

CITATION: *Pine Creek Community Government Council v Holm* [2008] NTMC 022

PARTIES: PINE CREEK COMMUNITY GOVERNMENT
COUNCIL

v

HERBERT WALDEMAR OTTO HOLM

TITLE OF COURT: Local Government Tribunal

JURISDICTION: Local Government Tribunal

FILE NO(s): 20802910

DELIVERED ON: 7 April 2008

DELIVERED AT: Darwin

HEARING DATE(s): 28 February 2008

JUDGMENT OF: Jenny Blokland CM

CATCHWORDS:

LOCAL GOVERNMENT – POWERS AND FUNCTIONS

Local Government Act (NT)

Real Property Act (NT)

Administration and Probate Act (1958) (Vic)

Law of Property Act (NT)

Trustee Act (NT)

Coomalie Community Government Council v Roberts [2007] NTMC 087

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:	C
Judgment ID number:	[2008] NTMC 022
Number of paragraphs:	19

IN THE LOCAL GOVERNMENT TRIBUNAL
AT DARWIN IN THE NORTHERN
TERRITORY OF AUSTRALIA

No. 20802910

[2008] NTMC 022

BETWEEN:

**PINE CREEK COMMUNITY
GOVERNMENT COUNCIL**
Applicant

AND:

HERBERT WALDEMAR OTTO HOLM
Respondent

REASONS FOR DECISION

(Delivered 7 April 2008)

Ms BLOKLAND CM:

Introduction

1. Pine Creek Community Government Council (“the Council ”) applies for the following directions:
 1. That Pine Creek Community Government Council (“the Council”) has taken all necessary steps to attempt to locate HERBERT WALDEMAR OTTO HOLM of Melbourne Victoria (as well as his heirs and assigns), the registered proprietor of all that piece of land being Lot 7 Town of Pine Creek entered in the Register Book Volume 010 Folio 038 (“the Land”);
 2. 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);

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. Such further or other directions as this Tribunal deems appropriate.
 5. That the costs of this application be added to the amount owing under the statutory charge.
2. The application if brought pursuant to ss 94(3) and 226(1)(e) *Local Government Act* in relation to money owed for rates on land where the owner cannot be found. The directions sought would enable the applicant to sell the land, pay the rates and dispose of the surplus proceeds. Section 94 *Local Government Act* 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) *Local Government Act* provides as follows:

221. Entry of owner on occupied land to carry out work required by council

(1) Where an owner of land within a council area is required, by or under this Act, to carry out work in connection with that land or with a building or other erection on that land, the owner may serve written notice personally or by post on the occupier of the land, building or erection, as the case may be, stating particulars of the work required to be done and requiring entry with or without vehicles, machinery, workmen and others for the purpose of carrying out that work.

- 3. The subject land is Lot 7, Town of Pine Creek, entered in the Register Book Volume 010 Folio 038. “*Herbert Waldemar Otto Holm of Melbourne, Victoria*” is the registered proprietor and person liable to pay rates and charges pursuant to s 77 *Local Government Act*: (Affidavit of Susan Louise

Valentine, CEO Pine Creek Council, sworn 23 January 2008, para 10, annexure 4, “SLV” and Affidavit of Meghan Louise Everett, sworn 24 January 2008, para 3 (“MLE”). The Certificate of Title issued by the Registrar General of South Australia and Northern Territory contains an entry transferring the title in the Land to the Owner on 20 September 1894 (MLE para 4). According to searches undertaken by Ms Everett, the Owner died in 1906 in Victoria at 37 years of age. His profession is listed as “painter” on the Registry entry (para 6, MLE, annexure “MLE 5”). The attention of the Council has focussed on tracing persons who may have an interest in the estate, or more relevantly as it has turned out, tracing successive executors according to the law of Victoria.

Jurisdiction of the Tribunal

4. As with a previous matter I have dealt with, I note and rely on the analysis of the *Local Government Act* 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, by virtue of s 108 of the Act, has effect as a law of the Northern Territory on and from the day on which the Notice of Approval of the Scheme is published. The Pine Creek Community Government Scheme was approved on 14 May 1987 by the responsible Minister and gazetted on 15 May 1987. The Council was established on 15 May 1987. 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 15 May 1987 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 1987.

