[2020] WASAT 45

JURISDICTION	**:**	STATE ADMINISTRATIVE TRIBUNAL
ACT	**:**	STRATA TITLES ACT 1985 (WA)
CITATION	**:**	DWORAKOWSKI and THE OWNERS OF 63 TEMPLE STREET VICTORIA PARK STRATA PLAN 26070 [2020] WASAT 45
MEMBER	**:**	MS R PETRUCCI, MEMBER
HEARD	**:**	9 MARCH 2020
DELIVERED	**:**	6 MAY 2020
PUBLISHED	**:**	6 MAY 2020
FILE NO/S	**:**	CC 1700 of 2019
BETWEEN	**:**	TOMASZ DWORAKOWSKI Applicant AND THE OWNERS OF 63 TEMPLE STREET VICTORIA PARK STRATA PLAN 26070 First Respondent BERNARDO DAVID MOYA Second Respondent JOY ANNE REBECCA JOHNSTON Third Respondent

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Catchwords:

Strata Titles Act 1985 (WA) - Strata scheme (single tier scheme) - Three-lot

scheme - Duties of strata company - Supply of information - Books of account - Statement of accounts - Settlement of a dispute - Common property - Keep in good and serviceable repair - Properly maintain - Liability for repair - General powers of Tribunal to make orders - Turns on own facts

Legislation:

State Administrative Tribunal Act 2004 (WA), s 15
Strata Titles Act 1985 (WA), s 3(1), s 17(1), s 32, s 35, s 36, s 42(2), s 42(4), s 42(8), s 43, s 43(1a), s 43(1)(b)(ix), s 47, s 47(1), s 77B, s 81(1), s 83, s 83(1)
Strata Titles General Regulations 1996 (WA), reg 29

Result:

Partially successful
Order made pursuant to s 83(1) of *Strata Titles Act 1985* (WA)
Otherwise application dismissed pursuant to s 81 of *Strata Titles Act 1985* (WA)

Category: B

Representation:

Counsel:

Applicant	:	In Person
First Respondent	:	No appearance - excused
Second Respondent	:	In Person
Third Respondent	:	In Person

Solicitors:

Applicant	:	N/A
First Respondent	:	N/A
Second Respondent	:	N/A
Third Respondent	:	N/A

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

Banning and The Owners of Terrace Place Strata Plan 9704 [2019] WASAT 89
Clark and The Owners of Waterfront Mews Strata Plan 14082 [2011] WASAT 110

Drexel London (a firm) v Gove (Blackman) [2009] WASCA 181
Gawor and The Owners of Dawesville Caravan Park Strata Plan 14644 [2015] WASAT 60
Sisto and The Owners of Glenway Gardens Apartments [2005] WASAT 282
Stann and The Owners of Beau Vista Strata Plan 12008 [2012] WASAT 227
The Owners of Mandurah Terrace Apartments Strata Plan 17133 and Russell [2009] WASAT 1
Trevallyn-Jones v Owners Strata Plan No 50358 [2009] NSWSC 694
Wong v Reid [2016] WASC 59

REASONS FOR DECISION OF THE TRIBUNAL:

Introduction

1 Mr Thomasz Jacek Dworakowski (**owner** or **Mr Dworakowski**) has brought proceedings in the Tribunal pursuant to s 83(1) of the *Strata Titles Act 1985* (WA) (**ST Act**).

2 Mr Dworakowski is the registered proprietor of Lot 2 on Strata Plan 26070 (**strata plan**). The relevant strata scheme is located at 63 Temple Street, Victoria Park and is described in the strata plan as follows:

> Three single storey units of brick and iron construction situated on portion of Swan Location 36 and being Lot 821 on Plan 4377(4) as contained in Certificate of Title Volume 1767 Folio 876.

3 The first respondent is the strata company of The Owners of the 63 Temple Street, Victoria Park Strata Plan 26070 (the **strata company**). The strata company did not participate in these proceedings. The second respondent is Mr Bernardo David Moya who is the registered proprietor of Lot 1 (**Mr Moya**). Finally, the third respondent is Ms Joy Anne Rebecca Johnston who is the registered proprietor of Lot 3 (**Ms Johnston**).

4 In his application to the Tribunal of 5 November 2019, as amended on 13 December 2019 (**amended application**), Mr Dworakowski complained that the strata company's bank statements and invoices **(bank statements and invoices)** and independently audited financial records for the past five financial years had not been made available to him for inspection. Further, Mr Dworakowski complained that the strata company had failed to reimburse him $505 that he had paid to Hilton Plumbing & Electrical (**HPE**) for tax invoice INV-12737 dated 7 December 2018 (**HPE invoice**). Mr Dworakowski alleged that on 3 December 2018 HPE found the blockage to be caused by a broken section of the strata company's main drainage pipe and was not caused by, or was not specific to any lot and that significant remedial work would be required to repair the broken section of pipe.

5 The orders sought by Mr Dworakowski under s 83(1) of the ST Act were stated in his amended application as follows:

> 1. The Respondent [strata company] make available for inspection by the Applicant true copies of the Respondent's [strata company's] bank statements and independently audited financial

records for the five (5) most recent financial years, together with true copies of invoices evidencing all moneys expended by the Respondent [strata company] over the same period.

2. The Respondent [strata company] pay to the Applicant the sum of $505.00 in reimbursement of the tax invoice issued by Hilton Plumbing & Electrical on 7 December 2018 (invoice number 12737).

6 Mr Dworakowski's application falls within the Tribunal's original jurisdiction (s 15 of the *State Administrative Tribunal Act 2004* (WA) (**SAT Act**)).

7 Mr Moya and Ms Johnston oppose Mr Dworakowski's application.

8 The application proceeded in the Tribunal on the basis that the standard by-laws apply, that is, the provisions set out in Sch 1 and Sch 2 applied to the strata scheme: s 42(2) of the ST Act (**by-laws**).

9 In these reasons, in order to avoid unnecessary repetition, all legislative references are to the ST Act unless expressly stated otherwise.

Relevant procedural history and documents before the Tribunal

10 The matter was heard on 9 March 2020, following which the Tribunal reserved its decision.

11 Mr Dworakowski and Ms Johnston attended the hearing in person and gave their respective oral evidence. Mr Moya attended the hearing by telephone and gave his oral evidence. They were all self-represented. No party called any witnesses. Each party asked questions of the other parties and answered questions put to them by the other parties and by the Tribunal.

12 In accordance with the Tribunal's usual practice in matters of this nature, the hearing was conducted on the basis that all of the documents filed with the Tribunal would be regarded as being in evidence, subject to any proper objection. The Tribunal prepared a hearing book (Exhibit 1) which included:

- Mr Dworakowski's application dated 5 November 2019 (as amended by the document titled 'Statement Of Amended Orders Sought' dated 13 December 2019) which included a copy of the Strata Plan, the Certificate of Title for each of Mr Dworakowski's,

Mr Moya's and Ms Johnston's respective strata lots and the s 77B certificate;

- the HPE invoice;
- tax invoice 8861 dated 20 March 2019 for $396 by On Tap Plumbing & Gas Pty Ltd (**On Tap**);
- various emails between Mr Dworakowski, Mr Moya and Ms Johnston;
- a letter dated 26 March 2019 from WFI Insurance Limited, the strata company's insurer, (**WFI Insurance Limited**) to the strata company declining the claim for the sewerage pipes as they are not covered under the strata company's Residential Strata Plan, Building and common contents policy;
- letters dated 8 April 2019, 1 May 2019 and 7 May 2019 from Procopio Legal on behalf of Mr Dworakowski to the strata company;
- a letter dated 18 April 2019 from Procopio Legal on behalf of Mr Dworakowski to Ms Johnston;
- letters of reply dated 9 April 2019 and 7 May 2019 from Ms Johnston to Procopio Legal;
- a letter of reply dated 22 April 2019 from Ms Johnston and Mr Moya to Procopio Legal;
- a written response of Ms Johnston dated 10 January 2020 in reply to Mr Dworakowski's application with supporting documents; and
- a written response of Mr Moya undated (but received by the Tribunal on 10 January 2020) in reply to Mr Dworakowski's application with supporting documents.

