QUEENSLAND CIVIL AND ADMINISTRATIVE TRIBUNAL

CITATION:	*Pead v Chambers & Anor* (*No.2)* [2021] QCATA 3
PARTIES:	**JILL PEAD** (applicant) **v** **SANDRA CHAMBERS** (first respondent) **THE BODY CORPORATE FOR OUTRIGGER SUITES CTS 32195** (second respondent)
APPLICATION NO/S:	APL199-18
ORIGINATING APPLICATION NO/S:	BCCM0215-18
MATTER TYPE:	Appeals
DELIVERED ON:	6 January 2021
HEARING DATES:	18 December 2020 and further written submissions 22 and 23 December 2020
HEARD AT:	Brisbane
DECISION OF:	Member 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 – BODY CORPORATE: POWERS, DUTIES AND LIABILITIES – OTHER CASES – body corporate expenditure – where committee resolved to pay legal fees of committee members to defend proceedings under the *Peace and Good Behaviour Act* 1982 (Qld) - purposes for which administrative fund and sinking fund may be applied – section 137 and section 146 *Body Corporate and*

Community Management (Accommodation Module) Regulation 2008 (Qld)

BODY CORPORATE COMMITTEES- POWERS - whether committee resolutions to pay or reimburse legal defence costs of the three committee members the subject of proceedings under the *Peace and Good Behaviour Act* 1982 (Qld), and confirming that resolution subject to certain amendments, were void under section 42(1)(f) of the Accommodation Module on the basis that they were decisions to pay remuneration, allowances or expenses to a member of the committee - restricted issues - whether section 43 of the Accommodation Module applied such that it permitted those decisions to be made by the Committee.

STATUTES – SUBORDINATE LEGISLATION – CONSTRUCTION – PARTICULAR WORDS – pay remuneration , allowances or expenses

Body Corporate and Community Management Act 1997 (Qld), s 162, s 289, s 290
Body Corporate and Community Management (Accommodation Module) Regulation 2008 (Qld), s 19, s 42(1)(f), s 43, s 137, s 146, s 161
Queensland Civil and Administrative Tribunal Act 2009 (Qld), s 146
Peace and Good Behaviour Act 1982 (Qld)

Bell v Commissioner of Taxation [2012] FCA 1042
Federal Commission of Taxation v Trail Brothers Steel & Plastics Pty Ltd (2010) 186 FCR 410
Minister for Immigration and Multicultural and Indigenous Affairs v Al-Miahi (2001) 65 ALD 141; [2001] FCA 744
Tisdall v Webber (2011) 193 FCR 260
Van Deurse & Anor v Q1 Management Pty Ltd & Anor [2017] QCATA 113
O'Donnell & Anor v Body Corporate for Magic Mountain Apartments [2020] QCATA 153

REPRESENTATION:

Applicant:	Self-represented
First Respondent:	Self-represented
Second Respondent:	Self-represented

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

REASONS FOR DECISION

[1] This is an appeal from a decision made by an Adjudicator appointed by the BCCM Commissioner. Outrigger Suites is a community titles scheme governed by the *Body Corporate and Community Management Act* 1997 (Qld) (the Act or the BCCM Act) and the *Body Corporate and Community Management (Accommodation Module) Regulation* 2008 (Qld) (Accommodation Module). There are 72 lots in the scheme. Both the Applicant and the First Respondent were lot owners and at the material time of the events which gave rise to the Appeal, the Applicant was a committee member.

[2] I previously dealt with and dismissed an application by the Applicant for leave to rely upon fresh evidence in the appeal.[1] As I previously observed in my reasons for rejecting the application for leave to rely upon fresh evidence, the background to the appeal concerns resolutions passed by a committee of the Second Respondent Body Corporate on 20 December 2017 and 14 February 2018 which had the effect of having the Body Corporate pay the legal defence costs of three committee members, including the Applicant, before this Tribunal in respect of proceedings which had been brought against them under the *Peace and Good Behaviour Act* 1982 (Qld) (**the Peace and Good Behaviour Act proceeding**) by another lot owner. The practical effect of those resolutions was that the Body Corporate paid or reimbursed the cost of legal fees invoiced to and incurred by those committee members of between $5,000.00 and $6,000.00 for each of the three relevant committee members against whom that proceeding had been brought.

[3] The Peace and Good Behaviour Act proceeding related to a confrontation between three committee members, including the Appellant, and the owner of lot 115 in the basement of the building on 20 October 2017. The committee later asserted that these three persons were acting in their role as committee members at the time. There was an allegation in those proceedings that a committee member Mr Aitken went to the basement of the property carrying a hammer, and along with the other two committee members, proceeded to dismantle a security cage belonging to the owner of lot 115. Not all of the committee members participated in the events of that date to the same degree or in the same way. In the Peace and Good Behaviour Act proceeding, the complainant made differing although related allegations against each of the three committee members in question**.**

[4] There is no documentary evidence of a committee resolution authorising the actions of those committee members. An insurance claim was lodged by the Body Corporate seeking to have an insurer reimburse the legal fees as a specified risk, but the insurer refused to reimburse the legal fees in some way, based on whether the committee members had a right to make a claim for their personal legal defence costs under the policy.

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1 *Pead v Chambers & Anor* [2020] QCATA 103.

[5] The applicant before the adjudicator, Ms Chalmers, the First Respondent here, was a person who became a lot owner on 2 January 2018 and discovered that at a committee meeting held Wednesday 14 February 2018 a resolution had been passed that:

> Legal defence costs associated with proceedings brought against three committee members under the Peace and Good Behaviour Act– that in the event that the insurance claim is rejected by the insurer the body corporate will pay the legal fees of Mr Aitken, Ms Pead and Ms Hollands (sic).

[6] On the application of Ms Chalmers the Adjudicator declared that the relevant resolution and an earlier one of relevance were void and ordered that the three committee members concerned repay to the Body Corporate the amounts in question. That decision was one of a large number that the adjudicator had been asked to and did decide in the reasons which also dealt with the subject matter of this appeal.

[7] The other two members of the committee who were affected by the orders of the Adjudicator other than Ms Pead have not appealed the orders and have apparently repaid the sums they were given to cover the legal costs.

[8] The Applicant has sought that the Adjudicator's order be set aside and that 'the Tribunal, "in all the circumstances, support the resolution" passed on 14 February 2018 by the Body Corporate committee to pay the legal defence costs of the three committee members'.

