

JURISDICTION : STATE ADMINISTRATIVE TRIBUNAL

ACT : STRATA TITLES ACT 1985 (WA)

CITATION : KONIG and THE OWNERS OF TRANBY ON
SWAN STRATA PLAN 2232 [2021] WASAT 156

MEMBER : DR B MCGIVERN, MEMBER

HEARD : 13 AND 14 MAY 2021, 23 JULY 2021,
10 SEPTEMBER 2021

DELIVERED : 8 DECEMBER 2021

FILE NO/S : CC 1671 of 2020

BETWEEN : URSULA KONIG
Applicant

AND

THE OWNERS OF TRANBY ON SWAN STRATA
PLAN 2232
Respondent

Catchwords:

Strata title scheme dispute - Proposed works to replace balustrades forming part of scheme common property - Whether strata company validly passed resolution to undertake such works - Resolution purported to be passed other than in a general meeting of the strata company - Procedures for voting - Meaning of 'ordinary resolution for a resolution passed other than at a general meeting' - Inadequate notice - Resolution not passed

Legislation:

State Administrative Tribunal Act 2004 (WA), s 9

Strata Titles (General) Regulations 2019 (WA), reg 89

Strata Titles Act 1985 (WA) (after 1 May 2020), s 14(8), s 91, s 91(c), s 119, s 120, s 120(3), s 120(4), s 120(8)(a), s 120(8)(b), s 122(1)(c), s 123(7), s 123(7)(a), s 123(7)(b), s 127, s 128, s 129, s 129(1), s 129(2)(c), s 129(2)(d), s 129(3), s 131, s 133, 135, s 197(4), s 199, s 199(1)

Strata Titles Act 1985 (WA) (prior to 1 May 2020), s 3C(1)(a), s 97, s 97(2)

Strata Titles Amendment Act 2018 (WA)

Strata Titles General Regulations 1996 (WA), reg 23

Result:

Application allowed

Category: B

Representation:

Counsel:

Applicant : Mr J Park

Respondent : Ms C Donald

Solicitors:

Applicant : Dentons Australia

Respondent : Lavan

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

Birchwood Consolidated Pty Ltd (ACN 119 162 211) (Receivers and Managers Appointed) (In Liquidation) and The Owners of Equus Strata Plan 62962 [2020] WASAT 161

Blazkiewicz and The Owners of 7 Henderson Street Fremantle (Strata Scheme 74918) [2021] WASAT 56

Glasby and The Owners of 84 Clydesdale Street Como Strata Plan 9012 [2021] WASAT 136

Meyer v Solomon [2021] WASCA 168

Redset Nominees Pty Ltd and The Owners of Spinnakers Apartments Strata Plan 53824 & Ors [2021] WASAT 96

Western Australian Planning Commission v Questdale Holdings Pty Ltd
[2016] WASCA 32

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

1 A large strata scheme in Maylands known as Tranby on Swan (**Scheme**) was developed in 1973. Various building elements in the complex, including balcony balustrades and stair rails, were constructed of timber which has begun to degrade. In late 2020, the respondent strata company sought, by means of an electronic voting system, to pass a resolution in relation to proposed works to replace those elements. The respondent says that that process resulted in a resolution to replace various existing timber elements with aluminium elements (**Disputed Works**). The applicant objects to the Disputed Works. She says that various processes connected with the voting system were improper and that the Disputed Works are not therefore authorised by a valid resolution of the strata company and has applied to the Tribunal for orders to that effect.

Issues

2 The applicant commenced the proceeding by an application lodged on 8 December 2020 under s 197(4) of the *Strata Titles Act 1985* (**ST Act**) in which she sought orders¹ in the following terms:

1. The Owners of Tranby on Swan Strata Plan 2232 ("the strata company") shall not act on any purported resolution or resolutions deriving from the "Circular Voting" mechanism dated November 24, 2020 and issued by B Strata on behalf of the Council of the Strata Company.

[First Proposed Order]

2. The strata company shall convene another Vote of members, either through a general meeting or outside of a general meeting, with the notice for such a "Vote" to include:
 - a) The exact motion or motions proposed for each "vote";
 - b) Arguments prepared by identified, appropriately qualified persons supporting or opposing the proposed motion;

¹ Although the applicant made reference in her application to seeking interim orders, she did not file a separate interim application which is required by Practice Note 5 of the Tribunal, and which was canvassed with the parties in the first directions hearing. In the event, the respondent indicated at the directions hearing that it did not intend to proceed with the Disputed Works until the proceeding was determined, and no further steps were taken by either party in relation to that issue: ts 3-4 and 7-11, 8 January 2021.

- c) Comprehensive details on all tenders or quotes obtained to perform the work the subject of the "vote" including comprehensive details of the work to be performed and the name, address and qualifications of each tenderer or quoter and the relationship, if any, of those tenderers with any member, employee, existing contractor (including Manager) of the strata company;
- d) Details on the proposed funding for the works the subject of the "vote",

[Second Proposed Order].

3 On the second day of hearing, counsel for the applicant indicated that she did not press for orders to be made in terms of the Second Proposed Order.² In keeping with that position, in her closing submissions, the applicant sought the following alternative orders (which broadly reflect the substance of the First Proposed Order):

- (a) declare under section 199 of the Act that the purported Extraordinary General Meeting of the Strata Company was invalid; or
- (b) order under section 200(2)(n) of the Act that the Strata Company is to be taken not to have passed the Electronic Resolution; or
- (c) alternatively, an order under section 200(1) of the Act that the Electronic Resolution was invalid; and
- (d) order that the Strata Company must not in any way act in reliance on the Electronic Resolution.

