

CITATION: *Body Corporate for Bay Villas on Stephenson CTS 41090 v Stansure Strata Pty Ltd* [2017] QCAT 400

PARTIES: Body Corporate for Bay Villas on Stephenson CTS 41090
(Applicant)
v
Stansure Strata Pty Ltd
(Respondent)

APPLICATION NUMBER: OCL026-16

MATTER TYPE: Other civil dispute matters

HEARING DATE: The matter was heard and decided on the papers

HEARD AT: Brisbane

DECISION OF: **Senior Member Brown**

DELIVERED ON: 3 August 2017

DELIVERED AT: Brisbane

ORDERS MADE:

- 1. The application for decision/order by consent filed 20 June 2017 is refused.**
- 2. The matter is listed for a Directions Hearing on Brisbane at 10:30am on 7 August 2017.**

CATCHWORDS: PROCEDURE – STATE AND TERRITORY COURTS: JURISDICTION, POWERS AND GENERALLY – JURISDICTION – GENERALLY – whether QCAT has an accrued jurisdiction, once seized of a matter within jurisdiction, to hear and determine a dispute not within jurisdiction – whether a tribunal can set its own jurisdictional boundaries

PROCEDURE – CIVIL PROCEEDINGS IN STATE AND TERRITORY COURTS – JOINDER OF CAUSES OF ACTION AND OF PARTIES – PARTIES AND REPRESENTATION – PROPER OR NECESSARY PARTY AND STANDING –

where no jurisdiction in respect of dispute between party and proposed party – s 42 of *Queensland Civil and Administrative Tribunal Act 2009* (Qld) – whether persons interests may be affected by the proceeding – whether desirable that person be joined as a party

Body Corporate and Community Management Act 1997 (Qld), s 227(1)(a), s 227(1)(b), s 229(1), s 229(2)

Family Law Act 1975 (Cth), s 21(2)

Federal Court of Australia Act 1976 (Cth), s 5(2)

High Court of Australia Act 1979 (Cth), s 5

Queensland Civil and Administrative Tribunal 2009 (Qld), s 10(1)(b), s 15(a), s 28(2), s 42(1)

Anisminic Ltd v Foreign Compensation

Commission [1969] 2 AC 147

Harris v Harris [1947] VLR 44

Henderson & Anor v The Body Corporate for Merrimac Heights [2011] QSC 336

Independent Finance Group Pty Ltd v Mytan Pty Ltd & Anor [2001] QCA 306

Jackson v Sterling Industries Ltd (1987) 162 CLR 612

James v Body Corporate for Aarons

Community Titles Scheme 11476 [2004] 1 Qd R 386

McDonald's Australia Ltd v Emaas Pty Ltd [2011] QCAT 293

Owen v Menzies & Ors; Bruce v Owen;

Menzies v Owen [2012] QCA 170

Philip Morris Inc. v. Adam P. Brown Male

Fashions Pty. Ltd (1981) 148 CLR 457

R v Berkeley (1754) 1 Keny 80

R v Brisbane City Council, ex parte: Read [1986] 2 Qd R 22

SCV Group Limited v Body Corporate for Parkview Gardens [2011] QCAT 299

The Mayor and Aldermen Of The City Of London v Richard Henry Cox (1867) LR 2 HL 239

This matter was heard and determined on the papers pursuant to s 32 of the *Queensland Civil and Administrative Tribunal Act 2009* (Qld) (QCAT Act).

REPRESENTATIVES:

APPLICANT: represented by Evans Lawyers

RESPONDENT: represented by Clyde & Co Australia

REASONS FOR DECISION

- [1] Bay Villas on Stephenson is a complex of five buildings and nineteen lots in Pialba, a suburb of Hervey Bay. Stansure was the body corporate manager. Stansure arranged for contracts of insurance to be entered into in respect of the complex. A number of lots in the complex sustained damage as a result of water ingress that occurred at various times. The body corporate says that Stansure failed to take appropriate steps to protect the interests of the body corporate and individual lot owners by, among other things, failing to ensure that appropriate insurance arrangements for the complex were in place.¹
- [2] In its response Stansure alleges, among other things, that any loss or damage suffered by the body corporate was caused by the actions of an insurance broker, Direct Insurance Brokers Pty Ltd (“DIB”).²
- [3] On 14 June 2017, the body corporate filed an application for miscellaneous matters seeking, among other orders, the joinder of DIB as a respondent. On 20 June 2017 the parties filed an application for decision/order by consent seeking the orders originally sought in the earlier miscellaneous matters application. The parties, and DIB, were directed to file submissions addressing the proposed joinder of DIB and the jurisdiction of the Tribunal in respect of the proposed claim by the body corporate against DIB.³
- [4] The substantive proceeding has been listed for hearing on 21 and 22 August 2017.
- [5] For determination is whether an order should be made joining DIB as a respondent. This requires consideration of two issues:
- a) Does the Tribunal have jurisdiction in respect of the proposed claim by the body corporate against DIB;
 - b) Depending upon the finding in relation to the first issue, is it appropriate or otherwise desirable that DIB is joined as a respondent.

Discussion

- [6] The claim which the body corporate seeks to pursue against DIB is in damages in respect of the failure by DIB to provide adequate insurance cover.⁴

¹ Further Amended Statement of Claim filed 18 April 2017.

² Further Amended Defence filed 8 May 2017.

³ Directions, 29 June 2017.

⁴ Applicant submissions, [1].

- [7] The body corporate says that the Tribunal would not have jurisdiction to hear and decide the proposed claim by the body corporate against DIB in a separate proceeding.⁵ The body corporate says that this is not the case in the present proceeding where the Tribunal is ‘already clothed with jurisdiction’.⁶
- [8] The body corporate says that given the pleaded defence of Stansure that it acted on the recommendation of DIB in relation to insurance cover, DIB ought to be bound by any decision against it.⁷
- [9] The body corporate relies upon the decision of the Tribunal in *McDonald’s Australia Ltd v Emaas Pty Ltd*⁸ and says that once the original jurisdiction of the Tribunal is enlivened, it may perform the functions conferred by the *Queensland Civil and Administrative Act 2009* (Qld) (“QCAT Act”). Thus, says the body corporate, the jurisdiction of the Tribunal is an accrued one.⁹
- [10] DIB says that the Tribunal is a creature of statute, deriving its power and jurisdiction from the QCAT Act and the various enabling Acts. DIB says that the Tribunal does not have jurisdiction to hear and determine any claim by the body corporate against it. DIB says that while the Tribunal may exercise its discretion and join a party to a proceeding in circumstances where the Tribunal does not have jurisdiction to hear the proposed claim, such a course necessitates the transfer of the matter to a forum possessing the requisite jurisdiction.¹⁰
- [11] Stansure says that it does not seek the joinder of DIB of its own accord and does not actively encourage or support the order to join DIB sought by the body corporate.¹¹
- [12] In *McDonald’s Australia Ltd v Emaas Pty Ltd*¹² then President Alan Wilson was required to consider whether the Tribunal had jurisdiction to make orders granting injunctive relief before a Notice of Dispute had been referred to the Tribunal pursuant to the provisions of the *Retail Shop Leases Act 1994* (Qld) (“RSL Act”).
- [13] The President noted the Tribunal’s jurisdiction to hear retail tenancy disputes¹³, finding that the dispute between the parties was a retail tenancy dispute. His Honour found that s 33 of the QCAT Act provided a mechanism for an applicant, clothed with jurisdiction, to apply to QCAT.¹⁴ His Honour rejected the argument that the effect of s 33 of the QCAT Act, when read with the RSL Act, was that an application for a retail tenancy

5 Ibid, [4].

6 Applicant submissions, [4].

7 Ibid, [16].

8 [2011] QCAT 293.

9 Applicant submissions, [9].

10 DIB submissions, [20].

11 Respondent submissions, [2].

12 [2011] QCAT 293.

