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**JURISDICTION** : STATE ADMINISTRATIVE TRIBUNAL

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

**CITATION** : WHOLLEY and THE OWNERS OF VIVIAN'S  
CORNER STRATA PLAN 45979 [2020] WASAT 69

**MEMBER** : MS D QUINLAN, MEMBER

**HEARD** : 15 JUNE 2020

**DELIVERED** : 25 JUNE 2020

**FILE NO/S** : CC 1834 of 2019

**BETWEEN** : ANNA WHOLLEY  
First Applicant

CHRISTOPHER WHOLLEY  
Second Applicant

AND

THE OWNERS OF VIVIAN'S CORNER STRATA  
PLAN 45979  
First Respondent

BRIAN PAGE  
Second Respondent

CARMEN ESMERALDA ARMSTRONG  
Third Respondent

KAYE HENDERSON  
Fourth Respondent

LEONIE HARRIS  
Fifth Respondent

MICHAEL FISCHER

Sixth Respondent

DANIELLA FISCHER  
Seventh Respondent

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*Catchwords:*

Strata titles - Mixed residential and commercial strata scheme - Specialist orthodontic practice - Installation of dental compressor unit - Erecting a structure on a lot - Structural alteration - Whether approval should have been given to proposal - Whether strata company unreasonably withheld approval of proposal - Proposed alterations to common property - Ground floor concrete slab - Whether strata company unreasonably refused consent to common property slab work

*Legislation:*

*Strata Titles Act 1985* (WA), s 3AC, s 7, s 7(2)(d) , s 7(4), s 7(5), s 7(5)c, s 7(5)(b)(i), s 7(5)(b)(ii), s 7A, s 7A(3), s 7B, s 7B(1), s 11, s 12, s 85, s 103F, s 103F(1) sch 5, cl 30

*Strata Titles Amendment Act 2018* (WA), Pt 2

*Strata Titles General Regulations 1996* (WA), reg 31, reg 34, reg 34(1)

*Result:*

Proposal approved

*Category:* B

**Representation:**

*Counsel:*

First Applicant : Mr S McFarlane  
Second Applicant : Mr S McFarlane  
First Respondent : No Attendance  
Second Respondent : In Person  
Third Respondent : In Person

Fourth Respondent : In Person  
Fifth Respondent : In Person  
Sixth Respondent : No Attendance  
Seventh Respondent : No Attendance

*Solicitors:*

First Applicant : Lavan Legal  
Second Applicant : Lavan Legal  
First Respondent : N/A  
Second Respondent : N/A  
Third Respondent : N/A  
Fourth Respondent : N/A  
Fifth Respondent : N/A  
Sixth Respondent : N/A  
Seventh Respondent : N/A

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

Boris and The Owners of Observation Rise Strata Plan 24414  
[2019] WASAT 112  
Paterson and The Owners of 27 Purdom Road Wembley Downs Survey-Strata  
Plan 30555 [2019] WASAT 40  
The Owners of Arbor North Strata Plan 67510 and Sun [2020] WASAT 28

**REASONS FOR DECISION OF THE TRIBUNAL:**

***Introduction***

1           On 29 November 2019, the owners of Lot 14 located at 30 Jarrad Street, Cottesloe (applicants) brought proceedings in the Tribunal pursuant to s 103F(1) of the *Strata Titles Act 1985* (WA) (ST Act). By order of the Tribunal on 24 January 2020, the application was amended to include s 85 of the ST Act.

2           The first respondent is The Owners of Vivian's Corner Strata Plan 45979 (strata company). As noted by the Tribunal in its orders on 24 January 2020, the strata company has elected not to participate in these proceedings. On 25 February 2020, the Tribunal joined the second to seventh respondents to the proceedings.

3           The dispute which gives rise to these proceedings, relates to a proposal by the applicants to install a dental compressor unit (DCU) to be situated in one of the car bays which form part of Lot 14 (the proposal). Attached to these reasons is a ground floor plan with proposed DCU location. On 14 November 2019 the strata company conducted its Annual General Meeting (AGM) and considered the proposal. The proposal was not approved as there was dissent from the proprietors of Lot 4 (Mr Brian Page) and Lot 10 (Ms Leonie Harris).

***The strata scheme***

4           The strata scheme located at 30 Jarrad Street, Cottesloe (30 Jarrad Street) is a mixed residential and commercial building with twelve residential lots and three commercial lots. The ground floor contains the three commercial Lots 13, 14 and 15 and the garage. The first floor contains residential Lots 1 to 10 and the second floor contains residential Lots 11 and 12 as well as part of Lots 9 and 10.

5           The applicants are the proprietors of commercial Lot 14 and wish to relocate their specialist orthodontic practice (the practice) from their current practice in Claremont to 30 Jarrad Street. Lot 14 includes ten car bays within part Lot 14 which is more car bays than any other lot in the strata scheme. All other lots in the strata scheme, including the two other commercial lots, only have two car bays within their part lot.

6           The second to seventh respondents are the owners of five of the twelve residential lots in the strata scheme, namely Lots 4 (Mr Page),

Lot 7 (Ms Carmen Armstrong), Lot 8 (Ms Kaye Henderson), Lot 9 (Mr Michael Fischer and Mrs Daniella Fischer) and Lot 10 (Ms Harris). The second to seventh respondents filed a joint response in these proceedings and will hereafter be referred to in these reasons as 'the respondents'. Each of the respondents also made separate oral submissions at the hearing which are detailed later in these reasons.

