

JURISDICTION : SUPREME COURT OF WESTERN AUSTRALIA

CITATION : BIRCHWOOD CONSOLIDATED PTY LTD
(RECEIVERS AND MANAGERS APPOINTED) (IN
LIQUIDATION) -v- KELLY [2021] WASC 448

CORAM : ALLANSON J

HEARD : 20 JULY 2021

DELIVERED : 15 DECEMBER 2021

PUBLISHED : 15 DECEMBER 2021

FILE NO/S : GDA 1 of 2021

BETWEEN : BIRCHWOOD CONSOLIDATED PTY LTD
(RECEIVERS AND MANAGERS APPOINTED) (IN
LIQUIDATION)
Appellant

AND

GLEN KELLY
First Respondent

LEE SHARON BAKER
Second Respondent

STARPHASE PTY LTD
Third Respondent

THE OWNERS OF EQUUS STRATA PLAN 62962
Fourth Respondent

ON APPEAL FROM:

Jurisdiction : SAT
Coram : Member C Barton
File Number : CC 1728 of 2016 and CC 1056 of 2017

Catchwords:

Appeal from State Administrative Tribunal - Strata title scheme - Where lot to be converted to common property and transferred out of scheme - Where State Administrative Tribunal held by-laws to effect that transaction are invalid - Whether by-laws address matters relating to the management, control, use and enjoyment of the lots and the common property

Administrative law - Strata titles scheme - Where management scheme lodged with strata plan - Whether registration of management scheme gives rise to presumption of validity of by-laws in management plan - Whether Registrar of Titles necessary party to challenge validity of by-laws in State Administrative Tribunal

Legislation:

Strata Titles Act 1985 (WA)
Strata Titles Amendment Act 2018 (WA)

Result:

Appeal allowed

Category: B

Representation:*Counsel:*

Appellant : DH Solomon
First Respondent : N Dillon
Second Respondent : N Dillon

Third Respondent : No Appearance
 Fourth Respondent : N Dillon

Solicitors:

Appellant : Solomon Brothers
 First Respondent : Murcia Pestell Hillard
 Second Respondent : Murcia Pestell Hillard
 Third Respondent : No Appearance
 Fourth Respondent : Murcia Pestell Hillard

Cases referred to in decision(s):

Birchwood Consolidated Pty Ltd and the Owners of Equus Strata Plan 62962
 [2020] WASAT 161
 Byrne v Owners of Ceresa Apartments Strata Plan 55597 [2017] WASCA 104
 Casuarina Rec Club Pty Ltd v Owners – Strata Plan 77971 [2011] NSWCA 159;
 (2011) 80 NSWLR 711
 City of Mandurah v Australian Flying Corps & Royal Australian Air Force
 Association (WA Division) Inc [2016] WASCA 185
 Darley Australia Pty Ltd v Walfertan Processors Pty Ltd [2012] NSWCA 48;
 (2012) 188 LGERA 26
 Gibb v Registrar of Titles (Vic) (1940) 63 CLR 503
 Goodman Court Pty Ltd v Registrar-General of NSW [2014] NSWSC 1828
 Hemer Pty Ltd v Bennl (No 2) [2011] SASCFC 143; (2011) 111 SASR 309
 King v Commissioner for Consumer Protection [2018] WASCA 194
 Kostas v HIA Insurance Services Pty Ltd [2010] HCA 32; (2010) 241 CLR 390
 Mackie v Henderson [2011] WASC 197; 42 WAR 194
 Minister for Natural Resources v NSW Aboriginal Land Council (1987) 9
 NSWLR 154
 O'Grady v Northern Queensland Co Ltd [1990] HCA 16 (1990) 169 CLR 356
 Osland v Secretary, Department of Justice (No 2) [2010] HCA 24; (2010) 241
 CLR 320
 Owners of Strata Plan No 3397 v Tate [2007] NSWCA 207; (2007) 70 NSWLR
 344
 Paridis v Settlement Agents Supervisory Board [2007] WASCA 97; (2007) 33
 WAR 361
 Perpetual Executors & Trustees Association of Australia v Hosken (1912) 14
 CLR 286
 Proprietors – Rosebank GTP 3033 v Locke [2016] QCA 192

Roy Morgan Research Centre Pty Ltd v Commissioner of State Revenue
(Vic) [2001] HCA 49; (2001) 207 CLR 72

Shinwari v Anjoul by her tutor Anjoul [2017] NSWCA 74; 94 NSWLR 314

Templeton v Leviathan Pty Ltd (1921) 30 CLR 34

White v Betalli [2006] NSWSC 537; (2006) 66 NSWLR 690

Wydgee Pastoral Co Pty Ltd v Registrar of Titles [1963] WAR 176

ALLANSON J

ALLANSON J**Introduction**

1 The *Strata Titles Act 1985* (WA) provides for strata title schemes under which a parcel of land may be physically divided into lots which may be owned and sold or otherwise dealt with separately. On registration of a strata title scheme, a strata company is established under the Act for that scheme.

2 The Owners of Equus Strata Plan 62962 is the Strata Company for the strata scheme known as Equus (the Scheme). The Scheme includes common property.

3 Birchwood Consolidated Pty Ltd (Receivers and Managers appointed) (In liquidation) is the proprietor of Lot 216 in the Scheme.

