SUPREME COURT OF QUEENSLAND

CITATION:	*Body Corporate for Mount Saint John Industrial Park Community Title Scheme 18632 v Superior Stairs & Joinery Pty Ltd* [2018] QCA 173
PARTIES:	**BODY CORPORATE FOR MOUNT SAINT JOHN INDUSTRIAL PARK COMMUNITY TITLE SCHEME 18632** (appellant) **v** **SUPERIOR STAIRS & JOINERY PTY LTD** ACN 010 689 086 (respondent)
FILE NO/S:	Appeal No 11242 of 2017 DC No 302 of 2016
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeal
ORIGINATING COURT:	District Court at Townsville – [2017] QDC 245
DELIVERED ON:	31 July 2018
DELIVERED AT:	Brisbane
HEARING DATE:	6 April 2018
JUDGES:	McMurdo JA and Mullins and Bond JJ
ORDERS:	**1. Appeal allowed.** **2. Orders 1 and 2 made in the District Court on 29 September 2017 be set aside.** **3. The respondent pay the appellant's costs of the appeal.**
CATCHWORDS:	REAL PROPERTY – STRATA AND RELATED TITLES – MANAGEMENT AND CONTROL – INSURANCE, FIRE SAFETY AND FINANCIAL MATTERS – where the appellant is the body corporate of a community titles scheme and the respondent is the owner of one of the lots within the scheme – where the appellant claims that the respondent is obliged to pay outstanding contributions under the scheme and commenced proceedings to recover them, together with interest and costs, in the District Court – where the respondent successfully applied for the summary dismissal of part of the appellant's claim upon the ground that it was made outside a limitation period which, the primary judge held, was prescribed by s 145(2) of the *Body Corporate and Community Management (Standard Module) Regulation* 2008 (Qld) –

where s 145(2) of the *Body Corporate and Community Management (Standard Module) Regulation* 2008 (Qld) provides that where the amount of a contribution or contribution instalment has been outstanding for two years, the body corporate must, within two months from the end of the two-year period, start proceedings to recover the amount – whether s 145 of the *Body Corporate and Community Management (Standard Module) Regulation* 2008 (Qld), upon its proper construction, prescribes a limitation period

Acts Interpretation Act 1954 (Qld), s 14A, s 14B, s 32CA
Body Corporate and Community Management Act 1997 (Qld), s 21, s 150, s 152, s 330
Body Corporate and Community Management (Standard Module) Regulation 2008 (Qld), s 141, s 142, s 144, s 145(2)
Limitation of Actions Act 1974 (Qld), s 10

Brisbane South Regional Health Authority v Taylor (1996) 186 CLR 541; [1996] HCA 25, considered
Project Blue Sky Inc v Australian Broadcasting Authority (1998) 194 CLR 355; [1998] HCA 28, cited
Westpac Banking Corporation v Body Corporate for the Wave Community Title Scheme 36237 [2014] QCA 73, cited

COUNSEL: D A Savage QC for the appellant
D L K Atkinson with J M O'Connor for the respondent

SOLICITORS: Connolly Suthers for the appellant
Irish Bentley Lawyers for the respondent

[1] **McMURDO JA:** The appellant is the body corporate of a community titles scheme for land in Townsville, in which there are six lots used for industrial purposes. The respondent is the owner of one of them. The appellant claims that the respondent is obliged to pay outstanding contributions under the scheme and sued to recover them, together with interest and costs, in the District Court. The respondent successfully applied for the summary dismissal of part of the appellant's claim, upon the ground that it was made outside a limitation period which, the primary judge held, was prescribed by s 145(2) of the *Body Corporate and Community Management (Standard Module) Regulation* 2008 (Qld) ("the Regulation").

[2] The only question in this appeal is whether s 145, upon its proper construction, does prescribe a limitation period, by requiring that if the amount of a contribution has been outstanding for two years, the body corporate must within the next two months start proceedings to recover the amount. If that provision prescribes a limitation period, it is common ground that the relevant part of the claim was made out of time and that the judge was correct to strike it out. If, as the appellant argues, it does not impose a limitation period, it is common ground that the claim was not otherwise out of time, and that the orders made should be set aside. For the reasons that follow, the appellant's argument should be preferred.

