DISTRICT COURT OF QUEENSLAND

CITATION:	*Redman v The Proprietors – Fairway Island GTP 107328* [2020] QDC 68
PARTIES:	**GARY REDMAN** (first appellant) and **ANDREW MURRAY** (second appellant) **v** **THE PROPRIETORS – FAIRWAY ISLAND GTP 107328** (respondent)
FILE NO/S:	4427/19
DIVISION:	Appellate
PROCEEDING:	Hearing
ORIGINATING COURT:	Magistrate A H Sinclair, sitting as the Tribunal
DELIVERED ON:	27 April 2020
DELIVERED AT:	Brisbane
HEARING DATE:	27 March 2020
JUDGE:	Barlow QC DCJ
ORDER:	**1. The appeal be dismissed.** **2. Unless either party, within seven days, files and serves written submissions seeking a different order as to the costs of the appeal, the appellants pay the respondent's costs of the appeal.**
CATCHWORDS:	REAL PROPERTY – STRATA AND RELATED TITLES MANAGEMENT AND CONTROL – BYLAWS – CONTROL OF OR RESTRICTION ON USE OF LOTS – respondent passed a by-law that purported to prevent lot owners renting out their lots for less than one month at a time – respondent contended that pre-existing by-laws had that effect – whether by-laws were within the scope of the body corporate's powers – whether by-laws restricted the devolution of lots by preventing an owner from leasing or otherwise renting out lots on a short-term basis – whether by-laws were valid REAL PROPERTY – STRATA AND RELATED TITLES MANAGEMENT AND CONTROL – BYLAWS – CONTROL OF OR RESTRICTION ON USE OF LOTS – respondent passed a by-law that purported to prevent lot owners renting out their lots for less than one month at a time lots were permitted to be used for "residential purposes" – whether the leasing or renting of lots on a short-term basis falls within the scope of "residential purposes" – whether by-laws valid

REAL PROPERTY – STRATA AND RELATED TITLES MANAGEMENT AND CONTROL – BYLAWS – CONTROL OF OR RESTRICTION ON USE OF LOTS – respondent passed a by-law that purported to prevent lot owners renting out their lots for less than one month at a time – whether by-law was unreasonable or oppressive

COURTS AND JUDGES – COURTS – OTHER MATTERS – denial of natural justice – tribunal, having found by-laws to be otherwise valid, did not give the appellants the opportunity to call further evidence or make further submissions as to whether by-laws were unreasonable or oppressive – whether procedural fairness afforded to appellants

Building Units and Group Titles Act 1994 s 27, s 30, schedule 3

Uniform Civil Procedure Rules 1999 r 745, r 765

Byrne v Owners of Ceresa River Apartments Strata Plan 55597 (2017) 51 WAR 304, applied

O'Connor v Proprietors, Strata Plan No 51 [2018] 4 WLR 22, considered

Owners of Stata Plan No 3397 v Tate (2007) 70 NSWLR 344, applied

South Australia v Tanner (1989) 166 CLR 161, applied

Williams v Melbourne Corporation (1933) 49 CLR 142, applied

COUNSEL: R Perry QC for the Appellants

M Amarena for the Respondent

SOLICITORS: HWL Ebsworth Lawyers for the Appellants

Grace Lawyers for the Respondent

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A - Introduction

[1] Fairway Island is, as its name denotes, an island overlooking several fairways of a golf course. It is situated within the Hope Island Resort area of the Gold Coast.[1] The respondent is the body corporate for the island.[2] Its affairs are governed by by-laws and it is, more broadly, governed by the *Building Units and Group Titles Act* 1994 (BUGTA).

[2] The first appellant is the owner of a private residential lot on the island. The second appellant is a part owner of another residential lot on the island. Each appellant has taken to renting out his house on Fairway Island for short terms, ranging from four to 24 days.[3] They have earned substantial income in the process.

[3] The respondent passed a by-law that purported to prevent lot owners renting out their lots for less than one month at a time. The respondent also contended that one or both of two pre-existing by-laws had that effect. The appellants contended, before a referee[4] and then before a magistrate sitting as a tribunal member,[5] that the new by-law was invalid under the Act and that the relevant pre-existing by-laws did not prevent short-term rentals. The tribunal held that the new by-law is valid, so that the appellants are prevented from renting out their lots for less than one month at a time.

[4] This is an appeal from that decision. The BUGTA provides that an appeal lies from a tribunal to the Supreme Court, and only on the ground that the tribunal's order was erroneous in law.[6] This appeal was commenced in the Court of Appeal,[7] but the President of that division of the Supreme Court remitted it to be heard in this Court.[8]

[5] The respondent submitted that the appeal is by way of rehearing on questions of law only. It submitted that the nature of the appeal is determined by its status as having been commenced in the Court of Appeal, where an appeal is by way of rehearing under subrule 765(1) of the *Uniform Civil Procedure Rules* 1999. However, that is incorrect, as subrule 745(2) provides that rule 765 applies only to an appeal from the Supreme Court constituted by a single judge.

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1 The Hope Island Resort was created under and is regulated by the *Integrated Resort Development Act* 1987 (IRDA). It includes a residential precinct, a retail precinct and a marina. Fairway Island falls within the residential precinct.

2 BUGTA, s 27(1).

3 Affidavit of G Redman, ex GR6 (Appeal Book (AB) 665ff); A Murray booking summary (AB408).

4 On an application under BUGTA, s 72. The referee found that the by-law was invalid.

5 BUGTA, s 96, on appeal by the body corporate under s 106.

6 BUGTA, subs 108(1), s 7.

7 Presumably because of paragraph 745(1)(c) of the *Uniform Civil Procedure Rules* 1999.

8 Under subs 61(2), *Supreme Court of Queensland Act* 1991; AB38.

[6] As this appeal is restricted to a question of law, it is an appeal in the strict sense, in which the sole question is whether the tribunal's decision was right at the time, having regard to the law at that time and the evidence before the tribunal.[9]

[7] The notice of appeal sets out nine grounds of appeal. They may be reduced to five broad categories:

(a) the proper construction of by-laws 3.1, 3.3 and 8.20;

(b) whether by-law 3.3 is invalid, as being prohibited by subs 30(6) of the BUGTA;

(c) whether the tribunal failed to accord procedural fairness to the appellants because, having held that by-law 3.3 was not otherwise invalid, the tribunal did not give them the opportunity to call further evidence and to make further submissions about whether it was unreasonable or oppressive and therefore invalid;

(d) whether the tribunal erred in finding that by-law 3.3 was not unreasonable or oppressive; and

(e) whether the tribunal's reasons for finding that the by-law was not unreasonable were inadequate.

B - Statutory provisions and by-laws

[8] The BUGTA, although itself providing for the creation and regulation of group titles, must be read and construed with and as an amendment of the *Land Title Act* 1994 (LTA).[10]

[9] A body corporate under the BUGTA has "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."[11]

[10] A body corporate is governed principally by its by-laws. Schedule 3 of the BUGTA sets out standard by-laws applicable to bodies corporate. However, a body corporate, by 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."[12] Any such amending, adding or repealing by-laws do not come into effect until notification of the by-laws has been recorded on the registered plan.[13]

[11] Of particular relevance to the issues before me are subsections 30(5) and (6). They provide:

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9 *Ponnama v Arumogam* [1905] AC 383, 388; *Builders Licensing Board v Sperway Constructions (Syd) Pty Ltd* (1976) 135 CLR 616, 619; *Logan v Woongarra Shire Council* [1983] 2 Qd R 689, 691.

