

QUEENSLAND CIVIL AND ADMINISTRATIVE TRIBUNAL

CITATION: *Penno v Body Corporate for the Oasis – Dunmore CTS 29301* [2019] QCATA 65

PARTIES: **GEOFFREY MARK PENNO**
(appellant)
v
**BODY CORPORATE FOR THE OASIS –
DUNMORE CTS 29301**
(respondent)

APPLICATION NO/S: APL071-18

MATTER TYPE: Appeals

DELIVERED ON: 18 April 2019

HEARING DATE: 15 March 2019

HEARD AT: Brisbane

DECISION OF: Senior Member Aughterson
Member Kanowski

ORDERS:

- 1. The decision of the adjudicator dated 19 February 2018 is set aside.**
- 2. The Appeal Tribunal declares that it would not be reasonable for Body Corporate for the Oasis – Dunmore CTS 29301, in reliance on section 163 of the *Body Corporate and Community Management Act 1997 (Qld)*, to enter Lot 3, as distinct from the related exclusive use balcony, in order to carry out routine gardening on the adjoining common property garden beds.**

CATCHWORDS: REAL PROPERTY – COMMUNITY TITLES SCHEME – *Body Corporate and Community Management Act 1997 (Qld)* – where body corporate seeking access to common property through an individual unit pursuant to s 163 of that Act – where adjudicator held that access reasonable – whether adjudicator erred in law – whether access reasonable in terms of s 94 of that Act.

Body Corporate and Community Management Act 1997 (Qld), s 94, s 163, s 289(2)
Queensland Civil and Administrative Tribunal Act 2009 (Qld), s 146(b)

Ainsworth v Albrecht (2016) 261 CLR 167
Plenty v Dillon (1991) 171 CLR 635

APPEARANCES &
REPRESENTATION:

Applicant:	Self-represented
Respondent:	Darren Lynch (body corporate manager) and Douglas Crothers (chairperson)

REASONS FOR DECISION

- [1] Mr Penno owns a unit, Lot 3, on the first floor in The Oasis – Dunmore complex. The unit leads onto an exclusive use L-shaped balcony.¹ On the outside edge of the balcony there are walled garden beds. These garden beds are common property, even though they are not accessible to other residents of the complex. On the same level of the complex there are four other units that have exclusive use balconies attached and similar common property garden beds.
- [2] Maintenance of the garden beds mainly involves pruning hedges, which needs to be done every few months. Practically, that cannot be achieved from the outer edge of the beds because of the considerable height from the ground. Accordingly, the gardening work needs to be carried out from inside the beds or from the adjacent balconies.
- [3] By agreement with the body corporate, one of the other residents on the first floor maintains the common property garden beds adjacent to their balcony. The other residents permit the body corporate’s gardener to walk through their unit to access the related balcony and garden beds. Mr Penno has refused consent and is unable or unwilling to maintain the garden beds adjacent to his unit.
- [4] The body corporate wishes to compel access through Mr Penno’s unit. It submits that it is entitled to exercise a right of entry under section 163 of the *Body Corporate and Community Management Act 1997* (Qld) (‘the Act’). Subsection 163(1) provides:
- (1) A person (an **authorised person**) authorised by the body corporate for a community titles scheme may enter a lot included in the scheme, or common property the subject of an exclusive use by-law, and remain on the lot or common property while it is reasonably necessary—
- (a) to inspect the lot or common property and find out whether work the body corporate is authorised or required to carry out is necessary; or
- (b) to carry out work the body corporate is authorised or required to carry out.

Notice requirements are specified elsewhere in the section.

- [5] Mr Penno strongly objects to the body corporate’s proposed course of action, mainly on the basis of potential risk of injury to occupants and damage to property involved in having a gardener carry equipment, such as a hedge trimmer, through a domestic space. He submits that the better option is for the body corporate to access the level 1 beds and balconies from a point adjacent to Lot 2, where the distance from the ground to that garden bed is 1.6 meters. He proposes that the gardener lift equipment onto that bed and access the related balcony via a short ladder. His balcony could then be

¹ Submissions of appellant paragraph 4; submissions of respondent page 7.

accessed via the Lot 2 balcony. The body corporate rejected that proposal, pointing to risks to the gardener and security concerns associated with the clearing of undergrowth.

