

SUPREME COURT OF QUEENSLAND

CITATION: *Westpac Banking Corporation v Body Corporate for the Wave Community Title Scheme 36237* [2014] QCA 73

PARTIES: **WESTPAC BANKING CORPORATION**
ABN 33 007 457 141
(appellant)
v
BODY CORPORATE FOR THE WAVE COMMUNITY TITLE SCHEME 36237
(respondent)

FILE NO/S: Appeal No 8999 of 2013
SC No 7122 of 2013
SC No 7925 of 2013

DIVISION: Court of Appeal

PROCEEDING: General Civil Appeal

ORIGINATING COURT: Supreme Court at Brisbane

DELIVERED ON: 11 April 2014

DELIVERED AT: Brisbane

HEARING DATE: 21 February 2014

JUDGES: Holmes and Fraser JJA and Mullins J
Separate reasons for judgment of each member of the Court, each concurring as to the orders made

ORDERS: **1. Appeal dismissed.**
2. The appellant must pay the respondent's costs of the appeal to be assessed.

CATCHWORDS: REAL PROPERTY – STRATA AND RELATED TITLES – MANAGEMENT AND CONTROL – BODY CORPORATE: POWERS, DUTIES AND LIABILITIES – OTHER CASES – where registered owners of a lot in a community title scheme mortgaged the lot to the appellant – where the body corporate took action to recover unpaid contributions, penalties and recovery costs from the lot owners – where the lot owners became bankrupt – where the appellant entered into possession of the lot – where the body corporate claimed the outstanding contributions, penalties and recovery costs from the appellant – where the primary judge held the appellant was liable for the recovery costs – whether a mortgagee in possession is liable under s 143(3) *Body Corporate and Community Management (Accommodation Module) Regulation 2008* (Qld) for the recovery costs incurred prior to the mortgagee entering into possession of the lot

Acts Interpretation Act 1954 (Qld), s 14D, s 32A
Body Corporate and Community Management (Accommodation Module) Regulation 1997 (Qld), s 97
Body Corporate and Community Management (Accommodation Module) Regulation 2008 (Qld), s 137, s 139, s 140, s 141, s 142, s 143, s 169, s 173, s 191, s 194
Body Corporate and Community Management Act 1997 (Qld), s 94, s 96, s 150, s 151, s 202

Builders' Licensing Board v Inglis (1985) 1 NSWLR 592, considered

Conde v Gilfoyle & Anor [2010] QCA 109, considered

Meridien AB Pty Ltd v Jackson [2014] 1 Qd R 142; [2013] QCA 121, considered

COUNSEL: L F Kelly QC, with M J Luchich, for the appellant
 R M Derrington QC, with D E F Chesterman, for the respondent

SOLICITORS: Minter Ellison Lawyers for the appellant
 OMB Solicitors for the respondent

- [1] **HOLMES JA:** I have had the advantage of reading the draft judgments of both Mullins J and Fraser JA. I agree with what their Honours have said, and with the orders Mullins J proposes.
- [2] **FRASER JA:** The comprehensive reasons for judgment of Mullins J, which I have had the advantage of reading in draft, enable me to state my reasons in brief terms.
- [3] The critical question of statutory construction is whether paragraph (c) of the definition of “body corporate debt” in the schedule to the *Body Corporate and Community Management (Accommodation Module) Regulation 2008 (Qld)* as that defined term is used in s 143(3)(b) of that Regulation comprehends the “recovery costs” described in s 143(1)(c) of the same Regulation.¹ I would accept, as the appellant argued, that the examples given in paragraph (c) of the definition are more obviously “associated with the ownership of a lot” than are recovery costs, but in the present context that does not suggest a negative answer to the construction question. As Mullins J points out,² s 14D of the *Acts Interpretation Act 1954 (Qld)* provides that an example of the operation of a provision does not limit the meaning of the provision. Accordingly, the reach of the expression “associated with the ownership of a lot” must depend upon other aspects of the statutory context in which that expression is used. Here there are strong contextual indications that the expression does comprehend recovery costs.
- [4] The word “another” in paragraph (c) of the definition of “body corporate debt” as “another amount associated with the ownership of a lot” conveys that the amounts identified in (a) and (b) (“a contribution or instalment of a contribution” and “a penalty for not paying a contribution or instalment of a contribution by the date for payment”) are themselves “associated with the ownership of a lot”. In the context that s 143(1) provides that both those amounts and the “recovery costs” reasonably incurred in recovering those amounts are recoverable by the body

¹ These provisions are reproduced in [27] and [28] of the reasons of Mullins J.

