

SUPREME COURT OF QUEENSLAND

CITATION: *The Proprietors Cathedral Village BUP 106957 v Cathedral Place Community Body Corporate* [2021] QCA 186

PARTIES: **THE PROPRIETORS CATHEDRAL VILLAGE
BUP 106957**
(applicant)
v
**CATHEDRAL PLACE COMMUNITY BODY
CORPORATE**
(respondent)

FILE NO/S: Appeal No 1690 of 2020
DC No 2754 of 2010

DIVISION: Court of Appeal

PROCEEDING: Miscellaneous Application – Civil

ORIGINATING COURT: District Court at Brisbane – [2019] QDC 210
(McGill SC DCJ)

DELIVERED ON: 31 August 2021

DELIVERED AT: Brisbane

HEARING DATE: 23 August 2021

JUDGES: Morrison JA

ORDERS: **1. The respondent pay the applicant the sum of \$290,077.44.**

2. The respondent pay interest on the sum in order number 1, pursuant to s 58(3) and s 59(3) of the *Civil Proceedings Act 2001* (Qld) at the rate specified for the purposes of Practice Direction 7 of 2013, paragraph 1(b), from 16 September 2020.

3. The respondent pay the applicant’s costs of and incidental to the application to be assessed on the standard basis.

4. Pursuant to s 193 of the *Mixed Use Development Act 1993* (Qld) the costs payable by the respondent for this application will be paid from contributions levied for that purpose against the members of the respondent apart from the applicant.

CATCHWORDS: PROCEDURE – CIVIL PROCEEDINGS IN STATE AND TERRITORY COURTS – JUDGMENTS AND ORDERS – OTHER CASES – where the applicant paid the respondent an amount pursuant to a District Court judgment – where that judgment was successfully appealed and remitted to the

District Court – where the respondent did not repay the judgment amount to the applicant – whether the judgment amount should be repaid to the applicant with interest and costs

Civil Proceedings Act 2001 (Qld), s 58(3), s 59(3)

Mixed Use Development Act 1993 (Qld), s 193

Gould v Vaggelas (1985) 157 CLR 215; [1985] HCA 75, distinguished

L Shaddock & Associates Pty Ltd v Paramatta City Council (No 2) (1982) 151 CLR 590; [1982] HCA 59, distinguished

Production Spray Painting & Panel Beating Pty Ltd v

Newnham (No 2) (1992) 27 NSWLR 659, considered

TCN Channel 9 Pty Ltd v Antoniadis (No 2) (1999)

48 NSWLR 381; [1999] NSWCA 104, considered

COUNSEL: D A Savage QC for the applicant
B P Strangman for the respondent

SOLICITORS: PHV Law Solicitors & Consultants for the applicant
Grace Lawyers for the respondent

- [1] **MORRISON JA:** This is an application brought by The Proprietors Cathedral Village Building Units Plan No 106957,¹ for an order that the respondent² repay the sum of \$290,077.44, plus interest on that sum from 16 September 2020. Cathedral Village also seeks its costs of the application on the indemnity basis.
- [2] On 29 October 2019 McGill DCJ gave judgment in favour of CBC against Cathedral Village, in the sum of \$290,077.44. A short synopsis of the background facts will serve to place this application in its correct setting.
- [3] A development in Fortitude Valley called Cathedral Place is subject to a scheme under the *Mixed Use Development Act 1993* (Qld). CBC is the body corporate under that scheme. There are six members of CBC, and each of them is a body corporate under a building units plan for a certain part of the site. Cathedral Village is one of those members, representing the commercial owners. The other members of CBC represent the residential owners.
- [4] The District Court proceedings which resulted in the judgement was but one of a number of pieces of litigation conducted between Cathedral Village and CBC. In the District Court McGill DCJ first determined a series of issues concerning the ability of CBC to levy contributions and whether CBC had failed to comply with its duties or relevant bylaws.³ Having made those findings, his Honour postponed the further hearing to enable the parties to make detailed submissions on the form of relief. The consequence was the determination that there be judgment against Cathedral Village in the sum of \$290,077.44.⁴

¹ Which I shall call “Cathedral Village”.

² Which I shall call “CBC”.

³ *Cathedral Place Community Body Corporate v The Proprietors Cathedral Village BUP 106957* [2018] QDC 275.

