QUEENSLAND CIVIL AND ADMINISTRATIVE TRIBUNAL

CITATION:	*Body Corporate for Hilton Park CTS 27490 v Colin Robertson* [2018] QCATA
PARTIES:	**BODY CORPORATE FOR HILTON PARK CTS 27490** (appellant) **v** **COLIN ROBERTSON** (respondent)
APPLICATION NO/S:	APL 215 -17
MATTER TYPE:	Appeals
DELIVERED ON:	8 November 2018
HEARING DATE:	11 May 2018
HEARD AT:	Brisbane
DECISION OF:	Member King-Scott
ORDERS:	**Appeal dismissed**
CATCHWORDS:	CORPORATIONS – BODIES CORPORATE OTHER THAN COMPANIES AND ASSOCIATIONS – POWERS – by-law limitations – requirement that any tenancy agreement be for a period not less than 6 months – restrictions on holiday letting APPEAL AND NEW TRIAL – APPEAL – GENERAL PRINCIPLES – RIGHT OF APPEAL – WHEN APPEAL LIES – OTHER CASES – questions of law and fact STATUTES – ACTS OF PARLIAMENT – INTERPRETATION – PARTICULAR WORDS AND PHRASES – GENERALLY – meaning of 'resident', 'residential' and 'commercial' – use of premises for holiday letting – type of residential use – construction that avoids surplusage – meaning of 'lease' and 'letting' *Byrne v The Owners of Ceresa River Apartments* [2017] WASCA 104 *Canada (Director of Investigation and Research) v Southam Inc* [1997] 1 SCR 748 *Carter v Delgrove Holdings Pty Ltd* [2013] FCCA 783 *Collector of Customs v Agfa-Gevaert Ltd* (1996) 186 CLR 389 *Collector of Customs v Pozzolanic Enterprises Pty Ltd* (1993) 43 FCR 280

Derring Lane Pty Ltd v Port Philip City Council (No 2) [1999] VSC 269
Estens v Owners Corporation SP 11825 [2017] NSWCATCD 63
Lynkim Lodge [2016] QBCCMCmr 419
Macleay Tower & Villas [2017] QBCCMCmr 12
Noblett & Mansfield v Manley [1952] SASR 155
O'Connor (Senior) and Ors v The Proprietors, Strata Plan No 51 [2017] UKPC 45
Project Blue Sky Inc v Australian Broadcasting Authority (1998) 194 CLR 355
R v Bishop of Oxford (1879) 4 QBD 245
Radaich v Smith (1959) 101 CLR 209
Samimi & Anor v Queensland Building and Construction Commission [2015] QCA 106
Swan v Uecker [2016] VSC 313
Vetter v Lake Macquarie City Council (2001) 202 CLR 439
Ward v McDonald [2014] QCATA 048

Acts Interpretation Act 1954 (Qld)
Body Corporate and Community and Management and Other Legislation Amendment Act 2003 (Qld)
Body Corporate and Community and Management and Other Legislation Amendment Act 2007 (Qld)
Body Corporate and Community Management Act 1997 (Qld)
Building Units and Group Titles Act 1980 (Qld)
Building Units Title Act of 1965 (Qld)
Conveyancing (Strat Titles) Act 1961 (NSW)
Group Titles Act 1973 (Qld)
Statutory Instruments Act 1992 (Qld)
Strata Titles Act 1966 (WA)

APPEARANCES & REPRESENTATION:

Applicant:	K Wilson QC, instructed by Cleary Hoare Solicitors
Respondent:	D Keane, instructed by Sykes Pearson Miller Law

REASONS FOR DECISION

[1] Hilton Park at 82-86 Hilton Terrace, Noosaville is a complex of 10 lots located on the southern side of the Noosa River. The lots are contained in two buildings with two levels. Four apartments in one building and six apartments in the other are divided by a common property walkway leading to a pool and a jetty on the Noosa River.

[2] The first Community Management Statement for the Hilton Park Community Titles Scheme ('CMS') was lodged on 8 October 1999 pursuant to the *Body Corporate and*

Community Management Act 1997 (Qld) ('BCCMA'). It provided, *inter alia,* under its by-laws:

> 12.1 Each lot must be used only for the following purposes:-
> 12.1.1 Lots 1 to 10 for residential purposes and not commercial purposes.

[3] The applicant, Colin and his wife, Anne Robertson purchased Lot 7 as an investment property by a contract dated 9 October 2016. They intended to let the property for holiday purposes and placed it in the hands of a property manager. It was also listed on short-term web site Stayz.com.au.

The Motion 14

[4] At the Annual General Meeting of the Body Corporate of the Hilton Park CTS 27490 held on 10 February 2017 a number of motions were put. The motion that is of concern in these proceedings is Motion 14 which provided:

[5] Motion 14. Permission to Let - 6 Months (Ordinary Resolution)

> THAT a unit owner be permitted to let the relevant unit (and that the meaning of 'commercial purposes' in By-law 12.1.1 be amended to reflect the outcome of this motion if and as carried) provided that the term of any such tenancy occupation agreement be for a period of not less than 6 months.

