

13/04; [2004] VSC 88

SUPREME COURT OF VICTORIA

NGUYEN v BODY CORPORATE STRATA PLAN NUMBER 34299

Balmford J

18 February, 31 March 2004 — (2004) 11 VR 86

CIVIL PROCEEDINGS – BODY CORPORATE – SPECIAL FEE LEVIED BY BODY CORPORATE – EXPENDITURE ON ITEM NOT INCURRED BY BODY CORPORATE – WHETHER MEMBER OF BODY CORPORATE REQUIRED TO PAY SPECIAL FEE – GENERAL MEETING OF BODY CORPORATE NOT CONVENED IN ACCORDANCE WITH REGULATION – DECISION BY BODY CORPORATE TO LITIGATE NOT INVALID – MAGISTRATE NOT REQUIRED TO DISMISS COMPLAINT – COSTS – WHETHER MAGISTRATE SHOULD HAVE ORDERED NO COSTS OR A LESSER AMOUNT: SUBDIVISION ACT 1988, S29; SUBDIVISION (BODY CORPORATE) REGULATIONS 2001, RR202, 207, 302, 403; MAGISTRATES' COURT ACT 1989, S105.

N. was a member of a body corporate. At a general meeting of the body corporate it was resolved to strike a special levy of \$264 per unit to cover the cost of repairs to a toilet which had been damaged by a motor vehicle. Subsequent to the meeting, the insurer of the property made good the cost of the work so that no extraordinary item of expenditure arose. N. refused to pay the amount of \$264 and also three quarterly service contributions totalling \$510. Legal proceedings were initiated against N. and upon the arbitration hearing, the magistrate made an order for the total amount owing including the \$264 plus costs. Upon appeal—

HELD: Appeal allowed in respect of the order for \$264. Otherwise appeal dismissed.

1. The resolution authorising the special levy was made on the basis of a false assumption, namely that the insurance policy of the body corporate would not cover the works in question. As the insurer made good the cost of the work, no extraordinary item of expenditure arose. In those circumstances the regulations could not empower the body corporate to recover the fee or charge from a member who had not paid it.

2. At its general meeting in 2003, the body corporate resolved to continue efforts to obtain payment of the outstanding monies from N. Whilst the meeting was not convened in accordance with the regulations and the resolution was thereby invalid, it was not possible to determine whether the resolution incorporated a decision to litigate or merely to continue implementing an earlier decision to litigate. In those circumstances, despite the invalidity of the meeting in 2003, it was not open to find that the decision to litigate was invalid. Accordingly, the magistrate was not required to dismiss the complaint.

3. In relation to the question of costs, the body corporate was essentially successful thereby entitling it to an award of costs in its favour. While the award of costs is discretionary, there were no special circumstances existing which would justify an order refusing costs.

Berbette v Hansa [1976] VicRp 35; [1976] VR 385, applied.

BALMFORD J:

Introduction

1. This is an appeal on a question of law under section 109 of the *Magistrates' Court Act* 1989 ("the Act") from a final order made on 19 June 2003 by the Magistrates' Court at Melbourne constituted by Ms Patrick, Magistrate, conducting an arbitration pursuant to section 103 of the Act. The Magistrate ordered judgment for the respondent ("the body corporate") against the appellant ("Ms Nguyen") in the sum of \$774 together with costs of \$3475.05 and interest of \$71.68.

2. On 10 September 2003 Justice Redlich found the following questions of law to be raised on the appeal:

(a) was the unpaid special fee of \$264.00, levied on the 5 May 2003 by the body corporate pursuant to Regulation 202(1)(b) of the Subdivision (Body Corporate) Regulations 2001 ("the regulations"), an amount owing to the body corporate at the time of the Magistrate's order when the extraordinary item of expenditure for which the special fee had been levied had not been and would not be incurred by the body corporate;

It is common ground that the date in that question should read “6 May 2002”.

(b) was the general meeting of the [body corporate] on 5 May 2003 convened in accordance with regulation 403(2) of [the regulations];

(c) if the answer to (b) is no, whether the learned Magistrate, conducting an arbitration pursuant to section 102 of [the Act], was required by section 103(4) of [the Act] to dismiss the complaint;

(d) if the answer to (c) was no, whether the Magistrate should have made no order as to costs or ordered [Ms Nguyen] to pay a lesser amount by way of costs having regard to the provisions of section 103 and section 105 of [the Act].