10 BUGTA, s 6.

11 BUGTA, s 27(3).

12 BUGTA, s 30(2).

13 BUGTA, s 30(3). Notification of by-law 3.3 has not yet been recorded on the plan, pending the outcome of this dispute, so it has not yet come into effect.

> (5) Without limiting the operation of any other provision of this Act, the by-laws for the time being in force bind the body corporate and the proprietors and any mortgagee in possession (whether by himself, herself or any other person), lessee or occupier, of a lot to the same extent as if the by-laws had been signed and sealed by the body corporate and each proprietor and each such mortgagee, lessee and occupier respectively and as if they contained mutual covenants to observe and perform all the provisions of the by-laws.
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> (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.

[12] At the first annual general meeting of the Fairway Island body corporate after it was created, it resolved that the schedule 3 by-laws be "amended, added to or repealed as set out in by-laws tabled." The tabled by-laws did not expressly amend, add to or repeal the schedule 3 by-laws, but clause 2.1 provided that "These by-laws may be cited as 'Fairway Island' Body Corporate By-Laws." Although, during the hearing of this appeal, I expressed the view that those by-laws may not have entirely replaced the schedule 3 by-laws, on reflection it is clear that they were intended to do that. I approach the questions before me on that basis: that is, that the only by-laws of the body corporate in this case are those adopted at the first annual general meeting, some irrelevant amendments recorded on 10 September 2015 and (subject to it coming into effect) the subsequent relevant amendment referred to below.

[13] Most relevant to this appeal are the following by-laws.

(a) Under by-law 1.1:

i. "Dwelling" means a residential dwelling constructed on a Lot;

ii. "Occupier" means the legal occupant from time to time of a Lot; and

iii. "Proprietor" means any proprietor of a Lot and includes, where the context allows, the proprietor's tenants, guests, invitees, servants and agents.

(b) By-law 3 relevantly provides:

3 Use of Lots

3.1 Residential Purposes Only

Subject to clause 3.2, each Lot shall be used for residential purposes only.[14]

(c) By-law 8.20 provides:

8.20 Leasing

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

[14] Clause 3.2 is irrelevant to this appeal.

> 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.

[14] At an annual general meeting of the body corporate held on 3 August 2018, by a special resolution (apparently agreed to by all members other than the two appellants), the body corporate resolved to insert the following new by-law:

> **3.3 Private Residence**
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> Subject to clause [sic] 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 [sic] 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 be for a period of less than one (1) month.

[15] The validity of by-law 3.3, together with the proper construction of that by-law and by-laws 3.1 and 8.20, are the issues now before me.

C - Principles guiding the construction of by-laws

[16] The proper approach to the construction of by-laws such as these could be said, to some extent, to depend on whether the by-laws are considered to be a statutory instrument (that is, delegated legislation) or a form of contract (a statutory contract). There have been differing views on this question expressed in Queensland[15] and it has not been determined finally.

[17] Having regard to the wording of subs 30(5), I consider the better view to be that by-laws made by a body corporate under subs 30(2) are a form of statutory contract between the body corporate and each of its members.[16]

[18] However, in reality there is little difference between the approaches to construction, whatever form of instrument by-laws may be. A very helpful discussion of the principles for construction of either type of instrument appears in the reasons of two members of the New South Wales Court of Appeal.[17] At the conclusion of that discussion, McColl JA set out the following propositions as to the proper approach to the construction of such by-laws:[18]

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15 *Dainford Ltd v Smith* (1984) Q Conv R ¶54–140 (56,874) (Shepherson J, sitting in the Full Court, neither Campbell CJ nor DM Campbell J expressing a view); *Re Taylor* (1995) 2 Qd R 564, 568-570 (Dowsett J); *The Proprietors – Rosebank GTP 3033 v Locke* [2016] QCA 192, [44]-[45] (Philippides JA), [133]-[135] (McMurdo JA).

16 Although the subsection provides that the binding force is as if the by-laws had been "signed and sealed" by the body corporate and each proprietor, there is no reference to them having the force of a deed, nor to deemed delivery of a deed. I consider that the reference to "sealed" applies only to the body corporate and "signed" applies to both the body corporate and the proprietors. Thus, as there would be mutual covenants between all parties, the section means that by-laws operate as if they were a contract between them all.

17 *Owners of Stata Plan No 3397 v Tate* (2007) 70 NSWLR 344, [34]-[72] (McColl JA, Mason P agreeing).

18 *Tate* at [71] (citations removed). Her Honour's discussion was in *obiter dicta* but is comprehensive and, as I say, helpful. Her Honour's references to "exclusive use by-laws" do not prevent these propositions having application to body corporate by-laws generally, particularly because the reasons expressed in point 3 of the principles apply equally to all by-laws.

1 By-laws are the "series of enactments" by which the proprietors in a body corporate administer their affairs; they do not deal with commercial rights, but the governance of the strata scheme.

2 By-laws have a public purpose which goes beyond their function of facilitating the internal administration of a body corporate. [19]

3 Exclusive use by-laws may be inspected by third persons interested in acquiring an interest in a strata scheme, whether, for example, by acquiring units, or by lending money to a lot proprietor; such persons would ordinarily have no access to the circumstances surrounding their making; their meaning should be understood from their statutory context and language.

4 By-laws may be characterised as either delegated legislation or statutory contracts.

5 Whichever be the appropriate characterisation, exclusive use by-laws should be interpreted objectively by what they would convey to a reasonable person.

6 In interpreting exclusive use by-laws the Court should take into account their constitutional function in the strata scheme in regulating the rights and liabilities of lot proprietors *inter se*.

7 Unlike the articles of a company, there does not appear to be a strong argument for saying exclusive use by-laws should be interpreted as a business document, with the intention that they be given business efficacy. That does not mean that an exclusive use by-law may not have a commercial purpose, and be interpreted in accordance with the principles expounded in cases such as *Antaios Compania Naviera SA*, but due regard must be paid to the statutory context in so doing.

8 An exclusive use by-law should be construed so that it is consistent with its statutory context; a court may depart from such a construction if departure from the statutory scheme is authorised by the governing statute and if the intention to do so appears plainly from the terms of the by-law.

9 Caution should be exercised in going beyond the language of the by-law and its statutory context to ascertain its meaning; a tight rein should be kept on having recourse to surrounding circumstances.

[19] The Court of Appeal in Western Australia has said that these propositions apply to the proper construction of by-laws considered as a statutory contract. The distinction between such a contract and delegated legislation was not argued before the Court, but it went on to consider that the "correct approach for construction" might be along the following lines:[20]

(a) the by-laws are to be construed objectively, by reference to what a reasonable person would understand the language of the instrument to mean;

(b) they are to be construed in the context of the registered strata plan;

(c) they are to be construed in the relevant statutory context (being, first and foremost, the BUGTA);

(d) as the by-laws are on the Torrens Register (that is, the registered plan), rules of evidence assisting the construction of contracts *inter partes*, of a nature

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19 In *Rosebank* at [133], McMurdo JA expressed the view that body corporate by-laws do not have a public purpose. With respect, I prefer the view that body corporate by-laws do have a public purpose, although they principally regulate affairs between private parties.

