

CITATION: *Coomalie Community Government Council v Roberts & Roberts* [2007]
NTMC 087

PARTIES: COOMALIE COMMUNITY GOVERNMENT
COUNCIL

v

BERTRAND JOHN PRICE ROBERTS &
DOUGLAS WALKDEN TOBERTS

TITLE OF COURT: Local Government Tribunal

JURISDICTION: Local Government Act

FILE NO(s): 20719807

DELIVERED ON: 12 December 2007 by forwarding to counsel
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JUDGMENT OF: Jenny Blokland CM

CATCHWORDS:

LOCAL GOVERNMENT – POWERS AND FUNCTIONS –

Local Government Act (NT)

Real Property Act

Land Title Act

Law of Property Act (NT)

Coomalie Community Government Council v Benjamin King [2001] NTMC 41

*Coomalie Community Government Council v The Owner of Section 1233, Hundred of
Goyder (unknown)* [2006] NTMC 077

REPRESENTATION:

Counsel:

Applicant: Ms Everett

Respondent: N/A

Solicitors:

Applicant: Cridlands
Respondent: N/A

Judgment category classification: B
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IN THE LOCAL GOVERNMENT TRIBUNAL
AT DARWIN IN THE NORTHERN
TERRITORY OF AUSTRALIA

No. 20719807

[2007] NTMC 087

BETWEEN:

**COOMALIE COMMUNITY
GOVERNMENT COUNCIL**
Applicant

AND:

**BERTRAND JOHN PRICE ROBERTS
& DOUGLAS WALKDEN ROBERTS**
Respondent

REASONS FOR DECISION

(Delivered 12 December 2007)

JENNY BLOKLAND CM:

Introduction

1. The *Local Government Act* (NT) sets out a procedure permitting Councils to apply for directions and relief from the Local Government Tribunal (“the Tribunal”) in relation to ratable land that has remained unpaid for more than three years. The parts of the *Local Government Act* (NT) (“the Act”) of direct relevance to this application are sections 94 and 226(1)(e) of the Act. Section 94 provides as follows:

94. Sale of land for unpaid rates and charges

(1) Where a rate or charge payable to a municipal council under this or another Act in relation to ratable land has remained unpaid for more than 3 years from the date on which it became payable, the council may apply to the Registrar-General to register its overriding statutory charge on the land and then

- (a) if the charge is registered before to the commencement of the *Law of Property Act* – sell the land in accordance with the *Real Property Act* as if that Act had not been repealed; or
- (b) if the charge is registered after the commencement of the *Law of Property Act* – exercise, subject to subsection (4), its power of sale under the overriding statutory charge.

(2) An application under subsection (1) is not to be made unless, in the 3 year period, the council either exercised its rights under section 92 to sue the ratepayer or applied to the Tribunal under subsection (3).

(3) Notwithstanding subsection (2), a council which, after reasonable enquiry having regard to the amount of rates and charges unpaid and the estimated value of the land or interest in land on which they are a charge, is unable to locate a person liable for payment of the rate or charge may apply to the Tribunal under section 226(1) for directions.

(4) In exercising its power of sale to sell land under an overriding statutory charge the council –

- (a) has the powers and obligations of a mortgagee specified in sections 86, 87, 89, 90, 91, 92, 93, 94, 95, 97, 98, 99, 100, 101 and 102 of the *Law of Property Act*; and
- (b) those provisions apply with the necessary changes and the council must comply with them to the extent necessary as if the council were a mortgagee within the meaning of the *Law of Property Act* and the ratepayer in respect of which the council is exercising its power to sell land were a mortgagor within the meaning of that Act who has defaulted in the payment of principal money or interest secured by a mortgage.

