
JURISDICTION : STATE ADMINISTRATIVE TRIBUNAL

ACT : STRATA TITLES ACT 1985 (WA)

CITATION : ERBRICH and THE OWNERS OF 125 HERDSMAN
PARADE WEMBLEY (STRATA PLAN 38066)
[2020] WASAT 109

MEMBER : MS R PETRUCCI, MEMBER

HEARD : 13 JULY 2020

DELIVERED : 8 SEPTEMBER 2020

FILE NO/S : CC 184 of 2020

BETWEEN : CARL ERBRICH
Applicant

AND

THE OWNERS OF 125 HERDSMAN PARADE
WEMBLEY (STRATA PLAN 38066)
Respondent

Catchwords:

Strata Titles Act 1985 (WA) as it was prior to 1 May 2020 - Strata scheme - Duties of strata company - Settlement of dispute - Common property - Proper construction of exclusive use by-law - Whether strata company required to maintain and repair timber floor decking boards and timber pergola roof louvres - General powers of Tribunal to make orders - Words & phrases: 'structure', 'structural'

Legislation:

State Administrative Tribunal Act 2004 (WA), s 15

Strata Titles Act 1985 (WA) (prior to 1 May 2020), s 3, s 7, s 7(2), s 7(6), s 35, s 35(1)(c), s 42, s 42(2), s 42(8), s 42(9), s 42(11)(b), s 81, s 83, s 83(1), s 103G(2), Sch 1, Sch 2

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

Strata Titles Amendment Act 2018 (WA)

Result:

Application unsuccessful

Application dismissed

Category: B

Representation:

Counsel:

Applicant : In Person

Respondent : Mr P Monaco

Solicitors:

Applicant : N/A

Respondent : GV Lawyers

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

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

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

The Owners of 5 Thor Street Innaloo Strata Plan 72475 and Maul [No 2]
[2020] WASAT 81

The Owners of Arbor North Strata Plan 67510 and Sun [2020] WASAT 28

The Owners of Del Mar Strata Plan 53989 and Dart Enterprises Pty Ltd
[2020] WASAT 9

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

REASONS FOR DECISION OF THE TRIBUNAL:

Introduction

1 The applicant, Mr Carl Theodore Erbrich (**Mr Erbrich**), an engineer with over thirty years' experience, mostly as a geotechnical engineer, has brought proceedings in the Tribunal under s 83(1) of the *Strata Titles Act 1985 (WA) (ST Act)*.

2 These proceedings commenced before the major amendments to the ST Act coming into operation on 1 May 2020 under the *Strata Titles Amendment Act 2018 (WA)*. This means the provisions of the ST Act, as they were prior to the amendments, apply to the determination of this application: cl 30 of Sch 5 of the ST Act. All references to the provisions of the ST Act in these reasons are to those in the ST Act immediately prior to 1 May 2020.

3 Mr Erbrich is a proprietor of Lot 93 together with a share in any common property (**Lot 93**) as set out on Strata Plan 38066 which was registered on 25 May 2000 (**strata plan**). The relevant strata scheme is located at No 125 Herdsman Parade, Wembley and is described in the strata plan as being 'ninety six units of brick construction situated on portion of Herdsman Lake Lot 153 as contained in Certificate of Title Volume 2178 Folio 598' (**strata complex**).

4 In his application to the Tribunal dated 7 February 2020, as amended on 12 April 2020 (**amended application**), Mr Erbrich complained that the strata company has declined to undertake the renewal or repair of the timber floor decking boards that provide the floor and the renewal or repair of the timber pergola roof louvres that comprise the ceiling to the extended balcony which is common property but assigned as an exclusive use area to his Lot 93 (**Extended Balcony**) pursuant to a change in by-law 16 on 9 November 2001.

5 Mr Erbrich is concerned that the pergola will collapse (with several louvres already having become detached) and injure someone. Further, he is concerned that a person may fall through the timber floor decking boards and injure themselves. Consequently, Mr Erbrich sought the following order under s 83(1) of the ST Act as set out in his amended application:

...

2. On behalf of myself I hereby request that SAT make an order under Section 83 (settlement of a dispute or rectification of a

complaint) of the Strata Titles Act 1985 (STA, 1985) that the Strata Company shall conduct repairs to the 'Extended Balcony' ... associated with my lot.

3. The specific repairs that are requested to be conducted comprise of:
 - a. Renewal / repair of timber decking boards that provide the floor of the 'Extended Balcony' associated with my lot.
 - b. Renewal / repair of timber pergola roof louvres that comprise the ceiling of the 'Extended Balcony' associated with my lot.

6 The respondent in these proceedings is The Owners of 125 Herdsman Parade, Wembley Strata Plan 38066 (**strata company**).