4 Birchwood applied to the State Administrative Tribunal for orders under s 83 of the *Strata Titles Act* to give effect to a transaction by which Lot 216 on the Strata Plan will be converted to common property and transferred out of the Scheme to the owner of the adjoining land. That transaction was provided for in by-laws set out in the management statement lodged with the Registrar of Titles pursuant to s 5C of the Act. Resolutions to give effect to that transaction were passed at the First General Meeting of the Strata Company. The Strata Company has not given effect to that transaction.¹

5 Glen Kelly, Lee Sharon Baker and Starphase Pty Ltd are proprietors of lots in the Scheme. They brought proceedings in the Tribunal against the Strata Company and Birchwood, in which they sought declarations pursuant to the *Strata Titles Act* that the relevant by-laws are invalid and that resolutions to hold the First General Meeting of the Strata Company, and resolutions passed at the First General meeting, are invalid.²

6 The applications were heard and determined together. On 22 December 2020, the Tribunal ordered:

CC 1728 of 2016

¹ CC 1728 of 2016.

² CC 1056 of 2017 and 1057 of 2017.

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The Tribunal orders in CC 1728 of 2016:

1. The application is dismissed.

CC 1056 of 2017

The Tribunal orders in CC 1056 of 2017:

1. Pursuant to s 93(2) of the *Strata Titles Act 1985* (WA), the Schedule 1 by-laws 64, 65 and 66 of the management statement L711880 and amended by-law 64(a) and (b) of the notification of change of by-laws L755034 registered on Strata Plan 62962 are declared invalid and are repealed.

CC 1057 of 2017

The Tribunal orders in CC 1057 of 2017:

1. Pursuant to s 97(1)(b) of the *Strata Titles Act 1985* (WA), the Tribunal refuses to invalidate resolutions 6 and 8 of the first annual general meeting of the strata company held on 2 September 2011 in respect of Strata Plan 62962.

2. The application is dismissed.

7 Birchwood has applied for leave to appeal the decisions in CC 1728 of 2016 and CC 1056 of 2017. No appeal was lodged against the orders in CC 1057 of 2017.

8 In these reasons, unless stated otherwise, a reference to legislation is to the provisions of the *Strata Titles Act* in force as at 1 July 2019. The Act was extensively amended by the *Strata Titles Amendment Act 2018* (WA), the provisions of which came into operation on 1 May 2020. The transitional provisions require proceedings in the Tribunal, that were commenced before commencement of the amending Act, to be dealt with as if that Act had not been enacted.³

The statutory scheme

9 By s 4, land may be subdivided into lots, or lots and common property, by the registration of a strata plan or a survey-strata plan. Where a strata plan is registered under the Act, the lots comprised in the plan, or any one or more of them, may devolve or be transferred, leased, mortgaged or otherwise dealt with in the same manner and form as land held under the provisions of the *Transfer of Land Act 1893* (WA).

³ Sch 5, cl 30.

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10 Sections 5 and 5B set out the requirements of a strata plan lodged for registration. If a strata plan lodged for registration complies with the Act, the Registrar shall register it in the prescribed manner.⁴

Management statements

11 By s 5C:

(1) When a strata/survey-strata plan is lodged for registration a management statement -

- (a) that is in the prescribed form; and
- (b) that complies with subsection (3),

may be lodged for registration with it.

(2) A management statement is a document setting out -

- (a) by-laws of the strata company that are to have effect under sections 42, 42A and 42B; and
- (b) amendments and repeals referred to in section 42(2),

and may include by-laws in relation to any matter specified in Schedule 2A.

(3) A management statement shall be signed by -

- (a) the person who is registered as proprietor of the fee simple of the parcel; and
- (b) each person who has a registered interest in, or is a caveator in respect of, the parcel.

...

(5) Upon registration of a management statement, the by-laws set out in the statement, and any amendments and repeals, have effect for the purposes of section 42.

(6) By-laws set out in a management statement may be amended in accordance with section 42 or as otherwise provided by this Act.

12 Schedule 2A sets out matters that may be provided for in a management statement, including:

1. The amendment or repeal of a by-law contained in Schedule 1.

⁴ Section 5B(4).

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2. The amendment or repeal of a by-law contained in Schedule 2.
3. Any additional by-law that may be made under section 42.
- ...
7. The control, management, use and maintenance of any part of the common property, including any special facilities provided on the common property.
8. Provisions relating to any proposed re-subdivision in a scheme being provisions that -
 - (a) comply with the requirements of section 8A(b) and (c) and any other prescribed requirements; and
 - (b) state the proposed unit entitlement of each lot and the proposed aggregate unit entitlement of the scheme following the completion of all proposed re-subdivisions in the scheme.

Strata companies

13 It is not necessary in these reasons to consider in any detail the provisions relating to management of strata companies. In broad outline, pursuant to pt IV div 1, on registration of the strata/survey strata plan, the proprietors from time to time constitute a strata company, which is a body corporate, and which shall be regulated in accordance with the Act and the by-laws in force in respect of that strata company.

14 By s 35, the strata company has duties including to enforce the by-laws and to control and manage the common property for the benefit of all the proprietors.

15 The Act provides for specific powers of the strata company including the power in s 42 to make by-laws.

By-laws

16 Section 42 is the general provision empowering a strata company to make by-laws. Sections 42A and 42B authorise by-laws made under s 42 to provide for specified matters. It is not necessary to consider them further.

17 Section 42 provides:

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- (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.

18 Section 42(4) provides that no amendment, repeal or additional by-law has effect until the strata company has lodged notice with the Registrar of Titles and the Registrar has made reference to the amendment, repeal or additional by-law on the appropriate registered strata/survey strata-plan.

19 By s 42(6):

Without limiting the operation of any other provision of this Act, the by-laws for the time being in force bind the strata company and the proprietors and any mortgagee in possession (whether by himself or any other person) or occupier or other resident of a lot to the same extent as if the by-laws had been signed and sealed by the strata company and each proprietor and each such mortgagee, occupier or other resident respectively and as if they contained mutual covenants to observe and perform all the provisions of the by-laws.

