the insurance policy exceeded the scope of the Strata Company's insurance obligations under cl 53C(1) and the applicant was not authorised to perform the Strata Company's insurance function; and

- c) the share of the Insurance Premium was not an amount due to the Strata Company because neither Notice 1 nor Notice 2 set out the respondent's share of the Insurance Premium based on unit entitlement and the applicant paid the Insurance Premium four days before the time for compliance had expired.

100 It follows that the application under cl 53E(4) of Sch 2A does not succeed.

101 For the reasons outlined above, the applicant is not eligible to recover a share of the Insurance Premium from the respondent under s 99(2) of the ST Act because:

- a) the Strata Company was not subject to the insurance obligation set out in s 97 of the ST Act; and
- b) the application was not brought against the Strata Company.

102 It follows that the application under s 99(2) of the ST Act does not succeed.

Costs

103 At the Hearing, counsel for the respondent foreshadowed that if the applicant was unsuccessful, then he would be making an application for costs against the applicant.

104 I indicated to the parties that, when I gave my reasons for decision, orders would be made to enable the successful party to apply for costs, for each party to make submissions in respect of costs and for costs to be determined on the papers.

Orders

The Tribunal orders:

1. Each application is dismissed.

2. The respondent has liberty to apply within 21 days from the date of this order to file with the Tribunal and give to the applicant an application for costs, including written submissions, copies of case authorities and any supporting documentation.
3. If the respondent elects to make an application for his costs, the applicant has 21 days from the date of the application for costs to file with the Tribunal, and give to the respondent, written submissions and any supporting documentation in reply.
4. Subject to any further order of the Tribunal, an application for costs will be determined entirely on the documents pursuant to s 60(2) of the *State Administrative Tribunal Act 2004* (WA).

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

MS C Conley, MEMBER

17 DECEMBER 2021