4 It follows that there is only one key issue for the Tribunal to determine: whether, in relation to a Notice of Circular Resolution dated 24 November 2020 (**Notice**), the strata company has (validly) passed a resolution authorising the Disputed Works. Relevant to that determination, the following must be decided:

- a) What was the nature of the Notice and the process it initiated? Specifically, did it give notice of and initiate:

² ts 110, 14 May 2021. That position was confirmed by the applicant in a later hearing, on 10 September 2021, concerning the parties' closing submissions.

- i) an extraordinary general meeting (EGM) of the strata company, and an item of special business to be voted upon at the EGM; or
 - ii) a vote to be taken outside of a general meeting?
- b) Was the resolution validly voted upon and passed?

Regulatory framework

5 As noted, the application is brought pursuant to s 197(4) of the ST Act. In these reasons, except as otherwise stated, any reference to a legislative provision is a reference to the ST Act (as it stood on 1 May 2020),³ and any reference to a regulation is a reference to regulation under the *Strata Titles (General) Regulations 2019 (WA) (Regulations)*.

6 The general duty of a strata company, which is set out in s 91, includes that it must:

keep in good and serviceable repair, properly maintain and, if necessary, renew and replace ... the common property, including the fittings, fixtures and lifts used in connection with the common property ... and to do so whether damage or deterioration arises from fair wear and tear, inherent defect or any other cause.

7 Pursuant to s 135, the functions of a strata company are (subject to the terms of the ST Act and to any restriction imposed or direction given by ordinary resolution) to be performed by the council of the strata company.

8 The procedures that a strata company must follow are dealt with in Pt 8 Div 3, which in turn has two sub-divisions: the first dealing with procedures for voting and the second dealing with procedures for meetings.

Voting

9 Section 120, which is of particular relevance to the proceeding, is set out in full below:

120. Voting

³ Pursuant to the *Strata Titles Amendment Act 2018 (WA)*, significant amendments came into effect on 1 May 2020 (referred to as the commencement day).

- (1) The owner of each lot in a strata titles scheme is entitled to 1 vote on a proposed resolution of the strata company.
- (2) However, the owner of a lot is not entitled to cast the vote attached to the lot if -
 - (a) the resolution is not required to be a unanimous resolution or a resolution without dissent and is not a resolution for postponing the expiry day for a leasehold scheme or a termination resolution; and
 - (b) there is an outstanding amount recoverable under this Act owed to the strata company by the owner of the lot.
- (3) A proposed resolution can be put to the members of a strata company⁴ -
 - (a) at a general meeting; or
 - (b) outside of a general meeting.
- (4) A resolution can be proposed only by a member of the strata company who is entitled to vote on the resolution.
- (5) The vote attached to a lot can, and can only, be cast, if at the time it is cast, the person is entitled to cast the vote attached to the lot.
- (6) The owner of a lot may cast the vote attached to the lot in person or by duly appointed proxy.
- (7) However, if a vote is taken at a general meeting at which both the owner of a lot and a proxy entitled to cast the vote attached to the lot are present and the owner is not a co-owner of the lot, the owner of the lot must cast the vote.
- (8) The voting system, whether it is electronic or by other means, must -
 - (a) enable votes to be cast in a manner designed to protect the integrity of the voting system; and
 - (b) comply with any requirements specified in the regulations.

10 For the purposes of s 120(8)(b), reg 89 provides that if a vote is to be taken *outside of a general meeting*, the notice of the proposed resolution must specify:

⁴ Members of a strata company are the owners for the time being of the lots in the strata titles scheme: ST Act, s 14(8).

- (a) how the vote will be conducted;
- (b) how a vote may be submitted;
- (c) the closing date for submitting a vote;
- (d) how the owner of a lot will know their vote has been cast;
- (e) how the results of the vote will be published.

11 An ordinary resolution requires:

- a) if passed *other than at a general meeting*, 14 days' notice of the terms of the proposed resolution to be given to each member of the strata company before voting on the resolution opens;⁵ and
- b) to pass (whether at or outside of a general meeting), more than 50% of the votes in support the resolution,⁶ with votes generally to be counted by the number of votes cast.⁷

Meetings

12 The ST Act deals with meetings of a strata company in a separate sub-division, being Pt 8 Div 3 sub-div 2, which:

- a) provides that resolutions passed at a general meeting may be ordinary resolutions unless the ST Act requires otherwise;⁸ and
- b) contemplates two kinds of general meeting: annual general meetings (AGMs) and EGMs.⁹ There are no matters required to be included on an agenda for an EGM,¹⁰ and all business transacted at an EGM is taken to be special business.

13 The notice requirements for all general meetings are dealt with in s 129, which relevantly provides that at least 14 days' notice of any

⁵ ST Act, s 123(7)(a).

⁶ ST Act, s 123(7)(b).

⁷ However, if a person entitled to cast a vote demands that they be counted by the number of unit entitlements of the lots for which votes are cast, they must be counted in that manner: ST Act, s 122(1)(c).

⁸ ST Act, s 133.

⁹ ST Act, s 127 and s 128.

¹⁰ Compare, in relation to AGMs, s 127(3).

general meeting must be given to all owners of lots in a strata titles scheme and first mortgagees of those lots.¹¹

- a) That notice must include the general nature of any special business, and notice of each method of voting, whether by means of an electronic communication or otherwise, that is acceptable to the strata company.¹²
- b) However, accidental omission to give notice of a general meeting to, or non-receipt of the notice by, the owner or first mortgagee of a lot does not invalidate any proceedings at the meeting.¹³

14 A person may attend and vote at a meeting of a strata company remotely 'by telephone, video link, internet connection or similar means of remote communication'.¹⁴

Construction

15 Those provisions are to be interpreted in accordance with the well-recognised approach to statutory construction, recently summarised by the Court of Appeal as follows:

- 76 The focus of statutory construction is upon the text of the provisions having regard to their context and apparent purpose.
- 77 A decision as to the meaning of the text requires consideration of the context, in its widest sense, including the general purpose and policy of the provision.
- 78 The context includes the existing state of the law, the history of the legislative scheme and the mischief to which the statute is directed.¹⁵

Procedural background

16 The grounds advanced in support of the application (collectively, **Applicant's Grounds**) are set out in:

- a) the document titled 'Grounds for Orders Sought' annexed to the application dated 8 December 2020;

¹¹ ST Act, s 129(1).

