

JURISDICTION : STATE ADMINISTRATIVE TRIBUNAL

ACT : STRATA TITLES ACT 1985 (WA)

CITATION : EFFICIENT BUILDING TEAM PTY LTD and
ROSSKEEN PTY LTD [2021] WASAT 157

MEMBER : MS R PETRUCCI, MEMBER

HEARD : 28 SEPTEMBER 2021

DELIVERED : 13 DECEMBER 2021

FILE NO/S : CC 1682 of 2020

BETWEEN : EFFICIENT BUILDING TEAM PTY LTD
Applicant

AND

ROSSKEEN PTY LTD
First Respondent

THE OWNERS OF 25, 27, 29, 31 PARRY STREET
FREMANTLE STRATA PLAN 6413
Second Respondent

Catchwords:

Strata Titles Act 1985 (WA) (as it applies from 1 May 2020) - Resolution of scheme dispute - Scheme by-laws - Vehicle parking on common property - Proper construction of by-laws - Discretion of Tribunal to make a decision to not make an order or declaration - Turns on own facts

Legislation:

City of Fremantle Local Planning Scheme No 4, cl 4.7.6(i)
State Administrative Tribunal Act 2004 (WA), s 95, s 95(1)
Strata Titles Act 1985 (WA), S 29, s 43, s 44(1), s 47, s 47(3), s 47(3)(a),
s 47(5), s 47(5)(a), s 199, s 200, s 202, Sch 1, Sch 2, Sch 5, cl 4(1), cl 4(2)
Strata Titles Amendment Act 2018 (WA)

Result:

Application unsuccessful

Category: B

Representation:

Counsel:

Applicant : In Person
First Respondent : In Person
Second Respondent : Did not participate

Solicitors:

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

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

Efficient Building Team Pty Ltd and The Owners of 25, 27, 29, 31 Parry Street,
Fremantle Strata Plan 6413 & Anor [2021] WASAT 158
The Owners of Del Mar Strata Plan 53989 and Dart Enterprises Pty Ltd
[2020] WASAT 9

REASONS FOR DECISION OF THE TRIBUNAL:***Introduction***

1 In or about November 2019, the applicant, Efficient Building Pty Ltd (**Efficient**) purchased Lot 8, which is one of four strata lots on Strata Plan 6413 and having the address of 25, 27, 29 and 31 Parry Street, Fremantle. The strata scheme comprises four limestone cottages built in the late 1890s and are therefore in excess of 120 years old.

2 On 8 December 2020, Efficient commenced this proceeding in the Tribunal by an application under s 47(3) of the *Strata Titles Act 1985* (WA) (**ST Act**).¹ It comes within the Tribunal's original jurisdiction (s 29 of the ST Act). Efficient seeks orders to resolve a scheme dispute involving the first respondent, Rosskeen Pty Ltd (**Rosskeen**) which is the owner of Lot 5 on Strata Plan 6413 and the second respondent, The Owners of 25, 27, 29 and 31 Parry Street, Fremantle Strata Plan 6413 (the **strata company**). The strata company did not participate in this proceeding.²

3 In addition to the current proceeding, Efficient also has two other proceedings in the Tribunal against the other two lot owners and the strata company. The matters are:

- CC 1672 of 2020 in which the respondents are Mr Anthony Elton Anderson who is the owner of Lot 6 on Strata Plan 6413, Perth Recruitment Services Pty Ltd which is the owner of Lot 7 on Strata Plan 6413 and the strata company; and
- CC 1742 of 2020 in which the respondent is Perth Recruitment Services Pty Ltd.

4 The above two matters were heard together, with evidence in one matter as evidence in the other matter and the matters were determined together. The Tribunal published its decision for those two matters on or about the same date that the decision for this matter was published (see *Efficient Building Team Pty Ltd and The Owners of 25, 27, 29, 31 Parry Street, Fremantle Strata Plan 6413 & Anor* [2021] WASAT 158 (*Efficient No 1*)).

¹ In these reasons all references to the ST Act are to the ST Act as it applies from 1 May 2020 (unless expressly stated otherwise).

² See the orders of the Tribunal made on 18 May 2021 (Exhibit 1, at page 457).

5 In this proceeding, Efficient originally sought orders from the Tribunal to:

- a) restrain Rosskeen, its employees and visitors to Rosskeen's Lot 5 from parking any vehicle on, or overhanging the common property;
- b) require Rosskeen to pay to the strata company such amount the Tribunal specifies is an appropriate penalty for the contravention; and
- c) make any other declaration or orders the Tribunal considers appropriate.

6 On the day of the final hearing (28 September 2021), Efficient sought to amend the orders it was seeking in this proceeding to the following orders:³

- a) as of the date of this order the owner, employees and visitors to Rosskeen's (Lot 5) shall not park any vehicle, whether partially or wholly, on or overhanging the airspace above, the common property;
- b) Rosskeen is to pay the strata company by way of penalty the amount of \$2,000 not later than the close of business seven days after the date of this order; and
- c) section 95 of the *State Administrative Tribunal Act 2004* (WA) (**SAT Act**) is to apply to the decision.

