

CITATION: *Davis & Santelli v The Body Corporate Westminster House Clayfield* [2016] QCATA 132

PARTIES: Anthony Davis and Tifini Santelli
(Applicants)
v
The Body Corporate Westminster House
Clayfield CTS 30996
(Respondent)

APPLICATION NUMBER: APL159-15

MATTER TYPE: Appeals3

HEARING DATE: 24 September 2015, 23 June 2016

HEARD AT: Brisbane

DECISION OF: **Senior Member Brown**
Member Dr Cullen

DELIVERED ON: 12 September 2016

DELIVERED AT: Brisbane

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

CATCHWORDS: PROCEDURE – CIVIL PROCEEDINGS IN STATE AND TERRITORY COURTS – PARTIES AND REPRESENTATION – GENERALLY – where applicants were lot owners at time of application for adjudication – where applicants were aggrieved persons at time of filing appeal against decision by adjudicator – where applicants subsequently sold lot – whether applicants had standing to continue with appeal – whether appeal became vexatious or without substance

Body Corporate and Community Management Act 1997 (Qld), s 31, s 227(1)(b), s 228(3), s 229(3), s 238(1)(a), s 238(1)(b), s 239C(1), s 239C(2), s 248(1), s 248(3)(e), s 248(3)(f), s 251(1), s 251(9), s 270(1)(c), s 270(1)(e), s 276(1)(b), s 276(3), s 289(1), 289(2), 294(1), Schedule 6
Queensland Civil and Administrative Tribunal

Act 2009 (Qld), s 6(2)(a), s 25(b), s 146(a), s 146(b), s 146(c), s 146(d)
Administrative Appeals Tribunal Act (1975)
 (Cth), s 42B

Albrecht v Ainsworth & Ors [2015] QCA 220
Ericson v Queensland Building Services Authority [2013] QCA 391
Allan v Transurban City Link Pty Ltd (2001) 208 CLR 167
Re Ripszam and Minister for Infrastructure and Regional Development [2013] AATA 918
Fearnley v Australian Fisheries Management Authority (2006) 94 ALD 519
Fearnley v Australian Fisheries Management Authority [2005] AATA 147
Transurban City Link Ltd v Allan (1999) 95 FCR 553
Saviane v Hope Island Resort Principal Body Corporate & Anor [2014] QCATA 355
Re McHattan and Collector of Customs (1977) 18 ALR 154

APPEARANCES:

APPLICANT:

Tifini Santelli appearing on behalf of the Applicants

RESPONDENT:

Richard Robinson and Andrew Turner appearing on behalf of the Respondent

REASONS FOR DECISION

What is this appeal about?

- [1] Anthony Davis and Tifini Santelli (the applicants) purchased a lot in Westminster House, a Community Titles Scheme comprising 15 lots. After purchasing the lot, the applicants discovered that the boundary walls between their lot and the common property were different to the boundaries indicated on the survey plan approved by the Brisbane City Council and subsequently registered. The applicants applied to the Body Corporate and Community Management Commissioner for orders that the original boundary walls and doors be reinstated and that common property electrical infrastructure items situated on lot 4 be relocated. An adjudicator dismissed the application. The applicants have appealed against that decision.

The statutory framework

- [2] A person aggrieved by the decision of an adjudicator may appeal to the Tribunal¹ however only on a question of law.² It is an appeal in the strict sense, not an appeal by way of re-hearing³ and must be determined on the material before the adjudicator.⁴
- [3] In deciding an appeal, the Tribunal may exercise the powers and jurisdiction conferred by the QCAT Act and the powers and jurisdiction of an adjudicator under the BCCMA.⁵ The Tribunal may amend or substitute an order that the adjudicator could have made; confirm or amend the decision⁶; set aside the decision and substitute its own decision⁷; set aside the decision and return the matter to the adjudicator for reconsideration⁸; or make any other order considered appropriate.⁹
- [4] If an error of law is identified then the 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.¹⁰ It is only if the determination of the question of law is capable of resolving the matter as a whole in the appellant's favour that the appeal tribunal will be in a position to substitute its own decision: s 146 QCAT Act does not entail any re-hearing of the matter, whether on the evidence below or on fresh evidence.¹¹

