QUEENSLAND CIVIL AND ADMINISTRATIVE TRIBUNAL

CITATION:	*Black v Summer Waters Body Corporate CTS 19297* [2022] QCATA 067
PARTIES:	**CHRIS BLACK** (appellant) **v** **SUMMER WATERS BODY CORPORATE CTS 19297** (respondent)
APPLICATION NO:	APL306-20
MATTER TYPE:	Appeals
DELIVERED ON:	27 May 2022
HEARING TYPE:	On the papers
HEARD AT:	Brisbane
DECISION OF:	Member Lumb
ORDERS:	**1. The appeal is dismissed.** **2. Each party shall file and serve, within 14 days of the date of these Orders, written submissions, limited to 5 pages in length, in relation to the costs of the appeal.** **3. Each party shall file and serve any submissions in response, limited to 3 pages in length, within 7 days of receipt of the other party's submissions.**
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 – where dispute in relation to a dividing fence separating an individual lot and common property within a community titles scheme – whether Adjudicator had jurisdiction to determine dispute – whether the Tribunal had exclusive jurisdiction to determine the dispute under the *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) REAL PROPERTY – STRATA AND RELATED TITLES – MANAGEMENT AND CONTROL –

BYLAWS – where by-law provided that an occupier of a lot must not mark, paint, drive nails or screws or the like into, or otherwise damage or deface, any structure that forms part of the common property except with the consent in writing of the body corporate (with two specific exceptions) – where lot owner installed a gate within a section of the dividing fence without written consent – whether by-law applied to the dispute – whether by-law was invalid because it prohibited rather than regulated the use and enjoyment of common property

Acts Interpretation Act 1954 (Qld)
Body Corporate and Community Management Act 1997 (Qld), s 10, s 168, s 169, s 184, s 227, s 228, s 270, s 276, s 289, s 290, s 311, Schedules 4 and 6
Land Title Act 1994 (Qld), s 41C, s 115B
Neighbourhood Disputes (Dividing Fences and Trees) Act 2011 (Qld), s 5, s 10, s 12, s 14, s 15, s 26, s 27, s 30, s 33, s 49
Queensland Civil and Administrative Tribunal Act 2009 (Qld), s 146

Body Corporate for River City Apartments CTS 31622 v Lauren McGarvey [2012] QCATA 47
Crystal Waters Permaculture Village & Ors v Boyle [2020] QCATA 80
HAP2 Pty Ltd v Bankier [2020] QCA 152
Lowe v BGC Technical [2016] QCATA 124
Miles v Body Corporate for Solarus Residential Community Title & Anor [2016] QCATA 130
Minerology v Body Corporate for the Lakes Coolum [2003] 2 Qd R 381, [2002] QCA 550
Norbis v Norbis (1986) 161 CLR 513
Swan Hill Corporation v Bradbury (1937) 56 CLR 746

APPEARANCES & REPRESENTATION:	
Appellant:	Self-represented
Respondent:	Self-represented

REASONS FOR DECISION

Introduction

[1] The Appellant is a lot owner (of Lot 21) in the Summer Waters Community Titles Scheme 19297 (the Scheme).

[2] The Respondent (the Body Corporate) is the body corporate for the Scheme.

[3] The Scheme is regulated by the *Body Corporate and Community Management Act 1997* (Qld) (the BCCMA) and the *Body Corporate and Community Management (Standard Module) Regulation 2008* (Qld).

[4] It is not in dispute that:

(a) there is a timber fence (the Fence) located on one of the boundaries of Lot 21 which separated that lot from part of the common property within the Scheme;

(b) in 2020, the Appellant installed or caused to be installed a gate (the Gate) within a section of the Fence.

[5] The Body Corporate brought an application (the Adjudication Application) before the Office of the Commissioner for Body Corporate and Community Management (the Office) that "the owner of lot 21" be ordered to reinstate the Fence to its "original form" and that the "cracker dust" on the common property outside the Gate be removed and the mulch replaced to its original condition. The application also sought that "The common area gardens are not to be damaged as per the by-laws below".

[6] By a decision dated 20 August 2020 (the Decision), an Adjudicator (appointed under the BCCMA) made the following orders:

> 1. Within 7 days of this Order, the [Appellant] must remove the gate he installed in the fence on the boundary between Lot 21 and the common property and return the fence to its prior state.
>
> 2. The application is otherwise dismissed.

[7] By an Application for leave to appeal or appeal filed on 30 September 2020 (the Appeal Application), the Appellant appeals the Decision pursuant to s 289 of the BCCMA. The Appeal Application was filed within the six week period provided for by s 290(1) of the BCCMA.

Statutory provisions relevant to the appeal

[8] Section 289 of the BCCMA provides:

> (1) This section applies if—
>
> (a) an application is made under this chapter; and
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> (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.

[9] There is no dispute that the Adjudication Application was made under Chapter 6 of the BCCMA (subject to the jurisdictional question raised by the Appellant); that the Adjudicator made orders for the Adjudication Application (which were not consent orders); that the Appellant is aggrieved by the orders; and that the Appellant was the Respondent to the Adjudication Application. The Appeal Tribunal has jurisdiction to determine this appeal. However, the Appellant may appeal to the Appeal Tribunal only on a question of law (see s 289(2) of the BCCMA).

[10] The powers of the Appeal Tribunal in deciding this appeal are governed by s 146 of the *Queensland Civil and Administrative Tribunal Act 2009* (Qld) (the QCAT Act) which provides:

> 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).

[11] In *Miles v Body Corporate for Solarus Residential Community Title & Anor*, it was said:[1]

> An appeal from an Adjudicator under the BCCMA is an appeal in the strict sense. Once an error of law affecting Adjudicator's decision is identified, the appeal tribunal may exercise the Adjudicator's powers and substitute its own decision based on the material before the Adjudicator, consistent with the

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1 [2016] QCATA 130 at [5] per Senior Member Brown.

Adjudicator's undisturbed factual findings. There is no element of rehearing nor can fresh evidence be considered.

The Grounds of Appeal

[12] In Part C of the Appeal Application (which addresses the Grounds of Appeal) the Appellant set out the following:

> That the Adjudicators [sic] has erred in the decision made as the dividing fence in question sits outside the jurisdiction of the BCCM Act and that questions of this nature should be dealt with pursuant to the Neighbourhoods Disputes (Dividing Fences & Trees) Act in an appropriate jurisdiction. Such a dispute is separate from the validity of a by law and requires consideration of the Neighbourhood Disputes (Dividing Fences & Trees) Act rather than being about the rights, powers or contraventions in respect of the BCCM Act (Act s227-s229, s276). The grounds of appeal are supported by previous findings in The Avenues (Ref: 0799-2008) & Kawana Island Villas (Ref: 0478-2005) cases. See attached for further information.

[13] Attached to the Appeal Application was a three page document headed "Part C: Grounds of Appeal". The content of the attachment is as follows:

> (1) The Adjudicator in the citation determined that my rear fence is common property governed by the BCCM Act whereby the bylaws of the scheme apply.
>
> (2) In my opinion this determination is incorrect and the interpretation has led the Adjudicator to make an order that is outside the jurisdiction of the BCCM Act.
>
> (3) The Adjudicator should have dismissed the Application made and orders sought under s270(1)(a) and/or s270(1)(b) of the BCCM Act.
>
> (4) My rear fence is a dividing fence under the Neighbourhood Disputes (Dividing Fences & Trees) Act 2011 (QLD) (Dividing Fences Act) and therefore subject to the Dividing Fences Act if disputes arise. When it comes to dividing fences the rules about neighbourhood fencing apply even if the fence is located within a strata scheme.
>
> (5) There are no exclusive use areas within the Summer Waters scheme. All land is either common property or private title. Located within the scheme there are 3 x types of dividing fence. They are:
>
> 1. Dividing fence between private lots: Shared ownership between individual lot owners.
>
> 2. The perimeter fence between the whole scheme and an adjoining title separate from the scheme: For the Dividing Fences Act, the BC is determined to be the owner of all scheme land in regards to perimeter fencing. The BC is responsible for the external perimeter fence of the scheme and it is clear that perimeter fences are 100% owned assets of the body corporate and therefore the bylaws of the scheme apply (reference made to s10 of the Dividing Fences Act in citation) as the land adjacent is council land.
>
> 3. A dividing fence between a private lot and common property within the scheme: This fence is my case.

