

DISTRICT COURT OF QUEENSLAND

CITATION: *The Body Corporate for the Anchorage One v Huang*
[2022] QDC 119

PARTIES: **THE BODY CORPORATE FOR THE ANCHORAGE ONE**
Plaintiff
v
YUE HUANG
Defendant

FILE NO/S: TD 213/2020

DIVISION: Civil

DELIVERED ON: 26 May 2022

DELIVERED AT: Brisbane

HEARING DATE: 4 February 2022

JUDGE: Barlow QC DCJ

ORDERS:

- 1. The plaintiff file and serve any amended statement of claim by 9 June 2022.**
- 2. Paragraphs 3, 4 and 5 of the further amended defence be struck out.**
- 3. The defendant have leave to re-plead her defence.**
- 4. Paragraphs 21, 23, 24, the words “and was in contravention of s.152 of the Act and s.157 of the *Body Corporate and Community Management (Accommodation Module) Regulation 2008*” in paragraph 25 and the words “pursuant to s.152 of the Act and s.157 of the *Body Corporate and Community Management (Accommodation Module) Regulation 2008*” in paragraph 29 of the counterclaim be struck out.**
- 5. The defendant file and serve a third amended defence and an amended counterclaim by 23 June 2022.**
- 6. The plaintiff file and serve any third amended reply and answer to counterclaim by 30 June 2022.**
- 7. The application filed on 15 December 2021 be adjourned to 9.00am on 8 July 2022, before Judge Barlow QC.**

CATCHWORDS: REAL PROPERTY – STRATA AND RELATED TITLES – GENERAL MATTERS – JURISDICTION AND POWERS OF COURTS AND TRIBUNALS – the plaintiff seeks recovery of levies for contributions under the *Body Corporate and Community Management Act 1997* - the defence pleads that the contributions were determined in breach of that Act – whether the District Court has jurisdiction to determine that issue – by the counterclaim the defendant seeks relief for (among other claims) alleged breaches of the body corporate’s duties under the Act and the regulations – whether the District Court has jurisdiction to determine those issues or they can only be determined by the dispute resolution processes under the Act – whether those issues and the balance of the defendant’s counterclaim, for damages for negligence or nuisance and for an injunction as a consequence of the nuisance, are a “related dispute” to the debt dispute and ought therefore be determined by a dispute resolution process under the Act or by the District Court

Body Corporate and Community Management Act 1997, ss 152, 227, 228, 229, 229A.

Body Corporate and Community Management (Accommodation Module) Regulation 2008, s 157.

Body Corporate of the Lang Business v Green [2008] QSC 318, considered.

Independent Finance Group Pty Ltd v Mytan Pty Ltd [2003] 1 Qd R 374, distinguished.

Macdonald v Clark [2012] QSC 418, applied.

COUNSEL: T Schmidt, for the plaintiff

SOLICITORS: FLS Lawyers, Solicitors for the plaintiff
Yue Huang, Self-represented defendant