[6] The motion was carried by a majority of 8 to 2.

[7] The exclamatory note that accompanied the motion said:

> It was the original developers' intention (firmly supported by unit owners over the years) that Hilton Parked be essentially an owner occupied complex with holiday letting actively discouraged. To that end, in the early 2000's, a motion was carried without objection to the effect that short-term lettings be subject to a six month minimum term.[1]
>
> Given the changes in unit ownership since 1999 (there being only one original owner remaining), the Committee considers it appropriate to revisit the issue of holiday letting is in the context of what is understood to be unit owners continue preference for Hilton Park to remain an owner occupied complex
>
> Whilst the by-laws do not deal specifically with holiday letting is, they do prohibit any unit being used for commercial purposes and letting for income earning purposes cannot be anything but commercial even if on a relatively small scale.
>
> ...

[8] The effect of the motion was to prevent Mr Robertson and his wife from letting their apartment for holiday letting.

[9] Mr Robertson applied under the BCCMA for an order that Motion 14 was invalid. On 26 May 2017 the Adjudicator held that the carriage of Motion 14 was invalid and of no effect.

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1 I am unaware of any record that such a motion was passed.

[10] The Body Corporate now appeals against that decision.

The Legislation

[11] BCCMA determined the content, extent and limitations of the by-laws for a community titles scheme.

[12] Section 169 provided;

> (1) The by-laws for a community titles scheme may only provide for the following-
> (a) ...
> (b) the regulation of, including conditions applying to, the use and enjoyment of-
> (i) lots included in the scheme;

[13] Section 180 sets out various limitations for by-laws and provides:

> (1) If a by-law for a community titles scheme is inconsistent with this Act) including a regulation module applying to the scheme) or of another Act, the by-law is invalid to the extent of the inconsistency.
> (2) ...
> (3) If a lot may be lawfully used for residential purposes, the by-laws cannot restrict the type of residential use.
> (4) A by-law cannot prevent or restrict a transmission, transfer, mortgage or other dealing with a lot.
> *Examples-*
> 1 a by-law cannot prevent the owner of a lot from leasing or mortgaging a lot.
> ...
> (5) A by- law must not discriminate between types of occupiers.
> *Example-*
> A by-law cannot prevent a tenant from using a pool on the common property.

The Adjudicator's Reasons

[14] After referring to by-law 12 of the CMS the adjudicator noted that 'commercial purposes' was not defined in the CMS.

[15] He then referred to sectional 180 (3) of the Act that a lot may lawfully be used for residential purposes and that the scheme by-laws cannot restrict the type of residential use. He noted there was no dispute that Lot 7 may be used for residential purposes although he noted there was no definition of 'residential purposes' in the governing legislation.

[16] He was satisfied that there was nothing wrong with by-law 12 as it currently stood. However, he was not satisfied that letting out of a unit for a term less than six months was using it for 'a commercial purpose'. He noted that renting of the lots was envisaged in the CMS. He then referred to a number of the by-laws in the CMS that lead him to that view. Particularly by-law 6.3 which referred to an occupier in respect of a lot the subject of a lease or licence agreement must take all reasonable steps to comply with the provisions of the by-law. By-law 29 which provided that tenants must have notice of the by-laws which must be exhibited in a prominent place in any lot made available for letting.

[17] The Adjudicator then posed the question 'when does the length of the term of the rental arrangement turn the use of a lot from a "residential purpose" into a "commercial purpose"'? He noted the Body Corporate's submission that letting out a property for reward at all was a commercial purpose. The adjudicator then said:

> However, I am satisfied there is no "commercial purpose" in the use of a lot in the scheme by a holiday maker or visitor. I am of the view that "commercial purposes" means that owners might not use their units as shops or restaurants or openly trade from them to the public. Such use is probably unlikely in any event, since local authority approval will be required for such a venture. The bylaw does not currently fall foul of section 180(3) Act because the statement that a lot may not be used for commercial purposes does not restrict a "type of residential use".

[18] He said further:

> I also note the contrary to the view of submitters that the original owner actively discouraged holiday lettings, the original owner registered the scheme under the "Accommodation Module" regulation, the purpose of which is to regulate a scheme of "predominantly accommodation lots" which are defined as lots which are either "*the subject of a lease or letting for accommodation for long or short term residential purposes or immediately available to be the subject of a lease or letting for accommodations long or short term residential purposes; or part of a hotel*" (emphasis in original)

[19] The adjudicator then referred to the decision of *Lynkim Lodge*[2] and made the orders now appealed against.

The Appeal

[20] An appeal from the decision of an adjudicator under s 289(2) of the Act may only be made to the Tribunal on a question of law.

