SUPREME COURT OF QUEENSLAND

CITATION:	*Breeze MR Pty Ltd v Body Corporate for Bay Village CTS 33127* [2022] QSC 195
PARTIES:	**BREEZE MR PTY LTD ACN 607 362 167** (Applicant) **v** **BODY CORPORATE FOR BAY VILLAGE COMMUNITY TITLES SCHEME 33127** (Respondent)
FILE NO/S:	BS 10028 of 2022
DIVISION:	Trial Division
PROCEEDING:	Application
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	16 September 2022
DELIVERED AT:	Brisbane
HEARING DATE:	30 August 2022
JUDGE:	Kelly J
ORDER:	**On the proper construction of s. 126 of the *Body Corporate and Community Management Act 1997* (Qld), the respondent cannot lawfully terminate the management agreement in reliance upon the remedial action notice dated 12 August 2021 and/or the contractual breaches alleged in the remedial action notice.**
CATCHWORDS:	REAL PROPERTY – STRATA AND RELATED TITLES – MANAGEMENT AND CONTROL – BODY CORPORATE: POWERS, DUTIES AND LIABILITIES – OTHER CASES – where s. 126(1) of the *Body Corporate and Community Management Act 1997* (Qld) ("the Act") provided that a body corporate may terminate a financed contract if the body corporate has given the financier written notice that the body corporate has the right to terminate the contract, circumstances existed when the notice was given under which the body corporate had the right to terminate the contract, and at least 21 days have passed since the notice was given – where s. 126(2) of the Act provided that the body corporate can not terminate the contract if, under arrangements between the financier and the contractor for the contract, the financier is acting under the contract in place of the contractor, or has appointed a person as a receiver or receiver and manager for the contract – where the applicant

was a service contractor engaged by the respondent pursuant to a management agreement – where the management agreement was a financed contract – where the respondent provided the applicant with a remedial action notice identifying alleged breaches of the management agreement – where the applicant admits the validity of the remedial action notice and that the breaches identified in the notice were not remedied within the necessary period of time – where the respondent gave the applicant's financier notice of its right to terminate the management agreement – where the financier appointed receivers and managers over the applicant's property, including the management agreement – where the financier satisfied its debts from the sale of assets other than the management agreement – where the receivers and managers retired – whether the respondent can lawfully terminate the management agreement in reliance upon the remedial action notice – whether s. 126(2) prevents the respondent from terminating the management agreement.

Acts Interpretation Act 1954 (Qld), s. 14A
Body Corporate and Community Management Act 1997 (Qld), s. 100, s. 123, s. 125, s. 126, s. 127
Body Corporate and Community Management (Commercial Module) Regulation 2020 (Qld), s. 99, s. 100, s. 102
Corporations Act 2001 (Cth), s. 420A

Alcan (NT) Illumina Pty Ltd v Commissioner of Territory Revenue (Northern Territory) (2009) 239 CLR 27; [2009] HCA 41, cited
Australand Corporation (Qld) Pty Ltd v Johnson [2008] 1 Qd R 203; [2007] QCA 302, cited
Carey v Korda (2012) 45 WAR 181; [2012] WASCA 228, cited
Certain Lloyd's Underwriters v Cross (2012) 248 CLR 378; [2012] HCA 56, cited
Henderson v Body Corporate for Merrimac Heights [2011] QSC 336, cited
Sheahan v Carrier Air Conditioning Pty Ltd (1997) 189 CLR 407; [1997] HCA 37, cited

COUNSEL: S Couper QC with BW Kidston for the applicant
MD White for the respondent

SOLICITORS: Mahoneys for the applicant
Butler McDermott Lawyers for the respondent

Introductory matters and the issue for determination

[1] The respondent is the body corporate for the Bay Village Community Titles Scheme 33127 ("the Scheme"), created under the *Body Corporate and Community*

Management Act 1997 (Qld) ("the Act"). The applicant is a service contractor for the Scheme and is engaged by the respondent pursuant to a management agreement ("the management agreement").[1]

[2] A body corporate may terminate a person's engagement as a service contractor under the Act, by agreement or under the engagement, but any termination must be approved by an ordinary resolution of the body corporate.[2] A means of terminating the engagement of a service contractor under the Act involves the body corporate giving to the contractor a remedial action notice under s. 102 of the *Body Corporate and Community Management (Commercial Module) Regulation 2020* (Qld) ("the Module"). A remedial action notice must provide details of, *inter alia*, the respects in which the contractor has engaged in misconduct or failed to perform duties and specify a period of time, not less than 14 days, in which the contractor is required to remedy the misconduct or perform the duties. Where the contractor is engaged pursuant to a "financed contract", s. 126 of the Act limits the right of the body corporate to terminate the contract. A "financed contract" is a contract for which there is a financier.[3] The body corporate may terminate a financed contract if it has given the financier notice of the body corporate's right to terminate the contract, circumstances existed when the notice was given under which the body corporate had the right to terminate the contract and at least 21 days have passed since the giving of the notice. However, s. 126(2) provides that the body corporate "can not terminate the contract" if the financier is acting under the contract in place of the contractor or has appointed a receiver or receiver and manager for the contract.

