QUEENSLAND CIVIL AND ADMINISTRATIVE TRIBUNAL

CITATION:	*WLK Management Pty Ltd v Body Corporate for The Persse Villas CTS 27758* [2023] QCAT 458
PARTIES:	**WLK MANAGEMENT PTY LTD ACN 626 970 796** (applicant) **v** **BODY CORPORATE FOR THE PERSSE VILLAS CTS 27758** (respondent)
APPLICATION NO/S:	OCL002-22
MATTER TYPE:	Occupational regulation matters
DELIVERED ON:	28 November 2023
HEARING DATE:	On the papers
DECISION OF:	Member Lumb
ORDERS:	**1. The dispute the subject of the Application to resolve a complex dispute (excluding lot entitlement disputes) – *Body Corporate and Community Management Act 1997* filed on 5 January 2022 is referred to arbitration pursuant to s 8 of the *Commercial Arbitration Act 2013* (Qld).** **2. This proceeding is stayed for a period of three months from the date of the Decision.** **3. A directions hearing is to be listed on a date more than three months from the date of the Decision, with such date to be advised by the Registry.** **4. The question of costs is reserved.**
CATCHWORDS:	BODY CORPORATE AND COMMUNITY MANAGEMENT – COMPLEX DISPUTE – JURISDICTION – whether dispute the subject of application was a 'complex dispute' within the meaning of the *Body Corporate and Community Management Act 1997* (Qld) (BCCMA) – whether s 149B of the BCCMA applied – where dispute also the subject of arbitration agreement – where respondent sought referral of dispute to arbitration – whether dispute required to be referred to arbitration pursuant to s 8 of the *Commercial Arbitration Act 2013* (Qld) – whether the arbitration agreement is 'null and void, inoperative or incapable of being

performed' by reason of operation of s 229 and s 318 of the BCCMA – whether jurisdictional question should be determined by arbitrator

Body Corporate and Community Management Act 1997 (Qld), s 15, s 16, s 149B, s 227, s 229, s 318, Schedule 6
Commercial Arbitration Act 2013 (Qld), s 1AC, s 2, s 5, s 8, s 16, s 33
Foreign Arbitral Awards Enforcement Act (1997 Revision), s 4
Queensland Civil and Administrative Tribunal Act 2009 (Qld), s 28, s 58, s 62

4D Electrical Qld v Greyburn Pty Ltd [2020] QCAT 74
Bulkbuild Pty Ltd v Fortuna Well Pty Ltd & Ors [2019] QSC 173
Dialogue Consulting Pty Ltd v Instagram, Inc (2020) 291 FCR 155
FamilyMart China Holding Co Ltd v Ting Chuan (Cayman Islands) Holding Corporation [2023] UKPC 33
Hancock Prospecting Pty Ltd (ACN 008 676 417) and Ors v Rinehart and Ors (2017) 257 FCR 442
Henderson and Anor v Body Corporate for Merrimac Heights CTS 19563 [2011] QSC 336
James v Body Corporate Aarons Community Title Scheme 11476 [2004] 1 Qd R 386
King River Digital Assets Opportunities SPC v Salerno [2023] NSWSC 510
Rinehart v Hancock Prospecting Pty Ltd (2019) 267 CLR 514
Shakur v Aintree Holdings Pty Ltd (t/as Beaumonde Homes) [2015] WASAT 12
Subway Systems Australia Pty Ltd v Ireland (2014) 46 VR 49
Tesseract International Pty Ltd v Pascale Construction Pty Ltd (2022) 140 SASR 395
Tesseract International Pty Ltd v Pascale Construction Pty Ltd [2023] HCATrans 65
The Body Corporate for Liberty CTS 27241 v Batwing Resorts Pty Ltd [2012] QSC 340
WCX M4-M5 Link AT Pty Ltd v Acciona Infrastructure Projects Australia Pty Ltd (No 2) [2022] NSWSC 505

REPRESENTATION:

Applicant:	Mahoneys Lawyers
Respondent:	LawSolve Lawyers

APPEARANCES:

This matter was heard and determined on the papers pursuant to s 32 of the

Queensland Civil and Administrative Tribunal Act 2009 (Qld).

REASONS FOR DECISION

Introduction

[1] On 5 January 2022, the Applicant (the Manager) filed an 'Application to resolve a complex dispute (excluding lot entitlement disputes) – *Body Corporate and Community Management Act 1997*' (the Primary Application).

[2] By the Primary Application, the Manager seeks declaratory and injunctive relief against the Respondent (the Body Corporate) arising out of what it contended was the valid exercise of options to renew contained in two separate agreements between the parties, the first entitled 'Service Management Agreement' (the Management Agreement) and the second entitled 'Letting Agreement' (the Letting Agreement). The Manager contended that, first, it was a 'caretaking service contractor' within the meaning of the *Body Corporate and Community Management Act 1997* (Qld) (the BCCMA), and second, its dispute with the Body Corporate was a 'complex dispute', being a dispute mentioned in s 149B of the BCCMA.

[3] On 31 January 2022, the Body Corporate filed written submissions (the January 2022 submissions) stating that it entered a conditional appearance in the matter and contended, relevantly for present purposes, that the parties were 'bound by a mandatory arbitration clause by operation of which QCAT is without jurisdiction to determine this dispute'.[1]

[4] On 21 February 2022, the Manager filed an affidavit of Joseph Khor (Mr Khor), one of the directors of the Manager.

