HIGH COURT OF AUSTRALIA

FRENCH CJ,
BELL, KEANE, NETTLE AND GORDON JJ

KJERULF AINSWORTH & ORS APPELLANTS

AND

MARTIN ALBRECHT & ANOR RESPONDENTS

Ainsworth v Albrecht
[2016] HCA 40
12 October 2016
B37/2016

ORDER

1. *Appeal allowed.*

2. *Set aside the order of the Court of Appeal of the Supreme Court of Queensland made on 6 November 2015, except insofar as it orders in paragraph 1 that leave to appeal be granted, and in its place order that the appeal be dismissed with costs.*

3. *The first respondent pay the appellants' costs of the appeal to this Court.*

On appeal from the Supreme Court of Queensland

Representation

S S W Couper QC with K N Wilson QC for the appellants (instructed by Australian Property Lawyers)

D R Gore QC with M J Batty for the first respondent (instructed by Mahoneys Lawyers)

Submitting appearance for the second respondent

Notice: This copy of the Court's Reasons for Judgment is subject to formal revision prior to publication in the Commonwealth Law Reports.

CATCHWORDS

Ainsworth v Albrecht

Real property – Community titles scheme – Use of common property – *Body Corporate and Community Management Act* 1997 (Q) – Dispute between owners of lots in community titles scheme – Where one lot owner sought to use common property airspace to expand balconies – Where proposal put to body corporate for alteration of rights of lot owners to allow lot owner exclusive use of common property – Where proposal required resolution without dissent – Where motion defeated – Where proponent applied for dispute resolution – Where adjudicator concluded that opposition by other lot owners to proposal unreasonable – Whether adjudicator erred in approach to decision – Whether grounds for opposition to motion by individual lot owners unreasonable – Whether necessary to balance competing interests.

Words and phrases – "adjudicator", "body corporate", "common property", "original design intent", "resolution without dissent", "unreasonable in the circumstances".

Body Corporate and Community Management Act 1997 (Q), ss 94(2), 276, Sched 5, Item 10.

1 FRENCH CJ, BELL, KEANE AND GORDON JJ. The *Body Corporate and Community Management Act* 1997 (Q) ("the BCCM Act") regulates the determination of disputes between the owners of lots in a community titles scheme. Here the dispute concerns a proposal for the alteration of the rights of lot owners to the common property of the scheme in order to allow one lot owner the exclusive use of part of the common property. Approval of the proposal required a resolution without dissent of the body corporate. The BCCM Act makes provision for an adjudicator to order that a proposal be approved, notwithstanding dissent by a lot owner, if the opposition to the proposal was unreasonable in the circumstances.

2 The adjudicator appointed to resolve the dispute between the parties concluded that opposition by lot owners to the proposal was unreasonable and made an order deeming the motion supporting the proposal to be passed. The adjudicator's conclusion was overturned by the Queensland Civil and Administrative Tribunal ("the Tribunal") but upheld by the Court of Appeal of the Supreme Court of Queensland.

3 For the reasons which follow, the adjudicator and the Court of Appeal erred in law, and the appeal to this Court must be allowed.

Background

4 The Viridian Noosa Residences is a residential building complex situated at Noosa in the State of Queensland. The complex is an architectural award winning development.

5 The Viridian Noosa Residences Community Titles Scheme 34034 ("the Scheme") regulates the ownership of the complex. The Scheme was established on or about 1 June 2005, and is comprised of 23 lots of which some (including the first respondent's lot) are semi-detached dwellings in the nature of townhouses located at some distance from each other, although the townhouses are constructed in pairs sharing a common wall. Upon establishment of the Scheme, a body corporate for the Scheme was created ("the Body Corporate")[1]. The members of the Body Corporate are the owners of all lots included in the Scheme[2].

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1 BCCM Act, s 30. The Body Corporate was named as the second respondent in the appeal; it filed a submitting appearance.

2 BCCM Act, s 31.

6 Under the BCCM Act, the common property for a scheme is owned by the lot owners as tenants in common, the interest of each lot owner in a lot being inseparable from the lot owner's interest in the common property[3]. The body corporate may enforce rights related to the common property as if it were the owner of the common property[4].

7 Kjerulf Ainsworth, Lisa Martoo, John Morris, Mark Lang and John Mainwaring ("the appellants") and Martin Albrecht ("the first respondent") are owners of lots in the Scheme. The first respondent owns Lot 11 (Unit 14). He has for some time wished to amalgamate the two balconies forming part of his lot so as to create one deck comprising the area of the two existing balconies and the space in between them and around them. To achieve this end, he requires the exclusive use of the common property airspace that lies between the two existing balconies, estimated to be an area of 5m².

8 Under s 169(1)(b) of the BCCM Act, the by-laws for a community titles scheme may provide for the regulation of the use of the common property. These by-laws are included in the community management statement for a community titles scheme[5]. An "exclusive use by-law" is a by-law that attaches to a lot and gives the occupier of the lot the exclusive use to the rights and enjoyment of common property[6]. Pursuant to s 171 of the BCCM Act, where the addition of a new exclusive use by-law to the community management statement is sought, the new by-law must specifically identify the common property affected and be the subject of a resolution without dissent by the body corporate consenting to the recording of the new community management statement incorporating the new by-law.

9 After several abortive attempts to procure the necessary approval to the proposed alterations from the Body Corporate, the first respondent moved at an extraordinary general meeting of the Body Corporate held on 10 August 2012 "that the Body Corporate consent to the owners of lot 11 extending the deck on the upper level of lot 11" and that the community management statement for the Scheme be amended by the inclusion of a by-law which would grant "the exclusive use and enjoyment of the common property airspace into which the

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3 BCCM Act, s 35(1) and (3).

4 BCCM Act, s 36(1).

5 BCCM Act, s 66(1)(e).

6 BCCM Act, s 170.

extended deck protrudes". The first respondent's motion also proposed that the Body Corporate endorse its consent to, and take steps to record, the new community management statement.

10 The motion was defeated with seven votes in favour, seven against, one abstention and eight owners not voting at all. The opponents of the motion were the first respondent's adjoining lot owners and six other lot owners, one of whom was the architect of the complex.

11 On 24 September 2012, the first respondent applied to the Office of the Commissioner for Body Corporate and Community Management for a referral of the dispute between himself and the Body Corporate to an adjudicator. The first respondent sought an order under s 276 and Item 10 of Sched 5 of the BCCM Act that effect be given to his motion on the basis that opposition to the motion was, in the circumstances, unreasonable.

Legislation

12 It is convenient at this point to refer to the material provisions of the BCCM Act which establish the framework within which the dispute was to be decided.

13 Chapter 6 of the BCCM Act provides for dispute resolution in relation to community titles schemes. Section 227(1)(b) defines "dispute" to include a dispute between "the body corporate for a community titles scheme and the owner or occupier of a lot included in the scheme".

14 Section 228(1) provides that the purpose of Ch 6 is to establish arrangements for resolving, in the context of community titles schemes, disputes about, inter alia, contraventions of the Act and the exercise of rights or powers under the Act.

15 Under s 238(1)(a), a person who is "a party to, and is directly concerned with, a dispute" to which Ch 6 applies may apply for an order to resolve the dispute. Section 269(1) provides for investigation by an adjudicator of such an application. It provides: "The adjudicator must investigate the application to decide whether it would be appropriate to make an order on the application."

16 Section 276 relevantly provides:

> "(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

...

(3) Without limiting subsections (1) and (2), the adjudicator may make an order mentioned in schedule 5."

17 Schedule 5 of the BCCM Act includes Item 10, which provides:

"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."

18 It can be seen that the state of satisfaction contemplated by Item 10 is a condition precedent both to the making of an order of the kind set out in Item 10 and to its characterisation as "just and equitable in the circumstances … to resolve a dispute". Item 10 fits with s 238(1)(a), which provides that a party to a dispute may apply for an order to resolve the dispute; and ss 269(1) and 276 provide for what the adjudicator must and may do respectively in relation to that dispute. The matter in dispute here is whether the opposition of the appellants to the first respondent's proposal was unreasonable.

