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**JURISDICTION** : STATE ADMINISTRATIVE TRIBUNAL

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

**CITATION** : THE OWNERS OF 5 & 7 UPTON PLACE  
LANGFORD STRATA PLAN 38498 and SWIFT  
[2020] WASAT 165

**MEMBER** : MS R PETRUCCI, MEMBER

**HEARD** : 1 AND 2 OCTOBER 2020

**DELIVERED** : 31 DECEMBER 2020

**FILE NO/S** : CC 1608 of 2019

**BETWEEN** : THE OWNERS OF 5 & 7 UPTON PLACE  
LANGFORD STRATA PLAN 38498  
Applicant

AND

REBECCA GAYE SWIFT  
Respondent

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*Catchwords:*

*Strata Titles Act 1985 (WA)* as it was prior to 1 May 2020 - Lemon-scented gum tree - Roots protruding from lot to under the surface of adjacent common property - Dispute - Whether Tribunal has power to make and if so, should make order under s 83(1) of the *Strata Titles Act 1985 (WA)* to settle dispute - Strata by-laws - Allegation strata company using proceeding as a means of intimidation and to financially ruin lot proprietor - Turns on own facts

*Legislation:*

*State Administrative Tribunal Act 2004* (WA), s 15(1)

*Strata Titles Act 1985* (WA) (post 1 May 2020), cl 30(1), Sch 5

*Strata Titles Act 1985* (WA) (prior to 1 May 2020), s 3(1), s 9, s 17(1), s 32, s 35(1), s 35(1)(a), s 35(1)(b), s 35(1)(c), s 39, s 39(1), s 42, s 81, s 81(1), s 81(2), s 81(3), s 83, s 83(1), s 83(4), s 84, s 84(1)(b), s 84(2), Div 3, Pt VI, Sch 1, Sch 2

*Strata Titles Amendment Act 2018* (WA)

*Result:*

Application successful

*Category:* B

**Representation:**

*Counsel:*

Applicant : Mr C Gough and Ms L Holland

Respondent : Mr A Read and Ms A Corstorphan

*Solicitors:*

Applicant : Mills Oakley

Respondent : Civic Legal

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

[2004] WASTR 66

Ainsworth v Albrecht [2016] HCA 40

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

Borg v The Owners of Strata Plan 64425 [2010] NSWDC 203

Brosolo and Council of Owners of 25 St Leonards Strata Plan 352  
[2008] WASAT 285

Clark and The Owners of Waterfront Mews Strata Plan 14082  
[2011] WASAT 110

Dimitrios Michos & Another v Council of the City of Botany Bay (No. 2)  
[2012] NSWSC 1464

Ding and The Owners of Strata Plan 19112 of 80 Forrest Street Fremantle  
[2005] WASAT 63

Drexel London (a firm) v Gove (Blackman) [2009] WASCA 181

Dworakowski and The Owners of 63 Temple Street Victoria Park Strata Plan  
26070 [2020] WASAT 45

Hutchison and Canciullo [2020] WASAT 22

Janus and Abernethy [2020] WASAT 88

Killigrew and The Owners of Camdale Strata Plan 7996 [2005] WASAT 48

Maguire v Owners of Roslyn Strata Plan 35960 [2014] WASC 28

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

McDonagh and Owners of Mount Bakewell Resort Strata Plan 18228  
[2011] WASAT 148

Mustac v Medical Board of Western Australia [2007] WASCA 128

Proprietors of Strata Plan No 14198 v Cowell (1989) 24 NSWLR 478

Squelch and Brooklea Nominees Pty Ltd [2005] WASAT 198

Stann and The Owners of Beau Vista Strata Plan 12008 [2012] WASAT 227

The Owners of Bouvard Villas Strata Plan 11315 and Eves [2019] WASAT 138

Wong v Reid [2016] WASC 59

**REASONS FOR DECISION OF THE TRIBUNAL:**

***Introduction***

1 On 18 October 2019, The Owners of 5 & 7 Upton Place Langford Strata Plan 38498 (**strata company or applicant**) commenced these proceedings in the Tribunal under s 83(1) of the *Strata Titles Act 1985* (WA) (**ST Act**). As the proceedings were commenced before the amendments to the ST Act under the *Strata Titles Amendment Act 2018* (WA) (**ST Amendment Act**) came into operation on 1 May 2020, the provisions of the ST Act as they were immediately prior to the amendments made by the ST Amendment Act apply to the determination of these proceedings.<sup>1</sup> All references to provisions of the ST Act in these reasons are to those in the ST Act immediately prior to 1 May 2020.<sup>2</sup>

2 The respondent in these proceedings is Ms Rebecca Gaye Swift (**Ms Swift or respondent**).

3 Ms Swift is the proprietor of Lot 1 together with a share in any common property (**Lot 1**) as set out on Strata Plan 38498 which was registered on 21 July 2000 (**strata scheme**). The relevant strata scheme is located at 5 & 7 Upton Place, Langford and is described in the strata plan as being 'three double storey brick and tile residential buildings which are situated on portion of Canning Location and being Lot 365 on Plan 11013 and are known as 5 & 7 Upton Place Langford' (**strata complex**).

4 The Housing Authority was listed as the second respondent in the strata company's application to the Tribunal. However, the Housing Authority was removed as a respondent in these proceeding by order of the Tribunal on 8 May 2020 as it no longer had an interest in Lot 1.

5 In these proceedings, the applicant seeks orders from the Tribunal under the ST Act as follows:<sup>3</sup>

1. [An] order that, within 14 days of the date of this order, the respondents do all things necessary to remove the tree located at the south western corner of Lot 1 on Strata Plan 38498, including but not limited to, carrying out all necessary works to remove the tree.

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<sup>1</sup> Clause 30(1) of Sch 5 to the ST Act as amended by the ST Amendment Act.

<sup>2</sup> Other than in footnotes referring to the ST Act as amended by the ST Amendment Act.

<sup>3</sup> Exhibit 1 at page 3 along with order 1 of the orders made by the Tribunal on 16 June 2020 (Exhibit 1 at page 18).

2. [An] order that, if order 1 is not complied with within 14 days of the date of this order, the applicant strata company be entitled to enter the respondents' property to do all things necessary to remove the tree, including but not limited to, inspection and carrying out all necessary works to remove the tree.
3. The respondents bear the costs of the works contemplated by order 1 or order 2 (as applicable).
4. The parties have liberty to apply for directions in the event (sic) that issues arise as to the implementation of these orders, or in the event that the parties reach an alternative agreement.

6 At the outset, the strata company made it clear that in these proceedings, it was not seeking an order from the Tribunal requiring Ms Swift to pay its legal costs and associated expenses or any order in regards to Sch 1 by-law 16 (Debt recovery).<sup>4</sup> Rather, it was explained at hearing that there are separate proceedings on foot concerning those matters.<sup>5</sup>

7 It is useful at this stage to set out the grounds on which the strata company relies as set out in its application to the Tribunal (references to annexures omitted):<sup>6</sup>

...

2. The applicant seeks orders to effect the removal of the tree situated on the respondents' property, which: a) is causing or has the potential to cause damage to common property in the form of cracking and dislodgment to the main driveway, surrounding curbing<sup>7</sup> and pavement; and b) is a hazard or is likely to cause a nuisance to other strata lots and/or occupiers of those lots.
3. The first respondent [Ms Swift] refused to remove the tree, and has denied the applicant access to the respondents' property in order to perform works to remove the tree.
4. This application has been authorised by the council of the applicant ... and [the] attached s 77B certificate.

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<sup>4</sup> Sch 1 by-law 16 was registered (notification by instrument O077530) with Landgate on 24 January 2019.

<sup>5</sup> ts 153, 2 October 2020.

<sup>6</sup> Exhibit 1 at page 6.

<sup>7</sup> The Tribunal understands the use of the word 'curb' by the parties to be the same as 'kerb'. All references in these reasons to 'curb' or 'curbing' may be read as 'kerb' or 'kerbing'.

5. Section 42 of the Strata Titles Act 1985 (WA) (STA) provides that the by-laws in Schedules 1 and 2 apply, unless amended or repealed. Those by-laws have been amended by the applicant upon enactment ... and by resolution passed on 20 November 2018.
6. By-law 1(2)(a), Sch 1 provides that a proprietor shall use and enjoy the common property in such manner as not to interfere with the use and enjoyment thereof by other proprietors. By-law 1(2)(b), Sch 1 provides that a proprietor shall not use the lot in such a manner as causes nuisance to any occupier of another lot. By-law 2, Sch 2 provides that a proprietor shall not obstruct lawful use of common property by any person.
7. S. 35(1)(a) STA requires the strata company to enforce the by-laws.
8. S. 35(1)(b) STA requires the strata company to control and manage the common property for the benefit of all the proprietors.
9. S. 35(1)(c) STA requires the strata company to properly maintain, and keep the common property in good and serviceable repair.
10. S. 39(1) STA enables a strata company to, amongst other things, enter upon land for the purpose of carrying out works under s 35(1)(c) STA or any work required to be carried out by the strata company by order of a court or tribunal.
11. S. 83(1) STA provides that the strata company may apply to the Tribunal for an order for 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 the STA or the by-laws.
12. Ss. 83(3) and 84 STA also provide that the Tribunal has the power to make an order that a proprietor or strata company do, or refrain from doing, a specified act with respect to a parcel, or to which the application relates, respectively.
13. The effect of the above provisions is that the Tribunal has the power to order that the respondents (sic) carry out works to remove the tree to comply with the by-laws, alternatively, the applicant may enter upon the

respondents' (sic) property to carry out works to remove the tree, in order to: a) avoid further damage from the tree to the common property and neighbouring strata lots; b) ensure the common property is properly maintained and kept in good and serviceable repair; and c) manage the common property for the benefit of others, consistent with the applicant's duties and obligations under the STA.

