JURISDICTION	:	STATE ADMINISTRATIVE TRIBUNAL
ACT	:	STRATA TITLES ACT 1985 (WA)
CITATION	:	BUXTON and THE OWNERS OF 163 SCARBOROUGH BEACH RD SCARBOROUGH STRATA PLAN 6660 [2021] WASAT 5
MEMBER	:	MS KY LOH, MEMBER
HEARD	:	20 OCTOBER 2020
DELIVERED	:	15 JANUARY 2021
FILE NO/S	:	CC 1733 of 2019
BETWEEN	:	KYLIE BUXTON Applicant AND THE OWNERS OF 163 SCARBOROUGH BEACH RD SCARBOROUGH STRATA PLAN 6660 First Respondent ROWAN ERIC LE LIEVRE Second Respondent KAREN THERESE HULL Third Respondent

Catchwords:

Strata titles - Unreasonable refusal to consent to replacement patio - Whether replacement patio constitutes alteration or repair - Whether refusal of consent without resolution being put to AGM - Concept of 'unreasonableness'

Legislation:

State Administration Act 2004 (WA), s 38(1), s 39(1)(e)
Strata Titles Act 1966 (WA)
Strata Titles Act 1985 (WA) (post 1 May 2020), Sch 5, cl 30
Strata Titles Act 1985 (WA) (prior to 1 May 2020), s 17(1), s 32(1), s 35(1)(c)(i), s 44(1), s 85, s 85(a), s 85(b), s 132, Sch 3, cl 3(1), cl 4, cl 6
Strata Titles Amendment Act 2018 (WA)

Result:

Application granted

Category: B

Representation:

Counsel:

Applicant	:	In Person
First Respondent	:	N/A
Second Respondent	:	Ms Naomi Le Lievre
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):

Ainsworth v Albrecht [2016] HCA 40; (2016) 261 CLR 167
Laffin and Renouf [2016] WASAT 48
Maber & Anor and The Owners of Strata Plan 11391 [2007] WASAT 99
Searle Australia Pty Ltd v Public Interest Advocacy Centre & Anor (1992) 36 FCR 111

REASONS FOR DECISION OF THE TRIBUNAL:

Introduction

1 In October 2017, the applicant, who is the owner of Lot 7 of the units on 163 Scarborough Beach Road (**applicant**) replaced an existing pergola or patio with a new one (**patio**) behind her unit which was located on common property. She did so without seeking consent from the first respondent, the strata company.

2 Despite the issue being raised, then discussed at two general meetings of the strata company, no proposal was ever put to the lot owners for a resolution on whether the patio could remain.

3 The Tribunal has determined that it has no power to make an order that the strata company consent to a proposal to effect alterations to the common property because the patio has already been constructed.

4 However, an order that the strata company consent to a proposal to have carried out repairs to any damage to the common property, by replacing the pre-existing patio with the patio, may be made in this case as the Tribunal has determined that the strata company has unreasonably refused to consent to such proposal.

Background

Strata scheme

5 These proceedings relate to the 14-lot strata scheme situated at, and known as, 163 Scarborough Beach Road, Scarborough (**strata scheme**).

6 The strata scheme is comprised of a parcel of land on which there are 14 units contained in a building, described on Strata Plan 6660 (**strata plan**) as being a 'single level brick residential building'.

7 The applicant is the owner of Lot 7 on the strata plan.

8 Mr Le Lievre is the owner of Lot 4, whilst Ms Hull is the owner of Lot 14, on the strata plan. Both live interstate and did not live on their lots at the relevant times.

9 The parcel of land is bordered by Scarborough Beach Road to the west and Westview Street to the south. There is a right of way (Brodie Lane) running next to the eastern boundary.

10 A plan lodged with the notice of change of by-laws (registered as Notification L136195 on the strata plan) to grant exclusive use of common property in November 2009 (**garage plan**) shows that each of the units have exclusive use to garages which run against the eastern boundary.

