

QUEENSLAND CIVIL AND ADMINISTRATIVE TRIBUNAL

CITATION: *Rio Villa Pty Ltd v The Body Corporate for Quay West Brisbane* [2019] QCATA 14

PARTIES: **RIO VILLA PTY LTD ACN 083 611 741**
(applicant/appellant)
v
**THE BODY CORPORATE FOR QUAY WEST
BRISBANE**
(respondent)

APPLICATION NO/S: APL022 – 18

ORIGINATING APPLICATION NO/S: 0917 – 2015

MATTER TYPE: Appeals

DELIVERED ON: 05 February 2019

HEARING DATE: 2 October 2018

HEARD AT: Brisbane

DECISION OF: Senior Member Aughterson
Member Paratz

ORDERS: **1. The application for leave to appeal or appeal against the decision of the Adjudicator made on 30 November 2007 is dismissed.**

CATCHWORDS: APPEAL AND NEW TRIAL – APPEAL
GENERAL PRINCIPLES – RIGHT OF APPEAL –
WHEN APPEAL LIES – ERROR OF LAW - body
corporate - appeal from decision of Adjudicator –
whether removal of a fixture from common property
requires an ordinary resolution, special resolution, or
resolution without dissent

Body Corporate and Community Management Act
1997 (Qld), s 2, s 4(f), s 10, s 11, s 100, s 154,
s276(1), s 289(2), sch 6,
Body Corporate and Community Management
(Standard Module) Regulation 2008 (Qld), r 161, r
163, r 167

Cedar Crossing Kenmore [2012] QBCCMCMr422
Kasikalis v Body Corporate for 'The Centre' [2009]
QCA 77
O'Neill v Perrins [2008] QCCTBCCM 022

**APPEARANCES &
REPRESENTATION:**

Applicant: Cleary and Hoare, Solicitors

Respondent: Shand Taylor, Solicitors

REASONS FOR DECISION

- [1] Quay West Brisbane is a residential apartment block having 136 lots. Motion 14 ('the Motion') was passed at the Annual General Meeting of the Body Corporate for Quay West ('the Body Corporate') on 21 September 2015 resolving to close and demolish the existing spa and to refurbish the spa area to complement existing surroundings (upon certain conditions).
- [2] The motion was passed with 50 'yes' votes, 25 'no' votes and five abstentions.
- [3] One of the lot owners, Rio Villa Pty Ltd ACN 083 611 741 ('the Owner'), applied to the office of the Commissioner for Body Corporate and Community Management for an order that the Motion be declared invalid.
- [4] An Adjudicator made a decision dated 30 November 2017 ordering that the application be dismissed.
- [5] Rio Villa filed an application in the Tribunal on 19 January 2018 to appeal the decision of the adjudicator. The application was heard on 2 October 2018. This is the decision on the application.

Relevant provisions

- [6] The motion provided as follows:¹

That the Body Corporate Committee for Quay West Brisbane CTS 16610, be authorised to close and demolish the existing common spa to refurbish the spa area to complement the existing surroundings. Approval for the works would be conditional upon the following:

- (a) Scope of works to be determined by majority written consent of Committee;
- (b) Minimum of two quotes to be sourced by the building manager/caretaker by in accordance with committee instructions;
- (c) Total proposed costs are not to exceed committee spending or limit; and
- (d) A resolution is to be executed by VOC (Vote Taken outside a Committee Meeting) or at a formal Committee Meeting, prior to actioning any final related work order to comply with legislative requirements.

- [7] An explanatory note was included as follows:²

Motion 14 – Replacement of Common Spa

¹ Applicants submissions filed 27 April 2018, [3]

² Applicants submissions filed 27 April 2018, [4]

I have concerns about hygiene and health risks, noise levels for residents/guests, running costs, damage of spa water and chemicals on adjacent area – timber and sandstone.

- [8] It was agreed between the parties that the spa is a fixture³. It is disputed whether the spa is ‘common property’ or a ‘Body Corporate asset’.
- [9] The meaning of a ‘Body Corporate asset’ is referred to in section 10 of the *Body Corporate and Community Management Act 1997* (‘the Act’) which provides as follows:

10 Meaning of community titles scheme

- (1) A community titles scheme is –
- (a) a single community management statement recorded by the registrar identifying land (the scheme land); and
 - (b) the scheme land.
- (2) land may be identified as scheme land only if it consists of –
- (a) 2 or more lots; and
 - (b) other land (the *common property* for the community title scheme) that is not included in the lot mentioned in paragraph (a)

- [10] The meaning of a ‘Body Corporate asset’ is referred to in section 11 of the Act which provides as follows:

11 Meaning of Body Corporate assets

- (1) *Body Corporate assets*, for a community titles scheme, are items of real or personal property acquired by the Body Corporate, other than property that is incorporated into and becomes part of the common property.

