

JURISDICTION : STATE ADMINISTRATIVE TRIBUNAL

ACT : STRATA TITLES ACT 1985 (WA)

CITATION : GOW and THE OWNERS OF GARDEN VILLAS
STRATA PLAN 10845 [2022] WASAT 22

MEMBER : MS A KING, MEMBER

HEARD : DETERMINED ON THE DOCUMENTS

DELIVERED : 18 MARCH 2022

FILE NO/S : CC 1035 of 2021

BETWEEN : CHRISTINE GOW
First Applicant

DANIEL JOSEPH BAYLISS
Second Applicant

AND

THE OWNERS OF GARDEN VILLAS STRATA
PLAN 10845
Respondent

Catchwords:

Practice and procedure - Costs - Costs orders - Unnecessary and unreasonable costs - Ordinary position of the Tribunal - Exercise of discretion - Whether appropriate to award costs

Legislation:

State Administrative Tribunal Act 2004 (WA), s 9, s 46, s 46(1), s 46(2), s 47,

s 48, s 87(1), s 87(2), s 88

Strata Titles Act 1985 (WA), s 47(3), s 87(2), s 109(1), s 197(4), s 199(1), s 199(3), s 199(3)(c), s 200, s 200(2), s 200(2)(h), s 200(2)(n), s 200(3)

Result:

Applications dismissed

Category: B

Representation:

Counsel:

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

Solicitors:

First Applicant : Bugden Allen Graham Lawyers
Second Applicant : Bugden Allen Graham Lawyers
Respondent : Dentons Australia

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

Banno v Commonwealth of Australia (1993) 45 FCR 32

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

Medical Board of Australia and Costley [2013] WASAT 2

Owners of Garden Island Strata Plan 52597 and Pindan Pty Ltd [No2] [2018] WASAT 2 (S)

Pearce & Anor and Germain [2007] WASAT 291 (S)

Teissier and Commissioner of State Revenue [No 2] [2016] WASAT 40

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

REASONS FOR DECISION OF THE TRIBUNAL:

Introduction

- 1 The first applicant Ms Christine Gow and the second applicant Mr Daniel Joseph Bayliss (applicants) are joint tenants of Lot 6 on strata plan 10845 (Strata Plan) together with a share of common property as set out in the Strata Plan known as Garden Villas situated at 26 Cape Street Osborne Park and are seeking orders against The Owners of Garden Villas Strata Plan 10845 (respondent). This was not in dispute.

- 2 The first applicant submits that at the 2019 Annual General Meeting (AGM) of the Strata Council she was appointed to the Strata Council in the role of Treasurer. It was during her term of office that she became aware of what she believed to be contraventions of the *Strata Titles Act 1985* (WA) (ST Act) (the dispute) by Strata Council members and by Jackson Properties Pty Ltd trading as Empire Estate Agents (the Strata Manager).

- 3 Unable to resolve the dispute the applicants lodged an application on 3 July 2021 with the Tribunal pursuant to s 47(3) of the ST Act and amended by order of the Tribunal on 30 July 2021 to have been commenced under s 197(4) of the ST Act seeking orders as set out in attachment 2 of the application (principal orders).

- 4 The issue for determination by the Tribunal is the question of jurisdiction and whether to allow the amendments to the application.

The application was subject to direction hearings as follows:

- 1) On 30 July 2021 the matter was adjourned to further directions. The Tribunal granted leave pursuant to s 46(1) of the *State Administrative Tribunal Act 2004* (WA) (SAT Act) to withdraw the application for interim orders.

- 2) On 31 August 2021 the Tribunal ordered that by 7 September 2021 a statement of proposed amended orders sought be filed and by 21 September 2021 the respondent was to provide written submissions whether the Tribunal should grant leave to the applicants to amend the application in the terms sought.

- 3) On 28 September 2021 the Tribunal ordered that the applicants file a reply and were directed not to raise new issues. By consent of the parties the application to amend was to be determined entirely on the documents.
- 4) On 2 November 2021 the matter was adjourned to enable the applicants to consider their position.
- 5) On 7 December 2021 the Tribunal ordered that the question of jurisdiction and whether to allow the amendments to the application be listed for hearing on 8 February 2022.