[5] On 16 March 2022, the Body Corporate filed an Application for miscellaneous matters (the Stay Application) by which it sought, relevantly, that the Tribunal proceeding be stayed, and the parties be referred to arbitration pursuant to s 8 of the *Commercial Arbitration Act 2013* (Qld) (the CAA).

[6] On 21 April 2023, the Body Corporate filed a further Application for miscellaneous matters (the Amended Stay Application) pursuant to which it sought additional or alternative relief to that claimed in the Stay Application (the content of which is set out at paragraph 9 below).

[7] On 16 May 2023, the Manager filed written submissions (opposing the relief sought by the Body Corporate) and a further affidavit of Mr Khor.

[8] On 2 June 2023, the Body Corporate filed written submissions in reply.

The relief sought in the Amended Stay Application

[9] The Body Corporate seeks the following relief (as amended):

> I/We the Respondent apply to the Tribunal for the following directions:
>
> 1. That:

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[1] January 2022 submissions, [1]; see also [15]-[25].

(a) Pursuant to s.8 *Commercial Arbitration Act 2013 (Qld)* ("CAA"), the within proceedings be stayed and the parties be referred to arbitration.

(b) The Applicant must, on or before the expiration of fourteen (14) days from that date of such order, provide to the Respondent the name of three (3) suitable persons who the Applicant proposes for the Respondent to choose one (1) from to be the arbitrator of the dispute in this proceeding.

(c) Paragraph 1-2 (inclusive) at page 2 of the interim orders of 21 March 2022 (**the interim orders**) are discharged;

(d) The Applicant pay to the Respondent all amounts paid by the Respondent under the interim orders (such amount to be determined by QCAT unless otherwise agreed):

(e) The Applicant pay the Respondent's costs of and incidental to the miscellaneous application filed 16 March 2022 In this proceeding, and this amended miscellaneous application.

(f) The Applicant pay the Respondent's costs of and incidental to this proceeding (including costs (if any any) reserved), such costs to be assessed unless otherwise agreed.

That in the alternative to paragraph 1, that pursuant to Ss.3(b), 4(c), 9(4), 28(1), 28(3)(d), 58(1) and/or 62(1) *Queensland Civil and Administration Tribunal Act 2009* ("**QCAT Act**"):

2. The proceedings be stayed for a period of three (3) months from the date of such order.

3. The:

(a) Applicant must on or before the expiration of seven (7) days from that date of such order provide to the Respondent the name of three (3) suitable persons who the Applicant proposes for the Respondent to choose one (1) persons [sic] from to be the arbitrator of the dispute in this proceeding.

(b) Respondent must on or before the expiration of seven (7) days from that date of such names of three (3) suitable persons being so provided by the Applicant, advise the Applicant inwriting of one (1) person from such three (3) to be the arbitrator of the dispute in this proceeding.

(c) Applicant must on or before the expiration of twenty-eight (28) days from that date of such order file in the Tribunal two (2) copies of evidence that the parties have complied with this order and clauses:

(i) 12 of the Management Agreement, and

(ii) 11 of the Letting Agreement

the subject of these proceedings (and as expressly relied upon by the Applicant).

4. Orders 1 and 2 (Inclusive) at page 2 of the interim orders of 21 March 2022 (**the Interim orders**) are hereby discharged.

5. Within 4 months of the date of this order, the Applicant pay to the Respondent all amounts paid by the Respondent under the interim orders (such amount to be determined by QCAT unless otherwise agreed).

6. The Applicant pay the Respondent's costs of and Incidental to the miscellaneous application filed 16 March 2022 in this proceeding, and this amended miscellaneous application.

7. The Applicant pay the Respondent's cost of and incidental to this proceeding (including costs (if any any) reserved), such costs to be assessed unless otherwise agreed.

In the alternative to paragraphs 4-7 above:

8. If the Applicant complies with order 3, the Tribunal make further directions as necessary in this proceeding.

9. If the Applicant fails to comply with order 3:

   (a) The proceedings will stand dismissed without further order;

   (b) Orders 1 and 2 (inclusive) at page 2 of the interim orders of 21 March 2022 will stand discharge without further order;

   (c) Within 56 days of the date of this order, the Applicant must pay to the Respondent all amounts paid by the Respondent under the interim orders (such amount to be determined by QCAT unless otherwise agreed);

   (d) The Applicant pay the Respondent's costs of and incidental to the miscellaneous application filed 16 March 2022 in this proceeding, and this amended miscellaneous application.

   (e) The Applicant pay the Respondents costs of and incidental to this proceeding (including costs (if any any) reserved), such costs to be assessed unless otherwise agreed.

10. That the Applicant pay the Respondent's costs of and Incidental to this Application.

The arbitration agreement provisions relied upon by the Body Corporate

[10] Clause 12 of the Management Agreement provides:

> Subject to the Act, in the event of any dispute arising between the Manger and the Body Corporate touching upon any matter arising under the terms of this Agreement or incidental hereto or relative to the interpretation of any of the provisions hereof then the same shall be settled by an arbitrator to be mutually agreed upon between the parties and in default of agreement then by such arbitrator as may be nominated for the purpose by the President for the time being of the Queensland Law Society and the decision of such arbitrator shall be final and binding between the parties and such arbitration shall be carried out pursuant to the provisions of the Arbitration Act 1973 or any statutory modification or re-enactment thereof for the time being in force.