19 Section 289 of the BCCM Act provides that a person who is aggrieved by an order that an adjudicator makes for the application may appeal to the Tribunal, but only on a question of law. It was pursuant to this provision that the appellants in this Court appealed from the adjudicator to the Tribunal.

The adjudicator

20 In the proceeding before the adjudicator, the owners of Lot 10, which adjoined the first respondent's lot, relied upon the opinions of three architects to the effect that implementation of the first respondent's proposal would have an adverse effect upon their privacy. The first respondent relied upon the opinions of three other architects to the contrary. The adjudicator considered the competing architectural opinions, and photographs, diagrams and drawings, and

came to a preference for the opinions of the first respondent's architects[7]. The adjudicator found that the proposed extension would have no noticeable detrimental impact on the building's architectural integrity[8].

21 The architect who designed the complex (the fifth appellant) gave evidence that he had intentionally designed the decks with limited functionality so as to minimise noise emanating from the decks. His evidence was that the residences were designed intentionally to avoid large decks and so were designed with two smaller outdoor balconies. In this regard, the adjudicator considered that the Body Corporate had no obligation to ensure that the original architectural intent was complied with[9]. Further, the adjudicator was unpersuaded on the evidence that the proposed expansion of the first respondent's deck would increase the use of the deck and noise in a way which would disturb other occupiers[10]. She noted that if the use of the extended deck resulted in a disturbance, affected occupiers could pursue their concerns under the by-laws[11].

22 In addition, the adjudicator accepted[12] evidence from one of the first respondent's architects that any slight increase in vision between Lots 10 and 11 would not interfere with the amenity of Lot 10. She held that any impact on privacy and views from Lot 10 would be minimal and that arising privacy issues could be ameliorated by additional privacy screening[13]. She considered that the privacy concerns of the owners of Lot 10 were not a sufficient basis to warrant the refusal of the motion[14].

23 There was some evidence from a valuer, contradicted by evidence from a real estate agent, that implementation of the first respondent's proposal would

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7 *Viridian Noosa Residences* [2013] QBCCMCmr 351 at [63].

8 *Viridian Noosa Residences* [2013] QBCCMCmr 351 at [61].

9 *Viridian Noosa Residences* [2013] QBCCMCmr 351 at [55].

10 *Viridian Noosa Residences* [2013] QBCCMCmr 351 at [66]-[67].

11 *Viridian Noosa Residences* [2013] QBCCMCmr 351 at [69].

12 *Viridian Noosa Residences* [2013] QBCCMCmr 351 at [76].

13 *Viridian Noosa Residences* [2013] QBCCMCmr 351 at [77].

14 *Viridian Noosa Residences* [2013] QBCCMCmr 351 at [77].

have the effect of modestly enhancing the value of his lot even though he offered nothing by way of payment to his fellow lot owners to secure that benefit[15]. The adjudicator did not seek to reach a concluded view on this issue, finding that no other lot owners or the Body Corporate would have any material use for the 5m² of common property airspace required by the first respondent to extend his decks, and that his exclusive use of this airspace would not result in any loss of the use of the space by any other person[16].

24 The adjudicator regarded the application by the first respondent as involving an assertion of a contravention by the Body Corporate of its obligation to act reasonably, pursuant to s 94(2) of the BCCM Act[17], in the exercise of its functions under s 94(1).

25 Section 94 of the BCCM Act concerns the general functions and powers of a body corporate in relation to the administration of a community titles scheme. It provides:

> "(1) The body corporate for a community titles scheme must –
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> (a) administer the common property and body corporate assets for the benefit of the owners of the lots included in the scheme; and
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> (b) enforce the community management statement ... and
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> (c) carry out the other functions given to the body corporate under this Act and the community management statement.
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> (2) The body corporate must act reasonably in anything it does under subsection (1) including making, or not making, a decision for the subsection."

26 The adjudicator considered that, if the opposition to the motion was unreasonable, then the resulting Body Corporate decision not to pass the motion

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15 See *Re Body Corporate for Viridian; Ainsworth v Albrecht* [2014] QCATA 294 at [135]-[137].

16 *Viridian Noosa Residences* [2013] QBCCMCmr 351 at [47].

17 *Viridian Noosa Residences* [2013] QBCCMCmr 351 at [28].

was unreasonable and so a contravention of s 94(2)[18]. The adjudicator seems to have viewed the dispute submitted to her as being within s 276(1)(a) of the BCCM Act.

27 It is convenient to note here that another view is that the dispute concerned the exercise of rights or powers under the Act, so that the dispute was within s 276(1)(b). That is the better view of the source of the adjudicator's authority for two reasons. First, it is focused upon Item 10 of Sched 5, which is the basis on which rights of lot owners exercisable under the Act and community management statement may be altered by the adjudicator. Secondly, it is the basis on which the first respondent relied in his application for a referral of the dispute to an adjudicator. The issue for the adjudicator was whether the votes of dissenting lot owners were unreasonable, not whether the decision of the Body Corporate was reasonable.

28 It is apparent that the framing of the dispute by the adjudicator skewed her approach to its resolution. The adjudicator noted that individual owners may have acted against the motion in good faith, and in genuine reliance on architectural and other advice[19]. Nevertheless, addressing the dispute as one concerned with a contravention of s 94(2), she concluded: "On balance I am not satisfied that the Body Corporate acted reasonably in deciding not to pass [the motion]."[20]

29 On that footing, the adjudicator made an order deeming the motion to have been passed[21].

The Tribunal

30 The appellants appealed to the Tribunal. As noted above, the appeal was limited to a question of law[22]. The Tribunal allowed the appeal and set aside the adjudicator's orders.

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18 *Viridian Noosa Residences* [2013] QBCCMCmr 351 at [29].

19 *Viridian Noosa Residences* [2013] QBCCMCmr 351 at [87].

20 *Viridian Noosa Residences* [2013] QBCCMCmr 351 at [87].

21 *Viridian Noosa Residences* [2013] QBCCMCmr 351 at [88].

22 BCCM Act, s 289(2); see also *Queensland Civil and Administrative Tribunal Act* 2009 (Q), s 146.

31 The Tribunal concluded[23] that the adjudicator had impermissibly substituted her own opinion as to the reasonableness of the Body Corporate's decision, and had not focused on whether the opponents' grounds of opposition were unreasonably held[24]. The Tribunal concluded that, in so proceeding, the adjudicator erred in law[25].

32 The Tribunal noted that the decks were intentionally designed with limited functionality and that all lot owners had acquired their lots fully aware of the limited functionality of the decks[26].

33 The Tribunal also noted that the adjudicator had not attempted to address the absence of compensation for the use of the common property airspace. The Tribunal held[27] that the adjudicator had erred in failing to conclude that the circumstance that there was no compensation offered for the use of the common property was a reasonable basis to oppose the motion.

The Court of Appeal

34 The first respondent applied for leave to appeal on a question of law to the Court of Appeal of the Supreme Court of Queensland to challenge the decision of the Tribunal.

35 The Court of Appeal (McMurdo P, Morrison JA and Martin J) granted the application for leave to appeal, allowed the appeal, set aside the Tribunal's orders and dismissed the appeal to the Tribunal. The Court of Appeal held that the

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23 *Re Body Corporate for Viridian; Ainsworth v Albrecht* [2014] QCATA 294 at [105].

24 See eg *Re Body Corporate for Viridian; Ainsworth v Albrecht* [2014] QCATA 294 at [101].

25 *Re Body Corporate for Viridian; Ainsworth v Albrecht* [2014] QCATA 294 at [146].

26 *Re Body Corporate for Viridian; Ainsworth v Albrecht* [2014] QCATA 294 at [97].

27 *Re Body Corporate for Viridian; Ainsworth v Albrecht* [2014] QCATA 294 at [143].

Tribunal erred in concluding that the adjudicator had erred in law in her understanding of the task committed to her[28].