20 *Byrne v Owners of Ceresa River Apartments Strata Plan 55597* (2017) 51 WAR 304, [139]. I have adapted the principles to the Queensland situation. Citations removed.

explained by *Codelfa Constructions Pty Ltd v State Rail Authority (NSW)*, do not apply to their construction;

(e) insofar as there are constructional choices properly open, a construction should be preferred which is consistent with the BUGTA.

[20] One thing that is clear is that a by-law made under the by-law power in subs 30(2) of the BUGTA is subject to the inconsistency principle: that is, the subsection does not authorise a by-law that is inconsistent with the BUGTA in that it contradicts a provision in the Act or extends the ambit of a power the parameters of which are specifically addressed by the Act.[21]

[21] In my view, particularly in light of subs 30(5) and because the by-laws only take effect upon their being recorded on the publicly available registered plan,[22] I should approach the construction of the by-laws in this case on the basis that they are a form of statutory contract. They should be construed in the plan as a whole and consistently with the BUGTA, having regard, if helpful, to the fact that Fairway Island forms part of the overall Hope Island scheme under the IRDA. However, they will not be invalid merely because they are inconsistent with the Hope Island scheme, provided that they are consistent with the BUGTA and the plan.[23] Any other surrounding circumstances are not relevant, as any circumstances outside the plan and the Act could not be expected to be known to any external person seeking to construe the meaning of the by-laws.

[22] Having said that, the starting point, of course, is to construe the actual words of the relevant provisions of the BUGTA and of the by-laws, but also in the context of the Act and the by-laws as a whole.[24] The three step approach to the determination of whether a regulation is valid, described by Brennan J in *South Australia v Tanner*,[25] is an appropriate approach to take (as the tribunal did).

D - The by-law making powers of the body corporate

[23] The first task in determining whether the by-laws are valid is to identify the nature and scope of the by-law making power under the BUGTA, including any restrictions on that power. The second task will be to determine the proper meaning of each of the relevant by-laws. Once I have done that, it will be necessary to determine whether any of the by-laws contravenes, or is inconsistent with, the BUGTA.

[24] In construing the BUGTA and the by-laws, the appellants submit that I should have regard to the Hope Island scheme. I shall address that question first.

The Hope Island Scheme

[25] Fairway Island is, as I have said, in a residential precinct of the Hope Island Resort, which is a scheme created under the IRDA. The appellants submit that the proper construction of s 30 and of the respondent's by-laws must be determined, among

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21 *Rosebank*, [48] (Philippides JA).
22 Subsection 30(3).
23 Counsel for the appellants submitted that the rules need not be consistent with the Hope Island scheme, but they may be construed by reference to that scheme as part of the legislative background. I agree.
24 *Williamson v Betterlay Brick and Block Laying Pty Ltd* [2020] QCA 52, [39]-[40] (Philippides JA).
25 (1989) 166 CLR 161, 173-174.

other things, by reference to (or at least in the context of) the Hope Island scheme. In particular, the appellants submit that the uses permitted within a residential precinct under that scheme affect how provisions in the BUGTA and the respondent's by-laws should be construed.

[26] The scheme provides that, "Any land, building or other structure may be used for any or all of the uses permitted within a Precinct as provided for in this scheme of development." It then lists permitted uses for each type of precinct. One permitted use in a residential precinct includes "rental accommodation." That term is defined in the scheme as meaning "any dwelling house … used or intended for use for either short-term or long-term rental."

[27] The appellants submit that, as short-term rental is a permitted use under the scheme, it must be a permitted use of any dwelling within a residential precinct under by-laws governing the management and control of a group title scheme within such a precinct and a by-law under a group title scheme within a residential precinct should be construed in that context. I disagree. The scheme lists the permitted uses for each precinct but, within those parameters, it does not permit or require that all of the uses may be made of any location or building in a precinct. It also does not regulate the use and enjoyment of any group title scheme, within the Hope Island area, created under BUGTA.

[28] This may be demonstrated by considering examples of the permitted uses within a residential precinct under the Hope Island scheme. Two such uses are a child care centre and a park. If the appellants' submission were correct, then it would be open to the owner of vacant land on Fairway Island, instead of building a house on the land, to develop a private park or to build a child care centre, or to use a pre-built house as a child care centre, in the middle of an otherwise exclusively residential area and the by-laws for the group title scheme in that area could not (or should be construed as not intended to) prevent either of those uses anywhere within the area. I do not consider that the mere fact that, under the Hope Island scheme, either of those uses is permitted within a residential precinct means that any owner of land within such a precinct may use that land for such a purpose. Rather, the registered plan for a group title scheme, and the by-laws governing it, may allow such uses only in areas that have been set aside, within the plan, for those purposes. The plan determines which use or uses are permitted in which area of a precinct (or not at all).

[29] Thus, the Fairway Island plan provides for a number of individual lots and the by-laws for the body corporate (specifically clause 3.1) provide that the lots may be used for residential purposes only.[26]

[30] Although the scheme may be seen as an indirect part of the legislative background to the Fairway Island group title plan and its by-laws, it is not, in any relevant way, helpful in the construction of the BUGTA and the by-laws. In particular, the scheme does not define what "residential purposes" are for the purposes of the by-laws. Nor does the scheme have any relevant bearing on the proper construction of s 30 of the BUGTA. Indeed, as Mr Amarena submitted, the scheme and the Act under which it was promulgated have different purposes to those of the BUGTA and the by-laws

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[26] I discuss later what is meant by "residential purposes."

made under it: the former are forms of planning legislation and instrument while the latter are concerned with the affairs of bodies corporate.

The power to make by-laws: subs 30(2)

[31] In considering the validity of by-laws, it is necessary first to consider the scope and meaning of the power to make by-laws. In the BUGTA, that power is granted by subs 30(2).

[32] It should be noted first that the power is broad: by-laws may be made "for the purpose of the control, management, administration, use or enjoyment of the lots and common property the subject of the plan." McMurdo JA has referred to the "undemanding nature of the requirement that the by-law relate to the use or enjoyment of the lots and common property."[27] Similar words have been described as being "of considerable breadth".[28] The subsection even allows a body corporate to make by-laws that themselves expand the body corporate's powers to regulate the use of lots beyond the areas expressly recognised in the BUGTA, including schedule 3.[29] I see no reason why, absent any restrictions imposed by other provisions in the Act, it would not entitle a body corporate to make a by-law that regulates a lot owner or occupier in undertaking a wide range of specified activities including, for example, installing a shed or a trampoline in a back yard, smoking or drinking alcohol in or around a lot, or perhaps even leasing or otherwise renting out or allowing the occupation of a lot other than by the owner and the owner's (or its directors') immediate family.

[33] Therefore, subject to any other restrictions on the power to make by-laws, subs 30(2) gives a body corporate very wide powers that could include the imposition of restrictions on who might use or occupy a lot, the purpose for which a lot may be used, or a minimum period for which a person might occupy or otherwise use a lot.

Limitation on the power: subs 30(6)

[34] Subsection 30(6) imposes an important and relevant restriction on the by-law making power. The appellants submit that the effect of by-law 3.3 is to restrict a dealing with a lot, by preventing an owner from leasing or otherwise renting out a lot for a period of less than one month. Therefore, they submit, it is contrary to subs 30(6) and invalid.

