QUEENSLAND CIVIL AND ADMINISTRATIVE TRIBUNAL

CITATION:	*Spryszynski v The Body Corporate for Residences on Upper Oxford (No 2)* [2020] QCATA 64
PARTIES:	**PETER SPRYSZYNSKI** (applicant) **v** **THE BODY CORPORATE FOR RESIDENCES ON UPPER OXFORD** (respondent)
APPLICATION NO/S:	APL286-19
HEARING DATE:	30 March 2020
DELIVERED ON:	24 April 2020
DECISION OF:	Member Roney QC
ORDERS:	**1. I dismiss the application.** **2. I discharge the respondent from any undertakings given not to implement the decision of the Body Corporate resolutions made at the EGM on 5 May 2019, or the committee resolutions based on them, made outside of a committee meeting on 10 May 2019.**
CATCHWORDS:	APPEAL AND NEW TRIAL – APPEAL – GENERAL PRINCIPLES – RIGHT OF APPEAL – WHEN APPEAL LIES – ERROR OF LAW – where s 289(2) of the *Body Corporate Community Management Act* 1997 (Qld) allows a person aggrieved by an Adjudicator's order to appeal on a question of law to the Queensland Civil and Administrative Tribunal – what is error of law – whether there was an error of law REAL PROPERTY – STRATA AND RELATED TITLES – MANAGEMENT AND CONTROL – BYLAWS – whether Body Corporate in General Meeting acted reasonably in failing to pass motions put forward by a lot owner *Body Corporate Community Management Act* 1997 (Qld), s 162, s 289, s 290 *Queensland Civil and Administrative Tribunal Act* 2009 (Qld), s 146 *Albrecht v Ainsworth & Ors* [2015] QCA 220 *Commonwealth v Human Rights and Equal Opportunity*

Commission (1995) 63 FCR 74
Commonwealth Bank of Australia v Human Rights and Equal Opportunity Commissioner (1997) 150 ALR 1
Ericson v Queensland Building Services Authority [2013] QCA 391
Finance Sector Union v Commonwealth Bank of Australia (1997) EOC 92-889
Waters v Public Transport Corporation; Secretary, Department of Foreign Affairs and Trade v Styles (1989) 23 FCR 251

APPEARANCES & REPRESENTATION:

Applicant:	Self-represented
Respondent:	A MacSporran

REASONS FOR DECISION

Background

[1] Residences on Upper Oxford was established on 22 December 2010 with the registration of Survey Plan 227890, a building format plan of subdivision. The scheme comprises six lots in a four-storey concrete building on Oxford Street, Balmoral.

[2] The applicant is a co-owner of Lot 3, and brought an application against the Body Corporate of Residences on Upper Oxford. He is disputing the validity of resolutions passed on the 5 May 2019 EGM and resolutions of the committee, made outside of a committee meeting on 10 May 2019 which have the effect of authorising and effecting the removal of air conditioning units located on the ground floor car park area of the development to a different area which is not within the shared carpark. It is common ground that the applicant does not reside at the property but tenants the property out.

[3] The resolutions passed at the 5 May 2019 EGM proposed:

> …that the current location of the air conditioning external units constitute an unreasonable interference with the enjoyment of other lots in the complex, namely Lots 1, 2, 5 & 6 and that should motion 2 not be carried then the body corporate must commence investigations and actions to remediate the unreasonable interference.

[4] Motion 2 passed at the 5 May 2019 EGM proposed:

> …that the six air conditioning external units be relocated from their current position to an area along the rear wall of the visitors parking bay area defined, at present, by the "visitors only parking" at the north western corner of the complex and that the body corporate accepts the quotations for the work to relocate and rehouse the units from Active Air Solutions in the amount of $6,280.96 and Jenolan Holdings Pty Ltd trading as Aristo Products in the amount of $3,410 and an amount of $150 for the services of Tracsafe and funds the total project cost of $9,840.96 by a special levy with a due date one

month after the contracts are executed provided that the existing quote terms and conditions are revalidated by the contractors.

[5] The minutes of the EGM record that both Motions 1 and 2 were carried with four votes in favour and none against.

[6] On 10 May 2019 the committee resolved that a relevant representative be authorised to execute contracts, approve payments and manage the implementation of the project to move the air-conditioning condensers in accordance with the resolution passed at the 5 May 2019 EGM. The committee also resolved that Body Corporate manager be authorised to issue notice of entry letters and emails to lot occupiers at the direction of that relevant representative to action the project to move the air-conditioning condensers.

[7] The applicant brought an application before the Office of the Commissioner for Body Corporate and Community Management alleging that the 5 May 2019 EGM motions and the committee resolutions were also invalid principally on the basis that in passing them, the actions of the Body Corporate were unreasonable.

[8] As is apparent, the dispute concerns the location of the compressors for the air conditioning units for the lots. Each of the six lots is serviced by air conditioning, the compressor for each lot presently being located in an area of common property in the basement.

[9] The owners of lots 1, 2, 5 and 6 justified their support for the resolutions under challenge on the basis that the operation of the compressors in their current location constitutes unreasonable interference with the enjoyment of their lots. These owners wanted the compressors re-located. Their submissions on those issues were set out in the reasons of the Adjudicator.

