SUPREME COURT OF QUEENSLAND

CITATION:	*Body Corporate of Balmattum v Biddle & Anor* [2016] QSC 144
PARTIES:	**THE BODY CORPORATE OF BALMATTUM, COMMUNITY TITLE SCHEME NUMBER 25383** (plaintiff respondent) **v** **JENNIFER LYNNE BIDDLE** (first defendant applicant) **PHILLIP NORMAN BIDDLE** (second defendant applicant)
FILE NO/S:	SC No 201 of 2013
DIVISION:	Civil
PROCEEDING:	Application
ORIGINATING COURT:	Supreme at Cairns
DELIVERED EX TEMPORE ON:	24 May 2016
DELIVERED AT:	Cairns
HEARING DATE:	23 May 2016; 24 May 2016
JUDGE:	Henry J
ORDER:	**1. The applications filed 4 December 2015 and 23 February 2016 are dismissed.** **2. The defendants pay the plaintiff's costs of and incidental to the application filed 4 December 2015 to be assessed on the standard basis, excluding the plaintiff's costs of appearing on the 21st of January 2016.** **3. The defendants pay the plaintiff's costs of and incidental to the application filed 23 February 2016, to be assessed on the standard basis.**
CATCHWORDS:	PROCEDURE – CIVIL PROCEEDINGS IN STATE AND TERRITORY COURTS – JUDGMENTS AND ORDERS – ENFORCEMENT OF JUDGMENTS AND ORDERS – GENERALLY – where the defendants are one of the resident owners in a body corporate of rural residential community title scheme pursuant to the *Body Corporate and Community Management Act* 1997 (Qld) – where the defendants have not

paid their body corporate levies in about 13 years – where the plaintiff sues for payment of the contributions owing, interests and costs of recovery of defendants body corporate levies – where the District Court made costs orders against the plaintiff in earlier proceedings – where the defendant seeks enforcement of the District Court costs orders – where the plaintiff resists paying the District Courts costs orders until the outstanding sums owing by either of both parties are settled when the case is finally determined – whether the court should enforce the District Court costs orders against the plaintiff by staying the proceeding pending payment or making an order for enforcement under s 83(3) or s 90 of the *Civil Proceedings Act* 2011 (Qld), or s 58(1) of the *Queensland Constitution* 2001 (Qld), or s 314 of the *Body Corporate and Community Management Act* 1997 (Qld)

Body Corporate and Community Management Act 1997 (Qld), s 300, s 314
Civil Proceedings Act 2011 (Qld), s 82, s 83, s 90, s 92
Constitution of Queensland 2001 (Qld) s 58
Uniform Civil Procedure Rules, Ch 19, r 801, r 817

Phillip Morris Limited v The Attorney-General of Victoria [2006] 14 VR 538

COUNSEL: P O Land for the applicant
T Fantin for the respondent

SOLICITORS: Lee & Company lawyers for the applicant
Preston Law for the respondent

[1] **HIS HONOUR**: The plaintiff respondent is the body corporate of a rural residential community title scheme on the beach front near Mission Beach. The defendants are the resident owners of one of seven lots which, together with a large common property, comprise the scheme. They have not paid their body corporate levies in about 13 years. Not unsurprisingly, the plaintiff sues for payment of the contributions owing, interest and the costs of recovery.

[2] It embarked upon that suit by filing its proceeding in the Tully Magistrates Court in 2007, nine years ago. Astonishingly, the plaintiff has failed to yet advance that simple proceeding to trial.

[3] This court became seized of the proceeding in 2013 when it was transferred to the Supreme Court, I am told because of the form of declaratory relief sort in a counterclaim in which the defendants seek to impeach the validity of the body corporate's existence and actions. Were this court ever invited by a party to the proceeding to bring this sorry saga to a head by trying it promptly, the court would happily accommodate such a request. Unfortunately, the present skirmish upon which I am asked to adjudicate involves no such invitation.

[4] By applications filed on 4 December 2015 (which application also sought orders on which I ruled yesterday) and 22 February 2015, the defendant applicants seek alternative means by which they can enforce certain costs orders in their favour.

[5] Back when this matter wallowed in the Magistrates Court there was an ill-fated and initially successful attempt by the plaintiff to end the proceeding early without trial. In hindsight, the plaintiff's monetary position was better served by just taking this case to trial. Instead, it became the loser in the defendants' successful District Court appeal.

[6] The quantum of the resulting two costs orders of the District Court against the plaintiff, dated 4 June 2014, excluding interest to date, was $1760 for the Magistrates Court summary judgment proceeding and a surprisingly large $38,231.24 for the District Court appeal. Presumably that appeal involved some demanding legal work which is not readily apparent from reading the judgment.

