

QUEENSLAND CIVIL AND ADMINISTRATIVE TRIBUNAL

CITATION: *Body Corporate for Clermont Apartments v Mercier BC t/as Mercier Body Corporate Services* [2024] QCAT 13

PARTIES: **BODY CORPORATE FOR CLERMONT APARTMENTS (CTS 42444)**
(applicant)

v

MERCIER BCS T/AS MERCIER BODY CORPORATE SERVICES
(respondent)

APPLICATION NO/S: OCL051-22

MATTER TYPE: Other civil dispute matters

DELIVERED ON: 10 January 2024

HEARING DATE: 13 November 2023

HEARD AT: Brisbane

DECISION OF: Member Richard Oliver

ORDERS:

- 1. The declarations sought in paragraphs 2, 3, and 4 of the application are dismissed.**
- 2. The claim by the applicant for restitution in the sum of \$23,666.00 is dismissed.**
- 3. It is declared that the respondent breached the Code of Conduct under schedule 2 of the *Body Corporate and Community Title Act 1997 (Qld)* by paying to itself the sum of \$25,381.70 from the Applicant's bank account without the authority of the Applicant.**

CATCHWORDS: REAL PROPERTY – STRATA AND RELATED TITLES – MANAGEMENT AND CONTROL – BODY CORPORATE: POWERS, DUTIES AND LIABILITIES – BODY CORPORATE MANAGER – APPOINTMENT AND FUNCTIONS – CODE OF CONDUCT – BREACH – where the respondent was appointed Body Corporate Manager pursuant to a body corporate management agreement signed by two committee members – where the validity of the appointment was challenged by the applicant at an adjudication – where the vote appointing the respondent at the Annual General Meeting differed from the vote recorded in the minutes of the Annual General Meeting signed by committee members – where applicant sought an adjudication in respect of the

appointment of the respondent in reliance of the vote taken at the Annual General Meeting – where the adjudication undertook a recount of the votes of the Annual General Meeting – where the recount of the vote was different to that taken at the Annual General Meeting – where on the recount the respondent did not receive a majority of votes rendering its appointment was invalid – where respondent withdrew a contract cancellation fee from the applicant’s bank account without authority – whether management agreement void ab initio – whether respondent liable for refund of management fees – whether respondent’s conduct breached the Code of Conduct.

CONTRACT – GENERAL PRINCIPLES – PERFORMANCE OF CONTRACTUAL DUTIES – DISCHARGE FOR INVALIDITY – DAMAGES – RESTITUTION – where respondent carried out the duties of body corporate manager under a management agreement – where the management agreement terminated because of an invalid appointment – where the applicant claims restitution of management fees paid to the respondent for the period the respondent carried out the duties of body corporate manager – whether the consideration for the management agreement wholly failed – whether the respondent liable to refund fees

Body Corporate and Community Title Act 1997, s 118, s 149B, s 151, Schedule 2

Body Corporate and Community Management Accommodation Module Regulation 2020 (Qld), s 224

Baltic Shipping v Dillon (1993) CLR 344

Clermont Apartments [2021] QBCCMCmr 231

Clermont Apartments [2022] QBCCMCmr 85

Fibrosa Spalka Akcyina v Fairbairn Lawson Combe

Barbour Ltd [1943] AC 32.

Randall v Body Corporate for Runaway Cove Bayside CTS 25498 [2011] QCATA 10

Whatco Pty Ltd v Body Corporate for Illawong Lakes Resort CTS 22485 [2023] QCAT 289

Principles of Contract Law Robertson & Paterson 6th ed

APPEARANCES &
REPRESENTATION:

Applicant: Self-represented

Respondent: Self-represented

REASONS FOR DECISION

- [1] Until the annual general meeting ('AGM') of the Body Corporate for Clermont Apartments ('Clermont') on 27 May 2020, Mercier Body Corporate Services ('*Mercier*') was the body corporate manager ('BCM') for Clermont pursuant to a Body Corporate Management Agreement ('the BCMA'). The BCMA was due to expire on 31 July 2020 and therefore an item on the agenda for the AGM on 27 May, motion 9, was whether Mercier should be re-appointed as BCM for a further term of 3 years.
- [2] There was another candidate proposed for the role of BCM, so an alternate option was included in motion 9, and that was whether to vote for Rubicon Body Corporate Services ('Rubicon') to replace Mercier.¹ There was vote for the BCM by those members of the scheme who were in attendance at the AGM, or who had otherwise lodged a vote.
- [3] The vote taken on the day of the AGM was 13 in favour of Rubicon and 11 in favour of Mercier.² However on 22 July 2020 when the minutes of the meeting were prepared by Mercier,³ and sent to the chairperson of the AGM, John Murray, and another committee person, Roslyn Murray, they showed that the vote was carried in favour of Mercier by 13 to 12. The Murrays approved the minutes, and at the same time executed a new BCMA in favour of Mercier.
- [4] In a series of emails from the new chairperson, Mr Labuschewski to Mercier, he disputed its appointment as BCM based on the vote taken on the day of AGM. Because of the difference in the vote on the day, and that recorded in the minutes signed by the Murrays, Clermont applied to the Office of the Commissioner for Body Corporate and Community Management ('the Commissioner') for an adjudication to correct the vote and appoint Rubicon as the BCM. The adjudication was contested by Mercier so the adjudicator effectively undertook a recount. The result was that Rubicon gained the majority of votes, on a different basis to vote at the AGM, to take over the role of BCM.
- [5] Clermont then applied to the Tribunal seeking a number of declarations and an order that Mercier refund money paid to it for body corporate services from the date of the AGM. In summary the declarations sought are:
- (a) Mercier breached the code of conduct for body corporate managers under Schedule 2 of the BCCM Act;
 - (b) There was no BCMA between Mercier and Clermont from 31 July 2000;
 - (c) Mercier was not authorised from 31 July 2000 under s 151(3) of the BCCM Act to operate the bank account of Clermont;
 - (d) That between 1 August 2020 and 23 June 2021 Mercier did in fact operate the bank account of Clermont in breach of s 151(3) of the BCCM Act.

¹ Refer to the AGM minutes – Exhibit 2 (affidavit of Gary Labuschewski), pages 190-191.

² Marc Mercier, the representative of Mercier, attended the meeting and took the minutes.

³ AGM minutes – Exhibit 2, page 191.

- [6] Assuming the declarations are made in favour of Clermont, the monetary claim is for the sum of \$23,666. This sum relates to management fees paid to Mercier for work done on behalf of Clermont in the period between 1 August 2023 and 23 June 2021.

The first adjudication

- [7] The relevance of period to 23 June 2021 is because it was on 13 May 2021 that the adjudicator appointed by the Commissioner made the order which resulted in Rubicon being appointed as BCM. As part of the adjudication, the learned adjudicator called for all ballot papers and effectively did a recount of all votes.
- [8] There was a contest, in the adjudication, as to whether the vote for lot 54 was valid and whether there was justification by Mercier for the contention that the votes for lots 72 and 77 were “administratively overlooked”. It was held that the vote for lot 54 was valid and should have been included, the vote for lot 77 was invalid and the vote for lot 72 was valid. The reasons⁴ record that:
- If lot 54’s vote was included in the count and lot 77’s vote on motion 9 was treated as invalid, the 13-12 vote in favour of motion 9, alternative 1 recorded in the minutes would have been 12-13 in favour of alternative 2.
- [9] The obvious consequence of the adjudicator’s order was that the contract between Clermont and Mercier came to an end because the vote appointing Mercier, as recorded in the official minutes signed by two committee members, was invalid. Until the adjudication Mercier continued to undertake the day-to-day management of the scheme and charged for services undertaken by it under the signed BMCA. This continued until the changeover to Rubicon, which was subsequent to receipt of the adjudication.
- [10] The declaratory orders sought in this application are effectively similar to the orders sought in the adjudication. Clermont also sought an order in the adjudication that Mercier repay moneys paid to it by Clermont for body corporate services provided under the contract. As to this contention the learned adjudicator said:
- I also cannot make orders against Mercier as sought at paragraphs 2(c) and (d). Mercier is not a respondent to this application, not could it be. Section 227(1) of the Act sets out the permissible parties to an adjudication application. It does not allow an application to be made by an owner against a body corporate manager.
- [11] The purpose of this application by Clermont, already having the benefit of the decision in the adjudication overturning the appointment of Mercier as BCM, is for the Tribunal to make additional findings against Mercier in relation to money received as a result of the void contract, its conduct in administering the scheme, when it knew or ought to have known it had no authority to do so (on Clermont’s case).