[9] It is critical to note that none of the parties to this appeal was legally represented or had the assistance of anyone with knowledge of the relevant law, and the submissions of the parties were tangential, often irrelevant and failed to focus on the legal issues and alleged errors of law this appeal threw up. The submissions were largely unhelpful in determining the appeal.

The relevant jurisdictional provisions

[10] 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.

[11] 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.

[12] 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.

[13] 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).

The grounds of appeal and arguments about the lack of evidence to justify findings

[14] The grounds of appeal as set out in the application to review the decision do not focus in any disciplined way upon any identified error of law. The appeal arguments focus on what was "incorrect" about the findings below or why there was procedural error of some kind.

[15] The decision under challenge is alleged first to be incorrect because the Adjudicator did not make an order which was seen to be just and equitable in the circumstances pursuant to s 276(1) of the Act.

[16] Secondly, there is said to have been a denial of natural justice because there were findings of fact which were not supported by the evidence, and as a corollary, the assertion is made that there was a reasonably arguable case that the primary decision maker made an error.

[17] Thirdly, it is contended that the reasoning setting aside the resolutions "do not align with or follow from, an evaluation of the evidence presented. Specifically relating to paragraphs 62, 63, 64 and 65 in the Reasons for Decision".

[18] To try to make some sense of these grounds, one needs to turn to the Applicant's submissions in support of them. The submissions do not, on the face of those submissions, address those specific issues which have been identified in the three separate categories mentioned above, except to identify that all of the grounds of appeal are based upon what is said to be a denial of natural justice.

[19] The Applicant's submissions make clear that this assertion of a denial of natural justice is not an identifiable or identified category of claimed denials of due process or other features of natural justice, but rather an assertion that there was a denial of natural justice because the facts, as found, were not supportable by the evidence.

[20] As I set out below, the Applicant's challenge goes on to address the ways in which it is said that the Adjudicator made "factual incorrect" findings or made findings which had no regard for certain other evidence which the Applicant contends was before the Adjudicator and ought to have been considered and which was to some degree inconsistent with the facts as found.

[21] The Applicant's appeal submissions are a mere four pages in length and have another 20 pages of attachments, but those are not submissions of themselves and are principally evidentiary materials.

[22] As I have said already, the Applicant's appeal submissions recite that the appeal is based upon what is said to be a denial of natural justice and to support that contention the submissions then go on to challenge the findings of fact in the following terms:

(a) The Appellant challenges the factual finding that the three committee members dismantled a security cage which belonged to the lot owner who had brought the peace and good behaviour proceeding;

(b) The Appellant challenges the factual finding about whether there was any evidence that the three were acting in the best interests of the Body Corporate;

(c) The Appellant challenges the factual finding about whether there was evidence of a committee resolution authorising their actions;

(d) The Appellant challenges the factual finding about whether there was any evidentiary support for the submission of the committee made to the Adjudicator that the three committee members were acting in their role as committee members, whereas the Adjudicator decided not to accept that evidence (it seems

because one of the members of the committee was in the basement carrying a hammer and proceeded to dismantle the security cage);

(e) The Appellant challenges the factual finding about whether the owner of the lot who had brought the proceeding had already indicated his intention to move the property out of the caged area and as to whether it was an appropriate course of action to then remove the cage or to bring some other kind of dispute resolution proceeding; and

(f) The Appellant challenges whether there was evidentiary or legal support for the conclusion that a Body Corporate could not use these funds in a way that they were used 'in the same way as directors of a company cannot use company funds for themselves'.

[23] Senior Member Howard previously dealt with an application by the Respondents to the appeal to strike-out or dismiss the appeal, or the application for leave to appeal. The bases for that application to strike-out or dismiss the appeal were, inter alia, because of technical non-compliances with time limits set for completion of steps in the appeal, but also a failure to comply with directions by this Tribunal that the Applicant identify errors of law which she contended the Adjudicator had made and to refer to any case law which she relied upon in support of her contentions in that regard.

[24] Senior Member Howard concluded, by reference to the Applicant's submissions filed in the Tribunal and which I have refenced above, that the Applicant had identified that the grounds of her appeal were that she had been denied natural justice by the Adjudicator, and that the findings which were made by the Adjudicator were unsupportable by the evidence. She therefore treated the appeal grounds as having two differing elements. The learned Member concluded that if either of those issues was established by the Applicant in the appeal, then either would constitute an error of law. The learned Member accepted that there had been submissions which identified errors of law, although there did not appear to be any case law relied upon by her in support of her appeal grounds of appeal.

[25] There is no doubt that the principles of natural justice or procedural fairness must be observed by administrative decision makers including Adjudicators in the present context to ensure that a person affected by a decision is allowed a fair hearing; that is, the process by which the decision is made must be a fair one.

[26] There can be no doubt that the Applicant was given the opportunity to put evidence and submissions before the Adjudicator and she took up that opportunity. Her written submissions to the adjudicator were comprehensive and comprised three pages of submissions and many pages of attachments which were evidentiary in nature. An affidavit she swore in the Peace and Good Behaviour Act proceedings outlining what she said were the relevant facts concerning the confrontation on the relevant day was also before the adjudicator, although what use was made of it by the Adjudicator is not apparent.

[27] As to the grounds of appeal which concern whether there was evidence or insufficient evidence "as a matter of law" to justify the findings of the adjudicator's 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.

[28] In an earlier decision of mine in this jurisdiction *Van Deurse & Anor v Q1 Management Pty Ltd & Anor* [2017] QCATA 113 and also this year in *O'Donnell & Anor v Body Corporate for Magic Mountain Apartments* [2020] QCATA 153, I reviewed the authorities that were relevant to identifying errors of law where there was said to have been a wrong finding of fact and "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.In exercising this appeal the task of the Tribunal is to leave to the decision maker questions of fact and only interfere when there is an error of law. There is no error of law in simply making a wrong finding of fact: *Collector of Customs v Pozzolanic* (1993) 43 FCR 280 at 286; *Waterford v Commonwealth* (1987) 163 CLR 54 at 77.

[29] Further it is a matter for the administrative decision maker to determine how much weight should be given to particular pieces of evidence. The weight to be attached to evidence and whether incorrect conclusions were drawn from the evaluation of evidence are matters of fact, not law: *Re Commissioner of Taxation v Brixius* [1987] FCA 400 at [28]-[29] per Forster, Fisher and Spender JJ referring to *R v Deputy Industrial Injuries Commissioner; Ex parte Moore* (1965) 1 QB 456 at 488. See also *Zizza v Commissioner of Taxation* [1999] FCA 37 at [51] and [90] per Katz J.

