

QUEENSLAND CIVIL AND ADMINISTRATIVE TRIBUNAL

CITATION: *Noonan v Osborne and Body Corporate for Spinnaker Blue CTS 40812 (No.2)* [2021] QCATA 82

PARTIES: **KAY NOONAN**
(appellant)

v

GRAEME OSBORNE & ROSLYN OSBORNE
(first respondents)
**THE BODY CORPORATE FOR SPINNAKER
BLUE CTS 40812**
(second respondent)

APPLICATION NO/S: APL240-19

MATTER TYPE: Appeals

HEARING DATE: 24 June 2021

HEARD AT: Brisbane

DELIVERED ON: 29 June 2021

DECISION OF: Member Roney QC

ORDERS: **1. The appeal is allowed and the Adjudicator’s order is set aside.**

2. Costs reserved.

CATCHWORDS: APPEAL AND NEW TRIAL – APPEAL – GENERAL PRINCIPLES – RIGHT OF APPEAL – WHEN APPEAL LIES – ERROR OF LAW – where s 289(2) of the *Body Corporate 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 – what is error of law – whether there was an error of law

REAL PROPERTY – STRATA AND RELATED TITLES – MANAGEMENT AND CONTROL – BODY CORPORATE: POWERS, DUTIES AND LIABILITIES – DUTY TO REPAIR AND MAINTAIN COMMON PROPERTY – resolution of body corporate to remove trees growing in exclusive use areas of common property –

- whether the body corporate is a “treekeeper” for the purposes of the *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld)

Body Corporate and Community Management Act 1997 (Qld), s 159(2), s 170(1), s 173(b), s 276, s 289(2), s 290

Body Corporate and Community Management (Accommodation Module) Regulation 2008 (Qld), s 157(1), s 171.

Neighbourhood Disputes (Dividing Fences and Trees) Act 2011 (Qld), s 5, s 41, s 46, s 48, s 52

Queensland Civil and Administrative Tribunal Act 2009 (Qld), s 64, s 146

Spinnaker Blue [2019] QBCCMCmr 323

Spinnaker Blue [2019] QBCCMCmr 375

Spinnaker Blue [2020] QBCCMCmr 47

Spinnaker Blue [2020] QBCCMCmr 227

APPEARANCES & REPRESENTATION:

Appellant: IHS Jackson of Counsel instructed by Hynes Legal

First Respondents: C Francis, Grace Lawyers

Second Respondent Body Corporate: Self-represented; Lynda Dimmack Chairperson

REASONS FOR DECISION

- [1] The appellant, is the owner of a Lot in Spinnaker Blue CTS 40812 which is a scheme comprising 22 lots and common property. Spinnaker Blue was established on 11 November 2009 with the registration of Survey Plan 176106, a building format plan of subdivision. The 22 lots are in a five-storey concrete block building which includes a basement car park.
- [2] It is one of three subsidiary schemes in a layered principal scheme, Spinnaker Shores, situated on the mainland foreshore of the Pumicestone Passage, which is a narrow waterway between Bribie Island and mainland Queensland north of Brisbane. The lots have views over Pumicestone Passage.
- [3] Spinnaker Blue is regulated 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).
- [4] The First Respondents are the owners of Lot 4 in Spinnaker Blue.
- [5] The second respondent is the Body Corporate. The Chairperson and another officeholder of the Body Corporate appeared in the Appeal on behalf of the Body Corporate. Essentially their position was to abide the order of the tribunal, whatever that might be.

- [6] The appellants brought an application before the Office of the Commissioner for Body Corporate and Community Management alleging that the respondent body corporate had invalidly passed two resolutions at the scheme's general meeting held 21 February 2019. The relevant adjudication was the matter of Spinnaker Blue CTS 40812, Adjudication Order 0265-2019.
- [7] An Adjudicator appointed by the BCCM Commissioner ruled¹ that a particular motion at a Body Corporate meeting of the Body Corporate of Spinnaker Blue on 21 February 2019 was void.
- [8] The Appellant had put a motion to the Body Corporate seeking resolution for the removal of two trees on common property exclusive use courtyards in Lots 1 and 4 of the relevant scheme, on the basis that they caused significant nuisance to the use, enjoyment and value of her Lot, and risked damage to the adjacent stormwater system.
- [9] The resolution which was passed at the Annual General Meeting of the Body Corporate on 21 February 2019 was ruled by the Adjudicator in this case to be void.
- [10] A different Application was also brought by Mr Jeffrey Stephan, the owner of lot 1 against the Body Corporate, seeking an order that Motion 13 which was passed at the Annual General Meeting on 21 February 2019 be declared invalid.² That different adjudicator came to the opposite conclusion to the present one.

