SUPREME COURT OF QUEENSLAND

CITATION:	*Dunlop & Anor v Body Corporate For Port Douglas Queenslander CTS 886 & Ors* [2021] QSC 85
PARTIES:	**DAMIEN BERNARD DUNLOP** (first respondent plaintiff) **ROSEMARY KNIGHTS** (second respondent plaintiff) **v** **BODY CORPORATE FOR PORT DOUGLAS QUEENSLANDER CTS 886** (first applicant defendant) **WAYNE PARRIS** (second applicant defendant) **SUE PARRIS** (third applicant defendant) **GAIL SEYMOUR** (fourth applicant defendant) **ROBERT ROMANIN** (fifth applicant defendant) **ROBERT JOHN HERD** (sixth applicant defendant)
FILE NO/S:	SC No 577 of 2020
DIVISION:	Trial
PROCEEDING:	Application
ORIGINATING COURT:	Supreme Court of Queensland
DELIVERED ON:	27 April 2021
DELIVERED AT:	Cairns
HEARING DATE:	12 February 2021
JUDGE:	Henry J
ORDER:	**1. Paragraphs [1(d)(ii)] and [23] of the amended Statement of Claim are struck out.** **2. If the plaintiffs intend to file and serve a further amended Statement of Claim they must do so by 4pm 25 May 2021.** **3. The Claim and the remainder of the application are listed for directions as to their future conduct at 9.15am 2 June 2021 (out of town parties having leave to appear by videolink or telephone).** **4. Costs reserved.**
CATCHWORDS:	PROCEDURE – CIVIL PROCEEDINGS IN STATE AND TERRITORY COURTS – PARTIES AND

REPRESENTATION – PROPER OR NECESSARY PARTY AND STANDING – where the first respondent defendant was a body corporate which terminated letting and caretaking agreements with the first applicant plaintiff – where the body corporate's committee members and its solicitor were included as defendants – whether parts of the statement of claim relating to the body corporate's committee members and solicitor disclose no reasonable cause of action or are an abuse of process – whether these paragraphs should be struck out

PROCEDURE – STATE AND TERRITORY COURTS: JURISDICTION, POWERS AND GENERALLY – JURISDICTION – GENERALLY – where the first respondent defendant was a body corporate which terminated letting and caretaking agreements with the first applicant plaintiff – where the dispute had not been pursued before a specialist adjudicator or QCAT – whether the remainder of the claim and statement of claim should be set aside for want of jurisdiction or because the dispute must be remedied before a specialist adjudicator or QCAT.

Australian Consumer Law (Cth), s 18, s 37, s 236
Body Corporate and Community Management (Accommodation Module) Regulation 2008 (Qld), s 128(1)(c)
Body Corporate and Community Management Act 1997 (Qld), s 96, s 149B, s 229(2), s 250(2), s 276(1)
Human Rights Act 2019 (Qld), s 48
Property Occupations Act 2014 (Qld), s 100
Queensland Civil and Administrative Tribunal Act 2009 (Qld), s 52
Uniform Civil Procedure Rules 1999 (Qld), r 16, r 149(1)(b), r 150(1)(j), r 171(1)

Concrete Constructions (NSW) Pty Ltd v Nelson (1990) 169 CLR 594, cited
Dual Homes v Moores Legal (2016) 50 VR 129, cited
Dunlop v Department of Justice and Attorney-General (Qld) [2020] QSC 160
Henderson & Anor v The Body Corporate for Merrimac Heights [2011] QSC 336, cited
Houghton v Arms (2006) 225 CLR 553, distinguished
James v Body Corporate Aarons Community Title Scheme 11476 [2002] QSC 386, cited
James v Body Corporate Aarons Community Title Scheme 11476 [2004] 1 Qd R 386, cited
MHA v DMA 18 (2020) 385 ALR 16, cited
New Cap Reinsurance Corporation Ltd v Daya (2008) 216 FLR 126, explained
Orison v Strategic Minerals (1987) 13 ACLR 314, distinguished

Wardrope v Dunne [1996] Qd R 224, cited

COUNSEL:	M Jonsson QC for the respondent plaintiffs M McDermott for the applicant defendants
SOLICITORS:	WGC Lawyers for the respondent plaintiffs HerdLaw for the applicant defendants

[1] The present application relates to a claim for losses said to have flowed from a body corporate's termination of letting and caretaking agreements. A controversial aspect of the claim is that it is made not only against the body corporate but also against the body corporate's committee members and its solicitor.

[2] The applicant contends that the statement of claim as it relates to those latter defendants ought be struck out as disclosing no reasonable cause of action and that the rest of it, as against the body corporate, ought be set aside. The latter relief is sought on the basis the dispute with the body corporate should be pursued before a specialist adjudicator or QCAT.

Background

[3] The first applicant plaintiff, Mr Dunlop, conducted a caretaking and letting business at an apartment complex in Port Douglas known as The Port Douglas Queenslander (the complex). He did so under the auspices of letting and caretaking agreements with the first respondent defendant, the body corporate of the complex, conditioned that he reside in unit four of the complex, owned by the second applicant plaintiff, Ms Knights. He needed to and did hold a letting agent licence under the *Property Occupations Act* 2014 (Qld) in order to carry on his business and meet the conditions of the letting agreement and, consequentially, the caretaking agreement.

