JURISDICTION	:	STATE ADMINISTRATIVE TRIBUNAL
ACT	:	STRATA TITLES ACT 1985 (WA)
CITATION	:	THE OWNERS OF BROOME BEACH RESORT STRATA SCHEME 32190 and WAYDANETTE PTY LTD [2022] WASAT 56
MEMBER	:	MS R PETRUCCI, MEMBER
HEARD	:	21, 22 AND 23 FEBRUARY 2022 (LAST SUBMISSION FILED 28 MARCH 2022)
DELIVERED	:	27 JUNE 2022
FILE NO/S	:	CC 1008 of 2021
BETWEEN	:	THE OWNERS OF BROOME BEACH RESORT STRATA SCHEME 32190 Applicant AND WAYDANETTE PTY LTD Respondent
FILE NO/S	:	CC 1481 of 2021
BETWEEN	:	THE OWNERS OF BROOME BEACH STRATA SCHEME 32190 Applicant AND WAYDANETTE PTY LTD First Respondent TRAVIS HERBERT Second Respondent

FILE NO/S : CC 1528 of 2021

BETWEEN : WAYDANETTE PTY LTD
Applicant

AND

THE OWNERS OF BROOME BEACH STRATA SCHEME 32190
Respondent

Catchwords:

Strata Titles Act 1985 (WA) (as it applies from 1 May 2020) - Scheme dispute - Strata manager - Specified scheme function - Strata management contract - Use and enjoyment of common property - Breach of by-laws - Occupier - Standing to bring proceedings - Whether EGM validly called and convened - Whether resolutions validly passed - Objectives of strata company - Whether resolutions contravene strata company objectives - Whether strata company excused from complying with resolutions - Tribunal proceedings - Discretion of Tribunal to make declarations and orders to resolve dispute or proceedings

Legislation:

Companies (New South Wales) Code, s 322
Interpretation Act 1984 (WA), s 5
State Administrative Tribunal Act 2004 (WA), s 51(1), s 95
Strata Titles (General) Regulations 2019 (WA), reg 91, reg 95, reg 98, reg 102, Pt 13
Strata Titles Act 1985 (prior to 1 May 2020), s 35(1)(b)
Strata Titles Act 1985 (WA), s 3, s 37(1), s 47(1), s 47(2), s 47(5), s 47(5)(a), s83, s 91(1)(b), s 100, s 102, s 112, s 115, s 115(4), s 119, s 119(1), s 120(2)(b), s128(2)(b), s 128(3)(2)(b), s 129(1), s 143, s 143(1), s 144, s 145, s 197(4), s197, s 197(1)(a), s 197(1)(a)(ii), s 197(1)(a)(iv), s 197(1)(g), s 197(2), s197(2)(a), s197(4), s 197(5)(b), s 199, s 199(3)(a), s 199(3)(d), s 200, s 202, s209, Pt 8, Pt9, Pt 13, Div 1, Sch1, Sch 2, Sch 5, cl 13(3)

Result:

CC 1008 of 2021 - Application unsuccessful
CC 1481 of 2021 - Application partly successful
Declarations and orders made
CC 1528 of 2021 - Application successful
Declaration and order made

Category: B

Representation:

CC 1008 of 2021

Counsel:

Applicant	:	Mr S Macfarlane
Respondent	:	Mr P Graham

Solicitors:

Applicant	:	Bugden Allen Graham Lawyers
Respondent	:	Kennedys (Australasia) Partnership - Perth

CC 1481 of 2021

Counsel:

Applicant	:	Mr S Macfarlane
First Respondent	:	Mr P Graham
Second Respondent	:	N/A

Solicitors:

Applicant	:	Bugden Allen Graham Lawyers
First Respondent	:	Kennedys (Australasia) Partnership - Perth
Second Respondent	:	N/A

CC 1528 of 2021

Counsel:

Applicant	:	Mr P Graham
Respondent	:	Mr S Macfarlane

Solicitors:

Applicant	:	Kennedys (Australasia) Partnership - Perth
Respondent	:	Bugden Allen Graham Lawyers

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

Arasi & Anor and The Owners of Beverley Court [2005] WASAT 197
Lloyd v Grace, Smith & Co [1912] AC 716
New South Wales v Lepore [2003] HCA 4
Robinson and Stevens [2009] WASAT 207
Steele and The Owners of Cocos Beach Bungalows Survey Strata Plan 42074 [2021] WASAT 101
Surrol Nominees Pty Ltd and The Owners of 1321 Hay Street West Perth - Strata Plan 9821 [2013] WASAT 77
The Owners of Ellement 996 Strata Plan 53042 and Tobias [2022] WASAT 49
The Owners of Motive Apartments Strata Plan 67587 and Tear [2021] WASAT 54
Wayde v New South Wales Rugby League Ltd [1985] HCA 68; 180 CLR 459; 61 ALR 225; 10 ACLR 87

REASONS FOR DECISION OF THE TRIBUNAL:

Introduction

1 Strata Plan 32190 was registered on 25 June 1997. The relevant strata scheme is known as 'Broome Beach Resort' (**Resort**). The Resort is a holiday resort situated at Cable Beach in the iconic coastal town of Broome, Western Australia and has over 10,000 square metres of grounds, gardens and lawns that include recreational and associated facilities including an outdoor lagoon style swimming pool, a children's wading pool, a barbeque area, recreational furniture and a furnished gazebo.

2 The Resort is the setting for three separate proceedings before the Tribunal that concern The Owners of Broome Beach Resort Strata Scheme 32190 (**strata company**) and Waydanette Pty Ltd (**Waydanette**).

3 The strata company is the applicant in matter CC 1008 of 2021 (**Primary Proceeding**) and in matter CC 1481 of 2021 (**Secondary Proceeding**) and Waydanette is the respondent in the Primary Proceeding and the second respondent in the Secondary Proceeding. Travis Herbert (**Travis**) is the second respondent in the Secondary Proceeding. In the final matter, CC 1528 of 2021 (**Tertiary Proceeding**) Waydanette is the applicant, and the strata company is the respondent.

4 The applicant in each of the three matters commenced the proceeding in the Tribunal under s 197(4) of the *Strata Titles Act* 1985 (WA) (**ST Act**) to resolve a scheme dispute.

5 In very broad terms, the Primary Proceeding concerns whether the Resort Management Agreement (**Agreement**) between the strata company and Waydanette is a 'strata management contract' under the ST Act. If the Tribunal declares that the Agreement is a 'strata management contract' then the Agreement will have ceased to have effect on 2 November 2020.

6 The Secondary Proceeding broadly concerns whether Waydanette breached various scheme by-laws and s 83 of the ST Act through the actions of its gardener, Travis, which included damaging Marianne Williamson's (**Marianne**), an employee of the then strata company's strata manager, PRD Real Estate Broome, car on 4 February 2021 while parked on common property of the Resort (**car damage**) and

through the use of a shed located on common property of the Resort (**back shed**). Further, the Secondary Proceeding concerns whether Travis breached various scheme by-laws by the car damage.

7 Finally, the Tertiary Proceeding broadly concerns the validity of the Extraordinary General Meeting held on 8 September 2021 (**2021 EGM**) which was requisitioned by various owners and whether the resolutions which are said to have been passed at that EGM, including a resolution to discontinue the Primary Proceeding and to replace the Agreement with a new resort management agreement (**Replacement Resort Management Agreement**), are valid.

8 On 11 October 2021 the Tribunal made orders, inter alia, that pursuant to s 51(1) of the *State Administrative Tribunal Act 2004* (WA) (**SAT Act**), the three matters are to remain as separate proceedings, but are to be heard and determined together and evidence in one proceeding is to be evidence in the other proceedings.

9 The proceedings before the Tribunal come within the Tribunal's original jurisdiction (s 209 of the ST Act).

10 I heard the matter by videoconference over three consecutive days from 21 to 23 February 2022, following which I made orders for each party to file written closing submissions by 28 March 2022. On 31 March 2022, I reserved my decision.

11 I acknowledge both the oral and written submissions of counsel for each party which greatly assisted me in my determination of the issues.

12 For the reasons which follow, the application in the Primary Proceeding is unsuccessful, the application in the Secondary Proceeding is partly successful and the application in the Tertiary Proceeding is successful.

Orders sought

13 It is useful to start by setting out the orders sought in each of the proceedings.

14 In the First Proceeding, the strata company seeks the following orders:[1]

[1] Closing submissions of the strata company filed on 28 March 2022 at para 91 and para 67 of the strata company's application filed with the Tribunal on 25 June 2021.

Primary Proceeding

Under s 199 of the ST Act the Tribunal is to make declarations that:

1) Under the Agreement, Waydanette is:

   a) authorised to perform scheme functions of the strata company; and

   b) in effect acting as a strata manager of the strata company as defined in s 143 of the ST Act.

2) The Agreement under which Waydanette is operating must be a strata management contract as required by s 144 of the ST Act.

3) The Agreement does not comply with s 145 of the ST Act.

4) Waydanette does not meet the requirements provided in s 144 of the ST Act.

5) As a result of the failure to comply with s 144 and s 145 of the ST Act, the Agreement, which was executed before 1 May 2020, ceased to have effect on 2 November 2020 by operation of Sch 5, cl 13(3) of the ST Act.

15 In the Secondary Proceeding, the strata company seeks the following orders:[2]

Secondary Proceeding

Under s 199 of the ST Act the Tribunal is to make declarations that:

1) Waydanette has contravened s 83 of the ST Act in relation to the car damage.

2) Travis has contravened s 83 of the ST Act in relation to the car damage.

[2] Closing submissions of the strata company filed on 28 March 2022 at para 192 and para 40 of the interim application filed by the strata company with the Tribunal on 14 September 2021 and para 52 of the strata company's application filed with the Tribunal on 14 September 2021.

3) Waydanette has contravened s 83 of the ST Act in relation to the back shed.

4) Waydanette has contravened Sch 1 by-laws 1(2)(a) and 1(2)(c) and Sch 2 by-law 1 in relation to the car damage.

5) Travis has contravened Sch 2 by-law 1 in relation to the car damage.

Under s 200 of the ST Act the Tribunal is to make orders that:

1) In accordance with s 47(5)(a) of the ST Act Waydanette must pay $2,000 by way of penalty to the strata company for each contravention of (a total of $8,000):

    a) Sch 2 by-law 1 in relation to the back shed;

    b) Sch 1 by-law 1(2)(a) in relation to the car damage;

    c) Sch 1 by-law 1(2)(c) in relation to the car damage; and

    d) Sch 2 by-law 1 in relation to the car damage.

2) Waydanette must, in relation to the car damage:

    a) ensure that its visitors, at all times comply with the by-laws;

    b) ensure that Travis does not enter the Resort, the common property or Lot 1 ever again; and

    c) ensure that Travis does not interfere with other owners', occupiers', residents' and visitors' use and enjoyment of the common property.

3) Waydanette, must, in relation to the back shed:

    a) remove all of its items from the back shed;

b) make good the back shed, including cleaning the back shed;

c) return to the strata company any keys or locking devices used to secure the back shed;

d) provide the strata company with unfettered access to the back shed to confirm that all of Waydanette's items have been removed from the back shed; and

e) refrain from using the back shed ever again.

4) Travis:

a) must pay the amount of $2,000 by way of penalty to the strata company for the contravention of Sch 2 by-law 1 in relation to the car damage in accordance with s 47(5)(a) of the ST Act; and

b) must:

i) not enter the Resort, the common property or Lot 1 ever again;

ii) not interfere with other owners', occupiers', residents' and visitors' use and enjoyment of the common property of the Resort;

iii) provide a formal written apology to Marianne for the car damage; and

iv) not contravene Sch 2 by-law 1 again.

5) In accordance with s 200(2)(m) of the ST Act that:

a) Waydanette, in relation to the car damage, must ensure that Travis does not enter the Resort, the common property or Lot 1 ever again.

b) Waydanette, in relation to the back shed must:

i) remove all of its items from the back shed;

ii) make good the back shed, including cleaning the back shed;

iii) return to the strata company any keys or locking devices used to secure the back shed;

iv) provide the strata company with unfettered access to the back shed to confirm that all of its items have been removed from the back shed; and

v) refrain from using the back shed ever again.

6) Travis, in relation to the car damage, must:

i) not enter the Resort, the common property or Lot 1 ever again;

ii) not interfere with other owners', occupiers', residents' and visitors' use and enjoyment of the common property of the Resort; and

iii) provide a formal written apology to Marianne for the car damage.

7) In accordance with s 200(2)(o) of the ST Act, Waydanette and Travis pay to the strata company by way of compensation the strata company's enforcement expenses.

8) If Waydanette or Travis fail to comply with a non-monetary decision of the Tribunal made in connection with the Secondary Proceeding, then Waydanette or Travis will have committed an offence, the penalty of which is $10,000 per s 95 of the SAT Act.

16 Finally, in the Tertiary Proceeding, Waydanette seeks the following orders:[3]

Tertiary Proceeding

Under s 199 of the ST Act the Tribunal is to make declaration that:

1) The resolutions were validly passed at the 2021 EGM.

Under s 200 of the ST Act the Tribunal is to make the orders:

1) In compliance with the EGM resolutions, the strata company must forthwith:

   a) enter into the Replacement Resort Management Agreement and Collateral Deed (as defined in the meeting Agenda for the 2021 EGM) with Waydanette; and

   b) withdraw the Primary Proceeding in CC 1008 of 2021 between the same parties.

2) For further or alternative relief.

Evidence and relevant procedural history

17 At the final hearing, the Tribunal marked the following documents, which the parties 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 an exhibit:

Exhibit 1 evidence book (agreed bundle of documents) dated 25 January 2021 (pages 1-996) (**EB**); and

Exhibit 2 statement of unfinancial owners as at 16 August 2021 (filed by the strata company).

