

**JURISDICTION** : STATE ADMINISTRATIVE TRIBUNAL

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

**CITATION** : BENNETT and THE OWNERS OF THE FAIRWAY  
STAGE TWO STRATA SCHEME 51326 [2021]  
WASAT 170

**MEMBER** : MS V HAIGH, MEMBER

**HEARD** : DETERMINED ON THE DOCUMENTS

**DELIVERED** : 28 JUNE 2021

**PUBLISHED** : 2 FEBRUARY 2024

**FILE NO/S** : CC 1800 of 2020

**BETWEEN** : KENNETH JOHN BENNETT  
First Applicant

JAN BENNETT  
Second Applicant

AND

THE OWNERS OF THE FAIRWAY STAGE TWO  
STRATA SCHEME 51326  
Respondent

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*Catchwords:*

*Strata Titles Act 1985 (WA) - Scheme dispute - Whether horizontal lower boundary of balcony is upper surface of the tiled floor or upper surface of concrete slab*

*Legislation:*

*State Administrative Tribunal Act 2004 (WA), s 91*

*Strata Titles (General) Regulations 2019 (WA), reg 6(2), reg 6(3), reg 6(3)(b), reg 73*

*Strata Titles Act 1985 (WA), s 3, s 3(1), s 3(2), s 3(2)(a), s 3(2)(a)(ii), s 3(2)(b), s 86, s 197(4), s 199*

*Result:*

Application allowed

*Category:* B

**Representation:**

*Counsel:*

First Applicant : Ms T Watson  
Second Applicant : Ms T Watson  
Respondent : Mr S Macfarlane

*Solicitors:*

First Applicant : Douglas Cheveralls Lawyers  
Second Applicant : Douglas Cheveralls Lawyers  
Respondent : Lavan

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

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

**REASONS FOR DECISION OF THE TRIBUNAL:**

(These reasons were delivered orally on 28 June 2021 and have been taken from the transcript of the hearing. They have been edited to make necessary corrections or annotations for the purposes of correcting grammatical errors or infelicity of expression. They have been published in response to requests by the industry for the reasons for decision).

**Introduction**

1 Mr and Ms Bennett (**applicants**) commenced these proceedings in December 2020 against The Owners of the Fairway Stage Two Strata Scheme 51326 (**strata company**) seeking resolution of a scheme dispute.<sup>1</sup>

2 They are seeking a declaration<sup>2</sup> that the horizontal lower boundary of the balcony of their fourth-floor lot, (**Lot 14**) on Strata Plan 51326 is the upper surface of the tiled floor.

3 The strata company contends that the horizontal lower boundary of the balcony of Lot 14 is the upper surface of the floor slab, rather than the upper surface of the tiled floor.

4 The issue for my determination is whether the horizontal lower boundary of the balcony of Lot 14 on Strata Plan 51326 is:

- (i) the upper surface of the tiled floor, or
- (ii) the upper surface of the concrete slab.

5 If it is the former, then the tiles are part of the common property. This is the outcome being sought by the applicants.

6 Conversely, if it is the latter, then the tiles are part of the applicants' Lot 14. This is the outcome being sought by the strata company.

7 Sheet 5 of Strata Plan 51326 depicts the lots and lot boundaries on the fourth floor, including the applicants' Lot 14. It depicts their balcony as part of Lot 14.

8 The surveyor's notation on the floor plan includes the following:

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<sup>1</sup> *Strata Titles Act 1985* (WA) (ST Act), s 197(4).

<sup>2</sup> Under s 91 of the *State Administrative Tribunal Act 2004* (WA), further or alternatively, under s 199 of the ST Act.

The boundaries of the lots or parts of the lots which are buildings shown on the strata plan are the inner surfaces of the walls, the upper surface of the floor and the under surface of the ceiling, as provided by Section 3(2)(a) of the Strata Titles Act 1985.

The stratum of all balconies extends from the upper surface of their floor slab to the under surface of the ceiling[.]

9 Pursuant to s 3(2) of the *Strata Titles Act 1985 (WA) (ST Act)* boundaries of a cubic space described on a floor plan may be determined in either of two ways.

10 The first way is set out in s 3(2)(a) of the ST Act which provides, relevantly, that the lower horizontal boundary of the cubic space defined in a floor plan is the 'upper surface of that floor' (see s 3(2)(a)(ii)).

