

JURISDICTION : SUPREME COURT OF WESTERN AUSTRALIA
IN CIVIL

CITATION : THE OWNERS OF DOLPHIN APARTMENTS
MANDURAH STRATA PLAN 49518 -v- POLAND
SUPERANNUATION PTY LTD [2023] WASC 452

CORAM : LUNDBERG J

HEARD : 24 JULY 2023

DELIVERED : 28 NOVEMBER 2023

FILE NO/S : GDA 14 of 2022

BETWEEN : THE OWNERS OF DOLPHIN APARTMENTS
MANDURAH STRATA PLAN 49518
Appellant

AND

POLAND SUPERANNUATION PTY LTD
Respondent

ON APPEAL FROM:

For File No : GDA 14 of 2022

Jurisdiction : STATE ADMINISTRATIVE TRIBUNAL

Coram : C BARTON (MEMBER)

Citation : [2022] WASAT 103

File Number : CC 851/2020

Catchwords:

Strata title scheme - Exclusive use by-laws - Proper construction of s 43 of the

Strata Titles Act 1985 (WA) - Whether relevant by-law in strata titles scheme is an exclusive use by-law - Whether by-law confers exclusive use and enjoyment of, or special privileges over, the common property - Whether by-law refers to specified lot or lots in the strata titles scheme - Asserted inconsistency between by-laws - Whether orders of Tribunal consistent with proper construction

Legislation:

State Administrative Tribunal Act 2004 (WA), s 105

Strata Titles Act 1985 (WA), s 35, s 36, s 42B, s 42 and s 43 (prior to 1 May 2020)

Strata Titles Act 1985 (WA), s 3(1), s 43, s 45, s 91 and s 100 (on and from 1 May 2020)

Strata Titles Amendment Act 2018 (WA)

Result:

Appellant has leave to amend grounds of appeal

Leave to appeal granted

Grounds 1 to 3 dismissed

Ground 4 allowed

Category: B

Representation:

Counsel:

Appellant : Mr P G McGowan

Respondent : Mr M J Sims

Solicitors:

Appellant : Lewis Kitson Lawyers

Respondent : Murcia Pestell Hillard

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

Bondi Beach Astra Retirement Village Pty Ltd v Gora [2010] NSWSC 81

Kelly v Birchwood Consolidated Pty Ltd (Receivers and Managers Appointed)

(In Liquidation) [2023] WASC 76

Legal Profession Complaints Committee v Lourey [2022] WASCA 114
Lin v Owners - Strata Plan No 50276 (2004) NSWSC 88; (2005) NSW ConvR
56-105
Lourey v Legal Services and Complaints Committee [2023] WASCA 90
Noon v The Owners - Strata Plan 22422 [2014] NSWSC 1260
Paridis v Settlement Agents Supervisory Board [2007] WASCA 97; (2007) 33
WAR 361
Poland Superannuation Pty Ltd and the Owners of Dolphin Apartments
Mandurah Strata Plan 49518 [2022] WASAT 103
Secretary, Department of Premier and Cabinet v Hulls [1999] 3 VR 331
Webb v Tang [2023] WASCA 119

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LUNDBERG J:**A. Introduction and summary**

1 The Dolphin Apartments are located adjacent to a marina in a picturesque part of Western Australia which was originally known as *Mandjoorgoordap*. The Noongar people who first inhabited the area so named the location to recognise it was a 'meeting place of the heart'. The locality is now more commonly known as the City of Mandurah.

2 The building which houses the Dolphin Apartments is subject to a strata scheme (**Strata Scheme**) under the *Strata Titles Act 1985* (WA) (the **Strata Titles Act**). The Strata Titles Act confers jurisdiction on the State Administrative Tribunal (the **Tribunal**) to resolve disputes arising under that legislation.

3 These reasons concern an appeal¹ brought pursuant to s 105 of the *State Administrative Tribunal Act 2004* (WA) (**SAT Act**) against a decision of the Tribunal relating to the Dolphin Apartments: *Poland Superannuation Pty Ltd and the Owners of Dolphin Apartments Mandurah Strata Plan 49518* (the **Tribunal's Decision**).² The building itself is a mixed use residential and commercial development, subject to a strata plan which was registered on 24 July 2006 (**Strata Plan**).³ The appellant to the present proceedings is the strata company for the Strata Scheme (the **Strata Company**).

4 A core issue in the proceedings below, and on appeal, is the scope of the power in s 44(1) of the Strata Titles Act for a strata company to make 'exclusive use' by-laws (which are a species of 'governance by-laws' under the legislation) and which are defined in s 43(1) of the Strata Titles Act. The particular point of construction raised by the appeal has not been the subject of previous authority, as far as can be ascertained. In her detailed reasons, the Tribunal member examined the proper construction of both s 43(1) of the Strata Titles Act and the relevant by-laws of the Strata Scheme, and the resulting

¹ The relevant materials relied on for the purposes of the appeal are contained in a book of documents filed pursuant to O 65 r 10(1)(e) and (g) of the *Rules of the Supreme Court 1971* (WA) (**RSC**), which I will refer to as the **Appeal Book**.

² *Poland Superannuation Pty Ltd and the Owners of Dolphin Apartments Mandurah Strata Plan 49518* [2022] WASAT 103 (the **Tribunal's Decision**).

³ Appeal Book, Document A (Strata Plan), pg 1. The scheme is a strata scheme as distinct from a survey-strata scheme. The parties have noted that the proposed strata plan for the re-subdivision of Lot 61, which was lodged on 23 July 2009, is still subject to dealings and has not been registered by Landgate. I do not understand this to have any impact on the issues raised by this appeal.

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allocation of responsibilities and scheme expenses as between lots in the Strata Scheme. The Tribunal member found the by-law in question was an exclusive use by-law and thus the owner of the retail lot was not required, among other things, to contribute levies for the repair and maintenance, as well as renewal and replacement, of the common property to which the residential lot owners had been given exclusive use.

5 It should be noted at the outset that the Strata Titles Act was extensively amended by the *Strata Titles Amendment Act 2018* (WA). Those amendments came into effect on 1 May 2020. The present proceedings were initially commenced after the amendments took effect and so the legislation in its amended form applies to this appeal. Accordingly, reference in these reasons is primarily to the legislation as amended. However, as the relevant by-laws were made under the legislation prior to the amendments taking effect, some specific reference is needed to the provisions of the legislation which applied prior to 1 May 2020 (which I will refer to as the **Prior Act**).

6 For the reasons which follow, the appeal should be dismissed as to the first three grounds but should be upheld as to the fourth ground (noting that the fourth ground was conceded by the respondent). The relevant orders I propose to make, subject to hearing from counsel, are set out under heading I below.

B. Factual background

The Dolphin Apartments

7 It is helpful by way of an overview to first describe the Dolphin Apartments themselves.

8 The building consists of a ground floor which houses commercial and retail shops together with secure parking and storerooms for the residential lots.⁴ The commercial and retail shops on the ground floor form lot 61. The respondent (**Poland Superannuation**) is the registered proprietor of this lot.⁵ It appears the respondent leases the various shops in Lot 61 to numerous tenants.

9 The first, second and third floors of the building consist of 60 residential apartments. The apartments are lots 1 to 60. The

⁴ Appellant's submissions [7] and [10].

⁵ Tribunal's Decision [23].

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common property on and above the first floor includes both structural and non-structural components.⁶

10 The Strata Plan includes plans for each floor. The ground floor plan is set out in Diagrams 1 and 2 in **Attachment A** to these reasons, showing the parking and storerooms marked for each residential lot and lot 61 itself.⁷

11 The first floor location plan is set out in Diagram 3 in Attachment A, depicting the central void within the building from the first floor upwards.⁸ The first level contains an open landscaped lawn and garden area, together with a swimming pool, gymnasium and other recreational facilities.⁹ The first, second and third floor plans are not included in these reasons, however I note that each residential floor plan shows the 20 individual lots marked out on each floor (lots 1 to 20 on the first floor, lots 21 to 40 on the second floor, and lots 41 to 60 on the third floor).

12 The building itself is depicted in sketches which form part of the by-laws, including the sketch in Diagram 4 in Attachment A, which shows the north elevation.¹⁰

13 It will immediately be apparent from the foregoing that the area of the premises comprised by lot 61 is quite different in nature and its contemplated use to the residential apartments.

14 As to the boundaries of the lots of the Strata Scheme, the Strata Plan provides as follows with respect to the ground floor:¹¹

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 the part lots labelled CB extends between the upper surface of their floor to the under surface of their ceiling.

All columns and pillars are common property.

⁶ Respondent's submissions [76].

⁷ Appeal Book, Document A (Strata Plan), pg 11 - 12.

⁸ Appeal Book, Document A (Strata Plan), pg 9.

⁹ Appellant's submissions [10].

¹⁰ Appeal Book, Document C (Notification of Change of By-law), pg 43. The sketches are referred to within by-law 42(1).

¹¹ Appeal Book, Document A (Strata Plan - Ground Floor Plan), pg 11 - 12.

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15 As to the boundaries for the first, second and third floors:¹²

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 boundaries of the lots or parts of the lots labelled BAL are the external surface of the building walls, the inner surface of the balcony walls and rails, the inner surface of common balcony walls and rails, and where the balconies encroach beyond the permitter parcel, the parcel boundary is the boundary, the upper surface of the floor and the under surface of other ceiling or where applicable, the prolongation of the under surface of the ceiling.

All columns and pillars are common property.

Relevant by-laws

16 The initial by-laws of the Strata Scheme for the Dolphin Apartments include the standard by-laws imposed by Schedules 1 and 2 of the Prior Act, as well as the by-laws in the management statement which was registered with Landgate on 24 July 2006 (**Management Statement**).¹³ Amendments to the Strata Scheme by-laws have been made over time.¹⁴ The by-laws of the Strata Scheme most relevant for the purposes of this appeal are extracted in **Attachment B** to these reasons.

17 The dispute which arose between the Strata Company and Poland Superannuation concerns the allocation of expenses by the Strata Company as between the retail lot (lot 61) and the residential lots (lots 1 to 60). In particular, the parties are in dispute as to whether by-law 17(2) is, as a matter of construction, an exclusive use by-law within the meaning of s 43(1) of the Strata Titles Act (or its predecessor provision).

18 That by-law provides that the respondent (being the owner of lot 61) is 'not permitted to use any part of the common property or common property facilities' that are located on or above the first floor of the building. The Strata Company contends that this is *not* an

¹² Appeal Book, Document A (Strata Plan - First Floor Plan, Second Floor Plan and Third Floor Plan), pg 13 - 18.

¹³ Appeal Book, Document B (Management Statement), pg 25.

¹⁴ Appeal Book, Document A (Strata Plan - Annexure B), pg 24. This annexure indicates that three notification of change forms have been registered at Landgate, by which amendments to the by-laws were made. One of the notification of change forms is found at Appeal Book, Document C, pg 37, which came into effect on 11 June 2007.

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exclusive use by-law, whilst the respondent maintains it is. I will return to the legislative provisions later in these reasons, but it is first appropriate to set out the relevant by-laws.

19 By-law 17(2) is contained in the Management Statement and so came into effect in July 2006. The express terms of the by-law are as follows:

17. COMMERCIAL/RETAIL LOT

(1) ...

(2) The proprietor of lot 61 (or lots created by a re-subdivision of lot 61) is not permitted to use any part of the common property or common property facilities that are located on or above the first floor level.

20 The terms of the by-law, *ex facie*, have the effect that the proprietor and occupiers of Lot 61 (the retail lot) cannot use any part of the identified common property (i.e. the common property on the first, second or third levels) and, as a consequence, only the proprietors and occupiers of the residential lots can use this common property.

21 The Strata Company accepts this is the effect of by-law 17(2).¹⁵

22 However, notwithstanding the admitted effect of the by-law, the Strata Company maintains that the by-law does *not* confer on the owners of the residential lots the exclusive use of, or any special privileges over, the common property on the first, second and third floor levels.

23 Pausing here, I should mention several other by-laws of particular relevance, the terms of which are set out in Attachment B to these reasons:

(a) By-law 18 is headed 'Variations to levy contributions in accordance with section 42B'.¹⁶ It is contained in the Management Statement which came into effect on 24 July 2006.

¹⁵ Appellant's submissions [28].