36 The Court of Appeal accepted[29] that, as the reasons of both the adjudicator and the Tribunal acknowledge, views as to what was reasonable or unreasonable involved value judgments on which there was room for reasonable differences of opinion, with no opinion being uniquely correct[30]. Nevertheless, the Court of Appeal went on to hold that the Tribunal erred in concluding that the adjudicator had erred in law in making findings of fact to resolve those reasonable differences of opinion in favour of the first respondent. The Court of Appeal held that these findings of fact were open on the material before the adjudicator, and that she did not adopt the wrong approach in balancing the interests of the proponent and the opponents of the alteration in order to resolve the dispute[31].

37 The Court of Appeal said that the issue for the adjudicator was "whether the body corporate had complied with its obligation under s 94(2) BCCM Act to act reasonably."[32] Later, the Court of Appeal said[33]:

> "Contrary to the [appellants'] contentions, the adjudicator was not limited to determining whether the [appellants'] opposition to the motion could have been reasonably held. She was required to reach her own conclusion after considering all relevant matters."

38 In addition, the Court of Appeal held that, because the adjudicator found as a fact that the airspace was of no value to anyone other than the first

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28 *Albrecht v Ainsworth* (2015) ANZ ConvR ¶15-041 at 374-376 [92]-[98]; [2015] QCA 220.

29 *Albrecht v Ainsworth* (2015) ANZ ConvR ¶15-041 at 372 [84].

30 *Norbis v Norbis* (1986) 161 CLR 513 at 518 per Mason and Deane JJ; [1986] HCA 17.

31 *Albrecht v Ainsworth* (2015) ANZ ConvR ¶15-041 at 374-375 [93].

32 *Albrecht v Ainsworth* (2015) ANZ ConvR ¶15-041 at 367 [58].

33 *Albrecht v Ainsworth* (2015) ANZ ConvR ¶15-041 at 372 [82].

respondent, she did not err in failing to regard the first respondent's failure to offer compensation as a reasonable basis to oppose the motion[34].

The appellants' submissions

39 The appellants submitted that the Court of Appeal erred in proceeding on the basis that the adjudicator was required to reach her own conclusion as to the reasonableness of the decision of the Body Corporate in failing to pass the necessary resolution without dissent[35]. It was said that the Court of Appeal erred in approving of the adjudicator's approach. The appellants submitted that no balancing exercise was involved in the adjudicator's task, which should have been focused upon whether the opposition of lot owners to the first respondent's proposal was unreasonable.

40 The appellants argued that to "balance" the right of the first respondent to improve his lot with the rights of the other owners to retain their (already existing) property rights fails to recognise that what is in issue under Item 10 of Sched 5 of the BCCM Act is the reasonableness of an insistence by a lot owner on maintaining his or her property rights under the Scheme. In that regard, each of the lot owners was entitled to vote in his or her own interests; only if the position adopted was unreasonable, having regard to those interests, could the adjudicator override that vote. The adjudicator did not find that their opposition to the motion was unfounded or vexatious. Indeed, the adjudicator expressly acknowledged that the lot owners voted against the motion in good faith and placed genuine reliance on architectural and other advice[36].

41 The appellants submitted that, had the Court of Appeal adopted the correct approach, it would necessarily have concluded that the opposition to the first respondent's motion was not unreasonable because it had a logical and rational basis.

42 The appellants submitted that it is evident from the reasons of the adjudicator, and of the Court of Appeal, that the adjudicator approached the matter by making findings of fact as to whether the various "grounds" of opposition to the motion represented the better view of the particular issue on the evidence. They submitted that this is exemplified in the adjudicator's preference

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34 *Albrecht v Ainsworth* (2015) ANZ ConvR ¶15-041 at 374-375 [93].

35 *Albrecht v Ainsworth* (2015) ANZ ConvR ¶15-041 at 372 [82].

36 *Viridian Noosa Residences* [2013] QBCCMCmr 351 at [87].

of the architectural opinions supporting the first respondent to the opinions supporting the appellants' opposition to the proposal. Further, the circumstance that there was a body of evidence supporting the opposition of the adjoining owners, and a real concern expressed about privacy and noise issues, shows that the opposition to the motion was, in the circumstances, not unreasonable.

43 The appellants also referred to evidence before the adjudicator from the valuer and the real estate agent as to the value of the common property under consideration. It was submitted that, when there was evidentiary support for the use of the common property having some value to the first respondent, who offered nothing to his fellow lot owners in return, the adjudicator erred in concluding that it was not reasonable to oppose the motion because the common property was not worth anything to the dispossessed owners.

The first respondent's submissions

44 The first respondent submitted that the adjudicator did not misunderstand the task committed to her. It was said that the adjudicator's task was to conduct a merits review, and, in carrying out that review, to engage in an exercise of balancing the interests of the proponent of the alteration to the common property and the opponents of the alteration.

45 The first respondent submitted that the approach taken by the adjudicator, and by the Court of Appeal, is supported by the judgments in this Court's decision in *Waters v Public Transport Corporation*[37] in relation to the necessity of striking a "balance" between competing positions[38], and of "weighing all the relevant factors" in determining whether the appellants' opposition was unreasonable[39]. In this regard, it was said that the interest of the proponent was a factor to be taken into account by opponents in order to ensure that their opposition was not unreasonable.

46 The first respondent's submissions should not be accepted.

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37 (1991) 173 CLR 349; [1991] HCA 49.

38 *Waters v Public Transport Corporation* (1991) 173 CLR 349 at 379 per Brennan J.

39 *Waters v Public Transport Corporation* (1991) 173 CLR 349 at 395 per Dawson and Toohey JJ.

The task of the adjudicator

47 The adjudicator described the issue which she was required to address as being "whether the opposition to [the] motion was unreasonable in the circumstances and whether the Body Corporate acted reasonably in refusing to give approval."[40] As indicated above, to state the issue in this way was to fail to appreciate that s 94(2) of the BCCM Act did not govern the resolution of the matter. The determination of the dispute submitted for resolution by the first respondent's application turned on whether a resolution by the lot owners in relation to their property rights could be overridden under s 276 and Item 10 of Sched 5 of the BCCM Act, and that question concerned the quality of the grounds of opposition of each dissentient lot owner, not the reasonableness of the decision of the Body Corporate.

48 Section 276 and Item 10 of Sched 5 are the provisions which were invoked by the first respondent. They are the specific provisions which authorise an adjudicator to override the legal effect of a failure to pass a resolution of lot owners required to be passed without dissent. It was no part of the function of the adjudicator under Item 10 of Sched 5 to seek to strike a reasonable balance between competing positions. The adjudicator's attention should have been focused squarely upon whether the opposition by a lot owner or owners to the passing of the resolution was unreasonable.

49 The issue for the adjudicator should not have been confused with an issue as to whether the Body Corporate had failed to comply with s 94(2) of the BCCM Act by achieving a reasonable balance of the competing interests affected by the proposal. In this regard, the language of Item 24 of Sched 5 provides an instructive contrast with the language of Item 10 of Sched 5. The former provides:

> "If satisfied a decision to pass or not pass a motion at a general meeting of the body corporate was unreasonable – an order declaring that a motion was invalid or giving effect to the motion as proposed, or a variation of the motion as proposed."

50 Item 24 of Sched 5 provides machinery for the enforcement of s 94(2). Under Item 24 of Sched 5, the focus of the adjudicator's concern is a decision of a general meeting of a body corporate, whereas under Item 10 the focus of the

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40 *Viridian Noosa Residences* [2013] QBCCMCmr 351 at [4].

task reposed in the adjudicator is whether the opposition of a lot owner to the motion is unreasonable.

51 Neither the text, the subject matter, nor the purpose of the BCCM Act made it part of the function of the adjudicator to come to a view that, on balance, the position of the proponent or the opponents was correct[41]. The reliance by the Court of Appeal[42] and by the first respondent in this Court upon the judgments in *Waters v Public Transport Corporation*[43] was misplaced. That case was concerned with the duty of a decision-making body to reach a reasonable decision taking into account competing considerations[44]. A lot owner voting his or her opposition to a motion is not a decision-maker of this kind. The adjudicator's task under Item 10 of Sched 5 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 opposition of lot owners to the proposal was unreasonable.

