JURISDICTION	:	STATE ADMINISTRATIVE TRIBUNAL
ACT	:	STRATA TITLES ACT 1985 (WA)
CITATION	:	ANDREWS and THE OWNERS OF CORALIE GARDENS STRATA PLAN 44374 [2022] WASAT 2
MEMBER	:	DR B MCGIVERN, MEMBER
HEARD	:	20 OCTOBER 2021
DELIVERED	:	14 JANUARY 2022
FILE NO/S	:	CC 553 of 2021
BETWEEN	:	MARRHEA ANNE ANDREWS Applicant AND THE OWNERS OF CORALIE GARDENS STRATA PLAN 44374 Respondent

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Catchwords:

Strata titles - Levying contributions other than in accordance with unit entitlement - Registered by-laws authorising costs of strata company incurred in debt recovery processes and unsuccessful actions against strata company to be levied on an owner - Objection to by-laws - Whether by-law could apply to proceedings on foot at the time it came into force - Whether by-laws invalid on the ground of being inconsistent with a written law - Whether inconsistent with discretion to award costs

Legislation:

Magistrates Court (Civil Proceedings) Act 2004 (WA), s 25, s 31
State Administrative Tribunal Act 2004 (WA), s 87
Strata Titles (General) Regulations 2019 (WA), reg 56, reg 180
Strata Titles Act 1985 (WA), s 3, s 14(8), s 39, s 44, s 45, s 45(2), s 45(5), s 46, s 46(a), s 46(b), s 46(j), s 56, s 90, s 99(2), s 100, s 135, s 197, a 199, Pt 8, Div 1, Sch 1, Sch 2A, cl 53E, Sch 5, cl 4, cl 4(7), cl 14, cl 23
Strata Titles Act 1985 (WA) (prior to 1 May 2020), s 32(2)(b), s 36, s 42, s 42B, s 81(1), s 103H(8), Pt IV, Div 1
Strata Titles Amendment Act 2018 (WA)

Result:

Application dismissed

Category: B

Representation:

Counsel:

Applicant	:	Mr C Silver
Respondent	:	Mr M Atkinson

Solicitors:

Applicant	:	Chad Silver & Associates
Respondent	:	Atkinson Legal

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

Aussie Airlines Pty Ltd v Australian Airlines Ltd, Qantas Airlines Ltd & Federal Airports Corporation (1996) 68 FCR 406
Birchwood Consolidated Pty Ltd (Receivers and Managers Appointed) (in liquidation) v Kelly [2021] WASC 448
Blaszkiewicz and The Owners of 7 Henderson Street Fremantle (Strata Scheme 74918) [2021] WASAT 56
Byrne v Owners of Ceresa Apartments Strata Plan 55597 [2016] WASC 153
Commissioner of Police v Thayli Pty Ltd [2020] WASC 43
Dickinson and Charuga [2021] WASAT 122

Director General of Department of Transport v McKenzie [2016] WASCA 147
Glasby and The Owners of 84 Clydesdale Street Como Strata Plan 9012 [2021] WASAT 136
Knapinski and The Owners of Strata Scheme 31300 [2012] WASAT 164
Meyer v Solomon [2021] WASCA 168
Steele and The Owners of Cocos Beach Bungalows Survey Strata Plan 42074 [2021] WASAT 101
Warramunda Village Inc v Pryde (2001) 105 FCR 437

REASONS FOR DECISION OF THE TRIBUNAL:

Introduction

1 This proceeding is a strata dispute concerning certain 'costs recovery' by-laws (**By-Laws**). The applicant is the owner of a lot in a strata scheme and, in 2020, she commenced and later withdrew proceedings in the Tribunal against the respondent strata company. Before the proceedings were withdrawn, however, the respondent passed and registered the By-Laws and relies upon them to levy contributions to recover certain of its legal and debt recovery costs against the applicant. The applicant argues that the By-Laws are invalid and that the respondent is not entitled to rely on them to recover its costs against her. She has applied to the Tribunal for orders to that effect.

Issues

2 The orders sought by the applicant (**Proposed Orders**) are as follows:

> 1. That SAT Declares that Governance By-law 19 can't be applied to matters which were on foot at the time of the By-Law's registration.
>
> 2. That SAT Declares that Governance By-law 19 is invalid in so far that it is inconsistent with any written legislation or orders of the SAT regarding Costs.
>
> 3. That SAT Declares that Governance By-law 20 is invalid in so far that it is inconsistent with any written legislation of the Magistrates Court (Civil Proceedings) Act or orders of the Magistrates Court. [1]

3 In deciding whether those (or any) orders are appropriate, and to resolve the dispute, the Tribunal must determine the following issues:

a) Is the proceeding a 'scheme dispute' within the meaning of s 197 of the *Strata Titles Act 1985* (WA) (**ST Act**)?

b) In relation to Governance By-Law 19:

[1] Being the applicant's amended proposed orders which, pursuant to orders dated 7 May 2021, were filed on 11 May 2021.

i) does or can the By-Law operate in relation to proceedings on foot at the time it came into force;

ii) is the By-Law inconsistent with a written law, or with the Tribunal's power to award costs;

iii) does or can the By-Law operate in a manner that is inconsistent with an order of the Tribunal; and

iv) if any of the above is answered in the affirmative, then is the By-Law invalid or inoperative by reason of that matter or those matters?

c) In relation to Governance By-Law 20:

i) is the By-Law inconsistent with a written law, or with the Magistrates Court power to award costs; and

ii) if so, then is the By-Law invalid by reason that matter?

d) What if any orders should be made by the Tribunal, taking into account:

i) whether the Tribunal's powers to make orders (as proposed or otherwise) are constrained by any relevant limiting factors; and

ii) what considerations are relevant to the exercise of the Tribunal's discretion in this case?

