SUPREME COURT OF QUEENSLAND

CITATION:	*JM Family Holdings Pty Ltd & Anor v Owltown Pty Ltd & Anor* [2018] QCA 260
PARTIES:	**JM FAMILY HOLDINGS PTY LTD ACN 154 045 128 (ATF) AND BERRIDGE ENTERPRISES PTY LTD ACN 168 647 934 (ATF)** (applicants) **v** **OWLTOWN PTY LTD** ACN 065 143 786 (first respondent) **THE BODY CORPORATE FOR NORWINN COMMERCIAL CTS 38094** (second respondent)
FILE NO/S:	Appeal No 3160 of 2018 QCATA No 5 of 2017
DIVISION:	Court of Appeal
PROCEEDING:	Application for Extension of Time/General Civil Appeal
ORIGINATING COURT:	Queensland Civil and Administrative Tribunal – [2018] QCATA 2
DELIVERED ON:	9 October 2018
DELIVERED AT:	Brisbane
HEARING DATE:	17 August 2018
JUDGES:	Fraser and McMurdo JJA and Bond J
ORDER:	**The orders of the Court are that:** **1. The applicants are granted an extension of time in which to seek leave to appeal the appeal tribunal's decision.** **2. The applicants have leave to appeal the appeal tribunal's decision.** **3. The appeal is allowed and –** **a. the orders made by the appeal tribunal (including the costs order) are set aside; and** **b. in lieu thereof it is ordered that the first respondent's appeal to the appeal tribunal be dismissed.** **4. The first respondent must pay the applicants' costs of the application for leave to appeal and of the**

appeal to this Court.

5. **The question of the order which should be made in relation to the costs of the proceeding before the appeal tribunal is remitted back to the appeal tribunal for determination.**

CATCHWORDS: COURTS AND JUDGES – COURTS – JURISDICTION AND POWERS – GENERAL PRINCIPLES – where a dispute arose as to the validity of motions passed at an annual general meeting of the body corporate – where an adjudicator was appointed under the *Body Corporate and Community Management Act* 1997 (Qld) to resolve the dispute – where the adjudicator's decision was appealed to the Queensland Civil and Administrative Tribunal pursuant to s 289 of the *Body Corporate and Community Management Act* 1997 (Qld) – where a single non-judicial tribunal member constituted the appeal tribunal – where the appeal tribunal allowed the appeal – where the applicants seek leave to appeal the appeal tribunal's decision to the Court of Appeal – where the respondents submit the Court of Appeal does not have jurisdiction to hear the appeal as it is not an "appeal under division 1" as referred to in s 150(2) of the *Queensland Civil and Administrative Tribunal Act* 2009 (Qld) – whether on a proper construction of the *Queensland Civil and Administrative Tribunal Act* 2009 (Qld) the Court of Appeal has jurisdiction to hear the appeal

APPEAL AND NEW TRIAL – PROCEDURE – QUEENSLAND – TIME FOR APPEAL – EXTENSION OF TIME – GENERAL PRINCIPLES AS TO GRANT OR REFUSAL – where the application for leave to appeal was filed 41 days after the expiry of the deadline for filing – where the court is empowered under the *Queensland Civil and Administrative Tribunal Act* 2009 (Qld) to extend the time for filing – whether there is good reason for delay – whether it is in the interests of justice to grant the extension – whether the extension of time should be granted

APPEAL AND NEW TRIAL – PROCEDURE – QUEENSLAND – WHEN APPEAL LIES – BY LEAVE OF COURT – where a dispute arose as to the validity of motions passed at an annual general meeting of the body corporate – where an adjudicator was appointed to resolve the dispute – where the adjudicator's decision was appealed to the Queensland Civil and Administrative Tribunal – where the appeal tribunal allowed the appeal – where the applicants seek leave to appeal to the Court of Appeal – whether leave to appeal should be granted

APPEAL AND NEW TRIAL – APPEAL – GENERAL PRINCIPLES – INTERFERENCE WITH JUDGE'S FINDINGS OF FACT – OTHER MATTERS – where a dispute arose as to the validity of two motions passed at an

annual general meeting of the body corporate – where the motions provided that the maintenance costs of a particular lift on the common property should be shared between all lot owners in accordance with their respective contribution entitlements – where the motions represented a change to the *status quo*, namely that the costs be borne solely by the applicants – where an adjudicator was appointed to resolve the dispute – where the adjudicator's decision was appealed to the Queensland Civil and Administrative Tribunal – whether the appeal tribunal erred in construing s 115(3)(b) of the *Body Corporate and Community Management (Commercial Module) Regulation* 2008 (Qld) so as to place an obligation on the applicants to be solely liable to maintain the lift – whether the appeal tribunal erred in construing references to "the lot" and "the owner's lot" in s 115(3) as including the plural – whether the appeal tribunal erred in making a finding of fact contrary to the findings of fact by the adjudicator

Acts Interpretation Act 1954 (Qld), s 14(4), sch 1 ("under")
Body Corporate and Community Management Act 1997 (Qld), s 152, s 289, sch 6 ("utility infrastructure" and "utility service")
Body Corporate and Community Management (Commercial Module) Regulation 2008 (Qld), s 115, s 115(3)(b)
Queensland Civil and Administrative Tribunal Act 2009 (Qld), s 25, s 26, s 27, s 143, s 149, s 150, s 150(2), s 151(2)(b), s 165, s 166, sch 3 ("appeal tribunal")

Rakaia Pty Ltd v Body Corporate for "Inn Cairns" Community Titles Scheme 16010 [2012] QCA 306, not followed
Rintoul v State of Queensland [2018] QCA 20, applied

COUNSEL: C L Hughes QC, with B Strangman, for the applicants
R S Litster QC, with K W Wylie, for the respondents

SOLICITORS: Stratum Legal for the applicants
Zande Law for the respondents

[1] **FRASER JA:** I agree with the reasons for judgment of Bond J and the orders proposed by his Honour.