3. It is to be assumed that the body corporate was incorporated on the registration of strata plan of subdivision number 34299 by virtue of section 28 of the *Subdivision Act* 1988 (“the Subdivision Act”). Section 29 of the Subdivision Act reads:

29. Provisions applying to bodies corporate

(1) A body corporate has perpetual succession and a common seal and is capable of suing and being sued in its own name.

(2) A body corporate and its members have the constitution, duties, functions, powers, rights and liabilities specified in the regulations.

4. The relevant provisions of the regulations read as follows, so far as relevant:

201. Functions of bodies corporate

A body corporate has the following functions—

(a) to repair and maintain—

(i) the common property;

(ii) the chattels, fixtures, fittings and services related to the common property or its enjoyment;

(iii) the equipment and services for which an easement exists for the benefit of the land affected by the body corporate;

(b) to manage and administer the common property;

(c) to take out, maintain and pay premiums on insurance required or permitted by any Act or Division 4 of this Part and any other insurance the body corporate considers appropriate;

202. Powers of bodies corporate

(1) A body corporate has all the powers that are necessary to enable it to perform its functions, including, but not limited to, the following powers—

(a) to set fees intended to cover general administration and maintenance, insurance and other recurrent obligations of the body corporate, based on lot liability and to determine the times for payment of these fees;

(b) to levy special fees or charges designed to cover extraordinary items of expenditure, based on lot liability;

(c) to acquire, hold and dispose of personal property for the use of members of the body corporate and the occupants of lots and the general public;

(d) to borrow, repay and invest money;

(e) to establish and operate any bank account consistent with current business practice;

204. Recovery of amounts owed to the body corporate

The body corporate may recover any amount owed to the body corporate in a court of competent jurisdiction.

207. Repairs and maintenance of common property

(1) The body corporate must keep in a state of good and serviceable repair and maintain—

(a) the common property;

(b) the chattels, fixtures, fittings and services related to the common property or its enjoyment;

(c) the equipment and services for which an easement exists for the benefit of the land affected by the body corporate;

(2) The body corporate does not have to maintain any service that is exclusively for the benefit of one lot.

(3) For the purposes of this regulation, the body corporate may carry out any necessary repairs, maintenance and other works on common property.

302. Appointment of manager

(1) A body corporate may, by ordinary resolution, appoint a person to be the manager of the body corporate.

(2) A manager need not be a member of the body corporate.

303. Payment of manager

(1) If the manager is to receive a fee, the body corporate must use Form 4 to appoint the manager.

310. Delegation

(1) A body corporate may by instrument delegate all or any of its powers and functions to a member or officer of the body corporate, except— ...

(2) A body corporate may by instrument delegate its power of delegation to the secretary or manager of the body corporate.

(3) Without limiting any other conditions that may be imposed, a power of delegation under sub-regulation (2) must be granted on condition that— ...

(b) the manager may only sub-delegate to an employee of the manager.

(4) In this regulation “officer” includes secretary and manager.

403. Who may convene annual general meetings?

(1) The first meeting of a body corporate convened under regulation 401 is the first annual general meeting.

(2) All other annual general meetings must be convened either by the manager acting on the authority of the committee, the secretary, the chairperson of the committee or in the absence of a committee, by a member or the manager.

5. The amount of \$774 which the Magistrate ordered Ms Nguyen to pay was made up of three quarterly service contributions of \$170 each, totalling \$510 and a levy of \$264 in respect of repairs to a toilet. Ms Nguyen’s appeal against that order relates specifically not to the amount of \$510 but only to the levy of \$264, which is the amount referred to in question (a) in the order of Justice Redlich.

6. The Magistrate’s reasons for decision as appearing in the transcript are understandably brief. However, her findings on the facts can be inferred from what she did say, and no issue arises in that regard.