[21] The principles in considering such an appeal are succinctly set out in *Ward v McDonald*.[3] There Member Barlow QC observed:

> [The] limitation on the Tribunal's jurisdiction imposes a significant constraint on the role of the Tribunal in reviewing decisions of an adjudicator. The appealable error of law must arise on the facts found by the adjudicator or must vitiate the findings made or must have led the adjudicator to omit to make a finding she or he was legally required to make.
>
> A wrong finding of fact is not sufficient to demonstrate an error of law. Particularly where a decision involves matters of fact and degree, provided that the decision maker applies correct principles of law[4] and the final conclusion is not unreasonable[5], no appeal is available under s289 of the Act.

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2 [2016] QBCCMCmr 419.
3 [2014] QCATA 048.
4 *Collector of Customs v Pozzolanic Enterprises Pty Ltd* (1993) 43 FCR 280, 286.
5 *Vetter v Lake Macquarie City Council* (2001) 202 CLR 439, 450.

A concise and helpful summary of the distinction between questions of law and questions of fact is set out in this passage from a decision of the Supreme Court of Canada[6]:

> Briefly stated, questions of law are questions about what the correct legal test is; questions of fact are questions about what actually took place between the parties; and questions of mixed law and fact are questions about whether the facts satisfy the legal tests.

Grounds of Appeal

[22] The Appellant's grounds of appeal are as follows:

(a) The Adjudicator erred in law by:

1. finding that the letting of a Lot (namely Lot 7) on a short-term basis does not constitute a "commercial purpose" as applied under bi-law 12.1.1. of the Hilton Park Community Management Statement (CMS), despite acknowledging at [16], *the longer the term and the greater the rent paid, the greater the "commercial purpose"* thereby making "commercial purpose" implicit in short-term letting, and in that context, failing to consider the impact of frequent short stay accommodation and letting (with a higher per night rental yield and more intensive and frequent management practices including vetting, monitoring and cleaning) in determining that Lot 7 was not being used for a commercial purpose;

2. failing to find that such "commercial purpose" is not an erosion of the amenity for a majority of Lot owners namely 9 of 10;

3. failing to construe or give proper meaning to the words, "residential purposes" in by-law 12.1.1 of the CMS seemingly inferring by an inherently circular argument that, if Lot 7 is residential in nature, the only relevant use to which it can be put involves residential purposes;

4. ignoring the proper meaning of "reside" and "residential" in the context of defining "residential purposes" as that term applies under by-law 12.1.1 of the CMS;

5. misconstruing the meaning of the term "residential" pursuant to s180 (3) of the Body Corporate and Community Management Act 1997 ("BCCMA"); and

6. determining that Motion 14 "restricted" the *residential use* of Lot 7, despite section 169 (1) (b) (i) of the BCCMA properly and lawfully allowing the *use* of any of the Lots to be subject to regulation with conditions applied.

Appellant's case

[23] Counsel for the Appellant did not address all of the grounds of appeal. Clearly, some were not arguable. Ground 1, with respect was not a reasonable interpretation of the Adjudicator's findings. The Adjudicator's words emphasised by the Appellant at [16], were posed as a rhetorical question based on the Body Corporate's interpretation rather than his interpretation of commercial purpose. Ground 2 was not in the words

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6 *Canada (Director of Investigation and Research) v Southam* Inc [1997] 1 SCR 748, [35].

expressed, a finding of the Adjudicator, and, in any event, was a question of fact and not appealable.

[24] The Appellant confined its argument to the construction of a number of terms contained in the BCCMA and the by-law. Counsel submitted that 3 questions of construction arose for consideration in construing by-law 12. The first, he submitted, related to the introductory words; whose 'use' was being referred to when it says each lot must be used only for the following purposes? Was it the owner or was it the occupier? Secondly, what were 'residential purposes'? Thirdly, what were 'commercial purposes'?

[25] It was then submitted that an owner letting out a unit for any term for a monetary return must be for a commercial purpose. It was submitted that the length of the term of the rental agreement was an irrelevant consideration to characterising the use either as residential or commercial. The Appellant relied upon the decision of *Carter v Delgrove Holdings Pty Ltd*[7] where the Court held that an intention to acquire property to rent out and derive a rental income was a 'commercial purpose'.

[26] The Adjudicator rejected the Body Corporate's submission before him that the original owner actively discouraged holiday lettings as he found that the original owner registered the scheme under the 'Accommodation Module' regulation which regulated the scheme of 'predominantly accommodation lots' which were defined as lots that were either the subject of a lease or letting for accommodation for long or short term residential purposes. Again, it was submitted by the Appellant that this is an irrelevant consideration.

[27] In construing s 180(3) of the Act, the Appellant argues that the first consideration must be whether the lot is being used for 'residential purposes'. It is then argued that a short term letting is not for a residential purpose and, therefore, the section is not engaged.

