# SUPREME COURT OF QUEENSLAND

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| CITATION: | *Cathedral Place Community Body Corporate v The Proprietors Cathedral Village BUP 106957* [2020] QCA 239 |
| PARTIES: | **CATHEDRAL PLACE COMMUNITY BODY CORPORATE**<br>(applicant)<br>**v**<br>**THE PROPRIETORS CATHEDRAL VILLAGE BUP 106957**<br>(respondent) |
| FILE NO/S: | Appeal No 14271 of 2019<br>DC No 2754 of 2010 |
| DIVISION: | Court of Appeal |
| PROCEEDING: | Application for Leave s 118 DCA (Civil) |
| ORIGINATING COURT: | District Court at Brisbane – [2019] QDC 238<br>(McGill SC DCJ) |
| DELIVERED ON: | 3 November 2020 |
| DELIVERED AT: | Brisbane |
| HEARING DATE: | 11 May 2020 |
| JUDGES: | McMurdo JA and Brown and Ryan JJ |
| ORDERS: | **1. Refuse to admit the affidavit evidence sought to be adduced by each party at the commencement of this hearing.**<br>**2. Grant leave to appeal.**<br>**3. Allow the appeal by:**<br>**(a) Deleting the declaration made on 29 November 2019.**<br>**(b) Deleting paragraph (c)(ii) of the orders made on that date, and substituting for it the following:**<br>**"(ii) The costs involved in whatever the plaintiff does are not borne by a body corporate whose members or occupiers are not entitled to use that facility."**<br>**4. Otherwise dismiss the appeal.**<br>**5. Order that the parties provide written submissions on the costs of this appeal, and the proceeding at first instance, not to exceed five pages in length, within 14 days of the delivery of the Court's judgment in Appeal No 1690 of 2020.** |

CATCHWORDS: REAL PROPERTY – STRATA AND RELATED TITLES – MANAGEMENT AND CONTROL – BODY CORPORATE: POWERS, DUTIES AND LIABILITIES – where the applicant is the community body corporate under a mixed-use scheme under the *Mixed Use Development Act* 1993 (Qld) ("the Act") – where the respondent represents the retail and commercial building within the scheme – where for many years, the respondent has complained that the applicant has levied some contributions on all of the applicant's members which have been applied only in the interests of the residential owners – where the applicant commenced proceedings against the respondent for unpaid levies – where the respondent claimed that, upon a proper accounting of what should have been levied against them, they had overpaid the applicant and that it should pay them – whether, on a proper construction of the Act, the applicant could require the respondent to subsidise the provision of services and other benefits to the other bodies corporate

EQUITY – EQUITABLE REMEDIES – INJUNCTIONS – PROCEDURE – APPEAL – where the trial judge made a declaration and injunctions to give effect to his conclusion on the subsidisation question – whether the trial judge erred in making the declaration and injunctions

*Mixed Use Development Act* 1993 (Qld), s 174, s 176, s 177

*Humphries v Proprietors Surfers Palms North Group Titles Plan 1955* (1994) 179 CLR 597; [1994] HCA 21, considered

COUNSEL: M Amerena with L V Amerena for the applicant
D Savage QC, with M Walker, for the respondent

SOLICITORS: Grace Lawyers for the applicant
PHV Law Solicitors & Consultants for the respondent

[1] **McMURDO JA:** Occupying an entire block in Fortitude Valley is a collection of buildings, mostly of residential apartments, called Cathedral Place. There are eight residential buildings, containing a total of 514 apartments. There is also a two storey building, facing Wickham and Gibbs Streets, which contains shops and other commercial premises.

[2] Cathedral Place is the subject of a scheme under the *Mixed Use Development Act* 1993 (Qld) ("the Act"). The applicant, which I will call "CBC", is the community body corporate under the scheme. There are six members of the applicant, each of which is a body corporate under a building units plan for a certain part of the site. Five of them represent, in total, the residential apartments. The other one, which is the respondent to this appeal and which I will call "the commercial owners", represents the retail and commercial building.

[3] For many years, the commercial owners have complained that CBC, under the control of the residential owners, has levied some contributions on all of CBC's members which have been applied only in the interests of the residential owners. In

essence, their complaint is that some of the contributions levied on them have been for the provision by CBC of amenities and services to other parts of the site from which they receive no benefit. Their complaint is that this conduct exceeds, or is a misuse of, CBC's powers under the Act.

[4] The dispute resulted in a proceeding in the District Court, commenced in 2010, as a claim in an amount of $188,352.71, as unpaid contributions levied by CBC against the commercial owners. They defended the case on the basis that those contributions, as well as earlier contributions which had been levied against and paid by them, were excessive because they included contributions for the provision of benefits to only the residential owners (or some of them). The commercial owners claimed that, upon a proper accounting of what should have been levied against them, they had overpaid CBC and that it should pay them. They counterclaimed for an amount of $246,719.

[5] For a number of reasons, the case was not tried until 2018. After a five day trial, McGill SC DCJ delivered extensive reasons for judgment, without then making any orders.[1] Guided by the judgment of the High Court in *Humphries v Proprietors Surfers Palms North Group Titles Plan 1955*,[2] his Honour held that the Act did not authorise CBC to require the commercial owners to subsidise the provision of services and other benefits to the other bodies corporate, or the owners or occupiers of lots within those bodies corporate. At the same time, however, his Honour held that this did not provide a defence to CBC's claim, or a basis for the counterclaim against it, because of the effect which he attributed to s 174(4)(c) of the Act.

[6] By s 174, a body corporate, in this case CBC, may levy contributions which it has determined to be necessary to meet its actual or expected liabilities. By s 174(4)(a), a contribution so levied is payable to the body corporate in accordance with its decision to make the levy, and by s 174(4)(c) "may be recovered as a debt by the body corporate in a court of competent jurisdiction." His Honour's conclusion on that question, which I will call the recoverable debt point, is the subject of another appeal, which, for reasons which need not be explored here, was heard separately from this appeal and by a differently constituted court.

[7] The case was adjourned by his Honour for further consideration of what equitable relief should be granted to the commercial owners in relation to future conduct by CBC.

[8] There was a further hearing in May 2019, from which his Honour delivered what I will call "the second judgment" on 29 October 2019.[3] By this judgment, which was largely concerned with the interest which should be awarded on CBC's claim, it was ordered that CBC be paid $290,077.44, including $106,419.24 by way of interest.

[9] Another hearing occurred on 7 November 2019, from which there was the judgment under this appeal, delivered on 29 November 2019.[4] His Honour there confirmed

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1 *Cathedral Place Community Body Corporate v The Proprietors Cathedral Village BUP 106 957* [2018] QDC 275 ("the first judgment").

2 (1994) 179 CLR 597 ("*Humphries*").

3 *Cathedral Place Community Body Corporate v The Proprietors Cathedral Village BUP 106957 (No 2)* [2019] QDC 210.

