QUEENSLAND CIVIL AND ADMINISTRATIVE TRIBUNAL

CITATION:	*Cello Court Pty Ltd v Body Corporate for Cello Court (No.3)* [2021] QCATA 110
PARTIES:	**CELLO COURT PTY LTD** **(appellant)** **V** **BODY CORPORATE FOR CELLO COURT CTS 42339** **(respondent)** **BCCM Ref: 0702-2019**
APPLICATION NO/S:	APL057-20
ORIGINATING APPLICATION NO:	BCCM Ref: 0702-2019
MATTER TYPE:	Appeals
HEARING DATE:	25 August 2021
DELIVERED ON:	3 September 2021
DECISION OF:	Member Roney QC
ORDERS:	**The appeal is dismissed.** **Costs reserved**
CATCHWORDS:	APPEAL AND NEW TRIAL – APPEAL – GENERAL PRINCIPLES – RIGHT OF APPEAL – WHEN APPEAL LIES – ERROR OF LAW – where s 289(2) of the *Body Corporate and Community Management Act* 1997 (Qld) allows a person aggrieved by an Adjudicator's order to appeal on a question of law to the Queensland Civil and Administrative Tribunal – what is error of law – whether there was an error of law REAL PROPERTY – STRATA AND RELATED TITLES – MANAGEMENT AND CONTROL – BODY CORPORATE: POWERS, DUTIES AND LIABILITIES – GENERALLY – where the applicant was the caretaker of a scheme – where the body corporate resolved to terminate the caretaker's services – where the caretaker applied to an Adjudicator for a declaration that the termination was void – where the Adjudicator dismissed the application – where the applicant appealed to the Appeal Tribunal

RESOLUTION OF BODY CORPORATE to terminate the caretaker's services on the basis that it was under external administration as referred to in the Corporations Act – Mortgagee appoints controller in relation to a secured real property of the company – where the Applicant seeks to invalidate the resolution of the body corporate on the basis that such an appointment does not constitute the company having become subject to any form of external administration
WORDS AND PHRASES – "external administration" – external administration referred to in the Corporations Law or the Corporations Act

Re Wakim; Ex parte McNally (1999) 198 CLR 511
Renard Constructions (ME) Pty ltd v Minister for Public Works (1992) 26 NSWLR 234
New South Wales v Commonwealth (1990) 169 CLR 482

Body Corporate and Community Management Act 1997 (Qld), s 94 and 100; Body Corporate and Community Management (Accommodation Module) Regulation 2008;

Corporations Act 2001 (Cth), Chapter 5; s 427(1A); Forms 504 and 505

APPEARANCES:

Appellant:	Self represented by Mr E Clarke-Wellsmore
Respondent:	C Francis, Grace Lawyers

REASONS FOR DECISION

[1] The appellant, Cello Court Pty Ltd, had a contract to provide caretaking services for the Body Corporate for Cello Court CTS 42339 ('the Body Corporate'), and was the owner of Lot 20 in the scheme. Despite being the owner, it did not hold possession of Lot 20 in that capacity but had possession and control of it under a licence it held from another entity that leased the property from it.

[2] Purportedly on the basis that a controller was appointed by the National Australia Bank to Lot 20, the Body Corporate passed a motion to terminate the caretaking agreement between Cello Court and the Body Corporate.

[3] The disputed resolution specified that the termination was pursuant to clause 9.1(d) of the Caretaking Agreement. Under the heading "Committee explanatory schedule", the voting paper provided that the Committee recommended a vote in favour of it on the

basis that the appellant was "placed under external administration" on about 12 February 2019, and sets out the terms of that clause.

[4] Clause 9.1 of the Caretaking Agreement provided a number of grounds for which the Respondent may unilaterally terminate the agreement, that is without being specifically in default under it. They were for what may be characterised as generally serious matters, going to the capacity of the appellant to properly perform the duties – fraud, dishonesty, gross misconduct or negligence, a continuing failure to remedy a breach, external administration, bankruptcy and the like. Clause 9.1 of the Caretaking Agreement stated that the respondent 'may' terminate on one of those grounds – that is, it allows a discretion not to terminate. The disputed resolution purported to exercise that discretion.

[5] The Body Corporate then gave notice of termination to Cello Court under a clause in the caretaking contract which provided a right to terminate if the appellant became 'subject to any form of external administration referred to in the Corporations Law'.

