QUEENSLAND CIVIL AND ADMINISTRATIVE TRIBUNAL

CITATION:	*Palmer v Grogan* [2019] QCAT 202
PARTIES:	**LORRAINE PALMER** (applicant) **v** **PENELOPE GROGAN** (respondent)
APPLICATION NO:	OCL019-18
MATTER TYPE:	Other Civil Matters
DELIVERED ON:	2 August 2019
HEARING DATE:	25 June 2019
HEARD AT:	Brisbane
DECISION OF:	Member Dr Collier
ORDERS:	**1. Application dismissed.** **2. If the parties are unable to agree on the allocation of a car park for the benefit of the Respondent at BPL within 28 days the Respondent may apply to the Tribunal for a further order consistent with this decision.**
CATCHWORDS:	REAL PROPERTY – BOUNDARIES OF LAND AND FENCING – IDENTIFICATION OF BOUNDARIES – manufactured homes – site agreement dispute – boundaries of site – failure to accurately identify site boundaries – failure to accurately identify site boundaries in site agreement – position of structures outside allocated site – relevance of a later site survey REAL PROPERTY – LICENCES – REMEDIES – manufactured homes – site agreement dispute – whether breach of site agreement by home owner – position of structures outside allocated site – unauthorised addition or extension to dwelling – use of an allocated car park – enforceability of verbal site agreement – effect of a later written site agreement *Queensland Civil and Administrative Tribunal Act* 2009 (Qld), s 32 *Manufactured Homes (Residential Parks) Act* 2003 (Qld), s 19(e), s 25, s 25(4)(e), s 25(7), s 38, s 98(2), s 98(3)

De Maid v C&K Anderson Pty Ltd [2014] QCAT 10
O'Brien v SEQ Properties Pty Ltd [2014] QCAT 270
Rutherford v Seachange (Land) as trustee for Seachange (GC) Unit Trust [2019] QCAT 33

APPEARANCES & REPRESENTATION:

Applicant:	K Yarrow, solicitor
Respondent:	B Smeed, Caxton Legal Centre

REASONS FOR DECISION

[1] The Applicant, Lorraine Palmer, is, and was at all relevant times, the owner or the controlling person behind Bundaberg Park Lodge ('BPL'), located at 20 Childers Road Bundaberg. Bundaberg Park Lodge appears to be a business name owned by the Applicant.

[2] Many documents related this matter make reference to Lorraine Palmer Pty Ltd in dealings with the Respondent. This decision proceeds on the basis that Lorraine Palmer, the Applicant, is the proper party in this matter. In the event that this is not so, either party may apply to the Tribunal to amend the identity of the Applicant. No harm is done to any party because, in any event, Lorraine Palmer appears to be the controlling person behind Lorraine Palmer Pty Ltd.

[3] The Respondent, Penelope Grogan, has rented site number 103 at BPL since 2005 on which she owns a manufactured home. The home was already positioned on the site when the Respondent purchased the home. The Respondent has resided in this home at all relevant times.

[4] The Applicant appointed managers for BPL during most of the period during which the Respondent has resided at BPL, but resumed control and management of BPL herself some time in 2017.

[5] In 2017 the Applicant filed an Application before the Tribunal sitting at Bundaberg requesting the Tribunal issue an order requiring the Respondent to remove the splitsystem air conditioner the Respondent had installed in her dwelling on site 103.[1] This Application was struck out 30 November 2017 prior to hearing.

[6] On 26 February 2018 the Applicant filed an Application seeking that the Tribunal order the Respondent to do the following:

1. That the Respondent, at her own expense, remedy the following encroachments on neighbouring properties in accordance with the site agreement:

   - all structures built outside the Respondent's Lot including:

   (a) the timber fence that has been constructed outside the allotted boundary of the Respondent.

[1] Application Bundaberg T044-17.

(b) the carport that has been constructed outside the allotted boundary of the Respondent.

(c) The garden shed be moved onto the allotted boundary of the Respondent.

2. That the Respondent, at her own expense, remove the air-conditioning unit that was installed in her home without the written consent of the Park Owner in accordance with the site agreement.

3. That the Respondent, at her own expense, remove the trees, shrubs and hedges that are outside the allotted boundary of the Respondent.

4. That the Respondent, at her own expense, ensure that all trees, shrubs, hedges, structures and things remain at least one metre from the bitumen and that all trees, shrubs, hedges and things be at least 50cm from neighbouring properties.

[7] By an amended Application filed on 29 November 2018 the Applicant is now seeking the same remedies or, in the alternative, that the Tribunal terminate the agreement between BPL and the Respondent.

The facts

[8] Under the *Manufactured Homes (Residential Parks) Act* 2003 ('MHRP Act') there must be a written site agreement between the park owner and the home owner.[2]

[9] When the Respondent became a home owner at BPL in 2005 she was not required to, and did not, enter into a written agreement with BPL. Nonetheless, the Respondent became a home owner at BPL according to the terms of an unwritten agreement ('the first agreement'). The relevant terms of the first agreement are identified later. The MHRP Act provides that the terms of an unwritten site agreement are enforceable.[3]

[10] A written site agreement between the Respondent and BPL was executed on 9 June 2011 ('the second agreement'). There is no dispute that this represents the latest site agreement. There is, however, some dispute concerning the terms of this agreement because each party holds a copy with some variations between them, the implications of which are addressed later.

[11] The second site agreement was signed by Penny Jackson, Debbie Woods and Lorraine Palmer. At the time the site agreement was signed Debbie Woods was the manager, or an authorised representative of the manager, of BPL, and Penny Jackson was the former name of the Respondent.

