SUPREME COURT OF QUEENSLAND

CITATION:	*The Proprietors – Rosebank GTP 3033 v Locke & Anor* [2016] QCA 192
PARTIES:	**THE PROPRIETORS – ROSEBANK GTP 3033** (appellant) **v** **JEREMY LOCKE** (first respondent) **CAMBRIDGE MANAGEMENT SERVICES PTY LIMITED** ACN 097 303 752 (second respondent)
FILE NO/S:	Appeal No 5294 of 2015 MC No 21175 of 2014
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeal Miscellaneous Application – Civil
ORIGINATING COURT:	Magistrates Court at Southport – [2015] QMC 3
DELIVERED ON:	29 July 2016
DELIVERED AT:	Brisbane
HEARING DATE:	1 March 2016
JUDGES:	Philippides and Philip McMurdo JJA and Bond J Separate reasons for judgment of each member of the Court, each concurring as to the order made
ORDER:	**The appeal be dismissed with costs.**
CATCHWORDS:	REAL PROPERTY – STRATA AND RELATED TITLES – MANAGEMENT AND CONTROL – BYLAWS – where the appellant was a residential body corporate governed by the *Building Units and Group Titles Act* 1980 (Qld) within the Hope Island Resort – where the appellant passed a by-law which permitted the expenditure of body corporate funds on Primary or Secondary Thoroughfare assets adjacent to the body corporate's common property – where the appellant subsequently passed a motion approving expenditure from its sinking funds on an upgrade of land located on the Primary Thoroughfare – where a Tribunal under the Act determined the by-law and motion to be invalid – where the appellant submitted that the Tribunal erred in failing to apprehend that the appellant's by-law making power was a valid source of the body corporate's powers, authorities, duties and functions under the Act – where the appellant submitted that a by-law could be made under

s 30(2) of the Act authorising improvements to the Primary Thoroughfare if it promoted the use or enjoyment of the lots and common property of the appellant – whether the s 30(2) by-law making power authorises the making of a by-law that is inconsistent with the Act – whether the by-law and motion are valid

REAL PROPERTY – STRATA AND RELATED TITLES – MANAGEMENT AND CONTROL – BODY CORPORATE: POWERS, DUTIES AND LIABILITIES – where the appellant was a residential body corporate governed by the *Building Units and Group Titles Act* 1980 (Qld) within the Hope Island Resort – where the appellant passed a by-law which permitted the expenditure of body corporate funds on Primary or Secondary Thoroughfare assets adjacent to the body corporate's common property – where the appellant subsequently passed a motion approving expenditure from its sinking funds on an upgrade of land located on the Primary Thoroughfare – where a Tribunal under the Act determined the by-law and motion to be invalid – where the appellant submitted that the power to disburse sinking fund moneys for the purpose of carrying out powers "under this Act" in s 38(6)(b) meant "under this Act or the by-laws" – where the appellant submitted that a by-law could be made under s 30(2) of the Act authorising improvements to the Primary Thoroughfare if it promoted the use or enjoyment of the lots and common property of the appellant – where the appellant submitted that the Tribunal erred in failing to find the by-law was validly made pursuant to s 30(2) of the Act – where the appellant submitted that the Tribunal erred in interpreting s 38A(2)(e) as confining expenditure to that concerning common property – where the appellant submitted that the Tribunal erred in failing to consider the relevance of the *Integrated Resort Development Act* 1987 (Qld) – whether the appellant is able to expend sinking funds on improvements to property that was not part of the common property

STATUTES – SUBORDINATE LEGISLATION – NATURE AND EFFECT – where the appellant submitted that the power to disburse sinking fund moneys for the purpose of carrying out powers "under this Act" in s 38(6)(b) meant "under this Act or the by-laws" – where the appellant submitted that by operation of s 7 of the *Acts Interpretation Act* 1954 (Qld) the expression "this Act" included a statutory instrument made under the Act – where the appellant submitted that the by-law was a statutory instrument under the Act within the meaning of s 7 of the *Statutory Instruments Act* 1992 (Qld) – whether it is appropriate to determine if the by-law is a statutory instrument made under the Act – whether the by-law is a statutory instrument made under the Act

COURTS AND JUDGES – COURTS – JURISDICTION AND POWERS – GENERAL PRINCIPLES – where an appeal on a question of law from the Tribunal pursuant to

s 108(1) of the Act was to "the Court" – where the "Court" was defined in s 7 of the Act to mean "the Supreme Court" – whether the Court of Appeal had jurisdiction to hear an appeal from the Tribunal under s 108(1) of the Act

Acts Interpretation Act 1954 (Qld), s 4, s 6, s 7, s 14A
Body Corporate and Community Management Act 1997 (Qld), s 325, s 326, s 328, s 330
Building Units and Group Titles Act 1980 (Qld), s 7, s 21, s 27, s 30, s 32, s 37, s 37A, s 38, s 38A, s 107, s 108
Building Units and Group Titles Regulation 2008 (Qld), r 9
Integrated Resort Development Act 1987 (Qld), s 91, s 93, s 102, s 109, s 116, s 120, s 139, s 145, s 151, s 176, s 178
Statute Law (Miscellaneous Provisions) Act (No 2) 1993 (Qld), s 3
Statutory Instruments Act 1992 (Qld), s 7
Strata Schemes Management Act 1996 (NSW), s 47
Strata Titles Act 1973 (NSW), s 43, s 58
Supreme Court of Queensland Act 1991 (Qld), s 4, s 5, s 29, s 61

Blizzard v O'Sullivan [1994] 1 Qd R 112, cited
Capricorn Inks Pty Ltd v Lawter International (Australasia) Pty Ltd [1989] 1 Qd R 8, cited
Casuarina Rec Club Pty Limited v The Owners - Strata Plan 77971 (2011) 80 NSWLR 711; [2011] NSWCA 159, distinguished
Dainford Ltd v Smith (1984) Q Conv R ¶54–140, considered
Dainford Ltd v Smith (1985) 155 CLR 342; [1985] HCA 23, considered
Grain Pool of Western Australia v Commonwealth (2000) 202 CLR 479; [2000] HCA 14, cited
Humphries v Proprietors 'Surfers Palms North' Group Titles Plan 1955 (1994) 179 CLR 597; [1994] HCA 21, considered
Legal Services Commissioner v Bradshaw [2009] QCA 126, considered
Locke v The Proprietors of Rosebank & Anor [2015] QMC 3, approved
London Association of Shipowners and Brokers v London and India Docks Joint Committee [1892] 3 Ch 342, cited
McLean v Gilliver [1995] 1 Qd R 637; [1994] QSC 53, cited
Re Hope [1996] 2 Qd R 25; [1995] QCA 471, considered
Re Taylor [1995] 2 Qd R 564, considered
Rosebank [2014] QBCCMCmr 301, cited
The Owners of Strata Plan No 3397 v Tate (2007) 70 NSWLR 344; [2007] NSWCA 207, considered
White v Betalli (2007) 71 NSWLR 381; [2007] NSWCA 243, cited
Williams v Melbourne Corporation (1933) 49 CLR 142; [1933] HCA 56, cited

COUNSEL:	D R Gore QC, with M Batty, for the appellant The first respondent appeared on his own behalf B P Strangman for the second respondent
SOLICITORS:	Grace Lawyers for the appellant The first respondent appeared on his own behalf MCG Legal for the second respondent

[1] **PHILIPPIDES JA: The appeal** The appellant, The Proprietors – Rosebank GTP 3033, is a residential body corporate under the *Building Units and Group Titles Act* 1980 (Qld) (BUGTA). It is one of many located within the Hope Island Resort, developed pursuant to an approved scheme under the *Integrated Resort Development Act* 1987 (Qld) (the IRDA).[1] The first respondent, Mr Jeremy Locke, is the owner and resident of Lot 54 Rosebank and thus a member of the appellant. The second respondent, Cambridge Management Services Pty Ltd, is the appellant's body corporate manager and did not seek to be heard on the appeal.

[2] The appeal concerns the validity of a by-law of the appellant (by-law 15) and a motion passed by the appellant (motion 3). By-law 15 concerns a by-law empowering the appellant to expend body corporate funds on primary and secondary thoroughfare assets on the Hope Island Resort. Motion 3 concerns the approval of expenditure from the appellant's sinking fund on an upgrade of land (the Rosebank Gardens Entrance Landscape Upgrade) which is located on the primary thoroughfare.

[3] The appellant appeals to this Court against the decision of the Magistrates Court, sitting as a Tribunal under BUGTA, which set aside the decision of a Referee[2] and determined the by-law and motion to be invalid. The appellant contended that the Tribunal erred in its determination in:

(a) Failing to apprehend that there are two sources of a body corporate's powers, authorities, duties and functions under BUGTA; namely, the Act and the by-laws of the body corporate.

(b) Failing to apprehend that the appellant could make a by-law empowering it to improve the primary thoroughfare pursuant to s 30(2) of BUGTA.

(c) Discerning a legislative policy intent in BUGTA with respect to the ability of a body corporate to make a by-law expending money on land adjacent to (but not part of) the lots or common property of Rosebank GTP 3033.

(d) Interpreting s 38A(2)(e) of BUGTA as containing a limitation that confines the expenditure to common property where no such limitation exists.

(e) Failing, when considering the legislative intent of BUGTA, to have regard to the fact that the appellant and other bodies corporate presently governed by BUGTA are parts of integrated resorts and developments regulated, inter alia, by the IRDA.

Background

The Hope Island Resort

[4] Hope Island Resort is regulated by the IRDA as an integrated resort. The resort consists of a number of precincts and uses (e.g. residential, retail, marina). The

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1 The IRDA provides for the approval of schemes of integrated resort development and makes provision to assist in the establishment, operation and management of approved integrated resort developments.

2 *Rosebank* [2014] QBCCMCmr 301.

registration of the initial plan of survey resulted in the creation of the primary thoroughfare, being land connecting the precincts of the Hope Island Resort, by means of roads. The secondary thoroughfare comprises areas connecting different parts of the residential precinct by roads and canals. The residential precinct includes the "secondary thoroughfare", 29 residential bodies corporate and the balance of lots awaiting development. Located in the "Rosebank Gardens Residential Precinct" are the appellant and two other residential bodies corporate.[3]

[5] As an integrated resort, Hope Island Resort operates under a tiered scheme. Within the scheme is the Primary Thoroughfare Body Corporate (PTBC), upon which is conferred responsibility for the control and management of the primary thoroughfare.[4] Beneath this tier is the Principal Body Corporate (PBC), responsible for the control and management of the secondary thoroughfare within the residential precinct.[5] The various bodies corporate within the residential precinct, including the appellant, are members of the PBC. The owners of land in the individual precincts are members of the PTBC, together with the PBC.[6]

[6] The PTBC and the PBC are governed by the IRDA and responsible under the IRDA for the control and management of the primary and secondary thoroughfares respectively. The various residential bodies corporate, on the other hand, are governed by BUGTA and are responsible under BUGTA for the control and management of the common property within the body corporate's plan.[7]

By-law 15

[7] The minutes of the meeting of the appellant of 6 August 2013 include a motion that the appellant's by-laws be amended (by special resolution) by inserting a new by-law 15 as follows:

> "**15 Expenditure on Areas of Adjacent Primary or Secondary Thoroughfares**
>
> 15.1 Subject to the prior approval of the Primary Thoroughfare Body Corporate or the Secondary Thoroughfare Body Corporate as the case may be, the Body Corporate *may expend Body Corporate funds on Primary or Secondary Thoroughfare assets adjacent to lots of common property* within the Scheme or immediately outside but adjacent to the Scheme Land *to promote the use or enjoyment of the lots and common property provided*:
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> (a) each proposed expenditure is first detailed for consideration and voting upon by special resolution at a general meeting of the body corporate
>
> (b) each proposal for consideration by a general meeting is accompanied by not less than two (2) quotations

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3 *Locke v The Proprietors – Rosebank GTP 3033 & Anor* [2015] QMC 3 at [4]. AB 270.
4 IRDA, s 116.
5 See IRDA s 151.
6 See IRDA s 102(1).
7 The successive legislation, the *Body Corporate and Community Management Act* 1997 (Qld), does not extend to bodies corporate that form part of "integrated resorts" such as the Hope Island Resort: see the transitional provisions of that Act; s 325 and s 328, which specify that that Act continues to apply to a plan for a "specified Act", which includes the IRDA.

(c) if the proposed expenditure is for work for which a monetary rebate or discount is being offered by either the Primary Thoroughfare Body Corporate or the Principal Body Corporate, the amount of the rebate or discount is to be set out as part of the proposal

(d) that sufficient Body Corporate funds are available to pay for the proposed works evidence of which shall accompany the notice of general meeting referred to herein

(e) that a proposal made under this by-law may include work to be carried out over a period of not more than one year and

(f) *that payments for approved works are drawn* from the applicable body corporate fund namely from the *administrative fund for maintenance type work and from the sinking fund for works of a capital nature*

For clarity it is to be noted that the authority granted to the committee to spend the prescribed amount on improvements to the common property by virtue of the terms of section 37(2)(g)(i) of the *Building Units and Group Titles Act* 1980, is not applicable for this by-law.

Body Corporate as Contractor

15.2 For the purposes of this by-law the body corporate may enter into a contract with the Primary Thoroughfare Body Corporate or the Principal Body Corporate as the case may be on terms which shall be subject to approval by a special resolution of the body corporate. Any contract with the Primary Thoroughfare Body Corporate or the Principal Body Corporate must contain a provision allowing for the work to be sub contracted to another party.

