SUPREME COURT OF QUEENSLAND

CITATION:	*Claremont Holdings Pty Ltd v The Chief Executive of the Department of Housing and Public Works; The Chief Executive of the Department of Housing and Public Works v Claremont Holdings Pty Ltd* [2015] QSC 349
PARTIES:	**CLAREMONT HOLDINGS PTY LTD** **ACN 010 347 038** (applicant) **v** **THE CHIEF EXECUTIVE OF THE DEPARTMENT OF HOUSING AND PUBLIC WORKS** (respondent) **THE CHIEF EXECUTIVE OF THE DEPARTMENT OF HOUSING AND PUBLIC WORKS** (applicant) **v** **CLAREMONT HOLDINGS PTY LTD** **ACN 010 347 038** (respondent)
FILE NO/S:	SC No 10456 of 2015 SC No 11339 of 2015
DIVISION:	Trial
PROCEEDING:	Originating Application
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	10 December 2015
DELIVERED AT:	Brisbane
HEARING DATE:	1 December 2015
JUDGE:	Flanagan J
ORDER:	**My initial view is that a declaration should be made in the terms of 1(a) of the Chief Executive's originating application.** **I will hear the parties as to the final form of relief and costs.**
CATCHWORDS:	LANDLORD AND TENANT – RESIDENTIAL TENANCIES LEGISLATION – JURISDICTION – where the applicant was the owner and operator of a park consisting of a number of sites, common areas and facilities – where the sites were permitted to be used by caravans, relocatable homes and/or permanent structures for the purpose of providing accommodation – where a number of sites had structures

positioned on them that had the character of a dwelling house but were not permanently attached to the land ("**the Homes**") – where the applicant entered into leases with persons in respect of site/s and use of the common areas – where the Homes were owned by the persons who leased site/s within the park – where the respondent Department was responsible for compliance with the *Manufactured Homes (Residential Parks) Act* 2003 (Qld) ("**the Act**") – where the Act imposed specific lease agreement requirements to lease agreements within the jurisdiction of the Act – where the relevant lease agreements did not comply with the requirements of the Act but instead complied with the provisions of the *Residential Tenancies and Rooming Accommodation Act* 2008 (Qld) ("**RTA**") – where the respondent Department warned the applicant that it was in breach of the Act by failing to enter into agreements pursuant to the Act – where the applicant submits that the Act has no application as the park is not a "residential park" and the agreements are not "site agreements" within the Act – whether the park owned and operated by the applicant is a "residential park" – whether the Act or the RTA regulates the lease agreements entered into between the applicant and those leasing sites within the applicant's park

Manufactured Homes (Residential Parks) Act 2003 (Qld), s 4, s 8, s 10, s 12, s 13, s 14, s 23, s 25,
Residential Tenancies and Rooming Accommodation Act 2008 (Qld), s 5(1), s 7, s 9, s 10, s 11, s 12, s 22, s 37, sch 2

Ainsworth v Criminal Justice Commission (1992) 175 CLR 564; [1992] HCA 10, cited
Forster v Jododex Australia Pty Ltd (1972) 127 CLR 421; [1972] HCA 61, cited

COUNSEL:

SC No 10456/15
P Hackett for the applicant
B McMillan for the respondent

SC No 11339/15
B McMillan for the applicant
P Hackett for the respondent

SOLICITORS:

SC No 10456/15
H Drakos & Company Pty Ltd Solicitors for the applicant
Crown Law for the respondent

SC No 11339/15
Crown Law for the applicant
H Drakos & Company Pty Ltd Solicitors for the respondent

[1] There are two originating applications before the Court, one brought by Claremont Holdings Pty Ltd and one by the Chief Executive of the Department of Housing and

Public Works. Both applications seek declarations in relation to the Aquatic Gardens Caravan Park.

