SUPREME COURT OF QUEENSLAND

CITATION:	*Breeze Mr Pty Ltd v Body Corporate for Bay Village Community Title Scheme 33127* [2021] QSC 263
PARTIES:	**BREEZE MR PTY LTD** (applicant) V **BODY CORPORATE FOR BAY VILLAGE COMMUNITY TITLE SCHEME 33127** (respondent)
FILE NO/S:	BS 9996 of 2021
DIVISION:	Trial Division
PROCEEDING:	Application
ORIGINATING COURT:	Supreme Court
DELIVERED ON:	14 September 2021 (*ex tempore*)
DELIVERED AT:	Brisbane
HEARING DATE:	14 September 2021
JUDGE:	Daubney J
ORDERS:	**1. It is declared that the termination by the Committee of the Respondent on 8 April 2021 of the Management Agreement dated 17 October 2005 and the written Notice of Termination of that Management Agreement dated 20 April 2021 are of no force and effect.** **2. The Respondent shall pay 80% of the Applicant's indemnity costs of and incidental to this proceeding, such costs to be assessed.**
CATCHWORDS:	PRINCIPLES – STATE AND TERRITORY COURTS: JURISDICTION, POWERS AND GENERALLY – JURISDICTION – DECLARATIONS – JURISDICTION – GENERALLY – where the respondent is a body corporate – where the respondent assigned a management agreement to the applicant – where the management agreement provided for the agreement could be terminated – where the respondent purported to terminate the management agreement without ordinary resolution in general meeting – where the applicant has brought an application in Supreme Court seeking declaration that termination of no force and effect – where the respondent argues QCAT has exclusive jurisdiction – where the *Body Corporate and Community Management Act 1997*

(Qld) provides that disputes which are not complex dispute must be resolved by a dispute resolution process or order of the Appeal Tribunal – whether this is a dispute under the provisions whether the Supreme Court has jurisdiction to determine the application – whether this was a "dispute" for the purposes of the exclusivity of dispute resolution provisions of the *Body Corporate and Community Management Act 1997* (Qld)

REAL PROPERTY – STRATA AND RELATED TITLES – MANAGEMENT AND CONTROL – BODY CORPORATE: POWERS, DUTIES AND LIABILITIES – GENERALLY – where respondent body corporate purported to terminate a service contractor without ordinary resolution in general meeting – whether this was a valid termination pursuant to s 100 of the *Body Corporate and Community Management (Commercial Module) Regulation 2020* (Qld) – whether this was a decision on a "restricted issue" under the Regulation – whether the purported termination should be declared of no force and effect

Body Corporate and Community Management Act 1997 (Qld), s 15, s 100, s 226, s 227, s 229
Body Corporate and Community Management (Commercial Module) Regulation 2020 (Qld), s 17, s 99, s 100

Henderson & Anor v The Body Corporate for Merrimac Heights [2011] QSC 336

COUNSEL: B Kidston for the applicant
M D White for the respondent

SOLICITORS: Mahoneys for the applicant
Butler McDermott for the respondent

[1] The Respondent is the body corporate for the Bay Village on Hastings Community Title Scheme 33127 under the provisions of the *Body Corporate and Community Management Act 1997* (Qld) ("BCCMA"). The Community Title Scheme is regulated by the *Body Corporate and Community Management (Commercial Module) Regulation 2020* ("the Module").

[2] On 17 October 2005, the Respondent entered into an agreement in writing with OKAPI Investments Pty Ltd for the performance of caretaking style duties at the scheme. This Management Agreement was subsequently varied and assigned a number of times. Ultimately, the Applicant took an assignment on 20 April 2018 and became the party known as the "manager" under that Management Agreement.

[3] Clause 6.1 of the Management Agreement sets out events giving rise to an entitlement on the part of the Respondent to terminate the Management Agreement. By clause 6.1(b), one of those events is that the Respondent may terminate the

agreement if the manager "is guilty of gross negligence or gross misconduct in performing the Duties or providing the Letting Service". It is unnecessary for present purposes to refer further to the nature of the duties or the letting services specified in the Management Agreement.

[4] On 8 April 2021, the Respondent's committee purported to resolve, on behalf of the Respondent, to terminate the Management Agreement, and on 20 April 2021, the Respondent purported to give notice to the Applicant that the Management Agreement was terminated. That occurred in a letter dated 20 April 2021 addressed to the Applicant under the hand of the chairman, the treasurer and the secretary signing for the committee of the Respondent. The letter made allegations of defalcation against the Applicant and asserted:

> The body corporate, in exercising its power pursuant to your breaches of the Management Agreement and yours or your company's gross misconduct in misappropriating money belonging to the body corporate, terminate the Management Agreement with Breeze Mr Pty Ltd.

