

QUEENSLAND CIVIL AND ADMINISTRATIVE TRIBUNAL

CITATION: *Body Corporate for Metro Quays CTS 28461 v Three Islands Pty Ltd & Ors* [2023] QCATA 20

PARTIES: **BODY CORPORATE FOR METRO QUAYS CTS 28461**
(applicant/appellant)

v

**THREE ISLANDS PTY LTD
METRO RETAIL CTS 43555
METRO CTS 28454**
(respondents)

APPLICATION NO/S: APL350-21

MATTER TYPE: Appeals

DELIVERED ON: 9 March 2023

HEARING DATE: 29 August 2022

HEARD AT: Brisbane

DECISION OF: Senior Member Brown

ORDERS: **Appeal dismissed.**

CATCHWORDS: ADMINISTRATIVE LAW – ADMINISTRATIVE TRIBUNALS – QUEENSLAND CIVIL AND ADMINISTRATIVE TRIBUNAL – error of law – obligations deriving from legislation and subordinate legislation – division of obligations between principal and subsidiary schemes in a layered arrangement of community titles schemes – responsibility for roofing membranes that are not common property but that provide protection for lots or common property – responsibility for maintaining roofing structures providing protection in a structurally sound condition – where roof of building formed part of the common property of the subsidiary scheme – whether principal scheme responsible for maintenance of roof

INTERPRETATION – GENERAL RULES OF CONSTRUCTION OF INSTRUMENTS – GENERAL MATTERS – interpreting legislation and subordinate legislation harmoniously as a whole – legislative intent

Body Corporate and Community Management Act 1997 (Qld), s 6, s 10, s 18, s 19, s 24, s 52, s 91, s 227, sch 6
Body Corporate and Community Management (Accommodation Module) Regulation 2020 (Qld), s 170(1), s 170(2)

Body Corporate and Community Management (Standard Module) Regulation 2020 (Qld), s 180(1), s 180(2)(b)
Land Title Act 1994 (Qld), s 48C, s 49C, s 49C, s 115Y, s 115Z

Bossichix P/L v Martinek Holdings P/L [2009] QCA 154
Metro [2021] QBCCMCmr 502
Sun Building [2013] QBCCMCmr 412

**APPEARANCES &
REPRESENTATION:**

Applicant: Mr B Strangman instructed by Grace Lawyers
Respondent: Mr S Kelly instructed by Wilson Ryan Grose Lawyers

REASONS FOR DECISION

- [1] This appeal involves a dispute about who is responsible for the roofing structure of a multistorey building located in Townsville (the building).

The background to the dispute

- [2] The building comprises a layered arrangement of community titles schemes.

What is a layered arrangement of community titles schemes?

- [3] A layered scheme is a grouping of community titles schemes in which there is a principal scheme and one or more subsidiary schemes.
[4] A principal scheme includes at least 2 lots, the land for all the community titles schemes in the grouping (which includes the common property of the subsidiary schemes) and the principal scheme's own common property. A principal scheme has its own community management statement (CMS) and by-laws.

The parties and the layered arrangement

- [5] The 3rd respondent, Metro CTS 28454 (Metro), is the principal scheme.
[6] The 1st respondent, Three Islands Pty Ltd (Three Islands), is the owner of lot 1 in the principal scheme. Lot 1, which comprises part of the ground floor and four floors above, is used as a commercial carpark.
[7] The subsidiary schemes are the 2nd respondent, Metro Retail CTS 43555 (Metro Retail), and the applicant, Metro Quays CTS 28461 (Metro Quays).
[8] Metro Retail is located on the ground floor of the building and comprises three lots, occupied by shops and a restaurant.
[9] Metro Quays is located on the seven upper levels of the building and comprises a residential carpark on two levels and five levels containing residential units, extending to the roof of the building above.

- [10] Given that the names of the parties are apt to cause confusion, I will refer in these reasons to Metro Quays as the appellant and Metro as the respondent. Metro Retail and Three Islands will be referred to by their respective names.