⁴ *Cathedral Place Community Body Corporate v The Proprietors Cathedral Village BUP 106957 (No 2)* [2019] QDC 210.

- [5] Cathedral Village unsuccessfully sought a stay of that judgment. When the stay was not granted CBC demanded payment of the judgment sum, threatening to appoint an administrator if it was not paid.
- [6] Negotiations followed and it was eventually agreed that Cathedral Village would pay the sum over time. It did so by five payments made between 3 February 2020 and 16 September 2020.
- [7] Cathedral Village filed an application to appeal against the judgment, that being the subject of appeal number 1690 of 2020. On 4 November 2020 this Court set aside the judgment and remitted the proceedings to the District Court “for determination of [CBC’s] claim and that part of [Cathedral Village’s] counter-claim which was for a money sum”.⁵
- [8] The Court subsequently ordered CBC to pay the costs of that appeal,⁶ adding this additional order:
- “Pursuant to s 193 of the *Mixed Use Development Act* 1993 (Qld) those costs payable by the respondent to the appellant be paid from contributions levied against the members of the respondent apart from the appellant.”
- [9] The evident reason for that order was that Cathedral Village is a member of CBC and should not have to bear any portion of the costs order made in its own favour.
- [10] Subsequently McGill DCJ made a declaration and various supporting orders concerned with whether the *Mixed Use Development Act* authorised CBC to require Cathedral Village to contribute to the costs providing amenities and services.⁷ Those declarations and orders became the subject of a separate appeal to this Court in appeal number 14271 of 2019.
- [11] This Court was differently constituted for each appeal, with the exception of McMurdo JA.
- [12] On 10 November 2020, six days after the judgment was set aside, Cathedral Village requested the repayment of the judgment sum. It was not repaid and on 13 August 2021 the present application was filed.

Current issues

- [13] By its application Cathedral Village sought the repayment of the judgment sum (\$290,077.44), together with interest and costs. In its outline on the application CBC agreed that it should be ordered to repay the judgment sum. It went on to submit that there were three remaining issues namely:
- (a) whether an order for repayment should be stayed for a period of six months to enable CBC to comply with the provisions of the *Mixed Use Development Act*;
 - (b) whether interest should be awarded; and
 - (c) the question of the costs of the application.

⁵ *The Proprietors Cathedral Village BUP 106957 v Cathedral Place Community Body Corporate* [2020] QCA 240.

⁶ Order made on 9 April 2021.

⁷ Order made 29 November 2019 in proceedings 2754 of 2010.

- [14] Refining those issues further, CBC submitted:
- (a) the stay should be granted because CBC needed to comply with the requirements of the *Mixed Use Development Act* as well as the *Building Units and Group Titles Act 1980* (Qld) in order to levy contributions on its members so as to meet the repayment; it pointed to the fact that when Cathedral Village was required to pay the judgment sum it had to comply with similar provisions, the consequence of which was that it could only pay in instalments;
 - (b) it also submitted that the constituent members of CBC were each subsidiary schemes also bound by the same requirements when levying contributions; for that reason a stay of execution of six months was sought;
 - (c) as to interest, it was submitted that the outcome of the appeal was that there was still a substantive dispute between the parties which had not been resolved and the outcome would not be known until such time as the District Court determined it; therefore, it was said, interest should not be awarded at all but if it was to be awarded then it should accrue only from the date of the application, namely 13 August 2021; and
 - (d) as to costs, it was submitted that Cathedral Village should be ordered to pay the costs because it was seeking discretionary relief in circumstances where there was still an outstanding substantive and unresolved dispute in the District Court; it also resisted any order for costs on the indemnity basis, submitting that there had been no wilful disregard of clearly established law.

The two appeals

- [15] Some of the features of the litigation between Cathedral Village and CBC was referred to by McMurdo JA in the reasons handed down on 4 November 2020.⁸ That decision was handed down one day after the other appeal.⁹ McMurdo JA said:¹⁰

“Another hearing occurred on 7 November 2019, from which there was a further judgment delivered on 29 November 2019. On the basis of his earlier conclusion, that the Act did not authorise CBC to require the commercial owners to subsidise the provision of services and other benefits to others within the scheme, his Honour granted a declaration and injunctions in favour of the commercial owners. CBC appealed against those orders. That appeal was heard by a differently constituted Court, which allowed the appeal, in part, by a judgment delivered on 3 November 2020. In that judgment, which I will call the first appeal judgment, the Court determined many of the issues, each involving the interpretation of the Act, which would otherwise have required a determination within this judgment. It is necessary to read this judgment with the first appeal judgment, although some repetition is unavoidable.”

