

QUEENSLAND CIVIL AND ADMINISTRATIVE TRIBUNAL

CITATION: *Reef Terraces (Two) CTS 18180 v The Body Corporate for Reef Terraces CTS 888* [2023] QCAT 326

PARTIES: **REEF TERRACES (TWO) CTS 18180**
(appellant)
V
BODY CORPORATE FOR REEF TERRACES CTS 888
(respondent)

APPLICATION NO/S: APL313-22 and APL005-23

ORIGINATING APPLICATION, NO: BCCM Ref. 346-22 and 658-22

MATTER TYPE: Appeals

HEARING DATE: 18 July 2023 and later written submissions delivered by each party on 31 July 2023 and 15 August 2023

DELIVERED ON: 25 August 2023

DECISION OF: Member Roney KC

ORDERS: **The Applications for leave to appeal or appeal filed 26 October 2022 and 5 January 2023 are dismissed.**

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 – GENERALLY – LOT OWNER’S RIGHTS TO USE COMMON PROPERTY – where a motion purports to limit access to the common property recreational facilities to only certain Lot owners and guests thereby excluding the other lot owners in the Scheme from accessing the common property facilities

RESOLUTION OF BODY CORPORATE to COMMITTEE RESOLUTION – whether a committee

resolution to change the security gate locks from coded locks to security key locks and issue one security key to each lot owner, was a decision on a restricted issue and therefore invalid.

Body Corporate and Community Management Act 1997 (Qld), s 35, 45, 94 and 100; Commercial Module, ss 17(1) (a)

Body Corporate and Community Management Act 1997 (Qld) (Act), sections 35, 45, 227, 229(3)(a), 276, 289, and 290 and

Body Corporate and Community Management (Commercial Module) Regulation 2020 (Commercial Module), s 17

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

Clarke & Anor v Body Corporate for Turner Park Shopping Village CTS [2019] QCATA 51

Reef Terraces (Two) [2022] QBCCMCmr 344

Reef Terraces (Two) [2022] QBCCMCmr 433

Thompson v Body Corporate for Arila Lodge & Anor [2018] QCATA 56

Thornton Tower [2006] QBCCMCmr 74

Turtle Beach [2006] QBCCMCmr 363

Villanella [2017] QBCCMCmr 248

APPEARANCES:

Appellant: B Strangman of Counsel instructed by Grace Lawyers

Respondent: H Lilley of Counsel instructed by Hynes legal

REASONS FOR DECISION

- [1] These are two applications for leave to appeal or appeal filed 26 October 2022 and 5 January 2023 from decisions of an Adjudicator appointed by the Queensland Body Corporate and Community Management Commissioner. The first decision was handed down on 15 September 2022 and is cited as Reef Terraces (Two) [2022] QBCCMCmr 344. There was a later decision of 24 November 2022 by the same Adjudicator, cited as Reef Terraces (Two) [2022] QBCCMCmr 433.
- [2] The Appellant, whom I shall refer to as Reef Terraces Two, is the Body Corporate of a community titles scheme that comprises 28 lots most of which are described as villas, and also comprises some common property which includes a pool and other facilities on the common property. A physically adjacent, i.e., neighbouring, but strictly unrelated scheme in which the Respondent *Body Corporate for Reef Terraces CTS 888*

is the Body Corporate, comprises a 146 lot community titles scheme. In submissions, the respective developments were described as rather different in that Reef Terraces Two's scheme, a much smaller development, had villas which were occupied by owners or their long-term tenants, whereas the Reef Terraces One scheme was conducted as a resort or holiday accommodation

- [3] Reef Terraces One is the registered owner of two lots in the Appellant's community titles scheme, namely Lots 27 and 28. The material includes photographs of what has been erected on that site and which show that erected on Lots 27 and 28 are somewhat aged buildings, perhaps pre-existing the rest of the development on the scheme by many years, and were used by an entity which was the caretaker of both developments. The two schemes are quite separate and not layered schemes, so the only formal arrangement between them in terms of common property concerns the Respondent's entitlements, if any, to make use of the common property on Reef Terraces Two and of course also its entitlements as the owner of Lots 27 and 28 in Reef Terraces Two.
- [4] For the purposes of these appeals, it is critical to understand at a broad level how the dispute that led the matter to this Tribunal arose. The resort operation conducted on Reef Terraces One had a large pool which it was said was strictly supervised by resort staff. There was also a relatively small pool on Reef Terraces Two site, and that pool was surrounded by the villas owned by lot owners other than the Respondent. The Respondent's two lots were separate and some way away from the villas which surround its pool. Problems were perceived to have arisen by Reef Terraces Two Body Corporate when it was thought that some of the Reef Terraces' residents and holiday guests were making use of the Reef Terraces Two pool which was unsupervised and as a result, they caused what were thought to be problems, for example broken glass in the pool and surrounds. There were other problems perceived to exist with maintaining control over the Reef Terraces Two pool and surrounds. At one time, entry could be made to the Reef Terraces Two pool area by any person who knew the code because the gate or gates to the pool area were able to be opened with a code and nothing more.
- [5] The trouble that led to this matter coming before the adjudicator began when 22 of the 28 lot owners in Reef Terraces Two voted to secure those gates to prevent entry to the area by what they saw as undesirable individuals.
- [6] There was very little evidence at all, and if there was any evidence it was probably not particularly compelling to the adjudicator about what the nature and use to which the buildings in lots 27 and 28 were put. One of the submissions made to the Adjudicator was that it was wholly commercial and a non-residential structure and was exclusively managed and operated by a caretaker which was not of course Reef Terraces One Body Corporate. The submission suggested that the caretaker paid the quarterly strata levies at Reef Terraces Two. It was suggested that owners and residents of Reef Terraces Two had no access rights to those buildings and that it served as a laundry and storage workshop area and contained maintenance and gardening equipment for the caretaker's staff. It was suggested that the caretaker's staff performed no gardening or maintenance functions for Reef Terraces Two as that work had been separately contracted out by Reef Terraces Two committee. The building had no residents' facilities to support residential use. From the outside it looked like a small office space which was closed between the hours of 6pm to 6am each day.

