

SUPREME COURT OF QUEENSLAND

CITATION: *Club Esplanade Ltd & Ors v Acott & Ors* [2002] QSC 256

PARTIES: **CLUB ESPLANADE LIMITED & ORS**
(applicant)

v

ROBERT GEORGE ACOTT and PATRICIA ANNE ACOTT, ALAN W J WILSON NOMINEES PTY LTD (ACN 005 897 512), CLINTON JAY ALCOCK, OSCAR ARFI, JOHN LINDSAY ARGENT and SHARON ANN ARGENT, JOHN ROSS BALLINGER and MARGARET ANN BALLINGER, PEGGY BARRAND, JOHN WAYNE BELL, KAYE MARIE BETTERIDGE, RICHARD WILLIAM BETTERIDGE (aka RICHARD WILLIAM MURPHY), STAN JOHN BILAS and IRENA RENATA BILAS, BEVERLEY ANN BIGGERS, GRAEME NEIL BLACKWELL AND SHERYL MARY BLACKWELL, STEVEN MICHAEL BLAIR and PAULA ANNE MCKENZIE BLAIR, CHRISTINE RAE BLOOM and STEPHEN MARK WILLIAMS, RICHARD and CAROL ANN BLOOM, BOB QUADARA PTY LTD (ACN 006 072 519), JOHN FREDERICK BOHNER and OLIVINE NADEAU BOHNER, ROSE-FRANCE BONDARENKO, MORVA GWENDOLINE BOX, PETER JAMES BRANDIE, ROBERT ELLIOTT BRENNAN and SARAH HAYES BRENNAN, PETER MICHAEL JOHN BROWN and HELEN JEAN BROWN, TREVOR GRAHAM BROWNE AND JULIE MAY BROWNE, JOHN BERNARD BURGESS and SUSAN GAYE BURGESS, NORMAN CARL and JUDITH ANN BURT, PETER McCULLOCH and JOAN BEVERLEY BURT, SHIRLEY DIANE CAMERON, FRANK CAMINITI and BEVERLEY CAMINITI, LEIGH FRANCIS and CAROLE JEAN CAMPBELL, LUCY CARPENTER, ANNETTE JOY CHRISTIE, NORMAN CLARE and WINIFRED CLARE, PHILIP GEORGE CLARK and GLORIA MAY CLARK, JOANNA LOUISE CLARKE, LOUISE JOAN CLARKE, CLASSIC PROPERTY MANAGEMENT PTY LIMITED (ACN001 566 211), MYRLENE NANCY COLES, JEFFREY BRUCE CONNOR and MILLS K, MARIA TERESA CONTRERAS and RAUL CONTRERAS, JOHN DAVID CRAWLEY and MARILYN JOY CRAWLEY, WENDY JOAN CRITCHLEY, ANTHONY CROWDER, PRUDENCE FRANCES CROWE, CHRISTIE DA COSTA and ANGELA DA COSTA, ANNIE PHILOMENA DALEY, GRACE DECARLI, ROHNAN WARWICK DENNIS, DIAL AN EXCHANGE PTY LTD

