MAGISTRATES COURTS OF QUEENSLAND

CITATION:	*Fairway Island GTP v Redman and Murray* [2019] QMC 13
PARTIES:	**The Proprietors – Fairway Island GTP 107328** (Appellant) **v** **Gary Redman** (First Respondent) And **Andrew Murray** (Second Respondent)
FILE NO/S:	MAG 247816/18(6)
DIVISION:	A Magistrate sitting as a Tribunal
PROCEEDING:	Appeal to Tribunal under s.106 BUGTA
ORIGINATING BODY:	Referee - *Fairway Island [2018] QBCCMCmr 564*
DELIVERED ON:	18 October 2019
DELIVERED AT:	Southport
HEARING DATE:	26 July 2019
MAGISTRATE:	A.H. Sinclair
ORDER:	**The appeal is allowed.**
CATCHWORDS:	Validity of By-Laws – Scope of power to make by-laws – Limitations on by-laws - Power to prohibit short-term letting. *Acts Interpretation Act 1954* s.14A ('AIA') *Building Units and Group Titles Act 1980* – ss. 6, 27, 30, 37, 51, 71, 73, 74, 77, 88, 90, 97, 103, 106, 107, Schedule 3 ('BUGTA') *Land Titles Act 1994 ('LTA')* *Strata Titles Act 1985 (WA)* ss.6, 6A, 42 *Body Corporate for Hilton Park CTS 27490 v Robertson* [2018] QCATA 168 *Byrne v The Owners of Ceresa River Apartments Strata Plan 55597* [2017] WASCA 104 *Fairway Island* [2018] QBCCMCmr 564 *Fox v Percy* (2003) 214 CLR 118 ; 197 ALR 201; [2003] HCA 22 *Lacey v Attorney-General of Queensland* [2011] HCA 10 *O'Connor (Senior) and others v The Proprietors, Strata Plan No 51.*[2017] UKPC 45

The Proprietors – Rosebank GTP 3033 v Locke & Anor [2016] QCA 192.
The Proprietors, Strata Plan No 51 & Pinnacle Reef Ltd v Frank O'Connor Senior, Frank O'Connor Junior and Robin Grose O'Connor (unreported) Action CL177/12 per Ramsay-Hale J, 31 July 2014 Supreme Court of Turks and Caicos.
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Lessons in personal freedom and functional land markets: What strata and community title can learn from traditional doctrines of property - Cathy Sherry - 280 UNSW Law Journal Volume 36(1)
The Use of Administrative Law principles to limit the decision making powers of owners corporates – Giridhar Kowtal – UNSWLJ Student Series No. 14-09 - 8 Sep 2014

COUNSEL:	M. Amerena (Appellant)
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What is the power of a Body Corporate to regulate short-term letting?

[1] This appeal raises squarely the issue of whether a Body Corporate under the BUGTA can ban short-term holiday letting under a By-Law. The Fairway Island BC did so. The Respondent owners appealed to a referee. The referee decided[1] that the relevant by-law was invalid and made a declaration to that effect. The Body Corporate appeals from that decision.

[2] This is an appeal by way of a re-hearing. Error must be demonstrated. The error alleged is incorrectly interpreting s.30(6) of the BUGTA. The tribunal was assisted by a hearing with comprehensive oral arguments addressing written submissions and several appeal books of material and authorities. The issue is of some importance. The cases demonstrate that Body Corporates and owners are in furious dispute over this issue wherever body corporate legislation exists.

[3] The by-law in issue here is By-Law 3.3. By-Law 3 provides:

> ***3 Use of Lots***
>
> ***3.1 Residential Purposes Only***
>
> *Subject to clause 3.2, each Lot shall be used for residential purposes only.*
>
> ***3.2 Company Exemption*** *[this clause is irrelevant for this appeal and I have omitted it.]*

[4] At an AGM on 10 August 2018, motion 15 passed by 24 votes to 2, the following addition:

> *3.3 Subject to clause 3.1 and 3.2, each proprietor shall not use or permit his lot to be used other than as a private residence of the proprietor or for accommodation of the proprietor's guests and visitors. Notwithstanding the foregoing, the proprietor may rent out his lot from time to time provided that in no event shall any individual rental for a period of less than one (1) month.*

[5] The Respondents' contentions were that this by-law is not within power to create under s.30(2) and that it breaches section 30(6). That section provides (relevantly):

> *(1) Except as provided in this section the by-laws set forth in schedule 3 shall be the by-laws in force in respect of each plan.*
>
> *(2) … a body corporate, pursuant to a special resolution, may, for the purpose of the control, management, administration, use or enjoyment of the lots and common property the subject of the plan, make by-laws*

[1] *Fairway Island* [2018] QBCCMCmr 564

amending, adding to or repealing the by-laws set forth in schedule 3 or any by-laws made under this subsection.

…

(6) No by-law or any amendment of or addition to a by-law shall be capable of operating to prohibit or restrict the devolution of a lot or a transfer, lease, mortgage or other dealing therewith or to destroy or modify any easement, service right or service obligation implied or created by this Act.

[6] By-Law 8.20 read:

A Proprietor may be permitted to lease his or her Lot by means of a written lease or rental agreement for permanent letting provided that such lease obliges the lessee thereunder to comply with these By-Laws and provided further that the lease be in writing and any Proprietor who shall lease his Lot shall be responsible for ensuring compliance with such lease particularly so far as that lease relates to the By-laws.

[7] The Respondents sought a declaration by the referee that:

1. the BC did not have the power to make these two by-laws; and

2. The by-laws were invalid.

[8] The referee decided:

1. The BC did not have the power to pass By-Law 3.3 because of s.30(6) [not because of a lack of power under s.30(2)];

2. and that:

   (a) if 'short-term leasing' was 'permanent letting' then it was permitted subject to the conditions listed; or

   (b) if 'short-term leasing' was not 'permanent letting' then 8.20 did not restrict it.

[9] The referee therefore declared only 3.3 to be invalid. It has not been registered.

[10] The BC appealed. Its ground of appeals were that the referee:

1. misconstrued 30(6) because it only prevented by-laws that restricted dealings under the *Land Title Act 1994*;

2. misinterpreted By-Law 3.3 as a restriction on leasing rather than a relaxation on a proper limitation to residential use.

[11] Ultimately, I agree with the BC submissions and will allow the appeal and hold that By-Law 3.3 is valid as a relaxation of a valid limit on use by-law. In short, a BUGTA BC can pass a by-law limiting short-term letting where it is non-residential.

[12] The critical factor in approaching the interpretation of the sections and the by-law appears to me to be:

1. whether 3.1 is valid and if so, what it means? i.e. does it already restrict short-term letting?

2. and

   (a) whether 3.3 is regarded as a valid restriction on use to residential purposes with a relaxation in the second sentence; or

   (b) whether the second sentence stands on its own and the whole of the import of 3.3 is really about achieving something which s.30(6) prohibits.

[13] I have determined that I will follow the decision of the Privy Council in *O'Conner*[2] in deciding that 3.3 was valid and in taking the former view and not the latter. I note the judge at first instance in *O'Connor*[3] essentially ruled in a way similar to the referee in this matter and was overturned on appeal. That was in turn appealed to the Privy Council.

The Nature of the Appeal

[14] Appeals are a creature of statute. They do not exist apart from the provisions that create and govern them. They are not automatic or as of right and rarely permit the parties to start again, ignoring the decision below as if it never happened. They are limited to the grounds in the notice of appeal.

[15] Section 97 is headed 'Tribunal may investigate as appropriate'. In contrast, the text itself says the tribunal 'shall make a thorough investigation without regard to legal forms or solemnities'. The tribunal is not bound by the rules of evidence and may inform itself in such matters as it thinks fit. It can make an order without a hearing but if a person entitled to appear does so, they can appeal in person or by counsel, solicitor or agent. They can examine any witnesses.

