

QUEENSLAND CIVIL AND ADMINISTRATIVE TRIBUNAL

CITATION: *Rolling Rock Nightclub Pty Ltd v Commissioner for Body Corporate and Community Management* [2020] QCAT 435

PARTIES: **ROLLING ROCK NIGHTCLUB PTY LTD**
(applicant)

v

**COMMISSIONER FOR BODY CORPORATE AND
COMMUNITY MANAGEMENT**
(respondent)

APPLICATION NO/S: GAR268-19

MATTER TYPE: General administrative review matters

DELIVERED ON: 10 November 2020

HEARING DATE: 23 September 2020

HEARD AT: Brisbane

DECISION OF: Member Fitzpatrick

ORDERS: **1. The decision of 30 May 2019 to reject Adjudication Application 0157 of 2019 is set aside.**

2. A decision that a dispute resolution recommendation that Adjudication Application 0157 of 2019 be subject to department adjudication is substituted.

CATCHWORDS: ADMINISTRATIVE LAW – ADMINISTRATIVE TRIBUNALS – QUEENSLAND CIVIL AND ADMINISTRATIVE TRIBUNAL - where decision to reject an application for adjudication – whether party to a dispute – whether party directly concerned in a dispute – whether dispute capable of adjudication

Body Corporate and Community Management Act 1997 (Qld), s 227, s 228, s 238, s 239C, s 241, s 276
Queensland Civil and Administrative Tribunal Act 2009 (Qld), s 20

MacDonald & Anor v Clark & Anor [2012] QSC 418
Sitting Bear Pty Ltd (receivers and managers appointed) v Body Corporate for Sphere Southport Living CTS 37951 [2014] QCATA 360
Wheeler and Smith v Body Corporate for Calypso Towers [2016] QCATA 66

**APPEARANCES &
REPRESENTATION:**

Applicant: B Strangman of Counsel instructed by M Kleinschmidt of Stratum Legal Pty Ltd

Respondent: K Dixon, Legal Officer, Department of Justice and Attorney-General

REASONS FOR DECISION

- [1] This is an application to review a decision of the Commissioner for Body Corporate and Community Management made 30 May 2019, pursuant to section 241 of the *Body Corporate and Community Management Act 1997 (Qld)* (BCCM Act). The decision was to reject an adjudication application made by the applicant Rolling Rock Pty Ltd ACN 619 409 951 (Rolling Rock).
- [2] The decision provides that the Commissioner is not satisfied that the application establishes a direct dispute between Rolling Rock and the Body Corporate about a legal issue with respect to which an adjudicator has the power to make orders.
- [3] Chapter 7, Part 1 of the BCCM Act provides for external review of a decision by this Tribunal, upon application by an aggrieved person such as Rolling Rock.
- [4] By section 20 of the *Queensland Civil and Administrative Tribunal Act 2009 (Qld)* (QCAT Act) the Tribunal must conduct a fresh hearing on the merits in order to produce the correct and preferable decision.
- [5] The applicant seeks orders that:
 - (a) the respondent's decision of 30 May 2019 to reject the Adjudication Application 0157 of 2019 be set aside; and
 - (b) the respondent make a dispute resolution recommendation that Adjudication Application 0157 of 2019 be subject to department adjudication.

Factual Background

- [6] The parties have filed a joint statement of facts and list of issues for determination.¹
- [7] In summary the relevant facts are:
 - (a) At all relevant times Rolling Rock was the occupier of Lot 28, Bay Village on Hastings Community Titles Scheme 33127 (Bay Village CTS). It conducted a nightclub on the premises.
 - (b) Rolling Rock leased Lot 28 from the owner, Ironbark SMSF Properties Pty Ltd, pursuant to a registered lease whereby Rolling Rock agreed at clause 2.2 to pay a relevant proportion of operating expenses, including amounts paid by the owner to the Body Corporate on account of levies, assessments, outgoings and impositions.
 - (c) The town planning consent relevant to conduct of the nightclub, requires at clause 8: the provision of security by the Body Corporate during the hours of

¹¹ Exhibit 4.

12.00 midnight and 4.00am for the purpose of prevention and restraint of unruly behaviour, undue noise, loud or foul language or abuse by patrons who have departed the premises.

