JURISDICTION	**:**	STATE ADMINISTRATIVE TRIBUNAL
ACT	**:**	STRATA TITLES ACT 1985 (WA)
CITATION	**:**	SAJE and SAMPSON [2023] WASAT 101
MEMBER	**:**	MS R PETRUCCI, MEMBER
HEARD	**:**	14 AUGUST 2023
DELIVERED	**:**	31 OCTOBER 2023
FILE NO/S	**:**	CC 494 of 2023
BETWEEN	**:**	ELIANA AURA LEENA SAJE Applicant AND DANIELLE SAMPSON First Respondent CHRISTINE BEVANS Second Respondent THE OWNERS OF 36B THIRD AVENUE MT LAWLEY STRATA PLAN 21602 Third Respondent

Catchwords:

Strata Titles - Strata scheme by-laws - Wooden screens and door - Common property - Licence - Application for enforcement of scheme by-laws - Exercise of Tribunal's discretion to make order - Turns on own facts

Legislation:

State Administrative Tribunal Rules 2004 (WA), r 42A
Strata Titles (General) Regulations 2019 (WA), reg 83
Strata Titles Act 1985 (WA) (prior to 1 May 2020), s 81(7)
Strata Titles Act 1985 (WA), Pt 8, Div 1, Sch 1, Sch 2, s 10(1), s 12, s 14(1), s 14(5), s 14(6), s 14(8), s 26, s 47, s 47(3), s 81(7), s 86, s 89, s 90, s 91, s 91(1)(a), s 91(2), s 93(2)(a), s 93(2)(c), s 104(1)(c)(viii), s 116, s 135, s 137, s 156(4)(d), s 183(21), s 197, s 197(4), s 200

Result:

Application dismissed

Category: B

Representation:

Counsel:

Applicant	:	In Person
First Respondent	:	P Monaco
Second Respondent	:	In Person
Third Respondent	:	In Person

Solicitors:

Applicant	:	N/A
First Respondent	:	GV Lawyers
Second Respondent	:	N/A
Third Respondent	:	N/A

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

Brooks and Gransden Building Company Pty Ltd [No 2] [2021] WASAT 86
Caltex Properties Ltd (in liq) v Love (1997) 95 LGERA 132
Dampier Mining Co Ltd v Federal Commissioner of Taxation (1981) 147 CLR 408
Engwirda and The Owners of Queen's Riverside Strata Plan 55728 [2020] WASAT 39

Hungry Jack's Pty Ltd v The Trust Company (Australia) Ltd [No 3] [2021] WASC 231
Maber & Anor and The Owners of Strata Plan 11391 [2007] WASAT 99
Pitsikas and Grimes [2009] WASAT 80
R v Toohey; Ex parte Meneling Station Pty Ltd (1982) 158 CLR 327
Radaich v Smith [1959] HCA 45; (1950) 101 CLR 209
Tipene v The Owners of Strata Plan 9485 [2015] WASC 30
Wong v Reid [2016] WASC 59

REASONS FOR DECISION OF THE TRIBUNAL:

Background

1 These proceedings concern the enforcement of scheme by-laws.

2 On 23 December 2022, Ms Danielle Sampson (**Ms Sampson**) purchased Lot 4 on Strata Plan 21602 which is described as 'eight two storey brick an iron residential home units … in Mt Lawley' (**strata titles scheme**).

3 Dr Eliana Aura Leena Saje (**Dr Saje** or the **applicant**) and her daughter, Ms Lisa Katherine Saje, are the owners as joint tenants of Lot 3 on the relevant strata plan. Ms Lisa Saje filed with the Tribunal notice that she authorised Dr Saje to act on her behalf in these proceedings. As a result, Ms Lisa Saje did not participate in these proceedings.

4 On 10 April 2023, Dr Saje commenced proceedings in the Tribunal under s 47(3) of the *Strata Titles Act 1985* (WA) (**ST Act**) for the enforcement of the scheme by-laws. Dr Saje alleges that Ms Sampson is in breach of the ST Act because the wooden slats or screens that are approximately 2.8 metres in height that are affixed to the brick walls which surround Ms Sampson's courtyard and the wooden door (**wooden screens and door**) were not approved by The Owners of 36B Third Avenue, Mt Lawley Strata Plan 21602 (the **strata company**) by way of resolution without dissent.

5 In addition to Ms Sampson, who is the first respondent in these proceedings, Ms Christine Bevans (**Ms Bevans)**, who is the owner of Lot 7 on the relevant strata plan, is the second respondent in these proceedings. Ms Bevans stated that she supports Ms Sampson in these proceedings.

6 Finally, the strata company was joined to these proceedings as the third respondent by the Tribunal on 11 July 2023.

7 Mr Wayne Marriott is the owner of Lot 1 on the relevant strata plan. Mr Marriott is the secretary of the council for the strata company. At the commencement of the final hearing, Mr Marriott informed me that the strata company would not be taking an active part in these proceedings but would abide by the decision of the Tribunal.

8 At the final hearing, Dr Saje informed me that she was not pressing for order 2 as set out in her application[1] but was only seeking the following two orders from the Tribunal:

> 1. Ms Sampson to remove the structural alterations built on the common property brick wall surrounding her courtyard within 14 days of the order made.
>
> …
>
> 3. Ms Sampson pay to Dr Saje the costs of the application.

9 Ms Sampson does not oppose Dr Saje vacating order 2. However, Ms Sampson opposes both orders 1 and 3 that Dr Saje seeks in these proceedings. Ms Bevans also opposes the orders that Dr Saje seeks in these proceedings.

10 In the reasons which follow, I explain why Dr Saje's application under s 47 of the ST Act, for the enforcement of the scheme by-laws, is unsuccessful.