⁴ *Clermont Apartments* [2021] QBCCMCmr 231.

- [12] It is relevant to note that after the adjudication no further proceedings were instituted by Mercier to challenge that finding. It accepted the decision, ceased acting as the BCM for Clermont and handed the role over to Rubicon. Rubicon then entered into a new BCM with Clermont. However before doing so, Mercier withdrew further funds from the body corporate account purportedly as a contract termination fee.

The second adjudication

- [13] There was a further adjudication in March 2022, which again involved similarities to the orders sought here. This followed the failure of Mercier to comply with a prescribed notice⁵ issued by Clermont's then BCM, Rubicon, on 3 June 2021. The notice called for the handing over all body corporate records and a return of all body corporate property including money paid to Mercier, particularised in an email from Clermont to Mercier dated 29 June 2021.
- [14] The orders sought by Clermont in that adjudication was a declaration that Mercier failed to comply with the prescribed notice to return all of the body corporate records to Clermont, and that it pay Clermont \$49,048.03. This sum is made up of two components, \$25,381.70 Mercier paid to itself on 17 June 2021, without the authority of Clermont, particularised as "termination of contract fees".⁶ The second component was for \$23,666.60 being the management fees incurred during the 'non-contract' period.⁷ In respect of the former payment, the adjudicator observed at [31]:

During this period, Mercier was not the appointed body corporate manager and had no contractual basis for any deductions from the body corporate bank account. Moreover, all deductions during the non-contract period were unauthorised by the committee.

- [15] The adjudicator found that Mercier had failed to comply with the prescribed notice and ordered that it return all body corporate records and refund the \$25,381.70 withdrawn after the date of the prescribed notice. As to the balance of the monetary claim the adjudicator said:

With respect to the additional amount of \$21,851.26 (ex GST) claimed by the body corporate said to have been transferred by Mercier from the body corporate bank account during the non-contract period, namely 01/08/2020 and the date of partial handover of records, namely 23/06/2021, I consider that I do not have authority to determine whether it was validly incurred or authorised, or should be returned. To do so requires consideration of 'contractual matters', within the meaning of that term in schedule 6 of the Act.....

- [16] Mercier complied with the orders and in particular paid \$25,381.70 to Clermont.

Jurisdiction

- [17] Before dealing with the specific declarations sought in the application, it is necessary to determine if other relief is available to Clermont such as a refund of all or some of the money paid to Mercier for the services rendered under the 20 July

⁵ *Body Corporate and Community Management Accommodation Module Regulation 2020* (Qld), s 224.

⁶ *Clermont Apartments* [2022] QBCCMCmr 85 at [24].

⁷ *Ibid* [30].

2020 contract ('the contract'). These services are particularised in Mr Mercier's affidavit.⁸ There is no contest that the contract, by reason of the recount alone, and also for the reasons set out in the second adjudication, is void.

