QUEENSLAND CIVIL AND ADMINISTRATIVE TRIBUNAL

CITATION:	*Combrinck v Body Corporate for Leeward Kawana Island* [2022] QCATA 14
PARTIES:	**GERHARD COMBRINCK** (appellant) **v** **BODY CORPORATE FOR LEEWARD KAWANA ISLAND CTS 31882** (respondent)
APPLICATION NO:	APL221-20
MATTER TYPE:	Appeals
DELIVERED ON:	25 January 2022
HEARING DATE:	On the papers
HEARD AT:	Brisbane
DECISION OF:	Member Olding
ORDER:	**The adjudicator's decision of 4 June 2020 is confirmed.**
CATCHWORDS:	APPEAL AND NEW TRIAL – APPEAL – GENERAL PRINCIPLES – RIGHT OF APPEAL – WHEN APPEAL LIES – where s 289(2) of the Body Corporate and Community Management Act 1997 (Qld) allows a person aggrieved by an Adjudicator's order to appeal on a question of law only – where grounds of appeal did not reveal error of law REAL PROPERTY – STRATA AND RELATED TITLES – MANAGEMENT AND CONTROL – BYLAWS – EXCLUSIVE USE – where appellant claimed a member of the body corporate committee advised the appellant his unit would have use of a storage loft on common property – where exclusive use of loft not granted to owner of the unit – whether body corporate committee estopped from denying appellant's use of the loft – whether body corporate should compensate appellant for loss of perceived value of unit. *Body Corporate and Community Management Act* 1997 (Qld), s 100(4), Chapter 6 *Queensland Civil and Administrative Tribunal Act* 2009 (Qld), s 146 *Crystal Waters Permaculture Village & Ors v Boyle* [2020] QCATA 80
APPEARANCES &	This matter was heard and determined on the papers

REPRESENTATION: pursuant to s 32 of the *Queensland Civil and Administrative Tribunal Act* 2009 (Qld)

REASONS FOR DECISION

[1] This is an appeal by Mr Gerhard Combrinck, who is the owner of unit 14 in the Leeward Kawana Island complex, against a decision of an adjudicator under the dispute resolution provisions in Chapter 6 of the *Body Corporate and Community Management Act* 1997 (Qld) (‘**BCCM Act**’).[1]

The decision

[2] The decision appealed against is the adjudicator’s order of 4 June 2020 in these terms:

> Within seven days of the date of this order the owner of Lot 14, Gerhard Combrinck, must remove and keep removed all items of personal property from the common property roof space above Lot 14.

Background

[3] Mr Combrinck entered into a contract with the then owners to purchase unit 14 in October 2014.

[4] Mr Combrinck has declared that before entering into the contract to purchase unit 14 he inspected several units and was shown around the complex by the then resident manager who was also at that time a member of the body corporate committee and a longstanding owner and resident of a unit in the complex. Mr Combrinck went on to declare that he was told that a built-in ‘attic’, sometimes called a ‘loft’, although located in common property in the roof space above the unit, could be used by the new owner of unit 14.

[5] Mr Combrinck did not confirm this understanding by inspecting the records of the body corporate before he entered into or completed the contract to purchase unit 14. In fact, no resolution approving such use of this common property by the owner of unit 14 was ever passed. Mr Combrinck says the body corporate committee, through the comments made by the resident manager at the inspection before he purchased unit 14, represented to him that storage in the loft was a ‘benefit’ available to the owner of unit 14.

[6] Mr Combrinck completed the purchase of unit 14 in December 2014. After taking possession, he proceeded to store personal effects in the loft. Some other unit owners also stored personal effects in similar common property spaces without body corporate approval.

[7] In 2019, an engineer advised that a compliance certificate for structural roof repairs, which is necessary for insurance purposes, could not be issued until the personal effects were removed from these areas. The other owners proceeded to remove their personal effects from these areas, but Mr Combrinck did not.

[8] The body corporate eventually lodged an application with the Commissioner for Body Corporate and Community Management seeking orders requiring Mr Combrinck to remove his effects.

