
JURISDICTION : STATE ADMINISTRATIVE TRIBUNAL

ACT : STRATA TITLES ACT 1985 (WA)

CITATION : VAN RENSBURG and OWNERS OF OCEAN
MARINA POINTE STRATA PLAN 45077 [2023]
WASAT 94

MEMBER : MS R PETRUCCI, MEMBER

HEARD : DETERMINED ON THE DOCUMENTS (LAST
SUBMISSION FILED 10 JULY 2023)

DELIVERED : 2 OCTOBER 2023

FILE NO/S : CC 1228 of 2022

BETWEEN : GIDEON VAN RENSBURG
Applicant

AND

OWNERS OF OCEAN MARINA POINTE STRATA
PLAN 45077
First Respondent

CRASON HOLDINGS PTY LTD
Second Respondent

FILE NO/S : CC 1857 of 2022

BETWEEN : CRASON HOLDINGS PTY LTD
Applicant

AND

GIDEON VAN RENSBURG
Respondent

Catchwords:

Strata Titles Act 1985 (WA) - Common property - General duty of strata company to control and manage the common property for the benefit of all owners - Resolution of scheme dispute - Tribunal proceedings - Discretion of Tribunal to make orders - Declaratory relief - Turns on own facts

Legislation:

State Administrative Tribunal Act 2004 (WA), s 51(1), s 60(2)

State Administrative Tribunal Rules 2004 (WA), r 42A

Strata Titles (General) Regulations 2019 (WA), reg 83

Strata Titles Act 1985 (WA), s 3, s 10, s 10(1), s 13(7), s 43, s 44(1), s 45, s 48, s 63, s 63(1), s 63(2), s 63(7), s 91(1), s 91(1)(b), s 91(2), s 104, s 104(1), s 104(1)(b)(ii), s 105, s 107, s 109, s 109(6)(c), s 197, s 197(1)(a)(ii), s 197(2), s 197(2)(a), s 197(4), s 199, s 199(1), s 199(3)(d), s 200, s 200(1), s 200(2)(m), s 200(2)(n), s 200(7), s 202, s 209, Sch 1, Sch 5, cl 2(1), cl 4(1), cl 4(2), cl 30(1), Pt 13

Strata Titles Act 1985 (WA) (prior to 1 May 2020) (repealed), s 81(7), s 85, s 94, Sch 1, Sch 2

Strata Titles Amendment Act 2018 (WA)

Town Planning and Development Act 1928 (WA) (repealed)

Result:

CC 1228 of 2022 - application dismissed

CC 1857 of 2022 - order made for an exclusive use by-law

Category: B

Representation:

CC 1228 of 2022

Counsel:

Applicant : N/A

First Respondent : N/A

Second Respondent : N/A

Solicitors:

Applicant : N/A
First Respondent : Lewis Kitson Lawyers
Second Respondent : N/A

CC 1857 of 2022

Counsel:

Applicant : N/A
Respondent : N/A

Solicitors:

Applicant : Williams and Hughes
Respondent : N/A

Cases referred to in decision(s):

Adder Holdings Pty Ltd and The Owners of Harbour Pines Strata Plan 23297
[2022] WASAT 120
Arasi & Anor and The Owners of Beverley Court [2005] WASAT 197
Aussie Airlines Pty Ltd v Australian Airlines Ltd and Others (1996) 68 FCR 406
Banning and The Owners of Terrace Place Strata Plan 9704 [2019] WASAT 89
Maber & Anor and The Owners of Strata Plan 11391 [2007] WASAT 99
Pitsikas and Grimes [2009] WASAT 80
Robinson and Stevens [2009] WASAT 207
Singh and UnitingCare West [2022] WASAT 18
The Owners of 25, 27, 29, 31 Parry Street Fremantle Strata Plan 6413 And
Efficient Building Team Pty Ltd [2023] WASAT 3
The Owners of Ellement 996 Strata Plan 53042 and Tobias [2022] WASAT 49
Wong v Reid [2016] WASC 59

REASONS FOR DECISION OF THE TRIBUNAL:

Introduction

1 On 24 May 2004, strata plan 45077 was registered (**strata plan**) pursuant to the *Strata Titles Act 1985* (WA) (**ST Act**) and the strata scheme known as 'Ocean Marina Pointe' was created. The strata scheme is a 38-lot scheme in the City of Mandurah comprising five commercial units and thirty three residential apartments.

2 The strata scheme is the setting for the two separate proceedings before the Tribunal.

3 Mr Gideon van Rensburg is the applicant in matter CC 1228 of 2022 (**First Proceeding**). Mr van Rensburg is the owner of Lot 9 on the strata plan (**Lot 9**). The first respondent in the First Proceeding is The Owners of Ocean Marina Points strata plan 45077, which is the strata company for the strata scheme (**strata company**). Crason Holdings Pty Ltd (**Crason Holdings**) is the second respondent in the First Proceeding. Crason Holdings is the owner of Lot 34 on the strata plan (**Lot 34**).

4 Crason Holdings is the applicant in matter CC 1857 of 2022 (**Second Proceeding**). Mr van Rensburg is the respondent in the Second Proceeding.

5 The respective applicants commenced proceedings in the Tribunal under s 197(4) of the ST Act for the resolution of a scheme dispute.

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

7 In very broad terms, the First Proceeding concerns whether the strata company failed to comply with a number of its duties under the ST Act and thereby contravened various sections of the ST Act and Sch 1 by-law 4(1) which requires a meeting of the council to have a quorum present.

8 The Second Proceeding broadly concerns whether two air-conditioning condenser units and associated surface conduit are permitted to remain in their current position in the carpark of the strata scheme.

9 On 24 February 2023, the Tribunal made orders, inter alia, that pursuant to s 51(1) of the *State Administrative Tribunal Act 2004* (WA) (**SAT Act**), the two 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 proceeding.

10 On 28 April 2023, in matter CC 1857 of 2022, the Tribunal made orders that pursuant to s 60(2) of the SAT Act the matter would be determined on the documents. Similarly, on 9 May 2023, in matter CC 1228 of 2022, the Tribunal made orders that pursuant to s 60(2) of the SAT Act the matter would be determined on the documents.

11 For the reasons which follow, the application in the First Proceeding is unsuccessful and is dismissed and the application in the Second Proceeding is successful and an order made for an exclusive use by-law for Crason Holdings in respect of the air-conditioning condenser units on the common property of the strata scheme.

Orders sought

12 It is convenient to start by setting out the orders sought by the respective applicants in the proceedings.

13 In the First Proceeding, Mr van Rensburg, as the applicant, seeks an order requiring:¹

- (1) The owner of Lot 34 (Crason Holdings) to remove alterations to the common property made without being approved by a resolution without dissent and to reinstate the common property to its original condition.

14 Further, in the First Proceeding, Mr van Rensburg seeks declarations that:²

- (1) The strata company contravened s 91(1)(b) of the ST Act when it failed to take action against an owner erecting structures onto the common property without consent from the co-owners of that common property;
- (2) The strata company contravened Sch 1 by-law 4(1) due to the council not taking decisions at a meeting of the council at which a quorum is present;

¹ Witness Statement of Mr van Rensburg dated 1 May 2023 and Order 1 of the orders made by the Tribunal on 21 March 2023.

² Ibid.

- (3) The strata company contravened at least s 104(1)(b)(ii) by not making and keeping records of all council decisions; and
- (4) The strata company contravened s 109 by not fully complying with a s 107 application.

15 The position of the strata company in relation to the First Proceeding is that it does not wish to take an active position in relation to the order sought by Mr van Rensburg but will simply abide by the decision made by the Tribunal.³ In respect of the four declarations sought in the First Proceeding, the position of the strata company in short is that the substantive merits of the application do not warrant the Tribunal making any of the declarations sought by Mr van Rensburg.

16 In short, the position of Crason Holdings in relation to the First Proceeding is that it should be dismissed.

17 In the Second Proceeding, Crason Holdings, as the applicant, seeks orders that:⁴

- (1) The owner of Lot 34 (Crason Holdings) be entitled to exclusive use over a portion of the carpark common walls of the basement for Crason Holdings' air-conditioning condensers, wiring and conduit through the common property wall being those portions shown in the four photos [...]. For the avoidance of doubt, the owner of Lot 34 is responsible for the maintenance, repair and upkeep of the air-conditioning units, wiring and conduit to the quality and standards required by the council of the strata company from time to time. For clarity, this order is in relation to the position of two (2) air-conditioning condenser units servicing Lot 34 and all surface conduit for these units.
- (2) An order under s 200 of the ST Act arising under s 197(4) of the ST Act to approve the position of the said two (2) air-conditioning units.
- (3) Mr van Rensburg pay Crason Holdings costs of this application on a full indemnity basis.

