

SUPREME COURT OF QUEENSLAND

CITATION: *Beenleigh Housing & Development Company Ltd v Isaiah Jumeirah Kahrter Pty Ltd as trustee for The Isjuka Trust & Anor* [2017] QSC 170

PARTIES: **BEENLEIGH HOUSING & DEVELOPMENT COMPANY LTD ACN 066 813 401**
(plaintiff)
v
ISAIAH JUMEIRAH KAHRTER PTY LTD ACN 154 830 092 AS TRUSTEE FOR THE ISJUKA TRUST
(first defendant)
v
NELSON LEON
(second defendant)

FILE NO/S: BS No 5594 of 2015

DIVISION: Trial Division

PROCEEDING: Application

ORIGINATING COURT: Supreme Court at Brisbane

ORDERS: 21 August 2017

REASONS: 24 August 2017

DELIVERED AT: Brisbane

HEARING DATE: 3 November 2016; Supplementary submissions on behalf of the plaintiffs received on 17 November 2016; 21 August 2017

JUDGE: Burns J

ORDER: **The orders of the court are that:**

- 1. The application brought by the first defendant is dismissed;**
- 2. The parties are directed to file and serve written submissions by 4.00 pm on 31 August 2017 as to:**
 - (a) what, if any, orders (by way of declaration or otherwise) should be made with respect to the**

cross-application brought by the plaintiff; and

(b) the costs of the application and cross-application.

CATCHWORDS: PROFESSIONS AND TRADES – LAWYERS – DUTIES AND LIABILITIES – SOLICITOR AND CLIENT – RETAINER – CHALLENGING RETAINER – where the plaintiff is a not-for-profit company and charity registered pursuant to the *Australian Charities and Not-for-profits Commission Act 2012* (Cth) – where, by the plaintiff’s Constitution, any member who failed to pay his or her annual membership fee before 31 August of the relevant membership year ceased to be a member of the company – where the plaintiff commenced a proceeding against the defendants – where the first defendant contended that various members had failed to pay their membership fee in accordance with the Constitution – where the first defendant contended that resolutions passed by the board of directors of the plaintiff authorising the commencement of the proceeding were invalid because they had been passed by, or were otherwise affected by the involvement of, persons whose membership had ceased through non-payment of their membership fee – where the first defendant sought an order dismissing the proceeding pursuant to r 16 of the *Uniform Civil Procedure Rules 1999* (Qld) – whether the resolutions authorising the commencement of the proceeding were invalid

CORPORATIONS – MANAGEMENT AND ADMINISTRATION – MEETINGS – MEETINGS OF MEMBERS – EFFECT OF IRREGULARITY – RETAINER – where the plaintiff is a not-for-profit company and charity registered pursuant to the *Australian Charities and Not-for-profits Commission Act 2012* (Cth) – where, by the plaintiff’s Constitution, any member who failed to pay his or her annual membership fee before 31 August of the relevant membership year ceased to be a member of the company – where the plaintiff commenced a proceeding against the defendants – where the first defendant contended that various members had failed to pay their membership fee in accordance with the Constitution – where the first defendant contended that resolutions passed by the board of directors of the plaintiff authorising the commencement of the proceeding were invalid because they had been passed by, or were otherwise affected by the involvement of, persons whose membership had ceased through non-payment of their membership fee – where the first defendant sought an order dismissing the

proceeding pursuant to r 16 of the *Uniform Civil Procedure Rules* 1999 (Qld) – whether the resolutions authorising the commencement of the proceeding were invalid

Australian Consumer Law 2010 (Cth), s 18
Corporations Act 2001 (Cth), s 249H(1), s 249J(1), s 1322
Uniform Civil Procedure Rules 1999 (Qld), r 16

Ashrafinia v Ashrafinia [2012] NSWSC 500, cited
Hawksford v Hawksford (2005) 191 FLR 173; [2005] NSWSC 463, cited
Re HIH Insurance Limited (in liquidation) [2014] NSWSC 922, cited
Wood v Inglis [2008] NSWSC 1147, cited

COUNSEL: P L O’Shea QC with C Harding for the plaintiff
 B O’Donnell QC for the first defendant

SOLICITORS: Mitchells for the plaintiff
 esourcelegal for the first defendant

- [1] By this application, the first defendant, Isaiiah Jumeirah Kahrter Pty Ltd, contended that the subject proceeding was commenced without the authority of the plaintiff, Beenleigh Housing & Development Company Ltd, and sought an order dismissing the proceeding pursuant to r 16 of the *Uniform Civil Procedure Rules* 1999 (Qld) or in the exercise of the inherent jurisdiction of the court.
- [2] An order was also sought that the solicitors on the record for the plaintiff, Mitchells Solicitors, pay IJK’s costs of the proceeding, including the costs of its application, on an indemnity basis.
- [3] The second defendant, Nelson Leon, did not join in the making of the application, but nonetheless supported it through the provision of two affidavits on which he was cross-examined at the hearing.
- [4] In opposing the relief sought by IJK, BHDC cross-applied for an order declaring that the instructions provided by it to Mitchells to commence the proceeding were not invalid by reason of any contravention of a provision of the *Corporations Act* 2001 (Cth) or a provision of the Constitution for BHDC. BHDC also sought its costs of that application together with “such further or other relief as to the court seems fit”.¹
- [5] On 21 August 2017, orders were made dismissing IJK’s application and directing the parties to file and serve written submissions as to (1) what, if any, orders should be made with respect to the cross-application and (2) the costs of the application and cross-application. These are my reasons for the making of those orders.

