

SUPREME COURT OF QUEENSLAND

CITATION: *BurrIDGE & Anor v Saville* [2023] QSC 244

PARTIES: **Wade James BurrIDGE**
(first plaintiff)
and
Annabelle Julie Borges
(second plaintiff)
v
Julie May Saville
(defendant)

FILE NO/S: BS No 14608 of 2022

DIVISION: Trial Division

PROCEEDING: Claim

ORIGINATING COURT: Supreme Court at Brisbane

DELIVERED ON: 3 November 2023

DELIVERED AT: Brisbane

HEARING DATE: 21 September 2023

JUDGE: Martin SJA

ORDER: **1. The answer to the separate questions are:**

(a) was the Disclosure Statement ‘signed by the defendant’ within the meaning of section 206(3) of the *Body Corporate and Community Management Act 1997*? *Unnecessary to decide*

(b) was the Disclosure Statement ‘substantially complete’ within the meaning of section 206(4) of the *Body Corporate and Community Management Act 1997*? *Yes*

(c) did the plaintiffs validly terminate the Contract pursuant to section 206(5) of the *Body Corporate and Community Management Act 1997*? *No*

2. I will hear the parties on costs.

CATCHWORDS: CONVEYANCING – BREACH OF CONTRACT FOR SALE AND REMEDIES – PURCHASER’S REMEDIES – BREACH OF VENDOR’S STATUTORY DISCLOSURE OBLIGATIONS – where real estate agent prepared disclosure statement – where there is no committee, secretary, body corporate manager, administrative fund or sinking fund – where disclosure statement states “N/A” – where buyers terminate a contract under s 206 of the *Body Corporate and*

Community Management Act 1997 – whether the disclosure statement is substantially complete within the meaning of s 206(4) of the *Body Corporate and Community Management Act 1997* – whether the buyers validly terminated the contract pursuant to s 206(5) of the *Body Corporate and Community Management Act 1997*

Body Corporate and Community Management Act 1997, s 206

Body Corporate and Community Management (Standard Module) Regulation 2020

Uniform Civil Procedure Rules 1999 (Qld), r 483

Pazcuff Pty Ltd v Farmilo [2010] 2 Qd R 268

Menniti v Chan [2007] QSC 190

Menniti v Winn [2009] 2 Qd R 425

COUNSEL: A Greinke for the plaintiffs
A Harding for the defendant

SOLICITORS: K2 Law for the plaintiffs
Delaneys Lawyers for the defendant

- [1] On 26 June 2023, Davis J ordered, pursuant to r 483 of the *Uniform Civil Procedure Rules 1999*, that the following questions be determined separately from, and before, the final trial:
- (a) was the Disclosure Statement ‘signed by the defendant’ within the meaning of section 206(3) of the *Body Corporate and Community Management Act 1997* (the Act)? (Separate Question 1)
 - (b) was the Disclosure Statement ‘substantially complete’ within the meaning of section 206(4) of the Act? (Separate Question 2)
 - (c) did the plaintiffs validly terminate the Contract pursuant to section 206(5) of the Act? (Separate Question 3)
- [2] The plaintiffs no longer press Separate Question 1. The parties agreed that it should be answered: *unnecessary to decide*.
- [3] The parties also agreed that an answer of “yes” to Separate Question 2 will mean the answer to Separate Question 3 is “no”, and vice versa.
- [4] For the reasons that follow, Separate Question 2 is answered “yes” and Separate Question 3 answered “no”.

What is a disclosure statement?

- [5] Section 206 of the Act requires the seller of a lot in a community titles scheme to give a disclosure statement to a person who proposes to buy the lot before that person enters into a contract. The contents of a disclosure statement and the consequences of a failure to comply with s 206 are as follows:

- “(2) The disclosure statement must—
- (a) state the name, address and contact telephone number for—
 - (i) the following—
 - (A) if the scheme is a specified two-lot scheme—each person who is responsible for keeping body corporate records under the specified two-lot schemes module;
 - (B) otherwise—the secretary of the body corporate; or
 - (ii) if it is the duty of a body corporate manager to act for the body corporate for issuing body corporate information certificates—the body corporate manager; and
 - (b) state the amount of annual contributions currently fixed by the body corporate as payable by the owner of the lot; and
 - (c) identify improvements on common property for which the owner is responsible; and
 - (d) list the following—
 - (i) if the scheme is a specified two-lot scheme—the body corporate assets of more than \$1,000 in value;
 - (ii) otherwise—the body corporate assets required to be recorded on a register the body corporate keeps; and
 - (e) state whether there is a committee for the body corporate or a body corporate manager is engaged to perform the functions of a committee; and
 - (f) include other information prescribed under the regulation module applying to the scheme.
- (3) The disclosure statement must be signed by the seller.
- (4) The disclosure statement must be substantially complete.
- (5) If the contract has not already been settled, the buyer may terminate the contract if the seller has not complied with subsection (1).
- (6) The seller does not fail to comply with subsection (1) merely because the disclosure statement, although substantially complete as at the day the contract is entered into, contains inaccuracies.”

