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**JURISDICTION** : STATE ADMINISTRATIVE TRIBUNAL

**ACT** : STRATA TITLES ACT 1985 (WA)

**CITATION** : THE OWNERS OF FOOTPRINTS AT PRESTON  
BEACH SURVEY STRATA PLAN 52193 and  
LITECH RESORTS PTY LTD [2023] WASAT 111

**MEMBER** : MS C BARTON, MEMBER

**HEARD** : 14 SEPTEMBER 2023

**DELIVERED** : 24 NOVEMBER 2023

**FILE NO/S** : CC 126 of 2023  
CC 1871 of 2022

**BETWEEN** : THE OWNERS OF FOOTPRINTS AT PRESTON  
BEACH SURVEY STRATA PLAN 52193  
Applicant

AND

LITECH RESORTS PTY LTD  
Respondent

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*Catchwords:*

Strata titles scheme - Scheme dispute - Specified scheme function - Authority of strata manager - Statutory construction - Strata management contract - Authority to perform scheme function - Whether manager authorised to perform a specified scheme function - Functions of council of the strata company - Nature of relationship between strata company and strata manager

*Legislation:*

*Interpretation Act 1984* (WA), s 3(1)(a), s 3(1)(b), s 5, s 6, s 32(2), s 44(1), s 59(2)

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

*Strata Titles (General) Regulations 2019* (WA), reg 90, reg 91, reg 91(2), reg 95, reg 95(3), reg 98, reg 102, Pt 13, Pt 18

*Strata Titles Act 1985* (WA) (prior to 20 May 2020), s 42, Div 1, Pt 4, Sch 1

*Strata Titles Act 1985* (WA), s 3, s 3(1), s 14, s 91, s 96, s 102(6), s 102(6)(a), s 102(6)(c), s 112, s 115, s 116, s 116(1)(a), s 117, s 118, s 135(1), s 135(2), s 139, s 143, s 143(1), s 143(2), s 143(3), s 143(5)(c), s 143(7), s 143(8), s 144, s 144(1)(a), s 145, s 145(1), s 197(4), Sch 3, cl 12, Sch 4, cl 2, cl 3, Sch 5, cl 13, cl 13(1), cl 13(3), Pt 8, Div 1, Div 4, Div 5, Pt 9, Div 1

*Strata Titles Amendment Act 2018* (WA)

*Strata Titles Amendment Bill 2018* (WA)

*Result:*

Preliminary issue answered in the negative  
Application dismissed

*Category:* B

**Representation:**

*Counsel:*

Applicant : Mr J Park & Ms A Beckwith  
Respondent : Dr R Collins & Mr D Todorov

*Solicitors:*

Applicant : Dentons Australia  
Respondent : Tempora Legal as agents for Mahoneys

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

Australian Leisure and Hospitality Group Pty Ltd v Director of Liquor Licensing [2012] WASC 463

Byrne v The Owners of Ceresa River Apartments Strata Plan 55597 [2016] WASC 153

Byrne v The Owners of Ceresa River Apartments Strata Plan 55597  
[2017] WASCA 104; (2017) 51 WAR 304

City of Fremantle v Imago Holdings Pty Ltd [2020] WASCA 61

Glasby and The Owners of 84 Clydesdale Street Como Strata Plan 9012  
[2021] WASAT 136

Kevin Gors (By his Plenary Administrator Janet Christine Gors) v Tomlinson  
(2020) 56 WAR 144

Mohammadi v Bethune [2018] WASCA 98

Northern Land Council v Quall [2020] HCA 33

Project Blue Sky Inc v Australian Broadcasting Authority [1998] HCA 28;  
(1998) 194 CLR 355

R & R Fazzolari Pty Ltd v Parramatta City Council; Mac's Pty Ltd v Parramatta  
City Council [2009] HCA 12

South Australian Housing Authority v Rossiter [2021] SASCA 113

SZTAL v Minister for Immigration and Border Protection [2017] HCA 34;  
(2017) 347 ALR 405

The Owners of Broome Beach Resort Strata Scheme 32190 and Waydanette  
Pty Ltd [2022] WASAT 56

Topic and The Owners of Raffles Waterfront Strata Plan 48545  
[2016] WASAT 27

Webb Distributors (Aust) Pty Ltd v Victoria (1993) 179 CLR 15

## REASONS FOR DECISION OF THE TRIBUNAL:

### *Introduction*

1 On 1 February 2023, the applicant in CC 126 of 2023, The Owners of Footprints at Preston Beach Survey Strata Plan 52193 (**applicant** or **Strata Company**), commenced a proceeding in the Tribunal pursuant to s 197(4) of the *Strata Titles Act 1985* (WA) (**ST Act**) to resolve a scheme dispute (**2023 Proceeding**).

2 The respondent in the 2023 Proceeding is Litech Resorts Pty Ltd (**respondent** or **Manager**). The respondent commenced an earlier and related proceeding in the Tribunal (**CC 1871 of 2022**) arising from a dispute about the non-payment of remuneration by the applicant under a Management and Caretaker Agreement (**Agreement**).

3 On 10 February 2023, the Tribunal ordered that proceedings CC 1871 of 2022 and the 2023 Proceeding are to remain as separate proceedings but be heard and determined together pursuant to s 51(1) of the *State Administrative Tribunal Act 2004* (WA) (**SAT Act**).

4 The preliminary question that arises for determination in these proceedings, in short, is whether the applicant has authorised the respondent to perform a 'specified scheme function' for the purposes of s 143(1) of the ST Act. If the answer is in the negative, the respondent is not a 'strata manager' and the Tribunal does not have jurisdiction to determine the proceedings because the dispute between the parties is not a 'scheme dispute' as defined in s 197(1) of the ST Act.

5 For the reasons that follow, I find that the preliminary question is answered in the negative.

### *Factual background*

6 Certain matters were not in dispute between the parties. I make the findings set out in this paragraph in relation to those matters.<sup>1</sup>

- (a) The applicant is a strata company incorporated pursuant to s 14 of the ST Act for the survey strata scheme known as Footprints at Preston Beach (**Scheme**), which was created by the registration of Survey Strata Plan 52193 (**Survey Strata Plan**).

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<sup>1</sup> Parties statement of agreed facts filed on 9 May 2023.

- (b) Survey Strata Plan 52193 comprises 79 lots and two common property lots.
- (c) The by-laws for the Scheme (**Scheme By-laws**) are set out in the management statement registered on the Survey Strata Plan as statement K800422 (**Management Statement**).
- (d) On or around 23 March 2009, the applicant and RPD Resorts & Hotels (WA) Pty Ltd (**RPD**) entered into the Agreement.
- (e) On or around 5 May 2016, the applicant, the respondent and RPD entered into an 'Assignment Deed' by which RPD assigned its rights and interests under the Agreement to the respondent.
- (f) On or around 23 April 2021, the applicant and respondent executed a document titled 'Deed of Variation - Footprints at Preston Beach Survey-Strata Plan 52193' which amended the terms of the Agreement (**Variation Deed**).
- (g) By letter dated 20 May 2022, the applicant's solicitor:
  - (i) advised the respondent that the Agreement ceased to have effect from 1 November 2020 (on the basis that it did not meet the minimum requirements for a strata management contract in s 145(1) of the ST Act); and
  - (ii) demanded under s 96 of the ST Act that the respondent return to the applicant its records, keys and other property in the respondent's property or control.
- (h) On 26 May 2022, the respondent rejected the applicant's position that, amongst other things, the Agreement ceased to have effect from 1 November 2020 and the applicant's demand that the respondent deliver all records, keys and other property to the applicant's solicitor.

