

SUPREME COURT OF QUEENSLAND

CITATION: *The Body Corporate for Cairns Village Resort Community Titles Scheme 18161 v FN Management Pty Ltd* [2004] QSC 371

Altman & Ors v FN Management Pty Ltd

PARTIES: **THE BODY CORPORATE FOR CAIRNS VILLAGE RESORT COMMUNITY TITLES SCHEME 18161**

(Applicant)

v

F N MANAGEMENT PTY LTD

(Respondent)

ALTMAN & ORS

(Applicants)

v

F N MANAGEMENT PTY LTD.

(Respondent)

FILE NO/S: 388 of 2004
389 of 2004

DIVISION: Trial

PROCEEDING: Applications

ORIGINATING COURT: Supreme Court Cairns

DELIVERED ON: 13 October 2004

DELIVERED AT: Cairns

HEARING DATE: 7 October 2004

JUDGE: Jones J

ORDER: **1. Declare that the Supreme Court has jurisdiction to hear Applications 388/2004 and 389/2004.**
2. Adjourn the further hearing of the applications to 18 October 2004.
3. Reserve the question of costs of and incidental to this application.

CATCHWORDS: PROCEDURE – JURISDICTION – POWERS OF SINGLE JUDGE - JUDGEMENTS AND ORDERS – OTHER MATTER – DECLARATIONS – Whether Supreme Court has jurisdiction to order declaratory relief under s 601ED(5) of the *Corporations Act* 2001.

Body Corporate and Community Management Act 1997 (Qld) s227, s229

Corporations Act 2001 (Cth) s 601ED(5)

James v The Body Corporate Aarons Community Title Scheme 11476 (2003) QCA 329 considered

Makucha v Albert Shire council (No.2) (1995) 1 QdR 518 considered

COUNSEL: Mr A Philp SC for the Applicant
Mr A Cooper for the Respondent

SOLICITORS: Susan Henson for the Applicant
Hillhouse Burrough McKeown for the Respondent

- [1] By application filed on 23 August 2004, the respective applicants seek a declaration that the respondent, contrary to s 601ED(5) of the *Corporations Act 2001*, has been, and is, operating an unregistered managed investment scheme.
- [2] The respondent objects to this Court hearing the matter on the basis that it lacks jurisdiction to do so. The parties have agreed that I should determine the question of jurisdiction as a preliminary point.
- [3] The circumstances giving rise to this litigation concerns the management of Cairns Village Resort, a 202 lot community title scheme located at Anderson Road, Cairns. The individual unit owners purchased their units subject to a lease in favour of the on-site manager, Firecroft Pty Ltd., which subsequently assigned the leases to Alongway Investments Pty Ltd. The directors of Alongway also became the registered owners of Lot 99. Lot 99 is the site of the central facilities of the resort, including a reception area and restaurant.
- [4] In January 2001, a number of individual unit owners agreed with Alongway Pty Ltd to surrender their leases upon certain terms. At about the same time the Body Corporate entered into a caretaking agreement and a letting agreement with the respondent, a company associated with Alongway Pty Ltd.
- [5] The named applicants in Appeal No. 389 of 2004, effectively are owners and occupiers of lots in the scheme. The respondent in both applications is an occupier of a lot but the dispute arises in respect of its function as a letting agent. The parties are in dispute over a number of issues but it is sufficient for the present purposes simply to identify the relief sought in Appeal 389 of 2004. These include –
 1. A declaration that the respondent has been and is operating an unregistered managed investment scheme contrary to s 601ED(5) the *Corporations Act*.
 2. a declaration that the termination notice dated 29 July 2002 was validly given and remains binding upon the respondent; and
 3. an order requiring the respondent to comply with the termination notice and to do all things necessary to transfer the management rights; or
 4. alternatively (to 2 and 3 above) a declaration that the termination notice served on 30 April 2004 was validly given and remains binding upon the respondent; and
 5. an order requiring the respondent to comply with the termination notice and to do all things necessary to transfer the management rights.

In Appeal No. 388 of 2004, the only remedy sought is the declaration referred to in No.1 above.

- [6] The respondent argues that by reason of the provisions of the *Body Corporate and Community Management Act 1997* (hereinafter “the Act”) those remedies in these circumstances can only be determined by “**dispute resolution process**” as provided for in the Act. Mr Cooper of Counsel on behalf of the respondent argues that the issues fall within the ambit of “dispute” as defined in s 227 of the Act. As a consequence of this s 229 operates and it provides:-

Exclusivity of dispute resolution provisions

- (1) Subsection (2) applies to a dispute if it may be resolved under this chapter by a dispute resolution process.
- (2) The only remedy for the dispute is –
 - (a) The resolution of the dispute by a dispute resolution process; or
 - (b) An order of the District Court on appeal from an adjudicator on a question of law.
- (3) However, subsection (2) does not apply to a dispute if –
 - (a) an application is made to the commissioner, and
 - (b) the commissioner dismisses the application under part 5.
- (4) Also, subsection (2) does not apply to a dispute about the adjustment of a lot entitlement schedule.”