18 I had the benefit of the affirmed oral evidence of the following witnesses for the strata company:

i) Neil Butler, the current Chair of the Council of Owners for the strata company (**Council**);

[3] Closing submissions of Waydanette filed on 28 March 2022 at para 255(b) and para 3 of Waydanette's application filed with the Tribunal on 21 September 2021.

ii) Sandra McCombie, a former member of the Council over several years and Chair of the Council for 2017 and 2018;

iii) Shashi Kala Sharma, the current Secretary of the Council; and

iv) Rachael Ferrante of Richardson Strata Management Services, the current strata manager for the strata company.

19 Finally, I had the benefit of the affirmed oral evidence of the following witnesses for Waydanette:

i) Dawn Elizabeth Herbert, one of the two directors of Waydanette;

ii) Royce Ernest Herbert, the other director of Waydanette; and

iii) Ian Arthur Laird, a strata consultant.

20 For convenience and without meaning any disrespect to the witnesses or to the parties, I will refer to each of the witnesses by their first name.

21 As noted, Travis is the second respondent in the Secondary Proceeding. Travis did not attend the hearing or file any written submissions. I proceeded to hear the Secondary Proceeding as I was satisfied that Travis was duly served notice of the hearing.

22 I heard all three matters at the same time per the order of the Tribunal (see above at [8]).

23 I will now set out the key issues to be determined by me in each of the three 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 fact. Finally, I will address each of the issues for determination in turn.

Issues

24 The key issues for determination in each of the three proceedings were largely agreed by counsel at the final hearing.[4] The key issues are:

Primary Proceeding

Issue 1: Are the services that Waydanette performs under the Agreement, 'scheme functions' as defined in the ST Act?

Issue 2: Does the performance of those services make the Agreement a 'strata management contract' under the ST Act? If 'yes' does the Agreement comply with s 145 of the ST Act?

Issue 3: Did the Agreement cease to have effect on 2 November 2020 by operation of Sch 5 cl 13(3) of the ST Act?

Issue 4: Is the strata company estopped from asserting that the Agreement ceased to have effect as at 2 November 2020?

Issue 5: Is Waydanette entitled to rely on estoppel?

Issue 6: Is Waydanette entitled to seek relief under s 200(2)(j) of the ST Act without making a separate application to the Tribunal? If 'yes', does the Tribunal have power under s 200(2)(j) of the ST Act to remove any provisions that may be found to otherwise characterise the Agreement as a 'strata management contract'? If 'yes', should the Tribunal exercise its discretion?

Secondary Proceeding

Issue 7: Whether the car damage for which Travis was convicted of amount to:

a) Waydanette and/or Travis breaching Sch 1 by-law 1(2)(a) or by-law 1(2)(c)?;

[4] ts 6-11, 21 February 2022.

b) Waydanette and/or Travis breaching Sch 2 by-law 1; and

c) Waydanette and/or Travis breaching s 83 of the ST Act?

Issue 8: Whether Waydanette's use of the back shed is a breach of its obligations under Sch 2 by-law 1 and/or s 83 of the ST Act?

Tertiary Proceeding

Issue 9: Does Waydanette have standing to bring the Tertiary Proceeding?

Issue 10: Was the 2021 EGM validly called and convened?

Issue 11: Were the resolutions of the 2021 EGM validly passed?

Issue 12: Do the resolutions of the 2021 EGM contravene s 91(1)(b) and/or s 119 of the ST Act?

Issue 13: Is the strata company excused from complying with the resolutions of the 2021 EGM (if validly passed) as a result of the operation of s 91(1)(b) and/or s 119 of the ST Act?

25 It is first necessary to set out the regulatory framework and factual background against which the consideration of the above issues must be made.

Regulatory framework

The strata plan

26 On 10 December 1996, the Registrar of Titles registered the Management Statement (by instrument G348037) to have effect upon registration of the strata plan.

27 On 25 June 1997, Strata Plan 32190 was registered by the Registrar of Titles (**strata plan**).

28 Finally, a notification (by instrument G511813) was provided for the re-subdivision of strata Lot 20 into strata Lots 21 to 36 and common

property. The notification was registered by the Registrar of Titles on 25 June 1997.

29 The relevant strata scheme (the Resort) is described on the strata plan as:[5]

> Twenty three (23) single story units and thirteen (13) two storey units constructed from timber, steel, corrugated steel and concrete situated on Broome Lot 2232.

ST Act

Resolution of scheme dispute

30 Section 197 of the ST provides for the resolution of certain 'scheme disputes' including a dispute between scheme participants about the performance of, or the failure to perform a function conferred or imposed on a person by the ST Act or the scheme by-laws (s 197(1)(a)(ii) of the ST Act).

31 Both the strata company and the owner of a lot are 'scheme participants' as that term is defined in s 197(2) of the ST Act. 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. However, if a party to the dispute is an occupier of a lot, then that occupier can only apply to the Tribunal for resolution of a scheme dispute under s 197(1)(a) if the dispute is about:

a) the scheme by-laws; or

b) a resolution or decision of the strata company that directly affects the occupier; or

c) an obligation or right of the occupier under the ST Act or the scheme by-laws.

Tribunal proceedings

32 Part 13 of the ST Act deals with Tribunal proceedings.

33 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

[5] EB at page 214.

s 200(2)(m) of the ST Act requiring a person to take specified action or to refrain from taking specified action to remedy a contravention or prevent further contraventions of the ST Act or scheme by-laws. In addition, the Tribunal may provide that the order is to remain in force for a specified period, until a specified event or until further order (s 200(7) of the ST Act).

34 Instead of, or in addition to any order that the Tribunal may decide to make to resolve the dispute or proceeding, s 199 of the ST Act provides that the Tribunal *may* make a declaration concerning a matter in the proceeding. An example of a declaration that the Tribunal may make is to declare that a resolution of the strata company is, or is not, invalid (s 199(3)(d) of the ST Act).

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

36 Next, I set out the factual background before considering the issues.

Factual background

37 Many of the key facts were agreed by counsel at the final hearing, or largely agreed but with reservations about the characterisation of the fact or are uncontentious facts.[6] I make the following findings of fact which are relevant to the issues (see above at [24]) to be determined by me in these proceedings. For convenience I have adopted many of the headings used by Waydanette in its closing submissions (as the strata company did not set out the agreed facts in its closing submissions) to set out my findings of fact which follow.

Resort

38 The Resort is a holiday resort located in Broome.[7]

39 The Resort comprises 35 units numbered strata Lots 1 to 19 and 21 to 36 (there is no Lot 20).[8]

40 A reception and office are currently located at Lot 1.[9]

[6] ts 17-74, 21 February 2022.
[7] ts 19, 21 February 2022.
[8] EB at page 71.
[9] ts 22-23, 21 February 2022.

41 The Resort's common property recreational and associated facilities comprise an outdoor lagoon style swimming pool, a children's wading pool, a barbeque area, recreational furniture and a furnished gazebo.[10]

42 The Resort has over 10,000 square metres of grounds, gardens and lawns.[11]

Waydanette and its directors

43 Waydanette's directors are Royce and Dawn, a couple in their late 70s.[12]

44 Royce and Dawn owned strata Lot 12 on the strata plan between 2009 and 2020.[13]

45 Royce served on the Council as Chair for about three years.[14]

46 Until March 2018 when Royce and Dawn took up the on-site management role at the Resort, Waydanette employed various on-site managers carrying out the duties under the Agreement.[15]

47 Waydanette operates the Resort from the reception and office located on strata Lot 1 which it leases.[16]

Agreement

48 In or about January 2004, the strata company entered into the Agreement with Michael and Shirley Phillips which was undated but stamped on 28 January 2004. The Agreement was assigned to Waydanette on 1 February 2006, and it expires on 4 March 2023.[17]

49 Waydanette is the current 'Resort Manager' under the Agreement.

50 Clause 8.1 of the Agreement sets out the duties and authority of the Resort Manager as follows:[18]

> (a) Supervision: Use its best endeavours to ensure that all Proprietors, occupiers and their visitors for the time being comply

[10] EB at pages 458-459.
[11] ts 357, 415 and 418, 23 February 2022.
[12] EB at pages 36 and 57.
[13] ts 413, 23 February 2022.
[14] Ibid.
[15] ts 23, 21 February 2022.
[16] ts 22-23, 21 February 2022.
[17] ts 19, 22-23, 21 February 2022.
[18] EB at page 247.

with the By-Laws and the Rules and Regulations and to take such steps as is reasonably required to prevent unauthorised persons from using the Common Property;

(b) Maintenance: (i) keep the Common Property clean and tidy; (ii) maintain the Common Property in good order and condition by:

A. doing repairs and maintenance except where work should be carried out by a skilled tradesperson;

B. arranging and supervising repairs and maintenance by skilled tradespeople;

C. maintain the lawns and gardens so that the lawns and gardens are, when required so to be: watered; fertilised; weeded; and generally kept in a clean and tidy condition;

D. keep the drains and gutters free of obstruction;

(c) Reporting and Maintenance: The Resort Manager will promptly report to the Stata Company in writing any condition of the Common Property requiring any maintenance or repair likely to exceed the amount provided for maintenance and repair in the budget for that year approved by the Strata Company; and

(d) Security: Keep securely all keys and not permit unauthorised use of any keys.

51 Clause 9.1 of the Agreement grants to the Resort Manager:[19]

> [f]ull exclusive licence and authority to occupy and use to the fullest extent possible the [c]ommon [p]roperty for the purpose of enabling the Resort Manager to carry out its obligations under this Agreement in accordance with the provisions of this Agreement, and the [s]trata [c]ompany will do all acts, matters and things necessary to perfect the grant of licence under this [c]lause and will cause each [p]roprietor to act consistently with the grant of this licence'.

52 Clause 10 of the Agreement provides that the Resort Manager in the performance of its duties will employ such competent staff as the Resort Manager considers appropriate to enable the Resort Manager to comply with its obligations under the Agreement and that each staff employed will be at the sole discretion of the Resort Manager. The Resort Manager has the sole responsibility of engaging and discharging staff.[20]

[19] Ibid.
[20] EB at page 248.

53 The Resort Manager is entitled to an annual 'Resort Management Fee' which is provided for at clause 4.1 of the Agreement. Currently, the Resort Management Fee is $49,589.88 per annum.[21]

54 Clause 4.3(a) of the Agreement provides that the following matters are *not* included in the Resort Management Fee:[22]

a) cost of lawn mowing and trimming of edges;

b) maintenance of the common property;

c) maintenance of the pool premises and supply of chemicals; and

d) maintenance of driveways, parking areas, paths and paved surfaces of the common property, not being part of a unit

(together **reimbursable expenses**)

55 The reimbursable expenses incurred by the Resort Manager are reimbursable by the strata company together with a 12% mark-up (clause 4.2 of the Agreement).[23]

56 On or about 3 August 2018, the Agreement was varied, inter alia, to provide that the Resort Manager is paid a caretaking retainer of $12,500 per annum indexed to inflation to:[24]

(a) maintain a resident presence on the Resort;

(b) be on call for customers at all hours every day of the year; and

(c) undertake to a high standard all gardener yardman work on the common property at the Resort on weekends and public holidays (save for work required in consequence of severe weather events such as cyclones and floods.

57 Clause 16.1 of the Agreement provides for the strata company to terminate the Agreement if the Resort Manager fails to perform its duties under the Agreement.[25]

[21] EB at page 244 and ts 400-401, 23 February 2022.
[22] EB at page 245.
[23] Ibid.
[24] ts 20, 21 February 2022.
[25] EB at page 252.

Lease of Lot 1

58 Waydanette leases the office and reception on Lot 1. The lease expires on 4 March 2023 (with two additional extension periods of five years each).[26] The lease of Lot 1 was first assigned to Waydanette in January 2006.

59 Clause 10.1 of the lease provides that Lot 1 shall be used as the reception area for a holiday accommodation resort and as the Manager's office for that resort. Further, part of Lot 1, as nominated by the lessor, may be used for accommodation purposes, but only for persons carrying on the duties of Manager under the Agreement.[27]

60 Clause 12.1.1 of the lease only permits an assignment of the lease to the Resort Manager under the Agreement.[28]

Waydanette letting pool

61 Waydanette also acts as a letting and management agent for 20 of the 35 strata lots (units) at the Resort, referred to as the 'letting pool' (**letting pool**).[29]

62 Five of the other units at the Resort are let and managed by their owners through AirBnB, and the remaining nine units are let and managed by Ross and Brett Forbes-Stephen who manage Cable Beachside Villas (**CBV**), a smaller resort that adjoins the Resort.[30]

63 The owners not in the letting pool are competitors to those owners in the letting pool.[31]

64 None of the units belonging to the five members of the Council are in the letting pool.[32]

Gardener

65 Waydanette employs a gardener. Royce and Dawn's son, Travis, is the current gardener.[33]

[26] ts 22-23, 21 February 2021 and EB at page 317.
[27] EB at page 333.
[28] EB at page 336.
[29] ts 24, 21 February 2022.
[30] ts 24, 21 February 2022.
[31] Ibid.
[32] ts 25, 21 February 2022.
[33] ts 26, 21 February 2022.

66 Apart from a three-month period between November 2020 and January 2021, Waydanette engaged a gardener on a full-time basis as the owners unanimously voted in favour of a motion put to the Annual General Meeting held on 25 November 2016 (**2016 AGM**) that Waydanette be required to increase the gardener's hours from part-time to full-time at 38 hours per week as the part-time hours were not sufficient to carry out the work required at the Resort.[34]

67 The work carried out by the gardener at the Resort includes work and maintenance work associated with:[35]

a) gardening;

b) the swimming pool;

c) barbeque and outdoor entertainment area;

d) rubbish disposal;

e) all the driveways;

f) general common property maintenance and repairs; and

g) common area lighting not requiring an electrician.