18 In short, the position of Mr van Rensburg in relation to the Second Proceeding is that even if the Tribunal approves the position of the right-

³ Strata company's submissions filed with the Tribunal on 5 July 2023 at para 82.

⁴ Crason Holdings' further amended application dated 27 April 2023 and Orders 1 and 2 of the orders made by the Tribunal on 28 April 2023.

hand side air-conditioning condenser where it is now located, the owner of Lot 34, Crason Holdings, would still not have approval for the remainder of the installation, including the left-hand side condenser, the conduits, wiring and tubing. Further, Mr van Rensburg asserts that he is willing to give consent if changes are made in order to minimize the impact that the air-conditioning condensers have on the common property. However, Crason Holdings has failed to show that any alternative installation which reduces the impact on the common property would make Lot 34 'incapable of reasonable use and enjoyment'.

- 19 I will now set out the key issues to be determined in each of the two proceedings, followed by the legal framework relevant to these proceedings by reference to the relevant regulatory framework, and then I will then make relevant findings of fact. Finally, I will address each of the issues for determination in turn.

Issues

- 20 The key issues for determination in the two proceedings are:

- Issue 1:** Does the Tribunal have jurisdiction? If 'yes' what are the 'scheme disputes'?
- Issue 2:** Whether the air-conditioning condenser units and associated surface conduits are on the common property?
- Issue 3:** Whether the utility service easement (s 63 of the ST Act) applies?
- Issue 4:** Whether the strata company gave the necessary approval?
- Issue 5:** Whether the Tribunal should exercise its discretion to make the orders sought?
- Issue 6:** Whether the strata company contravened s 91(1)(b) of the ST Act?
- Issue 7:** Whether the strata company contravened Sch 1 by-law 4(1)?
- Issue 8:** Whether the strata company contravened s 104(1)(b)(ii) of the ST Act?

Issue 9: Whether the strata company contravened s 109 of the ST Act?

Issue 10: Whether the Tribunal should exercise its discretion to make the declarations sought?

Issue 11: Whether the Tribunal should exercise its discretion to make an order for costs?

21 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

Strata plan

22 On 8 November 2001, a memorial (by Instrument H920933) pursuant to the *Town Planning and Development Act 1928* (WA) (repealed) was registered by the Registrar of Titles.

23 On 19 November 2001, a notification (by Instrument H930727) containing factors affecting the land was registered by the Registrar of Titles. A further notification (by Instrument I387404) was registered by the Registrar of Titles on 18 February 2003.

24 On 24 May 2004, the Registrar of Titles registered the Management Statement (by instrument I888856) to have effect upon registration of the strata plan. On the same date, strata plan 45077 was registered by the Registrar of Titles.

25 On 12 July 2004, a notification (by Instrument I950541) to change the by-laws was registered by the Registrar of Titles.

26 Finally, a notification (by instrument L767088) was provided for a further change to the by-laws. The notification was registered by the Registrar of Titles on 25 October 2011.

27 The strata complex is described on the strata plan as:

Thirty Eight concrete and metal constructed commercial and residential development situated on Lot 6 on deposited plan 28809(4) [...].

ST Act

28 Major amendments to the ST Act came into operation on 1 May 2020 under the *Strata Titles Amendment Act 2018* (WA) (**ST Amendment Act**). However, the coming into operation of the ST Act does not affect the continued existence of the strata scheme, a lot or common property or the strata company, its council, or its officers, amongst other things (Sch 5 cl 2(1) of the ST Act). Further, the scheme by-laws as in force immediately before 1 May 2020 continue in force (apart from certain listed by-laws which are not relevant for these proceedings), subject to the ST Act as scheme by-laws as if they had been made as governance by-laws or as conduct by-laws according to the classification into which they would fall if they had been made on 1 May 2020 (Sch 5 cl 4(1) and cl 4(2) of the ST Act).

29 Both applicants filed their respective application with the Tribunal after 1 May 2020. This means that the provisions of the ST Act, as they are after the amendments, apply to the determination of the applications before the Tribunal (Sch 5 cl 30(1) of the ST Act).

Common Property

30 Common property is property that is jointly owned by all owners in the strata title scheme as tenants in common and is not contained within any lot. The term common property is defined in s 10 of the ST Act as:

- (1) The ***common property*** in a strata titles scheme is —
 - (a) that part of the parcel of land subdivided by the strata titles scheme that does not form part of a lot in the strata titles scheme[.]
- (2) The ***common property*** includes, for a strata scheme, those parts of a scheme building that do not form part of a lot[.]

Scheme by-laws

31 Scheme by-laws are the rules the strata company, owners and occupiers must abide by. This is provided for in s 45 of the ST Act.

32 Importantly, in respect of by-laws, the by-laws as they applied immediately before commencement day (1 May 2020) continue to apply as provided for by Sch 5 cl 4(1) and (2) of the ST Act as follows:

4. Scheme by-laws

- (1) The by-laws (including any management statement) of a strata company as in force immediately before commencement day continue in force, subject to this Act, as scheme by-laws and if they had been made as governance by-laws or as conduct by-laws according to the classification into which they would fall if they had been made on commencement day.
- (2) However, all by-laws that are in force immediately before commencement day in the terms set out in Schedule 1 clauses 11 to 15, or Schedule 2 clause 5, as then in force are taken to be repealed on commencement day.

33 In summary, the current by-laws of the strata scheme comprise:

- (a) Schedule 1 of the ST Act (as it was prior to 1 May 2020) by-laws excluding by-laws 11 to 15 and as amended by the Management Statement (the addition of by-laws 16 to 44) and further amended by notification (by Instrument 950541) in relation to by-law 32, 41 and 42 and further amended by notification (by Instrument L767088) in relation to by-law 41; and
- (b) Schedule 2 of the ST Act (as it was prior to 1 May 2020) by-laws excluding by-laws 2 to 5 and as amended by the Management Statement (the repeal of by-laws 1, 7(b) and 12(c) and the addition of by-laws 15 to 24) and further amended by notification (by Instrument 950541) to repeal of by-law 20(a) and amend by-law 20 (together the by-laws).

34 Of relevance to these proceedings is Sch 1 by-law 4(1) of the ST Act which provides:

The powers and duties of the strata company must, subject to any restriction imposed or direction given at a general meeting, be exercised and performed by the council of the strata company and a meeting of the council at which a quorum is present is competent to exercise all or any of the authorities, functions or powers of the council.

35 The strata company may, by resolution of the strata company, make governance by-laws or conduct by-laws for the strata scheme including by-laws that amend or repeal the by-laws it is taken to have made on registration of the strata scheme (s 44(1) of the ST Act). The resolution to make by-laws must be:

- (a) for governance by-laws - a resolution without dissent; and

- (b) for conduct by-laws - a special resolution.

36 Section 43 of the ST Act deals with exclusive use by-laws.
The section provides as follows:

Exclusive use by-laws

- (1) ***Exclusive use by laws*** of a strata titles scheme are scheme by laws that confer exclusive use and enjoyment of, or special privileges over, the common property in the strata titles scheme or specified common property in the strata titles scheme (the ***special common property***) on the occupiers, for the time being, of a specified lot or lots in the strata titles scheme (the ***special lots***).
- (2) Exclusive use by laws may include the following —
 - (a) terms and conditions on which the occupiers of special lots may use the special common property;
 - (b) particulars relating to access to the special common property and the provision and keeping of any key necessary;
 - (c) particulars of the hours during which the special common property may be used;
 - (d) provisions relating to the condition, maintenance, repair, renewal or replacement of the special common property;
 - (e) provisions relating to insurance of the special common property to be maintained by the owners of special lots;
 - (f) matters relating to the determination of amounts payable to the strata company by the owners of special lots and the imposition and collection of the amounts.
- (3) Subject to the terms of exclusive use by laws, the obligations that would, apart from this subsection, fall on the strata company under section 91(1)(c) in relation to the special common property fall instead on the owners of the special lots.
- (4) An amount payable by a person to a strata company under exclusive use by laws must be paid (together with interest on any outstanding amount) and may be recovered by the strata company, as if the amount payable were an unpaid contribution levied on the person as a member of the strata company.
- (5) Exclusive use by laws can only be made, amended or repealed if the owner of each lot that is or is proposed to be a special lot has given written consent to the by-laws.

General duty and functions of the strata company

37 It is the general duty of the strata company to control and manage the common property for the benefit of all the owners. This is provided for in s 91(1)(b) of the ST Act.

38 Section 91(2) of the ST Act provides that a strata company may improve or alter the common property in a manner that goes beyond what is required under s 91(1) of the ST Act.

