QUEENSLAND CIVIL AND ADMINISTRATIVE TRIBUNAL

CITATION:	*Tume & anor v Body Corporate for Malibu CTS 22174* [2023] QCATA 101
PARTIES:	**STUART TUME** **TALIA MARQUES** (applicants/appellants) **v** **THE BODY CORPORATE FOR MALIBU CTS 22174** (First respondent) **NICHOLAS HRONIS** (Second respondent)
APPLICATION NO/S:	APL200-21
ORIGINATING APPLICATION NO/S:	BCCM1484-2020
MATTER TYPE:	Appeals
DELIVERED ON:	31 July 2023
HEARING DATE:	24 March 2023 Closing submissions filed on 7 and 21 April 2023
HEARD AT:	Brisbane
DECISION OF:	Senior Member Traves
ORDERS:	**1. Appeal allowed.** **2. Application remitted with additional evidence to adjudicator for further consideration.**
CATCHWORDS:	APPEAL AND NEW TRIAL – BODY CORPORATE DISPUTES – whether adjudicator failed to properly investigate application – whether denial of natural justice – whether error of law in finding improvements made to Lot 8 by owners in previous five years in absence of probative evidence – whether error of law in finding lower patio exclusively occupied by Lot 8 owners – whether error in finding disposition of common property – whether error of law in finding upper deck encroached on common property airspace – whether error of law in finding body corporate had not previously approved the alleged encroachments – whether order to remove patio and upper deck oppressive and not 'just and equitable' – where appellants applied to rely on fresh evidence – whether leave to rely on the fresh

evidence should be granted

Body Corporate and Community Management Act 1997 (Qld), s 154, s 243, s 261, s 269, s 271
Body Corporate and Community Management (Standard Module) Regulation 2008, s 184, s 187
Queensland Civil and Administrative Tribunal Act 2009 (Qld), s 146

Ainsworth v Albrecht (2016) 261 CLR 167
Hablethwaite v Andrijevic [2005] QCA 336
Katsikalis v Body Corporate for "The Centre" [2009] QCA 77
Kioa v West (1985) 159 CLR 550
Thompson v Body Corporate for Aspect Caloundra CTS 35499 [2013] QCATA 121
Walden v Body Corporate for Broadwater Tower [2015] QCATA 166

APPEARANCES & REPRESENTATION:

Applicant:	Self-represented
First Respondent:	Self-represented
Second Respondent:	Self-represented

REASONS FOR DECISION

[1] The appellants, the owners of Lot 8 at a unit complex "Malibu" at Mermaid Waters on the Gold Coast, have filed an application for leave to appeal and appeal against the decision and orders of an adjudicator made on 3 June 2021 pursuant to the *Body Corporate and Community Management Act* 1997 (Qld) (BCCM Act). The decision relates to improvements to Lot 8 which encroach on common property.

[2] Malibu is an older community titles scheme in Mermaid Waters on the Gold Coast, having been established in December 1978 with the registration of group titles plan 312. Malibu comprises eight, adjoining two-storey townhouses that each back onto a canal.

[3] Over the years various Lot owners have made improvements in the form of decks, extensions to existing decks and patios which appear, in most cases, to encroach onto common property.

[4] The appellants purchased Lot 8 in December 2016. The respondent, Mr Hronis purchased Lot 7 in April 2018. In mid-2018 Mr Hronis constructed some improvements to his Lot relating to the installation of a security gate and the construction of an enclosed sundeck. These improvements were held to encroach onto common property and were ordered to be removed.

[5] On 25 June 2020 Mr Hronis made applications against all bar one of the remaining Lot owners (owners of Lots 2, 3, 4, 5, 6 and 8) seeking orders that each remove any encroachments.

[6] On 3 June 2021 the adjudicator made the following orders:

1. Within eight weeks of the date of this order, the owners of Lot 8 must remove from common property on the northern side of Lot 8:

   (i) the patio structure attached to Lot 8 on the lower level of the building; and

   (ii) the upper deck which has also been constructed on common property.

