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QUEENSLAND CIVIL AND ADMINISTRATIVE TRIBUNAL

CITATION:	*Bynon & Anor v Body Corporate for Chichester Court CTS 11215* [2020] QCATA 17
PARTIES:	**IAN BYNON** **and** **SUSAN BYNON** (appellants) **v** **BODY CORPORATE FOR CHICHESTER COURT CTS 11215** (respondent)
APPLICATION NO/S:	APL222-18
MATTER TYPE:	Appeals
DELIVERED ON:	10 February 2020
DECISION OF:	Member Roney QC
ORDERS:	**The appeal is dismissed.**
CATCHWORDS:	APPEAL AND NEW TRIAL – APPEAL – GENERAL PRINCIPLES – RIGHT OF APPEAL – WHEN APPEAL LIES – ERROR OF LAW – where s 289(2) of the *Body Corporate Community Management Act* 1997 (Qld) allows a person aggrieved by an Adjudicator's order to appeal on a question of law to the Queensland Civil and Administrative Tribunal – what is error of law – whether there was an error of law REAL PROPERTY – STRATA AND RELATED TITLES – MANAGEMENT AND CONTROL – BYLAWS – whether Body Corporate in general meeting acted lawfully in passing motions put forward by a lot owner for exclusive use of common property for parking – whether notice of the proposed resolution is misleading as to what is really proposed, or its effect and implications, and the impact on the validity of the resolution – whether there was either no valid notice of the meeting or no valid notice of the proposed resolutions – duty on an Adjudicator to accord natural justice – what is required to discharge that duty *Body Corporate Community Management Act* 1997

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(Qld), s 171, 172, 244, 269, 276, 289, 290, 294
Queensland Civil and Administrative Tribunal Act 2009 (Qld), s 146

Ashworth v Foreman [2015] QCATA 1
Australian Broadcasting Tribunal v Bond (1990) 170 CLR 321
Bell v Commissioner of Taxation [2012] FCA 1042
Boca Raton East [2014] QBCCMCmr 37
Body Corporate for Palm Springs Residences CTS 29467 v J Patterson Holdings Pty Ltd [2008] QDC 300
Bruce v Cole (1998) 45 NSWLR 163
Clements v Independent Indigenous Advisory Committee (2003) 131 FCR 28
Federal Commission of Taxation v Trail Brothers Steel & Plastics Pty Ltd (2010) 186 FCR 410
Minister for Immigration and Multicultural and Indigenous Affairs v Al-Miahi [2001] FCA 744
Purcell v Murtagh [2011] QCATA 175
Re Refugee Review Tribunal; Ex parte Aala (2000) 204 CLR 82
Van Deurse & Anor v Q1 Management Pty Ltd & Anor [2017] QCATA 113
VWBF v Minister for Immigration and Multicultural and Indigenous Affairs (2006) 154 FCR 302

APPEARANCES:

This matter was heard and determined on the papers pursuant to s 32 of the *Queensland Civil and Administrative Tribunal Act* 2009 (Qld).

REASONS FOR DECISION

[1] The appellants are the owners of Lot 8 in a 12 lot development called Chichester Court situated at 112 Bayview Street, Runaway Bay on the Gold Coast in Queensland. Chichester Court was created by the registration of a group title plan in July 2013 and the CMS for the scheme was recorded on 3 July 2013. The CMS included bylaws, which included (as bylaw 15) a power to allocate to particular lot owners the allocation of parts of the common property for the exclusive use of lot owners, including the allocation of exclusive use areas for the purpose of permitting car parking by those lot owners.

[2] The appellants brought an application before the Office of the Commissioner for Body Corporate and Community Management, alleging that the respondent body corporate had not acted to give effect to a motion which it was alleged by the appellants had been put and passed at an annual general meeting of the body corporate held on 27 September 2017. This motion sought to convert certain areas of common property upon which various lot owners had from time to time parked their cars informally without any exclusive right to do so, and that a survey plan be prepared based on allocations which the motion was said to have identified and that a new community management state be lodged to reflect those allocations.

