SUPREME COURT OF QUEENSLAND

CITATION:	*Ridge Property Management Pty Ltd & Ors v The Body Corporate for Chevron Point Community Title Scheme 39849* [2012] QSC 193
PARTIES:	**RIDGE PROPERTY MANAGEMENT PTY LTD ACN 138 034 572** (first applicant) and **BOONGAL PROPERTY MANAGEMENT PTY LTD ACN 144 012 617** (second applicant) and **THE BODY CORPORATE FOR CHEVRON POINT COMMERCIAL COMMUNITY TITLE SCHEME 39850** (third applicant) **v** **THE BODY CORPORATE FOR CHEVRON POINT COMMUNITY TITLE SCHEME 39849** (respondent)
FILE NO/S:	2651 of 2012
DIVISION:	Trial
PROCEEDING:	Application
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	18 July 2012
DELIVERED AT:	Brisbane
HEARING DATE:	3 May 2012
JUDGE:	Dalton J
ORDERS:	**1. I refuse the relief sought at paragraphs 1 and 2 of the amended originating application filed 3 May 2012.** **2. I adjourn the hearing of paragraphs 3, 4 and 5 of that application.** **3. I give liberty to apply to the parties to relist the matter before me for the purpose of working out further orders consequent on my findings.**
CATCHWORDS:	Community Title Scheme – Building Management Statement – Rights of Access – Construction of Terms of Building Management Statement – Reasonableness of Access *Land Title Act* 1994 (Qld)

Westfield Management Ltd v Perpetual Trustee Co Ltd (2007) 233 CLR 528

COUNSEL: Mr M K Conrick for the applicants
Mr M Gynther for the respondent

SOLICITORS: Shand Taylor for the applicants
Muir Lawyers for the respondent

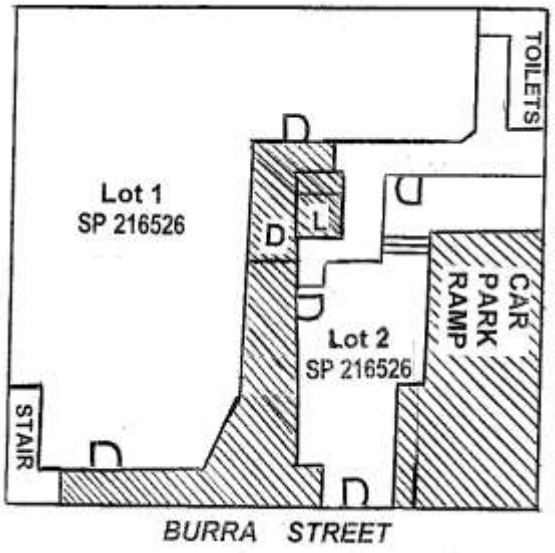
[1] This application concerns a low rise building at the Gold Coast. It has a basement car park. On the ground floor there are two Lots: Lots 1 and 2 on SP 216526. Lot 1 is for office use and Lot 2 is a café. There are five levels above this which contain 10 Lots on SP 216525. These Lots are all residential. There is a body corporate for the Scheme which comprises Lots 1 and 2 on SP 216526: Chevron Point Commercial Community Title Scheme. There is another body corporate for the 10 residential Lots: Chevron Point Community Title Scheme.

[2] The first applicant is the owner of Lot 1 on the ground floor. The second applicant is the owner of Lot 2 on the ground floor. The same person is the sole director of the first and second applicants and chairman of the third applicant, the commercial body corporate.

[3] There are two matters in dispute: access through a central entry door on the ground floor, and access to car parking in the basement.

Ground Floor Access

[4] The ground floor of the building is configured as follows:



[5] Initially Lot 1 on SP 216526 was leased to one tenant. More recently the first applicant has leased that part of Lot 1 on the front and left-hand side of the diagram above to one tenant and the longer, narrow area at the back of that Lot to other tenants. The difficulty with this is that while there is access from the street to the front of the area on the left-hand side of the diagram, providing separate access to the tenants in the section at the back is more problematic.