39 Section 104(1) of the ST Act requires the strata company as one of its functions to keep a copy of 'scheme documents' for the period fixed by the *Strata Titles (General) Regulations 2019* (WA) (**Regulations**).

40 Section 109 of the ST Act deals with the function regarding inspections of materials, the roll and other documents in the possession or control of the strata company.

Resolution of scheme dispute

41 Section 197 of the ST Act 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).

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

(a) the strata company for the strata titles scheme;

...

(d) a member of the strata company for the strata titles scheme;

...

43 Both the strata company and a member of the strata company (the owner of a lot) are 'scheme participants' as that term is defined in s 197(2) of the ST Act.

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

Tribunal proceedings

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

46 In proceedings under the ST Act, the Tribunal *may* make any order it considers appropriate to resolve the dispute or proceeding (s 200(1) of the ST Act). The types of orders that the Tribunal may make are set out in s 200 of the ST Act and include, for example, an order under s 200(2)(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).

47 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).

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

Principles to be applied in granting declaratory relief

49 The Tribunal in *Adder Holdings Pty Ltd and The Owners of Harbour Pines Strata Plan 23297* [2022] WASAT 120, summarised the rules for granting declaratory relief espoused by Lockhard J in *Aussie Airlines Pty Ltd v Australian Airlines Ltd and Others* (1996) 68 FCR 406 at 415, as follows:

- The proceeding must involve the determination of a question that is not abstract or hypothetical. There must be a real question involved, and the declaratory relief must be directed to the determination of legal controversies ... The answer to that question must produce some real consequences for the parties.
- The applicant for declaratory relief will not have sufficient status if relief is 'claimed in relation to circumstances that [have] not occurred and might never happen' or if the Tribunal's declaration will produce no foreseeable consequences to the parties.
- The party seeking declaratory relief must have a real interest to raise it.

- Generally there must be a proper contradictor.

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

Factual background

51 The key facts are uncontroversial. I make the following findings of fact.

- (a) Mr van Rensburg is the owner of Lot 9 on the strata plan.
- (b) Crason Holdings is the owner of Lot 34 on the strata plan.
- (c) In or about late May 2022, the owner of Lot 15 on the strata plan asked Crason Holdings to relocate an air-conditioner condenser unit in the carpark servicing Lot 34 as it was discharging air and dust onto the owner of Lot 15's vehicle.
- (d) All Fire and Electrical WA Pty Ltd (**AFEWA**) advised Crason Holdings to relocate the condenser to its current position on the rear wall of the carpark being a 'more suitable and appropriate location'.⁵
- (e) The council approved the relocation of the condenser in or about late June to mid-July 2022.
- (f) AFEWA completed the relocation of the condenser to its current position on the rear wall of the carpark by mid-July 2022.
- (g) AFEWA was not involved in the existing position of two other air-conditioning condensers in the carpark of the strata complex which had been in there for a number of years.
- (h) AFEWA's view is that the surface conduit in the present location is consistent with the aesthetics and use of the area as a car park.
- (i) On 5 September 2022 Mr van Rensburg filed his application with the Tribunal. The reason for application, according to Mr van Rensburg is because the strata company failed to take any steps 'remedy the transgression by Crason Holdings'.
- (j) By letter of 2 November 2022, the strata manager issued a Notice of proposed resolution outside of a general meeting (**notice**). Attached to the notice was a voting slip to allow members of the

⁵ Witness Statement of Jayden Hunting of AFEWA dated 3 May 2023 at para 3.

strata company to vote by way of circular resolution during the period 17 November 2022 to 14 December 2022 on the following proposed resolution (**proposed resolution**):

The Owner of Lot 34 on Strata Plan 45077 seeks exclusive use of several areas of common property.

The owner of Lot 34 seeks exclusive use cover over:

A portion of the carpark common walls of the basement for their air conditioning condensers, wiring and conduit through the common property wall being those portions shown on the photos attached. For avoidance of doubt, the Owner of Lot 34 is responsible for the maintenance, repair and upkeep of the air-conditioning units, wiring and conduit to the quality and standards required by the council of the strata company from time to time.

- (k) Mr van Rensburg and one other owner voted against the proposed resolution.
- (l) On 16 December 2022 Crason Holdings filed its application with the Tribunal. The reason for the application, according to Crason Holdings is because Mr van Rensburg's 'objections are unreasonable and the location on the common property is the only viable location to place the air-conditioning condenser and infrastructure'.

52 Following is a summary of the position put forward by each of Mr van Rensburg, Crason Holdings and the strata company. Following those summaries, a summary of the relevant points from the witness statement filed by Mr David Leslie Newton and Ms Elenore Clare Logiudice are provided.

Mr van Rensburg's position

53 Mr van Rensburg's position may be summarised as follows:

- (a) Crason Holdings attached two air-conditioning condensers and a large amount of conduits, wiring and tubing (with much of the conduits and wiring not relating to the air-conditioning) to the common property without consent from all the owners. A resolution without dissent was required as the structures were not for the benefit of all the owners. The council does not have the authority to approve such alterations to the common property.

- (b) Following the filing of his application with the Tribunal, on 2 November 2022 the notice issued to the owners asking them to vote on a proposed new exclusive-use by-law be added to the scheme by-laws. He made it clear that he would consent to the installation on the common property *if* changes were made to the existing installation in order to minimize the impact that the installation has on the common property, but that he would not consent to the installation in the present form.
- (c) In an email to Mr Michael Brown, director of Crason Holdings, dated 14 December 2022, he stated in part:

To repeat what I have said in the Directions Hearings [before the Tribunal], I am not against you (or any commercial unit) having air-con, and accept that it would have an impact on the common property. However, your installation is excessive and does not minimize the impact your installation has on the property belonging to others, including myself.
- (d) The ST Act currently does not include any specific provisions that allow the Tribunal to approve alterations to the common property that were not consented to by means of a resolution without dissent. The ST Act prior to 1 May 2020 did include such specific provisions in the form of s 85 and s 94 (now repealed). The former s 85 empowered the Tribunal to make an order that a strata company consent to a proposal to effect, relevantly, alterations to the common property, where the Tribunal considers that the strata company has unreasonably refused to consent to the proposal by the proprietor concerned to effect such alterations. Former s 85 is limited to a proposal, that is prior approval, in which case the Tribunal must be confident that consent was unreasonably refused. Former s 94 empowered the Tribunal to order that a proprietor (owner) may use specified common property but is precluded from making such an order unless satisfied that the lot is incapable of reasonable use and enjoyment...unless the order is made.
- (e) In the present case, Crason Holdings must show that Lot 34 is incapable of reasonable use enjoyment. It has not.
- (f) His decision to cast a dissenting vote to the proposed exclusive-use by-law by Crason Holdings was not arbitrary and hence not unreasonable. When considering the reasonableness

of his refusal, consideration should also be had to the reasonableness of Crason Holdings' conduct.

- (g) The owners were not asked to vote on the *position* of the condenser. He did not cast a vote relating to the *position* of the condenser. He has not disputed the position of the condenser. However, it appears the council disputed the positioning of the condenser.
- (h) The strata manager in an email dated 31 May 2022 to the council stated she had a telephone discussion with Mr Brown of Crason Holdings about the condenser and told him *not* to proceed without approval by all the owners and an exclusive use by-law.
- (i) AFEWA merely executed instructions from Crason Holdings. AFEWA did not consider any alternatives such as multi-split level air-conditioning systems or deducted systems.
- (j) The existence of pipes and conduits for the benefit of all owners in the carpark common area does not make the carpark a 'free for all'.
- (k) None of the other commercial lots have approval from the strata company for their air-conditioning condensers on the common property.
- (l) The strata company is in contravention of its non-discretionary duty under s 91(1)(b) of the ST Act when the council:
 - (i) approved the erection of structures on the common property when it had no authority to do so; and
 - (ii) failed to take action against owners erecting structures on the common property without consent from the co-owners of that common property.
- (m) The council's minutes of proposed orders at item 2, filed with the Tribunal on 15 March 2023, acknowledges the council had no authority to approve the installation of structures on the common property by the owner of Lot 34.
- (n) The council retrospectively approved the structures on common property by the owner of Lot 34 without having the authority to do so and relied on other unapproved installation of structures on common property as 'precedence' to do so. Crason Holdings is

similarly relying on the existence of other unapproved structures on common property to justify it ignoring the requirement to obtain prior approval from the other co-owners of the common property.

