

QUEENSLAND CIVIL AND ADMINISTRATIVE TRIBUNAL

CITATION: *Caputo v The Body Corporate for King's Row* [2021]
QCATA 135

PARTIES: **FRANK CAPUTO**
(applicant/appellant)

v

**THE BODY CORPORATE FOR KING'S ROW
CENTRE CTS 11632**
(respondent)

APPLICATION NO/S: APL137-20

MATTER TYPE: Appeals

DELIVERED ON: 1 November 2021

HEARING DATE: 11 August 2021

HEARD AT: Brisbane

DECISION OF: Member Richard Oliver

ORDERS: **1. The appeal is allowed**
2. The decision of the Adjudicator is set aside and in lieu thereof there be an order that the Committee for the Body Corporate take such steps as are necessary to relocate bike racks so as to provide unfettered access to the Applicant's allotted carpark in the scheme

CATCHWORDS: APPEAL AND NEW TRIAL – APPEAL – GENERAL PRINCIPLES – RIGHT OF APPEAL – WHERE APPEAL LIES – ERROR OF LAW – where appeal from Adjudicator's decision only on a question of law – where part of common property used as bike racks - where bike racks interfere with access to the applicant's exclusive use carpark – where bike racks had been in existence for many years prior to the applicant's acquisition of his lot – where applicant sought to have the bike racks removed – whether the Committee acted unreasonably in deciding not to remove the bike racks – whether it was open to the Adjudicator to find that the Committee acted reasonably in coming to its decision – whether the Adjudicator gave sufficient consideration to an expert traffic report provided by the applicant

Body Corporate and Community Title Act ss 100 and 289
Queensland Civil and Administrative Tribunal Act s 146

Ainsworth & Ors v Martin Albrecht & Anor [2016] HCA 40
Reserve CTS 31561 v Trojan Resource Pty Ltd [2017] QCATA 53

APPEARANCES & REPRESENTATION:

Applicant: Self-represented
Respondent: Self-represented

REASONS FOR DECISION

- [1] Mr Caputo is the owner of a Lot in the King's Rose Centre CTS 11632. This is a large apartment complex located at Surfers Paradise on the Gold Coast. In addition to ownership of the lot, he also has exclusive use to a carpark 27 located at Level A Basement. Attached to these reasons is a plan of the basement carpark to get a better understanding of the issues in this appeal.
- [2] Mr Caputo says he has difficulty accessing his carpark because of the presence of bicycles on racks attached to the wall adjacent to his carpark. He says he has to take a number of turns to get in and out of the carpark because of the racks. The problem is further compounded because opposite his carpark the wall comes in on a slight diagonal from north to northwest. If there is a vehicle in the carpark beside him, carpark 26, the manoeuvre is even more difficult. He wants the Body Corporate to remove the bike racks to make access to his carpark easier
- [3] The history of this scheme is that it first commenced in about 1980. The evidence is uncontested that there had always been bicycles racks on the opposite wall however, until 2017, the bicycles hung from a hook with a horizontal bar configuration.¹ In 2017, those hooks were removed and special brackets were then fixed to the wall to allow the bicycles to be stored on the bracket and then swung back so that the bicycle, as much as it could be, was flush with the wall to reduce the space that was taken up on the common area.
- [4] There is no dispute that the Body Corporate has the authority to allow fixtures to be attached to the common property as was done here. Similarly, it could remove the bike racks if it so chose.
- [5] To address his problem, on 14 August 2019, Mr Caputo took his complaint to the Committee of the Body Corporate requesting that there be a relocation of some of the bike racks. The Committee decided that "*The turning space in front of unit xx's car space (car space 27) has been assessed as adequate, therefore the request to relocate the bike rack is denied*".
- [6] On being advised of the Committee's decision with respect to the bike racks, Mr Caputo then took the matter up with the Office of Commissioner for Body Corporate and Community Management. Both Mr Caputo and the Body Corporate made submissions to the Commissioner and the matter was referred to an adjudication by a body corporate Adjudicator. The outcome sought in the adjudication, was that

¹ Adjudication [7].

“The bike racks opposite my car space be removed so as to not hinder my parking in my space”.²

- [7] An Adjudicator considered Mr Caputo’s contention that the car parking area had not been designed for bikes on racks and that he had minimal area to manoeuvre into his car space. He supported his position with a report from a traffic engineering firm, Rytenskild Traffic Engineering. The traffic report concluded that:

The bicycle parking located opposite space 27 is unacceptable for the following reasons: it reduces the adjacent circulation lane to an unacceptable and non-compliant width ... It results in an unsatisfactory number of reverse movements for a vehicle turning from the space; it reduces the size of vehicle that can satisfactorily access space 27.³

- [8] The Committee’s position was that it was not aware of any issues encountered by previous occupants of Mr Caputo’s lot. In addition, there had been bikes protruding from the wall on the original hooks for many years and the installation of the new racks were to assist in reducing the area taken up by bikes. It submitted that bikes were important to the residents for mobility in and around the local area and they had to be stored somewhere in the common area. The assertion that the turning circle does not comply with the Australian Standard is contested because if the bikes are pushed back to the wall, there is more than 5.8 metres to allow a vehicle to turn into the car space. If the bike racks were removed, there was no alternate place for them to be stored and therefore the owners of the various lots would be disadvantaged.