14. As to order 3, the costs are to be borne by the respondents in accordance with by-law 1.

8 Ms Swift opposes the application by the strata company because:<sup>8</sup>

[T]he application before the Tribunal is not founded on the ordinary maintenance or repair issues facing a strata company, but on the interpersonal disputes that unduly feature in strata matters between warring (sic) neighbours.

9 Counsel for Ms Swift stated in closing submissions:<sup>9</sup>

[T]he Tribunal ought to guard against misuse, oppression, obsessiveness, and it ought to guard against overreach and a draconian and excessive solution to what is, in essence, a relatively minor and practical problem which can be addressed by implementing the practical measures recommended by Mr Short.

10 In contrast, counsel for the strata company stated in closing submissions:<sup>10</sup>

[T]his isn't about whether you can save a tree. This isn't about whether you can put reinforced concrete in the driveway. This isn't about whether the strata company needs to spend five times more getting an engineer out to replace a road that it otherwise have put an asphalt road back down. This is purely and simply about by-laws, safety and common sense.

11 The strata company's application falls within the Tribunal's original jurisdiction under s 15(1) of the *State Administrative Tribunal Act 2004* (WA) (**SAT Act**).

12 For the reasons given below, the Tribunal has determined that the Tribunal has power, and that it is appropriate in this case, to make orders under the ST Act broadly along the lines of, and not differing in

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<sup>8</sup> Exhibit 1 at page 875.

<sup>9</sup> ts 152, 2 October 2020.

<sup>10</sup> ts 154, 2 October 2020.

substance from the orders sought by the strata company (as set out above in [5]).

*Procedural history and evidence*

13 Mr Dean Kevin Cahill, Ms Sharlene Anne Dixon and Ms Jocelyn Shanks provided statutory declarations which were filed with the Tribunal and relied on by the applicant. Mr Cahill is the proprietor of Lot 8 on the strata plan. Ms Dixon is the proprietor of Lot 7 on the strata plan. Ms Shanks is the director of Competent Strata Assistance Pty Ltd (**Competent Strata**) and is a senior strata manager. Since 8 October 2018, Competent Strata has been the strata manager of the strata company.

14 Mr Steven Mark Wadcock provided a statutory declaration and an expert report which was filed with the Tribunal and relied on by the applicant. Mr Wadcock is a horticulturalist with over 30 years' experience and holds a certificate in horticultural practice. Since 1988, Mr Wadcock has owned and operated his business, All Seasons Garden Care, which provides garden maintenance and horticultural services to over 1,100 properties in the Perth metropolitan area in the domestic, government and commercial markets.

15 Ms Swift and her son, Mr Jonathon Edward Swift, each provided a witness statement which were filed with the Tribunal and relied on by the respondent. Ms Swift, as set out earlier, is the proprietor of Lot 1 and is the respondent in these proceedings. Ms Swift moved into Lot 1 on 23 September 2000 and has been living there on and off but has not slept there since April 2000. Ms Swift is a lecturer in soil science and agronomy at Curtin University of Technology. She is a member of the council of owners for the strata complex. Mr Swift is a student and first lived at Lot 1 from 23 September 2000 when he was aged six and more recently from March 2020.

16 Mr Mark Short provided an expert report and response notes to the report prepared by Mr Wadcock which were filed with the Tribunal and relied on by the respondent. Mr Short is an arborist, having qualifications in horticulture and arboriculture, most recently having attained a graduate certificate in arboriculture from the University of Melbourne in 2015. Mr Short has been an arborist for approximately 19 years.

17 On 5 December 2019, the Tribunal made its usual orders programming the matter to a mediation on 16 January 2020.



The Tribunal mediation did not resolve the dispute between the parties and the matter was adjourned to further direction hearings on 3 April 2020, 8 May 2020, 8 June 2020, and on 16 June 2020 the matter was listed for a final hearing for one day on 9 September 2020. At the request of the respondent, a further urgent directions hearing was held 7 August 2020 to, inter alia, extend the date for the parties to comply with the earlier orders made by the Tribunal and to relist the final hearing to commence on 1 October 2020 for a duration of two consecutive days.

18 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,<sup>11</sup> subject to any objection. There were a number of objections to the admission of parts of the documents into evidence.<sup>12</sup> At the hearing, the Tribunal marked the following documents, to which the Tribunal has had regard for the purpose of its determination in these proceedings, as exhibits:<sup>13</sup>

- hearing book prepared by the Tribunal (pages 1 to 905 except for redactions<sup>14</sup>) dated 22 September 2020 (Exhibit 1);<sup>15</sup>

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<sup>11</sup> Although forming part of 'exhibits', the parties' contentions and submissions in Exhibit 1 are taken to be submissions, rather than evidence.

<sup>12</sup> The following were redacted from the hearing book prepared by the Tribunal (Exhibit 1):

- email from Mr Greg James to Ms Shanks dated 12 August 2019 (bottom of page 41);
- preliminary tree report by Perth Arbor Services Pty Ltd (pages 43-46);
- statutory declaration of Mr David John Cherry (pages 485-486);
- email from Ms Zana Sheary dated 15 July 2020 (page 505);
- Root Barrier Design & Installation Guidelines (pages 547-551);
- 'Examples of tree disputes' <http://lawreform.vic.gov.au> (pages 552-560);
- '*Widow-maker' branch near-miss for WA Parliament gardener* [www.perthnow.com.au](http://www.perthnow.com.au) (pages 561-569);
- 'Gum trees and eucalypts' <http://198.71.162.54/fauna/flora> (pages 570-573);
- Mr Brad Bowden 'Arboricultural assessment at 5 & 7 Upton Place Langford SP 38498' report dated 6 February 2020 (pages 691-707);
- Magistrates Court of Western Australia General Procedure Claim to remittance advice (pages 720-740);
- witness statement of Ms Swift at paras 11, 12, 14, 27, 28, 29, 30, 43 and 44 (pages 771-775);
- second witness statement of Ms Swift at paras 1, 2, 7 save for the first sentence up to the reference to the year 2018, 8 save for the first sentence, 9, 10 and the second last sentence in para 22 (pages 831-832); and
- respondent's submissions dated 1 September 2020 at para 89 (page 893).

<sup>13</sup> Above n 11.

<sup>14</sup> Above n 12.

<sup>15</sup> The following corrections were made to the statutory declaration from Sharlene Anne Dixon (pages 489 and 490):

- para 8 the word 'my' in the first sentence is deleted and replaced with the words 'Ms Wallins';

- applicant's bundle of photographs taken at 5 & 7 Upton Place, Langford (photograph pages 1 to 33) dated 27 September 2020 (Exhibit 2);
- applicant's bundle of photographs taken at 5 & 7 Upton Place, Langford (photograph pages 34 to 36) dated 27 June 2019 (Exhibit 3);
- Australian Standard AS 4373-2007 Pruning of amenity trees (Exhibit 4);<sup>16</sup> and
- Australian Standard AS 4970-2009 Protection of trees on development sites (Exhibit 5).<sup>17</sup>

19 Following the last day of the hearing, on 2 October 2020, the Tribunal reserved its decision.

### *Issues for determination*

20 The strata company's application to the Tribunal is an application under s 83(1) of the ST Act for the resolution of a dispute, whereby it seeks an order to effect the removal of the tree, as described in more detail below at [47], which it alleges is:<sup>18</sup>

- (a) causing or has the potential to cause damage to common property in the form of cracking and dislodgment to the main driveway, surrounding curbing and pavement; and
- (b) a hazard or is likely to cause a nuisance to other strata lots and/or occupiers of those lots.

21 Ms Swift identified three issues between the parties. First, the strata company's obligation under s 35(1)(c) of the ST Act to 'keep in good and serviceable repair, properly maintain and, where necessary, renew and replace ... the common property' (**repair obligation**). Second, the strata company's power to enter upon land for the purpose of carrying out works under s 35(1)(c) of the ST Act or any work required to be carried out by the strata company by order of a court or

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- para 9 the words 'my Property' in the first sentence is deleted and replaced with the words 'Unit 7D';
  - para 15 the word 'our' in the first sentence is deleted and replaced with the words 'Unit 7D's'; and
  - para 17 the words 'a owner and' in the first sentence are deleted and replaced with the word 'an'.

<sup>16</sup> Standards Australia, 2<sup>nd</sup> Ed, 14 March 2007.

<sup>17</sup> Standards Australia, 1<sup>st</sup> Ed, 26 August 2009.

<sup>18</sup> Exhibit 1 at page 6.

tribunal (**power to enter for repairs**). Third, the strata company's requirement to enforce the by-laws (**enforcement obligation**).<sup>19</sup>

22 In determining this matter, the Tribunal will need to consider the repair obligation, the power to enter for repairs and the enforcement obligation as raised by Ms Swift. It will do so by answering the following two questions:

- (1) Does the Tribunal have power under s 83(1) of the ST Act to order Ms Swift to have the tree, located at the south-western corner of her Lot 1, as described in more detail below at [47], removed including all necessary works to remove the tree including the roots and stump, at her cost?
- (2) If the answer to question (1) is 'yes', whether the Tribunal, in the exercise of its discretion under s 83(1) of the ST Act, should make an order for settlement of the dispute, and if so, what order should the Tribunal make?

23 The Tribunal turns, next, to set out the relevant provisions of the ST Act followed by relevant findings of fact. Then, the parties' main contentions are set out. Finally, the Tribunal will consider each of the issues for determination in turn.