[4] As a result of Mr Dunlop's conviction for using a carriage service to menace, harass or cause offence, the Department of Justice and Attorney-General, through its officers of the Office of Fair Trading, arrived at the view that the conviction was of a serious offence. If correct, the department's view would have had the consequence, pursuant to s 77 *Property Occupations Act*, that Mr Dunlop's licence was "cancelled on the happening of" the conviction. That view was found to be wrong in *Dunlop v Department of Justice and Attorney-General (Qld)*[1] and this court declared that Mr Dunlop was "not convicted of a serious offence" and his resident letting agent licence "was not cancelled by operation of s 77".

[5] The department, wrongly believing it was correct and not having determined Mr Dunlop's application for licence renewal when it fell due in the normal course, eventually recorded on its website that Mr Dunlop's licence had expired on 24 September 2019. In fact, s 60 *Property Occupations Act* had the effect the expired licence would continue in force until the renewal application was determined, which it had not been by the time of the ensuing actions of the body corporate.

[6] The body corporate enquired about the website entry with the department, which confirmed that Mr Dunlop was no longer the holder of a resident letting agent licence.

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1 [2020] QSC 160.

Wrongly believing the department was correct, and after consulting a solicitor and forewarning Mr Dunlop by remedial notices, the body corporate convened an extraordinary general meeting of the unit owners at which it was resolved the letting and caretaking agreements should be terminated. It did so by termination notices issued in November 2019.

[7] In consequence of what occurred Mr Dunlop and Ms Knight filed a claim alleging that Mr Dunlop lost the realisable value of the business of $1,027,277.20 and Ms Knight suffered loss to the value of $120,000, being the diminution in realisable value of her unit because of the lost opportunity to sell it as part of a business.

[8] There are six defendants to the claim. The first defendant is the body corporate. The second to fifth defendants were members of the body corporate's committee and the sixth defendant, Mr Herd, is the solicitor consulted by the body corporate.

[9] The defendants filed a conditional notice of intention to defend, essentially on bases grounding the present application.

The application

[10] The application seeks orders striking out those parts of the statement of claim relating to the last five defendants on the basis they disclose no reasonable cause of action or are an abuse of process. The application also seeks orders setting aside the remainder of the claim and statement of claim as not having been properly started for want of jurisdiction or because the only remedy for the dispute with the body corporate is before a specialist adjudicator or QCAT, pursuant to s 229(2) *Body Corporate and Community Management Act* 1997 (Qld) (BCCMA).

[11] The application is conveniently dealt with by considering the pleaded case against the defendants and then issues relating to the viability of the pleaded cases as against, firstly, the committee members, secondly, the solicitor and thirdly, the body corporate.

The pleaded case against the defendants

[12] The pleaded case alleges breach of contract in order to render the body corporate liable to Mr Dunlop for his alleged losses. It alleges breach of the *Australian Consumer Law* (*Schedule 2 Competition and Consumer Act* 2010 (Cth)) (Australian Consumer Law) in order to render all of the defendants liable to Mr Dunlop and Ms Knight for their alleged losses.

[13] The breach of contract (or alternatively covenant) alleged by Mr Dunlop against the body corporate is on the basis that by carrying out the termination process it manifested an unwillingness to perform the agreements and renounced them.

[14] That part of the pleaded case is straightforward. The same cannot be said of the pleaded cases of Mr Dunlop and Ms Knight against all of the defendants relying upon alleged breaches of the *Australian Consumer Law*.

[15] The Amended Statement of Claim (ASOC) alleges that in advance of the extraordinary general meeting the committee members made various representations

to the owners. In brief, those representations, which are contained at [16] of the ASOC, are said to be that:

- Mr Dunlop's licence had expired, and
- in carrying on his business as a resident letting agent notwithstanding that he no longer held a valid and current licence he was acting contrary to law, in breach of s 100 *Property Occupations Act* 2014 (Qld), and
- that pursuant to clause 10.1.3 of the letting agreement and s 128(1)(c) *Body Corporate and Community Management (Accommodation Module) Regulation* 2008 (Qld) (the BCCM Regulation) the body corporate was entitled to terminate the letting and caretaking agreements, and
- that as Mr Dunlop's conduct was contrary to law the owners should vote "yes" to the relevant motions.

[16] It is pleaded at paragraph [17] of the ASOC that the committee members made the representations "in reliance upon advice to the effect summarised in" paragraph [16] given by Mr Herd. In other words, it is alleged Mr Herd's advice was in summary to the same effect as the content of the representations.

[17] The ASOC alleges at [18] that the owners present at the meeting resolved to terminate in a 9:0 vote, "[u]pon the assurances of the representations … being representations which were in turn premised upon the advice" of Mr Herd.

[18] The ASOC pleads at [23] that the representations and Mr Herd's advice were:

> "(a) misleading or deceptive within the meaning of s 18 of the *Australian Consumer Law;*
> (b) false or misleading within the meaning of s 37(1) of the *Australian Consumer Law.*"

[19] It is a requirement of those sections that the relevant conduct be engaged in, "in trade or commerce". The ASOC alleges at [1] that both the committee and Mr Herd were acting in trade or commerce.