[7] It would be very unfortunate were the defendants to become emboldened as to their prospects at trial by their District Court victory and the securing of such a substantial costs order against the plaintiff. It is readily apparent from the District Court judgment that it did not endorse the defendants' long-term prospects of success. If, in the long run, this saga ever finds its way to trial and the defendants lose, they will be facing an obligation to pay the plaintiff a far greater amount than the present costs order in their favour. Indeed, they are already the subject of a significant costs order against them in QCAT in respect of proceedings by which they also dispute the body corporate validity issue. That order against them is of similar quantum to the costs order against the plaintiff with which the present applications are concerned

[8] Of the various options now urged on the court by the defendants to enforce the plaintiff's payment of the costs orders, it is convenient, first, to deal with the option of staying the present proceeding until the costs are paid. While not determinative on the issue of the stay, it is relevant that the defendants only seek the stay of the proceeding on the claim and not on their counterclaim. This option would have the unfortunate potential consequence, if granted, of splitting the proceeding. That would be a prima facie undesirable course, given the issues in the claim and counterclaim are interconnected, given the desirability of the finality of determination of the whole of the dispute and given the undesirability of potential for inconsistent court outcomes in connection with the same dispute.

[9] The defendants' submission in support of a stay is that it would be an abuse of process to permit the plaintiff to continue using this court to pursue their claim against the defendants while not paying the defendants' costs ordered in respect of earlier stages of the proceeding. The fact that the costs orders arise out of earlier stages of this proceeding tells against the continuance of the same proceeding being an abuse of process.

[10] The defendants place particular reliance on *Phillip Morris Limited v The Attorney-General of Victoria* [2006] 14 VR 538. The analysis of relevant authority in that case shows a tendency of the courts to more readily order a stay of proceeding brought separately after the earlier ending of a substantially similar proceeding where the plaintiff has not paid its costs of that earlier proceeding, than when the issue arises in the continuum of a single proceeding. Ultimately, the analysed authorities in Phillip Morris

suggest the real issue is whether the non-payment gives the ongoing proceedings such a vexatious quality as to be an abuse of process.

[11] On the filed materials the plaintiff's case appears to have at least reasonable prospects of success and, as earlier intimated, if the plaintiff succeeds, it will have the benefit of orders involving a more significant quantum than the present costs order against it in the same case. This tells powerfully against the continuing proceeding being an abuse of process. Also the materials do not suggest the plaintiff's continued proceeding against the defendant is an abuse of process by reason of the costs not yet being paid. For instance, there is no evidence that the proceeding has caused the defendants any or any such impecuniosity that they cannot fund their defence without the costs orders being paid.

[12] Further, there is no evidence of any intent by the plaintiff to never pay the costs order. For that reason, it was overreach to submit the plaintiff is, in effect, in contempt for not yet paying the costs order. The plaintiff's conduct in not paying the costs order to date is obviously consistent with an expectation that outstanding sums owing by either or both sides lend themselves to settlement at the time the case is finally determined. That is not to say the defendants are not entitled to try and effect payment to them of the costs order at an earlier stage. It merely provides further support for the conclusion the plaintiff's non-payment to date does not amount to a contempt and that its continuation of the proceeding without the costs being paid is not an abuse of process.

[13] I note, for completeness, the fact the plaintiff could have sought a stay of the assessment that apparently gave rise to the costs orders, a matter highlighted by the defendants, does not elevate the plaintiff's present continuation of the proceeding to an abuse of process either.

[14] I turn to consideration of the remaining alternative orders sought. The court's order for the payment of an amount, including an amount for costs, is a money order enforceable under part 13 of the *Civil Proceedings Act* 2011 (Qld) and chapter 19 of the *Uniform Civil Procedure Rules* 1999 (Qld). Section 83(2) of the *Civil Proceedings Act* provides a money order may be enforced only under part 13. Section 90 relevantly provides:

> "(1) To enforce an order (the original order) other than an order for the payment of money into court, a person entitled to enforce the original order may obtain an enforcement warrant from the court.
>
> (2) An enforcement warrant may contain any order directed to enforcing the original order, including an order authorising –
>
> (a) an enforcement officer to seize and sell, in satisfaction of a money order debt, all real and personal property (other than exempt property) in which an enforcement debtor has a legal or beneficial interest; or
>
> (b) redirection to a enforcement creditor of particular debts, belonging to an enforcement debtor, from a third person; or
>
> (c) redirection to an enforcement creditor of particular earnings, of an enforcement debtor, from a third person; or
>
> (d) an enforcement officer to enter and deliver possession of land; or
>
> (e) an enforcement officer to seize and deliver specific goods; or
>
> (f) an enforcement officer to seize and detain property."

