

**IN THE HIGH COURT OF AUSTRALIA
BRISBANE REGISTRY**

NO. B37/16

BETWEEN

KJERULF AINSWORTH
First Appellant

AND

LISA MARTOO
Second Appellant

AND

JOHN MORRIS
Third Appellant

AND

MARK LANG
Fourth Appellant

AND

JOHN MAINWARING
Fifth Appellant

AND

MARTIN ALBRECH
First Respondent

AND

BODY CORPORATE FOR VERIDIAN NOSSA RESIDENCES CTS 3404
Second Respondent

SUBMISSIONS IN REPLY ON BEHALF OF APPELLANTS

Part I: Suitability for publication

1. The Appellants certify that this submission is in a form suitable for publication on the internet.

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Part II: Reply

2. The first and second issues identified by the Appellants in their primary submissions (and described by the First Respondent as the “role of the Adjudicator” issue and the “test for unreasonableness issue”) are closely linked. Applying the correct test of unreasonableness will largely govern how the Adjudicator determines whether he or she is satisfied in terms of Item 10 of Schedule 5 to the BCCM Act, and whether it is just and equitable to make an order in terms of s. 276 BCCM Act.
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3. The contest is between an approach (adopted by the Adjudicator in this case, and endorsed, it is submitted, by the President of the Court of Appeal at paragraphs [82], [84] and [92] of the Reasons of that Court) whereby the Adjudicator makes findings of fact, and decides whether, in his or her own view, the opposition to the motion was unreasonable; and an approach (advocated by the Appellants) whereby the Adjudicator determines whether the opposition to the motion was objectively unreasonable.
4. It is necessary to understand the nature of the findings of fact made by the Adjudicator in order to demonstrate the error. At the relevant Body Corporate Meeting, each lot owner in deciding whether to oppose the First Respondent’s motion was entitled to form an opinion about whether the matters which were the subject of the motion created the risk that there would be an adverse effect on that lot owner or on the scheme generally. In order to form the opinion, each lot owner was entitled to have regard to facts capable of being known to them at the time of the meeting. In this situation, those facts would include expert opinions, such as the opinions of architects. A decision of a lot owner to oppose the motion would be reasonable if there were facts rationally capable of supporting the opinion of the lot owner that there was a sufficient risk of adverse consequences if the motion was passed. If the facts were in conflict, a lot owner would act reasonably if it was rationally open to that lot owner to prefer one view of the facts over an opposing view, for the purpose of making an informed risk assessment.
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5. The Adjudicator did not undertake the process of determining whether the dissenting lot owners had formed an opinion on this basis which was reasonable. Rather, the Adjudicator had regard to evidence of competing primary facts (whether available to lot owners at the meeting or not), including competing opinions of architects, and made a decision about which of the primary facts she accepted. Having made that decision, she then determined that if a lot owner had acted on a view of the facts contrary to her own view, that lot owner must have acted unreasonably. The Adjudicator did not apply the correct test.
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6. In determining whether a decision to oppose was reasonable in all the circumstances, it is necessary to define those circumstances which are relevant. Identification of the relevant circumstances does not equate to resolving disputes of primary facts (including resolving disputes of architectural opinion). The relevant circumstances are the existence of the primary facts (in this case including the architectural opinions). A consideration of unreasonableness in this case required a consideration about whether the decision to oppose could reasonably be taken having regard a risk assessment based on consideration of the primary facts.
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7. The First Respondent submits (at paragraph 20) that there is nothing in the reasons of the Adjudicator that support the Appellants' contention that she misunderstood her role. The Appellants point to the following:
- a. At paragraph [15], the Adjudicator summarized the basis of opposition of the adjoining owners. At paragraphs [70-77] of her reasons, the Adjudicator deals with the position of the adjoining owners. At paragraph [74] the Adjudicator sets out her view as to what would be unreasonable, supported by a section of the BCCM Act that is directed to the behavior of lot owners, and is not directly relevant. The Adjudicator resolves the issue by preferring the evidence of one architect over the others, and reaches her own conclusion as to whether the opposition of the adjoining owners was reasonable. Having reached that conclusion, the Adjudicator states at [89] that if the adjoining owners remain concerned about privacy, they could ask the [first respondent] to install a further privacy screen. The Adjudicator's approach to the opposition of this one opponent demonstrates a misunderstanding of her role;
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- b. The statement of the issue in [21] and [22] is incorrect. The issue was whether the motion was defeated because of opposition that was, in the circumstances, unreasonable;
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- c. At [34] the Adjudicator refers to the decision being objectively reasonable. Again that mis-states the enquiry, which is whether the objection to the motion was (objectively) unreasonable;
- d. The stated approach at [41] is potentially correct, but it is how that approach manifested itself that highlights the error in the way the Adjudicator went about her task. The Adjudicator went through the various grounds of opposition and formed her own views as to the merit of each ground: [47], [53], [57], [61], [62], [63], [67], [78], [79] and [82].
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8. As to paragraphs 11 and 12(a) of the submissions of the First Respondent, it is submitted that the proper role of the Adjudicator was raised in the grounds of appeal to the QCAT appeal member. In any event, the way in which the

Adjudicator conducted her task was fundamental to any consideration as to whether she erred in law. The role of the adjudicator was raised.

