SUPREME COURT OF QUEENSLAND

CITATION:	*McEvoy & Anor v The Body Corporate for No 9 Port Douglas Road* [2013] QCA 168
PARTIES:	**MICHAEL McEVOY & CHRISTINE McEVOY** (applicants) **v** **THE BODY CORPORATE FOR NO 9 PORT DOUGLAS ROAD** (respondent)
FILE NO/S:	Appeal No 6742 of 2012 QCAT No 199 of 2011
DIVISION:	Court of Appeal
PROCEEDING:	Application for Leave *Queensland Civil and Administrative Tribunal Act*
ORIGINATING COURT:	Queensland Civil and Administrative Tribunal at Brisbane
DELIVERED ON:	24 June 2013
DELIVERED AT:	Brisbane
HEARING DATE:	12 March 2013
JUDGES:	Margaret McMurdo P and Holmes JA and Douglas J Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**1. The application to seek leave to appeal is refused.** **2. The applicants are to pay the respondent's costs of the application incurred after 19 November 2012 on the standard basis.**
CATCHWORDS:	APPEAL AND NEW TRIAL – APPEAL - PRACTICE AND PROCEDURE – QUEENSLAND – POWERS OF COURT – OTHER MATTERS – where s 289(2) of the *Body Corporate Community Management Act* allows a person aggrieved by an adjudicator's order to appeal on a question of law to the Queensland Civil and Administrative Tribunal (QCAT) – where a developer contracted to sell a lot in a unit complex with exclusive use of an area of common property – where a general meeting of the body corporate passed a special resolution, which was not contained in the voting paper for the meeting, granting exclusive use – where the exclusive use area was not identified on any plan – where no amended community management statement containing the exclusive use by-law was registered – where more than ten years later the applicants as successor in title of the unit's purchaser successfully applied to an adjudicator for an order requiring

the body corporate to register a new community management statement containing the exclusive use by-law – where the committee of the respondent body corporate appealed the adjudicator's decision in QCAT – where the committee failed to obtain a special resolution of the body corporate for the appeal – where the QCAT member failed to deal with the applicants' submission as to the lack of authority – where the body corporate purported to ratify the decision to appeal after a decision was given in its favour – whether the QCAT proceeding was a nullity – whether there could be effective ratification after the proceeding was complete – whether a substantial injustice has occurred by virtue of the want of authority for the QCAT proceeding, warranting leave to appeal – whether the developer could confer exclusive use on a unit holder during the "original owner control period" – whether the resolution granting exclusive use was valid – whether the QCAT member was correct in finding that the exclusive use area was not identified – whether an order in the nature of rectification could be granted where there was no identification of the relevant area – whether the applicants' delay in seeking relief was relevant to any exercise of discretion

Body Corporate and Community Management Act 1997 (Qld), s 100, s 260, s 276, s 289, s 312, sch 5
Body Corporate and Community Management (Accommodation Module) Regulation 1997 (Qld), s 40(3)(c), s 50(5)
Body Corporate and Community Management (Accommodation Module) Regulation 2008 (Qld), s 42
Body Corporate and Community Management (Standard Module) Regulation 1997 (Qld), s 42(3)(c), s 52(5)
Queensland Civil and Administrative Tribunal Act 2009 (Qld), s 61(1), s 150

Alexander Ward & Co Ltd v Samyang Navigation Co Ltd [1975] 1 WLR 673; [1975] 2 All ER 424, cited
Berowra Holdings Pty Ltd v Gordon (2006) 225 CLR 364; [2006] HCA 32, cited
Bird v Brown (1850) 4 Ex 786; [1850] EngR 173, considered
Burge v Brutton (1843) 2 Hare 373; [1843] EngR 414, cited
Burrell v Body Corporate for Boulevard North [2010] QDC 352, cited
Chapman v State of Queensland [2012] QCA 134, cited
Danish Mercantile Co Ltd v Beaumont ; [1951] Ch 680 [1951] 1 All ER 925, considered
Davison v Vickery's Motors Ltd (In liq) (1925) 37 CLR 1; [1925] HCA 47, considered
Doulaveras v Daher (2009) 253 ALR 627, [2009] NSWCA 58, cited
Federal Commissioner of Taxation v Sara Lee Household & Body Care (Australia) Pty Ltd (2000) 201 CLR 520; [2000] HCA 35, considered