- (d) The Body Corporate for the Bay Village CTS has a Community Management Statement which contains the Body Corporate By-Laws for the Bay Village CTS.
- (e) By-Law 14 provides that the owner of Lot 28 has exclusive use of a given area for the purpose of security.
- (f) By-Law 14.1 provides:

Subject to By-Law 14.2, the owner of Lot 28 must pay the following amounts to the Body Corporate:

- (a) half of the cost incurred by the Body Corporate providing a single on-site security guard between 8.00pm and 4.00am, every day; and
- (b) the whole cost incurred by the Body Corporate providing a second on-site security guard between the hours of midnight and 4.00am every Friday and Saturday and any other nights the Body Corporate reasonably determines that an additional security guard is prudent.

...security provided must... satisfy the requirements of condition 8 of the Town Planning Consent...

- (g) By-Law 14.2 provides:

If the use of Lot 28 does not require the security to be provided to satisfy the requirements of condition 8 of Town Planning consent...then the provisions of By-Law 14.1 requiring the owner of Lot 28 to pay the amounts to the Body Corporate as noted in By-Law 14.1 shall cease to apply for so long as the use of Lot 28 does not require the provision of security under any Town Planning consent Permit.

- (h) Rolling Rock conducted the night club during the period 14 September 2017 to 11 February 2019. During that period the Body Corporate issued to the owner invoices for security costs incurred pursuant to By-Law 14.1, which were paid by it. During the relevant period the owner through its managing agent issued to Rolling Rock invoices which included the security costs payable under the lease. Those invoices were paid by Rolling Rock.
- (i) Rolling Rock did not open its night club and bar on Mondays, Tuesdays and Sundays, except where a public holiday fell on a Monday, in which case the business was also open on the Sunday night preceding between 10.00pm and 2.00am.
- (j) By letter dated 29 August 2018 Rolling Rock's solicitors wrote to the Body Corporate seeking reimbursement of GST paid on the security costs invoiced to it by the owner, seeking support from the Body Corporate Committee for an amendment of the town planning consent to reflect the security actually needed and asking it to cease incurring unnecessary security costs when the night club is not operating and the town planning consent does not require security. No response was received to that letter.

- (k) By letter dated 8 February 2019 Rolling Rock's solicitors wrote to the Body Corporate seeking reimbursement of GST paid on security costs and reimbursement of security costs paid in respect of nights when the night club was closed. Rolling Rock refers to this demand as a claim for overpaid security costs. The Body Corporate did not respond to this letter.
- (l) On 11 February 2019 Rolling Rock's solicitors filed an application for adjudication with the Office of the Commissioner for Body Corporate and Community Management (Commissioner's Office). On 18 April 2019 Rolling Rock requested an amended application be lodged in place of the earlier application.
- (m) Rolling Rock sought:
 - (i) a declaration that by-law 14 does not now, nor did at any time, permit the Body Corporate to seek, obtain or retain a reimbursement from the owner or occupier of Lot 28 of security costs arising under by-law 14.1 in respect of nights when the Applicant's business was closed (Overpaid Security Costs); and
 - (ii) an order that the Body Corporate reimburse the Applicant the Applicant's share of the Overpaid Security Costs for the period from October 2017 to 12 February 2019 (being \$9,641.24 excluding GST, plus the appropriate proportion of the "missing" invoices as identified in an attached spreadsheet;
 - (iii) such relief and such other orders as may be just and equitable in the circumstances to resolve the dispute.
- (n) By letter dated 8 May 2019 Rolling Rock made further submissions in support of the contention that a "dispute" exists within the meaning ascribed to it in the BCCM Act.
- (o) On 30 May 2019 the Commissioner advised the application is rejected because the Commissioner's delegate is not satisfied that the application establishes a direct dispute between Rolling Rock and the Body Corporate about a legal issue with regard to which an adjudicator has power to make orders.

Issues to be decided

- [8] The parties are agreed that based on the agreed facts the issues for the Tribunal's determination are:
 - (a) whether there is a 'dispute' within the meaning of section 227(1)(b) of the BCCM Act.
 - (b) if the answer to that question is 'yes', whether the applicant has standing to make the application to the respondent Commissioner for dispute resolution under section 238(1)(a) of the Act.
 - (c) whatever the answer to question (b), whether on the agreed facts, the respondent lawfully and properly rejected the application under one of the subparagraphs contained in section 241(1) of the BCCM Act.
- [9] At the hearing Counsel for the applicant advised that for the purposes of this review the GST issue raised in the adjudication application is not a relevant consideration for me.

