[2021] WADC 116

JURISDICTION	:	DISTRICT COURT OF WESTERN AUSTRALIA IN CIVIL
LOCATION	:	PERTH
CITATION	:	SARDUL SINGH -v- THOMPSON [2021] WADC 116
CORAM	:	LEMONIS DCJ
HEARD	:	30 & 31 JULY & 27 NOVEMBER 2020 & 28 JANUARY 2021
DELIVERED	:	30 NOVEMBER 2021
FILE NO/S	:	CIVO 162 of 2018
BETWEEN	:	AMARJIT KAUR SARDUL SINGH First Applicant CHAMKAUR SINGH SARBAN SINGH Second Applicant AND ELISE MARIE THOMPSON First Respondent ROBERTO GAUDIERI Second Respondent
FILE NO/S	:	CIVO 237 of 2019
BETWEEN	:	ROBERTO GAUDIERI First Applicant ELISE MARIE GAUDIERI Second Applicant

AND

AMARJIT KAUR SARDUL SINGH
First Respondent

CHAMKAUR SINGH SARBAN SINGH
Second Respondent

Catchwords:

Two lot strata scheme - Home on one lot demolished and new home built with agreement of all lot owners - Requisite changes to strata plan to reflect new home not made - Consideration of effect of not doing so - Adjoining lot subsequently sold - New owners wish to develop their lot and propose conversion to green title - Owners of lot on which new home built do not agree to conversion to green title - New owners apply to terminate strata scheme - Owners of lot on which new home built apply for orders such that the strata plan and unit entitlements reflect that new home

Legislation:

Strata Titles Act 1985 (WA)
Transfer of Land Act 1893 (WA)
Valuation of Land Act 1978 (WA)

Result:

In CIVO 162 of 2018, the application for termination of the strata scheme is dismissed

In CIVO 237 of 2019, the application that certain resolutions be deemed to have been passed as unanimous resolutions is dismissed

In CIVO 237 of 2019, the application to vary the strata plan and to substitute a new schedule of unit entitlements is allowed subject to satisfaction of certain conditions

Representation:

CIVO 162 of 2018

Counsel:

First Applicant	:	Mr R Singh
Second Applicant	:	Mr R Singh
First Respondent	:	Mr M A Atkinson
Second Respondent	:	Mr M A Atkinson

Solicitors:

First Applicant	:	Amasons Legal
Second Applicant	:	Amasons Legal
First Respondent	:	Atkinson Legal
Second Respondent	:	Atkinson Legal

CIVO 237 of 2019

Counsel:

First Applicant	:	Mr M A Atkinson
Second Applicant	:	Mr M A Atkinson
First Respondent	:	Mr R Singh
Second Respondent	:	Mr R Singh

Solicitors:

First Applicant	:	Atkinson Legal
Second Applicant	:	Atkinson Legal
First Respondent	:	Amasons Legal
Second Respondent	:	Amasons Legal

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

Bendall-Harris v Aitken [2008] WADC 112
Crugnale and Commissioner of State Revenue [2019] WASAT 8
De Mol Investments Pty Ltd v The Owners of Strata Plan No 31757 [2019] WADC 86
McHattie v Tuscan Investments Pty Ltd (1997) 18 SR (WA) 231

Mohammadi v Bethune [2018] WASCA 98
The Owners SP 35042 v Seiwa Australia Pty Ltd [2007] NSWCA 272
Tipene v The Owners of Strata Plan 9485 [2015] WASC 30
Topic v Owners of Raffles Waterfront Strata Plan 48545 [2016] WASAT 27
Wise v Owners of Argosy Court Strata Plan 21513 [2011] WASC 307

LEMONIS DCJ:

1 These two sets of proceedings concern a two-lot single tier strata scheme, which is the subject of strata plan 8695. The lots are known as 52A and 52B Leonora Street, Como.

2 Mr and Mrs Singh are the owners of lot 1, being 52A Leonora Street. Mr and Mrs Gaudieri are the owners of lot 2, being 52B Leonora Street. The background to the dispute can be summarised as follows.

3 Mrs Treasure previously owned lot 1, at a time when the Gaudieris owned lot 2. The Gaudieris wanted to replace their home on lot 2 with a new two storey home. They spoke to Mrs Treasure and she agreed to them building the proposed new home. The old home was demolished in June 2014. A new two storey home was built. The Gaudieris moved into the new home in November 2015.

4 Even though Mrs Treasure had agreed to the construction of the new home on lot 2, the strata plan still needed to be varied to reflect that new structure. In addition, the existing unit entitlements needed to be adjusted. They were derived from the old structures and accordingly reflected the comparative capital values of those structures. However, the new home on lot 2 was of significantly greater value than the home on lot 1. Thus, the unit entitlements no longer reflected the capital value of the structures post the construction of the new home on lot 2.

5 Unfortunately, the necessary variations to the strata plan and unit entitlements were not implemented by the Gaudieris and Mrs Treasure.

6 In 2017, Mrs Treasure decided to sell lot 1. She engaged Mr St Quintin of Soco Realty as the selling agent and the property was initially listed for sale on or about 11 December 2017. At this point in time, the Canning Bridge Activity Centre Plan had been released, which allowed for greater development in the area where the land the subject of the scheme was situated. Lot 1 was advertised as being amenable to development, subject to South Perth City Council approval.

7 The Singhs purchased lot 1 from Mrs Treasure. They became the registered proprietors of it on 28 June 2018. The Singhs purchased lot 1 with the intention of developing it. Their preference is to construct a multi-storey apartment building, however the specifics of that development remain very much in the abstract, as does the Singhs'

financial capacity to fund such a development. The Gaudieris oppose the development of lot 1 in such a manner. To effect their development, the Singhs wish the parcel of land the subject of the scheme to be converted to green title. The Gaudieris do not agree to this.

8 After the Singhs became the registered proprietors of lot 1, the Gaudieris sought to regularise the strata scheme so that it reflected the new home they had built on lot 2. Ultimately, on 30 July 2019, an extraordinary general meeting (EGM) was held of the strata company. Two resolutions, being resolutions 6.1 and 6.2, were put to effect a re-subdivision of the existing strata plan to take account of the new structure on lot 2.[1] Resolution 6.1 sought to effect the re-subdivision. It was put, as it needed to be, as a unanimous resolution. Resolution 6.2 sought to approve the affixation of the common seal of the strata company to those documents necessary or incidental to effect the re-subdivision.

9 The Gaudieris voted for, and the Singhs voted against, the resolutions. The resolutions therefore failed.

10 The parties are now in dispute as to two matters. First, the re-development of lot 1 proposed by the Singhs. Second, the re-subdivision proposed by the Gaudieris to take account of the new structure on lot 2.

11 The situation in which the parties find themselves is largely a result of their own conduct. Prior to the Singhs becoming the registered proprietors of lot 1, the Gaudieris had not made any commitment that they would agree to a re-development of lot 1. Further, the Singhs had not made any substantive enquiries as to the development opportunities which were feasible. The Singhs' intentions regarding lot 1 were, and remain, embryonic. On the other hand, it was only after the Singhs became the registered proprietors of lot 1, that the Gaudieris took the requisite steps to regularise the strata scheme so as to take account of their new home.

12 There is no doubt that the uncertainty surrounding the strata scheme has caused, and continues to cause, the Singhs and the Gaudieris much angst. As a consequence of their disputes, these two sets of proceedings were commenced.

[1] Gaudieris' bundle of documents, pages 215 - 216.

13 On 1 October 2018, the Singhs commenced CIVO 162 of 2018 against the Gaudieris. The Singhs seek an order pursuant to s 31 of the *Strata Titles Act 1985* (WA) that the strata scheme be terminated. They also seek orders effecting the conversion of the strata scheme to green title, which will, it seems, enable them to proceed with a development on lot 1 without the need for the Gaudieris' consent. Green title in effect is land which has no common ownership, common services or common property. Importantly, it is not the subject of any of the strata titles legislation.

14 On 30 July 2019, the Gaudieris commenced CIVO 237 of 2019 against the Singhs. The Gaudieris apply for an order pursuant to s 51A of the *Strata Titles Act* declaring that the resolutions put to the EGM be deemed as having been passed as unanimous resolutions. In the alternative, the Gaudieris seek an order pursuant to s 28(1) of the *Strata Titles Act* varying the existing strata plan to reflect the re-subdivision which was the subject of the resolutions voted upon at the EGM, and to adjust the unit entitlements to reflect the comparative capital values of the current structures on each lot.

15 On the first day of the hearing, the Gaudieris sought leave to amend their originating summons in terms of a minute of proposed revised orders dated 30 July 2020. The effect of the changes sought was to introduce ancillary relief to enable the strata company to implement the substantive effect of the primary orders. This does not introduce any new factual matters. It seeks to ensure that if I grant the substantive relief sought by the Gaudieris, it can be carried into effect by the strata company. I consider it is appropriate to grant leave for the Gaudieris to amend the originating summons so as to replace the existing orders 1 and 2 with the orders 1 and 2 set out in the minute. I grant that leave.

16 A point of importance in both matters is whether the demolition of the old home on lot 2 resulted in the extinguishment of lot 2. The Singhs contend it did and rely on this in support of their own application, and in opposition to the Gaudieris' application. The Gaudieris contend that the demolition of the old home did not extinguish lot 2. Consideration of this issue requires careful analysis of the decision of the Supreme Court of Western Australia in ***Tipene v The Owners of Strata Plan 9485* (*Tipene No. 2*)**,[2] which I address later in these reasons.

[2] ***Tipene v The Owners of Strata Plan 9485*** [2015] WASC 30.

17 Both sets of proceedings were commenced prior to the commencement of the new amendments to the *Strata Titles Act,* which have a commencement date of 1 May 2020. That being so, pursuant to sch 5, cl 30(1) of the amended *Strata Titles Act,* the proceedings must be dealt with as if the amending Act had not been enacted. Accordingly, the references in these reasons to the *Strata Titles Act* (the Act) are to the provisions of the Act in force prior to 1 May 2020, unless I have expressly indicated otherwise.

18 There is a significant degree of overlap between the two proceedings, in particular as part of the grounds relied on by the Singhs for an order that the scheme be terminated are that the existing plan does not reflect the current building on lot 2.

19 At this juncture, it is useful to describe the legislative structure applicable to the strata scheme and to then explain the history of that scheme. I will start with the applicable principles of statutory construction.

Statutory construction

20 The principles applicable to the process of statutory construction were summarised by the Court of Appeal of Western Australia in ***Mohammadi v Bethune***.[3] I adopt that summary. Statutory construction requires attention to the text, context and purpose of the Act under consideration. As their Honours noted in ***Mohammadi v Bethune*** at [32] and [33]:

> The primary object of statutory construction is to construe the relevant provision so that it is consistent with the language and purpose of all the provisions of the statute.
>
> The objective discernment of the statutory purpose is integral to contextual construction. The statutory purpose may be discerned from an express statement of purpose in the statute, inference from its text and structure and, where appropriate, reference to extrinsic materials. The purpose must be discerned from what the legislation says, as distinct from any assumptions about the desired or desirable reach or operation of relevant provisions.
>
> (footnotes omitted)

[3] ***Mohammadi v Bethune*** [2018] WASCA 98 [31] - [36].

21 Further, their Honours identified that the statutory purpose is particularly significant where there is a range of possible meanings, stating at [34]:

> Discernment of statutory purpose is particularly significant in cases, commonly encountered, where the constructional choice presented is from 'a range of potential meanings, some of which may be less immediately obvious or more awkward than others, but none of which is wholly ungrammatical or unnatural'. In such a case, the choice 'turns less on linguistic fit than on evaluation of the relevant coherence of the alternatives with identified statutory objects or policies'.
>
> (footnotes omitted)

The legislative regime applicable to the strata scheme

22 Pursuant to s 4(1) of the Act, land may be subdivided into lots, or lots and common property, by the registration of a strata plan or a survey-strata plan. A strata plan consists of, amongst other matters, a location plan and a floor plan: s 4(1a)(c) and s 5(1)(a).

23 The strata scheme here is a two-lot strata scheme, designated as lot 1 and lot 2. It is a single tier strata scheme. A single tier strata scheme is one where no lot or part of a lot is above or below another, subject to any permitted boundary deviations: s 3(1). Each lot in this scheme has a building on it, being a residential home. I understand there are not any permitted boundary deviations for this scheme.

24 Before turning to the scheme, it is useful to first explain:

1. The features of a lot and common property in a strata scheme.
2. The operation of s 21Q of the Act.
3. How a re-subdivision may be effected under the Act.
4. How common property may be acquired, or disposed of, under the Act.

Lots and common property

25 The concept of what constitutes a lot within a two-lot strata scheme is arrived at by the application of a number of inter-related definitions and statutory provisions.

26 The word *lot* is defined in s 3(1). A lot means one or more cubic spaces forming part of the parcel to which a strata scheme relates.

The base of each such cubic space is designated as one lot or part of one lot on the floor plan which forms part of the strata plan for the scheme. The concept of 'cubic space' includes a reference to space contained in any three-dimensional geometric figure which is not a cube: s 3(3).

27 From that starting point, it is then necessary to determine what are the boundaries of the relevant lot. The boundaries are designated as vertical boundaries and horizontal boundaries.

28 The vertical boundaries are identified by lines, the base of which appear on the floor plan. In this respect, relevant to this case, par (a) of the definition of floor plan in s 3(1) refers to a plan which defines by lines:

> … the base of each vertical boundary of every cubic space forming the whole of a proposed lot, or the whole of any part of a proposed lot, to which the plan relates;

29 Pursuant to par (b)(i) of that definition, a floor plan also must show the floor area of any such cubic space. Also, where any such cubic space forms part only of a proposed lot, the floor plan also must show the aggregate of the floor areas of every cubic space comprising the proposed lot: par (b)(ii) of the definition.

30 These provisions recognise that a lot can include part lots.

31 Horizontal boundaries are ascertained under s 3(2), subject to the operation of s 3AB.

32 Section 3AB applies to the existing scheme. This is because the existing strata plan was registered on 25 March 1997 (being after 20 January 1997[4] and before 1 January 1998) and did not provide that s 3AB does not apply to it: s 3A(1)(a).

33 The application of s 3AB results in s 3(2)(a) being displaced: s 3AB(4)(a). The application of s 3(2)(b) however remains: s 3AB(4)(b). Section 3(2)(b) defines the boundaries of any cubic space referred to in par (a) of the definition of floor plan. Relevantly to this case, the horizontal boundaries are as described on a sheet of the floor plan relating to that cubic space, those boundaries being described by reference to a wall, floor or ceiling in a building to which that plan relates.

[4] 20 January 1997 is the commencement date of s 6 of the *Strata Titles Amendment Act 1996*.

34 Further, for a single tier strata scheme, s 3AB fixes the boundaries of lots and parts of lots other than boundaries that are external to a building: s 3A(1). In respect of a lot within a single tier strata scheme, s 3AB fixes the boundaries of a building represented on the relevant floor plan by reference to the external services of that building: s 3AB(1)(a).

35 Each lot owner has a unit entitlement, which is calculated by reference to the proportionate value of the lot compared to the aggregate value of all of the lots: s 14(2). The concept of value for a strata scheme picks up the meaning of capital value under the *Valuation of Land Act 1978* (WA): s 14(2a)(a). Under that Act, there are numerous different ways in which the unit entitlements can change. This includes by way of an order of the State Administrative Tribunal if satisfied that the unit entitlement of any lot is not consistent with the proportionate value of that lot compared to the aggregate value of all lots and the inconsistency is sufficiently great as to be unfair or anomalous: s 103H(3). Also, the unit entitlements can be varied on an application under s 28 to vary the plan or substitute a new plan. So, the unit entitlements are not set in stone.

36 Relevantly, common property in relation to a strata plan is defined in s 3(1) as meaning so much of the land comprised in a strata plan as from time to time is not comprised in a lot shown on the plan.[5] Common property is held by the proprietors of the lots as tenants in common in shares proportional to their unit entitlements: s 17(1).

37 Once a strata plan is registered under the Act, the lots comprised in the plan may be dealt with in the same manner and form as land held under the *Transfer of Land Act 1893* (WA): s 4(2) of the Act. This provision recognises that the lot is not land per se. Further, registration under the Act results in the strata plan being deemed to be embodied in the Register held under the *Transfer of Land Act*: s 4(3) of the Act. Pursuant to s 4(3), a proprietor holds their lot and share in the common property subject to:

> (a) any interests for the time being notified on the registered strata/survey-strata plan; and
>
> (b) any amendments to lots or common property shown on that plan.

[5] The definition of common property also includes at par (b) a leasehold interest acquired by the strata company, however that scenario is not engaged here.

38 For a single tier strata scheme, this rather involved set of interacting provisions yields the following results:

1. The base of each vertical boundary for a lot is designated on the floor plan.

2. The horizontal boundaries are designated on the floor plan by reference to a wall, floor or ceiling in a building to which that plan relates.

3. The boundaries of a building on a lot are the external surfaces of that building, which then comprises a part lot within the overall lot.

4. Common property is so much of the land comprised in the scheme which is not comprised in a lot shown on the plan.[6]

5. The proprietors of the lots hold the common property as tenants in common in shares proportional to their unit entitlements.

Section 21Q

39 An analysis of s 21Q is required because the Singhs contend the resolutions put at the EGM were resolutions under s 21Q and thus s 51A does not apply to those resolutions: s 51A(1a). This proposition is put on the basis that what in truth is sought by the Gaudieris is an amendment to the strata plan to include a building not shown on it: see s 21Q(1)(b).

40 Section 21Q applies to this strata scheme as it was registered prior to 1 January 1998: s 21P. Section 21Q relevantly provides that a strata company for a strata scheme may resolve that the strata plan be amended to include a building not shown on the plan and to merge land that is common property into a lot: s 21Q(1)(b) and s 21Q(1)(c). In the case of a two-lot scheme, such a resolution must be a unanimous resolution, unless an order is made under s 103C that it is deemed to have been passed as a unanimous resolution: s 21Q(2)(a) and s 21Q(2)(b).

41 Where a strata company has passed a resolution under s 21Q, it may lodge a notice of the resolution with the Registrar of Titles: s 21S(1). If the relevant requirements in respect of the resolution are

[6] See footnote 5.

satisfied, the Registrar of Titles is to register the notice of resolution: s 21X.

42 After a resolution has been registered under s 21X, no further resolution may be registered under that section in respect of the relevant scheme: s 21C(2).

43 The effect of these provisions is that the procedure made available by s 21Q to allow for the strata plan to be amended so as to include a building not shown on the plan may be used only once. As I explain below, s 21Q has already been utilised in respect of this strata scheme and, accordingly, is no longer available for use. Therefore, the Gaudieris cannot avail themselves of s 21Q. They accept that they are not seeking to do so. Their position in respect of the resolution is that it seeks to effect a re-subdivision in accordance with s 8. This is because the resolution seeks to alter the boundaries of lot 2.

44 In effect, the Singhs' submission is that the only way a plan can be amended to reflect a new building, or an alteration to a building, is under s 21Q. I disagree. As I explain below, the re-subdivision process afforded by s 8 is available to accommodate a proposed change of boundaries brought about by new buildings, or an alteration to buildings. Also, the process available under s 28 expressly envisages the construction of a new building, or alterations to an existing building, with consequent changes to the plan to reflect this.