[12] Page 15 of the second site agreement contains the following special term, initialled by both parties:

1. Carport to be included into demarcated site area, subject to approval by Council.

2. Carport to be removed from outside the demarcated site area

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2 Manufactured Homes (Residential Parks) Act 2003, s 25.
3 Ibid s 25(7).

[13] The Applicant had a site plan prepared by a firm of surveyors on or about 19 May 2017 ('the 2017 survey'). One map prepared from this survey is attached to this decision as Annex 1. Prior to this date there appears to have been no survey to confirm the extent of each site within BPL.

[14] Six sites are described within the boundary of the area shown in Annex 1. Evidence before the Tribunal disclosed that since 2011 the Applicant had endeavoured to acquire possession of each of the six sites shown with only two sites, site 103 and site 106, refusing to surrender their entitlements. In her Response and CounterApplication filed 5 September 2018 the Respondent has included a written statement by the occupier of site 106 dated 2 September 2018 which says:[4]

> I … of site 106 and the owner of site 103 are the only people who did not surrender our manufactured homes agreement in 2011.

[15] The Respondent made the same claim, that sites 103 and 106 were the '… only two Home Owners who refused to surrender their Manufactured Home Site Agreements, in 2011 …'.[5]

[16] By letter from her solicitors dated 8 January 2018 the Applicant served on the Respondent a Form 6 - Notice to Remedy Breach alleging the following breaches:

1. the installation of the airconditioning unit was not approved;
2. the carport needs to be removed from the neighbouring site and moved onto your site;
3. your motor vehicle needs to be parked on your site;
4. the garden shed needs to be removed from the neighbouring site and moved onto your site;
5. the front fence needs to be within the boundary line of your site; and
6. any trees, shrubs or hedges on your site need to be a minimum of one meter from the road surface.

[17] The Respondent was required to remedy these alleged breaches by 6 February 2018. The Respondent did not remedy the alleged breaches by the given date. As already noted an Application dealing with these matters was filed on 26 February 2018 and an amended Application filed on 29 November 2018.

[18] The parties engaged in an unsuccessful compulsory conference at the Tribunal concerning their dispute on 28 June 2018.

[19] The Applicant made an offer of settlement to the Respondent by way of a Deed of Settlement on 3 July 2018 open until 10 July 2018, and again from 11 July 2018 until 13 July 2019. The Respondent did not accept the Applicant's offer.

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[4] This note is signed, but the signature and name are indistinguishable. There is no reason to doubt its veracity.

[5] Document dated 4 March 2019 and headed 'Re;-Attention Q.C.A.T. Member Howe'.

[20] There was no evidence before the Tribunal to suggest that the Respondent was not, apart from the matters complained of by the Applicant, other than a satisfactory resident who maintained her home neatly and properly and enjoyed cordial relations with her neighbours.

The Applicant's position

[21] In Attachment 'A' to the Applicant's amended Application dated 29 November 2018 the Applicant seeks the following remedies against the Respondent:

1. That the Respondent, at her own expense, remedy the following encroachments on neighbouring properties in accordance with the site agreement:

   a) all structures built outside the Respondent's Lot including, but not limited to:

      (i) the timber fence that has been constructed outside the allotted boundary of the Respondent.

      (ii) the carport that has been constructed outside the allotted boundary of the Respondent.

      (iii) The garden shed to be moved onto the allotted boundary of the Respondent.

2. That the Respondent, at her own expense, remove the air-conditioning unit that was installed in her home without the written consent of the Park Owner in accordance with the site agreement.

3. That the Respondent, at her own expense, remove the trees, shrubs and hedges that are outside the allotted boundary of the Respondent.

4. That the Respondent, at her own expense, ensure that all trees, shrubs, hedges, structures and things remain at least one metre from the bitumen and that all trees, shrubs, hedges and things be at least 50cm from neighbouring properties.

[22] The Tribunal may give a remedy as provided by s 117 of the MHRP Act as follows:

> If a party to a residential park dispute applies to the tribunal for an order in relation to the dispute, the tribunal may make the following orders—
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> (a) an order the tribunal is authorised to make in relation to the application under another provision of this Act;
>
> (b) any other order the tribunal considers appropriate to resolve the dispute.

[23] In the alternative, the Applicant seeks:

(a) to have the Tribunal terminate the site agreement with the Respondent because of the Respondent's failure to remedy the breaches alleged in its Breach Notice to the Respondent dated 8 January 2018. Details of the alleged breaches are set out in paragraph [16]; and

(b) a further series of orders pursuant to terminating the agreement.

[24] To have the site agreement terminated, the Applicant is relying on s 39 of the MHRP Act which relevantly provides:

> (1) On application by the park owner under a site agreement, the tribunal may make an order (a termination order) terminating the agreement on any of the following grounds—
>
> (a) the home owner—
>
> (i) has contravened a term of the agreement; and
>
> (ii) has failed to remedy the contravention after being given by the park owner a notice, in the approved form, requiring the home owner to remedy the contravention within 28 days after the notice is given.

[25] In her Application the Applicant also notes:[6]

> 6. There has been an irretrievable breakdown in the relationship between the parties and as a result it is unlikely that the parties will be able to resolve the issues in contention in future.

[26] The Applicant through her solicitor made the following points during the hearing:

a) The first site agreement may have existed, but it was superseded by the second site agreement which constitutes the entire agreement between the parties;

b) The Applicant has 85-100 occupants of the park and is not able to accommodate individual and informal arrangements among the park occupants, such as that the Applicant says concerns site 103;

c) The 2008 park plan does not make provision for a car park space for site 103;

d) Different copies of the second agreement refer to differing areas occupied by site 103: whether 120 sq m, 146 sq m, or 224 sq m;[7] the Applicant does not intend to reduce the area available to the Respondent, and contends that site 103 should occupy 146 sq m;

e) The Respondent has undertaken harassment of the Applicant in recent times including the placing of signs critical of the Applicant personally;

f) The Applicant wishes to regularise site arrangements in prospect of selling the park; and

g) The Applicant will make a car park available to the Respondent within the park for a periodic fee.