Question (a)

7. It appears from the minutes of the general meeting of the body corporate held on 6 May 2002 that a toilet (said in evidence to be on the common property) had been damaged by a vehicle. It was resolved at that meeting to strike a special levy of \$264 per unit to cover the cost of the removal and sealing of the toilet in accordance with a quotation which had been received from MTR Building Services. Ms Nguyen did not pay the levy. The Magistrate’s reasons read:

I am satisfied that that was a validly passed resolution and that Ms Nguyen in fact agreed with that at the time, but that later on she was able to make enquiries and that later on Mr Doran on behalf of the Brunswick franchise made enquiries and ultimately that money was refunded. As to what to do with the refund was a matter for the body corporate. And I am satisfied that the body corporate is owed that amount of \$264 from Ms Nguyen.

8. The unchallenged evidence of Ms Nguyen is that the meeting was informed that the insurance company of the body corporate would not pay the cost of the work on the toilet. The money was paid to MTR Building Services in accordance with its quotation. However, at some time after the meeting it was ascertained that in fact the insurance company would meet the cost of the work on the toilet, and in due course it did so. MTR Building Services accordingly refunded to the body corporate the money which had been paid by it. Ms Nguyen’s claim is that, as the amounts of \$264 paid by each of the unit owners by way of special levy had not, in the event, been used, and the resolution had been passed on the basis of inaccurate information, she should not be required to pay that amount, and it should be refunded to those members who had paid it.

9. Regulation 207(1) requires the body corporate to keep in a state of good repair, and maintain, the common property, and regulation 202(1)(b) empowers it to levy special fees or charges designed to cover extraordinary items of expenditure. The resolution authorising the special levy was made pursuant to those two provisions and it is not in issue that it was validly passed. However, it was made on the basis of a false assumption, namely that the insurance policy of the body corporate would not cover the works in question. And, more importantly, the insurer made good the cost of the work, and no extraordinary item of expenditure arose.

10. Mr Gilligan, for the body corporate, submitted that at the relevant time the accounts of

the body corporate were in deficit, because Ms Nguyen had not paid her service contributions. Accordingly, he submitted, it was appropriate for the manager to apply the money received by way of refund from the builder towards the deficit in the accounts of the body corporate, and to seek payment from Ms Nguyen of \$264 being the unpaid special levy.

11. The relevant meaning of the verb “levy” in the second edition of the *Oxford English Dictionary* is “to raise (contributions, taxes) to impose (an assessment, rate, toll)”.

12. The same dictionary gives three meanings for the word “designed”:

- a. marked out, appointed, designate;
- b. planned, purposed, intended; and
- c. drawn, outlined; formed, fashioned, or framed according to design.

Of those meanings, I find b. to be the meaning intended by the regulation.

13. Thus the power conferred on the body corporate by regulation 202(1)(b) is a power to raise fees or charges which are planned, purposed or intended to cover extraordinary items of expenditure. That being so, there must, in my view, be an obligation on the body corporate to expend those fees or charges only on the planned extraordinary item. If, as occurred in this case, that expenditure is not incurred and will not be incurred, having become unnecessary, and indeed, impossible to pay, because the extraordinary item has been paid for from another source, regulation 202(1)(b) does not empower the body corporate to spend the fees or charges on some other purpose, however worthy. The amounts levied must be refunded to those members who have paid them. Similarly, that regulation cannot, in those circumstances, empower the body corporate to recover the fee or charge from a member who has not paid it.

14. I was not referred to any authority relevant to this question, and I have found no authority directly in point. However, it seems to me that there are some analogies which can be drawn. While the body corporate was acting in accordance with its statutory powers, and it seems to me that the relationship between it and the owners, at least in the context of the exercise of those powers, is not one of contract, nevertheless certain cases on frustration of contract establish a principle which provides some guidance. Mason J said in *Codelfa Constructions v State Rail Authority of New South Wales*^[1]:

... in the case of frustration, as with the implication of a term, it is legitimate to look to extrinsic evidence in the form of relevant surrounding circumstances to assist us in the interpretation of the contract, unless its language is so plain that recourse to surrounding circumstances would amount to no more than an attempt to contradict or vary the terms of the contract. Cases such as *Krell v Henry* [1903] 2 KB 740 demonstrate the point. There the contract was for the hire of a flat for two particular days, the unexpressed common assumption being that the flat was hired for the purpose of viewing the Coronation processions. The Court of Appeal held that the taking place of the processions was the foundation of the contract and that the rent was not recoverable on the processions being cancelled due to the king's illness.