Insurances

15.3 In respect of all work to be undertaken under this by-law, the body corporate must effect Insurance for those liabilities which arise by reason of undertaking work which, but for this by-law, would not have been undertaken.

in accordance with section 30 (2) of the Building Units and Group Titles Act 1980 and further that the Body Corporate do all things necessary to record the amendment in accordance with section 30 (3) of the Building Units and Group Titles Act 1980." (emphasis added)

[8] By-law 15.1(f) thus purports to authorise payments from the sinking fund for "capital works" and payments from "administrative funds for maintenance type work".[8]

Motion 3

[9] An Extraordinary General Meeting was held on 23 May 2014. The minutes record that Item 3 "Rosebank Gardens Entrance Landscape Upgrade (Special Resolution)" was submitted by the appellant for consideration and that:

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8 The version of by-law 15 as recorded in the appellant's by-laws omitted the last paragraphs of 15.1 and 15.3 but nothing turns on that omission for the purposes of the appeal.

> "The Strata Manager advised Members that owners of the Rosebank South and Marina Houses Bodies Corporate have approved motions to proceed with the Rosebank Gardens entrance landscape upgrade at their respective Extraordinary General Meetings.
>
> Mr J Locke advised that Motion 3 should be ruled Out Of Order, as two (2) quotations were not put forth with the motion, for owners to vote on. The Chairman noted that the Body Corporate would like to move forward and improve the appearance of the entrance, noting that the motion will still be put to the meeting for consideration. It was noted that the various quotations sought were included in the explanatory material for the consideration of all owners. The Chairman noted that the Body Corporate will await the Final Order from the Commissioner, prior to taking any action."

[10] Motion 3 as passed was as follows:

> "**MOVED** that the Rosebank Body Corporate GTP 3033 accepts the Rosebank Gardens Entrance Landscape Upgrade proposal attached and marked 'Attachment B' and approves the expenditure of $18,446.79 being 144/247ths of the total cost of the project, with costs to be met from accumulated Sinking Funds, subject to the Rosebank South GTP 102509 and Marina Houses GTP 106928 bodies corporate also approving similar motions."

[11] While the first paragraph of by-law 15.1 refers to expenditure of "Body Corporate funds", by-law 15.1(f) identifies that payments are to be drawn from "the administrative fund for maintenance type work" and "the sinking fund for works of a capital nature". The upgrade works contemplated come within the latter category of works and motion 3 identifies the source of the funds to be expended as the sinking fund.

The Tribunal's decision

[12] Before the Tribunal, the appellant accepted that, in order for the by-law and motion to be valid, it was necessary to show that they authorised payments that came within the scope of those permitted by s 38(6) of BUGTA. In arguing that they did, the appellant, firstly, invoked s 38(6)(a), it being contended that the by-law and motion authorised the disbursal of money for s 38A(2) liabilities pursuant to s 38A(2)(e).

[13] Secondly, it was contended that s 38(6)(b) applied as the by-law authorised expenditure by the appellant from the sinking fund to carry out its powers, authorities, duties and functions "under this Act". In that regard, the appellant relied on the power in s 30(2) to make by-laws for the use and enjoyment of the lots and common property. It was argued that the making of a by-law for expenditure of body corporate funds on adjacent thoroughfare assets was one that promoted "the use or enjoyment of the lots and common property".

[14] The Tribunal described the by-law as one "to provide authority to make improvements on land adjacent to, but not part of Rosebank common property"[9] and, in rejecting the appellant's arguments, stated:[10]

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9 *Locke v The Proprietors – Rosebank GTP 3033 & Anor* [2015] QMC 3 at [6].

10 *Locke v The Proprietors – Rosebank GTP 3033 & Anor* [2015] QMC 3 at [15]-[21].

"The [appellant] argued that subsection 38A(2)(e) [BUGTA] extends the authority of a body corporate under [BUGTA] to authorise expenditure to: "such other liabilities expected to be incurred at a future time" and thus it contemplates a situation such as here, where improvements are sought to be made to an area outside the common plan. However, the Tribunal notes that subsections 37(2)(g) and 38A(2)(c) both expressly limit the making of improvements "to the common property".

There are no express exceptions to these provisions except with regard to unallocated State land that directly abuts the common plan in accordance with subsections 37(2)(f) and 37(4). The Tribunal notes that were the land 'unallocated State land' the [appellant] may be in a different position in regard to improvements. However, this does not apply given the land belongs to the third party BC.

Section 14A(1) of the *Acts Interpretation Act 1954* ('the AIA') provides that in the interpretation of a provision of an Act, the interpretation that will best achieve the purpose of the Act is to be preferred to any other interpretation. Given the express limitation of subsections 37(2)(g) and 38A(2)(c) to improvements to the common property, without express exception applicable in this case, and given that the words 'common property' are clearly a major thread through the legislation, it does appear clear that [BUGTA] operates to limit expenditure on improvements to areas of common property.

In the case of *Humphries v Proprietors 'Surfers Palms North' Group Titles Plan 1955* the majority decision of the High Court observed:[11]

> 'The chief duties of a body corporate are set out in s 37(1) of [BUGTA]; s 37(2) sets out powers which, in the discretion of a body corporate, it may exercise. Apart from specific paragraphs relating to the care of the personal property of the body corporate and the provision of a mail box, the duties of a body corporate imposed by s 37(1) relate either to what is or is part of the common property or to fixtures or fittings in one lot intended to be used for the servicing or enjoyment of any other lot or of the common property.'

Similarly, in this case it is clear that none of the duties encompassed by [BUGTA] extends to the provision by the body corporate of improvements relating to an area outside the common property. In general, the Third Schedule does not authorise a body corporate to provide improvements to property not on the common property.

It follows that the power to make by-laws pursuant to section 30(2) of [BUGTA] does not avail the respondent. The respondent did not have power under [BUGTA] to authorise improvements to the land of the [PTBC] and there was no valid by-law made which might have authorised the body corporate to improve property not the common property in the circumstances as here.

Thus, the Tribunal finds that there was no statutory power authorising, and there was no valid by-law which might have authorised, the

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11 (1994) 179 CLR 597 at 602.

> [appellant] to use funds of the residential body corporate to be used to fund works on property that is not part of the residential body corporate and is owned by the third party BC. As a result, the Tribunal finds that by-law 15 is invalid. It follows that Motion 3 is invalid, as the [appellant] did not have power to authorise funds of the residential body corporate be used to fund works on property that was not part of the residential body corporate."

[15] The Tribunal's reasoning may be summarised as follows. There was no statutory power authorising, or authorising a valid by-law which might have authorised, the use of body corporate funds to improve property that was not the common property of the relevant body corporate. The exception provided in s 37A(4) relating to expenditure on unallocated state land, did not apply. Furthermore, applying s 14A(1) of the *Acts Interpretation Act* 1954 (Qld) (the AIA) and given the express limitation in s 37(2)(g) and s 38A(2)(c) of BUGTA, it was clear that BUGTA limited expenditure to improvements to areas of common property. Schedule 3 did not provide such a power, nor did the power to make by-laws under s 30(2) of BUGTA. Accordingly, the by-law and motion were invalid as there was no statutory authorisation nor valid by-law authorising the funding.

Jurisdiction of the Court of Appeal to hear the appeal under BUGTA

[16] It is appropriate to deal first with an issue raised by the Bench as to this Court's jurisdiction to hear an appeal from the Tribunal pursuant to s 108(1) of BUGTA. That provision confers a right of appeal to "the Court" from an order made by a tribunal under s 107 on a question of law. The term "Court" is defined by s 7 of BUGTA to mean "the Supreme Court". No further definition is provided as to that term.

[17] Historically, as explained in the decisions of *Capricorn Inks Pty Ltd v Lawter International (Australasia) Pty Ltd*[12] and *Re Hope*,[13] the term "the Court" was understood to mean the Supreme Court sitting in Banc and not a single judge. McPherson JA authoritatively set this out in *Re Hope*:[14]

> "The word 'Court' is defined in the Rules to mean the Supreme Court of Queensland. As a matter of history, the Supreme Court meant the Supreme Court sitting in Banc. Originally the Court could be constituted only by all the judges sitting and exercising together the jurisdiction and powers of the Court. Apart from particular statutory provisions in that behalf, a single judge had no authority sitting alone to exercise any of the powers of the Court. See *Capricorn Inks Pty Ltd v. Lawter International (Australasia) Pty Ltd* [1989] 1 Qd.R. 8, 12–14 …
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> Legislation in the nineteenth century progressively altered this state of affairs. … See s. 6 of the *Judicature Act* 1876, which, as to the past, confirmed the power of single judges to exercise the jurisdiction of the Court in all proceedings which might before that Act have been heard by a single judge; and, as to the future, extended the same principle to such proceedings 'as may be directed or authorised to be so heard by any Rules of Court to be hereafter made'. In all those proceedings,

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12 [1989] 1 Qd R 8.
13 [1996] 2 Qd R 25.
14 [1996] 2 Qd R 25 at 26-27, the other members of the Court agreeing at 32.

> s. 6 went on to say, 'any Judge sitting in Court shall be deemed to constitute the Court'. When, after that, it was intended that a single judge should have the power to sit as the Court, the formula commonly employed was, and still is, 'the Court or a Judge…'.
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> … Accordingly, and subject to contextual indications to the contrary, when a statute or a Rule of Court uses the expression 'the Court', it should, in the first place, be taken to mean what it says and not to include a single judge of the Court. See *Capricorn Inks Pty Ltd v. Lawter International (Australasia) Pty Ltd*, at 12–14 …"

[18] The position following the enactment of the *Supreme Court of Queensland Act* 1991 (Qld) (the 1991 Act) was considered in *Legal Services Commissioner v Bradshaw*.[15] Section 29 addresses the jurisdiction and powers of the Court of Appeal, being "jurisdiction to hear and determine all matters that, immediately before the commencement of this section, the Full Court had jurisdiction to hear and determine", "such additional jurisdiction as is conferred on it by … another Act" and "may, in proceedings before it, exercise every jurisdiction or power of the court, whether at law or in equity or under any Act".

[19] Although the 1991 Act does not define the term "Supreme Court", it specifies that the Supreme Court (as consisting, inter alia, of a Chief Justice, a President, other judges of appeal, a Senior Judge Administrator and other judges)[16] is divided into the office of the Chief Justice and two divisions, namely the Court of Appeal and the Trial Division.[17] As Chesterman JA succinctly stated in *Bradshaw*, "[t]he jurisdiction conferred on 'the Supreme Court' is conferred on both divisions of the court".[18] Accordingly, there is no reason to read the 1991 Act as meaning anything other than the Court as constituted and defined by the 1991 Act, including the Court of Appeal. It follows that the term "the Court" in s 108, and elsewhere in BUGTA, is defined to mean "Supreme Court" and includes the "Court of Appeal".

[20] There is another provision of the 1991 Act that is pertinent for present purposes; that is s 61(2) which permits removal and remission of a proceeding where it may be more conveniently heard and determined in another court. It would not be appropriate to exercise the discretion to remit in this case, given that the matter before this Court concerns issues of some importance and with a potentially broader significance beyond the facts of the present case.

Relevant provisions of BUGTA

[21] The relevant provisions of BUGTA are to be found in Part 4 of BUGTA, entitled "Management" and in particular Division 1 thereof, entitled "Bodies Corporate".

[22] Section 27 provides for the constitution of bodies corporate. Section 27(1) provides for the establishment, by the proprietors upon registration of a plan, of a body corporate. Section 27(3) provides:[19]

> "Subject to this Act the body corporate shall have the powers, authorities, duties and functions conferred or imposed on it by or *under*

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15 [2009] QCA 126 at [25] per McMurdo P and at [80] per Chesterman JA.

16 *Supreme Court of Queensland Act* 1991 (Qld), s 4.

17 *Supreme Court of Queensland Act* 1991 (Qld), s 5.

18 [2009] QCA 126 at [80].

19 There are corresponding provisions in the IRDA in respect of the establishment and functions of the PTBC (see s 102(5) of the IRDA) and the PBC (see s 139(6) of the IRDA) discussed below.

this Act or the by-laws and shall do all things reasonably necessary for the enforcement of the by-laws and the control, management and administration of the common property." (emphasis added)

[23] Section 30 of BUGTA provides firstly for the Schedule 3 by-laws to be the by-laws in force for each plan, and secondly confers a by-law making power on a body corporate to alter those by-laws. It states:

"**30 By-laws**

(1) Except as provided in this section the by-laws set forth in schedule 3 shall be the by-laws in force in respect of each plan.

(2) Save where otherwise provided in subsections (7), (11) and (11A) a body corporate, pursuant to a special resolution, may, for the purpose of the control, management, administration, *use or enjoyment of the lots and common property* the subject of the plan, make by-laws amending, adding to or repealing the by-laws set forth in schedule 3 or any by-laws made under this subsection." (emphasis added)

[24] The duties and powers of a body corporate are set out in s 37 of BUGTA:

"**37 Duties and powers of body corporate regarding property etc.**

(1) A body corporate ***shall***—

(a) control, manage and administer *the common property* for the benefit of the proprietors; and

(b) where reasonably practicable, establish and maintain suitable lawns and gardens on *the common property*; and

(c) subject to section 37A, properly maintain and keep in a state of good and serviceable repair (including, where reasonably necessary, renew or replace the whole or part thereof)—

(i) *the common property*;

(ii) any fixture or fitting (including any pipe, pole, wire, cable or duct) comprised on *the common property* or within any wall, floor or ceiling the centre of which forms a boundary of a lot;

(iii) any fixture or fitting (including any pipe, pole, wire, cable or duct) which is comprised within a lot and which is intended to be used for the servicing or enjoyment of any other lot or of *the common property*;

(iv) each door, window and other permanent cover over openings in walls where a side of the door, window or cover is part of *the common property*;

(v) any personal property vested in the body corporate; and

(d) cause to be constructed and maintained at or near the street alignment of the parcel a receptacle suitable for the receipt of mail and other documents with the name of the body corporate clearly shown thereon.