Examples for subsection (1) -

- i) an air-conditioning unit might be bought by a Body Corporate as a Body Corporate asset, but become common property when it is installed as a fixture
- ii) a lot acquired by the Body Corporate under section 40

- (2) Body Corporate assets may consist of any property an individual is capable of acquiring.

Examples for subsection (2) –

freehold land, a lease, a license to use land for a particular purpose, a billiard table, gardening equipment

³ Applicants submissions filed 27 April 2018, [9]

- [11] Section 289 (2) of the Act provides that an aggrieved person may appeal from an Order of an Adjudicator to the Appeal Tribunal, but only on a question of law.⁴

Submissions of the owner

- [12] The owner submits that the Adjudicator erred in law by concluding that the spa is a Body Corporate asset, and fell into further error by failing to consider the correct regulation in the Standard Module.⁵

- [13] The owner submits that under the Act, common property is part of the scheme land being property other than designated lots, and that as the spa is fixed to the scheme land, without being part of a designated lot, it becomes part of the common property, and that because the spa is common property it cannot be a Body Corporate asset.⁶

- [14] The owner refers to the by-laws in respect of the Quay West Brisbane Community Titles Scheme 16610, which were in effect on 21 September 2015 for the purpose of the Annual General Meeting and Motion 14, which contain the following definitions:

Common Property has the same meaning as that of “Common Property” under the Act (the *Body Corporate and Community Management Act 1997 Qld*) and includes all improvements, fixtures and fittings erected, or which are on the common property.

Scheme land means the Lots and Common Property comprised in the Building Units Plan

- [15] The owner notes that the by-laws do not consider ‘Body Corporate assets’ in any substantive manner, and submits that the definitions in the by-laws are in accordance with the relevant definitions of the Act, with the result that the spa, as a fixture, should be considered common property.⁷

- [16] The owner submits that Motion 14 sought to ‘close and demolish’ the spa, and that this was in effect an intent to dispose of the spa. It submits that the Act prescribes a manner in which common property may be disposed of in section 154 which provides as follows:⁸

(1) The Body Corporate for a community titles scheme may sell or otherwise dispose of common property in the way, and to the extent, authorised under the regulation module applying to the scheme.

- [17] The owner refers to Regulation 161 of the standard module in respect of common property, which relevantly provides as follows:⁹

161 Disposal of interest in and leasing or licensing of common property

(1) This section sets out the way and the extent that the Body Corporate is authorised-

⁴ *Body Corporate and Community Management Act 1997 (Qld)*, s289(2)

⁵ Applicants submissions filed 27 April 2018, [10].

⁶ *Ibid*, [18] and [20].

⁷ *Ibid*, [23] and [24].

⁸ *Body Corporate and Community Management Act 1997 Qld*, s154.

⁹ *Body Corporate and Community Management (Standard Module) Regulation 2008 (Qld)*, r161.

- (a) to sell or otherwise dispose of common property; or
 - (b) to grant or amend a lease or licence over common property,
- (2) The Body Corporate may –
- (a) if authorised by resolution without dissent –
 - (i) sell or otherwise dispose of part of the common property; or
 - (ii) grant or amend a lease or licence for more than three years over part of the common property; and
 - (b) if authorised by special resolution – grant or amend a lease or licence for three years or less over part of the common property.

[18] The owner submits that the Adjudicator wrongly considered Regulation 167(c) which related to dealing with a Body Corporate asset, which provides as follows:¹⁰

The Body Corporate may –

c) sell or otherwise dispose of a Body Corporate asset that is personal property (not including personal property mentioned in paragraph (a) or (b), but including a licence or concession related to freehold land) only if authorised by special resolution, if the market value of the asset is more than the greater of the following amounts –

(ii) an amount worked out by multiplying the number of lots included in the community titles scheme by \$200.

[19] The owner submits that the effect of the Act and the Standard Module is that a resolution to dispose of common property requires to be passed without dissent, and that as Motion 14 was not passed without dissent, it ought to be invalidated.¹¹

Submissions of the Body Corporate

[20] The Body Corporate submitted that Motion 14 was a motion for the Body Corporate to make improvements to the common property which are allowed by Regulation 163 of the Standard Module.¹²

[21] The Body Corporate submits that the resolution to refurbish the spa area (including the closure and demolition of the existing spa) is an improvement to common property to which Section 163 of the Standard Module applies, and the committee would be authorised to act (within appropriate spending limits) by Section 100 of the Act without general meeting approval.

[22] The Body Corporate submits that improvement could involve removal of a Body Corporate asset:¹³

¹⁰ *Body Corporate and Community Management (Standard Module) Regulation 2008 (Qld)*, r167(c).