- (o) The council was informed on 11 August 2021 that the alterations to the common property were unauthorised but it took no action to require Crason Holdings to obtain approval from all the owners and/or order for the removal of unauthorised alterations to the common property. The only action taken by the council was the issue of the notice.
- (p) The council cannot ignore or override his dissenting vote. Doing so is in direct conflict with the principle that owners must collectively consent to alterations to the common property before the alteration may occur.
- (q) The council rarely meets and most decisions are made through an exchange of emails. Decisions not made at a meeting of the council do *not* appear in the minutes of the meeting and any decision made outside a meeting of the council at which a quorum is present are arguably invalid due to non-compliance with Sch 1 by-law 4(1).
- (r) Since the August 2021 AGM, various decisions including approval of structural alterations to common property and/or to lots have been made outside a meeting of the council and there is no record made and kept of those decisions contrary to s 104(1)(b)(ii) of the ST Act.
- (s) The council had not fully complied with his request to inspect documents and is therefore in contravention of s 109 of the ST Act.
- (t) The council's actions or inactions are in contravention of the ST Act. Those contraventions affect his rights as an owner and those of the other owners.
- (u) The declarations he seeks from the Tribunal will not remedy the contraventions by the council in relation to the past as some records are lost forever or would require an enormous amount of effort to go through past emails to extract the relevant council decisions. However, the declaration should bring about compliance by the council with the ST Act going forward.

- (v) If the Tribunal does not make the declarations he seeks that would give the council permission to continue contravening the ST Act and allow the scheme dispute to remain unresolved.

Crason Holdings' position

54 Crason Holdings' position may be summarised as follows:

- (a) Lot 34 is serviced by three air-conditioning condensers as follows:
 - (i) Condenser No 1 has been in place since 2004 which was when the strata complex was completed.
 - (ii) Condenser No 2 has been in place since August 2021 with the prior approval of the council.
 - (iii) Condenser No 3 had been in place for about 10 years but was relocated in May 2022 when the owner of Lot 15 brought to their attention that condenser No 3 was discharging air and dust onto the owner of Lot 15's vehicle.
- (b) The three air-conditioning condensers are attached to the rear wall of Lot 34. Condensers 1 and 2 support one commercial tenancy and the other condenser supports the other commercial tenancy.
- (c) There are five commercial tenancies on the ground floor of the strata scheme with 11 air-conditioning condensers supporting air-conditioning along with cabling and conduits which have been in place since the strata complex was completed in 2004.
- (d) The notice was in effect to seek approval of the *position* of the condenser.
- (e) AFEWA oversee all electrical work and fire safety for the strata complex.
- (f) AFEWA advised about the position of the condenser in terms of optimum placement, conduit positioning and fire safety. The council accepted the advice of AFEWA.

- (g) AFEWA advised that the position of the condenser and the condenser installed in 2021 is the most appropriate and only practical position.
- (h) The strata manager and the council followed proper process in order to approve the position of the condenser in August 2021. There is no evidence before the Tribunal that the process was not in accordance with the ST Act.
- (i) An amendment to the by-laws is not sought. To the extent such an amendment was proposed in the notice issued by the strata manager was in error.
- (j) What they seek is approval from the Tribunal of the *location* of the condenser and the location of the other air-conditioning condensers which were approved in 2021.
- (k) Mr van Rensburg's resistance to the placement of the condenser to where it is now located and the use of surface conduit is unreasonable, frivolous and vexatious.

Strata company's position

55 The strata company's position may be summarised as follows:

- (a) The strata company does not wish to take an active position in relation to the order sought by Mr van Rensburg and will simply abide by the decision made by the Tribunal. However, the strata company notes in the matter of *Singh and UnitingCare West* [2022] WASAT 18 (*Singh and UnitingCare*), where the Tribunal held at [85] to [88]:

85. There is case authority to the effect that a resolution without dissent is required for a strata company to erect any structure on the common property. However, the reason why a resolution without dissent was said to be required was because, prior to May 2020, a strata company did not have statutory authority to make alterations or improvements to the common property which went beyond the duty to control and manage the common property.

86. In my view, s 91 of the ST Act gives a strata company statutory authority to deal with the common property in accordance with that section subject to the following: the requirements in s 102 of the ST Act relating to the budget of a strata company, any regulations or scheme

by-laws that require a special resolution, resolution without dissent or unanimous resolution or steps to be taken for expenditure of a particular class; and any restrictions imposed or direction given by ordinary resolution.

...

88. There is nothing in the ST Act which requires that a resolution made in respect of improvements or alterations to the common property, be made by resolution without dissent. Accordingly, having regard to s 133 of the ST Act, such a resolution may be an ordinary resolution.

- (b) The substantive merits of the application with respect to the declarations sought by Mr van Rensburg do not warrant the making of any the declarations sought for the following reasons.

Declaration 1

- (i) A utility service easement exists for the benefit and burden of each lot and the common property to the extent reasonably required for the provision of utility services (including electricity or air service, including air conditioning and heating) to each lot and the common property and entitles the owner of a lot to install utility conduits including pipes, wires, cables and ducts. This is provided for in s 63 of the ST Act and therefore Crason Holdings has the benefit of the statutory easement which allows it to install conduits including pipes, wires, cables and ducts required for the provision of an electricity or air conditioning service.
- (ii) One of the air-conditioning condensers was an existing air-conditioning condenser which was being relocated by Crason Holdings as it had previously been installed incorrectly at or around the time the building was constructed about 18 years ago over Lot 15's car bay.
- (iii) The council initially thought it could approve the installation of an air-conditioning condenser because the installation was similar and in keeping with numerous other air-conditioning installations in the carpark and that it would be unreasonable for the council to decline the

application as there was no alternative location for the air-conditioning condenser unit.

- (iv) The council also understood that the additional air-conditioning was necessary to service the sub-divided spaces within Lot 34 as the subdivided spaces in Lot 34 were approved by the strata company without dissent.
- (v) The council now understands the requirements to obtain the approval for the alterations.
- (vi) The works undertaken by Crason Holdings, or its tenant, to relocate one air-conditioning condenser and to install another air-conditioning condenser do not equate to a failure by the strata company to control and manage the common property for the benefit of all the owners.
- (vii) There is no statutory obligation requiring the strata company to commence legal proceedings against a lot owner each time an unauthorised alteration is discovered and to do so would be impracticable and/or cost prohibitive in many cases.

Declaration 2

- (i) Schedule 1 by-law 4(1) provides that a meeting of the council at which a quorum is present is competent to exercise the authorities, functions, or powers of the council and does not provide that the only way in which the council may communicate or exercise its authorities, functions and powers (or in any way limit the manner in which the council may exercise its authorities, functions or powers). Therefore, if the council has made a valid decision outside of a formal council meeting at which a quorum was present, then this does not constitute a breach of Sch 1 by-law 4(1).
- (ii) The current council adopts and confirms any matters dealt with in email communications at the subsequent council meeting. Further, the current council keeps an 'action list' to record the powers and duties exercised and performed by the council, including matters approved, declined, or put on hold.

- (iii) The use of email communications between council meetings is a matter of practicality and convenience for the council in order to allow for the continual and smooth operation of the strata company.
- (iv) Neither the ST Act nor the scheme by-laws prevent such electronic communication from occurring.
- (v) A number of the decisions which Mr van Rensburg says were made outside of the council meetings (per paragraph 23 of his witness statement) were decisions made by prior councils.
- (vi) There is no utility or practical merit in making a declaration which largely relates to processes of past councils; and particularly where the current council has adjusted its procedures to account for concerns raised by Mr van Rensburg. A declaration would have not productive, real or foreseeable consequences for the parties.

Declaration 3

- (i) All decisions made by the current council are documented in writing, including by email, and copied to the strata manager for the purposes of record keeping. Email correspondence recording decisions made by the council constitute records of the council decisions and therefore there is no breach of s 104(1)(b)(ii) of the ST Act.
- (ii) Notwithstanding Mr van Rensburg in his witness statement states that some of the records are lost forever, he has failed to state which particular records he believes are lost or missing or whether such records ever existed.
- (iii) There is no utility or practical merit in the Tribunal making the declaration sought by Mr van Rensburg; particularly in circumstances where the current council has adjusted its procedures and now adopts and confirms any matters dealt with by the council by email communications at the subsequent council meeting thereby keeping a further record of those decisions in the minutes of the council meetings.