4 *Cathedral Place Community Body Corporate v The Proprietors Cathedral Village BUP 106957 (No 3)* [2019] QDC 238 ("the third judgment"). On 22 November 2019, the commercial owners

his earlier opinion that, although the subsidisation of benefits provided to the residential members had not invalidated the levies as recoverable debts, it was appropriate to grant some equitable relief to the commercial owners, which his Honour did by a declaration and injunctions. The orders then made were as follows:

> "Declare that the *Mixed Use Development Act* 1993 on its true construction does not authorise the community body corporate to require the defendant to contribute to the cost of providing amenities or services, pursuant to an agreement entered into under s 176(c) of the Act, for the provision of such amenities or services to a lot, or to the proprietor or occupier of a lot, or to a parcel comprised in a building units plan, other than a lot or the proprietor or occupier of a lot within the building units plan administered by the defendant, or to the building units plan administered by the defendant.
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> Order that:
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> (a) The plaintiff, in performance of its obligation to keep proper accounts, account separately for all costs incurred for the maintenance of the restricted community property covered by bylaw 27, including normal operating costs and periodic capital costs.
>
> (b) The plaintiff be restrained, until further order, by itself its servants or agents, from undertaking any works on any part of the common property of a member of the community body corporate, other than on the basis that all the costs of undertaking the works be paid by that body corporate.
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> (c) The plaintiff be restrained, until further order, by itself its servants or agents from the operating of a gymnasium or of a sauna, or from the provision of supplies or equipment for a gymnasium or for a sauna, or for the provision of cleaning, supervision, maintenance or other services to a gymnasium or to a sauna, unless either:
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> (i) The gymnasium or sauna is located wholly within the community property of the plaintiff; or
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> (ii) The body corporate within which the gymnasium or sauna is located pays all costs involved in whatever the plaintiff does."

[10] This is an application to appeal against those orders, save for the injunction in (a), in which CBC challenges the judge's conclusion, explained within the first judgment and confirmed in the third judgment, on what might be described as the

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made an application for a stay of the money judgment pending the determination of proceedings before a referee under the dispute resolution mechanism under the Act, by which the defendant sought to have the referee reconsider the amounts levied on it. That application was dismissed by his Honour.

subsidisation question. CBC argues that the judge erred in construing the Act as limiting its powers in that way, and seeks to have the declarations and injunctions set aside. The other appeal,[5] which will be subject of a separate judgment, is an appeal by the commercial owners against the second judgment, upon the basis that his Honour erred in his conclusion on the recoverable debt point.

**The Act**

[11] The Act provides for a "mixed use development", meaning a development consisting of two or more different classes of uses,[6] by a "mixed use scheme".[7] An approved mixed use scheme is said to allow for the development and subdivision of land in a way not otherwise permitted by law.[8]

[12] A mixed use scheme begins with the subdivision of the site by a plan called a community plan,[9] by which the site is subdivided into what are called community development lots and community property lots.[10] A community development lot may be further developed under the mixed use scheme.[11] A community property lot is shared by, and is property common to, owners of community development lots.[12]

[13] On registration of a community plan, the community body corporate is incorporated.[13] The community body corporate is the owner of the community property lot or lots, and is responsible for, and may make by-laws in relation to, the ongoing management of those lots.[14]

[14] A community development lot may be subdivided, by what is called a precinct plan, into lots,[15] the owners of which become members of the precinct body corporate.[16] However that did not occur at Cathedral Place, and the provisions for precinct plans are of minor importance in this case. A community development lot may also be subdivided by a group titles plan or a building units plan, under the *Building Units and Group Titles Act* 1980 (Qld),[17] as occurred here.

[15] At Cathedral Place, the site was divided into a community property lot and four community development lots. In turn, those four lots were subdivided, resulting in six building units plans. One of those building units plans, constituted by 27 lots, is the retail and commercial building. The five other building unit plans together govern the eight residential buildings. Consequently, the members of this community body corporate (CBC) are the bodies corporate of the six building units plans,[18] and each has a certain voting entitlement.[19] The bodies corporate for the residential lots have, in aggregate, 507 lot entitlements. The commercial owners have 143 lot entitlements.

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5 Appeal No 1690 of 2020, which was heard by Fraser JA, Jackson J and me.
6 As defined in sch 5.
7 s 6(1)(b).
8 s 6(2).
9 s 11(1).
10 s 12(2).
11 s 13(2).
12 s 14(1).
13 s 15(1), (2).
14 s 15(3), (4).
15 s 17.
16 s 25(1).
17 s 22 and sch 5 of the Act (definition of "building units plan").
18 s 173(2).
19 According to s 173.

[16] The duties of a community body corporate are expressed in several provisions. One of them, which I have mentioned already, is that by which the community body corporate is responsible for the ongoing management of the community property lots.[20] By s 159, the community body corporate may develop or construct facilities, for the use of persons who lawfully occupy land within the site, on community property[21] or land leased by the community body corporate to provide access to community development lots.[22] Section 161 provides for additional works to be undertaken on community property by the community body corporate, at the request of a member of the community body corporate, in order to enhance the amenity of land or the profitability of any business undertaking within the site. However, s 161 also provides that the costs of undertaking those works must be recovered by the community body corporate from the members who requested the works,[23] by the body corporate levying contributions against those members.[24]

[17] Part 9 of the Act prescribes certain powers and duties on a "body corporate", which for part 9 is a community body corporate or a precinct body corporate.[25]

[18] By s 167(9), a community body corporate:

> "(a) has the powers and functions conferred on it under this Act or its by-laws; and
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> (b) must do all things that are necessary and reasonable for—
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> (i) the enforcement of its by-laws; and
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> (ii) the control, management and administration of the community property."

[19] Section 174 provides:

> "**174 Levies by bodies corporate on members**
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> (1) A body corporate may levy—
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> (a) the contributions determined by it under section 177(1)(h); and
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> (b) any amount determined under section 177(2) in relation to the contributions;
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> by giving its members written notice of the contributions payable by them.
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> (2) Contributions must be levied, and are payable by the members of the body corporate, in shares proportional to their voting entitlements at the time the contributions are levied.
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> (3) If a contribution is outstanding when a person becomes a member of the body corporate, the member is liable for the

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20 s 15(3)(4).
21 Defined in sch 5 to mean the community property lots.
22 Under s 164.
23 s 161(5).
24 s 161(8), (9).
25 s 166.

contribution jointly and severally with the member who previously owed it.

(4) A contribution—

(a) is payable to the body corporate in accordance with its decision to make the levy; and

(b) if paid within 30 days from the day on which it becomes payable—is to be reduced by the part of the contribution attributable to any amount determined under section 177(2); and

(c) may be recovered as a debt by the body corporate in a court of competent jurisdiction.

(5) This section does not prevent the body corporate determining, in general meeting (either generally or in a particular case), that a contribution may be reduced under subsection (4)(b) even if the contribution is not paid within the time mentioned in the subsection."

[20] Section 176 confers certain powers on a body corporate as follows:

"**176 Miscellaneous powers of bodies corporate**

A body corporate may –

(a) invest amounts held by it in—

(i) a way permitted by law for the investment of trust funds; or

(ii) an investment prescribed by regulation; and

(b) borrow amounts, and secure the repayment of amounts and the payment of any interest in a way that is agreed between the body corporate and the lender; and

(c) enter into an agreement for the provision of amenities or services by it or another person to—

(i) a lot; or

(ii) the proprietor or occupier of a lot; or

(iii) a parcel comprised in a building units or a group titles plan; and

(d) if the body corporate is a community body corporate—enter into an agreement with a precinct body corporate for the provision of amenities or services by the community body corporate or another person to—

(i) a lot within a staged use precinct; or

(ii) the proprietor or occupier of a lot within a staged use precinct; or

(iii) a parcel comprised in a building units or a group titles plan; and

(e) acquire and hold any personal property to facilitate the carrying out of its functions."

