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**JURISDICTION** : STATE ADMINISTRATIVE TRIBUNAL

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

**CITATION** : THE OWNERS OF DEL MAR  
STRATA PLAN 53989 and DART ENTERPRISES  
PTY LTD [2020] WASAT 9

**MEMBER** : MS R PETRUCCI, MEMBER

**HEARD** : DETERMINED ON THE DOCUMENTS (FINAL  
WRITTEN SUBMISSIONS FILED ON  
22 OCTOBER 2019)

**DELIVERED** : 15 JANUARY 2020

**FILE NO/S** : CC 487 of 2019

**BETWEEN** : THE OWNERS OF DEL MAR  
STRATA PLAN 53989  
Applicant

AND

DART ENTERPRISES PTY LTD  
Respondent

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*Catchwords:*

Strata titles - Short-term stay accommodation - Management statement -  
Whether the by-law precludes use of a lot for short-term stay accommodation -  
Proper construction of 'Use of Premises' by-law - Meaning of 'a residential lot  
may only use his lot as a residence' - Short-term accommodation lot

*Legislation:*

*City of Mandurah Town Planning Scheme No. 3, cl 4.12*

*State Administrative Tribunal Act 2004 (WA), s 60(2)*

*Strata Titles Act 1985 (WA), s 5C, s 6, s 6A(2), s 6(1), s 42(1)(c), s 42(2), 42(3), s 42(6), s 81(10), s 83(1)*

*Town Planning and Development Act 1928 (WA)*

*Result:*

Application successful

*Category:* B

**Representation:**

*Counsel:*

Applicant : Ms K Lewis

Respondent : Mr T Stott

*Solicitors:*

Applicant : Lewis Blyth & Hooper

Respondent : P A Martino Barrister & Solicitor

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

Byrne v The Owners of Ceresa River Apartments Strata Plan 55597  
[2016] WASC 153

Byrne v The Owners of Ceresa River Apartments Strata Plan 55597  
[2017] WASCA 104

The Owners of Ceresa River Apartments Strata Plan 55597 and Haines  
[2015] WASAT 72

The Owners of Oceanique SP 52385 and MD & DK Giggins CT Pty Ltd  
[2017] WASAT 36

The Owners of Strata Plan No 3397 v Tate [2007] NSWCA 207;  
(2007) 70 NSWLR 344

**REASONS FOR DECISION OF THE TRIBUNAL:**

***Introduction***

1 This proceeding concerns the proper construction of a by-law, which is headed 'Use of Premises'.

2 Dart Enterprises Pty Ltd (the **respondent**) is the registered proprietor of a strata lot, lot 24, in the strata scheme known as 'Del Mar' (the **strata scheme**) located within the City of Mandurah.

3 The applicant, The Owners of Del Mar Strata Plan 53989 (the **strata company**) is the strata company of the strata scheme.

4 On 29 March 2019, the strata company lodged its application with the Tribunal alleging that the respondent had made available its lot 24 for short-term stay accommodation and to persons who did not use that lot as their settled or usual abode. The strata company sought the following order from the Tribunal under s 83(1) of the *Strata Titles Act 1985* (WA) (**ST Act**):

Pursuant to by-law 16.1 of the management statement, properly construed, the respondent may only use, and any occupier to whom the respondent grants occupancy rights in respect of lot 24 may only use, the lot as a settled or usual abode, and, subject to by-law 16.2.2, not otherwise.

5 Further, the strata company sought an order under s 81(10) of ST Act as follows:

It is declared that these orders shall not cease to have any force and effect 2 years after the making of these orders.

6 The respondent disputed the strata company's interpretation of by-law 16 and has continued to make its lot 24 available for short-term stay accommodation.

7 For the reasons set out below, the Tribunal concludes that by-law 16, properly construed, does not permit lot 24 in the strata scheme to be used for short-term stay accommodation.

***The proceedings in the Tribunal***

8 Following the usual programming orders, it was agreed by the parties for the Tribunal to determine the application on the documents.

9           Following receipt of the final written submissions on 22 October 2019, the Tribunal determined the application on the documents pursuant to s 60(2) of the *State Administrative Tribunal Act 2004* (WA).

10           In addition to the strata company's application dated 29 March 2019 which included strata plan 53989, the s 77B Certificate, the management statement, the strata roll and evidence that the application was authorised (see s 6(b)(ii) of the Tribunal's Practice Note 5), the Tribunal had the following documents before it:

- pages 48 to 51 of the report from the Planning & Sustainability Director to the Planning, Community Development and Sustainability Committee Meeting held on 17 May 2005;
- *City of Mandurah Town Planning Scheme No. 3* Grant of Planning Consent application No 4006 made on 19 May 2005;
- City of Mandurah minutes of council meeting held on 24 May 2005;
- City of Mandurah Certificate of Classification 6.2005.66407 dated 19 November 2007;
- *Western Australian Government Gazette*, dated 21 July 1999, 25 May 2004 and 4 February 2005;
- *Mandurah Ocean Marina Outline Development Plan* design criteria October 2010 (Revised 6.10.10);
- *City of Mandurah Town Planning Scheme No 3* (last updated 6 March 2018);
- respondent's response to the application dated 13 June 2019;
- statement of agreed facts dated 22 August 2019;
- affidavit of Mr Garry Wayne Granger sworn 6 September 2019 together with Annexure A;
- affidavit of Ms Kristy Jane Lewis sworn 6 September 2019 together with Annexures A to D;

- applicant's submissions dated 27 September 2019;
- respondent's submissions dated 4 October 2019;
- applicant's submissions in reply to the respondent's submissions of 4 October 2019 dated 18 October 2019; and
- respondent's submissions in reply to the applicant's submissions of 27 September 2019 dated 21 October 2019.

