
JURISDICTION : STATE ADMINISTRATIVE TRIBUNAL

ACT : STRATA TITLES ACT 1985 (WA)

CITATION : THE OWNERS OF 49 BORANUP AVENUE
CLARKSON STRATA SCHEME 63047 and POPAL
[2022] WASAT 14

MEMBER : MS KY LOH, MEMBER

HEARD : 19 OCTOBER 2021

DELIVERED : 21 FEBRUARY 2022

FILE NO/S : CC 525 of 2021

BETWEEN : THE OWNERS OF 49 BORANUP AVENUE
CLARKSON STRATA SCHEME 63047
Applicant

AND

KHALIDA POPAL
Respondent

Catchwords:

Strata titles - Preliminary question - Whether volunteer agreement for respondent to act as strata manager inferred by conduct of other owners - Whether such agreement properly terminated

Legislation:

Interpretation Act 1984 (WA), s 21

Strata Titles Act 1985 (WA), (post 1 May 2020), s 3(1), s 96, s 115, s 143, s144(1)(a), s 145, s 151, s 151(1), s 151(2), s 151(3), s 151(4), s 151(5), s 152,

s 228, Sch 5, cl 2(1), cl 2(2), cl 2(3), cl 4, cl 13(1)

Strata Titles Act 1985 (WA), (prior to 1 May 2020), s 39A, s 42(2), Sch 1, Sch 2

Strata Titles Amendment Act 2018 (WA)

Strata Titles Regulations 2019 (WA), reg 11(1)

Result:

Application partly dismissed

Category: B

Representation:

Counsel:

Applicant : J Johnstone

Respondent : In Person

Solicitors:

Applicant : Johnstone Crouse Lawyers

Respondent : N/A

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

Nil

REASONS FOR DECISION OF THE TRIBUNAL:

Introduction

1 Ms Popal was the original owner of all the six lots comprising the strata scheme, 49 Boranup Avenue Clarkson.

2 She took on the role as strata manager initially for cost-saving purposes, and continued in that role following the sale of four of the lots.

3 When the owners of the other lots decided to change strata managers, they passed a resolution at an Extraordinary General Meeting (**EGM**) on 30 July 2020 to 'terminate the current strata manager, [Ms] Popal, as strata manager'.

4 Prior to the EGM, the solicitor for the other owners sent Ms Popal a letter advising of concerns about her management of the strata scheme and their wish to appoint an independent strata manager, giving her seven days to respond.

5 No notice of termination was issued to Ms Popal.

6 The strata company seeks, in substance, an order that Ms Popal return to the strata company all records of the strata company, including records of accounts.

7 A preliminary issue arose as to whether Ms Popal was properly appointed as strata manager for the strata scheme, and if so, was she properly terminated as strata manager.

8 For reasons set out below, I am satisfied that, by conduct of the other owners, there was acceptance of a volunteer agreement for Ms Popal to act as strata manager, in respect of which formalities which arise under the 2018 amendments to the *Strata Titles Act 1985 (WA)* (the **Act**) did not apply.

9 I am not satisfied that that volunteer agreement was properly terminated in the absence of a notice of termination and a 'show cause' notice, which was required at the time as the 2018 amendments had come into effect.

10 As the strata management contract with Ms Popal was not properly terminated, I will dismiss that part of the application requiring

return of the strata company records under s 152 of the Act (where a strata management agreement has been terminated).

Issue for determination

- 11 In determining the preliminary issue identified in [7], the following secondary issues arise for consideration:
- a) Was there was an agreement for Ms Popal to act as strata manager?
 - b) If so, was it properly terminated, by reference to whether:
 - i) a show cause notice was provided to Ms Popal, in compliance with s 151(3) and (4) of the Act?
 - ii) a written notice of termination was provided to Ms Popal, in compliance with s 151(2) of the Act?

Legal framework

12 These proceedings commenced following the major amendments to the the Act coming into operation on 1 May 2020 under the *Strata Titles Amendment Act 2018* (WA) (**Amendment Act**), and as such those amendments apply to the determination of this application.