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[3] The application before the Adjudicator specifically sought the following orders:

> 1. An order requiring the body corporate to lodge a request with the Titles Office to record a new community management statement showing the conversion of my (Villa 8) "existing parking space (as per the existing car markings)" consistent with the statement for which the body corporate gave its consent i.e. Motion 10 passed at AGM without dissent on 29th September 2017, to an exclusive use parking space.
>
> 2. Allow the above to occur by waiving the 3 month time limit to lodge the new CMS with the Titles Office due to the body corporate committee's unreasonable actions in delaying the lodgement.
>
> 3. To order the committee to survey the parking area for inclusion in the CMS or use a survey plan provided by me of the parking area as shown on attachment 1e.

[4] The appellants effectively sought an order from the Adjudicator that the body corporate be compelled to record a new CMS giving their lot exclusive use of a particular space which they contended had been hitherto their informal allowed car parking space, consistent with the resolutions said to have been passed by that motion 10 put to the AGM, and for orders that the time limit to lodge the CMS be waived.

[5] The appellants also sought an order that the committee be directed to survey the relevant areas or use another survey plan which was in existence to enable the new CMS to record those relevant areas. At the time that the motion was put, it did not limit its operation merely to the allocation of a car parking space for the appellants, but also sought to affect the entitlements of other lot owners, indeed to grant exclusive use of particular space to each of the 12 lots in the scheme.

[6] The essential question for determination by the Adjudicator was whether the body corporate was required to but failed to implement the motion said to have been passed at the AGM, and whether orders ought to have been made to give effect to it, at least insofar as they affected the interests of the appellants.

[7] The Adjudicator accepted that there was a duty upon a committee of a body corporate to implement lawful decisions of the body corporate. As articulated in the reasons below, the Adjudicator identified two questions as relevant for consideration. The first was whether the motion contained sufficient information to enable a 'valid decision' to grant exclusive use. The second issue was whether the fact that not all owners had voted on the motion, or specifically given some formal or informal consent to the grant of exclusive use, meant that the motion could not be implemented.

[8] In relation to the first question, the findings on which are the subject of this appeal, the Adjudicator held as follows:

> [32] While AGM Motion 10 clearly showed an intent to grant exclusive use of car spaces to each owner, I am not satisfied that the resolution was effective in actually doing so because of the adequacy of information provided about the proposal.

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[33] In regard to the adequacy of notice and the provision of information to a meeting, the District Court[1] has said that:

> "There is certainly an obligation to give proper notice of what is actually to be considered by the meeting, and to point out the relevant consequences of the approval of the resolution. If there is a failure to give proper notice of the meeting, which may occur if the notice of the proposed resolution is misleading as to what is really proposed, or its effect and implications, then that may well impact on the validity of the resolution, because in such circumstances there was either no valid notice of the meeting or no valid notice of the proposed resolution."

[34] Normally a plan (whether a survey plan or at least an explicit sketch plan) of the proposed exclusive use area would be attached to the notice of a meeting which considers a motion to grant exclusive use. This ensures that it is quite clear to all owners the exact area under consideration. In this case there was no plan attached to the AGM notice.

[35] On its face, the wording of the motion described the proposed allocations. However, it seems to me from the material in the application and submissions that there is not a universally agreed understanding of the areas intended to be allocated by AGM Motion 10.

[36] The motion refers to *"existing parking spaces (as per the current unofficial car park markings)"*, but also to the spaces being as numbered on a previously prepared survey plan, except that spaces 9 and 10 would be swapped with 11 and 12. The motion is not explicit as to the previously prepared survey plan, but both the applicants and the Committee appear to assume this is referring to the plan prepared for the 2016 AGM. Although I have not been given a copy of that previous plan, it is not clear to me that the areas marked on the survey plan are exactly the same as the areas purportedly delineated by the unofficial line marking. In particular, it does not appear to be disputed that the previous survey plan provided a single 6x3m space for each lot, while the applicants argue that they are entitled to a larger space which they assert is 'existing' and clearly marked. I consider that conflict alone demonstrates that the information given to owners about AGM Motion 10 was not sufficiently clear as to the intended areas.