***The issue for determination***

7 By order dated 16 May 2023, the Tribunal identified the following preliminary issue for determination:

- (a) Has the applicant by the Agreement authorised the respondent (by those clauses identified in paragraph 5 of Annexure B of the application in the 2023 Proceeding) to perform a specified

scheme function (for the purposes of s 143(1) of the ST Act) on behalf of the applicant?

*The legal framework*

8 Section 143(1) of the ST Act empowers a strata company to 'delegate' its scheme functions to a strata manager. That is, pursuant to s 143(1) of the ST Act, a strata company may authorise a strata manager to perform a 'specified scheme function'.

9 An authorisation under s 143 of the ST Act is subject to any conditions specified by the strata company, and may be varied or revoked by the strata company.<sup>2</sup> If the performance of a function of a strata company requires a unanimous resolution, resolution without dissent, special resolution or ordinary resolution, the strata manager may perform the function only if a vote has been taken on a proposed resolution and it has been passed as a resolution of the relevant kind.<sup>3</sup> There are certain functions that a strata manager cannot be authorised to perform, including entering into a contract with another strata manager.<sup>4</sup>

10 The term 'authorise' in s 143(1) of the ST Act is not defined in the ST Act or the *Interpretation Act 1984* (WA) (**Interpretation Act**). Consequently, the expression bears its ordinary and natural meaning. The *Macquarie Dictionary Online* defines 'authorise' to mean:

*verb (t) (authorised, authorising)*

1. to give authority or legal power to; empower (to do something).
2. to give authority for; formally sanction (an act or proceeding).
3. to establish by authority or usage: *authorised by custom*.
4. to afford a ground for; warrant; justify.

11 Consequently, where a strata manager is authorised by a strata company to perform a 'specified scheme function' pursuant to s 143(1) of the ST Act, the strata manager is empowered to perform that scheme function for and on behalf of the strata company.

12 The authority of a strata manager to perform a scheme function does not prevent the function from being performed by the strata

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<sup>2</sup> ST Act, s 143(2).

<sup>3</sup> ST Act, s 143(3).

<sup>4</sup> ST Act, s 143(5)(c).

company, council or officer (as the case requires).<sup>5</sup> However, if the strata company, council or officer performs such a function, the strata company must notify the strata manager of that fact.<sup>6</sup>

13 Section 144 of the ST Act provides that, despite an authorisation under s 143 of the ST Act, a person is not authorised to perform functions as a strata manager unless:

- (a) a contract or volunteer agreement (**strata management contract**) is in force between the strata manager and the strata company; and
- (b) the requirements of the *Strata Titles (General) Regulations 2019* (WA) (**ST Regulations**) are met by the strata manager and each agent, employee or contractor of the strata manager for certain specified matters; and
- (c) the strata manager maintains professional indemnity insurance as required by the ST Regulations.

14 It follows from s 144(1)(a) of the ST Act that a strata company can only 'delegate' the performance of a 'specified scheme function' under s 143(1) of the ST Act to a person (a strata manager) by way of a strata management contract. The minimum requirements of a strata management contract are set out in s 145 of the ST Act.

15 Schedule 5 to the ST Act addresses the transition of the *Strata Titles Act 1985* (WA) that was in force prior to 1 May 2020 (**prior ST Act**).<sup>7</sup> The explanatory memorandum for the *Strata Titles Amendment Bill 2018* (WA), which introduced the amendments to the prior ST Act, provides the following overview:

This Bill will amend the *Strata Titles Act 1985* (the current Act) to make strata better, address problems that have arisen in strata, introduce a new form of land ownership (leasehold strata title schemes) and modernise the language and structure of the Act.

Strata managers will be regulated and made more accountable. Owners will have more of a say in the running of their scheme. The management of the strata company will be improved.

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<sup>5</sup> ST Act, s 143(7).

<sup>6</sup> ST Act, s 143(8).

<sup>7</sup> Sch 5 to the ST Act contains the transitional provisions for the *Strata Titles Amendment Act 2018* (WA) (**Amendment Act**).

Owners will be empowered to improve their scheme and retrofit their scheme to benefit from renewable energy sources. Better ongoing maintenance of schemes will be facilitated. Enforcing by-laws will be easier. Strata disputes will be resolved quickly, cheaply and effectively through a single specialist forum.

Buyers will receive better information about the strata lot they are buying. More flexibility in staged subdivision of strata and survey-strata schemes will be permitted. Safeguards will be introduced for the termination of schemes.

16 The transitional provisions in cl 13 of Sch 5 to the ST Act provide that a strata manager may continue to perform scheme functions under a strata management for 6 months after the commencement of the ST Act (**relevant date**) without complying with the requirements set out in s 144 of the ST Act. However, the strata management contract will cease to have effect on the relevant date unless the strata manager meets the requirements set out in s 144 of the ST Act and the strata management contract meets the requirements set out in s 145 of the ST Act by the relevant date.

17 The ST Act commenced on 1 May 2020 and, therefore, the relevant date for the purposes of cl 13 of Sch 5 to the ST Act is 1 November 2020.<sup>8</sup>

18 Clause 13 of Sch 5 to the ST Act provides:

**13. Strata managers**

(1) A person (a *strata manager*) may continue to perform scheme functions under a contract or volunteer agreement with a strata company that is in force immediately before commencement day for 6 months after that day and this Act applies, for that period, as if those functions were authorised to be performed by the strata manager under section 143 and as if the contract or volunteer agreement were a strata management contract.

(2) Subclause (1) —

(a) applies even if the functions could not be authorised under a strata management contract and even if the strata manager does not meet the requirements set out in section 144; and

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<sup>8</sup> Before 1 May 2020, the functions of a strata company were set out in Pt 4 Div 1 of the prior ST Act.

(b) is subject to the variation or termination of the contract or volunteer agreement.

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

19 The power of a strata company in s 143(1) of the ST Act to 'delegate' a scheme function is limited by reg 91 in Pt 13 of the ST Regulations. Regulation 91 provides that s 143(1) of the ST Act does not apply to a person who is employed or engaged by a strata company (or a strata manager on behalf of a strata company) to supervise or carry out repair or maintenance work or specialist work.

20 Regulation 91 of the ST Regulations provides:

**91. Repair or maintenance work and specialist work excluded**

(1) A person who is employed or engaged by a strata company, or by a strata manager on behalf of the strata company, to supervise or carry out repair or maintenance work, or specialist work, is not, because of that employment or engagement, authorised to perform any scheme functions of the strata company.