² In [56] of the reasons of Mullins J.

corporate as a debt, the conclusion seems all but inevitable that recovery costs are themselves to be regarded as being associated with the ownership of a lot for the purposes of the definition. It seems a most unlikely construction that a debt which one subsection of section 143 expressly makes recoverable by the body corporate without any qualification is not a “body corporate debt” for the purposes of another subsection of the same section dealing with a closely related topic.

[5] Subject to these reasons, I respectfully agree with all that Mullins J has written. I also agree with the orders proposed by her Honour.

[6] **MULLINS J:** The learned primary judge made the following declaration:

“Upon the proper construction of regulations 143(1) and 143(3) of the *Body Corporate and Community Management (Accommodation Module) Regulation 2008* (Qld) a liability to the respondent for recovery costs (as that term is defined in regulation 143(1)(c)) with respect to Lot 2503 on SP173160, County of Ward, Parish of Gilston, Title Reference 50640122 (**the Lot**) is enforceable as a body corporate debt pursuant to regulation 143(3)(b) against:

- (a) the applicant as mortgagee in possession of the Lot; and
- (b) any purchaser from the applicant exercising power of sale under mortgage number 710242327 registered over the Lot.”

[7] The appellant Westpac Banking Corporation (Westpac) appeals against the order on the basis that the primary judge erred in the construction of s 143(3) of the *Body Corporate and Community Management (Accommodation Module) Regulation 2008* (Qld) (the Regulation). In respect of the body corporate debt that was payable before it entered possession of the relevant lot, Westpac contends that its liability under s 143(3) of the Regulation for the body corporate debt as mortgagee in possession does not extend to “recovery costs” referred to in s 143(1)(c) of the Regulation.

Background

[8] In January 2007 Dr and Mrs Prins became the registered owners as joint tenants of Lot 2503 on SP173160 County of Ward Parish of Gilston, being a unit in the building known as “The Wave”. The respondent is the body corporate for the building. Dr and Mrs Prins granted a mortgage over the lot to St George Bank Limited (now Westpac) which was also registered in January 2007.

[9] In 2011 the respondent engaged solicitors to recover unpaid body corporate debts from Dr and Mrs Prins. A claim and statement of claim was filed on 27 April 2011 claiming an outstanding debt of \$5,514.42 and costs of \$1,139.58. There were difficulties serving Dr and Mrs Prins; a defence was filed; there were disputes over disclosure; and unsuccessful negotiations between the respondent and Dr and Mrs Prins ensued.

[10] Around 5 December 2011 Dr and Mrs Prins lodged a complaint with the Financial Ombudsman Service (FOS) against Westpac. Between the lodgement of the complaint until or around 7 November 2012, Westpac was prohibited by the FOS terms of reference from taking any action against Dr and Mrs Prins to recover the debt the subject of the dispute between Dr and Mrs Prins and Westpac or to protect the lot.

[11] Eventually the respondent applied for summary judgment. On 2 May 2012 the respondent was granted leave to file an amended claim and obtained summary

judgment against Dr and Mrs Prins for the outstanding contributions of \$10,711.52 and penalty interest of \$2,135.56 which made a total judgment sum of \$12,847.08. Recovery costs were to be determined at a trial set down for July 2012. An enforcement warrant for the judgment of \$12,847.08 and costs of the enforcement warrant of \$532.10 was issued by the respondent against Dr and Mrs Prins on 9 May 2012.