[20] The ASOC alleges at [25] that the body corporate, the committee members and Mr Herd are liable for damages pursuant to s 236 *Australian Consumer Law*, which provides for the recovery of the amount of loss or damage "because of" conduct contravening provisions including ss 18 and 37. The words "because of" express the notion of causation.[2] How are the plaintiffs' losses said to have been caused by such conduct by the body corporate, the committee members or Mr Herd?

[21] The causal foundation for the alleged liability of the committee and Mr Herd for the alleged losses of the plaintiffs is alleged at [24] of the ASOC. It pleads, "[b]ecause of the false and misleading … or alternatively, deceptive conduct" the plaintiffs have, "because of the matters referred to in paragraphs 18, 19, 20, 21 and 22", suffered the pleaded loss and damage. Paragraphs [18] to [22] of the ASOC describe the chain of events involving the meeting's vote (allegedly "upon the assurance of the representations …which were, in turn, premised upon the advice" of Mr Herd), the termination and the manifestation of the Body Corporate's unwillingness to perform

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2 *Flogineering Pty Ltd v Blu Logistics SA Pty Ltd (No 3)* (2019) 138 ACSR 172, [27].

the contract and Mr Dunlop's acceptance of that repudiation and cessation of his business.

[22] The ASOC thus alleges the committee members and Mr Herd are liable because the plaintiffs' losses resulted from the false and misleading or deceptive conduct constituted respectively by the representations of the committee members and the advice of Mr Herd. It pleads that causal connection as arising because:

- the losses arose as a result of Mr Dunlop ceasing business;
- Mr Dunlop ceased business as a result of the termination;
- the termination occurred as a result of the resolution to terminate voted on at the extraordinary general meeting;
- the resolution occurred "upon the assurance" of the representations; and
- the representations "were in turn premised upon" Mr Herd's advice.

[23] It is permissible in proof of the statutory cause of action pursuant to s 236 *Australian Consumer Law* for causation to be established indirectly on a "but for" basis, via a chain of causation.[3] The critical pleaded causal link, so far as the liability of the committee is concerned is that the resolution to terminate occurred upon the "assurance" of the committee members' representations. The critical pleaded causal links, so far as the liability of Mr Herd is concerned are that the resolution to terminate occurred upon the assurance of the committee members' representations which were, in turn, "premised" upon the advice of Mr Herd. Curiously, in respect of that critical chain of causation the ASOC does not plead the resolution, which was a product of votes cast without voters having to give reasons for their vote, was "a result of" or "caused by" the representations or the advice, and at the highest puts what are presumably intended to be causal links as, respectively, an assurance and premise.

[24] This potential shortfall in alleging causation was not the focus of argument in the application. It might be thought it looms as important to an apparently controversial issue of foundational importance to whether the respondents have a viable cause of action founded in the *Australian Consumer Law*. That issue is whether liability under s 236 of the *Australian Consumer Law*, for a chain of causal responsibility for loss caused by a body corporate's decision, can penetrate past the body corporate's decision, to attribute cause to the internal processes leading to that decision, in circumstances where the decision was by resolution carried on a vote of its members and the party allegedly suffering loss was not one of its members. In any event, if there is to be a further pleading of the respondent's statement of claim it would be prudent to address the potential shortfall.

[25] It is also not apparent from the ASOC how the body corporate is said to be liable for the plaintiffs' loss or damage because of conduct contravening ss 18 and 37. Paragraph [25] pleads it to be so, "[i]n the premises", yet the conduct alleged to have breached ss 18 and 37 is alleged by paragraph [23] to be the representations and advice referred to paragraphs [16] and [17]. They are pleaded as the representations of the committee members and the advice of Mr Herd. There is seemingly no pleading to the effect the representations were the representations of the body corporate. The closest is the allegation in [16] that the representations of the committee members were made "in their role as capacity as members of" the

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3 *Chowder Bay Pty Ltd v Paganin* [2018] FCAFC 25, [61].

committee of the body corporate. This feature was not the subject of argument in the present application either but, again, in the event there is to be a further pleading, it would be prudent to address the apparent deficit.

Consideration re the committee members

[26] The application seeks the striking out of the paragraphs of the ASOC relating to the committee members and Mr Herd, pursuant to r 171(1)(a) and (e) *Uniform Civil Procedure Rules* 1999 (Qld) (UCPR), on the basis they disclose no reasonable cause of action and are otherwise an abuse of the process of the court.