[11] Clause 11 of the Letting Agreement is in the same terms save that:

(a) it does not include the introductory words 'Subject to the Act,';

(b) it refers to 'Agent' rather than 'Manager'.

[12] With respect to clause 12 of the Management Agreement, there is no definition of 'the Act'. Although it is not entirely clear, I will proceed on the basis that the reference to 'the Act' is a reference to the 'Arbitration Act 1973' which is referred to in the same clause.

The issues

[13] In my view, the Amended Stay Application (and the parties' submissions) raise the following key issues for consideration:

(a) whether the Primary Application raises a 'complex dispute' within the meaning of the BCCMA;

(b) whether the Tribunal is a 'court' for the purposes of s 8 of the CAA;

(c) whether any of the exceptions to s 8 of the CAA applies;

(d) whether the proceeding should be stayed and, if so, for what period.

[14] I will address each issue in turn.

Complex dispute?

[15] On my reading of the Body Corporate's respective submissions, there is no challenge to the contentions of the Manager that the proceeding before the Tribunal is both a 'dispute' and a 'complex dispute' within the meaning of the BCCMA.

Dispute

[16] The term 'dispute' is defined in Schedule 6 to the BCCMA as follows:

> ***dispute—***
>
> (a) generally, includes complaint; and
>
> (b) for chapter 6, see section 227.

[17] Section 227(1) of the BCCMA provides, relevantly,

> **227 Meaning of dispute**
>
> (1) A ***dispute*** is a dispute between—
>
> (a) the owner or occupier of a lot included in a community titles scheme and the owner or occupier of another lot included in the scheme; or
>
> (b) the body corporate for a community titles scheme and the owner or occupier of a lot included in the scheme; or
>
> (c) the body corporate for a community titles scheme and a body corporate manager for the scheme; or
>
> (d) the body corporate for a community titles scheme and a caretaking service contractor for the scheme; or
>
> (e) the body corporate for a community titles scheme and a service contractor for the scheme, if the dispute arises out of a review carried out, or required to be carried out, under chapter 3, part 2, division 7; or

(f) the body corporate for a community titles scheme and a letting agent for the scheme; or

(g) the body corporate for a community titles scheme and a member of the committee for the body corporate; or

(h) the committee for the body corporate for a community titles scheme and a member of the committee; or

(i) the body corporate for a community titles scheme and a former body corporate manager for the scheme about the return, by the former body corporate manager to the body corporate, of body corporate property.

[18] In Schedule 6, 'caretaking service contractor' is defined as follows:

> ***caretaking service contractor***, for a community titles scheme, means a service contractor for the scheme who is also—
>
> (a) a letting agent for the scheme; or
>
> (b) an associate of the letting agent.

[19] A 'service contractor' is defined by reference to s 15 of the BCCMA.

[20] Section 15 of the BCCMA provides:

> A person is a ***service contractor*** for a community titles scheme if the person is engaged by the body corporate (other than as an employee of the body corporate) for a term of at least 1 year to supply services (other than administrative services) to the body corporate for the benefit of the common property or lots included in the scheme.
>
> *Examples of services that might be provided by a service contractor—*
>
> 1 caretaking services
>
> 2 pool cleaning services

[21] A 'letting agent' is defined by reference to s 16 of the BCCMA.

[22] Subsection 16(1) of the BCCMA provides:

> A person is a ***letting agent*** for a community titles scheme if the person is authorised by the body corporate to conduct a letting agent business for the scheme.

[23] Having regard to the Manager's material, including the terms of the Management Agreement and the Letting Agreement, I am satisfied that:

(a) the Manager is a 'caretaking service contractor' for the purposes of the BCCMA; and

(b) the Primary Application raises a dispute pursuant to s 227(1)(d) of the BCCMA.

Is the dispute a 'complex dispute'?

[24] Schedule 6 to the BCCMA defines 'complex dispute' as follows:

> ***complex dispute*** means—

(a) a matter for which an application mentioned in section 47AA(3)(a), 47B(3)(a), 48(1)(a), 385(8)(a), 387(6)(a), 405(2)(a) or 412(2)(a) is, or may be, made; or

(b) a dispute mentioned in section 133, 149A, 149B or 178.

[25] In the present case, the relevant provision for consideration is s 149B. This section states:

(1) This section applies to a dispute about a claimed or anticipated contractual matter about —

(a) the engagement of a person as a body corporate manager or caretaking service contractor for a community titles scheme; or

(b) the authorisation of a person as a letting agent for a community titles scheme.

(2) A party to the dispute may apply —

(a) under chapter 6, for an order of a specialist adjudicator to resolve the dispute; or

(b) as provided under the QCAT Act, for an order of QCAT exercising the tribunal's original jurisdiction to resolve the dispute.

[26] Section 149B of the BCCMA applies, relevantly, to a dispute about a claimed or anticipated contractual matter about the engagement of a person as a caretaking service contractor.