### *Legal framework*

#### **ST Act**

24 A strata scheme is the manner of division of a parcel of land into lots, or lots and common property, under a strata plan, and the manner of the allocation of unit entitlements among the lots, and the rights and obligations as conferred or authorised by the ST Act, between themselves, of proprietors, others having proprietary interests in, or the occupants of, the lots and the strata company.<sup>20</sup> A strata company, relevantly for a strata scheme, is a body corporate constituted under s 32 of the ST Act by the proprietors of the lots upon the registration of the strata scheme. The common property of a strata scheme relevantly comprises any lot or lots shown on the strata plan to be common property.<sup>21</sup> In Western Australia, common property is 'held by the

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<sup>19</sup> Exhibit 1 at page 662.

<sup>20</sup> Definition of 'strata scheme' in s 3(1) of the ST Act.

<sup>21</sup> Definition of 'common property' in s 3(1) of the ST Act.

proprietors [in a strata scheme] as tenants in common in shares proportional to the unit entitlements of their respective lots'.<sup>22</sup>

25 Section 35(1) of the ST Act sets out duties of the strata company. Relevantly, s 35(1)(a), (b) and (c) of the ST Act states as follows:

- (1) A strata company shall -
  - (a) enforce the by-laws; and
  - (b) control and manage the common property for the benefit of all the proprietors; and
  - (c) 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[.]

26 Section 39 of the ST Act sets out the powers of the strata company to enter. It provides:

**39. Power of strata company to enter**

- (1) For the purpose of carrying out -
  - (a) any work pursuant to section 38(1), (2), (3) or (6); or
  - (b) any work required to be carried out by a strata company by a notice or order of a public authority or local government; or
  - (c) any work referred to in section 35(1)(c); or
  - (d) any work necessary to repair or renew any pipes, wires, cables or ducts referred to in section 11(2)(b); or
  - (e) any work required to be carried out by the strata company by order of a court or tribunal,

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<sup>22</sup> Section 17(1) of the ST Act.

the strata company may, by its agents, servants or contractors, enter upon any part of the parcel for the purpose of carrying out the work -

- (f) in the case of an emergency, at any time; or
  - (g) in any other case, at any reasonable time on notice given to an occupier of that part of the parcel.
- (2) The strata company may, by its agents, enter upon any part of the parcel for the purpose of -
- (a) inspecting that part of the parcel; or
  - (b) ensuring that the by-laws are being observed,

and may do so in the case of an emergency at any time or, in any other case, at any reasonable time on notice given to an occupier of that part of the parcel.

- (3) A person shall not obstruct or hinder a strata company in the exercise of its power under subsection (1) or (2).

Penalty: \$400.

27 Division 3 of Pt VI of the ST Act concerns the resolution of disputes. The orders that the Tribunal may make for the resolution of a dispute are set out in Div 3 of Pt VI of the ST Act.

28 Section 83(1) of the ST Act sets out the general powers of the Tribunal to make orders in proceedings commenced under that enabling Act (in this case the ST Act). Section 83 of the ST Act provides, in part, as follows:

- (1) The State Administrative Tribunal may, pursuant to an application of a strata company, an administrator, a proprietor, a person having an estate or interest in a lot or an occupier or other resident of a lot, in respect of a scheme, 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 on any person entitled to make an application under this subsection or on the council or the chairman, secretary or treasurer of the strata company.

...

- (3) For the purposes of subsection (2), where -

- (a) application is made to a strata company to exercise a discretion referred to in that subsection; and
- (b) the strata company does not, before the expiration of the period of 2 months that next succeeds the making of the application -
  - (i) exercise or perform a power, authority, duty or function in accordance with the application; or
  - (ii) inform the applicant that it has decided not to exercise or perform the power, authority, duty or function in accordance with the application,

the strata company shall be deemed to have decided not to exercise or perform the power, authority, duty or function.

- (4) Nothing in subsection (1) empowers the State Administrative Tribunal to make an order under that subsection 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 on the strata company by this Act where that power, authority, duty or function may, in accordance with any provision of this Act, only be exercised or performed pursuant to a unanimous resolution, resolution without dissent or a special resolution[.]

29 Section 84 relevantly provides:

- (1) The State Administrative Tribunal is empowered to make an order that -
  - ...
  - (b) requires a party to the dispute before it to do, or refrain from doing, some specified act to which the application relates;
  - ...
- (2) An order made by the State Administrative Tribunal may direct that the order shall be complied with within a period specified in the order[.]

30 Sections 81(1), (2) and (3) of the ST Act state as follows in relation to orders the Tribunal may make under Div 3 of Pt VI of the ST Act:

- (1) The State Administrative Tribunal may make an order sought by the applicant and an order made may be expressed in terms different from the order sought, so long as it does not differ in substance from the order sought.
- (2) An order made may include such ancillary or consequential provisions as the State Administrative Tribunal thinks fit.
- (3) The State Administrative Tribunal may order a strata company, an administrator, a proprietor, a person having an estate or interest in a lot or an occupier or other resident of a lot to do, or to refrain from doing, a specified act with respect to a parcel.

31 Finally, in making its orders disposing of the matter, the Tribunal may make an order expressed in different terms to the order sought by the applicant provided that it does not differ in substance: *The Owners of Bouvard Villas Strata Plan 11315 and Eves* [2019] WASAT 138 (*Eves*) at [20] citing *Wong v Reid* [2016] WASC 59 at [32].

### ***By-laws***

32 Section 42 of the ST Act provides that in the absence of any notification of any amendment or repeal of or any addition to the by-laws, the by-laws of the strata company are the 'standard' by-laws in Sch 1 and Sch 2 of the ST Act.

33 In this case, the strata company by its management statement (notified by instrument H508037) on 21 July 2000 set out the by-laws as contained in Sch 1 and Sch 2 of the ST Act along with the following additional by-laws: Sch 1 by-law 16, 17, 18, 19, 20, 21 and 22. Following that there was of a change of by-laws (notified by instrument O077530) on 24 January 2019 by adding the following by-laws: Sch 2 by-law 15, 16 and 17.

34 The strata company has referred to Sch 1 by-laws 1(2)(a) and 1(2)(b) and Sch 2 by-law 2. They relevantly provide:

**1. Duties of proprietor, occupiers etc.**

...

(2) A proprietor, occupier or other resident of a lot shall -

- (a) use and enjoy the common property in such a manner as not unreasonably to interfere with the use and enjoyment thereof by other proprietors, occupiers or residents, or of their visitors; and

- (b) not use the lot or permit it to be used in such manner or for such purpose as causes a nuisance to any occupier of another lot (whether a proprietor or not) or the family of such an occupier[.]

**2. Obstruction of common property**

A proprietor, occupier or other resident of a lot shall not obstruct lawful use of common property by any person.

35 As noted earlier, s 35(1)(a) of the ST Act requires the strata company to enforce the by-laws, s 35(1)(b) of the ST Act requires the strata company to control and manage the common property for the benefit of all the proprietors, and finally s 35(1)(c) of the ST Act requires the strata company to properly maintain, and keep the common property in good and serviceable repair.

36 The evidence is summarised next.

***Expert evidence***

37 Mr Wadcock's expert evidence is summarised as follows:<sup>23</sup>

- The tree is an *E. Citriodora*.
- The tree has an approximate height of 20 lineal meters with an approximate total basal caliper of 150 centimetres.
- The condition of the tree is satisfactory as it has been well pruned over the years.
- The immediate ground area is sandy/alluvial and is considered a satisfactory media for the tree. However, the immediate ground area is congested with hardstand, curbs and the like which is not a satisfactory habitat for the tree.
- Analogical trees are typically residing in larger spaces, which are not immediate to dwellings, access ways and public or common areas.
- *E. Citriodora* is statistically considered a public liability concern with the risk of falling branches.

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<sup>23</sup> Exhibit 1 at pages 182 to 184 and ts 24-25, 1 October 2020.



- The tree is directly responsible for significant undulations to the common hardstand (driveway), curb header breakage and slight displacement of one common wall between units 7D and 7E. The undulations will continue to elevate and create further what is already a tripping hazard.
- The tree cannot be root guarded this far into its life. Root guarding is typically implemented when planning new trees and is only suited to trees that rely on a significant tap root to stabilise and do not rely on surface evident lateral roots such as evident with this tree.
- Removal or partial removal of any lateral tree roots is not recommended due to:
  - (a) destabilisation of the tree; and
  - (b) exponential root regeneration as the tree looks to ecologically resolve the issue.
- The tree while aesthetically acceptable is not suited to the current position.

38 Mr Short's expert evidence is summarised as follows:<sup>24</sup>

- The tree is a *Corymbia citriodora*.
- The tree is a semi mature tree (species originating in the eastern states of Australia) with a height of 20.2 metres and a total trunk diameter (DHB) of 810 centimetres and at ground level (DGL) is 124 centimetres. The canopy is 13 metres north/south and 18 meters east/west. The structural root zone is 3.62 metres and the tree protection zone is 9.72 metres. The condition rating of the tree is average.
- The tree is a common species of tree widely planted in Perth over the past 40 years due to its fast growing nature. It has become less common in the urban environment around homes due to its high propensity for leaf shed and its perception as having a high

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<sup>24</sup> Exhibit 1 at pages 622-643 and ts 121-144, 2 October 2020.

propensity to shed limbs, which drives people's general dislike of the species.

