
JURISDICTION : STATE ADMINISTRATIVE TRIBUNAL

ACT : STRATA TITLES ACT 1985 (WA)

CITATION : THE OWNERS OF JOHN PLACE STRATA
PLAN 9068 and KOZAK [2023] WASAT 38

MEMBER : MS R PETRUCCI, MEMBER

HEARD : 14 DECEMBER 2022, 15 FEBRUARY 2023 AND
29 MARCH 2023

DELIVERED : 22 MAY 2023

FILE NO/S : CC 419 of 2021

BETWEEN : THE OWNERS OF JOHN PLACE STRATA
PLAN 9068
Applicant

AND

JAMES KOZAK
First Respondent

JUNE WINSOME-SMITH
Second Respondent

Catchwords:

Strata Titles Act 1985 (WA) - Application by strata company for enforcement of scheme conduct by-laws where no written notice given - Whether contravention has had serious adverse consequences - Whether particular scheme conduct by-law contravened on at least three separate occasions - Onus of proof - Whether first respondent is an occupier of a lot in the strata scheme - Whether application should be dismissed - Failure of witnesses to attend hearing - Discretion of

Tribunal to make orders - Turns on own facts

Legislation:

Corruption, Crime and Misconduct Act 2003 (WA)

Criminal Code Act Compilation Act 1913 (WA), s 222

Criminal Procedure Act 2004 (WA)

Evidence Act 1906 (WA)

Magistrates Court Act 2004 (WA)

State Administrative Tribunal Act 2004 (WA), s 9, s 47, s 47(2), s 48, s 95

Strata Titles (General) Regulations 2019 (WA), reg 85

Strata Titles Act 1966 (WA)

Strata Titles Act 1985 (WA) (from 1 May 2020), s 3, s 10, s 45, s 45(1), s 45(2), s 45(4), s 47, s 47(1)(a), s 47(1)(b), s 47(1)(b)(i), s 47(1)(b)(ii), s 47(2), s 47(5), s 91, s 107, s 107(2), s 108, s 109, s 110, s 197(1)(a)(iii), s 197(4), s 199, s 200(2)(m), Sch 5, cl 2(1), cl 4(1), cl 4(2), cl 30(1)

Strata Titles Amendment Act 2018 (WA)

Result:

Application dismissed

Category: B

Representation:

Counsel:

Applicant : In Person

First Respondent : In Person

Second Respondent : In Person

Solicitors:

Applicant : N/A

First Respondent : N/A

Second Respondent : N/A

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

Currie v Dempsey [1967] 2 NSW 532

Dickinson v Minister of Pensions [1953] 1 QB 228

Efficient Building Team Pty Ltd and Perth Recruitment Services Pty Ltd
[2023] WASAT 37

Ellis and Director General of the Department of Transport [2011] WASAT 142

Robins v National Trust Company Ltd [1927] AC 515

REASONS FOR DECISION OF THE TRIBUNAL:

Introduction

1 The relevant strata titles scheme was created by the registration of Strata Plan 9068 on 28 March 1985 (**strata plan**) under the *Strata Titles Act 1966* (WA). That Act was repealed and replaced by the *Strata Titles Act 1985* (WA) (**ST Act**). The ST Act was significantly amended on 1 May 2020. In these reasons all references are to the ST Act as it applies from 1 May 2020, unless expressly stated otherwise.

2 On 23 March 2021, the applicant, The Owners of John Place Strata Plan 9068 (**strata company**) commenced these proceedings in the Tribunal by an application under s 47(1)(b) of the ST Act seeking the enforcement of a number of the scheme conduct by-laws; in particular conduct by-laws concerning the common property against the first respondent, Mr John Kozak who describes himself as a 'resident' of Lot 18 in the strata scheme¹ and the second respondent, Ms June Winsome-Smith who is the owner of Lot 18 on the strata plan. This was after the council (the governing body of the strata company) on 24 February 2021, authorised its strata manager, ESM Strata Pty Ltd (**ESM**) to instruct a legal practitioner to prepare an application to be lodged with the Tribunal.²

3 The issue to be determined is whether Mr Kozak and Ms Winsome-Smith contravened various scheme conduct by-laws on each of 16 December 2020, 12 February 2021 and 19 February 2021 as alleged by the strata company. If I find there has been a contravention of the scheme conduct by-laws, and if the requirements of s 47 of the ST Act are satisfied, then I may exercise the Tribunal's broad discretion under s 47(5) of the ST Act to make any order I consider appropriate to resolve the scheme by-law enforcement proceedings.

4 In relation to Mr Kozak, the strata company, under s 47(1)(b)(ii) of the ST Act alleges that he breached conduct by-law 2(a) and 2(d) on each of 16 December 2020, 12 February 2021 and 19 February 2021. In the alternative, under s 47(1)(b)(i) of the ST Act, the strata company alleges that Mr Kozak breached conduct by-laws 2(a) and 2(d) on 12 February 2021.

¹ Hearing Book at pages 7-8.

² Hearing Book at page 60.

5 Separately, in relation to Mrs Winsome-Smith, the strata company under s 47(1)(b)(ii) of the ST Act alleges that she breached conduct by-law 2(c) by failing to take reasonable steps to prevent Mr Kozak from contravening conduct by-laws 2(a) and 2(d) on each of 16 December 2020, 12 February 2021 and 19 February 2021. Further, under s 197(1)(a)(iii) of the ST Act the strata company alleges that Ms Winsome-Smith breached s 45(4) of the ST Act by failing to take reasonable steps to prevent Mr Kozak from contravening the various conduct by-laws.

6 In its application to the Tribunal, the strata company seeks the following orders in respect of the alleged contraventions of the scheme conduct by-laws by:

Orders sought against [Mr Kozak]

[I]n accordance with s 47(5) of the [ST] Act, [Mr Kozak] must:

[1] pay the amount of \$2,000,00 by way of penalty to the Strata Company for each contravention of the By-laws 2(a) and 2(d), being a combined penalty of \$6,000,00.

...

[2] refrain from:

(a) obstructing any workers, contractors, agents or person on the common property or the [strata] Scheme at the invitation of the Strata Company, the Council or the Strata Manager;

(b) interfering with any workers, contractors, agents or person on the common property or the [strata] Scheme at the invitation of the Strata Company, the Council or the Strata Manager; and

(c) unreasonably interfering with [Ms] Melanie [Case] and any other owners or occupiers on the common property; and

[3] otherwise comply with the Schedule 2 by-law 2 with effect from the date specified in the order; and

...

[4] that the Tribunal exercise its discretion under section 95 of the *State Administrative Tribunal Act 2004* (WA) (**SAT Act**) and order that if [Mr Kozak] fails to comply with a non-monetary decision of the Tribunal made in connection with this matter, then

[Mr Kozak] will have committed an offence, the penalty of which is \$10,000,00.

Orders sought against [Ms Winsome Smith]

[I]n accordance with section 47(5) of the [ST] Act, [Ms Winsome-Smith] must:

- [1] pay the amount of \$2,000,00 by way of penalty to the Strata Company for each contravention of By-law 2(c), being a combined penalty of \$6,000,00.
- [2] take all reasonable steps to ensure [Mr Kozak] does not behave in a manner likely to interfere with the peaceful enjoyment of an owner, an occupier or another person lawfully using the common property.
- [3] refrain from:
 - (a) obstructing any workers, contractors, agents or person on the common property or the Scheme at the invitation of the Strata Company, the Council or the Strata Manager;
 - (b) interfering with any workers, contractors, agents or person on the common property or the Scheme at the invitation of Strata Company, the Council or the Strata Manager; and
 - (c) unreasonably interfering with any other owners or occupiers on the common property; and
- [4] otherwise comply with the Schedule 2 By-law 2 with effect from the date specified in the order;
- [5] In accordance with section 200(2)(m) of the [ST] Act [Ms Winsome-Smith] must comply with section 45(4) of the [ST] Act to take all reasonable steps to ensure [Mr Kozak]:
 - (a) does not behave in a manner likely to interfere with the peaceful enjoyment of an owner, an occupier or another person lawfully using the common property; and
 - (b) complies with the Scheme by-laws.
- [6] that the Tribunal exercise its discretion under section 95 of the State Administrative Tribunal Act 2004 (WA) and order that if [Ms Winsome Smith] fails to comply with a non-monetary decision of the Tribunal made in connection with this matter, then [Ms Winsome Smith] will have committed an offence, the penalty of which is \$10,000,00.

7 The position of the strata company may be summarised as follows:³

[Mr Kozak and Ms Winsome-Smith] have shown a total disregard for following the [s]cheme [b]y-laws and continue to interfere and harass the [council] in their efforts to try and look after the units in the scheme. A very strong message needs to be sent to [Mr Kozak and Ms Winsome-Smith] to stop [them] continually interfering with contractors and the [council] performing lawful works on the property ... [Mr Kozak and Ms Winsome Smith] have no respect for the rule of law including the [Tribunal] and are causing massive disruption in the running of the [strata] [s]cheme.

8 Both Mr Kozak and Ms Winsome-Smith strongly deny they have contravened any of the scheme conduct by-laws and urge the Tribunal to dismiss or strike out the entirety of these proceedings. They assert that the strata company has:⁴

... failed to plead enough facts to state a claim to relief is plausible on its face. Application CC/419/2021 fails the plausibility test. Attached documents and annexures by [the strata company], relied upon as the foundation of their claims, have not raised the right of relief to beyond a speculative level and are in fact dispositive of the whole case. Simply put, [the strata company] has not pleaded a legally cognizable claim.

9 The position of both Mr Kozak and Ms Winsome-Smith may be summarised as follows:⁵

The [strata company] continue to push this vexatious litigation, intended to damage [Mr Kozak's and Ms Winsome Smith's] legitimate property interests. Therefore, due to the continual lack of duty of care, and the deliberate personal malice demonstrated against [Mr Kozak and Ms Winsome Smith], [we] request this Tribunal dismiss CC 419/2021 and award all reasonable costs and fees to [Mr Kozak and Ms Winsome Smith].

10 The strata company did not issue a written notice under s 47(1)(a) of the ST Act to Mr Kozak or to Ms Winsome-Smith for the alleged breaches of various conduct by-laws. Rather, the strata company relies on its position that Mr Kozak and Ms Winsome-Smith have each breached particular conduct by-laws on at least three occasions (s 47(1)(b)(ii) of the ST Act) and that in the case of Mr Kozak, his alleged

³ Written closing submission of the strata company dated 14 March 2023 at page 2.

⁴ Hearing Book at page 268.

⁵ Written closing submission of Ms Winsome-Smith dated 15 March 2023 at page 2.

contravention on 12 February 2021 has had serious adverse consequences (s 47(1)(b)(i) of the ST Act).

11 For the reasons given below, in circumstances where the strata company did not give a written notice to either Mr Kozak or Ms Winsome-Smith, on the evidence before the Tribunal, I do not find that either Mr Kozak or Ms Winsome-Smith breached the alleged particular conduct by-law on at least three occasions. Further, I do not find that on 12 February 2021 Mr Kozak breached the particular conduct by-law and that the contravention has had serious adverse consequences for Ms Melanie Case, a member of the council. The result is that the applicant's application is unsuccessful and is dismissed.

Relevant procedural history and evidence

12 Mr Kozak and Ms Winsome-Smith have maintained throughout these proceedings that these proceedings should be dismissed or struck out under s 47 of the *State Administrative Tribunal Act 2004* (WA) (**SAT Act**).

13 On 6 July 2021, the Tribunal refused to dismiss or strike out these proceedings, or part thereof.⁶ Instead, the Tribunal adjourned these proceedings to 11 January 2022 to await the outcome of the proceedings in the Magistrates Court (matter PE RO 858 of 2021).⁷ Subsequently, Mr Kozak and Ms Winsome-Smith sought to again have these proceedings dismissed or struck out under s 47(2) of the SAT Act (**strike out application**). On 11 January 2022, the Tribunal made programming orders listing the strike out application for hearing on 9 March 2022.⁸

14 On 9 March 2022, the Tribunal dismissed the strike out application resulting in these proceedings remaining on foot.

15 The Tribunal then made the usual programming orders listing the matter for a final hearing on 29 August 2022. The programming orders included orders requiring Ms Case, Ms Adele du Plessis of The Trustee for Du Plessis Family Trust trading as Reward Pest Control (**Reward Pest Control**) and Mr Lee Menaglio of First Choice Electrics Pty Ltd (**First Choice Electrics**) to file with the Tribunal and provide a copy to the parties of all the documents in their possession which relate to the alleged contraventions of various conduct by-laws by Mr Kozak

⁶ Hearing Book at page 75.