¹⁶ Appeal Book, Document B (Management Statement), pg 25. I note that s 42B of the Prior Act was repealed by the *Strata Titles Amendment Act 2018* (WA). Section 42B permitted by-laws made by a strata company under s 42 to provide for a method of assessing contributions to be levied on proprietors under s 36 otherwise than in proportion to the unit entitlement of their respective lots. See, now, s 100(1)(c) of the Strata Titles Act which authorises a strata company to levy contributions in proportion to the unit entitlements or in accordance with the by-laws if they provide for a different basis for levying contributions.

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- (b) By-law 26 is headed 'Intercom, security systems and common property expenses'.¹⁷ It is also contained in the Management Statement.
- (c) By-law 33 is headed 'Swimming pool and Gymnasium'.¹⁸ It is also contained in the Management Statement.
- (d) By-law 40 is headed 'Grease traps, ducting and air conditioners'. This by-law was introduced by amendment which was passed on 16 March 2007 and came into effect on 11 June 2007.¹⁹
- (e) Finally, by-law 42(1), which was also introduced by the amendment which came into effect on 11 June 2007 and is headed 'Exclusive use of part of the common property'.²⁰

24 Upon review of these by-laws, particularly by-laws 40(2) and 42(1), it can be seen that the drafting technique employed in relation to the by-laws has differed over time.

25 By-law 17(1) is drafted in negative language, and does not expressly grant rights or privileges to the lot owners in question. Rather, the by-law restricts or deprives the owner of lot 61 from the *prima facie* entitlement to use certain parts of the common property of the Strata Scheme.

26 By-law 18(1) exempts the owner of lot 61 from contributing to certain costs of the lifts, the swimming pool and the gymnasium on the first floor. By-law 26 requires the owners of lots 1 to 60 to share certain expenses.

27 Then, when the amendments to the by-laws were made in March 2007 (which came into effect in June 2007), the draftsman adopted the express language of the Strata Titles Act in drafting by-laws 40(2) and 42(1), to positively grant the owner of lot 61 exclusive use of certain common property. A question which arises on this appeal is whether this differential approach to the drafting of the by-laws produces any difference in the legal effect of those provisions.

¹⁷ Appeal Book, Document B (Management Statement), pg 27.

¹⁸ Appeal Book, Document B (Management Statement), pg 28.

¹⁹ Appeal Book, Document C (Notification of Change of By-law), pg 38

²⁰ Appeal Book, Document C (Notification of Change of By-law), pg 38.

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C. Legislative framework*Section 42 of the Prior Act*

28

Section 42 of the Prior Act was headed 'By-laws'. This provision was in operation when by-law 17 was introduced as a by-law of the Strata Scheme for the Dolphin Apartments. The provision included the general by-law making power (s 42(1)) and specifically dealt with the power of a strata company to make by-laws having exclusive use (s 42(8)). Relevantly, s 42 of the Prior Act provided as follows:

42. By-laws

(1) A strata company may make by-laws, not inconsistent with this Act, for -

- (a) its corporate affairs; and
- (b) any matter specified in Schedule 2A; and
- (c) other matters relating to the management, control, use and enjoyment of the lots and any common property.

...

(8) Without limiting the generality of any other provision of this section other than subsection (1), a strata company may, with the consent in writing of the proprietor of a lot, pursuant to a resolution without dissent (or unanimous resolution, in the case of a two-lot scheme) make, under this subsection only and not otherwise, a by-law in respect of that lot conferring on that proprietor the exclusive use and enjoyment of, or special privileges in respect of, the common property or any part of it upon such terms and conditions (including the proper maintaining and keeping in a state of good and serviceable repair of the common property or that part of the common property, as the case may be, and the payment of money by that proprietor to the strata company) as may be specified in the by-law and may, pursuant to a resolution without dissent (or unanimous resolution, in the case of a two-lot scheme), make a by-law amending or repealing any by-law made under this subsection.

(9) After the expiration of the period of 2 years that next succeeds the making, or purported making, of a by-law referred to in subsection (8) (including a by-law so referred to that amends, adds to or repeals another by-law), it shall be conclusively presumed that all conditions and preliminary steps precedent to

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the making of the by-law have been complied with and performed.

- (10) Any by-law referred to in subsection (8) shall, while it remains in force, enure as appurtenant to, and for the benefit of, the lot in respect of which it was made and the proprietor, occupier and (subject to the terms of the by-law) any other resident thereof for the time being.
- (11) The proprietor for the time being of a lot in respect of which a by-law referred to in subsection (8) is in force -
- (a) is, subject to section 43(4), liable to pay to the strata company any moneys referred to in the by-law in accordance with the by-law; and
 - (b) is, unless excused by the by-law, responsible for the performance of the duty of the strata company under section 35(1)(c) in respect of the common property, or the part of the common property, to which the by-law relates.

...

- (13) Any moneys payable by a proprietor to the strata company under a by-law referred to in subsection (8) or pursuant to subsection (12) may be recovered, as a debt, by the strata company in a court of competent jurisdiction.

The Strata Titles Act

29 Section 44 of the Strata Titles Act now provides the general by-law making power for a strata company. This section forms part of div 4 pt 4 of the legislation which is headed 'Scheme by-laws', with pt 4 headed 'Scheme documents'.

30 Section 44 permits a strata company to make 'governance by-laws' or 'conduct by-laws' for the strata titles scheme, including by-laws that amend or repeal the by-laws it is taken to have made upon registration of the scheme.

31 The term 'governance by-laws' is defined in s 3(1) of the Strata Titles Act. The term includes scheme by-laws dealing with 'exclusive use of common property in the scheme'.²¹ The term 'conduct by-laws' is also defined in s 3(1) and excludes 'governance by-laws'.

²¹ Definition of 'governance by-law' at paragraph (a)(iii).

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32 Section 43 of the Strata Titles Act is headed 'Exclusive use by-laws' and uses similar language to its predecessor provision, although is drafted with greater clarity. Indeed, the Explanatory Memorandum which accompanied the *Strata Titles Amendment Bill 2018* (WA) indicated that the new provision amended the existing provision in order to:²²

... provide greater clarity on the making, amendment, repeal and operation of exclusive use by-laws, including that exclusive use by-laws may provide exclusive use rights over parts of the common property to the owners and occupiers of more than one lot within a scheme.

33 As the terms of s 43 of the Strata Titles Act are central to this appeal, I will set them out in full:

43. Exclusive use by-laws

- (1) *Exclusive use by-laws* of a strata titles scheme are scheme by-laws that confer exclusive use and enjoyment of, or special privileges over, the common property in the strata titles scheme or specified common property in the strata titles scheme (the *special common property*) on the occupiers, for the time being, of a specified lot or lots in the strata titles scheme (the *special lots*).
- (2) Exclusive use by-laws may include the following -
 - (a) terms and conditions on which the occupiers of special lots may use the special common property;
 - (b) particulars relating to access to the special common property and the provision and keeping of any key necessary;
 - (c) particulars of the hours during which the special common property may be used;
 - (d) provisions relating to the condition, maintenance, repair, renewal or replacement of the special common property;
 - (e) provisions relating to insurance of the special common property to be maintained by the owners of special lots;
 - (f) matters relating to the determination of amounts payable to the strata company by the owners of special lots and the imposition and collection of the amounts.

²² Explanatory Memorandum, *Strata Titles Amendment Bill 2018* (WA), pg 26.

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- (3) Subject to the terms of exclusive use by-laws, the obligations that would, apart from this subsection, fall on the strata company under section 91(1)(c) in relation to the special common property fall instead on the owners of the special lots.
- (4) An amount payable by a person to a strata company under exclusive use by-laws must be paid (together with interest on any outstanding amount) and may be recovered by the strata company, as if the amount payable were an unpaid contribution levied on the person as a member of the strata company.
- (5) Exclusive use by-laws can only be made, amended or repealed if the owner of each lot that is or is proposed to be a special lot has given written consent to the by-laws.

34 Section 43 thus continues the ability of a strata company to make by-laws which confer exclusive use and enjoyment of, or special privileges over, the whole of the common property or over specified common property (which the legislation now refers to as *special common property*). These exclusive or special rights may be conferred on the occupiers of a specified lot or specified lots (which the legislation defines as the *special lots*).

35 The reference to more than one lot is a clarification referred to in the passage in the Explanatory Memorandum extracted above. The former provision was drafted in a narrower fashion. The text referred to 'the proprietor of a lot' and 'a by-law in respect of that lot conferring on that proprietor'. It does not follow from this drafting, and neither party suggested, that s 42(8) of the Prior Act permitted a by-law to confer the exclusive or special rights on *only one* particular lot owner. If that was the case, by-law 17(2) would not have been capable of being characterised as an exclusive use by-law under the Prior Act.

36 Rather, s 42(8) of the Prior Act permitted a by-law to provide for exclusive use and enjoyment in favour of the proprietors of multiple lots in a strata scheme provided *each* proprietor had given consent in writing. The language of the provision is explicable on this basis. The amendment to the language (now found in s 43(1) of the Strata Titles Act) is intended to clarify the scope of the power, not alter it in a substantive manner, in my view.

37 The terms of s 43(3) of the Strata Titles Act should be noted. As is evident, the inclusion of an exclusive by-law means that the strata company's obligations in s 91(1)(c) of the Strata Titles Act (to keep common property in good and serviceable repair etc) fall upon the

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owner or owners of the lots (that is, the *special lots*) to whom the exclusive or special rights have been conferred.

38 Section 91 provides as follows:

91. General duty

(1) A strata company must -

[(a) deleted]

(b) control and manage the common property for the benefit of all the owners of lots; and

(c) keep in good and serviceable repair, properly maintain and, if necessary, renew and replace -

(i) the common property, including the fittings, fixtures and lifts used in connection with the common property; and

(ii) any personal property owned by the strata company,

and to do so whether damage or deterioration arises from fair wear and tear, inherent defect or any other cause.

[(d)-(k) deleted]

(2) A strata company may improve or alter the common property in a manner that goes beyond what is required under subsection (1).

Note for this subsection:

Expenditure above a certain amount incurred for the purposes set out in subsection (2) must be authorised by special resolution, except for expenditure on sustainability infrastructure, which may be authorised by ordinary resolution: see section 102.

(3) A strata company may sue and be sued for rights and liabilities related to the common property in the strata titles scheme as if it were the owner and occupier of the common property.

39 Section 43 of the Strata Titles Act is reinforced by s 45(1)(e), which provides that scheme by-laws may apply, in the case of exclusive use by-laws, to the owners and occupiers of the time being of *special lots*.

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D. The Tribunal's Decision

40 As already mentioned, the present dispute was the subject of proceedings brought by Poland Superannuation in the Tribunal. Poland Superannuation sought declarations and orders as follows:²³

- (a) *First*, a declaration that the Strata Company was required by by-law 18 of the Strata Scheme to allocate strata fees for costs reasonably incurred in managing the proper operation of the Strata Scheme between the commercial and residential cost centres so that the commercial centre was responsible only for costs in respect of (i) Lot 61; (ii) Lot 61's area of exclusive use; (iii) the roof and external structure of the building; and (iv) the provision of services to the building.
- (b) *Second*, an order requiring the Strata Company to allocate such cost items in accordance with the above declaration for future budgeted costs in respect of the Dolphin Apartments.

41 As recorded in the Tribunal's Decision, the Member concluded that by-law 17(2) was an exclusive use by-law for the purposes of s 43 of the Strata Titles Act, and largely found in favour of Poland Superannuation. The appellant draws attention to the following passages of the Tribunal's Decision in particular:

What are the applicant's obligations to contribute to common property expenses?

[30] By-law 18 was made at the time the prior ST Act applied. Section 42B(1) of the prior ST Act provides that by-laws made by a strata company may provide for a method of assessing contributions to be levied on an owner otherwise in proportion to the unit entitlement of their respective lots.

[31] By-law 18 provides for the variation of levy contributions pursuant to s 42B(1) of the prior ST Act as follows:

- (1) The proprietor of lot 61 (or lots created by the sub-division of lot 61) shall be exempt from contributing to any costs associated with the operation, maintenance, repair, replacement and cleaning of the lifts, the swimming pool and gymnasium located on the first floor.

²³ Appeal Book, Document F.

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(2) The strata company in the annual budget and in the calculation of the levies shall use a cost centre for the retail lot and a separate cost centre for the residential lots. The costs shall be calculated for each cost centre in proportion to the unit entitlement of those lots in that cost centre only.

[32] There was no dispute, and I find, that for the purposes of By-law 18(1), the swimming pool and gymnasium are common property facilities located on the first floor of the Scheme building, and that the lifts form part of the common property of the Scheme.