[3] In the present case, the respondent gave the applicant a remedial action notice under s. 102 of the Module ("the RAN"). The matters it identified were not remedied. The respondent gave to the applicant's financier, Westpac, notice of its right to terminate the management agreement. Westpac appointed receivers and managers over the applicant's property including its rights under the management agreement. The financed debt was paid out by the sale of an asset unconnected with the management agreement. The receivers and managers retired and the financier gave notice to the respondent that it was no longer a financier of the management

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1 The management agreement is dated 17 October 2005 and was ultimately assigned to the applicant on 20 August 2018.
2 The Act, s. 100.
3 The Act, sch. 6.

agreement. At this point, the management agreement was properly described as a contract for which there was no financier and hence, no longer "a financed contract". The respondent contends that it remains entitled to terminate the management agreement in reliance upon the RAN and it intends to call a meeting to pass a motion terminating the management agreement.

[4] On 23 August 2022, the applicant filed an originating application seeking final and interlocutory relief against the respondent. On that date, I granted an interlocutory injunction restraining the respondent from terminating the management agreement and passing or attempting to pass the motion. On this occasion for final relief, the applicant seeks declaratory orders and a permanent injunction. There are no pleadings. The parties have agreed that the question for determination before me may be stated as follows:

> "In circumstances, where the applicant admits the validity of the RAN and that the breaches alleged in the RAN were not remedied within the necessary period of time, whether, on the proper construction of s 126 of the Act, the respondent can lawfully terminate the management agreement in reliance upon the RAN and/or the contractual breaches alleged in same, following the appointment of a receiver to the applicant pursuant to the said section, and the subsequent retirement of the receiver?"

Factual background

[5] On 20 August 2018, the contractor's rights under the management agreement were assigned to the applicant. The applicant purchased those rights for $980,000.00. At the same time, the applicant purchased the caretaker's lot at the Scheme for $400,000.00.

[6] Under clause 3 of the management agreement, the applicant agreed to provide essentially caretaker services, including cleaning, garbage removal, security and car park management. Clause 6 of the management agreement provided that the respondent might terminate the management agreement if the applicant was guilty of gross misconduct or gross negligence in the performance of its contractual duties.

[7] On or about 19 August 2021, the respondent gave the applicant the RAN, which contained serious allegations to the effect that the applicant had engaged in gross misconduct, gross negligence, failed to carry out the duties contained in the management agreement and contravened the relevant code of conduct for body

corporate managers and caretaker service contractors. The RAN advised the applicant that it had 21 days from its receipt to prove the alleged actions were false and/or did not amount to breaches of the management agreement or contraventions of the code and otherwise called upon the applicant to remedy the acts of misconduct and contraventions.

[8] It is common ground that the breaches identified in the RAN were not remedied. The respondent convened an extraordinary general meeting on 27 January 2022, which passed resolutions to the effect that the RAN had been given, the acts of misconduct and contraventions had not been remedied, the respondent had a right to terminate the management agreement and written notice would be given to Westpac pursuant to s. 126(1) of the Act.

[9] On or about 28 January 2022, Westpac received a notice from the respondent pursuant to s. 126(1) of the Act advising of its intention to terminate the management agreement after the expiry of 21 days.

[10] On 17 February 2022, Westpac appointed Mr Justin Denis Walsh and Mr Andrew Gerard Hanson as receivers and managers over, *inter alia*, "all of the [applicant's] right, title, estate and interest in the management, caretaking and letting rights for 'the Scheme'".

[11] At the time of the appointment of the receivers and managers, the applicant owned management rights at another body corporate scheme ("Maison Noosa").[4]

[12] On or about 14 June 2022, the receivers entered two contracts as agents of the applicant, one to sell the management rights for the Scheme ("the management rights sale contract") and the other to sell the caretaker's lot at the Scheme ("the caretaker's lot sale contract"). The management rights sale contract provided for an assignment of the applicant's rights and obligations under the management agreement and was conditional upon the respondent providing its consent. The sale price under the management rights sale contract was $750,000.00. The caretaker's lot sale contract was conditional upon the contemporaneous completion of the management rights sale contract. The sale price under the caretaker's lot sale

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4 Maison Noosa was a scheme located at 5 Hastings Street, Noosa and was named "Maison La Plage Community Titles Scheme 6489".

contract was $450,000.00. The two contracts have not yet settled. The respondent's consent to the management sale contract has not yet been provided.

[13] The receivers also sold the applicant's management rights for Maison Noosa ("the Maison Noosa sale"). Settlement of that transaction occurred on 1 July 2022. Westpac settled all debts owed to it by the applicant, including the debt secured by the management agreement, out of the proceeds of the Maison Noosa sale.

[14] On 19 July 2022, Westpac retired the appointment of the receivers and gave notice to the respondent that it was no longer a financier for the management agreement.

[15] On or about 2 August 2022, the respondent gave notice to the owners in the Scheme of an extraordinary general meeting to be convened on 25 August 2022. The notice included information about a proposed motion to terminate the management agreement.