(2) Accordingly, section 143 does not apply to that employment or engagement or to work done under that employment or engagement.

Note for this regulation:

Section 143 enables a strata company to delegate its scheme functions to a strata manager. The object of this regulation is to clarify that a strata company, or a strata manager for a strata company, does not delegate or sub-delegate scheme functions of the strata company by employing or engaging persons to supervise or carry out repair or maintenance work or specialist work that assists the strata company to perform its scheme functions.

21 The definitions in reg 90 of the ST Regulations apply to Pt 13 of the ST Regulations. For the purposes of reg 91, the meaning of the expressions 'repair or maintenance work' and 'specialist work' are provided in reg 90 as follows:

*repair or maintenance work* means work involved in repairing, maintaining, renewing, replacing, altering or improving the common property or any personal property owned by a strata company;

*specialist work* means any work that assists a strata company to perform its scheme functions and which the strata company or a strata manager is not ordinarily qualified to carry out, such as legal work, accounting work, auditing work, building work, plumbing work or electrical work.

- 22 The ST Regulations prescribe certain requirements that must be satisfied by a strata manager in order to protect consumers.<sup>9</sup> A strata manager must obtain and maintain professional indemnity insurance of not less than \$1,000,000 for any one claim,<sup>10</sup> and must lodge an annual return, in the approved form, at the office of the Western Australian Land Information Authority (**Landgate**).<sup>11</sup> The principal of the business of a strata manager must hold the qualifications specified in cl 2 of Sch 4 to the ST Act (which may include a Certificate IV in Strata Community Management), whilst a designated person who has a key role in performing scheme functions (but who is not a principal of the business of the strata manager) must hold the qualifications specified in cl 3 of Sch 4 to the ST Act.<sup>12</sup> The requirement to hold certain specified qualifications does not apply until the end of a 4-year transitional period set out in Pt 18 of the ST Regulations.

### *Principles of statutory construction*

- 23 The starting point in relation to statutory construction is consideration of the text of the provision, in its context, including the statute's purpose or object. A statutory provision must be construed so that it is consistent with the language and purpose of all the provisions of the statute.<sup>13</sup>

- 24 In *City of Fremantle v Imago Holdings Pty Ltd* [2020] WASCA 61 (*Imago Holdings*), the Western Australian Court of Appeal stated:<sup>14</sup>

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<sup>9</sup> *Hansard, Strata Titles Amendment Bill 2018 Second Reading*, 9 October 2018, p. 6580.

<sup>10</sup> ST Regulations, reg 98.

<sup>11</sup> ST Regulations, reg 102.

<sup>12</sup> ST Regulations, reg 95. The requirement to hold certain specified qualifications does not apply to a volunteer strata manager: ST Regulations, reg 95(3).

<sup>13</sup> *Mohammadi v Bethune* [2018] WASCA 98 (*Mohammadi*) at [32]; *Project Blue Sky Inc v Australian Broadcasting Authority* [1998] HCA 28; (1998) 194 CLR 355 at [69].

<sup>14</sup> *Imago Holdings* at [66] citing *Mohammadi* at [32].

The objective discernment of the statutory purpose is integral to contextual construction. The statutory purpose may be discerned from an express statement of purpose in the statute, inference from its text and structure and, where appropriate, reference to extrinsic materials. The purpose must be discerned from what the legislation says, as distinct from any assumptions about the desired or desirable reach or operation of relevant provisions[.]

25 Whilst a section heading does not form part of a written law,<sup>15</sup> it may assist in ascertaining the meaning of a statutory provision, including to confirm that its meaning is the ordinary meaning conveyed by the text of the provision having regard to its context and statutory purpose.<sup>16</sup>

26 Definitions contained in a written law apply to the construction of the text of the written law that contain those definitions.<sup>17</sup> Further, words and expressions used in subsidiary legislation have the same respective meanings as in the written law under which the subsidiary legislation is made.<sup>18</sup>

27 Generally, the ordinary meaning of a word in a statute will prevail. In *Australian Leisure and Hospitality Group Pty Ltd v Director of Liquor Licensing* [2012] WASC 463 (*Australian Leisure*), his Honour Hall J stated:<sup>19</sup>

... If it is intended that a word in a statute will be used in a specific way that may not accord with ordinary usage such an intention is generally reflected in a definition in the statute. Absent such a definition, the ordinary meaning should prevail unless there is something in the context to suggest that another meaning is intended[.]

28 Where a statute is capable of more than one construction, a construction will be chosen which interferes least with private property rights.<sup>20</sup> That is, there is a presumption in the interpretation of statutes against an intention by the legislature to interfere with fundamental rights and freedoms at common law, including vested property rights.<sup>21</sup>

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<sup>15</sup> See Interpretation Act, s 32(2).

<sup>16</sup> See *Kevin Gors (By his Plenary Administrator Janet Christine Gors) v Tomlinson* (2020) 56 WAR 144 (*Gors*), fn to [99].

<sup>17</sup> Interpretation Act, s 6.

<sup>18</sup> Interpretation Act, s 44(1).

<sup>19</sup> *Australian Leisure* at [22]. This is consistent with the approach of the High Court in *SZTAL v Minister for Immigration and Border Protection* [2017] HCA 34; (2017) 347 ALR 405 at [94] in which his Honour Edelman J stated, 'where a statute employs a term in its ordinary sense, there can be no warrant for the extension of the meaning beyond its ordinary sense'.

<sup>20</sup> *R & R Fazzolari Pty Ltd v Parramatta City Council; Mac's Pty Ltd v Parramatta City Council* [2009] HCA 12 (*Fazzolari*) at [43].

<sup>21</sup> *Fazzolari* at [43].

The presumption can be displaced by the clear and unambiguous terms of the statute.<sup>22</sup>

### ***Tribunal's consideration***

29 The applicant in the 2023 Proceeding is seeking, amongst other relief, a declaration that the Agreement ceased to have effect from 1 November 2020 pursuant to cl 13(3) of Sch 5 to the ST Act.<sup>23</sup>

30 The applicant contends that, by the terms of the Agreement, it has authorised the respondent to perform 'a specified scheme function' for the purposes of s 143(1) of the ST Act.<sup>24</sup> In granting that authority to the respondent, the applicant says that the Agreement is caught by cl 13(3) of Sch 5 to the ST Act and, consequently, it ceased to operate on 1 November 2020 because the respondent did not comply with the requirements set out in s 144 of the ST Act and the Agreement did not comply with the minimum requirements for strata management contracts set out in s 145 of the ST Act.

