

# SUPREME COURT OF QUEENSLAND

CITATION: *James & Anor v The Body Corporate Aarons Community Title Scheme 11476* [2003] QCA 329

PARTIES: **ROBERT CHARLES JAMES**  
**KATHRYN MARGARET JAMES**  
(applicants/appellants)  
v  
**THE BODY CORPORATE AARONS COMMUNITY**  
**TITLE SCHEME 11476**  
(respondent/respondent)

FILE NO/S: Appeal No 11588 of 2002  
SC No 8834 of 2002

DIVISION: Court of Appeal

PROCEEDING: General Civil Appeal

ORIGINATING COURT: Supreme Court at Brisbane

DELIVERED ON: 1 August 2003

DELIVERED AT: Brisbane

HEARING DATE: 15 July 2003

JUDGES: Davies and Jerrard JJA and Mackenzie J  
Separate reasons for judgment of each member of the Court, each concurring as to the orders made

ORDER: **1. Appeal dismissed**  
**2. Appellants to pay respondent its costs of the appeal to be assessed**

CATCHWORDS STATUTES - ACTS OF PARLIAMENT - STATUTORY POWERS AND DUTIES - CONSTRUCTION - where appellants are owners of a lot in community titles scheme - where there was evidence of water leaking through the top of the building penetrating into units and common property - where s 223 *Body Corporate and Community Management Act 1997* (Qld) provides that adjudicator may order a body corporate to have repairs carried out - where s 227 of the Act provides that an adjudicator may order a person responsible to have repairs carried out, provided the cost of repairs is not more than \$75,000 - where estimated cost of repairs was \$659,280 - whether relief sought by appellants is an order of a kind which an adjudicator could make under s 227

*Body Corporate and Community Management Act 1997* (Qld), s 87, s 184, s 223, s 227

*Body Corporate and Community Management  
(Accommodation Module) Regulation 1997 (Qld), s 108*

COUNSEL: D A Savage SC for the appellants  
D R M Murphy for the respondent

SOLICITORS: McDonald Chesters (Southport) for the appellants  
Hickey Lawyers (Bundall) for the respondent

**DAVIES JA:**

**The application and appeal**

- [1] This is an appeal against an order of a judge of the trial division on 25 November 2002 dismissing an originating application for a declaration and an injunction against the respondent. The respondent is the body corporate, constituted under the *Body Corporate and Community Management Act 1997* ("the Act") of a community titles scheme for a holiday unit complex at Surfers Paradise. The appellants are the owners of a lot in that community titles scheme and also, pursuant to the scheme, hold site management and letting rights for the complex. It is common ground that the Act in question in this appeal is the Act in the form in which it was prior to its amendment on 4 March 2003. The references herein to sections are references to the sections of the Act in that form.
- [2] The application to the learned primary judge sought:
1. a declaration that the respondent body corporate must in compliance with its obligations under s 87(1) of the Act and s 108 of the *Body Corporate and Community Management (Accommodation Module) Regulation 1997* ("the Regulation"):
    - (a) maintain the roofing membrane and other external surfaces of the buildings of the body corporate so as to prevent the ingress of water into the premises of the body corporate;
    - (b) maintain the parapets along the boundary of the body corporate in good condition.
  2. An injunction requiring the body corporate to forthwith carry out such work as is necessary to comply with its obligations under the declaration at 1 above.
- [3] The learned primary judge concluded that she did not have jurisdiction to make either of the orders sought because, she held, an adjudicator appointed under Chapter 6 of the Act had exclusive jurisdiction to decide and grant a remedy in a dispute of the kind for which the application sought remedies. Alternatively her Honour declined to proceed with the application because she held that the injunctive relief sought was of indefinite duration and imprecise as to its requirements such that a court would be loathe to supervise. Accordingly she dismissed the application.
- [4] The question before this Court, which was the principal question before her Honour, is whether the application sought remedies for a dispute of a kind the granting of remedies for which were within the exclusive jurisdiction of an adjudicator under the Act. In this Court the respondent did not seek to support her Honour's obiter conclusion, in the alternative, that there were, in any event, discretionary factors which would effectively preclude the court from granting the relief sought. Before

turning to the above question, it is necessary to say something about the context in which it arose.

