QCAT

Queensland **Civil and Administrative Tribunal**

DECISION

CITATION:	Williamson v Princess Palm Body Corporate CTS 9843 [2010] QCATA 55
PARTIES:	Jon Allan Williamson v Princess Palm Body Corporate CTS 9843
APPEAL NUMBER:	APL001-10
MATTER TYPE:	Appeal
HEARING DATE:	1 September 2010
HEARD AT:	Brisbane
DECISION OF:	Kenneth Barlow
DELIVERED ON:	24 September 2010
DELIVERED AT:	Brisbane
ORDERS MADE:	See paragraph 92
CATCHWORDS:	Body Corporate and Community Management – appeal from order of adjudicator – by-laws of the body corporate prohibiting certain activities - whether by-laws valid – *Body Corporate and Community Management Act* 1997 (Qld), ss 94, 169, 180

APPEARANCES and REPRESENTATION (if any):

Applicant: Mr Williamson in person

Respondent: Mr Derek Norquay, Solicitor

Introduction

1. This proceeding constitutes an appeal, pursuant to section 289 of the *Body Corporate and Community Management Act* 1997 (Qld) (the "Act" or the "BCCM

Act"), from an order of an adjudicator made under Part 9 of Chapter 6 of the Act concerning the respondent, Princess Palm Body Corporate. The applicant in this proceeding is the owner of one of the lots in the scheme and was the applicant to the adjudicator.

2. Under section 289 of the Act, an aggrieved person may appeal to this tribunal from an order of an adjudicator, but only on a question of law.

3. In the application as finally amended, the applicant asserts that each of three provisions in the by-laws of the respondent is unlawful, void and of no force or effect. The adjudicator ordered that the applicant's application for an order that each of those provisions was invalid be dismissed. The applicant contends that the adjudicator erred in law in making that order.

4. I shall deal with each of the by-laws sequentially. Each of them was adopted by the respondent at its annual general meeting on 27 March 2009.

By-Law 11: Appearance of Lot

The by-law

5. By-law 11 is headed "Appearance of Lot". The relevant part of the by-law which is challenged by the applicant is paragraph (d), which provides:

> "*Barbeques may only be stored or used on balconies with the written authorisation of the Body Corporate Committee.*"

6. The notice of the annual general meeting by which the by-law was proposed contained a note to each motion for the adoption of a new by-law. In respect of by-law 11(d), it stated, *"The use of barbeques could pose a safety concern as hot items or cooking oil could fall from balconies onto pedestrians."*

The adjudicator's reasons

7. The adjudicator decided that by-law 11(d) was not invalid. He referred to s.94 of the Act, which provides:

> "***Body corporate's general functions***
>
> *(1) The body corporate for a community titles scheme must –*
>
> *(a) administer the common property and body corporate assets for the benefit of the owners of the lots included in the scheme; and*
>
> *(b) enforce the community management statement (including any by-laws for the scheme); and*
>
> *(c) carry out the other functions given to the body corporate under this Act and the community management statement.*
>
> *(2) The body corporate must act reasonably in anything it does under subsection (1) including making, or not making, a decision for the subsection.*

8. He went on to state that by-law 11(d) does not contain an absolute prohibition upon the presence of barbeques on balconies and, given that the body corporate is

required by subsection 94(2) to act reasonably, he did not believe that the by-law should be declared invalid.

Applicant's submissions

9. The applicant submits that the body corporate has no power to prohibit or restrict owners or occupiers from actions within their units that do not interfere with common property, do not create noisy or offensive behaviour and are not otherwise contrary to the Act, the regulations or the by-laws. He likens the by-law to a by-law that might seek to prevent owners or occupiers of lots placing tables and chairs on balconies or themselves standing or sitting on balconies.

10. The applicant refers to s.169 of the Act. That section relevantly provides as follows:

> "***Content and extent of by-laws***
>
> *(1) The by-laws for a community titles scheme may only provide for the following –*
>
> *(a) the administration, management and control of common property and body corporate assets;*
>
> *(b) regulation of, including conditions applying to, the use and enjoyment of –*
>
> *(i) lots included in the scheme; and*
>
> *(ii) common property, including utility infrastructure; and*
>
> *…*
>
> *(iv) services and amenities supplied by the body corporate …*"

11. The applicant also relies upon subsections 180(1), (5) and (7), which provide as follows:

> "***Limitations for by-laws***
>
> *(1) If a by-law for a community titles scheme is inconsistent with this Act (including a regulation module applying to the scheme) or another Act, the by-law is invalid to the extent of the inconsistency.*
>
> *(5) A by-law must not discriminate between types of occupiers.*
>
> *(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.*"

12. In these respects, I understand the applicant's submission to be that there are no federal, state or local authority laws that prohibit the storage or use of barbeques on balconies of units or that require the written authorisation of a body corporate, or of any person, for such storage or use of barbeques on balconies. Other legislation provides for safety and other standards relating to the use of barbeques and related products, and the by-law seeks to impose an additional condition upon the use by unit holders of barbeques on their balconies, namely that they obtain

the body corporate's permission. In seeking to impose that condition, the by-laws are inconsistent with the legislation referred to and are therefore invalid.

