
JURISDICTION : STATE ADMINISTRATIVE TRIBUNAL

ACT : STRATA TITLES ACT 1985 (WA)

CITATION : JARVIS and THE OWNERS OF HORIZON
APARTMENTS ON CENTRAL STRATA PLAN
53941 [2023] WASAT 117

MEMBER : MS R PETRUCCI, MEMBER

HEARD : 7 NOVEMBER 2023

DELIVERED : 4 DECEMBER 2023

FILE NO/S : CC 547 of 2022

BETWEEN : BEVERLY JOY JARVIS
First Applicant

MATTHEW THOMAS FROUDE & JODI
ELIZABETH FROUDE
Second Applicants

AND

THE OWNERS OF HORIZON APARTMENTS ON
CENTRAL STRATA PLAN 53941
Respondent

Catchwords:

Strata Titles Act 1985 (WA) - Preliminary issue - Scheme by-laws - Common property - Proper construction of scheme by-law 17 'Repair and Maintenance of Premises' and by-law 19 'Exclusive use' - Whether written consent required for exclusive use - 'Exclusive use property' - Whether by-law 19 confers exclusive use and enjoyment of, or special privileges over part of the common property - Repair and maintenance of premises

Legislation:

State Administrative Tribunal Act 2004 (WA), s 38(1)

Strata Titles Act 1985 (prior to 1 May 2020), s 5C, s 5C(3), s 35(1)(b), s 42, s 42A, s 42B, s 42(2), s 42(8), s 42(9), Sch 1, Sch 2, Sch 2A

Strata Titles Act 1985 (WA), Sch 1, Sch 2, Sch 2A, Sch 5, s 3, s 3(2)(a), s 5C, s 5C(3), s 13(9), s 17, s 32, s 35(1)(b), s 35(1)(c), s 36, s 42, s 42A, s 42B, s 42(2), s 42(8), s 42(9), s 43, s 43(1), s 43(2), s 43(3), s 43(4), s 43(5), s 44, s 44(1), s 45(1)(e), s 91(1), s 91(1)(c), s 100, s 140(3), s 197(4), Pt 4, Div 4
Strata Titles Amendment Act 2018 (WA)

Result:

Preliminary issue determined

Application dismissed

Category: B

Representation:

Counsel:

First Applicant : In Person
Second Applicants : In Person
Respondent : Mr P Mariotto

Solicitors:

First Applicant : N/A
Second Applicants : N/A
Respondent : HWL Ebsworth Lawyers

Cases referred to in decision(s):

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

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

CIC Insurance Ltd v Bankstown Football Club Ltd (1997) 187 CLR 384

Codelfa Construction Pty Ltd v State Rail Authority (NSW) [1982] HCA 24;
(1982) 149 CLR 337

Erbrich and The Owners of 125 Herdsman Parade Wembley (Strata Plan 38066)
[2020] WASAT 109

Project Blue Sky Inc v Australian Broadcasting Authority (1998) 194 CLR 355;
[1998] HCA 28

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

Topic and The Owners of Raffles Waterfront Strata Plan 48545
[2016] WASAT 27

REASONS FOR DECISION OF THE TRIBUNAL:

Introduction

1 These proceedings concern a dispute at the strata scheme known as 'Horizon Apartments on Central' located in Maylands. The scheme was created by the registration of Strata Plan 53941 on 30 March 2009 under the *Strata Titles Act 1985 (WA) (ST Act)*.¹

2 The first applicant is Mrs Beverly Joy Jarvis (**Mrs Jarvis**). Mrs Jarvis purchased Lot 1 on Strata Plan 53941 on 12 May 2021. Lot 1, as depicted on the ground floor plan and the basement floor plan of the strata plan, is 159m² and comprises five parts as follows:

- part Lot 1 of 87m² (the **residence**);
- part Lot 1 of 42m² noted as a 'courtyard' on the strata plan, however in these reasons I have used the term 'the balcony' as the parties have used that term (the **balcony**);
- part Lot 1 of 13m² (the **car bay**);
- part Lot 1 of 13m² (the **second car bay**); and
- part Lot 1 of 4m² (the **storeroom**).

3 Following documents filed by Mrs Jarvis with the Tribunal on 19 November 2023, the Tribunal held a directions hearing at which Mr Matthew Thomas Froude and Mrs Jodi Elizabeth Froude (**Mr and Mrs Froude**) were joined as the second applicants to these proceedings. Mr and Mrs Froude recently purchased Lot 7 on Strata Plan 53941. Lot 7 as depicted on the ground floor plan and the basement floor plan of the Strata Plan 53941 is 133m² and comprises five parts as follows:

- part Lot 7 of 76m² (the **residence**);
- part Lot 7 of 40m² (noted as 'courtyard' on the strata plan) (the **balcony**);
- part Lot 7 of 13m² (the **car bay**); and
- part Lot 7 of 4m² (the **storeroom**).

¹ See also para [22].

4 The respondent is The Owners of Horizon Apartments on Central
Strata Plan 53941 (the **strata company**).

5 Within a year of purchasing her lot, Mrs Jarvis, on 9 May 2022,
commenced proceedings in the Tribunal under s 140(3) of the ST Act.
On 17 October 2023 the Tribunal gave leave to Mrs Jarvis to amend her
application to be an application under s 197(4) of the ST Act for the
resolution of a scheme dispute concerning who is responsible for the
repair and maintenance of the tiles on the balcony of her Lot 1.