11 The garage plan also shows the units running in two parallel rows along the western and eastern boundaries, with the western row (comprising Lots 1, 2, 3, 4, 5, 11 and 12) being closer to Scarborough Beach Road and the eastern row (comprising Lots 6, 7, 8, 9, 10, 13 and 14) being closer to the right of way.

12 The garages run parallel, and are proximate, to the eastern row.

13 Based on the applicant's oral testimony, there are fences erected on common property between units throughout the entire complex.

14 This is supported by the strata manager's understanding expressed in an email that all owners have placed an adjoining fence between each lot that is common property.

15 The applicant testified that the fences were constructed using different materials (some brick fences, some Super Six fences) and at different heights.

History to the proceedings

16 On 11 November 2019, the applicant applied under s 85 of the *Strata Titles Act 1985* (WA), as it was at the time (**Strata Act**), for an order that the Tribunal approve the keeping of the patio so that she can complete her application to the City of Stirling (**City**) for retrospective planning approval for an unauthorised work.

17 The City agreed to hold her planning application in abeyance pending the outcome of her application to the Tribunal.

18 The strata company adopts a neutral position in relation to the application and has not participated in the proceedings.

19 By orders of the Tribunal of 7 February 2020:

a) Mr Le Lievre and Ms Hull were joined as respondents to the proceedings, pursuant to s 38(1) of the *State Administrative Act 2004* (WA) (SAT Act); and

b) Ms Naomi Le Lievre was given leave pursuant to s 39(1)(e) of the SAT Act to represent Mr Le Lievre in the proceedings.

Legal framework

20 These proceedings commenced prior to the major amendments to the Strata Act coming into operation on 1 May 2020 under the *Strata Titles Amendment Act 2018* (WA) (**Amendment Act**). As such, the provisions of the Strata Act, as they were prior to those amendments, apply to the determination of this application: cl 30 of Sch 5 of the *Strata Act 1985* (WA), as amended by the Amendment Act.

21 All references to the provisions of the Strata Act in these reasons are to those in the Strata Act immediately prior to 1 May 2020.

22 The strata scheme and the strata company were created by the registration of the strata plan on 9 February 1979 under the *Strata Titles Act 1966* (WA) (**1966 Act**), with 14 lots and common property. The 1966 Act was repealed and replaced by the Strata Act, which came into operation on 30 June 1985. By virtue of s 132 of, and cl 6 of Sch 3 to, the Strata Act, the strata scheme continued, with modification to it made by the transitional provisions in Sch 3.

23 Pursuant to cl 3(1) of Sch 3 to the Strata Act, the boundaries of each lot (which had been, at the time the strata scheme was created, the centres of floors, walls or ceilings) became the upper surface of floors, the inner surface of walls and the under surface of ceilings of the buildings from the day that the Strata Act came into operation.

24 'Common property' is relevantly defined as so much of the land comprised in a strata plan as from time to time is not comprised in a lot shown on the plan: s 3(1) of the Strata Act. 'Common property' is held by proprietors as tenants in common in shares proportional to the unit entitlements of their respective lots: s 17(1) of the Strata Act.

25 The garages, patios and fences were constructed on common property as they fall outside of the lots on the strata plan.

26 The strata company, upon the Strata Act coming into operation, is deemed to be the strata company constituted under s 32(1) of the Strata Act in respect of the strata scheme: cl 4 of Sch 3 to the Strata Act.

27 The functions of a strata company are to be performed by the council of the strata company under s 44(1) of the Strata Act, commonly referred to as the council of owners.

28 Relevantly, under s 35(1)(c)(i) of the Strata Act, a strata company shall keep in good and serviceable repair, properly maintain and, where necessary, renew and replace the common property, including the fittings, fixtures and lifts used in connection with the common property, and to do so whether damage or deterioration arises from fair wear and tear, inherent defect or any other cause.

Factual background

29 The following factual background is gleaned from:

a) oral testimony from the applicant, Ms Le Lievre, Ms Hull, and the witnesses called by the applicant, Mr Kenny Wilson and Mr George Janicki; and

b) submissions and documents filed by the applicant, Ms Le Lievre and Ms Hull, which include email correspondence.