[35] The respondent submits that it does not operate to restrict a dealing, including a lease, because the reference to a "dealing" is to the types of transaction that are referred to in the LTA as dealings. They include the four types of dealing specifically referred to in the subsection but, under Part 6 of the LTA, dealings include easements, covenants, profits à prendre and other transactions. Licences to occupy land, for example, are not dealings. The subsection does not restrict an owner from dealing with a lot, such as by granting and registering a lease, but merely imposes a condition on the terms of such a lease. Similarly, by-law 8.20 imposes a condition on a lease or rental agreement, that the agreement require the

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27 *Rosebank*, [122].
28 *Byrne*, [116].
29 *Rosebank*.

tenant or occupier to comply with the by-laws. In doing so, it does not restrict a lease being entered into.

[36] Dealings under the LTA are all effected by registration under that Act. For example, s 64 provides that a lot or part of a lot "may be leased **by registering an instrument of lease** for the lot or part."[30] It is only upon registration that a lease or other dealing becomes effective under the LTA. It is trite that the system of Torrens title provided for under that Act is one of title by registration, not registration of title.[31]

[37] The limitation, under subs 30(6), of the power to make by-laws under subs 30(2) therefore operates only to prevent by-laws that would restrict or prohibit the registration of an instrument that would give rise to a dealing affecting a lot. A by-law may prescribe such things as time, place, manner and circumstance and may impose conditions, but must stop short of preventing or suppressing the thing or course of conduct to be regulated.[32] The subsection does not prevent the imposition of conditions on such an instrument, such as a requirement that a lease contain a condition that smoking be prohibited on or around the lot, or that the term of a lease be for no less than a specified period, or that a lease may only be entered into for a specified purpose, provided that the conditions imposed are for the purpose of the control, administration, use or enjoyment of the lots and the common property.

[38] In any event, I consider that the type of arrangement entered into by the appellants for the holiday letting of their lots is not a lease. A lease is an instrument of lease that is registrable as a dealing under the LTA. It is the grant of a right to exclusive possession of land for a term (however short) less than that of the grantor.[33] The appellants do not grant leases of their lots. They require tenants to agree to certain terms and conditions, but those agreements would not constitute leases.[34] They are clearly a form of licence to use the property on the stated conditions for the agreed term. They do not grant the tenant exclusive possession and control of the lots: for example they prevent the tenants using the outdoor areas between 10pm and 8am, they prohibit the tenants from having overnight guests and limit the number of day guests permitted, they entitle the owner's manager to enter the lot at any time to ensure compliance with the conditions and they provide for immediate eviction without notice if certain conditions are breached. The rental agreements are not leases or other dealings with the lots.[35]

[39] In the light of this conclusion, it is not necessary for me to consider whether any of by-laws 8.20, 3.1 or 3.3 purports to restrict or prohibit dealings with lots. However, in case I am wrong in that conclusion and for the benefit of the parties and others, I shall do so.

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30 The same (a dealing occurring by registration) applies to transfers (s 60), mortgages (s 72), easements (s 82), covenants (s 97A) and profits à prendre (s 97E).

31 *Breskvar v Wall* (1971) 126 CLR 376, 385.

32 *Swan Hill Corporation v Bradbury* (1937) 56 CLR 746, 762.

33 *Byrne*, 324 [87].

34 The terms of the rental agreements are at AB701-717.

35 Before the tribunal, the respondent expressly refrained from contending that the rental agreement was a licence, although counsel acknowledged that it may have some features of a licence. The respondent's counsel made his submissions on the basis that it was a lease (T1-52 to 1-55, AB780-783). The appellants' counsel also contended that both a lease and a rental agreement (referred to in by-law 8.20) are a de facto or de jure lease. I do not accept those contentions. In any event, the appellants' rental agreements are "rental agreements", though not for permanent letting.

E - The proper construction of by-laws 3 and 8.20

By-laws 3.1 and 3.3

[40] It is convenient to consider by-laws 3.1 and 3.3 together, as their consideration involves broadly similar criteria.

[41] By-law 3.1 requires that each lot be used for "residential purposes" only. One question is what are "residential purposes" and, in particular, whether using a lot for short-term letting of a house on the lot may be using it for a residential purpose.

[42] The appellants submit that, as the group title plan is part of the Hope Island scheme, a residential purpose may be contrasted with a commercial purpose, as those terms are used in the latter scheme, and any of the permitted uses for residential precincts is a residential purpose. As short-term letting is a permitted use in a residential precinct, to rent a house in such a precinct for short-term holiday use is to use it for a residential purpose.

[43] This cannot be correct. Even if one were to take into account, in construing the by-laws, the words and structure of the Hope Island scheme, the list of permitted uses in a residential precinct is simply that: a list of permitted uses. It does not mean that every one of those permitted uses within a residential precinct is a use for a residential purpose. Many of the permitted uses of lots in a residential precinct under the scheme are clearly not residential, nor for residential purposes. For example, as I have already stated, to establish a child care centre or a park on a lot is not to use the lot for a residential purpose.

[44] "Residential" and "residential purpose" are not defined in the BUGTA or in the by-laws. They therefore have their ordinary meanings. "Residential" imports a degree of establishment or occupation for a period of time. A "residence" is "the place, especially the house, in which one resides; dwelling place; dwelling." "Residential" means, among other things, "of or relating to residence or residences" and "(of a hotel, etc.) catering for guests who stay permanently or for extended periods." To "reside" means "to dwell permanently or for a considerable time; have one's abode for a time."[36]

[45] I agree, with respect, with the discussion and conclusions on who is a resident and what is residential by the Western Australian Court of Appeal[37] and in advice of the Privy Council.[38] Although they were construing differently worded by-laws, nevertheless in my view their respective discussions of what is meant by residential use or residential purposes are helpful and their conclusions are correct. Short-term use of a house by holiday makers or other persons seeking short-term accommodation is different from longer term residential use, even though it may be difficult to draw a clear dividing line. In its ordinary meaning, to use a building for a residential purpose does not include using it for the purpose of letting it out to others (and those others using it) for holidays or other temporary accommodation.

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36 All the quoted definitions are from the Macquarie Dictionary online.

37 *Byrne*, 326 [103] – 329 [112].

38 *O'Connor v Proprietors, Strata Plan No 51* [2018] 4 WLR 22, 25 [18] – 26 [20].

[46] While the dividing line between holiday or temporary use and a degree of permanence in use as a residence or abode may not be easy to draw, it is open to the body corporate to draw such a line, provided always that it does so for the relevant purpose – in this case, for the use or enjoyment of the lots and the common property. There is some element of discretion in choosing one month, or any other criterion, as the line (indeed, the period of one month itself is flexible, as different months last between 28 and 31 days). But, provided that it is not drawn capriciously, a by-law may draw such a line for the proper purposes of a body corporate and its members.

[47] I do not consider there to be a real distinction, as the appellants sought to draw, between using a lot for residential purposes and residential use. They are one and the same thing. The appellants sought to draw the distinction in order to enable reliance on the Hope Island scheme list of permitted uses in a residential precinct as defining what are residential uses. As I have already said, I disagree that that scheme effectively limits the restrictions on use that a body corporate in a residential scheme may properly impose.

[48] Therefore, of itself, by-law 3.1 may be seen to restrict the use of lots on Fairway Island to use as a residence, involving some degree of permanence or extended period of habitation by one person or group of people.

