

**JURISDICTION :** STATE ADMINISTRATIVE TRIBUNAL

**ACT :** STRATA TITLES ACT 1985 (WA)

**CITATION :** THE OWNERS OF ELLEMENT 996 STRATA PLAN 53042 and TOBIAS [2022] WASAT 49

**MEMBER :** MS R PETRUCCI, MEMBER

**HEARD :** 27 MAY 2022

**DELIVERED :** 1 JUNE 2022

**FILE NO/S :** CC 1961 of 2021

**BETWEEN :** THE OWNERS OF ELLEMENT 996 STRATA PLAN 53042  
Applicant

AND

JASON JOHN TOBIAS  
First Respondent

ANN MARIE TOBIAS  
Second Respondent

VINCENT JACQUES ANNIE HOODGEWIJS  
Fourth Respondent

CRAIG ANDREW HAYHOW  
Fifth Respondent

NI PUTU PURNAMAWATI FENNER-HAYHOW  
Sixth Respondent

TODD BREMNER  
Seventh Respondent

JULIEN CARLO MERVCICH

Eighth Respondent

TZE HIENG LAU

Tenth Respondent

CHI KEUNG CHUNG

Eleventh Respondent

ALISON AR CHE CHUNG- KWOK

Twelfth Respondent

KARTHIK MURALI

Thirteenth Respondent

MONG HAO LIM

Fifteenth Respondent

MEE HIONG DORIS PHANG

Sixteenth Respondent

JASON LAURIE BULLER

Nineteenth Respondent

DANIEL AGOSTINELLI

Twentieth Respondent

ARMANDO BRUNO

Twenty First Respondent

LAI TING NG

Twenty Second Respondent

MARK BLOCH

Twenty Third Respondent

DAISY TIWARI

Twenty Fourth Respondent

ADNAN KHAN AFRIDI

Twenty Seventh Respondent

EMMA FRANCES CRAMPIN

Twenty Eighth Respondent

STEPHEN CHARLES MAY

Twenty Ninth Respondent

SIYUAM CHEN

Thirtieth Respondent

YAN YU

Thirty First Respondent

FREDERICO PACI

Thirty Fourth Respondent

NGOC HUYNH KHANH VO

Thirty Seventh Respondent

JOSHUA FITZGERALD HAYNES

Thirty Ninth Respondent

NADIA HAYNES

Fortieth Respondent

NIRMIT SHARMA

Forty Fourth Respondent

LATIKA MAHAR

Forty Fifth Respondent

VANESSA ANNE CHAMBERS

Forty Seventh Respondent

BAYSTYLE PTY LTD  
Forty Eighth Respondent

VINZI CARCIONE  
Fifty Third Respondent

MARK DELLA ROCCA  
Fifty Fourth Respondent

BARRY GRAEME HOLFELD

Fifty Fifth Respondent

ALEKSANDER WARTON

Fifty Ninth Respondent

NORBERT AH SUE

Sixtieth Respondent

ANITA MCKINLEY

Sixty First Respondent

THE SANCTUARY INVESTMENT (WA) PTY LTD

Sixty Third Respondent

*Catchwords:*

*Strata Titles Act 1985* (WA) (as it applies from 1 May 2020) - Structural works - Type 4 subdivision - Resolution of scheme dispute - Failure to pass unanimous resolution - Discretion of Tribunal to make order to resolve dispute or proceeding - Considerations or factors for exercising discretion

*Legislation:*

*Strata Titles (General) Regulations 2019* (WA), reg 12, reg 13, reg 14, reg 15, Pt 3

*Strata Titles Act 1985* (WA), s 3, s 3(7), s 14, s 14(8), s 32, s 35, s 35(1)(e), s 35(1)(e)(i), s 35(5), s 197, s 120(3), s 120(4), s 121(2)(a), s 121(2)(b), s 123(1), s 200, s 200(1), s 200(2), s 200(2)(n), s 202, s 209, s 216, Pt 4, Div 2, Pt 8, Div 3, Pt 13, Sch 5, cl 2(1)(d)

*Result:*

Application successful  
Order made

*Category: B*



**Representation:**

*Counsel:*

*Solicitors:*







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

Arasi & Anor and The Owners of Beverley Court [2005] WASAT 197

Efficient Building Team Pty Ltd and The Owners of 25, 27, 29, 31 Parry Street, Fremantle Strata Plan 6413 [2021] WASAT 158

Robinson and Stevens [2009] WASAT 207

Thompson and The Owners of Blumarine Apartments Strata Scheme 57889 [2021] WASAT 120

## REASONS FOR DECISION OF THE TRIBUNAL:

### *Introduction*

1 Strata Plan 53042 was registered on 30 August 2007. The relevant strata scheme is known as 'Ellement 996' (**scheme**) and is described on the strata plan as:

A Multi Level Concrete and Steel Structure Being Lot 802 on Deposited Plan 56190 Contained in Certificate of Title Volume 2665 Folio 395. The Address of the Property is 996 Hay Street, Perth WA 6000[.]

2 The scheme comprises 156 lots and common property.

3 On 7 December 2021 The Owners of Ellement 996 Strata Plan 53042 (**strata company**) commenced these proceedings under s 197(4) of the *Strata Titles Act 1985* (WA) (**ST Act**) for the resolution of a scheme dispute.