Procedural background

4 The applicant commenced the proceeding by an application lodged on 7 May 2021 under s 197(4) of the ST Act.

5 A final hearing of the application was held on 20 October 2021, at which:

a) both parties were legally represented;

b) the respondent called one witness, Mr Adam Flemming, chairperson of the council of the respondent strata company. No other witnesses were called by either party; and

c) the Tribunal took into evidence (as Exhibit 1) a hearing book comprising all of the materials filed prior to the hearing by both parties.

Background and agreed facts

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

a) the strata scheme known as 'Coralie Gardens' (**Scheme**) was created upon the registration on 23 October 2003 of Strata Plan 44374;

b) the respondent is the strata company of the Scheme;

c) on 8 June 2015 the applicant became, and remains, the registered proprietor of Lot 11 in the Scheme;

d) in February 2020, the applicant commenced three applications against the respondent in the Tribunal, being: CC 182/2020, CC 183/2020 and CC 211/2020 (**2020 SAT Proceedings**).

7 The parties have agreed the following further facts (**Agreed Facts**):[2]

a) The applicant has commenced multiple proceedings against the respondent (including but not limited to the 2020 SAT Proceedings).

b) The respondent incurred significant legal costs because of the applicant's unsuccessful applications.

c) From March 2020 to 23 June 2020, the respondent engaged a lawyer to act in the 2020 SAT Proceedings.

d) On 29 April 2020, the respondent lodged a notification (instrument number O396663) (**Notification**)

[2] ts 10-13, 20 October 2021, referring to the Respondent's Final Submissions filed 16 August 2021, paras 17-40 (from which the summary of Agreed Facts has been drawn).

containing the three By-Laws with Landgate, and the By-Laws took effect from that time.

e) The applicant knew of the By-Laws from the time of their creation.

f) On 1 May 2020, the Tribunal made orders in the 2020 SAT Proceedings.

g) The applicant made various submissions to the Tribunal in the 2020 SAT Proceedings, including about the By-Laws.

h) On 23 June 2020, the 2020 SAT Proceedings were heard as per the transcript of that date (**Transcript**).

i) On 23 June 2020, the applicant withdrew each of the 2020 SAT Proceedings:

    i) after obtaining legal advice; and

    ii) knowing of the By-Laws.

j) The Transcript shows that:

    i) the applicant did not seek any assurance from the respondent that it would not comply with or rely on what became Governance By-Law 19;

    ii) 'costs' were considered and addressed only at the hearing on 23 June 2020 in the narrow context of what costs orders the Tribunal could or could not make; and

    iii) the respondent's lawyer was not invited to, called upon, or even given a chance to make any submissions about costs orders, or more broadly about costs.

k) On 23 June 2020, no final or substantive orders were made against the respondent in the 2020 SAT Proceedings.

l) The respondent relied on what was By-Law 22 in the Notification (which became Governance By-Law 19)

to levy contributions on the applicant regarding litigation costs incurred by the respondent after 29 April 2020 in the 2020 SAT proceedings (**Litigation Contributions**).

m) The applicant has not paid the Litigation Contributions and the respondent has commenced Magistrates Court proceedings against the applicant in respect of, inter alia, the Litigation Contributions.

Regulatory framework

8 In these reasons, except as otherwise stated:

a) any reference to a legislative provision is a reference to the ST Act as it stood on 1 May 2020[3] (the ST Act as it stood before 1 May 2020 will be referred to as the **Prior ST Act**); and

b) any reference to a regulation is a reference to regulation under the *Strata Titles (General) Regulations 2019* (WA) (**Regulations**).

9 As noted above, the respondent is the strata company for the Scheme:

a) which comprises, and at all material times comprised, the owners for the time being of the lots in the Scheme;[4] and

b) the functions of which are and were to be performed by the council of the strata company (subject to the terms of ST Act and to any restriction imposed or direction given by ordinary resolution).[5]

10 As appears from the Agreed Facts, the respondent made and registered the By-Laws prior to 1 May 2020 and therefore they were, at the time, subject to the requirements and limitations of the Prior ST Act.

[3] Pursuant to the *Strata Titles Amendment Act 2018* (WA), significant amendments came into effect on 1 May 2020 (referred to as the commencement day).
[4] ST Act, s 14(8).
[5] ST Act, s 135.

11 The transition from the Prior ST Act is dealt with in Sch 5 of the ST Act, cl 14 of which provides that a scheme dispute[6] may involve an event that occurred, or a matter that arose, before commencement day.

12 It follows from the above that the provisions having particular relevance for the proceeding are the provisions of the ST Act and the Prior ST Act dealing with:

a) strata companies' powers to determine and levy contributions on lot owners (and the resulting liability of lot owners in relation to such levies); and

b) making and challenging by-laws.

Levying contributions and resulting liabilities

13 The functions of a strata company are set out in Pt 8 Div 1 of the ST Act,[7] and notably include:

a) undertaking the 'financial management' of the scheme;[8] and

b) representing the owners of the lots in proceedings taken by or against them jointly.[9]

14 More specifically, the financial management powers and functions of a strata company include under s 100 of the ST Act, and included under s 36 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;[10]

b) 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

[6] Which term is defined by reference to s 197 of the ST Act, pursuant to which the proceeding was brought.
[7] And similar functions existed under Pt IV Div 1 of the Prior ST Act.
[8] ST Act, Pt 8 Div 1 Subdiv 3.
[9] ST Act, Pt 8 Div 1 Subdiv 4.
[10] ST Act, s 100(1)(a); Prior ST Act, s 36(1)(a).

expenses of the strata company likely to arise in the future;[11]

c) correlative powers to determine the amounts to be raised for payment into the administration fund and any reserve fund;[12] and

d) the power to raise amounts so determined by levying contributions on lot owners:

i) 'in proportion to the unit entitlements of their respective lots';[13] or

ii) if the scheme by-laws provide for a different basis for levying contributions, then in accordance with that basis.[14]

15 Any contribution levied under the provisions outlined above:

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); and

c) may be recovered (with the interest accrued) as a debt in a court of competent jurisdiction.[15]

16 I note that the transitional provisions in Sch 5 cl 23, relating to financial management matters, include that:

(3) Contributions or other arrangements determined under section 36 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.