[9] In relation to the second issue, which strictly speaking the Adjudicator did not need to decide in light of the findings on the first, the Adjudicator held as follows:

[40] Pursuant to *section 171(2)(a)* of the Act, exclusive use By-law 15 could not attach to a lot unless the relevant lot owners agreed in writing before the passing of the motion or voted personally in the resolution. It follows then that any variation to By-law 15 or to the specific areas allocated to lots under Schedule E of the CMS also could not apply to a lot unless the lot owner had voted personally on the motion or agreed in writing before the motion passed.

[41] It is clear that the owners of six lots did not vote personally on Motion 10. There is no suggestion that those owners agreed to the purported allocations in writing before Motion 10 was decided. Given the apparent absence of the required consent from those owners to the exclusive use being allocated to those

[1] *Body Corporate for Palm Springs Residences CTS 29467 v J Patterson Holdings Pty Ltd* [2008] QDC 300, [50] (McGill DCJ).

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six lots, it seems clear that the proposal in Motion 10 could not have attached to those six lots even if the motion had been effective.

[42] However, the key question is whether the non-consent of those six lots rendered the entire motion invalid or ineffective. On balance I do not consider that it did.

[43] If Motion 10 had been effective resolving to grant exclusive use to 12 lots, then the lack of consent preventing the exclusive use by-law attaching to six lots would not mean that the exclusive use by-law could not still attach to the six lots that did vote personally on the motion. The wording *section 171(2)(a)* of the Act gives no suggestion that a motion itself would be invalid or wholly unenforceable if owners did not give the requisite consent. Rather, it simply provides that the by-law would not attach to the lot who had not consented.

[44] On that basis, if Motion 10 had been otherwise valid and effective, I do not consider that the Committee would have been entitled to simply ignore the entire motion because it could not have been implemented for all affected lots. Accordingly, I do not see why the Committee could not have recorded a new CMS that implemented the grant of exclusive use just to the six lots that had consented. I do not consider that such a step would be prevented by the legislation.

[45] Although the circumstances were a little different, in a previous case where some lots affected by a motion granting exclusive use had not consented to it, an adjudicator ordered the committee to give effect to a variation of the motion only to the extent that it related to those lots for which the body corporate had the written agreement of the owners of the lots mentioned in the motion or had evidence of the owners voting personally for the motion.[2]

[46] While I appreciate that the Committee considered (albeit incorrectly in my view) that Motion 10 had no effect because not all owners had consented, I do not consider that it was appropriate for the Committee to simply ignore the motion. Given that the motion had purportedly passed at the AGM I am of the view that the Committee, acting reasonably, should have communicated with owners as soon as it formed the view that the resolution was unable to be implemented and why.

[10] One of the matters that the Adjudicator considered as a relevant matter was that the Adjudicator had been informed that the committee intended to put the issue about what should occur to the car parking spaces to the consideration of the owners at the 2018 AGM. The Adjudicator considered it relevant that at that time owners would have the opportunity to decide whether they agreed to the allocations proposed by the committee or not and could vote accordingly.

[11] The Adjudicator concluded:

[50] Unless and until exclusive use is granted to any lot over the ‘open’ car spaces, occupiers should consider whether they have written approval to park on those areas of common property pursuant to By-law 2. If they do not, they should consider applying to the Committee for approval. The Committee must act reasonably in considering any request for approval under By-law 2, but all owners

2 *Boca Raton East* [2014] QBCCMCmr 37.

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and occupiers should be aware that the limited approval under By-law 2 does not equate to a grant of exclusive use.

