

JURISDICTION : STATE ADMINISTRATIVE TRIBUNAL

ACT : STRATA TITLES ACT 1985 (WA)

CITATION : HUTCHISON and CANCIULLO [2020] WASAT 22

MEMBER : MS D QUINLAN, MEMBER

HEARD : 14 JANUARY 2020

DELIVERED : 13 FEBRUARY 2020

FILE NO/S : CC 1476 of 2019

BETWEEN : DEANNA LEE HUTCHISON
First Applicant

PATRICK DYLAN HUTCHISON
Second Applicant

ROBERTO BUSI
Third Applicant

LOUIS PHILLIP WEBER
Fourth Applicant

AND

ROBERT ARTHUR CANCIULLO
First Respondent

THE OWNERS OF 52 COHN STREET CARLISLE
STRATA PLAN 28713
Second Respondent

Catchwords:

Strata titles - Common property - Levy of contributions on proprietors - Pre-existing by-law adjusted method of contributions to be other than unit entitlement - Having regard to use and enjoyment of common property - Whether fair to all proprietors - Exercise of discretion - Adjustment of method of fixing contributions for common property - Turns on own facts

Legislation:

Dividing Fences Act 1961 (WA), s 7, s 14

Strata Titles Act 1985 (WA), s 3, s 17, s 17(1), s 32, s 35(1)(b), s 35(1)(c), s 36, s 36(1)(c)(i), s 42, s 42B, s 42B(1), s 99A, s 99A(4), s 99A(5), s 123, s 123(3)(b), s 123(3)(a), Sch 1, Sch 2

Result:

Applicants successful

Summary of Tribunal's decision:

The proprietors of Lots 2, 3 and 4 (the applicants) brought proceedings in the Tribunal pursuant to s 99A(1) of the *Strata Titles Act 1985* (WA) (ST Act). The first respondent is the proprietor of Lot 1. The applicants were aggrieved by the operation of a by-law made by previous proprietors under s 42B of the ST Act which provided the proprietor of Lot 1, apart from the cost of insurance, was exempt from any levy contributions for the control and management of the common property or any other obligation of the strata company in relation to the common property.

Section 99A(4) of the ST Act provides that the Tribunal may make an order to provide for a method of fixing contributions that is fair to all proprietors having regard to their use and enjoyment of the common property and any building or other improvement.

The common property as shown on the strata plan comprises:

- (a) a common property driveway giving access to Lots 2, 3 and 4 from Cohn Street (common property driveway);
- (b) the fence that divides the common property driveway from the neighbouring land (common property fence);
- (c) the land that is more than 5 metres below the surface of the ground; and
- (d) the airspace that is 10 metres above the upper surface of the floor level of the building on Lot 1.

The Tribunal found that:

(a) In the exercise of its discretion in all of the facts and circumstances, that it is fair to all proprietors that the proprietor of Lot 1 was no longer exempt from any levy contributions for the control and management of the common property or any other obligation of the strata company in relation to the common property.

(b) Adjusting the method of fixing contributions as suggested by the applicants to be in accordance with unit entitlement as provided under s 36(1)(c)(i) of the ST Act failed to fairly acknowledge the marked differing use and enjoyment of the common property driveway by the proprietor of Lot 1 (Lot 1 has its own driveway), as against the use and enjoyment by the proprietors of Lots 2, 3 and 4.

(c) However, having regard to its findings as to the use and enjoyment by the proprietor of Lot 1 of the remainder of the common property, that it would be unfair to leave the contributions method prescribed by by-law 16 in place.

The Tribunal found that a fair adjustment (apart from insurance) of fixing the method of contributions was 19% for Lot 1, with the remaining 81% to be divided evenly between Lots 2, 3 and 4 (being 27% each). The Tribunal found that the lot proprietors should continue to apportion the cost of insurance as per unit entitlement (25%).

Category: B

Representation:

Counsel:

First Applicant	: P Monaco
Second Applicant	: P Monaco
Third Applicant	: P Monaco
Fourth Applicant	: P Monaco
First Respondent	: JF Park and A Beckwith
Second Respondent	: N/A

Solicitors:

First Applicant	: GV Lawyers
Second Applicant	: GV Lawyers
Third Applicant	: GV Lawyers
Fourth Applicant	: GV Lawyers
First Respondent	: Kott Gunning
Second Respondent	: N/A

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

Arasi & Anor and The Owners of Beverley Court [2005] WASAT 197

Grenside and The Owners of Upper Eastside Apartments Strata Plan 41133
[2008] WASAT 229

Husic and Biancuzzo [2009] WASAT 192

Maludra Pty Ltd and The Owners of Windsor Towers Strata Plan 80
[2017] WASAT 112

Transport Workers Union of Australia and The Owners of Strata Plan 8921
(Beaufort Centre) [2012] WASAT 239

REASONS FOR DECISION OF THE TRIBUNAL:

Introduction

1 The strata title proprietors of Lots 2, 3 and 4 (the applicants) located at 52 Cohn Street, Carlisle (the parcel) have brought proceedings in the Tribunal pursuant to s 99A(1) of the *Strata Titles Act 1985* (WA) (ST Act).

2 The first respondent is the proprietor of Lot 1 also located at the parcel. The second respondent is The Owners of 52 Cohn Street, Carlisle Strata Plan 28713 (strata company). The strata company did not participate in these proceedings.