The applicants lodged the following Minutes of Proposed Orders as follows:

- 1) On 3 July 2021:

Principal Orders 1 - 10 sought, lodged at the time of application, seeking orders under s 200(2) and s 200(3) and s 109(1) of the ST Act.
- 2) On 31 August 2021:

First applicant's Minute of Proposed Orders seeking to withdraw orders 1, 3, 9 and 10 of the principal orders and seeking to amend orders 4 and 5 and 8. In addition seeking orders terminating the contract of the Strata Manager and compensation, amending order 2 and seeking orders in accordance with s 200(2)(n) of the ST Act and in the alternative a declaration by the Tribunal (First Amendments).
- 3) On 7 September 2021:

First and second applicants' Minute of Proposed Orders seeking to withdraw orders 3, 6, 9 and 10 of the Principal Orders; seeking to amend orders 2, 4, 5, 7 and 8; seeking enforcement orders under s 200 of the ST Act; and in the alternative a declaration under s 199(1) of the ST Act (Second Amendments).
- 4) On 13 September 2021:

Minute of Amended Principal Orders Sought seeking orders under s 200(2)(h); to amend order 2; seeking to withdraw orders 3, 6, 9 and 10; to amend orders 4, 5, 7 and 8; and to add enforcement orders under s 200 of the ST Act (Third Amendments).

5) On 6 December 2021:

First and second applicants' Minute of Proposed Orders sought to:

- a) withdraw orders 1, 3, 6 and 9 of the Principal Orders;
- b) amend order 2, which replaces orders 5 and 10 as follows:
 - i) order the respondent to take all reasonable steps to recover pecuniary losses suffered by the Strata Company for contravention of the ST Act and for breaches of contract by the Strata Manager; and
 - ii) order the respondent to bring proceedings under s 197 of the ST Act for orders for compensation:
 - to be paid by the Strata Manager;
 - to terminate the contract (to be withdrawn or struck out);
 - that the Strata Manager is prohibited from seeking or enforcing an indemnity from the Strata Company; and
 - to be withdrawn or struck out (or in the alternative to promptly give a show cause notice to the Strata Manager listing the breaches of contract and if the Strata Manager fails to rectify,

then to issue a notice of termination).

- c) to amend order 4 as follows:
 - i) an order that the Strata Company has not passed the resolution is without dissent and special resolutions referred to in notification N 183165; and
 - ii) a declaration under s 199(3)(c) of the ST Act that the by-laws contained in notification N 183165 are not valid.
- d) to amend order 7 as follows:
 - i) that all resolutions passed at the 2020 AGM are invalid; or in the alternative; and
 - ii) a declaration under s 199(1) that all resolutions passed at the 2020 AGM invalid.
- e) to amend order 8 as follows:
 - i) that all electronic votes made at the 2021 Extraordinary General Meeting (EGM) are invalid and that the resolutions passed are also invalid; or
 - ii) a declaration under s 199(1) that all electronic votes made at the 2021 EGM are invalid (Fourth Amendments).

The hearing processes

5 At the preliminary hearing on 8 February 2022 the applicants requested that leave be granted to withdraw order 2(1)(b) and order 2.2 or it be agreed that they be struck out as events had overtaken and the order terminating the Strata Manager was no longer sought.

6 On 14 February 2022 the Tribunal heard and determined the application and gave oral reasons for decisions and made the following orders:

1. Principal Orders 1, 3, 5, 6, 9 and 10 are dismissed.
2. The Tribunal does not have jurisdiction to determine amended Order 2 and it is struck out.
3. Leave is granted to amend Orders 4, 7 and 8 in the terms sought by the applicant.
4. The application of costs is adjourned.

7 At the conclusion of the hearing on the question of jurisdiction and whether to allow the amendments, the applicants and the respondent were invited to file written submissions in respect of the issue of costs and by consent the parties agreed that the matter was to be determined entirely on the documents.