(5) When complying with section 89 of the *Law of Property Act*, the council must include in the notice served on the ratepayer a statement that –

- (a) if the ratepayer pays all money that is a charge on the land and all the costs relating to the registration of the overriding statutory charge or to the sale to the council at least 7 working days before the date fixed for the sale; or
- (b) if the ratepayer enters into an arrangement satisfactory to the council for the payment of the money or costs referred to in paragraph (a) within the time referred to in that paragraph,

the council will not sell the land.

Section 226(1) provides as follows:

226. Powers of Tribunal

(1) The Tribunal has jurisdiction to hear and determine an application made, or a matter referred, to it under –

- (a) section 14 (which relates to the qualification of a member to hold office);
- (b) section 22(4) (which relates to a member with an interest voting on a matter);
- (c) section 58(4) (which relates to certain non-ratable land);
- (d) section 63 (which relates to a rate book appeal);
- (e) section 94 (which relates to directions before selling land);
- (f) section 246 (which relates to the imposition of a surcharge); or
- (g) other provisions of this Act, the Regulations or another Act if it is given jurisdiction (which may be an exclusive jurisdiction) by those provisions to do so.

2. The Coomalie Community Government Council (“the Council”) seeks directions that it has taken all necessary steps to attempt to locate Bertrand John Price Roberts and Douglas Walkden Roberts (as well as their heirs and assigns), being the registered proprietors of all that piece of land being Section 1109 Hundred of Goyder, Volume 005, Folio 248 (“the Land”); that Council need take no further action and shall be deemed to have exercised its rights under Section 92 of the *Land Government Act* for the purposes of section 94(2) of the *Local Government Act*; that the Council is to apply, pursuant to Section 94, to the Registrar General to register the Council’s overriding statutory charge over the land and, once registered, the Council is to sell the Land in accordance with the relevant provisions of the *Real Property Act*. Alternatively, if the Tribunal is not satisfied the Council has fulfilled its obligations under s 94(2) of the Act, the Council seeks a direction that it give public notice of its intention to act in accordance with s 94(1) of the Act in a form to be approved by the Tribunal, and that after

taking that action the Council, on a date to be fixed by the Tribunal, is deemed to have fulfilled its obligations under s 94(2) of the Act. Additional directions sought are in respect of lodgement of the statutory charge and once registered, sale, subject to the *Law of Property Act* (NT). Costs are also sought.

3. In brief, the land the subject of the application is registered in the names of Bertrand John Price Roberts of Holm Lea Landsdown Bath, Somerset, England and Douglas Walkden Roberts C/- Messrs. Cox & Co, 16 Charing Cross, London, England (“the Owners”), (affidavit of Chief Executive Officer of Coomalie Community Government, Lisa Wain, (“LW”) sworn 7 June 2007, paras 8 and 9 and annexure LW3). As “owners” and registered proprietors, they are the persons liable to pay the rates and charges pursuant to s 77 of the Act. The Council has levied rates and charges in accordance with s 76 of the Act (LW para 8). The Owners were registered on the title on 13 May 1912 (affidavit of Meghann Louise Everett, sworn 18 July 2007, para 14 (“MLE”) and annexure MLE 14. No rates have ever been paid. Although Council and its representatives have made extensive searches, neither the owners or their heirs or assigns have been located. This of course is not surprising given the owners were registered as Tenants in common on 24 August 1920. As counsel pointed out to the Tribunal, there is no evidence that either of the owners ever lived on or visited the land.

Jurisdiction of the Tribunal

4. With respect, I note and rely on in large measure the analysis of this branch of the law by Mr Bradley CM in *Coomalie Community Government Council v Benjamin King* [2001] NTMC 41 and Mr Wallace SM in *Coomalie Community Government Council v The Owner of Section 1233, Hundred of Goyder (unknown)* [2006] NTMC 077. As noted in Mr Bradley CM’s judgment in *Coomalie Community Government Council v Benjamin King*, ss 98 and 122 of the Act create the power for Community Government