[11] ST Act, s 100(2)(a); Prior ST Act, s 36(2)(a).
[12] ST Act, s 100(1)(b), s 100(2)(b); Prior ST Act, s 36(1)(b), s 36(2)(b).
[13] ST Act, s 100(1)(c)(i), s 100(2)(c); Prior ST Act, s 36(1)(c)(i), s 36(2)(c).
[14] ST Act, s 100(1)(c)(ii); Prior ST Act (this power applies to levying contributions to an administration fund only; there is no equivalent power conferred in relation to contributions to a reserve fund under s 100(2) of the ST Act), s 36(1)(c)(ii) (this latter provision referred specifically to a by-law under s 42B of the Prior ST Act).
[15] ST Act, s100(4); Prior ST Act s 36(4).

Making, amending and challenging by-laws

17 At the time that the By-Laws were made, s 42 of the Prior ST Act applied and provided:

> (1) A strata company may make by-laws, not inconsistent with this Act, for -
>
> (a) its corporate affairs; and
>
> (b) any matter specified in Schedule 2A; and
>
> (c) other matters relating to the management, control, use and enjoyment of the lots and any common property.
>
> (2) The provisions set out in Schedules 1 and 2 shall be deemed to be by-laws of the strata company and may be amended, repealed or added to by the strata company -
>
> (a) by resolution without dissent (or unanimous resolution, in the case of a two-lot scheme), in the case of Schedule 1 by-laws; or
>
> (b) in accordance with any order of a court or the State Administrative Tribunal or any written law; or
>
> (c) in any other case, by special resolution.
>
> (2a) Each by-law that is additional to the by-laws in Schedules 1 and 2 or any amendment to a Schedule 1 or Schedule 2 by-law shall be classified in the by-laws as -
>
> (a) a Schedule 1 by-law; or
>
> (b) a Schedule 2 by-law.
>
> …
>
> (4) No amendment or repeal of a by-law or additional by-law has effect until -
>
> (a) the strata company has, not later than 3 months after the passing of the resolution for the amendment, repeal or additional by-law, lodged a notice of the amendment, repeal or additional by-law in the prescribed form with the Registrar of Titles, including in the case of a by-law made under subsection (8) a description of the area affected; and

(b) the Registrar of Titles has made a reference to the amendment, repeal or additional by-law on the appropriate registered strata/survey-strata plan.

18 As referred to above, s 42B of the Prior ST Act clarified that a strata company's power to make by-laws extended to providing for a method of assessing contributions to be levied on proprietors otherwise than in proportion to the unit entitlement of their respective lots. The respondent relies on this provision as the basis for contending that the By-Laws were validly made.

19 The transitional provisions in Sch 5 cl 4 of the ST Act include that:

(1) The by-laws … of a strata company as in force immediately before commencement day continue in force, subject to this Act, as scheme by-laws and as if they had been made as governance by-laws or as conduct by-laws according to the classification into which they would fall if they had been made on commencement day.

…

(7) Sections 46 and 47 apply to scheme by-laws whether made or registered before, on or after commencement day and a penalty may be imposed by the Tribunal under section 47 whether or not the particular scheme by-law provides for a penalty as set out in section 42A as in force immediately before commencement day.

20 Regulation 180 relevantly provides that:

(1) If Schedule 5 clause 4 of the Act applies to the by-laws of a strata company and, on or after the commencement day, an application for registration of an amendment of a strata titles scheme is made to give effect to the making, amendment or repeal of any by-laws of the strata company, the current copy of scheme by-laws that is lodged with the application must be an updated consolidated set of scheme by-laws[16] that -

(a) includes any re-classification of the by-laws (as governance by-laws or conduct by-laws) that is taken to have been made by Schedule 5 clause 4(1) of the Act;

and

[16] See also reg 56, which provides that, where an application for registration of an amendment of a strata titles scheme is made (under s 56 of the ST Act) to give effect to the making, amendment or repeal of any scheme by-laws, the application must include a consolidated set of all the current scheme by-laws for the strata titles scheme.

> (b) omits any by-laws that are taken to have been repealed by Schedule 5 clause 4(2) of the Act; and (c) is otherwise consistent with Schedule 5 clause 4 of the Act.
>
> (2) A strata company may update its scheme by-laws in the manner set out in subregulation (1) but is not required to do so until it makes, amends or repeals any of its other scheme by-laws.

21 As referenced in those provisions, by-laws are now classified under the ST Act as 'governance by-laws' or 'conduct by-laws', with:

a) the 'default' governance by-laws set out in Sch 1 of the ST Act and the 'default' conduct by-laws set out in Sch 2 of the ST Act;[17] and

b) governance by-laws being defined to include 'scheme by-laws that deal with … contributions, levies or money payable by the owner of a lot in the scheme to the strata company'.[18]

22 I note for completeness that the making of by-laws is now dealt with in s 44, which relevantly provides:

> (1) Subject to this Act, a strata company may, by resolution of the strata company, make governance by-laws or conduct by-laws for the strata titles scheme (including by-laws that amend or repeal the by-laws it is taken to have made on registration of the scheme).
>
> …
>
> (3) The power to make by-laws includes power to amend or repeal by-laws in the same manner and on the same conditions as they are made.
>
> (4) If by-laws purport to be made in exercise of a particular power or powers, they are also taken to be made in exercise of all powers under which they can be made[.]

23 Pursuant to s 45:

a) by-laws are not subsidiary legislation; but rather

b) each person to whom scheme by-laws apply must comply with the by-laws as if the by-laws were a deed

[17] ST Act, s 39.
[18] ST Act, s 3: 'governance by-laws'.

> (signed and sealed by each person to whom they apply) containing mutual covenants to observe and perform the matters set out in the by-laws.[19]

24 Of particular relevance to the proceeding, s 46[20] provides that by-laws are invalid:

> (a) to the extent that there is no power to make the by-laws;
>
> (b) to the extent that they are inconsistent with this Act or any other written law;
>
> …
>
> (j) to the extent that, having regard to the interests of all of the owners of lots in the strata titles scheme in the use and enjoyment of their lots and the common property -
>
> (i) they are unfairly prejudicial to, or unfairly discriminatory against, 1 or more of the owners of lots; or
>
> (ii) they are oppressive or unreasonable.