*The agreed facts*

11 The following facts are agreed between the parties. They are uncontroversial and the Tribunal makes these findings of fact.

12 On 18 March 2005 Finbar Group Limited (then known as Finbar International Limited) (**Finbar**) became the proprietor of Lots 273, 276 and 279 each on Deposited Plan 41764 and being the land in Certificate of Title Volume 2586 and Folios 322, 323 and 324, respectively (the **Three Lots**).

13 On 21 June 2006 Finbar amalgamated the Three Lots with the resultant parcel of land being Lot 888 on Deposited Plan 48366 and being the land in Certificate of Title Volume 2624 Folio 386 with the street address of 3 The Palladio, Mandurah (the **Property**).

14 Finbar constructed a building on the Property (the **Building**).

15 On 19 November 2007, the City of Mandurah issued a certificate of classification numbered 6.2005.66407 for the Building (the **Certificate of Classification**).

16 Relevantly, the Certificate of Classification:

- (a) stated that the use of the Building had been approved as a building of the class or classes specified therein, and included the following table:

Storey or portion of building	Class or classes of building
Basement	Class 7a – Carpark
Ground floor	Class 3 - Short stay units
First, Second & Third Floor	Class 2 - Residential units

- (b) stated that the Certificate of Classification classifies the Building according to the *Building Code of Australia*.

17 The *Building Code of Australia* in force when the Certificate of Classification was issued was the *Building Code of Australia 2007*, having been adopted on 1 May 2007 (**BCA 2007**).

18 Relevantly, the BCA 2007 provides as follows:

### **A1.1 Definitions**

*For additional definitions see NSW Appendix, Qld Appendix, Tas Appendix, Vic Appendix*

In Volume One of the BCA unless the contrary intention appears-

...

**Sole-occupancy unit** means a room or other part of a building for occupation by one or joint owner, lessee, tenant, or other occupier to the exclusion of any other owner, lessee, tenant, or other occupier and includes-

- (a) a dwelling; or
- (b) a room or suite of rooms in a Class 3 building which includes sleeping facilities; or
- (c) a room or suite of associated rooms in a Class 5, 6, 7, 8 or 9 building; or
- (d) a room or suite of associated rooms in a Class 9c aged care building, which includes sleeping facilities and an area for the exclusive use of a resident.

...

### **A3.2 Classifications**

Buildings are classified as follows:

**Class 1:** one or more buildings which in association constitute-

- (a) **Class 1a** - a single dwelling being-
  - (i) a detached house; or

(ii) One of a group of two or more attached dwellings, each being a building, separated by a *fire-resisting* wall, including a row house, terrace house, town house or villa unit; or

(b) **Class 1b** - a boarding house, guest house, hostel, or the like

(i) with a total area of all floors not exceeding 300m<sup>2</sup> measured over the enclosing walls of the Class 1b; and

(ii) in which not more than 12 persons would ordinarily be resident,

which is not located above or below another dwelling or another Class of building other than a *private garage*.

**Class 2:** a building containing 2 or more *sole-occupancy units* each being a separate dwelling.

**Class 3:** a residential building, other than a building of Class 1 or 2, which is a common place of long term or transient living for a number of unrelated persons, including:

(a) a boarding-house, guest house, hostel, lodging-house or backpackers accommodation; or

(b) a residential part of a hotel or motel; or

(c) a residential part of a *school*; or

(d) accommodation for the aged, children or people with disabilities; or

(e) a residential part of a *health-care building* which accommodates members or staff; or

(f) a residential part of a *detention centre*.

19 On 18 January 2008 Finbar registered strata plan 53989 (the **strata plan**) in respect of the Property pursuant to the ST Act and the strata scheme was created.

20 The strata scheme is a 49 lot scheme.

21 The Form 7 and 5 certificates (Certificate of Local Government and Certificate of Licensed Surveyor respectively) accompanying the strata plan described the Property and Building as:

DESCRIPTION OF PARCEL & BUILDING

Forty nine residential apartment dwellings in a multiple-level development upon Lot 888 on Deposited Plan 48366 and having an address of 3 The Palladio, Mandurah WA 6210.

22 The strata plan depicted the 49 apartment dwellings (excluding car bays, boat berths and storage) and are situated in the Building as follows:

Storey	Apartment dwellings
Ground floor	1 to 7 and 25 to 31
First floor	8 to 14 and 32 to 38
Second floor	15 to 21 and 39 to 45
Third floor	22 to 24 and 47 to 49

23 The *City of Mandurah Town Planning Scheme No. 3 (TPS 3)* came into operation on 15 July 1999 pursuant to the *Town Planning and Development Act 1928 (WA)*. The Property falls within the Special Use Zone, known as the 'Mandurah Ocean Marina Development Zone' (**MOMD Zone**).

