# ACT CIVIL & ADMINISTRATIVE TRIBUNAL

**THE OWNERS – UNITS PLAN NO 68 v HAUGHEY (Unit Titles) [2016] ACAT 131**

**UT 13/2016**

**Catchwords:** **UNIT TITLES –** removal of hot water system from common property wall – approval of installation of hot water system – proxy nomination forms – motion raised at owners corporation meeting – type of motion needed to authorise installation of hot water system – 'special privilege' under s 49 of UTA 2001 and s 22 of UTM Act – 'special privilege' in circumstances where the use is other than 'minor' – permission via special resolution – principles governing meeting practice – interim application – application statute barred

**Legislation cited:**
*ACT Civil and Administrative Appeals Tribunal Act 2008* s 32
*Legislation Act 2001*s 140
*Limitation Act 1985* s 11
*Unit Titles Act 1970*
*Unit Titles Act 2001* ss 44, 47, 49, 88B, 97, 126, 128
*Unit Titles Amendment Act 2008* (No 2)
*Unit Titles (Management) Act 2011* ss 22, 49, 125, 129

**Subordinate Legislation cited:**
*Body Corporate and Community Management (Commercial Module) Regulation 1997* (Qld) s 91

**Cases cited:**
*Brown v The Owners of Units Plan 2737* [2001] ACAT 2
*General Steel Industries Inc v Commissioner for Railways* (NSW) (1964) 112 CLR 125
*Harrison v Commissioner for Social Housing in the ACT & Minister for Aboriginal and Torres Strait Islander* [2012] ACAT 10
*Katsikalis v Body Corporate for "The Centre"* [2009] QCA 77
*Owners Corporation Units Plan 202 v Brudenell & Ors* [2015] ACAT 64
*Owners Unit Plan 78 v Lokusooriya* [2013] ACAT 80
*Owners Units Plan No 116 & Nicholson and Ors* [2012] ACAT 63

**List of Texts/Papers cited:** Butt, P, *Land Law* (sixth edition)
*Explanatory Memorandum to the Unit Titles Ordinance 1970*
*Explanatory Memorandum to the Unit Titles Bill 2000*
Magner, Ellis S, *Joske's Law and Procedure at Meetings in Australia*, 11th ed

**Tribunal:** Senior Member H Robinson

**Date of Orders:** 28 November 2016
**Date of Reasons for Decision:** 28 November 2016

**AUSTRALIAN CAPITAL TERRITORY )**
**CIVIL & ADMINISTRATIVE TRIBUNAL ) UT 13/2016**

BETWEEN:

**THE OWNERS – UNITS PLAN NO 68**
Applicant

AND:

**REGAN JOHN HAUGHEY**
Respondent

**TRIBUNAL:** Senior Member H Robinson

**DATE:** 28 November 2016

**ORDER**

The Tribunal orders that:

1. Pursuant to subsections 129(1)(a) and 129(2) of the *Unit Titles (Management) Act 2011* (**UTM Act**), within 90 days of the date of this order, the respondent must either:
   a) obtain the necessary authority under the UTM Act for the installation or continued presence of the hot water system on the rear wall of the common property; or
   b) remove the hot water system from the rear wall of the common property.

……..
Senior Member H Robinson

## REASONS FOR DECISION

1. This is an application by the Owners – Units Plan No 68 (**Owners Corporation**) for an order that the respondent, Mr Haughey, remove a hot water system from the common property wall of the unit complex.

2. The application is made pursuant to section 129 of the *Unit Titles (Management) Act 2011* (ACT) (**UTM Act**).

3. The respondent has sought several alternative orders. Some of these orders required a counterclaim, which was not lodged. Others are beyond the scope of the Tribunal's functions. The remainder I have considered below.

4. The respondent also sought to have proceedings struck out on an interim basis. That application was dismissed prior to the substantive hearing, and I have set out the reasons for that decision below as well.

5. The proceedings raised three questions:

    1) What approval was required to install the hot water system?
    2) Was the installation of the hot water system so approved?
    3) If approval was granted, was the hot water system installed consistently with that approval?

6. For the reasons set out below, only the first two questions required an answer.

### The Facts

7. On 9 July 2009 a general meeting of the Owners Corporation was held on the premises of ACT Strata Management in Lyons (**2009 Meeting**).

8. Only two people attended the general meeting: the respondent and Mr Bowditch from ACT Strata Management, the Owners Corporation's management company.