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Introduction

- [1] The issue for determination in these reasons is whether this court has jurisdiction to hear and determine issues raised by the defence and counterclaim in this proceeding.
- [2] The plaintiff, as its name suggests, is the body corporate for a community titles scheme, which is situated in Townsville. The scheme is predominantly made up of residential units. The defendant is the owner of the only commercial lot in the scheme, which the defendant lets out and which is used as a restaurant.
- [3] This proceeding originally started in the Magistrates Court in Townsville. The plaintiff claims just under \$23,000 for contributions levied by it against the defendant, in respect of her lot, for its administrative fund or its sinking fund (or both) and costs that it has incurred in seeking to recover those contributions, together with interest.
- [4] The defendant filed a defence and a counterclaim. In her defence, she alleges that the amounts levied were not calculated in accordance with the *Body Corporate and Community Management Act 1997* (the **Act**) and therefore the plaintiff is not entitled to recover them from her. In particulars, she alleges that the contribution schedule for her lot contravenes s 46 of that Act because it is inconsistent with the equality principle or the relativity principle.¹ Her complaint in these respects is that her commercial lot is effectively being charged for services provided only to the residential lots. In her defence she purports to seek an order dismissing the plaintiff's claim and an order referring the matter to the Queensland Civil and Administrative Tribunal (**QCAT**) or a specialist adjudicator² for determination.
- [5] In her counterclaim, the defendant claims that the body corporate built an office structure and built or failed to maintain a paved area on the common property outside the defendant's lot which, together or separately, caused water to run into her lot and thus caused damage to her lot and loss of income to her. She claims damages of just over \$459,000. She pleads a number of causes of action. First, she claims damages for negligence or nuisance. But she goes on to claim that the plaintiff acted in breach of its statutory duties to administer, manage and control the common property and body corporate assets reasonably and for the benefit of lot owners³ and to maintain the common property in good condition, including, to the extent that common property is structural in nature, in a structurally sound condition.⁴ As well as seeking damages for negligence or nuisance, she seeks orders, purportedly under s 152 of the Act and s 157 of the Accommodation Module, that the body corporate demolish the office and pay her the amounts that she claims as damages.
- [6] In the light of that counterclaim, the proceeding was transferred to this court. The application now before me was then filed by the plaintiff, seeking to have the proceeding added to the Commercial List of the court. However, at the hearing of the application the plaintiff contended that the counterclaim raises issues that can only be dealt with under the dispute resolution processes set out in Chapter 6 of the Act⁵ and therefore this court has no jurisdiction to hear and determine the counterclaim. It also

¹ Act, s 46(7), s 46A. Under s 47, the contribution schedule for a lot is the basis for calculating the lots owner's share of amounts levied by the body corporate.

² Referring to procedures under Chapter 6 of the Act.

³ Act, s 152(1)(a).

⁴ *Body Corporate and Community Management (Accommodation Module) Regulation 2008* (**Accommodation Module**), s 157(1).

⁵ That is, by a specialist adjudicator or by QCAT.

contends that the defence raises issues that also can only be determined by one of those methods. Therefore the plaintiff contends that the defence and the counterclaim should be struck out, while the plaintiff should be entitled to proceed with its claim.

- [7] I therefore directed that, before I determine the application to place the proceeding on the Commercial List, the parties file submissions on the question of this court's jurisdiction. That is the question that I am now to decide.

The Act

- [8] Section 47B of the Act relevantly provides:

- (2) This section also applies if -
 - (c) the owner of a lot included in the scheme believes the contribution schedule lot entitlements for the lots included in the scheme are not consistent with the deciding principle for the lot entitlements.
- (3) The owner of the lot may apply -
 - (a) under chapter 6, for an order of a specialist adjudicator for an adjustment of the contribution schedule for the community titles scheme; or
 - (b) as provided under the QCAT Act, for an order of QCAT, exercising the tribunal's original jurisdiction, for an adjustment of the contribution schedule for the scheme.

- [9] Chapter 6 of the Act concerns dispute resolution. Section 227 relevantly defines a **dispute** as a dispute between the body corporate of a community titles scheme and the owner of a lot included in the scheme. The dictionary in schedule 3 defines a **complex dispute** as meaning, among other things, a matter for which an application under s 47B(3)(a) is or may be made.

- [10] Section 228 sets out the chapter's purpose:

- (1) This chapter establishes arrangements for resolving, in the context of community titles schemes, disputes about –
 - (a) contraventions of this Act or community management statements; and
 - (b) the exercise of rights or powers, or the performance of duties, under this Act or community management statements; and
 - (c) the adjustment of lot entitlement schedules.

- [11] 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;⁶ or
 - (b) an order of the appeal tribunal on appeal from an adjudicator on a question of law.