24 Up to and including 18 January 2008, cl 4.12 of TPS 3 read as follows:

**4.12 MANDURAH OCEAN MARINA DEVELOPMENT ZONE**

**4.12.1 Purpose and Intent of Zone**

The Mandurah Ocean Marina Development Zone is intended to provide for public marina uses, tourist, commercial and residential components for the local and visiting community, which has strong links to the existing cultural and town precincts, in recognition of the strategic location of the site in its local and regional context. Comprehensive planning for the area shall be carried out in an approved Outline Development Plan. The Outline Development Plan shall be prepared in accordance with Section 7.11 of the Scheme.

The Outline Development Plan should conform with any structure plans or guide plans any policies and Retail Structure Plan adopted by Council and the Western Australian Planning Commission. Where no Outline Development Plan exists, the following Uses and Development Standards will apply.



25 By *Western Australian Government Gazette*, dated 27 January 2012, the following land use classification was introduced into 'Appendix 1 - Interpretations' of the TPS 3:

short stay accommodation: means where occupation by any person is limited to a maximum of three months in any 12-month period.

26 On 16 March 1999 the City of Mandurah approved an outline development plan, known as the Mandurah Ocean Marina Outline Development Plan (**Mandurah Ocean Marina ODP**) which was approved by the Western Australian Planning Commission sometime later in 1999 whereby it came into effect.

27 The Property falls within the Mandurah Ocean Marina ODP and more particularly, within Precinct 6B: Tourist/Residential/Mixed Use (Ground Level: Non-Residential) (**Precinct 6B**).

28 At all material times, the Mandurah Ocean Marina ODP provided that in respect of Precinct 6B:

- (a) Precinct 6B will be mixed use;
- (b) tourist based uses must occupy ground level; and
- (c) for upper level, Council will consider development proposals on their individual merit, measure against the fundamental objectives for the precinct to become a predominantly tourist based development.

29 The schedule of interests and notification on page 1 of the strata plan contains the following interest/notification:

PURPOSE	STATUTORY REFERENCE	ORIGIN	LAND BURDENED	COMMENTS
USE RESTRICTION	SEC 6(1) OF THE S.T.A.	THIS PLAN	LOTS 1 - 7 INCL. & LOTS 27 - 31 INCL.	SHORT TERM STAY ACCOMMODATION (SEE SHEETS 2 & 23 OF 6 SHEETS)

30 Sheets 2 and 3 of the strata plan each contained the following endorsement (**strata plan use restriction**):

USE RESTRICTION

PURSUANT TO SECTION 6(1) OF THE STRATA TITLES ACT 1985, LOTS 1 TO 7 INCLUSIVE AND LOTS 27 TO 31 INCLUSIVE ARE DESIGNATED AS SHORT TERM STAY ACCOMMODATION BY THE CITY OF MANDURAH AND MUST NOT BE OCCUPIED BY THE PROPRIETOR OR ANY OTHER PERSON FOR PERIODS WHICH TOTAL THREE MONTHS IN ANY YEAR.

31 In March 2017 the respondent purchased lot 24 on the strata scheme (**lot 24**).

32 The apartment dwelling for lot 24 (excluding car bay, boat berth and storage) is located on the third floor of the Building.

33 The respondent remains the current owner of lot 24.

*The issue*

34 The issue to be determined by the Tribunal is whether by-law 16, properly construed, permits the respondent to use lot 24 as short-term stay accommodation.

*The relevant by-laws*

35 By-laws may be made which, amongst other things, restrict the use of lots and any common property, providing they are not inconsistent with the ST Act (see s 42(1)(c) and s 42(3) of the ST Act). Section 6 of the ST Act also deals with restrictions on use in that it provides for restrictions to be placed on the use to which the parcel, or part of the parcel may be put. Section 6(1) of the ST Act requires that the area the subject of the restriction be delineated on the plan lodged for registration, and that specific reference be made to s 6 by an appropriate endorsement on the plan. A proprietor, occupier or other resident cannot use or permit to be used the restricted area in any manner that contravenes the restriction.

36 On 18 January 2008, Finbar registered the Management Statement by Instrument K480973 (**management statement**) with the strata plan pursuant to s 5C of the ST Act. The management statement provided:

- (a) all the by-laws in Schedule 1 and Schedule 2 to the ST Act were repealed; and

- (b) all the by-laws contained in the management statement as Schedule 1 by-laws were adopted (**by-laws**).

37 The parties agreed that the following by-laws are relevant in regards to the dispute before the Tribunal.

**1. Definitions**

The following words have these meanings in the Schedule 1 Bylaws unless the contrary intention appears:

**'Bylaws'** means the bylaws adopted by the strata company from time to time;

...

**'Local Authority'** means the local authority as may from time to time have jurisdiction over the scheme;

**'Lot or lot'** means a strata lot formed upon registration of the strata plan;

...

**'Proprietor'** means the proprietor from time to time of a lot and the proprietors successors in title, personal representatives, permitted assigns and transferees or registered mortgagee in possession;

...

**'Schedule 1 Bylaws'** means the Schedule 1 Bylaws 1 to 52 inclusive;

...

**1.2 Interpretation**

In the Schedule 1 Bylaws:

...

1.2.4 Headings are inserted for convenience only and shall not affect the construction or interpretation of the Schedule 1 Bylaws.

...