¹² ST Act, s 129(2)(c) and s 129(2)(d).

¹³ ST Act, s 129(3).

¹⁴ ST Act, s 131.

¹⁵ *Meyer v Solomon* [2021] WASCA 168, [76]-[78] (citations omitted). See also: *Glasby and The Owners of 84 Clydesdale Street Como Strata Plan 9012* [2021] WASAT 136 at [28] and the authorities cited therein.

- b) by orders dated 8 January 2021, a document titled 'Additional Grounds in Support of the Application' filed on 6 January 2021; and
- c) by orders dated 9 February 2021, a document titled 'Applicant's Further Additional Grounds' filed on 15 January 2021.

17 The matter was initially set down for final hearing on 13 and 14 May 2021, and a further hearing day was subsequently added, being 23 July 2021.

18 Both parties filed written closing submissions on 16 August 2021.

19 Following objections raised by the respondent to the applicant's closing submissions, a further hearing was held on 10 September 2021 to hear the parties in relation to the scope of the closing submissions.

Evidence

20 Prior to the hearing the Tribunal compiled a hearing book comprising all the materials filed in the proceeding before 13 May 2021, which book was taken into evidence on the first day of hearing (Exhibit 1).

21 In the course of the hearing:

- a) the applicant gave oral evidence, and called the following witnesses:
 - i) Ms Jennifer Knevich (owner of a Scheme lot);
 - ii) Ms Patricia Welsh (owner of a Scheme lot);
 - iii) Ms Leslyann Watson (owner of a Scheme lot); and
 - iv) as an expert witness, Mr William Smalley, a structural engineer with Scott Smalley Partnership and an owner of a Scheme lot. Mr Smalley also produced a written report dated 18 February 2021;¹⁶
- b) the respondent called the following witnesses:

¹⁶ Exhibit 1, pages 180-199 (Mr Smalley's curriculum vitae, Exhibit 1, page 233).

- i) Ms Catherine Hobbs (owner of a Scheme lot and Chair of the Scheme Council);
- ii) Mr Brett King (caretaker for the Scheme);
- iii) Mr Scott Bellerby of B Strata Management (strata manager of the Scheme); and
- iv) as an expert witness, Mr Peter Baldwin, a senior structural engineer with Alteier JV. Mr Baldwin also produced a written report dated 8 February 2021¹⁷ (**Atelier Report**).

22 Additionally, five further items were tendered, as follows:

- i) a full copy of a document partially copied and appearing at page 127 of Exhibit 1 (being an email dated 7 January 2021 from Mr Bellerby to Mr Smalley) (Exhibit 2);
- ii) a bundle of eight colour photographs of elements of the balustrades (Exhibit 3);
- iii) a further witness statement of Jennifer Knevich dated 7 March 2021 (Exhibit 4);
- iv) the curriculum vitae of Mr Peter Baldwin (Exhibit 5); and
- v) a report of BSP Building Inspections dated 4 December 2017 (Exhibit 6) (**BSP Report**).

Scope

23 I note at this early stage that both parties addressed a deal of their evidence, and written and oral submissions, to matters that are of limited relevance to the principal issue (and associated sub-issues) to be determined (identified at [4] above).

- a) Partly, this arose because the Second Proposed Order was not withdrawn until the final hearing. Accordingly, a deal of the submissions and evidence had been directed to addressing whether a vote was in fact required to authorise the Disputed Works.

¹⁷ Exhibit 1, pages 277 to 301.

- b) However, both parties also made submissions about, and called expert witnesses to speak to, the merits of undertaking the Disputed Works (that is, whether they are necessary and reasonable and, if so, to what extent). That issue is not squarely raised in the proceeding and does not require determination (in its own right).

24 In the reasons that follow, I will deal with such contentions and evidence only briefly (insofar as it is necessary to do so at all).¹⁸

Material facts

25 I make the following findings of fact (which, except as otherwise indicated, were not contentious).

26 The Scheme was created upon the registration on 18 January 1974 of strata plan 2232 (**Strata Plan**). As appears from the Strata Plan the Scheme comprises 206 lots, with 'four level residential brick buildings'¹⁹ and large areas of open space.

27 The Scheme buildings have slightly different configurations and locations are divided into five groups known as 'The Lodge', 'The Loft', 'The Grange', 'The Lakehouses' and 'The Riverhouses'.

28 Since 31 May 1990, the applicant has been the registered proprietor of Lot 108 in the Scheme.

29 At all material times, the respondent engaged B Strata Management as the strata manager for the Scheme (**Strata Manager**).

30 In or about December 2017, a building maintenance audit was carried out in relation to the Scheme common property by BSP Building Inspections. The resulting BSP Report contains, amongst other things, references to various timber building elements, including various balustrades, as being 'rotten' or 'corroded'. Recommendations were made to remediate those elements - in some cases by replacing them, in others by repairing or repainting affected areas.

31 At an AGM of the respondent held on 26 August 2020, a resolution was passed that:

¹⁸ As to which, see 'Other matters' below.

¹⁹ Although I note that the Strata Plan shows that the buildings of Lots 17-28 are two-level.