13. The applicant also submits that the Act and regulations do not provide power for the body corporate to change "the normal constitutional and legal rights and privileges of owners or occupiers of lots (units), in regards to their own units or lots, by means of by-laws," which this by-law purports to do.

14. In his oral submissions, the applicant first referred to a decision of Mr Dorney QC (as his Honour then was) in *Bartley v Body Corporate for One Holman Street CTS 31236* [2008] CCT KA007-07. In that case, the tribunal decided that a "patio" was part of a lot in the relevant community titles scheme. I understand the applicant's submission in this case to be that a balcony is similarly part of a lot within this scheme and the use to which it may be put may not be regulated in the manner provided by-law 11(d).

15. The applicant also referred to the decision of the adjudicator which led to the appeal in *Mineralogy Pty Ltd v The Body Corporate for "The Lakes Coolum"* [2003] 2 Qd R 381. Although the applicant referred to the adjudicator's decision, it is the Court of Appeal's decision which is of most relevance and to which I shall have regard. In that case, the Court of Appeal considered whether a by-law requiring the approval of a body corporate committee to any construction, improvements or landscaping on a lot was validly within the scope of the equivalent section at the time to s.169(1)(b)(i).

16. By reference to this decision, the applicant contends that a by-law may only regulate matters that concern the use and enjoyment of lots included in the scheme and, if it seeks to control matters that are beyond the use and enjoyment of lots, it is invalid. He contended that "use and enjoyment" is typically limited to noise, the behaviour of invitees, the appearance of the lot, the storage of flammable materials and the keeping of animals, as indicated in the standard by-laws provided in schedule 4 to the Act. I understood him to contend that the by-law requiring the consent of the body corporate to the storage and use of a barbeque on a balcony of a lot goes beyond regulation of the use and enjoyment of the lots.

17. The applicant contended that the question to be answered is whether a body corporate can make by-laws concerning lots in a scheme about anything the body corporate wishes. The question, he said, was where the dividing line starts and ends between matters that may or may not be the subject of valid by-laws.

Respondent's submissions

18. The respondent submitted that there was no suggestion that the powers of the body corporate are unlimited. Its contention was that the by-law is a reasonable regulation of the use and enjoyment of lots because barbeques may affect the external appearance of lots and for safety reasons.

19. As to affecting the external appearance of lots, Mr Norquay, appearing for the respondent, noted that by-law 8 in Schedule 4 to the Act is a by-law concerning alteration of the external appearance of lots. Therefore, he contended, it is clear that a by-law that concerns the external appearance of lots is valid. He said that "external appearance" goes beyond changes to the lot itself (such as painting). Large or garishly coloured barbeques can have an adverse visual impact on the external appearance of the entire building and therefore it is appropriate that there be some control over the storage of barbeques on the balconies of lots.

20. Mr Norquay also contended that the by-law is reasonable from a safety point of view. He said a slippery surface on the floor of a balcony caused by fat falling from a barbeque could cause people to slip and to fall from balconies. Furthermore, he said that the body corporate needs to be able to tell the fire department whether there are gas bottles on the premises should an emergency arise. He also referred to s.96 of the *Fire and Rescue Service Act* 1990, contending that it had application to the body corporate.

21. Finally, Mr Norquay referred to s.186 of the *Body Corporate and Community Management (Accommodation Module) Regulation* 2008. That section provides as follows:

> "***Use affecting premium [SM, s188]***
>
> *(1) This section applies if, because of the way that a lot is used, a premium for reinstatement insurance or the premium for public risk insurance required to be taken out by the body corporate is likely to increase.*
>
> *(2) The owner of the lot must give the body corporate details of the use.*"

22. He contended that the use of barbeques on a balcony of a unit may well fall within that section and that s.96 of the *Fire and Rescue Service Act* demonstrates that it is an insurance issue.

Discussion and conclusions

23. If it is otherwise valid, I do not consider that this by-law is inconsistent with other Acts simply because it imposes a condition of use of barbecues on balconies whereas no other Act imposes any such condition. No other Act has been cited to me which provides that a body corporate may not impose conditions on the use of barbecues. Therefore, to the extent that the applicant's submission described in paragraph 12 above refers to Acts other than the BCCM Act, it is without substance.