⁷ Hearing Book at pages 284-289.

⁸ Hearing Book at page 326.

and by Ms Winsome-Smith. Further, on 19 July 2022, the Tribunal ordered the strata company to file with the Tribunal and provide a copy to the parties of all the communications from and to ESM strata and the strata company by various listed persons.⁹

16 The hearing was listed for 29 August 2022 but was vacated by the Tribunal and relisted to 24 October 2022 with the parties and witnesses to appear in person.¹⁰

17 Mr Kozak failed to appear at the hearing on 24 October 2022. Further, witnesses Ms Amy Warley, Ms Eunie Remiter and Mr Nicola Mancini for the strata company and witness Mr Ravindran Karuppan from ESM for the respondents failed to appear. After hearing submissions from Mr Lyndon Pearce for the strata company and Ms Winsome-Smith for the respondents, on 24 October 2022, I adjourned the matter to a final hearing on 14 December 2022 with the parties to appear in person.

18 At the commencement of the final hearing on 14 December 2022, Mr Pearce, for the strata company, informed me that only he, Ms Case and Ms Case's husband, Mr Cameron Ross, would be giving evidence for the strata company. Mr Pearce explained that the other three witnesses which the strata company was expecting to give evidence, Ms Warley, Ms Remiter and Mr Mancini, did not respond to his request to attend the hearing as a witness for the strata company. Further, at the commencement of the hearing Mr Kozak and Ms Winsome-Smith informed me that only they would be giving evidence and that they would not be calling Mr Karuppan to give evidence. I will return to the issue of witnesses not attending the hearing later in these reasons.

19 In accordance with the Tribunal's usual practice in matters of this nature, the hearing was conducted on the basis that all the documents filed with the Tribunal would be regarded as being in evidence,¹¹ subject to any objection. There was no objection.

20 Following a full day of hearing from the strata company's witnesses on 14 December 2022, I adjourned the matter to 15 February 2023 to hear from the remaining witnesses, Mr Pearce, for the strata company,

⁹ Hearing Book at pages 326-332.

¹⁰ See order 3 of the orders made by Tribunal on 19 August 2022 (Hearing Book at page 335).

¹¹ Although forming part of the 'Hearing Book prepared by the Tribunal on 14 October 2022 and provided to the parties on 24 October 2022' (**Hearing Book**), the parties' contentions, and submissions in the Hearing Book are taken to be submissions, rather than evidence.

and from Mr Kozak and Ms Winsome-Smith, being the respondents. Following hearing from the last witness, Ms Winsome-Smith, I made orders for each party to file with the Tribunal and provide a copy to the other parties of their respective written closing submissions (of not more than two A4 typed pages). I adjourned the matter to 29 March 2023 to hear the final oral closing submissions from each party, following which I reserved my decision.

Issues

21 The issues or questions that require determination by the Tribunal in these proceedings are as follows:¹²

Issue 1: (a) Did Mr Kozak contravene conduct by-law 2(a) and/or 2(d) on each of 16 December 2020, 12 February 2021 and 19 February 2021 in relation to the three alleged incidents on the common property?

(b) In the alternative, if Mr Kozak did not contravene conduct by-law 2(a) or by-law 2(d) on at least three separate occasions in relation to each of conduct by-law 2(a) and 2(d), did Mr Kozak contravene by-law 2(a) and/or 2(d) on 12 February 2021 where that contravention has had serious adverse consequences for a person (other than for Mr Kozak)?

Issue 2: Did Ms Winsome-Smith contravene conduct by-law 2(c) on each of 16 December 2020, 12 February 2021 and 19 February 2021 in relation to the three alleged incidents on the common property?

Issue 3: Did Ms Winsome-Smith, as the owner of Lot 18, fail to take all steps that are reasonable in the circumstances to ensure that Mr Kozak complied with the conduct by-laws (s 45(4) of the ST Act) in relation to the three alleged incidents on the common property?

¹² ts 7, 14 December 2022.

Issue 4: What orders, if any, should the Tribunal make under s 47(5) of the ST Act in respect of Mr Kozak and under s 47(5) and s 200(2)(m) of the ST Act in respect of Ms Winsome-Smith?

Issue 5: Should the Tribunal make the declaration under s 95 of the SAT Act in respect of Mr Kozak and/or Ms Winsome-Smith?

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

Regulatory framework

The strata plan

23 On registration of the relevant strata scheme on 28 March 1985 the strata company was established. The strata scheme comprises 24 lots in a brick and tile three storey home unit development (**strata scheme**). The parcel and building are described on the strata plan as:

A brick and tile three storey home unit development situated on Portion of Swan Location Y being Lot 2 and Diagram 45385.

24 A notification (by instrument G400221) provided for a change of by-laws and was registered with Landgate on 18 February 1997. Relevant to these proceedings is the following addition to conduct by-law 2 which reads:

BY-LAW 2 OBSTRUCTION OF COMMON PROPERTY

(a) No objects of obstruction or bicycles to be left on Pathways and Balconies.

25 Finally, a notification (O980469) provided for the first consolidation of the scheme by-laws on 16 December 2021.

ST Act

26 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).

27 The strata company filed its 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 this application (Sch 5 cl 30(1) of the ST Act).

28 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 relevantly 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[.]

29 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.

30 In the current proceedings the strata company applied to the Tribunal under s 47(1)(b)(ii) of the ST Act for the enforcement of the scheme conduct by-laws where it is alleged that Mr Kozak and Ms Winsome-Smith have contravened various scheme conduct by-laws on at least three separate occasions, and in the alternative under s 47(1)(b)(i) of the ST Act for the enforcement of the scheme conduct by-laws where it is alleged that Mr Kozak contravened conduct by-laws 2(a) and/or 2(d) on 12 February 2021 where that contravention has had serious adverse consequences for a person (other than Mr Kozak and Ms Winsome-Smith).

31 Relevantly, s 47 of the ST Act provides:

47. Enforcement of scheme by-laws

- (1) A strata company may —

...

- (b) apply to the Tribunal under this section for an order enforcing scheme by-laws if —
 - (i) the contravention has had serious adverse consequences for a person other than the person alleged to have contravened the scheme by-laws; or
 - (ii) the person has contravened the particular scheme by-law on at least 3 separate occasions; or[.]

32 An application under s 47(1)(b)(i) or s 47(1)(b)(ii) of the ST Act must be made against a person whom it is alleged is in contravention of the scheme by-laws. 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. In these proceedings, the strata company alleges that both Mr Kozak and Ms Winsome-Smith have contravened a number of scheme conduct by-laws; in particular, conduct by-laws concerning the use of the common property.

33 The Tribunal has broad discretionary powers to make one or more of the following orders under s 47(5) of the ST Act where the Tribunal finds the person to be in contravention of the scheme by-laws:

- (a) pay a specified amount to the strata company by way of penalty for the contravention;
- (b) take specified action within a period stated in the order to remedy the contravention or prevent further contraventions;
- (c) refrain from taking specified action to prevent further contravention.

SAT Act

34 The powers of the Tribunal to dismiss or strike out all or a part of a proceeding under s 47 and/or s 48 of the SAT Act were recently summarised in *Efficient Building Team Pty Ltd and Perth Recruitment Services Pty Ltd* [2023] WASAT 37 at [28] to [37].

35 Section 95 of the SAT Act provides for the imposition of a penalty of \$10,000 if a person fails to comply with a decision (apart from a

decision that is a monetary order) of the Tribunal. The strata company seeks an order under s 95 of the SAT Act against both Mr Kozak and Ms Winsome-Smith.

36 Relevantly, s 95 of the SAT Act provides:

95. Failing to comply with decision

(1) A person who fails to comply with a decision of the Tribunal commits an offence.

Penalty: \$10 000.

(2) Subsection (1) does not apply if, or to the extent that, the decision is a monetary order.

(3) Subsection (1) does not apply in relation to a decision unless —

(a) the Tribunal, in the decision, declares that subsection (1) applies; or

(b) after a person fails to comply with the decision, the Tribunal makes an order declaring that subsection (1) applies and the failure continues after notice of that order is served on the person[.]

37 Before considering each of the issues (see above at [21]), it is useful to briefly set out the three incidents as reflected in materials filed with the Tribunal.

Three incidents

38 The strata company alleges Mr Kozak and Ms Winsome-Smith contravened the scheme conduct by-laws; in particular, conduct by-law 2 which concerns the use of the common property on three separate occasions on 16 December 2020, 12 February 2021 and 19 February 2021.

Incident on 16 December 2020 - Electrical upgrade

39 On 28 July 2020, Mr Menaglio of First Choice Electrics submitted to Mr Karuppan of ESM an estimate for electrical works as follows:¹³

99 NINTH AVE INGLEWOOD - UNIT SUBMAINS CIRCUIT PROTECTION AND COMMON CIRCUIT DEVICES UPGRADE

¹³ Hearing Book at page 139.

- Disconnect and remove existing unit submain circuit fuses/panel and common services circuit devices/panel and appropriately dispose of asbestos containing panels and devices

- Supply and install 2 x new switchboard panels for new unit submain circuit devices and new common services devices

- Supply, wire and install 24 x new enclosures with new 32 amp circuit breakers and 24 x new neutral links for sub main protection of each of the 24 units

- Supply, wire and install new common services load centre complete with new main switch, individual RCD/MCB protection for each individual common circuit and new time clock and contactor for communal lighting

Supply and fit 3 x WAS padlocks to existing main switchboard latches to prohibit access of unauthorised persons, if required[.]

40 On 30 September 2020, the strata company held an Annual General Meeting (**AGM**). Minutes of the AGM were prepared and signed by the Chairman on 12 October 2020 (**minutes**).¹⁴ Item 9 of the minutes concerns items of business proposed by the council. The minutes at item 9.4 record the following in relation to the quote from First Choice Electrics:¹⁵

9.4 On a motion moved by Lyndon Pearce and seconded by Melanie Case it was resolved that the strata company approves the quote from First Choice Electrics for the Submain Circuit Protection and Common Circuit Devices.

Note: James Kozak (Proxy for Unit 18) requested that it be noted that motion is out of order.

41 The electrical main board is located at the common property of the strata scheme on the south-western external wall of Lot 2 (**meter board**).¹⁶ The meter board has three doors which were not previously locked as shown in the photographs before the Tribunal.¹⁷

42 On 13 November 2020 Mr Karuppan of ESM issued order 47535 to First Choice Electrics which provided in part:¹⁸

¹⁴ Hearing Book at page 35.

¹⁵ Hearing Book at page 31.

¹⁶ Hearing Book at pages 4 and 36.

¹⁷ Hearing Book at page 37.

¹⁸ Hearing Book at page 137.

The strata company has approved your quote 1292 dated 28/7/2020. Please schedule and proceed.

43 On 24 November 2020 Ms Winsome-Smith by email to Mr Karuppan of ESM stated in part:¹⁹

Yesterday, Monday 23 November 2020, Melanie Case, led a person through John Place, for the purposes of drawing up a proposal for work on the Common Property.

In order to prevent further unlawful actions by the Council of Owners, and lessen future litigation, I want to remind you of your obligations under the WA Strata Titles Act (1985) to inform the Corporation of the nature of the work, the name of the business, the reasons for this work, and the costs attached. This includes any contracts signed on behalf of John Place, PRIOR TO WORK STARTING, to enable meaningful review[.]

44 On or about 3 December 2020 Ms Case in reply to Mr Karuppan's of ESM request for a member of the council to be in attendance at the strata complex with First Choice Electrics stated that she would be available to attend the strata complex on 16 December 2020.