[16] Relevantly, the notice included a letter from the respondent's chairman ("the chairman's letter") which materially stated:

> "Dear Fellow Lot Owner,
>
> You will recall that on 27 January 2022 an Extraordinary General Meeting of the Body Corporate was held at which the following resolutions were passed:
>
> *'1. That [the applicant], being the "**Manager**" pursuant to a '[m]anagement [a]greement' with the [respondent] dated 17 October 2005 ("**the [m]anagement [a]greement**"), has:*
>
> *(a) engaged in gross misconduct for the purposes of clause 6.1(b) of the [m]anagement [a]greement;*
>
> *(b) engaged in misconduct and/or gross negligence in carrying out the functions required under the [m]anagement [a]greement in the way mentioned in section 102(1)(a) of [the Module]; and/or*
>
> *(c) failed to carry out those duties set out in the [m]anagement [a]greement in the way mentioned in section 102(1)(b) of [the Module].*
>
> *2. That the Manager has failed to remedy the above misconduct and contraventions in response to a Remedial Action Notice issued by the [respondent] to the Manager dated 12 August 2021.*
>
> *3. That, by reason of the above matters, the [respondent] has a right to terminate the [m]anagement [a]greement pursuant to:*
>
> *(a) clause 6.1 of the [m]anagement [a]greement;*

(b) section 100(1) of [the Module]; and/or

(c) section 102(1) of [the Module].

4. *That, pursuant to section 126(1) of [the Act], written notice be given to the Manager's financier, Westpac Banking Corporation at its address for service, that the [respondent] has a right to terminate the [m]anagement [a]greement.'*

In accordance with the above resolutions, on 27 January 2022 Westpac was served with a notice advising them of the [respondent's] right to terminate the [m]anagement [a]greement.

In response to this notice, Westpac appointed a receiver and manager to the Manager's right, title, estate and interest in the [m]anagement [a]greement, and the Manager's right, title, estate and interest in Lot 31 of the Scheme.

On 19 July 2022, the [respondent] received notice from Westpac that it is no longer a financier for the [m]anagement [a]greement.

In the circumstances, the [m]anagement [a]greement is now no longer a '*financed contract'* for the purposes of section 126 of [the Act], and the limitation on termination of the [m]anagement [a]greement imposed by that section no longer applies.

Given the [respondent's] earlier resolutions as to the Manager's conduct and the Body Corporate's right to terminate the [m]anagement [a]greement, notice is now hereby given of an extraordinary general meeting of the [respondent] to consider whether or not the [respondent] should exercise its rights to terminate the [m]anagement [a]greement.

A proposed motion to this effect for determination at the meeting is ***attached***."

The Act and the Module

[17] The Module contains provisions which are intended to provide for the grounds on which a person's engagement as a service contractor may be terminated and the steps which must be followed by a body corporate to terminate such an engagement. The presently relevant provisions of the Module are ss. 99, 100 and 102, which provide as follows:

"**99 Purpose of part [SM, s 149]**

This part provides for—

(a) the grounds on which the body corporate may terminate a person's engagement as a body corporate manager or service contractor, or authorisation as a letting agent; and

(b) the steps the body corporate must follow to terminate the engagement or authorisation.

100 Termination under the Act, by agreement etc. [SM, s 149]

(1) The body corporate may terminate a person's engagement as a body corporate manager or service contractor, or authorisation as a letting agent—

(a) under the Act; or

(b) by agreement; or

(c) under the engagement or authorisation.

(2) The body corporate may act under subsection (1) only if the termination is approved by ordinary resolution of the body corporate.

…

102 Termination for failure to comply with remedial action notice [SM, s 152]

(1) The body corporate may terminate a person's engagement as a body corporate manager or service contractor if the person, including, if the person is a corporation, a director of the corporation—

(a) engages in misconduct, or is grossly negligent, in carrying out functions required under the engagement; or

(b) fails to carry out duties under the engagement; or

(c) contravenes—

(i) for the body corporate manager—the code of conduct for body corporate managers and caretaking service contractors; or

(ii) for a service contractor who is a caretaking service contractor—the code of conduct for body corporate managers and caretaking service contractors or the code of conduct for letting agents; or

(d) fails to comply with section 104(2), 105(2) or 106(2); or

(e) for a body corporate manager—commits an offence under section 118(2).

(2) Also, the body corporate may terminate a person's authorisation as a letting agent if the person, including, if the person is a corporation, a director of the corporation—

(a) engages in misconduct, or is grossly negligent, in carrying out obligations, if any, under the authorisation; or

(b) fails to carry out duties under the authorisation; or

(c) contravenes the code of conduct for letting agents or, for a caretaking service contractor, the code of conduct for body corporate managers and caretaking service contractors; or

(d) for a caretaking service contractor—fails to comply with section 104(2), 105(2) or 106(2).