(6) To support this appeal, I refer to the order in the citation The Avenues whereby the Adjudicator specifically refers to dividing fence disputes between adjoining lot owners where the BC is an "owner" under the BCCM Act and Dividing Fences Act.

(7) The citation deals with how this type of dispute should be dealt with in the appropriate jurisdiction whereby the Adjudicator ordered that "the application for an order regarding the construction of a fence without authority is dismissed on the basis that it should be dealt with in a court or tribunal of competent jurisdiction."

(8) In consideration of this determination in The Avenues, why has this dispute surrounding my dividing fence not been dealt with in the correct court or tribunal of competent jurisdiction?

(9) The issue in The Avenues is in my view the same as my gate installation and the outcomes sought in the Application brought by the BC of Summer Waters are the same.

(10) The Adjudicator in The Avenues citation identified what is a dividing fence in a community titles scheme. "The Act sets out a scheme for one owner to require the owner of an adjoining lot to perform and/or contribute to the costs of fencing works undertaken on a dividing fence. The BCCM Act is relevant to determine responsibility for building and maintaining dividing fences to the extent that it clarifies which persons are considered adjoining owners under the Dividing Fences Act."

(11) In The Avenues citation the Adjudicator comments that "Adjoining owners under the Dividing Fences Act will normally be jointly liable for the costs of fencing works unless they have agreed on some other arrangement and the three common situations are as follows:

1. The body corporate is taken to be the adjoining owner in respect of fencing around the outside of the scheme land *(Act, 311(1)).* The body corporate will normally be equally responsible for fencing the outside of the scheme land with whichever person owns the land on the other side of the fence in question. However, if the land on the other side of the fence is council land then the body corporate would be solely responsible for the fence;

2. Owners of adjoining lots included within the scheme are taken to be adjoining owners for the purposes of dividing fences *(Act, 311(3)).* Therefore, these owners will normally be jointly responsible for fencing between their lots; and

3. Similarly, fencing between common property and lots included within the scheme will normally be the joint responsibility of the body corporate (which is responsible for administering the common property owned by all owners as tenants in common) and the particular owner who owns the lot on the other side of the part of the fence in question."

(12) The Adjudicator in The Avenue commented "If persons who share responsibility for a fence cannot agree" on fencing works "then action can be taken pursuant to the Dividing Fences Act, including if one of those persons is the body corporate (Act, 311(1))."

(13) The action available is supported further when the Adjudicator comments that "the body corporate is responsible for the fences on the outside perimeter and an owner or occupier will only be responsible for fences that are internal to the scheme (Acts 311)".

(14) The Adjudicator specifically addressed in The Avenues citation whether the BCCM Act and the actions of the BC in regards to fencing works undertaken on a joint owned fence was applicable. Specifically, fencing works as defined under the Dividing Fences Act undertaken by the BC without the approval of the joint owner.

(15) The determination in The Avenues citation appears at odds with the determination of this Adjudicator that a joint owned fence with the BC is deemed common property and as such, the BCCM Act and therefore bylaws of the scheme are enforceable.

(16) In The Avenues citation the Applicant sought an outcome to restore the dividing fence in question "similar to what was there before" . This outcome sought is very similar to the outcome sought by the BC of Summer Waters in the Application and the order made by the Adjudicator.

(17) However, the Adjudicator in The Avenue determined that "questions of this nature should be dealt with pursuant to the Dividing Fences Act in an appropriate jurisdiction. Such a dispute is separate from the validity" of a "by law and requires consideration of the Dividing Fences Act rather than being about the rights, powers or contraventions in respect of the BCCM Act (Act s227-s229, s276). The present application will therefore be dismissed in this respect for lack of jurisdiction and on the basis that this dispute should be dealt with in a court or tribunal of competent jurisdiction (Act 270(1), 270(2)).

(18) A similar determination in regards to a dividing fence between an individual lot owner and common property was also made in the citation Kawana Island Villas.

(19) The Adjudicator in Kawana Island Villas also identified that provisions of the Dividing Fences Act apply to fences between lots in that "Ordinarily the body corporate will be responsible for a fence that forms the perimeter of the scheme, this responsibility being shared with any neighbouring owner outside of the scheme. However, adjacent lot owners within the scheme will ordinarily share responsibility for fences between their respective lots. Further, if the fence is instead between the lot and common property then the lot owner will ordinarily share responsibility for the fence with the body corporate, as though the body corporate was the owner of the common property (Act s311)."

(20) The Adjudicator also identified specifically that "Under a standard format plan the fences generally approximate the boundaries of the lot and adjoining owners will have responsibilities under the Dividing Fences Act."

(21) The Adjudicator also highlighted that "Under a building format plan any fences are normally solely on common property and the Dividing Fences Act only applies between the body corporate and any neighbouring owner outside scheme land regarding fences outside of the scheme land. However, for Kawana Island Villas, the private yards surrounding the building forms part of the lot and fences are approximate on the boundaries of the lot and common property. Each

lot owner will therefore be an adjoining lot owner with the body corporate for the purposes of the Dividing Fences Act (Act s311.)".

(22) The Adjudicator also concluded that "The general rule is that adjoining owners will equally share the responsibility for the building or repair of a dividing fence ..."

(23) The consequence of joint responsibility is that not even a motion passed by the body corporate "amounts to permission from each individual lot owner" and that a bylaw of the scheme governing common property is not applicable to a jointly owned dividing fence. Again, how is my case different?

(24) The determination that my jointly owned dividing fence is common property subject to the BCCM Act and therefore the bylaws of the scheme is in my view at odds with the orders previously made in The Avenues & Kawana Island Villas and the dispute should be dealt with in the correct court or tribunal of jurisdiction. If I can rely on the findings in The Avenue & Kawana Island Villas cases, then I believe that the order made in the citation be declared void and the original Application submitted by the Summer Waters Body Corporate be dismissed.

(25) I think it is important to note the BC for Summer Waters has always recognised this dividing fence as a dividing fence subject to the Dividing Fences Act and that the gate installed was installed exactly where they recommended the gate be installed. The issues with regard to common property that they claimed are irrelevant as it is not against the bylaws of the scheme to cross common property. It is impossible to deal with the committee of this BC if they constantly change.

(26) The discussion of Carmody J in *Body Corporate for Beaches Surfers Paradise v Blackshall* defines the working of an effective BC Committee when he states that "A reasonable committee, in my opinion, would consider ..... practical ways of resolving the tension between the rival positions rather than reasons not to do so." This BC Committee that I deal with has no such intentions. Just complexity, delay and lack of genuine intent. Sometimes reasonable people just get fed up after 3 years of dealing with recalcitrant behaviour.

(citations omitted)

[14] As is evident from the content of the Attachment, the matters raised by the Appellant are in the nature of submissions rather than specific grounds of appeal. For the purposes of this appeal, I will refer to the content of the Attachment as "the Initial Appeal Submissions".

[15] The Appellant filed further submissions on 19 April 2021 (the April 2021 Submissions). The first page of that document contains the heading "Grounds of Appeal" and states:

(1) I am the aggrieved person in the citation and make this appeal under s289(1)(d) of the BCCM Act (the Act).

(2) The Adjudicator in the citation determined that my rear fence is common property governed by the BCCM Act whereby the bylaws of the scheme apply.

(3) In my opinion this determination is incorrect and the interpretation has led the Adjudicator to make an order that is outside the jurisdiction of the BCCM Act.

(4) The Adjudicator should have dismissed the Application made and orders sought under s270(1)(a) and/or s270(1)(b) of the BCCM Act.

(5) It is my belief that the Adjudicator has erred in the decision made by not taking into consideration or giving due weight to previous decisions made in the same jurisdiction (explained further below), whereby it was determined that matters relating to dividing fences between common property and an individual lot are subject to the provisions of the Neighbourhood Disputes (Dividing Fences & Trees) Act 2011 (QLD) (NDA) and should be dealt with in a court or tribunal of competent jurisdiction.