The submissions of the applicants

8 At the time of the first directions hearing the applicants sought to withdraw orders 1, 3, 9 and 10 and to amend orders 2, 4, 5 and 8. (First Attempt). The respondent opposed the withdrawal and the amendment of orders. The applicants submit that the refusals were unreasonable.

9 The applicants then sought leave to amend orders 2, 4, 5, 7 and 8 (Second Attempt). The respondent opposed the amendment of orders. The applicants submit that the refusals were unreasonable.

10 The applicants then filed Minutes of Proposed Orders withdrawing orders 1, 3 and 6 and seeking to amend orders 2, 4, 5, 7, 8 and 10 (Third Attempt).

11 The respondent opposed the withdrawal and amendment of orders. The applicants submit that the refusals were unreasonable.

12 The applicants submit that at the time of lodging the application the applicants were unrepresented. The legislative regime in relation to strata disputes is complex which is compounded by the amendments which came into operation as from 1 May 2020 and the fact that decisions relating to applicable sections under the new ST Act have only recently been published.

13 There was no basis for the respondent to refuse to consent to the withdrawal of orders as sought other than to seek costs.

14 As to orders 4, 7 and 8 the Tribunal granted leave to amend those orders which establishes that the applicants had reasonable grounds to initiate proceedings, and these remained largely unchanged.

15 The respondent by its conduct has delayed the timely and cost-effective disposition of the proceedings and the applicants have incurred unnecessary additional costs.

Orders sought by the applicants

16 The applicants are seeking costs from the respondent on the basis that:

- a) the applicants were successful in their application for leave to amend orders 4, 7 and 8; and
- b) the respondent's refusal to consent to amended orders 4, 7 and 8 and to the withdrawal of orders 3, 6 and 9 caused the applicants to incur unnecessary costs.

The submissions of the respondent

17 The respondent submits that the Tribunal should exercise its discretion under 87(2) of the ST Act by ordering the applicants to pay costs in relation to the various amendments as follows:

1. the first amendment/interim orders sought

- a) taking advice about the 'interim application';
- b) preparing for and attending on 30 July 2021 including preparation of oral submissions;
- c) preparing for and attending the initial directions hearing, and
- d) making submissions about the aspects of the application and the interim application that were doomed to fail.

2. the second amendments (first amendments)

- a) attending at the directions hearing on 31 August 2021 which was solely about the Second Amendments; and
- b) taking advice about the Second Amendments.

3. *the third amendments (second amendments)*
 - a) reviewing the Third Amendments;
 - b) taking advice about the Third Amendments, and
 - c) writing to the applicants' lawyer on 9 September 2021 about the deficiencies with the Third Amendments.

4. *the fourth amendments (third amendments)*
 - a) reviewing the Fourth Amendments;
 - b) taking advice about the Fourth Amendments;
 - c) preparing for and attending the directions hearing on 28 September 2021 which dealt solely with the Fourth Amendments;
 - d) reviewing and taking advice about the submissions filed on 6 October 2021; and
 - e) preparing for and attending the directions hearing on 2 November 2021.

5. *the fifth amendments (fourth amendments)*
 - a) reviewing and taking advice about the Fifth Amendments;
 - b) preparing for and attending the directions hearing on 7 December 2021 which dealt solely with the Fifth Amendments;
 - c) drafting and filing Submissions about the Fifth Amendments on 21 January 2022;
 - d) drafting and filing the statutory declaration of Kellie Marie Woods filed on 21 January 2022;
 - e) preparing for and attending the Case Management Conference on 8 February 2022 at which the applicants refused to make any concessions about the application; and
 - f) preparing for and attending the substantive hearing on 14 February 2022.

18 The respondent submits it has never opposed aspects of the First to the Fifth Amendments regarding the subject matter of the amendments and that:

- a) the interim application was misconceived and lacking in substance demonstrated by its withdrawal at the first directions hearing;
- b) the applicants refused to withdraw the application on 30 July 2021;
- c) the Second, Third, Fourth and then Fifth Amendments were pursued despite the Tribunal allowing more than one month for the applicants to consider its position;
- d) at the hearing on the 14 February 2022 the respondent did not oppose the orders the subject of the amendments and those orders did not need amending because the original orders were understandable; and
- e) as a result of the conduct of the applicants and given the Tribunal dismissed orders and struck out orders, it is fair and reasonable to award costs in favour of the respondent to be assessed if not agreed.

