CASENOTE

THE BATTLE OF THE BALCONIES: *AINSWORTH v ALBRECHT*

DR CHRIS DAVIES*

I INTRODUCTION

The regulation of disputes involving community title in Queensland is covered by the *Body Corporate and Community Management Act 1997* (Qld) ('the Act') and the recent case of *Ainsworth v Albrecht* [1] involved the application of the Act in regard to rights relating to common property. The dispute in question was originally referred to an adjudicator, before being appealed to the Queensland Civil Administration Tribunal ('the Tribunal'), then the Court of Appeal of the Supreme Court of Queensland, and finally, the High Court. Thus, the case provides an insight as to how disputes are to be resolved under the Act. This case note will therefore examine the history of this case, and the interpretation of the Act by various levels of judicial and non-judicial bodies.

II *AINSWORTH v ALBRECHT*

A *Background Facts*

The case involved the architectural award winning Viridian Noosa Residences at Noosa, comprising of 23 lots of semi-detached townhouses, run by a Body Corporate.[2] Albrecht wanted to join the two separate balconies on his lot, which required exclusive use of the common property space between these two balconies, estimated to be five square metres.[3] However, a proposal to allow this change was defeated at a Body Corporate meeting, with Albrecht then applying to the Office of the Body Corporate and Community Management requesting the matter be referred to an adjudicator. Albrecht was seeking an order under s 276 of the Act that the opposition to the motion had been unreasonable.[4] Section 276 (3) refers to the fact that an 'adjudicator may make an order mentioned in schedule 5.' Schedule 5 of the Act includes Item 10 which states that 'if satisfied a motion…considered by a general meeting of the body corporate and requiring a resolution without dissent was not passed because of opposition that in the circumstances is unreasonable – an order giving effect to the motion as proposed, or a variation of the motion as proposed.'[5]

Evidence was produced before the adjudicator by the owners of the adjoining Lot 10 that Albrecht's 'proposal would have an adverse effect upon their privacy.' This was in the form of expert evidence from three architects, though Albrecht then presented

* Associate Professor, College of Business, Law and Governance, James Cook University.
[1] [2016] HCA 40
[2] Ibid, [5].
[3] Ibid, [7].
[4] Ibid, [11].
[5] Ibid, [17].

evidence to the contrary from three other architects.[6] The adjudicator found, firstly, that 'the proposed extension would have no noticeable detrimental impact on the building's architectural integrity' and, secondly, that the proposed extension would not 'increase the use of the deck noise in a way which would disturb the other occupiers.'[7] The adjudicator then held that the owners of Lot 10's privacy concerns 'were not a sufficient basis to warrant the refusal of the motion.'[8] Under s 94 (2) of the Act, the Body Corporate was required to act reasonably in making decisions, with the adjudicator concluding that 'on balance' the Body Corporate had not acted reasonably in deciding not to pass the motion,'[9] and therefore made an order deeming it to have been passed.'[10]

Ainsworth, together with four other owners, then appealed the decision to the Tribunal which noted that the 'decks were intentionally designed with limited functionality,'[11] and also that the adjudicator had failed to address the issue of compensation for the loss of common property airspace.[12] It therefore held that 'the adjudicator has impermissibly substituted her own opinion as to the reasonableness of the Body Corporate's decision, and had not focussed on whether the opponent's grounds of opposition was unreasonably held', and had therefore erred in law.[13]

It was then Albrecht's turn to appeal, this time to the Court of Appeal.[14] In a single judgment McMurdo P (with whom Morrison JA and Martin J agreed) it was held that the Tribunal had been wrong 'in concluding that the adjudicator had erred in law in making the findings of fact to resolve those reasonable differences of opinion in favour of the first respondent [Albrecht].'[15] It was also held that 'the adjudicator was not limited to determining whether the opposition to the motion could have been reasonably held' as she 'was required to reach her own conclusion after considering all relevant matters.'[16] In regard to the issue of compensation, it was held that since the adjudicator considered that the airspace was of no value to anyone other than Albrecht, she had not erred in failing to regard the 'failure to offer compensation as a reasonable basis to oppose the motion.'[17] This decision was then appealed to the High Court.

B *The High Court Decision*

In a joint decision, French CJ, Bell, Keane and Gordon JJ noted 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

[6] Ibid, [20]. See also *Viridian Noosa Residencies* [2013] QBCCMCmr 351.
[7] Ibid, [21].
[8] Ibid, [22].
[9] Ibid, [28].
[10] Ibid, [29].
[11] Ibid, [32]. See also *Re Body Corporate for Viridian: Ainsworth v Albrecht* [2014] QCATA 294.
[12] Ibid, [33].
[13] Ibid, [31].
[14] *Albrecht v Ainsworth* (2015) ANZ ConvR 15-041; [2015] QCA 220.
[15] Ibid, 374-375; [93].
[16] Ibid. 372; [82].
[17] Ibid, 374-375; [93].