[2] **McMURDO JA:** I agree with Bond J.

[3] **BOND J:** The parties to the application before this Court are:

(a) the applicants, which are the present owners of lot 8 within Norwinn Commercial CTS 38094, a Community Title Scheme established on 18 February 2008 and governed by the *Body Corporate and Community Management Act* 1997 (Qld) (**the BCCM Act**) and the *Body Corporate and Community Management (Commercial Module) Regulation* 2008 (Qld) (**the Commercial Module**);

(b) the first respondent, which is the owner of lots 2 and 4 within Norwinn Commercial CTS; and

(c) the second respondent, which is the body corporate for Norwinn Commercial CTS.

[4] A dispute arose between the first respondent and the second respondent concerning the validity of two resolutions which had been passed at the annual general meeting of the second respondent on 20 July 2015. The resolutions had purported to specify that the maintenance costs of a particular lift on the common property should be shared between all lot owners in accordance with their respective contribution entitlements. That outcome represented a change to the *status quo*, namely that the costs be borne solely by the owner of lot 8.

[5] The first respondent contended that the resolutions were invalid and sought declarations to that effect and relevant ancillary orders from an adjudicator appointed under the BCCM Act to resolve the dispute. The applicants (who had become the new owners of lot 8 on 30 June 2014) were interested parties and supported the validity of the resolutions. The adjudicator dismissed the application.

[6] The first respondent exercised its right to appeal on a question of law to an appeal tribunal constituted under the *Queensland Civil and Administrative Tribunal Act* 2009 (Qld) (**the QCAT Act**). The first and second respondents were parties to the appeal, as were the present applicants. The appeal tribunal found in favour of the first respondent, declared that the impugned resolutions were void, and made the ancillary orders which had been sought.

[7] Pursuant to s 150(2) of the QCAT Act, the applicants seek to apply to this Court for leave to appeal from the decision of the appeal tribunal on a question of law. Because the application was made after the expiry of the time limit prescribed by s 151(2)(b) of the QCAT Act, the applicants also seek an extension of the time within which to bring the application.

[8] The first respondent contests the jurisdiction of this Court to hear the application on the grounds that, on its proper construction, s 150(2) of the QCAT Act does not apply to the present applicants. If there is jurisdiction, the first respondent opposes the extension of time sought, opposes the grant of leave to appeal and contends that if leave is granted the appeal should be dismissed.

[9] Accordingly, the issues for determination are:

(a) whether this Court has jurisdiction to entertain the application;

(b) whether the applicants should have the requisite extension of time;

(c) whether the applicants should have leave to appeal; and

(d) whether, if leave is granted, the applicants should succeed on their appeal.

[10] It is appropriate first to examine the factual background sufficiently to explain the nature of the dispute, the decisions made by the adjudicator under the BCCM Act and the appeal tribunal under the QCAT Act, and the orders which have been sought from this Court.

The factual background

[11] The Norwinn Commercial CTS comprises two buildings and 8 lots. Building A is a two level building which contains lots 1, 2 and 3. Building B is a two level building to the south of the Building A which contains lots 4, 5, 6, 7 and 8.

[12] Each of the lots in Building B encompasses a lower level and an upper level. There is lower level access for each of the lots via external lower level doors, and upper

level access via stairs internal to each lot.[1] Unlike the other lots in Building B, the upper level of lot 8 may also be accessed via means which are external to lot 8, namely by stairs or an electric lift.

[13] The stairs and the lift are located on common property between lots 7 and 8 and service common property foyers on both the lower and upper levels of Building B. At the lower level, there are male and female toilets, a toilet for the disabled, a shower facility, communal lockers and some other infrastructure. At the upper level, the stairs and the lift each open out onto a common property foyer. From that foyer there is access to the upper level of lot 8, but also, a short distance away, to the upper level common property toilets and to a separate set of common property stairs, which provides access to the roof of the building.

[14] There is no restriction on access to the common property toilets, stairs or lift on either level. The owner of lot 8 does not have any exclusive use rights over the lift. Any lot owner or occupier can use the lift at any time without the need to traverse any other lot in the scheme. Any visitor to Building B could access the upper level toilet facilities by using common property (whether by stairs or by the lift). Indeed, given the floor area of Building B, expert opinion suggested that access to the common property toilets on the upper level of Building B was necessary to ensure compliance with the Building Code of Australia requirements as to sufficiency of sanitary facilities.

[15] The evidence suggested that other lot occupiers and owners and cleaners and tradespersons did in fact access the upper level facilities in Building B. The body corporate engaged cleaners to clean the common property areas on the lower level and the upper level and engaged tradespersons to attend to many fixtures on the roof, including the air conditioning plant, TV antennae and roof anchor points. Cleaners, contractors and tradespersons are all able to use the lift to access the upper level and evidence suggested that they did so from time to time.

[16] From the time the Norwinn Commercial CTS was first established, the owner of lot 8 had consented to paying exclusively for the maintenance of the lift, even though it did not have any exclusive use rights over the lift. Accordingly, the body corporate had issued and the owner of lot 8 had paid levies to reflect the burden of all the maintenance costs of the lift. The ownership of lot 8 changed hands on 30 June 2014. By exercise of the voting power allocated to lot 8 under the scheme, the new owners of lot 8 ensured that the following motions were passed by ordinary resolution at the annual general meeting of the body corporate on 20 July 2015:

> Motion 17
> That the full cost of the lift be shared between all Lot Owners in accordance with the contribution entitlements.
>
> Motion 18
> That the Body Corporate rescind the Exclusive Use Levies for Lot 8 in relation to the shared Body Corporate Assets (the Lift).