The events leading up to the provision of the disclosure statement

- [6] The plaintiffs wanted to buy one lot in a two-lot community title scheme at Mermaid Beach (the Lot).
- [7] The defendant's real estate agent was Logan Horstead of Bourke Commercial and Prestige Agents.
- [8] On 15 October 2021, Wade Burrige asked Mr Horstead for details of the Lot.
- [9] On 15 and 16 October 2021, Mr Horstead sought information from Ms Saville with respect to:
- (a) the name and community title for the body corporate of the Lot;
 - (b) whether the body corporate has a secretary;
 - (c) whether the body corporate had a manager;
 - (d) whether there was a committee for the body corporate;
 - (e) whether there are any annual contributions currently fixed by the body corporate for the administrative fund, sinking fund and any other contributions;
 - (f) whether there was any common property that a potential buyer of the Property would be responsible for;
 - (g) whether there were body corporate assets on a register;
 - (h) whether there was information prescribed under regulation modules; and
 - (i) whether the defendant was content for Mr Horstead to sign a disclosure statement on her behalf.
- [10] Ms Saville advised Mr Horstead that there was:
- (a) no body corporate manager;
 - (b) no secretary;
 - (c) no common property on a register;
 - (d) no common property for which a buyer would be responsible, nor any annual contributions currently fixed by the body corporate for the administrative fund, sinking fund and any other contributions; and
 - (e) that there was an insurance contribution of \$1,200 per annum.
- [11] Soon after that advice was given, the defendant sent an email to Mr Horstead which showed that the annual insurance payable was \$1,367.

The disclosure statement

- [12] On 19 November 2021, Mr Horstead (acting on the information given to him) prepared and signed a Real Estate Institute of Queensland Standard Form Disclosure Statement (the Disclosure Statement) with respect to the Lot and gave it to the plaintiffs. A copy of the Disclosure Statement is annexed to these reasons.
- [13] On the first page of the Disclosure Statement, after the description of the body corporate, there is the heading “Prescribed Information” and several subheadings matching each item of information prescribed under s 206 of the Act. Space is provided for the relevant details to be inserted.
- [14] Apart from the entry “Other: INSURANCE \$1367.00” and the answer “No” to the question “Is there a Committee for the Body Corporate?” each entry in the Disclosure Statement contains “N/A” in response to the various headings.
- [15] On the following day the plaintiffs and the defendant entered into a contract of sale for the Lot (the Contract). The Contract provided for settlement on 21 July 2022.
- [16] On 13 July 2022, there was a series of emails between Mr Burridge and Mr Horstead in which information was sought by Mr Burridge:
- (a) Mr Burridge to Mr Horstead: “Who is the body corp on the property – we need to know if they are responsible for insuring the building for our certificate of currency that we need to get put in place.”;
 - (b) Mr Horstead to Mr Burridge: “There isn’t one as it’s only those two lots.”;
 - (c) Mr Burridge to Mr Horstead: “There would be an insurance and a body corp in place even though you dont need to go to a body corp to do reno s but there must be an insurer and body corp in place”; and
 - (d) Mr Horstead to Mr Burridge: this email provided the details of the community title scheme and the details of the broker who organised the insurance. Mr Horstead stated that the details in this email of the community title scheme “are the only details I have for the scheme”.

Termination of the Contract

- [17] On 20 July 2022, one day before settlement, the plaintiffs’ solicitors gave a letter to the defendant’s solicitors giving notice that the plaintiffs had elected to terminate the Contract pursuant to s 206(5) of the Act (the Termination Notice).
- [18] On the same day, the defendant’s solicitors emailed the plaintiffs’ solicitors stating that the Termination Notice was a repudiation of the Contract and that the defendant would consider her position.
- [19] On 21 July 2022, the defendant’s solicitors emailed the plaintiff’s solicitors stating:
- (a) the defendant accepted the repudiation and elected to terminate the Contract;

- (b) the plaintiffs had forfeited the deposit; and
- (c) the defendant reserved her right to recover any loss suffered as a result of the repudiation.