[28] Mr Wilson QC for the Appellant then distinguished the earlier adjudicator decisions of *Lynkim Lodge*[8] and *Macleay Tower & Villas*[9] as being contrary to authority of the Courts of Australia and England. He was critical of those decisions, as, in each case, the adjudicator approached the construction from the perspective of the user of the premises. He submitted that merely because a property was capable of being used as a residence did not necessarily mean that any occupier of the premises was using it for residential purposes.

[29] The Appellant referred to the Shorter Oxford Dictionary meanings of 'reside' being: 'To dwell permanently or for a considerable time; have one's regular home in or at a particular place'. And 'residence' as meaning: 'The circumstance or fact of having one's permanent or usual abode in a certain place; the fact of residing or being resident'.

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7 [2013] FCCA 783.
8 [2016] QBCCMCmr 419.
9 [2017] QBCCMCmr 12.

[30] Counsel referred to *Byrne v The Owners of Ceresa River Apartments*[10] where the Court considered the construction of a by-law relating to the use of the premises. The by-law provided

> 16 Use of Premises
>
> 16.1 … a proprietor of a residential lot may only use his lot as a residence.
> 16.2 Notwithstanding bylaw 16.1 a proprietor of a residential lot may:
> 16.2.1 grant occupancy rights in respect of his lot to residential tenants…

[31] The Court of Appeal considered the meaning of 'residence' and cognate terms. It held that the word did not itself import a fixed period of occupation. The prohibition in the by-law, the Court found, was not on periods of occupation but on *use*. The Court found 'the phrase *use his lot as a residence'* was significant in that 'the word *use* means to employ for some purpose, to put into service or turn to account'. The Court then held that:

> The effect of by-law 16 on its proper construction, is that a proprietor may only use, and any occupier to whom the proprietor grants occupancy rights may only use, the lot as a settled or usual abode and not otherwise.

[32] The Court of Appeal had earlier observed that it was unnecessary, for the disposition of the appeal, to reach a view on whether, for example, the word 'resident' in the provisions of the Act might apply to a holiday maker staying at the lot. That was because, even if the conception of 'resident' in the Act implied some lesser degree of continuity of living at the place than does the word 'residency' in by-law 16.1, that would not mean that by-law 16 operated inconsistently with the Act.

[33] Counsel then referred to s180(3) of the BCCMA and identified 2 elements that need to be satisfied before the sub-section can be invoked. Firstly, the initial enquiry, can the lot be used for residential purposes? Clearly so in this case. If so then moving to the second element, is the residential purpose being restricted? In responding to the second enquiry Counsel posed the hypothetical question. If the owner let the premises to a family for a period of 12 months to live in the lot as their home then that could not be restricted. However, if it was let to a family for a 3 week holiday, then he submits that can be restricted, and does not offend s 180(3).

[34] Subsection 180(4) provided that a by-law 'can not prevent or restrict a transmission, transfer, mortgagor other dealing with a lot'. Counsel referred to some conflicting authorities in Australia as to whether granting permission to stay in a lot for a couple of days, a week or longer was a lease or a licence? The decision of the High Court in *Radaich v Smith*[11] was concerned with the distinction between a tenancy or lease and a mere licence. In *Noblett & Mansfield v Manley*[12] Mayo J determined that a lodger was a licensee on the basis that the owner retains possession and control over rooms and means of ingress and egress, but grants license to guests who pay, or give consideration for the privilege. Counsel referred to *Swan v Uecker*[13] a decision of

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10 [2017] WASCA 104.
11 (1959) 101 CLR 209.
12 [1952] SASR 155, 158.
13 [2016] VSC 313, [46].

Justice Croft who reached the contrary view that a leased apartment sublet to AirBnB guests was a lease and not a licence. His Honour observed:

> I am of the view that the hotel room analogy is not appropriate in the present circumstances. The evidence and the provisions of the AirBnB Agreement indicate, in my view, that although the occupancy granted to the AirBnB guests was, in this case, for a relatively short time, the quality of that occupancy is not akin to that of a "lodger" or an hotel guest. Rather, it was the possession—exclusive possession—that would be expected of residential accommodation generally

[35] Finally, reference was made to the decision of the Privy Council on appeal from the Court of Appeal of the Turks and Caicos Islands of *O'Connor (Senior) and Ors v The Proprietors, Strata Plan No 51.*[14] In that case the legislation was modelled on the *Conveyancing (Strata Titles) Act* 1961 (NSW). The appeal involved a question of construction of a by-law restricting residential use of a lot. The relevant provision was as follows:

> 7.1 Each Proprietor shall:
>
> ...
>
> 9. Not use or permit his Residential Strata Lot to be used other than as a private residence of the Proprietor or for accommodation of the Proprietor's guests and visitors. Notwithstanding the foregoing the Proprietor may rent out his Residential Strata Lot from time to time provided that in no event shall any individual rental be for a period of less than one (1) month ...
>
> 16. Not use or permit to be used the Strata Lot or any part thereof for any illegal or immoral purpose, nor for the carrying on of any trade or business other than periodic renting or leasing of the Strata Lot in accordance with these bye-laws unless such trade or business activity has been approved in advance by the Executive Committee in writing, which approval may be revoked for cause.

