QCAT

Queensland **Civil and Administrative Tribunal**

CITATION:	Norbury v Hogan [2010] QCATA 27
PARTIES:	Ms Cleis NORBURY (Applicant) v Mr John HOGAN (Respondent)
APPLICATION NUMBER:	KA007-09
MATTER TYPE:	Appeals
HEARING DATE:	16 April 2010
HEARD AT:	Brisbane
DECISION OF:	President
DELIVERED ON:	13 May 2010
DELIVERED AT:	Brisbane
ORDERS MADE:	1 Appeal allowed; and 2 through the Commissioner, refer the matter back to the adjudicator for determination according to law
CATCHWORDS :	BODY CORPORATE – *Body Corporate and Community Management Act* 1997, s 167 – MEANING AND EFFECT – where Mr Hogan is sensitive to cigarette smoke – where cigarette smoke from adjacent Lot permeated into Mr Hogan's Lot – where adjudicator found that cigarette smoke unreasonably interfered with Mr Hogan's use and enjoyment of his Lot – whether cigarette smoke would unreasonably interfere with use and enjoyment of Lot of person with ordinary sensitivity – whether adjudicator erred in application of test pursuant to the legislation *Body Corporate and Community Management Act* 1997, ss 167, 276(1), 276(2), 289, 290 Commercial and Consumer Tribunal Act 2003, s294(1)(c) *Queensland Civil and Administrative Tribunal Act* 2009, ss 256, 271 *Burnitt Investments Pty Ltd v Body Corporate for the Tower Mill Motor Inn CTS 1918 & Ors* [2009] QSC

427, considered
Canada (Director of Investigation and Research) v. Southam Inc [1997] 1 S.C.R. 748, applied
Clarey v The Principal and Council of the Women's College (1953) 90 CLR 170, considered
Halsey v Esso Petroleum Co Ltd [1961] 2 All ER 145, applied
Hargrave v Goldman (1963) 110 CLR 40, considered
McKinnon Industries v Walker [1951] 3 DLR 577, considered
Robinson v Kilvert (1889) 41 Ch D 88, applied
Oldham v Lawson (No 1) (1976) VR 654, applied
Platt v Ciriello [1998] 2 Qd R 41, considered
Sedleigh-Denfield v O'Callaghan [1940] AC 880, considered
Walter v Selfe (1851) 64 ER 849, applied

APPEARANCES and REPRESENTATION (if any):

APPLICANT :	Mrs Norbury on behalf of the applicant
RESPONDENT:	Mr Hogan on his own behalf

REASONS FOR DECISION

[1] At the core of this proceeding is the question whether cigarette smoke drifting in to a home unit can constitute a 'nuisance' under the *Body Corporate and Community Management* Act 1997 (BCCM Act). Ms Norbury, the smoker, seeks to appeal a decision of an adjudicator under that Act. The appeal can only be on a question of law: BCCM Act, s 289.

[2] Mr Hogan is the owner of Lot 5 at Sun Crest Titles Scheme in Cairns. He alleges that cigarette smoke coming from the balcony of Lot 2, owned by Ms Norbury, drifts into in his unit and creates a nuisance by interfering with his use and enjoyment of his property, in breach of s 167 of the BCCM Act.

[3] Section 167 provides that:

> **167 Nuisances**
>
> The **occupier of a lot** included in a community titles scheme **must not use, or permit the use of, the lot** or the common property **in a way that**—
>
> (a) **causes a nuisance** or hazard; or
>
> (b) **interferes unreasonably with the use or enjoyment of another lot** included in the scheme; or
>
> (c) interferes unreasonably with the use or enjoyment of the common property by a person who is lawfully on the common property.
>
> (*emphasis added*)

[4] Mr Hogan presented the adjudicator with photographs of his unit showing it is adjacent to Ms Norbury's, and arrows allegedly indicating how the south-easterly direction of wind carries the cigarette smoke into his bedroom window from the balcony of her unit. He provided a medical certificate from his doctor showing that he is allergic or sensitive to cigarette smoke.