**16. Use of Premises**

16.1 Subject to Schedule 1 bylaw 16.2 a proprietor of a residential lot may only use his lot as a residence.

16.2 Notwithstanding bylaw 16.1 a proprietor of a residential lot may:

16.2.1 grant occupancy rights in respect of his lot to residential tenants;

16.2.2 conduct business from his lot, so long as:

16.2.2.1 the proprietor does not invite customers of the business to visit the lot for the purpose of conducting the business;

16.2.2.2 the conduct of the business from the lot does not breach any local authority bylaw or regulation;

16.2.2.3 the conduct of the business does not cause any inconvenience to the proprietors of other lots;

16.2.2.4 the business does not involve the manufacture, storage or vending of goods.

16.3 Notwithstanding bylaw 16.1 the original proprietor of the land may use any lot owned by the original proprietor for the purposes of display to prospective purchasers of that or other lots within the scheme.

16.4 If a proprietor grants occupancy rights in respect of his lot he shall:

16.4.1 promptly provide the council with the full name of each occupier;

16.4.2 give each occupier a copy of the bylaws and the rules (if any) at the commencement of the occupation; and

16.4.3 procure that the occupancy agreement contains a provision to the effect that the occupier will comply with the bylaws and the rules and that any breach thereof will constitute a breach of the occupancy agreement which will entitle the proprietor to terminate the occupancy agreement with the occupier.

...

## **50. Short Term Stay Accommodation**

50.1 In this By-law 'Short Term Accommodation Lot' means lots 1 to 7 inclusive and lots 27 to 31 inclusive of the scheme.

- 50.2 No proprietor will occupy or permit any other person to occupy a Short Term Stay Accommodation Lot for periods that total three months in any twelve month period.
- 50.3 The Proprietor will, as soon as practicable, give written notice to the Strata Manager of all those persons including the Proprietor, who occupy a Short Term Stay Accommodation Lot together with the periods of occupation by those persons.
- 50.4 This By-law may not be amended or revoked without the prior written consent of the Local Authority.

38 As at the date the final submissions were filed with the Tribunal on 22 October 2019, there was no notification of any changes to the by-laws.

39 Both parties referred the Tribunal to the most recent judicial consideration of a by-law in *Byrne v The Owners of Ceresa River Apartments Strata Plan 55597* [2017] WASCA 104 (*Appeal decision*), to which it is convenient to now turn.

#### ***Summary of the Appeal decision***

40 The *Appeal decision* concerned the appeal from the decision of her Honour Justice Pritchard in *Byrne v The Owners of Ceresa River Apartments Strata Plan 55597* [2016] WASC 153 (*First decision*) which concerned the appeal from the decision of the Tribunal in *The Owners of Ceresa River Apartments Strata Plan 55597 and Haines* [2015] WASAT 72 (*Tribunal decision*).

41 The issue in dispute in the *Appeal decision* is somewhat similar to that currently before the Tribunal, that is, the dispute concerns short-term stay accommodation and has an identical by-law 16. However, there is at least one important difference between the current matter and the *Appeal decision*. There was no equivalent by-law 50 in the *Appeal decision*.

42 The background to the *Appeal decision* is that Mr Byrne was the proprietor of a lot in a 113 lot strata scheme known as the Ceresa River Apartments. Mr Byrne and his wife had rented out their apartment as short-term stay accommodation. The strata company took the view that such activity was a breach of by-law 16 of the strata scheme. The strata company applied to the Tribunal for an order requiring Mr and Mrs Byrne and other proprietors to cease renting out their lots as short stay accommodation.

43

In considering the proper construction of by-law 16, it was held in the *Appeal decision* by their Honours Murphy, Mitchell and Beech JJA at [142] that insofar as by-law 16 refers to a 'residential lot' then it must be taken to be referring to each of the 113 lots in the 'residential apartment development' recorded on the strata plan. Their Honours found it difficult to accept Mr Byrne's contention that the purpose of the word 'residential' in by-law 16 was to distinguish between 'residential' and 'non-residential' lots because the by-laws were contained in the management statement lodged with the registration of the strata plan, and the strata plan referred to 'residential apartment dwellings'. Their Honours stated at [146] - [148]:

146. [W]hen by-laws 16.1 and 16.2.1 are read together, and with particular reference to the words 'residence', 'notwithstanding' and 'residential', they indicate that a lot may only be used as a 'residence' by the proprietor or by anyone to whom the proprietor grants 'occupancy rights'. In other words, in substance, by-law 16.1 and by-law 16.2.1, read together, mean that a lot may only be occupied by persons who use the lot as a 'residence'.

147. The words 'residence' and 'residential' in by-laws 16.1 and 16.2.1 are to be understood in a context where the by-laws treat the strata scheme development as a 'luxury residential complex'. It may be inferred that the rationale for by-law 16 is that occupants for whom their lot is their usual or ordinary 'residence', would more likely preserve the character of the complex as a 'luxury residential complex' than occupants who come and go, and whose 'residence' is elsewhere.

148. In the present context, the phrase 'use his lot as a residence' in by-law 16.1 appears, objectively, to be referring to the use of the lot as one's settled or usual abode. As noted earlier, ... the word 'resident' in the *Strata Titles Act* would include, at least, someone for whom the lot is their settled or usual abode. In this regard, the word 'residence' in by-law 16 is used in a manner consistently with the use of the word 'resident' in the *Strata Titles Act*.