- [16] McMurdo JA concluded that the judgment in favour of CBC should be set aside, as should the dismissal of the counterclaim. His Honour went on:¹¹

⁸ *The Proprietors Cathedral Village BUP 106957 v Cathedral Place Community Body Corporate* [2020] QCA 240.

⁹ *Cathedral Place Community Body Corporate v The Proprietors Cathedral Village BUP 106957* [2020] QCA 239.

¹⁰ [2020] QCA 240 at [8]; internal citations omitted.

¹¹ [2020] QCA 240 at [43].

“CBC’s claim, and that counter-claim which sought a money sum, should be remitted to the District Court for further determination according to this Court’s judgments in these two appeals. As the parties appeared to accept, in this appeal the Court could not determine the monetary extent to which CBC’s claim, or any of the counter-claim, should succeed, because of the absence of specific findings on each of the commercial owners’ complaints and the effect of them upon the defence and counter-claim.”

The application for a stay

- [17] The essential basis for this application was that CBC would need time to comply with the requirements of the *Mixed Use Development Act* and the *Building Units and Group Titles Act*, each of which had to be observed in order to lawfully levy contributions on the members of CBC. Affidavit evidence was read at the hearing of the application which showed that CBC has only just over \$14,000 in its bank account.
- [18] Mr Savage QC, appearing for Cathedral Village, submitted that there was no basis for a stay because:
- (a) the judgment upon which CBC had received the \$290,077.44 had been set aside on 4 November 2020 some nine months previously; there had therefore been ample time for CBC to take steps to levy contributions;
 - (b) CBC had taken no steps in the District Court proceedings since the remitter by this Court; it was said that in a practical sense that was explained by the fact that there were assessed costs outstanding against CBC in excess of \$350,000, and every likelihood that the District Court litigation would involve payments to Cathedral Village well in excess of the \$290,077.44; and
 - (c) the stay was being advanced in reality simply on the basis that CBC could not repay the sum immediately.
- [19] In my view, there is no warrant for a stay. It is true that the proceedings were remitted to the District Court for determination of CBC’s claim and the money component of Cathedral Village’s counterclaim, but that litigation has not been progressed by either side in the nine months since the remitter. In any event, the money was held by CBC purely because judgment had been entered against Cathedral Village. Once that judgment was set aside there was no warrant to retain the sum. Further, there was no legitimate basis to continue to hold that sum pending determination of the District Court litigation. To do so is tantamount to holding that sum as a form of security against the judgment that might be obtained in the District Court. Given the uncertainties of the litigation, the fact that this Court had found against the validity of the resolutions by which funds were levied, and the substantial amount owed by way of costs, there is simply no basis to resist repayment.
- [20] Further, balancing the interests of both sides does not call for a stay of the order for repayment. CBC has resisted the repayment since November 2020 and even if that resistance was on the basis of genuine efforts to negotiate some alternative outcome, CBC has belatedly agreed that it should repay the judgment sum.

Interest

- [21] There can be no doubt that CBC has had the benefit of the judgment sum which it had received in full by 16 September 2020. Self-evidently it has used those funds as it

now has only slightly more than \$14,000 in its bank account. It has therefore had the benefit of those funds for the entire period since then, and progressively from some seven months earlier when the first instalment was paid.

- [22] It is also plain that Cathedral Village has been denied the benefit of those funds since they were paid over. In my view, there is no proper basis upon which CBC can avoid paying the interest from 16 September 2020.¹²
- [23] It is not to the point that CBC did not seek to recover interest on the judgment debt. Its approach to enforcement can hardly govern the entitlement of Cathedral Village to be reinstated to the position it should have been in once the judgment was set aside.
- [24] Further, whilst it is true to say that the litigation in the District Court has not been finally determined, CBC has taken no steps in that proceeding to bring it to finality. The outcome is uncertain, as was recognised by McMurdo JA in the second appeal judgment. But that does not counter the fact that since 4 November 2020 Cathedral Village has been entitled to the judgment sum and deprived of it.
- [25] Interest should be awarded on the judgment sum from 16 September 2020 pursuant to s 58(3) and s 59(3) of the *Civil Proceedings Act*.

