

SUPREME COURT OF QUEENSLAND

CITATION: *James & Anor v The Body Corporate Aarons Community Title Scheme 11476* [2002] QSC 386

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

FILE NO/S: S 8834 of 2002

DIVISION: Trial Division

PROCEEDING: Application for declaratory relief and injunction

ORIGINATING COURT: Supreme Court Brisbane

DELIVERED ON: 25 November 2002

DELIVERED AT: Brisbane

HEARING DATE: 14 November 2002

JUDGE: Holmes J

ORDER: **Application be dismissed**

CATCHWORDS: PROCEDURE – COURTS AND JUDGES GENERALLY –
COURTS – ATTEMPT TO OUST JURISDICTION OF
COURT
Applicant owners and letting agents seek declarations and an injunction against respondent body corporate regarding repairs to units – whether s 184 of the *Body Corporate and Community Management Act 1997* applies to the dispute - whether the application is within the exclusive jurisdiction of an adjudicator by virtue of s 184 – whether the court’s jurisdiction to provide any remedy in respect of the dispute is excluded by s 184(2).

Acts Interpretation Act 1954, s 14(2), s 35C(1)
Body Corporate and Community Management Act 1997, s 182, s 183, s 184, s 223

Forster v Jododex Australia Pty Ltd & Anor (1972) 127 CLR 421, applied
Independent Finance Group Pty Ltd v Mytan Pty Ltd & Anor (2001) Q Conv R 54-558

Hemruth Advertising v Karafotias (1988) 46 SASR 532
Law Society of New South Wales v Weaver [1974] 1 NSWLR 271, applied
North Wind v Proprietors – Strata Plan 3143 (1981) 2 NSWLR 809, applied
Re Totalisator Administration Board of Queensland [1989] 1 Qd R 215, applied

COUNSEL: Mr R Lilley for the applicants
 Mr D Murphy for the respondent

SOLICITORS: McDonald Chesters for the applicants
 Hickeys Lawyers for the respondent

- [1] The applicants are the owners of a unit in a holiday unit complex at Surfers Paradise which is held under a community titles scheme. They also hold site management rights and letting rights for the scheme. The respondent is the scheme’s Body Corporate. The standard of the building work on the units seems to have been somewhat wanting, and there has been a longstanding dispute between the applicants and the respondent as to repairs. I have declined to proceed with an application for declaratory relief and an injunction requiring specific work to be performed on the basis that there exist areas of dispute as to the nature of the work required. However, there remains the question as to whether the application should be adjourned with appropriate directions so that it can be brought on for trial, or whether it should be dismissed as being beyond the jurisdiction of the court. The respondent submits that the dispute between the applicants and the respondent is, by virtue of s 184 of the *Body Corporate and Community Management Act 1997* (“the *BCCM Act*”), within the exclusive jurisdiction of an adjudicator.

Dispute resolution under the BCCM Act

- [2] Section 184 provides:
- “**184. (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.
- (3)** However, subsection (2) does not apply to a dispute if-
- (a) an application for an order of an adjudicator to resolve the dispute is made to the commissioner; and
- (b) the commissioner dismissed the application under part 5.”

- [3] Chapter 6 of the *BCCM Act* deals with dispute resolution. It commences with s 182 which defines dispute for the purposes of the chapter, not by reference to subject matter, but by reference to the parties involved. Relevantly here:
- “‘Dispute’ means a dispute between –
- ...
- (b) the body corporate for a community title scheme and the owner or occupier of a lot included in the scheme; or
- ...
- (d) the body corporate for a community title scheme and a service contractor for the scheme who is also a letting agent for the scheme; or
- (e) the body corporate for a community title scheme and a letting agent for the scheme.”
- [4] Section 183 sets out the purpose of chapter 6. It describes the chapter as establishing arrangements for resolving disputes about: contraventions of the *BCCM Act* or Community Management Statements; the exercise of rights or powers or the performance of duties under the *BCCM Act* or Community Management Statements; and matters arising in relation to the engagement of Body Corporate managers, service contractors and letting agents. Part 2 of the chapter establishes the office of Commissioner for Body Corporate and Community Management, while part 3 provides for appointment of adjudicators, either as specialist adjudicators or departmental adjudicators.
- [5] Part 4 deals with applications for orders. In the first instance a party to a dispute must make an application in writing to the commissioner, who may require further information or may reject an application if the order sought is not one that an adjudicator can make. Otherwise, pursuant to s 194, the commissioner is to give written notice to persons affected and the Body Corporate and invite written submissions, as well as allowing inspection of the application and any submissions, if required. Section 197 enables the commissioner, in circumstances of urgency, to dispense with these initial steps and to refer the application to an adjudicator for a department adjudication so that an interim order can be made if necessary. Part 5 of the chapter deals with case management. The commissioner can choose between referral to mediation or adjudication. Section 201 permits the commissioner, if satisfied that the dispute should be dealt with in a court of competent jurisdiction, to dismiss the application.
- [6] Part 9 of the chapter concerns adjudication. Once the commissioner makes the case management recommendation that an application be the subject of adjudication, it must be referred to an adjudicator. Under s 220 he or she must investigate the application, although it may be dismissed if it appears that the adjudicator does not have jurisdiction or it is frivolous or vexatious. In the investigation the adjudicator must observe natural justice and act as expeditiously as is consistent with proper consideration of the application, but is not bound by the rules of evidence. The adjudicator’s investigative powers extend, under s 221, to requiring information and entry and inspection of premises.