- The tree is causing damage by way of lifting of the asphalt in two locations and one section of curb adjacent to the tree.
- Other damage is caused to the driveway, such as subsidence, and that is best inspected by an engineer.
- Removal of the tree is not required at this time (at time of inspection).
- Further damage can be prevented through simple root pruning of the two offending roots without affecting the tree's structural integrity.
- Limb fall has continued after previous pruning events due to over pruning and strong winds. Further pruning will not prevent future branch fall and would likely exacerbate the situation.
- The tree has a very low rate of risk in terms of falling of branches - one in a million in terms of the falling of branches and limbs and people being struck and one in 400,000 of branches falling from the tree.
- As long as the two identified roots are the only ones removed, the risk of the tree falling is minimal.
- No damage was observed to have taken place to the adjacent dwellings, carport or wall.
- Undetected roots may cause further damage in the future.

39           The Tribunal considered each of the experts' written reports as well as their oral evidence. The Tribunal is satisfied that all the expert witnesses possess the relevant expertise through their qualifications and experience to express a relevant expert opinion in these proceedings.

40           The Tribunal does not accept Ms Swift's assertion that Mr Wadcock is not as qualified as Mr Short to make assessments on the

safety and stability of the tree.<sup>25</sup> Even though Ms Swift submitted that Mr Wadcock's report was 'lacking in detail and sophistication and scientific evidence' when compared to that of Mr Short,<sup>26</sup> and that Mr Short in giving oral evidence was a 'far more detailed' than Mr Wadcock and had 'conducted a thorough investigation',<sup>27</sup> the Tribunal prefers the evidence of Mr Wadcock as he was honest, straight forward and unshaken in giving his oral evidence. In contrast, the Tribunal found Mr Short's evidence to be cycloptic, selective in detail and failed to correct errors in his reports until pressed under cross-examination. Examples include: (a) Mr Short failing to concede that there was no asphalt installed up to the trunk of the tree (as set out in his report<sup>28</sup>) until pressed in cross-examination; (b) Mr Short failing to disclose in his report that he had sighted the significant tree root immediately in front of the tree and that the root could not be cut safely because that root is causing damage; and (c) Mr Short only conceded in cross-examination that if all the roots of the tree are cut the stability of the tree would be compromised.

### *Non-expert evidence*

41 Mr Cahill's evidence is summarised as follows:<sup>29</sup>

- In June 2020, he moved to Lot 8 which is situated diagonally opposite to Lot 1. The driveway (common property) runs between his property and Lot 1. There was no cracking on the common property driveway in 2010. Since 2010 the tree has grown bigger and cracking on the driveway has appeared.
- The tree has not been regularly or annually maintained by Ms Swift.
- On 14 November 2019, while sitting in his lounge room, he heard a loud bang which he thought was glass breaking and he knew workmen were working nearby. When he went outside, Ms Dixon, the owner or occupant of Unit 7D (Lot 7) told him that a large branch, of approximately several metres in length, had fallen from the tree and nearly hit the workmen. The

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<sup>25</sup> ts 150, 2 October 2020.

<sup>26</sup> Ibid.

<sup>27</sup> Ibid.

<sup>28</sup> Exhibit 1 at page 677.

<sup>29</sup> Exhibit 1 at pages 199-203 and ts 52-60, 1 October 2020.

weather on 14 November 2019 was calm and sunny and there was no wind or breeze.

- On 22 November 2019 he was home and observed a tree contractor cutting off some branches of the tree close to buildings. This was the first time the tree was trimmed.
- As an owner and occupier he:
  - (a) lives in fear of branches falling on his property and around the strata complex;
  - (b) is concerned walking to his letterbox (which requires him to walk under and past the tree) situated at the front of the strata complex in case branches fall on him;
  - (c) has seen branches of different sizes fall from the tree on a daily basis regardless of weather conditions;
  - (d) has had to remove larger and smaller branches from the driveway in order to drive his car into his carport on numerous occasions;
  - (e) has heard on numerous occasion loud banging noises made by branches falling on the tops of carports in the strata complex; and
  - (f) is constantly cleaning up after the tree every time there is a storm and a dozen or so branches fall on his property or surrounding areas.

42 Ms Shanks' evidence is summarised as follows:<sup>30</sup>

- On 12 August 2019, she received an email from Mr Greg James of Mr Grass Cutter, the gardener of the strata company's common property, wherein he stated he was concerned with damage being caused by a large tree situated in Ms Swift's property. She received the email after Mr James had telephoned her to say that he

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<sup>30</sup> Exhibit 1 at pages 233-241 and ts 60-66, 1 October 2020.

had tripped on the driveway where roots were causing damage and the asphalt had lifted.

- On 13 August 2019 she sent a 'breach notice' to Ms Swift in relation to damage caused by the tree and required the tree to be removed at her cost. On the same date, she received an email from Ms Swift advising that she was seeking legal advice.
- On or about 20 August 2019 she received an email from Ms Swift stating among other things, 'I would agree the raising of the curb on 5A is caused by the tree at 5A'.
- On 20 August 2019, on behalf of the strata company, she requested a report from Perth Arbor Services Pty Ltd (**Perth Arbor Services**) in relation to the tree.
- On 26 August 2019 she requested quotations from various third party contractors in relation to the costs of removing the tree.
- On or about 2 September 2019 she sent to Ms Swift the report she received from Perth Arbour Services.
- From 2 September 2019 to 24 September 2019, she and Ms Swift corresponded about the tree.
- On 24 September 2019 she received an email from Ms Swift stating, amongst other things, '[I]f you come onto my property and remove the tree, without a relevant court order, it will be considered trespass and I will be suing both Competent Strata and the Strata body for damages'.
- On 19 November 2019 she received an email from Ms Swift advising that Perth Arbor Services would be attending the strata complex to trim the tree.
- On 20 November 2019 she telephoned Mr Michael Dawson at Perth Arbor Services who advised they were asked to remove any dead wood and branches from the tree that may be at risk of falling and that they

would be at the strata complex for about an hour or so to do the works for a cost of \$495.

- She attended the strata complex on 23 November 2019 to view the tree and take photographs.
- On or about 30 November 2019 she received a complaint from Mr David Cherry of Unit 5B that a large tree branch had fallen on or near his carport. She received a further complaint about the tree from Mr Cherry on 29 January 2020.
- She has received several reports and complaints from various lot proprietors and occupants about damage caused by the tree.
- In or about mid-March 2020 she engaged Mr Pothole, bitumen repairers, to quote for the removal of the tree roots and to fix the driveway and curbing.
- The tree remains on Lot 1 and no further remedial works have been carried out since November 2019.

43 Ms Dixon's evidence is summarised as follows:<sup>31</sup>

- She has been an occupant of Unit 7D (Lot 7) for over seven years. Lot 1 is directly opposite Unit 7D.
- On 14 November 2019 she agreed for Ms Wallins' van to be parked in the front of her unit off to the side of the driveway in order for a windscreen to be fitted to the van by Novus Windscreens. She was sitting in her lounge room when she heard a loud cracking noise and then a loud thud noise. She went outside to find a large branch had fallen from the tree. She took a photograph of the van and tree. She spoke to one of the workmen who stated that he had to duck to avoid being hit as the branch fell down.
- As an occupier in the strata complex she:

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<sup>31</sup> Exhibit 1 at pages 489-498 and ts 46-52, 1 October 2020.

- (a) is very scared of branches falling on her property, vehicles and around the strata complex;
  - (b) has seen branches of different sizes falling from the tree on a daily basis regardless of weather conditions; and
  - (c) has had to remove bigger and smaller branches from the driveway in order to drive her vehicles into the carport on numerous occasion.
- The tree remains on Lot 1 and no further maintenance works have been carried out on the tree since November 2019.

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Ms Swift's evidence is summarised as follows:<sup>32</sup>

- She moved to Lot 1 on 23 September 2000 with her son, Mr Swift. She chose Lot 1 because of the amenity of the tree. The tree is alongside the curb of the common driveway of the strata complex. Back in 2000, the tree's canopy exceeded the height of her property and would have been in excess of 10 metres.
- She had one of the tree's trunks removed in 2005.
- She had the tree pruned in July 2018.
- There were two other lemon-scented gum trees in the strata complex. One was located on common property near the letterbox and the other was in the front yard of her neighbour at Unit 7A. Both trees were of comparative height to her tree and were in good health. In or about late 2015 the other two lemon-scented gum trees were cut down.
- There was a storm in October 2019 with a wind speed of 93 kilometres per hour recorded at Jandakot airport (closest weather station to Langford) according to the Bureau of Meteorology. Branches fell from numerous trees at the strata complex during the storm, however she is not aware of any damage to the strata complex as

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<sup>32</sup> Exhibit 1 at pages 770-798 and pages 829-872 and ts 68-69 and 77-108, 1 October 2020.

a result of that storm. After the storm, she had Mr Short evaluate the tree to ensure it would not be a hazard to the occupants of the strata complex. She was told that it was not necessary to remove the tree.

- She did not see any major or minor branch falls onto common property in the period between the end of December 2019 and about April 2020.
- The damage to the driveway has been an issue since earlier than 2012 when the roots of the tree were barely visible but there was water collecting in depressions in the driveway, unrelated to the tree's roots. The driveway has cracks throughout.
- She has pruned the tree approximately every two to three years since 2000. She paid cash for the work. The last pruning was done in November 2019.
- In or about 2020 she noted the tree shaded the solar panels on Lot 8 (Mr Cahill's lot).
- She refutes stating to Ms Shanks that the tree was causing damage to the common property. At most she said to Ms Shanks prior to the commencement of these proceedings that the tree was probably cracking her own private curbing.
- She is told by Mr Kelvin Ussher of Tree Care WA that his arborist told him that pruning of the tree cannot be carried out with the remedial works to the driveway being carried out at the same time.

45 Mr Swift's evidence is summarised as follows:<sup>33</sup>

- He is a student, studying on a part-time basis and spends more time at home than not.
- Since March 2020 he has not seen any large branches fall from the tree, or any branches on the ground beneath the tree.