[27] Schedule 6 to the BCCMA defines ***contractual matter***, about an engagement or authorisation of a body corporate manager, service contractor or letting agent, to mean, relevantly: 'the exercise of rights or powers under the terms of the engagement or authorisation' (see subsection (c)).

[28] I am satisfied that the Primary Application raises a 'complex dispute' being a dispute about a claimed or anticipated contractual matter, namely the exercise by the Manager of rights or powers under the terms of the Management Agreement and the Letting Agreement.

Is the Tribunal a 'court' for the purposes of s 8 of the CAA?

[29] Section 8 of the CAA is headed 'Arbitration agreement and substantive claim before court (cf Model Law Art 8)'. Section 8 provides:

(1) A court before which an action is brought in a matter which is the subject of an arbitration agreement must, if a party so requests not later than when submitting the party's first statement on the substance of the dispute, refer the parties to arbitration unless it finds that the agreement is null and void, inoperative or incapable of being performed.

(2) Where an action referred to in subsection (1) has been brought, arbitral proceedings may nevertheless be commenced or continued, and an award may be made, while the issue is pending before the court.

[30] Neither party made submissions in relation to the issue of whether the Tribunal is a 'court' for the purposes of s 8.

[31] The CAA does not contain a definition of 'court'.

[32] The CAA does contain a definition of 'the Court' (in s 2(1)) which provides:

> ***the Court*** means, subject to section 6(2), the Supreme Court.
>
> *Note—*
>
> The definitions arbitration agreement, confidential information, disclose, domestic commercial arbitration, exercise, function, interim measure, Model Law, party and the Court are not included in the Model Law.

[33] The *Acts Interpretation Act 1954* (Qld) does not contain a definition of 'court'.

[34] The Victorian Court of Appeal construed a provision in the Victorian legislation in identical terms to s 8 of the CAA in *Subway Systems Australia Pty Ltd v Ireland*.[2] The Court, by a 2-1 majority, held that the word 'court' in s 8 of the *Commercial Arbitration Act 2011* (Vic) included the Victorian Civil and Administrative Tribunal.

[35] That decision has been considered by the State Administrative Tribunal (of Western Australia) in relation to s 8(1) of the *Commercial Arbitration Act 2012* (WA) (which is also in identical terms to s 8(1) of the CAA).

[36] In *Shakur v Aintree Holdings Pty Ltd (t/as Beaumonde Homes)*,[3] Senior Member Raymond followed the decision in *Subway Systems* and made the following observations:[4]

> 15 It is important that uniform legislation be consistently interpreted in all Australian States and Territories. While the decision in ***Subway Systems*** is not one which binds the Tribunal, as not being part of the judicial hierarchy covering the Tribunal, the decision should be followed unless considered to be clearly wrong: ***Re Drake and Minister for Immigration and Ethnic Affairs (No 2)*** (1979) 2 ALD 634 (Drake), ***Commodore Homes (WA) Pty Ltd and Deegan & Anor*** [2007] WASAT 45 (***Deegan***).
>
> 16 The majority decision in ***Subway Systems*** is based on distinguishing between court jurisdiction in relation to adjectival functions on one hand, as described in Art 6 of the Model Law (s 6 of the CA Act) and the exercise of jurisdiction in a substantive sense as contemplated by Art 8 of the Model Law (s 8 of the CA Act). In relation to the exercise of court jurisdiction in the substantive sense, the majority relied on the definition of 'court' in Art 2 of the Model Law to find that the reference to the court intended to cover bodies or organs of the judicial system beyond a court in the strict sense. Such an interpretation is arguably consistent with the paramount objective of the Act and the provisions of s 1C of the CA Act, and although the majority view is certainly not free from doubt, neither party argued the contrary. The applicants' written submissions did not address this issue and their oral submissions were limited to the applicability of the CA Act as a whole, which was dealt with in the following issue discussed below. I am not persuaded that

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2 (2014) 46 VR 49.
3 [2015] WASAT 12.
4 At [15]-[17].

> ***Subway Systems*** is wrongly decided and will therefore follow the decision on this aspect.
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> 17 ***Subway Systems*** also determined that the Victorian Civil and Administrative Tribunal was a court within the meaning of s 8 of the Victorian legislation. The reasons for doing so apply equally to this Tribunal. The Tribunal is not called a court, but it is the function and purpose of the Tribunal and not its nomenclature which must determine whether it qualifies as a court for the purposes of s 8 of the CA Act: see, in this regard, the principles discussed in ***BGC Construction and Vagg & Anor*** [2006] WASAT 367 at [27] and following.

