

SUPREME COURT OF QUEENSLAND

CITATION: *MacDonald & anor v Clark & anor* [2012] QSC 418

PARTIES: **JOHN ANDREW MACDONALD**
(first respondent/plaintiff)
FRANCES MARGARET MACDONALD
(second respondent/plaintiff)
v
SIDNEY JOHN CLARK
(first applicant/defendant)
PAMELA JOAN REX
(second applicant/defendant)

FILE NO/S: BS 9462 of 2012

DIVISION: Trial Division

PROCEEDING: Application

ORIGINATING COURT: Supreme Court at Brisbane

DELIVERED ON: 21 December 2012

DELIVERED AT: Brisbane

HEARING DATE: 6 November 2012

JUDGE: Martin J

ORDER: **Application dismissed.**

CATCHWORDS: PROCEDURE – SUPREME COURT PROCEDURE – QUEENSLAND – JURISDICTION AND GENERALLY – GENERALLY – where plaintiffs seek relief under the *Property Law Act 1974* – where defendants seek declaration that these proceedings have not been properly commenced in this Court for want of jurisdiction – where the *Body Corporate and Community Management Act 1997* provides dispute resolution procedure for certain disputes – whether the dispute resolution procedure governs this dispute exclusively

Body Corporate and Community Management Act 1997 (Qld), s 167, s 227, s 228, s 229, s 270, s 276, s 285
Property Law Act 1974 (Qld), s 183, s 184, s 185

Body Corporate of the Lang Business v Green [2008] QSC 318, considered
Independent Finance Group Pty Ltd v Mytan Pty Ltd [2003] 1 Qd R 374; [2001] QCA 306, considered
James v Body Corporate for Aarons Community Titles Scheme 11476 [2004] 1 Qd R 386; [2003] QCA 329,

considered

*Penberg Pty Ltd v Body Corporate for Market Town
Community Titles Scheme 2052* [2007] QDC 020, considered

COUNSEL: R Cameron for the applicant/defendants
C Francis for the respondent/plaintiffs

SOLICITORS: Steindls Lawyers for the applicant/defendants
Hynes Lawyers for the respondent/plaintiffs

- [1] The plaintiffs have commenced proceedings seeking relief under Part 11 Division 1 of the *Property Law Act 1974* (“PLA”) being that part of the PLA which deals with encroachments. The defendants seek a declaration that those proceeding have not, for want of jurisdiction, been properly commenced in this Court. In the alternative, the defendants seek an order staying the proceedings permanently or until such other time as determined.

Background

- [2] The plaintiffs are the registered owners of Unit 16, 101 Morala Avenue, Runaway Bay. They are adjoining neighbours of the defendants, who are the registered owners of Unit 15. The properties are more properly described as Lots 24 and 23 of the Mornington Quays Community Title Scheme CTS 23056 (“Mornington Quays”) respectively.
- [3] The plaintiffs purchased Lot 24 in November 2007. At that time, the two lots were separated by a brush fence apparently located on the common boundary between the lots.
- [4] In April 2009, the plaintiffs and defendants shared the cost of replacing the brush fence with a wooden fence. The wooden fence was constructed along the same line as the brush fence and extended to the boardwalk at the first defendant’s request.
- [5] From April to June 2009, the plaintiffs undertook improvements in the vicinity of the wooden fence, including laying sandstone tiles to replace and extend the patio area and installing a shade sail structure. These improvements were carried out with the permission of the Body Corporate for Mornington Quays.
- [6] In July 2011, the defendants engaged a surveyor to determine the correct boundary line between the two lots.
- [7] In August 2011, the surveyor confirmed that there had been an encroachment onto the defendants’ property of an area of about 6.5 square metres. The encroachment consists of, among other things, the wooden fence, the patio improvements, a shade sail and supporting post, and a split-system air-conditioner motor.
- [8] Discussions occurred in an attempt to resolve the encroachment dispute. The plaintiffs want the defendants to convey the area of encroachment to them, and the defendants in turn seek the removal of the encroachment.