Previous proceeding CC 387 of 2022

11 I will first briefly consider the matter of CC 387 of 2022 which the parties referred me to. That matter is an earlier application to the Tribunal by Dr Saje. It concerned the same wooden screens and door.

12 On 27 March 2022 Dr Saje lodged an application with the Tribunal against the previous owner of Lot 4, Ms Elizabeth Sadler. According to Dr Saje, that application was under s 89 of the ST Act which concerns the structural alteration to a lot (but not to the common property).[2]

13 At the final hearing, Dr Saje submitted that the outcome of that proceeding is not relevant to these proceedings because the current application before the Tribunal concerns the alleged breach of the by-laws because the structural alteration, being the wooden screens and door, to the common property was done without approval of the strata company.[3]

14 I respectfully agree. This is because the proceeding before the Tribunal in CC 387 of 2022 concerned s 89 of the ST Act which deals

[1] ts 4-5, 14 August 2023 and Exhibit 1 at page 10.
[2] ts 11, 14 August 2023.
[3] Ibid.

with structural alterations to a *lot* but not with structural alterations to the common property.

Relevant procedural history and evidence

15 On 6 June 2023, the Tribunal make its usual orders programming the matter through to a final hearing on 14 August 2023. The orders required Dr Saje to file with the Tribunal and give to the respondents all documents, indexed and paginated upon which she proposed to rely, and for the respondents to each file with the Tribunal and to provide a copy to the applicant of a written response to the application and a copy of all documents, indexed and paginated on which they proposed to rely. Further, both parties were ordered to file with the Tribunal and provide a copy to the other parties of a list of persons to be called to give evidence at the final hearing along with a short summary of their evidence.

16 The Tribunal prepared a hearing book (Exhibit 1: pages 1 to 278) of all the documents filed with the Tribunal. It was provided to the parties on 10 August 2023.

17 In making my decision for the Tribunal, I have had regard to the documents in the hearing book as well as the oral evidence given by Dr Saje, Ms Sampson, Ms Bevans, Mr Marriott and the other lot owners who attended the final hearing.

18 Following the final hearing, I reserved my decision on 21 August 2023.

Issues

19 There are six issues to be determined by me in these proceedings. They are:

1) Does Dr Saje have standing to make her application under s 47(3) of the ST Act?

2) Are the wooden screens and door improvements or alterations made to the common property?

3) Has Ms Sampson breached the scheme by-laws?

4) Is the Licence valid?

    a) May the strata company licence to the owner of Lot 4 to use an area of common property for the wooden screens and door?

5) Should the Tribunal exercise its discretion to make an order requiring Ms Sampson to remove the wooden screens and door?

6) Should the Tribunal make an order for costs as claimed by Dr Saje?

Dr Saje's position

20 Dr Saje's position may be summaried as follows:

- She has tried to compromise with Ms Sampson including offering her to bring down the 'wooden structures' to 'half mast'.
- She had the same problem as a result of constructing structures along the same brick wall which she removed at a loss to her of $5,000. However, she no longer has the 'obstacle' and can sell her property whenever she wants. She understands it hurts and it costs money but life is hard.[4]
- Referring to the photo on page 91 of Exhibit 1, the wooden screens and door do not blend in with anything at her Lot 3.[5] The wooden screens are 'totally inconsistent with anything at the complex' and an 'ugly anomaly [that] block[s] [the] natural view from [her] property'.[6]
- The bamboo slats or strips of bamboo in a vertical position in the photo on page 91 of Exhibit 1 are not part of her application in these proceedings.
- The brick walls surrounding Lot 4 on two sides are common property and any additions to the brick wall are not an erection of a structure or an alteration of a structure *within a lot,* in this case, Lot 4. The alterations carried out at Lot 4 are not a *structural alterations of a lot* as that term is defined in s 86 of the ST Act. Rather, they are alterations to the common property.
- An owner cannot build beyond the lot borders. This is supported by the Supreme Court's decision in ***Tipene v The Owners of Strata Plan 9485*** [2015] WASC 30 (***Tipene***) .
- Ms Sampson as the current owner of Lot 4 is responsible for removing unauthorised alterations to the common property. It is

[4] ts 18, 14 August 2023.
[5] ts 43, 14 August 2023.
[6] Exhibit 1 at page 10.

Ms Sampson's responsibility to enquire about the structures on the common property before she decided to buy Lot 4.

- The previous owner of Lot 4, Ms Sadler, did not have authority to install or affix anything onto the common property. This is confirmed by Ms Sadler when she stated in an email to the previous strata manager in or about May 2022:[7]

> However, I did mentioned (sic) that she [referring to Dr Saje] never contacted the owners regarding her new structure so I wouldn't be for mine either.

- The council is responsible for dealing with the building or affixing of unauthorised structures on the common property, and should therefore notify the owner, in this case, Ms Sampson, that she cannot build or affix anything on the common property without the necessary approval.[8]

- The ST Act has no provision for an owner to build or affix anything on the common property. An owner may be granted exclusive use of part of the common property, provided there is a proper resolution without dissent and such exclusive use is reflected by way of a by-law. That is not the case here.

- The wooden screens and door cause a direct detriment to her Lot 3 by reducing the market value of Lot 3 as the wooden screens and door are not aesthetically pleasing and do not blend in with any structure at the strata complex generally and in particular, with her Lot 3. She has been trying to hide the wooden screens by growing large shrubs. However, it is not reasonable to expect that she as the owner of Lot 3 has to grow a forest in order to protect herself from the view of 'ugly' unauthorised wooden screens on the common property.

- Only roof tops are visible outside of Lot 4 and therefore the wooden screens are not a 'privacy screen' as claimed by Ms Sampson.