[27] In respect of that part of their application which relates to committee members, the applicants highlight that a body corporate is required to have a committee pursuant to s 8 *BCCM Regulation* and that a body corporate is precluded by s 96 *BCCMA* from carrying on a business. That section provides:

> **"96 Body corporate must not carry on business**
> (1) A body corporate must not carry on a business.
> *Examples—*
> A body corporate must not carry on business as—
> - a letting agent
> - a tour operator
> - a restaurant business
> - a real estate developer
> - a land trader.
>
> (2) However, the body corporate may—
> (a) engage in business activities to the extent necessary for properly carrying out its functions; and
> (b) invest amounts not immediately required for its purposes in the way a trustee may invest trust funds.
>
> *Examples for subsection (2)(a)—*
> 1 leasing part of the common property
> 2 selling body corporate assets no longer required for the scheme"

[28] The applicant also emphasises committee members are protected from civil liability by s 101A *BCCMA*, which provides:

> "**101A Protection of committee members from liability**
> (1) A committee member is not civilly liable for an act done or omission made in good faith and without negligence in performing the person's role as a committee member.
> (2) In this section—
> ***act done or omission made***, does not include the publication of defamatory matter as mentioned in section 111A(1)."

[29] That provision is likely an unhelpful diversion at this stage in that it involves a protection which would in the normal course be pleaded in a defence and in turn

prompt an argument as to whether a state Act can deprive a plaintiff of a remedy available under a federal Act[4] or whether its interpretation ought be read down.[5]

[30] The point more immediately in the applicant's favour is that the claim against the committee members requires that they were acting "in trade or commerce". As to the meaning of that term, the plurality observed in *Concrete Constructions (NSW) Pty Ltd v Nelson*:[6]

> "[T]he section was not intended to impose, by a side-wind, an overlay of Commonwealth law upon every field of legislative control into which a corporate might stray for the purposes of, or in connection with, carrying on its trading or commercial activities. What the section is concerned with is the conduct of a corporation towards persons, be they consumers or not, with whom it (or those whose interests it represents or is seeking to promote) has or may have dealings in the course of <u>those activities or transactions which, of their nature, bear a trading or commercial character</u>." (emphasis added)

[31] Admittedly that High Court decision was concerned with s 52 *Trade Practices Act* 1974 (Cth), a predecessor provision to those of present interest in the *Australian Consumer Law*. While the former provision was directed at corporations and the latter legislation also applies to individuals, that difference would not logically alter the principle inherent in the above observation. Adjusted to the present context it requires that in making their representations the committee members were engaged in activities or transactions which, of their nature, bore a trading or commercial character.

[32] It is difficult to see how activity internal to the decision-making machinations of the body corporate and which involved no representations to the parties claiming loss could be said to have occurred in trade or commerce.

[33] The respondents placed reliance upon *Houghton v Arms*.[7] In *Houghton v Arms* employees of a company engaged to advise on website development made representations to the corporation's client which were misleading or deceptive and they were held to be personally liable pursuant to a like statutory provision to s 18 *Australian Consumer Law.* There is, however, an obvious difference between *Houghton* and the present case. There the representations were not only made in a commercial setting, beyond the internal operations of the company, they were made to the party which suffered loss in reliance on them. Here the representations were internal to the operations of the body corporate and not made to an external party.

[34] The distinction is illustrated by *New Cap Reinsurance Corporation Ltd v Daya*.[8] There, the second defendant Mr Williams, a former director of the plaintiff company, cross-claimed against three other former directors and the company's former chief financial officer alleging they had made misleading or deceptive representations to him during a company board meeting. This allegedly caused Mr Williams to fail to prevent the incurring of the company debts the subject of the

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4 See for example *Wallis v Downard-Pickford (North Queensland) Pty Ltd* (1994) 179 CLR 388.
5 Per s 9(1) *Acts Interpretation Act* 1954 (Qld).
6 (1990) 169 CLR 594, 604.
7 (2006) 225 CLR 553.
8 (2008) 216 FLR 126.

main claim. After referring to the principle discussed in *Concrete Constructions (NSW) Pty Ltd v Nelson*, Barrett J rejected the viability of Mr Williams' cross-claim. His Honour found the representations occurred within a decision-making process which was internal to the company and which was anterior to and did not take place "in" trade or commerce.[9]

[35] The respondents also placed reliance upon *Orison v Strategic Minerals*,[10] which is an example of a company's internal decision-making having been held to be in trade or commerce. Orison, a corporate shareholder of Strategic, complained the passage of a resolution, at an extraordinary general meeting, authorising Strategic's acquisition of the shares of another company, was procured by misleading representations in an explanatory memorandum circulated by Strategic about the asset backing of those shares. French J found the forwarding of the memorandum with the notice to shareholders of the meeting was conduct in trade or commerce because it was a communication closely related and necessary to the acquisition of a significant asset.[11] That decision preceded *Concrete Constructions (NSW) Pty Ltd v Nelson*. It also differs from the present case in that the party claiming loss was a member of the corporation, involved in an inherently commercial decision-making process, risking direct potential commercial advantage or disadvantage to its members. While that process was internal to the company's processes, it bore a commercial character as between the internal players affected by it. In contrast, the present decision terminated agreements with a party external to the body corporate and the internal process of reaching that decision had no inherently commercial character.

[36] The ASOC is unilluminating in explaining how the committee members were acting in trade or commerce when making the representations.

[37] The applicants submit the ASOC's pleading, at [1(d)(ii)], that the committee members were acting in trade or commerce is conclusory and not accompanied by any material facts giving rise to such a conclusion and that such a conclusion is not apparent from the content of the ASOC.