2. The works must be carried out by appropriately licensed tradespeople in a good and tradesman-like manner and in a timely manner.

3. Once the works are completed, the Respondents must reinstate the lawn on common property, which was destroyed or damaged by the presence of the improvement, within 143 days of completion of the works.[1]

[7] The appellants appeal the decision. The appellants also seek to rely on fresh evidence that was not before the adjudicator in the determination of the application.

[8] On 19 November 2021 the tribunal granted a stay of the decision until the appeal proceedings were finalised.

Relevant statutory provisions

[9] The appeal to this appeal tribunal is governed by s 289 of the BCCM Act which provides:

289 Right to appeal to appeal tribunal

(1) This section applies if—

(a) an application is made under this chapter; and

(b) an adjudicator makes an order for the application (other than a consent order); and

(c) a person (the **"aggrieved person"**) is aggrieved by the order; and

(d) the aggrieved person is—

(i) for an order that is a decision mentioned in *section 288A* , *definition* order — an applicant; or

(ii) for another order—

(A) an applicant; or

(B) a respondent to the application; or

(C) the body corporate for the community titles scheme; or

(D) a person who, on an invitation under *section 243* or *271* (1) (c) , made a submission about the application; or

(E) an affected person for an application mentioned in *section 243A* ; or

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[1] Malibu [2021] QBCCMCmr 276.

(F) a person not otherwise mentioned in this subparagraph against whom the order is made.

(2) The aggrieved person may appeal to the appeal tribunal, but only on a question of law.

[10] Section 290 of the BCCM Act provides:

290 Appeal

(1) An appeal to the appeal tribunal must be started within 6 weeks after the aggrieved person receives a copy of the order appealed against.

(2) If requested by the principal registrar, the commissioner must send to the principal registrar copies of each of the following—

(a) the application for which the adjudicator's order was made;

(b) the adjudicator's order;

(c) the adjudicator's reasons;

(d) other materials in the adjudicator's possession relevant to the order.

(3) When the appeal is finished, the principal registrar must send to the commissioner a copy of any decision or order of the appeal tribunal.

(4) The commissioner must forward to the adjudicator all material the adjudicator needs to take any further action for the application, having regard to the decision or order of the appeal tribunal.

[11] Section 146 of the *Queensland Civil and Administrative Tribunal Act* 2009 (Qld) (QCAT Act) provides:

146 Deciding appeal on question of law only

In deciding an appeal against a decision on a question of law only, the appeal tribunal may—

(a) confirm or amend the decision; or

(b) set aside the decision and substitute its own decision; or

(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).

[12] An appeal under s 146 of the QCAT Act is an appeal in the strict sense and must be determined on the material before the adjudicator. However, if an error of law is

identified, one of the options open to the appeal tribunal is to set aside the decision and return the matter to the adjudicator with the hearing of additional evidence.[2] Unless the error of law decides the matter in its entirety in the applicant's favour, the proceeding must be sent back for reconsideration.[3]

[13] In deciding an appeal, s 294 of the BCCM Act provides that, in addition to the powers of the appeal tribunal under the QCAT Act, the tribunal may also exercise all the jurisdiction and powers of an adjudicator under the BCCM Act.

The adjudicator's findings

[14] The adjudicator found as follows:

(a) The patio at the rear of lot 8 backs onto common property;

(b) The upper deck encroaches upon the common property airspace;

(c) The 'relevant areas' are enclosed by railings and balustrades, which separate those areas from common property, resulting in the common property at the rear of lot 8 being 'exclusively occupied' by lot 8;

(d) Lot 8 does not have an entitlement to exclusive use of the relevant common property areas: the body corporate has not transferred part of the common property to the owners of lot 8 nor does lot 8 have the benefit of an exclusive use by-law;

(e) The encroachments are not minor improvements for the purposes of s 187 of the Standard Module;

(f) An improvement that is enjoyed exclusively and indefinitely by a lot owner amounts to a disposition of common property for an indefinite period;

(g) The owners of lot 8 required Body Corporate authorisation, not only for the improvements but also for the consequent disposition or exclusive use of common property.