6 Mrs Jarvis is concerned about loose and drummy tiles on her
balcony. Mrs Jarvis alleges that during periods of rain the drain that is
fed by the downpipe from the common property roof overflows onto
the neighbouring Lot 2's balcony which then flows into her balcony
causing damage to the tiles on her balcony.

7 Mrs Jarvis claims the strata company is responsible for rectifying:²

(a) ... the downpipe installation problem on ALL balconies
adjoining our lot, where the water is discharging onto tiled
areas; and

(b) ... our tiled balcony[.]

8 In addition, Mrs Jarvis seeks clarification from the Tribunal as to
what are the lot boundaries of the area identified in the Strata Plan as
'courtyard' (or the 'balcony' as referred to by the parties) in relation to
the definition of the floor.³

9 The strata company opposes Mrs Jarvis' application and submits it
should be dismissed.

Preliminary issue

10 By consent of Mrs Jarvis and counsel for the strata company,
I made an order on 3 November 2023 setting out the following
preliminary issue for determination:

Under the scheme by-laws, who is responsible for the repair and
maintenance of the balcony tiles (refer by-law 1:
Definitions, 17: Repair and maintenance, and 19: Exclusive Use)?

11 The answer to the preliminary issue will require the scheme
by-laws, in particular by-laws 17 and 19, to be properly construed.

² Mrs Jarvis' attachment to her application to the Tribunal at pages 8 to 9.

³ Ibid at page 9.

12 If Mrs Jarvis' interpretation of the by-laws is correct (which is supported by Mr and Mrs Froude), that the strata company is responsible for the repair and maintenance of the tiles of her balcony, the result will be that the matter will proceed to a final hearing of the substantive application, that is the application under s 197(4) of the ST Act to resolve the scheme dispute.

13 On the other hand, if the strata company's interpretation of the by-laws is correct, that Mrs Jarvis is responsible for the repair and maintenance of the tiles on the balcony of Lot 1, the result will be that the matter is at an end and Mrs Jarvis' application will be dismissed.

14 The preliminary issue was set down for a hearing on 7 November 2023.

15 Mrs Jarvis and Mr Ian Jarvis attended in person and made oral submissions on how the scheme by-laws should be interpreted in relation to the preliminary issue.⁴ In these reasons I will only refer to Mr and Mrs Jarvis' submissions because while Mr and Mrs Froude support the submissions made on the preliminary issue by Mr and Mrs Jarvis, they have not made any separate submissions.⁵

16 Counsel for the strata company also attended in person and made oral submissions on the scheme by-laws in relation to the preliminary question.

17 The oral submissions from both parties largely reflect their respective written outline of submissions which were filed on 7 November 2023. I have had regard to both the written outline of submissions and oral submissions in determining the preliminary issue.

18 For the following reasons, in my view, the scheme by-laws, in particular by-laws 17 and 19, properly construed require the lot owner, in this case Mrs Jarvis, to repair and maintain the tiles on the balcony. This means the matter has come to an end and therefore the application is to be dismissed.

19 Before considering the preliminary issue, (see above at [10]), I will work through the statutory framework as relevant to the

⁴ On 17 October 2023, I made an order under s 38(1) of the *State Administrative Tribunal Act 2004* (WA) allowing Mr Jarvis to represent Mrs Jarvis in these proceedings on the condition that he does not charge for the representation.

⁵ The previous owners of Lot 7, Mr Simon Kristoffer Siobhan and Ms Elizabeth Marshall, were removed as a party to these proceedings by order of the Tribunal on 17 October 2023 as they were no longer the owners of a lot on the Strata Plan.

preliminary issue by reference to the relevant provisions of the ST Act followed by the relevant scheme by-laws. Lastly, I will set out the principles that I will apply in the interpretation of the by-laws.

Statutory framework

Strata plan

20 Strata Plan 53941 was registered on 30 March 2009. The parcel and building is relevantly described as:

Fifty residential apartments in a multilevel development[.]

21 The Strata Plan provides (ground floor plan):

...

The boundaries of the lots or parts of the lots which are buildings shown on the strata plan are the inner surfaces of the walls, the upper surface of the floor and the under surface of the ceiling, as provided by section 3(2)(a) of the Strata Titles Act 1985.

The boundaries of the courtyards shown on the strata plan extends from the outer surfaces of the building walls to the external surfaces of the courtyard walls, where two courtyards share a common wall. The centre plane or the projection of the centre plane of that wall is the boundary.

The stratum of the courtyards shown on the strata plan extends from the upper surface of their floor to the projection of the under surface of the ceiling of its respective adjacent building part lot.

Prior Act

22 The ST Act was extensively amended by the *Strata Titles Amendment Act 2018* (WA) (the **Amending Act**). Those amendments came into effect on 1 May 2020. As the current proceedings were commenced after the amendments took effect, the ST Act in its amended form applies to Mrs Jarvis' application which includes the preliminary issue. Accordingly, in these reasons I have referred to the ST Act as it applies from 1 May 2020. However, as the management statement was registered (see below at [28]) which includes the by-laws (relevantly by-laws 17 and 19) on 30 March 2009,⁶ that is under the legislation prior to the amendments, I will need to refer to relevant

⁶ The Prior Act used the term 'proprietor' whereas the ST Act uses the term 'owner'. For convenience, I have used the term 'owner' in these reasons.

provisions in the ST Act which applied prior to 1 May 2020 (the **Prior Act**).