Heads of Agreement (**HoA**)

68 On or about 3 August 2018 the strata company and Waydanette entered into an agreement recorded in a HoA whereby:[36]

a) the Agreement was varied to include, inter alia, that the Resort Manager must maintain a resident presence on the Resort and be on call for customers at all hours every day of the year;

b) the strata company and Waydanette would jointly enter into a new caretaking agreement prepared by a third party independent specialist strata titles lawyer, that would be a commercial agreement reflecting current industry norms and standards, weighted in favour of protecting the owners, and extension options

[34] EB at page 370.
[35] ts 160, 22 February 2022 and ts 356-357, 23 February 2022.
[36] EB at page 415-418.

that could not be exercised by Waydanette (**caretaking agreement**);

c) the caretaking agreement would have detailed duties schedules in it which would be prepared by another independent expert; and

d) once those things had been accomplished, Waydanette would market and sell its business so that the strata company and Waydanette could part ways.

BMSC schedule

69 Pursuant to clause 2 of the HoA, the parties engaged Building Management & Consultancy Services (**BMCS**) to assess the duties required for the management and caretaking of the common property of the Resort and prepare duties schedules to form part of the caretaking agreement.[37]

70 Barry Turner of BMCS attended the Resort in late 2018 and then issued a report (**BMCS report**).[38]

71 The BMCS report included a schedule of work to be undertaken by a caretaker at the Resort and summarised those tasks, which total 55.20 hours per week, as follows:[39]

a) lawn, gardens and landscape features - 25.69 hours per week;

b) outdoor swimming pool and associated areas - 9.70 hours per week;

c) management and administrative duties - 5.18 hours per week;

d) BBQ and outdoor entertaining areas - 3.62 hours per week;

e) security and emergency services - 2.83 hours per week;

f) rubbish disposal - 2.50 hours per week;

[37] EB at pages 415-418.
[38] ts 157, 22 February 2022 and EB at pages 447-486.
[39] EB at pages 461 and 471-485.

g) driveways, residents' carpark areas and entrances - 2.48 hours per week;

h) maintenance and repair services - 1.83 hours per week;

i) occupational safety and health - 0.92 hours per week;

j) common areas lighting and electrical - 0.39 hours per week;

k) infrastructure administrative services - 0.04 hours per week; and

l) compliance management - 0.2 hours per week.

72 The duties as set out above are not required to be performed by a person with specialised skill and/or qualifications.[40]

73 An annual remuneration of $119,638.30 excluding GST to perform the duties was recommended in the BMCS report.[41]

Mahoney's draft caretaking agreement

74 Pursuant to clause 2 of the HoA the parties engaged the law firm Mahoney's to draft the caretaking agreement.[42]

75 The first draft of the caretaking agreement provided that the caretaker must operate from the reception and office at the Resort (that is, from Lot 1). This requirement was removed from the caretaking agreement on instruction from the Council.[43]

76 The caretaking agreement was never agreed and was not executed by the parties.[44]

2019 AGM

77 At the 2019 AGM on 30 November 2019:[45]

a) Dawn proposed a motion that the Agreement be varied to adopt the duties schedule as set out in the

[40] EB at page 461.
[41] EB at page 467.
[42] EB at page 415.
[43] ts 153, 212, 365 and ts 425, 22 and 23 February 2022.
[44] EB at pages 422-424 and ts 361, 23 February 2022.
[45] EB at pages 428-429.

BMCS report which comprised the caretaking duties to be undertaken by the Resort Manager in place of the general obligations presently in the Agreement and to remove the remuneration model by which the Resort Manager is paid a 12% uplift on expenses incurred in carrying out the resort management functions and replace it with the remuneration recommended in the BMCS report (**variation motion**);

b) the variation motion failed in favour of alternative motion moved by Neil, which was to defer consideration of the variation motion to an EGM at a later date to 'provide owners sufficient time to properly review [it], and obtain advice on and consider the financial [and] operational benefits and/or detriment to the strata company of the new or amended agreements proposed[.]';

c) Neil moved a motion to reduce the gardening hours from 37.5 hours per week to 25.5 hours per week. The Council resolved to defer this motion to an EGM on the basis that 'any changes to the Agreements would like flow through and change the remuneration in accordance with any [sic] agreements that may be struck'; and

d) Neil moved another motion that in the event Waydanette were granted any extension of the Agreement beyond 2023, or any variation or new agreement is entered into with Waydanette that Waydanette would be required to pay to the strata company a fee of $20,000 plus GST for each year of that further term or term of such variation or new agreement and any extension thereof. That motion carried.

2020 EGM

78 The 2020 EGM was held on 31 March 2020. Marianne, a strata manager employed by PRD Real Estate Broome, as the Chair conducted the 2020 EGM entirely on proxies with no attendance or discussion by the owners.[46]

[46] EB at page 433.

79 The variation motion (see above at [77(a)]) was rejected in favour of a motion that the strata company enter into a version of the new Resort Management Agreement proposed by the Council which made no provision for the Resort Manager to operate from the reception and office (on Lot 1).[47]

80 A resolution was passed that '[t]he [g]ardener's hours, which the [s]trata [c]ompany pays for, be brought in line with the BMCS Schedule and the current gardener[']s work duties, as provided by Waydanette' (**March 2020 resolution**).[48]

Gardening hours

81 Since the 2020 EGM, the Council has directed the strata manager, Richardson Strata Management Services, not to reimburse, and the strata manager has not reimbursed Waydanette any hours claimed in excess of 26 hours per week for the gardener.[49]

82 Twenty-six hours per week would allow the gardener to do no more than 'lawn gardens and landscape features' (see above at [71(a)]).[50]

83 Waydanette continued to pay for a full-time gardener from April to October 2020 with reimbursement of only 26 hours per week by the strata company.[51]

84 From 1 November 2020 the gardening hours were reduced to part-time and by late November 2020, Waydanette informed the Council that the reduction in the gardening hours was causing the upkeep of the common property to fall behind.[52]

2020 AGM

85 A motion was put by the owner of Lot 22 to the 2020 AGM that the Agreement be replaced by the caretaking agreement which had been amended to provide that the Resort Manager must maintain an on-site presence (office and reception) at the Resort from Lot 1 (clause 5.3(f)).[53]

[47] EB at page 434.
[48] Ibid.
[49] ts 214, 263 and ts 372, 22 and 23 February 2022.
[50] ts 158, 208, 214-215, 261-262, 357 and ts 372, 22 and 23 February 2022.
[51] ts 373-374, 23 February 2022.
[52] ts 182, 374, 22 and 23 February 2022.
[53] EB at page 443 and 495.

86 The minutes of the 2020 AGM at 3.2 reflect that:[54]

> [t]he majority of owners do wish to settle this matter and enter into a new agreement, however, the [m]otion [and] documents as presented for this [g]eneral [m]eeting did not provide enough clarity for a decision to be made, nor was it presented with sufficient time for review and questions to be answered before the AGM; the meeting agreed that an EGM be called, within 30 to 45 days following the AGM, at which the proposed Management Agreement as agreed by both parties is presented for adoption by the strata company.

(**October 2020 resolution**)

87 The minutes of the 2020 AGM at 3.3 reflect that the following motion under notice was carried:[55]

> That the strata scheme authorise the duly appointed Council of Owners and the Strata Manager to enforce the decision of the Owners of Broome Beach Resort with regards to the resolutions passed, as proposed by the Strata Company, whereby it was passed that the Gardener[']s hours paid by the strata company be reduced to 26 hours per week'.

88 Waydanette raised its concern that the motion to reduce the gardening hours was invalid because it changed the Agreement.[56]

89 The October 2020 resolution carried. However, the Council did not call an EGM as required by the October 2020 resolution.[57]

Negotiations towards a Replacement Resort Management Agreement

90 Following the 2020 AGM the parties negotiated the terms of a replacement caretaking agreement. The negotiations failed on two points:[58]

a) the Council would not agree that the Resort Manager is to be permitted (but not obligated) to operate from the Resort with a reception and office at strata Lot 1; and

b) although the parties agreed that a new agreement would expire when the Agreement is due to expire (on 4 March 2023) and would have renewal options that could not be exercised by Waydanette so as to facilitate the early

[54] EB at page 526.
[55] Ibid.
[56] EB at page 527.
[57] ts 216, 22 February 2022.
[58] ts 275 and 370, 22 and 23 February 2022 and EB at pages 530-568, 570-573, 663-634 and 647-648.

> parting of ways through the sale of the management rights to a new Resort Manager acceptable to the strata company, the mechanism for achieving this was not agreed. The Council sought to have the prohibition of Waydanette exercising the renewal options recorded in the new agreement but Waydanette sought to have the prohibition recorded in a confidential deed (**Collateral Deed**) so that it would not be known to potential new Resort managers.

Default notice

91 On 20 January 2021, the Council issued to Waydanette a default notice under clause 16 of the Agreement (**default notice**).[59] The default notice required Waydanette to remedy default in maintaining the Resort within 14 days failing which the Council intended to call a general meeting to terminate the Agreement.

92 On 29 January 2021, the Council wrote to the owners, stating in part:[60]

> a) the Council agreed to most of the points put forward except for the naming of Lot 1 in the Agreement, as the Council believes the use of 'Shire requirements' (use of the reception and office) covers this;
>
> b) the requirement for a Collateral Deed which was to hide the fact that Waydanette could not exercise the extension of the Agreement beyond 4 March 2023. Should Waydanette not sell by the end of its current term then the Agreement will lapse and revert back to the strata company; and
>
> c) the Council has issued a default notice and should Waydanette not comply with the default notice, an EGM will be called for the owners to vote on terminating the Agreement and removing Waydanette as the Resort Manager immediately.

93 In order to comply with the default notice, Waydanette re-installed the full-time status of the gardener and took on some short-term casual

[59] EB at pages 42 and 574-632.
[60] EB at pages 633-634.

labourers to return the common property to the state required by the common property maintenance obligations under the Agreement within the 14 day requirement stipulated in the default notice.[61]

94 Waydanette continues to pay for a full-time gardener to perform its obligations under the Agreement. The strata company continues to reimburse Waydanette for only 26 hours gardening work per week.[62]

Post default notice inspection and the car damage

95 On 4 February 2021, Marianne drove her car to the Resort to inspect the common property to determine if the default notice had been complied with. She parked her car in a car parking bay on the common property and sustained car damage.[63]

96 During the course of Marianne's inspection, there was a verbal altercation between Marianne and Royce.[64]

97 Travis was convicted on 4 August 2021 in the Broome Magistrates Court for the car damage and was fined $600 along with an order to pay costs of $251 and compensation of $1,967.90.[65]

Request for an EGM

98 On 16 June 2021 the owners of Lot 23 sent to the Council by an email to the strata manager, Richardson Strata Management Services, written notices (submitted by the owners of Lots 1, 2, 3, 7, 11, 14, 17, 22, 23, 28 and 35) requesting the convening of an EGM (**requesting owners**).[66]

99 The requesting owners stipulated in their written notices that in the event the Council did not convene the EGM within 21 days of receipt of the request, the owners would proceed to call an EGM.[67]

100 On 30 June 2021, the strata manager, Richardson Strata Management Services, advised the requesting owners that the EGM had been set for 9 September 2021.[68]

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[61] ts 374-375 and 418, 23 February 2022.
[62] ts 375 and 419, 23 February 2022.
[63] ts 33, 21 February 2022.
[64] ts 420-421, 443-444, 23 February 2022.
[65] ts 34, 21 February 2022.
[66] EB at pages 261-272.
[67] Ibid.
[68] EB at page 781.

101 As at 30 July 2021, 45 days after the requesting owners issued the written notices, no EGM had been called and no notice of an EGM had been issued by the strata manager for the strata company.[69]

Notice of the 2021 EGM

102 On 16 August 2021 Bruce Leslie (an owner of Lot 23) issued a notice of EGM to be held on 8 September 2021.[70]

103 The EGM Notice was posted by express post on 18 August 2021 from Broome to the strata manager, Richardson Strata Management Services and to the owners (apart from the owners of Lots 3, 14, 16, 19 and 29 who were emailed the EGM Notice as those owners had only provided an email address for the strata roll).[71]

104 The EGM Notice relevantly sets out the following resolutions (2021 EGM Resolutions):[72]

> **3. Recission of prior resolution**
>
> **Proposed Resolution**
>
> That, by ordinary resolution, the resolution passed as special business item 6 recorded in the minutes of the 2019 AGM of the strata company be rescinded and set aside.
>
> …
>
> **4. Replacement Resort Management Agreement**
>
> **Proposed Resolution**
>
> That, by ordinary resolution, the Council be directed to, within 14 days of the date of this meeting, execute the proposed Replacement Resort Management Agreement and the Collateral Deed with Waydanette Pty Ltd in place of the Existing Resort Management Agreement.
>
> …
>
> **5. Item of business notified or proposed by owner**
>
> Resolution proposed by Mr B Leslie the owner of Lot 23

[69] EB at page 730.
[70] EB at page 798.
[71] EB at page 885.
[72] EB at page 799.

> That, by ordinary resolution, the Council be directed to forthwith discontinue the proceedings in the State Administrative Tribunal reference CC 1008 of 2021.
>
> …

2021 EGM

105 At the insistence of the Council, Rachael, representing the strata manager, Richardson Strata Management Services, conducted the EGM, maintained the attendance register, checked proxies, verified a quorum, opened the meeting and prepared and circulated the minutes of the meeting to the Council (but not to the owners).[73]

106 Ian also prepared minutes of the 2021 EGM.[74]

107 The votes cast were in favour of each of the resolutions (see above at [104]).[75]

108 I now turn to address in turn each of the issues set out above at [24].

Issue 1 - Are the services that Waydanette performs under the Agreement, 'scheme functions' as defined under the ST Act?

Issue 2 - Does the performance of those services make the Agreement a 'strata management contract' under the ST Act? If 'yes' does the Agreement comply with s 145 of the ST Act?