The By-Laws

25 As appears from the Minutes of an Extraordinary General Meeting of the respondent held on 31 March 2020[21] and the Notification,[22] the By-Laws were:

> a) voted upon and passed as 'three new schedule 2 by-laws' by a special resolution of the strata company (with eighteen votes in for, and four votes against, the motion); and
>
> b) registered on the Strata Plan of 29 April 2020 (as Sch 2 by-laws 21, 22 and 23).

26 Pursuant to Sch 5 cl 4 and reg 180, the respondent registered the first consolidation of the Scheme by-laws on 20 June 2020 (instrument O435683),[23] pursuant to which:

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[19] ST Act, s 45(2), s 45(5).
[20] Which, by reason of Sch 5 cl 4(7), applies to the By-Laws.
[21] Exhibit 1, pages 61-62.
[22] Exhibit 1, pages 43-54.
[23] Exhibit 1 pages 88-128

a) the By-Law that was previously Sch 2 by-law 21 for the Scheme became **Governance By-Law 18**;

b) the By-Law that was previously Sch 2 by-law 22 for the Scheme became **Governance By-Law 19**; and

c) the By-Law that was previously Sch 2 by-law 23 for the Scheme became **Governance By-Law 20**.

27 In this proceeding:

a) there is no challenge in relation to Governance By-Law 18; and

b) the validity and operation of each of Governance By-Law 19 and Governance By-Law 20 is in dispute (but there is no challenge to the manner in which either of those By-Laws was voted upon or passed).[24]

28 The terms of the disputed By-Laws are set out in full below.

29 Governance By-Law 19 (described in its title as being about 'costs of responding to litigation against strata company') is in the following terms:

(1) In this by-law:

(a) **Act** means the Strata Titles Act 1985 (WA);

(b) **litigation** means litigation commenced by an owner or occupier of a lot against strata company in the State Administrative Tribunal or a Court in which no final and substantive orders are made against strata company;

(c) **litigation** costs means all expenses reasonably incurred by the strata company in a litigation process concerning a litigation lot, including fees and disbursements:

1. for work undertaken by strata manager engaged by the strata company, are not otherwise included within the fees charged by the strata manager to manage the scheme; and

2. of a lawyer engaged by the strata company on a lawyer and own client full indemnity basis,

[24] See "Parties' contentions' below.

including the fees and disbursements of barristers, process servers, witnesses and experts engaged by the lawyer;

(d) **litigation lot** means a lot the owner or occupier of which commenced litigation; and

(e) **litigation process** means all steps taken by the strata company to respond to litigation, and includes steps taken before and in that litigation.

(2) The strata company:

(a) must not levy contributions regarding debt recovery costs in accordance with unit entitlements, but in accordance with sub-bylaw (2)(b); and

(b) must levy contributions regarding debt recovery costs solely on the owner of the litigation lot concerned.

(3) The strata company is empowered to exercise functions in relation to debt recovery costs currently in the Act sections 36(1)(a) and 36(1)(b) and 36(1)(c), as allowed for by section 36(3) and in the Act sections 100(1)(a), 100(1)(b) and 100(1)(c) as amended by the *Strata Titles Amendment Act 2018* (WA) after those sections come into operation.

(4) For the avoidance of doubt: (a) the strata company must levy contributions regarding all other expenses incurred by it in accordance with the act and the other by-laws of the strata company; and (b) this bylaw prevails to the extent of any inconsistency with any other by-law.

30 Governance By-Law 20 (described in its title as being about 'debt recovery costs') is in the following terms:

(1) In this by-law:

(a) **Act** means the Strata Titles Act 1985 (WA);

(b) **debt** means a debt owed to the strata company by a debtor owner, arising under the Act, under the by-laws (including any penalty required to be paid) or under an agreement between that owner and the strata company;

(c) **debt recovery costs** means all expenses reasonably incurred by the strata company in a debt recovery process concerning a debtor owner, including fees and disbursements:

1. for debt recovery notices, demand letters and the like;

2. for work undertaken by a strata manager engaged by the strata company, and not otherwise included within the fees charged by the strata manager to manage the scheme;

3. of a debt collector engaged by the strata company; and

4. of a lawyer engaged by the strata company on a solicitor and own client full indemnity basis, including the fees and disbursements of barristers, process servers, witnesses and experts engaged by the lawyer;

(d) **debt recovery process** means a process adopted by the strata company to seek to recover a debt owed to the strata company by a debtor owner, and include steps taken before litigation and in litigation; and

(e) **debtor owner** means an owner of a lot who fails to pay a debt on time.

(2) The strata company:

(a) must not levy contributions regarding debt recovery costs in accordance with unit entitlements, but in accordance with sub-bylaw (2)(b); and

(b) must levy contributions regarding debt recovery costs solely on the debtor owner concerned.

(3) The strata company is empowered to exercise functions in relation to debt recovery costs currently in the Act sections 36(1)(a) and 36(1)(b) and 36(1)(c), as allowed for by section 36(3) and in the Act sections 100(1)(a), 100(1)(b) and 100(1)(c) as amended by the *Strata Titles Amendment Act 2018* (WA) after those sections come into operation.

(4) For the avoidance of doubt: (a) the strata company must levy contributions regarding all other expenses incurred by it in accordance with the act and the other by-laws of the strata company; and (b) this bylaw prevails to the extent of any inconsistency with any other by-law.