9. Prior to the meeting, a notice of general meeting had been circulated to all unit holders by ACT Strata Management. The notice provided, in part, that a single motion was to be put at the meeting. That motion (**first motion**) was as follows:

**Motion**

*The Owner of Unit 2 wishes to make the following alterations to his unit:*
1. *Install 2 Hitachi split systems*
2. *Erect 1 Rheem roof mounted hot water system*
3. *Erect 1Kw photovoltaic solar panel on the roof above the unit.*

10. The notice attached a proxy nomination form that allowed unit holders to nominate a proxy, or to appoint the chair as their proxy, and to indicate whether or not they approved or did not approve the first motion. The actual nomination forms are no longer in existence, but the minutes for the general meeting indicate that ten owners signed the nomination form, appointing the chair as their proxy. Mr Haughey did not seriously challenge the accuracy of this aspect of the minutes.

11. Mr Haughey's evidence was that, when the 2009 meeting was convened, he was surprised to find that he was the only member of the Owners Corporation in attendance. He was prepared to present an argument in favour of the first motion, and to answer any questions his fellow owners had about it. Because no other owner attended, he did not have this opportunity.

12. As the only member in attendance, Mr Haughey was appointed the Chairperson for the meeting. As all ten of the participating principal members who filled in a proxy nomination form appointed the chairperson as their proxy, Mr Haughey, as the chairperson, was entitled to exercise the proxy votes of the ten nominee unit holders.

13. There was no dispute that, as a proxy, Mr Haughey was required to exercise the votes consistent with the views of the appointing principals. Therefore, he cast votes in accordance with the proxy forms, and the minutes recorded that eight votes were cast in favour of the first motion and three votes against. Notwithstanding that the actual proxies were not in evidence, it was not seriously disputed that this meant that three of the owners indicated on their proxy form that they did not approve the motion.

14. The first motion was recorded as not being passed because it did not receive unanimous agreement. The first motion would have passed, had it needed to be

approved by a special resolution. Whether the first motion needed unanimous agreement or only a special resolution is considered below.

15. There was no dispute that the process at the general meeting was, until this point, consistent with the Owners Corporation's rules and with the relevant legislation. The next step was more controversial.

16. Mr Haughey's evidence to the Tribunal was that he discussed the first motion with Mr Bowditch. Mr Bowditch, he said, advised him that the "real concern" of the owners was that the hot water system was to be placed on the roof, and that there was a "house rule" that air conditioners and the like could be placed on a back wall. Mr Haughey further submitted that Mr Bowditch told him that the owners would not be as concerned if the hot water system were placed on the wall.

17. Mr Haughey then, in his view "acting in the best interests of the Owners Corporation", proposed a change to the wording of the first motion, to have the hot water system and air conditioning units installed on the wall, and the solar panels on the roof. The reworded motion (**second motion**) included the following:

> *...hot water system be installed on wall brackets bolted high on the wall behind unit 2.*

18. Mr Haughey's submissions set out what he said he did next:

> *A resolution was then made to install the two air-conditioning units and the hot water system on the back wall in their current location and the solar panels to be installed on the roof, and as I was the chairperson of this meeting and 10 unit owners had appointed me as their proxy the resolution was passed with 11 votes in favour of the resolution and no votes cast against the resolution.*
>
> *The meeting was closed shortly thereafter.*

19. According to the minutes, the meeting took 15 minutes, from 3:30pm to 3:45pm.

20. When asked by the Tribunal whether he thought this course of conduct was consistent with his role as a proxy representing his principals, Mr Haughey said

words to the effect that if a person gives another a proxy vote, without express limitation, the recipient of that proxy vote may act as he pleases, that being a risk the principal takes when they appoint a proxy. He cited as authority for this proposition the case of *Brown v The Owners of Units Plan 2737* [2011] ACAT 2.

21. The passage of the second motion is not reflected in the minutes for the 2009 meeting. The respondent says that the minutes are wrong, and requested that the Tribunal make an order correcting them. Mr Haughey said that he did not receive a copy of the minutes and was not aware of their alleged inaccuracy until he made enquiries after his authority to place the hot water system on the wall was questioned.

22. It is noted that the applicant's representative expressed some reservations about the accuracy of Mr Haughey's evidence regarding what happened at the 2009 meeting and particularly about the accuracy of the comments ascribed to Mr Bowditch. However, the applicant did not call Mr Bowditch to give evidence, despite Mr Bowditch being an officer of the applicant's management company and it being on notice about this evidence. In the absence of contrary evidence from Mr Bowditch, I have no reason to doubt the respondent gave honest evidence about his recollection of events.