20 The by-laws in sch 1 and sch 2 cover a range of topics. Those topics do not limit the matters on which by-laws may be made.

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Common property

21 Section 10 provides for the conversion of one or more lots into common property 'by the registration of a transfer executed by the proprietor or proprietors of that lot or those lots and by the strata company'. Under s 10(2), a transfer is not to be registered unless accompanied by prescribed documents, including 'a certificate under seal of the strata company certifying that the strata company has by resolution without dissent (or unanimous resolution, in the case of a two-lot scheme) consented to the conversion effected by the transfer'.

22 On registration of the transfer the land becomes common property and is subject to the provisions of the Act relating to common property.

23 The provisions relating to common property are in pt II div 2. Common property shall be held by the proprietors as tenants in common in shares proportional to the unit entitlements of their respective lots.

24 By s 19(2), a strata company may, pursuant to a resolution without dissent, and where satisfied that all persons concerned have consented in writing to the transfer, execute a transfer of common property.

25 Upon execution of a transfer by the strata company, the transfer or lease or sub-lease is valid and effective without execution by any person having any estate or interest in the common property. The transfer, endorsed with or accompanied by a certificate under the seal of the strata company, is conclusive evidence in favour of a purchaser or lessee of the common property and the Registrar of the facts stated in it.⁵

The powers of the Tribunal

26 Part VI of the Act provides for resolution of disputes, including by application to the State Administrative Tribunal.

27 Section 83(1) sets out general powers of the Tribunal to make an order 'for the settlement of a dispute, or the rectification of a complaint, with respect to the exercise or performance of, or the failure to exercise or perform a power, authority, duty or function conferred or imposed by this Act or the by-laws in connection with that scheme...'.⁵

28 By s 83(4):

⁵ Section 19(5), (6) and (7).

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Nothing in subsection (1) empowers the State Administrative Tribunal to make an order under that subsection for the settlement of a dispute, or the rectification of a complaint, with respect to the exercise or performance of, or the failure to exercise or perform, a power, authority, duty or function conferred or imposed on the strata company by this Act where that power, authority, duty or function may, in accordance with any provision of this Act, only be exercised or performed pursuant to a unanimous resolution, resolution without dissent or a special resolution.

29 By s 93, on application by any person entitled to vote at a meeting of a strata company, the Tribunal has specific powers to make orders relating to by-laws, including:

- (a) a declaration that a by-law or an amendment or repeal of a by-law is invalid;
- (b) the repeal of a by-law;
- (c) the repeal of an amendment to a by-law...

30 The powers under s 93 may be exercised where the Tribunal is satisfied that the by-law:

- (a) was made without power; or
- (b) was not made in accordance with this Act or the regulations or any other requirement that ought to have been observed; or
- (c) should not have been made having regard to the interests of all proprietors in the use and enjoyment of their lots or the common property.

Factual background

31 The reasons of the Tribunal, at [9] - [19], set out the following events, which were not in contest:

9 On 29 August 2011, the Management Statement was lodged with Landgate (as notification L755034) for registration with the Strata Plan under s 5C of the Act. The Management Statement was entitled, 'Lot 200 on Deposited Plan 66447 (formerly Lot 32 on Plan 12711 Volume 1657 Folio 653)'.

10 The Management Statement set out the proposed Schedule 1 by-laws for the Scheme that were to have effect upon registration of the Strata Plan. Original by-laws 64 to 66 of the Schedule 1 by-laws which relate to Lot 216 were as follows:

64. Removal of Lot 216 From Strata Scheme

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Under the *Strata Titles Act 1985* (WA) (**Act**) Lot 216 of the Strata Scheme (otherwise known as the 'ANZ site') will be converted into Common Property for the purpose of it then being immediately transferred out of the Strata Scheme and amalgamated with the adjoining land lot (now lot 31) as anticipated in Clause 33 of the Special Conditions of the standard contract for sale of Lots within the Strata Scheme.

65. Initial General Meeting

The Proprietors acknowledge that the Original Proprietor will pass at the initial General Meeting of the Strata Company the required resolutions without dissent allowing Lot 216 to be converted into Common Property and transferred out of the Strata Scheme in accordance with the above By-law 64.

66. Agreement to Convert and Transfer

The Proprietors agree to do all things necessary and covenant to take no action to prevent the conversion of Lot 216 into Common Property and its transfer from the Strata Scheme as allowed by above By-laws 64 and 65.

- 11 On 1 September 2011, Birchwood as the original and sole proprietor of all lots in the Scheme gave notice of the convening of the First AGM to be held on 2 September 2011 (**short notice**).
- 12 As at 2 September 2011, Birchwood was the proprietor of all of the lots in the Scheme (and, as observed by the Strata Company, was subject to the rights and interests of purchasers who had entered into the sale contract in relation to the Development as at that date (**first sale contract**)).⁶
- 13 Relevantly, the first sale contract provided in clause 6.1 to clause 6.3 of the Special Conditions (**clause 6.1 to clause 6.3**):

6. Management Statement and Proxy

- 6.1 The Buyer authorises the Seller to amend the Management Statement if such amendment is required to complete the Development, to allow for the registration of the Strata Plan, or to comply with any requirement of any Authority.

⁶ The first sale contract was entered into in respect of Lot 33 on the Strata Plan on 17 December 2007 and included the proposed Management Statement without By-laws 64 to 66 (Attachment H). The form of the first sale contract was different after the First AGM held on 2 September 2011 as it included the Management Statement with By-laws 64 to 66 (Attachment G) and the minutes and agenda for the First AGM and the Resolutions (Attachment L).