- [10] The applicant sold its business and transferred the Lease on 11 February 2019. Prior to settlement the application for adjudication was made to the respondent. The parties are agreed that pursuant to section 239C of the BCCM Act, the application continues as if the applicant were the lessee of Lot 28.

Discussion

- [11] Chapter 6 of the BCCM Act sets out an exclusive resolution scheme for disputes of the type which are referred to in s 228 of the Act.
- [12] Pursuant to section 238(1) of the BCCM Act a person wanting to participate in the dispute resolution process must be:
- (a) a party to; and
 - (b) directly concerned with;
 - (c) a dispute to which Chapter 6 applies.
- [13] By section 227(1)(b) of the BCCM Act an occupier such as Rolling Rock may be a party to a dispute with a Body Corporate for a community titles scheme. Whether Rolling Rock is a party to the asserted dispute is a matter of disagreement between the parties.

The Dispute

- [14] By section 228(1)(b) the type of dispute to which Chapter 6 applies is, relevantly, about the exercise of rights or powers, or the performance of duties, under the Act or community management statements.
- [15] In principle, the exercise by the Body Corporate of its rights and powers to recover the cost of security is a type of dispute to which Chapter 6 applies.
- [16] I accept the way in which Rolling Rock describes the dispute in this matter as: whether the invoicing by the Body Corporate for additional on-site security, when it was not required, was a proper exercise by the Body Corporate of its rights or powers, or the performance of its duties, as provided for in by-law 14 contained in Schedule C of the Community Management Statement. I intend to refer to this description in the decision whenever I use the words “the dispute”.
- [17] Whether the dispute is a dispute to which Chapter 6 applies is in contention.

Key issues

- [18] Encompassing the issues agreed by the parties to be at large in this matter and expressing those issues another way, I consider the debate in this matter is:
- (a) whether Rolling Rock is a party to;
 - (b) and directly concerned with the dispute;
 - (c) and whether the dispute is capable of being the subject of adjudication to achieve the outcome sought by Rolling Rock.
- [19] The elements of the debate are tightly linked.

Is Rolling Rock a party to the dispute?

- [20] As to whether Rolling Rock is a party to the dispute with the Body Corporate, the Commissioner submits that:

- (a) the claimed overcharging of security costs was the result of transactions occurring between the applicant when it was a former occupier, and the owner of Lot 28;
- (b) the real dispute is a contractual matter between the applicant and the owner of Lot 28 and it is beyond the jurisdiction of the respondent and the present matter;
- (c) section 227 of the BCCM Act does not contemplate a dispute between occupier and owner falling within the range of disputes which may be the subject of adjudication;
- (d) by-law 14 provides an obligation on the Lot owner, not on the occupier, to pay for security. There are no rights or obligations with respect to the applicant as occupier. Someone cannot be in dispute with a Body Corporate over a by-law when they are not subject to the by-law. The Body Corporate and Rolling Rock as occupier cannot be in dispute in the absence of a by-law obliging Rolling Rock to make a payment to it.

[21] Rolling Rock's position on this question is:

- (a) there is no dispute between the applicant and the Lot owner, no evidence of any dispute between the Lot owner and the Body Corporate and no outcome sought within the adjudication application that requires a determination of any contractual matter between the applicant and the Lot owner;
- (b) as to the respondent's submission that the claimed overcharging is a matter between the owner and the occupier in accordance with the lease, the dispute is between Rolling Rock as occupier and the Body Corporate because Rolling Rock was compelled to make a payment as a result of the Body Corporate not exercising its rights and powers appropriately under By-law 14;
- (c) the dispute is whether the continued invoicing by the Body Corporate for additional on-site security, when it was not required, is a proper exercise by the Body Corporate of its rights or powers, or the performance of its duties, as provided for in by-law 14 contained in Schedule C of the Community Management Statement;
- (d) the dispute is between the Body Corporate and the occupier of the Lot.

Is Rolling Rock directly concerned in a dispute?

[22] As to whether Rolling Rock is directly concerned in the dispute with the Body Corporate the Commissioner's position is that:

- (a) the applicant is only indirectly concerned with application of the by-law; and
- (b) when the respondent rejected the application on the basis that there is no direct dispute between Rolling Rock and the Body Corporate, the respondent was making the point that the adjudicator has no jurisdiction, because there is no legal issue over which the adjudicator has power to make orders.
- (c) It is not accepted that the respondent misconstrued section 238 of the BCCM Act by referring to a lack of a "direct dispute" as a reason for rejecting the application.