### **The relevant context**

- [5] There is some independent evidence that the building is in some disrepair. In particular there is evidence of water leaking in through the top of the building penetrating into some units and parts of the common property affecting, amongst other things, electrical fittings. Whilst I do not understand the appellants to assert that their unit was damaged they assert, correctly, that they are, together with the owners of other lots in the scheme, tenants in common in the common property including that part of it which was damaged.<sup>1</sup> They also assert that unfavourable publicity about the damage and the continuing problems caused by leaks and dampness has caused their business as on-site letting agents to suffer. And they assert that, because the value of the building has declined, so has the value of their lot. An estimate of the total cost of putting the building in repair, including but not limited to remedying the water penetration, by an independent expert is \$659,280.

### **Relevant statutory provisions**

- [6] Section 87(1)(c) of the Act requires the body corporate for a community titles scheme to carry out functions given to it under the Act and the community management statement. Subsection (2) requires it to act reasonably in anything it does under subsection (1). Section 108 of the Regulation provides:

"(1) The body corporate must maintain common property in good condition, including, to the extent that common property is structural in nature, in a structurally sound condition.

(2) To the extent that lots included in the scheme are created under a building format plan of subdivision, the body corporate must-

- (a) maintain in good condition-
  - (i) railings, parapets and balustrades on (whether precisely, or for all practical purposes) the boundary of a lot and common property; and
  - (ii) doors, windows and associated fittings situated in a boundary wall separating a lot from common property; and
  - (iii) roofing membranes that are not common property but that provide protection for lots or common property; and
- (b) maintain the following elements of scheme land that are not common property in a structurally sound condition-
  - (i) foundation structures;
  - (ii) roofing or other covering structures providing protection;
  - (iii) essential supporting framework, including load-bearing walls.
- (3) Despite anything in subsections (1) and (2)-
  - (a) the body corporate is not responsible for maintaining fixtures or fittings installed by the occupier of a lot if they were installed for the occupier's own benefit; and

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<sup>1</sup> Section 37 of the Act.

(b) the owner of the lot is responsible for maintaining utility infrastructure in good order and condition, to the extent that the utility infrastructure-

(i) relates only to supplying utility services to a particular lot; and

(ii) is 1 of the following types-

- hot-water systems
- washing machines
- clothes dryers
- another device providing a utility service of a domestic nature to a lot.

(4) To avoid doubt, it is declared that, despite an obligation the body corporate may have under subsection (2) to maintain a part of a lot in good condition or in a structurally sound condition, the body corporate is not prevented from recovering an amount of damages from a person (whether or not the owner of the lot) whose actions cause or contribute to damage or deterioration of the part of the lot."

[7] Section 184 of the Act headed "Exclusivity of dispute resolution provisions",<sup>2</sup> relevantly provides:

"(1) Subsection (2) applies to a dispute if an adjudicator may, under this chapter, make an order to resolve it.

(2) The only remedy for the dispute is an order of -

(a) an adjudicator; or

(b) a District Court on appeal from an adjudicator on a question of law.

... "

[8] A dispute for the purposes of s 184 is relevantly defined in s 182(1) as a dispute between the body corporate and the owner or occupier of a lot, a dispute between the body corporate and a service contractor for the scheme who is also a letting agent for the scheme or a dispute between the body corporate and a letting agent for the scheme. It is plain that, at least on two of those bases, this dispute is a dispute within the meaning of s 184.

[9] Among the orders which an adjudicator may make to resolve a dispute pursuant to Chapter 6 of the Act, the Chapter referred to in s 184, are those in s 223 and s 227. Section 223 relevantly provides:

"(1) An adjudicator to whom the application for an order of an adjudicator 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-

(a) a claimed or anticipated contravention of this Act or the community management statement;

...