24. To my mind, s.96 of the *Fire and Rescue Service Act* 1990 has no relevance as it concerns an occupier of premises in which any dangerous goods are stored. First, it is not clear to me whether a barbeque gas bottle is within the definition of "dangerous goods" in that Act. Secondly, the body corporate is not the occupier of premises comprising the lots.

25. Does the by-law, by requiring the consent of the body corporate to the storage and use of a barbeque on a balcony of a lot, go beyond regulation of the use and enjoyment of the lots, as the applicant contends?

26. To answer this question, one must first ask whether the by-law purports to regulate the use and enjoyment of a lot or to prohibit a certain manner of using and enjoying a lot. This is the question that was raised by the Court of Appeal in *"The Lakes Coolum*". The relevant by-law in that case prohibited any construction, renovation or landscaping works on a lot other than those to which the body corporate committee had given its approval in writing. In this case, the effect of by-law 11(d) is to prohibit the use or storage of barbeques on a balcony that forms part of a lot without the written authorisation of the body corporate committee. The by-law in this case is therefore relevantly similar to the by-law under discussion in *"The Lakes Coolum*".

27. In that case, McPherson JA (with whom Jerrard JA and Philippides J agreed) referred (at [7]) to 2 decisions of the High Court[1] in which it was said that, "*Prima facie a power to make by-laws regulating a subject matter does not extend to prohibiting it either altogether or subject to a discretionary licence or consent." "But ... this proposition cannot be universally applied.*" His Honour then went on to say (at [8]) that, "*Prohibition of an activity in part, in a particular case, or in a particular way, may however in some circumstances be needed in order to achieve effective regulation.*" He noted (at [9]) that the by-law in question before the Court commenced with a prohibition on carrying out works, the effect of which was to prevent what was generally accepted as a basic right of a land owner, which was to build a dwelling on the land. Prima facie, his Honour said, such a prohibition goes beyond mere regulation. However, his Honour noted that the discretion was not altogether unqualified or unlimited. Approval must not be unreasonably withheld provided that the works were in harmony with the architectural design and other aspects of existing improvements on other lots and the common property in the scheme.

28. His Honour went on to note (at [11]) that, although it was true that the determination of what was "in harmony" with existing improvements involved matters of personal predilection, taste and judgement, that did not necessarily make the process of assessment uncertain or arbitrary. In the District Court, the Judge considering the appeal from the adjudicator had held that the provisions of the by-law did not introduce such a degree of uncertainty as to require them to be condemned as invalid. McPherson JA noted that the application for leave to appeal had not challenged that conclusion with which, in any event, he agreed.

29. His Honour concluded (at [12]) that, "*Given that the by-law supplies an objective standard by which to judge the harmonious character of the proposed works, and that approval to carrying them out must not be unreasonably withheld, it does not seem to me that the by-law is invalid on the ground of its being prohibitory rather than regulatory.*" His Honour noted that, in *Brunswick Corporation v Stewart*, the question of validity was approached as one to be determined according to whether or not the requisite approval under the by-law could be arbitrarily withheld. And His Honour noted that, although the question whether the proposed works would achieve harmony with existing improvements involved an element of individual taste, it was not something that was committed to the arbitrary and capricious authority of the body corporate committee.

30. In this case, the adjudicator and the respondent relied upon the obligation of a body corporate, under s.94(2), to act reasonably in anything it does under subsection (1). Subsection (1) provides that the body corporate must, among other things, carry out the functions given to the body corporate under the Act and the community management statement. In this case, one of the functions given to the body corporate committee under the by-laws for the scheme is to decide whether to approve the use and storage of barbeques on the balconies of lots in the scheme. Subsection 100(1) provides that a decision of the committee is a decision of the body corporate. Therefore, the body corporate committee must act reasonably in making any decision as to whether or not to approve such matters.

31. However, by-law 11(d) sets out no guidelines or objective criteria by which the body corporate committee must make its decision whether or not to approve a particular barbeque. In that respect, it makes the process of assessment uncertain

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[1] *Swan Hill Corporation v Bradbury* (1937) 56 CLR 746, at 762; and *Brunswick Corporation v Stewart* (1941) 65 CLR 88, at 95.

and potentially arbitrary, in contrast to the by-law being considered by the Court of Appeal in "*The Lakes Coolum*".

32. Furthermore, in its current form the question whether the use and storage of a barbeque may be approved by the body corporate committee is committed to the potentially arbitrary and capricious authority of the committee, again in contrast to the by-law being considered by the Court of Appeal.