- [7] In another submission to the adjudicator, it was asserted that lots 27 and 28 were commercial lots which were contractually leased for the exclusive control and use of the caretaking company which was called Dekhi-RR Pty Ltd and was accessible only to caretaker staff.
- [8] There was no independent evidence of what the formal or legal arrangements were between the Respondent and any such caretaker. The notion that they were contractually leased is unsupported by any legal document recording that arrangement, or indeed any evidence to suggest that the person who made that submission, namely the owner of Lot 7, had any direct reliable evidence of what the arrangements were. There is no evidence that demonstrated that the Respondent did not seek to or continue to hold occupation or other rights to lots 27 and 28 or that it was legally excluded from being in possession of or in occupation of either of those lots at any material time.
- [9] There is actually a third, and also adjacent Body Corporate called Reef Terraces Three Body Corporate and scheme. In 2008, there was a motion passed that the three bodies corporate entered into a shared facilities agreement as a method for equitably sharing the aggregate body corporate sinking fund costs of the entirety of the three developments. One of the issues which went before the Adjudicator in the decision which is the first decision under appeal, was whether the Body Corporate ought to be prevented from putting into effect a resolution from a general meeting purporting to terminate that shared facilities agreement. The second issue was whether those resolutions were reasonable and whether the body corporate was acting reasonably in enacting them. As I mention shortly neither of those issues are the subject of this appeal.
- [10] On 4 February 2022, Reef Terraces Two Body Corporate purported to terminate the shared services agreement by a motion presented to a general meeting that also resolved the access to recreational facilities in the secured common area, i.e. the pool area would be restricted to owners, tenants and guests of accommodation villas Lot 1 to 25, but not lot 26 or those owned by the Respondent, Lots 27 and 28. One of the issues before the Adjudicator was whether Reef Terraces Two had properly terminated the shared facility agreement. No issue concerning the decision on that point is raised in this appeal nor is there any issue on this appeal as to whether the body corporate was acting reasonably as it did in relation to that agreement. Reef Terraces One brought an application as the owner of Lots 27 and 28 contending that the termination of the alleged shared services contractual agreement with it was not valid. The Adjudicator held that adjudicators did not have jurisdiction to declare whether a contract was formed and, outside the reasonableness of the decision to determine the rights and obligations under that contract, including its termination, the question of the validity of the termination was not able to be determined. There is no appeal from that decision.
- [11] The first appeal concerns the Body Corporate's resolution that access to recreational facilities in the secured common area should be restricted to owners, tenants and guests of villas 1 to 25 in Reef Terraces Two. In furtherance of that resolution, the Body Corporate committee had taken steps to prevent access to common property facilities by changing the key code to the gate to the common property facilities.
- [12] The Adjudicator went on to find that the shared services agreement was terminated in February 2022 by the resolution of the Body Corporate but went on to conclude that as an owner or as tenant in common in the common property of Reef Terraces Two, it had

a general right to make reasonable use of that common property and could not be excluded from it. It was held that that right did not depend upon gaining the permission of the Body Corporate and arose independently of any shared facility agreement that might exist.

[13] The Adjudicator then held as follows:

[93] Section 35 of the act provides as follows:

35 OWNERSHIP OF COMMON PROPERTY

- (1) Common property for a community titles scheme is owned by the owners of the lots included in the scheme, as tenants in common, in shares proportionate to the interest schedule lot entitlements of their respective lots.
- (2) Subsection (1) applies even though, under the Land Title Act, the registrar creates an indefeasible title for the common property for a community titles scheme.
- (3) An owner's interest in a lot is inseparable from the owner's interest in the common property.

Examples—

- 1 A dealing affecting the lot affects, without express mention, the interest in the common property.
- 2 An owner cannot separately deal with or dispose of the owner's interest in the common property.
- (4) If the occupier of a lot is not the lot's owner, a right the owner has under this Act to the occupation or use of common property is enjoyed by the occupier.
- (5) The way the body corporate for a community titles scheme ("scheme A") may enjoy the occupation and use of the common property for a community titles scheme for which scheme A is a subsidiary scheme is subject to the community management statement for each scheme for which scheme A is a subsidiary scheme.
- (6) If a body corporate is authorised under this Act to enter into a transaction affecting common property, it may enter into the transaction, and execute documents related to the transaction, in its own name, as if it were the owner of an estate of fee simple in the common property.

