QUEENSLAND CIVIL AND ADMINISTRATIVE TRIBUNAL

CITATION:	*O'Donnell & Anor v Body Corporate for Magic Mountain Apartments* [2020] QCATA 153
PARTIES:	**HAYDON O'DONNELL** **KAYE O'DONNELL** (Applicants) **v** **BODY CORPORATE FOR MAGIC MOUNTAIN APARTMENTS COMMUNITY TITLE SCHEME 16977** (Respondent)
APPLICATION NO:	APL345-19
MATTER TYPE:	Appeals
DELIVERED ON:	29 October 2020
HEARING DATE:	20 October 2020
HEARD AT:	Brisbane
DECISION OF:	Member P Roney QC
ORDERS:	**The appeal is dismissed.**
CATCHWORDS:	APPEAL AND NEW TRIAL – APPEAL – GENERAL PRINCIPLES – RIGHT OF APPEAL – WHEN APPEAL LIES– where s 289(2) of the *Body Corporate and 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 (QCAT) – what is error of law. REAL PROPERTY – STRATA AND RELATED TITLES – MANAGEMENT AND CONTROL – BYLAWS – EXCLUSIVE USE – whether exclusive use allocations for car parking were validly made in 1995 – whether they were incorrectly or inadvertently abandoned or repealed and ought to be reinstated. *Building Units and Group Titles Act* 1980 (Qld), s 5, s 30(7)-(10), s 42(3A). *Body Corporate and Community Management Act* 1997 (Qld), s 62, s 171 *Bell v Commissioner of Taxation* [2012] FCA 1042 *Carpenter v Carpenter Grazing Co Pty Ltd* (1987) 5

ACLC 506
Durbin v Perpetual Trustee Co Ltd [1995] ANZ Conv R 280
Federal Commission of Taxation v Trail Brothers Steel & Plastics Pty Ltd (2010) 186 FCR 410
GEC Marconi Systems Pty Ltd v BHP Information Technology Pty Ltd [2003] FCA 50
Re an agreement between Green & Anor [1999] QSC 31
Fitzgerald v Masters (1956) 95 CLR 420
S & E Promotions Pty Ltd v Tobin Bros Pty Ltd (1994) 122 ALR 637
McLean Bros and Rigg Ltd v Grice (1906) 4 CLR 835
Re NIAA Corp Ltd (in Liq) (1993) 33 NSWLR 344
Minister for Immigration and Multicultural and Indigenous Affairs v Al-Miahi (2001) 65 ALD 141; [2001] FCA 744
Tisdall v Webber (2011) 193 FCR 260
Van Deurse & Anor v Q1 Management Pty Ltd & Anor [2017] QCATA 113J D Heydon, *Cross on Evidence* (LexisNexis, 11th ed, 2017)

APPEARANCES & REPRESENTATION:

Applicant:	B Kidston of Counsel, instructed by Mahoneys
Respondent:	B Strangman of Counsel, instructed by Mathews Hunt Legal

REASONS FOR DECISION

[1] The Applicants are owners of a lot in a 73 lot residential development complex called Magic Mountain Apartments at Great Hall Drive, Nobby Beach on the Gold Coast. The respondent is the Body Corporate for Magic Mountain Apartments and is thereby the owner of the common property at the complex.

[2] The Applicants have appealed from the decision of an Adjudicator appointed by the Commissioner for Body Corporate and Community Management which had the effect of ordering that within 30 days the body corporate must lodge a request to record a new community management statement that reinstates a certain by-law 41 passed in 1995 as recorded by the Registrar of Titles on 13 June 1997, and the car parking plan that was included with the amended by-laws recorded by the Registrar on 17 July 1995.That order, if given effect to, would have the effect of confirming, or perhaps reinstating, rights over common property granted in 1995 to the owners of particular lots from time to time, to particular car parks in the development. Absent such an order being made, or a new or amended CMS being created which allocated those particular car park spaces to those units, no owners have any allocated car parks and no right to use those carparks to the exclusion of anyone else. Nor can they assign or sell with their units any allocated car park. That outcome is a very serious one because it has the potential to affect interests in

property assumed for the last 25 years to have been in existence and capable of being assigned to new purchasers of apartments.

[3] The Adjudicator also ordered that By-law 41 is only to be amended to the extent necessary to clarify that the common property allocated by the by-law is as depicted in the 1995 car parking plan and is not to be allocated by Lazermaze (Australia) Pty Ltd (in these reasons Lazermaze Australia), who was the developer and original lot owner of all the lots back in 1995, or anyone else.

[4] One original purchaser from the developer in 1997, Mr Layton, made a submission to the Adjudicator that if orders were made effectively "returning" to the 1995 car parking allocations, that would mean only five out of 72 owners were negatively affected because they lost a car space or went from parallel to tandem parking. That may or may not be a controversial proposition.

[5] The history of the matter of the enactment of By-law 41 and what happened to it is somewhat complex, indeed something of a comedy of errors. The body corporate became the registered owner of the common property on Magic Mountain Apartments site on 13 June 1995. At that time the owner of all the lots in the scheme was Lazermaze Australia. The operative legislative provisions that applied at the time were the provisions of the *Building Units and Group Titles Act* 1980 (Qld) (BUGTA), which Act has since been repealed.

[6] By section 30(1) of BUGTA, except as provided for elsewhere in section 30 in relation to adding to or repealing by-laws, there was a set of standard bylaws that applied and they were set out in the then schedule 3 to the Act.

[7] Reprint No. 4 of BUGTA, operative as in force on 15 March 2006, sets out the terms of section 30 of the Act as it them was. It is not suggested that there is a material difference in earlier versions of section 30.

[8] It was in these terms (with my emphasis added):

> **30 By-laws**
>
> (1) Except as provided in this section the by-laws set forth in schedule 3 shall be the by-laws in force in respect of each plan.
>
> (2) Save where otherwise provided in subsections (7), (11) and (11A) a body corporate, pursuant to a special resolution, may, for the purpose of the control, management, administration, use or enjoyment of the lots and common property the subject of the plan, make by-laws amending, adding to or repealing the by-laws set forth in schedule 3 or any by-laws made under this subsection.
>
> (3) An amendment of, addition to or repeal of the by-laws has no force or effect until the registrar of titles has, pursuant to a notification in the prescribed form lodged in the land registry by the body corporate, recorded the notification on the registered plan.
>
> (3A) The registrar of titles shall not record a notification on the registered plan in relation to an amendment of, addition to or repeal of the by-laws made more than 3 months prior to the lodgment of the notification.

(4) A lease of a lot or common property shall be deemed to contain an agreement by the lessee that the lessee will comply with the by-laws for the time being in force.