[7] Part 10 provides for the orders which the adjudicator may make:

“ **Orders of adjudicators**

223.(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; or
- (b) the exercise of rights or powers, or the performances of duties, under this Act or the community management statement; or
- (c) a claimed or anticipated contravention of the terms of, or the termination of, or the exercise of rights or powers under the terms of, or the performance of duties under the terms of-
 - (i) the engagement of a person as a body corporate manager or service contractor for a community titles scheme; or
 - (ii) the authorisation of a person as a letting agent for a community titles scheme.

(2) An order may require a person to act, or prohibit a person from acting, in a way stated in the order.”

Examples of orders which may be made follow in subsection (3). Section 225(1) enables the adjudicator to make an interim order where it is necessary. Section 226 provides for costs, while s 230 enables the adjudicator to add any ancillary and consequential provisions necessary or appropriate to his or her order. There is one specific limitation: the adjudicator may not resolve questions about title to land (s 231).

[8] Part 11 provides for enforcement of orders. Section 232 deals with notice of orders to affected persons while s 233 enables a copy of the adjudicator’s order to be registered in the Magistrates Court and enforced as if it were a judgment of that court. An appeal lies from an adjudicator to the District Court on a question of law; part 12 deals with such appeals. Nowhere else in the chapter is there specific provision for recourse to the courts, in contrast with provision in other chapters for applications to be made to the District Court.¹

Does s 184 (2) apply to this dispute?

[9] In this case the applicants’ dispute with the respondent seems primarily to have arisen from their role as letting agent. In that capacity they make bookings for

¹ Applications may be made for orders under s 46(2), adjusting a lot entitlement schedule; s69(1), approving a process for reinstatement of a damaged building; s75, terminating the scheme on just and equitable grounds, s82(3), amalgamating schemes.

rentals of the units for remuneration, and have lost, they say, custom because of the building's condition. They also have concerns as to their own liability as building managers should the state of the building cause any entrant injury. The terms on which they obtained their management rights are not before the court, but it may be that they are "service contractors" as defined by s 16 of the *BCCM Act*. But whether they be regarded as falling within (b) (d) or (e), it does seem that their position is such as to bring their dispute with the respondent within s 182.

- [10] The applicants allege that the respondent is, in failing to maintain the property, and particularly the roofing membranes, in good condition, in breach of s 87(1) of the *BCCM Act* and s 108 of the *BCCM Act (Accommodation Module) Regulations*, and has failed to carry out its duties under those provisions. They seek a declaration that the respondent must:

- “(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”.

and an injunction requiring the respondent to carry out such work as is necessary to comply with its obligations under that declaration.

- [11] Thus the dispute is one about alleged contraventions of the *BCCM Act* by the Body Corporate and the performance of its duties under the Act, and falls within the express purposes of chapter 6 as set out in s 183(1). The adjudicator is able to make orders, including a declaratory order about those matters pursuant to s 223(1)(a) and (b). The examples of the orders which may be made under s 223(3) include: “(c) order the body corporate ... to have repairs carried out”. An interim order may be made and any ancillary provisions necessary can be added. There is no doubt that this is a dispute which an adjudicator could make an order to resolve.

Is this court's jurisdiction excluded by s 184(2)?

- [12] The jurisdiction of a superior court can only be excluded, it is well recognised, by the clearest expression of legislative intent². Whether s 184 achieves the exclusion of the jurisdiction of this court in relation to disputes to which the section applies has not previously been decided. The question received some attention in *Independent Finance Group Pty Ltd v Mytan Pty Ltd & Anor*³. In that case the Court of Appeal was concerned with the power of an adjudicator to make orders concerning the validity of a motion for exclusive use of areas in a unit complex. The questions the applicant posed for the court were whether the orders were within the powers of the adjudicator under s 223 and whether the effect of his orders was to resolve a question about title to land so as to be beyond jurisdiction by virtue of s 231. The respondents mounted a counter-argument that s 184 precluded an appeal to the Court of Appeal from the District Court under s 118(3) of the *District Court Act*; the only remedies available were the order of an adjudicator or the decision of the District Court on appeal.

² *Forster v Jododex Australia Pty Ltd & Anor* (1972) 127 CLR 421 at 435; *Law Society of New South Wales v Weaver* [1974] 1 NSWLR 271 at 272; *Re Totalisator Administration Board of Queensland* [1989] 1 Qd R 215.

³ (2001) Q Conv R 54-558.