Motion in dispute

- [11] Motion 13 was worded as follows:

ORDINARY RESOLUTION - Removal of Trees in Lot 1 and Lot 4

Submitted by Owner Lot 10

That the trees in lot 1 and lot 4 common property exclusive use courtyards be removed. The body corporate being the tree keeper of trees growing on common property is responsible for ensuring that the trees do not cause substantial, ongoing and unreasonable interference with a persons (sic) use and enjoyment of the persons (sic) land.

- [12] The explanatory note accompanying Motion 13 provided as follows:

Removal of Trees in Lot 1 and Lot 4

The Motion is submitted that the Spinnaker Blue Body Corporate, being the Tree-keeper/Owner of the trees growing on the Common Property land of Lots 1 and 4, undertake the removal of these trees, as was undertaken with the same trees that were in Lots 2, 3, 5, 6 which were removed approximately 4 – 6 year ago, in keeping with the requirements of:

- A. The Neighbourhood Disputes (dividing Fences and Trees) Act 211, 41(1), p30-42, and

¹ *Spinnaker Blue* [2019] QBCCMCmr 323.

² *Spinnaker Blue* [2019] QBCCMCmr 375.

B. The Spinnaker Blue Community Management Statement By-Laws,

5. Maintenance of Lots (a), (b), (c) p5;

13. Nuisance p6;

24. Rules retaining to Common Property, p9;

40. Exclusive Use Area – Courtyard (a) – (e) pp12-13

To ensure the following legal compliance:

- A tree-keeper is responsible for ensuring that the tree does not cause substantial, ongoing and unreasonable interference with a person's use and enjoyment of the person's land.
- Above applied to interference that is an obstruction of a view only if
 - a. The tree is at least 2.5m above the ground; and
 - b. (iii) severe obstruction of a view, from a dwelling on the neighbour's land, that existed when the neighbour took possession of the land (52. Responsibilities of a tree-keeper, (2), (c), p/36; 66 (3)(2)(b)(ii)).

The trees severely impact on the enjoyment by residents of upper level units of their view of the Passage and waterfront flora and fauna. The impact on the Unit Owners immediately behind the trees is also significant in that they are closed in by dense mass resembling a green shipping container/green building wall this being the view from inside the Units.

The trees serve no demonstrative benefit to lot resident, are not keeping with the natural flora environment, and do not provide any benefit to the birdlife of the area.

- [13] A photograph supplied by the owner of lot 10 accompanied the explanatory note.
- [14] Motion 13 passed with 11 votes in favour, seven against and one abstention.
- [15] The finding of the Adjudicator in this case was that Motion 13 was invalid because the owners of the affected lots are responsible for the maintenance of the vegetation, including the particular trees within their exclusive use courtyards. The Adjudicator further held that there was no evidence that the owners of those lots were failing to maintain the trees, and that the Body Corporate had no authority to remove the trees within the exclusive use courtyards for the reason that they obstructed the view of Pumicestone Passage from other lots within the scheme.
- [16] In the course of making that finding the Adjudicator made reference to the *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011 (Qld)* and the way in which that Act made provision for the resolution of tree disputes involving adjoining lots. The Adjudicator determined that an Adjudicator had no jurisdiction to determine such a dispute, but that QCAT could make orders in relation to a tree to remedy, restrain or prevent substantial, ongoing and unreasonable interference with the use or enjoyment of a neighbour's land.
- [17] It is well accepted that such appeals are limited to appeals on questions or errors of law.

- [18] The decision of the Adjudicator was given under s 276 of the *Body Corporate and Community Management Act 1997* (Qld) ('the Act'). Section 276 provides as follows:

276 Orders of adjudicators

(1) An adjudicator to whom the application is referred may make an order that is just and equitable in the circumstances (including a declaratory order) to resolve a dispute, in the context of a community titles scheme, about—

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

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

(c) a claimed or anticipated contractual matter about—

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

(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.

