SUPREME COURT OF QUEENSLAND

CITATION:	*McColl & Anor v Body Corporate for Lakeview Park CTS 20751* [2004] QCA 44
PARTIES:	**IAN RONALD McCOLL** and **JILLIAN RAE McCOLL** (plaintiffs/applicants) v **BODY CORPORATE FOR LAKEVIEW PARK COMMUNITY TITLES SCHEME 20751** (defendant/respondent)
FILE NO/S:	Appeal No 9405 of 2003 DC No 4997 of 2002
DIVISION:	Court of Appeal
PROCEEDING:	Application for Leave s 118 DCA (Civil)
ORIGINATING COURT:	District Court at Brisbane
DELIVERED ON:	27 February 2004
DELIVERED AT:	Brisbane
HEARING DATE:	16 February 2004
JUDGES:	de Jersey CJ, Davies and Williams JJA Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDER:	**1. Application for leave to appeal refused** **2. Applicants to pay respondent's costs of this application**
CATCHWORDS:	STATUTES - BY-LAWS AND REGULATIONS - CONSTRUCTION - IN GENERAL - where applicant seeks leave to appeal from a District Court judgment given on appeal - where a by-law passed at an extraordinary general meeting of a body corporate was claimed by the applicant to be an "exclusive use by-law" - where s 55 *Body Corporate and Community Management Act* 1997 (Qld) required a resolution without dissent for "exclusive use by-laws" to be validly passed - whether application for leave to appeal should be granted in the circumstances STATUTES - ACT OF PARLIAMENT - INTERPRETATION - INTERPRETATION ACTS AND CLAUSES - PARTICULAR ACTS AND ORDINANCES - QUEENSLAND - where applicant claims that adjudicator failed to investigate the application as required by s 220 *Body Corporate and Community Management Act* 1997 (Qld) -

whether there was a failure to investigate by the original adjudicator

Body Corporate and Community Management Act 1997 (Qld), s 55, s 133, s 220

Coastalstyle Pty Ltd v The Proprietors, Surf Regency Building Units Plan 4246 [1992] QCA 346; Appeal No 25 of 1992, 12 October 1992, cited

COUNSEL: D A Savage SC, with B G Cronin, for the applicants
C J Carrigan for the respondent

SOLICITORS: Cusack Galvin & James for the applicants
Quinn & Scattini as town agents for Payne Butler Lang (Bundaberg) for the respondent

[1] **de JERSEY CJ**: I have had the advantage of reading the reasons for judgment of Davies JA. I agree that the application for leave to appeal should be refused, for the reasons given by His Honour.

DAVIES JA:

The application to this Court

[2] This purports to be an appeal from a judgment of the District Court, on appeal to it pursuant to Part 11 of the *Body Corporate and Community Management Act* 1997 ("the Act"), from an order made by an adjudicator under the Act. The judgment of the District Court which was given on 23 September 2003 was not a final judgment in its original jurisdiction because it was a judgment given on appeal. The applicants therefore require leave to appeal to this Court pursuant to s 118(3) of the *District Court of Queensland Act* 1967. In order to determine whether leave should be granted it is necessary to consider the nature of the matter and the applicants' prospects of success if the application were granted.

[3] The central question sought to be argued in the appeal, if leave were granted, is whether a by-law which came into effect in consequence of a special resolution passed at an extraordinary general meeting of the body corporate of Lakeview Park CTS 20751 ("the body corporate") on 4 May 2002, was an "exclusive use by-law" within the meaning of s 133[1] of the Act. If it was, then the resolution was not validly passed because, at least by implication, s 55[2] of the Act required the resolution to be a resolution without dissent. This question arose in the following way.

[4] Prior to 4 May 2002 the community management statement for the scheme of the body corporate contained a by-law 17 in the following terms:

> "17. Should the Caretaker/Letting Manager engaged by the Body Corporate at any time own or lease a lot in the development then same may be used for both residential purposes and for the purposes

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1 See now s 170. The section numbers in the text are those prior to the amending Act of 2003, which renumbered all relevant sections and amended some.

2 See now s 62.

of management of the development and for the sale and letting of lots in the development on behalf of the proprietors, and the rendering of services to occupiers of lots in the development. He may with the prior consent of the Committee of the Body Corporate display signs or notices for the purposes of offering for sale or provision of services. For the purpose aforesaid the Body Corporate shall have the power to grant to him the business of lettings of lots in the development and for that purpose to enter into appropriate agreement on such terms and conditions as the Body Corporate may deem fit. The Body Corporate shall not permit any other person to provide such letting or reception services in or about the common property."