Costs

- [26] Cathedral Village seeks the costs of this application on the indemnity basis, contending that the refusal to return the judgment sum is contrary to clearly established law.¹³
- [27] Mr Strangman of Counsel, appearing for CBC, submitted that Cathedral Village should pay the costs of the application because it omitted to seek repayment of the judgment sum at the time the appeals were heard. In that regard reliance was placed on two decisions of the New South Wales Court of Appeal, *Production Spray Painting & Panel Beating Pty Ltd v Newnham (No 2)*¹⁴ and *TCN Channel 9 Pty Ltd v Antoniadis (No 2)*.¹⁵
- [28] *Production Spray Painting* involved orders made by the Industrial Commission under which various sums were paid, both in respect of the claim and costs. Those orders were then quashed by the Court of Appeal. Nine months later a motion was filed seeking orders for the repayment of the sums paid under the orders. The Court of Appeal proceeded under the slip rule, observing that the relief could and should have been sought in the original hearing.¹⁶ Notwithstanding that restitution was resisted on a number of grounds the court concluded that the claimant was entitled to an order for repayment of the sums paid and interest as well.¹⁷ As to costs, the court ordered them paid by the applicant on the motion because the application “only became

¹² *Government Insurance Office of New South Wales v Healey (No 2)* (1991) 22 NSWLR 380, 387; *Baulkham Hills Shire Council v Pascoe* [2000] NSWCA 322, [12]; *Heydon v NRMA & Ors (No 2)* (2001) 53 NSWLR 600; [2001] NSWCA 445, [18].

¹³ In that respect Cathedral Village relies on *Colgate-Palmolive Company v Cussons Pty Ltd* [1993] 46 FCR 225 at 231, 233; *Fountain Select Meats (Sales) Pty Ltd v International Produce Merchants Pty Ltd* [1988] 81 ALR 397 at 401; and *Rouse v Shepherd (No 2)* [1994] 35 NSWLR 277, at 279-280. (1992) 27 NSWLR 659.

¹⁴ [1999] NSWCA 104; (1999) 48 NSWLR 381.

¹⁵ *Production Spray Painting* at 661.

¹⁶ *Production Spray Painting* at 663.

¹⁷ *Production Spray Painting* at 663.

necessary because the claimants omitted to ask for complete relief at the original hearing”.¹⁸ For that proposition the court relied upon *L Shaddock & Associates Pty Ltd v Paramatta City Council (No 2)*¹⁹ and *Gould v Vaggelas*.²⁰

- [29] *Shaddock* was a case where a claim for damages was dismissed both at first instance and on appeal, but that was reversed in the High Court. By the inadvertence of counsel the question of interest on the award of damages was not raised in argument before the High Court nor mentioned in the reasons for judgment. An application was made under the slip rule to amend the High Court’s order to include an award of interest. There was a contested hearing with the High Court concluding that but for the inadvertence of Counsel the court would have made provision for interest on the damages.²¹ The High Court concluded that the application had been made necessary by the failure on the part of the applicants to seek the order at the hearing, and therefore they should be ordered to pay the costs of the application.²²
- [30] *Gould* concerned a claim for damages which were recovered at first instance, and then reduced by the Full Court on appeal. The High Court allowed an appeal against that decision. After it had handed down its reasons an application was brought seeking an award of interest on the judgment debt. That question had not been raised in the appeal before the High Court, either in the notice of appeal or in the course of argument. The evidence was that it was as a result of an accidental omission on the part of the appellant’s legal representatives, partly due to the complexity of the facts and legal issues raised in the appeal. After a contested hearing the court acted under the slip rule to vary the award of interest. On the question of costs, the court concluded that the application had been made necessary by the failure to seek the order at the hearing, and therefore the appellants should be ordered to pay the costs of the application.²³
- [31] *TCN Channel 9* was a case where a judgment had been recovered at first instance for damages for defamation. A stay pending appeal was refused and as a consequence the judgment debt was paid, together with interest and costs. An appeal from those judgments succeeded and it was ordered that the judgments be set aside and there be a new trial. On that appeal the court was not told that the judgment debts had been paid, nor was it asked to order repayment. Orders to that effect were not sought until a motion was brought about 14 months later. The motion was opposed, in part on the basis that a new trial had been ordered and restitution should not be made before it was heard. The court rejected that approach finding that the claimant had been “injured” by the orders which had been set aside and that the respondent to the motion remained in possession of the judgment debt “without any existing right to do so”.²⁴ As to costs, the court held that the claimant’s failure to seek the orders at the hearing of the appeal “has made these further proceedings necessary”, and that the normal rule in such a case was that the claimant must pay the costs of the application. For that proposition the court relied on *Production Spray Painting*,²⁵ which, in turn, relied on *Shaddock* and *Gould*.