- [18] Although not articulated as such by Clermont, the monetary claim is made in restitution on the basis that the contract of 20 July 2020 is void ab initio. The Tribunal does have jurisdiction under s 60 of the *Queensland Civil and Administrative Tribunal Act 2009* (Qld) ('QCAT Act') to make a declaration. The jurisdiction is engaged if it is necessary to make a decision about a "a matter" in the proceeding.⁹ Under s 60(3) it can also make an order if it considers necessary to give effect to a declaration. Given the additional relief sought by Clermont for the recovery of money paid to Mercier, the Tribunal has jurisdiction to make the declarations sought.
- [19] The application is brought in the Tribunal exercising its original jurisdiction, pursuant to s 149B of the BCCM Act, where there is a dispute about a claimed or anticipated contractual matter involving a body corporate manager.¹⁰ The section is confined to a "contractual matter" and by the operation of s 118 of the BCCM Act, the code of conduct contained in Schedule 2 is taken to be included in the terms of the contract providing for BCM's engagement. It follows then, in my view, that the Tribunal has jurisdiction to make a declaration about the conduct of Mercier.

The BCM Contract dated 20 July 2020

- [20] The contract of 20 July 2020 was executed under the seal of Clermont by John Murray and Roslyn Murray, both committee members of Clermont. This followed the approval of the minutes by the chairperson of the AGM, Mr Murray. However, the validity of this was always challenged by Mr Labuschewski because of the vote taken on the day of the AGM.
- [21] In the emails referred to above, soon after the AGM, Mr Labuschewski sent an email on 11 August 2020 to Mr Mercier, at Mercier's generic email address,¹¹ and asked him to correct the minutes and record what actually occurred at the AGM as follows:

Reinstate Outcome on Motion 9 as Marc Mercier declared during the AGM as follows, 26 Votes, 11 Votes Alt 1 (MBCS), 13 Votes Alt 2 (Rubicon) 4 Abstain.¹²

- [22] Neither Mr Mercier, nor anyone else from Mercier, responded to Mr Labuschewski's email or made any correction to the minutes. There was a follow up email from Mr Labuschewski on 20 August 2020 repeating that, inter alia,

Marc, as MBCS Management Agreement was not renewed at the recent AGM by your declared outcome (Marc' own words) and therefore your MBSC Management of Clermont Apartments has effectively finalised as of 31 July 2020.....

⁸ Filed 15 May 2023 paragraph 4(e) and (f).

⁹ *Randall v Body Corporate for Runaway Cove Bayside* CTS 25498 [2011] QCATA 10; followed in *Whatco Pty Ltd v Body Corporate for Illawong Lakes Resort* CTS 22485 [2023] QCAT 289.

¹⁰ Annexure A to the Application paragraph 16.

¹¹ He also copied in John Murray and Roslyn Murray.

¹² Ibid page 224 and a further email sent an hour later reiterating the earlier email refer to page 225.

- [23] Mr Labuschewski, as secretary of Clermont, keep pressing the issue about the vote and Mercier's invalid appointment in emails until 2 November 2020.¹³ However, Mercier continued to perform the functions of the BCM under the contract. There was no meeting of Body Corporate of Clermont or the committee (it seems from the evidence) to issue any formal notice or a prescribed notice, to Mercier to stop undertaking the work.
- [24] Mr Labuschewski contends in his affidavit¹⁴ that:
- Neither the Body Corporate or its Committee ever approved the payment of Mercier's invoices issued and paid between 1 august [sic] 2020 and 23 June 2021 but could do little to prevent Mercier from making such payments as Mercier was acting without instructions from the Committee.¹⁵
- [25] Even so, the status quo remained and Mercier charged for its work and was paid in accordance with the contract. This work involved the payment of the usual body corporate expenses utilising Clermont's bank account as well as gathering in and banking body corporate levies paid by lot owners. In fact, the material filed by Mercier, included in the affidavit of Mr Mercier,¹⁶ provides particulars of the work done and there was really no challenge to this. The only exception was that Mercier charged a termination/exit fee under the contract, but this was refunded.
- [26] Despite what Mr Labuschewski says, Clermont acquiesced in this conduct "to ensure the Body Corporate continued to function adequately whilst the dispute with the respondent regarding the appointment, including the handover of Body Corporate records was produced".¹⁷ Clermont has produced no evidence other than Mr Labuschewski's affidavit to support Clermont's position that payments to Mercier were not authorised. I am particularly referring to at least a resolution by the committee.
- [27] On the other hand, Mercier maintained to the end that the contract signed by committee members under seal was valid and binding. It was not until the first adjudication when it had no choice but to accept the position advocated for by Mr Labuschewski. Also, the basis of the findings by the adjudicator, that the vote for the alternate option appointing Rubicon was different to the vote count taken on the day of the AGM, is relevant because this was as a result of a fresh tally.
- [28] Mr Labuschewski appeared at the hearing of the application before me on behalf of Clermont. He conceded the obvious that, had the body corporate management work not been undertaken by Mercier, the same work would have been done by Rubicon. The charges may have been somewhat different, but no evidence was put forward before me as to what that difference, if any, would have been. The only point raised that may have had some substance, was that Mercier utilised body corporate funds in putting forward a submission to the adjudicator. Even so, from reading the reasons