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[2] *O'Connor (Senior) and others v The Proprietors, Strata Plan No 51.*[2017] UKPC 45

[3] *The Proprietors, Strata Plan No 51 & Pinnacle Reef Ltd v Frank O'Connor Senior, Frank O'Connor Junior and Robin Grose O'Connor* (unreported) Action CL177/12 per Ramsay-Hale J, 31 July 2014 Supreme Court of Turks and Caicos.

[16] Section 107 provides that in determining the appeal, a tribunal may admit further evidence.

[17] These provisions appear to have influenced a widespread understanding that BUGTA appeals are hearings *de novo*. That is, the tribunal has to proactively investigate, must hear the parties, must allow further evidence and must decide the matter afresh. This is not the case.

[18] Appeals are usually conveniently put into three broad categories: See *Lacey v Attorney-General of Queensland* [2011] HCA 10 [citations omitted by me]:

> *56. Ascertainment of the statutory purpose is to be based on the words of s 669A(1) and, in particular, the word "appeal", which encompasses the jurisdiction conferred by the subsection. An appeal is a creature of statute and, subject to constitutional limitations, the precise nature of appellate jurisdiction will be expressed in the statute creating the jurisdiction or inferred from the statutory context. The purpose of s 669A(1) is to create an appellate jurisdiction exercisable upon the application of the Attorney-General and coupled with a wide remedial power. The question is what kind of jurisdiction does it create?*
>
> *57. Appeals being creatures of statute, no taxonomy is likely to be exhaustive. Subject to that caveat, relevant classes of appeal for present purposes are:*
>
> > *1. Appeal in the strict sense – in which the court has jurisdiction to determine whether the decision under appeal was or was not erroneous on the evidence and the law as it stood when the original decision was given. Unless the matter is remitted for rehearing, a court hearing an appeal in the strict sense can only give the decision which should have been given at first instance.*
> >
> > *2. Appeal de novo – where the court hears the matter afresh, may hear it on fresh material and may overturn the decision appealed from regardless of error.*
> >
> > *3. Appeal by way of rehearing – where the court conducts a rehearing on the materials before the primary judge in which it is authorised to determine whether the order that is the subject of the appeal is the result of some legal, factual or discretionary error. In some cases in an appeal by way of rehearing there will be a power to receive additional evidence. In some cases there will be a statutory indication that the powers may be exercised whether or not there was error at first instance.*
>
> *58. Where the court is confined to the materials before the judge at first instance, that is ordinarily indicative of an appeal by way of*

> *rehearing, which would require demonstration of some error on the part of the primary judge before the powers of the court to set aside the primary judge's decision were enlivened.*

[19] Carefully considering the powers of the original referee and the right of appeal set out in BUGTA the following intent can be clearly seen:

1. There is no presumption that extra material will be allowed.

2. There is no ability for any person other than the tribunal to call a witness. While parties may request a summons, it is only the tribunal who may issue it. [4]

3. The summons is only to 'give evidence and to produce books' etc.

[20] The referee is under no obligation to conduct a proactive investigation. Section 73 speaks of them investigating not the dispute, but the application. They 'may make such other investigations with respect to the application' as they think fit. They do this by requesting submissions. Their decision and the material is forwarded to the tribunal if there is an appeal.[5]

[21] A referee may enter the parcel[6]. No such power is given to the tribunal.

[22] A referee can require only the Applicant[7] to provide further information or inspect those things that an owner is entitled to.[8] They cannot compel witnesses, subpoena evidence or require attendance at a hearing.

[23] The referee receives not 'evidence' but 'submissions'[9]. They are also not bound by the rules of evidence. They do not hold hearings but invite all relevant parties to make submissions. They may require the applicant to provide 'such further information' as may assist.[10]

[24] The requirements that the tribunal is not bound by the rules of evidence is there because the referee was not. If the tribunal was to be bound to the rules of evidence much of what the referee considers might be inadmissible. It would then require great expenses and inconvenience for the parties to resubmit it all in admissible form (where it could be obtained in such a form). The small size of some BC's, the fact that many parties are often unrepresented and that many of these issues are relatively contained all speak to a legislative intent on the type of quick resolution best achieved outside a formal courtroom setting.

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[4] Section 103 BUGTA
[5] Section 106(5) BUGTA
[6] Section 73(1)(g) BUGTA
[7] Section 73(1)(a) BUGTA
[8] Section 71 BUGTA
[9] Section 74(b) BUGTA
[10] Section 73(1)(a) BUGTA

[25] There is nothing in the Act either by direct wording or inference to indicate that the tribunal is to regard the Referees actions as a nullity and start afresh. On the contrary, BUGTA evinces and intention that the tribunal conduct the appeal by way of rehearing:

1. It is called an appeal
2. The original material is forwarded to the tribunal
3. The referee's order is forwarded to the potential parties.
4. The appeal is 'against the order' not 'in relation to the dispute'.
5. A notice of appeal is required within a strict time limit. It must set out the grounds of appeal.

[26] On the other hand, if there is a factual dispute about key matters, these may well be resolved only by examining witnesses. Without that ability, the referee can only make the best of written material whereas a tribunal can get to the bottom of whether the referee's preference for one set of facts over another was an error. The giving of evidence on oath and the right to be represented perhaps signal that where there is a substantial factual dispute which is critical to its decision, the tribunal may be of the view that cross-examination is the best way to arrive at a resolution of which version of facts is to be accepted. In my view this would be the exception and not the rule. Parliament has not manifested any intention that every BC dispute might result in appeal in protracted cross-examination at a hearing.

[27] Likewise, what was received from the referee as 'submissions' become 'evidence' before the tribunal.[11] Also the only witnesses that appear able to be summonsed by the tribunal are those who are to both 'give evidence and produce books (etc)'.

[28] As there is no power to remit, the need to allow extra evidence would also permit a Tribunal to deal fully with an issue where there has been a change in circumstances or additional facts arising since the referees decision.

[29] There are not two bites at the cherry nor does BUGTA indicate any intention that tribunals are as a matter of course to allow for the calling of oral evidence and cross-examination. The desire to speedy and cheap decisions says the opposite. As does the specific provision about proceeding without formality.

[30] That being said, there is a requirement on all parties to receive notice of the dispute (Section 74) and the adversarial nature of any dispute is likely to lead to the parties with an interest in a matter putting forward their material. BUGTA matters do not often fail to attract a range of views and number of submissions.

[11] Section 107(1)(a) BUGTA

[31] The wording of s.106 BUGTA simply provides that certain parties 'may appeal to a tribunal against the order of the referee by lodging a written notice of appeal with the referee'.

[32] Section 107 set out that the tribunal may:

1. admit further evidence
2. affirm, vary or revoke the referee's order
3. only dismiss or revoke interim orders
4. not award costs.

[33] The appeal therefore seems to me to not be an appeal in the strict sense because the tribunal can vary the decision. Nor is it a hearing de novo because there is no legislative provision indicating a right to start again without demonstrating a legal error. It is a rehearing on the evidence.

[34] In an appeal by way of rehearing, the court is required to assess and evaluate the evidence for itself, maintaining due regard for the advantage of the trial judge in having seen and heard all of the evidence. [12] I note the referee decided the matter on the papers and without the need to assess the evidence. I do not consider myself to be at any disadvantage in assessing the evidence.

Does s.30(2) give the BC the power to create by-law 3.3?

[35] The correct approach to determine the validity of a by-law under BUGTA was explored in *The Proprietors – Rosebank GTP 3033 v Locke & Anor* [2016] QCA 192.

[36] The passages of the judgment of Philippides JA at [66] to [70] set out quotes from a line of the highest authority from which I take the following:

1. A three-step process should be undertaken:
   (a) Properly construe the provision in context to determine the power to make the by-law
   (b) Correctly interpret the by-law, not only at face value but as to its true nature in operation
   (c) Determine whether that by-law is squarely within the ambit of the power granted

[12] *Fox v Percy* (2003) 214 CLR 118 ; 197 ALR 201; [2003] HCA 22 at [29] per Gleeson CJ, Gummow and Kirby JJ.