[21] Section 177 should be set out in full:

"**177 Duties of bodies corporate**

(1) A body corporate must—

(a) control, manage and administer for the benefit of its members—

(i) the community property or the precinct property held by it; or

(ii) any road, wharf or land leased by it under section 164.

(b) properly maintain and keep in a state of good and serviceable repair—

(i) the community property or the precinct property held by it, including any improvements on the community property or the precinct property; and

(ii) any personal property vested in it; and

(iii) any road, wharf or land leased by the body corporate under section 164 and any improvements on the road, wharf or land;

(c) arrange for insurance under section 182; and

(d) keep proper records of—

(i) notices given to the body corporate under this or another Act; and

(ii) orders made by a court and served on the body corporate; and

(e) keep—

(i) for at least 10 years after their creation or receipt by or for the body corporate—

(A) minutes of its meetings, including particulars of motions passed at the meetings; and

(B) proper books of account for amounts received or paid by the body corporate, showing the items for which the amounts were received or paid; and

(ii) for at least 2 years after their creation or receipt by or for the body corporate—voting tally sheets or other records showing votes for motions and election ballots related to its meetings; and

(f) prepare, from the books mentioned in paragraph (e), a proper statement of accounts of the body corporate in relation to each period—

(i) starting on the day of its incorporation or the day up to which the last statement was prepared; and

(ii) ending on a day not earlier than 2 months before the next annual general meeting; and

(g) convene an annual general meeting each year on or after the anniversary of the first annual general meeting, but not later than 2 months after the anniversary; and

(h) not later than 14 days after its incorporation and whenever necessary after that, determine the amounts necessary in its opinion to be raised by way of contributions—

(i) for the purpose of meeting its actual or expected liabilities incurred or to be incurred under paragraph (b); or

(ii) for the payment of insurance premiums, rates or any other liability of the body corporate (other than amounts referred to in paragraph (l)); and

(i) on first determining the amounts mentioned in paragraph (h), establish a fund—

(i) into which must be paid all amounts received by it (including the proceeds of the sale or other disposal of any personal property of the body corporate and any fees received by it under section 180); and

(ii) into which may be paid any amounts paid to the body corporate by way of discharge of insurance claims; and

(j) levy under section 174, on each person liable, a contribution to raise the amounts mentioned in paragraph (h); and

(k) pay any amounts mentioned in paragraph (i) that are received by it and are not otherwise invested under section 176(a) into an account established in a financial institution in the name of the body corporate; and

(l) if the body corporate—

(i) becomes liable to pay an amount that it is unable to pay immediately; and

(ii) is not required under paragraph (j) to levy contributions to meet the liability;

levy contributions under section 174 to raise the amount; and

(m) implement the decisions of the body corporate.

(2) For the purposes of section 174, the body corporate may, in relation to contributions mentioned in subsection (1)(h) or (l), determine by comprehensive resolution an amount that is not greater than 10% of the contributions.

(3) The body corporate may disburse amounts from its fund only for the purpose of—

(a) carrying out its powers and functions under this Act or its by-laws; or

(b) meeting a liability mentioned in subsection (1)(l).

(4) A determination made by the body corporate under subsection (1)(h) may specify that the amounts concerned are to be raised by specified regular periodic contributions.

(5) If the body corporate fails to convene an annual general meeting within the period required by subsection (1)(g), the next general meeting held after the expiry of the period is to be the annual general meeting of the body corporate."

[22] Section 190 provides that the executive committee of a body corporate may undertake expenditure only with the authority of a "comprehensive resolution" of the body corporate, which is a resolution passed with the approval of not less than 75 per cent of the voting entitlements.[26] By s 192, a body corporate may appoint a body corporate manager to which it may delegate its powers, with the exception of certain matters described in s 189(1).

[23] A community body corporate may, by comprehensive resolution, make by-laws regulating the quality of design and development in the site.[27] It may make by-laws for the control, management, use or enjoyment of lots (other than community property or precinct property) within the site.[28]

[24] More significantly, it may, by comprehensive resolution, make by-laws for the control, management, administration, use or enjoyment of the community property.[29] In particular, it may make by-laws that restrict the use of any part of the community property to a member of the community body corporate, a body corporate created by the registration of a building units or group titles plan, or a proprietor of a lot created by the registration of such a plan, as well as a lessee or occupier of a lot within the site.[30] However, a by-law restricting the use of any part of the community property may only be made by resolution without dissent.[31] Such property is called "restricted community property",[32] and such a by-law may include "provisions about imposing and collecting levies from the persons entitled to use the restricted community property".[33]

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26 Or as authorised in an emergency by the Minister: s 190(1)(b).
27 s 202(1).
28 s 203.
29 s 206(1).
30 s 206A(1).
31 s 206A(2).
32 s 206(1).
33 s 206A(5)(b)(iv).

[25] The *Corporations Act* 2001 (Cth) does not apply to a community body corporate or a precinct body corporate.[34]

***Humphries***

[26] This was a case involving the operation of similar, but not identical, provisions of the *Building Units and Group Titles Act* 1980 (Qld) upon the power of a body corporate to enter into an agreement with a building manager by which some, but not all, of the lot owners would receive the benefit of the manager's services as a letting agent.

[27] Section 27(3) of that Act requires a body corporate to do all things reasonably necessary for the enforcement of the by-laws and the control, management and administration of the common property. Section 37(1) empowers a body corporate to control, manage and administer the common property for the benefit of the proprietors and to properly maintain and to keep the common property in a state of good and serviceable repair. Section 37(2)(a) empowers a body corporate to:

> "[E]nter into an agreement, upon such terms and conditions (including terms for the payment of consideration) as may be agreed upon by the parties thereto, with a proprietor or occupier of a lot for the provision of amenities or services by it to the lot or to the proprietor or occupier thereof."

Section 38(3) prohibits a body corporate from disbursing its funds otherwise than for the purpose of carrying out its powers and duties under the Act or for meeting its liabilities referred to in s 38A. Section 38A requires a body corporate to determine the amounts reasonable and necessary to be raised by contributions to meet its actual or expected liabilities.

[28] *Humphries* was a case between the body corporate and the assignees of a management agreement. It was not an agreement between the body corporate and a proprietor or occupier of a lot. At least for that reason, it was not an agreement which was authorised by s 37(2)(a).[35] However, it was held that there was a further limitation on the powers of the body corporate which was relevant, namely that the body corporate was not empowered to require funds, which had been raised by contribution from all proprietors, to bear the cost of the provision of a letting agency for the benefit of only those proprietors which required the service. The provision of this service was part of the consideration for which the manager was paid by the body corporate a lump sum annual payment.