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[1] All legislative references are to the BCCM Act unless otherwise stated.

[9] After receiving submissions from Mr Combrinck and reply submissions from Mr Combrinck, the adjudicator made the order set out above.

[10] Regrettably, Mr Combrinck's email address was wrongly transcribed in the body corporate's records. This seems to have resulted in Mr Combrinck not receiving notice of some alleged breaches from the body corporate and some communications from the Commissioner's offices.

[11] However, ultimately Mr Combrinck received notice of the adjudication and was able to take up the opportunity to provide submissions to the adjudicator. This is clear from the detailed submissions he lodged.

The adjudicator's reasons

[12] The adjudicator provided detailed reasons for the decision.

[13] In paragraph [28] of the reasons, the adjudicator concluded that Mr Combrinck did not have, and never has had, exclusive use over the common property roof space above his lot, nor a lease or licence to use the area.

[14] The adjudicator's decision that Mr Combinck was in breach of the relevant Community Management Scheme by-laws is based on by-law 6, which states:

> **6. Leaving of Rubbish etc, on the Common Property**
>
> A member must not leave rubbish or other materials on the Common Property in a way or place likely to interfere with the enjoyment of Common Property by someone else.

[15] The essence of the adjudicator's reasons for so concluding is found in paragraph [33] of the reasons, where the adjudicator stated that:

> it does appear that the continued storage of goods in the loft space by the respondent [that is, Mr Combrinck, as respondent to the body corporate's application to the Commissioner] would constitute a continuing breach of By-law 6. Although it may not be 'rubbish', the unspecified property stored in the loft by the respondent would undoubtedly fall within the broader term 'other materials'. The respondent does not dispute that an engineer has advised that the roof structures are not designed to bear the storage of goods. The respondent also does not dispute that the body corporate is unable to obtain a structural integrity certificate or proper insurance while goods continue to be stored in the roof void above his lot. While in practice no other resident could use the roof void above his lot, the storage of goods above Lot 14 undoubtedly diminishes other's enjoyment of common property to the extent that an engineer says it imperils the structural integrity of the roof and the ability to insure common property.

[16] Based on this conclusion, the adjudicator decided that an order requiring Mr Combrinck to remove his property from this area of common property was warranted.

Statutory framework for appeals

Adjudication

[17] To explain the nature of appeals to this Tribunal against decisions of adjudicators under the BCCM Act, it is first necessary to outline some features of the dispute resolution provisions in Chapter 6 of the Act:

(a) A person, including a body corporate for a community titles scheme, may make an ‘application’ if the person is directly concerned with a dispute to which Chapter 6 applies and has made reasonable attempts to resolve the dispute by internal dispute resolution.[2]

(b) The application must be made in the approved form, accompanied by the prescribed fee and given to the Commissioner.[3]

(c) Where, as in this case, the application is an adjudication application, the approved form must state the outcome sought by the application.[4]

(d) The Commissioner must give written notice of the application to the respondent to the application, provide a copy of the application and invite the respondent to make written submissions to the Commissioner about the application.[5]

(e) If an application is referred to an adjudicator for adjudication, the adjudicator must investigate the application to decide ‘whether it would be appropriate to make an order on the application’.[6]

(f) In investigating the application, the adjudicator must observe natural justice and act as quickly, and with as little formality and technicality as is consistent with a fair and proper consideration of the application, and is not bound by the rules of evidence.[7]

(g) To resolve a dispute about a claimed contravention of a community management statement, an adjudicator may make an order that is just and equitable in the circumstances.[8] The order may require a person to act in a particular way.[9]

Appeals

[18] A person aggrieved by an order of an adjudicator may appeal to the Appeal Tribunal.[10]

[19] However, an appeal is only on a question of law.[11] This means an appeal is not by way of rehearing. In other words, the purpose of an appeal is to provide the opportunity for the Appeal Tribunal to correct a legal error by the decision-maker, not to re-hear the matter from scratch.

