**QUEENSLAND CIVIL AND
ADMINISTRATIVE TRIBUNAL**

CITATION:

*The Body Corporate for The Grove CTS9356 v Comerford* [2019] QCATA 172

PARTIES:

**The body corporate for the grove cts 9356**

(applicant\appellant)

**v**

**anthony comerford**

(respondent)

APPLICATION NO/S:

APL101-18

MATTER TYPE:

Appeals

DELIVERED ON:

20 December 2019

HEARING DATE:

5 February 2019

Further written submissions filed on 22 November 2019 and 4 December 2019

HEARD AT:

Brisbane

DECISION OF:

Senior Member Brown

Member Traves

ORDERS:

**1. The appeal is allowed.**

**2. The decision of the adjudicator made 22 March 2018 is set aside.**

**3. The adjudication application filed 12 December 2017 is dismissed.**

CATCHWORDS:

BODY CORPORATE AND COMMUNITY MANAGEMENT – ADJUDICATION – SCOPE OF JURISDICTION OF ADJUDICATOR – where lot owner caused silica dust by grinding tiles - where Notice issued to body corporate under the *Workplace Health and Safety Act* 2011 (Qld) requiring silica dust be removed – where body corporate paid for clean up costs – where those costs incurred in respect of common property and individual lots – where lot owner responsible for the damage reimbursed the body corporate – where adjudicator ordered payment made by lot owner to the body corporate be refunded - whether error of law by adjudicator – whether adjudicator had basis in law for ordering restitution – where submissions invited by Tribunal addressing whether money paid on basis of mistake of law by lot owner – where no submissions received addressing mistake of law – where no legal basis for ordering restitution.

*Body Corporate and Community Management Act* 1997 (Qld), s 229A, s 276, s 281, s 289

*Body Corporate and Community Management (Accommodation Module) Regulation* 2008, s 157, s 167, s 169

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

*Australian Broadcasting Tribunal v Bond* (1990) 170 CLR 32

*Body Corporate for Grand Pacific Resort CTS 29576 v Cox* [2012] QCATA 14

*Body Corporate for Palm Springs Residences CTS 29467 v J Patterson Holdings Pty Ltd* [2008] QDC 300

*Climpson & Anor v Body Corporate for Rolling Surf Resort Celestial Investments Pty Ltd* [2013] QCATA 93

*Cody v JH Nelson Pty Ltd* (1947) 74 CLR 629

*David Securities Pty Ltd v Commonwealth Bank of Australia* (1992) 175 CLR 353

*Dindas v Body Corporate for One Park Road CTS 2114* [2006] QDC 302

*Ericson v Queensland Building and Construction Commission* [2014] QCA 297

*Henderson & Anor v The Body Corporate for Merrimac Heights* [2011] QSC 336

*Kioa v West* (1985) 62 ALR 321

*Mine Subsidence Board v Wambo Coal Pty Ltd* [2007] NSWCA 137

*The Grove* [2018] QBCCMCmr 157

*Werrin v The Commonwealth* (1938) 59 CLR 150

*Woolwich Equitable Building Society v Commissioners for Inland Revenue* [1993] AC 70

Appearances & Representation:

Appellant: Tania Campbell on behalf of The Body Corporate for The Grove CTS9356, self-represented

Respondent: Anthony Comerford, self-represented

**REASONS FOR DECISION**

[1] Mr Comerford is a lot owner in The Grove, a multi storey scheme comprising 24 lots and common property. After undertaking work on an external balcony at his lot a dispute arose between Mr Comerford and the body corporate relating to dust and residue resulting from the work. Mr Comerford paid to the body corporate an amount of $4,715.00 for cleaning costs (the disputed amount). An adjudicator subsequently ordered that the body corporate repay the amount to Mr Comerford (the decision).

[2] The body corporate appeals the decision.

[3] An appeal to QCAT from an adjudicator’s decision may only be on a question of law.