(2) A body corporate *may*—

(a) enter into an agreement, upon such terms and conditions (including terms for the payment of consideration) as may be agreed upon by the parties thereto, with a proprietor or occupier of a lot for the provision of amenities or services by it to the lot or to the proprietor or occupier thereof; and

(b) acquire and hold any personal property; and

(d) enter into hiring agreements and leasing arrangements; and

(e) accept or acquire a lease, licence or permit for the purposes of providing moorings for vessels; and

(f) accept and deal with a lease, licence or permit that may be issued or granted under the *Land Act 1994* to any person in respect of *any unallocated State land, road or reserve which abuts on the parcel*; and

(g) make or cause to be made *improvements to the common property* where—

(i) in any one case, the cost of the improvements does *not exceed the prescribed amount*;[20] or

(ii) the body corporate by resolution without dissent so resolves; or

(iii) the body corporate resolves in general meeting that the improvements are considered to be essential for the health, safety or security of users of the common property and the referee makes an order approving the making of the improvements.

(3) For the purposes of the application of the *Land Act 1994* the body corporate shall be deemed to be the holder or the registered proprietor in fee simple of the land comprising the parcel.

(4) Any unallocated State land, road or reserve referred to in subsection (2)(f) is *additional common property*." (emphasis added)

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[20] As to the "prescribed amount" for the purposes of s 37(1)(g)(i) see r 9 of the *Building Units and Group Titles Regulation* 2008 (Qld).

[25] Section 38 concerns the establishment and use of an "administrative fund" and a "sinking fund". In respect of the "administrative fund", s 38(2) specifies what moneys are to be paid into the fund, while s 38(3) limits what money may be disbursed from that fund. Those provisions are mirrored in relation to s 38(5) and s 38(6) concerning payments made into and out of the "sinking fund". It is convenient to set out only the relevant provisions concerning payments into and disbursement from the "sinking fund", since that is the subject of motion 3. Expenditure from the sinking fund pursuant to the motion can only be validly made if by-law 15 is valid. For the purposes of the by-law 15, nothing turns on the difference between s 38(3)(b) and s 38(6)(b).

[26] Section 38 relevantly provides:

> "(5) A body corporate *shall pay into its sinking fund*—
>
> (a) *all moneys received by it in respect of contributions determined pursuant to section 38A(2)*;
>
> (b) any amounts paid to the body corporate by way of discharge of insurance claims and not paid to its administrative fund;
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> (c) all other amounts received by the body corporate and not paid or payable into the administrative fund;
>
> (d) interest received on any investments belonging to the sinking fund.
>
> (6) A body corporate *shall not disburse any moneys from its sinking fund* otherwise than for the purpose of—
>
> (a) *meeting its liabilities referred to in section 38A(2)*; or
>
> (b) *carrying out its powers, authorities, duties or functions under this Act*." (emphasis added)

[27] The s 38A(2) "liabilities", for which the body corporate is to determine the amounts to be levied as contributions pursuant to s 32, are specified as follows:[21]

> "(2) Within 12 months after registration of the plan and from time to time thereafter, the body corporate shall determine the amounts which are reasonable and necessary to be raised by contributions for the purposes of meeting its *actual or expected liabilities* in respect of—
>
> (a) painting or treating of any part of the common property which is a structure or other improvement for the preservation and appearance of the common property; and
>
> (b) the acquisition of personal property; and
>
> (c) the making of improvements to the common property; and
>
> (d) the renewal or replacement pursuant to section 37 of parts of the parcel being the common property, fixtures and

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[21] There is a corresponding regime for levies for the administrative fund (s 38A(1)).

fittings which the body corporate is required by this Act to maintain and keep in good and reasonable repair and other property (including personal property) held by or on behalf of the body corporate; and

(e) *such other liabilities expected to be incurred at a future time where the body corporate considers that the whole or part thereof should be met from its sinking fund*." (emphasis added)

The grounds of appeal

[28] As mentioned, a disbursement of money from the sinking fund is only authorised under s 38(6) for two "purposes", namely, pursuant to:[22]

- s 38(6)(a) - to meet s 38A liabilities; and
- s 38(6)(b) - to carry out powers, authorities, duties or functions under "this Act".

[29] Mindful that the disbursement power is so restricted, the grounds of appeal address the validity of by-law 15 in respect of both of the purposes identified in s 38(6).

[30] Ground of appeal (d) addresses whether by-law 15 is valid as a by-law for the disbursal of sinking funds for a s 38(6)(a) purpose of meeting s 38A liabilities (in particular s 38A(2)(e) liabilities). That ground raised the question whether s 38A(2)(e) contains a limitation that confines expenditure to common property or lots within the plan.[23] It was that provision that was principally relied upon before the Tribunal.

[31] Grounds of appeal (a), (b), (c) and (e), which were primarily relied upon before this court, concern whether by-law 15 validly authorised a disbursement from body corporate funds being a by-law for the purpose of "carrying out powers, authorities, duties or functions under this Act", whether by virtue of s 38(3)(b) in respect of administrative funds or s 38(6)(b) in respect of sinking funds. The issue of the validity of motion 3 draws particular attention to whether the by-law was validly made pursuant to s 38(6)(b). A critical issue raised by these grounds concerns the scope of s 30(2).

Ground (a) - Error in failing to apprehend that the by-law making power in s 30(2) of BUGTA as a source of power

Submissions

[32] As to ground (a), the appellant contended that the Tribunal erred in law by failing to apprehend that there were two sources for a body corporate's powers, authorities, duties and functions under BUGTA, namely, the Act itself and pursuant to s 30(2) the body corporate's own by-laws (provided they are validly made).[24] It was submitted that, while the Tribunal's conclusion, that none of the s 37 "duties or powers" under BUGTA extended to the provision by the body corporate of improvements relating to an area outside the common property[25] may have been correct, the Tribunal failed

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22 There are cognate prohibitions on the power of the PTBC and PBC to disburse moneys "otherwise than for the purpose" specified in s 116(3) and s 151(3) of the IRDA.

23 Appellant's reply submissions at [4].

24 Appellant's outline at [21].

25 *Locke* [2015] QMC 3 at [19].

to apprehend that a power or right of the appellant has the potential to be sourced from either the Act or a valid by-law".[26] As a result, it failed to apprehend that, for the purposes of s 38(6)(b), a disbursement by-law under s 30(2) of BUGTA could empower the appellant with the authority to pass the motion authorising expenditure on a landscaping upgrade on property adjacent to the appellant's land but owned by another body corporate.[27]

[33] That there are two sources of a body corporate's powers, authorities, duties and functions of the body corporate is evident from s 27(3). As Brennan and Toohey JJ explained in *Humphries & Anor v Proprietors "Surfers Palms North" Group Titles Plan 1955*:[28]

> "The powers, authorities, duties and functions of the body corporate are prescribed by or under the Act or the by-laws of the body corporate (s. 27(3)), and the proprietors are liable to pay contributions levied by the body corporate (s. 32) in the amounts which, in the opinion of the body corporate, are necessary to meet its actual and expected liabilities in respect of items of legitimate expenditure (ss. 38A, 38B)."

[34] *Humphries* concerned whether management rights for a property regulated by BUGTA were validly assigned by the respondent body corporate. Their Honours observed that, there was "no statutory power" authorising the respondent to conduct a letting agency, and there was no by-law which might have authorised it.[29] Likewise, Deane and Gaudron JJ noted[30] there was no provision of BUGTA "which either expressly or impliedly authorized the body corporate" to enter into such a contract or to expend its funds in the payment of such remuneration. "[n]or was there any by-law of the body corporate which conferred such authority." Similarly, McHugh J observed,[31] "apart from the by-law making power … nothing in [BUGTA] authorizes a body corporate to interfere with the rights of proprietors in respect of their lots".

[35] The appellant sought to make a distinction between the facts of the present case and *Humphries*, in that in the present case it was said that there was a relevant by-law that was validly made pursuant to s 30(2).

[36] The appellant's submission was that, by-law 15, was validly made under the s 30(2) by-law making power and, as such was, for the purposes of s 38(6)(b), a valid disbursement by-law "under this Act" authorising the expenditure the subject of motion 3. The crux of the contention advanced as to ground (a) was that the term "this Act" in s 38(6) (and s 38(3)) was, by virtue of the AIA, to be interpreted as also including a reference to a "by-law" made under s 30(2). That result was said to follow because, subject to any contrary intention,[32] the expression "this Act" included any statutory instrument made or in force under BUGTA[33] and a by-law was a statutory instrument made under BUGTA.[34]

Discussion

[37] The appellant's argument as to the application of s 7 of the AIA was only raised in oral submissions and without argument as to whether the by-law had the character of

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26 Appellant's outline at [24].
27 Appellant's outline at [22].
28 *Humphries* (1994) 179 CLR 597 at 601-602.
29 *Humphries* (1994) 179 CLR 597 at 604.
30 *Humphries* (1994) 179 CLR 597 at 609.
31 *Humphries* (1994) 179 CLR 597 at 614.
32 See AIA, s 4.
33 See AIA, s 7.
34 See SIA, s 7.

being of a public nature under the *Statutory Instruments Act* 1992 (Qld) (SIA). Nor did the Court have the benefit of submissions on any relevant authorities concerning the related question of the nature of a by-law under strata title legislation and how such by-laws should be characterised, which affects their interpretation.

[38] There is a useful discussion of pertinent authorities in *The Owners of Strata Plan No 3397 v Tate*[35] by McColl JA (with whose remarks Mason P agreed).[36] Her Honour observed:[37]

> "There appear to be at least two available, and not necessarily inconsistent, views of the proper characterisation of strata scheme by-laws.
>
> One is that such by-laws are delegated legislation, being instruments 'made under an Act': s 3, *Interpretation Act* 1987 [NSW]. According to D Pearce and S Argument, *Delegated Legislation in Australia*, 3rd ed (2005) Australia, LexisNexis Butterworths, at 4 [1.7], '[t]he term "by-law" is used to describe the legislation of a body having a limited geographical jurisdiction, and is the expression most commonly used for the primary legislative instruments made by local government authorities'. In *Re Taylor* [1995] 2 Qd R 564 at 570, speaking in the context of exclusive use by-laws in a strata title scheme, Dowsett J said it was 'the nature of a by-law that it deals with matters of internal regulation and operates in a particular context'.
>
> If by-laws constitute delegated legislation, then they should be interpreted in accordance with principles of statutory interpretation: *Collector of Customs v Agfa-Gevaert Ltd* (1996) 186 CLR 389 at 398. The statutory context will therefore be the first point of reference in interpreting the purpose or object underlying the Act (or instrument): *One.Tel Ltd v Australian Communications Authority* (2001) 110 FCR 125 at 141 [64], per Hill J.
>
> Although this case does not concern the validity of Special By-Law 21, it is appropriate to refer briefly to principles by which the validity of delegated legislation is determined to test the parties' respective contentions as to its meaning. Critically, delegated legislation is subject to the inconsistency principle, that is to say it is invalid if it contradicts or is repugnant to, or inconsistent with, the Act under which it is made: Pearce and Argument, at 219 [19.1]. The learned authors quote in support of this proposition the 'most frequently cited statement of the law relating to repugnancy', being Channell J's statement in *Gentel v Rapps* [1902] 1 KB 160 at 166 that:
>
> > 'A by-law is not repugnant to the general law merely because it creates a new offence, and says that something shall be unlawful which the law does not say is unlawful. *It is repugnant if it makes unlawful that which the general law says is lawful. It is repugnant if it expressly or by necessary implication professes to alter the general law of the land. ... Again, a by-law is repugnant if it adds something inconsistent with the provisions*

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35 (2007) 70 NSWLR 344.
36 (2007) 70 NSWLR 344 at [1].
37 (2007) 70 NSWLR 344 at [34]-[47].

> *of a statute creating the same offence*; but if it adds something not inconsistent, that is not sufficient to make the by-law as repugnant …' (Emphasis added)"

[39] McColl JA also made reference to *Dainford Ltd v Smith*[38] as an example of by-laws under BUGTA being interpreted using principles of statutory interpretation. Her Honour observed that the case concerned an exclusive use by-law made under s 30(7) of BUGTA which was relevantly on all fours with s 58(7) of the *Strata Titles Act* 1973 (NSW) (the STA) under consideration in *Tate*. Her Honour summarised the question for determination in *Dainford* as:[39]

> "… whether a vendor of a home unit who had contracted to grant to the proprietor for the time being of the unit the exclusive use of a car parking space on part of the common property pursuant to a by-law made under s 30(7) of [BUGTA] … had repudiated the contract because the by-law did not designate the car space directly or by reference to an identification otherwise made before or at the time of the making of the by-law. By-Law 40 provided that 'the proprietor for the time being of each lot in the building shall be entitled to the exclusive use … of the car space or spaces the identifying number or numbers of which shall be notified in writing by [the vendor] to the Council of the Body Corporate within twelve months after the date of registration of the Plan'. The purchasers argued By-Law 40 was invalid because it effected an unauthorised delegation of legislative power."

[40] Her Honour noted this Court's decision in *Dainford* (Campbell and Shepherdson JJ, Campbell CJ dissenting),[40] that the by-law was not a valid exercise of the s 30(7) power because the body corporate had sub-delegated to the vendor the power to identify the car space attached to the unit, was reversed by the High Court.[41] McColl JA referred to Shepherdson J's conclusion, in considering the model by-laws in force in respect of a building unit plan made pursuant to s 30(2) of BUGTA (a provision relevantly on all fours with s 58(2) of the STA) that strata scheme by-laws were delegated legislation.[42] In relation to that conclusion, her Honour also observed:[43]

> "… All members of the Court approached the case on the basis that By-Law 40 was an exercise of statutory power to be interpreted in accordance with principles relevant to delegated legislation: see Gibbs CJ (at 347–348), Mason J (at 351–352), Wilson J (at 355–359), Brennan J (at 361–363).
>
> Wilson J, however, observed (at 359) that:
>
> > '… it may be questioned whether the power conferred by s 30(7) is properly to be regarded as a delegation to the body corporate of legislative power. The by-laws which are made in exercise of that power are not of general application; they bind only the body corporate itself and the proprietors and any mortgagee in

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38 (1985) 155 CLR 342.
39 (2007) 70 NSWLR 344 at [39].
40 *Dainford Ltd v Smith* (1984) Q Conv R ¶54–140.
41 *Dainford Ltd v Smith* (1985) 155 CLR 342 (Gibbs CJ, Wilson J and Dawson J; Mason J and Brennan J dissenting).
42 *Dainford Ltd v Smith* (1984) Q Conv R ¶54–140 (56,874).
43 (2007) 70 NSWLR 344 at [40]-[41].