- [12] On 9 May 2012 the respondent's solicitors forwarded a copy of the summary judgment and the enforcement warrant for seizure and sale of the lot to Westpac and advised of the setting down of the trial on the issue of costs. The respondent's solicitors advised that costs currently were \$46,068.26 and that if matters progressed to trial costs were estimated in the range of \$70,000 to \$100,000. The failure by Dr and Mrs Prins to pay levies was an event of default under the mortgage.
- [13] Dr and Mrs Prins failed to pay levies to the respondent for the period 1 August to 30 November 2012 that were due on 1 August 2012. On 17 August 2012 the respondent's solicitors advised Westpac that the total debt claimed by the respondent in respect of Dr and Mrs Prins' lot was \$133,638.97.
- [14] After a trial lasting five days, the respondent obtained judgment against Dr and Mrs Prins on 19 October 2012 for its reasonable recovery costs in the amount of \$150,000.
- [15] An enforcement warrant for seizure and sale of the lot in respect of the judgment debt of \$150,000 and costs of the enforcement of \$531 was issued on 22 October 2012 in favour of the body corporate which forwarded a copy to Westpac.
- [16] Between 7 November 2012 and 10 August 2013 Westpac was permitted by the FOS terms of reference to take steps to recover possession of the lot for the purpose of preserving the lot, but otherwise remained prohibited from taking any action against Dr and Mrs Prins to recover the debt the subject of the dispute between Westpac and them or to protect the lot.
- [17] Dr and Mrs Prins filed an appeal to the District Court from the Magistrate's decision given on 19 October 2012. The appeal was dismissed on 25 March 2013. Dr and Mrs Prins applied for leave to appeal to the Court of Appeal, but that did not proceed.
- [18] Dr and Mrs Prins became bankrupt on their own petition on 12 April 2013. Westpac entered into possession of the lot on 5 July 2013 by changing the locks on the property. On 23 July 2013 Westpac gave written notice to the body corporate that it had taken steps on 5 July 2013 to enforce the mortgage over the lot.
- [19] On 8 August 2013 Westpac paid the respondent the sum of \$10,711.52 on account of the amount of contributions for which judgment had been obtained by the respondent against Dr and Mrs Prins on 2 May 2012.
- [20] As of 20 August 2013 the respondent claimed from Westpac the sum of \$347,533.17 comprising the sum of \$12,475.83 for contributions, the sum of \$150,000 for recovery of costs up to 19 October 2012 and the sum of \$185,057.34 for recovery costs after 19 October 2012. On 27 August 2013 Westpac paid the respondent the outstanding amount of \$12,475.83 for contributions.

Relevant legislative provisions

- [21] The functions of the body corporate for a community title scheme are set out in s 94(1) of the *Body Corporate and Community Management Act 1997* (the Act). These functions are to administer the common property and body corporate assets for the benefit of the owners of the lots included in the scheme; enforce the community management statement (including enforcing any by-laws for the scheme in the way provided under the Act); and carry out the other functions given to the body corporate under the Act and the community management statement. There is an express prohibition in s 96(1) of the Act on a body corporate carrying on a business, subject to s 96(2) which permits the body corporate to engage in business activities to the extent necessary for properly carrying out its functions and invest amounts not immediately required for its purposes in the way a trustee may invest trust funds. Section 150(1) of the Act provides that, subject to s 151 of the Act, the financial management arrangements applying to a community title scheme are those stated in the regulation module applying to the scheme. Section 150(2) of the Act lists the subject matter for the regulation module, without limiting s 151(1). The topics covered include levying lot owners for contributions, discounts and penalties relating to the payment of contributions, and recovery of unpaid contributions.
- [22] The Regulation is the relevant regulation module that applies to the respondent's scheme.
- [23] Part 3 of ch 7 of the Regulation (s 139 to s 142) deals with contributions levied by the body corporate on owners.
- [24] Under s 139 of the Regulation the body corporate by ordinary resolution on the basis of its budget for a financial year fixes the contributions to be levied on the owner of each lot for the financial year, the number of instalments and the date on or before which payment of each instalment of the contributions is required. The body corporate is required under s 140 of the Regulation to give the owner of each lot notice at the specified time of the total amount of the contribution levied on the owner, the amount of the contribution or instalment of contribution whose payment is currently required, the due date for payment, any discount to which the owner is entitled for payment made by the due date for payment, any penalty to which the owner is liable for each month payment in arrears and the amount of any arrears applying to the owner.
- [25] The body corporate is empowered under s 141 of the Regulation to fix by ordinary resolution the discount to be given to owners, if an instalment of a contribution is received by the body corporate by the date for payment, provided the discount is not more than 20 per cent of the amount to be paid. Section 142 of the Regulation also permits the body corporate by ordinary resolution to fix a penalty to be paid by owners, if an instalment of contribution is not received by the date for payment, provided the penalty is not more than 2.5 per cent for each month the instalment is in arrears.
- [26] Section 143 of the Regulation is the sole provision in pt 4 of ch 7 of the Regulation which is headed "Payment and enforcement of body corporate debts".
- [27] Section 143 of the Regulation provides:
"143 Payment and recovery of body corporate debts [SM, s 145]

