ADJUDICATOR'S ORDER

Office of the Commissioner
for Body Corporate and Community Management

CITATION:	*Carson Place* [2012] QBCCMCmr 503
PARTIES:	Ian & Lorraine Webb, co-owners of lot 32 (**applicants**)
	Clem Hodda & Hannah Khurda, occupiers of lot 28 (**respondents**)
SCHEME:	Carson Place CTS 24620
JURISDICTION:	*Sections 227(1) and 229(3)(a)* of the *Body Corporate and Community Management Act 1997 (Qld)* (**Act**), applying the Act and the *Body Corporate and Community Management (Standard Module) Regulation 2008* (**Standard Module**).
APPLICATION NO:	0498-2012
DECISION DATE:	8 November 2012
DECISION OF:	S Zeidler, Adjudicator
CATCHWORDS:	NUISANCE – test for nuisance – whether cigarette smoke from another lot has unreasonably interfered with the applicants' use and enjoyment of their lot.
	Act, s167.

ORDERS MADE:

1. **I hereby order** that the application is **dismissed**.

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

Dated this day of 2012. _____

S Zeidler, Adjudicator

REASONS FOR DECISION

Introduction

[1] Carson Place consists of 32 lots and common property. The applicants say smoke from the respondents unit (situated directly below the applicant's unit) drifts into their apartment and causes them distress. The applicants are concerned about the effect smoke is having on their health.

[2] The applicants have included in the application publications from the Cancer Council Australia and Menzies Research Institute setting out the effects of passive smoking. The applicants request that the respondents be ordered to smoke outside the confines of the body corporate building to stop smoke penetrating their living, dining and sleeping areas.

[3] There is no provision in the legislation that specifically deals with cigarette smoke. However, *section 167* of the Act prevents an occupier using his or her lot in a way that creates a nuisance or unreasonable interference for another occupier.

[4] In determining this application, I will consider whether cigarette smoke from the respondents' lot causes a nuisance or unreasonably interferes with the applicants' use and enjoyment of their lot. This issue has been considered by the Queensland Civil and Administrative Tribunal (**QCAT**) in the decision of *Norbury v Hogan [2010]* QCAT 27 (***Norbury v Hogan***) and the subsequent Adjudication decision of *Admiralty Towers [2012]* QBCCMCmr 264 (***Admiralty Towers***).

Jurisdiction

[5] I am satisfied this matter falls within the legislative dispute resolution provisions.[1] It is a dispute between a lot owner and an occupier about a claimed contravention of the Act.[2] An adjudicator's order may require a person to act, or prohibit a person from acting, in a way stated in the order.[3] Further, an adjudicator's order may contain ancillary and consequential provisions the adjudicator considers necessary or appropriate.[4]

Procedural Matters

[6] In April 2012 the Commissioner's Office attempted to organise a conciliation session to assist in the resolution of this dispute. Unfortunately conciliation did not proceed. Subsequently, this application was lodged.

[7] A copy of the application was provided to the respondent, the Body Corporate Committee (**the committee**) and all owners, with an invitation to respond to the matters raised by the application.[5] Several submissions were received in this matter. The applicant inspected the submissions received and made a written reply.[6] A dispute resolution recommendation was then made referring the dispute to departmental adjudication.

Matters in Dispute

[8] The applicants say one or both of the respondents are heavy smokers and whenever they smoke on their front or back balcony or within the unit itself, the smoke drifts upwards directly into the applicants' unit, particularly their main bedroom, study and living areas. The applicants say this smoking causes a nuisance and/or unreasonably interferes with the use and enjoyment of their lot.

[9] In response to the application, the respondents make the following comments:

- Most of the time the wind blows away from the applicants' bedroom at a velocity sufficient to dilute any smoke from the respondents.

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[1] See *sections 227, 228, 276* and *Schedule 5* of the Act
[2] *Section 227(1)(a)* of the Act
[3] *Section 276(2)* of the Act
[4] *Section 284(1)* of the Act
[5] *Section 243* of the Act
[6] See *sections 246* and *244* of the Act respectively

- We have trialled smoking on the street frontage balcony (away from the applicants living areas). However, this has not alleviated complains from the applicants.
- The applicants may be more sensitive to smoke than the average person. In *Norbury v Hogan* it was found that nuisance would not be established if the complainant was abnormally sensitive.

[10] In reply to the respondents comments the applicants say:

- The respondents' interpretation of the wind direction is incorrect.
- The respondents' have not limited their smoking to the street frontage balcony.
- Passive smoking is a health hazard. There is no risk-free level of passive smoke.