[49] By-law 3.3, by its first sentence, appears to impose a greater limitation on who may use a lot for residential purposes: the proprietor and the proprietor's guests and visitors. To do that might be contrary to by-law 3.1 (to which by-law 3.3 is expressly subject), as the latter enables a lot to be used, without limitation as to the persons by whom it may be used: it may be inconsistent with that to limit the persons who may use a lot for residential purposes. However, I do not need to decide this, as it was not an issue before the tribunal or me. (Of course, the meaning given to the word "proprietor" in by-law 1.1 extends it beyond its usual meaning of "owner".) The by-law then relieves or explains that limitation by seeking to draw the line that is not clearly drawn in by-law 3.1, by imposing a minimum rental term of one month. In doing so, it effectively assists in defining what is meant by use for a residential purpose.

[50] Subject to whether this definition or limitation is required to be, and is, reasonable, I consider that by-laws 3.1 and 3.3 fall within the body corporate's power, as they are for the control, use or enjoyment of the lots in the scheme.

By-law 8.20

[51] The next question is whether by-law 8.20, in permitting a proprietor to lease his or her lot "by means of a written lease or rental agreement for permanent letting," itself allows only "permanent" letting and prohibits short-term letting of lots. If it does, is that a prohibition or restriction on a dealing under the LTA?

[52] The referee concluded that the by-law is permissive only and does not itself prevent a lot being used for short-term accommodation. Rather, what it does is to impose conditions for a lease or rental agreement concerning a lot: it must be in writing and must contain a condition requiring the tenant to comply with the by-laws. Additionally, the proprietor must ensure that the tenant complies with the lease.

[53] In my view, although in its first clause the by-law refers to and distinguishes between a lease and a rental agreement, all the other references to a lease are to

either form of agreement. Therefore, all the conditions applied to a "lease" and on a "lessee" are also applicable to any other form of rental agreement (which would include a licence) and the tenant or occupier under that agreement. Consistently with that approach, I consider that the words "for permanent letting" apply to both a "lease" and a "rental agreement". That is, the by-law only applies to leases or other rental agreements for "permanent letting". It does not define "permanent letting", but the ordinary meaning of that phrase, which I consider applies in this case, is that it is for letting for the purposes of the tenant living in the lot and using it as a residence or home (although not necessarily the tenant's sole residence). It may be distinguished, for example, from temporary letting such as for holiday or business purposes. It is unnecessary to consider all other possible examples of either permanent or temporary letting. It suffices to say that, by imposing conditions for permanent letting, the by-law does not itself prohibit temporary letting. Nor does it prohibit or restrict dealings (ie, leases); it merely regulates them. It is therefore a valid by-law.

F - Procedural fairness

[54] The appellants submit that the tribunal did not give them procedural fairness because the tribunal and the parties proceeded with the hearing on the basis that, if the tribunal considered that the by-laws were otherwise valid, it should then consider whether it was tenably arguable that by-law 3.3 was nonetheless invalid because it was unreasonable or oppressive. If it considered such an argument to be tenable, it would give the parties the opportunity to call further evidence and to make further submissions on the question whether it was unreasonable or oppressive, as the appellants contended. However, instead of doing that, the tribunal, after concluding that the by-laws were not otherwise invalid, went on to decide that they were not unreasonable or oppressive, without considering whether there was a tenable argument to the contrary and without giving the parties the proposed opportunity to call further evidence and to make further submissions.[39]

[55] In order to sustain this submission, counsel for the appellants took me to a number of passages in the transcript of the hearing before the tribunal.[40]

[56] It is important, in considering the appellants' submission, to determine what exactly the tribunal had in mind when discussing with the parties' representatives the possibility of further evidence or submissions. That becomes clear when one considers the context in which those passages appear.

(a) The respondent's counsel directed the tribunal to paragraphs [13] and [14] of the appellants' written submissions before the tribunal and submitted that the facts described in those paragraphs were irrelevant to the validity or otherwise of the by-laws: those paragraphs described the facts that the appellants had bought the lots in reliance on the by-laws at the time, intending to rent them out, and had earned considerable sums by doing so.[41]

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39 Appellants' written submission, [57].

40 T1-62:15-20 (AB790); T1-63:5-10 (AB791); T1-78:5-25 (AB806). I would add to those passages T1-62:36-39 (AB790).

41 T1-59:7-34 (AB787).

(b) The respondent's counsel then directed the tribunal to paragraphs [108] to [114] of the respondent's written submissions, dealing with "the [appellants'] other grounds below."[42] In that part of the respondent's submission, the respondent again submitted that none of the facts and other grounds relied on by the appellants (some of which were not dealt with by the referee) could render the by-law invalid in the sense of being unreasonable and not directed to the purpose of the power. In the written submissions at [112]-[113], the respondent's counsel had submitted that,[43]

> It is only if it can be shown that it could not have been reasonably adapted as a means of obtaining the ends of the power such that it was not a real and genuine exercise of the power that it will be held the [sic] common law to be invalid. In other words, by looking at its operation in local circumstances one might be able to conclude that the by-law was passed by some ulterior motive unconnected with the power …
>
> None of the evidence below comes anywhere near demonstrating that the making of by-law 3.3 was not a genuine and real exercise of the by-law making power in this case.

(c) Toward the end of the address by the respondent's counsel on this issue, the tribunal asked if he should deal with the two points made under "[appellants'] other grounds" now, whatever the outcome he reached in relation to what he called the main point (that is, the validity or otherwise of by-law 3.3). The following exchange then took place: [44]

> MR AMERENA: Oh, in my submission, there would have to be findings of fact about those matters.
>
> BENCH: Well, why can't I make those?
>
> MR AMERENA: You could make those and my submission would be, if you do, there's no material capable of leading you to a conclusion that they're unreasonable. But that will lengthen – if we have to deal with that, that will lengthen the hearing somewhat. I mean, our position's always been that if you don't accept the submissions made at paragraphs 108 … through to 114, that is that all of these grounds are incapable of effecting the invalidity of the by-law, as a matter of law, then the best idea is to – and you find against us on that, the best idea is to send it back to the magistrate [sic], so the parties can focus on the facts that go to those issues.
>
> BENCH: Do I have power to remit?
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> …
>
> BENCH: Because if it really is a de novo hearing, then, depending on what the other party has to say, it might be that I can make the legalistic determinations that you've asked me to and if there's any further factual considerations that flow from that, we can resume here to determine those rather than remitting it.

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42 T1-60:1-15 (AB788).
43 AB68-69.
44 T1-62:10 to T1-63:10 (AB790-791).

> MR AMERENA: Yeah … and it is a de novo hearing. So, in my submission, the appropriate acknowledgement of that absence of power would be that you should make the findings after … the hearing today, to the extent it's been assayed … and, if you're for the [respondent] on the validity of the by-law, but against the [respondent] on whether or not those types of grounds are capable, as a matter of law, of making the by-law invalid, you should invite the parties to come back at a later date, so we can have a hearing on the facts … about those other grounds.

