

SUPREME COURT OF QUEENSLAND

CITATION: *Club Esplanade Limited v Acott & Ors* [2003] QSC 012

PARTIES: **CLUB ESPLANADE LIMITED (ACN 010 470 354)**
(applicant)

v

**GEORGE ACOTT and PATRICIA ANNE ACOTT
ALAN W J WILSON NOMINEES PTY LTD ACN 005
897 512**

CLINTON JAY ALCOCK

OSCAR ARFI

**JOHN LINDSAY ARGENT and SHARON ANN
ARGENT**

**JOHN ROSS BALLINGER and MARGARET ANN
BALLINGER**

PEGGY BARRAND

JOHN WAYNE BELL

KAYE MARIE BETTERIDGE

**RICHARD WILLIAM BETTERIDGE (aka RICHARD
WILLIAM MURPHY)**

**STAN JOHN BILAS and IRENA RENATA BILAS
BEVERLEY ANN BIGGERS**

**GRAEME NEIL BLACKWELL and SHERYL MARY
BLACKWELL**

**STEVEN MICHAEL BLAIR and PAULA ANNE
McKENZIE BLAIR**

**CHRISTINE RAE BLOOM and STEPHEN MARK
WILLIAMS**

RICHARD and CAROL ANN BLOOM

BOB QUADARA PTY LTD ACN 006 072 519

**JOHN FREDERICK BOHNER and OLIVINE NADEAU
BOHNER**

ROSE-FRANCE BONDARENKO

MORVA GWENDOLINE BOX

PETER JAMES BRANDIE

**ROBERT ELLIOT BRENNAN and SARAH HAYES
BRENNAN**

**PETER MICHAEL JOHN BROWN and HELEN JEAN
BROWN**

**TREVOR GRAHAM BROWNE and JULIE MAY
BROWNE**

**JOHN BERNARD BURGESS and SUSAN GAYE
BURGESS**

NORMAL CARL and JUDITH ANN BURT

**PETER McCULLOCH and JOAN BEVERLY BURT
SHIRLEY DIANE CAMERON**

FRANK CAMINITI and BEVERLY CAMINITI

LEIGH FRANCIS and CAROLE JEAN CAMPBELL

**LUCY CARPENTER
ANNETTE JOY CHRISTIE
NORMAN CLARE and WINIFRED CLARE
PHILIP GEORGE CLARK and GLORIA MAY CLARK
JOANNA LOUISE CLARKE
LOUISE JOAN CLARKE
CLASSIC PROPERTY MANAGEMENT PTY LIMITED
ACN 001 566 221
MYRLENE NANCY COLES
JEFFREY BRUCE CONNOR and MILLS K
MARIA TERESA CONTRERAS and RAUL
CONTRERAS
JOHN DAVID CRAWLEY and MARILYN JOY
CRAWLEY
WENDY JOAN CRITCHLEY
ANTHONYCROWDER
PURDENCE FRANCES CROWE
CHRISTIE DA COSTA and ANGELA DA COSTA
ANNIE PHILOMENA DALEY
GRACE DECARLI
ROHNAN WARWICK DENNIS
DIAL AN EXCHANGE PTY LTD ACN 078 812 469
KEITH MAXWELL DIGHT and MARY BLAIR DIGHT
WALTER RONALD DON and MARY ALICE DON
CARMEL THERESE DOWNES
RAYMOND GEORGE DUNSTAN and MARY
BARBARA DUNSTAN
SHERY DURO and DIANE DURO
BETTY FLORENCE EARNEY
VIVIENNE SHIRLEY EBERHARD
JOHN ROBERT EELS
ALLAN KENNETH EKERT
IMELDA MARY ENNIS
ERIC NEIL EVANS
DALE JOHN FARNHAM
GREGORY KAVANAGH FARRELL and MARSHALL
WG
BRIAN KEITH FINDLATER and JENNIFER AGNES
FINDLATER
BERNARD FISCHER and EVELYN FISCHER
DANIEL WILLIAM FITZGERALD
NEIL JEFFREY FITZMAURICE and LISA
CATHERINE FITZMAURICE
BARRY GEORGE FLETCHER and MAREE
FLETCHER
BARRY GEORGE and MARIE FLETCHER
FLEXI-POINT HOLIDAYS LTD ACN 059 189 150
SUSAN FORSTER and JOANNE FORSTER
JONATHAN JAMES FRASER AND ANN FRASER
SIMONE FRIEDRICH
DOMENICO GAETANO and CATHY GAETANO**