[30] Errors of law also include, relevantly to the present case:

(a) whether a decision maker has failed to give adequate reasons where reasons are required: *Public Service Board of New South Wales v Osmond* (1986) 159 CLR 656 referred to in *Fletcher Construction Australia Ltd v Lines Macfarlane & Marshall Pty Ltd (No 2)* (2002) 6 VR 1; *Ta v Thompson & Anor* [2013] VSCA 344;

(b) whether there has been a failure to consider and decide on submissions made to the decision maker: *Dennis Willcox Pty Ltd v Federal Commissioner of Taxation* (1988) 79 ALR 267 at 276-277;

(c) whether the decision maker has failed to apply the rules of natural justice in making the decision (eg. a failure to give a fair hearing or apprehended or actual bias in the decision): *Craig v South Australia* (1995) 184 CLR 163.

[31] In the context of review applications on questions of law to 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 ...

[32] 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].

[33] It is clearly desirable, if not legally essential in present times since the decision in *Haritos v Commissioner of Taxation* (2015) 233 FCR 315 (***Haritos'* case)**, that the question of law had to be stated with precision in the notice or grounds of appeal. It was not generally permissible to identify the question of law by examining the grounds of appeal. Consequently, it was not sufficient that a question of law was capable of being extracted from the associated material, it had to be stated with sufficient clarity in the notice of appeal such that a pure question of law could be identified. There have been examples of a less strict approach being taken where, although the notice of appeal did not expressly state a clear question of law, it was possible to discern a question of law to found the court's jurisdiction from the requisite material: *Ergon Energy Corp Ltd v Commissioner of Taxation* (2005) 153 FCR 551 at [51]; *Kolya v Tax Practitioners Board* [2012] FCA 215 at [8]. Further, it is not permissible to "dress up" something as a question of law when, in substance, it is not one.

[34] Under the strict rules predating *Haritos'* case, it would not have been permissible to seek to identify the substance of a question of law from the notice of appeal, the grounds and surrounding context. The notice of appeal would need to state the questions of law with precision and if it did not do so the court would have no jurisdiction to hear the appeal. The Full Court's decision changed that strict approach. The Full Court summarised its conclusions on the principles that apply when appealing on a question of law as follows at [62]:

> (1) The subject-matter of the Court's jurisdiction under s 44 of the AAT Act is confined to a question or questions of law. The ambit of the appeal is confined to a question or questions of law.
>
> (2) The statement of the question of law with sufficient precision is a matter of great importance to the efficient and effective hearing and determination of appeals from the Tribunal.
>
> (3) The Court has jurisdiction to decide whether or not an appeal from the Tribunal is on a question of law. It also has power to grant a party leave to amend a notice of appeal from the Tribunal under s 44.
>
> (4) Any requirements of drafting precision concerning the form of the question of law do not go to the existence of the jurisdiction conferred on the Court by s 44(3) to hear and determine appeals instituted in the Court in accordance with s 44(1), but to the exercise of that jurisdiction.
>
> (5) In certain circumstances it may be preferable, as a matter of practice and procedure, to determine whether or not the appeal is on a question of law as part of the hearing of the appeal.
>
> (6) Whether or not the appeal is on a question of law is to be approached as a matter of substance rather than form.

> (7) A question of law within s 44 is not confined to jurisdictional error but extends to a non-jurisdictional question of law.
>
> (8) The expression "may appeal to the Federal Court of Australia, on a question of law, from any decision of the Tribunal" in s 44 should not be read as if the words "pure" or "only" qualified "question of law". Not all so-called "mixed questions of fact and law" stand outside an appeal on a question of law.
>
> (9) In certain circumstances, a new question of law may be raised on appeal to a Full Court. The exercise of the Court's discretion will be affected not only by *Coulton v Holcombe* [1986] HCA 33; 162 CLR 1 considerations, but also by considerations specific to the limited nature of the appeal from the Tribunal on a question of law, for example the consideration referred to by Gummow J in *Federal Commissioner of Taxation v Raptis* [1989] FCA 557; 89 ATC 4994 that there is difficulty in finding an "error of law" in the failure in the Tribunal to make a finding first urged in this Court.
>
> (10) Earlier decisions of this Court to the extent to which they hold contrary to these conclusions, especially to conclusions (3), (4), (6) and (8), should not be followed to that extent and are overruled. Those cases include *Birdseye v Australian Securities and Investments Commission* [2003] FCA 232; 76 ALD 321, *Australian Securities and Investments Commission v Saxby Bridge Financial Planning Pty Ltd* [2003] FCAFC 244, 133 FCR 290, *Etheridge, HBF Health Funds and Hussain v Minister for Foreign Affairs* [2008] FCAFC 128; 169 FCR 241.

[35] The Full Court's approach in *Haritos*' case involved a substantial shift. First, because it rejected the previous requirements that a question be a "pure" question of law. Secondly, because the Court accepted that some "mixed" questions of fact and law could form the subject matter of an appeal on a question of law.

[36] 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; eg *Haritos v Commissioner of Taxation* [2014] FCA 96, [27]. This is insufficient. 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.

The factual background behind the findings challenged in the Appeal

[37] The adjudicator identified in the reasons that pursuant to section 243 of the Act all lot owners and the body corporate committee were invited to make submissions regarding the outcomes sought. Submissions were received from the committee, the current committee secretary, and seven lot owners. I have already identified that the Applicant here was one of them.

[38] The committee had submitted before the adjudicator that on 15 November 2017, all seven committee members had voted in favour of a motion that the Body Corporate resolved to engage OMB Solicitors to provide advice to the Body Corporate on issues regarding, inter alia, the use of body corporate common property by Miami Rice Restaurant with the costs of OMB Solicitors' engagement not to exceed the committee spending limit of $13,600.00.

[39] The remaining resolutions which the Applicant was seeking to invalidate relate to resolutions made by the committee on 20 December 2017 and 14 February 2018, regarding an application made for orders against three committee members, under the Peace and Good Behaviour Act, by Mr Chin Lim Yap, the owner of lot 115, and the reimbursement of costs the three were invoiced by OMB Solicitors for defending that proceeding.

[40] The minutes of the committee meeting held on 20 December 2017 record the following:

> The Caretaker Managers, John & Colleen Trew, and the owner of lot 115, Alan Yap, have commenced legal proceedings to obtain an order under the Peace and Good Behaviour Act against 3 committee members; Jill Pead, Anthony Aitken & Leana Hollands.
>
> The estimated legal costs to defend the application is between $2,200 - $3,300 per person.
>
> The Secretary suggested that there could be a conflict of interest and that the 3 committee members may not be able to vote on the motions.
>
> The Body Corporate Manager stated that there could be a possible conflict of interest but was uncertain with the interpretation of the legislation.