[36] The Corporation (the equivalent of the body corporate in the Australian jurisdiction) sought to restrain the proprietor from letting his lot for less than one month contrary to a by-law that was present from the time of the Corporation's initial registration.

[37] The Board referred to the decision of *Byrne* with approval. It construed the by-laws benevolently having regard to its purpose in assisting the good management of development for the benefit of its residents as a whole. It regarded the by-law as a legitimate restriction on the use of the strata lot. Counsel referred to the following passage:

> It is clear however that statutes prohibiting restrictions on dealing in strata lots do not prevent reasonable restrictions on the uses of the property, even though such restrictions may have the inevitable effect of restricting the potential market for the property.

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14 [2017] UKPC 45.

Respondent's case

[38] It was the Respondent's case that 'commercial purpose', not otherwise defined in the Act, should bear its ordinary meaning and that by-law 12.1.1 applies to the operation of a business, such as a shop, restaurant or otherwise trade from the lot to the public.

[39] It was submitted that the Adjudicator correctly determined that the Respondent's use of the property for short term and holiday letting was a residential use, as:

(a) The occupants are no different from any other tenant who would lease the property for 12 months or more – the only difference is the length of stay;

(b) The occupants reside in the property during their letting term; for example, they sleep there; eat there and use the property as their residence during the letting term;

(c) In considering the meaning of the term 'reside' and 'residential' in *Derring Lane Pty Ltd v Port Philip City Council (No 2)*[15] Bramford J, considered that the term can include 'serving or used as a residence;' 'one's dwelling place;' 'a dwelling, abode, house …' '… to live in or at a particular place.' There is no reference to the length of time in these meanings, and the Respondent submits that a short-term visitor is also a resident for the duration of their stay.

[40] Reference was made to by-law 6.3 of the CMS which envisaged that an occupier may occupy premises under a licence agreement. Reliance was also placed on the fact that the Scheme was and is registered under the Accommodation Module which defines 'accommodation lot' as meaning either or both of the following-

> (a) The subject of a lease or letting for accommodation for long or short term residential purposes, or immediately available to be the subject of a lease or letting for accommodation for long or short term residential purposes;
> (b) part of a hotel.
> ....

[41] The Respondent submits that the Adjudicator correctly determined that short term or holiday letting was not a commercial purpose within the context of by-law 12.1.1 as the scheme was registered under the Accommodation Module and both by-laws 6.3 and 29 of the CMS contemplated a letting agreement without restriction and by-law 6.3 also contemplated an occupier under a licence agreement.

[42] The Respondent also submits that Motion 14 would be invalid having regard to s 180 (4) of the BCCMA as it would be an attempt to either prevent or restrict a dealing of the Respondent's lot and as such invalid.

[43] The Respondent relied upon the decision of the New South Wales Civil and Administrative Tribunal of *Estens v Owners Corporation SP 11285*.[16] That decision dealt with an attempt by a body corporate to limit an owner from dealing with a lot, namely renting her home through AirBnB. The Tribunal considered the arrangement to be a tenancy or lease and not a licence.

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15 [1999] VSC 269.
16 [2017] NSWCATCD 63.

[44] Finally, Counsel referred to the decision of *Collector of Customs v Agfa Gevaert Ltd*[17] where the High Court, he submitted, supported the proposition that the construction of the words as a whole was a question of law and not fact.

History of the legislation

[45] The BCCMA was enacted and assented to on 22 May 1997. For many years successive governments in Queensland had grappled with the complexity of community titles legislation. Initially, with the *Building Units Title Act of 1965*, then the *Group Titles Act* 1973 and later the *Building Units and Group Titles Act* 1980.

[46] The BCCMA refined and amalgamated those pieces of legislation[18] but it did much more in meeting the changing needs of the community. The legislation had to deal with the subdivision, management, consumer protection and dispute resolution.

[47] The explanatory note accompanying the introduction of the *Body Corporate and Community Management Bill* explained that because of the varying types of developments such as residential units, resorts, hotels, duplex apartments, business parks and commercial offices involving different management and administrative requirements a more flexible approach was required. The note went on to explain:

> The Body Corporate and Community Management legislation is structured on an Act supported by separate sets of regulations that are tailor-made for the different projects developed under its provisions. It relies on creating varying management processes to accommodate the different requirements of the various types of development.