44

Finally, their Honours concluded at [154]:

The effect of by-law 16, on its proper construction, is that a proprietor may only use, and any occupier to whom the proprietor grants occupancy rights may only use, the lot as a settled or usual abode and not otherwise. The limitation on the occupier's use is effected through the proprietor procuring (pursuant to by-law 16.4) the occupier's agreement to comply with the by-laws. By-law 16 does not operate relevantly as a restraint on alienation contrary to s 42(3) of the *Strata Titles Act*, but as a limitation on use.

45 Next, before considering the position of the parties, it is useful to set out the principles applicable to the proper construction of by-laws.

***The principles applicable to the proper construction of by-laws***

46 Having considered *The Owners of Strata Plan No 3397 v Tate* [2007] NSWCA 207; (2007) 70 NSWLR 344 (*Tate*), her Honour Justice Pritchard in the *First decision* concluded at [71] that by-laws should be characterised as a statutory contract. Her Honour summarised the principles applicable to the construction of by-laws at [75] to [79] as follows (citations omitted):

75. The ordinary principles of contractual construction should guide the construction of the By-Laws. They are that the rights and liabilities of parties under a term of a contract are determined objectively, by reference to the contract's text, context (the entire text of the contract as well as any contract, document or statutory provision referred to in the text of the contract) and purpose. However, in the case of the By-Laws, those principles are subject to four qualifications:
76. First, to the extent that their terms permit, the By-Laws should be construed so that they are not inconsistent with the ST Act (bearing in mind that a strata company has no power to make a by-law which is inconsistent with the ST Act).
77. Secondly, in interpreting a term of a contract which is ambiguous, it is possible in some circumstances to refer to objective extrinsic material to ascertain the meaning of the term. However, in the context of the By-Laws, caution should be exercised in going beyond the language of the By-Laws and their statutory context to ascertain their meaning, and a tight rein should be kept on having recourse to surrounding circumstances. (That reflects the fact that although (as I noted at [59] above) the by-laws of a strata company may be inspected by third persons, such persons would ordinarily have no access to the circumstances surrounding the making of those by-laws.)
78. Thirdly, the statutory context of the by-laws of a strata company should be taken into account by the Court in construing the By-Laws. That statutory context includes the fact that the function of the By-Laws is to regulate the rights and liabilities of the Respondent, the proprietors of the lots in the Complex and certain other parties with rights or interests in the lots and the common property in the Complex.
79. Fourthly, in ascertaining the meaning of a commercial contract, it is necessary to ask what a reasonable businessperson would have understood its terms to mean. That will involve a

consideration of the language used, the circumstances addressed by the contract, and the commercial purpose or objects to be secured by the contract. Unless a contrary intention is indicated, the court will approach the task on the assumption that the parties intended to produce a commercial result, so that the contract should be construed so as to avoid it making commercial nonsense or working a commercial inconvenience. However, in the case of the By-Laws, there is no basis for saying that they should be interpreted as a business document, with the intention that they be given business efficacy. That does not mean that the By-Laws may not have a commercial purpose, and be interpreted accordingly, but due regard must be paid to the statutory context in so doing.

47 In the *Appeal decision*, their Honours Murphy, Mitchell and Beech JJA observed at [139] that the parties in the appeal proceeding approached the proper construction of by-law 16 on the basis that the by-laws were a statutory contract to which, in general terms, the principles referred to in *Tate* applied. However, having stated that they considered and disposed of the appeal on that basis, their Honours went on to say at [139] that, in point of principle, it might be thought that the appeal before them concerned the proper construction of the management statement, lodged and registered with the Ceresa River strata plan and which had been amended since registration, and therefore the correct approach to construction of the management statement might be along the following lines:

- (a) is to be construed objectively, by reference to what a reasonable person would understand the language of the instrument to mean;
- (b) it is to be construed in the context of the registered strata plan;
- (c) it is to be construed in the relevant statutory context, being, first and foremost, the *Strata Titles Act*;
- (d) as the Management Statement is on the Torrens Register, unamended, rules of evidence assisting the construction of contracts inter partes, of a nature explained by *Codelfa Constructions Pty Ltd v State Rail Authority (NSW)* do not apply to its construction: *Westfield Management Ltd v Perpetual Trustee Co Ltd*; and
- (e) insofar as there are constructional choices properly open, a construction should be preferred which is consistent with the *Strata Titles Act*: s 42(1) of the *Strata Titles Act*.



48 Their Honours concluded at [140] that if the above approach to construction is the correct approach, the result of the appeal would have been the same. The approaches to construction of a management statement or of by-laws as set out in the *First decision* and the *Appeal decision* although different in part, are not inconsistent.