[6] The appellant sought an order Adjudicator of the Officer of the Commissioner for Body Corporate and Community Management ('the BCCM') that the resolution to terminate the agreement be declared void and of no effect, that the Body Corporate be restrained from relying on the resolution to terminate the agreement, and that any steps taken in reliance on the resolution are of no effect.

[7] Cello Court appeals the decision of the Adjudicator dated 16 January 2020. The effect of that decision was that insofar as the Body Corporate proposes to exercise a right under the terms of the agreement to terminate it, and the appellant opposes the termination, there is a dispute about both the termination of the engagement and the exercise of rights under the terms of the engagement. The appellant alleged that the Body Corporate contravened section 94(2) of Body Corporate and Community Management Act 1997 (Qld), (the Act) when it acted unreasonably in passing the disputed resolution. That dispute was held to be characterised as a dispute about a claimed contravention of the Act, as referred to in section 276(1)(a), and hence there is jurisdiction to resolve it by a departmental adjudicator's order.

[8] It was also held that to the extent the dispute may also be characterised as being about a claimed or anticipated contractual matter, the jurisdiction issue was resolved by section 276(1)(c)(i) of the Act. That section empowers a departmental adjudicator to resolve a dispute about a claimed or anticipated contractual matter about the engagement or authorisation of a person as a body corporate manager, service contractor or letting agent.

[9] Accordingly, both of sub-parts (b) and (c) of that definition were held to apply. Accordingly, it was held that the dispute about whether the agreement entitles the Body Corporate to terminate the agreement is a dispute about a contractual matter and within the jurisdiction of the Adjudicator. That issue does not arise to be determined on the Appeal, as was clarified during legal argument on the hearing of this appeal.

[10] No consideration was given to whether even if the motion was invalid, how that affected the Appellant's rights. By that I mean how an invalid or unlawful purported exercise of a contractual right affected the validity of the conduct of the Body Corporate. No party addressed this issue here or below but it seems to me to be a

critical one because what the Adjudicator was called upon to decide was as to the validity of the motion ,not the legality of the act which the passing of the motion authorised. The issue of the validity of the motion ,not the legality of the act which the passing of the motion authorised has not been an issue ventilated in this appeal.

[11] The question of whether that was reasonable conduct by the Body Corporate, whether having regard to its obligations to act reasonably under Sections 94 or 100 of the BCCM Act, or the implied obligation to so act when exercising discretionary powers to terminate a contract do not arise for consideration in this appeal either. For example, in Renard Constructions (ME) Pty ltd v Minister for Public Works (1992) 26 NSWLR 234 the New South Wales Court of Appeal held that when a discretionary right for example to terminate a contract is an explicit term of the contract, the discretionary power involved with triggering the application of such a clause requires such power to be exercised reasonably, not capriciously or for some extraneous purpose. No argument here or below relied upon that line of authority or that duty, if it applied.

[12] The parties applied for leave to be legally represented. This tribunal held that there were complexities to be considered in the appeal proceeding, as identified by the Body Corporate, and in particular, complex questions of law. In the BCCM adjudication, both parties were legally represented. The Tribunal determined that having regard to the questions of law to be considered by the Appeal Tribunal in determining the proceeding, it was in the interests of justice that it is assisted by submissions that address the relevant issues and that it was in the interests of justice to grant leave for representation to both parties. In the result, Cello Court was not legally represented.

[13] The Appellant argues that the Adjudicator made errors of law as to the construction of cl 9.1(d) of the relevant contract; the application of the *Corporations Act* 2001 (Cth) ('the Corporations Act'); whether the appointment of a controller was a form of 'external administration' sufficient to enliven cl 9.1(d) of the contract and what if any provisions of the *Corporations Act* 2001 should be applied.

[14] Cello Court CTS 42339 is governed by the Act and regulated by the Body Corporate and Community Management (Accommodation Module) Regulation 2008 (Qld). The Scheme commenced in 2011 and consists of 48 lots and common property. Octave Developments (Chinchilla) Pty Ltd ACN 133 135 627 was the original owner of the Scheme within the meaning of section 13 of the Act (the Original Owner). The Appellant is partly owned by the Original Owner; and, is related to the Original Owner as they share a Director and Secretary, Paul Wellsmore; and a Registered Office.