Separate Question 2

[20] The plaintiffs advanced five arguments in support of their contention that the Disclosure Statement was not substantially complete within the meaning of s 206(4). They are:

- (a) the insertion of “N/A” is an ambiguous non-answer and can be interpreted as “not applicable”, “not available” or “no answer”;
- (b) the Disclosure Statement does not comply with the requirements of the *Body Corporate and Community Management (Standard Module) Regulation 2020* (Standard Module) and, in the context of the Standard Module, “N/A” should be interpreted as “not available” or “no answer”;
- (c) even if “N/A” is interpreted as “not applicable”, the defendant is required to state why it is not applicable;
- (d) s 206(2)(b) requires an amount to be stated in the Disclosure Statement rather than inserting “N/A” which is an ambiguous non-answer; and
- (e) s 206(e) requires “binary disclosure”, stating whether there is a committee for a body corporate and, if there is no committee, whether a body corporate manager is engaged to perform the functions of a committee.

[21] The defendant submitted:

- (a) the answer “N/A” in the Disclosure Statement can only mean “not applicable” because:
 - (i) a reasonable, common-sense interpretation would interpret “N/A” to mean “not applicable”;
 - (ii) it would otherwise require interpreting “N/A” to convey:
 - (A) “not available” in the sense that the defendant did not have that information available, despite the scheme only being two lots; or
 - (B) “no answer” in the sense that the defendant had chosen not to comply with the requirement to provide a response; and
 - (iii) the defendant had provided answers to other points, being the details of the body corporate scheme and the annual insurance contribution amount;
- (b) “N/A”, being interpreted as “not applicable”, is not an ambiguous non-answer given the fact that there was no secretary, manager, sinking fund, administrative fund, common property, assets required to be registered or annual contributions other than the insurance amount disclosed;
- (c) although the Standard Module may require the body corporate to have particular items or positions, a seller’s obligation of disclosure is satisfied

under s 206 to state “not applicable” if the body corporate does not have that particular item or position; and

- (d) the Disclosure Statement states that there is no committee or a body corporate manager. Therefore, it meets the requirement to disclose whether a body corporate manager has been engaged to perform the functions of a committee.

Section 206

[22] The purpose of s 206 is consumer protection.¹ As was said by Keane JA (as his Honour then was), the evident policy of s 206 of the Act is that purchasers should be told “what they are getting into” in terms of the state of the affairs of the body corporate.² The role of s 206 is to provide information to enable the purchaser to make an informed decision on whether to proceed with a contract.³

[23] Section 206(4) states:

“The disclosure statement must be substantially complete.”

[24] Section 206(2) lists the items a disclosure statement must include in order for it to be “complete” within the meaning of s 206(4).

[25] Section 206(2) and 206(4) must also be considered in the context of s 206(6) which states:

“The seller does not fail to comply with subsection (1) [the requirement to give a disclosure statement] merely because the disclosure statement, although substantially complete as at the day the contract is entered into, contains inaccuracies.”

[26] It follows that a failure to include all the information in s 206(2) will not result in invalidity, so long as the disclosure statement is “substantially complete”.

[27] The requirements of s 206 were considered by the Court of Appeal in *Menniti v Winn*.⁴ The plaintiffs argued that *Menniti* is not applicable and can be distinguished as the pleaded case in *Menniti* was for misleading or deceptive conduct and that the argument in that case was whether there is a positive obligation under s 206, rather than just an argument as to the requirements of s 206 which is the dispute here.

[28] *Menniti* is applicable. In *Menniti*, the appellants purported to terminate a contract pursuant to s 206 due to what they alleged was non-compliance with s 206. The issue that was to be determined in *Menniti* was whether the respondents complied with s 206 of the Act in giving the appellants a disclosure statement for the sale of the property. The determination in *Menniti* was on the construction and application of s 206(2).

The Meaning of “N/A”

¹ *Pazcuff v Farmilo* [2010] 2 Qd R 268 at [18].

² *Menniti v Winn* [2009] 2 Qd R 425 at [10].

³ *Ibid* at [31].

⁴ [2009] Qd R 425.