4 The background to the application by the strata company is this. Airey Taylor Consulting in its report to the strata company stated that '[t]here is no doubt that the beams stress induced cracking are heavily overstressed, so that their safety is a concern. For this reason immediate and permanent action to remediate is required'.<sup>1</sup> In concluding, Airey Taylor Consulting recommended 'columns augmenting the capacity of the structure to deal with the stressed beams be introduced as a matter of urgency in the near future' (**structural works**).<sup>2</sup> The strata company authorised for the structural works to be undertaken at the scheme in or about February 2020.

5 The structural works required the installation of steel columns on common property and in the car parking bays of part Lots 29 and 139. To facilitate the structural works on the common property and to ensure the car parking bays are compliant with Australian Standard AS/NZ 2890.1, the boundaries of car parking bay part Lots 29, 30, 32, 138 and 139 were proposed to be subdivided as shown on the amended strata plan and attached to the resolution marked 'A' (**proposed subdivision**) which was put to the Extraordinary General Meeting of the strata company on 6 October 2021 (**EGM**).<sup>3</sup>

6 The resolution was not passed at the EGM. No owner voted against the resolution. However, many owners did not cast a vote for or against

<sup>1</sup> Exhibit 1 at page 109.

<sup>2</sup> Ibid.

<sup>3</sup> Ibid at pages 125 to 132.

the resolution and therefore the resolution was not passed as a unanimous resolution. The 29 owners who did not cast a vote for or against the resolution and who did not subsequently provide written consent to the Tribunal that they consent to the order as set out below at [7] are the 39 respondents in these proceedings.

7 The strata company seeks an order from the Tribunal under s 200(2)(n) of the ST Act that the strata company is taken to have passed the following resolution proposed at the EGM as a unanimous resolution:<sup>4</sup>

<sup>4</sup> Ibid at page 1.

<sup>5</sup> Ibid at page 494.

The [s]trata [c]ompany resolves by [u]nanimous [r]esolution to subdivide [s]trata [s]cheme 53042 in accordance with the plan of subdivision attached hereto and marked 'A' and approves the amendment in the Schedule of Unit Entitlement to give effect to the subdivision in accordance with the Schedule of Unit Entitlement attached hereto and marked 'B' (**resolution**).

8 These proceedings come within the Tribunal's original jurisdiction (s 209 of the ST Act).

9 For the following reasons I would make the order sought by the strata company. In other words, the resolution is taken to have been passed as a unanimous resolution at the 2021 EGM and therefore the strata company can proceed with the type 4 subdivision.

### ***Relevant procedural history and evidence***

10 I heard the matter on 27 May 2022 by videoconference. Counsel for the strata company appeared by videoconference. None of the respondents participated in the hearing. This was foreshadowed by counsel for the strata company in a letter to the Tribunal dated 13 May 2022.<sup>5</sup> I proceeded to hear the matter as I was satisfied that the respondents had been given notice of the hearing.

11 At the final hearing, the Tribunal marked the following documents, which the counsel for the strata company identified as the documents that they intended to rely on, and to which I have had regard for the purpose of my determination in these proceedings, as exhibits:

**Exhibit 1** hearing book (bundle of documents prepared by the Tribunal on 18 May 2022 and includes the statutory declaration of Meagan Louise

Chandler declared on 3 March 2022 at pages 287-289) (pp 1-592)<sup>6</sup>; and

<sup>6</sup> Although forming part of Exhibit 1, the parties' contentions and submissions are taken to be submissions, rather than evidence.

**Exhibit 2** affidavit of Karen Louise Sinclair affirmed 25 May 2022 (pp 1-11).

<sup>12</sup> I will now set out the issues to be determined by me in these proceedings, followed by the legal framework relevant to these proceedings by reference to the relevant regulatory framework, and I will then make relevant findings of facts. Finally, I will address the key issues for determination.

### ***Issues***

<sup>13</sup> The key issues for determination in these proceedings, in circumstances where a unanimous resolution was not passed, are:

**Issue 1:** Does the Tribunal have jurisdiction to determine the scheme dispute?

**Issue 2:** Are the requirements of s 200(2)(n) of the ST Act satisfied?

**Issue 3:** If 'yes' to issue 2, should the Tribunal exercise its discretion to make the order sought by the strata company?

### ***Relevant legal framework***

#### **The strata plan**

<sup>14</sup> From 1883 to 2007 various notifications (by various instruments) were provided for easements. The various notifications were registered by the Registrar of Titles.

<sup>15</sup> On 30 August 2007, Strata Plan 53042 was registered by the Registrar of Titles (**strata plan**).

<sup>16</sup> A notification (by instrument K783618) was provided for address for service on notices on the strata company. The notification was registered by the Register of Titles on 26 November 2008.



17 Finally, a notification (by instrument K823709) was provided for change of by-laws. The notification was registered by Registrar of Titles on 13 January 2009.

## ST Act

### *Amendment of a scheme plan*

18 Section 3(7) of the ST Act provides that an amendment of a scheme affects the common property or a lot in the scheme as follows:

- (a) an amendment affects the common property to the extent that it involves an amendment of the scheme plan that -
    - (i) modifies the common property; or
    - (ii) creates or discharges an easement or restrictive covenant that benefits or burdens the common property;
  - (b) an amendment affects a lot to the extent that it involves an amendment of the scheme plan that -
    - (i) modifies the definition of boundaries of the lot; or
    - (ii) creates or discharges an easement or restrictive covenant that benefits or burdens the lot;
  - (c) an amendment affects a lot to the extent that it involves an amendment of the schedule of unit entitles for the scheme that modifies the unit entitlement of the lot.
- 19 Div 2 of Part 4 of the ST Act deals with scheme plans. The requirements for registration of an amendment of a scheme plan for a scheme are specified in s 35 of the ST Act.