2. The by-law making power conferred by s 30(2) is of a broad nature, as opposed to the power conferred by s 38

3. It requires a clear case before an original by-law was held to be outside power.

[37] Justice Bond expressly agreed with Her Honour's comments in paragraphs [66] and [67] and restates the approach at [152]. Justice McMurdo preferred a broader argument citing s.27(3) but also appears to follow the line of authorities referred to by Her Honour. His reasons at [120] to [124] indicate his view that s.27 extends the powers of a body corporate if a by-law covers some legitimate area.

[38] If Justice McMurdo is correct, section 27(3) adds weight to two important points:

1. By-laws can be used to increase BC powers and areas of concern including passing more specific by-laws to allow for the easier enforcement of existing by-laws that were clear in intent but hard to police.

2. The existence of By-law 3.1 is relevant to the exercise of the power to create 3.3

[39] I should emphasise that I would have reached the same decision without reliance on these points.

[40] Section 27(3) reads:

> *(3) Subject to this Act the body corporate shall have the powers, authorities, duties and functions conferred or imposed on it by or under this Act or the by-laws and shall do all things reasonably necessary for the enforcement of the by-laws and the control, management and administration of the common property.*

[41] Justice Bond dealt with the same issue as Justice McMurdo (that a valid by-law increases the powers and duties of a BC) as follows:

> *[148] In my view:*
>
> *(a) If a by-law made pursuant to s 30(2) can properly be characterised "for the purpose of the control, management, administration, use or enjoyment of the lots and common property the subject of the plan" then it may operate to extend the very limited powers which the existing schedule 3 by-laws confer on the body corporate.*
>
> *(b) It would be a surprising outcome if the legislation contemplated that possibility, but neither provided for the means by which funds could be raised to meet the costs of exercising extended powers nor permitted the disbursement of funds for that purpose. However, it seems to me that the legislature has avoided that outcome.*

> *(c) If a by-law made pursuant to s 30(2) has extended a body corporate's powers then s 27(3) operates as an explicit statement in the Act that the body corporate "shall have" those powers. That statement is a sufficient basis to regard any step taken by the body corporate in carrying out the extended powers as a step taken in carrying out its powers "under this Act".*
>
> *(d) The result is that s 38B would authorise the raising of funds to meet the costs of exercising the extended powers and ss 38(3) and 38(6) would permit the disbursement of funds for that purpose.*

[42] Section 51(1)(b) indicates Parliaments intention that there is a difference between the 4 persons identified – proprietor, mortgagee, lessee and occupier. It reads [relevantly] :

> *(1) A proprietor, mortgagee in … , lessee or occupier of a lot shall not—*
>
> *…*
>
> *(b) use or enjoy that lot, or permit that lot to be used or enjoyed, in such a manner or fora manner or for such a purpose as to cause a nuisance or hazard to the occupier of any other lot (whether that person is a proprietor or not);*

…

[43] It also indicates that all four of those persons have a positive duty not to permit the lot to be *'used … for such a purpose as to cause a nuisance ... to the occupier of any other lot …'.* That tends to indicate nuisances as a field of responsibility about which the BC can pass by-laws because nuisance is something that prevents the use and enjoyment of other lots by their occupants.

Properly construe the provision in context to determine the power to make the by-law

[44] In the matter before me, by-laws were created at the time the BC sprang into existence. These included 3.1. In my view, their Honours' views would apply to those initial by-laws as being the source of power. It is unconstrained by Schedule 3. Any developer can create their own by-laws to make their product more attractive or valuable to their chosen market. Many have done so. The restrictions imposed under BUGTA seem to be valued by those who feel they increase their enjoyment of their lots.

[45] Interstate decisions have also given extra weight to 'original' by-laws.[13] The notion is one of common-sense. People coming in did or should and could have know what they were getting.

[46] The Appellant sought to show error in the approach taken by the referee by reference to their concentration on s.30(6) over s.30(2). That error is evident in the ruling. The referee was directed by the respondent's arguments not as to whether the by-law was within power but rather on whether s.30(6) was contravened. In doing so he was led into error.

[47] The referee correctly recognised that his decisions was at odds with *Byrne v The Owners of Ceresa River Apartments Strata Plan 55597* [2017] WASCA 104 and *O'Connor (Senior) and others v The Proprietors, Strata Plan No 51* [2017] UKPC 45.

[48] He stated he was unable to reconcile the approach in *O'Conner* with s.30(6). Again with respect, that is likely because he did not address the three step test to determine whether the by-law was within s.30(2) before going on to consider s.30(6).

[49] I have considered whether the grounds raised by the Respondents here as to whether the power to pass even the first part of the by-law (3.1) was actually squarely placed before the referee. Unless it was, I cannot determine that issue on appeal. Appellants cannot, without the right to a hearing de novo, raise issues without leave on the hearing of an appeal

[50] When it was squarely put by the Respondents in oral argument for the first time that s.30(2) did not authorise the making of the by-law, it came as a surprise to me. That was because it did not loom large in the written submissions. It does not appear in the outline of submissions filed before the referee. It did appear in the submission in reply before me but only to support the argument that the by-law prohibited rather than regulated.

[51] The parties were able to fully explore and meet all issues in the appeal. It is in the public interest that this issue be resolved as soon as possible. I am aware that the two similar matters of *Washingtonia*[14] are under appeal and this illustrates the need for the law in this area to be settled.

[52] Having identified that referee was led into error in the approach to interpreting the validity of the by-law without considering the power to impose it, I believe it more expedient for me to consider all the issues raised. I am required to conduct a real review and reach my own conclusions. I have attempted to do so.

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[13] *Rosebank* at [57] to [62]
[14] [2019] QBCCMCmr 7 and 8

The right to regulate a restriction to 'residential use' only

[53] In *O'Conner*, the Privy Council considered an appeal from Turks and Caicos about an identical by-law based on a provision in the local legislation which is very similar to those in section 30. As they appear in the judgment they were:

> *"… the control, management, administration, use and enjoyment of the strata lots … shall be regulated by by-laws". The section authorises the making and variation of by-laws, including standard by-laws set out in Schedules 1 and 2 to the Ordinance. Section 20(4) provides:*
>
> *"No by-law shall operate to prohibit or restrict the devolution of strata lots or any transfer, lease, mortgage or other dealing therewith or to destroy or modify any easement implied or created by this Ordinance."*

[54] The judgment in *O'Connor* also notes at [16]:

> *'It is common ground that a by-law designed to secure restriction to residential use is in principle unobjectionable. By the same token there can be no objection in principle to the inclusion of words designed to define what is meant by use as a residence.'*

[55] That this was not common ground before the referee was not made clear to them by the Respondents. Instead, their submissions focused on the second step of the three step process, namely that the true effect of the by-law was to ban short-term letting.

[56] It is scarcely surprising given the change in approach by the Respondents that the referee was led straight to s.30(6) and found it hard to reconcile the *Byrne* and *O'Connor* with it.

[57] Part of this dichotomy of views which the cases reveal is because fair-minded people might each answer the philosophical question about whether a BC should be allowed to regulate short-term holiday letting differently. This is not the venue for the resolution of that policy question. The question for the referee and now for me was whether Parliament has demonstrated an intent that a BC has power to regulate in this way and whether it has been properly exercised.

[58] I have concluded Parliament has granted that power to regulate fulsomely about the use of an enjoyment of lots. That is the use and enjoyment of a lot by its owner and the use and enjoyment of other lots which are or might be affected by the manner of use of another owner or occupier.

[59] While strictly speaking I am not bound by either the Privy Council or the WASC, their reasoning is highly persuasive. Their approach was to first look at power of the BC to regulate a use by an owner to be strictly for 'residential' purposes and then look at the relaxation of that as an exemption and not the primary purpose of the restriction in the first place.

[60] Some caution must be adopted when approaching the decision in *Byrne* and *O'Connor* because of the passage quoted at [16] of it (quoted above).