13 All references to the provisions of the Act in these reasons are to those in the Act coming into operation from 1 May 2020.

14 All references to the provisions of the *Strata Titles Act 1985* (WA) immediately prior to 1 May 2020 will be referred to as those in the **pre-amendment Act**.

15 The strata scheme was created by the registration of the strata plan on 4 October 2011 under the pre-amendment Act.

16 Clause 2(1) of Sch 5 to the Act provides that the following relevantly continues in existence notwithstanding the coming into operation of the Amendment Act:

- a) a strata scheme;
- b) a lot or common property in a strata scheme;

- c) an estate or interest in a lot or common property in a strata scheme; and
- d) a strata company, its council or its officers.

17 Section 228 of the Act provides that Sch 5 is additional to and does not prejudice or affect the application of any relevant provisions of the *Interpretation Act 1984* (WA) (**Interpretation Act**), except where the contrary intention appears.

18 The constitution of each of the above elements of the strata titles regime referred to in [16] is crystallised at the time of its creation under the pre-amendment Act. As such, I consider that the general rules of statutory construction that a written law comes into operation at the beginning of that day (s 21 of the Interpretation Act) must give way to a necessary construction of cl 2(1) of Sch 5 of the Act that each of the above elements continues into existence as constituted and defined under the pre-amendment Act, except by express modification (such as under transitional provisions, as set out in [54] below).

19 Clause 2(2) of Sch 5 to the Act provides that the strata scheme for which a strata plan is registered immediately before the commencement day is taken to be registered as a strata titles scheme. Further, the strata plan, by-laws and schedule of unit entitlement as registered immediately before 1 May 2020 continue to be registered as scheme documents: cl 2(3) of Sch 5 to the Act.

20 Clause 4 of Sch 5 of the Act provides that by-laws of a strata company as in force immediately before commencement day, save for specified by-laws which do not apply in this case, continue in force as scheme by-laws as if they had been made as 'governance by-laws' or 'conduct by-laws' according to the classification into which they would fall if they had been made on commencement day.

Background

21 The following facts are not in dispute between the parties.

Factual background

22 Ms Popal was the original owner of the lots comprising the strata scheme when it was registered on 4 October 2011.

23 Based on the roll of strata company, Ms Popal sold four of the lots to third parties and retained the remaining two lots; in particular, lot 4

was sold on 26 October 2011, lot 6 was sold on 2 February 2012, lot 2 was sold on 3 October 2013 and then again 18 April 2016, and lot 3 was sold on 11 September 2014.

24 It is conceded by the strata company that Ms Popal was managing the affairs of the strata scheme, although the capacity in which she managed those affairs appears to be disputed.

25 In an email interchange in February and March 2020 between Ms Popal and the owner of lot 6, Mr Safy Tashkandy, the latter had challenged why:

as strata manager, [was Ms Popal] not legally obliged to disclose ... information [about strata management services] to all of [the other owners] including arranging a meeting with all of the other property owners for this type of payments/management.

26 Ms Popal had responded that the 'service was enacted prior to [Mr Tashkandy's] purchase of the property' and then provided the following details of some management services she provided, noting that the 'token fee does not account for the amount of work that was involved':

- arranging and maintaining insurance and claims;
- managing the finances;
- maintaining records as required under law;
- coordinating and arranging for repairs and maintenance;
- attending to requests from authorities and utility providers;
- payment of bills;
- liaising with council, agents and settlement agents on behalf of owners; and
- preparing and maintaining accounts.

27 On 16 June 2020, the other owners' solicitors, Johnstone Crouse Lawyers (**Johnstone Crouse**), wrote to Ms Popal, advising of the other owners' concerns about whether a bank account was established in the strata company's name, and of compliance issues such as the lack of

annual general meetings being called, annual budgets not being set, and a council not being appointed.

28 In that letter, Johnstone Crouse requested that Ms Popal provide bank statements and invoices in relation to the strata scheme. They also indicated that the other owners wished to appoint an independent strata manager to manage the strata scheme, and were in the process of sourcing quotes.