52 Given that the adjudicator's concern with s 94(2) led her to address the wrong question, namely whether the Body Corporate's decision was reasonable, her ultimate conclusion was inevitably affected by an error of law. The same error infected the approach of the Court of Appeal.

53 Once the Court of Appeal accepted, as it did, that the grounds of opposition to the proposal considered by the adjudicator raised questions in respect of which reasonable minds may differ as to the answer, it is impossible to see how opposition to the first respondent's proposal based on those grounds could be found to be unreasonable[45].

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41 cf *Viridian Noosa Residences* [2013] QBCCMCmr 351 at [61].

42 *Albrecht v Ainsworth* (2015) ANZ ConvR ¶15-041 at 372 [82].

43 (1991) 173 CLR 349 at 379, 395, 411.

44 *Waters v Public Transport Corporation* (1991) 173 CLR 349 at 362-365, 377-379, 383-384, 395-397, 408-411.

45 cf *McKinnon v Secretary, Department of Treasury* (2006) 228 CLR 423 at 430-431 [11]-[12], 443-444 [55]-[57]; [2006] HCA 45.

Unreasonable opposition

54 In addition, there are specific errors which attend the Court of Appeal's conclusion that the opposition to the first respondent's proposal was unreasonable.

55 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. In the circumstances of the case, the Tribunal was correct to hold that the adjudicator erred in law in reaching that conclusion[46]; and the Court of Appeal erred in concluding otherwise.

56 The first respondent argued that the function of the adjudicator under Item 10 of Sched 5 involved four steps:

(i) identification of a ground of opposition;

(ii) inquiry as to whether that ground was a rational basis for opposition;

(iii) consideration of whether that ground is reasonable, considered in the abstract; and

(iv) determination whether in all the circumstances of the case, including the interests of the proponent, the ground of opposition is reasonable.

57 The first two steps in this analysis may readily be accepted. It may be doubted whether the third step adds anything useful to a consideration of the issue. But it is at the reference to the interests of the proponent in the fourth step that the first respondent's analysis clearly breaks down. Nothing in the BCCM Act suggests that an opponent to a proposal acts unreasonably in failing to act sympathetically or altruistically towards a proponent who seeks to diminish the property rights of the opponent. The BCCM Act does not contemplate that the rights of a lot owner genuinely opposed to the reduction of his or her rights to common property attached to his or her lot may be overridden where that might

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46 *Re Body Corporate for Viridian; Ainsworth v Albrecht* [2014] QCATA 294 at [91], [92]-[93], [98], [124], [132], [146].

be thought by an adjudicator to be a reasonable course to adopt, having regard to some standard of sympathy or altruism applicable between lot owners.

58 Such a standard is not prescribed or suggested by the BCCM Act; rather, the Act allows opposition to a resolution to be overridden only where opposition by lot owners other than the proponent is unreasonable. The unreasonableness of the opposition to the first respondent's proposal is to be determined in a context in which lot owners voting in respect of the proposed resolution are exercising their right to vote as an aspect of their proprietary rights as owners of lots included in the Scheme. In this context, the unreasonableness with which Item 10 of Sched 5 is concerned is unreasonableness on the part of the opposing lot owners having regard to those lot owners' interests under the Scheme.

59 The adjudicator was being asked to override rights attached to the property of the lot owners with respect to the common property. The requirement of a resolution without dissent is itself an acknowledgment that the by-laws function as terms of the charter of rights and duties which bind those who acquire lots in a community titles scheme under the BCCM Act. Other provisions of the BCCM Act which also require a resolution without dissent of a body corporate can be seen to be variations on the theme that the charter of rights and duties established between lot owners in relation to the use and enjoyment of their community title under the community management statement should, generally speaking, not be altered save with the consent of all parties to the compact[47]. Just as parties to a contract cannot, generally speaking, be obliged to give up contractual rights without their consent, so lot owners cannot be required to give up their property rights without consent to another lot owner save pursuant to Item 10 of Sched 5.

60 Of course, it is true, as the first respondent argued, that the unreasonableness of the appellants' opposition to the proposal can only be determined by considering the circumstances of the proposal and its likely effect upon the appellants' property interests; but to say that is distinctly not to demonstrate that opposition to the proposal is unreasonable if it is not informed by altruism or sympathy for the interests of the proponent, at the expense of the opponent's reasonable view of his or her own interests.

61 The Court of Appeal erred in holding that it was a consideration tending to show that the opposition to the proposed modification was unreasonable that the

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47 See BCCM Act, ss 37, 40, 47A, 62, 74, 78, 85 and 91.

first respondent had a legitimate interest in improving his lot[48]. Nothing in the BCCM Act suggests that a lot owner may be required by an adjudicator to assist another lot owner to enhance that lot owner's interest, or be regarded as acting unreasonably in declining to do so, at least where the enhancement of the proponent's interest is reasonably viewed as adverse to the interests of the opponent.

62 It was also an error on the part of the Court of Appeal to proceed on the basis that it was a consideration tending to show that the opposition to the proposed modification was unreasonable that the common property airspace required to give effect to the proposed modification was of no use to anyone but the first respondent[49]. A person with a property interest may reasonably insist on conserving that interest even if it is not presently being employed to that person's material advantage. That is so, if for no other reason than that he or she may reasonably expect to be offered something in return for agreement to part with it to another lot owner.

Conclusion

63 The power conferred by Item 10 of Sched 5 of the BCCM Act means that a lot owner's exercise of his or her right to vote may, in some cases, be overridden by an adjudicator[50]. Item 10 of Sched 5 is intended to operate in respect of a broad range of resolutions which are required to be passed without dissent. It must, therefore, be understood that it is neither necessary nor desirable to attempt an exhaustive statement of the circumstances in which such an order may be made. That having been said, opposition to a proposal that could not, on any rational view, adversely affect the material enjoyment of an opponent's property rights may be seen to be unreasonable. Opposition prompted by spite, or ill-will, or a desire for attention, may be seen to be unreasonable in the circumstances of a particular case. But, as is apparent from the foregoing reasons, the adjudicator, the Tribunal and the Court of Appeal all appreciated that this is not such a case.

64 The proposal in question was apt to create a reasonable apprehension that it would affect adversely the property rights of opponents of the proposal and the

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48 cf *Albrecht v Ainsworth* (2015) ANZ ConvR ¶15-041 at 372 [83].

49 cf *Albrecht v Ainsworth* (2015) ANZ ConvR ¶15-041 at 372 [83].

50 cf *Hablethwaite v Andrijevic* [2005] QCA 336 at [33].

enjoyment of those rights. In these circumstances, opposition of the lot owners who dissented from the proposal could not be said to be unreasonable.

Orders

65 The appeal should be allowed.

66 The order made by the Court of Appeal on 6 November 2015 should be set aside, except insofar as it orders in paragraph 1 that leave to appeal be granted, and in its place the appeal to that Court should be dismissed with costs.

67 The first respondent should pay the appellants' costs of the appeal to this Court.

68 NETTLE J. This is an appeal from a judgment of the Court of Appeal of the Supreme Court of Queensland (McMurdo P, Morrison JA and Martin J agreeing). The Court of Appeal allowed an appeal from a decision of the Queensland Civil and Administrative Tribunal (Member P Roney QC) ("the Tribunal"), which had allowed an appeal from orders made by an adjudicator under s 276 of the *Body Corporate and Community Management Act* 1997 (Q) ("the BCCM Act"). The facts of the matter and the relevant statutory provisions sufficiently appear from the joint reasons.