[6] The shaded area on the above diagram is the common property of the respondent. The area outside the boundaries of Lots 1 and 2, but not shaded, is common property of the commercial body corporate. There is a locked door (marked "D" on the diagram) in the central corridor which separates Lots 1 and 2 on SP 216526 at the front of the building. On that door is a sign which states, "RESIDENTIAL ENTRANCE ONLY Office entrance to the left." Tenants of the area at the back of Lot 1 on SP 216526 can access the back of Lot 1 from the lift (marked "L" on the diagram) if they drive into the basement car park and take the lift from the basement to the ground level. They can leave the building through the door marked "D", as it is only locked to persons accessing it from the outside. However, they cannot enter or re-enter the building through the door marked "D" unless they have an electronic key. Furthermore, invitees of the tenants at the back of Lot 1 cannot visit those tenants without making an arrangement, on arrival, to be let in through the door marked "D".

[7] As well, patrons of the café cannot access toilet facilities without passing through the door marked "D" on the diagram, because, as constructed, the doorway shown on the above diagram at the very back of the café does not exist.

[8] The applicants ask for the door marked "D" to be permanently unlocked, at least during business hours. The respondent resists unlocking the door marked "D" because it says that it provides security to the residents who live in the apartments above the ground floor. It prevents passers-by accessing the lift well and the toilets located at the right-hand rear of the above diagram.

[9] Both the applicants and the respondent have good practical reasons for the positions they take, it is a matter of determining what rights and obligations they have. Unfortunately, there is no document which clearly spells these out.

[10] There is a Building Management Statement (BMS) registered under the *Land Title Act* 1994 (Qld) (s 54A). Title searches of all 12 relevant Lots bear a notation under the heading "Easements, Encumbrances and Interests", that the BMS benefits and burdens the Lot, see s 54D(1) of the *Land Title Act*. SP 216525 (the residential plan) bears a notation that the BMS "benefits and burdens the Lots created on this plan".

[11] Section 54C(3) of the *Land Title Act* says:

> "To avoid doubt, it is declared that a right of access, support or shelter, or other right in the nature of an easement, under a building management statement may operate according to its terms, and may be effective, despite the absence of a formal registered easement establishing the right."

[12] By s 54B(3) of the *Land Title Act*, lots to which a building management statement applies will include common property. Further, at s 54I(2) of the *Land Title Act*, it is provided that, to remove any doubt, it is declared that if a building management statement applies to scheme land for a community title scheme, the building management statement is binding on the community title scheme.

[13] The BMS provides:

(a) At cl 1.1.3, "There are plans annexed to this BMS that identify certain areas regulated by this BMS."

(b) At cl 1.2.1, "The BMS is analogous to reciprocal easements with management covenants between the Lots to which it applies."

(c) At cl 1.2.2, "The terms of this BMS are intended to co-ordinate the development and operation of the complex."

(d) At cl 1.4.1, "… each Lot owner grants to each other Lot owner all rights of access to or use of any Lot or Lots as are necessary to enable another owner to comply with its obligations (if any) under conditions and other requirements of [Gold Coast City Council] development permits, and/or to enable another owner to take the benefit of services or facilities provided for the building as a whole pursuant to the conditions and other requirements of such development permit."

(e) At cl 3.1.1, "An owner must allow another owner to access their Lot where: … this BMS provides for a right of access … [or] access is needed to use or enjoy a shared facility which the second mentioned owner has the right to use or enjoy under this BMS … a person bound by this BMS who exercises rights of access under this clause 3.1 and incurs costs, must pay the costs associated with exercising the rights of access."

(f) At cl 3.2, "Owners and others bound by this BMS must not unreasonably interfere with or restrict the rights of access and use created by this BMS and must ensure that the rights of way created by this BMS are not impeded except as specifically allowed under this BMS."

(g) At cl 4.1, "Annexure 1 deals with the use of shared facility and identifies … those parts of the complex and those services which may be shared by other owners within the complex … [and] which Lots have the benefit of those areas or services … [and] the nature of the rights granted …"

(h) At cl 5.5, "The owners consent to any minor projections or encroachments from a Lot over the boundary of another Lot so long as the projection or encroachment does not unreasonably interfere with the use of the Lot subject to the projection or subject to the projection or encroachment."

(i) At cl 7.1, "The owners must establish a management group within 30 days of registration of this BMS …"

(j) At cl 7.5, "The management group must … fairly and reasonably administer and manage the complex and shared facilities for the benefit of the owners … [and] fairly enforce this BMS … [and] act reasonably in anything it does under this BMS …"

(k) At cl 12.3, "An owner and any person bound by this BMS must not interfere with the rights given under this BMS."