[61] Section 6 of the *Strata Titles Act 1985 (WA)* provides:

> *(1) A strata/survey-strata plan lodged for registration under this Act may, by an appropriate endorsement that delineates the area or space affected and refers to this section, restrict the use to which the parcel or part of the parcel may be put.*

[62] Section 6A of the *Strata Titles Act 1985 (WA)* provides:

> *(1) A restriction under section 6 may limit the use of the lots by requiring that each lot is to be occupied only, or predominantly, by retired persons.*
>
> *(2) Nothing in this section or section 6 is to be read as limiting the power of the strata company to make by-laws under section 42 relating to the circumstances in which persons, other than the occupier, may reside in a lot which is subject to a restriction referred to in subsection (1).*

[63] Because of this provision, in *Byrne*, there could be no challenge to the power to create by-law 16 which read:

> *Use of Premises*
>
> *16.1 Subject to the Schedule 1 by-law 16 a proprietor of a residential lot may only use his lot as a residence.*
>
> *16.2 Notwithstanding by-law 16.1 a proprietor of a residential lot may:*
>
> *16.2.1 grant occupancy rights in respect of his lot to residential tenants.*

[64] There is no equivalent of the WA s.6A in Queensland to broaden the scope of our s.30(2) [the equivalent of the WA s 42]. The WA provisions appear to be designed for restricting use at the time of creating the lots. The Privy Council did not refer to those sections and this may have affected the ease with which they accepted the parties common ground that it was right for a by-law to restrict to residential use by relaxing the restrictions imposed under those provisions.

[65] This is why it is so vital to consider the power first and the restriction after. If there is a power to restrict to 'resident use' and it was exercised in 3.1 and 3.3 is merely a relaxation of it, the decision in *O'Connor* remains sound in Queensland.

[66] The views expressed on the width of the power to make by-laws in *Rosebank v Locke* although in obiter are highly persuasive as are the various NSW authorities where restriction on use have been held to be valid without reference to something like the WA s.6 and 6A.

[67] The following passage from *Byrne* illustrates multiple superior courts have held that the words used in almost identical legislation must be broadly read and can restrict use:

> *116 Under s 42(1)(c) of the Strata Titles Act, by-laws may be made, not inconsistent with the Act, relating to the 'management, control, use and enjoyment' of a lot. Those words, singularly and collectively, are words of considerable breadth. (See, for example, Hamlena Pty Ltd v Sydney Endoscopy Centre Pty Ltd. [95])*
>
> *117 In Mackie v Henderson,[96] Edelman J observed:*
>
> *The starting point is that it is trite that by-laws frequently interfere with the property rights of the owner of a lot. They can also interfere with a myriad of personal rights in relation to the lot. The range of possible by-laws can be extremely broad. For instance, in Sydney Diagnostic Services Pty Ltd v Hamlena Pty Ltd (1991) 5 BPR 11,432 the New South Wales Court of Appeal upheld a by-law which prohibited the owner of a lot from engaging in any enterprise on the lot other than the medical practice of pathology. This by-law fell within the power to make by-laws 'for the purposes of the control, management, administration, use, or enjoyment of the lots'.*
>
> *118 Also, in Bapson Pty Ltd v Puyeti Pty Ltd,[97] Waddell CJ in Eq held that a by-law prohibiting, in effect, more than one 'Asian Food Outlet' in a strata scheme was not a restriction contrary to the then NSW equivalent of s 42(3) of the Strata Titles Act. His Honour said that:[98]*
>
> *[W]hile a restriction on use might limit the number of potential transferees or lessees, I do not think it can be regarded as a restriction on transfer or leasing or on any of the other transactions mentioned.*
>
> *119 That decision was followed in Salerno v Proprietors of Strata Plan No 42724,[99] where the by-law prohibited a proprietor or occupier from smoking 'within a lot or within the common property'. In that case, Windeyer J said, with respect to the NSW equivalent of s 42(3):[100]*
>
> *The purpose of [the provision] as was the purpose of its predecessor … appears to be to prevent restraints on alienation, leasing or mortgaging. Thus it is clear that a by-law requiring the consent of the body corporate to transfer or lease would be invalid. The argument of the defendant is that the by-law does not offend against [the relevant statutory provision] because it does not restrict in this case the leasing of the lots but rather controls, or seeks to control, the conduct of persons within the lots of the strata plan. Any person whatsoever is free to purchase or take a lease of the lots; what those persons are not free to do is to smoke or allow smoking within the lot.*
>
> *In our opinion, that argument is correct. It is supported by the decision of Waddell CJ in Equity in Bapson …*
>
> *In our view, the by-law in question here does not restrict the right to lease, albeit that it may limit the class of persons who might desire to*

take a lease of the premises in question. It is quite possible that a by-law which had the effect of prohibiting the lease of a lot to persons who were smokers would be invalidated by [the relevant statutory provision] because that would not control the conduct of such persons within the lot but would prevent the leasing of that lot to such persons whether or not they smoked within the lot. That is not the effect of the by-law in question here.

95 ***Hamlena Pty Ltd v Sydney Endoscopy Centre Pty Ltd*** (1990) 5 BPR 11, 436, 11, 440.
96 ***Mackie v Henderson*** [2011] 1 WASC 197; (2011) 42 WAR 194 [22].
97 ***Bapson Pty Ltd v Puyeti Pty Ltd*** (Unreported, NSWSC, 24 May 1990, BC9002451) (Waddell CJ).
98 ***Bapson*** (8); see also ***White v Betalli*** [2006] NSWSC 537; (2006) 66 NSWLR 690 [54]
99 ***Salerno v Proprietors of Strata Plan No 42724*** (1997) 8 BPR 15457 (Windeyer J).
100 ***Salerno*** (15458 - 15459).

Does s.30(2) properly construed confer the power to limit use to residential use?

[68] It is clear that the legislature intended that under the more modern BCCMA that it cannot in some circumstances. Section 180(3) provides that a by-law can't restrict the type of residential use if residential use is lawful. There has been some learned consideration[15] of what 'residential use' means. Whether that decision is correct does not affect this appeal.

[69] There was a large number of cases cited in argument that relate to other jurisdictions with laws that are similar to some extent at least. I have not canvassed each of those decisions to distinguish it. None is binding on me and the different focus taken in each matter reflect their local variations and approaches of the deciding body.

[70] One proposition advanced in various arguments is that the by-law making power is limited to the type of concerns set out in our s.37. Another is that only laws on the same topics or specific items as Schedule 3 are valid. They are not well made.

[71] Section 30(2) is what I must have regard to. Why give such a wide power if it's limited to the things in the schedule? Why not say that?

[72] By-law 3.1 makes non-residential use unlawful. If it can validly do so, the relaxation in 3.3 would in my view take effect in the same way as in *O'Connor* and *Byrne*.

[73] It's also clear that under the newer BCCMA by-laws may not discriminate between types of occupiers. The example given in s.180(5) is that tenants can't be banned from using a pool on common property.

[15] *Body Corporate for Hilton Park CTS 27490 v Robertson* [2018] QCATA 168

[74] Neither s.180(3) or (5) are mirrored in the continued BUGTA. Nor is the requirement that the BC behave reasonably.

[75] Properly understood, the Respondents say that a by-law is not valid under s.30(2) if it attempts to restrict the categories of persons who can undertake a residential use or, if short-term-leasing is residential use, the period of time of that use.

[76] The real issue for me is clear. Can a by-law limit the use of a residential lot in BUGTA to residential uses?

[77] I will start by construing the text itself, then examine the context in which it appears.

[78] Section 30(2) provides:

> *(2) Save where otherwise provided in subsections (7) , (11) and (11A) a body corporate, pursuant to a special resolution, may, for the purpose of the control, management, administration, use or enjoyment of the lots and common property the subject of the plan, make by-laws amending, adding to or repealing the by-laws set forth in schedule 3 or any by-laws made under this subsection.*

[79] To paraphrase and simplify: A BC may regulate for the purpose of the control, management, administration, use and enjoyment of the lots and common property.

