QUEENSLAND CIVIL AND ADMINISTRATIVE TRIBUNAL

CITATION:	*Ralborg No 2 Pty Ltd atf Ralston Property Trust v The Body Corporate for The Regent Apartments CTS 9573* [2020] QCATA 117
PARTIES:	**RALBORG NO 2 PTY LTD ATF RALSTON PROPERTY TRUST** (applicant\appellant) **v** **THE BODY CORPORATE FOR THE REGENT APARTMENTS CTS 9573** (respondent)
APPLICATION NO/S:	APL140-19
MATTER TYPE:	Appeals
DELIVERED ON:	19 August 2020
HEARING DATE:	7 May 2020
HEARD AT:	Brisbane
DECISION OF:	Member Traves
ORDERS:	**The appeal is dismissed.**
CATCHWORDS:	REAL PROPERTY – STRATA AND RELATED TITLES – MANAGEMENT AND CONTROL – RIGHTS AND OBLIGATIONS OF PROPRIETORS – statutory easement - where lot owner installed air-conditioner compressor on common property – where prior approval of the body corporate committee not obtained – where body corporate committee ordered removal of compressor – where body corporate committee approved installation of air-conditioner subject to conditions – whether adjudicator erred in applying s 115O of the *Land Title Act* 1994 (Qld) – whether statutory easement for utility services an absolute right – whether s 115O subject only to s 68 of the *Body Corporate and Community Management Act* 1997 (Qld) – whether by-law 23 applies - whether by-law 23 is invalid pursuant to s 180 of the *Body Corporate and Community Management Act* 1997 (Qld) – whether adjudicator erred in assessing 'reasonableness' under s 94(2) of the *Body Corporate and Community Management Act* 1997 (Qld) – whether adjudicator erred in failing to properly investigate the legality of alternative options for re-location pursuant to s 271 of the *Body*

	Corporate and Community Management Act 1997 (Qld)
	Body Corporate and Community Management Act 1997 (Qld), s 20, s 59, s 68, s 69, s 94, s 180, s 182, s 271, s 289 *Body Corporate and Community Management (Accommodation Module) Regulation* 2008, s 162, s 169 *S* 1994 (Qld), s 115O *Queensland Civil and Administrative Tribunal Act* 2009 (Qld), s 146
	Ainsworth v Albrecht (2016) 261 CLR 167 *Attenborough 4* [2008] QBCCMCmr 412 *Ballada Pty Ltd v North Point Brisbane* [2013] QCATA 184 *Bakir v Body Corporate for Chevron Renaissance* CTS 30946 [2017] QCATA 12 *Body Corporate No 413424R v Sheppard* [2008] VSCA 118 *Hablethwaite v Andrijevic* [2005] QCA 336 *ING Bank (Australia) Ltd v O'Shea* [2010] NSWCA 71 *Miles v Body Corporate for Solarus Residential Community Titles* [2016] QCATA 130 *Owners Corporation PS507084R v Marley* [2020] VSC 95
APPEARANCES & REPRESENTATION:	
Appellant:	Self-represented by M Ralston, director
Respondent:	B Strangman of counsel, instructed by ABKJ Lawyers

REASONS FOR DECISION

[1] The applicant, Ralborg No 2 Pty Ltd (Ralborg), is the owner of Lot 33 within the Regent Apartments Community Titles Scheme 9573. Mathew Ralston is the sole director and nominee of Ralborg and an occupier of the lot owned by Ralborg. The respondent is the body corporate.

[2] Mr Ralston arranged for an air-conditioner compressor to be installed on the planter box on the exterior wall of the balcony to Lot 33 despite not having body corporate approval to do so. The body corporate has asked Mr Ralston to remove the offending unit, but he refuses to do so. On 10 May 2019 orders were made by the adjudicator in the following terms:

> 1. Within 30 days of the date of this order, the respondent is to remove and keep removed the air conditioning unit servicing lot 33, from the planter box on the common property wall.
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> 2. After the respondent removes the air conditioner servicing lot 33 from the planter box on the common property wall, he is to reinstate any damage to the planter box and common property wall caused by the installation of

the air conditioner. This includes patching, rendering and painting with matching paint, to be finished in a professional workmanlike manner.

3. If the respondent wishes to install an air conditioner for the benefit of lot 33, he is to install it in accordance with the conditions referred to in the resolution of the committee dated 5 April 2018.[1]

[3] On 5 April 2018 the body corporate committee had resolved as follows:

a) Lot 33 is granted approval to install an air conditioning unit to service Lot 33;

b) This approval is subject to the following conditions:

a. the air condition unit is to be installed on the balcony of Lot 33 directly under the kitchen window;

b. the drainage of the unit is to be connected to the kitchen drainage;

c. the placement of the unit is consistent with other air condition units approved by the Committee and will not affect the amenity of the building (ie, is not capable of being seen from the street level);

d. the repair and maintenance of the air condition unit is the responsibility of the lot owner; and

e. any damage caused to common property is immediately rectified by the lot owner.

[4] The applicant sought a stay of that decision in the Tribunal which was granted on 1 November 2019 until the proceedings were determined.

[5] The applicant applied for leave to appeal or appeal on 11 June 2019 seeking orders that the adjudicator's orders be "rescinded" and alternative orders made. The orders the applicant seeks are as follows:

> That the applicant be given retrospective approval for the installation of the air conditioner compressor in its current location as per section 68 of the Act.
>
> That although other units have visible conduit to their air conditioning, as we accept our compressor is currently visible from street level, that we be granted approval for the installation of a screen similar to that depicted in the attached documents.
>
> That, in the alternative, if the Adjudicator's first order is maintained that the second and third order be struck out as we are being unjustly singled out and the conditions referred to and the location specified by the committee have not been imposed on other lot owners. As per section 180(5) A by-law must not discriminate between types of occupiers.[2]

[6] The adjudicator's orders were given under s 276 of the *Body Corporate and Community Management Act* 1997 (Qld) (BCCMA or BCCM Act). The adjudicator has power under that provision to make an order that is just and equitable in the circumstances to resolve a dispute about, relevantly, a claimed or anticipated

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1 *The Regent* [2019] QBCCMCmr 239.