[5] The purported effect of the resolution of 4 May 2002 was to delete from the community management statement by-law 17 and, in its stead, insert new by-law 17A which is in the following terms:

"17A(1) In this by-law:

(a) 'Letting Agent' means the Letting Agent appointed by the Body Corporate from time to time under the Body Corporate and Community Management (Standard Module) Regulation 1997;

(b) 'Caretaker' means the Service Contractor appointed by the Body Corporate from time to time under the Body Corporate and Community Management (Standard Module) Regulation 1997;

(c) 'Letting Agent's Lot' means the lot or lots occupied by the Letting Agent;

(d) 'Letting Agent's Services' means the services provided or agreed to be provided by the Letting Agent under the appointment by the Body Corporate including any agreement in writing between the Letting Agent and the Body Corporate;

(e) 'Related Entity' means:

(i) if the occupier is a company, has the same meaning as in the Corporations Act 2001; and

(ii) if the occupier is a person, includes:

(a) a company in which that person is a director or other officeholder or shareholder;

(b) is a partner or a joint venturer; or

(c) is the spouse or defacto spouse;

17A(2) The Body Corporate will not, to the extent that it can lawfully so covenant, when there is a Letting Agent:

(a) perform any or all of the Letting Agent's services; nor

(b) grant to any other person or entity any right to conduct any or all of the Letting Agent's services in, on or from the Scheme Land; nor

(c) permit any person or entity to perform any or all of the Letting agent's services in, on or from the scheme land.

17A(3) An occupier of a lot must not provide any or all of the Letting Agent's services in, on or from the Scheme land when there is a Letting Agent.

> 17A(4) An occupier of a lot must not, without the written prior consent of the Body Corporate construct, display and/or paint any signs, signage and/or notices within the Scheme Land and without derogating from the generality of the foregoing, within the Common Property, or any Body Corporate assets or from any lot or within any lot where the sign, signage and/or notice is visible from outside the lot.
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> 17A(5) An occupier of a lot will be deemed to have contravened this by-law or any part of it, if a related entity undertakes any activity that would, if it was undertaken by the occupier, be in breach of this by-law or any part of it."

[6] The scheme of the Act is such that, if the body corporate wishes to amend its by-laws it has to substitute a new community management statement for its existing one. Section 55 then relevantly provided:

> "**55 Body corporate to consent to recording of new statement**
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> (1) This section provides for the form of the consent of the body corporate for a community titles scheme to the recording of a new community management statement for the scheme in the place of the existing statement for the scheme.
>
> (2) The consent must be in the form of a resolution without dissent.
>
> (3) However, the consent may be in the form of a special resolution if the difference between the existing statement and the new statement is limited to the following –
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> (a) differences in the by-laws (other than a difference in exclusive use by-laws);
>
> (b) the identification of a different regulation module to apply to the scheme.
>
> … "

[7] If by-law 17A effected a difference in the by-laws which was a difference in exclusive use by-laws, there would need to have been a resolution without dissent on 4 May 2002. It was common ground that the resolution of that date was not one without dissent. Hence the need to determine whether the difference in the by-laws effected by that resolution was one in respect of exclusive use by-laws.

[8] The application before the adjudicator under Chapter 6 Part 9 of the Act, to the extent that it is relevant to this application and possible appeal to this Court, was, in substance, one for an order that the body corporate be directed that a motion for the resolution described earlier (motion 3) required a resolution without dissent and that, there being no such resolution, it cannot be implemented. The applicants submitted then, before the District Court judge and in this Court that the consent purportedly given to a new community management statement, substituting by-law 17A for by-law 17 at the meeting of 4 May 2002, required a resolution without dissent within the meaning of s 55. If that submission is correct the applicants were entitled to some such relief as they sought.

[9] However, in my opinion, for reasons which I shall explain, the submission is bound to fail because, as the learned District Court judge held, neither by-law 17 was nor by-law 17A is an exclusive use by-law. If I am correct in that conclusion, then what

I have described as the central question must be resolved against the applicants. I shall discuss that question first.

[10] Mr Savage SC, for the applicants, then argued, in effect, that it is implicit in the scheme of the Act, or perhaps in some specific provision, presumably s 55, that no rights to exclusive use of the common property may be conferred on any person except by a resolution without dissent. I shall then proceed to discuss this argument.

[11] Mr Savage SC next argued that, in resolving as it did on 4 May 2002, the respondent was required to act reasonably. He then submitted that the respondent had failed to so act and that the adjudicator failed to deal with the applicants' arguments in the above respects. I shall then discuss these arguments.

[12] Finally the applicants' outline seeks to argue, in some general way, that the adjudicator failed to investigate the application before him as required by s 220[3] of the Act. Except to the extent that this may include the argument to which I have last referred, Mr Savage SC did not seek to advance it orally. I shall nevertheless say something briefly about it.

