Kensington Gate [2007] QBCCMCmr 455 (30 July 2007)

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BODY CORPORATE AND COMMUNITY MANAGEMENT ACT 1997

Application Reference: 1067A-2006

Applicant: **VILLA MILOS MANAGEMENT PTY LTD**

AND

Respondent: **THE BODY CORPORATE FOR "KENSINGTON GATE" COMMUNITY TITLES SCHEME 28814**

ORDER

Before: Specialist Adjudicator Christopher Carrigan

Date: 30 July 2007

Initiating Document: Application dated 5 February 2007

I ORDER THAT:

1. A Declaration is granted that the Body Corporate is not entitled to deduct the sum of $1,386.00 from the remuneration of the Applicant.
2. The Body Corporate is ordered to reimburse forthwith the Applicant in the sum of $1,386.00.
4. Each of the parties are to deliver to me and to each of the other parties to the Application, their written Submissions on costs, if any, on or before **4:00 p.m. on Friday, 17 August 2007**.
5. Costs of the Adjudication are reserved.

C.J. CARRIGAN

Specialist Adjudicator

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REASONS FOR DECISION

BACKGROUND

1. The Applicant is the Caretaker and Service Contractor for the Body Corporate for "Kensington Gate" (the "Body Corporate").
2. The Body Corporate consists of 63 lots and is located at 433 Brisbane Road, Arundel on the Gold Coast. It is governed by the *Body Corporate and Community Management (Accommodation Module) Regulation 1997* ("the Accommodation Module").

3. On 28 November 2000 the Body Corporate entered into a Caretaking Agreement[1] with its then Caretaker and Service Contractor. By that Agreement the Body Corporate was desirous of providing better management of the common property including the care and maintenance of the gardens and grounds.[2] The Body Corporate engaged the Caretaker for a period of twenty-five (25) years from 23 November 2000 and the Caretaker accepts the appointment on the terms and conditions as set out in that Agreement.[3]

4. The remuneration of the Caretaker was in consideration of the due and punctual performance by the Caretaker of the duties set out in the Agreement.[4] Clause 4 of the Agreement contains the Caretaker's duties and in particular provided for the following duties:-

> "(a) Carry out the gardening and cleaning maintenance of the common property and any improvements there and in so doing it shall use its best endeavours to maintain the common property of the said development the same standard as applies as at the date hereof PROVIDED HOWEVER that the removal of all rubbish, grass and garden clippings collected by the Caretaker shall be at the body corporate's expense.
>
> (b) Use its best endeavours to see that the said development and any improvements on the common property thereof are kept in good order and repair.
>
> ...
>
> (h) Arrange maintenance contracts as instructed by the body corporate and ensure that any such contracts in force are carried out in accordance with their terms.
>
> (i) At all times ascertain and be aware of the general condition of the buildings on the common property and all machinery thereon and appurtenances thereto so that at all times the Caretaker is able to keep informed the representative of the body corporate in respect thereof.
>
> (j) To the best of its ability the Caretaker shall caretake the said development and any buildings on the common property and endeavour to ensure that they are kept in good order and repair and to protect the interest in the said development of the body corporate and of the owners of the lots in the development.
>
> ...

(m) To perform such other acts and things as are reasonable necessary and proper in the discharge of its duties under this agreement.

(n) Generally cause the buildings on the common property and the appurtenances thereto and grounds and all plant and equipment used in connection therewith to be properly maintained at all times.

...

(p) The Caretaker shall not be responsible for the repair and maintenance of common property which requires the services of a skilled tradesperson or specialist.

(q) Carry out the duties as set out in Schedule "B".

..."

5. On 7 June 2005 the Caretaking Agreement was assigned to the Applicant with the consent of the Body Corporate.[5]
6. In September 2005 a recommendation was made to the Body Corporate that the roof gutters be cleaned of leaves etc.[6]

7. At a Committee Meeting on 30 November 2005 the Caretaker presented two (2) quotes for the cleaning of leaves from roof gutters. By this stage there was already a dispute between the Body Corporate and the Applicant as to whether it was the responsibility of the Applicant as Caretaker to clean out leaves from the roof gutters of buildings in the scheme.[7]

8. At a Committee Meeting of 9 March 2006, it was claimed, allegedly by Mr Ian White, that he had another amended quote for gutter cleaning. The dispute as to responsibility of cleaning out gutters continued between the Body Corporate and the Applicant.[8]

9. The Minutes of the Meeting of the Committee on 9 March 2006[9] record the following discussion about the Management Report at item 10:-

"Gutter Maintenance

The Caretaker advised of an amended quote from Professional Cleaning and Repairs in the amount of $1,100.00 inclusive of G.S.T.

The Caretaker believes that gutter maintenance to the common property is not covered by his Maintenance Agreement nor is he able to arrange insurance cover.

The committee has an opposing view and will seek a resolution as to who is responsible."

10. On 6 July 2006 the Body Corporate engaged independent contractors for the purposes of cleaning the gutters of the high set and low set premises in the scheme.[10]

11. On 28 July 2006 the Body Corporate Manager sent to the Applicant a letter and enclosed a tax invoice for the cleaning of gutters and downpipes for the single storey buildings in the complex.[11] Demand was made on the Applicant for payment of $1,386.00.

12. On 5 September 2006 the Applicant's Solicitors wrote to the Body Corporate disputing responsibility for cleaning of the gutters and/or for payment of the invoice.[12] In that letter the Body Corporate was advised that the Applicant was not responsible for payment of the invoice as:-

> pursuant to the Management Agreement the Applicant is not responsible for the repair and maintenance of common property which requires the service of a skilled tradesman or specialist;
> the performance of that task would require the Applicant to obtain further insurances, thereby placing such maintenance outside the scope of the ordinary care and maintenance of the common property;
>
> gutter maintenance has at all times to date been outsourced by the previous Caretakers or been the subject of a separate agreement;
>
> the Body Corporate had cleaned gutters of high set premises and also for low set premises and the Applicant queried on what basis does the Body Corporate make the decision as to which of those gutters fall within and outside the Applicant's responsibility; and
>
> the Applicant was never consulted on the cost of cleaning which consultation would have been an essential pre-requisite if the Applicant were to be expected to pay for a portion of it.

13. On 5 December 2006 at a Committee Meeting, a resolution was passed to send a further letter to the Applicant requesting immediate payment and unless cleared funds were received within seven (7) days of the date of the letter, the amount of $1,386.00 would be deducted from the next monthly remuneration.[13]
14. On 13 December 2006 the Body Corporate Manager wrote to the Applicant advising that payment of the $1,386.00 was required within seven (7) days otherwise that amount would be deducted from the next monthly remuneration.[14]

15. On 14 December 2006 the Applicant's Solicitors wrote to the Body Corporate advising that it has no right to interfere with the Applicant's remuneration and requested a written retraction of the letter, and confirmation that no deduction will be made, by 10:00 a.m. on Monday, 18 December 2006.[15] That letter foreshadowed an urgent Application to the Commissioner seeking a Declaration that the Body Corporate was not entitled to deduct the monies as threatened.

16. The next monthly payment to the Applicant was due on 20 December 2006. That payment was made however the payment to the Applicant deducted $1,386.00 from the Applicant's remuneration.

17. Shortly thereafter the Applicant lodged the current Application with the Commissioner for Body Corporate and Community Management and is now the subject of this Specialist Adjudication.

THE DISPUTE

18. The Applicant originally sought a determination as to whether the Body Corporate was entitled to deduct the amount of $1,386.00, or any sum at all, from the remuneration of the Applicant. The Applicant specifically stated it did not require a determination whether, pursuant to the Agreement, the cleaning of gutters on the low rise buildings forms part of the Caretaker's duties or whether the Applicant is liable to pay the Body Corporate in the sum of $1,386.00.[16]

19. On 13 April 2007 the Body Corporate delivered its Submissions in response to the Application. In the course of those Submissions the Body Corporate stated[17]:-

> "The Respondent considers that the Orders sought by the Applicant are unnecessarily narrow and hide the wider issue that the Caretaker is in breach of its contract in refusing to clean the gutters."

Later in the Submissions the Body Corporate made the following submission[18]:-

> "It is our submission that in order to determine the Application the Adjudicator must look at whether the Applicant had performed its duties in a due and practical way, as this was the condition that must be satisfied before the Applicant is entitled to remuneration. Without the performance of the duties by the Caretaker the Body Corporate is clearly entitled to **withhold remuneration** pursuant to clause 2.1 of the Caretaking Agreement. The Application cannot be determined unless this issue is addressed."

