

QUEENSLAND CIVIL AND ADMINISTRATIVE TRIBUNAL

CITATION: *Body Corporate for Southport Central Residential v Teo Tran* [2023] QCATA 75

PARTIES: **BODY CORPORATE FOR SOUTHPORT
CENTRAL RESIDENTIAL
CTS 35751
(appellant)**

V

**TEO TRAN
(respondent)**

BCCM REF: Application 0735-2021 and Application 1221-2021

APPLICATION NO/S: APL347-22
APL348-22

MATTER TYPE: Appeals

HEARING DATE: 19 June 2023

DELIVERED ON: 20 June 2023

DECISION OF: Member Roney KC

ORDERS: **1. I grant the application for orders staying the decisions below of the Adjudicator in Application 0735-2021 and Application 1221-2021 and order that the orders made be stayed until further order of this Tribunal.**

2. I allow the time for the commencement of the Appeals to be extended to 19 November 2022

3. The costs of the Applications are reserved

CATCHWORDS: APPEAL AND NEW TRIAL – APPEAL – GENERAL PRINCIPLES – RIGHT OF APPEAL – WHEN APPEAL LIES – ERROR OF LAW – 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 to the Queensland Civil and Administrative Tribunal

ADMINISTRATIVE LAW – ADMINISTRATIVE TRIBUNALS – QUEENSLAND CIVIL AND ADMINISTRATIVE TRIBUNAL – procedure – appeal – stay pending appeal – whether power to grant –

test for granting – whether stay appropriate- application to extend time to appeal by a period of weeks – whether to grant – test for granting

BODY CORPORATE INVESTMENT – where the body corporate invested in a company that purchased lots in the scheme – where the company was created as an investment vehicle for the body corporate – whether the body corporate had the power to invest in the company – whether the body corporate acquired an interest in a lot - whether the body corporate is carrying on a business – whether the committee resolutions were valid – whether the body corporate acted reasonably – whether the chairperson as sole director of the company had a conflict of interest.

BODY CORPORATE INVESTMENT – where the body corporate invested in a company that purchased lots in the scheme – whether general meeting resolutions to ratify committee resolutions to purchase shares in the company were valid.

Body Corporate and Community Management Act 1997 (Qld), s 289

Accommodation Module, [ss 58, 157](#)

Queensland Civil and Administrative Tribunal Act 2009 (Qld), s 145(2)

Day v Humphrey & Ors [2017] QCA 104

Cherwell Creek Coal Pty Ltd v BHP Queensland Coal Investments Pty Ltd [2019] QCA 276

Valk v Commissioner of Police [2017] QCA 126

Mooney v Rowan Air Pty Ltd [2022] QCATA 185

Alexander v Cambridge Credit Corp Ltd (1985) 2 NSWLR 685;

Raschilla v Westpac Banking Corporation [2010] QCA 255

Cook's Construction Pty Ltd v Stork Food Systems Australasia Pty Ltd [2008] 2 Qd R 453; [2008] QCA 322

Southport Central Residential [2022] QBCCMCmr 346

Southport Central Residential [2022] QBCCMCmr 347

APPEARANCES:

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

REASONS FOR DECISION

- [1] There are 2 applications before the Tribunal in 2 separate but related appeals, and each of which is dealt with in these reasons. The applications are for orders staying the decisions below of the Adjudicator in Application 0735-2021 and Application 1221-2021¹ pending further order of this Tribunal and for an order allowing the time for the commencement of the Appeals to be extended to 19 November 2022.
- [2] The applications are the same for both APL347-22 and APL348-22 although submissions have only been filed in APL347-22.
- [3] The appellant is the Body Corporate for Southport Central Residential CTS 35751 (the Body Corporate). The Body Corporate is governed by the provisions of *Body Corporate and Community Management Act 1997* (BCCMA). The Scheme affected contains 789 lots in a building format plan to be found in 3 separate high-rise towers situated at 5 Lawson Street Southport.
- [4] In 2020, the Body Corporate had in its sinking fund an amount in excess of \$5m with most of that fund in bank term deposits said to be giving a poor rate of return. A decision was made to try to improve that return. An AGM was held on 30 October 2020. Motion 12 at the AGM provided that the Committee be authorised to invest body corporate funds pursuant to section 96(2)(b) of the BCCMA, provided that the funds are invested in accordance with advice received by a licenced financial adviser and otherwise in accordance with the Trusts Act, with the Committee authorised to invest up to \$600,000 in any one transaction.
- [5] That motion was passed at the AGM on 30 October 2020 with 104 votes for, 10 against, and 5 abstentions. The Committee then sought and obtained legal advice about the structuring of a company to be a vehicle for that investment. After considering that advice, the Committee instructed the Body Corporate's solicitor to establish a company (the Company) for that purpose.
- [6] According to the Appellant the structure created around the Company was that despite the Company being a separate entity to the Body Corporate, the investments are each protected by the company structure and constitution and the only beneficiaries from the proceeds of the Company were ultimately to be the Shareholders. Various other steps were then taken to give effect to the decision to use the Company as an investment vehicle for the benefit of the Body Corporate, the details of which are not significant for the purposes of the present applications.
- [7] On 21 June 2021, an application was made to the Commissioner by Allan and Anita Clair seeking orders:
 - (a) prohibiting the Body Corporate from inter alia investing funds in the Company;
 - (b) prohibiting the Body Corporate from authorising any purchase of lots in its scheme through the company or any other investment vehicle except where owners have passed a resolution without dissent to purchase a unit which is to become common property;

¹ Southport Central Residential [2022] QBCCMCmr 346 ; Southport Central Residential [2022] QBCCMCmr 347

- (c) the body corporate at the next meeting note that Mr Buckley failed to disclose a conflict of interest and correct the voting for the 22 May VOC to reflect that Mr Buckley was not entitled to vote. (Application 0735-2021)
- [8] On 2 October 2021, there was another Application was made to the Commissioner seeking orders
- (a) That motions put to the annual general meeting which sought to ratify decisions to invest in the Company, were at all times void and any resolutions pursuant to those motions are of no effect; and
- (b) That the Body Corporate be prohibited from purchasing any further lots in the Scheme via the Company or via any other entity, pursuant to motion 12 of the 30 October 2020 annual general meeting and / or motions 22 and 23 of the 22 October 2021 annual general meeting until the conclusion of the application. (Application 1221-2021)
- [9] The orders of the Adjudicator in Application 0735-2021 were to the effect that:
- (a) The Body Corporate must not purchase a lot in community titles scheme 35751, either directly or through the Company or any substantially similar investment entity, except pursuant to section 37 of the Act.
- (b) The resolutions of the committee for the Body Corporate on 22 May and 16 June 2021, authorising the investment in shares in the Company and to enter into a subscription agreement with the Company, were not valid.
- (c) The Body Corporate's purchases in April to June 2021 of K, L, M and N class shares in the company was not valid.
- (d) The Body Corporate must, within a reasonable time, divest itself of the current shareholding in the Company.
- [10] The orders of the Adjudicator in Application 1221-2021 were to the effect that:
- (a) Motions 22 and 23 as resolved at the annual general meeting of the Body Corporate on 22 October 2021 were not valid;
- (b) The Body Corporate must not purchase a lot in the [Scheme] either directly or through [the Company] or any substantially similar investment entity, except pursuant to section 37 of the Act.
- [11] The Body Corporate contends that the reasons for the Orders in Application 0735-2021 0735 were:
- (a) that the investment in the shares meant that the body corporate was "carrying on a business" in breach of section 96 of the BCCMA;
- (b) that the investment in the shares meant that the body corporate acquired an "interest" in the lots acquired by the Company;
- (c) that the investment was not in accordance with the *Trusts Act 1973*;