[29] Deane and Gaudron JJ accepted that the manager was not precluded from charging a fee or commission to those proprietors which used its services as a letting agent. Nevertheless, their Honours held, it remained the fact that only those proprietors who wished to let their properties "would obtain any direct practical benefit from the availability on the premises of a letting agency", and that "[e]xamination of the powers of the body corporate to expend its funds discloses that those powers did not encompass the payment of remuneration for the conduct of such an agency from a unit in the complex".[36]

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34 s 167(8), s 168(8) of the *Mixed Use Development Act* 1993 (Qld).
35 (1994) 179 CLR 597 at 602 and 614.
36 (1994) 179 CLR 597 at 607-608.

[30] Brennan and Toohey JJ said:[37]

> "[If] an agreement had been made with particular proprietors or occupiers, it would not have been a proper exercise of the body corporate's powers to require the funds raised by contribution from all proprietors to bear the cost of provision of the service for particular proprietors or occupiers. In any event, cl 2(r) of the management agreement was not made in implementation of any agreement made under s 37(2)(a) between the body corporate and an individual lot proprietor or occupier. None of the other powers conferred by s 37(2) authorizes the making of an agreement for the conduct of a letting agency for the benefit of those proprietors of individual lots who might require such a service."

Their Honours identified the relevant principle as that stated by Lord Selborne in *Ashbury Railway Carriage & Iron Co v Riche*,[38] being that "a statutory corporation, created by Act of Parliament for a particular purpose, is limited, as to all its powers, by the purposes of its incorporation as defined in that Act."[39]

[31] Similarly, McHugh J said that nothing in s 37(1)(a) and (c) conferred:[40]

> "[A]ny authority on a body corporate to enter into an agreement to pay money to a person in consideration of that person providing a letting service for the benefit of unit proprietors. They confer power in relation to the common property. They do not confer a power to enter into an agreement with a third party which affects the lots of other individuals as well as the common property."

[32] The effect of the judgments in *Humphries* was described by Macrossan CJ and McPherson JA, in their joint judgment in *Dynevor Pty Ltd v Proprietors, Centrepoint Building Units Plan 4327* as follows:[41]

> "The essence of the decision in *Humphries* is that the powers of a body corporate, constituted as it is under the *Building Units and Group Titles Act* 1980 as a creature of statute, are circumscribed by the specific statutory provisions of the Act. There being no statutory power authorising the body corporate to expend corporate funds for the benefit of individual proprietors or their units, an agreement contemplating or requiring such expenditure was held to be beyond power; or, if otherwise authorised by express agreement with a proprietor, to be an improper exercise of the powers of the body corporate to apply corporate funds for the benefit or purposes not of the body corporate but of a particular proprietor or proprietors".

**The complaints by the commercial owners**

[33] It is unnecessary to discuss every complaint made by the commercial owners, and considered by the trial judge. For the most part, his Honour accepted that these

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37 (1994) 179 CLR 597 at 602-603.
38 (1875) LR 7 HL 653 at 693.
39 (1994) 179 CLR 597 at 604.
40 (1994) 179 CLR 597 at 614.
41 [1995] QCA 166 at 20-21.

complaints involved expenses by CBC for which it had sought funds from all of its members, including the commercial owners, inconsistently with CBC's statutory duties and powers. It is sufficient to refer to examples of the complaints, including that relating to a gymnasium and sauna which became the subject of one of the injunctions which was granted.

[34] One complaint was about costs associated with restricted community property, as that term is used in s 206A. The community property in this instance is a "recreation area" in the community property lot, containing a swimming pool and areas of garden and lawn. The persons entitled to use the area are each of the residential bodies corporate and any proprietor, lessee or occupier of a lot within their areas. By-law 27 provides for this restricted use, and further provides that CBC is responsible for the maintenance of the area, but may levy contributions from the five residential bodies corporate to cover the maintenance costs, as well as other costs associated with the area. His Honour said that there could be no dispute that all of those costs must be met by levies only on the residential bodies corporate.[42] He held that to the extent that such costs had been included in levies on all proprietors under s 177(1)(h), they had been improperly included. His Honour rejected what he described as a "startling proposition" that CBC was not obliged to keep a separate account for the costs associated with restricted community property,[43] saying that CBC had "a duty to allocate these costs properly, to perform its function under the bylaw, and therefore … a duty to keep accounts in such a way as to enable that to be done."[44]

[35] Another complaint was about the costs of cleaning carparking spaces, situated within the community property, of which certain residential proprietors had been granted exclusive use.[45] A by-law[46] provided that those proprietors would be responsible, at their expense, for maintaining their car spaces, save and except for cleaning expenses. His Honour agreed with the commercial owners that the burden of the cleaning expenses ought not to fall upon all proprietors, including them.[47]

[36] Another complaint was about the cost of painting the exterior of buildings on the site. It appeared to the judge that virtually all of the exterior of the buildings on the site was within the common property of the residential bodies corporate, with only a small part within the community property. His Honour accepted the submission that there was no obligation or power in CBC to maintain the common property of the individual bodies corporate, except pursuant to the management agreements with them under which the cost of any such maintenance was to be borne by the relevant body corporate. Consequently, he said, there was no reason why such costs should be part of the amount determined under s 177(1)(h).[48]

[37] Within one of the areas of a residential body corporate is a gymnasium and sauna, able to be used by the occupiers of all residential lots, but the costs of which were met by CBC. His Honour considered that this did not appear to be an obligation on

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42 The first judgment [83].
43 The first judgment [84].
44 Ibid.
45 The first judgment [85].
46 By-law 21.
47 The first judgment [85].
48 The first judgment [93].

CBC pursuant to a management agreement with the residential bodies corporate.[49] He upheld the complaint that there was no authority in CBC to expend money in the maintenance of the gymnasium and sauna or on the purchase of equipment used there.[50]

**The reasoning of the trial judge**

[38] For the most part, the relevant reasoning of the trial judge was contained in the first judgment.

[39] In his discussion of *Humphries*, his Honour considered that there were two reasons why the contract in that case "infringed the requirements of the Act", namely:

> "[T]here was no power in the body corporate to enter into an agreement with anyone other than the proprietor or occupier of the lot for the provision of services by it to the lot or the proprietor or occupier of the lot, and there was no power to expend the funds raised by contribution from all proprietors on the provision of services to particular proprietors or occupiers."[51]

His Honour accepted that the first reason could not be applied to this case, because s 176 of the Act here permits a body corporate to enter into an agreement for the provision of amenities or services by another person to the proprietor or occupier of a lot, and in that way authorises CBC to enter into agreements such as caretaking agreements which it had made with third parties.[52] However, his Honour said, that difference did not overcome the second reason in *Humphries*.[53]

[40] His Honour expressed his opinion on the relevance of *Humphries* as follows:

> "[79] In my opinion an aspect of the approach of the Court in *Humphries* (supra) was that the legislation then under consideration did not contemplate or permit a situation where benefits would be conferred on some lot owners at a cost shared between all the lot owners, in effect, a situation where the owners who were not obtaining those benefits were subsidising those who were. This is a different question from whether that Act authorised the body corporate to enter into an agreement for the provision of services to lot holders in the absence of an agreement between the body corporate and the lot holders, and is therefore not a conclusion which is overcome by the existence of a statutory power to enter into such an agreement.
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> [80] The High Court's rejection of subsidisation was not based on any express term of the Act, but rather on the absence of any express authorisation in the Act of such subsidisation, or any indication that such subsidisation was intended. In that respect, the position is the same with the present Act. There is nothing in s 176(c) which contemplates the provision of amenities or

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49 The first judgment [89].
50 The first judgment [91].
51 The first judgment [68].
52 The first judgment [71].
53 Ibid.