(h) The body corporate must pass a resolution without dissent to record a new CMS that includes an exclusive use by-law.

(i) The 'obstruction' by-law has been breached whereby the occupier of a lot must not obstruct the lawful use of the common property by someone else.

What do the parties say?

The appellants

[15] The grounds of appeal can be summarised as follows:

(a) The adjudicator erred in law by failing to discharge the obligation to properly investigate the application pursuant to ss 269 and 271 of the BCCM Act and/or failing to accord the appellants procedural fairness. Further, the adjudicator erred by not providing the appellants with an opportunity to adduce evidence that the patio and upper deck were made by the original owner in about 1978-

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2 QCAT Act, s 146(c)(i).

3 *Ericson v Queensland Building and Construction Commission* [2014] QCA 297.

1980, when the relevant scheme was built and in accordance with the building plans for the scheme;

(b) The adjudicator erred in law in making a finding of fact not based on the evidence before him, in particular that there was no probative evidence to support the finding that built improvements and extensions had been made to Lot 8 on the common property by previous owners of Lot 8;

(c) The adjudicator erred in law in applying an incorrect principle of law, in particular in applying *Katsikalis v Body Corporate for "The Centre"* [2009] QCA 77 and *Ainsworth v Albrecht* (2016) 261 CLR 167;

(d) The adjudicator erred in law by assuming, in the absence of probative evidence, that the improvement amounted to a disposition of common property and contravened by-law 3;

(e) The adjudicator's order, requiring removal of the patio and upper deck is oppressive and not just and equitable in the circumstances;

(f) The adjudicator erred in finding the lawn on the common property was destroyed and in ordering its reinstatement.

Mr Hronis

(a) Mr Hronis submitted that the upper deck and lower patio extend over title boundaries.

(b) There has been no sale, lease or exclusive use of common property registered to Lot 8 owners. The Group Titles Plan was lodged in 1978 and there has been no registration of a change of by-laws prior to 2000 or a Community Management Statement post 2000 that would grant exclusive use of common property or other disposal of common property to the owners of lot 8.

(c) The appellants cannot rely on the facts proved in a separate matter involving Lot 3 and issues with encroachments. The circumstances with respect to Lot 3 were different: the area of the encroachment was less and the Lot 3 owner had an ordinary resolution approval by all owners to rebuild while the appellants had no general meeting and voting approval for their encroachments. In any event, an ordinary resolution for Lot 3 was not sufficient, as the improvements were intended for the sole and indefinite use and enjoyment of the Lot 3 and the common property needed to be disposed of by a vote by all owners by resolution without dissent.

(d) The decisions in *Katsikalis* and *Ainsworth* are relevant and apply to the matter. Where an improvement has the effect of granting use of part of the common property exclusively to a lot owner for an unlimited period, s 187 of the Standard Module cannot be treated separately in its effect from s 184 of the Standard Module, and an improvement that would be enjoyed exclusively and indefinitely by an owner amounts to a disposition of common property for an indefinite period.

(e) The adjudicator made an error of fact in finding that there were railings or balustrades enclosing the upper deck and patio, when in fact there are no railings around the patio. This is not appellable.

(f) Similarly, the adjudicator's finding that the lawn was damaged by the lower patio encroachment was an error of fact only as was the finding that the lower patio occupied 35.45m² of common property rather than 15m².

(g) The appellants were not denied procedural fairness as they could have obtained other lot owner's submissions (in particular Lot 2's submissions and the detailed survey plan they provided) pursuant to s 246 of the BCCM Act. They were not denied procedural fairness in not being given a copy of the 2016 survey of their lot by Stewart McIntyre. The appellants were required to anticipate possible findings and make submissions on potential findings in line with *Rhomberg Rail Australia Pty Ltd v Concrete Evidence Pty Limited* [2019] NSWSC 755. He asked for all adjudication applications to be expedited, not just the one against Lot 8.