[15] I have referred in full to s 90(2) because the defendants' counsel submits the machinery of enforcement here should be quite different from anything contemplated under the terms of the orders listed in s 90(2). The defendants emphasise that is an inclusive list and that in any event s 83(3) provides:

> "If the court has jurisdiction to order a party to do an act, the court may make a special order for the payment of money enforceable as an order to do an act."

[16] The defendants submitted s 83(3) is a stand-alone source of power, in effect, to make an order, a so-called "special order". On the face of it, s 83(3) was of utility when the District Court was making its money order, for that was a time when a court had "jurisdiction to order a party to do an act". In the present context, subject to what I will shortly note about my jurisdiction under the *Body Corporate and Community Management Act* 1997 (Qld), the jurisdiction of this court to order a party to do an act arises in connection with the costs orders by reason of my power to issue an enforcement warrant. The *Civil Proceedings Act* and the *Uniform Civil Procedure Rules* deal specifically with that process. Section 83(3) does not confer a separate source of power on me in connection with the costs order already made. I decline to ground the order sought on s 83(2).

[17] That said, I accept the list of orders in s 90(2) is inclusive and my power to authorise actions in an enforcement warrant is not limited to the means of enforcement listed in s 90(2) and can include an order to do an act.

[18] However, such an act must be of a character "directed to enforcing" the original order. The orders sought by the defendants at exhibit ATL8 to the affidavit of Anthony Lee filed 4 December 2015 would require the plaintiff to hold an extraordinary general meeting, before which a copy of a motion to be considered and decided at that meeting is to be provided by the plaintiff to the defendants' solicitor who would thereafter calculate and advise the plaintiff of interest due under the orders and the defendants' reasonable costs of the enforcement process, including this application. Then at the extraordinary general meeting of the plaintiff, the plaintiff would be required to pass a resolution that, within seven days thereof, the owners of all lots other than the defendants' lot, pay to the plaintiff one-sixth of the total of the sum calculated by the defendants' solicitors and that within 14 days of the extraordinary general meeting the total would then be paid out to the trust account of the defendants' solicitors.

[19] Such orders are certainly calculated at securing payment of the costs orders, however, they are not on the face of it within the meaning of orders "directed to enforcing" the original orders. They involve an indirect methodology, intruding upon the internal decision-making of the body corporate, without actually providing any means of enforcing the decision it compels the body corporate to make. They really appear to be calculated at securing an order that certain owners within the scheme pay the costs, rather than being an order directed to enforcing it or the original orders. The language of s 92 contemplates orders actually directed at enforcement of an existing order, not shifting the obligation to pay under that order to some other person.

[20] For that reason alone I would decline to make the order pursuant to s 90.

[21] A further reason, however, is that chapter 19 of the *Uniform Civil Procedure Rules* prescribes the procedure for how such an application ought be made, and the plaintiff takes the point that procedure set out at r 817 has not been complied with in all respects.

Were the latter point the only obstacle, I might have merely adjourned the application for the enforcement warrant to allow proper compliance to occur, but, as already explained, it is not the only obstacle.

[22] The plaintiff also argued the application for an enforcement warrant should be refused because it was brought as an application in the proceeding and not as a separate application.

[23] It is quite clear the orders which have been filed in this proceeding can be enforced in the Supreme Court (see r 801(3)). The rules do not appear to require the bringing of an application for enforcement as a separate proceeding, or exclude such an application being made in an existing proceeding. As I apprehend the plaintiff's argument, though, it is that the form of order sought here is not appropriate as part of the present proceeding because the persons it affects are not parties to the existing proceeding. This heralds a closely associated point to which I will come in dealing with the final pathway sought through the use of the *Body Corporate and Community Management Act*.

[24] However, I need express no concluded view insofar as the point relates to the enforcement warrant application, because that application must fail for reasons already given.

[25] This then leaves the application under the *Body Corporate and Community Management Act* and an application under the *Queensland Constitution* 2001 (Qld). Dealing with the latter first, it seeks, essentially, the same orders as the enforcement warrant application but founded on the Court's general jurisdiction pursuant to s 58(1) of the *Constitution of Queensland*, vis "all jurisdiction necessary for the administration of justice in Queensland". It is an intoxicating thought that I am empowered to act unconstrained by existing statutory provisions and rules to fulfil a litigant's avowed purpose, when to do so would merely be a device to avoid compliance by the litigant with existing statutory provisions and Court rules. I decline to exercise such a power. Statutory provisions and rules of Court exist, inter alia, to protect and assist both parties to an action and ensure the Court's effective and just administration of cases before it. If the defendants do not properly utilise those provisions and rules, it does not justify the Court ignoring their obvious existence and purpose.