33. In these circumstances, it seems to me that by-law 11(d) does not regulate the use and enjoyment of lots included in the scheme. Rather, it is a prohibition of a certain use, subject to the arbitrary permission of the body corporate committee.

34. I therefore consider that by-law 11(d) is invalid. The adjudicator erred in law in determining that it was valid. Having regard to this conclusion, it is unnecessary for me to consider, in respect of by-law 11(d), the applicant's submission described in paragraph 13 above.

By-Law 13 – Storage of Flammable Liquids etc

The by-law

35. The applicant challenges the validity of paragraph (b) of by-law 13, which provides as follows:

> "*An Occupier must notify the Body Corporate Committee in writing if they require oxygen bottles to be stored on their lot and/or transported in the lifts.*"

36. The note to the motion in the notice of the annual general meeting in which the by-law was proposed stated, in respect of by-law 13:

> "*That use and storage of oxygen cylinders may prove a fire or insurance risk and the appropriate people need to know the cylinders are present.*"

The adjudicator's reasons

37. The adjudicator concluded that the by-law was valid because it did not prohibit an occupier from storing an oxygen bottle in their lot or transporting the bottle in lifts, but rather enabled the body corporate to address any safety issues which may arise.

Applicant's submissions

38. The applicant submitted that by-law 13 was simply an impractical restriction on occupiers of lots, particularly if a person occupying a lot requires an oxygen bottle wherever they go. In the circumstances, he contends, it is oppressive and 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, contrary to subsection 180(7) of the Act.

39. The applicant also submitted, in his amended application, that a body corporate and its committee have no power to prohibit or restrict owners or occupiers from actions within their units that do not interfere with common property, that do not create noisy or offensive behaviour and that are not contrary to the provisions of other statutes.

40. Finally, the applicant said that the by-law is invalid for the reasons described in paragraph 13 above.

Respondent's submissions

41. The respondent submitted that it is reasonable for it to require a unit occupier to give written notice about the storage or transportation of oxygen bottles because:

    (a) storage of an oxygen bottle in, and transportation to and from, a unit comprise use and enjoyment of a lot, and the respondent is empowered to regulate and impose conditions applying to it, pursuant to s.169(1)(b) of the Act;

    (b) there is a need to minimise the risk of injury to occupiers and invitees when oxygen bottles are moved within the lifts in the building, which requires the respondent to regulate the transport of bottles to and from units; and

    (c) oxygen in oxygen bottles is flammable and therefore their use or storage may affect the insurance premium of the body corporate, so that by-law is consistent with s.186 of the regulation.

Discussion and conclusion

42. Insofar as by-law 13 refers to the storage of oxygen bottles in lots, it clearly relates to the use and enjoyment of lots included in the scheme. Insofar as it relates to the transportation of oxygen bottles in lifts, it relates to the management and control of common property.

43. The by-law does not purport to prohibit either the storage or the transportation of oxygen bottles. It simply imposes a condition of either activity, namely that the body corporate committee be notified in writing that an occupier requires oxygen bottles to be stored or transported. Contrary to by-law 11(d), it regulates the use and enjoyment of lots and the management and control of common property.

44. In my opinion, it does not require that every time an oxygen bottle is to be transported in lifts or stored in a unit, written notice must be given to the body corporate committee. That would be wholly impractical and therefore unreasonable and oppressive. It simply requires that, if an occupier intends to transport oxygen bottles in lifts, from time to time while occupying a lot, the occupier must notify the body corporate committee that it requires to do so from time to time. Similarly, if an occupier needs to store an oxygen bottle in the lot, whether permanently or from time to time, the occupier must give written notice to the committee that the occupier will do so.

45. I see some merit in the respondent's submission that it is reasonable for the body corporate to be told that oxygen bottles will be on the premises. However, the respondent tendered and called no evidence below, nor did the adjudicator make any findings, to prove the assertion that the presence of oxygen bottles might affect insurance premiums and so I do not accept that contention on the part of the respondent.

46. As the by-law in part provides for the management and control of common property and in part regulates, by applying conditions to, the use and enjoyment of lots for the storage of oxygen bottles, it falls within s.169 of the Act. I do not consider that it is 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.

47. As for the applicant's contention referred to in paragraph 13 above, I do not consider that it adds anything to his submission that the by-law is oppressive and unreasonable. Section 169 expressly authorises a body corporate of a community titles scheme to make by-laws regulating the use and enjoyment of lots in the scheme. By doing so it authorises some interference with the usual rights of a land owner. By owning or occupying a lot in a community titles scheme, a person such as the applicant voluntarily submits to the prospect of such regulation.