- (1) If a contribution or contribution instalment is not paid by the date for payment, the body corporate may recover each of the following amounts as a debt—
 - (a) the amount of the contribution or instalment;
 - (b) any penalty for not paying the contribution or instalment;
 - (c) any costs (*recovery costs*) reasonably incurred by the body corporate in recovering the amount.
- (2) If the amount of a contribution or contribution instalment has been outstanding for 2 years, the body corporate must, within 2 months from the end of the 2-year period, start proceedings to recover the amount.
- (3) A liability to pay a body corporate debt in relation to a lot is enforceable jointly and severally against each of the following persons –
 - (a) a person who was the owner of the lot when the debt became payable;
 - (b) a person (including a mortgagee in possession) who becomes an owner of the lot before the debt is paid.
- (4) If there are 2 or more co-owners of a lot, the co-owners are jointly and severally liable to pay a body corporate debt in relation to the lot.
- (5) If an owner is liable for a contribution or a contribution instalment, and a penalty, an amount paid by the owner must be paid –
 - (a) first, towards the penalty; and
 - (b) second, in reduction of the outstanding contribution or instalment; and
 - (c) third, towards any recovery costs for the debt.
- (6) If the body corporate is satisfied there are special reasons for allowing a discount of a contribution, or waiving a penalty or liability for recovery costs, the body corporate may allow the discount, or waive the penalty or costs in whole or part.”

[28] There is a definition of “body corporate debt” in the schedule to the Regulation:

“*body corporate debt* means a following amount owed by a lot owner to the body corporate –

- (a) a contribution or instalment of a contribution;
- (b) a penalty for not paying a contribution or instalment of a contribution by the date for payment;
- (c) another amount associated with the ownership of a lot.

Examples of another amount—

- an annual payment for parking under an exclusive use by-law
- an amount owing to the body corporate for lawnmowing services arranged by the body corporate on behalf of the lot owner”

[29] The definition of “owner” in schedule 6 to the Act is:

“*owner*, of a lot (other than a lot that is a community titles scheme) included in a community titles scheme, means—

- (a) the person who is, or is entitled to be, the registered owner of the lot, and includes—
 - (i) a mortgagee in possession of the lot; and
 - (ii) if, under the Land Title Act, 2 or more persons are the registered owners, or are entitled to be the registered owners, of the lot—each of the persons; and
- (b) for chapter 6, see section 226.”

- [30] There is also a definition of “mortgagee in possession” in schedule 6 to the Act: “*mortgagee in possession*, of a lot included in a community titles scheme, means a mortgagee who has taken steps to enforce a mortgage of the lot and has notified the body corporate of the intention to enforce the mortgage (whether or not the mortgagee has actually gone into possession of the lot), but does not include a mortgagee who has notified the body corporate of a decision not to proceed with enforcement of the mortgage.”
- [31] Under s 191 of the Regulation notice must relevantly be given by the mortgagee to the body corporate of the mortgagee entering into possession of the lot that is the subject of the registered mortgage. It appears that the reference to a mortgagee entering into possession takes its meaning from the definition of “mortgagee in possession” in schedule 6 to the Act. Under s 202(1) of the Act, a mortgagee in possession of a lot included in a community title scheme must immediately give written notice of any decision not to enforce the mortgage. Section 202(2) provides that on the giving of such written notice, the mortgagee ceases to be a mortgagee in possession of the lot and is not the owner of the lot under the Act.
- [32] The term “body corporate debt” first appeared in the *Body Corporate and Community Management (Accommodation Module) Regulation 1997* (the 1997 Regulation), as a result of the amendment made by the *Body Corporate and Community Management Legislation Amendment Regulation (No 1) 2003* to replace s 97.
- [33] Before the 2003 amendment, s 97 of the 1997 Regulation provided:
- “Payment and recovery of contributions [SM, s 99]**
- 97.(1)** If a contribution, or instalment, is not paid by the date for payment, the body corporate may recover the amount of the contribution or instalment, together with any penalty, as a debt.
- (2)** A liability to pay a contribution, instalment, penalty or other amount payable to the body corporate in relation to a lot is enforceable jointly and severally against the person who was the owner of the lot when the contribution, instalment or other amount became payable and a person (including a mortgagee in possession) who becomes an owner of the lot before the contribution, instalment, penalty or other amount is paid.
- (3)** If there are 2 or more owners of a lot, they are jointly and severally liable to pay a contribution, instalment or penalty under the Act or this regulation, or another amount payable to the body corporate in relation to the lot.