3 The proceedings have been brought by the applicants under s 99A(1) of the ST Act as they are aggrieved by the operation of a by-law made on 30 August 2002 under s 42B of the ST Act which provides that the proprietor of Lot 1, apart from the cost of insurance, is exempt from any levy contributions for the control and management of the common property or any other obligation of the strata company in relation to the common property. Section 99A(4) of the ST Act provides that the Tribunal may make an order to provide for a method of fixing contributions that is fair to all proprietors having regard to their use and enjoyment of the common property and any building or other improvement. The power vested in the Tribunal under s 99A(4) of the ST Act is discretionary.

Legislative framework

4 Section 3 of the ST Act defines 'common property' as follows:

common property means -

- (a) so much of the land comprised in a strata plan as from time to time is not comprised in a lot shown on the plan; and
- (b) any leasehold interest acquired by a strata company under section 18; and
- (c) the lot or lots shown on a survey strata plan as common property;

5 Section 17 of the ST Act provides that common property shall be held by the proprietors as tenants in common in shares proportional to the unit entitlements of their respective lots.

6 Section 32 of the ST Act provides that the proprietors, from time
to time, shall constitute the strata company.

7 Section 35(1)(b) of the ST Act prescribes that the duties of a strata
company is to control and manage the common property for the benefit
of all proprietors. Section 35(1)(c) of the ST Act also provides that the
strata company shall keep in good and serviceable repair, properly
maintain and, where necessary, renew and replace the common
property and to do so whether damage or deterioration arises from fair
wear and tear, inherent defect or any other cause.

8 Section 36 of the ST Act provides that the strata company shall
establish a fund by levying contributions on proprietors for the control
and management of the common property, for the payment of any
insurance and the discharge of any other obligation of the strata
company.

9 Relevant to these proceedings, s 42(1)(c) of the ST Act provides
that a strata company may make by-laws, not inconsistent with the
ST Act, regarding matters relating to the management, control, use and
enjoyment of the lots and any common property. Also relevant to these
proceedings, s 42(2)(a) of the ST Act provides that the by-laws set out
in Sch 1 and Sch 2 shall be deemed to be by-laws of the strata company
and may be amended, repealed or added to by the strata company, and
in the case of the Sch 1 by-laws, (relevantly here) by resolution without
dissent (or unanimous resolution, in the case of a two lot scheme).

10 Section 42(8) of the ST Act provides that a strata company may
make a by-law conferring exclusive use and enjoyment of, or special
privileges in respect of, any part of common property upon such terms
and conditions (including the proper maintenance and repair and the
payment of money) as may be specified in the by-law.

11 Section 42B(1) of the ST Act provides that by-laws made by a
strata company under s 42 may 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.
Further, s 42B(2) of the ST Act provides that such a by-law may relate
to contributions to all of the expenses of the strata company or to one or
more particular kinds of expenses.

12 These proceedings have been brought under s 99A of the ST Act
which provides as follows:

Order fixing different basis for levying contributions

- (1) A proprietor who is aggrieved by the operation of a by-law referred to in section 42B may apply to the State Administrative Tribunal for an order under this section.
- (2) An order under this section is an order -
 - (a) fixing a method of assessing contributions to be levied on proprietors under section 36 otherwise than -
 - (i) in proportion to the unit entitlements of their respective lots; or
 - (ii) in accordance with a by-law referred to in section 42B;
 - or
 - (b) that such contributions are to be levied in accordance with section 36(1)(c)(i).
- (3) An order under this section may relate to contributions to all of the expenses of the strata company or to one or more particular kinds of expenses.
- (4) On the making of an application under subsection (1), the State Administrative Tribunal may make an order under this section that appears to it to provide for a method of fixing contributions that is fair to all proprietors having regard to their use and enjoyment of the common property and any building or other improvement on the parcel.
- (5) To the extent of any inconsistency, an order under this section prevails over section 36(1)(c) or a by-law under section 42B.
- (6) An order under this section is of no effect until a copy of the order has been recorded by the Registrar of Titles under section 115 on the strata/survey strata plan to which it relates.
- (7) An order under this section is to be taken to be revoked or amended to the extent that it is inconsistent with a by law, or an amendment of a by law, subsequently made by the strata company by resolution without dissent (or unanimous resolution, in the case of a two lot scheme) and of effect under section 42(4).

13 The ST Act does not define the phrase 'use and enjoyment', nor each individual word in the phrase. The *Macquarie Dictionary*

Online has numerous definitions and examples of the verb 'use', relevant to this context including the following:

1. to employ for some purpose; put into service; turn to account: use a knife to cut; use a new method.
2. to avail oneself of; apply to one's own purposes: use the front room for a conference.
3. to expend or consume in use: his car uses a lot of oil.
4. to act or behave towards, or treat (a person) in some manner.
5. to exploit (a person) for one's own ends.
6. to utter (words) or speak (a language).
7. to operate or put into effect.

¹⁴ Included in the definition of 'use' under the heading 'Law, History' the *Macquarie Dictionary Online* includes:

22. Law, History
 - a. the enjoyment of property, as by employment, occupation, or exercise of it.
 - b. the benefit or profit of property (lands and tenements) in the possession of another who simply holds them for the beneficiary.
 - c. the equitable ownership of land the legal title to which is held by another; a passive trust.

¹⁵ The *Macquarie Dictionary Online* defines the noun 'enjoyment' as follows:

1. the possession, use, or occupancy of anything with satisfaction or pleasure.
2. a particular form or source of pleasure.
3. Law the exercise of a right: the enjoyment of an estate.