45 Further, as the Gaudieris' counsel submits, s 21Q was introduced as part of a suite of amendments, including the introduction of a new version of s 3AB into the Act, and the alternative boundaries which it provided for. In this respect, s 21Q does not apply to a plan registered on or after 1 January 1998: s 21P. Understood in this way, s 21Q operates to afford changes to a plan envisaged by s 3AB. It does not operate such that it is the only mechanism by which a plan can be amended to reflect a new, or altered, building.

46 Accordingly, I do not see s 21Q as an obstacle to the resolution for re-subdivision proposed by the Gaudieris, nor to the Gaudieris' application under s 28.

47 I now turn to legislative provisions pertaining to the re-subdivision of a strata scheme.

Re-subdivision within the meaning of the Act

48 Section 8(1) of the Act permits the re-subdivision of lots or common property, or lots and common property.

49 A lot in a strata scheme may only be re-subdivided by a strata plan of re-subdivision: s 8(2). An application for registration of a plan of re-subdivision must be accompanied by, amongst other matters, confirmation that the strata company has by unanimous resolution consented to the proposed re-subdivision and to the proposed allocation of unit entitlements: s 8A(a)(ii)(I). Upon registration, a plan of re-subdivision shall be deemed to be part of the previously registered strata plan, and the Registrar of Titles is to amend the existing strata plan and unit entitlements in accordance with the application: s 8C(1).

50 Section 3(5) of the Act defines what constitutes a re-subdivision. It provides that a reference in the Act to a re-subdivision of a lot or common property is a reference to the alteration of the boundaries of lots or common property in one or more of the combinations that are respectively set out at s 3(5)(a) - s 3(5)(d). Those combinations are as follows:

> … the alteration of the boundaries of -
>
> (a) one or more lots so as to create only 2 or more different lots; or
>
> (b) one or more lots so to create one or more different lots and common property; or
>
> (c) one or more lots and common property so as to create one or more different lots or one or more different lots and common property; or
>
> (d) common property so as to create one or more lots,
>
> but does not include a reference to the consolidation of 2 or more lots into one lot or the conversion of one or more lots into common property.

51 Section 8A sets out the requirements of a plan of re-subdivision. Section 8A(b) requires that a plan of re-subdivision define the boundaries of each lot that is to be altered or created by the plan of re-subdivision and in the case of a re-subdivision for a strata scheme, do so by reference to a floor plan.

Acquisition and disposal by the strata company of common property

52 Pursuant to a unanimous resolution of a two-lot scheme, the strata company may accept a transfer of unencumbered land which is part of

or contiguous to the land comprised in the plan for the purpose of creating new or additional common property: s 18(1).[7]

53 Further, the strata company of a two-lot scheme may execute a transfer of common property pursuant to a unanimous resolution and where the strata company is satisfied that all persons concerned have consented in writing to the transfer: s 19(2).[8]

54 The effect of s 18(1) and s 19(2) in respect of a two-lot scheme is that a strata company may acquire and dispose of common property pursuant to a unanimous resolution and subject to the further particular requirements of those sections.

55 Before coming to the relief sought by the parties, it is necessary to first explain the existing scheme and what is sought to be effected by the proposed re-subdivision advanced by the Gaudieris.

The existing strata scheme

56 The initial strata scheme was registered on 25 November 1980. It comprised two lots, being lot 1 and lot 2. The respective unit entitlements were two units for lot 1 and one unit for lot 2. The plan designated two buildings and certain areas which were for the use of lot 1 and lot 2 respectively.[9] The boundaries of the lots comprising the buildings were the external surfaces of the buildings, as provided for by the then s 3AB.[10] The rest appears to have been common property.

57 On 19 February 1997, the then owners of lot 1 and lot 2 passed a unanimous resolution under s 21Q.[11] The resolution effected the following matters:

1. In respect of the lots or part lots comprising buildings shown on the strata plan, the boundaries were fixed by reference to the external surfaces of those buildings as provided for by s 3AB: par 1 of the notice of resolution.

[7] The term *parcel* which appears in s 18(1) is defined in s 3(1) to mean the land comprised in the strata plan.
[8] In this case, I do not need to determine whether the phrase *all persons concerned* includes the lot owners. I expect it does not, as that would be inconsistent with the requirement for a resolution, however nothing turns on that in this case.
[9] Singhs' bundle of documents, pages 28 - 30.
[10] Singhs' bundle of documents, page 30.
[11] The notice of resolution as required by s 21S is contained at Singhs' bundle of documents, page 42.

2. The strata plan be amended to show an extension or alteration to existing buildings shown on the strata plan as depicted on the sketch plan tabled for the purposes of the resolution: par 2(a).[12]

3. The merger of land that was common property into the respective lots on the strata plan as depicted on the sketch plan: par 2(c)(i).

4. The horizontal boundaries of the land in the lots on the strata plan were designated as 20 metres above and 5 metres below the upper surface level of the ground floor of each owner's respective adjoining unit: par 3(b).

5. The lot owners consented to the schedule of unit entitlements being as set out in the schedule tabled for the purposes of the resolution: par 5. (The unit entitlements did not change from what they were previously.)[13]

58 The resolution was registered by the Assistant Registrar of Titles on 25 March 1997.[14] The result of the matters effected by the resolution was that:

1. Land that was previously common property was merged into the lots as depicted on the new plan.

2. The vertical boundaries were as designated on the new floor plan.[15]

3. The horizontal boundaries extended between 5 metres below and 20 metres above the upper surface level of the ground floor of the building on each respective lot.

4. The buildings on the lots constituted a part lot, the boundaries of such part lots being the external surfaces of the buildings.

59 In relation to what I have set out at [58(3)], the form of the resolution which described the horizontal boundaries was:[16]

> That the horizontal boundaries of the land in the lots on the strata plan are -
>
> (b) 20 metres above and 5 metres below the upper surface level of the ground floor of their respective adjoining unit.

[12] The plan appears at Singhs' bundle of documents, page 33.
[13] Singhs' bundle of documents, page 36.
[14] As is reflected by the notation on the plan at Singhs' bundle of documents, page 33.
[15] Singhs' bundle of documents, pages 33 - 34.
[16] Singhs' bundle of documents, page 42, resolution 3.

60 This might have been more precisely worded, as the use of the phrase *respective adjoining unit* and its effect is somewhat ambiguous. However, overall, in my view, the proper interpretation of the resolution is that the lower and upper horizontal boundary for each lot is designated by reference to 20 metres above and 5 metres below the upper surface level of the ground floor of the building *on that lot*. It would not serve any sensible purpose for the phrase *adjoining unit* to mean the building on the adjoining lot.

61 Further, in my view, the designation of the lower and upper horizontal boundaries by reference to the upper surface level of the ground floor applies across the entirety of the land comprising the lot. I cannot discern any sensible purpose why that would only apply to the areas external to the buildings, but not include the area below and above those buildings.

62 Understood in this way, each lot comprises:

1. As a part lot, the cubic space comprised within the external surfaces of the building described on the plan.

2. As a part lot, the cubic space constituted by the vertical boundaries as designated on the floor plan, with the upper and lower boundaries being 20 metres above and 5 metres below the upper surface level of the ground floor of the building on the lot, excluding the building itself.

63 The amalgam of these part lots results in the boundaries of lot 2 being as follows:

1. The vertical boundaries are the delineation of lot 2 on the plan.

2. The horizontal boundaries are 20 metres above and 5 metres below the upper surface level of the ground floor of the building.

64 As a result of the merger of common property effected by the resolution, the only common property which remained was the air space above the upper 20 metre horizontal boundary and the earth below the lower 5 metre horizontal boundary. The area above the upper horizontal boundary, and below the lower horizontal boundary, is common property.[17] However, it is likely that the extent of this common property is not indefinite, but only extends as far as is

[17] ts 478.

necessary for the ordinary use and enjoyment of the land and structures the subject of the lot.[18] It is not necessary to determine in this case the extent to which the common property extends beyond the designated upper and lower horizontal boundaries.

65 I have attached as an annexure to these reasons a lot 2 sketch elevation prepared by the Gaudieris' solicitors which depicts the cubic space of lot 2 consistent with how I have just described it. The sketch also depicts the cubic space of the proposed new lot 3.

66 I now turn to the proposed re-subdivision the subject of the resolutions put to the EGM.

The proposed re-subdivision

67 The proposed re-subdivision was the subject of resolutions 6.1 and 6.2 put to the EGM.

68 Given their significance to this matter, I set out in full the terms of resolutions 6.1 and 6.2:[19]

> *6.1 Re-subdivision of Lot 2 to create Lot 3*
>
> **Proposed motion:**
>
> That, by unanimous resolution but subject to a plan of re-subdivision meeting the requirements of Landgate (**plan of re-subdivision**) substantially in terms of the plan of re-subdivision enclosed with the notice of meeting being marked 'In Order For Dealing' at Landgate, the strata company:
>
> (a) consents to the re-subdivision of lot 2 as set out in the plan of re-subdivision;
>
> (b) consents to the proposed aggregate unit entitlement and proposed allocation of unit entitlement as set out in the form 3 enclosed with the notice of meeting; and
>
> (c) consents to the acquisition or transfer by the strata company of any common property as provided for in the plan of re-subdivision.
>
> *6.2 Execution of documents to effect re-subdivision of lot 2*
>
> **Proposed motion:**
>
> That the common seal of the strata company be affixed to all documents necessary or incidental to give effect to the preceding resolution, including but not limited to:

[18] Edgeworth B, *Butt's Land Law* (7th ed, 2017) 2.60.
[19] Gaudieris' bundle of documents, pages 215 - 216.

(a) A form 20 Application for re-subdivision by strata company;

(b) A form 23 Disposition on re-subdivision;

(c) Any document required by the Office of State Revenue to enable transfer duty on the form 23 to be assessed; and

(d) Any other document required by Landgate to enable the form 20 and the form 23 to be registered.

69 Resolution 6.1 was put as a unanimous resolution, as it needed to be. The need for unanimity arises from s 8A(a)(ii)(I), s 18(1) and s 19(2), which I have respectively addressed at [49], [52] and [53] above.

70 Resolution 6.1 sought to obtain the consent of the strata company to three interrelated matters. First, the re-subdivision of lot 2 as set out in the proposed plan of re-subdivision: resolution 6.1(a). Second, the reallocation of units consequent upon the re-development: resolution 6.1(b). Third, the acquisition or transfer by the strata company of any common property as provided for in the proposed plan: resolution 6.1(c). The re-subdivision proposed the creation of a new lot 3 in substitution for the existing lot 2.

71 Resolution 6.2 was to the effect that the common seal of the strata company be affixed to all documents necessary or incidental to give effect to resolution 6.1.

72 The plan of re-subdivision identified the boundaries of the new home built by the Gaudieris.[20] It described the boundaries for the new lot 3 in similar, but not identical, terms to the description of the boundaries on the existing plan. It did so in these terms:[21]

> The boundaries of the lots or parts of the lots which are buildings shown on the strata plan are the external surfaces of those buildings as provided by section 3AB of the Strata Titles Act 1985.
>
> The stratum of the part lots, including the cubic space above and below the part lots comprising buildings, is limited between 5 metres below and 20 metres above the upper surface level of the lowest ground floor of the main building situated on each respective lot, including where covered.

73 The second paragraph set out above is in much clearer terms than the description of the horizontal boundaries contained on the existing plan, which I have addressed at [59] - [61] above. It is to the effect that

[20] Gaudieris' bundle of documents, page 218.
[21] Gaudieris' bundle of documents, page 218; the terms are capitalised in the original.

the horizontal boundaries for the entire area of the lot are 5 metres below and 20 metres above the upper surface level of the lowest ground floor of the main building situated on each respective lot, with the building itself comprising a separate part lot within those horizontal boundaries. Overall, this is consistent with my interpretation of the existing plan, except that the reference point is described in different terms. In the new plan it is described as the upper surface level of the lowest ground floor of the main building. In the old plan the reference point is the upper surface level of the ground floor.

74 From having reviewed the plans of the new home,[22] there are varying floor levels on the ground floor, so presumably the introduction of the concept of *lowest* ground floor is to accommodate this.

75 The new floor plan is likely to result in a shift in the horizontal boundaries from those set out in the existing plan. This is because the designated reference point for the lower and upper horizontal boundaries is likely to differ between the old and the new plan. That being so, the cubic space will shift upwards or downwards depending on whether the new upper surface level is higher or lower than the previously designated level.

76 As an example, if the new reference point is 50 cm higher than the previous level, the cubic space shifts 50 cm higher. The proposed re-subdivision, if approved, would then result in the strata company transferring to the Gaudieris 50 cm of common property above the prior upper horizontal boundary (which is air space), and the strata company acquiring from the Gaudieris 50 cm of additional common property above the prior lower horizontal boundary (which is under ground). The total cubic space area will however remain the same, as both lower and upper horizontal boundaries shift by the same amount (50 cm in this example).

77 I turn now to the legislative basis for the relief sought by the Singhs and the Gaudieris. I will commence with the Singhs' originating summons, as it was the first in time.

The Singhs' originating summons

78 The Singhs' substituted originating summons filed 3 October 2018 set out a number of grounds relied on in support of an order for termination of the strata scheme. In effect, those grounds are that:

[22] Gaudieris' bundle of documents, pages 108 - 109.

1. The construction of the new home by the Gaudieris on lot 2 resulted in a contravention of the Act, in particular s 3, s 5, s 5B and s 7(2)(b): pars 2 - 5 of the originating summons.

2. The Gaudieris are estopped from refusing permission for the Singhs to convert the strata scheme to green title for the purposes of redeveloping lot 1 in accordance with the Canning Bridge Activity Centre Plan: par 6. The Singhs did not press the estoppel argument in their final submissions.[23]

79 The balance of the originating summons sets out the orders which the Singhs seek: pars 1, 7, 8 and 9. The principal orders sought are an order terminating the scheme (par 1), an order that the parties must do all things necessary to convert the strata scheme to green title with a consequent liability to pay compensation where a party hindered such conversion (par 8) and an order that the Gaudieris pay half of the costs associated with that conversion (par 7). The conversion of the land the subject of the scheme to green title is sought as a means of effecting the termination of the scheme.[24] The substantive relief sought by the summons is the termination of the scheme itself.

80 Section 31(1) of the Act provides this court with the discretion to make an order terminating the scheme upon the application of, amongst others, a proprietor of a lot in the scheme. The Singhs therefore have standing to bring the application. The Singhs' counsel accepted in closing submissions that absent the Gaudieris having built a new home on lot 2, it would be difficult for the Singhs to obtain an order for termination of the scheme.[25]

81 The application of s 31 was considered recently in this court by his Honour Judge Bowden in ***De Mol Investments Pty Ltd v The Owners of Strata Plan No 31757*** (***De Mol***).[26] His Honour set out the principles applicable to the application of s 31, noting:

1. The discretion afforded by s 31 is an unfettered statutory discretion.

2. The purpose, scope and context of the Act includes recognising that there are on occasion deadlocks or disagreements between

[23] Singhs' written submissions in CIVO 162 of 2018, par 11.
[24] It is sought under s 31(3)(g).
[25] ts 343 - ts 344, ts 455.
[26] ***De Mol Investments Pty Ltd v The Owners of Strata Plan No 31757*** [2019] WADC 86 [72] - [77].

> lot proprietors. A termination of the scheme is one mechanism by which such deadlocks or disagreements can be resolved.
>
> 3. The discretion must be exercised with due consideration to those who might be affected by its exercise.
>
> 4. Each case must be considered on its own merits.
>
> 5. The court's discretion under s 31 is a broad discretion.
>
> 6. Termination is a drastic matter which drastically alters the property rights of the parties.

82 I agree with and adopt this recitation of the principles applicable to the operation of s 31.

83 If I was to make an order terminating the scheme, the strata company is required to immediately lodge a copy of that order with the Registrar of Titles: s 31(8). The Registrar of Titles is then to make an entry on the relevant registered strata plan and also, where applicable, on the relevant certificates of title: s 31(9). Upon that entry being made, the proprietors of lots in that strata plan are entitled to the parcel of land the subject of the scheme as tenants in common in shares proportional to the unit entitlements of their respective lots: s 31(10)(a), s 30(2).

84 Further, an order for termination shall include directions in respect of:[27]

> any matter in respect of which it is, in the opinion of the District Court, just and equitable, in the circumstances of the case, to make provision in the order …

85 If I was of the opinion that an order for termination should not be made, the application for termination may, on the application of any person entitled to appear and be heard on that application, or of the court's own motion, be treated as an application for variation of the strata scheme under s 28.[28] Where a court orders an application for termination be treated as an application under s 28, there is an issue whether the application under s 28 is preconditioned by the requirements that a building be damaged or destroyed, or becomes an application *at large*.[29] My initial view is that it would seem

[27] Section 31(3)(g).
[28] Section 31(6)(a) and s 31(6)(b).
[29] See ***De Mol*** [209] - [210].

a somewhat unusual outcome that an unsuccessful application for termination can result in a much broader available basis for variation of the scheme than provided for by s 28. Further, in substance, s 28 is directed to the consequences of damage or destruction, so large parts of it would have no application if damage or destruction was not a precondition. In any event, given I have come to the view that s 28 is engaged in this case on the Gaudieris' application, it is not necessary for me to determine the breadth of s 28 when it is engaged via the pathway of s 31.

The Gaudieris' originating summons

86 The Gaudieris' originating summons seeks substantive relief under s 51A of the Act, in the alternative s 28: pars 1 and 2 of the proposed orders.

87 The relief sought pursuant to s 51A is for this court to declare that resolutions 6.1 and 6.2 are deemed to have been passed by the strata company as unanimous resolutions. The alternative relief sought under s 28 is for this court to make an order varying the strata plan so that it reflects the re-subdivision the subject of those resolutions.

88 The parties appear to accept that resolutions 6.1 and 6.2 needed to be passed by unanimous resolution. Resolution 6.1 was put as a unanimous resolution, as it needed to be. Resolution 6.2 however appears to have been put only as an ordinary resolution.[30] No party has raised any issue with this and it seems to me that in effect the required unanimity for resolution 6.1 flows through to resolution 6.2, as resolution 6.2 seeks to carry into effect resolution 6.1.

89 Because the required unanimity has not been obtained, the Gaudieris may apply to this court pursuant to s 51A for an order declaring that the relevant resolution is deemed to have been duly passed by the strata company as a unanimous resolution: s 51A(1) and (2).

90 The procedure afforded by s 51A does not apply to a unanimous resolution required under s 21Q: s 51A(1a). As I have explained at [39] - [46], the resolutions cannot be treated as a resolution under s 21Q. Accordingly, the restriction imposed by s 51A(1a) is not engaged here.

[30] Gaudieris' bundle of documents, pages 208 - 210.

91 The primary order sought by the Gaudieris is a declaratory order pursuant to s 51A(2). The order sought by the Gaudieris also includes the following:[31]

> … an order that the [Singhs] execute and cause the strata company to execute such documents and do such things as may be necessary to give effect to those resolutions.

92 I have my doubts as to whether this court has jurisdiction at this point in time to make such an order. The power given to this court under s 51A is to declare that a particular resolution is deemed to have been duly passed by the strata company as a unanimous resolution. Section 51A does not provide the court with any ancillary powers. In contrast, the Act does provide the court with such powers on an application to vary or substitute under s 28: see s 28(3)(h), or on an application for termination under s 31: see s 31(3)(g). It would seem to me the better view is that if I made the primary orders sought by the Gaudieris under s 51A, the ancillary order would need to be sought at a later time (perhaps in these proceedings) depending on whether the Singhs had obstructed the implementation of the resolutions the subject of the primary orders.