109 I will deal with issues 1 and 2 together.

110 The strata company contends that Waydanette is a 'strata manager' because s 143(1) of the ST Act defines the term 'strata manager' in a very broad way to include essentially a person who is authorised by the strata company to perform the 'scheme functions' of that strata company. Further, the strata company contends that the test of whether a person is a strata manger is not whether that person calls himself or herself a strata manager but whether that person is *authorised* by a strata company to perform the 'scheme functions' of that strata company.

111 Waydanette rejects the strata company's contention that it is a strata manager and that the Agreement is a strata management contract under the ST Act.

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[73] ts 329-330, 23 February 2022.
[74] ts 333-335, 23 February 2022.
[75] Ibid.

112 It is useful to start by considering Pt 9 of the ST Act which is headed 'Strata managers'. It contains nine sections relevant for strata managers.

113 A strata company may, subject to Pt 9 of the ST Act authorise a person (a strata manager) to perform *a specified scheme function*. This is provided for in s 143(1) of the ST Act. The phrase 'a specified scheme function' is not defined in the ST Act. However, the term 'scheme function' for a strata titles scheme is defined in s 3(1) of the ST Act as:

> (a) a function of the strata company; or
>
> (b) a function of the council of the strata company; or
>
> (c) a function of an officer of the strata company[.]

114 The term 'specified' is also not defined in the ST Act. The strata company did not make any submission as to how this term is to be interpreted. In any event, I accept Waydanette's submission that the plain grammatical meaning of s 143(1) of the ST Act which includes the words 'a specified' requires identification of a particular, definite and discrete scheme function that a person has been authorised to perform rather than merely some aspect falling within the scope of a particular scheme function. This is because, ordinarily, the term 'specified' means to mention or name specifically or definitely; state in detail.[76]

115 The term 'function' is not defined in the ST Act. The strata company referred me to s 5 of the *Interpretation Act 1984* (WA) (**IA**), where the term 'function' is defined as including powers, duties, responsibilities, authorities, and jurisdictions. While that definition is useful, it is not necessary, in my view, to consult the IA as Div 1 of Pt 8 of the ST Act identifies the 'Functions' of the strata company. For example, under Subdivision 1 of Div 1 of Pt 8 of the ST Act, the strata company has the function to control and manage the common property for the benefit of all the owners of lots (s 91(1)(b) of the ST Act).

116 It is therefore, in my view, that the requirement in s 143(1) of the ST Act to identify 'a specified scheme function' is a direction to those functions identified in Div 1 of Pt 8 of the ST Act. In other words, the requirement to identify 'a specified scheme function' directs attention to the functions set out in Div 1 of Pt 8 of the ST Act to determine whether

[76] *Macquarie Dictionary Online*.

the person has been authorised to perform 'a specified scheme function' of the strata company.

117 Both parties referred me to clause 8 of the Agreement. That clause requires Waydanette to provide various services (**Services**).

118 The strata company identified the following Services, which it submits authorise Waydanette to perform scheme functions of the strata company:

a) under clause 8.1(a) of the Agreement, the strata company authorises Waydanette to:

   i) manage and control the common property in accordance with the strata company's duty provided in s 91(1)(b) of the ST Act by using its best endeavours to:

      (A) ensure all owners, occupiers and visitors comply with the by-laws and rules when they are using the common property; and

      (B) prevent unauthorised people from using the common property;

   ii) monitor compliance with the by-laws in accordance with the strata company's function provided in s 47(1) of the ST Act; and

   iii) enforce compliance with the by-laws in accordance with the strata company's function provided in s 112 of the ST Act.

b) under clause 8.1(c) of the Agreement, the strata company authorises Waydanette to:

   i) manage and control the common property in accordance with the strata company's duty provided in s 91(1)(b) of the ST Act by reporting to the strata company the condition of any part of the common property needing significant expenditure; and

   ii) assist the strata company in managing the budget of the strata company in accordance with the

strata company's functions provided in s 100 and s 102 of the ST Act,

c) under clause 8.1(d) of the Agreement, the strata company authorises Waydanette to manage and control common property in accordance with the strata company's duty provided in s 91(1)(b) of the ST Act by keeping the keys to the common property areas in safe custody and not permitting unauthorised use of the keys.

119 Further, the strata company submits that clause 1.a. of the HoA[77] amended the Agreement to require Waydanette to 'maintain a resident presence' and to 'be on call for customers at all hours every day of the year'. These duties, it is submitted by the strata company are directly related to the strata company authorising Waydanette to manage and control the common property for the benefit of all owners in the strata scheme in accordance with s 91(1)(b) of the ST Act.

120 While I accept:

a) Royce stated that under the Agreement, Waydanette is authorised to manage and control the common property and that this is important ('nine out of 10');[78]

b) Dawn stated that the tasks listed in the BMCS report match what Waydanette is authorised to do under the Agreement;[79] and

c) the Agreement sets out the Services, and that the HoA amended the Agreement to require Waydanette to maintain a resident's presence at the Resort and to be on call for customers at all hours every day of the year,

I do not accept the strata company's contention that Waydanette, in providing the Services, is performing 'a specified scheme function' and is therefore a strata manager by application of s 143(1) of the ST Act. I have arrived at this conclusion for the following reasons.

121 First, if a person who is authorised by a strata company to do a task that falls within a specified scheme function, is, by doing that task deemed or designated a strata manager under the ST Act, that is, not in

[77] EB at pages 415-418.
[78] ts 434-435, 23 February 2022.
[79] ts 393, 23 February 2022.

my view, what the ST Act intended. It is useful to provide an example here to illustrate that the result would, using the words of Waydanette be an 'obvious absurdity' if the strata company's position is accepted:[80]

> A swimming pool attendant, for example, whose role includes ensuring that people observe the swimming pool rules on common property, would be deemed a strata manager [on the submission of the strata company] since he or she is authorised to perform one aspect of the strata company's common property control and management function in s 91(1)(a) of the ST Act.

122 In other words, if the strata company's position is accepted that the swimming pool attendant is a 'strata manager' under the ST Act that would require the swimming pool attendant to hold a Certificate IV in Strata Community Management (reg 95 of the *Strata Titles (General) Regulations 2019* (WA) (**Regulations**), obtain professional indemnity insurance (reg 98 of the Regulations) and lodge annual returns (reg 102 of the Regulations) amongst other requirements.

123 Second, Pt 13 of the Regulations which deals with strata managers provides at reg 91 that s 143 of the ST Act does *not* apply to work in supervising or carrying out repair or maintenance work or specialist work. It is useful to set out reg 91 and the relevant definitions in reg 90 of the Regulations as follows:

> **90. Terms used**
>
> In this Part, unless the contrary intention appears -
>
> …
>
> ***repair or maintenance work*** means work involved in repairing, maintaining, renewing, replacing, altering or improving the common property or any personal property owned by a strata company;
>
> ***specialist work*** means any work that assists a strata company to perform its scheme functions and which the strata company or a strata manager is not ordinarily qualified to carry out, such as legal work, accounting work, auditing work, building work, plumbing work or electrical work.
>
> **…**
>
> **91. Repair or maintenance work and specialist work excluded**

[80] Closing submissions of Waydanette filed on 28 March 2022 at page 40.

> (1) A person who is employed or engaged by a strata company, or by a strata manager on behalf of the strata company, to supervise or carry out repair or maintenance work, or specialist work, is not, because of that employment or engagement, authorised to perform any scheme functions of the strata company.
>
> (2) Accordingly, section 143 does not apply to that employment or engagement or to work done under that employment or engagement.
>
> Note for this regulation:
>
> Section 143 enables a strata company to delegate its scheme functions to a strata manager. The object of this regulation is to clarify that a strata company, or a strata manager for a strata company, does not delegate or sub-delegate scheme functions of the strata company by employing or engaging person to supervise or carry out repair or maintenance work or specialist work that assists the strata company to perform its scheme functions.

124 It is clear from reg 91 that a person who is engaged to supervise or carry out repair or maintenance work or specialist work is *not* a strata manager. Rather, such a person assists the strata company to perform the strata company's scheme functions.

125 In my view, reg 91 does not alter the scope of s 143(1) of the ST Act, but rather, as stated in the note to reg 91, it clarifies the operation of s 143 of the ST Act. This is consistent with my view that the proper construction of s 143(1) of the ST Act requires the delegation of 'a specified scheme function', rather than delegation of *an aspect of* a scheme function.

126 Returning to the swimming pool attendant example (see above at [121]). In my view, s 143(1) of the ST Act properly constructed means that the swimming pool attendant is not performing a specified scheme function of managing and controlling the common property, but rather is assisting the strata company to perform the strata company's scheme functions or perform an aspect of a specified scheme function of the strata company. The swimming pool attendant in the example given, cannot, in my view, be a strata manager under the ST Act.

127 Another example would be the holding of keys to a storeroom on the common property by a person. Again, in my view, the person is not a strata manager but rather is assisting the strata company to perform the

strata company's scheme functions or perform an aspect of a specified scheme function of the strata company.

128 Third, the requirement for Waydanette to perform the Services (or more specifically to the clauses referred to by the strata company being clauses 8.1(a), 8.1(c) and 8.1(d) of the Agreement and clause 1.a of the HoA) on a proper construction of s 143(1) of the ST Act the performing of the Services by Waydanette, do not, in my view, amount to the strata company delegating its scheme function of controlling and managing the common property by engaging Waydanette to use its best endeavours to ensure compliance of the by-laws etc, to report to the strata company about any condition of the common property requiring maintenance or repair likely to exceed the amount provided for in the budget, to keep all keys securely and to maintain a residence presence at the Resort and to be on call for all customers at all times. Rather, in my view, what Waydanette is employed (or contracted under the Agreement) to do is to assist the strata company to perform the strata company's scheme function of controlling and managing the common property of the Resort for the benefit of all the owners of the lots (s 91(1)(b) of the ST Act).

129 The obligation under clause 8.1(a) of the Agreement is for the Resort Manager to use best endeavours to ensure that all owners, occupiers and their visitors comply with the by-laws and rules and regulations and to take such action as is reasonably required to prevent unauthorised persons using the common property. In my view, the obligation to 'use best endeavours' cannot equate to having been authorised to perform the general duty of the strata manager under s 91(1)(b) of the ST Act. At most, the obligation under clause 8.1(a) of the Agreement is to assist the strata company. For similar reasons, the obligation under clause 8.1(c) of the Agreement for the Resort Manager to promptly report to the strata company any condition of the common property requiring any maintenance or repair to exceed the amount provided in the budget does not make the Resort Manager (Waydanette) a strata manager. Again, for the same reasons, the obligation under clause 8.1(d) to keep securely all keys and not permit unauthorised use of any key does not make the Resort Manager (Waydanette) a strata manger under the ST Act. Rather, at most the obligation is to assist the strata company to perform the strata company's scheme functions.

130 In summary, in my view, Waydanette is not a 'strata manager' under the ST Act by reference to the Agreement. Further, in my view the

Agreement is not a 'strata management contract' for the purposes of the ST Act and therefore the Agreement does not need to comply with the requirements of s 145 of the ST Act which sets out the minimum requirements for a strata management contract including specifying each of the scheme functions to be performed by the state manager.

Issue 3 - Did the Agreement cease to have effect on 2 November 2020 by operation of Sch 5 cl 13(3) of the ST Act?

131 Sch 5 cl 13(3) of the ST Act provides:

> A contract or volunteer agreement referred to in subclause (1) ceases to have effect 6 months after commencement day unless the strata manager then meets the requirements set out in section 144 and the contract or volunteer agreement then meets the requirements set out in section 145.

132 The above clause only applies if Waydanette is a strata manager, and the Agreement is a strata management contract.

133 As I have determined (see above at [109] to [130]) that Waydanette is not a strata manager and that the Agreement is not a strata management contract, Sch 5 cl 13(3) of the ST Act has no application. To be clear, in my view, the Agreement did not cease to have effect from 2 November 2020.

Issue 4 - Is the strata company estopped from asserting that the Agreement ceased to have effect from 2 November 2020?

Issue 5 - Is Waydanette entitled to rely on estoppel?

134 It is not necessary for me to determine issues 4 and 5. This is because of the outcome in respect of issues 1, 2 and 3 (see above at [109] to [130]) where I conclude that the Agreement is not a 'strata management contract' under the ST Act, that Waydanette is not a 'strata manager' under the ST Act in respect of the Agreement and that the Agreement did not cease to have effect from 2 November 2020.

135 Finally, and in any event, for the reasons set out below in relation to the Tertiary Proceeding (see below at [196] to [268]), where I conclude that the 2021 EGM was validly convened and the resolutions passed (which included a resolution to discontinue the Primary Proceeding), I would dismiss the Primary Proceeding.

Issue 6 - Is Waydanette entitled to seek relief under s 200(2)(j) of the ST Act without making a separate application to the Tribunal? If 'yes', does the Tribunal have power under s 200(2)(j) of the ST Act to remove any provisions that may be found to otherwise characterise the Agreement as a 'strata management contract'? If 'yes', should the Tribunal exercise its discretion?

136 Again, it is not necessary for me to determine issue 6 in these proceedings. This is because of the outcome of issues 1, 2 and 3 (see above at [109] to [130]) and the outcome of the Tertiary Proceeding (see below at [196] to [268]).

137 In conclusion, I would dismiss the Primary Proceeding. Finally, for avoidance of doubt, in my view, the Agreement did not cease to have effect on 2 November 2020 by operation of Sch 5, cl 13(3) of the ST Act.

138 I will now move on to consider the issues arising in the Secondary Proceeding.

Issue 7 - Whether the car damage for which Travis was convicted of amounts to: (a) Waydanette and/or Travis breaching Sch 1 by-law 1(2)(a) or 1(2)(c); (b) Waydanette and/or Travis breaching Sch 2 by-law 1; and (c) Waydanette and/or Travis breaching s 83 of the ST Act?

139 The strata company asserts that the car damage demonstrates breaches of Sch 1 by-law 1(2)(a) and by-law 1(2)(c) and Sch 2 by-law 1 and s 83 of the ST Act by Waydanette and/or Travis.