(l) At cl 12.4, "All owners must comply and must ensure their servants, contractors, agents, tenants, invitees and licensees comply with this BMS."

(m) At cl 12.5, "Owners must act reasonably and in good faith in pursuing and ensuring the observation of the aims and objectives of this BMS …"

(n) At cl 12.6, "Notwithstanding any other provision of this BMS, in exercising a right pursuant to this BMS, the person exercising the right … must not act unreasonably or adversely affect or interfere with the use or enjoyment of any occupier of all or part of a Lot … [and] must use its reasonable endeavours to minimise any disruption or inconvenience to an owner or an occupier's use

> and enjoyment of a Lot, licensed area or other part of the complex … [and] if this BMS entitles a person to enter part of a complex leased to or licensed to another person, the person … must give reasonable notice to the owner and occupier of the relevant area before entering; and … must comply with the security or other arrangements or requirements ordinarily applying for persons entering such area …"

[14] The BMS defines "owner" as meaning the owner of a Lot and where relevant including a body corporate.

[15] The BMS defines shared facilities as, "The shared access, building services, communal facilities, machinery, equipment and other things in the complex which are for the use of the owners and occupiers of two or more Lots. The term includes the facilities listed in appendix 1 …" Resort to appendix, or annexure 1, as it is labelled, does not provide much assistance in understanding the term with a view to determining the issues in this case.

[16] It can be seen from the above extracts that the BMS is not well drafted, for example there is no useful definition of the word "complex" appearing in cl 1.2.2; clauses such as cl 1.4.1 are very imprecise, both in their wording and conceptually, and other clauses, such as cl 3.2 are ambiguous, contradictory and hard to understand. As well as this, the BMS contemplates that there will be a management committee which will act reasonably to work out practical solutions to day-to-day problems that arise in the management of the building. That facility might be expected to work admirably where the parties are indeed reasonable and are not in dispute. Essentially, there are only two members of the management committee, the person behind the first, second and third applicants, and the person behind the respondent. These people are in dispute and, it is plain from the demeanour of both when giving evidence, unable to act reasonably in relation to the subject matter of this application.

[17] My view is that it is the provisions of the BMS which regulate the parties' rights and obligations so far as access is concerned. I reject the applicants' contention that I should have regard to a plan approved by the Gold Coast City Council prior to registration of the BMS. This plan did not show a door directly from the café to access the toilets, but showed access from the café through the central passageway to the toilets. The plan shows a directory board situated on the wall to the central passageway on the street side of the door marked "D". The plan is an architect's drawing marked "preliminary studies", and in other ways differs from the building as constructed. The BMS itself has annexed to it a plan which differs from this architectural drawing.

[18] It is true that cl 1.4.1 of the BMS states that the BMS recognises the continuing application of all current development permits issued over the land to which the BMS relates and that the conditions contained within those development permits "concerning the overall development" continue to apply to all Lots. The mere fact that this preliminary architectural drawing is proved to show a Gold Coast City Council's stamp of approval (at a preliminary stage of the approval process) does not to my mind mean that it is a condition of the development permit issued by the Council in relation to the land.

[19] The respondent sought to rely upon what was asserted to be the intention of the original owner of the building to assist in construing the BMS. Firstly, that type of evidence is not admissible – *Westfield Management Ltd v Perpetual Trustee Co Ltd.*[1] In any event, the original owner is not before the Court, nor is there any evidence of what intention that owner ever had.

[20] The BMS was registered on the same day as SP 216527. That plan has been superseded, but it showed two Lots: Lot 1, being a volumetric plan occupying all those parts of the ground floor which are not shaded on the above diagram, and Lot 2 being the shaded areas on the ground floor and the residential building above ground floor. The BMS contemplated that each of those Lots might be developed or further developed – cl 12.2, and also provided that if a Lot was subdivided or amalgamated, the benefit of all rights created by the BMS would run with any new Lots created, as would the burden – cl 12.1.

[21] On 23 March 2009 SP 216525 and SP 216526 were registered. The first cancelled Lot 2 on SP 216527 and created Lots 1 to 10 and common property in the residential part of the building and the second cancelled Lot 1 on SP 216527 and reconfigured the ground floor as Lots 1 and 2, together with common property on the ground floor.