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

289 Right to appeal to appeal tribunal

(1) This section applies if—

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

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

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

(d) the aggrieved person is—

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

(ii) for another order—

(A) an applicant; or

(B) a respondent to the application; or

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

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

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

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

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

[20] Section 290 of the Act provides:

290 Appeal

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

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

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

(b) the adjudicator's order;

(c) the adjudicator's reasons;

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

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

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

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

146 Deciding appeal on question of law only

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

(a) confirm or amend the decision; or

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

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

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

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

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

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

[23] The Adjudicator held³ as follows:

[16] By-law 40 grants exclusive use of areas identified in Schedule E of the CMS to the owners of lots 1 to 6 as courtyards. By-law 40 is an exclusive use by-law. An exclusive use by-law attaches to a lot and gives the occupier of the lot exclusive use and enjoyment of an area of common property. The by-laws are binding on the body corporate, lot owners and other persons who occupy a lot.

[17] While the body corporate has a general obligation to maintain common property in good condition, the body corporate's obligations regarding common property may be imposed on a lot owner who has the benefit of an exclusive use by-law. These obligations may be imposed by the by-law or the legislation.

[18] By-law 40 contains a general provision about benefiting owners maintaining their exclusive use courtyards. Paragraph (d) provides that *Each Owner shall be responsible for keeping their exclusive use courtyard clean and in a neat and tidy condition and shall be responsible for all maintenance and upkeep costs.*

[19] The Act and Accommodation Module make it clear that the owner who obtains the benefit of an exclusive use by-law is responsible for the general maintenance of the part of the common property to which the exclusive use by-law applies, unless the by-law itself makes some specific provision about maintenance and operating costs. The exclusive use by-law provides that the relevant owner is responsible for keeping the courtyard clean and in a neat and tidy condition and shall be responsible for all maintenance and upkeep costs, but does not specifically state whether the relevant owner is responsible for maintenance of vegetation within courtyard.

[20] Section 171(2) of the Accommodation Module provides that *an exclusive use by-law is taken, in the absence of other specific provision in the by-law for maintenance and operating costs, to make the owner of the lot to whom exclusive use or other rights are given responsible for the maintenance of and operating costs for the part of the common property to which the exclusive use by-law applies.*

³ *Spinnaker Blue* [2019] QBCCMCmr 323.

[21] In *Hillside Gardens*, the adjudicator held that an obligation to maintain an exclusive use area in good condition included the maintenance of lawns and gardens on the exclusive use area.

[22] I consider that the owners of lots 1 to 6 are required, under the exclusive use by-law and subsection 171(2) of the Accommodation Module, to maintain the vegetation within their exclusive use courtyards. Although it is apparent that a significant number of owners want the trees in the courtyards of lots 1 and 4 to either be removed, or kept to a height of 2.5m or less, from the material before me, there is no evidence that the vegetation in the exclusive use courtyards of lots 1 and 4 is overgrown or unkempt or otherwise not being maintained.

[23] Because the owners with the benefit of exclusive use are responsible for the maintenance of the vegetation within their exclusive use courtyards and there is no evidence before me that those owners are failing to maintain that vegetation, the resolution purportedly passed on Motion 13 of the AGM of 21 February 2019 is invalid.

[24] Both the applicants and various owners make reference to the NDA. The main objection cited by those supporting Motion 13 was the impediment caused by the trees to their view of the Pumicestone Passage.

[25] The NDA deals with disputes between neighbours about trees. Land affected by a tree must adjoin the land on which the trees are situated. Tree disputes involving adjoining lots within community titles schemes fall for determination under the provisions of Chapter 3 of the NDA. This office does not have jurisdiction to determine such a dispute. QCAT may make orders in relation to a tree to remedy, restrain or prevent substantial, ongoing and unreasonable interference with the use or enjoyment of the neighbour's land. An obstruction of a view may be an interference for the purposes of the NDA, however it must be a severe obstruction of a view that existed from a dwelling when the neighbour took possession of the land. If the obstruction is identified as severe, it is necessary to consider whether that obstruction constitutes a substantial, ongoing and unreasonable interference with the use or enjoyment of land. If it does, QCAT's discretionary power to make an order is enlivened.