20 The application before the Tribunal concerns a 'type 4 subdivision' which is defined in s 3 of the ST Act as:

***type 4 subdivision*** means a subdivision that does not involve the alteration of the boundaries of the parcel and is not a type 1, type 2 or type 3 subdivision;

Note for the definition of types of subdivision:

1. There are 4 types of amendment of a strata titles scheme that give effect to a subdivision, with varying requirements for resolutions and consents:
  - A type 1 subdivision covers adding land from outside the parcel to the common property (other than a temporary

common property) and what was formerly referred to as conversion of lots into common property.

- A type 2 subdivision covers the removal of common property from the parcel of a strata titles scheme.
- A type 3 subdivision covers what was formerly referred to as consolidation of lots.
- A type 4 subdivision covers what was formerly referred to as re-subdivision.

2. Re-subdivision of a lot or common property was defined in section 3(5) of the Act as in force immediately before the Strata Titles Amendment Act 2018 to include the alteration of the boundaries of -

- 1 or more lots so as to create only 2 or more different lots; or
- 1 or more lots so as to create 1 or more different lots and common property;
- 1 or more lots and common property so as to create 1 or more different lots or 1 or more different lots and common property; or
- common property so as to create 1 or more lots or 1 or more lots and common property.

21 Section 35(1)(e) provides that an amendment of a scheme plan for a strata titles scheme must not be registered for a type 4 subdivision unless:

- (i) the amendment is authorised by unanimous resolution of the strata company; and
- (ii) the holder of each designated interest over the whole or a part of the parcel has been given notice of the approved form of the subdivision and any associated amendment of the schedule of unit entitlements and -
  - (I) has given written consent to the subdivision; or
  - (II) has not, at the end of 60 days after being given notice, made a written objection to the subdivision setting out the reasons for the objection and

- (f) to the extent that the amendment gives effect to any type of subdivision - the amendment is approved by the Planning Commission (subject to any exemption in regulation under s 15(6)) and
  - (g) to the extent that the amendment imposes, varies or revokes a restricted use condition, the imposition, variation or revocation -
  - (i) has been approved by the Planning Commission under section 21; and
  - (ii) is authorised by resolution without dissent of the strata company;
- and
- (h) to the extent that the amendment describes land as temporary common property in the scheme or deletes land from such a description - the acceptance or surrender of the lease of the temporary common property under section 92 is authorised by resolution without dissent of the strata company; and
  - (i) to the extent that the amendment creates or discharges an easement or restrictive covenant -
  - (i) for a short form easement or restrictive covenant – the amendment of the scheme plan is approved by the Planning Commission;
  - (ii) in the case of an amendment affecting the common property – the amendment is authorised by resolution without dissent of the strata company;
  - (iii) in the case of an amendment affecting a lot – the owner of the lot has given written consent to the amendment; and
  - (iv) in any case - the holder of each designated interest over the common property or a lot affected by the amendment has been given notice in the approved form of the amendment and -
  - (I) has given written consent to the subdivision; or
  - (II) has not at the end of 60 days after being given notice, made a written objection to the creation or discharge setting out the reasons for the objection;
- and

(j) for a strata scheme -

- (i) the amendment of the scheme plan is accompanied by an occupancy permit or building approval certificate under the *Building Act 2011* Part 4 Division 3 for each scheme building constructed or modified in the course of a subdivision to be given effect by registration of the amendment of the scheme; and
- (ii) if the amendment of the scheme plan identifies an encroachment that is not to a public road, street or way and is to be managed or controlled as if it were common property, an appropriate easement has been granted and will be lodged with the Registrar of Titles.

22 Finally, s 35(5) of the ST Act requires the resolution for an amendment of a scheme plan must include details of the proposed amendment, and any associated amendment of the schedule of unit entitlements in the approved form. Part 3 of the *Strata Titles (General) Regulations 2019* (WA) is headed 'Scheme plans' and sets out the additional requirements for lodgement and registration (regs 12, 13, 14 and 15).

### *Strata company procedures*

23 Division 3 of Pt 8 (s 120 to s 134) of the ST Act sets out the procedures for voting and resolutions and procedures for meetings of the strata company.

24 A proposed resolution may be put to the members of the strata company at either a general meeting or outside the general meeting (s 120(3) of the ST Act). Importantly, a resolution can only be proposed by a member of the strata company who is entitled to vote on the resolution (s 120(4) of the ST Act).

25 Section 123(1) provides that a resolution of a strata company is a unanimous resolution if:

- (a) 14 days' notice of the terms of the proposed resolution is given to each member of the strata company before voting on the resolution opens; and
- (b) the vote attached to each lot in the scheme is cast in favour of the resolution.

### *Scheme dispute*

26 Section 197 of the ST provides for the resolution of certain 'scheme disputes' including a dispute between scheme participants about the scheme documents including the validity of scheme by-laws (s 197(1)(a)(i) of the ST Act) and a resolution or decision of a strata company or the council of the strata company, including its validity (s 197(1)(a)(iv) of the ST Act).

27 Under s 197(2) of the ST Act, 'scheme participants' include the strata company and a member of the strata company being an owner for the time being of a lot in the scheme as defined in s 14(8) of the ST Act.

28 Section 197(4) provides that an application to the Tribunal may be made by a party to the dispute for the resolution of a scheme dispute.