45 On or about 3 December 2020 Mr Karuppan of ESM issued the following notice:²⁰

Circuit Protection & Upgrades

Wednesday 16th December 2020 from 8:00am

Dear all,

99 NINTH AVE INGLEWOOD SP9068 - UNIT SUBMAINS CIRCUIT PROTECTION AND COMMON CIRCUIT DEVICES UPGRADE

First Choice Electrics will be on site to undertake an upgrade work to the Main Switch Board as approved at the recent Annual General Meeting. The work is expected to start at 8:00am on Wednesday 16 December 2020 and there will be a power disruption for the day. These works are required for safety & reliability of the Main Switch Board.

Please take note & make alternate arrangements if required.

Your cooperation and patience is appreciated.

¹⁹ Hearing Book at page 171.

²⁰ Hearing Book at page 143.

46 On 7 December 2020 Ms Winsome-Smith put the following questions in an email to Mr Karuppan of ESM, which she states were not answered at the AGM:²¹

...

- A) What are the competing bids for this proposed work?
- B) Does John Place Corporation have written assurances all prevailing WA legislation *Health (Asbestos) Regulations 1992* as it relates to asbestos removal, and disposal, will be complied with? I have seen no provision from COO/ESM to warn owners about closing doors and windows against asbestos fibres.
- C) What are the plans for continued access to Owners of the common property electricity behind those cabinet doors?
- D) I am also concerned there is no provision made for the temperature on the day. Should the heat reach 30C there needs to be provision for the work to be completed at a cooler, and more humane, time. This will allow residents to use air conditioning on the day[.]

47 Subsequently, on 10 December 2020 Mr Kozak and Ms Winsome-Smith sought a declaration from the Tribunal under s 199 of the ST Act that the strata company was acting outside of its authority by 'stripping access to a valued Common Property amenity' appurtenant to their property. Mr Kozak and Ms Winsome-Smith's request was made 'as the applicants in matter CC 1334 of 2020' and such request was made before any application was filed with the Tribunal by the strata company in respect of these proceedings.²² In the application for a declaration on 10 December 2020, Mr Kozak and Ms Winsome-Smith made the following statements:

... [O]n September 30th, 2020, a Motion was introduced, voted on and deemed to pass, that would have the effect of extinguishing access to a valued Common Property amenity, appurtenant to their [property], i.e. the electrical service in a ground floor cabinet, adjacent to the designated car servicing space. The electrical service has been utilized by Owners and Occupiers of John Place, since its inception in the 1970's on an unrestricted availability.

The Motion, purported to be an upgrade to the electrical service panels located behind the cabinet doors, has never held locks, enabling

²¹ Hearing Book at pages 155-156.

²² Hearing Book at page 147.

unfettered access [to] one's own individual electrical meter and the Common Property electrical outlet.

A proposed locking mechanism removes any meaningful access to these utilities to [Mr Kozak and Ms Winsome Smith].

In simpler terms, the AGM vote was to upgrade the electrical service, not to strip the Owners of these utilities.

[Mr Kozak and Ms Winsome Smith] raised timely objections to these changes, on the basis that they were not supported by prevailing law. Nevertheless [the strata company] passed the Motion over those objections. [The strata company] have just circulated a notice to all occupants, that they propose to make these upgrades and strip access to these utilities, on September 16th, 2020[.]

48 Next, on 11 December 2020, Ms Winsome-Smith by email to Mr Karuppan of ESM stated that she and Mr Kozak have the following 'time sensitive offer of conciliation' with the strata company in matter CC 1334 of 2020 (not these proceedings) which might permit the proposed 'Circuit Protection and Upgrades' to go ahead as scheduled:²³

- A) [The strata company] must immediately provide the required minimum of three proposals for this electrical upgrade work.
- B) Any security measures applied to the Common Property electrical cupboard must reflect the same right of access as present. This means all Owners must be provided with their own key, or combination, that will give access equal to that provided for the Common Property automated car park gate[.]

49 On 16 December 2020, Ms Case wrote to Mr Karuppan of ESM to advise:²⁴

Unfortunately unit 18 blocked the electrical board so works could not be completed

The issue will need to be brought up at SAT

please issue unit 18 a bill for the electrician labour hours once received as was done for the tree

Please also send am (sic) email to owners information that the works were not carried out and why[.]

²³ Hearing Book at page 152.

²⁴ Hearing Book at page 92.

50 Apart from the correspondence from Mr Menaglio of First Choice Electrics and from Mr Karuppan of ESM the authors of the other documents set out above in [39] to [49] gave evidence and were available to be cross-examined at the final hearing. The materials as set out above are not controversial apart from Ms Case's correspondence of 16 December 2020 where she stated 'unit 18 blocked the electrical board so works could not be completed' which is strongly disputed by Mr Kozak and Ms Winsome-Smith. I will return to consider Ms Case's statement and the testimony of Ms Case, Mr Ross, Mr Kozak and Ms Winsome-Smith when considering whether there has been a contravention of conduct by-laws 2(a), 2(c) and/or 2(d) and s 45(4) of the ST Act on 16 December 2020.

Incident on 12 February 2021 - Alleged assault of Ms Case

51 On 19 January 2021, Mr Karuppan of ESM issued the following notice (address of ESM omitted).²⁵

The Resident 19/01/2021

Important

Notice

Dear Owners & Property Managers,

Items on Common Property

Please take note that the Strata Company has been notified of residents leaving their personal property/items on Common Property.

Occupants are also reminded not to leave ashtrays/cigarette butts on window sills and to pick up their rubbish and to be disposed off accordingly.

The strata company hereby gives notice that ALL ITEMS on COMMON PROPERTY are (sic) be removed IMMEDIATELY.

Failing to remove them will result in the items being removed & disposed of by the strata company.

Photos of some of the items (not limited as shown) are attached.

Ravindran Karuppan
Strata Company Manager
For an On Behalf of the Owners of John Place
Strata Plan 9068

²⁵ Hearing Book at pages 40-46.

52 At about midday on 12 February 2021 Ms Case was at the strata complex removing items left on the common property²⁶ when she sent an email to Mr Karuppan of ESM on 12 February 2021 wherein, she stated in part:²⁷

This is regarding items left on the common property.

Currently I am at John's place cleaning up items left on the common property and waiting for the police to arrive as a result from James Kozak (sic) trying to stop me removing items and assaulting me[.]

53 Ms Case made a statement to police at 2.29 pm on 12 February 2021.²⁸

54 On 19 February 2021 Magistrate Campione adjourned Ms Case's application for a restraining order against Mr Kozak in relation to what happened on 12 February 2021 at the strata complex in order to hear from Mr Kozak for the reason that her Honour was:

... not satisfied that there has in fact been an act of personal violence, or if there have, that it is sufficient to warrant a restraining order being granted. This is an instance where I think Mr Kozak should be given an opportunity to be heard and to present his case. It also occurs to me that given the context and the nature of the dispute, that it may be more appropriate for a misconduct restraining order. The proceedings are adjourned to 12 March.

55 In the council's minutes of 24 February 2021, item 8 records that some personal items are stored on the verge and other items have been cleared.²⁹

56 The materials (see above at [51] - [55]) are uncontroversial apart from Ms Case stating that Mr Kozak assaulted her. Mr Kozak strongly rejects that he consciously or accidentally touched Ms Case while they were standing on the common property of the strata complex on 12 February 2021. I will return to consider Ms Case's statement and the testimony of Mr Kozak and Ms Winsome-Smith when considering whether there has been a contravention of conduct by-laws 2(a), 2(c) and/or 2(d) and s 45(4) of the ST Act on 12 February 2021.

²⁶ Hearing Book at page 11.

²⁷ Hearing Book at page 95.

²⁸ Hearing Book at pages 10-16.

²⁹ Hearing Book at page 61.

Incident on 19 February 2021 - Pest control inspection

57 Mr Karuppan of ESM in an email to the council on 18 February 2021 (not 19 February 2021) stated in part:³⁰

ESM received a call from Reward Pest Control (RPC) today about their staff David being accosted on site when he was there to prepare a quote for the work.

ESM requested PRC to submit a quote for the Ant Spray. While David was there, this gentleman came up to him and starting narrating about the Court Proceedings with John Place and they should not be using sprays on site. He further went on to say that RPC is a small company and will stand to lose everything if they are hauled up to Court. David mentioned that he has been requested by the Stata Company to submit the quote. ESM explained to RPC that there proposed scope of works has nothing to do with the SAT Hearings in progress. This has caused some anxiety in David & for obvious reasons he is declining to quote[.]

58 On 23 February 2021, Ms du Plessis of Reward Pest Control, by email to Mr Karuppan of ESM stated in part (added emphasis in bold):³¹

As per our telephone conversation on Friday. We attended the property to Quote as requested but were **not welcomed by an owner** of a property within the strata.

We were bombarded with questions.

We have discussed this quote and matter amongst myself and David and decided not to get involved in this strata.

When we do accept this quote request and continue, we will also be part of this issue and the resident may call the police on our arrival.

Any spraying of chemical without the consent of any person in the vicinity of that spray will be deemed illegal.

The regulation is clear - We cannot spray anything when someone objects.

59 In the application to the Tribunal the strata company stated that on 19 February 2021 Reward Pest Control attended the strata complex for the purpose of providing a quote to the strata company for pest control treatment.³²

³⁰ Hearing Book at page 102-103.

³¹ Hearing Book at page 17.

³² Hearing Book at page 4.

60 The materials (see above at [57] - [59]) are controversial as Mr Kozak strongly rejects that he spoke with anyone from Reward Pest Control within the strata complex. I will return to consider the materials and the testimony of Ms Case, Mr Kozak and Ms Winsome-Smith when considering whether there has been a contravention of conduct by-laws 2(a), 2(c) and/or 2(d) and s 45(4) of the ST Act on 19 February 2021.

61 I now turn to address each of the issues identified at [21] above.

Did Mr Kozak contravene conduct by-law 2(a) and/or 2(d) in relation to the incident on 16 December 2020 - Electrical upgrade?

62 It is useful to start by setting out the conduct by-laws which the strata company allege that Mr Kozak breached on 16 December 2020.

63 Conduct by-law 2(a) provides:

An owner or occupier of a lot must —

- (a) use and enjoy the common property in such a manner as not unreasonably to interfere with the use and enjoyment of the common property by other owners or occupiers of lots or of their visitors[.]

64 Conduct by-law 2(d) provides:

An owner or occupier of a lot must —

- (d) not obstruct lawful use of common property by any person.

65 The terms of conduct by-laws 2(a) and 2(d), properly construed, do not require the respondent to the allegation that he has breached the particular conduct by-laws, in this case Mr Kozak, to prove that he has complied with the particular by-laws. Further, nothing in the ST Act requires the respondent to the allegation, in this case Mr Kozak, to prove that he has complied with the particular conduct by-laws. This means that it is for the party who asserts the affirmative of the issue to prove that issue: *Robins v National Trust Company Ltd* [1927] AC 515 at [520], *Dickinson v Minster of Pensions* [1953] 1 QB 228 at [232] and *Currie v Dempsey* [1967] 2 NSW 532 at [537]. In other words, in these proceedings, the onus of proof is on the strata company to produce reliable evidence to establish its claim that Mr Kozak contravened conduct by-laws 2(a) and/or 2(d) on 16 December 2020.

66 The strata company alleges that Mr Kozak, while using the common property, unreasonably interfered with the use and enjoyment of the

common property by the electrical contractor from First Choice Electrics (**electrician**) in circumstances where at or about 8.00 am on 16 December 2020, Mr Kozak (along with Ms Winsome-Smith) directly obstructed the electrician's lawful use of the common property by:

- (a) setting up chairs and a picnic table directly in front of the meter board;
- (b) sitting in those chairs in front of the meter board; and
- (c) refused to move from the chairs, which obstructed the electrician from accessing the meter board and carrying out the upgrade.