[80] A first blush that is a very broad power. There is no reservation about the types of by-laws that cannot be passed other than s.30(6). There is no reason in principal why the Parliament cannot have intended that any group setting up or running a BC in their own interests could not involve itself in even the most private minutiae of a lot owner's life in a way totally unfamiliar with the owner of a fee simple title in an ordinary suburban house block. Examples and severe criticism of those examples appear in academia. They include even a requirement to attend permaculture classes.[16]

[81] I do not take the view that there is any presumption in the BUGTA that the owners of a lot in a body corporate had rights equivalent to freehold. Precisely the opposite is true. If 75% of the owners want to, they can limit the ordinary incidents of title with a by-law. It is wrong to approach the matter as if there were any requirement for the clearest of words being required to overcome some implied presumption of preservation of freehold rights. Nothing in BUGTA clearly grants any particular suite of rights other than those to registration. Registration is itself how and why by-laws are required to be notified.

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[16] *Lessons in personal freedom and functional land markets: What strata and community title can learn from traditional doctrines of property* - Cathy Sherry - 280 UNSW Law Journal Volume 36(1) at 305 and the criticism of the decision in *Casuarina* (2011) 80 NSWLRR 711 at 307 in particular and *The Use of Administrative Law principles to limit the decision making powers of owners corporates* – Giridhar Kowtal – UNSWLJ Student Series No. 14-09 - 8 Sep 2014

[82] An examination of the default by-laws in Schedule 3 is instructive. They regulate the keeping of pets, the storage of flammable liquids and the external appearance of lots. Other by-laws deal mainly with common property.

[83] These default by-laws indicate that a BC's powers were meant to be far more intrusive than say a Council's power to enforce noise or fire laws. All come under the purview of the BC to control, manage and administer and its duty to enforce.

[84] It seems entirely appropriate that if noise and the unreasonable interference with the quiet peace and enjoyment of other lot owners is an issue, that BC's can and must enforce, then it is entirely consistent with the Act that they be allowed to regulate it by more specific means.

[85] It appears that Parliament intended that people were to be free to create all manner of group titles and to regulate their own conduct as is appropriate for the type of uses and the configuration of the lots in question. The anti-discrimination laws and other beneficial legislation would still apply of course. The dangers of persons constraining the uses that can be made of their lots and the policy arguments against them have been explored in academia[17] and led to some reforms in NSW. There has been no change to the BUGTA laws here.

[86] An extreme example illustrates. Fire safety is an expensive component of building. A group of prospective owners could agree to limit the use of their lots so as to attract a fire safety solution that was cheaper to build and maintain.

[87] In principle there is no reason why a group of people could not set up a highly regulated small community in a way that made it attractive to themselves or like-minded purchasers.

[88] A group of allergy suffers might want to establish a community in which certain plants or animals are prohibited. The ability of a community to govern itself (requiring a 75% majority) would enable the benefits of group titles to extend beyond simply being small lots that share common property.

[89] The examples quoted in *Byrne* illustrate body corporates validly interfering with the use of the lots by owners or occupiers. By extension it must have been valid as a matter of regulating something which cannot be regulated on freehold.

[90] The view that a 'persons home is their castle' has to yield to the statutory context. These are not quarter acre blocks in the suburbs. BUGTA regulates all configurations of building and in my view Parliament appears to have intended to leave it up to the majority to decide their own rules given their own circumstances.

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17 *Lessons in personal freedom and functional land markets: What strata and community title can learn from traditional doctrines of property* - Cathy Sherry - 280 UNSW Law Journal Volume 36(1)

[91] Section 14A of the AIA requires me to determine and give effect to the BUGTA's purpose. Only section 6 of the BUGTA speaks to that and says it is to be interpreted as an amendment to the *Land Titles Act 1994*. There are a great deal of machinery provisions. These appear to relate to the creation of lots and how they are dealt with. A lot of the Act deals with the process of creating committees and how the BC manages itself.

[92] Section 90[18] is instructive. It provides for a referee to declare invalid a by-law on the basis the body corporate 'did not have the power to make' it. Apart from s.30(6) there seem to be no other express provisions under which it is contemplated that a by-law could be invalid or to simply that there is some limit to the power in s.30(2).

[93] The reference to 'did not have the power to make it' may also be a reference to the procedural requirements not being met e.g. getting a 75% vote at a properly convened meeting.

[94] Section 88[19] is as even more broad. It provides that an application can be made to a referee to set aside a by-law (one which must be otherwise valid) on the basis that 'having regard to the interests of all proprietors in the use and enjoyment of their lots or common property … the amendment .. should not have been made …'.

[95] No application was made to the referee under s.88.

The competing view

[96] In *Owners Corporation PS 501391P v Balcombe* [2016] VSC 384, Riordan J held in relation to a similar issue but obviously different legislation that:

> *[124] In summary, I do not consider that the Parliament conferred powers on bodies corporate for the Statutory Purpose of substantially interfering with rights and privileges usually attendant upon freehold owners. To adopt the words of Brennan J, notwithstanding that his Honour was in the minority, '[t]he undiscriminating nature of the regulation certainly reveals that, in many instances, the regulation would apply to [Short-Term Letting] which does nothing to enhance the risk of [conduct problems]; but it also reveals – and this is relevant to validity – that the regulation has been framed without regard to' a body corporate's limited functions and powers under the Subdivision Act 1988 (Vic) and its regulations. Accordingly, I consider that Rule 34 was*

[18] Section 90 (1) *Where, pursuant to an application by any person entitled to vote at a meeting of the body corporate (including both a first mortgagee and a mortgagor of a lot) for an order under this section, a referee considers that a body corporate did not have the power to make a by-law purporting to have been made by it, the referee may make an order declaring the by-law to be invalid*.

[19] Section 88 (1) *Where, pursuant to an application by any person entitled to vote at a meeting of the body corporate (including both a first mortgagee and a mortgagor of a lot) for an order under this section, the referee considers that, having regard to the interest of all proprietors in the use and enjoyment of their lots or the common property, an amendment or repeal of a by-law or addition of a new by-law should not have been made or effected, the referee may order that the amendment be revoked, that the repealed by-law be revived or that the additional by-law be repealed.*

not sufficiently directly or substantially connected with the Statutory Purpose to be a real exercise of the rule making power.

[97] Clear emphasis here is given to the rights of owners of freehold land. With the greatest of respect to His Honour's view which may hold true in Victoria, Fairway Gardens is simply not freehold land. Parliament has conferred on Body Corporates a clear role in enforcing by-laws that interfere with what would otherwise be a freehold owners' rights. Examples are found in the default by-laws in Schedule 3:

1. Interfering unreasonably with the peaceful enjoyment of any person lawfully on common property. (1)

2. Lot owners and occupiers are made responsible for taking reasonable steps to ensure their invitees don't interfere with the peaceful enjoyment or another lot (6)

3. Lot owners cannot hang their laundry anywhere that is visible from outside the building. (8) Even if it were fully enclosed within their 4 walls.

4. A lot owner or occupier can't store non-domestic flammable liquids. (9) A house owner can.

5. A lot owner or occupier cannot keep any animal on their lot without permission. (11).

[98] The court in *Balcombe* found at [186] to [188] that the by-law there was not sufficiently connected with the general ban on short-term-leasing. His Honour took the opposite view to my own, that the model rules gave no support for the idea that regulation could extend to a general ban on some uses.

[99] The real difference between my own view and that of His Honour is their preference for the rights of the owners to use their lots as they see fit and let other enforcement mechanisms do the heavy lifting. That case gives a detailed rationale for the view the Respondent's propounded before me. It can be distinguished here simply because the words used by Parliament clearly do manifest the intention that a Queensland body corporate can interfere in the use rights on lots. That view is informed by the learned decisions quote previously in *Byrne.*

[100] The absence of a by-law on a topic does not mean it is outside of power to regulate that topic. Rather than demonstrating the extent of interference with common law rights of freeholders permitted by the act, Schedule 3 clearly shows that some rights have been removed from lot owners and occupiers and other responsibilities imposed.

