

CITATION: *Ross-Gilder Holdings Pty Ltd v Body Corporate for La Promenade Beachfront Caloundra CTS 15476* [2016] QCATA 129

PARTIES: Ross-Gilder Holdings Pty Ltd
(Appellant)
v
Body Corporate for La Promenade Beachfront
Caloundra CTS 15476
(Respondent)

APPLICATION NUMBER: APL067-16

MATTER TYPE: Appeals

HEARING DATE: 8 August 2016

HEARD AT: Brisbane

DECISION OF: **Senior Member Brown**
Member Lumb

DELIVERED ON: 2 September 2016

DELIVERED AT: Brisbane

ORDERS MADE:

- 1. Appeal dismissed.**
- 2. The parties shall file (and serve on the other party), within 14 days of the date of these orders, written submissions (no longer than 4 pages) in respect of the question of costs of the appeal.**

CATCHWORDS: REAL PROPERTY – STRATA AND RELATED TITLES – MANAGEMENT AND CONTROL – BODY CORPORATE: POWERS, DUTIES AND LIABILITIES – POWER TO SUE AND BE SUED – Appeal from decision of adjudicator – body corporate resolution - agreement of body corporate to execute all applicable documents to enable lot owner to obtain approvals to construct – Whether adjudicator failed to consider argument – Whether body corporate was obliged to enter into a seabed lease – Proper construction of resolution

Body Corporate and Community Management Act 1997 (Qld) ss 289(1)(a), (b), (c), (d)(i), (d)(ii)(A), s 289(2), s 294(1)

Land Act 1994 (Qld) ss 373A(3), 97A(3)(c)
Land Title Act 1994 (Qld) s 97A(3)(C)

Albrecht v Ainsworth & Ors [2015] QCA 220
Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd
 (2004) 219 CLR 165
Electricity Generation Corporation v Woodside Energy Ltd and Ors; Woodside Energy Ltd and Ors v Electricity Generation Corporation (2014)
 251 CLR 640

APPEARANCES:

APPLICANT: Mr Andrew Sinclair of Counsel, instructed by Griffiths Parry Lawyers

RESPONDENT: Mr Chris Carrigan of Counsel instructed by Simpson Quinn Lawyers

REASONS FOR DECISION

- [1] On 29 January 2016 Ross-Gilder Holdings Pty Ltd (as trustee for the RG Property Trust) (the Appellant) filed an Application (the Application) to review a decision of an Adjudicator dated 17 December 2015 (the Decision below). By the Decision below, the Adjudicator dismissed an application lodged by the Applicant on 17 September 2015.
- [2] The Respondent to the application (the Body Corporate) is the Body Corporate for La Promenade Beachfront Caloundra CTS 15476 (the Scheme).
- [3] The Appellant is the owner of Lot 1 in the Scheme. As occupier, the Appellant is entitled to use Lot 1 for commercial purposes as a restaurant/cafe and is entitled to the exclusive use of that part of the common property adjacent to Lot 1. The Appellant runs a restaurant named *La Promenade Cafe* on Lot 1.
- [4] By a decision of the Tribunal dated 15 February 2016, the Application was transferred to the QCAT Appeal Tribunal list to be heard and determined as an appeal against the Decision below.

The Decision below

- [5] The application before the Adjudicator involved a consideration of two resolutions of the Body Corporate, the first being a resolution made at an Extraordinary General Meeting of the Body Corporate held on 23 December 2009 (which we will refer to as “the 2009 resolution”) and the second resolution being made in 2013. Pursuant to the 2013 resolution, the Body Corporate agreed to make an application to the “DNRM” (the Department of Natural Resources and Mines) for a lease of part of the

seabed adjacent to the exclusive use area of Lot 1. This was done by way of a “flying minute” of a resolution of the Committee of the Body Corporate. The Adjudicator concluded that the 2013 resolution involved a restricted issue for a committee and required a resolution without dissent. The Appellant did not challenge this finding on appeal.