[41] The first motion considered at the 20 December 2017 meeting was as follows:

> Legal Defence Costs/ Insurance Claim
>
> That the Body Corporate lodge an insurance claim on the Body Corporate's insurance cover for Legal Defence Costs to cover the legal fees to defend the matter.

[42] The body corporate contended that this motion was carried unanimously by all six committee members.

[43] The second motion considered at the 20 December 2017 meeting and which was carried by four votes to two provided that "in the event that the insurance claim is rejected by the insurer, the body corporate pay the legal fees to defend the matter".

[44] The minutes of the committee meeting held on 14 February 2018, record the following identified as business arising out of the previous meeting:

> Business Arising - Insurance Claim for Legal Defence Costs
>
> The Body Corporate Manager advised that the insurance claim lodged with the insurer was rejected because the Legal Defence section on the policy will only cover claims made against and defended by the Body Corporate, not individuals (regardless of whether they are a Committee member or not).

[45] The minutes of the committee meeting held on 14 February 2018 also record the following resolutions as having been passed:

> Confirmation of Minutes

> Subject to the below amendment of the last minutes (of legal action motion), the minutes of the Committee Meeting held on 20/12/17 be confirmed.
> 1. Legal Defence Costs - Anthony Aitken
>
> Motion 2a: That in the event that the insurance claim is rejected by the Insurer, the Body Corporate pay the legal fees for Anthony Aitken to defend the matter
>
> Voting: Yes 3, No 2, Abstain 1.
>
> 2. Legal Defence Costs - Jill Pead
>
> Motion 2b: That in the event that the insurance claim is rejected by the Insurer, the Body Corporate pay the legal fees for Jill Peed (sic) to defend the matter.
>
> Voting: Yes 3, No 2, Abstain 1.
>
> 3. Legal Defence Costs - Leana Hollands
>
> Motion 2c. That in the event that the insurance claim is rejected by the Insurer, the Body Corporate pay the legal fees for Leans (sic) Hollands to defend the matter.
>
> Voting: Yes 3, No 2, Abstain 1.
>
> (My underlining)

[46] The Adjudicator recited uncontroversial aspects of the evidence concerning what motions were put and what the effect of them was in relation to the payment of legal fees and then said as follows:

> [24] By way of background information, the committee says that the above proceedings relate to actions of committee members to stop the owner of lot 115 using part of the basement area for purposes associated with the conduct of his restaurant business.
>
> [25] The minutes of the committee meeting held on 7 September 2017 record the following:
>
> > Unauthorised Use of Carspace Area
> >
> > It was reported that some residents are using carspaces which are not their allocated space to store personal items in the basement garage, such as trailers full of rubbish, deep freezers, chairs and various pieces of furniture.
> >
> > Motion: - That the Body Corporate Manager to send a Notice to all residents requesting that all personal items must be removed from the basement garage within 14 days and also that all residents must ensure they are only using their allocated carspace.
>
> [26] On 19 September 2017, a Notice in the above terms was circulated to all residents, and on 21 September the body corporate issued a BCCM Form 10 "Notice of Continuing Contravention of By-law" to the owner of lot 115.
>
> [27] On 12 October, three committee members (Anthony Aitken, Jill Pead & Leana Hollands) undertook an inspection of the basement area. During this inspection, the owner of lot 115 was also present and he was advised that he was illegally storing goods items in carspace no. 50. This confrontation led to the owner of lot 115 seeking a Court order under the *Peace and Good Behaviour Act.*

[28] On 7 November 2017, the Gold Coast City Council issued a Show Cause Notice to the body corporate, stating that the allocated car parking spaces for units 49 & 50 were being used as storage space for the restaurant (lot 115) in contravention of the development approval.

[29] On 28 November 2017, the Body Corporate received a letter from Whitehead Crowther Lawyers, acting on behalf of the owner of lot 115, stating that: *"Our client has had the use of this for a number of years, however, he has conceded that he will remove all of the items within 60 days".*

[30] The committee believes that at the time of the incident in the basement garage, the three committee members were performing functions of the committee. The committee submit that the decision to engage OMB Solicitors to act on behalf of the committee members, was not a restricted issue for the Committee because such costs are outside the scope of section 42(1)(f) of the Accommodation Module.

[31] A submission was also received from Mrs Pead who is a member of the committee. Mrs Pead says that the two owners of commercial businesses operating within the scheme initiated action under the *Peace and Good Behaviour Act* against three members of the 2017 committee. She says Mr Trew withdrew his application on the first mention date. However, Mr Yapp continued with the application which was subsequently heard in the Magistrates Court.

[32] She further states that the owner of lot 115 was requested to remove his property from the storage area in the carpark, and it took over 4 months for him to finally remove his possessions including freezers used for storing foodstuffs. In her view the 3 committee members were trying to enforce the by-laws of the Body Corporate for the benefit of all members.

[33] The committee secretary also made a submission. She says that the 3 committee members misled other members of the committee and were wrongly reimbursed for legal expenses incurred for their actions, which were not authorised by the committee or body corporate. Their actions included removal of part of a security cage used by the owner of lot 115, abuse and unannounced inspections which were not authorised by the Committee. The owner of lot 115 was already in the process of moving his property out of the caged area. There are no minutes or records indicating that these three committee members were authorised to take these actions on behalf of the body corporate.

[34] Invoices were issued by OMB to the three committee members for their legal representation. These were paid out of body corporate funds without the treasurer sighting the invoices and approving payment.

[35] The applicant made further submissions in response. She says that the 3 committee members improperly voted to pay their legal expenses which amounted to more than $15,000 and they admitted under oath that they were not acting under the direction of the body corporate.

[36] She disputes that the 3 committee members were performing valid functions of the committee or that they were acting in the best interests of the body corporate. The applicant says Mr Aitken went to the basement carrying a hammer, and along with the other two committee members, proceeded to dismantle the security cage belonging to lot 115. She says the 3 people involved had no right to take any action and were clearly acting on their own volition which they have since admitted under oath.

[47] As the reasons correctly identified, a submission was made to the adjudicator by the present appellant in which she submitted that the two owners of commercial businesses operating within the scheme initiated action under the Peace and Good Behaviour Act against three members of the 2017 committee including herself. She submitted that the complainant Mr Trew withdrew his application on the first mention date of the Peace and Good Behaviour Act proceeding. She submitted that Mr Yap somehow continued with the application which was subsequently heard in the Magistrates Court.