140 It is useful to start by setting out the relevant by-laws and s 83 of the ST Act.

141 Sch 1 by-law 1(2) (as set out in the Management Statement of the strata company) relevantly provides:[81]

> 1. Duties of proprietor, occupiers, etc.
>
> …
>
> (2) A proprietor, occupier or other resident must -
>
> (a) use and enjoy the [c]ommon [p]roperty in such a manner as not unreasonably to interfere with the use and enjoyment by other proprietors,

[81] EB at page 103.

> occupiers of [sic] residents, or of their visitors; and;
>
> …
>
> (c) take all reasonable steps to ensure that his visitors do not behave in a manner likely to interfere with the peaceful enjoyment of the proprietor, occupier or other resident of another lot or of any person lawfully using [c]ommon [p]roperty; and
>
> …

142 Sch 2 by-law 1 (as set out in the Management Statement of the strata company) provides:[82]

> 1. Behaviour of proprietors or occupiers
>
> A proprietor, occupier or visitor must be adequately clothed when upon [c]ommon [p]roperty and must not use language or behave in a manner likely to cause offence or embarrassment to the proprietor, occupier or resident of another lot or to any person lawfully using [c]ommon [p]roperty.

143 Section 83 of the ST Act provides:

> The owner or occupier of a lot must not use or permit the use of, the lot or common property of the strata titles scheme in a way that interferes unreasonably with the use or enjoyment of another lot or the common property by a person who is lawfully on the lot or the common property.

144 The parties agree that Waydanette is the occupier of Lot 1 under a lease and that Royce and Dawn are the directors of Waydanette. Further, it is common ground that Travis is employed by Waydanette as a gardener at the Resort and is considered (at the least) to be a 'visitor' to the Resort. It is also common ground that Travis was convicted on 4 August 2021 in the Broome Magistrates Court for the car damage, was fined $600 and ordered to pay costs of $251 and compensation of $1,967.90 to Marianne.

145 The strata company's position is that Travis works at Lot 1 (reception and office for Waydanette) and on the common property (gardens etc) of the Resort and is therefore an 'occupier' of Lot 1 and the common property.

[82] EB at page 134.

146 The term 'occupier' in respect of a lot is defined in s 3 of the ST Act as follows:

> ***occupier*** of a lot means a person who occupies the lot on a temporary or permanent basis (either solely or jointly with other persons) and includes a person who is unlawfully in occupation of the lot[.]

147 Ordinarily the term 'occupies' means to take possession of (a place) or to hold (a position, office etc).[83] I accept that Travis in his capacity as an employee of Waydanette is an occupier of Lot 1 when he is working for Waydanette at the Resort.

148 The strata company asserts that Waydanette is responsible for Travis' acts when he is working for Waydanette which include the car damage because the car damage:

a) was an unreasonable interference with Marianne's lawful use of the common property as a contractor of the strata company; and

b) caused Marianne offence and embarrassment as her car was damaged while she was working for the strata company and lawfully on the common property.

149 The strata company says that after the conviction, neither Travis nor Waydanette issued an apology to Marianne and expressed no remorse. Further, the strata company asserts that Waydanette took no steps to sanction its employee, Travis, for his actions, even after he was convicted.

150 According to the strata company such inaction by Waydanette indicates the failure by Waydanette to take reasonable steps to control the 'unreasonable and criminal behaviour' on the part of its employee, Travis, which interfered unreasonably with Marianne's use of the common property and therefore amounts to a breach of Sch 1 by-laws 1(2)(a) and 1(2)(c).

151 In addition, the strata company submits that Travis' action whereby he caused the car damage and caused Marianne offence and embarrassment in circumstances where she was lawfully attending the Resort on the common property to conduct an inspection on behalf of the strata company amounts to a breach of Sch 2 by-law 1.

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[83] *Macquarie Dictionary Online*.

152 Finally, the strata company says that as a result of Travis' action, whereby he caused the car damage, Waydanette is in breach of s 83 of the ST Act.

153 For similar reasons, the strata company contends that Travis, as an occupier of strata Lot 1 on the basis that he works from that lot, breached Sch 1 by-laws 1(2)(a) and 1(2)(c) as well as s 83 of the ST Act.

154 Waydanette's position is that its directors, Royce and Dawn, did not permit, authorise or facilitate Travis in carrying out the car damage nor did they have any reason to believe that Travis would damage Marianne's car.[84] Further, Dawn gave evidence that Travis' action was out of character and that it could not have been anticipated.

155 Waydanette submits that to the extent the strata company asserts or seeks to have implied that Travis' conduct constitutes the conduct of Waydanette, as Travis' employer, for vicarious liability that argument must fail because the conduct must occur in the course of employment and be sufficiently connected with the duties and responsibilities of the employee to be regarded within the scope of that employment. Waydanette contends this is not the case because:

a) Waydanette did not fail to take all reasonable steps to ensure its visitors do not behave in a manner likely to interfere with the peaceful enjoyment of a person lawfully using the common property within the meaning of Sch 1 by-laws 1(2)(a) and 1(2)(c);

b) Waydanette did not behave in a manner likely to cause offence or embarrassment to a person lawfully using common property within the meaning of Sch 2 by-law 1; and

c) Waydanette did not use or permit the use of common property in a way that interferes unreasonably with the use or enjoyment of the common property by a person lawfully on the common property within the meaning of s 83 of the ST Act.

156 In my view, it is necessary to first consider and reflect on the events leading up to the car damage which occurred on 4 February 2021.

[84] ts 377, 23 February 2022.

157 It is common ground that the strata company and Waydanette have had a protracted history and seek to part company. They have been trying to negotiate that outcome since about 2018.

158 Apart from a period of about three months between November 2020 and January 2021, Waydanette continued to employ Travis as a full-time gardener, however, the strata company only reimbursed Waydanette for 26 hours gardening work per week. Waydanette say they engaged a full-time gardener, Travis, on the basis of the 2016 AGM where the owners unanimously approved Waydanette increasing the gardener's hours from part-time to full-time at 38 hours per week.[85] However, the strata company treated the March 2020 resolution (see above at [80]) as requiring to pay Waydanette, no more than 26 hours per week for the gardening.[86]

159 Waydanette informed the Council in or about late November 2020 that the reduction in the gardener's hours caused the upkeep of the common property to fall behind.[87] As a result the maintenance of the common property of the Resort suffered and subsequently resulted in the strata company issuing Waydanette with the default notice on 20 January 2021.

160 Consequently, Waydanette reinstated Travis on a full-time basis and incurred the cost of some additional short-term casual labourers to return the common property to the state required in the common property maintenance obligations under the Agreement within the 14 days stipulated in the default notice (that is, by early February 2021). In giving evidence about the default notice and the work to be done to comply with the default notice, Dawn described that time as 'very, very stressful. Very, very hard'.[88]

161 Next, Marianne attended the Resort on the day of the car damage (4 February 2021) to undertake an inspection to make sure the default notice had been complied with. It is common ground that there was a verbal exchange between Royce and Marianne. Royce gave evidence at the hearing of his interaction with Marianne on 4 February 2021. Marianne did not give evidence in these proceedings. Marianne's version of her interaction with Royce is per her employer's letter to the strata

[85] EB at page 370.
[86] EB at page 434.
[87] ts 374, 23 February 2022.
[88] Ibid.

company dated 12 February 2021.[89] The two accounts of what was said do not match.

162 A week later on 12 February 2021, Andrew Blackley of PRD Real Estate Broome (the then strata manager) notified the strata company that they chose to terminate their strata management agreement with the strata company because:[90]

> No one in today's world has to put up with this sort of treatment, and there's no excuse for it, no matter how aggrieved the other party may feel.

163 The strata company submits that even after Travis' conviction, neither Travis, nor Royce nor Dawn issued an apology to Marianne and neither expressed any remorse. Rather, Dawn sent an email to the owners on 12 August 2021 stating that after they receive the Magistrates Court transcript, they will decide if they will appeal the Magistrate's decision, and explained in her view:[91]

> The fact is, in this mixed up, woke [sic] world we are expected to live in now, if a lawyer is defending a male against any other gender, he is starting behind the 8 ball.

164 Putting to one side, the differing accounts of the verbal exchange between Royce and Marianne on 4 February 2021 it is clear that the car damage cannot be condoned. In my view, the car damage was an unreasonable interference with Marianne's use and enjoyment of the common property. Marianne was lawfully using the common property (carpark of the Resort) on the authority of the Council to undertake the inspection and therefore, in my view, was at least a visitor of the proprietors (owners) and a person lawfully using common property. I find that Waydanette, as the occupier of Lot 1 is in breach of Sch 1 by-law 1(2)(c). The reasons for this are as follows. First, Waydanette, as the occupier of Lot 1 in the context of a very stressful time (as described by Dawn) did fail to take all reasonable steps to ensure that Travis (at least, as a visitor to the Resort) did not behave in a manner likely to interfere with the use and enjoyment of the common property by Marianne who was lawfully using the common property (carpark) at the Resort.

165 Second, even though Dawn gave evidence that Waydanette did not permit, authorise or facilitate Travis doing the car damage, and that

[89] EB at pages 652 to 653.
[90] Ibid.
[91] EB at page 796.

Waydanette had no reason to believe that Travis would do the car damage,[92] in the context of a very stressful time, Royce and Dawn as the directors of Waydanette should have at least asked Travis to remain calm and to keep away when Marianne attends the Resort to inspect the gardening work that he and others had done to satisfy the default notice. These reasons, in my view, also support a finding that Waydanette is in breach of s 83 of the ST Act.

166 However, I am not satisfied that Waydanette is in breach of Sch 1 by-law 1(2)(a). This is because, while it is common ground that Waydanette is the occupier of Lot 1, the evidence before the Tribunal is that Travis (an employee of Waydanette) interfered with Marianne's use and enjoyment of the common property. To the extent that the strata company seeks to imply that the conduct of Travis constitutes the conduct of Waydanette by virtue of an employer's vicarious responsibility for the acts of its employees, that position must fail. This is because the conduct must occur in the course of employment and be sufficiently connected with the duties and responsibilities of the employee to be regarded within the scope of that employment.[93]

167 Further, I am not satisfied that Waydanette is in breach of Sch 2 by-law 1. The reason for this is that while I accept that there was damage to Marianne's car and that there was a verbal exchange between Royce and Marianne on the common property at the Resort, I am not persuaded that the language used (where the accounts differ), or the car damage caused Marianne offence or embarrassment as she did not give evidence in these proceedings and was therefore not available to be cross-examined.

168 In regard to Travis, in my view, Sch 1 by law 1(2)(c) has no application because that by-law requires 'the proprietor, occupier or other resident of a lot must take all reasonable steps to ensure that *his visitors* do not behave …'. It is common ground that Travis caused the car damage. Where Travis is an occupier of Lot 1, but there is no visitor this by-law cannot apply as Travis (the occupier) did the car damage. However, as noted earlier, in my view this by-law does apply in respect of Waydanette (see above at [164]-[165]).

169 As the occupier of Lot 1 (the place occupied or works at), I am satisfied that Travis is in breach of Sch 1 by-law 1(2)(a) and also in breach of s 83 of the ST Act. This is because as an occupier he must use

[92] ts 377, 23 February 2022.
[93] ***Lloyd v Grace, Smith & Co*** [1912] AC 716 and ***New South Wales v Lepore*** [2003] HCA 4 at [40].

the common property (carpark) as to not unreasonably interfere with the use and enjoyment by other owners, occupiers or residents or their visitors. In my view, the car damage clearly interferes with Marianne's use and enjoyment of the common property (carpark).

170 Again, for similar reasons as given with respect to Waydanette, I am not satisfied that Travis is in breach of Sch 2 by-law 1. While Travis caused the car damage while Marianne was working for the then strata manager, I am not persuaded that the behaviour (car damage) caused her offence or embarrassment as she did not give evidence in these proceedings and was therefore not available to be cross-examined.

171 As I have found Waydanette to be in breach of Sch 1 by-law 1(2)(c) and Travis to be in breach of Sch 1 by-law 1(2)(a) and both to be in breach of s 83 of the ST Act, I now turn to consider whether to make a declaration under s 199 of the ST Act and/or an order under s 47(5)(a) and/or s 200 of the ST Act.

172 In my view it is appropriate to make a declaration under s 199(3)(a) as follows:

- Waydanette is in breach of Sch 1 by-law 1(2)(c) and s 83 of the ST Act.
- Travis is in breach of Sch 1 by-law 1(2)(a) and s 83 of the ST Act.
- Waydanette has *not* breached Sch 1 by-law 1(2)(a) and Sch 2 by-law 1.
- Travis has *not* breached Sch 1 by-law 1(2)(c) and Sch 2 by-law 1.

173 As I explained in ***The Owners of Ellement 996 Strata Plan 53042 and Tobias*** [2022] WASAT 49 at [81] - [84] the ST Act does not provide any guidelines on the exercise of the Tribunal's discretion to make an order.

174 In ***Arasi & Anor and The Owners of Beverley Court*** [2005] WASAT 197 (***Arasi***) the Tribunal set out at [27] - [28] that, when exercising a broad discretion, the Tribunal must act in accordance with:

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.

175 While the list set out in ***Arasi*** (see above at [174]) is not an exhaustive list and it is a list 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 47(5) and/or s 200(2)(m) of the ST Act (a 'narrow discretion') that I act in accordance with each of the items listed. Further, in my view, using the words of the Tribunal in ***Robinson and Stevens*** [2009] WASAT 207, I must apply my mind to the facts to determine if I should exercise the Tribunal's discretion to make the order sought under the ST Act.

