



Queensland  
Government

Department of  
Tourism, Fair Trading and  
Wine Industry Development

*Building Units and Group Titles Act 1980*

## NOTICE OF AN ORDER OF A REFEREE

28 January 2005

Mr Laurence Howes  
1089 Killymoon Drive  
HOPE ISLAND QLD 4212

Dear Mr Howes

**RE: ORDER 0612-2004 - ROSEBANK - 0612-2004**

Pursuant to an application for an Order made under Part V of the *Building Units and Group Titles Act 1980* in relation to GTP 3033, a certified true copy of the Order, is attached.

A notice of appeal may be lodged, with the prescribed fee, against the enclosed Order of a Referee made under Part V of the Act, in accordance with the provision of *Section 106* of the Act, not later than 21 days after this Order takes effect.

Yours faithfully

A handwritten signature in black ink, appearing to be 'AB' followed by a long horizontal stroke.

**for Commissioner for Body Corporate and  
Community Management**

ORDER OF A REFEREE  
MADE UNDER PART 5 OF  
BUILDING UNITS AND GROUP TITLES ACT 1980

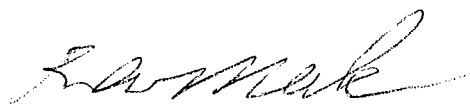
Number of Scheme: 3243  
Name of Scheme: Rosebank  
Address of Scheme: 1 Rialto Drive HOPE ISLAND QLD 4212

**TAKE NOTICE** that pursuant to an application made under the abovementioned Act by Laurence Guy Howes, the co-owner of lot 89

I **hereby order** that the application by Laurence Guy Howes, the co-owner of lot 89, for an order seeking the removal of an order by body corporate to remove an "Air Dock", which the applicant has attached to their mooring in the secondary thoroughfare waterway, is dismissed.

I **further order** that Laurence Guy Howes, the co-owner of lot 89, remove the air-dock from the Secondary Thoroughfare waterway of the scheme within 6 weeks of the date of this order, unless body corporate approval to the air dock under the by-laws is obtained within this time period.

**SIGNATURE:**

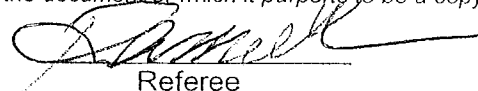


**DATE: 28/01/2005**

**RA Meek**

I HEREBY CERTIFY that the within photocopy is a true copy of the document of which it purports to be a copy.

Dated this 28th day of January 2005.

  
Referee

STATEMENT OF REFEREE'S REASONS FOR DECISION - REF 0612-2004

"Rosebank" CTS 0

The applicant, Laurence Guy Howes, the co-owner of lot 89, has sought the following order, quote

*Removal of order by body corporate to remove our Air Dock, which is currently attached to our mooring in a secondary thoroughfare waterway in tidal water.*

The applicant also sought the following interim order: order to prevent the body corporate attempting to remove from its location as stated above. On 12 October 2004, the interim order sought by the applicant was dismissed for the reason that:

*Given the undertaking of the secretary of the body corporate agreeing to take no action on the issue of removal of the Air Dock pending the "final outcome" of this dispute, I do not propose to further consider the terms of the interim order sought or to make any interim order, other than to dismiss this application in so far as it relates to the interim order.*

All land, including waterways, comprising the approved scheme at Hope Island Resort is governed by the *Integrated Resort Development Act* (the IRD Act). Section 179 of the IRD Act provides:

***179A Dealing with disputes***

*Unless otherwise provided in this Act, a dispute about the operation of this Act or the rights and obligations of persons under this Act may be dealt with under the Building Units and Group Titles Act 1980, part 5.*

Consequently, the relevant dispute resolution provisions are those under the *Building Units and Group Titles Act 1980* and not the *Body Corporate and Community Management Act 1997*, which is the generic legislation now applying to the vast majority of community title schemes operating in Queensland. Relevantly, sections 77 and 78 of the *Building Units and Group Titles Act 1980* provide as follows -

**77 General powers of referee to make orders**

(1) A referee may, pursuant to an application of a body corporate, a body corporate manager, a proprietor, a person having an estate or interest in a lot or an occupier of a lot in respect of a parcel, make an order on any person entitled to make an application under this subsection or on the chairperson, secretary or treasurer of the body corporate for the settlement of a dispute, or the rectification of a complaint, with respect to the exercise or performance of, or the failure to exercise or perform, a power, authority, duty or function conferred or imposed by this Act in connection with that parcel.

(2) Where a body corporate has a discretion as to whether or not it exercises or performs a power, authority, duty or function conferred or imposed on it by this Act, it shall be deemed to have refused or failed to exercise or perform that power, authority, duty or function only if it has decided not to exercise or perform that power, authority, duty or function.