[3] The scheme in this case was established under the (now repealed) *Building Units and Group Titles Act* 1980 (Qld). Upon the enactment of the *Body Corporate and Community Management Act* 1997 (Qld) ("the Act"), it became a community titles

scheme established under that statute.[1] By s 21 of the Act, regulations may be made in the form of a regulation module to be applied to a community titles scheme. In this case, that is the Regulation.

[4] Chapter 3, Part 3 of the Act provides for the financial and property management of a community titles scheme. Section 150(1) provides that the financial management arrangements applying to a community titles scheme are those stated in the regulation module applying to the scheme. Section 150(2) details ways in which the regulation module may provide for those arrangements, including by provisions for the budget of the body corporate, the levying of lot owners for contributions, the allowance of discounts and imposition of penalties relating to the payment of contributions and the recovery of unpaid contributions. Section 150(3) provides that, for the avoidance of doubt, it is declared that the financial management arrangements contained in a regulation module may impose obligations and limitations on both the body corporate (including the committee for the body corporate) and lot owners.

[5] The Regulation makes provision for such matters. By s 141(1) of the Regulation, the body corporate must fix, on the basis of its budgets for a financial year, the contributions to be levied on the owner of each lot. By s 141(2), if a liability arises for which no provision, or no adequate provision, has been made in the budget, the body corporate must fix a special contribution to be levied on the owner of each lot towards that liability. In either case, the body corporate must fix the date on which the contribution (or any instalment of a contribution) is to be paid. The body corporate may also fix an interim contribution to be levied on the owner of each lot, before the owner is levied contributions fixed on the basis of the budgets for a financial year, and interim contributions are then set off against the owner's liability to pay contributions levied under s 141(1).[2]

[6] By s 142 of the Regulation, the body corporate must give the owner of each lot written notice of the contribution, or instalment of a contribution, to be paid by the owner, at least 30 days before the date on which payment is required. Section 144 of the Regulation authorises the body corporate to fix a penalty to be paid by owners of lots if a contribution, or instalment of a contribution, is not received by the body corporate by the date fixed for payment. The penalty is to consist of an amount of simple interest at a stated rate for each month in which the contribution or instalment is in arrears.

[7] Section 145 of the Regulation relevantly provides as follows:

> "**145 Payment and recovery of body corporate debts**
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> (1) If a contribution or contribution instalment is not paid by the date for payment, the body corporate may recover each of the following amounts as a debt–
>
> (a) the amount of the contribution or instalment;
>
> (b) any penalty for not paying the contribution or instalment;

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1 s 330 of the Act.

2 s 141(3), (4) of the Regulation.

(c) any costs (***recovery costs***) reasonably incurred by the body corporate in recovering the amount.

(2) If the amount of a contribution or contribution instalment has been outstanding for 2 years, the body corporate must, within 2 months from the end of the 2-year period, start proceedings to recover the amount.

(3) A liability to pay a body corporate debt in relation to a lot is enforceable jointly and severally against each of the following persons–

(a) a person who was the owner of the lot when the debt became payable;

(b) a person (including a mortgagee in possession) who becomes an owner of the lot before the debt is paid."

[8] The relevant contribution in this case was that which was levied by the body corporate on 12 August 2009. This was a special contribution levied under s 141(2), which required each lot owner, including the respondent, to pay an amount of $14,183.81. On 17 August 2009, the body corporate issued a notice of contribution to the respondent seeking payment of that amount (and other levies which are not presently relevant) and requested that payment be made by 16 September 2009. The primary judge described this levy of $14,183.81 as the Second Special Levy.

[9] The respondent has not paid that amount, which made up most of the amount claimed in this proceeding, which was commenced (originally in the Magistrates Court) on 8 May 2013.