History of proceeding

- [9] On 21 March 2012, the defendants lodged a conciliation application with the Office of the Commissioner for Body Corporate and Community Management (“Office of the Commissioner”) in relation to the dispute.
- [10] A conciliation session was scheduled for 23 April 2012 but the plaintiffs advised that they would not be attending. As a result, the Office of the Commissioner issued a Conciliation Certificate to the effect that “the respondent did not make a reasonable attempt to participate in conciliation”.
- [11] On 18 April 2012, the plaintiffs filed a claim in the District Court at Southport seeking declarations that lasting improvements were made to the area of encroachment and orders vesting the area of encroachment in the plaintiffs.
- [12] On 27 April 2012, the defendants applied to the Office of the Commissioner for adjudication of the dispute.
- [13] On 18 May 2012, the defendants filed a conditional notice of intention to defend together with this application.
- [14] On 25 May 2012, the plaintiffs’ solicitors wrote to the Office of the Commissioner seeking a certificate of dismissal in relation to the adjudication application on the basis that the matter should be dealt with by a court of competent jurisdiction, which the plaintiffs asserted was the District Court at Southport, it being the court in which the plaintiffs had filed their claim.
- [15] On 26 June 2012, the Commissioner refused the dismissal request after considering the parties’ submissions and placed the adjudication in abeyance until the District Court claim was concluded.
- [16] The Commissioner stated:
 “Given the case history of encroachment disputes referred to, and determined by, department adjudicators I am not persuaded that any dispute involving an encroachment must automatically be outside the jurisdiction of a dispute resolution officer. I accept that a specific proceeding under, or seeking orders in accordance with, the *Property Law Act 1974* would be another case entirely.
 ...
 Consequently, on balance I am satisfied that the applicants have *prima facie* demonstrated a dispute for the purposes of the *Body Corporate and Community Management Act 1997* that is within the jurisdiction of a dispute resolution officer.
 ...
 I [turn] my mind to the question of whether the subject matter of adjudication is part of, or closely related to, the existing District Court proceedings – for which the answer is clearly in the affirmative.
 ...
 ... it should be noted that if I dismiss this application under *section 250* then the jurisdiction of this Office to resolve the dispute is permanently relinquished and it cannot be revisited. In the

knowledge that dismissal under *section 250* is irrevocable I am therefore reluctant to dismiss the application outright on what, in my view, amounts to speculation of how the Court will proceed in respect of the respondents' claim. For these same reasons I believe it is equally inappropriate to progress an adjudication application while a *potentially* related claim is under consideration in the District Court."

- [17] McGinness DCJ heard this application on 3 September 2012. Her Honour was not satisfied that the plaintiffs' cause of action was within the jurisdiction of the District Court and transferred the proceeding to this Court.

Relevant legislation

- [18] Chapter 6 of the *Body Corporate and Community Management Act 1997* (Qld) ("BCCM Act") sets out a dispute resolution scheme that the defendants contend should govern the dispute exclusively.

- [19] The relevant provisions are.

227 Meaning of dispute

- (1) A *dispute* is a dispute between –
- (a) the owner or occupier of a lot included in a community titles scheme and the owner or occupier of another lot included in the scheme; ...

228 Chapter's purpose

- (1) This chapter establishes arrangements for resolving, in the context of community titles schemes, disputes about –
- (a) contraventions of this Act or community management statements; and
 - (b) the exercise of rights or powers, or the performance of duties, under this Act or community management statements; and
 - (c) the adjustment of lot entitlement schedules; and
 - (d) matters arising under the engagement of persons as body corporate managers, the engagement of certain persons as service contractors, and the authorisation of persons as letting agents.
- (2) Also, this chapter authorises the provision of education and information services aimed at promoting the avoidance of disputes.

229 Exclusivity of dispute resolution provisions

- (1) Subsections (2) and (3) apply to a dispute if it may be resolved under this chapter by a dispute resolution process.¹
- ...

¹ 'dispute resolution process' is defined in Schedule 6 of the BCCM Act.