- (d) that the Body Corporate did not act reasonably in its decision to invest in the Company;
 - (e) that the Body Corporate should take all reasonable steps to divest itself of the shares.
- [12] The Body Corporate contends that the reasons for the Orders in Application 1221-2021 were that The Body Corporate did not legally have the power to invest in the Company because:
- (a)
 - (i) It would be operating a business;
 - (ii) It would be acquiring a lot in the scheme;
 - (b) The Body Corporate did not provide full knowledge of all the material facts and circumstances relating to the committee's actions, so were not sufficiently informed to ratify the decisions;
 - (c) The decisions to invest had insufficient evidence of analysis of the investment including obtaining financial advice on specific investment and investment vehicles.
- [13] It is submitted by the Body Corporate that the motions the subject of Application 1221-2021 were appropriate motions to ratify the decisions of the committee and Body Corporate the subject of Application 0735-2021. The reasons for Order 1221 are affected by the same errors as the reasons for Order 0735. As a consequence, it contends that:
- (a) Order 1221 should be overturned; and
 - (b) Even if the ratification is not upheld, provided that the Tribunal finds that the Body Corporate's investment is not unlawful *ab initio*, the Body Corporate would not be precluded from ratifying the decisions of the committee with further supporting material.
- [14] Some appeal grounds are not pressed. It is contended in the Second ground of appeal by the Body Corporate that the Adjudicator made findings that, because of the Body Corporate's relationship with the Company, the Body Corporate was operating a business, in breach of section 96(2)(b) of the BCCMA. It submits that this finding was wrong at law.
- [15] It is contended in the Third ground of appeal by the Body Corporate that the Adjudicator found that the investment created an interest in a lot in the scheme, in breach of section 44 of the BCCMA. It submits that this finding is also wrong at law and that the Body Corporate has no "interest" in the lots.
- [16] The Fourth ground of appeal is that there was a failure to provide reasons for the decision that acting on the expertise of the committee was unreasonable. It is contended that the Adjudicator made three findings that are not supported by reasons, or that do not address the submissions of the body corporate in a material respect.

- [17] Subsequently to the Application being brought that resulted in Order 0735, the Body Corporate resolved to ratify the decision, a decision that was held in Order 1221 to be void. It submits that this finding was also wrong at law.
- [18] The final ground of appeal is that some of the orders of the Adjudicator exceed the jurisdiction of the Adjudicator. The particular order that it is contended exceeded the jurisdiction of the Adjudicator is the order that the Body Corporate was required, within a reasonable time, to divest itself of its current shareholding in the Company, CTS 35751 Investments Pty Ltd and recover the funds invested in that company. The Appellant argues that the Order of the Adjudicator requiring the body corporate to divest itself of the investment requires that the body corporate take an action that it cannot unilaterally undertake. It argues that the holding and disposal of the shares is controlled by the subscription agreements. It argues that there is no power to re-sell shares or require the Company to refund the same. It argues that the most that could have been ordered was that the Body Corporate request that the company sell the lots, in order to have its shares 'cashed out' and that the decision whether or not to do so – in the best interests of the shareholders, lies with the Director of the Company.

The stay application

- [19] The Courts have on many occasions been called upon to consider and apply the relevant principles to whether to grant a stay of orders pending appeal. Reference may be had to *Alexander v Cambridge Credit Corp Ltd* (1985) 2 NSWLR 685; *Raschilla v Westpac Banking Corporation* [2010] QCA 255 and *Cook's Construction Pty Ltd v Stork Food Systems Australasia Pty Ltd* [2008] 2 Qd R 453; [2008] QCA 322, per Keane JA (with whom McMurdo P and White AJA agreed) at [12].
- [20] In *Day v Humphrey & Ors* [2017] QCA 104, Morrison JA summarised the effect of these cases and held that; "An applicant for a stay must demonstrate some reason why a judgment should not be given immediate effect. The test applicable on an application to stay a judgment pending an appeal is simply expressed as being whether the case is an appropriate one for a stay". His Honour went on the say that;
- [6] The test reflects a wide discretion reposed in the Court and authority establishes that there are some traditional factors to be taken into account on the application, namely whether:
- (a) there is a good arguable case;
 - (b) the applicant will be disadvantaged if the stay is not granted; and
 - (c) there is some compelling disadvantage to the respondent if a stay is granted, which outweighs the disadvantage suffered by the applicant.
- [7] In *Cook's Construction Pty Ltd v Stork Food Systems Australasia Pty Ltd* this Court said: "[I]t will not be appropriate to grant a stay unless a sufficient basis is shown to outweigh the considerations that judgments of the Trial Division should not be treated as merely provisional, and that a successful party in litigation is entitled to the fruits of its judgment. Generally speaking, courts should not be disposed to delay the enforcement of court orders."