(ACN 078 812 469), KEITH MAXWELL DIGHT and MARY BLAIR DIGHT, WALTER RONALD DON and MARY ALICE DON, CARMEL THERESE DOWNES, RAYMOND GEORGE DUNSTAN and MARY BARBARA DUNSTAN, SHERY DURO and DIANE DURO, BETTY FLORENCE EARNEY, VIVIENNE SHIRLEY EBERHARD, JOHN ROBERT EELS, ALLAN KENNETH EKERT, IMELDA MARY ENNIS, ERIC NEIL EVANS, DALE JOHN FARNHAM, GREGORY KAVANAGH FARRELL and MARSHALL W G, BRIAN KEITH FINDLATER and JENNIFER AGNES FINDLATER, BERNARD FISCHER and EVELYN FISCHER, DANIEL WILLIAM FITZGERALD, NEIL JEFFREY FITZMAURICE and LISA CATHERINE FITZMAURICE, BARRY GEORGE FLETCHER and MAREE FLETCHER, BARRY GEORGE and MARIE FLETCHER, FLEXI-POINT HOLIDAYS LTD (ACN 059 189 150), SUSAN FORSTER and JOANNE FORSTER, JONATHAN JAMES FRASER and ANN FRASER, SIMONE FRIEDRICH, DOMENICO GAETANO and CATHY GAETANO, MILOJKO GAJIC and MILEVA GAJIC, RUDOLPH GAJSKI and LYNDA GAJSKI, LEE GALLO, VICKIE GALLO, CAROLYN GARRETT, TONY GEORGEALLIS, LINDA GILFILLAN, JOY MAVIS GRAHAM and FAY JACKSON, LESLIE GEORGE GRAY and DOROTHY JOYCE GRAY, WILLIAM JAMES GREALY and BAMBI RAE GREALY, EDWARD HARCOURT GRIFFETT and HELEN ANNE GRIFFETT, ROBERT WILLIAM GRIMES and SYLVIA GLADYS GRIMES, PETER DAVID GROSSER and KAYLENE ANNE GROSSER, PETER GROSSMAN and CHERYL GALE GROSSMAN, TIONG HUA and SHIK JUI YAO HA, JANICE MARGARET HAMILTON and M M CATCHPOLE, JAMES COLIN HANDLEY, HENRY PANAYOTTI HANNA and ALICE HANNA and MARYLENE HANNA, ANTHONY RICHARD HARRISON, DENIS PETER HEASLY, KLAUS HECTOR, GRAEME HENDERSON and GLENDA HENDERSON, NEVILLE DALLAS HIGGINS and NORAH HIGGINS, NEVILLE DALLAS HIGGINS and NORAH HIGGINS, CHRISTOPHER DOUGLAS HILEY and SENG A GREER HILEY, ALAN JAMES HOOD and JUDITH JANET HOOD, ANDREW MARK HOXEY and MARGARET ALLIS AESCHLIMANN, GRAHAM BENJAMIN HUCKSTADT and LYNETTE ANNE HUCKSTADT, FAY JACKSON and JOY MAVIS GRAHAM, FERGUS BUTLER JACKSON, JAP MANUFACTURING PTY LTD (ACN 001 361 128), CAROLYNE JIGGINS, PETER NOEL JOHNSON and

JOYCE JOHNSON, JOHN ALLAN JONES and BARBARA EMILY JONES, FRANCIS JOSEPH JOYCE and BEVERLEY JOYCE, JOHN JAMES JOYCE and ARLENE PHYLIS JOYCE, RICHARD KAHN, WAYNE WAINA KAHU and MEREHAUTANGI KAHU, PAULINE LORRAINE KAY, JOSEPH EDWIN KEE and BERYL MAY KEE, WALTER PATRICK KEENAN and PATRICA JEANNE KEENAN, WILLIAM KEMPEES and MARGARET ETHEL KEMPEES, SIMON MARC KNIGHT, MAURE KRAMER and HELEN KRAMER, JOZEF LEONARD KULKENS and PATRICIA LOUISE KULKENS, BRIAN ROSS LAMB, CHRIS LAMBIS and FRANCESCA LAMBIS, KEVIN GERARD LANE, NERINGA JULIJA LANE, BERNARD JOHN LATHAM and DIANE LATHAM, DEBORAH MARGARET LE MAISTRE and PAUL GERARD LE MAISTRE, YIK LEE and ALICE LEE, ALEXANDER LENKO and EVA LENKO, LESLEY NEUPARTH NOMINEES PTY LTD (ACN 005 370 598), GIANG LEVAN and CATHY ANNE LEVAN, LESLIE WILLIAM LEWIS and THELMA MAY LEWIS, WILMA LIM, HUI SIU LING, LEONG ENG LING, LEY NA LING, STEVEN JOHN LOCK and MARGARET JOAN LOCK, JOSEPH LOMBARDO and PATRICIA LOMBARADO, GEORGE WALTER LONG, BERNICE LEILA LYNCH, NOEL RODERICK LYNCH, NOEL RODERICK LYNCH and BERNICE LEILA LYNCH and BERNICE LEILA LYNCH, N R & B MR LYONS: LYNCH NOMINEES PROPRIETARY LIMITED (ACN 005 429 783), MICHAEL JON MABBOTT and SANDRA ELAINE MABBOTT, IAN KEITH MACDONALD and VIVIANNE ALICE MACDONALD, MARGARET FLORENCE MAGEE, FRANK MARIOLI and STELLA STAMATAKIS, MARIA MATTIACCIO, ALAN HARRIS MAUGER, VOLA OLIVE MAUGER, ANDREW DAVID McCUTCHEN and CYNTHIA MARGARET McCUTCHEN, MARGARET MARY McDONALD, JOHN McKENNA and JULIAN STAFFORD McKENNA, ANDREW McKIE, BYRAN KENNETH McPHERSON, ALAN WILLIAM MEE and ELROY SUZANNE MEE, JOHN RICHARD MEE and JOAN MARY MEE, AMELIE ANTONIA MENHEERE, SAUL MIDLER, LAUREL MINTO MILLER, SAMMY MIZZI, CARMEL MARGARET MOORE, PETER KENNETH MORRIS and PATRICIA KATHLEEN MORRIS, ROGER ALBERT MORRIS and GABRIELLE MORRIS, DEREK PAUL MULLER, ANDREW MUSGROVE, NOEL RODNEY NEIL and MARGARET MARY NEIL, DANIELLE MARIE NELSON, MICHAEL MILAN NESS, RITA BERYL