### *Tribunal proceedings*

29 Part 13 of the ST Act deals with proceedings before the Tribunal.

30 In proceedings under the ST Act, the Tribunal *may* make any order it considers appropriate to resolve the dispute or proceeding (s 200(1) of the ST Act). The types of orders that the Tribunal may make are set out in s 200 of the ST Act and include, for example, an order under s 200(2)(n) of the ST Act that the strata company is to be taken to have passed or not to have passed a specified resolution required under the ST Act or the scheme by-laws as an ordinary resolution, special resolution, resolution without dissent or unanimous resolution.

31 Finally, it is also possible for the Tribunal to make a decision not to make an order. This is provided for in s 202 of the ST Act.

32 Next, I set out the factual background before considering the issue.

### ***Factual background***

33 I make the following findings of fact which are relevant to the issues (see above at [13]) to be determined by me in these proceedings which I have drawn from the strata company's grounds for orders sought, the affidavit of Karen Sinclair and from counsel for the strata company's outline of submissions dated 26 May 2022.<sup>7</sup>

<sup>7</sup> Exhibit 2.

## Structural works

<sup>34</sup> On instruction from the council of the strata company, Airey Taylor Consulting inspected a limited area of the strata complex building on 5 November 2019. The area inspected comprised Unit 1 and the second floor level and the soffit to the beam and slab transfer structure immediately below level 2. Airey Taylor Consulting reported the following observations:<sup>8</sup>

<sup>8</sup> Exhibit 1 at pages 99 to 100.

<sup>9</sup> Ibid at pages 101 to 102 and 119.

- a) the partition wall between Unit 1 and the adjoining unit to the east had crushed and brick was 'exfoliating' from the face of that wall;
- b) brickwork in the north-east corner of the main bedroom of Unit 1 had 'shattered';
- c) the slab transfer structure beams located immediately below level 2 and running in a north-south direction showed signs of shear cracking;
- d) the north-south beam located at the south edge of the swimming pool was split as a consequence of primary reinforcement within the beam and corrosion of the support bars which was 'a serious structure matter' which would 'compromise the structure of the building if not addressed in the very near term';
- e) the damage to the walls in Unit 1 would continue unless 'appropriately remediated in the near term';
- f) the shear cracking in the primary support beams was of 'real concern and required a formal investigation' and
- g) the above described issues had 'the potential to devalue the building as a whole'.

<sup>35</sup> Airey Taylor Consulting conducted further inspections and mathematic modelling of the strata complex building and variously advised the strata company that:<sup>9</sup>

- a) the cracking within the primary support beams was caused by 'high stresses caused by inadequate design rather than by a construction defect';
- b) it was 'unachievable' to remediate the existing beams;
- c) it recommended that the load be transferred by a new path created by installing various steel columns (**steel columns**);
- d) 'the beams are heavily overstressed, so that their safety is a concern. For this reason immediate and permanent action to remediate is required'; and
- e) it recommended that the steel columns be installed as a 'matter of urgency in the near term'.

<sup>36</sup> The strata company engaged Construction 360, a registered builder, in or about February 2020 to install the steel columns. The works were completed by the end of February 2020.

<sup>37</sup> On 25 February 2020, Airey Taylor Consulting by email to the (then) strata manager of the strata company stated that:<sup>10</sup>

<sup>10</sup> Ibid at page 121.

<sup>11</sup> Ibid at pages 119 to 120.

- a) it is structurally essential that these steel columns be installed at a distance of 1300 millimetres from the face of the existing concrete column C17 as shown in the attached submitted engineering drawings; and
- b) 'we considered multiple options before developing the attached engineering drawings. The only practical and most effective answer is that detailed in the attached engineering drawings of which you already have one. We have performed the necessary studies and advise that the affected car bays will be code compliant after they are equally relined'.

<sup>38</sup> The structural works being the steel columns are variously located on common property and in the car parking bay of part Lot 29 and part Lot 139.<sup>11</sup>

39 The strata company sought consent from the owners of Lot 29 and Lot 139 to 'encroach' on part of their respective lots by the installation of the steel columns. The owner of Lot 29 provided consent by a BA20 form to be provided to the City of Perth.

40 Initially, the owner of Lot 139, Scott Cameron, refused to provide consent and commenced proceedings in the Tribunal on 26 August 2020 (matter CC 1029 of 2020). However after commencing the proceedings, Mr Cameron sought leave of the Tribunal to amend the orders sought as follows:

[T]he strata company cause a proposed re-subdivision of the strata plan to give effect to the changes required to the strata plan by the installation of the steel columns in the car-parking aspects of the strata plan the subject of these proceedings, for approval of the strata company.  
(proceeding)

41 The Tribunal granted leave to Mr Cameron to amend the orders sought as set out above (per order 1 of the orders of the Tribunal of 31 August 2021 in matter CC 1029 of 2020).

42 Airey Taylor Consulting recommended to the strata company that it accommodate the installation of the steel columns on the strata plan by subdividing the strata plan to 're-align' the car parking substantially in accordance with the 'car bay set out' plan prepared by Airey Taylor Consulting on 2 April 2020 whereby:<sup>12</sup>

<sup>12</sup> Ibid at page 122.

<sup>13</sup> Ibid at pages 121 to 122.

- a) the steel columns installed during the structural works become situated on common property; and
- b) the owners of the car parking bay Lots 29 and 139 regain Australian Standards compliant car parking bays after the installation of the steel columns.