Parties' contentions

31 The applicant's contentions[25] may be summarised as follows:

a) the By-Laws are both specifically invalid (that is, invalid in the way that they are being applied to the applicant in the context of the 2020 SAT Proceedings) and generally invalid (that is, invalid by their intended operation in connection with future proceedings);

b) the law that applies to a litigation is the law in force at the time the litigation commenced and the application of Governance By-Law 19 to matters which were on foot at the time of its registration would 'create issues of natural justice, unfairness and uncertainty';

c) if and to the extent the respondent seeks to recover its costs of the 2020 SAT Proceedings against the applicant, then it must do so by application to the Tribunal, and cannot do so by purporting to pass a by-law;

d) Governance By-Law 19 was, from the time it was made, invalid as being inconsistent with the Prior ST Act because:

i) the Prior ST Act limited an award of costs to those contemplated under s 81(7)[26] and s 103H(8);[27]

ii) the By-Law cannot be used to override any order of the Tribunal or its discretion to award costs; and

iii) no costs were awarded against the applicant in the 2020 SAT Proceedings;

e) Governance By-Law 19 is invalid as now being inconsistent with the *State Administrative Tribunal Act 2004* (WA) (**SAT Act**) and Governance By-Law 20 is

[25] Summarised from the 'Applicant's Preliminary Submissions' filed with the application on 15 April 2021; 'Applicant's Contentions' filed on 12 May 2021 and 'Applicant's Submissions' filed on 5 August 2021 (Exhibit 1, pages 8-9 and 207-213), and the submissions made orally at the hearing.
[26] Which deals with costs thrown away by amending an application made to the Tribunal.
[27] Which deals with costs associated with orders for a variation of unit entitlements.

invalid as being inconsistent with the *Magistrates Court (Civil Proceedings) Act 2004* (WA) (**MCCP Act**) because the By-Laws have the effect of removing the costs jurisdiction and discretion of, respectively:

i) the Tribunal to award costs under s 87 of the SAT Act; and

ii) the Magistrates Court to award costs under s 25 and s 31 of the MCCP Act;

f) insofar as the Proposed Orders deal with future matters, they are not matters involving 'a dispute about an amount owed as a debt' (being a class of dispute excluded by s 197(3)(f) from the scope of a 'scheme dispute'), and the proceeding is therefore properly characterised as a scheme dispute under s 197(1); and

g) in the circumstances, the Tribunal should exercise its discretion to make the Proposed Orders.

32 The respondent's contentions[28] may be summarised as follows:

a) the proceeding is not properly characterised as a scheme dispute under s 197 because it is a dispute about an amount owed as a debt (and therefore excluded by s 197(3)(f));

b) in relation to the applicant's contention that the By-Laws are 'specifically invalid', the validity of a scheme by-law cannot be assessed by reference to its application in these particular circumstances. Rather, the validity of a by-law is properly assessed by reference to its text and character (as a statutory contract);[29]

c) at the time that they were passed and registered, the By-Laws were validly made under s 42 (as read with s 42B) of the Prior ST Act;

[28] Summarised from the 'Respondent's Response' filed on 18 June 2021; 'Strata Company's Final Submissions' filed on 16 August 2021 (Exhibit 1, pages 214-216 and 302-321), and the submissions made orally at the hearing.

[29] Referring to ***Byrne v Owners of Ceresa Apartments Strata Plan 55597*** [2016] WASC 153 (***Byrne***) in support.

d) the By-Laws are not oppressive or unreasonable - there is and was an adequate and understandable basis for the respondent to have made the By-Laws[30] because:

   i) absent Governance By-Law 19, lot owners in the Scheme would bear the costs of responding to unsuccessful litigation against the respondent (less costs ordered by a Court or Tribunal); and

   ii) absent Governance By-Law 20, lot owners in the Scheme would bear the costs of recovering debts owed to the respondent by a defaulting owner;

e) Governance By-Law 19 does not operate retrospectively because:

   i) properly construed, it applies only to costs incurred after it came into operation; and

   ii) it has been applied only in respect of costs incurred by the respondent after the date that the By-Laws were registered;

f) even if Governance By-Law 19 did or could operate retrospectively, that is a matter that is properly raised in challenge to the application of the By-Law (as opposed to its validity);

g) Governance By-Law 19 was not and is not inconsistent with a written law. Specifically, at the time it was made, it was not inconsistent with the limited power of the Tribunal to award costs under s 81(7) of the Prior ST Act, and is not now inconsistent with the power of the Tribunal to award costs under s 87 of the SAT Act, because it:

   i) does not empower the respondent to 'override' any order of the Tribunal (including those made on 23 June 2020 in relation to the 2020 SAT Proceedings);

[30] Referring to ***Knapinski and The Owners of Strata Scheme 31300*** [2012] WASAT 164 (***Knapinski***) in support.

ii) has nothing to do with the awarding of costs by the Tribunal; but rather

iii) is directed to the levying of contributions on owners other than in accordance with unit entitlements;

h) Governance By-Law 20 was not and is not inconsistent with a written law. Specifically, it is not inconsistent with the power of the Magistrates Court to award costs under the MCCP Act because it:

i) has nothing to do with the awarding of costs by the Court; but rather

ii) is directed to the levying of contributions on owners other than in accordance with unit entitlements; and

i) the Tribunal should not make orders in terms of the Proposed Orders because:[31]

i) the Tribunal's jurisdiction to make declarations is limited to the matters specified, and the language used, in s199(3);

ii) the Proposed Orders are in terms other than the language used in s 199(3)(b) (which is cast in terms simply that a declaration may be made 'that specified scheme by-law is or is not invalid'); and

iii) in the case of Proposed Orders 2 and 3, the declarations would be uncertain in their application and of no effect because they do no more than re-state the law and would not resolve the scheme dispute.

Consideration

Is the matter a 'scheme dispute'?

33 As noted in ***Blaszkiewicz and The Owners of 7 Henderson Street Fremantle (Strata Scheme 74918)***:[32]

[31] ts 46-48, 20 October 2021.