[5] The letter stated that this termination was to take immediate effect on service of the notice.

[6] It was an admitted fact that at the time this termination notice was given the body corporate had not obtained the authority of the lot owners in the scheme to terminate the Management Agreement by ordinary resolution in general meeting or otherwise. Rather, the purported termination was claimed to be sourced in a resolution of the committee. Reliance was then placed on s 100(1) of the BCCMA to aver that this decision of the committee was a decision of the body corporate, and therefore operated as an effective termination for the purposes of the Management Agreement.

[7] The Applicant has disputed that this was a valid termination. The Respondent did not and does not accept the Applicant's contention in that regard, and continues to assert that the termination was valid. Against that background, the Applicant now applies for a declaration that the purported termination was a nullity and of no effect.

[8] Before turning to the central argument on the efficacy or otherwise of the termination, it is necessary to deal with a preliminary jurisdictional argument advanced on behalf of the Respondent. That argument, in essence, was that this dispute does not fall within the jurisdiction of this Court. The Respondent invoked Chapter 6 of the BCCMA to contend, in effect, that this is a dispute in respect of which the Queensland Civil and Administrative Tribunal ("QCAT") has exclusive jurisdiction. It is necessary to refer to some of the relevant statutory provisions in order to deal with this argument.

[9] At the outset, it can be noted that it was not in issue that the Management Agreement was a "service contract" as that term is defined in Schedule 6 of the BCCMA, nor was it in issue that the Applicant was a "service contractor" as defined in s 15 of the BCCMA. The Applicant was not, however, a "caretaking service contractor". That term is defined in Schedule 6 of the BCCMA as, relevantly, "a service contractor for the scheme who is also a letting agent for the scheme, or an associate of the letting agent".

[10] Central to the argument in connection with whether this Court has jurisdiction or whether this ought be a matter before QCAT are the provisions of s 229 of the BCCMA. As appears from that section, a distinction is drawn between what are described as complex disputes and disputes which are not complex disputes. It was not suggested that the present dispute is a "complex dispute", that term also being defined in Schedule 6 of the BCCMA. The argument was that, this being not a complex dispute, s 229(3) provides that the "only remedy" for disposition of such a dispute is the resolution of the dispute by a dispute resolution process (as that term is defined in the legislation), or an order of the Appeal Tribunal of QCAT on appeal from an adjudicator on a question of law.

[11] It is unnecessary for present purposes to delve into the minutia of those various dispute resolution processes. The argument was that the reference to "only remedy" conferred an exclusive dispute resolution process that invoked only the jurisdictions specified in that section.

[12] The Respondent's argument was premised on the definition of "dispute" in s 227 of the BCCMA. In particular, s 227(1)(b) provides that:

> A dispute is a dispute between the body corporate for a community titles scheme and the owner or occupier of a lot included in the scheme.

[13] It was said that the Applicant is the owner of a lot included in the scheme, and that this is a dispute between an owner of a lot and the body corporate for a community title scheme. Therefore, went the argument, this is a "dispute" within the meaning of that term in s 227, and it is also, therefore, a dispute which is governed by the exclusive dispute resolution processes under s 229.

[14] In advancing that argument, the Respondent called in aid certain observations made by McMurdo J in *Henderson & Anor v The Body Corporate for Merrimac Heights*.[1] In particular, the Respondent referred to [107] of His Honour's judgment, in which His Honour noted that the dispute, in that case, between the parties, insofar as it involved the enforceability of one of the agreements between the parties, was a "dispute" as defined in s 227(1) of the BCCMA, "at least because it [was] a dispute between a body corporate and an owner of a lot included in the scheme". By reference to that statement, it was argued that it is simply sufficient for there to be a dispute between one party who owns a lot in the scheme, and another party which is the body corporate for the scheme.

[15] The statement made by His Honour on which reliance was placed, however, occurs in a somewhat more nuanced context and needs to be understood in the circumstances of the case which His Honour was there considering.

[16] In that case, there were disputes arising between parties under two agreements. One was a "Caretaking Agreement" which was for the provision of services encompassing caretaking of the premises. It also permitted the managers under that agreement to conduct a letting agency from within the complex. The other agreement was described as a Landscape Maintenance Agreement ("LMA") which was for the provision of gardening services.

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1 [2011] QSC 336.