... So, Lord Radcliffe in *Davis Contractors* [1956] UKHL 3; [1956] AC 696 at 729; [1956] 2 All ER 145; (1956) 3 WLR 37 quoted with approval the remarks of Lord Wright in *Denny, Mott & Dickson* [1944] UKHL 3; [1944] AC 265 at 274-275; [1945] SLT 2; [1944] SC (HL) 35:

The data for decision are, on the one hand, the terms and construction of the contract, read in the light of the then existing circumstances, and on the other hand the events which have occurred.

And, as we have seen, Lord Reid was of the same opinion.

15. Similarly, assistance may be derived from the law of agency, in the principle established in *Ehrensberger v Anderson*^[2] that if a principal has entrusted money to the agent for a particular purpose which the agent has yet to apply for that purpose, or which the agent purports to apply for a different purpose, the principal may recover it as money had and received.

16. The answer to question (a) is accordingly No.

Question (b)

17. Regulation 403(2) prescribes the persons who are empowered to convene annual general meetings of the body corporate after the first annual general meeting.

18. It appears from the minutes of the general meeting of the body corporate held on 6 May 2002 that at that meeting a resolution was passed “that Melbourne Body Corporate Management Essendon, be appointed as the manager/secretary to the body corporate at the quoted fee of \$660 per annum”. Attached to the minutes is a copy of the Form 4 pursuant to regulation 303(1), executed under the seal of the body corporate, appointing Melbourne Body Corporate Management Essendon (“MBCME”) to that position.

19. The operator of MBCME was apparently a franchisee from a franchisor known as Melbourne Body Corporate Management. At some time after the meeting of 6 May 2002 and before the convening of the annual general meeting held on 5 May 2003, MBCME transferred the franchise to manage the body corporate^[3] to one Paul Doran trading as Melbourne Body Corporate Management Brunswick (“MBCMB”), which purported to take over the management of the body corporate. The body corporate was notified of the proposal and made no objection. However, MBCMB was not at that time appointed by a resolution of the body corporate as required by regulation 302(1), or by Form 4 which is required by regulation 303(1) if the manager is to receive a fee. It is obvious that MBCMB is a professional manager of bodies corporate and would receive a fee. Appointments in both forms were effected as the first item of business at the meeting of 5 May 2003.

20. However, at the time when the meeting of 5 May 2003 was convened, MBCMB was purporting to act as manager and secretary of the body corporate, and in that capacity purported to convene that meeting. As MBCMB had not, at that time, been appointed in accordance with the requirements of the regulations, its purported appointment was invalid. Thus it was at that time not the manager or secretary of the body corporate, and it is not suggested that it fell within any of the other categories of persons entitled under regulation 403(2) to convene an annual general meeting. Accordingly, the meeting was not convened in accordance with that provision.

21. The answer to question (b) is accordingly No. I note that the Magistrate did not find it necessary to rule on this issue, but Redlich J found it to be one of the questions of law to be raised on the appeal. As a result of my finding on question (b) it is necessary for me to consider question (c).

Question (c)

22. This question was argued by both parties on the tacit assumption that the litigation against Ms Nguyen was initiated on the authority of a resolution by the body corporate at the meeting of 5 May 2003, and on the basis that if the meeting was invalid then the resolution was also invalid. However, all that the minutes disclose in that regard is the following item:

Status Report on Recovery of Outstanding Arrears

The Manager advised members of the progress to date in obtaining payment of contribution arrears from the owner of Unit 2 which, including legal costs, now total \$1924.20. He reported that the solicitor who has acted for the Body Corporate since September 2002 has, as a result of failing to obtain payments of arrears, applied to the Magistrates’ Court for a hearing date, expected to be within six to eight weeks. Costs of the action to the Body Corporate to date total \$548.17 which have in turn been charged to the account of the owner of Unit 2, as will all further legal costs. On behalf of Unit 2, Mr Nguyen indicated that the court action would be fully contested, and that members of the Body Corporate should be aware that not all court costs would be recoverable from the owner of Unit 2 if the court ruled in favour of the Body Corporate. It was resolved that the Manager continue efforts to obtain payment of the outstanding monies from Unit 2.

