QUEENSLAND CIVIL AND ADMINISTRATIVE TRIBUNAL

CITATION:	*Scholer Pty Ltd as Trustee v Gowland and Anor* [2021] QCATA 119
PARTIES:	**SCHOLER PTY LTD AS TRUSTEE FOR THE SCHOLER TRUST** (applicant/appellant) **v** **ROBYN GOWLAND** (respondent) v **THE BODY CORPORATE FOR SPINNAKER MAIN BEACH CTS 9565** (second respondent)
APPLICATION NO/S:	APL166-20
MATTER TYPE:	Appeals
DELIVERED ON:	27 September 2021
HEARING DATE:	On the papers
HEARD AT:	Brisbane
DECISION OF:	Member Richard Oliver
ORDERS:	**The Adjudicator's order of 11 May 2020 is set aside.**
CATCHWORDS:	APPEAL AND NEW TRIAL – APPEAL – GENERAL PRINCIPLES – RIGHT OF APPEAL – WHERE APPEAL LIES – ERROR OF LAW – where appeal from Adjudicator's decision only on a question of law — where the lot owners passed motion 14 to adopt a new Caretaker's at an Annual General Meeting – where application brought to challenge the validity of the motion – where the adjudicator declared a vote taken at the Annual General Meeting to adopt a new Caretaker's agreement void – where a finding that the explanatory statement was misleading in not providing further information – where not all lot owners given notice of the meeting within 21 days – whether lot owners given adequate notice in any event – whether the Committee was required to provide further information to lot owners in the explanatory statement concerning motion 14 – whether the absence of the information was misleading – the extent to which the Committee is required to provide information in the explanatory statement – whether there was a reasonable amount of information in the explanatory statement.

Body Corporate and Community Titles Act 2007 (Qld), s 289, s 296 and s 100;

Carroll & Ors v Body Corporate for Palm Springs Residence CTS 29467 [2013] QCAT 21;
Wei-Xin Chen v Body Corporate for Wishart Village CTS 19482, Appeal 4080 of 2000, District Court 29 May 2001 (unreported).
Morat Pharmaceuticals Pty Ltd v Hoft Pty Ltd & Anor [2014] QCA 319
Body Corporate for Palm Springs Residences CTS 29467 v J Patterson Holdings Pty Ltd [2008] QDC 300
Admiralty Towers [2014] QBCCMC mar 317.
Sun City Resort [2016] QBCCMC mar 436.
Contessa Condominiums [2018] QBCCMC mar 547.

APPEARANCES & REPRESENTATION:

Applicant:	Mr Strangman, counsel instructed by Small Myers Hughes
First Respondent:	In person
Second Respondent:	Mr Kyle, solicitor ABKJ Lawyers

REASONS FOR DECISION

[1] Spinnaker Main Beach is a large high rise apartment building on Main Beach at Surfers Paradise, comprising 119 lots and forms the community title scheme 9326 ("the Scheme"). It is registered as Building Units Plan 5576.

[2] Scholer Pty Ltd ("Scholer") has been the caretaking contractor since 2015 under the management agreement first entered into between the Body Corporate and the then contractor in 2006.

[3] In or about 2019 Scholer sought to negotiate a new agreement with the Body Corporate. It entered into discussions with the then Committee about the content of the new agreement. An agreement was finalised which met with the approval of the Committee, but it still had to be put to lot owners of the scheme at the annual general meeting (AGM) of the Body Corporate.

[4] The proposal for the Body Corporate to enter into a new management agreement with Scholer was contained in Motion 14 of the agenda before the AGM. To inform lot owners of the content and effect of motion 14, an explanatory statement was provided in the bundle of documents attached to the Notice for the AGM. This is contained in Schedule C. Motion 14 was in the following terms.

> New caretaking, gardening and letting agreement - motion by ordinary resolution by secret ballot [without the use of proxies] proposed by Brian and Diane Scholer of lot 3.

[5] In the explanatory statement the Committee commended the motion to the members of the scheme. The recommendation was also against a background of threatened arbitration proceedings by the manager if an agreement could not be reached. The Committee's position was put as follows:

> The management and committee consider that the new management agreement is a win dash win for both parties and strongly urged owners to vote in favour of the motion.

[6] The vote was taken and the motion passed with a vote of 53 in favour and 45 against. The new caretaker agreement was then implemented.

[7] Robyn Gowland, one of the respondents, is the owner of one of the lots in the scheme. She was dissatisfied with the process leading to the vote, in particular the information or lack thereof in the explanatory statement and sought the intervention of the Office of the Commissioner for Body Corporate Community Management. In her application for and adjudication lodged on 25 November 2019 she sought the following orders from the Adjudicator:

(a) That Motion 14 on the agenda of the annual general meeting of the body corporate held 30 September 2019 and the resolution passed on Motion 14 at the annual general meeting were all times void; and

(b) Any other final order the Adjudicator considers necessary.

