

QUEENSLAND CIVIL AND ADMINISTRATIVE TRIBUNAL

CITATION: *Agnew v Body Corporate for Ocean Resort Village (No 1)*
[2023] QCATA 67

PARTIES: **DONALD AGNEW**
(applicant/appellant)

v

**BODY CORPORATE FOR OCEAN RESORT
VILLAGE (NO 1)**
(respondent)

APPLICATION NO/S: APL022-22

ORIGINATING
APPLICATION NO/S: 0322-2021

MATTER TYPE: Appeals

DELIVERED ON: 6 June 2023

HEARING DATE: On the papers

HEARD AT: Brisbane

DECISION OF: Senior Member Aughterson

ORDERS: **1. The appeal is dismissed.**

CATCHWORDS: APPEAL – GENERAL PRINCIPLES – RIGHT OF
APPEAL – WHEN APPEAL LIES – OTHER CASES –
body corporate and community management – where
adjudicator dismissed application to invalidate an
extraordinary general meeting motion – whether material
provided with the motion misleading or inadequate –
whether adjudicator failed to take account of relevant
considerations – whether finding reasonably open

Body Corporate and Community Management Act 1997
(Qld), s 94, s 276, s 289, Schedule 5

Body Corporate for Palm Springs Residences CTS 29467 v
J Patterson Holdings Pty Ltd [2008] QDC 300

Gold Coast Apartment Management P/L v Price & Ors
[2017] QCATA 99

Morat Pharmaceuticals Pty Ltd v Hoft Pty Ltd & Anor
[2014] QCA 319

Ocean Resort Village (No 1) [2021] QBCCMCmr 543

Scholer Pty Ltd as Trustee v Gowland and Anor [2021]
QCATA 119

APPEARANCES & REPRESENTATION: This matter was heard and determined on the papers pursuant to s 32 of the *Queensland Civil and Administrative Tribunal Act 2009* (Qld)

REASONS FOR DECISION

- [1] This is an appeal from a decision of an adjudicator pursuant to s 289 of the *Body Corporate and Community Management Act 1997* (Qld) ('the BCCM Act'). By s 289(2) of the BCCM Act, any appeal is confined to a question of law.
- [2] The question before the adjudicator was whether a resolution at an extraordinary general meeting for the respondent held on 31 March 2021 should be invalidated. An earlier resolution of 1 May 2020 accepted an offer by Bosro Holdings Pty Ltd ('Bosro') by which monies owed to Bosro, arising from caretaking and letting services provided by that company, would be offset against levies owed by specified lot holders, with no transfer of funds to Bosro. This was referred to as 'the Bosro offset'.
- [3] The applicant disputed that earlier resolution, particularly on the basis of a purported notice of opposition given to the secretary on 5 May 2020. The adjudicator notes that a previous application which sought to invalidate the 1 May 2020 resolution was dismissed and that that decision was not appealed.¹ The adjudicator determined that there was no power to reconsider issues determined in the previous application.²
- [4] The resolution of 31 March 2021 was that the beneficiaries of the Bosro offset would remain financial until the credit owed to Bosro was either paid in full, or settled in agreement with Bosro, or settled in accordance with a Magistrates Court ruling.
- [5] Before the adjudicator, the applicant submitted, first, that there was no evidence that the purported debt owed to Bosro was a valid debt and, second, there were no amounts specified in the motion relating to the Bosro offset offer or the debts of the beneficiary lot holders. Accordingly, the motion did not give adequate or proper information to be acknowledged as a valid motion.
- [6] Those submissions are recanvassed in the current appeal, so that, effectively, the first submission underlies the first ground of appeal and the second submission the second ground of appeal.
- [7] In relation to the first ground, arguably this raises an error of law in so far as it is asserted that there was no evidence to support the decision of the adjudicator or there was a failure to take account of relevant considerations.
- [8] However, as noted by the adjudicator, the motion of 31 March 2021 did not purport to approve the Bosro offset. Rather, it simply confirmed the financial status of the owners who benefitted from the previously approved offset.³ It was added:⁴

Where the opponents of the Bosro offset have not challenged the body corporate's acceptance of the offset, or have not been successful in their challenges, I do not consider that their objection to the offset is a justification for invalidating EGM Motion 2 [of 31 March 2021].

¹ *Ocean Resort Village (No 1)* [2021] QBCCMCMr 543, [19].

² *Ibid*, [20].

³ *Ibid*, [26].

⁴ *Ibid*, [27].