23. I also accept that Mr Haughey certainly thought that he had permission to install the hot water system on the back wall of the unit, because that is where he installed it. That is where it remained for nearly five years, apparently without comment from the Owners Corporation. During this time other owners placed other items on the back wall, particularly air conditioning units.

24. There is no evidence that anyone expressed any concern about the hot water system before an Annual General Meeting (**AGM**) held on 17 March 2015. At that AGM it was noted that permission had not been granted for Mr Haughey to install the hot water system on the wall. The owners resolved that a rule infringement notice be issued to the respondent (**infringement notice**). The respondent did not comply with the infringement notice.

25. Mr Haughey attended the next AGM in April 2016. At that meeting, Mr Haughey was granted a retrospective special privilege to install the photovoltaic panel on the roof, but not for the hot water system on the wall. At that meeting, a motion was also passed that:

> *The Owners Corporation seeks an order from the ACT Civil and Administrative Tribunal (ACAT) that the owners of Unit 2 must remove the unapproved installation of a hot water service from the common property wall.*

26. No action has been taken in relation to the air conditioning systems.

**The First Issue: What permission was required to place the hot water system on common property?**

27. Before considering whether the second motion was validly passed, it is necessary to consider just what kind of motion would be needed to authorise the installation of a hot water system on the common property wall.

28. The parties each had a different position:

    (a) The applicant argued that what was required, in 2009, was the grant of a "special privilege" under section 49 of the *Unit Titles Act 2001* (**UTA 2001 -** unless otherwise noted, all references are to the Act as it was at 9 July 2009), which could only be authorised by an unopposed resolution. Consistent with the Owners Corporation Articles (**Owners Corporation Rules**), the unopposed resolution had been notified to unit owners, along with the proxy form.

    (b) The respondent argued that the only authorisation he required was a special resolution under clause 4(1) of the Owners Corporation Rules, which provided for the approval of the erection of structures on 'common property' by special resolution. No special privilege was required.

29. By way of brief background, the Owners Corporation Articles were based on the default rules found in the UTA 2001. That Act established a set of default rules, or articles, for Owners Corporations (**default articles**). At the relevant time, the UTA 2001 allowed owners corporations established prior to 2001 to

adopt the default articles as the rules of the corporation by special resolution.[1] The owners corporation did this at an AGM on 29 April 2003, subject to one amendment to default article 4.

30. Clause 4(1)(a) of the default articles provided that:

> *A unit owner may erect or alter any structure in or on the unit or the common property only-*
>
> *(a) In accordance with the express permission of the owners corporation by unopposed resolution; and... (emphasis added)*
>
> *...*

31. An 'unopposed resolution' was defined in clause 3.17 of the default rules as requiring that no votes are cast against the resolution and at least one vote is cast in favour of the resolution. Additionally, the UTA 2001 expressly required that if a motion was to be moved that required an unopposed or unanimous resolution, the text of the motion and the kind of resolution had to be notified to members of the owners corporation at least 21 days before the meeting.[2]

32. The amendment to article 4 of the default articles replaced the word 'unopposed' with 'special', such that the Owners Corporation Rules read:

> *A unit owner may erect or alter any structure in or on the unit or the common property only-*
>
> *(b) In accordance with the express permission of the owners corporation by* ***special resolution****; and... (emphasis added)*

33. Clause 3.16 provided that a special resolution required only that the number of votes cast in favour of the resolution be greater than the number of votes cast against it and the votes cast against the resolution number less than one third of the total number of votes that can be cast on the resolution by people present at the meeting (including proxy votes).

34. The parties agree that the amendment to default article 4 was valid.

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[1] Sections 126, 128

[2] *Unit Titles Act 2001* section 97 (R14)

35. The respondent argued that the placement of the hot water system on the roof amounted to the "erection of a structure on the common property", and that authorisation need be granted only under article 4. Accordingly, he only required a special resolution, and not an unopposed resolution.

36. The respondent also argued that section 97 of the UTA 2001 did not require that a notice of general meeting include the words of a special resolution, or even an agenda item foreshadowing a special resolution, and therefore there was no impediment to him raising the second motion 'from the floor'.

37. The Owners Corporation contented that a resolution under article 4 was not sufficient, and that it was necessary to obtain a grant of a 'special privilege' pursuant to section 44 of the UTA 2001 as well. This in turn required an unopposed resolution. On this basis, both the first and second motions would have failed; the first because it was opposed, and the second because it was not appropriately notified.