- (3) Subject to section 229A, the only remedy for a dispute that is not a complex dispute is –
 - (a) the resolution of the dispute by a dispute resolution process; or
 - (b) an order of the appeal tribunal on appeal from an adjudicator on a question of law.
- (4) However, subsections (2) and (3) do not apply to a dispute if –
 - (a) an application is made to the commissioner; and
 - (b) the commissioner dismisses the application under part 5.
- (5) Also, subsections (2) and (3) do not limit –
 - (a) the powers of QCAT under the QCAT Act to –
 - (i) refer a question of law to the Court of Appeal; or
 - (ii) transfer a proceeding, or part of a proceeding, to the Court of Appeal; or
 - (b) the right of a party to make an appeal from QCAT to the Court of Appeal under the QCAT Act.

[20] The plaintiffs also rely on ss 184 and 185 of the PLA.

“184 Application for relief in respect of encroachments

- (1) Either an adjacent owner or an encroaching owner may apply to the court for relief under this division in respect of any encroachment.
- (2) This section applies to encroachments made either before or after the commencement of this Act.

185 Powers of court on application for relief in respect of encroachment

- (1) On an application under section 184 the court may make such order as it may deem just with respect to –
 - (a) the payment of compensation to the adjacent owner; and
 - (b) the conveyance, transfer, or lease of the subject land to the encroaching owner, or the grant to the encroaching owner of any estate or interest in the land or of any easement, right, or privilege in relation to the land; and
 - (c) the removal of the encroachment.
- ...”

[21] Schedule 6 of the PLA defines “court” to be the Supreme Court.

Dispute resolution scheme

[22] The principal objective of the BCCM Act is to “provide a legislative framework which accommodates the establishment, operation and management of community

titles schemes.”² One of the secondary objectives in support of the principal objective is to provide “an efficient and effective dispute resolution process.”³

- [23] The starting point for considering the scheme is s 229, which gives exclusive jurisdiction to the dispute resolution provisions in chapter 6 if the “dispute” is one that “may be resolved under this chapter by a dispute resolution process”⁴.
- [24] The criteria that have to be satisfied are:
- (a) the “dispute” must come within the definition of s 227;
 - (b) the dispute must concern an enumerated purpose in s 228; and
 - (c) it must be a dispute that may be resolved under chapter 6 by a dispute resolution process (s 229(1)).

Is it a “dispute”?

- [25] A “dispute” is broadly defined in s 227 by reference to the parties involved. It is accepted by the plaintiffs that the parties fall within s 227(1)(a).

Is it within the chapter’s purpose?

- [26] Chapter 6 establishes arrangements for resolving disputes about matters contained in s 228(1).⁵
- [27] The relevance of s 228 in limiting the scope of exclusive jurisdiction was the subject of argument. The plaintiffs contend that a “dispute” for the purpose of chapter 6 is confined only to those matters which concern a subject matter enumerated in s 228. The defendants submit that the plain intention of the legislature is that an adjudicator has exclusive jurisdiction to make orders for disputes under s 227. I was referred to two decisions: one in support of each proposition.
- [28] In *Penberg Pty Ltd v Body Corporate for Market Town Community Titles Scheme 2052*,⁶ Tutt DCJ considered exclusivity of jurisdiction in relation to a dispute between a lot owner and the body corporate regarding repairs to a unit.
- “[18] While s 229 could be expressed in clearer terms, it seems to me that it is the intention of the legislature to require *any* dispute between the Body Corporate and the owner of a lot included in a community title scheme under the Act to seek remedy for the dispute under Chapter 6 if the dispute may be resolved by the dispute resolution process prescribed under the Act.”
- (original emphasis kept)
- [29] In contrast, in *Body Corporate of the Lang Business v Green*,⁷ Daubney J considered a dispute between a lot owner and body corporate regarding monies due and owing. His Honour said, in relation to s 227:⁸

² *Body Corporate and Community Management Bill 1997*, Explanatory Notes, p 1.

³ *Ibid.*

⁴ s 229(1) BCCM Act.

⁵ s 228 BCCM Act.

⁶ [2007] QDC 020.

⁷ [2008] QSC 318.

⁸ *Ibid.*, [30].