67 To support its position, the strata company rely on:

- (a) a photograph (which does not show a date or the time the photograph was taken) that it says was taken by the electrician on 16 December 2020 showing Mr Kozak and Ms Winsome-Smith sitting in front of the meter board,³³ which both Mr Kozak and Ms Winsome-Smith concede the photograph is of them on 16 December 2020 sitting in front of the meter board;³⁴
- (b) the photograph of the meter board (which similarly does not show a date or the time the photograph was taken);³⁵
- (c) the minutes of the AGM held on 30 September 2020 where it was resolved that the strata company approve the quote from First Choice Electrics for the submain circuit protection and common circuit devices;³⁶ and
- (d) the testimony given by Ms Case and Mr Ross at the final hearing.

68 Ms Case gave testimony that:

- (a) she spoke with the electrician from First Choice Electrics who attended the strata complex on 16 December 2020 but did not know his name and accepted that he was not in attendance at the hearing.³⁷ She did not know who took the photographs or the date

³³ Hearing Book at page 27.

³⁴ ts 243 and 245, 15 February 2023.

³⁵ Hearing Book at pages 36-39.

³⁶ Hearing Book at page 31.

³⁷ ts 40, 42 and 52, 14 December 2022.

the photographs were taken as part of the strata company's application;³⁸

- (b) it was Mr Kozak and Ms Winsome-Smith who insisted that the council get three quotes for the electrical upgrade. She attended to getting the three quotes as a compromise and in an effort to work with them;³⁹
- (c) prior to the electrical upgrade all the owners had access to the meter board;⁴⁰
- (d) after getting two further quotes, the electrical upgrade proceeded and was completed much later;⁴¹ and
- (e) she has never refused anyone access to the strata company's materials.⁴²

69 Mr Ross gave testimony that:

- (a) he and Ms Case owned Lot 17 until about December 2021;⁴³
- (b) he attended the AGM and recalls the discussion about the electrical upgrade in item 9.4 of the minutes;⁴⁴
- (c) he was not involved in the composition of the application to the Tribunal and had not seen it before giving evidence before the Tribunal on 14 December 2022;⁴⁵
- (d) he and Ms Case attended the strata complex on 16 December 2020 to meet the electrician at about 7.00 or 7.30 am.⁴⁶ When they got there Ms Winsome-Smith was sitting down with a deckchair in front of the meter board and Mr Kozak was also there as evidenced by the photograph before the Tribunal.⁴⁷ He was speaking with the electrician, who he does not know the name off, when Ms Case came over to him to say that she had asked Ms Winsome-Smith

³⁸ ts 42-43, 14 December 2022 and Hearing Book at pages 27 and 36-39.

³⁹ ts 54, 14 December 2022.

⁴⁰ ts 46, 14 December 2022.

⁴¹ ts 47 and 54, 14 December 2022.

⁴² ts 54 and 73, 14 December 2022.

⁴³ ts 61, 14 December 2022.

⁴⁴ ts 61, 14 December 2022 and Hearing Book at page 31.

⁴⁵ ts 64 and 72, 14 December 2022.

⁴⁶ ts, 14 December 2022.

⁴⁷ ts 62-63, 14 December 2022 and Hearing Book at page 27.

and Mr Kozak to move but they would not and in reply the electrician stated 'Well we can't do the work'.⁴⁸

- (e) he did not speak with Ms Winsome-Smith or with Mr Kozak;⁴⁹
- (f) the Police were called to try to resolve the matter and were in attendance for about 40 minutes, and they spoke with Ms Winsome-Smith and Mr Kozak;⁵⁰
- (g) he does not know who took the photographs filed with the Tribunal or the date they were taken⁵¹ other than they were taken by someone sitting in a car;⁵²
- (h) he does not know who took the photographs of the meter board filed with the Tribunal other than it may have been Ms Case. He does not know when the photographs were taken;⁵³
- (i) he is aware there was an objection that residents' access was going to be taken away from the power socket located inside the meter board as that was discussed at the AGM and that after Ms Winsome-Smith's objection the power socket was put on the outside of the meter board;⁵⁴ and
- (j) even though the electrician did not enter the strata complex and did not have a conversation with Ms Winsome-Smith and Mr Kozak, he is of the view that both Mr Kozak and Ms Winsome-Smith obstructed the electrician by sitting right in front of the meter board.⁵⁵

70 Mr Kozak's main assertion is that he is barred, as a 'resident' of Lot 18, from inspecting the records of the strata company which he asserts that he needed to form a meaningful response to the allegations made against him.⁵⁶ In my view, this assertion cannot succeed for the following reasons.

⁴⁸ ts 62-63, 68 and 71, 14 December 2022.

⁴⁹ ts 62, 14 December 2022.

⁵⁰ ts 63, 14 December 2022.

⁵¹ Hearing Book at page 27.

⁵² ts 65-66, 14 December 2022.

⁵³ ts 66-67, 14 December 2022.

⁵⁴ ts 68 and 72, 14 December 2022.

⁵⁵ ts 73, 14 December 2022.

⁵⁶ Hearing Book at pages 253-254.

71 First, while I accept that Mr Kozak is not a person who has a 'proper interest' in information about the strata titles scheme as he is not an owner or one of the other categories of persons listed in s 107(2) of the ST Act, read with reg 85 of the *Strata Titles (General) Regulations 2019* (WA), Mr Kozak filed with the Tribunal various responses to the allegations made against him; most of which were filed as a joint submission with Ms Winsome-Smith.

72 Second, the Tribunal issued to the parties a Hearing Book of all the materials filed with the Tribunal for these proceedings on or about 28 October 2022, that is some six weeks before the final hearing commenced on 14 December 2022. I am satisfied that Mr Kozak had been given sufficient time to respond to the application made by the strata company.

73 Third, the Tribunal directed Ms Case, Ms du Plessis and Mr Menaglio to file with the Tribunal all materials including but not limited to notes, letters, certificates and other material, recordings, electronic or otherwise which relate to the alleged contravention of various conduct by-laws by Mr Kozak and Ms Winsome-Smith as specified in the strata company's application to the Tribunal. Those orders were made by the Tribunal on 2 May 2022 and 12 May 2022.⁵⁷ The documents filed by Ms Case, Ms du Plessis and Mr Menaglio form part of the Hearing Book issued to the parties on or about 28 October 2022, that is, well in advance of the commencement of the final hearing on 14 December 2022. I am satisfied that Mr Kozak has been given sufficient time to respond to the application made by the strata company.

74 In addition to the strata company putting to Mr Kozak the nature of the case and the evidence on which it relies to make out the allegation that he breached conduct by-laws 2(a) and 2(d), Mr Kozak had the opportunity to cross-examine the strata company's witnesses Ms Case, Mr Ross and Mr Pearce at the final hearing which I note Mr Kozak did very extensively as the hearing had to be carried over to a second full day on 15 February 2023 to cater for this. Therefore, I do not accept Mr Kozak's assertion that his rights to procedural fairness have been extinguished causing a miscarriage of justice.

75 Mr Kozak's complaint that the strata company engaged a legal practitioner to prepare the application to the Tribunal which 'any competent legal practitioner would have known the vexatious nature of

⁵⁷ Hearing Book at pages 327-328 and pages 330-331.

the allegations was a foreseeable disadvantage for him in forming a meaningful response' to the application must fail.⁵⁸ This is because the application was filed with the Tribunal on 23 March 2021, there were numerous directions hearings including two dismissal/strike out applications brought by Mr Kozak and Ms Winsome-Smith before the matter was set down for a final hearing which commenced on 14 December 2022, that is, more than 18 months after the strata company filed its application with the Tribunal. Further, the legal representation for the strata company ceased to act for the strata company on 24 March 2021, that is, the day after the application was filed with the Tribunal. Mr Pearce, the chairperson of the council, who is not a legal practitioner, has had carriage of matter for the strata company.

76 Mr Kozak (and Ms Winsome-Smith) assert that the strata company coached First Choice Electrics as to what specifics to write in documents filed by the strata company⁵⁹ and that the strata company manufactured their evidence by reference to an email from Mr Karuppan of ESM on 8 March 2021 where he asked Mr Menaglio:⁶⁰

Can we have an email from your company to state that you were issued a WO by ESM to upgrade the MSB & all part were in order for the work to be completed on 16/12/2020. However on arrival your team could not access the MSB as a fellow resident and her partner were sitting close to the MSB and your team could not have access. After consultation with the COO member Melanie, it was decided to abort the work[.]

77 In my view, nothing turns on this email and in any event the strata company does not rely on it. I have not considered the email as Mr Karuppan did not make himself available to be cross-examined at the final hearing. Rather, I have only considered the evidence of Ms Case, Mr Ross, Mr Kozak and Ms Winsome-Smith who were present at the incident on 16 December 2020 and made themselves available to be cross-examined at the final hearing.

78 Mr Kozak conceded that neither he nor Ms Winsome-Smith had permission from the strata company to place the chairs and table on the common property in front of the meter board on 16 December 2020.⁶¹ According to Mr Kozak, this was the first time they had put the chairs

⁵⁸ Hearing Book at page 254.

⁵⁹ Hearing Book at page 252.

⁶⁰ Hearing Book at pages 19 and 276.

⁶¹ ts 252, 15 February 2023.

and table in front of the meter board and had sat in the chairs.⁶²
The reasons he gave for this were:⁶³

I was sitting there requesting that this corporation [strata company] live up to its duty of care and provide access to that power point equal to that with which was historically provided for the last 27 years of access to that power point. And I was asking for the corporation [strata company] to not abandon its duty of care, and provide three estimates for that[.]

79 Further, Mr Kozak gave testimony that:

- (a) at the AGM he requested that the council source three estimates for the electrical upgrade, but he was ignored and the minutes fail to reflect this;⁶⁴
- (b) at no point did anyone from First Choice Electrics enter the strata complex nor did anyone from First Choice Electrics seek to communicate with him from outside the strata complex;⁶⁵
- (c) Ms Case spoke with him and expressed her desire for the work to go ahead and that he remove the chairs and tables from in front of the meter board to which he replied, 'Get three estimates and provide access to that power point';⁶⁶ and
- (d) he spoke with the Police Officer who attended the strata complex and reiterated to that officer that all he 'was requesting was that they [the strata company] stick to their duty of care, produce three estimates, and give assurances that the valued common property amenity of the switchboard would be given the same access as it was before'. He noted the Police Officer also spoke with Ms Case but that she would not agree to his (Mr Kozak's) request.⁶⁷

80 In relation to the incident of 16 December 2020, I find:

- (a) the meter board is located on the common property;

⁶² ts 247 and 252, 15 February 2023.

⁶³ ts 243-244, 15 February 2023.

⁶⁴ ts 249, 15 February 2023.

⁶⁵ ts 251, 15 February 2023.

⁶⁶ ts 253, 15 February 2023.

⁶⁷ Ibid.

- (b) at the AGM it was resolved for First Choice Electrics to do the electrical board upgrade. Mr Kozak, as proxy for Lot 18, raised objections at the AGM in relation to the electrical board upgrade;
- (c) the council organised for First Choice Electrics to attend the strata complex to do the electrical board upgrade;
- (d) the strata company via ESM issued a notice which advised that First Choice Electrics would be attending the strata complex on 16 December 2020 to undertake the meter board upgrade;
- (e) First Choice Electrics attended on 16 December 2020 at or about 8.00 am but did not enter the strata complex;
- (f) Ms Case spoke to someone (name unknown) from First Choice Electrics;
- (g) Ms Kozak alone or along with Ms Winsome-Smith placed two chairs and a table in front of the meter board on the common property on 16 December 2020. Mr Kozak and Ms Winsome-Smith sat in the chairs on the common property on or about 8.00 am, without the permission of the strata company;
- (h) Ms Case asked Mr Kozak to move the chairs and table from in front of the meter board to which he replied, 'Get three estimates and provide access to that power point';
- (i) the Police were called. The Police attended the strata complex and spoke with both Mr Kozak and Ms Case. Mr Kozak reiterated his position that the council produce three estimates for the electrical upgrade works and that access to power point be given as it was before. Ms Case refused; and
- (j) First Choice Electrics left and no works were completed by them on the meter board on 16 December 2020.