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

(6) No by-law or any amendment of or addition to a by-law shall be capable of operating to prohibit or restrict the devolution of a lot or a transfer, lease, mortgage or other dealing therewith or to destroy or modify any easement, service right or service obligation implied or created by this Act.

(7) With the written consent of the proprietor or proprietors of the lot or lots concerned, a body corporate may, pursuant to a resolution without dissent make a by-law—

> (a) conferring on the proprietor of a lot specified in the by-law, or on the proprietors of the several lots so specified—
>
> > (i) the exclusive use and enjoyment of; or
> >
> > (ii) special privileges in respect of;
>
> the whole or any part of the common property, upon conditions (including the payment of money at specified times or as required by the body corporate, by the proprietor or proprietors of the lot or several lots) specified in the by-law; or
>
> (b) amending, adding to or repealing a by-law made in accordance with this subsection.

(7A) A by-law referred to in subsection (7) shall either provide that—

> (a) the body corporate shall continue to be responsible to carry out its duties pursuant to section 37(1)(b) and (c), at its own expense; or
>
> (b) the proprietor or proprietors of the lot or lots concerned shall be responsible for, at the proprietor's or proprietors' expense, the performance of the duties of the body corporate referred to in paragraph (a);

and in the case of a by-law that confers rights or privileges on more than 1 proprietor, any money payable by virtue of the by-law by the proprietors concerned—

> (c) to the body corporate; or
>
> (d) to any person for or towards the maintenance or upkeep of any common property;

shall, except to the extent that the by-law otherwise provides, be payable by the proprietors concerned proportionately according to the relevant proportions of their respective lot entitlements.

(7AA) If a by-law does not provide as required by section (7A)(a) or (b), the proprietor or proprietors shall be responsible at his, her or their own expense, for the duties of the body corporate referred to in subsection (7A)(a).

(7B) A by-law made pursuant to subsection (7)—

(a) need not identify or define the common property the subject of the grant of exclusive use and enjoyment or special privileges provided that the by-law prescribes a method of identifying or defining the common property;

(b) may authorise a person (including the original proprietor or the original proprietor's agent) to identify or define the common property and to allocate such identified or defined area of common property to the respective proprietors of each lot who are entitled by the by-law to the grant of exclusive use and enjoyment or special privileges;

(c) may authorise the transposition of an identified or defined area of common property from one proprietor of a lot to another proprietor of a lot at any time and from time to time on receipt of written notice to the body corporate form both such proprietors.

(7C) The notification on the registered plan referred to in subsection (7D) shall be given forthwith by the body corporate on receipt of a written request from the person referred to in subsection (7B)(b) or the proprietors referred to in subsection (7B)(c).

(7D) Neither the allocation of identified or defined common property nor any variation or transposition in relation thereto (which occurs after the commencement of the *Building Units and Group Titles Act Amendment Act 1990*, other than sections 1 and 2) has any force or effect until the registrar of titles has, pursuant to a notification in the prescribed form lodged in the land registry by the body corporate, recorded the notification on the registered plan.

(7E) The registrar of titles shall not record a notification on the registered plan in relation to an allocation of identified or defined common property or any variation or transposition in relation thereto (not being an allocation of identified or defined common property or any variation or transposition in relation thereto which occurred prior to the commencement of the *Building Units and Group Titles Act Amendment Act 1990*, other than sections 1 and 2) which occurred more than 3 months prior to the lodgment of the notification.

(8) A by-law referred to in subsection (7) shall, while it remains in force, enure as appurtenant to, and for the benefit of, and (subject to section 40(4)) is binding upon, the proprietor or proprietors for the time being of the lot or lots specified in the by-law.

(9) To the extent to which such a by-law makes a proprietor directly responsible for the duties of the body corporate referred to in subsection (7A)(a), it discharges the body corporate from the performance of those duties.

(9A) Where a person becomes a proprietor of a lot at a time when, pursuant to a by-law, another person is liable to pay money to the body corporate, the person who so becomes proprietor is, subject to section 40(4), jointly and severally liable with the other person to pay the money to the body corporate.

> (10) Any moneys payable by a proprietor to the body corporate under a by-law referred to in subsection (7) may be recovered, as a debt, by the body corporate in any Court of competent jurisdiction.
>
> (11) Where an order made under part 5, division 3 has effect as if its terms were a by-law, a by-law may vary or nullify the effect thereof.
>
> (11A) However, such by-law shall be made pursuant to a resolution without dissent.
>
> (12) A by-law which, but for this section, would have effect to prohibit or restrict—
>
> > (a) the keeping on a lot of a guide dog used by a proprietor or occupier of a lot who is a blind person or a deaf person; or
> >
> > (b) the use of a guide dog on a lot or common property by a blind person or a deaf person;
>
> shall, to the extent of that prohibition or restriction, have no force or effect.
>
> (12A) For the purposes of subsection (12)—
>
> > *guide dog*, *blind person* and *deaf person* have the meanings respectively assigned to them in the *Guide Dogs Act 1972*.
>
> (13) Subject to subsection (12), each by-law in force in respect of a plan immediately before the commencement of the *Building Units and Group Titles Act Amendment Act 1988*, section 19 shall, notwithstanding the commencement of that section, continue to be a by-law in force in respect of that plan except to the extent of any subsequent amendment or addition thereto or repeal thereof pursuant to this section.

[9] Adopting the practice contemplated by sections 30(3) and 30(7), the "proprietors" of the BUP executed a notification of change of by-laws form 17 (the notification of change of by-laws) under the then regulations to BUGTA. There was only one proprietor at that time, Lazermaze Australia, because it was the owner of all the lots in the scheme.

[10] The notification of change of by-laws is entitled as such and recites that the proprietors of the BUP No. 102739 certified that in pursuance of the provisions of s 30 of BUGTA, by special resolution in regard to by-laws 1 to 40 inclusive and 43 to 46 inclusive in the document which followed, and by resolution without dissent in regards to by-laws 41 and 42 duly passed on 4 July 1995, the by-laws enforced in respect of the parcel referred to in the plan were amended by inclusion of what were then set out as the relevant by-laws. The document then proceeded to delete the Schedule 3 by-laws, which otherwise operated pursuant to s 30(1) of the Act and included a total of 46 by-laws. As certification identified, it purported to recognise that there had been a resolution passed in relation to all, but specifically by-laws 41 and 42 on 4 July 1995. There is no independent record of that resolution having been put and passed without dissent, and nothing turns upon that issue in this appeal.