[12] Section 229A relevantly provides:

229A Disputes about particular debts

- (1) A claim to recover a debt the subject of a debt dispute that is a claim under the Queensland Civil and Administrative Tribunal Act 2009, schedule 3, definition minor civil dispute, paragraph 1(a)⁷ is, under paragraph 2 of that definition, a minor civil dispute.
- (2) Subsection (1) does not affect a body corporate’s right to start proceedings in a court of competent jurisdiction to recover a debt the subject of a debt dispute.
- (3) To remove any doubt, it is declared that an adjudicator does not have jurisdiction in a debt dispute.
- (4) A dispute resolution process does not apply to a debt dispute or a related dispute to a debt dispute once a proceeding to recover the debt the subject of the debt dispute is started before QCAT or in a court of competent jurisdiction.
- (6) A dispute is a **related dispute** to a debt dispute if—
 - (a) the subject matter of the dispute is related to the subject matter of the debt dispute; and
 - (b) there are proceedings in a court or before QCAT to recover the debt the subject of the debt dispute; and
 - (c) the commissioner considers that the dispute and the debt dispute are connected in a way that makes it inappropriate for the dispute to be dealt with by a dispute resolution process.
- (7) In this section—

debt dispute means a dispute between a body corporate for a community titles scheme and the owner of a lot included in the scheme about the recovery, by the body corporate from the owner, of a debt under this Act.

Is the defence within this court’s jurisdiction?

[13] The defendant’s challenge to the debt claimed by the plaintiff is that the amounts levied were not properly calculated under the Act because, in essence, the contribution schedule on which the debt is based is inconsistent with the relevant statutory principles. She does not allege, for example, that she has paid some or all of the debt claimed, or that the levies were not calculated in accordance with the contribution schedule, or that the levies were not in fact raised at all. In other words, she seeks to

⁶ “Dispute resolution process” is defined in the Dictionary by reference to a list of processes that are provided for in the Act.

⁷ That is, a claim for \$25,000 or less.

challenge the validity of the contribution schedule itself, which is the basis for the calculating the levies,⁸ rather than to challenge the existence of the calculation of the debt.

- [14] A debt dispute (for the purpose of s 229A only) is a dispute about the **recovery**, by a body corporate from an owner, of a **debt** under the Act.⁹ Section 143 of the Accommodation Module relevantly provides that, if a contribution or contribution instalment is not paid by the date for payment, the body corporate may **recover** that amount (together with any penalty and recovery costs) as a **debt**.¹⁰
- [15] On one view, the validity of a contribution that a body corporate seeks to recover as a debt (including by challenging the validity of the contribution schedule that is the basis for calculating the debt) may be seen to be a proper basis to dispute the recovery of that debt. However, the Act specifically provides for exclusive particular processes to enable a lot owner to challenge the validity of a contribution schedule, by seeking an adjustment to it.¹¹ In those circumstances, while a dispute as to whether a contribution has been properly calculated in accordance with the contribution schedule could be the subject of a debt dispute,¹² a challenge to the validity of the schedule itself on the basis that it is not consistent with the deciding principle for the lot entitlements cannot. The latter challenge must, by its very nature, encompass an application for an adjustment of the contribution schedule under s 47B. It would be a “complex dispute” and therefore can **only** be determined in one of the ways provided for in s 229(2) of the Act.
- [16] This conclusion might seem to be inconsistent with the decision of Daubney J in *Body Corporate of the Lang Business v Green (Green)*.¹³ There, the body corporate sought to recover contribution levies. In his defence, Mr Green admitted having been served with the notices of contribution, but denied that the notices were served or calculated in accordance with the provisions of the Act. He pleaded that he was only liable to pay such contributions as had been properly identified, calculated and resolved to be payable by members of the body corporate.¹⁴ The plaintiff contended that those issues constituted a dispute under the Act and fell exclusively within the dispute resolution procedures in chapter 6.
- [17] Justice Daubney expressed the view that the proceeding “would not appear to test the boundaries established by ss 227 and 228.”¹⁵ His Honour went on to conclude that:¹⁶

it appears that, had the defendant instituted separate proceedings in this court challenging the Notices of Contribution, he would have been thwarted by the exclusivity provisions of the BCCM. He has not, however, done so. Rather, the defendant has raised particular matters in defence of the plaintiff’s claim. I would be loathe to conclude, in the absence of a specific statutory provision compelling such a conclusion, that a defendant to a claim such as the one advanced by the plaintiff could not, under any circumstances, raise in a defence

⁸ Act, s47(2).