Whether the resolution of 4 May 2002 was in respect of differences in exclusive use by-laws

[13] The term "exclusive use by-law" was defined in s 133[4] of the Act in the following terms:

> "**133 Meaning of 'exclusive use by-law'**
> (1) An **'exclusive use by-law'**, for a community titles scheme, is a by-law that attaches to a lot included in the scheme, and gives the occupier of the lot for the time being exclusive use to the rights and enjoyment of, or other special rights about –
> (a) common property; or
> (b) a body corporate asset.
> … "

[14] Two elements of that definition are critical in considering the applicants' argument. The first is that an exclusive use by-law is one which "attaches to a lot included in the scheme". The ordinary meaning of that phrase, even without considering the balance of sub-section (1), is that it attaches to an identified lot included in the scheme. If support were needed for that construction it may be found in s 134(2)(b)[5] and s 134(3)(b), each of which dealt with the manner in which a by-law attached to a lot might stop applying to that lot. Each assumed that the lot to which it stopped applying was the same as the lot to which it was first attached.

[15] The second critical element of that definition is that it must be one which gives the occupier for the time being of that lot exclusive use to rights and enjoyment of common property or a body corporate asset. So, having attached itself to a lot, such a by-law confers certain rights on whoever may be the occupier of that lot.

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3 See now s 269.

4 See now s 170.

5 See now s 171.

[16] Both by-law 17 and by-law 17A are, in a sense, the obverse of exclusive use by-laws. Neither attaches to a specific lot, conferring rights on whoever may occupy that lot. On the contrary each appears on its face to confer rights on a person ("caretaker/letting manager"; "letting agent") irrespective of whether that person is the occupier of a lot. In the first case, those rights include (and perhaps are restricted to) rights in respect of any lot which that person may own or lease, but not necessarily occupy. In the second, those rights may include rights in respect of any lot which that person may occupy from time to time. But neither confers any rights by reference to occupation of a specific lot.

[17] Mr Savage SC submitted that by-law 17A(3) and (4), in providing, in each case, that "An occupier of a lot must not …" must mean "an occupier of a lot other than the letting agent must not …". For the purposes of considering this argument I am prepared to accept that submission. He then submitted that, by implication, these provisions conferred on the letting agent, as occupier of a lot, the right to perform the acts described in those provisions. For present purposes I am prepared to accept that proposition also. But, even if that much is accepted, no rights are conferred which attach to a specific lot. They may arise whenever there is a letting agent (for the by-law contemplates the possibility that there may not be one: see by-law 17A(2)) and whenever that letting agent occupies a lot; and then in respect of whatever lot he or she occupies from time to time.

[18] For those reasons it is unnecessary to consider whether, as well, either by-law 17 or by-law 17A confers exclusive use to rights and enjoyment in respect of common property or a body corporate asset. I turn then to Mr Savage SC's second submission.

Whether the Act prohibits exclusive use of the common property to be conferred otherwise than by a resolution without dissent

[19] Mr Savage SC was unable to point to any provision in the Act from which this statutory intention should be inferred. However he sought to rely on this proposition on a decision of this Court in *Coastalstyle Pty Ltd v The Proprietors, Surf Regency Building Units Plan 4246* Appeal No 25 of 1992, 12 October 1992. In my opinion that decision gives no support to this argument.

[20] The appellant's argument in *Coastal*, which was rejected by this Court, was that s 30(7) of the *Building Units and Group Titles Act* 1980, the predecessor of this Act, prevented the grant of exclusive use or enjoyment, or special privileges, in respect of common property to a person who is not the proprietor of a lot. Section 30(7) permitted a body corporate, with the consent in writing of the proprietor of a lot, pursuant to a resolution without dissent, to make a by-law in respect of that lot conferring on that proprietor the exclusive use and enjoyment of, or special privileges in respect of, common property and, in like manner to amend any such by-law.

[21] In rejecting that argument this Court relied on the provision requiring a body corporate to "control, manage and administer the common property for the benefit of the proprietors", as to which, see s 87(1)(a)[6] of the Act. The Court said that there seemed no reason to exclude from the ambit of such a provision a power in the body

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6 See now s 94.

corporate to grant exclusive use or enjoyment, or special privileges, in respect of the common property for the purpose of a business engaged in on behalf of the proprietors of the units in the building. This Court thus seemed to think that that provision permitted the body corporate to grant exclusive use or enjoyment, or special privileges in respect of the common property, without the need for a resolution without dissent, except where such rights were conferred on a proprietor in respect of a specified lot.

[22] It seems to me therefore that the decision in that case tends against the submission advanced by the applicants here. However not too much reliance should be placed on that. It is notoriously difficult to apply decisions construing one Act to the construction of another even though, as in this case, both Acts cover generally the same topic, the second is enacted in substitution for the first and there are a number of similar provisions.

