QUEENSLAND CIVIL AND ADMINISTRATIVE TRIBUNAL

CITATION:	*Woodhouse v The Body Corporate for Thirty Four Riverwalk & Ors* [2020] QCATA 43
PARTIES:	**AUDREY WOODHOUSE** (Applicant\appellant) **v** **THE BODY CORPORATE FOR THIRTY FOUR RIVERWALK CTS 34520** (first respondent) **RAYMOND O'ROURKE** (second respondent) **RICHARD BRENNAN** (third respondent)
APPLICATION NO:	APL009-19
MATTER TYPE:	Appeals
DELIVERED ON:	14 April 2020
HEARING DATE:	On the papers
HEARD AT:	Brisbane
DECISION OF:	Member Oliver
ORDERS:	**Appeal dismissed**
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 the respondent 22 Lot scheme – where Body Corporate required access through the applicant's lot for maintenance of a hedge growing on common property – where applicant refused access – where Body Corporate resolved at an extraordinary general meeting to remove the hedge – referral for adjudication of the Body Corporate's decision – where Adjudicator dismissed the Applicant's referral that the motion be set aside – where appeal on error of law – whether the adjudicator erred in failing to have regard to s 94(2) of the *Body Corporate and Community Titles Act* – whether the Body Corporate acted reasonably in passing the motion *Body Corporate and Community Titles Act 1997(Qld)*

ss 94; 163 and 289.

Trigubowff v Barry Body [2016] QCATA 58.
Re Body Corporate for Viridian; Kjerulf Ainsworth & Ors v Martin Albrecht & Anor[2014] QCATA 294;

APPEARANCES: 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] Ms Woodhouse is the owner of Lot 4 in Community Title Scheme 34520 and the Applicant in this appeal. The scheme comprises 22 lots and is five levels. The Applicant's lot is on the ground floor and incorporates a courtyard which is bordered by a fence with gardens that once contained a hedge. The hedge provided her with a privacy screen from the adjacent street.

[2] The Applicant purchased her lot in 2013 and the hedge screen was in existence at that time. The hedge obviously required maintenance and trimming/pruning from time to time. Even though it was on Body Corporate property, access to the hedge for maintenance could only be gained by going through the Applicant's lot. A dispute arose between the Applicant and the Body Corporate about access through her lot whereby access was denied for about 2 years before the hedge was ultimately removed.

[3] The Applicant, during the dispute, proposed an alternate solution, that is, the installation of a gate into the fence surrounding the complex. This solution did not find favour with either the committee for the Body Corporate, or the majority of the lot owners. The cost of installing a gate was investigated by both the Applicant and the Body Corporate and there are two quotes in the material, one to the Body Corporate from Welsh Building Company for $4,750, and another from Gold Coast Gate & Fence Repairs for $850.

[4] In any event, as the dispute escalated the Body Corporate insisted it was entitled to access Lot 4 under s 163 of the *Body Corporate and Community Title Act* ("*BCCM Act*") which empowers the Body Corporate to appoint an "*authorised person*" to "*carry out work the Body Corporate is authorised or required to carry out*". Clearly the work of trimming and maintaining the hedge on the common property would fall within s 163(1)(b). Despite that authorisation, the Applicant continued to refuse access and there was a standoff as to how and when the hedge should be maintained.

[5] To bring matters to a head, the Body Corporate held an extraordinary general meeting ("EGM") on 4 July 2018 to deal with the dispute. A motion was put, motion 3, that it be resolved that the Body Corporate engage a contractor to "*remove all shrubs and plants in the common property gardens located along the perimeter fence boundary adjacent to Lot 4*". The minutes of the EGM record that the resolution was passed.

[6] At that same meeting, the Applicant put forward the following motion:

> That all the common property gardens within the common property be maintained as required under the legislation for the peaceful enjoyment of all

> owners and that the common property gardens within the common property be accessed from the common property for maintenance purposes.

[7] That motion was not put to the meeting because the Chairperson of the meeting ruled it out of order. I have observed that there is an obligation under the scheme for this work to be carried out by the Body Corporate in any event save that because of the location of the hedge, access was required through the Applicant's lot which was denied. It was obvious at that time that access to 'common property gardens', the hedge, could not be accessed from the 'common property'.

[8] Subsequent to this meeting, the Applicant referred the matter to the Office of the Commissioner for Body Corporate and Community Management for adjudication. The Applicant sought the following:

> 1. That motion 3 be ruled out of order;
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> 2. That motion 5 be deemed passed;
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> 3. That the common property garden and hedge adjoining Lot 4 remain, and the Body Corporate be required to maintain the hedge 'to provide privacy for Lot 4 as it has in the previous 12 years since construction of the scheme'.