[33] Based on a proper construction of By-law 18(1), I find that the applicant, being the owner of Lot 61, is not required to contribute to any costs associated with the operation, maintenance, repair, replacement and cleaning (repair and maintenance) of the lifts, swimming pool and gymnasium. This finding is consistent with By-law 17(2) which provides that the owner of Lot 61 is not permitted to use any part of the common property or common property facilities that are located on or above the first floor.

[34] It follows that the applicant, as the owner of Lot 61, is not permitted to use and, therefore, is not required to contribute to the repair and maintenance of common property facilities located on or above the first floor, specifically the swimming pool and gymnasium, or the repair and maintenance of the common property lifts.

[35] In relation to the intercom, security and other common property expenses relating to reticulation and drainage, By-law 26 provides:

The proprietors of the lots 1 to 60 (inclusive) shall share in proportion to their unit entitlement all costs and expenses -

- (a) *that is necessary to operate, repair and maintain the intercom and security system;*
- (b) *needed to maintain the common property vehicle paved access way, the reticulation and drainage system and the water used for the gardens and landscaping that are on the common property.*

[36] Based on a proper construction of By-law 26, I find that the applicant, as the owner of Lot 61, is not obliged to contribute to the costs and expenses that are necessary to operate, repair and maintain the intercom and security system. Nor is the applicant obliged to contribute, under By-law 26, to the costs and expenses needed to maintain the common property vehicle

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paved access way, the reticulation and drainage system, or the water used for the gardens and landscaping that are on common property.

- [37] Subject to my findings below, it follows that the obligation on the owner of lot 61 to contribute to the costs and expenses of repairing and maintaining the common property (and common property facilities) of the Scheme is limited to the common property (and common property facilities) that fall outside the scope of By-Law 18(1) and By-Law 26.

Is By-law 17(2) an exclusive use by-law or does it confer any exclusive use rights to the Residential Lots over the common property on the first floor?

- [38] I will next consider whether By-law 17(2) is an exclusive use by-law or confers exclusive use rights to the Residential Lots in respect of the common property on or above the first floor of the Scheme building. Notably, the Retail Lot is granted exclusive use of certain parts of the common property walls, fixtures and fittings on the ground floor.

...

- [41] I find that By-law 17(2), properly construed, does confer exclusive use rights to the occupiers of the Residential Lots in respect of the Special Common Property (the common property located on the first floor of the Scheme building and above) because the owner of Lot 61 is not permitted by By-law 17(2) to use any part of the common property or common property facilities on the first floor or above. I further find that By-law 17(2) provides particulars relating to access to the Special Common Property in so far as it prevents the proprietor of Lot 61 from accessing the Special Common Property. Consequently, for these reasons, I find that By-law 17(2) is an exclusive use by-law for the purposes of s 43 of the ST Act.

...

- [44] By virtue of s 43(3) of the ST Act (and s 42(11)(b) of the prior ST Act), I find that the obligations that would ordinarily fall on the Strata Company under s 91(1)(c) of the ST Act (and s 35(1)(c) of the prior ST Act) in relation to the Special Common Property fall instead on the owners of the Residential Lots. This finding is consistent with By-law 18(1) which provides that the proprietor of Lot 61 (or lots created by the sub-division of Lot 61) shall be exempt from contributing to any costs associated with the operation, maintenance, repair, replacement and cleaning of the lifts, the swimming pool and gymnasium located on the first floor. Whilst the Scheme

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By-laws do not specifically exclude the proprietor of Lot 61 from contributing to the repair and maintenance costs of the Special Common Property located above the first floor of the Scheme building. I find that s 43(3) of the ST Act operates to impose an obligation solely on the owners of the Residential Lots to be responsible for those costs.

[45] It follows that the respondent is required by the ST Act (and was required by the prior ST Act) to allocate the costs of repair and maintenance, as well as any necessary renewal and replacement expenses, of the Special Common Property to the owners of the Residential Lots and not to the applicant.

...

Conclusion

[82] The dispute between the parties, which concerns the allocation of Scheme expenses between the Retail Lot and the Residential Lots, is a 'scheme dispute' for the purposes of the ST Act and, consequently, the application falls within the jurisdiction of the Tribunal.

[83] In summary, I have found that By-law 18(2) requires the respondent to allocate Scheme expenses between the Retail Lot cost centre and the Residential Lots cost centre but that the applicant is not required by the Scheme By-laws and the ST Act to contribute levies:

1. for the repair and maintenance of common property (and common property facilities) of the Scheme expressly referred to in By-law 18(1), and By-law 26;
2. for the repair and maintenance of the Special Common Property; and
3. to the reserve fund for the residential cost centre.

42

The Tribunal made the following orders having regard to the reasons set out above:

1. Pursuant to s 200(2)(l) of the *Strata Titles Act 1985* (WA) the respondent is required in accordance with by-law 18(2) of the scheme by-laws to allocate scheme expenses between the retail and residential cost centres noting that the owner of Lot 61 is not required pursuant to the scheme by-laws and the *Strata Titles Act 1985* (WA) to contribute levies to:

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- (a) repair and maintain the common property (and common property facilities) on the first floor of the scheme building (by-law 18(1));
 - (b) repair and maintain or renew and replace the common property on the second and third floors of the scheme building (by-law 17(2));
 - (c) operate, repair and maintain the intercom and security system (by-law 26(1));
 - (d) maintain the common property vehicle paved access way, the reticulation and drainage system and the water used for the gardens and landscaping located on common property (by-law 26(2)); and
 - (e) the reserve fund for the residential cost centre (by-law 18(2)).
2. Pursuant to s 199(1) of the *Strata Titles Act 1985* (WA) the Tribunal declares that based on the budgeted expenses of the strata scheme for the period 21 July 2014 to 21 July 2021 the respondent overcharged the applicant levies in the sum of \$20,011.16 (exclusive of GST).
 3. The application is otherwise dismissed.

E. The Appeal

Amended grounds of appeal

43 The first three grounds of appeal (as amended) are as follows:²⁴

1. The Tribunal erred in law by finding at [41] that By-law 17(2):
 - (a) conferred exclusive use rights to the occupiers of the Residential Lots in respect of the Special Common Property; and
 - (b) is an exclusive use by-law for the purposes of section 43 of the *Strata Titles Act*.
2. The Tribunal erred in law by finding at [44] and [45] that:
 - (a) by virtue of s 43(3) of the *ST Act* (and s 42(11)(b) of the prior *ST Act*), the obligations that would ordinarily fall on the Appellant under s 91(1)(c) of the *ST Act* (and s 35(1)(c) of the prior *ST Act*) in relation to the

²⁴ Amended Ground of Appeal dated 26 June 2023.

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Special Common Property fall instead on the owners of the Residential Lots; and

(b) it follows that the Appellant is required by the ST Act (and was required by the prior ST Act) to allocate the costs of repair and maintenance, as well as any necessary renewal and replacement expenses, of the Special Common Property to the owners of the Residential Lots, and not to the owner of Lot 61.

3. The Tribunal erred in law by finding, which finding is summarised at [83(2)], that the owner of Lot 61 is not required by By-Law 17(2) and the ST Act to contribute levies for the repair and maintenance, as well as renewal and replacement, of the Special Common Property.

44 Grounds 1 to 3 essentially raise a question of law as to whether, on a proper construction of s 43(1) of the Strata Titles Act, by-law 17(2) is (on its proper construction) an exclusive use by-law within the meaning of that section.²⁵ If the answer is yes, then grounds 1 to 3 must be dismissed and a fourth ground of appeal will need to be addressed.²⁶ The respondent accepts that this fourth ground discloses an error of law and that leave should be granted in relation thereto (although disputes the orders which the appellant says should be made as a result).²⁷

45 The fourth ground is in the following terms:

4. Further and in the alternative, the Tribunal erred in law by failing to find that:

(a) By-Law 17(2), properly construed means that:

(i) the proprietors of the Residential Lots are granted exclusive use and enjoyment of the Special Common Property;

(ii) pursuant to section 43(3) of the ST Act, but subject to another By-Law to the contrary:

(1) the proprietors of the Residential Lots have the responsibility for the performance of the obligations of the strata company under section 91(1)(c) of the ST Act, to keep in good and

²⁵ Respondent's submissions [2].

²⁶ Appellant's submissions [39].

²⁷ Respondent's submissions [6] - [9].

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serviceable repair, properly maintain and where necessary, renew and replace whether the damage or deterioration arises from fair wear and tear, inherent defect or any other cause, in respect of:

- (a) the non-structural components of the Special Common Property that are only for the benefit of all Residential Lots collectively; and
 - (b) the structural and non-structural components of the Special Common Property, but only if a By-Law (i) exempts the proprietor of Lot 61 from contributing to the costs of the performance of any of those obligations for a specified component of the Special Common Property; or (ii) solely imposes on all proprietors of the Residential Lots, the responsibility for the performance of any of those obligations for a specified component of the Special Common Property; and
- (2) the performance of the obligations as set out in s 91(1)(c) of the ST Act for all other structural and non-structural components of the Special Common Property remain the responsibility of the Appellant;
- (b) the Appellant is required to allocate any costs for the responsibilities in paragraph 4(a)(ii)(1) above to a Residential Lots cost centre; and
 - (c) the Appellant is required to allocate any costs of the responsibilities in paragraph 4(a)(ii)(2) above to a common cost centre for all lots of the Scheme.

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46 I propose to grant the appellant leave to amend the appeal
grounds in terms of the amended grounds of appeal dated 26 June 2023,
noting that the amendments were not opposed by counsel for the
respondent.

F. Disposition - Leave to appeal

47 The combined effect of s 105(1) and s 105(2) of the SAT Act is
that an appeal from a decision of the Tribunal may only be brought with
leave on a question of law.

48 Those sections confer jurisdiction on this Court to examine what
has been done in the Tribunal for legal error. Despite the description of
the proceedings in this Court as an appeal, s 105(1) read with s 105(2)
confers original not appellate jurisdiction. Given the statutory scheme,
the proceedings are not an appeal by way of rehearing.²⁸ The
proceedings are, in effect, in the nature of judicial review.

49 As the respondent has correctly submitted, the existence of a
question of law is a qualifying condition to invoke the court's
jurisdiction under s 105 of the SAT Act and is also the subject matter of
the appeal itself. The ambit of the appeal is confined to the question or
questions of law. It is therefore essential that the question of law relied
upon for the purposes of s 105(2) is identified with precision. The
question of law is not simply to be distilled from the grounds of appeal
and appellant's submissions.²⁹

50 The power to grant leave to appeal is conferred in general terms.
It is not restricted or qualified.³⁰ In my view, largely for the reasons
articulated by the appellant, leave to appeal should be granted. In brief:

- (a) the appeal raises questions of law, namely the proper construction of s 43 of Strata Titles Act (and its predecessor provision) and the proper construction of by-law 17(2);
- (b) significant arguments have been put on the questions of law raised;
- (c) consideration has not previously been given as to whether a by-law which only expressly restricts, deprives or overrides a

²⁸ *Legal Profession Complaints Committee v Lourey* [2022] WASCA 114 [125].

²⁹ *Lourey v Legal Services and Complaints Committee* [2023] WASCA 90 [9] and [21].

³⁰ *Paridis v Settlement Agents Supervisory Board* [2007] WASCA 97; (2007) 33 WAR 361 [16] - [18], noting the guidelines enunciated in *Secretary, Department of Premier and Cabinet v Hulls* [1999] 3 VR 331 [16] (Phillips JA, with whom Tadgell and Batt JJA agreed).

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lot owner's right to use common property (or part thereof) is an exclusive use by-law for the purposes of s 43 of the Strata Titles Act (or its predecessor provision) and it is at least possible there are by-laws made by other strata companies in the same or similar terms;

- (d) it is relevant to the grant of leave that the respondent accepts that at least the fourth ground discloses an error of law and leave should be granted in relation to that ground; and
- (e) it is in the interests of justice to grant that leave given the importance of the questions of law and the potential for substantial injustice to the owners of the retail lots if the alleged error went uncorrected.

51 I will therefore grant the appellant leave to appeal pursuant to s 105 of the SAT Act in respect of each ground.

G. Disposition - Grounds 1 to 3

Proper construction of s 43 of the Strata Titles Act

52 The central issue in dispute on this appeal is the proper construction of s 43(1) of the Strata Titles Act (and its predecessor provision). Whilst the relevant by-laws must also be construed, it is first necessary to understand the scope of the statutory provision.

53 As put by the respondent, the question is whether, properly construed, s 43(1) requires that a by-law be drafted so as to positively identify the specified lot or lots in the strata titles scheme to which exclusive use or special privilege is expressly granted, in order to be an exclusive use by-law.