- [9] In considering all of these matters, the Adjudicator came to the view that the Committee in refusing to remove the bike racks was not acting unreasonably or, alternatively, that their decision was reasonable and therefore Mr Caputo’s referral for adjudication was dismissed.

- [10] In coming to that decision, the Adjudicator had regard to what the High Court said in *Ainsworth v Albrecht*⁴ that the Committee must act to achieve a reasonable balance of the competing interests affected by a proposal, such as this. The Adjudicator also referred to what was said in *Reserve CTS 31561 v Trojan Resource Pty Ltd*⁵ that:

The Body Corporate must act reasonably to protect the interests of lot owners ... The question of reasonable ... requires the Body Corporate to look at whether taking the action was in the interests of the lot owners.⁶

- [11] In considering the interest of lot owners, it must be borne in mind that there are no exclusive use rights granted to the lot owners in respect of the bike racks. The racks and the location of the racks are common property.

- [12] Mr Caputo then filed an application for leave to appeal and appeal in the Tribunal on 28 May 2020. His grounds of appeal are that:

² Adjudication [2].

³ Adjudication [15].

⁴ [2016] HCA 40 at [49].

⁵ [2017] QCATA 53.

⁶ Adjudication [19].

The Adjudicator did not take into account the incorrect submission made by the building manager made on behalf of the Body Corporate. Furthermore, did not take into account the traffic engineer's report. The incorrect assumption that the Body Corporate Committee could rule on common property without an agenda or an agenda item. That a Committee could deal with common property without taking into consideration the impact on proprietors.

- [13] An appeal from an adjudication can only be on a question of law. Section 289 of the *Body Corporate Community Management Act* (BCCM Act) provides that:
- (2) The aggrieved person may appeal to the appeal tribunal, but only on a question of law.
- [14] Section 296 sets out the obligations of the Commissioner when an appeal is filed and the provision of information to the tribunal. As part of the appeal record book the tribunal is also in possession of the file generated by the Commissioner for the adjudication.
- [15] Under s.146 of the *Queensland Civil & Administrative Tribunal Act* (QCAT Act) where there is an appeal on a question of law only the tribunal can confirm or amend the decision; set aside the decision and substitute its own decision; set aside the decision and return the matter for reconsideration with or without a further hearing or make any other order it considers appropriate.
- [16] Under s.100 of the BCCM Act the committee in making any decision must act reasonably. The section provides that:
- (1) A decision of the Committee is a decision of the Body Corporate
 - ...
 - (5) The Committee must act reasonably in making a decision.
- [17] Mr Caputo's submission is that the committee did not act reasonably in making its decision not to remove the bike racks and therefore the decision is an error law. If that is the case the appeal should be allowed and the committee's decision set aside and a new decision made requiring the removal of some of the bike racks to improve his access to his carpark.
- [18] The analysis undertaken by Rytenskild, Traffic Engineering and set out in its report ('the traffic report'), is informative. Actual measurements taken indicate that there is 3.6 metres between the face of the column⁷ and the wall on which the bike racks are fixed. This is the original manoeuvrable space to gain access to carpark 27. However, with the "bicycle parking" this distance is reduced to 2.6 metres from the painted line on the floor of the carpark. This in effect means that 1 metre is taken up of bicycles which are hung on the rack. Photographs of the racking⁸ show that with the bike rack folded back to the wall there is certainly less than 1 metre taken up by the bikes.
- [19] The Adjudicator considered the painted line drawn on the floor of the basement, which also appears in that photo, as being an indicative line only and did not

⁷ Which is located at the right side of the start of carpark 27 as seen in Annexure A.

⁸ Document B in the further appeal book filed 12 April 2021.

prohibit vehicles from driving in that space between the line and the wall closer to the bikes in order to affect a manoeuvre into the car park. Therefore, to suggest that the turning space is limited to 2.6 metres as set out in the report is a little misleading. On this basis the traffic report establishes that if the turning space is confined to that area between the painted line and the right pillar⁹, then there is a difficulty in turning into carpark 27.

[20] The Adjudicator discussed this at [23] of the Reasons as follows:

There is some discussion about the purpose of the painted line on the floor out from the wall containing the bike racks. In the submitted circumstances, that line can be nothing more than a safety marking. There is no evidence that the Body Corporate has decided in accordance with the Act that an owner or occupier has a special right to use common property beyond the painted line to the exclusion of another owner/s or occupier/s. Given the submitted material, the painted line cannot prevent any person lawfully on common property from passing over it as a pedestrian or the driver of a vehicle. Nor can the painted line be enforced as a '*bike rake boundary line*'. For present purposes there is no evidence the Body Corporate has sought to enforce a '*bike rake boundary line*' against the applicant.