- (4) If an owner is liable for a contribution, or an instalment of a contribution, and a penalty, an amount paid by the owner must be paid first towards the penalty and then in reduction of the outstanding contribution or instalment.
- (5) If the body corporate is satisfied there are special reasons for allowing a discount of contributions, or waiving a penalty, the body corporate may allow the discount, or waive the penalty in whole or part.”

[34] Section 97 after the 2003 amendment was entitled “Payment and recovery of body corporate debts” and was in identical terms to s 143 of the Regulation. The Explanatory Note for this amendment regulation dealt with the replacement of s 97 in these terms:

“The recovery of contributions owed to the body corporate by lot owners is a significant issue for some bodies corporate, to the extent that in some instances contributions can be in arrears for a number of years. The problem of arrears can be such that it can cause severe financial hardship for the body corporate.

The amendment is intended to give clear direction to the body corporate that it must take steps to recover arrears, including any applicable penalty and any costs reasonably incurred in the recovery. The arrears cannot be allowed to remain outstanding for more than 2 years.

Whilst the body corporate must recover the contribution, it may waive the penalty or the costs if it considers the circumstances warrant this. This provision is necessary to allow some discretion, particularly where some special reason such as financial hardship exists.”

[35] The 2003 amendment introduced the right of the body corporate to recover as a debt “recovery costs,” being any costs reasonably incurred by the body corporate in recovering the amount of an outstanding contribution or instalment and any penalty for not paying that contribution or instalment. The 2003 amendment also mandated that the body corporate take proceedings to recover the amount of a contribution or contribution instalment that was outstanding for two years.

Decision of the primary judge

[36] The primary judge found it unnecessary to determine the proper construction of the definition of “body corporate debt.” The primary judge observed:

“It seems to me that the provisions have been drafted to establish a particular sequence. The first is the fixing of the contribution by resolution in section 139. The second is the giving of notice of the amount payable as well as the date for payment under section 140.

Sections 141 and 142 deal with whether payments are made early or late. Section 143 it seems to me is important because it is the section which creates a legal liability in the event amounts are not paid.”

[37] The primary judge decided that on the basis of the way the provisions are presented in sequence, s 143(3) identifies those who are liable in respect of the amounts

referred to in s 143(1). The primary judge concluded that s 143(3) imposes a liability on the owner at the time when the amounts become payable and a subsequent owner or a mortgagee who goes into possession and that s 143(1)(c) would have no effect, unless s 143(3) identified the person or entity who was liable for those recovery costs. The primary judge noted that would have the consequence that the expression “body corporate debt” is used in s 143(3) in a way which includes recovery costs, whether or not that is the correct construction of the definition. The primary judge found support for the conclusion about s 143(3) in the terms of s 143(5), as otherwise it would be a strange result that s 143(5) specified an order of priority for payments made by an owner to whom notice is given under s 140, but not in respect of payments made by a mortgagee in possession (as had been contended by Westpac).

