

ADJUDICATOR'S ORDER

Office of the Commissioner
for Body Corporate and Community Management

CITATION: *Artique* [2021] QBCCMCmr 596

PARTIES: Louise Lewis, owner of Lot 905 (**applicant**)
Debra Allen, owner of Lot 805 (**respondent**)

SCHEME: Artique CTS 34902

JURISDICTION: *Body Corporate and Community Management Act 1997* (Qld) (**Act**),
sections 227(1)(a) and 229(3)(a)
Body Corporate and Community Management (Accommodation Module)
Regulation 2020 (**Accommodation Module**)

APPLICATION NO: 0068-2021

DECISION DATE: 21 December 2021

DECISION OF: I Rosemann, Adjudicator

CATCHWORDS: BY-LAWS – NUISANCE, HAZARD, UNREASONABLE INTERFERENCE
– where the respondent smokes on her lot and balcony – where the
applicant experiences smoke drift – whether the respondent is in breach
of the by-laws - whether the respondent is causing a nuisance, a hazard,
or an unreasonable interference.
Act, ss 167, 182-186

ORDERS MADE:

1. The respondent, Debra Allen, is in breach of By-law 5 and section 167 of the Act.
2. The respondent, Debra Allen, must not smoke tobacco products on the balcony of Lot 805.
3. The respondent, Debra Allen, may only smoke tobacco products elsewhere within Lot 805 if she takes reasonable steps to ensure that tobacco smoke emanating from her lot does not affect any person lawfully using another lot, for example by closing windows and doors within Lot 805.

I HEREBY CERTIFY this is a true copy of the order and reasons for decision.

Dated this 21st day of December 2021.



I Rosemann, Adjudicator

REASONS FOR DECISION

Overview

- [1] This application is about the impact of the respondent's smoking on Lot 805 on the applicant's Lot 905 above. The applicant says this is in breach of By-law 5 and is a nuisance and hazard.
- [2] The applicant claims the respondent is chain smoker. She says the respondent spends about 5 minutes smoking a cigarette and can do so every 20 to 40 minutes. She refers to it as relentless and unbearable. The applicant is concerned about the smoke drift and its impact on her health. She notes that research on passive smoking confirms that it is a health hazard. The applicant says the smoke is interfering with her use and enjoyment of her lot and her balcony. She says she is continually closing the doors to her balcony, but that is her only means of fresh air and it makes her feel 'suffocated and trapped'.
- [3] The applicant notified the body corporate of a by-law breach. The body corporate took the view that this was a matter between the owners. The respondent believes she has a right to smoke on her property and she will continue to assert that right.
- [4] The applicant seeks orders that the respondent not smoke on her balcony and either smoke inside her lot with all doors closed or in the designated smoking area at the scheme. The question then is whether the respondent's conduct is breaching the by-laws or the Act.

Preliminaries

- [5] Artique community titles scheme 34902 (**Artique**) is a 176-lot scheme in Surfers Paradise. The community management statement (**CMS**) shows the Accommodation Module applies. The scheme is registered as Survey Plan 170410.
- [6] This application was lodged on 20 January 2021 seeking the following orders:
 - The outcome I am seeking is that Ms Allen NOT smoke on her balcony and that she smoke her cigarettes INSIDE her unit with ALL doors closed to prevent her toxic smoke drift from entering my unit. Or alternatively smoke in the designated smoking area OUTSIDE the common area at the visitor's carpark, where there is no impact on anyone.

Jurisdiction

- [7] An adjudicator may make an order that is just and equitable in the circumstances to resolve a dispute about a claimed or anticipated contravention of the Act or the CMS, or the exercise of rights or powers or performance of duties under the Act or the CMS.¹ I am satisfied that I have jurisdiction to determine this matter under the legislative dispute resolution provisions.²

Procedural matters

- [8] Initially the applicant applied for conciliation in November 2020.³ The parties participated in conciliation in January 2021 but unfortunately were not able to reach agreement.
- [9] The Commissioner sought clarification from the applicant on some aspects of the application.⁴ The application was subsequently amended.⁵
- [10] The Commissioner invited submissions from the respondent, the committee, the body corporate manager, and all owners.⁶ The respondent made a submission, and 4 submissions were made by lot owners. The applicant inspected and responded to the submissions.⁷
- [11] A dispute resolution recommendation was made referring the file to department adjudication.⁸ I then investigated the dispute, including reviewing the application and submissions.⁹