[2] The applications concern whether agreements between Claremont (as the owner and operator of the Park) and owners of manufactured homes located on sites within the Park should be agreements in accordance with the *Manufactured Homes (Residential Parks) Act* 2003 (Qld) ("**the Act**") or under the *Residential Tenancies and Rooming Accommodation Act* 2008 (Qld) ("**the RTA**").

[3] It is common ground that an agreement under the Act affords greater protection to a manufactured home owner than an agreement under the RTA.

Statement of agreed facts

[4] The applications proceeded on the basis of a statement of agreed facts as follows:

1. Claremont owns and operates the Aquatic Gardens Caravan Park.

2. The Park is located at 833-901 Beenleigh-Redland Bay Road, Carbrook, Queensland on land described as Lot 1 on RP156905.

3. The Park was approved by the Logan City Council as a caravan park on 19 September 1973 ("**the Use**").

4. The Park contains:

   (a) 120 sites;

   (b) common areas; and

   (c) facilities for the personal comfort, convenience, or enjoyment of persons residing in homes situated on sites in the Park.

5. The Use permitted occupation of the sites by caravans, relocatable homes and/or permanent structures (cabins) for the purpose of providing accommodation.

6. The Park does not have planning approval by the Logan City Council as either a Mobile Home Park or a Relocatable Home Park.

7. A number of the sites have positioned on them structures ("**the Homes**") that:

   (a) are not caravans;

   (b) have the character of a dwelling house;

(c) are designed to be able to be moved from one position to another; and

(d) are not permanently attached to land.

8. The site/s on which each of the Homes is situated is an area or areas of land that is or are available for rent under an agreement between the lessee of the site/s and Claremont.

9. Each of the Homes is owned by the lessee of the site/s upon which the Home is positioned ("**the Home Owners**").

10. Each of the Home Owners have entered into an agreement or agreements with Claremont that provide for:

(a) the payment of rent for the site/s by the Home Owner to Claremont;

(b) the positioning of the Home of the Home Owner on the site/s on which the Home is situated;

(c) the Home Owner's non-exclusive use of the Park's common areas and communal facilities; and

(d) special terms about the use and maintenance of the site.

11. The following are some, but not all, of the Home owners who occupy the Homes that are situated on sites the subject of agreements:

(a) Sharon Park whose home is situated on sites 115 and 116;

(b) Edmund Charles Cavanough and Anne-Marie Cavanough whose home is situated on sites 45 and 48;

(c) Jamie Matheson whose home is situated on site 17A;

(d) Mike Claridge whose home is situated on site 153;

(e) Les Winn whose home is situated on site 24;

(f) Marie Stieler, whose home is situated on site 120;

(g) Aubrey Rieck and Rita Rieck, whose home is situated on site 97.

12. The Chief Executive is responsible for ensuring compliance with the provisions of the Act by persons upon whom the Act places an obligation.

13. The Act came into force on 1 March 2004.

14 The Act replaced the *Mobile Homes Act* 1989 (Qld) which was repealed by s 147 of the Act.

[5] Counsel for Claremont in the course of oral submissions stated that he was embarrassed by the fact contained in paragraph 10(b) of the statement of agreed facts.[1] This agreed fact is that each of the home owners have entered into an agreement with Claremont that provides for the positioning of the home of the home owner on the site/s on which the home is situated. The embarrassment is said to arise because the agreed fact is inconsistent with the submission made by Counsel that the agreements which Claremont entered into with home owners pursuant to the RTA do not provide for the positioning on the land of a manufactured home. A number of examples of the relevant agreements are before the Court.[2] I am therefore in a position to construe the relevant agreements for the purposes of determining whether they provide for the positioning on the site of a manufactured home. For reasons stated below the fact in paragraph 10(b) may be accepted as a correct fact albeit not an agreed fact.

[6] Whilst the declaratory relief by each party is sought on the basis of the statement of agreed facts, it is helpful to first outline how the dispute between the parties arose.