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6 Attachment 'A' to Application filed 29 November 2018, 'The reasons I seek these orders are:', cl 6.

7 Or, possibly 112.1 sq m or over 200 sq m, see FN 25.

The Respondent's position

[27] The Respondent holds the view that the survey conducted by the surveyors does not reflect accurately the boundaries of her site.

[28] The Respondent says that the boundaries of her site (and other sites) were never formally described and have to be inferred from her dealings with park managers and other information available.

[29] The Respondent says that she has been harassed by the Applicant since 2017 because the Applicant wishes to resume occupation of site 103, among others, for the purpose of letting the site and home as one entity.

[30] In her submissions to the Tribunal the Respondent seeks the following remedies:[8]

a) A declaration that the precise area of the site is the area of the Original Site;[9]

b) A declaration that the Relevant Terms are the terms of the Respondent's existing site agreement;[10]

c) A declaration that it is unconscionable for the Applicant to enforce the Updated Agreement and/or the Alleged Variation;[11] and

d) An order that the Respondent [sic] consent to the installation of the Air-Conditioning unit on the Site.[12]

Where is the boundary of site 103?

[31] Precisely identifying a site is a statutory duty placed on the park owner.[13] The reason for this is explained in the decision in *O'Brien v SEQ Properties*:[14]

> As a matter of statutory interpretation, a statute that creates a duty creates a right in the persons for whose benefit the duty was imposed. The statutory duty to precisely identify the site recognises that home owners and prospective home owners have an inherent vulnerability in relying upon information within the province of and provided by the park owner.

[32] Similarly, sufficiently identifying a site is a contractual duty placed upon the park owner.[15]

[33] Until the 2017 survey, the Applicant breached both her statutory and contractual duty in respect of identifying the boundary of site 103.

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8 Submissions of the Respondent filed 25 June 2019, marked as Exhibit 1, par 100.

9 Original Site for this purpose is described in the drawing in Annex 2 as site 103 including those portions marked in yellow.

10 Relevant Terms means the boundaries of the Original Site and the Respondent's right to use the car parking space.

11 Updated Agreement means the 2011 written agreement; Alleged Variation means, for this purpose, the variation to site 103 that is depicted in Annex 2 as describing site 103, but excluding those portions marked in yellow.

12 The submission no doubt intends the Applicant rather than the Respondent provides such consent.

13 MHRP Act, s 25(4)(e).

14 O'Brien v SEQ Properties Pty Ltd [2014] QCAT 270, [9].

15 MHRP Act, s 19(e), s 25.

[34] Most matters in dispute here arise because the Applicant asserts that the Respondent is, or in some respects was until recently, occupying areas beyond site 103 to which the Respondent has no valid entitlement. This assertion by the Applicant relies in large measure on the correctness of the 2017 survey completed by surveyors according to her instructions.

[35] An agreement was reached between the Applicant and Respondent at QCAT in Bundaberg in relation to Tribunal Matter T044-17 concerning how site boundaries were to be determined which appears to have been the motivation for the Applicant to engage surveyors.[16]

[36] A map prepared from the 2017 survey, attached here as Annex 2, depicts, in yellow, that portion of site 103 that the Applicant claims the respondent occupies or, in some respects until recently, occupied but which lies outside the boundary of site 103.

[37] It is difficult to ascribe great weight to the veracity of the 2017 survey for a number of reasons. First, there was no documentary evidence brought to the Tribunal's notice that there was any pre-existing survey or definitive layout of the extent of the lots on which the surveyors could base a more precise survey. Prior to the survey much of the layout appears to have been done informally and approximately. Second, instructions to the surveyors were given by the Applicant, a person with a personal financial interest in the outcome of the survey. The Tribunal was not provided with any evidence concerning the instructions given to the surveyors.

[38] I note that Annex 1, where the 2017 survey plan shows the extent of the six sites depicted, the plan describes a shape like an elongated capital letter 'D'. Perusal of the map shows site 107, at the top of the map, has a boundary marked in red that extends beyond the existing fence and tracks close to the internal road. At the bottom of the map the boundary depicted cuts-off a large portion of what would otherwise be site 103, does not follow the existing fence line, and appears significantly less generous than its counterpart at the top of the 'D' in site 107. There is no evident reason for this different treatment of these two but otherwise similar sites.

[39] I further note that the surveyors marked their plan: 'Proposed boundaries overlayed with location survey of caravans and buildings, B'berg Park Lodge'. The fact that the surveyors annotate their plan as *proposed boundaries* suggests that they were not following existing boundaries and, indeed, may have ignored any earlier plans, if they existed, in preparing the boundaries shown.

[40] Taking these factors into account I place very little weight on the correctness or integrity of the 2017 survey as reflecting the boundaries of site 103 agreed between the parties in the first agreement and second agreement.

[41] The terms of an unwritten site agreement are enforceable.[17] Therefore the terms of the first agreement are enforceable and will continue to apply until they are lawfully

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16 General Agreement between the Applicant and Respondent dated 18 April 2017.

17 MHRP Act, s 25(7).

amended. The second agreement will have the effect of amending the terms of the first agreement to the extent that they alter the terms of the first agreement.

