

SUPREME COURT OF QUEENSLAND

CITATION: *Warren & Ors v Body Corporate for Buon Vista Community Titles Scheme 14325* [2004] QCA 104

PARTIES: **IAN CAMPBELL WARREN**
(first applicant/first applicant)
FLORENCE BURNETT WARREN
(second applicant/second applicant)
ALEXIA MARGARET WARREN
(third applicant/third applicant)
v
BODY CORPORATE FOR BUON VISTA COMMUNITY TITLES SCHEME 14325
(respondent/respondent)

FILE NO/S: Appeal No 2587 of 2002
DC No 98 of 2002

DIVISION: Court of Appeal

PROCEEDING: Application for leave s 118 DCA (Civil)

ORIGINATING COURT: District Court at Brisbane

DELIVERED EXTEMPORE ON: 7 April 2004

DELIVERED AT: Brisbane

HEARING DATE: 7 April 2004

JUDGES: McMurdo P, Williams JA and Holmes J
Separate reasons for judgment of each member of the Court, each concurring as to the order made

ORDER: **Application for leave to appeal refused with costs to be assessed**

CATCHWORDS: APPEAL AND NEW TRIAL – APPEAL – PRACTICE AND PROCEDURE – QUEENSLAND – WHEN APPEAL LIES – BY LEAVE OF COURT – GENERALLY – where application for leave to appeal from decision of District Court judge refusing leave to appeal from decision of Magistrate – where long delay in progressing application – where Magistrate ordered costs of body corporate (including legal costs) incurred in recovering unpaid body corporate fees to be assessed by Registrar and recovered from applicants – where involved costs order of less than \$1000 – whether Magistrate could make such an order – whether important question of law involved – whether leave to appeal should be granted

Body Corporate and Community Management Act 1997
(Qld), s 180
Queensland Law Society Act 1952 (Qld), Part 4A
Body Corporate and Community Management (Standard
Module) Regulation 1997 (Qld), r 99(1)(c)
Uniform Civil Procedure Rules 1999 (Qld), r 684, r 690

COUNSEL: J A Griffin QC with R J Clutterbuck for the applicants
G J Robinson for the respondent

SOLICITORS: Lexie Warren for the applicants
Herdlaw Solicitors for the respondent

THE PRESIDENT: The three applicants are owners of a lot in Buon Vista Community Titles Scheme 14325. The respondent brought a claim in the Brisbane Magistrates Court against the applicants for unpaid body corporate fees, penalty interest and costs. The applicants subsequently paid the outstanding body corporate fees and a small additional amount.

On 14 December 2001 a Magistrate gave summary judgment in favour of the respondent/plaintiff in the following terms:

"The whole of the body corporate costs and expenses (including solicitor and own client costs), incurred in recovering levies and moneys duly levied upon the owner of the body corporate pursuant to the *Body Corporate and Community Management Act 1997* to be assessed by the Registrar pursuant to Rule 684 of the *Uniform Civil Procedure Rules*, plus interest in accordance with the *Supreme Court Act 1995*. Costs of the assessment to the plaintiff in any event."

It seems that the applicants, one of whom is a solicitor practising on her own account, are aggrieved that, now having paid the levies of the body corporate in full, they should also be required to pay the respondent's legal costs, especially on an indemnity basis.

The applicant applied for leave to appeal to a District Court Judge against the Magistrate's decision, leave being necessary because, on any view, the judgment sum was less than \$2,000. On 20 February 2002 a District Court Judge dismissed that application with costs to be assessed on the standard basis and on the basis that the matter had been concluded before lunch that day, because the respondent was responsible for wasting a half day's costs. The applicants now seek leave to appeal from that decision, their application for leave to appeal being filed on 18 March 2002. The significant delay in progressing this application has been no fault of the Court.

The applicants have an onerous task in demonstrating why they should be granted leave to appeal to the Court of Appeal of the Supreme Court of Queensland over an amount of effectively only \$944.45 when they have already had a hearing in the Magistrates Court and been refused leave to appeal in the District Court, in circumstances where the learned primary Judge gave consideration to the matters which the applicant again seeks to raise on an appeal before this Court.

They contend that their proposed appeal relates to an important point of law: the Magistrate's order was in excess of jurisdiction in ordering costs under by-law 12 of the respondent's Community Management Scheme. The Magistrate was not authorised to order, nor the Registrar authorised to assess, such costs as costs of the proceeding in the Magistrates Court; such costs are the respondent's claimed damages not the costs of the proceeding contemplated by the

UCPR; UCPR rr 690(3) and (4) have the effect that Magistrates can only order those costs under those sub-rules.

By-law 12 is in the following terms:

"An owner shall pay on demand the whole of the body corporate's costs and expenses (including solicitor and own client costs) incurred in recovering moneys and levies duly levied upon the owner of the body corporate pursuant to the Act, such amount deemed to be a liquidated debt in that this by-law be recorded on the CMS statement and lodged with the Department of Natural Resources."

The learned primary Judge observed that the form of the judgment was unusual in the Magistrates Court in that it did not identify a specific monetary sum but left all matters of quantification to the Registrar; there did not, however, seem to be any reason why such an order could not be made. His Honour expressed concern that there not be duplication between the costs levied under by-law 12 and the costs order made in respect of the action but considered there was no reason to expect duplication from the terms of the order made. The learned primary Judge also noted that the Magistrate ordered only the lower rate of interest under s 47 of the *Supreme Court Act 1995 (Qld)* rather than any higher penalty rate of interest claimed by the respondent.

The order made is clearly intended to convey that the Registrar assess the costs which the respondent incurred in recovering moneys owed by the applicants under the *Body Corporate and Community Management Act 1997 (Qld)*.

The respondent's solicitor has filed affidavit material which demonstrates a registrar of the Brisbane Magistrates Court has assessed the respondent's costs in the amount of \$944.45. There is nothing before this Court to suggest there has been any duplication of costs in that assessment or that any sum beyond the respondent's entitlement under by-law 12 was included in that assessment; indeed the assessment if anything appears to have been modest. The applicants' application for a review of that assessment was dismissed with costs on 15 March 2004. The order made does not appear to be plainly unjust.

The applicants also contend that an important matter of law is that by-law 12 is inconsistent with part 4A *Queensland Law Society Act* 1952 (Qld) which deals with client agreements as to costs. Section 180 *Body Corporate and Community Management Act* specifically provides that where there is an inconsistency between a by-law and the principal Act or another Act the by-law is invalid to the extent of the inconsistency.

I cannot see that part 4A of the *Queensland Law Society Act* is necessarily relevant to or inconsistent with by-laws such as by-law 12 made under the *Body Corporate and Community Management Act*. The respondent was only entitled to recover the Body Corporate's costs and expenses properly incurred, that is, subject to section 48I *Queensland Law Society Act*. In any event, the position has since been clarified by regulation 99(1)(c) of the *Body Corporate and Community Management (Standard Module) Regulation* 1997.

The application does not raise an important question of law or of public importance; nor does the decision at first instance, which involves only a very modest amount, appear to be manifestly unjust; nor does the significant delay in progressing this appeal assist the applicants. The applicants have failed to establish any ground warranting the granting of leave to appeal to the Court of Appeal of the Supreme Court of Queensland. I would refuse the application for leave to appeal with costs to be assessed.

WILLIAMS JA: I agree.

HOLMES J: I agree.

THE PRESIDENT: That is the order of the Court.