⁹ Act, s 229A(7).

¹⁰ My emphasis is added in this paragraph.

¹¹ Section 47B and chapter 6.

¹² And, once a proceeding to recover the debt has been commenced in a court of competent jurisdiction, a dispute resolution process under chapter 6 does not apply to it: s 229A(4).

¹³ [2008] QSC 318. Notably, this decision was made before the introduction of s 229A of the Act.

¹⁴ [2008] QSC 318, [11], [13].

¹⁵ [2008] QSC 318, [31].

¹⁶ [2008] QSC 318, [40].

a matter which might trespass into the territory covered by the dispute resolution provisions of the BCCM. There is no legal or statutory impediment to these matters being raised by way of defence.

- [18] His Honour went on to say that his view was reinforced by a decision of the Court of Appeal in which McMurdo P expressed a “preliminary view”, in the context of the precursor to s 229, that “it would be surprising if, in the absence of the clearest words, the inherent jurisdiction of the Supreme Court was diminished by ch. 6.”¹⁷ His Honour said about that view:

In the same vein, it would be ‘surprising’ indeed if chapter 6 of the BCCM were read as so significantly constraining the right of a defendant to advance a defence as to render it unable to advance a simple contention that it is “only liable to pay such contributions as have been properly identified, calculated and resolved to be payable by members of the Body Corporate.”

- [19] In *Green*, the defence was far more vaguely expressed than in this case. Here, Ms Huang clearly wishes to challenge the validity of the contribution schedule, not the correctness of the calculation of the levies to her based on that schedule. For the reasons I have set out above, I consider that the Act is clear in requiring that any such challenge can only be made by a dispute resolution process under chapter 6. With respect, the President’s “preliminary view” in *Independent Finance Group* was expressed without any apparent (and certainly without detailed) consideration of the specific provisions in the Act. In any event, in both that case and *Green*, the issues for determination were completely different from those before me. Nevertheless, if one were to consider that my analysis and conclusion differ from those of their Honours, then I do respectfully disagree with them.
- [20] Therefore, in my view, the defendant cannot raise, as a defence to the plaintiff’s debt claim, a challenge to the contribution schedule that is the basis of the contributions that the plaintiff seeks to recover as a debt. It is not within this court’s jurisdiction to determine such an issue. The only mechanism by which she could do that is by an application to a specialist adjudicator or to QCAT for an adjustment of the contribution schedule. Unless and until such an application were successfully made, the existing contribution schedule remains the only basis for the calculation of the contribution and therefore of any debt owed by the defendant. That is, this court must decide whether the defendant owes the alleged debt on the basis of the current contribution schedule.¹⁸
- [21] The result is that, in my view, this court cannot determine the grounds of defence currently raised in Ms Huang’s defence. There is no formal application on foot for an order striking out the defence but, in its submissions on jurisdiction, the plaintiff submitted that the defence should be struck out. If that submission had been made orally, it would properly amount to an oral application under rule 32 of the *Uniform Civil Procedure Rules* 1999. But in any event, under r 171, the court can, at any stage of the proceeding, strike out all or part of a pleading, including if a defence discloses no reasonable defence.
- [22] As I have concluded that the court cannot determine the issues raised in the defence, it discloses no reasonable defence and it is appropriate that all of it but paragraphs 1

¹⁷ *Independent Finance Group Pty Ltd v Mytan Pty Ltd* [2003] 1 Qd R 374, 378.

