

CITATION: *Body Corporate for Parkwood Villas v Queensland Building and Construction Commission* [2015] QCATA 139

PARTIES: Body Corporate for Parkwood Villas Community
Titles Scheme 25983
(Applicant/Appellant)
v
Queensland Building and Construction
Commission
(Respondent)

APPLICATION NUMBER: APL120-15

MATTER TYPE: Appeals

HEARING DATE: 11 September 2015

HEARD AT: Brisbane

DECISION OF: **Senior Member Brown**

DELIVERED ON: 21 September 2015

DELIVERED AT: Brisbane

ORDERS MADE: **1. The application is dismissed.**

CATCHWORDS: APPLICATION FOR STAY – GROUNDS FOR STAY – where applicant prosecuting appeal relating to review proceeding – where applicant also seeking to prosecute separate review proceeding – where applicant seeking stay of appeal pending outcome of further review proceeding – whether balance of convenience favours stay – whether stay consistent with Tribunal functions relating to the objects of the *Queensland Civil and Administrative Act 2009* (Qld)

Queensland Civil and Administrative Act 2009 (Qld), s 3, s 4, s 58

Aon Risk Services Australia Limited v Australian National University [2009] HCA 27.
Body Corporate for Parkwood Villas Community Titles Scheme 25893 v Queensland Building and Construction Commission [2015] QCAT

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Coral Homes (Qld) Pty Ltd v Queensland Building Services Authority [2012] QCATA 241*Gagliano & Anor v Queensland Building and Construction Commission* [2014] QCAT 504.*King v King* [2010] QCATA 84*Minister for Immigration & Multicultural Affairs v Ali* [2000] FCA 1385*Solar Energy Australia Group Pty Ltd v Bannink* [2013] QCATA 14*Watkins v Queensland Building Services Authority* [2013] QCAT 535.**APPEARANCES and REPRESENTATION:****APPLICANT:** Ms K Wheatland, OMB Solicitors**RESPONDENT:** Mr G Thomson of Counsel instructed by Holding Redlich Solicitors**REASONS FOR DECISION****What is this application about?**

- [1] The Body Corporate for Parkwood Villas ('the body corporate') sought to review a decision of the Queensland Building and Construction Commission ('the QBCC') not to issue a direction to rectify in respect of certain building works ('the first complaint'). The Tribunal subsequently confirmed the decision of the QBCC. The body corporate is seeking to appeal the Tribunal's decision ("the appeal proceeding"). The body corporate has applied for a stay of the appeal proceeding pending the determination of a further review application ("the review proceeding") in relation to a decision by the QBCC regarding a second complaint by the body corporate concerning alleged defective building works ('the second complaint').

The background – the first complaint

- [2] Parkwood Villas is a residential housing complex ('the property'). Stage 3 of the property, the Platinum Stage, was completed in approximately January 2009. The construction works were undertaken by Anlight Pty Ltd trading as Green Constructions ('the builder').
- [3] During Cyclone Yasi in February 2011, damage was sustained to the property, as a consequence of which various contractors were engaged to carry out remedial building works.
- [4] The body corporate subsequently complained to the QBCC in relation to a number of alleged building defects in respect of the property. In summary, those complaints, 62 in number, comprised:

- a) Roof tiles and/or capping tiles cracked or damaged, damage to gable
 - b) Loose/damaged or defective roof flashing;
 - c) Cracked external concrete rendered block walls and windowsills. Defective or no sealant applied to windowsills;
 - d) Rust to base of steel columns;
 - e) Subsidence to paving and garden bed retaining wall;
 - f) Defective painting;
 - g) Defect to wall of electrical meter box;
 - h) Rusted nail fixing to external decorative wall.¹
- [5] The QBCC made a decision on 8 August 2012 not to issue the builder a notice to rectify defective building work. The body corporate filed an application to review that decision. The review application was dismissed by a decision of the Tribunal on 20 February 2015 ('the decision'). The body corporate has appealed the decision and is presently pursuing the appeal proceeding.