Analysis

[11] The key issues for determination in this matter are:

a. What legislative controls are in place regarding smoking?

b. What constitutes a nuisance?

c. Are the respondents using their lot in a manner which constitutes a nuisance?

What legislative controls are in place regarding smoking?

[12] The *Tobacco and Other Smoking Products Act 1998* (**TOSP Act**) is Queensland legislation which prohibits smoking in certain places. Adjudicator Rosemann in the matter of *Admiralty Towers* summarised the relevant provisions of the TOSP Act. There the Adjudicator stated:

> *"Section 26R(1)* of the TOSP Act prohibits smoking in an enclosed space, which includes "*a place…having a ceiling or roof and, except for doors and passageways, completely or substantially enclosed, whether permanently or temporarily*"[7] However, *section 26R(1)* does not apply to residential accommodation including lots in a community titles scheme other than "*an area accessible to all, or a specified class of, residents of, or persons employed at, the accommodation. Example— a TV room or cooking facilities shared by all, or a specified class of, residents*".[8]"

[13] There is nothing to suggest the current circumstances cause a breach of the TOSP Act. Further, the applicants have not argued, and I am not aware of, any other law or regulation specifically prohibiting smoking in a lot in a community titles scheme. Therefore, I am not satisfied that smoking in a lot is, in and of itself, a breach of any legislation or otherwise prohibited in Queensland. Accordingly, the next issue for determination in this matter is whether second-hand smoke can cause a nuisance under *section 167* of the Act.

What constitutes a nuisance?

[14] *Section 167* of the Act sets out the provision of nuisance. This section provides:

> *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.*

[15] *Section 167* of the Act, in the context of second-hand cigarette smoke, was considered by the Queensland Civil and Administrative Tribunal (**QCAT**) in the matter of *Norbury v Hogan*. This matter was an appeal of an Adjudicator's order[9] which considered the effect of cigarette smoke (from an adjacent lot) on the applicant's use and enjoyment of his lot. The Adjudicator, in that

[7] Schedule dictionary, TOSP Act
[8] *Section 26R(2)* and *(4)* of the TOSP Act
[9] *Sun Crest* [2009] QBCCMCmr 303.

instance, relied on medical evidence of the applicant's particular sensitivity to cigarette smoke and concluded that the smoke unreasonably interfered with the use of his lot.

[16] QCAT upheld an appeal of this order. The Tribunal found the Adjudicator had misapprehended the test under *section 167.* The Tribunal stated the correct test for determining whether cigarette smoke interfered with the applicant's use and enjoyment of his lot was an objective test to be measured against the needs and circumstances of a neighbour of ordinary sensitivity. The Tribunal stated that *section 167* would only be breached if it was established the cigarette smoke was *"…of such volume or frequency that it would interfere unreasonably with the life of another lot owner of ordinary sensitivity".*

[17] In stating this test, the Tribunal made the following comments regarding the phrase 'unreasonable interference'.

> *"What is considered unreasonable depends on the prevailing circumstances in each case but the 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: See* Walter v Selfe *(1851) 64 ER 849 at 851."*
>
> *"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."*

[18] The Tribunal then remitted the matter back to the Adjudicator to determine the application based on the correct test. After considering the correct test under *section 167* of the Act, the Adjudicator dismissed the application.

[19] This QCAT test was followed in the subsequent adjudication decision of *Admiralty Towers.* In that matter, the Adjudicator considered whether smoke from an adjacent lot interfered with the applicant's use and enjoyment of his lot. In applying the QCAT test, the Adjudicator stated:

> *"…the test of whether smoke is unreasonable is objective. It is not enough for an occupier to demonstrate the existence of smoke that is unreasonable <u>to them</u> – they must be able to present objective evidence that the smoke would cause a substantial interference to the average person. That is why a person alleging a nuisance from cigarette smoke must be able to quantify the volume and frequency of the smoke and the degree of interference."*

[20] In *Admiralty Towers* the Adjudicator dismissed the application noting that the applicant had failed to provide any objective evidence to demonstrate the amount of smoke entering his lot.

Are the respondents using their lot in a manner which constitutes a nuisance?

[21] Following the above decisions, I consider there are two issues which need to be considered when determining whether the respondents are using their lot in a manner constitutes a nuisance or unreasonable interference. These are:

a. Whether the smoke complained of is, in fact, caused by the respondents; and

b. Whether the smoke is of such volume and frequency that it would interfere unreasonably with a resident of ordinary sensitivity.