- The complex has four courtyards – Lots 1 to 4 all have a courtyard. Lot 2 has a courtyard that is different from the other lots. Lots 1 and 3 have the same look as it was at the registration of the strata scheme. Ms Sampson's Lot 4 needs to fall into line

[7] Exhibit 1 at page 77.
[8] ts 27, 14 August 2023.

with Lots 1 and 3 to give the strata scheme a uniform look as it was when the strata plan was registered.

- There was no council on 19 May 2023 when the parties attended a directions hearing at the Tribunal. However, shortly thereafter one was quickly formed on 24 May 2023. With the first and second respondents on the council it is not reasonable that they would present an unbiased position. Ms Bevans has herself had an air conditioner installed on the front wall of her building without strata company approval.

- The owners of Lots 1, 6 and 7 all wrote letters of support for Ms Sampson but they do not live in the complex.

- The owners of Lots 1, 5 and 8 all wrote they are not concerned about the wooden screens and door affecting the value of their lots. These lots are in the other part of the complex and are not connected to Ms Sampson's Lot 4. Further, those owners would not support the structures should their own lots fall in value because of the wooden screens and door.

- No owner expressed any merit in retaining the wooden screens and door.

- The Licence is invalid and vexatious. The Licence has nothing to do with the application before the Tribunal, which concerns the enforcement of scheme by-laws and in any event it does not address the issue before the Tribunal which is the unauthorised wooden screens and door on the common property.

- A licence would be available for someone who wants to have, say a shop, on the common property. Further, a licence has to be to a third party, but not to a member of the strata company, which is the case here. However, it does not mean that the strata company can issue a licence to a member of the strata company to build unauthorised structures on the common property or to increase the size of a lot or to change the lot borders.[9]

- The ST Act does not have a provision to allow a licence for structural alterations to the common property by lot owners. In any event, a lot owner cannot build structures that change lot

[9] ts 15 and 34, 14 August 2023.

boundaries or build on common property without proper approval (s 89 of the ST Act).

- The Tribunal does not have the power to retrospectively approve or dispense with requirements under the ST Act for works done outside of lot boundaries (s 90, s 197 and s 200 of the ST Act).

- If the current matter were not before the Tribunal, the strata company would be required to apply to the Tribunal for orders that the unauthorised alterations to common property (wooden screen and door) be removed.

- The Licence fails to acknowledge that the wooden screens and door on the common property are already in place and are unauthorised by the ST Act.

- The Licence is not a strata document under s 12 of the ST Act. The Tribunal does not have jurisdiction under the ST Act to deal with contracts or licences that do not fall under the ST Act. In any event, Ms Sampson has not sought any orders from the Tribunal in regards to the Licence. Ms Sampson needs to have a dispute about the Licence in order to bring it to the Tribunal.[10]

- Ms Sampson, Ms Bevans and Mr Marriott have a statutory obligation under the ST Act to *not* do what they have purportedly tried to do with the Licence.[11] They are in breach of their duties and responsibilities under s 137 of the ST Act. Under the Licence, Ms Sampson is both the licensee and licensor because she is on council and a member of the strata company and therefore she cannot both apply for, and grant to herself the Licence.[12]

- The strata company does have the authority to approve and give a licence to someone who wants to establish a business on the property but not to a member of the strata company.[13]

- The Licence is worded to fall under s 91 of the ST Act but it has no place there because s 91 covers functions of the strata company.

[10] ts 18, 14 August 2023.
[11] Ibid.
[12] ts 15-16, 14 August 2023.
[13] ts 58, 14 August 2023.

- The Licence has no provision whatsoever for an owner to build, erect or modify any structures on the common property.
- Ms Sampson is in breach of Sch 1 by-laws 6, 9 and 10 and Sch 2 by-law 13.[14]
- If the structures Ms Sampson has are half their height and they are the same lattice as Mr Bigleman has and are painted green so that they would blend in with what they have on Lot 3, then she would be in favour of them.[15] However, 'we still could not approve that because one cannot approve an owner building on the common property and that's all what it boils down to'.[16]
- Every visitor to her lot says in regards to the wooden screens and door, 'What on earth is that ugly stuff there?' and '[W]hy does she have such an ugly thing that nobody else has?'.[17]

21 In short, Dr Saje's position is that no owner can build or affix anything to the common property without authority of the strata company and that a Licence cannot override that.[18]

Ms Sampson's position

22 Ms Sampson's position may be summarised as follows:[19]

- Dr Saje wrote the following note for the strata company records on 10 October 2022 following the mediations in July and September 2022 for matter CC 387 of 2022:

> 1. The wooden screens on 2 outside walls at U4 were approved, but no pergola will be built at U4 and nothing on the brick wall between U4 and U3[.]

- Dr Saje's current application is misconceived. Dr Saje conceded there is no scheme by-law that says an owner cannot build or affix a structure to the common property and that the closest scheme by-law Dr Saje refers to is Sch 2 by-law 13 which concerns the alteration of a *lot* but not the common property.[20]

[14] ts 29, 14 August 2023.
[15] ts 59, 14 August 2023.
[16] ts 59, 14 August 2023.
[17] ts 59, 14 August 2023.
[18] ts 60, 14 August 2023.
[19] Exhibit 1 at pages 129 to 251.
[20] ts 30, 14 August 2023.

- As the owner of Lot 4 she has no case to answer under s 47 of the ST Act and that if the matter were to be considered under s 197(4) of the ST Act as a 'scheme dispute', which is *not* Dr Saje's application, then the dispute for determination is whether the Licence is valid to allow her to use part of the common property for the benefit or purpose of supporting the wooden screens and door.

- The strata company has not incurred any legal costs in relation to the preparation of Licence. She has incurred the legal costs.

- Dr Saje purchased her Lot 3 with the similar wooden screens in place and therefore it is not reasonable for Dr Saje to argue that the wooden screens and door on her lot reduce the value of Lot 3.