43 Airey Taylor Consulting advised the strata company that each of the car parking bay part Lots 29, 30, 32, 138 and 139 will comply with the relevant Australian Standard after the proposed subdivision.<sup>13</sup>

44 As stated earlier (see above at [40]), the strata company and Mr Cameron agreed to resolve the proceeding on the basis that the strata



company propose to all owners at the general meeting that the scheme be subdivided to accommodate the steel columns.

45 The proposed subdivision affects the boundaries of the car parking bay aspects of part Lots 29, 30, 32, 138 and 139 on the strata plan by altering the width of the affected car parking bays as follows:<sup>14</sup>

<sup>14</sup> Ibid at pages 26, 146 and 147.

<sup>15</sup> Ibid at pages 121, 122, 146 and 147.

<sup>16</sup> Ibid at pages 106 to 113.

<sup>17</sup> Ibid at pages 104 to 105 and 133 to 135.

<sup>18</sup> Ibid at page 153.

<sup>19</sup> Ibid at pages 136 to 153 and 267 to 488.

- a) Lot 29 increased in size by 2m<sup>2</sup>;
- b) Lot 30 reduced in size by 1m<sup>2</sup>;
- c) Lot 32 reduced in size by 1m<sup>2</sup>;
- d) Lot 138 reduced in size by 2m<sup>2</sup>; and
- e) Lot 139 increased in size by 2m<sup>2</sup>.

46 Each of the car parking bay part lots affected by the proposed subdivision are a minimum of 2.45 metres.<sup>15</sup>

## EGM

47 To cause a type 4 subdivision, the strata company engaged:

- a) RM Surveys to prepare an amendment of the scheme plan reflecting the proposed subdivision (**amended scheme plan**);<sup>16</sup> and
- b) Major Valuations to prepare an amendment to the Schedule of Unit Entitlements which reflected no change to the unit entitlement of each lot (**amended schedule of unit entitlement**).<sup>1718</sup>

48 An EGM was convened by the council of the strata company instructing the strata manager to send a notice and agenda to each owner on 17 September 2021 by email, post to the lot address and post to the postal address recorded on the strata roll:<sup>19</sup>

- a) explaining by an explanatory memorandum the reason for and effect of the installation of the steel columns;

b) including a 'motion on notice' that:

The [s]trata [c]ompany resolves by unanimous resolution to subdivide strata scheme 53042 in accordance with the plan of subdivision attached hereto and marked 'A' and approves the amendment of the [s]chedule of [u]nit [e]ntitlement to give effect to the subdivision in accordance with the [s]chedule of [u]nit [e]ntitlement attached hereto and marked 'B'.

c) attaching a copy of the amended scheme plan marked 'A'; and

d) attaching a copy of the amended schedule of unit entitlement marked 'B'.

49 On each of 29 September 2021 and 6 October 2021, the (then) strata manager sent on behalf of the strata company a letter to each owner explaining the purpose of the EGM and encouraged owners to attend the EGM and to vote at the EGM.<sup>20</sup>

50 At the EGM:<sup>21</sup>

<sup>20</sup> Ibid at pages 154 to 157.

<sup>21</sup> Ibid at pages 158 to 163 and Exhibit 2..

<sup>22</sup> Exhibit 2.

<sup>23</sup> Ibid at pages 163 to 164 and 240 to 254.

a) the owner of Lot 133 proposed the resolution (as set out above at [7]);

b) the owners of 86 lots voted in favour of the resolution either in person or by proxy; and

c) no owner present or by proxy voted against or abstained from voting on the resolution.

51 The owners of 70 lots did not attend the EGM either in person or by proxy and did not otherwise vote on the resolution at the EGM by proxy (**non-voting owners**).<sup>22</sup>

Votes cast outside the EGM

52 On 19 October 2021 the strata company issued a notice under s 121(2)(b) of the ST Act to each of the non-voting owners to their addresses for service as recorded on the strata roll, notifying, inter alia, that the voting period for the resolution closes on 3 November 2021.<sup>23</sup>

53 On 3 November 2021 at 9:48 pm the strata company sent an email to each of the non-voting owners to remind them to vote on the resolution before the voting period closes at '11.59 pm' on 3 November 2021.

54 Votes were cast in favour of the resolution by 18 of the non-voting owners after the EGM but before 3 November 2021.<sup>24</sup>

55 At the closure of the voting period for the resolution:

<sup>24</sup> Ibid at pages 165 to 239.

<sup>25</sup> Ibid at pages 510 to 570.

<sup>26</sup> Ibid at pages 505 to 508.

a) owners of 104 lots voted in favour of the resolution;

b) no owner voted against the resolution;

c) owners of 52 lots did not cast any vote for or against the resolution; and

d) the owner of Lot 29 and Lot 139 each affected by the installation of the steel columns and the realignment of the car parking bays made necessary by the installation of the steel columns voted in favour of the resolution.

Proceedings in the Tribunal

56 On 7 December 2021 the strata company commenced these proceedings in the Tribunal.

57 There were 63 respondents at the commencement of these proceedings. Of those 63 respondents 24 respondents provided a written consent to the Tribunal that they consented for the Tribunal to make the order sought by the strata company (see above at [7]).<sup>25</sup> This leaves 39 respondents at the date of hearing.

58 Of the 39 respondents, the 15th respondent and the 22nd respondent responded to the Tribunal.<sup>26</sup>

### ***Consideration***

#### **Issue 1: Does the Tribunal have jurisdiction to determine the dispute?**

59 In order for the jurisdiction of the Tribunal to be enlivened, I must be satisfied that the strata company and each of the 39 respondents is a 'scheme participant' and that there is a 'scheme dispute'.