7 Rosskeen did not object to the above amended orders sought by Efficient. Consequently, I gave leave for Efficient on the day of the final hearing (28 September 2021) to amend the orders sought in this proceeding to those set out above at [6].

8 The following statement reflects the position of Efficient:^{4 5}

[I]t is reasonable to desire the room for turning around to use the common property [behind Lot 8] for that purpose.

...

³ Exhibit 1, at pages 538-539.

⁴ ts 26, 28 September 2021 (Opening submissions).

⁵ ts 84, 28 September 2021.

[I] would say that the three of you, on the contrary, have - together with using the toilet blocks and refusing to demolish them, this is principally Mr Kullack - have deliberately obstructed my vehicle access to the lot [Lot 8], to annoy, to bully if you like, me.

9 Rosskeen's position is that this matter is about Mr Peter Stroud, a director of Rosskeen, parking his vehicle on common property behind the carport behind Lot 8 (described by Ms Williamson as the **turnaround** area) five times which he has already admitted to doing so, but says that tradespeople and visitors to Efficient's Lot 8 have also parked in that turnaround area. Rosskeen notes that after the application was made to the Tribunal by Efficient, the strata company passed a new conduct by-law 2(e) which was registered with Landgate on or about 31 May 2021 that allows vehicles to overhang on to the common property.

10 Rosskeen opposes the orders sought by Efficient and submits that the application should be dismissed.

11 The following statement reflects Rosskeen's position.^{6 7 8}

[When you count up the number of times [Mr Stroud has] parked there, it is not any more than the number of times that either [Ms Williamson's] tradies have parked there, or her Airbnb clients park there.

...

[S]he should not park there, and she should not also have her carport on common [property]. So it seems to be one rule applies for us and another rule applies for her.

...

[I] do not understand why the owners cannot make a special resolution allowing - if everyone is in agreement, or three of the four owners are in agreement, that we use that area [turnaround area] for overflow parking.

12 It is common ground that Mr Stroud has parked his vehicle on the common property (the turnaround area) behind Lot 8. The crux of this proceeding, and on which it will turn, is whether the Tribunal should exercise its discretion to make any, or all, of the declarations and orders sought by Efficient.

⁶ ts 89, 28 September 2021.

⁷ ts 96, 28 September 2021.

⁸ ts 90, 28 September 2021.

13 For the reasons given below, while Mr Stroud conceded that he has parked his vehicle on the common property behind Lot 8, (the turnaround area) I would not exercise the Tribunal's discretion in the circumstances of this case, to make any of the declarations and orders sought by Efficient. This means Efficient's application is unsuccessful.

Relevant procedural history and evidence

14 I heard the matter on 28 September 2021, following which I reserved the decision.

15 Ms Janet Williamson and Mr Geoffrey Chambers, both directors of Efficient, attended the final hearing in person. Efficient had one witness, Ms Williamson. Her 'Summary of expected witness evidence' is dated 22 April 2021 and was filed with the Tribunal.⁹ Ms Williamson's witness evidence is summarised below at [18].

16 Mr Stroud is a director of Rosskeen. He attended the final hearing in person and was the sole witness for Rosskeen. Mr Stroud did not file a witness statement. However, he gave oral evidence at hearing which is summarised below at [19].

17 In accordance with the Tribunal's usual practice in matters of this nature, the hearing was conducted on the basis that all the documents filed with the Tribunal would be regarded as being in evidence,¹⁰ subject to any objection. There was no objection. At the hearing, the Tribunal marked the following documents, to which I have had regard for the purpose of my determination in this proceeding, as exhibits:

- Exhibit 1** Hearing Book prepared by the Tribunal dated 23 September 2021 pages 1 to 459.
- Exhibit 2** Applicant's further bundle of documents filed with the Tribunal on 28 September 2021.
- Exhibit 3** Applicant's copy of page 60 of AS/NZS 2890.1:2004 'Turn radius - 6.3m'.
- Exhibit 4** Applicant's further bundle of documents (photographs) filed at hearing on 28 September 2021.

⁹ Exhibit 1, at page 369.

¹⁰ Although forming part of 'exhibits', the parties' contentions, and submissions in Exhibit 1 and Exhibit 2 are taken to be submissions, rather than evidence.