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<sup>33</sup> Exhibit 1 at pages 816 to 827 and ts 108-115, 1 October 2020.



- There are no cracks in the wall on either his side or to the neighbouring wall which belong to Mr Cherry. He inspected the wall on Mr Cherry's side on 28 August 2020 and he only found water damage to the paintwork at the top of the wall.

46 The Tribunal considered each of the non-experts' statutory declaration or witness statement as well as their oral evidence. Apart from Ms Swift and Mr Swift, the Tribunal is satisfied that all the non-expert witnesses presented their evidence in a straight forward manner. The Tribunal finds Ms Swift's oral evidence was selective and she made statements without calling witnesses to support her position such as experts from Murdoch University whom she stated said the tree is deep rooted and that the damage would not likely be caused by the tree.<sup>34</sup> Further, Ms Swift had to be pressed in cross-examination to concede that the roots under the driveway did not come from a rosemary shrub or hibiscus. In regards to Mr Swift, the Tribunal finds that his evidence was also selective and that he tailored his evidence to support his mother, Ms Swift, and was therefore of little probative value.

### ***Factual background***

47 Having considered all the evidence before the Tribunal, the Tribunal makes the following findings of fact which are relevant to the narrow issues to be determined by the Tribunal in these proceedings:

- A *Corymbia citridora* tree,<sup>35</sup> or more commonly known as a lemon-scented gum tree, consisting of four trunks and of approximately 20-25 metres in height is situated on the southern corner of Lot 1 adjacent to, and approximately 20 centimetres in distance from the main asphalt driveway and curbing (**tree**).
- Roots from the tree protrude from Lot 1 to under the surface of the adjacent common property, being the main asphalt driveway and curbing.

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<sup>34</sup> Exhibit 1 at page 63.

<sup>35</sup> Mr Wadcock referred to the tree as an *e. citridora* and Mr Short referred to the tree as a *corymbia citridora*. Both agreed the tree is a lemon-scented gum tree. The specific epithet (*citridora*) is Latin and means 'lemon-scented'. The lemon-scented gum tree was first described in 1848 by Mr William Jackson Hooker in Thomas Mitchell's *Journal of an Expedition into the Interior of Tropical Australia*. In 1995 Mr Ken Hill and Mr Lawrie Johnston changed the name to *corymbia citridora* (see <https://id.biodeversity.org.au/instance/apni/562365>). Many naturalists and conservationists do not recognise the genus *Corymbia* and still categorise the species within *Eucalyptus*.

- There is cracking of the asphalt driveway and curbing.
- The tree has been in place for over 40 years and in excess of 20 metres for over 20 years and is in close proximity to other strata lots.
- The tree sheds branches and drops limbs.
- In or about October 2018 the strata company engaged Ms Shanks of Competent Strata to act as its strata manager.
- On 13 August 2019, following a report from the strata complex's gardener raising concerns that the tree was causing damage to the common property, Competent Strata issued a breach notice to Ms Swift requiring the tree be removed. Ms Swift did not comply with the notice.
- Ms Swift requested Competent Strata to obtain three arborist reports in relation to alleged damage caused by the tree to the common property.
- On 20 August 2019 Competent Strata obtained a preliminary report from Perth Arbor Services in relation to the tree. It stated that damage was being caused to common property. On 2 September 2019, Competent Strata provided the report to Ms Swift.
- Subsequently, the strata company issued a works order to Ms Swift to remove the tree. The tree was not removed.
- On 24 September 2019 Ms Swift in an email to Competent Strata stated, among other things, 'if you come onto my property and remove the tree, without a relevant court order, it will be considered trespass and I will be suing both Competent Strata and the Strata body for damages'.<sup>36</sup>
- On 18 October 2019 the strata company commenced these proceedings in the Tribunal.

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<sup>36</sup> Exhibit 1 at page 108.

48 The Tribunal turns to address each of the issues identified at [22] above.

***Issue 1 - Does the Tribunal have power under s 83(1) of the ST Act to order Ms Swift to remove the tree?***

49 Ms Swift did not expressly contest the Tribunal's jurisdiction under s 83(1) of the ST Act to make an order to resolve a dispute between the parties. Rather, counsel for Ms Swift focused on making submissions that the strata company failed to resolve serious, or, even, trifling concerns in good faith and that the strata company was using these proceedings as a means of intimidating Ms Swift and to financially ruin her. Because of these factors, counsel for Ms Swift urged the Tribunal to focus on the substantial justice of the case to avoid the risk of misuse, oppression and obsessiveness.

50 The strata company submitted that the Tribunal has the requisite power to make the orders it seeks as set out in [5] above.

51 The strata company (correctly) submitted that s 83(1) of the ST Act states, inter alia, that the Tribunal may, pursuant to an application by the strata company, 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 the ST Act or the by-laws in connection with that scheme on any person entitled to make an application under this subsection or on the council or the chairman, secretary or treasurer of the strata company.<sup>37</sup> Further, the strata company (correctly) submitted that the Tribunal is empowered to make an order that, amongst other things, requires a party to the dispute before it to do, or refrain from doing, some specified act to which the application relates under s 84(1)(b) of the ST Act.<sup>38</sup> Also, the strata company (correctly) submitted that s 81(3) of the ST Act provides that the Tribunal may order a strata company or lot proprietor to do, or to refrain from doing, a specified act with respect to a parcel. Finally, the strata company (correctly) submitted that the Tribunal may also direct that the order is to be complied with within a specified period of time per s 84(2) of the ST Act.<sup>39</sup>

52 Section 83(1) of the ST Act relevantly authorises the Tribunal to determine issues in dispute between the parties in the proceedings

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<sup>37</sup> Exhibit 1 at pages 604-605.

<sup>38</sup> Exhibit 1 at page 605.

<sup>39</sup> Ibid.

commenced by the applicant, who is the strata company in the strata scheme, if the order sought from the Tribunal is 'for the settlement of a dispute' and the dispute relates to 'the failure to exercise or perform ... a ... duty or function ... imposed by [the ST Act] or the by-laws in connection with [the] [strata scheme]' by Ms Swift. Importantly the word 'may' in s 83(1) of the ST Act indicates that the power conferred on the Tribunal under this provision 'may be exercised or not, at discretion'. Therefore, in considering the strata company's application, the Tribunal must determine whether there is a dispute in these proceedings about a failure by Ms Swift to perform a duty or function imposed by the ST Act or the by-laws in connection with the strata scheme and, if so, whether, in the exercise of discretion under s 83(1) of the ST Act, it should make an order for the settlement of the dispute.

53 In addition, s 83(4) of the ST Act precludes the Tribunal from making an order under s 83(1) of the ST Act if the duty or function that Ms Swift has failed to perform can only be exercised or performed pursuant to a unanimous resolution, resolution without dissent or a special resolution of the proprietors of the lots in the strata scheme. As discussed below, the duty or function that Ms Swift has failed to perform in this case, does not require any such resolution of the proprietors.

54 The strata company's position is that all proprietors and occupiers, apart from Ms Swift, support the removal of the tree to avoid any ongoing obstructions and nuisance caused by the tree and damage caused to common property. Further, the strata company says that no approval has been sought or granted by it for the tree to remain.

55 Ms Swift's case, is simply that the 'minor root intrusion' can be resolved without being 'so drastic as to chop down the tree', and without exercise by the strata company of its power under s 39(1) of the ST Act to enter upon her Lot 1 for the purpose of carrying out works under s 35(1)(c) of the ST Act. Ms Swift submits that the strata company can have the entire driveway assessed by relevant contractors and an improvement program carried out to repair all cracks in the driveway, including severing specific roots on common property identified by Mr Short and taking root mitigation steps to shield the common property from any further damage. Ms Swift says such steps should be taken under the guidance of an arborist after appropriate quotes are obtained by the strata company and appropriate votes taken in a properly convened meeting of the strata company.

56 The Tribunal finds the tree (roots and canopy) protruding from Lot 1 into common property is the basis of the 'dispute' between the strata company and Ms Swift. The applicant as the strata company of the strata scheme is an authorised party to make an application to the Tribunal under s 83 of the ST Act. The strata company's position is that Ms Swift is in breach of Sch 1 by-law 1(2)(a) and by-law 1(2)(b) and Sch 2 by-law 2 and issued a 'breach notice' to Ms Swift on or about 13 August 2019 and a works order on or about 20 August 2019 to remove the tree. Ms Swift denies she is in breach of any by-law. The Tribunal is satisfied there is a dispute between the parties for the purposes of s 83(1) of the ST Act and therefore has the power to make an order under that section to resolve the dispute.

57 The Tribunal turns, next, to consider whether the Tribunal should make the orders sought by the strata company to require Ms Swift to remove the tree on Lot 1.

***Issue 2 - Should the Tribunal order Ms Swift to remove the tree on Lot 1?***

58 The Tribunal addresses each of Ms Swift's principal arguments below.

**The tree encroaching on the common property airspace does not assist the strata company**

59 Ms Swift submits that the strata company's allegation that the canopy of the tree encroaches on common property airspace does not assist the strata company. This is because, according to Ms Swift, the tree:<sup>40</sup>

- (a) was in place when the strata company was formed two decades ago; and
- (b) exceeded 10 metres in height at the inception of the strata company and the publication of its by-laws.

60 Further, Ms Swift submits that the strata company's claim that she is in breach of the by-laws because of the tree canopy is either nonsense or that it is substantially unjust or unreasonable for the strata company to seek to take enforcement action against her for the following reasons:<sup>41</sup>

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<sup>40</sup> Counsel for Ms Swift advised the Tribunal that Ms Swift was not pressing arguments of adverse possession as set out in Exhibit 1 at pages 883-884.