<u>Origin of the Smoke</u>

[22] The applicants assert that the smoke complained of originates from the respondents' lot. The respondents, in their submission, do not actually dispute this allegation. Rather, the respondents say:

- The wind blows away from the applicants' bedroom at a velocity sufficient to dilute any smoke;
- They have trialled smoking on the street frontage balcony (away from the applicants living areas) however this has not alleviated the applicants' complains; and
- The applicants may be more sensitive to smoke than the average person.

[23] Given that the respondents do not actually dispute the applicants' assertions regarding the origin of the smoke, I consider it is more likely than not that smoke does originate from the respondents' lot.

Nuisance

[24] The applicants' bear the onus of presenting objective evidence to demonstrate that the smoke is of such volume and frequency that it would interfere unreasonably with a resident of ordinary sensitivity.

[25] On 23 May 2012 a member of our Office, care of the Commissioner, wrote to the applicants requesting any objective evidence of the volume and frequency of the smoke and its impact upon the applicants. Our Office also provided the applicants with a copy of the QCAT decision *Norbury v Hogan* and the Adjudication decision *Admiralty Towers*.

[26] On 1 June 2012 the applicants sent an email to our Office stating:

- There is no commercially available machine to monitor the volume or frequency of smoke.
- In relation to passive smoking, it is neither the volume nor frequency of the smoking that is of concern, it is the fact that it has to be endured at all.
- The Cancer Council Australia in its publication *"Position Statement – Health Risks of Passive Smoking"* advises that exposure to second-hand smoke causes several diseases and conditions such as heart disease and lung cancer. Further, the publication advises there is no risk-free level of exposure to second-hand smoke. Rather it states that breathing even a little second-hand smoke can be harmful to a person's health. Therefore, it is not the frequency or volume of that passive smoking which should be of concern, but the fact that it has to be endured at all.
- Neither of the applicants are smokers nor do they have any family who are smokers. The applicants do not endure passive smoking at work or in any commercial environment and do not believe they should be forced to endure passive smoking in their own residence.

[27] *Section 269* of the Act says the Adjudicator must investigate the application to decide whether it would be appropriate to make an order on the application. Given this investigative requirement, on 10 September 2012, I also wrote to the applicants giving them the opportunity to provide objective evidence to fulfil the *Norbury v Hogan* nuisance test. Specifically, I requested evidence that the smoke purportedly emanating from the respondents' lot is of such volume and frequency that it would interfere unreasonably with the life of another lot owner of ordinary sensitivity.

[28] In response, the applicants made the following comments:

- The volume and frequency of smoke should not be the pre-eminent test in determining this application. If this test is applied it excludes world-wide health advice in relation to passive smoking and its detrimental health effects. The future of the applicants' health is an integral part of the application.
- *"To provide evidence of the frequency and volume of smoke entering our unit is now impossible as you have sent documentation of this requirement to the respondents and they have varied their habit to distort any such evidence."*

[29] Based on the information received, I consider the applicants have provided no objective (or even subjective) evidence of the volume or frequency of smoke entering their lot. I appreciate that the applicants may have had difficulty finding a commercially available machine to measure the quantity of smoke. However, the applicants have not even provided a detailed description or any subjective quantification of the smoke they are experiencing.

[30] The applicants have argued that the QCAT test should not be the pre-eminent test when determining whether second-hand cigarette smoke breaches *section 167* of the Act. Rather, the applicants have argued that the future of their health is an integral part of the application and that the Cancer Council health advice in relation to passive smoke should not be ignored.

[31] While I appreciate the applicants' comments regarding the effects of passive smoke, the fact remains that the applicants have provided no evidence of the frequency or volume of smoke entering their lot. Without such information there is no evidence that any smoke emanating from the respondents' lot is actually interfering with the applicants to any significant degree. In these circumstances, I am not satisfied it would be just and equitable to make an order that the respondents have breached *section 167* of the Act.

Conclusion

[32] *Section 167* of the Act provides that an occupier of a lot must not use, or permit the use of, the lot in a way that causes a nuisance or hazard or interferes unreasonably with the use or enjoyment of another lot. In *Norbury v Hogan,* QCAT stated that *section 167* would only be breached if it was established that the cigarette smoke was of such volume or frequency that it would interfere unreasonably with the life of another lot owner of ordinary sensitivity.

[33] The applicants have provided no objective evidence of the levels of smoke purportedly emanating from the respondents' lot. Accordingly, there is no evidence to justify a finding that the respondents have breached *section 167* of the Act. On this basis, I am dismissing the application.