(d) The solicitor for the appellants then addressed the tribunal. Toward the end of that address, the following exchange took place between him and the tribunal:[45]

> BENCH: … Is there anything else you wanted to say in particular in relation to the other two points? What we should do with the unreasonableness ground and the ---
>
> MR ESERA: I think that what my friend Mr Amerena has outlined is probably a sensible way to proeed.
>
> BENCH: Right.
>
> MR ESERA: And that if for whatever reason your Honour – I suppose the difficulty is that if your Honour finds that they never had the power to make that by-law, then why would those other grounds need to be determined.
>
> BENCH: Because I might be overturned on appeal on that one.
>
> MR ESERA: Yes. Yes, there's that. So if I understand what my friend's saying, is that if your Honour finds that they did not have the power to make this by-law but that to determine the other grounds in the event that there is an appeal, you would need to hear further evidence.
>
> BENCH: Well, I think his argument is that if I accept what he said in his outline and say that as a matter of law your arguments are … whatever the facts are, your arguments are untenable, then you lose at least on those two grounds.
>
> MR ESERA: Yes.
>
> BENCH: And if I think they are tenable, then I give everybody a chance to come back and argue them in full.
>
> MR ESERA: Yes. So that scenario that your Honour has proposed, I think would be a sensible way of proceeding. … So I agree with what my friend said about it.

[57] Mr Amerena, for the respondent, took me to other passages in support of his submission that there had been no intention to permit or consider permitting further evidence and submissions, or that, having been given the opportunity to seek to take those steps, the appellants declined to do so. In particular:

(a) in the discussions relied on by the appellants, there was no discussion of hearing further evidence but, at most, of hearing further submissions about

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[45] T1-77:31 to T1-78:26 (AB805-806).

what could be made of the evidence before the referee, if that evidence could tenably give rise to an argument that the by-law was unreasonable in the relevant sense;

(b) after the tribunal had delivered his reasons (on 18 October 2019), the parties had an opportunity to read and consider them before appearing again before the tribunal to discuss "the final disposition of the appeal;"[46]

(c) at that hearing (on 30 October 2019), when the tribunal indicated the orders it proposed to make and asked Mr Esera if that would complete everything needed to finalise the matter, Mr Esera agreed.[47]

[58] Mr Amerena also submitted that:

(a) the appellants had put before the referee all the evidence that they wanted to rely on, including evidence of facts that they contended made the by-law unreasonable if it was effective in preventing short-term letting of lots; the referee had not considered that evidence nor decided the issue because he found by-law 3.3 to be invalid for other reasons, but none of the facts was disputed;

(b) the appellants had an opportunity to put further material before the tribunal, before and at the commencement of the hearing, and did not seek to take up that opportunity;

(c) the appellants are bound by the way they conducted their case before the referee and the tribunal, namely, without seeking to put any further evidence before either decision maker, but to rely on the evidence before the referee in support of their submission that the by-law was unreasonable;

(d) but in any event, even if the respondent's and the tribunal's discussion – that it may be necessary to decide facts and to hear further evidence or submissions – were to be followed, a further hearing was only to occur if the tribunal concluded that the material before the referee was sufficient to raise a tenable argument that the by-law was unreasonable in the relevant sense;

(e) although the tribunal did not expressly decide whether there was such a tenable argument, that was the effect of his Honour's reasons and decision and no matters alluded to by the appellants could give rise to unreasonableness in the relevant sense.

[59] In an appeal, parties to litigation are generally bound by their conduct of the proceedings at first instance.[48] In this case, before there was any suggestion, either before the referee or, more particularly, before the tribunal, that there may be a need for further evidence or submissions about whether the by-law was unreasonable, the appellants put before the referee and the tribunal all the evidence on which they relied in respect of all matters in dispute and they did not seek to adduce further evidence before the appeal to the tribunal commenced. Nor did the appellants seek

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46 Reasons, [177].

47 AB820:24-36.

48 *Coulton v Holcombe* (1986) 162 CLR 1, 8 – 9; *Whisprun v Dixon* (2003) 77 ALJR 1598, 200 ALR 447, [51] – [52].

an order, at or before the commencement of the hearing before the tribunal, that the hearing be split so that issues of reasonableness might be dealt with only if the other grounds of the body corporate's appeal were successful and the issues of reasonableness were seen, on analysis, to be arguable or tenable.

[60] The appeal to the tribunal was an appeal by way of rehearing.[49] Therefore, unless the tribunal gave leave to a party to adduce further evidence, the appeal was to proceed on the basis of the evidence that was before the referee.

[61] There is no reason why the appellants should have been permitted, at a late stage of the proceeding before the tribunal, to conduct that proceeding on a different basis from that on which they had conducted the proceeding before the referee (and, up to that time, before the tribunal).

[62] In my view, the tribunal and the parties did not contemplate the parties having any opportunity to put on further evidence on the question whether the by-law, if otherwise not invalid, was invalid because it was unreasonable. Rather, they contemplated the parties having the opportunity to make further submissions if, on the evidence and submissions before the tribunal, he considered that it was arguable that, looking at its operation in the particular local circumstances, one might be able to conclude that it could not reasonably have been adopted as a means of attaining the ends of the power,[50] or that the by-law was so lacking in reasonable proportionality as not to be a real exercise of the power.[51]

[63] It is correct that the tribunal did not consider expressly whether the material on which the appellants sought to rely to demonstrate that by-law 3.3 is unreasonable did not or could not give rise to a tenable argument that it was unreasonable. But he did find that the effect of the by-law on the appellants' income was irrelevant: a decision with which I agree. The effect of a by-law on individual members of the body corporate is not relevant to the question whether the by-law is unreasonable (in the common law sense). Rather, what is relevant is whether the overall effect of the by-law (that is, what it results in generally) is within the purpose of the legislation (in this case, the control, management, administration, use or enjoyment of the lots and the common property).

[64] His Honour found that the by-law was not unreasonable. I shall consider his reasons for that conclusion below. But in his discussion leading to that conclusion, he considered the issues and evidence that had been raised and other cases and examples of by-laws that would be reasonable. It seems clear that, in finding that the by-law was not unreasonable, his Honour concluded that an argument that it was unreasonable or oppressive was not tenable. There was therefore no reason to invite further submissions from the parties.

[65] As for further evidence, there was no basis to admit further evidence, for the reasons I have already discussed. Indeed, the appellants have not given any indication of what further evidence they might have wanted to call, instead merely referring to "the necessity for further evidence" in general. In this respect they rely, in part, on

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49 In this respect I agree, with respect, with the tribunal's analysis of the nature of an appeal to it from a decision of a referee: reasons [14]-[34].

50 *Williams v Melbourne Corporation*, 155.

51 *South Australia v Tanner*, 168.

the tribunal's reasons for concluding that the by-law is not unreasonable as reinforcing that necessity. In my view, even if the tribunal's reasons for that conclusion are wrong, that does not mean that any further evidence was required, when the parties had conducted the hearings before the referee and the tribunal on the basis of the evidence that they had respectively chosen to put before each of them.

[66] The appellants were given full opportunity to present their case to the tribunal. There was no absence of procedural fairness in not giving them another opportunity to call further evidence or to make further submissions on the issue of reasonableness of the by-law before the tribunal decided that issue.

[67] But even if there were insufficient procedural fairness, the applicants need not necessarily succeed in this appeal. It would only be if I were to find that there is a tenable argument that by-law 3.3 is unreasonable or oppressive and that, in order to determine such an issue, further evidence is required, that I might allow the appeal, set aside the decision and remit the matter to the tribunal to hear further evidence and submissions.

G - Is by-law 3.3 unreasonable or oppressive?