Witness evidence

Ms Williamson

18 Ms Williamson's evidence may be summarised as follows:¹¹

- a) The sketch¹² shows the lot boundary of Lot 8 by the 45 degree truncation that crosses the word 'carport'. The common property is most of the area coloured yellow and the white area under the carport that follows the truncation around to the building of Lot 8. The common property is interrupted, otherwise by part Lots 6, 7, and 8 which all previously had outside toilets. Part Lot 6 was cleared and paved many years ago, and for all intents and purposes is part of the accessway. Part Lot 7 and 8 had the old toilets, but these were demolished and removed in late July 2021.
- b) Part of the common property behind Lot 8 (the turnaround area) is used for vehicles visiting Lot 8 to turn around and to drive back across the parcel to depart to Holdsworth Street in a forward direction. It is not possible to turn around a vehicle within Lot 8.
- c) Mr Stroud has repeatedly parked his vehicle, a red Mazda, on common property behind Lot 8 behind the carport (the turnaround area) as evidenced by the photographs. Further, the parking by Mr Stroud obstructs Efficient's use of the common property to manoeuvre and turn around when departing from Lot 8 or when arriving to Lot 8 and wanting to reverse onto Lot 8. This is a breach of Sch 2 of the ST Act conduct by-law 2.
- d) She sent an email to Mr Stroud on 20 October 2020 requesting that he not park his vehicle on the turnaround area. Mr Stroud replied that he would not park in the area but continued to do so on 11 occasions over a number of months up to March 2021. From 30 May 2020 to 19 October 2020 Mr Stroud did not park on the turnaround area.

¹¹ ts 65-96, 13 May 2021.

¹² Exhibit 1, at page 115. The sketch was prepared by Ms Williamson.

- e) Rosskeen has breached the by-laws in defiance of being requested not to do so, and after undertaking to not do so, has continued to breach the by-laws. The conduct of Rosskeen goes beyond neglect of duty for regard to Efficient's rights as a member of the strata scheme, but to a level of malicious harassment and intimidation to deny Efficient's lawful common property rights.
- f) The strata scheme is located in the City of Fremantle and comes under the *City of Fremantle Local Planning Scheme 4 (LPS 4)* and is zoned 'Town Planning - Town Centre' which permits a wide range of commercial uses and also residential. LPS 4 at 4.7.6 provides the notation:¹³
- Note: Reference to Australian standard in Scheme re layout and design.
- g) The Australian/New Zealand Standard AS/NZ 2890.1.2004 Parking Facilities Part 1: Off-street car-parking relevantly provides at 3.2.2 that 'Reversing movements to public roads shall be prohibited wherever possible'.¹⁴
- h) Mr Tim Kullack of Perth Recruitment Services Pty Ltd removed the 'No Parking' sign which was visibly located on the fence close to the turnaround area in an effort to 'trick' guests at Efficient's Airbnb to park in the common area behind Lot 8 (the turnaround area). She replaced the 'No Parking' sign to make it clear to the Airbnb guests that they are not to park on the common property behind Lot 8 (the turnaround area).
- i) When she became aware of an Airbnb guest parking on the common property behind Lot 8 (the turnaround area), she immediately asked them to move their vehicle. She provides to the Airbnb guests a diagram of where they should park on Lot 8 and gives some examples of how they should park their vehicle.

¹³ Ibid, at page 187.

¹⁴ Ibid, at page 350.

The diagram is part of the check-in procedure to the Airbnb.

- j) Contrary to the view of the other owners, she is not seeking to increase the size of Lot 8 by reducing the size of the common property behind Lot 8.
- k) Lot 8 is occupied most days either by Airbnb guests, managers to the property or tradespeople coming and going.
- l) Efficient should be able to park two or three vehicles on Lot 8 at 90 degrees (that is, to be the same as Lot 5, Lot 6 and Lot 7). However, with Mr Stroud parking his vehicle on the common property behind Lot 8 (the turnaround area) this prohibits this.
- m) She accepts that the carport on Lot 8 (built before Efficient purchased the Lot 8) overhangs on to the common property.
- n) She accepts that on occasion people, for example guests to the Airbnb have parked on the common property behind Lot 8 (the turnaround area).
- o) Mr Stroud has not prevented her leaving Lot 8 but when he is parked on the common property behind Lot 8 (the turnaround area) his vehicle obstructs the maneuvering of a vehicle egressing from Lot 8.
- p) The toilets on part Lot 7 and part Lot 8 were demolished in July 2021. It is much easier to egress from Lot 8 following the demolition and removal of the toilets on part Lot 7 and part Lot 8.
- q) When reversing on Lot 8 you know when you are getting close to the boundary fence when you see the Geranium flowers which overhang on to the common property.
- r) She has sought an easement over part Lots 6, and 7, but this has been refused by both the owners of those part Lots.

