

The Response

2. In response to the complaint brought by the Complainant, Counsel for the Respondent submitted that:
 - a. the amended by-laws that prohibit both short-term rentals and define short term rental as a period of rental by a tenant for less than one (1) year, when read together, are invalid pursuant to Section 9(4) of the Registration (Strata Titles) Act;
 - b. the strata lot as advertised does not need to be licensed under the Jamaica Tourist Board Act and is therefore not illegal in contravention of By-law 2(a);
 - c. the resolutions that gave life to the amendments in the by-laws were improperly passed;
 - d. the Respondent is not in breach of the Charter of Fundamental Rights and Freedoms (Constitutional Amendment) Act 2011, chapter III, section 13(3)(j).

The Facts

3. The Complainant is a strata corporation established by virtue of the provisions of the Registration (Strata Titles) Act.
4. Strata Plan 2652, with its accompanying by-laws, was registered on the 18th day of August, 2015 with the Office of Titles. The strata complex is located at No. 19 Three Views Avenue, Kingston 19, St. Andrew and is known as Tres Vistas Apartments.
5. The Respondent is the registered owner of Strata Lot No. 4 in Strata Plan 2652. The Respondent advertised his strata lot for rent via the online platform AirBnB.
6. From the outset of the hearing, the Respondent conceded that he was doing both short-term “rentals” (that is to say, for days or weeks at a time) and long-term rentals at his strata lot but contended that this was not in breach of the by-laws or any law.

The Issues

7. During the course of the hearing, the parties agreed to abandon their arguments relating to the amended by-laws. Accordingly, we will deal with the remaining issues. The issues for the Panel to consider, therefore, are whether:
 1. By-law 2a contravenes section 9(4) of the Registration (Strata Titles) Act;
 2. the Respondent is in breach of By-law 2a;
 3. the Respondent’s advertising his strata lot is in breach of the Tourist Board Act and therefore illegal and in contravention of Section 2(a) of the by-laws; and
 4. the Respondent was in breach of The Charter of Fundamental Rights and Freedoms (Constitutional Amendment) Act 2011, Chapter III, Section 13(3)(j).

Legal Analysis

8. For the record, the Panel has considered the submissions of counsel for both the Complainant and the Respondent but we does not propose to re-state them at length or refer to them in detail. The Panel, therefore, sets out below our analysis of the relevant provisions, the submissions and the authorities provided by counsel.

Issue 1

9. The starting point of any analysis in this matter will begin with **Section 9 of the Registration (Strata Titles) Act** and the by-law which is in contention in this matter.

Section 9(1) states:

“Subject to the provisions of this Act the control, management, administration use and enjoyment of the strata lots and the common property contained in every registered strata plan shall be regulated by by-laws.”

Section 9(4) states:

“No by-law shall operate to prohibit or restrict the devolution of strata lots or any transfer, lease, mortgage or other dealing therewith or to destroy or modify any easement implied or created by this Act.”

10. Therefore, any interpretation of the by-law at the crux of this matter is to be read in the context of Section 9(4). By-law 2a states:

“A Proprietor shall not use his Strata Lot or the common property nor any part thereof which may be illegal or immoral or injurious to the reputation of the land or buildings nor shall any trade or business be carried on there but the proprietor shall use his lot for the purpose of a single private residence only”

11. In the Privy Council case of *O'Connor (Senior) & Others v The Proprietors Strata Plan No. 51 [2017] UKPC 45*, an appeal from the Turks and Caicos Islands, the Board had to determine, *inter alia*, whether the relevant by-laws were in breach of the Strata Titles Ordinance (CAP 9:04). The relevant by-laws stated:

“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 by-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.

12. Section 20(1) of the Ordinance provides that "...the control, management, administration, use and enjoyment of the strata lots...shall be regulated by by-laws". Section 20(4) of the Ordinance provides:

"No by-law shall operate to prohibit or restrict the devolution of strata lots or any transfer, lease, mortgage or other dealing therewith or to destroy or modify any easement implied or created by this Ordinance".