13 At the hearing, Ms Johnson handed up an email dated 27 April 2019 which was from herself to Mr Dworakowski and Mr Moya (Exhibit 2).

14 Neither party raised any objection regarding the admission of the exhibits into evidence. The Tribunal therefore accepted both exhibits into evidence.

15 Next, the Tribunal sets out the issues to be determined in this matter.

Issues to be determined

16 In relation to the orders sought by Mr Dworakowski under s 83(1), as set out earlier, the Tribunal identified the following issues to be determined:

> (a) Did the strata company wrongfully fail to make available to Mr Dworakowski to inspect, copy or make an extract of the bank statement and invoices for the five most recent financial years? If the answer is 'No', can the Tribunal make the order sought under s 83(1) in any event?;
>
> (b) Does the Tribunal have jurisdiction to order the strata company to have its financial records for the five most recent financial years audited independently and to then make the same available to Mr Dworakowski to inspect, copy or make an extract of? If the answer is 'Yes', should the Tribunal make the order sought under s 83(1)?; and
>
> (c) Does the Tribunal have jurisdiction to order the strata company to reimburse Mr Dworakowski for the HPE invoice? If the answer is 'Yes', should the Tribunal make the order sought under s 83(1)?

17 Before considering the issues to be determined, the Tribunal will set out the relevant statutory provisions which it is required to apply, followed by a summary of each party's contentions.

Relevant statutory provisions

18 Section 83 sets out the general powers of the Tribunal to make orders. Section 83(1) provides that the Tribunal:

> [*M*]*ay* … make an order for the settlement of a dispute, or the rectification of a complaint, with respect to the exercise or performance of, or the failure to exercise or perform, a power, authority, duty or

> function conferred or imposed by this Act or the by-laws in connection with that scheme[.]
>
> (Emphasis added)

19 Section 83(1) does allow the Tribunal to determine issues in dispute between parties, provided the Tribunal's order is 'for the settlement of a dispute' (or the rectification of a complaint), the dispute (or complaint) being one relating to (relevantly) 'the failure to exercise … a power … duty or function conferred or imposed by (the) Act or the by-laws … on any person entitled to make an application under this subsection', which includes the proprietor of a lot on the strata plan. Importantly, the purpose of the Tribunal's order must be to settle a dispute about the exercise of, or failure to exercise a power, duty or function by (in this case) the strata company. Therefore, in considering the application, the Tribunal must take account of the requirements of the ST Act, the by-laws and all relevant information related to the application. Hence, the discretion in s 83(1) is that the Tribunal *may* make an order.

20 The requirement for the strata company to maintain books of account (s 35(1)(f)) and statements of account (s 35(1)(g)) does not apply for a three-lot strata scheme, but only if the strata company has by resolution without dissent, made a by-law to that effect and that by-law has effect under s 42(4) (s 36B(1)). No such resolution has been made in this case. Therefore, s 36B(1) has no application in this case.

21 The strata scheme in this case is a 'single tier strata scheme' as defined in s 3(1) because no part of any lot is above or below another lot. Further, as there are not more than five lots and as the strata plan was registered on 11 March 1994, that is, before 1 January 1998, it is an 'existing small strata plan'.

22 The 'common property' of the strata scheme is that part of the land (and improvements to it) which is not comprised in the lots on the strata plan (per the definition of 'common property' in s 3(1)). In this case, it is common ground that the inspection shaft and the main drainage pipe are 'common property' of the strata company. Section 17(1) provides that the common property shall be held by the proprietors as tenants in common in shares proportional to the unit entitlements of their lots under the strata scheme.

23 Upon registration of a strata plan, the proprietors constitute a strata company, which is a body corporate (s 32). Where there are not more than three proprietors, as is the case here, the council of the strata company consists of the three proprietors (Sch 1, by-law 4(3) and the quorum of the council is two members (Sch 1, by-law 11).

24 The strata company has responsibility to enforce the by-laws and to control and manage the common property for the benefit of all the proprietors (s 35(1)(a) and (b)). Further, s 35(1)(c) imposes an obligation on the strata company to:

> keep in good and serviceable repair, properly maintain and, where 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 vested in the strata company,
>
> and to do so whether damage or deterioration arises from fair wear and tear, inherent defect or any other cause[.]

25 In order for the strata company to undertake work for the control and management of the common property, the strata company is required to raise levies, and determine from time to time the amount to be raised for the control and management of the common property. Section 36 governs the basis upon which a levy can be raised against proprietors to establish a fund for administrative expenses sufficient for the control and management of the common property, payment of insurance premiums and the discharge of any other obligations of the strata company. By virtue of s 36(1)(c), the amount raised must be in proportion to the unit entitlements (refer to s 17(1) as discussed above), or in accordance with a by-law or an order made by the Tribunal.

26 Finally, there is an expenditure limit placed on the council of the strata company by s 47(1), which, pursuant to reg 29 of the *Strata Titles General Regulations 1996* (WA) (**ST Regs**), is currently limited to $65 per lot. There are exceptions and qualifications to that limit in other sub-sections of s 47, however, they are not relevant in this case.

27 The Tribunal turns, next, to the contentions of the parties.

Contentions of the parties

28 In summary, Mr Dworakowski contended:

- After he lodged his application with the Tribunal, the strata company provided to him the bank statements and invoices. However, he still has not been given the opportunity to inspect the strata company's independently audited financial records for the five most recent financial years and is therefore still seeking the order from the Tribunal.

- The plumbing/drainage blockages started in January 2018. Each proprietor attended to their respective lot's plumbing/drainage blockages until they all thought the problem was with the Water Corporation's mains (ts 19, 32 and 70, 9 March 2020).

- The strata company paid for the call outs in January and April 2018 to clear the blockages.

- On 16 November 2018, the tenant of his lot requested a plumber because there appeared to be a blockage. The following morning the tenant cancelled the call out stating that 'It's running'.

- On 3 December 2018, he called out HPE. He initially wanted to send the camera down the inspection shaft to see, once and for all, if there was any fault in the plumbing of his lot (ts 30, 9 March 2020). The camera inspection involved sending a 'worm' with the camera on the end down the inspection shaft which is about 1.3 metres deep and is connected to all three lots. This was the first time the camera was put down the inspection shaft (ts 32, 9 March 2020). The camera inspection can only be done via the inspection shaft which is common property and is located on, and can only be accessed from Ms Johnston's lot. He did not ask prior permission of the strata company (ts 20, 9 March 2020). HPE sent the camera down the inspection shaft and found a breakage in the drainage pipe (ts 20, 9 March 2020). HPE also ran a jetter down the drainage pipe to clear it but was unable to clear the roots.