7 The strata company opposes Mr Erbrich's application.

8 Mr Erbrich's application falls within the Tribunal's original jurisdiction (s 15 of the *State Administrative Tribunal Act 2004* (WA)).

9 For the reasons set out below, Mr Erbrich's application is unsuccessful. This means that with the current by-laws (in particular, by-law 16 as set out below), the proprietor(s) of Lot 93 are responsible for the repair and maintenance of the timber floor decking boards and the timber pergola roof louvres in the Extended Balcony.

Relevant procedural history and materials before the Tribunal

10 The matter was heard on 13 July 2020, following which the Tribunal reserved its decision.

11 Mr Erbrich attended the hearing by video conference and gave oral evidence. Mr P. Monaco attended the hearing by video conference and made submissions on behalf of the strata company. Mr Robert Vincenti, the chairman of the council of owners and Ms Rosina O'Neill, a member of the council of owners also attended the hearing by video conference.

12 No party called any witnesses (as reflected in order 4 of the orders made at a directions hearing on 21 May 2020).

13 In accordance with the Tribunal's usual practice in matters of this nature, the hearing was conducted on the basis that all of the documents filed with the Tribunal would be regarded as being in evidence, subject

to any proper objection. There was no objection. The following documents, comprising the hearing book prepared by the Tribunal, were accepted into evidence as Exhibit 1:

- Mr Erbrich's application dated 7 February 2020 (as amended by the document titled 'Statement of Proposed Amended Order Sought and Grounds for Order Sought' dated 12 April 2020) which included a copy of the Strata Plan, the Certificate of Title for Lot 93 and the s 77B certificate;
- the strata company's response to Mr Erbrich's application dated 2 June 2020; and
- Mr Erbrich's response to the strata company's response dated 22 June 2020 with supporting presentation notes.

14 The application proceeded in the Tribunal on the basis that the standard by-laws apply, that is the provisions set out in Sch 1 and Sch 2 of the ST Act applied to the strata scheme (s 42(2) of the ST Act (**by-laws**)) with the following changes:

- Notification of change of by-laws (By-law 16 - Exclusive Use amended) by Instrument H922945 registered on 9 November 2001 (**by-law 16**);
- Notification of change of by-laws (By-law 16 - Exclusive Use amended) by Instrument I395618 registered on 26 February 2003; and
- Notification of change of by-laws (By-law 12(c) repealed and By-law 15 added) by Instrument N958793 registered on 7 August 2018.

15 Next, the Tribunal sets out the facts.

Facts

16 It is common ground that by-law 16 (as set out in [22] below) is poorly drafted and that the sketch/drawing supporting that by-law is not helpful in defining the exclusive use area and the boundaries.

17 Apart from the timber floor decking boards which the strata company did not accept as having dual functionality, the following facts are uncontroversial and the Tribunal makes these findings of fact:

- The strata complex is a three level complex comprising 96 brick construction units divided over eight separate buildings.
- The eight buildings are combined into four blocks: Pelican, Sandpiper, Kestrel and Ibis. 'Pelican' refers to the units comprising the two northern buildings.
- Each unit comprises 59m² internal area and either an 8m² tiled balcony (Level one and Level 2) or an 8m² courtyard (Ground level).
- Some units have an 'exclusive use' area pursuant to by-law 16 which comprises either a car port, an extended courtyard or extended balcony.
- Lot 93 has an Extended Balcony.
- The Extended Balcony is common property of 15m² and is comprised of:
 - steel support columns that extend from Ground level to the roof of Level 2;
 - steel support beams that connect the support columns together and also, at discrete points, connect the columns to the main building;
 - timber joists that run at approximately 450 millimetres centre from the steel beams that connect the columns to the building;
 - timber floor decking boards that span across joists and provides the surface to the Extended Balcony and serves as a floor; and
 - on Level 2 only, timber pergola roof louvres that provide shade cover above the Extended Balcony.
- The timber floor decking boards span continuously over the boundary between two adjacent lots that benefit from the Extended Balcony.

Issues to be determined

18 The crux of Mr Erbrich's application to the Tribunal is simply, who is required to repair and maintain the timber floor decking boards and timber pergola roof louvres to his Extended Balcony? Mr Erbrich says it is the strata company. The strata company says it is Mr Erbrich.

19 The issues the Tribunal is required to determine are:

1) Does the Tribunal have power under s 83(1) of the ST Act to determine the dispute between Mr Erbrich and the strata company?

and

2) Does by-law 16, properly construed, require the strata company to renew or repair:

(a) the timber floor decking boards of the Extended Balcony associated with Mr Erbrich's Lot 93; and

(b) the timber pergola roof louvres of the Extended Balcony associated with Mr Erbrich's Lot 93.

