

JURISDICTION : STATE ADMINISTRATIVE TRIBUNAL

ACT : STRATA TITLES ACT 1985 (WA)

CITATION : THE OWNERS OF MOTIVE APARTMENTS
STRATA PLAN 67587 and TEAR [2021] WASAT 54

MEMBER : MS R PETRUCCI, MEMBER

HEARD : 23 FEBRUARY 2021

DELIVERED : 21 APRIL 2021

FILE NO/S : CC 521 of 2020

BETWEEN : THE OWNERS OF MOTIVE APARTMENTS
STRATA PLAN 67587
Applicant

AND

ROBERT TEAR
First Respondent

BERNADETTE TEAR
Second Respondent

GARY TEAR
Third Respondent

Catchwords:

Strata Titles Act 1985 (WA) (prior 1 May 2020) - Strata scheme (other than a single tier strata scheme) - Dispute - Breach of by-law - Whether by-law breached wilfully and persistently - Whether by-law specifies a penalty for breach of it - Orders Tribunal may make to settle dispute - Penalty for breach of

by-law - Whether tenant's occupancy should be terminated - Declaration under s 95(1) of the *State Administrative Tribunal Act 2004* (WA) - Turns on own facts

Legislation:

State Administrative Tribunal Act 2004 (WA), s 95(1)

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

Strata Titles Act 1985 (WA) (prior 1 May 2020), s 35(1)(a), s 42, s 42(6), s 42(7), s 83(1), s 83(4), s 83(10), s 103(I), Pt IV, Div 1, Pt VI, Div 3, Sch 1, Sch 2

Strata Titles Amendment Act 2018 (WA)

Result:

Application partly successful

Category: B

Representation:

Counsel:

Applicant : Mr M Atkinson
First Respondent : In Person
Second Respondent : In Person
Third Respondent : In Person

Solicitors:

Applicant : Atkinson Legal
First Respondent : N/A
Second Respondent : N/A
Third Respondent : N/A

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

Nil

REASONS FOR DECISION OF THE TRIBUNAL:***Introduction***

1 This matter concerns the set of rules (known as by-laws) that establish the conduct and governance standards in the strata scheme, 'Motive Apartments'.

2 The applicant (**strata company**), alleges 'repeated, wilful and persistent' breaches of the by-laws by the third respondent, Gary. It is convenient to refer to the third respondent by his first name. In doing so, I mean no offence. Further, the strata company alleges that the first and second respondents, Mr Robert and Mrs Bernadette Tear, who are the owners of lot 54 on Strata Plan 67587 have failed to ensure that their son, Gary, who resides at lot 54, comply with the by-laws of the strata scheme.

3 By-laws apply to the proprietors, tenants, occupiers and the strata company.¹ In the absence of any notification of any amendment or repeal of or any addition to the by-laws, the by-laws that apply are the 'standard' by-laws in Sch 1 and Sch 2 of the *Strata Titles Act 1985* (WA) (**ST Act**).^{2 3} In this case, the strata company, by its management statement of 21 December 2016 (as notified by instrument N516716), repealed the by-laws as contained in Sch 1 and Sch 2 of the ST Act and replaced them with a new Sch 1 By-Laws 1 to 51.2 and Sch 2 By-Laws 1 to 28 (the **by-laws**).

4 Because of Gary's alleged breaches of the by-laws, the strata company made an application to the Tribunal seeking orders under s 83(1), s 81(10), s 103(I) of the ST Act and s 95(1) of the *State Administrative Tribunal Act 2004* (WA) (**SAT Act**) with the ultimate intent that Mr and Mrs Tear be made responsible for the actions of Gary by requiring them to terminate Gary's occupancy of lot 54.

5 While Mr and Mrs Tear acknowledge that Gary breached some of the by-laws on several occasions,⁴ Gary strongly asserted that he did

¹ Section 42(6) of the ST Act.

² Section 42 of the ST Act.

³ Major amendments to the ST Act coming into operation on 1 May 2020 under the *Strata Titles Amendment Act 2018* (WA). In this case as the application was filed with the Tribunal before 1 May 2020, therefore the provisions of the ST Act, as they were before the amendments, apply to the determination of this application: cl 30(1) of Sch 5 of the *Strata Titles Act 1985* (WA) (after 1 May 2020). All references to the provisions of the ST Act in these reasons are to those in the ST Act as it was prior to 1 May 2020 unless expressly stated otherwise.

⁴ Hearing book at pages 215-216.

not breach any of the by-laws.⁵ Mr and Mrs Tear and Gary strongly oppose any of the orders sought by the strata company.

6 The issues to be determined by the Tribunal are as follows:

- a) What is the dispute between the parties?
- b) Which of the by-laws, if any, did Gary breach?
- c) If Gary did breach any of the by-laws, should the Tribunal make the following orders sought by the strata company:
 - i) an order that Mr and Mrs Tear terminate Gary's occupancy of lot 54;
 - ii) an order that until Mr and Mrs Tear terminate Gary's occupancy of lot 54, that Gary refrain from breaching any of:
 - (i) Sch 1 by-laws 33.5, 41.2(1), 42.2(1), 42.2(2), 42.2(3) and 44.2; and
 - (ii) Sch 2 by-laws 3.1(1), 3.1(4), 5.1, 5.1(1), 5.1(2), 5.1(3), 5.2(1), 5.2(7), 5.3(1), 5.3(3), 5.3(4), 6.1(1), 6.1(3), 14.1, 14.5(1), 14.5(2), 15.1, 16.3(3), 16.3(4) and 28;
 - iii) an order that Gary pay a penalty of \$500 to the strata company;
 - iv) an order that the decision of the Tribunal is one to which s 95(1) of the SAT Act applies; and
 - v) an order that the above orders (apart from a monetary order) will not cease to have any force to effect upon the expiration of the period of two years that next succeeds the making of the orders.