93 Pursuant to s 51A(3), the court's discretion to make an order declaring that a resolution is deemed to have been duly passed by the strata company as a unanimous resolution arises where the court is satisfied that:

(a) a proprietor has acted unreasonably in refusing to agree to the resolution; or

(b) that it is in the best interests of the proprietors that the order be made.

94 In considering whether a proprietor has acted unreasonably in opposing the resolution, in my view, the court must have regard to the particular position of that proprietor, irrespective of the overall impact of the proposed resolution on the strata scheme. In considering whether the proposed resolution is in the best interests of the proprietors, in my view, regard must be had to the overall interests of the proprietors as a whole, as well as the particular interests of each proprietor.

95 Each case falls to be considered on its own merits. I am therefore reluctant to impose a set of criteria that a court *must* consider in deciding whether to grant relief under s 51A. In the Gaudieris'

[31] Gaudieris' minute of proposed revised orders sought dated 30 July 2020, par 1.

counsel's written closing submissions,[32] reference is made to the decision of ***McHattie v Tuscan Investments Pty Ltd***.[33] However, this decision concerned the application of s 51 of the Act, which does not have the pre-conditions to the exercise of the court's discretion as I have set out at [93] above. Accordingly, in my view, caution needs to be exercised before endeavouring to adopt principles applicable to the exercise of the discretion under s 51, to consideration of the application of s 51A.

96 The Gaudieris' counsel's written submissions also referred to the decision of ***Bendall-Harris v Aitken***,[34] where Bowden DCJ expressed the view that the court must consider whether deeming the resolution as being unanimously passed under s 51A would result in:

1. Any detriment flowing to any proprietor, and whether it would impinge upon the proprietor's rights to the extent that it could be said to derogate from those proprietary rights.

2. Costs to a proprietor being incurred and the extent of those costs.

3. The formalisation of any longstanding informal arrangements.

4. Certainty in the relationship between the proprietors being created and thereby reducing disputes and contributing to harmonious relationship between the parties.

97 As I have indicated, I am not in favour of setting out a mandatory list of considerations. However, I agree that the factors identified in ***Bendall-Harris v Aitken*** should be taken into account in this case. In doing so, I need to keep in mind that the significance of such factors may vary depending upon which of the two threshold questions I am considering. That is, the significance of such factors may differ in considering whether a proprietor who voted against the resolution acted unreasonably, compared to considering whether it is in the best interests of the proprietors that the order sought be made. In addition, in my view, I also need to take account of the affect on the parties, and on the strata scheme, of the status quo remaining.

98 Furthermore, the pre-conditions to the exercise of the discretion are directed to different points in time. In that respect, whether a proprietor acted unreasonably in refusing to agree to the resolution in my view must be assessed having regard to the information at hand to

[32] Gaudieris' closing submissions dated 3 September 2020, par 75.
[33] ***McHattie v Tuscan Investments Pty Ltd*** (1997) 18 SR (WA) 231.
[34] ***Bendall-Harris v Aitken*** [2008] WADC 112 [57].

that proprietor at the time the resolution was voted upon. However, in my view whether or not the making of an order under s 51A(1) is in the best interests of the proprietors ought be assessed at the point in time the order is sought, with the information then available.

Section 28

99 The alternative basis upon which the Gaudieris apply is pursuant to s 28(1) of the Act, so as to vary the strata plan to reflect the proposed re-subdivision.

100 Section 28(1) of the Act provides:

> Where a building shown on a registered strata plan is damaged or destroyed, the District Court may, on an application by the strata company or by a proprietor or a registered mortgagee of a lot within the strata scheme, make an order for or with respect to the variation of the existing strata scheme or the substitution for the existing strata scheme of a new strata scheme.

101 The ordinary meaning of 'destroyed' includes demolish.[35] Further, that it includes demolish reflects my views in the following paragraph as to the scope of the remedial coverage which s 28 provides.

102 On an initial read of s 28, it may be thought that it only picks up *unintended* damage or destruction. However, the relief available under s 28(1) may be sought not only by the owner or owners of the particular lot or lots on which the building sits, but also by the strata company, or a proprietor or a registered mortgagee of any lot within the relevant scheme. Further, an insurer who has effected insurance against such damage or destruction has a right to appear on such an application: s 28(2). Therefore, in my view, s 28(1) is a remedial provision, directed to addressing damage or destruction and accordingly would pick up intentional damage or destruction to a building. For example, there does not appear to be any reason why the owner of a lot could not avail themselves of s 28 to address the intentional activity of another lot owner. However, that the damage was caused intentionally is not irrelevant. In my view, it is a relevant factor in the court's assessment as to whether the discretion to make an order under s 28 ought be exercised and also as to the terms of any such order. In some cases, it may be a powerful factor against the making of an order.

103 Without limiting the generality of s 28(1), s 28(3) provides that an order made under s 28(1) may include such directions for or with

[35] The Shorter Oxford English Dictionary, definition of 'destroy'. See also ***Tipene No. 2*** [107].

respect to any one or more of the following matters as the District Court considers necessary or expedient:

(a) the reinstatement in whole or in part of the building;

(b) the transfer or conveyance of the interests of the proprietors of lots that have been damaged or destroyed to the other proprietors in proportion to their unit entitlements;

(c) the substitution for the existing schedule of unit entitlement of a new schedule of unit entitlement;

(d) the application of insurance moneys received by the strata company in respect of damage to or destruction of the building;

(e) the payment of moneys to or by the strata company or any one or more of the proprietors;

(f) the amendment of the registered strata plan, in such manner as the District Court thinks fit, so as to include any addition to the common property;

(g) the payment to a mortgagee of a lot of money received by the strata company from an insurer of the building;

(h) any matter in respect of which it is, in the opinion of the District Court, just and equitable in the circumstances of the case to make provision in the order;

(i) the imposition of such terms and conditions as the District Court thinks fit.

104 An essential premise behind s 28 seems to be the recognition that the destruction or damage to a building may result in the need to adjust lot boundaries, unit entitlements and common property.

105 In ***Tipene No.2***, his Honour Justice Corboy held that s 28(1) cannot be used to approve in advance damage or destruction to an undamaged building.[36] Rather, it proceeds on the premise that the damage or destruction has *occurred*. Thus, the section does not provide power to authorise an activity that will result in damage or destruction to a previously undamaged building. It will however authorise the destruction of a damaged building. These observations in ***Tipene No.2*** were obiter. I agree with them. As his Honour makes clear, the text of s 28 demonstrates that this court's jurisdiction is contingent on a building having been damaged or destroyed.

[36] ***Tipene No.2*** [107] - [108].

106 Here, the damage or destruction has already occurred by the demolition of the old home. It has also been addressed by the construction of a new home. That being so, I consider the pertinent question in this case concerning the interpretation of s 28 is whether it:

(a) only permits the making of an order for a varied or new scheme to reflect matters which *will be* done to address the consequences of the damage or destruction to a building; or

(b) also permits the making of an order for a varied or new scheme which reflects matters that *have been* undertaken as a consequence of the damage or destruction.

107 With some initial hesitation, I have decided that s 28 applies to both of the scenarios I have just outlined.

108 My initial hesitation derives principally from the text of s 28(3)(a), which provides that the court may make an order for the reinstatement in whole or in part of the building that has been damaged or destroyed. This could be seen as suggesting that the section is directed only to prospective works to be carried out in order to address the consequences of the damage or destruction.

109 However, in my view, the language of s 28(1) does not definitively preclude the section applying where remedial work has already been undertaken, the prerequisite to the operation of the section being:

> … a building shown on a registered strata plan is damaged or destroyed …

110 Further, s 28 is designed to provide a remedy for all affected interest holders, so the lot proprietors, the strata company and any registered mortgagees of a lot. If s 28 was not available where the damage or destruction had already been remedied or addressed, then the available routes to the strata company or any registered mortgagees to address this are very limited. They could apply for termination of the scheme under s 31, however termination may not accord with their interests. Further, the first registered mortgagee could exercise the vote on a resolution to effect a re-subdivision proposal (if that route was available) in the circumstances provided for by s 50(6) and s 50(7). However, if the resolution was not passed, s 51 and s 51A only grant to the proprietors the right to apply to this court for an order deeming the resolution to have been properly passed.

111 Moreover, it does not take much imagination to envisage scenarios where damage to a building needs to be remedied urgently for safety purposes; so, for example the destruction of a roof or wall by a storm or by fire. Such remedial work may alter boundaries; for example a roof with a different pitch, or a wall of different proportions. In such circumstances, it seems to me the availability of s 28 so as to address the requisite changes to the scheme as a result of the remedial work already having been completed is consistent with s 28 applying to both of the scenarios referred to at [106(a)] and [106(b)] above.

112 The Singhs in their submissions focussed on s 28 not allowing for an order to be made in advance permitting an undamaged building to be demolished. I accept that proposition. However, the focus of s 28 is on the position as it exists at the time the matter comes before the court. Even if a building was undamaged at the time it was demolished, it is still a demolished building.

113 The Singhs also pointed to a distinction between the circumstances of this case and that in ***De Mol***. The home the subject of ***De Mol*** had been damaged by fire[37] and then was demolished pursuant to a resolution without dissent of the lot proprietors.[38] However, Bowden DCJ also held that the demolition of the home required that an application under s 28 be made to permit such demolition.[39] Thus, the demolition was not authorised. Ultimately, in ***De Mol*** an order was made varying the scheme to take account of the demolition of the home, even though its destruction occurred in contravention of the Act. It seems to me that the outcome and reasoning in ***De Mol*** is consistent with what I consider to be the preferred view, namely that in applying s 28 the court is addressing the situation then at hand, irrespective of whether it has come about by reason of a breach of the Act.

114 For these reasons overall, in my view s 28 permits the making of an order for a varied or new scheme where works have already been undertaken as a consequence of damage or destruction to a building shown on the strata plan. In my view, it therefore applies to the current scenario, as the demolition of the home occurred as part of one overall scenario whereby it was to be replaced with the new home.

115 I am conscious that such a result should not be seen as an encouragement for a proprietor or proprietors to breach the Act and

[37] ***De Mol*** [32].
[38] ***De Mol*** [65].
[39] ***De Mol*** [65].

then come before the court under s 28 seeking remedial orders. However, the preferred interpretation I have reached still leaves for consideration whether the discretion afforded by s 28 should be exercised, and if so, how. Where a proprietor is in flagrant breach of the Act, a court may be most reluctant to exercise the discretion afforded by s 28 absent the agreement of all affected parties. On the other hand, notwithstanding a flagrant breach, all affected parties may agree to orders being made under s 28 because such orders reflect the preferred outcome. In my view, this case falls within those two scenarios. As I explain below, what has occurred does not constitute a flagrant breach of the Act by the Gaudieris, but, conversely, the Singhs oppose orders under s 28 being made by the court.

116 I now turn to the evidence.

Evidence

117 My taking of the evidence proceeded primarily by way of my receipt of affidavits filed on behalf of the parties as their evidence-in-chief, with the parties having leave to cross-examine on those affidavits. Also, the parties provided me with bundles of documents, which became exhibit 12 for the Singhs' bundle and exhibit 13 for the Gaudieris' bundle. The evidence in each matter was in effect treated as evidence in the other matter. To avoid any uncertainty, I order that the evidence in each matter is evidence in the other matter.

118 The relevant affidavits are as follows, which became separate exhibits:

CIVO 162 of 2018

1. Affidavits of Mrs Singh affirmed 30 January 2019 and 18 September 2019.
2. Affidavit of Dean Naithan Diamond affirmed 21 October 2019. Mr Diamond is a licenced surveyor.
3. Affidavit of Gregory St Quintin sworn 31 January 2019.
4. Affidavit of Mr Gaudieri sworn 7 March 2019.

CIVO 237 of 2019

1. Affidavit of Mr Gaudieri sworn 23 September 2019.
2. Affidavit of Ian Arthur Laird sworn 23 September 2019. Mr Laird is a strata titles consultant.

3. Affidavit of Matthew John Garmony sworn 20 September 2019. Mr Garmony is a certified practicing valuer.

4. Affidavit of Gregory John Higham sworn 23 September 2019. Mr Higham is the godson of Mrs Treasure.

5. Affidavit of Mr Diamond affirmed 21 October 2019.

119 These affidavits were received as the evidence-in-chief of the parties who filed the relevant affidavit, subject to one exception. I required that evidence be led orally:

1. From Mr Gaudieri and Mr St Quintin as to the conversations they had prior to Mr and Mrs Singh becoming the registered proprietors of lot 1.

2. From Mr St Quintin and Mrs Singh as to the conversations they had regarding the possible development of lot 1 prior to Mr and Mrs Singh becoming the registered proprietors of lot 1.

120 I therefore struck from the affidavits in CIVO 162 of 2018, the following material:

1. From Mr Gaudieri's affidavit sworn 7 March 2019, pars 25, 30 - 34, 42 - 43.

2. From Mr St Quintin's affidavit sworn 31 January 2019, par 13 after the words 'Expression of Interest' in the third line, par 17 and par 20, except for the first three sentences and the last sentence.

3. From Mrs Singh's affidavit affirmed 30 January 2019, par 6, the first sentence of par 11, par 13 and par 19 except for the first and last sentence.

121 I also struck out par 7 of Mrs Singh's affidavit affirmed 18 September 2019 in CIVO 162 of 2018, on the grounds it was hearsay and also set out conclusions.

122 The affidavits of Mr Diamond and Mr Garmony in both sets of proceedings were received as expert evidence. At the commencement of the trial, I made an order permitting expert evidence to be led in terms of their respective affidavits. The Gaudieris objected to my receipt of Mr Diamond's affidavits on a number of grounds, which in essence were that he did not have the requisite expertise to express the

opinions which he did and further that a number of those opinions were directed to matters of law. However, in closing submissions, the Singhs' counsel made clear that they only relied on Mr Diamond's evidence for the purposes of explaining the options that are available for the development of the Singhs' lot if the strata scheme is terminated.[40] On this limited basis, I have addressed Mr Diamond's evidence later in this reasons. The Gaudieris also objected to evidence from Mrs Singh as to what type of development is achievable on lot 1. I address this when addressing Mr Diamond's evidence.

123 Before turning to the evidence of each of the witnesses, I will first set out those evidentiary matters which I consider are not in dispute and which help explain the context for both sets of proceedings.

Matters not in dispute

124 As at 28 April 2011, Mrs Treasure was the registered proprietor of lot 1 and lived in the home on that property.

125 On 28 April 2011, the Gaudieris became the registered proprietors of lot 2. The relevant certificate of title is volume 1578 folio 848.[41] The interest described in the certificate of title is:[42]

> Lot 2 on Strata Plan 8695
>
> Together with a share in any common property as set out on the Strata Plan

126 The Second Schedule to the certificate of title noted the Limitations, Interests, Encumbrances and Notifications on the title as being:[43]

> 1. Interests notified on the Strata Plan and any amendments to lots or common property notified thereon by virtue of the provisions of the Strata Titles Act No. 33 of 1985 as amended.

127 The relevant certificate of title for lot 1 is volume 1578 folio 847.[44] The interest described in the certificate of title is described as:[45]

> Lot 1 on Strata Plan 8695

[40] ts 331.
[41] Gaudieris' bundle of documents, page 5.
[42] The terms are capitalised in the original.
[43] The terms are capitalised in the original.
[44] Singhs' bundle of documents, page 27.
[45] The terms are capitalised in the original.

> Together with a share in any common property as set out on the Strata Plan

128 The Second Schedule to the certificate of title is in the same terms as that for lot 2.

129 Lot 2 has, and always has had, a unit entitlement of one unit. Lot 1 has, and always has had, a unit entitlement of two units.

130 Upon the Gaudieris becoming the registered proprietors of lot 2, they granted a mortgage over lot 2 to the Bank of Western Australia Ltd (Bankwest). The mortgage was registered on the title to lot 2 on 28 April 2011. It remains in place.[46] The mortgage described the land to which it applied as being lot 2.[47]

131 The property the subject of the mortgage is defined as being lot 2, each fixture, structure or improvement on it or fixed to it and the Gaudieris' estate and interest in lot 2.[48] Clause 6.2 of the mortgage provides that the Gaudieris must not make any structural alteration to the mortgaged property or remove any structure from the mortgaged property.[49] There is no evidence before me that the Gaudieris sought the approval of Bankwest to the demolition of the existing home on lot 2. It is unclear if Bankwest might suffer any prejudice from the current situation. That is, on the evidence before me, I do not know what the outstanding balance is on the monies the subject of the mortgage, or the financial means which the Gaudieris have to make payment if Bankwest called up the loan in the current circumstances.

132 In 2013, the Gaudieris decided they wanted to build a new home on lot 2. They discussed this with Mrs Treasure, with whom they had a good relationship and who still lived next door at lot 1. The old home on lot 2 was not damaged. Its demolition arose because of the Gaudieris' desire to build a new home.

133 The Gaudieris had plans for the new home drawn up by a professional builder, APG. In about August 2013, Mr Gaudieri took two sets of the plans over to show to Mrs Treasure. She signed one set in front of him. Mr Gaudieri did not retain the signed copy. This evidence regarding Mrs Treasure signing the plans appears at pars 11 and 12 of Mr Gaudieri's affidavit sworn 23 September 2019 in

[46] Mr Gaudieri's affidavit sworn 23 September 2019 in CIVO 237 of 2019, par 5.
[47] Mr Gaudieri's affidavit sworn 23 September 2019 in CIVO 237 of 2019, Annexure RG03; Gaudieris' bundle of documents, page 75.
[48] Mr Gaudieri's affidavit sworn 23 September 2019 in CIVO 237 of 2019, Annexure RG03; Gaudieris' bundle of documents, pages 81 - 82, definition of Property.
[49] Gaudieris' bundle of documents, page 83.

CIVO 237 of 2019 and the same paragraphs in his affidavit sworn 7 March 2019 in CIVO 162 of 2018. Mr Gaudieri was not cross-examined on these paragraphs and I accept his evidence as set out in them. I am satisfied that by signing the plans, Mrs Treasure consented to the demolition of the old home and the construction of a new home on lot 2 substantially consistent with the plans.

134 In June 2014, the old home on lot 2 was demolished. The Gaudieris obtained the necessary demolition permit.

135 Subsequently, Mrs Treasure signed a consent letter on 20 June 2014 prepared by APG regarding the works required for the connection of services through lot 1 to lot 2.[50] That consent letter is not a consent to the construction of the new home on lot 2. Rather, it is a consent to the works needed to be undertaken on lot 1 as described in the letter. However, implicit in the letter is that Mrs Treasure consented to the construction of the new home on lot 2.

136 The Gaudieris obtained the necessary development approval and building permit from the City of South Perth for the construction of the new home.

137 The new home was completed by November 2015, when the Gaudieris moved into it. During part of the build period, Mrs Treasure still lived in the home on lot 1. By November 2015, she had moved out.

138 In early 2018, lot 1 was advertised for sale via Soco Realty. The selling agent was Mr St Quintin. There was a for sale sign on the property and also internet advertising of the property on realestate.com.au. The internet advertising described the property in these terms:[51]

> Take advantage of the Canning Bridge Activity Plan and of the excellent views available.
>
> This 619 sqm block with 20.12m frontage and 30.76m depth can be developed up to 6 storeys.
>
> The 4 metre setbacks give you a 275 sqm building platform.
>
> Build six luxury apartments, build 12 luxury apartments, build a stunning two, three, four, five or 6 storey home for yourself, so many options available to you.
>
> All subject to SPCC approval.

