QUEENSLAND CIVIL AND ADMINISTRATIVE TRIBUNAL

CITATION:	*Spryszynski v The Body Corporate for Residences on Upper Oxford* [2020] QCATA 14
PARTIES:	Peter Spryszynski (applicant) v The Body Corporate for Residences on Upper Oxford (respondent)
APPLICATION NO/S:	APL286-19
MATTER TYPE:	Appeals
DELIVERED ON:	29 January 2020
DECISION OF:	Member Roney QC
ORDERS:	**1. I order the Body Corporate not to implement the decisions to move the units for a period of eight weeks from the making of this order.** **2. I give the parties liberty to apply to vary or discharge these orders.** **3. I direct the parties to take all reasonable steps to ensure the matter can be concluded in this Tribunal within a period of eight weeks from the date of this order.**
CATCHWORDS:	APPEAL AND NEW TRIAL – APPEAL – GENERAL PRINCIPLES – RIGHT OF APPEAL – WHEN APPEAL LIES – ERROR OF LAW – where s 289(2) of the *Body Corporate Community Management Act* 1997 (Qld) allows a person aggrieved by an Adjudicator's order to appeal on a question of law to the Queensland Civil and Administrative Tribunal – what is error of law – whether there was an error of law REAL PROPERTY – STRATA AND RELATED TITLES – MANAGEMENT AND CONTROL – BYLAWS – whether Body Corporate in General meeting acted reasonably in failing to pass motions put forward by a lot owner. APPEAL AND NEW TRIAL – PROCEDURE – QUEENSLAND – STAY OF PROCEEDINGS – GENERAL PRINCIPLES AS TO GRANT OR REFUSAL – where orders were made by an Adjudicator

relating to an application– where the current application seeks to stay the proceedings below pending an appeal.

APPEARANCES:

This matter was heard and determined on the papers pursuant to s 32 of the *Queensland Civil and Administrative Tribunal Act* 2009 (Qld).

REASONS FOR DECISION

[1] Residences on Upper Oxford was established on 22 December 2010 with the registration of Survey Plan 227890, a building format plan of subdivision. The scheme comprises six lots in a four storey concrete building on Oxford Street, Balmoral. The Appellant is a co-owner of Lot 3, and brought an application against the body corporate of Residences on Upper Oxford, disputing the validity of resolutions passed on the 5 May 2019 EGM and resolutions of the committee, made outside of a committee meeting on 10 May 2019.

[2] The resolutions passed on the 5 May 2019 EGM proposed "that the current location of the air conditioning external units constitute an unreasonable interference with the enjoyment of other lots in the complex, namely Lots 1, 2, 5 & 6 and that should motion 2 not be carried then the body corporate must commence investigations and actions to remediate the unreasonable interference". Motion 2 proposed "that the six air conditioning external units be relocated from their current position to an area along the rear wall of the visitors parking bay area defined, at present, by the "visitors only parking" at the north western corner of the complex and that the body corporate accepts the quotations for the work to relocate and rehouse the units from Active Air Solutions in the amount of $6,280.96 and Jenolan Holdings Pty Ltd trading as Aristo Products in the amount of $3,410 and an amount of $150 for the services of Tracsafe and funds the total project cost of $9,840.96 by a special levy with a due date one month after the contracts are executed provided that the existing quote terms and conditions are revalidated by the contractors". The minutes of the EGM record both Motions 1 and 2 as having been carried with four votes in favour and none against.

[3] On 10 May 2019 the committee resolved:

> that Kevin Smith is authorised to execute contracts, approve payments and manage the implementation of the project to move the air-conditioning condensers in accordance with the resolution passed at the EGM 5/5/19.
>
> that the body corporate manager is authorised to issue Notice of Entry letters and emails to lot occupiers at the direction of Kevin Smith in regard to the project to move the air-conditioning condensers.

[4] The appellant brought an application before the Office of the Commissioner for Body Corporate and Community Management alleging that the 5 May 2019 EGM motions and the committee resolutions were also invalid principally on the basis that in passing them, the actions of the Body Corporate were unreasonable .

[5] As is apparent, the dispute concerns the location of the compressors for the air conditioning units for the lots. Each of the six lots is serviced by air conditioning, the compressor for each lot is located in an area of common property in the

basement. It is alleged by the owners of lots 1, 2, 5 and 6 that the operation of the compressors in their current location constitutes unreasonable interference with the enjoyment of their lots. These owners wanted the compressors re-located.