[12] At the request of this Tribunal the parties were asked to provide the Tribunal with information concerning what, if anything, had occurred at later general meetings of the body corporate on the issues which were raised in the original application and mentioned by the Adjudicator as a relevant consideration. Minutes of the AGM for 26 September 2018 show that motion was put to establish a single vehicle exclusive use open area car park for each lot and seeking to authorise the body corporate to sign any necessary documents to record a new CMS to record that exclusive use allocation. The motion attracted six affirmative votes and three negative votes, and therefore since it was required to be a resolution without dissent, was lost. An ancillary motion which referred to construction of exclusive use carports was ruled to be out of order in light of the fact that motion 10 was lost. The minutes of the AGM for the body corporate held on 25 September 2019 put, as motion 9 and 10, equivalent motions to those discussed above and which were put to the 2019 meeting. This time the motion seeking to establish the exclusive use car parking attracted three affirmative votes and seven negative votes, and therefore was deemed lost. I mention these matters only to identify that there has not been any resolution of the issues in dispute by conduct of the body corporate since the Adjudicator's original reasons were given.

[13] Therefore, the Adjudicator's consideration that at later AGMs owners would have the opportunity to decide whether they agree with the allocations proposed was given effect and owners clearly had an opportunity on proper notice to consider those kinds of motions but did not support them.

[14] The appellants contend that the Adjudicator's decisions contained two errors of law. The first was that it was a decision given without regard to the principles of natural justice. The second error of law was said to be that the decision was not consistent with the objects of the *Body Corporate and Community Management Act* 1997 (Qld) ('the Act') because there was sufficient evidence presented to meet the requirements of s 172 of the Act 'to justify an affirmative conclusion to allow the registration of the appellants [sic]... unofficial car parking space as exclusive use.'

[15] The decision of the Adjudicator was given under s 276 of the Act. Section 276 provides as follows:

276 Orders of adjudicators

(1) An adjudicator to whom the application is referred 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—

(a) a claimed or anticipated contravention of this Act or the community management statement; or

(b) the exercise of rights or powers, or the performance of duties, under this Act or the community management statement; or

(c) a claimed or anticipated contractual matter about—

(i) the engagement of a person as a body corporate manager or service contractor for a community titles scheme; or

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(ii) the authorisation of a person as a letting agent for a community titles scheme.

(2) An order may require a person to act, or prohibit a person from acting, in a way stated in the order.

(3) Without limiting subsections (1) and (2), the adjudicator may make an order mentioned in schedule 5.

(4) An order appointing an administrator—

(a) may be the only order the adjudicator makes for an application; or

(b) may be made to assist the enforcement of another order made for the application.

(5) If the adjudicator makes a consent order, the order—

(a) may include only matters that may be dealt with under this Act; and

(b) must not include matters that are inconsistent with this Act or another Act.

[16] The appeal to this Tribunal is governed by s 289 of the Act, which provides:

289 Right to appeal to appeal tribunal

(1) This section applies if—

(a) an application is made under this chapter; and

(b) an adjudicator makes an order for the application (other than a consent order); and

(c) a person (the aggrieved person) is aggrieved by the order; and

(d) the aggrieved person is—

(i) for an order that is a decision mentioned in section 288A, definition order—an applicant; or

(ii) for another order—

(A) an applicant; or

(B) a respondent to the application; or

(C) the body corporate for the community titles scheme; or

(D) a person who, on an invitation under section 243 or 271(1)(c), made a submission about the application; or

(E) an affected person for an application mentioned in section 243A; or

(F) a person not otherwise mentioned in this subparagraph against whom the order is made.

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(2) The aggrieved person may appeal to the appeal tribunal, but only on a question of law.

[17] Section 290 of the Act provides:

290 Appeal

(1) An appeal to the appeal tribunal must be started within 6 weeks after the aggrieved person receives a copy of the order appealed against.

(2) If requested by the principal registrar, the commissioner must send to the principal registrar copies of each of the following—

(a) the application for which the adjudicator's order was made;

(b) the adjudicator's order;

(c) the adjudicator's reasons;

(d) other materials in the adjudicator's possession relevant to the order.

(3) When the appeal is finished, the principal registrar must send to the commissioner a copy of any decision or order of the appeal tribunal.

(4) The commissioner must forward to the adjudicator all material the adjudicator needs to take any further action for the application, having regard to the decision or order of the appeal tribunal.