Declaration 4

- (i) There is no section of the ST Act that requires the strata company to have, or make, available for inspection specific documents requested by Mr van Rensburg. All that s 109 of the ST Act requires is that upon receiving a proper application in writing from an applicant under s 107 of the ST Act and on the payment of the prescribed fee (if any), the strata company is required to make available for inspection to that applicant the material kept under s 104 of the ST Act, the roll kept under s 105 of the ST Act and other documents in the possession or control of the strata company as provided in s 109(6)(c) of the ST Act.
- (ii) Mr van Rensburg's application of 31 July 2022 where he emailed the strata manager and stated in part:

This is an application, by myself as an owner of a lot of the subject strata titles scheme, and thus a member of the strata company, for inspection of section 104 material under section 109. To avoid you having to comply with this application due to failure to pay the fee, as you have done in the past even though a fee was never quoted, I have paid into the account used for levies the maximum possible fee. That fee comprises \$1 (regulation 86(1)(b)(i) plus \$50 (regulation 88(1)(c) for the supply of an electronic copy of the material by email.

...

I look forward to receiving the material.

is not a proper or valid application made pursuant to s 107 of the ST Act, but rather a request for the electronic provision of material, which the strata company is not obliged to email to Mr van Rensburg.

- (iii) If Mr van Rensburg wishes to inspect the material, he may do so by making a proper application pursuant to s 107 of the ST Act.
- (iv) If there is merit to the application to warrant the Tribunal making declarations sought by Mr van Rensburg, the declarations produce no productive, real or foreseeable consequences for the parties and therefore the Tribunal

should use its discretion under s 199(1) of the ST Act to decline to make any of the declarations. The reasons for this are:

- a. Mr van Rensburg in his witness statement states that the declarations he seeks:
 - i. do not remedy contraventions of the past;
 - ii. attempt to bring about compliance in the future; and
 - iii. would not guarantee future compliance; and
- b. Mr van Rensburg's comments above (particularly i and iii) confirm that if the Tribunal made such declarations that those declarations would not produce any real or foreseeable consequences for the parties and therefore the declarations should not be made on the basis that:
 - i. the declarations sought by Mr van Rensburg do not remedy contraventions of the past (if any) including contraventions of prior councils or guarantee future compliance including by future councils;
 - ii. by not making the declarations that does not give permission to the strata company (or the council) to contravene the ST Act in future, as the strata company (and council) has a statutory obligation to comply with the ST Act, which statutory obligation is not impacted or affected by the Tribunal making or not making the declarations sought by Mr van Rensburg;
 - iii. the Tribunal (differently constituted) in separate proceedings in 2022 determined that:

1. the strata company is aware of its duties and conscientious to discharge those; and
 2. the strata company and the council acted in good faith; and
 - iv. the current council will continue to act in good faith and use its best endeavours in discharging its duties pursuant to the ST Act.
- c. Mr van Rensburg does not have sufficient status for the declaratory relief he seeks and therefore the Tribunal should use its discretion under s 199(1) of the ST Act to decline to make the four declarations even if the Tribunal is of the view that the substantive merits of the Mr van Rensburg's application with respect to the four declarations warrant the making of the declarations.

David Leslie Newton

56 Mr David Leslie Newton is the owner of lot 28 on the strata plan and is currently the chairman of the council. He filed a witness statement with the Tribunal on 26 May 2023 and a supplementary witness statement on 10 July 2023. Relevantly, Mr Newton stated, in summary:

- (a) On 2 November 2022, the strata manger circulated to all owners a resolution outside of a general meeting to seek the retrospective approval of the air-conditioning condenser unit installed on the common wall.
- (b) The council now refers such requests for approval of structural alterations to a lot or to the common property to the strata company to be voted on.
- (c) Mr Paul Marsh, the owner of Lot 11 and a member of the council informed him:
 - (i) at the commencement of the COVID-19 pandemic, the council cancelled the regular council meetings and all matters were directed to be handled by email

communications due to the social distancing directions and requirements; and

- (ii) Council members quickly realised that council matters and decision making could be handled quickly and efficiently by way of email communications. A copy of all emails relating to decisions made was provided to the strata manager for record keeping.
- (d) Currently the council meetings are held every two to three months and minutes are taken of the business arising from the meeting. In between meetings, the council communicates by circulating emails between the council members and the strata manager. In addition, an 'Actions List' which is a spreadsheet setting out all decisions made, whether they relate to routine or non-routine maintenance decisions is maintained by the council.

Eleanor Clare Logiudice

57 Ms Eleanor Clare Logiudice filed a witness statement with the Tribunal on 26 May 2023. Ms Logiudice is a director of Logiudice Property Group Pty Ltd (**Logiudice Property Group**) which provides strata management services to the strata company. Relevantly Ms Logiudice stated in summary:

- (a) Logiudice Property Group was appointed the strata manager in or about 2004 when the strata complex was handed over by the developer and has been the strata manager since then.
- (b) The notice was not sent out in regards to the resolutions proposed by the council on 2 June 2022 because the owners of Lots 11, 16 and 17 had removed the items.
- (c) On 6 August 2002 she attempted to compile the documents related to the items Mr van Rensburg's was seeking and emailed to him a number of documents. Subsequently, on 20 September 2022, she emailed to Mr van Rensburg further documents that she believed to be relevant to the items he was requesting.
- (d) Mr van Rensburg asserts that she has not provided to him copies of correspondence received and sent with regards to the planter box of Lot 10 and in regards to the cupboards on common property next to Lot 10. It is not the role of the strata manager to

read through the records to find and segregate what Mr van Rensburg is looking for and to provide the same to him.

- (e) There have been changes to the membership of the council over the years and it is only in the last two years that problems have arisen. In her view, the council members have acted diligently and professionally and have tried to manage the strata complex to the best of their ability and to promote harmony between all owners.

58 I now turn to address in turn each of the issues set out above at [20].

Consideration

Does the Tribunal have jurisdiction? What are the 'scheme disputes'?

59 The jurisdiction of the Tribunal was not challenged. In any event, in short, I am satisfied that the Tribunal has jurisdiction under s 197(4) of the ST Act to determine the 'scheme disputes' between the parties.

60 The 'scheme disputes' concern, firstly, the two air-conditioning condenser units and associated surface conduit in the car parking area on of the strata complex, and secondly, whether various alleged actions or inactions by the strata company are contrary to the ST Act including Sch 1 by-law 4(1) such that declarations under s 199 of the ST Act are required to be made by the Tribunal. These are the 'scheme disputes'.

61 Further, I am satisfied the scheme disputes are disputes between scheme participants as that term is defined in s 197(2) of the ST Act. This is because both Mr van Rensburg and Crason Holdings are owners of a lot on the strata plan and are therefore members of the strata company. The other party is the strata company which is listed in s 197(2)(a) of the ST Act as a scheme participant.

62 Finally, I am also satisfied that the Tribunal may make any order declaration it considers appropriate to resolve the scheme disputes. This is provided for in s 200(1) of the ST Act. Under s 200(7) of the ST Act, the order made by the Tribunal may be expressed to remain in force for a specified period, until a specified event or until further order of the Tribunal.

63 Alternatively, under s 199 of the ST Act, the Tribunal may make a declaration concerning a matter in the proceedings instead of any order that the Tribunal can make, or in addition to any order the Tribunal makes, in the proceeding.

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

Whether the air-conditioning condenser units and associated surface conduits are on the common property?

65 It is common ground that the air-conditioning condenser units are located on the walls of the car park which is 'common property' of the strata complex. I respectfully agree. The common property is 'that part of the parcel of subdivided by the strata titles scheme that does not form part of a lot in the strata titles scheme': s 10(1) of the ST Act. In other words, all the co-owners own the common property in proportion to their unit entitlement as reflected on the strata plan.

66 It is also agreed that the air-conditioning condenser units are not the subject of a specific exclusive use scheme by-law for Lot 34 as explained in Crason Holdings' submission (see above at [54]) where upon completion of the complex in 2004, the five commercial tenancies on the ground floor had 11 air-conditioning condenser units installed along with associated cabling and conduits including what it referred to a 'condenser No 1'.

67 The fact that there were no exclusive use by-laws for air-conditioning condenser units in place back in 2004 and there is currently no exclusive use by-laws for the air-conditioning condenser units does not mean what was done in 2004 was authorised by the strata company as required under the ST Act. This is supported by the notice issued by the strata manager (see above at [51(j)]) which set out a proposed resolution to give Crason Holdings exclusive use of several areas of common property for the air-conditioning condenser units and associated wiring and conducts. That resolution was not agreed to by Mr van Rensburg and another member of the strata company which resulted in the Second Proceeding before the Tribunal.

68 Crason Holdings' position that the notice was in effect seeking approval of the *position* of the condenser is misguided. In my view, it is clear that the proposed resolution as set out in the notice was seeking exclusive use of part of the carpark common property, be it the current position, for 'their [Crason Holdings] air-conditioning condensers, wiring and conduit through the common property wall'.

69 While the strata company can make improvements or alterations to the common property as provided for in s 91(2) of the ST Act, the same provision is *not* afforded to owners.