[8] Ms Gowland raised a number of grounds in support of the referral, in summary: lot owners were not given sufficient notice of the agenda of the AGM as required by the Standard Module; there was no record of the Committee supporting Motion 14 as indicated in Schedule C; the explanatory information was misleading, incomplete and insufficient to make an informed decision; clearing rubbish from the rubbish chute on each floor was deleted from the new agreement without the owners been informed; there were complaints that the Committee was not acting in the best interests of the lot owners; there was a loss of trust in the Committee; the Committee favoured the managers in preference to be lot owners; and there was an allegation of bias in favour of the caretakers. Finally, there was a lack of information, including legal advice, that had been obtained prior to the AGM to which the lot owners were not privy.

[9] Submissions from both the Committee and the managers were provided to the Adjudicator in support of the decision made at the AGM. They particularly challenged the issues of the delay in delivering the documents supporting Motion 14 and that the information provided in the explanatory statement was misleading.

[10] Having considered the submissions and material from both parties, including that which was before the lot owners for the AGM, the Adjudicator expressed concern that the owners may not have had sufficient time to fully comprehend the content of Schedule C. Further that the information in the explanatory statement provided was 'in the circumstances, inadequate and misleading'[1]. The Adjudicator went onto say:

> The material contained in the AGM notice was not sufficient for voters to be properly on notice of the effect of motion 14. I am satisfied the explanatory material tainted the voting on motion 14 in that some owners may have voted differently if they had been given different or more comprehensive information. It is not possible to know if the effect of that on voting would have been enough to change the result, however, the nature of the deficiencies with the meeting notice renders the recorded result and unsound. On that

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[1] Adjudicator's Reasons [58].

basis, I consider it just and equitable to invalidate the purported resolution of AGM motion 14.

[11] As a result of the adjudication being allowed and the vote invalidated, Scholer filed an application for leave to appeal the Adjudicator's decision in the Tribunal. Although the Body Corporate is a respondent to the Appeal, it essentially adopts the position taken by Scholer. That is the appeal should be allowed and the decision of the Adjudicator set aside.

[12] Under s 289 of the *Body Corporate Community Management Act* ("BCCM Act") an appeal from an adjudication can only be on a question of law. The section provides that:

> (2) The aggrieved person may appeal to the Appeal Tribunal, but only on a question of law.

[13] Section 296 sets out the obligations of the Commissioner when an appeal is filed and that is the provision of information to the Tribunal. As part of the Appeal Record Book the Tribunal is also in possession of the file generated by the Commissioner for the adjudication.

[14] Under s146 of the *Queensland Civil and Administrative Tribunal Act*, ("the QCAT Act") where there is an appeal on a question of law only, the Tribunal can confirm or amend the decision, set aside the decision, substitute its own decision, or set aside a decision and return the matter to the Tribunal or other entity who made the decision for reconsideration.

[15] The five grounds of appeal are:

(a) The Adjudicator erred in law by incorrectly interpreting and/ or applying the relevant legal test concerning whether the explanatory material supplied in relation to Motion 14 of the Annual General Meeting held on 30 September 2020 was misleading.

(b) The Adjudicator erred in law by taking into account irrelevant considerations, or giving certain considerations undue weight, in determining whether the explanatory material supplied in relation to Motion 14 of the AGM was misleading.

(c) The Adjudicator erred in law by failing to take into account relevant considerations, or failing to give relevant considerations appropriate weight, in determining whether the explanatory material supplied in relation to Motion 14 of the AGM was misleading

(d) The Adjudicator erred in law by incorrectly interpreting and/or applying the legal tests concerning whether there was adequate notice of the AGM sufficient to justify the making of the Order.

(e) The Adjudicator's findings, decision and order are manifestly unreasonable, unfair, inequitable and/or against the weight of the evidence.

[16] Despite the generality of the grounds of appeal, the Adjudicator's decision came down to two issues, it seems, from a reading of paragraphs [57] and [58] of the reasons. That is, whether all owners were given sufficient notice of the AGM in compliance with s 74 of the Standard Module. Notice must be given within 21 days

of the AGM. Secondly whether the explanatory statement provided with the notice was inadequate or misleading.

[17] However, in considering these issues the appeal can only succeed if the finding sought to be upset involves a question of law rather than fact.

Fresh Evidence

[18] Before dealing with the grounds of appeal there is a contentious issue about whether the Ms Gowland is attempting to introduce fresh evidence into the appeal, and if so whether she should be permitted to do so. As the appeal is on a question of law only it is difficult to appreciate how any new evidence would be relevant to the determination of an error of law in the Adjudicator's decision. It may well lead to some alternate finding of fact but this would not assist Ms Gowland and it would be contrary to the function of the appeal tribunal on this appeal.