[18] Section 146 of the *Queensland Civil and Administrative Tribunal Act* 2009 (Qld) ('QCAT Act') provides:

146 Deciding appeal on question of law only

In deciding an appeal against a decision on a question of law only, the appeal tribunal may—

(a) confirm or amend the decision; or

(b) set aside the decision and substitute its own decision; or

(c) set aside the decision and return the matter to the tribunal or other entity who made the decision for reconsideration—

(i) with or without the hearing of additional evidence as directed by the appeal tribunal; and

(ii) with the other directions the appeal tribunal considers appropriate; or

(d) make any other order it considers appropriate, whether or not in combination with an order made under paragraph (a), (b) or (c).

[19] Hence, pursuant to s 146, in deciding an appeal against a decision on a question of law, the Appeal Tribunal is not engaged in a rehearing of the matter.

[20] Section 294 of the Act and s 146 of the QCAT Act provide, in effect, that in deciding an appeal, the Appeal Tribunal has all of the jurisdiction and powers of an adjudicator

Retrieved from AustLII on 04 April 2020 at 12:53:27 Verify version

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under the Act, as well as the powers of the Appeal Tribunal under the QCAT Act. Section 146 of the QCAT Act provides for the Appeal Tribunal to confirm or amend the decision; set it aside and make its own decision; or set aside the decision and return the matter to the Adjudicator for reconsideration, with any directions it considers appropriate.

[21] As to the first error of law contended for, there can be no doubt that the principles of natural justice were required to be met by the Adjudicator under s 269 of the Act, although the extent to which a hearing was required or permitted will not necessarily be the same as those which would apply to others making decisions in a judicial or administrative environment. The essential point that the appellants make about the failure to afford natural justice, and alleged breach of the duty to do so under s 269 of the Act, is that the Adjudicator's decision 'must be based on logical proof or evidence material' and that the decision should not be based on 'mere speculation or suspicion.' The complaint in this regard seems to refer to the findings in paragraph 36 of the Adjudicator's Reasons which deal with the question of whether owners were given sufficient information about the substance and effect of the proposed motion 10 to properly inform them about what it was concerned with.

[22] In context, the Adjudicator held in paragraph 36 that there was doubt that the motion was sufficiently explicit as to what was contemplated to be included in the survey plan and as to whether the areas marked on the survey plan were exactly the same as the areas delineated on the unofficial line marking which was the subject matter of the resolution.

[23] The Adjudicator was considering whether there was potential for confusion or misunderstanding about whether the parking spaces were to be of a particular dimension for each lot or whether there were larger spaces which were existing but clearly marked. The comment made in the paragraph under attack was made in a context of seeking support for a proposition that at first glimpse does appear to involve some speculation by the Adjudicator: that the lack of explicit and unequivocal information in the proposal to put motion 10 may have led to or compounded confusion about what was to be in the survey plans which were to go into any amended CMS. From that postulation, the Adjudicator concluded that the information given in advance of the motion being put was not sufficient to show that owners were adequately on notice of the location and dimensions of the areas that were being referred to in the motion.

[24] The submission by the appellants on this issue does seem to fundamentally misunderstand what is required under the requirements for natural justice. The argument, as it is developed in the written outline, is that the Adjudicator should have been satisfied that the appellants, if not any other owner, could ascertain where their existing car parking space was as per the existing unofficial car park markings and that this be conveyed to a competent professional. The requirement for natural justice does not, as the appellants contend, require 'a reasonable decision' or that the reasons given could be justified at some level, as the submission puts it.

[25] There is undoubtedly a duty on an adjudicator to properly consider the evidence and provide proper reasons for findings. That is part of the duty to provide procedural fairness. In truth the complaint appears to be that the decision was not a reasonable one, or not one open on the evidence. That is not a complaint as to a failure to provide

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procedural fairness or comply with the rules of natural justice. The appellants do not submit that as a party they were not given the opportunity to comment on adverse material or that the issue was not brought to their attention so that they could comment on it.

[26] It has been held by this Tribunal in *Ashworth v Foreman* that:[3]

> In the context of the… Act, bringing a party's attention to their right to inspect and obtain copies of submissions is sufficient compliance with the relevant requirement of natural justice. While it may be desirable for the Commissioner's office or the adjudicator to inform a party that a particular submission has been received, there is no legal obligation to do so.