Mr Stroud

19 Mr Stroud's evidence may be summarised as follows:

- a) Prior to Efficient purchasing Lot 8, the carports were on the other side, that is, on the common property and the owners drove over Lots 6 and 7 to go straight into Lot 8 for at least the past 10 years. The arrangement worked.
- b) Prior to Efficient purchasing Lot 8, the common area behind Lot 8 (the turnaround area) was used for parking by Dr Bill Douglas, the previous owner of Lot 8, and after Mr Douglas left, the area was used by Mr Kullack (of Lot 7) to park there.
- c) Following the sale by Dr Douglas of Lot 8, the owners of Lot 6 and Lot 7 agreed for him to park his vehicle on the common property behind Lot 8 (the turnaround area).
- d) In response to Ms Williamson's email of 20 October 2020, he replied in part:

[P]reviously these bays which are on common land were enjoyed by all owners as a first come basis and we all frequently parked there. Since Ms Williamson bought the cottage [Lot 8] no one has parked there, as to allow her more room for her workers vehicles which frequently used it, even today there was her workers Ute parked there (photo attached). I do not object to this, why would I!

I parked there on the [three] occasions because one of her works Ute was in my space, and the other occasions there were also cars in my spot because her Airbnb tenants left the gate open.

- e) On 21 July 2021 he proposed that a resolution be put that the common property behind Lot 8 (the turnaround area) be available for use by all the owners and visitors as an area for overflow parking.
- f) Efficient has multiple applications in the Tribunal with the purpose of badgering him and the other owners into changing the strata plan to increase the size of Lot 8 by

reducing the common property because Ms Williamson is wanting to 'do it up [Lot 8] and flip it'.

- g) He did not cause any obstruction when he parked his small vehicle (which measures 4 metres long and 1.7 metres wide) on the common property behind Lot 8 (the turnaround area) because Lot 8 was unoccupied, and in any event, there is plenty of room to maneuver vehicles. When he parked on the common property behind Lot 8 (the turnaround area) it was on a Friday because that is when another podiatrist is working in the office with him.
- h) Efficient's application is trivial as Ms Williamson, her tradespeople and the Airbnb tenants have used the common property (turnaround area) more times than he has since Efficient purchased Lot 8.
- i) Guests at the Airbnb as well as tradespeople have stayed overnight or for a few nights at the Airbnb, park on the common property behind Lot 8 (the turnaround area) as he observed guests leaving Lot 8 in their vehicle in the morning and a work Ute reversing out of Lot 8 at 7 am on consecutive days.¹⁵
- j) He has not parked on the common property behind Lot 8 (the turnaround area) since this proceeding commenced. At the time he said to Ms Williamson that he would not park on the common property behind Lot 8 (the turnaround area) he was very stressed because his mother-in-law had just died in Ireland and due to COVID-19 he and his family would not be able to travel to Ireland for the funeral.
- k) Without the carport on Lot 8, part of which comprises carport poles on or overhanging on to common property, the ability to turn or manoeuvre vehicles would be improved.
- l) Ms Williamson has planted Geraniums which overhang onto the common property. She does not have the approval to do this.

¹⁵ Ibid, at page 449a.

- m) The owners of Lot 6 and Lot 7 do not want any penalty imposed on him for parking on the common property behind Lot 8 (the turnaround area).
- n) In the ten years that Rosskeen has owned Lot 5 and prior to Efficient purchasing Lot 8, the owners were able to get along and sorted out any parking issues.

20 I will now set out the issues to be determined in this matter, followed by the legal framework relevant to this proceeding by reference to the relevant provisions of the ST Act, and I will then make relevant findings of facts and set out the parties' main contentions. Finally, I will address each of the issues for determination in turn.

Issues

21 The parties agree that the issues or questions that require determination by the Tribunal in this proceeding are as follows:¹⁶

- Issue 1:** Whether Rosskeen, its employees, visitors or other persons park or have parked their motor vehicle(s) on, or overhang the common property behind Lot 8?
- Issue 2:** If 'yes', whether Rosskeen is in breach of Sch 2 of the ST Act conduct by-law 1(1) and 1(2) and conduct by-law 2(a), 2(b), 2(c), 2(d) and 2(e)?
- Issue 3:** If 'yes', can the Tribunal require Rosskeen to pay a penalty to the strata company for breach of the by-laws? If 'yes' should the Tribunal impose a penalty and if so, how much should the penalty be, and when is the penalty to be paid by?
- Issue 4:** Whether the Tribunal may make a declaration under s 95(1) of the SAT Act? If 'yes' should the Tribunal make such declaration?

22 I note Efficient in its Statement of Facts, Issues and Contentions,¹⁷ raises other issues such as whether the common property area which is described by Ms Williamson as the turnaround area is required to meet

¹⁶ ts 17-18, 28 September 2021.

¹⁷ Exhibit 1, at page 69.

the Australian Standard for Off-Street Parking ASNZS 2890.1:2004 and whether the turnaround area is required to comply with cl 4.7.6(i) of the TPS 4. While these and other issues are important, they are not issues directly relevant to determining the application before me, which on the concession of Mr Stroud that he has parked his vehicle on the common property (the turnaround area) behind Lot 8, is essentially whether the Tribunal should exercise its discretion to make any or all of the orders sought by Efficient (as set out above at [6]).