[17] The first respondent, as the owner of lots 2 and 4, disputed the validity of the resolutions. The first respondent brought an application against the body corporate to resolve the dispute. It sought a declaration that the resolutions were void or,

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[1] That each of lots 4, 5, 6 and 7 had internal stairs leading to the upper level was the subject of a specific finding in the adjudication. There was no specific finding one way or the other as to the existence of internal stairs in lot 8, but they were depicted on hydraulic plans, the accuracy of which was accepted by the adjudicator. That internal stairs in lot 8 in fact existed as so depicted was not disputed before this Court.

alternatively, orders that the owner of lot 8 be exclusively liable for all expenses associated with the lift and that there be consequential adjustments to past and future contributions. An adjudicator was appointed under the BCCM Act to resolve the dispute.

[18] The essence of the argument for invalidity was as follows:

(a) Section 152 of the BCCM Act operated to require the body corporate to comply with the obligations with regard to common property imposed by the Commercial Module.

(b) Section 115 of the Commercial Module relevantly provided:

> **115 Duties of body corporate about common property – Act, s 152 [SM, s 159]**
>
> (1) The body corporate must maintain common property in good condition, including, to the extent that common property is structural in nature, in a structurally sound condition.
>
> *Note –*
>
> For utility infrastructure included in the common property, see section 20 of the Act (Utility infrastructure as common property).
>
> (2) To the extent that lots included in the community titles scheme are created under a building format plan of subdivision, the body corporate must –
>
> (a) maintain in good condition –
>
> (i) railings, parapets and balustrades on (whether precisely, or for all practical purposes) the boundary of a lot and common property; and
>
> (ii) doors, windows and associated fittings situated in a boundary wall separating a lot from common property; and
>
> (iii) roofing membranes that are not common property but that provide protection for lots or common property; and
>
> (b) maintain the following elements of scheme land that are not common property in a structurally sound condition –
>
> (i) foundation structures;
>
> (ii) roofing structures providing protection;
>
> (iii) essential supporting framework, including load-bearing walls.
>
> (3) Despite anything in subsections (1) and (2) –
>
> (a) the body corporate is not responsible for maintaining fixtures or fittings installed by the occupier of a lot if they were installed for the occupier's own benefit; and
>
> (b) the owner of the lot is responsible for maintaining utility infrastructure, including utility infrastructure situated on common property, in good order and condition, to the extent that the utility infrastructure relates only to supplying utility services to the owner's lot; and
>
> *Example for paragraph (b) –*
>
> An air conditioning plant is installed on the common property, but relates only to supplying utility services to a particular lot. The owner of the lot would be responsible for maintaining the air conditioning equipment.

(c) the owner of the lot is responsible for maintaining the tray of a shower that services the lot, whether or not the tray forms part of the lot.

(c) Section 115(1) of the Commercial Module set out the general rule that the body corporate must maintain common property. But the general rule was subject to s 115(3) of the Commercial Module, which required an individual lot owner to be responsible for maintenance costs of "utility infrastructure" to the extent that the utility infrastructure "relates only to supplying utility services to the owner's lot".

(d) "Utility infrastructure" and "utility service" are defined in schedule 6 of the BCCM Act[2] as follows:

> ***utility infrastructure*** means—
>
> (a) cables, wires, pipes, sewers, drains, ducts, plant and equipment by which lots or common property are supplied with utility services; and
>
> (b) a device for measuring the reticulation or supply of a utility service.
>
> ***utility service*** means—
>
> (a) water reticulation or supply; or
>
> (b) gas reticulation or supply; or
>
> (c) electricity supply; or
>
> (d) air conditioning; or
>
> (e) a telephone service; or
>
> (f) a computer data or television service; or
>
> (g) a sewer system; or
>
> (h) drainage; or
>
> (i) a system for the removal or disposal of garbage or waste; or
>
> (j) another system or service designed to improve the amenity, or enhance the enjoyment, of lots or common property.

(e) A lift may be regarded as "utility infrastructure" because it is plant and equipment by which lots or common property can be supplied with "utility services" in the form of a system or service (namely a means of access or conveyance between levels of a building) designed to improve the amenity, or enhance the enjoyment, of lots or common property (by improving the means of access or conveyance between levels of a building).[3]

(f) As "utility infrastructure", the lift related only to supplying utility services to lot 8 and, therefore, the owners of lot 8 were obliged to be responsible for the maintenance costs of the lift.

(g) Accordingly, the resolutions were invalid because they contravened the requirements of the BCCM Act and of the Commercial Module.

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[2] The definitions in the BCCM Act are relevant because words and expressions used in the Commercial Module will have the same meaning as they have in the BCCM Act: see s 37 of the *Statutory Instruments Act* 1992 (Qld).

[3] This proposition was common ground before the adjudicator, the QCAT appeal tribunal and also before this Court. No occasion arises in this proceeding to consider whether that is the correct construction of subparagraph (j) of the definition of "utility service".

[19] An adjudicator appointed under the BCCM Act to determine the dispute dismissed the application. The adjudicator found that the lift as utility infrastructure could not be regarded as relating **only** to supplying utility services to lot 8. The adjudicator found (emphasis added):

> [38] The Commercial Module provides an example of an air conditioning unit, and that if an air conditioning unit is on common property but is installed for the purpose of only supplying utility services to a particular lot, then that owner would be responsible for maintaining the air conditioning equipment. In my view that example could be extended to this case of a lift, and that if it is proven that the lift was installed for the purpose of supplying a service to Lot 8, then the owner of Lot 8 would be responsible for maintaining that lift.
>
> [39] In this example the key issue, in my view, is that the utility infrastructure '*only*' relates to the supply of utility services to the lot, and not that it be mainly, or predominantly used by the lot owner, but it must be '*exclusively*'. **In this case the lift has not been installed '*only*' for the use of the owner of Lot 8, but for other lot owners, occupiers, body corporate agents, tradespersons and contractors to access the second level and for transportation of heavy items that may be required to be transported to the roof**.

