

SUPREME COURT OF QUEENSLAND

CITATION: *Famestock Pty Ltd v The Body Corporate for No 9 Port Douglas Road Community Title Scheme 24368* [2012] QSC 129

PARTIES: **FAMESTOCK PTY LTD (ACN 010 499 989)**
(Plaintiff)
v
THE BODY CORPORATE FOR NO. 9 PORT DOUGLAS ROAD COMMUNITY TITLE SCHEME 24368
(Defendant)

FILE NO/S: 48 of 2008

DIVISION: Trial

PROCEEDING: Application within a Trial

ORIGINATING COURT: Supreme Court, Cairns

DELIVERED ON: 10 May 2012

DELIVERED AT: Cairns

HEARING DATE: 8, 9 May 2012

JUDGE: Henry J

ORDER:

I determine the answer to the question is:

The committee of the defendant was not entitled to determine the plaintiff's caretaking and letting agreement, that being a matter requiring the authority of a general meeting of the defendant.

CATCHWORDS: STATUTORY INTERPRETATION – BODY CORPORATE – COMMUNITY TITLE SCHEME – where the scheme gave the plaintiff rights, privileges and obligations relating to caretaking and letting – where the plaintiff also had rights or obligations under a written caretaking and letting agreement – whether the decision to terminate the agreement was a restricted issue which could only be made by a general meeting of the body corporate – whether the decision changed the rights, privileges or obligations of the owners of lots included in the scheme

Body Corporate and Community Management (Accommodation Module) Regulation 1997 (Qld) reg 24
Body Corporate and Community Management Act 1997 (Qld)

s 92

Humphries and Anor v The Proprietors "Surfers Palms North" Group Titles Plan 1955 (1994) 179 CLR 597.
Victorian Professional Group Management Pty Ltd v The Proprietor "Surfers Aquarius" Building Units Plan No. 3881 [1991] Qd R 487.

COUNSEL: D A Savage SC for the plaintiff
 C J Ryall for the defendant

SOLICITORS: Alexander Law for the plaintiff
 Williams Graham Carman for the defendant

- [1] At the outset of the current trial the plaintiff successfully made an application for an order under *Uniform Civil Procedure Rules 1999* (Qld) r 483 for the decision of a question before and separately from the other questions in the trial.

Background

- [2] In a claim filed on 7 February 2008, the plaintiff seeks damages for breach of contract and a declaration.
- [3] The defendant, a body corporate for a community title scheme, entered into a written caretaking and letting agreement, exhibit 4 ("the agreement"), with the plaintiff to perform caretaking and letting duties and obligations in respect of a unit complex. It was a condition¹ of the agreement that the plaintiff² would obtain all licences required to enable it to conduct the business of letting the units.
- [4] At the commencement of the agreement the plaintiff obtained a letting agents licence from the Auctioneers and Agents Committee pursuant to the provisions of the *Auctioneers and Agents Act 1971* (Qld)³ in order for it to carry out its duties as letting agent. However, the plaintiff pleads that in or about May 2001, it discovered the licence had expired and it had failed to renew its licence.
- [5] The plaintiff sought a letter from the defendant confirming that the agreement was still in existence in order to provide such a letter to the licensing authority as evidence of the relevant body corporate's approval of the conduct of the letting business. It is implicit in the pleadings that such a letter was not forthcoming.
- [6] The plaintiff also pleads that in August 2001 the defendant's chairperson, Mr Hurst, advised Ms Pusztay, a representative of the Auctioneers and Agents Committee at the Office of Fair Trading, that the view of the defendant was that the agreement was no longer valid and the defendant would subsequently be voting not to approve the plaintiff as the caretaking and letting agent.

¹ Clause 8.1.5

² The terms of the agreement quoted in the Further Amended Statement of Claim refer to the "manager" but the pleadings treat that as a reference to the plaintiff

³ Since replaced by the *Property Agents and Motor Dealers Act 2000* (Qld)

- [7] The plaintiff relies upon the failure to provide the letter as well as the representation by Mr Hurst to Ms Pusztay as conduct that breached an allegedly implied term of the contract.
- [8] The defendant issued notices of termination on 7 February 2002 purporting to terminate the management agreement relying on a variety of grounds. It is common ground the decision to issue the notices was at best a decision of the body corporate's committee rather than a decision of a general meeting of the body corporate. The validity of the termination letters is denied by the plaintiff for various reasons, one of which is, in effect, that the purported termination was ultra vires. The plaintiff alleges that, in addition to the aforementioned breaches, the purported but ultra vires determination also constituted a breach of the agreement.
- [9] The plaintiff seeks damages for breach of contract in the sum of \$544,230. The plaintiff also seeks a declaration that the notices to terminate were invalid and of no effect and did not terminate the agreement.
- [10] The trial of the proceeding has commenced although save for the opening of the plaintiff's case it has not proceeded substantively, there having been argument and rulings in respect of a number of applications relating to the state of the pleadings as well as the successful application for the Court to determine the separate question now under consideration.