23 It is first necessary to set out the regulatory framework and factual background against which the consideration of the above issues must be made.

Regulatory framework

The strata plan, the ST Act, and by-laws

24 The strata plan was registered on 12 December 1978. The parcel and building are described as:

Four brick, stone, galvanised iron and fibro single-storey commercial units situated on Lot 123 of Diagram 2061, and having an address of 25, 27, 29 and 31 Parry Street, Fremantle WA 6160[.]

25 A notification of the subdivision of strata Lots 1, 2, 3 and 4 and common property into strata Lots 5, 6, 7 and 8 and a portion of the common property included in each of strata Lots 5, 6, 7 and 8 (by instruments F739080, F739077, F739081, F739078 and F739079) was registered with Landgate on 25 November 1994.

26 A further notification (by instrument N844663) was registered with Landgate on 6 February 2018. That notification provided for the merger of buildings and land.

27 Finally, a notification (by instrument O752814) was registered with Landgate on 31 May 2021 which provided for the first consolidation of the scheme by-laws and included an application to amend the by-laws by adding conduct by-law 2(e) concerning vehicle parking as follows:

2(e) All vehicles parking on the private area of all lots and roof structure of all carports shall be permitted to overhang a reasonable extent over the common property by up to one (1) metre and which would not impede or hinder vehicles using the six (6) metre wide accessway.

28 The above notification regarding by-law 2(e) on 31 May 2021 is contentious. This proceeding does not turn on this by-law and therefore I will consider by-law 2(e) in detail in *Efficient No 1* at [112] - [119] as it is very relevant in those proceedings.

29 Major amendments to the ST Act came into operation on 1 May 2020 under the *Strata Titles Amendment Act 2018* (WA) (**ST Amendment Act**). However, the coming into operation of the ST Act does not affect the continued existence of the strata scheme, the strata company, or its council, amongst other things (Sch 5 by-law 2(1) of the ST Act). In this case Efficient filed its application with the Tribunal after 1 May 2020. This means that the provisions of the ST Act, as they are after the amendments, apply to the determination of this application (Sch 5 by-law 30(1) of the ST Act).

30 In respect of by-laws, the by-laws as they applied immediately before commencement day (1 May 2020) continue to apply as provided for by Sch 5, cl 4(1) and cl (2) of the ST Act as follows:

Scheme by-laws

- (1) The by-laws (including any management statement) of a strata company as in force immediately before commencement day continue in force, subject to this Act, as scheme by-laws and 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.
- (2) However, all by-laws that are in force immediately before commencement day in the terms set out in Schedule 1 clauses 11 to 15, or Schedule 2 clause 5, as then in force are taken to be repealed on commencement day.

31 The relevant by-laws for this proceeding are the consolidated by-laws (consolidated on 31 May 2021) which comprise Sch 1 of the ST Act governance by-laws 1 to 10 but excluding Sch 1 by-laws 11 to 15 [general meeting, proceeding at general meeting, votes, and common seal] and Sch 2 of the ST Act conduct by-laws 1 to 15 including by-law 2(e) (from 31 May 2021) but excluding by-law 5 [children playing upon common property] (the **by-laws**).

32 The 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 (s 44(1) of the ST Act).
The resolution to make by-laws must be:

- a) for governance by-laws - a resolution without dissent;
and
- b) for conduct by-laws - a special resolution.

33 Efficient contend that Rosskeen breached conduct by-laws 1(1) and 1(2) and conduct by-laws 2(a), 2(b), 2(c), 2(d). These conduct by-laws appear in Sch 2 of the ST Act and provide as follows:

Schedule 2 - Conduct by-laws

1. Vehicles and parking

- (1) An owner or occupier of a lot must take all reasonable steps to ensure that the owner's or occupier's visitors comply with the scheme by laws relating to the parking of motor vehicles.
- (2) An owner or occupier of a lot must not park or stand any motor or other vehicle on common property except with the written approval of the strata company.

2. Use of common property

An owner or occupier of a lot must —

- (a) use and enjoy the common property in such a manner as not unreasonably to interfere with the use and enjoyment of the common property by other owners or occupiers of lots or of their visitors; and
- (b) not use the lot or permit it to be used in such manner or for such purpose as causes a nuisance to an occupier of another lot (whether an owner or not) or the family of such an occupier; and
- (c) take all reasonable steps to ensure that the owner's or occupier's visitors do not behave in a manner likely to interfere with the peaceful enjoyment of an owner or occupier of another lot or of a person lawfully using common property; and
- (d) not obstruct lawful use of common property by any person.