[50] Gaudieris' bundle of documents, pages 55 - 56.
[51] Singhs' bundle of documents, page 5.

139 The for sale sign on lot 1 was in similar terms, although it also had the headline 'So many options here'.[52]

140 Mrs Singh viewed the realestate.com.au advertisement and contacted Mr St Quintin. She also drove past the property. She then had a number of discussions and electronic communications with Mr St Quintin. I address these below, as well as the conversations between Mr St Quintin and Mr Gaudieri.

141 Mrs Singh only looked at the home on lot 1 from the outside before she and her husband made an offer to purchase it.[53] On 20 May 2018, the Singhs and Mrs Treasure entered into a contract for sale of strata title by offer and acceptance.[54] The contract does not contain any conditions regarding the Singhs being able to effect a development on the land.

142 The property the subject of the contract is described as:

> 52A Leonora Street, Como, Lot 1, Strata Plan 8695, Whole Vol 1578 Folio 847.

143 The contract had annexed to it the necessary information by reason of the property being a lot in a strata scheme. This included the most recent floor plan,[55] and the respective unit entitlements for each lot.[56] In cross-examination, Mrs Singh said she was unsure whether the floor plans were sent prior to her making the offer.[57] However, it is clear from the contractual documentation that the floor plans comprised part of the final offer as executed. In this respect, the compulsory disclosure commencing at page 23 of the Singhs' bundle of documents refers to the strata plan being attached, stating that the lot to be purchased was clearly identified. The lot was identified on the plan by yellow marking.[58] The acknowledgment of receipt of the strata information was signed by Mrs Singh on 20 May 2018, being the date of execution of the offer.[59] Further, on the same page as where Mrs Singh signed the offer as prospective buyer, she also signed separately acknowledging receipt of certain documents, which included the strata information. The information provided included a schedule of unit entitlement which set out the unit entitlements as being two units in respect of lot 1 and

[52] Singhs' bundle of documents, page 248.
[53] ts 92, ts 95.
[54] Singhs' bundle of documents, pages 20 - 48.
[55] Singhs' bundle of documents, pages 33 - 34.
[56] Singhs' bundle of documents, page 36.
[57] ts 99.
[58] Singhs' bundle of documents, page 33.
[59] Singhs' bundle of documents, page 26.

one unit in respect of lot 2.[60] Given the manner in which the offer was executed as I have described, the floor plan and unit entitlements must have formed part of the offer documents.

144 The Singhs became the registered proprietors of lot 1 on 28 June 2018.[61] The land description and second schedule applicable upon such registration are the same as those set out at [127] and [128] above.

145 On the evidence, Mrs Singh's husband, Mr C Singh, has not taken any active role in the purchase of lot 1. He was not called as a witness in these matters.

146 Mrs Singh met with Mr Gaudieri on 9 July 2018 at the Gaudieris' home. I deal with the evidence of this meeting below, as well as the communications between Mrs Singh and Mr St Quintin both prior to and after the meeting. Ultimately, Mr Gaudieri sent to Mrs Singh emails on 9 and 10 July 2018 to the effect that the Gaudieris did not agree to lot 1 being converted to green title.[62]

147 On 13 July 2018, Mrs Singh sent an email to Mr Gaudieri advising that '[lot 2] is not registered as strata under landgate'. Mr Gaudieri responded by email on 14 July 2018 stating that '[lot 2] is registered at Landgate…' and referring to the certificate of title details.

148 On 27 August 2018, a meeting was held at Mr St Quintin's office. The attendees were Mr St Quintin, Mrs Singh, Mr R Singh (the Singhs' counsel in these proceedings) and the Gaudieris. Mr C Singh, the party to these proceedings, did not attend. A resolution was not reached at the meeting.

149 On 1 October 2018, CIVO 162 of 2018 was commenced.

150 On 9 July 2019, an EGM of the strata company was to be held to consider the resolution for re-subdivision proposed by the Gaudieris. Mr C Singh did not attend the meeting, nor did he provide a proxy form for anyone to vote on his behalf. Accordingly, there was not a quorum and the meeting did not proceed. The meeting was rescheduled for 30 July 2019.

151 On 25 July 2019, the State Administrative Tribunal made an order on an application by the Gaudieris that Mr Laird be appointed to attend

[60] Singhs' bundle of documents, page 31.
[61] Gaudieris' bundle of documents, page 59.
[62] Singhs' bundle of documents, pages 60 and 62.

the meeting and exercise the Singhs' right to vote. The order was made by consent and upon Mr Laird's undertaking to the Tribunal to vote against resolutions 6.1 and 6.2.

152 The meeting then proceeded on 30 July 2019. Mr Laird attended as the proxy for the Gaudieris, and as the representative for the Singhs pursuant to the order of the Tribunal. On behalf of the Singhs, Mr Laird voted against resolutions 6.1 and 6.2. On behalf of the Gaudieris, Mr Laird voted in favour of resolutions 6.1 and 6.2. Resolution 6.1 was put as a unanimous resolution. [63] It therefore failed. Resolution 6.2 was put as an ordinary resolution and also failed.

153 The matters set out at [150] - [152] arise from the affidavit of Mr Laird, who was called by the Gaudieris and not cross-examined by the Singhs.

154 On 30 July 2019, the Gaudieris commenced CIVO 237 of 2019.

155 The proposed plan of re-subdivision is now in order for dealing with Landgate.

156 I now turn to the factual matters which I consider need to be determined.

Factual matters falling for determination

157 The parties have filed extensive submissions in this matter, both on the law and on the facts. Having considered those submissions, I consider I need to make factual findings in relation to the following subject matters:

1. The effect on the value of lots 1 and 2 by reason of the new home on lot 2 not conforming with the existing strata plan.

2. The appropriate change to the unit entitlements if the proposed re-subdivision is approved.

3. The communications between Mr St Quintin, Mrs Singh and Mr Gaudieri regarding the development of lot 1 and its possible conversion to green title.

[63] There is no suggestion on the evidence that Bankwest had given a notice under s 50(7) of the Act. If it had, under s 50(6) the power of voting on the unanimous resolution would need to have been exercised by Bankwest.

4. The inquiries which Mrs Singh made, prior to becoming the registered proprietor of lot 1, as to the available development options.

5. Whether the Singhs are likely to suffer any material financial loss by reason of not being able to pursue a multi-storey apartment building development on lot 1.

158 There is little dispute in respect of the first two matters, which arise from Mr Garmony's evidence. I will therefore address his evidence first. Once I have done so, I will then address the remaining subject matters, which is where the principal factual disputes arise. I do not need to address further Mr Laird's evidence. In relation to Mr Higham's evidence, it seems to me its relevance is directed to the discretionary considerations which arise under the parties' respective applications. I will address his evidence after having made findings in respect of the subject matters which I have outlined at [157]. I will also address Mr Diamond's evidence at that juncture.

Mr Garmony

159 The Gaudieris called Mr Garmony as an expert witness. Mr Garmony is a certified practicing valuer. Mr Garmony's evidence was directed to the following matters:

1. The effect on the value of lots 1 and 2 by reason of the Gaudieris' new home not being depicted on the strata plan.

2. Mr Garmony's assessment of the appropriate unit entitlements for lot 1 and lot 2 if the revised strata plan the subject of the resolutions put to the EGM came into effect.

Effect of irregularity in the strata scheme on the value of lots 1 and 2

160 Mr Garmony's report was to the effect that in his opinion the discrepancy arising from the new home on lot 2 not being part of the strata plan was such that 'the market would likely discount the market value of the lot by between 10% to 12.5%'.[64] It was put to Mr Garmony in cross-examination that his report suggested that the range was 9.4% to 25%.[65] However, pars 20 - 30 of his report make plain that the range of 9.4% to 25% is a range applicable overall to other properties that have been sold to which a discrepancy or 'stigma' attaches. Mr Garmony's reference to 'stigma' was a reference to matters

[64] Gaudieris' bundle of documents, page 226.
[65] ts 221 - ts 222.

such as visibility of high voltage power lines, traffic noise and railway noise.

161 I accept Mr Garmony's evidence that the likely impact of the discrepancy on the value of lot 2 is a discount of between 10% to 12.5%. The Gaudieris lead this evidence for the purpose of demonstrating the potential disadvantage to them if the orders they seek in CIVO 237 of 2019 are not granted.

162 Mr Garmony was cross-examined as to whether the discrepancy could also have an impact on lot 1. Mr Garmony said he was of the opinion that it may have an impact on the value of lot 1 as well.[66] Further, his opinion was that this was likely to be a less significant impact than the impact on lot 2. I accept this evidence. It is common sense. The discrepancy on lot 2 would in all likelihood have a flow on effect to lot 1, as it raises an issue in relation to the entire scheme given it is a two-lot scheme. However, that effect is unlikely to be as significant for lot 1, given that it is the home on lot 2 which does not accord with the strata plan.

Valuation of new unit entitlements

163 The proposed new unit entitlements are contained in form 3 which appears at page 219 of the Gaudieris' bundle of documents. The form contains a certificate by Mr Garmony to the effect that the unit entitlements proposed, being 41 units for lot 1 and 59 units for the new lot 3:

> … bears in relation to the aggregate unit entitlement of all lots delineated on the plan a proportion not greater than 5% more or 5% less than the proportion that the value (as that term is defined in section 14(2a) of the *Strata Titles Act 1985*) of that lot bears to the aggregate value of all the lots delineated on the plan.

164 Furthermore, Mr Garmony sent a letter to Mr Gaudieri dated 19 June 2019 setting out the basis upon which he came to these calculations.[67] In examination-in-chief, Mr Garmony said that:[68]

1. The numbers he ascribed to the unit entitlements reflected the ratio of the capital values on those two lots, with a tolerance of plus or minus 5%.

2. The unit entitlements flow from the relative capital values of those two lots.

[66] ts 219 - ts 220.
[67] Gaudieris' bundle of documents, page 220.
[68] ts 209.

165 Mr Garmony was not cross-examined in respect of his allocation of the new values underpinning the proposed new unit entitlements, nor was he cross-examined as to the appropriateness of the new unit entitlements. I accept Mr Garmony's assessment as set out in the Certificate of Licensed Valuer contained on the form 3. The basis he gave for that assessment was considered and plausible and the Singhs did not challenge it.

166 I will address next the factual disputes which arise in respect of the communications between Mrs Singh, Mr Gaudieri and Mr St Quintin.

Communications involving Mrs Singh, Mr St Quintin and Mr Gaudieri

167 I commence by making some general observations regarding each of Mrs Singh, Mr Gaudieri and Mr St Quintin.

168 I found Mrs Singh to be an upfront and frank witness. She is plainly concerned as to the position she and her husband have now found themselves in regarding their intended development of lot 1. Also, as I explain below, my impression of Mrs Singh is she does not have a detailed understanding of the regulatory regime applicable to the re-development of lot 1.

169 In respect of Mr St Quintin, my impression was that he was concerned to ensure that he could not be held responsible for the position which the Singhs have now found themselves in. Subject to that reservation, I consider Mr St Quintin sought to give evidence as best as he could recall. He did not have a good recall of events beyond a general conceptual level. However, this is not surprising given that the relevant transaction took place as part of Mr St Quintin's everyday business as a real estate agent and was one of numerous transactions which he would have been carrying out.

170 Mr Gaudieri impressed as a careful and truthful witness. He had significantly greater recall of the relevant events than Mr St Quintin. This is to be expected. Mr Gaudieri's interactions were in respect of a matter that directly affected him and his family. By comparison, Mr St Quintin's interactions were part of his everyday activities as a real estate agent. Accordingly, it is to be expected that Mr Gaudieri would have a significantly greater recall of events. Further, as I explain below, in giving his evidence Mr Gaudieri readily conceded his own neglect in not obtaining the necessary strata approval for the new home prior to the Singhs buying lot 1.

Mrs Singh

171 Mrs Singh is employed fulltime as a sonographer and worked on the potential development of lot 1 at night or on weekends,[69] outside office hours.[70] She has limited developmental experience in Australia and wished to develop an apartment complex. She wanted to undertake what she regarded as a low risk development.

172 In examination-in-chief and in her affidavits filed in CIVO 162 of 2018, Mrs Singh gave evidence as follows:

1. Just before giving the cheque for the deposit, she spoke to Mr St Quintin by telephone.[71] She was mainly discussing with him, her idea of redeveloping lot 1. Mr St Quintin said to her that Mr Gaudieri would be happy to discuss the process of redeveloping and changing the strata to green title.[72] Mrs Singh said she paid the deposit on or about 26 May 2018.[73]

2. In between paying the deposit and settlement of the purchase of lot 1, Mrs Singh spoke further to Mr St Quintin as she wanted to speak to Mr Gaudieri directly. Mr St Quintin told her that Mr Gaudieri would be happy to discuss this with her after settlement was completed. She therefore left everything and planned to meet Mr Gaudieri after settlement.[74]

3. After settlement, she obtained Mr Gaudieri's number through Mr St Quintin and also authorised Mr St Quintin to forward her number to Mr Gaudieri.[75]

4. On 9 July 2018 Mrs Singh met Mr Gaudieri at the Gaudieris' home. She explained she wanted to redevelop lot 1. She proposed converting the lots from strata to green title and said she was happy to pay for the conversion costs. These are estimated to be between $30,000 and $60,000. Mr Gaudieri said he would think about the proposal and discuss it with his wife.[76]

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[69] ts 104.
[70] ts 101.
[71] ts 82 – ts 83.
[72] ts 82.
[73] Mrs Singh's affidavit affirmed 30 January 2019 in CIVO 162 of 2018, par 9. The deposit was payable within 7 days of acceptance of the offer; Singhs' bundle of documents, page 20.
[74] ts 83.
[75] ts 83.
[76] Mrs Singh's affidavit affirmed 30 January 2019 in CIVO 162 of 2018, par 14.

5. Mr Gaudieri sent an email to Mrs Singh on 9 July 2018.[77] In effect the email said that the Gaudieris considered a conversion from strata to green title was not in their interest.

6. Mrs Singh sent an email to Mr Gaudieri on 10 July 2018 seeking clarification as to his concerns.[78] The email stated:

> Actually I wanted to discuss with you before the purchase was finalised but Greg said that your were happy to meet me after the settlement to discuss the process of converting into green title.
>
> Would be great if you could allow me to find out the process involved in converting it to green and we could discuss about it again.

7. Mr Gaudieri responded by email to Mrs Singh sent 10 July 2018 in which he stated amongst other matters that his main concern is that by converting to green title the Singhs will be able to construct a multi-unit development on lot 1 and that such a development would have an adverse impact on the enjoyment and value of his property.[79]

8. In her evidence, Mrs Singh said that after receiving this email, she spoke to Mr St Quintin and told him of Mr Gaudieri's position. Mr St Quintin responded by saying that was not what he understood from his previous discussions with Mr Gaudieri.[80]

9. The Singhs' bundle of documents contains a text message which Mrs Singh sent to Mr St Quintin explaining that Mr Gaudieri had emailed her and said the Gaudieris were not keen to convert to green title.[81] Mr St Quintin responded to that text message stating:[82]

> That is not what he has indicated to me over many conversations.

It is apparent from this text message exchange that Mrs Singh explained the Gaudieris' position to Mr St Quintin by text message, not by speaking to Mr St Quintin as she suggested in her evidence.

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[77] Singhs' bundle of documents, page 60.
[78] Singhs' bundle of documents, page 61.
[79] Singhs' bundle of documents, page 62.
[80] ts 83 - ts 84.
[81] Singhs' bundle of documents, page 63.
[82] Singhs' bundle of documents, page 64.

10. At the meeting held on 27 August 2018, Mr Gaudieri stated that:[83]

> … he was never interested or agreed to converting the lots to green title as that is not what they wanted.

173 In cross-examination, Mrs Singh said that:

1. Mr St Quintin did not give her Mr Gaudieri's telephone number before settlement and she had no way of contacting Mr Gaudieri before she made her offer and also before settlement. Further, Mr St Quintin told her that Mr Gaudieri was happy to meet with her after settlement.[84]

2. She could not meet Mr Gaudieri earlier because Mr St Quintin said it would have to be after the settlement.[85]

174 As can be seen from Mrs Singh's evidence:

1. At its highest, Mr St Quintin had said to her that Mr Gaudieri would be happy to *discuss* the process of redeveloping and changing the strata to green title. This falls well short of a firm commitment agreeing to such conversion.

2. Mr St Quintin explained to Mrs Singh that Mr Gaudieri wanted the discussion to take place after the settlement of the purchase of lot 1.

3. It is not apparent that Mrs Singh discussed the Gaudieris' attitude to redevelopment with Mr St Quintin before the offer was signed. In this respect, her evidence is that the discussion occurred '*just before the cheque was given'*, which Mrs Singh then clarified was the cheque for deposit.[86] The questioning of Mrs Singh on this topic initially commenced by asking her whether she had any communications with Mr St Quintin prior to 19 May 2018, being the date the offer was signed. However, Mrs Singh was quite specific that the conversation regarding the Gaudieris' attitude took place just before the cheque for the deposit was given. That being so, in my view, the preferred interpretation of her evidence is that the conversation took place after the offer was signed and just before the deposit was paid.

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[83] Mrs Singh's affidavit affirmed 30 January 2019 in CIVO 162 of 2018, par 23.
[84] ts 108.
[85] ts 108.
[86] ts 82 - ts 83.

Mr St Quintin

175 Mr St Quintin is a licenced real estate agent.

176 Mr St Quintin gave evidence in examination-in-chief as follows:

1. That after putting the for sale sign up on lot 1, he spoke to Mr Gaudieri initially enquiring whether he wished to purchase the property, which Mr Gaudieri did not.[87] Mr St Quintin asked if Mr Gaudieri was willing to sit down to discuss future development improvements to the front strata lot and Mr Gaudieri said he was *willing to discuss*.[88]

2. On 26 June 2018 Mr St Quintin sent a text message to Mrs Singh saying that he had spoken to Mr Gaudieri and:[89]

> He is happy to meet you after settlement and discuss the process of converting blocks to green title.

3. In relation to the reference in the text message to 'green title', Mr St Quintin said:[90]

> I don't remember mentioning green title. If I did, I did but I - because all my conversations had - were about future development of the front lot. I - if it says 'Green title,' that's more accurate than probably my memory, yeah.

4. Mr St Quintin also said that he had no recollection of the subject matter of the discussion being around converting blocks to green title and that the discussion:[91]

> … was always regarding future development of the property.

5. Further, Mr St Quintin was taken to his text message to Mrs Singh sent 10 July 2018.[92] He was asked what were the nature of his conversations with Mr Gaudieri the subject of the text message. His response was as follows:[93]

> Purely - purely the fact - well, to my mind Robert had always indicated he was happy to sit down and discuss and that text to me says they did sit down and discuss it and Robert changed his - well, not changed his mind, he wasn't willing to discuss it anymore. I can't control that. He was willing to discuss, he discussed and made a decision.

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[87] ts 133.
[88] ts 140.
[89] Singhs' bundle of documents, page 59.
[90] ts 142 - ts 143.
[91] ts 143.
[92] Singhs' bundle of documents, page 64.
[93] ts 145.