- HPE told him that because a plumber had cleared the blockage just a month before there was no way that the

blockage could have happened so quickly so they proceeded to find the inspection shaft (ts 28, 9 March 2020). The purpose of putting the camera down the inspection shaft was to see if there was any blockage to Lot 2 but HPE did not get that far because they identified the blockage in the inspection shaft part (ts 31, 9 March 2020). The inspection shaft was blocked and causing stagnant water and debris to pile up (ts 35, 9 March 2020). HPE did not carry out any work on Lot 2 (ts 30, 9 March 2020), rather they concluded on 3 December 2018 (page 154 of Exhibit 1):

> During our inspection and after discussions with the [Water Corporation], we can confirm our suspicions that the shared "inspection shaft" entry into the mains is compromised. This is causing the area to hold water and increase the likelihood of a blockage.

- What was compromised is not stated by HPE in their invoice, however, the 'compromisation' could be anything from roots to the breakage to the main drainage pipe not flowing properly because of debris stuck in that portion of the pipe (ts 51, 9 March 2020). The inspection shaft was blocked and was cleared by HPE using a 'large drain machine down the inspection [shaft]' (page 125 of Exhibit 1).

- The blockages were common blockages that were affecting his property, as in the past 12 months he has spent money 'unplugging' and sending the jet wash down the pipeline and as such would probably have been dislodging the main drainage pipe. He was not aware the actual culprit was the main drainage pipe until HPE inspected the inspection shaft (ts 24-25 and 31, 9 March 2020). It was not his property that caused the problem, the problem had been caused by the inspection shaft and the main drainage pipe.

- He presented the HPE invoice, which he had paid, to the strata company in or about mid December 2018. He incurred the HPE invoice for the benefit of all the proprietors. His proactive approach saved the strata company from ongoing plumbing costs to clear blockages without identifying the cause of the problem

which up to that point no one had identified (ts 27, 9 March 2020).

- On 20 March 2019, he engaged On Tap to inspect the main drainage pipe to determine the cause of the blockages. He received tax invoice 8861 for $396 and it stated that it had found a blockage at Lot 3 (**On Tap invoice**). Subsequently, on 25 March 2019, Ms Johnston emailed On Tap seeking to have invoice 8861 amended without his knowledge or consent. On Tap declined Ms Johnston's request to amend that invoice. On 27 March 2019 Mr Moya agreed for the On Tap invoice to be paid by the strata company. That was confirmed by Mr Moya in his email of 7 June 2019 (page 180 of Exhibit 1). He was reimbursed for the On Tap invoice sometime in late June 2019. He was given the choice as to whether the strata company reimbursed him or whether Mr Moya and Ms Johnston paid him privately. He said he thought it would be better to clear the On Tap invoice privately as the strata company was strapped in terms of paying cash, and there is a difficulty in paying because there was only a cheque account at the moment (ts 25, 9 March 2020).

- The HPE invoice and the On Tap invoice relate to the same problem concerning the inspection shaft and the main drainage pipe.

- On 5 April 2019 WFI Insurance Limited advised that the cost of the work to repair the broken section of the main drainage pipe was not covered under the strata company's insurance policy.

- There was no pattern by which expenses were paid for by the strata company. Rather, 'things get agreed on the fly' and in the past 20 years he and Mr Moya communicated where sometimes they agreed to an expense before it was incurred, sometimes it was after (ts 71, 9 March 2020).

- The inspection shaft which HPE identified to be the problem was physically replaced in June 2019 (ts 51, 9 March 2020).

29 In summary, Mr Moya and Ms Johnston contended:

- Mr Dworakowski was supplied periodically with the reconciliation spreadsheet for the strata company's account and by email (more recently, via a shared drop box) copies of all accounts, invoices, bills and bank statements showing deposits and withdrawals as well as account transactions and balances. Mr Dworakowski accepted the method and format of the accounts without complaint for 20 years. The accounts have been managed by successive proprietors, most recently by Mr Moya, on a cash accounting basis.

- The spreadsheet, bank statements and invoices together provide the necessary information to give a true and fair view of the strata company's financial affairs. All accounts that are agreed by the majority (of proprietors) to be an expense have been included in the accounts and shown in the reconciliation spreadsheet.

- The budget for the strata company had recently increased to $3,000 per annum for strata fees (or $1,000 per annum per lot). The increase was to cover increased insurance costs and to provide for a small buffer fund. The budget and accounts have always consisted of contributions to the strata company and by four recurring payments for insurance, lawn moving, water and bank fees (no longer payable). There have been nine one-off payments to cover fence repairs, landscaping, meter replacement and plumbing. Plumbing expenses have totalled $7,044 over the past 21 years (or about $336 per annum).

- In January and April 2018, the strata company paid for two plumber call outs. At that time all three lots were experiencing blockages (ts 36, 9 March 2020). Ms Johnston in her email to Mr Moya and

Mr Dworakowski on 27 April 2018 (Exhibit 2) stated in part:

> As you know, we all had an unfortunate sewerage/drainage blockage in late January this year and called a plumber to clear it.
>
> The blockage took about a week to work its way from the occasional gurgling and throwing water back up into the toilets and showers to not draining out at all[.]
>
> … The plumber was very clear to me, at the time, that the blockage was not in the units but was in the mains and I agreed to the account being charged to the strata company as it was a mains issue that was affecting all of the units.

- The 'mains' referred to in Ms Johnston's email of 27 April 2018 was the Water Corporation's mains (ts 57-58, 9 March 2020).

- In January 2018 Mr Dworakowski called for a plumber because the toilets on his lot were overflowing. Neither Mr Moya nor Ms Johnston approved the call out. However, they were also having blockages as Ms Johnston told the plumber 'I've got the same problem' (ts 69, 9 March 2020). The plumber checked the lots but found no blockages (ts 36, 9 March 2020), but rather the 'mains' was blocked and the plumber pumped it out (ts 37, 9 March 2020). On the day of the call out Ms Johnston approved for the plumber to be paid by the strata company (ts 70, 9 March 2020). Mr Moya explained that they agreed orally for the strata company to pay the January 2018 plumbing invoice (ts 70, 9 March 2020).

- In April 2018 there were similar 'backup problems' but not as bad as the blockages in January 2018 (ts 42, 9 March 2020, page 2 of Exhibit 2). For this call out, both Mr Dworakowski and Ms Johnston agreed before the plumber was called out (ts 65-66, 9 March 2020). The plumber said the blockage was caused by the strata company's connection to the mains (ts 37, 9 March 2020). All proprietors were made aware of the problem and agreed not to call out another plumber but

rather to pursue options to have the connection to the Water Corporation's mains repaired.

- An employee of the Water Corporation attended the strata complex in April 2018 and put a camera down the inspection shaft (ts 38, 9 March 2020). That employee told the resident at Ms Johnston's lot that the blockage was further down the line but that they could not reach it as they could not access it. But when Ms Johnston telephoned the Water Corporation, she was told that the problem was not the Water Corporation's mains but rather where the strata company's pipes join to the mains (ts 39, 9 March 2020).

- The strata company paid the January and April 2018 call outs on the basis that the problem identified was the 'entry point to the mains' (page 148 of Exhibit 1).

- By the end of April/beginning of May 2018, the proprietors agreed to 'do something and we would find out the best way of doing it' (ts 63, 9 March 2020). The first step they agreed was to approach WFI Insurance Limited (ts 63, 9 March 2020).

- The email from HPE dated 3 December 2018 does not say how the entry into the mains was 'compromised'. The term 'compromised' does not mean blocked. Rather, 'compromised' could mean slowed or something else. Further, HPE did not state that the entry into the mains caused the blockage (ts 49, 9 March 2020).

- At no point was it made clear by Mr Dworakowski that HPE was carrying out work on behalf of the strata company (ts 33, 9 March 2020).