“[30] ... This definition, however, does not clarify with any precision whether it covers every conceivable dispute between a body corporate and an owner or merely those within the purview contemplated by the Chapter’s purpose set out in s 228. In my view, good-sense and practicability, in conjunction with a purposive approach to the legislation, dictate that the latter must be the case; it could scarcely be said, for instance, that the legislature intended for the dispute resolution processes set out in the BCCM to apply in case of a personal injuries dispute between an owner and a body corporate.”

- [30] The dispute in *Green* fell squarely within s 228 and Daubney J ultimately did not have to make a finding on the point.⁹ However, I respectfully adopt his Honour’s view. The primary purpose of the Act is the establishment, operation and management of community titles schemes. The application of the dispute resolution scheme to every single dispute between the parties listed in s 227 could hardly be said to accord with the purpose of the Act. Take, for example, a contractual dispute between two people who happen to be lot owners in the same community titles scheme for the sale of a boat. To read chapter 6 of the BCCM Act as requiring these lot owners to settle their contractual dispute in accordance with the dispute resolution procedures would be to go outside the boundaries of a piece of legislation concerning the management of body corporate affairs.
- [31] Section 228 therefore establishes the parameters within which the dispute resolution scheme operates. A “dispute” within the definition of s 227 has to come within one of the four categories in s 228 before s 229 falls to be considered.
- [32] The plaintiffs submit that this proceeding does not fall within the scope of s 228. The defendants point to s 167 as an example of a provision that, if contravened, would bring the dispute within the scope of s 228(1)(a):

“**167 Nuisances**

The **occupier of a lot** included in a community titles scheme **must not use**, or permit the use of, **the lot** or the common property in a way that –

- (a) causes a nuisance or hazard; or
- (b) **interferes unreasonably with the use or enjoyment of another lot** included in the scheme; or
- (c) interferes unreasonably with the use or enjoyment of the common property by a person who is lawfully on the common property.

(emphasis added)

- [33] This section prohibits the occupier of a lot from using his or her lot in a way that interferes with the use or enjoyment of another lot. Examples of nuisance include noise, smoke and unruly behaviour¹⁰ and creating dust and sawdust.¹¹
- [34] The present dispute involves the plaintiffs making improvements on land belonging to the defendants. It does not concern the use of their own lot in such a way that

⁹ Ibid, [31]

¹⁰ *Peden Pty Ltd v Bortolazzo* [2006] 2 Qd R 574.

¹¹ *Aussie Traveller Pty Ltd v Marklea Pty Ltd* [1998] 1 Qd R 1.

causes a nuisance, or otherwise interferes with the use or enjoyment of the defendants' lot. Section 167 is not relevant in these factual circumstances and this dispute therefore does not fall within s 228(1)(a) of the BCCM Act.

[35] On this basis, therefore, the dispute resolution procedures of the BCCM Act do not govern this dispute exclusively.

[36] However, even if I am incorrect on this point, this dispute is nevertheless not subject to the BCCM Act dispute resolution procedures as it is not a dispute that can be resolved by a dispute resolution process.

Can the dispute be resolved by a dispute resolution process?

[37] If ss 227 and 228 are satisfied, s 229(1) requires the dispute to be one that may be resolved under chapter 6 by a dispute resolution process.

[38] A 'dispute resolution process' is defined in schedule 6 of the BCCM Act. The defendants in this matter applied for department adjudication.

[39] The meaning of 'may be resolved under chapter 6 by a dispute resolution process' was explained by the Court of Appeal in *James v Body Corporate for Aarons Community Titles Scheme 11476*,¹² where Davies JA stated:¹³

“Section 184¹⁴ does not speak in terms, specifically, of jurisdiction to hear and decide but **in terms of providing a remedy**. However I think **its plain intention is that the adjudicator is to have exclusive jurisdiction to make orders of the kind which the Act prescribes**, relevantly in s 223 and s 227, in disputes of the kind to which s 182 refers, **subject to any statutory exception or limitation.**”

(emphasis added)

[40] The following sections are relevant to the powers of the adjudicator.