- The Licence allows her, for an indefinite period, to attach to the top of four boundary walls of her part Lot 4 courtyard to a height of 275 centimetres from the courtyard floor but not including the brick wall between part Lot 3 and part Lot 4 the wooden screens and door for privacy, security and shading.

Ms Bevans' position

23 Ms Bevans did not give oral evidence at the final hearing and stated she supported Ms Sampson.

Mr Marriott

24 Mr Marriott is the owner of Lot 1. Mr Marriot stated that he voted 'yes' to the wooden screens affixed to the brick wall around the courtyard of Lot 4 being replaced by previous owner of Lot 4 and would again if required.

25 It is Mr Marriott's evidence that he was told by the strata manager for the strata company that the wooden screens had been voted on by owners on more than one occasion and had been 'passed' each time.

Mr Bigleman

26 Mr Harry Bigleman said he supports Ms Sampson.

27 Further, Mr Bigleman stated that he has lived at his Lot 2 for the past 32 years and recalls that the wooden screens were approved by the strata company on two separate occasions; first as far back as 1994/95 when they had to be replaced due to wood rot and new replacement

structures erected and reapproved by the strata company in approximately 2019. The wooden screens were in situ when Dr Saje purchased her lot.

28 In Mr Bigleman's view, the wooden screens and door are a vast improvement to the previous structure.

Ms Slater

29 Ms Leanne Slater is the owner of Lot 8 and briefly attended the final hearing by teleconference to express her support for Ms Sampson.

30 Ms Slater supports the wooden screens and will continue to do so.

31 Ms Slater states the structures do not impact on her lot, nor on the strata complex as a whole.

32 Finally, Ms Robin Lean and Mr Peter Phoenix who also own a lot on the relevant strata plan did not attend the final hearing. However, according to Ms Bevans they both support Ms Sampson.

Facts

33 The following facts are agreed or are uncontroversial. I make the following findings of fact:

a) Since 24 May 2023, the council comprises Ms Sampson, Ms Bevans and Mr Marriott.

b) The strata complex comprises two levels. Dr Saje owns Lot 3 and Ms Sampson owns Lot 4 which are both on the ground level.

c) Each of Lot 1, 2, 3 and 4 on the ground level have a 'courtyard' shown as a part lot on the strata plan. The courtyard for Lot 4 is 34m^2.

d) The brick wall surrounding the courtyard of Lot 4 was not in place when the strata plan was registered in 1991. However, the brick wall surrounding the courtyard of Lot 4 (and Lots 1, 2 and 3) was constructed pursuant to a building licence on or about 29 April 1991.[21]

e) Ms Sampson purchased Lot 4 on 23 December 2022.

[21] ts 52, 14 August 2023.

f) Prior to the ownership of Lot 4 by Ms Sampson, horizontal wooden slates of approximately 2.8 metres in height (the wooden screens) were installed on top of, or affixed to the brick wall surrounding the courtyard of Lot 4. Further, prior to the ownership of Lot 4 by Ms Sampson, the brick wall was cut and a wooden door which blends in with the wooden screens was affixed to the brick wall surrounding the courtyard of Lot 4 without approval of the strata company by way of resolution without dissent.[22]

g) Only the owner of Lot 4 has a key that opens and locks the wooden door.[23]

h) The brick walls that surround the courtyard of Lot 4 support the wooden screens and door.[24]

i) Roof tops are visible looking into the distance from the outside of each of Lot 3 and Lot 4.[25]

34 I now turn to consider each of the issues (see above at [19]).

Consideration of the issues

Does Dr Saje have standing?

35 An application under s 47(3) of the ST Act must be made against a person whom it is alleged is in contravention of the scheme by-laws.

36 This is because under s 47(5) of the ST Act, the orders which the Tribunal may make, upon the Tribunal being satisfied that the person has contravened one or more of the scheme by-laws, are solely directed to the person in contravention of the scheme by-laws.

37 In these proceedings, Dr Saje alleges that Ms Sampson is in 'wilful' breach of the ST Act as there is no provision for an owner 'to build on common property for her private purposes'.

38 Dr Saje, as a lot owner, must satisfy at least one of the following alternative requirements under s 47(4) of the ST Act in order to have

[22] Exhibit 1 at pages 37 and 132 and ts 45, 14 August 2023.
[23] ts 45, 14 August 2023.
[24] Exhibit 1 at page 37.
[25] Ibid at pages 95 and 96.

standing to bring an application under s 47(3) of the ST Act to the Tribunal:

> …
>
> (a) if a person other than the strata company is alleged to have contravened the scheme by-laws — the person has been given notice under subsection (1)(a) and has contravened the notice; or
>
> (b) the contravention has had serious adverse consequences for a person other than the person alleged to have contravened the scheme by-laws; or
>
> (c) the person has contravened the particular scheme by-law on at least 3 separate occasions.

39 Although not clear from Dr Saje's application, I accept that Dr Saje made her application under either s 47(3)(b) or s 47(3)(c) of the ST Act. On that basis, on my view, Dr Saje has standing under s 47(3) read with s 47(4) of the ST Act to make the application to the Tribunal for the enforcement of particular scheme by-laws.

Are the wooden screens and door improvements or alterations made to the common property?

40 It is agreed by the parties that brick walls surrounding what the parties referred to as the 'courtyard of Lot 4' (being part lot 4 on the strata plan comprised of 34m^2) were constructed on the common property many years ago, well before Ms Sampson purchased Lot 4.

41 However, it is not clear to me whether the construction of these brick walls was undertaken by the strata company or by the (then) lot owners and, if the later, whether the strata company gave the owner approval to construct the brick walls on the common property. I will return to this issue later in these reasons.

42 It is also common ground that the wooden screens and door were installed on top of or affixed to the brick walls surrounding the courtyard of Lot 4 and are therefore on the common property. I respectfully agree.