¹⁶ Neither counsel were able to locate any prior decisions of the Tribunal with regard to s 99A of the ST Act. The Tribunal was able to locate two decisions which briefly considered s 99A of the ST Act, however neither decision considered the issue arising for determination in these proceedings: see ***Grenside and The Owners of Upper Eastside***

Apartments Strata Plan 41133 [2008] WASAT 229 and *Transport Workers Union of Australia and The Owners of Strata Plan 8921 (Beaufort Centre)* [2012] WASAT 239.

17 The first respondent referred the Tribunal to previous Tribunal strata title decisions regarding the exercise of discretion: *Arasi & Anor and The Owners of Beverley Court* [2005] WASAT 197 at [27]-[28] and *Husic and Biancuzzo* [2009] WASAT 192 at [24]. The first respondent also referred the Tribunal to a previous decision regarding the duty of the strata company concerning common property under s 35(1)(c) of the ST Act in *Maludra Pty Ltd and The Owners of Windsor Towers Strata Plan 80* [2017] WASAT 112 at [202]-[204]. Having reviewed those three decisions, the Tribunal is not assisted by those decisions in these proceedings.

Background facts

18 The parcel comprises a residential strata scheme divided into four lots and common property. The strata plan was registered on 8 September 2000. Each of the four lots has equal unit entitlements.

19 The common property as shown on the strata plan comprises:

- a) a common property driveway giving access to Lots 2, 3 and 4 from Cohn Street (common property driveway);
- b) the fence that divides the common property driveway from the neighbouring land at 54 Cohn Street (common property fence);
- c) the land that is more than 5 metres below the surface of the ground; and
- d) the airspace that is 10 metres above the upper surface of the floor level of the building on Lot 1.

20 Lot 1 faces Cohn Street and has its own dedicated driveway from Cohn Street. Sitting alongside the front portion of the common property driveway, Lot 1 has a boundary wall of the residence which includes an opaque living room window, a light, eaves and fence including a gate that is presently boarded shut. Lot 1 (as do Lots 2, 3 and 4) has its electricity, gas and water meters all located within the common property driveway. Lots 2, 3 and 4 are located in numerical order behind Lot 1 and are all accessed using the common property

driveway. The common property fence sits alongside the common property driveway.

21 The remainder of the fencing on the strata plan is not common property and is maintained by the individual lot proprietor as required under s 123(3)(a) of the ST Act and the provisions of the *Dividing Fences Act 1961* (WA) (Dividing Fences Act).

22 At the Annual General Meeting (AGM) of the strata company on 30 August 2002 a resolution without dissent added a by-law to the existing ST Act, Sch 1 by-laws of the strata company (by-law 16) as follows:

By-law 16

Lot 1 - Exemption from contributions

(1) Interpretation

In this by-law 16 "balance lots" means the lots on the strata plan other than Lot 1.

(2) Lot 1 exempt from contributions

The Strata Company shall not levy contributions on the proprietor of Lot 1 with respect to the control and management of the common property or the discharge of any other obligation of the Strata Company relating to the common property save as provided in paragraph (4) of this by-law.

(3) Balance lots contributions

The strata company shall, save as provided in paragraph (4) of this by-law, levy contributions on the proprietors of the balance of lots with respect to the control and management of the common property and the discharge of any other obligation of the Strata Company relating to the common property in proportion to the unit entitlements of their respective lots.

(4) Insurance of common property

Paragraphs (2) and (3) of this by-law shall not apply to contributions to be levied with respect to the payment of premiums of insurance relating to the common property or any part of the common property, which shall be levied on all proprietors in proportion to the unit entitlements of their respective lots.

(5) Other components of strata levies

Save as set out in this by-law 16, the strata company shall levy contributions on all the proprietors in proportion to the unit entitlements of their respective lots.

(6) Application and inconsistency

If there is any inconsistency between this by-law and any other by-law of this Schedule or the Schedule 2 by-laws, the provisions of this by-law 16 shall prevail to the extent of that inconsistency.

23 None of the proprietors owned their respective lots in the strata scheme at the time that by-law 16 was passed at the AGM on 30 August 2002. As noted above, the applicants are the proprietors of Lots 2, 3 and 4 and the first respondent is the proprietor of Lot 1. The proprietors of the individual lots, who together own an equal share in the common property, are as follows:

- a) Lot 1 - Mr Robert Canciullo (the first respondent) who became the registered proprietor on 4 July 2004;
- b) Lot 2 - Mr Patrick Hutchison and Mrs Deanna Hutchison (the first and second applicants) who became the registered proprietors on 6 March 2013;
- c) Lot 3 - Dr Roberto Busi (the third applicant) who became the registered proprietor on 16 June 2009; and
- d) Lot 4 - Mr Louis Weber (the fourth applicant) who became the registered proprietor on 3 May 2016.

Issue to be determined

24 The issue to be determined in these proceedings is whether, in the exercise of the Tribunal's discretion under s 99A of the ST Act, taking into account all of the facts and circumstances, the Tribunal considers that it is fair to all proprietors, having regard to their use and enjoyment of the common property, that the Tribunal should determine a method of fixing contributions that is different from that which presently exists in by-law 16.

The applicants' case

25 The applicants seek an order that contributions are no longer to be paid in accordance with by-law 16, but are to be levied in accordance with the respective unit entitlements under s 36(1)(c)(i) of the ST Act.