54 As to the principles to be applied in undertaking the task of construing the legislation, the focus must be upon the text of the provisions having regard to their context and purpose. Recently, in *Webb v Tang*,³¹ the Court of Appeal summarised the applicable principles, which are extracted below, and which I intend to apply in construing the Strata Titles Act:

[73] The statutory text is the surest guide to Parliament's intention. A decision as to the meaning of the text requires consideration of the context, in its widest sense, including the general purpose and policy of the provision. See *Project Blue Sky Inc v*

³¹ *Webb v Tang* [2023] WASCA 119 [73] - [75] (Buss P and Vaughan JA).

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Australian Broadcasting Authority [1998] HCA 28; (1998) 194 CLR 355 [69] (McHugh, Gummow, Kirby & Hayne JJ); *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue (NT)* [2009] HCA 41; (2009) 239 CLR 27 [47] (Hayne, Heydon, Crennan & Kiefel JJ); *Travelex Ltd v Federal Commissioner of Taxation* [2010] HCA 33; (2010) 241 CLR 510 [82] (Crennan & Bell JJ); *SZTAL v Minister for Immigration and Border Protection* [2017] HCA 34; (2017) 262 CLR 362 [14] (Kiefel CJ, Nettle & Gordon JJ).

[74] The context includes the existing state of the law, the history of the legislative scheme and the mischief to which the statute is directed. See *CIC Insurance Ltd v Bankstown Football Club Ltd* [1997] HCA 2; (1997) 187 CLR 384, 408 (Brennan CJ, Dawson, Toohey & Gummow JJ).

[75] The purpose of legislation must be derived from the statutory text and not from any assumption about the desired or desirable reach or operation of the relevant provisions. See *Certain Lloyd's Underwriters v Cross* [2012] HCA 56; (2012) 248 CLR 378 [26] (French CJ & Hayne J). The intended reach of a legislative provision is to be discerned from the words of the provision and not by making an *a priori* assumption about its purpose. See *Minister for Employment and Workplace Relations (Cth) v Gribbles Radiology Pty Ltd* [2005] HCA 9; (2005) 222 CLR 194 [21] (Gleeson CJ, Hayne, Callinan & Heydon JJ).

The text of the statute

55 Starting with the text of s 43, I note that sub-sections (1) and (2) are definitional or descriptive in nature, not operative provisions. Sub-section (1) sets out the definition of the 'Exclusive use by-laws' and sub-section (2) explains the types of matters which may be included in such by-laws. Sub-section (3) is essentially the operative provision in the scheme, in the sense that it operates to modify or curtail the obligations which would otherwise fall on the strata company under s 91(1)(c) in relation to the special common property identified in the by-law. The obligation instead falls on the owners of the special lots identified in that by-law.

56 As is apparent from the definition of 'exclusive use by-law', the relevant linkage established by the statute is between:

- (a) the conferral of exclusive use and enjoyment of, or special privileges over, some or all of the common property in the strata scheme, on the one hand, and;

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(b) the concomitant obligations concerning that common property, on the other.

57 The promulgation of an exclusive use by-law may allow occupiers of the so-called special lots to use the identified special common property on certain terms and conditions, including as to access, the keeping of a key, and as to the applicable hours of use.³² Given the language of s 43(1), the use and access which is contemplated is of an 'exclusive' or 'special' nature. The exclusive use by-law may deal with the condition, maintenance, repair, renewal or replacement of the special common property, it may deal with the insurance to be maintained by the owners of the special lots, and may concern the determination of amounts payable to the strata company by those owners.³³

58 The text of s 43(1), when defining the essential concept, speaks of a by-law which would 'confer' the use and enjoyment of an exclusive nature, or a special privilege. The text also refers to the use, enjoyment or privilege being conferred on the occupiers of a 'specified lot or lots'.

59 The appellant submits that the use of the words 'confer' and 'specify' (or 'specified') are important. The word 'confer' is said to carry its ordinary meaning which is 'to give something such as authority, a legal right, or an honour to someone' and that 'to confer something such as power or an honour on someone means to give it to them'.³⁴ Further, to 'specify' means to 'to explain something in an exact and detailed way' and 'to mention or name specifically or definitely; state in detail'.³⁵

60 The appellant submits that a by-law which merely restricts, deprives or overrides the pre-existing right that a lot owner has to use or enjoy common property is insufficient to be characterised as an exclusive use by-law as defined in s 43(1). Similarly, a by-law that is silent as to the conferring or giving of any exclusive use of, or special privilege over, common property is not sufficient. Further, a by-law which is silent as to the occupiers of lots on which the exclusive use of, or special privilege over, the common property is conferred, is not sufficient.³⁶

³² Strata Titles Act, s 43(2)(a), (b) and (c).

³³ Strata Titles Act, s 43(2)(d), (e) and (f).

³⁴ Appellant's submissions [36.5] citing the Macmillan Dictionary and the Collins Dictionary.

³⁵ Appellant's submissions [36.6] citing the Macmillan Dictionary and the Collins Dictionary.

³⁶ Appellant's submissions [36.10].

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61 I am unable to accept the first of these submissions and I do not
accept that the by-law here is 'silent' as to the matters in question.

62 In my view, there is no warrant in the text of s 43 of the Strata
Titles Act to support the appellant's interpretation. The terms used,
particularly 'confer' and 'specify', are not so narrow in the meaning as to
preclude their application to a by-law which restricts or deprives the
use, enjoyment or privileges over common property of a specific
owner, and thereby through its operation confers the use, enjoyment or
privilege on the other owners in the scheme.

63 I do not consider the use of the words 'confer' or 'specify' in the
provision carry the weight the appellant submits. The language
employed is equally capable of capturing circumstances in which the
relevant by-law has *the effect* of conferring exclusive use and
enjoyment of, or special privileges over, common property, including
where the language is phrased in a negative manner to confer such
rights by a process of exclusion. A by-law which precludes a lot owner
from enjoying rights ordinarily attached to part of the common property
in the strata titles scheme will thereby, without more, operate to confer
on the remaining lot owners exclusive rights to enjoy that common
property. The rights are 'exclusive' relative to the lot owner or owners
who have been deprived of the right to access and enjoy the common
property.

The wider context and purpose

64 To understand the operation and effect of s 43(1), it is important
to recall that the right and opportunity of lot owners to use common
property in a building which is subject to a strata scheme is 'basal to an
understanding of the rights of owners of lots in a strata plan'.³⁷ In this
regard, there are six uncontentious points arising from the legislative
framework which I should emphasise to provide context for the present
argument.

65 *First*, in general terms, the common property of a scheme is the
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.³⁸

66 *Second*, the common property within a strata scheme is owned by
all of the lot owners in undivided portions which are determined by the

³⁷ *Bondi Beach Astra Retirement Village Pty Ltd v Gora* [2010] NSWSC 81 [63] (Bryson AJ). This
decision was followed by *Noon v The Owners - Strata Plan 22422* [2014] NSWSC 1260 [45] (Darke J).

³⁸ Strata Titles Act, s 10(1) and s10(2).

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unit entitlement of each lot.³⁹ It has been observed that lot owners have an interest in relation to common property under a strata scheme which is akin to equitable tenants in common.⁴⁰

67 *Third*, the owner of a lot cannot separately deal with or dispose of their share of common property.⁴¹

68 *Fourth*, the standard by-laws in the Strata Titles Act impose restrictions on the conduct of owners in relation to the use of common property in a strata titles scheme.⁴² In particular, by-law 2 in Schedule 2 to the Strata Titles Act expressly provides that:

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 thereof by other owners or occupiers of lots or of their visitors;
- (b) not use the lot or permit it to be used in such manner or for such purpose as causes a nuisance to an occupier of another lot (whether an owner or not) or the family of such an occupier; and
- (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 of an owner or occupier of another lot or of a person lawfully using common property; and
- (d) not obstruct lawful use of common property by any person.

69 These standard 'conduct by-laws' were inserted into the legislation by the *Strata Titles Amendment Act 2018* (WA), which came into effect on 1 May 2020. Prior to that, similar by-laws were found in Schedule 1 to the Prior Act, which have now been deleted.⁴³

70 *Fifth*, a strata company has a statutory duty to control and manage the common property for the benefit of all the owners of the lots.⁴⁴ A strata company must also keep in good and serviceable repair, properly maintain and, if necessary, renew and replace the common property.⁴⁵ I will address this further below.

³⁹ Strata Titles Act, s 13(7).

⁴⁰ *Lin v Owners - Strata Plan No 50276* (2004) NSWSC 88; (2005) NSW ConvR 56-105 [7] - [8] (Gzell J).

⁴¹ Strata Titles Act, s 13(9).

⁴² Strata Titles Act, s 3(1), paragraph (b)(i) of the definition of 'conduct by-laws'.

⁴³ *Strata Titles Amendment Act 2018* (WA), s 87 and s 100.

⁴⁴ Strata Titles Act, s 91(1)(b).

⁴⁵ Strata Titles Act, s 91(1)(c).

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71 *Sixth*, as has already been seen, both before and after the amendments which came into effect on 1 May 2020, the Strata Titles Act has provided for a curtailment of, or an exception to, the foregoing regime. I refer to s 42(8) of the Prior Act and to s 43(1) of the Strata Titles Act as introduced from 1 May 2020, which I have extracted above in these reasons.

72 I observe that s 42(8) of the Prior Act is in substantially similar terms to s 58(7) of the *Strata Titles Act 1973* (NSW), which was the subject of detailed analysis in *Noon v The Owners - Strata Plan 22422*. In that matter, Darke J concluded that the legislative regime was properly to be construed in a manner which did *not* authorise a general by-law making power to extend to making by-laws which conferred upon a person (whether a lot owner or not) exclusive use and enjoyment of the common property, or any part of it.⁴⁶ The relevant (and only) power which authorised the making of such a by-law (to confer exclusive use and enjoyment) was s 58(7). As the by-law in that case was not made pursuant to s 58(7), and was not authorised by the general by-law making power, it was held to be invalidly made.⁴⁷

73 As a matter of substance, the conclusion reached by Darke J would also apply analogously to s 42(8) of the Prior Act and to s 43 of the Strata Titles Act, given the closeness of the language used and the schemes of the legislation. Indeed, the presence in s 42(8) of the Prior Act of the phrase 'under this subsection only and not otherwise'⁴⁸ indicates that the conclusion reached by Darke J in relation to the NSW regime, as it stood, would apply with even greater force to the Prior Act in this State.

74 The evident purpose of s 43, as is apparent from the foregoing overview concerning the concept of 'common property' in the context of the legislative framework, is that it permits a strata company to make by-laws which allow certain owners within the strata scheme to have exclusive use, enjoyment and privileges in respect of common property (and so to modify the general rule in this regard). However, in doing so, it concomitantly requires:

- (a) the owner or owners with the exclusive use, enjoyment or privilege to bear the obligation to keep in good and serviceable

⁴⁶ *Noon v The Owners - Strata Plan 22422* [52] - [54] (Darke J).

⁴⁷ *Noon v The Owners - Strata Plan 22422* [55] (Darke J).

⁴⁸ Which words are not found in the former NSW legislation.

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repair, properly maintain and, if necessary, renew and replace the common property in question;⁴⁹ and/or

- (b) the owner or owners with the exclusive use, enjoyment or privilege to be bound by certain terms and conditions which may include payment of amounts to the strata company.⁵⁰

75 As the respondent has identified, there appears to be an implicit assumption which underpins the appellant's approach to construction of these provisions, namely that it is possible to deprive a lot owner of its *prima facie* entitlement to use and enjoy common property by means other than an exclusive use by-law under s 43(1). That assumption is not correct. Again, this flows from the importance to the strata scheme of the basal concept of common property, and (at least) the initial propositions that:

- (a) common property is owned by all lot owners in undivided portions determined by their unit entitlement;⁵¹ and
- (b) all owners may use and enjoy the common property, provided it is in such a manner as not to unreasonably interfere with the use and enjoyment of others.⁵²

76 The scheme of the Strata Titles Act is such that a lot owner may be deprived of its entitlement to use and enjoy common property only through the mechanism in s 43. Admittedly, the language of the predecessor provision was more emphatic, but the amendments introduced through the *Strata Titles Amendment Act 2018* (WA) did not have the effect, much less the objective intention, to modify this position.

77 In my view, there is no warrant in the scheme of the legislation, nor to be found in its purpose and objects, which justifies an interpretation of the provision which favours a technical or pedantic approach to the provision. Given that by-laws are not, I would infer, typically drafted by lawyers or parliamentary draftspersons, I do not consider an overly technical approach to the construction of a provision in the Act (which may or may not be engaged by a particular by-law) is to be preferred. Rather, an approach which permits regard to be had to the substance and effect of the by-law is to be preferred.