Councils to levy rates and to apply Pt 4 of the Act to strike, levy and recover the same unless there is a contrary provision relevant in the particular Community Government Scheme. A Community Government Scheme has, by virtue of s 108 of the Act, effect as a law of the Northern Territory on and from the day on which the Notice of Approval of the Scheme is published. As noted in the matter of *King* (cited above), the Coomalie Community Government Scheme (“the Scheme”), was published in the NT Government Gazette on 7 December 1990 and continues in force under Pt 5 of the Act. It follows, as is submitted on behalf of the Council by virtue of s 267(2), the Scheme became effective as a law of the Northern Territory from 9 December 1990 when the notice of the approval of the Scheme was published under s 106 (1)(a) of the Act. The Council has effectively been operating and exercising its functions and powers under the Act and its Scheme since 1990.

5. As well as vesting the Tribunal with certain powers and functions under s 94 and 226(1) (set out above), s 236 of the Act sets out the Tribunal’s power in relation to an application of this type:

236. Application under section 94 for directions

After considering an application for directions under section 94 the Tribunal may direct –

- (a) that the council need take no further action and shall be deemed to have exercised its rights under section 92 for the purposes of section 94(2);
- (b) that the council make further enquiries or that the council give public notice of its intention to act under section 94, in a form approved by the Tribunal, in a newspaper or by displaying a notice on the land, and that after taking the appropriate action the council, on a date to be fixed by the Tribunal, shall be deemed to have exercised its rights under section 92 for the purposes of section 94(2); or
- (c) that the council take such other action as the Tribunal thinks appropriate.

6. As noted in the previous decisions, the Tribunal is not bound by the rules of evidence and procedure and may inform itself on any matter in such manner as it thinks fit and act without regard to procedural technicalities of legal form. Mr Bradley CM noted s 94 “has an unusual structure” given references are made to a 3 year period, whereas s 92 gives Councils up to 6 years to sue for payment of rates and charges. As noted, when read with s 236 it becomes clear that the Tribunal has the power to order that the Council is deemed to have exercised its rights under s 92 for the purposes of s 94(2). With respect I agree with Mr Bradley CM that the Tribunal would only proceed in such a way “if it was reasonable in all the circumstances to do so.” Once the Tribunal has ruled in favour of the Council, the time limit under s 94(2) is notionally satisfied and Council may proceed in accordance with s 94(1) to the Registrar General to register its overriding statutory charge. I agree also with Mr Bradley CM that no time limit is prescribed within s 94(3) to bring an application to the Tribunal and adopt with respect his conclusion after extensive analysis that the *Limitations Act* does not apply. I note Mr Wallace SM has come to a similar conclusion and it would seem clear that the position is now fairly settled on this point. There is no reason to depart from that position.

Matters Relevant to the Exercise of the Powers and Functions of the Council

7. For the purpose of the Act, “Council” is defined to include a “community government council”. I accept Ms Lisa Wain is the Chief Executive Officer of the Council and is authorised to confirm the steps taken by Council in relation to attempting to recover the rates and charges claimed. On the material before me it is reasonable to accept the matters referred to in s 216 of the Act that need not be proven, namely:
- the constitution of Council’s community government area;
 - the constitution of Council;

- that the land is within the Council area;
- the appointment of the Chief Executive Officer;
- the presence of a quorum of Council on passing a resolution or making of an order of Council;
- whether any person(s) is an owner or occupier of land.

8. I have already noted the Council *Scheme* has been effective as a law of the Northern Territory from 9 December 1990. I accept the land in question is situated in the Coomalie/Tortilla Ward bringing it within the area controlled by the Council. The specific Council powers relevant to this application are set out in clause 14 of *the Scheme*. This includes the power of Council to do all things necessary or convenient for the performance of its functions and the power to declare and levy rates in order to raise revenue. Clause 14 of *the Scheme* provides:

Powers

- (1) The council has (in addition to the powers conferred on it by the *Local Government Act*, and, in particular, its power under section 292 of the Act to make by-laws with respect to the matters there stated) power to do all things necessary or convenient for the performance of its functions including the orderly running and control of the community government area.
- (2) Subject to subclause (3), all land within the community government area is ratable, and the council may declare and levy rates in relation to it for the purpose of raising revenue for the performance of its functions.
- (3) Land is not ratable by virtue of subclause (2) if it is land of a description which would be exempt from rating by a council of a municipality under section 97 of the *Local Government Act*.
- (4) Liability for the payment of rates declared by virtue of subclause (2) shall be determined in accordance with section 122 of the Act, and all other provisions with respect to rates contained in the Act or regulations under the Act shall apply to and in relation to rates so declared to the extent that they are capable of doing so and with any necessary modifications.

- (5) Without prejudice to the powers of charging conferred on it by section 272(2) of the Act, the council may for the purpose of raising revenue for the performance of its functions declare charges to be payable by reason of a person's residence in the community government area or his carrying on of a business in the area or his having an interest in ratable land in the area.
- (6) The council may exempt persons, or any class of persons, from all or part of the rates or charges for which they would otherwise have been liable by virtue of this clause.
- (7) The council may, by agreement with that body, take over and manage any activity of the Adelaide River Progress Association Incorporated consistent with the functions of the council.
- (8) The council may contract with the Territory or other persons in order to perform any of its functions.

9. The power to declare and levy rates must be determined in accordance with section 122 of the Act; the land must not be exempted from rating either by virtue of s 14(3) of *the Scheme* or by s 98 of the Act. By virtue of s 115 of the Act, a council has the power to do all things necessary or convenient to be done for the purpose of performing its functions; clause 13 of the Scheme lists a wide range of functions that Council can perform. It is clear by virtue of the s 98 of the Act that Community Council Schemes may provide;

- that land within the community government area is rateable;
- that Council may declare rates in relation to land within the community government area;
- for liability of a person to pay rates;
- for the imposition of charges in relation to a person who resides in or carries on business in the community government area or has an interest in ratable land in the area, whether a service is provided for or in relation to the person, business or land or not;
- for the services of notices of rates and charges; and

- that the council may exempt land or persons, or a class of land or persons, from all or part of the rates and charges for which they would otherwise have been liable.
10. It is noted that “rates” and “charges” are defined (s 3 of the Act) to include any penalties incurred for late payment.

Particular Actions Taken by Council in Compliance with the Act and Scheme

11. As set out in Chief Executive Officer Lisa Wain’s affidavit, in compliance with s 64 of the Act, Council has declared rates and charges payable for each year from 1991 to 2006/2007: (LW, para 5). In accordance with section 75 of the Act, the Declaration of Rates and Charges were published in the NT Government Gazette and the Northern Territory News for the same years: (LW, paras 6 & 7). Further, Council advertised the period 2006-2007 in its publication “Stop Press” that was also published on the Council’s website. Paragraph 8 of the affidavit confirms Council has imposed charges on the Owners and the persons who have *an interest in rateable land in the area*, whether service is provided or not in accordance with section 76 of the Act. The land is registered in the names of “Bertrand John Price Roberts of Holm Lea Landsdown Bath, Somerset, England and Douglas Walkden Roberts C/- Messrs. Cox and Co, 16 Charing Cross, London, England”. Annexure LW3 contains a copy of the Title Search for Section 1109 Hundred of Goyder entered in the Register Book Volume 005 Folio 248. Copies of the earliest and latest entries in the Rate Book of the Coomalie Community Government Council are annexed at LW4. Copies of the Rates Notices levied over the relevant time are annexed at LW5 and evidence of their gazettal as required by the *Local Government Act* is set out in LW para 13. As at 4 June 2007 the amount outstanding was \$13,029.43 and has remained outstanding for a period in excess of three years: (LW paras 14,15). The estimated value of the land is \$45,000: (see para 16 LW).