(6) I also believe that the notion of "non-exclusive" jurisdiction was not the intent of the Parliament in framing the laws around co-owned dividing fences and the Adjudicator has relied incorrectly on what appears to be a subjective and unsupported concept of "non-exclusive" jurisdiction.

(7) I also contend that the Adjudicator has also erred in the interpretation of Section 311 of the BCCM Act by relying on Section 10 of the NDA to support this interpretation of “non- exclusive" jurisdiction whereby the Adjudicator states that Section 10(1)(b) of the NDA does not affect a bylaw under the BCCM Act about a dividing fence.

(8) The Adjudicator also appears to have given no weight or due consideration to correspondence provided to me by the BC that I believe gave me an expectation of approval for my gate (discussed further below). The Adjudicator should have approved my gate or at least estopped the application if the facts in the case had been properly reviewed based on the information provided in the Adjudication Application made by the BC.

(9) Ultimately, they reneged on the agreement to approve my gate installation to my complete detriment. The decision of the Adjudicator and the actions, and inactions of the BC, have not provided a just and equitable outcome.

[16] The Appellant filed further submissions totalling 80 paragraphs on 11 October 2021 (the Further Appeal Submissions).

[17] The first page of the Further Appeal Submissions is headed “Grounds of Appeal” and sets out the following:

(1) I am the aggrieved person in the citation and make this appeal under s289(1)(d) of the Body Corporate and Management Act 1997 (the Act).

(2) The Adjudicator in the citation determined that my rear fence is common property governed by the Act whereby the by-laws of the scheme apply.

(3) In my submission this determination is incorrect. Further, that determination has incorrectly led the Adjudicator to make an order that is outside the jurisdiction of the Act.

(4) The Adjudicator should have dismissed the Application in accordance with s270(1)(a) and/or s270(1)(b) of the Act.

(5) The Adjudicator has erred in the decision made by not taking into consideration or giving due weight to previous decisions made in the same jurisdiction (explained further below), whereby it was determined that matters relating to dividing fences between common property and an individual lot are subject to the provisions of the Neighbourhood Disputes (Dividing Fences & Trees) Act (QLD) (NDA) and should be dealt with in a court or tribunal of competent jurisdiction.

(6) Furthermore, I submit that the notion of "non-exclusive" jurisdiction was not the intent of the Parliament in framing the laws around co-owned dividing fences and the Adjudicator has relied incorrectly on what appears to be a subjective and unsupported concept of "non-exclusive" jurisdiction.

(7) I also contend that the Adjudicator has also erred in the interpretation of Section 311 of the Act by relying on Section of the NDA to support this interpretation of "non-exclusive" jurisdiction whereby the Adjudicator states that Section 10(1)(b) of the NDA does not affect a by-law under the Act about a dividing fence.

(8) I also submit that by-law 6 is invalid as it is a by-law that prohibits rather than regulates the use and enjoyment of common property.

(9) The Adjudicator has also relied on by-law 11, which I also believe is invalid, to support the inference to by-law 6 and the decision given.

(10) The Adjudicator also appears to have given no weight or due consideration to correspondence provided to me by the body corporate committee (BCC) to approve the installation of a gate (discussed further below). The Adjudicator should have made orders directing the BCC to approve the installation of a gate or alternatively estopped the application if the facts in the case had been properly reviewed based on the information provided in the Adjudication Application made by the BCC.

(11) Ultimately, the BCC reneged on the agreement to approve my gate installation to my complete detriment. The decision by the Adjudicator and the actions, and inactions of the BC [sic], have not provided a just and equitable outcome.

[18] These Grounds are in substantively the same terms as those contained in the April 2021 Submissions, save that paragraphs 8 and 9 of the Further Appeal Submissions raise additional grounds.

[19] On my reading of the Appellant's Grounds of Appeal, the alleged errors can be broadly summarised as follows:

(a) the Adjudicator did not have jurisdiction to determine the dispute because:

(i) the Fence was not common property in respect of which the by-laws (in particular, by-law 6) applied;[2]

(ii) further or alternatively, that the dispute was governed by the *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld)

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2 Further Appeal Submissions, paragraphs 2-4.

> (the NDA) and, by virtue of that Act, the Queensland Civil and Administrative Tribunal (the Tribunal) had exclusive jurisdiction to resolve the dispute;[3]

(b) each of by-law 6 and by-law 11 is invalid;[4]

(c) the Adjudicator appears to have given no weight or due consideration to various correspondence provided to the Appellant by the Body Corporate and the Adjudicator should have made orders directing the Body Corporate to approve the installation of the Gate or, alternatively, "estopped the application" if the facts in the case had been properly reviewed based on the information provided in the Adjudication Application.[5]

[20] I will address each ground in turn.

Was the Fence common property in respect of which by-law 6 applied?

[21] The Appellant's contentions in relation to this Ground are set out in paragraphs 15 to 30 inclusive of the Further Appeal Submissions.

[22] As I read the Appellant's Submissions, it is contended that a by-law of the Scheme governing common property is not applicable to a jointly owned dividing fence (consistently with two previous adjudication decisions) and, consequently, the Adjudicator did not have jurisdiction to deal with the Adjudication Application and should have dismissed the Application pursuant to s 270(1)(a) of the BCCMA.[6]

[23] In my view, the error referred to in paragraph 19(a)(i) above is not a matter going to jurisdiction; rather, the issue is whether or not the Adjudicator erred in law in reaching the relevant conclusion.

[24] The two decisions of adjudicators relied upon are *The Avenues*[7] and *Kawana Island Villas*[8]. I reject the Body Corporate's submission that the Appellant is not entitled to refer to these decisions because they were not referred to below.[9] If such decisions are material, I consider that there is no obstacle to the Appellant referring to them on appeal.

[25] In my view, *The Avenues* does not support the Appellant's contention. That case involved two main issues. First, whether the by-law in question (by-law 24) was inconsistent with the *Dividing Fences Act 1953* (Qld) (the 1953 Act) and, second, whether the body corporate should be required to replace two sections of fence dividing the applicant's lot from the common property (which sections had been removed by the body corporate) or, alternatively, whether the applicant should be excused from paying for the cost of the fencing.

[26] As to the first issue, the adjudicator said, relevantly:

> … The Dividing Fences Act does not prescribe all matters dealing with fencing and allows for individual agreements on types of fences. There is no reason why owners would not be able to comply both with the by-law and

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3 Further Appeal Submissions, paragraphs 5-7.
4 Further Appeal Submissions, paragraphs 8-9.
5 Further Appeal Submissions, paragraphs 10-11.
6 See, in particular, paragraphs 19, 27, 28 and 29.
7 [2008] QBCCMCmr 444.
8 [2005] QBCCMCmr 648.
9 Body Corporate's Initial Response Submissions, paragraphs 2.4(a) and 2.5(a).

> with any procedures set out in the Dividing Fences Act. Any owner replacing a fence is likely to share that responsibility only with the body corporate or another owner in the scheme and any additional limitations imposed by by-law 24 appear unlikely to result in any inconsistency with any other law. I do not accept a by-law is inconsistent with another law simply because the by-law imposes a greater obligation on the owner provided that a person can comply with a by-law and the other law at the same time. For example, the standard by-law for parking of vehicles may well impose a greater limitation than many local council laws that regulate parking but occupiers would still be able to comply with both the local law and the standard parking by-law (*Act, Schedule 4 Item 2).*
>
> …

[27] The adjudicator found that, in principle, there was no reason why a lot owner would not be able to comply with both a by-law and any procedures set out in the 1953 Act.

[28] As to the second issue, the adjudicator said:

> I am of the view that questions of this nature should be dealt with pursuant to the Dividing Fences Act 1953 in an appropriate jurisdiction. Such a dispute is separate from the question of the validity of by-law 24 and requires consideration of the provision of the Dividing Fences Act rather than being about rights, powers, or contraventions in respect of the Body Corporate and Community Management Act *(Act 227-229, 276)*. The present application will therefore be dismissed in this respect for lack of jurisdiction and on the basis this dispute should be dealt with in a court or tribunal of competent jurisdiction *(Act 270(1), 270(2))*.