The body corporate

[16] The scheme has a dysfunctional history.

[17] On 1 October 2020 an Administrator was appointed to the Scheme. Ms Baker as the then secretary/chairperson of the Malibu scheme had made previous submissions on behalf of the Body Corporate. She was replaced by Jane Chandler as secretary/chairperson shortly after March 2022.

[18] A resolution 'passed outside committee meeting' of 26 September 2021 resolved by Motion 2 that the Body Corporate respond on QCAT Appeal APL200-21 and that Meredith Baker prepare and send the response/s on behalf of the committee at no cost to the Body Corporate. The motion was passed 3:0. The motions were voted on by Meredith Baker, Jane Chandler and Italo Mondin.

[19] However, on 28 September 2021 Ms Marques emailed the 3 committee members asking that the motions issued not be acted on until ratified by the Body Corporate and that they be issued to the Body Corporate in the upcoming EGM. On 4 December 2021 the EGM was held. Neither the Administrator nor Ms Baker were in attendance and Ms Marques became Chair.

[20] On 10 February 2022 the appellants' appeal submissions were sent to Mr Hronis and posted to Fatma Alkan as the only other committee member resident in Queensland (in accordance with s 315 of the BCCM Act).

[21] On 25 March 2022 Ms Baker filed submissions in the tribunal after receiving the appeal book. She made submissions because she believed as secretary for the past two years 'she was the only person with the knowledge and understanding able to refute the false claims made by the appellants'. She said that since she left, in December 2021, that the body corporate had made no steps to replace her. She submitted that there was no current Body Corporate owner capable or confident enough to represent the Body Corporate on the matter apart from Talia Marques who had a conflict of interest, and that this explained the long delays and lack of responses/participation from the Body Corporate in the last three months.

[22] On 4 April 2022 a motion was lost that sought to nominate Tony Ruellan and Jane Chandler to represent the Body Corporate and submit to QCAT on the APL200-21 matter; and that the Body Corporate make a written submission retracting all previous submissions made.

[23] Meredith Has Gone Fishing Pty Ltd was removed as a party on 22 December 2022 when it sold their Lot.

[24] Ms Marques is the current Chair of the Body Corporate and purported to appear at the appeal tribunal hearing on behalf of the Body Corporate.

[25] Mr Hronis objected to her appearing on behalf of the Body Corporate on the basis she had a conflict of interest, being an appellant in the matter. He did, however, have no objection to Mr Tume appearing on behalf of the Body Corporate.

[26] I am satisfied that Ms Marques is the duly elected Chair of the Body Corporate. That is not in dispute. Notwithstanding Mr Hronis' objection, I permitted Ms Marques to appear on the Body Corporate's behalf. Ms Marques referred to draft minutes of the AGM on 17 March 2023 where it was resolved (5:1) that submissions made on behalf of the Body Corporate on 26 August 2022 be the submissions of the Body Corporate and any previous submissions be withdrawn. In view of the history of the Body Corporate (outlined in part above) I have decided to take all submissions by the Body Corporate into account.

[27] Ms Marques made no further submissions on behalf of the Body Corporate.

Application for fresh evidence

[28] On 15 November 2021 the appellants filed an application for leave to rely on fresh evidence in the appeal. The appellants wish to adduce the following:

(a) 1978 Group Titles Plan;

(b) 1977 original architectural plans;

(c) Original architects drawings;

(d) 1999 committee meeting minutes that considered the historical "sundeck" at Lot 8;

(e) 1999 general meeting minutes which 'approved the body corporate to make improvements contiguous to lot 8';

(f) 2000 AGM minutes that ratify the committee minutes of the previous year.

[29] It is well established that an appeal in this type of matter is a strict appeal, there is no element of rehearing nor can fresh evidence be considered.[4] The fresh evidence the subject of the application cannot, therefore, now be adduced. The same applies to the new evidence referred to in Mr Hronis' closing submissions, in particular the July 2021 land survey prepared by Stewart McIntyre & Associates.