### **What is a 'specified scheme function'?**

31 The expression 'specified scheme function' in s 143(1) of the ST Act is not defined in the ST Act. However, the expression, 'scheme function' is defined in s 3 of the ST Act as follows:

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

32 The Interpretation Act defines the term 'function' to include 'powers, duties, responsibilities, authorities, and jurisdictions'.<sup>25</sup> The Interpretation Act applies to every written law unless, in relation to a particular written law, there is an express provision to the contrary, or in the case of an Act, the intent and object of the Act or something in the subject or context of the Act is inconsistent with such application.<sup>26</sup> I consider the definition of 'function' in the Interpretation Act should be applied to the construction of the term 'function' in the definition of

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<sup>22</sup> See also *South Australian Housing Authority v Rossiter* [2021] SASCA 113 at [78].

<sup>23</sup> Clause 13(3) of Sch 5 to the ST Act (being the transitional provisions for the Amendment Act) provides that a contract referred to in cl 13(1) ceases to have effect 6 months after commencement day unless the strata manager then meets the requirements set out in s 144 of the ST Act and the contract then meets the requirements set out in s 145 of the ST Act.

<sup>24</sup> Applicant's submissions on preliminary issue filed on 23 June 2023, para 18.

<sup>25</sup> Interpretation Act, s 5.

<sup>26</sup> Interpretation Act, s 3(1)(a) and s 3(1)(b).

'scheme function' in s 3(1) of the ST Act. This is because the subject matter of the ST Act is concerned with the governance and operation of strata titles schemes by the performance of functions of a strata company set out in Div 1 Pt 8 of the ST Act (and by the authority given to strata managers in accordance with the requirements of Pt 9 of the ST Act). Whilst I observe that neither a strata company nor a strata manager exercise the functions (or powers, duties, responsibilities, authorities, and jurisdictions) of an administrative decision-maker, I nevertheless find that the meaning of 'function' for the purposes of the expression 'scheme function' in s 3(1) ST Act includes a power, duty, responsibility or authority.

33 The note for reg 91 of the ST Regulations provides that s 143 of the ST Act enables a strata company to 'delegate' its functions to a strata manager. Whilst the note does not form part of a written law,<sup>27</sup> it does assist the reader to understand the effect of s 143 of the ST Act. However, I observe that the use of the expression 'delegate' in the note may imply that the relationship between a strata company and strata manager is something other than principal and agent. In contrast to the delegation of a power or function by an administrative decision-maker where the delegate must exercise its own independent discretion,<sup>28</sup> a strata company (the principal) may direct a strata manager (the agent) on the exercise of the specific scheme function that the strata manager is authorised to perform.

34 In *The Owners of Broome Beach Resort Strata Scheme 32190 and Waydanette Pty Ltd* [2022] WASAT 56 (*Waydanette*), the Tribunal considered whether the services that a resort manager was authorised to perform under a resort management agreement were specified scheme functions for the purposes of s 143(1) of the ST Act. The Tribunal concluded that:

- (1) the ordinary meaning of the word 'specified' as used in s 143(1) of the ST Act 'requires identification of a particular, definite and discrete scheme function that a person has been authorised to perform rather than merely some aspect falling within the scope of a particular scheme function';<sup>29</sup>
- (2) the requirement to 'identify' a 'specified scheme function' for the purposes of s 143(1) of the ST Act directs attention to the

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<sup>27</sup> Interpretation Act, s 32(2).

<sup>28</sup> See *Northern Land Council v Quall* [2020] HCA 33 at [83].

<sup>29</sup> *Waydanette* at [114] and [125].

functions set out in Pt 8 Div 1 of the ST Act to determine whether the person has been authorised to perform 'a specified scheme function' of the strata company;<sup>30</sup> and

- (3) a person does not perform a 'specified scheme function' for the purposes of s 143(1) of the ST Act if that person is assisting the strata company to perform the strata company's scheme function or an aspect of that function.<sup>31</sup>

35 The functions of a strata company, set out in Pt 8 Div 1 of the ST Act, are expressed as powers, duties or authorities. The functions of a strata company in Pt 8 Div 1 of the ST Act include, relevantly, to:

- (1) expend the strata company's money in accordance with an approved budget except in the circumstances set out in s 102(6)(a) to s 102(6)(c) of the ST Act: s 102(6) of the ST Act;
- (2) comply with the scheme by-laws and enforce compliance with those by-laws by others to whom they apply: s 112 of the ST Act;
- (3) terminate certain contracts for amenities or services: s 115 of the ST Act; and
- (4) purchase, hire or otherwise acquire personal property for use by owners of lots in connection with their enjoyment of the common property or for use by the strata company in the performance of its functions: s 116(1)(a) of the ST Act.

36 The functions of the Council of the Strata Company (**Council**) are set out in Pt 8 Div 4 of the ST Act. The Council is to perform the functions of the Strata Company, subject to the ST Act and to any restrictions imposed or direction given by ordinary resolution.<sup>32</sup> The Council must be constituted and perform its functions in accordance with the ST Act and the Scheme By-laws.<sup>33</sup>

### Should *Waydanette* be followed?

37 If there is any doubt about the meaning of 'a specified scheme function' in s 143(1) of the ST Act, the applicant says that the expression should be construed broadly (on the basis that the provision

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<sup>30</sup> *Waydanette* at [116].

<sup>31</sup> *Waydanette* at [126] and [127].

<sup>32</sup> ST Act, s 135(1).

<sup>33</sup> ST Act, s 135(2).

is intended to protect consumers)<sup>34</sup> and not limited to the discrete functions in Pt 8 Div 1 of the ST Act.<sup>35</sup> The applicant contends that these proceedings can be distinguished from *Waydanette* because it was claimed in that case that the management agreement only authorised the resort manager to perform functions of the strata company. The applicant says that the scheme functions that it authorised the respondent to perform under the terms of the Agreement are functions of both the Strata Company and the Council, including those in the Scheme By-laws.<sup>36</sup>

38 In support its position that the expression 'specified scheme function' in s 143(1) of the ST Act should be construed broadly, the applicant relied on a previous statement by the Tribunal, by reference to s 59(2) of the Interpretation Act, that a strata company is clothed with incidental powers as necessary to give effect to its powers and duties under the ST Act.<sup>37</sup> Having regard to the text of s 59(2) of the Interpretation Act, I observe that a strata company does not enjoy incidental powers by virtue of acting under delegation because it neither exercises delegated powers nor performs delegated duties. Nevertheless, a strata company has broad powers to assist it in the performance of its scheme functions.<sup>38</sup> But a strata company also has statutorily prescribed limitations on the exercise of its powers.<sup>39</sup>

39 The relevant terms of the Agreement on which the applicant relies as authorising the respondent to perform 'a specified scheme function' are cl 4.2(a), cl 4.3(b) and cl 4.6(a)(7) of the Agreement and cl 4.1A(f) of the Agreement (as inserted by cl 2.6 of the Variation Deed).

40 It is the respondent's position that, applying *Waydanette*, the applicant has not authorised it, by the terms of the Agreement, to perform any of the discrete functions set out in Pt 8 Div 1 of the ST Act. The respondent says that, at most, the clauses of the Agreement (referred to in [39] above) provide for the respondent 'assisting' the strata company perform the strata company's scheme

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<sup>34</sup> Applicant's outline of submissions in reply to the respondent's submissions filed on 7 July 2023, para 45 and para 46 referring to *Webb Distributors (Aust) Pty Ltd v Victoria* (1993) 179 CLR 15 at 41.