30 Except where indicated, the facts are largely agreed between, or otherwise not contested by, the parties.

31 The applicant bought Lot 7 in July 2017 with a pre-existing patio, which she said was falling apart and causing damage. She pulled down the pre-existing patio and put up the patio in October 2017 without seeking approval.

32 During the 12 months from the construction of the patio, neither of her neighbours on Lots 6 or 8 complained to her about the patio, nor advised her that she needed to seek approval. The owner of Lot 6 was on the council of owners at the relevant time.

33 In November 2018, the strata manager wrote to the applicant on behalf of the council of owners advising that the applicant had not sought approval from the strata company for the patio, and invited her to seek retrospective approval or remove the patio.

34 The applicant then applied for retrospective approval to the strata manager by email, explaining that the pre-existing patio was in disrepair which she then improved at a value of approximately $5,000. She stated

that she was under the understanding that she only needed permission for works that were visible to others, for example, in the front of the unit.

35 The Tribunal notes that at the hearing the applicant stated that she did not think she needed permission to build the patio, and that she thought she had sole use of the backyard.

36 Whilst this is not quite the same rationale provided to the strata manager, given the effluxion of more than three years since she had built the patio, and that no one suggests her failure to seek consent was anything other than an honest error, the Tribunal accepts that she had an innocent, albeit mistaken, reason (or reasons) for not seeking consent.

37 The Tribunal found her to be an honest witness, and the other aspects of her testimony have not been impugned due to the difference in her recollection of how she had come to her mistaken belief as to the legal requirement for consent to build the patio.

38 In January 2019, the strata manager advised the applicant of the council of owners' decision to refuse approval of the patio, essentially on the basis that:

a) the patio was visible from the rear and from neighbours;

b) the 're-construction' was not consistent with the pre-existing patio (unlike that undertaken on Lot 12);

c) the neighbour was impacted by the night light and a potential shading issue;

d) the proposed structure was different to all other units, and it needed to be made consistent with other patios so that there is some uniformity retained in the complex; and

e) approval of this proposal would set a precedent for others.

39 The applicant's response was:

a) the 're-construction' was to a better construction as the old one was not designed well;

b) the light had not yet been connected to electricity by an electrician, and so the light was coming from a different unit (Lot 4);

c) there was no shading issue as the patio did not go all the way to the fence;

d) there were no two patios that were the same size and shape, with Lots 8, 11 and 12 having a flat roof and Lots 5 and 7 having a pitched roof, and several others were small 'lean to' over doorways; and

e) the reason for the particular design of the patio was because it would be in keeping with the proposed new roof on the complex.

40 The applicant also provided to the council of owners five letters of support from other owners (although refers to six letters of support, all of which were filed with the Tribunal).

41 Despite the applicant's request that the matter be put to all of the owners, the strata manager refused to add the matter to the agenda of the annual general meeting on 18 September 2019 (**AGM**), as the council of owners did not want to wait until the AGM.

42 In email discussions between the council of owners in February and March 2019, Mr Le Lievre accepted that light could be coming from his unit and not from the applicant's patio. Another council member, Mr Ken Atkins, accepted that the patio was largely hidden, and that, being at the rear of the complex and behind the garage, it had less impact to the complex as a whole.

43 Whilst Mr Atkins agreed that the applicant's patio was similar to that on Lot 5, he considered it was significantly higher than all other patios, which were attached at the level of the unit roofs rather than raised up to the top of the garage roof.

44 The council of owners also received comment from the owner of Lot 6, who raised concerns about the high pitch structure collecting more rain water and draining into the common gutter, and also about light pollution.

45 The council of owners acknowledged that the owner of Lot 8 wished to remain impartial, although his communications with the strata

manager raised some concern about the applicant's (apparent) non-compliance with by-laws creating a precedent.

46 It is pertinent to note that the strata manager and at least some of owners (including some in the council of owners and the owners of Lots 6 and 8) were labouring under the misapprehension that by-law 14 of the strata company applied, which relevantly prohibited an owner from maintaining *within the lot* anything visible from outside the lot that viewed from outside the lot is not in keeping with the appearance of the rest of the building without the written consent of the strata company.