Issues

- [38] Westpac’s argument is that s 143(1) allows the body corporate to take advantage in recovering proceedings of the statutory deeming of any of the unpaid amounts described in s 143(1) as a debt: *Builders’ Licensing Board v Inglis* (1985) 1 NSWLR 592, 597-598. It argues that the actual liability to pay the contributions arises by reason of the resolution of the body corporate fixing the contribution amount and the time for payment and the issuing of written notice to the owner of the lot. Westpac argues then, in contrast, s 143(3) of the Regulation imposes a liability to pay a “body corporate debt” upon a person who was not the owner of the lot at the time the debt became payable, but who becomes an owner of the lot before that body corporate debt is paid, including a mortgagee in possession, and that the defined expression “body corporate debt” is used deliberately for the purpose of limiting the liability of a person who is a stranger to the body corporate/registered owner relationship at the time the debt was incurred, but who becomes liable for amounts covered by the expression “body corporate debt” relating to the ownership of the lot. Westpac argues that the liability of the mortgagee in possession is limited, because the recovery costs under s 143(1)(c) do not align with the third limb of the definition of “body corporate debt.”
- [39] The issues identified by Westpac on the appeal as relevant to the interpretation of s 143 of the Regulation are therefore:
- (a) whether the definition of “body corporate debt” in the schedule to the Regulation applies to that expression used in s 143(3)(b) of the Regulation;
 - (b) whether the definition of “body corporate debt” includes “recovery costs,” as that term is defined in s 143(1)(c); and
 - (c) whether the persons identified in s 143(3)(b) of the Regulation are liable for “recovery costs,” as that term is defined in s 143(1)(c) of the Regulation.
- [40] The respondent supports the conclusion of the primary judge, although also seeks to maintain the primary judge’s decision by applying the definition of “body corporate debt” to that expression used in s 143 of the Regulation and submitting that recovery costs are covered by paragraph (c) of the definition of “body corporate debt”.

Construction of s 143 of the Regulation

- [41] In order to deal with each of the interpretation issues identified by Westpac, s 143 of the Regulation must be construed in context. It was common ground between the

parties that the proper approach to construing s 143 was a consideration of the text of the provision in conjunction with the context and purpose of the provision, relying on the authorities extracted in *Meridien AB Pty Ltd v Jackson* [2014] 1 Qd R 142 at 158.

- [42] Under s 137 of the Regulation a body corporate must adopt for each financial year the administrative fund budget and the sinking fund budget. The administrative fund budget must contain estimates for the financial year of spending to cover the cost of maintaining common property and body corporate assets, the cost of insurance and other expenditure of a recurrent nature, and fix the amount to be raised by a way of contribution to cover the estimated recurrent expenditure. The sinking fund budget must allow for raising a reasonable capital amount to provide for spending from the sinking fund for the financial year and to reserve an appropriate proportional share of amounts necessary to be accumulated to meet anticipated major expenditure over at least the next nine years after the financial year, and fix the amount to be raised by way of contribution to cover the capital amount.
- [43] By a combination of s 139 and s 140 of the Regulation the body corporate fixes the contribution to be levied on the owner of each lot for the relevant financial year on the basis of the budgets and gives the owner of each lot the written notice of the due date for payment of the instalment of contribution, whose payment is currently required and the other matters specified in s 140. The address for service for each owner to which the written notice about payment of contributions is sent is determined by the notice required to be given to the body corporate in relation to change of ownership under s 191 of the Regulation and reflected in the roll of lots and entitlements maintained by the body corporate under s 194 of the Regulation.
- [44] Whereas pt 3 of ch 7 of the Regulation fixes the amount of the contribution to be levied on the owner of each lot and the mechanics for seeking the payment of the relevant instalment of contribution, pt 4 of ch 7 (which comprises s 143) covers the next stage where payment of a contribution instalment is not made by the due date. It also facilitates by s 143(3) the payment and recovery of amounts that are covered by the expression “body corporate debt,” apart from a contribution or contribution instalment. An example of such a debt is found in s 169(2) of the Regulation where the body corporate carries out work the owner or occupier has an obligation to carry out under statute, the community management statement or an order made by an adjudicator, court or tribunal, and the body corporate may then recover the reasonable cost of carrying out that work from the owner of the lot as a debt. Another example is found in s 173(1) where a monetary liability imposed under an exclusive use by-law on the owner of a lot may be recovered by the body corporate as a debt.
- [45] By itself, s 143(1) is an unusual provision in that it specifies that the body corporate may recover each of the amounts specified in paragraphs (a), (b) and (c) as a debt, but does not specify the party against whom the body corporate may seek such recovery. There is force in Westpac’s submission that s 143(1) of the Regulation assists the body corporate in recovering the amounts that are specified in that provision by deeming the unpaid amount to be a debt with the procedural advantages that may give in litigation, as was acknowledged in *Inglis*.
- [46] Section 143(1) is not such an unusual provision when it is construed in the context of s 143 and the purpose of s 143, taking into account the surrounding provisions of

the Regulation. It is not unreasonable to presume that most lot owners pay the instalment of contribution on receiving the written notice from the body corporate which specifies the date for payment. The recovery of all payments due from lot owners for contributions is essential for the body corporate to carry out its functions. Section 143 of the Regulation focuses on that part of the process of collection where the lot owner has not made payment of the contribution in the usual course in accordance with the written notice issued by the body corporate. That suggests that the primary liability for payment of the contributions is imposed in a provision other than s 143.