[4] In deciding an appeal on a question of law 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 adjudicator, or a different adjudicator, for reconsideration with or without further evidence and other directions; or

(d) Make any other order it considers appropriate.

[5] There is no element of rehearing in an appeal under s 146 of the QCAT Act. Unless the error of law decides the matter in its entirety in the applicant’s favour, the proceeding must be sent back for reconsideration.

[6] For the reasons that follow, we find that the learned adjudicator erred in law in concluding that the body corporate was required to repay the disputed amount to Mr Comerford.

**The background to the dispute**

[7] Mr Comerford undertook renovation works at his lot. According to the body corporate, on 21 March 2017 Mr Comerford undertook the grinding of tiles on an external balcony at the lot. On 22 March 2017 another lot owner reported the activity to the Department of Workplace Health and Safety, concerned at the potential risk posed by silica dust as a result of the grinding activity.

[8] Mr Comerford subsequently hosed the balcony down, with the debris resulting from the grinding activities being washed from the external balcony and deposited elsewhere. An officer from the Department of Workplace Health and Safety inspected the scheme on 23 March 2017. The same day an Improvement Notice was issued by the Department of Workplace Health and Safety to the body corporate (the Notice). The Notice identified contraventions of the *Workplace Health and Safety Act* 2011 (Qld) and *Regulation*.

[9] The Notice identified the site location of the breaches by reference to the scheme and various lots:

I observed and photographed dust on balconies, handrails and furniture on the eastern outside elevation from ground to level 5 of the unit complex.

Information, photographs, building age and material type have formed my reasonable belief that grinding of cement floor tiles has produced hazardous silica dust which is present on balconies, handrails and furniture.

[10] The Notice required the contravention to be remedied by 25 March 2017. The body corporate subsequently engaged a contractor to undertake the required works to remedy the contravention at a cost to the body corporate of $3,850.00.

[11] The body corporate requested payment from Mr Comerford of the sum of $4,665.00 said to be in respect of ‘WH&S silica Cleanup’. Mr Comerford subsequently paid to the body corporate the disputed amount.

[12] Mr Comerford applied for department conciliation through the Office of the Commissioner for Body Corporate and Community Management.

[13] After the department conciliation process had ended, Mr Comerford made the adjudication application resulting in the decision the subject of this appeal. Mr Comerford sought repayment of the disputed amount. Although not expressed, it seems to us that the only basis upon which Mr Comerford could have sought recovery of the amount was that the payment had been made under a mistake.

**The adjudicator’s findings**

[14] The adjudicator found as follows:

(a) The disputed amount comprised:

(i) Costs of the removal of the dust $3,850.00

(ii) Body corporate manager costs $ 320.00

(iii) Caretaker costs $ 495.00

(iv) Arrears notice fees $ 50.00

(b) ‘All or most’ of the damage occurred to other lots and not common property;

(c) The cleaning related ‘solely or predominantly’ to lots rather than common property;

(d) the power to order reimbursement pursuant to s 281 of the *Body Corporate and Community Management Act* 1997 (Qld) (BCCM Act) is restricted to reimbursement for repairs carried out to damaged property;

(e) neither the body corporate manager nor the caretakers spent their time performing repairs to the damaged property;

(f) By law 21 and by law 22 were invalid to the extent that they purport to impose a monetary liability on an owner, in breach of s 180(1) of the BCCM Act;

(g) The body corporate had not obtained a court order with respect to the disputed amount as contemplated in by law 21;

(h) As the disputed amount did not meet the description of amounts referred to in by law 22 that the body corporate was ‘entitled to receive’, the by law did not apply;

(i) The body corporate was not entitled to charge recovery costs as the disputed amount was not an overdue contribution to the administrative fund or sinking fund;

(j) There was no basis under the BCCM Act, the *Body Corporate and Community Management (Accommodation Module) Regulation* 2008 (the Module) or the by laws for Mr Comerford to be charged the disputed amount;

(k) The conciliation agreement entered into between the parties was not a legally binding document and evidence of anything said or done at conciliation was inadmissible in the proceedings.