43 Common property is property that is jointly owned by all owners in the strata titles scheme as tenants in common and is not contained within any lot: s 10(1) of the ST Act. This means that all the lot owners, as co-owners, own the common property in proportion to their unit entitlement as reflected on the strata plan.

44 Ms Sampson referred me to the minutes of the extraordinary general meeting that was held on 29 January 1997 and in particular the minutes of item 5.1 which concern Lot 4. The minutes record:[26]

> **Agenda item 5-1 – Unit 4**
>
> Resolved by Resolution Without Dissent that the proprietor of Unit 4 be granted approval to erect a pergola in the courtyard of Unit 4.
>
> Following a discussion and a vote by a show of hands, all those present at the meeting had no objections to the installation proceeding.
>
> The Strata manager informed the proprietor of Unit 4 that proprietors not present had 28 days to cast their vote in favour or against the resolution and that if no objections were received, than a letter granting permission would be forwarded.

45 The minutes reflect that only five owners were present at the meeting; being the owners of Lots 1, 2, 4, 6 and 7. The owner(s) of lots 3, 5 and 7 were not present at the meeting and did not vote on agenda item 5-1.

46 It is common ground that there is no resolution without dissent authorising the installation of the wooden screens and door on to or affixed to the brick walls surrounding the courtyard of Lot 4. Further, it is agreed that the strata company has not granted, by way of an exclusive use by-law to the owner of Lot 4, currently Ms Sampson, the use of part of the common property for the wooden screens and door.

47 However, Ms Sampson asserts that the strata company granted to her an unlimited licence to use or occupy part of the common property as support for the wooden screens and door. I will return to consider the Licence later in these reasons.

48 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 lot owners.

49 In this case, as the wooden screens and door were installed on top of or affixed to the brick wall, both of which are on common property, Ms Sampson as the current owner of Lot 4 runs the risk that she may have to remove the wooden screens and door on the common property and make good any damage that has been caused to the common property. The fact that a previous owner had the wooden screens and

[26] Ibid at pages 134 and 136.

door installed on or affixed to the brick wall without the permission of the strata company does not obviate the current owner's (in this case Ms Sampson) accountability.

50 To be clear, under the ST Act each lot owner has an undivided share in the common property and therefore all of the owners must consent to alterations to such common property before they may occur. This is an underlying principle of the management and control of common property under the ST Act: see ***Maber & Anor and The Owners of Strata Plan 11391*** [2007] WASAT 99 at [29] and ***Pitsikas and Grimes*** [2009] WASAT 80 at [24].

51 There is also an underlying assumption in the ST Act that a lot owner must seek approval from the strata company for a 'structure' to be located on common property prior to doing any works on the common property. The owner who fails to seek approval from all fellow owners (that is, the strata company) by having a 'structure' located on the common property may be required to remove the 'structure' and 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 common property in a strata scheme without consent of all of the owners in the strata scheme and to arrange for the reconstitution of the garden on the common property.

52 The same applies to a new owner who purchases a lot on a strata plan where the previous owner(s) made alterations to common property. It is the responsibility of the new owner to ensure through due diligence that any 'structure' located on common property by the previous owner was done with the necessary approval of the strata company as required by the ST Act. If the new owner fails to do this, this does not obviate the new owner of accountability or liability to remove the 'structure' and to rectify any damage that may have been caused to the common property by any structure located on common property by a previous owner(s).

53 This leads me back to the question, and the crux of Dr Saje's application under s 47 of the ST Act for the enforcement of the scheme by-laws, whether Ms Sampson is in breach or contravention of any of the scheme by-laws?

Has Ms Sampson breached a scheme by-law?

54 In her application, Dr Saje did not state which of the strata scheme by-law(s) she says Ms Sampson is in breach of. Consequently, at the final hearing, I gave Dr Saje time to reflect on, and then inform me which of the scheme by-laws she asserts that Ms Sampson is in breach off. After some discussion, Dr Saje stated that the wooden screens and door are in contravention of Sch 1 by-laws 6, 9 and 10 and Sch 2 by-law 13. I observe that when I asked Dr Saje whether Sch 2 by-law 2, which concerns the use of common property was breached by Ms Sampson, Dr Saje stated that she did not wish to pursue Sch 2 by-law 2.[27]

55 Counsel for Ms Sampson submits that Dr Saje's application should be dismissed as there is no basis to say there has been a breach of any of the scheme by-laws. I respectfully agree that the application, seeking the enforcement of Sch 1 by-laws 6, 9 and 10 and Sch 2 by-law 13, as asserted by Dr Saje, cannot succeed in this case for the following reasons.

56 First, Sch 1 by-law 6 is a governance by-law and concerns the appointment of a chairperson, a secretary and a treasurer of the council. Dr Saje asserts that Ms Sampson, Ms Bevans and Mr Marriott have breached their respective duties under the ST Act in allowing the unauthorised wooden screens and door to remain on the common property and in agreeing to grant the Licence to Ms Sampson. Sch 1 by-law 6 has nothing to do with the unauthorised structures (wooden screens and door) on the common property or the granting of the Licence.

57 Second, Sch 1 by-law 9 is also a governance by-law and sets out the powers and duties of the secretary of the strata company which includes the preparation and distribution of minutes of meetings of the strata company. This by-law has nothing to do with the unauthorised structures (wooden screens and door) on the common property.

58 Third, Sch 1 by-law 10 is another governance by-law. It deals with the power and duties of the treasurer of the strata company which includes notifying owners of any contributions levied under the ST Act. Again, this by-law has nothing to do with the unauthorised structures (wooden screen and door) on the common property.

59 Fourth, Sch 2 by-law 13 is a conduct by-law which requires the owner of a lot to provide written notice describing the proposed alteration

[27] ts 18 to 29, 14 August 2023.

to a lot to the strata company within a specified time. This by-law concerns alterations to a lot and not to the common property and is therefore not relevant in these proceedings.