[8] The Court went on to state, in relation to the assessment of the prospects on appeal, and a conclusion that the prospects may be poor: “In cases where this Court is able to come to a preliminary assessment of the strength of the appellant’s case, the prospects of success on appeal may weigh significantly in the balance of relevant considerations. The prospects of success will obviously tend to favour the refusal of a stay if the prospects of the appeal can be seen to be very poor.”[5] The Court in *Cook’s Construction* also referred to the relevant considerations that are applicable on a stay application, in these terms: “The decision of this Court in *Berry v Green* suggests that it is not necessary for an applicant for a stay pending appeal to show ‘special or exceptional circumstances’ which warrant the grant of the stay. Nevertheless it will not be appropriate to grant a stay unless a sufficient basis is shown to outweigh the considerations that judgments of the Trial Division should not be treated as merely provisional, and that a successful party in litigation is entitled to the fruits of its judgment.”[6]

[9] In determining the relevant factors, the Court identified the prospects of success, the question whether the appeal would be rendered nugatory, and whether there was irremediable harm if that should occur.

[21] In *Mooney v Rowan Air Pty Ltd* [2022] QCATA 185 Judicial Member D J McGill SC held in a case which required an application for leave to appeal that:

[3] The first question is whether there is power to stay a decision of the Tribunal pending the hearing of an application for leave to appeal. The QCAT Act s 145(2) permits the Tribunal to stay the operation of a decision being appealed against until the appeal is finally decided. It is well established that such wording does not give power to stay pending an application for leave to appeal, but only when there is an appeal as of right, or leave to appeal has been granted: *Cherwell Creek Coal Pty Ltd v BHP Queensland Coal Investments Pty Ltd* [2019] QCA 276 at p 5. That decision pointed out that the Court of Appeal can overcome this by relying on an inherent power to grant a stay. Hence, the recognised factors taken into account are whether there is a good arguable case, whether the applicant would be materially disadvantaged without a stay, and whether the balance of convenience favours a stay. *Bowie v Gela* [2022] QCATA 112 at 9, citing *Day v Humphrey* [2017] QCA 104 at [6].

[22] Section 289(2) of the BCCMA allows a person aggrieved by an Adjudicator’s order to appeal on a question of law to the Queensland Civil and Administrative Tribunal. No leave is required to bring such an appeal.

[23] In the application of these principles, I find that this not a case where this Tribunal is able to come to a preliminary assessment of the strength of the appellant’s case, so as to decide that the prospects of success on appeal weigh significantly in the balance of relevant considerations. Self-evidently the contentions put forward by the Applicant raise matters of considerable importance and complexity and if sustained would demonstrate errors of law by the Adjudicator.

[24] If no stay is ordered it may well be that the appeal would be rendered nugatory, and there may be irremediable harm if that should occur.

[25] I accept that if the Orders are required to be complied with, the Body Corporate may well be required to seek that the lots owned by the Company are liquidated and

therefore that if those steps were taken, they would be irreversible – the lots will be sold, and the body corporate's investment returned (subject to any losses as a consequence of a forced sale) to the sinking fund.