The question to be determined

- [11] The question to be determined is:
"Was the committee of the defendant entitled to determine the plaintiff's caretaking and letting agreement the subject of this proceeding, or was that a matter within the authority of the general meeting of the defendant?"
- [12] The plaintiff's relevant pleading as to the invalidity of the notices to terminate is:
"29. The notices to terminate were invalid and of no effect because:
 ...
(b) the Defendant had not lawfully made the decision to terminate the Agreement and issue the notices to terminate.
- Particulars*
- (i) The committee of the Body Corporate resolved to terminate the Agreement and issue the notices to terminate at a meeting of the Committee on 11 February 2002.*
 - (ii) The decision to terminate the Agreement was a decision on a restricted issue as defined in regulation 24(b) of the BCCM (Accommodation Module) Regulation.*
 - (iii) Therefore such decision should have been made by the body corporate and not by the committee.*
 - (iv) In the premises, the decision of the committee was not a decision of the body corporate as provided for in s 92 of the BCCM Act." (emphasis added)*
- [13] In summary the purported decision to terminate is said to be ultra vires because it was at best a decision of the committee of the body corporate when, on the

plaintiff's argument, it was only a decision which could be made by the body corporate in a general meeting. That is, it is contended it was not a decision the committee could make.

The Agreement

- [14] The agreement which the defendant purported to terminate provides at clause 10 that it may be terminated by the body corporate by notice in writing but gives no indication of whether the decision to send such a termination notice can be made by the committee of the body corporate or whether it requires a decision of a general or extraordinary meeting of the body corporate members.

The Statute

- [15] The relevant statute in force at the time of the purported termination notice was the *Body Corporate and Community Management Act 1997* (Qld) Reprint 1F ("the Act"). Section 88 of the Act expressly vested in the body corporate for a community titles scheme all the powers necessary for carrying out its functions, including entering into contracts.

- [16] As to the power of a committee of the body corporate, s 92 relevantly provides:

"92. Power of committee to act for body corporate

(1) A decision of the committee is a decision of the body corporate.

(2) Subsection (1) does not apply to a decision that, under the regulation module, is a decision on a restricted issue for the committee. ... (emphasis added)

- [17] This means decisions of the committee are deemed to be decisions of the body corporate, except for decisions of the committee on restricted issues, which are specified under regulation. If decisions fall to be made by the body corporate on restricted issues they could not be decided by its committee and by necessary implication would have to be made or authorised by the body corporate in a general meeting.

The Regulation

- [18] The relevant regulation module in force at the time of the purported termination was the *Body Corporate and Community Management (Accommodation Module) Regulation 1997* (Qld) Reprint 2 ("the Regulation").

- [19] The Regulation specifically provided at reg 85 that the body corporate could only engage a person as a body corporate manager or service contractor, or authorise a person as a letting agent with the approval by ordinary resolution of a general meeting of the body corporate. On the other hand in empowering the body corporate to also terminate such engagements, reg 84 did not specify whether such a decision could be made by the committee only or required approval by a general meeting.

- [20] As to the Regulation's definition of restricted issues for the committee, reg 24 provided:

"24. Restricted issues for committee – Act, s 92[SM, s 26]

A decision is a decision on a restricted issue for the committee if it is a decision –

- (a) *fixing or changing a contribution to be levied by the body corporate; or*
- (b) *to change rights, privileges or obligations of the owners of lots included in the scheme; or*
- (c) *on an issue reserved, by ordinary resolution of the body corporate, for decision by ordinary resolution of the body corporate; or*
- (d) *that may only be made by resolution without dissent, special resolution or ordinary resolution of the body corporate; or*
- (e) *to bring a proceeding in a court, other than –*
 - (i) *a proceeding to recover a liquidated debt against the owner of a lot; or*
 - (ii) *a counterclaim, third party proceeding or other proceeding in relation to a proceeding to which the body corporate is already a party; or*
- (f) *to pay remuneration, allowances or expenses to a member of the committee, unless the decision –*
 - (i) *is made under the authority of an ordinary resolution of the body corporate; or*
 - (ii) *is for the reimbursement of expenses of not more than \$50.” (emphasis added)*

[21] The plaintiff submits the decision to issue termination notices was a decision on a restricted issue because it was a decision, described at reg 24(b), “*to change rights, privileges or obligations of the owners of lots included in the scheme*”.

