

QUEENSLAND CIVIL AND ADMINISTRATIVE TRIBUNAL

CITATION: *Whatco Pty Ltd v Body Corporate for Illawong Lakes Resort CTS 22485* [2023] QCAT 289

PARTIES: **WHATCO PTY LTD**
(applicant)

v

**BODY CORPORATE FOR ILLAWONG LAKES
RESORT CTS 22485**
(respondent)

APPLICATION NO/S: OCL030-23

MATTER TYPE: Other civil dispute matters

DELIVERED ON: Decision handed down on 31 May 2023. Reasons delivered on 17 July 2023

HEARING DATE: 31 May 2023

HEARD AT: Brisbane

DECISION OF: Senior Member Brown

ORDERS:

- 1. The parties are granted leave to be legally represented in the proceeding.**
- 2. The application for interim order filed 23 May 2023 is refused.**
- 3. The parties must file in the Tribunal two (2) copies and exchange one (1) copy of:**
 - (a) Submissions on the costs of the application for interim order; and**
 - (b) Draft directions to progress the matter to a final hearing, by: 4:00pm on 14 June 2023.**
- 4. The parties must file in the Tribunal two (2) copies and exchange one (1) copy of submissions on costs in reply, by: 4:00pm on 21 June 2023.**
- 5. The costs of the application for interim order will be determined on the papers without an oral hearing and on the basis of the written submissions from the parties, after 21 June 2023.**
- 6. The Tribunal will make further directions to progress the matter to a final hearing, after 21 June 2023.**

CATCHWORDS: COURTS AND JUDGES – COURTS – JURISDICTION AND POWER – COURTS OF RECORD – POWERS AND GENERALLY – where the applicant sought an interim declaration that the applicant validly exercised the options contained in the agreements – where the tribunal does not have the jurisdiction to grant the final relief sought by the applicant

Queensland Civil and Administrative Tribunal Act 2009 (Qld), s 59(1), s 60(1)

Ainsworth v Criminal Justice Commission [1992] HCA 10
Body Corporate for the Lakes-Cairns CTS 28090 v Sunshine Group Australia Pty Ltd [2023] QCAT 39
Randall v Body Corporate for Runaway Cove Bayside CTS 25498 [2011] QCATA 10
JA & JB Boyle Pty Ltd v Major Furnace Australia Pty Ltd (No 2) [2019] QDC 215

APPEARANCES & REPRESENTATION:

Applicant: Mr B Strangman instructed by Tobin King Lateef Lawyers

Respondent: Ms S Moody instructed by Bugden Allen Graham Lawyers

REASONS FOR DECISION

- [1] Whatco is the caretaker and manager of the Illawong Lakes Resort Scheme in accordance with a caretaking agreement and a letting authority (collectively referred to as the agreements) originally entered into in June 2003. Whatco has the benefit of the agreements as a consequence of various assignments. The agreements contain a number of options to renew. If the remaining options are exercised the agreements will continue until 31 August 2033.
- [2] The present dispute relates to the options to renew the agreements for the period from 1 September 2023 to 31 August 2028.
- [3] Clause 2.4 of the caretaking agreement provides, inter alia:
 - (a) Provided this Agreement has not been terminated or there are no unremedied breaches by the Caretaker of the provisions of this Agreement of which the Caretaker has received written Notice to remedy, the Caretaker shall have the option to extend this Agreement for a second term for a further five (5) years commencing on the 1st day of September 2023 and ending on the 31st day of August 2028 ('the fifth term') upon the same terms and conditions of this Agreement with the exception of clause 2.4.
 - (b) The option for the fifth term must be exercised by the Caretaker by giving written notice to the Body Corporate not earlier than seven calendar months and not less than four calendar months prior to the expiration of the fourth term.
 - (c) On receipt by the Body Corporate of the written notice specified in clause 2.4(b), the Body Corporate must notify the Caretaker within six weeks of its acceptance or rejection of the notice of exercise of option by the Caretaker. In

the case of rejection of the notice of exercise of the option, this decision must be made by the Body Corporate in general meeting.

(d) The Body Corporate must act reasonably if it rejects the notice of exercise of the option by the Caretaker. For example if the Caretaker has met the conditions in clause 2.4(a), then the Body Corporate must accept the notice of exercise of the option by the Caretaker. However, the Body Corporate would have the right to reject the notice of exercise of the option by the Caretaker if it has served on the Caretaker three separate valid notices under clause 13 of this Agreement in the 12 month period prior to the expiry of the fourth term.

(e) If the Body Corporate fails to respond to the notice of exercise of the option as specified in clause 2.4(c), then it is deemed the Body Corporate accepts the notice of exercise of the option by the Caretaker.