¹ Cross-application filed on 13 October 2016, par 3.

The proceeding

- [6] BHDC is a not-for-profit company, and a charity registered pursuant to the *Australian Charities and Not-for-profits Commission Act 2012* (Cth).² One of its principal objects is to “assist Aboriginals and Torres Strait Islanders in need of accommodation and other housing services in the Beenleigh and district surrounding areas, and to rent accommodation to members only.”³
- [7] The claim and statement of claim by which this proceeding was commenced were filed on 9 June 2015. The defendants filed a notice of intention to defend and defence on 13 August 2015. The next day, the plaintiff filed an amended statement of claim. On 8 September 2015, the plaintiff filed another amended statement of claim, to which the defendants pleaded by way of a defence filed on 6 November 2015. The most recent formulation of the plaintiff’s claim can be found in a further amended statement of claim filed on 5 August 2016 to which the defendants have not yet pleaded.
- [8] Some facts are not in dispute on the pleadings: until 23 December 2014, BHDC was the registered proprietor of 26 house properties situated in Beenleigh, Bethania, Eagleby, Edens Landing and Mt Warren Park;⁴ on 2 December 2013, BHDC and IJK entered into a heads of agreement in relation to those properties;⁵ on 12 November 2014, BHDC and IJK entered into a contract for the sale of the properties as well as a deed of agreement;⁶ on 23 December 2014, settlement of the sale contract took place and IJK subsequently became the registered proprietor of the properties.⁷
- [9] By the sale contract⁸ and the deed of agreement,⁹ the agreed purchase price for the sale of the properties was \$3 million, with \$2.2 million payable on settlement and the balance of \$800,000 payable within 12 months of settlement together with interest at the rate of 5% per annum from the date of execution of the sale contract (12 November 2014) to the date of payment.¹⁰ At settlement, IJK paid \$2.2 million to BHDC, but no part of the balance was paid by 12 November 2015 or subsequently.¹¹

² Second affidavit of William Davis filed on 17 October 2016, par 4 and ex WGHD-21 and ex WHGD-22.

³ Constitution for BHDC, cl 10(a) (ex NWL-1.5 to the first affidavit of Nelson Leon filed on 28 October 2016).

⁴ Statement of claim, par 1(b) and Annexure A; defence, par1(b).

⁵ Statement of claim, par 10; defence, par 8.

⁶ Statement of claim, par 17; defence, par 17.

⁷ Statement of claim, par 18; defence, par 18.

⁸ First affidavit of David Graham filed on 29 August 2016, ex DG-2.

⁹ Ibid, ex DG-3.

¹⁰ Deed of agreement, cl 3.1.1 and cl 3.1.2.

¹¹ Graham 1, par 4(c) and par 5.

- [10] By the further amended statement of claim, it is alleged that:
- (a) between January 2013 and October 2014 the second defendant, Nelson Leon, was employed by BHDC as its chief executive officer pursuant to a contract between BHDC and Leon;¹²
 - (b) it was a term of the contract of employment that Leon was under a duty to act in the interests of BHDC with good faith and fidelity;¹³
 - (c) Leon owed fiduciary duties to BHDC which he breached;¹⁴
 - (d) Leon, on his own behalf and on behalf of IJK, made certain representations to BHDC regarding the properties and, in particular, as to the value of the properties;¹⁵
 - (e) by the making of the representations, IJK and Leon engaged in conduct that was misleading or deceptive and was likely to mislead or deceive in contravention of s 18 of the *Australian Consumer Law*;¹⁶ and
 - (f) Leon was knowingly involved in that contravention.¹⁷
- [11] BHDC seeks damages against IJK in the sum of \$3 million or such other sum as may be found to be the difference between the value of the properties and the consideration paid by IJK to BHDC along with damages in the sum of \$800,000 together with contractual interest pursuant to the deed of agreement. As against Leon, damages are sought in the sum of \$3 million or such other sum as may be found to be the difference between the value of the properties and the consideration paid by IJK to BHDC for the properties.

The challenge to the retainer

- [12] A party challenging the retainer of solicitors by another party to litigation bears the legal onus of proving the absence of sufficient authority.¹⁸ However, where the party propounding the challenge advances sufficient evidence from which the absence of authority may be inferred, an evidential onus may shift to the other party. That might be, for example, where the relevant facts are peculiarly within the knowledge of the

¹² Further amended statement of claim, par 6.

¹³ Ibid, par 7.

¹⁴ Ibid, par 8 and par 27(b).

¹⁵ Ibid, par 11.

¹⁶ Ibid, par 15.

¹⁷ Ibid, par 16.

¹⁸ *Hawksford v Hawksford* (2005) 191 FLR 173, [55]; *Re HIH Insurance Limited (in liquidation)* [2014] NSWSC 922, [5].

other party or where that party is in a better position to produce evidence of those facts.¹⁹

- [13] IJK’s challenge to Mitchells’ retainer was advanced on a number of grounds but, before considering them, it is useful to touch on some of the provisions of the Constitution for BHDC followed by a consideration of what is relied on by BHDC to establish Mitchells’ retainer.