176 Acting in accordance with the list set out in ***Arasi*** (see above at [174]) and in applying my mind to the facts in the context where the strata company and Waydanette have had a protracted history where they are now both keen to go their separate ways but have not been able to quite get there, I am satisfied that orders should be made in respect of the Second Proceeding as follows:

- Pursuant to s 47(5)(b) and s 47(5)(c) and s 200(2)(m) of the ST Act, Waydanette shall comply with Sch 1 by-law 1(2)(c) and s 83 of the ST Act and take the following action to prevent further contravention of the ST Act and scheme by-laws:

  (a) Waydanette shall take all reasonable steps to ensure that its visitors do not behave in a manner likely to interfere with the peaceful enjoyment of the proprietor, occupier or other resident of another lot or of any person lawfully using common property.

- Pursuant to s 47(5)(b) and s 47(5)(c) and s 200(2)(m) of the ST Act, Travis shall comply with Sch 1 by-law 1(2)(a) and s 83 of the ST Act and take the following action to prevent further contravention of the ST Act and scheme by-laws:

  (a) Travis shall use and enjoy the common property in such manner as not unreasonably to interfere

with the use and enjoyment by other proprietors, occupiers or residents, or their visitors.

177 Unlike the case of ***The Owners of Motive Apartments Strata Plan 67587 and Tear*** [2021] WASAT 54 (***Tear***) where a monetary penalty was imposed for the multiple and regular breach of by-laws, I am not satisfied that this is a case for which a monetary penalty is to be imposed under s 47(5)(a) of the ST Act. There is no evidence before the Tribunal of previous breaches of the ST Act or the by-laws. Further, in regard to Travis, I accept the observation of the sentencing Magistrate that '[Travis] doesn't get into much trouble …' and when asked to consider a restraining order, which his Honour declined to grant concluded that '[T]here's no evidence that it is likely to happen again'.

178 In addition, the strata company seeks an order under s 200(2)(o) of the ST Act requiring Waydanette and Travis to pay to the strata company by way of compensation, the strata company's enforcement expenses. Besides stating that the strata company's enforcement expenses are a significant pecuniary loss suffered by the strata company,[94] no oral or written submissions on the strata company's enforcements expenses, including the amount of the expenses incurred have been made by the strata company. I therefore decline to make an order under s 200(2)(o) of the ST Act.

179 Finally, the strata company seeks a declaration under s 95 of the SAT Act which provides:

> **95. Failing to comply with decision**
>
> (1) A person who fails to comply with a decision of the Tribunal commits an offence.
>
> Penalty: $10 000.
>
> (2) Subsection (1) does not apply if, or to the extent that, the decision is a monetary order.
>
> (3) Subsection (1) does not apply in relation to a decision unless -
>
> (a) the Tribunal, in the decision, declares that subsection (1) applies; or
>
> (b) after a person fails to comply with the decision, the Tribunal makes an order declaring that

[94] Annexure to interim application filed on 14 September 2022 at para 5.

> subsection (1) applies and the failure continues after notice of that order is served on the person.
>
> (4) If the Tribunal made the decision without giving a person an opportunity to be heard, subsection (1) only applies to that person on the person being given personally or in accordance with subsection (5) -
>
> (a) a copy of the decision that a judicial member or the executive officer has certified to be a true copy; and
>
> (b) a copy of this section.
>
> (5) If the Tribunal is satisfied that it is not possible or appropriate for a person to be personally given the documents referred to in subsection (4), the Tribunal may specify another method for service of the documents on the person under that subsection.

180 Unlike in ***Tear***, where a declaration was made under s 95 of the ST Act, it is not necessary, in my view, for a declaration to be made under s 95 of the SAT Act at this time as there is no evidence before the Tribunal that Waydanette and Travis will not comply with orders of the Tribunal.

181 I now turn to consider the back shed issue.

Issue 8 - Whether Waydanette's use of the back shed is a breach of its obligations under Sch 2 by-law 1 and/or s 83 of the ST Act?

182 The strata company asserts that Waydanette is using the back shed to the exclusion of all other owners, occupiers and residents within the Resort and is thereby unreasonably interfering with the use and enjoyment of the back shed by other owners, occupiers or residents and is therefore in breach of Sch 2 by-law 1 and/or s 83 of the ST Act.

183 It its closing submissions, the strata company refers to video footage of the back shed and its contents. The strata company did not seek to adduce the video footage during these proceedings. I therefore attribute no weight to it.

184 According to the strata company, the current strata manager, Richardson Strata Management Services, on 7 July 2021 directed Waydanette to stop using the back shed. Waydanette responded to the strata manager stating that it refused to vacate the back shed.

On 25 August 2021, the strata company says that a notice under s 47(2) of the ST Act was issued to Waydanette requiring it to:

a) remove all of its items from the back shed;

b) make good the back shed, including cleaning the back shed;

c) provide the strata company with unfettered access to the back shed to confirm that all of Waydanette's items have been removed from the back shed;

d) refrain from using the back shed ever again; and

e) provide written confirmation to the strata company of the action Waydanette has taken to rectify the alleged breach of by-law and to avoid any further contravention of Sch 2 by-law 1.

185 Waydanette's position is that the back shed is nothing more than an overflow area where items are stored or abandoned. According to Dawn, the back shed contains items that mainly belong to owners or were left behind by guests but also contains some boxes of paperwork and four folda beds that belong to Waydanette.

186 It is common ground that the back shed is situated on common property of the Resort and that the key to the back shed is held in Lot 1. This is where Waydanette operates the reception/office for the Resort. It is also common ground that Waydanette has stored items in the back shed and that they have refused to remove the items stored in the back shed.

187 The concern of the strata company is that the use of the back shed by Waydanette prevents the strata company from being able to exercise its statutory right and duty to control and manage the common property as well as exposing the strata company to potentially higher insurance premiums, a higher risk of claims being made on the strata company's insurance policy and increased insurance excess as a result. Further, the strata company asserts that the occupation of the back shed by Waydanette caused the strata company to incur considerable cost for another shed to be built on the common property in order to store gardening implements.

188 In giving evidence, Neil stated in part:[95]

> They say that owners could store things in there and in the 20-odd years that I've owned a unit there, that was the first time I had ever heard that there was available space there.

189 I do not accept the strata company's position that Waydanette is using the back shed to the exclusion of all other owners, occupiers and residents within the Resort and is thereby unreasonably interfering with the use and enjoyment of the back shed by other owners, occupiers or residents and is therefore in breach of Sch 2 by-law 1 and/or s 83 of the ST Act for the following reasons. First, besides Shashi who gave evidence that Waydanette refused to allow her to store a mattress in the back shed, no other owner, occupier or visitor gave evidence that Waydanette refused them access to use the back shed.

190 Second, while Neil gave evidence that in the 20-odd years that he has owned a unit at the Resort that, this was the first time he had heard there was space available in the back shed, it was common ground that the key to the back shed is kept at reception (held in Lot 1). On that basis I accept that any owner, occupier or guest who wants to use the back shed can ask for the key at reception.

191 Third, Waydanette does not use the back shed to the exclusion of others. Evidence given by Shashi was that the back shed contained items belonging to owners that are used by Waydanette. Dawn stated in her evidence that the back shed is an 'overflow area' where items are stored or abandoned,[96] and that Waydanette stored some boxes of their paperwork and four folda beds.[97]

192 Fourth, it was not disputed that clause 9.1 of the Agreement provides that the strata company grants to the Resort Manager (Waydanette) full exclusive licence and authority to occupy and use to the fullest extent possible the common property for the purpose of enabling the Resort Manager to carry out its obligations under the Agreement. As the back shed is on common property clause 9.1 of the Agreement, in my view, authorises Waydanette as the Resort Manager to occupy and use the back shed to the fullest extent possible for the purpose of enabling it to carry out its obligations under the Agreement.

[95] ts 176-177, 22 February 2022.
[96] ts 378, 23 February 2022.
[97] ts 253, 23 February 2022.

193 For these reasons, I am not satisfied of the strata company's assertion that Waydanette's occupation of the back shed is unreasonably interfering with the use and enjoyment of the back shed by owners and others. Therefore, in my view, Waydanette is not in breach of s 83 of the ST Act nor Sch 2 by-law 1 and I would, therefore, not make any declaration or order in respect of the back shed in the Secondary Proceeding.

194 In conclusion in respect of the Secondary Proceeding, in my view, it is appropriate to make a declaration under s 199(3)(a) of the ST Act as set out above at [172] and to make orders under s 47(5)(b) and s 47(5)(c) and s 200(m) of the ST Act as set out above at [176].

195 Finally, I turn to consider the issues arising in the Tertiary Proceeding.

Issue 9 - Does Waydanette have standing to bring the Tertiary Proceeding?

196 In order for Waydanette to have standing to bring the Tertiary Proceeding, it must be a 'scheme participant'. This is because s 197(1)(a) of the ST Act provides that the Tribunal can only resolve disputes between 'scheme participants' about, inter alia, a resolution of a decision of a strata company, or the Council of the strata company, including its validity (s 197(1)(a)(iv) of the ST Act). The Tertiary Proceeding concerns validity of the 2021 EGM and the resolutions passed at that EGM.

197 Section 197(2) of the ST Act states the following are 'scheme participants':

> (a) the strata company for the strata titles scheme;
>
> (b) for a leasehold scheme, the owner of the leasehold scheme;
>
> (c) a person who is appointed as an administrator of a strata company for the strata titles scheme;
>
> (d) a member of the strata company for the strata titles scheme;
>
> (e) the occupier of a lot in the strata titles scheme;
>
> (f) the registered mortgagee of a lot in the strata titles scheme;
>
> (g) a member of the council of a strata company, or an officer of the strata company, for the strata titles scheme, who is not a member of the strata company.

198 It is common ground that the strata company, who is the respondent in the Tertiary Proceeding, is a strata scheme participant as per s 197(2)(a) of the ST Act.

199 It is also common ground that Waydanette does not own a strata lot in the scheme and is not a member of the strata company. Waydanette must therefore fall within one of the other categories set out in s 197(2) in order to have standing to make an application to the Tribunal for the resolution of a scheme dispute.

200 Both parties accept that in order for Waydanette to have standing in the Tertiary Proceeding, the Tribunal must find that Waydanette is an 'occupier' of Lot 1 and that the dispute is about a resolution or decision of the strata company that directly affects the occupier (s 197(5)(b) of the ST Act).

201 The strata company in making closing submissions for the Secondary Proceeding submitted that Waydanette is an occupier of strata Lot 1 under a lease.[98] In the Tertiary Proceeding the strata company's position is that Waydanette is 'not directly affected as an occupier' by the resolutions of the 2021 EGM. This is because, according to the strata company, the resolutions of the 2021 EGM concern Waydanette as the Resort Manager under the Agreement but not as an occupier of the lease of Lot 1. Further, the strata company's position is that the resolutions of the 2021 EGM deal with the strata company seeking declarations as to: (a) whether the Agreement ceased to have effect; (b) appointing a contractor under a new agreement; and (c) the reversing of an early resolution which would require Waydanette to pay to the strata company $20,000 for each year the Resort Management Agreement is extended.

202 It is clear that if Waydanette was not the Resort Manager under the Agreement, it would have a lease of Lot 1 which it could not use. In my view the restrictions on the use of Lot 1 under the lease is tied up with Waydanette's role as Resort Manager under the Agreement. This is supported by clause 14.3 of the Agreement which provides that the strata company covenanted not to permit any of the lots, other than Lot 1, to be used for any commercial purpose including but not limited to use an on-site letting office. It follows therefore, in my view, that Waydanette as the occupier of Lot 1 is directly affected by the decision made by the strata company to bring the Primary Proceeding which was an

[98] Closing submissions of the strata company filed on 28 March 2022 at para 93.

application seeking to have the Agreement declared as having ceased to have effect on 2 November 2020 (see above at [109] to [133]).

203 Finally, I do not accept the strata company's contention that the Tribunal does not have jurisdiction to determine the Tertiary Proceeding on the basis that the orders sought by Waydanette in the Tertiary Proceeding are orders in relation to a dispute between Waydanette as the strata manager or a former strata manager and the strata company and therefore the application should have been made under s 197(1)(g) of the ST Act. This is because I have already determined (see above at [109] to [133]) that Waydanette is not a strata manager (or a former strata manager).

204 In conclusion, in my view, Waydanette does have standing to bring the Tertiary Proceeding, and the Tribunal does have jurisdiction to determine the Tertiary Proceeding under s 197(1)(a)(iv) of the ST Act.

205 I now turn to consider whether the 2021 EGM was validly called and convened.

Issue 10 - Was the 2021 EGM validly called and convened?

206 To require the Council of the strata company to convene, or call, an EGM, owners entitled to 25% or more of the unit entitlements of the lots in the strata title scheme must give written notice. This is provided for in s 128(2)(b) of the ST Act as follows:

> (2) An extraordinary general meeting of a strata company -
>
> …
>
> (b) must be convened by the council of the strata company on the written request of owners entitled to 25% or more of the unit entitlements of the lots in the strata titles scheme.

207 'Unit entitlements' is defined in s 37(1) of the ST Act as follows:

> 37. **Schedule of unit entitlements**
>
> (1) The schedule of unit entitlements for a strata titles scheme must-
>
> (a) allocate a whole number (a unit entitlement) to each lot in the strata titles scheme; and

> (b) state the number that is the sum of the unit entitlements of all the lots in the strata titles scheme.
>
> Note for this subsection:
>
> The unit entitlement of a lot determines-
>
> • the interest of the owner of the lot in the common property in the strata titles scheme: see section 13; and
>
> • subject to the scheme by-laws, the contributions payable by the owner of the scheme: see section 100; and
>
> • the voting rights that attach to the lot: see section 120.

208 The position of the strata company is that 'owners entitled to 25% or more of the unit entitlements of the lots' in s 128(2)(b) of the ST Act means only those owners who are entitled to vote because they are financial and who hold 25% or more of the unit entitlements of the lots may call an EGM. In other words, the strata company contends that where an owner is 'not financial' then his or her right to call an EGM is prohibited, irrespective of what his or her unit entitlement in the strata scheme is. I do not accept the strata company's contention for the following reasons.