¹ Section 276 of the Act

² See sections 227, 228, 276 and Schedule 5 of the Act

³ Conciliation application reference

⁴ Section 241 of the Act

⁵ Section 245 of the Act

⁶ Section 243 of the Act

⁷ See sections 246 and 244 of the Act respectively

Submissions

- [12] A submission from the respondent opposes the application and says:
- a. The by-laws are not the law.
 - b. She is not hurting anyone and is not doing anything wrong.
 - c. She can smoke anywhere on her property she wants to.
 - d. She cannot help where the wind blows.
 - e. She also gets cigarette smoke, marijuana smoke, BBQ smoke, strong perfume smells, cooking smells, and other smells entering her lot.
 - f. She disputes that she is a chain smoker and says a packet can last her up to a week.
 - g. She is not the only one smoking in the building. Other lots have guests who smoke.
 - h. She questions how the applicant knows the smoke is hers.
 - i. She objects being dictated to as to what she can do in her own home.
 - j. She has a disability and so going downstairs to smoke is out of the question.
 - k. She questions why the applicant does not buy a fan.
 - l. She questions the applicant's medical evidence.
 - m. She makes comments about the conduct of the applicant and other issues.
- [13] Three owner submissions support the application.
- a. One says the applicant has made reasonable attempts to resolve the issue; the body corporate should take action to enforce the smoking regulations; and the harmful effects of passive smoking are medically proven.
 - b. Another notes the applicant's efforts over a long period and the anxiety this has caused, as well as the health hazard. They have visited the applicant's lot on many occasions but since the respondent moved in have experienced a distinct cigarette smell that discourages them from visiting. They are astonished that the respondent does not do the right thing and smoke in the designated area. They say the smoking is denying the applicant's right to enjoy her deck and have fresh air, and is also penetrating the unit.
 - c. The owners of Lot 904 say that when staying in their lot in April/May they experienced a constant smell of cigarette smoke when they were on their balcony or when the doors were open, from early morning to the evening. They believe it is clear it was from Lot 805. They say this was unpleasant and is hazardous to themselves and any guests. Although smoking is legal, consideration should be given to its passive effects on people in the vicinity and the nuisance it causes.
 - d. A further submission says the respondent has no consideration for other people's health and wellbeing and smokes on her balcony because she does not want her room and furnishings to be polluted with smoke. They say that because of the respondent's addiction to cigarettes, she expects her neighbours to live with it.
- [14] The committee chairperson advised that the committee would not be making a submission as it considers this dispute is a matter that needs to be resolved by the two parties.
- [15] In reply to the respondent's submission, the applicant says her approach to the respondent has been to request that she be considerate and smoke inside her unit with the door closed. She disputes the comments in the submission and makes her own comments about the respondent's conduct. She says the respondent is defiant of the by-laws and rules in general. She subsequently provided further medical evidence as to the impact of this ongoing and unresolved issue on her health.

⁸ Section 248 of the Act

⁹ The investigative powers of an adjudicator are set out in section 271 of the Act

Analysis

- [16] In determining this application, I will consider the By-law 5 and section 167 of the Act, and relevant case law.
- [17] I note the *Tobacco and Other Smoking Products Act 1998* prohibits smoking in an enclosed place, including the common areas of multi-unit residential accommodation which specifically includes community titles schemes.¹⁰ 'Common areas' include areas that are accessible to all or a class of residents or employees. Not all common property will necessarily be an 'enclosed place', or otherwise covered by the other restrictions in that legislation. Queensland legislation does not expressly prohibit smoking within a community titles lot.

By-law 5

- [18] The current CMS for Artique includes the following By-law 5:¹¹

5. SMOKING

- (a) An Occupier must not -
- (i) cause a nuisance or a hazard, or
 - (ii) interfere unreasonably with the use or enjoyment of another Lot, or
 - (iii) interfere unreasonably with the use or enjoyment of the Common Property by persons lawfully on the Common Property,
- by smoking -
- (iv) anywhere on the Common Property,
 - (v) on the balcony of a Lot in circumstances where another person's use or enjoyment of another Lot is unreasonably interfered with by the smoke drift, and
 - (vi) in a Lot in circumstances where another person's use or enjoyment of another Lot is unreasonably interfered with by the smoke drift.
- (b) An Occupier must not dispose of cigarette butts or ash by throwing such items from the balcony of a Lot and must dispose of cigarette butts or ash by putting such items in a closed container in their Lot.

- [19] By-law 5 mirrors the wording of section 167 of the Act (which I will discuss below), but focuses it specifically on smoking. I consider that the legal test for a nuisance, hazard, or unreasonable interference under By-law 5 will likewise mirror the test for conduct under section 167.
- [20] The respondent says by-laws are 'not the law'. She appears to misapprehend her obligations as a lot owner in that regard. The Act provides that owners and occupiers are bound by the CMS, which includes the by-laws.¹² Moreover, they are bound as if the CMS included mutual covenants to observe its provisions entered into by each person bound by it and each person bound had signed the CMS under seal. The respondent is legally bound by the by-laws.