[101] The presence of a topic clearly indicates that it is a fit subject matter for further regulation by the Body Corporate. It is clear that noise is a matter of concern in confined living conditions. Now that most Australian's do not live on quarter acre

blocks, it is not unreasonable to think that in some poorly designed body corporates, that certain activities could be further regulated to reflect the living conditions and values in that particular community at that particular time.

Conclusion

[102] All sections must be given some work to do and not be presumed to be mere surplusage. Section 30(6) itself shows that Parliament itself thought s.30(2) wide enough to do what section 30(6) expressly prohibits. Sub-section (6) is only necessary because sub-section (2) was intended otherwise to be wide enough to potentially allow interference with dealings.

[103] It follows that the power to make by-laws in s.30(2) is wide enough to contemplate restricting the type of occupants by reference to the nature of their stay. That is what 3.1 did and it was valid. It was not challenged before the referee. Its validity is useful but not essential to interpreting the true nature and operation of 3.3.

Correctly interpret the by-law, not only to its value on its face, but its true nature in operation.

[104] What is by-law 3.3 designed to achieve? Is the true nature and effect that which was permitted in *Byrne* – to preserve the residential character of the area? Or is it simply a cleverly worded ban on short-term letting?

[105] Here the distinction made in *O'Connor* is critical. It looked at the first sentence in both deciding that it was a proper exercise of a valid power and that therefore the second sentence was a valid relaxation of it.

[106] The first sentence in both *Byrne* and *O'Connor* reflect the undoubted power to limit use to residential use. In both cases that came from the Act or approval.

[107] Here the lots are undoubtedly established with a view to privacy and amenity. That much can be gleaned by the presence of a security gate to the entry of a luxury cluster of houses effectively surrounded by a moat and acres of private golf course. Presumably this inspired the name – Fairway Island.

[108] The true character of the by-law is to ensure that only people who have some longer term commitment to the premises occupy them. That is, they are resident there and subject to some longer term control over their behavior.

[109] I conclude that its true nature to achieve the residential character of the BC and not to ban a particular type of tenant.

[110] One question is whether 3.1 and 8.20 do actually already ban short-term letting. The later reads:

> *A Proprietor may be permitted to lease his or her Lot by means of a written lease or rental agreement for permanent letting provided that such lease obliges the lessee thereunder to comply with these By-Laws and provided further that the lease be in writing and any Proprietor who shall lease his Lot shall be responsible for ensuring compliance with such lease particularly so far as that lease relates to the By-laws.*

[111] While 'permanent' letting is not defined, the by-law complements 3.1. It also shows that 3.3 is actually the relaxation of an existing by-law and therefore valid. It's purpose is to ensure the lot is used for residential purposes only.

[112] The referee decided they did not need to decide what 'permanent 'meant. To do so was a failure to attempt to give some meaning to a term used. It is therefore essential to interpret it. A precise definition is not required. No-one would argue that a lease or licence to occupy for 7 to 8 days on holiday is a 'permanent letting'. No one could argue that someone with an intention to occupy for less than 30 days is 'permanently letting' the lot.

[113] By-law 17 requires the by-laws to be exhibited on a permanent place on any lot made available for letting. They are 32 clauses and over 24 pages long. It is extremely unlikely that anyone holiday letting for a week would read them. Again this manifests an intention that the person letting would have the time and interest in reading such a long document.

[114] If 3.3 is invalid then 3.1 and 8.20 would prohibit the type of short-term letting of the Respondents in any event. It seems that disputes over this lead the BC to adopt 3.3 using the wording approved in *O'Connor*.

[115] The referee did not decide what 'permanent letting' meant. Combined with the requirement for 'residential-use' in 3.1 it seems clearly designed to prohibit things which are not 'permanent letting'. While it is poorly wording in being permissive rather than prohibitive, that is because 3.1 is the prohibiting by-law. It was an error not to look at the whole of the by-laws to establish the meaning and effect of each of them. Each of 3.1, 8.20 and 3.3 reinforce one-another.

[116] Could a by-law limit use to residents (and then relax for long term tenants)? According to the Respondents it could not. Their side of this argument leaves all that to planning laws, covenants and the like and says the BC is essentially a piece of machinery to maintain the common property. The Privy Council in *O'Connor* holds it to have a larger role and greater powers including passing by-laws limiting to residential use.

> *18. In the Board's view, the limitation to one month can be seen as designed to provide some definition of what is meant by "use as a residence" for this purpose. The character of the use is clearly affected by the length of occupation. Short-term use by holiday-makers is different in kind from longer-term residential use, even if it may be difficult to draw a clear dividing line.*

> *19. As already noted, this is a familiar problem in the law. For example, in an English case, Caradon District Council v Paton (2001) 33 HLR 34, the Court of Appeal had to decide whether a covenant requiring a house not to be used other than as a private dwelling-house was breached by use for occupation by holidaymakers under tenancies for short periods. Latham LJ said:*
>
> *"Both in the ordinary use of the word and in its context it seems to me that a person who is in a holiday property for a week or two would not describe that as his or her home. It seems to me that what is required in order to amount to use of a property as a home is a degree of permanence, together with the intention that that should be a home, albeit for a relatively short period, but not for the purposes of a holiday." (para 36)*
>
> *The Board respectfully agrees with this analysis, and would apply the same thinking to the concept of use as a residence.*

[117] Short-term letting is by definition not residential. To be residential there must be a resident. That is someone who lives there on a permanent or long term basis. That is, it is their 'settled place of abode'. It is clearly the degree of permanence that is contemplated in 8.20 relaxing 3.1.

[118] Whatever the line between short-term letting and permanent residence is, 30 days does not cross it. No-one even with a formal written lease for 30 days could be said to be making that place their customary place of abode. Clearly renting for up to 7 days is the diametric opposite. People do not bring all their possessions and intend to stay. Here, they come to a fully furnished holiday home for a relatively short period.

[119] Holiday letting is not a 'residential use' within the meaning of these by-laws. I am not assisted by looking at the scheme or development or the planning rules or possible uses. I have considered the actual words of the by-law for the BC that was actually created and the BUGTA.

[120] While the term 'residential' is not defined in the by-law or the BUGTA it is used in the section 41 BUGTA[20] in a manner which is only consistent with this definition. It also does not use the same terms as elsewhere of 'owner' or 'occupier'. It's clear that Parliament allows the relaxations in s.41 only 'where all of the proprietors of the lots contained in a plan reside permanently in their respective lots'.

[121] It is also consistent with the use of the term in s.127[21] which is similar to other acts about service. This must be done at a person's place of residence or business. No-

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[20] Section 41(1) *Where all of the proprietors of lots contained in a plan reside permanently in their respective lots the body corporate may by resolution without dissent resolve that any one or more of the following provisions of this Act shall not apply to that body corporate— ...*

[21] Section 127(4) *Notice under section 44 (5) may be served on a person—*
(a) personally or by post; or

one would think that a party could be served important legal notices by sending them to the holiday home they were occupying for a week.

[122] Both these sections are in BUGTA, the same Act that creates the power to make by-laws. Using that power the original by-laws restricted use to 'residential use' and to 'permanent letting'. The interpretation that the use of these terms were designed to prevent short-term holiday letting is entirely consistent with the way they are used in the parent Act.

[123] The true nature of the operation of the by-law is to ensure that the only people who use the building are persons who (by virtue of their non-transient connection to the lot) the BC perceives are less likely to be a source of nuisance and are more likely to be the subject of effective enforcement.

Regulation vs Prohibition

[124] I have read a number of referees' decisions over the years where they appear to have incorrectly applied the maximum that the power to regulate is not a power to prohibit. It is a power to prohibit. Just not everything to which the power applies.