20 The Tribunal turns, next to set out the legal framework.

Legal framework

21 The following provisions of the ST Act are relevant:

3. Terms used

common property means -

(a) so much of the land comprised in a strata plan as from time to time is not comprised in a lot shown on the plan; and

(b) any leasehold interest acquired by a strata company under section 18; and

(c) the lot or lots shown on a survey strata plan as common property;

...

35. Duties of strata companies

- (1) A strata company shall -
- (a) enforce the by-laws; and
 - (b) control and manage the common property for the benefit of all the proprietors; and
 - (c) keep in good and serviceable repair, properly maintain and, where necessary, renew and replace -
 - (i) the common property, including the fittings, fixtures and lifts used in connection with the common property; and
 - (ii) any personal property vested in the strata company,and to do so whether damage or deterioration arises from fair wear and tear, inherent defect or any other cause; and

...

42. By-laws

- (1) A strata company may make by-laws, not inconsistent with this Act, for -
- (a) its corporate affairs; and
 - (b) any matter specified in Schedule 2A; and
 - (c) other matters relating to the management, control, use and enjoyment of the lots and any common property.
- (2) The provisions set out in Schedules 1 and 2 shall be deemed to be by-laws of the strata company and may be amended, repealed or added to by the strata company -
- (a) by resolution without dissent (or unanimous resolution, in the case of a two lot scheme), in the case of Schedule 1 by-laws; or
 - (b) in accordance with any order of a court or the State Administrative Tribunal or any written law; or
 - (c) in any other case, by special resolution.

...

- (8) Without limiting the generality of any other provision of this section other than subsection (1), a strata company may, with

the consent in writing of the proprietor of a lot, pursuant to a resolution without dissent (or unanimous resolution, in the case of a two lot scheme) make, under this subsection only and not otherwise, a by-law in respect of that lot conferring on that proprietor the exclusive use and enjoyment of, or special privileges in respect of, the common property or any part of it upon such terms and conditions (including the proper maintaining and keeping in a state of good and serviceable repair of the common property or that part of the common property, as the case may be, and the payment of money by that proprietor to the strata company) as may be specified in the by-law and may, pursuant to a resolution without dissent (or unanimous resolution, in the case of a two lot scheme), make a by-law amending or repealing any by-law made under this subsection.

- (9) After the expiration of the period of 2 years that next succeeds the making, or purported making, of a by-law referred to in subsection (8) (including a by-law so referred to that amends, adds to or repeals another by-law), it shall be conclusively presumed that all conditions and preliminary steps precedent to the making of the by-law have been complied with and performed.

...

- (11) The proprietor for the time being of a lot in respect of which a by-law referred to in subsection (8) is in force -
- (a) is, subject to section 43(4), liable to pay to the strata company any moneys referred to in the by-law in accordance with the by-law; and
 - (b) is, unless excused by the by-law, responsible for the performance of the duty of the strata company under section 35(1)(c) in respect of the common property, or the part of the common property, to which the by-law relates.

...

81. Orders under this Division

- (1) The State Administrative Tribunal may make an order sought by the applicant and an order made may be expressed in terms different from the order sought, so long as it does not differ in substance from the order sought.

...

- (3) The State Administrative Tribunal may order a strata company, an administrator, a proprietor, a person having an estate or interest in a lot or an occupier or other resident of a lot to do, or to refrain from doing, a specified act with respect to a parcel.

...

83. General Powers of SAT to make orders

- (1) The State Administrative Tribunal may, pursuant to an application of a strata company, an administrator, a proprietor, a person having an estate or interest in a lot or an occupier or other resident of a lot, in respect of a scheme, make an order for the settlement of a dispute, or the rectification of a complaint, with respect to the exercise or performance of, or the failure to exercise or perform, a power, authority, duty or function conferred or imposed by this Act or the by-laws in connection with that scheme on any person entitled to make an application under this subsection or on the council or the chairman, secretary or treasurer of the strata company.
- (2) Where a strata company has a discretion as to whether or not it exercises or performs a power, authority, duty or function conferred or imposed on it by this Act, it shall be deemed to have refused or failed to exercise or perform that power, authority, duty or function only if it has decided not to exercise or perform that power, authority, duty or function[.]

22 The following by-laws are relevant:

1. Duties of proprietor, occupiers etc.

...

- (2) A proprietor, occupier or other resident of a lot shall -
- (a) use and enjoy the common property in such a manner as not unreasonably to interfere with the use and enjoyment thereof by other proprietors, occupiers or residents, or of their visitors; and
 - (b) not use the lot or permit it to be used in such manner or for such purpose as causes a nuisance to any occupier of another lot (whether a proprietor or not) or the family of such an occupier[.]

...

'By-Law 16 Exclusive Use'

The registered proprietor of each Lot shall be entitled to the exclusive use and enjoyment of that part of the common property as is marked on the attached exclusive use sketch as being 'for the use of' each Lot respectively.