- [6] The matter has been the subject of a long-running dispute between Mr Penno and the body corporate. At one point the idea of replacing the plants with boards was discussed, but no agreement was reached. Also, it is evident that in earlier years the garden beds contained ground cover that required no maintenance. It seems that in mid-2015 that was replaced by the present hedge species.
- [7] Mr Penno sought an order from an adjudicator under the Act to the effect that access to the common property on the first floor of the complex for maintenance purposes be from the North East corner of the property, to avoid access through the first floor units.
- [8] On 19 February 2018 the adjudicator dismissed that application.² The reasons indicate that the adjudicator was satisfied that the body corporate is entitled to access through the unit pursuant to s 163 of the Act. Further, the adjudicator considered that such access would be reasonable in the circumstances.
- [9] We are deciding an appeal by Mr Penno from the adjudicator's decision. The appeal is confined to questions of law.³ The appeal form filed by Mr Penno does not succinctly state the ground/s of appeal. However, in essence he submitted that the adjudicator failed to have regard to certain provisions of the *Work Health and Safety Regulation 2011 (Qld)* ('*WHS Regulation*') and that had he done so he would have granted the order sought.
- [10] At the hearing, the issue became more broadly a question of whether, in terms of s 94(2) of the Act, the body corporate was acting reasonably in requiring access through Mr Penno's unit for the purpose of access to the garden beds. Section 94(1) sets out the general functions of a body corporate and at s 94(2) provides:
- The body corporate must act reasonably in anything it does under subsection (1) including making, or not making, a decision for the subsection.
- [11] While the adjudicator did consider the issue of reasonableness, in our view it was looked at in a narrow context and did not take account of all relevant considerations. The adjudicator stated at [44]:
- The primary objection of the applicant is inconvenience experienced when gardening staff wish to access the gardens and this is a relevant consideration. However the question is whether this is simply a matter of what specific arrangements are made for how and when the works are undertaken, to minimise any inconvenience. Provided adequate notice is given, the body corporate has a statutory right of entry and I am inclined to the view that the applicant is overstating the inconvenience to him.⁴
- [12] Reasonableness should not be assessed in a vacuum, but in the context of the nature and impact of the conduct involved. In the present case, the conduct involved entering a person's home without their consent. Whether or not that entry is reasonable needs to be assessed in the context of the law's strong protection of the inviolability of a

² *The Oasis – Dunmore* [2018] QBCCMCmr 92.

³ *Body Corporate and Community Management Act*, s 289(2).

⁴ *The Oasis – Dunmore* [2018] QBCCMCmr 92, [44].

person's home.⁵ In *Plenty v Dillon*,⁶ Gaudron and McHugh JJ note that the 'policy of the law is to protect the possession of property and the privacy and security of its occupier',⁷ while Mason CJ and Brennan and Toohey JJ refer to a long line of authority in support of that proposition, including note of 'the great regard the law has to every man's safety and quiet' and that 'every man's house is called his castle'.⁸

- [13] While s 163 of the Act allows a right of entry for specified purposes, it remains that any action on the part of the body corporate must be reasonable. That needs to be assessed in the context of all relevant considerations, including the right to privacy and security of a home owner.
- [14] In our view, on an objective assessment,⁹ entering the unit of Mr Penno for the purpose of attending to the adjoining garden beds is not reasonable, given that the ultimate purpose is merely aesthetic and the garden beds are not accessible to other residents. Also, it is evident that other alternatives are available, not involving external access via a ladder, which the body corporate considers to be risky. In earlier years the garden beds contained ground cover that required no maintenance and, later, the option of replacing the plants with boards was discussed. If Mr Penno is concerned to maintain the garden in its present state, it is open for him to allow access through his unit or, with the agreement of the body corporate, to make his own arrangements for its maintenance.
- [15] In our view, pursuant to s 146(b) of the *Queensland Civil and Administrative Tribunal Act 2009*, it is appropriate to set aside the adjudicator's decision and to substitute a new decision.
- [16] Mr Penno has sought an order to the effect that access be from the north-east corner of the property. That would entail the risks referred to by the body corporate.
- [17] We consider it appropriate to make a declaratory order to the effect that the body corporate cannot access Mr Penno's unit, as distinct from the adjacent exclusive use balcony, without his consent for the purpose of carrying out routine gardening on the adjoining garden beds. Mr Penno has made no objection to access to the balcony to the extent necessary for that purpose.
- [18] Such a declaration would not preclude the body corporate from exercising any power of entry through Mr Penno's unit, if reasonably necessary, for a one-off gardening task such as removing the current plants and boarding up the garden beds or replanting them with ground cover, or for other activities such as necessary repairs to a garden wall if justified in terms of s 163 of the Act.
- [19] The appropriate orders are to set aside the adjudicator's decision and to make a declaration that it would not be reasonable for the body corporate, in reliance on s 163 of the Act, to enter Lot 3, as distinct from the related exclusive use balcony, in order to carry out routine gardening on the adjoining common property garden beds.

⁵ See *Plenty v Dillon* (1991) 171 CLR 635 and the list of authorities cited by Mason CJ and Brennan and Toohey JJ at 639-640.

⁶ (1991) 171 CLR 635.

⁷ Ibid, p 647.

⁸ Ibid, p 640.

⁹ An objective standard should be applied: *Ainsworth v Albrecht* (2016) 261 CLR 167, 198 per Nettle J.