

QUEENSLAND CIVIL AND ADMINISTRATIVE TRIBUNAL

CITATION: *Cello Court Pty Ltd v Body Corporate for Cello Court CTS 42339* [2020] QCATA 97

PARTIES: **CELLO COURT PTY LYD**
(applicant/appellant)

v

BODY CORPORATE FOR CELLO COURT CTS 42339
(respondent)

APPLICATION NO/S: APL057-20

MATTER TYPE: Appeals

DELIVERED ON: 30 June 2020

HEARING DATE: On the papers

HEARD AT: Brisbane

DECISION OF: Member Howe

ORDERS: **The application for injunction and stay of the decision below is refused.**

CATCHWORDS: REAL PROPERTY – STRATA AND RELATED TITLES – MANAGEMENT AND CONTROL – BODY CORPORATE: POWERS, DUTIES AND LIABILITIES – GENERALLY – where the applicant was the caretaker of a scheme – where the body corporate resolved to terminate the caretaker’s services – where the caretaker applied to a departmental Adjudicator for a declaration that the termination was void – where the Adjudicator dismissed the application – where the applicant appealed to the Appeal Tribunal – where the applicant sought interim relief to put it back in the position it was before the decision of the Adjudicator – whether there was a serious question to be decided – where the applicant failed to give the usual undertaking or any undertaking as to damages – where the balance of convenience did not favour granting the interim relief sought

Corporations Act 2001 (Cth) Schedule 2
Queensland Civil and Administrative Tribunal Act 2009 (Qld) s 58, s 59, s 145(2), s 165(3)
Body Corporate and Community Management (Accommodation Module) Regulation 2008 (Qld) s 120

Andrews & Anor v Andrews & Anor [2020] VSC 31
Barber v Mbuzi [2015] QCA 269

Mid Brisbane River Irrigators Inc v The Treasurer and Minister for Trade of the State of Qld & Ors (No 2)

[2014] QSC 197

Castlemaine Tooheys Ltd v South Australia (1986) 161 CLR 148

Ranch Frey Pty Ltd v Body Corporate for Quarterdeck

[2016] QCAT 252

The Sands Gold Coast Pty Ltd v The Body Corporate for the Sands [2019] QCAT 336

REPRESENTATION:

Applicant: Hynes Legal Pty Ltd

Respondent: Grace Lawyers

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] Cello Court CTS 42339 ('the body corporate') is a scheme of town houses comprising 48 lots and common property.
- [2] The applicant Cello Court Pty Ltd ('the applicant') is the scheme's caretaker. It has been engaged to act as such since 2009. It entered into the current caretaking agreement on 1 September 2012. It was also the owner of Lot 20 in the scheme at that time.
- [3] On 12 February 2019 the National Australia Bank was appointed controller over certain assets of the applicant including Lot 20.
- [4] The committee of the body corporate became aware of the appointment and proposed a Notice of Motion be passed by the body corporate to terminate the applicant's caretaking agreement. The Motion was passed at an extraordinary general meeting of the body corporate on 17 May 2019.
- [5] The right to terminate was said to be pursuant to clause 9.1(d) of the caretaking agreement which gave it a right to terminate if the caretaker became "subject to any form of external administration referred to in the Corporations Law".
- [6] The applicant applied to a department Adjudicator for an order declaring the resolution void.
- [7] The Adjudicator was not satisfied that the appointment of a controller could not trigger a right in the body corporate to terminate the agreement relying on clause 9.1(d) and dismissed the applicant's application.
- [8] The applicant has filed an application to appeal to the Appeal Tribunal the decision of the Adjudicator. The applicant has also filed an application for interim relief which latter is before me for decision.

The interim relief sought

- [9] The application for interim orders sought the following:
 - a. Pending determination of the application for appeal filed on 27 February 2020, the body corporate for Cello Court CTS 42339 and the

body corporate committee is restrained from relying on any purported termination of the caretaking agreement dated 1 September 2012 between the body corporate and Cello Court Pty Ltd ACN 150 664 574 in reliance on the resolution of the body corporate passed on 17 May 2019;

- b. Pending determination of the application for appeal filed on 27 February 2020, the order be suspended, or otherwise set aside without effect;
- c. Pending determination of the application for appeal filed on 27 February 2020, the caretaking agreement be reinstated with full effect, backdated to the date of the order, 16 January 2020.

[10] Application b. effectively seeks a stay order. Applications a. and c. seek interim injunctive relief.

[11] The respondent challenges the jurisdiction of the Appeal Tribunal to make those orders. The challenges can be dealt with in short order.

