SUPREME COURT OF QUEENSLAND

CITATION:	*Hannah & Ors v TW Hedley (Investment) Pty Ltd & Ors* [2010] QSC 56
PARTIES:	**ROBIN ERIC HANNAH and NOLA ROSINA LORRAINE HANNAH** **(first plaintiff)** **DAVID CHAPMAN and JANET CHAPMAN** **(second plaintiff)** **ROBERT JAN VAN DEN HOFF and OLPIAH BINTE VAN DEN HOFF** **(third plaintiff)** **GUISEPPE and CATHERINE SCARAMOZZINO** **(fourth plaintiff)** **ROWENA KIM FORD** **(fifth plaintiff)** **ERROL TREVOR OPIE and ANN MARIE DELAMERE** **(sixth plaintiff)** **GRAEME ANDREW ROBB and SHARON ANN ROBB** **(seventh plaintiff)** **REX ANTHONY PERKINS and MANDY LOUISE PERKINS** **(eighth plaintiff)** **v** **TW HEDLEY (INVESTMENT) PTY LTD (ACN 010 566 711) and PTH VISION PTY LTD (ACN 102 250 804) and RAS VISION PTY LTD (ACN 102 250 878)** **(first defendants)** **KATE THOMPSON** **(second defendant)** **MARKO DAMJANOVICH and MERICA DAMJANOVICH** **(plaintiffs)** **v** **TW HEDLEY (INVESTMENT) PTY LTD (ACN 010 566 711) and PTH VISION PTY LTD (ACN 102 250 804) and RAS VISION PTY LTD (ACN 102 250 878)** **(first defendants)** **KATE THOMPSON** **(second defendant)**
FILE NOS:	BS 360 of 2009 BS 5970 of 2009
DIVISION:	Trial Division
PROCEEDING:	Determination of separate question

DELIVERED ON: 3 March 2010

DELIVERED AT: Brisbane

HEARING DATE: 10 December 2009

JUDGE: Mullins J

ORDER: **In each proceeding BS 360 of 2009 and BS 5970 of 2009 the separate questions are answered as follows:**

(a) The answer to the question "Were the plaintiffs at liberty to rescind their contract of sale with the first defendants by reason that the terms of the said contract failed to comply with s 212 of the *Body Corporate and Community Management Act* 1997 (the Act)?" is "No."

(b) The answer to the question "Should the first defendants return to the plaintiffs the deposit paid upon entering the said contract of sale pursuant to s 218 of the Act?" is "No."

CATCHWORDS: REAL PROPERTY – STRATA AND RELATED TITLES AND OCCUPANCY – SALE OF UNIT INTERESTS – where buyer entered into contract with seller to purchase off the plan a proposed lot in a unit development – where s 212(1) *Body Corporate and Community Management Act* 1997 (Qld) required that contract provide for settlement not earlier than 14 days after seller gives advice to buyer that the community titles scheme is established – where buyer may cancel the contract if the contract does not comply with s 212(1) – whether the contract has the effect prescribed by s 212(1) – where one of the condition precedents under the contract for giving notice of the settlement date was described as the registration of the community management statement – where a community management statement is recorded not registered – whether the contract must convey to the buyer the legal requirements for establishment of the community titles scheme

Body Corporate and Community Management Act 1997, s 24, s 212
Land Title Act 1994, s 115K

Bossichix Pty Ltd v Martinek Holdings Pty Ltd [2009] QCA 154, followed
Pazcuff Pty Ltd v Farmilo [2009] QSC 230, considered

COUNSEL: S J Carius for the plaintiffs
M A Jonsson for the first defendants

SOLICITORS: Slater & Gordon Lawyers for the plaintiffs
Property Law Solutions for the first defendants

[1] In these proceedings it was ordered that the following questions be heard and determined separately and before the determination of any other issue in the proceedings:

(a) Were the plaintiffs at liberty to rescind their contract of sale with the first defendants by reason that the terms of the said contract failed to comply with section 212 of the *Body Corporate and Community Management Act* 1997 (the Act)?

(b) Should the first defendants return to the plaintiffs the deposit paid upon entering the said contract of sale pursuant to section 218 of the Act?

[2] The questions concern a number of contracts relevantly in the same terms under which each plaintiff agreed to purchase off the plan a lot in a unit development known as "The Keys" at Paradise Palms, Kewarra Beach.