¹³ Documents 7 – 11 to Mr Labuschewski affidavit.

¹⁴ Affidavit dated 13 January 2023 at paragraph 7.

¹⁵ Ibid paragraph 17.

¹⁶ Affidavit filed 15 May 2023, paragraph 2(e) and (f). It is unnecessary to particulars of work undertaken in these reasons.

¹⁷ Labuschewski affidavit dated 13 January 2023 paragraph 22.

of the adjudication, this was of assistance to the adjudicator in coming to the decision about the vote recount.

- [29] Although not articulated as such, accepting this monetary claim to be a claim in restitution, it is necessary to determine what loss, if any, Clermont has suffered by reason of the termination of the contract as a consequence of the adjudication. In other words, has Mercier been unjustly enriched at the expense of Clermont because of a total failure of the consideration paid under the contract, which was found to be void ab initio.

Applicable Principles

- [30] Neither party has provided the Tribunal with any helpful submissions or references to case law which would apply in these circumstances.¹⁸ The position put forward by Clermont is simply that it paid money to Mercier under an ineffective contract. Mercier puts the simple argument that Clermont received value for the money paid. In other words, there was no failure of consideration. Also, it would be unfair to refund the management fees under s 94 of the BCCM Act.
- [31] A useful summary of the applicable principles in restitutionary claims such as this, can be found in *Principles of Contract Law*:¹⁹

The most common restitutionary claims in the contractual context arise where money (such as a deposit) the transaction may be ineffective, for example, because the parties anticipate the formation of a contract that never materialises or because a contract is void for illegality, is frustrated or terminated for breach. The fact that benefits have been conferred under a contract that is or has become ineffective or unenforceable does not, of itself, provide a basis for restitution. Where money has been paid under an ineffective contract, it is recoverable if the money was paid for a consideration or purpose that has totally failed. The relevant basis for restitution is failure of consideration.

- [32] Although the circumstances here are not specifically referred to in the above statement, they are akin to a contract that has been frustrated. In a frustrated contract the recovery of money paid pursuant to the contract that is frustrated is recoverable if there is a total failure of consideration.²⁰
- [33] The High Court considered the question of restitution in a failed contract in *Baltic Shipping Co v Dillon*.²¹ In that case a passenger on a cruise ship sought to recover the balance cruise fare when the ship sank on the tenth day of a 14-day cruise. Although part of the fare was refunded, the passenger sued the shipping company for the balance of the fare on the basis that the consideration for the cruise contract totally failed, by reason of the ship sinking. For the purposes of this application, it is sufficient to adopt the statement of Mason CJ,²² with whom the Court agreed:

¹⁸ Clermont engaged a solicitor to prepare the submission with the application and Mr Mercier is a barrister.

¹⁹ Robertson & Paterson 6th ed at paragraph 10.20.

²⁰ *Fibrosa Spalka Akcyina v Fairbairn Lawson Combe Barbour Ltd* [1943] AC 32; adopted by the High Court in *Baltic Shipping v Dillon* (1993) CLR 344 ('*Dillon*'); [1993] HCA 4 at [23].