[21] In addition, there is the evidence from the committee itself that in their practical experience, there is sufficient room to turn into carpark 27. This is obviously contrary to Mr Caputo's position on the available turning area however, it is not clear whether he is attempting to turn within the painted line and the pillar rather than just moving as far to his right as he can in making the turn into his carpark. Even so, to contend that he can drive closer to the racked bikes, maybe by up to 50cm is imposing an unnecessary burden on him to be able to safely manoeuvre his vehicle to do so without incident.

[22] The Adjudicator considered all these matters and whether the Committee acted reasonably in coming to its decision. The following is set out at [25]:

He (Mr Caputo) has however disputed the fact that the Body Corporate, via the Committee, has acted to maintain the bike racks opposite space 27 despite his complaints. However, the applicant has not submitted any material which would support a view that, acting reasonably, the Committee could not have made the decision. Rather, the consideration of the applicant's request and the latter notification of the Committee's decision are, of themselves, acts which are indicative of the Body Corporate acting reasonably dealing with the applicant's request.

[23] In deciding whether the committee acted reasonably, the Adjudicator had a choice of accepting the evidence of the committee members as to their consideration of Mr Caputo proposal and the usability of the carpark, or that of Mr Caputo and the conclusions in the traffic report, which are persuasive. The Adjudicator observed that the report is based on a driver turning between the column (on the left) and the painted line. This is evident in the sketch drawings attached to the report. The obvious criticism of the traffic report was made in that it did not fully take into account the total area available for turning in that the turning area was not necessarily confined to between the painted line and the column. It is the case that a

⁹ Attachment C to the report.

vehicle could intrude to the area between the painted line and the bike racks which is now more than 30cm – 50cm.

- [24] The other factor taken into account was that the bike rack in its former configuration did not generate any complaints or concerns of users of the car park in the years before Mr Caputo purchased his lot. However, the relevant issue here is not what went on in the past but whether the presence of the bike racks now interferes with Mr Caputo's access to his carpark. Also reliance is placed on the new configuration, with the rack swinging back to the wall is more efficient in its use of space.
- [25] When considering whether the Committee acted reasonably, regard must be had to the what the majority of the High Court said in *Ainsworth*:

The Adjudicator's task under Item 10 of Sched 5 is not to determine whether the outcome of the vote of the general meeting of the Body Corporate was a reasonable balancing of competing considerations, but whether the opposition of lot owners to the proposal was unreasonable. Given that the Adjudicator's concern with s 94(2) led her to address the wrong question, namely whether the Body Corporate's decision was reasonable, her ultimate conclusion was inevitably infected by an error of law. The same error infected the approach of the Court of Appeal. 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.

- [26] In the same case, Nettle J put it more succinctly in the context of factual matrix where Mr Albrecht's motion for exclusive use of the air space between two balconies was considered by the Body Corporate. He said:

...the first error was the Adjudicator's determination of the matter on the basis that "[o]n balance" she was "not satisfied that the Body Corporate acted reasonably in deciding not to pass [the motion]. As the Tribunal stated, that was not the correct test. The correct test was whether the Adjudicator was satisfied that Albrecht's motion was not passed because of opposition which was in the circumstances unreasonable."¹⁰

- [27] Applying the above statement to this case, the question is whether the Adjudicator was satisfied that the Committee's rejection of Mr Caputo's request for the removal of the bike racks was unreasonable. It is reasonable to contend that all lot owners should have unfettered access to their respective carparks. The traffic report demonstrates that the turn in to Mr Caputo's carpark is impeded by the existence of the bike racks. To expect a driver to use up the extra 30cm – 40cm between the painted line and the bike racks calls for accurate manoeuvring so as not to collide with a bike, particularly if it is not pushed back vertical to the wall. Such an expectation is not reasonable. Therefore when considering all the circumstances, including the traffic report being the only truly objective evidence before the Adjudicator, it is difficult to see how it could be said that the Committee's decision was reasonable, as found by the Adjudicator. Or put another way opposition to the Mr Caputo's proposal was in the circumstances reasonable.

¹⁰ [2016] HCA 40 at [97]

- [28] The Committee represents all members of the scheme and their interest must also be considered in any decision making process, bearing in mind the Committee's responsibilities under s 100(5) of the BCCM Act. However here the members of the scheme do not have any individual proprietary rights to the bike racks or a particular bike rack. The Committee must also consider the rights of an individual lot owner to be able have quiet enjoyment of their lot and any exclusive use entitlements. There is clearly a problem with access to carpark 27, not only on the evidence given by Mr Caputo but supported by the traffic report. The Committee members did not accept there was a problem, their preference was to preserve the status quo, and the Adjudicator adopted this approach. Had appropriate weight been given to the expert traffic report, the only reasonable conclusion is that there is unreasonable interference with the access to Mr Caputo's carpark space.
- [29] The decision of the Adjudicator must be set aside and there should be finding that the Committee take such steps to ensure that Mr Caputo had unfettered access to his carpark.