The background – the second complaint

- [6] Subsequent to making the first complaint, the body corporate became aware of what it says are further defective building works. The body corporate subsequently made the second complaint. The QBCC investigated the complaint and determined on 11 March 2014 not to issue the builder with a direction to rectify.
- [7] The body corporate identified 9 defects in the second complaint which can be summarised as:
- a) Chalking, discolouration, staining and mould growth to paint work;
 - b) Water penetration to lots and timber rot as a result of the absence of appropriate rainwater pipes and inadequate pitch on patio roofs;
 - c) Water penetration to garages causing moisture damage and mould and timber rot;
 - d) Water penetration to front porches;
 - e) Degradation of paint work to cement render blocks in stage 3 of the property resulting in water penetration;
 - f) Substantial cracking of walls within lots allowing water penetration;
 - g) Water penetration into lots causing deterioration of ceilings and wall sheeting;
 - h) Water penetration through roof tiles;
 - i) Exterior windows of lots not sealed causing water penetration.²

¹ *Body Corporate for Parkwood Villas Community Titles Scheme 25893 v Queensland Building and Construction Commission* [2015] QCAT 059.

² Attachment 'A' to Application to review a decision filed 11 April 2014.

- [8] The body corporate commenced the review proceeding in April 2014. Since then, the review proceeding has effectively been stayed by agreement between the parties on the basis that the parties are awaiting the outcome of the proceeding in respect of the first complaint (it the appeal proceeding).
- [9] An application was made to the Tribunal by the QBCC in July 2014 to stay the review proceeding pending the outcome of the appeal proceeding ('the interim stay application'). The interim stay application was heard on 16 July 2014.
- [10] Prior to the hearing of the interim stay application, the solicitors for the body corporate wrote to the Tribunal on 17 June 2014 advising "*we accept that there is some overlap as to the complaint items between the first complaint and the current complaint and as such, it is our view that after the statement of reasons is delivered, the proceeding should be adjourned until a decision is made in respect of the first complaint.*". The "proceeding" being referenced in the letter was the review proceeding.
- [11] The interim stay was not granted.
- [12] The solicitors for the QBCC wrote to the Tribunal on 28 April 2015 advising that '*the parties continue to be awaiting (sic) the resolution of a related proceeding, GAR337-12. In this regard, Member Pennell's decision in GAR337-12 is now the subject of appeal proceeding APL120-15.*' The reference in the letter to APL120-15 is to the appeal proceeding the subject of this stay application.
- [13] Subsequently, on 28 July 2015, an Application for decision/order by consent was filed in the Tribunal in the review proceeding seeking to vacate a directions hearing listed for 30 July 2015 to a date not before 11 September 2015. The Tribunal subsequently made those orders by consent.
- [14] The actions of the parties as outlined above are, in my view, consistent with the parties not wishing to progress the review proceeding pending the outcome of the appeal proceeding.

What does the body corporate say?

- [15] The body corporate says that the Tribunal ordered a stay of the review proceeding on application by the QBCC (ie the interim stay application). The body corporate says that it opposed the application. It says in its written submissions that the review application has been stayed since approximately July 2014.
- [16] In the course of the hearing of the present stay application, the body corporate conceded that no formal stay order had been made by the Tribunal in July 2014. The body corporate says however that the review proceeding has essentially been stayed as a result of the Tribunal's decision in July 2014 not to order the QBCC to provide a statement of

reasons in relation to the second complaint. The body corporate now wishes to progress the review proceeding to a compulsory conference.

- [17] The body corporate says that if the review proceeding is resolved in the body corporate's favour, the result will be that it is likely the appeal proceeding will be withdrawn.
- [18] The body corporate says that significant costs will be incurred in respect of the appeal proceeding and, if it is successful on the appeal, there will be further costs associated with a re-hearing. The body corporate says that in the interests of cost efficiency, the appeal proceeding should be stayed pending the outcome of the review proceeding.
- [19] The body corporate says that it has good prospects of success in the appeal proceeding. It says that it will suffer disadvantage if a stay is not ordered. The body corporate says:
- a) There is commonality between the proceedings relating to the first and second complaints;
 - b) The factual matters in both proceedings are very similar;
 - c) The resolution of the review proceeding may resolve all of the litigation between the parties;
 - d) Resolution of the appeal will not resolve all of the issues between the parties;
 - e) The QBCC will suffer no disadvantage if the appeal proceeding is stayed particularly in view of the fact that the QBCC is not obliged to do anything as a result of the decision;
 - f) Granting the stay of the appeal and allowing the second complaint to be determined is consistent with the objects of the *Queensland Civil and Administrative Act 2009* (Qld) ('QCAT Act').

What does the QBCC say?