[17] Proceedings in respect of the Caretaking Agreement were originally commenced in QCAT. The proceedings in respect of the Caretaking Agreement were, however, transferred from QCAT to the Supreme Court by an order made by the then President of QCAT. The reasons do not disclose the basis on which the then President of QCAT relied for the transfer of that proceeding to the Supreme Court.

[18] In respect of the dispute between the parties concerning the LMA, there was a claim for damages for breach of contract brought by the manager under the LMA, seeking lost profits arising from the inability to perform under the contract as a consequence of a purported termination. McMurdo J noted at [6] that the claims in respect of the LMA were the subject of proceedings in the Supreme Court for which the Court had jurisdiction.

[19] The remarks made by His Honour on which the Respondent relied for present purposes occurred in a context later in the reasons for judgment where he was considering whether the Supreme Court in fact had jurisdiction to hear and determine the dispute which had been conducted between the parties. But with respect to the Caretaking Agreement, it will be recalled that proceedings in respect of that agreement had originally been instituted in QCAT, and then transferred to the Supreme Court. It is also clear from His Honour's reasons for judgment that the disputes were litigated fully, and at considerable length, before the Supreme Court, leading then to the judgment given by His Honour in which these observations were made.

[20] His Honour was, relevantly, not concerned about satisfying himself that the Supreme Court had jurisdiction in respect of the LMA because, as I have already said, at the outset of his judgment His Honour observed that the Court undoubtedly had jurisdiction in respect of that claim for damages for breach of contract. Rather, His Honour's focus was to ascertain and assure himself that the Supreme Court had jurisdiction to adjudicate on, and determine, the dispute concerning the Caretaking Agreement.

[21] The observations made by his Honour at [107] of his reasons were clearly not intended to be determinations which form part of the rationale of the case before His Honour. Rather, His Honour was exemplifying the *prima facie* operation of the wording in s 227, and the various categories of dispute described in that section. So after making the observation concerning the LMA involving a dispute between a body corporate and an owner of a lot, His Honour then went on to consider the status of the parties under the Caretaking Agreement, and whether, *prima facie*, their status under that contract brought them under any of the rubrics of s 227 of the BCCMA.

[22] His Honour examined the *prima facie* exclusive operation of s 229, and ultimately reached the view that the question as to the Court's jurisdiction in respect of the Caretaking Agreement turned on the operation of s 229(4). His Honour said:[2]

> In particular, it turns upon whether all of the matters presently in issue are within the dispute which was the subject of the plaintiffs' application to the Commissioner. The plaintiffs argue that there is one dispute with many elements. The defendant argues that issues involving the enforceability of the

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2 Ibid, [116].

> Caretaking Agreement constitute a dispute, distinctly from that which was the subject of the application to the Commissioner.

[23] His Honour then made observations about the overlap of claims, and the considerable overlap of factual issues, noting however, that they were not identical. He further observed that the question before him involved the meaning of "dispute" in a particular statutory context. His Honour said:[3]

> The evident intent of Chapter 6 of the Act is to facilitate the resolution of controversies. It would be inconsistent with that purpose if Chapter 6, and in particular s 229, promoted rather than resolved controversies, by giving rise to unproductive jurisdictional arguments. It would also be detrimental to the operation of Chapter 6 to unduly confine the boundaries of a "dispute", because that could prevent the one body resolving the entire controversy between the parties with disadvantages of extra cost, delay and the possibility of inconsistent findings.

[24] Justice McMurdo, in the context of the case before him, which involved disputes under the Caretaking Agreement and the LMA, said that the notion of a dispute should be one "which promotes the whole of the controversy between the parties being able to be resolved within the one process". His Honour then had regard to the body of case law dealing with accrued federal jurisdiction for assistance in resolving, in his mind, whether he was satisfied that he had jurisdiction to deal with the disputes under the Caretaking Agreement, at the same time as he dealt with the matter in respect of which he undoubtedly had jurisdiction, namely the dispute under the LMA. He concluded:[4]

> In substance, this controversy concerned the respective positions of the parties under the LMA, with consequences for their respective positions under the Caretaking Agreement. All of the matters in issue in this litigation should be understood as elements of the one controversy or dispute. In consequence of s 229(4), subsections (2) and (3) do not apply in any respect to this litigation, and this court has jurisdiction in all respects.

[25] That case, it can clearly be seen, was quite different from the present. In the present case, the dispute between the parties arises out of, and only out of, the parties in their capacities as parties to the Management Agreement. It has nothing to do, in any respect, with the Applicant's status as the owner of a lot in the scheme.

