**AINSWORTH & ORS v ALBRECHT & ANOR (B37/2016)**

Court appealed from: Court of Appeal, Supreme Court of Queensland [2015] QCA 220

Date of judgment: 6 November 2015

Special leave granted: 25 May 2016

The Appellants are among the owners of lots in the Viridian Noosa Residences Community Titles Scheme 34034 ("the Scheme"). Each of the 23 lots in the Scheme is a residence with two small balconies. The First Respondent, Mr Martin Albrecht, owns lot 11. Since 2011, Mr Albrecht has sought permission to join the balconies of lot 11 by the construction of a deck. Such a deck would require the use of approximately five square metres of airspace between the balconies ("the Airspace"). The Airspace is a part of the Scheme's common property, which is owned by all lot owners as tenants in common.

At an extraordinary general meeting in August 2012, the Scheme's body corporate ("the Body Corporate") considered a motion by Mr Albrecht ("the Motion") for the Scheme's community management statement to be amended such that Mr Albrecht would have exclusive use of the Airspace. The Motion did not obtain a majority of votes in favour. There was therefore not a resolution by the Body Corporate without dissent, which is required for the disposal of a part of common property by s 159(2)(a)(i) of the *Body Corporate and Community Management (Accommodation Module) Regulation* 2008 (Qld) ("the Regulation").

Mr Albrecht lodged an application for dispute resolution with the Office of the Commissioner for Body Corporate and Community Management, which referred the matter for adjudication under Chapter 6 of the *Body Corporate and Community Management Act* 1997 (Qld) ("the Act"). An adjudicator then received submissions from nine lot owners (including Mr Albrecht), along with six reports by architects. On 2 September 2013 the adjudicator ordered that the Motion was deemed to have been passed, as the opposition to it was unreasonable in the circumstances. The adjudicator also ordered that the Body Corporate arrange for the Scheme's community management statement to be amended accordingly. The adjudicator found that "*[w]hile the deck does not exactly accord with the original design intent … [no] submission has demonstrated that the extension would have any noticeable detrimental impact on the appearance, structure or functionality of the architecture of the scheme.*" She also found that the most substantive objection was the potential impact on an adjacent lot, but that "*any impact will be so slight that it does not constitute a reasonable basis to refuse the proposal.*"

An appeal by the Appellants was allowed by the Queensland Civil and Administrative Tribunal ("QCAT") on 17 October 2014. QCAT (Member P Roney QC) set aside the adjudicator's orders, upon holding that the adjudicator ought to have found that Mr Albrecht had not established that the Body Corporate had acted unreasonably. The Member firstly recognised a tension between the power of veto given to any lot-holder by s 159(2) of the

Regulation in respect of a proposed disposition of common property and the power of an adjudicator to make orders under s 276(3) of the Act upon determining that a body corporate had contravened s 94(2) of the Act by having acted unreasonably. He held that the adjudicator had erred when she found that she was "*not satisfied that the Body Corporate acted reasonably*", since the adjudicator's role was to determine whether the Body Corporate's decision was objectively unreasonable. The adjudicator had in effect reversed the onus of proof, which was properly borne by Mr Albrecht.

The Court of Appeal (Margaret McMurdo P, Morrison JA & Martin J) unanimously allowed an appeal by Mr Albrecht. Their Honours found that the reasons of the adjudicator made clear that she had not reversed the onus of proof. The Court of Appeal held that the adjudicator "*was required to reach her own conclusion after considering all relevant matters.*" Their Honours found that the adjudicator had, after making findings of fact that were open on the material before her, proceeded to be persuaded by Mr Albrecht that the opposition to the Motion was unreasonable in the circumstances. She had not erred as held by QCAT but had carried out her functions as adjudicator in accordance with the relevant provisions of the Act.

The grounds of appeal include:

- The Court of Appeal erred at [82] in formulating the relevant statutory test by stating that the adjudicator was required to reach her own conclusion as to whether the respondent's motion should have been passed by the body corporate, acting reasonably, after considering all relevant matters.
- The Court of Appeal ought to have accepted the decision of the appeal member of QCAT that the function of the adjudicator was to consider whether the opposition to the motion was objectively unreasonable, and not to embark upon the process that she did, and that the adjudicator erred in law in so doing.

Mr Albrecht has filed a notice of contention, the grounds in which include:

- In addition to concluding at [90] and [92] that QCAT erred in finding that the adjudicator reversed the onus of proof, the Court of Appeal ought to have also concluded that, in any event:

    a) onus of proof is an aspect of the law of evidence;

    b) pursuant to s 269(3)(c) of the Act, the adjudicator was not bound by the rules of evidence;

    c) in deciding the application made by Mr Albrecht under the Act, the adjudicator was not bound by any rule to the effect that Mr Albrecht carried an onus of proof;

    d) accordingly, in deciding the application, the adjudicator could not, and did not, make any error of law relating to any onus of proof rule.