[12] First the respondent says the Appeal Tribunal has no power to issue the injunctions sought because s 58 and s 59 of the *Queensland Civil and Administrative Tribunal Act 2009* (Qld) ('the QCAT Act') authorising such only applies to the tribunal, not the Appeal Tribunal.

[13] By section 165(3) of the QCAT Act:

For an appeal, or a proceeding relating to an application for leave to appeal to the Appeal Tribunal, a reference in this Act to the tribunal includes a reference to the Appeal Tribunal constituted, or to be constituted, for the appeal or proceeding.

[14] The Appeal Tribunal accordingly has the power granted by s 58 and s 59 to make interim orders including issuing interim injunctions in the course of appeal proceedings.

[15] Then the respondent says there is no power in the Appeal Tribunal to stay a decision being appealed from. By s 145(2) of the QCAT Act the Appeal Tribunal is expressly empowered to make an order staying the operation of the decision being appealed against until the appeal is finally decided.

Stay applications and interim relief

[16] A stay order suspends the operation of a decision. An interim injunction is directed to the opposing party and its behaviour.

[17] Given the order made below was simply that the application before the Adjudicator be dismissed there seems little utility in staying that order. Nothing will be achieved and it is not necessary. Stay applications and interim injunctions often operate to achieve the same result, protecting the interests of parties pending determination of an appeal.

[18] One difference in particular between the remedies however, considered further below, is that the grant of an interim injunction usually requires an undertaking as to

damages given by the party seeking it. There is no such usual requirement in applications for a stay of proceedings.¹

[19] By s 59(1) of the QCAT Act the tribunal may grant an injunction including an interim injunction in a proceeding if it is just and convenient to do so. The expression interim injunction in s 59 means an injunction that has effect for the duration of a proceeding (commonly known as an interlocutory injunction) or a shorter period (commonly referred to as an interim injunction).

[20] The usual factors to be considered in determining whether or not it is just and equitable to grant an interlocutory injunction were set out by Mason A.C.J in *Castlemaine Tooheys Ltd v South Australia*:²

...the plaintiff must show (1) that there is a serious question to be tried or that the plaintiff has made out a prima facie case, in the sense that if the evidence remains as it is there is a probability that at the trial of the action the plaintiff will be held entitled to relief; (2) that he will suffer irreparable injury for which damages will not be an adequate compensation unless an injunction is granted; and (3) that the balance of convenience favours the granting of an injunction.³

[21] The question whether damages would not be an adequate remedy sometimes arises for consideration as a “balance of convenience” factor and sometimes separately.⁴

A serious question to be tried

[22] The respondent submits the Appeal Tribunal only has jurisdiction in respect of errors of law and the applicant “acknowledges” that the decision here contains errors of law and errors of fact.

[23] The only reference by the applicant to errors of fact seems to be in the annexure to the application for leave to appeal or appeal where the applicant says that the adjudication contained errors of law “which further resulted in error of fact” arising from the misapplication of the law. There are no particulars about the errors of fact referred to. It should be ignored.

[24] It is not for the parties to decide what is an error of law or error of fact and law brought to the Appeal Tribunal. That is a matter for determination by the Appeal Tribunal if it arises as an issue. The appeal here clearly concerns claimed error of law on the part of the Adjudicator in respect of the construction of the provision in the caretaker contract where termination is permitted if the caretaker becomes subject to any form of external administration “referred to in the Corporations Law”.

[25] The Adjudicator pointed out that the Corporations Law has been superseded by the *Corporations Act 2001* (Cth) (‘the Corporations Act’) and proceeded to base his

¹ Contrast s 138A(2) and s 145(2) concerning stays with s 59(6)(a) concerning the tribunal’s power to require an undertaking as to costs and damages as considered appropriate in granting injunctions. That is also the case when considering the usual matters parties must address and courts and tribunal consider depending on the relief sought – see the relevant factors to be addressed described in *Body Corporate for the Rocks Resort CTS 9435 v East* [2014] QCATA 308, [6].

² (1986) 161 CLR 148; and see *Ranch Frey Pty Ltd v Body Corporate for Quarterdeck* [2016] QCAT 252, [17].

³ (1986) 161 CLR 148, [11].

⁴ *Andrews & Anor v Andrews & Anor* [2020] VSC 31, [10].

decision on the current legislation. He did not consider the terms of the repealed legislation. In his consideration of the Corporations Act he referred to Schedule 2 entitled Insolvency Practice Schedule, but Schedule 2 was only introduced as a schedule to the Corporations Act in 2016.