> 12 The Tribunal has jurisdiction under s 197 to resolve 'scheme disputes'. Pursuant to s 3(1), 'scheme dispute' takes its meaning from s 197 itself which, by reference to both subject matter and parties, relevantly describes various classes of dispute as:
>
> (a) in sub-section (1), being scheme disputes; and
>
> (b) in sub-section (3), not being scheme disputes.
>
> …
>
> 49 Reading s 197 as a whole and in context, s 197(3) is determinative in relation to certain matters not being scheme disputes, with the effect that it limits s 197(1)[.]
>
> 50. [E]ven if the dispute between the parties could be characterised as a dispute between scheme participants falling within s 197(1)(a), it is nevertheless excluded from being a scheme dispute if it falls within the scope of s 197(3).

34 In this case, subject to s 197(3), the proceeding squarely falls within the class of dispute described in s 197(1)(a)(i), being a dispute between 'scheme participants'[33] about 'the scheme documents, including the validity of scheme by-laws'.

35 The classes of dispute that are specified in s 197(3) *not* to be scheme disputes relevantly include 'a dispute about an amount owed as a debt.'[34]

36 In this case:

a) I accept the applicant's contention that the present proceeding is not limited to a dispute about the particular costs levied on the applicant and associated with the 2020 SAT Proceedings;

b) rather, the proceeding is about the ability of the respondent to rely on the By-Laws to levy contributions towards its litigation and debt recovery costs on any owner in the Scheme (including in relation to future proceedings); and

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[32] [2021] WASAT 56 (***Blaszkiewicz***), [12] and [49]-[50].

[33] Which term is defined in s 197(2) to include 'the strata company for the strata titles scheme' and 'a member of the strata company for the strata titles scheme' (the latter taking 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).

[34] Other than a debt owed under s 99(2) or cl 53E of Sch 2A (neither of which apply): ST Act, s 197(3)(f).

c) accordingly, the proceeding (as a whole) is not properly characterised as a dispute about 'an amount' owed as a debt and is not excluded by s 197(3)(f) from being a 'scheme dispute'.

Tribunal's power and discretion to make declarations

37 I begin by noting that:

a) each of the Proposed Orders sought by the applicant is in the form of a declaration; and

b) for the reasons that follow, I do not accept the respondent's contention that the Tribunal's declaratory power is confined to making declarations only in terms of the various sub-sections of s 199(3).[35]

38 As is well established, the Tribunal is a creature of, and exercises only such power as is conferred by, statute (in this case, the ST Act).

39 Relevantly, the Tribunal's power to make declaratory orders derives from s 199, which provides:

> **199. Declarations**
>
> (1) In a proceeding under this Act, the Tribunal may make a declaration concerning a matter in the proceeding instead of any order the Tribunal could make, or in addition to any order the Tribunal makes, in the proceeding.
>
> (2) The Tribunal's power to make a declaration is exercisable only by a legally qualified member (or by the Tribunal constituted of a legally qualified member and other members).
>
> (3) Without limitation, a declaration may be made that -
>
> (a) a specified person has or has not contravened a specified provision of this Act, the scheme by-laws or a strata lease; or
>
> (b) a specified clause of a strata lease is or is not invalid; or
>
> (c) a specified scheme by-law is or is not invalid; or
>
> (d) a specified decision or resolution of a strata company is or is not invalid; or

[35] Specifically, that if declaring a by-law to be invalid, the Tribunal could do so only in terms of s 199(3)(c): see [32](i) above; ts 46-48, 20 October 2021.

(e) a specified appointment or election of a member of a council of a strata company or an officer of a strata company is or is not invalid; or

(f) a settlement date for a contract for the sale and purchase of a lot was or was not validly postponed under this Act; or

(g) a contract for the sale and purchase of a lot was or was not validly avoided under this Act.

40 In approaching the construction of written laws, including those conferring power on the Tribunal, the focus is upon the text of the provisions having regard to their context and apparent purpose,[36] with the primary object being to interpret each provision in a manner that is consistent with the language and purpose of all the provisions of the statute.[37]

41 I have previously held, and remain of the view, that:

> [W]here a dispute is properly characterised as being a dispute about subject matter falling under a specific provision or provisions of the ST Act … then the jurisdiction of the Tribunal to deal with that dispute is limited by the terms of that provision / those provisions.[38]

42 However, the language of s 199(3) is plainly not directed to specifying the only terms in which a declaration may be made. On the contrary, the opening words of that sub-section expressly identify that its terms are to be applied 'without limitation' to the general discretion conferred in s 199(1). This kind of provision is plainly in contrast to provisions that may be construed as dealing comprehensively with a particular subject matter.[39]

43 Properly construed:

a) s 199(1) confers a very broad discretion on the Tribunal to make declaratory orders in relation to a scheme dispute;

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[36] ***Meyer v Solomon*** [2021] WASCA 168, [76] (***Meyer***). See also: ***Glasby and The Owners of 84 Clydesdale Street Como Strata Plan 9012*** [2021] WASAT 136, [28].

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

[38] ***Rechichi and Johnston*** [2021] WASAT 79 (***Rechichi***), [26].

[39] Such as, for example, s 90 which governs structural alterations to a lot, being the subject matter of dispute in ***Rechichi*** (above). Similarly, I consider that s 46 comprehensively deals with the grounds upon which a by-law, which has otherwise been validly voted upon and registered, could be declared invalid.

b) the power to make a declaration under s 199(1) is only limited in its exercise by s 199(2); and

c) s 199(3) is informing rather than limiting in nature (that is, it properly informs the exercise of the Tribunal's discretion in making a declaration, but does not limit it).

44 Although the discretion to grant a declaration is broad, it is helpful to consider the way in which declaratory relief has been approached in other fora, including considerations relevant to when such relief might be denied in the exercise of a discretion.

45 The Full Federal Court has described that:

> … The remedy of a declaration of right is ordinarily granted as final relief in a proceeding. It is intended to state the rights of the parties with respect to a particular matter with precision, and in a binding way.[40]

46 In the context of a court's general discretion to grant a declaration, Lockhart J[41] has usefully summarised that:

a) the proceeding should involve the determination of a question that is not abstract or hypothetical - there must be a real question involved and any declaratory relief must be directed to the determination of a legal controversy between the parties, and be productive of some real consequence for the parties; and

b) the applicant must have a real interest at stake - declaratory relief may not be sought in relation to circumstances that have not occurred and might never happen, or if the declaration will produce no foreseeable consequences for the parties.