[38] The respondents argued the committee members were each individuals acting in their capacity as members of the body corporate, drawn from amongst the cohort of lot owners that comprises the body corporate and were potential users and beneficiaries of the services to be provided under the subject agreements. The respondents submitted the representations complained of were directed towards the future behaviour of others – voters who were, collectively, the body corporate – with respect to the continuance or otherwise of commercial arrangements and so were in trade or commerce on that account. The respondents eschewed any argument that the committee members were aiding the body corporate and rather asserted, premised upon the above submissions, the committee members were actually acting in trade or business in their own right.

[39] The assertion that the committee members were actually acting in trade or business in their own right, in the manner submitted for, is not apparent from the present content of the ASOC. Rule 149(2) *UCPR* required the pleaded conclusion that the

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9 (2008) 216 FLR 126, 136.
10 (1987) 13 ACLR 314.
11 (1987) 13 ACLR 314, 329.

committee members were acting in trade or commerce could only be pleaded if there was also a pleading of the material facts in support of the conclusion. The rule does not stipulate that the pleading of the conclusion and the material facts need be in or near the same pleaded paragraphs, but if the connection between the conclusion and facts is not readily apparent the pleading should make it so. As much follows from r 149(1)(c)'s requirement that the pleadings state any matter that if not specifically stated may take another party by surprise.

[40] The pleaded conclusion that the committee members were acting in trade or commerce is not accompanied by a pleading of material facts in express support of the conclusion. Nor is it a conclusion which is so obvious as to be impliedly apparent from the facts pleaded. To the contrary, the known circumstances of the case as pleaded tell against such a conclusion, in that:

- the representations were representations about proposed resolutions for the determination of the body corporate,
- made to members of the body corporate,
- without apparent reward,
- in apparent performance of the committee members' role as committee members serving the administration of the body corporate,
- in aid, merely by "assurance",
- of decision-making internal to the body corporate,
- a body which is statutorily prohibited from and is not alleged to have been conducting a business.

[41] That the alleged conduct could only have been in aid of the internal decision-making of the body corporate appears particularly significant in that even if the body corporate's contractual relationship with Mr Dunlop could be said to have a trading or commercial character, it appears it would have been the body corporate, not its agents aiding its internal decision making, which was the actor in trade or commerce.

[42] The application seeks a striking out of an extensive array of paragraphs on the basis no reasonable cause of action is disclosed against the committee members. Such a wholesale striking out would leave the respondents without a pleaded case against the committee members. The considerations identified above suggest it may not be possible to plead a reasonable cause of action against the committee members. However, the successful argument before me in support of the absence of a reasonable cause of action went specifically to the absence of any pleading of the material facts giving rise to the conclusion pleaded at [1(d)(ii)] of the ASOC that the committee members were acting in trade or commerce. In light of that specificity and cognisant of the caution to be exercised in an application of this kind,[12] I will refrain from the wholesale striking out sought and confine my interference to ordering the striking out paragraph 1(d)(ii) of the ASOC on the basis that it fails to comply with r 149(2).

[43] Such an order would so compromise the ASOC's content as to leave the respondents with a choice to make: either discontinue its case against the committee members or file a further ASOC, properly pleading (if that be possible) the conclusion the

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12 *Royalene Pty Ltd v Registrar of Titles & Anor* [2007] QSC 59.

committee members were acting in trade or business by identifiably pleading the material facts in support of the conclusion. To that end I will list the matter for further argument as to the future conduct of the proceeding, allowing time in the interim for the plaintiffs to consider their position and to file a further ASOC, if that is what they decide to do.

[44] If such repleading is to occur, the respondents should bear in mind the point made earlier in these reasons regarding the (admittedly not argued) apparent deficit in pleading causation.

[45] They should also bear in mind another deficiency in the ASOC, which is that it does not plead what was false, misleading or deceptive about the representations. This complaint was raised in argument regarding Mr Herd but it is the same problem regarding the committee members. Paragraph [23] of the ASOC merely cites its first 14 paragraphs in making an "in the premises" allegation as to the legal conclusions of false, misleading or deceptive conduct. Those paragraphs demonstrate why the department's view was wrong. The "in the premises" allegation is inadequate in that it is not apparent from the facts earlier pleaded what it is that was false, misleading or deceptive about the representations.

[46] It is not enough to know that as it turned out the department's communicated understanding, presumably relied upon by the defendants, was wrong. The respondents are obliged pursuant to *UCPR* r 149(1)(b) to state all the material facts on which they rely, pursuant to r 149(2) to plead the material facts in support of a conclusion of law and, pursuant to r 150(1)(j), to specifically plead misrepresentation. This requires that their pleading specifically identify the facts which are said to render the representations false, which are said to render the representations misleading, and which are said to render the representations deceptive. It does not do so and for that reason paragraph [23] of the ASOC should be struck out. Again, it will be for the respondents to consider their position and decide whether they re-plead.