**What do the parties say?**

*The body corporate*

[15] The grounds of appeal relied upon by the body corporate are clarified to some extent in the appeal submissions.

[16] The body corporate says:

(a) the balconies of the ground floor lots formed part of the common property;

(b) the balustrades, parapets and handrails of lots 4 to 24 formed part of the common property.

[17] The body corporate says that as a result of the foregoing, the adjudicator erred in finding that all balcony cleaning could be attributed to the lots whereas only the floor area of the balcony of a lot should have been considered part of a lot.

[18] The body corporate says that the adjudicator erred in finding that the dust was only on balconies despite submissions that the dust was on other parts of the building including the common property.

[19] The body corporate says that the adjudicator failed to consider the application of s 169 of the Module and, in applying s 281 of the BCCM Act failed to provide an opportunity for the parties to make submissions.

[20] The body corporate, relying upon s 157 of the Module and the decision in *Climpson & Anor v Body Corporate for Rolling Surf Resort Celestial Investments Pty Ltd,* says that because the cleaning maintenance was undertaken partly on common property and partly on individual lots means that the body corporate was wholly responsible for the cleaning maintenance.

[21] The body corporate says that the adjudicator failed to consider s 167 of the Module.

[22] Finally the body corporate says that the adjudicator failed to consider s 229A of the BCCM Act and that the application by Mr Comerford should have been dismissed.

**Further submissions**

[23] The parties were invited to make further submissions addressing the legal basis upon which the adjudicator was entitled to order the Body Corporate to repay to Mr Comerford the disputed amount and specifically whether the payment by Mr Comerford was made under a mistake.

[24] Neither party filed submissions specifically addressing the matters the subject of the directions.

**Consideration**

*Was the payment made under a mistake?*

[25] In relation to payments made under a mistake, the High Court held in *David Securities Pty Ltd v Commonwealth Bank of Australia*:

... the payer will be entitled prima facie to recover moneys paid under a mistake if it appears that the moneys were paid by the payer in the mistaken belief that he or she was under a legal obligation to pay the moneys or that the payee was legally entitled to payment of the moneys. Such a mistake would be causative of the payment.

[26] A payment which is ‘voluntary’ will not be recoverable on the ground of mistake. This reflects the policy that the law wishes to uphold bargains and enforce compromises freely entered into. A ‘voluntary’ payment is one made in satisfaction of an honest claim.

[27] A payment is voluntary in the following circumstances:

(a) if the payer ‘chooses to make the payment even though he or she believes a particular law or contractual provision requiring the payment is, or may be, invalid, or is not concerned to query whether payment is legally required’; or

(b) if the payer ‘is prepared to assume the validity of the obligation, or is prepared to make the payment irrespective of the validity or invalidity of the obligation, rather than contest the claim for payment’.

[28] There is no requirement to independently prove “unjustness” over and above the mistake.

[29] The body corporate requested payment from Mr Comerford in respect of the cost of the cleaning works. The evidence before the adjudicator was that the body corporate rendered an invoice to Mr Comerford for $4,665. The reasons below refer to the body corporate having ‘charged’ Mr Comerford $4,715. The difference between the two figures appears to be arrears notice fees totalling $50. We will proceed on the basis that the amount paid by Mr Comerford was $4,715.

[30] It is not contentious that the parties engaged in department conciliation in an attempt to resolve the dispute. In oral submissions at the appeal hearing, Mr Comerford said that he paid the disputed amount prior to the conciliation. We understand Mr Comerford’s reference to ‘conciliation’ to be a reference to the department conciliation session.

[31] In the adjudication proceedings the onus was upon Mr Comerford to establish an entitlement to recover the disputed amount from the body corporate. Unfortunately neither party, nor the adjudicator, addressed this issue. The parties, and the adjudicator, focussed solely on whether the body corporate had an entitlement to recover the disputed amount from Mr Comerford rather than Mr Comerford’s entitlement to recover the amount from the body corporate.