NORTHORPE, KATHRYN EVELYN NUNN, FLORENCE JOAN OAKES, DONNA MAREE OTTO, OWEN MOORE OTTO and ELLAINE EDNA MARY OTTO, HENRY OWCHAREK, YOLANDA HOPE PALMA, JEANETTE GRACE PARKER and P M SMITH, LINDA CHRISTINE PEARCE, MAURICE PEAT and CHERYL ANN PEAT, VIRGIL PENDER, ALLAN McINTRYE PENMAN and JANICE ELIZABETH PENMAN, FRANCINE ELIZABETH PERKINS, ANNETTE MICHELLE PETTERSEN, NINO PETTORINO and ELANOR PETTORINO, BARRY GRAHAM PHILLIPS and PATRICIA ANNE PHILLIPS, BARRY GRAHAM PHILLIPS and PATRICIA ANNE PHILLIPS, MICHAEL GEORGE PICHLER, EILEEN PIGDON, KEVIN WILLIAM PITTS and JUDITH PITTS, GRAHAM MITCHELL POLKINGHORNE and JUDITH POLKINGHORNE, TRICIA MARGAARET PURCELL, JAMES WEIR QUAITE and ELSIE MAY QUAITE, QUINN GROUP (GOLD COAST) PTY LTD (010 146 817), QUINN GROUP (SUNCOAST) PTY LTD (ACN 009 926 238), ALAN JAMES RICHARD and HELEN CHRISTINE RICHARDS, DONALD GRAHAME RICHARDS, GERALD REGINAL RICKARD and DENISE JEAN RICKARD, RONALD ALFRED ROBERTS and ANDREW HILTON ROBERTS and DIANE MARGARET ROBERTS, ROBOROUGH PTY LTD (CAN 006 214 562), STEPHEN ROCHE and LYNNE ROCHE, ELIZABETH ROSS, JEAN NOEL ROUSSEY and JENNIE MARIE ROUSSEY, NEIL RICHARD ROWLEY, BRIAN DAVID RUSSELL and RAELEEN RITA RUSSELL, JAMIE ANDRE SCHIAVONS, FREDERICK JOHN SCOTT-RAYNSFORD, THOMAS WILHELM SENDIN and ROSEMARY SENDIN, WILLIAM JOSEPH SHARP and JOAN DAPHNE MARY SHARP, HAROLD JAMES SHAW and JEAN MARY SHAW, ROMANAS SILINIS and BARBARA HELEN SILINIS, PAUL JASON SIMMS and SHANE ALEXANDER HERBERT, JENNIFER LUCY SJODIN, GREGORY JOHN SMITH, MARGARET MADELINE SMITH, PETER GORDON SMITH, REBECCA SMITH, VICTOR SMITH and KERRY SMITH, MICHAEL JOHN SMITHURST, JOHN SPINELLO, PHILLIP MAURICE SPLITTER, LEONARD WILLIAM STANFORD and EVELYN STANFORD, PAUL ANTHONLY STAPLETON, CHARLES JOHN STARR and KATHLEEN DOROTHY STARR, CHARLES TREVOR STARR, JEFFREY CHARLES STARR, MATTHEW JOSEPH STARR, SIGURDS ANDRIS STOLCS and TONI BERNADETTE STOLCS, ANITA THEODORA SUSTRUNCK, DIANA GAY KILLEEN