34 In addition, Efficient contend that Rosskeen has breached by-law 2(e). This by-law does not appear in Sch 2 of the ST Act (as it was before 1 May 2020) and was registered after the first consolidation of the by-laws on 31 May 2021. It is contentious because Efficient submits that by-law 2(e) was registered by Landgate but should not have been so registered because the resolution was not made without dissent. It is common ground that Efficient did not vote in favour of the resolution that is conduct by-law 2(e). The three other lot owners voted in favour of conduct by-law 2(e) and argue that as the by-law is a conduct by-law only, all that is needed is a special resolution (and not resolution without dissent). As noted above, I consider by-law 2(e) in detail in *Efficient No 1* at [112] - [119].

35 Section 43 of the ST Act deals with exclusive use by-laws. The section provides as follows:

Exclusive use by-laws

- (1) Exclusive use by laws of a strata titles scheme are scheme by laws that confer exclusive use and enjoyment of, or special privileges over, the common property in the strata titles scheme or specified common property in the strata titles scheme (the special common property) on the occupiers, for the time being, of a specified lot or lots in the strata titles scheme (the special lots).
- (2) Exclusive use by laws may include the following —
 - (a) terms and conditions on which the occupiers of special lots may use the special common property;
 - (b) particulars relating to access to the special common property and the provision and keeping of any key necessary;
 - (c) particulars of the hours during which the special common property may be used;
 - (d) provisions relating to the condition, maintenance, repair, renewal or replacement of the special common property;
 - (e) provisions relating to insurance of the special common property to be maintained by the owners of special lots;

- (f) matters relating to the determination of amounts payable to the strata company by the owners of special lots and the imposition and collection of the amounts.
- (3) Subject to the terms of exclusive use by laws, the obligations that would, apart from this subsection, fall on the strata company under section 91(1)(c) in relation to the special common property fall instead on the owners of the special lots.
- (4) An amount payable by a person to a strata company under exclusive use by laws must be paid (together with interest on any outstanding amount) and may be recovered by the strata company, as if the amount payable were an unpaid contribution levied on the person as a member of the strata company.
- (5) Exclusive use by laws can only be made, amended or repealed if the owner of each lot that is or is proposed to be a special lot has given written consent to the by-laws.

36 The principles applicable to the proper construction of by-laws is summarised in *The Owners of Del Mar Strata Plan 53989 and Dart Enterprises Pty Ltd* [2020] WASAT 9 at [46] - [48]. I will apply the principles in determining the proper construction of the by-laws in regards to the by-laws which Efficient says that Rosskeen has breached.

37 Finally, the declarations and orders that the Tribunal may make are set out in s 199 and s 200 of the ST Act. Under s 202 of the ST Act, the Tribunal made decide not to make an order. That section provides as follows:

Decision not to make order or declaration

In a proceeding under this Act, the Tribunal may make a decision not to make an order or declaration.

Factual background

38 The key facts are not in any real dispute. I make the following findings of fact which are relevant to the issues to be determined by me in this proceeding:

- a) The sketch¹⁸ shows the lot boundary of Lot 8 by the 45 degree truncation that crosses the word 'carport'. The common property is most of the area on the sketch coloured yellow and the white area under the carport that follows the truncation around to the building of Lot 8. The common property is uninterrupted, otherwise by part Lots 6, 7, and 8 which all previously had outside toilets. Part Lot 6 was cleared and paved many years ago, and for all intents and purposes was part of the accessway. Part Lots 7 and 8 had the old toilets but these were demolished and removed by late July 2021.
- b) The strata company has been mostly inactive.
- c) Between October 2020 and March 2021 Mr Stroud has on occasion parked his vehicle on the common property behind Lot 8 (the turnaround area).
- d) Efficient's visitors and tradespeople to Lot 8 have on occasion parked their vehicles on the common property behind Lot 8 (the turnaround area).

Parties' main contentions

39 Efficient's main contentions may be summarised as follows:

- Any vehicle parked on the common property behind Lot 8 (the turnaround area) obstructs the reversing and turnaround manoeuvre of any vehicle attempting to egress from Lot 8 in a forward direction to then exit the strata complex to Holdsworth Street, Fremantle.
- Rosskeen has allowed Mr Stroud to park his vehicle on the common property behind Lot 8 (the turnaround area) in breach of the by-laws.
- By parking on the common property behind Lot 8 (the turnaround area), Mr Stroud has unreasonably interfered with the use and enjoyment of the common property by Efficient and its visitors and causes a nuisance as well as obstructs the lawful use of the common property for the maneuvering of motor

¹⁸ Ibid, at page 115.

vehicles visiting Lot 8 to be able egress in a forward direction.

40 Rosskeen's main contentions may be summarised as follows:

- Visitors and tradespeople to Efficient's Lot 8 have parked their vehicles on the common property behind Lot 8 (the turnaround area).
- Prior to Efficient purchasing Lot 8, the previous owner, Dr Douglas, parked his vehicle on the common property behind Lot 8 (the turnaround area) with approval of the owners. When Dr Douglas sold Lot 8, the owners of Lots 6 and 7 agreed for him to park his vehicle on the common property behind Lot 8 (the turnaround area).
- Prior to Efficient purchasing Lot 8, the turnaround area was used as an overflow parking area.