> possession, lessee or occupier of a lot to the extent described in s 30(5). However, the matter need not be pursued.'"

[41] McColl JA continued:[44]

> "The question Wilson J posed was taken up by Dowsett J in *Re Taylor*, albeit without reference to *Dainford*. In *Re Taylor*, the Registrar of Titles challenged the validity of exclusive by-laws purportedly made pursuant to s 30(7) of the *Building Units and Group Titles Act* (Qld). The body corporate applied for a determination of their validity. Dowsett J first considered whether the by-laws were properly so described. In concluding they were, he said (at 567):
>
> > 'The Shorter Oxford Dictionary defines "by-law" as, "a law or ordinance dealing with matters of local or internal regulation, made by a local authority, or by a corporation or association". A similar view was expressed by Lindley LJ in *London Association of Shipowners and Brokers v London and India Docks Joint Committee* [1892] 3 Ch 242 at 252 as follows:
> >
> > > "A by-law is not an agreement, but a law binding on all persons to whom it applies, whether they agree to be bound by it or not. All regulations made by a corporate body, and intended to bind not only themselves and their officers and servants, but members of the public who come within the sphere of their operation, may be properly called "by-laws", whether they be valid or invalid in point of law …"
> >
> > Clearly, by-laws have their operation within an identifiable and limited environment. Section 30(5) of [BUGTA] provides that by-laws made pursuant to s 30 bind persons other than owners of units.'
>
> Section 30(5) was in the same terms as s 58(5) [of the STA].
>
> Having concluded the by-laws were properly so described, Dowsett J held (at 569–570) that they must be construed in the context of the authorised functions of the body in question and the legislation conferring the power to make them. He held, applying the inconsistency principle, that s 30(7) could not be invoked to extend the powers or functions of the body or to contradict a provision of [BUGTA], at least in the absence of express or necessarily implied authority to do so. He concluded the exclusive use by-laws were invalid because they were inconsistent with express provisions of [BUGTA].

[42] In respect of London Association of Shipowners and Brokers v London and India Docks Joint Committee,[45] McColl JA made the following comments:[46]

> The by-laws with which [that case] dealt were purportedly made pursuant to s 83 of the *Harbours, Docks, and Piers Clauses Act*, 1847 (10 & 11 Vict c 27) which enabled the company to make by-laws under its common seal for the use of its docks and property. The by-

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44 (2007) 70 NSWLR 344 at [42]-[43].
45 [1892] 3 Ch 242.
46 (2007) 70 NSWLR 344 at [44]-[47].

> laws relevantly did not have effect unless confirmed in accordance with s 85; notices had to be given before they were confirmed (s 86 and s 87), and, when confirmed, they had to be published as directed by s 88. Once they were duly made, confirmed, and published, the by-laws become binding on all parties (s 89). They could only be altered by other by-laws similarly made and confirmed (at 251–252).
>
> It was of that power that Lindley LJ said (at 252), immediately before the passage Dowsett J quoted: 'This power of making by-laws is something very different from the power which every owner of property has of making agreements with those persons who may desire to use it'.
>
> Exclusive use by-laws under the [STA] had both qualities to which Lindley LJ referred: they bound all those referred to in s 58(5) whether or not, in the case of proprietors of the strata scheme, they voted in favour of them and they had to be agreed to by at least 75 per cent of those entitled to vote in respect of the common property in which they had a proprietary interest.
>
> The presence of s 58(5) suggests an alternative characterisation of strata scheme by-laws, namely that they are a statutory contract, deemed to exist by statute and constituted by the 'bundle of rights and liabilities' created by the [STA], the model by-laws and any special by-laws, such as Special By-Law 21, made pursuant to s 58: cf *Sons of Gwalia Ltd v Margaretic* (2007) 81 ALJR 525 at 535 [30] per Gleeson CJ; at 563 [191], 565 [203], 566 [205] per Hayne J (with whom Gummow J generally agreed); 232 ALR 232 at 243 [30], 282 [191], 285 [203], [205]."

[43] The conclusions that McColl JA drew from the authorities as to the nature of a by-law, include the following:[47]

> "2. By-laws have a public purpose which goes beyond their function of facilitating the internal administration of a body corporate; cf *National Roads and Motorists' Assoc Ltd v Parkin, Lion Nathan Australia.* …
>
> 4. By-laws may be classified as either delegated legislation or statutory contracts.…
>
> 8. An exclusive use by-law should be construed so that it is consistent with its statutory context; a court may depart from such a construction if departure from the statutory scheme is authorised by the governing statute and if the intention to do so appears plainly from the terms of the by-law: *Re Taylor*."

[44] It should be noted that *Re Taylor* did not consider the SIA. Neither did *Dainford*, which preceded the SIA.

[45] In the circumstances of the appeal before this Court, I do not consider that it is appropriate to determine whether a by-law under BUGTA is relevantly a statutory instrument or the related question of whether such a by-law is able to be characterised as delegated legislation. The Court did not have the benefit of submissions as to

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47 (2007) 70 NSWLR 344 at [71].

relevant authorities concerning the issue which was not itself the subject of comprehensive submissions. Importantly, a determination of whether a by-law under s 30(2) of BUGTA is a statutory instrument is not necessary for the resolution of this case. That follows for two reasons.

[46] Firstly, it is clear that BUGTA evinces an intention that the term "this Act" in s 38(6)(b) does not extend to include a by-law.[48] That is evident from the fact that, while s 27(3) expressly identifies the sources of a body corporate's powers, authorities, duties and functions as "the Act or the by-law," that compendious phrase is not utilised in s 38(6)(b). That a distinction ***is*** expressly made in s 27(3) but not in s 38(6)(b) is fatal to the appellant's contention, based on the AIA, as to the interpretation of the term "the Act". Given that a distinction is made in s 27(3) between "the Act or the by-law", one would expect it to have been repeated in s 38(6), so that it was clear that the disbursement power included that sourced in a by-law made under BUGTA.

[47] It would have been a simple matter to have done so. Such an approach is adopted in the IRDA. It specifies that the PTBC, has "the powers … conferred or imposed on it by or under this Act" (s 102(5)) and that the PTBC's disbursement power may be used for the purpose of carrying out its "powers … under this Act or the primary thoroughfare by-laws" (s 116(3)). Likewise, under s 139(6) of the IRDA, the PBC has the "powers … conferred or imposed on it by or under this Act or the development control by-laws". By s 151(3) of the IRDA the PBC's power to disburse moneys may be exercised "for the purpose of this Act, the development control by-laws or secondary thoroughfare by-laws". Although the primary thoroughfare by-laws, development control by-laws or secondary thoroughfare by-laws are all by-laws requiring Ministerial approval and gazettal, they are expressly identified as a source of the disbursement power.

[48] There is a second reason why it is not necessary to consider the nature of the by-law making power. It *remains* that, even if by-law 15 can be said to be a statutory instrument (as meeting the test of being of a public nature), the by-law's validity is to be considered using established principles of statutory construction, in particular the *inconsistency principle*.[49] A by-law made under the by-law power in s 30(2) of BUGTA is subject to the inconsistency principle. Whether by-law 15 is a valid exercise of the by-law making power is the subject of grounds (b) and (c). A statutory instrument is to be interpreted not to exceed the power conferred by the authorising law: s 21(1)(a). (Under the SIA subordinate legislation refers to a defined subset of statutory instruments)

[49] For the reasons that follow, I consider that by-law 15 is invalid on the basis of the inconsistency principle.

Ground (b) – Error in failing to find that by-law 15 was validly made pursuant to s 30(2)

Submissions

[50] The question raised by ground (b), and correctly identified by the appellant as "the critical question", is whether by-law 15 was validly made pursuant to s 30(2).

[51] As mentioned, s 30(2) permitted a body corporate to make by-laws amending, adding to or repealing the by-laws in Schedule 3 or any by-laws made under s 30(2) "for the purpose of the control, management, administration, use or enjoyment of the lots and common property the subject of the plan".

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48 The same applies in respect of s 38(3)(b) concerning expenditure of administrative funds.

49 A statutory instrument is to be interpreted not to exceed the power conferred by the law under which it is made: SIA s 21(1)(a).

[52] The appellant contended that a by-law could validly be made empowering the appellant to expend moneys "to improve the primary thoroughfare" pursuant to s 30(2) of BUGTA and that the Tribunal erred in concluding that the by-law making power in s 30(2) did not avail the appellant, because it "did not have a power under the Act to authorise improvements of the land of the [PTBC]".[50]

[53] In advancing this ground, the appellant placed reliance on the decision of the New South Wales Court of Appeal in *Casuarina Rec Club Pty Limited v The Owners - Strata Plan 77971*.[51] The issue for determination in *Casuarina* was whether an agreement made between a recreation club (containing a gymnasium, pool and tennis courts) and a body corporate (described as an "owners corporation") of a strata scheme resort, pursuant to by-laws made under the *Strata Schemes Management Act* 1996 (NSW) (the SSM Act), was valid. The recreation club was offsite (some 15 minutes' walk from the body corporate land).

[54] The appellant noted that the terms of the power in s 47 of the SSM Act, entitled "Can an owners corporation add to or amend the by-laws?" which stated:

> "An owners corporation ... may, for the purpose of the control, management, administration, use or enjoyment of the lots or the lots and common property for the strata scheme, make by-laws adding to, amending or repealing the by-laws for the strata scheme."

[55] The appellant relied on statements by Macfarlan JA that so far as by-laws relating to amenities were concerned, the amenities had to be "capable of enhancing the occupiers' use or enjoyment" of the body corporate land[52] and that requiring the amenity to be enjoyed on the premises would be arbitrary and unjustified.[53] Reliance was also placed on statements by Young JA that the power to make by-laws is to be generously construed[54] and that there was no reason to limit the provision of amenities to those which could be enjoyed on the land occupied by the strata buildings.[55]

[56] It was argued that the approach in *Casuarina* was persuasive and did not support the conclusion of the Tribunal that the power to make by-laws pursuant to s 30(2) did not avail the appellant.[56] The appellant contended that, on the basis of the approach in *Casuarina*, by-law 15 met the test set out in s 30(2) of BUGTA. In that regard, it was argued that:[57]

> "By-Law 15 explicitly stated that the improvement to the thoroughfare was to '*promote the use or enjoyment of the lots and common property'*… such a conclusion is straightforward given that By-Law 15 and Motion 3 were specifically directed towards improving landscaping on land which serves as an entry to the appellant's common property."

Discussion

[57] In considering *Casuarina* it is to be noted that it was concerned with the powers of an owners corporations to make an "original" by-law;[58] that is, by-laws established

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50 *Locke* [2015] QMC 3 at [20].
51 (2011) 80 NSWLR 711.
52 *Casuarina* (2011) 80 NSWLR 711 at 713 per Macfarlan JA.
53 *Casuarina* (2011) 80 NSWLR 711 at 713 per Macfarlan JA.
54 *Casuarina* (2011) 80 NSWLR 711 at 715 per Young JA.
55 *Casuarina* (2011) 80 NSWLR 711 at 718 per Young JA.
56 *Locke* [2015] QMC 3 at [20].
57 See [30] of the appellant's written outline.
58 (2011) 80 NSWLR 711 at 713 per Mcfarlan JA.

on registration of the strata plan, not by-laws created by amendment to the original by-laws.[59] It was not concerned with the power to alter by-laws found in s 47 of the SSM Act (the equivalent to s 30(2) of BUGTA).

[58] The original by-law making power in s 43 of the STA does not find an analogue in the BUGTA. Section 43(1) outlined the matters for which by-laws may be made as including "matters appropriate to the type of strata scheme concerned". By s 43(2) it was specified that subsection (1) did not limit the matters for which by-laws may be made.

[59] The submission in *Casuarina* that the original by-laws were invalid centred on the contention that there was "no sufficient connection between them and the role or functions of the owners corporation."[60] Turning to the provisions of SSM Act for guidance as to the width of the by-law making power, Young JA concluded that the provision of amenities to a lot owner or occupier was within the original by-law making power[61] and that there was no reason to limit the amenities provided thereunder to those that could be enjoyed on the land occupied by the strata building.[62] In that respect, Young JA had regard to s 47, holding that, if the amending by-law power permitted a by-law that was associated with the control, management, administration, use or enjoyment of the lots or the lots and common property, the criteria for assessing the validity of the original by-laws should not be narrower; the power to make by-laws could be not less than the power to alter them.[63]

[60] As to the required nexus, his Honour was of the view that easement cases concerning whether an easement touched and concerned the dominant tenement, supported the proposition that one "looks at the nexus question liberally but one still ends up with a question of fact as to whether the enjoyment of the land as opposed to the owner thereof is benefitted".[64] In observing that the by-law power was to be generously construed, Young JA[65] adopted the following statement of Campbell JA in *White v Betalli*:[66]

> "There is nothing in the notion of a by-law that, of itself, imposes any kind of limitation on the kind of regulation that might be adopted, beyond that it is for the regulation of the particular community to which it applies. Any limitation on the type of restriction or regulation that can be a by-law must arise from the statute that enables the by-laws to be created, or from the general framework of statute law, common law and equity within which that local community is created and administered."

[61] In finding that the by-laws were sufficiently connected with the functions of the owners corporation, his Honour stated:[67]

> "… I agree with the submission that this concept of 'adjacent' is a bit of a red herring. The vital question is whether the by-law was within the powers of the owners corporation, and a proper exercise of its functions under the SSM Act.

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59 (2011) 80 NSWLR 711 at 718 per Young JA.
60 (2011) 80 NSWLR 711 at 716 per Young JA.
61 (2011) 80 NSWLR 711 at 717.
62 (2011) 80 NSWLR 711 at 718.
63 (2011) 80 NSWLR 711 at 718 per Young JA.
64 (2011) 80 NSWLR 711 at 721.
65 (2011) 80 NSWLR 711 at 716.
66 (2007) 71 NSWLR 381 at [205].
67 (2011) 80 NSWLR 711 at 722.