[48] The Bill introduced four modules described as follows:

> The first, the Standard Module provides for significantly regulated management processes to accommodate predominantly permanent residential and mixed (accommodation/residential) developments.
>
> The second is the Accommodation Module which provides for management processes that are significantly less regulated than under the Standard Module. This second module is intended for schemes used predominantly as holiday letting or service apartment operations, under the control of an accommodation manager. It may also be suitable for certain hotel or resort projects where the majority of owners are investors.
>
> The third module deals with commercial projects. It is intended for the management of non-residential projects although some mixed-use (commercial/residential) Project may be included if the residential component is not significant. Compared with the Standard and Accommodation Modules these management processes are more deregulated.
>
> The fourth module is for the management of Small Schemes and will only be available for community titles schemes which have six or less lots. It sets up a very deregulated management processes which encourage the onus to self-manage. There is no body corporate committee and decisions are made by the owner's meeting informally.

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17 (1996) 186 CLR 389, 396-7.

18 *Building Units and Group Titles Act* 1980 (Qld) remains in force but has limited application to schemes regulated by specified Acts.

[49] The BCCMA was amended further by the *Body Corporate and Community and Management and Other Legislation Amendment Act* 2003 (Qld). The amendments, essentially, addressed the further regulation of letting agents, resident managers, body corporate managers and service contracts. Further amendments were made by the *Body Corporate and Community and Management and Other Legislation Amendment Act* 2007 (Qld). Relevantly, it introduced additional secondary objects of the Act, namely:

> To encourage the tourism potential of community titles schemes without diminishing the rights and responsibilities of owners and intending buyers, of lots in community titles schemes.

[50] In 2009 the BCCMA was amended when it came under the jurisdiction of QCAT. The amendments also introduced legislation to invalidate prohibitions in community management statements or body corporate by-laws regarding the use of sustainable building elements and features such as photovoltaic cells and energy efficient window treatments. It also amended the by-law provision s 180 to add two additional subsections:

> (7) A by-law must not be oppressive or unreasonable, having regard to the interests of all owners and occupiers of lots included in the scheme and the use of the common property for the scheme.
>
> (8) A by-law must not include a provision that has no force or effect under the Building Act 1975, chapter 8A, part 2.

[51] Amendments in 2011 provided for a new lot entitlements system.

Discussion

[52] The determination of this appeal turns on a consideration of what the legislature intended when it enacted section 180(3) of the BCCMA. The subsection should be considered in its entirety.

> If a lot may be lawfully used for residential purposes, the by-laws cannot restrict the type of residential use.

[53] The subsection has been in the BCCMA since its enactment on 22 May 1997.[19]

[54] It is apposite to bear in mind the words of Lord Hoffman in *R v Brown*[20] quoted with approval by the High Court in *Collector of Customs the Agfa-Gevaert.*[21] Lord Hoffman said:

> The fallacy in the Crown's argument is, I think, one common among lawyers, namely to treat the words of an English sentence as building blocks whose meaning cannot be affected by the rest of the sentence... This is not the way language works. The unit of communication by means of language as the sentence are not the parts which it is composed. The significance of individual words is affected by other words and the syntax of the whole.

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19 Formerly s 142(2).
20 [1996] 1 AC 543, 561.
21 (1996) 186 CLR 398, 397.

[55] It is not disputed that the lot here may be lawfully used for residential purposes. The second part of the provision then refers to the restriction of residential use. It assumes that there is more than one type of residential use. What types of residential use are envisaged other than short or long term accommodation? If the Appellant's argument is correct and residential purpose does not include holiday letting then why is it necessary to refer to 'type'. It would be sufficient for the section to provide that a lot may only be used for residential purposes'. The word 'type' is superfluous if the Appellant's argument is correct.

[56] A well established canon of statutory construction is that where two constructions are open, the construction that avoids 'surplusage' is to be preferred.[22]

[57] The proper approach to statutory interpretation enunciated by the High Court in *Project Blue Sky Inc v Australian Broadcasting Authority*[23] is to give "the words of a statutory provision the meaning which the legislator is taken to have intended them to have". The Appellant's interpretation would render unnecessary the inclusion of the word "type" in s 180 (3) of the BCCMA.

[58] See *Samimi & Anor v Queensland Building and Construction Commission*[24]for a similar approach where the Court of Appeal rejected an interpretation, contended for by the appellant, that would have rendered certain words, in the section, unnecessary.

[59] Section 14A of the *Acts Interpretation Act* 1954 (Qld) provides that in interpreting a provision of an Act the interpretation that will best achieve the purpose of the Act is to be preferred to any other interpretation. Section 14B(1) permits the use of extrinsic material:

> (a) If the provision is ambiguous or obscure – to provide an interpretation of it; or
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> (b) If the ordinary meaning of the provision leads to a result that is manifestly absurd or is unreasonable – to provide an interpretation that avoids such a result; or
>
> (c) In any other case – to confirm the interpretation conveyed by the ordinary meaning of the provision.

[60] It is implicit in the Appellant's argument is that when the dictionary meaning of 'reside' or its derivatives are applied to s 180(3) of the BCCMA the term is ambiguous. It is argued that 'reside' means 'to dwell permanently or for a considerable time' or to 'one's permanent or usual abode'. It incorporates a temporal factor whereas the term 'accommodation' does not.