20. Subsequently the Applicant delivered further Submissions on 9 May 2007 and in the course of those Submissions stated the following[19]:-

> "As the Respondent has sought to expand the scope of the Application, in addition to those orders sought in the Application, the Applicant also seeks a declaration that the cleaning and maintenance of gutters is not within the responsibility of the Applicant."

The Applicant seeks to amend its Application lodged with the Commissioner by adding this relief for a Declaration. I will decide later in these Reasons whether that amendment should be granted.

21. At a Directions Hearing conducted with the parties on 11 May 2007 the Solicitors for the Body Corporate raised issues as to what was the nature of the dispute to be determined by me. As a consequence of those Submissions on behalf of the Body Corporate, I made Directions for the Respondent Body Corporate to deliver Submissions setting out exactly what the Body Corporate was asserting to be the dispute between the parties and made other Directions. The Applicant was not required to deliver the Submissions, although its position was reserved to a further review date in the event that

it wished to make a reply to any Submissions by the Body Corporate as to the exact nature of the dispute to be determined.

22. On 18 May 2007 the Body Corporate delivered its Submissions as to the nature of the dispute. It summarised its position in these terms[20]:-

> "On any objective view of the facts, the scope of the relevant "dispute" between the Caretaker and the Body Corporate is whether or not the Body Corporate was legally entitled to withhold the sum of $1,286.00 from the monthly payment which it made to the Caretaker in or about December 2006 pursuant to the Caretaking Agreement.
>
> To resolve this dispute, the Adjudicator would need to determine various issues of fact at law. These are set out in Part 4 of this submission below."

Apart from the error in inserting the incorrect sum of the amount deducted (it should have been $1,386.00, see Exhibit "C" to the Application) the Submissions of the Body Corporate sufficiently describe the nature of the dispute to be determined as is articulated in the Application and the Submissions of the parties to date.

23. In its Submissions of 18 May 2007, the Body Corporate sought an opportunity to reply to the Caretaker's Submissions of 9 May 2007. Directions were made at the subsequent Directions Hearing for the Body Corporate to be afforded that opportunity and in due course it did deliver additional Submissions on 13 June 2007 and 17 June 2007. The Applicant sought and was granted, an opportunity to respond to these later Submissions of the Body Corporate.

AMENDMENT OF THE APPLICATION

24. The Body Corporate makes the submission that the Caretaker cannot now amend its Application to seek different relief.[21] The context of that submission appears to be limited to a situation where if I make a preliminary determination on the Body Corporate's request to dismiss the Application pursuant to s.270(1)(b) and (c) of the Act for those reasons articulated by the Body Corporate in paragraphs 3.21 and 3.22 of its Submissions dated 18 May 2007. In that event, the Body Corporate submits that the Applicant should not be allowed to amend its claim to in effect reinvigorate the Application and have it proceed on some other grounds.

25. I have previously determined and advised the parties that there would be no preliminary dismissal of the Application pursuant to s.270(1)(c) and I would deliver reasons for that determination on the amendments in the course of making these Reasons for Decision on the Application.[22]

26. As I have not dismissed the Application on the preliminary basis sought by the Body Corporate, it is not necessary for the Applicant to seek to make the amendments as were apparently foreshadowed earlier in the Body Corporate's Submissions.

27. The issue has however arisen whether the Applicant can now amend the Orders it seeks in the Application to now include a Declaration that the cleaning and maintenance of gutters is not within the responsibility of the Applicant.[23]

28. The Body Corporate opposes any amendments of the Application on the basis of the decision of a Specialist Adjudicator in *Parkrise*[24]. In that case the Applicant intended to amend its Application to insert a different table setting out recommended adjustments to the Contribution Schedule Lot Entitlements for each lot in that Body Corporate scheme. That amendment was refused on the basis that there was no power to grant the amendment of the Application. Further, reliance in that case was placed on s.245 of the Act which was the only provision identified in the Act allowing a change to or withdrawal of Applications. That Specialist Adjudicator said[25]:-

> "There is nothing else in the Act that allows an application to be amended once the Commissioner has made an initial dispute resolution recommendation. Having referred the application to me for determination, the Commissioner has clearly made an initial dispute determination and s.245 is now spent. I cannot find any other provision that would authorise me to allow the applicant to amend the application at this stage. That is not illogical, given that an amendment at this stage would deprive the owners of the opportunity to make submissions on the amended application and to elect to become parties to it.
>
> My jurisdiction is entirely statutory. I am bound by the terms of the statute and I have no inherent powers of the type I would require to allow an amendment of the application at this stage of the process."

29. I am conscious of the fact that the legislation requires Specialist Adjudicators to act with "little formality and technicality" and to observe "natural justice".[26] Nevertheless, a Specialist Adjudicator is a "creature of statute" and the powers, obligations and duties are prescribed by the legislation. In these circumstances, I propose to adopt, and to agree with, the reasoning of the Specialist Adjudicator in *Parkrise*[27] and refuse the Applicant's request to amend the Application in terms of paragraph 79 of its Submissions dated 9 May 2007. There is no general power in the Act or the Accommodation Module which authorises the granting of the amendment. Further, s.245 of the Act makes clear that any changes to the Application are to be made by the Applicant before the Commissioner makes the initial dispute resolution recommendation under Part 5.[28] On 1 March 2007, the Commissioner appointed me as Specialist Adjudicator for the purposes of resolving this dispute. The Applicant's request for the amendment occurred after my appointment. It is now too late for the Application to amend and its request is refused.

THE BODY CORPORATE'S APPLICATION TO SUMMARILY DISMISS THE APPLICATION PURSUANT TO SECTION 270(1)(B) AND (C) OF THE ACT

30. The other matter raised by the Body Corporate in its Submissions of 18 May 2007 was a preliminary application to summarily dismiss the Applicant's Application pursuant to s.270(1)(b) and (c) of the Act on the basis that the Application is misconceived or because the dispute is one best dealt with by a Court of competent jurisdiction.[29] I have previously made Orders dismissing the Body Corporate's application and refusing in effect to summarily dismiss the Application pursuant to s.270(1)(c).[30] I indicated at that

time that the reasons for dismissing the Body Corporate's application would be provided in the final determination of these proceedings which I now propose to provide.
31. At the time the Application was made, the Applicant was the onsite Caretaker for the Body Corporate pursuant to the Caretaking Agreement made with the Body Corporate on 28 November 2000. That is, the Applicant was a service contractor for the scheme within the meaning of s.15 of the Act.

32. The Application therefore raised a "dispute" within the meaning of s.227(1)(d) of the Act.

33. Further, the Application raised relevant facts and other allegations relating to the engagement of the Applicant as service contractor within the meaning of s.228(b) and/or (d) of the Act.

34. In these circumstances there is jurisdiction under Chapter 6 (Dispute Resolution) of the Act to resolve the dispute in the Application.

35. The Body Corporate concedes that there is "properly a dispute" before the Adjudicator.[31]

36. Accordingly, the Applicant's Application raises a "dispute" for the purposes of Chapter 6 of the Act and is one which is within the jurisdiction of the Specialist Adjudicator.

37. Section 270(1)(b) and (c) provides for an Adjudicator to dismiss the Application if the dispute should be dealt with in a Court of competent jurisdiction or the Application is frivolous, vexatious, misconceived or without substance. One of the grounds on which the Body Corporate relies is that the Application is misconceived because of the outcome sought or is a dispute which is best dealt with by a Court of competent jurisdiction.

38. The Body Corporate does not make any Submissions as to why the dispute in this Application is best dealt with by a Court of competent jurisdiction. The dispute in its widest terms is concerned with performance of tasks for a Body Corporate relating to the removal of leaves from gutters and involves:-

> whether the Body Corporate is entitled to deduct an amount from the Applicant's remuneration for alleged failure to carry out duties under the Caretaking Agreement; and
> whether or not the duties of the Caretaking Agreement require the Applicant to carry out duties which include the removal of leaves and other debris from the gutters to the low set dwellings in the scheme.

39. It seems that this type of dispute can and should be dealt with under the Dispute Resolution provisions of the Act by Specialist Adjudication. There is no principle of law or other potential findings of fact which would demonstrate that it is a matter which should be in effect be transferred to a Court of competent jurisdiction. In the circumstances, I am satisfied that the dispute is best dealt with in accordance with the Adjudication process under the Act. I refuse the Body Corporate's application based on this ground.