29 Johnstone Crouse asked if such appointment could be done unanimously by consent of all lot owners or whether a general meeting will need to be called.

30 They sought her response by close of business 23 June 2020.

31 On 15 July 2020, a notice was issued to convene an EGM to be held on 30 July 2020, with a copy of the agenda, which included the following motions:

- a) to terminate the current strata manager, Ms Popal, as strata manager;
- b) to appoint Johnstone Hocking Strata Management as strata managers (**Johnston Hocking**);
- c) to arrange for the transfer of the 'development's' records from the former strata manager to Johnstone Hocking.

32 All of the owners bar Ms Popal attended the EGM in person or by proxy.

33 At the EGM, the motions set out in [31] were passed by resolution of those who attended the EGM.

34 On 3 August 2020, a copy of the minutes of the EGM was provided to Ms Popal by email.

35 On 24 August 2020, Ms Popal responded to the Johnstone Crouse letter.

36 On 9 April 2021, Johnstone Hocking applied to the Tribunal for orders that Ms Popal return to the strata company or a representative of the strata company all records of the strata company, including records of accounts which are in her possession. They rely on s 152 of the Act

or, alternatively, if Ms Popal does not 'declare herself' as a strata manager, on s 96 of the Act, to require the return of all records (or alternatively property) of the strata company.

The strata company's case

37 Based on the application to the Tribunal, it appears that the strata company adopts alternate positions: that is, it seeks the return of its records under s 152 of the Act if Ms Popal is found to be the strata manager, or under s 96 of the Act if Ms Popal is not found to be the strata manager.

38 The strata company accepts that Ms Popal may be found to be the strata manager as it is contended, on its behalf, that 'it is common cause that [Ms Popal] was managing the affairs of the scheme, but the management fee of \$1,500.00 including GST per annum is disputed'.

39 In that case scenario, the strata company contends that the Johnstone Crouse letter of 16 June 2020 effectively complies with the requirement of a show cause notice to terminate Ms Popal's strata management. Whilst accepting that it only gave Ms Popal seven days to respond, it says that she had effectively at least 14 days' notice as the notice of EGM was not circulated until 15 July 2020.

40 No submission is made on whether a termination notice was given to Ms Popal.

41 Alternatively, the strata company appears to contend that Ms Popal was not a strata manager as she did not enter into a contract or volunteer agreement with the strata company as required under s 144(1)(a) of the Act. In this case scenario, there is no requirement to terminate Ms Popal's strata management, and presumably, the resolution made at the EGM to terminate her strata management was otiose.

Ms Popal's case

42 Ms Popal says that as the owner of all of the lots when the strata scheme was registered, she would have had the authority, as strata council, to appoint herself as strata manager.

43 She took on the role of strata manager initially as it was her responsibility and to keep costs down for herself and the other lot owners.

44 Based on the higher quote she had obtained for strata management services in 2012, she considered that it would be in her and other owners' benefit for her to remain the strata manager, a role in which she continued to undertake through subsequent sales of lots in the strata scheme over the years.

45 She paid for utilities, garden maintenance, insurance and other costs related to the strata scheme predominately out of her own funds. She did not seek reimbursement for some of those costs, but for those that she did, there is a debt of approximately \$18,000 outstanding for which she has not been reimbursed.

46 She contends that her continued authority as strata manager can be implied by conduct of the owners, as they have contacted her to request certain strata management tasks from time to time, such as engaging their preferred gardener or preparing strata documentation required for purchase or sale of property, bulk or hazard junk removal, putting in place legal indemnity deeds or letters relating to an owner's property on the common area, removal of dangerous substances, security lighting installation, gate door replacements and bollard installation payments.

47 Finally, she challenges that termination of her strata management was valid, as she was not issued with a show cause notice that complied with s 151(4) of the Act, as the terms of the Johnstone Crouse letter suggested the termination was *fait de accompli* (rather than a proposed termination), and that she did not receive at least 14 days to make submissions to the letter.

48 She also challenges her termination on the grounds that a notice of termination required under s 151(2) of the Act was never issued to her.