*The proposal*

7 The proposal by the applicants can be detailed further as follows:

- (a) The DCU is to be situated on the floor of a car bay within Lot 14 (the car bay) which is located in the south-western corner of the garage placed against the corner wall. The car bay is directly adjacent, as well as the closest car bay within Lot 14, to the practice. The southern corner of the wall measures 1800 millimetres and the western corner of the wall measures the width of the car bay at 2590 millimetres. This is shown on the chasing works diagram attached to the submission made to the strata company dated 14 October 2019 (page 14 of Exhibit 4).
- (b) A pipe will travel from the DCU cabinet in the car bay through the garage wall into the practice to service three consulting rooms.
- (c) The DCU will be housed in a custom built acoustic cabinet (including acoustic lining). The DCU cabinet will be mounted on rubber feet on the ground with its 2 metre length to sit directly adjacent to the wall of the car bay. The manufacturer's specifications detail that the noise of the DCU when running is 78 decibels. However, when the DCU is housed in the DCU cabinet the noise level when running will be only 40 decibels.
- (d) The DCU cabinet will be 2000 millimetres in length, 800 millimetres in depth and 900 millimetres in height (DCU cabinet). The aluminium finish of the DCU cabinet will be powder coated in a colour to match the existing garage wall.

- (e) The operation of the DCU will only be during business hours of the practice and involves the DCU running only when the tank needs filling.
- (f) Installation involves cutting into the ground floor concrete slab of Lot 14 to create a concrete channel to install a pipe 24 metres in length for the DCU then waterproofing and reinstating the ground floor concrete slab (slab work): see the chasing works diagram attached to the submission (page 14 of Exhibit 4) and the engineering drawings 193503 dated 12 November 2019 (Exhibit 7).
- (g) The cost for the works associated with the proposal are incurred by the applicants with no cost to be incurred by the strata company.

8 The part of the proposal that relates to s 85 of the ST Act is the slab work as it is to occur in the common property as shown on the strata plan.

9 The part of the proposal that relates to s 103F of the ST Act is the erection of a structure or any alteration of a structural kind, or extension of a structure occurring within Lot 14 as set out in s 7 of the ST Act.

### ***Statutory scheme***

10 On 1 May 2020, significant amendments were made to the ST Act with the commencement of Pt 2 of the *Strata Titles Amendment Act 2018* (WA) (Amendment Act) and the *Strata Titles (General) Regulations 2019* (WA). Relevant to these proceedings, s 85 of the ST Act was repealed. However, the transitional provisions provide in cl 30 of Sch 5 of the current ST Act that proceedings commenced before 1 May 2020 must be dealt with as if the Amendment Act had not been enacted. Therefore, for the purpose of determining these proceedings, the ST Act applies in the form it existed when the application was lodged with the Tribunal on 29 November 2019.

11 Section 103F of the ST Act provides that a proprietor may apply to the Tribunal for an order for a deemed approval to allow the erection of a structure or any structural alterations where the Tribunal is satisfied that the strata company should have given approval under s 7 or s 7A of the ST Act but has been unreasonably withheld. The power vested in the Tribunal under s 103F of the ST Act is also discretionary.

12

Section 103F of the ST Act relevantly provides:

**Order dispensing with approval under s. 7(2) or 7A(2)**

- (1) A proprietor of a lot who has applied for but not obtained an approval under section 7B may apply to the State Administrative Tribunal for an order under this section.
- (2) An order under this section is an order declaring that the approval required under section 7 or 7A, as the case may be, is to be deemed to have been given by the proprietor or the strata company.
- (3) On the making of an application under subsection (1), the State Administrative Tribunal may make an order under this section if satisfied that the approval -
  - (a) should have been given under section 7 or 7A, as the case may be; but
  - (b) has been unreasonably withheld,by the proprietor or the strata company.

13

Relevant to these proceedings, s 7(5) of the ST Act provides:

The grounds on which approval may be refused are -

- (a) that the carrying out of the proposal will breach the plot ratio restrictions or open space requirements for the lot ascertained in accordance with section 7A(3); or
- (b) in the case of a lot that is not a vacant lot, that the carrying out of the proposal -
  - (i) will result in a structure that is visible from outside the lot and that is not in keeping with the rest of the development; or
  - (ii) may affect the structural soundness of a building; or
  - (iii) may interfere with any easement created by section 11 or 12; or
- (c) any other ground that is prescribed.

14

Regulation 31 of the *Strata Titles General Regulations 1996* (WA) (ST Regulations) provides that a prescribed ground for the purposes of

s 7(5)(c) of the ST Act is that the carrying out of the proposal will contravene a specified by-law/s of the strata company.

15 Regulation 34 of the ST Regulations provides for the prescribed information for the purposes of s 7B(1) of the ST Act that the lot proprietor must serve of the strata company as part of an application under s 7 of the ST Act.

16 This Tribunal agrees with the process of reasoning set out in ***Boris and The Owners of Observation Rise Strata Plan 24414*** [2019] WASAT 112 in determining applications under s 103F of the ST Act as follows:

28 The process of reasoning to be adopted in such an applications is identified in *Tipene and The Owners of Strata Plan 9465* [2016] WASAT 101 (Tipene) at [54]-[56]:

29 The starting point in deciding whether approval should have been given under s 7 of the ST Act is to consider whether the Proposal falls within s 7(2). If the Proposal does not fall within s 7(2) then approval cannot be given to the Proposal under s 7 and the application for an order under s 103F must fail because the requirement of s 103F(3)(a) cannot be satisfied.