[20] The adjudicator found that it did not matter that the original owner of lot 8 had, by agreement, always paid exclusively for the lift maintenance. That agreement to take on the sole responsibility of those costs did not of itself transfer such rights and obligations to any new owner of lot 8 and, the adjudicator found, even if there was an agreement in place, a body corporate could not contract out of the operation of the BCCM Act. The adjudicator, accordingly, found that the resolutions passing motions 17 and 18 were valid.

[21] Section 289 of the BCCM Act conferred on the first respondent (as a person aggrieved by the order) the right to appeal to the appeal tribunal under the QCAT Act, but only on a question of law.

[22] For the purposes of the QCAT Act "appeal tribunal" is defined in Schedule 3 to the QCAT Act in these terms:

> ***appeal tribunal*** means the tribunal constituted, or to be constituted, under section 165 for the purpose of—
>
> (a) hearing and deciding an appeal against—
>
> (i) a decision of the tribunal; or
>
> (ii) a decision of another entity under an enabling Act for which the enabling Act confers appeal jurisdiction on the tribunal; or
>
> (b) deciding an application for leave to appeal against a decision mentioned in paragraph (a)(i) or (ii).

[23] The constitution of such an appeal tribunal is provided for in ss 165 and 166 of the QCAT Act in these terms:

> **165 Constitution generally**
>
> (1) The president must choose 1, 2 or 3 members, or an adjudicator, to constitute the tribunal for a particular matter.
>
> (2) The person or persons chosen by the president under subsection (1) constitute, and may exercise all the jurisdiction and powers of, the tribunal in relation to the matter.
>
> (3) For an appeal, or a proceeding relating to an application for leave to appeal to the appeal tribunal, a reference in this Act to the tribunal includes a reference to the appeal tribunal constituted, or to be constituted, for the appeal or proceeding.
>
> (4) Subsection (3) does not limit another reference in this Act to the tribunal being taken to include a reference to the tribunal as constituted by the appeal tribunal, if the context requires or permits.

166 Constitution of appeal tribunal

(1) The tribunal is to be constituted for an appeal or an application for leave to appeal, under chapter 2, part 8, division 1, by 1, 2 or 3 judicial members.

(2) If the president considers it appropriate for a particular appeal or application for leave to appeal, the president may choose 1, 2 or 3 suitably qualified members to constitute the tribunal for the appeal or application, whether or not in combination with a judicial member.

(3) Subsection (2) does not apply in relation to an appeal or an application for leave to appeal if the appeal or application relates to a decision of the tribunal as constituted by a magistrate.

[24] The President of QCAT exercised the power conferred on him by s 166(2) of the QCAT Act and chose an experienced Queen's Counsel as a suitably qualified member to constitute the appeal tribunal for the appeal of the adjudicator's decision.

[25] The critical components of the reasoning of the learned member are encompassed in the following passage:

> [38] I consider that the proper approach [to determining whether the lift related only to providing a utility service to lot 8] is:
>
> a) to have regard only to objective criteria[4] such as the design of the building and the requirements of the [Building Code of Australia] and, in the light of those criteria,
>
> b) to consider whether the elevator would be necessary for the use of lots 1 to 7 so that, if it were not for lot 8, the elevator need not exist; and
>
> c) to compare that situation with the existing situation where lot 8 exists.
>
> [39] If lot 8 did not exist, there would be no need for toilet facilities on the 1st floor of the building (which would then comprise only the internal upstairs areas in lots 4 to 7), nor would there be a need for disabled access to that floor. The elevator is only necessary because of the design of lot 8 and the consequent requirement to have additional toilet facilities.
>
> [40] Alternatively, if only the ground floor of lot 8 existed and the 1st floor did not, the elevator would not be required, which would have allowed space for additional toilet facilities on the ground floor, sufficient to cater for the requirements of the building housing lots 4 to 8.
>
> [41] These facts demonstrate sufficiently to my satisfaction that the elevator does relate only to the supply of utility services to lot 8. That being so, under s 115(3)(b) of the *Commercial Module*, the owner of lot 8 is responsible for maintaining the elevator.

[26] The appeal tribunal allowed the appeal and set aside the adjudicator's order. It further ordered:

(a) The tribunal declares that resolutions 17 and 18 made at the annual general meeting of the body corporate on 20 July 2015, and any levies imposed on the owners of lots 1 to 7, to the extent that the levies included amounts for the costs of maintaining the elevator in Building B within the scheme, were void.

(b) The body corporate, by 28 February 2018, refund to the owners of lots 1 to 7 that portion of any levies paid by them since 20 July 2015 that represents a portion of the costs of maintaining the elevator in Building B within the scheme.

(c) The body corporate, by 28 February 2018, invoice the owners of lot 8 for a levy representing the amount of any costs of maintenance of the elevator in

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[4] Where the learned member referred to "objective criteria" at [38](a), he had earlier made clear that he intended to convey the need to exclude the "subjective" evidence of who in fact used the lift and for what purposes: reasons at [25].

Building B within the scheme that have not previously been levied on and paid by the owners of lot 8 since 20 July 2015.

(d) The owners of lot 8 pay any amounts levied on them by 28 March 2018.

[27] By subsequent order the appeal tribunal ordered the present applicants to pay the present first respondent's costs of and incidental to the appeal before the appeal tribunal.

[28] Section 150 of the QCAT Act provides:

> **150 Party may appeal—decisions of appeal tribunal**
>
> (1) A person may appeal to the Court of Appeal against a decision of the appeal tribunal to refuse an application for leave to appeal to the appeal tribunal.
>
> (2) A party to an appeal under division 1 may appeal to the Court of Appeal against the following decisions of the appeal tribunal in the appeal—
>
> (a) a cost-amount decision;
>
> (b) the final decision.
>
> (3) However, an appeal under subsection (1) or (2) may be made—
>
> (a) only on a question of law; and
>
> (b) only if the party has obtained the court's leave to appeal.

[29] The applicants have sought to apply for leave to appeal to this court pursuant to s 150(2). The application was made outside the 28 day time limit prescribed by s 151(2)(b) of the QCAT Act. It is common ground that an extension of 41 days to the date of filing of the application for leave to appeal is required.