[The] Strata Company authorise the Council of Owners to organise the preparation of a 10 year maintenance plan for the scheme which [was] to be completed in time for consideration at the next AGM.²⁰

32 The council sought and obtained quotes to replace the existing timber balustrades and stair rails (collectively, **Balustrades**), as follows:

- a) a quote from JS Maintenance & Installations dated 28 March 2020²¹ to remove, replace and repaint exterior hardwood balustrades at The Loft (18 balustrades), The Riverhouses (12 balustrades), on stairs and porches (unspecified) using 'hardwood balustrade[s] to closest matching profile as existing and paint in closest available exterior low sheen timer paint' for an estimated²² total cost of \$151,030 (including GST); and
- b) a quote from Absolute Balustrades (**Absolute**) dated 16 October 2020 (**Absolute Quote**)²³ to remove and replace 18 separate balcony balustrades²⁴ (on the basis that a cherry picker would be supplied by the respondent) using powder coated aluminium in a 'Heritage' design for a total price of \$24,502.50 (including GST). A further amount of \$6,160 was quoted for supply of a cherry picker.

33 On 26 October 2020, the Strata Manager issued a work order to Absolute (**Work Order**), which included the following under 'Job Details':

Please proceed with part 1 & 2 for replacement of The Loft balustrading as per quote #2001115 at a cost of \$30,662.50.

...

²⁰ Exhibit 1, page 50.

²¹ Exhibit 1, page 308.

²² The number and cost of balustrades for The Loft and The Riverhouses were specified (the relevant costs being \$88,000 and \$47,000, excluding GST, respectively); the balustrades for stairs and porches were quoted on a 'price per unit' basis.

²³ Exhibit 1, pages 309-316.

²⁴ Which correlates with that component of the JS Maintenance & Installations quote dealing with replacement of The Loft balcony balustrades (which, as noted above, was quoted at \$88,000 excluding GST).

Please provide 14 days notice of the works so we can advise the residents accordingly[.]²⁵

On or about 27 October 2021, the Strata Manager paid a deposit of \$11,150.00 to Absolute.

34 Minutes of a Council meeting dated 2 November 2020, record (under the heading 'Maintenance') as follows:

ITEM:

Stairwell balustrades are currently being replaced

A quote for \$88,000 to replace the balcony balustrades was received

The reason the quote was so high is because the new balustrades need to comply with Aus Standards

Brett received another quote for \$35,000 and advises it must be addressed as a matter of urgency because it is getting worse

Council approved these works via email

DISCUSSION:

Work order sent

ACTION:

Kate will check with Bett when work will commence[.]²⁶

35 There was some contention about the date on which the Notice was given to owners in the Scheme.

- a) The applicant contended that it was sent on 25 November 2020, and she tendered statements (of herself and other owners in the Scheme) in support of that contention.²⁷
- b) The respondent contended that, on its behalf, the Strata Manager sent the Notice:
 - i) to lot owners who had supplied an email address to the respondent, by email 'sent from an online voting platform, Strata Vote on

²⁵ Exhibit 1, page 317.

²⁶ Exhibit 1, page 59.

²⁷ Exhibit 1, pages 113, 114, 116, 117, 129 and 330.

24 November 2020', and again by email sent by the Strata Manager on 25 November 2020;²⁸ and

- ii) to lot owners who had not supplied an email address to the respondent, by post on 24 November 2020.
- c) Although the body of the Notice contains the date 24 November 2020,²⁹ the weight of the evidence does not support the contention that it was in fact sent out on that date.
 - i) The respondent referred 'in particular' to Exhibit 1, page 23 in support of its contention.³⁰ However, that document is an email to the applicant which appears to have been generated by the Strata Vote system³¹ and which bears the date and time: '25/11/2020 5:06 PM'.
 - ii) The respondent also referred to the evidence of Mr Bellerby.³² However, his oral evidence addressed the process involved in, rather than the date of, distributing the Notice. Further, he agreed that the Notice sent to the applicant³³ was representative of the Notices distributed to all owners in the Scheme.³⁴
 - iii) The respondent did file the 'follow up' email sent by the Strata Manager on 25 November 2020, which states 'you will have received an email from StrataVote yesterday'.³⁵ However, it produced no further email or postal records, or records produced from the Strata Vote system, capable of supporting its contention.

²⁸ Respondent's Response, para 12 and para 13; Respondent's Closing Submissions, para 53 and para 54.

²⁹ Exhibit 1, page 34 and page 325.

³⁰ Respondent's Closing Submissions, footnote 24.

³¹ Exhibit 1, pages 23-35 (noting that pages 24, 26 and 32 all bear the header 'Strata Vote').

³² Respondent's Closing Submissions, footnote 24, which refers to the evidence of Mr Bellerby at ts 31-33, 23 July 2021.

³³ Exhibit 1, page 23 (referred to above).

³⁴ ts 31, 23 July 2021.

³⁵ Exhibit 1, page 330.

- d) To the extent that it is available, the weight of the evidence³⁶ (and in particular the most direct evidence of the Notice as it was sent via the Strata Vote system)³⁷ is that the Notice was in fact sent out on 25 November 2020, and I make that finding.

36

The Notice:

- a) indicated that, for the purposes of reg 89, acceptable methods of voting involved an owner (or his or her proxy) submitting a vote:
- i) signifying: 'FOR, AGAINST or ABSTAIN'; and
 - ii) made via the electronic voting platform, Strata Vote or by email (to a nominated address); and
- b) stated that voting would open on 9 December 2020 and would close at 5 pm that same day;
- c) contained a proposed resolution in the following terms:³⁸

1. Poll Vote - Works Project

Proposed Motion - Resolve by ordinary resolution that the Strata Company approve one of the following design options for the replacement of the balustrades and authorise the Council of the Strata Company to issue a work order to the contractor for the approved design, subject to ensuring the contractor adheres to all relevant Australian Standards, with the works to be completed throughout the current financial year.