13 RSL Act, s 103.

14 *McDonald’s Australia Ltd v Emaas Pty Ltd* [2011] QCAT 293, [26].

dispute could only be filed after the mediation process under the RSL Act had been attempted. The President found that such an argument invested s 33 of the QCAT Act with an effect and a power it did not have.¹⁵

- [14] The President found that the jurisdiction of the Tribunal to deal with the application for injunctive relief had its foundation in s 9(1) of the QCAT Act which provides:

The tribunal has jurisdiction to deal with matters it is empowered to deal with under this Act or an enabling Act.

- [15] His Honour considered s 9(4) of the QCAT Act:

The tribunal may do all things necessary or convenient for exercising its jurisdiction.

- [16] The President also considered ss 15 and 16 of the QCAT Act which provide:

15 When jurisdiction conferred by enabling Act exercised

The tribunal may exercise its original jurisdiction conferred by an enabling Act if—

(a) a person has, under this Act, applied to the tribunal to exercise its original jurisdiction; or

(b) a person has, under this Act, referred a matter to the tribunal to exercise its original jurisdiction.

16 Functions for jurisdiction conferred by enabling Act

In exercising its original jurisdiction conferred by an enabling Act, the tribunal may perform the functions conferred on the tribunal by this Act or the enabling Act.

- [17] The President considered the powers of the Tribunal, pursuant to ss 58 and 59 of the QCAT Act to make interim orders and grant injunctions. His Honour accepted that there was some tension within the provisions of the RSL Act about the circumstances in which a party may seek urgent relief in QCAT, finding:

... a construction which accepts that the Tribunal has jurisdiction to provide injunctive relief when QCAT has been specifically invested with that jurisdiction does not involve any unacceptable straining in the process of construction.¹⁶

- [18] The dispute between the parties in *McDonald's* was a retail tenancy dispute. It was not contended that the Tribunal lacked jurisdiction to hear and determine the substantive dispute between the parties. The question for determination was whether the Tribunal could make the interim orders

¹⁵ Ibid, [22].

¹⁶ *McDonald's Australia Ltd v Emaas Pty Ltd* [2011] QCAT 293, 6 [29].

sought relating to the retail tenancy dispute. *McDonald's* is not, in my view, authority for the proposition that the Tribunal has any expanded or accrued jurisdiction. *McDonald's* is limited to a consideration of the powers of the Tribunal in relation to a dispute where the Tribunal is seised of jurisdiction in relation to that dispute. *McDonald's* does not involve any consideration of whether the Tribunal has an accrued jurisdiction or when such an accrued jurisdiction may be exercised.

[19] Other than the submission by the body corporate relying upon *McDonald's* I have not been referred to any other authority on the question of whether the Tribunal has an accrued jurisdiction.

[20] In *SCV Group Limited v Body Corporate for Parkview Gardens*¹⁷ the Tribunal considered whether a claim in quantum meruit, framed as an alternative claim in respect of a dispute about a contractual matter, was one within the jurisdiction of the Tribunal. It was argued by the body corporate that:

(the applicant body corporate manager's) alternative claim in a quantum meruit is outside (a claim under the management contract). It is said that a claim of that kind depends upon the absence of a valid contract and, once that is appreciated, it could never be classified as a 'contractual matter' under the BCCMA.

[21] In finding that the Tribunal had jurisdiction in respect of the claim in quantum meruit, then QCAT President Wilson found:

The claim in quantum meruit does not arise out of a contract but by operation of law, but it can also be categorised as a *contractual matter* under the definition in Schedule 6 because it concerns the performance of duties under the terms of the engagement. Even if those terms might subsequently be found to be void, that does not change the nature of the dispute which on any view is a claim for payment for carrying out a duty which, it is alleged, is set out in the caretaking agreements.¹⁸

[22] *SCV Group* appears to have been principally decided on the basis that the applicant was seeking to pursue an alternative remedy, as between the existing parties, having an obvious connection with the original relief sought in the proceeding.¹⁹ President Wilson observed that:

... the Tribunal is invested under s 9 of the QCAT Act with jurisdiction to deal with matters under that Act or enabling Acts in the original, review or appeal jurisdictions – and, under s 9(4) it is given jurisdiction to '*...do all things necessary or convenient for exercising its jurisdiction*'.²⁰

[23] The decision in *SCV Group* can be distinguished from the present application. The claim by the body corporate against DIB is not in respect of the pursuit of an alternative remedy as was being referred to in *SCV*

¹⁷ [2011] QCAT 299, 3 [12].