[30] The applicants seek the following orders:

(a) the applicants be granted an extension of time in which to seek leave to appeal the appeal tribunal's decision;

(b) the applicants have leave to appeal the appeal tribunal's decision;

(c) the appeal be allowed and –

(i) the orders made by the appeal tribunal (including the costs order) be set aside;

(ii) in lieu thereof it be ordered that the first respondent's application be dismissed; and

(d) the first respondent pay the applicants' costs of the application for leave to appeal and of the appeal.

[31] It is common ground that if the applicants succeed to obtain those orders, the question of the order which should be made in relation to the costs of the proceeding before the appeal tribunal matter should be remitted back to the appeal tribunal for determination.

[32] Against that background, I turn now to consider the issues which arise in relation to the application.

Jurisdiction

[33] As has been mentioned, the first respondent has submitted the Court of Appeal does not have jurisdiction to hear the present application.

[34] The essence of the argument was that where s 150(2) of the QCAT Act empowers a party to an "appeal under division 1" to appeal to the Court of Appeal, "under" should be given the meaning of "pursuant to" or "by virtue of", such that the section should be taken as distinguishing between cases in which the right of appeal is conferred by division 1 and cases in which the right of appeal is conferred by some other statute. In this case the right of appeal was conferred by the BCCM Act and the appeal could not be regarded as an appeal "under" division 1.

[35] That argument must be rejected.

[36] Chapter 2 of the QCAT Act deals with the jurisdiction of the tribunal. Appeal jurisdiction is dealt with in Division 4, in these terms:

> **Division 4 Appeal jurisdiction**
>
> **25 Generally**
>
> The tribunal's appeal jurisdiction is—
>
> (a) the jurisdiction conferred on the tribunal by section 26; and
>
> (b) the jurisdiction conferred on the tribunal by an enabling Act to hear and decide an appeal against a decision of another entity under that Act.
>
> **26 Jurisdiction for decisions of the tribunal**
>
> The tribunal has jurisdiction to hear and decide an appeal against a decision of the tribunal in the circumstances mentioned in section 142.
>
> **27 When appeal jurisdiction exercised**
>
> The tribunal may exercise its appeal jurisdiction if a person has, under this Act or an enabling Act, appealed to the tribunal against a decision for which it has appeal jurisdiction.
>
> *Note—*
>
> Part 8, division 1 provides for how an appeal is made under this Act and how the tribunal's appeal jurisdiction is exercised.

[37] Section 25 makes it clear that the tribunal exercises two types of appeal jurisdiction:

(a) jurisdiction conferred by the QCAT Act (i.e. by ss 26 and 142); and

(b) jurisdiction conferred by an enabling Act (i.e. by a particular section in an enabling Act, s 289 of the BCCM Act being an example of such a section).

[38] Section 27 read with the note (which, by virtue of s 14(4) of the *Acts Interpretation Act* 1954 (Qld), is to be regarded as part of the QCAT Act) makes it clear that Part 8 division 1 is to be regarded as making provision for both types of the tribunal's appeal jurisdiction identified in s 25. An examination of Part 8 division 1 confirms that intention, because, apart from s 142 (which fulfils the role described by s 26), the division contains sections which govern how a litigant starts an appeal and how the appeal jurisdiction is to be exercised, in terms which expressly regulate both of the types of the tribunal's appeal jurisdiction referred to in s 25.

[39] Section 143 provides for how both types of the tribunal's appeal jurisdiction may be commenced and also imposes particular time limits applicable thereto. It is in these terms:

> **143 Appealing or applying for leave to appeal**
>
> (1) This section applies to—
>
> (a) an application for the appeal tribunal's leave to appeal to the appeal tribunal against a decision of the tribunal or a decision of another entity under an enabling Act; or

(b) an appeal to the appeal tribunal against—

(i) a decision of the tribunal; or

(ii) a decision of another entity under an enabling Act.

(2) The application or appeal must—

(a) be in a form substantially complying with the rules; and

(b) state the reasons for the application or appeal; and

(c) be accompanied by the prescribed fee (if any).

(3) An application for the appeal tribunal's leave to appeal must be filed in the registry within 28 days after the relevant day.

(4) An appeal must be filed in the registry within—

(a) if the appeal tribunal's leave is required for the appeal— 21 days after the leave is given; or

(b) otherwise—28 days after the relevant day.

Notes—

1. Under section 6(7), an enabling Act that is an Act may provide for a different period for applying for the appeal tribunal's leave to appeal or for making an appeal.

2. Under section 61, the tribunal may extend the period within which a person may apply for the appeal tribunal's leave to appeal or make an appeal.

(5) In this section—

relevant day, for an application or appeal, means—

(a) if a person makes an application under part 7, division 5, 6 or 7 about the decision being appealed against within 28 days after the person is given written reasons for the decision—the day that application is finally dealt with under that division; or

(b) if written reasons have not been given for the decision being appealed against and reasons have not been requested under section 122 or are not required to be given—the day the person received notice of the decision; or

(c) the day the person is given written reasons for the decision being appealed against.

[40] The subsequent sections of Part 8 division 1 –

(a) confer certain powers on the tribunal exercising its appeal jurisdiction (ss 143A and 144);

(b) provide that the start of an appeal does not operate as a stay of the decision appealed from, and empower the tribunal exercising appeal jurisdiction or a judicial member to order a stay (s 145);

(c) contain provisions which regulate the manner by which the tribunal must exercise its appeal jurisdiction (ss 146 to 148),

and are all expressed in terms which reveal an intention to govern both types of the tribunal's appeal jurisdiction referred to in s 25.

[41] Part 8 division 2 regulates appeals to the Court of Appeal from decisions of the tribunal, including appeals from decisions of the tribunal under division 1 and appeals from decisions of the tribunal which do not involve the exercise of its appeal jurisdiction. The ordinary and natural meaning of the phrase "appeal under division

1" is that the phrase is intended as a reference to a decision of the tribunal exercising the appeal jurisdiction referred to in ss 25 to 27, and regulated by division 1.

