

JURISDICTION : STATE ADMINISTRATIVE TRIBUNAL

ACT : STRATA TITLES ACT 1985 (WA)

CITATION : THE OWNERS OF DOLPHIN APARTMENTS
MANDURAH STRATA PLAN 49518 and POLAND
SUPERANNUATION PTY LTD [2022] WASAT 37

MEMBER : MS C BARTON, MEMBER

HEARD : 10 MARCH 2022

DELIVERED : 10 MAY 2022

FILE NO/S : CC 1475 of 2021

BETWEEN : THE OWNERS OF DOLPHIN APARTMENTS
MANDURAH STRATA PLAN 49518
Applicant

AND

POLAND SUPERANNUATION PTY LTD
Respondent

Catchwords:

Strata titles - Scheme dispute - Scheme participants - Declaratory relief -
Validity of unanimous resolution - Plan of re-subdivision - Whether contractual
obligation to vote in favour of re-subdivision - Failure to register strata plan -
Estoppel - Objectives of strata company - Application for dispensation

Legislation:

*State Administrative Tribunal Act 2004 (WA), s 37, s 38, s 45(1), s 45(3),
s 45(3)(b), s 45(3)(b)*

State Administrative Tribunal Rules 2004 (WA), r 26(1)
Strata Titles Act 1985 (WA), s 119, s 119(1), s 123, s 197(1), s 197(1)(iv),
s 197(2), s 197(4), s 198(2)(a), s 198(2)(b), s 198(2)(c), s 199, s 199(2),
s 199(3)(d), s 200(2)(a), s 200(2)(m)
Strata Titles Act 1985 (WA) (prior to May 2020), s 3(1), s 8A

Result:

Application successful

Category: B

Representation:

Counsel:

Applicant : Mr M Greenlees and Mr R Repacholi
Respondent : Mr S McFarlane

Solicitors:

Applicant : N/A
Respondent : Bugden Allen Graham Lawyers

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

Abbott v Clark [2006] NSWSC 111
Alpha Wealth Financial Services Pty Ltd v Frankland River Olive Co Ltd
[2008] WASCA 119
National Westminster Finance New Zealand Ltd v National Bank of New
Zealand Ltd [1996] 1 NZLR 548
Sidhu v Van Dyke (2014) 251 CLR 505
The Commonwealth of Australia v Verwayen (1990) 170 CLR 394
Thompson and The Owners of Blumarine Apartments Strata Scheme 57889
[2021] WASAT 120
Trentelman v The Owners – Strata Plan No 76700 [2021] NSWCA 242
Waltons Stores (Interstate) Ltd v Maher (1988) 164 CLR 387

REASONS FOR DECISION OF THE TRIBUNAL:

Introduction

1 The applicant in these proceedings is The Owners of Dolphin Apartments Mandurah Strata Plan 49518 (**Strata Company/applicant**). The strata scheme, known as Dolphin Apartments, comprises a mixed use residential/commercial development with ground floor commercial shops and three upper floors of residential apartments (**Scheme**).

2 On 13 September 2021, the applicant commenced proceedings in the Tribunal under s 197(4) of the *Strata Titles Act 1985* (WA) (**ST Act**) in respect of the resolution of a scheme dispute.

3 The applicant questions the validity of unanimous resolutions of the Strata Company that were purportedly passed in 2008 (**Unanimous Resolution**) authorising a re-subdivision of Strata Plan 49518 (**Strata Plan**) to include common property toilets (**Commercial Toilets**), bin room (**Retail Bin Store**) and walkway (**Walkway**) within lot 61 on the Strata Plan (**Lot 61**) to create the new lot 62 (**Lot 62**). The plan of re-subdivision was lodged at Landgate and signed by the Registrar in 2009 but was not registered.

4 In essence, the applicant seeks a declaration under s 199(3)(d) of the ST Act that the Unanimous Resolution is invalid.

5 The respondent, Poland Superannuation Pty Ltd, is the registered proprietor of Lot 61 on the Strata Plan (**respondent**). It is the respondent's position that the Unanimous Resolution is valid. The respondent requires the Commercial Toilets to be included in Lot 61 to allow shops 1 and 2 (which form part of Lot 61) to operate as a licensed restaurant.

Witness evidence and conduct of the proceedings

6 The proceedings are related to other proceedings in the Tribunal which were commenced by the respondent against the applicant and Logiudice Property Group Pty Ltd (**Strata Manager**) (**primary proceedings**). In the primary proceedings, CC 851 of 2020, the respondent seeks, relevantly, an order from the Tribunal under s 200(2)(a) of the ST Act requiring the Strata Plan to be amended in the manner approved by the Unanimous Resolution and, by s 200(2)(m) of

the ST Act, to order a person to sign the application for re-subdivision to give effect to the Unanimous Resolution.¹

7 Each party filed with the Tribunal and gave to the other party a statement of issues, facts and contentions (**SIFC**). On 30 November 2021, the applicant filed a bundle of documents on which it sought to rely in the proceedings.