The applicable legal principles

19 The ordinary position of the Tribunal in relation to the question of costs is pursuant to s 87(1) of the SAT Act, that parties bear their own costs in Tribunal proceedings.

20 That position is subject to the following:

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

21 The relationship between s 87(1) and s 87(2) of the SAT Act, and the approach of the Tribunal to the award of costs, was considered by the Court of Appeal in ***Western Australian Planning Commission v***

Questdale Holdings Pty Ltd [2016] WASCA 32 (*Questdale*), which held that:

- a) the starting point under s 87(1) is that the Tribunal is a 'no costs' jurisdiction, and that each party will bear its own costs;
- b) the discretion of the Tribunal to award costs under s 87(2):
 - i) is to be exercised 'judicially', not arbitrarily, capriciously or so as to frustrate the legislative intent;
 - ii) is directed to the question of whether, in the particular circumstances of the case, it is fair and reasonable that a party should be reimbursed for the costs it incurred (the legal rationale is not to punish the person against whom the order is made but to provide compensation); and
 - iii) is unconfined, except that the Tribunal should have regard to 'the subject matter and the scope and purpose' of the SAT Act and the objects set out in s 9 must be considered.
- d) the mere fact that a party fails on some condition or contention advanced would not, in itself signify that it has acted inconsistently with the objects of s 9; that is particularly so in the context of s 46, s 47 and s 48 of the SAT Act.

22 Circumstances in which costs might be awarded include plainly unmeritorious claims or claims made and pursued in circumstances which broadly speaking may be characterised as involving misconduct (*Questdale*)¹ and where a party has conducted itself unreasonably or inappropriately *Pearce & Anor and Germain* [2007] WASAT 291 (S) at [22].

23 As Wilcox suggested in *Banno v Commonwealth of Australia* (1993) 45 FCR 32, at 38:

¹ *Questdale* at [55].

[P]eople ... should be allowed access to the court, to present an arguable and well organised case, without being deterred by the prospect of being ordered to pay the Commonwealth's costs if their case proves unpersuasive. I distinguish the situation of resumees who pursue a vexatious, dishonest or grossly exaggerated claim or present their case in such a way as to impose unnecessary burdens on the Commonwealth or the court[.]

24 The party seeking costs bears the onus of satisfying the Tribunal in relation to the exercise of its discretion.²

Consideration by the Tribunal

25 The starting point by the Tribunal in relation to the application for costs is the hearing on the question of jurisdiction and the application to amend.

Costs sought by the applicants

26 The applicants seek costs in relation to the orders made by the Tribunal for leave to amend orders 4, 7 and 8 as they were successful in their application and as the respondents acted unreasonably and caused the applicants to incur costs unnecessarily.

27 I am not persuaded that I should exercise my discretion and order costs on the mere fact that a party is granted leave to amend specific orders sought. It does not in itself signify that it is thereby entitled to have its costs paid. The substantial merits in relation to orders 4, 7 and 8 sought are yet to be decided.

28 Secondly the applicants submit that the respondents ought to pay cost because of the respondent's refusal to consent to the withdrawal of orders 3, 6 and 9. The applicants failed to provide particulars of the costs they say they incurred unnecessarily however it is self-evident that numerous applications were made withdrawing the same orders amongst other orders.

29 The respondent submits it has never opposed aspects of the first to the fifth amendments. It however did not consent to the withdrawal of orders or consent to the amendments of orders being sought. In its submissions filed 24 September 2021 the respondent applied for costs in relation to orders 3, 6, 9 and 10. The position of the respondent can

² *Blaszkievicz and The Owners of 7 Henderson Street Fremantle (Strata Scheme 74918)* [2021] WASAT 56 at [61].

be understood as not opposing the applications save for the question of costs.