[11] By-law 41 was in these terms:

> 41. The proprietor for the time being of each unit in the building shall be entitled to the exclusive use for himself and his licensees of the car space or

> spaces the identifying number or numbers of which shall be notified in writing by Lazermaze (Australia) Pty Ltd ACN 003 251 803 to the Committee of the Body Corporate within 18 months after the date of registration of the Building Units provided that in respect of those spaces allocated pursuant to this By-Law, the committee is hereby authorised to vary the allocations so made and to transpose car spaces from one unit to another at any time and from time to time on the written request of the proprietors of the unit involved. Each proprietor to whom exclusive use of a car space or spaces is given pursuant to this By-Law shall use such space or spaces for the purpose of car parking only and shall not litter the same or so use the same as to create a nuisance or otherwise no such proprietor shall be responsible for the performance of the duty of the Body Corporate under section 37 of the Act. This By-Law shall only be relevant to the Body Corporate if the said car spaces are not on or form part of the title to the lots sold to each owner.

[12] The operative and critical words of by-law 41 are such as to give power to the original proprietor of all of the lots to notify with legal effect to the Committee of the body corporate, the allocation by it of particular car spaces to particular lots, and that is to be done within 18 months after the date of registration of the Building Plan, and which as I have identified above had already occurred on 13 June 1995. Therefore, the effect of by-law 41 was to have permitted the original proprietor to allocate with legally binding effect, subject to variations permitted, of defined areas of common property to respective proprietors for car parking purposes for a period of 18 months from 13 June 1995 until a date 18 months later, which would have been 13 December 1996. The power to authorise the original proprietor to do this is to be contained in s 30(7B) of BUGTA, set out above.

[13] The other critical wording in by-law 41 is the requirement that the allocation by the original proprietor be "notified in writing" to the committee within that period. That therefore contemplates not only the determination by the original proprietor which amounted to the allocation, but the giving of notice to the committee. No formal or specific kind of notice is identified as being required under by-law 41.

[14] The Form 17 constitutes a certification to the Registrar of Titles, and indeed to any reader of the document that certain events have occurred, and in particular that the resolutions have been passed adopting the by-laws. That means that it is not the act itself but certification that the act has occurred that is being dealt with by the Form 17 notification of change of by-laws.

[15] The certification was signed by "proprietors of the units", and the common seal of the proprietors was placed on the document, and through which the authorised nominee and sole proprietor Lazermaze Australia appeared.

[16] Six days later, on 10 July 1995, the common seal of Lazermaze Australia was itself applied in the capacity as sole registered proprietor. Hence the notification is both made by and signed by the proprietors, and also countersigned by Lazermaze Australia itself as the sole registered proprietor. The seal of the proprietor purports to have been "affixed by authority of resolution of the Council of the Body Corporate".

[17] Section 5 of BUGTA as it then provided, specified that in effect the references to "Councils" in any Act is taken to be a reference to the relevant committee. Section 42(3A) of BUGTA provided that where there is one proprietor only, the proprietor

may make any decision that a duly convened committee may make under this Act and such decision shall be deemed to be a decision of the committee.

[18] It may therefore confidently be concluded, that to the extent that the Council, i.e. the committee of the body corporate, authorised the affixing of the seal of the proprietors, that this conduct is direct objective evidence of the fact that the committee knew of the content of the notification of change of by-laws in all relevant respects.

[19] The notification of change of by-laws does not specifically reference any particular allocation of car park spaces or any plan pursuant to which allocation has or is proposed to be made. It is however common ground that on 10 July 1995 the notification of change of by-laws was lodged for registration with the Registrar of Titles and with it were two plans. It is not clear how the numbering on the notification of change of by-laws has occurred, however the numbering on the first page of the notification is page 5 and goes through consecutively to page 11. There are then pages numbered consecutively 12 and 13 which are the two plans.

[20] The plans are in each case marked with a handwritten notification as "Plan pursuant to by-law 41". Each is entitled under the description of the project as "Exclusive Use Plan Magic Mountain Apartments" by the surveyor. The client is identified as Walker Corporation which an original purchaser at the time had identified as Lazermaze Australia. Each is a survey plan and identifies the relevant BUP. Each is also marked with the description "Plan showing allocation of car parking spaces on Level (a) and (b)".

[21] The reference to the plan showing an allocation is clear and objective evidence that the allocation has occurred, and is not still yet to occur.

[22] There was independent evidence before the Adjudicator from a Mr Layton, but which is not specifically referenced in the Adjudicator's findings. Mr Layton was an original purchaser from the developer. Mr Layton's contract of sale identified that he was acquiring two allocated exclusive use car parking spaces. He identifies that the location of the carparks he expressly acquired the right to exclusively use, corresponded with their location for that apartment as shown in one of the plans attached to the 1995 notification which was registered.

[23] There was also independent evidence before the Adjudicator, which is not specifically referenced in the Adjudicator's findings, that later purchases of units purchased with the unit entitlements, the right to specific car parking spaces, and those car parking spaces corresponded with the allocations shown in the two plans just referred to. The relevant purchaser, Mr Alback, purchased his apartment in 2017. There is therefore objective evidence which was also before the Adjudicator that at least in relation to car parks allocated to Lot 10, his apartment A9, that the allocation corresponded with the allocation referenced in the plans attached to the notification of change of by-laws in 1995.

[24] The notification of change of by-laws was registered on 17 July 1995 and that would have had legal effect, to the extent that they recorded a change of by-laws from that date until such time as they were ultimately amended or repealed.

[25] As has been identified above, s 30(3) of the BUGTA at the time provided that amendments of or appeals of by-laws had no force or effect until the Registrar of

Titles pursuant to a notification such as that which was sent in 1995, records this on the Registered Plan.

[26] As I have already indicated, the Common Property Exclusive use car parking bylaw for individual lots over the common property on the site was recorded on 17 July 1995 under the *Building Units and Group Titles Act* 1980 (Qld) (BUGTA).

[27] The body corporate then amended by-law 41 on 13 June 1997 to permit exclusive use car parks to also be used for the purpose of storage. The by-law was otherwise identical to that set out above, although this time no plans were attached. However, the plan of exclusive use was not included with this change of by-laws. And furthermore the notion of Lazermaze Australia notifying allocations to the committee within 18 months after registration of the Building Units was nonsensical because it was already more than 18 months later and one would be entitled to reasonably infer that it was no longer the owner of all the lots in the scheme.

[28] Then in June 1999, the body corporate decided by special resolution to record a new community management statement (CMS). The body corporate contends that this was an attempt to adjust to the *Body Corporate and Community Management Act* 1997 (Qld) (BCCM Act) (Act No. 28 of 1997) which had only recently come into effect and required all schemes to have a CMS. The motion to record the new CMS explicitly stated that the CMS would not provide for exclusive use car parking and storage, as the committee believed that a resolution without dissent and the consent of all affected owners would be required in those circumstances. It was not confident that it could meet these conditions given that it had failed to do so the previous year. Despite the successful passage of this motion, no request to record a new CMS was lodged with the Titles Registry and the resolution lapsed.