[15] The Original Owner (and the related Appellant, by Mr Wellsmore as their common director) exercised control over the Respondent at the First Extraordinary General Meeting (the First EGM) and the First Annual General Meeting (the First AGM), being within the Original Owner control period. During that period they caused the Respondent to enter into the original Caretaking Agreement with the Appellant dated 3 May 2011 for the purposes of section 15 of the Act. Thereafter the current Caretaking Agreement was entered into on 1 September 2012 for a term of 25 years.

[16] Clause 9.1(d) of the Caretaking Agreement relevantly provides that the Respondent (as body corporate) may terminate the Caretaking Agreement if the Appellant (as the caretaker), being a company, "*becomes subject to any form of external administration referred to in the Corporations Law*".

[17] On 18 February 2019 the National Australia Bank (NAB) acted under a security in some way and appointed someone to do something which the respondent alleges was an external administrator to the Appellant. The lack of clarity about this is that the instrument of appointment by the bank was not before the Adjudicator nor was it put before this tribunal for the purposes of the Appeal.

[18] On about 26 March 2019 the Committee of the Respondent caused a Notice of Motion to be issued to the lot owners of the Scheme, containing resolutions to commence terminating the Caretaking Agreement pursuant to clause 9.1(d) and to call the EGM to terminate the Caretaking Agreement.

[19] On 10 May 2019 the Respondent, by ordinary resolution passed at the EGM, resolved to terminate the Caretaking Agreement specifically on the basis that the Appellant had breached clause 9.1(d). It did not rely on any breach of the Caretaking Agreement or specifically clause 11.1 of the Caretaking Agreement which relevantly provided that the Appellant or its Controller must own or otherwise have the right to occupy Lot 20.

[20] The NAB took possession of Lot 20 as mortgagee exercising power of sale and listed it for sale. Lot 20 was sold under an unconditional contract with settlement due at the end of August 2019. The sale was completed on 28 August 2019 and the new owners have been registered owners since 19 September 2019 as a result of a transfer by the NAB exercising its power of sale under its registered mortgage.

[21] The respondent argues that this is important because, clause 11.1 of the Caretaking Agreement relevantly provides that the Appellant or its Controller must own or otherwise have the right to occupy Lot 20, and that it is not and has not had that right for 2 years and that the Appellant has breached clause 11.1 and it cannot remedy that breach.

[22] On 18 June 2020 the Respondent, by ordinary resolution passed by secret ballot at the Annual General Meeting held that day, resolved in the following terms to terminate the Caretaking Agreement on the basis that the Appellant had failed to comply with the RAN; "*That the Body Corporate resolves to terminate the Caretaking Agreement dated 1 September 2012 between the Body Corporate and Cello Court Pty Ltd ACN 150 664 574, to the extent that the Caretaking Agreement is determined by the Queensland Civil and Administrative Tribunal Appeal Tribunal in proceeding APL057-20 to be reinstated or otherwise remain on foot, for failure to comply with a Remedial Action Notice dated 17 April 2020.*"

[23] The Respondent notified the Appellant on 9 July 2020 that it had terminated the Caretaking Agreement effective from 15 July 2020 based upon what it contended was the unremedied (and irremediable) breach of clause 11.1.12.

[24] There is no challenge to the contention that it had terminated the Caretaking Agreement effective from 15 July 2020 based upon what it contended was the unremedied (and irremediable) breach of clause 11.1.12.So if there is to be any outcome to this appeal which somehow results in the appellant having shown it was not lawful to terminate it in 2019, if faces the reality that it may have been terminated effectively for different reasons in 2020.I do not accept the submission made for the Respondent that this made the appeal futile.

[25] As I have mentioned, the relevant clause in the caretaking contract provided a right to terminate if the appellant became 'subject to any form of external administration referred to in the Corporations Law'.

[26] The question therefore for the Adjudicator was, whether in fact, applying whatever is properly identified as the "Corporations Law", the company had become subject to any form of external administration. That might have involved an analysis of what former so-called Corporations Laws provided, and which as I identify later, was just a generic, non-statutory title for co-operatively enacted legislation put into place by the States and the Commonwealth in 1989, but which was replaced by the 2001 Corporations Act enacted by the Commonwealth Parliament. No analysis of what former so-called Corporations Laws provided was conducted by the Adjudicator and the submissions of the parties did not refer to them either.