[20] Section 146 of the *Queensland Civil and Administrative Tribunal Act* 2009 (Qld) sets out the decisions the Appeal Tribunal may make in deciding an appeal against a decision on a question of law only. Such decisions include confirming or amending the decision appealed against. The Appeal Tribunal may also set aside the decision

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2 Section 238(1).
3 Section 239(1).
4 Section 239B(a).
5 Section 243.
6 Section 269(1).
7 Section 269(3).
8 Section 276(1).
9 Section 276(2).
10 Section 289(2).
11 Section 289(2).

and substitute its own decision or return the matter to the decision-maker for reconsideration.

[21] In summary, as Member Roney QC stated in *Crystal Waters Permaculture Village & Ors v Boyle*:[12]

> Pursuant to s 146, read with s 289 of the BCCM Act, in deciding an appeal against a decision on a question of law, this Appeal Tribunal is not engaged in a rehearing of the matter. Twice the Court of Appeal has decided that where this Tribunal is charged with determining a matter where the appeal is on a question of law, the Appeal Tribunal cannot treat the appeal as a rehearing, nor receive fresh evidence, nor make new findings of fact. And only if the determination of the legal error is capable of resolving the matter as a whole, can it substitute its own decision. Otherwise, the appeal must be allowed and the matter remitted.
>
> (Footnote omitted.)

Grounds of appeal

[22] In his application to appeal, Mr Combrinck stated the following grounds:

(a) 'The Adjudicator did not address matters contained in my submission relating to Section 100 of the Act.

(b) The adjudicator did not address matters contained in my submission relating to Procedural Fairness employed by the Leeward Body Corporate Committee.

(c) The Adjudicator did not address matters contained in my submission relating to the principle of Estoppel.

(d) The Adjudicator noted a lack of evidence for which I will present clear evidence.'

[23] However, in a letter to the Tribunal, Mr Combrinck stated:

> This appeal is not in relation to the *specific* Order that was given to vacate the "loft" in the ceiling above my apartment but relates to the *inferred* Order – or lack of an Order – with respect to reparations to be made in relation to it, which matter has not been addressed by the Adjudicator.[13]

[24] I take this to mean that Mr Combrinck seeks financial redress for what he says is the financial impact of not being able to use the loft for storage. This is also apparent from Mr Combrinck's comments in the area of the appeal form for details of the orders sought from the Appeal Tribunal.

[25] In that part, Mr Combrinck also sought a public apology from the body corporate committee to the body corporate for not communicating with him in the lead up to the adjudication. This non-communication appears to have arisen through the mistaken transcription of his email address. Mr Combrinck also sought a public apology in respect of minutes concerning non-payment of levies which he says arose because he did not receive the relevant invoice. Additionally, Mr Combrinck sought

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[12] [2020] QCATA 80, [57].

[13] Mr Combrinck's letter dated 14 July 2020.

an order that the records in the body corporate committee relevant minutes and resolutions be corrected.

[26] I address each of the grounds below as well as, where they appear to cover one of the grounds, Mr Combrinck's written submissions. The Body Corporate did not provide written submissions, other than to assert that the appeal did not raise a question of law.

(a) The Adjudicator did not address matters contained in my submission relating to Section 100 of the Act.

[27] It is not an error of law to not address every matter put to a decision-maker, regardless of its merit, particularly if the matter is not a relevant consideration for the decision-maker.

[28] Mr Combrinck raised s 100(4) of the BCCM Act in the context of asserting that the body corporate committee, through the resident manager, represented that the loft was approved for use by the owner of unit 14. Section 100(4) states:

> If persons, honestly and reasonably believing that they are the committee for the body corporate, make a decision while purportedly acting as the committee, the decision is taken to be a decision of the committee despite a defect in the election of 1 or more of the persons.

[29] Section 100(4) is concerned with actions taken by a body of persons who believe they are acting in the capacity of the committee for a body corporate. It has no application to comments made by an individual and provides no arguable basis upon which the resident manager could be said to constitute or act for the body corporate committee.

[30] Accordingly, there was no error of law by the adjudicator not referring to s 100(4). This ground therefore fails.

(b) The adjudicator did not address matters contained in my submission relating to Procedural Fairness employed by the Leeward Body Corporate Committee.

