

QUEENSLAND CIVIL AND ADMINISTRATIVE TRIBUNAL

CITATION: *Body Corporate for Aurelia CTS 55091 v Highlife Homes Pty Ltd & Anor* [2023] QCAT 284

PARTIES: **BODY CORPORATE FOR AURELIA CTS 55091**
(applicant)

v

HIGHLIFE HOMES PTY LTD
(first respondent)

AB WILKINSON INVESTMENTS PTY LTD
(second respondent)

APPLICATION NO/S: BDL152-22

MATTER TYPE: Building matters

DELIVERED ON: 14 March 2023

HEARING DATE: On the papers

HEARD AT: Brisbane

DECISION OF: Senior Member Brown

ORDERS: **1. The application for miscellaneous matters filed 13 February 2023 is refused.**

2. Body Corporate for Aurelia CTS 55091 must comply with direction 1 of the directions made 13 February 2023 by 4:00pm on 27 March 2023.

3. If Body Corporate for Aurelia CTS 55091 fails to comply with order 2 the proceeding may be dismissed.

CATCHWORDS: ADMINISTRATIVE LAW – ADMINISTRATIVE TRIBUNALS – QUEENSLAND CIVIL AND ADMINISTRATIVE TRIBUNAL – where the proceeding was originally brought by individual lot owners – where the applicant was change to the body corporate – where the original applicants commenced the proceeding without authorisation from the body corporate pursuant to s 312 of the *Body Corporate and Community Management Act 1997* (Qld) – whether the proceeding is liable to be dismissed

PROCEDURE – STATE AND TERRITORY COURTS: JURISDICTION, POWERS AND GENERALLY – INHERENT AND GENERAL STATUTORY POWERS - CONTROL OF COURT PROCEDURE – where the applicant applied to have the matter listed for a directions

hearing – where the application for a further directions hearing was refused

PROCEDURE – STATE AND TERRITORY COURTS: JURISDICTION, POWERS AND GENERALLY – INHERENT AND GENERAL STATUTORY POWERS – CONTROL OF COURT PROCEDURE – where the applicant nominated a representative to speak on behalf of the body corporate – where not all members of the body corporate were permitted to speak during the directions hearing – where the conduct of a proceeding is at the discretion of the tribunal

Body Corporate and Community Management Act 1997 (Qld), s 312(1)

Queensland Civil and Administrative Act 2009 (Qld), s 28, s 29

Harrison & Anor v Meehan [2017] QCA 315

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

REASONS FOR DECISION

- [1] The applicant (Body Corporate for Aurelia CTS 55091) has applied to have the matter listed for a directions hearing. For the reasons that follow, the application is refused.
- [2] This proceeding was originally brought by Mr Gary Lovett and Ms Jeannene Lovett who are the owners of a lot in Aurelia Community Title Scheme. Following a compulsory conference in September 2022 the name of the applicant was amended to Body Corporate for Aurelia CTS 55091. The reason for this order is apparent from the particulars of the claim, the subject of the proceeding. The applicant says that the driveway located on the scheme land has not been constructed in an appropriate and skilful way and with reasonable care and skill. Various complaints about the driveway are made. The driveway forms part of the scheme's common property. The first respondent undertook the construction of the building on the scheme land including the driveway. The second respondent was the property developer who contracted with the first respondent to undertake the building work. The second respondent sold the various lots in the scheme to the lot owners including Mr and Mrs Lovett.
- [3] Before dealing with the application for miscellaneous matters it is necessary to address the application of s 312 of the *Body Corporate and Community Management Act 1997* (Qld) (BCCM Act).
- [4] Section 312(1) of the BCCM Act provides that the body corporate for a community titles scheme may start a proceeding only if the proceeding is authorised by special resolution by the body corporate unless the scheme is a specified two-lot scheme in which event a lot owner agreement for the scheme may authorise the commencement of a proceeding.
- [5] On 13 February 2023 the Tribunal directed the applicant to file evidence of compliance by the applicant with s 312(1) of the BCCM Act by 27 February 2023.

The applicant says that it has complied with s 312(1) and points to a resolution of the body corporate, the date of which is not entirely clear but which I accept is before 27 October 2022, in the following terms:

That the Body Corporate for Aurelia Residences CTS 55091 resolve to appoint Garry Lovett and Jeannene Lovett to act on behalf of the Body Corporate in respect to QCAT Case no. BDL152-22.

