SUPREME COURT OF QUEENSLAND

CITATION:	*Body Corporate of the Lang Business v Green* [2008] QSC 318
PARTIES:	**BODY CORPORATE OF THE LANG BUSINESS CTS 5941** (plaintiff) **v** **GORDON GREEN** (defendant)
FILE NO/S:	7910 of 2007
DIVISION:	Trial Division
PROCEEDING:	Application
ORIGINATING COURT:	Supreme Court
DELIVERED ON:	5 December 2008
DELIVERED AT:	Brisbane
HEARING DATE:	9 October 2008
JUDGE:	Daubney J
ORDER:	**1. Application dismissed** **2. The plaintiff shall pay the defendant's costs of and incidental to the application**
CATCHWORDS:	PROCEDURE – SUPREME COURT PROCEDURE – QUEENSLAND – PROCEDURE UNDER RULES OF COURT – SUMMARY JUDGMENT – where the plaintiff body corporate claims contributions from the defendant pursuant to s 99 of the *Body Corporate and Community Management (Standard Module) Regulation* 1997 (Qld) – where the defendant resists the claim and requests information relating to the calculation of, and resolutions giving rise to, the claimed contributions – whether the matters raised in the defence fall exclusively within the dispute resolution provisions of the *Body Corporate and Community Management Act* 1997 (Qld) – whether summary judgment should be entered in favour of the plaintiff *Body Corporate and Community Management Act* 1997 (Qld), s 227, s 228, s 229, s242 *Body Corporate and Community Management (Standard Module) Regulation* 1997 (Qld), s 99 Uniform Civil Procedure Rules 1999 (Qld), r 292

Deputy Commissioner of Taxation v Salcedo [2005] 2 Qd R 232, applied
Elderslie Property Investments No 2 Pty Ltd v Dunn & Anor [2007] QSC 192, cited
Independent Finance Group Pty Ltd v Mytan Pty Ltd [2003] 1 Qd R 374, cited
Jessup v Lawyers Private Mortgages Ltd & Ors [2006] QSC 3, considered
JM Kelly (Project Builders) Pty Ltd v Toga Development 31 Pty Ltd & Anor (No 2) [2008] QSC 312, cited

COUNSEL: M A Hindman for the plaintiff
W L Cochrane for the defendant

SOLICITORS: McInnes Wilson for the plaintiff
WHD Lawyers for the defendant

[1] The plaintiff is a body corporate created under the *Body Corporate and Community Management Act* 1997 ("BCCM") constituted by the various owners of the lots in a community titles scheme. The defendant owns one of the lots in the community titles scheme for which the plaintiff was created.

[2] By a claim filed on 7 September 2007 ('the Claim") the plaintiff claims $325,930.98 'as monies due and owing by the Defendant to the Plaintiff pursuant to s 99 of the *Body Corporate and Community Management (Standard Module) Regulation 1997*".

[3] On 7 December 2007, the plaintiff filed an application seeking summary judgment in that sum plus interest. This application was adjourned by consent to a date to be fixed. On 27 May 2008, the registry issued a Case Flow Management Intervention Notice to the plaintiff requesting that a plan to facilitate the "timely determination of the proceeding" be provided to the registry. Such a plan was prepared and submitted by the plaintiff. On 24 June 2008, apparently without notice to the defendant, the following order was made in terms of the plan:

> "1. That if the Plaintiff intends to pursue the Application for Summary Judgment it be re-listed by 30 August 2008.
>
> 2. If Judgment is not obtained that disclosure be provided by each party by 4:00pm, 15 September 2008 and that inspection of documents and provision of copies of documents pursuant to the UCPR be made by 4:00pm, 29 September 2008.
>
> 3. That any amendments to the Claim arising out of disclosure be made by 4:00pm, 13 October 2008 and any consequential amendments to the Defence by 27 October 2008.
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> 4. That there be a Mediation or Case Appraisal by 31 October 2008.
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> 5. That the Request for Trial be filed by 07 November 2008."

[4] The application for summary judgment was not listed by 30 August 2008.

[5] On 24 September 2008, the plaintiff filed a further application seeking that Orders 1 and 2 of the orders of 24 June 2008 be set aside, and that the plaintiff's application for summary judgment filed 7 December 2007 be listed for hearing on the return date of the 24 September application.