The origin of the dispute

[7] On 20 August 2015 the Department sent an official warning to Claremont in relation to the alleged detection of an offence. The offence identified was pursuant to s 23 of the Act which prohibits a person entering into an agreement with the intention directly or indirectly of defeating the operation of the Act. The official warning states:[3]

> "Aquatic Gardens Caravan Park contains manufactured homes owned by individuals who have entered into lease agreements with park owner Claremont Holdings Pty Ltd for the sites upon which their homes are placed. On that basis, it falls within the definition of a residential park and the site leases must be documented in a manufactured home site agreement.
>
> To date the park owner, despite requirements issued from the Residential Services Unit, Department of Housing and Public Works, has refused to place home owners onto relevant site agreements as required.
>
> By refusing to enter into manufactured home site agreements with home owners of manufactured homes within the residential park … the park owner Claremont Holdings Pty Ltd has failed to acknowledge home owners rights conferred upon them by the provisions of the [Act].
>
> By requiring that home owners enter only into moveable dwelling residential tenancy agreements rather than manufactured homes site agreements the park owner is excluding the application and operation of the Act within the park, and is restricting the rights of home owners by failing to acknowledge their

---

1 Transcript of proceedings, 1 December 2015, 1-31, lines 22-45; 1-32, lines 1-6.
2 Exhibit KHM-05 to the affidavit of Katherine Michelle Harvey sworn 1 December 2015.
3 Exhibit 'IM-2' to the affidavit of Ingrid Martland sworn 16 October 2015.

> rights under the Act. The park owner is entering into residential tenancy moveable dwelling agreements with the intention either directly or indirectly, to defeat the operation of the Act."

[8] The official warning called on Claremont to enter into site agreements under the Act with the home owners within 30 days of the notice.

[9] The position of Claremont and its response to the official warning is stated in a letter from Claremont's solicitors dated 27 August 2015:[4]

> "Our client's position is that, as has always been conveyed to you, the 120 sites on Lot 1 comprising the Aquatic Gardens Caravan Park are not sites available for rent under a site agreement. That is because lot 1 is not zoned to be operated as a residential park but rather as a tourist park (formally known as a caravan park). As such, the 120 sites on Lot 1 are 'premises' within 'moveable dwelling premises' as defined by the [RTA]. It is for that reason that your client has to date and continues to enter into agreements pursuant to the RTA. Consistent with our client's position is the inability on the part of our client to comply with the mandatory requirements of the [Act]."

[10] The Department replied on 16 September 2015 in the following terms:[5]

> "Development approval and zoning of a property does not affect the status of Aquatic Gardens as a residential park under the [Act].
>
> …
>
> By recognising Aquatic Gardens Caravan Park as a residential park, we are simply recognising that it is a park that includes sites with owner occupied manufactured homes.
>
> Your further assertion that your client is correctly using the Moveable Dwelling tenancy agreement form 18b under the RTA, is incorrect. As per the attached RTA publication *Managing caravan park tenancies in Queensland*, (pg 5) these agreements are only for use when tenants are renting a caravan and a site, a site only for the placement of a caravan, or renting a manufactured home. The information produced by the Residential Tenancy Authority for caravan park owners specifically states (see inside cover of booklet – highlighted) – '*The Act* (*Residential Tenancies and Rooming Accommodation Act 2008*) *does not apply to owner-occupied manufactured homes (see Manufactured Homes (Residential Parks) Act 2003*)." (emphasis in original)

[11] The crux of the dispute is whether the Park is a "residential park" as defined in the Act. This issue is resolved by applying the relevant provisions of the Act to the agreed facts.

---

4 Exhibit 'IM-5' to the affidavit of Ingrid Martland sworn 16 October 2015.
5 Exhibit 'IM-6' to the affidavit of Ingrid Martland sworn 16 October 2015.