[42] A letter dated 22 September 2008 sent to the Respondent by Stephen Auld and Greg Reddaway, apparently managers of BPL at the time, advised the Respondent as follows, in respect of site 103, *inter alia*:

> … we are currently carrying out a review of the park. As part of this review we are measuring the site areas of each site.
>
> Attached is a plan showing the dimensions and area of your site. We ask that you review the plan within two weeks of the date of this letter.
>
> If you agree with the measurements you do not need to do anything more.

[43] No copy of the plan mentioned in this letter from Stephen Auld and Greg Reddaway was made available to the Tribunal.

[44] A letter written by the Respondent to the Applicant on 24 February 2017 concerning 'My continuing use, without any additional cost to me, of a car park area at the left side of site 103 occupied by me', where the Respondent said:

> … I advise that I received permission from your appointed managers Jim and Chris Redshaw in or about 2008. A sketch plan showing the location of the agreed car park is attached - "A". Each manager since then has acknowledged this right.[18]

[45] In a letter from the Respondent to the Applicant dated 30 January 2018 the Respondent said, and it is worthwhile quoting at length:

> In recent days you have erected a boundary fence between my Site 103 and Site 104 from the surveyed plans…
>
> This section of the boundary has never been fenced before and has now joined my existing fence line further down the boundary.
>
> The two fences have not met exactly and there is a small difference of 27cm.
>
> As you are well aware, all existing boundaries with-in Bundaberg Park Lodge have been in the past designated by whom ever was Park Manager or Leasee [sic] Managers at the time, using land marks and or hand measured methods with an eye sight line procedure. The balance of probabilities of any boundary on any site being exactly right as per a professional survey, would be very unlikely.
>
> Although their endeavours are very close to the surveyors, depicting just how good they were in those days, without any equipment, to be so close to the mark.

[46] It is clear from the evidence that the boundaries of various sites was informal for many years. This can be illustrated by a few examples:

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[18] Annex 2 describes the location of the car park, contiguous with site 103, formerly used by the Respondent.

a) In her letter to the Respondent dated 13 January 2017 when the Applicant raised her concerns with the Respondent in writing for the first time, the Applicant said, in respect of the split-system air conditioner, '… you placed it next to your dwelling which is actually on the allocated land for Van 104.' During the hearing it was not disputed that the external unit of the Respondent's air conditioner was, in fact, not located on site 104, but was entirely within site 103; b) In relation to the dispute concerning the location of the split-system air conditioner the Respondent said in a letter to the Applicant, 'I was informed by Mr Redshaw [former manager of BPL] that the boundary line of my site was immediately to the left of the "tree stump" shown in the attached plan.'[19]

c) Upon construction by the Applicant of a dividing fence between lots 103 and 104, the Respondent notes in a letter to the Applicant dated 30 January 2018, 'This section of boundary has never been fenced before and has now joined my existing fence line further down the boundary. The two joining fences have not met exactly and there is a small difference of 27cm.'

[47] The Respondent asserted in her statement of evidence that the proper line of the boundary of site 103 as it concerns the garden shed '… has not been depicted correctly, but rather the east boundary should be beside Site 103's carport.'[20]

[48] While the 2017 survey presents a series of neat straight lines purporting to delineate the boundaries of each site, for the reasons given above, I am not satisfied that they reflect the boundaries earlier agreed between the parties.

[49] On the balance of probabilities I am satisfied that the boundary between site 103 and site 104 is that described by the Respondent, that is, that it follows a line on the eastern edge of the carport previously used by the Respondent.

[50] I now consider each of the claims made in the Notice to Remedy Breach issued by the Applicant on 8 January 2018 and reiterated in her amended Application.

Applying the evidence

Installation of the air conditioning unit

[51] The Applicant's concerns about the air conditioner are as follows:

a) It was installed without the consent of the park owner;

b) It is visible from the outside of the home; and

c) It blows hot air into and constitutes a noise nuisance to the adjacent site, number 109.

[52] The Respondent's home previously had had a closed-unit air conditioner installed through the wall of the dwelling. The evidence disclosed that this closed-unit system

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[19] Letter from the Respondent to the Applicant dated 24 February 2017.

[20] Respondent's Statement of Evidence [which is marked 'Unsubstantiated Allegations (Case No. O.C.L.019-18)], Doc 1(a)ii.

was insufficient to cool the dwelling sufficiently so that, on medical advice, the Respondent chose to install a larger split-system.[21]

[53] It was common ground that the Respondent had not sought or obtained the consent of the Applicant before the split-system air conditioner was installed.

[54] Sections 98(2) and 98(3) of the MHRP Act deal with alterations and additions to manufactured homes subject to a site agreement, as follows:

> (2) The home owner must not make any alteration to the home that is visible from the outside of the home, or make any addition to the home, unless the park owner gives written consent to the proposed alteration or addition.
>
> (3) The park owner must not unreasonably refuse to give the consent.

[55] Neither 'alteration' nor 'addition' is defined in the Act.

[56] The home previously had had a single unit air conditioner installed that was visible from outside the home at a height of about 2m. The external components of the splitsystem air conditioner comprise a vertical duct containing pipes and electrical wiring emerging at about 2m from ground level, and the outdoor unit of the air conditioner, which was at ground level, all located within the Respondent's site. To the extent that any part of this air conditioner could be seen from outside the site, the outdoor unit is at ground level and obscured by a fence and the adjoining dwelling, while the duct is similarly substantially obscured by the fence and adjoining dwelling and is a colour consistent with the wall of the home.

[57] For the purposes of the MHRP Act I find as follows:

a) the split-system air conditioner in this configuration is not an alteration or addition to the home; and

b) the split-system air conditioner is not visible from the outside the home.