[61] I note the comments of Isaacs J in *The Australian Temperance & General Mutual Life Assurance Society Ltd v Howe*:[25]

> ...that [the word] "resident" and its cognate terms "reside", "residing" and "residence," are terms not of art or defined legal import but of very flexible

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22 *R v Bishop of Oxford* (1879) 4 QBD 245, 261 (Cockburn CJ.)
23 (1998) 194 CLR 355 at 384 [78]
24 [2015] QCA 106 paragraph [32]
25 (1922) 31 CLR 290, 304.

> meaning, acquiring whatever precision they have in any given case from their surroundings.

[62] It is useful, this stage, to refer to *Collector of Customs v Pozzolanic Enterprises Pty Ltd*[26] where the Full Bench of the Federal Court said:

> Although the words of the statute are construed according to their ordinary English meaning that does not mean that their application to a set of facts is simply described as the matching of that set of facts with a factual description. There is necessarily a selection process involved. The range of relationships to which the words apply for the purpose of the Act depends upon a judgement about that purpose... In the end this is not a process of fact-finding. The facts are found. What is left is a value judgement about the range of the Act and that is a question of law (citations omitted)

[63] The primary object of the BCCMA is expressed in section 2:

> The primary object of this Act is to provide for flexible and contemporary communally based arrangements for the use of freehold land, having regard to the secondary objects.

[64] The secondary objects are referred to in section 4 and relevantly are:

> (a) to balance the rights of individuals with the responsibility for self-management as an inherent aspect of community titles schemes;
> ...
> (c) to encourage the tourism potential community titles schemes without diminishing the rights and responsibilities of owners, and intending buyers, of lots in community titles schemes;
> ...
> (g) to provide an appropriate level of consumer protection for owners and intending buyers of lots included in the community titles schemes;

[65] The encouragement of tourism was a secondary object introduce into the BCCMA in the 2006 amendment. The explanatory note then stated:

> Clause 4 recognises the important contribution the community titles sector makes to Queensland's tourism industry, particularly through the provision of *short-term holiday accommodation*. The amendment in part encourages bodies corporate to consider tourism issues in the administration of their schemes. The acknowledgement of tourism issues is not intended to override or fetter existing rights of unit owners (for example, the right to object to, or vote against body corporate proposals that may have tourism benefits). The recognition of tourism is also not intended to limit the operation of existing consumer protection provisions for intending purchasers (for example, provisions requiring disclosure of letting arrangements in the course of the sale of lots) (emphasis added)

[66] Contrary to submissions of Counsel for the Appellant, it is relevant that the Hilton Park CMS is registered under the Accommodation Module which clearly contemplates '...letting for accommodation for... short-term residential purposes...'

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26 (1993) 43 FCR 280, 287-289.

[67] The Commercial Module contains the same definition of accommodation lot as the Accommodation Module but also defines 'commercial lot' as one that:

> a) is used for commercial (including retail) or industrial purposes; and
> b) is not an accommodation lot or a residential lot.

[68] 'Residential lot' is defined as meaning a lot used for residential purposes, whether or not the lot is also an accommodation lot.

[69] The distinction between 'accommodation lot' and 'residential lot' appears to be that the former can include a hotel which the regulation distinguishes from the residential lots.

[70] The Accommodation Module does contemplate that lots other than accommodation lots might be included in the scheme but the regulation requires that the lots be predominantly accommodation lots.[27] This would explain the restriction in by-law 12.1.1 that lots 1 to 10 must be used only for residential and not commercial purposes.

[71] The regulations that created the various modules was repealed and replaced by identical modules in 2008 as a requirement of the *Statutory Instruments Act* 1992 (Qld). Under that Act subordinate legislation expires on 1 September after the 10th anniversary of its making or such extended time as permitted under that Act.

[72] The Explanatory Note accompanying the introduction of the Accommodation Module contains the following statement:

> The policy objective of the *Body Corporate and Community Management (Accommodation Module) Regulation 2008* (the new Accommodation Module) is to provide management processes designed for schemes that are used predominantly as holiday letting or serviced apartment operation is the need for accommodation management.

[73] Interestingly, the *Body Corporate and Community Management (Standard Module) Regulation* 2008 (Qld) contained this statement:

> The policy objective of the *Body Corporate and Community Management (Standard Module) Regulation 2008* (the new Standard Module) is to provide management processes for predominantly owner-occupied schemes and schemes which are a mix of permanent residential and holiday letting.

[74] It is clear from the extrinsic material that the legislature intended that the term 'residential' would include holiday letting and/or short term accommodation and that is the way it should be construed in the BCCMA.

[75] In my opinion the use of 'commercial purpose' in by-law 12 is to exclude retail and business offices and the like. Further, in my opinion the by-law proposed by the Appellant was inconsistent the Accommodation Module and would be invalid under s 180(1) of BCCMA.