69 The adjudicator concluded[51] that she was not satisfied that the second respondent ("the Body Corporate") acted reasonably in deciding not to pass a motion to allow the first respondent ("Albrecht") to combine and extend the decks appurtenant to Lot 11 in the Viridian Noosa Residences at Noosa in Queensland, and, on that expressed basis, the adjudicator declared that the motion was not passed because of opposition that was unreasonable in the circumstances[52]. The Tribunal decided[53] that the adjudicator erred in law in a number of material respects and that, applying the correct legal test, the adjudicator ought to have held that Albrecht had not established that the Body Corporate acted unreasonably. The Court of Appeal held[54] that the Tribunal erred in identifying errors of law in the adjudicator's reasons that were not there. For the reasons which follow, the Tribunal was correct. The adjudicator did err in law in a number of material respects. On the material before the adjudicator, she should have held that it was not established that the opposition to the motion was unreasonable, and that Albrecht's application for an order giving effect to the motion as proposed should be dismissed.

The adjudicator's reasoning

70 Having set out the history of the matter and referred to some of the evidence and submissions, the adjudicator observed[55] of the BCCM Act that s 94(2) imposed an obligation on a body corporate to act reasonably; that Sched 5 provided "examples of the types of orders that an adjudicator may make pursuant to section 276"; that "[b]efore any of those orders could be made, the issue will be whether a body corporate has complied with its obligation to act reasonably";

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51 *Viridian Noosa Residences* [2013] QBCCMCmr 351 at [87].

52 BCCM Act, s 276(1), (3); Sched 5, Item 10.

53 *Re Body Corporate for Viridian; Ainsworth v Albrecht* [2014] QCATA 294 at [146].

54 *Albrecht v Ainsworth* (2015) ANZ ConvR ¶15-041 at 376 [98]; [2015] QCA 220.

55 *Viridian Noosa Residences* [2013] QBCCMCmr 351 at [24], [25], [28], [30].

and thus that "the central question in this application is whether the Body Corporate acted reasonably in deciding not to approve [Albrecht's] motion". It is apparent that the adjudicator viewed the dispute referred to her as one which involved an alleged contravention of s 94(2) of the BCCM Act constituted of the Body Corporate acting unreasonably in opposing the motion, and thus as a dispute falling within s 276(1)(a) of the BCCM Act.

71 As is observed in the joint reasons, however, the dispute was, in reality, a dispute about the exercise of rights or powers under the BCCM Act and, therefore, a dispute which fell within s 276(1)(b). Since s 276(1)(b) explicitly provided for the resolution of disputes about the exercise of rights or powers under the BCCM Act, in contradistinction to a dispute about a claimed contravention of the BCCM Act by a body corporate failing to act reasonably, s 276(1)(b) operated to the exclusion of s 276(1)(a) according to the maxim *expressum facit cessare tacitum*[56]. Contrary, therefore, to the adjudicator's reasoning, the "central question" was not whether the Body Corporate had acted reasonably, but whether the adjudicator was satisfied that the motion had not been passed because of opposition that in the circumstances was unreasonable.

72 As a consequence of that error, the adjudicator directed herself to the test of reasonableness under s 94(2) – which she opined[57] was not the test of *Wednesbury* unreasonableness[58] but rather a broad common sense test of objective reasonableness requiring "a balancing of factors in all the circumstances according to the ordinary meaning of the term 'reasonable'" – and stated that[59]:

> "an order of this nature enables an adjudicator to determine the balance between the need to protect the genuine interests of owners and their voting entitlements, and upholding the justifiable position of proponents [in] the face of unfounded or vexatious opposition."

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56 *R v Wallis* (1949) 78 CLR 529 at 550 per Dixon J; [1949] HCA 30; cf *Leon Fink Holdings Pty Ltd v Australian Film Commission* (1979) 141 CLR 672 at 678-679 per Mason J; [1979] HCA 26; *Minister for Immigration and Multicultural and Indigenous Affairs v Nystrom* (2006) 228 CLR 566 at 586-592 [54]-[70] per Gummow and Hayne JJ; [2006] HCA 50.

57 *Viridian Noosa Residences* [2013] QBCCMCmr 351 at [33]-[34].

58 *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223.

59 *Viridian Noosa Residences* [2013] QBCCMCmr 351 at [38].

73 The adjudicator then undertook the "balancing" exercise which she had presaged. In favour of the motion, the adjudicator observed that the primary purpose of the proposal was to improve the amenity of Lot 11 by providing it with a larger deck and perhaps by improving the safety of the deck areas by removing a "trip hazard" the result of a change in level from the interior of the lot to the outside deck. She concluded[60] that Albrecht had a "legitimate interest" in so improving the amenity of his unit, albeit one that had to be "balanced against impacts of the proposal on other lots and the scheme as a whole".

74 As against the motion, the adjudicator referred to each of the concerns expressed by the opponents of the motion (some of whom are appellants in this Court) and rejected each of them seriatim. The first was that the proposal ceded to Albrecht the common property airspace between the two discrete nooks comprising the current decks. The adjudicator said that she rejected that as a reasonable basis of opposition because[61]:

> "I cannot see how the granting of exclusive use rights, and the corresponding alienation of common property, has of itself any material or adverse impact on any other person."

75 The second basis of opposition was that the airspace between the nooks was valuable. One of the opponents adduced evidence from a sworn valuer that the airspace was worth at least $10,000 and possibly up to $20,000. That opponent based his opposition to the proposal in part on the fact that Albrecht was not offering any compensation for his acquisition of the airspace. The adjudicator dismissed[62] that concern because the valuation was disputed and, although the airspace was of value to Albrecht, "no submission refutes that this air space is of no material use to any other owner or occupier".

76 The adjudicator referred then to concerns expressed by several of the opponents that approval of Albrecht's proposal would make it difficult for the Body Corporate to refuse other, similar proposals in the future. She rejected those concerns on the basis that[63]:

> "*if* it were to be determined that one deck amalgamation would have no adverse impact on other owners or the scheme as a whole, I find it

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60 *Viridian Noosa Residences* [2013] QBCCMCmr 351 at [42].

61 *Viridian Noosa Residences* [2013] QBCCMCmr 351 at [47].

62 *Viridian Noosa Residences* [2013] QBCCMCmr 351 at [46].

63 *Viridian Noosa Residences* [2013] QBCCMCmr 351 at [49].

> difficult to see how the cumulative effect of multiple identical improvements would generate an adverse impact." (emphasis in original)

77 Evidently, the adjudicator also considered it to be significant that[64]:

> "[n]o evidence has been submitted that a similar deck extension, or indeed any other external alterations, has been proposed."

78 The adjudicator turned next to concerns that the proposal would compromise the original design intent and architectural integrity. She rejected[65] all of those concerns on the basis that, despite the written opinions of the leading architect who had designed the development ("Mainwaring"), who was an opponent of the motion and is an appellant in this Court, and two other notable architects, the proposal would not detract from the original design intent:

> "[T]hey [Mainwaring and the two other architects] appear to be importing a subjective view of the impact of the alteration rather than an objective one. Accordingly I am not convinced that they assist the dispute.
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> Given his qualifications and history in the scheme, it was entirely understandable that owners would rely on the expressed views of Mr Mainwaring as to the impact [of] the proposal on the architecture of the scheme. However on balance I am of the view that his opinion takes into account considerations that are not relevant for the Body Corporate to have regard to when balancing the competing interests and acting reasonably.
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> ...
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> Having assessed the material submitted and the competing architectural opinions, I am not satisfied that the opponents of the proposal have demonstrated that the proposed modification materially offends the integrity of the architectural design of the scheme. ... I do not consider that any submission has demonstrated that the extension would have any noticeable detrimental impact on the appearance, structure or functionality of the architecture of the scheme."

79 The adjudicator also dismissed concerns that the expansion of the deck would lead to added use and increased noise. She accepted that the expansion

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64 *Viridian Noosa Residences* [2013] QBCCMCmr 351 at [51].

65 *Viridian Noosa Residences* [2013] QBCCMCmr 351 at [58]-[61].

might lead to greater use of the deck, and a greater number of people on the deck on those occasions, but rejected that as immaterial because[66]:

> "I do not consider that it can be assumed that any increased use of the larger deck area will cause a disturbance. There is no demonstrable evidence it will do so."