- The plumbing services provided by HPE on 3 December 2018 did not provide any additional contribution to the management and control of the common property for the benefit of all the proprietors. There was no blockage and the main drainage pipe retained water until it was replaced (ts 52, 9 March

2020). On 3 December 2018, there was no emergency requiring a plumber.

- By December 2018 the proprietors were already trying to progress things. Ms Johnston tried getting a response from Mr Dworakowski as to moving forward, but she had 'been put off at every turn' (ts 72, 9 March 2020).

- Mr Moya was confused as to why Mr Dworakowski would call for a camera inspection which was not possible to do from his lot (ts 75, 9 March 2020). There was no benefit to the strata company from the HPE invoice because Mr Dworakowski told them that they could not use the HPE report (being the HPE invoice and photographs) (ts 72, 9 March 2020).

- Mr Dworakowski wanted to the resolve the issue for his lot so there is no justification for the strata company having to pay for the HPE invoice and in any event they were threatened with legal action if they used the information from HPE (ts 75, 9 March 2020).

- There was no need for a camera inspection to pinpoint the problem when the proprietors knew there was an issue between the mains and their main drainage pipe (ts 72, 9 March 2020) and they had agreed in January 2019 to undertake the repair work (page 99 of Exhibit 1). In any event, when a plumber is called out for a quote, the plumber 'puts a camera down to be sure what needs fixing' (ts 72, 9 March 2020).

- On Tap inspected the inspection shaft on 20 March 2019 and found it was blocked and cleared it. Ms Johnston stated that she believed the wording on On Tap's invoice was incorrect as it referred to a blockage at her Lot 3, which she refuted, and therefore contacted On Tap directly to have the invoice corrected. On Tap did not change the invoice, however, in their email of 26 March 2019 On Tap confirmed that Lot 3 did not cause the blockage. Further, On Tap's email stated in part (page 100 of Exhibit 1):

> He has looked at the inspection shaft which was located on unit 3's property and noticed this was also blocked. This is the inspection shaft for the complex not one unit. He has cleared the blockage from the main inspection shaft that was located at unit 3. The blockage was not caused by unit 3 the main inspection shaft is located in unit 3's garden.

- In the interests of goodwill and to secure agreement to proceed with the repairs they agreed to share the On Tap invoice for $396 (ts 75, 9 March 2020).

- The strata company has a general rule that if an issue affects all lots in some way, or concerns common property, then it is a strata company issue. Even if it is a strata company issue, the approval of all the proprietors is required for any expense to be incurred (page 107 of Exhibit 1). However, in the event of a dispute in respect of either the service provider to be engaged or the service being contracted, a majority vote (2 out of 3 of the proprietors) is required to proceed. Mr Moya stated the he did 'not know there's an agreement' (ts 64, 9 March 2020). Mr Moya said there was no documented agreement but rather it was a reflection of norms (ts 64, 9 March 2020) and that:

> … we had always come to the conclusion that if two of the people agree, then we go ahead with it as a strata expense. So I think - I mean, I can't think of a particular example, but I know between Tomasz and myself, back then, we had quiet an old person in unit 3, so for the most part, if Tomasz and I were in agreement with a certain expense, we would just push it through.

- Ms Johnston explained that in the past the strata company has always taken a majority decision, provided the discussion was held before the item was expended (ts 47, 9 March 2020). Mr Dworakowski did not seek the prior agreement of at least two lot proprietors before engaging HPE. He engaged HPE outside the agreed process (page 227 of Exhibit 1) and it was additional to the intended expenditure to repair the main drainage pipe. Ms Johnston stated that the camera inspection was booked by Mr Dworakowski with the intent of charging it to the strata without first

contacting the other proprietors (page 227 of Exhibit 1).

- Mr Moya agreed to the repairs to be undertaken by JP Plumbing and Hydraulic Services for $2,200 in January 2019 and Mr Dworakowski agreed in May 2019 (ts 74, 9 March 2020). The scope of the works was to 'excavate and replace a section of 100mm drain causing root intrusion into the drain adjacent to the inspection shaft' (page 184 of Exhibit 1). Ms Johnston described the repairs as (ts 73, 9 March 2020 and page 85 of Exhibit 1):

> The actual part where it - if this is the mains and this is our part that goes into it, the pipe had slipped. So it was causing things to slow, and if there was a lot of toilet paper and stuff, I guess, it was building up and blocking. And as it happens, the pipes were also not level so they were holding water. The pipe that went back up to the houses were holding water.

- The reason Ms Johnston gave for doing a camera inspection in June 2019 was (ts 73, 9 March 2020):

> Because the first one was inconclusive. It didn't provide us with the location of any break or any crush or whatever. It was not useful. And so they do the camera inspection because they want to make sure they've done the right thing. They replaced all the pipes in the common area right back to where the joins go to the houses, and they levelled everything. And they put extra reinforcement around it so that it wouldn't slip again.

- Mr Dworakowski's is currently $600.67 in arrears (page 235 of Exhibit 1). He has refused to pay this until a decision is made on this matter (ts 33, 9 March 2020).

30 Having set out the contentions of the parties, the Tribunal turns, next, to consider the issues.

The Tribunal's consideration

31 The Tribunal will first consider the issues concerning the inspection of documents.

Inspection of documents

32 At the hearing Mr Dworakowski said that after he had lodged his application with the Tribunal, he had been provided the bank statements and invoices, however he was still waiting to inspect the independently audited financial records for the five most recent financial years. Mr Dworakowski conceded that he had not, prior to his application to the Tribunal, put in writing to the strata company that he wanted to inspect the bank statements and invoices and the independently audited financial records.

33 Mr Moya explained that he distributed to each proprietor the statements of account of the strata company on an annual basis, which comprised the cash flow and a running tally of all strata fees paid since 1995. He understood this to be the method of maintaining an audit of the accounts. Mr Moya said that any accounting errors identified by Mr Dworakowski and Ms Johnston and which were brought to his attention were corrected. According to Mr Moya, the balance of the strata company's account has always been aligned with the corresponding bank statement. In respect of the strata company's assets and liabilities, Mr Moya explained there is just one asset, the bank account and that there are no liabilities.

34 It is not necessary for the Tribunal to further consider Mr Dworakowski's application to inspect the bank statements and invoices. This is because Mr Dworakowski conceded that they had been provided to him. However, there is still the issue of the independently or formally audited financial accounts.

35 Mr Moya and Ms Johnston stated that the accounts of the strata company had not been independently audited. Further, they explained that it was their understanding that the ST Act does not require the accounts of the strata company to be independently audited. The Tribunal respectfully agrees. There is no requirement in the ST Act or the by-laws that imposes an obligation on the strata company to have its books or statement of accounts formally audited. That does not mean that a strata company cannot have its accounts formally audited. Many strata companies, for example those responsible for large strata complexes do have their accounts audited formally and provide the auditor's report to the proprietors.

36 If there are formally audited financial accounts of a strata company, then a proprietor may seek to inspect those audited accounts

pursuant to s 43(1)(b)(ix). It will of course be incumbent on the proprietor to put his or her request to inspect those documents in writing to the strata company (s 43(1a)) and to meet any other relevant requirements of the ST Act. Importantly, the strata company is not compelled by s 43(1a) to provide the proprietor with a copy of any document within s 43(1)(b)(ix). This was explained by the Tribunal in ***Gawor and The Owners of Dawesville Caravan Park Strata Plan 14644*** [2015] WASAT 60 in the context of s 43(1)(b)(ix) which deals with 'any other record or document in the custody or under the control of the strata company', as follows at [11]:

> Section 43(1)(b)(ix) of the ST Act compels a strata company to make available for inspection 'any other records or documents in the custody or control of the strata company', relevantly, to a lot proprietor when that person makes a written request for access. Section 43(5) of the ST Act permits the person for whom the inspection is provided, or that person's agent, to either copy the document (but not take it away for copying) or make an extract of that document. Section 43(1a) of the ST Act confers a discretion on the strata company to provide a copy of such a document to a lot proprietor who makes a request. The strata company is not compelled by s 43(1a) of the ST Act to provide the lot proprietor with a copy of any document within s 43(1)(b)(ix) of the ST Act.