48. As for constitutional rights, the applicant did not refer to any particular right, either expressly or impliedly granted under either the Commonwealth or the Queensland Constitutions. There is no right of which I am aware that would invalidate this by-law, or the legislative power under which it was made.

49. I therefore consider that by-law 13(b) is valid. The adjudicator made no error in making an order to that effect.

By-Law 25

The by-law

50. By-law 25 is headed "Floor coverings". It provides as follows:

> "*(a) The Body Corporate requires that each Occupier maintains a high standard of sound-proofing in their Lot.*
>
> *(b) Occupiers may replace any carpet laid in the Lot with carpet, but not replace carpet with tiles, timber or other material without obtaining written consent of the Body Corporate Committee.*
>
> *(c) The Body Corporate Committee will provide an Occupier with its consent for the replacement of carpet with other floor coverings if:*
>
> > *(i) a written proposal is given by the Occupier to the Body Corporate Committee;*
> >
> > *(ii) work to be carried out under the proposal sets out the type and specifications of the materials to be used together with the details of sound-proofing materials to be incorporated in the new floor coverings sought;*
> >
> > *(iii) the Body Corporate Committee is satisfied that the sound-proofing materials proposed to be used in conjunction with the new floor coverings will not create a nuisance to other Occupiers;*
>
> *(d) If a carpet replacement proposal requires the consent of the Body Corporate Committee and that consent is refused, then an Occupier may amend the proposal (eg. by improving the proposed sound-proofing materials) and re-submit it for the consent of the Body Corporate Committee.*
>
> *(e) The Occupier shall arrange for an inspection of the work by an authorised member of the Body Corporate Committee upon completion*

of the work to ensure that it complies with the proposal to which the Body Corporate Committee consented.

(f) Any consultant's fees incurred by the Body Corporate Committee in considering any proposal by an Occupier be paid by the Occupier (or, if paid by the Body Corporate Committee, refunded by the Occupier to the Body Corporate Committee).

(g) Any tiling of floors must comply with the Australian Standards and legislation at the time that the tiles are laid.

(h) The products used in tiling floors must be installed in accordance with the specifications laid down by the manufacturer of the product and appropriately qualified tradespersons shall undertake such work."

The adjudicator's reasons

51. The adjudicator stated that, as an adjudicator, he was aware that replacement of carpet with hard flooring is a major source of conflict within community titles schemes. He said that many community titles schemes now include in their community management statement specific by-laws regulating hard flooring surfaces by prohibiting their installation without the consent in writing of the body corporate committee and, in some instances, conditions or standards for approved flooring. The adjudicator could see no reason why such a requirement was oppressive or unreasonable having regard to the interests of all owners and occupiers.

Applicant's submissions

52. The applicant submitted that by-law 25 is an unwarranted restriction on what owners can do within their own units. He relied on the submission described in paragraph 13 above. He said that it is an individual owner's responsibility to make sure that any new floor covering is not unreasonably noisy and any other aggrieved owner could take civil action against the offending owner if an owner did not do so. He contended that this by-law is akin to a building covenant, but without agreement between the interested parties. He also contended that the by-law is oppressive and unreasonable. He contended that the body corporate is responsible for common property only and not for property in areas within individual owner's units. He also contended that the committee had no power to require owners to provide a proposal, to arrange for an inspection of the work, or to repay the body corporate's consultant's costs.

53. In respect of the applicant's submission that the body corporate had no power to require that its consultant's costs be paid by an owner, I understood the applicant to be relying upon subsection 180(6) of the Act, which provides:

> "*A by-law (other than an exclusive use by-law) must not impose a monetary liability on the owner or occupier of a lot included in a community titles scheme.*"

54. I understood the applicant to contend that paragraph (f) of by-law 25 is invalid as being inconsistent with that subsection.

Respondent's submissions

55. The respondent relied upon the adjudicator's reasons for his decision in respect of this by-law. It submitted that the by-law was clearly introduced for the purpose of minimising the potential noise nuisance created by the replacement of carpet with hard surface floor coverings. The use of non-carpet floor covering can affect the use and enjoyment of lots, which the respondent is empowered to regulate and to which the respondent is empowered to apply conditions. Mr Norquay also contended that the by-law is consistent with standard by-law 1 in schedule 4 of the Act, which provides that the occupier of a lot must not create noise likely to interfere with the peaceful enjoyment of a person lawfully on another lot or the common property.