[32] It seems to us that the only basis upon which Mr Comerford could recover the disputed amount was on the basis that he had paid the amount under a mistake. In the circumstances the onus was upon Mr Comerford to show that he had made the payment under a mistake – that is to say, but for the mistaken belief that he was required to pay the amount to the body corporate he would not have done so. As we have observed, neither the parties nor the adjudicator turned their minds to this issue. To ensure that the parties were afforded procedural fairness, they were given an opportunity to make further submissions. As we have observed, the submissions do not address the issue we have identified.

[33] It is appropriate to consider briefly the evidence before the adjudicator:

(a) An interim order was made by an adjudicator on 24 March 2017 enjoining Mr Comerford from causing a nuisance or hazard pursuant to s 167 of the BCCM Act by the unsafe production and disposal of silica dust;

(b) Mr Comerford’s solicitors wrote to the body corporate on 9 May 2017 in which the solicitors referred to the invoice issued by the body corporate to Mr Comerford dated 4 April 2017 requiring payment of $4,665 on or before 28 April 2017 (the solicitors’ letter);

(c) The solicitors’ letter stated: ‘Our client reserves the right to defend this levy or take the matter further if no such evidence is forthcoming or, should such evidence be forth coming (sic), the amount charged is reasonably considered to be excessive’ and further ‘Our client seeks full compliance by the Body Corporate and its committee with the relevant laws and regulations concerning the building’;

(d) The body corporate responded to Mr Comerford’s solicitors, stating relevantly: ‘Mr Comerford caused substantial damage to the common property (Act, 36(1)) of The Grove and the costs to rectify this were considerable as it required the services of a licensed contractor at short notice. Invoice attached. We refer you to the by-laws with regard to recovery by the body corporate of the debt’;

(e) On 9 June 2017 Mr Comerford’s solicitors wrote again to the Body Corporate stating under the heading ‘Monies (alleged to be) owing to the Body Corporate: We have provided a copy of the Coastal Asbestos Removals Invoice to our client. Our client considers that the monies being charged reflect incompetence displayed by the Body Corporate Committee and accordingly he is not agreeable to paying all of the amount requested.’

[34] The body corporate had not, at the time of payment by Mr Comerford, threatened proceedings. However, a voluntary payment may be made in circumstances where there are no legal proceedings pending or threatened.

[35] The evidence before the adjudicator was that Mr Comerford had turned his mind to the question of his obligation to pay the body corporate at the time of payment. This is evident from the communications between Mr Comerford’s solicitors and the body corporate.

[36] We are satisfied that the payment by Mr Comerford falls within the second limb of the circumstances in which payments are voluntary as identified in *David Securities,*  that is, the payment was made on the basis Mr Comerford was prepared to assume the validity of the obligation or was made irrespective of the validity or invalidity of the obligation.

[37] There was no evidence before the learned adjudicator that the body corporate did not, when the payment was made by Mr Comerford, believe it did not have an entitlement to the payment.

[38] The adjudicator was required to determine the application by Mr Comerford according to law and to make an order that was just and equitable in the circumstances. Although the power to make an order under s 276 of the BCCM Act that is “just and equitable” confers a wide discretion on an adjudicator, that discretion must be exercised according to the law and is “not a matter of unfettered individual opinion”. It certainly does not give an adjudicator power to “depart from established principles of law” nor “to dispense justice otherwise than according to law”.

[39] There was no evidence upon which the adjudicator could conclude that Mr Comerford had made the payment under a mistake. It follows that there was no basis upon which the adjudicator could order the body corporate to repay to Mr Comerford the amount he voluntarily paid. The adjudicator erred in law. The appeal should be allowed, the decision of the adjudicator set aside and Mr Comerford’s application dismissed.