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[4] *Bakir v Body Corporate for Chevron Renaissance & Tran* [2016] QCATA 33; *Miles v Body Corporate for Solarus Residential Community Titles* [2016] QCATA 130; *Crystal Waters Permaculture Village & ors v Boyle* [2020] QCATA 80 at [57]; *Ralborg No 2 Pty Ltd ATF Ralston Property Trust v The Body Corporate for the Regent Apartments CTS 9573* [2020] QCATA 117 at [10]-[13].

[30] That said, the appeal tribunal does have the power to remit the matter to the original decision-maker with the hearing of additional evidence.[5] I deal with this matter further below.

Grounds relating to adjudicator's duty to investigate and denial of procedural fairness

[31] The alleged denial of procedural fairness relates, principally, to the following:

(a) the appellants claim they were not given submissions made by other owners in relation to their matter from the Office of the BCCM as required (they said by s 286 of the BCCM Act);

(b) they claim they were not given the opportunity to reply, in particular, to the submissions made by Meredith Has Gone Fishing Pty Ltd (owner of Lot 2) which annexed a copy of the 2016 survey plan of Lot 8 and on which the adjudicator heavily relied;[6]

(c) the appellants submit that the adjudicator did not conduct the matter like the other applications received in relation to the same issues in respect of other lots in the same scheme. In particular, the adjudicator did not ask for further submissions from the respondents;

(d) they claim they were not given a Form 1 Notice but merely a generic letter addressed to the owners of Lots 3, 4, 5, 6 and 8 on 25 June 2020 which alleged that unauthorised improvements had been made to the lots. They say the applicant did not clearly identify the improvements or when they were allegedly made. They say they did not appreciate the upper balcony was an issue until the adjudicator handed down the decision.

[32] The application was referred to the adjudicator by the Commissioner pursuant to s 267 of the BCCM Act. By s 269 of that Act, the adjudicator is required to investigate the application and to decide whether it would be appropriate to make an order on the application. Section 269(3) requires the adjudicator when investigating the application to observe natural justice.

[33] The appellants submit that they were not afforded procedural fairness in the following ways. First, they say that the original application lacked particularity and indeed lacked reference to the matters upon which the application was ultimately decided, in particular, the original application referred to improvements made approximately five years ago, whereas the relevant improvements appear likely to have been made much earlier than that.

[34] Secondly, and perhaps more pertinently in circumstances where as the matter developed, the nature of the improvements the subject of the dispute became clearer, the appellants submit that they were not shown important evidence upon which the adjudicator relied, and submissions made by Meredith Has Gone Fishing Pty Ltd (the owner of Lot 2) upon which the adjudicator relied.

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5 QCAT Act, s 146(c)(i).

6 Stewart McIntyre & Associates Survey of Lot 8 on GTP312 dated 1 April 2016.

[35] I am satisfied that, indeed, the appellants did not receive the submissions nor the copy of the 2016 Survey Plan of Lot 8.

[36] I am also satisfied that the fact they were not provided with that material constituted a failure to afford procedural fairness. Evidence which the adjudicator gathers and upon which the adjudicator relies must be brought to the attention of the parties, as must, in my opinion, submissions made by the parties or affected persons.[7]

[37] I do not accept the argument that s 246 of the BCCM Act, which requires the Commissioner on application of an interested party, to allow that person to inspect or have copies of the application, the submissions made about the application, and the applicant's reply to the submissions, obviates otherwise the obligation of the adjudicator to afford procedural fairness.

[38] The appellants argued that there was an error of law because, they contended, the adjudicator failed adequately to exercise his investigative powers under s 271 of the BCCM Act. I do not accept that submission and, in particular, do not accept the adjudicator failed to afford natural justice by not investigating the matter further.