40. The second ground relied upon by the Body Corporate is that the Application is misconceived because of the outcomes sought in the Application. The Applicant seeks a determination that the Body Corporate is not entitled to deduct $1,386.00 or any sum at all from the remuneration of the Applicant. The basic submission of the Applicant is that the Act, Module, and Caretaking Agreement do not permit the Body Corporate to deduct monies from the remuneration payable to the Applicant and authorised by the terms of the Caretaking Agreement.[32]

41. The Body Corporate contends on a number of grounds that it is entitled to deduct those monies. The parties raise grounds for determination based upon the relief sought by the Applicant in its Application.

42. The powers of a Specialist Adjudicator to resolve disputes between the parties are of considerable width. Section 276 of the Act provides for the Adjudicator to make an Order "that is just and equitable in the circumstances (including a declaratory order) to resolve the dispute in the context of a community title scheme about a claimed or anticipated contractual matter".

43. I am satisfied that the outcomes sought by the Applicant in the Application are not misconceived and are otherwise not within the meaning of any of the other terms in s.270(1)(c). That outcome sought firstly gives rise to factual and legal disputes about the construction of caretaking agreement which need to be determined to resolve the dispute. Further, the legislation by s.276 sufficiently enables the Adjudication process to make any Orders giving effect to the relief sought in the Application should it be ultimately determined that Orders of that nature are required to be given to resolve the dispute between the parties.

44. For these reasons, I did not propose to exercise any of the powers giving to an Adjudicator under s.270 of the Act and accordingly dismiss the Body Corporate's application pursuant to s.270 of the Act for summary dismissal of the Applicant's Application.

ISSUES FOR FINAL DETERMINATION OF THE APPLICATION

45. The Applicant contends that the Body Corporate was not entitled to deduct the monies as:-

> the Act, Module and Caretaking Agreement do not permit the Body Corporate to deduct monies from the remuneration of the Applicant;[33]
> the Body Corporate is not impartial in the matter and cannot fairly and independently make a determination that the monies should not be paid;[34]
>
> clause 4(p) of the Caretaking Agreement applies as the gutter maintenance to the low set premises requires the service of a skilled tradesperson or specialist;[35]
>
> a tradesperson or specialist is required as the work of gutter maintenance falls under the *Workplace, Health and Safety Act 1995* as high risk

construction work and should therefore be performed by a specialist;[36]

the Body Corporate has outsourced gutter maintenance in the past or made special arrangements with the previous onsite Manager;[37]

the Applicant would be obliged to obtain extended insurance cover to perform the work given the high risk of injury not only to the Applicant but also to third parties.[38]

46. The Body Corporate contends that it was entitled to deduct the monies from the Applicant's remuneration as:-

a practical solution to avoid costs of proceeding before a Specialist Adjudicator or the Court and therefore was entitled to set off that amount against the Applicant's remuneration;[39]

the owner of premises needs to ensure that every gutter etc. is properly maintained and kept free of obstruction so as to comply with s.73 of *The Health Regulation 1996*;[40]

clause 2.1 authorises the payment of remuneration to the Caretaker in consideration of the due and punctual performance by the Caretaker of its duties;[41]

the gutter maintenance for single storey premises does not constituted a task necessary for a skilled tradesman or specialist;[42]

clause 2.1 of the Caretaking Agreement specifically provides that the Applicant's entitlement to remuneration under the Agreement is the due and punctual performance by the Caretaker of its duties.[43]

CLAUSE 2.1 AND WITHHOLDING PAYMENT

47. The Act and the Accommodation Module for the Scheme as at December 2006 do not contain any relevant provisions authorising the Body Corporate to withhold the funds from the remuneration of the Applicant. Part 6 of the Accommodation Module contains various provisions relating to service contractors but none of those provisions appears to be relevant to the Body Corporate's withholding of salary payable under the Caretaking Agreement. I have not been referred to any relevant provision in the Submissions on behalf of the Body Corporate.

48. Under the Caretaking Agreement dated 28 November 2000, the Body Corporate has a contractual obligation to pay remuneration in consideration of the due and punctual performance by the Caretaker of the duties set out in that Agreement.[44] The Body Corporate is to pay the remuneration on the basis set out in Schedule "A". Remuneration is paid by instalments as set out in that Schedule.[45]

49. As previously stated the various duties of the Caretaker are set out in clause 4.

50. Otherwise, the Caretaking Agreement is silent as to what is to occur in any circumstances about a dispute whether or not the Caretaker has performed the duties.

The Caretaking Agreement does not authorise any payment of the salary in a lesser amount than which is payable in accordance with Schedule "A" as required by clause 2.1. I have not been referred to any provision of the Caretaking Agreement, apart from clause 2.1, which authorises the Body Corporate to deduct the monies from the Caretaker's remuneration. Clause 2.1 is concerned with the general obligation of the Body Corporate to pay the Caretaker's remuneration on the basis set out in Schedule "A" in consideration of the due and punctual performance by the Caretaker of its duties. But clause 2.1 and other provisions of that Agreement are silent as to what is to occur if the Caretaker does not complete due and punctual performance of its duties.

51. Clause 2.1 of the Caretaking Agreement appears to operate in the same way in which the remuneration clause operated in *Humphries v Proprietors "Surfers Palms North" Group Title Plan 1955*[46]. In the course of the Judgment of the High Court Brennan J. and Toohey J. referred to effect of the remuneration clause in that case in these terms[47]:-

> "The remuneration prescribed by cl.8 is not apportioned among the several duties which, by the terms of the management agreement, the manager is to perform. The promise to pay was therefore made in consideration in part of the manager's promise to provide the letting agency. ..."

And later in the Judgment they stated[48]:-

> "Similarly, the body corporate's promise in cl.8 of the management agreement to pay an entire sum as remuneration for the performance of the duties including those specified in cl.2(r) was not authorised by the Act. The appellants cannot enforce the remuneration clause against the body corporate. ..."

Here, the remuneration payable under clause 2.1 is made in consideration of performance of all duties under the Caretaking Agreement. None of the remuneration in the Caretaking Agreement is apportioned towards any of the particular duties itemised in clause 4 of the Caretaking Agreement. Rather, the remuneration is payable as a global amount. The Body Corporate therefore is unable, as it purported to do with the instalment of remuneration on 20 December 2006, to apportion part of that instalment towards the requirement to perform the alleged duty of maintaining roof gutters to the low set dwellings.
The subsidiary issue about the payment of that instalment is what entitlement, if any, did the Body Corporate have to deduct the whole amount of $1,386.00 from that one instalment when the remuneration is payable over a yearly or longer period. That is why wouldn't the deduction of $1,386.00 be apportioned against all of the instalments rather than from one instalment? However, the parties have not sought a determination of that issue and I do not embark upon it here. The other subsidiary issue which the parties have not sought a determination and which I do not embark upon is whether before any instalment is payable, is it a requirement that all duties be performed for the relevant period of the instalment and if not whether the whole of the instalment is not payable until completion of all duties for the relevant period of the instalment. Again that issue is not raised and I do not propose to embark upon it in this determination as the Body

Corporate's position appears to be that the instalment is payable but it can deduct part of the instalment which it alleges is referable to the alleged failure to carry out the duties under the Agreement.

52. The Body Corporate's reliance for non-payment is based on it withholding funds as a practical solution to avoid the costs of proceedings either before the Specialist Adjudicator or before the Courts.[49] The Body Corporate's alternative claim to or set-off will be discussed later in these Reasons.

53. While it may be a practical solution for the Body Corporate to withhold payment, that basis alone is insufficient. The self help of the Body Corporate to monies which it is contractually obliged to pay to the Caretaker does not provide a sufficient legal basis for withholding funds which the Body Corporate is otherwise contractually bound to pay to the Caretaker in accordance with cl.2.1 and Schedule "A" to the Caretaking Agreement.

54. As the Applicant submits the Body Corporate is hardly an impartial arbiter of the amount to reimburse the Body Corporate. On the evidence in these proceedings the quote from the independent contractor was for the maintenance of gutters to both the high set and low set dwellings in the scheme. There is no evidence that the $1,386.00 formed a separate and distinct quote from that for the high set dwelling.

55. The Act, Module and Caretaking Agreement do not authorise or provide any legal basis for the unilateral actions of the Body Corporate to withhold the sum of $1,386.00 as a practical measure adopted by the Body Corporate to avoid Adjudication or the Court process. For these reasons, I reject this purported basis of the Body Corporate withholding the $1,386.00 from the December 2006 instalment to the Applicant.