**Did the placement of the hot water system require a 'special privilege'?**

38. Section 49 of the UTA 2001 allowed the Owners Corporation to grant 'special privileges' relating to common property. The section provided that:

> *(1) An owners corporation may, if authorised by an unopposed resolution, grant a special privilege (other than a sublease) for the enjoyment of the common property (or any part of the common property) to a unit owner, a part-owner of a unit, or someone else with an interest in a unit.*
>
> *(2) A grant under subsection (1) may be terminated, in accordance with a special resolution, by written notice given by the owner's corporation to the person to whom the grant was made.*

39. The same words remain in use in section 22 of the UTM Act.

40. There was no dispute between the parties that the wall on which the hot water system was installed was common property. The question is therefore: could the installation of the hot water system be authorised without the granting of a special privilege in accordance with section 49?

41. Answering this question requires that the Tribunal consider what a special privilege is and when it is needed.

42. As a first step, the term 'special privilege' can be given meaning by looking at it in the context of the Act as a whole.[3] Under the UTA 2001, an owners corporation held the common property as agent of the unit holders as tenants in common.[4] As tenants in common, the owners had a common law right to use the common property, but not in a manner that unreasonably interfered with its use by others.[5] The UTA 2001 established a method by which individual owners or subgroups of owners could only appropriate the common property for their own benefit, but in accordance with a process set out therein.

43. There were two provisions in the UTA 2001 that expressly allowed such appropriations of the common property.

44. First, section 88B of the UTA 2001, which was inserted in 2008[6], allowed the executive committee to authorise 'minor' uses of common property. It provided:

> *88B The executive committee of an owners corporation may consent to an application by a member of the corporation to use the common property if –*
>
> *(a) the use applied for is minor; and*
>
> *(b) the use will not unreasonably interfere with the reasonable use and enjoyment of the common property by other members of the corporation.*
>
> *Example – minor use*
> *Installation of air conditioner or awning on unit that extends over common property*

45. There was no suggestion by either party that the 'executive committee' had authorised the use of the common property pursuant to this section. No member of the executive committee was even at the general meeting. For that reason, I do not need to consider whether the use in this case was a 'minor' one that could fall under the provision.

46. The second means by which the use of common property could be authorised under the UTM 2011 was by the granting of a 'special privilege' under

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[3] *Legislation Act 2001* (ACT) section 140
[4] Section 47
[5] See discussion in Butt, P *Land Law* (sixth edition) 21.18
[6] *Unit Titles Amendment Act 2008* (No 2)

section 49. This section was clearly intended as the means for authorising the use of common property in circumstances where the use is other than 'minor'. But what are those circumstances?

47. The *Explanatory Memorandum to the Unit Titles Bill 2000* is not particularly helpful, providing simply that:

> *Clause 49 - Special privileges relating to common property - provides that the owners corporation may grant or terminate a special privilege over the common property to anyone with an interest in a unit, but may not grant a sublease.*

48. A similarly worded clause existed in the *Unit Titles Act 1970*, but the *Explanatory Memorandum* for the *Unit Titles Ordinance 1970* does not provide any further detail about what is meant by a 'special privilege', nor does it discuss when a special privilege may be necessary in order to use the common property. It does, however, note that "...*[t]he legislation follows broadly the pattern of legislation for similar purposes in all the States*."

49. I am not aware of any decision that expressly deals with the meaning of the term 'special privilege' in the context of the Territory's unit titles legislation. Neither party referred me to any relevant case law. Still, the purpose of section 49 has been discussed in a number of previous cases.

50. In *Owners Unit Plan 768 v Lokusooriya* [2013] ACAT 80 (***Lokusooriya***), Member Daniel (as she then was) observed the purpose of section 49 as follows:

> *[35]As a matter of principle, there should not be encroachment by one unit on to common property. However, the provision under the Rules for the granting of a 'special privilege ' to use common property recognises that encroachment on to common property can, and does, happen.*

51. The underlying facts in *Lokusooriya* are not dissimilar to those in this case. The Owners Corporation filed an application seeking orders requiring the respondent, Mr Lokusooriya, to remove a front deck attached to the outer wall of his unit, which was unapproved and protruded onto the common property. Mr Lokusooriya opposed that application. He filed a response and counter claim seeking orders pursuant to section 129 of the UTM Act for, effectively, approval of the construction of the deck. The distinction is that, by his

counterclaim, Mr Lokusooriya sought the granting of a special privilege for the deck to protrude, so there was no contest that a special privilege was required to appropriate the common property, in addition to any approval necessary to erect a structure on it.