> services to a lot or the proprietor or occupier of a lot, or a parcel, other than pursuant to an agreement; it is not part of the function of the body corporate to provide amenities or services to such people. There are provisions in the Act dealing with benefits conferred specifically on one or some proprietors. Under s 161(5), if certain works are undertaken by the CBC on community property it must recover all the cost of undertaking those works from the members of the community body corporate who requested the works. On the other hand, if the CBC develops or constructs facilities *on the community property* for the use of persons who lawfully occupy land within the site, that is, all such persons, the obligation to maintain the facility falls on the CBC."

(Emphasis in the original, footnotes omitted.)

[41] His Honour said this about s 206A and a by-law restricting the use of community property:

> "[81] Further, s 206A provides that a bylaw restricting the use of part of the community property may include provisions about the maintenance of the restricted community property, and provisions about imposing and collecting levies from the persons entitled to use the restricted community property. That is consistent with an intention that where community property is made available to a particular person or persons, it is to be at the cost of that person or persons. I acknowledge the Act does not in terms make such a situation mandatory, but that is no doubt because a bylaw under s 206A can only be made by a resolution without dissent."

He continued:

> "[82] Apart from that, the idea of services or amenities being provided selectively to some people within the overall community at the expense of everyone is fundamentally an unfair and unjust way for such a community to function. I would therefore expect that, if there were a legislative intention for that to occur, it would appear with reasonable clarity from the terms of the legislation itself. I can find nothing in the legislation which provides any positive support for such an approach. In my opinion, on its true construction s 176(c) authorises agreements for the provision of amenities or services by the body corporate or another person to the various persons identified, but does not authorise a process of administration which would involve subsidisation, relevantly in the context of the present dispute, of owners of lots in the residential body corporate by the defendant. That is not to suggest that any of the particular agreements entered into by the body corporate were ultra vires and invalid; rather this is concerned with the proper internal administration of the [plaintiff]."

[42] For the commercial owners, it was submitted to the trial judge that certain caretaker and management agreements, which had been made by CBC, were beyond power and invalid, upon the basis of *Humphries*. His Honour rejected the submission in respect of the caretaker agreements, and otherwise found it unnecessary to consider it. Some discussion of his Honour's reasoning in that respect is necessary.

[43] From time to time, CBC had engaged caretakers under various contracts. The services provided by the caretakers, his Honour said, were essentially for the benefit of the owners and occupiers of the residential buildings. (Although at one time there had been a separate caretaking agreement for the provision of such services to the commercial and retail premises.) CBC had entered into management agreements with four of the residential bodies corporate, requiring CBC to perform certain duties on the basis that all of the costs of doing so would be met by that residential body corporate. His Honour thought that many of the duties, which were required of the caretaker, could be identified as effectively a performance of the obligations of CBC under those management agreements.[54]

[44] The judge said that the current caretaking agreement apportioned the remuneration, payable to the caretaker, between the five residential bodies corporate and CBC, in a particular way, which appeared to be "essentially arbitrary."[55] Nevertheless, his Honour said, the agreement between CBC and the caretaker was contractually binding. His reasoning was that CBC was authorised, by s 176(c) of the Act, to enter into the caretaker agreements, but that whether CBC was entitled to include its expenditure pursuant to those agreements within the amount to be levied as contributions under s 174 was another question.

[45] As earlier noted, the second judgment was largely concerned with the interest which should be awarded on CBC's claim. The primary judge did not revisit his reasoning, on the subsidisation point, in that judgment.

[46] In the third judgment, his Honour said that for the reasons which he had previously given, it was open to him "to grant a declaration or an injunction in relation to the future conduct by [CBC] of its administration under the Act, in effect requiring it properly to administer the body corporate in accordance with the Act in the future."[56] He said that there should be a declaration which embodied his "basic conclusion about the proposition that the Act does not authorise [CBC] to require the [commercial owners] to subsidise the provision of services and other benefits to the other bodies corporate within the community, or the owners or occupiers of lots within those other bodies corporate."[57] His Honour continued:

> "[8] The central conclusion that I came to about the operation of the Act in the first judgment was that, on the true construction of s 176(c) of the Act, it did not authorise a process of administration of the plaintiff which would involve the defendant having to contribute to the cost of the provision of amenities or services pursuant to an agreement under s 176(c) entered into by the plaintiff where the amenities or services were to be provided to a lot or to the proprietor or occupier of a lot or to a parcel comprised in a building units or a group

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54 The first judgment [35].
55 The first judgment [37].
56 The third judgment [5].
57 The third judgment [6].

titles plan, other than the lots, the proprietors or occupiers of the lots, or the parcel comprised in the building unit[s] plan of the defendant. There is nothing specific to the defendant about this analysis of the Act; it would be just as correct to say that no particular residential body corporate is required to contribute to the cost of providing amenities or services to another residential body corporate, or to the lots or owners or occupiers of lots within it.

[9] It seems to me with respect that the real difficulty which arises in relation to the administration of the plaintiff is that there is a disconnect between the way in which a mixed use development is supposed to operate as indicated by the provisions of the Act, and the way in which the plaintiff is in fact functioning. Broadly speaking, what the Act contemplates is that, within a particular development, each body corporate will be essentially autonomous, looking after its own common property and its own lot owners, with the community body corporate responsible only for that part of the land covered by the development which is not part of the individual bodies corporate within it. It has limited, specific powers, but that is it, and the performance of the ordinary body corporate functions within each particular body corporate is a matter for that individual body corporate.

[10] Instead of that, the way the system appears to work in practice is that the individual bodies corporate have virtually nothing to do, whereas the plaintiff functions as a "super body corporate" which performs all of the body corporate functions for the whole development, except perhaps for the defendant. The evidence, so far as it goes, suggests that the plaintiff does not do anything very much for the defendant, or the owners [or] occupiers of the lots within it, no doubt because the amenities and services the plaintiff provides includes those ordinarily provided within a residential development. Whether the current scheme arose as a matter of convenience, or (as I suspect) it was set up by the developer in disregard of the terms of the Act in order to maximise the marketability of the management rights to the development, it is this disconnect which is inevitably the product of a seriously unsatisfactory situation within the overall development, because of the capacity of the residential bodies corporate to use their voting power within the plaintiff to, in effect, extract a subsidy from the lot owners within the defendant.

[11] There is some material which suggests that those administrating the plaintiff believe that they can get over this difficulty by extending the services which are provided to the residential bodies corporate, and the proprietors or occupiers of lots within them, to the defendant and the proprietors [or] occupiers of lots within it. For example, the plaintiff has security arrangements, which in the past, operated essentially only for the benefit of the residential bodies corporate, which

extend to the area occupied by the defendant as well. That with respect misses my point.