> Whilst the focus of the owners corporation's functions is the site itself, it has not been demonstrated to me that the making of by-laws is restricted to the site. As shown in the earlier discussion, it can include at least some by-laws relating to the owners or occupiers of units on the site.
>
> …
>
> The power to make by-laws is to be liberally interpreted subject to the doctrine of fraud on the power and with the proviso that an unreasonable by-law will be held to be invalid.
>
> Furthermore, if an original by-law is to be declared invalid, a very strong case must be made out as people make their purchases on the basis of the original by-laws as filed.
>
> Thus, I conclude that the present by-laws did not step outside being sufficiently connected with the functions of the owners corporation, nor were they unreasonable."

[62] Macfarlan JA (with whom Handley JA agreed) agreed with Young JA, but refrained from commenting on the breadth of power to amend by-laws under s 47, confining his comments to the original by-law making power. In that regard, his Honour stated:[68]

> "For a by-law made under the [SSM Act], to be valid there must clearly be a nexus between the subject matter of the by-law and the use or occupation of the subject property. I do not consider that it is possible to formulate more precise rules that will determine whether that nexus exists in any particular case. The most that can be said is that, so far as by-laws relating to amenities are concerned, the amenities must be capable of enhancing the occupiers' use or enjoyment of the premises. As Young JA points out, requiring the amenity to be enjoyed on the premises would be arbitrary and unjustified. There would therefore be no reason why an owners corporation could not in ordinary circumstances make a by-law relating to the use of a tennis court on an immediately adjacent property.
>
> The question to be determined is one of fact and degree. There may no doubt come a point where an amenity is so remote from the subject premises that its use could clearly not be said to relate to the occupiers' use or enjoyment of the premises. ...
>
> Like Young JA, I derive some assistance from the easement cases to which his Honour refers. They involve a similar task to that required in the present case of identifying the way in which, and the extent to which, the enjoyment of premises is enhanced by the use of other premises.
>
> My view is that the relevant nexus did exist in the present case. Whilst the recreation centre was not adjacent to [the Resort] it was sufficiently close to enable the inference to be drawn that a right of access to it would be capable of enhancing the occupiers' enjoyment of their units at the Resort.

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68 (2011) 80 NSWLR 711 at 713.

> In conclusion I emphasise that the present case is concerned with the powers of an owners corporation to make an original by-law. Thus all owners would have been, or at least should have been, aware of the terms of the relevant bylaw at the time that they purchased their units. Accordingly its terms can be assumed to have been a matter that they took into account in deciding to purchase the units. It is not necessary in this case to comment on the breadth of the power under s 47 of the SSM Act to amend by-laws and I do not do so."

[63] The requirement of a sufficient nexus was posed by Young JA in terms of a sufficient connection with the functions of the body corporate being required. It was formulated by Mcfarlan JA as whether there was a sufficient nexus between the subject matter of the by-law and the use or occupation of the subject property.

[64] Bearing in mind that s 30(2) specifies the "purpose" for which by-laws thereunder may be made as being for "… use or enjoyment of the lots and common property", the requisite nexus is not necessarily established because a by-law being expressed to be for the use and enjoyment of the lots or common property. Drawing on the easement cases, referred to in *Casuarina*, it may not necessarily follow that expenditure by the appellant of body corporate funds on upgrading primary thoroughfare assets, albeit that it is adjacent, promotes enjoyment "of the lots and common property". By-law 15 does not facilitate a use or enjoyment that appertains to a lot in the same way, for example, that access to an amenity on or offsite does. In that respect, it is questionable whether it provides for a use or enjoyment that enures as appurtenant to the lot or common property or one that is for the benefit of the proprietor of a lot.

[65] Even if the requisite nexus is satisfied, there is a fundamental question that arises as to the ambit of s 30(2). It concerns the fact that, although s 27(3) recognises that the body corporate's powers are those conferred or imposed by the Act or by valid by-laws, the by-law making power in s 30(2) is not an unrestricted power, as was conceded by the appellant before the Tribunal and before this Court.[69]

[66] In *Re Taylor*,[70] Dowsett J referred to a long established line of authority outlining the approach in determining the validity or otherwise of a by-law. His Honour cited[71] the following passage of Dixon J (as his Honour then was) from *Williams v Melbourne Corporation*:[72]

> "To determine whether a by-law is an exercise of a power, it is not always enough to ascertain the subject matter of the power and consider whether the by-law appears on its face to relate to that subject. The true nature and purpose of the power must be determined, and it must often be necessary to examine the operation of the by-law in the local circumstances to which it is intended to apply. Notwithstanding that *ex facie* there seemed a sufficient connection between the subject of the power and that of the by-law, the true character of the by-law may then appear to be such that it could not reasonably have been adopted as a means of attaining the ends of the power."

[67] His Honour also referred to the following authorities:[73]

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69 AB 28-29.
70 [1995] 2 Qd R 564.
71 [1995] 2 Qd R 564 at 567-568.
72 (1933) 49 CLR 142 at 155.
73 [1995] 2 Qd R 564 at 568.

"Similarly, in *Footscray Corporation v. Maize Products Pty Ltd* (1942) 67 C.L.R. 301 at 308, Rich J. said:

> 'Authorities are of little use in determining the validity of a particular by-law. The appropriate steps are to construe the statute under which the by-law is made and then interpret it to ascertain whether it is within the ambit of the statute.'

Dixon C.J., in *Lynch v. Brisbane City Council* (1961) 104 C.L.R. 353 at 364, said:

> 'It is needless to repeat what has been already said about the manner in which s. 36 is constructed but the course the legislature has taken does not authorize the Court to read the wider words of sub-s. (2) down severely as if they were a vague and almost nugatory "*et cetera*". They give a power to lay down rules in respect of matters of municipal concern, matters that have been reasonably understood to be within the province of municipal government because they affect the welfare and good government of the city and its inhabitants. The words are not to be applied without caution nor read as if they were designed to confide to the city more than matters of local government. They express no exact limit of power but, directed as they are to the welfare and good government of a city and its inhabitants, they are not be read as going beyond the accepted notions of local government.'

Finally, Brennan J. described the process in *South Australia v. Tanner* (1989) 166 C.L.R. 161 at 173-174 as follows:

> 'In deciding whether an impugned regulation is valid, the court has three steps to take: it construes the terms in which the Parliament has conferred the power to make the regulation, it ascertains the scope and legal effect of the impugned regulation and it determines whether the regulation having that scope and legal effect is within the ambit of the power … This approach is similar to the approach adopted by a court in deciding whether a law enacted by the Parliament of the Commonwealth is within the legislative power conferred by the Constitution …, but an analogy between a decision upon the validity of subordinate legislation and a decision upon the validity of a law of the Parliament is imperfect. A legislative power conferred by the Constitution must be liberally construed unless there is some other constitutional warrant for a narrower construction … but in my opinion the same approach cannot be taken in construing a legislative power delegated by a Parliament. Parliament is the organ of government in which legislative power is vested and Parliament should not be held to have delegated to another repository more power than is clearly denoted by the words it has used. In my opinion, a delegation of legislative powers, should be narrowly construed unless the Parliament has, by express provision or necessary intendment, revealed a contrary intention.'

Although his Honour was in dissent, I do not understand that dissent to in any way undermine this general statement of principle."

[68] Having referring to these authorities, Dowsett J concluded:[74]

> "The power to make by-laws must be construed in the context of the authorized functions of the body in question and the legislation conferring the power. It follows that such a power cannot be invoked to extend the powers or functions of the body or to contradict a provision of the Act in question, at least in the absence of express or necessarily implied authority to do so."

[69] As to Dowsett J's conclusion, I agree that the s 30(2) by-law making power does not authorise a by-law that is inconsistent with the Act in that it contradicts a provision in the Act or extends the ambit of a power whose parameters are specifically addressed by the Act.

[70] The by-law making power conferred by s 30(2) is of a broad nature, as opposed to the power conferred by s 38 which is specifically concerned with a body corporate's power of disbursement of moneys from its funds. Section 38 is the sole source of the disbursement power under BUGTA. As a matter of statutory construction, the general must yield to the specific. The s 30(2) by-law making power is to be construed having regard to the disbursement power under s 38(3) in respect of administrative funds and s 38(6) in respect of sinking funds and the limitations imposed by those provisions.

[71] Beyond the s 38A liabilities under BUGTA, expenditure under s 38(3)(b) and s 38(6)(b) is confined to disbursements for the purpose of carrying out powers, authorities, duties and functions "*under this Act*".

[72] The parameters set out by s 38(3) and s 38(6) for the expenditure of funds are informed by the framework of s 37. The appellant seeks to interpret the s 30(2) by-law making power without regard to the framework in s 37 as to the body corporate's duties and powers. As stated in *Humphries*, the chief *duties* of a body corporate are set out in s 37(1), while s 37(2) sets out the *powers* which, in its discretion, the body corporate may exercise. The purpose of the by-law making power is primarily to permit a body corporate to make such by-laws as are required to meet its s 37(1) duties and facilitate the exercise of the s 37(2) powers. Central to the body corporate's duties is the control, management and administration of the common property; they are the express concerns of s 37(1)(a)-(c). The body corporate also has an express power pursuant to s 37(2)(g) to make improvements to the common property.

[73] The general by-law making power to make a by-law for "use and enjoyment of a lot or common property" cannot be used to confer a power on a body corporate which is *broader* than or contradicts the disbursement power in s 38 of BUGTA and is thereby *inconsistent* with s 38 of BUGTA.[75]

[74] This raises the question of the nature of the power to expend moneys on improvements that is authorised by s 38, which concerns ground (c).

Ground (c) – Error in discerning a legislative policy intent as to the power to make by-laws expending money on adjacent land

Submissions

[75] By ground (c) it was asserted that the Tribunal erred in holding that the legislative policy intent of BUGTA with respect to the by-law making power of a body corporate could be discerned by:

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74 [1995] 2 Qd R 564 at 568-569.
75 AB 27.

(i) the use of the phrase "common property" throughout BUGTA;[76]

(ii) the fact that Schedule 3 of BUGTA does not authorise a body corporate to provide improvement to land not part of the common property;[77] and

(iii) the "express limitations" that were said to operate pursuant to s 37(2)(g) and s 38A(2)(c) of BUGTA.[78]

[76] The appellant submitted firstly that there was no need for the Tribunal to have regard to the "policy" of BUGTA in circumstances where such a policy was not clear in respect of this issue and the relevant words of BUGTA were capable of being construed literally. The "policy intent" described by the Tribunal was, in any event, misconceived. The use of the phrase "common property" throughout BUGTA did not indicate a "policy intent". The fact that Schedule 3 did not authorise improvements to be performed "offsite" was of little moment, given the ability for such improvements to be sanctioned by way of a by-law as argued in ground (a). Similarly, the "express limitations" that were said to operate pursuant to s 37(2)(g) and s 38(2)(c) of BUGTA did not demonstrate the "policy intent" of BUGTA, particularly in circumstances where there is an ability for such limitations to be avoided by way of a valid by-law.

[77] Reference was also made to the power in s 37(2)(f) "to accept and deal with a lease, licence or permit that may be issued or granted under the *Land Act* 1994 (Qld) in respect of any unallocated State land, road or reserve which abuts on the parcel". An argument was advanced that, since such property might be the subject of improvement by the body corporate under s 37(2)(f), it was not outside the contemplation of BUGTA that abutting land (such as a primary thoroughfare in the context of the IRDA), might also be the subject of a by-law permitting expenditure on improvements.

Discussion

[78] It is clear that the power to effect improvements under s 37(2)(g) of BUGTA is conferred in respect of "common property".

[79] While by-law 15 is expressed in the language of "use or enjoyment" utilised in s 30(2), it is one that is concerned with effecting improvements. In its outline, the appellant frankly identifies by-law 15 as authorising the appellant to "make *improvements* on land adjacent to, but not part of, its common property".[79] For that reason, no doubt, the improvement power in s 37(2)(g)(i) of BUGTA was not relied on as a source of authority to expend funds under by-law 15. Indeed, by-law 15 expressly so states.

[80] It is also apparent from the terms of the by-law that the "use and enjoyment" "promoted" by the expenditure contemplated by the by-law is that arising from *improvements* to the assets of another body corporate located "adjacent to lots of common property within the Scheme or immediately outside but adjacent to the Scheme Land". By-law 15 is in effect a by-law authorising expenditure on "improvements" to assets of another body corporate.

[81] As to s 37(2)(f), it is pertinent to observe that unallocated State land, road or reserve coming within that provision is deemed to be "additional common property", by virtue of s 37(4).[80]

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76 *Locke* [2015] QMC 3 at [17].
77 *Locke* [2015] QMC 3 at [19].
78 *Locke* [2015] QMC 3 at [17].
79 Appellant's written outline at [9].
80 BUGTA, s 21 permits the acquisition of such "additional common property".

[82] By-law 15 is concerned with authorising "improvements" neither to common property, nor land which becomes additional common property. Rather, it is concerned with effecting "improvements" to the assets of another body corporate, which is part of an integrated resort under the IRDA.

[83] Given the power to disburse money for improvements to a body corporate's own common property is constrained by s 37 (in that either the cost of improvements may not exceed the prescribed amount, or the resolution to make improvements must be unanimous or be considered in general meeting to be essential for the health safety or security of users of the common property and approved by a referee),[81] it is difficult to see that a wider power to expend money on improvements was contemplated for property that is not common property. It could hardly have been the legislature's intention that a body corporate would be conferred with a power to effect improvements to the assets of another body corporate which was broader than that conferred on it under s 37(2)(g).

Ground (e) – Error in failing to consider the relevance of the IRDA

Submissions

[84] Ground (e) asserted error in failing to have regard to the fact that the appellant, and any other body corporate governed by BUGTA, were parts of "integrated resorts and developments" regulated by the IRDA or another specified Act[82] when considering the legislative policy intent of BUGTA.

