SUPREME COURT OF QUEENSLAND

CITATION:	*Gold Coast Commerce Club Inc & Anor v Body Corporate for Surfers Plaza Resort Community Titles Scheme 6388* [2009] QCA 238
PARTIES:	**GOLD COAST COMMERCE CLUB INCORPORATED** (first plaintiff/first appellant) **CRESTDEN PTY LTD** ACN 116 486 670 (second plaintiff/second appellant) **v** **BODY CORPORATE FOR SURFERS PLAZA RESORT COMMUNITY TITLES SCHEME 6388** (defendant/respondent)
FILE NO/S:	Appeal No 197 of 2009 Appeal No 577 of 2009 SC No 3451 of 2006
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeals
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	21 August 2009
DELIVERED AT:	Brisbane
HEARING DATE:	7 August 2009
JUDGES:	Keane and Holmes JJA and Mullins J Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**In Appeal No 197 of 2009:** **1. Appeal allowed to the extent of ordering that the appellants recover possession of that part of Lot 5 not leased to the respondent** **2. Respondent to pay the appellants' costs of the appeal to be assessed on the standard basis** **In Appeal No 577 of 2009:** **3. Appeal allowed** **4. Respondent to pay the appellants' costs of the action including the costs of the trial to be assessed on the standard basis** **5. Cross-appeal struck out** **6. Respondent to pay the appellants' costs of the cross-appeal to be assessed on the standard basis**

CATCHWORDS: REAL PROPERTY – TORRENS TITLE – LEASES – DETERMINATION – EJECTMENT AND RECOVERY OF LAND – where subject land part of an area of a car park – where appellants sought orders for recovery of possession of land and an injunction restraining use of land allegedly unlawfully possessed by respondent – where primary judge refused relief on basis of no evidence of unlawful possession – where appellants argued primary judge erred on finding of facts – whether trial judge so erred

Coulton v Holcombe (1986) 162 CLR 1; [1986] HCA 33, cited
Gold Coast Commerce Club Inc & Anor v Body Corporate for Surfers Plaza Resort Community Titles Scheme 6388 [2008] QSC 323, reversed

COUNSEL: A J H Morris QC, with C A Wilkins, for the appellants
M D Hinson SC for the respondent

SOLICITORS: Porter Davies for the appellants
Hynes Lawyers for the respondent

[1] **KEANE JA:** The appellants brought an action against the respondent seeking, inter alia, the recovery of possession by the appellants of that part of a car park owned by the appellants which is not leased to the respondent by the appellants. The appellants also sought an injunction restraining the respondent, by itself its servants and agents or otherwise, from using or entering upon the car park other than the area leased to the respondent.

[2] The learned trial judge declined to make an order for the recovery of possession because he found that the appellants were not in unlawful possession of the land in question. His Honour also declined to grant the injunction sought by the appellants because that injunction could only be enforced in breach of the appellants' covenant that the respondent should have quiet enjoyment of the leased area of the car park. His Honour made no order as to the costs of the proceedings before him.

[3] The appellants argue that the learned primary judge had no proper or sufficient basis to refuse the relief sought by the appellants on the issues tendered for determination, and the evidence adduced, at trial. A review of these aspects of his Honour's decision should lead, so the appellants say, to a reversal of his Honour's decision on these points and to an order as to the costs of the trial different from that made by his Honour.

Factual background

[4] Only brief reference to the facts of the case is necessary before I address the appellants' arguments. It should be said at the outset that the principal issues litigated at trial concerned the respondent's claim that it held the whole car park under new lease arrangements. The appellants denied that the new leases were binding on them. The appellants succeeded on these issues.

[5] The land the subject of the lease in question is part of the lot described in the proceedings as Lot 5. Lot 5 is part of an area of a car park on the ground floor of a

two-storey building at Surfers Paradise. The car park adjoins the common property of the community title scheme of which the respondent is the body corporate. Access to the car park is via a roller door situated on the common property and via a roller door on Lot 5 to Peninsular Drive (formerly called Whelan Street). The roller door on Lot 5 which gives access to Peninsular Drive is not within that part of Lot 5 which is leased to the respondent.

[6] In the action brought by the appellants, they alleged that the respondent was in possession of all of the land which constituted the car park and not merely that part of Lot 5 leased to it. The appellants alleged, in particular, that the respondent had taken control of both roller doors, and would only permit the appellants' members, guests, invitees and licensees to have access to or use the car park at times of the respondent's choosing. The appellants had pleaded that the respondent was in possession of the part of Lot 5 that was not leased to it.