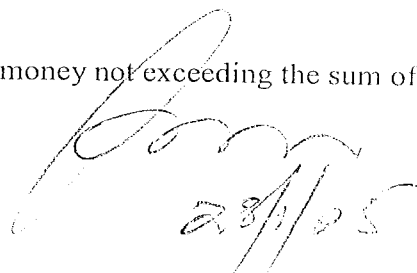
(3) Nothing in this part authorises the referee to make an order of the kind that may be made by the Court under section 25 or 26.

(4) Nothing in this part affects the generality of subsection (1), but an order in respect of any matter dealt with in any other section of this part shall not be made under this section.

**78 Further powers of referee**

(1) A referee is empowered to make an order that—

(a) requires a party to the dispute before the referee to pay money not exceeding the sum of \$1 000 to a person specified in the order;



(b) requires a party to the dispute before the referee to do, or refrain from doing, some specified act to which the application relates;

(c) strikes out for want of jurisdiction the dispute before the referee.

(2) An order made by a referee may direct that the order shall be complied with within a time limited in the order.

(3) An order made by a referee that requires the payment of money may be made to take effect instanter or so as to take effect upon default being made in complying with some other order made by the referee.

The applicant, an owner in the body corporate scheme known as "Rosebank Gardens", which is a body corporate within the "Hope Island Resort", has made application for an order seeking the reversal of a body corporate direction to remove an "unapproved attachment to (the applicant's) wet-berth mooring". The alleged unapproved attachment is the installation by the applicant of an "air dock" – "a submersible and mobile barge which is moored beside our pontoon and which elevates our boat from the water when it is not in use" to quote the applicant. The body corporate alleges that the applicant has made this "unapproved attachment" to their wet-berth mooring. The body corporate relies, in its correspondence to the applicant, on figure 28(d) of the Hope Island Resort Principal Body Corporate Development Control By-laws which provides that "devices to elevate vessels from a wet berth location are not permitted".

The applicant is challenging the applicability of this by-law stating that:

*We did not, and do not believe that the Air Dock was in breach of the By-laws as figure 28 (footnote D) is part of the Development Control By-laws that relates to the construction of moorings. It did not seem logical to consider the Air Dock to be a modification to the construction of a mooring for the reasons outlined above (mobile, not part of the property, located in tidal water beyond the quayline). ...*

The applicant seeks an order that the air dock is not in breach of any by-laws, and that on the basis of hardship to the applicant, should not be required to be removed. In correspondence with the Architectural Review Authority for the body corporate (the ARA), the applicant acknowledges that he did not apply for permission prior to purchasing the air dock, assuming that "it did not constitute a modification to our mooring and that an approval was therefore not necessary".

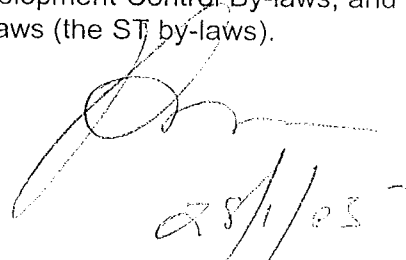
In correspondence with the ARA, the applicant has sought to rely on other legislation including *The Canals Act 1958* and *The Transport Operations (Marine Safety) Act 1994* to argue that the body corporate does not have jurisdiction in regard to the matter. In a teleconference with the parties held on Thursday 27 January 2005, I indicated to the parties that I considered my jurisdiction in this dispute limited to the consideration of the IRD Act and the Building Units and Group Titles Act 1980, and that I would not be considering arguments pertaining to the other legislation mentioned by the applicant.

The body corporate opposes the application. The ARA had resolved not to approve the air dock, and has directed the applicant to remove it.

It is not disputed that the air dock has been installed by the applicant, who did not seek or obtain prior permission of the body corporate for its installation. I note that the air dock is installed in what is described in the plan as "secondary thoroughfare". The IRD Act makes provision for the enactment of development control by-laws, primary thoroughfare by-laws and secondary thoroughfare by-laws. The body corporate has provided me with copies of the –

- Hope Island Resort Principal Body Corporate Development Control By-laws; and
- Hope Island Resort Secondary Thoroughfare By-laws (the ST by-laws).

both of which I have reviewed.



The applicant has not referred to the ST by-laws in his material, and the body corporate submission only refers to these by-laws in a general way. Even if the applicant were successful in arguing that the development control by-laws do not apply to him, which is not acknowledged, I nevertheless consider that the ST by-laws are relevant to this dispute, and I am somewhat surprised that the body corporate did not refer to these by-laws in its correspondence with the applicant, and in its submission in respect of this application. Specifically, by-law 2.04.01 provides that:

*A person must not construct, modify or vary a Mooring situated or to be situated in or on any part of the Waterway without receiving the PBC's prior written approval.*

The remainder of the by-law sets out the requirements for approval including, but not limited to:

- Written application;
- Referral of the application to the ARA "for consideration";
- A recommendation by the ARA on the application to the principal body corporate.