SECTION 73 OF THE HEALTH REGULATIONS

56. Section 73 of the Health Regulations 1996 (Qld)[50] is also relied upon by the Body Corporate. That provision requires an owner of premises to ensure that every gutter, drain, roof, etc. is properly maintained and kept free of obstruction. It does not assist in this case.

It is clear from the Submissions that no party disputes that the roof gutters on premises in this scheme are common property. Accordingly, it is the responsibility of the Body Corporate to the roof gutters as required by s.73 of the Health Regulations. As to whether the Body Corporate or the Applicant are to perform that maintenance is not dealt with in s.73. It is left to the terms of the Caretaking Agreement to determine that issue. That Regulation does not assist in the construction of the duties imposed on the Applicant by the Caretaking Agreement dated 28 November 2006. Section 73 does not assist in the construction of clause 4 of the Agreement.

OUTSOURCING OF MAINTENANCE WORK IN THE PAST?

57. The Applicant alleges that in the past the Body Corporate has outsourced the maintenance of gutters to third parties or has entered into a separate arrangement with the onsite Manager to undertake that maintenance. This is a matter of some dispute in the Submissions between the parties.

58. However, I do not consider it is necessary to resolve that dispute because even assuming the Applicant was correct and the Body Corporate had in the past outsourced the maintenance of gutters to third parties or made arrangements with the Manager, that does not assist in the construction of the duties of the Applicant under the Caretaking Agreement. I do not intend to rely on the Submissions of either of the parties in considering whether the outsourcing of that maintenance is determinative or otherwise of the responsibilities of the Applicant under the Caretaking Agreement. I do not find the Submissions of any assistance in the construction of the duties of the Applicant under the Caretaking Agreement.

FURTHER INSURANCES FOR THE APPLICANT

59. The Applicant states that further insurances would be required by the Applicant if it had to undertake the maintenance of gutters to the low set buildings in the scheme. They assert that this would place such maintenance outside the scope of ordinary care and maintenance of the common property.

60. The Body Corporate responds[51] with advice from its insurers with the statement that they believe there is no need for further insurance provided the Caretaker provides a public liability insurance policy to the Body Corporate with appropriate indemnification.

61. Again, I do not find the Submissions with respect to the Applicant being obliged to take out additional insurance as being an aid to construction of clause 2.1 or clause 4 of the Caretaking Agreement. Both of those clauses do not, from their express words make the obligations dependent upon insurance. Both of those clauses should be construed according to their ordinary meaning. The fact that the proper construction of those clauses may or may not affect the level of insurance required by the Applicant, does not seem to me to have much bearing on how those clauses should be construed. I do not propose to place any reliance on the Submissions related to insurance for the proper construction and true meaning of the various clauses in the Caretaking Agreement.

CLAUSE 4(p) AND OTHER ISSUES

62. The Body Corporate asserts that the duties under the Caretaking Agreement include maintenance of gutters to the low set buildings in the scheme. It relies particularly on clause 2.1 which requires due and punctual performance of the duties in exchange for payment of the Caretaker remuneration. It specifically relies on clause 4(a) and (b) as casting upon the Caretaker the obligation to undertake this maintenance work to gutters of the low set buildings. It argues also that clause 4(p) has no application as the cleaning of leaves from gutters on a single storey building is a task commonly carried out without the need for referral to a skilled tradesperson or specialist.[52]

63. The Applicant contests the assertion by the Body Corporate that clause 4(p) has no application. The Applicant contends that the work relating to maintenance of the gutters requires the services of a skilled tradesperson or specialist.[53] The Applicant contends at least two (2) propositions in support of its application of clause 4(p). That is:-

> firstly, it asserts that the cleaning of gutters is a "high risk non-housing construction activity" as defined under the *Workplace, Health and Safety Act*

and relevant *Regulations*; and
the average roof height of the single storey buildings in the scheme varies but there are a number of units where the height of the gutter above ground level is in excess of 4 metres.[54] The Applicant further asserts that in calculating the height, work is not done from a ladder as the Body Corporate contends but it is performed from the roof itself. I understand from this aspect of the Applicant's Submissions that the Manager, or its servants or agents, is in those circumstances working from a height in excess of the height of the gutter of the particular premises.

It is probably convenient to state at this stage that amongst the further Submissions made by the Body Corporate in response to these Submissions of the Applicant, the Body Corporate on 17 June 2007 sent a number of photographs which were attached to an email of that date, and which email was copied to the Applicant's Solicitors. I have viewed each of the photographs in the attachment to that email.[55] It is sufficient to say that in respect of each of those units photographed demonstrated according to what appears to be measurements written on a PVC pipe that the gutters of those units are less than 3 metres in height.

64. The Applicant asserts that this work is high risk non-housing construction activity as the work and the factual circumstances in this case comes within the meaning of:-

the definition of construction work in s.14(1) of the *Workplace, Health and Safety Act 1995*;
the definition of a high risk construction activity as defined in s.156 of the *Workplace, Health and Safety Regulations 1997*;

and is "not housing construction work" as the facts and circumstances here do not come within the definition of housing construction work defined in s.155 of the *Regulations*.

65. The Body Corporate on 14 June 2007 provided its response to those Submissions particularly with respect to the *Workplace, Health and Safety* legislation. The Body Corporate responds by reliance on s.37 of the *Workplace, Health and Safety Act* in asserting that in a prosecution for failing to comply with obligations under Part 3 of the Act does the Applicant have a defence in the circumstances of these proceedings. The Body Corporate asserts that there is no such defence open to the Applicant as:-

there are no ministerial notices relevant for gutter cleaning work;
if a scaffold was erected such that the risk of falling was:-

4 metres or less, then the Applicant Caretaker could lawfully instruct a worker to carry out the disputed gutter cleaning work, as the worker is not required to hold a specialist scaffolding qualification; and
more than 4 metres, the Applicant Caretaker could not lawfully direct any of its workers to carry out the disputed gutter cleaning

> work unless he held a basic, intermediate or advanced scaffolder's certificate.

I understand that it is not contended by any party that the Caretaker has or has held, a basic, intermediate or advanced scaffolder's certificate;
for this work to be either "high risk construction activity" or "housing construction work" the activity must come within the definition of "construction work" in s.14 of the relevant Act. As the work here does not require the Caretaker to "erect, construct, extend, alter, convert, fit-out, commission, renovate, repair, refurbish, disassemble or decommission a structure, or part of the structure", the activity requested of the Applicant does not come within the meaning of "construction work" in s.14(1)(a) of the Act. The Body Corporate also asserts that gutter cleaning work does not involve an activity which falls within the scope of s.14(1)(b), (c), (d), (e) and Schedule 1 of the *Workplace, Health and Safety Act*. The Body Corporate submits that[56]:-

> "In short, Gutter Cleaning Work is not a "construction activity". Therefore, it cannot be a "high risk construction activity" or "housing construction work" and Part 17 of the WHS Regulations has no application to gutter cleaning work.";

any relevant Code of Practice relevant to gutter cleaning work is a Scaffolding Code of Practice 2004. Clause 2.2 of that Code provides that a person is not required to hold a certificate if a person or thing may fall 4 metres or less from the scaffold. That clause goes on to provide as follows:-

> "... However, persons conducting a business or undertaking and principal contractors still have a general obligation to ensure the workplace, health and safety of themselves, workers and other persons. This includes ensuring any person performing scaffolding work is competent. The person should receive information, instruction, training and supervision in the safe execution, dismantling, maintenance and alteration of the scaffolding."

These Submissions suggest that it leaves open the possibility of this maintenance task being completed by the use of a ladder, scaffolding or by working from the roof, which may or may not require suitable roof protection to avoid falls.
66. I am not satisfied that the gutter maintenance work proposed by the Body Corporate is "construction work" for the purposes of s.14 of the *Workplace, Health and Safety Act*. That gutter maintenance work requested of the Applicant by the Body Corporate does not fit within any of the descriptions of "construction work" defined in s.14(1)(a) to (e) of that Act. If follows that gutter maintenance cannot be a "high risk construction activity" within the meaning of s.156 of the *Regulations* as that activity has to be part of "construction work". Consequently, I am not satisfied that gutter maintenance is an

activity coming within the meaning of "construction work" in that legislation. The Applicant's reasons based on this approach for determining that gutter maintenance requires the work of a skilled tradesman or specialist is rejected.

67. The further aspect on which the Applicant places reliance is that at least some of the units, but not all, have gutters which are in excess of 4 metres above ground level.[57] Exhibit "C" to the Applicant's Submissions contain various photographs of Units 1, 2 and 38. Those measurements have not been challenged in the subsequent Submissions of the Body Corporate dated 14 June 2007.