[40] In case we are wrong in our conclusion, and for the sake of completeness, we will address the specific grounds of appeal.

*The adjudicator’s findings about the silica dust and residue*

[41] The adjudicator made the following findings about the silica dust and residue:

(a) All or most of the damage occurred to the balconies below the applicant’s lot;

(b) The registered plan indicates that the balconies are part of the lots rather than the common property.

[42] The body corporate says that the adjudicator erred in finding that:

(a) the ground floor balconies were part of a lot when they were, in fact, part of the common property; and

(b) the entire balcony was part of a lot, referring to lots 4 to 24.

[43] The adjudicator did not make the findings of fact complained of by the body corporate. In any event as this appeal is limited to questions of law it is not open to the body corporate in this appeal to challenge the adjudicator’s factual findings.

[44] Factual findings may however constitute an error of law where findings are made and inferences drawn in the absence of evidence.

[45] What was the evidence before the adjudicator about the location of the silica dust and residue? The Improvement Notice stated:

I observed and photographed dust on balconies, handrails and furniture on the eastern outside elevation from ground to level 5 of the unit complex.

[46] Before the adjudicator was a report prepared by the contractor who undertook the cleaning of the dust and residue. The report contains photographs of what are said to be units 19, 17, 16, 14, 13, 11, 10, 8, 7 and 2. The photographs are of various balconies and balustrades. The report contains no description of the location of the dust and residue on the various lots or on the common property.

[47] Various submissions filed in the adjudication proceedings referred to: debris being hosed down the front of the building and onto the units below; dust ‘all over the units below’ Mr Comerford’s; ‘he (Mr Comerford) had hosed all the residue down onto the balconies and other owners (sic) property (including furniture and BBQ’s etc)’.

[48] We are satisfied that there was evidence before the adjudicator upon which he was entitled to rely to make the findings of fact about the location of the silica dust and residue. There was no error by the adjudicator.

*Section 157(1) of the Accommodation Module*

[49] The body corporate says that the adjudicator failed to properly consider the application of s 157(1) of the Module.

[50] Section 157(1) provides:

The body corporate must maintain common property in good condition, including, to the extent that common property is structural in nature, in a structurally sound condition.

[51] The body corporate says that the cleaning work required to be carried out as a result of the Improvement Notice was partly in respect of common property and partly in respect of individual lots. The body corporate says that, as part of the cleaning work was in respect of common property, it was responsible for the entirety of the cleaning works with the result that it was entitled to rely upon s 169 of the Module to recover the cost of the cleaning from Mr Comerford. We will address s 169 of the Module later in these reasons.

[52] The learned adjudicator found that ‘all or most’ of the damage was to individual lots and not to common property. As we have found, adjudicator’s finding is not open to challenge in this appeal.

[53] Although the finding to which we have referred is expressed somewhat imprecisely, it seems to us apparent that the adjudicator accepted some of the dust and residue was located on the handrails of various balconies.

[54] The lots included in the scheme were created under a building format plan requiring the body corporate to maintain in good condition, inter alia, the handrails.

[55] The body corporate says that it was required to undertake the cleaning work to the balustrades as maintenance and says that ‘cleaning maintenance performed under s 157(1) … partly on common property and partly on private lots would mean the Body Corporate was wholly responsible for the cleaning maintenance.’ In support of this contention, the body corporate relies upon the decision in *Climpson & Anor v Body Corporate for Rolling Surf Resort Celestial Investments Pty Ltd*.

[56] On the basis the ordinary meaning of balustrades includes handrails, we accept that the handrails on top of the balustrades were common property. Proceeding on that basis, the body corporate were obliged to maintain handrails on top of balustrades on the boundary between a lot and the common property.

[57] In *Climpson*, an adjudicator found that sails affixed to poles were partly within lot boundaries and partly in common property airspace. The Appeal Tribunal upheld this finding and found that responsibility for the maintenance of the sails lay with the body corporate.