2 Application for leave to appeal filed by the applicant on 11 June 2019, at 1.

contravention of the BCCMA or the community management statement.[3] Under s 276(2) an order may require a person to act, or prohibit a person from acting, in a way stated in the order.

[7] Under s 289, the applicant or respondent to an application to an adjudicator for an order under Chapter 6 is entitled to appeal to the appeal tribunal, but only on a question of law. The applicant, as the respondent to the application to the adjudicator, therefore has a right of appeal on questions of law.

[8] Section 146 of the *Queensland Civil and Administrative Tribunal Act* 2009 (Qld) (QCAT Act) applies to appeals on questions of law. Section 146 provides:

> In deciding an appeal against a decision on a question of law only, the appeal tribunal may:
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> (a) confirm or amend the decision; or
>
> (b) set aside the decision and substitute its own decision; or
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> (c) set aside the decision and return the matter to the tribunal or other entity who made the decision for reconsideration –
>
> (i) with or without the hearing of additional evidence as directed by the appeal tribunal; and
>
> (ii) with the other directions the appeal tribunal considers appropriate; or
>
> (d) make any other order it considers appropriate, whether or not in combination with an order made under paragraph (a), (b) or (c).

[9] There is no element of rehearing in an appeal under s 146 of the QCAT Act.[4] Unless the error of law decides the matter in its entirety in the applicant's favour, the proceeding must be sent back for reconsideration.[5]

Application for fresh evidence

[10] The applicant has made an application to adduce fresh evidence in this appeal.[6] The further material on which the applicant seeks to rely consists of responses to "other points" made by the adjudicator; a five page analysis of submissions made by other lot owners that the adjudicator had referred to; photographs of other air-conditioners on other lots and an email from lot owner Ms Layton to the body corporate given to the body corporate at the committee meeting on 28 June 2019. In support of the application the applicant has relied on *Hutchins v Touchstone Private Wealth Pty Ltd*[7] which is a case concerning fresh evidence in the context of an appeal under s 142 of the QCAT Act, not under s 289 of the BCCMA which confines the scope of an appeal to a question of law. The test which the applicant relies on is not applicable to an appeal under s 289 of the BCCMA.

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3 BCCMA, s 276(1)(a).
4 *Mantle v The Body Corporate for Coronation Gardens* [2019] QCATA 17 at [26].
5 *Ericson v Queensland Building and Construction Commission* [2014] QCA 297.
6 Application for leave to rely upon fresh evidence filed by the applicant on 10 January 2020.
7 [2019] QCATA 56.

[11] In *Ballada Pty Ltd v North Point Brisbane*,[8] a case also involving an appeal from a decision of an adjudicator under s 289 of the BCCMA, it was held that the appeal was governed by s 146 of the QCAT Act and that such an appeal, being on a question of law only, was confined to the evidence that was obtained by or presented to the adjudicator.

[12] Similarly, in *Miles v Body Corporate for Solarus Residential Community Titles*[9] it was held:

> [4] An appeal on a question of law is not a rehearing. Unless the determination of the question of law is capable of determining the matter as a whole in the applicant's favour, the proceeding must be sent back to the tribunal or the relevant decision maker for reconsideration.
>
> [5] An appeal from an adjudicator under the BCCMA is an appeal in the strict sense. Once an error of law affecting the adjudicator's decision is identified, the Appeal Tribunal may exercise the adjudicator's powers and substitute its own decision based on the material before the adjudicator, consistent with the adjudicator's undisturbed factual findings. There is no element of rehearing nor can fresh evidence be considered.[10]

[13] It follows, based on the nature of the appeal under s 146 of the QCAT Act and the cases I have referred to, that the application to adduce fresh evidence must be refused. Accordingly, that application is dismissed.

The background to the dispute

[14] On 26 February 2018[11] Mr Ralston emailed the body corporate advising that he intended to install an air-conditioner in Lot 33 and attached photographs indicating the intended location of the compressor. Mr Ralston advised that he would be installing the air-conditioner on 1 March 2018. The air-conditioner was installed on the morning of 2 March 2018, without the approval of the body corporate having been obtained.

[15] The body corporate committee issued the applicant with a Notice of continuing contravention of a body corporate by-law (BCCM, Form 10) on 13 July 2018. The notice stated the applicant was in breach of by-law 23 in a number of respects, including that the prior approval of the body corporate had not been obtained, as required by by-law 23, for the installation of the air conditioning unit on the common property and for penetrating the load bearing common property wall.

[16] The applicant applied for department conciliation through the Office of the Commissioner for Body Corporate and Community Management. On 30 August 2018, under a conciliation agreement entered into between the applicant and the body corporate, Mr Ralston agreed to provide the body corporate with alternative installation locations for the air conditioner, including quotes. Quotes for three alternative locations were provided to the body corporate on 19 September 2018. They involved installing a louvered screen to the top of the garden bed to hide the compressor; doing the same but also removing a brown wall adjacent to the common

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8 [2013] QCATA 184 at [9]-[11] (Thomas AM QC, Judicial Member).

9 [2016] QCATA 130.

10 See also *Bakir v Body Corporate for Chevron Renaissance CTS 30946* [2017] QCATA 12.

11 Mr Ralston submits that he informed the body corporate on 22 February 2018.

area window; and removing a section of the concrete garden bed to allow the compressor to be fitted inside the garden bed as well as installing a louvered screen.

[17] At the body corporate committee meeting of 15 October 2018 it was resolved that the body corporate committee would agree to the relocation of the compressor below the kitchen window on the balcony.

[18] On 10 November 2018 Mr Ralston wrote to the body corporate and, in relation to the air-conditioner, stated that the conciliator had informed the body corporate that their suggested location did not conform with current building standards and it was illegal to install the air conditioner in such a location. This led to the conciliator suggesting Mr Ralston provide alternative proposals for screening the compressor in its current location. Mr Ralston also stated that as the air conditioner and its installation in its current position was an improvement to common property exceeding the value of $3,000 that the issue was properly one for the next AGM.