[10] Those submissions, as set out by the Adjudicator included that:

(a) The lot owners were seeking to remove a significant source of heat from the basement which unreasonably interferes with the use and enjoyment of a lot and common property for most owners.

(b) The proposed location of the condensers is on an external wall that faces due South. As evidenced by BOM data, even at the height of a Brisbane summer, due to our latitude, the sun is always offset to the North. This feat of nature places the condenser units in a completely shaded location year-round.

(c) When the condensers are moved to the proposed location, they will be operating in cooler ambient temperatures, in a shaded location, with unlimited ventilation and will operate more efficiently.

(d) Many alternatives were discussed with the three air conditioning company expert personnel who attended onsite to assess their individual quotes. Also, an experienced building services engineer with a demonstrated history as an independent commissioning agent and energy auditor in the construction and facilities services industry was consulted regarding alternate insulating options. Effective insulation to inhibit a concrete slab from heating up as a result of high ambient temperatures requires a significant air gap in addition to the insulating material. This would significantly reduce the already minimal height allowance within the basement garage. Also, any leaks however small,

significantly reduce the insulation's effectiveness and with the vast array of pipes and plumbing and services in the ceiling of the garage, this was deemed an impossible option.

(e) The existing mechanical ventilation system is only designed to regulate the air quality requirements, not to reduce the heat load within the garage which it is completely ineffective at achieving.

(f) The condensers are currently situated directly adjacent to a car park without any barriers to ameliorate inadvertent damage, and the proposed new location will also be adjacent to a car park; however, they will now benefit from the protection of an aluminium privacy screen.

(g) The new location would be more susceptible to vandalism because the condensers would no longer be secured within the locked garage. However, with the condenser units effectively visually shielded by the proposed screening and with their location being situated at the end of a long driveway, he believes this significantly reduces the chance of random acts of vandalism.

(h) As to the allegation that the proposed location may subject the condensers to adverse environmental conditions which will affect performance, the condensers are designed by Daikin to be situated outside in the elements. Damage from hail or other extreme weather would be covered by insurance, just as any other external structures such as solar hot water heaters or photovoltaic cells would be.

The findings of the Adjudicator

[11] On 24 September 2019 M A Schmidt, an Adjudicator, held as follows in relation to the Application to the Office of the Commissioner for Body Corporate and Community Management:

> [23] In the present case, it is alleged that the exercise of rights under the statutory easement is interfering unreasonably with the use or enjoyment of numerous lots and common property. However, whether or not that is the case is not relevant to the determination of this dispute.
>
> [24] Section 159(1) provides that the body corporate is responsible for maintaining common property in good condition. However, the owner of the lot is responsible for maintaining utility infrastructure, including utility infrastructure situated on common property, in good order and condition, to the extent that the utility infrastructure:
>
> (i) Relates only to supplying utility services to the owner's lot; and
>
> (ii) Is one of the following types –
>
> Hot water systems
>
> Washing machines
>
> Clothes dryers
>
> Another device providing a utility service to a lot.

> [25] In the case of the air conditioning at Residences on Upper Oxford, each system services only one lot, therefore, that lot owner is responsible for the maintenance of the air conditioning system that services their lot.
>
> [26] The question raised in this application is, however, not one of maintenance. There is no suggestion that the air conditioning units are not being maintained in good condition.
>
> [27] The body corporate has proposed that the condensers be moved from one area of common property, to another area of common property.
>
> [28] Section 163 of the Standard Module provides that the body corporate may make improvements to common property costing more than $1,800 but less than $12,000 if authorised by ordinary resolution.
>
> [29] I am satisfied that the movement of the condensers is an 'improvement' (within the meaning of Schedule 6 of the Act) to common property.
>
> [30] Motion 2 of the EGM of 5 May 2019 resolved to relocate the condensers and the motion was passed by ordinary resolution.
>
> [31] The applicant has detailed numerous objections to the body corporate's decision to relocate the condensers to the chosen location. However, none of those objections evidence any failure to comply with the legislation. The body corporate has a legislative obligation to act reasonably, as does the committee. Whilst it is clear that the applicant disagrees with the body corporate and committee decisions in relation to the relocation of the condensers, he has failed to persuade me that the body corporate or the committee failed to act reasonably in arriving at its decisions.

[12] The Adjudicator was not satisfied on the basis of the material that it was just and equitable to invalidate either the Body Corporate resolutions made at the EGM on 5 May 2019, or the committee resolutions based on them, made outside of a committee meeting on 10 May 2019.

The present application

[13] On 25 October 2019, the applicant filed an application for leave to appeal to this Tribunal.

[14] The grounds of appeal, which are set out in Part C of the application for leave to appeal, contend that there has been an error of law in that the Adjudicator failed to conclude that the Body Corporate contravened s 100(5) and s 152(2) of the Act. In essence, the applicant essentially argues that the Body Corporate acted unreasonably and that the Adjudicator should have held that they did so.

[15] The arguments in support of these propositions as set out in the Appeal material rely upon arguments to the effect that the applicant and the other lot owners were not provided with all available and relevant information to assess the motions, were not provided with quotes in their entirety, and other similar matters.

[16] It was contended that the Adjudicator only assessed whether the process was conducted in a fair and equitable manner but not whether in passing the resolutions there was in substance unreasonable conduct by the Body Corporate.