23 When the strata plan was lodged for registration on 30 March 2009 it was possible under the Prior Act for a management statement to be lodged for registration which sets out:

- (a) by-laws of the strata company that were to have effect under ss 42, 42A and 42B of the Prior Act; and
- (b) amendments and repeals referred to in s 42(2) of the Prior Act.

and it was possible to include by-laws in relation to any matter specified in Sch 2A: s 5C of the Prior Act.

24 It was a requirement under the Prior Act for the management statement to be signed by:

- (a) the person who is registered as owner of the fee simple of the parcel; and
- (b) each person who has a registered interest in, or is a caveator in respect of, the parcel: s 5C(3) of the Prior Act.

25 Finally, upon registration of the management statement, the by-laws set out in the statement, and any amendments and repeals, had effect for the purposes of s 42 of the Prior Act.

26 Section 42 of the Prior Act was headed 'By-laws'. This provision was in place when the management statement for Horizon Apartments on Central (which included by-laws 1, 17 and 19) was registered on 30 March 2009. Section 42 included a general by-law making power for the strata company and specifically dealt with the power of the strata company to make by-laws an exclusive use.

27 Relevantly by-law 42 of the Prior Act provided as follows:

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 [matters that may be provided for in the management statement]; and

- (c) other matters relating to the management, control, use and enjoyment of the lots and any common property.

...

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

...

- (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 (...), 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.

- (10) Any by-law referred to in subsection (8) shall, while it remains in force, ensure as appurtenant to, and for the

benefit of, the law in respect of which it was made and the proprietor, occupier and (subject to the terms of the by-law) any other resident thereof for the time being.

- (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, to which the by-law relates.

...

- (13) Any moneys payable by a proprietor to the strata company under a by-law referred to in subsection (8) or pursuant to subsection (12) may be recovered, as a debt, by the strata company in a court of competent jurisdiction.

ST Act

28 The general by-law making power for a strata company is now found in s 44 of the ST Act. This provision forms part of Div 4 of Pt 4 of the ST Act which is headed 'Scheme by-laws', with Pt 4 headed 'Scheme documents'.

29 The strata company may make 'governance by-laws' or 'conduct by-law' for the strata titles scheme, including by-laws that amend or repeal the by-laws it is taken to have made on the registration of the scheme: s 44 of the ST Act.

30 The term 'governance by-laws' is defined in s 3 of the ST Act and includes scheme by-laws dealing with 'exclusive use' of common property in the scheme. 'Conduct by-laws' are also defined in s 3 of the ST Act and excludes 'governance by-laws'.

31 Section 43 of the ST Act is headed 'Exclusive use by-laws' and enables the strata company to make by-laws which confer exclusive use and enjoyment of, or special privileges over, the whole of the common property or over specified common property. These exclusive or special rights may be conferred on the occupiers, for the time being, of

a specified lot or specified lots (which the ST Act defines as the 'special lots').

32 Section 43(3) of the ST Act provides that the inclusive of an exclusive-use by-law means that the strata company's obligations under s 91(1)(c) of the ST Act (to keep common property in good and serviceable repair etc) falls upon the owners of the special lots to whom the exclusive or special rights have been conferred.

33 Finally, s 43 of the ST Act is reinforced by s 45(1)(e) of the ST Act which provides that the by-laws may apply, in the case of exclusive use by-laws to the owners and occupiers, for the time being, of the special lots.

By-laws

34 On 30 March 2009 (by Notification K894086) the management statement that sets out the by-laws of the strata company was lodged with the Registrar of Titles. The management statement provides that the 15 standard by-laws provided for in Sch 1 to the Prior Act are repealed and replaced by 51 by-laws provided for in a schedule attached to the management statement and described as 'Schedule 1 By-laws'. The management statement further provides that the standard by-laws provided for in Sch 2 to the Prior Act are repealed (the **by-laws**).

35 On 9 July 2014 (by Notification M699511) changes were made to the by-laws concerning quorum and insurance excess which are not relevant in determining the preliminary issue.

36 The following by-laws, which are part of the management statement, and to which the parties referred me, are relevant in determining the preliminary issue:

1. Definitions

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

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

...

"Fixtures and Fittings" means any fixtures and fittings in or about a lot;

...

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

...

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

...

"Premises" means the proprietor's lot together with fixtures and fittings and that portion of the common property which is exclusive use property;

...

"Schedule 1 Bylaws" means the Schedule 1 Bylaws 1 to 50 inclusive[.]

...

1.4 Application

The Schedule 1 Bylaws:

1.4.1 apply in respect of the common property and all lots[.]

...

2. Duties of Proprietor, occupiers, etc

2.1 A proprietor shall:

...

2.1.2 repair and maintain his lot, and keep it in a state of good repair, reasonable wear and tear, and damage by fire, storm tempest or act of God excepted.

...

...

17. Repair and Maintenance of Premises

- 17.1 A proprietor shall at the proprietor's cost:
- 17.1.1 maintain his premises in a good state of repair and condition;
 - 17.1.2 maintain his premises in a clean condition free from all vermin and insects;
 - 17.1.3 replace in a timely fashion all those parts of his premises which are beyond repair or which may become a nuisance or a hazard.

...