Explanatory notes:

It has become necessary for safety reasons to replace the balustrades on The Loft balconies, and due to the current Australian Standards they cannot be replaced in a similar style (with open horizontal slats). It has been decided to use aluminium (as wood will be approximately \$50,000 more expensive than aluminium). Aluminium [sic] requires less maintenance. The balustrades will be powder coated in Tranby blue.

³⁶ Exhibit 1, pages 23-35, pages 113, 114, 116, 117, 129 and 330.

³⁷ Exhibit 1, pages 23-35.

³⁸ Exhibit 1, pages 33 and 324.

It will also be necessary to replace the balconies on Riverside within the next year, which are becoming unsafe, and at some time The Grange, as well as eventually all other balconies. Therefore, the style chosen needs to allow for various locations, views and air circulation while complying with safety standards.

Please see below photos of the styles which have been selected as possibilities by the Council of Owners. All meet Australian Standards, however the Heritage is slightly more robust. It will still be possible for residents to apply blue shade cloth to the balconies facing Wall St to provide privacy, if they wish. Please note - To meet Australian Standards horizontal bars are not permitted to have a gap of more than 9mm between bars.

The cost for replacing the Loft balconies including installation will be:-

Heritage.	\$24,502 inc gst
Panascreen vertical.	\$27,175 inc gst
Panascreen horizontal	\$27,175 inc gst

It is hoped to start the replacement in January; if you would have a preference please feel free to comment by Thursday 9 December 2020 to avoid delaying the work[;]

- d) immediately below that, provided voting options of 'YES', 'NO' and 'ABSTAIN'; and
- e) after the voting options, under a further heading 'Alternatives for Poll Vote - Works Project', listed the three designs for selection as Option 'A' (Heritage), 'B' (Panascreen vertical) or 'C' (Panascreen horizontal).

37 A count of the votes was undertaken and reported upon by the Strata Manager on 22 December 2020. That report indicated that a total of 102 votes had been cast, with 98 of those being 'financial'. Of those:

- a) in relation to 'Motion 1 (Proceed with Design and Issue W/O)': 88 voted in favour, with seven against and three abstaining; and
- b) in relation to 'Motion 1A (Design)': 49 selected Option A, 22 selected Option B, and 21 selected Option C.

The reported result (**Disputed Resolution**) was that:

The motions on notice were for a simple majority and ... the motion was passed[.]

38 Mr Bellerby, for the Strata Manager, gave evidence which I accept that the votes that were counted and reported upon include those submitted online via the Strata Vote platform, as well as those received by email.³⁹

Parties' contentions

39 In summary, the applicant has contended⁴⁰ that, by reason of various deficiencies in the voting process, the respondent has not met the requirements of s 120(8)⁴¹ and, accordingly, the Disputed Resolution was not passed. Those contended deficiencies were to the effect that:

- a) the Notice did not clearly specify how the vote would be conducted (that is, whether it was an item of special business to be voted upon at an EGM, or a vote taken other than at a meeting of the strata company);
- b) inadequate notice was of the proposed resolution was given to all or some of the lot owners because:
 - i) in breach of s 129(1), all or some owners in the Scheme were given less than 14 days' notice of the proposed resolution;⁴² and
 - ii) the notice requirement is strict⁴³ (so that the Disputed Resolution cannot have been validly passed);
- c) the resolution contained in the Notice was not proposed by, or not clearly identified as being proposed by, a lot owner (and therefore by a member of the strata company, as required by s 120(4)); and

³⁹ ts 33-34, 23 July 2021.

⁴⁰ I have limited the summary to the contentions contained in the Applicant's Closing Submissions, because those are reflective of the matters she continued to press after she abandoned her plea for orders in terms of the Second Proposed Order.

⁴¹ Which required the respondent to enable votes to be cast in a manner designed to protect the integrity of the voting system, and to comply with any requirements specified in the regulations.

⁴² Applicant's Closing Submissions, paras 36 and 45.

⁴³ Applicant's Closing Submissions, para 45, citing *Birchwood Consolidated Pty Ltd (ACN 119 162 211) (Receivers and Managers Appointed) (In Liquidation) and The Owners of Equus Strata Plan 62962* [2020] WASAT 161 (*Birchwood*).

- d) in breach of reg 89, the Notice did not clearly specify how votes could be submitted, or the closing date for the vote.

40 The applicant also contended⁴⁴ that by endeavouring to replace the Balustrades in the manner proposed, the respondent has acted:

- a) beyond its power under s 91(c), because it is possible to repair rather than replace the Balustrades; and
- b) contrary to the objectives in s 119(1) because it failed to consider, or adequately consider, options other than Disputed Works to address the degradation of the Balustrades.

41 In summary, the respondent contended that:

- a) the applicant needs to provide sufficient evidence to prove that:
- i) the proposed resolution and Notice did not maintain the integrity of the voting system; and
- ii) the majority of owners entitled to vote would have voted down the proposed resolution;
- b) reasonable steps were taken by the Strata Manager, on the respondent's behalf, to ensure the integrity of the voting system, including by the provision of all information required under s 120(8)(b) (by reference to reg 89);
- c) the respondent first gave Notice of the proposed resolution by email on 24 November 2020 and therefore gave the required 14 days' notice⁴⁵ and, in any event, in any event, a failure to give 14 days' notice would be irrelevant⁴⁶ because:
- i) only 'a handful' of owners, being those who were sent the Notice by post, were given 12 (rather than 14) days' notice;

⁴⁴ Applicant's Closing Submissions, at paras 63-84.

⁴⁵ Respondent's Closing Submissions, paras 53-54.

⁴⁶ Respondent's Closing Submissions, paras 55-62.