[37] I also note the following obiter dicta observations of Doyle JA in *Tesseract International Pty Ltd v Pascale Construction Pty Ltd* (*Tesseract*):[5]

> Noting the various references in the *Commercial Arbitration Act 2011* (SA) to the "arbitral tribunal", it might be said that this decision provides some support for the words "the court" in the proportionate liability provisions in the Law Reform Act (and CCA) extending to an arbitral tribunal. However, I do not place much weight on *Subway Systems Australia Pty Ltd v Ireland* in this context. The reason for this is that the reasoning of the majority in that case as to the meaning of the words "the court" drew heavily upon the significance of those words appearing in the *Commercial Arbitration Act 2011* (Vic), being legislation that was to be construed by reference to the special principles governing the interpretation of an enactment of a model law (the UNCITRAL Model Law on International Commercial Arbitration), and having regard to its evident purpose of prohibiting parties who have agreed to have a relevant dispute dealt with by arbitration from taking the dispute to the adjudicative processes of a contracting State. In that context, it was considered appropriate to interpret "the court" as a reference to a decision-making arm of the State (which included VCAT), as opposed to a private and consensual arbitration.
>
> (citation omitted)

[38] Having regard to the above authorities, I find that the Tribunal (QCAT) is a 'court' for the purposes of s 8 of the CAA.[6]

Are any of the exceptions to s 8 of the CAA engaged?

[39] As I read the Manager's submissions, the Manager does not dispute (and I find) that:

(a) each of the clauses referred to at paragraphs 10 and 11 above (the arbitration clauses) constituted an 'arbitration agreement' for the purposes of the CAA;

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5 (2022) 140 SASR 395, [118] (Livesey P and Bleby JA agreeing). The High Court granted leave to appeal this decision in *Tesseract International Pty Ltd v Pascale Construction Pty Ltd* [2023] HCATrans 65, with the issues including whether s 28 of the *Commercial Arbitration Act 2011* (SA) empowers an arbitrator to apply the proportionate liability regimes, or whether the terms of legislation preclude arbitrator from doing so and whether the implied power conferred on an arbitrator to determine parties' dispute empowers an arbitrator to apply proportionate liability regimes, or whether terms of legislation preclude arbitrator from doing so.

6 I note that this conclusion is confined to the interpretation of the CAA, consistently with the observations of Doyle JA in *Tesseract*.

(b) the dispute the subject of the Primary Application is prima facie caught by the arbitration clauses; and

(c) the Body Corporate has requested that the dispute be referred to arbitration.

[40] In those circumstances, I consider that the Tribunal must refer the parties to arbitration (pursuant to s 8) unless I find that the agreement is 'null and void, inoperative or incapable of being performed'.

[41] The Manager submits that the arbitration clauses are null and void, inoperative or incapable of being performed.[7] The Manager submits that Chapter 6 of the BCCMA provides that 'the exclusive fora are this tribunal and specialist adjudication' (and that the arbitration clauses are 'void for illegality').[8]

[42] The Body Corporate's primary submissions are that:[9]

(a) the arbitration clauses are not, to a prima facie standard, null and void, inoperative or incapable of being performed (and the Manager cannot demonstrate, to the reasonable satisfaction of the Tribunal, that the Manager's submissions are 'so weak as to be not sustainable');

(b) it is for the arbitrator to rule on his or her own jurisdiction under s 16 of the CAA.

The proper approach to s 8 of the CAA

[43] In *Hancock Prospecting Pty Ltd (ACN 008 676 417) and Ors v Rinehart and Ors* (*Hancock*),[10] the Full Federal Court said the following in relation to the analogue provision of s 8 in the *Commercial Arbitration Act 2010* (Cth):[11]

(a) at [378]:

> Thus, the words of Art 8 and s 8 should be read and given content against the background, first, that the Court is not required to decide the matters in the proviso; secondly, that the competence principle is wide enough to permit the arbitral tribunal to decide any question of jurisdiction, including whether the arbitration agreement came into existence; and, thirdly, that that decision by the arbitral tribunal is not final, the Court having the final say on the question. A further consideration is that s 8 should, conformably with its language, be construed to facilitate, not impede, the process of arbitration: s 1C(1) of the CA Act.

(b) at [149]:

> … The Court's role in s 8 is not to act as a court of summary disposal filtering the matters that are suitable for arbitration.

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7 Manager's submissions, [4]-[23], esp. [16].
8 Manager's submissions, [23].
9 Body Corporate's submissions in reply, [10]-[13].
10 (2017) 257 FCR 442 (Allsop CJ, Besanko and O'Callaghan JJ).
11 In my view, the High Court decision on appeal from this decision does not affect the stated principles: *Rinehart v Hancock Prospecting Pty Ltd* (2019) 267 CLR 514.

[44] In this context, the Body Corporate relies upon various provisions of the CAA including, relevantly in my view:

(a) s 1AC which provides:

(1) The paramount object of this Act is to facilitate the fair and final resolution of commercial disputes by impartial arbitral tribunals without unnecessary delay or expense.

(2) This Act aims to achieve its paramount object by—

(a) enabling parties to agree about how their commercial disputes are to be resolved (subject to subsection (3) and such safeguards as are necessary in the public interest); and

(b) providing arbitration procedures that enable commercial disputes to be resolved in a cost-effective manner, informally and quickly.

(3) This Act must be interpreted, and the functions of an arbitral tribunal must be exercised, so that (as far as practicable) the paramount object of this Act is achieved.

(4) Subsection (3) does not affect the application of the *Acts Interpretation Act 1954*, section 14A for the purposes of interpreting this Act.

(b) s 5 which provides:

In matters governed by this Act, no court must intervene except where so provided by this Act.

(c) s 16 which provides:

(1) The arbitral tribunal may rule on its own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement.

(2) For that purpose, an arbitration clause which forms part of a contract is to be treated as an agreement independent of the other terms of the contract.