[76] The Appellant referred to a number of authorities. Reliance was placed on *Carter v Delgrove Holdings Pty Ltd,*[28] where the issue was whether a transaction was made in

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27 Regulation 3.
28 [2013] FCCA 783.

trade or commerce to ground jurisdiction. It related to the proposed purchase of a residential property to derive a rental income. The finding was that he transaction was a commercial activity as clearly, it was. The case is distinguishable.

[77] Reliance was placed on the decision of *Byrne v The Owners of Ceresa River Apartments*.[29] In my opinion the decision is distinguishable. The *Strata Titles Act* 1966 (WA) is very different to the BCCMA which with its various modules is unique to Queensland. The Management Statement lodged with the strata plan in *Byrne's* case referred to only residential apartment dwellings which meant there was no reason to distinguish between residential use and non-residential use such as commercial use. The by-laws there differed in one other respect. Under s 180(3) it was the lot's use that was restricted whereas in *Byrne* it was the proprietor's use of the lot that was restricted. The effect of the by-law was, on its proper construction, that a proprietor could only use, and any occupier to whom he granted occupancy rights, could only use, the lot as a settled or usual abode and not otherwise.

[78] The *Strata Titles Act* 1966 (WA) allowed restrictions on use provided they were not inconsistent with that Act.

[79] There the Court held that it was unnecessary to decide whether the word 'resident' in the *Strata Titles Act* might apply in some circumstances to a holiday maker or other person staying at the lot for a break away from their settled or usual abode.[30] It did so because if the conception of 'resident' in the *Strata Titles Act* implied some degree of continuity of living at the place than did the word residence in the by-law that would not mean that the by-law operated inconsistently with the *Strata Titles Act.*

[80] Counsel for the Appellant also relied upon the decision of the Privy Council in *O'Connor (Senior) and Ors v The Proprietors, Strata Plan No 51*.[31] Again, that can be distinguished as, like *Byrne*, the legislation is very different and the particular by-law restricted the use, not only for residential use, but also residential use by the proprietor. The relaxation in the next part of the by-law allowed reasonable residential use by others including exploitation of the property for rental by others but limited to a period of not less than a month.

[81] The Respondent argues that the proposed by-law also offended s 180(4) of the BCCMA in that it was an attempt to prevent or restrict a dealing of the Respondent's lot. The argument requires a consideration of whether 'other dealing' incorporates a 'holiday tenancy'. The section does not refer to a lease or tenancy, but one of the examples supporting the section refers to 'leasing'. The example may extend the meaning of the provision and is to be read in context with the provision.[32]

[82] It would appear that the distinction between a licence and a tenancy or lease is the right to exclusive occupancy. In *Lewis v Bell*[33] Mahoney JA said:

> In the present case, it was accepted, or at least assumed, that the test is that of exclusive possession. That, in my opinion, is correct. It is the test which was adopted by at least the majority of their Honours in *Radaich v Smith* (see

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29 [2017] WASCA 104.
30 [112].
31 [2017] UKPC 45.
32 Section 14D, *Acts Interpretation Act* 1954 (Qld).
33 (1985) 1 NSWLR 731.

> at 214, 217-220, 223). That that is, at least initially, the test, was affirmed by Mason J in *Goldsworthy Mining Ltd v Federal Commissioner of Taxation* (1973) 128 CLR 199 at 212; affirmed (1975) 132 CLR 463.
>
> It is not necessary to analyse the precise nature of the right to exclusive possession which is here in question. It is, for present purposes, sufficient to say that it involves that the lessee have the general right to exclude others, including the lessor, from the premises, subject at least to such specific provisions for entry as may be particularly provided for in the document: cf the rights reserved in the *Glenwood Lumber.* (citations in original)

[83] In the detailed review of the authorities, Croft J in *Swan v Uecker*[34] held that an AirBnB agreement for occupation of an apartment for short term stays was properly to be characterised as a lease between the sub-lessees and the AirBnB guests for the period of occupation agreed between them. In that case the lessee argued that the arrangement between them and AirBnB was a licence and not a sublease which would have beemn contrary to the terms of the head lease.

[84] In my opinion, holiday letting would come with in the purview of s 180(4). In *Byrne,* the Court held that a restriction on holiday letting was a permissible as it was not contrary to the general provision that allowed the body corporate to make by-laws not inconsistent with the Act for the management, control, use and enjoyment of a lot. Those provisions are different to s 169(1)(b)(i) and ss 180(1) and (4) of the BCCMA. In any event a restriction on holiday letting of a lot would be a restriction sufficient to engage s 180(4) of the BCCMA.

[85] Consequently, the Appeal should be dismissed. I invite the parties to file written submissions in relation to the Respondent's entitlement to costs. Such submissions, if any, to be filed by the Respondent by 30 November 2018 and by the Applicants by 14 December 2018.

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34 [2016] VSC 313, [46].