[94] Motion 3 purports to limit access to the common property recreational facilities to Lots 1 to 25 only, thereby excluding the lot owners of Lots 26 to 28 in the Scheme from accessing the common property facilities (Lots 27 and 28 being owned by the Applicant). In denying the applicant access to the pool precinct, there is a question as to whether the committee has changed the applicant's rights as a lot owner to that part of the common property. I note that the Respondent now concedes that the Common Property Decision (Motion 3) is void and of no effect.

[95] In *The Sands* [2010] QBCCM Cmr 424 the adjudicator found that:

the interests of all owners must be taken into account in any decisions of the body to restrict access to, or the use of common property. I cannot escape the conclusion that the decision to deny access to various common property areas amounts to an unreasonable action in the administration of the body corporate and therefore contrary to the legislation.

[96] Further, I am in agreement with the applicant that it is an established principle of common law that a tenant in common has no right to exclude co-tenants from possession. Since one tenant in common has no right to exclude another from part of the co-owned property, it follows that if the statutory power to grant exclusive use is not exercised, then the ordinary right of a proprietor, not to be excluded from any part of the common property, subsists.

[97] In the matter of *Villanella* [2017] QBCCM Cmr 248, the adjudicator there stated:

All occupiers are entitled to reasonable use of the common property for themselves and their invitees. The statutory right to use common property is not subject to whether an individual is perceived to have any need to access a particular part of common property. Having regard to section 167(c) of the Act, it is implicit that the right to use and enjoy common property exists provided it does not interfere unreasonably with the rights of others to do likewisearguably, a body corporate could not resolve to prevent occupiers from accessing common property that is not the subject of a formal lease or licence or a grant of exclusive use unless there was a compelling justification."

[98] I am of the view that the Applicant, as the owner of a lot in the Scheme, is entitled to the keycode to the common property, including the common property facilities. I am therefore also of the view that the Common Property Decision (Motion 3) is void, of no effect and ought to have been ruled out of order by the chairperson at the EGM.

[99] While numerous lot owners in Reef 2 wish to restrict access to the common property facilities by the applicant's guests, but I do not believe it is lawful to do so. I am in agreement with the applicant that it is presumptuous of the Respondent to assume that the Applicant's lot owners or their guests will contravene the scheme by-laws. Should the Respondent take issue with the behaviour of lot owners, occupier or invitees, it is open to the Respondent to enforce the by-laws in this regard.

[100] For the above reasons I have made the following declaratory orders:

- a) That the resolution on motion 3, the "Reef 2 Common Property Decision" was at all times void and of no effect.
- b) That Reef 1, as a lot owner in Reef 2, is entitled to use the common property facilities in Reef 2.

- c) That Reef 1, as a lot owner in Reef 2, is entitled to the keycode to the fence around the common property facilities in Reef 2.

[14] The Appellant appeals that decision contending that the findings cited above at paragraphs 93 to 99 involve an error of law and asserted that those findings amounted to a determination that the right to use of common property was enjoyed simultaneously by:

- (a) The occupier of a lot;
- (b) The occupier's invitees;
- (c) The owner of a lot;
- (d) The lot owner's invitees;
- (e) Where the owner of the lot is another Body Corporate, that Body Corporate's lot owners;
- (f) Where the owner of a lot is another Body Corporate, that Body Corporate's lot owner's invitees.

[15] The appeal to this Tribunal is governed by s 289 of the *Body Corporate and Community Management Act 1997* (Qld) ("the BCCM 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.

[16] Section 290 of the BCCM Act provides:

290 Appeal

- (1) An appeal to the appeal tribunal must be started within 6 weeks after the aggrieved person receives a copy of the order appealed against.
- (2) If requested by the principal registrar, the commissioner must send to the principal registrar copies of each of the following—
 - (a) the application for which the adjudicator's order was made;
 - (b) the adjudicator's order;
 - (c) the adjudicator's reasons;
 - (d) other materials in the adjudicator's possession relevant to the order.
- (3) When the appeal is finished, the principal registrar must send to the commissioner a copy of any decision or order of the appeal tribunal.
- (4) The commissioner must forward to the adjudicator all material the adjudicator needs to take any further action for the application, having regard to the decision or order of the appeal tribunal.

[17] Section 146 of the 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).

[18] 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.

[19] In the appeal, the appellant's arguments on two principal grounds contended for were, in summary, that because of the operation of s.35(4) of the BCCM Act, if an occupier

of a lot was not the lot's owner, a right the owner has under this Act to the occupation or use of common property is enjoyed by the occupier and that this did not include, in this case, Reef Terraces One Body Corporate because it was not the occupier, the caretaker was. I will refer to this as to the "occupier point".

- [20] The second argument is that the Adjudicator is said to have decided that each of those subcategories of individuals listed in the grounds of appeal I have set out at [14] above were held to have a right to use a common property and that this was an error of law because on the proper construction of s.35(3) of the BCCM Act, an owner's interest in a lot is inseparable from the owner's interest in the common property and that this meant that the Respondent's interest in the common property of Reef Terraces Two did not confer any entitlement on lot owners or their invitees or guests of other lot owners in Reef Terraces Two scheme. Nor for that matter did it confer any interest on any of the other cascading categories of individuals that it is said that the Adjudicator decided could use the Reef Terraces Two facilities, including the occupier's invitees, the lot owner's invitees, the other Body Corporate's lot owners or lot owner's invitees. I will refer to this as "the s.35(3) BCCM Act point".