⁴⁹ Strata Titles Act, s 43(3) and s 91(1)(c).

⁵⁰ Strata Titles Act, s 43(2)(a) and s 43(4).

⁵¹ Strata Titles Act, s 13(7).

⁵² Strata Titles Act, Schedule 1, by-law 1(2)(a) (now repealed) and Strata Titles Act, Schedule 2, by-law 2(a).

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78 In my view, a by-law may be characterised as an exclusive use by-law either because of its express language (such as by-law 42 in the present case, for example) or because it has that character by reason of the operation and effect of the by-law. In the latter case, it may be necessary to undertake a close review of the by-law in question, in the context of other by-laws, to form that view. But the necessity for that close review does not translate into a conclusion that the by-law cannot fall within s 43(1) of the Strata Titles Act (or s 42(8) of the Prior Act).

79 I accept the respondent's submission that, on the proper construction of the Strata Titles Act, s 43(1) cannot be out-flanked simply by framing a by-law, which has the effect of granting exclusive use or special privileges, in the negative.⁵³ A by-law framed in a negative manner is not silent as to the conferral of rights or as to the identification of the lots which enjoy the exclusive or special rights, if those rights and those lots can objectively be discerned from the language of the by-law. I further accept the respondent's submission that the appellant's construction would significantly undermine the statutory intention evident in s 43 as a whole that by-laws having the effect of granting exclusive use of common property can only be made under that section.⁵⁴

80 I accept it would be preferable for by-laws (which seek to bring themselves within s 43) to be drafted using the language of the provision. I also accept that such an approach would achieve greater certainty. But the proper construction of s 43 does not demand that a by-law faithfully adopt the express language of s 43 in order to achieve that result.

The by-laws in the present Strata Scheme

81 It follows from the foregoing discussion that I consider the manner in which by-law 17 is framed does not preclude its characterisation as an exclusive by-law within the meaning of s 43(1) (or its predecessor provision). The by-law has the effect, as the appellant accepts,⁵⁵ that the proprietors of lots 1 to 60 are conferred exclusive rights and privileges in respect of the common property and common property facilities located on or above the first floor level.

⁵³ Respondent's submissions [62].

⁵⁴ Respondent's submissions [64].

⁵⁵ Appellant's submissions [28].

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82 The appellant's preferred construction of by-law 17(2) is that, in effect, it means:⁵⁶

Subject to any By-Law conferring on the proprietor of Lot 61 exclusive use and enjoyment of, or special privileges over, any Special Common Property (or any specified part thereof), the proprietor of Lot 61 cannot use any part of the Special Common Property.

83 I do not accept this construction. The appellant's approach is driven by the proposition, which I have rejected, that a by-law must positively confer rights or privileges and must do with respect to an expressly identified lot owner or owners.

84 However, when viewed by reference to its text and the wider context of the by-laws, my view is that by-law 17(2) objectively operates to grant special privileges to the owners of lots 1 to 60. The Management Statement which contains the by-law must be construed objectively, by reference to what a reasonable person would understand the language of the instrument to mean. It must also be construed in the context of the registered Strata Plan, and then within the broader statutory context of the Strata Titles Act. This is the approach endorsed relatively recently by the Court of Appeal in *Kelly v Birchwood Consolidated Pty Ltd (Receivers and Managers Appointed) (In Liquidation)*.⁵⁷

85 The further point emphasised by the court in *Kelly v Birchwood Consolidated Pty Ltd (Receivers and Managers Appointed) (In Liquidation)* is that, in the case of a management statement on the publicly accessible register, a third party cannot be expected to look further for extrinsic materials which might establish facts or circumstances existing at the time of the registered dealing.⁵⁸ No issue in this regard arises in the present case.

86 In my view, by-law 17(2) operates on its face to confer special privileges to the owners of the residential lots, relative to the owner of the retail lot. The privilege is the right to use the common property on and above the first floor. The position might be illustrated with an example.

⁵⁶ Appellant's submissions [31.2].

⁵⁷ *Kelly v Birchwood Consolidated Pty Ltd (Receivers and Managers Appointed) (In Liquidation)* [2023] WASC 76 [104] (Quinlan CJ, Buss P and Beech JA).

⁵⁸ *Kelly v Birchwood Consolidated Pty Ltd (Receivers and Managers Appointed) (In Liquidation)* [104(d)] and [105].

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87

If the relevant strata titles scheme consisted of 3 lots, all on the same level, with common property which included a swimming pool, and the by-law provided that the owner of lot 1 was *not* entitled to access the swimming pool between 6.00 pm and midnight on Friday nights, Saturday nights and Sunday nights, the by-law would be an exclusive use by-law. That would be so because it, in effect, operated to grant exclusive use and enjoyment of, or special privileges over, the common property (i.e. the swimming pool) on certain terms (as contemplated by s 43(1) and 43(2)(c) of the Strata Titles Act). The framing of the by-law using negative language would not alter that. Further, the lots in respect of which the special privileges in that scenario would be granted is evident from the terms of the by-law, namely the owners of lots 2 and 3. In that scenario, the duty to repair and maintain the swimming pool in s 91(1)(c) of the Strata Titles Act would be modified, and would relevantly fall on the owners of lots 2 and 3 to the extent of the special privileges.

88

If this example is scaled-up to a much larger strata titles scheme, such as the present Strata Scheme, the position remains the same.

89

In the present circumstances, the objective construction of the by-law, and one which a reasonable person would understand the provision to mean, is that the owners of lots 1 to 60 are afforded special privileges with respect to the common property on and above the first floor. This construction emerges from the text but also accords with the statutory context of the Strata Titles Act, most particularly as to the manner in which that regime deals with rights to use common property in a strata scheme. Indeed, at the time by-law 17(2) was drafted and came into effect, s 42(8) of the Prior Act only (and not otherwise) permitted by-laws to grant exclusive use and enjoyment through that provision. This required certain procedural requirements to be met as stated in s 42(8), which I understand were met in fact in the present circumstances.⁵⁹

90

The effect of depriving the other lot owner (lot 61) of the rights of use to the common property identified was that the concomitant obligation in the legislation (to repair and maintain) then fell on the special lot owners by reason of s 42(11)(b) of the Prior Act. The same position continues to apply under the Strata Titles Act.

91

Further, I do not accept that this conclusion would result in inconsistencies with the other by-laws identified by the appellant, being

⁵⁹ See also the conclusive presumption in s 42(9) of the Prior Act.

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by-law 33 and by-law 40. As the respondent has noted, there is a degree of overlap in the by-laws and tighter drafting may have been desirable. Nonetheless, the by-laws are not inconsistent. The following brief points can be made.

92 By-law 33 is also an exclusive use by-law which provides a more detailed set of terms and conditions with respect to use of the recreational and entertainment facilities on the common property on the first floor, including as to the times at which those facilities may be used. Conditions such as this are expressly permitted by ss 43(2)(a) and (c) of the Strata Titles Act.

93 Further, by-law 33(2) sets out specific provisions relating to the condition, maintenance, repair, renewal and replacement of the subset of the common property. Again, this is permitted by s 43(2)(d) of the Strata Titles Act. This by-law operates according to its terms in respect of the common property to which it relates (as the language of s 43(3) allows). The more general by-law (that is, by-law 17(2)) does not cut across by-law 33(2), nor is it inconsistent with the operation of by-law 17(2).

94 As to by-law 40, I accept the respondent's submission that the inconsistency alleged by the appellant proceeds on an implicit factual assumption that the equipment referred to in by-law 40(1) (grease traps, ducting etc) has, or will be, installed in or on common property, on or above the first floor of the scheme building. The Tribunal was not asked to, and did not, make any factual finding to that effect and there is no evidence to support the assumption.⁶⁰ More fundamentally, even if that factual assumption is correct, no inconsistency arises because by-law 40(2) is an exclusive use by-law and by reason of s 43(3) it will operate subject to its terms and no inconsistency will arise.

Conclusion

95 In my view, s 43(1) and s 44(1) of the Strata Titles Act (and the predecessor provision) is to be construed in the purposive manner I have outlined above such that it is not to be confined to by-laws which expressly confer the special privileges to an expressly specified lot or lots. A by-law may have the character of an exclusive use by-law if it has the relevant effect required by s 43(1). That being so, the by-law under scrutiny in this appeal, by-law 17(2), is in my view an exclusive use by-law. In this sense, I agree with the conclusion of the Tribunal

⁶⁰ Respondent's submissions [73].

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below on the question of law which is before this court on appeal.⁶¹ There is a further point of construction concerning by-law 17(2), as to its application to structural aspects of the common property, which is dealt with as part of ground 4 below.

96 Accordingly, I would dismiss grounds 1 to 3 of the appeal.

H. Disposition - Ground 4

97 That leaves ground 4, which is conceded by the respondent.⁶² In framing paragraphs 1(a) and (b) of the orders, the respondent accepts the Tribunal misconstrued the by-laws and made an error of law, primarily because the Tribunal's orders do not cater for the boundaries of the Strata Scheme.⁶³ Although the ground is conceded, the court must nonetheless be satisfied it is made out.

Is the ground made out?

98 Order 1(a) as made by the Tribunal provides that the owner of lot 61 is *not* required to contribute levies to repair and maintain the common property (and common property facilities) on the first floor, given the terms of by-law 18(1). Order 1(b) as made by the Tribunal provides that the owner of lot 61 is *not* required to contribute levies to repair and maintain or renew and replace the common property on the second and third floors of the scheme building, given the terms of by-law 17(2). The difficulty with these orders, to which both parties refer, is that they would operate to excuse the owner of lot 61 owner from contributing to levies in respect of both structural and non-structural components of the scheme building on the first, second and third floors.

99 As the respondent explains, by reason of the way in which the boundaries of the lots in the Strata Scheme are defined and by reason of the definition of 'common property' in the Strata Titles Act, the common property on and above the first floor includes both structural and non-structural components of the scheme building.⁶⁴ Further, as regards the structural components of the scheme building which form part of the common property (that is, those which are essential to the structural integrity and function of the building as a whole, such as the

⁶¹ Tribunal's Decision [41].

⁶² ts 28 and ts 32.

⁶³ Appellant's submissions [43.2].

⁶⁴ Respondent's submissions [76].

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roof of the building), it is not possible for such components to be exclusively used by any proprietor.⁶⁵

100 The respondent explains the issue this way:⁶⁶

... the only practical use to which such structural common property can be put by any proprietor, is to maintain the structure and integrity of the building as a whole. All of the proprietors therefore *use* the structural common property in that way continually and no by-law can change that fact.

101 It is therefore common ground between the parties that a reasonable person reading by-law 17(2) would *not* understand the language of that by-law to preclude the respondent (as the owner of lot 61) from using the structural common property located on or above the first floor of the building. Further, it is common ground that, on its proper construction, by-law 17(2) cannot and does not confer exclusive use of, or special privileges over, the structural common property located on or above the first floor of the building to the residential lot owners.⁶⁷ I do not consider this was intended by the Tribunal, nor is it consistent with the proper construction of the by-laws, in my view.

102 I therefore agree that this represents the proper construction of the by-law and I consider the fourth ground of appeal is made out.

The orders which should be made

103 The parties disagree, however, as to the appropriate orders which should be made in substitution for those made by the Tribunal.⁶⁸

104 The orders proposed by the appellant can be found within the fourth ground of appeal (at [45] above). Those orders are relatively detailed and address the obligations to repair and maintain, and the obligations of the various lot owners to contribute to the costs.

105 The respondent submits that the following, more confined, orders should now be made in substitution for paragraphs 1(a) and 1(b) of the orders:

- (a) operate, maintain, repair, replace and clean the lifts in the scheme building and the swimming pool and gymnasium located on the first floor of the scheme building (by-law 18(1));

⁶⁵ Respondent's submissions [76] - [77].

⁶⁶ Respondent's submissions [78].

⁶⁷ Respondent's submissions [79] - [80].

⁶⁸ Appellant's submissions [47] - [48]; Respondent's submissions [82].