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- 6.2 The Buyer irrevocably:
- (a) appoints the Seller to be the proxy of the Buyer, in the name of and for and on behalf of the Buyer to do each of the following:
 - (i) attend and vote at the first Annual General Meeting of the Strata Company even to the exclusion of the Buyer, if present at the meeting, for the purposes of dealing with any matter arising at such meeting dealt with by this Contract, including but not limited to any matters enabling the Seller to proceed with or complete the Development;
 - (ii) to do all such things and execute all such documents as may be necessary to give effect to any resolution passed at such meeting or any matter required by this Contract;
 - (iii) to propose and vote for any By-Law or the repeal, substitution or variation of any By-Laws including the Non-Standard Bylaws;
 - (b) agrees to ratify and confirm as necessary all that the Buyer does pursuant to this clause; and
 - (c) will sign the proxy form attached as Attachment R or as to give effect to this clause and for the proxy to provide as necessary to the Strata Company at any meeting.

- 6.3 The Buyer unconditionally:
- (a) approves the By-Laws;
 - (b) consents, if required, to the Strata Company adopting By-Laws; and
 - (c) approves the resolutions set out in Attachment P that are to be proposed and passed at the first annual general meeting of the Strata Company.

14 The Minutes of the First AGM record that, on 2 September 2011:

- a) there was a quorum;

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- b) the meeting was properly constituted by agreed short notice; and
- c) Birchwood resolved unanimously and without dissent to pass each of the Resolutions on the agenda, including, 'special business item 6' (**resolution 6**) in respect of the Transaction as follows:
 - i. Lot 216 of the Strata Scheme (otherwise known as the 'ANZ site') will be converted into Common Property for the purpose of it being then immediately transferred out of the Strata Scheme and amalgamated with the adjoining land lot (now lot 31) as anticipated in Clause 33 of the Special Conditions of the standard contract for sale of Lots within the Strata Scheme.
 - ii. The Common Property formerly known as Lot 216 of the Strata Scheme be transferred to the registered proprietor of the adjoining land lot (now lot 32)⁷ as anticipated in Clause 33 of the Special Conditions of the standard contract for sale of Lots within the Strata Scheme.

15 On 10 October 2011, Landgate registered Amended by-law 64 which reflects resolution 6 passed at the First AGM. Amended by-law 64 provides:

- (a) Lot 216 of the Strata Scheme (otherwise known as the 'ANZ site') will be converted into Common Property for the purpose of it being then immediately transferred out of the Strata Scheme and amalgamated with the adjoining land lot (now lot 31) as anticipated in Clause 33 of the Special Conditions of the standard contract for sale of Lots within the Strata Scheme;
- (b) The Common Property formerly known as Lot 216 of the Strata Scheme be transferred to the registered proprietor of the adjoining land lot

⁷ There is no dispute between the parties that resolution 6(b) of the First AGM agenda should refer to Lot 31.

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(now lot 32)⁸ as anticipated in Clause 33 of the Special Conditions of the standard contract for sale of Lots within the Strata Scheme.

16 On 6 April 2016, the Strata Company was provided with a suite of documents to give effect to the Transaction through its legal advisers.

17 On 12 August 2016, Birchwood sent an email to the strata manager, Richardson Strata Management Services (**Richardsons**), requesting that the Strata Company include on its agenda for the next Strata Council meeting a resolution to the effect that:

The Strata Council approves the Sale Documents and agrees to take all reasonable steps to give effect to the transaction that was unanimously approved without dissent on 2 September 2011 at the first annual general meeting of the Equus Strata.

18 At the Strata Council meeting held on 5 September 2018, the resolution was not put to a vote.

19 Neither the resolution, nor any similar resolution which would constitute compliance with by-law 66 has been put or passed.⁹

32 It is also necessary to consider Special Condition 33 in the first sale contract, by which:

The Buyer acknowledges that:

- (a) the Development is not intended to be constructed over all of the land more particularly described as Lot 32 on Plan 12711 being the land contained in certificate of title Volume 1657 Folio 653 and incorporating the proposed Strata Plan because the portion of the land currently leased by ANZ bank, being about 143 square metres in area at the south western corner of Lot 32 on Plan 12711, having approximately a 9.5 metre frontage on Hay Street and abutting Lot 31 on Plan Diagram 55867 to the west which is now occupied by a McDonalds Restaurant is intended to be excluded from the Development and to have a separate and unrelated title initially owned by the Seller (**Excised Portion**);
- (b) if the Seller because of any refusal by any Authority, or for other reasons, cannot obtain a separate title for the Excised Portion then it will include the Excised Portion into the Development

⁸ There is no dispute between the parties that Amended by-law 64(b) should refer to Lot 31.

⁹ *Birchwood Consolidated Pty Ltd and the Owners of Equus Strata Plan 62962* [2020] WASAT 161 [9] - [19].

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and the Strata Scheme as Lot 1767 with the commensurate rights appurtenant to that Lot and in the common property;

- (c) the Unit Entitlement of the Lots in the Strata Scheme will be subject to change if the Excised Portion becomes a Lot in accordance with clause 33(b); and
- (d) nothing in this clause or its effect will give the Buyer a right to object to the registration of the Strata Plan, avoid the Contract or to seek damages from the Seller.