68. In the Body Corporate's additional Submissions on 17 June 2007 a number of photographs of several other units were provided which demonstrated that the gutter of some units was 3 metres or less above ground level.

69. The Body Corporate further submits that if scaffolding was to be erected such that the risk of falling was more than 4 metres, the Applicant Caretaker could not lawfully direct any of its workers to carry out the disputed guttering work unless they had a basic, intermediate or advanced scaffolder's certificate.[58] There is no evidence of the Applicant or any of its workers holding such a scaffolder's certificate. The problem therefore is what to do about part of the scheme where the guttering is 4 metres or more in height and the balance of the buildings having gutters of less than 4 metres.

70. The Caretaking Agreement dated 28 November 2000 is a commercial document regulating the commercial activities of the Caretaker for the scheme. In this case clause 4(p) is to be construed by those words as used by the parties in that clause. The common intention of the parties is ascertained from the words of clause 4(p). The principles for the constructions of a contract in a commercial context were summarised by Atkinson J. in *Décor Blinds Gold Coast Pty Ltd v Décor Blinds Australia Pty Ltd*[59]. In that case

Her Honour referred to the statements of Gibbs J. in *Australian Broadcasting Commission v Australian Performing Right Association Limited*[60] and stated:-

> "These rules do not ignore the fact that a contract such as this regulates the rights, responsibilities and liabilities of the parties in a commercial context. Such parties require not only certainty but also a realistic or common sense assessment of what the contract between them means."

As to the meaning of clause 4(p) or put another way "what did the parties mean to say" in clause 4(p) is that the Caretaker "by its employees, contractors or agents:" shall carry out the various duties in clause 4(a) to (o) save and except that the Caretaker shall not be responsible for repair and maintenance where the services of a skilled tradesperson or specialist are required. That is, the duties of the Caretaker and its servants or agents are restricted to the ordinary or simpler tasks of maintenance of the Body Corporate where the services of a skilled tradesperson or specialist are not required.
Clause 4(p) is written against the background of the principles in the *Workplace, Health and Safety Act*, principally s.28 which imposes obligations on persons conducting business or undertaking in these terms:-

> "(1) A person (the relevant person) who conducts a business or undertaking has an obligation to ensure the workplace, health and safety of the person, each of the person's workers and any other persons is not affected by the conduct of the relevant person's business or undertaking.
>
> (2) The obligation is discharged if the person, each of the persons' workers and any other persons are not exposed to risks to the health or safety arising out of the conduct of the relevant person's business or undertaking.
>
> (3) The obligation applies –

(a) whether or not the relevant person conducts the business or undertaking as an employer, self-employed person or otherwise; and

(b) whether or not the business or undertaking is conducted for gain or reward; and

> (c) whether or not the person works on a voluntary basis."

Pursuant to s.29 the obligations imposed by s.28 include the "providing and maintaining of a safe and healthy work environment", "safe plant", "safe use, handing, storage and transport of substances", "safe systems of work", and "providing information, instruction, training and supervision to ensure health and safety".

71. As has already been conceded by the Body Corporate[61] that if a scaffold was erected such that the risk of falling was more than 4 metres, the Applicant Caretaker could not lawfully direct any of its workers or servants or agents to carry out the gutter cleaning work unless they held a relevant scaffolder's certificate, which, in this case there is no evidence of such a certificate being held. Consequently, part of the gutter work to those buildings with a gutter in excess of 4 metres in height in the scheme could not have been contemplated by the parties as being carried out by the Applicant and "employees, contractors or agents" of the Caretaker who were not skilled tradespersons or specialists. That is, those gutters in that part of the scheme required somebody who would at least have a basic, intermediate or advanced scaffolder's certificate. This requirement removes this part of the work from that which would be carried out by the Applicant and/or "employees, contractors or agents" who were not a skilled tradesperson or a specialist. It cannot have been the intention of the parties, and it cannot be what they "meant to say" in clause 4(p) that the Applicant was to undertake the cleaning of some gutters in the low rise dwellings and the balance of gutters would be cleaned by some third party tradesman or specialist. Obviously if it was a task which the Applicant was to perform, the parties intended the Applicant to attend to all of the gutters of low set premises in the scheme. That is consistent with the approach of the Body Corporate as follows:-

> On 28 July 2006 sending the invoice to the Applicant of $1,386.00 for cleaning of all of the gutters to the low set premises in the scheme;[62]

On 5 September 2006 the Applicant's Solicitors wrote to the Body Corporate disputing responsibility for cleaning of gutters and the payment of the invoice for various reasons;[63]

On 5 December 2006 the Body Corporate resolved at a Committee Meeting to request payment in seven (7) days of its invoice of $1,386.00;[64]

On 13 December 2006 the Body Corporate Manager on behalf of the Body Corporate wrote to the Applicant requesting payment of $1,386.00.[65]

72. The parties have conducted themselves at all times on the basis that it was an "all or nothing" obligation on the part of the Applicant to clean all of the gutters of the low set premises. I am satisfied that that was the intention of the parties in determining the duties of the Applicant in clause 4 was that in the performance by the Caretaker that certain activities were not contemplated within the scope of the Caretaker's duties where they required a specialist tradesperson or specialist.
73. The construction of clause 4(p) is that the Caretaker, or its employees, contractors or agents, must undertake duties of the Body Corporate save where there is a need for a skilled tradesman or specialist. The facts and circumstances where such a skilled tradesman or specialist is required will vary according to the circumstances of the case. It is always a question of the particular circumstances as to whether a skilled tradesman or specialist is required to carry out duties required by the Body Corporate.

74. Here, in view of:-

the Applicant's obligations under s.28 and s.29 of the *Workplace, Health and Safety Act*;
the fact that some of the gutters to some of the low set premises in the scheme were 4 metres or more in height from ground level;

that there was no suitably qualified person with a scaffolder's certificate whether at basic or other level;

that clause 4 required the Applicant to provide "employees, contractors or agents" who were not skilled tradespersons or specialists; and

clause 2.2 of the Scaffolding Code of Practice, which the Body Corporate submits is a relevant Code of Practice, which provides that the person conducting the business or undertaking shall have the general obligation of ensuring the workplace, health and safety of themselves, workers and others. This includes ensuring any person performing scaffolding work is competent, who should receive information, instruction, training and supervision in the safe execution, dismantling, maintenance and alteration of scaffolding;

the mode of gutter maintenance based on the Submissions be carried out by means of:-

the use of a ladder;
scaffolding;

> from working on the roof, presumably with appropriate roof and gutter restraints to prevent a fall.

> Obviously the particular mode of performance will vary according to whatever person undertakes this type of maintenance. The Applicant however makes out a case for maintenance of gutters by working from the roof. The Applicant states[66]:-

> > "The Respondent also provides photographic evidence of heights of common property roofs within the scheme, ladders and people up ladders. The Applicant acknowledges that it may be possible for some gutters to be reached from a ladder, however the valleys and channels of the roof mean that the maintenance person would need to be on the roof to clean and maintain all areas required. (See photo attached to this Submission and marked Exhibit "1".)"

These factors indicate that a person may well be required who has competence in the erection, alteration or dismantling of scaffolding, if scaffolding is the preferred mode of undertaking this maintenance work. In that case, a suitable appropriate person who can give information, instruction and training and supervision in the safe execution of dismantling and maintenance and alteration of the scaffolding is required. Those circumstances and others referred to in the preceding paragraph indicate in those circumstances that a person of greater competence and qualification than that of the Caretaker and its servants or agents, are required for this maintenance task. In that case, clause 4(p) operates and the services of a skilled tradesman or specialist who would be required.

75. In the event that the mode of operation requires work to be undertaken by standing on the roof, then there was nothing in the Body Corporate Submissions or the Applicant's Submissions which suggest that the present equipment, training or skills of the Caretaker are sufficient to satisfy the requirements of the *Workplace, Health and Safety Act* and other matters referred to above. In those circumstances, I am satisfied for the reasons referred to above that an appropriate tradesperson or specialist would be required to carry out that maintenance task including the task to the associated areas of valleys and channels of the roofs.