(3) A decision by the arbitral tribunal that the contract is null and void does not of itself entail the invalidity of the arbitration clause.

Note—

The Model Law provides that such a decision does not 'ipso jure' entail the invalidity of the arbitration clause.

(4) A plea that the arbitral tribunal does not have jurisdiction must be raised not later than the submission of the statement of defence.

(5) A party is not precluded from raising such a plea by the fact that the party has appointed, or participated in the appointment of, an arbitrator.

(6) A plea that the arbitral tribunal is exceeding the scope of its authority must be raised as soon as the matter alleged to be beyond the scope of its authority is raised during the arbitral proceedings.

(7) The arbitral tribunal may, in the case of a plea referred to in subsection (4) or (6), admit a later plea if it considers the delay justified.

(8) The arbitral tribunal may rule on a plea referred to in subsection (4) or (6) either as a preliminary question or in an award on the merits.

(9) If the arbitral tribunal rules as a preliminary question that it has jurisdiction, any party may request, within 30 days after having received notice of that ruling, the Court to decide the matter.

(10) A decision of the Court under subsection (9) that is within the limits of the authority of the Court is final.

(11) While a request under subsection (9) is pending, the arbitral tribunal may continue the arbitral proceedings and make an award.

Note—

This section (other than subsection (10)), is substantially the same as Art 16 of the Model Law.

Subsection (10) makes it clear that, although a decision of the Court is generally final, review of a decision of the Court that is not made within the limits of its powers and functions is not precluded.

The exceptions to s 8 of the CAA

'null and void'

[45] In *Hancock*, the Court expressed the view that the phrase 'null and void' is to be limited to circumstances where 'it is commonly internationally recognised that the consequence of the vitiating consideration is to nullify or render void a contract, such as in the consequence of duress, mistake, fraud, or fundamental policies'.[12] I leave open the question of whether the operation of Chapter 6 of the BCCMA arguably falls within the scope of 'fundamental policies'.

'inoperative'

[46] In *WCX M4-M5 Link AT Pty Ltd v Acciona Infrastructure Projects Australia Pty Ltd (No 2)* (WCX),[13] Rees J said the following in relation to the meaning of 'inoperative':[14]

> Generally, "inoperative" has been interpreted across jurisdictions implementing the Convention and the Model Law as meaning that the arbitration agreement has ceased to have effect for the future, either for a specific type of dispute or at large. An arbitration agreement may be "inoperative" as it is unenforceable, has been amended by a further agreement, is the subject of *res judicata*, has been set aside by a Court, has been frustrated or discharged by breach or by reason of waiver, estoppel, election or abandonment or has otherwise been repudiated.

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12 See [381].
13 [2022] NSWSC 505.
14 At [117].

[47] In *FamilyMart China Holding Co Ltd v Ting Chuan (Cayman Islands) Holding Corporation*,[15] the Privy Council recently considered the operation of s 4 of the *Foreign Arbitral Awards Enforcement Act* (1997 Revision) which is in the following terms:

> The court of a Contracting State, when seized of an action in a matter in respect of which the parties have made an agreement within the meaning of this article, shall, at the request of one of the parties, refer the parties to arbitration, **unless it finds that the said agreement is null and void, inoperative or incapable of being performed**.
>
> (emphasis added)

[48] In relation to the meaning of 'the arbitration agreement is … inoperative', the Privy Council said:[16]

> 70. **On the authorities there are two broad circumstances in which an arbitration agreement may be inoperative. The first is where certain types of dispute are excluded by statute or public policy from determination by an arbitral tribunal. The second is where the award of certain remedies is beyond the jurisdiction which the parties can confer through their agreement on an arbitral tribunal. The Board refers to the first type as "subject matter non-arbitrability" and to the second as "remedial non-arbitrability"**.
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> 71. **Subject matter non-arbitrability can arise where the state intervenes by statute to preserve a right of access to the courts.** Examples of such in English law in the field of employment and discrimination can be found in section 203 of the Employment Rights Act 1996 and section 144(1) of the Equality Act 2010, which, subject to specified exceptions, prevent parties by agreement from contracting out of an employee's right to have access to an employment tribunal, or in the latter Act the courts. Subject matter non-arbitrability may also arise as a result of public policy considerations. In the Singaporean case of *Larsen Oil and Gas Pte Ltd v Petropod Ltd* [2011] 3 SLR 414, ("*Larsen*") V K Rajah JA, delivering the judgment of the Singapore Court of Appeal, at para 44 recognised two grounds for excluding from arbitration a dispute which fell within the scope of an arbitration agreement. The first was where the legislature had precluded the use of arbitration to determine the particular type of dispute and the second was where "there is an inherent conflict between arbitration and the public policy considerations involved in that particular type of dispute". *Larsen* was concerned with claims by the liquidator of an insolvent company for the avoidance of unfair preferences and payments made with an intention to defraud a creditor which arose only on the onset of insolvency and could be pursued by the liquidator of the insolvent company for the benefit of the company's creditors. The court refused the application by Larsen, the recipient of the alleged preference, to stay the legal proceedings for arbitration of the dispute on grounds of public policy, namely that it would affect the substantive rights of the company's creditors and undermine the policy aims of the insolvency regime.