23 Before setting out the contentions of the parties, it is useful to set out the principles applicable to the proper construction of strata by-laws as enunciated in *Byrne v The Owners of Ceresia River Apartments Strata Plan 55597 (First decision)*¹ and subsequently in the decision on appeal in *Byrne v The Owners of Ceresia River Apartments Strata Plan 55597 (Appeal decision)*.² The principles were summarised in *The Owners of Del Mar Strata Plan 53989 and Dart Enterprises Pty Ltd (Del Mar)*³ at [46]-[48] as follows:

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

¹ [2016] WASCA 153.

² [2017] WASCA 104.

³ [2020] WASAT 9.

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.

24 As the Tribunal said in *Del Mar* at [48], 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. The Tribunal will apply these principles in interpreting the meaning of by-law 16.

25 The Tribunal turns, next, to set out in summary the contentions of the parties.

Contentions of the parties

26 In summary, Mr Erbrich's main contentions may be summarised as follows:

- The timber floor decking boards are 'structural' as they are not underlain by any other structural supporting material.

- All components of the Extended Balcony (except the balustrade) have shared utility or functionality and are therefore not for the exclusive use of Lot 93.
- The strata company's interpretation of by-law 16 will cause an unequal impost on proprietors with an extended balcony who otherwise have a similar unit entitlement.
- The strata plan does not define the boundaries of the Extended Balcony.

27 In summary, the strata company's main contentions may be summarised as follows:

- The strata company is responsible for the 'structural' elements (such as the columns, the beams and the joists) but not the timber floor decking boards because even if the flooring is removed the building would retain its structural integrity. Similarly, the timber pergola roof louvres have no 'structural' elements.
- The timber floor decking boards do not have shared functionality. The boards are simply to walk on.
- Unit entitlement has no connection to exclusive use.

28 Having set out the main contentions of the parties, the Tribunal turns, next, to determine the issues as set out in [19] above.

Consideration

Issue 1: Does the Tribunal have power under s 83(1) of the ST Act to determine Mr Erbrich's dispute with the strata company?

29 Section 83 of the ST Act sets out the general powers of the Tribunal to make orders. Section 83(1) provides that the Tribunal:

[M]ay ... make an order for the settlement of a dispute, or the rectification of a complaint, with respect to the exercise or performance of, or the failure to exercise or perform, a power, authority, duty or function conferred or imposed by this Act or the by-laws in connection with that scheme[.]

(Emphasis added)

30 Section 83(1) of the ST Act does allow the Tribunal to determine issues in dispute between parties, provided the Tribunal's order is 'for the settlement of a dispute' (or the rectification of a complaint), the dispute (or complaint) being one relating to (relevantly) 'the failure to exercise ... a power ... duty or function conferred or imposed by [the] Act or the by-laws ... on any person entitled to make an application under this subsection', which includes the proprietor of a lot on the strata plan. Importantly, the purpose of the Tribunal's order must be to settle a dispute about the exercise of, or failure to exercise a power, duty or function by (in this case) the strata company.

31 Therefore, in considering Mr Erbrich's application, the Tribunal must take into account of the requirements of the ST Act, the strata plan, the by-laws (in particular by-law 16) and all relevant information related to the application. Hence, the discretion in s 83(1) is that the Tribunal *may* make an order.

32 It is common ground that Mr Erbrich is a proprietor of Lot 93. He is therefore entitled to make an application to the Tribunal under s 83(1) of the ST Act. Further, it is common ground that there is a dispute between Mr Erbrich and the strata company where Mr Erbrich asserts that the strata company is required to renew or repair: (a) the timber floor decking boards that he says provides the floor of the Extended Balcony; and (b) the timber pergola roof louvres that he says comprises the ceiling of the Extended Balcony. The strata company rejects Mr Erbrich's assertion that it is required to renew or repair the timber floor decking boards and the timber pergola roof louvres.

33 The Tribunal finds that there is a dispute between the parties. However, before the Tribunal can consider making an order under s 83(1) of the ST Act it must be satisfied that the dispute between the parties concerns or relates to the exercise of, or failure to exercise a power or function imposed by the ST Act or the by-laws.

34 In this case, the dispute between the parties concerns who is responsible for the repair and maintenance of the timber floor decking boards and the timber pergola roof louvres. In terms of s 83(1) of the ST Act, the dispute is one relating to (relevantly) 'the failure [of the strata company or the proprietor] to exercise ... a ... duty or function conferred or imposed by the ST Act and by-law 16'.

35 The Tribunal is satisfied that Mr Erbrich's application can be determined under s 83(1) of the ST Act. In the following paragraphs, the Tribunal will work through each of the parties' main contentions.

Issue 2: Does by-law 16 properly construed require the strata company to renew or repair the timber floor decking boards and the timber pergola roof louvres of the Extended Balcony?