The Constitution

- [14] BHDC is a company whose members do not hold shares. Instead, under the Constitution,²⁰ its members are obliged to pay an annual membership fee.²¹ The membership year is the period from 1 July to 30 June²² and, at all times, the fee has been \$10.00. Membership fees are payable in advance unless the board otherwise determines,²³ and there is no suggestion that such a resolution was ever passed. Importantly, membership is a condition of eligibility for rental accommodation provided by BHDC.²⁴
- [15] To become a member, a person must: (1) be 18 years or over; (2) be an Aboriginal or Torres Strait Islander; (3) subscribe to the objects of the company; and (4) satisfy the board of directors that they are “currently living in the Beenleigh and district surrounding areas”.²⁵ An applicant for membership who does not satisfy these criteria may be accepted as an associate member at the discretion of the board.²⁶ Applications for membership and associate membership must be made in writing to the board in a prescribed form.²⁷
- [16] Once a person becomes a member, if the annual membership fee is not paid by 1 July of the relevant membership year, the person will continue to be a member of the company until 31 August of that year but cannot vote at a general meeting, be nominated for appointment as a director, or nominate another for appointment as a director.²⁸ If the failure to pay the membership fee continues beyond 31 August, the person will cease to

¹⁹ *Hawksford v Hawksford* (2005) 191 FLR 173, [54] – [55]; *Ashrafinia v Ashrafinia* [2012] NSWSC 500, [21]; *Re HIH Insurance Limited (in liquidation)* [2014] NSWSC 922, [5].

²⁰ Constitution for BHDC (Nelson 1, ex NWL-1.5).

²¹ *Ibid*, cl 23.

²² *Ibid*.

²³ *Ibid*.

²⁴ *Ibid*, cl 10(a).

²⁵ *Ibid*, cl 17.

²⁶ *Ibid*, cl 17(e) and cl 18.

²⁷ *Ibid*, cl 19.

²⁸ Constitution, cl 24(b), cl 29 and cl 74.

be a member of the company unless the payment of the fee is suspended or waived by the board.²⁹ Again, it is not suggested that such a resolution was ever passed.

- [17] Late payment of the membership fee does not have any reinstating effect. Thus, in any case where a member fails to pay the membership fee by 31 August 2014, that person's membership will cease and may only be reinstated after the making, and acceptance by the board, of a fresh application to be admitted as a member.³⁰
- [18] The board of directors consists of not more than seven and not less than four people.³¹ Each must be a member of the BHDC,³² although associate members are eligible to fill two non-executive positions as directors.³³ A quorum is constituted by four members of the board,³⁴ at least two of whom must occupy executive positions.³⁵ Directors are elected at the AGM³⁶ and hold office for three years "before coming up for re-election".³⁷ At each AGM, one third of the directors must retire from office, in which event they will become eligible for re-election.³⁸ The board also has the power to appoint persons to fill casual vacancies as directors but any such appointment will only have effect until the next AGM, at which time the person may stand for election.³⁹
- [19] A director who fails to pay his or her annual membership fee by 31 August will not only cease to be a member of the company, he or she will no longer be eligible to continue as a director.⁴⁰ In other words, loss of membership results in the loss of position as a director.
- [20] Only members are eligible to vote at the AGM. A quorum is constituted by "15 voting and financial members".⁴¹ Notice of the AGM is required to be given, and this is to be achieved by "publishing [a notice of meeting] in a newspaper having circulation in and

²⁹ Ibid, cl 24(b).

³⁰ Ibid, cl 19.

³¹ Ibid, cl 26.

³² Ibid, cl 26, cl 29 and cl 31.

³³ Ibid, cl 26.

³⁴ Ibid, cl 35(b).

³⁵ That is, as president, vice-president, secretary or treasurer: Constitution, cl 26.

³⁶ Constitution, cl 26.

³⁷ Ibid, cl 30.

³⁸ Ibid, cl 30.

³⁹ Ibid, cl 27.

⁴⁰ Ibid, cl 26, cl 29 and cl 31.

⁴¹ Ibid, cl 65.

around Beenleigh”.⁴² In this regard, 14 days clear notice is required unless the members attending the meeting agree to shorter notice,⁴³ although it is also provided that:

“The accidental omission to give notice to, or the non receipt of notice by any member or person entitled thereto, shall not invalidate the proceedings of any general meeting.”⁴⁴

The claimed retainer

- [21] On 4 February 2015, a costs agreement between Mitchells and BHDC⁴⁵ was executed under the common seal of BHDC following a meeting of the board of directors held on that day.⁴⁶ Present at the meeting were Peter Eather, Maureen Gordon, Gail Turnbull and David Leon. As to those persons, BHDC maintains that:
- (a) Eather was elected as a director of BHDC at the AGM held on 3 November 2012.⁴⁷ At a meeting of the board of directors held on 7 May 2014, he was elected to the position of “chair” of the board, but that was intended to be a reference to the position of president.⁴⁸ He was a director, and the president of the board, as at 10 October 2014⁴⁹ and that remained the position on 4 February 2015;
 - (b) Gordon was first appointed as a director on 22 November 2003.⁵⁰ She was a director as at 14 October 2014⁵¹ and that remained the position on 4 February 2015. She was re-appointed to the board at the AGM held on 17 May 2015;⁵²
 - (c) Turnbull was appointed as a director on 31 January 2012.⁵³ She was a director, and the secretary, as at 14 October 2014⁵⁴ and that remained the position on 4

⁴² Ibid, cl 58.

⁴³ Ibid, cl 67.

⁴⁴ Constitution, cl 66.