30 If the Proposal falls within s 7(2) of the ST Act, then the next step is to consider whether the Approval Application complies with the requirements of s 7B(1). If the Approval Application does not comply with s 7B(1) then the application under s 103F must fail because s 7B(1) provides that the Approval Application shall set out details of the proposal and the prescribed information, which indicates that it is mandatory for those details and information to be provided.

31 If the Approval Application falls within s 7(2) of the ST Act and complies with s 7B, then the next step is to consider whether the Strata Company should have given approval for the Proposal under s 7.

32 In addition, of course, the Tribunal must be satisfied that the approval sought was 'not obtained under s 7B [of the ST Act]'. If a compliant application was served on a strata company but that strata company failed to follow the process prescribed by s 7B of the ST Act and in particular, if the strata company refused the application and did not serve on the applicant a notice of refusal resultant from the process prescribed by s 7B and which contains the detail identified in s 7B(6) of the ST Act within 77 days of the service of the application for approval, the sought approval is 'taken to have been given' (s 7B(7) of the



ST Act; *Owners of Kingsway Gardens Strata Plan 4 and Connelly* [2012] WASAT 236).

33 It is also to be observed that in considering an application made pursuant to s 103F(3) of the ST Act the Tribunal is exercising its review jurisdiction (*Tipene v The Owners of Strata Plan 9485* [2015] WASC 30) and such a proceeding attracts the provisions of the *State Administrative Tribunal Act 2004* (WA) (SAT Act) concerning reviews (s 17 of the SAT Act). Notably the purpose of the review is to arrive at the correct and preferable decision; is to be conducted by way of a hearing de novo and therefore a review on the facts and merits afresh; and may include additional information that was not before the respondent in a general meeting (s 27 of the SAT Act). The Tribunal may refuse or grant the application for an order made pursuant to s 103F(2) of the ST Act (see s 18 and s 29(2) of the SAT Act).

34 Upon review, the Tribunal must examine the ground or grounds of dissent to decide whether on the balance of probabilities the approval sought pursuant to s 7 and s 7B of the ST Act should have been granted 'but was unreasonably withheld' by the respondent (s 103F(3)(a) and (b) of the ST Act), such as arriving at the decision arbitrarily or without logic or reason (*EDWF Holdings 1 Pty Ltd v EDWF Holdings 2 Pty Ltd* [2008] WASC 275 at [191] following *Secured Income Real Estate (Australia) Ltd v St Martins Investments Pty Ltd* [1979] HCA 51; (1979) 144 CLR 596).

35 Where the Tribunal is satisfied that is the case, the Tribunal has a discretion whether to 'make an order under this section [s 103F of the ST Act]'. The order that the Tribunal has the discretion to make is that identified in s 103F(2) of the ST Act a declaration that the approval required under s 7 of the ST Act is deemed to have been given by the strata company.

17 Section 85 of the ST Act provides, where the Tribunal considers that the strata company has unreasonably refused to consent to a proposal by a proprietor to effect alterations to the common property, the Tribunal may order that the strata company consent to the proposal. The power vested in the Tribunal under s 85 of the ST Act is discretionary.

18 Section 85 of the ST Act provides:

**Order with respect to certain consents affecting common property**

Where, pursuant to an application by a proprietor for an order under this section, the State Administrative Tribunal considers that the strata

company for the scheme to which the application relates has unreasonably refused to consent to a proposal by that proprietor -

- (a) to effect alterations to the common property; or
- (b) to have carried out repairs to any damage to the common property or any other property of the strata company,

it may make an order that the strata company consent to the proposal.

19 This Tribunal agrees with the process of reasoning set out in *Paterson and The Owners of 27 Purdom Road Wembley Downs Survey-Strata Plan 30555* [2019] WASAT 40 (*Paterson*) in determining a proposal under s 85 of the ST Act as follows:

94 This proceeding arises in the Tribunal's review jurisdiction: *Laffin* at [21]-[33]; see also Corboy J's analysis in *Tipene v The Owners of Strata Plan 9485* [2015] WASC 30 at [138] and [139]. The hearing is de novo and the purpose of the review is to make the correct and preferable decision: s 27 of the *State Administrative Tribunal Act 2004* (WA).

95 I commence my analysis by noting the comments of Member Hawkins (as her Honour then was) in *Maber* where she stated at [30] that:

The common property must be managed for the benefit of all proprietors. This is a good governance provision. It requires a balancing of interests to assess whether the applicants' proposal in the context of the scheme is for the benefit of all.

96 I am also mindful of and agree with the analysis of (then) Senior Member Raymond in *Russell* in that what in effect I am required to do, in the context of an application involving common property is to resolve an impasse between the co-owners of CP Lot 3 by reviewing the basis of the second respondent's dissent. If I find that the second respondent's position is reasonable, then I should not intervene. In other words if, in the end, I find this is a matter over which reasonable minds may differ, I should uphold the Strata Company's decision.

97 I also agree with *Russell* (at [60]) that the exercise under s 85 of the ST Act necessarily means that I must undertake an assessment that balances the interests and views of each proprietor and reach my own view of whether the decision the subject of the review is 'unreasonable' for the purpose of s 85 of the ST Act.