[29] The Adjudicator found that a standard CMS was automatically recorded for the scheme under the transitional provisions of the BCCM Act on 15 July 2000, and it carried on the by-laws in effect at that time (without explicitly stating what they were). Three further CMSes have since been recorded, each authorised by special or ordinary resolution and none of which made any provision for exclusive use of common property for parking and storage.

[30] The Adjudicator found that the body corporate never had any intention of rescinding the exclusive use arrangements implemented in 1995 and the parking plan was simply omitted by mistake in 1997. This error was then compounded when the new Act came into effect because the committee was confused about its obligations under the new rules.

[31] The committee attempted to resolve the issue via motion 7 of an extraordinary general meeting held on 28 March 2019. The motion proposed to amend the CMS to include a by-law modelled on old by-law 41 that provided for the same exclusive use allocations, with one exception necessary because a storage shed now occupies a former parking space. However, the motion failed with 19 votes in favour and 14 against. The opponents of the motion included the Applicants in the present application.

[32] The committee had argued below it is uncontroversial that the 1995 exclusive use arrangements have continued in effect because there has never been a resolution without dissent to rescind them, and nor have all affected owners ever given their

written consent to giving up their exclusive use entitlements. It is uncontroversial that there has never been an express resolution passed without dissent to rescind the 1995 By-laws , and nor have all affected owners ever given their express written consent to giving up any exclusive use entitlements. These were requirements under both BUGTA and presently operative the BCCM Act. The issue here is what effect the 1995 exclusive use arrangements had because there was no allocation made of the kind that by-law 41 contemplated.

[33] The Adjudicator made the orders which were made by applying what was called the exercise of the equitable doctrine of rectification of instruments and which Adjudicator held allows an instrument to be corrected where an error means the instrument does not accurately reflect the intentions of the parties who created it; relying on *Burrell v Body Corporate for Boulevard North* [2010] QDC 352, [42].The error being rectified in this case was brought about because after the general meeting held on 12 May 1997 when the body corporate resolved by resolution without dissent to rescind by-law 41 and replace it with a new version that was identical in every respect except that it also permitted the car parks to be used for the purpose of storage, the body corporate neglected to include the car parking allocation plan when registering this by-law amendment. As a consequence, the new by-law contained no allocations but left it to the original developer to allocate common property for the purpose of the by-law within eighteen months of the registration of the Building Units Plan – a period that had expired six months before the body corporate resolved to adopt the amended by-law.

[34] In *Burrell v Body Corporate for Boulevard North* [2010] QDC 352, McGill SC DCJ said in obiter at [40]-[42] in relation to the making of orders by Adjudicators for rectification of instruments in the context of Bodies Corporate and grants of exclusive use over Common Property:

> [40] There was some question about the jurisdiction of the adjudicator to make such an order. It does not follow that an adjudicator is entitled to make such an order simply because he or she thinks it is a good idea. In Body Corporate for Palm Springs Residences CTS29467 v J. Patterson Holdings Pty Ltd [2008] QDC 300 I held that s 276 of the Act does give an adjudicator the power to grant equitable relief or relief on equitable grounds, but does not give the adjudicator a discretion to set aside a decision taken in accordance with the mechanism established under the Act simply on the basis that he or she disagrees with it. It is not simply a question of whether the particular outcome would be just and equitable in accordance with the subjective view of the adjudicator. It follows that the question is not simply whether an adjudicator thinks that the appellant should get an extra car parking space; it would be necessary to show that there was a proper basis on equitable grounds for such an order being made.
>
> [41] I accept that rights to exclusive use of the common property, which are the subject of fairly close restriction under the statute, would not readily be varied by adjudicators, but obviously the statute contemplates that such an order can be made. One example is under paragraph 10 in Schedule 5, which could apply to a motion to approve a Community Management Scheme which included a provision for exclusive use. I do not, however, consider that that is the only appropriate example; paragraph 2 refers to an order that the body corporate lodge a request to record a new Community Management Statement regardless of whether the body corporate consents to the recording, and that power, which matches the provision in s 62(4)(c), could also be used in an

> appropriate case. In any case, none of the orders in Schedule 5 act as limitations on the power otherwise conferred on the adjudicator under s 276: subsection (3).
>
> [42] There is, however, a well-recognised equitable doctrine which can be called in aid here, the doctrine of rectification of instruments. It is well established that in many cases where a written formal document embodies a mistake, the document may be rectified by a court of equity.13 The basis of the doctrine is that the document, which was brought into existence to give effect to the intention of the parties, did not accurately reflect that intention. Commonly the doctrine is applied in relation to written instruments inter partes, usually contracts, and most of the statements in relation to its operation apply in that context.14 It may be a little more difficult to apply here in relation to what happened in 1982 where all of the units were owned by the same company, Dorotea Pty Ltd, but it seems in principle that all that is required is that there be an intention on the part of that company to produce a particular result which by mistake the written documents did not reflect.

[35] The Applicants have standing to appeal on the basis that they contend that they were respondents to the Application below and are lot owners adversely affected by the orders which affect common property.

[36] At Reasons [11] to [13] the Adjudicator held after having identified the power to rectify, as follows:

> [11] However, five respondents argued in their joint submission that there is no error to correct as no exclusive use car parks were ever allocated to owners pursuant to by-law 41 after it was recorded in 1995. BUGTA allows exclusive use by-laws to authorise a person to allocate common property to proprietors for the purpose of the by-law.7 By-law 41 appeared to be such a by-law. It empowered the developer to make exclusive use allocations and notify the committee of them within 18 months of the registration of the Building Units Plan. The respondents point out that the by-law made no reference to the attached car parking plan, and there are otherwise no records of any allocations being made by the developer. They suggest that the parking plan may have been "preliminary" in nature, yet to be finalised by the developer making the allocations foreshadowed in the by-law, and/or that it was included as part of a set of plans for the purpose of exclusive use by-law 42. By-law 42 was added at the same time as by-law 41 and it allocated areas of common property as exclusive use gardens and courtyards. It explicitly referred to the allocations depicted in attached "preliminary plans".
>
> [12] While it is a little odd that by-law 41 authorised the developer to make allocations yet also included a plan of all allocations, it is nevertheless sufficiently clear that the body corporate intended to make the exclusive use allocations depicted in the attached plan. The plan as it appears in Titles Registry records has two pages, and each of them are clearly marked "Plan showing allocation of car parking spaces on Level A/B" in typed text. Both pages also feature the following handwritten note: "Plan pursuant to by-law 41". Every available space on the plan is allocated a lot number or marked as visitor parking. I do not see how this might be described as "preliminary" or how it left scope for the developer to finalise the plan through future allocations. I also do not see that it was necessary to include the plan for the purpose of by-law 42. By-law 42's allocations were depicted on a separate page and were clearly identified as relating to by-law 42. I cannot think of any other plausible explanation for the car parking plan except that it was precisely

what it purported to be: a plan of car parking allocations made pursuant to by-law 41.