The decision of the Tribunal

33 The Tribunal listed eight issues for determination arising from the applications before it. Four of the issues related to the validity of the First AGM or the resolutions passed at it. There is no appeal against the findings on those issues. The issues relevant to the appeal are:

- 1) What is the proper construction of By-laws 64 to 66? Are they consistent with the Act for the purposes of s 42 of the Act and otherwise valid?
- 2) What is the effect of Special Condition 33 and clause 6.1 to clause 6.3? Are they relevant to the Tribunal's construction of By-laws 64 to 66 and the determination of their validity?
- ...
- 7) Should the Tribunal exercise its discretion to invalidate By-laws 64 to 66 under s 93(2) of the Act?
- 8) If By-laws 64 to 66 and the Resolutions are valid, does the Tribunal have power to give effect to the Transaction under s 83(1) having regard to the operation of 83(4) of the Act?

34 The Tribunal first considered the scope of the by-law making power, and whether the challenged by-laws fell outside those that could be made by a strata company. The Tribunal held, correctly, that the words of s 42(1)(c) are 'singularly and collectively words of considerable breadth'.¹⁰

35 The Tribunal held, however, that the challenged by-laws 'do not relate solely to lots (and any common property) within the Scheme'. That appeared to follow from the statement that the transaction contemplated by the by-laws was intended to benefit one lot owner by

¹⁰ Reasons [64], citing *Byrne v Owners of Ceres Apartments Strata Plan 55597* [2017] WASC 104; 51 WAR 304 [116]; *Mackie v Henderson* [2011] WASC 197; 42 WAR 194 [22].

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the amalgamation of that owner's lot within the Scheme with adjacent land that does not form part of the Scheme.¹¹

36 The Tribunal further found that the process for the transfer of common property out of the Scheme, as contemplated by the transaction, was inconsistent with pt II div 1 of the Act, and also inconsistent with s 35(1) as the transfer of the property out of the Scheme was not for the benefit of all proprietors.¹²

37 The Tribunal addressed the argument put forward by Birchwood (repeated in this appeal) that:

- (1) the Registrar was under a duty pursuant to s 5B(4) to determine whether the strata plan and accompanying management statement complied with the Act and Regulations;
- (2) a presumption of regularity arose from the decision of the Registrar under s 5C(1) to register the management statement.

38 The Tribunal held, first, that there is no positive duty on the Registrar to consider whether a management statement complies with the Act; second, the Act confers no power on the Registrar to determine the validity of a by-law. The Tribunal concluded that the registration of the management statement did not have the effect of validating a by-law that was otherwise invalid.¹³

39 The Tribunal further considered whether the reference to Special Condition 33 in the sale contracts made the challenged by-laws void for uncertainty and held that it did not.¹⁴

40 Birchwood also argued before the Tribunal that its power under s 93(3) to declare a by-law invalid applied only to a by-law 'made', and did not include by-laws included in the management statement which are not made by the strata company before its incorporation. The Tribunal held that its power extended to by-laws in the management statement which, by s 5C(5), have effect for the purposes of s 42 of the Act.¹⁵

¹¹ Reasons [65].

¹² Reasons [69].

¹³ Reasons [73].

¹⁴ Reasons [77].

¹⁵ Reasons [80].

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41 Although it is not the subject of this appeal, it is relevant that the Tribunal dismissed the application to invalidate the resolutions passed at the First AGM.

42 The Tribunal stated the following conclusions:

111. The Tribunal finds that By-laws 64 to 66 are invalid because they were made without power for the purposes of s 93(3)(a) of the Act. By-laws 64 to 66, which give effect to the Transaction, are not within the scope of the by-law making power in s 42 of the Act. The Tribunal finds that By-laws 64 to 66 and, specifically, the Transaction contemplated by them, do not relate to the Strata Company's corporate affairs, any matter specified in Sch 2A, or other matters relating to the management, control, use and enjoyment of the lots and any common property. The Tribunal further finds that By-laws 64 to 66 are inconsistent with the provisions of the Act that provide a specific process for the conversion of lots to common property and the transfer of common property out of a scheme.
112. Accordingly, the Tribunal will decline to make an order giving effect to the Transaction under s 83 of the Act and will make a declaration under s 92(2) of the Act that By-laws 64 to 66 are invalid. Because the Tribunal has declined to make an order under s 83(1) of the Act giving effect to the Transaction, it is unnecessary for the Tribunal to consider the scope and effect of 83(4) of the Act.

The appeal

43 A party to a proceeding in the State Administrative Tribunal may appeal from a decision of the Tribunal, but only if the court to which the appeal lies gives leave to appeal. The appeal can only be brought on a question of law.¹⁶

44 Although s 105 uses the word 'appeal', the court is exercising original jurisdiction. The proceedings are not a rehearing: the essential character of s 105 is that it provides for proceedings in which the legal correctness of what the Tribunal has done can be challenged.¹⁷ The subject matter of the appeal is the question of law, which is both a

¹⁶ *State Administrative Tribunal Act 2004* (WA) s 105.

¹⁷ *Roy Morgan Research Centre Pty Ltd v Commissioner of State Revenue (Vic)* [2001] HCA 49; (2001) 207 CLR 72 [15]; *Osland v Secretary, Department of Justice (No 2)* [2010] HCA 24; (2010) 241 CLR 320 [18]. And see *City of Mandurah v Australian Flying Corps & Royal Australian Air Force Association (WA Division) Inc* [2016] WASCA 185; (2016) 50 WAR 466 [37] - [39]; *Paridis v Settlement Agents Supervisory Board* [2007] WASCA 97; (2007) 33 WAR 361.