[47] It is convenient at this point to also deal with the applicants' submissions on a specific point regarding the committee members as well as Mr Herd. The applicants submitted in respect of the cause of action for false or misleading conduct within the meaning of s 37(1) *Australian Consumer Law*, that facts establishing the elements of that cause of action had not been pleaded. In particular it was submitted the ASOC fails to identify facts sustaining the elements of s 37(1)(b), which requires that the person's conduct in making a false or misleading representation:

> "(b) concerns the profitability, risk or any other material aspect of any business activity that the person has represented as one that can be, or can be to a considerable extent, carried on at or from a person's place of residence."

[48] For this reason, it was submitted [23(b)] of the ASOC should be struck out. In answer to that complaint the respondents pointed to [3], [4] and [5] of the ASOC, which plead the occupancy, letting services and residential components of Mr Dunlop's contract with the body corporate. They also pointed to those parts of paragraphs [15] and [16] of the ASOC which dealt with the representation Mr Dunlop was carrying on his letting service business unlicenced and contrary to law. It was in effect put that the false representation Mr Dunlop was unlicenced and

carrying on his business contrary to law involved an implied representation he could carry on business at his residence because the contractual arrangement was that he could do so.

[49] Whether that is sufficient for the purposes of proving the elements of s 37(1)(b) is contentious, though that will be a matter for argument on the merits. The starting point though is that the nature of this implied representation must be pleaded. It has not been. True it is, the factual fuel to found the seeking of the inference of fact has been pleaded, however, the inferred making of the representation is itself a material fact, critical to supporting the conclusion of breach alleged at [23(b)] of the ASOC. The absence of the pleaded fact, if it is to be alleged, that the committee members and Mr Herd represented Mr Dunlop could carry on business from his residence means the conclusion of law pleaded at [23(b)] of the ASOC does not comply with r 149(2). For this reason, were I not in any event ordering the strike out of [23] I would at least order the strike out of [23(b)].

Consideration re Mr Herd

[50] In respect of that part of the application which relates to Mr Herd, the applicants accept for present purposes that the conduct of a solicitor providing professional advice to the body corporate may amount to acting in trade or commerce (the point not being the subject of settled authority[13]). However, it will be recalled it is only pleaded to be advice which provided a premise for the committee members' assurance in aid of the internal decision-making of the body corporate. Even accepting it is arguable Mr Herd was acting in trade or commerce, it appears to remain a deficiency on the pleaded case that it is not articulated how his advice, aiding persons who were aiding the internal decision-making of the body corporate, caused the purported conduct of the body corporate whose actions allegedly caused the loss. The point looms as potentially significant in that proof the solicitor was acting in trade or commerce goes nowhere unless his conduct in so doing was causative of loss. However, that point was not the focus of submissions.

[51] The applicants' submissions focussed upon the absence of any pleading as to the content of the advice and what was false, misleading or deceptive about it. It will be recalled paragraph [17] of the ASOC in effect alleges Mr Herd's advice was to the same effect in summary as the content of the representations in paragraph [16]. The applicant complains that is too general and not particularised so as to meet the respondents' obligation, pursuant to *UCPR* r 149(1)(b), to state all the material facts on which it relies and, pursuant to r 150(1)(j), to specifically plead misrepresentation.

[52] I do not accept that in combination paragraphs [16] and [17] are too general. It is tolerably clear the respondent's pleaded case on the ASOC is that the advice was in its material particulars the same as the content of the representations in paragraph [16]. To remove doubt, while legal professional privilege looms as a future issue, it is no obstacle to the respondents pleading facts which are obviously based upon their inference that the representations reflected the advice.[14]

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13 See for example *Dual Homes v Moores Legal* (2016) 50 VR 129, 167-169.

14 The present interest is in the adequacy of what has been pleaded in the ASOC, not with a future debate about the relevance of privilege and the circumstances in which it may be overridden in the context of

[53] The ASOC is deficient however in that it does not identify the facts which rendered the advice false, misleading or deceptive – the same deficiency identified above in respect of the committee members' representations. The pleading of those material facts is necessary if the cause of action against Mr Herd is to be maintained. As earlier explained, I will address the shortcoming by striking out paragraph [23] of the ASOC.

Consideration re body corporate

[54] The application seeks orders setting aside the remainder of the claim and amended statement of claim as against the body corporate pursuant to *UCPR* r 16(a) because it "has not, for want of jurisdiction, been properly started" or pursuant to r 16(e) because it is a "complex dispute" within the meaning of *BCCMA* for which the only remedy for resolution of the dispute is pursuant to s 229(2) *BCCMA*. The alternative bases are founded upon essentially the same argument.

[55] Section 229 relevantly provides:

> "**229 Exclusivity of dispute resolution provisions**
> (1) Subsections (2) and (3) apply to a dispute if it may be resolved under this chapter by a dispute resolution process.
> (2) The only remedy for a complex dispute is—
> (a) the resolution of the dispute by—
> (i) an order of a specialist adjudicator under *chapter 6* ; or
> (ii) an order of QCAT exercising the tribunal's original jurisdiction under the *QCAT Act* ; or
> (b) an order of the appeal tribunal on appeal from a specialist adjudicator or QCAT on a question of law.
> (3) Subject to *section 229A* , the only remedy for a dispute that is not a complex dispute is—
> (a) the resolution of the dispute by a dispute resolution process; or
> (b) an order of the appeal tribunal on appeal from an adjudicator on a question of law.
> (4) However, subsections (2) and (3) do not apply to a dispute if—
> (a) an application is made to the commissioner; and
> (b) the commissioner dismisses the application under *part 5*.
> (5) Also, subsections (2) and (3) do not limit—
> (a) the powers of QCAT under the *QCAT Act* to—
> (i) refer a question of law to the Court of Appeal; or
> (ii) transfer a proceeding, or a part of a proceeding, to the Court of Appeal; or
> (b) the right of a party to make an appeal from QCAT to the Court of Appeal under the QCAT Act." (emphasis added)

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the pleading and disclosure obligations of Mr Herd and the recipients of his advice - as to which see *Wardrope v Dunne* [1996] Qd R 224.