[27] *Purcell v Murtagh* [2011] QCATA 175 is cited as support for that conclusion.

[28] In *Purcell v Murtagh*, this Tribunal (constituted by Justice Wilson and Member Howard) said:[4]

> Under s 269, the Adjudicator was required to observe natural justice, and a failure to do so is an error of law. The Federal Court has held that if a tribunal decides an issue adversely to a party without informing a party that it intended to do so, then it makes an error of law [citing *Re Refugee Review Tribunal; Ex parte Aala* (2000) 204 CLR 82; *Clements v Independent Indigenous Advisory Committee* (2003) 131 FCR 28]. However, the High Court has also observed that the requirements of natural justice are flexible and vary according to the circumstances. In essence, the requirement is to act fairly in all of the circumstances. When a statutory power is exercised, the requirements will depend upon a proper construction of the statutory provision, having regard to the common law principles.
>
> Whether facts as found fall within a properly construed statutory provision is also, generally, a question of law. Whether facts as found fall within a by-law is, it follows, a question of law. Whether a decision is based on findings of fact which are open on the available evidence is, as well, a question of law.
>
> However, a finding of fact will generally not be disturbed on appeal if the evidence before the decision-maker supports the inferences drawn, and the facts found. Further, the Appeal jurisdiction is not generally the proper forum to receive evidence on disputed facts.

[29] In *Purcell v Murtagh*, this Tribunal further said:[5]

> The Adjudicator refers to Dr Murtagh having exercised his right to inspect the submissions made by others following his application. This right to inspect is provided for in s 244 of the Act. The reasons for decision state that Dr Murtagh's evidence, to which the Adjudicator refers, was provided in reply to the submissions. It was provided on 24 November 2009. Mr Purcell's submission in his personal capacity was submitted on 31 December 2009.
>
> There is a right under s 246 for an 'interested person' to inspect the application; submissions made about the application; and the applicant's reply to the

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3 [2015] QCATA 1, [35].
4 [2011] QCATA 175, [9]–[11].
5 Ibid, [70]–[73].

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submissions. An interested person includes a person who has made a submission on the application. There is no doubt that Mr Purcell is an interested person. The file of the Commissioner discloses a copy of correspondence addressed to Mr Purcell, it appears in his capacity at that stage of Chair of the Body Corporate, on whose behalf he had sought an extension to make submissions, dated 16 October 2009 granting an extension of time for the making of submissions to 22 October 2009 and advising, amongst other things, as follows:

> Persons with a proper interest may inspect or obtain a copy of submissions (see section 246). There is a cost to inspect or obtain copies of submissions.

Although this correspondence went to Mr Purcell as Chair of the Body Corporate, he was made aware of the right of persons with a proper interest to inspect the file. Mr Purcell's personal submission was made subsequently on 31 December 2009.

The requirements of natural justice are flexible depending upon the circumstances. In this case, an adjudication process was completed on the papers. The opportunity was afforded to Mr Purcell to make submissions, and to inspect the submissions of others. Had he done so, he may have chosen to make further submissions in response to Dr Murtagh's submissions, to which he now complains he had no opportunity to respond. He did not exercise his right to inspect Dr Murtagh's submissions, and therefore, did not respond to the allegations made.

He had the opportunity to inspect and respond to Dr Murtagh's submissions. He failed to exercise that right. He was accorded natural justice. In my view, this aspect of the appeal must fail.

[30] I do not need to consider the accuracy of the proposition stated in *Ashworth v Foreman* in this case; however, there is doubt in my view as to whether in every case the duty to ensure procedural fairness does not entail offering a specific opportunity to an applicant to have drawn to their attention a proposition adverse to their position about which they would not be aware unless told of it. I agree that the requirements of natural justice are flexible depending upon the circumstances. That means that the mere fact that someone has been given a notice that they have a right to inspect and obtain copies of submissions is not likely in every case to be sufficient compliance with the relevant requirement of natural justice.