The legislation relevant to this appeal

- [11] This appeal involves a consideration of the following legislation and subordinate legislation:
- (a) *Body Corporate and Community Management Act 1997* (Qld) (the BCCM Act);
 - (b) *Body Corporate and Community Management (Accommodation Module) Regulation 2020* (Accommodation Module);
 - (c) *Body Corporate and Community Management (Standard Module) Regulation 2020* (Standard Module).
- [12] The *Standard Module* applies to the respondent. The *Accommodation Module* applies to the appellant.

The decision of the adjudicator

- [13] The respondent and Metro Retail applied to the Body Corporate and Community Management Commissioner for an order that the appellant is responsible for the maintenance of the roof of the building.
- [14] The adjudicator found:¹
- (a) Pursuant to s 170(2)(b) of the *Accommodation Module* the body corporate has an obligation to maintain the following items of land that are not common property in a structurally sound condition:
 - (i) Foundation structures;
 - (ii) Roofing structures providing protection;
 - (iii) Essential supporting framework including load bearing walls;²
 - (b) Where a roofing structure provides protection to lots in a subsidiary scheme, the lot owner's rights in respect of the maintenance of the roof lie against the subsidiary body corporate containing the lots and not against the principal body corporate;³
 - (c) The colorbond roof and nearly all of the roof area of the building does not form part of the respondent's common property;⁴
 - (d) The appellant had responsibility for the roof;⁵

¹ *Metro* [2021] QBCCMCmr 502 (*Metro*).

² *Metro* at [60].

³ *Ibid*, [61].

⁴ *Ibid*.

⁵ *Ibid*.

- (e) The obligations between a lot owner and a body corporate in a layered scheme only relate to the individual lot owner within a subsidiary scheme and the subsidiary body corporate, not the principal body corporate;⁶
- (f) The obligations of a body corporate with respect to the maintenance of property in a principal scheme that is not principal common property do not apply unless there is some specific wording saying that they apply to a principal body corporate.⁷

What do the parties say in this appeal?

- [15] The appellant relies upon a single ground of appeal. It says that the adjudicator erred in law by determining that the obligations contained in s 170(2)(b) of the *Accommodation Module*, and by analogy s 180(2)(b) of the *Standard Module*, do not apply to a principal scheme in a layered arrangement of community titles schemes.
- [16] Before proceeding to consider the parties' submissions it is appropriate to refer to the relevant statutory provisions.
- [17] Sections 170(1) and 170(2) of the *Accommodation Module* provide as follows:

170 Duties of body corporate about common property

- (1) The body corporate must maintain common property in good condition, including, to the extent that common property is structural in nature, in a structurally sound condition.

Note—

For utility infrastructure included in the common property, see section 20 of the Act.

- (2) To the extent that lots included in the community titles scheme are created under a building format plan of subdivision, the body corporate must—
 - (a) maintain in good condition—
 - (i) railings, parapets and balustrades on, whether precisely, or for all practical purposes, the boundary of a lot and common property; and
 - (ii) doors, windows and associated fittings situated in a boundary wall separating a lot from common property; and
 - (iii) roofing membranes that are not common property but that provide protection for lots or common property; and
 - (b) maintain in a structurally sound condition the following elements of scheme land that are not common property—
 - (i) foundation structures;

⁶ Ibid, [63].

⁷ Ibid, [64].

- (ii) roofing structures providing protection;
- (iii) essential supporting framework, including load-bearing walls.

[18] Sections 180(1) and 180(2) of the *Standard Module* are in the same terms.