- 98 In making a decision pursuant to s 85, the ST Act is to be read and construed in accordance with the ordinary principles of construction: *Ethnic Interpreters and Translators Pty Ltd v Sabri-Matanagh* [2015] WASCA 186 at [63]-[65] (Buss JA, Mitchell J and Newnes AJA); *Strzelecki Holdings Pty Ltd v Jorgensen* [2016] WASCA 77 at [95] (Buss P, Murphy JA and Mitchell JA).
- 99 The general rule is that words in a statute must be taken to have been used in their ordinary sense: *Van Der Feltz v City of Stirling* [2009] WASC 142; (2009) 167 LGERA 236 at [90] (Murphy J). Dictionaries may assist in ascertaining the commonly accepted meaning of words. However, it remains important 'to interpret the phrase as used in its context, assisted as it may be, but not necessarily bound by, one of a variety of dictionary definitions': *Optus Mobile Pty Ltd v City of Swan* [2017] WASC 251; (2017) 227 LGERA 368 at [39] (Banks-Smith J); *Falconer v Pederson* [1974] VR 185 at 187 (Anderson J).
- 100 Consistent with *Russell* (at [61]) I find that the word 'unreasonable' in s 85 takes its ordinary and plain meaning. It is common ground that the second respondent's decision does not need to be legally 'unreasonable' (in the sense outlined in the seminal case of *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223 at 229) before I can intervene.
- 101 The *Australian Oxford Dictionary (2nd Edition) Oxford University Press, Melbourne (2004)* (AOD) defines the adjective 'unreasonable' to mean:
1. 'going beyond the limits of what is reasonable or equitable'. 2. 'not guided by or listening to reason' (page 1415).
- 102 The AOD defines 'reasonable' to mean:
1. 'having sound judgement ...'. 2. 'in accordance with reason; not absurd' (page 1075).
- 103 The question of what is unreasonable decision or otherwise, for the purposes of s 85 of the ST Act, will depend on the circumstances of each case. That is particularly so in the context of the ST Act which governs and regulates a wide range of strata developments; from very large complexes with multiple strata titles (and many owners) being located within the same building (or multiple buildings) through to two-lot survey strata schemes which look and appear as separate fee simple lots.

The question of what is unreasonable in any given context is impossible to reduce to a set of rigid principles.

***Background facts***

20 On 14 August 2019 the applicants became the proprietors of Lot 14 (Exhibit 1).

21 On 19 August 2019 the Town of Cottesloe granted development approval for the operation of the practice as well as alteration and construction work on Lot 14 (development approval) (pages 19-23 of Exhibit 4). The only reference to parking requirements in the development approval was that onsite parking be made available for staff and visitors during operating hours.

22 On 10 October 2019 the applicants' appointed builder obtained a building permit from the Town of Cottesloe (pages 15-18 of Exhibit 4).

23 On 14 October 2019 the applicants made an application to the strata company seeking approval for their proposal described as to carry out alterations within Lot 14 and to allow for the chasing of the concrete slab to allow for a drainage network and mounting of a DCU within the car bay (page 4 of Exhibit 4). Within the application there is a reference to s 7 of the ST Act and the by-laws but no reference to s 85 of the ST Act.

24 On 24 October 2019 the strata company gave notice of its AGM including the proposal as a special business agenda item. The agenda item noted that the motion under notice is:

That the strata company by resolution without dissent pursuant to section 7(2)(d) of the ST Act 1985 approves the application by the proprietor of lot 14 to carry out works on the lot as described in the application dated 14 October 2019.

25 In compliance with s 7(4) of the ST Act, the agenda item also explained that a vote to refuse approval is of no effect unless it discloses the ground for refusal which can only be given under s 7(5) of the ST Act on the basis that the proposal:

- (a) will breach the plot ration or open space restrictions under s 7A(3) of the ST Act; or
- (b) will result in a structure that is visible from outside the lot and that is not in keeping with the rest of the development; or

- (c) may affect the structural soundness of the building; or
- (d) may interfere with any easement created by s 11 or s 12 of the ST Act.

26 On 14 November 2019 the strata company conducted its AGM and considered the proposal. The application under s 7 of the ST Act requires under s 7(2)(d) that approval must be expressed by resolution without dissent as defined in s 3AC of the ST Act. The decision of the strata company at the AGM as recorded in the Minutes is that the motion failed as Lots 4 and 10 voted against the motion. Both Lots 4 and 10 recorded their reason for voting against the motion as being that the proposal will result in a structure that is visible from outside the lot and that is not in keeping with the rest of the development.

*Issues to be determined*

27 There are two issues to be determined in these proceedings by the Tribunal.

28 Firstly, pursuant to s 85 of the ST Act, the issue is whether in the exercise of the Tribunal's discretion, the Tribunal considers that the strata company has unreasonably refused to consent to that part of the proposal to effect alterations to the common property, that being the slab work.

29 Secondly, pursuant to s 103F of the ST Act, (the part of the proposal which constitutes the erection of a structure on, or a structural alteration to, Lot 14) the issues to be determined are whether:

- (a) approval should have been given to the proposal under s 7 of the ST Act;
- (b) approval has been unreasonably withheld by the strata company; and
- (c) the Tribunal should declare that the approval of the proposal is deemed to have been given by the strata company.