[56] A "dispute" is relevantly defined in s 227 as follows:

> **"Meaning of *dispute***
> (1) A ***dispute*** is a dispute between— …
> (d) the body corporate for a community titles scheme and a caretaking service contractor for the scheme; or …
> (f) the body corporate for a community titles scheme and a letting agent for the scheme; …"

[57] As to meaning of a complex dispute the dictionary at Sch 6 relevantly provides:

> ***"complex dispute*** means— …
> (b) a dispute mentioned in section … 149B …"

[58] Section 149B provides:

> "**149B Specialist adjudication or QCAT jurisdiction**
> (1) This section applies to a dispute about a claimed or anticipated contractual matter about—
> (a) the engagement of a person as a body corporate manager or caretaking service contractor for a community titles scheme; or
> (b) the authorisation of a person as a letting agent for a community titles scheme.
> (2) A party to the dispute may apply—
> (a) under chapter 6, for an order of a specialist adjudicator to resolve the dispute; or
> (b) as provided under the *QCAT Act*, for an order of QCAT exercising the tribunal's original jurisdiction to resolve the dispute."

[59] A contractual matter is defined in the dictionary as follows:

> ""**contractual matter**" about an engagement or authorisation of a body corporate manager, service contractor or letting agent, means—
> (a) a contravention of the terms of the engagement or authorisation; or
> (b) the termination of the engagement or authorisation; or
> (c) the exercise of rights or powers under the terms of the engagement or authorisation; or
> (d) the performance of duties under the terms of the engagement or authorisation"

[60] The applicants submit the claim against the body corporate is a complex dispute in that it is a dispute mentioned in s 149B, namely a dispute between the body corporate and a caretaking service contractor and letting agent about a contractual mater, namely the termination of the engagement of the contractor and letting agent. From this it follows, the applicants submit, that pursuant to s 229 the "only remedy" for resolution of the dispute is by an order of a specialist adjudicator or of QCAT.

[61] A point which did not receive attention in argument in this context is that the claim against the body corporate is not singularly founded in contract and is also founded in the *Australian Consumer Law*. Can the parties' dispute be a complex dispute

attracting s 229(2) if it is a dispute founded upon multiple foundational pathways to liability, only one of which relies upon a contractual matter?[15] I will for present purposes set that question to one side and consider the dispute as one singularly founded in contract.

[62] While s 149B(2) provides that a party to a dispute "may" apply for an order of a specialist adjudicator or of QCAT, s 229 mandates the only remedy for a complex dispute is such an order.

[63] The respondents do not argue against the obvious conclusion that Mr Dunlop's claim in contract against the body corporate is a complex dispute. However, they emphasise s 229(2) does not go to jurisdiction. They submit, drawing on reasoning in *MHA v DMA 18*,[16] that s 229(2) "potentially bars the remedy, not the right", so that the objection to jurisdiction is misplaced and that if the applicants wish to maintain their reliance upon the statutory bar to the remedy sought, they should do so in their pleading.

[64] However, the authorities relevant to s 229(2) indicate it is more than a statutory bar to the remedy sought in the dispute and that its effect is to remove the court's jurisdiction to resolve the dispute. As much was concluded by Holmes J, as her Honour then was, in *James v Body Corporate Aarons Community Title Scheme 11476*[17]. Her Honour observed of s 184(2) of *BCCMA*, the equivalent provision to what is now s 229(2) of that Act:

> "The wording of the section itself is unusual: rather than providing for exclusive jurisdiction in so many words, s 184(2) speaks in terms of "the only remedy" being the order of an adjudicator or that of a District Court on appeal on a question of law. But those words "the only remedy" are not ambiguous; it is difficult to see what meaning they can have other than that in the circumstances to which s 184(2) applies, the only manner in which the dispute itself can be resolved is by the means prescribed: the adjudicator's order or that of the District Court on appeal."[18]

[65] Her Honour went on to observe:

> "The conclusion that exclusivity is intended in respect of the disputes to which s 184(2) applies is reinforced by the existence of provisions which have the effect of allowing recourse to other remedies (including court orders) in specified situations: subsection 184(3), which removes the dispute from the purview of s 184(2) if the commissioner dismisses the application, and s 201(2), which entitles the commissioner to dismiss an application if he or she is satisfied that it should be dealt with in a court of competent jurisdiction."[19]

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15 See for example the observations of the High Court in *MHA v DMA 18* (2020) 385 ALR 16, 32 [55].
16 (2020) 385 ALR 16, 19-20.
17 [2002] QSC 386.
18 [2002] QSC 386 [14].
19 [2002] QSC 386 [18].