The background to the appeal

- [5] The applicants purchased their lot in August 2012. Soon after moving in to the property they raised with the body corporate their concerns regarding the positioning of the boundary walls. It was only after taking possession of the lot that the applicants noted certain features on the ceiling of the common property immediately outside their lot which indicated that the walls separating the lot from the common property had previously been in a different position with the result that their lot was smaller in size. The features identified by the applicants appeared to accord with the boundary of lot 4 as it appeared on the registered survey plan.¹²
- [6] A survey was undertaken. The surveyor expressed an opinion which accorded with the view of the applicants as to the position of the boundary walls. Negotiations were thereafter undertaken between the applicants

1 *Body Corporate and Community Management Act 1997* (Qld), s 289(1).

2 *Ibid*, s 289(2).

3 *Albrecht v Ainsworth & Ors* [2015] QCA 220 at [94]

4 *Ibid*.

5 *Body Corporate and Community Management Act 1997* (Qld), s 294(1).

6 *Queensland Civil and Administrative Tribunal Act 2009*, s 146(a).

7 *Ibid*, s 146(b).

8 *Ibid*, s 146(c).

9 *Ibid*, s 146(d).

10 *Albrecht v Ainsworth & Ors* [2015] QCA 220

11 *Ericson v Queensland Building Services Authority* [2013] QCA 391

12 Survey plan reference

and the body corporate in an attempt to resolve the matter. The negotiations were ultimately unsuccessful.

- [7] In June 2014, the applicants lodged an adjudication application. The applicants sought orders that the temporary boundary walls between lot 4 and the common property be removed and replaced with an appropriately fire rated wall, that the temporary internal wall between lot 4 and the storeroom be removed and that the electrical and telephone boards and light switch in the storeroom be removed and relocated to the common property.
- [8] An adjudicator dismissed the application, finding that there was no evidence as to when or by whom the boundary walls were removed and the temporary walls erected.¹³ The adjudicator found that the *Body Corporate and Community Management Act 1997* (Qld) did not impose upon the body corporate liability for the cost of relocating the walls.¹⁴
- [9] The applicants appealed to the Tribunal. After the hearing of the appeal, the Tribunal was made aware that the applicants had sold lot 4. A further directions hearing was held which was attended by the body corporate, but not by the applicants. At the directions hearing, the body corporate confirmed that the applicants had sold lot 4 and advised the Tribunal that the new owners of lot 4 were in negotiation with the body corporate with a view to resolving the issues relating to the boundary walls and items of common property. Directions were made requiring the applicants to advise the Tribunal whether they intended proceeding with the appeal.
- [10] The applicants subsequently communicated with the Tribunal advising that they had sold lot 4 and enquiring as to whether they could continue the appeal on behalf of the new owner of lot 4. The Tribunal made further directions requiring the applicants to file submissions as to the basis upon which they say they have standing to continue with the appeal in light of their sale of the lot. Directions were also made requiring the Body Corporate to serve the Tribunal's further directions and the original decision by the adjudicator on the current owner of lot 4. Any application by a person, including the current owner of lot 4, to be joined as a party to the appeal was directed to be filed by a specified date. The applicants have filed no submissions nor has any other person applied to be joined as a party to the appeal.