[13] Exclusive use allocations that are made by an authorised person must ultimately be notified to the body corporate and recorded on the registered plan by the registrar of titles. While there is no evidence one way or the other, it may be that the developer made its allocations and notified the body corporate in the time that elapsed between the decision to adopt the by-law and lodgement of the request to record it with the registrar of titles. That would explain why a by-law written in those terms was accompanied by a comprehensive plan of exclusive use. Whatever the explanation, I can see no reason not to accept the car parking plan at face value as a plan of allocations made pursuant to exclusive use by-law 41.

The jurisdictional provisions

[37] Section 276 of the *BCCM Act* provides:

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

(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.

[38] Section 289 of the *BCCM Act* 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.
>
> (2) The aggrieved person may appeal to the appeal tribunal, but only on a question of law.

[39] Section 290 of the *BCCM 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.

[40] Section 146 of the *Queensland Civil and Administrative Tribunal Act* 2009 (Qld) 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).

Arguments about the lack of evidence to justify findings

[41] As to the first ground which was concerned with whether there was evidence or insufficient evidence "as a matter of law" to justify the findings of the Reasons, I was not taken to what the evidence did or did not establish in that regard in each of the categories in respect of which it was said that there was no or insufficient evidence.

[42] In an earlier decision of mine in this jurisdiction *Van Deurse & Anor v Q1 Management Pty Ltd & Anor* [2017] QCATA 113 I reviewed the authorities that were relevant to identifying errors of law where there was said to have been a wrong finding of fact "no evidence" to support the findings that were made. In *Van Deurse* I identified that 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) 65 ALD 141; [2001] FCA 744, [43]-[45].

[43] In the context of the AAT, the majority of the Full Court in *Federal Commission of Taxation v Trail Brothers Steel & Plastics Pty Ltd* (2010) 186 FCR 410 at [13] (citations omitted) stated that what is an appeal on "a question of law" for the purposes of s 44 of the AAT Act had been analysed in many cases and included:

> (1) whether the Tribunal has identified the relevant legal test;
>
> (2) whether the Tribunal 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 ...

[44] 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.

[45] The appellant 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: *Haritos*; *MIMA v Al-Miahi* (2001) 65 ALD 141, 149 [34]-[35] and *Tisdall v Webber* (2011) 193 FCR 260, 270-271.

[46] Gordon J summarised the "no evidence" ground in *Bell v Commissioner of Taxation* [2012] FCA 1042 at [84] as follows:

> 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 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]. (Emphasis added)

The Applicants' grounds of Appeal and contentions in the appeal

[47] The Applicants submit that the Adjudicator erred in law by finding that the Body Corporate intended to make the exclusive use allocations depicted in the plan attached to the notification of change of by-laws registered on 17 July 1995 when that finding was made in the absence of evidence of that fact or that finding was the wrong inference to draw or not available to be drawn from the primary facts.

[48] The Applicants also submit that the Adjudicator erred in law by taking into account a finding that the Body Corporate had that intention where, even if properly found, that fact was an irrelevant consideration of the question of the efficacy of the 1995 by-law.

[49] The Applicants also submit that Adjudicator erred in law by failing to find that the body corporate bore the onus of proof to show that the original proprietor had given the requisite notice to the committee in the terms required by by-law 41.

[50] The Applicants also submit that the Adjudicator erred in law in failing to find that the body corporate had failed to discharge the onus of proving the requisite notice to the committee , where the Adjudicator allegedly found that there was no evidence either way. The Applicants also submit that the proper inference of fact to be drawn from the committee's passing of a resolution on 7 November 1996 was that the state of mind of the body corporate at that time was that it had not received the requisite written notice of the allocation, and in circumstances where there ought to have been an adverse inference drawn against the body corporate based on the principles in *Jones v Dunkel*.

[51] The Applicants also submit that the Adjudicator erred in law by finding that the 1995 by-law 41 was effective to grant exclusive use of the car parks depicted on the

plan and that the 1997 by-law and later CMSes did not erroneously remove the by-laws from the plan such that CMSes ought be rectified. That is to say, that it follows on from the proposition that the Adjudicator's error in finding that the 1995 by-law, and its associated allocation in the plan, was effective to allocate exclusive use car parks to particular lot owners which were inadvertently removed by the 1997 by-law and later CMSes. It is unnecessary to deal in any detail with this last point because it is clear that unless the 1995 by-law was effective to allocate those car parks, there was nothing to rectify and the 1997 by-law and later CMSes did not inadvertently remove any accrued rights to exclusive use to any car parks.

[52] On the first ground of appeal, that there was no evidence on certain issues, it is submitted for the Appellants that the first error by the Adjudicator was the conclusion in paragraph 12 of the Reasons that despite the "oddness" associated with the by-law providing that the developer was to make allocations yet also included a plan of all allocations, it is nevertheless sufficiently clear that the body corporate intended it to make the exclusive use allocations depicted in the attached plan. The Appellants submit that the Adjudicator erred in drawing what is described as an inference. It is actually a finding as to the clarity or level of probity of the evidence as to what the body corporate intended in enacting by-law 41.

[53] The Appellants submit that the Adjudicator proceeded to erroneously make findings in the Reasons at [13] that although there was no evidence one way or the other, it "may be" that the developer made its allocations and notified the body corporate in the relevant time between the decision to adopt the by-law and the lodgement of the request to record it. In fact, it does not necessarily follow that the developer needed to make its allocations and notify the body corporate in the time elapsed between the decision to adopt the by-law and the lodgement of the request to record it because allocation could have been made anytime after 13 June 1995 when the body corporate became the registered owner of the common property, and when Lazermaze Australia signed the notification of change of by-laws on 10 July 1995, and lodged them for registration with the Registrar of Titles on that date. There is nothing per se about the terms of the by-law which means that any of the conduct it references can only be prospective conduct and could not be conduct by way of allocation and notification which had already occurred. Even if the terms of the by-law suggest that any of the conduct it references is prospective conduct, that is a mere ambiguity which can be resolved in conventional ways.