41 I now turn to address each of the four issues identified at [21] above.

Issue 1 - Whether Rosskeen, its employees, visitors or other persons park or have parked their motor vehicle(s) on, or overhanging the common property behind Lot 8?

42 Mr Stroud accepts that he has on occasion parked his vehicle on the common property behind Lot 8 (the turnaround area). This usually occurred on a Friday when another podiatrist was working in his office.

43 Mr Stroud says that Efficient's visitors to the Airbnb and tradespeople have also parked their vehicles on the common property behind Lot 8 (the turnaround area). Ms Williamson conceded that this occurred, however, as soon as she was told that someone had parked on the common property behind Lot 8 (the turnaround area) she asked them to move their vehicle.

44 It is also Mr Stroud's evidence that before Efficient purchased Lot 8, the turnaround area was used as an overflow parking area.

45 On the concession of Mr Stroud, I find that he parked his vehicle on the common property behind Lot 8 (the turnaround area) on occasion from October 2020 to March 2021. Further, I find that

Mr Stroud no longer parks his vehicle on the common property behind Lot 8 (the turnaround area).

Issue 2 - Whether Rosskeen is in breach of Sch 2 of the ST Act conduct by-law 1(1) and 1(2) and conduct by-law 2(a), 2(b), 2(c), 2(d) and 2(e)?

46 As set out earlier, Mr Stroud conceded that he parked his vehicle on the common property behind Lot 8 (the turnaround area), which prior to Efficient purchasing Lot 8, was used as an overflow parking area. Further, Ms Williamson conceded that visitors to Lot 8, for example guests to the Airbnb and tradespeople, parked their vehicles on the common property behind Lot 8 (the turnaround area). However, as soon as she was told someone had parked on the common property behind Lot 8 (the turnaround area) she asked them to move his or her vehicle.

47 By-law 1(2) prohibits an owner or occupier of a lot from parking or standing of any motor or other vehicle on common property except with the written approval of the strata company.

48 Prior to the registration with Landgate of by-law 2(e) on or about 31 May 2021, I find there was agreement between Rosskeen, and the owners of Lot 6 and Lot 7 for Mr Stroud to park his vehicle on the common property area behind Lot 8 (the turnaround area). However, Efficient, the other lot owner did not agree to such parking by Mr Stroud. Also, there is no evidence before the Tribunal of a written approval for this agreement by the owners of Lot 6 and Lot 7 with Rosskeen by the strata company.

49 Similarly, I find that there was no agreement from the owners of Lot 5, Lot 6 and Lot 7 for occupiers of Lot 8, for example guests at the Airbnb and tradespeople, to park their vehicles on the same common property (the turnaround area) and there is no evidence before the Tribunal of a written approval for this arrangement by the strata company.

50 The result is that I find both Rosskeen and Efficient are in breach of conduct by-law 1(1) and 1(2).

51 Efficient argues that Rosskeen and Mr Stroud are in breach of conduct by-law 2(a), 2(b), 2(c) and 2(d) by unreasonably interfering in the use and enjoyment of the common property area behind Lot 8 by Mr Stroud parking his vehicle on the common property behind Lot 8

(the turnaround area) and by obstructing the use of that area for the maneuvering of motor vehicles accessing and egressing from Lot 8.

52 As already stated, Mr Stroud conceded that he parked on the common property behind Lot 8 (the turnaround area) on occasion in the period October 2020 to March 2021. Ms Williamson also conceded that some of the visitors to Lot 8 (guests to the Airbnb and tradespeople who were renovating the cottage on Lot 8) parked on the common property (the turnaround area), although contrary to her instructions.

53 As Mr Stroud and the occupier or visitor to Lot 8 have had a vehicle parked on the common property (the turnaround area) from time to time, be it for a few hours, for the day or overnight or for some other period of time, with or without approval of the owner of Lot 8, I find that both parties have breached conduct by-law 2(a), 2(b), 2(c) and 2(d) by having a car parked on common property without approval of the strata company.

54 Efficient seeks an order from the Tribunal under s 47(5) of the ST Act to prohibit Rosskeen or its employees or visitors or other persons from parking on the common property behind Lot 8 (the turnaround area) or elsewhere on the common property.

55 Section 202 of the ST Act provides that the Tribunal may make a decision not to make an order. This is a discretionary power of the Tribunal. In other words, in exercising the Tribunal's discretion under the s 202 of the ST Act, I may decide not to make any of the orders sought by Efficient in this proceeding. The ST Act does not provide any guidance on the exercise of the Tribunal's discretion under s 202.