[10] In the judgment under appeal,[3] the judge accepted the respondent's argument that s 145(2) of the Regulation imposed a limitation period of two years and two months, so that the claim for the Second Special Levy, having been made nearly four years after the date on which payment had been required, was bound to fail and should be struck out. He ordered that "those parts of the paragraphs in the Amended Claim and the Amended Statement of Claim that refer to the Second Special Levy" be struck out.

[11] The judge reasoned as follows. By s 14A of the *Acts Interpretation Act* 1954 (Qld), the interpretation of a provision of an Act which would best achieve the purpose of the Act is to be preferred to any other interpretation. By s 14B of that Act, consideration may be given to extrinsic material capable of assisting in the interpretation in the circumstances there specified. In that respect, the judge said that he had then referred to an Explanatory Note for the Regulation and that he had found nothing there which had dissuaded him from the construction which he considered to be correct.[4]

[12] The judge referred to s 32CA of the *Acts Interpretation Act* which is as follows:

"32CA Meaning of *may* and *must* etc.

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3 *BC for Mount Saint John Industrial Park CTS v Superior Stairs & Joinery Pty Ltd* [2017] QDC 245 ("Judgment").

4 Judgment at [42].

> (1) In an Act, the word ***may***, or a similar word or expression, used in relation to a power indicates that the power may be exercised or not exercised, at discretion.
>
> (2) In an Act, the word ***must***, or a similar word or expression, used in relation to a power indicates that the power is required to be exercised.
>
> (3) To remove any doubt, it is declared that this section applies to an Act passed after 1 January 1992 despite any presumption or rule of interpretation."

He said that the words "may" and "must" were "pivotal in the construction of the competing legislative time limitation provisions that I have considered".[5]

[13] By "the competing legislative time limitation provisions", the judge was referring to what he saw as the "specific time limit provided in s 145" of the Regulation and the limitation period of six years prescribed by s 10 of the *Limitation of Actions Act* 1974 (Qld).[6]

[14] The judge said this about the proper construction of s 145(2) of the Regulation:

> "[46] The plain reading of s 145(2) of the Standard Module means that if a body corporate does not commence recovery proceedings before two years and two months from when the levy became outstanding, then the body corporate is precluded from commencing proceedings and is not entitled to recover relief from a lot owner by a proceeding. In this case the recovery proceedings were commenced well outside the two years and two month period."

Similarly, a little further on the judge said:

> "[49] It seems to me that on a proper construction the purpose of the Act is clear.[7] The time limit is very specific. It matters not that a committee of the body corporate may unintentionally or by oversight not strictly comply with the requirements of the Act. That is not a matter that goes to a construction of the section."

[15] The judge referred to this court's decision in *Westpac Banking Corporation v Body Corporate for the Wave Community Title Scheme 36237*[8] and to the statement there by Mullins J that "[t]he recovery of all payments due from lot owners for contributions is essential for the body corporate to carry out its functions".[9] But, the judge said, none of the authorities to which he had been referred were "specifically directed to the issue of statutory construction".[10] That was correct about the *Westpac* judgment, and neither party now suggests that the other authorities cited in the Judgment, with the exception of *Project Blue Sky Inc v Australian Broadcasting Authority*,[11] assists in this case.

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5 Ibid at [44].
6 Ibid at [45].
7 An apparent reference to s 145 of the Regulation.
8 [2014] QCA 73 ("*Westpac*").
9 Ibid at [46].
10 Judgment at [50].
11 (1998) 194 CLR 355; [1998] HCA 28.