47 No decision appears to have been made by the council of owners until sometime in August 2019.

48 In the meantime, the issue of the patio was discussed at an extraordinary general meeting on 19 March 2019 (**EGM**), with the matter left pending. The minutes record that the council of owners recommended the applicant provide a building engineer's report, to which she agreed.

49 The council of owners then obtained legal advice sometime in August 2019 that the patio was erected on common property without written consent, and that it should be removed as it was not a consistent structure and was not maintaining the same vista from the street view.

50 The council of owners instructed the law firm on 31 August 2019 to send a letter to the applicant requiring her to remove the patio by 31 October 2019. The applicant denies receiving the letter.

51 The Tribunal notes that a copy of the signed letter from the law firm tendered into evidence is addressed to 'Unit 7, *161* Scarborough Beach Road' (error italicised), which may have accounted for the letter not having been received by the applicant.

52 In the meantime, the applicant submitted to the strata company on 3 September 2019 a copy of a certificate of building compliance for the patio signed by an independent building surveyor. She requested approval by the council of owners of her application to keep the patio and in the absence of that, to put her application on the agenda for the AGM for a vote by all owners.

53 The applicant also requested an item be added to the AGM agenda proposing a by-law conferring exclusive use of rear courtyards.

The strata manager recommended deferring the proposal until the Amendment Act and related regulations came into operation.

54 At about the same time, the applicant also submitted an application to the City for building approval for the patio.

55 At the AGM, the patio was discussed but no proposal was put up for resolution as to whether the patio could remain. Instead, the council of owners advised of their legal advice as referred to in [49] above, although no reference was made to the legal letter to the applicant.

56 Further, the applicant contends that, whilst not recorded in the AGM minutes, the other owners disagreed with this advice and requested that this be revisited with the new council of owners. Mr Janicki's recollection of the meeting was vague, but he recalled no resolution was ever made at the end of each meeting, and it was always left to be discussed.

57 The strata manager was also directed at the AGM to add the proposal for an exclusive use by-law for courtyards to the agenda of the annual general meeting in the following year.

58 After the AGM, the applicant asked whether the matter needed to go the newly elected council of owners, to which the strata manager advised that the matter could not be resubmitted to the council of owners or to all owners, and she was required to take down the patio as there was impact on her adjoining neighbours.

59 In November 2019, the applicant then became aware of the letter from the law firm which was forwarded to the council of owners, to which she was newly elected following the AGM.

Impact of patio

60 Mr Wilson has owned Lot 12 for the last five to seven years, and is a bricklayer by occupation.

61 He testified that at least four years ago, he asked the strata company to replace his patio for a new one as it had rusted at the bottom and was going to fall down, but it refused.

62 He then spoke to his next door neighbour, Mr Atkins, of Lot 11, who recommended that he replace his patio with the exact same patio. He then replaced his patio with the exact same Colorbond material with

a flat roof (albeit at a slight angle) and at the same height, although it was 'two sheets' longer than his original patio.

63 He received a letter from the strata manager similar to, and at the same time as, that sent to the applicant about replacing his patio without prior approval. The applicant's case was then investigated further by the strata manager, whilst his seemed to have been 'left alone' without an official request to remove his patio.

64 He stated that the patio cannot be seen from the outside.

65 Based on his observation of the patio and the applicant's courtyard, the pitch of the patio is 400 millimetres from the base of the pitch, which is the lowest pitch of all the patios in the complex. He considered it to be a 'super low' pitch.

66 He considered that the Lot 5 patio may have a bigger pitch, but accepts that he has not been past Lot 5 for a year and a half.

67 Further, he observed that the patio was about 500 millimetres to 1 metre away from each neighbour's boundary, which, in his view, was too far away from either boundary to cast shade over either Lot 6 or Lot 8.