<sup>41</sup> Exhibit 1 at page 884.

- (a) the strata company was formed and the by-laws were passed in 2000;
- (b) the tree was already in excess of 17 metres in height in 2000;
- (c) after the passage of the by-laws in 2000, Ms Swift acquired ownership of Lot 1; and
- (d) there is no reasonable basis for the strata company to justify either as a technical matter or on the substantial justice of the matter by turning on Ms Swift - with nary a complaint for almost two decades - and decrying the long-term existence of the tree as some kind of breach on her part.

61 Ms Swift (correctly) submits that the decision by the Office of the Strata Titles Referee in *[2004] WASTR 66* is not binding on the Tribunal. The Court of Appeal in *Mustac v Medical Board of Western Australia* [2007] WASCA 128 made it clear that, although principles of good administration and consistency of decision-making may be relevant to the approach taken, judicial comity does not apply between Tribunal decision-makers.

62 Further, Ms Swift submits that the decision in *Ainsworth v Albrecht* [2016] HCA 40 at [62] is not authority for the strata company's submission that she, as the proprietor of Lot 1, has no right or permission to allow the tree above 10 metres to remain as it encroaches common property. It is not necessary for the Tribunal to consider this case for the reasons set out below at [68]-[70].

63 It is Ms Swift's evidence that the tree was pruned most recently in November 2019. Further, Ms Swift submits that if the tree is pruned back by at least 10 metres it will present a greater safety and failure risk according to Mr Short.

64 The strata company (correctly) identified the common property of a strata scheme in Western Australia as that part of the land and improvements to it which is not comprised in the lots on the strata plan in accordance with the definition under s 3(1) of the ST Act. This was so stated by the Tribunal in *Eves* at [12].

65 Further, as stated earlier at [24], in Western Australia the common property is held by the proprietors as tenants in common in shares

proportional to their unit entitlements of their lot under the strata scheme.<sup>42</sup> In Ms Swift's case, her unit entitlement is one (out of an aggregate of nine units) and therefore she holds a 1/9 interest in the common property as a tenant in common.

66 The strata company referred to the strata plan which has the following endorsement:

The stratum of the part lots external to the buildings extends between 5 metres below and 10 metres above the upper surface level of the lowest ground floor of the building located on each respective lot.

67 Relying on *Maludra Pty Ltd and The Owners of Windsor Towers Strata Plan 80* [2017] WASAT 112 at [194], the strata company submits that the failure to obtain approval [for an item to be on common property] constitutes an unauthorised obstruction and interference with the common property which is for the strata company to control and manage for the benefit of all proprietors.

68 In the Tribunal's view, the endorsement on the strata plan (as set out at [66]), means the airspace above 10 metres on top of the upper surface level of the lowest ground floor of Lot 1 is common property. It is common ground that the tree is more than 10 metres in height. Therefore, in the Tribunal's view, the tree is growing on an external portion of Lot 1. The upper limit of that external portion is 10 metres above the upper surface level of the lowest ground floor of the Lot 1 residence. This means that, to the extent the tree may be higher than that 10 metre upper limit, it would be protruding into common property air space which is owned by all lot proprietors and which cannot be used without approval of the strata company. It is the evidence of the strata company that such approval has not been requested by Ms Swift and that at no time has the strata company approved any request from Ms Swift for a licence or an exclusive use by-law under the ST Act in regards to the tree.

69 There is nothing in the ST Act which excludes a lot proprietor, such as Ms Swift, who purchased Lot 1 with the tree in place, from complying with the requirements of the ST Act regarding common property. Similarly, there is nothing in the ST Act which excludes a strata company from its obligations under the ST Act regarding common property when a tree is protruding from a lot into common property of the strata scheme.

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<sup>42</sup> See also *Eves* at [12].

70           Consequently, in the Tribunal's view, that part of the tree protruding from Lot 1 is encroaching in the common property air space falls within the strata company's duty imposed by s 35(1)(c) of the ST Act 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 fittings, fixtures and lifts used in connection with the common property) and to so whether damage or deterioration arises from fair wear and tear, inherent defect or any other cause.

71           The strata company's obligations under s 35(1)(c) of the ST Act are further discussed below.

**Section 35(1)(c) only applies to the remediation of existing damage to common property**

72           Ms Swift submits that the issue between the parties primarily concerns the obligation of the strata company under s 35(1)(c) of the ST Act to 'keep in good and serviceable repair, properly maintain and where necessary, renew and replace the common property' and the power under s 39(1) of the ST Act which enables a strata company to enter upon land for the purpose of carrying out works under s 35(1)(c) or 'any work required to be carried out by the strata company by order of a court or tribunal'.

73           Ms Swift's position is that the strata company's obligation under s 35(1)(c) of the ST Act extends only to repairing *existing* damage to common property and that it does not extend to an obligation to guard against potential further damage, for example, damage caused by third parties.

74           In addition, Ms Swift submits that the power under s 39(1) of the ST Act is limited to the strata company entering upon land to undertake repairs but it does not extend to the strata company enforcing the by-laws. In other words, Ms Swift's position is that the strata company does not have a general power to enter private land (such as her Lot 1) to enforce the by-laws. Ms Swift says the decision in *McDonagh and Owners of Mount Bakewell Resort Strata Plan 18228* [2011] WASAT 148 at [12] does not support a power for preventing potential future breaches, but rather it is a power to remedy a persisting breach of a by-law that was causing, and would continue, to cause the breach of a by-law.



75 In its application the strata company seeks to 'avoid further damage from the tree to common property and neighbouring strata lots', which Ms Swift submits is not a 'repair' for the purposes of s 35(1)(c) of the ST Act. Ms Swift submits that the action of the strata company to avoid (or prevent) further damage is not obligatory under s 35(1)(c) of the ST Act and referred to *Stann and The Owners of Beau Vista Strata Plan 12008* [2012] WASAT 227 (*Stann*) at [13] where the Tribunal stated:

... 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) of the ST Act.

76 *Stann* was cited with approval in *Dworakowski and The Owners of 63 Temple Street Victoria Park Strata Plan 26070* [2020] WASAT 45 at [61].

77 Ms Swift submits that the strata company's argument that the tree poses an unacceptable limb fall risk has no merit for two reasons. First, the strata company seeks to put the onus on her to 'guarantee [that the works to remedy the root ingress] ... will not have an effect on the structure, stability, survivability and most importantly, safety of the tree'. Second, the advice of the experts is that the work would be low risk and the tree itself is an acceptable risk for its placement.

78 The strata company (correctly) submits that pursuant to s 35(1)(a) and s 35(1)(b) of the ST Act it has responsibility to control and manage the common property for the benefit of all the proprietors. Further, it is the strata company's submission that the obligation under s 35(1)(a) and s 35(1)(b) of the ST Act will be construed more strictly in circumstances where safety issues are evident, as is the case with the tree. Relying on *Ding and The Owners of Strata Plan 19112 of 80 Forrest Street Fremantle* [2005] WASAT 63 at [25], the strata company submits that the obligation to control and manage the common property to the benefit of the proprietors includes the duty of care to ensure that the activities by the strata company on common property do not cause damage to the buildings on the respective lots or the adjacent properties.

79 Further, the strata company, referring to *Clark and The Owners of Waterfront Mews Strata Plan 14082* [2011] WASAT 110 at [33] submits that in exercising its power to control and manage common property, it can make decisions which adversely affect one or more proprietors in certain circumstances, such as where the object of the proposed course of action is based on grounds of safety and security.

80 In regards to s 35(1)(c) of the ST Act, the strata company referred to *Drexel London (a firm) v Gove (Blackman)* [2009] WASCA 181 (*Drexel*) to submit that a breach of the section can form the basis of an action for damages by the proprietor or an occupier (including a resident) of a lot. Because of this, the strata company submits that if the obligation under s 35(1)(c) of the ST Act is not satisfied, then the strata company may be exposed to liability if someone is injured as a result. Further, the strata company submits that the obligation is continuing and is not fettered, limited or conditioned by its financial reserves or the financial circumstances of the lot proprietors: *Brosolo and Council of Owners of 25 St Leonards Strata Plan 352* [2008] WASAT 285.

81 In addition, the strata company, referring to *Drexel* at [238] and *Borg v The Owners of Strata Plan 64425* [2010] NSWDC 203 submits that it has a common law duty of care to strata occupiers and lot proprietors, including to ensure the personal safety of users of common property, and to take reasonable steps to prevent reasonably foreseeable harm.

82 The strata company's position is that the tree poses a safety risk or hazard in the form of a trip hazard caused by the uplifting of the main asphalt driveway and curbing and the limb fall (despite previous pruning) and that these risks or hazards expose it to liability in the event a strata occupant is injured or for property damage under common law and under s 35(1)(c) of the ST Act.

83 In the Tribunal's view the obligation imposed by s 35(1)(c) of the ST Act is clear. The obligation under s 35(1)(c) of the ST Act is not to guarantee the state of the common property to the mandated standard at all times. Rather, compliance with s 35(1)(c) of the ST Act and the obligation to 'maintain' requires there to be a 'process that involves acts of maintenance with the object of continuing the statutory standard': *Drexel* at [232]. As explained in *Maludra* at [204], 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 maintain and where necessary renew or replace the common property, the strata company will have discharged its duty imposed by s 35(1)(c) of the ST Act, even if, at any given time, the common property is in a deteriorated state.