**MILOJKO GAJIC and MILEVA GAJIC
RUDOLPH GAJSKI and LYNDIA GAJSKI
LEE GALLO
VICKIE GALLO
CAROLYN GARRETT
TONY GEORGEALLIS
LINDA GILFILLAN
JOY MAVIS GRAHAM and FAY JACKSON
LESLIE GEORGE GRAY and DOROTHY JOYCE
GRAY
WILLIAM JAMES GREALY and BAMBI RAE
GREALY
EDWARD HARCOURT GRIFFETT and HELEN ANNE
GRIFFETT
ROBERT WILLIAM GRIMES and SYLVIA GLADYS
GRIMES
PETER DAVID GROSSER and KAYLENE ANNE
GROSSER
PETER GROSSMAN and CHERYL GALE
GROSSMAN
TIONG HUA and SHIK JUI YAO HA
JANICE MARGARET HAMILTON and MM
CATCHPOLE
JAMES COLIN HANDLEY
HENRY PANAYOTTI HANNA and ALICE HANNA and
MARYLENE HANNA
ANTHONY RICHARD HARRISON
DENIS PETER HEASLY
KLAUS HECTOR
GRAEME HENDERSON and GLENDA HENDERSON
NEVEILLE DALLAS HIGGINS and NORAH HIGGINS
NEVILLE DALLAS HIGGINS and NORA HIGGINS
CHRISTOPHER DOUGLAS HILEY and SENG
GREER HILEY
ALAN JAMES HOOD and JUDITH JANET HOOD
ANDREW MARK HOXEY and MARGARET ALLIS
AESCHLIMANN
GRAHAM BENJAMIN HUCKSTADT and LYNETTE
ANNE HUCKSTADT
FAY JACKSON and JOY MAVIS GRAHAM
FERGUS BUTLER JACKSON
JAP MANUFACTURING PTY LTD ACN 001 361 128
CAROLYNE JIGGINS
PETER NOEL JOHNSON and JOYCE JOHNSON
JOHN ALLAN JONES and BARBARA EMILY JONES
FRANCIS JOSEPH JOYCE and BEVERLEY JOYCE
JOHN JAMES JOYCE and ARLENE PHYLIS JOYCE
RICHARD KAHN
WAYNE WAINA KAHU and MEREHAUTANGI KAHU
PAULINE LORRAINE KAY
JOSEPH EDWIN KEE and BERYL MAY KEE**

**WALTER PATRICK KEENAN and PATRICIA
JEANNE KENNAN
WILLIAM KEMPEES and MARGARET ETHEL
KEMPEES
SIMON MARC KNIGHT
MAURE KRAMER and HELEN KRAMER
JOZEF LEONARD KULKENS and PATRICIA LOUISE
KULKENS
BRIAN ROSS LAMB
CHRIS LAMBIS and FRANCESCA LAMBIS
KEVIN GERARD LANE
NERINGA JULIJA LANE
BERNARD JOHN LATHAM and DIANE LATHAM
DEBORAH MARGARET LE MAISTRE and PAUL
GERARD LE MAISTRE
YIK LEE and ALICE LEE
ALEXANDER LENKO and EVA LENKO
LESLEY NEUPARTH NOMINEES PTY LTD ACN 005
370 598
GIANG LEVAN and CATHY ANNE LEVAN
LESLIE WILLIAM LEWIS and THELMA MAY
LEWIS
WILMA LIM
HUI SIU LING
LEONG ENG LING
LEY NA LING
STEVEN JOHN LOCK and MARGARET JOAN LOCK
JOSEPH LOMBARDO and PATRICIA LOMBARDO
GEORGE WALTER LONG
BERNICE LEILA LYNCH
NOEL RODERICK LYNCH
NOEL RODERICK LYNCH and BERNICE LEILA
LYNCH
NR & BL LYNCH NOMINEES PROPRIETARY
LIMITED ACN 005 429 783
MICHAEL JON MABBOTT and SANDRA ELAINE
MABBOTT
IAN KEITH MACDONALD and VIVIANNE ALICE
MACDONALD
MARGARET FLORENCE MAGEE
FRANK MARIOLI and STELLA STAMATAKIS
MARIA MATTIACCIO
ALAN HARRIS MAUGER
VOLA OLIVE MAUGER
ANDREW DAVID McCUTCHEN and CYNTHIA
MARGARET McCUTCHEN
MARGARET MARY McDONALD
JOHN McKENNA and JULIAN STAFFORD McKENNA
ANDREW MCKIE
BRYAN KENNETH McPHERSON
ALAN WILLIAM MEE and ELROY SUZANNE MEE**