30 In practical terms, the structural issue in dispute to be determined in these proceedings under s 103F of the ST Act is the erection of the DCU and DCU cabinet in the car bay. The respondents do not dispute

any of the other structures to be erected or structural alterations proposed by the applicants.

*The applicants' case*

31 The applicants had two witnesses attend the hearing to provide oral evidence and be available for cross-examination by any of the respondents. The two witnesses were Mr Jason Nguyen, structural engineer and the strata manager, Ms Janine Chapman.

32 The applicants' case can be relevantly summarised as follows:

- (a) Evidence from Mr Nguyen detailed and specified the slab work which would be to relevant structural engineering standards. The report from Mr Nguyen dated 12 November 2019 No. 193503 (Exhibit 7) had been obtained but was not tabled at the AGM because no structural issues were raised. The applicants provided a further letter from Mr Nguyen dated 23 March 2020 which certified that:

...the existing ground floor concrete slab is structurally sound for the proposed cut out detail structural drawings #193503. **This work will Not effect the structural soundness of The Building.**

Mr Nguyen explained further in his oral evidence that the ground floor concrete slab is not a structural component holding up the building as this role is undertaken by the footings.

- (b) Evidence from Ms Chapman set out the proposal and AGM process and the compilation of the Minutes (Exhibits 4 to 6). The applicants submitted that the Tribunal has jurisdiction under s 103F as s 7 and s 7B of the ST Act as well as reg 34 of the ST Regulations have been complied with by the applicants.
- (c) A DCU is a specialised item essential for the operation of the practice and is not something that a residential lot or other commercial lot would require or use. It is similar to an air-conditioning unit in that it has a compressor and fan housed in metal casing. However, for operational reasons, the DCU must be mounted on the floor. The applicants do not dispute

that it is possible to find examples of DCUs located in different places just as there are examples of DCUs being located in parking areas. The proposed location is central to Lot 14 thereby reducing the length of the required concrete channels and making the system run more effectively. The proposal before the Tribunal is the one to be determined, not any alternatives suggested by the respondents.

- (d) The mounting and size of air-conditioners as well as other service or utility fixtures are not uniform in the garage. The garage includes a number of bicycles in bicycle racks and also Lot 4 keeps its bicycle in its car bay secured to the wall in addition to a motor vehicle. The DCU cabinet would not constitute 'clutter' as suggested by the respondents. The garage space taken as a whole is a utilitarian service area which includes parked vehicles, bicycles and necessary utility services and fixtures (such as air-conditioners, a switchboard, fire extinguishers, and a gate motor). The DCU is another necessary fixture for the use and enjoyment of Lot 14 as approved by the Town of Cottesloe.
- (e) The existing car bays (as shown on the strata plan) are not consistent in size. The car bay is 14m<sup>2</sup> whereas almost all the car bays for the residential lots (including those opposite the car bay) are 12m<sup>2</sup> or 13m<sup>2</sup>. The car bay is 5.5 metres in length whereas the car bays opposite are 5 metres in length. The DCU cabinet makes effective use of the space of Lot 14 whilst still allowing the parking of a small to medium vehicle in the car bay. The footprint of the DCU cabinet is 1.6m<sup>2</sup> so the car bay will still be bigger than some of the other car bays. Access to the car bay will not be affected. The car bay adjacent to the car bay is one of 10 car bays which form part of Lot 14 and access to that car bay is not affected by the DCU cabinet.
- (f) The DCU cabinet is not at 'eye level' as suggested by the respondents as its height is 900 millimetres. A discreetly tucked away DCU cabinet painted the

same as the wall colour is not 'highly visible' as suggested by the respondents.

- (g) The door referred to by the respondents as the 'main entry' is a secondary entry to the building from the garage. It is not an entry able to be used by the public or the commercial lot proprietors.

33 In closing submissions the applicants submitted in relation to s 103F of the ST Act (regarding the erection of the DCU and DCU cabinet in the car bay) that:

- (a) The respondents have not substantiated any of the grounds they raise under s 7(5) of the ST Act. Therefore the Tribunal should be satisfied that approval should have been given and has been unreasonably withheld.
- (b) The DCU cabinet may be visible from outside Lot 14 in that it can be seen by other lot proprietors but its visibility from outside the development is almost impossible. In any event, the DCU and DCU cabinet is in keeping with the development as well as the use and enjoyment of the garage and Lot 14.
- (c) There are no issues of structural soundness for the building in relation to the erecting of the DCU and DCU cabinet in the car bay of Lot 14.
- (d) There are no breaches of specified by-laws by reason of the DCU and DCU cabinet. Schedule 1 by-law 20 (by-law 20) does not apply as the DCU is not an air conditioning unit. The by-laws should be read as a whole and in context. Schedule 1 by-law 22.1.3 (by-law 22.1.3) provides that a proprietor or their invitee cannot use a designated car bay for any purpose other than parking a 'motor vehicle'. However, Sch 1 by-law 40.1.1 allows for the bay to be used for another purpose as it provides that a proprietor shall not erect any form of structure in their lot intended for use as a car bay which may prevent access to contiguous bays.