[58] In regard to inconvenience to neighbouring site 109, the Respondent submitted a statement from a former occupant of site 109. In referring to the Respondent's splitsystem air conditioner, the neighbour said:[22]

> I Kerry Hellens of Bundaberg Lodge-Site 104, next door neighbour to Penny Grogan Site 103.
>
> I hereby verify the air conditioner does not effect [sic] me at all, the noise the hot air none of that and I have been at the park for almost 12 months renting this van.

[59] It emerged in oral evidence that Ms Hellens no longer occupies site 104, but it was confirmed that there had been no complaints from the existing neighbours concerning the air conditioner. In the meantime a fence has been erected between the two sites so that any adverse effect on site 104, if it ever happened, now would be quite unlikely.

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[21] Letter from Dr Ian Holthouse dated 8 February 2017.
[22] Witness statement of Kerry Hellens dated 10 April 2018.

[60] The only basis for the Applicant's objection to the split-system air conditioner derives from aesthetic considerations. Consistent with the Tribunal's decision in *Rutherford v Seachange (Land) as trustee for Seachange (GC) Unit Trust*[23] I find that the Respondent did not require the Applicant's consent before having the split-system air conditioner installed in her home.

[61] I further find, should it be necessary to do so, that the Applicant cannot withhold consent to the split-system air conditioner because to do so would be unreasonable.

Removal of the carport

[62] In her evidence the Applicant said:[24]

> 3. Whilst the Respondent has had the carport erected for the past 11 years or so, it remains outside her allotted site 103 and it is a breach of the Site Agreement.
>
> 4. At no time has the Applicant consented to the Respondent parking her car on another site or made arrangements for the Respondent to park anywhere other than on her site or in the Bundaberg Park Lodge car park located outside of the park….

[63] The Respondent had been using, without additional charge, the 'car shade' nearer site 103 as depicted in Annex 1 and Annex 2 since 2005 until her access was denied by the Applicant in 2019.

[64] The Respondent's access to the carport was first blocked by Applicant using a frontend loader and was subsequently dismantled on the instructions of the Applicant. In other words, there is no longer any basis for the Applicant to seek a remedy on this ground because the offending car shade and car parking space no longer exist.

[65] However, the issue of whether the Respondent is entitled to a car park under the terms of her site agreement remains live.

[66] In her oral evidence the Respondent made the following relevant points:

a) When the Respondent entered the park in 2005 she was not required to enter into a written site agreement;

b) The Respondent was advised by the then park manager that there was a car park associated with site 103, being the car park she used from 2005 until 2019;

c) The Applicant raised no objection with the Respondent concerning use of the car park used by the Respondent until the Applicant wrote her a letter in 2017 (in which the Applicant's concern about the air conditioner was also raised);

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[23] *Rutherford v Seachange (Land) as trustee for Seachange (GC) Unit Trust* [2019] QCAT 33.

[24] Statement of Evidence & Submissions on Behalf of Lorraine Palmer filed 6 Feb 2019, 'SUBMISSIONS', p 3, cl 3 and cl 4.

d) The 2008 plan of site 103 prepared by Jim and Chris Renshaw shows 'Area of site details – house site and car space' which confirms that a car park was part of site 103; and

e) The special term in the 2011 written site agreement was intended to mean that the car park annexed with site 103 was to be explicitly included in site 103.

[67] The 2008 plan prepared by Jim and Chris Renshaw depicts a 'car space 13.5 sq' as part of site 103.[25]

[68] The site agreement dated 9 June 2011 contained a special condition about the car park, see paragraph [12], which was:

1. Carport to be included into demarcated site area, subject to approval by Council.

2. Carport to be removed from outside the demarcated site area

[69] What this special condition means is far from clear. But, given the whole of the circumstances, it appears not to be intended to derogate from the rights to the allocated car park previously enjoyed by the Respondent.

[70] The term could be read to say either: 'the car park, as it stands, is to be included in site 103', or 'the car park is to be shifted so that it comes within the boundary of site 103'. However, the fact remains that the Respondent enjoyed the benefit of the car park annexed to site 103 without let or hindrance from 2005 until 2019 (although the Applicant complained about the Respondent's use of the car park beginning in 2017). The Respondent's ability to use the car park was defeated in early 2019 as a result of the actions of the Applicant blocking access to the car park.

[71] In a letter by the Respondent to the Applicant on 24 February 2017, the Respondent said:

> [In regard to m]y continuing use, without any additional cost to me, of a car park area at the left side of site 103 occupied by me …
>
> … I advise that I received permission from your appointed managers Jim and Chris Redshaw in or about 2011. A sketch plan showing the location of the agreed car park is attached- "A". Each manager since then has acknowledged this right.

[72] On the balance of probabilities I accept the Respondent's evidence that she was informed by the park management in 2005 that she was entitled to exclusive use of the car park annexed to site 103.

[73] Furthermore, I accept the Respondent's oral evidence that the intention of the special conditions in the 2011 written site agreement was intended to place that car park formally within the boundary of site 103. There is nothing in the 2011 site

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[25] Letter P Grogan to Ms L Palmer dated 24 February 2017. I also note that this drawing shows a purported area of the site as 112.1 sq m, yet the linear dimensions disclose an area of approximately 200 sq m. I conclude that no reliance can be placed on this drawing apart from disclosing the Respondent's entitlement to a car space.

agreement to displace that conclusion, and the 2017 survey is irrelevant in this respect because I cannot place reliance upon that survey.

[74] The evidence demonstrates that the Respondent was entitled at all relevant times to use the car park near annexed to site 103 as part of her site agreement.

Parking arrangements

[75] Since relations between the parties became acrimonious the Applicant has refused to allow the Respondent to park her car within BPL unless the Respondent agrees to pay a fee associated with a car park.