JOHN RICHARD MEE and JOAN MARY MEE
AMELIE ANTONIA MENHEERE
SAUL MIDLER
LAURELMINTO MILLER
SAMMY MIZZI
CARMEL MARGARET MOORE
PETER KENNETH MORRIS and PATRICIA
KATHLEEN MORRIS
ROGER ALBERT MORRIS and GABRIELLE MORRIS
DEREK PAUL MULLER
ANDREW MUSGROVE
NOEL RODNEY NEIL and MARGARET MARY NEIL
DANIELLE MARIE NELSON
MICHAEL MILAN NESS
RITA BERYL NORTHORPE
KATHRYN EVELYN NUNN
FLORENCE JOAN OAKES
DONNA MAREE OTTO
OWEN MOORE OTTO and ELAINE EDNA MARY
OTTO
HENRY OWCHAREK
YOLANDA HOPE PALMA
JENETTE GRACE PARKER and PM SMITH
LINDA CHRISTINE PEARCE
MAURICE PEAT and CHERYL ANN PEAT
VIRGIL PENDER
ALLAN McINTYRE PENMAN and JANICE
ELIZABETH PENMAN
FRANCINE ELIZABETH PERKINS
ANNETTE MICHELLE PETTERSEN
NINO PETTORINO and ELANOR PETTORINO
BARRY GRAHAM PHILLIPS and PATRICIA ANNE
PHILLIPS
BARRY GRAHAM PHILLIPS and PATRICIAN ANNE
PHILLIPS
MICHAEL GEORGE PICHLER
EILEEN PIGDON
KEVIN WILLIAM PITTS and JUDITH PITTS
GRAHAM MITCHELL POLKINGHORNE and
JUDITH POLKINGHORNE
TRICIA MARGARET PURCEL
JAMES WEIR QUAITE and ELSIE MAY QUAITE
QUINN GROUP (GOLD COAST) PTY LTD ACN 010
146 817
QUINN GROUP (SUNCOAST) PTY LTD ACN 009 926
238
ALAN JAMES RICHARDS and HELEN CHRISTINE
RICHARDS
DONALD GRAHAME RICHARDS
GERALD REGINAL RICKARD and DENISE JEAN
RICKARD

**RONALD ALFRED ROBERTS and ANDREW HILTON
ROBERTS and DIANE MARGARET ROBERTS
ROBOROUGH PTY LTD ACN 006 214 562
STEPHEN ROCHE and LYNNE ROCHE
ELIZABETH ROSS
JEAN NOEL ROUSSEY and JENNIE MARIE
ROUSSEY
NEIL RICHARD ROWLEY
BRIAN DAVID RUSSELL and RAELEEN RITA
RUSSELL
JAMIE ANDRE SCHIAVONS
FREDERICK JOHN SCOTT-RAYNSFORD
THOMAS WILHELM SENDIN and ROSEMARY
SENDIN
WILLIAM JOSEPH SHARP and JOAN DAPHNE
MARY SHARP
HAROLD JAMES SHAW and JEAN MARY SHAW
ROMANAS SILINIS and BARBARA HELEN SILINIS
PAUL JASON SIMMS and SHANE ALEXANDER
HERBERT
JENNIFER LUCY SJODIN
GREGORY JOHN SMITH
MARGARET MADELINE SMITH
PETER GORDON SMITH
REBECCA SMITH
VICTOR SMITH and KERRY SMITH
MICHAEL JOHN SMITHURST
JOHN SPINELLO
PHILLIP MAURICE SPLITTER
LENOARD WILLIAM STANFORD and EVELYN
STANFORD
PAUL ANTHONY STAPLETON
CHARLES JOHN STARR and KATHLEEN DOROTHY
STARR
CHARLES TREVOR STARR
JEFFREY CHARLES STARR
MATTHEW JOSEPH STARR
SIGURDS ANDRIS STOLCS and TONI BERNADETTE
STOLCS
ANITA THEODORA SUSTRUNCK
DIANA GAY KILLEEN SWEETMAN and MARY
ELIZABETH SWEETMAN
LOU TAMBURRO and FAYE TAMBURRO
EVELYN TAN
TANNER JAMES ALBERT TANNER
DONALD ANGUS TAYLOR
LOIS ANNE TAYLOR
EDWARD ANDREW THOMAS and MARGARET
DAWN THOMAS
SCOTT ROBERT THOMAS
JUDITH ANNE THOMPSON**