7 For the reasons given below, the strata company's application is partly successful.

⁵ ts 12, 23 February 2021.

What is the dispute between the parties?

8 The strata company made its application to the Tribunal under s 83(1) of the ST Act which is found in Div 3 of Pt VI titled 'Resolution of disputes'. That section relevantly authorises the Tribunal to determine issues in dispute between the parties, if the order(s) sought from the Tribunal is 'for the settlement of a dispute' or the 'rectification of a complaint' which relates to 'the failure to exercise or perform ... a ... duty or function ... imposed by the by-laws in connection with [the] [strata scheme]'

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

10 In addition, s 83(4) of the ST Act precludes the Tribunal from making an order under s 83(1) of the ST Act if the duty or function that Gary has failed to perform can only be exercised or performed pursuant to a unanimous resolution, resolution without dissent or a special resolution of the proprietors of the lots in the strata scheme.

11 It is common ground that the 'dispute' between the parties is whether, since about October 2017, Gary, as the tenant of lot 54, breached one or more of the by-laws.

12 I respectfully agree that this is the relevant 'dispute' for the purposes of s 83(1) of the ST Act. Such a dispute does not require consideration of s 83(4) of the ST Act.

Which by-law(s) did Gary breach?

13 The strata company submits that it has 'reached the end of the road' in trying to have Gary, as the tenant of lot 54, comply with his obligations under the by-laws. It is the strata company's position that Gary has continued to 'thumb his nose' at the requirement that he comply with the by-laws even after Mr and Mrs Tear intervened to have Gary comply with the by-laws.

14 The strata company alleges that Gary has breached the by-laws at least 25 times since October 2017. The alleged breaches, according to

the strata company, include Gary parking his vehicle in other proprietors' car bays in the strata complex, Gary removing chairs from the residents' lounge, and Gary breaking into the games room and breaching the COVID-19 protocols.⁶

15 Mrs Tear explained:^{7 8}

- Gary has done some silly things regarding the alleged breaches of the by-laws but he is a very honest and trustworthy person. She is sorry that '[Gary] keeps upsetting people' and she apologises.
- She received the breach notices from the strata company and gave them to Gary.
- Storage of tools and supplies for a business that need to be transported within the car parking facility of the strata complex is not for a residential use, however, Gary now uses a unit in Wangara to park the business van.
- The parking issues are 'trivial'.

16 As noted earlier, the by-laws apply to the strata company, proprietors, tenants and occupiers. Part IV of the ST Act is headed 'Management' and Div 1 of Pt IV is headed 'Strata companies'. Div 1 sets out, amongst other things, the duties of strata companies. Relevant to this proceeding is the duty of the strata company to enforce the by-laws.⁹

17 The proprietors of the lots in the strata complex also have duties under the ST Act. The duties of the proprietors of a lot (in this case, Mr and Mrs Tear) that are relevant in this proceeding are:

- to take all steps that are reasonable in the circumstances to ensure that every occupier or other resident of that lot complies with the by-laws;¹⁰

⁶ Hearing book at pages 197-200 and 208s-208u.

⁷ ts 58, 23 February 2021.

⁸ ts 59, 23 February 2021.

⁹ Section 35(1)(a) of the ST Act.

¹⁰ Section 42(7) of the ST Act.

- to give each occupier a copy of the by-laws and the rules (if any) at the commencement of occupation; and¹¹
- to procure that the occupancy agreement contains a provision to the effect that the occupier will comply with the by-laws and any rules.¹²

18 I now turn to consider each of the alleged breaches of the by-laws by Gary.¹³ I have grouped the alleged breaches into the following categories:

- vehicles (alleged breaches # 2, 5, 6, 7, 11, 12, 13, 15, 19, 20, 21, 23, 24, and 25);
- rubbish and storage of items (alleged breaches # 1 and 18);
- removing chairs from the residents' lounge (alleged breaches # 3 and 9);
- damage to common property vehicle gate (alleged breaches # 4 and 22);
- damage to common property front door of lot 54 (alleged breach # 8);
- camera installed on common property (alleged breach # 10);
- invitees to lot 54 failure to clean up after dog defecation on common property (alleged breach # 14);
- installation of peephole and keypad lock to common property front door of lot 54 (alleged breach # 16); and
- break in to the games room and breach of COVID-19 protocols (alleged breach # 17).

Vehicles

19 Sch 2 by-law 14 concerns vehicles. It provides that a proprietor or occupier or invitee must not park or stand a vehicle in any other

¹¹ Hearing book at page 70 (by-law 41.6(2)).

¹² Hearing book at page 70 (by-law 41.6(3)).

¹³ Hearing book at pages 208s-208u.

proprietor's lot car bay or exclusive use car bay, or park or stand a vehicle on common property except within a bay set aside for the parking of a motor vehicle (by-law 14.1). Further, a proprietor, occupier or invitee must not, without the prior written approval of the strata company: (a) park or stand any vehicles upon common property, except as permitted by the by-laws or with the written approval of the council; nor (b) park or stand any vehicle on a part-lot car parking bay lot or common property other than within a car parking bay (by-laws 14.5(1) and (2)).

20 The term 'vehicle' is defined in Sch 1 by-law 1 to mean any 'motor car, van ... or any other conveyance of any kind used as or as an adjunct to a method of transport on land'.