The *Body Corporate and Community Management Act 1997* (Qld) (“BCCMA”)

- [11] A dispute under the BCCMA includes a dispute between the body corporate for a community titles scheme and the owner or occupier of a lot included in the scheme.¹⁵ The only remedy for a dispute that is not a complex dispute is the resolution of the dispute by a dispute resolution

¹³ Reasons [33]

¹⁴ Reasons [40]

¹⁵ BCCMA, s 227(1)(b)

process or an order of the QCAT appeal tribunal on appeal from an adjudicator on a question of law.¹⁶ A complex dispute is defined.¹⁷

- [12] A person, including the body corporate for a scheme, may make an application in respect of a dispute if the person:
- a) Is a party to a dispute;¹⁸ and
 - b) Is directly concerned with the dispute;¹⁹ and
 - c) Has made reasonable attempts to resolve the dispute by internal dispute resolution.²⁰
- [13] An application may be for conciliation or adjudication. A party to a dispute is a “relevant person”.²¹ If a party to an application stops being a relevant person for an application before it is disposed of, the application continues as if the party continued to be the relevant person unless someone else is substituted as the relevant person.²² Section 239C BCCMA only applies in circumstances where a party ceases to be a relevant person before the application is disposed of under Chapter 6 BCCMA.²³ Chapter 6 relates to dispute resolution.
- [14] After an application is filed, the Commissioner may recommend that the matter proceed to adjudication.²⁴ Before deciding on a dispute resolution recommendation, the Commissioner may seek the views of each interested party.²⁵ An interested party means a party to an application, an affected person or the body corporate.²⁶ An affected person is a person, other than a party to an application, who would be directly or materially affected by the outcome sought by the application.²⁷
- [15] The powers of an adjudicator are set out.²⁸ An adjudicator may dismiss an application if satisfied that a party to an application is no longer a person mentioned in s 227(1) BCCMA and the outcome sought by the application is no longer relevant or required.²⁹

¹⁶ Ibid, s 228(3)

¹⁷ Ibid, Schedule 6

¹⁸ Ibid, s 238(1)(a)

¹⁹ Ibid

²⁰ Ibid, s 238(1)(b)

²¹ Ibid, Schedule 6

²² Ibid, s 239C(1) and (2)

²³ Ibid, s 239C(1)

²⁴ Ibid, ss 248(1), 248(3)(e) and (f)

²⁵ Ibid, s 251(1)

²⁶ Ibid, s 251(9)

²⁷ Ibid, Schedule 6

²⁸ Ibid, Chapter 6, Part 9, Division 2

²⁹ Ibid, s 270(1)(e)

- [16] An adjudicator may make an order that is just and equitable to resolve a dispute about, among other things, the exercise of rights or powers or the performance of duties under the BCCMA³⁰. An adjudicator may also make an order mentioned in schedule 5 BCCMA.³¹
- [17] An aggrieved person may appeal to the QCAT Appeal Tribunal from a decision by an adjudicator. The person must be:
- a) aggrieved by the order;³² and
 - b) an applicant, a respondent or the body corporate;³³ or
 - c) a person invited by the commissioner or adjudicator to make a submission about the application;³⁴ or
 - d) an affected person for an application in emergency circumstances;³⁵ or
 - e) another person against whom the order is made.³⁶

Standing to bring an application for adjudication under the BCCMA

- [18] The applicants filed their application with the Commissioner in June 2014. At that time, the applicants were the owners of lot 4. The dispute between the applicants and the body corporate was a dispute for the purposes of s 227(1)(b) BCCMA. The dispute was not a complex dispute as defined. Accordingly, the only remedy available to the applicants was the resolution of the dispute by a dispute resolution process or an order of the QCAT Appeal Tribunal on an appeal from an adjudicator on a question of law.³⁷
- [19] The applicants were entitled to make application to the Commissioner. They were a party to, and directly concerned with, the dispute³⁸ and had attempted to resolve the dispute.³⁹
- [20] Each of the applicants was a “relevant person” (as a party to the dispute) and remained so for the duration of the adjudication process.