19. Exclusive Use

- 19.1 In this Bylaw "exclusive use property" means every portion of common property comprising:
- 19.1.1 decorative fixtures and fittings including but not limited to wall tiles, floor tiles, doors, door handles and locks, light fittings, windows and plate glass and screens which are appurtenant to a proprietor's lot; and
 - 19.1.2 that portion of the common property required for an air conditioning system approved by the strata company in accordance with bylaw 20.
- 19.2 The strata company grants to each proprietor who signs a written consent in a form reasonably required by the strata company exclusive use of the exclusive use property relevant to the proprietor's lot.
- 19.3 The strata company may withdraw the exclusive use rights or any part thereof described in this bylaw 19 of this Schedule 1 if 7 days after service of a written notice from the strata company a proprietor fails to maintain and repair or replace the exclusive use property in accordance with bylaw 17 of this Schedule 1 or fails to remove an air conditioning system in accordance with bylaw 20 of this Schedule 1.
- 19.4 Should a proprietor fail to comply with a notice served by the strata company pursuant to bylaw 19.3 of this Schedule 1 then the strata company may at the proprietor's cost enter the proprietor's lot or his premises for the purpose of maintaining and repairing or replacing the proprietor's exclusive use property.

...

37 The above by-laws were in force under the Prior Act. Schedule 5 to the ST Act provides transitional provisions for the Amendment Act, including in relation to the by-laws that were in force immediately before the commencement of the ST Act.

38 Clause 4 of Sch 5 to the ST Act relevantly provides the following in relation to by-laws:

4. Scheme by-laws

- (1) The by-laws (including any management statement) of a strata company as in force immediately before commencement day continue in force, subject to this Act, as scheme by-laws as if they had been made as governance by-laws or as conduct by-laws according to the classification into which they would fall if they had been made on commencement day.
- (2) However, all by-laws that are in force immediately before commencement day in the terms set out in Schedule 1 clauses 11 to 15 or Schedule 2 clause 5, as then in force are taken to be repealed on commencement day.
- (3) A by-law under s 42(8) as in force immediately before commencement day is taken to be an exclusive use by-law subject to this Act[.]

Principles applicable to the proper construction of scheme by-laws

39 Before setting out the interpretation of by-laws - in particular by-laws 17 and 19 - given by Mrs Jarvis and by counsel for the strata company, it is useful to set out the principles applicable to the proper construction of scheme by-laws, or a statutory contract, as the by-laws are deemed to exist by statute and constituted by the bundle of rights and liabilities created by the ST Act and Sch 1 and Sch 2 to the ST Act.

40 The principles enunciated in *Byrne v The Owners of Ceresia River Apartments Strata Plan 55597* [2016] WASC 153 at [75] to [79] and in the subsequent decision on appeal in *Byrne v The Owners of Ceresia River Apartments Strata Plan 55597* [2017] WASCA 104 at [139] to [140] may be summarised as follows:

- by-laws are to be construed so that they are not inconsistent with the ST Act;

- by-laws are to be construed objectively, by reference to what a reasonable person would understand the language of the by-law to mean;
- caution should be exercised in going beyond the language of the by-law and its statutory context to ascertain their meaning. A tight rein should be kept on having recourse to surrounding circumstances;
- by-laws are to be construed in the relevant statutory context which includes that the function of by-laws is to regulate the rights and liabilities of strata company and the owners and other persons who have rights or interests in the lots or the common property;
- by-laws are to be construed in the context of the registered strata plan;
- by-laws may have a commercial purpose and be interpreted accordingly but due regard must be paid to the statutory context in so doing so; and
- rules of evidence assisting the construction of contracts *inter partes* do not apply to the proper construction of by-laws: *Codelfa Construction Pty Ltd v State Rail Authority (NSW)* [1982] HCA 24; (1982) 149 CLR 337.

41 I will apply these principles in interpreting the meaning of the scheme by-laws – in particular by-laws 17 and 19 – to determine the preliminary issue.

Mrs Jarvis' interpretation

42 Mrs Jarvis' position as to how the by-laws are to be interpreted (which Mr and Mrs Froude support) is summarised as follows:

- the balcony, including the tiles on the balcony, are common property;
- the ST Act mandates that exclusive use by-laws require the written consent of the lot owner before exclusive use rights over common property may be granted;
- without an exclusive use agreement, the 'premises' is limited to the internal area of part Lot 1 of 87m² (the residence) and the

internal fixtures and fittings. The definition of 'premises' excludes any portion of the common property that is not subject to an exclusive use agreement;

- to the extent there is no power to make the by-laws under the ST Act, the strata company cannot confer exclusive use rights, bypassing the required written consent and legal steps for obtaining exclusive use rights;
- the concept of 'exclusive use' assumes individual responsibility for upkeep and maintenance of the balcony;
- the terms 'decorative', 'fixtures and fitting' and 'in or about' in by-law 19 lack clarity and allow subjective interpretation as to who is responsible for the maintenance;
- the tiles on the balcony are functional and not 'decorative' and therefore by-law 19 which attempts to confer exclusive use on a functional area is not within the intended scope of the ST Act and therefore exceeds the power of the strata company to make the by-law;
- by-law 19.2 requires the owner to sign a written consent. Without that, exclusive rights cannot be conferred to a lot owner;
- by-laws are invalid if they are unfairly prejudicial, discriminatory, oppressive or unreasonable;
- the interconnected nature of balconies across the four lots (Lots 1, 2, 7 and 8) challenges the feasibility of conferring exclusive use both in terms of consent of the owner but also in terms of maintenance and repair responsibilities;
- in *Erbrich and The Owners of 125 Herdsman Parade Wembley (Strata Plan 38066)* [2020] WASAT 109 (*Erbrich*) the timber decking was not a structural component of the building and the owner was held responsible for repairing the decking. That is the opposite to this case where the tiles are a structural component of the building and part of the common property; and
- exclusive use agreements do not terminate on the sale of the lot. They are transferred to the next owner.