- [7] Mr Cooper also refers to the decision of the Court of Appeal in *James v The Body Corporate Aarons Community Title Scheme 11476*¹. That case involved a dispute concerning the obligation to repair a leaking roof membrane which clearly fell within the ambit of the provisions identifying disputes and was concerned with the power of an adjudicator. The case itself is not definitive of the scope of the present s 229 (then numbered s 184 and in terms different, though not materially different, to the terms of the present reprint). The Court of Appeal in that instance simply found that the dispute in question was a dispute within the meaning of the section which provided exclusivity of the dispute resolution process.

- [8] Mr Philp, Senior Counsel, appearing on behalf of the applicants submits that the remedy sought here - a declaration of the existence or otherwise of a managed investment scheme – does not fall within the scope of the Act. It is an issue for determination in accordance with the provisions of the *Corporations Act 2001* which expressly provides that the Supreme Court shall have jurisdiction to do so. He argues that State legislation could not affect jurisdiction so bestowed by Commonwealth legislation. In my view, that submission is plainly correct.

- [9] For the respondent, however, it was argued that the making of the declaration sought is not a remedy itself but simply an ancillary step to the granting of the other remedies which do constitute a dispute within the definition of the Act.

- [10] This involves a consideration of declaratory judgments. As the learned authors in “Equity Documents and Remedies” point out in para [1901] it is clear “that at all times the Court of Chancery in England had the power to grant declaratory relief as ancillary to the granting of some principal relief”. The development of the power to

¹ (2003) QCA 329

grant mere declaratory relief occurred over some time with the passing of various statutes. As White J observed in *Makucha v Albert Shire council (No.2)*²

“The jurisdiction to grant purely declaratory relief was given to the Supreme Court by s 73 of the Equity Act 1867. That provision is also to be found in O.4 R11 of the Rules of the Supreme Court. The history of the declaratory order is to be found in Young, *Declaratory Orders* (1984), and generally in McPherson, *The Supreme Court of Queensland (1859-1960)* (1989). Gibbs J, in *Forster v Jododex Aust Ltd*, at 435, described the ambit of the declaratory order as almost unlimited and indeed limited only by its own discretion.”³

- [11] The declaration sought is a remedy in its own right. There is a dispute between the parties and so far as the applicant alleges the existence of an unlawful investment management scheme and the respondent has made no admission to this effect. Without in any way considering the discretionary element, I note that the background material, to which it is unnecessary to refer, identifies the importance of the determination of this issue for the purpose of resolving the relationships between parties.
- [12] The remedy of declaratory judgment is not, in my opinion, caught by the provisions of the Act and the exclusivity provisions referred to above have no application to this issue. I therefore find that this Court has jurisdiction to determine the issue in respect of which the declaration is sought.
- [13] In his written outline Mr Cooper sought to identify the dispute between the owners (No. 389/04) and the respondent as falling with s 227(1)(a), (b) and (c). Mr Philp argued that the other relief sought in that application does not fall within the ambit of s 227. The substance of the dispute against the respondent arises not in any capacity as “occupier” but rather in its capacity as a “letting agent.” If that is the case then it seems the only applicable part of the definition of **dispute** for the purpose of s 227(1) is para (f) viz a dispute between –
“(f) the body corporate for a community titles scheme and a letting agent for the scheme;”
- [14] The scope of dispute resolving appears to be further limited by the terms of s 228 which identifies four areas within which the disputes arise. Only para (d) appears to be applicable – dispute about “the authorisation of persons as letting agents”. Mr Philp therefore contends that as neither section contemplates a dispute between owners and a letting agent then none of the issues raised fall to be resolved by a dispute resolution process under the Act.
- [15] The issues as identified in the two applications do not, it seems to me, fall within the scope of the relevant provisions of the Act which clarify a dispute to be resolved by a dispute resolution process. This being the case the exclusivity provisions of s 229 of the Act do not have application. I hold therefore that the Supreme Court has jurisdiction to hear both applications and I determine the preliminary point accordingly.

Orders:

² (1995) 1 QdR 518

³ Ibid at p 523

1. I declare that the Supreme Court has jurisdiction to hear Applications 388/2004 and 389/2004.
2. I adjourn the further hearing of the applications to 18 October 2004.
3. I reserve the question of costs of and incidental to this application.