21 The strata company via the strata manager issued written breach notices to Mr and Mrs Tear alleging Gary's vehicle was parked in another proprietor's lot car bay or in a visitor car bay in contravention of the by-laws between 23 October 2017 and 31 December 2020 as follows:

- 23 October 2017 - at 6:00 pm a Perth Glassworks van was parked in lot 130's car bay.
- 24 April 2018 - a Perth Glassworks van was parked in lot 130's car bay.
- 30 April 2018 - a Perth Glassworks van was parked in lot 130's car bay.
- 20 May 2018 - a Perth Glassworks van was parked in lot 130's car bay.
- 28 September 2018 - at 11:25 am a Perth Glassworks van was parked in lot 130's car bay.
- 7 October 2018 - at 12:03 pm a Perth Glassworks van was parked in lot 130's car bay.
- 7 November 2018 - at 4:04 pm a Perth Glassworks van was parked in lot 130's car bay.
- 6 December 2019 - at 8:23 am a Perth Glassworks van was parked in lot 40's car bay.

- 16 June 2020 - a Perth Glassworks van in the lower ground car park in front of the fire stairwell and the fire pump room.
- 17 June 2020 - at 11:35 pm a Perth Glassworks van was parked in a visitor car bay.
- 25 June 2020 - at 7:09 am a Perth Glassworks van was parked at the rear of the building.
- 12 July 2020 - at 13:52 pm a grey BMW vehicle was parked in a visitor car bay on the lower ground level car parking area.
- 31 July 2020 - at 2:45 pm a grey BMW vehicle was parked in lot 7's car bay.
- 4 August 2020 - at 7:09 am a grey BMW vehicle was parked in a visitor car bay.
- 31 December 2020 at 12:30 am a grey BMW vehicle was parked in a visitor car bay.

22 In respect of each of the above breach notices, Ms Stacey Marks, an employee of the strata manager engaged by the strata company, gave evidence that she issued the written breach notices to Mr and Mrs Tear on instruction from the strata company. Further, Ms Marks stated that other proprietors and occupants have also breached the by-laws which are met with a written breach notice but no one has breached the by-laws as persistently as Gary.

23 Each of the written breach notices was accompanied by photographs and/or still images of the CCTV footage. Mr Charles William Hirst, who is employed by the strata company as a part-time building manager for the strata complex, gave evidence that he reviews the CCTV footage at the request of Ms Marks or a member of the Council of Owners in respect of possible breaches of the by-laws and provides to them still images from the CCTV footage.

24 Neither Mr and Mrs Tear nor Gary denied that the Perth Glassworks van and the BMW vehicle belong to Gary. Their position is that the parking issues are 'trivial'.

25 Of concern to Gary was that he needed somewhere to park his van in order to access his tools and supplies which were stored in his

storeroom located on another car parking level in the strata complex away from lot 54's allocated car bay. The need to access the storeroom to obtain tools and supplies is no longer an issue, according to the respondents, as Gary now has access to a unit in Wangara where the van, including the tools and supplies are securely stored.

26 In regards to the BMW vehicle, Gary's evidence is that it belongs to his business and it was one of his employees who parked the car in a visitor car bay, not him.

27 While a vehicle may be parked in a visitor car bay, or on common property that is only possible after the strata company has given approval. In this case, no approval was sought (or given by the strata company) and therefore I find Gary was in breach of Sch 2 by-laws 14.1 and 14.5(1) when the Perth Glassworks van or the BMW vehicle were parked in a visitor car bay or on other common property (for example, at the rear of the strata complex).

28 For the same reasons, in relation to parking the Perth Glassworks van in another proprietor's car bay, I find this is a breach of Sch 2 by-laws 14.1 and 14.5(2). Similarly, I find the Perth Glassworks van parked in front of the fire stairwell and fire pump room, which is common property on 17 June 2020, is in breach of Sch 2 by-laws 14.1, 14.5(1) and 14.5(2).

29 In relation to the above breaches of by-laws in relation to vehicles, the strata company sought to add further breaches of the by-laws, for example, Sch 1 by-law 42.2(3) and Sch 2 by-laws 5.1(1), 5.2(1) and 5.3(1) in its chronology of breaches filed with the Tribunal on 31 August 2020 and Sch 1 by-laws 42.2(1), 42.2(1) and 42.2(2) by way of oral submission at the hearing. Sch 1 by-law 42 sets out acknowledgements and obligations in relation to car bays and visitor car bays and Sch 2 by-law 5 concerns the use of common property. It is not necessary for me to consider these alleged breaches of the by-laws as I have already made a finding that Gary was in breach of the main by-law concerning vehicles, that is Sch 2 by-law 14.

Rubbish and storage of items

30 Sch 1 by-law 33 deals with waste management. By-law 33.5 provides that proprietors are not permitted to: (a) place any waste storage or recycling bins on any verge and in any area other than a designated area on the common property set aside for the storage of waste; and (b) obstruct the common property in any manner which will

prevent or hinder access by any persons and vehicles that require access to the common property for the purpose of removing and collecting waste from any areas set aside for the storage of waste.

31 Sch 2 by-law 3 concerns refuse, cleaning and waste management. By-law 3.1(1) requires that proprietors and occupiers must maintain within their lot, or on such part of the common property as may be authorised, a garbage bin in clean and dry condition and adequately covered. By-law 3.1(4) provides that proprietors and occupiers must not deposit rubbish on common property or on their lots other than properly wrapped or otherwise sealed and placed in garbage bins or chutes provided or approved by the strata company, or on any other lot.

32 Sch 2 by-law 5 concerns the use of common property. By-law 15 requires that a proprietor or occupier not use or store hazardous materials upon a lot or common property.

33 The strata company alleges that on 24 October 2017 Gary transported a recycling bin to the car bay of the proprietor of lot 130 and disposed glass into the recycling bin. Further, the strata company alleges that Gary stored items in an empty storeroom adjacent to the car bay of the proprietor of lot 100.