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- (b) keep in good and serviceable repair, properly maintain and, if necessary, renew and replace any non-structural common property on or above the first floor of the scheme building (by-law 17(2));⁶⁹

106

The orders proposed by the appellant strata company are consistent with the construction of by-law 17(2) as outlined in these reasons and are to be preferred in my view. That is not to say that the orders proposed by the respondent are wholly inconsistent with the proper construction. However, the more detailed formulation proposed by the appellant is preferable because:

- (a) I consider there is a degree of complexity in the manner in which the by-laws for the Dolphin Apartments operate and, indeed, several of the by-laws intersect with each other;
- (b) it would be beneficial for the Strata Company and the lot owners to have greater certainty as to their duties and obligations; and
- (c) this can best be achieved by setting out in greater detail the operation of by-law 17(2) relative to the operation of other by-laws, within the framework of the Strata Titles Act itself, and to do so by reference to the concepts of structural and non-structural components of the special common property (being the common property on and above the first floor).

107

Further, rather than merely setting aside orders 1(a) and 1(b) of the Tribunal's orders, orders should now be made in substitution of orders 1(a) to 1(e) inclusive. I have not been provided with a minute of proposed orders that achieves this result and will therefore direct that the appellant provide a minute of proposed orders to the court in accordance with the formulation of ground 4 (as amended).

I. Conclusion and orders

108

For the foregoing reasons, I propose to order as follows, subject to hearing further from counsel including as to whether there is any reason the proposed costs order below should not be made:

1. The appellant have leave to amend the grounds of appeal in terms of the amended grounds of appeal dated 26 June 2023.

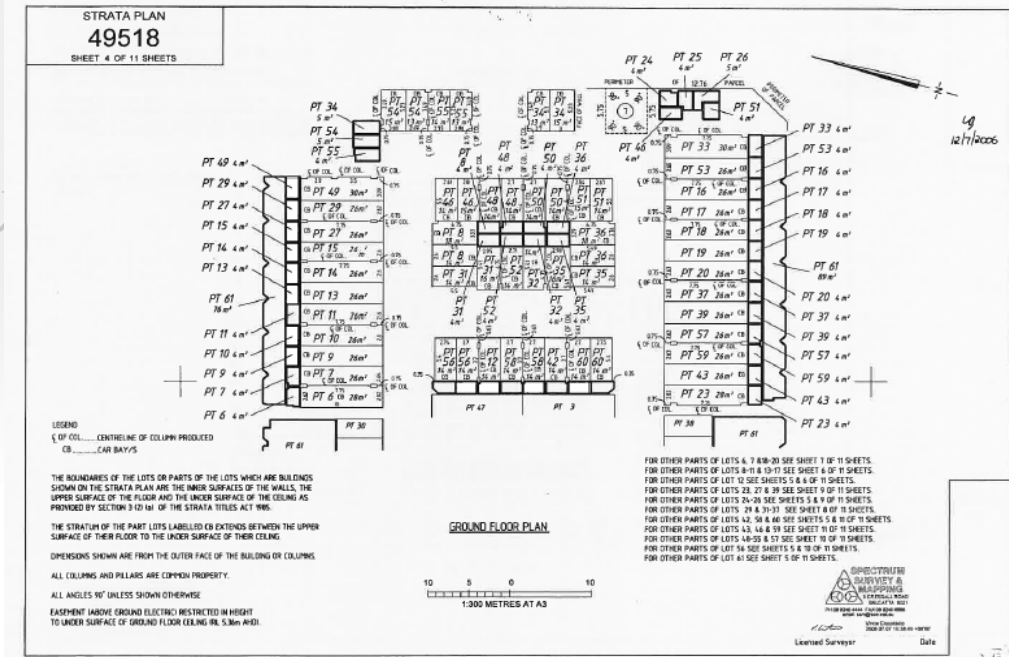
⁶⁹ Respondent's submission [82].

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2. Pursuant to s 105 of the *State Administrative Tribunal Act 2004* (WA), the appellant be granted leave to appeal in respect of grounds 1 to 4.
3. Grounds 1 to 3 of the appeal be dismissed.
4. Ground 4 is allowed and the appellant will be directed to file and serve a minute of proposed orders to give effect to this ground.
5. The appellant pay the respondent's costs of the appeal to be assessed if not agreed.

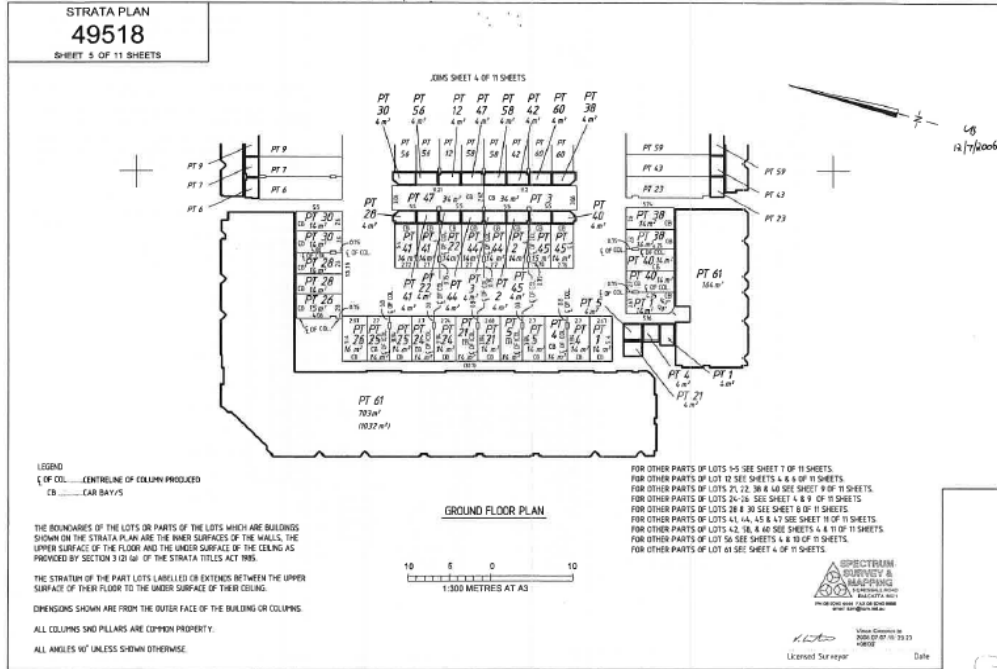
ATTACHMENT A Strata Plans and Elevation

Diagram 1 - Ground Floor Plan:

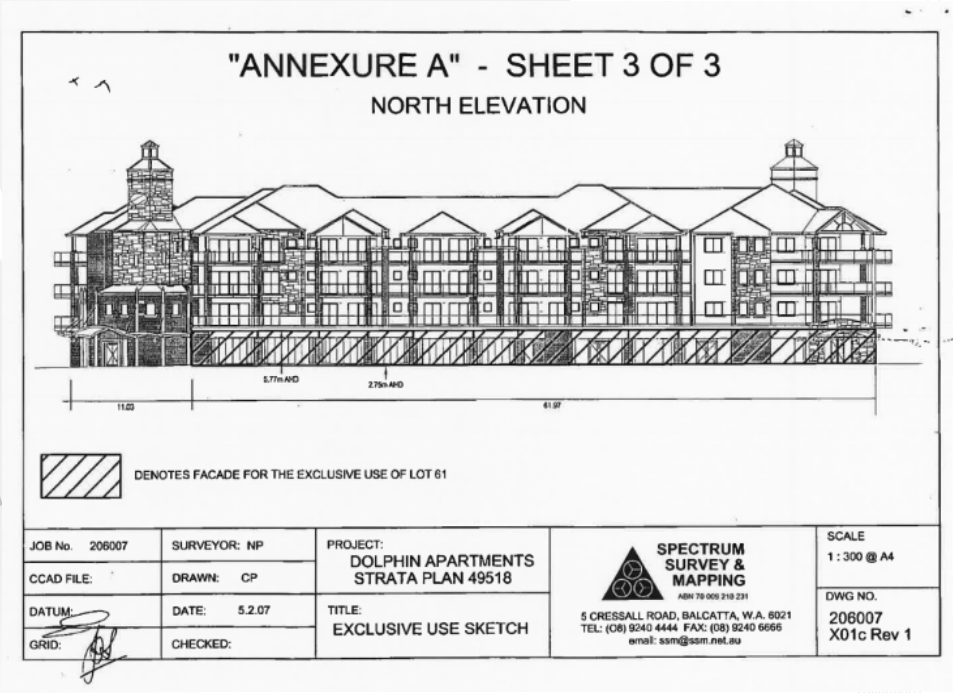


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Diagram 2 - Ground Floor Plan:



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ATTACHMENT B
Extracts of the Strata Title By-laws

17. COMMERCIAL/RETAIL LOT

- (1) The proprietor or tenants of lot 61 (or lots created by a re-subdivision of lot 61) are permitted to conduct a commercial and or retail business in accordance with the City of Mandurah requirements and regulations and shall take all reasonable steps to ensure that the conduct of their business and the behaviour of their patrons does not unduly impact on the peaceful enjoyment of other proprietors and residents.
- (2) The proprietor of lot 61 (or lots created by a re-subdivision of lot 61) is not permitted to use any part of the common property or common property facilities that are located on or above the first floor level.
- (3) The proprietors or tenants of lot 61 (or lots created by a re-subdivision of lot 61) shall not be permitted to accept delivery of goods or unload goods or stock between the hours of 6.00 pm to midnight and from midnight to 8.00 am.

18. VARIATION TO LEVY CONTRIBUTIONS IN ACCORDANCE WITH SECTION 42B

- (1) The proprietor of lot 61 (or lots created by a re-subdivision of lot 61) shall be exempt from contributing to any costs associated with the operation, maintenance, repair, replacement and cleaning of the lifts, the swimming pool and gymnasium located on the first floor.
- (2) The strata company in the annual budget and in the calculation of the levies shall use a cost centre for the retail lot and a separate cost centre for the residential lots. The costs shall be calculated for each cost centre in proportion to the unit entitlement of those lots in that cost centre only.

26. INTERCOM, SECURITY SYSTEM AND COMMON PROPERTY EXPENSES

The proprietors of the lots 1 to 60 (inclusive) shall share in proportion to their unit entitlement all costs and expenses -

- (a) that is necessary to operate, repair and maintain the intercom and security system;
- (b) needed to maintain the common property vehicle paved access way, the reticulation and drainage system and the water used for the gardens and landscaping that are on the common property.

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33. SWIMMING POOL AND GYMNASIUM

- (1) A proprietor, occupier or other resident of lots 1 to 60 (inclusive) only, shall be permitted to use the recreational and entertainment facilities located on the common property on the first floor. The managing agent shall arrange for these facilities to be available between the hours of 7.00 am to 10.00 pm.
- (2) The strata company shall at all times maintain the swimming pool, spa and other recreational facilities on the common property in accordance with the statutory requirements and by-laws of the City of Mandurah and the Health Department of Western Australia.
- (3) ...

40. GREASE TRAPS, DUCTING AND AIR CONDITIONERS

- (1) The proprietor of lot 61 shall be permitted at its cost to install grease traps, exhaust ducts and equipment and air conditioners on parts of lot 61 and the common property in locations that do not interfere with the peaceful enjoyment of other proprietors, occupiers and residents. All works carried out during the installation of the grease traps and exhaust ducting and air conditioners must be made good to the satisfaction of the strata counsel. The proprietor of lot 61 shall be responsible for all costs to install, maintain, repair, clean, replace and operate the grease trap, exhaust ducts and air conditioners.
- (2) In accordance with section 42(8) of the Act, the rights of exclusive use and enjoyment over that volume of the common property occupied by any grease trap, exhaust ducts and equipment and air conditioning (including ducting, cabling and any ancillary equipment) that services and relate to any individual tenancies on lot 61, are granted to the proprietor of lots 61 but, only for the purpose of providing and maintaining services and conditioned air for that lot.

42. EXCLUSIVE USE OF PARTS OF THE COMMON PROPERTY

- (1) The proprietor of lot 61 is hereby granted exclusive use of those parts of the common property walls, fixtures and fittings on the ground floor designated Annexure "A" as "For Exclusive Use of Lot 61" (exclusive use area") [sic] and shall -
 - (a) As its cost ensure the exclusive use area is kept clean, neat and tidy;
 - (b) Control all external signage and colours affixed to the exclusive use area;

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- (c) Be responsible at its cost to repair, maintain and if necessary replace all fixtures and fittings including plate glass, doors, windows hinges, locks and lighting that are within the exclusive use area;
 - (d) Permit tenants who have obtained written permission from the proprietor of lot 61, to paint and decorate those parts of the exclusive use area that abuts their tenancy in the corporate colours of their business;
 - (e) Permit tenants who have obtained written permission from the proprietor of lot 61 to affix signage or logos to parts of the exclusive use area that abuts their tenancy and ensure the signs are securely fixed;
 - (f) Ensure that the structural integrity of the building is maintained at all times.
- (2) Schedule 1 by-law 19 does not apply to this part of the façade of the building. The strata company is not responsible for the repair, maintenance or replacement of any items contained, or affixed within the exclusive use area.