[66] Section 184(3) was, in effect, the same as what is now s 229(3) of the Act and s 201(2) was the same, in effect, as what is now s 250(2) of the Act. Her Honour's conclusion was confirmed on appeal where Davies JA observed:

> "Section 184 does not speak in terms, specifically, of jurisdiction to hear and decide but in terms of providing a remedy. However I think its plain intention is that the adjudicator is to have exclusive jurisdiction to make orders of the kind which the Act prescribes, relevantly in s 223 and s 227, in disputes of the kind to which s 182 refers, subject to any statutory exception or limitation."[20]

[67] The point was further considered by McMurdo J, as his Honour then was, in *Henderson & Anor v The Body Corporate for Merrimac Heights*.[21] His Honour there followed the above reasoning, rejecting an argument that s 229 is not of the same effect as its s 184 predecessor in that s 52 of the *Queensland Civil and Administrative Tribunal Act* 2009 (Qld) empowers the tribunal to transfer a matter to a court or other entity which the tribunal considers would more appropriately deal with the subject matter of the proceeding. His Honour observed the tribunal could not have the power to transfer to a court where the court lacked any jurisdiction to deal with the proceeding, observing that s 52 does not confer jurisdiction upon other courts or tribunals but rather permits a transfer to a court or tribunal where the entity has jurisdiction.[22] His Honour observed the legislative intention of s 229 was to "remove a court's jurisdiction to resolve" a complex dispute.

[68] This line of authority clearly affirms the interpretation of s 229 advanced by the applicant's argument as to want of jurisdiction. Those authorities do not suggest the provision is ambiguous or lacks clarity, such that the interpretation is inappropriate given the significance of a denial of jurisdiction.[23] Nor do they raise an alternate realistically arguable interpretation of the effect of s 229 which ought now be favoured because of the subsequent creation of the requirement in s 48 *Human Rights Act* 2019 (Qld) that statutory provisions must be interpreted in a way that is compatible with human rights.

[69] The respondents also advance an argument, seizing upon s 229(1)'s reference to disputes that "may be resolved under this chapter", that because their contractually founded case seeks damages founded in general law, not in the contract itself,[24] it may not be resolved "under" the process referred to in s 229(1). An adjudicator's power in that process, relevantly includes the power to make orders pursuant to s 276(1) that are "just and equitable" to resolve a dispute about a claimed "contractual matter" about the engagement of a service contractor or authorisation of a letting agent. It will be recalled the definition of a contractual matter includes termination of such engagements and authorisations. It is therefore not apparent on the respondent's argument why such "just and equitable" orders could not include an award of damages for loss caused by the wrongful termination of caretaking and letting agreements.

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20 *James v Body Corporate Aarons Community Title Scheme 11476* [2004] 1 Qd R 386 [12].

21 [2011] QSC 336.

22 [2011] QSC 336 [113].

23 As to which see *Johnson v Director-General of Social Welfare (Vict)* (1976) 135 CLR 92, 97; *Owners of "Shin Kobe Maru v Empire Shipping Co Inc"* (1994) 181 CLR 404, 421; *Shergold v Tanner* (2002) 209 CLR 126, 136.

24 See *Mann v Peterson Constructions Pty Ltd* (2019) 93 ALJR 1164, 1187, 1210.

[70] These conclusions trend in favour of granting the application to set aside the claim and statement of claim in respect of the body corporate for the reason that it is a complex dispute to be resolved pursuant to s 229(2). However there remain two considerations.

[71] The first is that the applicants' counsel indicated in argument that if the claims against the committee members and Mr Herd were to live on, the applicants would not want to split the proceedings by part of it diverting to an adjudicator or QCAT and the remainder staying before this court. The claims against the committee members and Mr Herd may live on if the respondents elect to file a further ASOC (and if it survives any further existential challenge).

[72] The second consideration is the unargued question of whether the dispute with the body corporate can be a complex dispute attracting s 229(2) if it is a dispute founded upon multiple foundational pathways to liability, only one of which relies upon a contractual matter. That has some connection with the first consideration in that if it is permissible in the context of s 229(2) to regard the dispute with the body corporate founded in a contractual matter as a separate dispute to the dispute with the body corporate relying upon the *Australian Consumer Law*, then even the proceedings as they relate only to the body corporate might be split – again an outcome unlikely to be desired by the applicants.

[73] In the circumstances I refrain from reaching a concluded view on paragraphs 2 and 3 of the application pending the receipt of further submissions made in light of my orders and the matters canvassed in these reasons.

Orders

[74] Given the incomplete state of the application costs should be reserved.

[75] My orders are:

1. Paragraphs [1(d)(ii)] and [23] of the amended Statement of Claim are struck out.

2. If the plaintiffs intend to file and serve a further amended Statement of Claim they must do so by 4pm 25 May 2021.

3. The Claim and the remainder of the application are listed for directions as to their future conduct at 9.15am 2 June 2021 (out of town parties having leave to appear by videolink or telephone).

4. Costs reserved.