The Manufactured Homes Act – relevant provisions

[12] The main object of the Act is "to regulate, and promote fair trading practices in, the operation of residential parks—

(a) to protect home owners from unfair business practices; and

(b) to enable home owners, and prospective home owners, to make informed choices by being fully aware of their rights and responsibilities in their relationship with park owners."[6]

[13] The main object is achieved by:[7]

(a) declaring particular rights and obligations of the park owner, and home owners, for a residential park; and

(b) facilitating the disclosure of information about a residential park, and this Act, to a prospective home owner for a site; and

(c) regulating—

(i) the making, content, assignment and ending of a site agreement; and

(ii) the sale of an abandoned manufactured home positioned on a site in a residential park; and

(iii) the variation of site rent; and

(d) facilitating participation by home owners for a residential park in the affairs of the park; and

(e) providing ways of resolving a site agreement dispute.

[14] Section 12 of the Act defines "residential park":

"**What is a *residential park***

A ***residential park*** is an area of land that includes—

(a) sites; and

(b) common areas; and

(c) facilities for the personal comfort, convenience or enjoyment of persons residing in manufactured homes positioned on sites.

[15] Section 13 defines "site", for the purposes of the Act as "… land that is available for rent under a site agreement."

[16] Section 14 defines "site agreement" as "an agreement between a park owner and a home owner that:

---

6 *Manufactured Homes (Residential Parks) Act* 2003 (Qld) s 4(1).
7 *Manufactured Homes (Residential Parks) Act* 2003 (Qld) s 4(2).

(a) provides for—

(i) the rental by the home owner of particular land in a residential park; and

(ii) the positioning on the land of a manufactured home; and

(iii) the home owner's non-exclusive use of the park's common areas and communal facilities; and

(b) includes provision about anything else required or permitted by this Act to be in the agreement."

[17] Section 8 defines "home owner":

(1) Each of the following is a ***home owner***—

(a) a person who owns a manufactured home that is positioned on a site in a residential park under a site agreement;

(b) a person who intends to position a manufactured home on a site in a residential park under a site agreement for use by the person as the person's principal place of residence;

(c) a person who obtains an interest in a site agreement as the personal representative, or a beneficiary of the estate, of a deceased individual who immediately before the individual's death was a person mentioned in paragraph (a) or (b);

(d) another successor in title of a person mentioned in paragraph (a) or (b).

(2) A person mentioned in subsection (1)(a) is a ***home owner*** whether—

(a) the person occupies the home as the person's principal place of residence; or

(b) a tenant of the person occupies the home.

[18] Section 10 defines "manufactured home":

"(1) A ***manufactured home*** is a structure, other than a caravan or tent, that–

(a) has the character of a dwelling house; and

(b) is designed to be able to be moved from one position to another; and

(c) is not permanently attached to land.

(2) A ***manufactured home*** does not include a converted caravan.

(3) However, if a park owner and the owner of a converted caravan enter into an agreement, that would be a site agreement if it related to a manufactured home, for a site on which the converted caravan is positioned or intended to be positioned—

(a) the converted caravan is taken to be a manufactured home; and

(b) the agreement is taken to be a site agreement.

(4) To remove any doubt, it is declared that an agreement entered into under another Act or a former Act, other than the repealed *Mobile Homes Act 1989,* is not a site agreement under subsection (3).

Example –

A residential tenancy agreement entered into under the *Residential Tenancies and Rooming Accommodation Act 2008* is not a site agreement under subsection (3)."

[19] Part 5 of the Act establishes the statutory requirements for site agreements and creates various offences for non-compliance including, relevantly, ss 25(1) and 23(2) of the Act. Section 25(1) states that a park owner for a residential park must ensure a site agreement is written to the extent, and in the way, required by the section. Section 25(2) requires a site agreement to include certain standard terms. Other specific requirements for a site agreement are identified in s 25(4). A site agreement may only be terminated under Part 6 or Part 8 of the Act.