[29] In that instance, the adjudicator made no mention of any by-law which governed the replacement of the fence. In my view, the adjudicator's reasoning was that the issue did not involve the operation of, or contravention of, a particular by-law. By-law 24 only addressed the maximum height of a fence if it was replaced. Consequently, there was no issue about rights, powers or contraventions in respect of the BCCMA. The issue was left for determination under the 1953 Act (it is implicit in the finding that the dispute in that case could have been determined under the 1953 Act).

[30] In *Kawana Island Villas*, the adjudicator made an order that a resolution purporting to authorise the body corporate committee to paint the wooden parts of fences between the common property and individual lots within a scheme was invalid (on the basis that each individual owner had joint responsibility with the body corporate for those fences and the consent of each individual lot owner was necessary for any alterations to those fences).

[31] A number of findings were made in the course of the reasons.

[32] First, the adjudicator said:

> Provisions of the *Dividing Fences Act 1953* apply to fences between lots. Ordinarily the body corporate will be responsible for a fence that forms the perimeter of the scheme, this responsibility being shared with any neighbouring owner outside the scheme. However, adjacent lot owners within the scheme will ordinarily share responsibility for fences between their respective lots. Further, if the fence is instead between the lot and common property then the lot owner will ordinarily share responsibility for the fence with the body corporate, as though the body corporate was the owner of the common property *(Act, 311)*.

[33] To the extent (if any) that the passage could be taken to be relevant to a consideration of the application of the NDA to a dividing fence between common property and an individual lot, I consider that this statement is open to argument for the reasons discussed below. In any event, the above statement does not provide support for the proposition that a jointly owned dividing fence cannot be the subject of by-law 6 in the present dispute.

[34] Second, the adjudicator in *Kawana Island Villas* found that there was jurisdiction to determine the dispute, saying:

> An adjudicator has exclusive jurisdiction to make an order that is just and equitable to resolve a dispute between an owner and the body corporate about the exercise of rights or powers, or performance of duties, under the *Body Corporate and Community Management Act* or the community management statement *(Act 228, 229, 276)*. This dispute is clearly within this exclusive jurisdiction to the extent that it concerns a decision of the body corporate to paint wooden parts of fences rather than to regularly apply wood stain. It involves consideration of the provisions of the *Body Corporate and Community Management Act* regarding maintenance and improvements as well as consideration of the by-laws under the community management statement. I have therefore decided it is appropriate for me to determine this dispute, even though it may also require consideration of some of the provisions of the *Dividing Fences Act 1953* which are normally considered in disputes before a Magistrates Court or Small Claims Tribunal.
>
> (citation omitted)

[35] I accept the Body Corporate's submission that this passage does not support the Appellant's contention that the Adjudicator in the present dispute had no jurisdiction to determine the dispute.

[36] Third, in relation to the obligation for the maintenance of the fence, the adjudicator in *Kawana Island Villas* said:

> Based on the survey plans provided, parts of the fences are wholly within the individual lot boundary but at least parts of the fence have the face of the wall on the boundary line or on common property. The boundary is formed by survey pegs rather than a line along the centre of the fence so it is not possible to clearly say that the body corporate is responsible for the exterior surface of the fence and the individual owner is responsible for the interior surface. Being a structure that effectively forms a boundary between a lot and common property that is partially on the lot and partially on common property I conclude that maintenance responsibilities need to be jointly shared by the body corporate and each lot owner of land upon which the fence is partially situated.

[37] And later in those reasons:

> As the body corporate and the individual owners have a joint responsibility in respect of the fences, the consent of both parties is necessary for any changes to a particular fence. I will therefore make an order that the resolution purporting to authorise the body corporate committee to unilaterally paint the fences is invalid.

[38] The parties here do not challenge the correctness of that statement. In my view, a finding that the consent of both parties is necessary for changes to be made to a particular dividing fence does not support the Appellant's contention. The relevant issue in the present context is whether by-law 6 applies to the dividing fence

between Lot 21 and the common property and, in my view, this issue turns on the proper construction of the by-law (subject to the argument as to invalidity).

[39] There is some overlap between this issue and the Appellant's contention in relation to whether by-law 6 was a by-law "about a dividing fence".

[40] In the Further Appeal Submissions, the Appellant contends:[10]

> The Adjudicator concluded that by law [sic] 6 is a bylaw "about a dividing fence", on the basis that because the body corporate has an interest in the fence, the fence "forms part of the common property" for the purpose of by law [sic] 6.
>
> (citations omitted)

[41] The Appellant then refers to the Adjudicator's observations in relation to by-laws 6, 11 and 12 and submits that:

> "Nothing in those by laws [sic] gives any impression or basis to conclude that those by laws [sic] are intended to govern disputes over a dividing fence." [11]

[42] In my view, the Adjudicator did not express any conclusion that by-law 6 is a by-law "about a dividing fence".

[43] While the Adjudicator did refer to s 10 of the NDA, which provision included a reference to a by-law under the BCCMA about a dividing fence, the Adjudicator did so, in conjunction with a reference to s 5 of that Act, in a process of construction of the NDA in order to demonstrate that the Tribunal did not have "exclusive jurisdiction" to determine disputes about a dividing fence in a community titles scheme. Paragraph [84] of the Reasons, which is expressly referred to by the Appellant, does not contain the alleged conclusion or finding. That paragraph refers to the previous conclusion that the Body Corporate has an interest in the Fence and noted that the Adjudicator needed to be satisfied that by-law 6 applied (also noting that the Appellant did not specifically dispute that the Fence was a "structure that forms part of the common property"). The Adjudicator then proceeded to address the application of by-law 6 at Reasons [85]-[91].

[44] The findings made by the Adjudicator insofar as they are relevant to the Appellant's contention were that:

(a) under the BCCMA anything owned by a body corporate is either common property or a body corporate asset, being the former if it is incorporated into land that is part of the common property;[12]

(b) there was no basis in either the NDA or the BCCMA to justify the Appellant's contention that he was the sole owner of the Fence;[13]

(c) the Body Corporate had an "ownership interest" in the Fence;[14]

(d) a fence is a "structure" within the ordinary meaning of that word;[15]

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10 Reasons for Decision at [36].
11 Reasons for Decision at [37]. See also [42]-[43].
12 Reasons for Decision at [52].
13 Reasons for Decision at [56].
14 Reasons for Decision [56], [84].
15 Reasons for Decision at [86].

(e) "in a sense" a dividing fence on a boundary between a lot in common property is on both at the one time (but the Adjudicator did not need to decide whether, under the BCCMA, the Fence was a body corporate asset or part of the common property);[16]

(f) a fence in which the Body Corporate has an interest and which is incorporated into the boundary between a lot and common property, is subject to by-law 6.[17]

[45] In my view, the Adjudicator correctly identified that the issue in question was whether the dispute between the Body Corporate and the Appellant involved a contravention of by-law 6 and that, in turn, involved the question of whether the Fence was a structure that formed part of the common property for the purposes of by-law 6 (and, if so, was contravened by the Appellant by installing the Gate). As to the former, I consider that the Adjudicator was correct in law in identifying the issue for determination. As to the latter, the conclusions reached involved, in my view, a question of fact or a mixed question of fact and law. The issue raised by the Appellant does not involve only a question of law and this ground of attack must necessarily fail as it is not permitted by virtue of s 289(2) of the BCCMA. In any event, I consider that the Appellant has not raised any arguable basis for challenging the specific findings referred to in paragraphs [44](a) to (e) above.

Exclusive jurisdiction of the Tribunal?

[46] The Appellant's contentions in relation to the issue of jurisdiction are set out in paragraphs 31 to 44 inclusive of the Further Appeal Submissions.

[47] The Appellant's overarching contention is that the dispute is one which is caught by the NDA and falls to be determined within the exclusive jurisdiction of the Tribunal and, consequently, was outside the scope of the jurisdiction of the Office (and the Adjudicator).