Stata company's interpretation

43 The strata company's position as to how the by-laws are to be interpreted is summarised as follows:

- the tiles of the balcony are either:
 - (a) a fixture in or about Lot 1; or
 - (b) common property following *Topic and The Owners of Raffles Waterfront Strata Plan 48545* [2016] WASAT 27 (*Topic*) at [41];
- if the tiles on the balcony are a 'fixture' then pursuant to the definition of 'premises' in the by-laws which expressly includes 'fixtures' read with by-law 17, Mrs Jarvis, as the lot owner, is responsible to repair and maintain the tiles on her balcony;
- if the tiles on the balcony are part of the common property, then pursuant to the definition of 'premises' in the by-laws which expressly includes 'that portion of the common property which is exclusive use property' (and is to be contrasted with the definition of 'Lot'), the definition of 'exclusive use property' in by-law 19 which is defined as 'every portion of common property comprising: ... decorative fixtures and fittings including but not limited to ... floor tiles ... which are appurtenant to a proprietor's lot', read with by-law 17, Mrs Jarvis is responsible for the repair and maintenance of the tiles on her balcony;
- the term 'exclusive use property' in by-law 19 is incorporated by reference to the definition of 'premises'. The definition of 'exclusive use property' must apply to the use of that term throughout the by-laws otherwise it would result in an absurdity. It should not, and could not objectively have been intended that the definition of 'exclusive use property' only apply to by-law 19 and not in the by-laws as a whole;
- to adopt a construction that the balcony is not 'exclusive use property' would give rise to an absurdity in that Mrs Jarvis has use of the balcony to the exclusion of all other owners. In other words, it is nonsense that Mrs Jarvis has the exclusive use of her balcony but that the balcony is not an 'exclusive use property' for the purposes of the by-laws;

- consent has *no* bearing on the definition of 'exclusive use property' or the application of that definition more broadly. Without the words '... and where consent has been granted and accepted' (or words to similar effect), 'consent' was not intended to be a prerequisite or qualification to the definition of 'exclusive use' and has no work to do;
- Mrs Jarvis' interpretation requiring written consent produces an absurdity or commercial nonsense. This is because on Mrs Jarvis' interpretation, each time a lot within the strata scheme is sold, a fresh written consent would be required from the new owner with the result that some lots may have exclusive use of the tiles on their respective balconies and for other owners the tiles on their balcony would simply remain common property available for the use and enjoyment of all owners. Consent was clearly not intended to form part of the definition otherwise it would lead to an absurd result;
- the purpose and function of by-law 19.2 is for circumstances where an owner wants to use some part of the common property, which is not necessarily appurtenant to the lot, to the exclusion of other owners;
- the *Erbrich* case is analogous to the current matter, but this case goes further. In *Erbrich* the 'exclusive use property' was poorly defined by some sketches on a strata plan and so the Tribunal was left with having to fill in the gaps as to what was 'structural' and what was 'not structural'. In contrast, in this case there is no need to determine what is structural or not structural because by-law 19.1 clearly defines what is included in exclusive use property including relevantly the floor tiles on the balcony that is appurtenant to an owner's lot; and
- having regard to the entire text of the by-laws, by-law 34.2 which concerns floor coverings, anticipates that owners may wish to alter laid hard floor surfaces (such as timber floorboards or tiles) within a lot, and when doing so must ensure acoustic standards are adhered to.

Consideration

44 Before by-law 19 can be properly interpreted, I need to determine if the balcony is common property and whether the tiles on the balcony are a fixture or are part of the common property.

Balcony is part of the common property

45 Mrs Jarvis and counsel for the strata company agree that the balcony is common property. I respectfully agree that the balcony is common property. The ground floor plan of the strata plan details the boundaries of the balcony (see [21] above).

46 It is also agreed by the parties that the other owners, occupiers, residents or visitors to Horizon Apartments on Central do not have access to the balcony. In that regard, it is not contentious that Mrs Jarvis has exclusive use of the balcony appurtenant to her lot.

Tiles on the balcony a 'fixture' and a part of the common property

47 Mrs Jarvis submits, following **Topic**, that the tiles on the balcony are part of the common property. Mrs Jarvis did not make any submissions as to whether the tiles on the balcony are a 'fixture'.

48 Counsel for the strata company say the tiles on Mrs Jarvis' balcony are either:

- (a) a 'fixture'; or
- (b) in the alternative, they are part of the common property on the reasoning in **Topic**.

49 If the balcony tiles are a 'fixture' but not part of common property, then by-law 17 applies. That by-law regulates that the owner of the 'premises' is responsible for repair and maintenance of the premises.

50 On the other hand, if the tiles on the balcony are part of common property, then by-law 19 requires interpretation.

51 There is a significant point of difference between the parties in the interpretation of by-law 19, and in particular by-law 19.2.