- [6] It is only the 2009 resolution that is material to this appeal.
- [7] By the 2009 resolution the Body Corporate passed Motion 7, by a resolution without dissent, in the following terms:
- a) **Resolved** that, by resolution without dissent, the Body Corporate agrees that at the request of the owner of Lot 1, it will execute all applicable documents as Applicant to enable the Owner of Lot 1 to obtain all necessary approvals to construct, at the cost of the Owner of Lot 1, an Over-Water Deck which will be as near as possible in length from the South-East corner of the scheme to the South –West boundary of the exclusive use area of Lot 1 on Level B and to form part of a structure that will be as near as possible in length from the South-east corner of the scheme to the South-West boundary of the scheme, and to construct the Over-water Deck, and
 - b) The Body Corporate agrees that the Owner of Lot 2, in conjunction with the Owner of Lot 1 shall be entitled to obtain all necessary approvals to construct, at the cost of the owners of Lot 2, that part of the Over-Water Deck that is not the responsibility of Lot 1 as previously described in this motion, subject to the following-
 - i) Prior written approval of the Committee for plans before lodging with any authority for approval, provided however that the Committee shall not unreasonably withhold its consent; and
 - ii) Plans for such Over-Water Deck to be lodged with the Body Corporate for approval not later than 31 December 2014 and thereafter lodged with all relevant authorities for approval not later than six (6) calendar months after receiving the Body Corporate approval; and
 - iii) Works for such Over-Water Deck to commence not later than nine (9) months after receipt for approvals from all relevant authorities; and
 - iv) All costs in relation to the Over-Water Deck to be met by the Owners of Lots 1 and 2 and not the Body Corporate; and
 - v) Constructions of the Over-Water Deck to be undertaken in one complete constructions programme, and if agreement is not reached between Owners of Lots 1 and 2 in relation to any aspect of the work, no work is to commence; and
 - vi) The Body Corporate will meet all ongoing costs in relation to the Over-Water Deck including maintenance, insurances, licenses, permits etc. on condition that Lot Owners 2-23 be allowed to moor vessels, if mooring space is available, any day for a maximum of one (1) hour between the hours of 7am and 5pm; and
 - vii) If approval for such works has not been obtained from all relevant authorities by 31 December 2015, the approval by the Body Corporate is withdrawn; and

viii) The Owners of Lots 1 and 2 shall ensure that the Over-Water Decks are kept in a clean and tidy condition at all times.

[8] Pursuant to the application below, the Appellant sought the following declarations:¹

1. That the Respondent execute all applicable documents and take all steps necessary to enable the Applicant to obtain all necessary approvals to construct an over-water deck to the extent of and consistent with paragraph 1 of the Resolution of the Body Corporate dated 23 December 2009, including but not limited to if necessary:
 - a) The entering into of a Seabed Lease with the DNRM to the extent necessary for construction of the over-water deck;
 - b) The entering into of a transferable sublease or an exclusive use licence over the Seabed lease for an over-water deck;
 - c) The granting of exclusive use to the Applicant over the sliver of common property over which access to the proposed over-water deck is required or alternatively, the taking of the Statutory and other steps necessary for the Applicant to purchase that common property from the Body Corporate at a price to be agreed or failing agreement, by valuation;
 - d) A finding that the Applicant is entitled to construction of the over-water deck, roof structure and ancillary works insofar as they relate to and are confined within Lot 1, Lot 1's exclusive use area, the Body Corporate Property between Lot 1's exclusive use area and the proposed over water-deck as depicted in the preliminary sketches and documents referred to in the email from the Applicant to the Respondent dated 30 November 2009 so far as it relates to the improvement adjoining Lot 1;
 - e) An extension, if necessary, to the Resolution to allow completion of the improvements.

[9] The Adjudicator dismissed the application.

The "Seabed Lease"

[10] It is necessary to identify the so-called "Seabed Lease" which the Appellant sought to require the Body Corporate to execute. The relevant documentation is found at pages 49 – 62 of the Annexures to the Submissions by the Committee of the Body Corporate below.

[11] That documentation comprised an "Agreement to Offer a Term Lease" which contained various obligations required of the Body Corporate and also incorporated specified terms and conditions which were referred to in the Agreement as the "Conditions Report". For ease of reference, we are content to adopt the nomenclature "Seabed Lease" in respect of the composite (unsigned) documentation identified above (which we consider would more properly be characterized as a draft agreement for lease).

¹ Decision below at [3].