**LESLIE MAXWELL THOMPSON and CHERYL
 MAREE THOMPSON
 COLIN LESLIE TINKER and VALERIE DAWN
 TINKER
 RAMON BRUCE TOMPKINS
 DAVID TONKINSON and VICKI JOY TONKINSON
 BRIAN JAMES TOOMEY and BERYL TOOMEY
 TOTAL PERSON PTY LTD ACN 005 963 904
 GRAEME WALTER TOWNSEND and SUSANNE
 MARGARET TOWNSEND
 JULIE FAYE TULLOCH
 ANNIKA THERESE TURPIE
 DAVID RICHARD TYRER
 WILLIAM MICHAEL VAUX
 ANNE CHRISTINE VIDIS
 AMEDEO BASIL VIRGONA and TERRY ANNE
 VIRGONA
 TREVOR DOUGLAS VOSS and MARINA VOSS
 IVAN VUILLEMAIN
 MICHAEL VUKSIC and LORIE VUKSIC
 RUTH LYNETTE WALKER
 SUSAN WARD
 ERIC WATKINS and SANDRA WATKINS
 MARK LYNLEY WATSON
 SUE VANESSA WATTS
 GRAHAM JOSEPH WEISS
 WILLIAM LEWIS WESTON and JOAN WINIFRED
 WESTON
 LYNDSAE CLAIR WHEEN
 GRAHAM ALAN WHITE
 CHRISTOPHER EDWARD WILLIAMS
 DOROTHY JOAN WILLIAMS
 TIMOTHY VAUGHAN WILLIAMS
 GORDON RANKIN WILSON and BETTY ANNE
 WILSON
 KEITH SIDNEY WOOD and ELSA PAULINE WOOD
 ELEANOR HARLE YOUNG and STUART LAMB
 YOUNG
 STEPHEN JOHN YOUNG
 MAWN YOUNG
 JUDITH ANN ZONNEVELD
 (respondents)**

FILE NO/S: S10760 of 2002
DIVISION: Trial Division
PROCEEDING: Application
**ORIGINATING
 COURT:** Supreme Court Brisbane
DELIVERED ON: 04 February 2003

DELIVERED AT: Brisbane

HEARING DATE: 06 January 2003

JUDGE: Mackenzie J

ORDER: **1. That pursuant to s 38 of the *Property Law Act 1974* Bradley Vincent Hellen and Ann Fordyce be appointed trustees of the land described as Lots 1 to 10 on BUP 1463, situated at 116 The Esplanade, Surfers Paradise in the State of Queensland (“the land”);**
2. That pursuant to s 38 of the *Property Law Act 1974* Bradley Vincent Hellen and Ann Fordyce be appointed trustees of the registered leases Nos 601142188, 601394906, 601401140, 601147589, 601085123, 601355575, 601440303, 601147912, 601277248 and 601142186 over the land;
3. That the application insofar as it relates to paragraph 4 of the originating application filed 26 November 2002 be adjourned to a date to be fixed;
4. That the costs of and incidental to the application insofar as they relate to paragraphs 1 and 2 of the originating application filed on 26 November 2002 be paid by the applicant to the respondent, Wendy Critchley, to be assessed. Otherwise costs are reserved.

CATCHWORDS: EQUITY-TRUSTS AND TRUSTEES – TRUSTEES - THEIR APPOINTMENT, DISMISSAL, ESTATE, ETC - APPOINTMENT OF NEW TRUSTEES - where question of who should be appointed as trustees for sale- whether trustees for sale should be independent of the applicant

EQUITY - TRUSTS AND TRUSTEES-TRUSTS FOR AND POWERS OF SALE - TERMS, CONDITIONS AND MODE OF SALE - where question of the basis of distribution of any proceeds of sale

Property Law Act 1975 (Qld), s 38

COUNSEL: N Thompson for the applicant

D J Dowd for the respondent

SOLICITORS: Gustafson’s Solicitors and Attorneys for the applicant

Dibbs Barker Gosling Lawyers for the respondent

[1] **MACKENZIE J:** This is an application for appointment of trustees for sale and associated orders under s 38 of the *Property Law Act 1974*. The applicant is a company limited by guarantee. It operates as a time share resort. The respondents’ entitlement to participate in the time share scheme is derived from membership of the company, which is the registered proprietor of each lot within the building. Each respondent has the benefit of a registered lease expiring on 31 December 2082 and has an entitlement in respect of one or more time share weeks.