81 It is the general duty of the strata company to control and manage the common property for the benefit of all the owners (s 91 of the ST Act). In order to be able to do this, the strata company must have full and free access to the common property (unless there is an exclusive use by-law in place concerning that part of the common property, which is not the case here) so that any person engaged to carry out repairs or other works can undertake those works. It is common ground that the meter

board is located on the common property and that the strata company is responsible for it.

82 I accept that at no time did the electrician from First Choice Electrics speak with either Mr Kozak or Ms Winsome-Smith on 16 December 2020. Having discussed the situation of the table and chairs in front of the meter board with two people sitting on the chairs with Ms Case, the electrician from First Choice Electrics decided it was best to leave site and leave the works for another day.⁶⁸

83 Mr Kozak had not sought, and the strata company had not given to him nor to Ms Winsome-Smith permission to place the two chairs and table on the common property in front of the meter board on 16 December 2020. When Ms Case, for the council, asked Mr Kozak to move them from in front of the meter board, he replied, 'Get three estimates and provide access to that power point.' Calling for assistance from the Police did not assist the situation because the chairs and table were not moved from the common property in front of the meter board.

84 Mr Kozak's position that he was asking for 'nothing more other than the three estimates and that the power point be made available to us in an access equal to what it had been'⁶⁹ was understood by the strata company as the council as a compromise, according to Ms Case, eventually provided two further estimates and a power point was installed on the outside of the meter board.

85 Mr Kozak's failure to move the chairs and table when asked to do so by Ms Case on 16 December 2020 will cause him to be in contravention of conduct by-law 2(a) and 2(d) in the circumstances of this case if he is an 'owner' of a lot on the strata plan or is an 'occupier' of a lot on the strata plan.

86 It is common ground that Mr Kozak is not an owner of a lot on the strata plan.

87 Mr Kozak asserts that he is a 'resident' of Lot 18. That term is not used in the ST Act. However, the term 'occupier' is used in the ST Act. It is defined in s 3 of the ST Act as follows:

⁶⁸ Hearing Book at page 18.

⁶⁹ ts 253, 15 February 2023.

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

88 In my view, Mr Kozak is an 'occupier' of Lot 18 on the basis that he lives with his spouse, Ms Winsome-Smith at Lot 18 and has done so since July 2018, apart from a couple of months when he returned to Canada.⁷⁰ This was not disputed by Ms Winsome-Smith. Consequently, in my view, Mr Kozak is an occupier of Lot 18 per the definition of 'occupier' (see above at [87]).

89 Having decided that Mr Kozak is an occupier of Lot 18, I now turn to consider if Mr Kozak contravened conduct by-law 2(a) and or 2(d) on 16 December 2020.

90 In my view Mr Kozak's failure to move the chairs and table from the common property in front of the meter board when asked to do so by Ms Case, for which he had not asked the strata company for, and had not been given permission to place them on the common property, in circumstances where the strata company had organised for First Choice Electrics to attend to do works on the meter board on 16 December 2020 caused him to contravene conduct by-law 2(d) by obstructing lawful access to the meter board.

91 Further, I am satisfied that Mr Kozak contravened conduct by-law 2(a) in circumstances where his use of the common property area in front of the meter board by placing the table and chairs unreasonably interfered with the use of that common property area by the electrician from First Choice Electrics, a visitor to the strata complex who was invited to attend the strata complex by the council, in order to carry out certain electrical works which they were engaged to complete on 16 December 2020 but when Ms Case asked Mr Kozak to move the chairs and table he refused to and therefore unreasonably interfered with the electrician's use of the common property area in front of the meter board.

92 In my view, it was not necessary for the electrician from First Choice Electrics to have spoken directly with Mr Kozak and/or with Ms Winsome-Smith or to actually be on the common property in order for the Tribunal to make a finding that Mr Kozak contravened conduct by-law 2(a) and 2(d). This is because, in the circumstances of this case, Ms Case had asked Mr Kozak to move the chairs and table in order for the electrician from First Choice Electrics to do his work, but Mr Kozak

⁷⁰ Ibid.

refused to move the table and chairs and told Mr Case to 'Get three estimates and provide access to that power point'.

93 Mr Kozak made several other contentions, none of which, in my view, assist him. In the paragraphs which follow, I provide brief reasons as to why Mr Kozak's other main contentions are not successful.

94 I do not accept Mr Kozak's contention that the strata company failed to present a 'cognisable claim' upon which the Tribunal can grant relief,⁷¹ on the basis that Mr Kozak says the strata company has classified him as Ms Winsome-Smith's 'visitor',⁷² which according to Mr Kozak is a person with no duty of care to the strata company under the ST Act or the Regulations. This is because I have made a finding that Mr Kozak is an occupier of Lot 18 (see above at [87] - [88]) and therefore the scheme by-laws apply to him (s 45 of the ST Act).

95 Mr Kozak's assertion that even if all of the strata company's claims are accepted, the evidence of the strata company repeatedly suggests the opposite,⁷³ and therefore the strata company's pleadings have no meritorious argument⁷⁴ is not accepted because I have found the strata company's claim has merit as already explained.

96 Mr Kozak's contention that the photographic evidence submitted by the strata company is of grainy photographs of unrecognisable persons taken from outside the strata complex and which in any event is not evidence of obstruction⁷⁵ is not consistent with his own evidence at hearing that the photograph is of him and Ms Winsome-Smith taken in front of the meter box on 16 December 2020 and that was the first occasion they had put the chairs and table in front of the meter box.

97 Mr Kozak's assertion that the council by seeking further quotes for the electrical upgrade as set out in a minute of 24 February 2021 nullifies the strata company's claim that the electrical upgrade was authorised per the requirements of the ST Act⁷⁶ is not accepted as it is the incident of 16 December 2020 that is relevant in these proceedings. I have already made a finding that Mr Kozak refused to move the table and chairs when asked to do so by Ms Case in circumstances where the strata company

⁷¹ Hearing Book at page 251.

⁷² Hearing Book at page 5.

⁷³ Hearing Book at page 251.

⁷⁴ Ibid.

⁷⁵ Hearing Book at pages 27 and 252.

⁷⁶ Hearing Book at pages 61, 253, 267 and 297.

had engaged First Choice Electrics to undertake works on the meter board on 16 December 2020.

98 In summary, I find that Mr Kozak breached conduct by-law 2(a) and 2(d) on 16 December 2020 when he (alone or along with Ms Winsome-Smith) placed chairs and a table in front of the meter board on the common property, without permission of the strata company, and when asked by Ms Case to move them in circumstances where the strata company had organised for First Choice Electrics to attend the strata complex to undertake the upgrade to the meter board, he refused to do so. By that refusal, in my view, Mr Kozak unreasonably interfered with and obstructed the lawful use of the common property by the electrician from First Choice Electrics who was engaged to attend the strata complex on 16 December 2020 to undertake the electrical upgrade. Finally, I note that it was open to Mr Kozak to file an application with the Tribunal under s 197(4) of the ST Act to resolve the scheme dispute for the continuing access to the power point and other scheme matters.

99 I will later in these reasons return to consider if the requirements of s 47(1)(b)(i) or s 47(1)(b)(ii) of the ST Act have been satisfied. If the requirements are satisfied for either of these provisions then I may exercise the Tribunal's broad discretion under s 47(5) of the ST Act, if satisfied, to make any order I consider appropriate to resolve the present by-law enforcement proceedings including making an order requiring Mr Kozak to pay a specified amount by way of penalty for the contravention of conduct by-law 2(a) and/or 2(d) and/or take or refrain from taking specified action to remedy or to prevent further contravention of the particular conduct by-law.

Did Mr Kozak contravene conduct by-law 2(a) and/or 2(d) in relation to the incident on 12 February 2021 - Alleged assault of Ms Case?

100 Conduct by-law 2(a) and 2(d) are set out above at [63] to [64].

101 The strata company alleges that Mr Kozak, while using the common property, unreasonably interfered with the use and enjoyment of the common property by Ms Case on 12 February 2021 when Mr Kozak grabbed Ms Case's upper left arm and that he directly obstructed Ms Case's lawful use of the common property. The result of this is that the strata company contends that under s 47(1)(b)(ii) Mr Kozak contravened conduct by-law 2(a) and 2(d).

102 In the alternative, the strata company contends that under s 47(1)(b)(i) of the ST Act, Mr Kozak contravened conduct by-law 2(a)

and 2(d) as his grabbing of Ms Case's upper left arm has had serious adverse consequences for Ms Case.

103 Ms Case gave testimony that:

- (a) on 19 January 2021, a notice was issued to all owners and that it was up to the owners to pass the notice onto their tenants.⁷⁷ The notice required people's private property on the common property to be removed, otherwise the council would remove it;⁷⁸
- (b) the photographs attached to the notice were taken by her, but she does not know the date she took the photographs and that the photographs are of the type of stuff that is on the common property which should not be there;⁷⁹
- (c) on 12 February 2021 she parked her ute on Coode Street and entered the strata complex via the pedestrian gate to clean up the common property at about midday.⁸⁰ She had placed one or two bikes in the back of her ute along with some hoses and other stuff that was lying around on the common property when she was confronted by Mr Kozak as she was retrieving some plastic pots/buckets with plant clippings under a tree on the common property;⁸¹
- (d) she asked Mr Kozak if they were his to which he replied 'Case, you're not taking those' and he tried to block her.⁸² She thinks Mr Kozak may also have said to her 'Get a court order like everyone else'.⁸³ It was about this time that Mr Mancini and his partner parked their car and came to ask Mr Kozak to leave her alone. She tried to go past Mr Kozak, but he blocked the pedestrian gate so that she could not exit.⁸⁴ She asked Mr Mancini to open the gate but as she went to walk out to go to her ute, Mr Kozak grabbed her left arm;⁸⁵
- (e) while waiting for the Police, she sent an email to Mr Karuppan at 12.48 pm about the incident. She received and responded to text

⁷⁷ ts 83, 14 December 2022 and Hearing Book at page 40.

⁷⁸ ts 83 and 98, 14 December 2022.

⁷⁹ ts 84, 14 December 2022 and Hearing Book at pages 41-46.

⁸⁰ ts 84-85, 14 December 2022.

⁸¹ ts 85, 14 December 2022.

⁸² ts 85, 14 December 2022.

⁸³ ts 96, 14 December 2022.

⁸⁴ ts 86-87, 14 December 2022.

⁸⁵ ts 85-86, 14 December 2022.

messages from Mr Pearce at 1.09 pm and signed a Police Statement at 2.29 pm that day;⁸⁶

- (f) she later requested a copy of her Police Statement from the Bayswater Police Station;⁸⁷
- (g) she was not aware that Ms Winsome-Smith had called the Police on 12 February 2021, and she does not have a copy of the incident report and has not seen Ms Winsome-Smith's Police Statement;⁸⁸ and
- (h) she sought a violence restraining order against Mr Kozak in relation to the incident on 12 February 2021, but no orders or charges were made against him as she eventually withdrew her application.⁸⁹

104 At hearing, Ms Case stated that she has been involved in legal proceedings with Mr Kozak for the past two years. According to Ms Case this was because she was not able to fulfill her duties as chairperson of the council and that she did not feel safe attending the strata complex because she was not sure what Mr Kozak may do.⁹⁰ Further, Ms Case states that she was shaken by the incident of 12 February 2021 and that she does not feel comfortable going to the strata complex. These are the serious adverse consequences that Ms Case say have arisen for her from Mr Kozak breaching conduct by-laws 2(a) and 2(d).

105 In her statement to the Police, Ms Case stated that she felt pressure on her arm but no pain but that she has no injury from Mr Kozak grabbing her upper left arm and that she would not be seeking medical attention.⁹¹

106 On 19 February 2021, Magistrate Campione refused Ms Case's application for a restraining order against Mr Kozak. Her Honour stated that she was:

... not satisfied that there has in fact been an act of personal violence, or if there have, that it is sufficient to warrant a restraining order being granted. This is an instance where I think Mr Kozak should be given an opportunity to be heard and to present his case. It also occurs to me that

⁸⁶ ts 87 and Hearing Book at pages 105, 108 and 10-16.