[19] The appellant says that in a layered scheme, the subsidiary schemes are 'lots' in the principal scheme. The corollary of this says the appellant is that the principal body corporate is the 'body corporate' for the purposes of s 180 of the *Standard Module* (and by analogy s 170 of the *Accommodation Module*). There are a number of threads to this submission:

- (a) The terms 'body corporate' and 'lot' are interchangeable terms drafted to apply not only as body corporate and lot in a basic scheme, but also as principal scheme and subsidiary scheme in a layered arrangement;
- (b) Section 10(2) of the BCCM Act provides that land may be identified as scheme land only if it consists of 2 or more lots and common property for the scheme. By s 10(6), for the purposes of a scheme other than a basic scheme, a lot may be another community titles scheme;
- (c) Consistent with (b) above, schedule 6 of the BCCM Act defines a 'lot' as a lot under the *Land Title Act*, but if the lot is included in a community titles scheme other than a basic scheme, the lot could be another community titles scheme;
- (d) Section 18 of the BCCM Act deals with the meaning of layered arrangement of community titles schemes. Section 18(4) provides that the expression 'included in', if used in the context of the inclusion of a lot in a community titles scheme, establishes the relationship the lot has to the scheme and, in general terms, is used to establish that the lot is directly a part of the scheme, rather than only indirectly a part of the scheme;
- (e) In the context of a principal scheme, 'lots' having a direct connection to the principal scheme are the subsidiary schemes, in the present case the appellant and Metro Retail.

[20] The respondent's position is:

- (a) The roof of the building forms part of the common property of the appellant and is not part of the respondent's common property. This, says the respondent, is the end of the matter as s 180 of the *Standard Module* is not enlivened;
- (b) Section 180(2) only applies to lots created under a building format plan of subdivision and while the appellant and Metro Retail are lots in the principal scheme they are not lots created under a building format plan of subdivision;
- (c) The roof of the building forms part of the common property of the appellant. Accordingly, s 170(2) and s 180(2) of the *Accommodation Module* and the *Standard Module* respectively, have no application in the circumstances of the present dispute, those sections dealing with items that are not part of the common property.

- [21] The respondent advances two alternative arguments. The first is that s 180(2) of the *Standard Module* is enlivened and s 170(2) of the *Accommodation Module* is not. Section 180(2) of the *Standard Module* operates in respect of the common property and lot 1 in the respondent, being lots created under a building format plan of subdivision but does not operate in respect of the appellant or Metro Retail as lots in the principal scheme. On the other hand, s 170(2) of the *Accommodation Module* operates to enliven the appellant's maintenance obligations in respect of the residential lots and common property forming the scheme land, such lots in the appellant scheme having been created under a building format plan of subdivision. The corollary of this is that by operation of s 170(2)(b)(ii) of the *Accommodation Module* the appellant is obligated to maintain roofing structures providing protection in a structurally sound condition. This obligation extends to any roofing structure providing protection. The result, says the respondent, is that the appellant's maintenance obligations extend to the whole roof.
- [22] The second argument relies upon what the respondent says is the correctness of the decision of an adjudicator in *Sun Building*.⁸ The appellant, in contrast, says that *Sun Building* was wrongly decided and the adjudicator at first instance erred in relying upon the decision which involved different provisions and a different factual scenario.

The decision in Sun Building

- [23] *Sun Building* involved a layered scheme comprising the principal body corporate and two lots, a commercial scheme and a residential scheme. There was a complaint of water ingress to penthouse units in the residential scheme. The residential scheme asserted that the principal scheme was responsible for the maintenance of the roof.
- [24] The case involved a consideration of s 159(2)(a) of the repealed *Standard Module*. Section 180 of the *Standard Module* is the analogue of the repealed s 159. The adjudicator considered the obligation of the principal body corporate to maintain roofing membranes that were not common property but provided protection for lots or common property. The adjudicator found that if s 159(2)(a) of the *Standard Module* was to be interpreted generally as meaning that the 'body corporate' with the relevant maintenance obligations was the principal body corporate then it would follow that the legislation would more broadly impose a responsibility on the principal body corporate for all body corporate maintenance. The adjudicator considered that on a proper construction, the legislation did not support such a conclusion. The adjudicator found that the obligations between an individual lot owner and a body corporate in a layered arrangement exist between the lot owner and the subsidiary body corporate, and not the principal body corporate, unless there is a specific exception or contrary intention in the legislation. The adjudicator found that the responsibility of the principal scheme was in respect of the roofing membranes providing protection for lots and common property within the principal scheme and not the residential scheme.
- [25] The adjudicator below agreed with the following passage from *Sun Building*:⁹

⁸ [2013] QBCCMCmr 412.