[19] The body corporate wrote to Mr Ralston on 26 November 2018 setting out the reasons why the proposals to screen the air-conditioner had been declined. A further letter was sent the same day attaching photos showing how another air-conditioner had been installed on a lot owner's balcony with a protective fence around it.

[20] Following the department conciliation process, the body corporate made the adjudication application which resulted in the decision the subject of this appeal.

The adjudicator's decision

[21] The adjudicator made the following orders:

> 1. Within 30 days of this order, the respondent is to remove and keep removed the air conditioning unit servicing lot 33, from the planter box on the common property wall.
>
> 2. After the respondent removes the air conditioner servicing lot 33 from the planter box on the common property wall, he is to reinstate any damage to the planter box and common property wall caused by the installation of the air conditioner. This includes patching, rendering and painting with matching paint, to be finished in a professional workmanlike manner.
>
> 3. If the respondent wishes to install an air conditioner for the benefit of lot 33, he is to install it in accordance with the conditions referred to in the resolution of the committee dated 5 April 2018.

[22] In arriving at the decision, the adjudicator made the following findings of fact:

> (i) The air-conditioning unit attached to the exterior wall outside lot 33 is attached to common property;
>
> (ii) The community management statement contains by-law 23;
>
> (iii) The applicant has been granted permission to install their air-conditioning unit subject to the same conditions that have been applied to other unit owners. I can see nothing unreasonable with the manner in which the body corporate committee made this decision.

(iv) The applicant's arguments that it is not practicable to relocate the air conditioner to their balcony are unconvincing having regard to the attachments and photographs provided by the body corporate.

(v) Having considered the submissions, I am satisfied that other owners have reasonable concerns regarding the current location of the lot 33 air-conditioning compressor and the impact on the overall appearance of the scheme.

The grounds of appeal

[23] The applicant raises the following grounds of appeal:

(a) Pursuant to s 115O of the *Land Title Act* 1994 (Qld) (LTA), the owner of Lot 33 has a statutory easement over other lots and common property for the purposes of supplying utility services to the lot and establishing and maintaining utility infrastructure reasonably necessary for supplying the utility services;

(b) The statutory easement under s 115O of the LTA is subject only to s 68 of the BCCM Act, pursuant to the *Attenborough* decision;[12]

(c) Because the statutory easement is only subject to s 68, the applicant has a prima facie right to install the air-conditioning compressor on common property;

(d) By-law 23, as far as it attempts to regulate the installation of air conditioning compressors on common property is invalid, pursuant to s 180 of the BCCMA because it is inconsistent with either the BCCMA or the LTA; and

(e) Therefore, the adjudicator made an error of law in finding the air conditioning compressor, installed by the applicant on common property, ought to be removed, and that if the applicant wished to re-install the compressor, it should do so in compliance with the approval given by the committee.

(f) The adjudicator did not properly considered the unreasonableness of the body corporate's actions since the applicant acquired the lot in determining whether the conduct of the body corporate was in breach of s 94(2) of the BCCMA.[13] The adjudicator erred in finding the conduct of the body corporate was not unreasonable within the meaning of s 94(2) of the BCCMA.[14]

(g) The adjudicator did not properly consider current building legislation and that the orders made by the body corporate regarding the re-location of the compressor were in direct violation of those laws.[15] The adjudicator did not obtain necessary information regarding the legality of the proposed re-location by utilising their powers under s 271 of the BCCMA.

The response to the appeal grounds

[24] The body corporate says:

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12 *Attenborough 4* [2008] QBCCMCmr 412.
13 Further submissions in reply filed by the applicant on 24 February 2020 at [2].
14 Further submissions regarding error of law filed by the applicant on 13 December 2019.
15 Ibid.

(a) The adjudicator was aware of the relevant provisions of the LTA, having referred to ss 49C(4) (at [20]) and s 115O (at [28]) of the LTA;

(b) The *Attenborough* decision was not binding on either the adjudicator or the Appeal Tribunal and is wrong in law due to s 69 of the BCCMA;

(c) The effect of s 69 of the BCCM Act is that s 68 does create a statutory easement, but that it is subject to any rights or obligations contained in the CMS;

(d) By-law 23, which is in the CMS, is not invalid, because the creation of the rights and obligations contained in by-law 23 are those envisaged by s 69 of the BCCMA;

(e) Further, in the absence of by-law 23, s 159 of the BCCMA and s 162 of the *Body Corporate and Community Management (Accommodation Module) Regulation* 2008 (Qld) provide for ancillary rights and obligations necessary to make a statutory easement effective; and

(f) Therefore, the adjudicator was correct in finding that the statutory easement created by s 115O of the LTA did not operate in a way which allowed the applicant to install the air-conditioning compressor on common property without regard to the interests of their neighbours, via the body corporate.

(g) Section 68 of the BCCMA does not make any by-law which regulates the exercise of rights pursuant to a statutory easement under s 115O of the LTA, invalid. Indeed, s 69(3) of the BCCMA provides that the regulations contained in by-law 23 supersede any rights and obligations that would otherwise apply.

(h) The submission regarding s 271 of the BCCMA is wrong at law as provided for in *Hablethwaite v Andrijevic*.[16]

Consideration

Ground (a): the applicant has a statutory easement

[25] Section 115O of the *Land Title Act* 1994 (Qld) creates statutory easements for utility services and associated infrastructure in favour of lot owners over common property. Section 115P creates a corresponding easement in favour of common property against lots for utility services and associated infrastructure to the common property.

[26] Section 115O relevantly provides:

> 115O Easements in favour of lots for utility services and utility infrastructure
>
> (1) An easement exists in favour of a lot and against other lots and common property for supplying utility services to the lot and establishing and maintaining utility infrastructure reasonably necessary for supplying the utility services.
>
> (2) However, the exercise of rights under the easement must not interfere unreasonably with the use or enjoyment of the lot or part of common property against which the easement lies.

16 [2005] QCA 336.