¹⁸ Whether any adjustment to the contribution schedule would have any retrospective effect is not a matter for me to decide in this proceeding.

and 2 (containing admissions) be struck out. However, I will grant the defendant leave to re-plead her defence in case she discovers that she has some other arguable ground to dispute the alleged debt.

The statement of claim

[23] I might add, though, that I consider that the plaintiff's statement of claim is itself inadequately pleaded. It pleads that it levied contributions for its "administrative fund and/or sinking fund," it served on the defendant notice of those contributions and the contributions were not paid in full. It also alleges that it incurred expenses seeking to recover the contributions. But it pleads no details of the contributions, the notices or the expenses alleged, apart from the gross amount of the contributions and expenses. That is unsatisfactory. In my preliminary view, the plaintiff's statement of claim should also be struck out with leave to re-plead, which should be done before the defendant is required to re-plead her defence. However, that possibility has not been raised with the parties so far, so I shall hear from the parties before I decide whether to make such an order. In the meantime I shall set a date by when the plaintiff must file and serve any amended statement of claim.

Is the counterclaim within the court's jurisdiction?

- [24] I have described above the bases of the defendant's counterclaim: negligence, nuisance and breach of statutory duties under the Act and the Accommodation Module. The plaintiff contends that the counterclaim is a dispute, as defined, about alleged contraventions of the Act by the plaintiff. But it is not a "related dispute" to the debt dispute and, even if it otherwise might be, the commissioner has not considered the question raised by s 229A(6)(c), so it cannot be raised by a counterclaim in the debt dispute. It can only be determined by a dispute resolution process under the Act.
- [25] It is clear, in my view, that the subject matter of the counterclaim – concerning as it does allegations of damage caused to the defendant's lot by the actions or inaction of the plaintiff – is not related in any way to the plaintiff's claim for recovery of the contributions that it alleges are a debt owed to it by the defendant. Therefore s 229A(4) has no application to the counterclaim.
- [26] In that case, the plaintiff submits that at least that part of the counterclaim by which the defendant alleges that the body corporate has acted in breach of its duties under the Act and the Accommodation Module is a dispute between the body corporate and the owner of a lot in the scheme. It is therefore a "dispute", as defined in s 227 and it is not a "complex dispute". Therefore, under s 229(3), the only remedy for the dispute is resolution by a dispute resolution process under chapter 6. This is particularly so when one considers the purposes of that chapter as stated in s 228(1)(a) and (b): the defendant alleges, in her counterclaim, that the plaintiff has contravened the Act and failed to perform its duties under the Act, which are intended to be resolved only under the processes in chapter 6.
- [27] I agree that the allegations of breach of duties under the Act and the Accommodation Module are disputes that may only be resolved by an application under chapter 6. Those parts of the counterclaim cannot be determined by this court.
- [28] But the plaintiff also contends that the acts or omissions by it that are the bases for the claim in nuisance (and presumably also the claim in negligence) are the same as those

alleged to constitute breaches of its statutory duties. The entire counterclaim is “about” matters described in s 228(1)(a) and (b). That being so, the exclusivity provisions in s 229 apply equally to those claims, which must therefore be dealt with in a manner provided for in chapter 6.

[29] With respect, I disagree with these propositions. Although the same or similar conduct may give rise to rights and duties under both the Act and the common law, the duties respectively raised by the statute and the common law are different and the consequences of any breaches of the respective duties may well be different. There is little or no risk of conflicting judgments if the statutory duties and alleged breaches of those duties are determined in one forum and the alleged common law breaches are determined in another. For example, whether or not any conduct or omission by the plaintiff was a breach of its statutory duty would not affect the question whether or not it was negligent or caused a nuisance. Similarly, the consequences (including any liability for loss and any injunctive-type relief) may be different. Of course, the defendant could not recover damages or compensation for the same loss in both jurisdictions, as she can never be entitled to recover more than her actual loss, to the extent that the plaintiff may be liable for it.