76. The use of a ladder at first glance indicates that some of the premises in the scheme can be maintained in that made where the height of the gutters was less than 3 metres. However, this mode does not allow for all gutters to be maintained as there is evidence before me in the Applicant's Submissions that at least several of the gutters have a height in excess of 4 metres from ground level. In those circumstances a direction by the Body Corporate to provide maintenance to all roof gutters in the scheme brings into operation clause 4(p) as requiring a tradesman or specialist to deal with those gutters which are in excess of 4 metres in height. That direction also does not take into account, as the Applicant points out in its Submissions, the need to clean and maintain the valleys and channels of the roof. The Body Corporate has provided no explanation of how those

areas are to be maintained. In those circumstances, and for the various reasons which I have referred to above relating to the *Workplace, Health and Safety Act* and other matters, I am satisfied that the maintenance of the gutters to the low set buildings, including the valleys and channels to the roofs of those buildings is an activity which falls within the requirement of a tradesperson or specialist in clause 4(p) of the Caretaking Agreement.

77. For these reasons, I am satisfied that gutter maintenance to the low set buildings in the premises is not a duty of the Applicant pursuant to the current Caretaking Agreement dated 28 November 2000.

78. As the gutter maintenance work was not part of the duties in clause 4 of the Caretaking Agreement, the Body Corporate was not entitled to withhold payment of the $1,386.00 and should forthwith reimburse the Applicant those monies.

WHAT IF GUTTER MAINTENANCE IS PART OF THE DUTIES OF THE CARETAKING AGREEMENT?

79. If contrary to the finding that I have already made in the preceding paragraph, that the maintenance of the gutters to the low set premises in the scheme was part of the duties of clause 4 of the Caretaking Agreement, the issue arises whether the Body Corporate was in those circumstances entitled to withhold $1,386.00 from the instalment of the Applicant's remuneration pursuant to clause 2 and Schedule "A" to the Caretaking Agreement.

80. In the circumstances in these proceedings, the Body Corporate was not entitled to withhold that instalment of $1,386.00. The Body Corporate was not authorised by any provision in the Act or the Accommodation Module to withhold that payment. Neither was the Body Corporate entitled to withhold that instalment pursuant to any provisions of the Caretaking Agreement dated 28 November 2000.

81. The Body Corporate asserts that it is entitled to claim that money as a set-off against monies due to the Applicant pursuant to the remuneration clause in the Caretaking Agreement.

82. The amounts paid to the Applicant by way of instalments pursuant to the remuneration clause are liquidated amounts. They are ascertained by clause 2.1 and Schedule "A" to that Agreement.

83. On the other hand, the amount of $1,386.00 is an unliquidated demand. It is that part of the quote by the independent contractor engaged by the Body Corporate who was in 2006 to perform maintenance works on the gutters not only to the low set buildings but also the high set buildings in the scheme. It is some proportion of the overall quote arrived at by the Body Corporate which it no doubt believes is appropriate for the cost of maintenance to the gutters on the low set dwellings.

84. Further, there was at least another one or possibly a second quote from other independent contractors. The evidence in these proceedings did not include the quotes relied upon by the Body Corporate for the work completed in 2006 nor were the other

quotes in evidence. There is no way of knowing exactly how the Body Corporate has arrived at the amount of $1,386.00 or indeed whether or not there was a lower quote referable to the work on the low set premises in the scheme. In any event, that amount of $1,386.00 is an unliquidated demand.

85. The amount of $1,386.00 also represents the damages which the Body Corporate claims it has suffered if it is correct in asserting that the maintenance to the gutters for the low set premises was part of the duties of the Applicant. If the Body Corporate was right in that assertion, then there would be a breach by the Applicant of those duties and the Body Corporate is entitled to recover whatever damage it has suffered.

86. An unliquidated claim whether equitable or common law cannot be set-off against a liquidated claim.[67] The set-off claimed by the Body Corporate is a legal set-off. That is the Body Corporate relies on its contract made with the Applicant in the Caretaking Agreement of 28 November 2000. It asserts the Applicant is in breach of its duties under that Agreement and seeks to set-off its damages consequent on that breach. In *McDonnell & East Limited v McGregor*[68] Dixon J. stated:-

> "My opinion is that a liquidated cross-demand cannot be pleaded as an answer in whole or in part to a cause of action sounding in damages or vice versa."

87. The Body Corporate's claim to $1,386.00 is in effect a claim for its damages in the event that there was a breach of the Caretaking Agreement by the Applicant if the Applicant was required to carry out the gutter maintenance as part of its duties under clause 4 of that Agreement. At this stage the quantum of and basis of those damages is, for the reasons I have already set out, unclear. I do not regard the Body Corporate as being entitled to or indeed claiming an equitable set-off in the circumstances of this case. [69]

88. In these proceedings, where the Body Corporate is claiming its legal set-off of its alleged damages of $1,386.00, it is not entitled to set-off those monies against the liquidated amount payable by the Body Corporate to the Applicant pursuant to the remuneration clause in 2.1 of the Caretaking Agreement.

89. In those circumstances even if the Applicant's contractual duties under the Caretaking Agreement required it to perform the gutter maintenance (which I have already found it was not a duty of the Caretaker under that Agreement), then the Body Corporate was not entitled to set-off the $1,386.00 against the instalment payment being made to the Applicant pursuant to clause 2.1 of the Caretaking Agreement. For these reasons the Body Corporate should forthwith refund or reimburse to the Applicant the $1,386.00 which it withheld in the payment of instalments towards the end of 2006 or beginning of 2007. I propose to make Orders accordingly for the reimbursement of those funds by the Body Corporate to the Applicant.

90. In the final Orders sought by the Applicant in Annexure "A" to the Application, it seeks a Declaration that the Body Corporate is not entitled to deduct the sum of $1,386.00 "or any sum at all", from the remuneration of the Application. The only amount which has

been deducted is the sum of $1,386.00. I propose limiting any Declaration to that sum. I do not propose to include in the Order the additional words sought by the Applicant "or any other sum at all" as that aspect of the relief has not been the subject of any evidence or Submissions. I do not propose to grant a Declaration in such wide terms in these circumstances.

91. As for the costs of the Adjudication, as none of the parties have made Submissions to date with respect to costs of the Adjudication pursuant to s.280 of the Act. I will direct that each of the parties deliver to me and each of the other parties to the Application, their written Submissions on costs, if any, on or before 4:00 p.m. on Friday, 17 August 2007.

ORDERS

A Declaration is granted that the Body Corporate is not entitled to deduct the sum of $1,386.00 from the remuneration of the Applicant.

The Body Corporate is ordered to reimburse forthwith the Applicant in the sum of $1,386.00.

Each of the parties are to deliver to me and to each of the other parties to the Application, their written Submissions on costs, if any, on or before **4:00 p.m. on Friday, 17 August 2007**.

Costs of the Adjudication are reserved.

Dated: 30 July 2007

_____

Christopher John Carrigan

Specialist Adjudicator

BODY CORPORATE AND COMMUNITY MANAGEMENT ACT 1997

Application Reference: 1067A-2006

Applicant: **VILLA MILOS MANAGEMENT PTY LTD**

AND

Respondent: **THE BODY CORPORATE FOR "KENSINGTON GATE" COMMUNITY TITLES SCHEME 28814**

ORDER

Before: Specialist Adjudicator Christopher Carrigan

Date: 11 September 2007

Initiating Document: Application dated 5 February 2007

I ORDER THAT:

1. The Respondent Body Corporate is to pay on or before 4:00 p.m. on 26 October, 2007, the costs of the Adjudication pursuant to s.280 of the Body Corporate and Community Management Act 1997 fixed in the sum of $12,100.00 to the Adjudicator in accordance with the tax invoice dated 13 September, 2007, delivered to the Respondent's Solicitors.

C.J. CARRIGAN

Specialist Adjudicator

BODY CORPORATE AND COMMUNITY MANAGEMENT ACT 1997

Application Reference: 1067A-2006

Applicant: **VILLA MILOS MANAGEMENT PTY LTD**

AND

Respondent: **THE BODY CORPORATE FOR "KENSINGTON GATE" COMMUNITY TITLES SCHEME 28814**

REASONS FOR DECISION AND ORDER ON COSTS

1. On 30 July 2007, Orders were made to resolve the dispute between the parties and Directions made for the parties to deliver submissions with respect to the Adjudicator's costs pursuant to s.280 of the *Body Corporate and Community Management Act 1997* ("the Act").

2. The parties have now delivered their submissions.[70] The parties have referred me to the District Court decision by His Honour Judge McGill DCJ in *Woodrange Pty Ltd v Le Grand Broadwater Body Corporate*[71] where it was held that the Adjudicator's power to award costs under s.280 of the Act is limited to the Adjudicator's costs and does not include the legal costs or fees incurred by either party in relation to the Application. Accordingly, this decision is only concerned with the Adjudicator's costs in this Adjudication and no other costs.