52. *The Owners Units Plan No 116 & Nicholson and Others* [2012] ACAT 63 (***Nicholson***) concerned a purported grant, by the executive committee, of 'carport licence agreements', allowing unit owners to build carports for their exclusive use on designated areas of common property. There appeared to be no dispute that this was the grant of a 'special privilege', and the finding was that the grant was invalid because such grants required the passage of an unopposed resolution.

53. In *Nicholson*, the Tribunal noted the observations of Douglas J of the Queensland Court of Appeal in *Katsikalis v Body Corporate for "The Centre"* [2009] QCA 77 (***Katsikalis***), in which his Honour stressed the importance of compliance with the statutory requirements for the grant of a special privilege. *Katsikalis* was decided under a different statutory regime, with somewhat different terminology, but the principles are similar and relevant here.

54. *Katsikalis* involved an extension of a shop's bulkhead into the common property. Although no approval was granted at the time, a retrospective approval was passed by special resolution at a subsequent body corporate meeting. The resolution did not make it clear on what basis the use of the common property was to be authorised. On review, the body corporate argued that the resolution was permissible by reason of section 94 of the *Body Corporate and Community Management (Commercial Module) Regulation 1997* (QLD), which provided for "*making improvements to the common property, including improvements for the benefit of the owner of the owner of the lot*" to be approved by resolution of the body corporate. The applicant in the case argued that this was a disposition of the common property, and as such it had to be approved by an unopposed resolution for the appropriation of common property under section 91 of that regulation.

55. The matter eventually wound its way to the Queensland Court of Appeal, which determined that the outcome of the resolution was that the lot owner would effectively acquire and enjoy exclusive and indefinite use of the relevant area of common property, and that this required an unopposed resolution. Douglas J (with whom McMurdo P and Cherterman JA agreed), observed that:

> *[25] Where the improvement permitted under s. 94 of the regulation has the effect of granting the use of part of the common property exclusively to a lot owner for an unlimited period, as has happened here, it seems to me that s. 94 cannot be treated separately in its effect from s. 91. The sections are not necessarily mutually exclusive as there is the real likelihood of the creation of a disposition of the land in those circumstances.*
>
> *[26] That may not necessarily be the case in some examples that one may think of. For example, a lot owner may ask for permission to fix a bench or place some seats outside his lot on the common property for the benefit of the business's customers. Although it would be an improvement it may not necessarily amount to a disposition of that part of the common property, especially if it remains accessible to others. A different conclusion would be likely to follow if, for example, the permission sought was to make an improvement to enclose indefinitely a car parking space on common property for use as a private parking space exclusively for a lot owner.*
>
> *[27] The position accepted by both the adjudicator and the learned District Court judge was that the evidence was not sufficient to allow the conclusion that what had occurred was a de facto acquisition of common property by the owner of lot 5. In a sense that is an approach that casts the onus of proof on the applicant to show that the resolution had the effect of otherwise disposing of that part of the common property. It is not necessary in this case to decide whether that is the correct way to approach the issue as it is my view, for reasons I shall explain, that there has been a disposition of the common property on the evidence available. In making a resolution of this type, however, the body corporate is potentially interfering with the rights of unit holders to the common property and should be required to make it clear just how those rights are to be affected.*
>
> *[28] In this case the approvals given retrospectively show that the extensions to the bulkheads over the common property will be enjoyed exclusively and indefinitely by the lot owner. That, in my view, amounts to a disposition of that property at least by the grant of an exclusive licence to it for some indefinite period. It may also amount to a gift of the property unless it is a mere licence that would normally be revocable.*
>
> ...

> *[31] It would have been simple for the body corporate to clarify in its resolution whether the permission to extend the bulkhead was for a particular period or was revocable and whether it was subject to other conditions. It would then have been possible to ascertain clearly what type of resolution was required, whether one without dissent or a special resolution....*
>
> *[32] It is important that the rights to common property of bodies corporate are not removed unheedingly or inadvertently and to the detriment of their members. That is why the rules require such resolutions to be passed without dissent. That the infringement on those rights is relatively trivial in this case does not excuse what occurred. The principle is significant.*[7]

56. In my view, section 49 of the UTA 2001 serves the same purpose as that of section 91 of the Queensland Regulation considered in *Katsikalis*, and the reasoning of Douglas J set out above is equally applicable to the Territory legislation and should be applied. That is, where there is to be a disposal or alienation of the common property, then it is necessary that that be done by a clear and unopposed process that is consistent with the legislative scheme. Under the UTA 2001, that approval required the grant of a special privilege under section 49 or a right to a minor use under section 88B. Moreover, that approval is in addition to any other approvals that may be necessary because of the intended use of the appropriated property.