So far as can be ascertained, there has been no change in ownership as recorded by Council: (LW para 9; annexure LW3).

Searches Undertaken To Locate the Owners or others that may have an interest in the land

12. The Tribunal does not of course take the matter lightly that granting the directions sought in this case will inevitably lead to sale of the land in circumstances where the owners or others entitled to an interest could not be found. I am impressed however with the steps and searches that have been taken both locally, nationally and internationally. These steps are set out in Ms Everett's affidavit (MLE) sworn 18 July 2007. I will not repeat them here, the affidavit is available on the Court file if there is ever a need to inquire into the sufficiency of the search. A curious matter arose in relation to a caveat lodged over the land in 1920 (MLE, para 15). It was submitted and I accept that the law in force at that time in the Northern Territory was the *Real Property Act* 1886 (SA): (MLE, para 16). By virtue of ss 39 and 45 *Real Property Act* (SA) a caveat may be lodged with the Registrar General by a person claiming an interest, however the caveat is deemed to have lapsed after one month unless the person who lodged the caveat has notified the Registrar General of having taken proceedings in a Court to establish their interest. Searches undertaken with both the Supreme Court of South Australia and the Supreme Court of the Northern Territory have failed to reveal cases lodged in relation to the caveat and it is reasonable in all of the circumstances to find the caveat has lapsed: (MLE paras 18-20).
13. I agree with the submission that since no payments for outstanding rates have been received by Council and given the operation of s 90(1), non-payment of the rates creates an overriding statutory charge within the meaning of the *Land Title Act*. Section 90(1) *Local Government Act* provides as follows:

90. Rates and charges a charge on land

(1) An overriding statutory charge on land (within the meaning of the *Land Title Act*) exists for the benefit of a municipal council if, in relation to the land, any of the following are due to the council and are unpaid:

- (a) rates;
- (b) a charge made for services provided to the land or for work done in relation to the land;
- (c) costs awarded to the council by a court or the Tribunal in proceedings in relation to a rate or a charge of a type referred to in paragraph (b).

14. The statutory charge may be registered. In relation to costs, I agree with the submission and note the principle would appear to be settled that costs awarded may be included in the amount to be registered and that costs should be at 100% of the Supreme Court Scale. In that regard I note section 234 *Local Government Act* provides as follows:

234. Tribunal may order costs

(1) The Tribunal may make such orders as to costs in an application or matter before it as it thinks fit.

(2) Where a Tribunal makes an order as to costs and the costs are to be taxed by a Registrar, the costs to be applied shall be in accordance with the prescribed scale.

(3) Costs awarded by the Tribunal shall be a debt due and payable by the person ordered to pay them to the person in whose favour they are awarded.

15. I note also that once directions are given that Council has discharged its duties and is entitled to sell the land pursuant to the overriding statutory charge, ss 92 and 93 *Law of Property Act* (NT) protects the transaction and directs the application of the surplus. Those sections provide as follows:

92. Protection of purchasers

(1) If a conveyance is made in the exercise of the power of sale conferred by this Act, the title of the purchaser is not impeachable on the ground that –

- (a) no case had arisen to authorise the sale;
- (b) due notice was not given;
- (c) leave of the Court, if required, was not obtained; or
- (d) the power was otherwise improperly or irregularly exercised.

(2) A purchaser is not, either before or on conveyance, to be concerned to see or inquire whether the power of sale referred to in subsection (1) is authorised or properly or regularly exercised but a person who suffers loss or damage by the power has a remedy in damages against the person exercising the power.

93. Application of proceeds of sale

(1) The proceeds from the sale of land by a mortgagee entitled to the benefit of an overriding statutory charge are to be –

- (a) first – applied in payment of the costs, charges and expenses properly incurred by the mortgagee as incident to the sale;
- (b) secondly – applied in payment of any money owing to a person entitled under a law of the Commonwealth to priority over an overriding statutory charge;
- (c) thirdly – applied in payment of any money owing to a mortgagee entitled to the benefit of a prior overriding statutory charge having priority;
- (d) fourthly – applied in payment of the money owing to the mortgagee entitled to the benefit of the overriding statutory charge; and
- (e) further – in accordance with subsection (2)(b), (c), (d), (f) and (g) (in that sequence).