⁹ *Ibid.*

[31] Section 170(5) of the Standard Module specifies that the section does not apply to a lot that is itself a community titles scheme. I do not consider that this means, as argued by Sun Apartments, that Sun Apartments has no obligation to maintain Sun Apartments. Rather, I consider that it simply means that the subsidiary Body Corporate will not be solely responsible for the maintenance of the PBC lot which Sun Apartments constitutes. Instead, the maintenance of that lot will be shared by the Body Corporate for Sun Apartments (pursuant to section 159 of the Standard Module) and the owners of individual lots within Sun Apartments (under section 170 of the Standard Module).

...

[34] All that is relevant to determining whether there is responsibility by any body corporate under section 159(2)(a)(iii), is whether it is on a lot rather than common property, and whether it provides protection for lots or common property. In my view the only circumstance in which the PBC would be responsible, under section 159(2)(a)(iii), for the affected roofing membrane would be if those roofing membranes provided protection within the principal scheme land.¹⁰

[26] The respondent says that the decision in *Sun Building* is of direct application in the present dispute. The respondent says that the roof is part of the scheme land in the appellant's scheme. The roof provides protection to the lots in the appellant's scheme and also to the stairwell and elevator shaft which are part of the respondent's scheme land. Analogously to the operation of s 159(2)(b), s 170(2)(b)(ii) obliges the appellant to maintain roofing structures providing protection in a structurally sound condition.

Consideration

[27] In these reasons, references to s 170 of the *Accommodation Module* should be read as also, by analogy, referring to s 180 of the *Standard Module*.

Is a subsidiary scheme in a layered arrangement a lot created under a building format plan of subdivision?

[28] Section 170(2) of the *Accommodation Module* is only engaged if the lots included in the scheme are created under a building format plan of subdivision.

[29] The appellant argues that the creation of a lot, as referred to in s 170(2), and the establishment of a subsidiary scheme under a layered arrangement are synonymous. This argument proceeds on the basis that a subsidiary scheme, being a 'lot' in a layered arrangement, is 'established' by the BCCM Act rather than 'created'. For the reasons that follow I do not accept this submission.

[30] A community titles scheme is a single community management statement recorded by the registrar identifying the scheme and the scheme land itself.¹¹ Land is scheme land only if it consists of 2 or more lots and the common property for the community

¹⁰ Ibid, [31] and [34].

¹¹ BCCM Act, s 10(1).

titles scheme.¹² A lot may be, for its inclusion in a community titles scheme other than a basic scheme, another community titles scheme.

- [31] A 'lot' is defined in Schedule 6 of the BCCM Act as meaning a lot under the *Land Title Act* (the first limb) but if the lot is included in a community titles scheme other than a basic scheme, the lot could be another community titles scheme (the second limb). A community titles scheme is a basic scheme if all the lots mentioned in s 10(2)(a) are lots under the *Land Title Act*.¹³ A layered arrangement of community titles schemes is not a basic scheme.
- [32] Section 18 of the BCCM Act sets out the meaning of a layered arrangement of community titles schemes:
- (1) A **layered arrangement of community titles schemes** is a grouping of community titles schemes—
 - (a) in which there is 1 community titles scheme (the **principal scheme**) that—
 - (i) is not a lot included in another community titles scheme; and
 - (ii) is made up of—
 - (A) the scheme land for all other community titles schemes in the grouping; and
 - (B) its own common property; and
 - (C) each lot (if any) that is not a community titles scheme, but that is included in the scheme; and
 - (b) in which there is at least 1 basic scheme; and
 - (c) in which there may or may not be 1 or more community titles schemes located between the principal scheme and each basic scheme.

Note—

See schedule 1, parts 2 and 3 for examples of layered arrangements of community titles schemes.