[6] There are then two primary questions before me:

1. whether, notwithstanding the failure to comply with the order of 24 June 2008, I should entertain the summary judgment application; and

2. if so, whether summary judgment should be entered in favour of the plaintiff.

[7] These questions, however, are not wholly discrete – determining whether to allow the application for summary judgment to proceed necessarily requires at least some consideration of the merits of the application itself. I will therefore turn to consider the summary judgment application before considering the impact the non-compliance with the order of 24 June 2008.

The pleadings

[8] The money claimed is said to be owing pursuant to unpaid Notices of Contribution issued to the defendant on 26 August 2006, 26 September 2006, 16 November 2006, 14 February 2007 and 26 June 2007 in respect of his Lot 12 in Community Titles Scheme 5941.

[9] The plaintiff claims that it is now entitled to recover the amounts set out in these notices as a debt due under s 99 of the *Body Corporate and Community Management (Standard Module) Regulation* 1997 (Qld) ("the Regulation").

[10] Section 99(1) of the Regulation provides:

> "(1) If a contribution or contribution instalment is not paid by the date for payment, the body corporate may recover each of the following amounts as a debt—
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> (a) the amount of the contribution or instalment;
>
> (b) any penalty for not paying the contribution or instalment;
>
> (c) any costs (***recovery costs***) reasonably incurred by the body corporate in recovering the amount."

[11] The defendant admits having been served with purported Notices of Contribution on the dates indicated by the plaintiff but complains that he has previously requested, but not been provided with, further details of the calculations contained in the notices, namely information relating to the method of calculation, and the basis upon which the levies referred to in the notices were agreed upon by the Committee of the Body Corporate. On this basis, the defence filed 5 October 2007 "denies that the notices served on him were served in accordance with or calculated in

accordance with the provisions of the Body Corporate and Community Management Act 1997"[1].

[12] The defence then states that the failure to provide such information renders the defendant unable to properly plead to the allegations in the statement of claim until disclosure has been completed between the parties and until further and better particulars have been provided.

[13] In short, the defendant acknowledges that a he owes some money to the plaintiff, but considers that he is "only liable to pay such contributions as have [been] properly identified, calculated and resolved to be payable by members of the Body Corporate."[2]

The application for summary judgment

[14] Before summary judgment can be entered in favour of a plaintiff it is necessary for the court to be satisfied both that:

(a) the defendant has 'no real prospect of successfully defending' the claim; and

(b) there is no need for a trial of the claim or part of the claim.[3]

[15] Whilst it is clear that the "no real prospect of successfully defending" test is applied according to its tenor, an appropriately cautious approach is required, bearing in mind the well established principle that issues raised in proceedings will be determined summarily only in the clearest of cases.[4]

[16] The burden of satisfying the court that the matters raised in r 292 are satisfied rests firmly on the plaintiff.[5]

[17] The defence, in querying the calculations and resolutions underpinning the Notices of Contribution, raises issues of a type which conventionally would not be considered appropriate for summary determination.

[18] This view is reinforced by a consideration of the defendant's complaints about the state of disclosure in the matter. On 29 March 2007, the defendant's solicitors wrote to the plaintiff's solicitors requesting 'copies of all documentation in respect of each of the levies made which total the amount of $275,817.05 which you say remains unpaid.' The documents sought included details of works to which the levies related, including contracts, invoices and the like.

[19] On 4 September 2007, the plaintiff's solicitor wrote to the defendant's solicitor in relation to the request for documents and records held by the body corporate. The letter included the following passage:

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1 See defence, para 2(c)

2 See defence, para 5.

3 Rule 292, *Uniform Civil Procedure Rules* 1999 (Qld).

4 See *Deputy Commissioner of Taxation v Salcedo* [2005] 2 Qd R 232, per McMurdo P at [3]; see also my observations in *JM Kelly (Project Builders) Pty Ltd v Toga Development 31 Pty Ltd & Anor (No 2)* [2008] QSC 312 at [10]-12]

5 See my observations in *Elderslie Property Investments No 2 Pty Ltd v Dunn & Anor* [2007] QSC 192 at [6]-[8].

> "Our client does not intend to be put to the expense of collating and providing to you the extensive documentation requested. As a member of the body corporate your client is entitled to access to the full records of the body corporate. Should he wish to access the body corporate records we suggest that he contact the body corporate manager in this regard."