⁸⁷ ts 99, 14 December 2022.

⁸⁸ ts 89, 14 December 2022.

⁸⁹ ts 91, 103 and 104, 14 December 2022.

⁹⁰ ts 106, 14 December 2022.

⁹¹ Hearing Book at pages 14-16.

given the context and the nature of the dispute, that it may be more appropriate for a misconduct restraining order[.]⁹²

107

Mr Kozak strongly denies that he assaulted Ms Case on 12 February 2021. Rather, Mr Kozak's position is that on 12 February 2021, Mr Mancini assaulted him which resulted in him obtained a restraining order against Mr Mancini. Further, Mr Kozak gave testimony that:⁹³

- (a) on or about three days after the incident on 12 February 2021, he was the applicant before the Magistrates Court seeking a violence restraining order against Mr Mancini who is six foot tall and about 200 pounds and had violently tackled him from behind on 12 February 2021 throwing him to the ground. The Magistrate granted him the order against Mr Mancini which is still active;
- (b) he never received the notice that council would be removing things left on the common property. He does not recall Ms Winsome-Smith giving to him the notice but that she may have referred to an email that she received and that she may have stated that 'They're coming to clean up the property' but from his knowledge and belief he had nothing that would have qualified to be 'seized' by Ms Case. He received a copy of the notice from the Police when they were seeking to prosecute him for the two bicycles that Ms Case 'seized' from the common property;
- (c) on 12 February 2021 he could see from the window of Lot 18 that Ms Case appeared to be 'stealing and seizing' property, that included an expensive bicycle which had been abandoned some time earlier which he had put underneath some bushes behind Lot 5 on the common property to camouflage it while he was dealing with Bikelinc in order to return it to its rightful owner, and putting them on the back of her ute;
- (d) a few minutes later after he saw Ms Case, he went downstairs and was standing on the common property on the Coode Street side with his back turned to the main vehicle gate and within 8 to 10 metres of Ms Case. They were speaking about the property that Ms Case was 'seizing' which, according to Mr Kozak, included some Frangipani and Jade cuttings that were outside of the strata complex on the Coode Street verge as well as some pots that he had placed in the shade just inside the strata complex just a few

⁹² Hearing Book at page 129.

⁹³ ts 214-241, 15 February 2023.

days before that he was trying to rehabilitate to be later planted on the street verge. At this time, Mr Kozak says that Ms Case had brought herself closer to him. When he told Ms Case words to the effect that the property was not hers and that if she wanted to remove the property that she had to get a Court order just like everyone else, Ms Case yelled out to Mr Mancini, who promptly came over and tackled him violently from behind;

- (e) he did not touch or grab Ms Case either deliberately or inadvertently. Nor was he within an arm's reach of her;
- (f) he spoke with the Police when they attended the strata complex. The conversation centred on his belief that Ms Case was 'seizing' not only his cuttings that were located outside of the strata complex but also about the bicycle that he had reported to Bikelinc. He said he was concerned that he had no prior notice that Ms Case was coming to 'seize' property; and
- (g) he did not have permission from the strata company for the bicycle to be stored on common property. Nor did he have permission from the strata company for the pots and plants including clippings to be placed on the common property.

108 Ms Winsome-Smith gave testimony that:⁹⁴

- (a) on 12 February 2021 she was standing at her window which directly overlooks the car park area and had a very clear view of Mr Kozak and Ms Case. They were standing on the lawned area between the Coode Street boundary fence and the carport area and were facing each other with Mr Kozak having his back to the carport area. Ms Case was holding some pots in her hands. Her window was open so she could hear the loud conversation or yelling going on between them. It appeared to be a standoff situation to her, so she called the Police on 131 444 and halfway through dialling the number, she saw Mr Mancini come charging down the path yelling, then grabbed and threw Mr Kozak to the ground. Because of this she hung up and immediately dialled 000 and reported the incident to the Police as it was unfolding in front of her. She saw Mr Mancini go down on top of Mr Kozak;
- (b) after Mr Mancini's arms came out, Ms Case dropped the pots and one of them smashed. Something made Ms Case drop the pots

⁹⁴ ts 290-306, 15 February 2023.

and it was not Mr Kozak because she saw Mr Mancini's arms came out wide like a bear hug grabbing Mr Kozak. Ms Case in her Police Statement states that Mr Mancini came between her and Mr Kozak;

- (c) she knows that Mr Kozak sought and was granted a restraining order against Mr Mancini for what happened that day.

109 There is a significant divergence between the parties as to what happened on 12 February 2021 on the common property. The strata company assert that Mr Kozak assaulted Ms Case on common property. The testimony of both Mr Kozak and Ms Winsome-Smith is that Mr Kozak did not touch Ms Case and that Mr Mancini assaulted Mr Kozak on 12 February 2021. Further, Mr Kozak's and Ms Winsome-Smith's evidence is that as a result of that incident, Mr Kozak was granted a violence restraining order against Mr Mancini. Ms Case withdrew her application for a restraining order against Mr Kozak. The strata company did not dispute this.

110 I am not satisfied that the strata company has proved that Mr Kozak contravened either conduct by-law 2(a) or 2(d) on 12 February 2021. The reasons for this are as follows.

111 First, I am satisfied that on 12 February 2021, Ms Case was going about her business collecting items, that in her view, had been left on the common property, without permission, and during that activity, Mr Kozak verbally challenged Ms Case 'seizing' property, being the bicycle he had reported to Bikelinc, Frangipani and Jade cuttings as well as various pot plants located under the shade of a tree on the common property. This verbal challenge, or a loud discussion or yelling between Ms Case and Mr Kozak, as described by Ms Winsome-Smith, occurred on the common property. However, I do not find the loud discussion or yelling from Mr Kozak, without more, in the circumstances of this case on 12 February 2021, amount to Mr Kozak unreasonably interfering with Ms Case's use and enjoyment of the common property or that such loud discussion or yelling has obstructed Ms Case's lawful use of the common property.

112 Second, Ms Case in her Police Statement stated that Mr Kozak grabbed her on her upper left arm and was trying to grab the bucket out of both of her hands. Ms Case also stated that she felt Mr Mancini come between herself and Mr Kozak and that Mr Mancini and Mr Kozak tussled for a bit. Mr Kozak strongly denies that he either intentionally or

unintentionally touched Mr Case. Mr Pearce for the strata company informed the Tribunal that he requested Mr Mancini attend to give evidence in these proceedings, but that Mr Mancini ignored his request. In respect of the witnesses who did give testimony at the final hearing, being Ms Case, Mr Kozak and Ms Winsome-Smith, I prefer the evidence of Ms Winsome-Smith, who was able to clearly articulate what was unfolding between Ms Case, Mr Kozak and Mr Mancini on 12 February 2021 as she had a clear view of the common property where the three persons were and could hear the conversation and yelling from the window of her Lot 18. Mr Winsome-Smith's evidence is that Mr Mancini came charging down the path yelling, then grabbed and threw Mr Kozak to the ground. This accords with Ms Case's evidence that there was a tussle between Mr Mancini and Mr Kozak and that Mr Mancini came between her and Mr Kozak. However, the tussle between Mr Mancini and Mr Kozak does not amount to a breach by Mr Kozak of conduct by-laws 2(a) and 2(d) in regards to Ms Case.

113 As I am not satisfied that the strata company has proved that Mr Kozak breached conduct by-laws 2(a) or 2(d), it is not necessary for me to consider the strata company's alternative position under s 47(1)(b)(i) of the ST Act that Mr Kozak contravened conduct by-law 2(a) and 2(d) as his grabbing of Ms Case's upper left arm has had serious adverse consequences for Ms Case. This is because, s 47(1)(b)(i) of the ST Act, properly construed, is only enlivened for the strata company to make an application to the Tribunal in relation to one alleged breach of a scheme by-law where no notice of the contravention of the scheme by-laws has been given to Mr Kozak (which is the case here) and where there has not been a contravention of the particular by-law on at least three separate occasions (which is the case here) provided that there is a contravention of conduct by-law 2(a) and or 2(d) and that contravention has had serious adverse consequences for a person other than Mr Kozak (in this case Ms Case).

114 Mr Kozak raises other concerns including:

- (a) the strata company in its application to the Tribunal liberally sprinkled the word 'assault' at least eight times with no supporting evidence that rise to the level to support such usage of 'assault' as that term is defined in s 222 of the *Criminal Code Act Compilation Act 1913* (WA). Mr Kozak states there has been no judicial determination of the alleged conduct, nor is there a

statement of material facts and there is no Police Statement.⁹⁵ In addition, Mr Kozak asserts that Ms Case's witness statement is a series of unverified claims which was never subject to cross-examination by any judicial proceeding;⁹⁶

- (b) the strata company used the terms 'assault' and 'Police statement' is an unconscionable, vexatious and a misrepresentation of untested claims⁹⁷ and that as Ms Case's allegation against him failed in the Magistrates Court, the strata company's application must be dismissed as a matter of law;⁹⁸ and
- (c) the strata company may have violated the *Evidence Act 1906* (WA), the *Magistrates Court Act 2004* (WA) and the *Criminal Procedure Act 2004* (WA) by publishing evidence that was before the Magistrates Court in 208479-1 in circumstances where there is no evidence before the Tribunal that the strata company sought leave of the Magistrates Court to publish Ms Case's statement to the Police in these proceedings,⁹⁹ and that as part of the record before the Crime and Corruption Commission (CCC) for proceedings concerning the alleged incident on 12 February 2021, that it is within the authority of the CCC under the *Corruption, Crime and Misconduct Act 2003* (WA) to issue a report 'significantly undermining' the strata company's claims of 12 February 2021.¹⁰⁰

115 It is not necessary for me to consider these other concerns because as set out earlier, in my view, the strata company has not proved that Mr Kozak contravened either conduct by-laws 2(a) or 2(d) on 12 February 2021 in regards to Ms Case.

Did Mr Kozak contravene conduct by-law 2(a) and/or 2(d) in relation to the incident on 19 February 2021 - Pest control inspection

116 Conduct by-law 2(a) and 2(d) are set out above at [63] to [64]. They deal with the use of common property.

117 The strata company alleges that Mr Kozak while using the common property unreasonably interfered with the employee from Reward Pest

⁹⁵ Hearing Book at page 251.

⁹⁶ Hearing Book at page 251.

⁹⁷ Hearing Book at page 251.

⁹⁸ Hearing Book at page 268.

⁹⁹ Hearing Book at page 267.

¹⁰⁰ Hearing Book at page 268.

Control who attended the strata scheme on 19 February 2021 to provide a quote for pest control and directly obstructed the lawful use of the common property by that employee. As already explained the onus of proof is for the strata company to provide reliable evidence to establish its claim that Mr Kozak has contravened conduct by-law 2(a) and/or 2(d) (see above at [65]).

118 In regards to the incident, Mr Pearce for the strata company informed the Tribunal that, as stated in the email of 23 February 2021 from Ms du Plessis to Mr Karuppan of ESM that Reward Pest Control has 'decided not to get involved with this strata' including in any legal proceedings and for that reason no witness from Reward Pest Control attended the hearing.

119 Both Mr Kozak and Ms Winsome-Smith submit that the email from Ms du Plessis refers to 'an owner' but there is no express reference to Mr Kozak and therefore the claim made by the strata company against Mr Kozak must be nullified.¹⁰¹ Further, Mr Kozak asserts that the evidence of Reward Pest Control, that 'Any spraying of chemical without the consent of any person in the vicinity of that spray will be deemed illegal. The regulation is clear - We cannot spray anything when someone objects' nullifies the claim by the strata company.

120 Whether or not a chemical can be sprayed is not to the point in these proceedings concerning alleged breach of conduct by-laws. The issue to be determined by the Tribunal is whether Mr Kozak contravened conduct by-law 2(a) and/or 2(d) by unreasonably interfering with the use and enjoyment of the common property or obstructed the lawful use of the common property of the strata complex by a visitor, in this case the person (unnamed) from Reward Pest Control.