²¹ [1993] HCA 4

²² *Ibid* at [17].

I have come to the conclusion in the present case that the respondent is not entitled to recover the cruise fare on either of the grounds just discussed. The consequence of the respondent's enjoyment of the benefits provided under the contract during the first eight full days of the cruise is that the failure of consideration was partial, not total. I do not understand how, viewed from the perspective of failure of consideration, the enjoyment of those benefits was "entirely negated by the catastrophe which occurred upon departure from Picton" ((25) (1989) 21 NSWLR, at p 668), to repeat the words of the primary judge.

- [34] It is evident on Clermont's own case that it did derive considerable benefit from the payments to Mercier under the contract until handover to Rubicon.

Discussion

- [35] The question of the validity of the BCM contract has been determined by the first adjudication. Mercier has accepted the determination that the contract is void. The utility of making a declaration to that effect in this application escapes me save for the possible recovery of money paid pursuant to the void contract. Also, it must be considered whether Mercier breached the code of conduct, but his latter point is independent of the restitution claim.
- [36] As to the monetary claim of \$23,666, as discussed above, this would only be recoverable if there was a total failure of consideration. Although Clermont may not have obtained full value for the sum paid to Mercier, like in *Dillon*, it simply cannot be said that it got nothing for the work undertaken by Mercier as set out in the tables referred to in Mr Mercier's affidavit. Had the management fees not been paid to Mercier a proportion would have been paid to Rubicon. I appreciate that Mr Labuschewski never waived from the position that Mercier had not been validly appointed, but Clermont, by its committee, never sought to terminate Mercier's appointment, which it could have done. It may have faced a breach of contract claim, but if it was to maintain its position with respect to the appointment, this was the obvious step to take. Instead, it was content for Mercier to continue with the management functions until the adjudication.
- [37] The other important feature in this case is that the first adjudication was decided on a recount. The result was not the same as that advocated for by Mr Labuschewski at the AGM. The material suggests that Mercier was being somewhat coy in simply relying on a position that votes were "administratively overlooked" when the minutes were being prepared. However, it is also relevant that the Murray's were content to accept the accuracy of the AGM minutes and sign the contract. This would suggest there may have been some disharmony within the committee of Clermont. This is further evidenced by the fact that Mr Labuschewski has been the prime mover in this litigation.
- [38] As there has not been a total failure of consideration, the claim for \$23,666 is dismissed.
- [39] With respect to the declarations that there was no BCMA between Clermont and Mercier, as I have already said, because of the decision made about the vote for the appointment of a BCM in the first adjudication, there seems little utility in making a declaration in this proceeding. The making of a declaration under s 60 of the QCAT Act is an exercise of discretion to give effect to some issue in dispute. Here there is none because Mercier has accepted and abided the decisions in both adjudications.

Until then it acted in accordance with the signed agreement and with the full knowledge and acquiescence of Clermont, despite Mr Labuschewski's protestations. Even though the agreement was not signed in accordance with the requirements of the BCCM Act, Clermont permitted Mercier to carry out the functions as manager for the scheme.

[40] By reason of these facts, until the decision in the first adjudication, it was authorised to, and did in fact, operate the bank accounts under s 151(3) of the BCCM Act. Therefore, the declarations sought that Mercier was not authorised to do so is also dismissed.

[41] The final question for determination is whether a declaration should be made that Mercier breached the code of conduct in sch 2 of the BCCM Act. The only particulars of conduct are those referred to in the application in the declarations sought in paragraphs 2 and 3 in relation to the use of Clermont's bank account and in paragraph 4 being the failure to hand over records.

[42] I have dealt with the operation of the bank accounts. As to the failure to hand over records, this was dealt with in the second adjudication. There the order made by the adjudicator was:

I declare that Mercier Body Corporate Services breached section 224 of the Accommodation Module by failing to return all records, assets and other property of the Body Corporate of Clermont Apartments with 14 days of receiving the prescribed notice.