34 In closing submissions the applicants submitted in relation to s 85 of the ST Act for the slab work on common property that:



- (a) The respondents have not provided any evidence to support their submissions and are unreasonably withholding consent under s 85 of the ST Act. The Tribunal should intervene and order that the strata company consent to the slab work.
- (b) It is conceded that the application to the strata company did not specify s 85 of the ST Act. However, the proposal did specifically include the slab work to occur on the common property ground floor concrete slab. An application under s 85 of the ST Act is not required to progress with the same formality as an application under s 7 of the ST Act.
- (c) The evidence of Mr Nguyen establishes that there are no issues of structural concern in relation to the slab work. The respondents have provided no engineering evidence to support their allegation that there may be a structural issue.
- (d) Any temporary inconvenience arising from the slab work, estimated by Mr Nguyen to only take three hours, is trivial and unreasonable as a reason for resisting the proposal: see *Paterson* at [110]-[113].
- (e) The slab work when completed will not affect the use and enjoyment of any of the other lots in the strata scheme.
- (f) In assessing and balancing the interests of all proprietors, the slab work causes no detriment to the other lot proprietors. However if the slab work is not approved the applicants will suffer significant detriment as they are being prevented from using and enjoying commercial Lot 14.

***The respondents' case***

35 The respondents' case can be relevantly summarised as follows:

- (a) Pursuant to s 7(5)(b)(i) of the ST Act, the placing of the DCU cabinet on the floor of the car bay will be visible from outside Lot 14 and is not in keeping with the rest of the development.

- (b) Pursuant to s 7(5)(b)(ii) of the ST Act, the proposal may affect the structural soundness of the building.
- (c) The structural engineer's report provided by the applicants is not full and comprehensive as it does not include a reference to recent drilling and chasing into the concrete slab for the installation of a shower, toilet and hand basin from a previous unapproved Lot 14 alteration in 2014.
- (d) No car bay in the strata scheme has a DCU on the floor of the car bay. All air-conditioning units are mounted on the wall at a minimum height of 1200 millimetres. This would result in a dissimilarity in the garage and is not in keeping with the rest of the development.
- (e) The garage will become cluttered with large fixtures at eye level that will detract from the overall appearance of the garage and not be in keeping with the current appearance of clear uncluttered car bays in the garage.
- (f) The DCU cabinet is not comparable to an air-conditioning unit. The DCU cabinet will be three times the size of the majority of air-conditioning units in the garage and twice the size of two units. The air conditioning units are all discreetly mounted on the wall.
- (g) The DCU cabinet will reduce the size of the car bay to a size not consistent with the other car bays in the garage resulting in a dissimilarity not in keeping with the rest of the development. The reduced size of the car bay will limit the size and type of the vehicle that can park in the car bay and may affect manoeuvring of cars for Lots 5 and 10.
- (h) The car bay is adjacent to a main entry to the building for a proprietor or occupant on foot when entering from a parked car and the DCU cabinet will be highly visible.
- (i) There are alternatives as DCUs can be installed inside a practice (two example photographs provided of a cupboard in a lunchroom or sterilisation room).

36 The respondents provided some photographs of the garage in support of their case. However, the respondents did not call any witnesses, or any expert witnesses such as a structural engineer in support of the structural issue raised by the respondents.

37 The respondents provided further separate oral submissions at the hearing, summarised as follows:

(a) Mr Page submitted that the DCU cabinet would be in breach of Sch 1 by-law 22.1.3 which provides that you cannot use a designated parking bay for any purpose other than parking a vehicle. Mr Page also submitted that the DCU could easily fit within the practice and provided example photographs (Exhibit 20 attachments 10 and 11).

(b) Ms Armstrong undertook the role of lead spokesperson for the respondents. Ms Armstrong submitted:

a. due to the DCU cabinet being two to three times larger than the air-conditioning units mounted on the walls of the garage (though no evidence of their dimensions was provided);

b. the visibility of the DCU cabinet near the 'main' entry to the building for the residents from the garage; and

c. its intended placement on the floor,

that it was not in keeping with the rest of the development.

Ms Armstrong also submitted that the proposal would be in breach of Sch 1 by-laws 20 and 22.1.3.

(c) Ms Henderson's husband was previously required to remove a workshop trailer he placed in one of their car bays. Ms Henderson also submitted her concerns were regarding the DCU cabinet being on the floor of the garage as well as the noise and vibration it will make.

(d) Ms Harris agrees that the DCU cabinet will not be visible to the public but it will be visible to the owners. Ms Harris acknowledged the delay for the applicants in

commencing their practice however stated that the strata company had done everything it could to respond quickly. Ms Harris submitted that she is concerned about the DCU cabinet being on the floor as it will create a precedent.

- (e) Mr and Mrs Fischer were unable to attend the telephone hearing. Ms Armstrong informed the Tribunal of their submission that they were not able to be present at the AGM to object and were unable to send in a proxy. Their concerns relate to the installation disruption, the large size of the cabinet and the noise the DCU will make (particularly on the weekend).

### *Consideration*

38 The application made by the applicants to the strata company on 14 October 2019 expressly referred to s 7 of the ST Act and Sch 1 by-laws 18 (alterations to a Lot), 22 (Vehicles) and 40 (Car bays) of the Strata Company's by-laws. The application did not refer to an application for approval to effect alterations to the common property as are proposed in the proposal by the pipes going from the car bay through the common property wall. The Tribunal finds that a component of the application, whilst not expressed, did in substance include seeking approval under s 85 of the ST Act. Section 85 does not have the same prescribed requirements as s 7 of the ST Act and reg 34 of the ST Regulations. The Tribunal is satisfied, by the amendment to the application by the Tribunal on 24 January 2020 to include s 85 of the ST Act that it has jurisdiction to consider the proposal under s 85 of the ST Act.