Structural components

36 Mr Erbrich submitted that the terms 'structure', 'structural nature' and 'structural component' (or similar variant) are not defined in the ST Act and referred to *The Owners of Arbor North Strata Plan 67510 and Sun* [2020] WASAT 28 (*Sun*) where the Tribunal stated at [21] that:

The terms 'structure' or 'structural improvement' are not defined in the St Act apart from s 7(6) of the ST Act which provides that structure includes and 'prescribed improvement'.

37 Mr Erbrich referred the Tribunal to *The Penguin Dictionary of Building*⁴ to define the term 'structure' as:

The loadbearing frame or *fabric* of a building, its walls, floor and roof but not *finishings* or *joinery*.

38 Mr Erbrich explained that a 'structure' is not the same thing as 'structural' (or of a 'structural nature') in the context of defining a 'structural' component that performs a structural supporting function. He referred to *The Penguin Dictionary of Building*⁵ to define 'structural' as:

Concerned with strength, as, e.g. the parts of a building which carry loads in addition to their own weight.

39 Mr Erbrich submitted that an 'objective test' is required to differentiate between what is a 'structural' and what is a 'non-structural' component of the building. He suggested the following test.

40 First, define the core function(s) of the component, for example, a floor must support the weight of people and the items placed on it, while a wall separates one space from another. Some walls may also have to support other external loads, such as other parts of the building,

⁴ Penguin, Maclean JH and Scott JS (4th Ed, 1995).

⁵ Ibid.

while some may not. Second, consider whether the selected component can be changed for something thinner and weaker, assuming it has been optimally designed in the first place, while still maintaining some or all of its core functionality without breaking it (that is failing) in such a way as to compromise safety.

41 Mr Erbrich submitted that when, applying the test as set out above, if a change can be made then the component can be deemed to be 'non-structural', that is, its inherent strength is not critical to the performance of its core function(s). However, if a change cannot be made then, in Mr Erbrich's view, the component is 'structural', that is, its inherent strength is critical to the performance of at least one of its core functions.

42 By way of further explanation of his 'objective test' (as set out above), Mr Erbrich gave the following example. When a timber floor is laid over a cantilevered reinforced concrete balcony deck the concrete balcony is 'structural' because its core function is to sustain the weight of the items placed on top of it, including people and equipment as well as the weight of the timber floor covering. The timber floor covering is non-structural because the load it bears is directly transferred into the concrete balcony and its presence or absence or indeed its replacement with another weaker surface covering, for example, artificial grass, does not detract in any way from the ability of the concrete balcony to undertake its core function of supporting the weight of people and equipment. In this example, Mr Erbrich submitted that the timber floor is simply a surface 'finishing'.

43 In contrast, Mr Erbrich submitted that the timber floor decking boards of the Extended Balcony are laid over a steel and timber framed structure, and therefore the steel and timber frame is 'structural'. However, unlike the example in the previous paragraph, Mr Erbrich submitted that in the present case the timber floor decking boards are 'structural' because the timber floor decking boards are not underlain by any other structural supporting material (for example a concrete slab) and the timber floor decking boards must span between the joists and steel frame and support the weight of people and equipment located between the joists and the framing. Mr Erbrich said if the timber floor decking boards are replaced by weaker and thinner materials, such materials would increase the risk of structural failure when the floor is required to perform its core function of supporting people and equipment. Mr Erbrich submitted that the timber floor decking boards in the present case have the additional core functionality and not just a

'finishing' with the consequence they are properly classified as 'structural'.

44 The strata company submitted that the Extended Balcony is not part of a lot or a part lot, rather the Extended Balcony is common property and it is comprised of: steel columns, steel beams, steel balustrade, timber joists, timber floor decking boards and the wooden louvres. Further, the strata company submitted that the steel columns are common property which support the timber floored balcony and because of their structural nature they are not subject to by-law 16 but rather, in accordance with s 35(1)(c) of the ST Act, they are the responsibility of the strata company to maintain and repair. In addition, the strata company stated that the Extended Balcony is supported by steel beams and steel balustrades between the columns and because of their structural nature they are not subject to by-law 16 but rather, in accordance with s 35(1)(c) of the ST Act, they are the responsibility of the strata company to maintain and repair.

45 In regards to the timber floor decking boards, the strata company submitted that the boards are attached to timber joists which in turn are attached to the steel columns and beams. The timber joists are common property and because of their structural nature they are not subject to by-law 16 but rather, in accordance with s 35(1)(c) of the ST Act, they are the responsibility of the strata company to maintain and repair.

46 However, in regards to the timber floor decking boards, the strata company submitted that the boards do not serve any structural function. Further, the strata company submitted that while they are common property, the timber floor decking boards are subject to by-law 16 and therefore the responsibility to maintain and repair falls to the proprietor, in this case, Mr Erbrich.