[19] The Applicant has conveniently provided a schedule of the evidence it says is sought to be admitted. It is dated 8 June 2021 and responds to Ms Gowland submissions of 24 February 2021. The 'evidence' is contained in a volume marked 'Respondent's Submissions' and there are various documents under tabs which are intended to be read and relied upon with her submissions. I have had regard to the schedule and accept the submissions made therein.

[20] Attached to Ms Gowland's submissions there is a further submission titled 'Supporting Information' and attached to that is 'Background and the sequence of events on a timeline'. There is also the ten annexures in the Book of Submissions which include further submissions by Ms Gowland, and attached to that submission is further evidence including a variety of documents such as emails, correspondence, statutory declarations and minutes of meetings. Some of that material is in the BCCM file and some of it includes further evidence.

[21] The Applicant submits that these further documents should not be considered in the appeal because they include material and evidence that was not before the Adjudicator. The Applicant relies on statements made in previous cases by the tribunal concerning the admission of fresh evidence. A succinct statement as to the correct approach to be taken by the tribunal in an appeal on a question of law can be found in in *Ballada Pty Ltd v North Point Brisbane*[2] where the Honourable James Thomas AM QC, Judicial Member, said:

> [9] The present appeal is governed by s.146 of the *Queensland Civil and Administrative Tribunal Act* 2009 ('the QCAT Act'). Such an appeal, which is on question of law only, is confined to the evidence that was obtained by or presented to the Adjudicator.
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> [10] The material attached to the Application for appeal contains a quantity of documents and seeks to raise some issues that were not raised before the Adjudicator. There was adequate opportunity for the parties to raise the issues about which they were in dispute, and to present all relevant material during that procedure. The appeal must of course be confined to the evidence and issues that were presented to the Adjudicator.

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2 [2013] QCATA 184.

> [11] The ultimate issue is whether the Adjudicator has shown to have heard on a question of law that affected the outcome.

[22] Similar statements were made in other appeal decisions in particular, *Miles v Body Corporate for Solarus Residential Community Title & Anors*[3] where Senior Member Brown said:

> An appeal from an Adjudicator under the BCCMA is an appeal in the strict sense. Once an error of law affecting Adjudicator's decision is identified, the appeal tribunal may exercise the Adjudicator's powers and substitute its own decision based on the material before the Adjudicator, consistent with the Adjudicator's undisturbed factual findings. There is no element of rehearing nor can fresh evidence be considered.

[23] Therefore, to engage in a process where further evidence is considered, or arguments are put forward as to factual matters in support of the Respondent's contentions that the appeal should be dismissed on the basis there was no error of law, would result in an error on the part of the appeal tribunal in determining the appeal presently before it.

[24] An obvious example of this, is Annexure 5 which is a statutory declaration by Ms Gowland which speaks of disputation between some owners in the scheme. The statutory declaration is made on 6 November 2020 well after the adjudication which was delivered on 11 May 2020. The other submissions attached to each annexure, are submissions of facts and not on questions of law.

[25] Having regard to the above authorities, this appeal is confined to the evidence before the Adjudicator, and whether or not on that evidence, and the factual findings made, that decision should be upheld or whether it is infected by an error of law. That is the task to be undertaken and the appeal will proceed on that basis.

Delay in Delivery of the AGM Notice

[26] There is no dispute that there was delay in giving the Notice of the AGM to some of the lot owners.

[27] Applying the 21 day notice period, the Adjudicator found that the last date of the giving of the notice was 8 September 2019 for the meeting to be held on 30 September 2019. The evidence concerning the delivery of Notice is best set out by the Adjudicator in [24] as follows:

> [24] The BCM[4] states that he posted the AGM Notice to one overseas owner on 2 September and to 65 other owners on 3 September. He then says that on 6 and 9 September he emailed 53 owners who live at the Scheme saying he would be present in the Scheme's lobby between 3pm and 5pm on 9 September to deliver the notice packages because they were too large to put in letterboxes. He says 44 of the 53 resident owners collected their AGM notice from him personally on 9 September.

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3 [2016] QCATA 130.

4 Body Corporate Manager.

> [25] The information from the BCM does not comment on the delivery of the AGM Notice to the remaining 9 resident owners. The emails sent by the BCM indicated that, if not collected, a card would be placed in the owner's letterbox advising the notice could be collected. The Applicant says the remaining notices were left with the caretaker whose office hours are 9am to 3pm, so those owners could not have collected their notice until 10 September or later. The Applicant says the caretaker offered to deliver the notice to some owners.