- [2] One respondent, Mrs Critchley, who does not oppose the overall purpose of the application but opposes aspects of the orders sought in the originating application, owns three weeks of “fixed time” time share for the last two weeks in December and the first week in January each year in two units. Her opposition relates to the identity of the proposed trustees and the method of distribution of the net sale proceeds. The issue of selling the building had been agitated for a number of years. It is not necessary to recount the history of the matter beyond saying that at a special general meeting in August 2001 a minimum sale price was fixed. The property was auctioned on 2 April 2002 and a contract, subject to conditions, for more than the minimum price was entered into.
- [3] The originating application sought to have two solicitors, Mr Gustafson, the sole partner of his firm, and Mr Campbell, an associate in Mr Gustafson’s firm, appointed as trustees for sale. The firm acts for the applicant but their appointment as trustees is said to be justified on the basis that, in the particular circumstances of the case, special knowledge of the applicant’s affairs is necessary. Mrs Critchley has proposed two accountants to fill the role of trustees. They are independent of her. On the material before me there is no reason why statutory trustees should not be appointed. The only issue is who should be appointed.
- [4] The second issue concerns the basis of distribution of the proceeds of sale in the event that the contract proceeds. The applicant has submitted that the distribution should reflect each respondent’s entitlement under the rights that are held. The result would be that each person holding an entitlement would receive an equal share of the proceeds for each entitlement. There is a calculation annexed to Mrs Critchley’s submissions which appears to be based upon the notion that some rights, and in particular hers, are more valuable than others because they cover a more profitable time of the year and that this should be reflected in the method of distribution. There is no expert opinion as to whether this is a valid methodology or not. Subsequent to the hearing I was provided with correspondence suggesting that attempting to value interests on that basis would be complex and expensive, with the suggestion, which is probably a ballpark figure, that it could cost about \$50,000. As the evidence provides an unsatisfactory basis as it stands for determining this issue – and there is no guarantee that Mrs Critchley’s view is correct – it is not appropriate to determine this issue at this point. Accordingly the application, insofar as it relates to the basis of distribution of the proceeds of sale, if the sale occurs, should be adjourned to a date to be fixed.
- [5] The possibility that there is likely to be further litigation in the matter provides a pointer to how the remaining issue of who should be the trustees should be resolved. There is a conflict of approaches as to the distribution of proceeds of sale. If that dispute is not resolved by other means, including a realistic assessment of commercial realities, before proceedings actually become necessary, solicitors who have been acting for the applicant who has put forward an argument that proceeds should be divided equally between all interest holders would, it seems to me, face difficulties in carrying out the role of trustees applying to the court for a determination of the issue unless they had relinquished the role of solicitors for the applicant. If they did that, one of the suggested benefits of having them as trustees, that they are familiar with the affairs of the company, would be lost. Accordingly, the appropriate order is that it is more appropriate to have independent trustees. Bradley Vincent Hellen and Ann Fordyce, both partners in Calabro Partners,

Chartered Accountants, have consented to perform the duties of trustees and there is no reason why they are not appropriate appointees.

[6] I make the following orders:

1. That pursuant to s 38 of the *Property Law Act 1974* Bradley Vincent Hellen and Ann Fordyce be appointed trustees of the land described as Lots 1 to 10 on BUP 1463, situated at 116 The Esplanade, Surfers Paradise in the State of Queensland (“the land”);
2. That pursuant to s 38 of the *Property Law Act 1974* Bradley Vincent Hellen and Ann Fordyce be appointed trustees of the registered leases Nos 601142188, 601394906, 601401140, 601147589, 601085123, 601355575, 601440303, 601147912, 601277248 and 601142186 over the land;
3. That the application insofar as it relates to paragraph 4 of the originating application filed 26 November 2002 be adjourned to a date to be fixed;
4. That the costs of and incidental to the application insofar as they relate to paragraphs 1 and 2 of the originating application filed on 26 November 2002 be paid by the applicant to the respondent, Wendy Critchley, to be assessed. Otherwise costs are reserved.