[48] The present appellant had also submitted that the owner of lot 115 had been requested to remove his property from the storage area in the carpark, and it took over four months for him to finally remove his possessions including freezers used for storing foodstuffs. She also submitted the three committee members were trying to enforce the by-laws of the Body Corporate for the benefit of all members.

[49] After reciting that background the Adjudicator concluded:

> [62] The proceedings relate to a confrontation between three committee members and the owner of lot 115 in the basement of the building on 20 October 2017. While the committee says that these 3 persons were acting in their role as committee members, I have some difficulty accepting that this was the case. The applicant and Mr Yap, say Mr Aitken went to the basement carrying a hammer, and along with the other two committee members, proceeded to dismantle the security cage belonging to lot 115. There is no evidence of a committee resolution authorising their actions or that they were acting in the best interests of the body corporate. The applicant notes that the insurer has refused to reimburse the legal fees as they had no right to make a claim for their personal legal defence.
>
> [63] The body corporate is a separate legal entity in the nature of a corporation, and committee members are bound by statutory and fiduciary obligations. The funds of the body corporate may only be applied for certain purposes such as maintenance of common property and non-recurrent expenses arising in connection with the operations of the body corporate. The body corporate may not vote to use these funds in any other way, in the same way as directors of a company cannot use company funds for themselves.
>
> [64] *Section 137* Accommodation Module states the things for which the administrative fund budget must provide. *Section 146* then provides how the administrative fund can be applied, namely to all spending of the body corporate which is not sinking fund expenditure.
>
> *Subsections 137(2) & 137(3)* Accommodation Module provide as follows:
>
> *(2) The administrative fund budget must—*
>
> *(a) contain estimates for the financial year of necessary and reasonable spending from the administrative fund to cover—*
>
> *(i) the cost of maintaining common property and body corporate assets; and*
>
> *(ii) the cost of insurance; and*
>
> *(iii) other expenditure of a recurrent nature, and*

(b) fix the amount to be raised by way of contribution to cover the estimated recurrent expenditure mentioned in paragraph (a).

(3) The sinking fund budget must—

(a) allow for raising a reasonable capital amount both to provide for necessary and reasonable spending from the sinking fund for the financial year, and also to reserve an appropriate proportional share of amounts necessary to be accumulated to meet anticipated major expenditure over at least the next 9 years after the financial year,

having regard to—

(i) anticipated expenditure of a capital or non-recurrent nature; and

(ii) the periodic replacement of items of a major capital nature; and

(iii) other expenditure that should reasonably be met from capital; and

(b) fix the amount to be raised by way of contribution to cover the capital amount mentioned in paragraph (a).

Section 146 Accommodation Module provide (sic) as follows:

Application of administrative and sinking funds

(1) The sinking fund may be applied towards—

(a) spending of a capital or non-recurrent nature; and

(b) the periodic replacement of major items of a capital nature; and

(c) other spending that should reasonably be met from capital.

(2) All other spending of the body corporate must be met from the administrative fund.

Examples—1 The cost of repainting the common property or replacing air conditioning plant would be paid from the sinking fund. 2 The cost of insurance would be paid from the administrative fund.

[65] I believe that the three committee members were wrongly reimbursed for legal expenses incurred as a result of actions taken without authorisation by the committee or body corporate. It is not disputed that their actions included removal of part of a security cage used by the owner of lot 115. There are no minutes or records indicating that these three committee members were authorised to take these actions on behalf of the body corporate. The owner of lot 115 had already indicated his intention to move his property out of the caged area. If there were concerns that the owner of lot 115 was contravening the scheme by-laws, then the appropriate course of action would have been to seek dispute resolution pursuant to Chapter 6 of the *Body Corporate and Community Management Act*.

[66] I therefore order that the resolution of 20 December 2017 to pay the legal defence costs of the three committee members, and the resolution of 14 February

> 2018 confirming that resolution subject to certain amendments, were both void. Any body corporate funds spent in pursuance of the invalid resolutions must be returned to the body corporate. The body corporate must seek the return of any funds so expended.
>
> (Emphasis as per the original reasons)

[50] The Adjudicator accepted as a fact that the committee members' actions which had been the subject matter of the Peace and Good Behaviour Act proceeding, included removal of part of a security cage. Paragraph 65 of the reasons appears to involve some kind of value judgment about the appropriateness of the relevant committee members' actions and whether in some way or another that bore upon the legality of the resolutions of the Body Corporate to reimburse them or pay for the legal costs of defending themselves against their conduct in that context.

[51] The ultimate conclusion of the Adjudicator on this issue is to be found at paragraph 65 of the reasons set out above. They appear to contain a thread-bare analysis of the evidence which was before the Adjudicator concerning the question of authority to take actions or the question of the appropriateness of the committee members in taking the actions they took. There is no reference in the decision to circumstances in which a committee of a Body Corporate can take action in relation to Body Corporate common property, or reinstate the condition of unlawfully altered common property without the formality of the resolution or minutes in that regard. There is no reference in the decision to the capacity of the Committee to have ratified the relevant conduct even if it occurred without the benefit of a resolution at the time.

[52] My initial response to reading the reasons of the Adjudicator raises concerns as to the extent to which those reasons actually disclosed the process of reasoning that led to the Adjudicator arriving at the conclusions that were reached.

[53] As I have identified the Applicant's appeal submissions seek to challenge a number of the Adjudicator's findings of fact:

(a) The Appellant challenges the factual finding that the three committee members dismantled a security cage which belonged to the lot owner who had brought the peace and good behaviour proceeding;

(b) The Appellant challenges the factual finding about whether there was any evidence that the three were acting in the best interests of the Body Corporate;

(c) The Appellant challenges the factual finding about whether there was evidence of a committee resolution authorising their actions;

(d) The Appellant challenges the factual finding about whether there was any evidentiary support for the submission of the committee made to the Adjudicator that the three committee members were acting in their role as committee members, whereas the Adjudicator decided not to accept that evidence (it seems because one of the members of the committee was in the basement carrying a hammer and proceeded to dismantle the security cage);

(e) The Appellant challenges the factual finding about whether the owner of the lot who had brought the proceeding had already indicated his intention to move the property out of the caged area and as to whether it was an appropriate course of

action to then remove the cage or to bring some other kind of dispute resolution proceeding; and

(f) The Appellant challenges whether there was evidentiary or legal support for the conclusion that a Body Corporate could not use these funds in a way that they were used 'in the same way as directors of a company cannot use company funds for themselves'.