was unreasonable.'[18] Since the adjudicator addressed the wrong question, 'her ultimate conclusion was inevitably affected by an error of law,'[19] their Honours also noting that the 'same error affected the approach of the Court of Appeal.'[20] More specifically their Honours noted that:

> 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.[21]

It was further noted that 'opposition prompted by spite, ill-will, or a desire for attention,'[22] 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.'[23] Thus their Honours held that the Tribunal had been correct in stating the adjudicator had erred in law, and set aside the order made by the Court of Appeal.[24]

In a separate judgment, Nettle J noted that the Tribunal had found that the adjudicator had decided the issue on the basis that the opponents had not demonstrated the modification offended the integrity of the Scheme. The Tribunal had therefore found that the adjudicator has erred in failing to consider that the objectors had spent millions of dollars in purchasing the award winning units, and 'that each feared that those architecture and design principles would be compromised if Albrecht's proposal were allowed to proceed.'[25] Justice Nettle also noted that the Tribunal had stated the adjudicator had erred in not taking into consideration the evidence that Albrecht 'saw himself as paving the way for other owners to be permitted to make similar alterations.'[26]

Justice Nettle also disagreed with McMurdo P stating 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.[27] Her Honour also disagreed with McMurdo's comment that the 'competing submissions and supporting material' meant that the question of unreasonableness was a difficult one to resolve.[28]

In regard to the noise and privacy issues, Nettle J noted that McMurdo P had stated that the adjudicator had been 'unpersuaded' 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.' Her Honour,

---

[18] *Ainsworth v Albrecht* [2016] HCA 40, [51].
[19] Ibid, [52].
[20] Ibid.
[21] Ibid, [55].
[22] Ibid, [63].
[23] Ibid.
[24] Ibid, [66].
[25] Ibid, [87].
[26] Ibid, [89].
[27] Ibid, [97].
[28] Ibid, [101].

however, then stated that 'with 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.'[29]

Justice Nettle then looked at McMurdo P's consideration of the precedent issue, noting that her Honour had stated that 'the "floodgates" argument, the adjudicator found, was not a reasonable basis for opposing the proposal.'[30] Justice Nettle, however, stated 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.'[31]

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:

> It remains only to observe that one of the remarkable features of the Court of Appeal's judgment is that, 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 have led to a better understanding of the correct test and the correct method of its application. For the reasons given, the Tribunal was correct.

Thus, Nettle J likewise allowed the appeal, with costs being awarded against Albrecht.

III CONCLUSION

A fundamental common law principle is that land includes the soil, and the air space above, at least to the height for the ordinary use of that land.[32] It is suggested that this case reinforces that principle, and it was estimated that the value of the air space in question was at least $10 000, possibly as much as $20 000.[33] This is consistent with other cases, such as *Uniting Church in Australia Property Trust (NSW) v Immer (No 145) Pty Ltd*,[34] which have established that air space has a monetary value.

The main principle that emerges from the case, however, is that the correct test that needs to be applied in a dispute regarding what can be done within a community title scheme, is to ask whether any objections to the proposal were unreasonable, given the overall circumstances. The case also highlights the full scope of recourse the Act

[29] Ibid, [105].
[30] Ibid, [106].
[31] Ibid, [107].
[32] *Bernstein of Leigh (Baron) v Skyways & General Ltd* [1978] QB 479, 488.
[33] *Ainsworth v Albrecht* [2016] HCA 40, [75].
[34] (1991) 24 NSWLR 510, 511.

provides, the provisions for alternative dispute resolution allowing the matter to be first heard by an adjudicator, with an aggrieved party then having the right to take the matter to the Tribunal. Even that may not be the end of the matter as appeals can be made to the courts, in this case both the Court of Appeal and the High Court.

While this highlights the legal avenues available to parties, it also raises concerns with how the case was conducted. One concern is that in relation to decisions made by a Body Corporate, the adjudicators will not only be the first level of appeal, but may be the only one. This is because many parties are likely to either not have the funds, or the desire, to take the matter any further. One of the main reasons for alternative dispute resolutions options for Body Corporate situations is to provide cheaper means of adjudication. However, a satisfying decision by an adjudicator does rely on the correct test being applied, and it is a concern that it was not done in this case, leading to the need for appeals, and the subsequent costs involved.

The application of the unreasonable opposition test raises the question as to what evidence is required to prove that the opposition was, in fact, unreasonable. The High Court indicated that, although it was not the case here, evidence of spite or ill-will could be sufficient to demonstrate unreasonable opposition. It is further suggested the case also provides indications of what may be reasonable opposition, namely objecting to changes in architectural design, and opposing decisions that may lead to potential further conflicts.

There is also perhaps a cautionary tale in the case, and that is the issue of costs, as the fact that it reached the High Court surely means that the balconies in question at the Viridian Noosa Residencies now have the dubious honour of being the most expensive in Australia.