[27] As to what might be described as constituting laws relating to Corporations in Australia, since 1988, in 1989[1], the Commonwealth tried to enact a federal law governing companies, without the need for State cooperation, based on s 51(xx) of the Constitution. That law was successfully challenged in the High Court in New South Wales v Commonwealth (1990) 169 CLR 482. The Court held that the power in s 51(xx) to make laws in relation to "foreign corporations, and trading or financial corporations formed within the limits of the Commonwealth" did not extend to allowing the Commonwealth to make a law for the incorporation of trading and financial corporations, as opposed to regulating those that were already incorporated.

[28] The Commonwealth then carried out negotiations with the States for further uniform legislation, based on a similar cooperative mechanism to that discussed above. This led to the enactment of the Corporations Act 1989 (Cth). The States passed complementary legislation, the Commonwealth Act being a schedule to the State Acts. The scheme essentially involved a purported conferral of jurisdiction on the Federal Court of Australia under the State Acts and an authorisation under the Commonwealth Act for the Federal Court to exercise such jurisdiction, so conferred. It was held in Re Wakim; Ex parte McNally (1999) 198 CLR 511 that this was a purported conferral on the Federal Court of jurisdiction not found in ss 75 or 76 of the Constitution, and was therefore invalid. Had the matter been left there, the result would have been that the Federal Court would effectively have no corporations' jurisdiction.

[29] In 2001, a fully unified system was achieved with the enactment of the Corporations Act 2001 (Cth) and Australian Securities and Investment Commission Act 2001 (Cth) based on a referral of State power to the Commonwealth.

[30] The Corporations Act 2001 was therefore the principal legislative statute that might be described as a Corporations law in Australia from 2001, although it has been frequently amended in the period since 2001.

[31] On the issue which is the foundation for this appeal, the Adjudicator held as follows;

Entitlement to terminate

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1 Reference may be made to the historical summary of the legislative enactments in Australia as to what might be described as constituting laws relating to Corporations by his Honour TF Bathurst in "The Historical Development of Corporations Law" [2013]

[44] The question of whether the respondent was entitled to terminate the agreement under clause 9.1(d) of the agreement turns on whether the applicant became "subject to any form of external administration referred to in the Corporations Law". The meaning of external administration must be answered with reference to the terms of that clause, as it is dependent on the context created by the words "any form ... referred to in the Corporations Law".

[45] I note that the "Corporations Law" referred to in clause 9.1(d) of the agreement was repealed in 2001. Its provisions are now largely repeated in the Corporations Act 2001 (Cth).

[46] A 'Historical Company Extract' for Cello Court Pty Ltd said to have been extracted from the ASIC database on 26 June 2019 describes the appellant company as having the "status" of "Externally Administered". That extract also bears a section headed "External Administration Documents" and under that lists two forms as having been lodged on 18 February 2019 (with date of effect 12 February 2019). One is form 504 which is titled "Notification that a person has been appointed controller/ entered into possession etc." and the other is form 505 which is titled "Notification of appointment or cessation as an external administrator or controller or scheme administrator".

[47] The appellant acknowledges that the ASIC extract refers to the applicant being "externally administered", but says that the Insolvency Practice Schedule (Corporations), in Schedule 2 of the Corporations Act, distinguishes the appointment of an administrator and a controller. It provides:

> A company is under external administration if the company is under administration, is the subject of a deed of company arrangement or has had a liquidator or provisional liquidator appointed in relation to it. A company is not under external administration merely because a person has been appointed as a receiver, receiver and manager or other controller in relation to the property of the company.

[48] In my view, those words indicate that the appointment of a controller may coincide with external administration but will not of itself constitute a type of external administration.

[49] There is other support, to be found in the ASIC extract referred to above, the other provisions of the Corporations Act, and information on ASIC's website, for the contention that the appointment of a controller does not constitute the appointment of an administrator.

[50] The ASIC extract referred to above, under the heading "External Administration Documents", has explanatory text "Documents relating to External Administration and/or appointment of Controller". That suggests external administration and the appointment of a controller are not the same thing.