80 The adjudicator recognised that the design of the current nooks purposely "restricts the functionality of the decks" but dismissed that consideration on the basis that[67]:

> "I do not consider it is reasonable to oppose an improvement on the basis that it will make part of a lot more functional or useable."

81 There was a body of evidence as to the impact of the proposal on the privacy and views of the occupants of other lots. Some of it supported the opponents' concerns. Some of it was directed to minimising any consequent loss of privacy or overviews. The adjudicator said[68] that she preferred the latter evidence. She accepted that the proposal would increase the overview from the deck to the adjacent Lot 10 and, therefore, have an impact on Lot 10. But she stated that she did not consider that that was sufficient to make objection on that basis reasonable; and that, in any event, the impact on Lot 10 could "be addressed by additional privacy screening".

82 There were also concerns about the aesthetic effects of the structural elements necessary to support the enlarged deck, compliance with the Architectural Design & Landscaping Code, planning approvals and other financial obligations potentially arising from the extension. But the adjudicator rejected[69] all of those concerns as well because, she said, there was no evidence that they would be borne out.

83 The adjudicator concluded[70]:

> "On balance I am not satisfied that the Body Corporate acted reasonably in deciding not to pass Motion 1 at the EGM on 10 August 2012.

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66 *Viridian Noosa Residences* [2013] QBCCMCmr 351 at [67].

67 *Viridian Noosa Residences* [2013] QBCCMCmr 351 at [68].

68 *Viridian Noosa Residences* [2013] QBCCMCmr 351 at [76]-[77].

69 *Viridian Noosa Residences* [2013] QBCCMCmr 351 at [78]-[84].

70 *Viridian Noosa Residences* [2013] QBCCMCmr 351 at [87].

> Individual owners may have voted against the motion in good faith, and in genuine reliance on architectural and other advice. However I consider they have relied on irrelevant and unsubstantiated considerations. The most substantive objection is the potential impact on Lot 10, but based on the evidence submitted, I consider that any impact will be so slight that it does not constitute a reasonable basis to refuse the proposal."

The Tribunal's reasoning

84 The Tribunal found that the adjudicator had made a number of errors of law. The first was to cast what was in effect an onus of proof on the individuals opposing Albrecht's motion. As the Tribunal observed[71], the adjudicator was not empowered to make an order under Item 10 of Sched 5 unless she were first affirmatively satisfied that the motion was not passed because of opposition which in the circumstances was unreasonable. It was not enough to decide the matter, as the adjudicator stated she did, on the basis that she was not satisfied that the Body Corporate had acted reasonably. The Tribunal considered[72] that the adjudicator's erroneous approach to that conclusion was compounded by her application of a similar approach in a number of places throughout her review of the stated bases of opposition to the motion.

85 Secondly, the Tribunal stated[73] that the exercise of deciding whether the motion was not passed because of opposition which in the circumstances was unreasonable did not necessarily, or even ordinarily, require any "balancing [of] competing interests"[74]. To act reasonably in the relevant sense did not imply even-handedness, a conciliatory approach to a dispute, or recognition of the interests or wishes of others. The fact that a lot owner might have had an interest in improving his or her lot was not a prima facie affirmative proposition, the pursuit of which can be assumed to be appropriate or supported by other lot owners. The question was not a "balancing act". A balancing act might have assisted if the adjudicator had been asked whether it was just and equitable for the Body Corporate to pass the motion. But that was not the question. The question was whether it was shown to be unreasonable to oppose the motion. And as a consequence of that fundamental error of approach, the adjudicator failed to consider whether and why it was shown to be unreasonable for property

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71 *Re Body Corporate for Viridian; Ainsworth v Albrecht* [2014] QCATA 294 at [92]-[93].

72 *Re Body Corporate for Viridian; Ainsworth v Albrecht* [2014] QCATA 294 at [94].

73 *Re Body Corporate for Viridian; Ainsworth v Albrecht* [2014] QCATA 294 at [97]-[98].

74 *Viridian Noosa Residences* [2013] QBCCMCmr 351 at [59].

owners, who had purchased their units knowing that the decks were intentionally designed with limited functionality, to insist that the deliberately limited functionality of the decks not be altered.

86 Thirdly, in relation to the integrity of the original design, the Tribunal observed that the adjudicator had assessed the issue on the expressed basis that she was "not satisfied that it is reasonable to seek to prevent *any* deviation from the original design intent"[75]. The Tribunal considered[76] that to be an erroneous conception of the question. The issue was not whether any deviation from the original design intent was justified. The question was whether it was established that it was unreasonable for the objectors to insist on the original architectural vision for the scheme being maintained. As the Tribunal concluded, her misdescription of the question led the adjudicator to approach the matter erroneously according to whether, in her subjective view, it was appropriate to allow someone to alter the original design.

87 Fourthly, the Tribunal found[77] that there were indications in several places in the adjudicator's reasons that she had decided the matter by placing herself, as it were, in the shoes of the Body Corporate, posing the issue in terms of what a "just and equitable" balancing of interests required and deciding the issue on the expressed basis that the opponents of the motion had not demonstrated that the modification offended the integrity of the scheme. As a consequence, it appeared that the adjudicator had erred in failing to recognise as a consideration relevant to whether the withholding of approval was demonstrated to be unreasonable that each of the several objectors had spent some millions of dollars in purchasing their units, each regarding the scheme's award winning architecture and design principles as a matter of high priority in their purchase and, consequently, that each feared that those architecture and design principles would be compromised if Albrecht's proposal were allowed to proceed[78].

88 Fifthly, the Tribunal noted[79], in an essentially similar vein regarding the privacy and noise issues, that, despite what might well be thought to be

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75 *Viridian Noosa Residences* [2013] QBCCMCmr 351 at [56] (emphasis in original).

76 *Re Body Corporate for Viridian; Ainsworth v Albrecht* [2014] QCATA 294 at [99]-[101].

77 *Re Body Corporate for Viridian; Ainsworth v Albrecht* [2014] QCATA 294 at [104]-[107].

78 *Re Body Corporate for Viridian; Ainsworth v Albrecht* [2014] QCATA 294 at [121].

79 *Re Body Corporate for Viridian; Ainsworth v Albrecht* [2014] QCATA 294 at [122].

legitimate concerns, the adjudicator had disposed of the issues on the expressed basis that "[n]o submitter has demonstrated that the expansion of the deck will inherently increase the disturbance to other occupiers or users of common property compared with the potential use of the current deck configurations"[80]. As the Tribunal concluded[81], that was an erroneous process of reasoning. The question which the adjudicator should have determined was whether it was unreasonable for any of the owners who opposed the motion to have harboured those concerns and therefore whether there was not a reasonable basis for their opposition to the motion. Further, the adjudicator disposed of the privacy issue *after* she had recognised that there would be some impact on the privacy of and views from Lot 10. That invited the conclusion not only that she had erred by casting what was in effect a burden of proof on the opponents but also that she had acted erroneously by exercising her own subjective judgment in what she conceived of as a balancing exercise aimed at assessing the appropriateness of allowing the improvements.

89 Sixthly, in relation to the concern that the approval of the proposal would make it difficult to resist further similar proposals to amalgamate the decks of other units, the Tribunal observed[82] that it was apparent, in holding that "[n]o evidence has been submitted that a similar deck extension, or indeed any other external alterations, has been proposed"[83], that the adjudicator had erred by failing to take into account evidence that Albrecht had written to other lot owners stating that he made a "deep and abiding commitment" to ensuring that other lot owners would not be subjected to similar campaigns to prevent improvements to their lots and that Albrecht saw himself as paving the way for other owners to be permitted to make similar alterations. There was also a further indication of error in the adjudicator's conclusion that she did not consider concerns about opening the floodgates to be a reasonable basis for opposing the motion[84]. That was indicative of the adjudicator again casting an onus of proof on the opponents and thus failing to give proper consideration to the question of why opposition to the proposal based on fear that it would set a precedent was unreasonable.