³⁰ Ibid, s 276(1)(b)

³¹ Ibid, s 276(3)

³² Ibid, s 289(1)(c)

³³ Ibid, s 289(1)(d)(ii)(A), (B), (C)

³⁴ Ibid, s 289(1)(d)(ii)(D)

³⁵ Ibid, s 289(1)(d)(ii)(E) and s 243A

³⁶ Ibid, s 289(1)(d)(ii)(F)

³⁷ Ibid, s 229(3)

³⁸ Ibid, s 238(1)(a)

³⁹ Ibid, s 238(1)(b)

Standing to appeal an adjudication decision

- [21] The adjudicator's decision was made on 26 February 2016 and was an order for the purposes of s 289(1)(b) BCCMA. Each of the applicants was an "aggrieved person".⁴⁰ As aggrieved persons, each of the applicants was entitled to appeal the decision of the adjudicator.⁴¹

Consideration

- [22] The applicants and the body corporate have advised the Tribunal that the applicants have sold lot 4. The applicants say that they wish to continue with the appeal, and that "the matter is a major fire danger and therefore a health and safety issue (and) we believe it should still be rectified."⁴²
- [23] The body corporate says that it has met with the new owner of lot 4 and that they have agreed on a "mutually agreeable path forward for the building of the wall."⁴³
- [24] The BCCMA is an enabling Act. An enabling Act confers upon the Tribunal original, review or appeal jurisdiction.⁴⁴ An enabling Act conferring appeal jurisdiction on the Tribunal may state the Tribunal's functions in the jurisdiction, which may add to, otherwise vary, or exclude functions stated in the QCAT Act.⁴⁵ The Tribunal's appeal jurisdiction, relevant to this application, is the jurisdiction conferred by the BCCMA to hear and decide an appeal against a decision of an adjudicator.⁴⁶
- [25] As we have observed, at the time the appeal was filed each of the applicants was an aggrieved person and entitled to appeal the decision by the adjudicator. The question arises as to whether, having sold lot 4, the applicants each remain an aggrieved person; if they are not, whether they have standing to continue with the appeal; and whether the appeal should otherwise continue or be dismissed as frivolous, vexatious or otherwise lacking in substance.
- [26] 'Standing' is a metaphor to describe the interest required, apart from a cause of action as understood at common law, to obtain various common law, equitable and constitutional remedies.⁴⁷
- [27] The issue of standing was considered in *Re Ripszam and Minister for Infrastructure and Regional Development*⁴⁸ where the Administrative Appeals Tribunal was required to consider a review of a decision by the Minister for Infrastructure and Regional Development to refuse the

40 Ibid, s 289(1)(d)(ii)(A)

41 Ibid, s 289(2)

42 Applicants' submissions 07.07.16

43 Respondent's submissions 18.05.16

44 QCAT Act, s 6(2)(a)

45 Ibid, s 6(6)

46 Ibid, s 25(b)

47 *Allan v Transurban City Link Pty Ltd* (2001) 208 CLR 167

48 *Re Ripszam and Minister for Infrastructure and Regional Development* [2013] AATA 918

importation of non-standard vehicles under the *Motor Vehicle Standards Act 1989* (Cth). After the application for review was filed, the vehicles were sold. The Minister sought dismissal of the application on the basis that it was frivolous or vexatious. The AAT found that while the applicant had an interest affected at the commencement of the proceeding, after the sale of the vehicles he no longer had that interest. The AAT found:

*The case is analogous to others in which the interest that gave the person standing to commence the proceedings ceased to exist, so that the person had no interest in pursuing the issue and the proceedings, although not instituted vexatiously, had become vexatious.*⁴⁹

[28] The AAT found that the applicant no longer had standing to bring the application.