37 The Tribunal concludes that the amended order sought by Mr Dworakowski on 13 December 2019 where he sought an order under s 83(1) requiring:

> The Respondent [strata company] make available for inspection by the Applicant [Mr Dworakowski] true copies of the … independently audited financial records for the five (5) most recent financial years[.]

is misconceived because he had failed, prior to lodging his application with the Tribunal, to put in writing to the strata company his request to inspect those records of the strata company as required by s 43(1). Further, and in any event, the evidence before the Tribunal is that there are no formally audited financial records of the strata company and therefore the strata company has not wrongfully failed to make available those documents and as those documents do not exist, they cannot be provided to Mr Dworakowski for his inspection. Importantly, as noted earlier, there is no requirement in the ST Act or the by-laws which requires the financial accounts of the strata company to be formally audited. Whether the strata company should incur the expense of an audit of its financial accounts is a matter entirely for the members of the strata company to determine in general meeting:

Sisto and The Owners of Glenway Gardens Apartments [2005] WASAT 282 at [48]. The management of the strata company is best left to the strata company and the Tribunal should not too readily impose its own view on what the strata company should do: ***Banning and The Owners of Terrace Place Strata Plan 9704*** [2019] WASAT 89 at [73]. In this matter, there is no basis for the Tribunal to interfere with the operations of the strata company.

38 In summary, in respect of each of the issues identified in respect of the inspection of documents, the Tribunal determines as follows:

(a) Did the strata company wrongfully fail to make available to Mr Dworakowski to inspect, copy or make an extract of the bank statement and invoices for the five most recent financial years? The Tribunal answers 'No' as Mr Dworakowski conceded that the strata company provided to him the bank statements and invoices.

(b) Does the Tribunal have jurisdiction to order the strata company to have its financial records for the five most recent financial years audited independently and then to make the same available to Mr Dworakowski to inspect, copy or make an extract of? The Tribunal answers 'No'. Further, and in any event, the Tribunal cannot make the order sought under s 83(1) because there are no independently or formally audited financial records.

39 The Tribunal turns, finally, to consider the issues raised concerning the HPE invoice.

HPE invoice

40 It appears that prior to these proceedings, the proprietors were getting along as Mr Moya stated in his email of 5 January 2019 that, 'I really don't want to drag this into a fight within the strata. For the most part we've all been pretty easy to get along with, so let's see if we can't find a reasonable compromise' (page 85 of Exhibit 1). Further, Mr Moya expressed in his email of 26 March 2019 that, 'We need to work together efficiently since we are only 3 people here, and not being [in the] country also makes it hard for us all to sit down and talk - so we

do need time and tolerance to resolve our issues online' (page 97 of Exhibit 1).

41 Unfortunately the proprietors were not able find a reasonable compromise which resulted in Mr Dworakowski making his application under s 83(1) to the Tribunal seeking an order to require the strata company to reimburse him $505 for the HPE invoice. The invoice reads (page 31 of Exhibit 1):

Description	**Quantity**	**Unit Price**	**GST**	**Amount AUD**
3/12/18 - Attended site and carried out the following works				
- Conduct camera inspections of ISRS, Found water holding water	1.00	505.00	10%	505.00
- Ren jetter down line, approx. 20m and unable to clear and inspect further				
-Provide report and findings				
		INCLUDES GST 10%		45.91
		TOTAL AUD		**505.00**

42 Section 83 sets out the general powers of the Tribunal to make orders and that s 83(1) does allow the Tribunal to determine issues in dispute between parties, provided that the Tribunal's order is 'for the settlement of a dispute', the dispute being one relating to 'the exercise of, or failure to exercise a power … or function conferred or imposed by the [ST] Act or the by-laws …on any person entitled to make an application under this subsection' which includes the proprietor of a lot on the strata plan. In considering the application, the Tribunal must take account of the requirements of the ST Act, the by-laws and all relevant information related to the application.

43 Mr Dworakowski is the proprietor of Lot 2 and is therefore entitled to make an application under s 83(1). Further, there is a dispute between Mr Dworakowski and the strata company whereby Mr Dworakowski asserts that the strata company is required to reimburse him for the HPE invoice. However, before the Tribunal can consider making an order under s 83(1) it must be satisfied that the

dispute between the parties concerns or relates to the exercise of, or failure to exercise a power or function imposed by the ST Act or the by-laws.

44 Although not clearly articulated by Mr Dworakowski in his application to the Tribunal, at the hearing Mr Dworakowski asserted that the strata company is required to reimburse him the HPE invoice because it had failed in its duty to keep in good and serviceable repair and properly maintain the common property being the inspection shaft and the main drainage pipe as required by s 35(1)(c). In support of his assertion, Mr Dworakowski relied on his lawyer's letter to the council of the strata company dated 1 May 2019 (page 139 of Exhibit 1) and the HPE invoice of 3 December 2018 where Mr Clint Hancock of HPE explained (page 154 of Exhibit 1):

> During our inspection and after discussions with the Water [Corporation], we can confirm our suspicions that the shared "inspection shaft" entry into the mains is compromised. This is causing the area to hold water and increase the likelihood of a blockage.

45 In addition, Mr Dworakowski relied on Mr Hancock's description of the scope of the repairs which included 'Hand [excavate] main S.O.B shaft to main stubb' and 'Replace all pipework from mains stubb to riser' (page 154 of Exhibit 1).

46 The above scope of repairs is included by Ms Johnston in her email of 20 March 2019 to WFI Insurance Limited as follows (page 114 of Exhibit 1):

> Blocked access to the mains sewerage pipe.
>
> Crushed pipe or slipped connection at the mains pipe has been reported as the issue by three independent plumbing services.
>
> The damaged pipe area appears to be on the other side of the fence, outside the strata owners properties, but the Water Corporation report that it is not a mains issue. We are at a loss as to how the pipe may have been damaged.

47 It is common ground that each of the lots had suffered blockages from time to time. Mr Moya stated that his lot had drainage issues/blockages on and off for years but that he had 'not called on strata but just dealt with it' (page 8 and note 16 on page 230, Exhibit 1). Mr Dworakowski stated that the blockages were common blockages that were affecting his lot as in the past 12 months he had spent money

'unplugging' and sending a jet wash down the pipeline (ts 24-25 and 31, 9 March 2020).

48 It is useful at this point to set out in summary a history of the blockages from April 2018.

49 In an email of 27 April 2018, Ms Johnston wrote to Mr Dworakowski and Mr Moya, stating in part (page 1 of Exhibit 2):

> When the agent for your unit, Tom, called the plumber we realised that the issue was not a single unit issue. The plumber was very clear to me, at the time, that the blockage was not in the units but was in the mains and I agreed to the account being charged to the strata company as it was a mains issue that was affecting all of the units.
>
> …
>
> The plumber advised me that if it happended again (a blockage) that we should call the Water [Corporation] for their assistance as there were no issues with the units, only the mains.