[54] In my view even if the challenges to the Adjudicator's findings of fact had merit, and some do, for the reasons which follow, I do not consider that they reveal any error of law and even if they did somehow demonstrate an error of law, they do not affect the outcome of this appeal for the reasons which I explain below.

[55] In relation to the adjudicator's findings, they seem to conflate a number of issues. The first seems to be the proposition that actions taken by the applicant were done without authorisation by the committee or body corporate. That is a question of fact, but the conclusion seems to have been reached without taking into account the fact that the Committee said that that actions taken by the applicant were done with authorisation by the committee.

[56] The finding made that 'there is no evidence of a committee resolution authorising their actions or that they were acting in the best interests of the body corporate', is problematic when that is determinative of the issue in the face of contrary evidence that the committee said that these three persons were acting in their role as committee members at the time. It is fair to assume that this was a reference to contemporaneous or written evidence.

[57] Section 55 of the *Body Corporate and Community Management (Accommodation Module) Regulation* 2008 (Qld) requires that full and accurate minutes of committee meetings are taken; and a full and accurate record is kept of each motion voted on other than at a meeting. It does not provide that unless a minute is kept, that conduct done purportedly with the authority of the committee is done without authority.

[58] In the submissions on the appeal, the Applicant asserts that the decision to remove the relevant metal panel was made by a majority of members of the Body Corporate, whom she identified and included herself. She contends that a written resolution "would have rendered the same result".

[59] In the submissions on the appeal, the Applicant then goes on to set out a range of factual matters which identified that the caretaker or manager specifically sent an email to the strata manager inviting them to discuss amongst themselves and make a decision about the relevant matter concerning the cage. The rest of the submissions on this topic do not go to the question of whether there was evidence of a committee resolution and appear to be references to other circumstantial evidence which would go to the question of whether there was a history of the committee taking action which was not formally the subject of any resolution but which was done without objection and raised by the committee without "written authorisation".

[60] This contention appears to be an assertion that the committee was not in the habit of always passing appropriate resolutions or acting in union to make decisions, but rather had from time to time taken action without formal authority, but about which no objection was taken. It does not sustain the proposition that the Adjudicator was not entitled to conclude there was no evidence of a committee resolution authorising the actions in

question. If one focuses specifically upon the proposition that that statement is directed to, it is not directed to the general question of whether the committee had given consideration to what should be done about the relevant cage and specifically about whether the conduct which was being engaged in that day, and which was the subject matter of the peace and good behaviour proceeding, had been formally authorised and been the subject of a resolution by the Body Corporate.

[61] The submission provided by the committee for the Body Corporate to the Adjudicator, which imposed the setting aside of the relevant motions, dealt with the question of the authority of the committee members on the day of the incident involving the cage. Paragraph 30 in that submission is relevant. It fails to address the question specifically of what authority those individuals had. The evidence shows that there was a history of the committee having considered aspects of the unauthorised use of the relevant car parking space over a period, with a decision having been made on 12 October 2017 that three committee members, including the present Applicant, undertake an inspection of the basement garage at which time the lot owner of the garage was present, was told that he was illegally storing goods in a particular site, and that was when the alleged incident occurred.

[62] Nothing in that history of the committee having considered aspects of the unauthorised use of the relevant car parking space over a period identifies that there was a resolution of the committee members in any way authorising the specific conduct which was the subject matter of the peace and good behaviour complaints.

[63] Paragraph 31 of the Applicant's submission asserts that "at the time of the incident in the basement garage, the committee were acting in the best interests of the Body Corporate and were performing valid functions of the committee". That proposition, which is unsubstantiated by evidence, and is mere assertion, did not disprove the proposition that there was no evidence of a resolution of the committee of the kind the reasons refer to.

[64] The second finding one might extract from the reasons and which is challenged is that the relevant committee members were taking or removing part of a security cage used by the owner of lot 115.This would tend to suggest that such conduct was in aid of enforcing the entitlement of the Body Corporate to remove intrusions upon the common property. That was a conclusion which was consistent with the proposition that the Applicant and the other two committee members were acting in what they perceived was their role as committee members at the time. The fact, if it was a fact, that they thought they were so acting does not assist in resolving whether they were in fact and in law acting as and with the authority of the Body Corporate by its committee at the time.

[65] The third material finding one might extract from the reasons and which is challenged was that there are no minutes or records indicating that these three committee members were authorised to take these actions on behalf of the body corporate. That does not mean that the conduct was not so authorised. It is a not infrequent occurrence that bodies corporate are presented with situations where they may see the need to act in relation to common property on an urgent or perceived to be urgent basis and without any resolution being passed or a minute of any kind being passed. The fact that there are no minutes or records indicating that these three committee members were authorised to take these actions on behalf of the body corporate is an evidentiary matter which goes to the issue of whether authority existed, but it is not conclusive of the issue.

[66] Committees can make decisions without holding a formal committee meeting. This is sometimes called a 'flying minute' or a 'VOC'. Outside a committee meeting, notice of the motion must be given to all committee members and the committee members must vote on the motion in writing. The Act does not say how much notice must be given for the motion or when the votes must be made, but advice of the motion must be given to lot owners at the same time that committee members are notified of the motion.

[67] There is however nothing in the evidence that compelled the Adjudicator to find that a meeting was in fact held and certainly no minute of it. The objective evidence is that there are no minutes or records indicating that these three committee members were authorised to take these actions on behalf of the body corporate.

[68] Section 54 of the Accommodation Module provides that in an emergency, notice of the motion only needs to be given to those committee members that it is reasonably practical to contact. Votes can be made verbally or in some other form. Advice of the motion can be given to owners when it is reasonably practical to do so. Any motion voted on outside a committee meeting is to be confirmed at the next committee meeting.

[69] There is however nothing in the evidence that compelled the Adjudicator to find that the committee was acting in an emergency situation at the time.

[70] The fourth material finding one might extract from the reasons and which is seemingly challenged was that the owner of lot 115 had already indicated his intention to move his property out of the caged area. That fact, assuming it to be true, does not mean that conduct rightly or wrongly seen to be contravening the scheme by-laws cannot be actioned, or if it is actioned, the conduct is unauthorised. Despite that, it does not seem to me to have any bearing in the issue to be decided whether the owner of lot 115 had already indicated his intention to move his property out of the caged area. The real issue was the question of whether what was being done was regarded by the Committee to be the approved course of action and potentially whether it was reasonable.