[3] Each plaintiff contends that the contract contravenes s 212(1) of the Act and seeks to justify the cancellation of the contract under section 212(3) of the Act. The first defendants contend that each contract complied with section 212 of the Act.

The contracts

[4] Clause 3.1 of part C of the contract provides:

> "This contract is conditional on the following Conditions Precedent being satisfied on or before the Sunset Date:
>
> (a) completion of the Building;
>
> (b) registration of the Building Plan and Community Management Statement by the registrar; and
>
> (d)(*sic*) issue of a certificate of classification under the *Building Act 1975* for the Building."

[5] Definitions of "Building", "Building Plan" and "Community Management Statement" are set out in clause 1.2 of part B of the contract. The "Building" means the building referred to as "The Keys" proposed to be built on the relevant parcel of land in accordance with the plans that were produced in the disclosure statement under section 213 of the Act that formed part of the contract. The "Building Plan" is defined as the proposed building plan in respect of the Building of which a rough draft was incorporated in the disclosure statement. The "Community Management Statement" is defined as the community management statement proposed to be registered with the Building Plan of which a preliminary draft was also in the disclosure statement. The definition of "Community Titles Scheme" is "the proposed The Keys community titles scheme that will come into existence when the Building Plan is registered."

[6] Clause 8.1 of part C of the contract specifies the time for settlement of the contract:

> "8.1 You must settle this contract in Cairns 14 days after the day we notify you that all of the Conditions Precedent are satisfied and you must not settle before those 14 days expire. Settlement must occur at or before 4.00pm on the fourteenth day at the place we notify, or in the absence of that notification:
>
> (a) at the Cairns office of any first mortgagee; or

(b) if there is no mortgagee, at the office of the Seller's Solicitor."

[7] By letter dated 13 May 2008 the solicitors for the vendor advised the plaintiff that the conditions precedent had been satisfied and notified the plaintiff that settlement was due on 27 May 2008. Prior to settlement each of the plaintiffs purported to rescind the contract and these proceedings were commenced seeking declaratory relief in respect of the cancellation of the contracts and the return of the deposits.

Section 212 of the Act

[8] Section 212 of the Act (reprint 3D) provided:

"**212 Cancellation for not complying with basic requirements**

(1) A contract entered into by a person (the ***seller***) with another person (the ***buyer***) for the sale to the buyer of a lot intended to come into existence as a lot included in a community titles scheme when the scheme is established or changed must provide that settlement must not take place earlier than 14 days after the seller gives advice to the buyer that the scheme has been established or changed.

(2) Also, when the contract is entered into, there must be a proposed community management statement for the scheme as established or changed.

(3) The buyer may cancel the contract if—

(a) there has been a contravention of subsection (1) or (2); and

(b) the contract has not already been settled."

[9] The operation of s 212 of the Act was considered by the Court of Appeal in *Bossichix Pty Ltd v Martinek Holdings Pty Ltd* [2009] QCA 154 (*Bossichix*).

[10] The purchaser in *Bossichix* entered into a contract to purchase off the plan a lot in a community titles scheme. The contract provided that settlement must not occur until at least 14 days after the building format plan had been registered. The building format plan was defined in the contract as the building format plan that was registered to create the lot. It was argued by the purchaser that the clause that dealt with the settlement date referred to notice of the registration of the building format plan, whereas s 212 of the Act refers to a notice of the establishment of the community titles scheme. It was argued that the registration of the plan and the establishment of the scheme were not the same thing and that they could not, or need not, occur contemporaneously. That argument was accepted by Mackenzie J at first instance: *Bossichix Pty Ltd v Martinek Holdings Pty Ltd* [2008] QSC 278 (Mackenzie J's decision). This finding depended on the construction and the operation of the provisions of the Act and the *Land Title Act* 1994 (*LTA*) that deal with the establishment of a community titles scheme.

[11] By s 10(1) of the Act a community titles scheme is defined to mean a single community management statement recorded by the registrar identifying land (which is referred to as the scheme land) and the scheme land. A community management statement is defined in s 12(2) of the Act as a document that identifies land and otherwise complies with the requirements of the Act for a community management statement. Section 24 of the Act provides:

> "**24 Establishment of community titles scheme**
>
> (1) A community titles scheme is established by—
>
> (a) firstly, the registration, under the Land Title Act, of a plan of subdivision for identifying the scheme land for the scheme; and
>
> (b) secondly, the recording by the registrar of the first community management statement for the scheme.
>
> (2) A community titles scheme is established when the first community management statement for the scheme is recorded."