[26] As was advanced in argument on behalf of the Applicant, the sort of contention advanced by the Respondent would have undesirable results. Two examples will suffice. On the Respondent's contention that it is sufficient for the purposes of invoking the exclusive jurisdiction of QCAT for a dispute simply to be between a body corporate and a person who happens to be a lot owner in the scheme, if the person who happened to be a lot owner suffered personal injuries in connection with the common property controlled by the body corporate, then the only avenue for resolving the dispute arising out of the negligent act that caused the personal injuries would be to pursue the Chapter 6 dispute resolution process. Similarly, if a body corporate published a pamphlet which defamed a person who happened to be a lot owner, on the Respondent's argument, the recourse for the claim for damages for

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3 Ibid, [119].
4 Ibid, [123].

defamation would somehow have to be accommodated under the Chapter 6 dispute resolution process. Obviously, those examples would lead to absurd results.

[27] It seems, therefore, that the proper way of reading s 227 is to understand the reference to "dispute" to being a dispute between a body corporate and an owner of a lot in their respective capacities in that regard. This present dispute is not a dispute involving the Applicant qua owner of a lot in the scheme, and it is therefore not a "dispute" for the purposes of s 227 of the BCCMA. Accordingly, it does not fall under the exclusive dispute resolution provisions provided for in s 229, and, this Court has jurisdiction to hear and determine the present application.

[28] Finally, it must be noted that this interpretation aligns completely with the definition of "owner" in s 226 of the BCCMA.

[29] Turning then to the substance of the application, it will be recalled that the Respondent body corporate and the scheme are regulated by the Module. Sections 99 and 100 of the Module provide:

> **99 Purpose of Part [SM, s 149]**
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> This part provides for:
>
> (a) the grounds on which the body corporate may terminate a person's engagement as a body corporate manger or service contractor, or authorisation as a letting agent; and
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> (b) the steps the body corporate must follow to terminate the engagement or authorisation.
>
> **100 Termination under the Act, by agreement etc. [SM, s 149]**
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> (1) The body corporate may terminate a person's engagement as a body corporate manager or service contractor, or authorisation as a letting agent—
>
> (a) under the Act; or
>
> (b) by agreement; or
>
> (c) under the engagement or authorisation.
>
> (2) The body corporate may act under subsection (1) only if the termination is approved by ordinary resolution of the body corporate.

[30] The fundamental argument advanced on behalf of the Applicant is that the purported termination of April 2021 had not been approved by ordinary resolution of the body corporate. On that basis, by a clear application of s 100(2) of the Module, there was no valid termination. The Respondent, however, contended that there had nevertheless been a decision deemed to be a decision of the body corporate, because of s 100(1) of the BCCMA. That subsection simply provides that "a decision of the committee is a decision of the body corporate".

[31] Section 100(2) goes on, however, to provide:

> Subsection (1) does not apply to a decision that, under the regulation module, is a decision on a restricted issue for the committee.

[32] One must, accordingly, then revert to the Module to find out what a restricted issue is. Restricted issues are defined in s 17 of the Module, and by section 17(1)(c), a decision is a decision on a restricted issue for the committee if, relevantly, it is a decision "that may only be made by … ordinary resolution of the body corporate".

[33] Notwithstanding that provision, it was argued that s 100 preserved the decision of the committee as a decision of the body corporate. That argument, however, cannot be accepted. Section 100(2) of the Module is clear by its terms that a body corporate may only act under s 100(1) to terminate a person's engagement as a service contractor "if the termination is approved by ordinary resolution of the body corporate". In my opinion, the meaning and effect of those words could not be more clear.

[34] The decision by a body corporate to terminate a service contractor is, therefore, one that may only be made by ordinary resolution of the body corporate, and accordingly is a decision on a restricted issue for the committee by the operation of s 100(2) of the BCCMA. It is, therefore, a decision of a nature which is not one which can be constituted by a decision of the committee.

[35] In those circumstances, in the absence of an ordinary resolution of the body corporate, the purported decision of April 2021 was not properly passed by the Respondent, and the purported termination notice issued consequent upon the committee's decision to terminate is of no force and effect. I will hear the parties as to the necessary orders to give effect to these reasons.

…

ORDERS

1. It is declared that the termination by the committee of the Respondent on 8 April 2021 of the Management Agreement dated 17 October 2005, and the written notice of termination of that Management Agreement dated 20 April 2021, are of no force and effect.

2. The Respondent shall pay 80% of the Applicant's indemnity costs of and incidental to this proceeding, such costs to be assessed.