- (2) Each community titles scheme, other than the principal scheme, in a layered arrangement of community titles schemes—
 - (a) is a subsidiary scheme for the principal scheme; and
 - (b) unless it is a lot included in the principal scheme—may also be a subsidiary scheme for another community titles scheme forming part of the layered arrangement.
- (3) A **subsidiary scheme**, for a community titles scheme (**scheme A**), is a community titles scheme the scheme land for which forms part of the scheme land for scheme A.

¹² Ibid, s 10(2).

¹³ Ibid, s 10(5).

- (4) In this Act, the expression *included in*, if used in the context of the inclusion of a lot in a community titles scheme, establishes the relationship the lot has to the scheme and, in general terms, is used to establish that the lot is directly a part of the scheme, rather than only indirectly a part of the scheme.
- (5) The diagram and notes in schedule 1, part 3 illustrate more comprehensively how the expression 'included in' is used.
- [33] In addition to the definition of 'lot' in sch 6 of the BCCM Act, various provisions of the Act recognise that a community titles scheme may itself be a 'lot'. For example, s 18(1)(a)(i) refers to the principal scheme in a layered arrangement not being a 'lot' included in another community titles scheme. Another example is s 18(2) which provides that each community titles scheme, other than the principal scheme, in a layered arrangement of community titles schemes is a subsidiary scheme for the principal scheme and, unless it is a lot included in the principal scheme, may also be a subsidiary scheme for another community titles scheme forming part of the layered arrangement.
- [34] Section 18(2)(b) of the BCCM Act provides that each community titles scheme in a layered arrangement, other than the principal scheme, is a subsidiary for the principal scheme and, unless it is a lot included in the principal scheme, may also be a subsidiary scheme in another layered arrangement. The meaning of s 18(2)(b) is made clear by s 18(4) which provides that the expression 'included in' if used in the context of the inclusion of a lot in a community titles scheme, establishes the relationship the lot has to the scheme and, in general terms, is used to establish that the lot is directly a part of the scheme, rather than only indirectly a part of the scheme.
- [35] Section 19 of the BCCM Act provides that if a community titles scheme includes a lot that is another community titles scheme, a reference in the Act to the owner of the lot is a reference to the body corporate for the scheme. The effect of this provision is that, in the context of a layered arrangement, the body corporate for the subsidiary scheme is a lot owner.
- [36] The various provisions to which I have referred in the BCCM Act recognise and address the relationship between a principal scheme and a subsidiary scheme in a layered arrangement. In the context of such an arrangement it is necessary, for the proper functioning of the layered arrangement, to ensure that the roles, rights and responsibilities of the principal scheme and the subsidiary scheme or schemes are clarified.
- [37] An example of why such clarity is required relates to dispute resolution. Section 227 of the BCCM Act sets out the various types of disputes for the purposes of Chapter 6 of the Act. There is no reference in s 227 to a dispute between a principal body corporate and a subsidiary body corporate. However, a dispute includes a dispute between a body corporate and a lot owner.¹⁴ By operation of s 19 of the BCCM Act, the subsidiary scheme is a lot owner. It follows that a dispute between a principal body corporate and a subsidiary body corporate is a dispute within s 227.

¹⁴ Ibid, s 227(1)(b).

- [38] It is relevant to note that the dispute resolution provisions in the BCCM Act do not apply to disputes between a lot owner in a subsidiary scheme and the principal body corporate. A dispute by a lot owner against a principal body corporate must be pursued by the subsidiary body corporate, not by the lot owner directly against the principal body corporate. This is to be contrasted with, for example, provisions in the *Sanctuary Cove Resort Act 1985* (Qld), *Integrated Resort Development Act 1987* (Qld) and *Mixed Use Development Act 1993* (Qld) which permit application to QCAT by a lot owner in circumstances where there is a principal scheme and a subsidiary scheme and where the matters relates to the application, contravention, or alleged contravention, of the development control by-laws.
- [39] It is clear from the foregoing that the appellant is a 'lot' within the second limb of the definition of that term in schedule 6 of the BCCM Act. However, this is not determinative of the application of s 170 to the appellant and the respondent.
- [40] Section 170(2) is confined in its application to lots created under a building format plan of subdivision.
- [41] A 'lot' is defined in the *Land Title Act* as a separate, distinct parcel of land created on either the registration of a plan of subdivision or the recording of particulars of an instrument.
- [42] Section 49 of the *Land Title Act* provides that a plan of subdivision is a plan of survey providing for 1 or more of, inter alia, division of 1 or more lots. Upon registration of a plan, a lot defined in the plan is created.¹⁵
- [43] The term 'building format plan of subdivision' is not defined in the BCCM Act or the *Accommodation Module*. The term 'building format' is defined in the *Accommodation Module* as having the meaning given to it by s 48C of the *Land Title Act 1994* (Qld). Section 48C provides that a 'building format' plan of survey defines land using the structural elements of a building, including, for example, floors, walls and ceilings. A building format plan is used to subdivide a building into lots and create common property.
- [44] Section 49C of the *Land Title Act* provides:

49C Building format plan of subdivision

- (1) This section applies to a building format plan of subdivision.
- (2) Common property for a community titles scheme must be created under the plan unless the plan divides a lot, or amalgamates 2 or more lots, on an existing registered building format plan of subdivision.
- (3) Two or more lots must be created under the plan unless—
 - (a) the plan amalgamates 2 or more lots on an existing registered building format plan of subdivision; or
 - (b) common property for a community titles scheme is created under the plan, and the common property created is additional to common property already existing under the community titles scheme.

¹⁵ *Land Title Act*, s 49A(2).

- (4) Except to the extent permitted under a direction given by the registrar under section 10(1)(b), the boundary of a lot created under the plan, and separated from another lot or common property by a floor, wall or ceiling, must be located at the centre of the floor, wall or ceiling.

- [45] The establishment of a community titles scheme involves two separate and distinct steps: firstly, the registration of a plan of subdivision identifying the scheme land (which includes the lots in the scheme and the common property), and secondly the recording of the first community management statement for the scheme.¹⁶ A community management statement has no effect unless it is recorded.¹⁷
- [46] It can therefore be seen that a lot created under a building format plan of subdivision falls within the first limb of the definition of 'lot' in schedule 6 of the BCCM Act, being 'a lot under the *Land Title Act*'.
- [47] As earlier noted, the creation of a lot under a building format plan of subdivision is only the first step in the establishment of a community titles scheme.¹⁸ The process for the creation of a layered arrangement is found in s 91 of the BCCM Act. Sections 115Y and 115Z of the *Land Title Act* set out the relevant procedure for recording the creation of a layered arrangement. Of note is that the creation and recording of a layered arrangement does not involve the registration of a plan of subdivision.
- [48] The processes for the creation of a lot under a building format plan of subdivision and the creation of a layered arrangement of group titles schemes are quite different. Noting these differences, the use of the words 'created under a building format plan of subdivision' in s 170(2) clearly have a qualifying or limiting effect. Had the legislature intended s 170(2) to have the meaning which the appellant argues for, the qualifying words could readily have been omitted. The words used in s 170(2) evince a clear legislative intent to confine the operation of the section to the relationship between a lot within the first limb of the definition of 'lot' under the BCCM Act and the body corporate of the scheme of which the lot forms part.
- [49] The legislature clearly intended there to be distinction between a lot created under a building format plan of subdivision as referred to in s 170(2) of the BCCM Act and both a community titles scheme established by the recording of the first community management statement and a subsidiary scheme in a layered arrangement of community management schemes. Accordingly, the reference in s 170(2) to 'body corporate' and 'lot' is a reference to the body corporate of the scheme and the lots within the scheme, established by the two-step process set out at s 24 of the BCCM Act. Section 170(2) does not apply to the relationship between a principal scheme and a subsidiary scheme under a layered arrangement of community titles schemes.

Conclusion

- [50] There was no error by the adjudicator in concluding that the appellant was responsible for the maintenance of the roof of the building. The appeal is dismissed.

¹⁶ BCCM Act, s 24.

¹⁷ Ibid, s 52; see also *Bossichix P/L v Martinek Holdings P/L* [2009] QCA 154.

¹⁸ BCCM Act, s 24(2).