[28] There was one owner who was travelling overseas and did not get back until 13 September 2019 to collect the notice. It is evident from the above that delay for some owners was minimal and for some it was longer. However, when reaching a decision in respect of the delivery of the notices, the Adjudicator said[5]:

> I have no evidence that any owner did not eventually receive the AGM notice or was prevented from voting at the AGM because of any delay. However, given the significant volume of the AGM material and the complexity of Motions 8 and 14, in my view a reduction in the time to read, consider, discuss, and seek further information about the motions effected the adequacy of notice to those owners. For that reason, I have concerns that the AGM Notice was insufficient.

[29] It was that statement that then led to the conclusion at [57] that the Adjudicator was not satisfied that all owners had been given adequate notice of the AGM to be held on 30 September 2019. That of course is a finding of fact and although a finding of fact, is the delay such as to warrant the motion void as found by the Adjudicator.

[30] The Applicant relies on a number of authorities to contend that delay in getting notice of the AGM is not critical to the outcome of the vote. It relies on the Adjudicator's acknowledgement of the authorities which support the view that even though the giving of notice is not strictly compliant with the legislation, delay of one or two days in the receipt of the meeting notice by at least half the owners is not likely to have such an impact on the conduct of the AGM so as to warrant invalidating a motion of a meeting.[6] Having regard to what was said in paragraph [28] of the reasons, 65 owners were posted the notices with five days allowance for delivery. On 9 September 2019, 44 personally collected the notices from the BCM, which was one day late. Then 'for nine resident owners the delay was at least two days in in some cases much longer". That is a total of 118 which would exclude, presumably the BCM who is a lot owner. Bearing in mind that this is a 119 lot scheme, all lot owners had notice of the AGM and the explanatory statement with respect to Motion 14. Of the total, the short fall in the time from receipt of the notice to the AGM may have been more than two days. Also, there is a finding that one of the owners did not collect the Notice until 13 September.

[31] Of the 119 lot owners, 98 attended the meeting and voted. It remains uncertain, apart from the contentions raised by the Respondent, as to how many of those who attended the meeting and voted did not receive the notice within the required time frame. That also applies to those 21 who did not attend the meeting and vote.

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5 Reasons [30].

6 Reasons [29] referencing *Carroll & Ors v Body Corporate for Palm Springs Residence CTS 29467* [2013] QCAT 21 and *Wei-Xin Chen v Body Corporate for Wishart Village CTS 19482*, Appeal 4080 of 2000, District Court 29 May 2001 (unreported).

[32] By reference to the authorities cited and the fact that most owners had in excess of two weeks to consider the content of the AGM material, and in particular the critical Motion 14 with respect to the new caretaking, gardening and letting agreement explained in Schedule C which is a page and a half, there would have been ample time to form a view about whether to support or reject the motion. Also, the generalisation set out in paragraph [57] that "*not all owners were given adequate notice*", does not go far enough to explain how the inadequate notice caused prejudice to that unidentified number of lot owners who did not receive the notice in time.

[33] Ms Gowland's written submission to the appeal tribunal adopts the reasoning of the Adjudicator with respect to the timing issue of the delivery of the notices. She contends that the delay was a breach of ss 38(1), 39A(1)(b) and (3) of the *Acts Interpretation Act*. The only section that could have any relevance is s 38 which deals with the reckoning of time. However there is no challenge to the findings as to when the notices were delivered or made available to the lot owners. It is difficult to see the relevance of this submission, and it ignores cases like *Wishart Village*. She also contends that the failure to comply with the time requirements for giving notice was a breach of the Committee's fiduciary duty to the lot owners. Again, as was said in Wishart a delay of one or two days will not, and would not here, have had a significant impact on the lot owners to warrant invalidating the motion. Ms Gowland relies on and reiterates the findings of the Adjudicator to submit that the vote was void.

[34] Furthermore, it is not clear that the Adjudicator did in fact rely on the inadequacy of the notice of the meeting to invalidate the vote. Having said in [30] there is an acknowledgment that there was no evidence that any lot owner did not eventually receiver the AGM material or was prevented from voting' and that there were 'concerns that the AGM notice was insufficient' and then at [56] that 'not all owners were given adequate notice', there is no clear finding as such that the giving of the notice late to some lot owners was sufficient to invalidate the vote. It seems that the fact that not all owners were given adequate notice together with the explanatory material was presented in a manner that was contrary to legislation led to the result that the vote was void. In other words it was a combination of both, not just the solely the delay that led to the result.

[35] Therefore, on the above analysis of how any delay could have impacted the vote when one has regard to the result of the vote, the number of those lot owners who attended the meeting and the absence of any conclusion just how the delay impacted the outcome it is difficult to see how this could result in finding that the vote was void.