[26] Finally, coming to the statutory provisions, which seem clearly designed for the defendant's present dilemma, the *Body Corporate and Community Management Act* provides two solutions. First, the Court may, on application, pursuant to s 300, appoint an enforcement creditor. That remedy is not sought here. Second, s 314 provides:

> (1) In a proceeding by or against the body corporate for a community titles scheme, a Court may order that an amount payable under a judgment or order against the body corporate be paid by the owners of particular lots included in the scheme in proportions fixed by the Court.
>
> (2) If an order is sought under subsection (1) against the owner of a lot who is not a party to the proceeding, the owner must be joined as a party.

[27] This is exactly the sort of relief the defendants misguidedly sought in applying for an enforcement warrant. However, the hurdle they presently face, as earlier foreshadowed, is that it is brought as an application in the existing and ongoing proceeding, not separately. To succeed in securing the order sought, it is necessary for each owner of the individual lots to be joined as a party to that proceeding. The only reason advanced to

justify that course is to secure an order under s 314(1) so as to recover costs and, more speculatively, to promote the payment of money orders that might be made later in the proceeding. No good reason has been shown why the proceeding should be complicated, and the owners inconvenienced, by requiring a remedy that necessitates their joinder as parties.

[28] The remedy, pursuant to s 314(1), is discretionary, vis that subsection's use of the term "may". As I have already indicated, the obstacle, which, in my view, inevitably would preclude the exercise of my discretion under s 314(1), is a threshold obstacle which ought not be therefore taken to trigger the mandatory effect of s 314(2). That obstacle is that the application for the order pursuant to s 314(1) ought not have been made in the pending proceeding, for the inevitable consequence of it would be to require the joinder of parties to that proceeding unnecessarily. It can readily be pursued by way of application brought separately from the proceeding, so that any joinder of the parties, if they are not already named as respondents to such an application, could be effected without causing the complications in the existing proceeding that would otherwise occur were I to grant the application in its present form.

[29] The advancing of the s 314 application in the existing proceeding, rather than as a separate application, was, for these reasons, misconceived, and I decline to make the order sought.

[30] It follows all of the applications must fail. I dismiss both applications. I will hear the parties as to costs.

…

[31] **HIS HONOUR**: As to costs, the defendants generally accept that costs ought follow the event. That acceptance makes it unnecessary to enter into commentary upon some of the more technical argument advanced in respect of costs, in particular, the relevance or otherwise of certain *Uniform Civil Procedure Rules*. The only real issues for resolution flow from the fact that there was an appearance in respect of the application filed 4 December 2015 on 21 January 2016, which was the subject of a consent adjournment.

[32] I am happy to accept that there was likely more than one reason motivating each of the parties in the respective consents, but one at least very obvious reason is that there had been a significant volume of disclosure on the part of the plaintiff not long before that day, so that the defendants had not had sufficient time to practicably assess whether they ought persist with that component of their application that went to disclosure.

[33] Mr Land goes so far as to argue that, by reason of that event, they ought have their costs of that day. That is, I think, a bridge too far. It ought be borne in mind there were a variety of other matters that fell to be litigated that day, apart from disclosure, and the day was the subject of a consent adjournment. It is reasonable though to conclude that the defendants ought not have to carry the plaintiff's costs of appearing on that day in circumstances where a significant, although I accept not sole reason for the adjournment was the belated disclosure of the plaintiff.

[34] This issue only arises in respect of the application filed 4 December 2015. The second application filed 23 February 2016 obviously post-dated the events I have referred to.

[35] Accordingly, my orders are:

(1) the applications filed 4 December 2015 and 23 February 2016 are dismissed,

(2) the defendants pay the plaintiff's costs of and incidental to the application filed 4 December 2015 to be assessed on the standard basis, excluding the plaintiff's costs of appearing on the 21st of January 2016,

(3) the defendants pay the plaintiff's costs of and incidental to the application filed 23 February 2016, to be assessed on the standard basis.

…

[36] **HIS HONOUR**: On the undertaking just given by Mr Land, on behalf of his clients, I order that the costs to be assessed pursuant to orders 2 and 3 not be assessed until the proceeding ends.