[85] The appellant submitted that, even if the policy intent of BUGTA as found by the Tribunal was discernible and relevant, the Tribunal did not have proper regard to the fact that BUGTA now only applies to residential bodies corporate that form part of integrated resorts governed by, for example, the IRDA. It was said that in determining the purpose of BUGTA, such a matter was important. Thus, for example, funds raised by the appellant from its lot owners undoubtedly funded improvements made to areas outside its common property by the PBC and the PTBC. However, on the analysis undertaken by the Tribunal, particularly in respect of s 38A of BUGTA, such expenditure would not be permitted.

Discussion

[86] The IRDA provides a comprehensive regime which by s 91 places the responsibility for maintenance of roads within the primary thoroughfare and any other improvements thereon on the PTBC.[83] Of significance is s 93, entitled "Additional works on primary thoroughfare". It empowers the PTBC, at the written request of a member, to undertake works on any part of the primary thoroughfare "with a view to enhancing the amenity of the land" or profitability of any business undertaking within the site.[84] Section 93(5) provides that, in such a case, the PTBC "shall recover all costs of undertaking works" pursuant to s 93 from the member of members of the PTBC at whose request the works were undertaken. A formula is set out in s 93(6) for apportionment of costs where two or more members are liable to pay the costs of

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81 See BUGTA s 37(2)(g)(i), (ii), (iii).
82 BCCMA, s 326.
83 There is a corresponding responsibility on the PBC for secondary thoroughfares and improvements thereon.
84 See IRDA, s 93(1).

undertaking the s 93 works and an avenue of review to the Minister is available where a member feels aggrieved by a levy imposed under s 93.[85]

[87] Also pertinent is s 116 which imposes duties of the PTBC, *inter alia*, to "control, manage and administer the primary thoroughfare for the benefit of its members",[86] to properly maintain and keep in good and serviceable repair "the primary thoroughfare and any improvements thereon"[87] and to effect insurance in accordance with s 120 (which includes insurance in respect of damage or bodily injury happening on or in relation to the primary thoroughfare).[88] The PTBC is also required by s 116 to determine amounts to be raised by contribution for the purpose of meeting actual or expected liabilities incurred or expected to be incurred[89] and to levy a contribution to raise those amounts.[90]

[88] The PTBC is prohibited from disbursing funds other than for the purpose of carrying out its powers, etc. under the IRDA, the primary thoroughfare by-laws and any liability in s 116(1). The primary thoroughfare by-laws are dealt with in s 178. Section 178(1) empowers the PTBC, pursuant to a special resolution, to make by-laws (and amend or repeal by-laws) "for the purpose of the control, management, administration, use or enjoyment *of* the primary thoroughfare *and any improvements* thereon". The Minister's approval is required by s 178(2) before a primary thoroughfare by-law can have any force or effect. Section 176(8) specifies that a body corporate by-law that is inconsistent with a development control by-law of the PBC is to that extent of no effect.

[89] This summary of relevant provisions of the IRDA illustrates that the appellant's submissions concerning the relevance of the IRDA are misguided. In particular, improvements outside the appellant's common property funded by the PTBC (as with the PBC) are not sourced under the provisions in BUGTA (such as s 38A) but under the provisions of the IRDA. Thus, the example advanced by the appellant in support of ground (e) does not assist it.

Ground (d) – Error in interpreting s 38A(2)(e) as confining expenditure and improvements to that concerning common property, where no such limitation existed

Submissions

[90] Section 38A(2)(e) of BUGTA allows a body corporate to raise contributions to its sinking fund to meet actual and expected liabilities in respect of "such other liabilities expected to be incurred at a future time where the body corporate considers that the whole or part thereof should be met from its sinking fund". The error raised by ground (d) was stated to be "interpreting s 38A(2)(e) of [BUGTA] as containing a limitation that confines the expenditure of a body corporate under [BUGTA] to common property, when no such limitation exists".[91]

[91] The appellant argued that s 38A(2)(e) of BUGTA was erroneously interpreted by the Tribunal as confining expenditure to that which facilitated improvements to common property. It was argued that no such limitation was present on the express words of that provision and there was no basis to "read in" such a limitation.

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85 See IRDA, s 93(9).
86 IRDA, s 116(1)(a).
87 IRDA, s 116(1)(b).
88 IRDA, s 116(1)(c).
89 IRDA, s 116(1)(h).
90 IRDA, s 116(1)(j).
91 *Locke* [2015] QMC 3 at [15].

Discussion

[92] The submission that by-law 15 and motion 3 concerned an actual or expected liability coming within the scope of s 38A(2)(e) must be rejected. If s 38A(2)(e) were read alone without regard to BUGTA as a whole, it might be said to offer, in a theoretical or abstract sense, a basis for a finding that the by-law concerned "liabilities expected to be incurred at a future time where the body corporate considers that the whole or part thereof should be met from its sinking fund". But s 38A(2)(e) is to be read in the context of BUGTA as a whole, particularly s 37 and s 38.

[93] The term "liabilities" in s 38A is to be understood as comprehending those arising from the duties imposed on or powers exercisable by a body corporate under BUGTA, for example pursuant to s 37. The term "liabilities" is to be understood as encompassing the liabilities arising from the duties imposed on a body corporate with respect to those matters a body corporate "shall", that is, must attend to identified in s 37(1). Additionally, the term encompasses those liabilities that a body corporate assumes through the exercise of the "powers" conferred on it as identified in s 37(2). Section 38A(2)(e) is thus constrained by s 38(6)[92] and, in turn, by s 37. It does not authorise expenditure beyond that envisaged by s 37. By-law 15 does not concern a "liability" that arises as a result of a liability under BUGTA.

Conclusion

[94] Although s 27(3) identifies the Act and the by-laws as sources of powers, the by-law power in s 30(2) did not avail the appellant. It is not necessary to determine whether the by law is a statutory instrument. Firstly, not only does BUGTA evince an intention that the disbursement power in s 38(3) and s 38(6) was confined to the powers, authorities, duties or functions under "this Act" but, additionally, even if the by-law was a statutory instrument it is invalid in any event as inconsistent with BUGTA. The disbursement power in s 38(3) and s 38(6) is the sole source of the disbursement power and confined to the disbursement authorised as those for the purpose of s 38A liabilities and the powers etc under "this Act". The power to make improvements under BUGTA is expressed as one to make improvements to the common property. A by-law under s 30(2) cannot extend the disbursement power beyond the limitations in s 38(3) and s 38(6) nor be inconsistent with it.

[95] It follows that for the reasons expressed the Tribunal did not err in determining that by-law 15 and motion 3 were invalid. The appeal should accordingly be dismissed.

Costs

[96] An application was made by the first respondent that he was entitled to be indemnified in relation to any adverse costs order. It is not necessary to consider that issue. The appellant having failed in its appeal against the decision of the Tribunal, whose orders remain in effect, should pay the first respondent's costs.

Order

[97] I would order that the appeal be dismissed with costs.

[98] **PHILIP McMURDO JA:** Within the Hope Island Resort is a large residential precinct in which there are some 29 communities, each the subject of a registered plan

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92 AB 25.

under the *Building Units and Group Titles Act* 1980 (Qld). One of those communities is called Rosebank. It is the subject of a registered group title plan under that Act. The appellant is its body corporate and the first respondent is an owner of one of its lots. The second respondent, which is not an active party to this proceeding, is the appellant's body corporate manager.

[99] The ultimate issue is whether the appellant is entitled to spend money from its administrative fund or its sinking fund for works which it would cause to be undertaken on land which is outside the area of Rosebank, or in other words, on land beyond the lots and the common property under its registered plan. The appellant says that it is entitled to do so by a by-law, which was added in 2013, and a resolution at an extraordinary general meeting of the body corporate, which was passed in 2014. Mr Locke says that both the by-law and the resolution are of no legal effect.

[100] He made an application to a referee[93] seeking orders to the effect that the by-law and the motion are invalid. He was unsuccessful and appealed the referee's decision to a tribunal, constituted by a magistrate.[94] His appeal was allowed by the tribunal which held that the by-law and the motion were invalid.

[101] This is an appeal against the tribunal's decision, brought pursuant to s 108 of the *Building Units and Group Titles Act* which provides that an appeal lies to "the Court" from an order made by such a tribunal on the ground of an error of law. The only question or questions in this appeal are ones of the proper interpretation of this Act and are thereby questions of law. The Act defines the term "Court" to mean the Supreme Court.[95] For the reasons given by Philippides JA, that includes the Court of Appeal.

The Hope Island Resort

[102] Before going to the terms of the by-law, the motion and the relevant provisions of the *Building Units and Group Titles Act*, it is necessary to say something of the structure for the control and management of the Hope Island Resort. The resort was created under and is regulated by the *Integrated Resort Development Act* 1987 (Qld), which I will call the IRDA. It includes a residential precinct, a retail precinct and a marina. Within the residential precinct, the land which connects the various communities, such as Rosebank, consists of roads and canals which are together described as the "secondary thoroughfare". It is owned and managed by what is called the Principal Body Corporate,[96] the members of which are the bodies corporate of the 29 residential communities.[97]

[103] The land which connects the various precincts in the resort is called the "primary thoroughfare". It is owned and managed by what is called the Primary Thoroughfare Body Corporate. Its members are the bodies corporate of subdivisions within the resort (other than the residential precincts) and the Principal Body Corporate.

[104] By s 109 of IRDA, the Primary Thoroughfare Body Corporate may levy contributions upon its members to raise the funds which it requires for works upon the primary thoroughfare. By s 145 of IRDA, the Principal Body Corporate is given a like power

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93 Under Part 5 of the *Building Units and Group Titles Act* 1980 (Qld).

94 Under Division 5 of Part 5. There was another dispute between the parties which was also a subject of that appeal but which is not presently relevant.

95 s 7.

96 Constituted under s 139 of IRDA.

97 s 139(3) of IRDA.

to levy its members for works upon the secondary thoroughfare. In this way, the appellant, as a member of the Principal Body Corporate, contributes to a pool of funds to be expended by the Principal Body Corporate, throughout the secondary thoroughfare, as that entity sees fit. In the same way, the Principal Body Corporate contributes to a pool of funds to be spent by the Primary Thoroughfare Body Corporate.

[105] The contributions which the appellant must make to the maintenance and improvement of the thoroughfares, by levies made under IRDA, are not in question. The present dispute concerns the power of the appellant, on its own initiative, to spend its funds to undertake particular works on the primary or secondary thoroughfares which the appellant considers will enhance the enjoyment of the lots within Rosebank. These are moneys to be drawn from the administrative fund or the sinking fund for Rosebank and applied to specific works, rather than from the pool of funds administered by the Principal Body Corporate or the Primary Thoroughfare Body Corporate. There is no suggestion that IRDA authorises what is proposed by the appellant. The authority for this expenditure, if any, must be traced to the *Building Units and Group Titles Act*.

Building Units and Group Titles Act

[106] Most strata title and group title subdivisions in Queensland are governed by the *Body Corporate and Community Management Act* 1997 (Qld). Upon the commencement of that Act, most subdivisions effected under the *Building Units and Group Titles Act* became schemes under that Act.[98] However the 1980 Act continued to apply to a plan "for a specified Act",[99] which was defined to include IRDA.[100] It is therefore the *Building Units and Group Titles Act*, which I will describe from this point as the Act, which governs this subdivision.

[107] By s 27 of the Act, upon registration of a plan of subdivision the proprietor or proprietors of the lots shall be a body corporate. Section 27(3) is as follows:

> "(3) Subject to this Act the body corporate shall have the powers, authorities, duties and functions conferred or imposed on it by or under this Act or the by-laws and shall do all things reasonably necessary for the enforcement of the by-laws and the control, management and administration of the common property."

Importantly, that provision recognises two potential sources of the powers, authorities, duties and functions of a body corporate, namely the Act and the by-laws.

[108] Section 30 provides for the by-laws relevantly as follows:

> "30 By-laws
>
> (1) Except as provided in this section the by-laws set forth in schedule 3 shall be the by-laws in force in respect of each plan.
>
> (2) …[A] body corporate, pursuant to a special resolution, may, for the purpose of the control, management, administration, use or enjoyment of the lots and common property the

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98 *Body Corporate and Community Management Act* 1997 (Qld) s 330.
99 *Body Corporate and Community Management Act* 1997 (Qld) s 328.
100 *Body Corporate and Community Management Act* 1997 (Qld) s 326.

subject of the plan, make by-laws amending, adding to or repealing the by-laws set forth in schedule 3 or any by-laws made under this subsection.

…

(4) A lease of a lot or common property shall be deemed to contain an agreement by the lessee that the lessee will comply with the by-laws for the time being in force.

(5) Without limiting the operation of any other provision of this Act, the by-laws for the time being in force bind the body corporate and the proprietors and any mortgagee in possession (whether by himself, herself or any other person), lessee or occupier, of a lot to the same extent as if the by-laws had been signed and sealed by the body corporate and each proprietor and each such mortgagee, lessee and occupier respectively and as if they contained mutual covenants to observe and perform all the provisions of the by-laws."

It is to be noted that the purpose of any by-law made according to s 30(2) must be the control, management, administration, use or enjoyment of the lots and common property. The appellant's case is that in some circumstances, such as those the subject of the 2014 motion, the use or enjoyment of the lots and common property can be enhanced by works undertaken upon other land. As will be seen, the subject by-law, in authorising the expenditure of funds upon such works, required that the expenditure be for the promotion of the use or enjoyment of the lots and common property.

[109] Section 37(1) imposes certain duties upon a body corporate as follows:

"37 Duties and powers of body corporate regarding property etc.