(2) An order may require a person to act ... in a way stated in the order.

(3) Without limiting subsections (1) and (2), the adjudicator may, for example-

<sup>2</sup> This heading is part of the Act: *Acts Interpretation Act 1954* s 14(2).

...  
 (c) order the body corporate ... to have repairs carried out;  
 ... "

[10] Section 227 provides:

- "(1) If the adjudicator is satisfied that the applicant for the order has suffered damage to property because of a contravention of this Act or the community management statement, the adjudicator may order the person who the adjudicator believes, on reasonable grounds, to be responsible for the contravention -
- (a) to carry out stated repairs, or have stated repairs carried out, to the damaged property; or
  - (b) to pay compensation of an amount fixed by the adjudicator.
- (2) The order cannot be made if -
- (a) for an order under subsection (1)(a) - the cost of carrying out the repairs is more than \$75 000; or
  - (b) for an order made under subsection (1)(b) - the amount of the compensation is more than \$10 000."

**Whether the Act, on its face, gives the adjudicator exclusive jurisdiction to resolve this dispute**

[11] This was plainly a dispute in respect of which an adjudicator may make an order under Chapter 6 within the meaning of s 184. It was, at the very least, both a dispute between the body corporate and the owner of a lot included in the scheme and a dispute between the body corporate and a letting agent for the scheme. In the end, the only questions in issue in this appeal are whether the order which an adjudicator may make to resolve this dispute is one pursuant to s 223 or one pursuant to s 227; or whether the adjudicator may make such an order under either section.

[12] Section 184 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<sup>3</sup> 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.<sup>4</sup> Mr Savage SC, for the appellants did not argue to the contrary.

[13] It was submitted by Mr Savage SC that s 227, at least indirectly, provided such a limitation which effectively excluded the adjudicator's jurisdiction in this case. The submission was that this case came within s 227(1) but, because the cost of carrying out repairs to the common property was substantially more than \$75,000, the adjudicator had no jurisdiction to make such order. It was submitted that even if this case also came within s 223, it was subject to the limitation in s 227(2). Accordingly, it was submitted, the court had jurisdiction in the matter.

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<sup>3</sup> See, especially, the heading to the section.

<sup>4</sup> And subject, possibly, to the power of the Commissioner to terminate that jurisdiction under s 201(2). See also, s 192(1)(a).

- [14] The critical question, on the appellants' argument, is whether the relief which the appellants seek, which is, effectively as Mr Savage SC concedes, an order that the respondent repair the roof membrane, is an order of a kind which, subject to the exception contained in s 227(2), an adjudicator could make under s 227. That question, in turn, depends on whether "damage to property" in s 227(1) includes, where the applicant is a lot owner, damage to the roof membrane.
- [15] Section 227 was not necessary to enable the adjudicator to order a body corporate to have repairs to the roof membrane carried out. Section 87(1) of the Act and s 108(1) and s 108(2)(a)(iii) of the Regulation required a body corporate to maintain it in good condition; and an order requiring the body corporate to have repairs carried out, in compliance with that obligation, was an order which the adjudicator was empowered to make, under s 223(3)(c), in any dispute coming within s 184. So much was accepted by Mr Savage SC. However he submitted that an order requiring the body corporate to repair the roof membrane would also be an order made under s 227 and consequently that it would be subject to the limitation contained in s 227(2).
- [16] There can be no doubt that s 227 confers jurisdiction on an adjudicator to make an order to carry out stated repairs or to pay compensation which would not be an order of a kind which could be made under s 223(3)(c). An example of such an order is given in the example contained in s 227(1)<sup>5</sup> which is in the following terms:  
 "A waterproofing membrane in the roof of a building in the scheme leaks and there is damage to wallpaper and carpets in a lot included in the scheme. The membrane is part of the common property and the leak results from a failure on the part of the body corporate to maintain it in good order and condition, the adjudicator could, on the application of the lot's owner, order the body corporate to have the damage repaired or to pay appropriate compensation."  
 The damage referred to in the example is plainly the damage to the wallpaper and carpets in the lot. Mr Savage SC did not contend that an order of the kind envisaged in the example could be made under s 223(3)(c).
- [17] If Mr Savage SC's submission is correct, s 227 would apply, not only in the case of damage to the separate property of a lot owner or of the occupier of a lot, but to damage to the common property falling within the power to order repair already conferred by s 223(3)(c). It would also, on that submission, both expand that power (by the power to order compensation for damage in s 227(1)(b)) and limit it (by s 227(2)). And it would do so without any reference to s 223(3)(c). In my opinion that would be a surprising result.
- [18] It would be surprising for two reasons. The first is that when, in an Act, a section confers power to do an act, which at the same time in this case also confers jurisdiction, it would be surprising to find, in a later section, the conferral of the same power, albeit together with the conferral of another power. And the second is that it would be even more surprising to find, in the later section, that the power conferred by the earlier section is not only conferred once again but also expanded in one way and limited in another. If s 227 can be given a sensible construction which does not have those effects I think it should be given that construction.