(2) The proceeds from the sale of land by the mortgagee in any other case are to be –

- (a) first – applied in payment of the costs, charges and expenses properly incurred by the mortgagee as incident to the sale;
- (b) secondly – applied in payment of money owing to a person entitled under a law of the Commonwealth to priority over a statutory charge;
- (c) thirdly – applied in payment of money owing to a mortgagee entitled to the benefit of a registered overriding statutory charge;
- (d) fourthly – applied in payment of a prior registered mortgage, if any, if the mortgagee entitled to the benefit of the mortgage has concurred in the sale and has executed a discharge of the mortgage;
- (e) fifthly – applied in payment of the money owing to the mortgagee;
- (f) sixthly – applied in payment of any subsequent mortgages in order of their priority; and
- (g) seventhly – in the case of any residue of the proceeds, paid to the person entitled to receive or give receipts for the proceeds of sale of the land.

16. Further, ss 157, 158, 159 and 176 *Local Government Act* direct how Councils are to deal with the surplus of funds received as follows:

157. Council funds

A council shall establish or cause to be established –

- (a) a general fund; and
- (b) a trust fund.

158. General fund

The income of a council relating to its general fund consists of all money and property received or receivable by it other than money required to be held in the trust fund.

159. Trust fund

(1) The trust fund of a council shall consist of the trust accounts established under this or another Act or as accounts forming part of the trust fund.

(2) A council may –

(a) open a trust account to form part of the trust fund and specify the purpose for which the account is opened; or

(b) close a trust account, not being a trust account authorised or required by or under this or another Act to be opened or kept.

(3) A council shall credit to each account of a trust fund –

(a) money granted by the Territory to the council on the condition that it shall be used for a specified purpose;

(b) money, which may include money received from a local rate or special rate, received by the council to be used for a specified purpose;

(c) money, and money received as income from property, held by the council by way of deposit or in trust for a person; and

(d) money given or bequeathed, and money received as income from property assigned, conveyed, bequeathed or devised to the council in trust for a charitable or public purpose.

176. Unclaimed deposit or trust money or property

Where a council holds money or property by way of a deposit or in trust for a person, it shall pay the money or transfer the property to or on behalf of the person in accordance with any directions or the terms of the trust but, if money has remained in the trust account for more than 10 years, the council may, in pursuance of section 44 of the *Trustee Act*, pay the money into the Supreme Court.

Directions

17. I intend to make the following Directions, subject to any technical amendments suggested by counsel when the Tribunal reconvenes:

1. That Coomalie Community Government Council (“the Council”) has taken all necessary steps to attempt to locate

BERTRAND JOHN PRICE ROBERTS and DOUGLAS WALKDEN ROBERTS (as well as their heirs and assigns), the registered proprietors of all that piece of land being Section 1109 Hundred of Goyder, Volume 005, Folio 248 (“the Land”);

2. That the Council need take no further action and shall be deemed to have exercised its rights under Section 92 of the *Local Government Act* for the purposes of section 94(2) of the *Local Government Act*;
 3. That the Council is to apply, pursuant to Section 94, to the Registrar General to register the Council’s overriding statutory charge over the Land and, once registered, the Council is to sell the Land in accordance with the relevant provisions of the *Real Property Act*;
 4. That the costs of this application to be taxed at 100% of the Supreme Court Scale be added to the amount owing under the statutory charge.
18. I will forward these reasons to counsel today and list the matter for final orders on 13 December 2007 and hear any argument on the form of the orders.

Dated this 12th day of December 2007.

Jenny Blokland
CHIEF MAGISTRATE