[12] The problem is not that services or amenities are being provided only to people other than those who are proprietors or occupiers of lots within the defendant; the problem is that body corporate A, which for practical purposes means the lot owners within that body corporate, are being required to contribute to the cost of the provision of services or amenities to body corporate B, rather than just contributing to the cost, albeit the total cost, of the provision of amenities or services to body corporate A, or to the lot owners within body corporate A. Unless the levy ratios happened to correspond with the cost ratios for the provision of the relevant services or amenities, it may well be the case that one or more of the residential bodies corporate are also subsidising other bodies corporate; I have not investigated this. But the present dispute is concerned only with the position of the defendant, and accordingly any declaration I make should be framed with respect to the defendant's position."

[47] The first of the injunctions which his Honour granted, against which there was no appeal, was explained in the third judgment as follows:

"[15] One matter which was raised and discussed was the costs associated with what has been described as the restricted community property, for practical purposes the podium level of lot 4, which is part of the community property of the plaintiff. Because this level has been used to house a swimming pool and associated amenities available to all the residents of any of the residential bodies corporate, it is the subject of a scheme in a bylaw for the plaintiff to collect levies only on the residential bodies corporate to enable it to meet its budget for the maintenance of this area, in terms of both normal operating costs and anticipated periodic capital costs. One of the difficulties that emerged however, is that, from the way the plaintiff keeps its accounts, it is not obvious what costs have been allocated to the bylaw 27(c) process, and what have not. I rejected in my first reasons the proposition that there was no obligation on the plaintiff to account separately for costs associated with the restricted community property; in my opinion such an obligation arises under [s 177(1)(e)(i)(B)] of the Act. It also seems to me that it is impossible for the plaintiff to comply with its obligation under bylaw 27(c) unless it does keep such accounts.

[16] This being something I have decided, and being an obligation imposed by the Act, it seems to me that there can be no hardship to the plaintiff to require it to comply with this obligation, and to keep accounts in such a way as to show the operating costs and periodic capital costs associated with the restricted community property. It is only in that way that the

body corporate can properly determine what amounts to collect by levies under bylaw 27(c)."

[48] The second injunction was explained as follows:

> "[18] Section 161 does not apply to the community body corporate undertaking works on the common property of a member of the community body corporate, but it provides an indication of how such work could be appropriately regulated to ensure that the conduct of the plaintiff is in accordance with the declaration that I have made earlier. Accordingly, subject to considerations to be dealt with later, it would be appropriate to restrain the plaintiff from undertaking works on any part of the common property of a member of the community body corporate other than on the basis of recovering from that member of the community body corporate all the costs of undertaking the works. That would cover doing work on the parts of the car park which are within the common property of particular residential bodies corporate."

[49] The third injunction was explained in these paragraphs:

> "[19] I discussed costs incurred under the caretaking agreements in my first reasons, although I noted that there were limits to the extent to which I had investigated the question of cost allocation under those agreements. Besides, I expect that the current situation may well be different. One matter I did look at however was the cost involved in maintaining a gymnasium and sauna available to the occupiers of any of the lots within any of the residential bodies corporate but located within the common property of a particular residential body corporate. This gave rise to duties on the caretaker, under the last caretaking agreement I examined, including checking and cleaning the gym area and equipment daily, checking, inspecting and regulating the use of the sauna, and scrubbing out, disinfecting the sauna benches and testing the operation of the sauna: [90].
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> [20] One matter that I concluded in my previous reasons was that there was no basis under the Act or bylaws authorising the plaintiff to expend money on the purchase of gym equipment, or sauna equipment, for the establishment or continuation of a gymnasium and a sauna which is not within the community property of the plaintiff. The same applies to the provision of pot plants: [92]. Consistently with my earlier reasons therefore it is appropriate for me to grant an injunction restraining the plaintiff from spending money on the provision of gymnasium or sauna equipment or on the operation of a gymnasium or sauna, or on the provision of pot plants, which are not within the community property of the plaintiff."

**The submissions for CBC**

[50] Counsel for CBC challenged his Honour's essential conclusion, that the Act did not authorise CBC to require the commercial owners to subsidise the provision of services and other benefits to the other bodies corporate, or the owners or occupiers of lots within those other bodies corporate.[58] It was submitted that this proposition is not supported by the text, context or purpose of the relevant provisions of the statute, and that his Honour impermissibly read down the powers of a body corporate under ss 174, 176 and 177, giving the statute a modified meaning which is inconsistent with the language in fact used by the legislature.[59]

[51] It was submitted that the trial judge erroneously drew his subsidisation proposition from *Humphries*, which was a case involving a different statute, in relevantly different terms and in a different context from the present one, where a body corporate has functions and powers over the entirety of a site which has been developed for different uses.

[52] CBC's submissions drew attention to part 9A of the Act, and its provisions for letting agents and service contractors. By s 201T(1), a person is a letting agent under part 9A if a community body corporate authorises the person to conduct a letting agent business for a site (or a precinct body corporate authorises the person to conduct a letting agent business for a precinct). By s 201T(2), a person conducts a letting agent business for a site if the person conducts the business of acting as the agent of the owners of one or more lots included in the site, and the owners choose to use the person's services for securing, negotiating or enforcing leases or other occupancies of lots included in the site. By s 201U, a person is a service contractor for a site if that person is engaged by the community body corporate for the site to supply services to the body corporate for the benefit of the common property or lots included in the site. CBC's argument emphasised that these are agents or contractors which can be authorised or engaged by it *for the entire site*.

[53] It was submitted that the power of a community body corporate, to enter into an agreement of the kind described in s 176(c), contains no express limitation according to the judge's subsidisation principle. Nor is there such a limitation, it was submitted, affecting the words "any other liability of the body corporate" in s 177(1)(h)(ii).

[54] CBC's argument conceded that there is some limitation on a body corporate's powers in these respects. CBC conceded that it could not incur liabilities by entering into an agreement for the provision of amenities or services, by it or another person, where there could be no possible benefit, directly or indirectly to owners who could be called upon to contribute to the discharge of those liabilities by levies under s 174. However the effect of this concession was that the community body corporate has a broad discretion in the exercise of its powers, by which it must assess the potential benefits to all owners, in circumstances where some owners might benefit more than others.

[55] This interpretation was questioned by the Court, during the submissions for CBC, by reference to two examples. One was a hypothetical contract for the provision of window cleaning services to only some owners, but at the cost of the community body corporate and, thereby, ultimately at the cost of all owners. It was conceded that such an agreement would be beyond the power conferred by s 176(c). The

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58 The third judgment [6].

59 Citing *Taylor v Owners - Strata Plan 11564* (2014) 253 CLR 531 at 548-549 [39]; [2014] HCA 9 and *HFM043 v Republic of Nauru* (2018) 92 ALJR 817; [2018] HCA 37 at [24].

second example was the operation of the gymnasium and sauna, which gave rise to the subject of the third injunction. None of the commercial owners is entitled to use that facility. It was submitted, nevertheless, that there was an indirect benefit to at least one of the commercial owners, which conducts a laundry business from its premises on the site, from the patronage that might come from those who use this facility. From this example can be seen the latitude which, on CBC's argument, a community body corporate is to be allowed under the Act.