(1) A body corporate shall—

(a) control, manage and administer the common property for the benefit of the proprietors; and

(b) where reasonably practicable, establish and maintain suitable lawns and gardens on the common property; and

(c) subject to section 37A, properly maintain and keep in a state of good and serviceable repair (including, where reasonably necessary, renew or replace the whole or part thereof)—

(i) the common property;

(ii) any fixture or fitting (including any pipe, pole, wire, cable or duct) comprised on the common property or within any wall, floor or ceiling the centre of which forms a boundary of a lot;

(iii) any fixture or fitting (including any pipe, pole, wire, cable or duct) which is comprised within a lot and which is intended to be used

for the servicing or enjoyment of any other lot or of the common property;

(iv) each door, window and other permanent cover over openings in walls where a side of the door, window or cover is part of the common property;

(v) any personal property vested in the body corporate; and

(d) cause to be constructed and maintained at or near the street alignment of the parcel a receptacle suitable for the receipt of mail and other documents with the name of the body corporate clearly shown thereon."

[110] Sections 37(2), (3) and (4) confer powers upon a body corporate as follows:

"(2) A body corporate may—

(a) enter into an agreement, upon such terms and conditions (including terms for the payment of consideration) as may be agreed upon by the parties thereto, with a proprietor or occupier of a lot for the provision of amenities or services by it to the lot or to the proprietor or occupier thereof; and

(b) acquire and hold any personal property; and

(d) enter into hiring agreements and leasing arrangements; and

(e) accept or acquire a lease, licence or permit for the purposes of providing moorings for vessels; and

(f) accept and deal with a lease, licence or permit that may be issued or granted under the *Land Act 1994* to any person in respect of any unallocated State land, road or reserve which abuts on the parcel; and

(g) make or cause to be made improvements to the common property where—

(i) in any one case, the cost of the improvements does not exceed the prescribed amount; or

(ii) the body corporate by resolution without dissent so resolves; or

(iii) the body corporate resolves in general meeting that the improvements are considered to be essential for the health, safety or security of users of the common property and the referee makes an order approving the making of the improvements.

(3) For the purposes of the application of the *Land Act 1994* the body corporate shall be deemed to be the holder or the registered proprietor in fee simple of the land comprising the parcel.

(4) Any unallocated State land, road or reserve referred to in subsection (2)(f) is additional common property."

[111] It can be seen that s 37 neither imposes any duty or function nor confers any power or authority for works to be effected by the body corporate upon land outside the lots and the common property.

[112] Section 38 requires a body corporate to establish an administrative fund and a sinking fund. The operation of the administrative fund is governed by s 38(2) and (3) as follows:

> "(2) A body corporate shall pay into its administrative fund—
>
> (a) all moneys received by it in respect of contributions determined pursuant to section 38A(1);
>
> (b) the proceeds of the sale or other disposal of any personal property of the body corporate;
>
> (c) any fees received by the body corporate under section 40;
>
> (d) any amounts paid to the body corporate by way of discharge of insurance claims;
>
> (e) interest received on any investments belonging to the administrative fund.
>
> (3) A body corporate shall not disburse any moneys from its administrative fund otherwise that for the purpose of—
>
> (a) meeting its liabilities referred to in section 38A(1); or
>
> (b) carrying out its powers, authorities, duties or functions under this Act."

The operation of the sinking fund is governed by s 38(5) and (6) as follows:

> "(5) A body corporate shall pay into its sinking fund—
>
> (a) all moneys received by it in respect of contributions determined pursuant to section 38A(2);
>
> (b) any amounts paid to the body corporate by way of discharge of insurance claims and not paid to its administrative fund;
>
> (c) all other amounts received by the body corporate and not paid or payable into the administrative fund;
>
> (d) interest received on any investments belonging to the sinking fund.
>
> (6) A body corporate shall not disburse any moneys from its sinking fund otherwise than for the purpose of—
>
> (a) meeting its liabilities referred to in section 38A(2); or
>
> (b) carrying out its powers, authorities, duties or functions under this Act."

[113] A body corporate raises money for its administrative fund and sinking fund by levies on the proprietors of lots pursuant to a power conferred on the body corporate by s 32(1) as follows:

"32 Levies by body corporate on proprietors

(1) A body corporate may levy the contributions determined by it in accordance with section 38A(1) and (2) and contributions referred to in section 38A(3) and the amount (if any) determined pursuant to section 38A(4) in respect thereof by serving on the proprietors notice in writing of the contributions payable by them in respect of their respective lots."

[114] A body corporate is to determine the contributions to be levied according to s 38A which relevantly provides as follows:

"38A Body corporate to determine contributions by proprietors

(1) Within 14 days after registration of the plan and from time to time thereafter, the body corporate shall determine the amounts which are reasonable and necessary to be raised by contributions for the purpose of meeting its actual or expected liabilities incurred or to be incurred within the period (not exceeding 12 months) specified in the determination in respect of—

(a) the regular maintenance and keeping in good and serviceable repair pursuant to section 37 of parts of the parcel being the common property, fixtures, fittings and other property (including personal property) held by or on behalf of the body corporate; and

(b) the payment of insurance premiums; and

(c) all other liabilities incurred or to be incurred during that period by or on behalf of the body corporate in carrying out its powers, authorities, duties and functions under this Act other than liabilities referred to in subsection (2).

(2) Within 12 months after registration of the plan and from time to time thereafter, the body corporate shall determine the amounts which are reasonable and necessary to be raised by contributions for the purposes of meeting its actual or expected liabilities in respect of—

(a) painting or treating of any part of the common property which is a structure or other improvement for the preservation and appearance of the common property; and

(b) the acquisition of personal property; and

(c) the making of improvements to the common property; and

(d) the renewal or replacement pursuant to section 37 of parts of the parcel being the common property, fixtures and fittings which the body corporate is required by this Act to maintain and keep in good

and reasonable repair and other property (including personal property) held by or on behalf of the body corporate; and

(e) such other liabilities expected to be incurred at a future time where the body corporate considers that the whole or part thereof should be met from its sinking fund."

The by-law

[115] The relevant by-law, headed "Expenditure on Areas of Adjacent Primary or Secondary Thoroughfares", is as follows:

"15.1 Subject to the prior approval of the Primary Thoroughfare Body Corporate or the Secondary Thoroughfare Body Corporate as the case may be, the Body Corporate may expend Body Corporate funds on Primary or Secondary Thoroughfare assets adjacent to lots of common property within the Scheme or immediately outside but adjacent to the Scheme Land to promote the use or enjoyment of the lots and common property provided:

(a) each proposed expenditure is first detailed for consideration and voting upon by special resolution at a general meeting of the body corporate

(b) each proposal for consideration by a general meeting is accompanied by not less than two (2) quotations

(c) if the proposed expenditure is for work for which a monetary rebate or discount is being offered by either the Primary Thoroughfare Body Corporate or the Principal Body Corporate, the amount of the rebate or discount is to be set out as part of the proposal

(d) that sufficient Body Corporate funds are available to pay for the proposed works evidence of which shall accompany the notice of general meeting referred to herein

(e) that a proposal made under this by-law may include work to be carried out over a period of not more than one year and

(f) that payments for approved works are drawn from the applicable body corporate fund namely from the administrative fund for maintenance type work and from the sinking fund for works of a capital nature

Body Corporate as Contractor

15.2 For the purposes of this by-law the body corporate may enter into a contract with the Primary Thoroughfare Body Corporate or the Principal Body Corporate as the case may be on terms which shall be subject to approval by a special resolution of the body corporate. Any contract with the Primary Thoroughfare Body Corporate or the Principal Body Corporate must contain a provision allowing for the work to be sub contracted to another party.

Insurances

15.3 In respect of all work to be undertaken under this by-law, the body corporate must effect Insurance for those liabilities which arise by reason of undertaking work which, but for this by-law, would not have been undertaken."

The motion

[116] The motion which is in question approved particular expenditure towards the improvement of part of the secondary thoroughfare which was considered to be beneficial for the use and enjoyment of the lots and the common property. The work proposed was for landscaping, or improving the landscaping, of areas near the entrance to the Rosebank subdivision. These works were also considered to be beneficial to the adjoining subdivisions, known as the Rosebank South Group Titles Plan and the Marina Houses Group Titles Plan. The appellant and the bodies corporate for those subdivisions proposed to effect these works as a joint endeavour.

[117] On 23 May 2014, at an extraordinary general meeting of the members of the appellant body corporate, this motion was passed:

> "MOVED that the [Respondent] GTP 3033 accepts the Rosebank Gardens Entrance Landscape Upgrade proposal attached and marked 'Attachment B' and approves the expenditure of $18,446.79 being 144/247^{ths} of the total cost of the project, with costs to be met from accumulated Sinking Funds, subject to the Rosebank South GTP 102509 and Marina Houses GTP 106928 bodies corporate also approving similar motions."

The tribunal's decision

[118] The tribunal member noted that s 37(2)(g) and s 38A(2)(c) both expressly limit the making of improvements "to the common property". She held that:[101]

> "Given the express limitation of subsections 37(2)(g) and 38A(2)(c) to improvements to the common property, without express exception applicable in this case, and given that the words 'common property' are clearly a major thread through the legislation, it does appear clear that the Act operates to limit expenditure on improvements to areas of common property."

In that respect her Honour relied on this passage from the judgment of Brennan and Toohey JJ in *Humphries v Proprietors "Surfers Palms North" Group Titles Plan 1955*:[102]

> "The chief duties of a body corporate are set out in s 37(1) of the Act; s 37(2) sets out powers which, in the discretion of a body corporate, it may exercise. Apart from specific paragraphs relating to the care of the personal property of the body corporate and the provision of a mail box, the duties of a body corporate imposed by s 37(1) relate either to what is or is part of the common property or to fixtures or fittings in one lot intended to be used for the servicing or enjoyment of any other lot or of the common property."

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101 [2015] QMC 3, [17].
102 (1994) 179 CLR 597, 602.

[119] Her Honour held that "none of the duties encompassed by the Act extends to the provision by the body corporate of improvements relating to an area outside the common property" and that consequently "the power to make by-laws pursuant to s 30(2) of the Act does not avail the respondent". Her Honour concluded:[103]

> "Thus, the Tribunal finds that there was no statutory power authorising, and there was no valid by-law which might have authorised, the respondent to use funds of the residential body corporate to be used to fund works on property that is not part of the residential body corporate and is owned by the third party [body corporate]. As a result, the Tribunal finds that by-law 15 is invalid. It follows that Motion 3 is invalid, as the Respondent did not have power to authorise funds of the residential body corporate be used to fund works on property that was not part of the residential body corporate."

The powers of the body corporate

[120] As the tribunal member held, there is no power expressed within s 37 for a body corporate to undertake works of this kind. Nor does any other provision of the Act confer such a power. However the appellant argues that the tribunal member overlooked the by-laws as a source of power. As already noted, s 27(3) identifies the by-laws, as well as the Act, as a source of a body corporate's powers, authorities, duties and functions. The appellant argues that the power was able to be conferred by a by-law made under s 30(2) and that the power in this case was conferred by the making of by-law 15. It is argued that by-law 15 was duly made under s 30(2) because there was a sufficient nexus between the subject matter of the power and the use or enjoyment of the lots and common property.

[121] Subject to the qualification which I am about to discuss, I would accept that by-law 15 was made within the power conferred by s 30(2). The required nexus is relatively undemanding. There is no express limitation within s 30(2) to the effect that a by-law may not empower the body corporate to act beyond its powers as conferred by the Act itself. Nor could such a limitation be implied, having regard to the terms of s 27(3).

[122] The undemanding nature of the requirement that the by-law relate to the use or enjoyment of the lots and common property is illustrated by the decision of the New South Wales Court of Appeal in *Casuarina Rec Club Pty Ltd v The Owners - Strata Plan 77971*.[104] In that case a by-law was made by which the owners corporation (the equivalent of a body corporate) was given "the power and function" to enter into an agreement with the operator of a recreation centre, containing a gymnasium, a pool and tennis courts, by which lot owners and their guests could use those facilities. The recreation centre was about a 15 minute walk from the resort the subject of the strata scheme. Macfarlan JA (with whom Handley AJA agreed) said that "there must clearly be a nexus between the subject matter of the by-law and the use or occupation of the subject property"[105] and held that such a nexus existed in that case. He rejected an argument that such an amenity had to be enjoyed on the premises of the scheme. Macfarlan JA said that "requiring the amenity to be enjoyed on the premises would be arbitrary and unjustified".[106]

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103 [2015] QMC 3, [21].
104 (2011) 80 NSWLR 711.
105 (2011) 80 NSWLR 711, 713 [2].
106 (2011) 80 NSWLR 711, 713 [2] and 723 [97].

[123] In the present case the by-law is expressly confined to a circumstance where the expenditure would promote the use or enjoyment of the lots and common property. In a particular case, that might raise a fine question as to whether the expenditure was of that character, although again, the test would be relatively undemanding. But as to the validity of the by-law itself, by its terms the by-law has a demonstrated nexus with the use or enjoyment of the lots and common property.

[124] However the power to make a by-law under s 30(2) is qualified by the Act, in that a by-law could not be made in terms which permitted the body corporate to act inconsistently with the Act. As Dowsett J said in *Re Taylor*,[107] the power to make by-laws under s 30(2) "cannot be invoked…to contradict a provision of the Act in question, at least in the absence of express or necessarily implied authority to do so". His Honour also said there that the power could also not be used to extend the powers or functions of a body corporate. With that I respectfully disagree: having regard to s 27(3), it is possible for the powers to be extended by a by-law. But it is another thing to say that a body corporate could be empowered by a by-law to act inconsistently with a provision of the Act.

[125] The powers of a body corporate are necessarily confined by its authority to deal with the moneys within its administrative and sinking funds. The Act imposes limitations upon the collection and expenditure of those moneys. It expressly proscribes the expenditure of moneys from the administrative fund or from the sinking fund except for a purpose set out in s 38(3) or s 38(6). A by-law which purported to authorise a body corporate to disburse money from either or both of those funds, inconsistently with the proscriptions within those provisions, would be invalid.