[68] Having concluded that it was open to the tribunal to decide whether, on the material before it, by-law 3.3 is unreasonable or oppressive, I now turn to the question whether the tribunal erred in concluding that it cannot be characterised in that manner.

[69] There is no express requirement, in the BUGTA, that a by-law not be oppressive or unreasonable.[52] However, the parties agree that, at common law, as with delegated legislation, a by-law (even one forming part of a statutory contract) must be the result of a genuine and real exercise of the power to make it: the power must not have been exercised for a purpose not related (that is, ulterior) to the purpose for which it was conferred on the body corporate. It is in that sense that a by-law must be reasonable.

[70] A by-law made under such a power must be within the scope of what parliament intended when enacting the statute that gave the power to a subordinate body (in this case, the body corporate). It must not be so capricious and irrational that no reasonable person exercising the power could have devised it.[53] It must be reasonably proportionate to the end to be achieved under the legislation. It is not enough that a reviewing decision maker may think the by-law to be inexpedient or misguided. It must be so lacking in reasonable proportionality as not to be a real exercise of the power.[54]

[71] In *Williams v Melbourne Corporation*,[55] Dixon J said,

> To determine whether a by-law is an exercise of a power, it is not always enough to ascertain the subject matter of the power and consider whether the by-law appears on its face to relate to that subject. The true nature and purpose of the power must be

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52 Cf *Body Corporate and Community Management Act* 1997, subs 180(7).
53 *Minister for Resources v Dover Fisheries Pty Ltd* (1993) 43 FCR 565, 575, 582.
54 *South Australia v Tanner* (1989) 166 CLR 161, 168.
55 (1933) 49 CLR 142, 155.

> determined, and it must often be necessary to examine the operation of the by-law in the local circumstances to which it is intended to apply. Notwithstanding that *ex facie* there seemed a sufficient connection between the subject of the power and that of the by-law, the true character of the by-law may then appear to be such that it could not reasonably have been adopted as a means of attaining the ends of the power. In such a case the by-law will be invalid, not because it is inexpedient or misguided, but because it is not a real exercise of the power.

[72] The purpose of the relevant provisions of the BUGTA (that is, those dealing with the power to make by-laws) can be ascertained from subs 30(2) itself. It is to enable the body corporate to regulate the control, management, administration, use or enjoyment of the lots and the common property.

[73] The appellants contend that it was necessary for the tribunal to examine the operation of the by-laws in this case in the local circumstances to which they are intended to apply and, for that purpose, evidence going to the true purpose of the by-laws and their effects – including their effects on owners of lots (particularly on the appellants) – was relevant. In the absence of such evidence, the tribunal could not determine whether or not the by-laws are reasonable and proportional.

[74] I disagree. The circumstances in which the validity of a by-law can be determined must be the objectively ascertainable facts that can be found from publicly available information. The particular effects of a by-law on an individual owner are not relevant: they could not be ascertained by any person or tribunal in considering whether the by-laws are valid, as being reasonable and proportional to the objects of the legislation.

[75] The "local circumstances" in this case are that this is a group title scheme for residential purposes within an overall mixed use development and that the scheme is a "gated" community that effectively is designed to prevent access to members of the public other than those specifically authorised by the body corporate or by individual owners of lots (that is, members of the body corporate), or other lawful occupiers of lots, to have access to the area of the scheme.

[76] It was open to the tribunal, in the circumstances, to determine whether the by-laws could be reasonable in the relevant sense. It was not necessary that it wait for and consider evidence concerning whether the purported reasons for making the by-law were substantive and real, or concerning the effects of the by-law on the appellants. It decided that they were reasonable.

[77] In his address before me, Mr Perry QC, for the appellants, appeared to criticise by-law 3.3 on the basis that a by-law banning rentals under one month is not a proportional response to the issue to which the by-law may have been addressed (the behaviour of holiday makers or non-residents).[56] In making this submission, he appeared to be contending that it was necessary to look for the particular purpose for which the particular by-law was made and to consider whether that by-law was a reasonable and proportional response to address that purpose. In this case, if the purpose was to address the behaviour of short-term occupiers of houses in the precinct, it was already addressed by other by-laws regulating the behaviour of

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[56] T1-11:1-22.

occupants of lots and it was not reasonable or proportional simply to ban rentals of under one month for that purpose.

[78] I do not accept that one must drill down to the particular purpose of each by-law in such detail. Rather, one looks at the statutory purpose of by-laws generally and asks whether the particular by-law is reasonably and proportionally directed toward that purpose: in this case, the use and enjoyment of lots.

[79] But if one were to look at the particular purpose of the particular by-law, Mr Perry submitted that, when looking at this by-law, one cannot tell what the issue is that is sought to be addressed by it. I put to him that the issue sought to be addressed may have been that, in a residential area, short-term occupants are more likely to disrupt the peace and quiet of the local residents than longer term rentals, where the occupiers are more likely to act like resident owners. Mr Perry responded that, if there were any reference in the meeting at which the body corporate passed the resolution, or in an explanatory note for the proposed resolution, or anything in the by-law itself, that indicated that the rental of lots would be limited in this way for the purposes of preventing or limiting those issues, that would be simple. But in this case there was no attempt to explain what end the by-law was meant to achieve.[57]

[80] Mr Perry seemed to accept that, if the by-law or an explanatory note had said something about the problems that it was intended to address, and it was proportionate in seeking to address that problem, it would not have been objectionable.

[81] The agenda for the meeting at which the resolution to insert by-law 3.3 was passed had attached to it explanatory notes for the motions. It said the following about the relevant motion:[58]

> Motion 14 proposes to register a by-law for the regulation of short term letting. Over the past 12 months there has been an increase in complaints regarding properties being used for short term letting. In response, the Committee have sought legal advice … for the implementation of a by-law to regulate short term letting within Fairway Island.

[82] The explanatory note does therefore, although in somewhat vague terms, say what the by-law was intended to achieve: a method of overcoming problems leading to complaints about the behaviour of short-term occupiers of the houses; almost exactly what I suggested to Mr Perry was its purpose.

[83] Therefore, even if (contrary to my view) one must look for the particular purpose of a particular by-law, that purpose was explained in this case. It is, in my view (and as Mr Perry appeared at that point to accept), a proportionate response to the problem when the existing by-laws had not seemed successfully to have addressed the problem.

[84] The appellants also contend that by-law 3.3 is oppressive. It is not clear if that is intended to be an additional complaint to the assertion that it is unreasonable. The BUGTA has no specific equivalent to s 232 of the *Corporations Act* 2001. To determine whether conduct is oppressive in the sense meant by that provision

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57 T1-12:10-36.
58 AB304-305.

requires consideration of the objects and effects of the relevant resolution or conduct. But, in my view, nothing in the evidence before the referee and the tribunal serves to demonstrate (or even to hint or to provide a basis for a tenable argument) that the conduct of the members of the body corporate in this case, in voting for the resolution making the by-law, was for an illegitimate purpose and oppressive to the applicants.

[85] Even the fact that the appellants bought their respective lots before by-law 3.3 was made and relied on the existing by-laws in buying their lots (for the purpose of letting them out to holiday makers for short terms) is not a reason to conclude (or that gives rise to a tenable argument) that the by-law is oppressive. Any purchaser of a lot within a group title plan would be aware that by-laws could be amended by special resolution, including one with which they might disagree. They are not entitled to expect that by-laws will not be changed in ways that they might consider to be disadvantageous to them. In any event, as I have found, short-term letting was already prohibited by by-law 3.1 at the times they bought their lots. I see no basis for any submission that the by-law is oppressive.