[58] In the present appeal, there is no dispute that the maintenance of the handrails was the responsibility of the body corporate. The body corporate had no responsibility however to maintain any part of the external balconies of the lots. We do not accept that, because the body corporate was responsible for the maintenance of the balcony handrails, it was thereby responsible for the maintenance of all external balconies of the lots in the scheme. The facts, and the decision, in *Climpson* can be distinguished. There was no error by the adjudicator.

*Section 167 and section 169 of the Accommodation Module*

[59] The body corporate says that the adjudicator failed to properly consider the application of s 167(1) and s 169 of the Module.

[60] Section 167(1) of the Module provides:

The body corporate may supply, or engage another person to supply, utility services and other services for the benefit of owners and occupiers of lots, if the services consist of 1 or more of the following—

(a) maintenance services including, for example, cleaning, repairing, painting, pest prevention or extermination or mowing;

(b) communication services including, for example, the installation and supply of telephone, intercom, computer data or television;

(c) domestic services including, for example, electricity, gas, water, garbage removal, air conditioning or heating.

[61] Section 167(2) of the Module provides:

The body corporate may, by agreement with a person for whom services are supplied, charge for the services (including for the installation of, and the maintenance and other operating costs associated with, utility infrastructure for the services), but only to the extent necessary for reimbursing the body corporate for supplying the services.

[62] The body corporate, relying upon s 167(1) of the Module, says that it engaged the services of the cleaning contractor to clean the balconies of various lots despite there being no agreements in place between the body corporate and the individual lot owners that would entitle the body corporate to charge for the provision of the cleaning services. The body corporate says that it has thereby incurred the cost of cleaning the individual lots.

[63] Section 169 of the Module provides:

**169 Body corporate may carry out work required of owners and occupiers—Act, s 161 [SM, s 171]**

(1) This section applies if the owner or occupier of a lot included in the community titles scheme does not carry out work that the owner or occupier has an obligation to carry out under—

(a) a provision of the Act or this regulation, including a provision requiring an owner or occupier to maintain a lot included in the scheme; or

(b) a notice given under another Act or a Commonwealth Act; or

(c) the community management statement, including the by-laws; or

(d) an adjudicator’s order; or

(e) the order of a court or QCAT.

(2) The body corporate may carry out the work, and may recover the reasonable cost of carrying out work from the owner of the lot as a debt.

(3) In acting under subsections (1) and (2), the body corporate must, to the greatest practicable extent, ensure the total cost to the body corporate (other than body corporate administrative costs) for supplying a service, including the cost of a commercial service, and the cost of purchasing, operating, maintaining and replacing any equipment, is recovered from the users of the service.

[64] The body corporate says that, having undertaken cleaning works in respect of the various lots pursuant to s 167 of the Module, it was entitled to recover the cost of the cleaning works from Mr Comerford pursuant to s 169.

[65] The body corporate says that the fact no agreements were in place with the individual lot owners in respect of the cleaning works does not prevent it from recovering the cost of the cleaning works. The body corporate relies upon the decision in *Henderson & Anor v The Body Corporate for Merrimac Heights*.

[66] In *Henderson* McMurdo J (as he then was) was required to consider the validity of a gardening maintenance agreement entered into by the body corporate with a contractor which involved the maintenance of both common property and individual lots. McMurdo J held that s 167(2) is expressed in permissive terms and that the absence of an agreement entitling the body corporate to charge a lot owner for the cost of supplying services did not prevent the body corporate from engaging a service provider to provide the services. His Honour held that the body corporate’s duty under s 167(3) is expressed in relative terms and is to ensure “to the greatest practicable extent” that the user pays for the provision of services.

[67] The body corporate seeks to rely upon s 167 not to recover the cost of the provision of the cleaning services from the individual lot owners for whom the services were rendered, but to recover the totality of the cost of cleaning from Mr Comerford. As was noted in *Henderson*, the duty imposed by s 167(3) is not so much to make the cost recoverable, but to ensure “to the greatest practicable extent” that the total cost is recovered from users. The ‘users’ are the individual lot owners for whom the services are rendered and, in the present case, the individual lot owners whose balconies were cleaned. The difficulty facing the body corporate is that Mr Comerford was not one of those lot owners.