**The removal of the tree is not required to repair existing damage to common property**

84 Ms Swift submits that the removal of the tree is not required to resolve the root ingress or attributed damage. It is Ms Swift's submission that the roots are capable of being cut and the roots of the tree under the driveway removed without compromising the integrity of the tree's structure. Ms Swift says this view is supported by the report submitted by Mr Bowden of Bowden Tree Consultants to the strata company in early February 2020.<sup>43</sup>

85 Ms Swift urged the Tribunal not to accept Mr Wadcock's report on the basis that he is not a 'relevantly qualified expert' and did not assess the tree for risk, or investigate actual root spread or the balance of the tree and made no assessment of the possibility of root mitigation measures.

86 Ms Swift conceded in giving oral evidence that damage to the pavers, to the driveway and to the curbing is attributable to some extent to root ingress from the tree. However, Ms Swift was adamant that damage is also caused by other trees such as the rosemary shrub and the hibiscus.<sup>44</sup>

87 Finally, Ms Swift is of the view that the strata company is capable of carrying out repairs (if needed to) without exercising its powers under s 39(1) of the ST Act or by removing the tree. Mr Short in giving oral evidence explained that the digging of a trench of 500 millimetres from the tree roots is the solution to the root ingress problem.<sup>45</sup>

88 The strata company submits that the removal of the tree entirely including the roots and stump is appropriate because:

- (a) Ms Swift has refused to take any reasonable steps to cure the breaches;

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<sup>43</sup> This report is not before the Tribunal. See above n 12.

<sup>44</sup> ts 149, 2 October 2020.

<sup>45</sup> ts 149, 2 October 2020.

- (b) pruning of the tree has not abated the nuisance being caused including further limb fall and root ingress persists;
- (c) root pruning or removal may cause adverse structural, safety, stability or survivability issues;
- (d) root pruning or removal (without any additional barrier) will not prevent future root ingress into common property or other strata lots, and the damage is likely to re-occur in the future;
- (e) due to the large canopy size, cutting or removal of roots may affect the structural stability of the tree;
- (f) where, due to the maturity and size of the tree, the cutting or removal of all roots and installation of a root barrier between the tree and driveway may not even be possible due to the close proximity of the tree;
- (g) the installation of a root barrier will not guarantee that it will not have an effect on the structure, stability, survivability and most importantly, safety of the tree; and
- (h) the tree species is considered a public liability concern, and the strata company has a duty of care to take reasonable steps to ensure the tree does not pose a not insignificant risk of harm.

89 The Tribunal is not satisfied that root ingress from other shrubs or trees such as the rosemary shrub and the hibiscus has caused damage to the pavers, driveway and curbing. The Tribunal accepts the evidence of Mr Wadcock that the damage to the paving, driveway and curbing is caused by the tree roots.

90 Further, the Tribunal accepts Mr Short's evidence when he conceded in cross-examination that trimming down the tree and the tree's canopy to 10 metres and removing the roots extruding into common property is not a solution because the structural integrity of the tree would be weakened so as to render the stability of the tree as questionable.<sup>46</sup>

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<sup>46</sup> Ibid.

**The removal of the tree is not required to prevent future potential damage**

91 It is Ms Swift's position that the strata company has not established that the tree poses any unacceptable level of risk. Ms Swift submits that the tree does not need to be removed to guard against future potential damage. This position, according to Ms Swift, is supported by Mr Short<sup>47</sup> and also by Mr Bowden in his report to the strata company.<sup>48</sup>

92 Ms Swift says the proper exercise by the Tribunal of its discretion is to leave the tree in place and remedy the root ingress. In this regard, Ms Swift referred the Tribunal to the decision of the New South Wales Supreme Court in *Dimitrios Michos & Another v Council of the City of Botany Bay (No. 2)* [2012] NSWSC 1464, a case on nuisance caused by tree roots.

93 For reasons detailed below, the Tribunal does not accept Ms Swift's position that removal of the tree is not required.

**No breach of Sch 1 by-law 1(2)(a) and by-law 1(2)(b) and Sch 2 by-law 2 to justify Ms Swift bearing the costs of removing the tree**

94 Ms Swift denies breaching Sch 1 by-law 1(2)(a) and by-law 1(2)(b).

95 Ms Swift says that the tree root damage does not arise from her use of the common property. Ms Swift's position is that the strata company has not alleged that she has used the common property and the root ingress is not from her use of common property and therefore she has not breached Sch 1 by-law 1(2)(a).

96 Ms Swift submits that the tree root damage is alleged to cause a nuisance to the common property and limb fall is said to have affected the common property. Ms Swift said even if there was some effect on other lots in the strata scheme, the costs of removing the tree on her Lot 1 would not be directed to remedying the nuisance and therefore she has not breached Sch 1 by-law 1(2)(b).

97 Ms Swift submits that in any event the roots of the tree and the limb fall do not obstruct common property and that the common property comprised of the main asphalt driveway and curbing is still

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<sup>47</sup> Exhibit 1 at page 634.

<sup>48</sup> Above n 43.

useable and unobstructed. Ms Swift submits, that at best for the strata company, there has been some relatively minor damage to the common property and therefore she has not breached Sch 2 by-law 2.

98 Ms Swift's evidence in cross-examination was that the indentations and undulations in the pavers on the adjacent lot's driveway may not have been caused by ingress of the tree's roots but rather by vehicles reversing in and out of the driveway.<sup>49</sup>

99 Finally, Ms Swift submits that root ingress by the tree is not a breach of the by-laws and in any event the removal of the tree would not be a reasonable remedy even if any such breach was established.

100 The strata company's position is that Ms Swift is using common property by encroachment of the tree which interferes with the use and enjoyment of common property and other strata lots by the other strata proprietors or occupants and is therefore in breach of Sch 1 by-law 1(2)(a) because:

- (a) the limb drop is interfering with the use and enjoyment of the common property (and other property) insofar as it:
  - (i) obstructs access on the driveway to other strata lots; and
  - (ii) presents safety fears and hazards to pedestrians, occupants and users of the driveway and other areas of the strata complex;
- (b) the lifting and displacement of curbing and the driveway by the tree's roots will likely create a trip hazard; and
- (c) the tree obstructs light to other strata lots, including blocking sunlight to the solar panels of surrounding units due to its encroachment in the airspace.

101 Further, the strata company submits that Ms Swift is in breach of Sch 1 by-law 1(2)(b) by reason of the following nuisances, which the strata company say have and continue to take place to other occupiers in the strata complex:

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<sup>49</sup> ts 149, 2 October 2020.

- (a) root ingress causing the uplift of pavement and damage to the adjoining wall to the neighbouring property and pavement;
- (b) root ingress is or is likely to be causing damage to plumbing of neighbouring property;
- (c) extensive dropping of limbs on neighbouring strata lots, and occupant vehicles which is blocking or restricting occupier access, damaging property (for example, broken lights), making loud noises when hitting carports and strata roofing, and damaging vehicles; and
- (d) general leaf and bark litter on common property and other strata lots.

102 Relying on *Proprietors of Strata Plan No 14198 v Cowell* (1989) 24 NSWLR 478 at 484 the strata company submits that Ms Swift has continued the nuisances as set out in the immediately preceding paragraph as the nuisances were in her knowledge or presumed knowledge and she has failed to take any reasonable means to bring the nuisances to an end with ample time to do so.

103 Finally, the strata company submits that Ms Swift is in breach of Sch 2 by-law 2 by reason of the tree obstructing the lawful use of common property as follows:

- (a) the continuous limb drop causes large obstructions to the lawful use of the common property driveway by restricting or preventing access to the other strata lots in the strata complex;
- (b) the lifting of driveways causes the use thereof to be unlawful in that the driveway is not fit for purpose and otherwise safe;
- (c) the mere existence of the tree given its history causes fear in those that use the common property and other property; and
- (d) the unauthorised encroachment onto common property is considered an obstruction of airspace which is owned by all strata lot proprietors.

104 Sch 1 by-law 1(2)(a) provides that a proprietor of a strata lot shall use and enjoy the common property in such manner as not to interfere with the use and enjoyment thereof by other proprietors. The terms 'use' and 'enjoy' are not defined in the ST Act. The terms therefore take their ordinary meaning.

105 In *Hutchison and Canciullo* [2020] WASAT 22 at [42]-[44] the Tribunal explained that the use and enjoyment of common property is to be objectively assessed and includes the proprietary right to such use and enjoyment, not only the actual use.

106 Sch 2 by-law 2 requires that a proprietor not use his or her lot in such a manner as to cause nuisance to any occupier of another lot. The term 'nuisance' is not defined in the ST Act. It therefore takes its ordinary meaning.

107 In the Tribunal's view, a lot proprietor is prohibited from using his or her lot or common property for their own benefit in a way that unreasonably interferes with the use and enjoyment of common property or causes a nuisance to any occupier of another lot.

108 The question for the Tribunal, is simply, does the tree cause Ms Swift to be in breach of Sch 1 by-law (1)(2)(a) or 1(2)(b) or Sch 2 by-law 2? This question must be answered objectively. If the answer is 'yes' then the Tribunal must decide whether to exercise its discretion under s 83(1) of the ST Act to make the orders sought by the strata company.

109 Ms Swift did not suggest that she could not reasonably be able to use her Lot 1 other than with the tree remaining in place.

110 Both Mr Cahill and Ms Dixon gave evidence that they have seen branches of different sizes fall from the tree regardless of weather conditions. Further, both Mr Cahill and Ms Dixon expressed concern of branches continuing to fall on their respective lots and on common property.