[17] In January this year I decided that were the Body Corporate ordered not to implement the decisions to move the units for a period, on balance the other lot owners would not be inconvenienced to any degree beyond which they have already been inconvenienced for a very considerable time. The appeal would not be rendered nugatory were a stay not allowed because theoretically the air conditioning units could always be moved back to where they were. I decided that on balance, allowing a period by which to stay the decision below to permit a relatively prompt determination of the appeal is appropriate.

The powers of this Tribunal and scope of the appeal

[18] The decision of the Adjudicator was given under s 276 of the *Body Corporate Community Management Act* 1997 (Qld) ('the BCCM Act' or 'the Act'). Section 276 provides as follows:

> **276 Orders of adjudicators**
>
> (1) An adjudicator to whom the application is referred may make an order that is just and equitable in the circumstances (including a declaratory order) to resolve a dispute, in the context of a community titles scheme, about—
>
> (a) a claimed or anticipated contravention of this Act or the community management statement; or
>
> (b) the exercise of rights or powers, or the performance of duties, under this Act or the community management statement; or
>
> (c) a claimed or anticipated contractual matter about—
>
> (i) the engagement of a person as a body corporate manager or service contractor for a community titles scheme; or
>
> (ii) the authorisation of a person as a letting agent for a community titles scheme.
>
> (2) An order may require a person to act, or prohibit a person from acting, in a way stated in the order.
>
> (3) Without limiting subsections (1) and (2), the adjudicator may make an order mentioned in schedule 5.
>
> (4) An order appointing an administrator—
>
> (a) may be the only order the adjudicator makes for an application; or
>
> (b) may be made to assist the enforcement of another order made for the application.
>
> (5) If the adjudicator makes a consent order, the order—
>
> (a) may include only matters that may be dealt with under this Act; and
>
> (b) must not include matters that are inconsistent with this Act or another Act.

[19] The appeal to this Tribunal is governed by s 289 of the Act, which provides:

289 Right to appeal to appeal tribunal

(1) This section applies if—

(a) an application is made under this chapter; and

(b) an adjudicator makes an order for the application (other than a consent order); and

(c) a person (the aggrieved person) is aggrieved by the order; and

(d) the aggrieved person is—

(i) for an order that is a decision mentioned in section 288A, definition order—an applicant; or

(ii) for another order—

(A) an applicant; or

(B) a respondent to the application; or

(C) the body corporate for the community titles scheme; or

(D) a person who, on an invitation under section 243 or 271(1)(c), made a submission about the application; or

(E) an affected person for an application mentioned in section 243A; or

(F) a person not otherwise mentioned in this subparagraph against whom the order is made.

(2) The aggrieved person may appeal to the appeal tribunal, but only on a question of law.

[20] Section 290 of the Act provides:

290 Appeal

(1) An appeal to the appeal tribunal must be started within 6 weeks after the aggrieved person receives a copy of the order appealed against.

(2) If requested by the principal registrar, the commissioner must send to the principal registrar copies of each of the following—

(a) the application for which the adjudicator's order was made;

(b) the adjudicator's order;

(c) the adjudicator's reasons;

(d) other materials in the adjudicator's possession relevant to the order.

(3) When the appeal is finished, the principal registrar must send to the commissioner a copy of any decision or order of the appeal tribunal.

> (4) The commissioner must forward to the adjudicator all material the adjudicator needs to take any further action for the application, having regard to the decision or order of the appeal tribunal.

[21] Section 146 of the *Queensland Civil and Administrative Tribunal Act* 2009 (Qld) ('QCAT Act') provides:

> **146 Deciding appeal on question of law only**
>
> In deciding an appeal against a decision on a question of law only, the appeal tribunal may—
>
> (a) confirm or amend the decision; or
>
> (b) set aside the decision and substitute its own decision; or
>
> (c) set aside the decision and return the matter to the tribunal or other entity who made the decision for reconsideration—
>
> (i) with or without the hearing of additional evidence as directed by the appeal tribunal; and
>
> (ii) with the other directions the appeal tribunal considers appropriate; or
>
> (d) make any other order it considers appropriate, whether or not in combination with an order made under paragraph (a), (b) or (c).

[22] Pursuant to s 146, read with s 289 of the BCCM Act, in deciding an appeal against a decision on a question of law, this Appeal Tribunal is not engaged in a rehearing of the matter. Twice the Court of Appeal has decided that where this Tribunal is charged with determining a matter where the appeal is on a question of law, the Appeal Tribunal cannot treat the appeal as a rehearing, nor receive fresh evidence, nor make new findings of fact. And only if the determination of the legal error is capable of resolving the matter as a whole, can it substitute its own decision. Otherwise, the appeal must be allowed and the matter remitted.[1] Although the Court of Appeal decision in *Albrecht* was overturned by the High Court on the basis that the Court of Appeal made numerous errors of law in arriving at its conclusions in that decision, it did not make any finding which differed from that which the Court of Appeal determined on that aspect of the appeal.