- ii) whilst s 129(3) (regarding an accidental omission to give notice) applies to general meetings of the strata company, the same principle should apply here; and
- iii) 'strict compliance with notice does not invalidate a resolution'. In this case, compliance would have no effect on the result (and the applicant has provided insufficient evidence to prove the contrary) because an overwhelming majority of the votes cast favoured the proposal;⁴⁷
- d) the Disputed Works are contemplated in its 10-year maintenance plan and are fully budgeted, and the respondent has the requisite power and authority to undertake the works;⁴⁸ and
- e) the respondent is not acting outside its authority under s 91, or other than in accordance with its objectives under s119, because:
 - i) the respondent has the responsibility and authority to maintain the common property (including repairing or replacing elements thereof);
 - ii) the Balustrades are common property, are in a state of disrepair (such that they are structurally unsound), do not comply with current Australian Standards or the current National Construction Code (NCC), and pose a safety risk; and
 - iii) the Disputed Works constitute replacement rather than improvement of common property, and will result in the Balustrades being made safe and compliant with Australian Standards and the NCC.

What was the nature of the Notice and the process it initiated?

42 I note that the Notice, as it was issued by the Strata Vote system (as filed in the applicant's bundle)⁴⁹ is presented in a slightly different format to that which was apparently sent by post (as filed in the

⁴⁷ Citing *Birchwood* in support.

⁴⁸ The respondent submitted that it only took a vote on the matter out of an abundance of caution in the event that the Disputed Works may be regarded as alterations to, rather than repair or maintenance of, the Scheme common property.

⁴⁹ Exhibit 1, pages 23-35.

respondent's bundle).⁵⁰ The former contains, as part of a document header, the words 'Extraordinary General Meeting'. The latter does not.

43 No doubt some confusion may, by reason of the header, have arisen in recipients of the Notice sent via Strata Vote. Nevertheless, it is in my view clear that the Notice was intended to be, and is properly characterised as being, a notice of a proposed resolution to be voted upon outside a general meeting (not as a notice of an EGM and an item of special business to be voted upon therein). That is because:

- a) the Notice, in both formats:
 - i) is headed: 'NOTICE OF CIRCULAR RESOLUTION' and states:

Notice is hereby given by authority and on instruction of the Owners of Tranby on Swan, Strata Plan 2232 that in accordance with Section 120(3)(b) of the Strata Titles Act 1985, that notice of proposed resolutions hereto, will be voted on outside of the general meeting[;]
 - ii) notes, with reference to s 120(3), that 'Circular Resolutions are now permitted under the Act' and defines 'Circular Resolutions' as being resolutions outside of a general meeting;
 - iii) as noted previously in these reasons, also refers to reg 89 (which applies only to votes taken other than at a general meeting);
- b) that characterisation was accepted by Mr Bellerby in cross-examination;⁵¹ and
- c) the online and email voting system contemplated by the Notice is individual voting; it is not a process that could properly fall within the scope of the meaning of remote attendance (by telephone, video link, internet connection 'or similar means of remote communication') of a meeting under s 131.

⁵⁰ Exhibit 1, pages 322-329.

⁵¹ ts 38, 23 July 2021.

44 The Strata Vote system, and the validity of the Disputed Resolution, must therefore be considered and assessed against the requirements for voting 'other than at a general meeting'.

Was the Disputed Resolution validly voted upon and passed?

45 I accept the respondent's contention the applicant bears the onus in relation to any contention that the respondent breached its obligations under the ST Act. However, for the reasons that follow, I do not accept that if she succeeds in establishing a breach, she must also prove what the vote would have been in the absence of that breach.

Inadequate notice

46 I have found that the voting process adopted by the respondent:

- a) included votes submitted via the online Strata Vote system and votes submitted by email; and
- b) opened on 9 December 2020 and closed at 5:00 pm the same day.

47 I begin by noting that, by reason of the conclusion at [43] above, s 129(1) (which applies to general meetings of a strata company) did not apply (and so cannot have been breached). Rather, the requirement for 14 days' notice arose under s 123(7)(a) (which applies to ordinary resolutions passed other than at a general meeting).⁵²

48 By reason of my finding at [35](c) above, the respondent's contention that the required notice was given to all owners, fails.

49 In any event, as acknowledged by the respondent, even if the Notices distributed via the Strata Vote system had been sent on 24 November 2020, the owners who received the Notice by post cannot have been given the requisite 14 days' notice.

50 Both parties have referred to the Tribunal's decision in *Birchwood*⁵³ in support of their respective submissions concerning the effect of a failure to comply with the requisite notice period. It is important to recognise, however, that that decision is of limited relevance because:

⁵² See [11(a)] above.

⁵³ [2020] WASAT 161.

- a) that matter was determined under and by reference to various provisions of the ST Act as it stood prior to the introduction, on 1 May 2020, of very significant amendments⁵⁴ (which for convenience I will refer to as the **Prior ST Act**) and the now-repealed *Strata Titles General Regulations 1996* (WA) (**Prior Regulations**);
- b) specifically, it concerned:
- i) the failure to accord with notice requirements for an AGM under of s 3C(1)(a) of the Prior Act and reg 23 of the Prior Regulations; and
 - ii) the exercise of a particular power (under s 97 of the Prior ST Act) to invalidate a resolution if the legislative requirements for the meeting at which it was made had not been met. The exercise of that power was expressly directed by terms that the Tribunal should not refuse to make an order unless it considered:
 - (a) that the failure to comply with the provisions of this Act did not prejudicially affect any person; and
 - (b) that compliance with the provisions of this Act would not have resulted in a failure to pass the resolution, or have affected the result of the election, as the case may be[.]⁵⁵
- c) accordingly, the Tribunal in that case was directed by the Prior ST Act to consider certain specified consequences of any failure to comply with a meeting requirement;
- d) by way of contrast, s 123(7)(a) is concerned with the notice requirement for passing an ordinary resolution other than at a meeting of the strata company, with no express considerations or constraints relevant to the exercise of the Tribunal's power to determine and make orders in relation to that matter; and

⁵⁴ Pursuant to the *Strata Titles Amendment Act 2018* (WA).