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qualifying condition to the invoking of the court's jurisdiction under s 105 and the subject matter of the 'appeal' itself.¹⁸

45 Section 105 also requires that the appellant obtain leave to appeal. There are no rigid or exhaustive guidelines governing the grant of leave. Generally, leave to appeal should be granted if, in all the circumstances, it is in the interests of justice to do so.¹⁹

The grounds

46 Section 105 of the *State Administrative Tribunal Act 2004* (WA) is in similar terms to s 44(1) of the *Administrative Appeals Tribunal Act 1975* (Cth). The *Federal Court Rules 2011* (Cth) require a person appealing from the Administrative Appeals Tribunal under s 44(1) to file a notice of appeal which must state:

- (a) the part of the decision the applicant appeals from or contends should be varied; and
- (b) the precise question or questions of law to be raised on the appeal; and
- (c) any findings of fact that the Court is asked to make; and
- (d) the relief sought instead of the decision appealed from, or the variation of the decision that is sought; and
- (e) briefly but specifically, the grounds relied on in support of the relief or variation sought.²⁰

47 Order 65 of the *Rules of the Supreme Court 1971* (WA) does not prescribe a similar requirement to state the precise question of law to be raised on the appeal. Nor does O 65 stipulate that the grounds be stated 'briefly but specifically'. The Federal Court practice imposes a useful discipline on practitioners. The absence of a disciplined approach to the formulation of the grounds of appeal was manifest in this appeal.

48 The appellant relies on five grounds, with multiple sub-grounds or alternatives. The grounds are unnecessarily long and only reluctantly yield their meaning. The resulting difficulty was not relieved by the appellant's written submissions which referred specifically to only two of the grounds (which are framed as alternatives), and relied on the

¹⁸ *City of Mandurah v Australian Flying Corps* [39].

¹⁹ *King v Commissioner for Consumer Protection* [2018] WASC 194 [166].

²⁰ Rule 33.12(2).

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general statement that the correct construction of a statute is a question of law.

49 I made a case management order requiring the appellant to file and serve a statement setting out the precise question of law to be raised on the appeal. Birchwood filed a statement of 11 paragraphs, compounding the shortcomings of the grounds of appeal.

50 Reading the grounds, together with the statement of questions of law. and Birchwood's submissions, the following issues emerge.

Review of the registration decision

51 First, Birchwood contended that the Registrar was under a duty:

- (1) to determine whether the management statement lodged with the strata plan was in the prescribed form and was signed in compliance with s 5C(3) of the Act; and
- (2) to determine whether all documents lodged complied with the Act and the *Strata Titles (General) Regulations 2019* (WA) .

52 Several grounds of appeal and questions of law stemmed from that contention.

53 Birchwood submitted, further, that the duty of the Registrar is 'quasi-judicial' and extends to a duty 'to prevent any strata plan with any accompanying management statement and other accompanying documents from being registered which in law, as well as fact, ought not be placed on the register'. This submission was not confined to compliance with pt II div 1, in particular with s 5C.

54 Birchwood relied on a series of cases which recognised a duty on the Registrar, in registering dealings in land, to refuse to register a document that purported to effect a transaction which, to the knowledge of the Registrar, the registered proprietor was not by law justified in effecting.²¹ In *Goodman Court Pty Ltd v Registrar-General of New South Wales*, Brereton J analysed those authorities and showed that they upheld refusal to register dealings 'where the Registrar was affirmatively satisfied that the transactions they purported to effect

²¹ *Templeton v Leviathan Pty Ltd* (1921) 30 CLR 34, 60, 61 and 64; *Gibb v Registrar of Titles (Vic)* (1940) 63 CLR 503, 513; *Perpetual Executors & Trustees Association of Australia v Hosken* (1912) 14 CLR 286, 291 and 295; *Wydgee Pastoral Co Pty Ltd v Registrar of Titles* [1963] WAR 176, 178.

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were unlawful'.²² They do not support the imposition of the wider obligation relied on by Birchwood.

55 Birchwood has not shown anything in the Act that would support an obligation on the Registrar to inquire or otherwise determine whether the management statement ought be placed on the register.

56 The reliance by Birchwood on the presumption of regularity fails at the same point. The presumption has been explained in this way:

Where a public official or authority purports to exercise a power or to do an act in the course of his or its duties, a presumption arises that all conditions necessary to the exercise of that power or the doing of that act have been fulfilled.²³

57 The *Strata Titles Act* prescribes certain requirements for any strata plan or survey-strata plan, and requires a plan lodged for registration to be accompanied by prescribed certificates and permits.²⁴ The Act requires a management statement lodged for registration with the strata plan to be in the prescribed form and signed by the registered proprietor, and each person who has a registered interest in, or is a caveator in respect of the parcel.²⁵ Should the presumption operate, it may be presumed that the Registrar has properly considered whether the management statement is in the prescribed form and duly signed. The Act does not, however, state any other matters that the Registrar is required to consider as a condition of exercising the Registrar's functions under pt II div 1. Specifically, the Act does not require the Registrar to consider whether the by-laws in the management statement comply with the Act as a condition of registering the strata plan and accompanying management statement. Nor is it necessary to imply such a requirement for the Act to operate effectively.

58 In the same way, s 42(4) provides that no amendment or repeal of a by-law has effect until it has been lodged with the Registrar in the prescribed form and the Registrar has made a reference to the amendment on the appropriate registered plan. It may be presumed that the Registrar has properly considered whether the notice of the

²² *Goodman Court Pty Ltd v Registrar-General of NSW* [2014] NSWSC 1828 [30], [39]. See also *Wydgee Pastoral Co Pty Ltd v Registrar of Titles*, 179; *Hemer Pty Ltd v Bennl (No 2)* [2011] SASFC 143; (2011) 111 SASR 309.

²³ *Minister for Natural Resources v NSW Aboriginal Land Council* (1987) 9 NSWLR 154, 164 (McHugh JA); see also *Darley Australia Pty Ltd v Walfertan Processors Pty Ltd* [2012] NSWCA 48; (2012) 188 LGERA 26.