[54] The Appellants then go on to contend that the finding in paragraph 14 of the Adjudicator's Reasons that the body corporate neglected to include the car parking plan when registering the 1997 by-law and as a consequence the new by-law included no allocations was erroneous. The Appellants contend that the Adjudicator failed to consider the entirety of the evidence, and which if it had been considered, would have led to other available inferences or conclusions which were equally open. One is that the body corporate erroneously included the allocation plan at the time of registering the by-law and this is partially open because there was no evidence of the required notice having been given by Lazermaze Australia to the committee. They submit that the registering of the 1997 by-law without the allocation plan is consistent with there having been no notice given to the body corporate committee under the 1995 by-law and the proposition in paragraph 14 of the Reasons that the 1997 by-law included no allocations and left it to the developer to do something in a period that had already been expired, it is contended, is also consistent with no notice having been given under the 1995 by-law.

[55] The Appellants submit that the Adjudicator erred in law in finding, as the Adjudicator did in paragraph 15 of the Reasons, that in passing the 1997 by-law, lot owners would not have intentionally given up existing allocations of car parks with no prospect of securing a replacement car park given the period for allocations had already expired. They contend that this fact is equally consistent with there having been no original allocation of car parking spaces and this being known.

[56] The fundamental flaw in these arguments is that they confuse the state of mind or knowledge of the controlling mind and will or company nominee of the sole proprietor, Lazermaze Australia, in July 1995 with the state of mind or knowledge of the committee, or Council as it was then known, of the body corporate in July 1995 and also in 1997. The Council or committee as the nominee of Lazermaze Australia identified in the 1995 notification of change of by-laws as Anthony Gerard Robinson. He signed the 1995 notification of change of by-laws document as the nominee of the Council on behalf of the proprietors, and also on behalf of Lazermaze Australia as the registered proprietor, affixed by authority of a resolution of the committee of the body corporate.

[57] The evidence shows that the persons who were the controlling mind and will or were the committee members of the body corporate in 1997 were different.

[58] The notice of change of by-laws registered on 13 June 1997 was in the material before the Adjudicator although not referenced in the reasons of the Adjudicator. The notice shows that the common seal of the proprietors was affixed under the name of specified individuals who were the chairman and a secretary/ member of the committee. They were different persons from those involved in the adoption of the 1995 by-laws.

[59] A change of by-laws registered on 13 March 1996 was also in the material before the Adjudicator although not referenced in the reasons of the Adjudicator. That change of by-laws, which concerned the installation of services and ducting, was signed under the common seal of the proprietors, and at that time was lodged by a body corporate management company. The document itself was signed by the aforementioned Anthony Robinson and Allen Ryall, but as members of the committee, and not on behalf of Lazermaze Australia as sole registered proprietor or its nominee of the sole registered proprietor.

[60] It is therefore obvious that the state of knowledge or belief which the body corporate (by committee members) held in 1997 (assuming that can be ascertained) cannot be indicative of whether Lazermaze Australia had in fact allocated car parking spaces in accordance with by-law 41 in 1995 nor indicative of whether the committee had received notice in writing by Lazermaze within 18 months of 10 July 1995 that those spaces had been allocated and identified, nor rationally indicative of what those committee members believed to be the true position, even it that mattered.

[61] There is nothing at all to suggest that the body corporate erroneously included allocation plans with the notification of change of by-laws when that notification was lodged and registered and part of the public register thereafter.

[62] Moreover, the argument concerning the states of mind or belief of the committee cannot affect the outcome because the requirement in by-law 41 is nothing more than that the committee be notified in writing by Lazermaze Australia of the

identified numbers and identities of units to which exclusive use was granted. It is not a specific requirement that anyone in particular or indeed the committee members acknowledge receipt of that notice, or specifically turn their mind to the question of whether the notice had been received and as to its contents.

[63] Notwithstanding what was in by-law 41, Section 30(7B) of BUGTA did not in fact require any notification to be made to the committee of such allocations. It permitted a by-law, made with the written consent of the proprietor or proprietors of the law to "allocate such identified or defined area of common property with respect to proprietors of each lot who are entitled". It was sufficient authority under the Act for the original proprietor to merely allocate areas of common property to the respective lots if authority was given in that regard. Section 30 did not require notification to the body corporate, although that was included as part of the requirements of by-law 41.

[64] I reject the proposition that the finding at paragraph [12] of the Adjudicator's Reasons that it was sufficiently clear that the body corporate intended to make the exclusive use allocation depicted in the attached plan is based upon some inference, or supposition which was unsupported by any evidence of fact, or was a wrong inference to draw from primary facts. In any event it is not determinative of the issue of what the body corporate intended to do. In circumstances in which by-law 41 gave the power to the original proprietor to identify and allocate the common property, what is of significance is whether the legal requirements for the allocation and identification of common property to particular lots has occurred, and whether it has been notified to the committee that that has occurred.

[65] As I have already referenced, the terms of the notification of change of by-laws, acknowledged by the signature having been placed on the document by the committee, as well as the proprietors, with its attached sequentially numbered and identified plans identified as issued pursuant to by-law 41 and having all of the other characteristics that I have described earlier, puts it beyond doubt, and certainly establishes on the balance of probabilities that Lazermaze Australia:

(a) Identified and allocated car parking spaces;

(b) Directed that that be recorded on the survey plan, copies of which were attached to the registered document;

(c) Caused the plan to be identified as specifically issued under by-law 41 and therefore acknowledged that the exercise that had been conducted was that identified in by-law 41;

(d) Necessarily had to have notified the committee of the allocations because, within the time within which notice was to be given, the committee acknowledged by executing the notification of change of by-laws, that those allocations had occurred in accordance with those plans.

[66] Whilst it may be that there is some ambiguity about the fact that by-law 41 authorised the developer to make allocations yet also included a plan of all allocations, that so called "oddness" can be reconciled in the same way that courts have regularly reconciled inconsistent provisions to be found in contracts.

[67] Courts regularly are confronted with situations where at face value there are significant tensions, indeed even contradictory provisions to be found within contracts or other documents or instruments but which are capable of reconciliation or resolution. There are various methods by which it has been identified that this can occur. The fact that a term is susceptible of one or more possible meanings or may produce in its application more than one result is not a provision which is void for uncertainty. As long as it is capable of a meaning it will ultimately bear that meaning which the court on its construction decides is its proper construction. Hence in the process of giving it that construction courts have been prepared to supply omitted words, correcting literal errors such as incorrect clause cross-references. Examples can be found in *Fitzgerald v Masters* (1956) 95 CLR 420, *S & E Promotions Pty Ltd v Tobin Bros Pty Ltd* (1994) 122 ALR 637.