5. As noted in the previous decisions and adopted by me in *Coomalie Community Government Council v Roberts* [2007] NTMC 087, 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 the position appears to be settled on that point. I see no reason to depart from this position.
6. For the purpose of the Act, “Council” is defined to include a “community government council”. I accept Susan Louise Valentine 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.

Powers and Functions of Pine Creek Council Relevant to this application

7. Pine Creek Council’s functions and powers are set out in ss 11 and 12 *Pine Creek Community Government Scheme* and more broadly in ss 97, 98, 115-122 *Local Government Act*. Section 115 *Local Government Act* provides:

115. Powers of council

- (1) Subject to this Act, a council –
- (a) has the power to do all things necessary or convenient to be done for, in connection with or incidental to; and
 - (b) may do anything which is not otherwise unlawful for,
- the purpose of performing its functions.
- (2) A council may –
- (a) for the performance of its functions, grant registrations and issue permits and licences; and
 - (b) for the provision of services of a type not addressed in section 74, levy charges, fees and rents and recover amounts payable for the provision of the services.

(3) A fee charged in connection with a service provided at an airport maintained by a council may be recovered from the holder of the certificate of registration issued under the Civil Aviation Regulations of the Commonwealth for the aircraft in respect of which the service was provided, whether or not the holder of the certificate is the person to whom the service was provided.

Section 122 *Local Government Act* provides:

122. Functions of community government councils

(1) A community government council has the functions given to it by or under this or another Act or its constitution.

(1A) The Administrator, when approving a constitution under section 105, may declare that the community government council has –

- (a) of the functions of local government specified in Schedule 2, only those functions specified in the instrument of approval; or
- (b) all the functions of local government specified in Schedule 2 other than those (if any) excluded by the instrument of approval,

subject to any conditions that the Administrator thinks fit and specifies in the instrument of approval, and the council has those functions accordingly.

(1B) The Minister may, by notice in the *Gazette* –

- (a) add any function of local government specified in Schedule 2 to the functions specified by the Administrator in relation to a community government council;
- (b) amend the conditions to which a function of a community government council is subject; or
- (c) remove from a community government council a function that was specified by the Administrator or added by the Minister under paragraph (a).

(2) A community government council, in the exercise of its powers and the performance of its functions under this Act, is subject to any provision to the contrary in its constitution.

(3) A community government council may, for the purpose of performing its functions, raise revenue –

- (a) by charging for work done and for services, facilities, amenities and utilities provided; and
- (b) where rates are not levied on residential units, by imposing, in accordance with the Regulations, a charge on persons ordinarily resident in the council area who have attained 18 years of age, whether the council provides a service to the person or not and whether the person uses a service provided or not.

(4) Where, under section 98, a constitution or a council by resolution provides for rates and charges, the rates or charges may be declared by the council –

- (a) where they relate to a service provided by the council, to apply to a person whether the person uses the service provided or not;
- (b) to apply in relation to a period that commenced before the date on which the rate or charge is declared; and
- (c) to apply at different rates or amounts for different persons or classes of persons.

(5) Where rates or charges are declared under subsection (4), the provisions of this Act under Part 4 relating to the levying and collection of rates and charges shall, with any necessary changes, apply to and in relation to the rates and charges declared to the extent that they are capable of doing so.

8. Pine Creek Community Government Council has, by resolution, declared rates are payable on the land (SLV para 5); determined the Owner is the person liable to pay rates (SLV para 9); imposed charges on the Owner as the person who *has an interest in rateable land in the area*, whether a service is provided or not (SLV paras 5, 6, 10, 13) and has properly served notices of rates and charges (SLV paras 12–13). I note the terms “rates” and “charges” are both defined to include any penalties incurred for late payment in respect of them (s 3 *Local Government Act*). I am satisfied in this matter that Council has complied with the requirements to give public notice of rates to be levied by publishing details of them in both the Gazette and in a newspaper with local circulation: (ss 75, 93(1) *Local Government Act*; SLV paras 5-7). I accept that there has been no change in Ownership since Herbert Waldemar Otto Holm became the registered proprietor.