- [9] There is no evident error in that conclusion drawn by the adjudicator. The submission of the applicant appears simply to be an endeavour to reopen a challenge to the earlier resolution of 1 May 2020, which, as noted by the adjudicator, was the subject of an earlier decision that was not appealed. Any issue in relation to that resolution, including whether or not in fact there was a debt owed, could have been raised in those earlier proceedings. It cannot be reopened by way of an appeal of the present decision, which relates to the subsequent motion and resolution of 31 March 2021.
- [10] This ground of appeal is rejected.
- [11] In relation to the second ground, it is submitted that the motion of 31 March 2021 was invalid in that it did not provide adequate or proper information. In particular, it is submitted that there were no amounts specified in the motion relating to the Bosro offset offer or the debts of the beneficiary lot holders.
- [12] Generally, whether the content of a motion is misleading or inadequate is a question of fact.⁵ However, to the extent that it is alleged that the adjudicator failed to take into account relevant considerations or that the decision was legally unreasonable, this second ground of appeal raises a question of law.
- [13] As to the powers of an adjudicator, s 276 of the BCCM Act provides, in part:
- (1) An adjudicator to whom the application is referred may make an order that is just and equitable in the circumstances (including a declaratory order) to resolve a dispute, in the context of a community titles scheme, about—
 - (a) a claimed or anticipated contravention of this Act or the community management statement; or
 - (b) the exercise of rights or powers, or the performance of duties, under this Act or the community management statement; or
 - (c) a claimed or anticipated contractual matter about—
 - (i) the engagement of a person as a body corporate manager or service contractor for a community titles scheme; or
 - (ii) the authorisation of a person as a letting agent for a community titles scheme.
 - (2) An order may require a person to act, or prohibit a person from acting, in a way stated in the order.
 - (3) Without limiting subsections (1) and (2), the adjudicator may make an order mentioned in schedule 5.
- [14] Schedule 5, at clause 8, allows an adjudicator to make:
- An order declaring that a resolution purportedly passed at a meeting of the committee for the body corporate, or a general meeting of the body corporate was, at all times void.

⁵ See *Body Corporate for Palm Springs Residences CTS 29467 v J Patterson Holdings Pty Ltd* [2008] QDC 300, [35]-[36]; *Scholer Pty Ltd as Trustee v Gowland and Anor* [2021] QCATA 119, [37], [40]. What is 'just and equitable' may also be a question of fact: see [2008] QDC 300, fn.34.

- [15] As to when a resolution might be void, in *Morat Pharmaceuticals Pty Ltd v Hoft Pty Ltd & Anor*,⁶ an explanatory note included a false statement about a proposed motion in a notice of meeting. The Court of Appeal referred to the power in s 276 of the BCCM Act to declare a motion void if it is 'just and equitable' to do so and stated: 'Such discretion, although broad, must be exercised in accordance with established principles, taking account of relevant considerations'.⁷ It was further stated:⁸

Proprietors 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 on a motion may have been affected, an obvious course to take by a 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.

- [16] In *Gold Coast Apartment Management P/L v Price & Ors*,⁹ Carmody J referred to the functions of the body corporate under s 94(1) of the BCCM Act and to the obligation under s 94(2), which provides:

The body corporate must act reasonably in anything it does under subsection (1) including making, or not making, a decision for the subsection.

- [17] Reference was made to the examples given under s 94(2) of a body corporate making a decision, including 'passing a motion by resolution at a general meeting or a committee meeting'. It was then stated (footnotes omitted):

[55] The question of reasonableness is objective. Good intentions and honest beliefs are immaterial. A reasonable action, including a decision, is not necessarily the correct or preferable one but is made in good faith in the overall best interests of most owners. There is at the very least an equitable obligation for the committee to provide adequate explanatory material to a general meeting.

...

[59] An explanatory note is not construed benevolently. The test is whether it gives fair warning to the members of the matters to be dealt with by the meeting. Sometimes too much detail can mislead a voter reading a note quickly, as much as too little.

[60] Inaccurate, inadequate or misleading explanatory notes may result in the resolution passing a motion to be declared void if the decision of a lot owner to vote for it was adversely affected by the tainted information.

...

[66] However, in the absence of fraud, oppression or other abuse of power a breach of the disclosure duty is necessary but not always enough of itself to invalidate an affirmative vote. The breach must be such as to empower an adjudicator to make an order under s 276, including one mentioned in Sch 5 BCCMA.