57. The installation of the hot water system on the wall amounted to an appropriation of an area of the common property for the benefit of the respondent. That the use may be minor is beside the point. It is clear that such a use must be authorised either by the granting of a special privilege to use the common property under section 49, or some other statutory means. The granting of a special privilege under section 49 would have required unopposed resolution of the Owners Corporation, following appropriate notification. This requirement was not met. There is no evidence of any alternative form of approval to appropriate the common property.

58. But what of the respondent's argument that he obtained permission for the erection under rule 4(1)(a) instead, and that required only a special resolution, on a motion that could be brought from the floor?

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[7] See *Katsikalis v Body Corporate for "The Centre"* [2009] QCA 77 at [25] to [32]

59. Two observations may be made.

60. First, section 49 of the UTA 2001 was a statutory provision, and as such it prevailed over any inconsistent article.[8] Consequently, if a special privilege was required to use common property, then it was not possible for a provision of the rules to remove or ameliorate that requirement.

61. Second, I do not think that rule 4 removes or ameliorates the requirement for a special privilege in any case. Adopting the reasoning of Douglas J, as set out above, rule 4(1)(a) cannot be read independently of section 49 of the Act. The example provided by his Honour in *Katsikalis* at [26] would be just as relevant to the Territory framework. Other examples can also be envisaged. For example, a special privilege that was approved by an unopposed resolution may allow an owner to build a deck that extends marginally onto the common property, or to use an area of the common property as a parking space. Where the owner proposes an alteration of that deck, or the building of a carport, that does not further encroach upon the common property, that could potentially then be approved by a special resolution in accordance with rule 4(1)(a). However, a resolution under rule 4 could not grant such a special privilege or otherwise authorise the exclusive use of the common property. That requires a special privilege and the unopposed consent of the body corporate. On any view of the facts of this case, no such consent was obtained in relation to either the first or the second motion in this case.

**Notice of special resolutions**

62. Although it is not necessary to decide this matter, I take the opportunity to make some observations about the respondent's contention that a motion requiring a special or ordinary resolution may be put forward at a general meeting without prior notice to all unit holders.

63. The relevant notice provisions were set out in section 97 of the UTA 2001, which provides:

> *97 Notice of general meetings*

[8] Section 128(4)(a)

*(1) The executive committee of an owners corporation must give notice of a general meeting to—*

*(a) each member of the corporation; and*

*(b) each mortgagee's representative (if any).*

*(2) The executive committee must give notice of the general meeting—*

*(a) so that the notice would reasonably be expected to be received at least 14 days before the date fixed for the meeting; or*

*(b) if a motion is to be moved that requires an unopposed or unanimous resolution—so that the notice would reasonably be expected to be received at least 21 days before the date fixed for the meeting.*

*(3) A notice of a general meeting for an owners corporation must state—*

*(a) the time, date and place fixed for the meeting; and*

*(b) whether the person notified is entitled to vote on all (or any) motions at the meeting, and if not, why not; and*

64. The practical limitations of this section were discussed by Presidential Member Daniel in *The Owners Corporation Units Plan 202 v Brudenell & Ors* [2015] ACAT 64 as follows (references to the '2002 Act' are to the UTA 2001 as it was in the year 2002):

> *[68] Subsection (3) deals with the content that must be included in the notice. Relevantly, paragraph (c) requires notice of motions that require unopposed or unanimous resolutions to be given. That notice must include the text of the motion and the kind of resolution. Importantly, paragraph (c) does not mention special resolutions. There is a well known presumption in statutory interpretation, usually represented by the maxim "expressio unius est exclusio alterius", meaning that expressly mentioning something would exclude others. In this context, applying that presumption would mean that the express mention in the notice requirement for unopposed or unanimous resolutions means that special resolutions are not intended to be covered by that paragraph. Section 97 of the 2002 Act does not require notice of the text or the kind of resolution to be given of a motion requiring a special resolution.*
>
> *[69] There are no other provisions in the 2002 Act which might create a requirement to give notice that a motion must be voted on as a special*

> *resolution. The only other source of such a requirement may be the common law, the parties did not point the Tribunal to any authority that such a requirement exists.*

65. In summary, the respondent is quite correct to suggest that the Act does not require that the text of a special resolution be advised to members prior to the meeting. Nor is there any express requirement to circulate an agenda. However, this does not mean that a general meeting may canvas any topic.