[22] The BMS shows the shaded areas on the diagram above as being marked "access" in the plans attached to it. This must be interpreted as meaning that the part of the ground floor which was Lot 1 on SP 216527 has access over the shaded areas, ie., that Lots 1 and 2 and common property on SP 216526 have access over the shaded areas.

[23] The applicants argued that this access meant unrestricted access, limited only by considerations intrinsic to the building itself – for example, that access through the front door, "D" could only be pedestrian, not vehicular. I am unable to accept that submission.

[24] At all times relevant to the granting of the rights of access, the building was to be used as it is being used: a residential building with commercial premises and a café on the ground floor. The BMS gave no right of access to commercial owners to any floors in the building above ground level. The plan of the ground floor annexed to the BMS showed a door in the central passageway at about the place of door "D" in the above diagram.

[25] There are indications in annexure 1 to the BMS (dealing with shared facilities) that rights of access granted by the BMS are not absolute and unhindered:

(a) the provision applying to ground floor toilets in annexure 1 to the BMS which provides, "Lot 1 on SP 216526 within Commercial Lot grants the Lot 2 on SP 216526 use of the toilets from within the boundary of its Lot. The other Lot is responsible for the upkeep of the area and shall keep keys for the toilets on hand for after business hours access by patrons."

(b) in the schedule of shared facilities to the BMS it is provided that the residential Lot grants a commercial Lot access from the basement to the ground floor level only, and expressly does not grant access to the residential

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1 (2007) 233 CLR 528 [35]-[45].

levels above the ground floor. There is no particular provision made in relation to the central passageway on the ground floor.

(c) under the section, "Repairs and maintenance – building, grounds and maintenance", annexure 1 provides, "The Residential may lock off shared stairs for security reasons after trading has finished on the commercial Lot if resolved by building management committee."[2]

[26] Having regard to the provisions of the BMS and to the diagram attached to it, it seems to me, particularly having regard to cll 1.4.1, 3.2, 7.5, 12.5 and 12.6, that the respondent has the right to restrict rights of access through the central passageway by having a locked door situated there so long as it makes reasonable accommodation so that this does not unreasonably restrict the first, second and third applicants' rights of access through the passageway. That is, I find that the rights of access granted by the BMS are moderated and reasonable rights to enable use of the building as originally intended, for both residential and commercial purposes.

[27] Having regard to considerations of commonsense, bearing in mind the various uses to which the building was to be put from the time of its construction, and also cl 12.4 of the BMS, I construe the word "owners" in cl 3.1.1 and cl 3.2 as including an owner's agents, tenants, invitees and licensees.

[28] As I say, communication between the parties in dispute in this matter, about the subject matter of the dispute, has become non-productive, if not non-existent. The most that could be said was that the respondent would "seriously consider" supplying electronic keys to the first applicant for distribution to tenants of the area at the rear of Lot 1 and allowing an intercom system to be installed adjacent to the door in the central corridor so that customers of the businesses could alert the business owners to their presence once they had reached that point of the building. In my view, if such a system were in place it could not be said that the respondent was unreasonably interfering with the applicants' rights of access. There may be other solutions. As matters stand, it seems to me that the respondent is unreasonably interfering with the rights of access of the applicants accorded by the BMS, because it will not allow tenants and invitees of Lot 1 on SP 216526 to use electronic keys to enter via the door marked "D". This is clear from the correspondence before me and on the evidence given orally.

[29] I note that without access through the doorway marked "D" patrons of the café cannot access the toilet. Had the café been designed differently, patrons of the café, except those in wheelchairs, would have been able to access the toilet through the door at the very back of the café, shown on the diagram, but not in fact built. Patrons in wheelchairs would never have been able to access the toilet even if that door had been built because of the presence of three steps indicated by three horizontal lines towards the back of Lot 2 on SP 216526 on the above diagram. Having regard to that, it seems to me that it would be unreasonable in terms of cl 3.2 of the BMS for the respondent to forbid access by electronic key through the central door to patrons of the café in a wheelchair to the toilets at the rear of the ground floor. However, having regard to the specific provision extracted at paragraph [25](a) above, and the fact that the plan annexed to the BMS shows a doorway at the back of the café accessing the corridor leading to the toilets at the

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[2] In fact these stairs were not built. The provision does however indicate an intention of reasonable, moderated access.

back of the ground floor, I do not think it would be unreasonable for the respondent to deny access to able-bodied café patrons through the locked central door. I bear in mind that one might reasonably expect numerous café patrons to access the toilet and that the hours of access might extend into the evening and night, well past normal business hours.