[26] Motion 13 is invalid. The owners of lots 1 and 4 are responsible for the maintenance of the vegetation (including the Tuckerroo trees) within their exclusive use courtyards. There is no evidence that the owners of lots 1 or 4 are failing to maintain the Tuckerroo trees. The body corporate had no authority to resolve to remove the trees within the exclusive use courtyards of lots 1 and 4 for the reason that they obstructed the view of the Pumicestone Passage from other lots within the scheme.

[27] Nothing in this decision affects any cause of action the parties may have under the NDA.

[24] As I have already mentioned, on the application of a different party, a different Adjudicator handed down the decision in *Spinnaker Blue* [2019] QBCCMCmr 375 in which that Adjudicator held that the self-same motion as was considered by the Adjudicator in the present case, is not invalid.

[25] After setting out what the parties' respective arguments were in the second Adjudication, the Adjudicator noted that the original landscaping for the scheme included six small one metre saplings located in the exclusive use courtyards. Two of

those remain and were the subject of motion 13 for their removal. The Adjudicator observed that within the courtyards was an easement for an underground stormwater drain and that in 2014 the committee undertook the removal of trees as it considered them to be unsuitably placed and risked damage or further damage to the stormwater drain. The owners of lots 1 and 4 refused access for that purpose, and hence the dispute which is now before this Tribunal.

- [26] By the time of the hearing in July 2019, what had once been a small topiary feature was now an advanced tree of 4.5 to 5 metres high and still expanding. The Adjudicator held at the time that lot 1 was originally purchased, the tree had limited foliage and did not obstruct views or provide any other kind of significant obstruction.
- [27] That Adjudicator correctly noted that although each of the owners were entitled to use their respective courtyards to the exclusion of others, those courtyard areas remained common property under the ownership of the Body Corporate. He identified the operation of section 94 of the Act. The Adjudicator noted in terms of section 311(1) of the Act which identified as having the effect of providing that the Body Corporate is taken to be the owner of the scheme land for the purposes of the *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (the NDA), he might also have noted the operation of section 311(3) that provides for the purposes of the NDA, owners of adjoining lots included in a scheme were taken to be the owners of adjoining land. For present purposes it is sufficient to note that this is really a reference to those parts of the NDA which relate to boundary disputes, and not disputes over trees. He then went on to consider the obligation under section 167(a) of the BCCM Act which required that an occupier of a lot included in a Community Title Scheme must not use the lot or the common property in a way that causes a nuisance or hazard or interferes unreasonably with the use or enjoyment of another lot included in the scheme, or interferes unreasonably with the use or enjoyment of the common property by a person who is lawfully on the common property.
- [28] The Adjudicator also referenced the provisions of section 46 and 52 of the NDA which respectively define when land is affected by a tree for the purposes of the NDA and its reference to ongoing and unreasonable interference with a neighbour's use and enjoyment of the neighbour's land, and the responsibilities of a tree keeper of cutting and removing any branches of a tree that overhang a neighbour's land or ensuring that the tree does not cause injury to a person, serious damage to a person's land or substantial ongoing and unreasonable interference with a person's use and enjoyment of the person's land.
- [29] The Adjudicator then discussed how these two trees blocked the views of other lots, and that periodic pruning has had no effect on the impact on affected owners. He also referenced the underground stormwater drain connected to a stormwater pit on the common property exclusive use courtyard area of lot 4, which is the lot affected by the decision under appeal here. The Adjudicator held that the Body Corporate had reasonable concerns regarding the impact of tree roots on the drainage system. He held that the Body Corporate was a tree keeper for the purposes of the NDA and had valid concerns about the risk of damage to the stormwater system by the root systems of the trees, which may involve a nuisance in contravention of section 167 of the Act.
- [30] The Reasons did not involve an analysis of the question of what power or authority the Body Corporate specifically had to pass such a motion. Nor does it specifically deal

with the tension between the grant of rights under by-law 40 and any powers or responsibilities that the Body Corporate has either under the BCCM Act, or the NDA. It appears to be implicit in the reasoning of the Adjudicator in that case that he considered the obligations on the Body Corporate under the NDA to avoid nuisances and its responsibilities as a tree keeper to avoid causing unreasonable interference with two other lots in some way validated the resolution.