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80 *Viridian Noosa Residences* [2013] QBCCMCmr 351 at [66].

81 *Re Body Corporate for Viridian; Ainsworth v Albrecht* [2014] QCATA 294 at [122]-[124].

82 *Re Body Corporate for Viridian; Ainsworth v Albrecht* [2014] QCATA 294 at [129]-[132].

83 *Viridian Noosa Residences* [2013] QBCCMCmr 351 at [51].

84 *Viridian Noosa Residences* [2013] QBCCMCmr 351 at [53].

90 Seventhly, with respect to the absence of compensation issue, the Tribunal found[85] that there was error in the adjudicator's perfunctory rejection of the sworn valuer's evidence as "disputed" and in thus failing to conclude that the absence of an offer of compensation was a reasonable basis for opposing the proposal. Evidently, the adjudicator's statement that the valuation was "disputed" was a reference to a letter from an estate agent, tendered by Albrecht, in which it was asserted that the airspace had "no value whatsoever". As the Tribunal observed[86], the estate agent had no formal valuation qualifications and the adjudicator did not provide any reason for rejecting the opinion of the sworn valuer on the say-so of the estate agent.

The Court of Appeal's reasoning

91 McMurdo P gave the only reasons for judgment in the Court of Appeal. Morrison JA and Martin J agreed with her Honour's reasons.

(i) The role of the adjudicator

92 After setting out the facts and history of the matter, McMurdo P stated the law to be that[87]:

> "The role of the adjudicator in this case was to investigate [Albrecht's] application and to decide whether it was appropriate to give effect to his motion before Viridian's body corporate to allow him to extend his decks. She was not bound by the rules of evidence; must act as quickly, and with as little formality and technicality, as is consistent with a fair and proper consideration of the application; and must observe natural justice. She had wide investigative powers to obtain information. If satisfied the opposition to the motion is in all the circumstances unreasonable, she could give effect to the motion and could make an order that is just and equitable in the circumstances (including a declaratory order) to resolve the dispute." (footnotes omitted)

93 Although McMurdo P later qualified that observation[88], it should be observed at once that it was not the role of the adjudicator "to decide whether it

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85 *Re Body Corporate for Viridian; Ainsworth v Albrecht* [2014] QCATA 294 at [135]-[137], [143].

86 *Re Body Corporate for Viridian; Ainsworth v Albrecht* [2014] QCATA 294 at [136].

87 *Albrecht v Ainsworth* (2015) ANZ ConvR ¶15-041 at 371-372 [80].

88 *Albrecht v Ainsworth* (2015) ANZ ConvR ¶15-041 at 372 [82].

was appropriate to give effect to [the] motion". As the Tribunal stated[89], correctly, the adjudicator's task was to decide whether the adjudicator was satisfied that the motion had not been passed because of opposition which in the circumstances was unreasonable.

94 McMurdo P continued[90]:

> "[The adjudicator's] role under s 276 and Item 10 in Schedule 5 BCCM Act ... was to determine whether she was satisfied the body corporate did not pass [Albrecht's] motion because of opposition from the [opponents] that was in the circumstances unreasonable. ... [T]he adjudicator was not limited to determining whether the [opponents'] opposition to the motion could have been reasonably held. She was required to reach her own conclusion after considering all relevant matters."

95 That may be accepted as a correct statement of the law provided it is understood that the requirement that the adjudicator "reach her own conclusion after considering all relevant matters" means that the adjudicator must reach her own conclusion after considering all matters relevant to whether she is satisfied that the motion was not passed because of opposition which in the circumstances was unreasonable. As the Tribunal emphasised, correctly, it does not mean that the adjudicator is to reach her own conclusion as to whether it would be reasonable to approve the motion.

96 McMurdo P held[91] that the Tribunal erred in identifying errors of law in the adjudicator's reasons. Her Honour concluded that there were no such errors and, it followed, that the Tribunal was not entitled to set aside the adjudicator's decision.

(ii) Reversal of onus of proof

97 Plainly, however, there were errors of law in the adjudicator's reasons, and the Tribunal identified them correctly. As was earlier observed[92], the first error was the adjudicator's determination of the matter on the basis that "[o]n balance" she was "not satisfied that the Body Corporate acted reasonably in deciding not

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89 *Re Body Corporate for Viridian; Ainsworth v Albrecht* [2014] QCATA 294 at [98].

90 *Albrecht v Ainsworth* (2015) ANZ ConvR ¶15-041 at 372 [82].

91 *Albrecht v Ainsworth* (2015) ANZ ConvR ¶15-041 at 376 [98].

92 See [85] above.

to pass [the motion]"[93]. As the Tribunal stated[94], that was not the correct test. The correct test was whether the adjudicator was satisfied that Albrecht's motion was not passed because of opposition which was in the circumstances unreasonable.

98 McMurdo P held that there was no error because, when the adjudicator's reasons are considered "in their entirety"[95], it is clear that the adjudicator[96]:

> "conscientiously considered all the material and submissions relied upon by [Albrecht] and the [opponents], made findings of fact, all of which were open on that material, and was ultimately satisfied as a matter of fact that [Albrecht's] motion was not passed because of the [opponents'] opposition to it that in the circumstances was unreasonable."

99 With respect, that is not so. Apart from the insufficiency of the adjudicator's consideration of the submissions and her questionable findings of fact – which are aspects of the reasoning that necessitate separate consideration below – it is manifest that the adjudicator never expressed herself to be satisfied that the appellants' opposition to the motion was unreasonable. And, as the Tribunal identified[97], over and above the adjudicator's express conclusion that she was *not* satisfied that the Body Corporate acted reasonably in deciding not to pass the motion, the adjudicator so many times otherwise expressed herself to be unsatisfied that the grounds of objection were reasonable that it cannot realistically be supposed that she decided the matter on any other basis. As was earlier noticed, those occasions included the adjudicator's statement, when dealing with deviation from the original design intent, that "I am not satisfied that it is reasonable to seek to prevent *any* deviation from the original design intent"[98] and her disposition of the noise issue on the basis that "[n]o submitter has demonstrated that the expansion of the deck will inherently increase the

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93 *Viridian Noosa Residences* [2013] QBCCMCmr 351 at [87].

94 *Re Body Corporate for Viridian; Ainsworth v Albrecht* [2014] QCATA 294 at [92]-[93].

95 *Albrecht v Ainsworth* (2015) ANZ ConvR ¶15-041 at 374 [92].

96 *Albrecht v Ainsworth* (2015) ANZ ConvR ¶15-041 at 374 [91].

97 *Re Body Corporate for Viridian; Ainsworth v Albrecht* [2014] QCATA 294 at [93]-[94].

98 *Viridian Noosa Residences* [2013] QBCCMCmr 351 at [56] (emphasis in original).

disturbance to other occupiers or users of common property compared with the potential use of the current deck configurations"[99].

(iii) Deviation from design intent

100 Turning to the adjudicator's findings of fact, and beginning with the issue of whether it was unreasonable to refuse to pass the motion because Albrecht's proposal would result in a deviation from the original design intent, McMurdo P said that[100]:

> "The competing submissions and supporting material in this case, particularly the architectural reports, made the question of unreasonableness difficult to resolve. As the reasons of both the adjudicator and [the Tribunal] demonstrate, views as to what was reasonable or unreasonable involved value judgments on which there was room for reasonable differences of opinion, with no opinion being uniquely right.[101] Had [the Tribunal's] views as to unreasonableness been the views of the adjudicator, and had the adjudicator made no errors of law, that finding would have been unassailable on a [Tribunal] appeal which was limited to a question of law: see s 289 [BCCM] Act."

101 With respect, that is not correct either. The competing submissions and supporting material did not make the question of unreasonableness difficult to resolve. Nor is reasonableness something about which informed views are likely to, or should, differ. Reasonableness does not mean whatever the adjudicator considers to be just and equitable and it does not involve the application of discretionary considerations of the kind that were essayed in *Norbis v Norbis*[102]. The standard of reasonableness is objective[103] and it is to be applied in this case at the time of rejection of Albrecht's motion taking into account all relevant factors including factors which were extant but which the parties may not have identified or appreciated at the time, as is implied by the words "in the

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99 *Viridian Noosa Residences* [2013] QBCCMCmr 351 at [66].