[27] "Utility service" and "utility infrastructure" are defined by incorporating the respective definitions in Schedule 6 of the BCCMA.[17] Those definitions are as follows:

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

[28] Section 115O(1) of the LTA recognises the existence of an easement in favour of a lot owner against common property in respect of utility infrastructure "reasonably necessary" for supplying air-conditioning to the lot.

[29] Where a lot is separated from another lot or common property by a floor, wall or ceiling, the boundary is the centre of the floor, wall or ceiling. It was accepted that the air-conditioner compressor installed on the level 8 south facing exterior wall above the planter box, was installed on the common property.

[30] It was accepted that an air-conditioner compressor is "utility infrastructure", presumably because it is plant or equipment by which air-conditioning is supplied to Lot 33. The issue is whether an easement in respect of the relevant part of the common property exterior wall is "reasonably necessary" for supplying the air-conditioning to the lot.

[31] The applicant bore the onus of establishing that the statutory easement existed, in particular that the condition of s 115O(1) of the LTA had been met. That required the applicant to establish that the easement over the common property was

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17 LTA, Schedule 2.

"reasonably necessary" for supplying the utility services. It is the easement, rather than the function it secures, which must be "necessary".[18]

[32] There is similar legislation in other jurisdictions. In Victoria, under s 12(2) of the *Subdivision Act* 1988 (Vic), a statutory easement exists, relevantly, in favour of a lot owner over common property if the easement is 'necessary' for the supply of the service provided the easement is necessary for the reasonable use and enjoyment of the lot and is consistent with the reasonable use and enjoyment of the other lots and the common property. The construction of that provision has been considered in *Body Corporate No 413424R v Sheppard*[19] and recently in *Owners Corporation PS507084R v Marley*.[20]

[33] Under s 12(2) of the *Subdivision Act* 1988 (Vic) two conditions were required to be satisfied before the easement was implied: the easement must be necessary for the reasonable use and enjoyment of the lot or the common property; and must be consistent with the reasonable use and enjoyment of the other lots and the common property.[21]

[34] In *Sheppard* the Victoria Court of Appeal held that the word "necessary" means "essential" but is to be construed in the context of the composite phrase, in which it is qualified by the broad concept of reasonable use and enjoyment of the benefited property. There it was held that "necessary" meant the easement was essential to achieving the specified function, in the sense that no alternative means of achieving the relevant function was feasible or reasonably available. Further, that in assessing whether an alternative was reasonably available, all relevant circumstances, including physical factors, legal restrictions, safety considerations and cost were required to be considered.[22]

[35] It was held that, while the mere possibility of an alternative to the easement would not be enough to preclude satisfaction of the first condition (that the easement was necessary), if the alternative was reasonable, although involving some inconvenience or additional cost, an easement would not be necessary in the relevant sense.

[36] There are also useful authorities dealing with the meaning of 'reasonable necessity' in the context of the granting of easements under s 88K of the *Conveyancing Act* 1919 (NSW). I note that in *ING Bank (Australia) Ltd v O'Shea,*[23] Giles JA, with whom Campbell JA agreed, said:

> In my opinion, in *117 York Street Pty Ltd v Proprietors of Strata Plan No 16123* Hodgson CJ in Eq was not saying that it was sufficient that use or development with the easement was substantially preferable to use or development without the easement. That appears in particular from the parenthetic "at least". The words of s 88K(1) must be applied, rather than some substituted words. Although qualified by "reasonable", the requirement is necessity, and I respectfully agree with Young J's emphasis on (reasonable)

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18 *Body Corporate No 413424R v Sheppard* [2008] VSCA 118 at [80].
19 [2008] VSCA 118.
20 [2020] VSC 95.
21 *Body Corporate No 413424R v Sheppard* [2008] VSCA 118 at [67].
22 Ibid at [81].
23 [2010] NSWCA 71.

> necessity. In my opinion, reasonable necessity can not be reduced to substantial preference.[24]

[37] There, reasonable necessity was held to also require consideration of the impact on the servient tenement. This is clear in *ING Bank* where Giles JA, with whom Campbell JA agreed, said:

> [48] "Reasonably necessary" is a composite phrase, in which the necessity is qualified so that it must be a reasonable necessity. Necessity is quite an absolute concept. The qualification is not of the use or development, so that it must be reasonable, although no doubt reasonableness of the use or development comes into reasonable necessity for that use or development. It is of the necessity.
>
> [49] A qualification which did no more than reduce the necessity to a less absolute level is unlikely, and if that were intended some other word could have been used such as "convenient". Qualification whereby the necessity must be reasonable is apt to, and in my opinion does, permit regard to matters beyond the relatively absolute necessity for the effective use or development of the dominant tenement. It calls for an assessment of that necessity having regard to all relevant matters, according to the criterion of reasonableness. The impact of the easement on the servient tenement, and the fact that ordering an easement detracts from the property rights of the owner of the servient tenement, are matters readily to be taken into account in that assessment. It is difficult to see how reasonable necessity for an easement for the use or development of a dominant tenement, as distinct from necessity, can be arrived at without regard to the effect on the enjoyment of the servient tenement and on the property rights of the owner of the servient tenement.

[38] Similarly, Young JA held:

> [155] ...It seems to me that one cannot assess what is reasonably necessary unless one considers the whole picture including the effect of the proposal on the servient land.
>
> [156] A good illustration as to why this is so is provided by those cases where in a closely settled area, a person builds on the whole of his or her land and then seeks an access strip over neighbouring land (see eg *Hanny v Lewis* [1998] NSWSC 385; (1998) 9 BPR 16,205). Although, if considered by itself, the grant of access might be considered "reasonably necessary" for the use of the applicant's land, in my view the court would take into account the effect on the neighbour and the fact that the necessity was created by the applicant himself.