[51] Section 435C of the Corporations Act determines when 'administration' begins and ends, and says that it "begins when an administrator of the company is appointed under section 436A, 436B or 436C." Those provisions of the Corporations Act fall under Division 2 of Part 5.3A, whereas receivers and other controllers are dealt with in the earlier Part 5.2 of the Corporations Act, and (as far as I can see) controllers are not dealt with in Part 5.3A. The same observations apply in the context of the old Corporations Law. On that basis, it could be said that there is a material difference between the appointment of a controller and an external administrator.

[52] Also, on ASIC's website in an information sheet headed "External administration, controller appointments and schemes of arrangement - most commonly lodged forms" the corporate regulator apparently distinguishes the appointment of an external administrator from the appointment of a controller. It says:

> This information sheet (INFO 29) outlines our expectations for forms commonly lodged with ASIC when:
>
> • an external administrator (liquidator, voluntary administrator or deed administrator) has been appointed to a company
>
> • a controller (receiver, receiver and manager, controller or managing controller) has been appointed over company property
>
> • an administrator of a scheme of arrangement has been appointed.

[53] However, there is also support for the contention that the appointment of a controller is a form of external administration.

[54] Firstly, as I have noted above, the ASIC extract states the applicant's status as 'externally administered'.

[55] Secondly, both of Parts 5.2 and 5.3A of the Corporations Act fall under Chapter 5 of that Act, and that chapter is headed "external administration", suggesting that at least insofar as the schema of the Corporations Act is concerned, the appointment of a controller is a form of external administration.

[56] Further support for that view can be found in the Glossary of Terms on the ASIC website. For the term "external administrator", it says:

> A general term for an external person externally appointed to a company or its property. Generally it includes:
>
> - provisional liquidators
> - liquidators
> - voluntary administrators
> - deed administrators
> - controllers
> - receivers, and
> - receiver and managers.

[57] The Glossary carries a disclaimer that it is "provided for general information only and should not be taken as constituting professional advice". Nonetheless, I consider that information in such a form would not have been provided by the corporate regulator without due consideration for its implications and hence can be given weight when it is not relied upon as professional advice.

[58] Clause 9.1 of the agreement is cast in brief and broad terms. It is not specific as to the type of external administration that could trigger the right to terminate.

> Rather, as I have noted, it refers to "any form of external administration referred to in the Corporations Law".
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> [59] In light of the above, I am not satisfied that, for the purposes of clause 9(1)(d) of the agreement, the appointment of a controller could not be characterised as a form of external administration referred to in the Corporations Law. The applicant has not adduced any evidence that, at the time the agreement was entered into, the parties intended to adopt a narrower or more strict interpretation of 'externally administered' that would not encompass the appointment of a controller.
>
> [60] Hence, I am not satisfied that the appointment of a controller could not trigger a right for the respondent to terminate the agreement. If that seems unfair to the applicant, the response must be that those were the agreed terms of the engagement.

[32] Hence the Adjudicator's analysis was based on an examination of and the drawing of inferences from the content of an 'Historical Company Extract' for Cello Court Pty Ltd obtained from ASIC, the language of Section 435C of the Corporations Act, that Parts 5.2 and 5.3A of the Corporations Act fall under Chapter 5 of that Act which chapter is headed "external administration", and the Glossary of Terms on the ASIC website.

[33] The Adjudicator held that the "Corporations Law" had been "superseded" by the Corporations Act 2001 and proceeded to base his decision on the current legislation. He did not consider the terms of the former legislation. In his consideration of the Corporations Act, the Adjudicator referred to Schedule 2 entitled "Insolvency Practice Schedule", but Schedule 2 was only introduced as a schedule to the Corporations Act in 2016, after this Caretaker Agreement was entered into.

[34] It is true that Schedule 2 the Corporations Act from 2016 defined external administration as: "5-15 Meaning of external administration of a company A company is taken to be under external administration if: (a) the company is under administration; or (b) a deed of company arrangement has been entered into in relation to the company; or (c) a liquidator has been appointed in relation to the company; or (d) a provisional liquidator has been appointed in relation to the company. Note: A company is not under external administration for the purposes of this Schedule merely because a receiver, receiver and manager, or other controller has been appointed in relation to property of the company".

[35] It is also true, and common ground that there was no statute that existed at the time the caretaking agreement was entered into that was called the "Corporations Law", whether State or Commonwealth.