[126] By s 38(3) the body corporate is not to disburse moneys from its administrative fund other than for the purpose of meeting its liabilities referred to in s 38A(1) or "carrying out its powers, authorities, duties or functions *under this Act*." On the face of s 38(3), the relevant powers, authorities, duties or functions must have their source in the Act rather than in a by-law. However the appellant argues that the reference to "this Act" in s 38(3), and the like reference in s 38(6), includes a by-law.

[127] The basis for this argument is that a by-law for a group titles plan under the Act is a statutory instrument under the *Statutory Instruments Act* 1992 (Qld), so that it is within s 7 of the *Acts Interpretation Act* 1954 (Qld) which provides:

> "(1) In an Act, a reference (either generally or specifically) to a law (including the Act), or a provision of a law (including the Act), includes a reference to the statutory instruments made or in force under the law or provision."

Of course, the application of the *Acts Interpretation Act* may be displaced by a contrary intention appearing in any Act.[108] But the appellant argues that there is no contrary intention which appears. Consequently, it argues, there is no relevant impediment to the use of moneys from an administrative fund or a sinking fund for carrying out a power of a body corporate under a by-law. If that is correct, then there is no inconsistency between this by-law and the provisions of the Act.

[128] That argument should be rejected. It is far from clear that by-laws for a plan are a statutory instrument. And if they are, the application of s 7 of the *Acts Interpretation Act* is displaced.

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107 [1995] 2 Qd R 564, 569.

108 *Acts Interpretation Act* 1954 (Qld) s 4.

[129] The *Statutory Instruments Act* defines an instrument to mean "any document".[109] By s 7 it defines a statutory instrument as follows:

> "(1) A ***statutory instrument*** is an instrument that satisfies subsections (2) and (3).
>
> (2) The instrument must be made under—
>
> (a) an Act; or
>
> (b) another statutory instrument; or
>
> (c) power conferred by an Act or statutory instrument and also under power conferred otherwise by law.
>
> *Example of paragraph (c)—*
>
> an instrument made partly under an express or implied statutory power and partly under the Royal Prerogative
>
> (3) The instrument must be of 1 of the following types—
>
> - a regulation
> - an order in council
> - a rule
> - a local law
> - a by-law
> - an ordinance
> - a subordinate local law
> - a statute
> - proclamation
> - a notification of a public nature
> - a standard of a public nature
> - a guideline of a public nature
> - another instrument of a public nature by which the entity making the instrument unilaterally affects a right or liability of another entity.
>
> (4) However, to remove doubt, an Executive Council minute is not itself a statutory instrument."

[130] The question at this point is not whether by-laws are analogous to delegated legislation so as to potentially affect the approach to their interpretation.[110] It is whether a by-law for a plan is within the particular terms of s 7 of the *Statutory Instruments Act*.

[131] Subject to any amendment, addition or repeal under s 30(2) of the Act, s 30(1) provides that the by-laws for a plan shall be those set forth in schedule 1 of the Act. The by-laws are thereby prescribed by the Act itself, rather than being an instrument made under the Act. If the (original) by-laws are not a statutory instrument, it is

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109 s 6.

110 As discussed in *The Owners of Strata Plan No 3397 v Tate* (2007) 70 NSWLR 344.

unlikely to have been intended that an amended or added by-law would be a statutory instrument. In particular, it is unlikely that the rules for interpretation of statutory instruments would apply only to one or a few by-laws for a plan.

[132] One instrument listed in s 7(3) is a "by-law". But it must be a by-law in the sense relevant to s 7(3). In the context of s 7(3), it is apparent that to be a statutory instrument it must be of a public nature. That is confirmed by the explanatory note to this definition[111] as follows:

> "Amendment 1 clarifies the meaning of "statutory instrument". Implicit in the existing definition is a limitation to documents of a public nature. For example, if an Act contemplates an employment contract may be negotiated between the State and an employee, the contract is not a statutory instrument. Proposed subsection (3) makes the public nature limitation an express element of specified types of statutory instrument and clarifies (by the last dot point) the miscellaneous category of instruments that are statutory instruments."

That implication in "the existing definition" had been identified by Thomas J (as he then was) in *Blizzard v O'Sullivan*.[112]

[133] By-laws under the Act bind the body corporate, the proprietors, mortgagees, lessees and occupiers.[113] By-laws under the plan do not have a public function, in that they are in place only to affect the relationships between private entities and not for any public purpose. In that sense, by-laws under the Act are not instruments of a public nature. An alternative view is that the quality of a "public nature" would exist simply whenever the instrument is, or is intended to be, made public.

[134] If the by-laws of a body corporate are statutory instruments, the operation of s 7 of the *Acts Interpretation Act* is displaced within s 38. In each of subsections (3)(b) and (6)(b), the "powers, authorities, duties or functions" are those "under this Act." In s 27(3), the body corporate is given "the powers, authorities, duties and functions conferred or imposed on it by or under this Act *or the by-laws*". The omission of the reference to "the by-laws" in s 38(3) and s 38(6) is apparently deliberate. And there is an apparent explanation for the difference, namely that it was intended that the powers of a body corporate should not be able to be extended where that would enlarge the burden upon owners to contribute to the funds of the body corporate.

[135] It follows that the powers of a body corporate, as referred to in s 38(3) and s 38(6), are limited to those conferred by the Act. For the same reasons, the powers referred to in s 38A(1)(c) are limited to those conferred by the Act.

[136] By s 38(3)(a) a body corporate may disburse moneys from its administrative fund in meeting its liabilities referred to in s 38A(1). Because of what I have just said as to s 38A(1)(c), it cannot be said that an expenditure pursuant to by-law 15 would meet a liability referred to in s 38A(1). Consequently, at least for the reason that the by-law would authorise the expenditure of money from the administrative fund contrary to s 38(3), it is invalid.

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111 Explanatory note annexed to the *Statute Law (Miscellaneous Provisions) Act (No 2)* 1993 (Qld) s 3 Sch 1.

112 [1994] 1 Qd R 112, 121-122; see also *McLean v Gilliver* [1995] 1 Qd R 637, 646 per Lee J; (1994) 121 ALR 537, 546.

113 s 30(4), (5).

[137] By s 38(6), a body corporate may disburse money from its sinking funds in meeting its liabilities referred to in s 38A(2). At times in the oral submissions for the appellant, reliance was placed upon s 38A(2)(e), it being suggested that this might provide a power to spend moneys for works outside the subdivision. The category of liabilities here is:

> "(e) such other liabilities expected to be incurred at a future time where the body corporate considers that the whole or part thereof should be met from its sinking fund."

A liability will fall within paragraph (e) according to an opinion of the body corporate. But that is not an opinion that a liability should be incurred; rather it is an opinion that the liability, if properly incurred, should be met from the sinking fund rather than from the administrative fund. By subsections (1) and (2) of s 38A, liabilities are able to be categorised as relevant to the administrative fund or the sinking fund. The evident purpose of s 38A(2)(e) is to permit a body corporate to collect for and spend from its sinking fund moneys to meet liabilities which are not within s 38A(1) or otherwise described in s 38A(2). It could not be thought that paragraph (e) is an intended source of an (unlimited) authority to spend money, for a purpose not otherwise not permitted by the Act, as a body corporate may see fit.

[138] It follows that the expenditure as purportedly authorised by by-law 15 is not authorised by s 38(6) and for that additional reason, the by-law is invalid.

[139] That leaves for consideration the motion of 23 May 2014. Absent the purported authority from by-law 15, the body corporate has no power to spend funds as purportedly approved by the motion and nor does it have power to contract to do so. Consequently the motion was of no effect.

Conclusion and orders

[140] The tribunal was correct to set aside the decision of the referee and to declare the by-law and motion to be invalid. I would dismiss this appeal. Mr Locke is without legal representation but may have some recoverable costs. The appellant should be ordered to pay the costs of the appeal.

[141] **BOND J**: In formulating these reasons, I have had the considerable advantage of reading in draft the separate reasons for judgment of Philippides JA and Philip McMurdo JA.

[142] I agree with their Honours' conclusions that the appeal should be dismissed. However my route to that outcome differs from theirs and I respectfully disagree with some aspects of their Honours' reasoning. The detailed analysis expressed in their Honours' judgments means I can express my views in a summary way.

[143] Section 27(3) relevantly provides:

> "Subject to this Act the body corporate shall have the powers, authorities, duties and functions conferred or imposed on it by or under this Act or the by-laws and shall do all things reasonably necessary for the enforcement of the by-laws and the control, management and administration of the common property."

[144] I will use the term "powers" instead of the compendious phrase "powers, authorities, duties and functions".

[145] I agree with Philippides JA and Philip McMurdo JA[114] that it is evident from s 27(3) that there are two sources of a body corporate's powers, namely the Act and the by-laws. The latter term is a reference to the by-laws in force from time to time, namely the by-laws set out in schedule 3, as amended by valid resolution pursuant to s 30(2).

[146] Philippides JA and Philip McMurdo JA note that ss 38(3) and 38(6) relevantly constrain the body corporate's power to disburse moneys from the administrative and sinking funds by reference to the purposes of "carrying out its [powers] under this Act". Their Honours construe (albeit for reasons which differ in important respects) the phrase "under this Act" as not intended to include a by-law validly made.[115] Their Honours conclude that the s 30(2) by-law making power is to be regarded as constrained by reference to the limitations on the disbursement power under ss 38(3) and 38(6)[116] and, accordingly, that those limitations provide a basis for concluding that s 30(2) could not authorise the by-law under consideration in this appeal.

[147] I respectfully disagree with the significance attributed to the expression "under this Act" where it appears in ss 38(3) and 38(6).

[148] In my view:

(a) If a by-law made pursuant to s 30(2) can properly be characterised "for the purpose of the control, management, administration, use or enjoyment of the lots and common property the subject of the plan" then it may operate to extend the very limited powers which the existing schedule 3 by-laws confer on the body corporate.[117]

(b) It would be a surprising outcome if the legislation contemplated that possibility, but neither provided for the means by which funds could be raised to meet the costs of exercising extended powers nor permitted the disbursement of funds for that purpose. However, it seems to me that the legislature has avoided that outcome.

(c) If a by-law made pursuant to s 30(2) has extended a body corporate's powers then s 27(3) operates as an explicit statement in the Act that the body corporate "shall have" those powers. That statement is a sufficient basis to regard any step taken by the body corporate in carrying out the extended powers as a step taken in carrying out its powers "under this Act".

(d) The result is that s 38B would authorise the raising of funds to meet the costs of exercising the extended powers and ss 38(3) and 38(6) would permit the disbursement of funds for that purpose.

[149] The disposition of this appeal would then turn on the view which should be formed as to the validity of by-law 15 as an exercise of power pursuant to s 30(2).

[150] The relevant part of by-law 15 was in these terms:

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114 Philippides JA at [33]; Philip McMurdo JA at [107].

115 Philippides JA at [46]; Philip McMurdo JA at [127] to [135].

116 Philippides JA at [70] to [73]; Philip McMurdo JA at [124] to [125].

117 An analysis of schedule 3 reveals that the unamended by-laws confer only two very limited types of "powers, authorities, duties or functions". First, giving consent in writing which might enable a proprietor or occupier of a lot to do something which it would otherwise by prohibited from doing: see by-laws 2, 4, 5, 8, 9 and 11 of schedule 3. Second, authorising means of garbage disposal by a proprietor or occupier of a lot or providing alternative means: by-law 10 of schedule 3.

> "… the Body Corporate may expend Body Corporate funds on Primary or Secondary Thoroughfare assets adjacent to lots of common property within the Scheme or immediately outside but adjacent to the Scheme Land to promote the use or enjoyment of the lots and common property …."

[151] The critical question is whether an exercise of power to make a by-law which authorises future expenditure constrained only by the stated geographical confines and a future formation of view about the purpose of the particular expenditure can properly be characterised as an exercise of power "for the purpose of the control, management, administration, use or enjoyment of the lots and common property the subject of the plan".

[152] I agree with Philippides JA that the approach to be taken to the resolution of the validity or invalidity of a by-law purportedly made pursuant to s 30(2) is that identified in the authorities cited by Dowsett J in *Re Taylor*,[118] which are also quoted by Philippides JA.[119] An imperfect analogy is to be drawn with the approach taken to determining whether a Commonwealth law is within the legislative power conferred by the Constitution. When validity is in issue, it is necessary carefully to focus on the legal and practical operation of the by-law. To continue the analogy with Commonwealth constitutional law: its character would be determined by reference to the rights, powers, liabilities, duties and privileges which it creates.[120]

[153] The appellant contended that *Casuarina Rec Club Pty Ltd v The Owners - Strata Plan 77971*[121] supported its argument that the exercise of power could properly be characterised as an exercise of power for the requisite purpose. I agree with the observations made by Philippides JA concerning *Casuarina*.[122] I also note that in *Casuarina* the language of the by-laws under consideration directly addressed the authorisation of a particular type of agreement, namely an agreement for the off-site provision of particular amenities (such as gymnasium facilities) to residents of the body corporate. The Court felt able to evaluate the adequacy of the connection between the by-laws and the control, management, administration, use or enjoyment of the lots and common property in a way which supported the conclusion of validity.

[154] I do not think the same result can be reached in relation to by-law 15. Here the by-law contains insufficient details about the power conferred by the by-law to permit the evaluation whether the exercise of power to make the by-law was an exercise of power for the purposes set out in s 30(2). Here the by-law confers on the body corporate the power to expend moneys on assets of another body corporate conditioned only by the stated geographical confines and the future formation of view by the body corporate that a particular expenditure is for the purpose set out in s 30(2). That does not seem to me to be sufficient to justify the conclusion that the by-law as made was within power. If the by-law was not within power, the motion later passed in reliance on the by-law must also have been invalid.

[155] For these reasons the appeal should be dismissed with costs.

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118 [1995] 2 Qd R 564 at 567 to 568.
119 Philippides JA at [66] and [67].
120 Cf *Grain Pool of Western Australia v Commonwealth* (2000) 202 CLR 479 at 492 [16].
121 (2011) 80 NSWLR 711.
122 Philippides JA at [57] to [63].