- [6] It is clear that, by the resolution, the applicant authorised Mr and Mrs Lovett to represent the applicant in the proceeding. It is also clear that the resolution is not one satisfying s 312(1) of the BCCM Act. The section is clear in its terms. The body corporate must by special resolution *authorise the start of a proceeding*. The resolution relied upon by the applicant makes no reference to the commencement of the proceeding. A proceeding commenced in the absence of compliance with s 312(1) is liable to be dismissed on the basis that the body corporate has not authorised the bringing of the proceeding. The defect may yet be cured and I will make a direction permitting the applicant additional time to file evidence of the required special resolution. If the applicant does not comply, then the proceeding will be dismissed.
- [7] The applicant raises a number of issues in relation to the directions hearing on 13 February 2023 including that Ms Lovett was not given the opportunity to speak and the principal of the second respondent was not telephoned by the Tribunal and therefore permitted to attend the directions hearing. It should be noted that the first respondent appeared at the directions hearing.
- [8] The conduct of a proceeding is at the discretion of the Tribunal. Several directions hearings are listed by the Tribunal each hour. The directions hearings must therefore be conducted expeditiously. One of the ways in which this is achieved is limiting the number of persons speaking on behalf of a party. Mr Lovett spoke on behalf of the applicant. There is no suggestion that he was not authorised to do so. The interests of the applicant were adequately represented at the directions hearing. In any event the applicant does not assert any particular consequences flowing from Mr Lovett alone representing the applicant. As to the issue of the absence of Mr Wilkinson, the principal of the second respondent, it is noted that that the matter was listed for a directions hearing at 9:30am on 13 February 2023. There is an email from Mr Wilkinson to the Tribunal registry on 13 February 2023 in which he states he waited an hour and a half for the directions hearing and received no telephone call from the Tribunal. Mr Wilkinson states that he had a missed call from the Tribunal at 11:10am. There are a number of things to say about Mr Wilkinson's communication. Firstly, the email from Mr Wilkinson was received by the Tribunal registry at 10:31am on 13 February – that is, prior to when Mr Wilkinson said he had a missed call from the Tribunal. Secondly, the directions hearing proceeded before 10:30am on 13 February. Thirdly, it is noted that Mr Wilkinson resides in New South Wales where daylight savings time is in effect. I infer from the foregoing that, rather than not being contacted by the Tribunal, Mr Wilkinson mistakenly proceeded by reference to daylight saving time rather than Queensland time and that his failure to attend was the result of his own oversight.
- [9] That leaves the final matter raised by the applicant and the issues relevant to the applicant's particular cause of action against the respondents. It is not controversial that the contract for the building works was entered into between the first respondent and second respondent. The body corporate came into existence some time later. Accordingly, the claim by the body corporate against the respondents is one in

negligence for breach of duty and the High Court of Australia has had something to say about such claims in *Brookfield Multiplex Ltd v Owners Corporation Strata Plan 61288 & Anor.*¹ I also raised at the directions hearing the issue of whether consideration had been given as to whether the claim against the second respondent, the property developer who sold the lots to the individual lot owners, is a 'building dispute' within the meaning of that term in the *Queensland Building and Construction Commission Act 1991* (Qld).

- [10] In referring to these issues at the directions hearing I was doing nothing more than ensuring that the parties understood the nature of the assertions made in the proceeding and the legal implications of the assertions as required by s 29 of the *Queensland Civil and Administrative Act 2009* (Qld). How the applicant elects to conduct its case is a matter for the applicant. It is not the role of the Tribunal to assist a party to conduct their case or to give a party legal advice. This has been made clear by the Court of Appeal in *Harrison & Anor v Meehan.*²
- [11] For the foregoing reasons, the matter will not be listed for a further directions hearing. The parties are at liberty to seek independent legal advice if they wish to clarify their position or to assist the parties in determining how best to proceed with the matter. Indeed, the parties are at liberty to apply to the Tribunal for permission to be legally represented in the proceeding.
- [12] The matter will proceed to a tribunal hearing in accordance with the directions made on 13 February 2023.

¹ [2014] HCA 36.

² [2017] QCA 315.