- [20] The QBCC opposes the stay application. The QBCC says that there is significant overlap between the issues in the appeal proceeding and the issues in the review proceeding.
- [21] The QBCC says that at the hearing of the interim stay application, the parties were in agreement that the review proceeding should be stayed pending the outcome of the appeal proceeding. It should be noted that this agreement was prior to the decision in the appeal proceeding at first instance.
- [22] The QBCC says that the appeal proceeding should be first determined as it is that proceeding which will impact upon the review proceeding and not the reverse. The QBCC says that the decision in the appeal proceeding will be highly persuasive if not generally binding upon the Tribunal in the review proceeding. The QBCC says that the determination of the issues in

the appeal proceeding will create an issue estoppel which will prevent the re-agitation of those issues in the review proceeding.

[23] The QBCC says that the determination of the appeal proceeding will resolve a number of issues in the review proceeding including the categorisation of defective building work, whether the QBCC is out of time to issue a direction to rectify to the builder and whether the builder was responsible for the defective building work.

[24] The QBCC says that irrespective of the outcome of the appeal proceeding, the review proceeding will be impacted. If the body corporate is unsuccessful in the appeal, the review proceeding should be significantly narrowed and overlapping issues can be resolved and will fall away. If the body corporate is successful in the appeal, the QBCC says it will have cause to reconsider its position in the review proceeding.

[25] The QBCC says that:

- a) It would not be economical to progress the review proceeding prior to the determination of the appeal proceeding. The costs of progressing the review application will be significant including the costs associated with expert evidence.
- b) The body corporate's position is premised upon it succeeding in both the appeal proceeding and the review proceeding. It would be a waste of Tribunal resources to progress the review proceeding in circumstances where the Tribunal has already decided, in the appeal proceeding, a number of the disputed issues in the review proceeding;
- c) The interests of justice would not be served by progressing the review proceeding prior to the determination of the appeal proceeding. It is neither fair nor just to permit the body corporate to seek a "second bite at the cherry" in litigating substantially the same issues in the review proceeding. The QBCC is entitled to the benefit of the Tribunal's decision at first instance in the appeal proceeding;
- d) It is vexatious for the body corporate to commence 2 actions for substantially the same remedy

[26] The QBCC says that if the body corporate is dissatisfied with the outcome of the appeal proceedings at first instance, then the appropriate course of action is for the appeal proceeding to be prosecuted rather than litigating substantially the same issues in the review proceeding.

Discussion

[27] This is a highly unusual application.

[28] The body corporate seeks to stay the appeal proceeding which has been the subject of a 2 day hearing before the Tribunal at first instance in which a large amount of evidence was given, including by experts. The Tribunal thereafter delivered its decision.

- [29] The body corporate has appealed the decision. The body corporate now seeks to stay the appeal proceeding and reactivate the review proceeding which has lain dormant for over 12 months.
- [30] The first point to note is that, contrary to the assertion by the body corporate, the review proceeding was not stayed by the Tribunal. In the course of argument of the interim stay application the following exchange took place:

MR THOMSON: Just a couple of housekeeping sort of things. Firstly, I've suggested there might be a formal order – well, it's a matter for the Senior Member whether the Senior Member thinks it's appropriate but there might be a formal order in terms of paragraph 2 of our application, that is, that the proceeding is stayed or adjourned or whatever language one wants to adopt - - -

SENIOR MEMBER: Well - - -

MR THOMSON: - - - at least until a directions hearing.

SENIOR MEMBER: Well I don't – that's why I've listed it for a directions hearing because I've vacated the orders. Nothing is to happen. There's no requirement on anyone to do anything and we'll look at (sic) again on the 4th of September.³

- [31] The Senior Member specifically declined to make a stay order. At no time has the review proceeding been stayed by order of the Tribunal. Rather, in my view, any stay has been operative as a result of agreement between the parties. The body corporate says that this was because the Tribunal declined to order the QBCC to deliver a statement of reasons and there was therefore no utility in its seeking to pursue the review proceeding.
- [32] That explanation does not, in my view, sit consistently with the more recent actions of the body corporate following the decision of the appeal proceeding at first instance.