49 The Tribunal turns, next, to set out in summary each party's position.

*Summary of the respondent's position*

50 In short, the respondent's position is that by-law 16 permits the use of lot 24 for long-term stay accommodation or short-term stay accommodation (transient living). The respondent's position may be summarised as follows:

- The context in this case differs to that in the *Appeal decision* because that case only had by-law 16 whereas the present case has by-law 50 regulating short-term stay accommodation. By-law 16 must be read in context of by-law 50 where by-law 50 only restricts duration of occupation.
- Taking into account the by-laws, the strata plan, the ST Act and the location of the Building which is in a tourist precinct in the City of Mandurah, the interpretation of the use of the lots is that all lots are able to be used for long-term and short-term stays only that there is a restriction that certain lots (for example lot 1) which can only be used for short-term stays as defined as 'short-term accommodation lots' in by-law 50.
- If the words 'residence' and 'residential tenants' in by-laws 16.1 and 16.2.1 mean that a lot may only be occupied by persons who use the lot as one's settled or usual abode, then a conflict arises between by-laws 16 and 50 and a conflict arises between by-law 16 and the strata plan use restriction.
- If the words 'residence' and 'residential tenants' in by-law 16 are taken to identify the type of use as opposed to the intention or duration of that use, then by-law 16.1 would be properly construed as requiring a

proprietor to use their residential lot as a residential dwelling, with no restriction as to intention or duration and therefore able to be used for long-term or short-term stay accommodation (or transient living) (the **first construction**). The first construction is to be preferred because:

- (a) the word 'residence' and cognate terms are of a 'very flexible meaning, acquiring whatever precision they have in any given case from their surroundings' (see *Appeal decision* at [149] to [150]) and capable of meaning differing degrees of continuity of living;
  - (b) no additional words are required to be read into by-law 16 or to give a special and unnatural meaning to any terms;
  - (c) the permissible surrounding circumstances favour this construction, noting the Building is located in a precinct zoned as a predominantly tourist development, the Building has been classified as residential units restricted to short-term stay accommodation (or transient living) for the ground floor and residential units without restriction for the upper levels; and
  - (d) it achieves the objective intention that the restricted lots be used as short-term stay accommodation.
- The only other construction that would enable effect to be given to both by-laws 16 and 50 is where by-law 16 is construed in a manner so that it does not apply to the proprietors of lots subject to the strata plan use restriction (the **second construction**). However, such a construction would require either:
    - (a) additional words to be read into by-law 16 to exclude its application to those proprietors; or
    - (b) the term 'residential lot' is to be construed as a reference to the 49 residential apartment dwellings with the exclusion of the restricted lots.

*Summary of the strata company's position*

51 In short, the strata company's position is that the respondent, as the proprietor of lot 24, is prohibited from using that lot for short-term stay accommodation and to persons who do not use that lot as their settled or usual abode. The strata company's position may be summarised as follows.

- The context of this case is not different to that in the *Appeal decision* as in that case the City of Belmont approved a change for the relevant lot from a 'multiple dwelling' to a 'serviced apartment' which was defined as an independent living residential unit providing for short stay accommodation.
- All lots on the strata plan are either 'short-term stay accommodation lots' or 'residential lots'. Only lots 1 to 7 and lots 27 to 31 are short-term stay accommodation lots and are therefore subject to by-law 50. By-law 16 does not suggest that a proprietor of a lot has the ability to change the use of the lot on the strata plan from 'residential' use to a 'non-residential' use.
- The words 'residence', 'residential tenants' and 'occupancy rights' in by-law 16 are to be given the same meaning as in the Appeal decision and in *The Owners of Oceanique SP 52385 and MD & DK Giggins CT Pty Ltd* [2017] WASAT 36.
- The second construction is to be preferred because:
  - (a) there is no ambiguity in by-laws 16 and 50 and therefore there is no need to consider any extrinsic materials;
  - (b) zoning of the land and the classification of the buildings are matters for the local government, rather than for regulation by by-laws, and in any event:
    - (i) the second construction is not inconsistent with the zoning of the property and the classification of the Building; and

- (ii) by-law 21.1.1 provides that a proprietor shall not use his premises or any part of the common property for any purpose which may be a breach of the by-laws, the regulations or by-laws of the local authority or any other government regulation or law;
- (c) the use of a strata lot may be affected by a compliant endorsement on the registered strata plan restricting the use of a delineated area as provided in s 6 of the ST Act;
- (d) the second construction is not inconsistent with the ST Act. This is because at [148] of the *Appeal decision*, it was stated that:

[t]he word 'resident' in the *Strata Titles Act* would include, at least, someone for whom the lot is their settled or usual abode. In this regard, the word 'residence' in by-law 16.1 is used in a manner consistently with the use of the word 'resident' in the *Strata Titles Act* ...;
- (e) in each of the *Tribunal decision*, the *First decision* and the *Appeal decision* it was held that the word 'residence' and 'residential' in the Ceresa River Apartments by-laws refer to the intent with which a lot on the strata plan is occupied and not the usage of the lot on the strata plan.

### *Consideration by the Tribunal*

52 The issue before the Tribunal turns on the proper construction of the words '[a] residential lot may only use his lot as a residence' in by-law 16.

53 There are two by-laws in the strata plan in the current proceeding which relate to the 'use' of lots, being by-laws 16 and 50. By-law 16 is expressed in the same way as by-law 16 was in the *Appeal decision*. There was no equivalent by-law 50 in the *Appeal decision*.

54 The *Appeal decision* sets out the principles to be applied in the proper construction of by-laws. Therefore, in considering the issue before it, the Tribunal will need to determine the proper construction of by-law 16 objectively by applying those principles. Importantly, to the extent that the terms of the by-law permit, the proper construction of by-law 16 should not be inconsistent with the ST Act (as the strata company has no power to make a by-law which is inconsistent with the ST Act).