60 Dr Saje stated that her Lot 3 has devalued because of the wooden screens and door. Further, Dr Saje described the wooden screens and door as 'ugly'. Besides making that statement, Dr Saje did not provide any supporting evidence, such as written report from a real estate expert opining that the value of her Lot 3 has decreased because of the wooden screens and door, or that objectively viewed, the wooden screens and door are ugly and unreasonably interfere with her use and enjoyment of the common property. Consequently, I was not able to consider whether Ms Sampson was in breach of Sch 2 by-law 2. In any event, Dr Saje did not press there was a breach of this by-law.

61 Finally, Dr Saje's relies on ***Tipene***. In my view that case does not apply here as that case concerned alterations to the lot boundaries. All that Ms Sampson seeks is to use of part of the common property for the purpose of supporting the wooden screens and door.[28] In other words, the wooden screens and door are not an alteration to Lot 4's boundaries.

62 For all of the above reasons, in my view, Dr Saje's application under s 47 of the ST Act, seeking the enforcement of the strata scheme by-laws, is misconceived and therefore is to be dismissed.

63 Although it is not necessary, for completeness I will go on to consider the Licence as its validity was challenged by Dr Saje.

Is the Licence valid?

64 On 9 August 2023, the council of the strata company comprised of Ms Bevans (as treasurer) and Mr Marriott (as secretary) signed a deed titled 'Licence of Part of Common Property' (the Licence) with Ms Sampson (the owner of Lot 4) as the licensee.[29] The deed was drafted by Ms Sampson's legal representative.

65 Dr Saje's position is that the Licence has nothing to do with her application to Tribunal which seeks the enforcement of the scheme by-laws and in any event it does not address the issue before the Tribunal which is the unauthorised wooden screens and door on the common property.

[28] Ibid.
[29] Exhibit 1 at pages 187 to 198.

66 Dr Saje suggests that a licence would be available for a third party (but not to a member of the strata company) who wants to have, say a shop, on the common property. Further, Dr Saje submits that the ST Act does not allow a licence to be given to a lot owner allowing that lot owner to make a structural alteration to the common property.

67 In reviewing the Licence, Dr Saje submits that the Licence fails to state that the wooden screens and door are already in place on the common property but are unauthorised under the ST Act. Further, Dr Saje says the Licence has been drafted to come within the terms of s 91 of the ST Act but it has no place there because s 91 covers the functions of a strata company. Also, according to Dr Saje, the Licence has no provision whatsoever for a lot owner to build, erect or modify any structures on the common property.

68 Dr Saje submits that the Licence is not a strata document under s 12 of the ST Act and therefore the Tribunal does not have jurisdiction under the ST Act to deal with the Licence. In any event, Dr Saje says that Ms Sampson has not sought any orders from the Tribunal in regards to the Licence as there is currently no dispute before the Tribunal about the Licence.

69 Importantly, Dr Saje says that Ms Sampson, Ms Bevans and Mr Marriott in their respective roles on the council have a statutory obligation under the ST Act to *not* do what they have purportedly tried to do under the Licence.[30] Consequently, it is Dr Saje's position that Ms Sampson, Ms Bevans and Mr Marriott are in breach of their duties and responsibilities under s 137 of the ST Act. Further, Dr Saje submits that Ms Sampson cannot apply for the Licence as she is both the licensee and licensor.[31]

70 It is useful to start by considering what a strata company and a council are and then turn to consider their functions before considering the terms of the Licence.

71 A strata company is a creature of statute. In this case, when the strata plan was registered on 9 August 1991, the strata company was established for the strata scheme: s 14(1) of the ST Act. The strata company is a body corporate, has perpetual succession, is capable of suing and being sued in its own name and has, subject to the ST Act, all the powers of a natural person that are capable of being exercised by a

[30] Ibid.
[31] ts 15-16, 14 August 2023.

body corporate: s 14(5) of the ST Act. The strata company is comprised of the owners for the time being of the lots in the strata titles scheme: s 14(8) of the ST Act. In this case, there are eight lots. The owners of the eight lots make up the strata company.

72 The governing body of a strata company is the council of the strata company: s 14(6) of the ST Act. Sch 1 to the ST Act comprises the governance by-laws and includes by-law governing the constitution of the council, the election of the council, meetings of the council and various other by-laws.

73 Division 1 of Pt 8 of the ST Act sets out the functions of a strata company. Without limiting the powers of a strata company in performing its functions, a non-exhaustive list of functions that a strata company may undertake, for example entering into a contract with an owner of a lot for the provision of amenities or services by it to the lot or a licence over common property for the purpose of utility infrastructure, are set out in s 116 of the ST Act.

74 Importantly, in performing its functions, the strata company has a general duty to control and manage the common property for the benefit of all the owners of lots in the strata scheme. This is provided for in s 91(1)(a) of the ST Act.

75 I now turn to consider whether the document titled 'Licence of Part of Common Property' dated 9 August 2023 (the Licence) is a licence.

76 A 'licence' gives a mere right to occupy, and usually without any interest in the land. In contrast, a 'lease' gives the tenant the right to exclusive possession – the right to exclude all others from the land, including the landlord although subject to any rights the landlord has by law or under the lease such as the right to enter and view the state of the repair. A lease also usually gives the tenant an interest in the land: ***R v Toohey; Ex parte Meneling Station Pty Ltd*** (1982) 158 CLR 327, 340-354, 363-364.

77 The sole test for deciding whether something is a lease or a licence is whether the putative lessee has a right to exclusive possession: ***Radaich v Smith*** [1959] HCA 45; (1950) 101 CLR 209 (***Radaich***) and more recently ***Dampier Mining Co Ltd v Federal Commissioner of Taxation*** (1981) 147 CLR 408 at 428.