The power of the Tribunal to order a stay

- [33] It is common ground that the Tribunal has the power to order a stay of the appeal proceeding.⁴ The Tribunal must be satisfied that the balance of convenience favours staying the proceeding.⁵ Whether to grant a stay requires the exercise of a discretion by the Tribunal.
- [34] The Tribunal must act in a way that is accessible, fair, just, economical, informal and quick.⁶ The Tribunal must also ensure that proceedings are conducted in an informal way that minimises costs to parties, and is as quick as is consistent with achieving justice.⁷
- [35] The general thrust of the body corporate's submissions is twofold:

³ Transcript of proceedings, p 14, lines 5 to 17.

⁴ QCAT Act s 58.

⁵ *King v King* [2010] QCATA 84.

⁶ QCAT Act s 3.

⁷ QCAT Act s 4.

- a) It says that it should be entitled to the stay on the basis that it has good prospects of success in the appeal proceeding; and
- b) It will suffer disadvantage if the stay is not granted on the basis that the resolution of the review proceeding will resolve all issues in dispute between the parties which the resolution of the appeal proceeding cannot do.
- [36] It is not possible on the hearing of an application such as this to make specific findings as to the extent to which the issues the subject of the appeal proceeding overlap with the review proceeding.
- [37] In the course of the hearing of the present application, there was reference to the interim stay application which has 2 attachments:
- Attachment 1 is a Complaint Table relating to the first complaint (the subject of the appeal proceeding);
 - Attachment 2 is a Complaint Table relating to the second complaint (the subject of the review proceeding).
- [38] In the course of the hearing of the interim stay application, counsel for the QBCC made extensive oral submissions on the extent to which the issues relating to the relevant building works overlapped between the proceedings. Counsel for the QBCC also observed that:
- Almost certainly after Member Pennell's decision is delivered the Commission will have to deliver an amended statement of reasons in these proceedings one way or the other. Whether we lose every point or win every point, it's going to have some effect on the statement of reasons.⁸
- [39] In the course of argument in the present application, the QBCC submitted that there is significant overlap between the issues in the appeal proceeding and the review proceeding.
- [40] The body corporate conceded that there was a degree of overlap but was not prepared to go so far as to say that the degree of overlap was significant.
- [41] I find it difficult to reconcile the position of the body corporate with its submissions in the present application that there is commonality between the proceedings relating to the first and second complaints; the factual matters in both proceedings are very similar; and the resolution of the review proceeding may resolve all of the litigation between the parties. These submissions all indicate that the body corporate is very much aware of the overlap between the two proceedings.
- [42] The QBCC says that the decision of the Appeal Tribunal will be, if not binding, then highly persuasive in the determination of the review proceeding.

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Op cit 3 – page 5, lines 8 – 12.

- [43] In *Gagliano & Anor v Queensland Building and Construction Commission* ('*Gagliano*')⁹ Member Howard considered the issue of appeals from the Administrative Appeals Tribunal to the Federal Court, noting that the doctrine of precedent applies in respect of those appeal decisions which are binding on the AAT.
- [44] In *Gagliano* it was argued that a tribunal is not bound by the doctrine of precedent when performing an administrative function and that a decision of the QCAT Appeal Tribunal could not be binding on the tribunal. It was argued that any such decision would nevertheless be persuasive.
- [45] Whilst not reaching any concluded view on the matter, Member Howard observed:
- Arguably, the QCAT Appeals Tribunal is in a substantially similar position when exercising QCAT's appeals jurisdiction to the Federal Court vis-à-vis appeals from the AAT.¹⁰
- [46] As this Tribunal has observed, the duty to do justice according to law warrants a departure if higher authority so requires.¹¹
- [47] I do not have the benefit of detailed submissions from the parties on the point identified by Member Howard in *Gagliano* as to whether the Appeals Tribunal exercises judicial or administrative power in determining an appeal from review proceedings. Nevertheless, I accept the QBCC's submission that the decision of the Appeals Tribunal in the appeal proceeding will be, at the very least, highly persuasive in the review proceeding.
- [48] The QBCC says that questions of issue estoppel will arise in respect of any specific issues which are finally determined by the Appeal Tribunal in the appeal proceeding. Issue estoppel does not arise unless in two proceedings there is an identity of parties and an identity of issues. The previous issue must have been an ultimate issue which was part of a final judgment on the merits.¹² This cannot occur in the context of a review of an administrative decision.¹³
- [49] It has been held that in circumstances where a Tribunal is not bound by the rules of evidence, the principle of issue estoppel does not arise on the basis that it is a rule of evidence.¹⁴
- [50] The QBCC submits that aside the question of whether issue estoppel arises, the evidence given in the appeal proceeding and the findings of the Tribunal will be relevant and persuasive in the review proceeding.