Adjudicator's findings

[48] As to whether the dispute was caught by the NDA, the Adjudicator proceeded on the basis that the fence was on the boundary between Lot 21 and the common property and appears to have accepted that it was a "dividing fence".[18]

[49] The Adjudicator referred to ss 12(1), 14(1)(a) and (e), 15(1) and (3), 26, 27, 30(3) and 33 of the NDA and then said:[19]

> [35] While those provisions create jurisdiction for QCAT to hear a dispute about a dividing fence in a community titles scheme, none say or necessarily imply that QCAT has *exclusive* jurisdiction to determine such disputes. I must therefore also look to the other provisions of the NDA to discern the affect the NDA has on other laws that may apply to dividing fences in a community titles scheme.
>
> [36] I note firstly that section 5 of the NDA says: "Unless otherwise expressly provided for in this Act, this Act does not affect the operation of another Act or law." Accordingly, the BCCM Act is affected by the NDA only to the extent expressly stated.

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16 Reasons for Decision at [88].
17 Reasons for Decision at [90].
18 Reasons for Decision at [42].
19 Reasons for Decision at [35]-[40].

> [37] Section 10 of the NDA refers expressly to the BCCM Act:
>
> (1) This chapter does not affect—
>
> (a) a covenant or agreement, other than an agreement under this chapter, made between adjoining owners about a dividing fence before or after the commencement of this section; or
>
> (b) a by-law under the Body Corporate and Community Management Act 1997 or the Building Units and Group Titles Act 1980 about a dividing fence; or
>
> (c) a law about retaining walls or rights of support, including easements of support.
>
> (2) To remove any doubt, it is declared that this chapter does not prevent the State, a local government or other entity from entering into an agreement to contribute to fencing work.
>
> [38] None of the other express references to the BCCM Act in the NDA are relevant to fences.
>
> [39] Therefore, regardless of the application of the NDA to the fence, I am satisfied that the BCCM Act and By-law 6, if they could apply in this case at all, continue to apply unaffected by the NDA.
>
> [40] It follows that I am satisfied I have jurisdiction to determine this matter according to the provisions of the BCCM Act and the regulation modules [sic] and by-laws made pursuant to it.
>
> (citation omitted)

[50] The Adjudicator further said:[20]

> To give it the context the respondent apparently prefers, under section 27 of the NDA, as an equal owner, the Body Corporate would be entitled under that Act (and separately from any entitlement to a remedy under this Act) to apply for an order to have the fence and restored "to a reasonable standard, *having regard to its state before the thing was attached*" (emphasis added). As I have said, this application is to be determined regardless of the provisions of the NDA. However, given the respondent's reliance on it for his position, it is notable that if anything its provisions tend to support the Body Corporate's position.

[51] In my view, the appropriate starting point for determining the issue of exclusive jurisdiction is whether, subject to the impact of the NDA, the Adjudicator had jurisdiction to deal with the dispute.

Application of the BCCMA

[52] By virtue of s 228 of the BCCMA, Chapter 6 of that Act establishes arrangements for resolving, in the context of community titles schemes, disputes about, relevantly, contraventions of the BCCMA or community management statements; and the exercise of rights or powers, or the performance of duties, under the BCCMA or community management statements.[21]

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20 Reasons for Decision at [109].

21 Subsections 228(1)(a) and (b).

[53] A "dispute" for the purpose of Chapter 6 includes, relevantly, a dispute between the body corporate for a community titles scheme and the owner or occupier of a lot included in the scheme.[22]

[54] Further, s 184 of the BCCMA provides:

> (1) This section applies if—
>
> (a) a dispute exists between the body corporate for a community titles scheme and the owner or occupier of a lot included in the scheme; and
>
> (b) the dispute arises because the body corporate reasonably believes
>
> (i) the owner or occupier has contravened a provision of the by-laws for the scheme; and
>
> (ii) the circumstances of the contravention make it likely the contravention will continue or be repeated.
>
> (2) The body corporate may make an application under chapter 6 for resolution of the dispute only if the body corporate has given the owner or occupier a contravention notice for the contravention the subject of the dispute.
>
> (3) This section is subject to section 186.

[55] An adjudicator may make an order dismissing the application if, amongst other matters, it appears to the adjudicator that the adjudicator does not have jurisdiction to deal with the application.[23]

[56] Section 276 provides for the orders that an adjudicator may make. This provision provides, relevantly:

> (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
>
> …
>
> (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.
>
> …

[57] Further, by virtue of the definition of "order" in Schedule 6 to the BCCMA, for an application under Chapter 6 for the resolution of a dispute, an adjudicator may make an order dismissing the application.

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22 Subsection 227(1)(b).

23 Subsection 270(1)(a).

[58] In my view:

(a) the Adjudication Application involved a dispute about a claimed contravention of the community management statement (with the by-laws forming part of the community management statement); and

(b) subject to the Appellant's contentions in relation to the exclusive jurisdiction of the Tribunal, the Adjudicator had jurisdiction to determine the dispute.

[59] I consider the next issue is whether the dispute was amenable to resolution pursuant to the NDA. If it was not, the Tribunal could not have had jurisdiction to deal with the dispute.

Application of the NDA

[60] As I read the reasons of the Adjudicator, the Adjudicator appears to have been satisfied (although it is not entirely clear)[24] that the dispute between the Appellant and the Body Corporate was one which could have been the subject of an application to the Tribunal under the NDA.

[61] The Body Corporate, by its submissions, accepts that the Fence constituted a dividing fence.[25] Further, the import of the submissions is that the Body Corporate accepted that the Adjudicator concluded that the dispute was one which may have been subject to determination under the NDA (in particular by reference to its submissions in relation to "non-exclusive jurisdiction").[26]

[62] In one of the adjudication decisions relied upon by the Appellant in this appeal, namely, *Kawana Island Villas*, it was said:

> Under a building format plan any fences are normally solely on common property and the *Dividing Fences Act 1953* only applies between the body corporate and any neighbouring owner outside scheme land regarding fences around the outside of the scheme land. However, for Kawana Island Villas, the private yards surrounding the buildings form part of the lot and fences are approximately on the boundaries of the lot and common property. Each lot owner will therefore be an adjoining owner with the body corporate for the purposes of the *Dividing Fences Act 1953 (Body Corporate and Community Management Act, 311).*

[63] In my view, for the following reasons, it is open to argument whether a dispute about a dividing fence which separates common property and a lot within the same community titles scheme is caught by the provisions of the NDA (on the proper construction of the BCCMA and the NDA).

[64] Pursuant to s 311(1) of the BCCMA, the body corporate for a community titles scheme is taken to be the owner of the "scheme land" for each of the *Land Act 1994* (Qld) and the NDA.

[65] The definition of "scheme land" in the Dictionary to the BCCMA refers to s 10 of that Act. Section 10 provides:

> **10 Meaning of *community titles scheme***
>
> (1) A ***community titles scheme*** is—

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24 Cf Reasons for Decision at [55] in a different context.
25 Paragraph 3.2 of the Initial Response Submissions.
26 Paragraph 5.3(b)(iv) of the Body Corporate's subsequent submissions.

(a) a single community management statement recorded by the registrar identifying land (the ***scheme land***); and

(b) the scheme land.

(2) Land may be identified as scheme land only if it consists of—

(a) 2 or more lots; and

(b) other land (the ***common property*** for the community titles scheme) that is not included in a lot mentioned in paragraph (a).

Note—

Common property for a community titles scheme is, effectively, freehold land forming part of the scheme land but not forming part of a lot included in the scheme.

(3) Land can not be common property for more than 1 community titles scheme.

(4) For each community titles scheme, there must be—

(a) at least 2 lots; and

(b) common property; and

(c) a single body corporate; and

(d) a single community management statement.

(5) A community titles scheme is a ***basic scheme*** if all the lots mentioned in subsection (2)(a) are lots under the Land Title Act.

(6) However, under this Act, a lot may be, for its inclusion in a community titles scheme other than a basic scheme, another community titles scheme.

Note—

Schedule 1 contains examples of possible structures of community titles schemes.

[66] By virtue of s 10, the scheme land comprises all lots within the scheme and the common property for the scheme. The distinction drawn between lots in a community titles scheme on the one part and the common property for that scheme on the other is reinforced by the Note to s 10(2) which provides:

> Common property for a community titles scheme is, effectively, freehold land forming part of the scheme land but not forming part of a lot included in the scheme.

[67] Returning to s 311 of the BCCMA, I consider that s 311(3) provides a carve out of the operation of s 311(1) but only insofar as the NDA is concerned. Section 311(3) provides:

> However, for the *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011*, owners of adjoining lots included in a community titles scheme are taken to be the owners of adjoining land.