[36] Although there was no statute that existed at the time the caretaking agreement was entered into or since that was called the Corporations Law, it was common experience in legal practice see references to the Corporations Law or Corporations Laws. For example there is a text which is entitled "Corporations Law: In Principle[2]". The Federal Court Website[3] refers to the Corporations Law guideline in reference to its "wide jurisdiction in matters arising under the Corporations Act 2001, the Australian

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2 https://legal.thomsonreuters.com.au/corporations-law-in-principle-10th-edition-book/productdetail/124546

3 https://www.fedcourt.gov.au/law-and-practice/guides/corporations-guides/corporations

Securities and Investments Commission Act 2001 and the Cross Border Insolvency Act 2008".

[37] In Cello Court Pty Ltd v Body Corporate for Cello Court CTS 42339 [2020] QCATA 97, Member Howe heard an application for interim orders that pending determination of the application for appeal filed on 27 February 2020, the body corporate for Cello Court CTS 42339 and the body corporate committee be restrained from relying on any purported termination of the caretaking agreement dated 1 September 2012 between the body corporate and Cello Court Pty Ltd ACN 150 664 574 in reliance on the resolution of the body corporate passed on 17 May 2019; And that pending determination of the application for appeal filed on 27 February 2020, the order be suspended, or otherwise set aside without effect. And that pending determination of the application for appeal filed on 27 February 2020, the caretaking agreement be reinstated with full effect, backdated to the date of the order, 16 January 2020. These were declined, but it was held at [36]-[38] that;

> [31] The Adjudicator appears to have given greater weight to the ASIC website than the legislative provisions. Arguably the Schedule 2 definition deserved as much or greater weight than the commentary on the website.
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> [32] The decision lacks consideration of the terms of the Corporations Act prior to 2016 and the provisions of the repealed Corporations Law perhaps deserve further attention.
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> [33] I consider the applicant does have an arguable case that the Adjudicator misconstrued the caretaking agreement and there is therefore a serious question to be decided in the appeal.
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> [34] What is also unclear is the matter of the Adjudicator's jurisdiction to make the decision.
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> [35] The Adjudicator decided that the applicant was not a caretaking service contractor but rather simply a service contractor. If the latter, the Adjudicator had jurisdiction to determine the dispute. If the former the Adjudicator had no jurisdiction and the application should have been brought before a specialist Adjudicator or the tribunal.
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> [36] The applicant claimed it was no longer the letting agent for the scheme. That isa requirement for an entity to be a caretaking service contractor under the *Body Corporate and Community Management Act* 1997 (Qld). The applicant claimed it had transferred those rights to a third party. Whilst the submissions of the parties lacked evidence or clarity, the body corporate appeared to be ignorant of such transfer and appears not to have consented to such.
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> [37] The Adjudicator accepted the claimed transfer of rights as letting agent meant the applicant was no longer the letting agent. The Adjudicator did not consider that the *Body Corporate and Community Management (Accommodation Module) Regulation* 2008 (Qld) applies to the scheme and by s 120 of that module a person's rights as a letting agent may only be transferred if the body corporate approves the transfer.
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> [38] What effect the applicant's failure to obtain the approval of the body corporate before purporting to transfer the letting rights may have on the identity

of the applicant as a caretaking service contractor potentially arises as a further question for determination in the appeal.

[38] Despite these findings, none of these issues was argued before me except for the critical issue of whether the Adjudicator misconstrued the caretaking agreement. No issue of jurisdiction was argued either.

[39] The first thing and a critical thing to be observed about the Adjudicator's analysis is that it fails in any way to actually identify precisely what the facts were in the case which constituted or described in the Reasons at [3] as being there being a controller "appointed for particular assets of the appellant, including Lot 20".

[40] There is no identification within the Adjudicator's analysis of what the terms of any instrument was that purported to appoint a controller, or whether the language of the relevant instrument referred to the appointment of a controller or indeed whatever language it did in fact use.

[41] It is not immediately obvious from the Adjudicator's Reasons that the Adjudicator had copies of the relevant Forms 504 and 505 which are referred to in paragraph 46 of the Reasons. It is evident from the Reasons, which make no reference to the content of the relevant Forms 504 and 505, that what the Adjudicator was referring to as to what those forms stated were entries about those forms which were set out in the historical company extract, which is merely an ASIC record of historical records kept by ASIC.