[23] In *Albrecht v Ainsworth & Ors*[2] the Court of Appeal held at [94] that:

> The appeal to QCATA was limited to a question of law. It was an appeal in the strict sense, not an appeal by way of re-hearing. It had to be determined on the material before the adjudicator. But had QCATA correctly identified an error of law, I do not accept the applicant's contention that its only course was to remit the matter to the same adjudicator for determination according to law. Once an error of law affecting the adjudicator's decision was correctly identified, QCATA could exercise the adjudicator's powers and substitute its own decision based on the material before the adjudicator, consistent with the

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1 *Ericson v Queensland Building Services Authority* [2013] QCA 391, [25]-[28]; *Albrecht v Ainsworth & Ors* [2015] QCA 220, [94].

2 [2015] QCA 220.

> adjudicator's undisturbed factual findings. So much is clear from the terms of s 294 BCCM Act and s 146 QCAT Act.

The relevant legal test – unreasonableness

[24] When looking at the conduct of bodies corporate when acting in general meeting, reference should be made to the High Court's decision in *Ainsworth v Albrecht* [2016] HCA 40. Although the case was concerned with opposition to what became an unsuccessful motion, albeit one required to be passed without dissent, the fundamental principles to be derived from the decision remain the same. Here we have a minority challenging a decision by a majority on the basis of unreasonableness on its part in passing a motion, rather than rejecting it.

[25] In the joint decision of the High Court in *Ainsworth*, French CJ, Bell, Keane and Gordon JJ held that the task of the adjudicator under Item 10 of Schedule 5 was 'not to determine whether the outcome of the vote of the general meeting of the Body Corporate was a reasonable balancing of competing considerations, but whether the opposition of lot owners to the proposal was unreasonable.'

[26] Here then the question is not to determine whether the outcome of the vote of the general meeting of the Body Corporate was a reasonable balancing of competing considerations, but whether the support of lot owners to the proposal was unreasonable.

[27] The Court in *Ainsworth v Albrecht* held that the adjudicator addressed the wrong question, and in consequence 'her ultimate conclusion was inevitably affected by an error of law,' and their Honours also observed that the 'same error affected the approach of the Court of Appeal.' Their Honours observed that:[3]

> It is no light thing to conclude that opposition by a lot owner to a resolution is unreasonable where adoption of the resolution will have the effect of: appropriating part of the common property to the exclusive use of the owner of another lot, for no return to the body corporate or the other lot owners; altering the features of the common property which it exhibited at the time an objecting lot owner acquired his or her lot; and potentially creating a risk of interference with the tranquillity or privacy of an objecting lot owner.

[28] It was further noted that 'opposition prompted by spite, ill-will, or a desire for attention,' may amount to being unreasonable, but it is 'apparent from the foregoing reasons, the adjudicator, the Tribunal and the Court of Appeal all appreciated that this was not such a case.' Thus their Honours held that this Tribunal had been correct in finding that the adjudicator had erred in law, and set aside the order made by the Court of Appeal.

[29] There is no issue here that support for the motion was prompted by spite, ill-will, or a desire for attention, or any other irrelevant consideration.

[30] In a separate judgment, Nettle J noted that this Tribunal had found that the adjudicator had decided the issue on the basis that the opponents to the motion had not demonstrated that the modification offended the integrity of the Scheme. This Tribunal had found that the adjudicator had erred in failing to consider that the objectors had spent millions of dollars in purchasing the award winning units, and

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3 [2016] HCA 40, [55].

'that each feared that those architecture and design principles would be compromised if Albrecht's proposal were allowed to proceed.'

[31] Justice Nettle also disagreed with the conclusion of McMurdo P that there had been no error in regard to the test applied by the adjudicator, and that the correct test was whether the adjudicator was satisfied that Albrecht's proposal had not been passed because the opposition was, in the circumstances, unreasonable.

[32] His Honour also disagreed with McMurdo P's comment that the 'competing submissions and supporting material' meant that the question of unreasonableness was a difficult one to resolve.

[33] In regard to the noise and privacy issues, Nettle J noted that McMurdo P had stated that the adjudicator had been 'unpersuaded' that the alterations would allow the deck to be used 'in a way that would disturb other occupiers or users of the common property,' and that 'any privacy issues could be ameliorated by a privacy blade.' His Honour, however, then stated that:[4]

> …[w]ith respect, McMurdo P's acceptance of that analysis repeats the adjudicator's error of approaching the question as one of whether the adjudicator was satisfied that the objections based on noise and infringement of privacy were reasonable objections.

[34] Justice Nettle then looked at McMurdo P's consideration of issue of whether this might set a the precedent or open the floodgates, noting that her Honour had stated that 'the "floodgates" argument, the adjudicator found, was not a reasonable basis for opposing the proposal.'

[35] Justice Nettle, however, held that 'as the Tribunal identified, the difficulties with that sort of reasoning are manifold,' and that if Albrecht's proposal had been approved, it would have been 'unreal' to suppose others would not seek to similar modifications, for if he was entitled to some of the common property, why shouldn't others. These further applications for alterations would then necessitate the Body Corporate to have to make decisions as to whether it was unreasonable to refuse them, with Nettle J noting that the potential conflict that could arise between owners 'may in itself have provided a reasonable base to oppose the motion in this case.'