²⁴ Section 5B(1) and (2).

²⁵ Section 5C.

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amendment is in the prescribed form and complies with s 42(4). The presumption goes no further.

59 More generally, the challenge to the validity of a by-law included in the management statement is not a challenge to the decision of the Registrar to register the strata plan. The question posed by Birchwood, whether the decision of the Registrar was reviewable by the Tribunal, does not arise. The grounds for challenge under s 93 are specifically directed - not to registration, but to the power of the Strata Company to make the challenged by-law; to compliance with the Act and regulations or other requirements; and to the interests of the proprietors in the use and enjoyment of their lots and the common property. It may be that judicial review would lie to a decision by the Registrar to register a strata plan that did not comply with the Act. But that form of review is not necessary, and not appropriate where the challenge is based on one of the grounds in s 93(3). The legislature has expressly provided for administrative review in the Tribunal, and the Act reveals no reason why that review should be limited in the way Birchwood contended.

60 Birchwood also questioned whether the Registrar was a necessary party to the review. The question of law raised in this argument was premised on the Tribunal reviewing the decision to register the Strata Plan. On the correct reading of the Act, that is a false premise. Should the Tribunal declare invalid or repeal a by-law, the Registrar again has a function under the Act: an order under s 93 must be lodged with the Land Information Authority, and recorded on the registered strata plan.²⁶ That function does not require the Registrar to be a party to the review.

Scope of the by-law making power

61 The next group of grounds, and associated questions of law, were directed to the Tribunal's conclusion that the challenged by-laws are not within the scope of the by-law making power in s 42 of the Act because the by-laws and the transaction contemplated by them do not relate to the corporate affairs of the strata company, any matter specified in sch 2A, or other matters relating to the management, control, use and enjoyment of the lots and any common property.

62 The Tribunal found that the by-laws did not relate to the management, control, use and enjoyment of the lots in any common

²⁶ Section 115.

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property because they 'do not relate solely to lots (and any common property) within the Scheme'.²⁷

63 By s 5C(2), a management statement 'may include by-laws in relation to any matter specified in Schedule 2A'. That schedule lists a number of specific matters, and in item 3, any additional by-law that may be made under s 42.

64 Birchwood submitted that the words 'may include' are inclusive and not exhaustive. It was not clear whether that submission extended to an argument that a management statement could include by-laws that could not be made by a strata company. Birchwood's written submissions were to the effect that the original proprietor of the lots comprising a strata scheme could put in place whatever by-laws it considered appropriate, subject only to pt V (for the protection of purchasers) and the mandatory requirements for registration being satisfied.

65 It is not necessary to determine whether that broad submission is sustainable. The more limited submission that the challenged by-laws fall within the power conferred by s 42 is, in my opinion, correct.

66 The first necessary step is to determine the proper construction of the challenged by-laws. They must be read together. Collectively, they provide for the conversion of one lot in the scheme into common property for the purpose of it being immediately transferred out of the scheme and amalgamated with adjoining land, by a resolution without dissent at the initial General Meeting of the strata company. By-laws 65 and 66 are, in effect, specific acknowledgement by the (subsequent) proprietors of what will be done at the First General Meeting and an agreement to do all things necessary to enable the conversion and transfer to be carried out.

67 Section 42(1)(c) empowers a strata company to make by-laws for other matters relating to the management, control, use and enjoyment of the lots and the common property. Terms such as 'relating to', or 'relates to', or with respect to' have been described as having indefinite content²⁸ 'The sufficiency of the connection or association will be a matter for judgment which will depend, among other things, upon the

²⁷ Reasons [65].

²⁸ *O'Grady v Northern Queensland Co Ltd* [1990] HCA 16 (1990) 169 CLR 356, 376; *Kostas v HIA Insurance Services Pty Ltd* [2010] HCA 32; (2010) 241 CLR 390 [24].

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subject matter of the enquiry, the legislative history, and the facts of the case'.²⁹

68 There are several decisions which discuss the nature of the by-laws of a strata company, describing them (by analogy to membership of the company) as a statutory contract 'constituted by the bundle of rights and liabilities created by the constituent documents'.³⁰ That description must allow for the requirement that the validity of a by-law depends upon its consistency with the Act.

69 In the context of the *Strata Titles Act*, regard must be had to s 42(6) by:

Without limiting the operation of any other provision of this Act, the by-laws for the time being in force bind the strata company and the proprietors and any mortgagee in possession (whether by himself or any other person) or occupier or other resident of a lot to the same extent as if the by-laws had been signed and sealed by the strata company and each proprietor and each such mortgagee, occupier or other resident respectively and as if they contained mutual covenants to observe and perform all the provisions of the by-laws.

70 The 'mutual covenants' in the challenged by-laws must, accordingly, have a sufficient connection to the management, control, use and enjoyment of the lots in the common property to meet the description 'relating to' those matters. First, the by-laws relate to the conversion of a lot to common property for the purpose of its transfer. The statutory process pursuant to s 10 requires execution by the proprietor and by the strata company. Second, by s 19, common property may be transferred by the strata company, pursuant to a resolution without dissent, and where the strata company is satisfied that all persons concerned have consented in writing to the transfer. Each of those steps is directly connected to the property in the scheme. By-laws which regulate the bundle of rights and liabilities of the strata company and the proprietors in relation to the conversion and transfer of a lot, in my judgment, have a sufficient connection to the matters specified in s 42(1). That is, they are properly characterised as relating to the management, control, use and enjoyment of the lots and the common property.