- [12] The Seabed Lease required the Body Corporate to satisfy the following “Offer Requirements”:
- a) complete and return the Agreement;
 - b) make payment of the sum of \$4,500.90 (which comprised three items being, first, a “Deposit” (being an estimate of the first year’s rent) of \$4,093.10; secondly, a “Lease/License/Permit Fee” of \$63.30; and, thirdly a “Plan Lodgement Fee” of \$344.50;
 - c) lodgement of a Survey Plan;
 - d) completion and return of a “fully signed” Form 31 Covenant Document (the Form 31 Covenant) referred to as the “Tied Covenant”.
- [13] The Seabed Lease provided for:
- a) a term of 20 years; and
 - b) an annual rent of 6% of the rental valuation (the commencing annual rent being \$3,721.00).
- [14] The terms and conditions which were incorporated included:
- a) an indemnity on the part of the Body Corporate of the Minister and the State of Queensland and its representatives against all liability, costs and expenses including claims in negligence arising from or incurred in connection with, among other things, the Body Corporate’s use and occupation of the land or personal injury or property damage or loss in connection with the performance (or attempted purported performance or non-performance) of the Seabed Lease or a breach of that lease by the Body Corporate;
 - b) a requirement that the Body Corporate effect a public liability insurance policy for an amount not less than \$20 million to be effected on a “claims occurring” basis and to be maintained at all times during the currency of the Seabed Lease.
- [15] The proposed Form 31 Covenant described the covenant as “Pursuant to Section 97A(3)(C) of the Land Title Act 1994 and Section 373A(3) of the Land Act 1994”. The *Land Title Act* 1994 (Qld) reference should have referred to “Section 97A(3)(c)”. The apparent purpose of the Form 31 Covenant was to ensure that Lot 0 on PUP 105255 (seemingly the common property of the Scheme) could only be transferred if the leasehold land the subject of the Seabed Lease was also transferred.

The Appeal

- [16] The Applicant alleged the following errors of law on the part of the Adjudicator:
- a) The Adjudicator erred in law by failing to consider what were the fair and equitable orders to make as a result of her findings in respect of the validity of the 2009 Resolution.

- b) The Adjudicator erred in law by making a decision for which there was no evidence namely that the Body Corporate ‘had signed all other applicable documents as requested.’ when there was no evidence the body corporate had signed any document it was requested to.
 - c) The Adjudicator erred in law in failing to consider item (a) of the application namely whether the terms of the 2009 Resolution alone required the body corporate to enter into the seabed lease.
 - d) The Adjudicator erred in law in failing to consider item (c) of the application namely whether the terms of the 2009 Resolution alone required the body corporate to enter into a sub-lease of the sliver common property or the grant of exclusive use of it to the Appellant.
 - e) The Adjudicator erred in law by failing to consider item 1(e) of the application relating to the granting of an extension.
- [17] By its written Outline of Submissions filed on 6 May 2016, the Appellant abandoned Ground (d).²
- [18] At the commencement of the Appeal, Counsel for the Appellant advised the Appeal Tribunal that the Appellant wished to address Ground (c) only. During the course of argument, Counsel developed two arguments in support of that ground, first, that the Adjudicator had erred in law in failing to address the question of whether the terms of the 2009 resolution required the Body Corporate to enter into the Seabed Lease and, alternatively, if it were concluded that the Adjudicator had considered that question, that the Adjudicator erred in law in the Adjudicator’s construction of the 2009 resolution.
- [19] Counsel for the Appellant indicated that the orders sought were either:
- a) that the matter be returned to the Adjudicator for reconsideration; or
 - b) that the Appeal Tribunal exercise the powers of the Adjudicator (as it is entitled to do) to order that the Body Corporate be required to enter into the Seabed Lease.

The legal framework for the appeal

- [20] The Applicant is an “aggrieved person” within the meaning of s 289 of the *Body Corporate and Community Management Act 1997* (Qld) (the BCCMA) on the basis that the application below was made under Chapter 6 of the BCCMA; the Adjudicator made an order for the application other than a consent order; the order was a decision other than one mentioned in s288A; and the Appellant was an applicant for such order.³ The contrary was not contended on the appeal.

² Outline of Submissions at [3].

³ BCCMA ss 289(1)(a)-(d)(ii)(A).

- [21] The Appellant is entitled to appeal to the Appeal Tribunal but only on a question of law.⁴
- [22] An appeal to the Tribunal from the decision of an adjudicator is an appeal in the strict sense.⁵ In deciding an appeal, in addition to the jurisdiction and powers of the Appeal Tribunal under the *Queensland Civil and Administrative Tribunal Act 2009* (Qld) (QCAT Act), the Appeal Tribunal may exercise the adjudicator's powers and substitute its own decision based on the material before the adjudicator, consistent with the adjudicator's undisturbed factual findings.⁶ The orders which an adjudicator may make are set out in s 276 of the BCCMA and include, without limitation, those orders set out in schedule 5 to the Act.

Did the Adjudicator consider the operation of the 2009 Resolution in relation to the Seabed Lease?