The "occupier point"

- [21] In relation to the first argument that Reef Terraces One was not the occupier of the relevant lots, the Applicant relies upon s.35(4) of the Act which provides as follows:

"occupier" , of a lot [included in a community titles scheme](#)—

(a) means—

- (i) a resident owner or resident lessee of the lot, or someone else who lives on the lot; or
- (ii) a person who occupies the lot for business purposes or works on the lot in carrying on a business from the lot; and

...

- [22] There are other expanded parts of that definition which are not relevant for present purposes.
- [23] The Applicant contended that the evidence established that the right to occupy the Applicant's common property facilities is enjoyed by the caretaker because it was the occupier of Lots 27 and 28, whereas the Applicant was not an occupier and therefore did not hold any such right to those facilities. The Applicant also contended that having erroneously concluded that the Respondent did not have that right because it was not in occupation, concluded that the right extended to owners of the lots in the Respondent's community title scheme, the occupiers of those same lots, and the invitees of both the owners and occupiers.
- [24] The elementary flaw in this contention is that there was in fact no reliable evidence before the Adjudicator that the Reef Terraces One Body Corporate ceased in any way to be in occupation of the lot, and therefore had lost the use of the common property.
- [25] There is some authority from this Tribunal, namely a decision in *Clarke & Anor v Body Corporate for Turner Park Shopping Village CTS* [2019] QCATA 51 at [66] to [71]

which held that the effect of s.35(4) of the BCCM Act provided in effect that if the lot occupier is not the owner, the owner's right to occupation and use of the common property was enjoyed by the occupier, and since an interest in the common property could not be separated from ownership, then the occupier came to be entitled to rights to occupy and use the common property. When read carefully, it is clear that the decision in *Clarke* does not involve a considered analysis of the operation of that provision of the Act nor apply it to the particular facts of that case. There the Adjudicator had found that the Clarkes had not occupied the relevant lot at the time of the event and in fact they had conceded they had not occupied the relevant lot at the time. Those owners argued that notwithstanding that they were not in occupation, they could have a separate interest in the common property of the lot notwithstanding that they were not in possession of the lot itself.

- [26] That decision does not decide the point in issue here at all, nor does it suggest that there are no circumstances in which there could be more than one occupier or that rights and interests to occupation of a lot cannot be shared or allocated between two different individuals. Nor is there analysis of the circumstances by which, even if a party had ceased to be an occupier, they necessarily were deprived of any rights or interests to use the common property in a scheme.
- [27] That said, it seems to me that this ground of appeal is without merit. That is, because as is evident from the material cited earlier in these reasons at [6], there was little or no evidence to show what arrangements were in place between Reef Terraces One and the caretaker, or what the occupational arrangements or agreements about those lots were.
- [28] The Adjudicator did not make any findings on this issue in the first decision under appeal. That is because that argument was not put below or if it was, not clearly, and the Adjudicator was not clearly asked to decide that point in the way that I am now asked to do so.
- [29] The Applicant submits that by reference to the Appeal Books filed in these two appeals, it can be seen that the matter was raised before the Adjudicator at: a. Pages 339 and 340 ([32] to [40]) which are said to raise the issue of Lots 27 and 28 being occupied by the caretaker and the consequences arising from s35 of the BCCM Act, in particular s35(1), (3) and (4).
- [30] The Applicant also refers to page 345 ([58(b)]) and the point that upon the proper construction of s35 of the BCCM Act the Applicant's (then respondent's) conduct, in restricting access to the occupiers of Lots 27 and 28, was not unreasonable and pages 366 and 367([2.2(f)]) where it is said that both the issue of Lots 27 and 28 being occupied by the caretaker and the consequences arising from s35 of the BCCM Act, in particular s35(4), were raised.
- [31] The Applicant also refers to pages 72 to 74 ([25] to [31], and [36]) where it is said that both the issue of Lots 27 and 28 being occupied by the caretaker and the consequences arising from s35 of the BCCM Act, in particular s35(1), (3) and (4), were raised.
- [32] The Applicant also refers to pages 117 and 118 ([3.2(c)]) where it is said that both the issue of Lots 27 and 28 being occupied by the caretaker and the consequences arising from s35 of the BCCM Act, in particular s35(4), were raised.