- [31] The Appellant in the present appeal sought in large part to adopt the analysis which was conducted by the Adjudicator in the later *Spinnaker Blue* decision⁴.
- [32] At the heart of the analysis of the Adjudicator, and which led to the determination that the resolution purportedly passed was “all times void”, seems to be the unstated proposition that a motion passed in general meeting by lot holders in a body corporate is not a valid motion if the things which the motion, once passed, authorised were not lawful. I say this because at the heart of the Adjudicator’s analysis is the conclusion that the Body Corporate’s obligations regarding the maintenance of common property could be imposed on a lot owner who had the benefit of an exclusive by-law, and that this had occurred in that case. The result was that the Adjudicator found:
- (a) That the owners of the lot affected by the exclusive use by-law entitlements have the obligation to maintain vegetation, including trees on that part of the common property affected by the exclusive use rights;
 - (b) The Body Corporate was someone divested of any right, entitlement or interest in removing vegetation, including trees on common property subject to exclusive use by-laws;
 - (c) That because there was no evidence of a failure by the lot owners “to maintain the vegetation in accordance with the by-law which imposed on them a responsibility for keeping their exclusive use courtyard clean and in a neat and tidy condition, to be responsible for maintenance and upkeep costs”, therefore the Body Corporate had “no authority” to resolve to remove the trees.
- [33] The first thing to be observed about those conclusions is that they involve a fundamental misconception. Whether a Body Corporate has authority to pass a resolution is determined by whether the procedural requirements for putting a resolution that has been passed have been met. Conceptually, a Body Corporate under the BCCM Act might purport to do all sorts of things by way of resolution but find itself prevented from doing so because despite having resolved to take that action, it is not lawfully entitled to carry it out.
- [34] One might take as an obvious example, a situation where a Body Corporate resolved to remove a tree on an adjoining property, or on public land which was not part of the scheme. Assuming the procedural requirements for the calling of the meeting and the passing of the resolution were met, *prima facie* the motion would be a valid motion if it was seen to be protecting a legitimate interest of the Scheme. The difficulty that would then arise would be that although the motion had been validly passed, it could not be lawfully given effect to without the consent of some third person. The requirement however for that consent to be given does not invalidate the passing of the motion.

⁴ *Spinnaker Blue* [2019] QBCCMCmr 375

Moreover, the refusal to provide such consent or otherwise permit conduct referenced in the motion to occur, does not mean that the passing of the motion was an act which was void, or outside of the powers of the Body Corporate. In my view this is a fundamental misconception in the analysis which has been conducted in arriving at the conclusion which the Adjudicator has reached in this case.

- [35] Neither party dealt with this argument in their submissions. In light of that, it seems to me that I should treat the finding of the Adjudicator, relevantly for the purposes of this appeal, as concerning the essential issue of whether in fact the Body Corporate was entitled at law to give effect to a motion that has been passed that the trees in lots 1 and 4 exclusive use affected common property “be removed” and that it intended to remove those trees itself.
- [36] It is to be noted that the motion itself did not identify who it was that it was proposed remove these trees, but there is no suggestion in the material that it was the intention of the motion that it require the lot owners on whose property the trees were situated remove those trees. It seems to be common ground, although it is not expressly stated in any of the submissions for either party, or indeed the findings of the Adjudicator, that the effect of the motion was that the Body Corporate would be the entity to remove the trees.
- [37] One of the submissions made to the Adjudicator by the First Respondents to this appeal was to object that no quotes had been obtained concerning the removal of the trees and it was not clear how the action required was to be paid for, and whether there were sufficient funds in the budget. So the lot owners themselves understood that it was the Body Corporate that would be removing the trees, and/or meeting the costs associated with their removal.
- [38] If I do not decide the appeal in the way in which I have just articulated the issue, and indeed it was implicitly argued, the problem which has arisen at Spinnaker Blue as to whether the trees can be required to be removed by the Body Corporate will remain unresolved, notwithstanding the view that the mere passing of the motion in circumstances where giving effect to it might not be impossible, does not invalidate the motion or the resolution or result in the motion being “at all times void”, which was the order that the Adjudicator here made.

