

THE DEFENCE OF ACQUIESCENCE: ACT NOW OR (POSSIBLY) FOREVER HOLD YOUR PEACE

Disputes about improvements to a lot or common property can be defended by an owner on the basis that the body corporate did nothing, over an extended period of time, to enforce the scheme's by-laws or its rights to common property.

If this defence is successful, the body corporate cannot enforce against the owner, the relevant by-laws or common property rights that the owner contravened.

This is the defence of acquiescence.

Acquiescence

The High Court defines acquiescence as the contemporaneous and informed (or knowing) acceptance, or standing by, which is treated as assent (or consent) to what would otherwise be an infringement of rights.

The defence of acquiescence is arguably consistent with an adjudicator's broad discretion to make orders that are just and equitable in the circumstances to resolve a dispute.

Adjudication

Adjudicators recognise that in some circumstances, acquiescence is relevant if a body corporate allows an unapproved improvement to remain for an extended period of time without acting.

To establish the defence of acquiescence, it is necessary to show –

1. that the body corporate did something beyond mere delay to encourage the owner in the belief that the body corporate did not intend to assert its rights;
2. the owner must have acted to his or her detriment on that belief;
3. the belief of the owner must have a reasonable basis.

Examples

Case examples where the defence of acquiescence was successful include:

1. An owner built several decks encroaching on common property between 1991 and 1993. The body corporate appeared to make no complaint about the positioning of the decks and only applied to the Commissioner's Office in 2005. The body corporate was found to have acquiesced to the decks by failing to take appropriate action earlier to have those decks removed;
2. An owner inherited an unapproved shed constructed on the owner's exclusive use car park. The relevant bylaw was not enforced by the body corporate for over 20 years. No objection to the presence of the shed was raised after a fire service inspection in 2014. There were

many other unapproved sheds constructed on common property. The body corporate was found to have acquiesced to the shed;

3. An owner constructed a carport in about 2004 or 2005. Ownership of the lot changed in 2009. The construction of the carport was raised in a general meeting in 2009 but no specific decision was made. The body corporate were found to have been aware of the existence of the carport for some time. There was no evidence of a body corporate complaint about the carport for 10 years. The only time the body corporate became concerned about the carport was because of action being taken by local council. The body corporate was found to have acquiesced to the carport.

If a body corporate is found to have acquiesced to an owner's improvement, it is likely that a body corporate will not be acting reasonably if it seeks to have that improvement removed.

There are of course case examples where the defence of acquiescence has been unsuccessful, and the body corporate were allowed to seek the removal of an owner's improvement.

What to do?

The question of whether the defence of acquiescence applies will turn on the facts of the individual case.

Delay is not the only factor relevant to the defence, but it is very important. Acting early will assist a body corporate to overcome the defence.

Article Written by Brendan Pitman (17 January 2023)

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