⁴⁵ First affidavit of William Davis filed on 10 October 2016, par 13 and WGHD-11.

⁴⁶ Davis 1, par 13 and ex WGHD-10.

⁴⁷ Ibid, ex WHGD-3; First affidavit of Peter Eather filed on 10 October 2016, par 3.

⁴⁸ Eather 1, par 4; second affidavit of Peter Eather filed on 17 October 2016, par 3; Davis 2, ex WGHD-19.

⁴⁹ Davis 1, ex WGHD-2.

⁵⁰ Ibid, ex WGHD-1.

⁵¹ Ibid, ex WGHD-2.

⁵² Ibid, ex WGHD-9.

⁵³ Ibid, ex WGHD-1.

⁵⁴ Ibid, ex WGHD-2.

February 2015. She resigned as a director on 29 March 2016;⁵⁵ and

- (d) David Leon was appointed to the board of directors at the AGM held on 4 April 2014.⁵⁶ At a meeting of the board of directors held on 7 May 2014, he was elected to the position of “vice-chair” of the board, but similar to the position regarding Eather, that was intended to be a reference to the position of vice-president.⁵⁷ He was a director and vice-president as at 14 October 2014⁵⁸ and that remained the position on 4 February 2015. He resigned as a director on 4 March 2015.⁵⁹

[22] Thus, BHDC maintains, a quorum was constituted at the 4 February 2015 meeting by four directors – the president (Eather), vice-president (David Leon), secretary (Turnbull) and one other director (Gordon). The costs agreement was executed on behalf of BHDC by Eather and Turnbull after the meeting.⁶⁰

[23] By the costs agreement, BHDC appointed Mitchells to “represent [its] interests in enforcing [its] rights” pursuant to the heads of agreement dated 2 December 2013 and the deed of agreement dated 12 November 2014, and to protect the interest of its “members as tenants of the 26 properties” in a number of specified stages.⁶¹ The first stage concerned the taking of instructions, the review of material and the briefing of counsel to “advise in relation to appropriate remedies including an action for breach of the agreement, an action pursuant to section 55 the Property Law Act 1974, an action based on equitable fraud and an application seeking injunctive relief”.⁶² The second stage concerned “corresponding with and if applicable negotiating with” IJK “in order to reach an agreement which protects the tenants”.⁶³ The third stage was expressed in these terms:

“If applicable **and subject to your further instructions**, commencing legal proceedings against [IJK] and any other appropriate parties in order to obtain orders protecting the tenants including briefing counsel to appear and if necessary advise.”⁶⁴ [Emphasis added].

⁵⁵ Ibid, par 7 and ex WGHD-5; Eather 1, par 8.

⁵⁶ Ibid, ex WGHD-6; Eather 1, par 7.

⁵⁷ Eather 2, par 3; Davis 2, ex WGHD-19.

⁵⁸ Davis 1, ex WGHD-2.

⁵⁹ Ibid, par 8 and ex WGHD-7.

⁶⁰ Ibid, ex WGHD-10.

⁶¹ Item 3.

⁶² Item 3.1.

⁶³ Item 3.2.

⁶⁴ Item 3.3.

- [24] The costs agreement also authorised Mitchells “to obtain ongoing instructions in relation to the matter” from its chief executive officer, William Davis.⁶⁵
- [25] On 1 April 2015, at a meeting of the board of directors, Eather, Turnbull and Gordon purported to ratify instructions to Mitchells to “proceed to secure protection of members under” the deed of agreement with IJK,⁶⁶ but it may be said at once that any such resolution must be regarded as ineffective because Eather, Turnbull and Gordon were the only directors in attendance.⁶⁷ As such, a quorum could not have been constituted.⁶⁸
- [26] The AGM for the 2015 year was held on 17 May 2015. It was attended by 21 people.⁶⁹ Among them was the CEO⁷⁰ and a consultant to BHDC, Tony Watt. The meeting was chaired by Eather. Four persons were elected to positions on the board that had been declared vacant. They were:
- (a) Gordon, who was re-elected;
 - (b) Shaun Davies, who was purportedly appointed to the board of directors to fill a casual vacancy on 1 April 2015⁷¹ but was, in any event, elected at this meeting;⁷²
 - (c) Maxine Hilt;⁷³ and
 - (d) Kelly Hogan.⁷⁴
- [27] On 1 June 2015, the CEO (Davis) instructed David Graham of Mitchells to commence this proceeding⁷⁵ and, as already observed, that involved the filing of the claim and statement of claim eight days later. Davis told Graham that a majority of the members of the board of directors had agreed to commence the proceeding.⁷⁶

⁶⁵ Clause 5. Mr Davis commenced as CEO on 1 October 2014; Davis 1, par 1.

⁶⁶ Davis 1, ex WGHD-8.

⁶⁷ Eather 2, ex PJE-5.

⁶⁸ Constitution, cl 35(b).

⁶⁹ Davis 1, pars 10 – 12 and exs WGHD-8 and WGHD-9; Eather 2, ex PJE-5.

⁷⁰ William Davis.

⁷¹ Ibid, par 9 and ex WGHD-8. His appointment to fill the casual vacancy could not have been effective because there was an insufficient number of directors to constitute a quorum.

⁷² Ibid, par 9 and ex WGHD-9.

⁷³ Ibid, par 11 and ex WGHD-9.

⁷⁴ Ibid, par 12 and ex WGHD-9.