13. It is clear that Section 9(4) of the Registration (Strata Titles) Act is virtually identical to Section 20(4) of the Turks and Caicos Islands Ordinance. The by-law in the instant matter, By-law 2a, is also similar to the relevant by-laws in *O'Connor* in that they both restrict the use of the strata lot for use as a "private residence". In *O'Connor*, the Board stated:

"...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". (at para. 10)

14. The Board went further and highlighted the Court's finding in *Byrne v The Owners of Ceresia River Apartments Strata Plan 5597 [2017 WASCA 104]*, that the relevant by-law operated as a restriction on use rather than on alienation, and was therefore unobjectionable. In *Byrne*, the court held:

"By-law 16 is concerned with use...Construed in the manner we have described, and taking into account what we have said...as to s 42(3), by-law 16 does not prohibit or restrict dealings in a lot in a manner contrary to or that engages s 42(3) of the *Strata Titles Act*." (at para. 157)

15. We are persuaded by the judgments of *O'Connor* and *Byrne*. In particular, the statutory provisions and by-laws in *O'Connor* and the instant matter being very similar, we find favour with the decision of the Board. Accordingly, By-law 2a is not inconsistent with Section 9(4) of the Registration (Strata Titles) Act.

Issue 2

16. Is the fact that the Respondent is renting the unit for short term rentals mean that it is not being used “for the purpose of a single private residence only”? In determining this issue, it is important to consider what is meant by “single private residence”.
17. In *O’Connor*, the Board also had to determine whether the appellants were in breach of the relevant by-laws by allowing “paying holidaymakers” to occupy their strata lots. In so doing, the Board considered the meaning of “private residence” and relied on the dicta in *Caradon District Council v Paton (2001) 33 HLR 34*. In *Caradon*, Latham LJ said:

“Both in the ordinary use of the word and in its context it seems to me that a person who is in a holiday property for a week or two would not describe it as his home. It seems to me that what is required in order to amount to some use of a property as a home is a degree of permanence, together with the intention that that should be a home, albeit for a short period, but not for the purposes of a holiday.” (at para. 36)

18. Similarly, in *Byrne v The Owners of Ceresa River Apartments Strata Plan 5597 [2017 WASCA 104]*, the Tribunal had to consider whether short term rentals or “short-stay accommodations” were consistent with a by-law that provided that a lot must be used as a ‘residence’ by the proprietor of the lot. The Court reasoned:

“...Whilst proof of permanency of abode or 'extended or substantial' occupation of a place may be evidence of a settled or usual abode, in our view, the word 'residence' in this context more accurately denotes a settled or usual abode. Whether someone is occupying a lot for use as their settled or usual abode will, generally speaking, be a question of fact. On the other hand, some uses will necessarily fall outside the phrase 'use his lot as a residence'. Thus, a lot occupied by persons who merely use the lot as tourist accommodation, or as accommodation for holidays or other breaks away from their settled or usual abode, is not being occupied by persons who use the lot as a 'residence' within the meaning of by law 16...” (at para 151)

...But the word 'residence' does not itself import a fixed period of occupation. The prohibition in by-law 16 is not on periods of occupation, but on use... (at para. 152)

...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. ... By-law 16 does not operate relevantly as a restraint on alienation contrary to s 42(3) of the *Strata Titles Act*, but as a limitation on use. (at para 154)

19. This Panel agrees with the reasoning of the courts in *O’Connor*, *Caradon* and *Byrne*. We, therefore, find that the Respondent herein is in breach of By-law 2a in that he was not using his strata lot for the purpose of a single private residence only.

Issues 3 and 4

20. In light of our findings above, and without disrespect to the parties and their respective counsel, we did not find it necessary to address Issues 3 and 4.

Conclusion

21. Based on the foregoing discussion, the Panel rules as follows:
1. By-law 2a is not in contravention or inconsistent with Section 9(4) of the Registration (Strata Titles) Act;
 2. The Respondent, by using his strata lot for short-term “rentals”, is in breach of By-law 2a;
 3. The Respondent shall immediately cease and desist from using his strata lot for short term “rentals”;
 4. The Respondent shall pay to the Commission of Strata Corporations for the recovery of costs for the use of its facilities and services. The Respondent shall be advised of the sum payable within fifteen (15) days of the date of this ruling, and shall make payment within thirty (30) days thereafter.