[39] The above authorities are useful in construing the phrase "reasonably necessary" in s 115O(1) of the LTA. In s 115O(1) it is the "utility infrastructure" which must be "reasonably necessary" for supplying the utility services. The requirement of "reasonable necessity" calls up, in my opinion, not only the nature of the infrastructure but its location. Utility infrastructure will be reasonably necessary in this context, in my view, if the supply of air-conditioning to the lot cannot be performed or achieved without it, and if an alternative location for the infrastructure is not feasible or reasonably available. It will also be necessary to consider the whole picture, which here would mean taking into account the effect of the location of the

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24 Ibid at [53].

utility infrastructure on the right of other lot owners to the use and enjoyment of the relevant common property.

[40] The adjudicator observed:

> The respondent says that it is not practicable to install the air conditioning unit on their balcony because the aperture that currently exists through the adjoining wall is 600mm above the floor. The air conditioning unit is 800mm high. In order to use this for drainage the respondent says it would be necessary for the unit to be located at least 600mm above the floor, which would result in it being 1400mm high. They also believe that it would be too close to the railings, creating a safety hazard.[25]

[41] The adjudicator then reasoned as follows:

> The applicant has been granted permission to install their air conditioning unit subject to conditions that the committee has previously imposed on other owners when such permission was sought. I can see nothing unreasonable with the manner in which the body corporate committee made this decision.
>
> The applicant's arguments that it is not practicable to relocate the air conditioner to their balcony are unconvincing having regard to the attachments and photographs provided by the applicant body corporate. The respondent says the existing aperture between in (sic) the adjacent wall is 600mm above floor level but fails to provide evidence that another hole cannot be drilled through the wall.
>
> Having considered the submissions, I am satisfied that other owners have reasonable concerns regarding the current location of the lot 33 air conditioning compressor and the impact on the overall appearance of the scheme. These were matters that were appropriately considered by the committee and it is not just and equitable in the circumstances to overturn the resolution of the committee refusing permission to install the air conditioning unit on common property.
>
> The final matter for consideration is the application of section 115O of the Land Title Act to the circumstances at hand. While section 115O of the Land Title Act states that an easement exists for supplying utility services to a lot, this does not preclude the operation of section 162 of the Accommodation Module which provides that a lot owner must obtain the approval of the body corporate if they wish to make (sic) undertake work on common property.[26]

[42] The adjudicator considered whether it was practicable to relocate the air-conditioner compressor. The adjudicator was not satisfied that there were no feasible alternatives to the easement being sought. In that sense, the adjudicator was of the opinion that the easement in respect of the exterior wall was not necessary. The applicant bore the onus of demonstrating that the utility infrastructure was reasonably necessary.[27] If the applicant did not consider the alternatives were feasible due to, for example, legal impediments, it was up to the applicant to satisfy the adjudicator accordingly. While the applicant raised the issue of safety and compliance with the Building Code, these claims do not appear to have been supported by appropriate evidence. Further, I note the applicant raised the issue of cost in re-locating the compressor

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25 *The Regent* [2019] QBCCMCmr 239 at [17].
26 Ibid at [28]-[31].
27 *The Owners – Strata Plan 61233 v Arcidiacono (No 2)* [2019] NSWSC 1876 at [9]-[10].

from its current location. However, this cost is a consequence of the applicant installing the compressor without first seeking body corporate approval, and its relevance is limited as a consequence. In any event, there was no evidence before the adjudicator as to the cost of the relocation.

[43] The adjudicator also took into account the "reasonable concerns" of other lot owners. I have earlier found that the impact on other lot owners is relevant to the issue of "reasonably necessary" within the meaning of s 115O(1). Under s 115O(2), the exercise of rights under the easement must not interfere unreasonably with the use or enjoyment of the part of common property against which the easement lies. Although the impact on use and enjoyment of the common property is, on one view, relevant to the exercise of rights under the easement rather than to its existence, this is a case where the distinction between the existence and the use of an easement is somewhat artificial.[28] From the time the easement is granted, it has the potential to affect the use and enjoyment of common property by other lot owners. In this case, the adjudicator was satisfied that the use and enjoyment of common property was affected by the visual impact the compressor had on the overall appearance of the scheme.

[44] In conclusion, the applicant, in order to have a statutory easement in respect of the common property for the purposes of supplying air-conditioning to its lot, was required to demonstrate that the infrastructure was "reasonably necessary" in the sense conveyed by s 115O. The applicant bears the onus in this regard.[29] It can be inferred that the adjudicator was not satisfied on the available evidence that the infrastructure was reasonably necessary. In any event, the exercise of rights in respect of the easement that exists under s 115O(1) must not interfere unreasonably with the use or enjoyment of the part of common property against which the easement lies.[30] In this context, the existence and use of the easement were inextricably intertwined, in that it was the mere fact of its existence, rather than its use, that caused the adverse impact to the use and enjoyment of common property. The adjudicator was entitled to take into account the impact of the easement on the use and enjoyment of common property by other lot owners. In my view this is relevant in considering whether the infrastructure was "reasonably necessary" under s 115O(1)[31] and to the exercise of rights under the easement.[32]

[45] In my view, there was no error of law demonstrated by ground (a). The applicant did not have an easement under s 115O of the LTA because the applicant had not established that the infrastructure was "reasonably necessary" within the meaning of s 115O(1) of the LTA.

Grounds (b) and (c)

[46] The applicant submits that the statutory easement under s 115O of the LTA is subject only to s 68 of the BCCMA and, accordingly, that the applicant has a prima facie right to install the compressor on common property.

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28 *Body Corporate No 413424R v Sheppard* [2008] VSCA 118 at [90].

29 *Lambert Property Group Pty Ltd v Body Corporate for Castlebar Cove Community Title Scheme 37148* [2015] QSC 179.

30 LTA, s 115O(2).

31 *ING Bank (Australia) Ltd v O'Shea* [2010] NSWCA 71 at [155].

32 LTA, s 115O(2).

[47] Part 7, headed Statutory Easements, of Chapter 2 of the BCCMA has effect subject to the provisions of an easement established under the LTA. The principal provisions in Part 7 are ss 68 and 69.

[48] Section 68 relevantly provides:

> 68 Exercise of rights under statutory easement
>
> (1) Rights under a statutory easement must not be exercised in a way that unreasonably prevents or interferes with the use and enjoyment of a lot or common property.
>
> Note—
>
> For other provisions about statutory easements, see the Land Title Act, part 6A, division 5.