Consideration

- [39] The starting point to examine who has power, although not necessarily responsibility, to manage trees on common property the subject of exclusive use by-laws, is to examine in each particular case precisely what powers and responsibilities have been allocated away from the Body Corporate.
- [40] Under section 94 of the BCCM Act, the general functions of the Body Corporate are that it must administer the common property for the benefit of the owners of the lots included in the scheme, enforce the CMS and carry out any other functions given to the Body Corporate under the Act and the CMS. Section 95 provides that the Body Corporate has all the powers necessary for carrying out its functions and may for example enter contracts or deal with and dispose of property. Section 95(2) provides that without limiting the description of the powers in subsection (1), the Body Corporate has the other powers given to it under this Act or another Act. The appellant

in this case contends that in effect there are powers granted to the Body Corporate which may relevantly be exercised, permitting it to remove trees on common property the subject of an exclusive use by-law by reason of the provisions in the Neighbourhood Disputes (Dividing Fences and Trees) Act 2011. I shall return to that Act in a moment.

- [41] It is a common ground that there was an exclusive use by-law in this case which gave certain rights to the owners of lots 1 and 4.
- [42] Pursuant to section 170 of the Act, an exclusive use by-law “is a by-law that attaches to a lot included in the scheme, and gives the occupier of the lot for the time being exclusive use to the rights and enjoyment of, or other special rights about-
- (a) Common property; or
 - (b) A body corporate asset.”
- [43] Therefore, the focus under section 170 is upon precisely what the relevant by-law gives by way of exclusive use to the rights and enjoyment of, or other special rights about common property. It might notionally include the right to plant vegetation on the site, including substantial trees such as those that are present which were the subject of the relevant resolutions in this case.
- [44] The Adjudicator referenced in his reasoning the terms at section 171(2) of the Accommodation Module, which I have set out above in the extract from paragraph 20 of the Reasons. By its terms, it identifies that it is not a given in every case that the owner of the lot to whom exclusive use or other rights are given is responsible for the maintenance of and operating costs of the exclusive use area. It depends upon what is in the by-law. If there is nothing in the by-law to say otherwise, that section operates to impose maintenance and operating costs from the area of the lot owner. It is however clear that even if those responsibilities did vest in the lot owner, the scheme of the Act does not operate to divest the Body Corporate of all rights, entitlements and interest in common property which has been made the subject of an exclusive use by-law.
- [45] Section 157(1) of the Accommodation Module provides that a body corporate is responsible for maintaining common property in good condition and, if it is structural in nature, in structurally sound condition. It should be noted that there was a new version of the Accommodation Module enacted in 2020 and this Regulation appears to have come into force on 1 March 2021.
- [46] What was formerly section 157 of the Accommodation Module 2008 is now section 170 of the Accommodation Module 2020. The parties did not identify that there is a new version of the Accommodation Module enacted in 2020 and that the Regulation appears to have come into force on 1 March 2021 in any of their submissions but I reference it for completeness as the issue for determination here may arise for consideration again.
- [47] Section 157(2) of the Accommodation Module 2008 provided that if the scheme is created under a building format plan (BFP), as occurred in this case, the body corporate is also responsible for maintaining some parts of owners’ lots. Those parts are: balustrades and the like that practically form part of a lot boundary; roofing membranes

that provide protection for lots or common property; “foundation structures”; roofing structures providing protection; and “essential supporting framework”.