[39] The nature of the power to investigate in s 271 was considered by Keane JA in *Hablethwaite v Andrijevic*.[8] There, in concluding that the adjudicator had satisfied his obligations by receiving submissions from the parties, Keane JA held:

> 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 limited to considering submissions obtained from the parties must therefore fail.[9]

[40] The adjudicator, in my view, was not required to investigate the matter merely because the appellants referred to "archived records" in their response. The onus lay with the appellants to make application to retrieve those records. Accordingly, I find no error in failing to investigate the matter.

Was there an error in finding there had been a disposition of common property

[41] The appellants contend that as they or any other previous owner did not undertake any improvements to the upper balcony or lower patio that the adjudicator's reliance on *Katsikalis v Body Corporate for "The Centre"* [2009] QCA 77 and the passage in *Ainsworth v Albrecht* (2016) 261 CLR 167 at [55] is misplaced. The adjudicator reasoned, in reliance on the *Katsikalis* and *Ainsworth* decisions, as follows:

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7 *Thompson v Body Corporate for Aspect Caloundra CTS 35499* [2013] QCATA 121 per Thomas AM QC; see also *Walden v Body Corporate for Broadwater Tower* [2015] QCATA 166.

8 [2005] QCA 336.

9 Ibid at [31].

[27] The significance of the concept of indefinite use, or disposition, of common property has been highlighted by the Queensland Court of Appeal in *Katsikalis v Body Corporate for "The Centre"* [2009] QCA 77. The Court of Appeal found that where an improvement has the effect of granting use of part of common property exclusively to a lot owner for an unlimited period, section 187 of the Standard Module cannot be treated separately in its effect from section 184 of the Standard Module, and an improvement that would be enjoyed exclusively and indefinitely by an owner amounts to a disposition of common property for an indefinite period.[5]

[28] Additionally, the High Court of Australia, in *Ainsworth & Ors v Albrecht & Anor* [2016] HCA 40; (2016) 261 CLR 167, made clear that an allocation of exclusive use[6] of body corporate airspace is a serious and significant issue. It said, in the context of an owner's opposition to such a proposition put to a general meeting:

> 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.[7]
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> .....
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> Just as parties to a contract cannot, generally speaking, be obliged to give up contractual rights without their consent, so lot owners cannot be required to give up their property rights without consent to another lot owner save pursuant to Item 10 of Sched 5.[8]

[29] In the circumstances, I am of the view that the owners of lot 8 required Body Corporate authorisation, not only for the improvements, but also for the consequent disposition or exclusive use of common property. Although the current owners of lot 8 state that they have not made any extensions to the rear of their lot since they acquired it in 2016, I am of the view that the upper deck and lower level balcony are encroachments onto common property and I do not accept that they are minor improvements for the purposes of section 187 of the Standard Module.

[42] The appellants submit that the legal principles relied upon above do not apply because the relevant structures were original components of the scheme and cannot, therefore, be the subject of a disposition of common property to an owner. Further, in relation to the patio, the appellants contend, in any event, that because it has no railing or balustrade that the patio has not been enclosed for their exclusive use, remains accessible to others and does not amount to a disposition of common property.

[43] The first assertion depends on whether the patio and upper balcony were in fact part of the original construction and did not, therefore, require a subsequent disposition of common property by the body corporate to the owners of Lot 8. As this was not established, indeed, the adjudicator found to the contrary, there is no foundation for arguing that the adjudicator was in error in relying on the *Katsikalis* and *Ainsworth* decisions on that basis.

[44] Alternatively, the appellants assertion that there could be no disposition because there is no balustrade or railing on the lower deck preventing access by others, is not correct. The absence of a barrier is not necessarily a reason for concluding there is no exclusive use of the area occupied by the deck, and therefore no disposition of common property. In practical terms, the deck was an extension of Lot 8 and intended to be used exclusively by the appellants.

[45] I find no error by the adjudicator.