34 In an email to Mrs Tear on 24 October 2017, Ms Ellyn Pettit, assistant strata manager, requested Mrs Tear to ask Gary to stop disposing glass in the recycling bin and to remove the items and the bin immediately and that failure to do so will result in a breach of Sch 2 by-laws 5.3(1) and (3) and 33.5(1). Further, Ms Pettit asked Mrs Tear to tell Gary that residents are not allowed to remove the bins from the bin rooms.

35 While an email was sent to Mrs Tear about the recycling bin on 24 October 2017, no written breach notice was issued to Mr and Mrs Tear. I infer from this that the glass was removed from the recycling bin and the bin was returned to the bin room as requested by Ms Pettit. Consequently, I find that while Gary did breach Sch 2 by-laws 5.3(1) and (3) and 33.5(1) on 24 October 2017, he completed the actions required by Ms Pettit as there is no evidence before the Tribunal that a written breach notice was issued to Mr and Mrs Tear.

36 Separately, on 16 June 2020, the strata company via its strata manager issued a written breach notice to Mr and Mrs Tear alleging that on 11 June 2020 Gary left items in the fire stairwell (common property) and a bookcase was moved from the storeroom of

lot 54 and left in the lower ground car park lift lobby (common property) contrary to Sch 2 by-laws 3.1(4) and 3.2. Attached to the breach notice was a photograph of items left in the fire stairwell, level 7, south tower. The photograph does not identify Gary.

37 Gary denies that the furniture in the fire stairwell belongs to him.¹⁴

38 I find that items were left in the fire stairwell (common property) as evidenced by the photograph before the Tribunal. Leaving items on common property is contrary to Sch 2 by-law 5. However, on the evidence before the Tribunal, I am not satisfied that the items belong to Gary or that Gary put the items in the fire stairwell or the lower ground car park lift lobby. Consequently, I am not satisfied that Gary breached the by-laws on 11 June 2020 in regards to items in the fire stairwell and the lower ground car park lift lobby.

Removing chairs from the residents' lounge

39 Sch 2 by-law 5 concerns the use of common property, the conduct of proprietors, occupiers and invitees. By-law 5.1(1) provides that proprietors and occupiers must use and enjoy the common property in such a manner as not to interfere with the reasonable use and enjoyment of the common property by other proprietors, occupiers or invitees. By-law 5.2(1) provides that proprietors and occupiers must not use their lots or permit them to be used in such a manner or for such purposes as are illegal or immoral or cause a nuisance to a proprietor or occupier of another lot. By-law 5.3 provides that proprietors and occupiers must not, without the prior consent of the strata company: (a) obstruct the lawful use of the common property by any person or permit to be done anything whereby any obstruction, restriction or hindrance may be caused to the entrances, exits, access roads or pathways and access ways of any lot or any part of the common property; and (b) store any items in or upon the common property.

40 On 15 March 2018 Ms Marks sent an email to Mrs Tear attaching still images from the CCTV footage showing Gary carrying a chair from the residents' lounge and separately a photograph of three chairs left in the hallway. In that email, Ms Marks stated that she would not issue a breach notice and no further action would be taken if the chairs were returned.

¹⁴ ts 29-30, 23 February 2021.

41 On 20 March 2018 Mrs Tear emailed Ms Marks advising that the chairs had been returned to the residents' lounge and the other chairs removed from the hallway. In giving her evidence, Mrs Tear conceded that she relied on what Gary had told her.

42 In his email to Ms Marks on 21 May 2018, Gary conceded that he had 'borrowed' chairs from the residents' lounge. It is Gary's evidence that he did this because his chairs were being repaired and that he 'returned the chairs immediately in perfect order and (sic) cleaned by myself the day mine were returned'.¹⁵

43 Mrs Tear in her written submissions to the Tribunal of 23 November 2020 acknowledged that Gary 'borrowed some dining chairs and had left his broken chairs in the passage'. Further, Mrs Tear wrote that 'the chairs left in the passage were neatly stacked to the side so not to obstruct any passers by and [Gary] had returned the chairs to the common area within a couple of days'.¹⁶ It appears that this submission made by Mrs Tear is in regards to the incident of 15 March 2018.

44 In relation to the alleged breach of Sch 2 by-law 5 on 15 March 2018, Gary conceded that he removed chairs from the residents' lounge but that he returned them. On that basis, while I find Gary breached Sch 2 by-law 5(1) on 15 March 2018, I do not intend to consider this breach further as Ms Marks in her email stated that no further action would be taken if the chairs were returned (which was not denied by the strata company).

45 Separately, on 22 July 2018, the strata company via its strata manager issued a written breach notice to Mr and Mrs Tear alleging Gary took two chairs from the residents' lounge on 4 July 2018 and took them to the 7th floor (which is where lot 54 is located) and thereby breached Sch 2 by-law 5.1(1). Attached to the breach notice is three still images from the CCTV footage with the date 4 July 2018 showing Gary in the residents' lounge and in the elevator with a chair from the residents' lounge.

46 It is clear from the still images from the CCTV footage of 4 July 2018, that Gary removed at least one chair from the residents' lounge and took it to the 7th floor which is where lot 54 is located. Consequently, I find that on 4 July 2018 Gary breached Sch 2

¹⁵ Hearing book at page 115.

¹⁶ Hearing book at page 212.

by-law 5.1(1) in that he removed at least one chair from the residents' lounge (common property) and took it to the 7th floor (which is where lot 54 located).