56. In respect of paragraph (f) of by-law 25, the respondent submitted that it is distinguishable from cases referred to by the adjudicator in considering other by-laws which, he found, breached subsection 180(6). Mr Norquay submitted that this by-law does not have the potential for imposing unlimited liability on owners, and that subsection 180(6) is not a strict prohibition on the imposition of monetary liability, but a prohibition on the unreasonable imposition of such a liability.

57. The respondent also submitted that the dictionary to the regulation states:

> "*Body corporate debt means a following amount owed by a lot owner to the body corporate -*
>
> *(c) another amount associated with the ownership of a lot.*
>
> *Examples of another amount - …*
>
> - *an amount owing to the body corporate for lawn mowing services arranged by the body corporate on behalf of the lot owner.*"

58. The respondent submitted that a consultant's fee incurred by the respondent to advise on an occupier's proposal to install non-carpet flooring is an "amount associated with the ownership of a lot". The association is effecting an improvement to or refurbishment of a unit by means of installing flooring, which is incidental to ownership or occupation of a unit. It follows that the consultant's fee is a "body corporate debt" that can be properly recovered from an occupier pursuant to s.97 of the regulations. (I take the reference to s.97 to be a reference to s.143 of the regulation to which I have referred above, as s.97 is irrelevant to the payment of body corporate debts.)

Discussion and conclusions

59. The format of by-law 25 is similar to that of by-law 11(d). It imposes a prohibition on the use of tiles, timber or material other than carpet, subject to a qualification that those materials may be used with the written consent of the body corporate committee. However, the by-law goes further than by-law 11(d). It identifies specifically the object of the by-law, namely that occupiers maintain a high standard of sound-proofing in their lots. It sets out a specific methodology by which consent may be obtained and the criteria which, if met, will lead to the body corporate committee giving its consent. The principal criterion is that the body corporate is satisfied that the sound-proofing materials proposed to be used in conjunction with the new floor coverings will not create a nuisance to other occupiers.

60. By-law 25 therefore differs from by-law 11(d), in that it does not give the committee an unqualified or unlimited discretion, and the process of assessment is not uncertain or arbitrary. In my opinion, therefore, it is a by-law regulating, and applying conditions to, the use and enjoyment of lots in the scheme. Subject to its compliance with other sections, it therefore falls within s.169(1)(b)(i) of the Act.

61. The other sections which I have to consider, having regard to the parties' submissions, are subsections 180(6) and (7) and s.143 of the regulation in conjunction with the definition of "body corporate debt". I shall start with sub-section (7).

62. This community titles scheme relates to a high rise building. There was no evidence before the adjudicator of the extent of sound proofing included in the building itself, which might reduce or remove altogether the passage of sound from a hard floored unit to the unit below or to units alongside it. However, it is not hard to appreciate that the use of hard flooring would at least increase the risk of annoying sounds passing from one unit to others.

63. In my opinion, it is not unreasonable for the by-laws of a community titles scheme such as this to regulate the use of flooring within individual units so as to contain the possibility of nuisance created by noise travelling between units. This by-law in that respect is not unreasonable or oppressive.

64. Nor is it unreasonable or oppressive, in my opinion, for a condition of the replacement of carpet with other materials, that the occupier permit an authorised member of the body corporate committee to inspect the works to ensure that it complies with the proposal that was approved. Nor, in my opinion, is it unreasonable or oppressive for there to be a condition that tiling floors be installed in accordance with the manufacturer's specifications and by appropriately qualified tradespersons.

65. However, I am not satisfied that it is reasonable for a condition of the body corporate providing consent that <u>any</u> consultant's costs incurred by it be paid by the occupier. While a body corporate committee may have to act reasonably in deciding whether or not to engage a consultant, the provision does not require that the consultant's fees be reasonable, nor impose any limit on such fees.

66. Furthermore, paragraph (f) of by-law 25 clearly purports to impose a monetary liability on the occupier of a lot. In that respect, it clearly offends subsection 180(6). It purports to impose on the occupier monetary liability for unquantified costs which the body corporate committee may or may not choose to incur.

67. The respondent submitted that subsection 180(6) should not be construed as imposing a strict prohibition on the imposition of monetary liability by a by-law. I see no other way in which this subsection can be construed.

68. Section 143 of the regulation does not assist the respondent. The liability which the by-law purports to impose is not a charge for the provision of a service, such as the example given in the definition of "body corporate debt" in the regulation. In any event, that section is not a source of power to impose a monetary obligation. Rather it simply provides for who is liable for a body corporate debt. If the body corporate were entitled to impose a particular monetary obligation associated with the ownership of a lot, then such an obligation would be a body corporate debt. But the respondent's submission in this respect begs the question whether such a debt in fact can arise in the manner which the by-law purports to provide. If, as I

have found, the by-law purports to impose a monetary liability on a lot owner or occupier, then it is invalid and no body corporate debt based upon it can exist.