(3) The body corporate may act under subsection (1) or (2) only if—

(a) the body corporate has given the person a remedial action notice under subsection (4); and

(b) the person fails to comply with the remedial action notice within the period stated in the notice; and

(c) the termination is approved by ordinary resolution of the body corporate; and

(d) for the termination of a person's engagement as a service contractor if the person is a caretaking service contractor, or the termination of a person's authorisation as a letting agent—the motion to approve the termination is decided by secret ballot.

(4) For subsection (3), a remedial action notice is a written notice stating each of the following—

(a) that the body corporate believes the person has acted—

(i) for a body corporate manager or a service contractor—in a way mentioned in subsection (1)(a) to (e); or

(ii) for a letting agent—in a way mentioned in subsection (2)(a) to (d);

(b) details of the action sufficient to identify—

(i) the misconduct or gross negligence the body corporate believes has happened; or

(ii) the duties the body corporate believes have not been carried out; or

(iii) the provision of the code of conduct or this regulation the body corporate believes has been contravened;

(c) that the person must, within the period stated in the notice but not less than 14 days after the notice is given to the person—

(i) remedy the misconduct or gross negligence; or

(ii) carry out the duties; or

(iii) remedy the contravention;

(d) that if the person does not comply with the notice in the period stated, the body corporate may terminate the engagement or authorisation."

[18] Section 126 is contained within chapter 3, part 2, division 4 of the Act and addresses the circumstances in which a financed contract may be terminated.

[19] Section 126 provides as follows:

"**126 Limitation on termination of financed contract**

(1) The body corporate under a financed contract may terminate the contract if—

(a) the body corporate has given the financier for the contract written notice, addressed to the financier at the financier's address for service, that the body corporate has the right to terminate the contract; and

(b) when the notice was given, circumstances existed under which the body corporate had the right to terminate the contract; and

(c) at least 21 days have passed since the notice was given.

(2) However, the body corporate can not terminate the contract if, under arrangements between the financier and the contractor for the contract, the financier—

(a) is acting under the contract in place of the contractor; or

(b) has appointed a person as a receiver or receiver and manager for the contract.

(3) A financier may take the action mentioned in subsection (2)(a) or (b) only if the financier has previously given written notice to the body corporate of the financier's intention to take the action.

(4) The financier may authorise a person to act for the financier for subsection (2)(a) if—

(a) the person is not the contractor or an associate of the contractor; and

(b) the body corporate has first approved the person.

(5) For deciding whether to approve a person under subsection (4), the body corporate—

(a) must act reasonably in the circumstances and as quickly as practicable; and

(b) may have regard only to—

(i) the character of the person; and

(ii) the competence, qualifications and experience of the person.

(6) However, the body corporate must not—

(a) unreasonably withhold approval of the person; or

(b) require or receive a fee or other consideration for approving the person, other than reimbursement for legal or administrative expenses reasonably incurred by the body corporate for the application for its approval.

(7) Subsection (2) does not operate to stop the body corporate from terminating the contract for something done or not done after the financier started to act under the subsection.

(8) Nothing in this section stops the ending of a financed contract by the mutual agreement of the body corporate, the contractor and the financier.

(9) In this section—

address for service, for a financier, means the financier's address for service—

(a) for notices given by the body corporate under this division; and

(b) stated in a notice given to the body corporate under section 123 or 124."

[20] There are relevant definitions contained in schedule 6 to the Act. Notably:

(a) "***contract***, for chapter 3, part 2, division 4, means the contract or other arrangement under which a person is engaged as a service contractor, or authorised as a letting agent, for a community titles scheme";

(b) *"**contractor***, for a contract, for chapter 3, part 2, division 4 means a person who, under the contract, is engaged as a service contractor, or authorised as a letting agent;"

(c) *"**financed contract*** means a contract for which there is a financier."

[21] Section 123 provides:

"**123 Meaning of *financier* for div 4**

(1) For this division, a person is a *financier* for a contract if a contractor for the contract and the person give written notice signed by each of them to the body corporate under the contract that the person is a financier for the contract.

(2) For this division, a person stops being a financier for a contract if the person gives the body corporate under the contract a written notice withdrawing the notice given under subsection (1).

(3) A notice under subsection (2) may be given without the contractor's agreement.

(4) However, a person is a financier for the contract only if the person is—

(a) a financial institution; or

(b) a person who, in the ordinary course of the person's business, supplies, or might reasonably be expected to supply, finance for business acquisitions, using charges over contracts as the whole or part of the person's security; or

(c) if the contract is in existence immediately before the commencement—a person who, at the time the person supplied finance for a business acquisition, using a charge over the contract as the whole or part of the person's security, was a person mentioned in paragraph (b)."

[22] Finally, two further sections may be conveniently mentioned.

[23] Section 125 provides:

"**125 Notice of changes affecting financed contract**

If the body corporate and a contractor for a financed contract change the contract or enter into an arrangement that affects the contract, the body corporate must give the financier written notice of the change or arrangement."