[30] The application of my conclusion in this respect to the Queensland arena is fortified by Daubney J’s views expressed in *Green* that the definition of “dispute” in s 227:

does not clarify with any precision whether it covers every conceivable dispute between a body corporate and an owner or merely those within the purview contemplated by the Chapter’s purpose set out in s228. In my view, good-sense and practicability, in conjunction with a purposive approach to the legislation, dictate that the latter must be the case; it could scarcely be said, for instance, that the legislature intended for the dispute resolution processes set out in the BCCM to apply in case of a personal injuries dispute between an owner and a body corporate.¹⁹

[31] Similarly, I consider that it could scarcely be said that the legislature intended that those processes would apply to a claim in negligence or nuisance, simply because the claim is between an owner and a body corporate. That is not a dispute of the types described in s 228.

[32] Daubney J’s view was subsequently endorsed and adopted by Martin J, who went on to say:²⁰

The primary purpose of the Act is the establishment, operation and management of community titles schemes. The application of the dispute resolution scheme to every single dispute between the parties listed in s 227 could hardly be said to accord with the purpose of the Act.

[33] Therefore, to the extent that the defendant seeks remedies for breach by the plaintiff of its statutory duties under the Act and the Accommodation Module, this court has no jurisdiction. Those claims must be made in a forum provided for in chapter 6. But the defendant’s counterclaims for damages for negligence or nuisance and for an

¹⁹ [2008] QSC 318, [30]. I note that his Honour’s view was *obiter dictum*.

²⁰ *Macdonald v Clark* [2012] QSC 418, [30].

injunction as a consequence of the nuisance are within this court's jurisdiction²¹ and could not be heard and determined by a specialist adjudicator or by QCAT.

- [34] Insofar as the counterclaim relies on the statutory duties, it should be struck out. It will also need to be amended to clarify the negligence and nuisance claims. Indeed, in her submissions the defendant concedes that she will need to amend the pleading. I will order that the paragraphs and phrases referring to the body corporate's duties under the Act and the Accommodation Module be struck out. The defendant will have leave to amend the counterclaim generally.

Should claim and counterclaim be separated?

- [35] Counsel for the plaintiff submitted that, even if the counterclaim is within this court's jurisdiction, it involves discrete issues from those arising in the claim and any proper defence. The counterclaim does not seek to set-off any damages against the debt that the defendant allegedly owes to the plaintiff. Even if it did seek such a set-off, the competing claims do not arise out of the same facts and there is no sufficient connection between them to permit any set-off. Therefore, the counterclaim should be excluded from the proceeding commenced by the plaintiff's claim, so that it does not delay the claim and it is heard separately.²²
- [36] There may well be merit in this submission. However, until the statement of claim, the defence and the counterclaim (and, if necessary, the reply and answer) are re-pleaded, it is premature to determine whether the claim and the counterclaim should be heard together or separately. At this stage, therefore, I shall not make such an order.

Next steps

- [37] Subject to any submissions for the plaintiff about the statement of claim, each party needs to re-plead its case before any further steps may be taken.
- [38] It is doubtful, in the circumstances, whether the proceeding is a suitable matter for the Commercial List. However, I shall not determine at this stage whether that is so, as it may depend on how each party re-pleads its case. I shall therefore adjourn the application, but make directions for fresh pleadings by both parties, with the application to be re-listed before me after the fresh pleadings have closed. I shall hear from the parties about costs.

²¹ The defendant has expressly abandoned any damages in excess of \$750,000. At this stage of the proceeding there has been no suggestion that the value of the defendant's land (determined in accordance with s 69(3)(b) of the *District Court of Queensland Act 1967*) is over that sum, but that should be pleaded so that it is clear on the pleading that this court has jurisdiction.

²² *Uniform Civil Procedure Rules*, 1999, r 182.