50 Ms Johnston explained that the 'mains' she was referring to in her email of 27 April 2018 (as set out above) was the 'mains' belonging to the Water Corporation to which the strata company's inspection shaft and main drainage pipe is connected. Ms Johnston explained the inspection shaft is about 1.3 metres and the mains is about 900 centimetres into the next property (pages 77-78 of Exhibit 1).

51 On 11 April 2018 Ms Johnston called out a plumber when the water in the drains of her lot started gurgling. She sought reimbursement from the strata company per her email of 27 April 2018. The reason for seeking reimbursement was put by Ms Johnston as follows (page 2 of Exhibit 2):

> … [I] am asking that the Body Corporate cover the account as it relates to all units due to it being a mains issues. Both plumbers have confirmed no blockages in the units themselves.

52 It appears that back in April 2018, as evidenced by Ms Johnston's email of 27 April 2018 (Exhibit 2), the proprietors understood the blockages to be something to do with the Water Corporation's mains rather than with the strata company's inspection shaft and/or the main drainage pipe. It is Ms Johnston's evidence that the proprietors agreed at about this time to not call out a plumber unless agreement was reached by all before the call out (page 228 of Exhibit 1). In contrast, both Mr Dworakowski and Mr Moya in their oral evidence stated that

in the past 20 years, they had informally agreed to the payment of expenses by the strata company including call outs to plumbers, sometimes before the expense was incurred, and sometimes after.

53 Following the April 2018 blockage, the next plumbing call out occurred on 3 December 2018 when Mr Dworakowski called out HPE. Shortly before that call out, Ms Elliot, in her email of 12 November 2018 to Mr Dworakowski with a copy to Mr Moya and Ms Johnston stated that Miriam from the Water Corporation had told her in part (page 66 of Exhibit 1):

> …
>
> 4. The blockage in April was NOT in the mains - she commented the report stated…SEWER MAIN RUNNING CLEAR/RISING SHAFT HOLDING WATER
>
> 5. She suggests a plumber calls out again and 'scopes' the system (a 'worm' with a camera at the end) and if they think it's a mains issue to call out Water Corp[.]

54 In reply to Ms Elliot's email, Ms Johnston wrote on 13 November 2018 that her lot was not blocked and that it must be a mains problem but the Water Corporation will not pay. Further, Ms Johnston stated that the strata company needs to get the problem fixed (note 5 on page 230 of Exhibit 1).

55 It turned out that on 3 December 2018 none of the lots had a blockage. Rather, the problem as identified by HPE was that the inspection shaft entry into the Water Corporation's mains was compromised causing the area to hold water and therefore increase likelihood of a blockage (page 154 of Exhibit 1). Mr Dworakowski in his email to Mr Moya and Ms Johnston on 4 December 2018 stated in part 'We now know the pipe is crushed …' (page 82 of Exhibit 1). Ms Johnston in her email of 12 December 2018, stated that the plumber from HPE suggested to her that 'rather than the pipe being crushed, the pipe may have dropped and was out of line with the sewer junction' (page 78 of Exhibit 1).

56 Although Ms Johnston was of the view that plumbers had told the proprietors back in January and April 2018 that there was a problem with the entry point to the mains (page 148 of Exhibit 1), in her email of 27 April 2018 she clearly stated the problem to be the Water Corporation's mains where she wrote '[t]he plumber advised me if it happened again (a blockage) that we should call the Water

[Corporation] for their assistance as there were no issues with the units, only the mains' and that she was 'not willing to pay for, or contribute to, a long string of plumbing bills because the Water [Corporation] cannot clear their mains properly' (Exhibit 2), the Tribunal prefers the evidence of Mr Dworakowski who stated that it was not until HPE attended on 3 December 2018 that it was clear that the inspection shaft was compromised causing the area to hold water and thereby increase the likelihood of blockages. Therefore, the Tribunal finds that until 3 December 2018, the proprietors understood (albeit incorrectly) that the problem was with the Water Corporation's mains. On that basis, the Tribunal finds it was reasonable for Mr Dworakowski, when notified by the tenant of his lot on 3 December 2018 of a possible blockage, that he made a call out to a plumber to 'scope' the system as suggested by the Water Corporation per Ms Elliot's email of 12 November 2018 (page 66 of Exhibit 1).

57 It is common ground that the inspection shaft and the main drainage pipe are common property of the strata company. The inspection shaft is the vertical access portion to the main drainage pipe and the Water Corporation's mains, that is too small for human access, but does allow instruments (such as a camera) to inspect, test and clear blockages and obstructions. Ms Johnston stated in an email of 4 December 2018 '… I am not the responsible party for resolving the pipe issue - It is a strata issue' (page 63 of Exhibit 1). The Tribunal respectively agrees that in general, problems in respect of the common property, such as the inspection shaft and the main drainage pipe are the responsibility of the strata company. Who is required to pay for work done on the common property is discussed in the following paragraphs.

58 All costs incurred by the strata company must be associated with a power, duty or function of the strata company. The strata company cannot be obliged to make payment for invoices, such as the HPE invoice, unless the invoice is related to the powers, functions and duties of the strata company. Importantly, the strata company is limited in its scope of operations by the provisions of the ST Act and applicable by-laws. The obligation imposed on the strata company by s 35(1)(c) is to keep the common property 'in good and serviceable repair', 'properly maintain' the common property and 'where necessary' 'renew and replace' the common property including fixtures fittings 'used in connection with the common property' including lifts and any personal property vested in the strata company. The term 'properly maintain' is one of which it is hard to make sense insofar as there would be, implicit therein, a suggestion that there is an improper way in which one could

maintain common property. In contrast, the concept of maintaining something properly is readily understood and such phraseology is commonly used. However, like the case of ***Trevallyn-Jones v Owners Strata Plan No 50358*** [2009] NSWSC 694 where his Honour Justice Ward was considering a similar provision (at [131]), the Tribunal doubts that anything turns on the word 'properly' in the context of term 'properly maintain' in s 35(1)(c).

59 In ***Clark and The Owners of Waterfront Mews Strata Plan 14082*** [2011] WASAT 110 the Tribunal considered the extent of the obligation 'to properly maintain' the common property as provided for in s 35(1)(c). In that case, the Tribunal was considering the strata company's obligation in relation to the maintenance of correcting the balance for a swimming pool located on common property. There, the Tribunal concluded at [25] that in applying the maintenance obligation, as explained in ***Drexel London (a firm) v Gove (Blackman)*** [2009] WASCA 181, there is no requirement to do anything with the pool chemicals until a reading establishes that the pool is out of balance and some additional chemicals are required. Provided that is done, the maintenance obligation in s 35(1)(c) will, in this respect be discharged. This was explained by Her Honour Justice McLure (as she was then) at [231]-[232]:

> The obligation to 'properly maintain' has, in another statutory context, been held to give rise to an absolute obligation of the kind contended for by the injured claimants: *Galashiels Gas Co Ltd v O'Donnell* [1949] UKHL 2; [1949] AC 275; *Hamilton v National Coal Board* [1960] 2 WLR 313. In both cases the expression was contained in legislation imposing specific safety obligations on employers. In *Galashiels*, the expression 'maintained' was defined in the relevant legislation to mean 'maintained in an efficient state, in efficient working order and in good repair'. Lord MacDermott in *Galashiels* at 286 noted that the word 'maintain' when used in relation to the state or condition of things is not always used in the same sense. It may be used to indicate the continuance of a particular state or condition or it may mean acts done or required to be done in the course of maintenance. In the latter context, maintain means service, look after or attend to. The House of Lords construed the term in the former sense with the consequence that any cessation in the efficient working order of plant in question established a breach. The effect was that the employer warranted that the equipment it was obliged to maintain would never be out of working order (see *Hamilton* (316)).
>
> When regard is had to the multiple purposes in s 35(1)(c), it is clear that the legislature did not intend for a strata company to guarantee a continuous outcome or standard. The term 'maintain' is used in the

> second sense identified by Lord MacDermott in *Galashiels*, being the process that involves acts of maintenance with the object of continuing the statutory standard, which in this case is that the common property be in good and serviceable repair.