69. I also note that the adjudicator failed even to consider the submission before him that the by-law was inconsistent with subsection 180(6). In that respect, he erred in law.

70. In all these circumstances, I consider that by-law 25 is valid, other than paragraph (f). The adjudicator erred in concluding that paragraph (f) was valid.

Costs

Costs of the appeal generally

71. The respondent made two applications in respect of costs. First it submitted that, in the event that the appeal is dismissed or substantially dismissed, then the applicant ought be ordered to pay all or a substantial part of the respondent's legal costs.

72. As it turns out, each of the applicant and the respondent has been partially successful on this appeal.

73. Section 100 of the *Queensland Civil and Administrative Tribunal Act* 2009 (the "QCAT Act") provides that, other than as provided under that Act or an enabling Act, each party to a proceeding must bear the party's own costs of the proceeding.

74. Section 102 of the QCAT Act relevantly provides that the tribunal may make an order requiring a party to pay all or a stated part of the costs of another party if the tribunal considers that the interests of justice require it to make the order. Subsection 102(3) sets out matters to which the tribunal may have regard in deciding whether to award costs.

75. The enabling Act for this appeal (the BCCM Act) does not make any provision for the costs of an appeal. Therefore, for this tribunal to order that the applicant pay the respondent's costs, the tribunal must be satisfied that the interests of justice require it to make such an order.

76. In this case, as I have said, each party attained a reasonable degree of success. Each party also had reasonable arguments in respect of each of the three by-laws with which I have been concerned. The applicant was self represented, while the respondent was represented by a solicitor, having obtained leave to be so represented. That leave was obtained without opposition from the applicant, other than (according to him at the hearing of the appeal) that he said that he did not agree with "unwarranted" legal costs being incurred.

77. Although the respondent has attained some measure of success, it seems to me that it would not be appropriate to order that the applicant pay any of its costs of the appeal. Rather, each party should bear its own costs.

Costs of the strike out application

78. The respondent also seeks an order that the applicant pay the respondent's costs of the strike out application which I determined on the papers on 4 June 2010. Prior to that application, the applicant had raised a number of other grounds of appeal, which I found did not raise questions of law or were substantially misconceived or lacking in substance. By my order of that date, I struck out

substantial parts of the amended application. The final hearing concerned the remaining parts of that application.

79. The respondent submits that its strike out application was substantially successful. What had been a 47 page application was reduced to 8 pages. Those parts which were struck out were, it is submitted, prolix, verbose and largely otiose.

80. The respondent relies upon an affidavit of Mr Norquay sworn on 24 February 2010 in which, as described in the respondent's written submissions, he deposed to numerous endeavours to ensure that the applicant limit himself to raising proper questions of law in his appeal, thereby obviating the need for the respondent to incur significant legal costs defending an unmeritorious appeal. The respondent submits that its pleas fell on deaf ears, leading to it having to file the application to strike out the appeal, which was substantially successful.

81. The history of this appeal is as follows.

(a) After the adjudicator's decision, but before the appeal was commenced, the body corporate wrote to the applicant, noting that the role of the tribunal is not to repeat the function of the adjudicator and to carry out a re-assessment of the applicant's applications and reminding him that an appeal can only be made on an issue of law. The letter put the applicant on notice that, if he lodged an appeal to the tribunal that did not raise issues of law and was therefore unmeritorious and doomed to fail, then the body corporate would seek an order that he pay the body corporate's legal costs of the appeal.

(b) On 8 January 2010 the applicant filed his appeal. The grounds of appeal were stated to be that "the adjudicator erred in dismissing my application for orders as outlined in annexure A". The orders were those that had been sought before the adjudicator and dismissed.

(c) On 29 January 2010, Mr Norquay wrote to Mr Williamson asserting that the appeal, as originally filed, was doomed to fail because he did not specify the particular errors made by the adjudicator, nor how those errors caused the adjudicator wrongly to dismiss the application. Mr Norquay invited the applicant to withdraw the appeal, in the absence of which the respondent would apply for the appeal to be struck out and for an order for costs.

(d) A directions hearing took place on 11 March 2010, at which directions were made providing that the applicant file an amended application and any written submissions in support of it by 1 April, the respondent file any application to strike out the amended application and its response to the application by 22 April, that any application be heard and determined on the papers, and that the respondent have leave to be legally represented.

(e) On 30 March 2010, the applicant filed an amended application for appeal, which was the subject of the application to strike it out.

(f) On 13 April 2010, Mr Norquay filed submissions in support of the respondent's application to strike out the appeal.