60 The strata company is a body corporate established under s 14 and Sch 5 cl 2(1)(d) of the ST Act on the registration of the strata plan on 30 August 2007.

61 Each of the 39 respondents being an owner of a lot(s) in the scheme, including some of the lots which have co-owners, are members of the strata company representing Lots 1, 8, 11, 13, 28, 32, 36, 38, 39, 47, 51, 52, 56, 61, 64, 70, 72, 73, 74, 86, 100, 103, 111, 115, 118, 120, 130, 135, 141, 143, 150, 154 and 156.

62 I am satisfied that both the strata company and each of the 39 respondents are 'scheme participants' for the purposes of the ST Act.

63 Under s 197(1)(a)(iv) of the ST Act 'scheme disputes' include disputes between scheme participants about a resolution of a strata company. Counsel for the strata company explained that the dispute that is the subject of these proceedings is whether the strata company ought to be taken to have passed a unanimous resolution at its EGM (see above at [7] for the resolution). I am satisfied that this dispute is a 'scheme dispute' under the ST Act.

64 Finally, I am satisfied that the strata company, as a party to the dispute, may make an application to the Tribunal under s 197(4) of the ST Act for the resolution of a scheme dispute.

65 In conclusion, I am satisfied that the Tribunal has jurisdiction to determine this matter. I will now proceed to consider whether the requirements of s 200(2)(n) of the ST Act are satisfied and if so, determine whether the Tribunal should exercise its discretion to make the order sought by the strata company.

## **Issue 2: Are the requirements of s 200(2)(n) of the ST Act satisfied?**

66 The proposed resolution put to the EGM was a resolution to subdivide Lots 29, 30, 32, 138 and 139 as shown on the amended strata plan and attached to these reasons and marked 'A'.

67 The proposed subdivision is a type 4 subdivision under the ST Act. This is because the proposed subdivision does not involve the alterations of the boundaries of the parcel and is not a type 1, type 2 or type 3 subdivision. Therefore, the proposed subdivision could only be authorised by a unanimous resolution of the strata company pursuant to s 35(1)(e)(i) of the ST Act. This required the strata company to give to each owner of each lot in the scheme notice of the proposed subdivision

including the details of the proposed amendments and any associated amendment of the schedule of unit entitlement in accordance with s 35(5) of the ST Act.

68 I am satisfied that the strata company satisfied s 35(5) of the ST Act by giving each owner of each lot in the scheme notice of the proposed subdivision including the amended strata plan and the amended schedule of unit entitlements in the approved form by having those documents attached to the notice of EGM issued to all owners by their addresses recorded in the strata roll as required by s 216 of the ST Act.<sup>27</sup>

69 Further, I am satisfied that the amended strata plan complies with the requirements set out in s 32 of the ST Act that it is in approved form and was certified by a licensed surveyor.<sup>28</sup>

70 I am also satisfied that the amended schedule of unit entitlements is in accordance with the requirements of s 37 of the ST Act. The amended schedule of unit entitlements allocates a whole number of unit entitlement to each lot in the scheme; states the number that is the sum of unit entitlements of all the lots in the scheme; is in the approved form; and was certified by a licensed valuer.<sup>29</sup> A copy of the schedule of unit entitlements is attached to these reasons and is marked 'B'.

71 The strata company convened an EGM by sending the notice to each owner by his or her address as recorded on the strata roll on 17 September 2021.<sup>30</sup> The notice included the: resolution; the amended strata plan; and the amended schedule of unit entitlements. I am satisfied the owners were given notice of the proposed subdivision including the details of the proposed subdivision.

72 The owners of 86 lots attended the EGM either in person or by a duly appointed proxy. This was sufficient for a quorum of owners and the EGM proceeded.<sup>31</sup> The owners of 70 lots did not attend the EGM either in person or by proxy.<sup>32</sup>

73 As there are 156 lots in the scheme and only owners of 86 lots attended the EGM, the strata company did not pass the proposed subdivision as there was not a unanimous resolution. Of the owners of

<sup>27</sup> Ibid at pages 136 to 153 and Exhibit 2 at paragraph 11(a).

<sup>28</sup> Ibid at pages 144 to 151.

<sup>29</sup> Exhibit 1 at pages 152 to 153.

<sup>30</sup> Ibid at pages 136 to 153 and Exhibit 2 at paragraph 11(a).

<sup>31</sup> Exhibit 2.

<sup>32</sup> Ibid.

the 86 lots who attended the EGM, they all voted in favour of the resolution.

<sup>74</sup> Subsequently, on 19 October 2021, the strata company notified each owner who was not present at the EGM of the outcome of the votes on the resolution.<sup>33</sup> Of those owners, 18 owners of lots in the scheme voted in favour of the resolution within the 28 day voting period (per s 121(2)(a) of the ST Act).<sup>34</sup>

<sup>75</sup> The end result is that the owners of 52 lots in the scheme did not cast any vote either for or against the resolution during the voting period or at all (**result**).

<sup>76</sup> Because of the result, counsel for the strata company submit that:

<sup>33</sup> Exhibit 1 at pages 163 to 164.

<sup>34</sup> Ibid at pages 175 to 239.

a) the strata company was required by s 35(1)(e)(i) of the ST Act to approve the proposed subdivision by unanimous resolution; and  
b) the strata company had not passed the proposed subdivision by unanimous resolution by the end of the voting period  
the requirements of s 200(2)(n) of the ST Act are satisfied and, therefore, the Tribunal's power to make an order in terms of the application is enlivened.