70 I will return to explain why, in my view, the strata company failed to give the necessary approval for the air-conditioning condenser units located on the common property of the strata complex.

71 Although not an issue before the Tribunal in these proceedings, I make the observation that the other commercial tenancies with air-conditioning condenser units on the common property may not be properly authorised, and if that is the case, the strata company in carrying out its general duty to control and manage the common property for the benefit of all owners, as required by s 91(1)(b) of the ST Act, will need to decide what is required to ensure compliance with the ST Act and scheme by-laws.

72 Having concluded that the air-conditioning condenser units and associated wiring and conduits in relation to Lot 34 are on common property I now turn to consider whether the common property utility easement applies in this case.

Whether the utility service easement (s 63 of the ST Act) applies?

73 Crason Holdings seeks an order that as the owner of Lot 34 it is entitled to exclusive use over a portion of the carpark common property for wiring and conduit for the air-conditioning condenser units (**wiring and conduit**).

74 Crason Holdings along with the other parties treated the wiring and conduit as tied to the merits for the application in respect of the air-conditioning condenser units.

75 In my view, the wiring and conduit is incidental to the air-conditioning condenser units, however, it is distinct in nature from the air-conditioning condenser units. Consequently, in my view, it is necessary to consider specific provisions, if any, in the ST Act dealing with that aspect of the scheme dispute.

76 Section 63 of the ST Act provides for utility service easements in strata scheme. Relevantly, s 63 of the ST Act provides:

- (1) An easement (a **utility service easement**) exists for the benefit and burden of each lot and the common property in a strata titles scheme to the extent reasonably required for the provision of utility services to each lot and the common property.
- (2) A utility service easement entitles the strata company, and the owner of a lot, in the strata titles scheme —

- (a) to install and remove utility conduits; and
 - (b) to examine, maintain, repair, modify and replace utility conduits.
- (3) The rights conferred by a utility service easement must be exercised so as to minimise, as far as reasonably practicable, interference with the use and enjoyment of lots and common property in the strata titles scheme.
- (4) A strata company must not interfere or permit interference with utility conduits or a utility service provided by means of utility conduits in a way that may prejudice the use or enjoyment of a lot or the common property, other than —
 - (a) in the reasonable exercise of rights under a utility service easement of which it has the benefit; or
 - (b) in the performance of its function of controlling and managing common property in the scheme.
- (5) An owner or occupier of a lot must not, either within or outside the lot, interfere or permit interference with utility conduits or a utility service provided by means of utility conduits in a way that may prejudice the use or enjoyment of another lot or the common property in the strata titles scheme, other than in the reasonable exercise of rights under a utility service easement.
- (6) A utility service easement has effect even if the lot benefited and the lot burdened have the same owner.
- (7) In any dispute about the location of utility conduits under a utility service easement, the objective must be to resolve the matter fairly taking into account the options that are reasonably available to give effect to the easement.

...

77 The term 'utility conduit' is defined in s 3 of the ST Act to mean a conduit for the provision of a utility service (including pipes, wires, cables and ducts). The term 'utility service' is also defined in s 3 of the ST Act and means, relevantly, electricity service.

78 The strata plan refers to 'all lots and the C.P [common property]' burdened by a memorial registered on 8 November 2001 and two notifications registered on 19 November 2001 and 18 February 2003. Although the Tribunal requested a copy of these instruments, neither was filed with the Tribunal by either of the parties.

79 On the information before the Tribunal, I am satisfied there is a 'utility service easement', the nature and operation of which is clearly defined in s 63(1) and s 63(2) of the ST Act (see above at [76]).

80 I find the wiring and conduit affixed to the common property of the scheme is subject to the utility services easement under s 63 of the ST Act. This means that it is not necessary for a lot owner, in this case Lot 34, to have an exclusive use by-law to have wiring and conduit affixed to the common property. However, that does not mean the wiring and conduit can be affixed wherever the owner chooses. The wiring and conduct must be limited to the extent reasonably required for the provision of utility services to the lot.

81 In resolving any dispute about the location of utility conduits under a utility service easement, the objective must be to resolve the matter fairly taking into account the options that are reasonably available to give effect to the easement. This is provided for in s 63(7) of the ST Act. I will return to whether the Tribunal should exercise its discretion to make the order sought by Mr van Rensburg and the opposite order sought by Crason Holdings later in these reasons.

Whether the strata company gave the necessary approval?

82 While the strata company stated that it did not wish to take an active role in relation to the order sought by Mr van Rensburg (for Crason Holdings to remove alterations to the common property), counsel for the strata company referred me to the decision in ***Singh and UnitingCare***. With respect, in my view, that case does not assist in these proceedings. The reason is because in that case, the Tribunal was considering whether the installation of the bike rails and bollards by the first respondent, UnitingCare West, on the common property fell within the control and management of the common property by the strata company for the benefit of *all* the owners of lots. The Tribunal in that case accepted that the bike rails are used by visitors to the relevant scheme and that such installation was necessary on the grounds of safety and security, amongst other things, for both the owners and visitors to the relevant scheme.

83 It is clear from the orders sought by Crason Holdings in the Second Proceeding that it is seeking exclusive use of part of the common property for the two air-conditioning condenser units already installed on the common property being the carpark (see above at [17]). To support such an order, Crason Holdings puts forward the argument that the location or position of the air-conditioning condenser unit (condenser No 3) is the 'optimum placement, conduit posit[ion]ing and fire safety' and

that in regards to the air-conditioning condenser unit installed in 2021 (condenser No 2) that its location is the 'most appropriate and only practical position'. Unlike in *Singh and UnitingCare* there is no suggestion by Crason Holdings that the positioning of the condensers on the common property is for the strata company to control and manage for the benefit of *all* the owners of the lots such as reasons of occupational health and safety or for reasons of security. In other words, the installation of the air-conditioning condenser units are for the exclusive use of the owner, occupier or tenant of Lot 34 and not for the use or otherwise by the other owners or visitors to the strata complex.

84 There is no evidence before the Tribunal, such as minutes of a meeting of the strata company, where a relevant resolution was passed and/or a copy of an exclusive use by-law registered by Landgate where the strata company gave approval for two or even three air-conditioning condenser units that service Lot 34 and owned by Crason Holdings to be positioned or located on the common property.

85 What is before the Tribunal is the statement made by counsel for the strata company that the 'council now understands the requirements to obtain the approval for the alterations' (see above at [55]) and the statement from Mr Newton that the 'council now refers such requests for approval of structural alterations to a lot or the common property to the strata company to be voted on' (see above at [56]).

86 In my view, Crason Holdings is seeking exclusive use of part of the car park common property for the air-conditioning condenser units. Consequently, it was necessary, in my view, for Crason Holdings to have obtained the necessary approval from the strata company by way of a resolution without dissent before such air-conditioning condenser units were installed, positioned or located on the common property. Such approval was not requested, nor was such approval given by the strata company, even with the recent notice, when Mr van Rensburg and one other owner voted against the proposed resolution (as set out above at [51(j)]).

87 As I stated in *The Owners of 25, 27, 29, 31 Parry Street Fremantle Strata Plan 6413 And Efficient Building Team Pty Ltd* [2023] WASAT 3, each lot owner has an undivided share in the common property as a tenant in common with the other owners proportional to the unit entitlement of their respective lots (s 13(7) of the ST Act) and therefore the owners must consent to any alterations to such common property or removal from the common property before it may occur.

This is an underlying principle of the management and control of common property under the ST Act. All the owners must therefore consent for a structure to be installed, positioned or located on common property (see *Maber & Anor and The Owners of Strata Plan 11391* [2007] WASAT 99 at [29] and *Pitsikas and Grimes* [2009] WASAT 80 at [24]). The effect or consequence of this is that an owner who has air-conditioning condenser units or other structures erected on the common property runs the risk that they may be ordered to remove the structure from the common property and make good any damage that has been caused to the common property.

88 There is also an underlying assumption in the ST Act that owners must seek approval for a 'structure' to be located on common property prior to doing any works. The owner who fails to seek approval from all fellow co-owners by having a 'structure' located on common property may be ordered to remove such 'structure' from the common property and to restore the common property. This occurred in *Wong v Reid* [2016] WASC 59 (*Wong v Reid*) where the Supreme Court dismissed Mr Wong's application seeking leave to appeal against the decision of the Tribunal requiring Mr Wong to remove a wall he had constructed on the common property in a strata scheme without consent of his co-owners in the strata scheme and to arrange for the reconstitution of the garden on the common property.