[6] On 24 September 2019 M A Schmidt, an Adjudicator held as follows;

> [23] In the present case, it is alleged that the exercise of rights under the statutory easement is interfering unreasonably with the use or enjoyment of numerous lots and common property. However, whether or not that is the case is not relevant to the determination of this dispute.
>
> [24] Section 159(1) provides that the body corporate is responsible for maintaining common property in good condition. However, 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:
>
> (i) Relates only to supplying utility services to the owner's lot; and
>
> (ii) Is one of the following types –
>
> - Hot water systems
> - Washing machines
> - Clothes dryers
> - Another device providing a utility service to a lot.
>
> [25] In the case of the air conditioning at Residences on Upper Oxford, each system services only one lot, therefore, that lot owner is responsible for the maintenance of the air conditioning system that services their lot.
>
> [26] The question raised in this application is, however, not one of maintenance. There is no suggestion that the air conditioning units are not being maintained in good condition.
>
> [27] The body corporate has proposed that the condensers be moved from one area of common property, to another area of common property.
>
> [28] Section 163 of the Standard Module provides that the body corporate may make improvements to common property costing more than $1,800 but less than $12,000 if authorised by ordinary resolution.
>
> [29] I am satisfied that the movement of the condensers is an 'improvement' (within the meaning of Schedule 6 of the Act) to common property.
>
> [30] Motion 2 of the EGM of 5 May 2019 resolved to relocate the condensers and the motion was passed by ordinary resolution.
>
> [31] The applicant has detailed numerous objections to the body corporate's decision to relocate the condensers to the chosen location. However, none of those objections evidence any failure to comply with the legislation. The body corporate has a legislative obligation to act reasonably, as does the committee. Whilst it is clear that the applicant disagrees with the body corporate and committee decisions in relation to the relocation of the condensers, he has failed to persuade me that the body corporate or the committee failed to act reasonably in arriving at its decisions.

[7] The adjudicator was not satisfied on the basis of the material that it is just and equitable to invalidate either the body corporate resolutions made at the EGM on 5 May 2019, or the committee resolutions based on them, made outside of a committee meeting on 10 May 2019.

[8] On 25 October 2019, the appellant filed an application for leave to appeal to this Tribunal. He has filed an application to stay that decision which is being treated as an application for an interim order by this Tribunal. It is not a decision which can be stayed as such because the Adjudicator simply dismissed the application for orders seeking to have the Body Corporate's decision invalidated. So as it stands the Body Corporate's decision is not invalidated and subject to what I may order , it can action that decision.

[9] The grounds for appeal which are set out in Part C of the application for leave to appeal, contend that there has been an error of law in that the Adjudicator failed to conclude that the body corporate contravened s 100(5) and s 152(2) of the Act. In essence, but in grounds of appeal that run for some considerable length, the appellant essentially argues that the body corporate acted unreasonably and that the Adjudicator should have held that they did so. The arguments in support of these propositions rely upon arguments to the effect that the appellant and the other lot owners were not provided with all available and relevant information to assess the motions, were not provided with quotes in their entirety, and other similar matters. It is contended that the Adjudicator only assessed whether the process was conducted in a fair and equitable manner but not whether in passing the resolutions there was in substance not unreasonable conduct by the body corporate. He also argues that there has been a contravention of s 162(2) of the Act that the resolutions were required to be without dissent. Section 162(2) of the Act is concerned with the power of a body corporate, if authorised by a motion passed without dissent, to grant an easement of common property or accept the surrender of an easement. The Respondent contends that there is no issue to the authority of a body corporate to relocate utility infrastructure for one part of common property where it was permitted to be placed pursuant to a statutory easement to another part of the common property also subject to a statutory easement, and no question of legal invalidity arises.

[10] In support of the application for what I am treating as an interim order by this Tribunal, the appellant contends that the matter under appeal involved costly building works which would incur additional costs to undo the event in the event the Adjudicator's decision was overturned. The appellant contends that its application is "not doomed to fail". The respondent points to the fact that the cost involved is not particularly significant and that the work to relocate the air conditioning units is urgent in order to relieve what the Adjudicator found to be unreasonably interference with the enjoyment of other lot owners of their lot. The respondent's submissions, somewhat ominously, identified that as at 20 December 2019, Queenslanders had commenced what was clearly going to be a very hot and humid summer. One can take judicial notice of the fact that it was extremely hot.