<sup>35</sup> Applicant's outline of submissions in reply to the respondent's submissions filed on 7 July 2023, para 48 and para 56.

<sup>36</sup> Applicant's outline of submissions in reply to the respondent's submissions filed on 7 July 2023, para 4; ts 9, 14 September 2023.

<sup>37</sup> Applicant's outline of submissions in reply to the respondent's submissions filed on 7 July 2023, para 14 and para 15. See *Glasby and The Owners of 84 Clydesdale Street Como Strata Plan 9012* [2021] WASAT 136 (*Glasby*) at [29].

<sup>38</sup> See ST Act, s 116.

<sup>39</sup> ST Act, s 117.

function or perform an aspect of a specified scheme function of the strata company'.<sup>40</sup> The respondent noted that the Variation Deed, which resulted in cl 4.1A(f)(i) of the Agreement, was signed by the parties in April 2021 which is 18 months after the date that the Agreement would have ceased to have effect by operation of cl 13(3) of Sch 5 to the ST Act.

41 I will next consider whether the terms of the Agreement, relied on by the applicant, authorise the respondent to perform a 'specified scheme function' for the purposes of s 143(1) of the ST Act. In doing so, I consider that it is appropriate to apply *Waydanette* to the extent that the Tribunal's construction of the ST Act is relevant to the determination of the preliminary issue. As an independent decision-maker, I am not bound to follow a prior decision of the Tribunal, but I should depart from it if I consider it to be clearly wrong.<sup>41</sup> However, I agree with the Tribunal's findings in *Waydanette* and do not consider that there is more than one construction of s 143(1) of the ST Act open to me. Nor do I consider, as the applicant contends, that a statutory provision which empowers a strata company to authorise a person to perform specified scheme functions can properly be construed as protectionist.

**Does cl 4.2(b) of the Agreement authorise the respondent to perform a 'specified scheme function'?**

42 Clause 4.2(b) of the Agreement provides:

In the performance of its duties as the caretaker of the Common Property, with the prior consent of the Strata Company, which consent will not be unreasonably withheld, the Manager has the power and authority to:

...

- (b) negotiate and enter into (and extend, vary or cancel) agreements for the supply of materials, equipment and services in connection with the Common Property;

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<sup>40</sup> Litech Resort's submissions on preliminary issue filed on 7 July 2023, para 42 and para 43; *Waydanette* at [127].

<sup>41</sup> *Topic and The Owners of Raffles Waterfront Strata Plan 48545* [2016] WASAT 27 at [26].

43 The applicant says that, by cl 4.2(b) of the Agreement, it has authorised the respondent to perform the following specified scheme functions:<sup>42</sup>

- (a) the function of the Strata Company under s 139 of the ST Act to make, vary, extend, discharge or terminate a contract in the name of or on behalf of the Strata Company; and
- (b) the function of the Council under by-law 8(2)(b) of Sch 1 to the prior ST Act (**By-law 8(2)(b)**)<sup>43</sup> to employ on behalf of the Strata Company such agents and employees as it thinks fit in connection with the control and management of the common property and the exercise and performance of the powers and duties of the Strata Company.

44 It is the respondent's position that neither s 139 of the ST Act nor By-law 8(2)(b) is a 'function' of the strata company (or 'scheme function') as determined by the Tribunal in *Waydanette* because they are not discrete functions identified in Pt 8 Div 1 of the ST Act (comprising s 91 to s 118 of the ST Act). The respondent observed that s 139 of the ST Act is contained in Pt 8 Div 5 of the ST Act (which is titled 'Miscellaneous') and provides for the manner in which a person already authorised by a strata company should exercise its authority in relation to contracts (ie the person may make, vary, extend, discharge or terminate a contract in the name of or on behalf of the strata company).<sup>44</sup>

45 Having regard to the language of the chapeau in cl 4.2(b) of the Agreement, the respondent further observed that it is not, in any event, authorised to negotiate and enter into (and extend, vary or cancel) contracts without the prior consent of the applicant.<sup>45</sup> Consequently, the respondent says that cl 4.2(b) of the Agreement cannot be construed as authorising the respondent to perform a 'specified scheme function' by entering into contracts as it thinks necessary.<sup>46</sup>

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<sup>42</sup> Applicant's submissions on preliminary issue filed on 23 June 2023, para 14; Applicant's outline of submissions in reply to the respondent's submissions filed on 7 July 2023, para 21.

<sup>43</sup> Clause 12 of Sch 3 to the ST Act provides that the former by-laws of the Scheme continue to have effect notwithstanding the repeal of the prior ST Act. By-laws made under s 42 of the prior ST Act are properly characterised as a statutory contract as opposed to subsidiary legislation: *Byrne v The Owners of Ceresa River Apartments Strata Plan 55597* [2016] WASC 153 at [61]. See also *Byrne v The Owners of Ceresa River Apartments Strata Plan 55597* [2017] WASC 104; (2017) 51 WAR 304 at [34].

<sup>44</sup> Litech Resort's submissions on preliminary issue filed on 7 July 2023, para 46 and para 47.

<sup>45</sup> Litech Resort's submissions on preliminary issue filed on 7 July 2023, para 49; ts 23, 14 September 2023.

<sup>46</sup> Litech Resort's submissions on preliminary issue filed on 7 July 2023, para 45; ts 31, 14 September 2023.

*Findings - cl 4.2(b) of the Agreement*

46 The applicant contends that, by cl 4.2(b) of the Agreement, it has authorised the respondent to undertake a 'specified scheme function' of the Strata Company in respect of the contract formalities set out in s 139 of the ST Act.<sup>47</sup> I do not accept the applicant's contention for the reasons that follow.

47 First, s 139 of the ST Act is not a discrete function in Pt 8 Div 1 of the ST Act and, consequently, applying *Waydnette*, it is not a 'function' of the Strata Company for the purposes of 143(1) of the ST Act.

48 Second, s 139 of the ST Act empowers a person to make, vary, extend, discharge or terminate a contract in the name of or on behalf of the Strata Company but only when that person is already acting under the express or implied authority of the Strata Company. It applies to 'any person' who is authorised (either expressly or impliedly) to contract on behalf of the Strata Company. Section 139 of the ST Act can be contrasted to the function in s 115 of the ST Act (a provision contained in Pt 8 Div 1 of the ST Act) which specifically empowers 'a strata company' to terminate certain contracts for amenities or services.

49 Third, I agree with the respondent's contention that the legislature could not have intended that a person acting as an agent of the Strata Company in respect of contract formalities would be required to, amongst other things, hold the necessary qualifications in strata management, obtain professional indemnity insurance, and lodge annual returns.