[24] Section 127 provides:

"**127 Agreements between body corporate and financier prohibited**

(1) A financier for a financed contract must not enter into an agreement or other arrangement with the body corporate under the contract for a matter about—

(a) the role of the financier for the contract; or

(b) arrangements entered into between the financier and contractor for the contract under which the financier is acting, or may act, under the contract in the place of the contractor; or

(c) the operation of this division in relation to the contract.

(2) An agreement or arrangement is void to the extent it contravenes this section."

The real issues in dispute and the parties' arguments

[25] It is uncontroversial that, as at 17 February 2022:

(a) the management agreement was "a financed contract";

(b) the respondent had given to the applicant the RAN;

(c) the RAN alleged that the applicant had:

(i) engaged in gross misconduct for the purposes of clause 6.1(b) of the management agreement;

(ii) engaged in misconduct and/or gross negligence in carrying out the functions required under the management agreement in the way mentioned in section 102(1)(a) of the Module; and/or

(iii) failed to carry out the duties set out in the management agreement in the way mentioned in section 102(1)(b) of the Module;

(d) the applicant had failed to remedy its misconduct and contraventions in response to, and within the time specified by, the RAN;

(e) the respondent had given notice to Westpac pursuant to s. 126(1)(c); and

(f) Westpac had appointed receivers and managers, s. 126(2) was engaged and the respondent could not lawfully terminate the management agreement.

[26] On 19 July 2022, Westpac retired the receivers and managers and advised the respondent that it was no longer a financier for the management agreement. That advice appears to have been the impetus for the present dispute. The chairman's letter asserted that, because the management agreement was no longer a "financed contract" for the purposes of s. 126 of the Act, the limitation on termination imposed by that section "no longer applies". Freed of that limitation, the respondent

now seeks to rely upon a right to terminate the management agreement based upon its earlier resolutions as to the applicant's historical conduct.

[27] Section 100 of the Module makes it clear that a body corporate may terminate a person's engagement as a service contractor under the Act, by agreement or under the engagement. The respondent accepted that it was purporting to rely upon a right to terminate the management agreement for conduct of the kind described by s. 102 of the Module.[5] A termination for conduct of that kind must follow the procedure outlined in that section which relevantly includes the giving of an opportunity to remedy the defaults and a motion to approve the termination being conducted by secret ballot and carried by an ordinary resolution. [6]

[28] In the present case, the respondent gave the RAN to the applicant, the matters alleged in the RAN were not remedied within the required period of time and the respondent thus met the requirements in ss. 102(3)(a) and (b) of the Module. However, at a point when ss.102(3)(c) and (d) were still to be satisfied before the respondent could "act" to terminate the management agreement under ss. 102(1) or (2) of the Module, it gave notice to Westpac as required by s. 126(1) of the Act. The respondent did so because the management agreement was then "a financed contract". Having received the notice, Westpac appointed the receivers and managers.

[29] The real issue in dispute concerns the proper construction of s. 126 of the Act. More particularly, if s. 126(2) is engaged, does it prohibit a body corporate from terminating a contract under which a person is engaged as a service contractor in reliance upon the circumstances which existed prior to the financier starting to act under s. 126(2) or does it merely prohibit termination in reliance upon such circumstances for such time as the contract remains "a financed contract"?

[30] The applicant submitted that the notice required by s. 126(1) was meant to enable the financier to choose or elect whether to act under the relevant contract in place of the contractor or to appoint receivers or receivers and managers for that contract. If the financier elected to act under the contract or appointed receivers or receivers and

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5 T 1-11 ll 30-32.

6 *Henderson v Body Corporate for Merrimac Heights* [2011] QSC 336 [98].

managers for the contract, the right to terminate the contract on the basis of the circumstances existing as at that time was said to be lost "once and for all".[7]

[31] With reference to the facts of the present case, the respondent conceded that it could not exercise a right to terminate "whilst the [management agreement] remained a financed contract by reason of the prohibition imposed by s. 126".[8] The respondent submitted that the relevant time to consider whether there was a statutory bar to termination was at the time the respondent sought to terminate, not the time when any breaches occurred or any notices had been given.[9] The respondent maintained that from the point when the financier's debt was paid in full, the management agreement ceased to be "a financed contract" and s 126 had no application. The respondent variously put its argument along these lines:

(a) the right to terminate always existed but s. 126(2) precluded termination in circumstances where the contract remained "a financed contract";[10]

(b) alternatively, the right to terminate "revived" at the point when the contract ceased to be "a financed contract".[11]

Consideration

[32] The relevant principles of statutory interpretation are not in dispute.

[33] In *Alcan (NT) Illumina Pty Ltd v Commissioner of Territory Revenue (Northern Territory)*,[12] the joint judgment said:

> "This Court has stated on many occasions that the task of statutory construction must begin with a consideration of the text itself. Historical considerations and extrinsic materials cannot be relied on to displace the clear meaning of the text. The language which has actually been employed in the text of legislation is the surest guide to legislative intention. The meaning of the text may require consideration of the context, which includes the general purpose and policy of a provision, in particular the mischief it is seeking to remedy."