[29] In *Fearnley v Australian Fisheries Management Authority*⁵⁰ the Full Court of the Federal Court was required to consider an appeal against a decision by the AAT to dismiss an application for review by a fishing permit holder, Mr Fearnley. Subsequent to filing his application for review, the permit was transferred to a third party following the sale by Mr Fearnley of his fishing quota. The AAT found that pursuing the application would lead to no practical outcome for Mr Fearnley, was thereby futile and must be regarded as frivolous and vexatious to continue with it.⁵¹

[30] The Full Court considered the decision in *Transurban City Link Ltd v Allan*⁵². In *Transurban*, the court was required to consider whether, if a change in circumstances arose after an application was filed but before the hearing or decision, the AAT was required to continue with a review on the basis of an accrued right. In *Transurban* the Court, in dismissing the appeal, found that it was not necessary to determine the point:

*...for the obvious reason that whether standing is conclusively determined at the time of review but the application becomes vexatious if circumstances change, or whether standing may be reconsidered if circumstances change, the result is the same. The proceedings will be dismissed.*⁵³

[31] The QCAT Appeal Tribunal considered the issue of standing in *Saviane v Hope Island Resort Principal Body Corporate & Anor*⁵⁴. Mr Saviane was the co-owner, with his wife, of a waterfront property on Hope Island. A dispute arose between Mr Saviane and adjoining lot owners over a pontoon and dividing fencing. Mr Saviane complained that the body corporate failed to intervene to resolve the dispute. There was some

⁴⁹ Ibid citing *Transurban City Link Ltd v Allan* (1999) FCR 553, *Fearnley v Australian Fisheries Management Authority* (2006) 94 ALD 519; *Re Williams and Australian Electoral Commission* (1995) 38 ALD 366

⁵⁰ *Fearnley v Australian Fisheries Management Authority* (2006) 94 ALD 519

⁵¹ *Fearnley v Australian Fisheries Management Authority* [2005] AATA 147
⁵² (1999) 95 FCR 553

⁵³ *Transurban* at [69]

⁵⁴ [2014] QCATA 355

uncertainty as to who was the registered owner of Mr Saviane's lot. It was suggested that Mrs Saviane may have been the sole registered owner. Although the Appeal Tribunal was considering the standing of Mr Saviane to pursue the claim in the context of the relevant by-laws and the statutory contractual rights of lot owners, occupiers and bodies corporate, the Appeal Tribunal found that:

*... a mere occupier (could not) maintain what are in effect proprietary claims in the absence of the owner of the lot which is said to have been encroached...and, even assuming that QCAT otherwise has jurisdiction to determine claims of that kind I do not think that QCAT could or should do so with a mere occupier as sole claimant.*⁵⁵

- [32] In deciding this appeal, we may exercise all the jurisdiction and powers of an adjudicator under the BCCMA.⁵⁶ An adjudicator may make an order that is just and equitable in the circumstances to resolve a dispute about a range of matters.⁵⁷ An order may require a person to act, or prohibit a person from acting, in a way stated in the order.⁵⁸ Schedule 5 BCCMA sets out the orders an adjudicator may make.
- [33] The members of the body corporate for a community titles scheme are the owners of all lots included in the scheme.⁵⁹ A lot owner is defined as a person who is, or is entitled to be, the registered owner of the lot.⁶⁰
- [34] In the present appeal, the applicants no longer have any proprietary rights in respect of lot 4. They are no longer the owners of lot 4 and hence they are no longer members of the body corporate. As they are no longer the owners of lot 4 they could no longer be said to be aggrieved by the adjudication order. There is no suggestion that in the sale of the lot to the new owner the present appeal was in any way considered. Even had it been, it is difficult to see how, having sold the lot, the applicants could have any ongoing proprietary interest that could be relevant to the present dispute.
- [35] Chapter 6 BCCMA deals with "Dispute Resolution". The distinction between BCCMA s 239C and the appeal provisions set out in the BCCMA is, in our view, a relevant one. BCCMA s 239C is contained within Chapter 6, Part 4 which deals with applications for adjudication. Appeals from adjudicators' decisions are dealt with at Chapter 6, Part 11.
- [36] The effect of s 239C is that an application for adjudication may continue notwithstanding that a party to the dispute ceases to be a relevant person. The intent of the legislature was clearly therefore that one of the preconditions to the initiation of an application for adjudication might change and that such a change would not preclude an adjudicator from

⁵⁵ *Saviane v Hope Island Resort Principal Body Corporate & Anor* at [154]

⁵⁶ BCCMA, s 294(1)

⁵⁷ BCCMA, s 276(1)

⁵⁸ BCCMA, s 276(2)

⁵⁹ BCCMA, s 31

⁶⁰ BCCMA, Schedule 6

deciding an application. Put simply, a person may not remain a relevant person throughout the application process. A relevant person is a party to a dispute under s 227(1) BCCMA. A lot owner, for example, could sell their lot (and thereby cease to be a relevant person) however the application would continue as if the lot owner continued to be a relevant party. It follows that a party's standing as a "relevant person" may change after an application for adjudication is filed.