Legislative framework

The pre-amendment Act

49 Unlike the current provisions of the Act, there was no requirement for a particular form that a strata manager's agreement was to take, nor any prescription of the general duties of a strata manager, under the pre-amendment Act.

50 The pre-amendment Act simply allowed by-laws to be adopted that relevantly permitted a council to employ on behalf of the strata company such 'agents ... as it thinks fit in connection with the control and management of the common property and the exercise and

performance of the powers and duties of the strata company':
Sch 1 by-law 8(2)(b) of the pre-amendment Act.

51 As no management statement was lodged with the strata plan, the
by-laws set out in Sch 1 and Sch 2 of the pre-amendment Act shall be
taken to be by-laws of the strata company: s 42(2) of the
pre-amendment Act.

52 Section 39A of the pre-Amendment Act relevantly provides that
implied in every agreement relating to the 'provision of services of an
agent in connection with the management of the common property or
the performance of the functions of the strata company' is a provision
that the strata company may terminate the agreement by notice in
writing to all other parties to the agreement after five years have passed
since entry into the agreement.

The Act

Strata Manager

53 The transitional provisions for the Amendment Act are contained
in Sch 5 to the Act.

54 Significantly, cl 13(1) of Sch 5 to the Act provides that a person
may continue to perform scheme functions under a contract or
volunteer agreement with a strata company that is in force immediately
before 1 May 2020 for six months after that date, with the Act applying,
for that six month period, as if those functions were authorised to be
performed by that person under s 143 of the Act and as if the contract
or volunteer agreement were a strata management contract.

55 A volunteer strata manager is defined under s 3(1) of the Act as a
strata manager of a strata company who:

- a) is the owner of a lot in the strata titles scheme;
- b) does not receive any fee, reward or benefit for work
performed as a strata manager other than an honorary
fee or reward not exceeding, if an amount is fixed by
the regulations, that amount; and
- c) personally performs the work of the strata manager.

56 Regulation 11(1) of the *Strata Titles Regulations 2019* (WA) (Regulations) prescribes such amount of the honorary fee or reward is fixed at \$250 per calendar year for each lot in the strata titles scheme.

57 Under s 151(2) of the Act, a strata company may terminate a strata management contract if satisfied that there are proper grounds for termination of the contract, as specified in s 151(1) of the Act, by giving the strata manager written notice of termination:

- a) specifying the date (being not less than 28 days after the date of the notice) on which the termination will take effect; and
- b) informing the strata manager of the right to apply to the Tribunal for review of the decision to terminate the contract.

58 Before a strata company terminates a strata management contract under s 151(2) of the Act, the strata company must give the strata manager a show cause notice: s 151(3) of the Act.

59 The show cause notice must satisfy the following requirements under s 151(4) of the Act:

- a) be in writing;
- b) state that the strata company proposes to terminate the strata management contract;
- c) specify the grounds on which it is proposed to terminate the strata management contract;
- d) set out particulars of the facts relied on as evidence of those grounds;
- e) invite the strata manager to make written submissions to the strata company as to why the strata management contract should not be terminated; and
- f) specify the period (being at least 14 days after the date of the notice) within which the written submissions must be received by the strata company.

60 The strata company must give proper consideration to any written
submissions made by the strata manager within the period specified in
the show cause notice: s 151(5) of the Act.

61 Section 151 of the Act does not apply in relation to the right of the
strata company to terminate under s 115 of the Act, which is the
equivalent provision to s 39A of the pre-amendment Act in relation to
an implied term that any service contract may be terminated within
five years of entry into such contract.

62 If a strata management contract is terminated, the strata manager
must, relevantly, return all records of the strata company to the strata
company: s 152 of the Act.

***Secondary Issue 1 - was there a volunteer agreement to act as strata
manager?***

63 I find that Ms Popal performed scheme functions under a contract
or volunteer agreement with a strata company that was in force before
the commencement of the major amendments to the pre-amendment
Act, and as such, the transitional provision under cl 13(1) of Sch 5 to
the Act operated to authorise any further action by Ms Popal for
six months after that date.