SWEETMAN and MARY ELIZABETH SWEETMAN, LOU TAMBURRO and FAYE TAMBURRO, EVELYN TAN, TANNER JAMES ALBERT TANNER, DONALD ANGUS TAYLOR, LOIS ANNE TAYLOR, EDWARD ANDREW THOMAS and MARGARET DAWN THOMAS, SCOTT ROBERT THOMAS, JUDITH ANNE THOMPSON, LESLIE MAXWELL THOMPSON and CHERYL MAREE THOMPSON, COLIN LESLIE TINKER and VALERIE DAWN TINKER, RAMON BRUCE TOMPKINS, DAVID TONKINSON and VICKI JOY TONKINSON, BRIAN JAMES TOOMEY and BERYL TOOMEY, TOTAL PERSON PTY LTD (ACN 005 963 904), GRAEME WALTER TOWNSEND and SUSANNE MARGARET TOWNSEND, JULIE FAYE TULLOCH, ANNIKA THERESE TURPIE, DAVID RICHARD TYRER, WILLIAM MICHAEL VAUX, ANNE CHRISTINE VIDIS, AMEDEO BASIL VIRGONA and TERRY ANNE VIRGONA, TREVOR DOUGLAS VOSS and MARINA VOSS, IVAN VUILLEMAIN, MICHAEL VUKSIC and LORIE VUKSIC, RUTH LYNETTE WALKER, SUSAN WARD, ERIC WATKINS and SANDRA WATKINS, MARK LYNLEY WATSON, SUE VANESSA WATTS, GRAHAM JOSEPH WEISS, WILLIAM LEWIS WESTON and JOHN WINIFRED WESTON, LYNDYSAE CLAIR WHEEN, GRAHAM ALAN WHITE, CHRISTOPHER EDWARD WILLIAMS, DOROTHY JOAN WILLIAMS, TIMOTHY VAUGHAN WILLIAMS, GORDON RANKIN WILSON and BETTY ANNE WILSON, KEITH SIDNEY WOOD and ELSA PAULINE WOOD, ELEANOR HARLE YOUNG and STUART LAMB YOUNG, STEPHEN JOHN YOUNG, MAWN YOUNG, JUDITH ANN ZONNEVELD
(respondents)

FILE NO/S: SC No 5922 of 2002
 SC No 5926 of 2002
 SC No 5927 of 2002
 SC No 5929 of 2002
 SC No 5931 of 2002
 SC No 5932 of 2002
 SC No 5933 of 2002
 SC No 5935 of 2002
 SC No 5936 of 2002
 SC No 5937 of 2002

DIVISION: Trial

PROCEEDING: Application

ORIGINATING COURT: Supreme Court at Brisbane

DELIVERED ON: 19 August 2002

DELIVERED AT: Brisbane

HEARING DATE: 13 August 2002

JUDGE: WILSON J

ORDER: **Applications dismissed**

CATCHWORDS: REAL PROPERTY – STRATA AND RELATED TITLES AND OCCUPANCY – GENERAL MATTERS – COMMON PROPERTY – where applicant company managed timeshare scheme and sought to appoint statutory trustees for sale, pursuant to s 38 *Property Law Act 1974* (Qld), of unit building co-owned by timeshare members – where one of the timeshare co-owners opposed the application – whether applicant had standing to bring application – whether proposed sale would effect a winding up of the business of the timeshare scheme

Property Law Act 1974 (Qld), s 38

COUNSEL: N Thompson for the applicant
J Critchley (by leave) for the respondent Wendy Joan Crichley

SOLICITORS: Gustafson's Solicitors for the applicant
J Critchley (by leave) appeared on behalf of the respondent Wendy Joan Critchley

- [1] There are 10 applications pursuant to section 38 of the *Property Law Act 1974* for the appointment of statutory trustees for sale. The applications relate to the 10 lots in building units plan 1463. Those lots, together with the common property, are situate at 116 The Esplanade, Surfers Paradise, and operated as a timeshare resort.
- [2] Ownership of each lot is comprised of 51 undivided shares as tenants in common. Each lot was leased to Club Esplanade Limited, the applicant, by the developer of the resort, Quinn Group Gold Coast Pty Ltd, from 25 November 1986 until 31 December 2082. The leases are registered.
- [3] The applicant is a public company limited by guarantee. It operates the resort on behalf of its co-owners, who are referred to as "members of the Club". Each 1/51 interest is referred to as "a week", there being a total of 510 "weeks". Mr Raymond George Dunstan, the president and public officer of the applicant, has summarised how the scheme operates in these terms:

"8. Each lot is divided into 51 fractional interests, making a total of 510 fractional interests, each 1/51st interest being usually referred to as a 'week'. A purchaser of one week acquires 'a Prescribed Interest' under Corporations Legislation, which interest consists of title to at least one week in the particular Lot in which the week was purchased, together with entitlement to membership in the Club, upon submitting an application. Pursuant to the Club's Articles of Association, each member is

entitled to occupy the Lot in which the week is owned during the specific week or in the period each year for which it was purchased, subject to compliance with the Articles.-----"

He went on:

"9. Under the Articles, the 51 weeks in each Lot are assigned specific classifications, together with a related permanent membership number, in accordance with the Schedules contained in the Articles 6 to 8. The weeks are numbered 1 to 52 consecutively, from January through December. Week 9 in each Lot is set aside for maintenance. Six weeks in each Lot are fixed entitling the owner/member to occupancy of the particular unit for a specific week during the Christmas, New Year or Easter holidays. Thirteen weeks in each Lot are assigned to various Autumn and Spring holiday periods, and the balance of thirty-two weeks to General Floating Time. Non-fixed weeks must be booked through the resort management in advance for the appropriate period on a first come first serve basis.