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15 [2023] UKPC 33.

16 At [70]-[73].

72. **The underlying concept of subject-matter non-arbitrability is that there are certain matters which in the public interest should be reserved to the courts or other public tribunals for determination. But there is no agreement internationally as to the kinds of subject matter or dispute which fall within subject matter non-arbitrability**. In the 2001 Companion Volume to their book on Commercial Arbitration Lord Mustill and Stewart Boyd stated (p 71):

> "Since different states have their own traditions and precepts, differing radically from state to state, on matters of politics, economics, morality and the like, it is not surprising that equally radical divergences can be found when each state identifies the matters which are regarded as too important to be left to private dispute resolution."

73. A similar statement can be found in Born, *International Commercial Arbitration*, 3rd ed (2021) Vol I, p 1029, para 6.01 in which the author states:

> "Although the better view is that the [New York] Convention imposes international limits on Contracting States' applications of the nonarbitrability doctrine… the types of claims that are nonarbitrable differ from nation to nation. Among other things, typical examples of nonarbitrable subjects in different jurisdictions include selected categories of disputes involving criminal matters; domestic relations and succession; bankruptcy; trade sanctions; certain competition claims; consumer claims; labor or employment grievances; and certain intellectual property matters. Over the past several decades, the scope of the non-arbitrability doctrine has materially diminished in most developed jurisdictions.
>
> As these examples suggest, the types of disputes which are nonarbitrable nonetheless almost always arise from a common set of considerations. The nonarbitrability doctrine rests on the notion that some matters so pervasively involve either 'public' rights and concerns, or interests of third parties, that agreements to resolve such disputes by 'private' arbitration should not be given effect." (Footnotes omitted)

(emphasis added)

[49] In my view, it is at least arguable that the concept of 'subject matter non-arbitrability' may be equated with an arbitration agreement being 'unenforceable' as identified by Rees J in *WCX*.

'incapable of being performed'

[50] In relation to this phrase, in *Bulkbuild Pty Ltd v Fortuna Well Pty Ltd & Ors*,[17] Bowskill J (as her Honour then was) said:[18]

> [15] … The meaning of "incapable of being performed" in a provision such as s 8 is discussed in *Novawest Contracting Pty Ltd v Brimbank City Council* [2015] VSC 679 at [22]-[30] and in Broken Hill City Council v Unique Urban Built Pty Ltd [2018] NSWSC 825 at [33]-[58]. In both cases, reference is made to a decision of the High Court of Singapore in *Sembawang Engineers and Constructors Pte Ltd v Covec (Singapore)*

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17 [2019] QSC 173.

18 At [15]-[16].

Pte Ltd [2008] SGHC 229 in which the following was said in relation to the term "incapable of being performed" (at [42]):

> "[T]his term would relate to the capability or incapability of parties to perform an arbitration agreement. In Mustill & Boyd, *Commercial Arbitration*, it is stated the expression would suggest 'something more than mere difficulty or inconvenience or delay in performing the arbitration' (at p 465). There has to be 'some obstacle which cannot be overcome even if the parties are ready, able and willing to perform the agreement' (*id* at p 465). In Margaret L Moses, *The Principles and Practice of International Commercial Arbitration* (Cambridge University Press, 2008), some examples of situations where an arbitration agreement has become incapable of being performed are given. It is stated (id at pp 32-33):
>
> > 'An arbitration agreement could be incapable of being performed, if, for example, there was contradictory language in the main contract indicating the parties intended to litigate. Moreover, if the parties had chosen a specific arbitrator in the agreement, who was, at the time of the dispute, deceased or unavailable, the arbitration agreement could not be effectuated. In addition, if the place of arbitration was no longer available because of political upheaval, this could render the arbitration agreement incapable of being performed. If the arbitration agreement was itself too vague, confusing or contradictory, it could prevent the arbitration from taking place.'"

[16] Mere inconvenience, such as might arise if the claims against the second and third defendants were permitted to be actively pursued in the court, at the same time as the arbitration of the claim against the first defendant, does not render the arbitration agreement "incapable of being performed".

(citation omitted)

Discussion

[51] The Manager submits[19] that the 'exclusive process' for resolution of this dispute is set out in s 229 of the BCCMA and the parties cannot contract out of the BCCMA (by virtue of s 318), with the result that the arbitration clauses 'contradict' and, therefore, 'contract out' of the BCCMA, specifically s 229 of the BCCMA.

[52] Section 229 of the BCCMA provides:

> (1) Subsections (2) and (3) apply to a dispute if it may be resolved under this chapter by a dispute resolution process.
>
> *Notes—*
>
> 1 For a dispute about a body corporate decision under section 47A, see section 47AA.

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[19] Manager's submissions, [16].

2 For disputes about a decision of a body corporate committee under section 410, or a body corporate decision under section 411, see section 412(5).

(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; or

(b) an order of the appeal tribunal on appeal from an adjudicator on a question of law.

(4) However, subsections (2) and (3) do not apply to a dispute if—

(a) an application is made to the commissioner; and

(b) the commissioner dismisses the application under part 5.