[68] In *Durbin v Perpetual Trustee Co Ltd* [1995] ANZ Conv R 280, Kirby J said that the following were the rules which the court should adopt in its approach to the resolution of the tension [to use a neutral word] between clauses there:

> 1. The primary obligation is to give meaning to the document viewed in its entirety. See Australian Guarantee Corporation Ltd v Balding (1930) 40 CLR 140, 151. The decision-maker will only appreciate the true meaning of the several clauses by approaching their meaning in the context of the instrument as a whole. An attempt must be made to bring the apparently disharmonious clauses into harmony so long as the construction then resulting does no violence to the language used by the parties. Behind this approach is an assumption, to which common sense contributes, that the parties would not themselves have executed the deed with an intention of adopting disharmonious, repugnant or incompatible provisions. See Halsbury's Laws of England Vol 12 (4th edition), para1469. So far as possible, the Court's task is to give effect to every word and every clause.
>
> 2. Where there is apparent disharmony between the provisions of different clauses, unless one effectively destroys the other, it will be assumed that the disharmony involves qualification by one of the other, not incompatibility. In Forbes (above) at 259, Lord Wrenbury, delivering the judgment of the Privy Council, expressed the rule thus:
>
> > The principle of law to be applied may be stated in few words. If in a deed an earlier clause is followed by a later clause which destroys altogether the obligation created by the earlier clause, the later clause is to be rejected as repugnant and the earlier clause prevails ... Thus if A covenants to pay 1001. and the deed subsequently provides that he shall not be liable under his covenant, that later provision is to be rejected as repugnant and void, for it altogether destroys the covenant. But if the later clause does not destroy but only qualifies the earlier, then the two are to be read together and effect is to be given to the intention of the parties as disclosed by the deed as a whole. Thus if A covenants to pay 100l and the deed subsequently provides that he shall be liable to pay only at a future named date or in a future defined event or if at the due date of payment he holds a defined office, then the absolute covenant to pay is controlled by the words qualifying the obligation in manner described. ... In the latter case, there could be no question if the later provision of the deed were introduced by the word ‘but’ or the words ‘provided always nevertheless’, or the like. But there is no necessity to find any such words. If a later clause says in so many words or as matter

> of construction that an earlier clause is to be qualified in a certain way, effect can be given and must be given to both clauses.

[69] Kirby J was in the minority in that case on the issue of whether on the true construction of the agreement there it was required that priority be given to the application of earlier clauses over later clauses.

[70] Similarly in *Re an agreement between Green & Anor* [1999] QSC 31, Muir J was attempting to reconcile apparently mutually inconsistent provisions, two of which related to two alternative completion date clauses. He did this by adopting what he called the orthodox approach to construction of contracts, that is to attempt to reconcile those inconsistencies by treating the agreement as a whole in an attempt made to give effect to all of its provisions.

[71] He referred to a passage in *AGC Ltd v Balding* (1930) 43 CLR 140, saying that it:

> … stated very distinctly the principle of construction where repugnant provisions exist in a contract. If a latter clause cannot be reconciled with an earlier one creating an obligation, then if it altogether destroys the obligation it must be treated as void, but if it only qualifies the former the two are to be read together and effect given to the intention of the parties as disclosed by the instrument as a whole.

[72] I think this approach is very similar to that which I have taken earlier as to the proper construction to be placed on the definitional clause relating to the completion date. It is about giving a sensible meaning to the provisions even though they appear initially to be in conflict.

[73] Similarly, Finn J in *GEC Marconi Systems Pty Ltd v BHP Information Technology Pty Ltd* [2003] FCA 50 said as follows:

> **[305]** As to the first of these questions, it is clear that when the parties contracted in the Emulation Variation Agreement to vary the Sub-Contract they did not intend to end the Sub-Contract and replace it with that variation agreement. Rather their intent was to leave the Sub-Contract on foot subject to the alteration: cf Federal Commissioner of Taxation v Sara Lee Household and Body Care (Australia) Pty Ltd, above, at 350–351; Tallerman and Co Pty Ltd v Nathan's Merchandise (Victoria) Pty Ltd, above, at 144. In consequence it was the Sub-Contract as altered that the parties were required to perform. But that contract now contained inconsistent provisions relating in particular to acceptance testing. And the resolution of that inconsistency?
>
> **[306]** There is a large body of case law dealing with how a contract should be construed when it contains inconsistent provisions, having regard to the nature and cause of the inconsistency: see generally Cheshire and Fifoot, Law of Contract, 213 (8th Aust ed); Chitty on Contracts, Vol 1, para 12–076 (28th ed); Lewison, The Interpretation of Contracts, para 8–08ff (2nd ed); Farnsworth, Contracts, §7.11 (3rd ed). It is unnecessary here to outline in detail the various 'rules' of construction that have evolved to resolve inconsistencies. These rules reflect the types and causes of inconsistencies: if specially tailored terms contradict standard terms, the specially tailored terms will prevail over the standard terms: cf Re Theodorou [1993] 1 Qd R 588; '[i]f a later clause cannot be reconciled with an earlier one creating an obligation, then if it altogether destroys the obligation it must be treated as void': Australian

> Guarantee Corporation Ltd v Balding (1930) 43 CLR 140 at 151; if the terms of a document incorporated into an agreement conflict with expressly agreed terms in that agreement, the expressly agreed terms prevail: Modern Building Wales Ltd v Lemmer and Trinidad Co Ltd [1975] 1 WLR 1281 at 1289; etc. The common thread in the cases is that effect is given to that part of an agreement 'which is calculated to carry into effect the real intention of the parties as gathered from the instrument as a whole, and that part which would defeat it must be rejected': Chitty on Contracts, para 12–076.
>
> **[307]** In the present case the real intention of the parties in relation to acceptance testing must be regarded as having been reformed by the Emulation Variation Agreement. Accordingly, the agreement to complete using emulation must prevail over those provisions in the subsidiary documentation that would prevent this outcome occurring. The alleged inconsistency in other words would be resolved as a matter of construction though, it might be said, a hiatus in the subsidiary documentation necessary for acceptance testing would ensue.

[74] But in any event it is not so odd to treat the words in by-law 41 as not necessarily referring to prospective conduct and in reading them as referring to any allocations which have already objectively occurred, by objective conduct of Lazermaze Australia and any notification potentially already sent to the body corporate committee in that regard.

[75] It follows from what I have said that whilst the Adjudicator asserted that there was no evidence one way or the other about whether the developer made its allocations and notified the body corporate, it is clear that the objective evidence demonstrates that it in fact did so. What the Adjudicator was referring to in there being "no evidence one way or the other" is a reference to whether there was direct testimony from someone on behalf of the developer and original proprietor in that regard.