Was there an error in making a finding of fact that built improvements and extensions had been made to Lot 8 on the common property by previous owners of Lot 8 (at [4] and [35])

[46] The appellants argue that the physical and photographic evidence shows:

(a) the cantilevered upper balcony was clearly built at construction in accordance with the 1977 architectural plans approved by the local council;

(b) the patio beside Lot 8 has no railing enclosing it and is in keeping with the original scheme's appearance;

(c) the patio encroachment was 35.45m² which amounts to the whole patio; and

(d) no previous owners made the encroachments.

[47] The appellants argue that the adjudicator's findings are inconsistent with the photographic evidence that shows the upper deck was part of the original construction because they show the exposed joists which support the cantilevered upper balcony extend from under the upper floor. Further, that there is no support beam or post to indicate the structure was added on later. The photo evidence also shows the lower patio was built with the building materials 'of the day' used throughout the scheme in 1979 and that there is no balustrade or railing separating it from common property.

[48] The appellants also seek to rely on the 1977 Plans which they say show that the adjudicator's conclusions were wrong. This overlooks the issue, however, that the adjudicator did not have the 1977 Plans.

[49] The appellants also argue that the Plans are inconsistent with the land survey plan registered on establishment of the Body Corporate and postulate that this was an error. Again, the adjudicator, in the absence of any contrary evidence was entitled to rely on the group title plan and survey plan. The photographs were, in my view, insufficient evidence upon which to make the findings, contrary to the group title plan and survey plan, that the encroachments were not encroachments but in fact part of the original build.

[50] There is no error of law in making a finding of fact unless there is no evidence to support the finding.[10] There is no error of law if a finding of fact or an inference drawn is contrary to the overwhelming weight of the evidence.[11] A challenge to a

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10 *Australian Broadcasting Tribunal v Bond* (1990) 170 CLR 321.

11 *Azzopardi v Tasman UEB Industries Ltd* (1985) 4 NSWLR 139.

finding of fact on the "no evidence" basis may be agitated on an appeal restricted to a question of law.[12]

[51] In the absence of evidence to the contrary the adjudicator was entitled to find that the encroachments must have been made after the original construction. There is no error of law in the adjudicator proceeding to make findings consistent with the available evidence. There is nothing in the adjudicator's reasons to suggest that he considered the evidence incomplete or lacking in some respect. Even had the adjudicator found a deficiency in the evidence, there is no error of law by an adjudicator who determines that the evidence is insufficient to justify a necessary conclusion and does not actively seek further evidence to support the application.[13]

[52] I find no error by the adjudicator.

The adjudicator's order, requiring removal of the patio and upper deck is oppressive and not just and equitable in the circumstances

[53] The adjudicator's powers under s 276 to make a just and equitable order to resolve a dispute does not mean the adjudicator has power to override other rights which lie behind, and form the basis of, voting rights. The legislation requires that a motion which involves a disposition of commonly owned property be passed by resolution without dissent: s 62 BCCM Act. This reflects the situation that, at law, all lot owners own the common property as tenants in common. Against that background it is not difficult to see why the legislature would give, in effect, a power of veto to any lot owner in respect of such a motion.

[54] The fact that the adjudicator found no resolution without dissent had been passed and that the encroachments had to be removed, does not mean, without more, the orders were not "just and equitable" within the meaning of s 276. The section does not give an adjudicator a discretion to set aside a decision which was taken in accordance with the mechanism established under the BCCM Act simply on the basis that he or she disagrees with it or even where the adjudicator may, subjectively, consider the outcome unfair to the appellants. It is necessary to show some proper basis in law or equity for the grant of relief under s 276(1) where the effect would be to substitute a different decision for that of the members of the Body Corporate exercising their rights to vote at a general meeting, in accordance with the scheme laid down by the BCCM Act and regulation.[14]

[55] The appellants, in my view, have not established that the orders were not "just and equitable".

[56] I find no error by the adjudicator.

Additional evidence and disposition of the appeal

[57] As noted above, the appellants sought to adduce the fresh evidence identified above on the appeal. For the reasons I have given, that evidence was not admissible on the appeal.