23. It is not possible to determine, on the basis of that item, whether the resolution incorporated a decision to litigate, or merely to continue implementing an earlier decision to litigate. The report that the solicitor has “applied to the Magistrates’ Court for a hearing date” would indicate that the solicitor had already been instructed to proceed with litigation. No inference can be drawn as to when or by whom, and how authorised, any such instruction was given. Accordingly, despite my finding as to the invalidity of the meeting, I cannot find that the decision to litigate was invalid. Accordingly, I cannot find that the magistrate was required to dismiss the complaint. The answer to question (c) is accordingly No.

24. As to the provisions of the Act which are referred to in the question, the proceeding in the Magistrates' Court was conducted as an arbitration under Division 2 of Part 5 of the Act because the amount of monetary relief sought was less than \$5000. Section 103(4) of the Act provides that the Magistrates' Court must determine according to law any question that arises for determination in an arbitration. It seems to me that the purpose of that provision is to make clear that the informality of procedure on an arbitration provided for in section 103(2) and (3) does not extend to the making of decisions otherwise than in accordance with law. Division 1 of Part 5, which deals generally with the civil jurisdiction of the Magistrates' Court, contains no equivalent provision. Mr Gilligan submitted that the effect of section 103(4) was that the Magistrate was bound to determine any question which arose, but was not bound to deal with the question of the validity of the meeting and thus of the proceeding, because although the issue was raised by counsel for Ms Nguyen at the commencement of the hearing before the Magistrate, she expressly did not proceed with it. In view of my finding in [23] above it is not necessary for me to deal with that submission and I do not do so.

Question (d)

25. Section 105 of the Act provides that, in an arbitration where the Court awards \$500 or more, it may award costs in accordance with the regulations. At the relevant time, the *Magistrates' Court (Arbitration) Regulations 2000* provided that the Magistrates' Court might award costs in accordance with Schedule 3. The relevant provisions of the Schedule read:

1. For all professional costs including solicitors' costs and fees to counsel—
 - (a) where the amount awarded is \$500 or more but does not exceed \$3000 Not more than \$974 for each 2 hour session.
 If an arbitration hearing requires more than one 2 hour session the Court may award any further professional costs in accordance with Appendix A to the *Magistrates' Court Civil Procedure Rules 1999*.
2. Disbursements

In addition to the above amounts, money properly paid or payable out of pocket and the expenses of witnesses and interpreters are to be allowed.

26. After hearing argument, from which it appears that the proceeding had occupied slightly more than six hours, the Magistrate awarded costs, in accordance with the schedule, in respect of three two-hour periods, amounting to \$2922, plus witness expenses of \$160. Counsel indicated that other disbursements could be discussed between them, and disbursements no doubt account for the balance taking the costs up to \$3475.05, the amount which was awarded.

27. The body corporate was unsuccessful before the Magistrate in a claim against Ms Nguyen for \$262, being the cost of repairs to guttering. It was successful in its claim for the service contributions and contribution to the costs of repairs to the toilet, totalling \$774. Thus it was essentially successful. While the award of costs is discretionary (and I note the word "may" in section 105 of the Act), the settled practice is that described by Lord Sterndale MR in *Ritter v Godfrey*^[4], approved by the House of Lords in *Donald Campbell & Co Ltd v Pollak*^[5] and cited by Anderson J in *Berbette v Hansa*^[6]:

... there is such a settled practice of the courts that in the absence of special circumstances a successful litigant should receive his costs, that it is necessary to show some ground for exercising a discretion by refusing an order which would give them to him.

28. I find no circumstances in this case which would justify any interference with the order for costs which was made by the Magistrate in the exercise of her discretion. The answer to question (d) is accordingly No.

29. In summary, the answer to each of the four questions is No. I invite submissions as to the form of the orders to be made as a result of those answers and as to costs.

[1] [1982] HCA 24; 149 CLR 337 at 358; (1982) 41 ALR 367; (1982) 56 ALJR 459.

[2] [1848] EngR 1020; 154 ER 793; (1848) 3 Exch 148.

[3] As well as the management of a number of other bodies corporate previously managed by MBCME.

[4] [1920] 2 KB 47 at 52; [1918-19] All ER 714.

[5] [1927] AC 732 at 814; [1927] All ER 1.

[6] [1976] VicRp 35; [1976] VR 385 at 388.

APPEARANCES: For the appellant Nguyen: In person. For the respondent Body Corporate: Mr C Gilligan, counsel. Wundele & Co, solicitors.