[68] In an attempt to overcome this hurdle, the body corporate relies upon s 169 of the Module to support its entitlement to undertake the cleaning works and to recover the cost from Mr Comerford.

[69] The operation of s 169 is engaged if a lot owner fails to carry out work the lot owner is obliged to carry out in certain stated circumstances. In support of its argument that it is entitled to recover from Mr Comerford the total cost of the cleaning works, the body corporate relies upon the decision of the Appeal Tribunal in *Body Corporate for Grand Pacific Resort CTS 29576 v Cox.*

[70] *Grand Pacific Resort* involved a dispute about unauthorised structural alterations by a lot owner. The body corporate applied for an order that it be permitted to inspect the lot. In dismissing an appeal from a decision by an adjudicator refusing the body corporate’s application, the Appeal Tribunal held:

Section 169 of the Accommodation Module relevantly provides that if the owner or occupier of a lot does not carry out work that the owner or occupier has an obligation to carry out under the Act or the Module or under a notice given under any other Act or under the Community Management Statement including the by-laws, then the body corporate may carry out the work. It may be that, under that section, the body corporate would be entitled to carry out work to rectify structural alterations undertaken without its consent, but there is nothing in the Act or the Accommodation Module that specifically provides for such a power. If, for example, the by-laws provided that any alterations for which the body corporate had not given its consent must be removed upon demand by the body corporate, then s 169 would authorise or require the body corporate to carry out that work if the owners refused to do so after a demand. Or if the council had served a notice on the Coxs requiring them to carry out some form of rectification works, which they had declined to do, then the body corporate would have been authorised to carry out works under s 169. But the body corporate failed to identify to the adjudicator any such power under which, if there were unapproved structural alterations, it would be authorised or required to carry out works.

[71] The body corporate’s submission as to the relevance of the decision in *Grand Pacific Resort* is not entirely clear but it seems to be to this effect: Mr Comerford, being aware that the Improvement Notice had been issued to the body corporate, did not object to the cleaning work being carried out, with the result that the body corporate was authorised to carry out the work. For the reasons that follow, the body corporate’s reliance upon *Grand Pacific Resort* is misplaced.

[72] Section 160 of the BCCM Act provides that the module applying to a community titles scheme may impose obligations about the condition in which lots included in the scheme must be maintained. The owner of a lot included in a scheme must maintain the lot in good condition. The owner of a lot must also maintain the utility infrastructure within the boundaries of the lot, and not part of common property, in good condition and, if the utility infrastructure is in need of replacement, must replace it. The owner of the lot is also responsible for maintaining utility infrastructure, including utility infrastructure situated on common property, in good order and condition, to the extent that the utility infrastructure relates only to supplying utility services to the owner’s lot.

[73] The work carried out by the body corporate relating to the cleaning of the dust was not work Mr Comerford was obliged to carry out under the Act or the Module. The cleaning related to other lots, not Mr Comerford’s. Mr Comerford was required to maintain his own lot, not other lots. Section 169(1)(a) of the Module does not apply.

[74] The body corporate relies upon the Improvement Notice as a notice given under s 169(1)(b) of the Module. However the Notice was issued not to Mr Comerford but to the body corporate and the obligation to remedy the breach identified in the Notice was imposed upon the body corporate and not Mr Comerford. Section 169(1)(b) of the Module does not apply.

[75] The adjudicator considered the scheme by-laws and specifically by-laws 21 and 22. The adjudicator found that, to the extent the by-laws sought to impose a monetary liability on a lot owner in contravention of s 180(6) of the BCCM Act, the by-laws were invalid. The by-laws imposed no obligation on Mr Comerford to undertake the cleaning work. The adjudicator’s finding in relation to the application of the by laws are not challenged in this appeal. Section 169(1)(c) of the Module does not apply. There was no error by the adjudicator.