[23] Rolling Rock submits that:

- (a) the respondent erred in concluding that this is a contractual dispute, or a dispute to which the applicant was not directly concerned, because it is the use of Lot 28 by the applicant and the exercise of the Body Corporate's rights or powers under the Community Management Statement that is the basis of the dispute;
- (b) the important words contained in section 238(1)(a) "directly concerned with" are different to the words used in the respondent's rejection notice of 30 May 2019, being "direct dispute";
- (c) section 238(1)(a) of the BCCM Act does not require there to be a "direct dispute" between the applicant and the Body Corporate. Section 238(1)(a) allows a person to make an application if the person is a party to and directly concerned with a dispute to which Chapter 6 applies;
- (d) The respondent has fallen into error in construing section 238 of the Act as requiring a "direct dispute" between the applicant and the Body Corporate, rather than as is the case, that the applicant is directly concerned in a dispute;
- (e) the applicant is directly concerned with the dispute because:
 - (i) additional on-site security was not required; and
 - (ii) the applicant has been ultimately paying for the amounts invoiced by the Body Corporate, for the additional on-site security, in circumstances where, pursuant to by-law 14.2, the Body Corporate ought not be issuing invoices in the first place.

Is the dispute capable of adjudication?

[24] As to whether the dispute is capable of being adjudicated under Chapter 6 of the BCCM Act, the Commissioner submits that:

- (a) not every grievance amounts to a dispute;
- (b) the respondent exercised his powers under section 241 of the Act to reject the Application. Section 241 provides that the Commissioner may reject an application if the outcome sought is not within the jurisdiction of a dispute resolution officer;
- (c) the respondent is required to administer Chapter 6 in a way consistent with the objects of the Act, including to provide an efficient and effective dispute resolution process. That is achieved through consistent application of the provisions of Chapter 6 of the Act. The outcomes sought in the Application are not consistent with previous application of the provisions of Chapter 6 of the Act, with particular regard to the meaning of "dispute" under section 227 of the Act;
- (d) section 276 of the Act limits any Order that can be made. Section 276 provides that 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". Re-imbusement to the occupier of moneys paid by the owner are not orders the Adjudicator could make if the matter were to proceed to adjudication.

[25] Rolling Rock argues that:

- (a) the dispute is a dispute to which Chapter 6 applies as provided by s 228(1)(b) of the BCCM Act. The section does not require that rights or powers are exercised against Rolling Rock. It is sufficient that the dispute is about the exercise of rights or powers;
- (b) Section 241 of the BCCM Act contains an exhaustive list of bases on which the respondent can reject an application. Neither the rejection notice nor the statement of reasons provides which subsection of section 241 is relied upon. The reason contained in the rejection notice of 30 May 2019 is that there is an absence of a legal issue with regard to which an adjudicator has the power to make orders, but that reason is not contained in section 241 of the BCCM Act. It was conceded in oral submissions that if there is no “dispute” the Commissioner could reject the application under s 241(1)(a) of the Act, that is, the outcome sought is not within the jurisdiction of a dispute resolution officer;
- (c) it is wrong to determine jurisdiction by the remedy sought;
- (d) section 276 of the Act gives the adjudicator broad powers, including a power to consider equitable claims and defences arising from or relating to disputes;²
- (e) the adjudication application seeks a declaration as to the application of by-law 14. Rolling Rock is a proper applicant for a declaration. If the adjudicator finds that the Body Corporate was wrong to charge for security costs, then the adjudicator has power to order a refund of the money.

[26] After the hearing I sought further submissions from the parties as to:

- (a) what cause of action, legal or equitable right is asserted by Rolling Rock against the Body Corporate for “Bay Village on Hastings Community Tiles Scheme”; and
- (b) the legal basis on which an adjudicator is entitled to grant each element of the relief sought by the applicant.

[27] Rolling Rock submitted that:

- (a) the primary question in this application is whether the applicant comes within s 238 of the BCCM Act. Once that is resolved the exclusive jurisdiction of the Commissioner’s dispute resolution processes under Chapter 6 of the BCCM Act is enlivened;
- (b) the BCCM Act does not speak in terms of a cause of action. The legislators chose the word “dispute”. That approach enables an adjudicator to resolve disputes that arise in the context of community title living which otherwise would not give rise to a cause of action as that term is applied by courts. However, the dispute must be able to be resolved through a dispute resolution process. The applicant submits that this dispute can be so resolved;
- (c) Rolling Rock has sought relief which may be ordered by an adjudicator pursuant to s 276 of the BCCM Act, in respect of overpaid security costs, namely:
 - (i) a declaration as to the construction and operation of by-law 14;

² *Sitting Bear Pty Ltd (receivers and managers appointed) v Body Corporate for Sphere Southport Living CTS 37951* [2014] QCATA 360, [27].