- [33] Hence the Applicant makes the submission that if the Tribunal determines that the Adjudicator did not determine the occupancy of Lots 27 and 28 and the consequences of that occupancy, arising from s35 of the BCCM Act, in particular whether the occupier of Lots 27 and 28 enjoys the right to use the common property of the Applicant, to the exclusion of the Respondent, that amounts to an error of law.
- [34] In lengthy written submissions filed on 15 August 2023 the Respondent contends that the issue as to the Respondent's right to use the common property (as lot owner) extends to the Body Corporate's members was not raised in argument before the Adjudicator; and that the Applicant may not introduce arguments on appeal which were not raised before the original decision maker.
- [35] The Respondent contends that by reference to the Appeal in 313-22, while the issue of Lots 27 and 28 being occupied was raised by the Appellant, no submissions was made as to whether the rights of the Respondent (then Applicant) to use the common property in its capacity as lot owner extended to its constituent members. It submits that to the contrary, while the submissions of John Christopher stated that the Respondent's ownership "in no way provides the 144 Reef 1 Owners with a *de facto* right to use facilities", his submissions go on to make it clear that he considers this to be on the basis that the relevant lots were not residential and/or were occupied by the Caretaker and the Lot 27 and 28 owner does not materially contribute to the costs of the common property facilities, making access by all of its members to the common property of Reef 2 is unreasonable.
- [36] The Respondent refers to the submission of Chris Dahlberg on behalf of the Committee, that stated that "Lots 27 & 28 are owned by the neighbouring body corporate Reef 1 of 146 lots. This is hardly equitable when 144 accommodations of lots can use facilities who cost is being met by 26 accommodation lots in Reef 2". The Respondent refers to the submission of Deborah Christopher, who said that "They... want to use the ownership of those lots to gain admittance for 144 Reef 1 'proxy owners'...Twenty-six owners supporting the wear and tear of 144 non-contributing users cannot be seen as fair and reasonable by any rational person";
- [37] The Respondent submits that while the submission filed on behalf of this Appellant (as the Respondent below) did submit that "Reef 1 is 'a piece of paper'" it did not make the submission that this prevented the lot owners or occupiers forming part of the Scheme from receiving the benefit of any rights the Respondent holds as lot owner within Reef.
- [38] The Respondent contends that by reference to the Appeal in 005-22 that while the issue of Lots 27 and 28 being occupied was raised by the Appellant, no submission was made as to whether the right of the Appellant (as the Respondent below) to use the common property in its capacity as lot owner extended to its constituent members. Notwithstanding, the basis of the Respondent's arguments in its application indicated its understanding that it did;
- [39] The Respondent points to the submission of the Appellant below that "To the extent that the [Respondent] relies on the words, "*including Reef 1 as an owner in the Scheme*" in paragraph 4 of the 0346-2022 Interim Orders to forcibly obtain access for its 146 lot owners' to the Reef 2 common property, such an interpretation would be inconsistent with section 35(4) of the Act..."It submits that it did not make any further argument that the lot owners or occupiers forming part of the Respondent Scheme are

not entitled to receive the benefit of any rights the Respondent holds as lot owner within Reef 2; and instead, as set out in paragraph 4 of the Appellant's Final Submission, its arguments regarding inconsistency with section 35(4) are limited to its claim that Lots 27 and 28 are occupied and as to the consequences of that.

- [40] The Respondent points to the submission of the Appellant that "*The source of the "right" [for the Respondent's 146 lot owners to use the keycode to access the common property in Reef 2] is the shared facility arrangement, which the [Appellant] has sought to terminate. The right does not arise by the [Respondent]'s ownership of two lots*" it made no argument beyond those regarding whether the Respondent's lots were occupied (and therefore had a right to use the common property in the first instance). Accordingly, it submits that the contention that "the right does not arise" refers to the Appellant's argument that the lot is occupied and therefore the Respondent has no such right, and is not a contention that disputes whether the Respondent's rights as a lot owner extend to its constituent owners/occupiers;
- [41] In my view it is apparent from the submissions filed below before the Adjudicator for Reef Terraces Two at [34] to [40], that reference was made to the operation of s.35 as giving a right to use the common property to the occupier. It was asserted that the occupier of the lots owned by Reef Terraces One was the caretaker, but that was in the context of a submission that the occupier of the lots owned by Reef Terraces One, not the Body Corporate for Reef Terraces One as the owner of those lots, was "entitled to the key code and the use of the common property". The submission was not clearly made that it followed that the Body Corporate for Reef Terraces One ceased to have any interest or entitlement to use the Body Corporate common property on Reef Terraces Two.
- [42] The way that argument was put then possibly explains the failure to reference that submission in the first judgment under appeal.
- [43] In *Thompson v Body Corporate for Arila Lodge & Anor*; *Thompson v Body Corporate for Arila Lodge & Anor* [2018] QCATA 56 at [44] and [45], I recognised the finality principle that applies to appeals, so that "except in the most exceptional circumstances, it would be contrary to all principle to allow a party, after a case has been decided against him, to raise a new argument which, whether deliberately or by inadvertence, he failed to put during the hearing when he had opportunity to do so. I considered that had to be tailored to a situation like this where Adjudicators conducted hearings on the papers, and may not always have the issues clearly identified for them.
- [44] It is relevant that the Adjudication Process, pursuant to s269(3), requires that an adjudicator must act as quickly, and with as little technicality, as is consistent with a fair and proper consideration of the application.
- [45] One of the orders I can make where I determine that an error of law has been made would have been to remit it to the Adjudicator to hear the issue appropriately. That might have been a possible outcome here. I need not decide whether to permit the Appellant to raise a new argument which, whether deliberately or by inadvertence, it failed to put during the hearing when it had opportunity to do so because for the reasons which follow, to do so would be pointless.

[46] Under the second judgment under appeal, which might perhaps be seen as some kind of supplementary finding in relation to all of the arguments which were put initially, the Adjudicator did deal with the point, and held as follows:

[40] The respondent says that the effect of section 35(4) of the Act is that if the occupier of a lot *is not* the lot's owner, a right the owner has under the Act to the occupation or use of common property, can only be enjoyed by the occupier of the lot. They go on to argue that the occupier of the two lots owned by the Applicant is the caretaker, and that two keys have been given or made available, to the Applicant for use by the occupier.