Location of the Owner or his heirs and successors

9. As noted above, the Owner died in 1906. In my view the applicant’s legal representative has conducted major searches to locate anyone claiming to be a beneficiary, heir or successor of the Owner. As well as searches of the Births, Deaths and Marriages Registries in the Northern Territory and Victoria, the applicant’s solicitor has advertised in the Northern Territory

News, the Age and the Australian newspapers to ascertain the whereabouts of any heirs and assigns of the Owner. No response was ever received as a result of those advertisements. (Paras 4, 6, 7 MLE).

Location of Executors of the Owner's Estate

10. The question of legal succession of the executors is dealt with in the *Administration and Probate Act (1958) Vic*. In short it provides that if an estate is not fully executed successive executors assume the obligation to conclude any outstanding matters relevant to the estate. Section 13 reads as follows:

- 13.** (1) An executor of a sole or last surviving executor of a testator is the executor of that testator.

This provision shall not apply to an executor who does not prove the will of his testator, and, in the case of an executor who on his death leaves surviving him some other executor of his testator who afterwards proves the will of that testator, it shall cease to apply on such probate being granted.

- (2) So long as the chain of such representation is unbroken, the last executor in the chain is the executor of every preceding testator.

- (3) The chain of such representation shall be broken by –

- (a) an intestacy; or
- (b) the failure of a testator to appoint an executor; or
- (c) the failure to obtain probate of a will;

but shall not be broken by a temporary grant of administration if probate is subsequently granted.

- (4) Every person in the chain of representation to a testator –

- (a) shall have the same rights in respect of the estate of that testator as the original executor would have had if living; and

(b) shall be to the extent to which the estate of that testator has come to his hands, answerable as if he were an original executor.

11. Solicitors for Pine Creek Community Government Council engaged historical searches in Victoria and obtained a copy of the Owner's will. (MLE para 9, annexure 8). The Owner left his entire estate to his wife, Kate Holm. The land is not specifically referred to in his will. Kate Holm obtained probate of the Owner's will on 28 July 1906. She remarried in 1912 and died in 1948. She left her entire estate to her sisters. She appointed Leslie William Quarry and Rita Irene Quarry executors of her estate. Leslie William Quarry pre-deceased Rita Irene Quarry and there was no grant on his estate. Rita Irene Quarry died on 28 March 1985. Neville David Quarry and Fay Michaela Quarry became executors of her estate. Neville David Quarry died on 21 October 2004. Contact has been made with the solicitor (Mr Downing of Home Wilkinson Lowry Lawyers) of the executor (Leon Fink) of Neville Quarry's estate. Mr Downing advised he would obtain instructions but has not contacted the solicitor for Pine Creek Council and has not returned messages. The tone of the conversation as reported in Ms Everett's affidavit tends to indicate there may not be significant interest in taking up the responsibilities of executor and administrator. For example, on being advised of the nature of the problem, Mr Downing answered, "That's the craziest thing I've ever heard. What are his options?" (MLE paras 10-18).
12. The executor of Mrs Fay Michaela Quarry's estate (who died in 2007) was also contacted and advised it was not something she wanted to do.
13. In all the circumstances, I am satisfied that a proper search has been made to locate the successive executors and it is clear that no executor wishes to assume obligations in dealing with the land.
14. 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).

15. The statutory charge may be registered. In relation to costs, as with previous applications of this type costs awarded may be included in the amount to be registered and costs should be at 100% of the Supreme Court Scale. 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.

16. 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.

17. 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

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

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

HERBERT WALDEMAR OTTO HOLM of Melbourne, Victoria (as well as his heirs and assigns), the registered proprietors of all that piece of land being Lot 7 Town of Pine Creek entered in the Register Book Volume 101 Folio 038 (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.
19. I will forward these reasons to counsel today and list the matter for final orders on 8 April 2008 at 9.45 and hear any argument on the form of the orders.

Dated this 7th day of April 2008.

Jenny Blokland
CHIEF MAGISTRATE