- [23] The first issue on the appeal is whether the Adjudicator erred in law by failing to consider whether the Body Corporate was required to execute the Seabed Lease by reason of the 2009 resolution. The Appellant submitted that the Adjudicator addressed the question only in relation to the 2013 resolution.
- [24] The orders sought by the Appellant at first instance did not clearly identify that there were two discrete bases upon which it was contended the Body Corporate was obliged to enter into the Seabed Lease, namely by virtue of the 2009 resolution or by virtue of the 2013 resolution. Notwithstanding this, we consider that, on a proper reading of the Reasons as a whole, the Adjudicator did address, albeit briefly, the question of whether the 2009 resolution encompassed execution of the Seabed Lease.
- [25] At Reasons [39], the Adjudicator said:

The issue of the body corporate granting exclusive use rights over that sliver of common property at the front of Lot 1 is also a restrictive issue and must be voted on by an ordinary resolution of the Body Corporate. The Committee either did not contemplate or failed to include the matter in the 2009 Motion and the subsequent 2009 Resolution does not cover the seabed lease issue. Further, the 2009 Resolution did not contemplate the fact that a sublease may or would be required to contract with the owner of Lot 1 to exercise exclusive use over the seabed for the construction of the over-water deck. In my view, either such matters were not contemplated or considered necessary at the time. I find that the issue of a transferrable sublease or an exclusive use licence over a seabed lease is for restrictive use rights and as such can only be approved by the body corporate by a resolution without dissent. The second and third orders sought must be refused. (underlining added)

- [26] The Appellant correctly points out that the first sentence of [39] refers to the grant of exclusive use rights over a "sliver" of common property at the

⁴ BCCMA s 289(2).

⁵ *Albrecht v Ainsworth & Ors* [2015] QCA 220.

⁶ *Ibid*; BCCMA s 294(1).

front of Lot 1. However, we consider that the balance of that paragraph is not so confined. The Adjudicator makes express reference to the 2009 resolution not covering “the seabed lease issue”. When regard is had to the phrase “seabed lease”, we conclude that this was a reference to the question of whether the Body Corporate could be compelled to enter into the Seabed Lease. This is fortified by the concluding sentence to Reasons [39] in which the Adjudicator stated that the second and third orders sought must be refused.

- [27] The second order involved the entry into the Seabed Lease by the Body Corporate. We reject the Appellant’s argument that the language of the second sentence of [39] should be construed to mean that the 2009 resolution did not “mention” the Seabed Lease as distinct from not “encompassing” the Seabed Lease. Support for that argument is not found in the plain language adopted by the Adjudicator.
- [28] For these reasons, we reject the Appellant’s contention that the Adjudicator did not address at all the question of whether the 2009 resolution required the Body Corporate to enter into the Seabed Lease.
- [29] The next issue is whether, on a proper construction of the 2009 resolution, the Seabed Lease is an “applicable” document (with the Appellant as “Applicant”) to enable the Appellant to obtain all necessary approvals to construct an “Over-Water Deck” (the proposed deck).

The proper construction of the 2009 resolution

- [30] The dimensions of the proposed deck were not identified in the 2009 resolution or in any accompanying plans. It appears that the length of the proposed deck could be gleaned from the language of the resolution in conjunction with the registered plans of the Scheme. However, neither the width of the proposed deck (nor its height) was capable of identification. No point was taken in relation to the lack of delineation of the metes and bounds of the proposed deck.
- [31] Neither party sought to rely upon extrinsic evidence to assist in the interpretation of the 2009 resolution, so as to resolve any case of ambiguity. Such a course would not have been open given that no such evidence was placed before the Adjudicator.
- [32] The parties were in agreement that the principles of construction applicable to contracts were applicable to the proper interpretation of the 2009 resolution.
- [33] The relevant general principle was set out in *Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd*:⁷

⁷ (2004) 219 CLR 165 at [40] per Gleeson CJ, Gummow, Hayne, Callinan and Heydon JJ; see also *Electricity Generation Corporation v Woodside Energy Ltd and Ors*; *Woodside Energy Ltd and Ors v Electricity Generation Corporation* (2014) 251 CLR 640 at [35].

It is not the subjective beliefs or understandings of the parties about their rights and liabilities that govern their contractual relations. What matters is what each party by words and conduct would have led a reasonable person in the position of the other party to believe. References to the common intention of the parties to a contract are to be understood as referring to what a reasonable person would understand by the language in which the parties have expressed their agreement. The meaning of the terms of a contractual document is to be determined by what a reasonable person would have understood them to mean. That, normally, requires consideration not only of the text, but also of the surrounding circumstances known to the parties, and the purpose and object of the transaction. (footnotes omitted)