26

The applicants submitted that the Tribunal should make the order sought on the following bases:

- a) The obligations of the strata company include the proper maintenance and control of common property which is a primary and unavoidable obligation under the ST Act.
- b) In this strata scheme, the common property is owned by the lot proprietors as tenants in common in equal shares (proportional to their unit entitlement). Therefore, by operation of by-law 16, the first respondent has an equal say in how the common property is to be maintained and controlled but without the same liabilities as the applicants.
- c) The strata company has a duty of care to ensure that the common property is a safe and secure area. This duty extends to the proprietors, occupants, invitees and others who may not be invited which includes the invitees and non-invitees of the first respondent.
- d) In these circumstances it is unfair and inequitable that the applicants should carry the burden and that the first respondent should be exempt (save for insurance).
- e) The applicants' evidence, as well as the evidence of the first respondent, makes it clear that the first respondent has at least some limited need as well as use and enjoyment of the common property driveway in order to access utility meters. Further, the first respondent may not need to access Lot 1 via the common property driveway and gate, but as the proprietor of Lot 1, has the right to such access.
- f) The first respondent has the use and enjoyment of the common property fence for privacy and security.
- g) The first respondent has sought to downplay his use and enjoyment of the common property in these proceedings while simultaneously showing his keen interest in maintaining the common property by commencing other proceedings seeking to compel the

applicants to repair the common property driveway and common property fence.

The first respondent's case

27 The first respondent submitted that by-law 16 was fair because of his limited use and enjoyment of the common property. The first respondent opposes any order changing the levying of contributions otherwise in accordance with by-law 16.

28 In summary, the first respondent submitted as follows:

- a) The Tribunal can only make an order under s 99A(4) of the ST Act if the Tribunal is satisfied that by-law 16 is unfair considering the first respondent's use and enjoyment of the common property.
- b) Relevant to the exercise of the Tribunal's discretion under s 99A of the ST Act, the first respondent purchased Lot 1 in 2004 with the knowledge of by-law 16 which was a motivating factor in purchasing Lot 1. It is not fair that the applicants seek to change the long-standing by-law 16.
- c) Consideration of use and enjoyment only applies to existing, not future, proprietors and existing use not potential or right to use common property.
- d) Section 42B of the ST Act contemplates circumstances where, despite having a proprietary interest in the common property, a proprietor is not required to financially contribute to levies on the basis of unit entitlement.
- e) In the alternative, the first respondent contends that even if the Tribunal considered by-law 16 to be unfair considering the first respondent's use and enjoyment of the common property, the applicants' proposed method of unit entitlement would not provide a fair method of fixing contributions considering the first respondent's use of the common property.
- f) Lot 1 has its own dedicated driveway from Cohn Street, therefore, the first respondent does not use nor enjoy any amenity provided by the common

property driveway. The gate located on the boundary between Lot 1 and the common property driveway is screwed and boarded shut.

- g) Lots 2, 3 and 4 can only be accessed using the common property driveway.
- h) Lot 1 is enclosed by its own fences and maintained by the first respondent in accordance with the Dividing Fences Act and s 123 of the ST Act.
- i) The first respondent does not use nor enjoy the amenity of the common property fence on the parcel because that fence divides the common property driveway from the neighbouring parcel and the first respondent does not use or enjoy the common property driveway. In oral closing, however, it was conceded that the common property fence provided some limited amenity to Lot 1.
- i) By-law 16 is long-standing and all proprietors had knowledge of it at all material times.
- k) The applicants have brought these proceedings in the context of repair and maintenance issues of the common property that have arisen over a number of years and are yet to be addressed. It is unfair that the first respondent should be burdened with that cost when those issues have been going on for some time.

The evidence

29 On 20 December 2019, the applicants each provided a short witness summary of evidence from Mrs Hutchison, Dr Busi and Mr Weber. Those summaries were all the same and included the following background information:

- a) The view of the applicants that by-law 16 is unfair and inequitable;
- b) That tensions had been rising between the applicants and the first respondent concerning expenditure on the common property;

- c) The first respondent makes demands for expenditure on the common property but does not wish to contribute;
- d) There is potential deterioration of the common property as a consequence of the first respondent not being legally obliged and refusing to contribute to expenditure on the common property; and
- e) The common property issues being dealt with by the applicants include the common property driveway, the common property fencing and the front verge.

30 None of the summaries prepared by the applicants addressed the issue to be determined under s 99A(4) of the ST Act as to the first respondent's use and enjoyment of the common property.

31 On 13 January 2020, the applicants provided a further witness summary from Dr Busi which included the following:

- a) He purchased Lot 3 in 2009 without the knowledge of by-law 16;
- b) He has witnessed the first respondent as well as the other applicants using the common property driveway.
- c) Together with the first respondent as well as the other applicants he has contributed to the maintenance of the common property driveway to keep it in functional order by removing weeds at least once a year during winter/spring;
- d) On several occasions he has witnessed the first respondent removing weeds on a proportion of the common property driveway that 'comprises part of Lot 1' (Tribunal note – presumably that part of the common property driveway that is adjacent to Lot 1);
- e) He has mowed the grass near the letter boxes for all lots several times and cleaned the front verge area;
- f) On 11 July 2016 he, along with the first respondent and the other applicants, contributed 25% (being \$680) for the cost of a plumber to repair a burst water pipe affecting Lot 1. Following a direct request from the

first respondent, the applicants also shared the costs of repair of the water system. In his understanding the applicants' water systems were not directly affected by the pipe deterioration;