Examples—

A layered arrangement of community titles schemes consists of a principal scheme (***scheme A***) which in turn includes 2 basic schemes (***scheme B and scheme C***), and, of course, the common property for scheme A.

- If a matter under the *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* concerns a boundary between scheme land for scheme A and a lot (***lot X***) that is not scheme land for scheme A or another community titles scheme, the owners are the body corporate for scheme A and the registered owner of lot X.

- If a matter under the *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* concerns a boundary between scheme land for scheme B and scheme land for scheme C, the owners are the body corporate for scheme B and the body corporate for scheme C. This will apply even if the length of boundary that is of concern happens also to be the boundary between a lot included in scheme B and a lot included in scheme C.

- If a matter under the *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* concerns a boundary between a lot (***lot Y***) included in scheme B and another lot (***lot Z***) included in scheme B, the owners are the owner of lot Y and the owner of lot Z.

[68] The term "lot" is defined in the BCCMA to mean, relevantly "a lot under the *Land Title Act*, but if the lot is included in a community titles scheme other than a basic scheme, the lot could be another community titles scheme".

[69] With respect to an "owner", the term is defined in the BCCMA as follows:

> owner, of a lot (other than a lot that is a community titles scheme) included in a community titles scheme, means—
>
> (a) the person who is, or is entitled to be, the registered owner of the lot, and includes—
>
> (i) a mortgagee in possession of the lot; and
>
> (ii) if, under the Land Title Act, 2 or more persons are the registered owners, or are entitled to be the registered owners, of the lot—each of the persons; and
>
> (b) for chapter 6, see section 226.

[70] In my view, whilst s 311(3) plainly applies to a dispute in respect of a dividing fence separating two adjoining lots owned by separate lot owners within a community titles scheme, a question arises as to whether that subsection has application to a dispute in respect of a dividing fence separating a lot owned by a lot owner within the scheme and the common property within that scheme. In my view, none of the examples in s 311(3) covers a scenario concerning a boundary between a lot included in a scheme and the common property contained within the same scheme. Further, at first blush, it would appear incongruous to construe s 311(3) as applying to both a lot owner in, and the body corporate of, the same community titles scheme, having regard to s 10(2) of the BCCMA.

[71] Turning to the NDA, that Act provides for the resolution of disputes between "adjoining owners" about fencing work.[27]

[72] The definition of each of "adjoining owners" and "adjoining land" refers to, for Chapter 2 of the NDA, s 15 of the NDA. Section 15 provides:

> (1) ***Adjoining owners*** are the owners of the land on either side of a common boundary.
>
> (2) Also, the owners of agricultural land or pastoral land on either side of a road are ***adjoining owners*** if—
>
> (a) the owners agree to be adjoining owners under this chapter; or
>
> (b) QCAT decides a fence has been used, or could reasonably be used, as a dividing fence for the 2 parcels of land.
>
> *Note—*
>
> This means that a responsibility to contribute to fencing work may apply to a fence on 1 side of a road.
>
> (3) ***Adjoining land*** is the land on either side of a common boundary.

[73] "Common boundary" is defined as follows:

> ***common boundary***, for chapter 2, in relation to adjoining land consisting of 1 or more parcels of land separated by a watercourse, lake or other natural or artificial feature insufficient to stop the passage of stock at all times, includes the bed and banks of the watercourse, lake or other feature separating the lands.

[74] The definition of "owner" (for land) references s 14 of the NDA which provides, relevantly for present purposes:

> An *owner*, for land, is—
>
> (a) if the land is a lot recorded in the freehold land register under the *Land Title Act 1994*—the registered owner of the lot under that Act; or
>
> …
>
> (e) if the land is scheme land under the *Body Corporate and Community Management Act 1997*—the body corporate for the community titles scheme; or
>
> (f) if the land is a parcel of land the subject of a plan under the *Building Units and Group Titles Act 1980*—the body corporate for the plan; or
>
> …

[75] With respect to s 14(e) of the NDA, there is no definition of "scheme land" in the NDA (or in the *Acts Interpretation Act 1954* (Qld)). In addition to the BCCMA, "scheme land" is also defined in the Dictionary to the *Land Title Act 1994 (Qld)* (the LTA) which definition refers to s 115B(a)(i) of the LTA. Subsection 115B of the LTA and s 10 of the BCCMA are in the same terms save for the cross-referencing to the respective Acts in subsections (5) and (6), and the omission, from s 115B of the LTA, of the "Note" to s 10(2) of the BCCMA.

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[27] NDA, s 30.

[76] Given the context in which the phrase "scheme land" appears in s 14 (and s 49) of the NDA, I consider that the only workable meaning that can be given to that phrase is the meaning given to it in the BCCMA.

[77] Adopting that view, I consider that s 14(1)(e) of the NDA operates consistently with s 311(1) of the BCCMA. Consequently, a body corporate is taken to be the owner of all scheme land for the purposes of the NDA, subject to s 311(3) of the BCCMA and any exception to be found in the NDA.

[78] On my reading of the NDA, there is no express provision corresponding with s 311(3) of the BCCMA. Despite this, it may be arguable that a dispute between adjoining lot owners in a community titles scheme is caught by s 14(1)(a) of the NDA, particularly if the reasoning of the Appeal Tribunal in *Lowe v BGC Technical*[28] (which involved a tree dispute between adjoining lot owners involving a parcel of land the subject of a plan under the *Building Units and Group Titles Act 1980*) is applied by analogy. In any event, s 311(3) of the BCCMA deems such lot owners to be owners of adjoining land for the purposes of the NDA.

[79] However, where common property is involved, is a body corporate the registered owner of a lot (compromising the common property) for the purposes of s 14(1)(a) of the NDA?

[80] Section 41C of the LTA provides:

> (1) **In this Act, a reference to a lot is taken to include a reference to common property**.
>
> (2) **However, subsection (1) has effect only to the extent necessary to allow for the registration, and appropriate recognition under this Act, of dealings that**—
>
> **(a) affect common property (including dealings affecting interests in common property); and**
>
> **(b) are consistent with the BCCM Act.**
>
> (3) **In particular, subsection (1) has effect subject to the following principles**—
>
> - **there can be no registered owner for common property (although the body corporate for the community titles scheme that includes the common property is taken to be the registered owner for dealings affecting the fee simple interest in the common property)**;
> - the fee simple interest in the common property for a community titles scheme can not be the subject of sale or transfer (although a part of the common property might be the subject of transfer after the registration of an appropriate plan of subdivision and the recording of a new community management statement)
> - the fee simple interest in common property can not be the subject of a mortgage (although a lesser interest able to be created over common property, for example, a lease, might be the subject of a mortgage).

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28 [2016] QCATA 124.

> (4) **Without limiting subsections (2) and (3), subsection (1) has no application for the purpose of the following provisions—**
>
> - **this Act's definition of *lot***
> - division 2.
>
> (emphasis added)

[81] As s 41C(3) of the LTA makes clear, there can be no registered owner for common property (although the body corporate is taken to be the registered owner for dealings affecting the fee simple interest in the common property).

[82] Having regard to the various provisions identified above, I consider that questions arise as to whether, first, common property is a lot (and a body corporate is the owner of that lot) for the purposes of s 311(3) of the BCCMA and, second, whether a body corporate is the registered owner of a lot (comprising common property) for the purposes of s 14(1)(a) of the NDA.

[83] In turn, these questions are relevant to the issue as to whether a lot owner and a body corporate can be "adjoining owners" for the purpose of a dividing fence dispute under the NDA concerning a fence separating a lot from the common property. There is also a related issue of whether a lot (owned by a lot owner) within a community titles scheme and the common property within the same scheme constitute "adjoining land" for such a dispute.[29]

[84] However, given the apparent findings made by the Adjudicator in relation to the NDA, the absence of any challenge to such findings by the Body Corporate (or a positive submission by it that the NDA could have no application to the dispute), and that the issues require detailed consideration, I do not propose to express a concluded view in relation to the issue of whether the dispute between the Body Corporate and the Appellant was amenable to the jurisdiction of the Tribunal. For the purposes of this appeal, I will proceed on the basis that it was so amenable.