52 Mrs Jarvis contends that without written consent, which she says she has never received, the strata company has not, and cannot grant to her exclusive use of the tiles of her balcony.

53 In contrast, the position of the strata company is that 'consent' was not intended to be a prerequisite or qualification to the definition of 'exclusive use' of the tiles on Mrs Jarvis' balcony.

54 The question of the proper approach to interpreting the by-laws turns on the nature of the by-laws made under the Prior Act. The nature of the by-laws is a statutory contract (see above at [39] to [40]).

55 Whilst the relevant by-laws must be properly construed, it is first necessary to understand the scope of the relevant statutory provision in this case s 43 of the ST Act which is headed 'Exclusive use by-laws'.

Scope of the statutory provisions

56 The principles of statutory construction are well established as stated by the High Court (McHugh, Gummow, Kirby and Hayne JJ) in *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355; [1998] HCA 28, at [69] (*Project Blue Sky*) as follows:

The primary object of statutory construction is to construe the relevant provision so that it is consistent with the language and purpose of all the provisions of the statute. The meaning of the provision must be determined 'by reference to the language of the instrument viewed as a whole' ... [T]he process of construction must always begin by examining the context of the provision that is being construed.

57 The purpose is part of the context. 'Context is understood in its widest sense to include not just the text of the [relevant] Act but also the existing state of the law and the mischief which the statute was meant to remedy': *CIC Insurance Ltd v Bankstown Football Club Ltd* (1997) 187 CLR 384 at [88].

58 The legislative framework or context to examine the context of s 43 of the ST Act may be summarised as follows.

59 First, at the time by-laws were registered on 30 March 2009 (see above at [28]), the strata company was the occupier of the common property on the strata plan, that does not form part of a lot in the strata titles scheme, by virtue of its management and control of the use of the common property for the benefit of all the lot owners pursuant to s 35(1)(b) of the Prior Act.

60 Second, the ST Act takes the common property as a whole and treats each lot owner as having an undivided beneficial interest in every part of it, whether or not that part is susceptible of any use or enjoyment by that owner or of greater use or enjoyment by that owner than by any other. This position continues in the ST Act.

61 Third, with respect to the repair and maintenance of all or part of
the common property, the Prior Act provided that the strata company
must keep in good and serviceable repair, properly maintain and if
necessary, renew and replace the common property (s 35(1)(c) of the
Prior Act).

62 Fourth, an owner of a lot in the strata titles scheme cannot
separately deal with or dispose of their share of the common property:
s 13(9) of the ST Act.

63 Fifth, the standard or deemed by-law 2 in Sch 2 to the ST Act
deals with common property and expressly requires that an owner or
occupier of a lot must use and enjoy the common property in such
manner as not unreasonably to interfere with the use and enjoyment
thereof by other owners, occupiers of lots or their visitors.
The standard or deemed by-laws in Sch 2 of the ST Act were inserted
into the ST Act by the Amending Act. Prior to that similar by-laws
were found in Sch 1 of the Prior Act which have now been deleted.

64 Finally, s 43(1) of the ST Act (as did s 42(8) of the Prior Act)
provides for an exception to the above general rules. That is, the strata
company is permitted to make by-laws which allow certain owners
within the strata scheme to have the exclusive use, enjoyment and
privileges in respect of common property and so modify the general
rule.

65 Turning to the text of s 43 of the ST Act. Section 43(1) defines
'exclusive use by-laws' and s 43(2) sets out what an exclusive use
by-law may contain. Section 43(3) provides that what would normally
fall on the strata company under s 91(1)(c) of the ST Act instead,
subject to the terms of the exclusive by-law falls on the owners of the
special lots. Section 43 of the ST Act therefore sets out the linkage
between the exclusive use and enjoyments of, or special privileges
over, some or all of the common property in the strata scheme and
obligations concerning the repair, maintenance and renew obligations
concerning that common property.

66 The language of s 43(1) of the ST Act, 'use' and 'enjoyment' which
is contemplated is of an 'exclusive' or 'special privileges' nature.
The exclusive use by-law may deal with particulars relating to the
condition, maintenance, repair, renewal or replacement of the common
property as well as matters relating to the insurance of the common

property as well as the determination of amounts payable to the strata company by those owners (s 43(2) of the ST Act).

67 Section 42(8) of the Prior Act permitted the strata company to make by-laws for the exclusive use and enjoyment in favour of the owners of multiple lots in a strata scheme provided that each owner had given consent in writing. The amendment to the language now found in s 43(1) and s 43(5) of the ST Act provides that the strata company may make a by-law for exclusive use by the occupier, for the time being of the special lots provided that the owner of each lot that is or is proposed to be a special lot has given written consent to the by-laws. Section 43 of the ST Act clarifies the scope of the power set out in s 42(8) of the Prior Act but is not intended to alter it: *The Owners of Dolphin Apartments Mandurah Strata Plan 49518 v Poland Superannuation Pty Ltd* [2023] WASC 452 at [36].

68 In summary, s 43(1) and s 44(1) of the ST Act along with the predecessor provisions under the Prior Act give a by-law the character of an exclusive use by-law if the by-law has the relevant effect required by s 43(1).

69 I return to determine if the tiles on Mrs Jarvis' balcony are a 'fixture'.

Fixture

70 As stated earlier, Mrs Jarvis did not make any submission as to whether the tiles on the balcony are a 'fixture'.

71 Also, as stated earlier, counsel for the strata company submit that the tiles on the balcony appurtenant to Lot 1 are a fixture in or about Lot 1.