Damage to common property vehicle gate

47 On 26 April 2018, the strata company issued a written breach notice to Mr and Mrs Tear alleging that on 22 April 2018 at 11:28 pm a visitor to lot 54 damaged the strata complex's vehicle gate. In its chronology of breaches filed with the Tribunal on 30 August 2020, the strata company included Sch 2 by-law 6.1(1) as also being breached by Gary on 22 April 2018. That by-law requires proprietors and occupiers to take all reasonable steps to maintain the safety and security of the strata scheme.

48 On 21 May 2018, Gary emailed Ms Marks stating that 'the gate incident and cctv footage ... has nothing to do with [Gary] as they were visitors unknown to [Gary] and very unjustified to automatically assume they were associates of [Gary] simply because [Gary] was seen interacting with them as that's the normal response a friendly neighbour would give. That in no way should implicate [Gary] to be responsible for any and all damages to the complex gate by these anonymous people'.

49 There was no CCTV footage before the Tribunal in regards to the incident alleged by the strata company on 21 May 2018. I am not satisfied on the evidence before the Tribunal that the visitor(s) who damaged the strata complex's vehicle gate were in fact Gary's invitees. The consequence is that I cannot find that Gary, through his invitees, breached the by-laws as alleged by the strata company on 21 May 2018.

50 Separately, on 17 July 2020 the strata company via its strata manager issued a written breach notice to Mr and Mrs Tear alleging that on 10 July 2020 at 17:25 pm Gary gained entry to the south-east section of the car park of the strata complex by removing the cover of the sliding gate controller and then shorting out the control circuitry so that the gate opened. The strata company alleges that Gary's action on 10 July 2020 is a breach of Sch 2 by-law 22(1) which concerns common property damage and provides that if damage of any nature is caused to any part of the common property by the actions of any proprietor or occupier, the proprietor must bear the full cost of making good such damage. No evidence was adduced by the strata company as to the cost, if any, of making good any damage to the gate and control circuitry. Attached to the breach notice is a still image from the CCTV

footage of 10 July 2020. At hearing the strata company submitted that the air-key records of 10 July 2020 for lot 54 show each time access was denied to Gary's air-key entries through the 'Res sliding Gate East'.

51 Mr Hirst explained that the air-key for lot 54 has access to lot 54 and level 7, the ground level and lower ground parking level B1 which is where lot 54's car bay and storage room is located. Mr Hirst said the air-key for lot 54 does not have access beyond the 'Res sliding Gate East'.

52 Mrs Tear in her written submission to the Tribunal dated 23 November 2020 stated that Gary had mentioned to her the he had been unable to gain access to the level where his storeroom is located with his vehicle. Mrs Tear described this situation as 'unreasonable' and that because Gary could not access that area, Gary had resorted to shorting the electrical box in order to enter that area. Gary's evidence is that others also short the control circuitry in order for the gate to open.

53 The outcome for breaching Sch 2 by-law 22(1) is for the proprietor (in this case, Mr and Mrs Tear) to pay for the cost of making good any damage to the gate and control circuitry. I find Gary breached Sch 2 by-law 22(1) on 10 July 2020.

54 In its chronology of breaches filed with the Tribunal on 30 August 2020, the strata company sought to add Sch 2 by-laws 5.1(1), 5.2(7) and 6.1(1) which concern use of common property and the requirement for proprietors and occupants to take reasonable steps to maintain the safety and security of their lots and the strata scheme. These were not included in the written breach notice issued 10 July 2020. The sliding gate and controller are located on common property which under Sch 2 by-law 5.2(7) must not be damaged except for reasonable wear and tear during its use for the purpose for which it is intended or used. Gary did not deny shorting out the control circuitry on 10 July 2020 so that the gate opened for his vehicle to pass through. Further, Gary did not challenge the strata company's evidence that the air-key for lot 54 was denied access through the 'Res sliding Gate East' on 10 July 2020. I am therefore satisfied that on 10 July 2020 Gary shorted out the control circuitry in order for the gate to open, and in doing so, he breached Sch 2 by-laws 5.1(1) and 5.2(7).

Suspected criminal activity on lot, leading to damage to common property in police raid

55 On 30 May 2018, Ms Marks in an email to Mrs Tear stated that the front door of lot 54 was damaged beyond repair by the Police that day. Further, Ms Marks wrote in her email that the cost of replacing the door is the responsibility of the proprietors due to the circumstances. She asked Mrs Tear to let her know how she wished to proceed. Attached to the email is a photograph of the damaged door. In her email, Ms Marks made no reference to which by-law had been breached. However, it can be inferred that the breach was that of Sch 2 by-law 22(1) as Ms Marks stated that the proprietors are required to pay the cost of replacing the door.

56 In its chronology of breaches filed with the Tribunal on 30 August 2020, the strata company sought to add Sch 1 by-law 41.2(1) and Sch 2 by-laws 5.1(2), 5.2(1) and 6.1(1). There was no reference to these by-laws in Ms Mark's email of 30 May 2018. Schedule 2 by-law 5 concerns common property and by-law 5.2(1) provides that the proprietor or occupant must not use the lot for illegal or immoral purposes. Schedule 2 by-law 6 concerns safety and security.

57 There is no evidence before the Tribunal to support the strata company's position that lot 54 was used for illegal or immoral purposes.

58 I find the door to lot 54 (common property) was damaged on 30 May 2018 as evidenced by the photograph before the Tribunal. That, in my view, at best may be a breach of Sch 2 by-law 6.1(1) which requires the respondents to not permit any obstruction to the entrance of lot 54. There is no evidence before the Tribunal to support a finding that Gary breached any other by-law on 30 May 2018.