[5] The adjudicator, in his reasons, reviewed previous applications under s 167 involving cigarette smoke and observed that in each case the complaint had been dismissed on the basis that restricting a lot owner from performing a legal act in the confines of their own property would, in fact, unreasonably interfere with their use and enjoyment of that lot.

[6] Despite these previous decisions the adjudicator here found, however, that on the balance of evidence there was a reasonable likelihood that persons smoking on Lot 2 or adjacent common property may cause a nuisance through unreasonable interference with Mr Hogan's use and enjoyment of his unit, in a way which offended s 167.

[7] He also found that Ms Norbury was aware of the harm the cigarette smoke caused Mr Hogan, and that she did not take reasonable steps to minimise the effects of her smoking.

[8] He ordered that Ms Norbury must give consideration to the effects of cigarette smoke on Mr Hogan, and must take reasonable steps to ensure that the smoking of cigarettes on Lot 2 or the common property does not cause a nuisance to Mr Hogan, or interfere unreasonably with his use and enjoyment of Lot 5.

[9] Ms Norbury filed an application with the Commercial and Consumer Tribunal (the predecessor of QCAT) appealing this decision, claiming that the adjudicator committed an error of law by making a finding that cigarette smoke actually drifted into Lot 5 despite, she asserts, insufficient evidence to warrant that finding; and, then, incorrectly applying the finding to the statutory requirements.

[10] Section 167 refers to *nuisance* and, also, *unreasonable interference*. Neither term is defined in the BCCM Act.

[11] The predecessor of s 167 was s 51(1)(c) of the *Building Units and Group Titles Act* 1980 (BUGTA), which relevantly stated that an occupier of a lot should not: *'(c) use or enjoy the common property in such a manner or for such a purpose as to interfere unreasonably with the use or enjoyment of the common property by the occupier of any other lot (whether that person is a proprietor or not) or by any other person entitled to the use and enjoyment of the common property*.'

[12] In *Platt v Ciriello* [1998] 2 Qd R 41 McPherson JA (with whom Ambrose J agreed) noted at p 42 that although s 51(1)(c) of BUGTA did not expressly confer a right on a proprietor to use the common property in a manner or for a purpose that did not unreasonably interfere with the

exercise of similar rights by others, it was implicit in that provision that it had that effect. The approach adopted by the majority in *Platt* was followed recently, with respect to s 167, by Mullins J in *Burnitt Investments Pty Ltd v Body Corporate for the Tower Mill Motor Inn CTS 1918 & Ors* [2009] QSC 427.

[13] In the absence of a statutory definition it is useful to consider how the common law has construed the phrase '*interferes unreasonably'*. Under the common law, a private nuisance is an unlawful and unreasonable interference with an occupier's use and enjoyment of land or of some right over, or in connection with it: *Hargrave v Goldman* (1963) 110 CLR 40; *Sedleigh-Denfield v O'Callaghan* [1940] AC 880. Decided cases on what constitutes unreasonable interference include reference to alleged nuisances like noxious fumes,[1] dust,[2] noise,[3] vibration,[4] sewerage,[5] or odours,[6] and light.[7]

[14] What is considered unreasonable depends on the prevailing circumstances in each case but the nuisance, these decisions show, needs to be an inconvenience that materially interferes with the ordinary notions of a 'plain and sober' person, and not merely the 'elegant or dainty' habits of the complainant: See *Walter v Selfe* (1851) 64 ER 849 at 851. (That is not to categorise Mr Hogan in that way, of course; as his medical evidence indicated he has a heightened, but very real, sensitivity.)

[15] The nuisance must result in a substantial degree of interference according to what are considered reasonable standards for the enjoyment of those premises: *Oldham v Lawson (No 1)* (1976) VR 654.