**The commercial owners' submissions**

[56] In essence, the submissions for the commercial owners supported the reasoning of the primary judge. They also filed a notice of contention, arguing that if CBC had the power to make the levy or levies the subject of the proceeding, CBC's exercise of the power was "unreasonable", so that a similar exercise of the power needed to be restrained. That contention was based upon s 167(9) of the Act, which provides that a community body corporate has the powers and functions conferred on it under the Act or the by-laws, and must do all things that are necessary and *reasonable* for the enforcement of those by-laws and the control, management and administration of the community property.

[57] The principal argument for the commercial owners was that CBC's powers under the Act are limited by its expressed functions, and that it is not a function of a community body corporate to provide benefits to some of its members, at least if that is to be at the expense of all of them.

**Consideration**

[58] As I have discussed, a relevant principle, as identified by Brennan and Toohey JJ in *Humphries*,[60] is that a corporation, created by a statute for a particular purpose, is limited, as to all its powers, by the purposes of its incorporation as defined in that Act. It is necessary to identify the functions of a community body corporate before determining the limits of its powers. However, as I am about to discuss, there are some provisions of the Act which, by conferring particular powers on a community body corporate, indicate that its functions go beyond the management and maintenance of the community property.

[59] Clearly a community body corporate has a responsibility for the management of the community property.[61] As I have discussed, a community body corporate may develop or construct facilities, for the use of persons who lawfully occupy land within the site, on the community property or land leased by the community body corporate under s 164,[62] and it must maintain those facilities.[63] It may undertake particular works on any part of the community property, to enhance the amenity of land or the profitability of any business undertaking within the site, if requested by one of its members.[64] However the cost of undertaking works of that kind must be recovered from those who requested the works.[65]

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60 (1994) 179 CLR 597 at 604, citing *Ashbury Railway Carriage & Iron Co v Riche* (1875) LR 7 HL 653.

61 s 15(4).

62 s 159(1).

63 s 159(3).

64 s 161(1).

65 s 161(5).

[60] By s 167(9), a community body corporate has the powers and functions conferred on it under the Act or its by-laws, and it must do all things that are necessary and reasonable for the enforcement of its by-laws and (again) the control, management and administration of the community property.

[61] The powers of the body corporate to make by-laws, governing the whole or part of the site, demonstrate that the community body corporate's responsibilities extend beyond the community property. It may make community development control by-laws, regulating the quality of design and development within the site,[66] activities by-laws, for the control, management, use or enjoyment of lots,[67] by-laws governing the community property[68] and restricted community property by-laws.[69]

[62] The reach of the body corporate's responsibilities is also evident from part 9A, which provides for the conduct of body corporate managers, service contractors and letting agents. Part 9A recognises that a community body corporate is empowered to authorise a person to conduct a letting agent business, and to engage a service contractor, for the whole or part of the site. Section 201U provides examples of the services which might be provided by a service contractor, namely caretaking services and pool cleaning services.

[63] Part 9A contains no provision which specifically authorises a community body corporate to contract with a letting agent or a service contractor. The power to do that is within the contractual power conferred by s 176(c).

[64] Unambiguously, s 176(c) is not confined to the provision of amenities or services for the benefit only of the community property. An agreement under s 176(c) may be made for the provision of amenities or services to a lot, a proprietor or occupier of a lot or a parcel comprised in a building units plan or a group titles plan.

[65] There is no provision which expressly limits the power in s 176(c) to an agreement which requires that the costs of the provision of the amenity or service be met entirely by those who would benefit from it. But that does not mean the power is unconfined. This power, like the other powers of a community body corporate, must not be exercised in a way which prefers the interests of some members of the body corporate (or owners or occupiers within them) to the detriment of others. To adopt the language of Brennan and Toohey JJ in *Humphries*, it would not be a proper exercise of CBC's powers to require the funds raised by contribution from all proprietors to bear the cost of provision of an amenity or service for particular proprietors or occupiers.[70] This constraint is a consequence of the expressed functions of the community body corporate, and the structure of a mixed use scheme under the Act. In essence, a community body corporate has a responsibility for the governance of the site, more precisely defined by its functions under the Act, under a regime in which its members would be expected to have different interests between them. The community body corporate must be impartial between its members in the performance of its functions and the exercise of its powers. Necessarily, there will be some services which, for reasons of practicality and economy, will have to be provided across the entire site and conceivably, to the

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66 s 202.
67 s 203.
68 s 206.
69 s 206A.
70 (1994) 179 CLR 597 at 602-603.

benefit of some more than others. However, it is another thing to say that services which are provided only to some should be paid for by others.

[66] The necessity for this limitation on the power conferred by s 176(c) is confirmed by provisions for the levying of contributions, namely s 174 and s 177(1).

[67] Section 177 requires the community body corporate to levy contributions of two kinds. The first is a levy, under s 174, to raise the amounts mentioned in s 177(1)(h). The second is a levy to meet a liability mentioned in s 177(1)(l). The distinction between the two is illustrated by the alternatives in s 177(3).

[68] For the purposes of this case, it is necessary to consider only the amounts to be determined under (h). In particular, what must be considered is the scope of the expression "any other liability of the body corporate" within paragraph (h)(ii). Obviously, this goes beyond the actual or expected liabilities incurred or to be incurred under paragraph (b), namely what must be spent in the proper maintenance of the community property and any personal property vested in the body corporate. It extends to any other liability of the body corporate in carrying out its powers and functions under the Act or its by-laws,[71] save for those expenses which, by particular provisions of the Act or its by-laws, are to be recovered by contributions from only some of its members or proprietors, lessees or occupiers.[72]

[69] Under s 177(1)(h), the opinion which must be formed is as to the amounts necessary to be raised by way of contributions to meet actual or expected liabilities. That is not the same thing as an assessment of the body corporate's likely expenditure. It is an assessment of such of the expenditure for which it is necessary to raise contributions under s 174. So where, for example, a service is provided by the body corporate to certain of its members, individual proprietors or occupiers, under an agreement which provides for the recovery by the community body corporate of at least its costs of providing that service, that expenditure would not be brought into account in considering what has to be funded by contributions levied under s 174.

[70] Of course, in not every case will the community body corporate recover its costs in the provision of the amenity or service, although it is entitled to do so under the relevant agreement. The cost of the provision of the service may turn out to be higher than the agreed price to be paid to the body corporate, or the body corporate may be left with a liability to the user of the service, having engaged and paid a contractor which then failed to perform its contract. In such cases, the otherwise unfunded cost borne by the body corporate would be brought into account under s 177(1)(h) (or in some cases under s 177(1)(l)). In that event, the body corporate would be bound to levy, on each of its members, a contribution to raise funds for expenditure which would include that cost.

[71] By the text of s 177(1)(h), the body corporate is given no discretion to exclude any liability according to whether its burden should fall on only one or some of its members. The required opinion, under this provision, is as to the amounts which are necessary to be raised by way of contributions to meet the liabilities or payments referred to in paragraph (h), and by s 177(1)(j) its duty is to levy under s 174 the required contribution to raise those amounts.

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71 s 177(3)(a).

72 s 161 and s 206A.