64 The strata company does not dispute that Ms Popal was managing
the affairs of the strata scheme, and indeed has never challenged her
description of the tasks she has undertaken for the strata company
despite having numerous opportunities to do so following receipt of her
letter of 24 August 2020 responding to the Johnstone Crouse letter and
her submissions filed in these proceedings.

65 I am thus satisfied that she was carrying out scheme functions on
behalf of the strata company akin to the role of a strata manager.

66 Further, by not having challenged her role in undertaking such
functions until, it would seem, at about the time the EGM was called,
when all owners have had the opportunity to do so since the purchase of
their respective lots between 2011-2016, I find it reasonable to infer
that, by their conduct (or, at the very least, acquiescence), they have
entered into a strata management agreement with Ms Popal.

67 In coming to this conclusion, I have also relied on the email
exchange in March and April 2020 where Mr Tashkandy refers to
Ms Popal as 'strata manager' as supporting that inference that that

arrangement was agreed to and accepted by Mr Tashkandy, and by extension, the other lot owners.

68 The concept of a volunteer strata manager was only introduced by the Amendment Act, and so the transitional provisions could not have been intended to apply that definition to any arrangement that could have existed prior to 1 May 2020.

69 However, to the extent that the current definition of volunteer strata manager encapsulates the circumstance of an owner of a lot 'voluntarily' (for, at most, an honorary fee) and personally performing the work of a strata manager, I am satisfied that the strata management agreement between Ms Popal and the other owners is better characterised as a volunteer agreement within the meaning of that term in cl 13(1) of Sch 5 to the Act.

70 The effect of the transitional provision under cl 13(1) of Sch 5 of the Act is that, notwithstanding the volunteer agreement did not comply with the formalities of a strata management contract under s 145 of the Act, the volunteer agreement will be recognised as a strata management contract, and the volunteer manager will be recognised as having the authority of a strata manager, for the purpose of the Act.

Secondary Issue 2 - was the volunteer agreement properly terminated?

71 As there was a volunteer agreement with Ms Popal in force as at the date the other owners first indicated their intention to terminate Ms Popal's strata management agreement by the Johnstone Crouse letter, it was necessary to comply with the requirements of s 151 of the Act in terminating that agreement.

72 I am satisfied that that letter is not sufficient as a show cause notice as it does not comply with the requirements of s 151(4) of the Act, in particular, that at least 14 days' notice should be given for Ms Popal to make written submissions.

73 I also agree with Ms Popal that the Johnstone Crouse letter does not adequately invite the strata manager to make written submissions to the strata company as to why the strata management contract should not be terminated as the tenure of that letter suggests the other owners are already in the process of finding another strata manager.

74 Even if it could be accepted that the Johnstone Crouse letter
satisfies the requirements of a show cause notice, there is no notice of
termination issued to Ms Popal.

75 Such notice must specify the date on which termination will take
effect and inform Ms Popal of the right to apply to the Tribunal for
review of the decision to terminate the contract.

76 The minutes of the EGM fail to satisfy those fundamental
requirements of a notice of termination.

77 I am thus satisfied that the volunteer agreement was not properly
terminated, and as such, there is no basis for the order sought under
s 152 of the Act.

Conclusion

78 For reasons set out above, I will dismiss the application as it
relates to an order sought under s 152 of the Act.

79 In light of my findings, I will hear from the strata company as to
whether it wishes to proceed with the application.

Orders

The Tribunal makes the following order:

1. As to the preliminary question of whether the respondent was properly appointed as strata manager for the strata scheme, and if so, was she properly terminated as strata manager, I find that the respondent was properly appointed as strata manager for the strata scheme and that she was not properly terminated as strata manager.
2. The applicant's application as it relates to an order sought under s 152 of the *Strata Titles Act 1985 (WA)* is dismissed.
3. The matter is listed for directions at 12 pm for one hour on 4 March 2022, to be conducted by videoconference through Microsoft Teams, with the Tribunal notifying the parties of the manner in which they are to connect to the videoconference, to hear whether the applicant wishes to proceed with the application.

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

MS K Y Loh, MEMBER

21 FEBRUARY 2022