⁷⁵ Second affidavit of David Graham filed on 10 October 2016, par 4 and ex DG-2.

⁷⁶ Ibid.

- [28] There was another meeting of the board of directors on 15 July 2015. A revised cost schedule from Mitchells formed part of the “inward correspondence” tabled at that meeting. The board approved the “legal approach and costs but [reserved] the right to renew costs and proceedings at any time with consideration to the security and wellbeing of members in subsidised housing and the financial security and future of BHDC”. The board also agreed “to proceed to court to defend applications to have caveats removed and commence proceedings in support of the tenant’s caveatable interest in respect of those caveated properties where [the] Isjuka [Trust] has not granted a 5-year lease prior to lapsing of the caveats”.⁷⁷
- [29] Almost 12 months later, on 3 August 2016, a flying minute was circulated and signed by five directors – Eather, Gordon, Davies, Hilt and Jo-Ann Nicol.⁷⁸ Nicol had been elected as a director at the AGM on 3 November 2012.⁷⁹ She was a director as at 14 October 2014⁸⁰ and that remained the position in August 2016.
- [30] By its terms, the flying minute referred to a letter from Mitchells dated 25 July 2016, but it is not in evidence. Nonetheless, each of the directors to whom the flying minute was circulated acknowledged having read the contents of that letter and then agreed:
- “[With] its entire content and processes including but not restricted to the;
- the Amended Statement of Claim
 - File and serve the Amended Statement Claim
 - File and serve an application for summary judgement [sic]
 - Leaving the claim from amounts due under clause 3.2 the Deed of Agreement in abeyance for the present time
 - The Trial Preparation
 - Advice on Evidence
 - Advice on Prospects”.⁸¹
- [31] That decision of the board⁸² was communicated to Mitchells by Davis on 4 August 2016.⁸³ The amended statement of claim was filed the next day.

⁷⁷ Davis 1, par 15 and ex WGHD-12.

⁷⁸ Ibid, par 16 and ex WGHD-13.

⁷⁹ Ibid, WGHD-3; Eather 1, par 3.

⁸⁰ Ibid, ex WGHD-2.

⁸¹ Ibid, par 16 and ex WGHD-13.

⁸² It should be noted that, as at 3 August 2016, BHDC had six directors – the five to whom the flying minute was circulated and Kelly Hogan. Thus, the five signing directors constituted more than the two thirds of directors required by clause 36 of the Constitution.

- [32] At a meeting of the board of directors held on 10 August 2016, the board ratified the content of the flying minute circulated and signed by its directors on 3 August 2016.⁸⁴ The directors present at the meeting were Eather, Hilt, Davies and Gordon.⁸⁵
- [33] To the extent that it was argued on behalf of IJK on the hearing of the applications that it could not be concluded from the content of the flying minute and resolution of 10 August 2016 (in the absence of the letter from Mitchells dated 25 July 2016) that the proposed proceeding was this proceeding, I do not agree. It is clear that it was.

Non-payment of membership fees?

- [34] The first argument advanced by IJK to challenge the retainer relied on what was submitted to be a failure on the part of various members of BHDC to pay their membership fee on time – or, in the case of some members, a failure to pay at all – for the membership year commencing 1 July 2014. To support that argument, a subpoena for production of various documents was directed to BHDC⁸⁶ and, when it was responded to, the documents produced were cross-referenced against other records.⁸⁷ Based on that exercise, IJK contended that:
- (a) For the membership year commencing 1 July 2014:
 - (i) Eather, Gordon, Davies, Hilt and Hogan failed to pay their membership fees by 31 August 2014 and, further, did not pay those fees until January, March and April 2015;
 - (ii) Turnbull, Nicol and David Leon did not pay their membership fees at all;
 - (b) For the membership year commencing 1 July 2015, although Eather, Gordon, Turnbull, Nicol, David Leon, Davies and Hilt paid their fees by 31 August 2015, Hogan did not pay at all.
- [35] If IJK's contentions were correct, it would follow that each of Eather, Gordon, Turnbull, Nicol, David Leon, Davies, Hilt and Hogan ceased to be members of BHDC on 31 August 2014. Also, for the reasons expressed above (at [17]), late payment of the membership fee for that membership year would not serve to reinstate the membership of Eather, Gordon, Davies, Hilt or Hogan. To become members again, each of those persons – along with Turnbull, Nicol and David Leon – would need to have re-applied for membership but, IJK argued, there was no evidence that any such application had been made. Furthermore, for the reasons earlier expressed (at [19]), Eather, Gordon, Turnbull, David Leon and Nicol would have ceased to be directors on 31 August 2014,

⁸³ Graham 2, par 5 and ex DG-3.

⁸⁴ Davis 1, par 16 and ex WGHD-13.

⁸⁵ Ibid.

⁸⁶ Third affidavit of William Davis filed on 17 October 2017, ex A.

⁸⁷ Second affidavit of Nelson Leon filed on 28 October 2016, pars 27 – 35.

the appointment of Davies to fill the casual vacancy on the board on 1 April 2015 would have been a nullity and the election of Gordon, Hilt and Davies at the AGM on 17 May 2015 would also have been a nullity. It would also follow, if IJK's contentions were correct, that the 4 February 2015 meeting of directors and subsequent signing of the costs agreement could have been of no effect because the persons involved in that meeting (Eather, Gordon, Turnbull and David Leon) lost their position as directors on 31 August 2014 and, further, the resolution by flying minute on 3 August 2016 and the ratification seven days later would also have been of no effect because the persons there involved had either ceased to be directors on 31 August 2014 (Eather and Nicol) or had not been validly elected as directors at the AGM on 17 May 2015 (Gordon, Hilt and Davies).