[72] Similarly, s 174 does not permit a body corporate to discriminate between its members in levying contributions. Those contributions must be levied in shares proportional to the voting entitlements of the members of the body corporate.[73]

[73] The absence of a discretion of that kind, either in the formation of the opinion which is required by s 177(1)(h), or in the making of a levy under s 174, is a further reason for limiting the powers to provide amenities or services, outside the community property, in the way which I have described. If the cost of the provision of the amenity or service cannot be recovered from those who would benefit from it, a burden will inevitably fall upon those who would not benefit.

[74] I agree with his Honour's "central conclusion" in the first judgment, which he repeated in the third judgment at [8] in these terms:

> "[O]n the true construction of s 176(c) of the Act, it [does] not authorise a process of administration of the plaintiff which would involve the defendant having to contribute to the cost of the provision of amenities or services pursuant to an agreement under s 176(c) entered into by the plaintiff where the amenities or services were to be provided to a lot or to the proprietor or occupier of a lot or to a parcel comprised in a building units or a group titles plan, other than the lots, the proprietors or occupiers of the lots, or the parcel comprised in the building unit[s] plan of the defendant."

[75] There is one respect in which the effect of the declaration made by his Honour does not accord with my interpretation of the Act. This arises from his Honour's reasoning, expressed within the third judgment at paragraphs [11] and [12], particularly in this passage:

> "The problem is not that services or amenities are being provided only to people other than those who are proprietors or occupiers of lots within the defendant; the problem is that body corporate A, which for practical purposes means the lot owners within that body corporate, are being required to contribute to the cost of the provision of services or amenities to body corporate B, rather than just contributing to the cost, albeit the total cost, of the provision of amenities or services to body corporate A, or to the lot owners within body corporate A."

Respectfully, I disagree with that analysis. As I have discussed, inevitably there will be services which, for reasons of practicality and economy, must be procured by the community body corporate and provided across the entire site. The body corporate's powers in that respect must be exercised impartially between its members, but subject to that constraint, the Act contains no provision which would prevent the service being provided at a cost to the body corporate's members in the proportions for which the Act provides in s 174(2).

[76] For these reasons, whilst I largely agree with the reasoning of the trial judge, I would allow the appeal against the declaration. I would order that the declaration be set aside. I would not substitute another declaration. The extent of CBC's powers will appear from the reasons for judgment of this Court.

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73 s 174(2).

[77] Although there is no appeal against the first injunction, my reasons for agreeing with it should be stated. This injunction, requiring CBC to keep accounts which separately record costs incurred for the maintenance of restricted community property covered by by-law 27, does not depend upon his Honour's central conclusion on the subsidisation question. Rather, it is the consequence of the terms of by-law 27 itself. That by-law requires CBC to collect, by levies on the residential bodies corporate, sufficient funds to enable it to meet its budget for the maintenance of the relevant area. As his Honour said, there could be no dispute that all of those costs must be met by levies only on the residential bodies corporate.[74] His Honour correctly rejected the submission for CBC that there was no obligation on it, in its accounts, to provide separately for the costs associated with restricted community property.[75] Those costs could give rise to liabilities of CBC, but as discussed earlier, not liabilities which must be brought to account under s 177(1). Because those costs would be met by the residential bodies corporate, under a separate charge pursuant to the by-law, money would not have to be raised for them by a contribution under s 174. It would be impossible for CBC to discharge its distinct functions, on the one hand under s 174 and s 177, and on the other hand under by-law 27, without records of the costs attributable to this restricted community property.

[78] The second injunction restrains CBC from undertaking any works on any part of the common property of a member of the community body corporate, other than on the basis that all of the costs of doing so are paid by that body corporate. There is no basis for disturbing this order. CBC would have no power to undertake those works, other than on that basis, for to do so would be inconsistent with the limitation on its powers which I have described.

[79] The third injunction resulted from the expenditure by CBC for the purchase of gym equipment, and sauna equipment, for the establishment and operation of a gymnasium and a sauna which is within the common property of an area of one of the residential bodies corporate. Those facilities were apparently available to all occupiers of the residential bodies corporate, not limited to the body corporate whose area was used for them. His Honour was correct in holding that it was a misuse of power for CBC to incur costs in this respect, where the burden would fall also upon the commercial owners. CBC's submission that these facilities would benefit the commercial owners, or at least an owner with a laundry business, cannot be accepted. It was a speculative suggestion, without reference to any evidence at the trial, and in any event, this could not justify a burden upon all of the commercial owners.

[80] However, I respectfully disagree with the terms of this third injunction. The order was that CBC be restrained in relevant respects, unless either the gymnasium or sauna was located wholly within the community property of CBC, or "the body corporate within which the gymnasium or sauna is located pays all costs involved in whatever the plaintiff does." That second condition would not allow CBC to provide this amenity, outside its own community property, at some location on the site, for the benefit of all of the residential bodies corporate and at *their* cost. It results from his Honour's view, expressed in the third judgment at [11] and [12], with which I have disagreed. I would alter this injunction by substituting for sub-paragraph (ii) the following:

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74 The first judgment [83].

75 The first judgment [84].

"(ii) The costs involved in whatever the plaintiff does are not borne by a body corporate whose members or occupiers are not entitled to use that facility."

**Applications to adduce evidence**

[81] Lastly, at the commencement of the hearing of this application for leave to appeal, each side saw fit to tender affidavit evidence. With the agreement of the parties, the question of the admissibility of this evidence was reserved. CBC sought to rely upon affidavits by Ms Anwoir, the principal of the body corporate manager for CBC. Her evidence was that in that capacity, she was "in a position on a first hand basis to assess the level of actual and potential cost, inconvenience and detriment that compliance with the … declaration and orders will cause the Community Body Corporate and all the persons on the Site, including its subsidiary bodies corporate, the lot owners, and their tenants, guests and customers." This evidence could have been adduced at the trial, if it was relevant to the questions of construction of the Act. It should not be admitted now for that purpose. The evidence may be relevant to whether leave to appeal should be given; but as should be evident, leave should be given regardless of this evidence.

[82] The other affidavit for CBC was one by its solicitor, simply deposing to discussions with the Registry about the Court's practice, as was followed on this occasion, for the full merits of the proposed appeal to be argued upon the application for leave to appeal.

[83] In the circumstances, it is unnecessary to discuss the evidence sought to be adduced by the commercial owners. The respective applications to adduce evidence should be refused.

[84] I would order as follows:

1. Refuse to admit the affidavit evidence sought to be adduced by each party at the commencement of this hearing.

2. Grant leave to appeal.

3. Allow the appeal by:

   a. Deleting the declaration made on 29 November 2019.

   b. Deleting paragraph (c)(ii) of the orders made on that date, and substituting for it the following:

      "(ii) The costs involved in whatever the plaintiff does are not borne by a body corporate whose members or occupiers are not entitled to use that facility."

4. Otherwise dismiss the appeal.

5. Order that the parties provide written submissions on the costs of this appeal, and the proceeding at first instance, not to exceed five pages in length, within 14 days of the delivery of the Court's judgment in Appeal No 1690 of 2020.

[85] **BROWN J:** I agree with the orders proposed by McMurdo JA for the reasons given by his Honour.

[86] **RYAN J:** I agree with the orders proposed by McMurdo JA for the reasons given by his Honour.