50 In relation to By-law 8(2)(b), I am not satisfied that it is a function of the Council and, consequently, it is not a 'scheme function' as defined in s 3(1) of the ST Act. By-law 8(2)(b) enables the Council to employ agents and employees on behalf of the Strata Company to, amongst other things, control and manage the common property of the Scheme and, thereby, the Council facilitates or supports the Strata Company in the performance of its functions, powers and duties (by employing people to assist). Notably, the Council is not obliged, by the terms of By-law 8(2)(b), to employ agents and employees on behalf of the Strata Company. The chapeau of By-law 8(2)(b) provides that the Council 'may' employ the relevant agents or employees on behalf of the Strata Company. For these reasons, I find that

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<sup>47</sup> ts 10, 14 September 2023.

By-law 8(2)(b) is not a 'scheme function' for purposes of s 143(1) of the ST Act.

51 If I am wrong and s 139 of the ST Act and/or By-law 8(2)(b) are scheme functions, I nevertheless find that cl 4.2(b) of the Agreement does not authorise the respondent to undertake the relevant 'function' specified in that clause without the prior consent of the applicant. Consequently, I find that the relevant 'function' (to negotiate and enter into (and extend, vary or cancel) agreements for the supply of materials, equipment and services in connection with the common property) has not been 'delegated' to the respondent by cl 4.2(b) of the Agreement. I accept the respondent contention that, at its highest, cl 4.2(b) of the Agreement provides for the respondent to assist the Strata Company to perform its scheme function, or perform an aspect of the scheme function, if the Strata Company provides its consent.<sup>48</sup>

52 Accordingly, for these reasons, I find that cl 4.2(b) of the Agreement does not authorise the respondent to perform a 'specified scheme function' for the purposes of s 143(1) of the ST Act.

**Does cl 4.3(b) of the Agreement authorise the respondent to perform a 'specified scheme function'?**

53 Clause 4.3(b) of the Agreement provides:

The Manager as the caretaker of the Common Property:

...

(b) has power on behalf of the Strata Company, to the same extent as that power may be exercisable by the Strata Company, to evict or deal with any person creating a nuisance or annoyance on the Common Property or committing any breach of the by-laws of the Strata Company[.]

54 The applicant says that, by cl 4.3(b) of the Agreement, it has authorised the respondent to perform the specified scheme function of the Strata Company under s 112 of the ST Act to comply with the Scheme By-laws and enforce compliance with those by-laws by others to whom they apply.<sup>49</sup> Further, the applicant says that cl 4.3(b) of the Agreement gives the respondent the powers of the Strata Company, exercisable 'to the same extent' as the Strata Company and, consequently, goes beyond the obligation in the resort management

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<sup>48</sup> ts 31, 14 September 2023.

<sup>49</sup> Applicant's submissions on preliminary issue filed on 23 June 2023, para 15.

agreement relied on in *Waydanette*.<sup>50</sup> Consequently, the applicant says that the respondent is not 'merely assisting' the Strata Company to perform its function of enforcing the Scheme By-laws under s 112 of the ST Act because cl 4.3(b) of the Agreement authorises the respondent to act with all of the powers of the Strata Company.<sup>51</sup>

55 The respondent disagrees with the applicant's interpretation of cl 4.3(b) of the Agreement and says that it does not contain the discrete scheme function as specified in s 112 of the ST Act. It is the respondent's position that cl 4.3(b) of the Agreement empowers it, as the Manager, to evict or deal with a person committing any breach of the Scheme By-laws but does not impose any requirement or obligation to exercise that power.<sup>52</sup> The respondent observed that, by contrast, the Strata Company is obliged to comply with the Scheme By-laws and enforce compliance with those by-laws by others.<sup>53</sup> Consequently, the respondent says that the function of the Strata Company specified in s 112 of the ST Act has not been 'delegated' to it by cl 4.3(b) of the Agreement.<sup>54</sup>

56 Clause 4.3(b) of the Agreement provides that the Manager has power 'to the same extent as that power may be exercisable by the Strata Company'. The respondent contends that even if cl 4.3(b) of the Agreement, by its terms, is in the nature of an obligation, the obligation would be merely to assist the Strata Company in the performance of its scheme functions or perform an aspect of a specified scheme function.<sup>55</sup>

#### *Findings - cl 4.3(b) of the Agreement*

57 The applicant contends that, by cl 4.3(b) of the Agreement, it has authorised the respondent to undertake a 'specified scheme function' of the Strata Company, namely, to comply with the Scheme By-laws and enforce compliance with those by-laws by others to whom they apply, as provided by s 112 of the ST Act. I do not accept the applicant's contention for the reasons that follow.

58 First, whilst I am satisfied that s 112 of the ST Act is a discrete function that falls within Pt 8 Div 1 of the ST Act, I find that the function has not been 'delegated' to the respondent by cl 4.3(b) of the

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<sup>50</sup> Applicant's outline of submissions in reply to the respondent's submissions filed on 7 July 2023, para 29.

<sup>51</sup> Applicant's outline of submissions in reply to the respondent's submissions filed on 7 July 2023, para 30.

<sup>52</sup> ts 27, 14 September 2023.

<sup>53</sup> Litech Resort's submissions on preliminary issue filed on 7 July 2023, para 55.

<sup>54</sup> Litech Resort's submissions on preliminary issue filed on 7 July 2023, para 56.

<sup>55</sup> Litech Resort's submissions on preliminary issue filed on 7 July 2023, para 57; ts 29, 14 September 2023.

Agreement. This is because cl 4.3(b) of the Agreement merely empowers the respondent to evict or deal with a person committing a breach of the Scheme By-laws (**relevant scheme function**) but does not impose any requirement or obligation on the respondent to exercise that power.

59 Second, cl 4.3(b) of the Agreement provides that the Manager has 'power on behalf of the Strata Company, **to the same extent as that power may be exercisable by the Strata Company**' (emphasis added). If cl 4.3(b) of the Agreement is in the nature of an obligation, I agree with the respondent's contention that, at most, the obligation would be to assist the Strata Company to perform the relevant scheme function or perform an aspect of that function because the Strata Company has not, by the terms of the clause, 'delegated' the function to the respondent.

60 Third, in *Waydanette*, cl 1.8 of the resort management agreement that was the subject of those proceedings (which is in similar terms to cl 4.3(b) of the Agreement) did not authorise the resort manager to perform a specified scheme function because the Tribunal concluded that an obligation to 'use its best endeavours' cannot equate to having been authorised to perform a general duty of a strata manager.<sup>56</sup> Clause 1.8 of the resort management agreement provided:<sup>57</sup>

- (a) Supervision: Use its best endeavours to ensure that all Proprietors, occupiers and their visitors for the time being comply with the By-Laws and the Rules and Regulations and to take such steps as is reasonable required to prevent unauthorised persons from using the Common Property.

61 Whilst I acknowledge that cl 4.3(b) of the Agreement does not adopt the expression 'use its best endeavours', I accept the respondent's contention that the clause does not impose an obligation on the respondent to enforce compliance with the Scheme By-laws but merely a power to do so.<sup>58</sup> Consequently, I find that cl 4.3(b) of the Agreement does not authorise the respondent to enforce compliance with the Scheme By-laws for the purposes of s 112 of the ST Act.