Nuisance, hazard and unreasonably interference

- [21] Section 167 of the Act provides:

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.

- [22] The concepts of 'nuisance', 'hazard' and 'unreasonable interference' are not defined in the Act.
- [23] The Queensland Civil and Administrative Tribunal (**QCAT**) has considered the meaning of 'nuisance' and 'unreasonable interference' on several occasions.¹³

¹⁰ Section 26R

¹¹ Titles dealing number 720233258, recorded 27 August 2020

¹² Section 59 of the Act

¹³ For example, *Norbury v Hogan* [2010] QCATA 27, *Quinn v The Body Corporate of Sanctuary Bay CTS 6523* [2013] QCATA 25, *Miles & Anor v Body Corporate for Solarus Residential Community Titles & Ors* [2016] QCATA 130

- [24] In one matter, QCAT summarised the relevant principles, including that:¹⁴
- a. The term ‘nuisance’ in section 167(a) of the Act carries the common law meaning of private nuisance.
 - b. The phrase ‘interferes unreasonably’ in section 167(b) of the Act is to be construed according to the normal meaning of the words.
 - c. The test for ‘nuisance’ requires a substantial degree of interference according to what are considered reasonable standards for the enjoyment of those premises.
 - d. The test for ‘unreasonable interference’ does not involve any notion of substantiality.
 - e. The test for ‘nuisance’ and ‘unreasonable interference’ is objective.
- [25] QCAT has said that what is considered unreasonable depends on the circumstances in each case, but a nuisance “...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.”¹⁵ That decision referred to the need to establish whether the alleged activity was “... of such volume or frequency that it would interfere unreasonably with the life of another lot owner of ordinary sensitivity.”¹⁶
- [26] The Queensland Court of Appeal has noted that nuisance would always constitute an unreasonable interference but that interference that was not substantial might be unreasonable if, for example, it had no purpose other than to annoy.¹⁷
- [27] Of ‘hazard’ in the context of section 167 of the Act, QCAT has said it is a non-technical term that “...plainly relates to situations with a potential for harm which has not yet occurred.”¹⁸ It referred to Macquarie Dictionary definitions for the word as:

1. A risk; exposure to danger or harm
2. The cause of such a risk; a potential source of harm, injury, difficulty

Case law

- [28] In Queensland, cases regarding smoking in community titles lots, particularly on balconies, have focussed on whether the conduct constitutes a nuisance or an unreasonable interference to the use and enjoyment of another lot, pursuant to section 167 of the Act.
- [29] In numerous cases, adjudicators have not been satisfied on the evidence presented in the particular matter that the conduct complained of constituted a nuisance or an unreasonable interference such that they could make orders to curtail the activity.¹⁹ In a matter where the complainant had a particular sensitivity to cigarette smoke, QCAT on appeal was not satisfied the complainant had provided sufficient objective evidence that the volume or frequency of smoke permeating his lot would unreasonably interfere with the use and enjoyment of a lot by a person of ordinary sensitivity.
- [30] In New South Wales, an adjudicator in one case was satisfied that smoking in a lot had caused a nuisance, contrary to a statutory obligation not to use a lot in a way that causes a nuisance or a hazard,²⁰ and required action to prevent cigarette smoke odour from entering other lots and common property.²¹ The adjudicator acknowledged the evidence was ‘best described as informal’, but they were ‘...satisfied on the balance of probabilities that smoke penetration causes a considerable problem for the occupiers of the adjoining lots.’²²

¹⁴ *Miles & Anor v Body Corporate for Solarus Residential Community Titles & Ors* [2016] QCATA 130, 32-49

¹⁵ *Walter v Selfe* (1851) 64 ER 849 at 851, cited in *Norbury v Hogan* [2010] QCATA 27, at 14

¹⁶ *Norbury v Hogan* [2010] QCATA 27 at 28, 31

¹⁷ *Miles & Anor v Gough & Ors* [2017] QCA 190, at 13

¹⁸ *Mirana Investments Pty Ltd and Ors v Coupe* [2012] QCATA 187, para 48

¹⁹ For example: *North Shore Apartments* [2003] QBCCMCmr 505, *Villas Mermaid* [2005] QBCCMCmr 582, *Bacala Park* [2006] QBCCMCmr 415, *Heritage Village Ormiston West* [2007] QBCCMCmr 565, *Sun Crest* [2010] QBCCMCmr 524, *Admiralty Towers* [2012] QBCCMCmr 264, *Carson Place* [2012] QBCCMCmr 503