⁵⁵ Prior ST Act, s 97(2).

- e) it is clear therefore that the provisions considered by the Tribunal in *Birchwood* are distinct in language, context and purpose from the provisions that must be construed and applied in the disposition of this proceeding.

51 There is no current equivalent of s 97(2) of the Prior ST Act that applies to a breach of the requirements for voting outside a general meeting and, as such, I do not accept the respondent's contention that it is necessary for the applicant to prove that the proposed resolution would have been defeated by a majority of the owners entitled to vote.

52 It is noteworthy that the requirement for 14 days' notice in s 123(7)(a) is definitional. That is, a resolution *is* an ordinary resolution passed other than at a meeting *if* (amongst other things) 14 days' notice of the terms of the proposed resolution is given. In the absence of the definitional requirements under s 123(7), there is no ordinary resolution.

53 The failure to provide the requisite notice is in this case fundamental.

- a) By reason of my finding at [35](c) above, no owner was given 14 days' notice.
- b) Even if that conclusion were wrong, it is uncontentious that at least a group of owners, being those who received the Notice by post, were not given 14 days' notice.
- c) Further, the failure to provide adequate notice is not cured by s 129(3), or any 'equivalent principle', because:
- i) it is clear from both the express language of the provision and its context (being within sub-div 2 of Pt 8 Div 3) that it applies only in relation to meetings procedures (and not to voting procedures)⁵⁶ of a strata company;
- ii) further, s 129 (3) does not codify a self-standing or generalisable principle - it is a provision that is directed by (and subject to) its

⁵⁶ Which are dealt with separately in sub-div 1 of Pt 8, Div 3 of the ST Act.

terms to a particular context, and has effect within that stated context;

- iii) the confined nature of s 129(3) cannot be read as a legislative error, to be 'corrected' by a construction that is contrary to the unambiguous terms of the statute;
- iv) indeed, it is apparent that the distinct treatment of procedures for voting, and in particular for votes taken outside a general meeting, is deliberate. The ST Act directly addresses, and makes particular provision for, voting outside a general meeting.⁵⁷ Those provisions, read together, evince an intention to impose somewhat stricter regulation of such voting systems. That purpose responds to the inability outside a meeting to discuss and ask questions about a motion, and to readily discern the nature and requirements of the voting process (which may be contrasted with the voting in general meetings); and
- v) finally, even if s 129(3) (or some equivalent) did apply, the situation at hand concerns neither an omission to give (or non-receipt of) the Notice to an owner, nor an accident.⁵⁸ Rather, it is a failure to allow adequate time for all owners (or at the very least a distinct and ascertainable group of owners) to have the requisite 14 days' notice.

⁵⁴ It follows, and I find, that:

- a) the failure by the respondent (acting through the Strata Manager) to allow sufficient time for owners of Scheme lots to have 14 days' notice of the proposed resolution has resulted in the resolution the subject of the Notice not being passed; and

⁵⁷ Notably, by s 120(3) and s 123(7)(a) as well as by the additional procedural requirements imposed by reg 89.

⁵⁸ In this regard, I accept the applicant's contention that the respondent would be required to lead, and has not led, evidence capable of satisfying the Tribunal of the accidental nature of any omission on its part.

- b) therefore, the respondent is not, by reason of the vote taken on 9 December 2020,⁵⁹ authorised to undertake the works the subject of the Notice.

55 The findings and conclusions above are sufficient to determine the proceeding and comprise the principal reasons for allowing the application.

56 For completeness, I will deal briefly with other of the key contentions in relation to the voting process below.

Other contended voting deficiencies

57 I accept the applicant's contention that it is not clear on the face of the Notice that the proposed resolution was moved by a member of the strata company. It appears from the language of s 120(4) (that a resolution can be proposed *only by* a member) that its requirements are strict, and it should be clear on the face of a proposed resolution that they have been met.

58 However, I do not otherwise accept:

- a) for the purposes of s 120(8)(a), that there were material deficiencies in the information (as required by reg 89) contained in the Notice; or
- b) for the purposes of s 120(8)(b), that the misnomer header in the Notice as it was sent out was via the Strata Vote system would give rise to such confusion as to undermine the integrity of the system for casting votes.⁶⁰ Consistent with my findings above, there was sufficient clarity in the body of the Notice that in my view made it reasonably clear that the Notice was of a proposed resolution to be voted on outside a general meeting.

Other matters

59 As to whether the respondent has authority independent of a specific resolution of the strata company to undertake the Disputed Works, that issue is not raised on the application. There is no

⁵⁹ The respondent has contended that it has authority independent of a resolution of the strata company to undertake the Disputed Works (as to which, see 'Other matters' below).

⁶⁰ I observe that the language of s 120(8)(a) makes it clear that the obligation to protect the integrity of the voting system is anchored to the *manner of casting votes*.

'cross claim' or any consolidated application of the respondent that would make it proper for the Tribunal to determine the issue.

60 The residual contentions of the applicant (at [40] above) that the respondent has acted in breach of s 91(c) and s 119, and the responsive contentions of the respondent (at [41](d)-(e) above), are curious in that they do not clearly bear on the relief sought by the applicant.⁶¹ Those matters are, therefore, also not strictly necessary to determine.

61 The expert evidence going to the underlying merits of the Disputed Works is therefore of limited relevance. It arguably has some bearing on the question of whether the Tribunal should exercise its discretion in favour of making orders (that is, whether there is sufficient need to carry out the works as to deny the relief sought).⁶² I will deal briefly with that evidence below.