209 An owner's entitlement to vote on a proposed resolution of the strata company is based on whether the owner is 'financial' (s 120(2)(b) of the ST Act). However, in my view, s 128(2)(b) of the ST Act properly constructed does not require the owner to be 'financial' in order to call for an EGM.

210 Section 115 of the ST Act concerns the power to terminate certain contracts for amenities or services. Section 115(4) provides that the section applies to a contract, inter alia, if it was made when 'any owner held 50% or more of the unit entitlement of the lots'. In my view, the use of the word 'held' in s 115(4) of the ST Act reinforces that the proper construction of s 128(2)(b) of the ST Act does not refer to an owner who is 'financial'. In other words, s 115(4) is considering the past (when there was an owner who held 50% or more or the unit entitlement) rather than the current owners. Therefore, in my view, the proper construction of s 128(2)(b) provides that the (current) owners who are entitled to 25% or

more of the unit entitlements may call for an EGM, regardless of whether they are 'financial' or 'not financial'.

211 According to Waydanette, on 16 June 2021, Bruce and Christine Leslie, the owners of Lot 23 sent to the secretary of the Council via the strata manager, Richardson Strata Management Services, the written notices.[99] Each of the written notices also included the statement that in the event the Council did not convene an EGM within 21 days of receipt of the request, that they would do so.

212 The written notice was given by:

- Bruce and Christine Leslie, owners of strata Lot 23 - unit entitlement of 281;
- John Backman, owner of strata Lot 7 - unit entitlement of 324. (As strata Lot 7 settled on 16 June 2021 it must be disregarded);
- Murray Macdonald, owner of strata Lot 22 - unit entitlement of 208;
- Desmond and Robin Tilbrook, owners of strata Lot 14 - unit entitlement of 324;
- Lee Watkins, owner of strata Lot 17 - unit entitlement of 324;
- Rachel Jones, owner of strata Lot 11 - unit entitlement of 208;
- Kevin Ryan, Director of Devami Pty Ltd, owner of strata Lot 28 - unit entitlement of 281;
- Justin Hayes, owner of strata Lot 1 - unit entitlement of 471;
- Vicky Linfoot, owner of strata Lot 3 - unit entitlement of 281;
- Stephen and Maryanne Iredale, directors of Stephen Iredale Pty Ltd, owner of strata Lot 35 - unit entitlement of 208; and

[99] EB at pages 262-272.

- Margaret Hookings, owner of strata Lot 2 - unit entitlement of 324.

213 Excluding John Backman, the combined unit entitlement is 2,910 units or 29% of the total unit entitlement of the strata scheme.

214 By 30 July 2021 no EGM had been called by the Council or no notice of an EGM had been issued.[100] Consequently, on 16 August 2021, Bruce Leslie issued the EGM Notice. In my view it was open to the owners who made the request under s 128(2)(b) of the ST Act to convene an EGM as the Council had not taken steps to convene the EGM within 21 days of the request being made.

215 According to Waydanette the EGM Notice was posted by express post on 18 August 2021 from Broome[101] to the strata company, the strata manager (Richardson Strata management Services) and to each owner apart from the owners of Lot 3, 14, 16, 19 and 29 as those owners had only provided an email address and not a physical or postal addresses for the owners roll and were provided with an EGM Notice by email.

216 It is necessary to give at least 14 days' notice of the EGM to all owners of the strata scheme (s 129(1) of the ST Act). This means for an EGM to be held on 8 September 2021, notice must be given on or before 24 August 2021.

217 The strata company challenged as to whether the owner of Lot 10 (located in the Northern Territory) and Lot 32 (located in Tasmania) received the EGM Notice by 24 August 2021, being 14 clear days prior to the EGM Notice.

218 The strata company concluded in its closing submissions that:

> The owner of Lot 10 was not likely to have received the EGM notice through express post by Tuesday 24 August 2021 … as it was posted on 18 August 2021, which only allowed 5 business day. The owner of Lot 32 did not attend this EGM in person or by duly appointed prox[y].
>
> [I]t is also likely that the owner of Lot 32 did not receive EGM notice by Tuesday 24 August 2021, as it was posted on 18 August 2021, which only allowed 5 business days. The Owner of Lot 32 did not attend this EGM in person or by duly appointed proxy.

[100] EB at page 730.
[101] ts 444, 23 February 2022.

219 According to the strata company, Australia Post's expected delivery time for express post from Perth to Parap, Northern Territory (for the owner of Lot 10) it is between four to seven business days and from Perth to Hobart, Tasmania it is three to four business days. The strata company suggested as the EGM Notice was sent from Broome a further day to the expected delivery time was likely.

220 While Ian was not aware of Australia Post's delivery time for every place in Australia, he gave evidence that:[102]

> [O]n 19 August I was informed that the hard copy notices had been mailed by Express Post to those owners whose address for service was contained in the supplied roll, and by email to those who wished only inserting an email address on the roll. And I calculated that the 12 days in August and 10 days in September was a total of 22 days, which, if you take the 14 clear days and you delete the two days for the day of the meeting and the day of the service, leaves another six days for it to be delivered, and in any reasonable - at any reasonable time, that would be sufficient, in my view for an Express letter to be delivered.

221 In this case, I prefer the evidence of Ian as he was clear that six days is a reasonable time for an express letter to be delivered. This is well within Australia Post's advertised delivery time for express post from Perth to Parap, Northern Territory and Hobart, Tasmania. On the other hand, the strata company did not call any owner to give evidence concerning the receipt of the EGM Notice by express Post but relied on making the submission that it was 'not likely' that the owners of strata Lot 10 and strata Lot 32 would have received the EGM Notice (see above at [218]).

222 In conclusion, in my view, the 2021 EGM was validly called and convened.

Issue 11 - Were the resolutions of the 2021 EGM validly passed?

223 It is uncontentious that each of the resolutions at the 2021 EGM carried if the 2021 EGM was validly called and convened.

224 As I have determined (see above at [206] to [222]) that the 2021 EGM was validly called and convened, it follows that the resolutions of the 2021 EGM carried.

225 Finally, I turn to consider whether the resolutions of the 2021 EGM contravene s 91(1)(b) and/or s 119 of the ST Act and whether the strata

[102] ts 454-455, 23 February 2022.

company is excused from complying with the resolutions of the 2021 EGM.

Issue 12 - Do the resolutions of the 2021 EGM contravene s 91(1)(b) and/or s 119 of the ST Act?

Issue 13 - Is the strata company excused from complying with the resolutions of the 2021 EGM (if validly passed) as a result of the operation of s 91(1)(b) and/or s 119 of the ST Act?

226 I will deal with issue 12 and issue 13 together. The resolutions of the 2021 EGM are set out above at [104] and are summarised as follows:

a) to rescind the 2019 AGM special business item 6 resolutions (refer above at [77(d)]);

b) to direct the Council to execute the proposed Replacement Resort Management Agreement and the Collateral Deed with Waydanette in place of the Agreement; and

c) to direct the Council to discontinue the Primary Proceeding.

227 Under 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 strata company contends that even if the resolutions of the 2021 EGM carried, it is excused from complying with the resolutions by operation of s 91(1)(b) and/or s 119 of the ST Act.

228 As already explained, s 91 of the ST Act sets out the general duties of the strata company. Section 91(1)(b) provides that the strata company must 'control and manage the common property for the benefit of all the owners of lots'.

229 It is contended by the strata company that there is no benefit to the strata company to continue with Waydanette managing and controlling the common property 'for a further 15 years'. Two reasons are given for this contention by the strata company. First, the strata company asserts that Waydanette refuses to promptly follow, if at all, the strata company's lawful instructions to manage, control and maintain the common property.

230 Second, the strata company contends that Waydanette intimidates and unnecessarily interferes with people lawfully using common

property, including contractors instructed to perform inspections of the common property of the Resort. Accordingly, the strata company submits that this intransigence and intimidatory behaviour by Waydanette amounts to the strata company not being able to properly exercise its statutory duty to control and manage the common property for the benefit of all the owners of lots.

231 I do not accept either argument put forward by the strata company for the following reasons. First, Waydanette is not a strata manager and the Agreement is not a strata management contract as explained above (see [109] to [133]) and therefore, in my view, Waydanette is not managing and controlling the common property of the Resort.

232 Second, the Agreement does *not* allow the Council of the strata company to give directions or instructions to the Resort Manager (Waydanette) under the Agreement. However, I note in the Replacement Resort Manager Agreement, there is provision for the Council to give directions.

233 Third, while I note the car damage and that words were exchanged between Royce and Marianne and between Royce and a contractor, I am not satisfied that such actions are sufficient for the Tribunal to order that the strata company be excused from complying with the 2021 EGM Resolutions.

234 Relying on ***Surrol Nominees Pty Ltd and The Owners of 1321 Hay Street West Perth - Strata Plan 9821*** [2013] WASAT 77 (***Surrol***), the strata company contends that in the exercise of its powers under s 91(1)(b) of the ST Act, it must consider and assess whether in the circumstances that the statutory criteria of 'for the benefit of all the owners of lots' has been met.

235 The strata company submits that the 2021 EGM Resolutions relate directly to the management and control of the common property and will result in the Replacement Resort Management Agreement in circumstances which will result in awarding to Waydanette a 15 year contract to manage and control the common property and will not benefit all the owners as a whole.

236 In ***Surrol***, the Tribunal was considering whether the resolution passed at an annual general meeting that the strata company execute a licence agreement for a lot owner the right to affix signage to common property was invalid. The licence fee in the proposed licence agreement was a modest amount for a fixed 10 year period which had not been

determined by an assessment of market rates or by consideration of the strata company's outgoings. It was on this basis that the Tribunal found that the strata company had failed to objectively meet the statutory criteria in the relevant provision (s 35(1)(b) of the then ST Act which is the equivalent of s 91(1)(b) of the ST Act).

237 The control and management of common property may at times result in the strata company making decisions which adversely impact on one or more owners on the basis that such action is required for the 'greater good' of the owners as a whole (***Surrol*** at [12]).

238 In my view, in the circumstances of a protracted history where the strata company and Waydanette seek to part company, the 2021 EGM Resolutions objectively meet the statutory criteria in s 91(1)(b) of the ST Act for the 'greater good' of the owners as a whole. There are two reasons for this. First, the association between the strata company and Waydanette under the Replacement Resort Management Agreement would not extend any further than under the Agreement (4 March 2023) and may come to an end sooner.

239 Second, the Agreement which has had a propensity to engender dispute between the strata company and Waydanette would be replaced by the Replacement Resort Management Agreement with greater protections for the owners as a whole.

240 It is the strata company's position that the 2021 EGM Resolutions contravene the strata company's objectives in s 119 of the ST Act in that they result in outcomes that are, having regard to the use and enjoyment of lots and common property, oppressive or unreasonable.

241 Section 119(1) of the ST Act 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
>
> (b) oppressive or unreasonable.

242 The terms 'oppressive' and 'unreasonable' are not defined in the ST Act. Ordinarily the term 'unreasonable' means things that are not based on or in accordance with reason or sound judgment while

'oppressive' encompasses things that are burdensome, unjustly harsh, or tyrannical.[103] I will apply these definitions in considering the application of s 119 of the ST Act in circumstances that the strata company say that the resolutions of the 2021 EGM contravene this section and that in any event the strata company should be excused from complying with the resolutions of the 2021 EGM.

243 Both parties referred me to the High Court's decision in ***Wayde v New South Wales Rugby League Ltd***[104] (***Wayde***) which concerned whether the Board of the New South Wales Rugby League's decision to exclude a particular team (Wests) from the New South Wales Rugby League was in breach of s 322 of the *Companies (New South Wales) Code* which in summary, provides that if the affairs of the company are conducted in a manner that is oppressive, or unfairly prejudicial to, or unfairly discriminatory against a member or members, the court may make such order or orders that it thinks fit.

244 The majority[105] in ***Wayde*** found that the decision of the Board of the New South Wales Rugby League to exclude Wests from the League 'was taken honestly in pursuit of the object of fostering the game of rugby league and serving its best interests: cl 3(b), memorandum of association'.[106]

245 In concluding, the majority held:[107]

> Given the special expertise and experience of the Board, the bona fide and proper exercise of the power in pursuit of the purpose for which it was conferred and the caution which a court must exercise in determining an application under s. 320 of the Code in order to avoid an unwarranted assumption of the responsibility for management of the company, the appellants faced a difficult task in seeking to prove that the decisions in question were unfairly prejudicial to Wests and therefore not in the overall interests of the members as a whole. It has not been shown that those decisions of the Board were such that no Board acting reasonably could have made them. The effect of those decisions on Wests was harsh indeed. It has not, however, been shown that they were oppressive or unfairly prejudicial or discriminatory or that their effect was such as to warrant the conclusion that the affairs of the League were or are being conducted in a manner that was or is oppressive or unfairly prejudicial.

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[103] *Macquarie Online Dictionary*. See also ***Steele and The Owners of Cocos Beach Bungalows Survey Strata Plan 42074*** [2021] WASAT 101 at [36].
[104] ***Wayde*** [1985] HCA 68; 180 CLR 459; 61 ALR 225; 10 ACLR 87.
[105] Mason ACJ, Wilson, Deane and Dawson JJ.
[106] (1985) 180 CLR 469 at 7.
[107] Ibid.

> That being so, the appellants have failed to make good their second submission.

246 In my view, ***Wayde*** supports the following two propositions:

a) that the application of provisions such as that in s 119 of the ST Act must be exercised with caution by the Tribunal in order to avoid an unwarranted assumption of the responsibility for managing a strata company; and

b) that a party seeking to rely on provisions such as in s 119 of the ST Act carries the burden of establishing that the decisions under challenge were such that *no* strata company acting reasonably could have made them.