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7 T 1-5 l 16.
8 Respondent's Outline of Argument [15].
9 T 1-12 l 45 - T 1-13 l 5.
10 T 1-14 ll 11-14.
11 T 1-15 ll 20-22.
12 (2009) 239 CLR 27, 46-47 [47] (Hayne, Heydon, Crennan and Kiefel JJ).

[34] In *Certain Lloyd's Underwriters v Cross,*[13] the joint judgment said:

> "The context and purpose of a provision are important to its proper construction because, as the plurality said in *Project Blue Sky Inc v Australian Broadcasting Authority*, '[t]he primary object of statutory construction is to construe the relevant provision so that it is consistent with the language and purpose of *all* the provisions of the statute' (emphasis added). That is, statutory construction requires deciding what is the legal meaning of the relevant provision 'by reference to the language of the instrument viewed as a whole', and 'the context, the general purpose and policy of a provision and its consistency and fairness are surer guides to its meaning than the logic with which it is constructed'.
>
> Determination of the purpose of a statute or of particular provisions in a statute may be based upon an express statement of purpose in the statute itself, inference from its text and structure and, where appropriate, reference to extrinsic materials. The purpose of a statute resides in its text and structure. Determination of a statutory purpose neither permits nor requires some search for what those who promoted or passed the legislation may have had in mind when it was enacted. It is important in this respect, as in others, to recognise that to speak of legislative 'intention' is to use a metaphor. Use of that metaphor must not mislead. '[T]he duty of a court is to give the words of a statutory provision the meaning that the legislature *is taken to have intended* them to have' (emphasis added). And as the plurality went on to say in *Project Blue Sky*:
>
> > 'Ordinarily, that meaning (the legal meaning) will correspond with the grammatical meaning of the provision. But not always. The context of the words, the consequences of a literal or grammatical construction, the purpose of the statute or the canons of construction may require the words of a legislative provision to be read in a way that does not correspond with the literal or grammatical meaning.'
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> To similar effect, the majority in *Lacey v Attorney-General (Qld)* said:
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> > 'Ascertainment of legislative intention is asserted as a statement of compliance with the rules of construction, common law and statutory, which have been applied to reach the preferred results and which are known to parliamentary drafters and the courts.' (footnote omitted.)
>
> The search for legal meaning involves application of the processes of statutory construction. The identification of statutory purpose and legislative intention is the product of those processes, not the discovery of some subjective purpose or intention."

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13 (2012) 248 CLR 378, 389-390 [24]-[25] (French CJ and Hayne J).

[35] Section 14A of the *Acts Interpretation Act 1954* (Qld) provides that, when interpreting a provision, the interpretation that will best achieve the purpose of the Act is to be preferred.

[36] Turning then to the text of s. 126, s. 126(1) provides that, before "a financed contract" may be terminated, the body corporate is required to give the financier notice of the body corporate's right to terminate. The giving of the notice is one precondition to the lawful termination of the contract. The other preconditions are that the notice is given when "circumstances existed under which the body corporate had the right to terminate the contract" and "at least 21 days have passed since the notice was given". The language of s. 126(2)(b) is relevantly that "the body corporate can not terminate the contract if …the financier … has appointed a person as a receiver or receiver and manager for the contract". This limitation is imposed by reference to an existing fact, "the financier has appointed" receivers. Notably, in imposing that limitation, the statutory language does not reference any future state of affairs, such as the continuation of the appointment or the contract thereafter remaining "a financed contract".

[37] By way of contrast, s. 126(7) does refer to future matters namely conduct ("something done or not done") after the financier "started to act". At first glance, the words "started to act" as contained in s. 126(7) might seem to only reference the financier starting to act under the contract in place of the contractor as contemplated by s. 126(2)(a). However, the relevant language of s. 126(7) is "the financier started to act under the subsection". That language should be taken as a reference to the financier having acted in one of the two ways contemplated by s. 126(2), namely, acting under the contract in place of the contractor (s. 126(2)(a)) or appointing receivers or receivers and managers for the contract (s. 126(2)(b)). My reasons for this conclusion are as follows:

(a) First, s. 126(7) commences with reference to "Subsection (2)" and then later contains the words "under the subsection". These references are to the entirety of s. 126(2) rather than to one of its subparagraphs. Elsewhere within s. 126, the draftsperson has specifically identified paragraphs of subsections.[14] Had it been intended that s. 126(7) was only meant to refer to

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14 The Act, s. 126(3) and s. 126(4).

s. 126(2)(a), the language of s. 126(7) could have been expected to refer to s. 126(2)(a) as distinct from "Subsection (2)" and "the subsection";

(b) Secondly, s. 126(3) refers to "the action mentioned in subsection (2)(a) or (b)" and hence contemplates that the appointment of receivers and managers is properly regarded as "an action" or "act" taken by the financier;

(c) Thirdly, s. 126(2)(a) is concerned with a situation where the financier is acting "under the contract" whereas s. 126(7) refers to the financier starting to act "under the subsection". This is a deliberate distinction in the statutory language. Section 126 has been renumbered and was formerly s. 110. As initially enacted, s. 110 contained subsections (2) and (7) in these terms:

> "(2) However, the body corporate may not terminate the contract if the financier is, under arrangements between the financier and the contractor for the contract, acting under the contract in the place of the contractor for the contract.
>
> …
>
> (7) When the financier is acting under the contract under subsection (2), the subsection does not operate to stop the body corporate from terminating the contract for something done or not done after the financier started to act under the contract."