89 In conclusion, in my view, Crason Holdings without authority installed, positioned or located air-condition condenser units on the common property without the required approval of the strata company and further the recent notice did not achieve a resolution without dissent as Mr van Rensburg and one other owner voted against the proposed resolution. I will now go on to consider whether I should exercise the Tribunal's discretion to make an order:

- (a) in the form sought by Mr van Rensburg; or
- (b) in the form sought by Crason Holdings

to resolve the scheme dispute in respect of:

- (i) the air-conditioning condenser units on the common property;
 and
- (ii) the associate wiring and conduit on the common property.

Whether the Tribunal should exercise its discretion to make the orders sought?

90 In *The Owners of Ellement 996 Strata Plan 53042 and Tobias* [2022] WASAT 49 at [81] to [84], I noted that the ST Act does not give any guidance on the exercise of the Tribunal's discretion to make an order.

91 In *Arasi & Anor and The Owners of Beverley Court* [2005] WASAT 197 (*Arasi*) the Tribunal set out at [27] to [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;
- (d) equity; and
- (e) due consideration of all the information at its disposal.

92 While the list set out in *Arasi* (see immediately preceding paragraph) 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 200(2) 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.

93 Acting in accordance with the list set out in *Arasi* (see above at [91]) and in applying my mind to the facts in the context where Crason Holdings failed to obtain the necessary approval to install, position or locate the air-conditioning condenser units in the carpark of the strata complex being common property, I am satisfied in the circumstances of this case that an order should be made as follows in the Second Proceeding (CC 1857 of 2022).

94 Pursuant to s 200(2)(n) of the ST Act, the strata company is to be taken to have passed the following resolution required under the ST Act as a resolution without dissent for the following exclusive use by-law for

the two air-conditioning condenser units located on common property in terms similar to those set out by Crason Holdings (see above at [17]):

The owner of Lot 34 be entitled to the exclusive use over the portion of the carpark common property walls of the basement where two air-conditioning condensers owned by the owner of Lot 34 are located as shown in the photos attached to Crason Holding's Further Amended Application dated 27 April 2023 and marked 'Annexure A extracted photo'.

The owner of Lot 34 is responsible for the maintenance, repair and upkeep of these air-conditioning condenser units, as well as the wiring and conduit used by the two air-conditioning condenser units to the quality and standards required by the council of the strata company from time to time.

95 It will be incumbent on the strata company to register the by-law with Landgate pursuant to s 48 of the ST Act.

96 Crason Holdings' further amended orders sought in the Second Proceeding makes reference to two air-conditioning condenser units. However, in its submissions, Crason Holdings refers to three air-conditioning condenser units. Mr van Rensburg in his questions for Mr Jayden Hunting notes two air-conditioning condenser units are on common property and one is located in the car bay of Lot 2. To be clear, the above order only covers the two air-conditioning condenser units on the common property.

97 Earlier, I concluded that pursuant to s 63 of the ST Act, a utility service easement exists for the benefit and burden of Lot 34 in respect of wiring and conduit connected to the air-conditioning condenser units owned by Crason Holdings. Consequently, in my view, it is not necessary to include in the above exclusive use by-law, that the owner of Lot 34 be entitled to the exclusive use of the wiring and conduit on the common property because of the utility service easement that exists.

98 It is not necessary to make amended order 2A sought by Crason Holdings in its Further Amended application filed with the Tribunal on 27 April 2023. This is because the above order gives Crason Holdings exclusive use of the current position of the air-conditioning condenser units in the carpark on the common property.

99 Finally, in view of the above order made in favour of Crason Holdings to resolve the scheme dispute, I will dismiss that part of Mr van Rensburg application where he seeks an order requiring Crason

Holdings to remove the air-conditioning condenser units on the common property.

100 The reasons for exercising the Tribunal's discretion to make the above order are as follows.

101 First, I accept the evidence of Mr Jayden Hunting of AFEWA, licensed electrician, that the air-conditioning condenser unit that was moved to its current position in June 2022 is the 'optimum location in the area' and that the air-conditioning condenser unit is 'sufficiently far away from the access door to not present an issue with accessing the doorway'. Mr van Rensburg has not provided any evidence to contra that of Mr Hunting.

102 Second, Mr Hunting in inspecting the wiring near Lot 34's car bay in his report of 21 November 2022 stated that the installation of the electrical cabling via surface conduit is the only practical way to install cabling in the carpark area and that the electrical cables are installed per Australian/New Zealand Wiring Rules AS/NZS 3000:2018. Again, Mr van Rensburg has not provided any evidence to contra that of Mr Hunting.

103 Third, while Mr van Rensburg position is that he has 'always made it clear that [he] is willing to give consent if changes were made in order to minimise the impact the subject installation has on the common property' he has not provided any expert evidence to support his position on what is required to minimise the impact of the air-conditioning condenser units on the common property.

104 The only evidence before the Tribunal from an electrical expert is that of Mr Hunting. Mr van Rensburg in his questions to Mr Hunting asked how did he 'determine that three separate air conditioning systems are required for the 113 sqm floor area of lot 34?' Further Mr van Rensburg asked Mr Hunting whether 'a multi-split system or ducted system, each of which would have reduced the number of condensers required, and if so, why were those options dismissed?' Finally, Mr van Rensburg asked Mr Hunting whether 'it would be possible to design a system that could provide lot 34 with air conditioning using less than 3 condensers?'

105 In reply, Mr Hunting stated that he was not involved in determining whether any new air-conditioning units were to be installed as his instructions were to relocate and reuse one air-conditioning condenser unit to a more suitable and appropriate location. Further Mr Hunting

stated that he had not been involved in assessing a re-design of the HVAC systems servicing Lot 34 but that he did not regard the three air-conditioning units to be excessive for an area of 113 square meters.

106 Fourth, two lot owners voted against the proposed resolution per the notice. It is not known how many of the 38 lots voted in favour of the notice. However, in my view the number of owners who voted against the notice was small compared to the total number of lots.

107 Fifth, Mr van Rensburg's position is that 'there is no scheme dispute with regard to the specific position of the units'. I understand that to mean that, apart from the lack of required approval for the air-conditioning condenser units being on the common property, Mr van Rensburg does not object to the actual position of the air-conditioning condenser units.

108 Finally, I note Mr van Rensburg asserts that other cabling and conduits was installed in about August 2021 on the common property unrelated to the air-conditioning condenser unit installed at that time. No further information is provided about this cabling and conduits which may have been installed for the benefit of all owners. Without more, it is not possible for me to further consider the other cabling and conduits unrelated to the air-conditioning condenser units in these proceedings. Consequently, in my view, it is not appropriate to make any order in relation to that other cabling and conduits unrelated to the air-conditioning condenser units in these proceedings.

109 It is important to state that even though the order is made in Crason Holdings' favour, that it *not* to be understood that other items on common property such as other air-conditioning condenser units will be granted a similar order if an application is made to the Tribunal. Much will depend on the facts of each case. Finally, it is therefore incumbent on the strata company to comply with its general duty under s 91(1) of the ST Act to control and manage the common property for the benefit of all the owners of lots.

110 I now turn to consider if the strata company contravened various provisions of the ST Act and Sch 1 by-law 4(1) and if so, to consider whether to exercise the Tribunal's discretion to make the declarations sought by Mr van Rensburg.

Whether the strata company contravened s 91(1)(b) of the ST Act?

111 Mr van Rensburg asserts the strata company contravened its general duty under s 91(1)(b) of the ST Act to control and manage the common property for the benefit of all the owners when the council:

- (a) approved the erection of structures such as the air-conditioning condenser units on the common property when it had no authority to do so; and
- (b) failed to take action against owners erecting structures on the common property without the necessary consent from all the owners.

112 For reasons explained earlier (see above at [86]), I do not accept Crason Holdings' position that the council followed proper process in order to approve the position of the air-conditioning condenser units on the common property.

113 The strata company properly conceded that approval of all owners was not given for the air-conditioning condenser units on the common property in regards to Crason Holdings. The strata company stated that the council now understands the requirements to obtain the proper approval for alterations to the common property. Further, the strata company says that there is no statutory obligation imposed by the ST Act requiring it to take legal proceedings against an owner each time an unauthorised alteration to the common property is discovered because to do so may be impracticable and/or cost prohibitive.

114 In my view, the strata company, in regards to the allowing the air-conditioning condenser units to be installed on the common property without the proper approval of all owners contravened s 91(1)(b) of the ST Act. I will return to consider if it is appropriate to make the declaration sought by Mr van Rensburg later in these reasons.

Whether the strata company contravened Sch 1 by-law 4(1)?