8 The respondent filed its bundle of documents on 1 March 2022, comprising two witness statements with annexures. The respondent relied on the evidence of Mr John Silbert, the architect who was responsible for the design of the Scheme building. Mr Silbert prepared a witness statement dated 28 February 2022. The respondent also relied on the evidence of Mr Andrew Thorpe, who is the company secretary of the respondent. Mr Thorpe prepared a witness statement dated 28 February 2022. The applicant did not call any witnesses.

9 On 22 February 2022, the applicant sought an order under s 45(3)(b) of the *State Administrative Tribunal Act 2004* (WA) (**SAT Act**) to dispense with the requirement to give a copy of the application in these proceedings to all notifiable persons.

10 I will first consider whether the application for dispensation should be granted.

The application for dispensation

11 Pursuant to s 45(3) of the SAT Act, the Tribunal has discretion, in certain circumstances, to dispense with the service of an application in respect of a notifiable person. Section 45(3) of the SAT Act provides:

The Tribunal may make an order dispensing with the requirement to give a copy of an application to a notifiable person specified in the order if satisfied –

- (a) that the applicant has made all reasonable attempts to give a copy of the application to the notifiable person, but has been unsuccessful; or
- (b) that the making and hearing of the application without notice to the notifiable person would not cause injustice.

¹ Exhibit 1, page 237.

12 A 'notifiable person' is a person referred to in s 45(1) of the SAT Act and includes, for the purposes of the ST Act:²

- (a) each member of the strata company;
- (b) each mortgagee of a lot who has given written notice of the mortgagee's interest to the strata company;
- (c) the occupier of each lot in the strata titles scheme that would be affected if the order sought were made.

13 Pursuant to r 26(1) of the *State Administrative Tribunal Rules 2004* (WA), a copy of an application must be given immediately after it is filed but, in any event, no more than seven days after the day on which the application is accepted by the executive officer of the Tribunal. The applicant conceded that the application was not provided to all notifiable persons within seven days of it being accepted by the executive officer.³

14 The giving of an application to all notifiable persons satisfies the requirements of procedural fairness by ensuring that persons whose interests may be affected by the application can, if they wish, intervene or seek to be joined as a party to the proceedings.⁴ The onus is on the applicant to demonstrate that there are real grounds to dispense with the requirement to give the application to all notifiable persons.⁵

15 The applicant says that the requirement to notify each member of the Strata Company and their mortgagees should be dispensed with because, when it lodged the application, it considered that the issues in dispute in these proceedings were internal to the management of the Strata Company.⁶ The applicant did not wish to sign a Landgate transfer of common property for the purposes of re-subdivision without first verifying that the Unanimous Resolution was valid. To expedite the determination of the issue in dispute, the applicant says that it essentially extracted these proceedings from the primary proceedings.⁷

16 Further, it is the applicant's position that on 5 October 2021 it provided to all lot owners a detailed letter about why it was not signing the re-subdivision document, and a copy of the SIFCs filed by the

² ST Act, s 198(2)(a), s 198(2)(b) and s 198(2)(c).

³ Exhibit 1, pages 198-199.

⁴ See SAT Act, s 37 and s 38.

⁵ See *Abbott v Clark* [2006] NSWSC 111 at [6].

⁶ Exhibit 1, page 199.

⁷ Exhibit 1, page 199.

parties in the proceedings.⁸ Also, on 10 February 2022, the applicant provided all owners with the wording of the order sought in the proceedings, an update on programming directions and advised them of the date of the final hearing.⁹ The applicant says that no lot owner has requested a copy of the application. Because the purpose of the proceedings is to determine the validity of the Unanimous Resolution, the applicant contends that no occupier would be directly affected by the making of the order sought.¹⁰

17 The owner of Lot 61 in the Scheme was substituted as the respondent in these proceedings on 16 November 2021 after it became aware that the applicant had commenced the application against itself. The respondent opposes the application for dispensation. It is the respondent's position that the applicant did not seek the approval of the Strata Company for the filing of the application and that none of the lot owners, other than the members of the Council of Owners (**Council**), had been informed that the application had been lodged.¹¹

18 I accept the applicant's contention that a discrete issue arises for determination in these proceedings. There was no dispute, and I find, that the application relates to the validity of the Unanimous Resolution which was an issue raised in the primary proceedings.¹² I accept that the issue has been 'extracted' from those proceedings for expediency.

19 Based on the evidence of Mr Thorpe which I accept, I find that on 10 February 2022 the applicant provided each member of the Strata Company with the order sought in these proceedings, an update on programming directions, and the date of the final hearing.¹³ The SIFCs were also provided to all owners prior to the final hearing.¹⁴ Consequently, I am satisfied that each member of the Strata Company has been notified of the substance of the proceedings and given notice of the date of the final hearing in the event that he or she wished to intervene or seek to be joined as a party to the proceedings.

20 For these reasons, I find that the applicant has made out real grounds to dispense with the requirement to provide a copy of the application to all notifiable persons. Consequently, I am satisfied that

⁸ Exhibit 1, page 200.