55 In these proceedings, a significant point of difference between the parties is that the respondent is of the view that by-laws 16 and 50 are in conflict and that there is a further conflict between by-law 16 and the strata plan use restriction (where lots 1 to 7 and lots 27 to 31 inclusive are restricted from being occupied by the proprietor of the lot or any other person for periods which total three months in any 12 month period). The strata company refuted there was any conflict between the by-laws.

56 The respondent submitted that if the words 'residence' and 'residential tenants' in by-laws 16.1 and 16.2.1 are understood to mean that a lot may only be occupied by a person who uses the lot as one's settled or usual abode (per the *Appeal decision*), then by-law 16 prohibits a restricted lot (for example lot 1) from being occupied by the proprietor who uses it as his or her settled or usual abode, or allowing anyone else, to occupy it for periods that total three months in any 12 month period.

57 The strata company, on the other hand, submitted that:

- (a) the use of the words 'residence' and 'residential tenants' in by-law 16 refers to the intent with which a lot on the strata plan is occupied and not the usage of the lot; and
- (b) the only objective meaning that can be given to the words 'residential lot' is for all the lots on the strata plan excluding the lots defined in by-law 50 as a 'short term accommodation lot'; the only objective meaning that can be given to the words 'residential lot' is for all the lots on the strata plan excluding the lots defined in by-law 50 as a 'short term accommodation lot';

and therefore the only, ordinary objective meaning that can reasonably be given to the words 'residence', 'residential tenant' and 'occupancy rights' in by-law 16 is that of an occupant who demonstrates the intention to use the lot as a settled or usual abode.

58 The Tribunal does not, with respect, accept the respondent's preferred construction of by-law 16 where the words 'residence' and 'residential tenants' are said to identify the type of use as opposed to the intention of that use. This is because such a construction would mean that each proprietor of the 49 strata lots could use their lot as a residential apartment dwelling for long-term stay accommodation or for short-term stay accommodation (or as described by the respondent as transient living) either by them or by any person to whom they grant a right of occupancy. It is necessary to read by-law 16 in context of by-law 50. In the Tribunal's view, by-law 50 qualifies by-law 16 by limiting the restricted proprietors' (that is, the proprietors of lots 1 to 7 inclusive and lots 27 to 31 inclusive) use of their respective strata lots as a residential dwelling for short-term accommodation (or as described by the respondent as transient living) only. As already stated, by-laws may be made relating to 'use' under s 42(2) of the ST Act. By-law 16 is such a by-law relating to 'use'. In this case, the strata plan contains an endorsement on sheets 2 and 3 of the strata plan restricting the use of lots 1 to 7 and lots 27 to 31 inclusive from being occupied by the proprietor of the lot or any other person for periods which total three months in any 12 month period. The endorsement specifically makes reference to s 6 of the ST Act. All of the identified short-term stay accommodation lots are located on the ground floor. The respondent's lot 24 is not located on the ground floor and is not included in the endorsement. The Tribunal notes that the endorsement on the strata plan is similar to the terms set out in by-law 50. Importantly, the strata lots listed in by-law 50 are the same as the strata lots expressly listed in the endorsement and they are restricted from being occupied by the proprietor of the lot or any other person for periods which total three months in any 12 month period.

59 In construing the management statement objectively, and in particular the endorsement on sheets 2 and 3 of the strata plan, by reference to what a reasonable person would understand the language of the management statement to mean, the Tribunal finds that that the respondent's lot 24 is not a 'short term accommodation lot' as that term is defined in by-law 50 (see by-law 50.1) and it is, therefore, not to be used by the proprietor or any other person for short-term accommodation for periods that total three months in any 12 month

period. The same construction arises in reading by-laws 16 and 50 objectively. That is, a reasonable person would read by-laws 16 and 50 to mean the respondent's lot 24 is not included in the list of short-term accommodation lots to be used for short-term accommodation only. In other words, a reasonable person would conclude that the by-laws restrict lot 24 from being occupied by the proprietor, occupier or another person for periods that total three months in any 12 month period.

60       Recourse may be had to the surrounding circumstances, such as to objective extrinsic materials to ascertain the meaning of a by-law. However, her Honour Justice Pritchard in the *First decision* at [77], stated that caution should be exercised in going beyond the language of by-laws and their statutory context to ascertain their meaning because third persons would ordinarily not have access to the circumstances surrounding the making of the by-laws.

61       The respondent referred to the Building being located in a precinct zoned as a predominantly tourist development and the Building being classified as residential units restricted to transient living for the ground floor and residential units without restriction for the upper levels (per the Certificate of Classification). In the Tribunal's view, there is no need to refer to objective extrinsic materials to ascertain the meaning of the by-laws in the present case. If it were necessary to refer to extrinsic materials, the TPS 3 provides that the Property falls within a special use zone known as the MOMD Zone. That zone is intended to provide for public marina use, tourist, commercial and residential components for the local and visiting community. Further the Property falls within the Mandurah Ocean Marina ODP, particularly Precinct 6B for tourist/residential/mixed use (ground level: non-residential). Also, the City of Mandurah approved the Building classification into classes where class 3 for short stay units applied to ground floor of the Building and class 2 residential units applies to the first, second and third floors. However, even if planning and building considerations of these kinds could properly inform the construction of by-law 16, the Tribunal finds that the zoning of the Property and the classification of the Building for mixed use with the ground floor classified for use as residential units restricted to short-term stay accommodation, is consistent with the construction that by-law 16 does not apply to the restricted proprietors (of lots 1 to 7 and 27 to 31 inclusive).