- (ii) an order for re-imburement;
 - (iii) other orders which may be just and equitable.
- (d) In the alternative Rolling Rock has at least the following causes of action against the Body Corporate:
- (i) negligence and breach of statutory duty;
 - (ii) breach of covenant; and
 - (iii) unjust enrichment.

[28] The Commissioner submits:

- (a) an adjudicator has no power to compel the owner of Lot 28 to supply information. The actions of the owner are critical to determining each of the alleged causes of action by Rolling Rock;
- (b) as to the relief sought by Rolling Rock:
 - (i) insofar as it seeks a declaration, Rolling Rock is asking an adjudicator to determine a question of law about the rights and obligations of the owner of Lot 28, without the owner being a party to the dispute.
 - (ii) Whilst the Commissioner accepts that an adjudicator has the power to make a declaration whether a Body Corporate was entitled, pursuant to by-law 14 to invoice the owner for a particular expense, the adjudicator does not have the subsequent power to make a declaration about the amount the owner is then entitled to charge the applicant pursuant to a lease nor to make an order for payment of that amount.
 - (iii) Rolling Rock is not seeking reimbursement of security costs from the Body Corporate, but reimbursement of some of the moneys the applicant paid to the owner of Lot 28.
 - (iv) An order which effectively involves the assessment of moneys paid pursuant to a lease would exceed the authority of an adjudicator under s 276(2) of the BCCM Act.
 - (v) It is acknowledged that adjudicators are vested with equitable power, however,

...it is not a power which can be exercised arbitrarily according to the adjudicator's unfettered opinion. In order for the adjudicator to make an order under s276 that is "just and equitable in the circumstance" there must be some proper basis in law or equity for the grant of relief and not just a notion of unfairness as subjectively determined by the adjudicator.³
 - (vi) As to what is meant by "a dispute that may be resolved under Chapter 6 by a dispute resolution process" – the question is whether the orders the adjudicator is empowered to make will resolve the dispute.⁴

³ *Wheeler and Smith v Body Corporate for Calypso Towers* [2016] QCATA 66, [63].

⁴ *MacDonald & Anor v Clark & Anor* [2012] QSC 418, [42].

- (vii) An adjudicator can determine the power of the Body Corporate to issue invoices to the owner of Lot 28. An adjudicator does not have the power to determine the entitlements between the owner of Lot 28 and the applicant as occupier of part of Lot 28 pursuant to a lease.

Findings

- [29] Each element of the questions to be determined nests within the next element. The final and overarching element is whether the dispute is a dispute that may be resolved under Chapter 6 by a dispute resolution process. I intend to approach the questions first by a consideration of that overarching element.
- [30] I respectfully adopt the reasoning of Martin J in *MacDonald & Anor v Clark & Anor*. His Honour made the point that the BCCM Act talks in terms of providing a remedy. The adjudicator is to have exclusive jurisdiction to make orders of the kind which the Act prescribes, subject to any statutory exception or limitation. An adjudicator may make an order about a matter in s 276(1) and those mentioned in schedule 5 of the BCCM Act. The adjudicator also has the power to dismiss an application for want of jurisdiction or if the adjudicator is satisfied that it should be dealt with in a court or tribunal of competent jurisdiction. The question to be answered is whether the orders the adjudicator is empowered to make will resolve the dispute.⁵
- [31] Relevantly, the adjudicator is empowered to 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: the exercise of rights or powers, or the performance of duties, under the Act or the community management statement.
- [32] As to the scope of the power to make an order that is just and equitable in the circumstances, the BCCM Act has been found to vest the necessary equitable jurisdiction in adjudicators to consider equitable claims and defences arising from or relating to disputes described in the section.⁶
- [33] Although not expressly stated in s 276 it is implicit that in order to resolve disputes an adjudicator must not only have the power to consider equitable claims and defences, but also legal claims and defences.
- [34] The extract from *Wheeler and Smith v Body Corporate for Calypso Towers* given by the Commissioner is apposite. That is, there must be some proper basis in law or equity for the grant of relief.
- [35] For that reason, I reject the submission of Rolling Rock that an adjudicator may resolve disputes that would not give rise to a cause of action as that term is applied by courts. To find otherwise would be to invite an adjudicator to exercise an arbitrary power upon a “notion of unfairness as subjectively determined by the adjudicator”.⁷
- [36] The causes of action which Rolling Rock contends it may have against the Body Corporate are all causes of action which an adjudicator may consider, given the width of the power to make orders that are just and equitable.