47 In my view, similar considerations should inform the exercise of the Tribunal's discretion under s 199(1).

[40] ***Warramunda Village Inc v Pryde*** (2001) 105 FCR 437, [8].
[41] ***Aussie Airlines Pty Ltd v Australian Airlines Ltd, Qantas Airlines Ltd & Federal Airports Corporation*** (1996) 68 FCR 406, 415

Should an order in terms of the first Proposed Order be made?

48 For the reasons that follow, I do not accept the applicant's contention that that Governance By-Law 19 is objectionable on the ground that it operates or could operate in relation to matters that were on foot at the time that it came into force.

49 The applicant's contention in relation to the 'retrospective' application of Governance By-Law 19 appears to be founded on:

a) the existence of the 2020 SAT Proceedings at the time that the By-Law was registered; and

b) the premise (outlined at [31](b) above) that 'the law that applies to a litigation is the law that was in force when the litigation commenced'.[42]

50 That foundation is unsound because:

a) by-laws (while sharing some features with subsidiary legislation) are properly characterised as being in the nature of a deed (or statutory contract),[43] comprising 'the bundle of rights and liabilities created by the constituent documents', not as subsidiary legislation;[44]

b) whatever the position, therefore, regarding the operation of *laws* that were or were not in force at the time the 2020 SAT Proceedings commenced, the same cannot be said of the By-Laws;

c) rather, subject to certain qualifications reflecting the nature and operational context of by-laws,[45] the ordinary principles of contractual construction should guide the construction of the By-Laws, such that:

> [T]he rights and liabilities of parties under a term of a contract are determined objectively, by reference to the contract's text, context (the entire text of the contract as well

[42] Applicant's Submissions, para 1.4.
[43] That characterisation is now made explicit in s 45 of the ST Act (see [24] above) and applied at the time that the By-Laws were made pursuant to the analysis contained in ***Byrne***, [61]-[71].
[44] ST Act, s45(2); ***Birchwood Consolidated Pty Ltd (Receivers and Managers Appointed) (in liquidation) v Kelly*** [2021] WASC 448 (***Birchwood***), [68] (citations omitted).
[45] Identified in ***Byrne*** at [76]-[79]. See also ***Birchwood***, [70].

> as any contract, document or statutory provision referred to in the text of the contract) and purpose[;][46]

d) on the face of it, there is no reason to presume that contracting parties could not enter into 'mutual covenants'[47] regulating rights and liabilities that exist, or may exist, at the time of the agreement (including in relation to legal proceedings); and

e) further, noting in particular that the By-Laws in question are not the 'default by-laws' (as was the position in ***Byrne***[48]), there is no basis to construe them as having or implying such restrictions as pertain to subsidiary legislation in relation to their intended operation.

Accordingly, to the extent that the applicant's objection is that no by-law could apply to proceedings on foot at the time that it came into being, that objection fails.

51 The applicant also asserts that 'issues of natural justice, fairness and uncertainty'[49] would arise if Governance By-Law 19 were to apply to proceedings that were already on foot. That contention goes no further, however, than mere assertion. The applicant did not explain or expand, in oral or written submissions, upon that part of her grounds. Importantly:

a) I do not understand the assertion to be a contention that Governance By-Law 19 is invalid on the ground that it is 'unfairly prejudicial to, or unfairly discriminatory against, 1 or more of the owners of lots' or 'oppressive or unreasonable' within the meaning of s 46(j) because:

i) there is and was no reference in the applicant's submissions to s 46(j) or to any of its constituent language;[50] and

[46] ***Byrne***, [75] (citations omitted).
[47] ST Act, s 45(5); ***Birchwood***, [70].
[48] ***Byrne***, [70].
[49] Applicant's Submissions, paras 1 and 1.3.
[50] See ***Steele and The Owners of Cocos Beach Bungalows Survey Strata Plan 42074*** [2021] WASAT 101 (***Steele***), [28].

ii) the first Proposed Order is not in terms that Governance By-Law 19 be declared invalid; and

b) in any event, if and to the extent that the applicant intended to challenge Governance By-Law 19 on the ground that it is invalid by reason of s 46(j), then the applicant has not sufficiently advanced a case to succeed on that ground.[51]

52 In relation to the operation of Governance By-Law 19:

a) I accept the respondent's contention, which is supported by the evidence and Agreed Facts,[52] that the By-Law has not in fact been exercised in relation to costs incurred prior to the date of the By-Law's registration and, in that sense, it does not operate retrospectively;

b) to the extent that the objection to the By-Law is that it could never have application to any costs associated with proceedings on foot at the time that the By-Law was made, that contention has not been made out (for the reasons outlined above); and

c) to the extent that the applicant's objection is to the particular application of the By-Law to her in relation to the costs of the 2020 SAT Proceedings:

i) the applicant has not advanced a case, or a sufficient case, to challenge its application (on the grounds, for example, that the By-Law is invalid by reason of s 46(j), or that it could not be construed to apply in the circumstances, or that it had been implemented in a way that contravened the respondent's objectives under s 119);

ii) in the circumstances, such a dispute would more likely to be characterised as a dispute about an amount owed as a debt; and

[51] Because no evidence or submissions were addressed to satisfying the relevant limbs of that provision: see ***Steele***, [28]-[29], [31], [35]-[36].
[52] See [7](l) above.

iii) the first Proposed Order does not respond to (in that it goes beyond the scope of) such an objection.

53 It follows that I decline to make an order in terms of the first Proposed Order.

Is Governance By-Law 19 inconsistent with a written law or an order of the Tribunal?

54 The applicant relies, as the ground for her contention that Governance By-Law 19 is invalid, on the contention that Governance By-Law 19 was and is inconsistent with a written law (as outlined at [31](d)-(e) above) within the meaning of s 46(b).