Rights, privileges and obligations under the contract

[22] It is not in dispute that the plaintiff had rights, privileges and obligations under its agreement with the body corporate.

[23] The plaintiff was obliged as a condition of the agreement to purchase and retain ownership of the Managers unit or “lot”, which was lot 1.⁴ The agreement also made provision for the mandatory transfer of the manager’s lot in the event of termination.⁵

[24] Under the agreement the plaintiff was to perform management and caretaking duties,⁶ for which it was to receive monthly remuneration⁷ as well as reimbursement for the cost of consumable materials and equipment required to carry out its duties.⁸ It was required to carry on from its unit the business of letting lots for the owners thereof, supervise tenants and promote the letting of units, including by erecting promotional signs.⁹

Rights, privileges and obligations under the Scheme

[25] The plaintiff’s rights, privileges and obligations as manager did not derive solely from the agreement between the parties but also derived from the so-called New

⁴ Ex 4 cl 2 & 5

⁵ Ex4 cl 11

⁶ Ex 4, preamble C, cl 4

⁷ Ex 4 cl 3.3

⁸ Ex4 cl 6.3 & 7.1

⁹ Ex4 cl 8

Community Management Statement, exhibit 3, relating to the community title scheme with which this case is concerned.

- [26] In Schedule C to that document, by-law 34 makes specific provision for the use to which Lot 1 can be put:

“34. USE OF LOT 1

34.1 Lot 1 in the Parcel may be used for both residential purposes and only during the currency of any property management agreement made between the Body Corporate and the registered proprietor of Lot 1, for the purpose of caretaking the Parcel and for the sale and letting of units on the Parcel on behalf of the proprietors. The proprietors of Lot 1 may with the prior consent of the Committee of the Body Corporate display signs or notices for the purposes of offering for sale or for lease or for letting of any lot on the Parcel.

34.2 During the currency of any Property Management Agreement made between the Body Corporate and registered proprietor of Lot 1, the proprietor of Lot 1 shall be entitled to the exclusive use for office purpose of that area designated on the building plan as an office situated within the Common Property lobby area of the ground floor and being immediately adjacent to Lot 1.” (emphasis added)

- [27] The rights of use conferred by by-law 34 are rights or privileges. They are of potentially very significant value to the proprietor of lot 1 given the nature of the business they effectively allow that person to conduct. They were described as “special privileges” of the agent in *Victorian Professional Group Management Pty Ltd v The Proprietor “Surfers Aquarius” Building Units Plan No. 3881*.¹⁰

Discussion

- [28] The meaning of reg 24(b) does not appear to have received any reported authoritative consideration. Its meaning can be readily derived from the plain meaning of the words used and the context of their use.¹¹
- [29] The reference in reg 24(b) to “rights, privileges or obligations of the owners of lots included in the scheme” ought not be read literally as a reference to any right, privilege or obligation which a person who owns a lot in the scheme happens to have. That would ignore the context of the words, which necessarily implies a connection between the rights, privileges or obligations and the person’s status as an owner of a lot included in the scheme.
- [30] When the plain meaning of the words is considered in context, the reference to an owner’s rights, privileges or obligations is obviously a reference to the rights, privileges or obligations that arise in the person’s capacity as an owner of a lot included in the scheme. That is, they are rights, privileges or obligations which derive from the fact of the person’s ownership of the lot and not from some other

¹⁰ [1991] Qd R 487 at 489, referred to in *Humphries and Anor v The Proprietors “Surfers Palms North” Group Titles Plan 1955* (1994) 179 CLR 597

¹¹ Context being of primary importance in the modern approach to statutory interpretation – see *CIC Insurance Ltd v Bankstown Football Club Ltd* (1997) 187 CLR 384

source, for example, from a contractual agreement such as the Caretaking and Letting Agreement in this case.