78 In ***Radaich*** at 222-223, Windeyer J stated that to describe a person with the 'legal right to exclusive possession' as a mere license was 'self-contradictory and meaningless'.

79 Referring to Parker J in ***Caltex Properties Ltd (in liq) v Love*** (1997) 95 LGERA 132, 140, Tottle J in ***Hungry Jack's Pty Ltd v The Trust Company (Australia) Ltd*** **[No 3]** [2021] WASC 231 at [110] stated the test is not an easy one to apply because:

> … [A] lease will only exist when there is a legal right to exclusive possession and the legal right to exclusive possession must be distinguished from the fact of exclusive possession though the fact of exclusive possession may indicate a right to exclusive possession[.]

80 The test becomes even more difficult when the terms of the document signed by the parties is not clear.

81 Whether the terms of the document gives exclusive possession - and so whether it creates a lease rather than a mere licence - is a matter of substance and not form. In other words, in this case, the relationship between the strata company and Ms Sampson is to be determined by the legal effect of the arrangement and not by the label or title the parties choose to put on the document (the Licence). The consequence is that an arrangement that gives exclusive possession, and so in substance is a lease, cannot be converted into a licence by merely by calling it the Licence: ***Radaich*** at 209.

82 While Dr Saje contends that the Tribunal does not have jurisdiction under the ST Act to deal with licences that do not fall under the ST Act, in my view, the ST Act contemplates that a strata company may enter into licences. The reasons for this follow.

83 First, a licence to use or occupy the common property or part thereof is expressly provided for in s 26 of the ST Act which relevantly provides:

> A lease or licence, or lease and licence, to use or occupy the common property or part of the common property, in a strata titles scheme for a term or terms exceeding the period specified in the regulations in aggregate (including any option to extend or renew the term of a lease or licence) is not effective unless it has been approved in writing by the local government of the district in which the parcel is situated.

84 The *Strata Titles (General) Regulations 2019* (WA) (**Regulations**) does not specify any limit on the term of the licence.

85 Second s 156(4)(d) of the ST Act sets out the information to be given to a prospective buyer concerning the terms and conditions of any licence over common property.

86 Finally, s 183(21) of the ST Act provides that in the process of terminating a strata titles scheme, the licence may be terminated on the termination of the strata titles scheme.

87 Therefore, in my view, in undertaking its duty to control and manage the common property for the benefit of all the owners of lots, a strata company may enter into a licence to use or occupy part of the common property for a term as provided for by s 26 of the ST Act. If such a licence is granted then the strata company must keep for the period specified in the Regulations, the licence granting a special privilege over the common property. The is provided for in s 104(1)(c)(viii) of the ST Act. Reg 83 of the Regulations sets the retention period as 7 years beginning the day after the licence granting a special privilege ends.

88 Section 135 of the ST Act provides that the functions of the strata company are to be performed by the council. This is subject to any restriction imposed or direction given by ordinary resolution.

89 Counsel for Ms Sampson submits that there is no restriction or direction that prevents the council from entering into the Licence. In addition, following ***Engwirda and The Owners of Queen's Riverside Strata Plan 55728*** [2020] WASAT 39 (***Engwirda***), counsel for Ms Sampson submit that the strata company is authorised to enter into the Licence for Ms Sampson to use or occupy part of the common property and in such circumstances a resolution without dissent of the strata company is not required.

90 In summary, the crux of the matter, according to counsel for Ms Sampson, is whether or not Ms Sampson has a valid licence to use or occupy part of the common property for the purpose of supporting the wooden screens and door.

91 In my view, in this case, it is possible for the strata company, via its duly elected council, to enter into a licence for part of the common property with a lot owner. This is because there is no evidence before the Tribunal, for example a by-law or a minute of a general meeting where the strata company directed the council not to enter into a licence for part of the common property with a lot owner. Having said that, it is now necessary for me to carefully consider the substance of the

transaction including the circumstances surrounding the grant of the right to occupy or use part of the common property to determine whether the document before the Tribunal (the Licence) is a mere licence or is a lease.

92 The form of the document of the document before the Tribunal (the Licence) is that of a licence because the document clearly states that Ms Sampson seeks a licence of an area described as the 'Licence Area' being 'that part of the common property on the top of four boundary walls of part Lot 4 courtyard to a height of 275 centimetres from the courtyard floor'. The purpose for Ms Sampson seeking a licence of the Licence Area is set out in the Licence as 'to enable the attachment of a screen wall on the Licence Area and installation of a door to create a screen for privacy, security and shading but not to attach any temporary lights'.

93 It is common ground that the 'screen wall' and 'door' (wooden screens and door) were installed prior to Ms Sampson purchasing Lot 4 on 22 December 2022.

94 The wooden screens, according to counsel for Ms Sampson is a screen that divides Lot 4 from the common property on one side and from Lot 3 on the other side. Counsel for Ms Sampson describe the common property area as follows:[32]

> It isn't an area of land for which, for example, you might want to drive a car across or walk across or grow roses in …[it] is simply using the top of the wall and the inside of the wall as a support for a wooden structure that simply extends the height and dimensions of that screen wall … So, for that reason, we have talked about this structure being a screen – a screen wall. It is not a structural wall and nor is the bricks that support it a structural wall[.]

95 Counsel for Ms Sampson say:[33]

> We haven't sought to occupy and use the common wall between [L]ot 4 and [L]ot 3 which, for example, [L]ot 3 might want to obtain a similar licence to put something on that particular wall if the applicant so chose to do. So what we're saying is that the exclusivity of it isn't necessarily something that we are depriving others of its accessibility because it was never accessible by anybody else other than [L]ot 4[.]

96 In considering the circumstances surrounding the grant of the right to occupy part of the common property it is clear from the terms of the document (the Licence) that the wooden screens and door are for

[32] ts 48, 14 August 2023.
[33] ts 48, 14 August 2023.