*Was the dispute a ‘debt dispute’?*

[76] The body corporate says that the adjudication application by Mr Comerford was in respect of a ‘debt dispute’ for the purposes of s 229A of the BCCM Act.

[77] An adjudicator does not have jurisdiction in a debt dispute.

[78] Section 229A is contained within Chapter 6 of the BCCM Act. Chapter 6 is concerned with dispute resolution. The purpose of Chapter 6 is to establish arrangements for resolving disputes about, inter alia, contraventions of the BCCM Act or community management statements and the exercise of rights or powers, or the performance of duties, under the Act or community management statements.

[79] Subject to s 229A, the only remedy for a dispute that is not a complex dispute is the resolution of the dispute by a dispute resolution process or an order of the QCAT appeal tribunal on appeal from an adjudicator on a question of law. The dispute before the Tribunal is not a complex dispute.

[80] By s 229A(3) of the Act, an adjudicator does not have jurisdiction in a ‘debt dispute’. A ‘debt dispute’ is defined as:

… a dispute between a body corporate for a community titles scheme and the owner of a lot included in the scheme about the recovery, by the body corporate from the owner, of a debt under this Act.

[81] The term ‘debt’ is not defined in the BCCM Act. The body corporate relies upon the definition of ‘body corporate debt’ found in the Accommodation Module. Delegated legislation made under an Act should not be taken into account for the purposes of the interpretation of the Act itself.

[82] The term ‘debt’ is a general word and, in the absence of the contrary being shown, should be given its plain and ordinary meaning. A debt is a sum of money that is owed or due. However, in the context of s 229A, the debt must be one owed “under the Act”.

[83] We have found that there was no error by the adjudicator in concluding that the body corporate had no basis under the BCCM Act for demanding payment from Mr Comerford for the cleaning costs. The payment by Mr Comerford to the body corporate was not one owed or due under the BCCM Act. It follows that there was no debt dispute between Mr Comerford and the body corporate. The adjudicator therefore had jurisdiction to hear and decide the application.

*Failure to provide natural justice*

[84] The body corporate says that the adjudicator failed to afford the parties natural justice in considering s 281 of the BCCM Act when the application of the section had not been raised by the parties.

[85] Section 281 provides that where an applicant has suffered damage to property because of a contravention of the BCCM Act or the CMS, an adjudicator may order the person who the adjudicator believes to be responsible for the contravention to carry out repairs or pay the applicant an amount as reimbursement for repairs.

[86] In considering s 281, the adjudicator correctly observed that the body corporate was not the applicant. Further, the adjudicator found that the damage resulting from Mr Comerford’s actions was to other lots and not to the common property. We have found that it was open to the adjudicator on the evidence to make this finding. The adjudicator concluded that the body corporate had not suffered any damage to property.

[87] The task of the adjudicator was to make a just and equitable decision. The adjudicator was required to observe procedural fairness in arriving at the decision. The requirements of procedural fairness are flexible and vary according to the circumstances. The fairness of the procedure depends on the nature of the matters in issue, and what would be a reasonable opportunity for parties to present their cases in the relevant circumstances. The complaint by the body corporate is that the adjudicator failed to observe the fair hearing rule in not affording the parties an opportunity to be heard on the application of s 281 before making his decision.

[88] However the adjudicator determined, correctly in our view, that s 281 did not apply in the circumstances of the application before him. As such, the consideration by the adjudicator of the section did not adversely affect the interests of the body corporate. Notwithstanding that neither party had raised s 281 of the BCCM Act, there was no error by the adjudicator in considering the application of the section.

**Conclusion**

[89] The appeal is allowed. The decision of the adjudicator made 22 March 2018 is set aside. The adjudication application filed 12 December 2017 is dismissed.