¹⁸ *Ibid*, 4 [14].

¹⁹ *Ibid*, 4 [17].

²⁰ *Ibid*, 4 [15].

Group. Whilst the body corporate has not filed a draft of the proposed amended application naming DIB as a respondent, it is readily apparent that the body corporate is seeking to pursue an entirely different cause of action, presumably framed in negligence, against another party in circumstances where, for reasons I will outline subsequently, the ‘dispute’ with DIB is not one within the meaning of that term in the BCCM Act. *SCV Group* was decided on the basis of the powers of the Tribunal granted by the QCAT Act once the Tribunal is invested with jurisdiction in respect of the dispute as between the parties.

- [24] The question of accrued jurisdiction, in the context of the *Body Corporate and Community Management Act 1997* (Qld) (“BCCM Act”), was considered by the Supreme Court of Queensland in *Henderson & Anor v The Body Corporate for Merrimac Heights*.²¹
- [25] In *Henderson*, the plaintiffs and the defendant were parties to two agreements: one pursuant to which the plaintiffs provided caretaking services and the other pursuant to which the plaintiffs provided landscape maintenance services. The Supreme Court was asked to consider whether each agreement was enforceable against the body corporate.
- [26] The plaintiffs in *Henderson* had successfully applied in QCAT for an injunction restraining the termination of the caretaking agreement. The QCAT proceeding was then transferred by order of the QCAT President to the Supreme Court. A proceeding in respect of the dispute about the landscape maintenance agreement had been commenced separately by the plaintiffs in the Supreme Court.
- [27] McMurdo J observed that the jurisdiction of the Supreme Court to determine the dispute the subject of the original QCAT proceeding was not clear. McMurdo J considered the application of s 229(2) of the BCCM Act observing that the section appeared to exclude the jurisdiction of the Supreme Court, except that of the Court of Appeal, in relation to what is defined for the purposes of the BCCM Act as a ‘dispute’ including a ‘complex dispute’. McMurdo J found that the disputes in relation to the landscape maintenance agreement and the caretaking agreement were, variously, disputes for the purposes of ss 227(1)(b), 227(1)(d) and 227(1)(f). The dispute in relation to the landscape maintenance agreement had been the subject of an adjudication application to the Office of the Commissioner for Body Corporate and Community Management. That application had been dismissed. McMurdo J observed that, save for the operation of s 229(4) of the BCCM Act, the Supreme Court did not have jurisdiction in respect of the landscape maintenance agreement dispute.
- [28] McMurdo J relied upon the decision of the Court of Appeal in *James v Body Corporate for Aarons Community Titles Scheme 11476*²² where it was held in construing the then equivalent of s 229 (s 184):

²¹ [2011] QSC 336.

²² [2004] 1 Qd R 386, [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 is that the adjudicator is to have exclusive jurisdiction to make orders of the kind which the Act prescribes...

[29] In respect of the jurisdiction of the Supreme Court to deal with the dispute in relation to the caretaking agreement, the plaintiffs also relied upon the powers conferred by s 52 of the QCAT Act to transfer a proceeding to another tribunal, court or entity. McMurdo J dismissed this argument, noting that s 52 does not confer jurisdiction upon other courts or tribunals, and that another court could not deal with a matter where the court lacked jurisdiction.