⁵ Ibid, [39], [40], [41], [42].

⁶ *Sitting Bear Pty Ltd (receivers and managers appointed) v Body Corporate for Sphere Southport Living CTS 37951* [2014] QCATA 360, [27].

⁷ *Wheeler and Smith v Body Corporate for Calypso Towers* [2016] QCATA 66, [63].

- [37] The causes of action potentially give rise to relief in favour of Rolling Rock by way of a Declaration, an order for the award of damages or restitution. There is nothing in the BCCM Act to suggest that an adjudicator does not have available to him or her the full suite of remedies in law and equity, provided Rolling Rock has standing to bring claims against the Body Corporate as a party directly concerned in the dispute.
- [38] I note the objections made by the Commissioner to the relief sought by Rolling Rock. To the extent that the objections go to the power of an adjudicator to determine questions about the rights and obligations of the owner of Lot 28 without the owner being a party to the dispute or to re-imburement to the occupier of moneys paid by the owner, I acknowledge that may present a jurisdictional bar to Rolling Rock's claims. However, that problem is dependent on how Rolling Rock frames its claims and relief sought. It is possible that the claims and relief sought can be framed only in terms of liability a Body Corporate may have to an occupier for loss and damage suffered as a result of the way in which it exercises its powers under a by-law.
- [39] I accept on their face the submissions made by the lawyers for Rolling Rock that they have considered the available causes of action. The corollary of the lawyers doing so is that the causes of action must at least be arguable in their view. It is not a matter for me in these review proceedings to consider the strength of the claims which might ultimately be made.
- [40] Having decided that an adjudicator could consider the causes of action referred to by Rolling Rock, and award relief which is just and equitable, my task is then directed to determining if within the framework of the BCCM Act, Rolling Rock is a party directly concerned with the dispute.
- [41] Rolling Rock's status as an occupier does not preclude it from being a party to the dispute. Section 227(1)(b) provides that a dispute is a dispute between the Body Corporate for a community titles scheme and the occupier of a lot included in the scheme.
- [42] The Commissioner's submissions that the real dispute is between the owner and Rolling Rock are not accepted in circumstances where I have accepted Rolling Rock's categorisation of the dispute and found on the basis of the potential causes of action submitted by Rolling Rock that an adjudicator could make an order to resolve the dispute. Likewise, I find on the basis of the stated causes of action that it is possible for a person to be in dispute with a Body Corporate over a by-law, even though they are not subject to the by-law.
- [43] I find that Rolling Rock is a party to the dispute.
- [44] In terms of the dispute I find that Rolling Rock is affected by the way in which the Body Corporate exercised its rights or powers, or performed its duties, as provided for in by-law 14. It is true that Rolling Rock is affected because of the terms of its lease with the owner of the Lot and not because it is directly subject to by-law 14. However, being affected by the conduct of another may well be the foundation of a cause of action between the two.
- [45] I think that is a sufficient basis on which to conclude that Rolling Rock is directly concerned in the dispute. It is directly concerned because the dispute gives rise to a cause of action which an adjudicator can consider, and which may give rise to an order that is just and equitable to provide relief to Rolling Rock.

[46] On the basis of that reasoning I do not accept the submission of the Commissioner that there is no “direct dispute” because the adjudicator has no jurisdiction as there is no legal issue over which the adjudicator has power to make orders.

[47] In terms of the issues to be decided, I find that:

- (a) there is a dispute within the meaning of section 227(1)(b) of the BCCM Act;
- (b) Rolling Rock has standing to make the application to the respondent Commissioner for dispute resolution under section 238(1)(a) of the Act; and
- (c) on the agreed facts, the respondent did not lawfully and properly reject the application under one of the subparagraphs contained in section 241(1) of the BCCM Act.

[48] I order that:

1. the decision of 30 May 2019 to reject Adjudication Application 0157 of 2019 be set aside; and
2. a decision to recommend that Adjudication Application 0157 of 2019 be subject to department adjudication is substituted.