[42] Reaching that construction is entirely consistent with the direction provided for in schedule 1 to the *Acts Interpretation Act* 1954 (Qld) which provides:

> ***under***, for an Act or a provision of an Act, includes
>
> (a) by; and
>
> (b) for the purposes of; and
>
> (c) in accordance with; and
>
> (d) within the meaning of.

[43] If the phrase "appeal under division 1" is to be construed in the way I have identified, then the applicants have the right to appeal to this Court as provided for in s 150(2).

[44] The contrary view, espoused by the first respondent, was that there would be no right of appeal to the Court of Appeal from the appeal tribunal under the QCAT Act in the present circumstances. The remedy for the applicants would be to lodge an appeal under s 142 to a differently constituted appeal tribunal, with the result that the second appeal would be an appeal by virtue of division 1 and s 150(2) would apply to that second appeal. There is nothing in the words of the Part 8 division 1 or division 2 which suggests an intention to require two exercises by the appeal tribunal of its appellate jurisdiction.

[45] The first respondent suggested that *Rakaia Pty Ltd v Body Corporate for "Inn Cairns" Community Titles Scheme 16010* [2012] QCA 306 was an authority in support of its contention.

[46] *Rakaia* was an appeal from a decision of the appeal tribunal under the QCAT Act in which the appeal tribunal had been constituted by a judicial member and by a non-judicial member. Like the present case, the appeal to the appeal tribunal had been brought from a decision of an adjudicator under the BCCM Act on a question of law, pursuant to s 289 of the BCCM Act.

[47] The questions of law before the adjudicator, the appeal tribunal and the Court of Appeal were apparently substantially the same, because in the Court of Appeal the respondent filed a brief outline, saying it wished to rely on submissions made to the adjudicator, and on the decisions of both the adjudicator and the appeal tribunal and that it did not want to be heard to make further submissions. The respondent did not appear on the appeal and oral submissions were received on the appeal from the appellant only.

[48] The appeal was dismissed on the merits. But, as the present first respondent correctly notes, before embarking on an examination of the case, Gotterson JA (with whom McMurdo P and White JA agreed) did observe (at [4]) that:

> This appeal is made pursuant to s 149(2) of the QCAT Act. As the appeal is on a question of law only, leave to appeal is not required. [There followed a footnote which stated "Compare s 149(3)(b) for appeals on a question of fact or of mixed law and fact where leave is required."]

[49] Section 149 of the QCAT Act provides as follows:

> **149 Party may appeal—decisions of tribunal**
>
> (1) A party to a proceeding (other than an appeal under division 1) may appeal to the Court of Appeal against a cost-amount decision of the tribunal in the proceeding, whether or not a judicial member constituted the tribunal in the proceeding.

> (2) A party to a proceeding (other than an appeal under division 1) may appeal to the Court of Appeal against another decision of the tribunal in the proceeding if a judicial member constituted the tribunal in the proceeding.
>
> (3) However—
>
> (a) an appeal under subsection (1) may be made only on a question of law and only if the party has obtained the court's leave to appeal; and
>
> (b) an appeal under subsection (2) on a question of fact, or a question of mixed law and fact, may be made only if the party has obtained the court's leave to appeal.
>
> (4) Also, a party to a proceeding can not appeal to the Court of Appeal against a decision of the tribunal under section 35.
>
> *Note—*
>
> An enabling Act may provide for appeals to the Court of Appeal against decisions of the tribunal in different circumstances. See, for example, the *Legal Profession Act 2007*, section 468.

[50] There is no indication in *Rakaia* that the question whether leave was required was the subject of argument before the Court of Appeal. Given the respondent's very limited participation in the appeal, it may not have been. In any event, I respectfully disagree with the observation by Gotterson JA. It is apparent from the respective headings to ss 149 and 150 that they are intended to apply to different subject matters, the latter being the section applicable to decisions of the tribunal when constituted as the appeal tribunal, and, accordingly, the section applicable to the appeal then before the Court. For the reasons I have identified, I would regard the intended operation of s 149(2) of the QCAT Act as being to permit a party seeking to appeal a decision of the tribunal constituted by a judicial member to by-pass the internal appeal to the appeal tribunal and to appeal directly to the Court of Appeal. That view is also consistent with the terms of s 142 which do not permit an appeal to the appeal tribunal when a judicial member constitutes the tribunal.

[51] The result is that I reject the first respondent's argument. For the sake of completeness I record that the first respondent also sought to rely on an argument from redundancy, suggesting that if "appeal under division 1" has the meaning that I have attributed to it, the addition of the words "under division 1" have no utility. I disagree. The words are an unremarkable shorthand expression intended to encompass decisions of the tribunal exercising the appeal jurisdiction.

Extension of time

[52] Section 151(2)(b) of the QCAT Act requires an application for leave to appeal to be filed within 28 days after the "relevant day". In this case that would have required the application seeking an extension of time and attaching the notice of appeal to be filed by 8 February 2018. It was not filed until 21 March 2018, 41 days after the expiry of the 28 day deadline.

[53] The Court is empowered to extend time. The two relevant considerations are whether there is good reason for delay and whether it would be in the interests of justice to grant the extension. It is not necessarily fatal that the first consideration has not been satisfied.

[54] In the present case, an illness in the family of the shareholder of one of the applicants which occurred on the last day for filing of the application provided a partial explanation for the time which was allowed to pass, after the expiry of the deadline. However no explanation was established as to why the application was not filed before the expiry of the deadline.

[55] In my view the applicants have not demonstrated a good reason for the delay.

[56] On the other hand, the respondents have not suffered any prejudice in consequence of the delay, and the issues on the appeal involve a question of construction of s 115(3) of the Commercial Module, which is an issue of wider import than merely providing a resolution to the dispute between the present litigants and in which, as will appear,[5] the decision below contains a determinative error of law. Moreover, the resolution of the question, although involving comparatively modest amounts of money,[6] affects the liability of the lot owners for the costs of their ownership of real property for the life of the building.