[76] For the reasons described above I find that the site agreement for site 103 incorporates an allocated parking space near site 103 for the sole benefit of the Respondent without additional cost.

[77] The conduct of the Applicant has deprived the Respondent of her entitlement under the site agreement to the benefit of a car park and the entitlement should be restored. For clarity: the cost of this car park is included within the park fee presently paid by the Respondent.

Removal of the garden shed

[78] In her evidence the Applicant said:[26]

> 7. Whilst the Respondent has had the garden shed erected for the past 11 years or so, it remains outside her allotted site 103 and it is a breach of the Site Agreement.
>
> 8. Due to the garden shed and carport being erected partially on site 109, the Applicant, as owner of site 109, has been unable to make much needed renovations for her long term tenant…

[79] As identified earlier, the boundaries of the sites within BPL were informally defined for many years.

[80] The Respondent asserted in her statement of evidence that the proper line of the boundary of site 103 as it concerns the garden shed '… has not been depicted correctly, but rather the east boundary should be beside Site 103's carport.'[27]

[81] While the 2017 survey presents a series of neat straight lines purporting to delineate the boundaries of each site, for the reasons given above, I am not satisfied that they reflect the boundaries earlier agreed between the parties.

[82] On the balance of probabilities I am satisfied that the boundary between site 103 and site 104 is that described by the Respondent, that is, that it follows a line on the eastern edge of the carport previously used by the Respondent.

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[26] Ibid cl 7 and cl 8.

[27] Respondent's Statement of Evidence [which is marked 'Unsubstantiated Allegations (Case No. O.C.L.019-18)], Doc 1(a)ii.

[83] This means that that the Respondent's existing garden shed is entirely within the boundary of site 103 as it was contemplated in the first and second site agreements. This can be seen in Annex 2 marked in yellow.

[84] Even if my conclusion concerning the boundary line between site 103 and site 104 is wrong, the long period of acquiescence to the arrangement by the Applicant, who was the park owner at all relevant times, and the encouragement of the park managers in the belief that the Respondent was entitled to use the area occupied by the garden shed, the Applicant is estopped from denying the Respondent use of the area. This conclusion accords with the decision of the Tribunal in *De Maid v C&K Anderson Pty Ltd*.[28]

[85] If the Applicant wishes to have the garden shed relocated to conform with the proposed boundary of site 103 as described in the 2017 survey, this will have to be done at her cost, with the consent of the Respondent, and in accordance with the relevant law.

Front fence to be within boundary

[86] The Applicant says that the 2017 survey shows that the Respondent's fence extends beyond the Respondent's site and must be moved so that it conforms with the layout of site 103 as depicted in the survey.

[87] In order to succeed in this claim the Applicant has to demonstrate that, on the balance of probabilities, the area allocated to site 103 is that described in the 2017 survey.

[88] In her affidavit filed on 26 March 2018, the Respondent expressed her view concerning the location of the boundary with respect to her fence:[29]

> There has been no fence constructed outside my boundary …

[89] I am not satisfied that the 2017 survey is consistent with the agreement between the parties and, in particular, it is not consistent with the area allocated to site 103 in the first and second site agreements.

[90] The area occupied by site 103 has been identified as being, variously, 120 sq m, 146 sq m, 224 sq m, while my calculation based on the 2008 diagram of the site prepared by the BPL manager at the time showed it to be approximately 200 sq m. The evidence leads to the conclusion that defining the area of site 103 by reference to a fixed area is not practical.

[91] On the balance of probabilities I am satisfied that the area of site 103 is that agreed by the parties in the first and second site agreements and depicted by the area marked yellow in the map at Annex 2.

Foliage to be at least 1m from road

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[28] *De Maid v C&K Anderson Pty Ltd* [2014] QCAT 10, par 30.
[29] Par 1(a).

[92] The Applicant contends that the present location of the fence on the Respondent's site obstructs the road, reduces visibility for cars in the park, has resulted in a mess from soil being placed or running on to the road, and diminishes the benefit of the park to other residents. The Applicant seeks to require the Respondent to remove foliage so that it is, in all cases, at least 1m from the roadway.

[93] The Respondent, on the other hand, claims that foliage from her site is approximately 900mm from the road. She conceded that, from time to time, it may get closer to the road as it grows, but that she maintains the foliage in a neat manner back from the road.

[94] On the evidence before me I am satisfied that the Respondent maintains site 103 in a neat, tidy and proper manner and will maintain the foliage as required without any order from this Tribunal.

Conclusions

[95] I find that the boundary of site 103 is that agreed in the first and second site agreements and depicted by the area marked yellow in the map at Annex 2. That is, the boundary of site 103 is consistent with the existing fence presently forming the limits of the site. The 2017 survey does not reflect, nor does it alter, the boundaries of site 103 as contemplated in the first and second site agreements.

[96] I find that the Applicant had known of, and suffered, for at least 12 years the terms under which the Respondent resided at BPL, including the car parking and other arrangements. There was acquiescence by the Applicant to the situation over that time

in respect of the boundary of site 103, the car parking arrangements, the location of the garden shed, and the location of the boundary fence.

[97] I find that there is no substance in the Applicant's objection to the Respondent's splitsystem air conditioner nor to her objection to the presence of foliage along the boundary of site 103.

[98] I find that the first site agreement was formed when the Respondent first took up residence on site 103 at BPL and that this agreement defined the terms of the Respondent's rights and obligations at the time. I find that this agreement included the following terms:

a) Finding 1: the area of site 103 was and remains defined by the extent of the fence, more or less, that presently exists around site 103. Any present variation from what was agreed in the 2005 site agreement is negligible and *de minimis*; and

b) Finding 2: that the Respondent was entitled to a car park adjacent to site 103 and that the cost of the car park was incorporated into her rent.