[20] The order of 24 June 2008, made provision for disclosure to be given in the event summary judgment was not obtained. Clearly, there was no order for summary judgment and, by the terms of the order, further disclosure should have been made by 15 September 2008. This order was not complied with and the application filed 24 September 2008, seeks to have it set aside. I observe here that no proper explanation was provided for the failure to re-list the application for summary judgment by 30 August 2008, beyond information that the plaintiff's solicitor was on leave in July. Nor was there any proper explanation for the plaintiff's failure to make disclosure, it being contended, in effect, that in view of the summary judgment application now being pursued, that order for disclosure should be vacated.

[21] The plaintiff contends that it has, in fact, addressed the defendant's complaints about disclosure by virtue of the answer to the defendant's request for further and better particulars and by the affidavit material filed.

[22] The key outstanding issue in this respect would seem to arise out of paragraph 3 of the defendant's request for further and better particulars. In it the defendant requests further and better particulars of, inter alia, "[t]he basis upon which the Plaintiff says that that the amount of $325,930.98 was due and owing by the Defendant".

[23] The plaintiff's response to the request for further and better particulars, insofar as it relates to this complaint, says only that:

> "The basis of the Plaintiff's claim that the amount of $325,930.98 was due and owing by the Defendant at the date of the Statement of Claim is as particularised in the Statement of Claim."

[24] As to the requests contained in the rest of that paragraph, which are largely requests for certain documents including minutes of meetings, quotations, invoices and contracts, the plaintiff says only that the requests are not proper requests for particulars, and that the request is 'properly a matter for disclosure'.

[25] This may be so but, in circumstances where disclosure has not occurred, it cannot be said to strengthen the plaintiff's position on a summary judgment application.

[26] The importance of disclosure in the determination of applications of this type is readily apparent. In *Jessup v Lawyers Private Mortgages Ltd & Ors* [2006] QSC 3, Chesterman J reviewed the decision in *Deputy Commissioner of Taxation v Salcedo* and observed:

> "In practical terms I suspect the rule means (as the old rules meant) that summary judgment should not be given where the facts upon which the parties respective rights depend are disputed, or where the respondent to the application for summary judgment adduces evidence as to the existence of facts which, if proved, would establish a defence or a right to relief. In other words it is only where all the facts are known and/or are established beyond controversy that the court should embark upon determining whether to give summary judgment. Where relevant facts are controverted, or where it appears that facts may exist which would affect a right of action or defence, there should be a trial to determine the facts."[6]

[27] In this case, relevant facts are in issue on the pleadings, pending the provision of further information. This also militates against the exercise of the discretion to grant summary judgment, in the particular circumstances of this case.

[28] The plaintiff, however, continued to press for the summary remedy despite these matters having been identified to it. It did so on the basis of a contention that the matters raised in the defence are matters which cannot be determined by this court, but rather fall exclusively within the dispute resolution procedures set out in the BCCM.

[29] Chapter 6 of the BCCM is entitled 'Dispute Resolution.' Section 228 sets out the purpose of Chapter 6. It provides:

> **'228 Chapter's purpose**
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> (1) This chapter establishes arrangements for resolving, in the context of community titles schemes, disputes about—
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> (a) contraventions of this Act or community management statements; and
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> (b) the exercise of rights or powers, or the performance of duties, under this Act or community management statements; and
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> (c) the adjustment of lot entitlement schedules; and
>
> (d) matters arising under the engagement of persons as body corporate managers, the engagement of certain persons as service contractors, and the authorisation of persons as letting agents.'

[30] Section 227 of the BCCM defines 'dispute' to include a "dispute between a body corporate for a community titles scheme and the owner or occupier of a lot included in that scheme" [7]. This definition, however, does not clarify with any precision whether it covers every conceivable dispute between a body corporate and an owner

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6 At para 21.

7 Per 227(b)

or merely those within the purview contemplated by the Chapter's purpose set out in s228. In my view, good-sense and practicability, in conjunction with a purposive approach to the legislation, dictate that the latter must be the case; it could scarcely be said, for instance, that the legislature intended for the dispute resolution processes set out in the BCCM to apply in case of a personal injuries dispute between an owner and a body corporate.

[31] In any event, the present proceeding would not appear to test the boundaries established by ss 227 and 228.

[32] The present matter involves the levying of members of the body corporate for contributions. This is plainly an exercise of a right or power under the BCCM or a community management statement. The defendant's failure to make the contributions set out in the notices, can also, if not otherwise excused, be said to constitute a contravention of the BCCM or a community management statement.