[12] Part 6A of the *LTA* regulates community titles schemes. Section 115J of the *LTA* specifies that a request to record a new community management statement for a community titles scheme must be lodged when a new plan of subdivision affecting the scheme is lodged. Section 115K of the *LTA* requires a request to record a community management statement to be lodged with the registrar as a condition that must be satisfied before the registrar may record the community management statement. Section 115K(3) states that a request to record a community management statement is an instrument, and is lodged, under the *LTA*. Section 115L(3) of the *LTA* provides that the community management statement takes effect when it is recorded by the registrar as the community management statement for the scheme.

[13] The appeal from Mackenzie J's decision was dismissed in *Bossichix*. McMurdo J (with whom the other members of the court agreed) observed (at [16]) that s 24 of the Act makes it clear that both registration of the relevant plan of subdivision for identifying the scheme land under the *LTA* and the recording by the registrar of the first community management statement for the scheme are distinct steps that are necessary for the establishment of the scheme, so that a notice to the purchaser of registration of the plan is not the equivalent of a notice of the establishment of the scheme. McMurdo J noted (at [18]) that the parties had specified the registration of the plan and not the establishment of the scheme, as the relevant event for fixing the date for settlement. McMurdo J therefore concluded (at [20]) that the relevant clause in the contract did not have the same effect as the provision required by s 212(1) of the Act.

[14] The Court of Appeal in *Bossichix* also considered (at [1], [21] and [25]) that s 212(1) of the Act did not require the use of its precise words in the relevant contract, but required the contract to have the effect prescribed by s 212(1). The reason for this was explained by McMurdo J at [21]:

> "No purpose would be served by requiring the exact words to be used. The purpose of s 212 is not to inform the buyer of its legal rights. Rather the purpose is to inform the buyer that the scheme has been established and to allow a sufficient time prior to settlement for the buyer to make any necessary searches and enquiries."

Plaintiffs' submissions

[15] It was submitted on behalf of the plaintiffs that s 212 of the Act has a consumer protection purpose (as was recognised in Mackenzie J's decision at [16]) and should be construed to give full effect to that purpose. There are therefore two elements that must be incorporated in the contract to comply with s 212(1) of the Act. First,

the parties must agree that settlement will not occur earlier than 14 days after the seller gives advice to the buyer that the scheme has been established (which allows the buyer to do any relevant searches and to ensure that the buyer is ready to complete at settlement) and, second, the rights must be expressly conveyed in the text of the contract. The submission is made, based on the process by which a community management statement is recorded, that any contract which seeks to refer to the establishment of a scheme by reference to its constituent steps must define the establishment of the scheme within the contract as entailing both the registration of a plan of subdivision and the recording of the community management statement.

[16] The plaintiffs argue that the contract fails to comply with s 212(1) of the Act because it does not expressly provide that settlement must not occur earlier than 14 days after notice is given that the scheme has been established in the manner in which the Act defines the establishment of a scheme. This is because the definition of community titles scheme in clause 1.2 has a similar defect to the contract in *Bossichix* in that it equates the registration of the relevant building plan with the establishment of the scheme. There is also an error in clause 3.1(b) where reference is made to registration of the community management statement by the registrar, as there is no "registration" of a community management statement under the *LTA*, as it is the request to record the community management statement that is the instrument that results in the registrar recording the community management statement. There is also nothing within the contract itself that expressly equates the establishment of the scheme with both the registration of the plan of subdivision and the recording of the community management statement.

[17] The plaintiffs submit that to derive a meaning that approximates what is required by s 212(1) of the Act requires clauses 8.1 and 3.1 of the contract to be read in conjunction with s 24 of the Act. On the basis that s 212(1) of the Act demands that there is a clear statement within the contract of terms that give effect to the requirements of s 212(1), the plaintiffs submit that the subject contracts fail to comply with s 212(1).

First defendants' submissions

[18] The first defendants draw the distinction between a statutory provision which mandates that a document must contain terms which "state" or "specify" particular information (such as s 213(2) of the Act) and a statutory provision such as s 212(1) of the Act which requires the contract to "provide" for settlement of the contract to be fixed in the manner and at the time specified in s 212(1).