177 In cross-examination, Mr St Quintin said:

1. That in his discussions with Mr Gaudieri, there was no commitment from Mr Gaudieri, it was simply that Mr Gaudieri was willing to sit down and discuss any particular development.[94] Further, there was no agreement the Gaudieris would consent to any agreement to convert to green title.[95]

2. He did not know that Mr Gaudieri had indicated to another prospective purchaser that Mr Gaudieri would not agree to convert to green title.[96] If he had known that, he would have taken the property off the market.[97]

3. He did not discuss with Mr Gaudieri the termination of the strata scheme.[98] Further, there was no conversation or other communication with Mr Gaudieri to the effect that he would agree to a proposal for conversion to green title.[99]

4. After the contract was signed, he spoke to Mr Gaudieri who asked what the sale price was. Mr St Quintin responded that he could not tell Mr Gaudieri that until settlement. He indicated to Mr Gaudieri that the buyers wanted to have a meeting to discuss the future prospects.[100]

5. Mr Gaudieri's response was that he was happy to hear the buyers out.[101] Mr St Quintin said that he thinks Mr Gaudieri had said that he would only meet the buyers after settlement.[102] It was then put to him that Mr Gaudieri never said that he would only meet a buyer after settlement, and Mr St Quintin responded: 'I can't recall'.[103]

6. Mr St Quintin was taken to his text message to Mrs Singh sent 26 June 2018 setting out that Mr Gaudieri was happy to meet Mrs Singh after settlement.[104] It was then put to Mr St Quintin

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[94] ts 164.
[95] ts 165.
[96] ts 164.
[97] ts 164.
[98] ts 165.
[99] ts 165.
[100] ts 166.
[101] ts 166.
[102] ts 166.
[103] ts 167.
[104] Singhs' bundle of documents, page 59.

that Mr Gaudieri had never said that any meeting had to wait until after settlement. Mr St Quintin's answer was: 'Not true'.[105]

7. Before the meeting held on 27 August 2018, Mr St Quintin called Mr Gaudieri and asked him to rethink their decision. Mr Gaudieri called Mr St Quintin back later and said that the Gaudieris were not going to be changing their mind.[106]

8. Mr St Quintin did not recall whether another prospective buyer had told him that they had visited the Gaudieris.[107] He denied that another prospective buyer had told him the Gaudieris would not agree to convert to green title.[108] The cross-examination of Mr St Quintin on this topic was a little unclear. It seems to me that ultimately Mr St Quintin's position is best encapsulated in his evidence arising from the following question and answer:[109]

> Okay. And I put it to you that at about that time Mr Gaudieri told you in a phone call that they wouldn't agree unless they saw some specific plans and a formal proposal, words to that effect?--- Well, the words that I remember is he was willing to sit and discuss future developments of the front lot and the complete lot. Green title was not a forefront of any conversation that I had.

178 In re-examination:

1. Mr St Quintin said that in relation to the text message that he sent on 26 June 2018, he would say he typed that message pretty soon after he spoke to Mr Gaudieri.[110] His recollection as to the content of the conversation was that Mr Gaudieri was happy to meet after settlement.[111]

2. Further, he had told Mr Gaudieri that the new buyer wanted to meet up with him to discuss the future of the front lot which included its development as per the Canning Bridge Activity Centre Plan.[112]

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[105] ts 168.
[106] ts 167.
[107] ts 164.
[108] ts 164.
[109] ts 164.
[110] ts 170.
[111] ts 170.
[112] ts 170 - ts 171.

Mr Gaudieri

179 In respect of Mr Gaudieri, I will first set out his evidence regarding his dealings with Mr St Quintin and Mrs Singh. I will then deal with his evidence regarding the reasons why he did not agree with Mrs Singh's proposal to convert to green title and the reasons for his delay in regularising the strata scheme.

Dealings with Mr St Quintin and Mrs Singh

180 In examination-in-chief and in his affidavits filed in both matters, Mr Gaudieri gave evidence as follows:

1. He spoke to Mr St Quintin after he had seen the for sale sign on the property and introduced himself as the owner of the rear property.[113]

2. On 13 May 2018 a young couple came to the Gaudieris' front door. The female's name was Sheryl. She asked Mr Gaudieri whether they would be interested in converting to green title or to survey-strata title. He said no but if they wanted to build a new home the Gaudieris would not object and the Gaudieris may be interested in converting to green title or more likely survey-strata down the track after the home was built. Sheryl asked whether Mr Gaudieri would put that in writing and he said no as they would need to see the plans first.[114] Mr Gaudieri then had a text message exchange with Sheryl on 15 May 2018.[115] In the text message from Sheryl, she said that Mr St Quintin had told her that Mr Gaudieri had agreed in principle for the property to be converted into green title if the buyer paid the cost. She enquired of Mr Gaudieri as to his position. Mr Gaudieri responded saying that he would be happy for it to be converted to a green title if possible, however he would need to look at the plans before confirming, but essentially he would not object going from strata to green title. He was asked to put that in writing. His response was that it would be hard for him to put it in writing as he would need to see the proposed plan and go over some specifics.

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[113] ts 243.
[114] Mr Gaudieri's affidavit sworn 7 March 2019 in CIVO 162 of 2018, pars 26 - 27.
[115] Gaudieris' bundle of documents, pages 57 - 58.

My characterisation of these messages is that Mr Gaudieri was in favour of conversion to green title if he and his wife were comfortable with the proposed development planned for lot 1.

3. Mr St Quintin called Mr Gaudieri and said to him that he understood that a prospective buyer had spoken to Mr Gaudieri and was interested in converting the titles. Mr Gaudieri told Mr St Quintin that his response was that based on the proposal put to them, the Gaudieris would not agree to convert the titles.[116] I understand Mr Gaudieri was referring to conversion to green title.

4. Mr St Quintin and Mr Gaudieri spoke again after the property became under offer.[117] Mr Gaudieri recalled that in this further conversation Mr St Quintin was somewhat uncertain as to what the buyers were intending on doing, but they would like to speak to Mr Gaudieri to put forward a proposal. Mr Gaudieri said that he was willing to hear them out.[118]

5. Mr St Quintin spoke to Mr Gaudieri again after Mr Gaudieri had sent his emails to Mrs Singh advising that he did not agree to convert to green title. He said that Mr St Quintin asked if he would reconsider and that he told him that he would think about it a little bit longer, which he and his wife did, and then he conveyed to Mr St Quintin that the position had not changed.[119]

181 In cross-examination, Mr Gaudieri gave evidence that:

1. He was aware of the for sale sign and that the property was being advertised with the potential for redevelopment.[120]

2. There are circumstances in which he would have agreed to a multi-unit residential development.[121] These circumstances included if the proposal included offering compensation and potentially buying the Gaudieris out.[122]

3. Further, whether Mr Gaudieri was agreeable to conversion to green title depended on the proposal.[123]

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[116] ts 244.
[117] ts 244.
[118] ts 244 - ts 245.
[119] ts 245.
[120] ts 252.
[121] ts 252 - ts 253.
[122] ts 264.
[123] ts 259.

4. The proposal put by Mrs Singh to Mr Gaudieri at the meeting held on 9 July 2018 was very vague as to what her true intentions were.[124] Further, she said during the initial meeting at the Gaudieris' home that she was not sure if she wanted to build a home, two homes or do an apartment development.[125]

5. Mr Gaudieri considered Mrs Singh's proposal which was put at the meeting held on 27 August 2018 was detrimental because there was no certainty as to what Mrs Singh was proposing to do and a proposal was not put for there to be a multi-storey development.[126]

182 In re-examination Mr Gaudieri said he had not been shown:[127]

1. Any proposed agreement to redevelop by the Singhs.

2. Any proposed building plans or subdivision plans.

3. Any diagram with the proposed boundaries on a green title subdivision.

4. Any proposed compensation payment arising out of a green title subdivision.

183 Further, he gave evidence that he is not interested in being a co-owner with the Singhs of the entire parcel of land the subject of the strata scheme.[128]

Mr Gaudieri's concerns with, and reasons for rejecting, Mrs Singh's proposal

184 In Mr Gaudieri's affidavit in CIVO 162 of 2018, he set out the following concerns regarding a multi-storey apartment development being built on lot 1:

51. A multi-storey apartment development would result in more people living on the site, in very close proximity to our family home.

52. It would be substantially bigger than our home and may well over-shadow our backyard.

53. I believe my family and I would inevitably lose some privacy in our own home.

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[124] ts 259 - ts 260.
[125] ts 259.
[126] ts 258 - ts 259.
[127] ts 290.
[128] ts 290.

> 54. I am also concerned that construction of an apartment development would be very disruptive and possibly damaging, given the close proximity of the house to the boundary with 52A. I am also concerned about the health and safety of our young children during the construction process, from noise, vibration, building debris and the like.
>
> 55. I believe these factors will significantly reduce the enjoyment of our property.

185 It was put to Mr Gaudieri in cross-examination that his concern was primarily limited to that of privacy.[129] However, as the recitation from his affidavit set out above demonstrates, this plainly is not the case.

186 Furthermore, Mr Gaudieri was taken in cross-examination to the minutes of the ordinary council meeting of the City of South Perth held on 27 August 2019.[130] In substance, it was put to Mr Gaudieri that the portions he was taken to reflected the existing development plan and allowed for a consultative process with developers which would address Mr Gaudieri's concerns regarding privacy. In effect, Mr Gaudieri's answer was that unless he had engaged in that consultation process, he would not be able to know whether his concerns had been addressed.[131] That answer reflects common sense.

187 In re-examination, Mr Gaudieri was taken to the minutes of the council meeting held on 27 August 2019. Those minutes record that:[132]

> It is recommended that Council consent to publically advertise the recommended amendments.

188 Further, on page 99 the minutes stated that council deferred consideration of the amendments to the September ordinary meeting of council to enable the review document to be further reviewed in light of the waste management collection amenity issues.

189 Accordingly, the document which was put to Mr Gaudieri in cross-examination does not constitute on the evidence before me the existing activity centre plan. Rather, it constitutes proposed amendments to the plan which on the evidence before me was deferred to the September ordinary meeting of council in 2019. There is no evidence before me as to what has subsequently happened in respect of that proposal. Moreover, the introduction to the proposed amendments

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[129] ts 276 - ts 279.
[130] Singhs' bundle of documents, pages 108 - 109; ts 270 - ts 271.
[131] ts 270 - ts 272.
[132] Singhs' bundle of documents, page 98.

to which Mr Gaudieri was taken in cross-examination identify the design element objectives as follows:[133]

> The orientation and design of buildings, windows and balconies minimises direct overlooking of habitable rooms and private outdoor living areas within the site and of neighbouring properties, while maintaining daylight and solar access, ventilation and the external outlook of habitable rooms.

190 It is self-evident from this recitation that the concerns expressed by Mr Gaudieri regarding matters such as privacy and over-shadowing had in fact eventuated with existing development applications. If anything therefore, the minutes and proposed amendments to which Mr Gaudieri was taken in cross-examination reinforce his concerns rather than abate them.

191 Mr Gaudieri was cross-examined at length regarding his communications with Mrs Singh, in particular, that they did not state his supposed concerns as to privacy. The relevant communications appear at pages 60 to 62 of the Singhs' bundle of documents. In the concluding email from Mr Gaudieri to Mrs Singh sent 10 July 2018, Mr Gaudieri states:[134]

> Such development would have an adverse impact on the enjoyment and value of my property.

192 This sentence conveys a general position as to the reason for Mr Gaudieri's concerns. While it does not delineate the specific reasons why an adverse impact would occur, in my view, privacy is plainly a matter that could fall within the general description given by Mr Gaudieri in his email.

193 Furthermore, Mr Gaudieri gave evidence which I accept, that part of his concern arose because Mrs Singh would not reveal her hand as to what development she proposed to carry out on lot 1. In this respect, on the evidence, Mrs Singh's proposal remained at a generic level of conversion of the strata lot to green title without any delineation as to what type of development was proposed.

194 During Mr Gaudieri's cross-examination, the Singhs' counsel started to put the proposition that Mr Gaudieri's evidence that there were circumstances where he may agree to a multi-storey

[133] Singhs' bundle of documents, page 108.
[134] Singhs' bundle of documents, page 62.

development,[135] was inconsistent with the statement in his affidavit that Mr Gaudieri told Mr St Quintin that he wasn't keen on a multi-storey apartment development.[136] This putting of a prior inconsistent statement does not seem to have been followed through by the Singhs' counsel. In any event, I do not consider there is an inconsistency. By referring in his affidavit to not being keen, Mr Gaudieri was in effect saying that the terms would need to be very attractive, which is not inconsistent with him saying in evidence there were circumstances where he may agree to a multi-storey development.

195 In my view, Mr Gaudieri's position was and remains consistent, namely his and his wife's consent to any such proposal depended upon the terms. This included the type of development proposed, its impact on the use and enjoyment of the Gaudieris' home on lot 2 and whether any compensation would be provided for the impact on the Gaudieris' property. In this respect, the uncontroverted evidence is that the extent of Mrs Singh's proposal was to convert to green title and for her and her husband to pay the costs of doing so. Mrs Singh's proposal did not contain any element of compensation.

Mr Gaudieri's delay in acting and concession made

196 Mr Gaudieri conceded that he knew after the development on lot 2 had been completed that he needed to update the strata plan.[137] However, Mr Gaudieri's evidence was that he did not appreciate the legal ramifications in not doing so and was not aware there was a timeframe.[138] Further, he only became aware of the ***Tipene No.2*** decision in October 2018, which is after the Singhs had commenced their proceedings. I accept this evidence. It seems to me overwhelmingly clear that if Mr Gaudieri had appreciated the significance of the strata plan not having been updated, he would have acted sooner.

Points of difference between Mrs Singh, Mr St Quintin and Mr Gaudieri

197 Broadly speaking, there is little if any material difference between Mr Gaudieri and Mr St Quintin's evidence concerning Mr Gaudieri's attitude to the development of lot 1. In effect, both say that Mr Gaudieri was willing to discuss with the new owners any proposal for redevelopment of lot 1. There was however no commitment,

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[135] ts 252 - ts 253.
[136] Mr Gaudieri's affidavit sworn 7 March 2019 in CIVO 162 of 2018, par 33.
[137] ts 247.
[138] ts 247 - ts 248.

whether firm or indicative, to a redevelopment. This accords with Mrs Singh's evidence as to what Mr St Quintin told her, namely that Mr Gaudieri was prepared to discuss the redevelopment of lot 1. There is also the issue of whether the concept of green title was raised in their conversations, however that does not alter the substantive effect of the conversations, namely there was no indicative or firm commitment from Mr Gaudieri to a redevelopment. Rather, it was a matter he was prepared to discuss.

198 Having regard to the evidence of Mrs Singh, Mr St Quintin and Mr Gaudieri, I consider I must resolve the following factual disputes:

1. The extent of the conversation between Mr Gaudieri and Mr St Quintin regarding Mr Gaudieri's communications with a prior prospective purchaser.

2. Whether or not Mr Gaudieri said to Mr St Quintin that he would be prepared to discuss with the new buyer a change of title from strata title to green title.

3. Whether or not Mr Gaudieri said to Mr St Quintin that he would only speak to the new buyer after settlement was complete.

4. Whether Mr Gaudieri said to Mrs Singh at the meeting on 27 August 2018 that he was never interested in converting the lots to green title.

199 Where Mr Gaudieri's evidence and Mr St Quintin's evidence differs on matters of their dealings with each other, I prefer Mr Gaudieri's evidence. As I have said, he impressed as a careful and truthful witness who had significantly greater recall than Mr St Quintin.

200 Further, in respect of the point of difference as to whether or not Mr Gaudieri indicated to Mr St Quintin that he was only prepared to engage in discussion with a new buyer after settlement, there is no apparent rationale why Mr Gaudieri would defer consideration or discussion on that issue until after settlement. In addition, Mr Gaudieri's evidence, which I accept, is that a prior interested purchaser had attended at his home to discuss the matter and he had then had text message exchanges with that person. This indicates a preparedness on Mr Gaudieri's part in a general sense to discuss matters pertaining to lot 1 prior to settlement of the purchase. Accordingly, I find that Mr Gaudieri did not say or otherwise indicate to Mr St Quintin that he was only prepared to have the discussion after settlement.

201 Furthermore, while Mr St Quintin portrayed to Mrs Singh that Mr Gaudieri was only prepared to discuss such matters after settlement, I am satisfied this arose because of a misunderstanding on Mr St Quintin's part as to when Mr Gaudieri would meet, rather than Mr St Quintin deliberately seeking to defer such a meeting until after settlement. I consider this misunderstanding arose in the context of communications between Mr Gaudieri and Mr St Quintin after the contract was signed, where Mr Gaudieri asked what the purchase price was and Mr St Quintin advised he could only pass this on after settlement. It seems to me that Mr St Quintin misunderstood Mr Gaudieri's willingness to meet as forming part of this overall exchange of information and thus would occur after settlement.

202 I am also satisfied that Mr Gaudieri's indication to Mr St Quintin as to the scope of the discussion was general, in terms that he was willing to discuss a proposed development. I do not consider that what Mr Gaudieri said extended to the specifics of discussing conversion to green title. While Mr St Quintin sent the text message on 26 June 2018 to Mrs Singh saying that Mr Gaudieri was happy to discuss the process of converting the blocks to green title, I consider that text message to be Mr St Quintin's interpretation of his discussion with Mr Gaudieri, rather than the message reflecting what was actually said. In that respect, at the point in time that the message was sent, I accept Mr Gaudieri's evidence that Mr St Quintin knew that Mr Gaudieri had previously had a discussion with another potential buyer for lot 1 and indicated a preparedness to discuss conversion to green title depending on the overall plans. I consider that in sending the text message, Mr St Quintin was therefore interpreting what Mr Gaudieri had said overall, as opposed to it being the specifics of what Mr Gaudieri had said. Similarly to what I have said regarding Mr St Quintin's portrayal that Mr Gaudieri was happy to meet after settlement, I do not consider that Mr St Quintin sought to deliberately mislead Mrs Singh by sending that text message.

203 Finally, I do not accept the suggestion in par 23 of Mrs Singh's affidavit affirmed 30 January 2019 in CIVO 162 of 2018 that at the meeting on 27 August 2018 Mr Gaudieri said that he was never interested in converting the lots to green title. I find this is contrary to my assessment as to what Mr Gaudieri was prepared to consider in relation to lot 1. As I have set out above, I am satisfied that Mr Gaudieri was prepared to discuss conversion to green title, however, whether he would agree to it depended upon the terms of the ultimate proposal put, including the nature of the proposed development.

I consider Ms Singh's position arose from her misinterpretation of what Mr Gaudieri said at the meeting. In my view, it is likely that at the meeting, Mr Gaudieri said words to the effect that he had never agreed to convert the lots to green title, which is consistent with Mr Gaudieri's position. It seems to me that Mrs Singh misinterpreted this to mean that Mr Gaudieri was *never interested* in converting to green title.