115 Mr van Rensburg asserts that the council rarely met and that most decisions of the council are made via an exchange of emails. In addition, Mr van Rensburg says that decisions that are not made at a meeting of the council do not appear in the minutes of the meeting and any decision made outside of the council at which a quorum is present are arguably invalid.

116 In response, the strata company says that many of the decisions that
Mr van Rensburg says were made outside of the council meetings were
decisions made by previous councils.

117 Mr Newton explained that currently council meetings are held every
two to three months and minutes are taken of the business arising from
the meeting. Further, Mr Newton says that in between meetings, the
council communicates by circulating emails and an 'action list' is
maintained setting out all decisions made, whether they relate to routine
or non-routine maintenance decisions.

118 In my view, the strata company, is in contravention of Sch 1
by-law 4(1) where the council made decisions outside a council meeting
and where those decisions are not reflected in the minutes of the meeting.
I will return to consider if it is appropriate to make the declaration sought
by Mr van Rensburg later in these reasons.

Whether the strata company contravened s 104(1)(b)(ii) of the ST Act?

119 Mr van Rensburg asserts that since the August 2021 AGM various
decisions made by the council outside a meeting of the council, including
the approval for erecting structures on the common property, have no
record contrary to the ST Act.

120 The strata company's position is that all decisions made by current
council are documented in writing including by email and copied to the
strata manager. Further, the strata company says that Mr van Rensburg
in his witness statement stated that some records are lost for forever,
however, he failed to state which particular records he believes are lost
or missing or whether such records ever existed.

121 In my view, the strata company, is in contravention of s
104(1)(b)(ii) of the ST Act where it failed to keep a record of its
resolutions and decisions of council for the period fixed by reg 83 of the
Regulations as follows:

Type of document	Retention period
...	20 years for special resolutions, unanimous resolutions and resolutions without dissent;
Section 104(1)(b)(ii) (records of resolutions and decisions of council)	7 years in any other case [.]

122 I will return to consider if it is appropriate to make the declaration
sought by Mr van Rensburg later in these reasons.

Whether the strata company contravened s 109 of the ST Act?

123 Finally, Mr van Rensburg asserts that the council has not fully
complied with his request to inspect documents and is therefore in
contravention of the ST Act.

124 In response, the strata company says that all s 109 of the ST Act
requires is for it to make available for inspection the materials kept under
s 104 of the ST Act, the roll kept under s 105 of the ST Act and other
documents in the possession or control of the strata company as provided
for in s 109(6)(c) of the ST Act. Further, the strata company says that
Mr van Rensburg's application is not a proper or valid application under
s 107 of the ST Act as it is a request for the electronic provision of
material which the strata company is not obliged to email to Mr van
Rensburg.

125 Ms Logiudice in her witness statements explained that she
attempted to compile the documents sought by Mr van Rensburg and
email them to him. Ms Logiudice says it is not her role as the strata
manager to read through all the records to find and segregate what
Mr van Rensburg is looking for and to provide the same to him.

126 In my view, a strata company is obliged to make material available
for inspection as set out in s 109 of the ST Act. There is no requirement
for the strata company to email to Mr van Rensburg any documents.
In ***Banning and The Owners of Terrace Place Strata Plan 9704***
[2019] WASAT 89 I explained, in the context of the ST Act (as it applied
prior to 1 May 2020) the strata company's obligations to make available
for inspection documents. Those obligations have not changed in the ST
Act.

127 In conclusion, in my view, Mr van Rensburg's application is
misconceived.

128 In view of the above contraventions of the ST Act and Sch 1
by-law 4(1), I turn now to consider if I should exercise the Tribunal's
discretion to make the declaration sought by Mr van Rensburg.

Whether the Tribunal should exercise its discretion to make the declarations sought?

129 Mr van Rensburg seeks various declarations (see above at [14]). Mr van Rensburg properly concedes that the declarations he seeks will not remedy the contraventions by the council in relation to the past. However, his position is that the declarations should bring about compliance by the council with the ST Act going forward. Further, Mr van Rensburg says that if the declarations are not made that would give the council permission to continue contravening the ST Act and allow the scheme dispute to remain unresolved.

130 The position of the strata company is that if the Tribunal made any of the declarations sought by Mr van Rensburg, those declarations would not produce any real or foreseeable consequences for the parties and therefore the declarations should not be made for the following main reasons, in summary:

- (a) the declarations sought do not remedy contraventions of the past including contraventions of prior council or guarantee future compliance including by future councils;
- (b) by the Tribunal not making the declarations, that does not give the strata company or the council permission to contravene the ST Act;
- (c) the Tribunal (differently constituted) found in 2022 that the strata company is aware of its duties and is conscientious to discharge those duties and that the strata company acted in good faith; and
- (d) the current council will continue to act in good faith and use its best endeavours to discharge its duties under the ST Act.

131 In Ms Logiudice's view, the current council members have acted diligently and professionally and have tried to manage the strata complex to the best of their ability and to promote harmony between all owners.

132 In my view, applying the rules for granting declaratory relief per ***Aussie Airlines***, it is not appropriate to exercise the Tribunal's discretion to make the declarations under s 199 of the ST Act as sought by Mr van Rensburg in these proceedings for the following reasons.

133 First, while I accept that Mr van Rensburg has a real interest to seek the declarations as the actions and/or inactions of the strata company and the council affect his rights as a lot owner and those of the other owners,

the declaratory relief claimed is in relation to past actions of the strata company and/or council, which in my view, may not produce any real consequences for either Mr van Rensburg or the strata company. This is because on Mr van Rensburg's evidence some of the records are lost forever or would require an enormous amount of effort to go through past emails to extract the relevant council decisions. Further, the evidence of the strata company and Mr Newton is that the council now understands the requirements to obtain the required approvals for alterations to the common property, the requirements to keep records and in regards to other obligations under the ST Act.

134 Second, the parties concede that the declarations sought may not produce any foreseeable consequences. Mr van Rensburg is misguided in his assertion that if declarations are not made that would give permission to the strata company or to the council to contravene the ST Act. This is because the strata company and the council have clear obligations under the ST Act and should they contravene the ST Act it is open, for example for a lot owner, to make an application to the Tribunal.

135 Finally, I turn to consider Crason Holdings application for costs.

Whether the Tribunal should exercise its discretion to make an order for costs?

136 Crason Holdings in its application seeks its costs in the Second Proceeding on a full indemnity basis. Subsequently, in its Outline of Submissions dated 9 May 2023, Crason Holdings states that if successful, it wishes to be heard on the question of costs.

137 Under s 81(7) of the former ST Act (which only applies up to 1 May 2020), a party to proceedings in the Tribunal was prohibited from making an application for costs, other than in very limited circumstances. Such prohibition no longer applies under the ST Act. This means a party may make an application to the Tribunal for their costs in the proceedings in accordance with the r 42A of the *State Administrative Tribunal Rules 2004* (WA) which provides:

42A. Time within which costs application may be made

Subject to these rules, an application to the Tribunal for costs under this Division can be made within 21 days of the orders to which the application relates being made by the Tribunal.

Conclusion and orders

138 The Tribunal's objectives require that it achieve the resolution of matters according to the substantial merits of the case with as little formality and technicality as is practicable (s 9 of the SAT Act).

139 In summary, reflecting back on the orders sought by the respective applicants (see above at [12] to [14]), and the findings reached in respect of the issues before me (see above at [20]), I make the following orders.

Orders

CC 1228 of 2022

The Tribunal orders:

1. The application is dismissed.

CC 1857 of 2022

The Tribunal orders:

1. Pursuant to s 200(2)(n) of the *Strata Titles Act* 1985 (WA) the Owners of Ocean Marina Pointe Strata Plan 45077 is to be taken to have passed the following resolution required under the *Strata Titles Act* 1985 (WA) as a resolution without dissent for the following exclusive use by-law:

The owner of Lot 34 on Strata Plan 45077 be entitled to the exclusive use over the portion of the carpark common property walls of the basement where two air-conditioning condensers owned by the owner of Lot 34 are located as shown in the photos attached to applicant's Further Amended Application dated 27 April 2023 and marked 'Annexure A extracted photo' (and attached to this order as Annexure A).

The owner of Lot 34 is responsible for the maintenance, repair and upkeep of these two air-conditioning condenser units, as well as the wiring and conduit used by the two air-conditioning condenser units to the quality and standards required by the council of the strata company from time to time.

For the avoidance of doubt, a utility service easement pursuant to s 63 of the *Strata Titles Act* 1985 (WA)

exists for the benefit and burden of Lot 34 in respect of wiring and conduit connected to the two air-conditioning condenser units to which this by-law applies.

2. The application is otherwise dismissed.

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

MS R PETRUCCI, MEMBER

2 OCTOBER 2023

Annexure A