72 The term 'fixtures and fittings' is defined in by-law 1.1 as 'any fixtures and fittings in or about a lot'. Ordinarily, a 'fixture' means something securely fixed in position.⁷ 'In or about' is used when referring to a general (not precise) area.

73 It is common ground that the tiles on Mrs Jarvis' balcony are securely fixed in position on the concrete slab (although noting that Mrs Jarvis contends that some tiles are loose or drummy). On the basis the tiles are securely fixed in position, in my view, the tiles on Mrs Jarvis' balcony are a 'fixture'.

⁷ *Macquarie Online Dictionary*.

74 By-law 17 imposes obligations on the owner to repair and maintain that owner's 'premises'.

75 'Premises' is different to an owner's 'lot' on the strata plan.

76 A 'lot' is defined in by-law 1.11 'as a strata lot formed upon registration of the strata plan'. I find Mrs Jarvis' Lot 1 is a 'lot' as defined in by-law 1.11.

77 'Premises' is defined in by-law 1 to mean both the owner's 'lot' together with fixtures and fittings and that portion of the common property which is 'exclusive use property'.

78 The question arises as to whether the tiles, being a fixture (see above at [72] to [73]), are part of the owner's 'lot' or a portion of the common property. For the reasons which follow, in my view, the tiles on Mrs Jarvis' balcony are part of the common property.

Tiles part of the common property

79 In *Erbrich* at [48] to [52] I considered the term 'structure' and noted that ordinarily the term 'structure' means built up as in a building. Further, in *Erbrich* at [53] referring to *The Owners of Arbor North Strata Plan 67510 and Sun* [2020] WASAT 28 I noted that whether a thing is a structure in a particular case is a mixed question of law and fact having regard to the ST Act in the context of which its meaning must be ascertained.

80 The parties agree that the tiles on Mrs Jarvis' balcony were installed prior to the registration of the strata plan. On that basis, following *Topic*, I find the tiles of Mrs Jarvis' balcony were intended to be part of the completed building and therefore form part of the structure.

81 In *Topic* the Tribunal in finding that the floor tiling formed part of the constituent part of the building stated at [41] – [42]:

41 ... [An] installation of a floor, be it constructed of tiling or timber flooring, intended to be part of the completed building, would form the structure, the upper surface of which would define the relevant horizontal boundary of the lot ... assuming installation prior to the date of registration of the strata

42 ... the tiles ... formed part of the common property[.]

82 In summary, in my view, the tiles on Mrs Jarvis' balcony are a 'fixture' and a structure that forms part of the common property.

Proper construction of by-law 17

83 In properly construing by-law 17, it is necessary to consider the language of the by-law, viewed in the statutory context in which it was made (see above at [56] to [67]), and while recourse to surrounding circumstances may be permissible as an aid to construction, it is necessary, particularly bearing in mind the public purpose of by-laws (as by-laws go beyond facilitating the internal administration of the strata company and third parties who ordinarily would not have access to the scheme by-laws may inspect them), to exercise caution in going beyond the language of the by-law itself and its statutory context.

84 By-law 17 was made pursuant to Div 4 of Part 4 of the ST Act. Division 4 is headed 'Scheme by-laws' and Part 4 is headed 'Scheme documents'. The management statement which contains the by-laws was executed by two officers of the original owner of the land the subject of the strata plan.

85 By-law 17 properly construed means, in my view, that the owner(s) of the relevant lot is required to repair and maintain the tiles on the balcony of that lot on the basis that the tiles form part of the constituent part of the building and therefore form part of the common property.

86 I now turn to interpret by-law 19.

Proper construction of by-law 19

87 Like by-law 17, to properly construe by-law 19, it is necessary to consider the language of the by-law, viewed in the statutory context (see above at [56] to [67]) in which it was made, and while recourse to surrounding circumstances may be permissible as an aid to construction, it is necessary, particularly bearing in mind the public purpose of by-laws (as by-laws go beyond facilitating the internal administration of the strata company and third parties who ordinarily would not have access to the scheme by-laws may inspect them), to exercise caution in going beyond the language of the by-law itself and its statutory context.

88 By-law 19 was similarly made pursuant to Div 4 of Part 4 of the ST Act.

89 The ordinary and natural meaning of the words of by-law 19, considered in the context of Div 4 of Part 4 of the ST Act, is that a new right is conferred upon the owner for the time being of the lot. The right was not exchanged for money. Nothing in by-law 19 affirmatively suggests that the existence of any other right held by the lot owner was to be removed or reduced, or that by the exercise of any such rights is to be restricted in any way. In my view, if by-law 19 was intended to cut down the property rights of the lot owner it would be expected that words clearly showing the intention would have been included.

90 By-law 19 consists of two parts. First, it grants to the lot owner an exclusive use of the 'exclusive use property'. Secondly, it sets out a mechanism should the owner of the lot fail to maintain, repair or replace that 'exclusive use property'.

91 By-law 19 at 19.1.2 concerns air conditioning systems. It is not relevant for the purpose of determining the preliminary issue.

92 The definition of the term 'exclusive use property' in by-law 19 is properly understood by reference to the definition of 'premises' in by-law 1 which includes not only the owner's lot but also that portion of the common property which is 'exclusive use property'. If it was intended that the definition of 'exclusive use property' was limited to by-law 19 only, then the parties to the management statement could no doubt have stipulated such limitation.