Summary of findings on the evidence

204 In summary, my findings in respect of the matters the subject of the evidence referred to at [159] - [203] are as follows:

1. The likely impact of the structure on lot 2 not forming part of the strata plan was that the value of lot 2 was discounted by between 10% to 12.5%. This would also have an impact on the value of lot 1, however the discount on lot 1 would not be as significant as the likely discount applicable to lot 2.[139]

2. The appropriate unit entitlements taking account of the capital value of the buildings on lot 1 and lot 2 is 41 units for lot 1 and 59 units for the proposed new lot 3.[140]

3. Prior to the Singhs signing the offer and acceptance, Mr St Quintin and Mr Gaudieri had a telephone conversation in which Mr Gaudieri told Mr St Quintin that a prospective buyer had spoken to Mr Gaudieri and was interested in converting the titles from strata title to green title and Mr Gaudieri had told the prospective buyer that based on the proposal put, he would not agree to that conversion.[141]

4. Prior to the Singhs signing the offer and acceptance on 20 May 2018, the Singhs did not speak to Mr St Quintin regarding the Gaudieris' attitude to the redevelopment of lot 1 and converting the strata lots to green title.[142]

5. Mr St Quintin and Mr Gaudieri spoke again after the Singhs had signed the offer and acceptance. In that conversation, Mr Gaudieri said to the effect that he was willing to hear the new owners out as to their proposal regarding lot 1.[143]

6. Mr Gaudieri did not indicate to Mr St Quintin that Mr Gaudieri was prepared to discuss with the new owners of lot 1

[139] Reasons [161] - [162].
[140] Reasons [163] - [165].
[141] Reasons [177(8)], [180(2)], [180(3)] and [199].
[142] Reasons [174(3)].
[143] Reasons [180(4)], [199].

a conversion of the titles from strata title to green title. However, overall on the evidence, I am satisfied that Mr Gaudieri was prepared to have such a discussion.[144]

7. Mr St Quintin had indicated to Mrs Singh by text message on 26 June 2018 that the Gaudieris were happy to meet after settlement and discuss the process of converting the blocks to green title.[145] However, Mr Gaudieri did not say to Mr St Quintin that he would only speak to the new owners after settlement was complete.[146]

8. Mr Gaudieri was prepared to consider the conversion of the strata lots to green title however this depended upon matters such as, the development proposed for lot 1, its impact on the use and enjoyment of the Gaudieris' home on lot 2, and whether any compensation was offered.[147]

9. Mr Gaudieri did not say to Mrs Singh at the meeting on 27 August 2018 that he was never interested in converting the lots to green title.[148]

10. Mrs Singh's proposal was to convert the lots to green title and for the Singhs to pay the costs of doing so. Mrs Singh's proposal did not contain any precision as to what type of development Mrs Singh was proposing to carry out on lot 1.[149]

11. Mr Gaudieri only appreciated the significance of the strata plan not having been updated to reflect the new home on lot 1 after he became aware of the ***Tipene No. 2*** decision in October 2018.[150]

Inquiries made by Mrs Singh prior to settlement regarding potential development opportunities and assertion of financial loss by the Singhs

205 I will deal with these two subject matters together, as they are quite closely aligned.

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[144] Reasons [202].
[145] Reasons [176(2)].
[146] Reasons [200].
[147] Reasons [195], [203].
[148] Reasons [203].
[149] Reasons [172(4)], [181(4)].
[150] Reasons [196].

206 My impression of Mrs Singh was that she did not have a detailed understanding of the necessary processes to enable her to develop lot 1. While Mrs Singh spoke of conversion to green title, she did not have a definitive view as to whether this could be achieved by there being one title or two titles.

207 Mrs Singh has not yet engaged anyone to prepare plans for a proposed development on lot 1.[151]

208 The generality of the Singhs' position is revealed by the communications which Mrs Singh had regarding a possible development on the property.[152] Those communications reveal that Mrs Singh first discussed possible development with a builder named Robert on 2 June 2018 via text message,[153] and then engaged in email communications with other builders.

209 It is apparent from those communications that Mrs Singh misapprehended the position as to what was needed for a potential apartment development. In particular, in Mrs Singh's email to a builder named Ryan sent 3 June 2018, she stated that 'There is a preliminary approval to build up to 6 storey apartment'.[154] However, there was no such approval, even at a preliminary level.

210 The email goes on to state:

> Firstly, it is strata. I have to change it to green title and alter the sewerage connection etc
>
> I would like to know the feasibility of building apartments and especially the financing of it.

211 Another email sent by Mrs Singh to builders at Nephrite Projects on 24 June 2018 stated that:[155]

> I remember one of you told me about building townhouse or strata houses.
>
> Next week pls share the idea. That might be lower risk.
>
> Just a thought

[151] ts 92, ts 101, ts 106.
[152] Singhs' bundle of documents, pages 49 - 59.
[153] Singhs' bundle of documents, page 56.
[154] Singhs' bundle of documents, page 49.
[155] Singhs' bundle of documents, pages 51 - 52.

212 The response from Nephrite Projects sent 25 June 2018 was:[156]

> Building apartments requires large capital but there isn't a lot of space for townhouses either.
>
> We will have to work something out in between.

213 These emails are a stark illustration of the commercial risk which Mrs Singh and her husband took in purchasing lot 1. Specifically, they entered into the contract to purchase lot 1:

1. with the expectation that they needed to change it to green title but having no consent to do; and

2. without having any considered position as to the financial feasibility of conducting a development project on the property.

214 Further, on the evidence presented during the trial, there is no explanation as to how the Singhs are able to fund a multi-storey apartment development, or a townhouse type development.

215 Furthermore, there is still no delineation from the Singhs as to what development is proposed in respect of lot 1. Apart from Mrs Singh indicating her aim was to redevelop into multi-storey apartments,[157] the Singhs' proposed development has very little detail to it.

216 In Mrs Singh's affidavit affirmed 30 January 2019 in CIVO 162 of 2018, Mrs Singh says at par 24 that she is now facing a heavy financial loss if she is unable to redevelop the property.[158] The purchase price offered by the Singhs was significantly higher than the other offer received for lot 1, being $105,000 more.[159] I also am satisfied that the likely achievable price for the property is less if it is sold on the basis that the Gaudieris will not consent to conversion to green title. However, I am not able to make an assessment of the extent of that difference. Also, there is no evidence before me as to the fluctuation in property prices since the Singhs bought lot 1. That is, there is no evidence which explains whether the price of similar type properties to lot 1 have gone up or down since the Singhs purchased lot 1.

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[156] Singhs' bundle of documents, page 51.
[157] ts 87.
[158] Exhibit 1, page 6.
[159] ts 134 - ts 135.

217 In addition, there is no evidence before me which demonstrates that if lot 1 was converted to green title, the Singhs would be able to develop the property in such a manner so as to earn a profit. The limited information available from the builders with whom Mrs Singh made contact was that the feasibility of a project was something which needed to be worked out.

218 Also, Mrs Singh in cross-examination accepted she had not considered, or was not interested in, potential development opportunities other than a multi-apartment development.[160]

219 The net effect of the evidence regarding a potential development is that:

1. The Singhs assume that a development on lot 1 will earn a material profit.

2. They have no development expertise which might lend weight to that assumption.

3. The evidence before me does not demonstrate that such an assumption is reasonable or likely.

4. The evidence does not enable any considered assessment to be made as to the Singhs' ability to fund a development.

5. The planned possible development remains at a level of generality.

220 While I accept that lot 1 is likely to be worth less in circumstances where the Gaudieris do not consent to conversion to green title, that was always the risk which the Singhs took in purchasing lot 1 without having a firm indication from the Gaudieris as to what their position was. The Singhs took a significant commercial risk in proceeding in such a manner, which risk has now eventuated.

221 In relation to the state of the property, the Singhs' bundle of documents includes a number of photographs of the property, which Mrs Singh says show the property is in a state of disrepair.[161] Mrs Singh also expressed the view that there appear to be numerous cracks in the walls and ceilings making the building unsafe to be

[160] ts 121 - ts 122.
[161] Singhs' bundle of documents, pages 71 - 96.

occupied.[162] I accept from the photographs that the building is in a state of disrepair, however I am not able to form a view based on the material before me whether it would be uneconomic for repairs to be conducted so as to enable the property to be rented out.

222 Overall, when I have regard to the matters I have just set out, I am not satisfied on the evidence that the Singhs are facing a material financial loss if they are unable to develop lot 1 by way of a multi-apartment development.

223 Before moving to an analysis of the parties' respective positions, I will address Mr Higham's and Mr Diamond's evidence.

Mr Gregory John Higham

224 The Gaudieris called Mr Higham. Mr Higham is Mrs Treasure's godson. Mr Higham gave evidence that Mrs Treasure did not have any children and he assisted her in respect of matters pertaining to lot 1.

225 Mr Higham gave evidence which was not challenged in cross-examination that at no stage did he have any sense from Mrs Treasure that she was not happy with the construction of the new home on lot 2 being undertaken.[163]

226 Mr Higham did not give evidence as to whether or not Mrs Treasure would have agreed to the proposed new unit entitlement of 59 units for lot 2 (or a proposed new lot 3) and 41 units for lot 1 as ultimately proposed by Mr Garmony. I therefore make no finding as to whether or not Mr Higham or Mrs Treasure would have consented to that entitlement. I am however satisfied that Mrs Treasure and Mr Higham would have agreed to a fair reallocation of the units to reflect the new development. I infer this from their co-operation with the Gaudieris in the construction of their new home and further, that the proposed new unit entitlements ultimately reflect the overall increased value of lot 2.

227 Mr Higham was cross-examined at length about what he knew regarding the need for the strata plan to be updated as a consequence of the development. Mr Higham frankly accepted that he did not appreciate the plan needed to be updated and he had not made any enquiries in respect of this prior to lot 1 being put on the market.[164]

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[162] Exhibit 1, page 6, par 24; ts 107.
[163] Mr Higham's affidavit sworn 23 September 2019 in CIVO 237 of 2019, par 14.
[164] ts 231.

He gave evidence that he was instrumental in organising for lot 1 to be put on the market and that in doing so he waited for the new Canning Bridge Activity Centre Plan to be approved.[165] He also acknowledged this may have added some value to the sale.[166]

228 The Singhs' counsel sought to cross-examine Mr Higham as to what a 'prudent' seller would do regarding making those enquiries.[167] I disallowed this questioning for two reasons. First, what a prudent person would do is ultimately an assessment for the court to make. Secondly, this case turns upon what Mr and Mrs Singh knew and the impact on them of the strata plan not having been updated. Any rights which the Singhs might have against Mrs Treasure or Mr Higham because the strata plan did not take account of the new home on lot 2 is not a matter which is before me.

Mr Diamond

229 The Singhs engaged Mr Diamond to provide them with planning advice in relation to the development of lot 1. The effect of Mr Diamond's evidence as sought to be relied on by the Singhs is that it will be more difficult to undertake a development on lot 1 if it remains a strata lot, compared to green title.

230 Mr Diamond's letter to Mrs Singh dated 24 January 2019 set out his views in respect of the question 'Whether conversion to green title is the most feasible option in order for [the Singhs] to construct a multi-storey dwelling'.[168] His response was:

> The determination of feasibility to develop into a multi storey dwelling is based on the cooperation of the adjoining lot owner.
>
> The process of developing Lot 1 on SP8695 doesn't require the termination of the existing strata plan and green title subdivision. The process could be completed by simply gaining City approval to develop (development approval and building license), gaining approval of all owners in the strata scheme and developing the lot. The process to gain titles for the newly constructed units would be through the re-subdivision of the existing strata process. This process would require WAPC approval if the intention is to create more than 5 lots in the scheme (including the existing Lot 2). However, this requires the approval of all owners in the strata scheme.
>
> The option being considered, that of termination of the strata and subdivision into two green title lots is overall less feasible as it requires an extra stage in the process, that being the application for and

[165] ts 233 - ts 234.
[166] ts 234.
[167] ts 236.
[168] Mr Diamond's affidavit affirmed 21 October 2019 in CIVO 237 of 2019, pages 11 - 12.

> subdivision of the parent lot into two lots. As it stands the lot is currently two lots with development potential, pending approval from all owners in the strata scheme (along with the City and WAPC). The process of terminating the existing strata and green title subdividing into the same two lots (albeit with different titles) gives more certainty to each original owner as green title is the highest form of freehold ownership in Western Australia and removes any uncertainty over development with the requirements of neighbour approval being removed from the development approval process.

231 Mr Diamond's opinion that the determination of feasibility is based on the cooperation of the adjoining lot owner is really a matter of common sense, which can be accepted. As can Mr Diamond's statement that termination of the scheme and creation of new green titles gives more certainty to the Singhs. There does not appear to be any dispute between the parties that the construction of a multi-storey apartment building might be permissible if the strata scheme was terminated and the lots became green title. However, on the evidence, the proposed development remains in the abstract, so it is not possible for me to reliably assess whether it would be approved, or be profitable. In Mrs Singh's affidavit affirmed 18 September 2019 in CIVO 162 of 2018 she stated that she would be able to build a four-storey building on lot 1.[169] However, this is a generalised statement, and does not address the planning criteria specifically applicable to lot 1. Similarly to what I have said in relation to Mr Diamond, without more detail as to the nature of the development proposed by the Singhs, it is not possible for me to assess whether it would be approved, or profitable. The Singhs' position is, at best, aspirational.

232 Also, what is perhaps quite telling about Mr Diamond's evidence is that his first report to the Singhs is dated 2 August 2018, so that is after the Singhs became the registered proprietors on 25 June 2018.

233 Having dealt with the evidence, I turn now to the matters which I consider ought be addressed in considering the parties' respective applications. I will start with ***Tipene No. 2***.

Tipene No. 2

234 In both written and oral submissions, counsel gave significant attention to the reasons for decision in ***Tipene No. 2***.

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[169] Mrs Singh's affidavit affirmed 18 September 2019 in CIVO 162 of 2018, par 6. The Gaudieris' objection to this evidence is set out in their written submissions dated 18 September 2020 in CIVO 162 of 2018, par 10.

235 This is so for differing reasons. The Singhs' counsel contends that as a result of ***Tipene No. 2***, lot 2 in effect no longer exists and therefore s 28 and s 51A of the Act are not available to be utilised by the Gaudieris. The Singhs' counsel also raised the prospect that ***Tipene No. 2*** may also result in lot 1 having been extinguished. The Gaudieris submit that ***Tipene No. 2*** does not preclude the making of the orders which they seek and is an *irrelevant red herring*.[170] As I will explain, my view is that the correct application of ***Tipene No. 2*** to this case sits somewhere between these two outer landmarks of the parties' positions.

236 It is important to first identify what was, and was not, decided in ***Tipene No. 2***.

237 By way of background, the relevant strata plan in ***Tipene No. 2*** had nine separate lots. Each lot was comprised of a unit. The units were situated across two buildings. One building contained five single storey units, the other contained four two-storey units. The proprietors of the four two-storey units wished to demolish their building and construct a new building with four new townhouses in it. They applied to the strata company for approval to do so. The proprietors of the five single storey units objected.

238 The proponent proprietors applied to the State Administrative Tribunal for an order under s 103F of the Act that approval for the purposes of s 7(2) be deemed to be given by the strata company. As there were more than two lots, s 7(2)(d) applied. It provides that a lot proprietor shall not cause or permit any structure to be erected, or any structural alteration or extension of a structure, except with the prior approval of the other proprietors expressed by resolution without dissent.

239 The Tribunal dismissed the application, holding that it did not have jurisdiction to make the order sought as the redevelopment proposal required the building containing the units to be demolished. The Tribunal considered that the jurisdiction conferred by s 103F was confined to proposals to erect structures or to undertake alterations or extensions to existing structures and therefore the demolition of the building did not fall within such concepts.

240 The matter went on appeal to the Supreme Court. The appellants in ***Tipene No. 2*** conceded that the Tribunal correctly held that an alteration of a structural kind did not include the demolition of a

[170] Gaudieris' written submissions in CIVO 237 of 2019, par 57.

structure.[171] The appellants sought to amend their grounds of appeal to reflect that what they sought was the erection of a structure, not the alteration of a structure. Notwithstanding this change of emphasis, demolition of the existing building was still required.

241 His Honour Justice Corboy held that even if leave to amend the grounds of appeal was granted, the Tribunal still would not have had jurisdiction to make the order sought. This was because of the effect that demolition of the existing building had on the proprietary interests of the lot owners.[172] His Honour explained that effect as being:[173]

> …
>
> (a) The demolition of a Boundary Building will obliterate the cubic space that constitutes a lot. The lot will be destroyed with the building so that there is nothing in respect of which title can subsist. The proprietary interest constituted by a combination of the title to the lot and the power to deal with the lot conferred by s 4(2) STA is effectively extinguished by the demolition of the building and cubic space that comprised the lot. The proprietor will hold some interest in the land but that interest will not be in the cubic space that formed a 'lot' according to the statutory definition.
>
> (b) It follows that there is no lot on which a new structure could be erected after a Boundary Building has been demolished.
>
> (c) Consequently, there is nothing that could be the subject of the prohibition contained in s 7(2) and the approval processes provided for by ss 7B and 103F. It is not just that there would be a vacant lot following demolition, as the respondents feared; rather, the lot as depicted by the strata plan and which is the subject of the strata scheme, with its boundaries defined by the structures of the building that had been demolished, would no longer exist.
>
> …

242 His Honour therefore concluded:[174]

> … ss 7 and 103F do not permit any alteration or extension to a structure that affects the boundary of a lot - a limitation to be implied by the (Act) read as a whole.

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[171] ***Tipene No. 2*** [44].
[172] ***Tipene No.2*** [51].
[173] ***Tipene No.2*** [87(a)] - [81(c)].
[174] ***Tipene No.2*** [93].

243 His Honour also explained that the conclusions which I have just set out were sufficient to dispose of the appeal. This was because whichever way the appellants framed their argument, the demolition of the existing building remained an integral part of what was proposed.[175] His Honour reasoned that such demolition would extinguish the lots comprised within that building, the boundaries to those lots would therefore no longer exist and s 7 and s 103F of the Act did not permit the alteration or erection of a new structure that affected the boundary of a lot.

244 The Gaudieris' counsel submitted that his Honour's reasoning regarding the effect of the destruction of a boundary building is obiter dicta. The Singhs' counsel submits likewise. As I read his Honour's reasons, his Honour's view that the demolition of a boundary building will obliterate the cubic space that constitutes a lot was central to the implied limitation placed on s 7 and s 103F, which was why his Honour considered there was no utility in granting the appellant leave to amend and therefore dismissed the appeal.

245 His Honour did not however decide that the destruction of a boundary building resulted in the destruction of the underlying strata scheme. Further, s 28(1) of the Act expressly recognises that where a building shown on a registered strata plan is damaged or destroyed, the District Court may make an order:

> … for or with respect to the variation of the existing strata scheme or the substitution for the existing strata scheme of a new strata scheme.

246 In my view, this recognises that the destruction of a building does not result in the *automatic* termination of the strata scheme.

247 Further, his Honour recognised that the proposal which the proponents of the development sought to achieve could be achieved by way of a re-subdivision. As his Honour stated:[176]

> As earlier indicated, in my view ss 7 and 103F were not intended to allow an alteration or extension that would change the boundaries of a lot or lots. A change in the boundaries of a lot or lots is, in effect, a re-subdivision within a scheme. Section 8 provides for such re-subdivisions. The procedures prescribed necessarily require a new strata plan to be registered: see s 8A. The amendment of the strata plan has other consequences that are dealt with by ss 8B and 8C. Accordingly, ss 7 and 103F are subject to a limitation implied from the STA read as a whole that an alteration or extension of a structure cannot affect the boundaries of a lot or lots.

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[175] ***Tipene No. 2*** [94].
[176] ***Tipene No.2*** [104].