The *Body Corporate and Community Management and Other Legislation Amendment Act 2003,* amended s. 110 to relevantly include provisions in identical terms to the current ss. 126(2) and (7).[15]

[38] Reading ss. 126(1), (2) and (7) together, where s. 126(2) is engaged it stops a body corporate from terminating the relevant contract for something done or not done before the financier acted under s. 126(2)(a) or (b) but does not stop a body corporate from terminating the contract for something done or not done after the financier took either of those actions.

[39] This interpretation is consistent with the statutory purpose. As initially enacted, what is now s. 126(2) was limited to the circumstance of the financier acting under the contract (the action now contemplated by s. 126(2)(a)). The explanatory notes for the *Body Corporate and Community Management Bill 1997* (Qld) suggest that the section as initially enacted was relevantly intended to provide "the level of

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15 *Body Corporate and Community Management and Other Legislation Amendment Act 2003* (Qld), s. 47.

protection given to a financier of a contract of a person who is engaged as a service contractor".[16] The section was later amended in 2003 in terms which introduced provisions in the form of the current ss. 126(2) and (7). The explanatory notes to the *Body Corporate and Community Management and Other Legislation Amendment Bill* 2002 relevantly note:[17]

> "Section 110 has been substantially rewritten to clarify the rights and responsibilities of the financier of a financed contract and the body corporate. For instance the section now recognises the appointment of a receiver and manager for the financed contract."

[40] The applicant described the purpose of s. 126 as being "to protect the rights of the financier by protecting the value of the asset over which it has security, namely the contract".[18] The respondent variously described the purpose of s. 126 as being "…to ensure that the financier has recourse to the contractor's security in the form of an asset and… before that asset is lost … before the management agreement is terminated".[19] Having identified that purpose, the respondent emphasised that the purpose was not to protect the contractor under a financed contract by "wiping the slate clean of their past acts" or "wholly extinguishing a [b]ody [c]orporate's right to terminate a contract where … breach has occurred".[20]

[41] I find that the purpose of ss. 126 (1) and (2) is to provide protection to a financier by giving the financier the opportunity to take identified steps to protect itself against the loss of its secured asset, the financed contract. The protection is provided in a context where circumstances otherwise exist under which the body corporate has a right to terminate the financed contract. The protection is provided by first requiring the body corporate to provide the financier with the notice under s. 126(1) and then prohibiting the termination of the contract in reliance upon the existing circumstances if the financier has acted under s. 126(2). The requirements to give the notice and to allow at least 21 days before the body corporate may lawfully terminate, gives the financier the opportunity to act to avail itself of the statutory protection. In this regard, ss. 126(1) and (2) confer upon a financier a right or power to adversely affect the legal position of the body corporate under the relevant

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16 *Body Corporate and Community Management Bill 1997* (Qld), Explanatory Notes, 24.
17 *Body Corporate and Community Management and Other Legislation Amendment Bill 2002* (Qld), Explanatory Notes, 36-37.
18 Applicant's Outline of Argument [42].
19 T 1-14 ll 26-29.
20 Respondent's Outline of Argument [19].

contract.[21] If the financier does act under s. 126(2), the body corporate is then prohibited from terminating the relevant contract in reliance upon circumstances which existed prior to the financier so acting.

[42] Three further matters may be noted. First, the prohibition is against termination in reliance upon those past circumstances. The body corporate can still terminate for something done or not done after the financier started to act under s. 126(2). Secondly, the prohibition is against termination. The body corporate remains entitled to pursue other remedies in respect of the past circumstances, such as damages for breach of the relevant contract. Thirdly, from the time when the financier starts to act under s. 126(2), the contractor loses control (to varying degrees depending upon what action is taken) over the secured asset, the relevant contract. From this point, third parties might be expected to deal with the financier or the receivers on the basis that the relevant contract exists and is not liable to be terminated for conduct pre-existing the involvement of the financier or receivers.

[43] In the present case the financier availed itself of the statutory protection and there was no issue that s. 126(2) was, at least initially, engaged so as to prohibit the termination of the management contract. The respondent contended that the prohibition lifted or no longer applied at the point when the management contract ceased to be "a financed contract". I reject that submission for the following reasons.

[44] There is nothing in the statutory language to suggest that the prohibition, once imposed by s. 126(2), was subject to a temporal limitation and applied only for so long as the relevant contract retained its character as a financed contract.

[45] The statutory purpose is also better served by regarding the prohibition in s. 126(2) as operating once and for all from the point when the financier has acted under that subsection. The respondent's suggested construction is in my respectful view inconsistent with the statutory purpose.