[9] Having considered submissions from the Applicant, the Body Corporate and various lot owners, the Adjudicator determined that the outcomes sought by the Applicant should be dismissed. Reasons were provided on 20 November 2018 in which he reached the following conclusions:

> The High Court of Australia in *Ainsworth v Albrecht* said that the issue for an adjudication is whether the Body Corporate failed to comply with s 94(2) "*By achieving a reasonable balance of the competing interests affected by the proposal*".
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> The Body Corporate is aware of its maintenance duty about common property. Given the scheme design, the Body Corporate considers the only safe option at present to maintain the shrubs and plants adjoining Lot 4 is through the lot. I am satisfied by the submitted material that this is a justifiable position for the Body Corporate. The Body Corporate has a statutory power to enter Lot 4 for practical purposes including to carry out maintenance work on common property.
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> The Applicant refuses to allow the Body Corporate access through Lot 4 and wants the Body Corporate to install a gate on common property. Whether or not the Body Corporate (the other owners) has been asked to consider this option is not relevant. Owners were informed about the circumstances which led to the committee's proposal in motion 3. I am satisfied owners were informed of those circumstances and were not misled. Owners agreed with the committee. For the reasons discussed above, I am not satisfied by the Applicant's submissions that the Body Corporate decision was arbitrary or objectively unreasonable. Therefore, I have dismissed the outcome sought.

[10] It is clear from the above reasons that the Adjudicator made findings of fact about the reasonableness of the Body Corporate's position and that the only safe way to maintain the hedge was by access to the Applicant's lot. The Adjudicator also found the committee and the owners were fully informed of the circumstances leading to the motion and agreed with it.

[11] From that decision, the Applicant has filed an application for leave to appeal or appeal. The grounds of appeal are that:

> I am appealing the adjudicator's order on the question of law pursuant to ss 288A, 289 and 290 of the Act.
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> Grounds for appeal are in relation to errors in question of law in reaching decisions.

[12] The notice of appeal does not particularise the errors of law it is alleged the Adjudicator made in the reasons for decision. However, they are to some extent in a very general way set out in the submission annexed to the application for leave to appeal or appeal.

[13] Under s 289 of the *BCCM Act* an aggrieved person may appeal to the Appeal Tribunal, but only on a question of law. In addition to the submission attached to the application for leave to appeal, the Applicant has also filed an appeal booklet with numerous annexures unrelated to the issues considered by the Adjudicator but rather, a general history of the conflict and strained relationship she has had with certain members of the Body Corporate.

[14] It is important for the Applicant to recognise that the appeal from the Adjudicator's decision is not a rehearing of the referral for adjudication. Furthermore, it is not for this Appeal Tribunal to merely substitute its own decision as though it considered the referral afresh. Unless it is established that the adjudicator made an error of law in coming to the decision under appeal the appeal must fail.

[15] In *Trigubowff v Barry*[1], Member Barlow QC (as he then was) said as follows:

> An appeal under s 289 of the Act can only be on a question of law. When an appeal is permitted only on a question of law, that question is not merely a qualifying condition to ground the appeal, but is the sole subject matter of the appeal, to which the ambit of the appeal is confined. An appeal restricted to a question of law is an appeal in the strict sense, in which the sole question is whether the original decision was right at the time, having regard to the law at that time and the evidence before the primary decision maker.
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> The limitation of the Tribunal's jurisdiction to the resolution of questions of law imposes a significant constraint on the role of the Tribunal in reviewing decisions of an adjudicator. The appellable error of law must arise on the facts found by the adjudicator or must vitiate the findings made or must have led the adjudicator to omit to make a finding she or he was legally required to make. A wrong finding of fact is not sufficient to demonstrate error of law. Where the decision of the administrator involves matters of fact and degree, then provided she or he applies correct principles of law, no appeal will lie.[2]

Motion 3

[16] There can be no dispute that the Body Corporate at the EGM had the power to consider motion 3 and if the majority were in agreement, pass it. The motion was in

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1 [2016] QCATA 58.

2 Applicant's submissions [36].

respect of common property which is not disputed and as the adjudicator pointed out in his reasons[3]:

> Motion 3 related to shrubs and plants in common property gardens. This land is owned by all owners as tenants in common. The owners are the members of the Body Corporate. In effect the Body Corporate is the representative of the interests of owners when dealing with common property issues. Its functions included administering the common property which includes their land adjacent to Lot 4. The Body Corporate has the powers necessary to carry out this function. The Body Corporate's duties included administering, managing and controlling common property. In this context, motion 3 related to the administration of common property and the Body Corporate has power to decide the motion.