[41] The respondent refers to the decision in *Clarke & Anor v Body Corporate for Turner Park Shopping Village* [2019] QCATA 51, in which the tribunal declared invalid a by-law which allowed a "proprietor or occupier" to display a sign in or about common property. In that case, the appellant lot owner wished to erect signage on common property, despite not being the occupier of their lot in the Scheme. Senior Members Guthrie and Howard commented that *section 35(4) of the Act provides, in effect, that if a lot occupier is not the owner, the owner's right to occupation and use of the common property is enjoyed by the occupier.*

[42] The respondent says it follows that the right to common property can only be enjoyed by the occupier of the lot in question. The respondent argues that if the owner of a lot is not in occupation of the relevant lot, the right to enjoyment and use of common property is transferred to the occupier by statute. However, the caretaker only occupies the lots for specific purposes and I am not satisfied that the caretaker occupies the lots in a manner which enlivens section 35(4) of the Act.

[47] Hence, it is clear that the Adjudicator was not prepared to conclude on the evidence that the Body Corporate for Reef Terraces One was not in occupation of the lot because the caretaker only occupied the lots for specific purposes and the Adjudicator was not satisfied that the caretaker occupied the lots in a manner which enlivened s.35(4) of the Act.

[48] In my view, although it is unfortunate that this analysis was not included in the initial reasons, it is clear that the Adjudicator has made a finding of fact on that issue in the course of deliberation of all of the submissions which were made, including those which preceded the first judgment. The fact that such a finding of fact was made does not establish that an error of law was made in arriving at that conclusion, or not having arrived at it in the first judgement.

[49] In my view therefore, this ground of appeal must fail.

[50] **The s.35(3) BCCM Act point".**

[51] The second argument on the first appeal which I have described above is founded upon the contention that the Adjudicator made a finding that a cascading range of individuals had and have an entitlement to use the common property on Reef Terraces Two based on an analysis of the language of s.35(3) of the BCCM Act.

[52] For the purposes of advancing that argument, the Appellant contends that by necessary implication the Adjudicator must have made a finding in that regard and contends that it would have been an absurd result if a Body Corporate for one scheme could purchase

a lot in an entirely different scheme and inform all of its individual lot owners and guests or visitors to lots the first scheme and now have the right to use the common property of the second scheme as they saw fit.

- [53] I was not referred to any authority which had interpreted s.35(3) of the BCCM Act or for that matter anything that involved a clear determination that the effect of it is that if a person which has a property interest in entity A which in turn has a property interest in entity B, has the result that the first persons also have an interest in the property of entity B. I was not taken to any general authority in property law which concerned this issue, however it seems to be to be self-evidently problematic to suggest that property rights or other entitlements in an entity to confer all the benefits which that entity has upon its beneficial owners.
- [54] The appellant placed reliance on the operation of s.45(1) of the BCCM Act which provides:
- (1) The body corporate for a community titles scheme holds the body corporate assets beneficially.
- [55] The fact that a Body Corporate owns its assets beneficially for lot owners, in this case it could be said the Body Corporate for Reef Terraces One owned its interest in Lots 27 and 28 in the other scheme beneficially for its lot owners, does not mean that those lot owners have the legal entitlement to do all of the things which a legal owner of that property had. The existence of a beneficial interest in property does not intrinsically or necessarily confer all the right, title and interest that the trustee has as the legal owner of that property, to the beneficiaries of a trust. Where a trust exists, the beneficiaries of a trust do not have the right to avail themselves of the accoutrements of legal ownership which the trustee has.
- [56] More problematic for the Appellant here is that in fact this argument was not raised below and that explains why it is in no way dealt with in the reasons of the Adjudicator.
- [57] Even more problematic for the Appellant here is that, it is, in my view clear that the Adjudicator did not conclude that individual lot owners or their invitees had the legal right to use the common property of the Applicant when in Port Douglas. The relief given was for declaratory orders inter alia that Reef Terraces One as a lot owner in Reef Terraces Two was entitled to use the common property facilities in Reef Terraces Two. As such it was concluded that as a lot owner it was entitled to the key code to the fence around the common property facilities. It had been deprived of an entitlement to the key code or to a security key which replaced it, notwithstanding the motion that purported to exclude that right to it.
- [58] The Reasons at [96] make clear that the Adjudicator was referencing the right of the Respondent as proprietor, not to be excluded from any part of the common property and in that regard applied an earlier decision of Villanella [2017] QBBCM CMR 248 concerned with the right not to have its rights unreasonably interfered with could not resolve to prevent occupiers from accessing common property that is not the subject of a formal lease or licence or a grant of exclusive use unless there was compelling justification.
- [59] The Reasons at [99] of the decision under appeal here are directed to Reef Terraces One's right as a lot owner to have guests who might use those common property

facilities. True it is that there is no analysis in the reasons for how it is that lot owners might become entitled to have guests, particularly where they are corporate owners, and I do not propose to speculate as to the bases upon which it might be said that owners in a particular scheme can have guests. It should be clearly understood that this appeal does not involve a determination of the manner by which or the extent to which a body corporate can restrict a right to use the common property by guests of lot owners or their invitees or licensees.