47 Similarly, in regards to the timber pergola roof louvres, the strata company submitted that there are no structural elements. Further, the strata company submitted that while they are also common property the timber pergola roof louvres are subject to by-law 16 and the responsibility to maintain and repair falls to the proprietor, in this case, Mr Erbrich.

48 In the Tribunal's view, to properly interpret by-law 16 it is first necessary to consider the term 'structure'.

49 As stated by the Tribunal in *Sun* at [21], the term 'structure' is not defined in the ST Act apart from s 7(6) of the ST Act which provides that the term structure includes 'any prescribed improvement'.

50 This means that the ordinary meaning of 'structure' is to be used. This was confirmed in the recent decision of *The Owners of 5 Thor Street Innaloo Strata Plan 72475 and Maul [No 2]* [2020] WASAT 81, where the Tribunal stated at [79] that the word 'structure' in the context of s 7 of the ST Act is to take its ordinary meaning.

51 Ordinarily the term 'structure' means built up as in a building. This is supported by the decision in *Sun* where the Tribunal stated at [23]:

The term 'structure' ordinarily means something which is constructed in the way of being built up as in a building. In *South Wales Aluminium Co Ltd v Assessment Committee for the Neath Assessment Area* [1943] 2 All ER 587 Atkinson J stated at 592:

... There is nothing to suggest here that the word 'structure' is not to be used in its ordinary sense ... I suppose it means something which is constructed in a way of being built up as in a building; it is in the nature of a building. It seems to me it is not in the nature of a building, or a structure analogous to a building, unless it is something which you can say quite fairly has been built up. I do not think that is the only guide or the only test, but roughly, I think that must be the main guide: how has it got there? Is it something which you can fairly say has been built up[?]

52 The strata company (correctly) submitted that the decision in *Sun* is not relevant in the present case to determine whether the timber floor decking boards and the timber pergola roof louvres are a 'structure'. This is because *Sun* concerned whether a gazebo (pergola) that was placed on the proprietor's lot without prior consent of the strata company was a structure in the context of s 7(2) and s 103G(2) of the ST Act. The current proceedings do not concern s 7(2) or s 103G(2) of the ST Act.

53 Whether a thing is a structure in any particular case is a mixed question of law and fact. This was stated by the Tribunal in *Sun* at [26] as follows:

Whether a thing is a structure in any particular case is a mixed question of law and fact having regards to the ST Act in context of which its meaning must be ascertained.

54 Giving the word 'structure' its ordinary meaning as set out in [51], the Tribunal finds that the timber floor decking boards and the timber pergola roof louvres are not structures but rather they are finishings. In other words, the Tribunal is of the view that the timber floor decking boards and the timber pergola roof louvres are not essential to the structure of the building but give a complete or finished appearance.

55 In the Tribunal's view, it cannot be fairly said that the timber floor decking boards have been 'built up' in the way of being built up as in a building. The same is true for the timber pergola roof louvres, that is, they have not been 'built up' in the way of being built up as in a building. The mere fact that the timber floor decking boards and the timber pergola roof louvres are fixed to the building does not make them a part of the integral structure of the building. The timber floor decking boards and the timber pergola roof louvres cannot be equated to such items as the steel columns, steel beams, steel balustrades and timber joists that benefit the building which must be maintained by the strata company pursuant to its duty in s 35(1)(c) of the ST Act.

Shared utility or functionality

56 Mr Erbrich submitted that many of the structural components of the Extended Balcony have shared functionality (both structural and in their utility).

57 Mr Erbrich submitted that the Extended Balcony components with shared functionality include:⁶

- Steel columns and beams – have the shared functionality of supporting each successive level of the extended balconies.
- Steel beams and timber joists - have the shared functionality of providing the framing that supports the balcony floor of the exclusive use area above the balcony ceiling of the exclusive use area below.
- Timber floor decking boards - provide the shared functionality of serving as the floor to the balcony for

⁶ Exhibit 1, page 269.

the exclusive use area above and as a ceiling providing shade/cover for the exclusive use area below. At the lateral boundaries between adjacent exclusive use areas, they have a shared supporting function spanning between the provided supports in adjacent exclusive use areas.

- Some of the pergola roof louvres - freely span over the adjacent exclusive use area boundaries and therefore their structural integrity relies on shared support at both ends in adjacent exclusive use areas.

58 In respect of the timber pergola roof louvres, Mr Erbrich submitted that most of the louvres are not shared, and therefore the pergola has limited shared functionality. According to Mr Erbrich, the singular function of the unshared pergola is to provide shade or covering.

59 Because of this shared functionality, Mr Erbrich submitted that he does not have exclusive use of the Extended Balcony and therefore he should not be liable to maintain and repair the timber floor decking boards and the timber pergola roof louvres.