[71] The fifth material finding one might extract from the reasons and which is challenged indirectly was the conclusion that if there were concerns that the owner of lot 115 was contravening the scheme by-laws, then the appropriate course of action would have been to seek dispute resolution pursuant to Chapter 6 of the Body Corporate and Community Management Act. That opinion is misconceived because there is nothing in the Act that requires a Body Corporate to bring a dispute resolution application pursuant to Chapter 6 of the Body Corporate and Community Management Act and do no more where there is a person contravening the scheme nor does it follow as a matter of legal principle that if a committee member takes some other action other than to cause the Body Corporate to bring a dispute resolution application pursuant to Chapter 6 of the Body Corporate and Community Management Act then the conduct is unauthorised.

[72] Section 101 of the Act sets out the procedures and powers of committee and expressly provides that the committee must put into effect the lawful decisions of the body corporate. It provides that:

> (1) The procedures and powers of the committee are stated in the regulation module.
>
> (2) Without limiting subsection (1), the committee must put into effect the lawful decisions of the body corporate.

[73] The sixth material finding one might extract from the reasons and which is challenged was the conclusion that there is no evidence that the Applicant and/or the other committee members involved were acting in the best interests of the body corporate. The reasons contain no analysis of what the relevance of such evidence, if it existed, might be. Self-evidently if Body Corporate common property was being misused or being used unlawfully one might easily consider that it was in the interests of the Body Corporate not to permit that to continue. There was nothing that directly suggested that self interest and not the interests of the Body Corporate was the motivator. Nothing is cited to suggest one can only be acting properly or with authority if one is acting in the best interests of the body corporate, or for that matter someone's subjective opinion on that issue, or even objectively acting in the best interests of the body corporate.

[74] On the contrary, section 101A of the Act, headed "Protection of committee members from liability", provides:

> (1) A committee member is not civilly liable for an act done or omission made in good faith and without negligence in performing the person's role as a committee member.

[75] That implies that the Act is founded on the notion that conduct done in good faith ought be protected, even if objectively it might not be seen to be acting in the best interests of the body corporate or even if it constitutes a civil wrong or a tort, other than defamation.

[76] Despite that, it does not seem to me to have any bearing in the issue to be decided whether the appropriate course of action by law or according to the judgement of someone else, would have been to seek dispute resolution pursuant to Chapter 6 of the Body Corporate and Community Management Act.

[77] As I have said the real issue was the question of whether what was being done was regarded by the Committee to be the approved course of action and potentially whether it was reasonable.

[78] The seventh material finding one might extract from the reasons was the conclusion, which may or may not be challenged, concerned with the insurer having refused to reimburse the legal fees as the committee members had "no right to make a claim for their personal legal defence." In my view the opinion or belief of the Insurer, if it had one on this issue, cannot be meaningfully used to arrive at any finding about whether the Committee members were acting properly or with authority.

[79] There is no analysis in the reasons of what other basis it might be that a body corporate might reimburse a committee member who believed, wrongly or otherwise, that they were entitled to take action to protect common property, or remove unlawful improvements made to common property.

[80] Undoubtedly Committees serve to implement the lawful decisions of the body corporate except for a decision on a restricted issue. Restricted issues are those issues that must be determined by the body corporate in a general meeting, that is, it is not the committee's right to make decisions on restricted issues without the resolution of the body corporate at general meeting.

[81] There seems to have been little or no analysis by the Adjudicator of whether the provisions of s 137(2) and (3) of the Accommodation Module concerning the provision

of administrative and sinking fund budgets, and s 146 of the Module concerning how administrative and sinking funds of a Body Corporate could be spent, necessarily limited the capacity of a Body Corporate committee to approve the legal costs of its members if they were subjected to legal proceedings arising out of their conduct whilst arguably taking action to protect the integrity of Body Corporate assets.

[82] In my view the reference in the reasons to what is said in s 137(2) and (3) of the Accommodation Module concerning the provision of administrative and sinking fund budgets, and s 146 of the Module concerning how administrative and sinking funds of a Body Corporate could be spent, is not relevant nor determinative of the issue. Conceptually a Body Corporate could spend moneys on a contractor to perform services which for example involved the protection, maintenance or reinstatement of common property. Different specific provisions apply to expenses, in this case incurred by a committee member to a firm of solicitors, in respect of what conceptually involved the protection, maintenance or reinstatement of common property.

Restricted issues under section 42(1) of the Accommodation Module

[83] Section 100 of the Act headed "Power of committee to act for body corporate" refers to restricted issues for Committees in the module.

[84] Subject to the requirements and exceptions provided for in section 43 of the Accommodation Module Committees are not authorised by law to make decisions on restricted issues.

[85] Restricted issues under section 42(1) of the Accommodation Module include decisions or resolutions:

(a) To fix or change a contribution to be levied on owners;

(b) Changes to the rights or privileges or obligations of owners;

(c) Decisions which the Act or SM state must be made by ordinary resolution;

(d) To commence proceedings in a court;

(e) To recover a liquidated debt from an owner;

(f) To pay remuneration, allowances or expenses to a committee member if it is a restricted issue.

[86] Specifically as to the last dot point, under section 42(1)(f) a decision to "pay remuneration, allowances or expenses to a member of the committee is a restricted issue unless, under section 43, the decision is not a decision on a restricted issue for the committee".

[87] Section 43 of the Module provides:

> **43 Exceptions to restricted issues for committee [SM, s 43]**
>
> (1) A decision to pay remuneration, allowances or expenses to a member of the committee is not a decision on a restricted issue for the committee if—

> (a) the decision is made by ordinary resolution of the body corporate stating—
>
> > (i) the full amount of the remuneration, allowances or expenses; and
> >
> > (ii) if the payment relates to expenses—the reason the expenses were incurred; and
>
> (b) an explanatory schedule stating full details of the remuneration, allowances or expenses accompanied the relevant voting paper.
>
> *Example—*
>
> > For a payment relating to a mileage allowance, full details would include the distance travelled, the date of travel, the cost per kilometre and the reason for travel.
>
> (2) Also, a decision to pay expenses to a member of the committee is not a decision on a restricted issue for the committee if—
>
> > (a) the decision is for the reimbursement of expenses of not more than $50 incurred by the member in attending a committee meeting; and
> >
> > (b) the reimbursement would not result in the member being reimbursed more than $300 in a 12-month period for expenses incurred by the member in attending committee meetings.

[88] There seems to have been no consideration by the Adjudicator given to the terms and effect of sections 42 and 43 of the Module. There is passing reference to what the Committee submitted about those provisions but the submission itself was not otherwise considered nor what the effect of the relevant sections was in terms of the questions to be decided about the validity of the two resolutions.