247 In considering whether the decisions under challenge, being the 2021 EGM Resolutions, were such that no strata company acting reasonably could have made them, I will apply the ordinary meaning of 'oppressive' and 'unreasonable' as set out above at [242]. In doing so, I will also consider the following questions identified by the strata company:

> (a) Was the [strata company] acting consistently with a power that was conferred on the [strata company]?
>
> (b) Did the [strata company] exercise that power in a bona fide and proper way in pursuit of the purpose by which that power was conferred on the [strata company]?
>
> (c) Did the [strata company] have or seek special expertise or experience when considering how to exercise the power?
>
> (d) What decisions were unfairly prejudicial to, unfairly discriminatory or oppressive against a member of the [strata company] and to what extent did that member suffer?
>
> (e) Were the decisions in the overall interests of the members of the [strata company] as a whole?
>
> (f) Considering all the above, is it appropriate for the [Tribunal] to assume the responsibility for the management of the [strata company]?

248 The strata company argues that the effect of the 2021 EGM Resolutions will result in Waydanette being awarded a 15 year contract to manage and control the common property of the Resort and undertake other strata scheme functions as a strata manager of the strata company.

249 This position cannot be accepted. This is because, as I have already determined, the Agreement is not a strata management contract for the purposes of s 145 of the ST Act. Further, in my view, any Replacement Resort Management Agreement is not required to comply with s 145 of the ST Act because Waydanette is not a strata manager of the strata company (see above at [109] to [133]).

250 It is clear that the 2021 EGM Resolutions were intended to bring the Primary Proceeding to an end and to replace the Agreement with the Replacement Resort Management Agreement. The votes were cast in favour of each of the 2021 EGM Resolutions as conceded by Neil.[108]

251 However, it is the contention of the strata company that the 2021 EGM Resolutions amount to a significant failure to properly exercise the powers of the strata company. The following was advanced by the strata company in support of this contention. The strata company says that in passing the 2021 EGM Resolutions the owners who voted in favour:

a) were making a decision in their vested interest as part of the Waydanette letting pool and in the case of Lot 1, making a decision in the vested interest of the lease that the owner of Lot 1 has with Waydanette;

b) did not consider the best interests of the owners as a whole or even the interests of the strata company;

c) did not seek independent expert advice on whether the 2021 EGM Resolutions or the Replacement Resort Management Agreement was appropriate or even a prudent commercial decision from the perspective of the strata company.

d) have not demonstrated that it had sufficient expertise to properly consider whether to commit the strata company to a 15 year contract;

e) have not demonstrated that it undertook any proper consideration about the 2021 EGM Resolutions, including proper consideration of Waydanette's misconduct and non-compliance with the Agreement and how such misconduct should be managed by the strata company in the future;

[108] ts 220, 22 February 2022.

f) did not attempt to take the commercially prudent approach of conducting a request for tenders to ascertain whether the Replacement Resort Management Agreement or Waydanette was the best option for the strata company;

g) did not seek to review the terms of the Replacement Resort Management Agreement with an experienced and independent lawyer representing the best interests of the strata company, including to verify whether the Replacement Resort Management Agreement complies with the ST Act;

h) did not seek to negotiate the terms of the Replacement Resort Management Agreement to provide for the interest of the strata company or the owners as a whole; and

i) made a decision that it is not in the overall best interests of the owners as a whole.

252 I do not accept the strata company's position. In my view, the 2021 EGM Resolutions were reasonable and in the interests of all of the owners particularly in the context of parties who were seeking for the Agreement to come to an end. The 2021 EGM Resolutions were put forward after much toing and froing between the parties (since 2018) including the engagement of an experienced and independent legal firm, Mahoneys, to draft the caretaking agreement. In my view, the EGM Resolutions do not contravene either s 91(1)(b) or s 119 of the ST Act.

253 The submission is advanced by the strata company that it does not have power to enter into the Replacement Resort Management Agreement with Waydanette. The strata company says it was not expressly constituted to:

a) sign a contract with Waydanette that does not comply with s 145 of the ST Act;

b) grant a 15 year contract extension to Waydanette in circumstances where there are significant breaches of the ST Act and the Agreement;

c) grant a 15 year contract extension for no financial gain to the strata company (including the decision to waive the $300,000 commission for granting the extension); and

d) to grant a 15 year contract extension to Waydanette who has refused the lawful directions of the strata company.

254 This submission is not accepted. First, as set out above at [109] to [133] I have determined that the Agreement is not a 'strata management contract' and that Waydanette is not a strata manager of the strata company. This means, in my view, that the Replacement Resort Management Agreement does not need to comply with s 145 of the ST Act.

255 Second, while I have determined that Waydanette breached s 83 of the ST Act and Sch 1 by-law 1(2)(c) it would not, in my view, prevent the strata company negotiating the terms and entering into a Replacement Resort Management Agreement with Waydanette.

256 Finally, the strata company urges the Tribunal to intervene in the management of the strata company by excusing the strata company from complying with the resolutions passed at the 2021 EGM.

257 To accept the strata company's contention and to intervene to excuse the state company from complying with the resolutions passed at the 2021 EGM, I would need to, following ***Wayde***, conclude that *no* strata company acting reasonably could have made the 2021 EGM Resolutions. I do not accept the strata company's contention. In my view the 2021 EGM Resolutions, in all of the circumstances, were a reasonable course to adopt in the interests of all the owners. In coming to this conclusion, I note that the Agreement contains general provisions about the Resort Manager's duties and the reimbursement and 12% mark-up remuneration which historically has been a cause for much dispute. The most recent draft of the Replacement Resort Management Agreement includes detailed duties schedules which make the Resort Manager's duties clear and a move away from the 12% mark-up remuneration to a fixed annual fee. Further, the draft Replacement Resort Management Agreement requires guarantees from the Directors of the Resort Manger whereas the Agreement does not. In addition, the draft Replacement Resort Management Agreement expressly provides for the Council of the strata company to give directions to the Resort Manager which the Agreement does not.

258 Also relevant in my consideration is that the Council considered the Replacement Resort Management Agreement acceptable apart from a clause which permitted (but did not require or was not obligatory for) the Resort Manager to operate from the reception and office from Lot 1. In my view, a strata company acting reasonably could have included such a clause in a negotiated Replacement Resort Management Agreement.

259 It is also relevant, in my view, that the Agreement is due to expire on 4 March 2023. The draft Replacement Resort Management Agreement is drafted to expire on the same date unless it is assigned to a new Resort Manager acceptable to the strata company. Again, in my view, a strata company acting reasonably, could have entered into the Replacement Resort Management Agreement with this term and thereby bringing the Agreement, which historically has caused much dispute between the strata company and Waydanette, to an end and the association between the parties would come to an end on 4 March 2023 or sooner (if assigned).

260 Finally, I am not persuaded that Waydanette is unsuitable to be the Resort Manager for the Resort. In coming to this conclusion, I have considered the following.

261 Dawn and Royce assert that the Council is acting contrary to the will of the owners and is pursuing a vendetta against Waydanette. Waydanette presented evidence that it as the current Resort Manager and Travis are highly regarded by guests, scoring well on booking and review websites. Further, Waydanette submits that statements made by Ross and Brett of CBV that the strata company relies upon to support its position that Waydanette acts in an unacceptable manner should be given no weight as they did not give evidence in these proceedings.

262 The strata company refutes Dawn's and Royce's assertion submitting that Waydanette communicates with owners in a way that disparages the Council; Waydanette refuses to follow instructions from Council; Waydanette mistreated guests staying at lots not within the letting pool as well as poorly treating people lawfully on common property. The strata company also raised concerns about 'fraudulent invoices' and favouring owners in the letting pool.

263 Further, the strata company submits that Royce's and Dawn's evidence lacks credibility. However, in my view, on the whole, I found

that Royce and Dawn gave considered evidence and adequately answered questions put to them in a reflective and measured manner.

264 The strata company sought to rely on statements made by Ross and Brett of CBV in support of a number of the concerns raised. Neither Ross nor Brett gave evidence and none of the witnesses for the strata company gave evidence on any of the incidents as put forward by Ross and Brett and relied on by the strata company. Because of that, I afford no weight to that evidence.

265 Both Neil and Sashi gave evidence that guests complained about Waydanette. I did not find either Neil or Sashi for the strata company to be forthright or compelling witnesses. For example, Neil suggested that Waydanette 'harasses and intimidates guests' but in cross-examination, was not able to give any first-hand evidence in support of his assertion. Neil and Sashi gave inconsistent evidence that they had been informed by a guest that they were told to clean the barbeque after use. Neil said it was Royce. Sashi said it was Dawn.[109]

266 Barbara, also for the strata company, in explaining why she had resigned from the Council (having been elected in 2020) singled out Neil and Sashi and stated, inter alia, that the Council's attention was focused on Waydanette and not the Resort and that the Council was caught up with issues from years ago that needed to be resolved so that they could move forward and that the Council was often hostile, unfriendly and resistant to all proposals put forward by Waydanette. I found Barbara to be a compelling witness. When Barbara's statements were put to Neil and Sashi they had no reasoned response.[110] Neither Neil nor Shashi accepted that they had waged a vendetta against Waydanette.[111] However, Neil conceded that Waydanette is 'probably sick and tired of this whole situation'.[112]

267 In my view, in consideration of all the evidence before me, I conclude that this is not a case for the Tribunal to intervene in the management of the strata company. Further, in my view, the strata company has not established that the decisions under challenge, being the resolutions passed at the 2021 EGM, are such that *no* strata company acting reasonably could have made them. Therefore, in my view, the strata company cannot be excused from complying with the

[109] ts 174 and ts 232, 22 February 2022.
[110] ts 193-194, ts 223, 247 and ts 310-311, 22 and 23 February 2022.
[111] ts 198 and ts 247, 22 February 2022.
[112] ts 221, 22 February 2022.

2021 EGM Resolutions either by application of s 91(1)(b) and/or by application of s 119 of the ST Act.

268 In conclusion, in my view, in respect of the Tertiary Proceeding it is appropriate to make a declaration under s 199(3)(d) of ST Act that the 2021 EGM Resolutions of the strata company are *not* invalid. Further, it is appropriate, in my view, to make an order under s 200(2)(l) of the ST Act that the strata company shall forthwith, in the performance or exercise of its functions, enter into the Replacement Resort Management Agreement and the Collateral Deed (as defined in the meeting Agenda for the 2021 EGM[113] with Waydanette. Finally, it is not necessary for me to consider dismissing the Primary Proceeding as sought by Waydanette in its application, as I have dealt with the Primary Proceeding (see above at [109] to [133]).

Conclusion and orders

269 In summary, reflecting back on the orders sought by the respective applicants (refer above at [14] to [16]), and the findings reached in respect of the 12 issues before me, I make the following declarations and orders.

Orders

CC 1008 of 2021

The Tribunal orders:

1. The application is dismissed. For avoidance of doubt the Resort Management Agreement between the applicant (strata company) and the respondent (Waydanette Pty Ltd) did not cease to have effect on 2 November 2020 by operation of Sch 5, cl 13(3) of the *Strata Titles Act 1985* (WA).

CC 1481 of 2021

The Tribunal declares:

1. Pursuant to s 199(3)(a) of the *Strata Titles Act 1985* (WA) the first respondent (Waydanette Pty Ltd) has contravened:

[113] EB at page 799.

(a) Section 83 of the *Strata Titles Act 1985* (WA); and

(b) Schedule 1 by-law 1(2)(c).

2. Pursuant to s 199(3)(a) of the *Strata Titles Act 1985* (WA) the second respondent (Travis Herbert) has contravened:

(a) Section 83 of the *Strata Titles Act 1985* (WA); and

(b) Schedule 1 by-law 1(2)(a).

3. Pursuant to s 199(3)(a) of the *Strata Titles Act 1985* (WA) the first respondent (Waydanette Pty Ltd) has *not* contravened:

(a) Schedule 1 by-law 1(2)(a) and Sch 2 by-law 2.

4. Pursuant to s 199(3)(a) of the *Strata Titles Act 1985* (WA) the second respondent (Travis Herbert) has *not* contravened:

(a) Schedule 1 by-law 1(2)(c) and Sch 2 by-law 2.

The Tribunal orders:

5. Pursuant to s 47(5)(b) and s 47(5)(c) and s 200(2)(m) of the *Strata Titles Act 1985* (WA) the first respondent (Waydanette Pty Ltd) shall comply with Sch 1 by-law 1(2)(c) and s 83 of the *Strata Titles Act 1985* (WA) and take the following action to prevent further contravention of the *Strata Titles Act 1985* (WA) and scheme by-laws:

(a) the first respondent (Waydanette Pty Ltd) shall take all reasonable steps to ensure that its visitors do not behave in a manner likely to interfere with the peaceful enjoyment of the proprietor, occupier or other resident of another lot or of any person lawfully using common property.

6. Pursuant to s 47(5)(b) and s 47(5)(c) and s 200(2)(m) of the *Strata Titles Act 1985* (WA) the second respondent

(Travis Herbert) shall comply with Sch 1 by-law 1(2)(a) and s 83 of the *Strata Titles Act 1985* (WA) and take the following action to prevent further contravention of the *Strata Titles Act 1985* (WA) and scheme by-laws:

(a) the second respondent (Travis Herbert) shall use and enjoy the common property in such manner as not unreasonably to interfere with the use and enjoyment by other proprietors, occupiers or residents, or their visitors.

7. The application is otherwise dismissed.

CC 1528 of 2021

The Tribunal declares:

1. Pursuant to s 199(3)(d) of the *Strata Titles Act 1985* (WA) all of the resolutions of the 8 September 2021 Extraordinary General Meeting of the strata company are *not* invalid.

The Tribunal orders:

2. Pursuant to s 200(2)(l) of the *Strata Titles Act 1985* (WA) the respondent (strata company) shall take the following action in the performance or exercise of its functions:

(a) The respondent (strata company) shall forthwith enter into the Replacement Resort Management Agreement and Collateral Deed (as defined in the meeting Agenda for the Extraordinary General Meeting held on 8 September 2021) with the applicant (Waydanette Pty Ltd).

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

MS R PETRUCCI, MEMBER

27 JUNE 2022