- [34] The question is what a reasonable person would have understood the terms of the 2009 resolution to mean.
- [35] The Body Corporate was to “execute” documents to enable the Appellant, as “Applicant”, to obtain all necessary “approvals to construct” the proposed deck.
- [36] The Appellant contends that the language of the 2009 resolution is very broad and necessarily encompasses the Seabed Lease (or at least “a” seabed lease). We reject that contention.
- [37] In our view, construing the resolution as a whole, the focus of the clause is on the physical construction of the proposed deck and the approvals necessary to enable the Appellant to do so. The resolution refers only to the “execution” of a document; it does not purport to require the Body Corporate to enter into contracts nor does it refer to the Body Corporate “performing any acts” necessary obtain the approval to construct.
- [38] In our view, a reasonable person would not understand the language of the 2009 resolution to encompass the entry by the Body Corporate into a binding agreement with a third party creating binding legal obligations as between that third party and the Body Corporate. We consider that entry into the Seabed Lease would entail a greater obligation on the part of the Body Corporate than the mere execution of a document necessary to obtain “approval to construct” and that the generality of the language of the 2009 resolution does not extend to creating a primary obligation to enter into such an agreement. This conclusion is sufficient to dispose of the Appellant’s second argument.
- [39] Nevertheless, we consider there are two additional obstacles to the Appellant’s case.
- [40] First, the orders sought by the Appellant required the Body Corporate to enter into the Seabed Lease. In order to enter into the (binding) Seabed Lease, the Body Corporate was also required by the State of Queensland/DNRM to:
- a) pay the sum of \$4,500.90; and
 - b) execute the Form 31 Covenant.

- [41] Even on the broadest view of the 2009 resolution, there could be no basis for concluding that the Body Corporate was also obliged to make a payment of money. The Body Corporate's obligation was merely to *execute* applicable documents.
- [42] Further, the required Form 31 Covenant was not necessary in order for an approval to construct to be obtained by the Appellant; rather it was an ancillary obligation required by the State of Queensland/DNRM in order to grant the proposed lease. The 2009 resolution did not authorise the Body Corporate to enter into the Form 31 Covenant.
- [43] In our view, in light of the above, there was no proper basis for the Body Corporate to be compelled to execute the Seabed Lease.
- [44] Secondly, Counsel for the Body Corporate referred to s 164 of the Accommodation Module under the BCCMA which provides, inter alia:

(1) This section states the way and the extent that the body corporate may acquire, and enter into agreements about the use of, real and personal property.

(2) The body corporate may, in the name of the body corporate—

- (a) acquire freehold land for the use and enjoyment of the owners or occupiers of lots included in the community titles scheme; or
- (b) acquire a leasehold interest in freehold or non-freehold land for the use and enjoyment of the owners or occupiers of lots included in the scheme; or
- (c) acquire a licence or concession related to land for the use and enjoyment of the owners or occupiers of lots included in the scheme, or surrender a licence or concession related to land previously acquired by the body corporate as a body corporate asset; or
- (d) acquire personal property (other than personal property mentioned in paragraph (b) or (c)) for the general use and enjoyment of the owners and occupiers of lots included in the scheme.

Example— The body corporate may under subsection (2)(c) acquire rights to establish or use moorings for vessels.

(3) The body corporate may exercise its powers under this section only if authorised by a resolution without dissent if the proposal is—

- (a) to acquire freehold land; or
- (b) to enter into a lease of more than 10 years.

...

- [45] Given the 20 year term of the Seabed Lease, by reason of s 164(3)(b) of the BCCMA, a resolution without dissent was required to authorise the Body Corporate to enter into that lease. The Appellant's case was that the 2009 resolution had the effect of authorising entry into the Seabed Lease. However, the 2009 resolution made no reference to the Seabed Lease (or any lease). Section 164 contemplates authorisation, by resolution without dissent, to enter into the acquisition of freehold land or the entry into a lease of more than 10 years as the case may be. It is unnecessary to decide whether a resolution that authorises entry into a lease of more than 10 years in general terms (without reference to a particular lease) constitutes a sufficient authorisation for the purposes of s 164(3)(b). In the present case, it is our view that the absence of any reference to a lease exceeding 10 years precludes the 2009 resolution from constituting valid authorisation of the Body Corporate to enter into the Seabed Lease.
- [46] The Appellant has not demonstrated any error of law on the part of the Adjudicator.

Conclusion

- [47] For the reasons set out above, the appeal is dismissed.

Costs of the Appeal

- [48] The Appeal Tribunal will allow the parties 14 days to file written submissions in relation to the question of costs.

Orders made

- [49] The formal orders of the Appeal Tribunal are as follows:
1. The appeal is dismissed.
 2. The parties shall file (and serve on the other party), within 14 days of the date of these orders, written submissions (no longer than 4 pages) in respect of the question of costs of the appeal.