[36] Justice Nettle then made one final comment regarding the errors of law that had occurred in the case, and in what can be considered to be a strong rebuke of how the Court of Appeal had approached the case, stated that:[5]

> …apart from asserting that the Tribunal erred in holding that the adjudicator reversed the onus of proof and in holding that the adjudicator applied the wrong test, the Court of Appeal's reasons nowhere grapple with the Tribunal's detailed analysis of the adjudicator's specific errors of law. That is unfortunate for a number of reasons, but particularly because, if greater attention had been paid to the Tribunal's analysis of those problems, it might had led to a better understanding of the correct test and the correct method of its application. For the reasons given, the Tribunal was correct.

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4 Ibid, [105].

5 Ibid, [108].

[37] The correct test in this case is not to ask whether the Adjudicator was satisfied that the proposal had been passed because the support for it was, in the circumstances, unreasonable. The test is not whether the Adjudicator, or for that matter, I consider it was reasonable or not, nor whether the Body Corporate or those who supported the motion have discharged some evidentiary onus of showing it was reasonable, and not unreasonable. The correct test is to ask whether it has been shown that the proposal which had been passed was passed because the support for it was, in the circumstances, unreasonable.

[38] Notwithstanding what the High Court has said to be the test, the applicant submits that there were reasonable and appropriate objections as to the requirement to move the air conditioning units into the proposed location, in the absence of what he describes as plausible alternatives for the matters considered at the EGM and in committee. The objections he summarises are:

(a) The withholding of information at the time of the EGM and which to members had some regard;

(b) What he contends to be 'incomplete and invalid quotes' presented at the EGM for the works;

(c) What he contends to be a lack of any justification or need for moving the air conditioning units; and

(d) What he contends to be a failure to consider other plausible alternatives, including what he describes as the 'existing solution', by which he means preserving the status quo.

[39] In other words, his submissions focus on whether there was or may have been a reasonable basis for his or any other opposition to the motion.

[40] There have been no findings of fact by the Adjudicator to support the contentions that:

(a) There was any withholding of information at the time of the AGM;

(b) That there were incomplete or invalid quotes;

(c) That there was no justification or need for moving the air conditioning condensers; and/or

(d) The existing situation of the condensers was adequate.

[41] Even if there were findings which supported those contentions, and even if the Adjudicator had found that there was a reasonable basis for his contentions in that regard, that does not in my view establish that the Adjudicator erred in concluding that the Body Corporate did not act unreasonably in deciding as it did.

[42] On the issue of whether the Adjudicator made an error of law, the applicant submits that it was the responsibility of the Adjudicator to decide whether the points which have just been stated above were reasonable. In essence, this submission seems to approximate the submission that the Adjudicator's error of law is in failing to consider those submissions. It is well accepted that an Adjudicator is not required to conduct an analysis of and provide reasons for rejecting all or any submissions

which are made by parties who make applications for adjudication. If it were accepted that the Adjudicator was required to provide reasons for rejecting points which might be made in submissions, it does not follow that the conclusions of the Adjudicator ought be set aside in circumstances where, as I elsewhere find in these reasons, there is no demonstrated error on the part of the Adjudicator in determining that it had not been demonstrated that the Body Corporate acted unreasonably in deciding to act as it did. The applicant relies upon a decision in *Commonwealth Bank of Australia v Human Rights and Equal Opportunity Commissioner* (1997) 150 ALR 1 at 34 per Davies Beaumont and Sackville JJ. That submission is based on a proposition which is contrary to that what the High Court and this Tribunal held in *Ainsworth v Albrecht* to be the relevant one.

[43] The issue which was under consideration in the *Commonwealth Bank of Australia v Human Rights and Equal Opportunity Commissioner* decision is not that under consideration here.

[44] That case involved an application under the *Administrative Decisions (Judicial Review) Act* 1977 (Cth) ('ADJR Act') to review a decision made by the Commission, reported: *Finance Sector Union v Commonwealth Bank of Australia* (1997) EOC 92-889. In that decision, the Commission found that a complaint against the Bank, concerning what it described as indirect sex discrimination contrary to s 5(2) of the *Sex Discrimination Act* 1984 (Cth) ('SD Act'), had been substantiated. The issue under consideration was 'reasonableness' in that context – that is, whether the requirement with which the aggrieved person had to comply was 'not reasonable having regard to the circumstances of the case' (SD Act, s 5(2)(b)). It referred to several cases addressing the question (*Waters v Public Transport Corporation; Secretary, Department of Foreign Affairs and Trade v Styles* (1989) 23 FCR 251; and *Commonwealth v Human Rights and Equal Opportunity Commission* (1995) 63 FCR 74 ('Dopking No 2').

[45] In dealing with what was said in that decision I should not be taken to suggest that the approach to deciding reasonableness by a decision maker such as the Commission in that case applies to the question of whether lot owners voting in general meeting are acting unreasonably.

[46] Sackville J, with whom the other members of the Court agreed, said in that case:[6]

> … reasonableness (or non-reasonableness), for the purposes of s 5(2)(b) of the SD Act, is a question of fact for the Commission to determine, but it can only do so by weighing all relevant factors. What is relevant differs from case to case, but will, usually at least, include the financial or economic circumstances of the alleged discriminator, including its ability to accommodate the needs of the aggrieved persons. It may also be relevant to consider the availability of alternative approaches which would achieve the objectives of the alleged discriminator, but "in a less discriminatory way": *Waters v PTC*, at 394-395, per Dawson and Toohey JJ; and see at 383-384, per Deane J; at 410, per McHugh J.
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> As Brennan J pointed out in *Waters v PTC* (at 378), reasonableness cannot be determined in the abstract:

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6 *Commonwealth Bank of Australia v Human Rights and Equal Opportunity Commissioner* (1997) 150 ALR 1, 33-35.