[31] In their further submissions on the relevant errors of law, the appellants contend that the decision of the Adjudicator was based upon a mistaken assumption of fact as to whether the car parking spaces were able to be identified by the unofficial markings consistent with the current bylaws that apply to existing exclusive use areas. They complain that the material on the file which went to the Adjudicator is unsatisfactory, and misrepresented the position due to the poor quality of the relevant reproduction of photos.

[32] On this issue, focusing on whether the Adjudicator's decision was based upon speculation, a lack of evidence, or did not disclose its course of reasoning, it is clear that the Adjudicator had evidence which led to the conclusion that there was not a universally agreed understanding of the areas intended to be allocated by the motion. It also focuses upon the language of the motion and as to whether it is explicit as to the previous prepared survey plan as well as identifying car parking spaces which were

Retrieved from AustLII on 04 April 2020 at 12:53:27

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identified by 'unofficial car park markings.' The existence of doubt or the concern that there was misunderstanding enlivened the jurisdiction under s 276 of the Act for the making of an order which was just and equitable and that arose even if the requirements for clarity as to what the motion concerned were met.

[33] In *Van Deurse & Anor v Q1 Management Pty Ltd & Anor* [2017] QCATA 113 I came to consider a similar issue, applying statements taken from *Body Corporate for Palm Springs Residences CTS 29467 v J Patterson Holdings Pty Ltd* [2008] QDC 300 in which McGill SC DCJ held at [99]–[100]:

> The Act clearly contemplates that various matters are to be decided by the members of the body corporate in general meeting, and provides a mechanism for regulating the voting rights of members in general meeting, and the inference from such provisions is that the members are entitled to exercise such voting rights at general meetings. There is no general fiduciary obligation on proprietors in general meetings in relation to the way in which they exercise their votes: Houghton (supra) p 52. Accordingly it would be no basis for setting aside the resolution of the members in the general meeting that the majority's desire to be rid of the respondent as a caretaker should not be given effect to because this had the effect of terminating contractual rights which were from the point of view of the respondent a valuable asset. Circumstances may arise under which a resolution of the members in general meeting which had such an effect would amount to a fraud on the power, but it would not be a fraud on the power merely because it had that effect, or merely because the adjudicator thought that such an outcome was unfair to the respondent.
>
> Accordingly, the appellant cannot show the respondent's application is doomed to fail because the adjudicator lacked the power to give relief for breach of an equitable principle. On the other hand, the respondent is not entitled to support the existing decision of the adjudicator simply on the basis that the adjudicator thought that the result was unfair to the respondent. It is in my opinion necessary to show some proper basis in law or equity for the grant of relief under s 276(1) where that has the effect of preventing a majority of the members of the body corporate from exercising effectively their rights to vote at general meetings, in accordance with the scheme laid down by the Act and regulation.

[34] The allocation of parts of common property to the exclusive use of particular lot owners is a serious matter for any body corporate to consider. It is for that reason that any motion which purports to do so must be passed without dissent. It is right to give proper consideration to whether it can be said that there was sufficient clarity and certainty about what exactly was being put in a motion to be adopted by the body corporate to achieve that outcome, such that it is clear and certain as to its outcome. Whilst the motion may well have a particular meaning to the mind of the person putting it, giving effect to it in circumstances in which there are requirements at law for the registration of a survey plan which records specifically what areas are affected is a different matter (see s 172 of the Act). It is not essential that a survey plan be lodged. However, since property which is owned in union by all lot owners is being allocated to the exclusive use of particular individuals, it is important that motions which deal with the allocation of that property by way of exclusive use are certain as to their terms.

[35] Independently of whether there was or was not actual dispute about what was in the survey plans or, as to what areas were allocated to individual lots by way of 'unofficial car park markings', in my view the Adjudicator was entitled to conclude that the

Retrieved from AustLII on 04 April 2020 at 12:53:27

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motion was insufficiently clear as to its intent and consequence to be given effect by a committee of the body corporate after it was purportedly passed. The existence, however, of clarity in the minds of the appellants as to what particular area their own car parking space was, and whether it was sufficiently marked on a plan, is not determinative of whether the motion put, and which effected the body corporate and involved space other than that being purportedly allocated to the appellants, was validly passed or effective at law so as to require the body corporate to give effect to it.