93 'Exclusive use property' is defined in by-law 19.1 to relevantly include ... decorative fixtures ... including but not limited to ... floor tiles... which are appurtenant to the owner's lot. Earlier, I made findings that the tiles on the balcony are a 'fixture' and that the tiles are part of the common property, which in this case is appurtenant to the lot.

94 Nothing, in my view, turns on the word 'decorative' in by-law 19.1.1. The adjective, 'decorative' means 'serving or tending to decorate'.⁸ Ordinarily decorative floor tiles means having the function of decorating, in this case, the balcony.

95 As noted earlier, the main point of difference between Mrs Jarvis and counsel for the strata company is the interpretation of by-law 19.2. Mrs Jarvis says that as she has not signed a written consent form and

⁸ *Macquarie Online Dictionary*.

she therefore does not have exclusive use of the floor tiles on the balcony and therefore she has no obligation to maintain, repair or replace the tiles as set out in by-law 17.

96 Counsel for the strata company submits that the 'consent' required in by-law 19.2 has *no* bearing on the definition of 'exclusive use property' or the application of that definition more broadly. In other words, the position of counsel for the strata company is that a lot owner's consent was *not* intended to be a prerequisite or qualification to the definition of 'exclusive use' to be given by the strata company and therefore has no work to do.

97 With respect, I cannot accept Mrs Jarvis' literal interpretation of by-law 19.2 for the following reasons.

98 First, just because a written consent form has not been signed by Mrs Jarvis it does not follow that she does not have exclusive use of the floor tiles on the balcony or the balcony itself. It is common ground that the owner and occupier of Lot 1 has, at all times since registration of the strata scheme, had the exclusive use of the balcony which implicitly means the floor tiles on the balcony as well.

99 Second, such a literal interpretation would require that each time a lot is sold that a fresh written consent form be signed by the new owner, then some lots who had such a written consent would have exclusive use of the floor tiles on the balcony but for other lots the floor tiles would be common property and remain the responsibility of the strata company. Such an interpretation, in my view, could not have been intended by the by-laws when considering the statutory context, being in particular s 42(8) of the Prior Act which provides for making of by-laws that are not inconsistent with the Prior Act and for other matters relating to the management, control, use and enjoyment of the lots and any common property. Mrs Jarvis conceded that an 'exclusive use' agreement does not terminate on the sale of a lot but remains in place for the new owner of the lot.

100 Third, in any event, as the management statement which includes by-law 19, was registered on 30 March 2009, and as two years have passed since the making of those by-laws, by application of s 42(9) of the Prior Act it is conclusively presumed that all conditions and preliminary steps precedent to the making of by-law 19 have been complied with and performed. The effect of s 42(9) of the Prior Act is that the strata company is taken to have granted exclusive use to the

exclusive use property relevant to the owner's lot being the balcony and the tiles on the balcony.

101 In summary, by-law 19.2 properly interpreted does not require written signed consent each time there is a change of owner. However, in the alternative, *if* by-law 19.2 properly construed required each new owner to sign a written consent form, that failure to sign would be better characterised as a failure to comply with a requirement but that is *not* a precondition to having the exclusive use of the exclusive use property. Even on the alternative basis, the owner (or new owner as the case may be) would have exclusive use of the balcony and the tiles on the balcony and therefore the cost to repair and maintain the premises as set out in by-law 17 would fall on the owner (or new owner as the case may be).

102 However, by-law 19.2 is not to be understood that approval of the strata company is never required. An example would be where an owner to the strata scheme seeks to use part of the common property, for example for a new air conditioning system, which may not be appurtenant to that owner's lot, to the exclusion of all other owners. The owner in such a case must seek the approval of the strata company (by-law 19.2 read with 19.1.2 and 20).

103 In my view, in the context of s 43(1) and s 44 (and the predecessor provisions in the Prior Act), by-law 19 is an exclusive use by-law.

104 In summary, by-law 19, is properly construed as follows:

- By-law 19.1.1 lists what is 'exclusive use property'. It is not an exhaustive list. By-law 19.1.1 is to be read with the definition of 'premises' in by-law 1.1.
- By-law 19.1.2 (read with by-law 20) regulates air conditionings systems to be placed on the common property.
- By-law 19.2 regulates the exclusive use of a part of common property, which may not be appurtenant to a lot.
- By-law 19.3 and 19.4 regulate who is to maintain, repair or replace the exclusive use property and who is liable to pay for such maintenance, repair or replacement of the exclusive use property.

Conclusion

105 In conclusion, in my view, a reasonable person would understand the language of by-laws 17 and 19, to mean that the owner of the lot, in this case Mrs Jarvis, is required to maintain and repair or replace the floor tiles on the balcony where both the floor tiles and the balcony are part of the common property which, since the registration of the strata scheme, the owner of Lot 1 has had the exclusive use of. Such an interpretation is, in my view, consistent with the ST Act.

106 The consequence of the above is that the preliminary issue is determined in favour of the respondent. This means the application has come to an end and must be dismissed.

Orders

The Tribunal orders:

1. The preliminary issue is determined in favour of the respondent. The scheme by-laws properly construed, in particular by-laws 1, 17 and 19 require the applicant to maintain, repair or replace the tiles on the balcony.
2. 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

4 DECEMBER 2023