121 Ms Case gave testimony that on 19 February 2021, an employee of Reward Pest Control attended the strata complex to assess the property and give a pest control quote. Ms Case stated that the employee of Reward Pest Control was not there to spray anything. Ms Case states that she does not know the name of the person who attended from Reward Pest Control.¹⁰² According to Ms Case, the gentleman referred to in Mr Karuppan's email of 18 February 2021¹⁰³ to the council is Mr Kozak because of the reference to court proceedings as there are only two people, Mr Kozak and Ms Winsome-Smith, with whom the strata

¹⁰¹ Hearing Book at pages 17 and 275.

¹⁰² ts 82-83, 14 December 2022.

¹⁰³ Hearing Book at page 102.

company has had legal proceedings.¹⁰⁴ Even though Mr Karuppan's email does not use the word 'harassed', Ms Case states that all contractors who attends the strata complex are 'harassed' or threatened with legal action. It is because of this the council arranges for a member of council to be on site to meet with the contractor.¹⁰⁵ Ms Case stated that she accepts that if someone says 'they object to the spraying of chemicals without consent' they are lawfully exercising their right to object.¹⁰⁶

122 Mr Kozak disputes the strata company's characterisation of him as 'running around the complex like some sort of wild man when there is no indication, at any point, that [he] has acted anything (sic) except in accordance with the pertinent legislation'.¹⁰⁷ This is because, according to Mr Kozak, he was outside of the strata complex on the verge gardening in proximity to the pedestrian exit gate on Coode Street. Mr Kozak said he saw the vehicle from Reward Pest Control and once the van had driven out of the strata complex and was within four to five metres of where he was gardening, he asked the male driver what he was doing there to which he was told that he was there to provide an estimate to spray the common property.

123 Mr Kozak stated that he told the male driver from Reward Pest Control that 'unit 18 is currently in SAT proceedings against the [strata company] outside of the [ST] Act that controls the spraying of poisons' and that:¹⁰⁸

We are certain to raise our objections in a – in a tribunal or court of law, to the spraying of those chemicals because, ... when any [one] objects to it, they can't spray ... and if you want to further participate in resolving this, there's a certainty that your testimony would be relevant to any proceeding.

124 Mr Kozak estimates that the conversation with the male driver from Reward Pest Control lasted about six to eight minutes.

125 Mr Kozak's evidence in the main confirms the email from Reward Pest Control dated 23 February 2021 except for where, and on what date the conversation took place.

126 In the email of 23 February 2021 (which was a Tuesday), Ms du Plessis stated 'As per our telephone conversation on Friday.

¹⁰⁴ ts 75, 14 December 2022.

¹⁰⁵ ts 76 and 78, 14 December 2022.

¹⁰⁶ ts 80-81, 14 December 2022.

¹⁰⁷ ts 260-261, 15 February 2023.

¹⁰⁸ ts 260, 15 February 2023.

We attended the property to Quote as requested ...¹⁰⁹ The date on Friday was 19 February 2021 which is the date the strata company alleges Mr Kozak breached conduct by-laws 2(a) and 2(d). However, there is an email from Mr Karuppan of ESM of the morning of 18 February 2021 to council in which he stated in part:¹¹⁰

ESM received a call from Reward Pest Control (RPC) today about their staff David being accosted on site when he was there to prepare a quote for the work[.]

127 The date '18 February 2021' was a Thursday (and not a Friday). In the same email of 18 February 2021, Mr Karuppan states that the staff member was 'accosted on site'.

128 Mr Kozak is very clear that he was not in the strata complex or on the common property. Rather, Mr Kozak's evidence is that he spoke with the male driver of the Reward Pest Control vehicle when the vehicle was outside of the strata complex.

129 In my view, the strata company's claim must fail. The reasons for this are as follows.

130 First, the evidence as to what occurred on 19 February 2021 is in conflict. Ms Case and Ms du Plessis as well as the strata company say the incident occurred on 19 February 2021. However, Mr Karuppan's email of 18 February 2021 is clear and was not contested by the strata company or the respondents. At best, in my view, Reward Pest Control attended the strata complex on 18 February 2021 as evidenced by the email of 18 February 2021 from Mr Karuppan to the council.

131 Second the strata company relies on the email of 18 February 2021 and the email of 23 February 2021 to support a conclusion that Mr Kozak obstructed the lawful use of common property and/or unreasonably interfered with the use and enjoyment of the common property by the employee of Reward Pest Control. In my view, the email of 23 February 2021 is unreliable as it refers to a different date (19 February 2021) that Reward Pest Control attended the strata company and it states the employee of Reward Pest Control was 'not welcomed by an owner' yet the strata company alleges it is Mr Kozak, who is not an owner, who contravened conduct by-laws 2(a) and 2(d). The email of 18 February 2021 is Mr Karuppan's understanding that the employee of Reward Pest Control was 'accosted on site'. However, the testimony of Mr Kozak is

¹⁰⁹ Hearing Book at page 91.

¹¹⁰ Hearing Book at page 102.

very clear - that he spoke with the employee from Reward Pest Control outside of the strata complex.

132 The strata company did not call Mr Karuppan as a witness with the result he was not available to be cross-examined. I accept the evidence of Mr Kozak that he spoke with the employee from Reward Pest Control outside of the strata complex.

133 The email of 23 February 2021 which provides in part 'We have discussed this quote and matter ... When we do accept this quote request and continue, ...' supports the conclusion that the employee of Rewards Pest Control attended the strata complex and was able to prepare the quote and there is no suggestion in that email that the employee was obstructed on the common property or that the person's use and enjoyment of the common property was unreasonably interfered with in the preparation of the quote. The email simply reflected that the employee of Reward Pest Control was 'not welcomed'.

134 I am not satisfied that the strata company has proved that the alleged incident did in fact occur on 19 February 2021 (rather than on 18 February 2021 per Mr Karuppan's email of 18 February 2021) and that Mr Kozak unreasonably interfered with the use and enjoyment of the common property of the strata scheme by the employee of Reward Pest Control and/or obstructed that employee's lawful use of the common property when the email of 23 February 2021 is clear that the employee of Reward Pest Control did attend the strata complex and did provide a quote. Further, the email of 23 February 2021 refers to an 'owner' not welcoming the employee from Reward Pest Control. Mr Kozak is not an owner. For all of these reasons, the claim against Mr Kozak must therefore fail.

Did Ms Winsome-Smith contravene conduct by-law 2(c) and/or s 45(4) of the ST Act in relation to the incident on 16 December 2020 - Electrical upgrade?

135 The strata company asserts that on 16 December 2020, Ms Winsome-Smith failed to take reasonable steps to prevent Mr Kozak from obstructing the electrician from First Choice Electrics from lawfully using the common property and thereby breached conduct by-law 2(c) and s 45(4) of the ST Act.

136 Conduct by-law 2(c) provides:

An owner or occupier of a lot must —

- (c) take all reasonable steps to ensure that the owner's or occupier's visitors do not behave in a manner likely to interfere with the peaceful enjoyment or an owner or occupier of another lot or of a person lawfully using common property[.]

137 Properly construed, conduct by-law 2(c) requires Ms Winsome-Smith, as an owner, to ensure her 'visitors' do not behave in a manner likely to interfere with the lawful use of the common property by a person, in this case the electrician from First Choice Electrics, when on 16 December 2020 he attended the strata complex to undertake the upgrade of the meter board. The issue is whether, Mr Kozak, who earlier I found to be an occupier, is Ms Winsome-Smith's 'visitor'. The term 'visitor' is not defined in the ST Act. Ordinarily, the term 'visitor' means:¹¹¹

- 3. One who pays a visit to another person or to a household; one who is staying for a time with friends.

138 In my view, Mr Kozak is more than Ms Winsome-Smith's 'visitor' as he is not just paying a visit or staying for a time. Rather, Mr Kozak is an occupier of Lot 18 as set out above at [87] to [88].

139 Section 45(4) of the ST Act provides:

- (4) The owner, occupier or lessee of a lot or common property in a strata titles scheme must take all steps that are reasonable in the circumstances to ensure that every person who they permit to use or who they invite on to the lot or the common property complies with by-laws that apply to the owner, occupier or lessee.

140 Properly construed, s 45(4) of the ST Act requires both the owner (in this case, Ms Winsome-Smith) and the occupier (in this case, Mr Kozak) to ensure that every person they permit or invite on to the common property complies with the scheme by-laws.

141 Ms Winsome-Smith gave testimony that:¹¹²

- (a) she was not concerned that the meter board was to be upgraded. Rather, what she was concerned about was that only one quote for the meter board upgrade had been presented to the council which was discussed at the AGM. She did not consider this to be at all fair to the other owners and she thought this was showing favouritism towards First Choice Electrics. She stated that when

¹¹¹ *Oxford English Dictionary Online.*

¹¹² ts 306- 333, 15 February 2023.

she was a member of the council they always obtained three reasonable quotes for any planned works;

- (b) she knows there is a power point behind one of the doors of the meter board because she has seen people plug in their vacuum cleaners into the power point so they can vacuum their cars etc. The meter board has never been locked and in her view the proposal to padlock it is impractical. It was reasonable therefore, in her view, to advocate for everyone to continue to have access to the power point that has been available since at least when she moved to the strata complex back in 1997. In the end, the council conceded and had a power point installed on the outside of the meter board for use by all residents of the strata complex;
- (c) she sat on a chair reading her book in front of the meter board on 16 December 2020 as a peaceful, civil objection representing everyone's right to continue to have access to the power point. She stated that she and Mr Kozak had no other option because the council ignored their requests and concerns;
- (d) this was the first occasion that she and Mr Kozak placed chairs and the table in front of the meter board;
- (e) Ms Case spoke to her on 16 December 2020 but she does not recall Ms Case asking her to move the chairs and tables from in front of the meter board so that the electrician from First Choice Electrics could do work on the meter board. However, she recalls telling Ms Case that the council needs to keep the power point available for use by all residents;
- (f) the Police attended on 16 December 2020, but they did not speak with her; and
- (g) the First Choice Electrics vehicle did not enter the strata complex. It was parked on the driveway on the verge. She saw either Ms Case or Mr Ross speak with the person sitting in the parked vehicle which remained there for about five to ten minutes.

142 Ms Winsome-Smith is of the view the strata company's application to the Tribunal in regards to this incident is 'ludicrous'. In her view, the incident should have been resolved through discussion, but it was not. According to Ms Winsome-Smith this is because over many years, instead of talking, 'the council just barges in and does what it wants to

without any warning and without discussion. It is *carte blanche* - they do what they like'.

143 Ms Winsome-Smith asserts that the strata company has conveniently converted Mr Kozak's status from being an 'occupier' of Lot 18 to that of a 'visitor' and alternatively to that of 'proxy' as well as to that of 'partner' and thereby seeking to make her liable for the alleged breach of the conduct by-laws.^{113 114} Further, Ms Winsome-Smith asserts by reference to the 'fruit of the poisoned tree' doctrine that the strata company is barred from its claim as the claim is built on a reclassification of Mr Kozak from being an 'occupier' to being a 'visitor'.¹¹⁵

144 While I acknowledge that in its application to the Tribunal, the strata company has referred to Mr Kozak as the 'occupier' of Lot 18 and separately has referred to him as a 'visitor' of Ms Winsome-Smith as well as her 'partner' and as the 'proxy' for her at the AGM, in my view, nothing in these proceedings turns on the different characterisation of Mr Kozak by the strata company. This is because I have made a finding that Mr Kozak is an occupier of Lot 18 (see above at [87] - [88]). As an occupier, Mr Kozak is subject to the conduct by-laws just as an owner is subject to the conduct by-laws as provided for in s 45(1) of the ST Act as follows:

- (1) Scheme by-laws may apply to the following:
 - (a) the strata company for the strata titles scheme;
 - (b) a member, for the time being, of the strata company for the strata titles scheme;
 - (c) an occupier or lessee, for the time being, of a lot, or the common property, in the strata titles scheme;
 - (d) in the case of leasehold by-laws — the owner of the leasehold scheme;
 - (e) in the case of exclusive use by-laws — the owners and occupiers, for the time being, of special lots.