⁹ Exhibit 1, page 200.

¹⁰ Exhibit 1, page 200.

¹¹ Exhibit 1, page 492, para 17 and para 32.

¹² Exhibit 1, page 472.

¹³ Exhibit 1, page 455, para 29.

¹⁴ ts 88, 10 March 2022.

the making and hearing of the application without notice to the notifiable persons referred to in s 45(1)(b) of the SAT Act would not cause injustice.

21 I will make an order pursuant to s 45(3)(b) of the SAT Act to dispense with the requirement to notify the persons specified in s 198(2)(a), s 198(2)(b) and s 198(2)(c) of the ST Act.

The Tribunal's jurisdiction

22 Under s 197(4) of the ST Act, an application for the resolution of a scheme dispute can be made to the Tribunal by a party to the dispute. The Tribunal has jurisdiction to resolve disputes between 'scheme participants' that relate to a resolution or decision of a strata company or the council of a strata company, including its validity.¹⁵

23 The expression 'scheme participants' is defined in s 197(2) of the ST Act to include, relevantly, the strata company for the strata titles scheme and a member of the strata company for the strata titles scheme.

24 There was no dispute and, I find, that the respondent is the owner of Lot 61 on the Strata Plan and, therefore, is a scheme participant for the purposes of s 197(2) of the ST Act. I further find that the applicant being the Strata Company of the Scheme, is also a scheme participant. Consequently, having granted the applicant dispensation under s 45(3)(b) of the SAT Act, I find that the Tribunal has jurisdiction to determine the scheme dispute between the applicant and the respondent.

25 In proceedings under the ST Act, the Tribunal can make a declaration concerning a matter in the proceedings instead of any order the Tribunal could make, or in addition to any order the Tribunal makes.¹⁶ Relevantly, the Tribunal may make a declaration that a specified decision or resolution of the strata company is or is not valid.¹⁷

26 I set out below the issues that are relevant to my determination about the validity of the Unanimous Resolution.

The issues for determination

27 The following issues arise for determination:

¹⁵ ST Act, s 197(1)(iv).

¹⁶ ST Act, s 199(2).

¹⁷ ST Act, s 199(3)(d).

- 1) Was the Unanimous Resolution validly passed?
- 2) If the answer to 1) is in the negative, should the Strata Company be taken to have validly passed the Unanimous Resolution?
- 3) Is the Strata Company estopped from seeking a declaration that the Unanimous Resolution was invalid?
- 4) Has the Strata Company contravened s 119 of the ST Act by commencing the application and, if so, should the relief sought by the applicant be declined?

Chronology of events

²⁸ Certain relevant factual matters were not in dispute between the parties. I make the findings set out in this paragraph in relation to those matters:

- a) The Strata Plan was registered at Landgate on 24 July 2006.
- b) By letter dated 27 February 2008, Ms Eleanor Logiudice of the Strata Manager gave notice to all owners of lots in the Scheme of an extraordinary general meeting to be held on 19 March 2008 (**EGM Notice**).¹⁸
- c) The EGM Notice included:¹⁹
 - a. an agenda;
 - b. draft motions;
 - c. an explanatory memorandum entitled 'Introduction to the Proposed Resolution' which referred to the off-the-plan sales contract signed by the original lot owners who purchased lots in the Scheme (**Contract**);

¹⁸ Exhibit 1, page 425.

¹⁹ Exhibit 1, page 330.

- d. a copy of the proposed amended strata plan with the heading 'Resubdivision of Lot 61 and Common Property' (**Proposed Plan**); and
 - e. a copy of a search of the existing registered Strata Plan.
- d) The Proposed Plan comprised two sheets which set out the three areas that were proposed to be added to Lot 61 to create Lot 62, including the Commercial Toilets, the Walkway of 49m² running behind the commercial shops, and the 17m² Retail Bin Store.²⁰
- e) The extraordinary general meeting of the Strata Company was held on 19 March 2008 (**2008 EGM**). The minutes of the 2008 EGM prepared by the Strata Manager (**EGM Minutes**) show that those present were Mr J Ledger, Mr J Silbert, and Ms E Logiudice.²¹ Ms Logiudice had been given proxies for many of the owners.²²
- g) The 2008 EGM was chaired by Ms Logiudice who moved the following three motions on the agenda:²³

Unanimous Resolution - Re-subdivision of Lot 61

The strata company resolves by unanimous resolution to the proposed re-subdivision of Lot 61 and part of the common property as set out in the attached 'Proposed Strata Plan of Re-subdivision of Lot 61 and the common property'.

The strata company resolve by unanimous resolution to agree to the proposed Schedule of Unit Entitlement and Aggregate Unit Entitlement as set out in the attached 'Proposed Schedule of Unit Entitlement for the Re-subdivision of Lot 61 and the Common Property'.

The strata company resolves by a majority resolution to authorise the council of owners of the strata company to affix the common seal and execute any documents required to effect the above resolutions.

²⁰ Exhibit 1, page 330; Exhibit 1, page 211-212.