68 In cross-examination, he disagreed that the building gutters are hidden by the patio roof, and observed that the old gutter under the patio roof had been replaced with a brand new gutter (in stark contrast with the rest of the complex). In his view, water is flowing through there nicely and draining away, and is not building up.

69 Indeed, he thought that applicant's design of the pitched roof is beneficial, as the pitched design allows for better drainage, with water having somewhere to go, whereas a flat design does not allow that and will result in rust.

70 Mr Wilson did not consider that the lighting in the patio will impact the neighbouring units. Further, any impact from the patio to neighbouring lots will be a lot less than from his patio as he has more lighting and has lighting under his eaves.

71 Mr Janicki has owned Lot 9 for the past four years, and is a personal trainer by occupation.

72 He stated that he viewed the patio from the applicant's rear courtyard, which is about 50 centimetres from the fence line of each neighbour.

73 He said that he is not able to see the patio from Brodie Lane except from a recess in the garage.

74 He stated that the lighting in the patio is considerate as it reflects a cylindrical beam from a spotlight, positioned just off centre of the patio, which can be angled away from the neighbouring lots.

75 He considered that a lot owner had sole use of his or her rear courtyard as most lots had two walls which divided the lots.

Relevant consents affecting common property

76 Under s 85 of the Strata Act, where the Tribunal considers that the strata company for the strata scheme has unreasonably refused to consent to a proposal by that proprietor:

> a) to effect alterations to the common property (sub-par (a)); or
>
> b) to have carried out repairs to any damage to the common property or any other property of the strata company (sub-par (b)),
>
> the Tribunal may make an order that the strata company consent to the proposal.

77 A clear distinction is drawn in the language of the provision over consent to action that has occurred (under sub-par (b)) and action that has not occurred (under sub-par (a)).

78 In the face of the distinction drawn in the language adopted by the legislature, there is little room to argue that sub-par (a) of s 85 of the Strata Act allows retrospective consent to be given for a proposal to effect alterations to the common property.

79 In the absence of any other provision in the Strata Act which provides for retrospective approval of alterations to common property which were effected without strata company consent, the Tribunal has no power to give such retrospective approval.

80 In this case, however, given the evidence by the applicant of the state of disrepair of the pre-existing patio, which has not been refuted or contested by any party or witness, it remains open to the applicant to apply for retrospective approval of her act to carry out repairs to any damage to the common property, including damage by fittings and fixtures used in connection with the common property.

81 In the *Macquarie Dictionary Online* (as at 11 January 2021), 'repair' is relevantly defined as:

> …
>
> **3.** to remedy; make good; make up for: *to repair damage*; *to repair a loss*[.]
>
> **6.** (*especially plural*) an instance or operation of repairing: *to carry out repairs*[.]

82 Whilst the relevant repair conducted in this case resulted in the removal and replacement of the pre-existing patio, in light of the fact that the patio was in disrepair, falling apart and causing damage, the Tribunal is satisfied that the replacement of the pre-existing patio was a reasonable response to effect a remedy or to make good the damage caused by the pre-existing patio such as to constitute a 'repair'.

Did the strata company refuse to consent?

83 Having been satisfied that the replacement of the pre-existing patio constitutes 'repair' for which the strata company could have given retrospective consent, the Tribunal needs to be satisfied that the strata company refused to consent to the proposal.

84 As established in ***Maber & Anor and The Owners of Strata Plan 11391*** [2007] WASAT 99 (***Maber***) (which was followed more recently in ***Laffin and Renouf*** [2016] WASAT 48), all proprietors have a proprietary interest in common property, and as such, it is consistent with an entitlement by a co-owner of property to prevent works being conducted on the property by another co-owner that a resolution without dissent should be required: ***Maber*** per Chaney DCJ (as he then was) at [29]-[30].

85 The significance of the right of proprietors to vote on resolutions which have the effect of altering the features of common property or potentially creating a risk of interference with the tranquillity or privacy of an objecting proprietor was recognised by the High Court of Australia

in ***Ainsworth v Albrecht*** [2016] HCA 40; (2016) 261 CLR 167 at [55] (***Ainsworth***), which is a case involving opposition of lot owners to the proposal for exclusive use of part of the common property.