[16] The judge then quoted the often cited statements of principle in the joint judgment in *Project Blue Sky*[12] before expressing his conclusions as follows:

> "[52] Those statements are apposite to the statutory construction exercise in this case. If the general rule in the [*Limitation of Actions Act*] applied here the specific provision in [s 145(2) of the Regulation] would be entirely superfluous. A construction such as advocated by the plaintiff would make the specific provision in the Act a nullity. That cannot possibly have been the intention of the legislature and to find in favour of the plaintiff's argument would render the reference to time limitation in the Act completely unnecessary. That would not be a proper construction of a statutory provision.
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> [53] The explanatory note for the 2003 amendment to the Act regarding payment and recovery of body corporate debts makes it clear that, as I have observed, arrears of levies, including any relevant penalty or cost recovery sums, cannot be allowed to remain outstanding for more than two years. The rationale for that is clearly to maintain the financial viability of a body corporate. Hence the body corporate **must** take steps to recover its arrears including any penalty or cost recovery sums within the two year period. Whilst there is a discretion in that a body corporate may waive the recovery of a contribution, that course requires a resolution of the body corporate and one sensibly would expect that only to occur in, for example, instances of hardship to a lot owner rather than, of course, a reluctance or refusal to pay a levy which is the subject of a proper resolution of the body corporate. No such circumstance is relevant to the construction point in this case. The reference to the word **must** in the Standard Module is mandatory – the power is to be exercised. The discretion does not apply to the two year period but rather applies more generally to the particular circumstances of a lot owner and requires, as I have said, a specific resolution."
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> (Original emphasis.)

[17] As the question was argued in this court, and correctly in my view, the issue is not one of competing limitation periods. The issue is whether a failure by a body corporate to start proceedings in accordance with s 145(2) within a period of "two months from the end of the two-year period", has the consequence of barring any proceeding commenced beyond that date. Clearly, the language of s 145(2) requires a body corporate to start proceedings to recover the amount within that two months. But it does not expressly provide that a failure to do so will bar a subsequent proceeding. The question then is whether, upon the proper construction of this provision, in the context of the Act and the Regulation and having regard to the relevant objects of each, that is the effect of the provision. With respect, the judge did not consider that question.

[18] Section 145(2) is in mandatory terms: it compels a body corporate to start proceedings if an amount has been outstanding for two years. It is not in terms

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12 Ibid at 381-382 [69]-[71].

which require proceedings, if the body corporate decides to bring any, to be commenced within a certain time. Nor is it in terms that no proceedings are to be commenced after the expiration of that time. The difference between the terms of s 145(2) and provisions of those kinds is telling and reveals that the intended purpose of s 145(2) is to impose a duty upon the body corporate, rather than to serve any of the purposes for which limitation periods are enacted.

[19] In *Brisbane South Regional Health Authority v Taylor*,[13] McHugh J summarised the purposes of limitation periods as follows:[14]

> "The effect of delay on the quality of justice is no doubt one of the most important influences motivating a legislature to enact limitation periods for commencing actions. But it is not the only one. Courts and commentators have perceived four broad rationales for the enactment of limitation periods. First, as time goes by, relevant evidence is likely to be lost. Second, it is oppressive, even "cruel", to a defendant to allow an action to be brought long after the circumstances which gave rise to it have passed. Third, people should be able to arrange their affairs and utilise their resources on the basis that claims can no longer be made against them. Insurers, public institutions and businesses, particularly limited liability companies, have a significant interest in knowing that they have no liabilities beyond a definite period. As the New South Wales Law Reform Commission has pointed out:
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>> "The potential defendant is thus able to make the most productive use of his or her resources and the disruptive effect of unsettled claims on commercial intercourse is thereby avoided. To that extent the public interest is also served."
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> Even where the cause of action relates to personal injuries, it will be often just as unfair to make the shareholders, ratepayers or taxpayers of today ultimately liable for a wrong of the distant past, as it is to refuse a plaintiff the right to reinstate a spent action arising from that wrong. The final rationale for limitation periods is that the public interest requires that disputes be settled as quickly as possible."
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> (Footnotes omitted)

[20] Of those four rationales identified by McHugh J, three are concerned with the interests of potential defendants or those sharing an interest with them. There is no discernible feature of a claim for outstanding contributions under s 145 which would indicate why any of those purposes requires a limitation period of two years two months, rather than six years as provided by s 10 of the *Limitation of Actions Act*. Nor can it be said that there is some reason why the public interest requires a dispute about a claim under s 145 to be settled more quickly than any other dispute about a debt.