(5) Also, subsections (2) and (3) do not limit—

(a) the powers of QCAT under the QCAT Act to—

(i) refer a question of law to the Court of Appeal; or

(ii) transfer a proceeding, or a part of a proceeding, to the Court of Appeal; or

(b) the right of a party to make an appeal from QCAT to the Court of Appeal under the QCAT Act.

[53] Section 318 of the BCCMA provides:

> A person can not waive, or limit the exercise of, rights under this Act or contract out of the provisions of this Act.

[54] In *The Body Corporate for Liberty CTS 27241 v Batwing Resorts Pty Ltd* (*Batwing*),[20] Dalton J (as her Honour then was) refused to enforce an arbitral award pursuant to s 33 of the *Commercial Arbitration Act 1990* (Qld), because the arbitration was 'ineffective' to resolve the dispute between the parties as a result of the provisions of Chapter 6 of the BCCMA. Her Honour said:[21]

> I find that leave to enforce the arbitration award should be refused because the arbitration was ineffective to resolve the dispute between the applicant and the respondent. This conclusion is based on the provisions of chapter 6 of the BCCMA. The dispute between the body corporate and Batwing was a dispute

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20 [2012] QSC 340.

21 At [36].

> as defined by s 227(1)(d) of the BCCMA. Section 229 goes on to provide exclusive remedies for disputes which may "be resolved under this chapter by a dispute resolution process". It seems to me that the matter is a "complex dispute", at least within the meaning of s 149B of the BCCMA because it is a dispute about a contractual matter concerning the engagement of Batwing as a caretaking service contractor for a community title scheme. The dispute as to the amount to be paid to Batwing under the OMA, after deletion of the security services from the scope of works in that contract, is within the definition of "contractual matter" in Schedule 6 to the BCCMA, concerning, as it does, Batwing's rights under the terms of the OMA and the body corporate's duties thereunder. **Section 229(2) provides exclusive remedies for the resolution of complex disputes. They do not include arbitration by a private arbitrator. While the wording of the section is peculiar, it has been interpreted as meaning that the only manner in which a dispute caught by the section can be resolved is by the prescribed means.**
>
> (citation omitted, emphasis added)

[55] Her Honour cited the following decisions which are also relied upon by the Manager: *James v Body Corporate Aarons Community Title Scheme 11476*[22] and *Henderson and Anor v Body Corporate for Merrimac Heights CTS 19563*.[23]

[56] In my respectful view, the statement emphasized in paragraph [54] above is plainly a correct statement of principle and, subject to the impact of the subsequent enactment of the CAA, I would consider myself bound to apply it in the present case.

[57] Whilst I am doubtful that the operation of the CAA overrides or displaces the operation of s 229 of the BCCMA (in conjunction with s 318) (and I consider it at least reasonably arguable that the arbitration clauses are inoperative (or possibly 'void')):

(a) I am not satisfied that the contrary argument is so weak as to justify a concluded finding that one of the exceptions to s 8 of the CAA applies, particularly having regard to the terms of s 1AC and s 5 of the CAA (and that the CAA closely follows commercial arbitration legislation enacted in other Australian jurisdictions 'to ensure the greatest possible harmonisation across Australian jurisdictions');[24]

(b) I consider that:

(i) the question of jurisdiction is appropriately a matter to be decided by an arbitrator acting pursuant to the arbitration clauses, having regard to the authorities identified by the Body Corporate;[25] and

(ii) the dispute must be referred to arbitration pursuant to s 8 of the CAA.

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22 [2002] QSC 386, confirmed on appeal at [2004] 1 Qd R 386, 390.

23 [2011] QSC 336, [112].

24 CAA, Part 1A.

25 *King River Digital Assets Opportunities SPC v Salerno* [2023] NSWSC 510, [33]-[34]; *Dialogue Consulting Pty Ltd v Instagram, Inc* (2020) 291 FCR 155, [155].

Grant of a stay?

[58] In *4D Electrical Qld v Greyburn Pty Ltd*,[26] Senior Member Brown concluded, after extensive analysis, that the combined effect of s 28(1), s 28(2), s 58(1) and s 62(1) of the *Queensland Civil and Administrative Tribunal Act 2009* (Qld) is to confer upon the Tribunal the power to order a stay of proceedings if it is in the interests of justice to do so.[27] I respectfully agree with the conclusion expressed by Senior Member Brown.

[59] In the circumstances, I consider that it is appropriate to grant a stay of the current Tribunal proceeding but that the stay should be limited to a period of three months (subject to any further extension that may be granted by the Tribunal), given that there is a prospect that the adjudicator may decide that he or she has no jurisdiction to decide the dispute because of the operation of Chapter 6 of the BCCMA (in which event the proceeding should continue in the Tribunal).

[60] It follows that the question of costs should be reserved.

Orders

[61] For the above reasons, I order that:

(a) the dispute the subject of the Application to resolve a complex dispute (excluding lot entitlement disputes) – *Body Corporate and Community Management Act 1997* filed on 5 January 2022 is referred to arbitration pursuant to s 8 of the *Commercial Arbitration Act 2013* (Qld);

(b) this proceeding is stayed for a period of three months from the date of the Decision;

(c) a directions hearing is to be listed on a date later than three months from the date of the Decision, with such date to be advised by the Registry;

(d) the question of costs is reserved.

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26 [2020] QCAT 74.

27 At [18]-[35].