- [47] Although the term “liability” is not used in pt 3 of ch 7 of the Regulation to describe the obligation of the lot owner to pay the contribution or the instalment of contribution, equivalent terminology is used by the reference to “the contribution levied on the owner”.
- [48] It is logical to conclude that the liability of the owner of each lot to pay the contributions determined as a result of the budgets adopted by the body corporate for the relevant financial year is created under pt 3 of ch 7 of the Regulation in the provisions dealing with the contributions levied by the body corporate on the owners and the requirement for notice to be given of the payment due by the owner of the instalment of contribution and any arrears.
- [49] On this construction, s 143(3) extends the liability of the persons liable for a body corporate debt in relation to a lot and deals with the liability among those who are liable for the same debt by specifying that the liability is enforceable jointly and severally against each of them. Although the lot owner who received the written notice requiring the payment of the instalment of contribution was made liable for that amount by the operation of s 139 and s 140 of the Regulation, s 143(3) refers again to that liability in the context of dealing with the relationship of the liability of that owner with the liability that is imposed under s 143(3) on the parties to whom liability is extended. Section 143(3) of the Regulation reflects the deliberate policy choice of the Legislature to confer advantage on the body corporate by extending the parties who are liable with the owner of the lot when a body corporate debt became payable.
- [50] The advantages given to the body corporate by the provisions in s 143 of the Regulation that assist the body corporate in recovering outstanding contributions are balanced by the obligation imposed on the body corporate under s 143(2) of the Regulation to take steps to recover arrears in contributions no later than two months from the end of the period of two years for which the contributions have been outstanding.
- [51] Section 143(4) covers the liability of and between co-owners of a lot for a body corporate debt in relation to the lot.
- [52] Section 143(5) of the Regulation sets out the priority in which a body corporate must apply any payment made by any owner for a contribution or contribution instalment and a penalty and specifies that, after applying the payment first towards the penalty, second in reduction of the outstanding contribution or instalment, any balance of the payment is applied towards any recovery costs for the debt.
- [53] Section 143(6) gives the body corporate discretion in waiving a penalty or liability for recovery costs.

Whether the definition of “body corporate debt” applies to that expression used in s 143(3)(b) of the Regulation

- [54] The expression “body corporate debt” is found in very few provisions in the Regulation. Apart from s 143, it is found in provisions that deal with the disqualification of an owner who owes a body corporate debt to be nominated for, or elected to, the committee or to vote at a general meeting: s 11, s 17, s 18, s 39, s 40, s 82, s 217 and s 218 of the Regulation. The subject matter of s 143 is concerned with the payment and enforcement of liabilities owed to the body corporate and the definition “body corporate debt” sets out categories of liabilities owed by the lot owner to the body corporate.
- [55] Both parties ultimately contended that the definition of “body corporate debt” in the schedule to the Regulation applies to that expression used in s 143(3)(b) of the Regulation. That should be adopted as the correct interpretation of the expression “body corporate debt” in the context of s 143. As the definition of “body corporate debt” was introduced into the 1997 Regulation at the same time that s 97 was replaced by a provision in identical terms to what is now s 143 of the Regulation, and was given a new heading that referred to “body corporate debt,” it would be an odd result to conclude the use of the expression “body corporate debt” in s 97 did not reflect the meaning of that newly introduced defined expression. Even allowing for the flexibility in the application of a definition that is provided for by s 32A of the *Acts Interpretation Act 1954* (Qld) (as discussed in *Conde v Gilfoyle & Anor* [2010] QCA 109 at [20]-[21]), the context and subject matter of s 143 support giving the expression “body corporate debt” its defined meaning.