62 Accordingly, for these reasons, I find that cl 4.3(b) of the Agreement does not authorise the respondent to perform a 'specified scheme function'.

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<sup>56</sup> *Waydanette* at [129].

<sup>57</sup> *Waydanette* at [50].

<sup>58</sup> ts 28, 14 September 2023.

**Does cl 4.6(a)(7) of the Agreement authorise the respondent to perform a 'specified scheme function'?**

63 Clause 4.6(a)(7) of the Agreement provides:

- (a) As the caretaker of the Common Property, the Manager must provide the services of a natural person as the resident caretaker of the Resort who shall permanently occupy the Residence and whose duties shall include the following:

...

- (7) **(materials and services)** obtaining quotes for materials and services necessary to perform the Manager's duties as caretaker hereunder and, as instructed by the Strata Company from time to time, buying materials and engaging services for the Strata Company.

64 The applicant says that, by cl 4.6(a)(7) of the Agreement, it authorised the respondent to perform the following specified scheme functions:<sup>59</sup>

- (a) the function of the Strata Company under s 116(1)(a) of the ST Act to purchase, hire or otherwise acquire personal property for use by owners of lots in connection with their enjoyment of the common property or for use by the Strata Company in the performance of its functions;
- (b) the function of the Strata Company under s 139 of the ST Act to make, vary, extend, discharge or terminate a contract in the name of or on behalf of the Strata Company; and
- (c) the function of the Council under By-law 8(2)(b) to employ on behalf of the Strata Company such agents and employees as it thinks fit in connection with the control and management of the common property and the exercise and performance of the powers and duties of the Strata Company.

65 As already stated, it is the respondent's position that neither s 139 of the ST Act nor By-law 8(2)(b) is a scheme function. In relation to s 116(1)(a) of the ST Act, the respondent contends that it is not authorised by cl 4.6(a)(7) of the Agreement to perform the scheme function specified in that provision of the ST Act. Instead, the respondent says that its obligation is limited to buying materials

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<sup>59</sup> Applicant's submissions on preliminary issue filed on 23 June 2023, para 16.

(not hiring or acquiring personal property) and only for the Strata Company (not for use by owners of lots in connection with their enjoyment of the common property) and, most significantly, only when instructed by the Strata Company to do so.<sup>60</sup> Consequently, the respondent says that the authority granted by cl 4.6(a)(7) of the Agreement is limited to it 'assisting the strata company to perform the strata company's scheme function or perform an aspect of a specified scheme function of the strata company'.<sup>61</sup>

*Findings - cl 4.6(a)(7) of the Agreement*

66 The applicant contends that, by cl 4.6(a)(7) of the Agreement, it has authorised the respondent to undertake a 'specified scheme function' of the Strata Company, namely, the purchase, hire or acquisition of personal property as provided by s 116(1)(a) and s 139 of the ST Act and By-law 8(2)(b).

67 Whilst I accept that s 116(1)(a) of the ST Act is a scheme function because it falls within Pt 8 Div 1 of the ST Act and is expressed as a power on which the strata company may rely to perform its functions, I nevertheless find that the applicant has not 'delegated' its function to the respondent for the reasons that follow.

68 First, the obligation on the respondent in cl 4.6(a)(7) of the Agreement is limited to buying materials (not hiring or acquiring personal property) and only for the Strata Company (and not for use by owners of lots in connection with their enjoyment of the common property).

69 Second, the respondent is only authorised by cl 4.6(a)(7) of the Agreement to purchase, hire or acquire personal property when instructed by the Strata Company to do so. Consequently, I find that the Strata Company has not, by cl 4.6(a)(7) of the Agreement, 'delegated' its function in s 116(1)(a) of the ST Act to the respondent. Rather, the respondent may assist the Strata Company in the performance of a specified scheme function or the performance of an aspect of that function (ie buying materials).

70 Third, I agree with the respondent's contention that the legislature could not have intended that a person who is authorised to buy materials as and when instructed by the Strata Company to do so would be required to, amongst other things, hold the necessary qualifications

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<sup>60</sup> Litech Resort's submissions on preliminary issue filed on 7 July 2023, para 63.

<sup>61</sup> *Waydanette* at [127]; ts 33, 14 September 2023.

in strata management, obtain professional indemnity insurance, and lodge annual returns.<sup>62</sup>

71 I have already found that neither s 139 of the ST Act nor By-law 8(2)(b) is a 'scheme function'. If I am wrong, and s 139 of the ST Act and/or By-law 8(2)(b) are scheme functions, I nevertheless find that the applicant has not, by cl 4.6(a)(7) of the Agreement, 'delegated' those functions to the respondent because the respondent may only contract to buy materials or engage services (as agents or employees) when instructed by the Strata Company to do so.

72 Accordingly, for these reasons, I find that cl 4.6(a)(7) of the Agreement does not authorise the respondent to perform a 'specified scheme function' for the purposes of s 143(1) of the ST Act.

**Does cl 4.1A(f) of the Agreement authorise the respondent to perform a 'specified scheme function'?**

73 Clause 4.1A(f) of the Agreement, as inserted by cl 2.6 of the Variation Deed, provides:

...

- (f) In the event that Specialist Work is required, the Manager:
  - (i) must for Specialist Works not exceeding \$2,000.00 excluding GST, engage an Approved Specialist Contractor:
    - A without the need to seek further approval from the Strata Company or COO;
    - B having regard to any budget set by the strata Company for Specialist Works, or if there is no budget, having regard to the best interests of the Strata Company[.]

74 'Specialist Work' is defined in cl 1.1 of the Agreement as work which:

- (a) requires Specialist Equipment for it to be carried out in an efficient and good and workmanlike manner;
- (b) requires a certificate of competence, qualification, licence, permission or authority from a government body for it to be performed lawfully;

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<sup>62</sup> ts 33, 14 September 2023.

- (c) needs to be carried out from above a fall height which complies with the Workplace Health & Safety Regulations; or
- (d) can only reasonably be carried out by a skilled or specialist tradesman or contractor; and

....

75 An 'Approved Specialist Contractor' for the purposes of the cl 4.1A(f) of the Agreement is a contractor who is appointed to the Specialist Contractor Panel pursuant to cl 4.1A(a) of the Agreement.

76 The applicant contends that, by cl 4.1A(f) of the Agreement, it has authorised the respondent to perform the following specified scheme functions:<sup>63</sup>

- (a) the function of the Strata Company under s 139 of the ST Act to make, vary, extend, discharge or terminate a contract in the name of or on behalf of the Strata Company;
- (b) the function of the Council under By-law 8(2)(b) to employ on behalf of the Strata Company such agents and employees as it thinks fit in connection with the control and management of the common property and the exercise and performance of the powers and duties of the Strata Company; and
- (c) the function of the Strata Company under s 102(6) of the ST Act to make expenditure in accordance with an authorised budget.