[19] The first defendants argue, in reliance on the observations by the Court of Appeal in *Bossichix*, that it was sufficient to satisfy s 212(1) of the Act that a contract had the effect prescribed by s 212(1) and submit that was the substantive or functional effect of the relevant provisions of the contracts. This was on the basis that clause 8.1 of the contract provided for settlement to occur on the fourteenth day after the date of notification that all the conditions precedent (defined in clause 3.1) had been satisfied and the conditions precedent included requirements that the building plan relating to the proposed development had registered and the community management statement for the development had also registered which addressed the two requirements for the establishment of a community titles scheme under s 24 of the Act.

Do the contracts comply with s 212(1) of the Act?

[20] The issue is whether each of the contracts has the effect prescribed by s 212(1) of the Act: *Bossichix* at [21].

[21] In considering what effect is prescribed by s 212(1) of the Act, it is relevant that it has a consumer protection purpose, but it is also relevant that the manner in which that purpose has been expressed in s 212(1) is less prescriptive than other consumer protection provisions within the Act, such as those regulating disclosure statements in parts 1 and 2 of chapter 5 of the Act: cf *Pazcuff Pty Ltd v Farmilo* [2009] QSC 230 at [18] and [22].

[22] The terms of s 212(1) of the Act do not require that the contract should convey to the purchaser as information within the contract itself the legal requirements for establishing a community titles scheme: *Bossichix* at [21].

[23] The contention of the plaintiffs that the definition of community titles scheme in clause 1.2 of the contract is defective overlooks the purpose for which the definition is in the contract. The definition does not displace the operation of the Act and the *LTA*. The definition allows the term "Community Titles Scheme" to be used throughout the contract as referring to the community titles scheme that will apply to the building development when the community titles scheme for "The Keys" is established. The definition does not purport, and could not be taken, to be an exposition of the law by which a community titles scheme is established. It was sufficient for the purpose of the contract to define the community titles scheme as the one that would come into existence when the proposed building plan (of which a draft was included in the disclosure statement) was registered. It was, in fact, the community titles scheme for "The Keys" that came into existence, when the relevant building plan was registered. The fact that a community management statement was also recorded, before the community titles scheme was established, does not invalidate the means by which the relevant community titles scheme was defined in the contract. The definition of community titles scheme has no consequences in this contract for the events of which notice is given under clause 8.1 of the contract.

[24] Unlike the contractual provision in *Bossichix* that allowed the vendor to fix the settlement date by reference to the registration of the relevant plan, rather than the establishment of the community title scheme, the notice of the settlement date is given under clause 8.1 of the subject contract on satisfaction of the conditions precedent which covers the registration of both the building plan and community management statement. Although a community management statement is technically "recorded" by the registrar under s 115K of the *LTA* upon the lodgment of a request to record the community management statement, rather than being "registered", the shorthand reference in clause 3.1(b) of the contract to registration of the community management statement by the registrar (in conjunction with clause 8.1 of the contract) conveys that one of the events that must occur as a condition precedent to the giving of the notice for fixing the settlement date is the processing by the registrar of the community management statement for the relevant community titles scheme. The use of the expression "registration" instead of "recording" does not alter the nature of the condition precedent under the contract.

[25] It is sufficient that clause 8.1 of the contract which fixes the time for settlement is based on notification of events that cover the constituent steps for the establishment of the community title scheme, even though the notice provision in the contract does not require advice to be given in express terms that the scheme has been established. The effect of the provisions in the contract satisfies the requirements of s 212(1) of the Act.

Orders

[26] In view of the conclusion that I have reached which favours the first defendants in relation to the construction of s 212(1) of the Act, it is unnecessary to consider the additional argument of the first defendants that applied to some of the plaintiffs about the content of the letters of termination which made no reference to any alleged breach of part 2 of chapter 5 of the Act.

[27] In each proceeding the separate questions should be answered as follows:

(a) The answer to the question "Were the plaintiffs at liberty to rescind their contract of sale with the first defendants by reason that the terms of the said contract failed to comply with s 212 of the *Body Corporate and Community Management Act* 1997 (the Act)?" is "No."

(b) The answer to the question "Should the first defendants return to the plaintiffs the deposit paid upon entering the said contract of sale pursuant to s 218 of the Act?" is "No."

[28] I will give the parties an opportunity to make any submissions on the question of costs. Subject to these submissions, my proposal is to order in each proceeding that the plaintiffs pay the first defendants' costs of the hearing and determination of the separate questions, including the costs of the application filed on 30 October 2009, to be assessed.