- g) On 23 November 2017 he contributed \$231 towards the costs of a plumber to repair a burst water pipe affecting Lot 4. Following a request from the proprietor of Lot 4, he and the proprietor of Lot 2 immediately contributed to the costs of repair of the water system affecting Lot 4. In his understanding, the water systems of Lots 1, 2, and 3 were not directly affected by the pipe deterioration at Lot 4. In that instance, the first respondent refused to contribute to the costs of repair;
- h) This incident in November 2017 has led to the start of Tribunal proceedings. Since November 2017, the first respondent has not participated in the strata company meetings and ceased his voluntary contribution to maintain the initial part of the common property driveway;
- i) Since the start of the Tribunal proceedings in 2018, he has witnessed the gate to Lot 1 which gives access to the common property driveway being shut with nails and wooden boards; and
- j) In 2019 he communicated with the strata manager at 54 Cohn St, Cassandra Enkel, (Richardson Strata Management Services), regarding the replacement of the common property fence between 52 and 54 Cohn Street, Carlisle.

32

On 6 January 2020, Mr Canciullo, the first respondent, provided a summary of his own evidence which included the following:

- 1) He purchased Lot 1 in 2004 with the knowledge of by-law 16 which was a motivating factor in purchasing Lot 1.
- 2) He has witnessed the various proprietors and tenants of Lots 2, 3 and 4 consistently using the common property driveway to:

- a) access their respective lots by foot and using vehicles;
 - b) allow third parties to use and park vehicles, including heavy duty vehicles; and
 - c) transport their 'wheelie' bins and garbage.
- 3) That part of Lot 1 that is located furthest from Cohn Street comprises a garden. The part of the fencing enclosing the garden and separating it from the common property driveway includes a gate. That gate is boarded and nailed shut and cannot be used to access the common property driveway from Lot 1.
- 4) He does not use or enjoy the common property driveway except to infrequently (on average once each year) 'reset' the meters for Lot 1 which are attached to the north-eastern wall of the building on Lot 1. He accesses the common property driveway for that purpose. The common property driveway otherwise provides no amenity, use or enjoyment to him or to Lot 1.
- 5) On the north-east facing boundary of the strata plan is a common property fence between the common property driveway and the neighbouring parcel at 54 Cohn Street. The common property fence provides amenity to the users of the common property driveway, and the proprietors of Lots 2 and 3, which lots face onto the common property driveway, by separating the common property driveway from the neighbouring parcel at 54 Cohn Street and affording privacy to the occupiers or proprietors of Lots 2 and 3. The common property fence is not connected in any way with Lot 1. He does not, therefore, enjoy, nor use the common property fence.
- 6) The carports of Lots 2, 3 and 4 each adjoin the common property driveway and the common property fence affords security and amenity to each of those lots.

- 7) Various occupiers of Lots 2, 3 and 4 use, or have used, parts of the common property driveway to park vehicles, including heavy duty vehicles and trucks.
- 8) He does not use or enjoy the airspace that is located more than 10 metres above the surface of the floor level of the building located on Lot 1. That airspace is vacant.
- 9) The collective use of the land located below the surface of the ground of the parcel is described as follows:
 - a) parts of the pipes and wires that deliver gas to Lot 1 are located under the surface of the land along the boundary between Lot 1 and the common property driveway;
 - b) the various pipes of the water system that deliver water to Lot 1 are located under the surface of the ground. That system, to the extent it services Lot 1, is located under parts of Cohn Street, the verge in front of the parcel and Lot 1 and is located less than 5 metres below the surface of the ground;
 - c) the various pipes of the water system that deliver water to Lots 2, 3 and 4 are partially located under the surface of the common property driveway;
 - d) the wires and parts of the National Broadband Network, to the extent it services Lot 1, are located under the surface of the ground of Lot 1 and less than 5 metres below the surface of the ground; and
 - e) the wires and parts of the National Broadband Network, to the extent it services Lots 2, 3 and 4, are located under the surface of the common property driveway.
- 10) The various pipes of the sewerage system servicing the parcel are located under the surface of the ground, approximately 1 to 2 meters below the surface level.

The part of the system which services Lot 1 is located under the surface of Lot 1.

- 11) He only benefits from the pipes that deliver gas to Lot 1 which are affixed to the land beneath the surface of the boundary between Lot 1 and the common property driveway for a distance of approximately 3 meters.

33 All of the witnesses attended the hearing to give oral evidence in order to elaborate on their summaries and to be cross-examined on their evidence.

34 Mr Weber, the fourth applicant, gave oral evidence in summary as follows:

- a) He has seen the first respondent walking on the driveway and using his gate to access the common property driveway. One occasion was when the first respondent came to speak to him about the first plumbing incident that had occurred on Lot 1. All of the owners contributed a $\frac{1}{4}$ share to that plumbing cost.
- b) In the last couple of years, the first respondent boarded up and nailed shut his gate that gives Lot 1 access to the common property driveway. This took place after a second plumbing incident had occurred at his Lot 4 and resulted in a dispute as the proprietor of Lot 1 was hesitant to contribute but then paid his $\frac{1}{4}$ share along with the other owners.
- c) Since the second plumbing incident his relationship with the first respondent is now nearly non-existent.