60 Mr Erbrich submitted that the 'default position' of by-law 16 of shifting the responsibility for maintaining the common property to the proprietor might be appropriate for non-safety critical and truly 'exclusive use' areas. However, he submitted that it was not appropriate or adequate that this 'default position' be applied to safety critical and shared structural components.

61 The strata company did not accept Mr Erbrich's submission that the timber floor decking boards and the timber pergola roof louvres have shared functionality. In regards to the timber floor decking boards, the strata company submitted that its function was simply to walk on to it. Further, the strata company submitted that the timber floor decking boards did not have the characteristics of a balcony such as for drainage, privacy and waterproofing.

62 In the Tribunal's view, it is not necessary to determine if the timber floor decking boards or the timber pergola roof louvres have shared functionality. In any event, as explained below, the proper construction of by-law 16 in the context of the strata plan, the ST Act and the by-laws is that the proprietor is to have exclusive use of the

Extended Balcony which includes the timber floor decking boards and the timber pergola roof louvres.

Unequal impost on proprietors with an extended balcony

63 Mr Erbrich submitted that the original unit entitlements impose a differential responsibility amongst the proprietors to cover the cost of repairs and maintenance of the common property in the strata scheme. According to Mr Erbrich this is despite all lots being essentially identical other than for a differential allocation of exclusive use areas.

64 Mr Erbrich submitted that by-law 16 would never have been agreed to if the differential maintenance financial burden had been appreciated by the proprietors at the time it was passed in 2001. Because of this, Mr Erbrich submitted that the strata company should be responsible for the repair and maintenance of the unshared timber pergola roof louvres of the Extended Balcony in order to avoid an unfair differential repair and maintenance responsibility.

65 The strata company submitted that 'unit entitlement' has no connection to 'exclusive use'. Unit entitlement, explained the strata company, may have something to do with the ambience of the unit, the view, or its location but it has nothing to do with the cost that a particular unit needs to bear in terms of its contribution to strata levies.

66 The Tribunal respectively agrees with the strata company. That is, unit entitlement does not equate to, or have anything to do with exclusive use. Further, in this case, by reference to by-law 16, unit entitlement does not have anything to do with who has the duty to carry out the repair and maintenance work of the timber floor decking boards and the timber pergola roof louvres.

Strata plan does not define boundaries

67 It is common ground that by-law 16 contains sheet 9 of 9 which depicts the dimensions of Lot 93 (and other lots).⁷ Further, the parties agree that the strata plan states with respect to boundaries:⁸

Stratum of balconies extends to a height of 2.5 meters above the upper surface of their respective floors. Except where covered.

The boundaries of the lots or part of the lots which are buildings shown on the strata plan are the inner surfaces of the walls, the upper surface

⁷ Exhibit 1, page 46.

⁸ Exhibit 1, page 35.

of the floor and the under surface of the ceiling, as provided by section 3(2)(a) of the Strata Titles Act 1985.

68 Mr Erbrich stated that the strata plan has no definition of where the horizontal boundaries should be drawn to define the respective upper and lower surfaces of the Extended Balcony that stack one upon another from Ground level to Level 2. Further, Mr Erbrich submitted there is nothing on the boundary to allow the timber floor decking boards to be assigned to his Lot 93 or to the adjacent lot.

69 It was submitted by the strata company that:⁹

Neither the strata plan nor the plans registered with By-law 16 show columns, this is typical of strata complex's [sic] where the structural works comprise columns within a courtyard or as part of the support for a balcony. Sometimes in some strata complexes the columns are within a lot and support a slab. The column is a structural cubic space as they are supporting the structure of the balcony (as in this case) or slab which is common property.

70 It is not necessary for the Tribunal to determine the boundaries of Lot 93 in this case, as the Tribunal finds, as set out earlier at [54], that the timber floor decking boards and the timber pergola roof louvres are not a structure but are finishing's. Further, for reasons set out below, the proper construction of by-law 16 requires the proprietor of Lot 93 to maintain and repair the timber floor decking boards and the timber pergola roof louvres.

By-law 16 properly constructed

71 Mr Erbrich submitted that by-law 16 was poorly conceived and drafted which has created major uncertainty.

72 The strata company (properly) conceded that by-law 16 lacks detail and that the drawings supporting by-law 16 are not helpful in defining the exclusive use area and the boundaries. However, the strata company submitted that by-law 16 is a valid by-law even though there appears to be no evidence of consent in writing by the proprietors of by-law 16 relating to the timber floor decking boards on the extended balconies, the by-law was registered in 2001 and as two years have passed since the making of the by-law, s 42(9) of the ST Act cured the possible absence of a consent in writing by the proprietors. This was not contested by Mr Erbrich.