- [31] At first blush it might appear that the decision to terminate the contractual agreement in the present case was a decision that changed the plaintiff's rights, privileges or obligations deriving from the agreement and not in the plaintiff's capacity as an owner of a lot included in the scheme and was therefore not a restricted decision. However, that reasoning ignores the fact the community titles scheme expressly confers rights or privileges upon the owner of lot 1, the manager's lot, under by-law clause 34 in the community management statement for the scheme. Those are rights or privileges that do derive, as reg 24(b) contemplates, from the plaintiff's capacity as an owner of a lot included in the scheme.
- [32] The rights and privileges of the owner of lot 1 in the scheme include, under the scheme's by-law 34, the right to use lot 1 for the purpose of caretaking the parcel, ie. the unit complex, and for the sale and letting of units on the parcel. They also include the exclusive use of the office area in the lobby of the unit complex.
- [33] Under the by-laws these rights and privileges are clearly those of the owner of lot 1 in that person's capacity as an owner of that lot in the scheme. A decision to change those rights is a decision described in reg 24(b).
- [34] Such a decision only bears upon one owner of one lot included in the scheme whereas the regulation refers in the plural to "the owners of lots". However, the ordinary meaning of the words of the regulation is consistent with the rights, privileges or obligations not having to relate to all owners and all lots included in the scheme. It is well known in such schemes that there may be differences in the rights, privileges and obligations of some owners of lots compared to others. In any event, pursuant to s 32C of the Acts Interpretation Act 1954 (Qld), words in the plural include the singular. It follows reg 24(b) ought be read as including a right, privilege or obligation which might, as here, only relate to a single owner of a single lot included in the scheme.
- [35] The defendant submitted that the aforementioned rights and privileges under by-law 34 are qualified as only existing "*during the currency of any Property Management Agreement*" and therefore are not rights and privileges which derive from ownership of a lot included in the scheme and, rather, derive from the property management agreement. The submission seems to assume a mutual exclusivity between rights and privileges that flow from the agreement and rights and privileges that flow from the by-laws. It ignores the reality that rights and privileges can derive from both. The issue is not whether the plaintiff has rights or privileges under the agreement; it is whether it has rights or privileges under the by-laws as an owner of a lot included in the scheme.
- [36] On the plain meaning of by-law 34, if a Property Management Agreement is current, the owner of lot 1 has rights and privileges in that person's capacity as the owner of a lot included in the scheme. A decision to terminate the Property Management Agreement is necessarily a decision that will change those rights or privileges because they are not rights or privileges that the owner can enjoy if the agreement is no longer current.
- [37] The defendant contended that the by-laws did not grant the plaintiff a right to insist, if the agreement were to be terminated, that it be terminated in any particular way.

That is not to the point. The issue here is whether the committee had the power to decide to terminate.

[38] The defendant also contended that even if the agreement is terminated that does not change the rights and privileges accorded by by-law 34. It was submitted in effect that even though the decision would render those rights and privileges worthless or dormant, those rights and privileges still existed, unchanged, as rights and privileges under the by-laws. However, this ignores the reality that the rights and privileges accorded by by-law 34 exist, as the by-law says, “*only during the currency of any Property Management Agreement*” (emphasis added).

[39] It was submitted the body corporate had resolved in advance by clause 10 of the agreement that the rights or privileges could be terminated. The argument was in effect that the right or privilege in by-law 34 was subject to a determination in advance that it could be terminated and thus a decision of the committee to terminate could not be said to have changed a right or privilege under the by-law. This ignores the relevant sequence of events and ignores the difference between the potential for a decision to be made and the making of a decision. If an agreement is current and a decision is taken to terminate it, the rights and privileges under by-law 34 will exist up to and at the time the decision is being made. It is only when the decision has been made, assuming it is validly made, that the rights and privileges which up to that time were held by the owner of the lot will change. As at the time a decision to terminate a current agreement is being considered, the rights and privileges of the owner of the manager’s lot included in the scheme still exist. The making of the decision to terminate will change those rights and privileges by removing the condition for their existence under by-law 34, namely a current Property Management Agreement.

[40] It follows the decision to terminate a current Property Management Agreement in this case must have been a decision to change rights and privileges in as much as it would remove the rights and privileges the plaintiff otherwise enjoyed as an owner of a lot included in the scheme pursuant to by-law 34. Regulation 24 therefore deemed the decision to be a decision on a restricted issue and it was therefore a decision the committee could not lawfully make.

[41] I determine the answer to the question is:

The committee of the defendant was not entitled to determine the plaintiff’s caretaking and letting agreement, that being a matter requiring the authority of a general meeting of the defendant.