[125] The difference between regulation and prohibition is set out in *Mineralogy Pty Ltd v Body Corporate for the 'The Lakes Coolum'* [2002] QCA 550 [with my underlining]:

> *[7] In Swan Hill Corporation v Bradbury [1937] HCA 15; (1937) 56 CLR 746, 762, Dixon J said:*
>
> *"... the force of the word 'regulating' has been discussed repeatedly and the cases dealing with its application have grown only too familiar. Prima facie a power to make by-laws regulating a subject matter does not extend to prohibiting it either altogether or subject to a discretionary licence or consent. By-laws made under such a power may prescribe time, place, manner and circumstance and they may impose conditions, but under the prima facie meaning of the word, they must stop short of preventing or suppressing the thing or course of conduct to be regulated."*
>
> *Similar statements are found in judgments in other cases. For example, in Brunswick Corporation v Stewart [1941] HCA 7; (1941) 65 CLR 88, 95, Starke J said:*
>
> *"Prima facie a power to regulate and restrain a subject matter does not authorize prohibiting it altogether or subject to a discretionary licence or consent ... But, as might have been expected, this proposition cannot be universally applied (Slattery v Naylor (1888) 13 App Cas 446)."*

(b) by leaving it with a person apparently of or above the age of 16 years at the place of residence or place of business of the firstmentioned person.

> *[8] The underlying rationale is that a power to regulate an activity implies that the activity will, despite such regulation, be capable of continuing, which it would not do if it were completely prohibited. See City of Toronto v Virgo [1896] AC 88, 93. Prohibition of an activity in part, in a particular case, or in a particular way, may however in some circumstances be needed in order to achieve effective regulation. "The extent to which such partial prohibition is permissible" the Privy Council has said, "depends on the terms of the power to regulate and on the context in which the power is to be operated": Ng Enterprises Ld v Urban Council [1996] UKPC 30; [1997] AC 168, 177. The Australian authorities, a few of which are referred to in that decision are in accord with that view. See, for example, Goldberg v Law Institute of Victoria [1972] VicRp 69; [1972] VR 605, where Gillard J held that a prohibition upon exhibiting a sign or nameplate of more than a specified size on solicitor's premises was authorised by a power to make rules regulating professional duties, practice, conduct and discipline of practitioners. In Brunswick Corporation v Stewart [1941] HCA 7; (1941) 65 CLR 88, 95, Starke J said that the court "should have regard to the body entrusted with the power and the language in which the power is expressed and the subject matter with which the body has to deal". In reliance on that statement, Gillard J held that the provision relating to exhibiting signs was no more than a particular prohibition in a solicitor's practice, and was valid as a form of regulation ([1972] VR 605, 610).*

[126] For example a by-law could prohibit the keeping or a tiger, elephant or bear. This would squarely prohibit only those dangerous and impractical animals from a BC. It is still not a prohibition on every animal. It is not unreasonable either. It is aimed at amenity.

[127] The default Schedule 3 by-law 11 prohibits all pets without approval as an alternative way of regulating.

[128] The regulation power here is very broad and what has been regulated is just one type of use. Especially given the relaxations built in, that is far from a prohibition on all uses.

Determine whether that by-law is squarely within the ambit of the power granted.

[129] It follows that where the law is within power and does no more than regulate, it valid.

[130] The Respondents argument that it is a prohibition is not made out. It permits any occupation for residential purposes by anyone. It does not prohibit all or even

substantially limit all of the thing being regulated (the use and enjoyment of the lot) but only a small subset. That subset is people who want to rent the premises for less than a month. Banning such a group is not a prohibition on anyone or anything else.

Conclusion - Does s.30(2) give the BC the power to create 3.3?

[131] It follows that s.30(2) is about the use and enjoyment of other lots. That is a subject which is within the power of the BC to regulate especially as it relates to noise and the conduct of invitees.

[132] The by-law in the true nature of its operation is to secure the intended residential use of the lots which is within the power and duty of the BC to regulate.

[133] On a proper interpretation of s.30(2) and by-law 3.3, it is within power to create.

Does s.30(6) restrict the BC from using that power?

[134] Simply put, the referee decided that the short-term letting arrangements were a lease and the effect of by-law 3.3 was to interfere with it.

[135] The Appellant argues that s.30(6) applies only to leases as defined under the LTA as an actual registered or at least registerable lease.

[136] The Appellant expressly did not argue that the short-term letting arrangements were not a lease but I have to consider whether they even meet the common definition of lease in the event the answer to the first question is that the section applies to protect more than registered/registerable leases under the LTA.

[137] The referee preferred a plain reading approach also followed in *Washingtonia* to conclude that 'lease' in s.30(2) had its ordinary meaning. That approach demonstrates error in interpreting the statute.

[138] The starting point is the language itself followed by the context in which it appears.

[139] However in this case s.6 LTA expressly says :

> *6 CONSTRUCTION OF ACT*
>
> *(1) This Act shall be read and construed with and as an amendment of the Land Title Act 1994 .*
>
> *(2) However, that Act shall be read and construed subject to this Act and to the extent that this Act is inconsistent with that Act, this Act shall prevail.*

[140] The context is thus the whole of the LTA. In that context s.30(6) takes on a new meaning:

> *(6) No by-*law *or any amendment of or addition to a by-law shall be capable of operating to prohibit or restrict the devolution of a lot or a transfer, lease, mortgage or other dealing therewith or to destroy or modify any easement, service right or service obligation implied or created by this Act.*

[141] Part 6 of the LTA is headed *Dealings directly affecting lots.* Division 1 is *Transfers*, Division 2 is *Leases*, and Division 3 is *Mortgages.* The use of these terms show that s.30(6) is concerned with dealings under the LTA, an Act of which BUGTA is to be as a part of.

[142] Lease appears with and between words all of which are 'dealings' under the LTA.

[143] Its purpose is apparent – to protect the scheme of registration, not the absolute right to use the lot for anything. This is illustrated by the Victorian case[22] in which a by-law prohibiting smoking within the lot was held not to prevent a smoker leasing or purchasing, just from smoking on it.

[144] It is clear that the Act is attempting to prevent by-laws from stopping the free alienation or transfer of lots as if they were freehold. All the references are to terms used in the LTA to define 'dealings'. These affect registration and it is registration that creates or transfers an interest under s.181 LTA.

[145] These are things capable of registration. They appear on title. They affect property rights. The by-law regulates use rights.

[146] What is protected is the operation of the LTA, not the creation of unregistered and registrable rights.

[147] I also note that the section does not purport to make the by-law invalid or to prevent it from being passed. It simply says it is of no effect to that extent. Her Honour Ramsay-Hale J recognised this at first instance in *O'Connor* and declined to make a declaration of invalidity. Instead Her Honour ruled the by-law was valid '*but so much of it as purports to restrict the length of the tenancies the owners may create is inoperative and of no effect.*'[23]

[148] While the parties did not contest that the short-term letting was a lease of sorts and preferred to argue about the LTA, during argument, it became apparent to me that it was arguable that the arrangements the Respondents were using were perhaps not a lease and were only a mere licence.

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[22] *Salerno v Proprietors of Strata Plan No 42724* 8 BPR 15457 as quoted at [119] in *Byrne* above.

[23] *The Proprietors, Strata Plan No 51 & Pinnacle Reef Ltd v Frank O'Connor Senior, Frank O'Connor Junior and Robin Grose O'Connor* (unreported) Action CL177/12 per Ramsay-Hale J, 31 July 2014 Supreme Court of Turks and Caicos at [38] to [39].

[149] While the right of exclusive possession is the key factor it might not be determinative because of the reservation of the landlord of the right to enter and enforce the BC by-laws including summary ejectment for breach. To be truly exclusive possessing there has to manifested an intention not to interfere with quiet enjoyment for the duration of the lease and for the tenant to have a right to sue for trespass.

[150] The statement of Andrew Murray filed in submissions in reply before the referee contains the terms on which his agent, Gold Coast Holiday Houses, lets his premises as Attachment 6:

1. At 2.4 - They purport to direct the tenant that there will be no outdoor noise between 10pm and 8am. They require the tenant to move indoors and close the doors. There is no exclusive possession of the outdoor part of the lot at night under this agreement.

2. At 2.4 – They state breach of this condition will be dealt with under condition 12

3. At 2.5 – The right to have guests is limited to the guests stated on the confirmation notice and 5 casual visitors who cannot stay overnight.