- [26] I am not persuaded that there is any material prejudice to any other party if the stay is granted. No individual member of the body corporate has a right to funds in the sinking fund which have been invested.
- [27] If the appeal is successful, the Orders will be vacated so that in the absence of a stay, there is a risk that the Body Corporate could be successful in its appeal, but that success would be defeated by the orders having already had their effect.
- [28] There is a potential complication if stay is not granted in that the Body Corporate arguably has no entitlement to demand the sale of lots secured by the shares at law or under the Subscription Agreements. If this were the case, then there is a limit inherent in the orders as the Body Corporate's ability to comply with the Orders in the interim.
- [29] Submissions have been filed in response to the applications on behalf of the Respondent and R Cartledge and M Lim. In relation to the stay application the Respondent contends that the argument put forward to the effect that the Body Corporate cannot be compelled to sell the shares means that there is no point in staying the orders. Whether they can be practically enforced or not does not alter the validity of the proposition otherwise advanced that the stay is in the interests of preserving the outcome of the appeal.
- [30] In those circumstances it seems to me to be an appropriate exercise of my discretion to grant orders staying the decisions below.

Extension of time for appeal

- [31] The Body Corporate seeks an extension of time of approximately three weeks for the filing of the Appeals. The appeals were filed on 18 November 2022. The Body Corporate provided detailed reasons for delay in the Application and in the Schedule to it.
- [32] The relevant principles in relation to the grant of an extension were identified by Bond J in *Valk v Commissioner of Police* [2017] QCA 126 at [12]:

On such applications the Court considers, first, whether there is good reason for the delay and, second, whether it would be in the interests of justice to grant the extension: see *R v Tait* [1999] 2 Qd R 667 at 668 and *Puschenjak v Wade* [2002] QCA 190 at 4. It is not necessarily fatal that the first limb has not been satisfied: *R v GV* [2006] QCA 394 at [3].

- [33] The date by which the decisions should have been appealed (in order that the appeal be made in time) was 28 October 2022 (for the Adjudicator's Orders). I accept that in order to decide whether or not to appeal, the Body Corporate was required to or that it was appropriate to consider matters in general meeting. A motion was proposed for the Annual General Meeting that the shares in CTS35751 Investments Pty Ltd be sold. Had that motion been passed, there would have been no need for the appeal. Accordingly, the Body Corporate considered it more efficient and in the interests of its members not to appeal prior to considering the resolution.

- [34] An AGM was held on 31 October 2022, at which the motion to sell the shares was not passed and a new committee was elected. The new committee met for the first time on 12 November 2022 and resolved to appeal the decisions on 17 November 2022.
- [35] I accept that the extension of time is relatively short and allowed for the body corporate to follow proper decision-making processes. I accept that the invested funds are not required to meet the body corporate's financial obligations so the extension does not prejudice the body corporate's finances in the interim.
- [36] In the circumstances there is no material prejudice to the Respondent if the extension of time was granted. In my view it is accordingly in the interests of justice and the furtherance of the purposes of the BCCMA to allow the extension of time.
- [37] There are submissions filed in response to this part of the applications on behalf of the Respondent and R Cartledge and M Lim. In relation to the application to extend time the Respondent contends that the decisions under appeal were handed down after long and careful consideration of the matters raised in the applications and that the appellant was put on notice that there were limits on the time available to appeal. It is suggested that the body corporate was not required to consider matters in a general meeting nor pass a special resolution to Appeal.
- [38] Whether that is true or not the period for which an extension is sort is not significant in the overall scheme of things
- [39] It is submitted that if the committee genuinely believed an appeal was justified it did not need to wait until the AGM and the appointment of a new committee. In my view, where significant resources are likely to be committed to a legal process it is always appropriate to obtain the authority of the Body Corporate in general meeting even if, as is questionable, the committee had power to bring the appeal without a general resolution approving that course and the potential expenditure on legal costs associated with it.
- [40] R Cartledge and M Lim Cartledge submit that the grant of the extension would prejudice the respondent., They submit that the failure to appeal in time was intentional and that the fact that it was a short period of extension sought is not relevant. I do not accept these contentions. They also submit that they failure to appeal in time within time was some kind of ruse and was intentional conduct, and an extension will prejudice owners generally. I do not accept that submission.
- [41] I therefore grant the application for orders staying the decisions below of the Adjudicator in Application 0735-2021 and Application 1221-2021 and order that the orders made be stayed until further order of this Tribunal.
- [42] I allow the time for the commencement of the Appeals to be extended to 19 November 2022
- [43] The costs of the applications are reserved.