[26] Schedule 2 defines external administration as:

5-15 Meaning of external administration of a company

A company is taken to be under external administration if:

- (a) the company is under administration; or
- (b) a deed of company arrangement has been entered into in relation to the company; or
- (c) a liquidator has been appointed in relation to the company; or
- (d) a provisional liquidator has been appointed in relation to the company.

Note: A company is not under external administration for the purposes of this Schedule merely because a receiver, receiver and manager, or other controller has been appointed in relation to property of the company.

- [27] He noted however a “Historical Company Extract” for the applicant from the ASIC database which described the applicant as “Externally Administered.”
- [28] The Adjudicator went on to say “there is other support, to be found in the ASIC extract ... other provisions of the Corporations Act, and information on ASIC’s website, for the contention that the appointment of a controller does not constitute the appointment of an administrator.”
- [29] Despite that the Adjudicator found he was not satisfied that the appointment of the bank as controller in relation to property of the applicant did not amount to external administration for the purpose of clause 9.1(d) of the caretaking agreement. He gave weight to information appearing on the ASIC website including a Glossary of Terms which said that an “external administrator” was a “general term for an external person externally appointed to a company or its property.” A list of appointees then followed and the list included a controller.
- [30] The Adjudicator said “in light of the above” he was not satisfied that for the purpose of clause 9.1(d) the appointment of a controller could not be characterised as a form of external administration.
- [31] The Adjudicator appears to have given greater weight to the ASIC website than the legislative provisions. Arguably the Schedule 2 definition deserved as much or greater weight than the commentary on the website.
- [32] The decision lacks consideration of the terms of the Corporations Act prior to 2016 and the provisions of the repealed Corporations Law perhaps deserve further attention.
- [33] I consider the applicant does have an arguable case that the Adjudicator misconstrued the caretaking agreement and there is therefore a serious question to be decided in the appeal.

- [34] What is also unclear is the matter of the Adjudicator's jurisdiction to make the decision.
- [35] The Adjudicator decided that the applicant was not a caretaking service contractor but rather simply a service contractor. If the latter, the Adjudicator had jurisdiction to determine the dispute. If the former the Adjudicator had no jurisdiction and the application should have been brought before a specialist Adjudicator or the tribunal.
- [36] The applicant claimed it was no longer the letting agent for the scheme. That is a requirement for an entity to be a caretaking service contractor under the *Body Corporate and Community Management Act 1997* (Qld). The applicant claimed it had transferred those rights to a third party. Whilst the submissions of the parties lacked evidence or clarity, the body corporate appeared to be ignorant of such transfer and appears not to have consented to such.⁵
- [37] The Adjudicator accepted the claimed transfer of rights as letting agent meant the applicant was no longer the letting agent. The Adjudicator did not consider that the *Body Corporate and Community Management (Accommodation Module) Regulation 2008* (Qld) applies to the scheme and by s 120 of that module a person's rights as a letting agent may only be transferred if the body corporate approves the transfer.
- [38] What effect the applicant's failure to obtain the approval of the body corporate before purporting to transfer the letting rights may have on the identity of the applicant as a caretaking service contractor potentially arises as a further question for determination in the appeal.

Damages will not be an adequate remedy

- [39] Neither party addressed this issue directly.
- [40] Generally the applicant says if an interim injunction is not granted there are a number of significant consequences which will follow.
- [41] The body corporate may act to repudiate the caretaking contract.
- [42] The body corporate may engage another person or entity to perform the caretaking services which the applicant was performing.
- [43] There will be severe financial consequences for the applicant through loss of the ability to earn an income from the caretaking business.
- [44] The applicant may be liable to its employees for termination or repudiation of employment agreements.
- [45] It will lose the ability to sell the caretaking agreement at some point in the future if that course was pursued.
- [46] These matters were noted by the Adjudicator in his reasons for decision in giving interim injunctive relief to the applicant during the course of the adjudication.
- [47] There does not appear to have been any evidence led in support of those assertions. There was no evidence about the number of employees engaged by the applicant, their basis of employment or their duties or remuneration.

⁵ Body corporate's submissions to the Commission dated 21 October 2019.