35 Dr Busi, the third applicant, gave oral evidence in summary as follows:

- a) He accepts that he cannot confirm whether the first respondent did or did not contribute a $\frac{1}{4}$ share to the cost of the second plumbing incident but he clearly recalls there was a dispute about the proprietor of Lot 1 refusing to pay a share of the plumbing costs.

- b) He clearly recalls that on more than one occasion, he completed the weed spraying for the remainder of the common property driveway because weeds had only been sprayed alongside Lot 1. He saw the effects of herbicides or weed spray having been applied to the weeds on the common property driveway alongside Lot 1 and concluded it had been done by the first respondent.
- c) Discussions had been held at more than one yearly strata meeting regarding the type of weed spray to use for the common property driveway and owners were requested to spray the entire common property driveway, if spraying for weeds adjacent to their lots.

36

Mrs Hutchison, the first applicant, gave oral evidence in summary as follows:

- a) She owns Lot 2 with her husband. They now have tenants occupying Lot 2. They had just moved out when the second plumbing incident had occurred at Lot 4.
- b) Her husband saw the first respondent use his gate to access the common property driveway to discuss with her husband the first plumbing incident which had occurred at Lot 1.
- c) She has seen the first respondent use the gate and common property driveway when they asked him to cut back his tree. They allowed the first respondent to use their skip for the tree branches. The first respondent used his gate to access the common property driveway to put his tree branches into the skip which was located on the front verge.
- d) The first plumbing incident at Lot 1 was resolved on amicable terms with all owners contributing a share to the costs. When the second plumbing incident at Lot 4 occurred, all owners agreed to chip in but the first respondent refused to contribute to a share of the plumbing costs, referring to by-law 16. She accepts he later paid his share of the costs.

- e) At the next strata meeting following the second plumbing incident the owners of Lots 2, 3 and 4 decided to contest by-law 16. The first respondent had said he was unable to attend that meeting. Since the dispute about the second plumbing incident, the first respondent has now not attended a number of strata meetings.
- f) When the neighbouring parcel at 54 Cohn Street was developed in around 2012/2013, the pavers towards the end of the common property driveway near Lot 4 shifted and now require maintenance and repair.
- g) The owners have had fencing contractors come out to give advice about the fence, but there is a dispute with 54 Cohn Street that needs to be resolved before the common property fence issue can be resolved. The pavers cannot be repaired until the fence is done.

37

Mr Canciullo gave oral evidence in summary as follows:

- a) He concedes he gets some irregular use from the common property driveway. His electricity and gas meters are located on the common property driveway alongside his boundary wall. All four water meters for the parcel are located at the truncation at the front of the common property driveway. He could potentially access his water meters from Lot 1 but he conceded that it was not practical and the best method of access was from the common property driveway.
- b) The window located on his boundary wall is a feature window to his living room that consists of opaque glass blocks that allow light to enter but only shadows to be seen, such that no window treatments are required.
- c) He has another gate he can use for access to his backyard on the other side of Lot 1; however he conceded that he could also use the gate alongside the common property driveway. He agreed he accessed this gate to talk to his neighbours when the first plumbing incident occurred on Lot 1. He also agreed he had boarded up the gate in the past couple of years and accepts he could use the gate if he so desired.

- d) He made a $\frac{1}{4}$ contribution to the costs of repairs for the second plumbing incident for neighbourly reasons not because he felt obliged to contribute.
- e) He disagreed that he, or Lot 1, benefitted from any security provided by the common property fence.
- f) He agreed in answer to a question in cross-examination that the common property fence was in 'serious disarray' and that he had taken photos from the street to show how it is leaning. When asked in cross-examination as to whether the strata company has put in an insurance claim for the common property fence, he answered that he is unaware of this.
- g) He was asked in cross-examination whether he was downplaying his interest in the common property in these proceedings in contrast with the interest he has shown in other proceedings which he has commenced in the Tribunal seeking to compel the applicants to repair and maintain the common property. His initial answer as to why he had commenced the other proceedings insisting work be done on the common property was that he was exempt by by-law 16. His second answer when pressed was that he has a legal liability and that is why he pays insurance.

Consideration

38 These proceedings arise out of conflict between strata proprietors who, not surprisingly, each recall his or her own version of the facts somewhat differently. The Tribunal finds that all of the witnesses were honest and largely candid in their evidence. The Tribunal finds that Dr Busi was a particularly reliable witness. Mr Weber, despite only somewhat recently purchasing his lot and having some recollection issues, was also of assistance to the Tribunal. Whilst Mrs Hutchison may have occasionally deviated from evidence into advocacy and Mr Canciullo veered occasionally into defending his self-interest and protecting his position, the Tribunal nonetheless found both witnesses to be honest in their evidence.

39 The Tribunal has noted the occurrence of the first and second plumbing incidents referred to by the witnesses for the purposes of background to the conflict and the dispute that has arisen causing these

proceedings to be commenced in the Tribunal. The Tribunal has insufficient evidence and makes no findings as to whether either incident involved common property.

40 Relevant to the exercise of the Tribunal's discretion whether or not to adjust the method of fixing contributions by the operation of by-law 16, is to consider that the proprietors of Lots 2, 3 and 4 bought their lots with an assumed knowledge of by-law 16 (even though they may not have actually personally read the information disclosed to them). It is also relevant to the exercise of the Tribunal's discretion whether or not to adjust the method of fixing contributions by the operation of by-law 16 to consider that the first respondent was partially motivated to purchase Lot 1 due to the favourable position that the proprietor of Lot 1 enjoys regarding contributions to the common property as a result of by-law 16.