- [29] The plaintiffs' case is that "N/A" is an ambiguous non-answer that does not provide disclosure as required under s 206.
- [30] The plaintiffs argued that "N/A" could mean "not applicable", "no answer" or "not available" and that a buyer should not be left guessing as to a body corporate's state of affairs.
- [31] The answer "not applicable" was sufficient in *Menniti*. The reasoning underlying the decision in *Menniti* was that the creation and maintenance of the categories of information required to be provided in a disclosure statement was an obligation borne by the body corporate and not the vendor. It followed, then, that where there was no information created by a body corporate in relation to a particular item mentioned in s 206, an answer of "not applicable" by a vendor was accurate and to that extent satisfied the vendor's obligation of disclosure under that section.⁵
- [32] The plaintiffs argued that, as the Standard Module requires that there be a committee and a secretary, then a response of "not applicable" does not make sense. Instead, "N/A" should be viewed as meaning something other than "not applicable" such as "no answer". I do not agree. The answer "not applicable" is accurate if there is no committee or secretary.
- [33] The Standard Module also requires the body corporate to keep a register of all assets of more than \$1,000. Again, it was argued that "N/A" cannot mean "not applicable" given the Standard Module requires assets to be recorded.
- [34] The Disclosure Statement demonstrates that there had not been compliance with the Act and the Standard Module as, after a question of whether there is a committee for the body corporate, the Disclosure Statement has a ticked "no" response. This alerts the reader to the fact that there is, at least, a serious question as to whether there had been compliance with the Act.
- [35] The defendant submitted:
- (a) first, that a reasonable, common-sense approach to interpreting "N/A" would require it to be interpreted as "not applicable" and that "N/A" is commonly understood to mean "not applicable".

I agree that this is a commonly understood meaning.
 - (b) secondly, the interpretation of "N/A" should not be construed in a manner which means the defendant has deliberately avoided her obligations under s 206. A construction of "not available" and "no answer" may have this effect while "not applicable" meets the obligations. Further, the defendant disclosed information such as the insurance amount that the plaintiffs would be obligated to pay. Given that the defendant disclosed this information, it is unlikely that the defendant would disclose some information but deliberately avoid disclosing the other information for s 206.

⁵ *Menniti v Winn* [2009] 2 Qd R 425 at [5] and [61].

Whether the defendant's disclosure of some information made it unlikely that she would avoid disclosing other information is irrelevant to the proper construction of "N/A".

- (c) thirdly, it is unlikely that "N/A" would mean "no answer" given the defendant had inserted some financial information and that the community title scheme is comprised of only two lots. It was submitted it is unlikely given the small status of the scheme that the defendant would not have access to the information, making an interpretation of "not available" or "no answer" more unlikely.

The likelihood of the existence of certain facts does not assist in determining the proper construction of "N/A".

[36] In the circumstances of this Disclosure Statement, the term "N/A" means "not applicable" given that:

- (a) "N/A" is commonly understood to mean "not applicable"; and
 (b) the disclosure that the Body Corporate was not compliant with the Act or Standard Module made "not applicable" the more natural meaning.

Sufficiency of Disclosure

[37] The plaintiffs argued that even if "N/A" is interpreted as "not applicable" it is insufficient disclosure for the purpose of s 206. I disagree.

[38] The disclosure statement in *Menniti v Chan*⁶ gave the answer "not applicable" to a number of questions. Wilson J found the disclosure statement in that case was compliant with s 206. On appeal, that finding was upheld.⁷

[39] The plaintiffs argued that the Disclosure Statement can be distinguished from the disclosure statement in *Menniti* given that the disclosure statement in that case stated "not applicable" rather than just "N/A" and also included the notations "Body Corporate not being operated formally" and "NB. Body Corporate not being formally operated as all lots owned by [respondents]".

[40] I have already determined that "N/A" means "not applicable". The issue then is whether there should have been additional notations to make it compliant.

[41] In *Menniti*, Keane JA (with whom Fraser JA agreed) said that:

"If there is no information created by the body corporate in relation to a particular item mentioned in s 206, an answer of 'not applicable' by a vendor is accurate, and the vendor's obligation of disclosure under s 206 is satisfied to that extent."

[42] Muir JA (with whom Keane and Fraser JJA agreed) stated:

"[32] ... where, for example, the disclosure statement requires the 'name, address and contact telephone number for ... the

⁶ [2007] QSC 190.

⁷ *Menniti v Winn* [2009] Qd R 425.

secretary of the body corporate' to be stated **if there is no secretary, an appropriate entry in the disclosure statement will be 'there is no secretary'**. So, too, with the requirement to state 'the amount of annual contributions currently fixed by the body corporate as payable by the owner of the lot'. **If no such contributions have been fixed, irrespective of the requirements of the Act or the Standard Module, an appropriate response will be to the effect that none have been fixed.**"

(emphasis added)

- [43] Both Keane and Muir JJA (with both of whom Fraser JA agreed) did not regard a disclosure statement as needing something more to explain why a body corporate is not in compliance with the Act or the Standard Module.
- [44] Muir JA's comments also deal with the plaintiffs' contention that s 206(2)(b) requires a response of "Nil" or "None" with respect to an amount. The term "not applicable" is a response to the effect that no amount has been fixed, although it could be better expressed.
- [45] While there were better responses available to be inserted which might have avoided this dispute, "N/A" satisfies the defendant's disclosure requirement for the purpose of s 206.