> [I]t must be determined by reference to the activity or transaction in which the putative discriminator is engaged. Provided the purpose of the activity or transaction is not to discriminate on impermissible grounds, the reasonableness of a requirement or condition depends on whether it is reasonable to impose the requirement or condition in order to perform the activity or complete the transaction. There are two aspects to this criterion of reasonableness: first, whether the imposition of the condition is appropriate and adapted to the performance of the activity or the completion of the transaction; second, whether the activity could be performed or the transaction completed without imposing a requirement or condition that is discriminatory (that is, one to which pars (a) and (b) of s 17(5) [equivalent to s 5(2)(a) and (c) of the SD Act, respectively] would apply) or that is as discriminatory as the requirement or condition imposed. These are questions of fact and degree. Effectiveness, efficiency and convenience in performing the activity or completing the transaction and the cost of not imposing the discriminatory requirement or condition or of substituting another requirement or condition are relevant factors in considering what is reasonable.

Fifthly, the role of the Commission is not to determine whether the decision to impose the condition or requirement was the "correct" one. The point was put this way by Heerey J in AMC v Wilson (at 61-62), adopting a passage in the judgment of Sheppard J in *Dopking (No 2)*:

> 'reasonable' in this context speaks of a term, condition or requirement that is dictated by reason and rationality - not necessarily in which all people or even most people agree. In Dopking Sheppard J emphasised what is in my respectful opinion an important aspect of reasonableness in an indirect discrimination context. The case was concerned with a complaint by Mr Dopking that a Defence Department determination that a benefit for the reimbursement of legal and other costs in connection with the acquisition of off-base accommodation by armed services personnel discriminated against him because it was restricted to personnel with families. Mr Dopking, being single, was entitled to full board in barracks but wished to live in his own home. Sheppard J said (at 87):
>
> > "The basis for the discrimination which results from [the determination's] application only to married members is, in the circumstances of the case, within the bounds of objective reasonableness. In other words, the point of distinction which has been adopted has a logical and understandable basis. There may have been other ways of approaching the problem; views may differ about the matter. But, in my opinion, there was nothing unreasonable in adopting the point of distinction applied by those responsible for the determination. With respect, I do not consider any other view to be open. I am thus unable to see how it can be said that the adoption of the policy to which the determination gives effect is unreasonable having regard to the relevant circumstances."

It may be that the passage cited from the judgment of Sheppard J in *Dopking (No 2)* somewhat overstates the position. The fact that a distinction has a "logical and understandable basis" will not always be sufficient to ensure that a condition or requirement is objectively reasonable. The presence of a logical and understandable basis is a factor - perhaps a very important factor - in

> determining the reasonableness or otherwise of a particular condition or requirement. But it is still necessary to take account of both the nature and extent of the discriminatory effect of the condition or requirement (in the sense in which the authorities interpret that concept) and the reasons advanced in its favour. A decision may be logical and understandable by reference to the assumptions upon which it is based. But those assumptions may overlook or discount the discriminatory impact of the decision. Depending on the circumstances, such a decision might be legitimately characterised as not reasonable, having regard to the circumstances of the case, within the meaning of s 5(2)(b) of the SD Act. I do not understand Heerey J to have intended to express a different view in *AMC v Wilson*. However, in my respectful view, Sheppard J's judgment correctly emphasises that the question is not simply whether the alleged discriminator could have made a "better" or more informed decision. The issue is that posed by the legislation, namely, whether the requirement is not reasonable having regard to the circumstances of the case.

[47] Even adopting the reasoning of that case about what reasonableness (or non-reasonableness), for the purposes of s 5(2)(b) of the SD Act entailed, and accepting its specific application in the statute under consideration there, the question is not simply whether the Body Corporate could have made a 'better' or more informed decision. The issue is whether the determination by lot owners to move the units and the associated resolutions were unreasonable having regard to the circumstances of the case.

[48] The applicant also submits that the test which the Adjudicator should have considered 'should have been whether a reasonable person would have opposed the motions on any, or all, of the bases outlined'. The test is not whether a reasonable person would have opposed the motions on any, or all, of the bases outlined. Nor should the Adjudicator have considered that issue. There was no error of law on the part of the Adjudicator in failing to do so.

[49] The applicant further submits that it could be expected that a body corporate will behave reasonably and in the best interests of lot owners and would expect proper consideration to be given to objections, and to ensure everyone is able to make an informed decision when called upon to vote upon resolutions.

[50] This is the shadow of the submission dealt with earlier which seems to seek to raise the notion that a Body Corporate must give consideration to objections, or give some kind of appropriate hearing to objectors or those who oppose the motion or otherwise be seen to act unreasonably; as if procedural fairness was a relevant factor.

[51] Of course, the Body Corporate in general meeting is acting in private. It is not exercising any statutory decision making function, and is not bound by the rules of natural justice or to apply procedural fairness, except to the extent that the Act required the meeting to be conducted according to specified procedures. There is nothing in the Act to identify a way in which lot owners might even give consideration to objections. Motions are accompanied by explanatory material but reasons are not given for the passing of resolutions, and there is no effective mechanism to decide whether there has been proper consideration given to objections or the opinions of those who oppose motions.