²¹ Exhibit 1, page 445.

²² Exhibit 1, page 331.

²³ Exhibit 1, page 425.

- g) Mr Ledger and Mr Silbert voted in favour of the motions, as did Ms Logiudice, using her proxies.²⁴
- h) Ms Logiudice declared that the motion to approve the Proposed Plan of re-subdivision and schedule of unit entitlement (**Re-subdivision Motions**) had been carried unanimously.²⁵ The EGM Minutes confirmed that the Re-subdivision Motions had been carried unanimously.²⁶
- i) Following the 2008 EGM, the developer's architect, Mr Silbert, instructed the surveyor to update the Strata Plan in accordance with the Unanimous Resolution and to lodge the plan of subdivision with the City of Mandurah, the Western Australian Planning Commission, and Landgate.²⁷
- j) The amended strata plan was lodged at Landgate by the surveyor and signed by the Registrar on 14 October 2009 but not registered (**Amended Strata Plan**). The Amended Strata Plan does not show the area where the Commercial Toilets is located as part of the proposed Lot 62.²⁸
- k) Following the Unanimous Resolution, a fence and gate were installed alongside the Commercial Toilets to separate those toilets from the residential parking area.²⁹
- l) Additional toilets are located within Lot 61, on the north-eastern boundary of the lot.
- m) Common property staff toilets are provided by the Scheme and are shown on the Strata Plan.

The Tribunal's consideration

29 At the time of the 2008 EGM, the ST Act provided that a strata company must consent to a proposed re-subdivision by unanimous

²⁴ Exhibit 1, page 331; Exhibit 1, page 445.

²⁵ Exhibit 1, page 331.

²⁶ Exhibit 1, page 445.

²⁷ Exhibit 1, page 331.

²⁸ Exhibit 1, page 331; Exhibit 1, page 6; ts 34, 10 March 2022.

²⁹ ts 54, 10 March 2022; Exhibit 2.

resolution.³⁰ The expression 'unanimous resolution' was defined in s 3(1) of the ST Act as follows:³¹

unanimous resolution means -

- (a) a resolution that is passed unanimously at a duly convened general meeting of the strata company -
 - (i) of which at least 14 days' notice specifying the proposed resolution has been given; and
 - (ii) at which all persons entitled to exercise the powers of voting conferred under this Act are present and vote, either personally or by proxy;

or

- (b) a resolution that is passed unanimously at a duly convened general meeting of the strata company by every person entitled to exercise the powers of voting conferred under this Act who is present and votes either personally or by proxy and agreed to, in writing signed by him, within 28 days after the day of the meeting by every other person who was entitled to exercise the powers of voting conferred under this Act at the meeting, or by every person who at the time of his signature was entitled to exercise those powers in place of such other persons[.]

³⁰ The applicant observes that not all owners entitled to vote were present at the 2008 EGM.³² Based on the EGM Minutes, the applicant says that only 29 of the 61 owners were present either in person or by proxy.³³ Further, the applicant says that the 2008 EGM did not have a quorum because the Sch 1 By-laws required one-half of the persons entitled to vote to be present in person or by duly appointed proxy. Consequently, it is the applicant's position that to form a quorum a minimum of 31 owners were required to be present at the 2008 EGM either in person or by appointed proxy.³⁴

³⁰ ST Act, s 8A.

³¹ Following the ST Act amendments in May 2020, s 123 of the ST Act provides that a resolution of strata company is a 'unanimous resolution' if 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 the vote attached to each lot in the scheme is cast in favour of the resolution.

³² Applicant's SIFC, para 44.

³³ Applicant's SIFC, para 37; ts 47, 10 March 2021.

³⁴ Applicant's SIFC, para 37.

31 It is the respondent's position that the Unanimous Resolution was validly passed.³⁵ The respondent says that, in any event, the re-subdivision should be taken to have been authorised by the Unanimous Resolution because it was intended to rectify an error in the Strata Plan. In support of its position, the respondent relied on the evidence of Mr Silbert, who attended the 2008 EGM as the owner of Lot 48 in the Scheme.³⁶

32 On 15 January 2008, Mr Silbert advised the surveyor who had finalised the Strata Plan that the Commercial Toilets had not been included as part of Lot 61.³⁷ He sent the surveyor two pages of the registered plan with notations showing the required changes, specifically, he advised the surveyor that the Strata Plan would have to be re-done to include the Commercial Toilets, the Retail Bin Store and the Walkway in Lot 61.³⁸

33 As the owner of Lot 48 in the Scheme, Mr Silbert received a letter from the Strata Manager dated 27 February 2008, being the EGM Notice, which included an agenda, draft motions, an explanatory memo headed 'Introduction to the Proposed Resolution', the Proposed Plan, and a copy of a search of the existing registered Strata Plan. Mr Silbert said that the Proposed Plan comprised the Commercial Toilets, the Walkway and the Retail Bin Store.³⁹

34 Mr Silbert confirmed that he attended the 2008 EGM. He stated that the 2008 EGM was chaired by Ms Logiudice who advised those present that she had been given proxies for many of the owners.⁴⁰ Mr Silbert said that Ms Logiudice moved the motion on the agenda and that he voted in favour of it together with Mr J Ledger, and that Ms Logiudice declared the motion had been carried unanimously.⁴¹

Was the Unanimous Resolution validly passed at the 2008 EGM?