[17] There is no error of law in respect of that statement relating to the powers and functions of the Body Corporate.

[18] However, there is also an obligation on the Body Corporate when making decisions to act reasonably. That is set out in s 94 of the *BCCM Act* and was specifically referred to by the adjudicator. Section 94 provides:

> (1) The Body Corporate for a community titles scheme must—
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> (a) administer the common property and Body Corporate assets for the benefit of the owners of the lots included in the scheme; and
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> (b) enforce the community management statement (including enforcing any by-laws for the scheme in the way provided under this Act); and
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> (c) carry out the other functions given to the Body Corporate under this Act and the community management statement.
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> (2) The Body Corporate must act reasonably in anything it does under subsection (1) including making, or not making, a decision for the subsection.

[19] The question of reasonableness must be considered in all the circumstances of the decision being considered by the Body Corporate, here motion 3. If the decision can be found to be unreasonable, capricious or perverse for whatever reason, then under s 94(2) the decision could be set aside as a matter of law. However, the question of law when considering s 94(2) is based on findings of fact. The adjudicator's reasons demonstrate that all of the submissions in relation to the reasonableness were considered. In particular, the Adjudicator took note of the fact that the Applicant would not give access through her lot for the purposes of maintaining the hedge which stalemate existed for about 2 years resulting in the Body Corporate not being able to carry out its responsibilities under the scheme.

[20] There was no motion put before the Body Corporate as to whether a gate should or should not be installed and despite the Applicant's contention in this respect, this was not a relevant consideration in determining whether the hedge should remain.

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3 [12].

[21] The Body Corporate is in an awkward position because it consists of members of the owners of lots in the scheme. As pointed out this is an average size scheme with 22 lot owners who are entitled to express their views and vote on how the scheme should be administered. Theoretically, they should put aside their own personal views and vote for the common good of the Body Corporate. This was considered by Member Roney in the *Body Corporate for Viridian; Kjerulf Ainsworth & Ors v Martin Albrecht*[4]*:*

> In my view, it is critical to observe in deciding this appeal that the language in s 94 of the *BCCM Act* is of course directed to the Body Corporate as a corporate entity, and not to individuals who collectively constitute the Body Corporate in general meeting. The conundrum that this presents, is of course that the will of the Body Corporate as a corporate entity, can only reflect the collective decisions of individual lot owners who participate in voting upon motions at general meetings.

[22] The effect of this is that s 94(2) is directed specifically to a duty cast upon the Body Corporate and not the individual lot owners. It is not a duty to make reasonable decisions, it is a duty to "*act reasonably*" in anything it does under sub-section (1), which is reference to it carrying out the functions given to it under the Act. One of these functions, relevantly for present purposes, is to conduct general meetings and to record the vote on motions put to that general meeting.

[23] It then becomes an objective test as to whether or not the motion as put and past was done so by the Body Corporate e.g. its members, acting reasonably in considering the motion. That is based on the factual circumstances surrounding the consideration of the particular motion and in passing that motion, having regard to the issues extant at the time. When considering all those factors as identified in the Adjudicator's reasons, and findings made, there is no basis upon which it can be said that the Body Corporate acted unreasonably.

[24] The Applicant also relies on the conduct of the Body Corporate accessing her unit for the purposes of maintenance of the hedge under s 163 of the Act as being unreasonable. The Adjudicator, ignoring the personal conflict going on between the Applicant and some of the lot owners at the time, took an objective view and concluded that there was nothing unreasonable for the committee to rely on the lack of access when considering motion 3. In fact, it was because the Applicant refused access to her lot that was the genesis of motion 3. Clearly that is not an error of law and not a matter which would vitiate the passing of motion 3.

[25] The gate proposition is, in my view, irrelevant to the appeal. It is an issue that was raised and discussed as alternate solution but there was no obligation on the Body Corporate to adopt the Applicant's preferred solution. The appeal is not an opportunity, as I have said, to re-argue the case that was before the adjudicator.

[26] The Applicant does not accept many of the factual conclusions of the adjudicator in coming to the conclusion in the adjudication but that is of no assistance to her.

[27] I have considered the parties submissions dealing with the interpersonal conflict that is underlying this dispute. However, that is irrelevant to the consideration of the

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4 [2014] QCATA 294.

application as to whether the Adjudicator fell into error. As I am unable to identify any error of law which would warrant intervention by this Appeal Tribunal the appeal is dismissed.