[43] The matters referred to in sch 2 of the BCCM Act relate to conduct during the performance of the management agreement. By the time of the adjudication the body corporate records had been returned, albeit outside the 14-day prescribed period. This was a technical breach, and the declaration was made in respect of the records because of this delay.

[44] The return of the \$25,381.70, the contract cancellation fee, is another matter. At the time these funds were withdrawn Mercier was aware of the outcome of the first adjudication and knew, or ought to have known, it had no authority to withdraw these funds without the express authority of the committee or a resolution at a general meeting. It is sufficient here to record what the adjudicator said about this issue:

In any event, expenditure decisions must be made by a body corporate, either by owners at a general meeting or by the committee. This decision making power cannot be delegated. The authorisation of a body corporate manager to exercise the powers of executive committee members does not give the body corporate manager the authority to decide on expenditure. Individual committee members cannot make expenditure decisions. A committee member or a body corporate manager can only pay an invoice if it was for expenditure that has been expressly authorised by the committee or at a general meeting. Nor can the provisions in any alleged contract of engagement with Mercier authorise Mercier to make payments without a valid body corporate decision. The provisions of the legislation cannot be waived, limited or contracted out of.

To the extent that the body corporate is seeking orders for the return of its property, I consider that amounts purportedly paid by Mercier to itself after the prescribed notice was issued on 3 June 2021, without authority and contrary to the specific direction of the committee, remain the property of the

body corporate. Mercier does not dispute that it has paid amounts to itself since this date. Clearly, Mercier should not have made any payments from the body corporate account to itself or anyone else after 3 June 2021(if not before).²³

- [45] This conduct was not acting in the body corporate's best interest,²⁴ constituted misleading conduct,²⁵ unconscionable conduct²⁶ and was a conflict of duty and interest.²⁷
- [46] As Mercier is an experienced body corporate manager, and given the history of the disputation, to unilaterally withdraw a significant sum from the body corporate account without approval does amount to a breach of the code of conduct set out in sch 2. I therefore propose to make a declaration that Mercier did breach the code of conduct but confine it to the withdrawal of \$25,381.70 without Clermont's approval.

Summary

- [47] The genesis of this application seems to be a breakdown of the relationship between Mr Labuschewski and Mr Mercier. Although Mr Mercier must have been aware that the vote appointing the new body corporate manager was in favour of Rubicon because Mr Mercier was at the meeting, two committee members were prepared to accept the minutes appointing Mercier as accurate. They then signed the management agreement appointing Mercier as manager. This was reversed at the first adjudication and had the result of the adjudication been consistent with the vote at the AGM, a different approach may have been taken to the conduct of Mercier in the preparation of the minutes.²⁸
- [48] Mercier continued to perform the functions of body corporate manager and was paid for that work. Even though the contract was void ab initio, Clermont's claim in restitution depended on a finding there was a total failure of the consideration paid under the contract. This could not be made out and therefore the claim for monies paid under the contract must be dismissed.
- [49] As for the balance of the declarations sought, I only propose to make the declaration about the conduct of Mercier in paying to itself, without authority, the sum of \$25,381.70 for the reasons stated.
- [50] Therefore, the order of the Tribunal is that:
1. The declarations sought in paragraphs 2, 3, and 4 of the application are dismissed.
 2. The claim by the applicant for restitution in the sum of \$23,666.00 is dismissed.
 3. It is declared that the respondent breached the Code of Conduct under schedule 2 of the *Body Corporate and Community Title Act 1997* (Qld) by

²³ *Clermont Apartments* [2022] QBCCMCmr 85 at [44].

²⁴ BCCM Act, sch 2(4).

²⁵ *Ibid*, (7).

²⁶ *Ibid*, (8).

²⁷ *Ibid*, (9).

²⁸ There has been no allegation of fraud against Mercier.

paying to itself the sum of \$25,381.70 from the Applicant's bank account without the authority of the Applicant.