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12 *Kostas v HIA Insurance Services Pty Ltd* (2010) 241 CLR 390.

13 *K G Tully & Anor v The Proprietors The Nelson Body Corporate* [2000] QDC 031.

14 *Body Corporate for Palm Springs Residences CTS 29467 v J Patterson Holdings Pty Ltd* [2008] QDC 300 at [100].

[58] The appellants say that the plans approved by the Gold Coast City Council in 1977 are important because they show that the Lot 8 encroachments were an original component of the building as constructed in accordance with those Plans. They also submit, and I accept, that the same adjudicator relied on these 1977 original plans in dismissing the application against the Lot 3 owner, accepting that Lot 3 encroachments were an original component of the building constructed in 1978.[15] I find that the 1977 Plans and original architects' drawings would have had an important, though not necessarily decisive, influence on the result.

[59] The evidence is apparently credible. It appears likely the evidence could not have been obtained at time of the first instance application because the scheme (Malibu) was under administration from August 2019 and the body corporate records had been seized by the Queensland Police Service in August 2020.

[60] The originating application was filed on 8 December 2020. At that time the appellants were living in New Zealand and could only rely on the administrators at the time and the powers under the *Justice Legislation (COVID-19 Emergency Response – CTS and Other Matters) Regulation* 2021 to access body corporate records. I accept that the appellants made multiple requests of the then administrator to access body corporate records.

[61] The appellants were informed by the administrator in February 2021 that the police had the records whereupon they immediately requested copies of relevant records. Those records, including the material the subject of their application, were forwarded to the appellants by the police on 7 September 2021, some three months after the adjudicator's decision.

[62] I am unable to determine on the limited evidence available as to whether the Plans were provided to the appellants in November 2020. In any event, I find that the appellants did use reasonable diligence to locate relevant records and that these records were not accessible to them at the time they made their submissions in January 2021 or, by the time the adjudicator made the decision.

[63] Under s 146 of the QCAT Act, the appeal tribunal has power to set aside a decision of the adjudicator and to return the matte to the adjudicator for reconsideration with the hearing of additional evidence as directed by the appeal tribunal.

[64] It seems to me that the evidence is of potential relevance to the adjudicator's determination., accordingly, I direct that the adjudicator reconsider the matter with the hearing of the additional evidence identified above.

[65] Further, since that may require responsive evidence from the respondents, I direct that the additional evidence not be limited to those matters, and that the parties be permitted, subject to relevance, to adduce any further evidence they wish to rely upon.

Other matters

[66] Following the hearing of the appeal, Ms Marques filed a blank application for miscellaneous matters and accompanying submissions which, it appears to me go in

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[15] Malibu [2022] QBCCMCmr 30 at [47].

substance to the matters the subject of this appeal. In the submissions Ms Marques contends that evidence adduced by the closing submissions of the respondents was inadmissible and that submissions made by the respondents not be allowed. It is not clear to me whether the application and submissions were served on the respondents.

[67] It is generally inappropriate for a party to make further submissions following the conclusion of a matter particularly, as appears to be the case here, where those submissions are made without the consent of the other party.

[68] I have disregarded Ms Marques further submissions in making this determination.

[69] Also, subsequent to the hearing of this matter, the appellants filed a further application for leave to adduce further evidence in this appeal and attached a further decision of the adjudicator in Malibu [2023] QBCCMCmr 231.

[70] I determined above that fresh evidence could not be adduced on this appeal, insofar as that determination might be relevant to an attempt to adduce evidence consisting of an adjudicator's decision.

[71] In any event, given my reasons above, it is unnecessary for me to consider the decision and I disregard it for the purposes of this appeal.

Conclusion

[72] I dismiss the application for fresh evidence, given the nature of the appeal.

[73] For the reasons above, I find that the decision of the adjudicator involved an error of law, namely, the failure to provide to the appellants procedural fairness. I set aside the decision.

[74] I order that the matter be remitted to the adjudicator for reconsideration with the hearing of additional evidence.