60 Further, in ***Stann and The Owners of Beau Vista Strata Plan 12008*** [2012] WASAT 227 (***Stann***) the Tribunal stated at [12] that s 35(1)(c):

> [i]mposes an obligation on the respondent [strata company] to attend to proper maintenance, renewal and replacement of the common property where there is damage or deterioration. If damage or deterioration occurs and at that stage proper maintenance is not undertaken by the strata company, it can be said that there is breach of the obligation to 'properly maintain' the common property for the purposes of s 35(1)(c) of the ST Act by the strata company[.]

61 The Tribunal in ***Stann*** made it clear at [13] that a strata company is not obliged to undertake a perpetual maintenance programme so that the common property is, at all times, in a particular state or condition. The Tribunal gave the following example in ***Stann*** at [13]:

> … If, for example, a gate deteriorates to such an extent that it fails to function as a gate, it could be said that it has reached the state where the strata company's obligations to service, repair, replace or renew arises and it is to return the gate to a good functioning and serviceable state. It need not restore it to an as new condition and it is not obliged to undertake maintenance to prevent deterioration. Although preventative maintenance is prudent, it is not obligatory under s 35(1)(c)[.]

62 The effect of the above reasoning is that if there is evidence of an adequate process adopted by the strata company, the practical objective of which is to keep the common property in good and serviceable repair, properly maintained and where necessary renew or replace the common property, the strata company has discharged its duty imposed by s 35(1)(c) even if, at any given time, the common property is in a deteriorated state. Whether the process adopted is adequate to meet the procedural objective and complied with in any case is a question of fact - the facts concerning the process adopted, the facts concerning the compliance with that process and the facts concerning the type or level of deterioration of or damage to the common property.

63 In this case, the Tribunal finds that the strata company was told by Mr Dworakowski of the damage or deterioration to the inspection shaft and the main drainage pipe following HPE attending the strata complex on 3 December 2018. The Tribunal finds therefore that on 3 December

2018 the strata company reached the state where it had an obligation to service, repair or renew to return the inspection shaft and/or the main drainage pipe to a good functioning and serviceable state. At that time the blockage was cleared by HPE but the repairs as recommended by HPE were not undertaken by the strata company. The inspection shaft and/or main drainage pipe were therefore left in a deteriorated or damaged state until June 2019 when the repairs were completed by JP Plumbing and Hydraulic Services for $2,200. Mr Moya and Mrs Johnston agreed to the repairs going ahead, subject to getting further quotes, in January 2019 (pages 85, 87 and 99 of Exhibit 1). Mr Dworakowski agreed for the repair work to proceed in May 2019 (page 94 of Exhibit 1).

64 The Tribunal, is satisfied that in June 2019 the maintenance obligation in s 35(1)(c) was discharged by the strata company. However, before the repairs were completed in June 2019, the Tribunal is not satisfied that the strata company had an adequate process in place to keep the common property, being the inspection shaft and the main drainage pipe, in good and service repair, and properly maintained. There was no process in place, rather each proprietor took it upon himself or herself to have the blockage cleared and if two proprietors agreed then the strata company paid for the plumber. The deterioration or damage to the inspection shaft and the main drainage pipe was significant as it was acknowledged by all proprietors they had blockages from time to time but without any resolution. For these reasons the Tribunal concludes that before June 2019 the strata company failed to perform its function under the ST Act to keep in good and serviceable repair, and property maintain the common property comprised of the inspection shaft and the main drainage pipe (s 35(1)(c)) and therefore the Tribunal can further consider the HPE invoice.

65 It appears in this case that the proprietors, at least in the past, have preferred to cover one-off payments, such as for plumber call outs, in relation to common property on a 'needs' basis, as a special payment, rather than having moneys set aside for ongoing maintenance and repair of the common property. Such a practice, in the Tribunal's view, does not support Mr Moya's and Ms Johnston's position that they are not required to contribute to the HPE invoice because they did not give approval before the call out was made to HPE and/or that their respective lots did not have a blockage on 3 December 2018.

66 Unexpected repairs to common property, such as to the inspection shaft, arise from time to time, and it is for this reason that levies must sometimes be imposed or, pursuant to s 36(2), a strata company may establish a reserve fund for the purpose of accumulating funds to meet such contingent expenses. The provisions of s 35 are mandatory, in that the legislature used the word 'shall', and therefore there is a clear onus on the strata company to manage its affairs in a way that allows it to comply with the requirements of s 35. As already stated, the strata company is under an obligation to control and manage the common property for the benefit of all the proprietors, keep it in good and serviceable repair, properly maintained and, where necessary, renew and replace the common property including the fittings and fixtures.

67 Mr Dworakowski paid the HPE invoice. No amount is outstanding to HPE. That does not, in the Tribunal's view, prevent Mr Dworakowski from contending that the HPE invoice arises from the strata company's obligation under the ST Act to keep in good and serviceable repair and properly maintain the common property. The work done by HPE on 3 December 2018 was not for the demolition or alteration of any structure on common property or for the erection of any structure on the common property and therefore did not require the approval of all the proprietors, or as it is provided in s 42(8), a resolution without dissent (refer ***Wong v Reid*** [2016] WASC 59 at [22]). Rather, the work done by HPE on 3 December 2018 which included the camera inspection, in the opinion of the Tribunal, falls within the category of maintenance and repair work of common property which is the responsibility of the strata company: s 35(1)(c). It does not matter that the maintenance and repair work to the common property may have arisen from damage or deterioration from fair wear and tear, inherent defect or any other cause: s 35(1)(c). In this case, where one plumber suggested that 'rather than the pipe being crushed, the pipe may have dropped and was out of line with the sewer junction' does not relieve the strata company of its obligation to maintain all common property in good and serviceable repair, properly maintained and where necessary renewed and replaced.

68 It is not accepted by the Tribunal that the strata company can refrain from paying the HPE invoice merely because of an ongoing conflict between the proprietors or for other reasons such as, for example, the failure of the proprietors to adopt an annual budget for plumbing expenses. In this case, the budget for the strata company had recently increased strata fees to $3,000 per annum (or $1,000 per

annum per lot). Ms Johnston in her evidence (page 226 of Exhibit 1) stated:

> 6. The budget and accounts of the Strata Council have always consisted of contributions to the Strata by the members (direct deposit) and four recurring payments:
>
> 6.1. Insurance,
>
> 6.2. Lawnmowing,
>
> 6.3. Water (now automatically deducted) and
>
> 6.4. Bank Fees (automatically deducted - Waived from September 2019).
>
> 7. There have also been nine (9) one off service payments to cover fence repairs (3), landscaping, a meter replacement and plumbing (3) ($7044 over a 21 year period, or approximately $336 per annum).

69 The Tribunal finds in this case where the cost for the repair of the inspection shaft and the main drainage pipe had not been provided for in the annual budget, the HPE invoice could be invoiced from all the proprietors paying a 'levy' as the plumbing cost is a cost that the strata company had to incur pursuant to the ST Act. The ST Act does not define the term 'levy'. Section 36(1)(c) empowers a strata company with broad power to raise amounts by 'levying contributions' in proportion of unit entitlement or as determined by a special by-law. There is no suggestion that the levy must be recurring or be of an annual nature. In the view of the Tribunal, a 'levy' may be a one-off payment. 'Levy' refers to moneys payable by a proprietor to the strata company to enable it to discharge its obligations (s 36(1)).