35 There was no dispute, and I find, that the proposed re-subdivision to create Lot 62 required a unanimous resolution at a duly convened general meeting of the Strata Company.

³⁵ Respondent's SIFC, para 51.

³⁶ ts 49, 10 March 2022.

³⁷ Exhibit 1, page 330, para 17; ts 52, 10 March 2022.

³⁸ Exhibit 1, page 330, para 18; ts 52-53, 10 March 2022.

³⁹ Exhibit 1, page 330, para 23; ts 53, 10 March 2022.

⁴⁰ Exhibit 1, page 331, para 25.

⁴¹ Exhibit 1, page 331, para 26.

36 I find that the 2008 EGM was duly convened by the giving of the
EGM Notice.

37 I accept the evidence of Mr Silbert, and I find, that the
Commercial Toilets, the Retail Bin Store and the Walkway were
mistakenly omitted from Lot 61 when the Strata Plan was registered.
I further find that the 2008 EGM was held for the purpose of passing a
resolution that would rectify these errors in the Strata Plan by the re-
subdivision and creation of Lot 62.

38 The Unanimous Resolution was documented in the EGM Minutes
as follows.⁴²

It was resolved by unanimous resolution that the proprietor of Lot 61
proceed with the re-subdivision of Lot 61 as per the schedule attached
to the Agenda.

39 The respondent referred the Tribunal to *Thompson and
The Owners of Blumarine Apartments Strata Scheme 57889*
[2021] WASAT 120 (*Blumarine*) in support of its contention that the
re-subdivision should be taken to have been authorised by the
Unanimous Resolution because it was intended to rectify an error in the
Strata Plan. In *Blumarine*, Ms Thompson sought an order from the
Tribunal to amend the strata plan because it did not reflect the footprint
of her lot. Prior to commencing her application, she had put forward a
motion for re-subdivision at an annual general meeting of the strata
company for re-subdivision but it had failed to pass by unanimous
resolution. Ultimately, the Tribunal ordered that the unanimous
resolution authorising the re-subdivision was taken to have been passed
by the strata company. I do not consider that *Blumarine* is of
assistance in these proceedings where a resolution for re-subdivision
was purportedly passed unanimously, and it is the validity of the
resolution that is challenged by the applicant. Further, no application
has been made by the respondent seeking an order from the Tribunal
that the Strata Company is taken to have passed a resolution to correct
an error in the Strata Plan.

40 The Unanimous Resolution was purportedly passed almost
15 years ago. Due to the effluxion of time, it is difficult to determine
whether the 2008 EGM followed the procedural requirements of the
ST Act and the Sch 1 By-laws. However, based on the EGM Minutes
which I accept, I find that 29 of the 61 owners attended the 2008 EGM,

⁴² Exhibit 1, page 445.

either in person or by proxy, and voted in favour of the Re-subdivision Motions.⁴³ On the face of it, there were lot owners who were entitled to vote but did not attend the 2008 EGM, either in person or by proxy. In these circumstances, a lot owner could within 28 days after the day of the 2008 EGM exercise his or her powers of voting to achieve a unanimous resolution.⁴⁴ There was no evidence before me that the lot owners who were not present at the 2008 EGM exercised their powers of voting within this time frame. Consequently, I find that the Re-subdivision Motions moved at the 2008 AGM were not carried unanimously because only 29 of the 61 owners either in person or by proxy voted in favour of them. In any event, I find that a quorum was not established because the 2008 EGM did not have one-half of all owners present, in person or by proxy, as required by the Sch 1 By-laws.⁴⁵ For these reasons, I find that the Unanimous Resolution was not validly passed at the 2008 EGM.

⁴¹ The applicant has raised concerns that the lot owners, who voted at the 2008 EGM, may have been unduly influenced by the content of the EGM Notice to vote in favour of the re-subdivision and were misled about which areas of common property were to be transferred to Lot 61.⁴⁶ Specifically, the applicant contends that the Strata Company should not be taken to have validly passed the Unanimous Resolution because the covering letter to the EGM Notice in respect of the re-subdivision only mentioned the Commercial Toilets and not any other area. Consequently, the applicant contends that those owners who voted in favour of the Unanimous Resolution through their proxy were not made aware of the additional areas that would form part of Lot 62.⁴⁷

⁴² The applicant further contends that the strata plan annexed to the Contract (**Preliminary Strata Plan**) was not included in the EGM Notice documentation provided to owners.⁴⁸ For this reason, the applicant says that there is no evidence that the Preliminary Strata Plan was given to owners to show that the Commercial Toilets, Retail Bin Store or the Walkway formed part of Lot 61.⁴⁹

⁴³ Exhibit 1, page 460.