3. On or about 1 March 2007, the Commissioner for Body Corporate and Community Management determined this Application falls within the definition of a contractual matter and that pursuant to s.265 of the Act it must be determined by Specialist Adjudication. I was then appointed as the Specialist Adjudicator.[72]

4. The Applicant's submissions refer me to a number of decisions relating to the interpretation of s.280 of the Act and the apportionment of costs in an Adjudication. The Applicant relies on a number of considerations in their submissions including:-

> (a) that the Orders made on 30 July 2007 resulted in the Applicant being successful in its Application and the repayment of the remuneration previously withheld by the Body Corporate;
> (b) the Applicant did not lose on any part of its Application and there was no contributory fault on its part in this matter;
>
> (c) the Applicant did not raise any unnecessary or unreasonable arguments which were required to be considered in the Adjudication;
>
> (d) it was the Body Corporate who sought to have the wider issue of duty under the relevant agreement addressed and considered in the Adjudication which resulted in a marked increase in adjudication costs;
>
> (e) the Body Corporate lodged an additional interlocutory Application to have the Applicant's Dispute Resolution Application dismissed and this Application was refused, but increased the overall costs of the Application.

5. The Applicant makes submissions with respect to issues involving facts leading to the Adjudication, the conduct of the parties in the Adjudication and that the Applicant was

"wholly successful in obtaining the relief it sought".[73]
6. Accordingly, the Applicant submits that the Respondent Body Corporate should be completely responsible for the costs of the Adjudication.[74]

7. The Respondent Body Corporate in its submissions quite properly points out that on

1 July 2007 the Act was amended and a "different regeme for costs put in place".[75] The Respondent submits that in this case the proper costs provision to be applied is s.280 of the Act in the form in which it was prior to 1 July 2007.[76] The Applicant, in its submissions in reply also contends that s.280 is the relevant provision to determine the issue of costs.[77]

8. The Body Corporate's submissions provide the legislative background history on costs since 1997. The submissions in relation to s.280 assert that the usual rule that costs follow the event has no application in view of the specific terms of s.280.[78] Accordingly, the Respondent submits that something more than

> "mere success on an application must be demonstrated by a successful applicant before an adjudicator should exercise his or her discretion to depart from the general rule under s.280 the costs are borne by the applicant".

The Respondent submits that the factors that bear upon the exercise of the Adjudicator's discretion are those which go to the parties' conduct in relation to the Application.
9. The Respondent Body Corporate refers to a number of matters in relation to whether there should be a departure from the general rule in s.280 of the Act. Those matters to which the Body Corporate refers include[79]:-

> the Body Corporate had a genuine belief that it had a contractual entitlement to withhold the $1,386.00;

that it was accepted the dispute concerned two principal issues;
the issues involved complex issues;

> there was no evidence that the Body Corporate was acting unreasonably or that it was motivated by bad faith;
> neither party was found to have acted unreasonably.

In consequence, the Body Corporate asserts that in these circumstances the Application was unexceptional and there are no special features that would necessarily attract the Adjudicator's discretion to warrant a departure from the general rule in s.280. The Body Corporate accordingly asserts that the Applicant shall bear the costs of the Application.
10. I have regard to the submissions of the parties and to any additional submissions in reply by the Applicant.

11. As for the conduct of the parties prior to the Adjudication, the deduction of $1,386.00 from the Applicant's remuneration occurred with notice to the Applicant. The Respondent

Body Corporate sent an invoice on 28 July 2006 and did not deduct that money until following a Committee Meeting held on 5 December 2006.

12. However, the money was withheld in circumstances where the Body Corporate was, or ought to have been, aware following a letter dated 5 September 2006 from the Applicant's Solicitors, that the Applicant disputed responsibility for the cleaning of the gutters and the withholding by the Body Corporate of those funds payable as remuneration to the Applicant.

13. Accordingly, there seems to have been a genuine dispute between the parties as to the duties and as to the issue of payment. Rather than have that issue determined the Body Corporate unilaterally withheld that part of the remuneration payable to the Applicant under the Caretaking Agreement.

14. In the course of the Adjudication the Applicant made a deliberate attempt, as it was entitled to do, to limit the Adjudication to a determination of the issue as to whether the Body Corporate was entitled to withhold the monies payable as remuneration under the Caretaking Agreement.[80] The Applicant sought to avoid having determined whether pursuant to the Caretaking Agreement, the cleaning of gutters on the low rise buildings forms part of the Caretaker's duties and whether the Applicant is liable to pay the Body Corporate in the sum of $1,386.00.[81]

15. The Body Corporate responded by asserting[82]:-

> "The Respondent considers that the orders sought by the Applicant are unnecessarily narrow and hide the wider issue that the Caretaker is in breach of its contract in refusing to clean the gutters.
>
> An Adjudicator has the power under s.276 of the Act to decide the wider issue, and to make ancillary or consequential provisions that the Adjudicator considers necessary or appropriate."

16. The Body Corporate then raised the duties of the Caretaker pursuant to clause 4(a), (b) and (p) of the Caretaking Agreement and also raised the issue of whether the services of a skilled tradesman or specialist are required for the cleaning of the relevant gutters.[83] The Body Corporate widened the issues of the dispute and as a result, it was necessary to consider the additional issues raised by the Body Corporate in determining the Application. These additional considerations added to the complexity and the length of time for the determination of this dispute between the parties. The Applicant, as it is required to do, joined in and responded to those wider issues but only did so following these additional issues being raised by the Body Corporate.

17. A further matter to have regard to is the basis on which the Body Corporate withheld the funds of $1,386.00 from the Applicant. In its submissions the Respondent stated[84]:-

> "The body corporate withheld funds as a practical solution to avoid the costs of proceedings either before a Specialist Adjudicator, or before the Courts."

Whatever were the motives of the Body Corporate in refraining from taking steps to resolve this dispute under the Act, it gave the Body Corporate the tactical advantage that it would be the Respondent to an Application by the Applicant to recover its unpaid remuneration. That is by refraining from taking steps, it was forcing the Applicant to bring an Application and expose the Applicant to the general order for costs pursuant to s.280 of the Act. A Body Corporate is required to act reasonably in carrying out its functions under the Act. The Body Corporate in effect left the Applicant with a choice whether to:-

> forego the remuneration withheld by the Body Corporate; or
> take action to recover that remuneration by commencing an Application under the Dispute Resolution provisions in Chapter 6 of the Act. I also note the exclusivity of those dispute resolution provisions as set out in s.229(2) of the Act.

The actions of the Body Corporate manoeuvred the Applicant into a position whereby if it wished to recover the remuneration withheld by the Body Corporate, then it was compelled to bring an Application under the Dispute Resolution provisions of the Act. Consequently, as a tactical matter, the Applicant then became primarily responsible for the costs of the Adjudication unless an Adjudicator was to "otherwise order" in terms of s.280. I think it is appropriate to take into account these circumstances particularly as it was the Body Corporate who was refusing to pay that part of the remuneration, did so in circumstances where it was aware of the basis of objection as indicated in the Applicant's Solicitors' letter dated 5 September 2006 and then in effect "stood back" and waited to see what the Applicant would do. These circumstances significantly militate against a costs order being made against the Applicant and are part of the consideration as to whether I should "otherwise order" the Respondent to pay some part or the whole of the costs of the Adjudication.

18. While costs do not follow the event so far as s.280 of the Act is concerned, nevertheless it is a relevant consideration to have regard to the success, or lack of success of the parties to the Application. As the Applicant has submitted in these proceedings, it has been successful. The Respondent Body Corporate has raised a number of issues to justify its retention of that part of the remuneration and has not succeeded on those issues. Accordingly this is a consideration suggesting that the general rule set out in s.280 of the Act should be departed from and that I should make some form of alternative order.

19. During the Adjudication, the Respondent Body Corporate was on several occasions the recipient of extensions of time for delivery of material which was the subject of several Directions Hearings. The proceedings were thereby delayed. The Respondent Body Corporate also brought a discrete Application seeking the summary dismissal of the Application. That interlocutory Application was refused but nevertheless added to the length of time for the hearing of this Application and also added to its complexity. The Applicant should not be responsible for these costs of the Adjudication.

20. A number of lot owners made submissions generally in accordance with the position taken by the Body Corporate. Their submissions were also taken into account in the

determination of these proceedings.