70 It is clear from the submissions in this case, even those opposing Mr Dworakowski's application to the Tribunal, that repairs were needed to bring the inspection shaft and the main drainage pipe up to a standard of good and serviceable repair as required by the ST Act. It is common ground that repairs were finally completed in June 2019 (some six months after the HPE invoice). It is the strata company's obligation to see that the repair and maintenance work to common property is done regardless of how the damage or deterioration occurred. The uncontested evidence before the Tribunal is that there was no blockage to Mr Dworakowski's lot on 3 December 2018. Further, the work done by HPE on 3 December 2018, which included the camera inspection, identified the problem in the inspection shaft and the main

drainage pipe and the blockage was cleared. It is appropriate, therefore, that no adjustment be made by the Tribunal to the HPE invoice of $505. The Tribunal finds therefore that the HPE invoice was for repair and maintenance work of common property and that the strata company is to pay for that work.

71 In considering what order to make, some guidance on the Tribunal's exercise of the s 83(1) is found in ***The Owners of Mandurah Terrace Apartments Strata Plan 17133 and Russell*** [2009] WASAT 1 at [59]-[61]:

> 59 In dealing with whether or not a strata company has unreasonably refused to do that which it allegedly should have done, the Tribunal has consistently taken an approach that the management of a strata company is best left to the strata company and that the Tribunal should not too readily impose its own views of what is unreasonable. See, for example, *Hopkins and Clayton* [2007] WASAT 255. At the same time, the legislature has intended that there be a practicable means of breaking deadlocks between the members of a strata company who are co-owners of the common property, live often in close proximity, and who should desire to live in harmony with each other.
>
> 60 The Tribunal has fulfilled that role in circumstances where resolutions proposed to a strata company have failed whether due to the dissent of a single lot owner, or of a majority of lot owners, by examining the rationale for dissent to ascertain whether there is a sensible basis for dissent. This necessarily means *that the Tribunal is drawn into a balancing of interests and views and must inevitably reach a subjective view of whether the decision is unreasonable. If that balance is delicately poised it will not be possible to conclude that the decision is unreasonable. It is possible for persons acting reasonably to come to opposite conclusions on the same set of facts*.
>
> 61 In effect, this is to apply the ordinary dictionary definition of 'unreasonable' - 1. going beyond the limits of what is reasonable or equitable. 2. not guided by or listening to reason: *The Australian Oxford Dictionary,* (2nd ed), Oxford University Press, Melbourne 2004. A decision is unreasoned if, as that term is defined in the same dictionary, it is not based on good sense or logic. That was also the approach taken by the former strata titles referee: see *Campbell and The Owners of Rangeview Apartments* [1988] WASTR 29. It is not the standard of reasonableness required by what is known as Wednesbury unreasonableness as adopted in the administrative

> law governing proper exercise of governmental power: *Associated Provincial Picture Houses Ltd v Wednesbury* Corporation [1947] EWCA Civ 1; [1948] 1 KB 223 at 229. So, it is not necessary that a decision be regarded as so unreasonable that no sensible lot owner or number of lot owners could have come to that conclusion.

(Emphasis added)

72 The order under s 83(1) needs to be an order of the type that the Tribunal is empowered to make under the ST Act. Further, it should reflect the matter in relation to which the applicant has established an entitlement. The order may be expressed in terms different from the order sought, so long as it does not differ in substance from the order sought: s 81(1). Finally, it should be limited to the relief which so far has not been forthcoming voluntarily.

73 The Tribunal has taken into account Mr Dworakowski's action in engaging HPE without first getting approval from the strata company. Perhaps with such a request, Mr Dworakowski may have been able to persuade the strata company to carry out the necessary repairs at that time. The Tribunal has also considered what might have occurred had someone, for example a tenant, been injured or taken ill by a blockage caused by the inspection shaft holding water or backup in the main drainage pipe. All of the proprietors may have been at risk of having to meet a damages claim. Even if the strata company has third party insurance cover, the insurer might be able to dispute liability under such a policy where the strata company is aware of a hazard or risk in relation to the damage to the inspection shaft and the main drainage pipe which could have been avoided by complying with its obligation under the ST Act to repair and maintain the common property. By having the work done by HPE on 3 December 2018, Mr Dworakowski may have helped to relieve the other proprietors of the risk of such a claim.

74 There is an expenditure limit placed on the council of a strata company by s 47(1), which, pursuant to reg 29 of the ST Regs, is limited to $65 per lot. There are exceptions and qualifications to that limit in other subsections of s 47, but the Tribunal does not need to consider them in terms of the order the Tribunal is considering for this case. If compliance with the Tribunal's order necessitates the raising of money from the proprietors, Mr Dworakowski will have to contribute his proportion of those funds in proportion to the unit entitlement of his Lot 2, as well as paying any arrears of levies due by him to the strata

company. According to the strata plan, Mr Dworakowski's unit entitlement for his Lot 2 is the smallest of the three proprietors with 32 units out of 100 units, Mr Moya's unit entitlement for his Lot 1 is 35 units out of 100 units and Ms Johnston's unit entitlement for her Lot 3 is 33 units out of 100 units.

75 As Mr Dworakowski paid the whole of the HPE invoice for $505, the Tribunal, having considered all the circumstances of this case, will make an order pursuant to s 83(1) requiring the strata company to reimburse Mr Dworakowski $343.40 by 30 May 2020, or within 14 days after Mr Dworakowski has paid all money properly levied against him by the strata company, whichever later occurs, in settlement of Mr Dworakowski's dispute with the strata company.

Conclusion

76 In summary, the Tribunal concludes:

(a) The strata company did not wrongfully fail to make available to Mr Dworakowski to inspect, copy or make an extract of the bank statements and invoices in breach of s 43. In any event, Mr Dworakowski conceded at the hearing that he was provided the bank statements invoices. The Tribunal will dismiss Mr Dworakowski's application in respect of the bank statements and invoices.

(b) There is no requirement in the ST Act for the strata company to have its financial records audited independently. As there are no independently audited financial records, the strata company did not wrongfully fail to make them available to Mr Dworakowski to inspect, copy or make an extract thereof. The Tribunal will dismiss Mr Dworakowski's application in respect of independently audited financial records.

(c) The Tribunal does have jurisdiction under s 83(1) to settle the dispute between Mr Dworakowski and the strata company. The Tribunal will order the strata company to reimburse Mr Dworakowski $343.40 by 30 May 2020 or within 14 days after Mr Dworakowski has paid all money properly levied against him by the

strata company, whichever later occurs in settlement of his dispute concerning the HPE invoice.

77 For the reasons set out above, the Tribunal will issue an order as follows.

Order

78 The Tribunal orders:

1. Pursuant to s 81 of the *Strata Titles Act 1985* (WA), save as is provided in order 2 hereof, the application is dismissed.

2. Pursuant to s 83(1) of the *Strata Titles Act 1985* (WA), The Owners of 63 Temple Street Victoria Park Strata Plan 36070 (the strata company and first respondent) must by 30 May 2020, or within 14 days after Tomasz Jacek Dworakowski (applicant) has paid all money properly levied against him by the strata company, whichever later occurs, pay to the applicant the sum of $343.40 in settlement of the dispute concerning Hilton Plumbing & Electrical's invoice INV-12737 dated 7 December 2018.

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

MS R PETRUCCI, MEMBER

6 MAY 2020