- [48] It is unclear whether the applicant has any other form of income other than the caretaking remuneration from the body corporate.
- [49] Again there is no evidence about the value of the caretaking rights though the remaining term of the service agreement is long, some 13 years. The body corporate says the applicant made no capital investment to acquire the original caretaking agreement however, nor the current caretaking agreement.
- [50] There is insufficient material presented by the parties to allow an informed decision to be made. There are submissions made but no particulars or supporting evidence.
- [51] In the matter of *The Sands Gold Coast Pty Ltd v The Body Corporate for the Sands*,⁶ a complex dispute brought before the tribunal at first instance, it was determined the body corporate had validly terminated the caretaker's service contract. The contractor appealed. Shortly after the hearing and before the appeal was heard the body corporate acted on the finding and purported to terminate the caretaking agreement. On appeal it was found the grounds for termination were invalid. The matter was referred back to the tribunal to decide on damages for breach of the contract of the caretaking agreement. An assessment of damages, though complex, was able to be made in that matter.
- [52] I am not persuaded that damages will not similarly be an adequate and available remedy here in the absence of grant of the interim injunctive relief sought.

The balance of convenience

- [53] The applicant says there will be no prejudice done the body corporate if the applicant is allowed to continue to perform the caretaking duties required under the caretaking agreement. There is no challenge to its adequate performance of the duties under the agreement.
- [54] That does not appear to be the view of the body corporate. The body corporate submissions talk about being rid of a non-performing caretaker.
- [55] The body corporate says it has already acted in reliance on the termination of the caretaking agreement and the decision of the Adjudicator. It has entered into arrangements with new third party contractors to perform the maintenance duties. The new arrangements will result in a saving of approximately \$60,000 per annum.
- [56] As with the applicant's claims about loss if not granted the relief sought, there are no adequate particulars about the third party arrangements claimed to have been entered into by the body corporate with third parties.

Undertaking as to damages

- [57] The body corporate also complains however that the applicant has not offered the usual undertaking as to damages in support of its application for interim orders.
- [58] The matter of an undertaking was first raised in the proceedings before the Adjudicator. The applicant said there that whilst undertakings as to damages are widely required in courts and the tribunal, that was not the case before department Adjudicators.

⁶ [2019] QCAT 336.

- [59] The matter is now in fact however before the Appeal Tribunal and there is specific provision in the QCAT Act about undertakings as a condition of the grant of interim injunctive relief, as mentioned above.
- [60] The matter of an undertaking has now again been raised by the body corporate in the within application. The applicant filed reply submissions to the body corporate response which again raised the issue about an undertaking but simply failed to address the issue. The body corporate suggests an undertaking is a bare minimum requirement for the injunctive relief sought.
- [61] The giving of an undertaking has been said to be nearly always required of an applicant for an interlocutory injunction as a condition of granting such an injunction.⁷ The absence of an undertaking to pay the body corporate any damages it may suffer by reason of the grant of the interim should the applicant fail on appeal potentially means that the body corporate may not only face a loss with respect to savings it would be entitled to make with the reduced third party service charges, but any money paid the applicant for services backdated to 16 January 2020 may not be recovered. There is no information about the financial standing of the applicant and indeed its financial standing must be of concern given the appointment of a controller to property owned by the applicant.
- [62] The refusal of the applicant to give an undertaking in these circumstances weighs the balance of convenience against the grant of the interim relief sought.

Conclusion

- [63] In the circumstances, though the applicant has shown there is a serious question (or questions) to be determined in the appeal I am not persuaded damages will not be an adequate remedy should the applicant succeed in the appeal and the balance of convenience does not favour the grant of injunctive relief in favour of applicant. The failure to offer the usual undertaking as to damages lends significant weight against granting such relief.
- [64] The application for interim injunction is refused. For the reason given above the application for a stay of the decision below is refused.
- [65] In the applicant's submissions in reply to the submissions of the body corporate opposing the making of the interim orders the applicant sought further orders that the body corporate's submissions be rejected and that the body corporate be disqualified from making any submissions in response to the applicant's appeal.
- [66] This was on the basis that the body corporate failed to file and serve the submissions in respect of the application for interim orders in time. The complaint is the body corporate was out of time by approximately two hours on a Friday afternoon.
- [67] The applicant says that was to achieve a strategic advantage in preventing the applicant from obtaining legal advice and consider and gather evidence and reply.
- [68] Despite that however the applicant has filed a reply and I have considered it and all other submissions by both parties, including the body corporate's additional submissions filed 9 April 2020 in reaching my decision.

⁷ *Barber v Mbuji* [2015] QCA 269, [23]; *Mid Brisbane River Irrigators Inc v The Treasurer and Minister for Trade of the State of Qld & Ors (No 2)* [2014] QSC 197, [23].

- [69] How the body corporate should additionally be penalised by not being allowed to file a response in the appeal is not explained nor understandable. There have not been any directions given to date about filing a response to the appeal.
- [70] The further applications are without merit and also refused.