62 The conferral and concurrent evidence of Mr Smalley and Mr Baldwin resulted in significant agreement between them. That joint evidence was to the effect that:

- a) the Balustrades are in a state of disrepair and are structurally unsound; they also do not comply with current building standards;
- b) from a structural perspective, the Balustrades could be replaced using aluminium or a suitable timber (both being capable of spanning the required width and of being anchored to the building structure); and
- c) the replacement of the Balustrades with aluminium is not in keeping with the design and architectural integrity of the Scheme (although I give no weight on this point because it lies outside the relevant professional expertise of the witnesses, being structural engineering).

63 Mr Smalley and Mr Baldwin disagreed in relation to whether the Balustrades could be adequately repaired (rather than replaced), with Mr Smalley opining that they could be, and Mr Baldwin opining that repair would be structurally inadequate.

⁶¹ In the First Proposed Order or in the Applicant's Closing Submissions: see [2]-[3] above.

⁶² As to which, see 'Relief' below.

64 To the extent of any conflict, I prefer the evidence of Mr Baldwin because he is an independent expert. Although I accept the professional experience and qualifications of Mr Smalley, he cannot be said to be independent given that he is an owner in the Scheme, and in that capacity has previously expressed strong views about the merits of the Disputed Works.

65 I observe that the expert evidence suggests that there was a reasonable basis upon which a strata company could form the view that it was necessary and appropriate to undertake the Disputed Works, and to characterise that work as replacement or repair of the common property. I therefore do not accept, and decline to make findings in line with, the applicant's contentions at [40] above.

66 I deal with the question of relief, and the relevance of the expert evidence to that question, below.

Relief

67 I have previously noted that the Tribunal has a broad discretion in deciding whether to make declarations or other orders in the resolution of a scheme dispute, and that such discretion should be exercised after the determination of, and with regard to, the merits of the substantive underlying dispute.⁶³

68 Whether the Disputed Works are necessary, and whether the respondent could proceed without a specific resolution of the strata company, are not matters that go to the heart of the dispute or the orders sought by the applicant. Rather, at the heart of the application is the respondent's conduct of a voting process.

69 In all the circumstances, I am satisfied that it is appropriate in this case to grant declarations under s 199 giving effect to the findings at [54] above. Even if there is merit in ultimately undertaking the Disputed Works, there is no (or no sufficient) reason to exercise discretion to deny such relief because:

- a) if, as contended by the respondent, it has power independent of a resolution of the strata company to undertake the Disputed Works, then it cannot be argued that orders giving effect to the findings at [54] above would prevent those works; and

⁶³ See *Redset Nominees Pty Ltd and The Owners of Spinnakers Apartments Strata Plan 53824 & Ors* [2021] WASAT 96 at [81]-[82].

- b) if and to the extent that a resolution of the strata company is required, then such relief:
- i) operates to preclude the respondent from relying on a purported resolution that, by reason of a failure to meet certain essential requirements for taking a vote outside a general meeting, was not passed; and
 - ii) properly reflects the need to adopt a voting process that meets the essential requirements of the ST Act (and associated ST Regulations).

Costs

70 Finally, I note that the applicant has, in her closing submissions, applied for her costs of the proceeding.

71 As noted in *Blaszkiwicz and The Owners of 7 Henderson Street Fremantle (Strata Scheme 74918)* [2021] WASAT 56.⁶⁴

The question of costs begins with the ordinary position being, pursuant to s 87(1) of the SAT Act, that parties bear their own costs in Tribunal proceedings. Nevertheless, that position is subject to:

- (a) any relevant provision of the enabling Act (in this case, the ST Act, which used to preclude, but no longer precludes, an award of costs); and
- (b) the discretion of the Tribunal under s 87(2) of the SAT Act to 'make an order for the payment by a party of all or any of the costs of another party'.

72 Further, the broad discretion to award costs is to be exercised in accordance with the considerations outlined by the Court of Appeal in *Western Australian Planning Commission v Questdale Holdings Pty Ltd* [2016] WASCA 32⁶⁵ which are ultimately directed to whether it is fair and reasonable that a party should be reimbursed for its costs, taking account of the conduct of both parties in relation to the objectives in s 9 of the *State Administrative Tribunal Act 2004 (WA)* (**SAT Objectives**). Those objectives are to determine proceedings fairly and in accordance with the substantial merits, with as little formality as possible, and in a way that minimises costs to the parties.

⁶⁴ [2021] WASAT 56 (*Blaszkiwicz*) at [60].

⁶⁵ [2016] WASCA 32; see also *Blaszkiwicz* at [61]-[62], and the decisions cited therein.

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The applicant points in support of her costs application to alleged departures by the respondent from the SAT Objectives.⁶⁶ However, the conduct of the proceeding by the applicant has itself departed in some material ways from those objectives. For example:

- a) the applicant's withdrawal of the application for relief in terms of the Second Proposed Order made in, rather than before, the hearing resulted in a range of submissions and evidence that could have been dispensed with at an earlier stage; and
- b) after the withdrawal of the Second Proposed Order, the applicant (indeed, both parties) devoted considerable time in the proceeding to evidence and submissions about the underlying merits of the Disputed Works, which was disproportionate to the relevance of those matters to the issues to be determined.

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In the event, I do not consider there to be a sufficient basis to depart from the ordinary position that the parties are to bear their own costs.

Orders

The Tribunal orders:

Pursuant to s 199(1) of the *Strata Titles Act 1985* (WA):

1. The voting process undertaken by the respondent on 9 December 2020, in connection with a 'Notice of Circular Resolution' dated 24 November 2020, did not result in an ordinary resolution (or any resolution) of the strata company, and the purported resolution is invalid.
2. The respondent is not, by reason of the vote taken on 9 December 2020, authorised to undertake the works the subject of the 'Notice of Circular Resolution' dated 24 November 2020.

⁶⁶ She points in her Closing Submissions to alleged departures from 'fair process', particularly in relation to the obligation to provide a summary of witnesses' evidence.

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

DR B MCGIVERN, MEMBER

8 DECEMBER 2021