Camera installed on common property

59 On 12 September 2018, Ms Pettit by email to Mrs Tear reported that she (the strata manager) had been notified that a security camera had been installed in a vent outside the door of lot 54. Ms Pettit requested the camera to be removed if it belonged to lot 54. Two photographs were attached to Ms Pettit's email. Further, in the email, Ms Pettit stated that if the camera is not removed within the next 48 hours, then the strata company would have it removed and the cost billed to Mrs Tear. In the email there is no reference to which by-law had been breached.

60 In its chronology of breaches filed with the Tribunal on 30 August 2020, in regards to the camera the strata company referred to Sch 2 by-laws 5.1(1), 5.2(7), 5.3(3) and 5.3(4) which concern the use of common property.

61 Gary explained at hearing that he had the camera put into the air vent outside the door of lot 54 in 2018 because he was concerned about his safety and the safety of the strata complex. Gary conceded that this was done without the approval of the strata company but noted that other proprietors or occupiers have also installed cameras.

62 On Gary's concession I find he had installed a security camera in the vent outside the door of lot 54 (on common property). This is a breach of Sch 2 by-laws 5.1(1), 5.2(7) and 5.5(3).

Failure to clean up after dog defecation on common property

63 On 6 November 2019 the strata company via its strata manager issued a written breach notice to Mr and Mrs Tear alleging that on 30 October 2019 Sch 2 by-laws 16.3(3) and (4) were breached when the occupant(s) of lot 54 allowed a dog to defecate on the carpet of the 7th floor outside lot 54 and although they did attempt to clean up the mess, a professional clean was needed to remove the staining. The strata company stated the cleaning costs would be on charged. No submissions were made by the strata company regarding the professional cleaning costs. I infer the strata company recovered its costs in having the carpets professionally cleaned.

64 Sch 2 by-laws 16.3(3) and (4) concern animals. The proprietor or occupier is responsible for the health, hygiene, control and supervision of the animal and must ensure the animal does not interfere with the quiet and peaceful enjoyment of the scheme by other proprietors.

65 None of respondents made any submission regarding the dog or the dog's defecation on common property. I therefore find Gary breached Sch 2 by-laws 16.3(3) and 16.3(4) as he failed to supervise the dog and allowed the dog to interfere with the quiet and peaceful enjoyment of the strata scheme by other proprietors by allowing the dog to defecate on the carpet on the 7th floor outside of lot 54 resulting in staining of the carpet which required a professional clean.

Installation of peephole and keypad lock (not fire compliant) to common property door

66 On 13 January 2020 Ms Marks emailed Mrs Tear to state that the lock on the front door of lot 54 was removed and replaced with an electronic type of keypad/lock which is not permitted without prior written consent as required by Sch 2 by-law 7.1. Ms Marks requested Mrs Tear to arrange for the keypad to be removed and to reinstate the lock that was removed prior to 27 January 2020 to avoid any further action by the strata company. On 4 February 2020, Ms Marks requested Mrs Tear to have the peephole on the front door of lot 54 removed and made good.

67 Following an inspection of front door of lot 54 by a certified fire door installer, the strata company via its strata manager wrote to Mr and Mrs Tear stating that the keypad lock is not fire rated and is to be removed with the original handle/lock/hardware reinstated. Further, the strata company required the peephole to be removed as, even though it has not affected the fire rating of the door, it was not authorised, or alternatively, for Mrs Tear to seek approval from the strata company to keep the peephole.

68 In its chronology of breaches filed with the Tribunal on 30 August 2020, the strata company sought to add Sch 2 by-law 5.2(7) concerning damage to common property and by-law 6.1(1) concerning taking reasonable steps to maintain the safety and security of the lot.

69 None of respondents made any submission regarding the peephole and keypad lock.

70 I find that the removal of lock on the front door of lot 54 and the installation of a different electronic type keypad/lock and peephole is not in keeping with the rest of the strata scheme and is therefore a breach of Sch 2 by-law 7.1. Further, I find the installation of the different electronic type keypad/lock and peephole to be damage to common property (front door of lot 54) and is therefore a breach of Sch 2 by-law 5.2(7).

Unauthorised use of common property - break into games room and breach of COVID-19 protocols

71 On 2 April 2020, the strata company via its strata manager wrote to Mr and Mrs Tear alleging that at about 11.19 pm on 31 March 2020 Gary and his guest broke into the residents' games room which had

been closed due to the COVID-19 pandemic and were playing table tennis. Still images from the CCTV footage of 31 March 2021 were attached.

72 The strata company allege Gary's actions are a breach of Sch 1 by-law 44 which concerns the use of recreational facilities and provides that it may make rules regarding the use of recreational facilities from time to time. Sch 2 by-law 5.1(3) requires Gary to ensure his guest complies with the by-laws, and by-law 6.1(3) requires Gary to comply with all directions of the strata company concerning the safety and security of the strata scheme. By-law 28 concerns limiting access to parts of the common property.

73 Mrs Tear in her written submission to the Tribunal of 23 November 2020 stated that Gary's action on 31 March 2020 was the most serious breach of the by-laws as this was during COVID-19 restrictions when the games room was closed to tenants. Mrs Tear stated that Gary entered the games room and played table tennis with a colleague whom he has daily contact with. She sought to mitigate the breach by stating the risk was minimal due to Western Australia having no community transmission. Mrs Tear concluded her submission by stating that Gary acknowledges that this was an error in his judgment and that he should not have entered the games room.

74 I find Gary ignored the safety and security of the strata complex by going into the games room with a guest to play table tennis on 31 March 2020 when proprietors and occupiers were instructed not to go into the residents' games room due to the COVID-19 pandemic. By doing so, on 31 March 2020, Gary breached Sch 1 by-law 44 and Sch 2 by-laws 5.1(3) and 6.1(3).

What orders should the Tribunal make?