Whether the definition of “body corporate debt” includes “recovery costs,” as that term is defined in s 143(1)(c)

- [56] The issue is whether paragraph (c) of the definition of “body corporate debt” which specifies that, in addition to a contribution or instalment of a contribution and a penalty for not paying a contribution or instalment of a contribution by the date for payment, “another amount associated with the ownership of a lot” includes “recovery costs” which are referred to in s 143(1)(c). Two examples are then given of such other amount associated with the ownership of a lot. They are an annual payment for parking under an exclusive use by-law (which suggests that the exclusive use by-law is for the benefit of the owner of the specified lot) and an amount owing to the body corporate for lawn mowing services arranged by the body corporate on behalf of a lot owner (which suggests that the body corporate organised for the lawn mowing to be undertaken on that part of the property that belonged to the relevant lot owner). Under s 14D of the *Acts Interpretation Act 1954* (Qld), an example of the operation of a provision is not exhaustive and the example does not limit, but may extend, the meaning of the provision. Section 14D also provides that the example and the provision are to be read in the context of each other and the other provisions of the relevant legislation.
- [57] Paragraphs (a) and (b) of s 143(1) are mirrored by paragraphs (a) and (b) of the definition of “body corporate debt.” Paragraph (c) of the definition of “body corporate debt” covers other debts that are not the subject of s 143(1)(c). Putting to one side the issue of whether recovery costs provided for in s 143(1)(c) fall within paragraph (c) of the definition of “body corporate debt,” that definition has wider application than what is specified in s 143(1).

- [58] Westpac emphasised its lack of control in being able to prevent the escalation of recovery costs as a stranger to the relationship between Dr and Mrs Prins with the respondent, in circumstances where it can be inferred that the relationship had broken down. Westpac argued that any interpretation of s 143(3) which made Westpac liable for what it claimed was exorbitant recovery costs that devalued the security interest of Westpac as mortgagee in possession could not have been the intention of the Legislature.
- [59] The policy that prevailed when s 97 was introduced to the 1997 Regulation by the 2003 amendment is evident from the Explanatory Note. The severe financial hardship for the body corporate caused by arrears in contributions was intended to be addressed by the amendment. The body corporate depends on each lot owner making its payment of the contributions reflecting the proportionate share of the body corporate's projected expenditures, so that the body corporate meets those expenditures. Ultimately, it is the other lot owners who are meeting their share of the expenditures who will be disadvantaged by the non-payment by one lot owner of that lot owner's contributions.
- [60] The advantage given to the body corporate under s 143(1)(c) of being able to recover recovery costs as a debt is qualified by the express statement that it applies only to costs reasonably incurred by the body corporate in recovering the amount of the unpaid contributions and any penalty.
- [61] Recovery costs are incurred by the body corporate in taking steps to recover from the lot owner the outstanding contributions and penalty in respect of the relevant lot. On the plain and ordinary meaning of paragraph (c) of the definition of "body corporate debt", recovery costs are associated with the ownership of the relevant lot. In addition, they are of a similar nature to the expenditures that are illustrated by the two examples as payments made by the body corporate associated with the ownership of a lot.
- [62] As the primary judge observed, support for that conclusion is also found in s 143(5) of the Regulation which specifies the priority for payments made by an owner. There is no basis for applying s 143(5) in a different manner when the outstanding amounts are paid by the mortgagee in possession.

Whether the mortgagee in possession is liable for recovery costs

- [63] By the express terms of s 143(3) of the Regulation, the Legislature has resolved the different interests between a mortgagee in possession and the body corporate where there are contributions and penalty outstanding in respect of the relevant lot in favour of the body corporate (and consequentially the owners of the other lots in the community title scheme.) Under s 143(3) of the Regulation, Westpac as mortgagee in possession is therefore liable for recovery costs (as that term is defined in s 143(1)(c) of the Regulation), notwithstanding that those recovery costs have been incurred by the body corporate before Westpac became the mortgagee in possession for the purpose of the Regulation. The complication for Westpac in endeavouring to observe the FOS terms of reference can have no bearing on the interpretation of s 143 of the Regulation.
- [64] There remains an issue between the parties as to the reasonableness of the total amount claimed by the respondent for recovery costs, but that is for another hearing.

Orders

[65] The above analysis of s 143 of the Regulation reaches the same conclusion as the primary judge, although with some variations in the reasoning. The orders which should be made therefore are:

1. Appeal dismissed.
2. The appellant must pay the respondent's costs of the appeal to be assessed.