270 Dismissal of applications

- (1) The adjudicator may make an order dismissing the application if –
 - (a) it appears to the adjudicator that the adjudicator does not have jurisdiction to deal with the application; or
 - (b) the adjudicator is satisfied the dispute should be dealt with in a court or tribunal of competent jurisdiction;...

276 Orders of adjudicators

- (1) An adjudicator to whom the application is referred may make an order that is just and equitable in the circumstances (including a declaratory order) to resolve a dispute, in the context of a community titles scheme, about –

¹² [2004] 1 Qd R 386.

¹³ Ibid, 390.

¹⁴ Currently s 229 BCCM Act.

- (a) a claimed or anticipated contravention of this Act or the community management statement; or
- (b) the exercise of rights or powers, or the performance of duties, under this Act or the community management statement; or
- (c) a claimed or anticipated contractual matter about –
 - (i) the engagement of a person as a body corporate manager or service contractor for a community titles scheme; or
 - (ii) the authorisation of a person as a letting agent for a community titles scheme.
- (2) An order may require a person to act, or prohibit a person from acting, in a way stated in the order.
- (3) Without limiting subsections (1) and (2), the adjudicator may make an order mentioned in schedule 5.
- (4) An order appointing an administrator –
 - (a) may be the only order the adjudicator makes for an application; or
 - (b) may be made to assist the enforcement of another order made for the application.
- (5) If the adjudicator makes a consent order, the order –
 - (a) may include only matters that may be dealt with under this Act; and
 - (b) must not include matters that are inconsistent with this Act or another Act.

285 Limitation on powers of adjudicator

The adjudicator does not have power to resolve a question about title to land.”

[41] An adjudicator may make an order about a matter in s 276(1) and those mentioned in schedule 5 of the BCCM Act. The matters enumerated in s 276(1) are broad and generally correspond with those in s 228. The adjudicator also has the power to dismiss an application for want of jurisdiction, or if the adjudicator is satisfied that it should be dealt with in a court or tribunal of competent jurisdiction. Importantly, s 285 specifically excludes the adjudicator from resolving a question about title to land.

[42] The question to be answered is whether the orders the adjudicator is empowered to make will resolve the dispute. The plaintiffs seek the conveyance of the area of encroachment to them while the defendants want the encroachment removed.

[43] The answer is apparent in s 285 of the BCCM Act: the adjudicator does not have power to resolve a question about title to land. If the plaintiffs were to be successful and the dispute was resolved in their favour, the adjudicator would not have the power to grant them the relief they seek. There would be no utility in going through a dispute resolution process that is incapable of ultimately resolving the dispute.

- [44] I was referred to *Independent Finance Group Pty Ltd v Mytan Pty Ltd*¹⁵ as authority for the proposition that the plain intention of the legislature is that an adjudicator is to have exclusive jurisdiction to make orders of the kind prescribed in ss 276 and 281 for disputes under s 227. A salient question in that decision was whether the adjudicator had to resolve a question about title to land in giving effect to a resolution granting exclusive rights over common property. In separate reasons, Thomas JA and Atkinson J (with whom McMurdo P agreed) both found that the adjudicator's order did not resolve a question about title to land.¹⁶ Both their Honours acknowledged that, where the adjudicator has to resolve a question about title to land, the adjudicator would be prohibited from resolving the dispute.¹⁷

The Property Law Act 1974

- [45] Part 11, Division 1 of the PLA provides for relief in respect of encroachments. Section 183 of the PLA provides that that division applies despite the provisions of any other Act. Section 185 gives powers to the Supreme Court to grant relief in respect of encroachments as it may deem just, including the power to order the conveyance of the subject land or the removal of the encroachment.
- [46] The legislature has specifically provided for this Court to resolve disputes about encroachments. It has also specifically excluded an adjudicator under the BCCM Act from resolving a question about title to land. The legislative intent is clear. Disputes concerning encroachments are to be dealt with by this Court and not be subject to the dispute resolution processes contained in the BCCM Act.

Conclusion

- [47] The application is dismissed.

¹⁵ [2003] 1 Qd R 374.

¹⁶ Ibid, 384, 397.

¹⁷ Ibid, 384, 394.