66. The principles governing meeting practice and notice requirements are well developed, and guidance can be found in a number of authorities and in legal textbooks. For example, *Joske's Law and Procedure at Meetings in Australia*[9] states as follows:

> *A meeting cannot travel outside the scope of the notice relating to it, so the notice should be drawn in such a way as to not unduly restrict the business that can be done under it. The meeting is competent to consider amendments to motions of which notice has been given, but the amendment must be such as it comes within the scope of the notified business...*[10]

67. In other words, notwithstanding that a notice of general meaning need not contain the *words* of a motion that requires approval only by special resolution, that motion must not be outside the scope of the meeting, as advised to members.

68. It is conceivable that a meeting notice could be broadly worded to allow for various forms of business to be raised from the floor. However, the meeting in this case concerned a single specific motion. The words of the motion were expressly advised to members. Consistent with practice for unopposed resolutions, members were asked whether they agreed to the motion. In my view there is an argument that, having regard to the clear terms of the notice, the putting of any other motion, including an amended motion, was inappropriate and outside the terms of the business and invalid. Ultimately, however, I do not need to decide this as I am satisfied that both the first and second motions were invalid.

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[9] Magner, Ellis S, 11th edition, [3.10]
[10] At [3.14], citations omitted

**Conclusion**

69. The installation of the hot water system on the complex wall amounted to an appropriation of the common property for the personal use of the respondent. Two steps had to happen for the respondent to be granted permission to do this:

    (a) First, the words and nature of the motion for an unopposed resolution to grant the special privilege at the general meeting had to be notified to all members – and these words needed to clearly state that the hot water system was to be placed on the wall; and
    (b) Second, at that general meeting there had to be the express act of an unopposed resolution of the owners to grant the special privilege over the common property.

70. Neither step was completed. Therefore, the respondent did not have authorisation to install the hot water system on the complex wall. I am satisfied that it is appropriate that the respondent be directed to remove it.

71. I note that the respondent has collected, and filed, a considerable amount of material that, he argued, demonstrates that the hot water system presents no danger to the structure of the wall or to residents of the complex. He also contends that he has been treated unfairly. I have not had regard to this material as it is outside the scope of the application before me. It would, however, be relevant to any deliberation by the members of the Owners Corporation when considering whether to authorise a special privilege for the continued installation of the hot water system.

72. To this end, there is nothing preventing the respondent from putting to a general meeting a motion seeking the unopposed consent of the members of the applicant for a grant of a special privilege allowing the use of the common property for the hot water system, in a similar manner to the permission sought for the installation of the solar panels. I also note that, in the event that motion is declined, the respondent is entitled to seek a merits review of the motion pursuant to section 129 of the UTM Act, at which time this information may also be relevant.

73. Given the significant amount of time that has elapsed between the installation of the hot water system and the present action, it is appropriate that the respondent be given time to either seek the necessary authorisation or remove the hot water system if that authorisation is denied.

74. Accordingly, the Tribunal orders that:

    1) Pursuant to subsections 129(1)(a) and 129(2) of the UTM Act, within 90 days of the date of this order, the respondent must either:
        a) obtain the necessary authority under the UTM Act for the installation or continued presence of the hot water system on the rear wall of the common property; or
        b) remove the hot water system from the rear wall of the common property.

**The Interim Application**

75. Early in these proceedings, the respondent lodged an interim application seeking that this matter be 'struck out' on three grounds:

    1) The application is statute barred;
    2) The application is frivolous and vexatious; and
    3) The application is lacking in substance and merit.

76. I heard the interim application for strike out on 29 July 2016, and determined to dismiss it shortly thereafter. I advised the respondent that I would provide written reasons, and I take the opportunity to do so now.