[42] Records kept by ASIC, insofar as they refer to an appellant being externally administered, do no more than establish three things. It could reflect merely the fact that insofar as a security holder or mortgagee filled out the forms referring to the entity as being externally administered, that it held the opinion that the Company fell within the definition of an entity being externally administered under the Corporations Act, or it could reflect the way in which ASIC treated notices under Forms 504 and 505, and which it broadly determined, those forms having been received, enlivened a description of a company as being one having the status of being externally administered. Or the third possible alternative is that the solicitor who prepared the relevant Forms 504 and 505 for the security holder, held a view about whether the company was externally administered. Alternatively it could reflect an entirely misunderstood notion, that the company was externally administered because a mortgagee appointed someone to sell a mortgaged property.

[43] It is at best only secondary evidence, potentially entirely irrelevant evidence which ought be regarded as inherently unreliable to reach the conclusion that the company has been the subject of external administration, merely because ASIC has formed the view that it has been so subjected, or alternatively because the security holder, or solicitor acting for a security holder, has given a notice in a particular form which asserts the appointment of an external administrator.

[44] The language of clause 9.1(d) as set out earlier in these reasons, does not make reference to entitlement to terminate the agreement if the caretaker has any property which becomes subject to any form of external administration. It refers to being a "company which becomes subject to any form of external administration". So it is the company at a broad level which is referenced in that clause. Hence on one view of it, the mere fact that a company holds real property the subject of a mortgage, and which the mortgagee purports to obtain or recover possession and exercise power of sale, does

not expose the company itself to being subject to any form of external administration, although an individual asset might be described as being subject to external administration.

[45] The Adjudicator's Reasons entirely fail to identify and resolve those critical distinctions.

[46] The Adjudicator conducted no proper analysis of what was the meaning of the expression "the Corporations Law" in clause 9.1. He merely proceeded on the basis that the material which was in the 2001 Corporations Act but which was not introduced until 2016, four years after the caretaking agreement was entered into was definitive of what a clause agreed upon four years earlier meant. Although Schedule 2 the Corporations Act from 2016 defined external administration, in my view the caretaker agreement cannot properly have been referencing that definition of external administration because the relevant legislation with that definition of external administration did not exist at the time.

[47] There is reference in the Reasons in a very abbreviated form, to a finding that a controller was appointed for particular assets of the appellant, including Lot 20. That finding is not borne out by the evidence, insofar as it exists, about what the circumstances were of the appointment of the so-called external administrator. There is no evidence that any other assets other than Lot 20, were the subject of such an appointment. The relevant Forms 504 and 505 suggest in the strongest terms that no other assets other than Lot 20 were the subject of such any appointment by the security holder.

[48] I now turn to the relevant Forms 504 and 505 which are before this Appeal Tribunal with the consent of both parties and were received into evidence by joint tender.

[49] The Form 504 dated 15 February 2019 is one said to have been notified pursuant to s 427(1), 427(1A) and 427(1B) of the Corporations Act and can see by comparison with the current version of those forms which are readily available in the public domain , that the current Form 504 makes reference to the same sections of the Act as did the February 2019 version. The Form 504 as lodged purports to be a notification, not an instrument of appointment and asserts the details of the person appointed as "Administrator for National Australia Bank". Under a category which requires a box to be ticked as to the "type of administrator", one choice has been made from those proffered, and that is "Controller (other than Receiver, Receiver and Manager and Managing Controller) of the property described in the schedule of property to this form". The appointment is stated as having been purportedly made on 12 February 2019 and the from refers to an instrument dated 5 January 2015, which is referenced to the mortgage, not to an instrument of appointment.

[50] Schedule 4to the Form 504 is a schedule of the property, and it identifies the property as Lot 20 and no other property. The document is signed by the external administrator, by a solicitor for the National Bank, although the document itself identifies on its lodgement details that it has been prepared by a paralegal.

[51] The Form 505 also dated 15 February 2019 describes itself as a notification of an appointment of an external administrator and references s 415(1), 427(2)(4), 450A(1)(a), 537(1) and (2) of the Corporations Act. It contains more or less the same

information as the Form 504 and similarly identifies the property affected as Lot 20 and no other property.