[36] The conclusion with respect to the vote is not supported by any evidence as to how it was prejudicial to the lot owners, particularly when the majority voted in favour of the motion. Insofar as the adjudication outcome is based on a finding that the delay in giving notice of the AGM, this is an error of law.

Was the explanatory statement in the circumstances, inadequate or misleading?

[37] The applicant contends that the adjudicator erred in law by finding that the explanatory statement was inadequate or misleading in circumstances where the information provided to the lot owners was sufficient to inform them the thrust and effect of Motion 14, consistent with previous cases on the point. Although the

finding as to sufficiency of the information is primarily one of fact, it is submitted that in circumstances where the Committee has discharged its obligations under the BCCM Act and decided authority, to require something beyond that, and say in its absence is misleading, is an error of law.

[38] The applicant submits as follows:

> …the various issues outlined in paragraphs [48] to [51] of the Adjudicators decision upon which the Adjudicator relied informing the conclusion that the committee's explanatory material was misleading (as detailed above) are either not true (as a matter of fact) or immaterial and cannot justify the making of your Order on the basis of established case law….[7]

[39] Regulation 73 of the BCCM (Standard Module) Regulation sets out in some detail how the explanatory statement is to accompany voting papers for a general meeting. Although the regulation was not strictly complied with, the Adjudicator found this was not fatal to the voting process. It does not specify in detail what is to be included in the explanatory statement other than 'explaining the effect of the proposed change'.

[40] The Applicant submits that the error of law is "*incorrectly interpreting and/or applying a relevant legal test concerning whether the explanatory statement supplied in relation to Motion 14 of the AGM was misleading*".[8] As mentioned above, the first point that should be made about conclusions made by the Adjudicator from the evidence submitted, is that generally speaking they are findings of fact. If the findings of fact were open on the evidence that the Adjudicator had to consider they are generally unassailable as they do not involve a question of law. However, the applicant submits that when one considers the specific deficiencies in the explanatory statement identified by the Adjudicator, and the requirement to address those deficiencies, this went beyond that which the Committee was legally required to include in the material. It further submits that by imposing such a requirement in the circumstances where the explanatory provided sufficient information to inform the lot owners of the effect of Motion 14 is the error of law.

[41] The Adjudicator referred to the authorities relied on by the Applicant which discusses the adequacy or otherwise of explanatory statement. In *Morat Pharmaceuticals Pty Ltd v Hoft Pty Ltd & Anor*[9], Justice Muir said:

> Propreitors of lots are entitled to expect that materials provided to them by the Body Corporate Committee in respect of matters to be voted on at a Body Corporate Meeting are accurate and not misleading in any way. Where there has been a breach of the Committee's obligation in that regard and where it appears that the outcome of voting or a motion may have been affected, an obvious course to take by the Tribunal having jurisdiction over the matter, is to set aside the tainted resolution so that the proprietors may have the opportunity of voting on the matter uninfluenced by tainted information.

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7 Applicant's submissions paragraph 35
8 Applicant's submissions paragraph 108.
9 [2014] QCA 319, paragraph 37.

[42] The above statement must be considered, as the Applicant points out, having regard to the factual basis underlying that statement which is distinguishable from the current circumstances here. In *Morat*, there was an actual false representation by the Committee that they had reviewed the new caretaking agreements when in fact they had not. There is no allegation of false information in the statement here.

[43] In *Body Corporate for Palm Springs Residences CTS 29467 v J Patterson Holdings Pty Ltd,*[10] Judge McGill said:

> There is certainly an obligation to give proper notice of what is actually to be considered by the meeting, and to point out the relevant consequences of approval of the resolution. If there is a failure to give proper notice of the meeting, which may occur with matters of the proposed resolution is misleading as to what is really proposed, or its effect and implications, then that may well impact on the validity of the resolution, because in such circumstances there was either no valid notice of the meeting or no valid notice of the proposed resolution.

[44] In that case, Judge McGill also observed that the explanatory schedule made clear the position of the Committee.[11] He also observed that someone who knew nothing about the scheme or the caretaking agreements would not have been well informed by the explanatory note. But, because all of the members of the scheme attending the meeting knew the background to the motion, he could not see that as being a basis of criticism of the body corporate committee. In effect what he is saying is that the members of the body corporate did not go into the AGM without background knowledge of the scheme, how it works, and the existing caretaking agreement which had been in operation for many years.

[45] He also usefully pointed out that the explanatory note was not the place to put arguments for and against the particular motion. Also that lot owners, with knowledge of how the scheme had operated have to make their own minds up as to whether to support or reject the particular motion.

[46] Ultimately, the extent to which the explanatory statement properly informed the members attending the AGM is a value judgment having regard to their knowledge of how the scheme operates, and what is proposed. An example of this is picked up in the Adjudicator's reasons where it was determined that although it would have been of some benefit perhaps to have the existing caretaking agreement included in the schedule, however this was not fatal to the motion[12].