86 In this case, the applicant requested the council of owners (through the strata manager), more than 14 days prior to the AGM, to put to a vote at the AGM the applicant's application to keep the patio, but no resolution was proposed or put on the issue. Indeed, even after the AGM, the strata manager rejected the applicant's request to put the matter to the council of owners again or to all owners.

87 Notwithstanding that the applicant had some support from some of the owners, there was objection from at least Mr Le Lievre and Ms Hull, and possibly from the owners of Lots 6 and 8.

88 Mr Le Lievre and Ms Hull renewed their objections to the patio in the course of the hearing, even having heard further evidence at the hearing, and confirmed that a resolution without dissent would not have been forthcoming at any relevant time given at least both of their objections.

89 In the circumstances, the Tribunal treats the conduct of the strata company (acting through its council of owners), as at the AGM, to be a refusal to consent to the proposal to have replaced the pre-existing patio with the patio, by its decision to refuse to put a resolution up to the owners at the AGM and by virtue of the underlying objections of some of the owners.

Was the refusal to consent unreasonable?

Legal Principles

90 Section 85 of the Strata Act is silent on how a refusal of consent is to be assessed as 'unreasonable'; as such, that term should be attributed its ordinary meaning (see, for example, ***Searle Australia Pty Ltd v Public Interest Advocacy Centre & Anor*** (1992) 36 FCR 111 at 122 and 125).

91 In the *Macquarie Dictionary Online* (as at 11 January 2021), the ordinary meaning of 'unreasonable' is:

> *adjective* **1.** not reasonable; not endowed with reason.
>
> **2.** not guided by reason or good sense.
>
> **3.** not agreeable to or willing to listen to reason.

4. not based on or in accordance with reason or sound judgement.

5. exceeding the bounds of reason; immoderate, exorbitant.

92 In ***Ainsworth***, the majority considered (at [58]) that, in a case of a resolution involving an aspect of proprietary rights as owners of lots, the requirement of unreasonableness is concerned with unreasonableness on the part of opposing lot owners having regard to those lot owners' interests under the relevant scheme.

93 In this case, given the erection of fences between lots on common property for which the strata company has given at least tacit, if not express, approval, the concept of unreasonableness must be assessed in the context of the exclusivity of use of common property enjoyed by all owners in the strata scheme.

94 Relevantly, the dividing fences have the effect of providing certain lot owners with exclusive use of common property bound by the fences (and in some cases, garages) which they consider to be their courtyards.

95 The tension between the rights of all owners to such courtyards, and the effective exclusive use of such common property to which the strata company has given approval, is recognised in the forthcoming proposal to add an exclusive use by-law for such courtyards.

96 In addition, there has been at least tacit, if not express, approval given to certain lot owners for the erection of patios and 'lean-to's over doorways over common property.

97 The nature of the proposal must also be taken into account in assessing whether it was unreasonable to refuse to consent.

98 In this case, the applicant was simply repairing a fitting or fixture on common property that had been approved by the strata company, for which it would otherwise be responsible for maintaining, repairing and, if necessary, replacing.

99 Indeed, if the state of Mr Wilson's previous patio was any indication of the state of the applicant's pre-existing patio, his previous patio was so precarious that it was going to fall down.

100 In the circumstances, it would have been in the interests of all lot owners for the applicant's pre-existing patio to be repaired.