39 The respondents have not has raised any procedural issues under s 7 or s 7B of the ST Act or reg 34(1) of the ST Regulations. Having heard all of the evidence, the Tribunal has not found any such issues. The Tribunal finds it is satisfied that the procedural issues have been met in reg 34 of the ST Regulations as well as s 7B and therefore the Tribunal has jurisdiction to make orders concerning the proposal under s 103F(1) of the ST Act.

40 No party has submitted that the proposal on Lot 14 is not a structure to be erected or an alteration of a structural kind. The Tribunal finds that it is satisfied that the proposal is a structure to be erected under s 7(2) of the ST Act and therefore falls within its

jurisdiction under s 103F of the ST Act: see *The Owners of Arbor North Strata Plan 67510 and Sun* [2020] WASAT 28.

41 The Tribunal finds that the respondents' submissions in relation to whether the proposal, or in particular the placement of the DCU cabinet on the floor, is in keeping with the rest of the development are misconceived. The Tribunal finds, that there are items and structures on the garage floor such as bicycles, the main switch board and the gate motor (see Exhibits 14, 15, 24 and 31). More importantly, unsurprisingly for a garage servicing a mixed strata scheme, the garage is a service area which the Tribunal finds would reasonably include a number of service or utility items and structures as evidenced in the photographs provided (see page 8 of Exhibit 4 and those cited above).

42 The practice has development approval and a building permit (pages 15-23 of Exhibit 4). The Tribunal notes that no parking concerns were raised by the Town of Cottesloe. The practice is not unusual in this location or within this strata scheme. The Tribunal finds that the practice is in keeping with the rest of the development. The respondents do not dispute that the practice requires a DCU.

43 The Tribunal also accept the applicants' evidence that the DCU and the DCU cabinet for operational reason must be mounted on the floor. The Tribunal understands this to mean that the DCU works more effectively, particularly the acoustic performance of the DCU cabinet, if mounted on the floor. The respondents have not provided any evidence to counter this point.

44 The respondents produced a photograph of the car bay with an overlay of an indicative placement of the DCU cabinet (Exhibit 32). This photograph is disputed by the applicants as an incorrect indication of the size and placement of the DCU cabinet in relation to the wall and the car bay. The Tribunal concurs and finds that this overlay photograph is not an accurate indication of the placement of the DCU cabinet in the car bay. The Tribunal will give no weight to that overlay photograph. The Tribunal finds that it prefers and relies upon the measurements and photographs provided by the applicants as to the placement of the DCU cabinet in the car bay.

45 Regulation 31 of the ST Regulations prescribes that a ground for refusal for the purposes of s 7(5)(c) of the ST Act is the fact that the carrying out of the proposal will contravene a specified by-law or by-laws. The Tribunal finds that carrying out the proposal, in particular

the proposed placement of the DCU cabinet, would not contravene specified by-law 20 or by-law 22.1.3. The Tribunal finds that by-law 20 does not apply as the DCU is not an air-conditioning unit. The by-laws should be read as a whole and in context. By-law 22.1.3 provides that a proprietor or their invitee cannot use a designated car bay for any purpose other than parking a 'motor vehicle'. However, Sch 1 by-law 40.1.1 allows for the bay to be used for another purpose as it provides that a proprietor shall not erect any form of structure in their lot intended for use as a car bay which may prevent access to contiguous bays. The Tribunal finds that as long as the DCU cabinet does not prevent access to contiguous bays (which the Tribunal finds it does not) and the car bay can still be properly utilised as a car bay to park a motor vehicle (which the Tribunal finds it will be) then relevant to the question whether there is a ground for refusal under s 7(5)(c) of the ST Act, the carrying out of the proposal will not constitute a contravention of by-law 22.1.3 or by-law 40.

46           Whilst the Tribunal accepts there was confusion regarding the permitted reasons to be given for dissent at the AGM (as s 85 of the ST Act was not mentioned), the Tribunal finds that the respondents have provided no cogent or reasonable basis for their continuing objection to the proposal as a whole or the original dissent to the proposal at the AGM.

47           The respondents have not provided any expert engineering, or any other, evidence to form a reasonable basis for their submission that the carrying out of the proposal may affect the structural soundness of the building. The respondents have also not provided any architectural, design or planning evidence to support their submission that the DCU cabinet placed on the garage floor is not in keeping with the rest of the development.

48           The Tribunal finds that the applicants have provided a sufficiently detailed proposal addressing all reasonable issues including an expert opinion from a structural engineer. The Tribunal finds the expert opinion of Mr Nguyen is persuasive. Mr Nguyen's opinion is logical, coherent and reasonably based in fact. The Tribunal accepts and relies upon the evidence of Mr Nguyen.

49           Relevant to the proposal before the Tribunal is the consideration that, in assessing and balancing the interests of all lot proprietors, this exercise involves an acknowledgement that the strata scheme includes

three commercial lots who each have their own necessary service infrastructure.