[16] In *Oldham* Harris J said, at 655:

> What are reasonable standards must be determined by common sense, taking into account relevant factors, including what the Court considers to be the ideas of reasonable people, the general nature of the neighbourhood and the nature of the location at which the alleged nuisance has taken place, and the character, duration and time of occurrence of any noise emitted, and the effect of the noise.

[17] In residential areas, the cases show, the principle of 'give and take, live and let live' is customarily applied[8] so that the 'ordinary and accustomed use' of premises will not be considered a nuisance, even if some inconvenience to a neighbour is caused[9].

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[1] *St Helen's Smelting Co v Tipping* (1865) 11 HLC 642 , 11 ER 1483
[2] *Thompson v Sydney Municipal Council* (1938) 14 LGR (NSW) 32, SC(NSW)
[3] *Vincent v Peacock* [1973] 1 NSWLR 466
[4] *Halsey v Esso Petroleum Co Ltd* [1961] 2 All ER 145
[5] *Baulkham Hills Shire Council v AV Walsh Pty Ltd* [1968] 3 NSWR 138
[6] *Bone v Seale* [1975] 1 All ER 787
[7] *Raciti v Hughes* (1995) 7 BPR 14, 837 SC (NSW)
[8] See *Bamford v Turnley* (1862) 122 ER 27 at 32-33
[9] *Clarey v The Principal and Council of the Women's College* (1953) 90 CLR 170

[18] Importantly, nuisance is not established because the complainant is abnormally sensitive, or if the alleged nuisance involves a particularly sensitive use of land: *Halsey v Esso Petroleum Co Ltd* [1961] 2 All ER 145; *Robinson v Kilvert* (1889) 41 Ch D 88 per Cotton LJ (cf *McKinnon Industries v Walker* [1951] 3 DLR 577 in which the fumes from the defendant's factory damaged delicate orchids and the defendant was liable, because the fumes would have damaged flowers of ordinary sensitivity).

[19] If it is shown that the nuisance is unreasonable, it is then necessary to determine whether liability should be imposed. That will only occur in cases where the harm or risk to the complainant is greater than ought to be borne by that person, under the circumstances: *Sedleigh-Denfield v O'Callaghan* [1940] AC 880.

[20] Mr Hogan complains that smoke from Lot 2 penetrates the bedroom window and balcony of his Lot, requiring him to close his windows and run his air conditioner. He says that Ms Norbury was initially understanding of his sensitivity to cigarette smoke. However, around the time Ms Norbury's partner began to live with her at the unit, Mr Hogan began to complain and to request that Ms Norbury and her partner smoke in a different area, as he said, 'downwind' of his unit. He says he went so far as to erect a temporary gazebo with table and chairs for Ms Norbury and her partner to smoke in, but that they refused to use it.

[21] He alleges that Ms Norbury and/or her partner begin smoking around 5:15am on weekdays, which is also accompanied by Ms Norbury '…*coughing until the point of vomiting*'. This compels him, he says, to move to another bedroom in his unit. The smoking stops between 7am and 9:30am when both Ms Norbury and her partner are out of the unit, and then in the late evening after 8:30pm when they retire. Mr Hogan otherwise alleges that Ms Norbury and her partner are at home most weekends, and smoke regularly throughout the day.

[22] Ms Norbury says that she has been forced to smoke in her carport because when she is smoking Mr Hogan has hosed her once or twice and made negative comments about her. Although unrelated to the alleged breach, it was argued on Ms Norbury's behalf that she suffered a severe bashing when she was young and this has caused her to be very susceptible to stress; it is assumed this is something by way of an explanation for her smoking.

[23] The adjudicator had the discretion to make an order that was just and equitable, in the circumstances, to resolve the dispute: BCCM Act, s 276(1). That order could require a person to act, or prohibit them from acting, in a particular way: BCCM Act, s 276(2).