<sup>77</sup> I respectively agree with counsel for the strata company that the requirements of s 200(2)(n) of the ST Act have been satisfied in this matter because the strata company has not passed the proposed subdivision by unanimous resolution by the end of the voting period.

<sup>78</sup> That leaves me to consider if I should exercise the Tribunal's discretion to make the order under s 200(2)(n) of the ST Act as sought by the strata company (see above at [7]).

### **Issue 3: Should the Tribunal exercise its discretion to make the order sought by the strata company?**

<sup>79</sup> It is clear that the Tribunal *may* make an order that it considers appropriate to resolve the dispute (s 200(1) of the ST Act). This may be described as a 'broad discretion'.

80 Section 200(2) of the ST Act lists the types of orders (not exhaustive) that the Tribunal *may* make including an order under s 200(2)(n) of the ST Act that the strata company is taken to have passed or not to have passed a specific resolution required under the ST Act as a unanimous resolution. This may be described as a 'narrow discretion'.

81 The ST Act does provide any guidance to the Tribunal on determining whether it should decide that a strata company is to be taken to have passed a resolution required under the ST Act: ***Efficient Building Team Pty Ltd and The Owners of 25, 27, 29, 31 Parry Street, Fremantle Strata Plan 6413*** [2021] WASAT 158 at [99].<sup>35</sup> In other words, the ST Act is silent on the factors or circumstances a decision-maker is to consider in the exercise of the Tribunal's discretion to make orders under s 200 of the ST Act.

82 Counsel for the strata company referred me to ***Arasi & Anor and The Owners of Beverley Court*** [2005] WASAT 197 (*Arasi*) at [27]-[28] which provided that, when exercising a broad discretion, the Tribunal must act in accordance with:

<sup>35</sup> See also ***Thompson and The Owners of Blumarine Apartments Strata Scheme 57889*** [2021] WASAT 120 at [56].

- a) the provisions of the ST Act;
- b) the principles of reasonableness and fairness;
- c) the interests of the parties;
- e) equity; and
- f) due consideration of all the information at its disposal.

83 While the list set out in *Arasi* (see above at [82]) is for exercising a 'broad discretion', in my view, it is appropriate in my consideration of whether to exercise the Tribunal's discretion to make an order under s 200(2)(n) of the ST Act (a 'narrow discretion') that I act in accordance with each of the items listed. In my view the list in *Arasi* is not exhaustive.

84 Importantly, using the words of the Tribunal in ***Robinson and Stevens*** [2009] WASAT 207 at [23], I must apply my mind to the facts to determine if I should exercise the Tribunal's discretion to make the order sought under s 200(2)(n) of the ST Act.

85 Counsel for the strata company submit that the Tribunal should exercise its discretion to make the order as sought by the strata company under s 200(2)(n) of the ST Act (see above at [7]) for the following reasons:

a) the strata company had no option but to undertake the structural works which required the installation of steel columns including in the car parking bay part Lots 29 and 139. Mr Peter Airey of Airey Taylor Consultants, opined:

[I]n my extensive term of practice I have never encountered a problem of this type in the past and I hope to never encounter it in the future. It has horrible echoes of the Miami catastrophe.

b) the scheme plan is not now reflective of the actual building and needs to be rectified to reflect the physical structures, being the steel columns, now installed at the scheme and, therefore, the proposed subdivision has merit;<sup>36</sup>

<sup>36</sup> Ibid at [39].

<sup>37</sup> Exhibit 1 at page 121.

<sup>38</sup> Ibid at page 568 and Exhibit 2 at annexure 'KLS2'.

c) the principles of reasonable and fairness require that the proposed subdivision is approved to allow the occupiers of each of Lot 29 and Lot 139 the use and enjoyment of an Australian Standards compliant car parking bay;<sup>37</sup>

d) the only owners affected by the proposed subdivision, and therefore, with any material interest in the proceedings have each authorised the proposed subdivision;<sup>38</sup>

e) no owner has voted against the resolution or opposed the proposed subdivision in these proceedings;

f) there is no known opposition from any owner to the proposed subdivision; and

g) the strata company has discharged each of its obligations under the ST Act with respect to the convening and conduct of the EGM, the resolution and the preparation and notification of the documents required to cause the



proposed subdivision. Further, the strata company caused the strata company's lawyers to audit the notification, convening and conduct of the EGM and resulting minutes and followed the recommendation of that audit to correct the minutes.<sup>39</sup>

86 On applying my mind to the facts of this matter (see above at [34] to [58]), I am persuaded to exercise the Tribunal's discretion to make the order sought by the strata company under s 200(2)(n) of the ST Act. I consider the following six factors or considerations are relevant in deciding to exercise the Tribunal's discretion to make the order that the strata company is taken to have passed the resolution (as set out above at [7]) at the EGM as a unanimous resolution. First, the strata company in order to comply with its obligation under s 91(1)(c) of the ST Act to keep in good serviceable repair the common property, it had no option but to follow the advice of the engineers (Airey Taylor Consultants) to install the steel columns on the common property and in the car parking bay part Lots 29 and 139. To not carry out the structural works, may have, using the words of Mr Airey, resulted in a catastrophe.

87 Second, having done the structural works, the scheme plan is *not* now reflective of the actual building and this needs to be rectified.

88 Third, it is reasonable, fair and appropriate that each of the owners of Lots 29 and 139 have a car parking bay that is compliant with the Australian Standard AS/NZS 2890.1 which can be achieved by the proposed subdivision.