- [13] The court in *Independent Finance* held that s 184 did not operate to limit rights of appeal from the District Court. In the course of considering the provisions of the *BCCM Act*, Atkinson J expressed the view that the adjudicator had exclusive jurisdiction to deal with disputes under chapter 6⁴. On the other hand, Thomas JA, while acknowledging that the legislature had “deliberately established a mechanism for the resolution of community title scheme disputes” nonetheless considered that there remained a concurrent jurisdiction in the Supreme Court, although the court would be reluctant to restrain a party from exercising its rights in the manner envisaged by the legislation⁵. McMurdo P expressed a “preliminary view”, that “it would be surprising if in the absence of the clearest words, the inherent jurisdiction of the Supreme Court was diminished by chapter 6”⁶.
- [14] The heading to s 184, “Exclusivity of dispute resolution provisions” is part of the Act⁷, and part of the provision itself⁸. It indicates, plainly enough, an intention to confer jurisdiction in dispute resolution in accordance with the provisions of chapter 6, excluding other fora. The wording of the section itself is unusual: rather than providing for exclusive jurisdiction in so many words, s 184(2) speaks in terms of “the only remedy” being the order of an adjudicator or that of a District Court on appeal on a question of law. But those words “the only remedy” are not ambiguous; it is difficult to see what meaning they can have other than that in the circumstances to which s 184(2) applies, the only manner in which the dispute itself can be resolved is by the means prescribed: the adjudicator’s order or that of the District Court on appeal.
- [15] Mr Lilley, for the applicants, argued that the absence of any equitable jurisdiction in the adjudicator, as opposed to the statutory power to make declarations and grant orders in the nature of injunctions, was significant. If that is so, it is answered in my view by the fact that the legislature in s 184(2) has specified the remedies available, and must by implication be taken to have intended to exclude equitable remedies.
- [16] There are other reasons, beyond the clear words of the provision, for construing s 184(2) as exclusive of remedies to be obtained in other jurisdictions. Section 14A(1) of the *Acts Interpretation Act* 1954 requires that an interpretation be preferred that will best achieve the purpose of the Act. The secondary objects of the *BCCM Act*, set out in s 5, include:
- “(h) to provide an efficient and effective dispute resolution process”.

Section 183 identifies the purpose of chapter 6 as establishing arrangements for resolving disputes in the context of community titles schemes. The purpose of chapter 6, as identified by s5 (h) and s183, is best met by an interpretation of its provisions which recognises the primacy of the dispute resolution procedure it provides.

- [17] Chapter 6, as already outlined, creates the positions of commissioner, adjudicators and mediators, and provides for case management and for management and adjudication in such a way as to constitute, in my view, a comprehensive code for

⁴ At 60693.

⁵ At 60687.

⁶ At 60683.

⁷ Section 14(2) *Acts Interpretation Act* 1954.

⁸ Section 35C(1) *Acts Interpretation Act* 1954.

dispute resolution. The existence of such a code for dealing with the subject matter is at least an indication of exclusivity. As Lunn AJ observed in *Hemruth Advertising v Karafotias*⁹,

“The efficient operation of a specialist tribunal with powers to conciliate and to resolve disputes in an expeditious and inexpensive way would be partly defeated if parties to such a dispute could resort to other courts as they saw fit.”

The combined functions of commissioner, mediator and arbitrator under chapter 6 constitute a specialised mechanism peculiarly suited to speedy, cheap and relatively informal resolution of community titles scheme disputes.

- [18] The conclusion that exclusivity is intended in respect of the disputes to which s 184(2) applies is reinforced by the existence of provisions which have the effect of allowing recourse to other remedies (including court orders) in specified situations: subsection 184(3), which removes the dispute from the purview of s 184 (2) if the commissioner dismisses the application, and s 201(2), which entitles the commissioner to dismiss an application if he or she is satisfied that it should be dealt with in a court of competent jurisdiction.
- [19] Section 184(2) has, I conclude, the effect of confining those remedies which may be given in disputes to which it applies to those available from an adjudicator under the chapter. Other orders or declarations – for example as to the jurisdiction of the commissioner, or of an adjudicator – are unaffected; but any order such as that sought in the present case, designed to resolve a dispute which can equally be resolved by an adjudicator’s order under s 223, is unavailable. It follows that the jurisdiction of the court to provide any remedy in respect of this dispute is excluded by s 184.
- [20] If I am wrong as to this question of jurisdiction, I would, in any event, exercise my discretion against proceeding with the application. The injunctive relief sought is of indefinite duration, and imprecise as to its requirements; of a kind, in short, which the court would be loath to supervise. It is better dealt with by a mechanism designed precisely for such disputes¹⁰; and the powers of the adjudicator are ample to grant the orders sought.
- [21] I dismiss the application.

⁹ (1988) 46 SASR 532 at 534.

¹⁰ *North Wind v Proprietors – Strata Plan 3143* (1981) 2 NSWLR 809 at 815.