The issue of exclusive jurisdiction

[85] The Adjudicator rejected the Appellant's argument that the dispute was exclusively governed by the NDA. The relevant parts of the Reasons are set out at paragraph [49] above.

[86] The Appellant challenges this conclusion.[30] The Appellant's case on this issue, in substance, appears to be that the Parliament intended that disputes concerning dividing fences were to be heard and determined in accordance with the NDA unless by another law or "rule", the clear intent appeared that a fencing dispute ought to be determined in another way, and that by-laws 6, 11 and 12 provided no "clear and unambiguous impression" that they were intended to create a "door" through which a fencing dispute might be resolved outside of the NDA.[31]

[87] In my view, the Appellant's contentions should be rejected.

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29 The issue arises having regard to the operation of s 311(1) of the BCCMA and s 14(e) of the NDA, in the event that it should be concluded that neither s 311(3) of the BCCMA nor s 14(a) of the NDA apply to a dividing fence dispute between a lot owner and the body corporate within the same scheme.

30 Further Appeal Submissions, paragraphs 31-44.

31 Further Appeal Submissions, paragraphs 39-44.

[88] As addressed above, I have approached the appeal on the basis that the dispute was amenable to the dispute process under the NDA (notwithstanding the question as to whether a dispute such as the present one is caught by the provisions of the NDA).

[89] In my view, in order to ground a conclusion that the NDA denies jurisdiction to determine a dispute that would otherwise fall within the dispute resolution processes under the BCCMA, that would need to be made plain on a proper construction of the NDA. I consider that the NDA, on its proper construction, does not support such a conclusion and the Adjudicator was correct in finding that the NDA did not operate to preclude the Adjudicator from determining the dispute about the Fence.

[90] Section 5 of the NDA provides:

> Unless otherwise expressly provided for in this Act, this Act does not affect the operation of another Act or law.
>
> *Example—*
>
> > The *Electricity Act 1994, the Transport Infrastructure Act 1994 and the Vegetation Management Act 1999* also contain provisions about trees.

[91] In my view, there is no express provision in the NDA which limits the scope of the jurisdiction that may be exercised in respect of disputes falling within the scope of the BCCMA.

[92] Section 10(1)(b) of the NDA provides that Chapter 2 of that Act (which concerns dividing fences) does not affect a by-law under the BCCMA or the *Building Units and Group Titles Act 1980* about a dividing fence. In my view, this provision operates such that the provisions of Chapter 2 of the NDA do not override or otherwise affect the operation of a by-law made under the BCCMA. It should not be construed, as I apprehend the Appellant contends, as limiting the jurisdiction of an Adjudicator to determine a dispute only if it specifically concerns a by-law "about a dividing fence".[32]

[93] In my view, on the proper construction of the NDA, as a whole, the Act does not give exclusive jurisdiction to the Tribunal to determine disputes about a dividing fence within a community titles scheme and no error has been established by the Appellant.

[94] The next issue concerns the alleged invalidity of the by-laws.

Alleged invalidity of by-laws

[95] The Body Corporate submits that the Appellant's arguments raise a new ground of appeal; that such alleged invalidity was not raised before the Adjudicator and there can be no error on the part of the Adjudicator in failing to consider an issue that was not raised by the Appellant below.[33]

By-law 11

[96] The issue of by-law 11 was not central to the decision reached by the Adjudicator and was referred to as part of a process of construction of the by-laws. Further, in my view, if by-law 6 is valid, any finding as to the invalidity of by-law 11 could not have any bearing on the outcome of the Appeal. Given this, and that the argument

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32 Further Appeal Submissions, paragraphs [55]-[73], esp. [55], [59], [63].

33 Body Corporate's October 2021 Submissions, paragraphs 6.1-6.3.

was not raised below, I find that the Appellant is not entitled to raise this new ground on appeal.

By-law 6

[97] With respect to by-law 6, the application of this by-law was critical to the Decision. Although the point was not argued below, in my view, the question of its validity raises only a question of law involving the proper construction of the by-law and the application of settled law. There are no "nice questions of fact" to be resolved.[34] I am prepared to allow the Appellant to raise this ground of appeal.

[98] By-law 6 is in the following terms:

> An occupier of a lot must not mark, paint, drive nails or screws or the like into, or otherwise damage or deface, any structure that forms part of the common property except with the consent in writing of the body corporate, but this by-law does not prevent a proprietor or any person authorised by him from installing –
>
> (a) any locking or other safety device for protection of his lot against intruders; or
>
> (b) any screen or other device to prevent entry of animals or intersects upon his lot.
>
> Provided that the locking or other safety device or, as the case may be, screen or other device is constructed in a workman-like manner, is maintained in a state of good and serviceable repair by the proprietor and does not detract from the amenity of the building.

[99] The Appellant submits[35] that by-law 6 is invalid in that it prohibits rather than regulates the use and enjoyment of common property and reference is made to the decisions of *Minerology v Body Corporate for the Lakes Coolum*[36] (*Minerology*) and *Swan Hill Corporation v Bradbury*.[37] The Appellant refers in particular to the initial part of by-law 6.[38]

[100] I reject the Appellant's submission in relation to the invalidity of by-law 6 for the following reasons.

[101] First, I consider that by-law 6 is in substantively the same terms as by-law 5 of the standard by-laws provided for in the BCCMA[39] and this provides proof against the Appellant's challenge to by-law 6 being beyond power.[40]

[102] In *Minerology*, it was said by McPherson JA:[41]

> In the case of this body corporate, the standard by-laws were displaced by other express by-laws; but **it is well settled that provisions having, like the by-laws in Schedule 2, the benefit of statutory sanction by way of example are proof against challenge as being beyond power**. That has long been

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34 Cf *HAP2 Pty Ltd v Bankier* [2020] QCA 152 at [130].
35 Further Appeal Submissions, paragraphs 45-56.
36 [2003] 2 Qd R 381.
37 (1937) 56 CLR 746.
38 Appellant's Further Submissions, paragraphs 48-49.
39 Which apply if the community management statement does not include provisions that are, or purport to be, the by-laws for the scheme: s 168(2) of the BCCMA.
40 Cf Body Corporate's October 2021 submissions paragraph 6.4(f).
41 At p 386.

> recognised in the case of Table A to the Companies Act. See *Lock v Queensland Investment & Land Mortgage Co.* [1896] AC 461, 466, 467. By comparison, the provisions in by-law 53.1 afford a standard that is considerably more precise and less arbitrary than that prescribed by the words "detracts from the amenity of the lot and its surrounds" appearing in the standard by-law 8(1).
>
> (emphasis added)

[103] Section 168 of the BCCMA provides:

> (1) By-laws, for a community titles scheme, are provisions that appear in the community management statement under the heading of "BY-LAWS".
>
> (2) However, if the community management statement does not include provisions that are, or that purport to be, the by-laws for the scheme, the by-laws for the scheme are the provisions stated in schedule 4.

[104] Schedule 4 contains a number of by-laws including by-law 5 which concerns damage to common property and is in the following terms:

> (1) **An occupier of a lot must not, without the body corporate's written approval, mark, paint, drive nails, screws or other objects into, or otherwise damage or deface a structure that forms part of the common property.**
>
> (2) However, an occupier may install a locking or safety device to protect the lot against intruders, or a screen to prevent entry of animals or insects, if the device or screen is soundly built and is consistent with the colour, style and materials of the building.
>
> (3) The owner of a lot must keep a device installed under subsection (2) in good order and repair.
>
> (emphasis added)

[105] In my view, by-law 5(1) is, substantively, in the same terms as that part of by-law 6 sought to be impugned by the Appellant.

[106] I find that, on the proper construction of the BCCMA, it cannot be concluded that it was the intent of the legislature that it is beyond power to pass a resolution adopting a community management statement that includes a by-law which, in substance, reflects the standard by-laws provided for in Schedule 4 to the BCCMA.

[107] Second, in my view, by-law 6 should not be characterised as prohibiting, rather than regulating, the use and enjoyment of the common property for the Scheme.