[99] While the area of site 103 appears to be the subject of some dispute arising from differences in the area mentioned within different copies of the second agreement, there is nothing that appears intended in the second site agreement to vary the

boundaries of site 103. Given the silence in the second site agreement on the issue of boundaries and the uncertainty caused by apparently different areas used in describing site 103 by different copies of the agreement, I am not satisfied that the parties intended the second site agreement to vary the boundaries of site 103. The Applicant has the burden to demonstrate the proposition that the second site agreement varied the boundaries of site 103, and that burden has not been discharged. Nothing in the second site agreement displaces Finding 1.

[100] The uncertainty surrounding the meaning of the special conditions in the second site agreement concerning car parking arrangements is sufficient to satisfy me that they cannot be relied upon to displace the first site agreement; thus Finding 2 is not displaced.

[101] The 2017 survey does not affect the extent of site 103 because the plan derived from that survey, insofar as it concerns site 103, is inconsistent with the terms of the first and second site agreements and cannot supersede those agreements without agreement between the parties.

[102] I find that the Respondent is not in breach of any terms of any site agreement and has not been in breach of any terms of any site agreement. In particular:

a) Installation of the split-system air conditioner by the Respondent did not breach the site agreement or, if it did, could not reasonably be the subject of objection by the Applicant;

b) The Respondent has been deprived of access to the carport annexed to site 103 so that, if use of the carport ever constituted a breach by the Respondent, it no longer does;

c) The garden shed, in its present location, is within the area of site 103 and does not encroach on any other property. Its location does not, and has never, constituted a breach of the site agreement by the Respondent;

d) The fence of site 103 follows, or sufficiently follows, the boundary of site 103 and does not, and has never, constituted a breach of the site agreement by the Respondent; and

e) To the extent that the foliage growing near the boundary of site 103 extends beyond the boundary of site 103, this does not constitute any danger or loss of amenity to any person and is within reasonable bounds so that it is *de minimis*.

[103] The Application is without merit and the Applicant is not entitled to a remedy.

[104] As noted earlier in paragraph [76], the Respondent remains entitled, without additional charge, to the use of a car park located conveniently to site 103. I will therefore make the following order in this regard, to the effect that, if the parties are unable to resolve the matter by negotiation, the Respondent may, within 28 days of the publication of this decision, apply to the Tribunal for an order consistent with this decision.

[105] The remedies sought by the Respondent in her Counter-Application are not required in light of the decision of the Tribunal and will not be granted.