[47] Here it is not contended that the information contained in the explanatory statement was misleading rather that it simply did not go far enough or was inadequate so as to properly inform the lot owners of the full impact of the changes under the new agreement.

[48] These concerns are expressed by the Adjudicator and set out in [48] and [49] of the reasons. The Applicant has addressed each of those concerns and submits generally that there was sufficient information in the explanatory information to inform the

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10 [2008] QDC 300, paragraph 50.
11 Ibid [26].
12 Reasons [48].

owners of the effect of the new agreement. To go beyond that was unnecessary in light of what was said in *Palm Spring Residences*.

[49] Before dealing with that submission it is, in my view, appropriate to give some consideration to the role of the Committee in a scheme. The Committee is constituted by lot owners who are volunteers elected to represent the interest of all lot owners in the scheme. They are involved in the day-to-day management of the building, common property and oversee the functions/duties of the caretakers under the management agreement. They make decisions on behalf of, and for the benefit of, the 119 lot owners in this scheme. They have obligations under the BCCM Act as set out in Chapter 3 Division 2 and in the BCCM (Standard Module) Regulation and decided cases like *Morat*.

[50] This must be borne in mind when considering the extent to which the Committee must go in providing information to the members of the scheme at the AGM. Also, all the actions taken by the Committee are transparent through the minutes of Committee meetings which minutes are available to all lot owners. Lot owners can attend the Committee meetings to observe, and with the agreement of the Committee, contribute to the discussion at those meetings. Lot owners can be as fully informed of the goings on of the Committee as they choose. Furthermore, interested lot owners can go into an AGM with as much information as they want if there are concerns about particular actions of the Committee.

[51] The explanatory statement, on its face, demonstrates that the Committee, on behalf of the members of the scheme, carefully considered all of the options associated with the new agreement, including the threat of costly litigation and its overall benefits to the scheme as outlined in the statement**.** This was undertaken by the Committee to come to a recommendation and save the majority of lot owners the time and trouble of fully investigating the proposal. Upon being given the explanatory statement, any member of the scheme could have undertaken their own inquires rather than just leave it in the hands of the Committee. Therefore and obviously, a majority of those who voted in favour of Motion 14 must have been satisfied with the content of the statement although it is acknowledged that there is reference in the Adjudicator's reasons that some may not have voted in favour if they had received more information.

[52] The question of whether the explanatory statement should have provided more detail with respect to the extension in the term of the new agreement must be considered against the information that was in fact in the statement. The statement specifically referred to the remuneration for the services provided by the Caretaker. It informed the members that:

> Accordingly, the total discount being offered to the Body Corporate under the New Management Agreement is $31,395.25 plus GST each year of its term (total of $313,952.50 plus GST over its 10-year term (excluding CPI adjustment).

[53] Ms Gowland submits that statement was misleading because it did not specifically refer to the old agreement. Furthermore the new agreement contained a revised schedule of duties which incorporated the gardening duties. Consistent with what was said in *Palm Spring Residences,* it was not incumbent on the Committee to highlight every difference in the change of duties from the old agreement. Lot owners, who are concerned about a particular motion, must bear some responsibility

for making their own inquires and not rely solely on the volunteer Committee. It is therefore open to find that there was sufficient information in the explanatory statement with respect to the term of the new agreement and the Committee was not obliged to provide further information.

[54] Similar considerations apply with respect to the difference in the management costs to the Body Corporate under the old agreement compared to the new agreement. Lot owners were clearly informed from the content of the explanatory statement that the new agreement would result in an increase in costs to the Body Corporate. Once again, the lot owners, in the time available before the AGM could have accessed the old agreement and undertaken a comparison themselves between the two agreements.

[55] Also, in the material before the Adjudicator[13] there is a copy of the Spinnaker AGM Newsletter published on 19 September which provides information about the new caretaker agreement and associated costs to lot owners.

[56] The alleged misleading information was not so much what was contained in the explanatory material, but lack of further information which could have assisted voters in understanding to a greater extent, Motion 14. In one sense, it could be said it was misleading by silence. Ms Gowland contends that the Committee knowingly misled the owners by not including legal advice from SP & G Lawyers concerning the threat of arbitration if an agreement could not be reached. The advice seems to have raised an issue about whether there was a right to arbitration. She says this was relevant to the decision whether to pass Motion 14. This, it seems, was not an issue considered in the adjudication and I cannot see how it is particularly relevant to the appeal. The owners of Lot 3 were intent on taking any legal action necessary to have the old agreement varied and the Committee determined it was best to avoid that outcome. This was raised fairly and squarely in the explanatory statement. There was also a finding, that the Pevy Lawyers advice need not be circulated.