Ms Sampson's 'privacy, security and shading'. I accept that the wooden screens provide Ms Sampson privacy and security to her courtyard. In my view, Ms Sampson also has exclusive use of the wooden screens and door as she is the only person who has a key to the door and therefore she exclusively controls who enters her courtyard. As the wooden screens are installed on or affixed to the brick wall no other lot owner can access that part of the common property and in that regard I do not accept Ms Sampson's position that that part of the common property (on top of the brick wall) was never accessible to anyone else other than Lot 4.

97 In ***Engwirda***, the Tribunal had before it two 'licences'. The first was an 'Alfresco Licence' for the use of the alfresco area for the purpose of an outdoor eating area for a restaurant or café operated on the lots. The second was a 'Wall Licence (Lot 525)' for the use of the wall area, the cubic space occupied by the boundary wall between the lots, to enable unrestricted access between the lots for the purpose of the restaurant or café operated on the lots. In that case, the Tribunal found at [76] and at [78] to [79] and [81] to [82] that the licence specifically prohibited the licensee from interfering with or obstructing the movement of any person gaining access to or from any part of the strata scheme, that the alfresco area could only be used for an eating area and that outside of trading area the chairs and tables were moved from the common area allowing and that pedestrians can walk through the area where the tables and chairs are situated regardless of whether it was for the purpose of accessing the alfresco area.

98 The circumstances in this case are distinguishable from those in ***Engwirda***. In my view, the circumstances of this case are akin to those in ***Radaich***, where the nature of the milk bar business carried on at the premises necessitated it being able to exclude persons from the premises. Here, Ms Sampson similarly excludes persons from her courtyard by holding the key to the door and for her security and privacy she decides who may enter her courtyard. Similarly, the wooden screens are for her security and privacy and no other owner has a right to use that area above the brick wall on the common property. The wooden screens and door are installed on, or affixed to the brick wall, therefore unlike the tables and chairs in ***Engwirda***, the wooden screens and door cannot me moved for other owners or occupiers to use that part of the common property.

99 Consequently, in my view the true nature of the document titled 'Licence of Part of Common Property' (the Licence) is to give Ms Sampson exclusive use of that part of the common property on top

of four boundary walls of part Lot 4 courtyard to a height of 275 centimetres from the courtyard floor. Further, in my view, it is also intended that Ms Sampson has exclusive use of the four boundary walls of part Lot 4. As the language of the document (the Licence) contradicts the reality of lease, the reality must prevail.

100 Therefore, in my view, the transaction between the strata company and Ms Sampson is that of a lease which purports to give Ms Sampson exclusive use of the 'Licence Area' as defined in the Licence. Therefore, it is necessary for the requirements of the ST Act as far as they relate to a lease to be complied with. Pursuant to s 93(2)(c) of the ST Act read with s 93(3)(a) of the ST Act, approval of the strata company to enter into the lease over common property must be obtained at a general meeting by a resolution without dissent. It is common ground that such a general meeting had not been so convened before the final hearing at the Tribunal.

101 In conclusion, in my view, the document (the Licence) before the Tribunal is not a mere licence but a lease which does not have the approval of the strata company.

Should the Tribunal exercise its discretion to make an order requiring Ms Sampson to remove the wooden screens and door?

102 As explained above, Dr Saje's application under s 47 of the ST Act, seeking the enforcement of scheme by-laws, is misconceived and is to be dismissed.

103 Further, although not necessary for me to determine in these proceedings, in my view, the Licence is not a mere licence but is a lease which does not have the approval of the strata company. Consequently, in my view the document before the Tribunal (the Licence) does not authorise Mr Sampson to use or occupy part of the common property for the purpose of supporting the wooden screens and door.

104 The result is unsatisfactory for the parties. However, had an application been made under s 197(4) of the ST Act, for the resolution of a scheme dispute, in my view, it would have been open for the Tribunal to make an order under s 200 of the ST Act to resolve the scheme dispute.

105 Finally, by way of observation, in order to avoid further litigation, the strata company would be well advised to consider all improvements and alterations made to the common property to determine if those improvements and alterations to the common property were properly

authorised under the ST Act, and if not, to decide what action to take under the ST Act. In this regard, I return to the brick wall on the common property that surrounds the courtyard of four ground floor lots. If the brick wall on the common property was constructed by the strata company, nothing further is required in respect of the brick wall (as the strata company may improve or alter the common property as provided for in s 91(2) of the ST Act). However, if the brick wall on the common property was not constructed by the strata company, then the same issue (was the brick wall authorised by the strata company) arises for each of the four ground floor lot owners that have the brick wall surrounding their courtyards.

106 Finally, I turn to consider Dr Saje's application for costs.

Should the Tribunal make an order for costs as claimed by Dr Saje?

107 Dr Saje seeks her the cost of her application. Apart from the filing fee, the details of other costs incurred by Dr Saje were not provided.

108 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).

109 In ***Brooks and Gransden Building Company Pty Ltd* [No 2]** [2021] WASAT 86 at [147] to [152] the Tribunal set out the principles to be applied in determining an application for costs. I have applied those principles.

110 The underlying consideration for the Tribunal when determining an application for costs is whether the justice of the case supports moving away from the initial position that each party should bear its own costs.

111 In this case, I am not satisfied that the objectives of the Tribunal would be advanced and the justice of the case supports an order for the costs for Dr Saje as her application was unsuccessful.

Conclusion

112 For the foregoing reasons, Dr Saje's application under s 47 of the ST Act, for the enforcement of scheme by-laws, is unsuccessful. It is dismissed.

Orders

The Tribunal orders:

1. The application is dismissed.

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

MS R PETRUCCI, MEMBER

31 OCTOBER 2023