[30] McMurdo J considered that the determination of the matter before him turned on the operation of s 229(4) of the BCCM Act and whether all of the matters in issue were within the dispute relating to the landscape maintenance agreement that had been the subject of the adjudication application. His Honour noted that there was a possibility that the dispute relating to the landscape maintenance agreement may not have been one within the jurisdiction of QCAT and, if that was the case, his Honour observed:

... no single entity, including the QCAT, could have resolved what is now the subject of this litigation. The potential for that consequence indicates the risk in adopting too narrow an understanding of what is a 'dispute'.²³

[31] Drawing upon the body of case law dealing with accrued federal jurisdiction, McMurdo J considered that the principles affecting accrued jurisdiction were relevant to assessing what constituted the 'dispute' before the Supreme Court. In finding that the court had jurisdiction to hear and decide the dispute in relation to the caretaking agreement, his Honour noted that the issues concerning the enforceability of the two agreements significantly overlapped and that all of the matters in issue in the litigation should be considered as elements of the one controversy or dispute.²⁴

[32] When a court which can exercise federal jurisdiction has its jurisdiction attracted in relation to a matter, that jurisdiction extends to the resolution of the whole matter.²⁵ The question of accrued jurisdiction and when it may be exercised is limited to the sphere of federal courts. The High Court, the Federal Court and the Family Court are all superior courts of record.²⁶ I have not been directed to any authority suggesting that the doctrine of accrued jurisdiction has any application in a tribunal which is an inferior court of record and a creature of statute²⁷.

²³ Op cit 21, [120].

²⁴ Ibid, [123].

²⁵ *Philip Morris Inc. v. Adam P. Brown Male Fashions Pty. Ltd* (1981) 148 CLR 457 per Barwick CJ, [34].

²⁶ *High Court of Australia Act 1979* (Cth), s 5; *Federal Court of Australia Act 1976* (Cth), s 5(2); *Family Law Act 1975* (Cth), s 21(2).

²⁷ *Owen v Menzies & Ors; Bruce v Owen; Menzies v Owen* [2012] QCA 170.

- [33] As I have observed, the body corporate concedes that its claim against DIB is not a dispute for the purposes of the BCCM Act. This concession is properly made. The meaning of 'dispute' is set out at s 227 of the BCCM Act. Section 227 is contained within Chapter 6 of the Act which relates to 'Dispute Resolution'. Section 229(2) provides that the only remedy for a complex dispute is the resolution of the dispute by a specialist adjudicator or an order of QCAT. Section 229(2) only applies to a dispute if it may be resolved under Chapter 6 by a dispute resolution process.²⁸ Section 227 of the BCCM Act sets out an exhaustive list of 'disputes' for the purposes of Chapter 6. These include disputes between a lot owner or occupier and another lot owner or occupier²⁹; or between a lot owner or occupier and the body corporate.³⁰ The dispute between the body corporate and DIB is not a dispute within s 227 of the BCCM Act.
- [34] The reference in *Henderson* to the doctrine of accrued federal jurisdiction is directed to the consideration by McMurdo J of what constituted the 'dispute' before the court. The Supreme Court of Queensland is a court of unlimited jurisdiction. QCAT is an inferior court of record created by statute and has no powers, jurisdictions or authorities other than those authorised by the QCAT Act or the various enabling Acts.
- [35] Any proposed claim by the body corporate against DIB is one in the Tribunal's original jurisdiction. The Tribunal's original jurisdiction is the jurisdiction conferred by an enabling Act to decide a matter in the first instance.³¹ The Tribunal may exercise its original jurisdiction conferred by an enabling Act if a person has applied under the QCAT Act to exercise its original jurisdiction.³²
- [36] A superior court of record, such as the Supreme Court of Queensland, is a court of unlimited jurisdiction which means that, even if there are limits to its jurisdiction, it will be presumed to have acted within it.³³ There is a presumption that a superior court such as the Supreme Court has jurisdiction over any and every justiciable matter arising within the territorial jurisdiction of the Court.³⁴ The distinction between a superior court and an inferior court are considerable. Tribunals are not free to set their jurisdictional boundaries.³⁵ If a Tribunal strays beyond the jurisdictional boundaries set by statute the proceedings are invalid and may be ruled as such by a court.³⁶

²⁸ BCCM Act, s 229(1).

²⁹ *Ibid*, s 227(1)(a).

³⁰ *Ibid*, s 227(1)(b).

³¹ QCAT Act, s 10(1)(b).