[57] Notwithstanding the inadequacy of the explanation of the delay, I think that it is in the interests of justice to grant the extension.

Leave to appeal

[58] Similar matters are relevant to the question of leave to appeal from the appeal tribunal under the QCAT Act to the Court of Appeal. In *Rintoul v State of Queensland* [2018] QCA 20, Applegarth J (with whom Morrison and Philippides JJA agreed) observed (at [10], footnote omitted) that:

> The principles governing a grant of leave to appeal are well-established. In short, an applicant for leave to appeal must show:
>
> (a) the appeal is necessary to correct a substantial injustice;
>
> (b) there is a reasonable argument that there is an error to be corrected.
>
> There must be reasonable prospects of success to warrant a grant of leave. Therefore, in deciding whether to grant leave to appeal the Court usually makes some preliminary assessment of the prospects of the proposed appeal.

[59] The matters relevant to the discussion of the interests of justice discussed under the previous heading also warrant a grant of leave to appeal.

The merits of the appeal

[60] Three grounds of appeal were advanced by the applicants.

[61] First, the appeal tribunal misconstrued s 115(3)(b) of the Commercial Module so as to place an obligation on the applicants to be solely liable to maintain the lift in circumstances where the lift can be, and is, used by persons associated with the other lots to access common area facilities and other infrastructure.

[62] Second, the appeal tribunal misconstrued s 115(3)(b) of the Commercial Module by concluding that the singular terms "the lot" and "the owner's lot" include the plural and that in consequence in the event that the relevant lift "relates only" to supplying utility services to lots 4 to 8 then only lots 4 to 8 are responsible to maintain that lift.

[63] Third, the appeal tribunal erred in law by finding, contrary to the findings of fact by the adjudicator below, that the only access to the upper story of lot 8 was by the common property stairs or lift.

[64] The second and third grounds may be addressed first.

The second ground:

[65] The second ground refers to the following passage from the reasons for the learned member (footnote omitted):

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[5] See the discussion of the first ground of appeal below.

[6] The total maintenance costs of the lift per annum are only of the order of $10,000 to $15,000.

> [42] If I were wrong, it seems clear to me that the elevator would relate only to supplying utility services to lots 4 to 8, given that lots 1 to 3 are in a different building that has adequate facilities and services for those lots. In my opinion, s 115(3)(b) could apply in that situation to make only lots 4 to 8 responsible for maintaining the elevator. The singular terms "the lot" and "the owner's lot" include the plural of those terms unless the contrary intention appears from the Act or the module. Nothing that I have seen indicates a contrary intention in this case. I consider that the phrase "to the extent that" indicates an intention to enable responsibility for the maintenance of utility infrastructure that relates only to a number of lots in a scheme to be shared between those lots only.

[66] The first respondent submitted, correctly, that that part of the learned member's reasoning was not part of the course of reasoning which justified the order which was made.

[67] No party to the present appeal submitted that there should be any order which would reflect that reasoning. Even if one had, it would be difficult to see how this Court could entertain any such argument in light of the absence before this Court of any party representing the interests of lots 5, 6 and 7.

[68] In my view it is unnecessary to consider this ground. The dispute which was determined by the adjudicator and by the appeal tribunal was whether the operation of s 115(3) compelled the outcome that lot 8 alone must bear the maintenance costs of the lift, on the grounds that the lift related only to supplying utility services to lot 8. It is the correctness or incorrectness of the legal reasoning justifying that conclusion which should be considered on this appeal.

The third ground:

[69] The alleged erroneous finding is to be found in the following passage from appeal tribunal's reasons (emphasis added):

> [3] … Each of lots 4, 5, 6 and 7 has 2 storeys with an external lower floor door and access to the upper level by internal stairs. **Lot 8 is differently configured. It also has 2 storeys with access to the ground floor through an external door, but access to the upper storey is by stairs or the elevator, both of which are common property in the area that separates lot 8 from lot 7**. …

[70] The applicants contended that that finding was contrary to a finding of fact made by the adjudicator, and that it was not open for the appeal tribunal to proceed in that way, the appeal being limited to appeals on a question of law. The applicants contended that when, in the following passage, the adjudicator referred to stairs which form part of Building B she must have been referring to both the external common property stairs and the stairs which are internal to lot 8 (emphasis added):

> [6] … Building B for Lot 8 is accessed on the lower floor via an external lower floor door **and the upper floor access is via stairs which form part of Building B**. An electric automatic lift which forms part of Building B common property also provides access to the upper floor area.

[71] The actual configuration is identified at [12] above. Like the other lots in Building B, lot 8 has stairs between its upper and lower levels which are internal to lot 8. The feature which distinguishes lot 8 from the other lots is that the upper level of lot 8 may also be accessed via means which are external to lot 8, namely by the stairs on common property and by the lift on common property.

[72] If the learned member mistakenly thought that the sole means of access to the upper level of lot 8 was via means external to lot 8, he could scarcely be criticized for so doing. The first respondent had submitted to the appeal tribunal that there was no "internal" means by which lot 8 occupiers might move from the lower level to the

upper level within lot 8.[7] That submission had not been advanced to the adjudicator and was, in any event, wrong. But the error was not corrected by the applicants in their responsive submissions and they made no submission – whether to the adjudicator or to the appeal tribunal – as to the significance of the internal stairs to lot 8.

[73] Although the matter is not entirely clear, I am not persuaded that it is appropriate to conclude that the learned member did proceed contrary to facts found by the adjudicator. The truth of the positive proposition that the upper level of lot 8 could be accessed via means which were external to lot 8 – namely by the stairs or the lift located on common property – was common ground before the adjudicator and the appeal tribunal. The adjudicator did not make any finding one way or the other as to the existence of the stairs which are internal to lot 8. But neither did the learned member specifically state that the external access to the upper level of lot 8 was the only means of access. I think that the better reading of the passages in the reasons of the adjudicator and the appeal tribunal to which the applicants refer is that they record only the positive proposition which was common ground between the parties before them.