The RTA – relevant provisions

[20] One of the main objects of the RTA is to state the rights and obligations of tenants, lessors and agents for residential tenancies.[8] Section 7 contains a definition of "caravan". Section 37 of the RTA specifically refers to agreements under the Act. Section 37(1) states that the RTA does not apply to a residential tenancy agreement if the agreement is a site agreement. Section 37(2) provides that the RTA may however apply to a subsequent agreement. This simply means that the RTA will not apply to a site agreement between a park owner and a home owner but would apply if the home owner, having positioned the manufactured home on the site, rented the home to a third party. Sections 10, 11 and 12 of the RTA define "residential premises", "residential tenancy" and "residential tenancy agreement". Residential premises are defined as premises used, or intended to be used, as a place of residence or mainly as a place of residence. A residential tenancy is the right to occupy residential premises under a residential tenancy agreement.

[21] The RTA also includes the following definitions at Schedule 2:

moveable dwelling means a caravan or manufactured home.

moveable dwelling park means a place where moveable dwellings are situated for occupation on payment of consideration.

moveable dwelling premises means premises consisting of—

(a) for a moveable dwelling that is a caravan—the dwelling or its site, or both the dwelling and site; or

(b) for a moveable dwelling that is a manufactured home in, or intended to be situated in, a moveable dwelling park—the dwelling or its site, or both the dwelling and site.

---

[8] *Residential Tenancies and Rooming Accommodation Act* 2009 (Qld) s 5(1)(a).

[22] The provisions of the Act are not subject to or qualified by the RTA. The Act and the RTA seek to deal with separate subject matters. I accept the submission of the Chief Executive that when regard is had to the objects of the RTA and the relevant definitions quoted above, the provisions of the RTA that apply to moveable dwellings apply only to manufactured homes that are offered for rental in circumstances where:[9]

(a) the manufactured home is owned by the same person or entity as the site upon which it is positioned, and both are offered for rental; or

(b) the manufactured home is owned by a different person or entity than the owner of the site upon which it is positioned, and the home is offered for rental under a residential tenancy agreement.

This is the effect of s 37(2) of the RTA discussed in paragraph [20] above.

Consideration

[23] When taken together the definitions in ss 12, 13 and 14 of the Act mean that the Park will be a residential park if it includes land that is available for rent pursuant to an agreement which provides for the positioning on the land of a manufactured home. A park can still be a residential park even if it includes sites that are not available for rent under a site agreement. This is because the definition of residential park makes reference to "an area of land that includes" land that is available for rent under a site agreement. Importantly, a park in order to constitute a residential park does not require the actual existence of a site agreement. All that is required is that land is "available" for rent under a site agreement. This is in circumstances where s 23(2) prohibits a person entering into an agreement with the intention directly or indirectly of defeating the operation of the Act.

[24] There is no dispute that there are a number of homes within the Park that meet the definition of a "manufactured home". Each of these homes is owned by the home owner and is positioned on a site or sites that are rented by the home owner pursuant to an agreement with the park owner, Claremont. This is the very situation which the legislature intended to be covered exclusively by the Act.

[25] There is no dispute that the present agreements under the RTA between Claremont and the home owners make provision for the payment of rent by the home owners to Claremont and for the home owners' non-exclusive use of the Park's common areas and communal facilities. Claremont, however, submits that the agreements are not "site agreements" because they "do not provide" for the positioning on the land of a manufactured home as expressly required by s 14(a)(ii) of the Act. Claremont submits that they are site only agreements as expressly contemplated by the RTA and its definition of "premises". This submissions should be rejected. Section 9 of the RTA defines premises as follows:

> "(1) ***Premises***, for a residential tenancy, include a part of premises and land occupied with premises.

---

[9] Outline of submissions on behalf of the Chief Executive of the Department of Housing and Public Works dated 1 December 2015, [32].

> (2) ***Premises***, for a residential tenancy, also include—
>
> (a) a caravan or its site, or both the caravan and site; and
>
> (b) a manufactured home in, or intended to be situated in, a moveable dwelling park or its site, or both the manufactured home and site; and
>
> (c) a houseboat."

A further reference to "premises" is made in s 22 of the RTA:

> "In this Act, unless a contrary intention appears, a reference to premises is a reference to a residential premises under a residential tenancy agreement to which this Act applies."