³² *Ibid*, s 15(a).

³³ *Jackson v Sterling Industries Ltd* (1987) 162 CLR 612.

³⁴ *R v Brisbane City Council, ex parte: Read* [1986] 2 Qd R 22.

³⁵ *The Mayor and Aldermen Of The City Of London v Richard Henry Cox* (1867) LR 2 HL 239; *Harris v Harris* [1947] VLR 44.

³⁶ *R v Berkeley* (1754) 1 Keny 80; *Anisminic Ltd v Foreign Compensation Commission* [1969] 2 AC 147.

- [37] The Tribunal cannot arrogate to itself jurisdiction not derived from the QCAT Act or an enabling Act. The original jurisdiction conferred upon the Tribunal by the BCCM Act is clear. It does not encompass the dispute between the body corporate and DIB. The powers conferred upon the Tribunal by the QCAT Act to do all things necessary or convenient for exercising its jurisdiction and performing its functions under the QCAT Act or an enabling Act cannot avail a party unless the Tribunal is exercising the jurisdiction conferred by the QCAT Act or an enabling Act. For the purposes of the present application, the 'matter' the Tribunal has jurisdiction to deal with for the purposes of s 9(1) of the QCAT Act is a 'dispute' as identified in ss 227 and 229(2) of the BCCM Act. The Tribunal cannot exercise an 'accrued jurisdiction' as contended for by the body corporate in respect of the dispute between the body corporate and DIB which is not one within s 227 of the BCCM Act.
- [38] The Tribunal may make an order joining a person as a party to a proceeding if the Tribunal considers that (a) the person should be bound by or have the benefit of a decision of the Tribunal in the proceeding; or (b) the person's interests may be affected by the proceeding; or (c) for another reason, it is desirable that the person be joined as a party to the proceeding.³⁷
- [39] In circumstances where the Tribunal does not have jurisdiction in respect of a dispute between a party and a proposed party, the issue of utility or purpose in the proposed joinder is central to the determination of a joinder application. DIB cannot be bound by or have the benefit of a decision of the Tribunal in the proceeding. The Tribunal does not have jurisdiction in respect of any claim by the body corporate against DIB. In my view, whilst DIB's interests may arguably be affected by the proceeding, this does not justify the exercise of the discretion to order a joinder. To order the joinder of a party in respect of whom no orders can be made by the Tribunal would result in considerable expense and inconvenience to that party. Such an outcome would be inconsistent with the objects of the QCAT Act,³⁸ the functions of the Tribunal³⁹ and requirement that the Tribunal act fairly and according to the substantial merits of the case.⁴⁰ The application to join DIB as a respondent is refused.
- [40] For the reasons made clear in *Henderson*, it is not appropriate to make an order transferring the proceeding to another court. The legislature may exclude the jurisdiction of the Supreme Court.⁴¹ The Tribunal has exclusive jurisdiction to decide and grant a remedy in the dispute between the body corporate and Stansure.
- [41] There is no doubt that, on one view, the outcome for the body corporate in the present application might be categorised as raising the type of sterile

³⁷ QCAT Act, s 42(1).

³⁸ *Ibid*, s 3(b).

³⁹ *Ibid*, s 4.

⁴⁰ *Ibid*, s 28(2).

⁴¹ *Op cit* 34 at 25.

jurisdiction question referred to by Atkinson J in *Independent Finance Group Pty Ltd v Mytan Pty Ltd & Anor.*⁴² This may be so but it is the consequence of how the legislature has ordained the way in which body corporate disputes must be conducted. The body corporate may elect to proceed against DIB but it must do so in another place.

[42] The application for a decision/order by consent also seeks orders adjourning the hearing. The matter is listed for hearing on 21 and 22 August. The hearing dates were set in Tribunal directions made on 21 March 2017. In light of my order refusing the joinder of DIB as a respondent, the steps envisaged as required to be taken between the parties are obviated. I decline to make any order adjourning the hearing.

[43] The application for decision/order by consent filed 20 June 2017 is refused.

⁴²

[2001] QCA 306.