[23] It is s 55, which had no close analogue in the earlier statute, which must be construed here. And the correct construction of that section, in my opinion, is that any alteration of a by-law requires a resolution of the body corporate; that if that alteration is as to differences in exclusive use by-laws it requires a resolution without dissent; and that, relevantly, otherwise a special resolution only is required. There is no other provision in the Act from which it might be inferred that any alteration in a by-law, other than in respect of the exclusive use by-laws, requires a resolution without dissent.

Whether, in resolving on 4 May 2002 the respondent was required to act reasonably, whether it failed to do so and whether the adjudicator should have dealt with that question

[24] There are two reasons why, in my opinion, this submission must fail. The first concerns the application of s 87 which is in the following terms:

> "**87 Body corporate's general functions**
>
> (1) The body corporate for a community titles scheme must –
>
> (a) administer the common property and body corporate assets for the benefit of the owners of the lots included in the scheme; and
>
> (b) enforce the community management statement (including the by-laws affecting the common property); and
>
> (c) carry out the other functions given to the body corporate under this Act and the community management statement.
>
> (2) The body corporate must act reasonably in anything it does under subsection (1)."

[25] The section is in Chapter 3 of the Act headed "**MANAGEMENT OF COMMUNITY TITLES SCHEMES**" and in Part 1 thereof headed "**MANAGEMENT STRUCTURES AND ARRANGEMENTS**". It can be seen that it is concerned with the body corporate's general management functions. It is not, it seems to me, concerned to regulate decisions made at meetings of the body corporate, in this case to consent to the recording of a new community management statement. In my opinion s 87(2) has no application to a resolution of the members of the body corporate under s 55.

[26] The second is that the adjudicator was never asked to determine whether, in so resolving, the body corporate acted reasonably. It was submitted to this Court by Mr Savage SC that he was so asked but that submission, it seems to me, is wrong. In making this submission Mr Savage pointed to paragraphs 4, 6 and 7 of the applicants' grounds of appeal against motion 4 also passed at the meeting of 4 May 2002. But motion 4 was not a motion in respect of the by-law in question but a motion to approve amendments to a letting agreement between the body corporate and Gregory Allan Cumerford and Janice Anne Cumerford.

[27] The decision of the body corporate to approve amendments to that agreement was not the subject of the proposed appeal to this Court if leave were granted. The proposed appeal was in respect only of motion 3. Had the applicants contended before the adjudicator that in passing motion 3 the body corporate was required to act reasonably and did not do so the adjudicator may have been required to investigate the factual aspects of the second of those questions. Of course he did not do so because there was no such contention. In those circumstances I would not permit it to be raised, for the first time, in an application for leave to appeal to this Court.

[28] For both of these reasons, in my opinion, the applicants' submission on this question must fail.

A general failure to investigate

[29] The outline of argument also contended, more generally that the adjudicator failed to investigate the application before him as required by s 220[7] of the Act. That section provided:

> **"220 Investigation by adjudicator**
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> (1) The adjudicator must investigate the application to decide whether it would be appropriate to make an order on the application.
>
> …
>
> (3) When investigating the application, the adjudicator –
>
> (a) must observe natural justice; and
>
> (b) must act as quickly, and with as little formality and technicality, as is consistent with a fair and proper consideration of the application; and
>
> (c) is not bound by the rules of evidence."

[30] The applicants' application was described by the adjudicator as one "for an order that the body corporate be directed that -

> (a) motion 3 considered at the extraordinary general meeting held on 4 May 2002 required a resolution without dissent and that if it was not passed in that manner it cannot be implemented; and
>
> (b) in the absence of motion 3 being passed by resolution without dissent, motion 4 be ruled out of order and that no voting on or further action in respect of motion 4 proceed."

It was not contended that that was an inaccurate description of the applicants' application.

[31] It is hard to see what investigation could have been required to determine whether the first of those orders should be made other than one necessary to determine

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[7] See now s 269.

whether the resolution was passed without dissent (it was common ground that it was not) and whether it was one which required to be passed without dissent. Those matters were fully investigated by the adjudicator. The proposed appeal to this Court was not concerned with motion 4.

[32] The outline contended that the "underlying dispute between the parties" was never investigated. It is unclear what is meant by this. But in view of the application which was made, s 220 did not require the adjudicator to embark on some far ranging investigation of the "underlying dispute" whatever that may mean.

[33] Because, for the reasons which I have given, if leave were granted an appeal would be bound to fail, I would refuse the application for leave to appeal.

Orders

1. Application for leave to appeal refused.
2. Applicants to pay respondent's costs of this application.

[34] **WILLIAMS JA:** I have had the advantage of reading the reasons for judgment of Davies JA and I agree with all that is said therein and with the orders proposed.