I referred both parties to the terms of this by-law in the teleconference. I consider that the by-law is specifically applicable to the current scenario. The applicant indicated that he had not considered the relevance of the by-law, and the body corporate solicitor indicated that its grounds and other materials did refer to this by-law albeit in a general way.

I conclude that the requirements of the by-law to be directly applicable to this dispute. I consider the applicant required the prior approval of the ARA, and thereafter the body corporate before proceeding with the installation of the air dock. It is not disputed that the applicant failed to obtain such approval. In the circumstances, I conclude that the applicant is in breach of the relevant by-law and prima facie is required to comply with the direction of the body corporate to remove the air dock.

The applicant's material raises two further or associated issues.

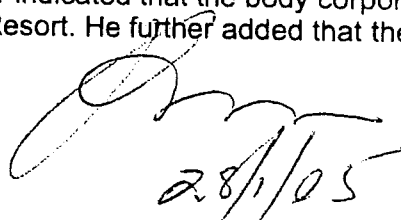
The first is that "we observed that 2 other similar barges were already present within the resort". This appears to form the basis of an argument of discrimination on the part of the body corporate.

The body corporate in its submission states that "the fact that another air dock may have (sic) been approved in waterways at Hope Island Resort is irrelevant to this issue".

I do make the observation that the IRD Act permits the making of by-laws specific to each development, with very few, if any limitations it seems to me. Moreover, many of the safeguards or consumer protection aspects of the *Body Corporate and Community Management Act 1997* have no application here. For example, under the BCCM Act (section 94), a body corporate must –

- (a) administer the common property and body corporate assets for the benefit of the owners of the lots included in the scheme; and
  - (b) enforce the community management statement (including any by-laws for the scheme); and
  - (c) carry out the other functions given to the body corporate under this Act and the community management statement.
- (2) The body corporate must act reasonably in anything it does under subsection (1).

In the teleconference, I did however raise the issue of the other alleged air docks. The applicant did refer to one other such device within "Rosebank" and another within the Resort. The solicitor for the body corporate did acknowledge that there was one other such device. I queried the circumstances of this air dock being approved. The solicitor indicated that it was most likely that the air dock was not in fact approved. The parties agreed that the owner of the other air dock was one of the developers / original owners. The solicitor further indicated that the body corporate had not approved any air dock or other like devices within the Resort. He further added that the other



air dock was currently in a state of disrepair, and in fact had "sunk" and that it was likely that the body corporate would shortly be taking action against the owner regarding this air dock.

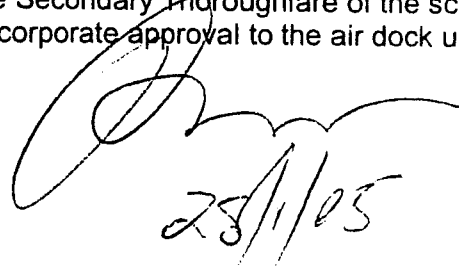
In the circumstances, I am satisfied that the body corporate is not acting in a discriminatory way in seeking to have the applicant remove the air dock.

The other aspect raised by the applicant is that of hardship. In his grounds, he states –

*... We decided to purchase the Air Dock, which cost \$12000 as we have a performance ski boat which is not suitable for anti-fouling and cannot be left in the water. There was no other practical alternative to enable use to enjoy the use of our boat as our pontoon is too small to accommodate the boat on a slipway and we have no place to store the boat on a trailer. In addition the requirement retrieve the boat and trailer from a distant location to launch it on each occasion of use would severely limit our capacity to enjoy our boat and be contrary to the purpose for which we purchased a house on a canal with a mooring.*

*... If we were compelled to remove the air dock, we have been advised by the manufacturer that it would be difficult to sell and that we could only expect to obtain \$6000-\$7000 for it. ... Removal of the air dock would therefore cause us a large amount of financial and personal hardship.*

I consider that these factors cannot justify a denial of the body corporate of its rights under the by-laws. The applicant was required to obtain approval. He failed to do so. The consequence of this is that the air dock must be removed, as it does not have approval. The hardship is a consequence of the applicant's own actions. I consider that there is no basis on which the body corporate should now be estopped from asserting its right to have the applicant comply with the by-laws. In the circumstances, I intend to dismiss the applicant's application. Moreover, I intend to go further, and to order the applicant to remove the air-dock from the Secondary Thoroughfare of the scheme within 6 weeks of the date of this order, unless body corporate approval to the air dock under the by-laws is obtained within this time period.



A handwritten signature in black ink, followed by the date 28/1/05 written in a similar cursive style.