56 In this case as both parties have had a vehicle parked on the common property behind Lot 8 (the turnaround area), with or without the consent of the owner of Lot 8, in my view, it is appropriate in all the circumstances of this proceeding that by application of s 202 of the ST Act to exercise the Tribunal's discretion to make no order with respect to whether Rosskeen has breached the by-laws.

57 In deciding to exercise the Tribunal's discretion under s 202 of the ST Act to not make an order with respect to whether Rosskeen has breached the by-laws, this does not in any way authorise the parking or standing of vehicles on the common property apart from what is provided for by the by-laws.

58 To be clear, nothing in the current by-laws authorises or permits
Efficient, Rosskeen or its employees or visitors or anyone else to stand
or park a vehicle on the common property behind Lot 8 (the turnaround
area).

Issue 3 - Can the Tribunal require Rosskeen to pay a penalty to the strata company for breach of the by-laws? If 'yes' should the Tribunal impose a penalty and if so, how much should the penalty be and when is the penalty to be paid by?

59 Efficient seeks a penalty to be imposed on Rosskeen in the amount
of \$2,000 under s 47(5)(a) of the ST Act.

60 Section 47 of the ST Act is headed 'Enforcement of scheme
by-laws'. Under s 47(3)(a) of the ST Act, an owner (in this case
Efficient) may apply to the Tribunal for the enforcement of a by-law.
Efficient's application to the Tribunal was made after it gave notice to
Rosskeen by email on 20 October 2020.

61 In my view, as I have found that both parties have had a vehicle
parked on the common property behind Lot 8 (the turnaround area),
with or without the consent of the owner Lot 8, it is not appropriate to
impose any penalty on Rosskeen.

62 Further, in my view, it would be futile in the circumstances of this
case to impose a penalty on Rosskeen, because the penalty can only be
enforced by the strata company (which is comprised of the four lot
owners) where the evidence of Mr Stroud is that the owners of Lot 6
and Lot 7 agreed for him to park his vehicle on the common property
behind Lot 8 (the turnaround area). Mr Stroud opposes the imposition
of any penalty as does the owners of Lot 6 and Lot 7. In short, as three
out of the four lot owners support Mr Stroud parking on the common
property behind Lot 8 (the turnaround area) it is unlikely the strata
company would enforce any penalty imposed in any event.

63 For the above reasons, I would not impose a penalty on Rosskeen,
under s 47(5)(a) of the ST Act.

Issue 4 - Whether the Tribunal may make a declaration under s 95(1) of the SAT Act? If 'yes' should the Tribunal make the declaration?

64 Section 95 of the SAT Act provides for the imposition of a penalty
of \$10,000 if a person fails to comply with a decision (apart from a
decision that is a monetary order) of the Tribunal. Relevantly, the
section provides:

Failing to comply with decision

- (1) A person who fails to comply with a decision of the Tribunal commits an offence.

Penalty: \$10 000.

- (2) Subsection (1) does not apply if, or to the extent that, the decision is a monetary order.

- (3) Subsection (1) does not apply in relation to a decision unless —

(a) the Tribunal, in the decision, declares that subsection (1) applies; or

(b) after a person fails to comply with the decision, the Tribunal makes an order declaring that subsection (1) applies and the failure continues after notice of that order is served on the person[.]

65 Mr Stroud in giving evidence stated that he would abide by the decision of the Tribunal.

66 Ms Williamson in giving evidence stated that she instructs visitors and other persons to Lot 8 to not park on the common property behind Lot 8 (the turnaround area).

67 There is nothing before the Tribunal to suggest that either party would fail to comply with the decision of the Tribunal. Consequently, in my view, it is not necessary at this time to make a declaration under s 95 of the SAT Act.

Conclusion

68 The four issues (set out above at [21]) are answered as follows, in summary:

Issue 1: Mr Stroud conceded that he parked his vehicle on the common property area behind Lot 8 (the turnaround area) on occasion from October 2020 to March 2021. Efficient's visitors and other persons to Lot 8 (guests at the Airbnb and tradespeople) have also parked on the common property behind Lot 8 (the turnaround area).

Issue 2: Both Rosskeen and Efficient are in breach of conduct by-laws 1(1), 1(2), 2(a), 2(b), 2(c) and 2(d) as evidenced by vehicles parked on the common property behind Lot 8 (the turnaround area), either with or without the consent of the owner of Lot 8. No order is to be made as both parties are in breach of the by-laws.

Issue 3: A penalty will not be imposed under s 47(5) of the ST Act.

Issue 4: A declaration will not be made under s 95 of the SAT Act.

69 The result is that, pursuant to s 202 of the ST Act, I would not make any orders or declarations apart from dismissing the application.

Conclusion and orders

70 For the reasons given, I will make the following orders.

The Tribunal orders:

1. Pursuant to s 202 of the *Strata Titles Act 1985* (WA), no order or declaration is made.
2. The application is otherwise dismissed.

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

MS R PETRUCCI, MEMBER

13 DECEMBER 2021