¹¹ Applicants submissions filed 27 April 2018, [30] to [33].

¹² Respondents Submissions filed 21 May 2018, [18]; *Body Corporate and Community Management (Standard Module) Regulation 2008 (Qld)*, r163.

¹³ *Ibid*, [27].

The improvement of common property will often involve the removal of the Body Corporate asset - for example, the replacement of carpet involves the removal of existing carpet, the erection of a building or other structure will inevitably involve the removal of an existing structure, gardens, turf or dirt, the repair of a fence may involve the replacement of panels etc. It is difficult to imagine that the legislature intended that every such improvement would need to comply with all of sections 161, 163 and 167 of the Standard Module.

- [23] The Body Corporate accepts that the spa as a fixture notionally becomes part of the common property, but submits that once detached, the spa becomes a Body Corporate asset and can be disposed of as such.¹⁴
- [24] The Body Corporate submits that the removal of a fixture from common property is not a 'disposal of freehold land' or the 'disposal of common property', as once the spa is removed and the area refurbished, that part of the common property will remain accessible to all lot owners.¹⁵
- [25] The Body Corporate submits that the motion was just and equitable, as the spa was in a poor condition with significant remedial works required, and it had a long history of problems, and a significant majority of the Body Corporate supported the removal of the spa, and the adjudicator had power to make an order that was just and equitable in the circumstances.¹⁶

Discussion

- [26] It is apparent that the spa, if it had been purchased as an object by the Body Corporate, would be a Body Corporate asset prior to its being fixed into place, and that once the spa was installed and attached to the fabric of the building, it would become common property.
- [27] The question in this matter is as to what process is required to effect the reverse of installation, which is removal and disposal.
- [28] The effect of regulation 163 would, on a plain reading, have enabled the Body Corporate to install the spa, in the first place, by ordinary resolution if it was within the 'ordinary resolution improvement range' provided by that regulation. Logically, then, de-installation of the spa should also be achievable by ordinary resolution.
- [29] Regulation 161 deals with disposing of part of the common property. That regulation refers in regulation 161(2) to selling or otherwise disposing part of the common property, or granting or amending a lease or licence for more than three years over part of the common property, as requiring a resolution without dissent.
- [30] Regulation 167 (c) deals with disposal of Body Corporate assets and provides that personal property may be sold or disposed of only by special resolution if the market value of the asset is more than either \$1000, or an amount worked out by multiplying the number of lots included in the community title scheme by \$200 (which works out in this case to be \$27,200, there being 136 lots).

¹⁴ Ibid, [32] and [33].

¹⁵ Ibid, [35].

¹⁶ Ibid, [42]-[43], *Body Corporate and Community Management Act 1997* (Qld), s 276(1).

- [31] In *Katsikalis v Body Corporate for 'The Centre'* the Court of Appeal noted that the giving of exclusive possession of part of the common property could constitute a disposition:¹⁷

[30] The words, 'dispose', 'disposition' and 'disposal' are very wide in their effect and, depending on the context, are not restricted to arrangements involving the transfer or creation of proprietary rights. The terms of S. 154 suggests that the grant of a licence is one of the means of disposing of common property envisaged by the legislation. Even if one assumes that the transaction here is simply the creation of a mere license that gave no interest, legal or equitable, in the common property and was revocable, the fact that exclusive possession of that part of the common property had passed to the owner of lot 5 would, in my view, allow the conclusion that there had been a disposition of the relevant part of the common property. The right to possession of that part of the common property had been made over or parted with for the period of the licence. If the licence remains unrevoked, no action of trespass could have been maintained by the respondent against the owner of lot 5.

- [32] In this matter, use of the area of, and around the spa, remained available to all lot owners, and was to be refurbished as a common space, so there was no disposition by the granting of exclusive possession to any person.
- [33] The expression 'common property' is referred to in Section 10 in the context of being 'land'.¹⁸ When that section is applied to Regulation 161, the regulation can be seen to refer to the disposal of interest in and leasing or licensing of land. When the spa is a fixture, it becomes attached to, and part of the land.
- [34] Once the spa is removed from the land it once again becomes personal property, rather than any part of the land.
- [35] A similar situation was considered in *Cedar Crossing Kenmore* where a Body Corporate resolved to demolish a brick wood-fired barbecue on common property. The Adjudicator held that it could be resolved to detach it and dispose of it as an asset.¹⁹

[23] As the brick barbecue was installed on common property, there is an issue of whether it was an asset or part of the common property. The definition of a Body Corporate asset excludes property that has been incorporated into the land and so becomes part of the common property. An example is given of an air conditioner that is purchased by the Body Corporate as an asset, but becomes part of common property when it is installed as fixture. Therefore, while it was in situ, the barbecue is part of common property rather than an asset.