[52] Similarly there is little if anything to identify the extent to which decision makers who vote on a motion are 'fully informed' of the matters about which objectors might wish them to give consideration.

[53] In my view, there is no basis to conclude that the Adjudicator made an error of law in failing to conclude either that the lot owners did not give proper consideration to objections, whatever they may have been, or make an informed decision about the substance of the motions.

[54] In his written submissions the applicant submits that he has demonstrated that the Body Corporate Committee was in possession of research that was relevant to the decision about the removal of the air conditioning units which was not shared with all committee members. He contends that there were insights from an experienced building services engineer, and advice from persons with necessary knowledge, which was not shared with owners. He submits that it was reasonable to expect that this information would have been provided to lot owners prior to the relevant meeting. That material was obtained by the Body Corporate to obtain clarification of certain aspects of the decision made. There is nothing to demonstrate that the information to which he refers was available to be provided to lot owners prior to the relevant meeting. The fact that it was obtained does not mean it had to be shared with the lot owners. In any event the research favoured the decision made, and was not in any way likely to lead to a reconsideration which would lead to overturning the decision.

[55] The Adjudicator did not err in failing to find that there was such information and that it should have been provided to lot owners. But even if the Adjudicator had concluded that there was such information, it does not follow that the Adjudicator ought to have concluded, and could only have concluded, that the passing of the motions was unreasonable having regard to the nature of that information. On the contrary, the information which now exists and to which the submission addresses itself substantiates the decision to move the condensers.

[56] The applicant further submits that the quotes which were provided to do the work associated with the removal were incomplete and some were out of date. There is some evidence that those quoting had confirmed their willingness to do the work at the specified prices notwithstanding the passage of time. The Adjudicator did not accept that the quotes were incomplete or out of date, and there is no demonstrated error of law in an Adjudicator's failure to do so. Even had the Adjudicator concluded that the quotes were incomplete and were out of date, it does not follow that a Body Corporate must be acting unreasonably if it makes a decision based upon documentation which has that character.

[57] The applicant also raised objections in submissions to the:

(a) Failure to explain why there was urgency in relation to the decision;

(b) Failure to identify how or why enjoyment of the car park was being impeded for lot owners at that time when it was allegedly not impeding that enjoyment earlier;

(c) Failure to consider alternative potentially cheaper locations and to identify whether a compromise was to be achieved without the need for air conditioning condenser units to be moved;

(d) Failure to explain why an existing and functioning ventilation system was being ignored;

(e) Failure to consider safety implications of the proposed location;

(f) Failure to consider the potential noise nuisance implications of moving the units;

(g) Failure to consider the relocated air conditioner unit efficiency and impact on their longevity in the new location, because they would be in direct sunlight; and

(h) Failure to consider the overall financial implications in the existing position did not require any expense to be incurred or be distributed amongst lot owners.

[58] That is not to say that those objections were raised by the applicant at or before the meeting of the Body Corporate which resolved the matter. They were not. He did not attend the meeting, because he had another commitment. Accepting that to be so, it is impossible to conclude that the failure to dispel his presently stated concerns on those issues was unreasonable, and that the determination to pass the resolution was of itself unreasonable.

[59] The Adjudicator did not make findings of fact which are consistent with these contentions. Even if there were facts to support some of these contentions, failures of the kind which have been identified in the submissions do not demonstrate unreasonableness on the part of the Body Corporate in its determination to move the units.

[60] There were justifications for the moving of the units which were fundamentally associated with the fact that in their present location they caused very significant problems with heat being produced from the units and some units were significantly being affected by this heat. There were other aspects of the reasons behind the decision which went to the amenity of lot owners generally. It was open to the lot owners to decide, acting reasonably, having regard to those factors, that they were so significant that it might not be necessary to have regard to the sorts of issues that have been raised by the applicant in his submissions here and listed at paragraph 57 of these reasons.

The respondent's arguments

[61] The respondent submits that the Adjudicator understood and carefully considered the submissions of the applicant and respondent. The respondent submits that the Adjudicator identified the relevant statutory provisions and found, correctly it is submitted, that:

(a) The air conditioning condensers, being in the basement garage, are not within the boundaries of the lot, and hence prima facie, are common property;

(b) Movement of the condensers is 'an improvement' (within the meaning of Schedule 6 of the Act) to common property.

(c) Section 163 of the Standard Module provides that the body corporate may make improvements to common property, costing more than $1,800 but less than $12,000 if authorised by ordinary resolution; and

(d) Motion 2 of the EGM of 5 May 2019 resolved to relocate the condensers and the motion was passed by ordinary resolution.

[62] The respondent submits that none of the applicant's objections to the motions evidence any failure to comply with legislation.

[63] The respondent submits that the Body Corporate and committee have a legislative obligation to act reasonably and although the applicant disagrees with the Body Corporate and committee decisions in relation to the relocation of the condensers, the applicant has failed to persuade the Adjudicator that the Body Corporate or committee failed to act reasonably in arriving at its decisions..