75 The strata company's position is that:

- (a) it has not 'targeted' Gary; and
- (b) its application:¹⁷
 - (i) against Gary is based on his 'repeated, wilful and persistent' breaches of the by-laws, continuing after the application was served on him; and

¹⁷ Hearing book at pages 193-195.

- (ii) against Mr and Mrs Tear because of their failure to take sufficient steps in the circumstances, even after the application was served on them, to ensure that their son, Gary, comply with the by-laws.

76 It is the evidence of the strata company that the steps taken by Mr and Mrs Tear to ensure Garry comply with the by-laws, which were at the most the passing on of breach notices and asking Gary to comply with the by-laws, were not effective.

77 The strata company submits that in order to ensure the continued good governance of the strata scheme, the only action now available to prevent further breaches by Gary is an order from the Tribunal requiring Mr and Mrs Tear to terminate Gary's occupancy of lot 54 as no other action will be effective.

78 Mrs Tear explained:^{18 19}

- Gary lost his business due to bad management and had nowhere else to go so she and Mr Tear purchased lot 54 and allowed Gary to live there rent free on the hope that '[Gary] would get his act together and behave himself'. She has told Gary many times 'to behave himself and keep his head above water and do as - what everyone else does and be - do as he's told'.
- Some of the breaches are more serious but none which warrant Gary having to be evicted from lot 54.
- There has been one breach of the by-laws on 31 December 2020 but none since.

79 In her written submission to the Tribunal of 23 November 2020, Mrs Tear pleaded:

We do not believe that the incidents that have been presented to us would warrant eviction & ask that Gary has the opportunity to stay in the apartment & continue without breaching rules & regulations of the property.

80 Gary filed character references with the Tribunal.²⁰ The character references are complimentary of Gary, including that Gary is

¹⁸ ts 58, 23 February 2021.

¹⁹ ts 59, 23 February 2021.

'trustworthy and honest, and possesses high levels of integrity and emotional intelligence'. None of the character references was called by Gary, therefore were not able to be cross-examined. Consequently, I place little weight on the character references.

81 The strata company seeks various orders from the Tribunal as set out above in [6]. The respondents oppose any orders.

82 For the reasons that follow, the Tribunal will make orders to resolve the dispute between the parties.

Should Gary's occupancy of lot 54 be terminated?

83 Under s 42(7) of the ST Act, it is the responsibility of the proprietors, in this case Mr and Mrs Tear, to take all steps that are reasonable in the circumstances to ensure that Gary, as the occupier or resident of lot 54, complies with the by-laws.

84 The strata company says the steps whereby Mr and Mrs Tear passed on the breach notices to Gary were ineffective. Further, the strata company submits that while Mr and Mrs Tear have asked Gary to comply with the by-laws, they have never threatened Gary with termination of his occupancy of lot 54 if he continued to fail to comply with the by-laws. Mrs Tear's response was simply, 'Where would [Gary] go as he has nowhere [else] to go?'

85 The strata company is concerned that the evidence given by Mr and Mrs Tear was 'whataboutism' where they focused on other people breaching the by-laws, and not on Gary's breaches of the by-laws. In response, Ms Marks, in her evidence, accepted that other occupiers breached the by-laws and they were issued written breach notices. However, Ms Marks was clear that no other occupier of the strata complex has breached the by-laws as persistently as Gary.

86 Mrs Tear submits that when you have many people in a building, such as the strata complex, not everyone is going to get along and that there will be conflict from time to time. The key factor, according to Mrs Tear, is how the conflict is dealt with. It is Mrs Tear's evidence that while she has received various breach notices from the strata company, Gary has not been approached by any tenants to discuss the alleged breaches of the by-laws with the result he has not had the opportunity to resolve the conflict personally.

²⁰ Hearing book at pages 219b-219c.

87 The by-laws apply to the strata company, the proprietors, tenants and occupiers. Further, each of these persons have responsibilities under the ST Act as explained above in [16]-[17]. Other tenants in the strata scheme are not required to discuss alleged breaches of the by-laws with Gary (as Mrs Tear would like). Rather, under the ST Act, it is the obligation of the strata company to enforce the by-laws.

88 I accept that Gary's breaking into the games room with his guest to play table tennis on 31 March 2020 is a serious breach as described by Mrs Tear. The incident was a once off incident and the breach occurred shortly after the COVID-19 pandemic was declared.

89 I do not accept that the vehicle (parking) breaches are 'trivial' as stated by Mrs Tear that have 'caused some inconvenience at times'. In regards to Gary's BMW vehicle no approval was sought (or given by the strata company) for it to be parked in a visitor car bay (common property) on a number of different dates. The evidence before the Tribunal is that Gary's Perth Glassworks van, tools and materials are now stored at a unit in Wangara with the result the strata company has not issued a breach notice in respect of the Perth Glassworks van since 25 June 2020. I find Gary's breaches in respect of the vehicles were persistent, as they continued to occur regardless of the strata company issuing Mr and Mrs Tear written breach notices.

90 Gary's other breaches of the by-laws including the damage to the common property vehicle gate and the door of lot 54, the installation of peephole and keypad lock on the door of lot 54, and the removal of chairs from the residents' lounge are all of concern. However, in my view, Gary's breach of various by-laws, either alone or in combination, is not sufficient, subject to the comments set out in the next paragraph to require Mr and Mrs Tear to terminate Gary's occupancy of lot 54 at this time.

Should Gary be required to refrain from breaching the by-laws until his occupancy of lot 54 is terminated?