41 Of note is that by-law 16 was validly enacted and such a by-law adjusting contributions to be other than by unit entitlement is permitted under s 42B of the ST Act. Also of note is that the applicants are entitled to bring their application seeking a further adjustment of contributions pursuant to s 99A of the ST Act.

42 The first respondent submitted that the Tribunal's consideration of use and enjoyment under s 99A(4) of the ST Act only applies to existing, not future proprietors and existing use, not potential use or any right to use common property. The Tribunal does not agree with or accept this submission as the Tribunal finds such a submission is contrary to the provisions of the ST Act.

43 Section 3 of the ST Act defines 'proprietor' as the person who is for the time being registered as the proprietor. Whilst the first respondent is the current proprietor of Lot 1, circumstances personal to the first respondent's use and enjoyment of the common property are not determinative for the Tribunal in having regard to the use and enjoyment of the common property by the proprietor of Lot 1 for the purposes of s 99A(4) of the ST Act. This is an objective assessment to be undertaken by the Tribunal, not a subjective assessment of the current proprietor's current use and enjoyment. Assessment of use and enjoyment is not confined to actual use by the current proprietor; it also includes the proprietor's right to use and enjoy the common property as permitted under the ST Act.

44 The Tribunal finds that consideration of the meaning of the phrase 'use and enjoyment' is understood by the ordinary meaning of the words as outlined above in the *Macquarie Dictionary Online* as read in their statutory context in s 99A(4) of the ST Act. Assessing such use and enjoyment must include consideration of property rights and obligations. The proprietor in a strata scheme does not only own his or her individual lot. Under s 17(1) of the ST Act, the proprietor of a lot is also a proprietor of the common property as a tenant in common in shares proportional to unit entitlement. Being a proprietor of the common property, whilst not determinative of the question to be determined under s 99A(4) of the ST Act, does in itself carry with it a level of use and enjoyment that should not be overlooked.

45 When by-law 16 was added to the existing Sch 1 by-laws of the strata company, the strata company could have perhaps alternatively, or in addition to by-law 16 also have attempted to formulate a special privileges, or exclusive use by-law under s 42(8) of the ST Act. An exclusive use, or special privileges by-law could have had the effect of:

- 1) retaining the obligation of Lot 1 to contribute to insurance;
- 2) the right of the proprietor of Lot 1 to access utility meters;
- 3) otherwise removing the right of the proprietor of Lot 1 to use and enjoy the common property; and
- 4) requiring the proprietors of Lots 2, 3 and 4 to have responsibility to manage the common property in order to maintain and keep it in good and serviceable repair.

46 The Tribunal finds that the proprietor of Lot 1 does have the use and enjoyment of all of the common property. As defined earlier in these reasons, this includes the land that is more than 5 metres below the surface of the ground and the airspace that is 10 metres above the upper surface of the floor level of the building on Lot 1. The Tribunal does not accept the subjective evidence of the first respondent that he personally does not have the use and enjoyment of the common property, that is, the airspace above 10 metres and the land below 5 metres.

47 As the common property driveway and common property fence are the two areas of the common property where the dispute has

principally arisen due to the requirement for repairs and maintenance, the Tribunal makes specific findings as follows regarding the use and enjoyment by the proprietor of Lot 1 of the common property driveway and common property fence.

48 The first respondent's evidence and submissions argued that:

- a) his opaque living room window on the boundary wall of Lot 1; and
- b) his boundary wall as well as his fence along the driveway with a gate that he has boarded closed,

together constitute a physical barrier between Lot 1 and the common property driveway such that he has no use and enjoyment of the common property fence.

49 An assessment of the first respondent's, or the applicants' subjective view of the first respondent's use and enjoyment of any of the common property is not the correct approach. The Tribunal finds the assessment of the extent of use and enjoyment of any of the common property by the proprietor of Lot 1, should be assessed objectively.

50 In his evidence and under cross-examination, the first respondent denied that he, unlike the proprietors of Lots 2, 3 and 4, derived any benefit or use and enjoyment from the common property fence. Counsel for the first respondent submitted that, as Mr Canciullo had denied any use and enjoyment in cross-examination, there was insufficient evidence before the Tribunal for it to find that the first respondent used and enjoyed the common property fence. The Tribunal cannot agree with this submission.

51 Relevant to the context of the use of the word 'fence' in these proceedings, the *Macquarie Dictionary Online* defines the noun 'fence' to be 'an enclosure or barrier, usually of wire or wood, as around or along a field, garden, etc'. The *Macquarie Dictionary Online* defines verb 'fence' to be 'to provide (a plot of land, etc.) with a fence or fences: to fence the garden' and 'to separate by, or as by, a fence or fences'.

52 Pursuant to the provisions of the Dividing Fences Act and the ST Act, the strata company (which includes the proprietor of Lot 1) has legal obligations to contribute to the construction and maintenance of the common property fence which divides 52 and 54 Cohn Street,

Carlisle: see s 32 and s 123(3)(b) of the ST Act and s 7 and s 14 of the Dividing Fences Act.

53 The Tribunal finds that the liability and discharge of a legal obligation to contribute to the construction and maintenance of the common property fence by the strata company (which includes the proprietor of Lot 1) objectively constitutes a use and enjoyment of the common property by the proprietor of Lot 1 for the purposes of s 99A(4) of the ST Act. Further, the Tribunal finds it would be unfair for the proprietors of Lots 2, 3 and 4, by the operation of by-law 16, to continue to be held responsible for the liability and discharge of the obligation of the proprietor of Lot 1 with regards to the common property fence.