55 The party asserting the invalidity of a by-law bears the onus of establishing any ground under s 46.

56 The question of whether a by-law is invalid by reason of s 46(b) must be assessed:

a) on the basis of the nature, construction and operation of:

i) the by-law in question (to be construed as a deed pursuant to s 45 of the ST Act, in accordance with the approach in ***Byrne***);[53] and

ii) the written law with which it is alleged to be inconsistent (to be construed in accordance with the established approach to statutory construction);[54]

b) consistently with the approach outlined in ***Steele***,[55] in approaching the question of the nature and operation of the by-law in question:

i) the focus is on the inherent nature of the by-law, not on how it has been implemented in a particular instance (the latter may give rise to

[53] ***Byrne***, [72]-[79]. Although that this case concerned a dispute determined only under the Prior ST Act, the characterisation of by-laws under s 45 of the ST Act, as identified above, makes the approach to construction articulated in ***Byrne*** equally apposite.

[54] ***Glasby and The Owners of 84 Clydesdale Street Como Strata Plan 9012*** [2021] WASAT 136, [28] (and the authorities cited therein); ***Meyer***, [76].

[55] [2021] WASAT 101, [29].

an objection, but on the ground of the decision being objectionable, not that the by-law is invalid);

ii) it is certainly proper (and indeed necessary) to consider the impact or likely impact of the by-law on a scheme participant in certain circumstances, but that is to be undertaken by reference to:

1) the way the by-law operates or is likely to operate, based on its construction and on an objective basis; and

2) the context in which the by-law must operate, notably including the legislative framework in which it operates or is intended to operate; and

c) on the basis that inconsistency may arise:

i) directly, where the terms of the by-law contradict a written law; or

ii) indirectly, where the by-law seeks to deal with subject-matter that is intended to be comprehensively dealt with by a written law (that is, where the written law is intended to 'cover the field').

57 In this case, the applicant contends that Governance By-Law 19 is inconsistent with the Tribunal's powers (and any orders made using those powers) to award costs. I do not accept that contention.

58 There is no doubt that:

a) the Prior ST Act dealt comprehensively in s 81(7) with the award of costs in strata scheme disputes;

b) the ST Act is now silent as to the award of costs in scheme disputes and so any award of costs by the

Tribunal is comprehensively dealt with by s 87 of the SAT Act;[56] and

c) accordingly, a by-law that sought to prevent the Tribunal from awarding costs in a scheme dispute, or to interfere with the exercise of its powers, would be inconsistent with those provisions.

59 However, as noted above, by-laws are properly characterised as having the nature of deeds (or statutory contracts). It is well-accepted that one contracting party may agree to be liable for the costs incurred by another contracting party in certain circumstances (indeed, such agreement is a common feature of deeds of settlement and release which may include a bar to future proceedings). Such deeds do not usurp or interfere with the power of a court or Tribunal to award costs; they are agreements that avoid the need for the indemnified party to seek an award of costs.

60 Properly construed, Governance By-Law 19 does not purport to remove any discretion the Tribunal had under the Prior ST Act, or has under s 87 of the SAT Act, to award costs in relation to a scheme dispute. Rather, it is intended to operate as an agreement between the strata company and its constituent members such as to:

a) indemnify the strata company in relation to its 'litigation costs' (as defined); and

b) avoid the need for the strata company to apply to the Tribunal for an award of costs.

61 I find that:

a) Governance By-Law 19 was and is not either directly or indirectly inconsistent with the written laws conferring jurisdiction on the Tribunal to award costs;

b) further, since no order was made in connection with costs in the 2020 SAT Proceedings,[57] the question of inconsistency with an order made in the exercise of the Tribunal's jurisdiction does not arise, and is no more than merely hypothetical; and

[56] See ***Dickinson and Charuga*** [2021] WASAT 122 and ***Blaszkiewicz***.
[57] See Agreed Facts at [7](j)-(k) above.

c) it follows that Governance By-Law 19 is not, by reason of s 46(b), invalid.

Is Governance By-Law 20 inconsistent with a written law?

62 In line with the reasoning above, I find that, properly construed, Governance By-Law 20:

a) does not purport to remove any discretion conferred on the Magistrates Court by the MCCP Act to award costs in debt recovery (or other civil) proceedings;

b) but rather, is intended to operate as an agreement between the strata company and its constituent members such as to:

i) indemnify the strata company in relation to its 'debt recovery costs' (as defined); and

ii) avoid the need for the strata company to apply to the Magistrates Court for an award of costs;

c) as such, is not either directly or indirectly inconsistent with the written laws conferring jurisdiction on the Magistrates Court to award costs; and

d) is not, by reason of s 46(b), invalid.

Conclusion

63 It follows from [61]-[62] above that I decline to make orders in terms of the second or third Proposed Orders.

Final comments

64 Even if the substantive merits of the application had warranted the making of declarations, I observe for completeness that I would decline to make declarations in terms of the second and third Proposed Orders (as set out in [2] above) because declarations in those terms would:

a) as submitted by the respondent, do little more than restate (rather than apply) s 46(b); and

b) fail to 'state the rights [or position] of the parties with respect to a particular matter with precision, and in a binding way'.[58]

65 Finally, given the limited grounds upon which the applicant advanced her application:

a) these reasons are confined to determining:

i) whether Governance By-Law 19 is incapable of operation in relation to proceedings that were on foot at the time it came into force; and

ii) whether Governance By-Law 19 and Governance By-Law 20 are invalid by reason of s 46(b);

and

b) noting in particular that the applicant did not rely on s 46(a) or s 46(j) as grounds for contending the disputed By-Laws' invalidity, and no objection is raised in connection with the manner in which the By-Laws were voted upon or registered, it has been unnecessary for me to:

i) determine any broader questions connected with the validity or operation of the By-Laws; or

ii) deal directly with the respondent's contentions at [32](c)-(d) above.

Orders

The Tribunal orders:

1. The application is dismissed.

[58] See [45] above.

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

DR B MCGIVERN, MEMBER

14 JANUARY 2022