248 This passage recognises that an alteration or extension to a building can be carried out pursuant to s 8. That is, it is not precluded *per se*. Rather, it must be achieved through a different mechanism under the Act.

249 His Honour also considered the situation where there was a partial demolition of a building, with the demolished part comprising a boundary wall that forms a boundary. His Honour stated that:[177]

> … the Tribunal observed that a structure may be altered by the demolition of part of the structure. It considered that s 7 applied to such an alteration. However, a partial demolition that constituted an alteration was to be distinguished from the demolition of an entire building. Nevertheless, the demolition of, for example, a party wall that forms the boundary between two lots will 'destroy' one part of the structure that defines the cubic spaces that form the lots. On the conclusions expressed above, the lots would cease to exist as statutory constructs once the wall had been demolished. …

250 This reasoning is to the effect that the demolition of a boundary wall results in the adjoining lots ceasing to exist.

251 The reasoning in ***Tipene No. 2*** as to both the destruction of a boundary building, and the destruction of a boundary wall, was adopted and applied by Bowden DCJ in ***De Mol***.[178]

252 The Gaudieris' counsel submitted that the decision in ***Tipene No. 2*** is contrary to the decision of his Honour Justice Hall in ***Wise v Owners of Argosy Court Strata Plan 21513***.[179] ***Wise*** concerned an appeal against an order made by the Tribunal requiring the appellants to ensure that the strata lots owned by them were permanently vacated by a certain date. The purpose of the order was to enable compliance with a notice issued by the Shire of Exmouth that required the immediate removal of the buildings.

253 Relevantly, Hall J held that:[180]

> … In my view, the application did not raise a question as to the title to land. The appellants' title to the lots owned by them was not affected in any direct way by the order of the Tribunal. If, as is argued, the removal of the buildings would make it impossible to determine the boundaries of individual lots, that could be remedied by an application

[177] ***Tipene No.2*** [92].
[178] ***De Mol*** [48] - [53].
[179] ***Wise v Owners of Argosy Court Strata Plan 21513*** [2011] WASC 307 (***Wise***).
[180] ***Wise*** [32].

> to vary the strata scheme. However, the appellants' title to their individual lots and the attached shares in the common property have not been and would unlikely be affected, even if a variation application was made.

254 I do not see this finding as being inconsistent with ***Tipene No. 2***. As I have said, the order of the Tribunal was that the relevant proprietors vacate the property. So, it is not an order that results in the destruction of a boundary building.

255 Furthermore, his Honour did not say that the title to the individual lots would not be affected. Rather, his Honour said that the title to the lots was not affected in any *direct way* by the Tribunal's order. His Honour then said that the title to the lots would *unlikely* be affected if the removal of the buildings made it impossible to determine the lot boundaries. His Honour also recognised that if it did become impossible to determine the lot boundaries, this could be remedied by an application to vary the strata scheme, that being an application under s 28.[181] This, in effect, is what the Gaudieris are seeking to do by their application under s 28.

256 For these reasons, I do not see ***Wise*** as inconsistent with ***Tipene No. 2***.

257 The Gaudieris' counsel also referred to the decision of the Tribunal in ***Topic v Owners of Raffles Waterfront Strata Plan 48545***,[182] suggesting ***Tipene No. 2*** did not find favour in ***Topic***.[183]

258 ***Topic*** concerned a situation where the owner of an apartment caused the existing carpeting throughout the whole of the apartment, and the tiling in the kitchen, to be uplifted and replaced with timber flooring.[184] Section 3AB did not apply to that strata scheme. Instead, s 3(2)(a)(ii) of the Act set the horizontal boundary as being:

> … where any floor or ceiling joins a vertical boundary of that cubic space - the upper surface of that floor and the under surface of that ceiling;

259 Accordingly, the upper surface of the floor of the apartment set the lower horizontal boundary.

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[181] ***Wise*** [32]; his Honour set out at [29] that an application to vary the scheme is made under s 28.
[182] ***Topic v Owners of Raffles Waterfront Strata Plan 48545*** [2016] WASAT 27 (***Topic***).
[183] Gaudieris' closing submissions in CIVO 237 of 2019, page 31, par 38.
[184] ***Topic*** [3].

260 The Tribunal found that the only work which affected the lower horizontal boundary of the apartment was that which involved removing and replacing the kitchen floor tiles.[185] Therefore, the Tribunal noted that it was not necessary to examine the effect of a complete destruction of the lower horizontal boundary.[186]

261 The Tribunal found that the original location of the horizontal boundary could still be ascertained notwithstanding the installation of new tiles in the kitchen.[187] The Tribunal ultimately found that the removal of the original carpeting and the tiling in the kitchen did not constitute a destruction of the lower horizontal boundary of the lot and therefore did not destroy the lot.[188]

262 The Tribunal referred (with apparent approval) to the decision of the New South Wales Court of Appeal in ***The Owners SP 35042 v Seiwa Australia Pty Ltd***,[189] where Tobias JA (with whom the other members of the court agreed) stated:

> However, if at the date of registration a tile or timber floor has been laid over and affixed to the concrete slab, then the boundary will be the upper surface of the tiles or timber flooring. If that upper layer of flooring is later removed and replaced by tiles or timber flooring the upper surface of which is higher than the surface as at the date of registration of the strata plan, it is the level of the original surface which remains the lower horizontal boundary, not the level of the new surface. The boundary remains fixed: it is not ambulatory. The same principle applies to the determination of the upper horizontal boundary being the ceiling to the relevant cubic space as well as to a vertical boundary of that space being a wall.

263 The issue under consideration in ***Seiwa*** was whether a waterproof membrane formed part of the lot, or was common property. The appellant in that case contended that the lower horizontal boundary of the lot was the upper surface of the concrete slab and thus the membrane formed part of the lot. The respondent contended that the lower horizontal boundary was the upper surface of the ceramic tiles which had been laid on top of the membrane which, in turn, had been placed on top of the slab.[190] The NSW Court of Appeal held that the lower horizontal boundary was the upper surface of the tiles, as that was the presentation of the property upon registration of the plan.

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[185] ***Topic*** [111].
[186] ***Topic*** [111].
[187] ***Topic*** [113].
[188] ***Topic*** [114].
[189] ***The Owners SP 35042 v Seiwa Australia Pty Ltd*** [2007] NSWCA 272 [39] (***Seiwa***).
[190] ***Seiwa*** [4].

The decision in ***Seiwa*** does not directly address the consequences of the destruction of a boundary. Furthermore, ***Seiwa*** deals with a different statutory regime to that which I am considering.

264 Critical to Corboy J's reasoning in ***Tipene No. 2*** was that the demolition of a boundary building will obliterate the cubic space that constitutes a lot. That was not the situation under consideration in ***Topic***, which dealt with alterations being made to the surface of a floor which constitutes the lower horizontal boundary.

265 For these reasons, I do not regard either ***Topic*** or ***Seiwa*** as being inconsistent with ***Tipene No. 2***.

266 I have come to the following view regarding the effect of the decision in ***Tipene No. 2*** on these matters.

267 First, in my view, Corboy J's reasoning that the demolition of a boundary building obliterates the cubic space that constitutes a lot comprised by that building is either the ratio for the decision to dismiss the appeal, or seriously considered obiter dicta central to the ultimate disposition of the appeal. Accordingly, I consider I am bound to follow, or should follow, that reasoning. It follows therefore that the demolition of the home previously on lot 2 destroyed the part lot comprised by that building. However, as I have explained, the extinguishment of the part lot comprising the home does not terminate the strata scheme.

268 Here, the home not only constitutes a part lot itself, its walls also form part of the boundaries for those part lots of lot 2 external to the home. The part lots external to the home, are the air space and land sitting within the lower and upper horizontal boundaries but not including the home. I am troubled by an outcome that the demolition of a structure that partly defines the boundaries of a part lot results in that part lot also being extinguished. The part lot itself is not destroyed; rather part of the boundaries to it are. Also, while those boundaries are destroyed, they are capable of being ascertained by reference to the documentation sustaining the existing plan, which was the approach suggested in ***Seiwa***.[191] However, the difference in ***Seiwa*** and in ***Topic*** is that the relevant structure itself remained in place whereas here the structure has been removed entirely.

[191] ***Seiwa*** [39].

269 In any event, for reasons which I will come to, I consider I do not need to resolve the question of whether the removal of the building results in the destruction of the part lots external to it, or the extinguishment of either lot 1 or lot 2. I consider it is sufficient to dispose of this matter for me to hold that the destruction of the building on lot 2 results, at least, in the extinguishment of the part lot constituted by that building.

What becomes of the space the subject of the demolished building?

270 Differing views have been expressed as to the consequences where a lot, or part lot, is extinguished by reason of a building being damaged or demolished.

271 In ***Tipene No. 2***, his Honour stated that:[192]

> The proprietor will hold some interest in the land but that interest will not be in the cubic space that formed a 'lot' according to the statutory definition.

272 In ***Crugnale and Commissioner of State Revenue***,[193] the Tribunal stated that:

> I disagree with the Applicants that the demolition of the buildings comprising Lots 1 and 2 on Strata Plan 6837 of itself effected the termination of the strata scheme. As I understand the decision in ***Tipene***, the effect of the destruction of a lot is simply to create additional common property under the strata scheme. The strata scheme itself continues until the termination of strata scheme by the process set out in s 30 of the 1985 Act.

273 I agree that the demolition of the building does not itself effect the termination of the scheme. In this respect, as I have explained, s 28 of the Act permits a scheme to be varied or substituted where a building is damaged or destroyed and thus recognises that the scheme remains on foot, irrespective of such damage or destruction.

274 The approach that the destruction of a lot creates additional common property was also applied in ***De Mol***.[194]

275 In my view, whether the destruction of a lot creates additional common property requires analysis of the Act as to how common property is defined, and may be added to, or taken away.

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[192] ***Tipene No. 2*** [87(a)].
[193] ***Crugnale and Commissioner of State Revenue*** [2019] WASAT 8 [113].
[194] ***De Mol*** [52].

276 Relevantly for this strata scheme, s 3(1)(a) of the Act defines common property as meaning:

> so much of the land comprised in a strata plan as from time to time is not comprised in a lot shown on the plan.

277 The words 'not comprised in a lot shown on the plan' are important. They suggest that the common property is ascertained from what is shown on a plan, not to whether such lots may have been extinguished by reason of the demolition of a building. This seems consistent with the description of the lot proprietor's interest as recorded on the certificate of title, which is:

> Together with a share in any common property as set out on the Strata Plan.

278 This is subject to the limitations set out in the second schedule of the certificates of title. The relevant portion is:

> Interests notified on the Strata Plan and any amendments to lots or common property notified thereon by virtue of the provisions of the *Strata Titles Act*…

279 This suggests that a lot proprietor's share in common property is to the common property set out on the strata plan, subject to any notifications placed on the strata plan by virtue of the provisions of the Act.

280 Such an outcome also appears consistent with pt II div 2 of the Act which deals with common property. It speaks of the processes by which additional common property can be acquired (s 18) or disposed of (s 19).

281 Also, the Act envisages that common property may be altered by way of a re-subdivision pursuant to s 8C. However, it is only upon registration of the plan of re-subdivision that it becomes part of the strata plan as previously registered: s 8C(1). Further, upon such registration, the Registrar of Titles is to amend the strata plan and the schedule of unit entitlements as per the plan of re-subdivision.

282 Section 8C(3) deals with the scenario where a lot or part lot of the prior strata plan becomes common property under the new re-subdivision. Section 8C(3)(a) provides that upon registration of the plan of re-subdivision, by operation of law, the common property described in the new plan vests in the proprietors to be held by them as tenants in common in shares proportionate to their unit entitlements. Thus, it is registration which affects the change in common property.

283 The further way in which common property can be altered is by way of a variation of the strata scheme pursuant to an order of the court made under s 28 of the Act, whether under a varied or new scheme, or by way of addition to the common property under s 28(3)(f).

284 Overall, these provisions envisage that the enlargement of the common property occurs as part of processes specifically afforded by the Act. The Act does not seem to envisage that there can be an addition to common property immediately upon the demolition of a boundary building *without more*. It may be that the procedures afforded by the Act end up with that as the ultimate result, but it does not seem to me that the Act envisages it happens automatically without more, and without taking account of the interests of affected parties. So, for instance, without taking account of the right of the lot proprietor to sole occupation of the land where the lot is constituted by a delineated parcel of land, or without taking account of the effect on third parties, such as mortgagees or insurers. As an example, if in a two-lot single tier scheme, a boundary wall was destroyed, but the respective dwellings remained habitable, it does not seem to me that the Act envisages that immediately upon destruction of the boundary wall, those dwellings become common property.

285 Accordingly, in my view, in respect of the part lot that previously comprised the building, it does not become common property. Rather, the proprietors of that lot, so here the Gaudieris, have an interest in the land the subject of the prior building. For the purposes of this decision, it is not necessary that I delineate further the precise type of interest that arises. It is sufficient for me to say that it is not a part lot and it is not common property. This same conclusion would apply if I had found the entirety of the lot was extinguished by reason of the demolition of the home.

286 Further, in my view, the Gaudieris remain the proprietor of lot 2 within the meaning of the Act. In that respect, the Act defines the proprietor as being the person registered under the *Transfer of Land Act* as proprietor of the estate in fee simple of the lot.[195] With respect to lot 2, that is the Gaudieris. Accordingly, it follows that the Gaudieris are able to exercise the rights afforded under the Act to a proprietor, irrespective of whether a part lot, or the entire lot, is extinguished. If it were otherwise, the Gaudieris would have no recourse to the various possible avenues under the Act to remedy the effect of the home being

[195] Section 3(1) of the Act.

demolished. This same reasoning applies to the Singhs in relation to lot 1, that is they remain the proprietor of that lot for the purposes of the Act. Furthermore, the decisions in ***Tipene No. 2*** and in ***De Mol*** reflect that s 28 is available where a boundary building has been destroyed.

287 The Singhs' counsel submitted that the titles to lot 1 and lot 2 are affected by reason of the demolition of the old home on lot 2.[196] I do not accept that submission. As I have explained, the Act recognises that the proprietor of a lot is ascertained by reference to the registered proprietor under the *Transfer of Land Act*. Further, the Act recognises that where a building is demolished any proprietor can apply to have the scheme plan varied or replaced. This process does not envisage that title is extinguished upon demolition. Further, such a submission is inconsistent with the result in ***De Mol***, which recognised the rights of the participants as proprietors to bring the respective applications under s 28 and s 31, notwithstanding the demolition of the subject building.

288 For these reasons, in my view, the demolition of the home on lot 2 results in the following:

1. Notwithstanding the demolition of the home, under the Act, the Gaudieris remain the proprietors of lot 2 and the Singhs remain the proprietors of lot 1.
2. Accordingly, the Singhs and the Gaudieris remain able to exercise the rights of a proprietor under the Act.
3. The part lot comprising the home is extinguished. I do not make a finding as to whether the destruction of the home also resulted in the extinguishment of the part lots external to the home, or of lot 1 or lot 2.
4. The Gaudieris have an interest in the land the subject of that home. It is not, at present, common property.

Are the Gaudieris in breach of the Act?

289 I consider the next matter I need to consider is whether the Gaudieris' action in demolishing the existing home, and building a new home, contravened the Act. In my view, it did. Consistently with ***Tipene No.2***, s 7(2) of the Act precluded the demolition of the home and the construction of a new home. This is because demolition of the old home destroyed the part lot it comprised.

290 However, I do not consider the Act prevents absolutely what has occurred. In my view, a resolution for a re-subdivision pursuant to s 8

[196] Singhs' written closing submissions in CIVO 237 of 2019 dated 20 November 2020, pars 43, 44.

of the Act could have been validly passed prior to the demolition of the home. Such a result is consistent with the observations of Corboy J in ***Tipene No. 2***.[197] Section 28 would not however have been available to approve in advance the demolition of the old home and the construction of a new home.

291 It is now necessary to consider whether the alternate bases for the relief sought by the Gaudieris, being s 51A and s 28, are available in light of these conclusions. I will start with s 51A.

Section 51A

292 An application under s 51A seeks to have the court declare a failed resolution as having been passed unanimously. That being so, in my view, the efficacy of the resolution if declared passed needs to be considered. Put another way, there is little utility in the court declaring a resolution to be validly passed if it is otherwise ineffective.

293 In this case, the resolution is to effect a re-subdivision under s 8. The re-subdivision is to divide the existing lot 2 into a new lot 3. As I have explained, a re-subdivision can be characterised in four different ways under s 3(5), which reflect alterations to the boundaries of a lot, or common property, or both.[198] The Gaudieris' counsel was reluctant to commit as to whether the proposed re-subdivision fell within either (b) or (c) of the possible alternatives outlined in s 3(5).[199] While not in any way determinative, this reluctance illustrates the difficulties associated with addressing the current scenario via a re-subdivision.

294 I have two difficulties with the proposed resolution.

295 First, it proceeds on the premise that the existing lot 2 remains as it was from when the strata plan was last registered. So, the premise is that lot 2 is unaffected by the demolition of the home. However, as I have found, the part lot on lot 2 comprised by the home has been extinguished (at least). Therefore, lot 2 in its form prior to the demolition of the home no longer exists.

296 Second, given the likelihood there are different floor levels between the old and the new home, it is likely that the common property boundaries as a result of the proposed re-subdivision will be altered. While the total cubic space area of the lot will remain the same, the lower and upper horizontal boundaries will shift. These are not only the horizontal boundaries for the lot, but are also the boundaries for the common property adjoining the lot.

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[197] ***Tipene No. 2*** [104].
[198] Reasons [50].
[199] ts 487 - ts 488.

297 Resolution 6.1(a) provides for consent to the re-subdivision of lot 2, not to the re-subdivision of lot 2 and the common property. Therefore, in its express language, the resolution does not provide for consent to the alteration of the boundaries of the common property. Resolution 6.1(c) does however provide for consent to the acquisition or transfer by the strata company of *any* common property as provided for in the plan of re-subdivision. Such acquisition or transfer is not identified on the proposed new plan. The use of the word *any* in resolution 6.1(c) suggests it is a type of safety net to take account of potentially unthought of consequences. Such an approach by its very nature lacks specificity. In my view, that lack of specificity counts against resolution 6.1(c) being used as a basis to expand the consent for re-subdivision expressly set out so as to also include the re-subdivision of the common property.

298 In this case, the alteration of the boundaries to the common property are likely to be minor. However, in my view, whether or not the resolution is effective must be assessed against whether such alteration is provided for by the proposed resolution, not whether it is a significant result.

299 Accordingly, in my view the resolution as put to the meeting is ineffective to achieve the re-subdivision sought by the Gaudieris. That being so, I do not consider it appropriate for this court to exercise its discretion to deem such a resolution to be unanimously passed.

300 Having come to this view, I do not need to consider whether s 8 can be used retrospectively to regularise something that has occurred. The Singhs' counsel submitted that the reference to a *proposed* re-subdivision in s 8A(a)(ii)(I), means that the re-subdivision for which approval is sought cannot take account of events that have already occurred. It seems to me the use of the word proposed refers to the new subdivision plan, taking account of the existing state of affairs. So, a proposed re-subdivision conceivably could take account of historical events. In this respect, as the Gaudieris' counsel pointed out, a plan of re-subdivision of a lot in a strata scheme must be accompanied by either an occupancy permit, or a building approval certificate: s 8A(f). This suggests the plan can take account of a building already built, rather than only one proposed to be built. In any event, I do not need to decide this.