⁹ [2014] QCAT 504.

¹⁰ Ibid at [37].

¹¹ *Watkins v Queensland Building Services Authority* [2013] QCAT 535.

¹² *Coral Homes (Qld) Pty Ltd v Queensland Building Services Authority* [2012] QCATA 241.

¹³ Ibid [103].

¹⁴ *Minister for Immigration & Multicultural Affairs v Ali* [2000] FCA 1385 at [32].

- [51] Without making a determination on the specific question of whether and to what extent an issue estoppel may arise, I agree with the QBCC's submission that the evidence in the appeal proceedings, particularly the expert evidence, will be relevant in the review proceeding.
- [52] The body corporate submits that should the review proceeding progress to a compulsory conference it is '*hoped*' that the review proceeding may be resolved. If this occurs, the body corporate says that the appeal proceeding may be discontinued. The QBCC's response is that it has the benefit of a decision of the Tribunal and that the position taken by the body corporate is optimistic in the sense that it involves a number of "if's" resolved in the body corporate's favour.
- [53] I agree with the QBCC.
- [54] The review proceeding is one which may traverse a long path to final resolution. Statements by witnesses will be required. Further expert evidence will be required as acknowledged by the parties during the course of oral argument in the present application. A conclave of experts will be required to be held. There will be the inevitable delay in obtaining a hearing date and, of course, there is always the prospect of an appeal.
- [55] The appeal proceeding could be stayed for many months pending the review proceeding being progressed to final resolution.
- [56] Considerations in relation to the impact of granting a stay of the appeal proceeding extend beyond the interests of the parties. As the High Court has observed:
- In the proper exercise of the primary judge's discretion, the applications for adjournment and amendment were not to be considered solely by reference to whether any prejudice to Aon could be compensated by costs. Both the primary judge and the Court of Appeal should have taken into account that, whatever costs are ordered, there is an irreparable element of unfair prejudice in unnecessarily delaying proceedings. Moreover, the time of the court is a publicly funded resource. Inefficiencies in the use of that resource, arising from the vacation or adjournment of trials, are to be taken into account. So too is the need to maintain public confidence in the judicial system.¹⁵
- [57] The body corporate says that it is now progressing the review proceeding and will be seeking directions from the Tribunal in relation to the delivery of a statement of reasons by the QBCC.
- [58] The body corporate says that the delivery of the decision at first instance in the appeal proceeding has been the trigger for the present application. As I have noted, I find this explanation unconvincing. It would appear that the body corporate's decision to pursue this application has been prompted by its dissatisfaction with the decision in the appeal proceeding. There has, in my view, been no persuasive reason advanced by the body corporate in relation to this somewhat abrupt change of position.

¹⁵ *Aon Risk Services Australia Limited v Australian National University* [2009] HCA 27.

- [59] The inevitable delay associated with the stay of the appeal proceeding to enable the review proceeding to be progressed is not consistent with the requirement by the Tribunal to deal with matters in a way that is accessible, fair, just, economical, informal and quick. Nor is it consistent with the obligation on the tribunal to ensure that proceedings are conducted in an informal way that minimises costs to parties, and is as quick as consistent with achieving justice.
- [60] It would be an inefficient use of the Tribunal's resources to order a stay of an appeal which is well advanced, in order to permit proceedings which have barely commenced to proceed. As this Tribunal has observed, the fundamental principle governing applications for a stay is that the successful party is prima facie entitled to the benefit of the decision in its favour.¹⁶ In this case, the QBCC is entitled to the benefit of the certainty of the outcome of the appeal proceeding at first instance, at least until the appeal is determined.

Conclusion and orders

- [61] In the circumstances I am not persuaded that the balance of convenience favours the granting of the stay. The body corporate has not established a basis upon which the Tribunal's discretion to order a stay should be exercised in its favour.
- [62] Granting a stay would be inconsistent with the objects and functions of the Tribunal. It would be an inefficient use of Tribunal resources and result in the resolution of the matters in dispute between the parties being prolonged, potentially for a lengthy period time.
- [63] The application for a stay of the appeal proceeding is dismissed.

Order

1. The application is dismissed.

¹⁶ *Solar Energy Australia Group Pty Ltd v Bannink* [2013] QCATA 14 at [3].