⁴⁴ Limb (b) of the definition of 'unanimous resolution' in s 3(1), ST Act (prior to 2020).

⁴⁵ By-law 12(3), Sch 1 to the ST Act (prior to 2020).

⁴⁶ Exhibit 1, page 303, paras 20-25.

⁴⁷ Exhibit 1, page 472.

⁴⁸ Exhibit 1, page 472.

⁴⁹ Exhibit 1, page 472.

43 There was no dispute, and I find, that the Preliminary Strata Plan was attached as Annexure 2 to the Contract. I accept the evidence of Mr Silbert, and I find, that the owners of the Scheme received, as part of the EGM Notice, a copy of the Preliminary Strata Plan.⁵⁰ I observe that the area where the Commercial Toilets are now located is shown as part of Lot 61 on the Preliminary Strata Plan but not the Retail Bin Store and Walkway.⁵¹

44 However, based on the evidence before me, I am satisfied that the owners who attended the 2008 EGM, either in person or by proxy, were made aware of the areas that would form part of Lot 62 following the re-subdivision. I find that the 'Introduction to the Proposed Resolution' included in the EGM Notice refers to the Commercial Toilets and the Walkway and that the Proposed Plan is marked with these two areas, as well as the Retail Bin Store.⁵²

45 The applicant did not call any witnesses or adduce documentary evidence to support a finding that the owners who voted in favour of the re-subdivision at the 2008 EGM were misled or unduly influenced by the content of the EGM Notice.

46 In light of my finding that the Unanimous Resolution was not validly passed at the 2008 EGM, I will next consider whether it should be taken to have been validly passed having regard to the provisions of the Contract.

Should the Strata Company be taken to have validly passed the Unanimous Resolution?

47 In response to the Strata Company's application, the respondent contends that the Unanimous Resolution should be taken to have been validly passed at the 2008 EGM. It is the respondent's position that clause 7.1 of the Contract operated at the time of the 2008 EGM to prevent all purchasers from objecting to a re-subdivision that amounted to a correction of the Strata Plan that aligned with the Proposed Strata Plan.⁵³

48 Clause 7.1 of the Contract provides:

The Seller may:

⁵⁰ Exhibit 1, page 330, para 22.

⁵¹ Exhibit 1, page 363.

⁵² Exhibit 1, pages 209-212.

⁵³ Respondent's SIFC, para 55.

- (a) make any modification to the Proposed Strata Plan, the Building or the Property as may be required by any competent authority or otherwise *to procure the registration of the Proposed Strata Plan* provided that such modification does not materially prejudice or affect the size or value of the Property;

...

[and]

the Buyer must not make any objection, requisition or claim for compensation nor terminate this Contract in respect of any such modification, alteration or variation.

(Emphasis added)

49 The expression 'Proposed Strata Plan' is defined in clause 1.1 of the Contract as follows:

Proposed Strata Plan means the plan or plans attached to the Disclosure Statement as Attachment 2, annexed to this Contract as amended varied or supplemented from time to time[.]

50 Having regard to these provisions of the Contract, the respondent contends that all owners had a contractual obligation to vote in favour of the proposed re-subdivision at the 2008 EGM as a failure to vote in favour of it would prevent a unanimous resolution and, therefore, amount to an objection.

51 I do not accept the respondent's construction of clause 7.1 of the Contract and, therefore, I am not satisfied that the purchasers would have been entitled to raise an objection to the re-subdivision of Lot 61 at the 2008 EGM.⁵⁴ I find that, properly construed, clause 7.1 of the Contract has no bearing on an extraordinary meeting held once a strata scheme has come into existence. The reference to 'amended, varied or supplemented from time to time' in the definition of 'Proposed Strata Plan' in clause 1.1 of the Contract does not alter this finding because, by virtue of clause 7.1 of the Contract, any modification to the Proposed Strata Plan is limited to that which is required to procure its registration for the first time. The Strata Plan was first registered at Landgate on 24 July 2006 and the purported inaccuracies in it was the reason the 2008 EGM was convened.

52 For these reasons, I am not satisfied that clause 7.1 of the Contract operated at the time of the 2008 EGM to prevent the owners who did

⁵⁴ Exhibit 1, pages 362-367.

not attend the 2008 EGM, either in person or by proxy, from objecting to a re-subdivision of Lot 52 to correct an error in the Strata Plan. That is, I do not accept that the owners who were eligible to attend, either in person or by proxy, were contractually bound not to raise an objection to the re-subdivision.

53 Consequently, I do not accept the respondent's contention that the Unanimous Resolution should be taken to have been validly passed at the 2008 EGM because of the operation of clause 7.1 of the Contract.

Is the Strata Company estopped from seeking a declaration that the Unanimous Resolution was invalid?

54 I have reached the conclusion that the Unanimous Resolution was not validly passed at the 2008 EGM. I will next consider whether the Strata Company is estopped from bringing its application to declare the Unanimous Resolution invalid.