100 *Albrecht v Ainsworth* (2015) ANZ ConvR ¶15-041 at 372 [84].

101 *Norbis v Norbis* (1986) 161 CLR 513 at 518 per Mason and Deane JJ; [1986] HCA 17.

102 (1986) 161 CLR 513.

103 See, in a different context, *Department of Foreign Affairs and Trade v Styles* (1989) 23 FCR 251 at 263 per Bowen CJ and Gummow J.

circumstances" appearing in Item 10 of Sched 5 to the BCCM Act[104]. Item 10 of Sched 5 is not to be read as if it contained the words "in the opinion of the adjudicator"[105], nor as if it otherwise threw the determination of what is unreasonable upon the subjective and unexaminable opinion of an adjudicator. Evidently, the BCCM Act so values the interests of lot owners in common property that, subject only to proven unreasonableness, it conditions the disposition of common property upon unanimity. It would require terms much different from and clearer than those in Item 10 of Sched 5 to substitute adjudicative discretion for a lot owner's objectively not unreasonable exercise of self-interest.

102 The consequence of that error, with respect, is reflected in the following further observations of McMurdo P[106]:

> "[Mainwaring], the highly respected architect of Viridian, purposefully designed the decks so that they were discrete and did not interlink. He and other eminent architects opined before the adjudicator that the proposed deck extension would be harmful to the architectural integrity of Viridian, an architectural award winning development. Seven Viridian owners, having purchased their homes on the basis of Viridian's architectural merit, objected to [Albrecht's] motion for reasons including those based on these architectural opinions. On the other hand, the same number of equally respected architects opined that extending [Albrecht's] decks in the manner proposed would not have any detrimental impact on Viridian's architectural integrity and any appreciable change to its external appearance would be minimal.
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> ...
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> After considering the competing architectural opinions and relevant photographs, diagrams and drawings, the adjudicator preferred the opinions of [Albrecht's] architects. She found that the proposed extensions would have no noticeable detrimental impact on Viridian's architectural integrity. She considered that she should balance [Albrecht's] interest in improving his lot against the impacts of the proposal on the other owners and on Viridian as a whole." (footnote omitted)

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104 See and compare *Shi v Migration Agents Registration Authority* (2008) 235 CLR 286; [2008] HCA 31; *Waratah Coal Pty Ltd v Mitchell* [2013] 1 Qd R 90.

105 See and compare *Greiner v Independent Commission Against Corruption* (1992) 28 NSWLR 125 at 143 per Gleeson CJ.

106 *Albrecht v Ainsworth* (2015) ANZ ConvR ¶15-041 at 372-373 [86]-[88].

103 As already stated, the adjudicator's task was to determine whether she was satisfied that it was objectively unreasonable for the seven Viridian owners – who had purchased their homes recognising Viridian's architectural merit and whose disquiet at the damage which the proposal, if implemented, would likely do to the original design intent was supported by the closely reasoned opinions of three eminent architects – to oppose the motion. It was not for the adjudicator to reject one set of architectural opinions because she perceived them "to be importing a subjective view of the impact of the alteration"[107]. Axiomatically, both sets of opinions imported "a subjective view of the impact". Consequently, it was not open to the adjudicator to reject one of them on that basis while, in effect, preferring the other as if it did not. The inconsistency, and hence the error, in that reasoning is manifest. Moreover, as the Tribunal in effect observed, in view of the standing of the architects concerned, it could hardly be said that it was unreasonable to prefer one set of opinions over the other; and there is certainly nothing else in the legislation which purports to subjugate matters of reasonably defensible personal taste and preference to the demands of *laissez-aller* alteration. Consequently, even if the adjudicator's preferred architectural philosophy was the latter, it was not within the statutory task with which she was entrusted to impose it on those opposing Albrecht's motion.

(iv) Noise and privacy

104 Turning to the adjudicator's consideration of the noise and privacy issues, McMurdo P said this[108]:

> "The adjudicator was unpersuaded on the evidence that the proposed deck expansion would increase the use of [Albrecht's] decks and noise in a way which would disturb other occupiers or users of the common property and that the unsubstantiated risk of a potential nuisance was not a reasonable basis to refuse the proposal. She accepted the evidence from [Albrecht's] architect, Mr McKerrell, and concluded that there would be no greater overlooking of and from lot 10 than at present and that any slight increase in vision between the lots would not interfere with the amenity of lot 10. Any arising privacy issues could be ameliorated by a privacy blade and would not unreasonably interfere with the amenity of lot 10. This was not a sufficient basis to warrant the refusal of the motion." (footnotes omitted)

105 With respect, McMurdo P's acceptance[109] of that analysis repeats the adjudicator's error of approaching the question as one of whether the adjudicator

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107 *Viridian Noosa Residences* [2013] QBCCMCmr 351 at [58].

108 *Albrecht v Ainsworth* (2015) ANZ ConvR ¶15-041 at 373 [89].

109 *Albrecht v Ainsworth* (2015) ANZ ConvR ¶15-041 at 374 [90].

was satisfied that the objections based on noise and the infringement of privacy were reasonable objections. It also repeats the misconception that the adjudicator's subjective perceptions of what would constitute acceptable, as opposed to unacceptable, effects on noise and privacy were somehow to be adopted as the appropriate basis of decision. The question was whether, given that the objections were bona fide and supported by a significant body of respectable architectural opinion, they were still somehow to be regarded as objectively unreasonable. As thus expressed, the question answers itself.

(v) Precedent effect of approval

106 Lastly there is McMurdo P's consideration of the precedent issue. Of that, her Honour said the following[110]:

> "As to the 'floodgates' argument, [the adjudicator] noted that there was no evidence of any similar pending applications by other owners to extend their decks. The history of [Albrecht's] proposal showed that no one had an automatic right to have such a proposal approved. Any future application would have to be determined on its merits. If the present application was found not to adversely impact on other owners or Viridian as a whole, it was difficult to see how the cumulative effect of multiple identical improvements would generate an adverse impact. The 'floodgates' argument, the adjudicator found, was not a reasonable basis for opposing the proposal." (footnotes omitted)

107 As the Tribunal identified[111], the difficulties with that sort of reasoning are manifold. First, since the type of deck modification which Albrecht proposed had the attractions for him which he contended it did, it was unreal to suppose that, if his proposal were approved, there would not then be others seeking to make similar deck modifications. After all, if some of the common property could be allocated to Albrecht to enable him to achieve his self-interested objectives, why would not others consider that more common property ought to be allocated to them so that they could achieve theirs? Secondly, as will be recalled, Albrecht had written to other owners stating that his "deep and abiding commitment [was to ensure] other unit owners [would] not be subjected to similar campaigns to prevent improvements to their residences" and that he saw himself as paving the way for other owners to be permitted to make similar alterations. Regardless, therefore, of whether there was evidence of other pending applications, it was distinctly possible that approval of the motion would lead to a multiplicity of applications to the Body Corporate for similar approvals;

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110 *Albrecht v Ainsworth* (2015) ANZ ConvR ¶15-041 at 373 [88].

111 *Re Body Corporate for Viridian; Ainsworth v Albrecht* [2014] QCATA 294 at [129]-[132].

and, as the Tribunal recognised[112], it *was* easy to see how the cumulative effect of multiple identical improvements could generate an adverse impact. Thirdly, those further applications would necessitate the Body Corporate making further decisions as to whether it was reasonable to refuse them and in turn more division and conflict between owners would arise. The potential for that kind of disharmony may in itself have provided a reasonable basis to oppose the motion in this case.

Errors of law

108 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.

Conclusion

109 In the result, the appeal should be allowed and the orders proposed in the joint reasons made.

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112 *Re Body Corporate for Viridian; Ainsworth v Albrecht* [2014] QCATA 294 at [129]-[130].