[30] The relief sought in relation to the ground floor is:

(a) a declaration that the first to third applicants, together with their employees, agents and invitees are entitled to free unimpaired access to the areas shaded on the above diagram;

(b) that the respondent unlock and leave permanently unlocked the door marked "D" on the above diagram;

(c) that the respondent remove the sign situated on the door marked "D" which reads, "RESIDENTIAL ENTRANCE ONLY Office entrance to the left", and

(d) a declaration that the applicants are entitled to place a directory board on the wall in the central passageway of the building on the street side of the door marked "D", as is shown in the Gold Coast City Council approved plan discussed at paragraph [17] above.

[31] From the above reasons it will be apparent that I refuse to grant the relief sought at paragraphs [30](a) and (b) above. It will also be apparent from my reasons that I would grant relief in an alternative form, were that necessary. Hopefully the parties will manage to resolve their differences given the findings I have made. However, if they do not, I give liberty to apply to bring the matter back on so that the parties can be heard on the terms of orders sought.

[32] Some reasonable accommodation needs to be made for entry through the central door, "D" and once that it is done, the existing sign dealt with at paragraph [30](c) above will need to be modified. Further, if an intercom system is determined upon, there will need to be some notice adjacent to, or associated with the intercom system, to show who can be contacted by intercom – see [30](d) above. Once again, it is obviously preferable that the parties determine these matters pragmatically themselves. If they cannot, they too can be dealt with under the liberty to apply which I grant.

Basement Car Park

[33] The car park ramp shown on the above diagram leads to a basement car park in which residential has allocated to it 13 car parks and commercial has allocated to it 10 car parks. These numbers are in conformity with the Council development approval conditions. Those conditions stated that, "All car parking spaces shall be provided so as to be freely accessible to accommodate vehicles of persons employed on the site for the time the development is open for business and those of bona fide visitors for the duration of any visit to the site."

[34] There is a security roller door at the entrance to the car park which the applicants do not make complaint about. It is operated by an electronic key, allowing access to commercial and residential cars alike. Once in the car park some parks are immediately accessible, two others are on the far side of a further security grill which, likewise, is operated by electronic key. That second security grill can be operated by a driver whilst sitting in their car. The driver merely pushes a button

and the grill is activated. There is no need for the driver to get out of the car or wave the electronic key in front of any particular sensor. The respondent has made available electronic keys so that persons with car parks on the far side of the second electronic grill can operate that grill to access the parks.

[35] The second security grill is to provide security to the residents of the building in relation to the cars and other things stored in the car park.

[36] Having regard to the matters of interpretation discussed above, I do not think that there is an unreasonable restriction on the access of the applicants in relation to the two car parks situated on the far side of the second security grill. They do not have unrestricted access, but they have reasonable access and that is what they are entitled to.

[37] A further complaint is made about car parking bay 23, which is one of those allocated to the applicants. It is a small bay and it is situated right alongside the second security grill. It is possible to manoeuvre a car into car parking bay 23 without moving the second security grill, but it involves what was described in evidence as a three-point-turn. The alternative to the three-point-turn is for persons wishing to access car parking bay 23 to use an electronic key to lift the second security grill so that access into and out of car parking bay 23 is easier. The respondent has provided an electronic key for this purpose. I do not consider that the second security grill presents an unreasonable interference with the rights of access granted by the BMS to car parking bay 23.

[38] It follows that I refuse relief in relation to that part of the originating application which deals with the car park.

Orders

[39] I refuse the relief sought at paragraphs 1 and 2 of the amended originating application filed 3 May 2012; adjourn the hearing of paragraphs 3, 4 and 5 of that application against the day that it is necessary for the parties to return to Court under the liberty to apply provisions, and I give liberty to apply to the parties to relist the matter before me for the purpose of working out further orders consequent on my finding that, at present, the respondent is in breach of its obligations under the BMS to provide reasonable access through the locked door in the central corridor of the building. I encourage the parties to resolve those issues themselves, having regard to my findings, rather than return to Court.

[40] I will hear the parties as to costs.