50 The Tribunal agrees with the applicants' submission that, in assessing and balancing the interests of all proprietors, the slab work causes no detriment to the other lot proprietors. The Tribunal does not agree with the applicants' submission that if the slab work is not approved they will suffer significant detriment as they are being prevented from using and enjoying Lot 14. The Tribunal finds that the applicants are not being prevented from using and enjoying Lot 14 as the applicants still have other options in installing the DCU. However, the Tribunal does find that a refusal of the proposal would result in the applicants suffering a detriment due to being unreasonably delayed in using and enjoying Lot 14 because the applicants cannot proceed with commencing to operate their practice under their current development approval and building permit.

51 Having considered all of the evidence presented in these proceedings and the Tribunal's findings in relation to that evidence, the Tribunal concludes the respondents have not substantiated to the satisfaction of the Tribunal any of their objections to the proposal under s 85 or s 7(5) of the ST Act.

52 In particular in relation to s 85 of the ST Act the Tribunal finds that, whilst it can be demonstrated that the slab work on common property is to significantly benefit Lot 14 and not all other proprietors, the slab work will not cause a detriment to any other proprietors. Therefore, in following the same reasoning in *Paterson* at [138]-[139], the Tribunal finds in relation to the slab work proposal under s 85 of the ST Act, that refusal by the strata company to consent to the proposal is unreasonable and the Tribunal should intervene.

53 In particular in relation to s 7(5) and s 103F of the ST Act the Tribunal finds that the DCU and DCU cabinet, whilst visible outside part Lot 14 to other proprietors it will not be visible to members of the public and, in any event, is in keeping with the rest of the development. The Tribunal finds that there are no structural issues arising from the carrying out of the proposal, in particular in relation to the erection of the DCU and DCU cabinet, which may effect the soundness of the building. The Tribunal also finds the carrying out of the proposal, in particular in relation to the erection of the DCU and DCU cabinet in the car bay, will not contravene any specified by-law.

**Conclusion**

54 Therefore, in accordance with these reasons and the issues so framed, the Tribunal concludes and finds that the decision of the strata company at the AGM on 14 November 2019:

- (a) in relation to the proposal as it pertains to the erection of a structure on the car bay within Lot 14, that the strata company should have approved the proposal under s 7 of the ST Act and unreasonably withheld approval of the proposal; and
- (b) in relation to the proposal as it pertains to the slab work within the common property, the strata company unreasonably refused to consent to the proposal.

55 Accordingly, the Tribunal finds that approval for the proposal should be granted in accordance with the particular requirements of each of s 85 and s 103F of the ST Act.

**Orders**

The Tribunal will order as follows:

1. Pursuant to s 103F of the *Strata Titles Act 1985* (WA) (ST Act), the Tribunal declares that the approval of the proposal as required under s 7 of the ST Act is deemed to have been given by the strata company insofar as it relates to work to be done within Lot 14.
2. Pursuant to s 85 of the ST Act, the Tribunal orders the strata company forthwith to consent to the proposal insofar as it relates to the concrete slab work within the common property.



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

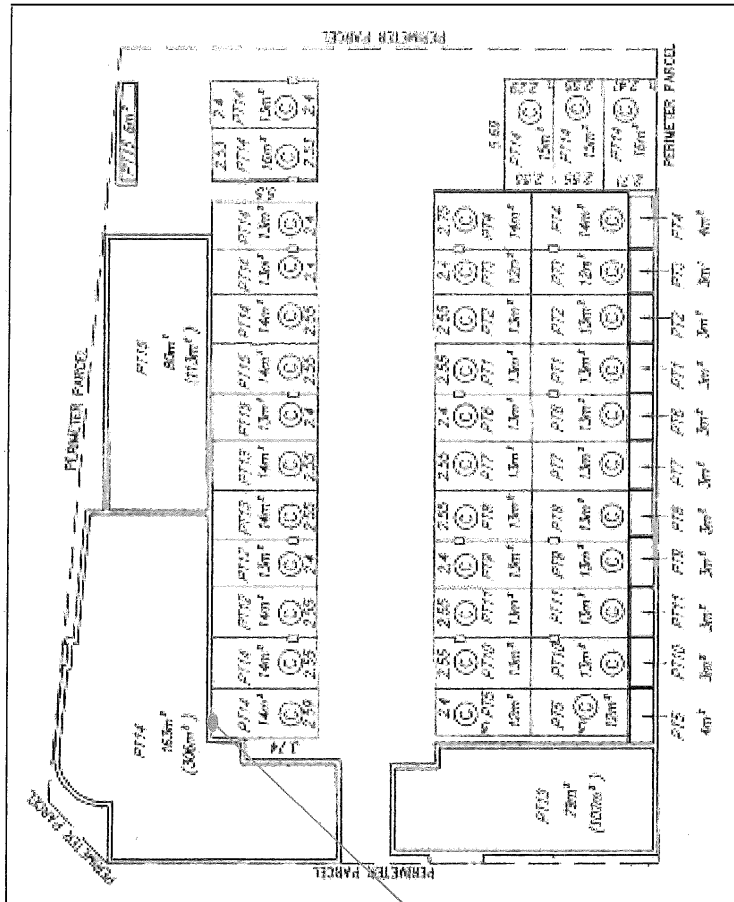
MS D QUINLAN, MEMBER

25 JUNE 2020

Attachment 1: Ground Floor Plan with proposed DCU location

Strata Title Consult Pty Ltd

9.1 Strata Plan – Ground Floor Plan



Proposed location of dental air compressor within the boundary of Lot 14 Car Bay.

October 2019