[57] The Adjudicator was critical of the Committee for not identifying in the explanatory statement in more detail the differences between the new agreement and the old agreement. In particular, that the new agreement provided for a market review after 5 years and the change in the provision of some services. This included removing the responsibility of the Caretaker to remove rubbish from each level and also, the Caretaker office hours were reduced.

[58] Having been put on notice by the content of the explanatory statement, if the owners took the opportunity to actually compare the two agreements, which they could have in the available time between receiving the Notice and the AGM, the differences could have easily been noted. It was made clear in the statement that the Committee also recommended the new agreement on the basis that the Caretaker intended to invoke the arbitration provision in the old agreement, which would have led to an uncertain outcome and costs to the Body Corporate.

[59] It also would have been an onerous and unnecessary task to decide what were "*significant changes*" because what might be significant to one owner, may not be significant to another in the 119 lot scheme. An example of this is the rubbish

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[13] Exhibit "LWJH-8" to the affidavit Lee William Joseph Hipkins.

collection on each floor. This is particularly so when 55 owners voted for the new agreement.

[60] Similar observations can be made about the advices received by the Committee. Had any owner made an inquiry of the Committee about the advice referred to in the explanatory statement, the Committee would have been obliged to provide the actual advice received. The receipt of the advice, one can reasonably assume, would be recorded in the minutes of the Committee meetings, form part of the records of the Body Corporate and be available to all lot owners. Importantly, the Committee informed owners in the statement that advice from Pevy Lawyers, had been received and also what use was made of that advice. Obviously, given the vote, there was a cohort of owners who were intent on opposing Motion 14 and therefore if concerned about these issues they could have investigated the source documents, to put forward their opposition to Motion 14 at the AGM.

[61] Similarly, there is criticism by Ms Gowland that the Committee did not file to have regard to the time and motion study referred to in the Pevy Lawyer's advice. She also says that the explanatory statement was misleading because the Committee did not inform owners that that it was the Caretaker that engaged BMCS to paid for the report. It seems this report was relevant to the calculation of the caretaker's remuneration. As the applicant points out, this document was in the records of the Body Corporate, could have been accessed prior to the AGM and is lengthy and need not be included in the AGM material. The point here is that what was to be considered was the proposed new agreement. That was abundantly clear to the lot owners who had sufficient time to prepare for the meeting. Minutes could have been examined and inquires made about the new agreement by any lot owner prior to the meeting. It is not incumbent on the Committee to disclose or include every piece of information it has collated for the proposed motion.

[62] There seems to be some confusion in the adjudication about what was meant by "*minor amendments*". The Adjudicator proceeded on the basis that the reference to minor amendments was between the new agreement and the old agreement. However, the explanatory statement makes reference to the advice received from the Body Corporate's solicitors in respect of the proposed agreement and then goes on to inform that:

> Agreement was made between the Body Corporate Committee and Scholer Pty Ltd (current Caretakers) on minor amendments to the proposed Caretaking, Gardening and Letting Agreement which are now reflected in the attached document for the owner's consideration.

[63] There is no specific reference to minor amendments being made to the old agreement and its content being incorporated into the new agreement. Clearly what was referred to is that minor amendments were being made to the new agreement after advice had been received from the solicitors. Once again it is prudent to observe that if there was any confusion on the part of the lot owners when the explanatory statement was received, they could have sought clarification from the Committee prior to the AGM or have inspected the documents for themselves.

[64] As for any inconsistencies between what was set out in the explanatory statement and the actual new charges, the actual cost was set out in the explanatory notes and referred to above. Furthermore, the statement specifically advised owners that:

> Whilst it is acknowledged that the adoption of this agreement will result in an increase in costs to the Body Corporate, this is at least a quantifiable increase, as compared to an open ended arbitration and legal proceedings.

[65] When going into the AGM, the owners knew there was going to be an increase in costs and those costs were further set out in the explanatory material provided by the owners of Lot 3, the Caretakers.

[66] The new agreement does provide for a change in Caretaker duties. This new "*comprehensive duties schedule*", was included in the new agreement annexed to Schedule C. This was in accordance with recommendations by an independent expert. As already discussed, the removal of rubbish from garbage rooms on each level was not included. The justification for this is that it is argued that to do so would be a breach of the by-laws to just leave rubbish in the rooms rather than put it down the chutes.

[67] The other change complained of is the reduction in office hours, however, a perusal of the new agreement, would note the reduction in hours prior to the time of the meeting. Obviously, given the vote at the AGM, a number of lot owners would have been aware of these changes which is self-evident in the schedule. To contend that the failure to particularise these changes in the explanatory statement should result in a void motion, would be quite unfair to those who voted in favour of the new agreement.