[31] The principles of procedural fairness require that a decision-maker give a person affected by a potential decision a reasonable opportunity to be heard and the absence of bias.

[32] The adjudicator was required to make a decision on the application lodged by the body corporate which sought an order requiring removal of Mr Combrinck's property from the common property. That decision fell to be made on the material before the adjudicator. Whether the antecedent procedures of the body corporate committee were attended by procedural fairness was irrelevant to that task. Any want of procedural fairness could be corrected by the adjudicator providing, as Chapter 6 of the BCCM Act required, an opportunity for Mr Combrinck to provide submissions. That opportunity was provided. There is no suggestion of bias on the part of the adjudicator.

[33] Accordingly, there is no error of law on the part of the adjudicator arising out of any failure to observe the principles of procedural fairness by the body corporate committee.

[34] Parts of Mr Combrinck's submissions to the Appeal Tribunal on the topic of procedural fairness refer to the body corporate committee's failure to offer public apologies to Mr Combrinck regarding various matters. This suggests that Mr

Combrinck may be using the expression ‘procedural fairness’ in a non-technical way that does not accord with its legal meaning to encapsulate or include fairness in some broader sense.

[35] The outcomes sought in the ‘Conclusion’ section of Mr Combrinck’s submissions to the adjudicator did not include an order that apologies by body corporate committee be required and nor was there any application in the approved form seeking such orders.

[36] In those circumstances there was no error of law by the adjudicator in failing to consider whether the body corporate committee did or did not appropriately apologise for any communication issues arising out of the incorrect transcription of the email address. Similar reasons apply in respect of the absence of an order for correction of the body corporate committee’s records.

[37] For these reasons, Mr Combrinck’s second ground of appeal fails to identify an error of law.

(c) The Adjudicator did not address matters contained in my submission relating to the principle of Estoppel.

[38] Although Mr Combrinck’s submissions to the adjudicator included a section headed ‘In Defence of Estoppel’, the body of the submission does not actually discuss the principles of estoppel. Rather, the submission suggests that the body corporate committee, being aware some owners were storing personal effects in common property:

> by **not** advising the current Owners of LOT 14 and Body Corporate members at the time, upon advertising for sale of the LOT, served to positively inform the market at large as to the utility (additional storage capacity in a loft) – and therefore also the underlying value of LOT 14.

[39] The submissions went on to assert that because of what Mr Combrinck called perceived approval of the loft the value of unit 14 was inflated; that he has accordingly suffered a potential financial loss; and that he should not have to bear the cost of that loss.

[40] It is clear that the adjudicator implicitly rejected this submission. The adjudicator noted that the onus was on Mr Combrinck to inform himself as to what he was purchasing and what he would be entitled to use and that in that regard he could have inspected the body corporate’s records. The adjudicator also noted that Mr Combrinck provided no evidence that a committee member told him of the lofts when he inspected unit 14 prior to entering into the contract of purchase and that, even if he did, that ‘does not mean that the committee as a whole was aware of the lofts or had approved or acquiesced to them’.

[41] It is clear that the adjudicator considered but rejected Mr Combrinck’s claim that the body corporate committee should be prevented from denying that the owner of lot 14 was entitled to use the loft area. That is implicit in the statement extracted in the preceding paragraph. It is true that the adjudicator did not address the issue in a technical way by reference to principles of estoppel derived from case law, but nor did Mr Combrinck’s submissions.

[42] I can identify no error of law in the way the adjudicator approached this issue.

(d) The Adjudicator noted a lack of evidence for which I will present clear evidence.

[43] There is no error of law in the adjudicator not considering evidence that was not put forward by Mr Combrinck at the time of the adjudication.

[44] For these reasons, the grounds of appeal upon which Mr Combrinck relied do not involve a question of law. It follows that I must confirm the adjudicator's decision and no other orders should be made by the Appeal Tribunal.[14]

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[14] Although not the subject of an order by the tribunal, it would obviously reduce the potential for further disputation if any errors in the body corporate's records in respect of alleged breaches by Mr Combrinck were corrected.