21. A relevant matter is that the Body Corporate consists of 63 lots.[85] Any costs order made against the Applicant will be met by itself as a single entity. Any costs order made against the Body Corporate would be or would eventually be, the subject of levies on the 63 lots. That is the Body Corporate's costs would be shared amongst 63 lot owners, not all of whom I assume were necessarily for or against the position adopted of withholding of part of the Applicant's remuneration. However, the effect is that the Body Corporate's costs would rateably fall upon and be recovered from 63 lot owners.

22. I am concerned that the principal dispute between the parties involved the Body Corporate's withholding of $1,386.00, which is a relatively small amount, although no doubt an important matter for the parties. The Applicant no doubt has already been put to significant legal expense exceeding the amount of the claim in dispute. Similar comments could also be made about the Body Corporate's legal expenses. While it is appreciated that s.280 of the Act is not concerned with the parties' legal expenses, nevertheless in reviewing discretionary matters, it is an obvious observation when the complex issues are considered in the light of the very full and complete submissions made on behalf of the parties by their legal representatives that they have both incurred their own legal expenses.

23. I am persuaded by these matters referred to above that the general rule in s.280 of the Act should be departed from in the circumstances of this case. I am also persuaded that the discretion under s.280 should be exercised to "otherwise order" that the Body Corporate be responsible for the costs. Having regard to the considerations discussed above including the conduct of the Body Corporate leading up to the Adjudication, its conduct during the Adjudication, the Body Corporate's lack of success in the Adjudication, the delays caused by the Body Corporate during the Adjudication, its unsuccessful interlocutory Application, the fact that it withheld the remuneration and took no steps to resolve the dispute but rather left it to the Applicant to bring any Application, I am persuaded that in this instance the Body Corporate should be responsible for all of the costs of the Adjudication pursuant to s.280 of the Act.

24. I accordingly intend to order that the Body Corporate pay the costs of the Adjudication.

ORDER

92. The Respondent Body Corporate is to pay on or before 4:00 p.m. on 26 October, 2007, the costs of the Adjudication pursuant to s.280 of the Body Corporate and Community Management Act 1997 fixed in the sum of $12,100.00 to the Adjudicator in accordance with the tax invoice dated 13 September, 2007, delivered to the Respondent's Solicitors.

Dated: 13 September 2007

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Christopher John Carrigan

Specialist Adjudicator

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[1] See Exhibit "A" to the Application.

[2] Preamble "B" to the Caretaking Agreement.

[3] See clause 1(a).

[4] Clause 2.1.

[5] See clause 5.1 of the Deed of Assignment at Exhibit "B" to the Application.

[6] See Submissions of Carol Toal dated 28 March 2007 para. 3.

[7] Submissions of Carol Toal dated 28 March 2007.

[8] Submissions of Carol Toal dated 28 March 2007.

[9] Exhibit "F" to the Body Corporate's Submissions dated 13 April 2007.

[10] See Submissions of the Body Corporate dated 13 April 2007 at page 4.

[11] See Exhibit "C" to the Body Corporate's Submissions dated 13 April 2007.

[12] Application at Exhibit "C".

[13] Application at Exhibit "D".

[14] Application at Exhibit "E".

[15] Application at Exhibit "F".

[16] See Application para. 16 and para. 1 of the Orders sought in the Application.

[17] The Body Corporate's Submissions dated 13 April 2007 at page 5, para. 1.

[18] The Body Corporate's Submissions dated 13 April 2007 at page 8, para. 8.

[19] See Submissions at paragraph 79.

[20] Submissions dated 18 May 2007 at para. 3.13.

[21] The Body Corporate's Submissions dated 18 May 2007 at para. 3.23.

[22] See Order made on 23 May 2007 and short Reasons accompanying the Order.

[23] This amendment is sought by the Applicant in its Submissions dated 9 May 2007 at para. 72.

[24] (2006) QBCCMC 419

[25] See para. 13 of the Reasons for Decision.

[26] s.269 of the Act

[27] (2006) QBCCMC 419

[28] See 2.248 et seq of the Act.

[29] See the Body Corporate's Submissions dated 18 May 2007 para. 3.23 and para. 4.1.

[30] Orders dated 23 May 2007

[31] The Body Corporate's Submissions dated 18 May 2007 at para. 3.22.

[32] See the Application at para. 15.

[33] Application at para. 15; see also the Applicant's Submissions dated 9 May 2007 at para. 23.

[34] See the Applicant's Submissions dated 9 May 2007 at para. 24.

[35] Applicant's Submissions dated 9 May 2007 at para. 30.

[36] Applicant's Submissions dated 9 May 2007 at para. 31 et seq.

[37] Applicant's Submissions dated 9 May 2007 at para. 55 et seq.

[38] Applicant's Submissions dated 9 May 2007 at paras. 50 – 51.

[39] The Body Corporate's Submissions dated 13 April 2007 at page 6, para. 1.

[40] The Body Corporate's Submissions dated 13 April 2007 at page 6, para. 2.

[41] The Body Corporate's Submissions dated 13 April 2007 at page 7.

[42] The Body Corporate's Submissions dated 13 April 2007 at page 7.

[43] The Body Corporate's Submissions dated 13 April 2007 at page 8.

[44] Clause 2.1 of the Caretaking Agreement.

[45] Caretaking Agreement clause 2.1 at Exhibit "A" to the Application.

[46] [1994] HCA 21; (1993-94) 179 CLR 597

[47] Above note 46 at page 601.

[48] Above note 46 at page 606.

[49] The Body Corporate's Submissions dated 13 April 2007 at page 6, para. 1.

[50] The Body Corporate's Submissions dated 13 April 2007 at page 6, para. 2.

[51] The Body Corporate's Submissions dated 13 April 2007 at page 7.

[52] The Body Corporate's Submissions dated 13 April 2007 at pages 6 – 7.

[53] Applicant's Submissions dated 9 May 2007 at para. 28 et seq.

[54] Applicant's Submissions dated 9 may 2007 at para. 41, in particular Unit 1 is 4.2 metres, Unit 2 is 4.05 metres and Unit 38 is 3.05 metres.

[55] The attachments related to Units 58, 60, 38, 40, 52, 57 and 59.

[56] The Body Corporate's Submissions dated 14 June 2007 at para. 5.23.

[57] Applicant's Submissions dated 9 May 2007 at para. 41.

[58] The Body Corporate's Submissions dated 13 June 2007 at para. 5.13(b).

[59] (2004) QSC 055 at paras. 24 – 26.

[60] [1973] HCA 36; (1973) 129 CLR 99 at 109 – 110.

[61] The Body Corporate's Submissions dated 13 June 2007 at para. 5.13(b).

[62] The Body Corporate's Submissions dated 13 April 2007 at Exhibit "C".

[63] See Application at Exhibit "C".

[64] See Application at Exhibit "D" and the Body Corporate's Submissions dated 13 April 2007 at Exhibit "D".

[65] See Application at Exhibit "E" and the Body Corporate's Submissions dated 13 April 2007 at Exhibit "E".

[66] See Applicant's Submissions dated 20 June 2007 at para. 24.

[67] *Bayview Quarries Pty Ltd v Castley Development Pty Ltd* [1963] VicRp 64; (1963) VR 445 per Sholl J.

[68] [1936] HCA 28; (1936) 56 CLR 50 at p. 62.

[69] *United Dominions Corporation Limited v Jaybe Homes Pty Ltd* (1978) Qd.R. 111; *Eversure Textiles Manufacturing Co Ltd v Webb* (1978) Qd.R. 347.

[70] The Applicant delivered its submissions on 17 August 2007; the Respondent Body Corporate delivered its submissions on 24 August 2007; and the Applicant delivered submissions in reply on 29 August 2007.

[71] (2004) QDC 215

[72] See letter from the Commissioner dated 1 March 2007.

[73] See para. 40 of the Applicant's submissions.

[74] See paras. 42 and 47 of the Applicant's submissions.

[75] See paras. 2.1 – 2.9 of the Respondent's submissions.

[76] See para. 2.10 of the Respondent's submissions.

[77] See para. 1 of the submissions in reply.

[78] See para. 2.17 of the Body Corporate's submissions.

[79] See para. 2.5 of the Body Corporate's submissions.

[80] See para. 17 of the Application.

[81] See para. 16 of the Application.

[82] See para. 2 page 5 of the Respondent's submissions dated 13 April 2007.

[83] See para. 2 on pages 6 and 7 of the Respondent's submissions delivered 13 April 2007.

[84] See para. 1 on page 6 of the Body Corporate's submissions dated 13 April 2007.

[85] See page 1 of the Applicant's Application.