[24] In his reasons the learned adjudicator undertook a careful analysis of the evidence, and the law. He referred to provisions of the *Tobacco and Other Smoking Products Act* 1998 concerning prohibitions against

smoking in certain places, and to previous cases under the BCCM Act dealing with the same subject matter.

[25] Ms Norbury's submission that the learned adjudicator erred in finding that cigarette smoke emanating from her unit permeated into Mr Hogan's unit is not persuasive. The apparent proximity of the balcony on Lot 2 and the bedroom window in Lot 5 provided a sufficient basis for that finding. The adjudicator's determination that this event comprised a nuisance which unreasonably interfered with Mr Hogan's use and enjoyment of his unit appears, however, to be the product of a misapprehension of the test which should be applied under s 167.

[26] Although it is unsurprising that the adjudicator found that the cigarette smoke emanating from Lot 2 is *subjectively* interfering with Mr Hogan's use and enjoyment of his Lot, the correct test for determining what is unreasonable is an objective one: *Oldham.*

[27] Mr Hogan's particular sensitivity to cigarette smoke must be considered in light of ordinary notions of reasonable standards for the use and enjoyment of a Lot. Smoking cigarettes in one's own premises remains a lawful activity. Although there is natural sympathy for Mr Hogan's particular circumstances it does not follow that an ordinary person, without his sensitivities, would also find that cigarette smoke constitutes an unreasonable interference.

[28] Once that is acknowledged, a finding that s 167 is offended could only be made, in the circumstances arising here, if it was established that the cigarette smoke emanating from Lot 2 is of such volume or frequency that it would interfere unreasonably with the life of another lot owner of ordinary sensitivity.

[29] Here, the adjudicator adopted another test: he referred to medical evidence establishing a connection between Mr Hogan's allergies and cigarette smoke and then said there was a '*reasonable likelihood*' of '*nuisance or unreasonable interference with the* ***Applicant's*** *use or enjoyment of his Lot'* (emphasis added).

[30] A misapprehension about the correct test to be used in the application of a statute is an error of law, something well explained in a Canadian decision:

> After all, if a decision maker says the correct test requires him or her to consider A, B, C and D, but in fact the decision-maker considers only A, B and C, then the outcome is as if he or she applied a law that required consideration of only A. B and C. If the correct test requires him or her to consider D as well, then the decision-maker has in effect applied the wrong law, and so has made an error of law.[10]

[31] For the reasons already explored, the test under s 167 is objective and is to be measured against the needs and circumstances of a neighbour of

[10] *Canada (Director of Investigation and Research) v. Southam Inc* [1997] 1 S.C.R. 748 at [39].

ordinary sensitivity; it is not subjective, reflecting Mr Hogan's particular circumstance of sensitivity. That was, also, the test correctly applied in the earlier decisions to which the learned adjudicator referred.

[32] The appeal should, then, be allowed and the order of the adjudicator made on 18 August 2009 set aside. The appeal was commenced under the *Commercial and Consumer Tribunal Act* 2003 (CCT Act), the legislation applying before the *Queensland Civil and Administrative Tribunal Act* 2009 (QCAT Act). Under ss 256 and 271 of QCAT Act, this Tribunal has jurisdiction, but it can only make an order which could have been made under the former CCT Act.

[33] The former tribunal, the CCT, could under the CCT Act refer the matter back to the adjudicator (via the Commissioner for Body Corporate and Community Management) with appropriate directions '*having regard to the question of law the subject of the appeal*': CCT Act, s 294(1)(c).

[34] The matter should be returned to the Commissioner for referral, under s 290 of the BCCM Act, to the adjudicator to determine the matter according to law and having regard to this decision. It is unclear from the material provided by the Commissioner for this appeal whether the adjudicator had evidence about matters which might enable him to address the correct test under s 167, described above. It is to be observed that the adjudicator had, under the BCCM Act, powers to investigate the application[11].

[11] BCCM Act, Chapter 6 Part 9 Division 2