[7] In the respondent's defence there was a denial that the respondent had been in possession of the unleased part of Lot 5 during the period alleged by the appellants, but it is clear that the denial was directed only to the date on which the appellants had alleged that the respondent had gone into possession.

[8] In this regard, paragraph 12 of the statement of claim alleged relevantly:

> "On or about 18 April 2006, the defendant entered into possession of:
>
> (a) that part of Lot 5 which is not the subject of the Lot 5 Lease;
>
> (b) Lot 342;
>
> (c) Lot 6; and
>
> (d) that part of Lot 35 which the first plaintiff holds as registered lessee, and has at all material times since then remained so in possession."

[9] The respondent's defence was relevantly in the following terms:

> "The Defendant denies the allegations of fact in paragraph 12 of the Third Amended Statement of Claim and says they are untrue and cannot be admitted because:
>
> (a) the Defendant has been entitled to and has been in possession of the land the subject of the new leases (which includes all of that land pleaded in paragraphs 12(a) to (d) of the Third Amended Statement of Claim) pursuant to and by virtue of the new leases since in or about September 1998, such entitlement to possession commencing on 1 July 1998.
>
> (b) accordingly, the Defendant did not 'enter into possession' of the said land on 18 April 2006."

The decision of the learned primary judge

[10] Notwithstanding the state of the pleadings, the learned trial judge found that the respondent was not in unlawful possession of the balance of the car park beyond the common property and the part of Lot 5 the subject of the lease.

[11] His Honour made the following findings in respect of this issue:[1]

> "The allegation [of possession by the respondent] is founded upon the decision of the body corporate to change the hours the roller door at the entrance to the car park was left open.
>
> I have already observed that the entry door is on land owned by the body corporate and controlled by the body corporate. It seems to me that had the body corporate denied guests and members of the bowls club access to the car park through that door, it would be difficult to regard that as taking possession of the balance of the car park. Particularly, I find this a difficult proposition when there is a door to the street presently used as an exit, which remains under the control of the bowls club.
>
> Further, I am satisfied that the body corporate has not deprived the bowls club or its members of access to the car park through the door on body corporate land. All that it has done is to restrict the hours on which the door was left open with the result that persons wishing to access the car park through that entrance at other times are required to obtain and sign for a mil key or otherwise arrange for the body corporate manager to let them in.
>
> There is no evidence that any person has been refused permission to enter the car park through the door controlled by the body corporate on the body corporate land.
>
> In the further amended defence, the defendant denies that it entered into possession of the balance of the car park on the date alleged by the bowl club.
>
> Since the bowls club has failed to establish to my satisfaction the unlawful possession of the unleased portion of the car park by the body corporate the occasion for ordering recovery of possession does not seem to me to have arrived.
>
> I am not satisfied that restricting the period of time the entry door is left continually open infringes any right of the bowls club and, in particular, any property right the bowls club has in the car park.
>
> For that reason the relief sought in paragraph 1 of the amended claim is moot and I decline to grant it."

[12] The appellants complain, understandably, that his Honour's reference to the respondent's defence glosses over the point that, while the defence may have disputed the date of the respondent's entry into possession, it admitted the allegation that it was indeed in possession of the area in question.

[13] The learned trial judge also relied upon the appellants' covenant for quiet enjoyment in favour of the respondent as a ground for refusing the respondent's claim for an injunction. In this regard, his Honour said:[2]

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1 *Gold Coast Commerce Club Inc & Anor v Body Corporate for Surfers Plaza Resort Community Titles Scheme 6388* [2008] QSC 323 at [144] – [151].

2 [2008] QSC 323 at [137] – [142] (citation footnoted in original).

"By clause 2 of the registered lot 5 lease the bowls club covenanted with the body corporate as follows:

> 'The lessee paying the rent and performing and observing the covenants on the part of the lessee herein contained or hereby implied may peaceably hold and enjoy the demised premises during the said term without any interference of or disturbance by the lessor or any person claiming rightfully under or in trust for it.'

The effect of the order sought is to exclude the body corporate absolutely from ingress to or egress from the leased part of lot 5.

I am satisfied that to do so would be to authorise a breach of the covenant for quiet enjoyment.