55 The respondent says that the applicant is estopped from seeking a declaration that the Unanimous Resolution was not validly passed because it would deny the respondent the right to register the Amended Strata Plan in circumstances where the parties had accepted the Unanimous Resolution.⁵⁵ Because of its reliance on this state of affairs, the respondent says it took no further steps to seek a resolution of the Strata Company at a later general meeting. The respondent contends that estoppel by representation, estoppel by convention and equitable estoppel (such as proprietary estoppel) all apply in this case.

56 In *The Commonwealth of Australia v Verwayen* (1990) 170 CLR 394, Mason CJ stated:⁵⁶

... it should be accepted that there is but one doctrine of estoppel, which provides that a court of common law or equity may do what is required, but not more, to prevent a person who has relied upon an assumption as to a present, past or future state of affairs (including a legal state of affairs), which assumption the party estopped has induced him to hold, from suffering detriment in reliance upon the assumption as a result of the denial of its correctness[.]

57 A promise or representation will generally be sufficiently clear to support an estoppel if it was reasonable for the representee to interpret the promise in a particular way and to act in reliance on that

⁵⁵ Exhibit 1, page 498, para 69; ts 27, 10 March 2022.

⁵⁶ At 413; See also *Waltons Stores (Interstate) Ltd v Maher* (1988) 164 CLR 387.

assumption: *Trentelman v The Owners - Strata Plan No 76700* [2021] NSWCA 242 (*Trentelman*) at [121].

58 The onus of proof is on the party seeking to establish that it relied on an assumption or expectation to its detriment: *Sidhu v Van Dyke* (2014) 251 CLR 505 at [90].

59 In *Trentelman*, the New South Wales Court of Appeal, in dealing with a claim of proprietary estoppel held that it must be shown that the property owner, as representor, has induced another to alter its position in the expectation of obtaining a proprietary interest, and that the representee has to its detriment altered its position in reliance on the expectation, such that it would be unconscionable for the representor to resile from the representation.⁵⁷

60 The elements of the doctrine of estoppel by convention are set out by the Western Australian Court of Appeal in *Alpha Wealth Financial Services Pty Ltd v Frankland River Olive Co Ltd* [2008] WASCA 119 citing *National Westminster Finance New Zealand Ltd v National Bank of New Zealand Ltd* [1996] 1 NZLR 548 at 550.⁵⁸

The authorities show that for an estoppel by convention to arise the following points must be established by the party claiming the benefit of the estoppel (the proponent):

- (1) The parties have proceeded on the basis of an underlying assumption of fact, law, or both, of sufficient certainty to be enforceable (the assumption).
- (2) Each party has, to the knowledge of the other, expressly or by implication accepted the assumption as being true for the purposes of the transaction.
- (3) Such acceptance was intended to affect their legal relations in the sense that it was intended to govern the legal position between them.
- (4) The proponent was entitled to act and has, as the other party knew or intended, acted in reliance upon the assumption being regarded as true and binding.
- (5) The proponent would suffer detriment if the other party were allowed to resile or depart from the assumption.

⁵⁷ *Trentelman* at [116]-[118].

⁵⁸ At [164]. Subject to the qualification that, to the extent the proponent relies upon an assumption of law or an assumption of mixed fact and law, the assumption of law must relate to private legal rights.

- (6) In all the circumstances it would be unconscionable to allow the other party to resile or depart from the assumption[.]

61 To support its claim for estoppel by convention, the respondent relied on the evidence of Mr Thorpe. Mr Thorpe said that since 2008 both parties had conducted themselves on the basis that the Commercial Toilets, the Retail Bin Store and the Walkway had become part of the commercial lot (Lot 61) as a result of the Unanimous Resolution.⁵⁹ In particular, he had observed that a steel fence had been erected alongside the Commercial Toilets to prevent tenants and patrons from the cafes and restaurants from having access to the residents' cars.⁶⁰ He said that the respondent or its tenants cleaned and maintained the Commercial Toilets.⁶¹ Also, the Retail Bin Store had been used almost exclusively by the tenants of Lot 61 apart from the storage of some cleaning equipment.⁶²

62 Mr Thorpe said that he had negotiated a lease of shops 1 and 2 (which form part of Lot 61) to operate as a licensed restaurant.⁶³ He said that to satisfy liquor licensing requirements the Commercial Toilets must form part of Lot 61.⁶⁴ If shops 1 and 2 could not operate as a licensed restaurant, it is the respondent's position that it would suffer significant detriment because the lease of shops 1 and 2 is conditional on the grant of the liquor licence.⁶⁵

63 For the reasons that follow, I find that the respondent has not established that it relied on an assumption or expectation to its detriment in respect of the Unanimous Resolution and, therefore, I am not satisfied that the applicant is estopped from seeking a declaration that the Unanimous Resolution is invalid.

64 First, I am not satisfied that the Unanimous Resolution is a representation that can be relied upon by the respondent for the purposes of raising estoppel. Whilst there is no dispute that the respondent relied on the outcome of the 2008 EGM, I find that the respondent was not induced by any representation made by the Strata Company to adopt an assumption or expectation in respect of the re-subdivision. I do not accept that the outcome of a vote put at an extraordinary general meeting is the making of a promise or

⁵⁹ Exhibit 1, page 453, para 13; ts 79, 10 March 2022.