I certify that the preceding paragraph(s) comprise the reasons for decision of the Supreme Court of Western Australia.

IHN
Associate to the Honourable Justice Lundberg

28 NOVEMBER 2023

JURISDICTION : SUPREME COURT OF WESTERN AUSTRALIA
IN CIVIL

CITATION : THE OWNERS OF DOLPHIN APARTMENTS
MANDURAH STRATA PLAN 49518 -v- POLAND
SUPERANNUATION PTY LTD [2023] WASC 452
(S)

CORAM : LUNDBERG J

HEARD : 7 DECEMBER 2023 AND ON THE PAPERS

DELIVERED : 3 JANUARY 2024

FILE NO/S : GDA 14 of 2022

BETWEEN : THE OWNERS OF DOLPHIN APARTMENTS
MANDURAH STRATA PLAN 49518
Appellant

AND

POLAND SUPERANNUATION PTY LTD
Respondent

ON APPEAL FROM:

For File No : GDA 14 of 2022

Jurisdiction : STATE ADMINISTRATIVE TRIBUNAL

Coram : C BARTON (MEMBER)

Citation : [2022] WASAT 103

File Number : CC 851/2020

Catchwords:

Practice and procedure - Appropriate orders to be made on disposition of appeal
- Whether respondent should have leave to re-open and rely on further material -
Leave granted and final orders made

Practice and procedure - Costs orders - *Calderbank* offer made by respondent -
Indemnity costs orders not appropriate - Turns on own facts

Legislation:

Rules of the Supreme Court 1971 (WA), O 65 r 18
Strata Titles Act 1985 (WA), s 100(1)(c)

Result:

Appellant has leave to amend its grounds of appeal
Leave to appeal is granted in respect of grounds 1 to 4
Respondent has leave to re-open and to rely on the amended minute of proposed
orders
Grounds 1 to 3 are dismissed
Ground 4 is allowed
Orders 1(a) to 1(e) of the Tribunal's orders are set aside and orders made in lieu
thereof
Appellant ordered to pay 80% of the respondent's costs of the appeal, to be
assessed if not agreed

Category: B

Representation:

Counsel:

Appellant : Mr P G McGowan
Respondent : Mr D Murdzoski

Solicitors:

Appellant : Lewis Kitson Lawyers
Respondent : Murcia Pestell Hillard

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

Amaca Pty Ltd (formerly James Hardie and Co Pty Ltd) v Moss [2007]
WASCA 162 (S)
Bell Group Ltd v Australian Securities and Investments Commission (No 2)
[2018] FCA 1970
Calderbank v Calderbank [1976] Fam LR 93
De L v Director-General, New South Wales Department of Community Services
[No 2] [1997] HCA 14; (1997) 190 CLR 207
Strzelecki Holdings Pty Ltd v Jorgensen [2019] WASCA 96; (2019) 54 WAR
388
The Owners of Dolphin Apartments Mandurah Strata Plan 49518 v Poland
Superannuation Pty Ltd [2023] WASC 451

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LUNDBERG J

LUNDBERG J:**A. Introduction**

109 These reasons relate to the appeal which was heard on 24 July
2023 and which is the subject of the reasons published on 28 November
2023 (**Reasons**).⁷⁰ These supplementary reasons address two issues
which were the subject of submissions from the parties at the hearing
on 7 December 2023, and thereafter.

110 The first issue concerns the orders which should now be made to
give effect to the court's reasons, particularly insofar as ground 4 of the
appeal is concerned. Ground 4 is dealt with in the Reasons at [97] -
[107]. This ground was properly conceded by the respondent. The
ground focused attention on the existence of both structural and non-
structural components of the Special Common Property, and the
allocation of costs to costs centres, which were not addressed in the
Tribunal's orders.

111 The second issue concerns the appropriate costs orders which
should be made on this appeal, in light of the court's reasons, and
having regard to the without prejudice *Calderbank* offer made by the
respondent.⁷¹

B. First issue - orders to give effect to the appeal

112 Although ground 4 was conceded, there was disagreement as to
the orders which should be made in substitution for those made by the
Tribunal at first instance. I indicated in the Reasons (at [106]) that I
preferred the orders proposed by the appellant strata company as they
were consistent with the construction of by-law 17(2) and should be
preferred to those which had been originally proposed by the
respondent. Nonetheless, I sought competing minutes from the parties,
which were provided on 5 and 6 December, and were the subject of
short oral submissions from Mr McGowan for the appellant and
Mr Murdzoski for the respondent at a hearing on 7 December.

113 The orders proposed by the parties were not significantly
different, with the respondent effectively proposing changes to the
baseline version of orders drafted by the appellant. An unfortunate

⁷⁰ *The Owners of Dolphin Apartments Mandurah Strata Plan 49518 v Poland Superannuation Pty Ltd*
[2023] WASC 451.

⁷¹ *Calderbank v Calderbank* [1976] Fam LR 93.

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degree of greater complexity subsequently arose, however, which has delayed the conclusion of this matter. Specifically, on the evening of 7 December, the respondent's solicitors provided the court with a further revised minute of proposed orders, which had not been the subject of conferral. As I had reserved my decision at the conclusion of the hearing,⁷² and as the new minute had not been the subject of conferral, I informed the parties through my associate that the unilateral communication from the respondent's solicitor would be put to one side.

114 Several further communications followed thereafter between the court and the parties' solicitors, on 8 December, the substance of which indicated disagreement between the parties' solicitors as to whether the respondent was entitled to file and rely on the additional minute. I should record that the appellant's objections in this regard were entirely understandable given the Reasons were formally delivered by the court on 28 November and a directions hearing to address final orders was then listed for 7 December, giving the parties ample opportunity to take instructions and consider the orders which should be sought.

115 The foregoing kerfuffle culminated in the court receiving the following additional material:

- (a) an email to the court from the respondent's solicitors sent on 11 December, which indicated that the parties had been unable to agree on orders but at least agreed that the final orders should be determined administratively without the need for a further hearing;
- (b) a letter to the court from the respondent's solicitors sent on 11 December, three pages in length, explaining why the respondent should have leave to rely on the amended minute and detailing why those orders should be made;
- (c) the respondent's amended minute of proposed orders dated 11 December, setting out the seven orders sought by the respondent (**Respondent's Amended Minute**);
- (d) the respondent's memorandum of proposed orders dated 11 December, seeking orders that the respondent have leave to rely on the Respondent's Amended Minute; and

⁷² ts 52 - 53.

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- (e) a concise letter from the appellant's solicitors dated 11 December 2023, explaining that orders 5.4.2, 5.4.3 and 5.4.4 of the Respondent's Amended Minute were not issues in the appeal and, as those matters were subject to findings made by the Tribunal and were not the subject of challenge, it is not necessary or appropriate for this Court to make orders in relation to those matters.

116 I have considered the above material. In the absence of specific prejudice to the appellant in so doing, as the application was made promptly, as the respondent did not propose to adduce further evidence or material other than the minute and brief submissions, and in light of the respondent's solicitor's explanation for the failure to raise these matters at the listed directions hearing (which explains this was a matter of inadvertence), I will grant the respondent leave to re-open its argument as to the appropriate orders to be made and grant the respondent leave to rely upon the Respondent's Amended Minute.⁷³ I consider it is in the interests of justice to do so.⁷⁴

117 At the hearing on 7 December, there was some discussion as to whether all the orders made by the Tribunal needed to be set aside. The Tribunal's orders are set out in the Reasons at [42]. For ease of understanding, I have extracted order 1 below:

1. Pursuant to s 200(2)(l) of the Strata Titles Act 1985 (WA) the respondent is required in accordance with by-law 18(2) of the scheme by-laws to allocate scheme expenses between the retail and residential cost centres noting that the owner of Lot 61 is not required pursuant to the scheme by-laws and the Strata Titles Act 1985 (WA) to contribute levies to:
 - (a) repair and maintain the common property (and common property facilities) on the first floor of the scheme building (by-law 18(1));
 - (b) repair and maintain or renew and replace the common property on the second and third floors of the scheme building (by-law 17(2));

⁷³ Letter from MPH Lawyers dated 11 December 2023, [3] – [4] and [8] – [12].

⁷⁴ *Bell Group Ltd v Australian Securities and Investments Commission (No 2)* [2018] FCA 1970 [13] – [18] (McKerracher J); and *De L v Director-General, New South Wales Department of Community Services [No 2]* [1997] HCA 14; (1997) 190 CLR 207.

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- (c) operate, repair and maintain the intercom and security system (by-law 26(1)),⁷⁵
- (d) maintain the common property vehicle paved access way, the reticulation and drainage system and the water used for the gardens and landscaping located on common property (by-law 26(2));⁷⁶ and
- (e) the reserve fund for the residential cost centre (by-law 18(2)).

118 The appellant's submissions on the appeal (which I largely accepted) identified the need to make orders in substitution of orders 1(a) and 1(b) only.⁷⁷ However, I had indicated in the Reasons (at [107]) that orders should be made in substitution of orders 1(a) to 1(e), largely to ensure the parties had greater certainty as to their rights and obligations going forward and to avoid unintended inconsistencies. There appeared to me to be far greater utility in having the subject matter of the allocation of scheme expenses dealt with in one instrument, than spread across both an order of this court and an order of the Tribunal.

119 It is to be noted that this court has broad powers to deal with an appeal from the Tribunal, including to make any decision that the Tribunal could have made in the proceedings, and to make any order the court considers appropriate.⁷⁸

120 Of course, the approach to be adopted by the court on appeal from the Tribunal must reflect the scope of the appeal itself, and recognise that where matters have not been the subject of challenge or argument on appeal, the court should be slow to disturb the orders as made by the Tribunal.

121 On my assessment, the appropriate exercise of the court's powers in order to deal with this appeal is to set aside order 1 of the Tribunal's orders in its entirety, and to set out the entitlements of the parties in clear terms, but without disturbing the substance of those matters as ordered by the Tribunal which were not the subject of challenge. This can be achieved by picking up proposed orders 5.4.1 to 5.4.4 of the Respondent's Amended Minute, with some appropriate modifications. That is, the orders will continue to reflect that:

⁷⁵ This should be a reference to by-law 26(a).

⁷⁶ This should be a reference to by-law 26(b).

⁷⁷ Appellant's submissions [82].

⁷⁸ SAT Act, s 105(9).

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- (a) the owner of Lot 61 is *not* required to contribute levies to the operation, repair and maintenance of the intercom and security system (given the terms of by-law 26(a), as reflected in order 1(c) of the Tribunal's orders);⁷⁹
- (b) the owner of Lot 61 is *not* required to contribute levies to the maintenance of the common property vehicle paved access way, the reticulation and drainage system and the water used for the gardens and landscaping located on the common property (given the terms of by-law 26(b), as reflected in order 1(d) of the Tribunal's orders);⁸⁰ and
- (c) the owner of Lot 61 is *not* required to contribute levies to the reserve fund for the residential cost centre (given the terms of by-law 18(2), as reflected in order 1(e) of the Tribunal's orders).⁸¹

122 Further orders are also required to ensure the subject matter covered by orders 1(a) and 1(b) of the Tribunal's orders are dealt with by this court's orders.

123 The orders I consider appropriate, to reflect the reasons of the court and the proper construction of by-law 17(2) in respect of the Special Common Property, are set out at [146] below. The Special Common Property in this regard is the common property located on the first floor of the Scheme building and above, as explained in the Reasons at [20] to [22], [81] and [99]. The Residential Lots are Lots 1 to 60 which are located on the first floor and above.

124 An important aspect of the orders I propose to make is the clarification that the proprietors of the Residential Lots:

- (a) have responsibility for the performance of the obligations of the Strata Company under s 91(1)(c) of the Strata Titles Act in respect of the non-structural components of the Special Common Property (without the unnecessary further qualification proposed by the appellant that those components be for the benefit of all Residential Lots collectively); and
- (b) have only limited responsibility for structural components.

⁷⁹ Appeal Book, Document B, pg 27.

⁸⁰ Appeal Book, Document B, pg 27.

⁸¹ Appeal Book, Document B, pg 25.

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125 This is the effect of by-law 17(2) being construed as an exclusive use by-law within the meaning of s 43(1) of the Strata Titles Act, and also being construed such that it does not confer exclusive use of, or special privileges over, the structural components of the Special Common Property. The orders I have proposed largely adopt the amendments promoted by the respondent which, in my view, are consistent with the proper construction of the by-law and the governing statute.