[64] The respondent submits that although the applicant contends that the Body Corporate and committee acted unreasonably in not sharing with the applicant all material in their possession justifying the making of the decisions to relocate the condensers, the Body Corporate met at a lawfully scheduled EGM on 5 May 2019 in order to discuss the merits or otherwise of the proposed motions, as the minutes of that meeting record.

[65] The respondent submits that the applicant chose not to attend the EGM on 5 May 2019, and instead, submitted detailed objections to the validity of the motions as well as arguments as to why the condensers should not be moved. The applicant was consequently not present when the motions were debated. The respondent submits that had the applicant been present, he would have been party to discussions concerning the merits of the proposal and would have had a further opportunity to advance his contentions as to why the motions should not be passed.

[66] The respondent submits that that the applicant cannot now claim unreasonableness arising from the applicant's voluntary decision to absent himself from discussions concerning the merits of the motions.

[67] The respondent submits that the summary of the material considered by the Adjudicator evidenced the breadth and adequacy of the material upon which the Body Corporate and committee made its decisions. The respondent submits that this material provided an ample basis for the conclusion of the Adjudicator that the Body Corporate and committee have not been shown to have acted unreasonably.

[68] At the heart of the applicant’s arguments is the proposition that the onus lies with the Body Corporate to prove that its conduct is reasonable, and that if it is not demonstrably reasonable, or indeed demonstrated to be reasonable to move the units proposed, then it is unreasonable. For the reasons I have identified earlier, there is no legal foundation for any proposition of that kind, nor any proposition that the Body Corporate has some duty to prove that it is acting reasonably, and that if it does not, an Adjudicator must decide that conduct is unreasonable.

[69] The ancillary submission for the applicant is that there is an obligation on the Body Corporate to conduct due diligence investigations in relation to its decisions. The fact that the applicant has his own concerns about issues such as safety, the risk of vandalism, the adequacy of the current ventilation system, the longevity of the units

in their new location and other such concerns do not result in the conclusion that, unless disproved, the decision in question is to be treated as prima facie unreasonable.

[70] The Adjudicator made reference to the justification for the Body Corporate decision to move the condensers. These included a list of eight practical reasons which the Adjudicator identified in the reasons at [15] as providing sound justification for the decision to remove the condensers. The Adjudicator held at [29] the movement of the condensers was an improvement within the meaning of Schedule 6 of the Act, to common property, and that the resolution passed met the requirements of the Act for such a motion.

[71] In my view, the Adjudicator made no error of law in concluding that that the Body Corporate or the committee failed to act reasonably in arriving at its decisions. The Adjudicator was not satisfied on the basis of the material that it was just and equitable to invalidate either the Body Corporate resolutions made at the EGM on 5 May 2019, or the committee resolutions based on them, made outside of a committee meeting on 10 May 2019.

The statutory easements issue

[72] The applicant also contended that there has been a contravention of s 162(2) of the Act that the resolutions were required to be without dissent. Section 162(2) of the Act is concerned with the power of a body corporate, if authorised by a motion passed without dissent, to grant an easement of common property or accept the surrender of an easement. The respondent contended that there is no question of the authority of a body corporate to relocate utility infrastructure from one part of common property where it was permitted to be placed pursuant to a statutory easement, to another part of the common property also subject to a statutory easement, and no question of legal invalidity arises.

[73] The applicant submits that since this matter relates to what he describes as ‘statutory easements’, the vote that was held was not in compliance with the requirements of s 162(2) of the Standard Module, therefore the resolution was invalid or ought to be deemed to have been invalid.

[74] The applicant also submits that the failure to table the motions in accordance with the requirements of s 162(2) of the Standard Module was a contravention of the regulation, but also evidence that the respondent was not acting in the best interests of the Body Corporate.

[75] He argues that there is an impediment to moving the units because the place to which the units are proposed to be moved, which he concedes is still on Body Corporate property, as the units presently are, will not be the subject of any statutory easement and one will have to be granted . He submits that s 162(3) of the Standard Module is operative in that it provides that the Body Corporate may only grant to surrender an easement over common property by resolution without dissent. He submits that since there was no motion without dissent which established or granted an easement over the common property for the purpose of locating the condensers there, that they could not be moved there. This is also said to demonstrate a failure to act reasonably and in the best interests of the Body Corporate.

[76] The applicant's submissions on this issue are misconceived. Air conditioning condensers of the kind in question are utility infrastructure and part of the common property. Insofar as it becomes necessary, the *Land Title Act* 1994 (Qld) deems a statutory easement for access to the units as long as units are there, and without reasonable interference. There is no requirement for the Body Corporate to grant an easement over the common property by resolution for these condensers to be placed where it is proposed that they be placed. If they are placed there, the law grants the easement which is effective for the relevant purposes.

[77] Therefore it was unnecessary for the Body Corporate to have passed any motion which specifically dealt with the grant or surrender of relevant easements over common property associated with the movement of these condensers. It was not unreasonable not to have passed any such motion.

[78] It follows, that in my view, none of the grounds of appeal is made out.

[79] Accordingly, the appeal is dismissed.

[80] I discharge the respondent from any undertakings given not to implement the decision of the Body Corporate resolutions made at the EGM on 5 May 2019, or the committee resolutions based on them, made outside of a committee meeting on 10 May 2019.