Separate Question 3

- [46] The only controversy before me at the hearing was whether the Disclosure Statement was substantially complete within the meaning of s 206(4) of the Act. Both parties agreed that a finding that the Disclosure Statement was substantially complete would result in a finding that the Contract was not validly terminated pursuant to s 206(5).
- [47] I agree. I have found that the Disclosure Statement was substantially complete within the meaning of s 206(4) of the Act. The answer to Separate Question 3 is "no".

Orders

- [48] I make the following declarations with respect to the separate questions:
- was the Disclosure Statement 'signed by the defendant' within the meaning of section 206(3) of the *Body Corporate and Community Management Act 1997*? *Unnecessary to decide*
 - was the Disclosure Statement 'substantially complete' within the meaning of section 206(4) of the *Body Corporate and Community Management Act 1997*? *Yes*
 - did the plaintiffs validly terminate the Contract pursuant to section 206(5) of the *Body Corporate and Community Management Act 1997*? *No*
- [49] I will hear the parties on costs.

Annexure A

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DOC1

Disclosure Statement

Body Corporate and Community Management Act 1997 Section 206

BODY CORPORATE

Body Corporate for: CHAIRLIFT APARTMENTS Community Titles Scheme: 32933
Lot No: 2 on: [] BUP [] GTP [x] SP
ADDRESS: 2/27 CHAIRLIFT AVENUE
SUBURB: MERMAID BEACH STATE: QLD POSTCODE: 4218

PRESCRIBED INFORMATION

SECRETARY OF BODY CORPORATE

NAME: N/A
ADDRESS:
SUBURB: STATE: POSTCODE:
PHONE: FAX:

BODY CORPORATE MANAGER

NAME: N/A
ADDRESS:
SUBURB: STATE: POSTCODE:
PHONE:

BODY CORPORATE COMMITTEE

← Do not complete if there is no Committee for the Body Corporate

Is there a Committee for the Body Corporate? [] Yes [x] No
If there is a committee, is the Body Corporate Manager engaged to perform the functions of the Committee? [] Yes [] No

ANNUAL CONTRIBUTIONS AND LEVIES

Amount of annual contributions currently fixed by the Body Corporate as payable by the owner of the lot:
Administrative Fund: \$ N/A each year by instalments in: [] advance [] arrears
on the day of each
Sinking Fund: \$ N/A each year by instalments in: [] advance [] arrears
on the day of each
Other: INSURANCE \$1367.00

INITIALS (Note: initials not required if signed with Electronic Signature)

Handwritten initials: LA, WJB, RJB

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Annexure A

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IMPROVEMENTS ON COMMON PROPERTY FOR WHICH BUYER WILL BE RESPONSIBLE (insert details)

N/A

BODY CORPORATE ASSETS REQUIRED TO BE RECORDED ON REGISTER: (insert details)

N/A

INFORMATION PRESCRIBED UNDER REGULATION MODULE (insert details)

N/A

SIGNATURES

Seller:	 DocuSigned by: Logan Horstead F5875124063406...	Witness:	Not required if this form is signed electronically
Date:			
Seller:	19/11/2021	Witness:	Not required if this form is signed electronically
Date:			
Seller:		Witness:	Not required if this form is signed electronically
Date:			
Seller:		Witness:	Not required if this form is signed electronically
Date:			

BUYER'S ACKNOWLEDGMENT

The Buyer:

- (a) Consents to this Disclosure Statement being given by electronic means and to the Seller signing the Disclosure Statement using an Electronic Signature; and
- (b) Acknowledges having received and read this statement before entering into the contract.

Buyer:	 DocuSigned by: Wade James Burridge F5888F88F8C4E...	Witness:	Not required if this form is signed electronically
Date:	19/11/2021		
Buyer:	 DocuSigned by: A. Borger F5888F88F8C4E...	Witness:	Not required if this form is signed electronically
Date:	19/11/2021		
Buyer:		Witness:	Not required if this form is signed electronically
Date:			
Buyer:		Witness:	Not required if this form is signed electronically
Date:			

INITIALS (Note: initials not required if signed with Electronic Signature)

DS	DS	DS
LA	WJB	AB

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