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<sup>5</sup> Which is part of the Act: *Acts Interpretation Act 1954* s 14(3).

- [19] In my opinion s 227 can be given such sensible construction, having as its purpose the conferral on an adjudicator of a limited power, additional to those already conferred, to provide remedies, including one of compensation, to a lot owner or occupier whose property has been damaged by a contravention of the Act or the community management statement. So, in a case like the present where the breach is alleged to consist in the failure of the body corporate to maintain the roof membrane in good condition, s 227 confers a power in the adjudicator, additional to the power already conferred to order repair of the membrane, to require the body corporate to make repairs to or to pay compensation in respect of damage to property of the owner or occupier in consequence of that failure. But in my opinion, reading s 223(3)(c) and s 227 together requires the conclusion that, just as damage to the property of a lot owner or occupier could not be the subject of an order made under s 223(3)(c), damage to the common property could not be the subject of an order for repair or compensation under s 227.
- [20] It was submitted by Mr Savage SC that such a construction would have the curious result of conferring on an adjudicator under s 223(3)(c) a power to make an order, unlike other orders of the kind which can be made under s 223(3), which may involve expenditure of substantial money, as it seems in this case; whereas orders which can be made under s 227 are limited in amount to \$75,000 for repairs and \$10,000 for compensation. I do not find that curious. Orders of the kind which the adjudicator is given power to make by s 223(3) are all orders with respect to matters which might be expected to arise in the administration of the affairs of the body corporate including the obligation of the body corporate to maintain the common property in good condition. Orders which the adjudicator is given power to make under s 227 are orders of a quite different kind. They are orders to remedy a civil wrong causing damage to property where that wrong arises out of a contravention of the Act or the community management statement. In this respect they trespass into the field ordinarily occupied by the common law. It is therefore unsurprising, it seems to me, that the power which is conferred on an adjudicator to make orders of that kind should be limited in amount.
- [21] As I understand his submissions, Mr Savage SC did not contend that, if s 227(1) did not also permit the making of an order to repair the roof membrane, of the kind which could be made under s 223(3)(c), s 227(2) would apply to limit any such order. Nor do I think that any such contention would be open. Section 227(2), in terms, refers to an order made under s 227(1).
- [22] For those reasons, in my opinion, the learned primary judge was correct in making the order which she did and this appeal must be dismissed.
- Orders**
1. Appeal dismissed.
  2. That the appellants pay the respondent its costs of the appeal to be assessed.
- [23] **JERRARD JA:** I have read the reasons for judgment of Davies JA and the orders he proposes and I respectfully agree with those.
- [24] **MACKENZIE J:** I agree with the orders proposed by Davies JA for the reasons given by him.