30 The position of the respondent in my view contributed to the failure to narrow the issues which is likely to have contributed to the length of the hearing process. The application to withdraw orders 3, 6 and 9 however was only part of each amendment to orders sought as each application to withdraw or to amend also contained new and different orders being sought.

31 In assessing costs, the Tribunal takes a 'robust and broadbrush approach' and bases its determination on what reasonable allowance should be made for the work necessarily done to bring the proceedings to a conclusion.³

Costs sought by the respondent

32 The costs sought by the respondent in relation to the 'interim orders sought' in my view, are not costs unreasonably or unnecessarily incurred. The application seeking leave to withdraw the 'interim orders sought' was made at the first opportunity and it was incumbent upon the respondent to attend the first directions hearing, at which time the respondent consented to the application. The Tribunal granted leave to withdraw the interim orders sought, and the matter was adjourned for further directions. In those circumstances I decline to make any order for costs in relation to the 'interim orders sought'.

33 As to the 'second amendments' and 'third amendments' the orders sought were in part similar to the 'first amendments'. Similarly, as to the fourth and fifth amendments the applicants sought some new or similar orders, the substantial amendments pertaining to order 2.

34 The respondents did not oppose aspects of the first to the fifth amendments save for the question of costs. The Tribunal must have regard to the objectives set out in s 9 of the SAT Act which are:

- (a) to achieve the resolutions of questions, complaints or disputes, and make or review decisions, fairly and according to the substantial merits of the case; and
- (b) to act as speedily and with as little formality and technicality as it practicable and minimise the costs to the parties[.]

³ *Medical Board of Australia and Costley* [2013] WASAT 2 at [66].

35 In all of the circumstances, the Tribunal is not satisfied that the objectives of the Tribunal and the justice of the case support an order for costs. I am not satisfied that it is fair and reasonable that a party should be reimbursed for the costs it incurred in having those matters proceed in circumstances where the starting point is s 87(1) of the SAT Act.

36 In regard to the ongoing substantial amendments to order 2 as sought by the applicants, the amendments historically overlapped with amendments and attempted withdrawals of other orders. Given events had overtaken the proceedings I considered it entirely appropriate that leave be granted to withdraw order 2(1)(b) and order 2.2. Ultimately the Tribunal struck out all of the amended order 2 as it formed the view that it did not have jurisdiction to determine the matter and the respondent seeks costs because it is 'fair and reasonable' to do so.

37 Although the Tribunal has a broad discretion to award costs, it is clear that it needs a good reason to depart from the general principle that parties will bear their own costs.⁴

38 In the matter of *Owners of Garden Island Strata Plan 52597 and Pindan Pty Ltd [No2]* [2018] WASAT 2 (S) (*Owners of Garden Island*) the Tribunal held that where the applicant was successful, in the circumstances of this case, the Tribunal is not satisfied that the objectives of the Tribunal would be advanced and the justice of the case supports an order of costs for the legal costs of the preparation of hearing and the hearing itself.⁵

39 In this case, notwithstanding that I have found that for the purposes of s 46(2) of the SAT Act, that orders be dismissed and struck out, I am nevertheless not satisfied (taking into account that the applicants at the commencement of the proceedings were not legally represented) that the conduct of the applicants in bringing or conducting the proceeding was oppressive, vexatious or so unreasonable, such as to warrant the displacement of the usual position that parties should bear their own costs.

40 Neither party conducted the proceedings in a manner that was of assistance to the Tribunal. I have considered whether the parties should pay costs under s 88 of the SAT Act but I have decided in the exercise of my discretion not to entertain such orders.

⁴ *Teissier and Commissioner of State Revenue [No 2]* [2016] WASAT 40 at [49].

⁵ *Owners of Garden Island* at [137].

41 I decline to exercise the discretion under s 87(2) of the SAT Act to order that either the applicants or the respondent pay costs of the proceeding.

Conclusion

42 The Tribunal is not satisfied that it is appropriate to exercise its discretion under s 87(2) of the SAT Act by making an order for costs in favour of the applicants or in favour of the respondent.

Orders

The Tribunal orders:

1. The parties bear their own costs.
2. Applications dismissed.

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

MS A King, MEMBER

18 MARCH 2022