[76] It is not necessary in my view that there be any direct testimony in that regard before the Adjudicator, or this Tribunal, can arrive at the conclusion that for notification of change of plan to have been signed and lodged with its attached plans allocated car parks, it cannot have done so unless those documents were in existence as evidencing those allocations prior to the by-law being passed and the notification given in relation to it. Therefore, in my view, the Appellants' criticism of the Adjudicator's reference to absence of evidence that the developer made its allocations in the timeframe referenced, is without merit.

[77] I also reject the submission that the Adjudicator wrongly inferred that the body corporate neglected to include the car parking plan in registering the 1997 by-law amendment to include storage space. Whether it is described as neglect, or an affirmative decision not to include the car parking plan when registering the 1997 by-law amendment, is of no significance because the fact is that the body corporate did not include the car parking plan. Even if it properly described as neglect, that does not mean that the events in 1995 were ineffective to create by-law 41, and for car parking spaces to have been allocated. The omission to include the car parking plan in registering the 1997 by-law amendment can be reasonably and plausibly explained as being based on an understanding of what was to be done to achieve the outcomes in s 30(7) of BUGTA where the circumstances were that all that was objectively being sought to be achieved at the time was to add storage space to existing car park allocations. That meant adopting precisely the same language for

by-law 41 as presently existed, making no change to it and avoiding the necessity of having to refer to the allocations which had already occurred. The purpose of the amendment in 1997 was simply to add that storage space to existing allocations and did not otherwise amend, add or repeal part of by-law 41 where if it had purported to do so it would have required the written consent of all owners without dissent, to meet the requirements of s 30(7).

[78] There was direct evidence, some of which I have already mentioned, before the Adjudicator which directly demonstrates that one or more purchasers of lots have, when they have bought their units, also acquired the rights attached to those units in respect of exclusive use to car parking spaces, and which spaces correspond with the allocations made in 1995. That is direct evidence of a course of conduct by owners both buying and selling that the registered record of the allocations made in 1995 was seen to be binding allocations. But in the end, it is of little significance whether those lot owners believed they were binding allocations, because for the reasons I have already mentioned they in fact were binding allocations.

[79] There is also testimony from Mr Alan Layton. He was an original purchaser from Lazermaze Australia when it was the developer and the sole proprietor of all the lots. He does not say whether he purchased the unit off the plan. But what he does identify is that his contract of sale identified that he had two allocated exclusive use car parking spaces. Ambiguously he says that these were shown on the exclusive use plan, although he does not say whether he was given a copy of that plan but identifies it clearly by reference to one of the plans attached to the 1995 notification which was registered. The clear inference to be drawn from the fact that the original proprietor was selling apartments in the development in 1997 and which reflected the allocations made in 1995 is that in fact and in law, and in the state of mind of the original proprietor, and its representative on the council or committee, it knew and believed that as a fact.

[80] I mentioned at the outset that the consequence which would flow if this appeal were allowed on the basis for which it is brought is that no owner of any lot since 1995 to the present had any legal entitlement to exclusive use of any car parking space in the scheme. Furthermore, none was entitled to purport to assign those rights to any purchaser from them of those lots. The Adjudicator's statement at [15] of the Reasons that the owners in 1997 did not intend to give up their existing exclusive use car parks when it lodged the amended by-laws, and that it was beyond belief that they would intentionally give up their existing allocations with no prospect of securing a replacement is, with respect, fundamental common sense and perfectly obvious. Conversely, it is counterintuitive to suggest that the original proprietor did not have, and did not believe it had, discharged the requirements of by-law 41 when it sold its lots to members of the public with car parking spaces allocated in accordance with the exclusive use plan created in 1995.

[81] Reference has been made above to the arguments put concerning the absence of direct evidence, and the failure to discharge what was said to be some onus of proof on the body corporate in proving by direct testimony the allocation and notification of 1995. *Jones v Dunkel* adverse inferences are open to be drawn where there is no explanation for the failure to call direct evidence on some point. An adverse inference that could be drawn is only that the evidence, if it existed, would not necessarily favour a case for the entity who might have called the witness. Of course, there is no reason to think in this case that it would have been just as open to

the Appellants to have adduced evidence to prove non-compliance with by-law 41. It is not necessarily an inference to be drawn against the body corporate. Furthermore, as the case was articulated by the body corporate before the Adjudicator, it did not carry an onus of proving by direct testimony from the original proprietor or its representative Mr Robinson, what occurred in 1995. Twenty-five years have passed since those events occurred. There is other additional objective evidence which I have already referenced which establishes on the balance of probabilities the requirements of by-law 41 were met in 1995 and that the allocations referenced in the registered plans did exactly what they said they did, which is to record and register allocations of those car parks to specific lot owners.

[82] On the onus issue, apart from what I have already said, in my view the Respondent body corporate was entitled, in the event that it carried any onus to show a valid allocation of car parks in 1995, to rely upon the so called presumption of regularity. As is noted in Cross on Evidence 11th Edition at paragraph 1175, the principle applies to corporations. Sometimes it is a presumption of fact and sometimes a presumption of law. The author there notes:

> the presumption arises where an intention to do some formal act is established, when the evidence is consistent with that intention having carried into effect in a proper way, the observance of the formality has not been proved or disproved and its actual observance can only be inferred as a matter of probability,

citing *Carpenter v Carpenter Grazing Co Pty Ltd* (1987) 5 ACLC 506 at 514 (citing earlier English authority on this issue).

[83] The learned author goes on to reference the fact that sometimes the maxim involves the presumption that the law will be observed, and to prove execution, for example of a party of affidavits bearing their name. The authors then state "the rule has been put broadly; where an act is done which can be done legally only after the performance of some prior act, proof of the latter carries with it a presumption of the due performance of the prior act", citing *McLean Bros and Rigg Ltd v Grice* (1906) 4 CLR 835; *Re NIAA Corp Ltd (in Liq)* (1993) 33 NSWLR 344 at 349.

[84] In this case, the purported sale of lots by Lazermaze to the public for good consideration, along with allocated exclusive use car parking spaces, was an act which carries the presumption of the due performance of the requirements of by-law 44 and the allocation associated with it of those lots. The presumption is of course only that, and can be rebutted. In my view, in this case, the evidence did not go to show rebuttal of the presumption.

[85] In my view there was no error of law by the adjudicator in making the orders made. I therefore order that the Application be dismissed.

[86] One final matter should be mentioned. The adjudicator did not make any finding as to whether the Body Corporate might have been acting unreasonably in failing to pass motion 7 at the extraordinary general meeting held on 28 March 2019 and which sought to amend the CMS to include a by-law modelled on old by-law 41 that provided for the same exclusive use allocations, with one exception necessary because a storage shed now occupies a former parking space, without dissent. Both parties submitted that should I allow the appeal, I should send it back for an Adjudicator to decide that point. In view of my findings, there is no need to do so.