⁹ Exhibit 1, page 292.

73 The strata company submitted that s 42(11)(b) of the ST Act cured the lack of terms and conditions in by-law 16 with the effect that the liability and responsibility to renew and replace the timber floor decking boards fall to the proprietor, in this case, Mr Erbrich.

74 The strata company submitted that the proper construction of by-law 16 requires a consideration of the language of by-law 16, viewed in the statutory context of s 42 of the ST Act, and whilst recourse to surrounding circumstances may be permissible as an aid to construction it is necessary, particularly bearing in mind the public purpose of strata scheme by-laws, to exercise caution in going beyond the language of the by-law and s 42: *The Owners of Strata Plan No 3397 v Tate*.¹⁰ .

75 Finally, according to the strata company, the proper construction of by-law 16 requires that the strata company only repair and maintain the structural elements of the Extended Balcony, such as the steel columns, beams and the joists. The strata company submitted that the timber deck flooring boards and the pergola timber roof louvres have no structural elements because if they are removed, the building would retain its structural integrity. Because of this, the strata company submitted that the timber floor decking board and the pergola timber roof louvres do not fall to be repaired or maintained by the strata company but rather are to be repaired and maintained by the proprietor, in this case, Mr Erbrich.

76 In the Tribunal's view, the starting point in interpreting by-law 16 is to consider s 42(8) of the ST Act.

77 By-law 16 was enacted under s 42(8) of the ST Act which enables the strata company to set aside **common property or any part of it** upon such terms and conditions for the exclusive use of proprietors (Tribunal emphasis). In this case, the strata company sought to set aside the Extended Balcony for the exclusive use for the proprietor(s) of Lot 93, in this case, Mr Erbrich. It appears, from the submission of the strata company, that evidence of consent in writing of the proprietors of by-law 16 is not available. However as that by-law was registered with Landgate on 9 November 2001 (by instrument H922945) and as two years have passed since the making of by-law 16, the Tribunal accepts that by the application of s 42(9) of the ST Act, that it is conclusively presumed that all conditions and preliminary

¹⁰ (2007) 70 NSWLR 344; [2007] NSWCA 207

steps precedent to the making of the by-law have been complied with and performed.

78 Section 42(11)(b) of the ST Act provides (relevantly) that 'unless excused by the by-law', the proprietor, in this case the proprietor of Lot 93 is 'responsible for the performance of the duty of the strata company under section 35(1)(c) in respect of the common property, **or the part of the common property**, to which the by-law relates' (Tribunal emphasis).

79 The Tribunal notes that by-law 16 refers to the '... exclusive use and enjoyment **of that part of the common property** as is marked on the attached exclusive use sketch ...' (Tribunal emphasis).

80 The words 'the common property or any part of it' in s 42(8) of the ST Act, in the Tribunal's view, enables the strata company to set out what part of the common property falls within the exclusive use area.

81 It is common ground that the timber floor decking boards, the timber pergola roof louvres as well as the steel columns and beams are all common property. In this case, by-law 16 does not expressly exclude any part of the common property from its operation. However, the detail in by-law 16 is missing.

82 In the Tribunal's view, in construing by-law 16, a reasonable person would understand the language of by-law 16 to mean that the proprietor is required to repair and maintain the non-structural elements such as finishings and that the strata company is required to repair and maintain the structural elements such as the steel beams and columns that are essential to the structure of the building. Such an interpretation, in the Tribunal's view, is consistent with the ST Act.

83 In conclusion, the Tribunal is of the view that by-law 16, properly construed, gives that the proprietor of the lot, in this case Mr Erbrich as the proprietor of Lot 93:

- the exclusive use and enjoyment of the Extended Balcony, being the area marked EU93 on sheet 9 of 9 (of some 15m²); and
- pursuant to s 42(11)(b) of the ST Act, has the responsibility for the performance of the duty of the strata company under s 35(1)(c) of the ST Act, to keep in good and serviceable repair, properly maintain and

where necessary, renew and replace whether the damage or deterioration arises from fair wear and tear, inherent defect or any other cause, in respect of the non-structural components of the Extended Balcony which, as explained earlier in these reasons, include:

- (a) the timber floor decking boards; and
- (b) the timber pergola roof louvres.

84 The other components of the Extended Balcony as explained earlier in these reasons, which are structural in nature, including the steel columns, steel beams, steel balustrade and timber joist, remain the responsibility of the strata company for the performance of the duties as set out in s 35(1)(c) of the ST Act.

Conclusion

85 For the reasons set out above, Mr Erbrich's application for an order under s 83(1) of the ST Act is unsuccessful. The Tribunal will issue an order as follows.

Order

The Tribunal orders:

1. The application is dismissed.

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

MS R PETRUCCI, MEMBER

8 SEPTEMBER 2020