- [48] The question of whether there is a right to remove or forced removal of a tree on an exclusive use area by the Body Corporate is, in my view, not resolved by reference to whether the lot owner has a duty to maintain the subject area. Certainly, if a lot owner fails to maintain such an area, it would be possible for the Body Corporate to enforce the by-law and compel the owner to maintain the property, and there may be circumstances in which the Body Corporate would be permitted to enter and bring about compliance in those circumstances.
- [49] Consistently with what I have already said, an Adjudicator observed in the decision of *Hillside Gardens CTS3109* [2001] QBCCMCmr 357, that a by-law might impose maintenance obligations in relation to exclusive use areas on the lot owner or it might specifically provide that the Body Corporate continue to be responsible to maintain it. It is self-evidently the case that, as the Adjudicator there observed, the terms and conditions included in an exclusive use by-law could be quite varied.
- [50] It is therefore critical to return to the precise language of by-law 40 in the relevant scheme in this case. It commences as identifying:
- (a) Parts of the common property to be allocated under that by-law as being for the purposes of “courtyard”;
 - (b) The areas by reference to a schedule and states that the owner of the lot “is entitled to exclusive use and enjoyment of that area, subject to the conditions imposed by this by-law”. In my view, it also goes without saying that the uses and enjoyment of that area are also subject to other lawful requirements, albeit that they are not specifically identified as conditions under the by-law.
- [51] Turning to the balance of by-law 40, one of the conditions imposed is that the lot owner not create a nuisance. It does not fall to be considered in this case as to whether either of the trees in question has created a nuisance. Indeed there is little to suggest that that is the case at all. There is considerable debate to be found in the arguments for all sides as to whether the trees are of a suitable size, location and type to justify their remaining in place. The Adjudicator did not find it necessary to resolve those differences because the decision was that there was no failure to maintain the trees, and that the motion was invalid because maintenance of the trees fell to the lot owners.
- [52] The second thing to be observed is that in by-law 40 subparagraph (e) it is expressly provided that it specifically authorises the Body Corporate Manager, who would be acting under the authority of the Body Corporate, to enter into the common property courtyard areas to carry out works or for effecting repairs and maintenance of the building, the common property, the lot or an adjoining lot, and it is not limited to the utility infrastructure or services.
- [53] So on that analysis, lot owners are subject to the entitlement of the Body Corporate to enter to carry out works which may or may not necessarily be works that lot owners themselves are required to have carried out because of their duty to maintain the common property areas.

- [54] The effect of by-law 40(f) is that there is a clear prohibition on erecting a shade awning, unless written approval has been given by the Body Corporate. That implies that even something as fundamental as putting a shade awning on one's courtyard required the authority of the Body Corporate and was therefore not something which the lot owner could do without approval. The Body Corporate retained a measure of control over the area despite it being the subject of a grant of exclusive use.
- [55] The by-laws are otherwise silent in relation to the position of what is to occur for example to trees on the affected areas.
- [56] As is evident from what I have already said, it is clear that the grant of exclusive rights, privileges and responsibilities to particular lot owners over Body Corporate common property is not in every case, or perhaps even in any case, entirely removed from the jurisdiction or control of the Body Corporate, in respect of things that affect the Body Corporate's interests and responsibilities.
- [57] Exclusive use affected areas do not become the property of lot owners, and to the extent that they remain within the ownership of a Body Corporate, it is clear that both the BCCM Act and the NDA create responsibilities on Bodies Corporate, inter alia to maintain common property in good condition if it is structural.
- [58] Implicit in the statutory duty to maintain common property in good condition if it is structural, are the powers which are necessary to be exercised to be able to carry out that maintenance. That would permit an appropriate case of the power to enter upon exclusive use common property and carry out that maintenance.
- [59] The express terms of by-law 40 in this case make clear that there are remnant powers and responsibilities in the Body Corporate to enter onto the courtyard areas and carry out works or effect repairs and maintenance of the common property.
- [60] Neither party addressed me on what the meaning of the expression "maintenance of the ... common property" might mean, but certainly conceptually it could include maintaining of the property to ensure, for example, that trees on the property do not cause a nuisance, or cause damage to aspects of the common property, and/or stormwater drainage which may be the subject of easements to local authorities. By-law 40(e) gives it power to carry out works on mains, pipes, or connections of any utility service or utility infrastructure. It seems to me this would necessarily include maintenance of pipes, either removal of a tree on the common property which was causing or potentially causing damage to those pipes. Those are mere examples of the ways in which the Body Corporate remains better positioned in having some influence or control over what occurs on the common property. Another example is that referenced in by-law 40(f) which makes clear that owners are not as of right entitled to erect structures such as shade awnings without the approval of the Body Corporate. Implicitly, that suggests that the Body Corporate has retained the power to refuse certain types of structures to be erected, even if they are not permanent in nature, and notwithstanding that these areas are courtyard exclusive use areas.
- [61] The scheme of the NDA insofar as it affects disputes about trees, is to be achieved by an object which is to provide "rules about each neighbour's responsibility for... trees"

so that neighbours are generally able to resolve issues about the fences or trees without a dispute arising.⁵