4. At 12 – A breach of these Terms and Conditions by any Guest or Visitor may result in … your immediate eviction from the property … [and/or] … additional charges …

[151] I am not certain it can be said to be a grant of exclusive possession giving 'an interest in land' if the conditions imposed include who can be there and what they can do in what parts of the house at what times of day and retain a right for summary ejectment.

[152] The Respondent has imposed in their own terms and conditions, clauses which appear to be aimed at protecting them from allegations of breaching by-law 6. They do not have all the characteristics of a grant of exclusive possession of the whole of the property for the whole of a fixed period. In any event, whether this is a lease or licence need not be finally determined here as it is not determinative of the appeal.

The remaining issues raised in the application to the referee

[153] The respondents did not raise s.88 in their application for dispute resolution. It was based only on sections 77 and 90(1) and sought declarations that

1. the BC did not have power to make by-laws 8.20 and 3.3

2. those two by-laws were invalid

[154] They used convenient headings in the submission to the referee which set out the substance of their contentions:

1. No Power to Make By-Law 8.20 and By-Law 3.3

2. Body Corporate Management Act 1997 (Qld)

3. Unreasonableness of By-Law 8.20 and By-Law 3.3

4. Purpose of Development

5. Loss of Income

[155] It is readily apparent that item 1 occupied most of the referee's consideration and submission before me. The referee expressly did not consider 2, 3, 4 or 5.

[156] In my view 2, 4 and 5 are irrelevant as to the validity of the by-law and are only arguments raised in support of an application under s.88 which was not made.

1. The newer BCCMA changes were specifically not applied to some BUGTA properties such as Fairway Island.

2. What matters is not what could have been built or set up but what was.

3. The impact of the by-law alone does not go to its validity. In any event, short-term letting was always banned at Fairway Island on the initial by-laws in any event, before the respondents bought.

[157] The respondents outline before me argues no declaration of validity should be made because by-law 3.3 -

1. Exceeds the power to make by-laws because it prohibits and does not merely regulate

2. Is unreasonable and oppressive

3. Is misguided because it was created to address the concerns about the behaviour of occupants rather than the term of the letting.

4. Is unreasonable as prohibiting normal residential activities

5. Is inconsistent with the scheme of development which allows for short term letting.

[158] In short I have found:

1. The power to make 3.3 (and 3.1 and 8.20) exists. It does not prohibit but merely regulates.

2. It is also very difficult to see how a by-law which is lawful in terms approved by the Privy Council and which has the lawful effect it seeks to achieve could ever be objectively unreasonable. It is hard to see how a 75% majority can be said to be oppressive when they simply exercise the powers the legislature has given them for a legitimate purpose.

3. The by-law is not misguided (even if that is a reason going to validity). It addresses concerns about nuisance by requiring only residential use. It relaxes that for any written letting over 30 days. It may be aimed at preventing short-term occupants because they are perceived as more likely to generate nuisances and be harder to regulate but the Privy Council has held that is not an inappropriate response.

4. I have held that short-term letting is not a residential activity within the context of these by-laws.

5. What a planning scheme or scheme of development permits in the abstract is irrelevant. What is relevant is what has been built and what that BC has decided to pass.

[159] A great many of the cases decided under the BCCM place weight on promises by occupiers/owners to conduct themselves in a manner that attempt to make the restrictions placed upon them by the BC look 'unreasonable' in operation. Just because a by-law could be more reasonable does not make it unreasonable.

[160] It appears to me that BUGTA intended to allow the BC to pass by-laws to protect lot owners from even a hypothetical nuisance of the occupier of a lot. They need not wait until a matching band starts rehearsals at midnight in one lot to ban such an activity. The requirement to get approval for a pet is a standard by-law. This is based on no evidence whatsoever that any particular animal <u>is</u> a problem but on the potential for one to be.

[161] In my view, a BC is entitled to act on no evidence whatsoever about an actual nuisance but to pass by-laws if there are genuinely held views about them. Usually that will be because there has been a perception of enough actual examples to encourage 75% to vote in favour of the banning by-law.

[162] Whether one group of owners acts on less evidence than another might require it does not mean they acted unreasonably. I would think that *Wednesbury* standard of unreasonableness would be required to illustrate what would be the real point – that the by-law is not really aimed at its subject matter but is for an improper purpose.

[163] Regulation is not just about stopping proven past behaviours from repeating but also about preventing anticipated breaches based on experience elsewhere or common sense. Likewise regulations need not be limited to just preventing certain noise during certain hours but may in principle act to eliminate the source of some potential problems altogether. The response must be appropriate but there is no need

to wait until a problem has actually manifested before addressing it. Nor does the power restrict the right to regulate by the simple and enforceable expedient of regulating the perceived source of the perceived problem.

[164] A commonly drafted form of by-law prohibits the playing of musical instruments after 10pm. That if far easier to understand, comply with and enforce than one limiting the use of certain instruments beyond a particular noise level. The 10pm ban may be unfair as many modern musical instruments can be played silently because the musician wears headphones. It does not make the by-law unreasonable.

[165] In principle, if 75% of BC members supported the banning of playing the tuba even at midday, it would still be a valid by-law under s.30(2).

[166] A simple example from the traffic laws illustrates the regulatory response to some problems can be aimed at certainty and ease of enforcement rather than a case-by-case nuanced application of a broader law. Not all drivers at 0.05% BAC will be affected the same way. But it is having that concentration in the blood that is made an offence, not driving badly.

[167] Parliament targets the risk that the use of the road by such persons is best regulated by keeping them off the road. It is also much easier for the driver to understand and the police to enforce.

[168] Other examples abound: You can't speed. Even if it very late at night and you are the only driver on an excellent, dry straight, fenced section of road. The law aims not at punishing someone driving too fast but with someone going over a set defined and knowable limit even if in the circumstances it might not be unsafe.

[169] The right to regulate includes the right to create specific and enforceable obligations rather than rely on abstract concepts which are harder to enforce. Noise is transient. There is little point in effectively shutting down loud noises every night after it occurs if sleep is already interrupted.

[170] It appears to me that if any by-law went too far, the onus falls on the occupier/owner to show that the law should be set aside under s.88. It is also critical to the issue of the standard and onus of proof.

[171] Much of the rest of the BUGTA is unhelpful about how that power might be exercised or on what basis a referee might exercise a power that is reposed in the special resolution. When would or should a referee overrule a 75% majority? It must surely only be where the majority is persecuting the minority or there is a fraud on the power. These concepts require a response that is not related to the legitimate concern but is made for some improper purpose. The purpose here is clear – to maintain the residential character of the lots.

[172] The material before the referee clearly shows there were genuinely held concerns about conduct of holiday tenants in breach of the by-laws on multiple occasions.

Actual complaints were made and investigated. Whether they came to the attention of the respondents simply does not matter.

[173] It is then up to those wanting action to call a vote and obtain 75% to agree the by-law is an appropriate response. It may be strong, heavy-handed, un-neighborly and have impacts on people in the shoes of the applicants but that does not mean is not the appropriate subject matter for a by-law or that it is not within power.

[174] It is not up to the minority to say that being adversely affected by a legitimate by-law gives them a right to succeed before a referee on the grounds of validity. Their real avenue for these arguments appears to lie under s.88 when they might attempt to persuade the referee '*that, having regard to the interest of all proprietors in the use and enjoyment of their lots or the common property, an amendment or repeal of a by-law or addition of a new by-law should not have been made or effected'.*

[175] It is indeed likely that this section demonstrates the statutory criteria for dealing with a by-law that might be 'unreasonable'. When would a referee ever repeal a valid by-law or amendment on the grounds it 'should not have been made or effected' unless they considered it unreasonable? Perhaps the emphasis is intended on the reference to the interests of all proprietors.

[176] Conversely, if it is a valid by law in response to an actual problem using Privy Council approved terms, it is hard to see it as unreasonable.

Conclusion

[177] I have had the parties advised that I would give these reasons today and hear them further on a later date as to the final disposition of the appeal.

A. H. Sinclair

Magistrate / Tribunal under BUGTA.