[36] However, for the reasons that follow, I am not persuaded that IJK's contentions are correct.

[37] IJK's contentions fail to properly take into account some of the evidence from the CEO, Davis. I refer in particular to his evidence about the dispute with Nelson Leon regarding the return of records and other property of BHDC,⁸⁸ the discussions he had after commencing in his role as CEO with members concerning the payment of their fees,⁸⁹ the email and attached membership list forwarded by Nelson Leon to a consultant to BHDC on 5 November 2014⁹⁰ and the two membership lists he (Davis) prepared.⁹¹

[38] According to Davis, Nelson Leon was the CEO of BHDC between January 2013 and October 2014. Thereafter, Davis took on that role but, until the end of January 2015, he was still employed on a full-time basis by a University in Lismore, New South Wales. After Leon finished up as CEO, he was in dispute with BHDC regarding access to some of the company's records and their return. After demands for their return were made, in November 2014, Leon allowed BHDC access to a commercial storage unit where a number of records and other property belonging to the company were stored. Davis assisted in removing the records and property. However, a close inspection revealed that "most of the records which would have been expected to have been generated between January 2013 and October 2014 were not there".⁹² In February 2015, Mitchells were engaged on behalf of BHDC to pursue recovery from Leon of the missing records, but Leon claimed not to be in possession of any of the records that were sought.⁹³ BHDC has been unable to locate all of the source documents relating to receipts and expenditures during the period when Leon was the CEO.

⁸⁸ Davis 1, pars 18 – 20 and ex WGHD-14.

⁸⁹ Fourth affidavit of William Davis sworn on 2 November 2016 and filed by leave, par 2; fifth affidavit of William Davis sworn on 3 November 2016 and filed by leave, pars 2 – 6.

⁹⁰ Davis 1, par 22 and ex WGHD-16.

⁹¹ Ibid, par 23 and exs WGHD-17 and WGHD-18; Davis 4, pars 2 - 4

⁹² Ibid, par 18.

⁹³ Ibid, par 18 and ex WGHD-14.

[39] As to Davis' discussions with members, this occurred after he commenced in his position as CEO. He asked the members whether they had paid the membership fee for the membership year commencing 1 July 2014. According to Davis, because of the absence of records as to which of the members had paid their membership fee, he encouraged all of the members to whom he spoke to pay the fee for that year "whether they had previously paid or not, so that BHDC could have a record of the payment ...".⁹⁴ Some members were agreeable to doing so, but others were not. Eleven members (including Davies, Turnbull and Nicol) assured Davis that they had paid the fee and were unwilling or unable to make the payment. He therefore arranged for the sum of \$110 to be debited to the company's bank account. He subsequently determined that, for three of these people, this "meant a double payment", so three other members (including David Leon) were treated as receiving the benefit of that payment instead of three of the people (one of whom was Davies) on his original list of eleven. In discussions with Hilt, Davis was told that she had been a member "since about 2008 or 2009".⁹⁵ Even though she told Davis that she had previously paid the membership fee, Davis encouraged her to pay it again so that a record would be created. Similarly in the case of Davies, he told Davis that he had been a member "since about 2011 or 2012",⁹⁶ but he agreed to pay the membership fee again.

[40] The email forwarded by Nelson Leon to the consultant on 5 November 2014 read, in part:

"Financial member list as at today."⁹⁷

The attached list was entitled, "Current Financial Members – Full membership". It is comprised of four columns of information concerning 45 named persons. The last column is described, "Tenant (Yes/No)" and, against each of the named persons, appears either a "Y" or an "N". The other two membership lists exhibited to Davis' affidavit follow a similar format but the last of the four columns in each is described, "Financial Y/N". Again, against each of the named persons appears either a "Y" or an "N". The first list came from Leon, but the other two were produced by Davis. It was submitted by senior counsel for BHDC that the description in the last column of the first document should be taken as read – i.e., an indication whether the person was a tenant – but I am not convinced that is so. Given the evident purpose of the document, I think it more likely to be an indication whether the person was a financial member.⁹⁸ Be that as

⁹⁴ Davis 5, par 2.

⁹⁵ Davis 5, par 5.

⁹⁶ Ibid, par 6.

⁹⁷ Davis 1, ex WGHD-16.

⁹⁸ Such a conclusion is supported by the correspondence from Mitchells to IJK's solicitors to the effect that Nelson Leon's membership "ceased when his membership subscription was more than two months in arrears" (Nelson 1, ex NWL-1) and the affidavit of Pamela Rogers filed on 28 October 2016 in which she deposed to not being able to recall having paid her membership fee and having been advised by BHDC that her "membership lapsed" (pars 4 and 5) because an "N" appears against the names of both Leon and Rogers in the last column of the document. Neither Leon nor Rogers appear on either of the lists produced by Davis: exs WGHD-17 and WGHD-18.

it may, Davis used the list emailed by Leon together with the information he obtained from his discussions with members as well as records of BHDC (including a receipt book) to construct two lists of financial members of the company for the membership years commencing 1 July 2014⁹⁹ and 1 July 2015.¹⁰⁰