- [62] In section 5 of the NDA, unless otherwise provided for in the NDA, there is provided that the NDA does not affect the operation of another Act or law. This can be read with section 180 of the BCCM Act which provides that if a by-law is inconsistent with the BCCM Act or another Act, the by-law is invalid to the extent of the inconsistency. That would mean, that to the extent that by-law 40 provided for something different in relation to the responsibilities of the Body Corporate to manage vegetation on exclusive use affected common property, that the NDA obligation would prevail.
- [63] Chapter 3 of the NDA deals with trees. Section 41 of the NDA explicitly provides that a tree keeper is responsible for the proper care and maintenance of the tree keeper's tree. It references the tree keeper's specific responsibilities set out in section 52.
- [64] The regime of the Act is to protect the interests of immediate neighbours of property on which trees exist in respect of which a tree keeper is responsible for proper care and maintenance of the tree. It therefore does not apply to other than immediate neighbours of the affected lot or land. That is the effect of section 46 and 49 of the NDA.
- [65] Section 52 of the NDA makes clear that the tree keeper, as defined by the Act, has legal responsibility inter alia for ensuring that a tree does not cause damage to a neighbour's land, or any property on a person's land, or substantial ongoing and unreasonable interference with a "person's use and enjoyment of the person's land". The NDA uses this peculiar expression "of a person" in this context, although it is not one defined in that Act, and the rest of the Act references persons who are "neighbours". Indeed, that precise expression appears using "neighbours" in section 52(1), whereas 52(2) refers to persons not neighbours. The submission was made that this was sloppy drafting and that the expressions in both cases are intended to refer to the protected person, ie. the neighbour. I am not confident that this is so, however I do not need to decide that issue in this appeal.
- [66] Section 52(3) provides that section 52 does not "create a civil cause of action based on a tree keeper's responsibilities." That does not mean however that those responsibilities are not imposed.
- [67] In any event, section 48(1)(e) makes clear that if land on which the tree is situated is common property under the BCCM Act, the Body Corporate for the Community Titles Scheme is the tree keeper.
- [68] The effect then is that the Body Corporate in this case has legal responsibility to discharge the responsibilities under section 52. Here, compliance with section 52 would require an entity to act to ensure that a tree on common property does not cause damage to a neighbour's land, or any property on a person's land, or substantial ongoing and unreasonable interference with a "person's use and enjoyment of the person's land". In my view it is self evident that where compliance with a statute would require such conduct, that absent a clear statement in Bylaw 40 to the contrary, it is implicit that the Body Corporate has the powers of entry and other powers necessary to meet its statutory duties, including removal of a tree. It certainly means that the passing of a

⁵ Section 3 of the NDA.

motion by the Body Corporate for the Community Titles Scheme and which it does pursuant to its duties as the tree keeper is not void.

- [69] To the extent that any rights which arguably exist under by-law 40 of this scheme which impose concurrent, or different responsibilities on a lot owner, rather than the Body Corporate, those responsibilities do not override the statutory responsibilities under section 52 of the NDA.
- [70] In my view therefore, it necessarily follows that to the extent that the Body Corporate is purporting to discharge its responsibilities as a tree keeper under the NDA, and the evidence in this case makes clear that it was, that it is acting lawfully, and is entitled to pass a resolution to take steps which are consistent with its obligations as a tree keeper under the NDA.
- [71] In my view, it therefore follows that the passing of motion 13 was not invalid, and the resolution was not void at the time it was passed and remains validly passed.
- [72] I therefore allow the appeal and set aside the Adjudicator's order.
- [73] This is the fourth matter involving this Scheme that has been sent for adjudication in the past two years.⁶ It is to be hoped that this pattern does not continue.
- [74] The parties have asked to be heard in relation to the question of costs, and I therefore reserve costs. I should indicate, without expressing any final view on the matter, that having regard to the well established principles, that any application for costs would face considerable difficulties.

⁶ *Spinnaker Blue* [2019] QBCCMCmr 323; *Spinnaker Blue* [2019] QBCCMCmr 375; *Spinnaker Blue* [2020] QBCCMCmr 47; *Spinnaker Blue* [2020] QBCCMCmr 227.