89 Fourth, the owners of Lots 29 and 139 have each authorised or consented to the proposed subdivision.

90 Fifth, no owner voted against the resolution or objected to the proposed subdivision in these proceedings.

91 Sixth, the strata company has complied with the procedures under the ST Act for the EGM, voting and resolutions and any associated matters.

92 Finally, in deciding to exercise the Tribunal's discretion to make the order sought by the strata company, in my view, nothing turns on the correspondence received from the two respondents (the 15th respondent

and the 22nd respondent) who replied to the Tribunal<sup>40</sup> or in respect of the corrections to the minutes.<sup>41</sup>

<sup>40</sup> Exhibit 1 at pages 505 to 508.

<sup>41</sup> Exhibit 2.

### ***Conclusion***

93 In conclusion, for the above reasons, I would exercise the Tribunal's discretion to make the order under s 200(2)(n) of the ST Act as sought by the strata company (see above at [7]).

### ***Orders***

The Tribunal orders:

1. Pursuant to s 200(2)(n) of the *Strata Titles Act 1985* (WA), The Owners of Ellement 996 Strata Plan 53042 (the strata company) is taken to have passed the following resolution that was proposed at its extraordinary general meeting held on 6 October 2021, as a unanimous resolution:

The strata company resolves by unanimous resolution to subdivide strata scheme 53042 in accordance with the plan of subdivision attached hereto and marked 'A' and approves the amendments in the Schedule of Unit Entitlements to give effect to the subdivision in accordance with the Schedule of Unit Entitlements attached hereto and marked 'B'.

## ATTACHMENT A































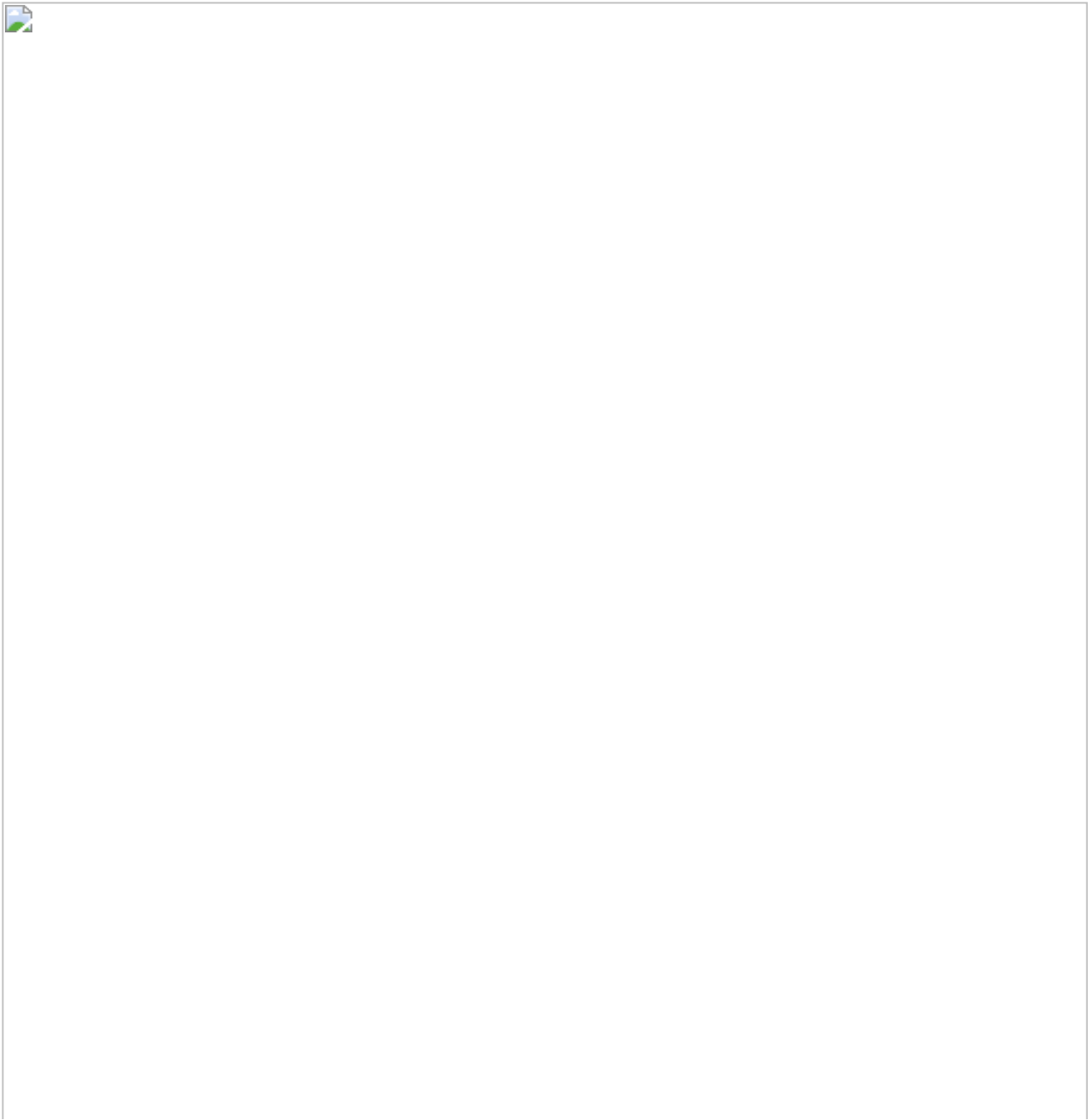








**ATTACHMENT B**







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

**MS R PETRUCCI, MEMBER**

**1 JUNE 2022**