11 Section 3(2)(a) is the default position and only applies 'except as provided in paragraph (b)'.

12 The second way is set out in s 3(2)(b) which provides that the boundaries of a cubic space are:

... such boundaries as are described on a sheet of paper of the floor plan relating to that cubic space (those boundaries being described in the manner required by the regulations by reference to a wall, floor, or ceiling in a building to which that plan relates or to structural cubic space within that building).

13 Given that the surveyor's notation describes the lower boundary of the part-lot balconies, the default position under s 3(2)(a) does not apply.

14 Regulation 6(2) of the *Strata Titles (General) Regulations 2019 (WA) (ST Regulations)* states that:

For the purposes of section 3(2)(b), the boundaries of any cubic space referred to in paragraph (a) of the definition of *floor plan* in section 3(1) must be described in accordance with this regulation.

15 Regulation 6(3) provides that:

If the cubic space is within a building that is not a single tier building, the boundaries of the cubic space must be —

...

- (b) in the case of a horizontal boundary, if any floor or ceiling joins a vertical boundary of that cubic space — the upper surface of that floor and the under surface of that ceiling.

16 The strata company contends that reg 6(3) only applies to cubic space 'within a building' and does not apply to cubic space outside the building external part-lots, that is, balconies. For this reason, they contend that reg 6(3) does not apply.

17 I reject the strata company's submissions for the following reasons.

18 'Building' is defined in s 3(1) of the ST Act to include 'structure'.

19 'Structure' is not defined in s 3.

20 In the absence of a definition of 'structure' in s 3, I turn to other divisions of the ST Act and ST Regulations to assist me.

21 Section 86 defines 'structure' as including 'anything classified as a structure by the regulations'.

22 Regulation 73 provides that:

For the purposes of the definition of *structure*, section 86, the things classified as a "structure" are any dwelling, shop, factory, commercial premises, garage, carport, shed, or other building or improvement (whether free standing or annexed to or incorporated with any existing building on the lot) —

- (a) the construction or erection of which is required to be approved by the local government or any other authority; or
- (b) the area of which is taken into account for the purposes of determining the plot ratio restrictions for open space requirements for the lot.

23 In particular I note that garages and carports are 'structures' and therefore included within the definition of 'building'. By analogy, a balcony may also be considered to be a 'structure' and therefore within the definition of 'building'.

24 Further, a balcony may be considered to be a 'structure' because it is 'annexed to or incorporated with any existing building on the lot' and the construction of a balcony is 'required to be approved by the local government or other authority'.

25           Considering the ST Act and ST Regulations as a whole, I am of  
the view that the balconies are 'within a building'.

26           Accordingly, the proviso in s 3(2)(b) applies and the boundaries  
described in the floor plan must be described in the manner set out in  
reg 6(3)(b). That is, the lower horizontal boundary must be described  
as the 'upper surface of that floor'.

27           In the circumstances, matters such as the surveyor's subjective  
intention, and the meaning of, or the industry use of the phrase  
'floor slab' are irrelevant.

28           This is because the descriptor noted by the surveyor in this case,  
'upper surface of their floor slab' can only have the legal effect in  
determining a boundary of a lot conferred on it by the ST Act and  
ST Regulations. Specifically, s 3(2)(b) of the ST Act allows that  
boundaries may be described on a sheet of a floor plan relating to the  
cubic space, but only if a description is in accordance with the  
ST Regulations.

29           This was not done in this case because reg 6(3) requires that the  
horizontal boundary of the cubic space 'must be ... the upper surface of  
that floor'. Accordingly, if it was accepted that 'upper surface of their  
floor slab' means anything other than 'the upper surface of that floor'  
s 3(2)(b) does not apply to the description of the boundaries in  
this case.

30           The 'upper surface of that floor' is determined with reference to the  
state of the parcel at the date of registration (*Topic and The Owners of  
Raffles Waterfront Strata Plan 48545* [2016] WASAT 27) at [22] and  
[35].

31           The parties are in agreement that the balcony had tiles affixed at  
the date of registration of the strata plan.

32           Accordingly, the upper surface of the tiles is the upper surface of  
that floor.

**Conclusion**

33 For the reasons given I declare that the horizontal lower boundary of the balcony on Lot 14 on Strata Plan 51326 is the upper surface of the tiled floor.

34 Accordingly, I find in favour of the applicants.

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

MS V Haigh, MEMBER

2 FEBRUARY 2024