[86] The appellants contend that, in deciding that by-law 3.3 was reasonable, the tribunal erred in four respects:

(a) finding that the body corporate could decide to make by-law 3.3 without any evidence before it about the matters that led it to make the by-law;

(b) finding that, as the Privy Council had advised that a similar by-law was valid, it was difficult to see how this by-law could be unreasonable;

(c) finding that it was difficult to see how a by-law could be oppressive where at least 75% of lot owners had voted in favour of it; and

(d) failing to identify, or in the absence of, any evidence supporting the conclusion that the by-law was not unreasonable or oppressive.

No evidence before the body corporate

[87] The tribunal said that there was no reason for the body corporate to find that there had been actual poor behaviour or other problems caused by the appellants' tenants, in order to justify the conclusion that it was appropriate to regulate the permissible term of leases or other rental agreements. His Honour said that the BUGTA allowed the body corporate to pass by-laws to protect lot owners from even a theoretical nuisance by the occupier of a lot. They need not wait for a nuisance to occur in order to regulate a certain type of activity or occupant.[59]

[88] I understood the appellants to submit that such a conclusion would enable a body corporate to make by-laws that have no basis in fact and therefore no proper purpose. I disagree. I agree with the tribunal that part of the role of a body corporate is to regulate activities in the area of the scheme for the purpose of enhancing the use and enjoyment of the lots and the common area. In doing so, it may anticipate possible problems and make by-laws directed to regulating, overcoming or preventing those problems. Indeed, many by-laws are made for that

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[59] Reasons [160].

purpose. An example given by the tribunal is a by-law regulating the types or behaviour of pets that may be kept on a lot: such a by-law is made in order to prevent problems arising, even though they may not have occurred before the date the by-law is made. But if there is no proper purpose for a by-law, it will be invalid for other reasons.

[89] Even if all the members of the body corporate did not have details of the specific complaints that had been made to it when they discussed and passed the resolution, the object of the proposed by-law was sufficiently clear and it was open to them to consider it to be an appropriate response to the complaints and to achieve that object.

[90] In any event, there was material before the referee and the tribunal of complaints by residents of lots adjoining or near the appellants' lots. First, there was the explanatory note. Then there were a statement from a resident next door to one of the appellants' lots and several submissions from residents in lots adjoining or near the appellants' lots. Some of the submissions recorded that they had concerns about the security of the community and increased traffic, as well as increased noise, arising from frequent access to the island by short-term visitors. The complaints referred to in the explanatory note were not themselves in evidence. But neither the referee nor the tribunal is bound by the rules of evidence; they may inform themselves in such manner as they think fit.[60] There was sufficient material before them to justify a finding that the body corporate had good reasons to make a by-law that might overcome the problems that had arisen or might arise in the future.

[91] The body corporate had before it, at the meeting at which the resolution was passed, grounds for concerns about the enjoyment of lots arising from the behaviour of short-term occupants of the appellants' lots. In considering the proposed by-law, its members would no doubt have been aware of the "local circumstances" to which I have referred above. While the members did not have the complaints themselves, or details of them, before them at the meeting, it was open to them to allay past and present concerns and to attempt to prevent future problems by making a by-law intended to enhance the use and enjoyment of lots. This ground of appeal fails.

Reliance on Privy Council's advice

[92] At paragraph [158] of the tribunal's reasons, his Honour said that he had found, among other things, that it was "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." The appellants submit that that is not a proper criterion of reasonableness.

[93] I agree that one cannot find that a by-law is not unreasonable simply because a similar by-law in a different country has been held by a judicial authority to be valid.

[94] However, this does not affect the question whether it was open to the tribunal to find that the by-law in this case was not unreasonable. While not a sufficient or proper reason for his Honour's decision, of itself it does not render the decision wrong.

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60 BUGTA, s 73, subs 97(2).

Reliance on special resolution

[95] Similarly, the tribunal said (at [158]) that he had found that it was "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."

[96] It can be seen, from a comparison of the tribunal's words and the paraphrasing of those words in the notice of appeal, that in fact the appellants have not correctly described his Honour's conclusion. His Honour limited his conclusion that the by-law was not oppressive to the circumstance where 75% of members (that is, sufficient to pass a special resolution) have exercised their power (or, more precisely, the power given to the body corporate) **for a legitimate purpose**. It was not just the fact that the sufficient majority had passed the resolution, but that it had done so for a legitimate purpose. If that was so, then the resolution could not relevantly be described as oppressive (or unreasonable) in the relevant sense, unless it was disproportionate to achieving that purpose.

[97] However, simply because a large majority of members considered that a particular by-law was appropriate to achieve a legitimate purpose does not mean that the by-law could not be oppressive of the minority. There have been many examples, at least in corporate law, where a majority's resolution or other conduct has been found to be oppressive of a minority. To determine that question requires consideration of the objects and effects of the conduct. So his Honour's reasoning in this regard was, with respect, incorrect. Nevertheless, I have considered the question of oppression above and I have found that there is no basis in the evidence for such a submission to succeed.

[98] Therefore, although the tribunal's reason is wrong, his conclusion that the by-law is not oppressive was correct.

Absence of evidence

[99] The tribunal did not fail to identify the evidence on which he relied. He referred to evidence before the referee and to the complaints that had been made.[61] I have referred above to that material. Also relevant were the "local circumstances," which his Honour had discussed.

[100] His Honour identified the evidence on which he based his conclusion that the by-law is not oppressive or unreasonable. In any event, for the reasons I have identified, there was no tenable argument that the by-law is unreasonable or oppressive.

H - Sufficiency or correctness of tribunal's reasons on reasonableness

[101] The appellants submitted that his Honour did not give adequate reasons for his decision that the by-law is reasonable and that the grounds on which he relied were simply incorrect and did not justify the conclusion.

[102] I have already discussed, in section G above, the grounds on which the appellants contend the tribunal's decision on reasonableness was wrong. I have indicated there the evidence and law on which the tribunal relied and those aspects of his Honour's

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61 Reasons, [172].

decision that I consider to be wrong. There is no need to repeat those matters. It can be seen from my discussion that his Honour gave sufficient reasons for his decision,[62] although I have, in some respects, disagreed with them. Even if he did not, for the reasons I have set out his Honour's decision in that respect was correct.

I - Conclusions

[103] For these reasons, the appellants have failed to substantiate any of their grounds of appeal. The appeal will be dismissed.

[104] No submissions were made to me by the appellants about the costs of the appeal. The respondent submitted that, if the appeal is dismissed, the appellants should be ordered to pay the respondent's costs of and incidental to the appeal.

[105] Costs would ordinarily follow the event of an appeal (that is, the unsuccessful appellants pay the respondent's costs of the appeal). My preliminary view, without having received any submission from the appellants, is that such an order seems appropriate. However, if either party wishes to submit that some other order (or no order) should be made, I am happy to consider any submissions. But in an attempt to limit the parties' costs, I shall make an order now that will only operate if neither party submits otherwise. If I do receive any submissions I will decide the issue on the papers.

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62 Especially reasons, [159]-[176].