⁶ [2014] QCA 319.

⁷ [2014] QCA 319, [30].

⁸ *Ibid*, [37].

⁹ [2017] QCATA 99.

- [18] It that case the order voiding the motion in question was confirmed, in circumstances where the relevant explanatory material was factually incorrect and misleading.
- [19] In *Body Corporate for Palm Springs Residences CTS 29467 v J Patterson Holdings Pty Ltd*,¹⁰ in issue was whether a resolution to terminate a service contract was valid. McGill DCJ stated:¹¹

In relation to the question of whether there was a breach of the fiduciary obligation, it is important to bear in mind what was said about the obligations of a party alleging a breach of this duty in the Full Federal Court in *Fraser (Fraser v NRMA Holdings Ltd (1995) 55 FCR 452)* at p 467-8:

“Where the contravention of s 52 alleged involves a failure to make a full and fair disclosure of information, the applicant carries the onus of establishing how or in what manner that which was said involved error or how that which was left unsaid had the potential to mislead or deceive. Errors and omissions to have that potential must be relevant to the topic about which it is said that the respondents’ conduct is likely to mislead or deceive. The need for an applicant to establish materiality is of particular importance in a case like the present one where the proposal is complex, and involves difficult questions of commercial judgment and matters of degree and conjecture as to the future about which there is room for a range of honestly and reasonably held opinions.”

- [20] In *Scholer Pty Ltd as Trustee v Gowland and Anor*,¹² it was stated:

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.

- [21] In *Scholer* it was also stated:¹³

[49] ... 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

¹⁰ [2008] QDC 300.

¹¹ *Ibid*, [71].

¹² [2021] QCATA 119, [46].

¹³ *Ibid*, [49]-[50]. See also at [71]-[75].

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

[22] In relation to the circumstances of the present case, the adjudicator stated:¹⁴

[31] EGM Motion 2 and its explanatory note do not detail the amount of the debt owed by the body corporate to Bosro, or the outstanding levies owed by the Bosro beneficiaries that would be offset. However, the applicants have not substantiated that they have no details of the Bosro offer. The application itself includes an email from Bosro dated 6 May 2020 to all owners and committee referring to the offer made to the committee on 28 April 2020. It appears that at least some information on the quantum of levies to be offset has been communicated.

[32] Moreover, the applicants and submitters have not explained why specific financial details were necessary for owners to decide Motion 2. I have been given not [sic] evidence that the motion or explanatory note were incorrect or misleading. There is no suggestion that any owner would have voted differently had they been given different information. Indeed, given the history of the disputes in this scheme it seems likely that most owners would have voted the same regardless of the detail in the motion and explanatory material.

[23] On this appeal, the applicant submits that those observations of the adjudicator disregard the 'valid notice of opposition' to the Bosro offset. That issue is a running theme throughout the applicant's submissions. It effectively returns to the first ground of appeal in that it relies on the purported invalidity of the earlier resolution of 1 May 2020. That issue has been addressed above.

[24] It is also submitted that the committee did not provide owners with the financial calculation against the purported Bosro debts and for the debts of the lots of the beneficiaries of the Bosro offset. This suggests a lack of information, rather than the provision of information that was in itself misleading. It is clear that the adjudicator found that the material provided was not inadequate or misleading. The applicant does not indicate how that finding constituted an error of law, other than by reference to the purported failure to take account of the alleged invalidity of the Bosro offset.

[25] The applicant was not legally represented. Any submission, were it so argued, based on legal unreasonableness would be difficult to maintain. As noted by the adjudicator,¹⁵ the motion of 31 March 2021 'simply confirms the financial status of the owners who benefit from the offset that was previously approved by the body corporate'. It was further stated:¹⁶ 'obviously any offset is finite having regard to the relevant amounts at the time the offset was accepted and implemented'.

[26] As also noted by the adjudicator at [32], there is no suggestion that, with the additional information, any owner would have voted differently. Further, there is no suggestion that those attending the extraordinary general meeting of 31 March 2021 were unaware of what the motion involved or were not in a position to seek further information. In

¹⁴ *Ocean Resort Village (No 1)* [2021] QBCCMComr 543, [31]-[32].

¹⁵ *Ibid.*, [26].

¹⁶ *Ibid.*, [33].

those circumstances and where, in essence, the applicant's submission rests on the adequacy of the information, the finding of the adjudicator was reasonably open.

[27] Ground 2 of the appeal is rejected and the appeal is dismissed.