- [41] On the hearing of the applications, IJK objected to the reception in evidence of the email from Leon (including the attached list) as well as the two lists prepared by Davis, and I reserved that question.¹⁰¹ In support of that objection, it was submitted that the source of the information contained in the list emailed by Leon was “not clear” and that it “was not known who prepared it”.¹⁰² Because the lists prepared by Davis were based in part on the list emailed by Leon, they too, it was submitted, should be excluded. I do not agree.
- [42] Although, Leon denied when giving evidence at the hearing that he was the CEO of BHDC, or even that he had acted in that capacity, I did not believe him. The allied attempts he made to distance himself from any other position of responsibility within BHDC along with his claimed ignorance of the provenance or accuracy of the list emailed by him on 5 November 2014 were demonstrated through cross-examination to be most unconvincing. Indeed, based on the observations I noted at the time he gave evidence and my review of the transcript of that evidence, my overall impression was of a man who, with little or no regard for the truth, did his level best to avoid saying anything he perceived might assist BHDC while at the same time being prepared to advance a version that he must have believed might enhance IJK’s application and, in turn, its prospects of securing an order for dismissal of the proceeding. Consistently with what Davis deposed, I am satisfied that Leon at least acted in the capacity of CEO of BHDC between January 2013 and October 2014 and that when, early the next month, he emailed the list of members to BHDC’s consultant, he was conveying a belief he held had at that time, that is to say, that the list of financial members was current “as at today”.
- [43] Given those findings, I have little hesitation in concluding that the email and list are admissible and, as such, the two lists prepared by Davis should also be received in evidence. Furthermore, coming as the email and list did from a man who had only a short time before been acting (at least) in the capacity CEO of the company, they should be accorded proper weight. In this regard, the feature that the emailed list must have been compiled from source documentation and that it has not been produced may be accepted but where, as here, the evidence establishes that the source documentation has been lost or destroyed, what remains – the emailed list combined with the other records and information Davis was able to source – constitutes the best available evidence. Taken together, this evidence paints an entirely different picture to the one advanced by

⁹⁹ Davis 1, ex WGHD-17.

¹⁰⁰ Ibid, ex WGHD-18

¹⁰¹ T. 1-10 – 12. Objection was also taken to portions of what is deposed in the fifth affidavit of Davis, but those objections were addressed by the provision of a replacement affidavit: T. 1-72.

¹⁰² T. 1-11.

IJK. To the point, each of Eather, Gordon, Turnbull, David Leon, Davies, Hilt, Hogan and Nicol appear on Davis' list of financial members for the membership year from 1 July 2014 to 30 June 2015.¹⁰³

- [44] After all, the proposition underlying IJK's contentions – that so many members of BHDC, including directors of the company, failed to honour their membership fee obligation – is an unlikely one. The fee was in a nominal amount, and therefore easily affordable. Members who had not paid their fee were reminded by letter of the need to do so.¹⁰⁴ Payment was also important; unless paid, membership would be lost and, with that, the person's eligibility to remain (or become) a tenant.
- [45] That said, I return to the question of onus. I do not think that this is a case where an evidential onus can be said to shift to BHDC. The argument advanced by IJK based on the claimed non-payment of membership fees relies almost wholly on an absence of records to prove to the contrary. One exception to that may be the evidence of the payments made in January, March and April 2015, however those payments are adequately explained by what Davis did when faced with an absence of membership records after commencing as CEO; he requested members to pay again. But, that aside, it cannot be said that BHDC is in any better position than IJK to produce evidence of the payment of membership fees (or, for that matter, the making of membership applications). Nor are those facts peculiarly within BHDC's knowledge. It cannot be doubted that membership and other records over the relevant period have either not been kept or, if they were, that they have been lost or destroyed. Nor can it be doubted that those records were, or should have been, generated at the time when Nelson Leon was acting as CEO of the company. In such circumstances, the evidential onus must be regarded as remaining with IJK as the propounder of the challenge.
- [46] I am not satisfied that IJK has proved the factual premise for its contentions and, as such, this part of its argument should be rejected. Indeed, far from proving the factual premise, I consider it more probable than not on the whole of the evidence that:
- (a) each of Eather, Gordon, Turnbull and David Leon were financial members, and directors, of BHDC at the time of the 4 February 2015 meeting of directors and the execution later that day by Eather and Turnbull of the costs agreement with Mitchells;
 - (b) each of Davies, Hilt and Hogan were financial members of BHDC at the time of the AGM held on 17 May 2015 and eligible for election as directors;
 - (c) each of Eather, Gordon, Davies, Hilt and Nicol were financial members, and directors, of BHDC at the time of the flying minute on 3 August 2016; and
 - (d) each of Eather, Hilt, Davies and Gordon were financial members, and directors, of BHDC at the time of the board meeting held on 10 August 2016.

¹⁰³ Davis 1, ex WGHD -17.

¹⁰⁴ Affidavit of Ashley Moore sworn on 2 November 2016 and filed by leave, ex AJM-3.

- [47] To the extent that it might be thought that the evidence falls short of proving that each of the members referred to in the preceding paragraph paid their membership fee by no later than 31 August 2014, it is for IJK to prove that this did not occur but there is scant evidence¹⁰⁵ to support such a conclusion.

No membership application?