77 It is the respondent's position that neither s 139 of the ST Act nor By-law 8(2)(b) is a scheme function for the reasons already stated. In relation to s 102(6) of the ST Act, the respondent says that the provision effectively prohibits expenditure that is not authorised by an approved budget except for expenditure as specified in that subsection. Consequently, it is the respondent's position that s 102(6) of the ST Act is in the nature of a prohibition or limitation rather than authorising the performance of a scheme function.<sup>64</sup> Even if s 102(6) of the ST Act could be characterised as providing for the scheme function of making expenditure in accordance with an authorised budget (which the

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<sup>63</sup> Applicant's submissions on preliminary issue filed on 23 June 2023, para 17; Applicant's outline of submissions in reply to the respondent's submissions filed on 7 July 2023, para 39.

<sup>64</sup> Litech Resort's submissions on preliminary issue filed on 7 July 2023, para 67 and para 68; ts 16, 14 September 2023.

respondent refutes), the respondent says that under cl 4.1A(f)(i) it is authorised to engage an Approved Specialist Contractor regardless of whether there is an authorised budget.<sup>65</sup>

78 Further, the respondent observed that cl 4.1A(f)(i) of the Agreement is limited to circumstances in which Specialist Work is required and does not exceed \$2,000 (exclusive of GST). Because the clause does not extend to the full scope of the scheme function (of making expenditure in accordance with an authorised budget), the respondent says that at most it could be seen as authorising an aspect of the function which is insufficient to constitute the authorisation of a specified scheme function for the purposes of s 143(1) of the ST Act.<sup>66</sup> Consequently, it is the respondent's position that cl 4.1A(f)(i) of the Agreement does not extend to the full scope of any scheme function in s 102(6) of the ST Act.<sup>67</sup>

79 The respondent also referred to Pt 13 of the ST Regulations which deals with strata managers and, specifically, reg 91(2) of the ST Regulations which provides that s 143 of the ST Act does not apply to a person who is employed or engaged by a strata company (or a strata manager on behalf of a strata company) to supervise or carry out repair or maintenance work or specialist work. Consequently, the respondent says that s 143(1) of the ST Act does not apply to the engagement of an 'Approved Specialist Contractor' who is managed and supervised by the respondent pursuant to cl 4.1A(f) of the Agreement.<sup>68</sup>

*Findings - cl 4.1A(f) of the Agreement*

80 I find that the respondent is not a person referred to in reg 91(1) of the ST Regulation and, consequently, I do not accept the respondent's contention that s 143(1) of the ST Act does not apply, by operation of reg 91(2) of the ST Regulations, to the engagement of an 'Approved Specialist Contractor' pursuant to cl 4.1A(f) of the Agreement.

81 For the purposes of reg 91, the expressions 'repair or maintenance' and 'specialist work' are defined in reg 90 of the Regulations (reproduced at [21] above). Whilst there was no dispute that the types of 'Specialist Work' referred to in cl 1.1 of the Agreement are not inconsistent with the definition of 'specialist work' in reg 90 of the

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<sup>65</sup> Litech Resort's submissions on preliminary issue filed on 7 July 2023, para 69; ts 35, 14 September 2023.

<sup>66</sup> Litech Resort's submissions on preliminary issue filed on 7 July 2023, para 70.

<sup>67</sup> ts 35, 14 September 2023.

<sup>68</sup> Litech Resort's submissions on preliminary issue filed on 7 July 2023, para 71 and para 72.

Regulations,<sup>69</sup> I find that it is the 'Approved Specialist Contractor' and not the respondent who is responsible for supervising and carrying out that work under cl 4.1A(f) of the Agreement.

82           Consequently, on a proper construction of cl 4.1A(f)(i) of the Agreement (and the relevant definitions in cl 1.1 of the Agreement), I find that the respondent does not fall within the meaning of a person who is employed or engaged to supervise or carry out repair or maintenance work, or specialist work that assists the Strata Company to perform its scheme functions for the purposes of reg 91. Rather, as already stated, it is the Approved Specialist Contractor who is caught by reg 91 of the Regulations and to whom s 143 of the ST Act does not apply. If the Approved Specialist Contractor sub-contracts (and supervises) specialist work, any sub-contractor would also be caught by reg 91 of the Regulations.

83           The applicant contends that, by cl 4.1A(f) of the Agreement, it has authorised the respondent to undertake a 'specified scheme function' of the Strata Company in respect of engaging Specialist Contractors to perform Specialist Work up to \$2,000 (excluding GST).<sup>70</sup> The applicant relies on s 102(6) of the ST Act, s 139 of the ST Act, and By-law 8(2)(b).

84           I do not accept the applicant's position for the reasons that follow.

85           First, I have already found that neither s 139 of the ST Act nor By-law 8(2)(b) is a 'scheme function'.

86           Second, whilst I am satisfied that s 102(6) of the ST Act can be characterised as a scheme function because it falls within Pt 8 Div 1 of the ST Act and provides for the circumstances in which expenditure can be made by the Strata Company without an approved budget, I find that cl 4.1A(f)(i) only delegates an aspect of that function. This is because cl 4.1A(f)(i) of the Agreement authorises the respondent to engage an Approved Specialist Contractor for Specialist Works (up to \$2,000 excluding GST) whether or not there is an approved budget. Consequently, applying *Waydanette*, I find that the respondent's authority pursuant to cl 4.1A(f)(i) of the Agreement is limited to assisting the Strata Company to perform an aspect of the scheme function in s 102(6) of the ST Act.

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<sup>69</sup> ts 50, 14 September 2023.

<sup>70</sup> ts 44, 14 September 2023.

87 Accordingly, for these reasons, I find that cl 4.1(f)(i) of the Agreement does not authorise the respondent to perform a 'specified scheme function' for the purposes of s 143(1) of the ST Act.

### ***Conclusion***

88 The preliminary issue is answered in the negative. That is, I find that the applicant has not authorised the respondent, by the terms of the Agreement, to perform a 'specified scheme function' for the purposes of s 143(1) of the ST Act on behalf of the applicant.

89 The effect of this finding is that the Agreement did not cease to operate on 1 November 2020 because it is not a strata management contract that is caught by cl 13(3) of Sch 5 to the ST Act. It also means that the Tribunal does not have jurisdiction to determine these proceedings as the dispute between the parties is not a 'scheme dispute' for the purposes of s 197(1) of the ST Act.

90 Accordingly, I will make an order dismissing the application.

### ***Orders***

The Tribunal orders:

1. The preliminary issue is answered in the negative, that is, the applicant in CC 126 of 2023 (**2023 Proceeding**) has not authorised the respondent in the 2023 Proceeding by the terms of the 'Management and Caretaker Agreement' entered into on or around 23 March 2009 to perform a 'specified scheme function' on behalf of the applicant in the 2023 Proceeding for the purposes of s 143(1) of the *Strata Titles Act 1985* (WA).
2. The application is dismissed.

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

MS C BARTON, MEMBER

24 NOVEMBER 2023