²⁰ Section 117 of the *Strata Schemes Management Act 1996 (NSW)*

²¹ *Owners Corporation SP 49822 v May & Ors (Strata & Community Schemes)* [2006] NSWCTTT 739

²² *Owners Corporation SP 49822 v May & Ors (Strata & Community Schemes)* [2006] NSWCTTT 739, para h, o

[31] To my knowledge, the issue of whether smoking constitutes a hazard, contrary to section 167(a) of the Act, has not been specifically canvassed in Queensland. The applicants in the matters noted above do not appear to have explicitly asserted that the smoking in dispute constituted a hazard (whether or not it was also a nuisance or unreasonable interference).

[32] However, the issue of smoking as a hazard in a strata environment has been considered in New South Wales. In one case, the New South Wales Commercial and Administrative Tribunal (**NCAT**) said:²³

There is, in my view no medical or scientific dispute that the inhalation of either primary smoke and second-hand smoke can cause an increased risk of adverse health effects. It is an issue of increased risk, not of the certainty of a health hazard becoming a reality.

and

The inhalation of second-hand smoke is a hazard. It is adjudged as such by public health legislation.

[33] In that matter, the respondents regularly smoked in their courtyard. When the prevailing wind was blowing, the smoke would drift to the neighbouring courtyard and home, such that the neighbours, who had respiratory illnesses, had to move inside and close their doors. NCAT noted the absence of legislation preventing a person smoking within the boundaries of the home that they own or rent was not necessarily the case in a strata scheme. That was because of the mandatory prohibition in the legislation on an owner or occupant causing a nuisance or hazard to the occupier of any other lot. The Tribunal found that the respondent had breached the statutory obligation and ordered them not to smoke in the courtyard.

[34] That decision was followed in a later NCAT decision.²⁴ By that time, the relevant legislative provision had been superseded by one that included a note: *“Depending on the circumstances in which it occurs, the penetration of smoke from smoking into a lot or common property may cause a nuisance or hazard and may interfere unreasonably with the use or enjoyment of the common property or another lot.”*²⁵ The Tribunal accepted the applicant’s evidence that second hand tobacco smoke drifted into some or all of his rooms, depending on wind flow direction, through windows and doors. NCAT noted that the neighbour admitted smoking in her lot and had not ceased smoking. It said:²⁶

I further find that the smoke drift that emanates from lot 7 owned and occupied by Ms Cameron which enters into lot 5, owned and occupied by the lot owner, is a hazard for the same reasons as found by Senior Member Buckley in *Bill Sheath and Rhonda Sheath v Rick Whitley and Sandra Whitley* as stated in the passages extracted above. The lot owner complains in his email of 16 March 2015 of his health and safety being of primary concern and his health concerns regarding inhalation of cigarette smoke which he describes as a toxic chemical cocktail. I accept that evidence of his concerns regarding tobacco smoke drift.

I further find that the smoke drift that emanates from lot 7 owned and occupied by Ms Cameron which enters into lot 5, owned and occupied by the lot owner is a nuisance because it is an interference with the lot owner’s use and enjoyment of his lot which is substantial and unreasonable. His evidence in my view establishes that fact.

Evidence of a breach

[35] Although the evidence in the application is not extensive, I am satisfied, from the application and the submissions, that the applicant is regularly exposed to cigarette smoke in her lot. The applicant is particularly concerned about the toxicity of tobacco smoke entering her lot and the resulting increased risk to her of smoking-related diseases. She believes this is a serious health threat to her and that there is no safe level of passive smoking.

²³ *Bill Sheath and Rhonda Sheath v Rick Whitley and Sandra Whitley* [2014] NSWCATCD 44, paras 19, 22

²⁴ *Gisks v The Owners – Strata Plan No 6743; The Owners – Strata Plan No 6743 v Gisks* [2019] NSWCATCD 44

²⁵ Section 153 of the *Strata Schemes Management Act 2015 (NSW)*

²⁶ *Gisks v The Owners – Strata Plan No 6743; The Owners – Strata Plan No 6743 v Gisks* [2019] NSWCATCD 44, paras 29-30