111 Both Mr Wadcock and Mr Short agreed that the tree has the propensity to shed branches and limbs.

112 The photographs (taken on 27 September 2020) filed by the strata company with the Tribunal clearly show the uplifting of the curbing in



front of the tree, cracking of the driveway in front of the tree as well as the uplifting of pavers on the neighbouring lot to Lot 1.<sup>50</sup>

113 In cross-examination, Mr Short conceded that if the significantly large root identified by the strata company is cut, the tree would be potentially unstable.<sup>51</sup> Mr Short said he would not recommend cutting the roots in such a case because the tree might fall over which at the 10 metres mark could weigh as much as four tonnes. Mr Short conceded the tree was a safety issue for the strata complex.

114 The Tribunal does not accept Ms Swift's argument that the indentions and undulations in the pavers on the neighbouring lot to Lot 1 may have been caused by vehicles reversing in and out of the driveway. No evidence was presented to support this position.

115 The Tribunal accepts the evidence of Mr Wadcock who stated the tree is directly responsible for significant undulations to the common property, the slight displacement of one common wall between units 7D and 7E and that these undulations will continue to elevate and create what is already a tripping hazard. The photographs filed with the Tribunal by the strata company support Mr Wadcock's evidence.<sup>52</sup>

116 The Tribunal concludes that the tree's roots have protruded into common property with resultant damage to the curbing, and the driveway. Further, the Tribunal finds that the tree's roots have protruded to the neighbouring lot causing damage by uplifting pavers. By allowing the tree's roots to ingress into common property and the neighbouring lot, and for the tree canopy to protrude into common property airspace, the Tribunal finds that Ms Swift is in breach of Sch 1 by-law 1(2)(a) and by-law 1(2)(b) and Sch 2 by-law 2 for the reasons submitted by the strata company above at [100] - [103].

117 Having determined that Ms Swift is in breach of Sch 1 by-law 1(2)(a), and by-law 1(2)(b) and Sch 2 by-law 2, the Tribunal must decide whether to exercise its discretion under s 83(1) of the ST Act to resolve the dispute by making the orders sought by the strata company.

118 Section 83 of the ST Act does not set out criteria to be applied by the Tribunal in making determinations under it.

119 Section 9 of the SAT Act relevantly provides:

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<sup>50</sup> Exhibit 2 at pages 1-12.

<sup>51</sup> ts 140, 2 October 2020.

<sup>52</sup> Exhibit 2.

The main objectives of the Tribunal in dealing with matters within its jurisdiction are:

- (a) to achieve the resolution of questions, complaints or disputes, and make or review decisions, fairly and according to the substantial merits of the case[.]

120 In addition to acting in accordance with the SAT Act and ST Act, the following is a non-exhaustive list of relevant guiding principles or factors to be considered by the Tribunal when exercising its discretion under s 83(1) of the ST Act. The Tribunal is to:

- (a) act fairly and reasonably taking into consideration the interests of the parties, equity and due consideration to all of the information at its disposal;<sup>53</sup>
- (b) guard against misuse, oppression and obsessiveness in an application;<sup>54</sup>
- (c) ensure the nature of the breach and the surrounding circumstances justify the making of the order; and<sup>55</sup>
- (d) consider the degree to which the proposed relief corresponds with, and responds to, the grounds proved by the applicant, and the likely efficacy of the proposed relief.<sup>56</sup>

121 As noted earlier, counsel for Ms Swift made submissions that the strata company failed to resolve serious or even trifling concerns in good faith and that it was using these proceedings as means of intimidating Ms Swift and to financially ruin her.

Whilst the Tribunal acknowledges that Ms Swift is particularly fond of the tree,<sup>57</sup> the Tribunal is not persuaded by Ms Swift's submissions that there is no justification to have the tree removed. The reasons for this are as follows. First, even though Mr Short's evidence was that the root ingress and the damage the tree roots is causing can be resolved by the digging of a trench of 500 millimetres from the offending roots, he conceded in cross-examination that if the significantly large root protruding from the front of the tree, as identified by the strata

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<sup>53</sup> *Arasi & Anor and The Owners of Beverley Court* [2005] WASAT 197 at [24]-[28].

<sup>54</sup> *Maguire v Owners of Roslyn Strata Plan 35960* [2014] WASC 28 at [62].

<sup>55</sup> *Squelch and Brooklea Nominees Pty Ltd* [2005] WASAT 198 at [28]-[29].

<sup>56</sup> *Janus and Abernethy* [2020] WASAT 88.

<sup>57</sup> ts 151, 2 October 2020.

company, is cut the tree might fall over and the tree at the 10 metre mark, could weigh as much as four tonnes. Second, both Mr Wadcock and Mr Short agreed the tree is causing damage by way of lifting of the driveway and the curbing. Third, both Mr Wadcock and Mr Short agreed that the tree sheds branches and limbs. Further, Mr Short's evidence is that further limb fall will not be prevented by pruning, rather the pruning will likely exacerbate the situation. Fourth, the Tribunal accepts Mr Wadcock's evidence that the tree cannot be root guarded this far into the tree's life and that removal or partial removal of any tree roots is not recommend due to the destabilisation of the tree and exponential root regeneration as the tree looks to ecologically resolve the issue. Mr Wadcock explained:<sup>58</sup>

[W]hen we cut a tree to the base, it automatically responds exponentially. And that is why you see these four leaders come of the base of this tree, not one. Now, trees should be fine, botanically, by having one leader or one trunk, not four. This has actually shrub, essentially, to break it down. But it still appeared as a tree. The four laterals could not ever be considered as safe as one, ever.

122 The Tribunal concludes, taking into consideration the interests of the parties, equity and consideration of the evidence before it concerning the dispute as well as the nature of Ms Swift's breach of the by-laws (as set out above), the relief sought by the strata company corresponds with and responds to the grounds proved by the strata company. The efficacy of the relief, being the removal of the tree (including roots and stump) will avoid further damage from the tree to the common property and neighbouring lots as well as enabling the strata company to manage the common property for the benefit of all lot proprietors consistent with the strata company's duties and obligations under the ST Act.

123 The Tribunal will therefore exercise its discretion under s 83(1) of the ST Act to resolve the dispute between the strata company and Ms Swift by ordering Ms Swift to do all things necessary to remove the tree (including the roots and the stump) located on her Lot 1 by 5 February 2021. The order will specify that the tree removal work is to be carried out by contractor(s) with suitable insurance, the work is to take place at reasonable times and that Ms Swift is to give reasonable prior notice to the strata company.

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<sup>58</sup> ts 43, 1 October 2020.

124 Further, the Tribunal will order that if Ms Swift fails to comply with order to remove the tree, the strata company may enter Lot 1 to do all things necessary to remove the tree, including inspecting and carrying out all necessary works to remove the tree (including the roots and the stump). The Tribunal will make these orders under s 83(1) of the ST Act.

***Who is to pay for the costs to remove the tree?***

125 In these proceedings, the strata company seeks an order requiring Ms Swift to pay the costs for removing the tree. Ms Swift opposes any such order.

126 In **[2004] WASTR 66**, the Office of the Strata Titles Referee held at [8]:

In relation to the requested order for the payment of costs, s 81(7) prohibits me from making an Order in relation to the cost of the application but the 1985 Act [ST Act] allows me to make orders in relation to the costs of any works that may be required in order to comply with any order that I might make.

127 In ***Killigrew and The Owners of Camdale Strata Plan 7996*** [2005] WASAT 48, the Tribunal ordered the applicant lot proprietor under s 81(3) of the ST Act to remove at the proprietor's cost within 60 days of the date of the orders the air conditioner unit, the subject of the application and to make good any damage that had been caused to the common property.

128 The Tribunal concludes that it is appropriate in this case that Ms Swift pay the costs to remove the tree including carrying out all necessary works to remove the tree (which includes removing the roots and the stump) on her Lot 1.

129 If Ms Swift fails to comply with the Tribunal's order to remove the tree, then she will be liable for the costs of the works necessary to remove the tree by the strata company which includes the inspection and carrying out all necessary works to remove the tree (including the roots and the stump) on Lot 1. The Tribunal will make this order under s 83(1) of the ST Act.

130 Finally, the Tribunal notes there is no place for partiality, selective enforcement of powers or the like on the part of the strata company in its dealings with proprietors. That Ms Swift feels that the strata company has used these proceedings to intimidate her and to seek to

financially ruin her is regrettable. However, once it is accepted that a proper basis for the application exists (as found earlier), whether or not the strata company is acting in the ways alleged cannot affect the final outcome of the application.

### ***Conclusion***

131 For the reasons set out above, the Tribunal will order for the removal of the tree as set out below.

132 Although the orders of the Tribunal under the ST Act are expressed in terms slightly different from the orders (set out at [5] above), sought by the strata company, they do not differ in substance from the orders sought by the strata company (s 81(1) of the ST Act).

### ***Orders***

The Tribunal orders:

Pursuant to s 83(1) of Div 3 of Pt VI of the *Strata Titles Act 1985* (WA) (as it stood prior to 1 May 2020):

1. The respondent shall by 5 February 2021:
  - (a) do all things necessary to remove the *Corymbia citridora* tree (or more commonly known as lemon-scented gum tree) including the roots and stump located at the south western corner of Lot 1 on Strata Plan 38498 (Lot 1); and
  - (b) the tree removal work set out in (a) above shall be carried out by contractor(s) with suitable insurance. The work shall take place at reasonable times and on reasonable prior notice to the applicant.
2. If order 1 is not complied with, the applicant may enter the respondent's Lot 1 to do all things necessary to remove the tree, including inspecting and carrying out all necessary works to remove the tree (including the roots and the stump).
3. The respondent shall bear the costs of the works contemplated by order 1 or order 2 (as applicable).

4. The parties have liberty to apply for directions in the event that issues arise as to the implementation of these orders or in the event that the parties reach an alternative agreement.

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

MS R PETRUCCI, MEMBER

31 DECEMBER 2020