[33] This then brings me to the question of whether the defendant is precluded from advancing their defence by virtue of the 'exclusivity' provision contained in Chapter 6 of the Act.

[34] Section 229(3), in the plaintiff's submission, provides the only remedy for a dispute under the BCCM. The relevant section (considering that the present matter does not involve a so-called 'complex dispute') provides:

Exclusivity of dispute resolution provisions

"(3) The only remedy for a dispute that is not a complex dispute is—

(a) the resolution of the dispute by a dispute resolution process; or

(b) an order of the CCT on appeal from an adjudicator on a question of law."

[35] The BCCM then goes on, in subsequent sections, to set out the 'dispute resolution process' in more detail. The dispute resolution processes available include conciliation and adjudication.[8]

[36] The plaintiff submits that the matters raised as underpinning the denials in the defence constitute a dispute under the BCCM and should have been pursued via an adjudication application under the BCCM. Such an application has not been made and would, in the plaintiff's submission, be out of time if it was now brought by reason of s 242. In those circumstances, the plaintiff contends that the matters sought to be raised in defence of the plaintiff's claim are not within the jurisdiction of this Court to determine and, accordingly, cannot be deployed to resist the present application for summary judgment.

[37] Before considering this submission further, it is worth noting the suggestion in argument that the exclusivity provisions might work against the plaintiff so as to

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[8] See s 248.

preclude it from pursuing the current claim. Indeed, in the course of argument it was suggested that the plaintiff's proceeding ought be struck out for this reason. It is unnecessary to agitate this speculation further. Section 99(1) of the Regulations outlined above in paragraph [9], makes it clear that amounts unpaid in respect of properly issued notices of contribution are recoverable as a debt.

[38] Furthermore, s 312 of the BCCM includes the following terms:

> '**312 Proceedings**
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> (1) The body corporate for a community titles scheme may start a proceeding only if the proceeding is authorised by special resolution of the body corporate.
>
> (2) However, the body corporate does not need a special resolution to—
>
> (a) bring a proceeding for the recovery of a liquidated debt against the owner of a lot included in the scheme; or
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> (b) bring a counterclaim, third-party proceeding or other proceeding, in a proceeding to which the body corporate is already a party; or
>
> (c) start a proceeding for an offence under chapter 3, part 5, division 4; or
>
> (d) start a proceeding, including a proceeding for the enforcement of an adjudicator's order or an appeal against an adjudicator's order, under chapter 6.'

[39] Thus, there is no merit in the suggestion that s 229 could prevent the plaintiff pursuing its claim.

[40] Returning then to the primary point for determination, it appears that, had the defendant instituted separate proceedings in this court challenging the Notices of Contribution, he would have been thwarted by the exclusivity provisions of the BCCM. He has not, however, done so. Rather, the defendant has raised particular matters in defence of the plaintiff's claim. I would be loathe to conclude, in the absence of a specific statutory provision compelling such a conclusion, that a defendant to a claim such as the one advanced by the plaintiff could not, under any circumstances, raise in a defence a matter which might trespass into the territory covered by the dispute resolution provisions of the BCCM. There is no legal or statutory impediment to these matters being raised by way of defence.

[41] My view is reinforced by reference to *Independent Finance Group Pty Ltd v Mytan Pty Ltd*[9], in which the Court of Appeal was called upon to consider whether an appeal to the Court of Appeal lay from a decision of the District Court made under the appeal provisions of the dispute resolution processes set out in the BCCM, McMurdo P expressed a 'preliminary view' in the context of the precursor to s229,

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9 [2003] 1 Qd R 374 at 378.

that “it would be surprising if, in the absence of the clearest words, the inherent jurisdiction of the Supreme Court was diminished by ch. 6.” In the same vein, it would be ‘surprising’ indeed if chapter 6 of the BCCM were read as so significantly constraining the right of a defendant to advance a defence as to render it unable to advance a simple contention that it is “only liable to pay such contributions as have been properly identified, calculated and resolved to be payable by members of the Body Corporate.”

[42] For these reasons, the application for summary judgment should be dismissed.

[43] Apart from the consideration that costs should follow the event, the failure of the plaintiff to comply with the order of 24 June 2008 renders it proper for it to be ordered that the plaintiff pay the defendant’s costs of and incidental to the application.