91 While I have found that this is not a case requiring the proprietors, Mr and Mrs Tear, to terminate Gary's occupancy of lot 54 at this time, it is in my view, appropriate for the Tribunal to make an order requiring the proprietors, Mr and Mrs Tear, to take all reasonable steps to ensure Gary, the occupier of lot 54 on Strata Plan 67587, does not act in a manner which constitutes a breach of any of the:

- Schedule 1 by-laws 42.2 (visitor car bays) and 44.2 (use of recreational facilities); and
- Schedule 2 by-laws 5.1, 5.1(1), 5.1(2), 5.1(3), 5.2(1), 5.2(7), 5.3(1), 5.3(3), 5.3(4) (use of common property), 6.1(1), 6.1(3) (safety and security of lot and strata scheme), 14.1, 14.5(1), 14.5(2), 14.5(3) (vehicles), 16.3(3), 16.3(4) (animals),

including, if that is Mr and Mrs Tear's only means of preventing such breaches of the above listed by-laws, the termination of occupancy of Gary from lot 54.

Should Gary be required to pay a penalty of \$500?

92 By-laws made by the strata company may provide for a penalty for a breach of any specified provision of the by-laws.²¹ In this case, Sch 1 by-law 46 provides for a penalty for a breach of a by-law as follows:

46.1 Subject to Section 42A of the Act, the penalty for breaching any of Schedule 1 By-Laws or any Schedule 2 By-Law shall be \$500 or such other amount as may from time to time be prescribed by the Act.

93 However, a penalty may only be imposed by an order of the Tribunal provided that it is satisfied that:²²

- (a) the by-law specifies a penalty for breach of it; and
- (b) the strata company has authorised the application; and
- (c) the proprietor has wilfully and persistently breached the by-law.

94 The strata company seeks an order from the Tribunal requiring Gary to pay a penalty of \$500 as set out in Sch 2 by-law 46.1. The respondents oppose any order.

95 As set out earlier, I have found Gary to be in breach of various by-laws, for example Sch 2 by-law 14 regarding vehicles (parking). Gary breached Sch 2 by-law 14 on numerous occasions. While Mrs Tear sought to defend Gary's actions in breaching by-law 14 on the basis that Gary required his tool and supplies from his storeroom which

²¹ Section 42 and 42A of the ST Act.

²² Section 103I of the ST Act.

was located on another level away from his allocated car bay, he continued to do so until other arrangements were made to securely park his Perth Glassworks van, tools and supplies at a unit in Wangara. I find that Gary willfully and persistently breached Sch 2 by-law 14 by parking his vehicles in other proprietor's car bays or in visitor car bays or on common property as it suited him, contrary to the by-laws. The consequence is that, in my view, it is appropriate in all of the circumstances of this case to make the order sought by the strata company, under s 103I of the ST Act, that is, a fine of \$500 to be paid by Gary to the strata company.

Should the orders not cease?

96 The strata company also seeks an order that the orders of the Tribunal are not to cease to have force or effect upon the expiration of the period of two years that next succeeds the making of the orders (apart from in relation to the penalty payable to the strata company).²³

97 In my view it is appropriate to make the order sought by the strata company. This is because the strata company has issued since October 2017 multiple and regular breach notices to Mr and Mrs Tear in relation to lot 54. Further, Gary has failed to comply with the by-laws since October 2017, in particular regarding vehicles (parking).

Should the Tribunal make a declaration?

98 The strata company seeks an order under s 95(1) of the SAT Act. That section provides that a person who fails to comply with a decision of the Tribunal (apart from a monetary order) commits an offence. The penalty is \$10,000. In order for the penalty to apply, the Tribunal, in its decision, must declare that s 95(1) of the SAT Act applies.

99 The strata company has since October 2017 issued multiple and regular breach notices to Mr and Mrs Tear in relation to lot 54. Further, Gary has failed to comply with the by-laws, in particular regarding vehicles (parking). In all of these circumstances, I find this is an appropriate case for an order to be made that s 95(1) of the SAT Act applies to this decision (apart from the monetary order).

Conclusion

100 For the above reasons, the Tribunal will make the following orders.

²³ Section 81(10) of the ST Act.

Orders

The Tribunal orders:

1. Pursuant to s 83(1) of the *Strata Titles Act 1985* (WA) as it was before 1 May 2020, Robert Tear and Bernadette Tear are to take all reasonable steps to ensure that the occupier of lot 54 on Strata Plan 67587, Gary Tear, not act in a manner which constitutes a breach of any of the:
 - Schedule 1 by-laws 42.2 (visitor car bays) and 44.2 (use of recreational facilities); and
 - Schedule 2 by-laws 5.1, 5.1(1), 5.1(2), 5.1(3), 5.2(1), 5.2(7), 5.3(1), 5.3(3), 5.3(4) (use of common property), 6.1(1), 6.1(3) (safety and security of a lot and strata scheme), 7.1 (lot appearance) 14.1, 14.5(1), 14.5(2), 14.5(3) (vehicles), 16.3(3), 16.3(4) (animals),
including, if that is Robert Tear and Bernadette Tear's only means of preventing such breaches of the above listed by-laws, the termination of occupancy of Gary Tear from lot 54.
2. Pursuant to s 103I of the *Strata Titles Act 1985* (WA) as it was before 1 May 2020, Gary Tear shall pay to The Owners of Motive Apartments Strata Plan 67587 the sum of \$500 by 31 May 2021.
3. Pursuant to s 81(10) of the *Strata Titles Act 1985* (WA) as it was before 1 May 2020, these orders (apart from the monetary order under order 2) will not cease to have force or effect upon the expiration of the period of two years that next succeeds the making of the orders.
4. Section 95(1) of the *State Administrative Tribunal Act 2004* (WA) applies to this decision (apart from the monetary order under order 2).

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

MS R PETRUCCI, MEMBER

21 APRIL 2021