The issue arises most commonly in relation to shopping centres. In *Dowse v Wynyard Holdings Ltd* ((1961) 79 WN (NSW) 122 at 131) in the context of the shopping centre, Jacobs J said:

> 'I do not find it necessary to determine whether the passageway is a convenience or not, since I consider that the interference with the passageway does interfere with the ordinary use or enjoyment by the lessees of the premises. I have already held that the passageway is an apparent accommodation to the premises and I consider that interference with an apparent accommodation, although that accommodation is off the demised premises, can amount to an interference with the ordinary use or enjoyment of the demised premises themselves … The implied accommodation of the passageway is part of the ordinary use or enjoyment of the premises whether a counter runs along the length of the passageway or whether a shop window runs along its length.'

To similar [effect] was a decision of the Court of Appeal in England in *Owen v Gadd* [1956] 2 QB 99 where it was held that there could be a breach of the covenant for quiet enjoyment without an actual physical interruption into or upon demised premises on the part of the landlord.

In this particular case, the land leased by the body corporate has been leased for the purpose of a car park. The only access to the car park is across the bowls club's land. To deprive the body corporate of the right to traverse the balance of the car park in order to reach the leased portion would render the entire lease futile."

[14] The view expressed in the second paragraph of the passage cited in the preceding paragraph was based on his Honour's apparent understanding that the part of Lot 5 subject to the lease in favour of the respondent could only be accessed from parts of the car park outside the leased area.[3] The appellants contend that this finding was wrong as a matter of fact. They also contend that the covenant for quiet enjoyment in the lease of Lot 5 was not relied upon at trial by the respondent.

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3 [2008] QSC 323 at [13], [142].

[15] In this Court, the respondent concedes that, on the evidence adduced at trial, it is physically possible for vehicles to enter and leave the car park via the leased portion of Lot 5. The respondent also concedes that it did not at any stage at trial seek to rely on the covenant for quiet enjoyment to resist the appellants' claims. The respondent argues that this failure in terms of natural justice can be redressed by this Court.

[16] The difficulty with the respondent's submission is that the only conclusion reached by the learned trial judge was based upon a view of the facts whereby the effect of the injunction sought by the appellants would "exclude the body corporate absolutely from ingress to or egress from the leased part of lot 5". It is conceded that this view was wrong.

[17] The respondent seeks to retrieve the situation by contending that a measure of inconvenience to the respondent would result from the strict enforcement of the appellants' rights in respect of the unleased portion of Lot 5 and that this inconvenience is of such an extent as to involve a substantial derogation from the benefit of the covenant for quiet enjoyment. That contention must inevitably turn on matters of fact and degree. There is no basis in the evidence on which this Court could make the findings of fact necessary to resolve these matters. This difficulty is a consequence of the respondent's failure to litigate these questions below, and cannot be obviated on appeal.[4]

[18] In my respectful opinion, there is no proper basis on which the appellants can be denied their right to recover possession of the unleased part of Lot 5.

[19] On the other hand, the respondent has not manifested a clear intention to deny the appellants' rights in respect of the unleased part of Lot 5. It must be borne in mind that in the action the respondent was asserting, albeit mistakenly, a right to occupy the area in question under the new leases. There is no reason why this Court should assume that the respondent will not respect the Court's determination that the new leases conferred no rights upon it. On this basis, I would be disinclined to grant the injunctive relief claimed by the appellants.

Conclusion and order

[20] I am persuaded that the learned primary judge erred in declining to make an order for the recovery of possession.

[21] The appeal must be allowed to the extent of ordering that the appellants recover possession of that part of Lot 5 not leased to the respondent.

[22] The respondent should pay the costs of the appeal to be assessed on the standard basis.

[23] The appeal in respect of the costs of the trial should be allowed, and the respondent should pay the costs of the action including the costs of the trial to be assessed on the standard basis.

[24] The respondent filed and served a notice of cross-appeal, but the cross-appeal was not pursued, and the respondent agreed that the cross-appeal should be struck out. Accordingly, the cross-appeal should be struck out, and the respondent ought to pay the appellants' costs of the cross-appeal to be assessed on the standard basis.

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4 *Coulton v Holcombe* (1986) 162 CLR 1 at 7 – 8.

[25] **HOLMES JA:** I agree with the reasons of Keane JA and with the orders his Honour proposes.

[26] **MULLINS J:** I agree with Keane JA.