62 The words 'residence' and 'residential tenants' in by-law 16 refers to intent with which a lot on the strata plan is occupied and not the usage (for example, commercial use) of the lot on the strata plan. In the Tribunal's view, the only reasonable objective meaning that can be given to the words 'residential lot' in by-law 16 read in context of all the by-laws including by-law 50 is to all lots on the strata plan excluding the lots defined in by-law 50 as short-term accommodation lots. This construction is consistent with the ST Act. Finally, the words 'residence', 'residential tenant' and 'occupancy rights' in by-law 16 have the same meaning as in the *Appeal decision*, that of an occupant who demonstrates the intention to use the lot as a settled or usual abode. This construction achieves the intention that short-term stay accommodation lots are to be used for short-term stay accommodation only and that the other residential lots on the strata plan are to be used as a settled or usual place of abode. This is consistent with the endorsement on sheets 2 and 3 of the strata plan and is consistent with the management statement as well as with the ST Act (see s 6, 6A(2) and s 42(1)(c) of the ST Act).

63 The Form 5 and 7 certificates accompanying the strata plan refer to 'residential apartment dwellings' only. There is no reference on the Form 5 and 7 certificates to 'non-residential dwellings' (such as a commercial lot). Similarly, the Form 3 refers to 'residential apartment dwellings' only. It is therefore difficult to accept that the words 'residential' and 'residential tenants' in by-law 16 should be taken to identify the type of 'use' of the lots on the strata plan and therefore distinguish between 'residential' (being for the use of the lot as one's settled or usual abode) and 'non-residential' lots (such as a commercial lot) on the strata plan. There is therefore nothing in by-law 16 that provides for a change in the use of a lot on the strata plan from a 'residential' use to a 'non-residential' use.

64 The effect of by-law 16, on its proper construction, is therefore that a proprietor may only use, and any occupier to whom the proprietor grants occupancy rights, may only use the lot as a settled or usual abode and not otherwise. A proprietor who does not himself or herself reside at the lot and who allows those who reside elsewhere to stay at the lot cannot be said to use the lot as a residence within the meaning of by-law 16.1 (see the *Appeal decision* at [155]). Importantly, the limitation on the occupier's use is effected by the proprietor procuring the occupier's agreement to comply with the by-laws (pursuant to by-law 16.4). As already noted, by-law 16 is a limitation on 'use' of the strata lot. The subject matter of by-law 16 as a whole is 'use'.



65 In conclusion, by-law 16 properly construed, has the same construction as that reached in the *Appeal decision* at [157] as follows:

- By-law 16.1 states a general rule that confines the use to which a proprietor may put his or her strata lot;
- By-laws 16.2.1, 16.2.2 and 16.2 provide exceptions to that rule; and
- By-law 16.4 regulates the exception in by-law 16.2.1.

66 The Tribunal concludes therefore that by-law 16, on its proper construction, means that a residential lot may only be occupied by persons who use the lot as their settled or usual abode. Such a lot cannot be used for short-term stay accommodation. As lot 24 is a residential lot, and not a short-term stay accommodation lot, the respondent cannot use that lot for short-term stay accommodation. The Tribunal will therefore make the order as sought by the strata company. That is, the respondent may only use, and any occupier to whom the respondent grants occupancy rights in respect of lot 24 may only use, that lot as a settled for usual abode, and, subject to by-law 16.2.2, not otherwise.

67 The Tribunal notes that the strata company and the respondent are bound by the by-laws (s 42(6) of the ST Act). Further, by-law 21.1.1 provides that a proprietor shall not use his or her premises or any part of the common property for any purpose which may be a breach of the by-laws, the regulations or by-laws of the local authority or any other government regulation or law. However, the City of Mandurah is not, and cannot be bound by the by-laws of the strata scheme.

68 Finally, the Tribunal considers it appropriate to make the declaration sought by the strata company under s 81(10) of the ST Act. That section relevantly provides:

**81. Orders under this Division**

....

- (10) Except to the extent that the order otherwise provides, an order under this Division (not being an order for payment of money referred to in section 84(1)(a)) ceases to have any force or effect upon the expiration of the period of 2 years that next succeeds the making of the order.

69 The effect of the Tribunal making a declaration under s 81(10) of the ST Act is that the order the Tribunal will make concerning by-law 16 will not cease to have any force or effect upon the expiration of two years after the making of the order. This will ensure certainty for the strata scheme.

***Orders***

The Tribunal orders:

1. Pursuant to by-law 16.1 of the management statement of the Del Mar Strata Plan 53989, properly construed, the respondent may only use, and any occupier to whom the respondent grants occupancy rights in respect of lot 24 may only use, the lot as a settled or usual abode, and, subject to by-law 16.2.2, not otherwise.
2. Pursuant to s 81(10) of the *Strata Titles Act 1985* (WA) it is declared that these orders shall not cease to have any force or effect two years after the making of these orders.

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

MS R PETRUCCI, MEMBER

15 JANUARY 2020