¹⁸ *Production Spray Painting* at 663.

¹⁹ (1982) 151 CLR 590.

²⁰ (1985) 157 CLR 215, at 276.

²¹ *Shaddock* at 594.

²² *Shaddock* at 595.

²³ *Gould* at 276.

²⁴ *TCN Channel 9* at 384 paras 11 and 13.

²⁵ *TCN Channel 9* at 386 para 20.

- [32] In my view, *Shaddock* and *Gould* are different from the present case. Neither of those cases involved the question of restitution following the overturning of a judgment. Each concerned the application of the slip rule because the inadvertence of the lawyers had led to the relevant claim not being raised during the appeal.
- [33] Further, an application of the present kind, brought before a single judge of the Court of Appeal, is not an application under the slip rule. Where the slip rule is applicable it is to correct an error in orders, and the power is exercised by the court as constituted when the orders said to be in error were made.²⁶
- [34] However, *Shaddock* and *Gould* do stand as authority for the proposition that where some aspect of relief is not claimed or raised at the appeal, a subsequent application for that relief may be at the applicant's cost. That is the basis upon which, it seems, the court proceeded in both *Production Spray Painting* and *TCN Channel 9*. But in neither of those cases can it be seen that there was anything other than the fact that the relevant relief had not been sought at the time of the appeal. That is not the case here. A week after this court set aside the judgment, repayment was sought. The judgment having been set aside CBC was in possession of the judgment sum without any right to retain it.²⁷ Repayment was resisted on the basis that the claim had been remitted, an application for repayment had not been made to the Court of Appeal and that the clients were in discussions in an attempt to reach agreement on the levies to be properly payable.²⁸ Notwithstanding that CBC asked at the same time for Cathedral Village's solicitors to "identify the authority upon which any order for repayment should be made", the entitlement to recover the money because a judgment had been reversed was well established,²⁹ as pointed out in *Product Spray Painting*.³⁰ There matters stood until the present application was brought. The initial reaction to that application was an assertion by CBC that the efforts to resolve the matter remained on foot, the application had been brought prematurely and the application should be adjourned to allow an agreement to be reached.³¹ Two days later CBC's outline was filed, consenting to an order for repayment.³²
- [35] In my view, the concession in CBC's outline, that it should be ordered to repay the judgment sum, recognises what was inevitable from when the judgment was set aside. Cathedral Village was always entitled to restitution, which it had sought promptly after the judgment was set aside. In the circumstances I infer that the only reason CBC acknowledged its obligation to repay was because the application was filed. But that application only sought, in a formal sense, what had already been sought by Cathedral Village soon after the judgment was set aside.
- [36] In the particular circumstances I do not consider that the "normal rule" referred to in *Shaddock* and *Gould* should govern the result. CBC had no right to retain the judgment sum once the judgment was set aside and Cathedral Village had promptly sought repayment. CBC could always have repaid the sum as it was obliged to do, and as is acknowledged by its consent to an order for repayment.

²⁶ *Government Insurance Office of New South Wales v Healey (No 2)* (1991) 22 NSWLR 380, 383.

²⁷ *TCN Channel 9* at 384, paras 11 and 13; *White v Tomasel* [2004] QCA 89, [2004] 2 Qd R 438, at 450, [55]; *Easterday v The State of Western Australia* [2005] WASCA 105, [38]-[39] and [47].