[74] Even if I had been persuaded that the learned member had made the alleged error, the applicants have not demonstrated that the error had any relevance to the reasoning by which the learned member determined the application.

[75] This ground of appeal must fail.

The first ground

[76] Section 115(3) of the Commercial Module requires an individual lot owner to be responsible for maintenance costs of "utility infrastructure" to the extent that the utility infrastructure "relates only to supplying utility services to the owner's lot".

[77] In this context "relates" is used as an intransitive verb and the Macquarie Dictionary proposes two meanings of the verb in that sense, namely "to have reference (to)" and "to have some relation (to)". The problem is that, by definition, "utility infrastructure" will always "relate" to the supply of "utility services" to the lots or common property. That must be so because the definitions of "utility infrastructure" and "utility services" (quoted at [18](d) above) dictate that "utility infrastructure" is the particular means by which –

(a) lots or common property;

(b) are supplied with;

(c) a type of systems or services designed to improve the amenity, or enhance the enjoyment, of lots or common property, namely one of the particular types of systems or services mentioned in subparagraphs (a) to (i) of the definition of "utility service", or something which fits within the residual category mentioned in subparagraph (j).

[78] It is evident then, that the critical aspect of s 115(3) is the introduction of "only" as an adverb modifying the nature of the verb "relates". The Macquarie Dictionary proposes two relevant meanings of the adverb in that sense, namely "without others or anything further; alone; solely" and "exclusively". The text suggests the need for a sole or exclusive relationship between the utility infrastructure and its supply of

[7] Appeal record 256 at [5](c). The submissions at [5](a) and (b) repeated submissions made to the adjudicator. The submission at [5](c) was the new and erroneous submission made to the appeal tribunal.

utility services to the lot concerned such that, if the utility infrastructure also relates to the supply of the relevant services to common property or to lots other than the lot concerned, then it could not be said to "relate only" to supplying utility services to the lot concerned.

[79] Given the definitions of "utility infrastructure" and "utility services", the text suggests the need for –

(a) an objective identification and understanding of –

(i) the nature and function of the particular utility infrastructure concerned;

(ii) the type of utility services which it supplies;

(iii) the lots or common property to which those services are supplied; and

(b) against that background, a determination of the extent to which the utility infrastructure concerned could be said to relate **only** to the supply of the services to the particular lot concerned.

[80] In this case, the analysis referred to in the previous paragraph was left to be performed by an examination of plans which identified the physical layout of the relevant areas of Building B; a lay person's understanding of how building users might be expected to use the lift given the physical layout; some expert evidence of the impact of the Building Code of Australia; and, finally, evidence of how the lift was used in fact. There was not, as there might have been, any expert architectural or other design opinion shedding light on the analysis.

[81] In my view, the evident function of the lift was to provide one of two alternative means of access between the common property foyers on the lower and upper levels of Building B between lot 7 and lot 8, the second means being the common property stairs. As an alternative, the lift would be relevant and available to any person wishing to access or depart from the upper level of lot 8. But, critically, it would also be a relevant and available alternative to any person who wished to access or depart from the common property toilet facilities on the upper level or the roof itself. It would be impossible to reach a conclusion that there was a sole or exclusive relationship between the lift and the supply of utility services to lot 8. One could easily reach the conclusion that one function of the lift was to enhance access to lot 8. One might even be persuaded that that was the dominant function. But one could not conclude it was the **only** function because it would also be true to say that the lift enhanced access in relation to common property (namely by easing the path to and from the common property toilet facilities and the roof) such that it could be regarded as relating to the supply of access to common property.

[82] It was suggested by the appeal tribunal that no regard should be had to evidence of how and for what purposes the lift is used in fact. Whilst it would be correct to seek to exclude subjective statements of the intention some person had in installing a particular type of infrastructure, I think it would be wrong to conclude that evidence of actual usage would in all circumstances be irrelevant to the requisite analysis. In the present circumstances the conclusion I have expressed in the previous paragraph would be reached even if one disregarded the evidence of actual usage. However that evidence of actual usage tended to shed light on (so as to confirm) an objective understanding of how building users might be expected to use the lift.

[83] In my respectful view, the contrary conclusion reached by the appeal tribunal was reached because the learned member misconstrued s 115(3) of the Commercial Module as authorizing the application of a "but for" test. The learned member

enquired whether "but for" the existence of lot 8, the lift would have been necessary. He answered the question in the negative and concluded that but for lot 8, the lift would not have been necessary and, accordingly, the infrastructure related only to the supply of services to lot 8. However, for reasons I have identified, the analysis called for by the proper construction of s 115(3) was not one to which the application of a "but for" test was apposite. The application of a "but for" test would, wrongly, operate to treat as irrelevant relationships between infrastructure and the supply of utility services to other lots or common property if those relationships existed, but could not be regarded as so significant that they explained the existence of lot 8. Section 115(3) does not contemplate that course.

[84] The conclusion reached by the adjudicator was correct and the decision of the appeal tribunal to reverse it should be set aside.

Conclusion

[85] I would make the following orders:

(a) The applicants be granted an extension of time in which to seek leave to appeal the appeal tribunal's decision.

(b) The applicants have leave to appeal the appeal tribunal's decision.

(c) The appeal be allowed and –

(i) the orders made by the appeal tribunal (including the costs order) be set aside; and

(ii) in lieu thereof it be ordered that the first respondent's appeal to the appeal tribunal be dismissed.

(d) The first respondent must pay the applicants' costs of the application for leave to appeal and of the appeal to this Court.

(e) The question of the order which should be made in relation to the costs of the proceeding before the appeal tribunal is remitted back to the appeal tribunal for determination.