- [36] The respondent does not dispute that she smokes on her lot. While she disputes that she smokes as frequently as the applicant claims, she still seems to acknowledge that she smokes regularly. The respondent also does not dispute that she smokes on the balcony of her lot. She argues she is entitled to smoke anywhere on her lot.
- [37] The respondent does not dispute that the applicant experiences cigarette smoke in her lot. The respondent also does not dispute that smoke from Lot 805 drifts into the lot above. The respondent makes vague assertions that others smoke in the building. The applicant refutes the respondent's submissions in general but does not specifically address this point. While it may be that the applicant is experiencing smoke drift from multiple sources, given the proximity of the lots, the submissions, and that the respondent acknowledges smoking regularly on her lot, I am satisfied on the balance of probabilities that the primary source of the cigarette smoke affecting Lot 905 is from Lot 805.
- [38] The respondent refers generally to the odour of cigarette smoke but does not appear to acknowledge the impact of tobacco smoke on the health of others. Despite the respondent's apparent scepticism in this regard, I consider that the harm from second hand tobacco smoke is sufficiently widely accepted that the applicant does not need to provide medical evidence to establish it.²⁷ I accept the views of NCAT quoted above. On that basis, I similarly agree that second hand tobacco smoke is a 'hazard' in that it presents a risk of harm. Furthermore, I accept that the risk of harm is serious, and that there does not appear to be a safe level of exposure to second hand smoke.²⁸
- [39] Having regard to the test for nuisance and unreasonable interference set by QCAT in the cases cited above, I am not satisfied the applicant has provided sufficient objective evidence as to the volume and frequency of the smoke drift into Lot 805 from Lot 905 to establish a requisite degree of substantiality for nuisance. As such, I do not consider on this occasion that I am able to reach a finding that the smoking on Lot 805 is causing a 'nuisance' for the purposes of section 167 of the Act. I consider it is more arguable that the smoke drift is unreasonably interfering with the lawful use of Lot 905. More substantively, I am satisfied that the smoke drift from Lot 805 into Lot 905 constitutes a hazard.
- [40] By-law 5 and section 167 of the Act prohibit the respondent from using her lot in a way that causes a hazard.

Conclusion

- [41] The respondent believes she is entitled to do whatever she likes within her lot. However, owners and occupiers within a community titles scheme do not have unfettered rights. The respondent is bound by the by-laws (including By-law 5) and the body corporate legislation (including section 167 of the Act). These provisions place some limitations on activities within lots to reduce or avoid adverse impacts on other users of scheme land.
- [42] Although smoking is not inherently illegal, controls exist on smoking in many contexts within the community because of its potential to harm others. The Body Corporate for Artique has chosen to include smoking controls in its by-laws. Section 167 of the Act applies in any event.
- [43] On balance, I am satisfied the respondent's smoking on Lot 805 is causing a hazard to those using Lot 905, such that it is a breach of By-law 5 and section 167(a) of the Act.
- [44] I consider orders to address this conduct are warranted. Primarily, the problem relates to smoking on the Lot 805 balcony. I will make an order, consistent with By-law 5(b)(v), that the respondent must not smoke on the balcony of Lot 805. If the respondent wishes to smoke within the interior of her lot, I will require her to take reasonable steps to ensure that smoke drift does not affect neighbouring lots. That does not necessarily mean she can only smoke within her lot if all windows and doors are shut. Whether that is necessary will depend on where the respondent is smoking within the lot and her proximity to windows and doors.

²⁷ See for example: www.health.qld.gov.au/_data/assets/pdf_file/0014/440204/passivesmoking.pdf

²⁸ See for example: www.health.gov.au/health-topics/smoking-and-tobacco/about-smoking-and-tobacco/about-passive-smoking

- [45] The respondent should understand that if she fails to comply with this order, it can be enforced against her in the Magistrates Court.²⁹
- [46] I will make a comment about the body corporate. The body corporate has said this is a matter between the applicant and the respondent and it declined to make a submission on this application. It did not issue a by-law contravention notice in response to the applicant's complaints. In correspondence to the applicant, it said it gave the respondent a copy of the by-law and tried to 'broker a resolution', but that it was a personal interpretation as to whether there was a breach and it could not make that determination.
- [47] The body corporate is not obliged to enforce section 167 of the Act, but it does have a statutory obligation to enforce the by-laws, including By-law 5.³⁰ Moreover, it must act reasonably in undertaking its functions and in making decisions.³¹ If the body corporate did not reasonably believe the respondent was in breach of By-law 5, it did not need to issue a by-law contravention notice to her. If it was unsure if the by-law had been breached, it could have asked the applicant for more evidence to assist it in making a decision. However, I do not consider that it could fail to act simply because it thought it was not its responsibility to decide if the by-law had been breached or that it was just a matter between residents.

²⁹ Section 287 of the Act

³⁰ Section 94(1)(b) of the Act

³¹ Section 94(2) and 100(5) of the Act