71 Further, it is not necessary, as the Tribunal said, that a by-law relate *solely* to lots and any common property within the scheme. Nor

²⁹ *Shinwari v Anjoul by her tutor Anjoul* [2017] NSWCA 74; 94 NSWLR 314 [88].

³⁰ *Owners of Strata Plan No 3397 v Tate* [2007] NSWCA 207; (2007) 70 NSWLR 344 [47]; *Proprietors – Rosebank GTP 3033 v Locke* [2016] QCA 192.

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is it necessary that the by-law be for the benefit of all owners: a by-law that relates to common property does not lose that character because it is for the benefit of one proprietor.

72 Finally, Birchwood argued that it is relevant that the by-laws are in a management statement lodged with the strata plan. It has been held that it would be rare for the original by-laws to be held invalid where those by-laws accompany the strata plan and people who buy a lot in the strata scheme buy with notice of those by-laws.³¹ That consideration was addressed by Edelman J in *Mackie v Henderson* as relevant to the exercise of the discretion to declare a by-law invalid or to repeal it pursuant to s 93(2)(a) and (b).³² Is not relevant to whether a by-law does not fall within s 42(1)(c).

Inconsistency with other provisions

73 The power under s 42(1) is to make by-laws 'not inconsistent with this Act'.

74 The strata company contended before the Tribunal that pt II div 1 and div 2, including s 10, s 18 and s 19, provide a mechanism for the purchase and transfer of common property by a strata company which cannot be circumvented. The Tribunal found 'at first blush' that the challenged by-laws were inconsistent with the Act in avoiding or contracting out of the process prescribed by the Act by the use of the by-law making power.

75 Properly construed, however, by-law 64, read with the other by-laws, did not avoid the processes prescribed by the Act.

76 Consistently with s 10, the by-laws provided for the original proprietor to pass the required resolution without dissent at the initial General Meeting of the Strata Company. The subsequent execution of the transfer by the Strata Company is consistent with a resolution it has already passed in accordance with s 10.

77 The by-laws also provided for the resolution required by s 19 to execute the transfer disposing of that part of the common property. The present proprietors simply acknowledged that the original proprietor would do what, consistently with the Act, it was entitled to do.

³¹ *Casuarina Rec Club Pty Ltd v Owners – Strata Plan 77971* [2011] NSWCA 159; (2011) 80 NSWLR 711[51] - [52].

³² *Mackie v Henderson* [41]; *White v Betalli* [2006] NSWSC 537; (2006) 66 NSWLR 690 [46]. And see *Byrne v Owners of Ceresa River Apartments Strata Plan 55597*

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78 It cannot, in my opinion, be said that the result of the by-laws was that the original proprietor contracted out of the requirements of the Act.

79 The agreement by the proprietors, pursuant to by-law 66, to do all things necessary to give effect to resolutions that have passed without dissent, is not inconsistent with pt II.

80 The Tribunal also found that the transfer of common property out of the Scheme, as contemplated by the transaction, was not for the benefit of all proprietors of the Scheme. Birchwood submitted, in my opinion correctly, that at the time that the management statement including the challenged by-laws was lodged for registration, Birchwood (as the original proprietor) was to become the sole proprietor of all lots in the strata scheme on registration and therefore the sole owner of all common property. Assuming that s 35(1)(b) would operate so as to invalidate a by-law, the by-law when made was not inconsistent with the Act, as it was then for the benefit of all proprietors. That conclusion appears to be consistent with the Tribunal's finding (at [92]) that it was not satisfied that by-laws 64 to 66 were invalid having regard to the interests of all proprietors in the use and enjoyment of their lots or the common property.

81 In summary, I am satisfied that the Tribunal erred in its construction of s 42 in finding that the challenged by-laws were not for matters relating to the management, control, use and enjoyment of the lots and the common property. I am also satisfied that the Tribunal erred in finding that the by-laws were inconsistent with s 10, s 19 and s 35.

The operation of s 83(4)

82 Because of its other findings, the Tribunal did not consider the operation of s 83(4) by which it was not empowered to make an order 'with respect to the exercise or performance of, or the failure to exercise or perform, a power, authority, duty or function conferred or imposed on the strata company by this Act where that power, authority, duty or function may, in accordance with any provision of this Act, only be exercised or performed pursuant to a unanimous resolution, resolution without dissent or a special resolution'.

83 The Tribunal dismissed the challenge to the resolutions that were passed at the initial General Meeting of the strata company. The minutes of that General Meeting record that Birchwood resolved

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unanimously and without dissent to pass each of the Resolutions on the agenda, including,

- i. Lot 216 of the Strata Scheme (otherwise known as the 'ANZ site') will be converted into Common Property for the purpose of it being then immediately transferred out of the Strata Scheme and amalgamated with the adjoining land lot (now lot 31) as anticipated in Clause 33 of the Special Conditions of the standard contract for sale of Lots within the Strata Scheme.
- ii. The Common Property formerly known as Lot 216 of the Strata Scheme be transferred to the registered proprietor of the adjoining land lot (now lot 32)³³ as anticipated in Clause 33 of the Special Conditions of the standard contract for sale of Lots within the Strata Scheme.

84 Section 83(4) does not prevent the Tribunal making an order with respect to the exercise of the strata company of its functions necessary to give effect to the transaction because the required resolutions of the strata company have already been passed without dissent.

Conclusion

85 I would accordingly grant leave and allow the appeal. I will ask the parties to bring in a minute to reflect these reasons.

³³ There is no dispute between the parties that resolution 6(b) of the First AGM agenda should refer to Lot 31.

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I certify that the preceding paragraph(s) comprise the reasons for decision of the Supreme Court of Western Australia.

MG
Associate to the Honourable Justice Allanson

15 DECEMBER 2021