[36] The second aspect of the argument of the appellants is that they contend that seven of 12 lot owners who actually voted at the 2018 AGM 'appear to have understood the motion and were clear on the location of their unofficial car park spaces.' That submission is then developed to the proposition which is closely related to the first ground of appeal, that there must be sufficient evidence upon which a finding of fact may reasonably be based and that here the evidence was sufficient to demonstrate that the appellants had parked on the space identified to them at the time they purchased their lot, that they had consistently used that space since, and that it was sufficiently certain to enable the Adjudicator to conclude that its identification in the motion was sufficiently certain.

[37] It is not an error of law to make a wrong finding of fact: *Minister for Immigration and Multicultural and Indigenous Affairs v Al-Miahi* [2001] FCA 744, [34]–[35]. In the context of the AAT, the majority of the Full Court in *Commission of Taxation v Trail Bros Steel & Plastics Pty Ltd* (2010) 186 FCR 410 at [13] (citations omitted) stated that what is "on a question of law" for the purposes of s 44 of the AAT Act has been analysed in many cases and includes:

> (1) whether the AAT has identified the relevant legal test;
>
> (2) whether the AAT has applied the correct test;
>
> (3) whether there is any evidence to support a finding of a particular fact ...;
>
> and
>
> (4) whether facts found fall within a statute properly construed...

[38] It is not an easy thing to establish that a tribunal made an error of law because there was "no evidence" to support the findings that it made. Often the case is, at best, that there must have been an error of law because a party says it ought to have succeeded on the evidence. See, for example, Haritos v Commissioner of Taxation [2014] FCA 96, [27]. This is insufficient – the taxpayer must establish that the relevant finding of the Tribunal was not open to it in the sense of there being no evidence to support the finding; ibid Haritos; MIMA v Al-Miahi 65 ALD 141 at 149 [34]- [35] and Tisdall v Webber (2011) 193 FCR 260, 270-271.

[39] Gordon J summarised the "no evidence" ground in *Bell v Commissioner of Taxation* as follows:[6]

> In relation to the "no-evidence" ground, a decision will be set aside where a decision maker has made a finding of fact without probative evidence to support it or drawn an inference which was not open on the primary facts: *Australian*

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6 [2012] FCA 1042, [84].

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Broadcasting Tribunal v Bond (1990) 170 CLR 321 at 356; *Bruce v Cole* (1998) 45 NSWLR 163 at 188. Further, only jurisdictional facts are relevant: *VWBF v Minister for Immigration and Multicultural and Indigenous Affairs* (2006) 154 FCR 302 at [19]. The finding complained of must be identified accurately: *VWBF* at [18].

[40] In my view, the Adjudicator's conclusion – that the language of the resolution is insufficiently clear as to its meaning, raising doubt as to whether those who are called upon to vote for or against it were capable of making an informed decision about whether to grant it – did not involve any error of law. That conclusion involved a construction of the language of motion 10, having regard to submissions made by others as to what they understood it to mean, to conclude that there was not a universally agreed understanding of the areas that the motion intended to refer to. There was other objective evidence to support the view that the language of it was equivocal.

[41] The Adjudicator did not need to refer to evidence of an actual misunderstanding or dispute about its meaning to conclude that its language was insufficiently clear or certain. In that regard, the Adjudicator correctly referred to a decision of His Honour Judge McGill in *Body Corporate for Palm Springs Residences CTS 29467 v J Patterson Holdings Pty Ltd* [2008] QDC 300 to the effect that the validity of a resolution may be affected if the notice of proposed resolution was misleading as to what was proposed, or its effect and implications misstated. That is a reference to what the notice of the resolution proposed, but the principles apply equally to the language of resolutions themselves.

[42] In my view, it was not an error of law on the part of the Adjudicator not to conclude that the motion was sufficiently certain to identify the ways in which it effected the allocation of exclusive use by the appellants.

[43] In the circumstances, I order that the appeal be dismissed.

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