[49] Section 69 provides:

> 69 Ancillary rights and obligations
>
> (1) Ancillary rights and obligations necessary to make easements effective apply to statutory easements.
>
> (2) The community management statement may also establish rights and obligations ancillary to statutory easements.
>
> (3) Rights and obligations established under subsection (2) supersede rights and obligations that would otherwise apply under subsection (1), to the extent that there is inconsistency between the rights and obligations under subsection (1) and the rights and obligations under subsection (2).

[50] Section 68(1) of the BCCMA mirrors the requirement of s 115O(2) and 115P(2) of the LTA, namely, that rights under a statutory easement must not be exercised in a way that unreasonably prevents or interferes with the use and enjoyment of a lot or common property.

[51] Ancillary rights and obligations necessary to make easements effective apply to statutory easements under s 69(1). However, if any ancillary rights and obligations to the easements have been established under the community management statement pursuant to s 69(2), then, to the extent there is inconsistency, the ancillary rights and obligations established under the community management statement take precedence pursuant to s 69(3).

[52] The statutory easement, presuming it exists, cannot be exercised if it unreasonably prevents or interferes with the use or enjoyment of common property.

[53] The exercise of the easement is also subject to any rights and obligations established under the community management scheme.

[54] The right is also subject to any ancillary rights and obligations which are necessary to make the easement effective, provided they do not conflict with the community management scheme.

[55] The statutory easement against common property for the supply of air-conditioning to a lot, as I have outlined above, is not an unqualified one. The rights under the

easement are not to be exercised in a way that interferes unreasonably with the use or enjoyment of common property. The visual impact of the compressor on the common property was capable of constituting unreasonable interference with the use and enjoyment of common property.

[56] The adjudicator in my view, was, in effect, satisfied that if an easement existed the easement was being exercised in a way that unreasonably interfered with the use and enjoyment of common property. This was a sufficient basis upon which to order its removal. Accordingly, the adjudicator did not err in making that order on that basis.

[57] It follows that grounds (b) and (c) are dismissed.

Ground (d): By-law 23 is invalid due to s 180 of the BCCMA

[58] The applicant submits that by-law 23, insofar as it purports to regulate the installation of compressors on common property is invalid, pursuant to s 180 of the BCCMA, because it is inconsistent with the BCCMA or the LTA.

[59] Section 180 of the BCCMA provides:

> (1) If a by-law for a community titles scheme is inconsistent with this Act (including a regulation module applying to the scheme) or another Act, the by-law is invalid to the extent of the inconsistency.

[60] By-law 23, which is contained in the community management statement, provides:

> An owner or occupier of a lot must not make or permit any structural alteration, internal alteration or external addition, renovation, and any improvement to any lot or common property nor do anything to vary the external appearance of the building without the prior written consent of the body corporate committee and must observe the applicable provisions of the Act, Regulation Module and this by-law for the making of improvements.

[61] The applicant submits that by-law 23 is inconsistent with the BCCMA or the LTA and is therefore invalid pursuant to s 180 of the BCCMA. The applicant relies on *Attenborough 4*[33] in support of this argument. There it was held:

> A statutory easement [under s 115O of the LTA] creates automatic rights which are subject only to section 68 of the Act. The rights must not be exercised in a way that unreasonably prevents or interferes with the use and enjoyment of a lot or common property.
>
> > 68 Exercise of rights under statutory easement
> >
> > (1) Rights under a statutory easement must not be exercised in a way that unreasonably prevents or interferes with the use and enjoyment of a lot or common property.
> >
> > (2) If a statutory easement entitles a lot owner to enter another lot or common property to carry out work, the owner—
> >
> > (a) must give reasonable written notice—

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33 [2008] QBCCMCmr 412.

> (i) to the other lot's owner, and additionally, if the owner is not the occupier, the other lot's occupier, before entering the lot to carry out work; or
>
> (ii) to the body corporate, before entering the common property to carry out work; and
>
> (b) must comply with the security or other arrangements or requirements ordinarily applying for persons entering the lot or the common property.
>
> (3) If a statutory easement entitles the body corporate to enter a lot to carry out work, the body corporate must give reasonable written notice to the lot owner before entering the lot to carry out work.
>
> (4) Subsections (2) and (3) do not apply if the need for the work to be carried out is, or is in the nature of, an emergency.
>
> Air conditioning is a utility service and so the respondents have a prima facie right to provide this service to their lot (which the applicants specifically accept). All lots share this right. The right to a statutory easement exists regardless of any applicable by-law, as by-laws are invalid to the extent of any inconsistency with the Act [footnote refers to s 180(1) of the BCCM Act]. So, the key questions are whether the utility infrastructure is reasonably necessary to supply the service and whether the exercise of the statutory easement is interfering unreasonably with the use or enjoyment of the common property on which it is installed.[34]

[62] The *Attenborough* decision was not binding on the adjudicator and is not binding on the Appeal Tribunal. In any event, if the case is authority for the proposition that it is not necessary for a lot owner to obtain body corporate approval for the installation of utility infrastructure on common property in compliance with a by-law that requires it, then, in my view, for the reasons below, the case is wrong at law. Further, I note that as the air-conditioner in *Attenborough* had been installed for four years and body corporate approval had been obtained (although the validity of the approval was disputed) the issue was not necessary for the adjudicator to decide.

[63] In any event, in my view, by-law 23 is not inconsistent with the BCCMA or the Module. Section 69(2) of the BCCMA specifically provides that the community management statement may establish obligations ancillary to statutory easements. A requirement to obtain prior approval from the body corporate is, in my view, such an ancillary obligation. It is reasonable, given the body corporate's obligations with respect to common property, that it should be informed of any proposal to install plant and equipment on it, even where that plant and equipment relates to the supply of utility services to a lot. Whether approval is forthcoming will depend upon whether the imposition of the utility infrastructure complies with s 115O of the LTA or its mirror provision in s 68 of the BCCMA.