[60] Paragraph 99 of the Reasons makes reference to circumstances where the Respondent might take issue with the behaviour of “lot owners, occupier or invitees” (sic) and its right to enforce the bylaws in that regard. That does not convey the proposition that a finding has been made that at law Reef Terraces One is entitled, of itself or by its granting invitations to others taking below it, to be allowed to authorise all their lot owners, guests or invitees to use those facilities. It is the right which the lot owner has in the common property which was under consideration. The Adjudicator has concluded this without providing any particular analysis of how, that the Applicant’s lot owners or guests or invitees might be legally entitled use those facilities. The reference in the reasons to the Respondent enforcing the bylaws in that regard is, in my view, a conclusion concerning the ability of Reef Terraces Two to enforce its bylaws against Reef Terraces Two in relation to the conduct of its lot owners or invitees or guests.

[61] It follows that the appeal on this issue, which assumes that the Adjudicator held that there were rights in those individuals other than Reef Terraces One is misconceived because no such finding was made. The Appellant did not otherwise seek to argue that a finding that Reef Terraces One was entitled to have invitees use the common property facilities on Reef Terraces Two was an error of law, except to the extent that it argues that there was no vesting of those rights by virtue of it no longer being in occupation of the lots.

[62] There is no foundation for the Appellant’s contention that that decision involved an error of law because those findings do not amount to a determination that the right to use of common property was enjoyed simultaneously by:

- (a) The occupier of a lot;
- (b) The occupier’s invitees;
- (c) The owner of a lot;
- (d) The lot owner’s invitees;
- (e) Where the owner of the lot is another Body Corporate, that Body Corporate’s lot owners;
- (f) Where the owner of a lot is another Body Corporate, that Body Corporate’s lot owner’s invitees.

[63] For those reasons, that ground of appeal also fails.

The second appeal

[64] The second appeal sought a declaration that a committee resolution of 5 May 2022 to change the security gate locks to the common property at Reef Terraces Two and issue

only one security key to each lot owner was a decision on a restricted issue and therefore not capable of being the subject of a valid resolution by the committee that purported to pass such a resolution.

[65] The Adjudicator declared that the on-5 May 2022 resolution was void and of no effect because it was a resolution which changed the rights and privileges of owners, including the Applicant and was a restricted issue for the committee and therefore required a general meeting resolution.

[66] The Adjudicator held as follows:

[28] [Section 17](#) of the Commercial Module establishes restricted issues for a committee. Relevantly, a committee cannot decide to change rights, privileges or obligations of owners. Such a decision should be made by a general meeting.

[29] The practical effect of the committee resolution of 5 May 2022 is to restrict access to the facilities. The applicant believes the circumstances of this case are analogous to those in *Coronation Gardens*, where meter boxes were locked by the committee, and the Adjudicator relevantly said:

...The meter boxes are common property and were apparently accessible to all owners before February 2016. In my view, a decision to restrict access to part of common property is changing the rights and privileges of owners. As such, it required a general meeting resolution...

[30] To the extent that the Applicant contends that the Reef 2 decision was decision on a restricted issue, it relies on [section 17\(1\)\(a\)](#) of the Commercial Module, which states that a decision is on a restricted issue if it changes the rights, privileges or obligations of the owners of lots included in the community titles scheme.

[31] The respondent refers to the decision of the Supreme Court in *Famestock Pty Ltd v The Body Corporate for No 9 Port Douglas Road* [2012] QSC 129, where the Court considered the meaning of “restricted issue” within the context of regulation 24(b) of the *Body Corporate and Community Management (Accommodation Module) Regulation 1997*, which was drafted in almost identical terms to section 17(1)(a) of the Commercial Module, which is in issue here.

[32] Justice Henry found the following as to the meaning of the words, “rights, privileges or obligations of the owners of lots included in the scheme”:

its meaning can be derived from the plain meaning of the words used and *the context of their use*;

it ought not to be read literally as a reference to any right, privilege or obligation which a person who owns a lot in the scheme happens to have, as that would ignore the context of the words which necessarily implies a connection between the rights, privileges or obligations and the person’s status as an owner of a lot included in the scheme; and

the reference to the rights, privileges or obligations are those which arise in the person’s capacity as an owner of a lot included in the scheme and not from some other source, for example, from a contractual agreement.^[9]

- [33] In that case the defendant submitted that rights and privileges created under a by-law were qualified as only existing “during the currency of any Property Management Agreement” and therefore were not rights and privileges which derived from ownership of a lot. However, His Honour found that rights and privileges that flow from an agreement, and rights and privileges that flow from the by-laws to an owner of a lot, are not mutually exclusive.
- [34] While there is no facility sharing agreement in place, the applicant derives certain rights and privileges as the owner of lots 27 and 28.
- [35] As mentioned above, in *Reef Terraces (Two)* [2022] QBCCMCmr 344, (15 September 2022) I made final declaratory orders that:
- a) the resolution on motion 3, the “Reef 2 Common Property Decision” was at all times void and of no effect.
 - b) Reef 1, as a lot owner in Reef 2, is entitled to use the common property facilities in Reef 2.
 - c) Reef 1, as a lot owner in Reef 2, is entitled to the keycode to the fence around the common property facilities in Reef 2.