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9. Paragraph 12(d) of the First Respondent's submissions contends that the Appellants incorrectly state that the present case was the first occasion on which the Queensland Court of Appeal was required to decide the issue, framing that issue as to whether or not the *Wednesbury* test for unreasonableness ought to be applied. That is not what the Appellants submit. The present case was the first occasion for the Court of Appeal to consider the issue of what "unreasonable" means in Item 10 of Schedule 5 to the BCCM.
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10. The First Respondent's submission at paragraph 12(f) begs the question, as to how the Adjudicator fulfills her statutory function. The test propounded by the Appellants is materially different from that applied by the Adjudicator. The Appellants contend that there was no warrant for the Adjudicator to act, effectively as an arbiter of fact, in reaching her own conclusions as to the merits of various grounds of opposition, and then substituting her view for those of the dissentients to the motion. The President of the Court of Appeal has endorsed the manner in which the Adjudicator acted, by reference, inter alia, to the ordinary meaning of the term 'adjudicator'.
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11. The First Respondent's answer to the Appellants' submissions regarding the erroneous approach taken by the Adjudicator and endorsed by the Court of Appeal is that the Appellants have mis-read paragraph [82] of the Reasons of the President in the Court of Appeal, and the reasons of the Adjudicator. A reading of paragraphs [82], [84] and [92] of the Reasons of the President, it is submitted, makes good the point made at paragraph 41 of the Appellants' primary submissions. For the reasons identified above, at paragraph 4, a fair reading of the Adjudicator's reasons demonstrates the point that the Appellants wish to make. It is the approach of the Adjudicator, reflected in her reasons, that was endorsed by the President. There is no mis-reading, or taking the sentence highlighted out of context, as asserted by the First Respondent.
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12. An objective test of unreasonableness, proposed by the Appellants, is consistent with the operation of the BCCM. That is, decisions are to be made primarily at body corporate level, but where there is opposition that is objectively unreasonable, an adjudicator can make an order to the contrary of that made by the body corporate.
13. The case relied upon by the First Respondent, at paragraph 25 of its submissions, regarding the reasonableness of a decision, is of little assistance in the resolution of the present dispute. *Minister for Immigration and Citizenship v Li* (2013) 249 CLR 332 concerned procedural fairness, in the context of a refusal to grant an adjournment for a particular purpose. Nothing said at [30] and [68] assists this

Court in construing Item 10 of Schedule 5 to the BCCM, or whether the approach of the Adjudicator in assessing whether conduct was unreasonable. In particular, nothing is said that casts doubt on the Appellants' proposed objective test of unreasonableness.

14. The two decisions of the Queensland Court of Appeal referred to at paragraph 29 of the First Respondent's submissions are also of limited assistance. *Independent Finance Group Pty Ltd v Mytan Pty Ltd* [2003] 1 Qd R 374 concerned a question as to jurisdiction of an adjudicator, and it was in that context that Thomas JA made the quoted statement at [31]. His Honour offered no interpretation of what was meant by "a certain type of unreasonable conduct that might otherwise frustrate an objective that could otherwise only be attained by a resolution without dissent".
15. *Hablethwaite v Andrijevic* [2005] QCA 336 was decided effectively on the basis that there was no justiciable dispute between the parties, and the Applicant was seeking an advisory opinion of the Court: see Keane JA (as his Honour then was) at [22] – [25]. Nothing said at paragraph [33], relied on by the First Respondent assists in the determination of this appeal.
16. The submission made by the First Respondent at paragraph 31(f), by reference to paragraph [84] of the President's reasons highlights the flaw in the approach of the Adjudicator and of the Court of Appeal. An approach that permits different decisions, depending on the view of a particular decision maker as to the facts, is hardly consistent with the objects of the BCCM. To the contrary, the objective approach advocated by the Appellants permits of one answer. Such an approach avoids the pitfall highlighted by the Appellants in their primary submissions, that to endorse the approach applied in the present case by the Adjudicator is to render decisions of a body corporate subject to a merits review on the application of an aggrieved lot owner. The purpose and object of the BCCM is to make the body corporate the decider of issues as between lot owners, with the protection that if there is conduct that it in all of the circumstances objectively unreasonable, the office of the Commissioner can intervene, including by the appointment of an Adjudicator.

Part III: The Notice of Contention

17. It was pointed out in the Appellants' primary submissions, at paragraph 21, that the Adjudicator, in performing her statutory function, was not bound by the rules of evidence.
18. It is accepted that, having regard to the provisions of the BCCM, and the way in which the adjudicator is authorized to act, that there is no legal onus of proof on either party to the dispute before the adjudicator.

19. In the present case, onus of proof has been used as a label to describe how the function of the Adjudicator is to be performed: *McDonald v Director-General of Social Security* (1984) 1 FCR 354 at 356-7.
20. In the present case, the Adjudicator put a practical onus on the present Appellants to satisfy her of the reasonableness of their opposition. That was inappropriate. The task of the Adjudicator was to determine whether she was satisfied that the objection to the motion was in all of the circumstances unreasonable. Any practical onus of persuasion lay on the First Respondent.
21. In making a number of her findings the Adjudicator stated that she was not satisfied on the evidence of a number of grounds of opposition. The way in which the Adjudicator expressed herself in her reasons plainly demonstrates that the Adjudicator regarded the present Appellants of having the task of persuading her as to the reasonableness of their conduct, rather than (as ought to have been the case, it is submitted) the First Respondent having the task of persuading the Adjudicator that, objectively, the conduct of each of the dissentients (given that a resolution without dissent was required) was unreasonable.
22. As to the scope of the appeal issue, it is submitted that s. 146 of the QCAT Act gave power to the appeal member to substitute his decision for that of the Adjudicator.
23. If the Adjudicator had not erred in law in the approach she took to the determination of the matter before her, and had she applied the correct test of unreasonableness, there was, it is submitted, only one result that was open to her. In those circumstances, the issue sought to be raised by the First Respondent as to whether the matter ought to have been remitted to the Adjudicator does not arise.

Dated: 17 August 2016

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