- [4] Clause 13 of the Caretaking Agreement set out the process for the Body Corporate to issue a breach notice to the caretaker/manager.
- [5] Between 24 January 2022 and 3 April 2023 the Body Corporate issued eight breach notices to Whatco. Whatco says that the notices were not validly issued because the Body Corporate had not resolved to issue the notices. Whatco also says that the Body Corporate did not act reasonably in issuing the notices and says that the notices were issued to prevent Whatco from exercising the option to extend.
- [6] Whatco has applied for an injunction preventing the Body Corporate from voting on a motion at a general meeting to exercise the option. The proposed resolution before the general meeting is to reject the applicant's notice of intention to exercise the fourth option.
- [7] The Tribunal may grant an injunction, including an interim injunction, in a proceeding if it is just and convenient to do so.¹ The relevant considerations in deciding whether to grant an interim injunction are well established:
- (a) Does the applicant have a prima facie case; and
 - (b) Does the balance of convenience favour the grant of the injunction? Part of this consideration involves whether damages would be an adequate remedy.

Does the applicant have a prima facie case?

- [8] The final relief sought by the applicant in the proceeding is a declaration that the applicant validly exercised the options contained in the agreements. No other orders are sought.
- [9] Section 60 of the QCAT Act provides:

60 Declarations

- (1) The tribunal may make a declaration about a matter in a proceeding—
 - (a) instead of making an order it could make about the matter; or

¹ *Queensland Civil and Administrative Tribunal Act 2009* (Qld), s 59(1) ('QCAT Act').

- (b) in addition to an order it could make about the matter.
- (2) The tribunal may make an order it considers necessary or desirable to give effect to a declaration under subsection (1).
- (3) A declaration under subsection (1) is binding on the parties to the proceeding mentioned in the declaration.
- (4) The tribunal's power under subsection (1) is in addition to, and does not limit, any power of the tribunal under an enabling Act to make a declaration.
- (5) The tribunal's power to act under subsection (1) or (2) is exercisable only by a legally qualified member.

[10] Section 60 was considered in *Randall v Body Corporate for Runaway Cove Bayside CTS 25498*.² Member Barlow (as his Honour then was), with whom Deputy President Kingham agreed, stated:

28. The only relevant source of power of the tribunal to make a declaration is s.60 of the QCAT Act. The tribunal does have power to make declarations in certain circumstances pursuant to any enabling Acts, but no such express power under an enabling Act has been pointed to in this case.

29. Pursuant to s.60, the tribunal may make a declaration "about a matter in a proceeding" either "instead of making an order it could make about the matter" or "in addition to an order it could make about the matter". I also note that such a declaration may only be made by a judicial member of the tribunal: subs.60(5).

30. "Matter" is not defined in the Act, but a matter must be "in a proceeding". There must, therefore, be a valid "proceeding" on foot: that is, one within the tribunal's jurisdiction. "Proceeding" is defined as meaning "a proceeding before the tribunal".

31. As I have already held, this application is not a minor civil dispute. It is therefore not a proceeding within the tribunal's jurisdiction and therefore, in the absence of such proceeding, the tribunal does not have power to make a declaration. It does not have jurisdiction to make another order and, unless it has jurisdiction to make an order, it cannot make a declaration.

32. But even if the proceeding were a minor civil dispute, the applicant does not seek any order other than a declaration. The tribunal does not have power simply to make a declaration, not ancillary to, or in lieu of, another order which it could make. That is, it does not have a power similar to that of the Supreme Court that is confirmed by s.128 of the *Supreme Court Act 1995*. In the absence of an express power to entertain a proceeding simply for the purposes of giving a declaration, it does not have the power to grant and make a declaration unless such power is expressly given to it by an enabling act. As I have said, no such power is relied upon here.

33. The fact that the applicant also seeks "interim orders" is irrelevant to this issue. Those orders are of an interlocutory nature. If a properly constituted proceeding were on foot, the tribunal would have power to consider whether or not to make such orders for the purposes of the proceeding. But the fact that

² [2011] QCATA 10.

the applicant wishes to seek such orders cannot affect the question whether the proceeding is properly constituted having regard to the final relief that the applicant seeks.

[11] *Randall* has been cited on a number of occasions with approval.³ The power of an inferior court to grant declaratory relief must have a statutory basis.⁴ For example, s 69(2)(a) of the *District Court of Queensland Act 1967* (Qld) empowers the District Court to grant relief by way of a declaration of rights of the parties. That power is however not confined, unlike s 60(1) of the QCAT Act. The Tribunal may only grant a declaration instead of, or in addition to, an order it could make about the matter.