[21] On the other hand, there is an evident purpose in requiring a body corporate to take prompt action to recover the amount of a contribution which has been outstanding for two years. The burden of outstanding contributions falls upon the other lot

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[13] (1996) 186 CLR 541; [1996] HCA 25.
[14] Ibid at 552-553.

owners and it is in their interests that an asset of the body corporate be preserved by prompt recovery proceedings. If there were any doubt that this was the purpose of s 145(2), it is dispelled by the Explanatory Notes on the amendment to the Regulation in 2003 which inserted this provision.[15] It was there said that the amendment was one of "a range of measures designed to give greater clarity and accountability on administrative matters including … financial management". The Explanatory Notes continued:

> "One of the principal functions of the body corporate is the proper management of its finances. A range of amendments are made to either clarify the provisions regarding the management of finances, or to improve the standard of financial management[.]
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> …
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> Clear direction is given to the body corporate that it must take steps to recover arrears, including any applicable penalty and any costs reasonably incurred in the recovery. The arrears cannot be allowed to remain outstanding for more than 2 years.
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> …
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> The recovery of contributions owed to the body corporate by lot owners is a significant issue for some bodies corporate, to the extent that in some instances contributions can be in arrears for a number of years. The problem of arrears can be such that it can cause severe financial hardship for the body corporate.
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> The amendment is intended to give clear direction to the body corporate that it must take steps to recover arrears, including any applicable penalty and any costs reasonably incurred in the recovery. The arrears cannot be allowed to remain outstanding for more than 2 years.
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> Whilst the body corporate must recover the contribution, it may waive the penalty or the costs if it considers the circumstances warrant this. This provision is necessary to allow some discretion, particularly where some special reason such as financial hardship exists."

[22] Nowhere in the Explanatory Notes is there an indication of any concern for the interests of the defaulting lot owner or, more generally, for any of the recognised rationales for the enactment of limitation periods. Instead, the Notes confirm what is already sufficiently clear from the text, namely that the purpose and effect of s 145(2) is to compel the body corporate to bring a proceeding, rather than to impose a time limit, for the benefit of a defendant, upon any proceeding which a body corporate might see fit to commence.

[23] There is a further feature of s 145 which confirms this interpretation. Section 145(2) is engaged only where the amount of a contribution (or contribution instalment) has been outstanding for two years; in other words, it is engaged only where an amount *is* owed, rather than where an amount is claimed to be owed. It applies only where the lot owner does owe the debt. It is yet more difficult to see the purpose of a limitation period being imposed where the defendant has no defence on the merits. Of course, as McHugh J said in *Brisbane South Regional Health Authority v*

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[15] Explanatory Notes for SL 2003 No. 263.

Taylor,[16] a limitation period may often result in a good cause of action being defeated. But it would be an unusual limitation period which operates upon the condition that there is a good cause of action, as would be this provision upon the interpretation of the primary judge.

[24] The duty imposed by s 145(2) serves several purposes, without it imposing a limitation period. The duty is fortified by s 152 of the Act, which provides by s 152(1)(b), that a body corporate must comply with the obligations with regard to common property and body corporate assets imposed under the regulation module applying to the scheme. Where there is an outstanding amount of a contribution, that debt is a body corporate asset. In the event that the body corporate did not discharge the duty under s 145(2) of the Regulation (and s 152 of the Act), the duty could be enforced by a lot owner through the dispute resolution provisions of the Act.

[25] In my conclusion s 145(2) does not impose a limitation period for a proceeding of the present kind. The relevant parts of the appellant's pleading ought not to have been struck out. I would order as follows:

1. Appeal allowed.
2. Orders 1 and 2 made in the District Court on 29 September 2017 be set aside.
3. The respondent pay the appellant's costs of the appeal.

[26] **MULLINS J:** I agree with McMurdo JA.

[27] **BOND J:** I agree with the reasons for judgment of McMurdo JA and with the orders proposed by his Honour.

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16 (1996) 186 CLR 541 at 553.