Application

101 Mr Le Lievre and Ms Hull's objections expressed at the hearing are mainly consistent with that as expressed by the council of owners back in February 2019. At the hearing, they pressed the following objections:

a) the pitched angle of the patio roof is not a like-for-like replacement of the original flat roof style, and the patio is taller than any other patio (in particular, being 355 millimetres taller than the next tallest patio at the unit at Lot 5);

b) the patio sits higher than the building's guttering system, unlike the other patios, which will cause additional rainwater inflows to the existing guttering of the applicant's unit and neighbouring units as well as garage roofs behind. There is no longer clear and free access to the existing guttering and downpipes for cleaning and maintenance purposes;

c) there is a potential for any insurance claim to be rejected as the structure does not have strata company approval or the City's building approval;

d) the pre-existing patio only covered approximately two thirds of the applicant's courtyard, which the patio now fully covers. Mr Le Lievre accepts that the patio at Lots 5 and 12 are close to the full length of their properties, but are narrower, and so allow for additional sunlight, airflow, rainwater; and

e) the patio is enclosed at three sides on the western, northern and southern (garage) sides, unlike any other patio, which is open on at least two sides, which creates in effect a semi-enclosed outdoor room.

102 The Tribunal is not satisfied that the objections raised by the objecting owners (including Mr Le Lievre and Ms Hull) were reasonably held.

103 Firstly, the Tribunal is satisfied that the certificate of design compliance establishes that the patio is structurally sound, including addressing any drainage issues and any concomitant insurance concerns.

104 Whilst some of the owners raised concerns about potential drainage issues, it is telling that in the three years since the patio was constructed, none of them have been able to point to any actual damage caused by drainage problems. Further, the Tribunal accepts the evidence of Mr Wilson, who has some experience in the building industry, that the pitched angle of the roof has improved, rather than inhibited, effective drainage of rainwater.

105 Secondly, the Tribunal accepts the applicant's evidence that there is a lack of consistency in size and shape of patios within the complex (in particular, the angle of the roofs of the patios).

106 The Tribunal also finds there is a lack of uniformity in the appearance of fences (in terms of their height and constructed material) constructed across the complex.

107 As such, the Tribunal is not satisfied that there is any established consistency in the appearance of any of these patio structures, or indeed any other structures, in the common property in the unit complex to reasonably justify excluding the patio.

108 In addition, the Tribunal accepts the evidence of Messrs Wilson and Janicki (and to some extent, documented comments from Mr Atkins) that the patio is not generally visible from the outside, which further reduces the significance of visual amenity as a relevant factor.

109 Thirdly, the Tribunal is also not satisfied that the complaint by the owner of Lot 6 of light pollution has been made out, given that at the time the complaint was made, electricity had not been connected to the light, and that since electricity has been connected, both Messrs Wilson and Janicki attest to the minimal impact of the lighting.

110 The Tribunal also accepts the evidence of Mr Wilson that there is no shading issue for Lots 6 or 8.

111 As neither of the owners of Lots 6 and 8, in respect of whom these issues would have had a direct impact, have sought to be a party nor appeared as a witness in these proceedings, the Tribunal has not been able to assess and test their impressions of the impact of these issues against Messrs Wilson's and Janicki's evidence. As such, the Tribunal accepts the evidence of Messrs Wilson and Janicki that these issues have minimal, if no impact, on Lots 6 and 8.

112 Indeed, it could be inferred from their absence as parties to the proceedings that any lighting or shading impact of the patio does not amount to a serious concern to them. Ultimately, it has not been necessary to make that inference as the Tribunal is able to rely on the independent evidence of Messrs Wilson and Janicki.

113 Fourthly, the Tribunal is not satisfied that the semi-enclosed effect of the patio is a reasonable basis for refusing the consent. Given that lot owners already enjoy what is effectively exclusive use of common property (bound by the dividing fences, and in some cases, garages), the extent of the enclosed nature of the patio from what it had been before is not a compelling nor reasonable basis for refusing the consent.

114 The Tribunal therefore finds that the strata company's refusal to consent to the applicant's proposal to be unreasonable.

Conclusion

115 For the reasons stated above, the Tribunal finds that the strata company's refusal to consent to the applicant's proposal to have replaced the pre-existing patio with the patio is unreasonable.

116 Accordingly, the Tribunal will grant the application.

Orders

The Tribunal makes the following orders:

1. The applicant's application is granted.

2. The strata company consents to the applicant's proposal to have replaced the pre-existing patio on Lot 7 of Strata Plan 6660 with the current patio in October 2017.

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

MS K Y Loh, MEMBER

15 JANUARY 2021