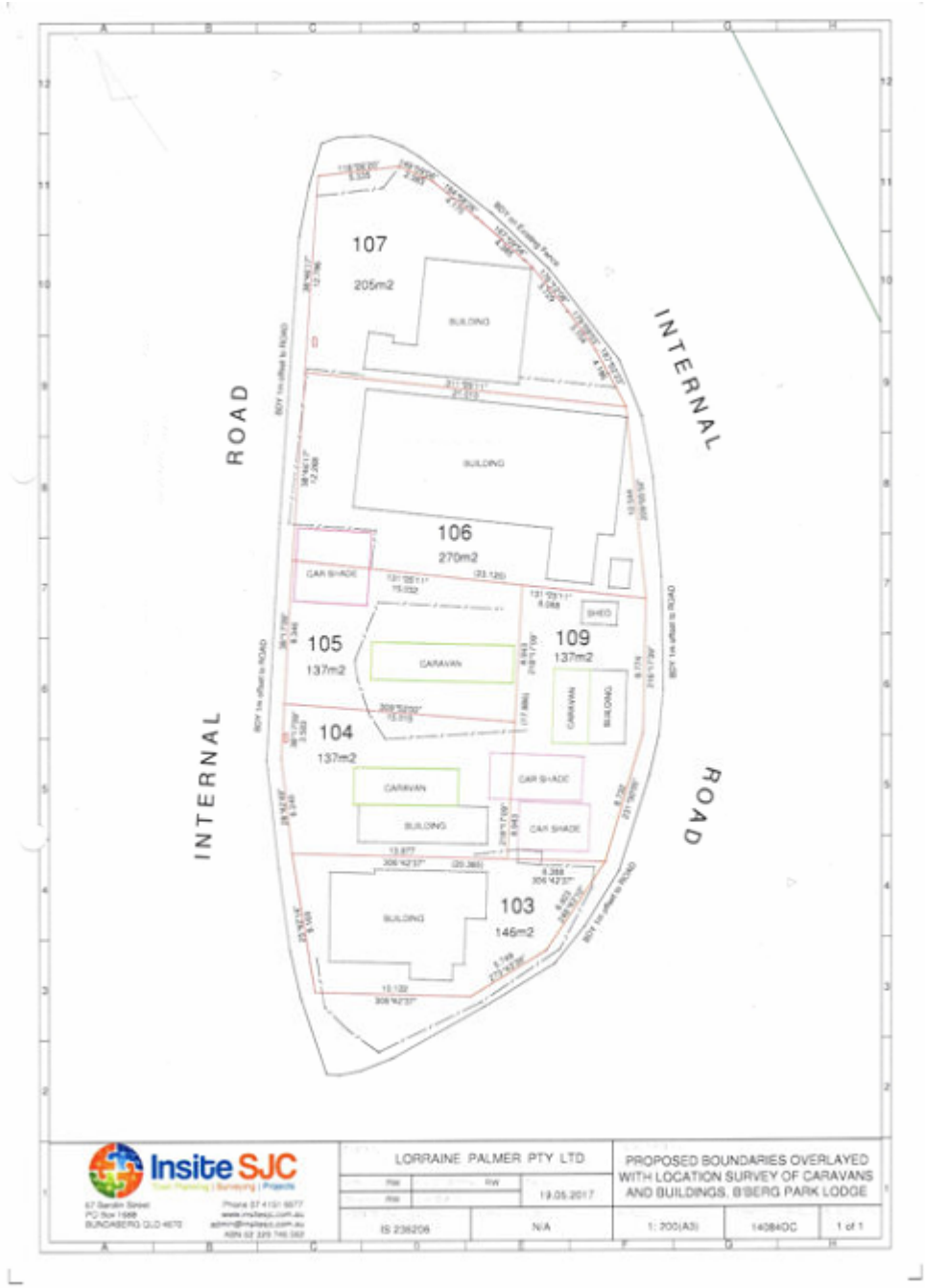
Decision

[106] The Tribunal makes the following Orders:

(a) The Application is dismissed.

(b) If the parties are unable to agree on the allocation of a car park for the benefit of the Respondent at BPL within 28 days the Respondent may apply to the Tribunal for an appropriate order consistent with this decision.

ANNEX 1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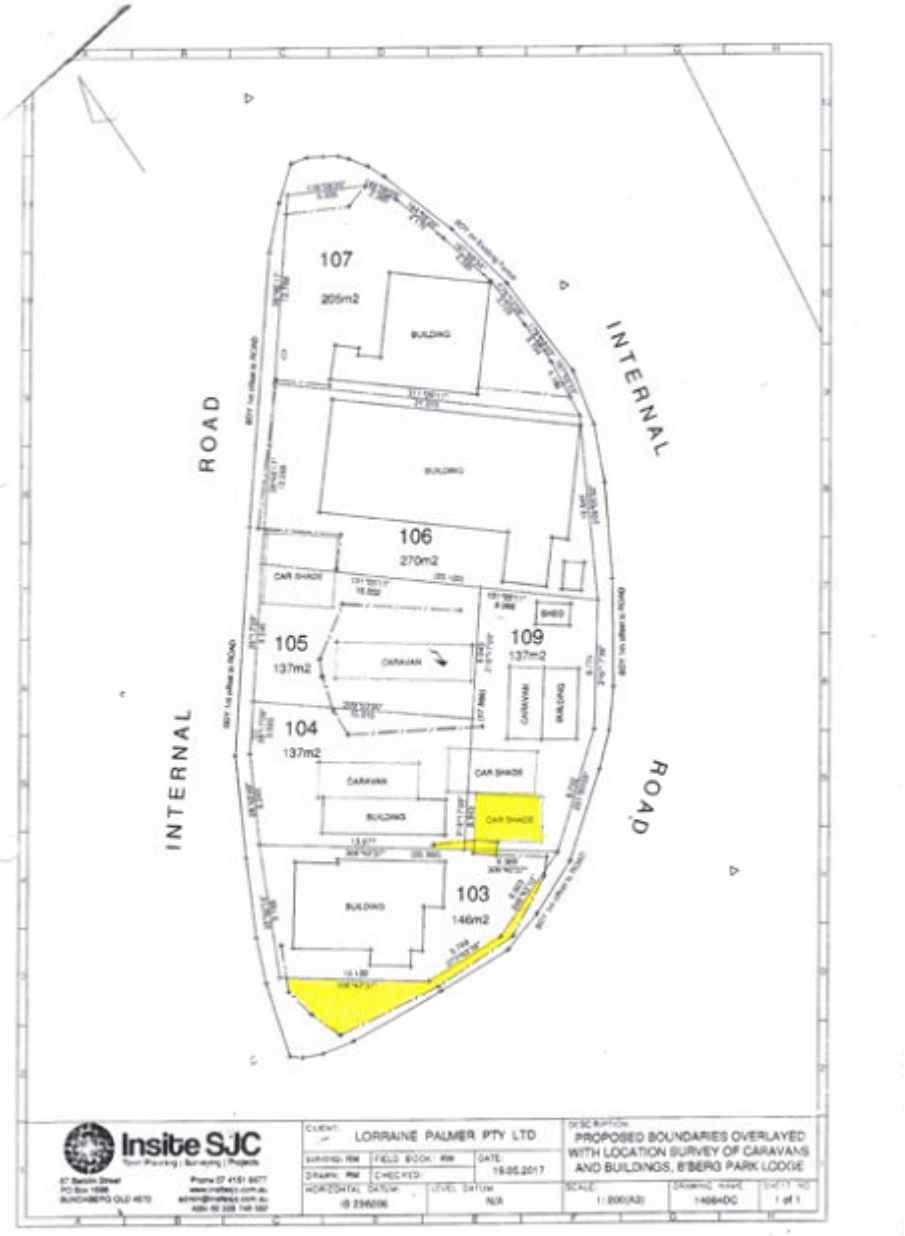
INTERNAL ROAD
Insite SJC
LORRAINE PALMER PTY LTD
19.05.2017
PROPOSED BOUNDARIES OVERLAYED WITH LOCATION SURVEY OF CARAVANS AND BUILDINGS, B'BERG PARK LODGE
IS 236206
N/A
1: 200(A3)
1 of 1

ANNEX 2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CARAVAN
CAR SHADE
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BUILDING
INTERNAL ROAD
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LORRAINE PALMER PTY LTD
PROPOSED BOUNDARIES OVERLAYED WITH LOCATION SURVEY OF CARAVANS AND BUILDINGS, B'BERG PARK LODGE
DATE: 19.05.2017
LEVEL DATUM: N/A
SCALE: 1: 200(A3)
1 of 1