[108] Section 169(1) of the BCCMA provides:

> (1) **The by-laws for a community titles scheme may only provide for the following**—
>
> (a) the administration, management and control of common property and body corporate assets;
>
> (b) **regulation of, including conditions applying to, the use and enjoyment of**—
>
> (i) lots included in the scheme; and

> (ii) **common property**, including utility infrastructure; and (iii) body corporate assets, including easement areas relevant to common property; and (iv) services and amenities supplied by the body corporate; (c) other matters this Act permits to be included in by-laws.
>
> (2) If there is an inconsistency between a by-law and a provision (the other provision) of the community management statement that is not a by-law, the other provision, to the extent of the inconsistency, prevails.
>
> (emphasis added)

[109] In *Crystal Waters Permaculture Village & Ors v Boyle*,[42] it was said by Member Roney QC:[43]

> Associate Professor Sherry has made the observation in her work entitled "Strata Title Property Rights: Private governance of multi-owned properties" published in 2016 that characterisation of the prohibition on pets as "not regulation" is untenable. She expresses the view that logically and as a matter of legal reality regulation frequently prohibits certain activities; for example the fisheries legislation, which was the subject of the High Court decision in Akiba on behalf of Torres Strait Regional Seas Claim Group v Commonwealth of Australia [2013] HCA 33 was clearly regulation yet it implemented a blanket prohibition on commercial fishing without a licence. Properly understood as a power to regulate by making by-laws for the regulation of the use and enjoyment of lots and common property, regulation of, or even prohibitions on some kinds of pets onsite is a subcategory of the general regulation of the property itself. **Conceptually one could prohibit entirely certain conduct on common property for example and it could still constitute regulation of the use of common property albeit prohibition of a specific activity**.
>
> (emphasis added)

[110] In *Body Corporate for River City Apartments CTS 31622 v Lauren McGarvey*,[44] it was said by Member Barlow SC (as he then was):[45]

> … As the Court of Appeal made clear in Mineralogy at [8]-[9], the power to regulate an activity implies that the activity will, despite such regulation, be capable of continuing, which it would not do if it were completely prohibited. **Prohibition of an activity in part, in a particular case, or in a particular way, may in some cases be needed to achieve effective regulation**. In the case of a vacant lot, a basic right of a landowner is to build a dwelling on the land. Such a basic right cannot be prohibited under a provision such as s 169.
>
> (emphasis added)

[111] Consistently with the above observations, I consider that the prohibition of certain conduct or activities occurring on common property may, in some circumstances, amount to regulation of the use or enjoyment of common property rather than prohibition.

[112] In the present case, save for the express exceptions of a safety device or relevant screen, by-law 6 prohibits, what I would summarise as, conduct by which some

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42 [2020] QCATA 80.
43 At [39].
44 [2012] QCATA 47.
45 At [37].

physical alteration is made to any structure that forms part of the common property, subject to the consent in writing of the Body Corporate being obtained. The by-law prohibits the specified activity from occurring (without consent) but the use and enjoyment of the common property is otherwise unaffected. That physical changes cannot be made to common property without consent (in addition to the specified exceptions) cannot be considered to preclude the exercise of a "basic right". In my view, by-law 6 constitutes the regulation of the use and enjoyment of the common property.

[113] I consider that this conclusion is fortified by the inclusion of the words "including conditions applying to" (the regulation of the use and enjoyment of the common property) in s 169(1)(b) of the BCCMA. In my view, the terms of by-law 6 may be viewed as imposing a condition on the use and enjoyment of the common property, namely, that the use and enjoyment does not extend to making physical alterations to structures forming part of the common property (without consent).

[114] I reject the Appellant's contention that by-law 6 is invalid.

"Gate Approved or Adjudication Application Estopped"

[115] The Appellant's contentions in relation to this Ground are set out in paragraphs 55 to 73 inclusive of the Further Appeal Submissions. This Ground must necessarily be raised in the alternative to the Appellant's Submissions in relation to jurisdiction.

[116] The Appellant contends that the Adjudicator erred by failing to make an order that was just and equitable, under s 276 of the BCCMA, approving the installation of the Gate "but with the condition attached such as use of the [Gate] shall be restricted until the perceived concerns of the [Body Corporate] around access over common property were addressed".[46]

[117] The Appellant's Submissions include the following:

> (55) Under section 276 of the Act an Adjudicator may make an order that is just and equitable in the circumstances to resolve a dispute. In my opinion a just and equitable outcome has not been delivered because the Adjudicator fails to deal with an important fact when justifying the decision made.
>
> (56) In the citation the Adjudicator states that "There is no dispute that the gate installation was not approved" and the outcome sought by the BC was for the fence to be reinstated to its original form because of breaches to bylaw 6 of the scheme. The Adjudicator ultimately agreed and delivered a decision directing that I remove the gate.
>
> (57) In all of the correspondence with the BC about the improvement request over the last 4 years, the BCC never at anytime questioned the form of the gate in itself and had agreed in principle to the location of the gate based on their own recommendation. In the expectation that the BCC would follow through on its agreement in principle, I installed the gate exactly where they had recommended and the improvement applications I submitted reflected exactly that position.

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[46] Appellant's Further Submissions, paragraphs 55, 63, 73.

> (58) In reaching the conclusions in the citation, The Adjudicator appears to have given no consideration to this actual fact and has clearly not referred to the submissions made by the BC in the original application.
>
> (59) Therefore the Adjudicator taking into account the actions of the BCC, had other options available that would have provided for a far more just and equitable outcome than making me remove the gate, that being to approve the gate based on the correspondence provided.

[118] In determining what order is just and equitable, the exercise of discretion arises.[47] Consequently, the essence of the Appellant's complaint is that the Adjudicator failed to exercise his discretion to order the (conditional) approval of the Gate rather than making the orders made.

[119] There are a number of difficulties for the Appellant on this Ground.

[120] First, I accept the Body Corporate's argument that such an order was not sought below.[48] As noted above, the Adjudicator addressed the Appellant's argument in relation to unreasonableness and vexatiousness etc. The Adjudicator considered and rejected those arguments. The Adjudicator did not err in failing to consider an argument not put to him.

[121] Second, as submitted by the Body Corporate, the Appellant had previously applied to the Office for orders allowing the Appellant to install the Gate and that application was dismissed and was not appealed by the Appellant. This was expressly noted by the Adjudicator in the Reasons for Decision:[49]

> [8] The dispute began in 2017 when the respondent first unsuccessfully applied to the Body Corporate's committee for permission to install a gate in the fence between his Lot and the common property. A further application was made by the respondent in July 2019, which the committee again refused.
>
> [9] The respondent then applied to this Office for adjudication of the dispute, in effect seeking orders to allow him to install the gate, on the grounds the committee's refusal was unreasonable. That application was dismissed and was not appealed.
>
> (citation omitted)

[122] Third, the matters raised by the Appellant would require a careful consideration of the evidence and the making of factual findings such as whether the Body Corporate "created an expectation that the [Gate] would be approved if [the Appellant] placed it in the position that they recommended".[50] This is against the background that the Adjudicator found that the installation of the Gate was not approved and this constituted a contravention of by-law 6.

[123] The Appellant is, in effect, seeking to reagitate the issue the subject of his previous application that has been concluded.

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47 See eg *Norbis v Norbis* (1986) 161 CLR 513, 518-19 (Mason and Deane JJ).

48 Body Corporate's Initial Response Submissions, paragraphs 2.4(b) and 2.5(a).

49 At [8]-[9]. See also [117] where the Adjudicator also said that it was not appropriate for him to revisit those decisions.

50 Body Corporate's Initial Response Submissions, paragraph 5.4(b); Appellant's Further Submissions, paragraph 68.

[124] In the circumstances identified above, I consider that the Appellant has failed to demonstrate any error of law on the part of the Adjudicator by failing to make the order now sought by the Appellant (or some similar order).

Orders

[125] For the above reasons, the appeal should be dismissed and I order accordingly.

[126] As to the question of costs, it is ordered that:

(a) each party shall file and serve, within 14 days of the date of these Orders, written submissions, limited to 5 pages in length, in relation to the costs of the appeal;

(b) each party shall file and serve any submission in response, limited to 3 pages in length, within 7 days of receipt of the other party's submissions.