²⁸ Letter from CBC's solicitors, 15 December 2020, Exhibit B to the affidavit of Mr Palella.

²⁹ *The Commonwealth v McCormack* (1984) 155 CLR 273; [1984] HCA 57, at [4]-[5].

³⁰ *Production Spray Painting* at 661.

³¹ Letter from CBC's solicitor, 18 August 2021, Exhibit C to the affidavit of Mr Palella.

³² Respondent's outline, para 11.

- [37] Further, whilst it is true to say that such an application had to be brought because that relief was not sought as part of the appeal process, in the appeals themselves this Court was not in a position to finally determine the entitlement of either party as a consequence of the relief granted. So much is evident from the comments of McMurdo JA: see paragraph [16] above. That is why the matter was remitted to the District Court for determination. In each appeal the outcome of the other was not known at the time arguments were advanced. And, it was not contested on this application that it was CBC who insisted on the appeals being heard separately. These matters might serve to explain why the current relief was not sought as part of the appeals.³³ However that may be, within a week of the judgment being set aside Cathedral Village sought repayment of the judgment sum. It was always open to CBC to repay the sum, or at least to signify its agreement to do so. It did neither and at the same time took no step to advance the District Court litigation which would, even on its own account, have determined the account as between the parties.
- [38] In those circumstances it seems to me to be just that CBC pay the costs. I note a similar approach was taken in *Government Insurance Office of New South Wales v Healey [No 2]*.³⁴
- [39] In my view, CBC should pay the costs on the standard basis, rather than on the indemnity basis. There are several reasons for that conclusion.
- [40] First, the costs sought under this order do not relate to anything but the costs of the application itself. The stance taken by CBC to the request by Cathedral Village to repay the judgment sum matters only to the extent that it is reflected in the response once the application was filed. Looking at the material which deals with the initial response, it is fair to say that within a month of the request for repayment CBC had pointed out that representatives on each side had commenced discussions “on issues that may help to resolve the dispute”, but that if agreement could not be reached then it was “appropriate that the District Court on remitter determine who is properly entitled to the amounts paid by your client to date in considering the claim, defence and counterclaim”.³⁵ That was followed by a proposal by CBC’s solicitors that “our client will treat those amounts already paid as an offset against all levies payable by your client to date”. Neither stance justified retaining the judgment sum.³⁶ Whatever the discussions were, and however successful or otherwise they were, matters were not advanced until eventually the application was filed. Within a week of it being filed CBC consented to an order that it repay the judgment sum, and raised issues concerning only interest, costs and a stay.
- [41] Secondly, if one looks at the conduct of CBC in terms of the conduct of the application itself, no stance was taken which would warrant a conclusion that there was a refusal being maintained contrary to clearly established law. The first response by way of outline was to consent to an order for a repayment, whilst raising issues concerning interest, costs and a stay. Each of those matters required the exercise of a discretion and the points raised were arguable, even if they failed. There is nothing in that which, to my mind, warrants the conclusion that indemnity costs are appropriate.

³³ Though in truth the issue could have been raised in a one sentence submission to the effect that in the event that the orders were set aside CBC should be ordered to repay the judgment sum, with interest. (1991) 22 NSWLR 380, 387-388.

³⁵ Letter 15 December 2020, Exhibit B to the affidavit of Mr Palella.

³⁶ *Easterday v Western Australia* (2005) 30 WAR 122, [38]-[39] and [47].

[42] Thirdly, because the relief was not sought as part of the appeals an application of this kind was necessary. That emphasises that it was the response to the application itself which was relevant to the issue of costs, rather than some aspect of the competing stances before that time.

[43] For these reasons I make the following orders:

1. The respondent pay the applicant the sum of \$290,077.44.
2. The respondent pay interest on the sum in order number 1, pursuant to s 58(3) and s 59(3) of the *Civil Proceedings Act 2001* (Qld) at the rate specified for the purposes of Practice Direction 7 of 2013, paragraph 1(b), from 16 September 2020.
3. The respondent pay the applicant's costs of and incidental to the application to be assessed on the standard basis.
4. Pursuant to s 193 of the *Mixed Use Development Act 1993* (Qld) the costs payable by the respondent for this application will be paid from contributions levied for that purpose against the members of the respondent apart from the applicant.