[24] However in my view a fixture can revert to being an asset if it is detached from common property. A similar conclusion has been reached in other disputes. Accordingly I see no reason why a Body Corporate could not resolve to detach a fixture from common property (thereby reverting the item to the status of an asset), and then resolve to dispose of the asset.

- [36] It is difficult to imagine that it was the intention of Parliament to require a resolution, without dissent, to dispose of an asset that has become personal property upon removal

¹⁷ [2009] QCA 77 at [30].

¹⁸ *Body Corporate and Community Management Act 1997* (Qld), s10.

¹⁹ [2012] QBCCMCmr 422 at [23] – [24].

from land under Regulation 161; and yet require only an ordinary resolution (or special resolution if over a certain value) in relation to the disposal of personal property generally under Regulation 167.

- [37] The interpretation advocated by the owner, that a resolution without dissent is required to remove a chattel that has been affixed to the fabric of the building, would make Body Corporate management very difficult – for example, it would require a resolution without dissent to remove and replace an air conditioner in a common area.
- [38] It is notable that the Act provides for the provision of flexible and contemporary arrangements as its primary object.²⁰

2. Primary object

The primary object of this Act is to provide for flexible and contemporary community-based arrangements for the use of freehold land, having regard to the secondary objects.

- [39] The Act goes on to provide for flexibility in the secondary objects:²¹

4. Secondary objects

The following other secondary objects of this act –

(f) to provide bodies corporate with the flexibility they need in their operations and dealings to accommodate changing circumstances within community titles schemes

- [40] The interpretation advocated by the owner would create rigidity in the day-to-day operations of the Body Corporate in conducting routine maintenance, and in effecting minor works, which would be at odds with the flexibility sought by the Act.
- [41] Regulation 163 provides for improvements to common property by the Body Corporate, and sets out a regime for doing so. The interpretation advocated by the owner would narrow the improvements which are able to be carried out under Regulation 163 to very little, if any. That would arise because an ‘improvement’ will almost invariably involve disposing of something that is affixed to the land – even the sanding back of old paintwork prior to the application of fresh paint.
- [42] Some guidance as to the proper interpretation of the Act can be obtained from the definition of ‘improvement’ in Schedule 6 of the Act, which provides as follows:

improvement includes –

- (a) the erection of a building; and
- (b) a structural change; and
- (c) a non-structural change, including, for example, the installation of air conditioning.

- [43] An improvement under Regulation 163 requires either an ordinary or special resolution, depending on cost. If the position advocated by the owner is correct, it

²⁰ *Body Corporate and Community Management Act 1997* (Qld), s2.

²¹ *Body Corporate and Community Management Act 1997* (Qld), s4 (f).

would mean that only an ordinary or special resolution would be required to install a complete new split system air conditioning system, but a resolution without dissent would be required to remove and dispose of the old wall mounted air-conditioning unit which it is replacing.

- [44] The scope of a Body Corporate to remove chattels which had become fixtures will be constrained by an overriding requirement to act reasonably. Section 94 (2) of the Act provides that the Body Corporate must act reasonably in anything it does under subsection (1) of the act in carrying out its functions, including making, or not making, a decision for the subsection. Similarly, Section 100(5) of the act provides that '*The committee must act reasonably in making a decision*'.
- [45] In *Cedar Crossing* the Adjudicator was not satisfied that the Committee acted unreasonably in entirely removing the barbecue.²²
- [46] In this matter, the adjudicator noted that an engineer's report had been obtained stating that the spa was unsafe and should be closed to avoid further damage²³, and found that the owner had provided no reasons to suggest that the motion was unreasonable.
- [47] It is alternatively arguable that no resolution is required at all – that is, there is neither a disposal of personal assets nor an 'improvement'. We note that in *O'Neill v Perrins*²⁴ the Commercial and Consumer Tribunal took the view, in 2008, that the simple removal of palm trees did not even constitute an 'improvement' such that a resolution was required.
- [48] The decision in *O'Neill* reflects an approach to the treatment of improvements which is far less restrictive than the interpretation advocated by the owner.
- [49] Overall, we consider that regulation 167(c) is the appropriate regulation to be applied in this matter rather than Regulation 161(1). The effect of that is that a motion without dissent was not required for removal of the spa, and Motion 14 is valid as found by the Adjudicator.
- [50] No error of law having been shown in the reasons of the Adjudicator, the application for leave to appeal or appeal is dismissed.

²² *Cedar Crossing Kenmore* [2012] QBCCMCmr422

²³ Adjudicator's decision at [11].

²⁴ [2008] QCCTBCCM 022 at [33].