[11] In *Day v Humphrey & Ors* [2017] QCA 104, it was held in relation to what an applicant for a stay must demonstrate :

> An applicant for a stay must demonstrate some reason why a judgment should not be given immediate effect. The test applicable on an application to stay a

judgment pending an appeal is simply expressed as being whether the case is an appropriate one for a stay.[1]

[6] The test reflects a wide discretion reposed in the Court and authority establishes that there are some traditional factors to be taken into account on the application, namely whether:

(a) there is a good arguable case;

(b) the applicant will be disadvantaged if the stay is not granted; and

(c) there is some compelling disadvantage to the respondent if a stay is granted, which outweighs the disadvantage suffered by the applicant.[2]

[7] In *Cook's Construction Pty Ltd v Stork Food Systems Australasia Pty Ltd*[3] this Court said:

> "[I]t will not be appropriate to grant a stay unless a sufficient basis is shown to outweigh the considerations that judgments of the Trial Division should not be treated as merely provisional, and that a successful party in litigation is entitled to the fruits of its judgment. Generally speaking, courts should not be disposed to delay the enforcement of court orders."

[8] The Court went on to state, in relation to the assessment of the prospects on appeal, and a conclusion that the prospects may be poor:

> "In cases where this Court is able to come to a preliminary assessment of the strength of the appellant's case, the prospects of success on appeal may weigh significantly in the balance of relevant considerations. The prospects of success will obviously tend to favour the refusal of a stay if the prospects of the appeal can be seen to be very poor."[4]

The Court in *Cook's Construction* also referred to the relevant considerations that are applicable on a stay application, in these terms:

> "The decision of this Court in *Berry v Green* suggests that it is not necessary for an applicant for a stay pending appeal to show 'special or exceptional circumstances' which warrant the grant of the stay. Nevertheless it will not be appropriate to grant a stay unless a sufficient basis is shown to outweigh the considerations that judgments of the Trial Division should not be treated as merely provisional, and that a successful party in litigation is entitled to the fruits of its judgment."[5]

[9] In determining the relevant factors, the Court identified the prospects of success, the question whether the appeal would be rendered nugatory, and whether there was irremediable harm if that should occur.

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1 *Williams v Chesterman* [1992] QCA 198; *Crony v Nand* [1999] 2 Qd R 342; [1998] QCA 367.

2 *Alexander v Cambridge Credit Corp Ltd* (1985) 2 NSWLR 685; *Cook's Construction Pty Ltd v Stork Food Systems Australasia Pty Ltd* [2008] 2 Qd R 453; *Raschilla v Westpac Banking Corporation* [2010] QCA 255.

3 *Cook's Construction Pty Ltd v Stork Food Systems Australasia Pty Ltd* [2008] QCA 322, per Keane JA (with whom McMurdo P and White AJA agreed) at [12].

4 *Cook's Construction* at [13].

5 *Cook's Construction* at [12]; internal footnotes omitted.

> [10] The principle that poor prospects would favour the refusal of a stay is because "if there is obviously little prospect of ultimate reversal of existing orders, the concern to ensure that the existing orders can be overturned without residual injustice will have less claim on the discretion than might otherwise be the case".[6]

[12] Whilst I have serious concerns as to whether there is any merit to the appeal, it is not appropriate on an application of this kind to decide complex questions of law in order to decide whether to stay a decision. Whilst in the overall scheme of things, a decision by a body corporate to incur a cost of some $12,000.00 approximately, which would be the subject of a special levy to lot holders is not particularly significant, the fact that those costs might be unnecessarily incurred is a relevant matter, particularly if this appeal can be resolved relatively quickly.

[13] It seems to me that the issues which arise on the appeal are relatively narrow and limited to questions of law and it ought be possible for the Tribunal to have them determined within a relatively short time. As I understand the submissions made on behalf of the respondent body corporate, it is not that lot owners do not have the capacity to air condition their units, but rather the continued position of the units causes inconvenience and a nuisance. The nature of the inconvenience was set out in paragraph 15 of the Reasons in that it heated up the cold water which was being supplied to some of the units, the slabs were heated and caused an unpleasant reaction for those walking around in bare feet and such matters.

[14] One of the submissions which was made before the Adjudicator is that the applicant does not even reside at the property and would not be exposed in any event to any of the nuisance associated with the units remaining where they are.

[15] It seems to me that were the Body Corporate ordered not to implement the decisions to move the units for a period of up to eight weeks, on balance, the other lot owners would not be inconvenienced to any degree beyond which they have already been inconvenienced for a very considerable time. The appeal would not be rendered nugatory were a stay not allowed because theoretically the air conditioning units could always be moved back to where they were. However it seems to me on balance that allowing a period by which to stay the decision below to permit a relatively prompt determination of the appeal is appropriate.

[16] I therefore order the Body Corporate not to implement the decisions to move the units for a period of eight weeks from the making of this order.

[17] I give the parties liberty to apply to vary or discharge these orders. I direct the parties to take all reasonable steps to ensure the matter can be concluded in this Tribunal within a period of eight weeks from the date of this order.

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6 *Cook's Construction* at [13].