[64] Further, s 162 of the Module imposes another obligation ancillary to the exercise of the statutory easement. Section 162 requires the approval of the body corporate by ordinary resolution for any improvements made to the common property in favour of a lot owner. "Improvement" is defined in Schedule 6 of the BCCM Act to include a "non-structural change, including, for example, the installation of air conditioning."

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[34] Ibid at 7-8.

It follows, that the Module comprehends approval for the installation of air-conditioning be obtained if common property is involved and the improvement "is in favour of a lot owner".

[65] It follows that the adjudicator was correct in finding that the statutory easement created by s 115O of the LTA was subject to ancillary obligations as imposed by by-law 23 and which enabled the adjudicator to take into account the interests of other lot owners, via the body corporate.

[66] Accordingly, ground (d) is dismissed.

Ground (e): the adjudicator made an error of law in finding the compressor ought be removed and that if the applicant wanted to re-install it, it should do so in accordance with the conditions imposed by the committee.

[67] The applicant submits, on the basis of the grounds in (a), (b), (c) and (d), that the adjudicator made an error of law in finding that the compressor ought to be removed and that if it wished to re-install it, it should do so in compliance with the approval given by the committee.

[68] In my view, for the reasons above, the adjudicator was not in error in ordering the removal of the compressor. The applicant had not demonstrated it was "reasonably necessary" in accordance with s 115O(1) of the LTA. Further, its exercise interfered unreasonably with the use and enjoyment by other lot owners of the part of common property against which the easement lay within the meaning of s 115O(2).

[69] The adjudicator had the power under s 276 of the BCCMA to make the orders in the terms that were made.

[70] Accordingly, there has been no error of law by the making of those orders.

Ground (f): The body corporate did not act "reasonably" in accordance with s 94(2) of the BCCMA

[71] The applicant submits in relation to this ground as follows:

> Section 94(2) gives regard to the obligation of the body corporate to act reasonably, as any reasonable person would in the same circumstances. The Adjudicator failed to consider unreasonableness of the Body Corporate's blatant refusal to communicate with us, and their decision to order that the air-conditioning be installed contrary to Building Code and further making those orders himself.

[72] The applicant also submits that the adjudicator erred in failing to consider the unreasonableness of the body corporate's actions since the applicant acquired Lot 33 in assessing whether the body corporate was in breach of s 94(2).

[73] The applicant refers in support of its argument regarding s 94(2) to the decision of the Queensland Court of Appeal in *Albrecht v Ainsworth*[35] where, it is submitted, the court found in favour of the applicant that the body corporate had been acting

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35 [2015] QCA 220.

unreasonably. The applicant submits that this case "set the precedent for considering the definition of reasonableness of body corporates".[36]

[74] Section 94 of the BCCMA provides:

> 94 Body corporate's general functions
>
> (1) The body corporate for a community titles scheme must—
>
> > (a) administer the common property and body corporate assets for the benefit of the owners of the lots included in the scheme; and
> >
> > (b) enforce the community management statement (including enforcing any by-laws for the scheme in the way provided under this Act); and
> >
> > (c) carry out the other functions given to the body corporate under this Act and the community management statement.
>
> (2) The body corporate must act reasonably in anything it does under subsection (1) including making, or not making, a decision for the subsection.

[75] The proposition advanced by the applicant as to the appropriate test to be applied in construing what it means for the body corporate to "act reasonably" in the context of s 94(2) is rejected. The approach adopted by the Court of Appeal was overturned by the High Court in *Ainsworth v Albrecht*.[37] As the High Court held, the relevant test to be applied in respect of s 94(2) is not whether the body corporate's decision was reasonable in the sense that it was an outcome based on a reasonable balancing of competing considerations, but whether the opposition of lot owners to the relevant proposal under consideration was reasonable. Accordingly, the High Court held:

> Once the Court of Appeal accepted, as it did, that the grounds of opposition to the proposal considered by the adjudicator raised questions in respect of which reasonable minds may differ as to the answer, it is impossible to see how opposition to the first respondent's proposal based on those grounds could be found to be unreasonable.
>
> …
>
> It is no light thing to conclude that opposition by a lot owner to a resolution is unreasonable where adoption of the resolution will have the effect of: appropriating part of the common property to the exclusive use of the owner of another lot, for no return to the body corporate or the other lot owners; altering the features of the common property which it exhibited at the time an objecting lot owner acquired his or her lot; and potentially creating a risk of interference with the tranquillity or privacy of an objecting lot owner. In the circumstances of the case, the Tribunal was correct to hold that the adjudicator erred in law in reaching that conclusion; and the Court of Appeal erred in concluding otherwise.[38]

[76] What is required in assessing reasonableness is to identify the ground of opposition and to consider whether that is reasonable. It does not extend to considering

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36 Applicant's submissions filed 19 December 2019, [5].
37 (2016) 261 CLR 167.
38 Ibid at [53], [55].

whether, in the interests of the proponent, the ground of opposition is reasonable. As the High Court held:

> Nothing in the BCCM Act suggests that an opponent to a proposal acts unreasonably in failing to act sympathetically or altruistically towards a proponent who seeks to diminish the property rights of the opponent. The BCCM Act does not contemplate that the rights of a lot owner genuinely opposed to the reduction of his or her rights to common property attached to his or her lot may be overridden where that might be thought by an adjudicator to be a reasonable course to adopt, having regard to some standard of sympathy or altruism applicable between lot owners.
>
> Such a standard is not prescribed or suggested by the BCCM Act; rather, the Act allows opposition to a resolution to be overridden only where opposition by lot owners other than the proponent is unreasonable. The unreasonableness of the opposition to the first respondent's proposal is to be determined in a context in which lot owners voting in respect of the proposed resolution are exercising their right to vote as an aspect of their proprietary rights as owners of lots included in the Scheme. In this context, the unreasonableness with which Item 10 of Sched 5 is concerned is unreasonableness on the part of the opposing lot owners having regard to those lot owners' interests under the Scheme.[39]

[77] The applicant has not demonstrated how it is that the adjudicator erred in law in his approach to the question of "reasonableness". The adjudicator referred to the conduct of the applicant in proceeding to install the air-conditioner compressor on common property without the approval of the body corporate as required by by-law 23 and to the submissions of other lot owners opposed to its location. The adjudicator found, in clear terms, that, having considered those submissions, he was satisfied the lot owners had reasonable concerns regarding the current location of the air-conditioner compressor and the impact on the overall appearance of the scheme.