[52] It is thus reasonable to infer from that material that the appointment in this case was most likely not the appointment of an administrator to the Company itself, but rather the appointment of someone to enter into possession Lot 20, and exercise the power of sale under the mortgage, and which it is common ground eventually occurred.

[53] Neither party in its submissions referred to the terms of s 427(1A) of the Corporations Act. The Adjudicator was not referred to the terms of s 427(1A) of the Corporations Act either .By the terms of s 427(1A) of the Corporations Act as it then provided, a Form 504 was required to be provided by a person who appoints another person to enter into possession, or take control, of property of a corporation (whether or not as agent for the corporation) for the purpose of enforcing a security interest otherwise than as receiver of that property.

[54] Section 427(1A) of the Corporations Act appears in Part 5.2 of the Corporations Act which is within Chapter 5 of the Act, with that Chapter carrying the heading "External Administration". Part 5.2 includes provisions, for example in s 420A, that impose duties on a controller when exercising a power of sale in respect of a property, for example to take all reasonable care to sell the property for market value or the best price reasonably obtainable. This is consistent with the notion that a mortgagee that appoints another person, whether described as a controller or not, to enter into possession and exercise power of sale in respect of a security property, is a controller for the purposes of the Corporations Act.

[55] It can be readily accepted that termination clauses in contracts ought be read strictly and according to their natural meaning, and ought be confined to the clear language which appears in them because they can bring about potentially draconian effects , or be penalties, in permitting termination of valuable rights in circumstances where there has not necessarily been any fundamental breach of the contract, such as where a company has been subjected to external administration,.

[56] At the time of entry into the caretaking agreement, whatever had been colloquially previously referred to as the Corporations Law, which was the amalgam of State and Federal legislative provisions, was no longer operable. The law that applied to corporations, particularly in respect of external administration of them, was the Corporations Act 2001. To give sense to the terms of the Caretaker Agreement, its reference to the Corporations Law ought to be properly treated as a reference to the law that regulated corporations specifically in relation *to the external administration of companies and their assets.*

[57] It seems to me then that the objective meaning of the reference to the "Corporations Law" referred to in clause 9.1 of the caretaking agreement must be a reference to National scheme law that then applied into the Corporations Act and provided for operation of the law in circumstances where a company was subject to any form of external administration.

[58] Chapter 5 of the Corporations Act was and still is headed "External Administration".

[59] Since the Acts Interpretation Act 1901 (Cth) was amended by the Acts Interpretation Amendment Act 2011 (Cth), which commenced on 27 December 2011, the headings to

chapters are, pursuant to provisions of the Acts Interpretation Act, to be treated as part of the statute. Section 13 of that Act now says that all material from and including the first section of an Act to the end of the last section of the Act, or the last Schedule to the Act if there are Schedules, is part of the Act. Long titles, preambles, enacting words and headings appearing before the first section of the Act are also part of the Act. The Adjudicator's Reasons failed to identify to existence or significance of this provision. Nor was it referenced in the submissions of the parties, until I raised it during argument, and then I was referred to what the State Act provided.

[60] Chapter 5 of the Corporations Act which falls under that heading "External Administration, deals variously with arrangements and reconstructions in Part 5.1, receivers and other controllers and property of corporations, the administration of a company's affairs with a view to executing a Deed of Company Arrangement under Part 5.3A, winding-up in insolvency under Part 5.4, winding-up by the Court and in insolvency under Part 5.4A and B, voluntary winding-up and other presently immaterial provisions.

[61] In my view therefore, it is clear from the language of the statute itself that the appointment of a controller to take possession of and exercise a power of sale in respect of Hewitt Real Estate, such as Lot 20, and that the company became subjected to a form of external administration in that relevant respect.

[62] Therefore, in my view, the company was within its contractual rights to purport to terminate the caretaker agreement on the basis that it did, although it may or may not have appreciated that it was doing so on that basis. It follows that the Adjudicator arrived at the correct result, although not necessarily based upon a proper or accurate analysis of the evidence, or a proper consideration of it, or the law that was required to be applied.

[63] I therefore dismiss the appeal.

[64] The parties have asked to be heard in relation to the question of costs, and I therefore reserve costs. I should indicate, without expressing any final view on the matter that having regard to the way the matter was argued and well established principle, that any applicant for costs would face considerable difficulties in obtaining an order that the other party ought pay its costs.