Section 28

301 As I have explained, in my view, irrespective of whether the demolition of the home resulted in the extinguishment of part of lot 2, or the entirety of it, under the Act the Gaudieris remain the proprietor of the lot. They therefore can avail themselves of s 28, as an application under that section can be brought by a proprietor of a lot.

302 Further, the pertinent question in relation to the availability of s 28 is whether it applies to the scenario where a home has been demolished *and* a new home built in its stead. For the reasons already given, it my view it is available in such circumstances.[200]

Effect of order terminating the scheme

303 As I have explained, if I was to make an order terminating the scheme, upon entry of the order on the registered strata plan and on the respective certificates of title, the Singhs and the Gaudieris are entitled to the parcel of land the subject of the scheme as tenants in common in shares proportional to the unit entitlements of their respective lots.

304 Accordingly, the effect of making an order for termination is that the Singhs would become entitled as tenants in common of two-thirds of the parcel of land the subject of the strata plan, and the Gaudieris would become entitled as tenants in common of a one-third interest. Self-evidently that does not accord with the values of the homes situated on the respective lots. In that respect, Mr Garmony's undisputed evidence is that a unit entitlement reflecting the capital value of the new home on the Gaudieris' lot is 59 units for the Gaudieris and 41 units for the Singhs.

305 The Singhs' counsel in closing submissions accepted that the result of termination would be that the Singhs would become the owners as tenants in common of a two-third interest in the parcel of land the subject of the scheme, with the Gaudieris being the owners of the remaining one-third interest.[201] The Singhs by their counsel have said that is not their intention. Further, the Singh's counsel accepted that to overcome such a result would require agreement between the parties.[202] However, the Singhs have not put forward any proposed agreement which would alleviate that result.

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[200] Reasons [106] - [115].
[201] ts 364 - ts 366.
[202] ts 364 - ts 365.

306 The Singhs do seek an order that the parties do all things necessary to convert the strata scheme to green title. This order is sought under s 31(3)(g) of the Act. In my view, the order sought is misconceived. The effect of an order for termination is that the scheme no longer exists. There is accordingly no scheme to convert. Rather, s 31(10)(a) and s 30(2) provide that upon entry on the register of the order for termination, there is then one parcel of land owned by the lot proprietors as tenants in common. The process provided by s 31 does not envisage the court making orders addressing what is to happen to that parcel of land after termination; that is after it is no longer the subject of a strata scheme. In my view, to do so would cut across s 31(10)(a) and s 30(2). Ultimately, in my view, the conversion of the existing lots to green title requires either the agreement of the parties, or an order for partition subsequent to termination. I do not see that this court has the power to compel such a result as a function of the termination of the scheme. Furthermore, as the Gaudieris' submit, there is inadequate material before the court to conclude that the proposed conversion to green title complies with the applicable planning regime.

Are the unit entitlements under the Act a proprietary right?

307 The Singhs submitted that they purchased lot 1 on the basis that they had a two-third unit entitlement which was in effect a proprietary right which could not be altered. The regime under the Act envisages that the unit entitlements give an immediate entitlement to ownership of common property. However, the Act envisages that common property can be altered by unanimous resolution or by court order, as can the unit entitlements. The second schedule to the certificates of title for each lot recognises that the common property may be amended under the Act. Further, the certificate does not identify any numerical unit entitlement.

308 In addition, as I have explained, the Act envisages scenarios where the unit entitlements can change. These include on an application under s 28 and in circumstances where the proportionate values reflected by the unit entitlements have become unfair or anomalous.[203]

309 Having regard to these matters, in my view, the unit entitlements are not an unalterable proprietary right.

Voting rights attaching to the proposed unit entitlements

[203] Reasons [35].

310 In respect of the amendments to the unit entitlements sought by the Gaudieris, this will result in them having 59% of the total unit entitlements.

311 I do not need to decide whether or not the transitional provisions permit me to take account of possible prejudice going forward under the amended Act from a change in voting entitlements. This is because the outcome seems to be substantially the same under both the Act and the amended Act.

312 Under the Act, the quorum in respect of a two-lot scheme is the proprietors or their duly appointed proxies: s 50B. Under the amended Act, the quorum for a general meeting for a two-lot scheme requires that there are persons present entitled to cast the vote attached to each lot: s 130(2) of the amended Act.

313 Under the Act, a unanimous resolution requires all persons entitled to exercise the powers of voting to vote in favour.[204] A resolution without dissent requires that no vote is cast against the resolution: s 3AC(1). Under the amended Act, a unanimous resolution requires that the vote attaching to each lot in the scheme is cast in favour of the resolution: s 123(1)(b) of the amended Act. Further, for a two-lot scheme, a resolution is only regarded as a resolution without dissent, if it is a unanimous resolution: s 123(2)(b) and s 123(3) of the amended Act.

314 In respect of ordinary resolutions, under the Act, on a show of hands each proprietor has one vote: sch 1, bl 14(1). On a poll, the proprietors have the same number of votes as the unit entitlements of their respective lots: sch 1, bl 14(2).

315 Under the amended Act, an ordinary resolution is regarded as passed where:

(a) more than 50% of the number of lots for which votes are cast vote in favour: s 122(1)(c) and s 123(7)(b)(i); or

(b) any person entitled to cast a vote demands that the vote be counted by the number of unit entitlements of the lots for which votes are cast, and more than 50% of the sum of the unit entitlements of the lots in the scheme for which votes are cast vote in favour: s 122(1)(c) and s 123(7)(b)(ii).

[204] See definition of unanimous resolution in s 3(1).

316 Accordingly, whether under a poll under the Act, or on a demand that the vote be counted by the number of unit entitlements under the amended Act, an ordinary resolution can be passed if the majority of the unit entitlements vote in favour.

317 In opening submissions, the Gaudieris' counsel submitted that with this scheme there are no circumstances in which an ordinary resolution would arise.[205] While that may well be likely, I do not consider it a matter which I can predict with certainty.

Should the relief sought by the respective parties be granted?

318 In my view, consideration of the separate applications brought by the Singhs and the Gaudieris are interlinked. I consider the following matters are of significance in determining both sets of proceedings:

1. Mrs Treasure consented to the demolition of the old home on lot 2 and the construction of a new home on it. Mrs Treasure was provided with the plans for the new home and agreed to construction in accordance with those plans. The old home on lot 2 was however not damaged. Its demolition arose because of the Gaudieris' desire to build a new home.

2. The required demolition permit was obtained to demolish the prior home. The required development approval and building permit were obtained for the construction of the new home.

3. The Act does not preclude a re-subdivision being effected by the demolition of an old home and the construction of a new home. However, the required procedures to authorise that activity have not been carried out in this case.

4. The Gaudieris did not take steps to regularise the position under the Act within a reasonable time after the construction of the new home.

5. There is no suggestion by the Singhs of any complaint with the appearance or structure of the home itself on lot 2.

6. Prior to the Singhs signing the offer and acceptance to purchase lot 1, they had not had any discussion with Mr St Quintin regarding the Gaudieris' attitude to a redevelopment of lot 1.

[205] ts 67.

7. Prior to the Singhs becoming the registered proprietors of lot 1, the Gaudieris did not indicate to Mr St Quintin that the Gaudieris agreed to the lots in the strata scheme being converted to green title. Mr Gaudieri's position as indicated to Mr St Quintin was that he would consider any development proposal put forward by the new owners. This was a position genuinely held by Mr Gaudieri. It was also the position passed on by Mr St Quintin to Mrs Singh. That being so, the Gaudieris made no representation to the Singhs that they would consent to conversion to green title. I should also say that even if the conversation between Mr St Quintin and Mrs Singh regarding the Guadieris' attitude to redevelopment took place before the offer and acceptance was signed, I do not consider that advances the Singhs' position given the generality of the Gaudieris' position.

8. The Singhs took a significant commercial risk in purchasing lot 1 without first obtaining a commitment from the Gaudieris that they agreed to convert the lots to green title.

9. Prior to becoming the owners of lot 1, the Singhs only made preliminary enquiries as to what type of developments were achievable, and financially viable, for lot 1. Further, on the evidence, I am not able to conclude that a multi-storey apartment building development will be profitable, or that the Singhs have the ability to fund it. I am therefore not satisfied that the Singhs will suffer a material financial loss by reason of not being able to undertake a multi-storey apartment development on lot 1.

10. The Singhs submitted that the Gaudieris stood by and allowed the Singhs to purchase lot 1 without bringing to their attention that the building on lot 2 did not accord with the strata plan.[206] The Gaudieris did not bring this to the Singhs' attention. As these two sets of proceedings demonstrate, it certainly would have been preferable if the position regarding lot 2 was regularised before the sale of lot 1. However, I do not consider this reflects any bad faith on the part of the Gaudieris. In my view, prior to the sale of lot 1, the Gaudieris did not appreciate the significant uncertainty under the scheme which arose from the construction of their new home. No doubt, the Gaudieris

[206] ts 365.

were comforted by the fact they had sought and obtained Mrs Treasure's consent. Moreover, common sense suggests that if the Gaudieris had appreciated the significance of the predicament they were in, they would have sought to regularise the position while Mrs Treasure remained the owner of lot 1. The Gaudieris had a good relationship with Mrs Treasure and her godson Mr Higham, and it plainly would have been preferable to deal with them rather than an unknown new owner.

11. The Singhs' proposal put to the Gaudieris does not identify with any precision the type of development that would be undertaken on lot 1. Rather, the proposal was to the effect that the strata lots be converted to green title, without any commitment as to the type of development which might then take place on lot 1.

12. In these circumstances, in my view, the Gaudieris did not act unreasonably by not agreeing to the Singhs' proposal.

13. The documents comprising the Singhs' offer and acceptance for lot 1 identified the relevant unit holding as being two units for lot 1 and one unit for lot 2. However, Mrs Singh did not in evidence suggest that this was a determinative factor in her decision to buy lot 1.

14. The unit entitlements are not an unalterable proprietary right.

15. The proposed new unit entitlements reflect the fair value of the structures on lot 1 and lot 2.

16. The unit entitlements carry significant importance upon termination of the scheme. The effect of termination without an alteration of the unit entitlements is that the land the subject of the scheme would become one parcel, which would be owned two-thirds by the Singhs and one-third by the Gaudieris. As Mr Garmony's evidence demonstrates, such an outcome does not accord with the values attributable to the home on each lot. If termination was ordered as sought by the Singhs, this would result in a significant windfall to them.

17. If the Gaudieris were to be granted a majority unit entitlement of 59%, this would only provide them with a voting advantage in respect of an ordinary resolution where a lot owner demands that the votes be counted by unit entitlements.

18. The common property in respect of the scheme is quite limited, being part of the air space above the upper horizontal boundary, and part of the earth below the lower horizontal boundary.

19. The Singhs' counsel submitted there was significant animosity between the Singhs and the Gaudieris and this was a reason to justify termination. I do not accept that submission. These proceedings certainly reflect that the parties are in significant disagreement as to what should happen with the strata scheme. However, both Mrs Singh and Mr Gaudieri were very respectful of each other in terms of the evidence that they gave.

20. Regularising the strata scheme removes the reduction in value for both lots by reason of the current scheme being non-compliant.

21. The proposed plan of re-subdivision is now marked in order for dealing with Landgate.

22. I am not able to make any finding as to the possible prejudice to Bankwest if I was to order the termination of the scheme, or not make the orders sought by the Gaudieris.

319 When I have regard to the entirety of the matters which I have just set out, in my view, the overall circumstances fall well short of justifying an order for termination of the scheme. As the Singhs' counsel acknowledged, absent the situation regarding the Gaudieris' new home, the grounds for termination are difficult.[207] I consider the situation regarding the new home is remediable under s 28.

320 Further, termination of the scheme delivers to the Singhs a significant windfall, well beyond what their expectation was when they purchased lot 1. This is against the context of the Singhs purchasing lot 1 without having any commitment from the Gaudieris regarding conversion to green title and where the current situation is that I am not able to assess whether the Singhs can carry out a profitable development on lot 1.

321 Accordingly, I refuse to make the orders sought by the Singhs in their substituted originating summons. The Singhs have not sought that their originating summons be treated as an application under s 28 if

[207] ts 343 - ts 344, ts 455.

I declined to make an order for termination. In the circumstances of this case, where there is already an application before me under s 28, I do not consider I should treat the Singhs' originating summons as an application under s 28. Accordingly, I dismiss the Singhs' substituted originating summons.

322 This then leaves the Gaudieris' originating summons. In my view, for reasons already explained, the relief sought under s 51A should not be granted. That being so, it seems there are two alternatives. First, I grant the relief sought under s 28 of the Act. Second, I dismiss the Gaudieris' originating summons and leave the regularisation of the current position to be addressed by the State Administrative Tribunal under the amended Act. There is an initial attraction to the second alternative, as the amended Act contains substantially different provisions, including s 9(7) which on its face minimises the potential effect of the destruction of a boundary building. However, while I think the better view is the transitional provisions do not prevent me from taking account as a discretionary consideration that the Act no longer applies to the scheme, that is not without doubt given the rather specific language used, namely the application must be dealt with as if the amending Act had not been passed.

323 In addition, the matter has been extensively argued before me with the parties giving detailed evidence and putting on voluminous written submissions. Furthermore, for the position to remain unresolved is prejudicial to the parties and only results in the continuation of the current disputes.

324 There are significant advantages to an order being made which regularises the current situation regarding lot 1 and lot 2. It provides the parties with certainty. It removes the negative effect on the values of lot 1 and lot 2 due to the current irregularity in the scheme. Further, the proposed new unit entitlements reflect the capital values of the lots taking account of the new structure on lot 2. This does not result in an unfairness to the Singhs, but rather reflects the fair capital value having regard to the structures which are on each lot and which were on each lot when the Singhs purchased lot 1.

325 While the Gaudieris did delay in obtaining the requisite strata approval, this was because they did not appreciate the significance of not having done so, against the context that Mrs Treasure had agreed to the building of their new home. The delay was not for the purpose of obtaining an advantage. If anything, the delay has been to the

Gaudieris' detriment. Also, this is not a situation where the Gaudieris have acted in a cavalier way. They sought and obtained Mrs Treasure's approval. They sought and obtained the required demolition approval and building permit. They have ensured that the proposed re-subdivision plan is in order for dealing with Landgate.

326 When the Singhs purchased lot 1 they were aware of the home on lot 2. They make no complaint about it, either in terms of its size or its presentation.

327 I have explained that in my view s 28 can apply in the current circumstances. That being so, when I have regard to the overall effect of the factors which I have addressed at [318] and [324] - [326], in my view I should exercise the discretion afforded by s 28 to order the variation of the scheme by replacing the existing strata plan with the strata plan which was put to the meeting on 30 July 2019 and for consequential orders to be made that the unit entitlements be varied to reflect Mr Garmony's assessment of the capital values, so that is 59 units allocated to the new lot 3 and 41 units allocated to lot 1. There are however three qualifications.

328 First, my current view is that I am only prepared to make such orders on the basis that the Gaudieris provide a written undertaking as to the following two matters:

1. They will pay all costs associated with the registration of the new strata scheme and the substitution of the new schedule of unit entitlements for the existing schedule of unit entitlements. The need to now regularise the scheme is largely one of the Gaudieris' own making and I do not consider the Singhs should have to bear any of the costs of doing so.

2. The Gaudieris will not demand that the vote on an ordinary resolution be counted by the number of unit entitlements. In this respect, counsel for the Gaudieris submitted that there are no circumstances in which an ordinary resolution would arise within this scheme. The proposed undertaking ensures that if such an unlikely scenario does arise, the Gaudieris would not be able to have the vote passed by demanding that it be counted by reference to unit entitlements.

329 The effect of the requirement for such an undertaking is that the orders would not become operative unless and until such an undertaking is given. I consider I am able to impose the undertaking as

a condition in accordance with s 28(3)(i) of the Act. However, I recognise that the parties have not been given an opportunity to be heard on the imposition of such a condition, so if they wish to be heard, they will be afforded the opportunity to make submissions.

330 The second qualification is that I am not at this stage prepared to make the ancillary orders sought by the Gaudieris to compel the Singhs to take steps to give effect to an order for variation of the strata plan. I am satisfied that I have the power to make such an order under s 28(3)(h). However, I do not consider such an order should be made in the abstract. Rather, I am of the view that the Gaudieris need to identify the particular documents and steps required and then the appropriateness of the order can be considered against that defined subject matter.

331 The third qualification relates to Bankwest, which has a registered mortgage in respect of lot 2. The proposed variation to the strata plan contemplates a new lot 3 in lieu of lot 2. Before making the order, I will need to be satisfied that Bankwest's rights as mortgagee are preserved by the varied plan.

332 I should also say that if I was of the view that s 51A was an available option, I would have been of the view that is in the best interests of the Singhs and the Gaudieris that the primary orders sought under s 51A be made. This is for the same reasons that I consider it is appropriate that an order be made under s 28. It would also be subject to the same qualifications. However, I have my doubts whether the ancillary orders sought could be made on an application under s 51A.

333 I will hear from the parties as to the precise terms of the order to be made and also the day on which the order should take effect in accordance with s 28(5). I will also hear from the parties in relation to costs.

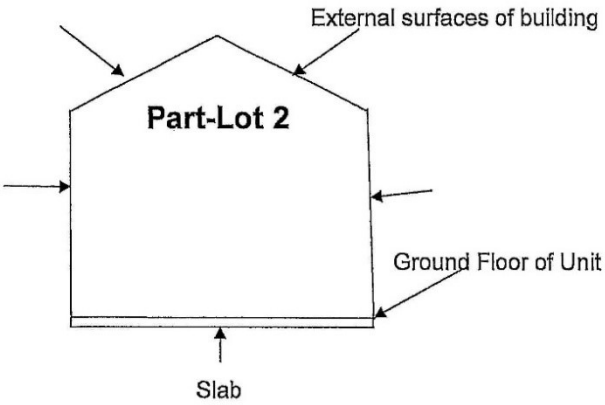
Lot 2 Sketch Elevation

Not to Scale

Common Property

20m above upper surface level of ground floor of unit

Part-Lot 2



Part-Lot 2

5m below upper surface level of ground floor of unit

Common Property

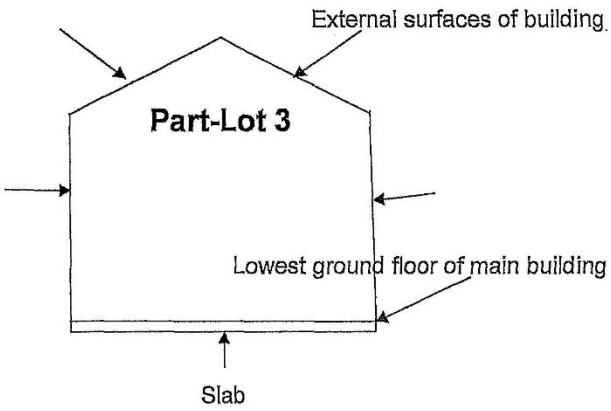
Lot 3 Sketch Elevation

Not to Scale

Common Property

20m above upper surface level of the lowest ground floor of main building

Part-Lot 3



Part-Lot 3

5m below upper surface level of the lowest ground floor of main building

Common Property

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

CA
Associate to Judge Lemonis

29 NOVEMBER 2021