Discussion

[68] The Adjudicator determined that the material contained in the explanatory statement was not sufficient to properly inform owners of the effect of the changes from the old agreement to the new agreement. Although there was a finding that the "contents of the notice about Motion 14 were, in the circumstances, inadequate and misleading", the Adjudicator then went onto say that it was "not sufficient for voters to be properly ??? on notice of the effect of Motion 14". There was then the conclusion that some owners may have voted differently if there was 'different or more comprehensive information provided'.

[69] There is no finding that any of the actual content of the statement was misleading, more so that it was inadequate. The question for determination is whether, as a matter of law, the Committee was obliged to provide more information by way of clarification in the statement to overcome the shortcomings found by the Adjudicator. If it was not necessary, having regard do more than what is disclosed in the explanatory statement.

[70] The Applicant submits that none of the grounds identified by the Adjudicator can properly be categorised as misleading. It is evident that what is contained within the explanatory statement is of itself not misleading and no allegation is made that the information contained in the statement is inaccurate. The complaint is that the information was inadequate not inaccurate.

[71] The two cases where the motion was held to be void, *Morat Pharmaceutical* and *Gold Coast Apartment Management,* involved specific false and misleading information in the documents in support of the motion. That is not the case here. This case is more analogous to what was said in the following cases.

[72] In *Palm Springs* McGill J at [31] and [40] provided a further explanation about the content of the notice of a resolution for a meeting as follows*:*

> In any case, I cannot understand why the notice should be required to be balanced. What the notice is required to do is to give notice of the resolution actually proposed. The obligation is faithfully to reproduce what it is that has been proposed by the committee, or whoever else is proposing the motion, and there is a requirement that if an explanatory note of the resolution is provided by the submitter of the motion it must be included. Obviously, any note put forward by the submitter of the motion is going to present an argument in favour of the motion. I cannot see anything in the regulation which requires the submitter of the motion to include in the explanatory note arguments against the motion as well as arguments in favour of it so it is to be balanced, and such a proposition strikes me as not supported by anything in the legislation or the general law…….
>
> The mere fact that the committee was on one side can hardly be a basis of rendering that process unbalanced and unfair, and therefore incapable of producing above results. The respondent cannot complain that it was deprived of the opportunity to present its case on the basis that it chose not to present it.

[73] Also, in *Admiralty Towers*[14], the Adjudicator there said:

> Other owners claimed the Committee should have provided owners with more information. However, nobody has made out a case that the Committee had misled owners or are in breach of their fiduciary duty.

[74] In another case, *Sun City Resort*[15], the Adjudicator there said:

> Lot owners had fair warning about the amendments and access to all of the information and documents they needed, through the Body Corporate, if they had any queries or concerns. They were informed, correctly, that the majority of the Committee support the motions. The support of the Committee members was based on legal advice. Lot owners also were free to seek their own legal advice.

[75] Then finally, in *Contessa Condominiums*[16] it is worth noting that there the Adjudicator said:

> If owners consider they don't have enough information on the proposal in the new motion they can simply vote against it. If anyone sought to challenge the motion, if passed, on the basis of inadequate notice, they would bear the onus of demonstrating a breach of the legislation and that owners were actually misled into voting in favour of a motion.

[76] The circumstances of this appeal have similarities to the above cases. Here, for the reasons stated above, the owners were not misled by the explanatory statement. Apart from the timing of the delivery of the explanatory statements with the Notice of Motion for the AGM, there was no breach of the BCCM Act, or the Accommodation Module. That of itself is not enough to invalidate the vote, and, at worst, that was a technical breach which, according to the authorities, is not of sufficient seriousness to warrant a setting aside of the vote. All owners had sufficient opportunity to make any necessary enquiry of the Committee and examine the records prior to the AGM. The vote taken, was entirely consistent with the

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14 [2014] QBCCMC mar 317.
15 [2016] QBCCMC mar 436.
16 [2018] QBCCMC mar 547.

information provided in the explanatory memorandum. Even if some of the owners may have voted differently, as seems to be suggested, there was still a substantial number of owners who were content with the information to vote positively in favour of the motion.

[77] The Adjudicator was also somewhat equivocal in determining how the owners were misled. It is not specifically identified how the inadequacy of the information contained in the explanatory statement could amount to misleading information for the unit owners. Given that lack of clarity, to arrive at the conclusion that the motion was void presents an error of law. Also it cannot be ignored that 53 lot owners voted in favour of the motion.

[78] The actual information contained in the explanatory memorandum was not misleading. As the Applicant submits, having regard to the above authorities to require the Committee to do more in the circumstances of putting forward Motion 14, is an error of law. Therefore the Adjudicator's decision must be set aside and the vote in favour of the motion be upheld.