[46] Section 126(2)(b) contemplates the appointment of receivers and managers over the contract. There are some usual consequences which follow from the appointment of

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[21] In the sense discussed in *Australand Corporation (Qld) Pty Ltd v Johnson* [2008] 1 Qd R 203, 242 [109]-[110].

receivers. First, receivers are regarded as agents for the mortgagor and the mortgagor is usually bound by the receivers' dealings with third parties.[22] Secondly, receivers will owe a duty to the mortgagee to collect and realise the secured asset to discharge the secured debt. Thirdly, in exercising any power of sale, receivers will owe a duty to the mortgagor to take reasonable care to sell the secured asset for its market value or, if there is no market, the best price that is reasonably obtainable having regard to the circumstances existing when the asset is sold.[23] Nothing in the Act suggests that any of these usual consequences following the appointment of receivers are intended to be displaced. Indeed, to the contrary, ss. 126(8) and 127 recognise the contractor's continuing interest in the contract and the privity of the relations between the financier and the contractor. When s. 126(2)(b) speaks of the appointment of receivers "for the contract" it must be contemplating as a usual consequence of such appointment, the receivers acting with reasonable care to sell for market value or the best price reasonably obtainable in the absence of a market. Any concept of market value will involve a hypothetical sale involving a purchaser "perfectly acquainted with the [asset] and cognisant of all circumstances which might affect its value".[24]

[47] Having placed the contemplated sale into the context of a sale by receivers, some matters can be observed.

[48] First, the financier is protected by a prohibition against the termination of its secured asset, the relevant contract. The prohibition is against terminating the relevant contract in reliance upon circumstances which existed prior to the financier starting to act under s. 126(2). The prohibition prevents the loss of the secured asset but also facilitates the sale of the secured asset to recoup the secured debt. If the right to terminate the relevant contract in reliance upon matters pre-existing the receivership subsists or is revived in any case where the secured debt is able to be repaid without recourse to the security, that circumstance could be expected to adversely affect the value of the secured asset. If the pre-existing matters continue to support a right of termination in the event there is no financed debt, the value of

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22 *Sheahan v Carrier Air Conditioning Pty Ltd* (1997) 189 CLR 407, 419, 433; *Carey v Korda* (2012) 45 WAR 181, 192 [47]; *Almona Pty Ltd v Parklea Corporation Pty Ltd* [2019] NSWSC 1868 at [726].

23 *Corporations Act 2001* (Cth), s. 420A(1).

24 *Spencer v Commonwealth* (1907) 5 CLR 418, 441.

the asset would be diminished, if not illusory. To be consistent with the purpose of protection and recoupment of value, the sale in contemplation must be of a secured asset unimpaired by any right to terminate in respect of the pre-existing matters.

[49] Secondly, if the prohibition applies irrespective of whether the relevant contract remains "a financed contract", the asset being sold will be worth the same value whether it remains in the hands of the receiver or, following payment of the financed debt, is returned to the control of the mortgagor. That outcome sits comfortably alongside the expectation that receivers will usually bind the mortgagor to any contract for the sale of the secured asset. According to the respondent's construction, whilst the secured asset might be sold by the receivers for substantive value whilst the financed debt existed, the value of the secured asset in the hands of the mortgagor once the financed debt has been repaid would be nominal because the relevant contract could be terminated by the body corporate as of right in reliance upon circumstances which pre-existed the receivership.

[50] Thirdly, where the receivers enter into a contract for the sale of the relevant contract, the purchaser acquires a contractual right to receive performance of the contract of sale. On the respondent's construction of s. 126(2), if the financed debt is paid out prior to the settlement of the contract of sale, the body corporate can terminate the relevant contract relying upon matters pre-existing the receivership thereby thwarting the purchaser's expectation of receiving performance in the form of an assignment of the rights under the relevant contract. Parliament clearly contemplated that a receiver might be appointed with a view to realising the value of the secured asset through a sale. There is no obvious reason why Parliament would have intended that the legitimate expectations of a purchaser who contracts with a receiver should be thwarted in this way.

[51] The Act is concerned to protect financiers against the loss of their secured asset, a contract, by prohibiting a body corporate from terminating the relevant contract where the financier has acted under s. 126(2). If a financier starts to act under s. 126(2), the body corporate is prohibited from terminating in reliance upon the circumstances which existed prior to the financier so acting. When the financier starts to act under s. 126(2), the contractor loses full control over the secured asset. From this point, third parties might be expected to deal with the financier or the

receivers on the basis that the relevant contract exists and is not liable to be terminated for conduct pre-existing the involvement of the financier or receivers. Once the prohibition is engaged, as it was in this case, it matters not whether the contract subsequently retains its description as "a financed contract". This outcome does not involve "wiping the slate clean of [the contractor's] past acts".[25] As I have indicated, the Act does not prohibit other remedies, such as damages, for past acts.

[52] For the reasons which I have provided, I make the following declaration:

(a) On the proper construction of s. 126(2) of the Act, the respondent cannot lawfully terminate the management agreement in reliance upon the RAN and/or the contractual breaches alleged in the RAN.

[53] I will hear the parties as to further orders and costs.

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25 Respondent's Outline of Argument [19].