The definition of "premises" in the RTA only makes a tenancy agreement under the RTA appropriate in circumstances where tenants are renting a caravan and a site, a site only for the placement of a caravan, or renting a manufactured home. The RTA in my view has no application to the present situation as identified in the statement of agreed facts. It does not apply where land owned by a park owner is leased to a home owner who positions a manufactured home on the site.

[26] The starting point in determining whether the Park is a residential park is not the terms of the present agreements between Claremont and the home owners. As already observed, the Park will be residential park if it has land that is available for rent under a site agreement.

[27] Even if it was considered necessary for the purposes of determining whether the Park is a residential park that the present agreements provide for the positioning on the land of a manufactured home, I am of the view that they do so provide. Under Item 6.1 of each agreement, the relevant location of the premises or site is identified. The agreements identify the sites by number. Under Item 6.2, which refers to "the moveable dwelling", the notation in each agreement is "site only". The agreements in Part 3 contain certain special terms:[10]

> "● All caravans/mobile homes residing in this park must be owner occupied and not used for renting out."

It is irrelevant that the rental is of the site only. It is also irrelevant whether a lessee under the agreement may either leave the site vacant, pitch a tent, place a caravan or position a manufactured home on the site. An agreement may still "provide for the positioning on the land of a manufactured home" even if it also provides for or permits other matters. Further, as a matter of construction, the special term set out above contemplates and therefore provides for the placement of a manufactured home. Not only does the special term contemplate the positioning of the manufactured home on the relevant site, a specific restriction is imposed. By the special term, if a home owner positions their manufactured home on a site in the Park, they must be an owner occupier and are prohibited from renting the home to a third party.

---

[10] Exhibit 'IM-3' to the affidavit of Ingrid Martland sworn 16 October 2015.

Relief

[28] The Court has jurisdiction pursuant to s 10 of the *Civil Proceedings Act* 2011 (Qld) to "hear an application for a declaratory order and may make a declaratory order without granting relief as a result of making the order." The Court's discretion to make a declaration is extremely wide.[11]

[29] The jurisdiction of the Court is not however to give gratuitous legal advice to an applicant. There must be a genuine legal controversy to be resolved:[12]

> "… declaratory relief must be directed to the determination of legal controversies and not to answering abstract or hypothetical questions. The person seeking relief must have a 'real interest' and relief will not be granted if the question 'is purely hypothetical', if relief is 'claimed in relation to circumstances that [have] not occurred and might never happen' or if 'the Court's declaration will produce no foreseeable consequences for the parties'."

[30] In this case there is a genuine dispute between the parties, namely whether or not the Park is a "residential park" for the purposes of the Act and, if so, whether Claremont is bound by the provisions of that Act in relation to the leasing of sites within the Park to owners of manufactured homes situated on those sites.

[31] The interests that the parties have in the legal questions posed by the applications are demonstrated by the following facts:

(a) The Department is responsible for administering and ensuring compliance with the Act;[13] and

(b) The Department has issued Claremont with a warning notice alleging offences by it against the Act;[14]

(c) If the Park is a "residential park" for the purposes of the Act, and Claremont fails to ensure any agreement between it and any "home owner" in relation to a "site", as defined in the Act, is a written agreement compliant with Part 5, Division 1 of the Act, Claremont will be liable to prosecution for an offence or offences against the Act.

[32] My initial view is that a declaration should be made in the terms of 1(a) of the Chief Executive's originating application. I will, however, hear the parties as to the final form of relief and costs.

---

[11] *Forster v Jododex Australia Pty Ltd* (1972) 127 CLR 421, 435 (Gibbs J).
[12] *Ainsworth v Criminal Justice Commission* (1992) 175 CLR 564, 582 (Mason CJ, Dawson, Toohey and Gaudron JJ).
[13] Statement of agreed facts, [12].
[14] Exhibit 'IM-2' to the affidavit of Ingrid Martland sworn 16 October 2015.