145 Importantly, s 45(2) of the ST Act states that each person to whom scheme by-laws apply must comply with the by-laws as if the by-laws were a deed (signed and sealed by each person to whom they apply) containing mutual covenants to observe and perform the matters set out

¹¹³ ts 70, 14 December 2022.

¹¹⁴ Hearing Book at pages 4- 5, 28 and 60.

¹¹⁵ Hearing Book at page 255.

in the by-laws. Finally, the owner or occupier of a lot in a strata titles scheme must take all steps that are reasonable in the circumstances to ensure that every person who they permit to use or who they invite on to the lot or common property complies with by-laws that apply to the owner, occupier or lessee. This is provided for in s 45(4) of the ST Act.

146 The effect of the above provisions of the ST Act is that Ms Winsome-Smith, as a lot owner, is required to take all steps that are reasonable in the circumstances to ensure that every person who she permits to use or who she invites on to Lot 18 or on to the common property comply with the by-laws. In my view, s 45(4) of the ST Act equally applies to Mr Kozak on the basis that he is an occupier of Lot 18 (see above at [87] - [88]).

147 The result of the above is, in my view, that conduct by-law 2(c) and s 45(4) does not apply to Ms Winsome-Smith as the owner of Lot 18 because Mr Kozak is not her 'visitor' but rather is an occupier of Lot 18. Consequently, the strata company's allegation that Ms Winsome-Smith has breached conduct by-law 2(c) must fail because there is no 'visitor'.

148 Ms Winsome-Smith also contends that she has no probative documents to file in response to the application made against her. This is because, according to Ms Winsome-Smith, the strata company failed to comply in good faith with s 109 of the ST Act despite her prolonged and repeated efforts.¹¹⁶ This contention must fail for the following reasons.

149 First, while s 109 of the ST Act provides that a strata company commits an offence if it does not make material to which the section applies available for inspection by an owner, there is no evidence before the Tribunal by Ms Winsome-Smith that she applied in writing to the strata company, as required by s 107 of the ST Act, for information under s 108 of the ST Act, or inspection of material under s 109 of the ST Act or a certificate under s 110 of the ST Act and that it was rejected by the strata company.

150 Second, like Mr Kozak, Ms Winsome-Smith was provided with the Hearing Book which contains all the material filed with the Tribunal for these proceedings on or about 28 October 2022, some six weeks before the final hearing. Had Ms Winsome-Smith formed the view that she needed, for example, to inspect what she refers to as probative correspondence between the parties, it was open to her to write to the

¹¹⁶ Hearing Book at page 255-256.

strata company to request an inspection of the materials as provided for in s 107 of the ST Act. As already stated, there is no evidence before the Tribunal that Ms Winsome-Smith made a written application to the strata company under s 107 of the ST Act and that the strata company rejected the request.

151 Ms Winsome-Smith rejects that she breached by-law 2(a) and/or 2(d) by simply joining Mr Kozak on 16 December 2020 to sit on a chair in front of the meter board.¹¹⁷ Ms Winsome-Smith argues that the strata company failed to provide any independent reasons to substantiate its claim that she breached by-law 2(a) and 2(d) and is therefore an 'impermissible overreach' and the strata company has 'voluntarily waived any entitlement to the orders sought'.¹¹⁸ These contentions must fail because, even though Ms Winsome-Smith gave evidence that she could not recall if Ms Case had asked her to move the table and chairs, Mr Ross was clear that Ms Case told him that she had asked Mr Kozak and Ms Winsome-Smith to move the chairs and table out of the way. I accept the testimony of Ms Ross that Ms Case told him that she had asked Mr Kozak along with Ms Winsome-Smith to move the chairs and table out of the way. The consequence of this is that, in my view, Ms Winsome-Smith contravened conduct by-law 2(a) and 2(d) by allowing the chairs and table to remain on common property without permission of the strata company and thereby unreasonably interfering with access to the meter board by the electrician on behalf of First Choice Electrics who were lawfully engaged to attend the strata complex to do works for the strata company. Finally, I note it was open to Ms Winsome-Smith to file an application with the Tribunal to resolve a scheme dispute under s 197(4) of the ST Act about the continuing access to the power point (see also above at [98]).

152 I will return to consider if the requirements of s 47(1)(b)(i) or s 47(1)(b)(ii) of the ST Act have been satisfied. If the requirements are satisfied for either of these provisions then, pursuant to s 47(5) of the ST Act, if satisfied, I may make orders requiring Ms Winsome-Smith to pay a specified amount by way of penalty for the contravention of conduct by-law 2(a) and/or 2(d) in regards to the incident on 16 December 2020 and/or take or refrain from taking specified action to remedy or to prevent further contravention of the particular conduct by-law.

¹¹⁷ Hearing Book at page 255.

¹¹⁸ Hearing Book at page 255.

Did Ms Winsome Smith contravene by-law 2(c) and/or s 45(4) of the ST Act in relation to the incident on 12 February 2021 - Alleged assault of Ms Case?

153 The strata company asserts that Ms Winsome-Smith failed to take reasonable steps to prevent Mr Kozak from obstructing the lawful use of the common property by Ms Case when he grabbed her upper left arm when both were standing on the common property of the strata complex.

154 In my view, Mr Kozak is more than a visitor, he is an occupier of Lot 18 (see above at [87] - [88]). As an occupier of a lot in the strata scheme, Mr Kozak is subject to conduct by-law 2(c) just as an owner is subject to the conduct by-laws as provided for in s 45(1) of the ST Act. Because of this, in my view, the strata company's allegation that Ms Winsome-Smith has breached conduct by-law 2(c) must fail because Mr Kozak is not her 'visitor'.

155 Further, in my view, for similar reasons as for conduct by-law 2(c), the strata company's allegation that Ms Winsome-Smith has breached s 45(4) of the ST Act on 12 February 2021 must fail.

Did Ms Winsome-Smith contravene by-law 2(c) and/or s 45(4) of the ST Act in relation to the incident on 19 February 2021 - Pest control inspection

156 The strata company asserts that Ms Winsome-Smith failed to take reasonable steps to prevent Mr Kozak from obstructing the lawful use of the common property on 19 February 2021 by the employee from Reward Pest Control to inspect the strata scheme in order to provide a quote for pest control.

157 Ms Winsome-Smith challenges whether the claim by Ms du Plessis that Reward Pest Control were 'not welcomed by an owner' even took place on the common property.¹¹⁹ Ms Winsome-Smith described Ms du Plessis email as vague and unspecified reflecting an abuse of process by the strata company.¹²⁰

158 For the same reasons as set out above in regards to Mr Kozak (see above at [129] - [134]), the strata company's claim against Ms Winsome-Smith in regards to the incident on 19 February 2021 fails.

¹¹⁹ Hearing Book at pages 17 and 275.

¹²⁰ Hearing Book at page 275.

What orders, if any, should the Tribunal make under s 47(5) of the ST Act in respect of Mr Kozak and under s 47(5) and s 200(2)(m) of the ST Act in respect of Ms Winsome-Smith?

159 In order for me to exercise the Tribunal's discretion to make an order under s 47(5) of the ST Act to resolve these by-law enforcement proceedings, I must first be satisfied that the strata company has meet the requirements of either s 47(1)(b)(i) or s 47(1)(b)(ii) of the ST Act. In this case, it is common ground that the strata company did not issue to Mr Kozak or to Ms Winsome-Smith a written notice under s 47(1)(a) of the ST Act. This means that s 47(1)(a) and s 47(1)(b)(iii) of the ST Act have no application in these proceedings. Therefore s 47(1)(b)(i) and s 47(1)(b)(ii) of the ST are left for consideration.

160 Section 47(1)(b)(ii) of the ST Act requires the person to have contravened the particular scheme by-law on at least three separate occasions in order for the strata company to make an application to the Tribunal seeking an order to enforce scheme by-laws. I made a finding that Mr Kozak breached conduct by-law 2(a) and by-law 2(d) on one occasion, that is on 16 December 2020. Similarly, I made a finding that Mrs Winsome-Smith breached conduct by-law 2(a) and 2(d) on one occasion, that is on 16 December 2020. Because I have not made a finding that Mr Kozak breached the particular by-law, that is conduct by-law 2(a) or 2(d) on three separate occasions, the requirements of s 47(1)(b)(ii) are not satisfied with the result the application for the breach by Mr Kozak of conduct by-law 2(a) and 2(d) on 16 December 2020 must be dismissed. The same applies for Mrs Winsome-Smith. This is so, even though Mr Pearce made submissions for the strata company that Mr Kozak and Ms Winsome-Smith breached the conduct by-laws on many occasions. As evidence was only filed in relation to the three incidents that occurred on 16 December 2020, 12 February 2021 and 19 February 2021, I am limited to considering the evidence before the Tribunal.

161 I note that had the strata company issued a written notice to Mr Kozak and to Ms Winsome-Smith under s 47(1)(a) of the ST Act, the outcome of these proceedings in regards to the incident of 16 December 2020 may have been different.

162 Finally, turning to s 47(1)(b)(i) of the ST Act, the strata company only agitated this provision in relation to the alleged assault on Ms Case on 12 February 2021, which I earlier found that Mr Kozak did not breach conduct by-laws 2(a) or 2(d) and that Ms Winsome-Smith did not breach

conduct by-law 2(c) or s 45(4) of the ST Act. In relation to the incident on 16 December 2020, concerning the employee from First Choice Electrics who attended the strata complex, there is no evidence before the Tribunal that the contravention has had serious adverse consequences for a person (for example, the employee from First Choice Electrics) from the contravention of conduct by-laws 2(a) and 2(d). The only evidence before the Tribunal is that the electrical upgrade did not go ahead on 16 December 2020 but was completed at a later date following the obtaining of two other quotes. In my view, while what occurred on 16 December 2020 was no doubt inconvenient for the strata company, I am not able to make a finding that there were serious adverse consequences for a person (other than Mr Kozak and Ms Winsome-Smith).

163 In summary, in my view, the requirements of s 47(1)(b)(i) or s 47(1)(b)(ii) of the ST Act have not been satisfied by the strata company, therefore the application by the strata company fails and is to be dismissed.

Should the Tribunal make the declaration under s 95 of the SAT Act in respect of Mr Kozak and/or Ms Winsome-Smith?

164 For the reasons given above, the application by the strata company fails and is to be dismissed. The consequence of this is that, in my view, no declaration is to be made under s 95 of the SAT Act in respect of Mr Kozak and Ms Winsome-Smith.

Conclusion and Orders

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

166 Following *Ellis and Director General of the Department of Transport* [2011] WASAT 142, where it was stated that an application to dismiss or strike out the entirety of the proceeding is to be approached with a great deal of caution where the parties are not legally represented, in my view, as previously determined by the Tribunal (differently constituted) there is no basis to Mr Kozak and Ms Winsome-Smith's position for these proceedings to be dismissed or struck out under s 47 or s 48 of the SAT Act on the basis that the proceedings are frivolous, vexatious, misconceived or lacking in substance, used for an improper purpose or an abuse of process.

167 Reflecting back on the orders sought by the strata company (refer above at [6]), the finding I made that both Mr Kozak and Ms Winsome-Smith have each contravened scheme conduct by-law 2(a) and 2(d) on one occasion on 16 December 2020 concerning First Choice Electrics, but did not contravene any conduct by-law on 12 February 2021 and on 19 February 2021, I dismiss the application made by the strata company because, in circumstances where the strata company did not give a written notice under s 47(1)(a) of the ST Act to Mr Kozak and to Ms Winsome-Smith, the strata company have failed to satisfy the requirements of either s 47(1)(b)(i) of the ST Act that the contravention on 16 December 2020 has had serious adverse consequences or s 47(1)(b)(ii) of the ST Act that the contravention of conduct by-law 2(a) or 2(d) occurred on at least three separate occasions. In other words, the application by the strata company is dismissed because, in circumstances where a written notice was not issued under s 47(2) of the ST Act to Mr Kozak and to Ms Winsome-Smith, it failed to satisfy the requirements of either s 47(1)(b)(i) or s 47(1)(b)(ii) of the ST Act.

168 For all of the above reasons, I make the following order:

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

22 MAY 2023