- [48] An associated argument advanced by IJK was to the effect that the evidence fails to establish that three of the four people who were elected as directors at the AGM on 17 May 2015 – Hilt, Davies and Hogan – were ever accepted as members. The point was made on behalf of IJK that, in the list of members emailed by Nelson Leon on 5 November 2014,¹⁰⁶ their names did not appear. Although that may be accepted, their names do appear in the first of the two lists prepared by Davis.¹⁰⁷ That list covers the same membership year and was, as discussed above (at [39]), compiled by Davis using a wider body of information. If, therefore, each of those persons was a financial member of BHDC in that year, the available inference is that each of them must have applied, and been accepted, as members at some earlier point in time. The absence of records to that effect does not displace that inference or, at least, not in a way that proves to the contrary. This argument, too, should be rejected.

Deficiencies in the AGM of 17 May 2015

- [49] The next argument advanced on behalf of IJK had three strands but each concerned the AGM held on 17 May 2015.

First, it was submitted that the evidence does not show that any of the persons who attended and voted as members at the AGM had paid their membership fee by 31 August 2014. Thus, it was submitted that the required quorum of “15 voting and financial members”, could not have been constituted. However, of the 21 persons who attended that meeting,¹⁰⁸ and leaving to one side the consultant,¹⁰⁹ all save for Davies, Hilt, Amanda Ludgater and Lisa Mason appear on the list of financial members emailed by Nelson Leon on 5 November 2014¹¹⁰ and each of those four persons appear on the first of the two lists prepared by Davis.¹¹¹ It follows that, even without recourse to Davis’ list, there was a sufficient number of financial members in attendance at the

¹⁰⁵ As to which, see the observations above (at [44]) regarding the evidence of the payments made in January, March and April 2015.

¹⁰⁶ Davis 1, ex WGHD-16.

¹⁰⁷ Ibid, ex WGHD-17.

¹⁰⁸ Davis 1, WGHD-9.

¹⁰⁹ Tony Watt.

¹¹⁰ Davis 1, ex WGHD-16.

¹¹¹ Ibid, ex WGHD-17.

AGM to constitute a quorum. Again, IJK has not proved to my satisfaction that any of those members paid the membership fee later than 31 August 2014.

- [50] *Second*, IJK contended in respect of the four people elected as directors at the AGM (Hilt, Gordon, Davies and Hogan) that each was nominated or seconded by one or other of Eather, Gordon or Turnbull. Thus, and on the assumption that those persons ceased to be members of the company prior to 17 May 2015, it was submitted that they were precluded from nominating, or being a seconder of the nomination, in each case. For the reasons I have already expressed, I am not satisfied that the assumption is correct.
- [51] *Third*, it was submitted that each of the four people elected as a director at the AGM were ineligible for appointment as such because each had ceased to be a member of the company. For the same reasons, this submission cannot be upheld.
- [52] It follows that this argument should also be rejected.

Deficiency of notice for the AGM

- [53] The last argument advanced on behalf of IJK was based on what was contended be deficiencies of notice for the AGM. As discussed earlier (at [20]), under the Constitution, 14 days clear notice of the AGM is required to be given by “publishing [a notice of meeting] in a newspaper having circulation in and around Beenleigh”. That occurred in relation to the AGM held on 17 May when a notice was published in the April 30 edition of the *Albert and Logan News*.¹¹²
- [54] Despite that, IJK pointed to the notice requirements contained in s 249H(1) and s 249J(1) of the *Corporations Act*. By s 249H(1), at least 21 days notice must be given of a meeting of a company's members.¹¹³ Under s 249J(1), written notice of a meeting of a company's members must be given individually to each member entitled to vote at the meeting and to each director.¹¹⁴ As neither provision was apparently complied with, IJK submitted that the AGM had been held in contravention of the Act. The difficulty, though, with that submission is that neither provision applies to BHDC because it is a body corporate registered under the *Australian Charities and Not-for-profits Commission Act*¹¹⁵ and, as such, this argument fails.

Conclusion on IJK's application

- [55] As none of IJK's arguments can be accepted, its application must be dismissed.

¹¹² Fourth affidavit of David Graham sworn on 2 November 2016 and filed by leave, par 3 and ex DG-4.

¹¹³ Although an AGM may be called on shorter notice if all the members entitled to attend and vote at the AGM agree beforehand: sub-s 249H(2)(a).

¹¹⁴ Subsection 249H(3) prescribes how such notice is to be given.

¹¹⁵ Section 111L(1) of the *Corporations Act*.

The cross-application

- [56] BHDC cross-applied for an order pursuant to s 1322 of the *Corporations Act* declaring that the instructions provided by it to Mitchells to commence the proceeding were not invalid by reason of any contravention of a provision of the Act or a provision of the Constitution for BHDC.
- [57] IJK has failed to prove the existence of any contravention – whether of the Act or the Constitution – affecting the validity of Mitchells’ retainer, their authority to act or the commencement of the subject proceeding on behalf of BHDC. In such circumstances, it is difficult to see that any cross-relief is now required. It might be thought that a declaration regarding the inapplicability of s 249H(1) and s 249J(1) of the *Corporations Act* could serve some utility, but s 1322 operates in such a way that an AGM will not be invalidated unless the court declares that to be so. Nevertheless, the parties should have the opportunity to provide submissions as to whether a declaration should be made.

Orders

- [58] For these reasons, on 21 August 2017, I made orders dismissing IJK’s application and directing the parties to file and serve submissions as to (1) what, if any, orders should be made with respect to the cross-application and (2) the costs of the application and cross-application.