**The application is statute barred**

77. In arguing that this application is statute barred, the respondent relied upon section 11(1) of the *Limitation Act 1985* (ACT), which provides that:

> ***11 General***
>
> *(1) Subject to subsection (2), an action on any cause of action is not maintainable if brought after the end of a limitation period of 6 years running from the date when the cause of action first accrues to the plaintiff or to a person through whom he or she claims.*

*(2) Subsection (1) does not apply to a cause of action in relation to which another limitation period is provided by this Act.*

78. Does this section operate so as to bar the Owners Corporation from commencing proceedings in the Tribunal?

79. First, it is necessary to consider what the 'cause of action' is in this case.

80. 'Cause of action' is defined in the Dictionary to *the Limitation Act 1985* (ACT) to mean:

*"...the fact or combination of facts that gives rise to a right to bring a civil proceeding".*

81. Assuming for a moment that this is a 'civil proceeding', the question becomes: what "facts or combination of facts" give rise to "a right to bring proceedings"?

82. This application is brought under section 125 of the UTM Act. That provision provides:

*(1) This section applies to a dispute relating to an owners corporation for a units plan between the corporation and any 1 of the following:*

*(a) an owner or occupier of a unit in the units plan;*

*(b) the manager (if any) for the owners corporation;*

*(c) a service contractor for the owners corporation;*

*(d) an executive member.*

*(2) A party to the dispute may apply to the ACAT for an order in relation to the other party if the application relates to the dispute.*

83. In this case, it is a 'dispute relating to an owners corporation' within the meaning of this section that gives rise to the cause of action. 'Dispute' is not defined. However, the basis for this application is clearly the resolution of the Owners Corporation of May 2015 that the respondent remove the hot water system. The dispute is over the enforcement of that resolution. The cause of action did not arise until the passage of that resolution. Accordingly, the action is not statute barred.

84. The other grounds cited were that the claim should be struck out as being frivolous and vexatious or lacking in substance and merit. The Tribunal's power to dismiss proceedings on these grounds is found in section 32 of the *ACT Civil and Administrative Appeals Tribunal Act 2008* (ACT), which provides:

> ***32 Dismissing or striking out applications***
> *(1) This section applies if the tribunal considers that an application, or part of an application is—*
>
> *(a) frivolous or vexatious; or*
>
> *(b) lacking in substance; or*
>
> *(c) otherwise an abuse of process; or*
>
> *(d) made by a person who has been dealt with by a court or tribunal in Australia as frivolous or vexatious.*
>
> *(2) The tribunal may, by order, do 1 or more of the following:*
>
> *(a)refuse to hear the application or part of the application;*
>
> *(b)dismiss the application or part of the application;*

85. In *Harrison v Commissioner for Social Housing in the ACT & Minister for Aboriginal and Torres Strait Islander* [2012] ACAT 10 President Crebbin observed that *"[t]he phrase frivolous and vexatious can be used in the context of an action that is brought to harass or annoy a party*"[11], but that it *"...is not limited in its meaning and application to such circumstances. It is a term of art that is applied in legal proceedings to describe the absence of a cause of action generally*."[12]

86. In terms of whether this was an action "brought to harass or annoy", although the respondent raised some concerns that he was being treated unfairly, there was no evidence before the Tribunal that demonstrated a collateral purpose or other vexatiousness, and accordingly I declined to dismiss the proceedings on this basis.

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[11] At [25]
[12] At [26]

87. In terms of whether the proceeding was "lacking in substance", making out this ground, at that early stage, required that the respondent demonstrate that the application be "so obviously untenable that it cannot possibly succeed": eg, *General Steel Industries Inc v Commissioner for Railways* (NSW) (1964) 112 CLR 125 at 128–129 per Barwick CJ. Meeting this test usually requires, for example, clear facts or an unarguable point of law. It was apparent from the respondent's material that his case was contingent upon the Tribunal accepting his version of the events of the 2009 Meeting. The facts of that meeting were in contention, as were the consequences of it, and therefore this was not the kind of matter where it would have been possible to dismiss proceedings without proceeding to hearing.

88. Accordingly, I declined to dismiss the application on an interim basis and set the matter down for a substantive hearing.

……..
Senior Member H Robinson

# HEARING DETAILS

| | |
|---|---|
| **FILE NUMBER:** | UT 13/2016 |
| **PARTIES, APPLICANT:** | The Owners – Unit Plan No 68 |
| **PARTIES, RESPONDENT:** | Regan John Haughey |
| **COUNSEL APPEARING, APPLICANT** | N/A |
| **COUNSEL APPEARING, RESPONDENT** | N/A |
| **SOLICITORS FOR APPLICANT** | N/A |
| **SOLICITORS FOR RESPONDENT** | N/A |
| **TRIBUNAL MEMBERS:** | Senior Member H Robinson |
| **DATES OF HEARING:** | 23 September 2016 |