- [37] Part 11 contains no equivalent provision to s 239C. In *Allan v Transurban City Link Limited*⁶¹, Kirby J said at [80]:

*To the respondent's suggestion that the appellant was obliged to demonstrate that his interests were affected by the decision in question throughout the review process, the answer must be given that this is not what the legislation says. It is certainly not the way in which the AAT Act has been interpreted*⁶². *That does not mean that a supervening change in the position of the person applying for review of the decision, or in that person's "interests", would be irrelevant to a final decision of the AAT or, indeed, as to whether a decision would be made by it*⁶³. *But it is irrelevant to the establishment of the preconditions to the initiation of review for which ss 119 and 120 of the DAA Act and ss 25 and 27 of the AAT Act respectively provide.*

- [38] It was open to the legislature to have included in Part 11 BCCMA a similar provision to s 239C to address any change in a party's status as an aggrieved person during an appeal. In the absence of a provision similar to s 239C in Part 11, we adopt the reasoning of Kirby J. An applicant is not obliged to demonstrate that their interests are affected throughout the appeal process. The applicants, having been aggrieved persons at the commencement of the appeal, remain aggrieved persons for the purposes of the appeal. However for the reasons that follow, this outcome is not determinative of the issue.
- [39] It is clear that the applicants no longer have any interest in the subject matter of the dispute. They have no proprietary interest in lot 4 and the outcome of the appeal. The outcome sought by the applicants in the application for adjudication, and in this appeal, is the reinstatement of what the applicants say are the correct boundary walls between lot 4 and the body corporate common property and the removal of common property from lot 4 and its relocation elsewhere. The applicants' no longer own lot 4. There is no purpose in their pursuing the appeal further as they cannot derive any benefit from (an assumed beneficial) outcome.
- [40] The appeal was not commenced vexatiously nor was it lacking in substance, however it has become so as a result of the sale by the applicants of lot 4.

⁶¹ 208 CLR 167

⁶² *Re McHattan and Collector of Customs* (1977) 18 ALR 154 at 157 per Brennan J.

⁶³ AAT Act, s 42B.

- [41] In deciding an appeal, the tribunal may exercise all the jurisdiction and powers of an adjudicator under the BCCMA.⁶⁴ An adjudicator may make an order dismissing an application if, among other things, it appears to the adjudicator that the application is frivolous, vexatious, misconceived or without substance⁶⁵ or the adjudicator is satisfied a party to the application is no longer a person mentioned in s 227(1) for the dispute the subject of the application and the outcome sought by the application is no longer relevant or required.⁶⁶
- [42] The applicants are no longer the owners or occupiers of the lot. They are therefore no longer persons mentioned in s 227(1). Having no proprietary interest in the lot, the outcome sought by the applicants in the application is no longer relevant or required. The present owner of lot 4 has evinced no interest in becoming involved in the appeal despite the opportunity to do so following direction by the Appeal Tribunal.
- [43] In exercising the jurisdiction and powers of the adjudicator we dismiss the appeal pursuant to s 270(1)(c) BCCMA and s 270(1)(e) BCCMA. We would otherwise dismiss the appeal pursuant to s 47(1) QCAT Act.

Order

- [44] The appeal is dismissed.

⁶⁴ BCCMA, s 294(1)

⁶⁵ BCCMA, s 270(1)(c)

⁶⁶ BCCMA, s 270(1)(e)