126 As such, by operation of s 43(3) of the Strata Titles Act, the Residential Lots will bear the obligations of repair and maintenance which are imposed by s 91(1)(c) of the Strata Titles Act in respect of the non-structural components of the Special Common Property. Unless expressly identified in the orders, the balance of the Special Common Property remains the responsibility of the appellant strata company.

127 The orders I will make may be explained as follows.

Order	Explanation
7	This order is required to give effect to the court's conclusion that by-law 17(2) is an exclusive use by-law in respect of the Special Common Property.
8	This order is required to give effect to the court's conclusion that, as by-law 17(2) is an exclusive use by-law, and pursuant to the combined operation of s 43(3) and s 91(3) of the Strata Titles Act, the owners of the Residential Lots will have certain repair and maintenance responsibilities in respect of the Special Common Property. In particular, the Residential Lot owners will have those responsibilities in respect of all the non-structural components of the Special Common Property: order 8(a)(i). As to the structural components, they <i>prima facie</i> remain the responsibility of the appellant Strata Company (see order 8(b)), unless the terms of order 8(a)(ii) are engaged.
9 & 10	These orders operate in harmony with order 8 to confirm the concomitant allocation of costs having regard to the divided responsibilities as between Residential Lot owners and the owner of Lot 61.
11	This order is required to give effect to the court's conclusion as to the meaning of by-law 17(2) (and in light of s 100(1)(c) of the Strata Titles Act and by-laws 18(1) and 18(2)) as to the power of the Strata Company to levy contributions on owners of the lots in this Scheme in accordance with the express basis set out within the by-laws.

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C. Second issue - costs orders

128 I turn now to the costs orders sought by the parties. The appellant proposed an order that, given the outcome in the appeal, it pay 50% of the respondent's costs of the appeal, to be assessed if not agreed. In essence, the appellant submitted the appeal may be seen as having two hemispheres, one being grounds 1 to 3, and the other being ground 4. The appellant having been successful on ground 4, it urged upon the court an order that would require it to bear only 50% of the respondent's costs of the appeal.

129 I do not agree that the aspects of the appeal on which the appellant was successful represented 50% of the appeal itself, taking a broad brush approach to that assessment. Undoubtedly, both parties approached the appeal in an efficient manner overall, but my assessment is that the time, cost and effort spent by the parties and by the court at the hearing in respect of the first three grounds of appeal represented the majority of the battle between the parties, recognising as well that the respondent conceded ground 4 itself. That concession did not obviate the need for the parties to address the court on ground 4, and it was necessary for the court to consider the merits of that ground for itself.

130 Overall, my assessment is that the aspects of the appeal on which the respondent was successful occupied around 80% of the matter. I propose to exercise the broad discretion to award costs having regard to this assessment, with the appellant being ordered to pay 80% of the respondent's costs (not 50% as proposed by the appellant, nor 100% as sought by the respondent). I am approaching the issue as a matter of impression, without an attempt at mathematical precision, which has often been said would likely prove to be illusory in any event.⁸²

131 As to the basis on which those costs should be assessed, the respondent proposed sought an order that the costs be assessed on an indemnity basis. The sole basis for seeking an indemnity costs order was that a without prejudice *Calderbank* offer had been made by the respondent, and rejected by the appellant, in circumstances in which that offer largely (although not wholly) reflected the ultimate outcome of the appeal. The respondent submitted it was unreasonable for the appellant to have rejected that offer and in the circumstances, that should be met with an indemnity costs order.

⁸² *Amaca Pty Ltd (formerly James Hardie and Co Pty Ltd) v Moss* [2007] WASCA 162 (S) [6].

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132 There must be some special or unusual feature of the case to warrant the award of indemnity costs.⁸³ It is certainly the case that the rejection of a *Calderbank* offer can (but not must) lead to an award of indemnity costs if the offer is bettered by the result ultimately obtained by the party making the offer. The party who made the *Calderbank* offer bears the onus of persuading the court that indemnity costs should be awarded.

133 The *Calderbank* offer was made on 30 June 2023 and was open until 5.00pm on 5 July 2023.⁸⁴ It was thus open for a short period only. Shortly after the expiration of that time period (but less than an hour after the 5.00pm deadline), the appellant rejected the offer. The offer, in substance, was that, upon the appellant abandoning grounds 1 to 3 of the appeal, the respondent would concede ground 4 and consent to orders being made to the effect that the structural common property would be carved out. The offer proposed that each party walk away bearing their own costs in respect of the appeal.⁸⁵ A memorandum of consent orders was enclosed with the letter.

134 The *Calderbank* offer made by the respondent is in clear terms and represented a genuine proposal to narrow down the issues requiring determination on the appeal. The offer put the appellant on notice that it would be relied upon in support of an indemnity costs application.

135 The offer could not wholly dispose of the appeal itself, given the need for the court to consider for itself whether the additional orders should be made, as explained below. The offer was open for a limited time period, but the appellant was able to reject the offer which suggests the short time period itself was not an obstacle for the appellant. That is, the correspondence indicates the appellant had adequate time to consider the proposal.

136 The appellant rejected the offer on the basis it was 'conceptually misconceived'. The appellant's solicitors explained to the respondent's solicitors that the parties could not by agreement, set aside or otherwise allow an appeal such as this.⁸⁶

⁸³ *Strzelecki Holdings Pty Ltd v Jorgensen* [2019] WASC 96; (2019) 54 WAR 388 [82] - [83].

⁸⁴ Affidavit of Gregory John O'Shannessy sworn 6 December 2023, Attachment GO-1 (being the *Calderbank* letter from MPH Lawyers dated 30 June 2023).

⁸⁵ *Calderbank* letter from MPH Lawyers dated 30 June 2023, [10].

⁸⁶ Affidavit of Gregory John O'Shannessy sworn 6 December 2023, Attachment GO-2 (being the email from Lewis Kitson Lawyers sent on 5 July 2023 at 5.48pm).

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137 There is facility in O 65 r 18 of the *Rules of the Supreme Court 1971* (WA) for the parties to an appeal to the General Division to file a consent notice seeking final orders in an appeal. The consent orders drafted by the respondent referred to O 43 r 16, not to O 65 r 18, but it is evident that the respondent intended the consent orders to be filed by the parties (in the event agreement was forthcoming) for the ultimate consideration of the court. I therefore do not agree that the offer was conceptually misconceived.

138 Rule 18 relevantly provides:

18. Settling an appeal

- (1) The parties to an appeal may file a Form No. 87 (Consent notice), modified as necessary, stating the final order that the parties consent to being made in the appeal.
- (2) When a consent notice is filed, the registrar must refer it to a judge who may direct the registrar —
 - (a) to issue a final order in accordance with the notice; or
 - (b) to notify the parties that the judge will decide the final orders at a hearing.

139 In the context of the present appeal, the orders proposed by the respondent as part of its *Calderbank* offer would not have been the subject of a direction under O 65 r 18(2)(a), but rather would have required a determination at a final hearing, in accordance with O 65 r 18(2)(b). This is the case because the orders proposed that leave to appeal on grounds 1, 2 and 3 be refused and that leave to appeal be granted on ground 4, with further orders to be made concerning the substitution of orders 1(a) and 1(b) of the Tribunal's orders. Matters such as this would require careful consideration by the court, with the assistance of submissions from the parties. As the Reasons demonstrate, there is a degree of complexity in the operation of the applicable provisions of the Strata Titles Act and in the assessment as to whether by-laws may be construed as exclusive use by-laws, as well as there being a need to give attention to the relevance of structural and non-structural components of a scheme building.

140 So, while the offer was not conceptually misconceived as such, in the context of this appeal, it is not appropriate in my view to visit upon the appellant the consequences of an indemnity costs order merely

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because it rejected the *Calderbank* offer made by the respondent. I say this for several reasons.

141 *First*, because a hearing not dissimilar to the hearing which in fact took place on 24 July 2023 would have been required in any event, and would have required a degree of assistance from counsel for both parties to satisfy the court that the orders should be made. This is an important consideration in the assessment of the discretion whether to order indemnity costs following a rejection of a *Calderbank* offer.

142 *Second*, and more generally, although I ultimately formed views adverse to the appellant in relation to grounds 1 to 3, the issues of construction required close analysis and it could not be said (at the time the offer was made) that the grounds were untenable in any respect. Indeed, I indicated in the Reasons that leave to appeal should be granted in respect of those grounds.

143 *Third*, it is not apparent that the appellant is worse off than it would have been had it accepted the offer.

144 I am therefore not persuaded that the rejection of the offer was unreasonable in all the circumstances.

145 I accordingly formed the view at the conclusion of the hearing on 7 December that an indemnity costs order based solely on the refusal to accept the *Calderbank* offer was not appropriate. The costs order I will make is set out in order 12 below.

D. Conclusion and orders

146 The final orders made by the court will be as follows:

Leave to appeal and to amend the grounds of appeal

1. The appellant has leave to amend the Grounds of Appeal in terms of the Amended Grounds of Appeal dated 26 June 2023.
2. Pursuant to s 105 of the *State Administrative Tribunal Act 2004* (WA), the appellant be granted leave to appeal in respect of Grounds 1 to 4.

Leave to re-open and to rely upon the amended minute

3. The respondent has leave to re-open and leave to rely upon the amended minute of proposed orders dated 11 December 2023.

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Disposition of the appeal

4. Grounds 1 to 3 of the appeal be dismissed.
5. Ground 4 of the appeal is allowed.
6. Orders 1(a) to 1(e) of the Orders of the State Administrative Tribunal made on 24 November 2022 be set aside and in lieu thereof Orders 7 to 11 below be made.

By-law 17(2) is an exclusive use by-law

7. Properly construed, by-law 17(2) of the Strata Scheme is an exclusive use by-law for the purposes of the *Strata Titles Act 1985* (WA), such that the by-law means that the Residential Lots (being Lots 1 to 60) are granted exclusive use and enjoyment of the Special Common Property (being the common property located on the first floor of the Scheme building and above).

Responsibilities under s 43(3) of the *Strata Titles Act 1985* (WA)

8. Pursuant to s 43(3) of the *Strata Titles Act 1985* (WA), but subject to any other by-law to the contrary:
 - (a) the proprietors of the Residential Lots have the responsibility for the performance of the obligations of the strata company under s 91(1)(c) of the *Strata Titles Act 1985* (WA), to keep in good and serviceable repair, properly maintain and where necessary, renew and replace whether the damage or deterioration arises from fair wear and tear, inherent defect or any other cause, in respect of:
 - (i) the non-structural components of the Special Common Property; and
 - (ii) the structural components of the Special Common Property, but only if a by-law: (A) exempts the proprietor of Lot 61 from contributing to the costs of the performance of any of those obligations for a specified component of the Special Common Property; or (B) solely imposes on all proprietors of the Residential Lots, the responsibility for the performance of any of those obligations for a specified component of the Special Common Property; and
 - (b) the performance of the obligations as set out in s 91(1)(c) of the *Strata Titles Act 1985* (WA) for all

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other structural components of the Special Common Property remain the responsibility of the appellant.

Costs centres

9. The appellant is required to allocate any costs for the responsibilities in Order 8(a) above to a Residential Lots cost centre.
10. The appellant is required to allocate any costs of the responsibilities in Order 8(b) above to a common cost centre for all lots of the Scheme.

Contributions to levies

11. The proprietor of Lot 61 is not required pursuant to the by-laws and the *Strata Titles Act 1985* (WA) to contribute levies to:
 - (a) any costs associated with the operation, maintenance, repair, replacement and cleaning of the lifts, the swimming pool and gymnasium located on the first floor of the Scheme Building (in accordance with the terms of by-law 18(1));
 - (b) the costs and expenses necessary to operate, repair and maintain the intercom and security system (in accordance with the terms of by-law 26(a));
 - (c) the costs and expenses necessary to maintain the common property vehicle paved access way, the reticulation and drainage system and the water used for the gardens and landscaping located on common property (in accordance with the terms of by-law 26(b)); and
 - (d) the reserve fund for the Residential Lots costs centre (in accordance with the terms of by-law 18(2)).

Costs of the appeal

12. The appellant is to pay 80% of the respondent's costs of the appeal to be assessed if not agreed.

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I certify that the preceding paragraph(s) comprise the reasons for decision of the Supreme Court of Western Australia.

THE HONOURABLE JUSTICE M LUNDBERG

3 JANUARY 2024