(g) The respondent's application was determined by me, as I have said, on 4 June 2010.

82. In my reasons for striking out parts of the amended application, I said the following:

> "*It is true that the amended application (which is 43 pages long) is in places difficult to understand. It is verbose and repetitive and makes a large number of very general assertions, such as that the adjudicator failed to observe natural justice, the adjudicator failed to make a fair and proper consideration of the application and all issues, the adjudicator erred by not considering all issues and circumstances and all issues of law and by not properly 'applying' all the issues of law. In many respects, therefore, it is inadequate and objectionable. However, it is not prepared by a lawyer and it is necessary to consider it carefully to determine whether it raises any questions of law as grounds of appeal from the adjudicator's decision and to isolate any such questions from other parts that are not properly capable of being raised in this proceeding.*"

83. To my mind, the attempts by Mr Norquay and the respondent to encourage the applicant to limit himself to raising proper questions of law had borne fruit, in the sense that they led the applicant to amend his initial application. In doing so, he was clearly attempting to do the right thing by specifically identifying the questions of law to be answered, although in his application he also made his submissions in respect of the questions of law which he said arose and, in many cases, he was verbose and repetitive.

84. Mr Norquay's submissions on the strike out application were concise. Although long, the amended application did not, in my opinion, raise particularly complex questions. While the respondent was given leave to be represented by a lawyer, it appears to have been because the application for representation was not opposed by Mr Williamson, although he had concerns about unwarranted costs being incurred.

85. The respondent itself was perfectly able (as it demonstrated by its first letter to the applicant after the adjudicator's decision was handed down) to argue whether the application, or the amended application, properly identified questions of law to be determined by the tribunal.

86. Furthermore, as was pointed in *Tamawood Limited v Paans* (2005) 2 Qd R 101, at [33], there is a clear distinction, in the terms of the interests of achieving justice, between the mere fact of having representation and the fact of having reasonably obtained that representation because of the complexity of the case. In this case, the respondent obtained legal representation before there was any asserted complexity to the case and, upon a relatively straightforward reading of the amended application, there was no substantial complexity to it, although it was verbose and repetitive.

87. In all these circumstances, I am not satisfied that the interests of justice require that I make an order for costs in favour of the respondent in respect of its strike out application. Rather, I consider that the general rule provided in s.100 should apply.

Orders

88. Section 294 of the BCCM Act provides that, in deciding an appeal, in addition to the jurisdiction and powers of the appeal tribunal under the QCAT Act, the tribunal may also exercise all the jurisdiction and powers of an adjudicator under the BCCM Act. However, the appeal tribunal may amend or substitute an order only if the

adjudicator, who made the order being appealed, would have had jurisdiction to make the amended or substituted order or decision.

89. Section 276 of the BCCM Act provides that an adjudicator may make an order that is just and equitable in the circumstances (including a declaratory order) to resolve a dispute, in the context of a community titles scheme, about, among other things, a claimed contravention of the Act. Subsection 276(3) provides that the adjudicator may make an order mentioned in schedule 5 of the Act. Paragraph 21 of schedule 5 lists, as one of the types of order that an adjudicator may make, "*If satisfied a by-law is invalid – an order declaring that the by-law is invalid and requiring the body corporate to lodge a request to record a new community management statement to remove the by-law.*"

90. Section 146 of the QCAT Act provides that, in deciding an appeal against a decision on a question of law only, the appeal tribunal may, among other things, confirm or amend the decision, or set aside the decision and substitute its own decision.

91. In this appeal, I have concluded that the adjudicator erred in law in 2 respects, but not in the 3rd respect for which the applicant contended. It is therefore appropriate that I amend or set aside the adjudicator's orders in respect of by-laws 11 and 25, and confirm his decision in respect of by-law 13. It is also appropriate to make a further order requiring the lodgment of a further request to record a new community statement reflecting this decision.

92. I therefore make the following orders.

1. The order of the adjudicator made on 30 November 2009, whereby he dismissed the application for an order that by-law 11 and by-law 25 were invalid, be set aside.

2. In lieu thereof I declare that:

(a) paragraph (d) of by-law 11 in the community management statement of the respondent is invalid;

(b) paragraph (f) of by-law 25 in the community management statement of the respondent is invalid; and

(c) the balance of by-law 25 in the community management statement of the respondent is valid.

3. The order of the adjudicator made on 30 November 2009, whereby he dismissed the application for an order that by-law 13 was invalid, be confirmed.

4. Within 21 days of the date of this order, the respondent body corporate lodge a request to record a new community management statement in which each of paragraph (d) of by-law 11 and paragraph (f) of by-law 25 is removed.