[12] Unlike inferior courts, superior courts have an inherent power to grant declaratory relief. In *Ainsworth v Criminal Justice Commission* it was stated:

It is now accepted that superior courts have inherent power to grant declaratory relief. It is a discretionary power which '[i]t is neither possible nor desirable to fetter ... by laying down rules as to the manner of its exercise'. However, it is confined by the considerations which mark out the boundaries of judicial power. Hence, declaratory relief must be directed to the determination of legal controversies and not to answering abstract or hypothetical questions. The persons seeking relief must have 'a real interest' and relief will not be granted if the question 'is purely hypothetical', if relief is 'claimed in relation to circumstances that [have] not occurred and might never happen' or if 'the court's declaration will produce no foreseeable consequences for the parties'.⁵ (footnotes and citations omitted)

[13] As an inferior court, the Tribunal has no inherent power. There is no specific power conferred upon the Tribunal by the *Body Corporate and Community Management Act 1997* (Qld) to grant injunctive relief nor, as I have observed, is such a power to be found in the QCAT Act.

[14] The applicant relies upon the decision in *Body Corporate for the Lakes-Cairns CTS 28090 v Sunshine Group Australia Pty Ltd*⁶ in support of its contention that the Tribunal has the power to grant a bare declaration. In *Lakes-Cairns* the Tribunal stated:

[68] The Applicant relies upon the decision of this Tribunal in *Randall v Body Corporate for Runaway Cove Bayside CTS 25498* [2011] QCATA 10 as supporting its contention that this Tribunal does not have power to grant a declaration of the kind sought. *Randall* was a case where the only relief sought was a declaration that the Applicant did not owe a particular sum of money, in the context of a minor civil dispute proceeding. The principal basis for the disallowance of the application was that it was not in fact a minor civil dispute. In that case, the Tribunal noted that such a declaration could only be

³ *Delmason Pty Ltd ATF Libby Mason Trust v Body Corporate for The Crest on Bonney* [2015] QCAT 209; *Northbuild Construction Pty Ltd v Body Corporate for Harmony Broadwater* [2015] QCAT 33; *Tang v Body Corporate for Greenly Gardens* [2019] QCAT 207.

⁴ See for example *JA & JB Boyle Pty Ltd v Major Furnace Australia Pty Ltd (No 2)* [2019] QDC 215 where Porter QC DCJ found that the Magistrates Court had no express statutory power to grant declaratory relief.

⁵ [1992] HCA 10.

⁶ [2023] QCAT 39.

made by a judicial member of the Tribunal, but that s.60 only permitted a declaration to be made about a matter in a proceeding, and that this was not such a proceeding because it was not a minor civil dispute. She held in the alternative that even if it were a minor civil dispute, because the Applicant did not seek any order other than a declaration, and that it was not ancillary to or in lieu of another order which it could make, it could not make a declaration.

[69] It is obvious from the matters which are sought to be advanced in the proposed amended application that they are certainly not only seeking a declaration of invalidity of the agreement. They certainly arise in the context of a determination of a present dispute before this Tribunal of longstanding, both before and after its initiation in this Tribunal. The alternative relief sought in paragraphs 29(c), (d) and (e) set out in above, concern the prima facie valid caretaker agreement and as to whether 10% increases are valid variations, and also for a declaration as to what the remuneration is under the agreement, as well as the repayment of any amount paid in excess of that.

[70] In any event, it is not necessary for me to decide in this case whether the scope of s.60 of the QCAT Act is sufficiently broad to permit this Tribunal to hear the applications for declaratory relief, along with the other relief sought, for the reasons which I will set out later, or are limited to that the declaratory relief sought here is ancillary to or in lieu of another order which this Tribunal could in fact make, concerning what the proper construction of the caretaker agreement is and as to whether it is sufficiently certain or compliant with the legislative requirements in the Accommodation Module such that it is valid and enforceable. (underlining added)

- [15] The relief sought in *Lakes-Cairns* was not, as here, a bare declaration. *Lakes-Cairns* does not support the applicant's submission.
- [16] It follows from the foregoing analysis that the Tribunal does not have the jurisdiction to grant the final relief sought by the applicant. As presently framed, the applicant has no prospect of success in the proceeding. It is unnecessary for me to consider the balance of convenience arguments. The applicant's case is fatally flawed.
- [17] In the circumstances the application for an interim injunction is refused.
- [18] It is of course open to the applicant to amend its claim. Noting that the extraordinary general meeting is yet to be held, it may be that if the respondent resolves to reject the notice of exercise of the option, the applicant may seek alternative relief which the Tribunal has the power to order in respect of the applicant's rights under the agreements.

Conclusion

- [19] The application for an interim injunction is refused.