[89] The adjudicator noted the submission from the committee that the decision to engage OMB Solicitors to act on behalf of the committee members, was not a restricted issue for the Committee because such costs are outside the scope of section 42(1)(f) of the Accommodation Module.

[90] On 21 December 2020 after hearing the matter on the papers I invited the parties to make a written submission on this issue since it was not otherwise the subject of parties' submissions. I invited the parties to make a submission addressing the question of whether the resolution of 20 December 2017 to pay the legal defence costs of the three committee members, and the resolution of 14 February 2018 confirming that resolution subject to certain amendments, were both void under section 42(1)(f) of the Accommodation Module on the basis that they were decisions to pay remuneration, allowances or expenses to a member of the committee and which was a restricted issue and not one able to be made by the committee and also whether section 43 of the Accommodation Module applied such that it permitted those decisions to be made by the Committee. The First Respondent sent back a response which did not address the specific issue raised but addressed a whole range of other issues concerned with why the appeal should be dismissed and other opinions she had about a range of issues. The Adjudicator acknowledged that the First Respondent had made a submission that the motions should be invalidated because they were concerned with a restricted issue but did not resolve that issue or otherwise even discuss it.

[91] The Second Respondent did not send back a response to the invitation to make submissions on this issue. One can however refer to the submission from the committee on behalf of the Body Corporate to the Adjudicator on this issue. The submission made on behalf of the Body Corporate was that that s 42(1)(f) "primarily" applied to remuneration, allowances or expenses payable to or incurred personally by a person performing functions as a committee member, and that it equated to or related to payments or services. It was submitted that typically an allowance is a payment to meet particular needs associated with a person's involvement as a committee member such as a travel allowance or the like. It was submitted that expenses encompassed things such as out of pocket expenses incurred to attend a meeting or carry out a specific function, such as taxi travel or incidental phone calls.

[92] The Applicant also provided further submissions in which she adopts to some degree the argument put up by the Body Corporate on this issue. She submits that the focus of sections 42 and 43 is that it relates to expenses incurred by committee members while attending meetings and related expenses in attending those meetings. The 2017 Body Corporate committee did not see the payment of legal costs as an expense paid to individual committee members and did not see it as a restricted issue and for this reason section 43 did not apply. She submits that if the Tribunal's decision is to uphold the Adjudicator's decision:

> it sets a dangerous precedent whereby any disgruntled unit owner can manufacture evidence to support a vexatious legal claim against individual committee members for carrying out their duties and obligations to the Body Corporate leaving them vulnerable and unprotected. It is always difficult to convince owners to engage in the committee process at the best of times. An adverse decision in this case would make owners think twice about being members of a Body Corporate committee in the first instance.

[93] No authority was cited for the proposition that that s 42(1)(f) "primarily" applied to remuneration, allowances or expenses payable to or incurred personally by a person performing functions as a committee member, and that it equated to or related to payments or services. No reference was made to any explanatory material associated with the enactment of the relevant regulation. No case law or precedent or other authority was referenced in support of the proposition which was apparently sought to be advanced that the reference to "expenses" of a committee member is to be read down as relating only to the likes of travel expenses or expenses associated with attending committee meetings. There is no definition in the Act or Module as to what an "expense" is.

[94] Section 19 of the Module which is concerned with nominations for election to the committee requires "details of any payment to be made to, or to be sought by, the candidate from the body corporate for the candidate carrying out the duties of a committee member. *Example of a payment for paragraph (e)*— payment of the candidate's expenses for travelling to committee meetings." The example does not define or restrict the categories of expenses.

[95] Section 152 of the Module requires that the body corporate keep proper accounting records and prepare for each financial year a statement of accounts showing the income and spending, or receipts and payments, of the body corporate for the financial year. It requires "disclosure of all remuneration, allowances or expenses paid to members of the committee, identifying the total amounts paid to each member during the financial year under the following categories—(i) remuneration or allowances; (ii) expenses, split up

into travelling, accommodation, meal and other expenses". The section specifically refers to an open ended category called "other" expenses.

[96] Section 152 of the Module does not suggest that the categories of expenses are limited to meeting attendance expenses or any particular categories of expenses.

[97] In my view, there is no warrant for such conclusion that the reference to "expenses" of a committee member is to be read down as relating only to the likes of travel expenses or expenses associated with attending committee meetings.

[98] There is no definition in the Act or Module as to what a "reimbursement" of something is but an ordinary dictionary meaning is that it is the action of repaying a person who has spent or lost money or a sum paid to cover money that has been spent or lost. The notion of payments being made to persons in office of remuneration, allowances or expenses is frequently encountered. For example, the *Parliamentary Business Resources Act* 2017 (Cth) established a new framework for remuneration, business resources and travel resources for current and former members of the federal Parliament. Under that Act, Members are personally responsible and accountable for, must be prepared to publicly justify, and must act ethically and in good faith in using and accounting for, their use of public resources for conducting their parliamentary business. Members must not claim expenses, an allowance or any other public resources unless the expenses are incurred, or the allowance or resources are claimed, for the dominant purpose of conducting a Member's parliamentary business. Members must ensure that expenses incurred, or allowances or resources claimed, provide value for money.

[99] In the same way, by analogy, expenses which might be paid or reimbursed to Committee members, are those which were incurred for the dominant purpose or perhaps even for a bona fide purpose of discharging a committee member's responsibilities.

[100] In my view, legal expenses of a committee member, even if they were associated with the defence of conduct of committee members and had been appropriately authorised by resolutions of the committee, still fall within the definition of payments of expenses to a member of the committee and a resolution concerning that was therefore a restricted issue unless the amounts fell below the monetary thresholds set out in section 43.

[101] The objective evidence is that OMB Solicitors were engaged to act for the individual committee members who were the defendants in the proceedings, and relevantly for this appeal, Ms Pead. Affidavits were prepared for them and the invoices addressed to them for services provided to them to act on behalf of the committee members.

[102] In my view the resolution of 20 December 2017 to pay the legal defence costs of the three committee members, and the resolution of 14 February 2018 confirming that resolution subject to certain amendments, were both void under section 42(1)(f) of the Accommodation Module on the basis that they were decisions to pay remuneration, allowances or expenses to a member of the committee which was a restricted issue and not one able to be made by the committee and also because section 43 of the Accommodation Module did not apply such that it otherwise permitted those decisions to be made by the Committee.

[103] It follows that even if I had been prepared to uphold the grounds of appeal on any of the bases for which that outcome was advanced, the appeal must fail because the resolutions were invalid at law for reasons other than those decided by the Adjudicator.

[104] I therefore order that the Appeal be dismissed.