10. The members' rights and obligations in respect to their weeks are prescribed by the Articles. Each member's entitlement to occupy the relevant Lot for the relevant week (see Articles 6-10) as well as other rights, like voting (see Article 4) is subject to the member's obligation to pay annual levies and otherwise comply with the Articles (See Articles 12-15, 22 in particular). The number of votes at Members Meetings at which members are entitled to vote are determined by the number of weeks owned, one vote for each week regardless of classification or Lot. (See article 4.)"

- [4] The building is 28 years old and expensive to maintain. The applicant seeks to have its solicitors, Robert Stephen Gustafson and John Graham Campbell, appointed as statutory trustees for the sale of each lot. In April 2002 it entered into a contract with Elvio Pugliesi and/or his nominees, whereby it undertook to use its best endeavours to have statutory trustees for sale appointed and to have them execute the contract for sale for \$2.9 million.
- [5] According to Mr Dunstan, the applicant is or is entitled to be registered as owner of at least 1/51 share as tenant in common in each of the 10 lots, and so it makes these applications in its capacity as a co-owner.
- [6] Although all the tenants in common were served, pursuant to an order made by Justice White on 4 July 2002, only one of them, Wendy Joan Critchley, appeared to oppose the applications. With the leave of the Court, her husband represented her at the hearing.
- [7] Mrs Critchley has three weeks in each of lots 7 and 8 - that is, she is a co-owner as tenant in common in each of those lots to the extent of 3/51 undivided shares.
- [8] Mrs Critchley challenged the applicant's standing to bring these applications. As her husband pointed out in submissions, according to the spreadsheet list of

members which is exhibited to Mr Dunstan's affidavit, the applicant does not have any interest in lots 1, 6 and 8. Mr N Thompson of counsel, who appeared for the applicant, informed the Court that the applicant holds unregistered transfers from the developer. However, those transfers were not in evidence and Mr Critchley opposed their late receipt into evidence. On the evidence before me the applicant has not shown that it has standing to bring the applications with respect to lots 1, 6 and 8.

- [9] If that were the only difficulty I saw in the applications, I should be inclined to allow further evidence. But it is not. What is proposed is simply that the 10 lots be sold for one lump sum, and the net proceeds of sale be divided equally amongst the holders of the 510 interests as tenants in common.
- [10] In 1997, the articles of association of the applicant were amended to require all members to put their certificates of title in escrow with its solicitors and to grant it irrevocable powers of attorney. Not all members have done so.
- [11] According to the contract, the property is to be sold free from encumbrances. There is no mention of the registered leases, which will not expire for another 80 years. There is no proposal advanced for the surrender of the leases. There is no proposal for the winding up of the timeshare business or the winding up of the applicant and the distribution of any surplus among the members.
- [12] Mrs Critchley's position seemed to be that there is provision in the articles of association of the applicant for changes in membership, and that the new owner ought, in effect, to buy the 510 weeks. That is, that he ought to acquire not just the freehold title to the 10 lots in the building units plan, but also the bundle of timeshare rights and obligations associated with membership of the applicant. She was concerned that, if this were not done, the outgoing owners may have ongoing liabilities under the articles. I note articles 13 (annual contributions), 16.2 (special levies), and 11.3 (liability of a person to pay contributions, notwithstanding having ceased to be a member).
- [13] Further, there is the question of how the net proceeds of sale should be distributed. The lots are unlikely to be of equal value. Some weeks, for example at peak holiday times, are potentially more valuable than others. However, there was no evidence of present values. All Mr Critchley could point to was the variations in price in 1986.
- [14] In the usual case, an application for the appointment of statutory trustees for sale is granted quite readily, the right to approach the Court for such relief being seen as an incident of co-ownership of property. On the material it seems that it may have become, or at least may fast be becoming, the case that it is no longer commercially viable to use the property as a timeshare resort. However, merely to sell the real estate interests would not effect a winding up of the business relationships between the parties, and the proposed method of distributing the net sale proceeds may not result in returns to the members that accord with the true value of their respective interests. For these reasons, I am unwilling to grant the applications for the appointment of statutory trustees for sale.
- [15] The applications are dismissed.