54 The proprietor of Lot 1 has the use and enjoyment of the common property driveway in order to access the electrical, gas and water meters as well as any maintenance required to the built structure of Lot 1 (for instance the light, the wall, the window and the eaves) which sits on the boundary of Lot 1 and the common property driveway. Whilst the Tribunal acknowledges the alternative southern side and gate access from Cohn Street, the proprietor of Lot 1 also has the use and enjoyment of the common property driveway to access the back area of Lot 1 through the gate should it ever be required (which includes in an instance such as the tree lopping referred to by Mrs Hutchison and may include delivery of goods from a vehicle). However, whilst acknowledging that between them, Lots 2, 3 and 4 variably use and enjoy the common property driveway as occurs in many strata schemes (for instance, in relation to use and enjoyment of lifts and swimming pools) and does not affect contributions, the Tribunal does also find that the proprietor of Lot 1 uses and enjoys the common property driveway substantially less than the proprietors of Lots 2, 3 and 4.

55 Mrs Hutchison gave evidence that the common property driveway damage that requires repair of the shifted pavers near Lot 4 occurred because of the development of the neighbouring parcel at 54 Cohn Street in around 2012/2013. The Tribunal does not have any expert, or other evidence, to corroborate the opinion of Mrs Hutchison in this regard. Therefore, the Tribunal makes no findings as to why the common property driveway pavers have shifted and who would be liable to make repairs other than to note the overarching duty of the strata company in s 35(1)(c) of the ST Act to keep in good and serviceable repair and properly maintain the common property. However this possible reason, if correct, highlights an example of the

duty of the strata company (which includes Lot 1) which may have arisen as a reason separate to the extent of the use and enjoyment of the common property by any proprietor. A possible example such as the cause of the movement of the pavers, highlights, and is relevant to, the exercise of the Tribunal's discretion under s 99A(4) of the ST Act.

56 Section 99A(5) of the ST Act provides that an order made by the Tribunal under s 99A, to the extent of any inconsistency, will prevail over by-law 16 and the unit entitlement method in s 36(1)(c) of the ST Act.

Conclusion

57 In accordance with these reasons, the Tribunal concludes and finds as follows.

58 The Tribunal finds in all of the facts and circumstances, in the exercise of its discretion, that it is fair to all proprietors that the proprietor of Lot 1 is no longer exempt from any levy contributions for the control and management of the common property or any other obligation of the strata company in relation to the common property.

59 The Tribunal finds that adjusting the method of fixing contributions as suggested by the applicants to be in accordance with unit entitlement as provided under s 36(1)(c)(i) of the ST Act fails to fairly acknowledge the marked differing use and enjoyment of the common property driveway by the proprietor of Lot 1, as against the use and enjoyment by the proprietors of Lots, 2, 3 and 4. The Tribunal finds that it would be unfair to adjust the contributions in accordance with unit entitlement. The Tribunal also finds that having regard to its findings as to the use and enjoyment by the proprietor of Lot 1 of all of the common property, that it would be unfair to leave in place the contributions method prescribed by by-law 16.

60 Therefore, the Tribunal does find that some adjustment is required that the Tribunal considers is fair to all proprietors, other than the adjustment that was made by by-law 16. The Tribunal finds that the adjustment should occur due to the limited use and enjoyment of the common property driveway by the proprietor of Lot 1 with no adjustment for any other part of the common property.

61 However, in order to make any method of fixing the calculation for contribution to the common property fair and simple to follow the Tribunal finds that (apart from the cost of insurance which should

continue as per unit entitlement), the most sensible approach is an overall percentage adjustment.

62 The Tribunal finds, in the exercise of its discretion, it is fair and reasonable that (apart from insurance) the proprietor of Lot 1 has a reduction of contributions to common property from unit entitlement of 25% to 19%. The Tribunal finds that it is fair and reasonable to the proprietors of Lots 2, 3 and 4 that the proprietor of Lot 1 have an increase in contributions from the operation of by-law 16 from 0% to 19% contribution to the common property (apart from insurance).

63 Therefore, in accordance with the findings made by the Tribunal as to the use and enjoyment of the common property by the proprietor of Lot 1, the Tribunal finds in the exercise of its discretion by taking into account all of the facts and circumstances that a fair adjustment (apart from insurance) of fixing the method of contributions is 19% for Lot 1, with the remaining 81% to be divided evenly between Lots 2, 3 and 4 (being 27% each). The Tribunal finds that the lot proprietors should continue to apportion the cost of insurance as per unit entitlement.

Orders

Accordingly, the Tribunal will order as follows:

1. Pursuant to s 99A of the *Strata Titles Act 1985* (WA):
 - (a) The first respondent (the proprietor of Lot 1 located at 52 Cohn Street, Carlisle) is no longer exempt from any levy contributions for the control and management of the common property or the discharge of any other obligation of the strata company in relation to the common property.
 - (b) Other than the cost of insurance which is to continue to be contributed to in accordance with unit entitlement, the method of assessing contributions to be levied on the proprietors located at 52 Cohn Street, Carlisle, under s 36 of the *Strata Titles Act 1985* (WA) is 19% for Lot 1 and 27% each for Lots 2, 3 and 4 respectively.

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

MS D QUINLAN, MEMBER

13 FEBRUARY 2020