- [36] At paragraph [92] I made the following comments:

While I have found that the Written Agreement was terminated in February 2022 by ordinary resolution of an EGM, it should be noted that as an owner of the respondent’s common property as a tenant in common, the applicant also enjoys a general right to make reasonable use of that common property. That right generally does not depend upon gaining the permission of the body corporate and arises independently of any shared facility agreement.

- [37] In my view the decision to change the security gate locks from coded locks to security key locks, and issue one security key to the owner of each lot in Reef 2, is a restricted issue for the committee.
- [38] In the decision *Villanella* [2017] QBCCMCmr 248, Adjudicator Rosemann made the following observations :

[245] A body corporate has a statutory responsibility to administer the common property and body corporate assets for the benefit of the owners of lots included in the scheme. That function will routinely include providing for access to and security for the scheme land, including supplying, maintaining and managing locks and keys.

[246] It has been acknowledged in past adjudications that it may be appropriate for a body corporate to exercise some control as to when and how keys are issued ensure an appropriate level of security for individuals on the scheme and the property belonging to the Body Corporate and its occupiers. However, in doing so, a body corporate must act for the benefit of all owners. Moreover, as with anything it does, a body corporate and its committee must act reasonably.

[247] If the Body Corporate wishes to limit the number of keys or sets of keys supplied to each lot, or otherwise place restrictions on keys, it

must pass a specific general meeting resolution to that effect. Adjudicators have previously found that decisions to limit the number of keys provided to owners and occupiers would be a restricted issue for a committee.

[39] I believe the applicant has established that the committee resolution of 5 May 2022, the “Reef 2 Decision”, restricts access to the common property, thereby changing the rights and privileges of owners, including the Applicant.

...

[43] Further, the subject committee resolution reads as follows:

Motion:

Committee Resolution - that the Body Corporate for Reef Terraces Two CTS18180 resolves to change the security gate locks from coded locks to security key locks and issue one security key to each owner.

Explanatory Note: The gate codes are not being protected and are being handed out to unauthorised people. The use of security keys will improve security.

Motion CARRIED by 7 votes to nil

[44] Clearly, the committee resolution restricts the number of access keys to be given to each owner. For the above reasons I am of the view that the committee resolution of 5 May 2022, the “Reef 2 Decision”:

- (a) changes the rights and privileges of owners, including the Applicant; and
- (b) is a restricted issue for the committee, and required a general meeting resolution.

[45] I have therefore ordered that the “Reef 2 Decision”, being the resolution of the committee dated 5 May 2022, was at all times void and of no effect.

[67] I have already identified above that part of the reasoning in paragraphs [40]-[42] concerned with the occupier point. Section 17 of the Commercial Module sets out what are restricted issues for a committee. The adjudicator properly found that a committee cannot decide to change rights, privileges or obligations of owners and that such a decision must be made by the lot owners in a general meeting. The appellant did not contend otherwise.

[68] I reject the proposition advanced for the Appellant that restricting the number of access keys did not amount to change in the rights or privileges of owners because the possibility of additional keys being obtained was still open. The Adjudicator properly held that a resolution that only one security key be issue amounted to a change in the rights and privileges of owners having regard to a body of adjudicator decisions on this issue.

[69] I express no concluded view about precisely what circumstances need to exist before a decision to change keying arrangements or to limit the number of keys provided to owners and occupiers is necessarily a restricted issue for the committee. Reference was made to the decision in *Villanella* cited earlier. There are other decisions of adjudicators involving a similar analysis in similar circumstances including *Thornton*

Tower [2006] QBCCMCmr 74 and *Turtle Beach* [2006] QBCCMCmr 363. An examination of the facts under consideration in each of those decisions demonstrates that the precise circumstances of each case need to be carefully considered to consider any restriction of access which amounts to a change in the rights and privileges of owners. Demonstrably though, in this case restricting lot owners to entitlement to one security key when previously coded access was permissible and therefore involved no restriction on the number of guests or invitees who might use the facilities were amounts to a change to the rights and privileges of owners. It was specifically designed to achieve an outcome which changed the rights of the owner of Lots 27 and 28, indeed to achieve an outcome which would probably result in limiting the number of lot owners in Reef Terraces One or their invitees or guests who might in a practical sense be able to use the facilities on the common property at Reef Terraces Two.

- [70] In my view, the Adjudicator's reasons disclose no error of law in relation to whether the committee motion changed the rights, privileges or obligations of the owners of lots included in the scheme.
- [71] The alternate argument of the appellant, based upon whether the Respondent was an occupier has already been dealt with and rejected.
- [72] The contention by the Appellant that the Adjudicator in some way erroneously adopted and applied findings from the first decision has no merit, in my view. The only reference which is made to the first decision is the recitation that a finding was made there that Reef Terraces One, as an owner in Reef Terraces Two, was entitled to use the common property facilities in Reef Terraces Two and that as such, it was entitled to the key code to the fence around the common property. From that conclusion the Adjudicator moved to the proposition that having regard to those interests or that entitlement, to restrict the number of access keys available to that owner, or indeed as the Adjudicator put it, to "each owner", was a restricted issue. In my view, the remedy open to the Appellant is to take whatever steps it sees fit in relation to access keys by way of a resolution of the Body Corporate in general meeting.
- [73] I therefore dismiss each of the applications for leave to appeal or appeal filed 26 October 2022 and 5 January 2023.