[78] The issue, as I have outlined above, is whether the opposition by lot owners to the applicant's proposed resolution was unreasonable. The adjudicator found the opposition was reasonable. Section 94(2) does not require the adjudicator to consider the history of the conduct of the body corporate towards the applicant in matters unrelated to the relevant resolution.

[79] In my view there was no error by the adjudicator either in the test applied, or in its application to these circumstances. The air-conditioner compressor is, in my view, unsightly; was placed on the common property without approval; potentially created problems for maintenance workers abseiling and was the only air-conditioner compressor on the exterior wall visible from the street and from neighbouring buildings. These issues were raised in submissions by lot owners in opposition to the proposal and the adjudicator found, having considered those submissions, that those concerns were reasonable.

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39 Ibid at [57]-[58].

Ground (g): the adjudicator did not properly consider current building legislation and that the orders made by the adjudicator were in direct violation of those laws. The adjudicator did not obtain necessary information regarding the legality of the proposed re-location by utilising their powers under s 271 of the BCCMA.

[80] Section 271 of the BCCMA provides:

> 271 Investigative powers of adjudicator
>
> (1) When investigating the application, the adjudicator may do all or any of the following—
>
> (a) require a party to the application, an affected person, the body corporate or someone else the adjudicator considers may be able to help resolve issues raised by the application—
>
> (i) to obtain, and give to the adjudicator, a report or other information; or
>
> *Example—*
>
> an engineering report
>
> (ii) to be present to be interviewed, after reasonable notice is given of the time and place of interview; or
>
> (iii) to give information in the form of a statutory declaration;
>
> (b) require a body corporate manager, service contractor or letting agent who is a party to the application or an affected person to give to the adjudicator a record held by the person and relating to a dispute about a service provided by the person;
>
> (c) invite persons the adjudicator considers may be able to help resolve issues raised by the application to make written submissions to the adjudicator within a stated time;
>
> (d) inspect, or enter and inspect—
>
> (i) a body corporate asset or record or other document of the body corporate; or
>
> (ii) common property (including common property the subject of an exclusive use by-law); or
>
> (iii) a lot included in the community titles scheme concerned.
>
> (2) If the application is an application referred to the adjudicator for department adjudication, the commissioner must give the adjudicator all reasonable administrative help the adjudicator asks for in investigating the application.
>
> (3) If a place to be entered under subsection (1) (d) is occupied, the adjudicator may enter only with the occupier's consent and, in seeking the consent, must give reasonable notice to the occupier of the time when the adjudicator wishes to enter the place.

> (4) If a place to be entered under subsection (1) (d) is unoccupied, the adjudicator may enter only with the owner's consent and, in seeking the consent, must give reasonable notice to the owner of the time when the adjudicator wishes to enter the place.
>
> (5) The body corporate or someone else who has access to the body corporate's records must, as requested by an adjudicator and without payment of a fee, do either or both of the following—
>
> > (a) allow the adjudicator access to the records within 24 hours after the request is made;
> >
> > (b) in accordance with the request, give the adjudicator copies of the records or allow the adjudicator to make the copies.
> >
> > *Penalty—*
> >
> > Maximum penalty—20 penalty units.
>
> (6) A person who fails to comply with a requirement under subsection (1) (a) or (b), or obstructs an adjudicator in the conduct of an investigation under this part, commits an offence unless the person has a reasonable excuse.
>
> *Penalty—*
>
> Maximum penalty—20 penalty units.
>
> (7) It is a reasonable excuse for a person not to comply with a requirement mentioned in subsection (6) to give information or a document, if giving the information or document might tend to incriminate the person.

[81] The applicant argues that the adjudicator failed to investigate the matters required and to use the powers under s 271. The applicant says this is evidenced by the adjudicator's statement that the applicant failed to show why another hole could not be core drilled. The applicant says that a simple enquiry would have been easily explained by the drain height of the internal plumbing. Further, the applicant says that the adjudicator failed to consider that the location contemplated by order 2 is against the Building Code.

[82] Section 271 was considered by the Queensland Court of Appeal in *Hablethwaite v Andrijevic*[40] in response to an argument that by simply asking the parties for submissions, the adjudicator had failed to conduct any investigation at all. It was held that the argument could not stand in light of s 271:

> Two things may be said about this provision. The first is that s 271(1)(c) makes clear that seeking information from the parties to the application was a valid means for the adjudicator to pursue the investigation he was required to carry out under the Act. The second is that, while the adjudicator had other powers at his disposal, the introductory words to the provision stating that an adjudicator "may do all or any of the following" mean that the adjudicator was not required to make use of any more of these powers that he considered were necessary in order to carry out an effective investigation. The applicants' submission that the adjudicator's investigation was flawed because it was

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40 [2005] QCA 336.

> limited to considering submissions obtained from the parties must therefore fail.[41]

[83] The adjudicator did not err in law by not undertaking an investigation of the legality of the alternative location on the applicant's balcony. The applicant bore the onus of establishing whether the infrastructure was "reasonably necessary" which, in this context, included whether the compressor could be located elsewhere with less or no impact on the use or enjoyment of common property by other lot owners. The applicant did not establish to the satisfaction of the adjudicator that alternative locations for the compressor were not feasible or reasonably available. The applicant could have engaged a qualified building inspector to give evidence on any legal restrictions which may have prevented the compressor being located on the balcony but did not do so. The adjudicator is not compelled by s 271 to cure that failure. Accordingly, no error is disclosed by this ground of appeal.

Conclusion

[84] The appeal of the decision of the adjudicator in *The Regent* [2019] QBCCMCmr 239 dated 10 May 2019 is dismissed.

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41 Ibid at [31].