⁶⁰ Exhibit 1, page 452, para 12(b); ts 73, 10 March 2022.

⁶¹ Exhibit 1, page 452, para 12(b).

⁶² Exhibit 1, page 456, para 38.

⁶³ ts 78, 10 March 2022.

⁶⁴ Exhibit 1, page 57; ts 81, 10 March 2022.

⁶⁵ Exhibit 1, page 497, para 65; ts 99, 10 March 2022.

representation designed to induce a lot owner. In any event, the result of the vote was communicated to the respondent by the Strata Manager.⁶⁶

65 Second, there was evidence before me that supports a finding that the parties accepted, by their conduct, that the re-subdivision had occurred following the Unanimous Resolution. The respondent says that it believed that the Commercial Toilets formed part of Lot 61 because the Amended Strata Plan was lodged at Landgate. Although the respondent conducted itself based on this assumption, I am not satisfied that estoppel operates in the circumstances of this case to preclude the applicant from challenging the validity of the Unanimous Resolution. Despite the parties shared assumption about the successful registration of the Amended Strata Plan, there was no evidence before me that the applicant made any representation or assurance to the respondent regarding the status of the re-subdivision at Landgate so as to affect their legal relationship.

66 Third, I accept that the respondent is likely to suffer detriment if shops 1 and 2 cannot obtain a liquor licence because the shops would be unable to operate as a licensed restaurant. However, for the reasons just stated, I am not satisfied that the detriment arises from the respondent's reliance on any representations or assurances made by the applicant.

Is the application contrary to the objectives in s 119 of the ST Act?

67 Pursuant to s 197(1) of the ST Act, a 'scheme dispute' includes a dispute between scheme participants about the alleged contravention of the ST Act (other than an offence). The respondent contends that the applicant has acted contrary to the objectives set out in s 119 of the ST Act by lodging the application.⁶⁷

68 Section 119(1) of the ST Act sets out the objectives of a strata company. Section 119(1) provides:

- (1) In performing its functions, a strata company is to have the objective of implementing processes and achieving outcomes that are not, having regard to the use and enjoyment of lots and common property in the strata titles scheme -
 - (a) unfairly prejudicial to or discriminatory against a person; or

⁶⁶ Exhibit 1, page 331, para 27.

⁶⁷ ts 36, 10 March 2022.

(b) oppressive or unreasonable.

69 It is the respondent's position that the application to invalidate the Unanimous Resolution is oppressive and unreasonable and that it will cause significant detriment to the respondent's interests.⁶⁸ For these reasons, the respondent says that the declaration sought by the applicant should not be made by the Tribunal.

70 Because the validity of the Unanimous Resolution is an issue that has been raised in the primary proceedings, I am not satisfied that the applicant has acted in contravention of s 119 of the ST Act by commencing the application. Consequently, based on the evidence before me, I do not consider that the application is unfairly prejudicial to the respondent or oppressive or unreasonable. In any event, the respondent has not made an application to the Tribunal under s 197(4) of the ST Act for the resolution of a scheme dispute and, consequently, has sought no remedy to address the applicant's alleged contravention of s 119 of the ST Act.

Conclusion

71 The applicant sought to challenge the validity of the Unanimous Resolution on several grounds. It said that the purpose of its application was to achieve certainty about the lawfulness of the re-subdivision of Lot 61 and the legal status of the Amended Strata Plan which were issues raised in the primary proceedings.⁶⁹

72 Based on the evidence before me, I conclude that the Unanimous Resolution was not validly passed at the 2008 EGM because a quorum was not achieved and only 29 of the 61 lot owners, either in person or by proxy, voted in favour of it. Further, I am not satisfied that clause 7.1 of the Contract operated at the time of the 2008 EGM to validate the Unanimous Resolution, or that the applicant is estopped from seeking a declaration that the Unanimous Resolution is invalid.

73 Consequently, I will allow the application and declare that pursuant to s 199(1) and s 199(3)(d) of the ST Act the Unanimous Resolution is invalid.

Orders

The Tribunal declares:

⁶⁸ Respondent's SIFC, paras 67-68; Exhibit 1, page 497.

⁶⁹ ts 40, 10 March 2022.

1. Pursuant to s 199(1) and s 199(3)(d) of the *Strata Titles Act 1985* (WA) the unanimous resolutions passed at the extraordinary general meeting of the strata company held on 19 March 2008 to proceed with the re-subdivision of Lot 61 and proposed schedule of unit entitlement are invalid.

The Tribunal orders:

1. Pursuant to s 45(3)(b) of the *State Administrative Tribunal Act 2004* (WA) the requirement to notify the persons specified in s 198(2)(a), s 198(2)(b) and s 198(2)(c) of the *Strata Titles Act 1985* (WA) is dispensed with.
2. The application is allowed.

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

MS C BARTON, MEMBER

10 MAY 2022