Hall v Laver (1842) 1 Hare 571; [1842] EngR 883, cited
Ox Operations Pty Ltd v Land Mark Property Developments (Vic) Pty Ltd (in liq) [2007] FCA 1221, cited
Presentaciones Musicales SA v Secunda [1994] 2 WLR 660; [1994] Ch 271, considered
Pukallus v Cameron (1982) 180 CLR 447; [1982] HCA 63, considered
Russian Commercial and Industrial Bank v Comptoir D'Escompte de Mulhouse [1925] AC 112, considered
Re Oriental Gas Co Ltd [1999] BCC 237, cited
Sattell v The Proprietors – Be-Bees Tropical Apartments Building Units, Plan No 71593 [2001] 2 Qd R 331; [2000] QCA 496, cited
Trident General Insurance Co Ltd v McNiece Bros Pty Ltd (1987) 8 NSWLR 270, cited
Underwood v Queensland Department of Communities (State of Queensland) [2013] 1 Qd R 252; [2012] QCA 158, cited
Victorian Professional Group Management Pty Ltd v The Proprietors "Surfers Aquarius" Building Units Plan No 3881 [1991] 1 Qd R 487, considered
Victoria Teachers Credit Union Ltd v KPMG (2000) 1 VR 654; [2000] VSCA 23, cited

COUNSEL: L Stephens for the applicants
C Ryall for the respondent

SOLICITORS: Alexander Law for the applicants
Robert P Palethorpe Lawyers for the respondent

[1] **MARGARET McMURDO P**: This application for leave to appeal should be refused for the reasons given by Holmes JA and the additional reasons given by Douglas J. I agree with the orders proposed by Holmes JA.

[2] **HOLMES JA**: The applicants seek leave to appeal a decision of the Queensland Civil and Administrative Tribunal (QCAT) which set aside an adjudicator's orders, made under s 276 of the *Body Corporate Community Management Act* 1997. Those orders required the respondent to register a new Community Management Statement stating the applicants' entitlement to exclusive use of an area of common property in a Port Douglas unit complex.

[3] Section 150 of the *Queensland Civil and Administrative Tribunal Act* 2009 permits a party to an appeal to QCAT to appeal to the Court of Appeal only on a question of law and with this Court's leave. This court has generally considered the question of leave by reference to whether there is a substantial injustice to be corrected.[1]

[4] The first of the applicants' proposed appeal grounds was described as a "preliminary point": that the appeal to QCAT against the adjudicator's decision was not authorised by the body corporate. The remaining grounds concerned whether exclusive use had been conferred on the applicants' predecessor in title (a company controlled by them) by the actions of the original owner or by a resolution of a

[1] See, for example, *Chapman v State of Queensland* [2012] QCA 134 at [32] and [35]; *Underwood v Queensland Department of Communities (State of Queensland)* [2012] QCA 158 at [54] and [68].

general meeting of the body corporate; whether the QCAT member had erroneously had regard to the absence of a plan showing the area of exclusive use; and whether the adjudicator could properly order the filing of the new community management statement.

Background to the exclusive use dispute

[5] In May 1998, Famestock Pty Ltd, the applicants' company, bought Lot 16 from Blue Raven Pty Ltd, the developer of the unit complex; the latter company was controlled by a Mr Loane. The property purchased was described as:

> "Lot 16 in BUP 106455 together with an exclusive use of adjacent roof area [and] of car park no. as indicated on the plan in Annexure 'C' hereto".

[6] The *Body Corporate and Community Management Act* 1997, as it stood in 1998, contemplated (as it does now) that land in a community title scheme would be identified in a community management statement to be recorded under the *Land Title Act* 1994. The original community management statement for the unit complex had been executed in April 1998; it made no reference to any right of exclusive use of the kind which the contract purported to confer on Famestock Pty Ltd.

[7] In September of the same year, Mr Loane wrote to the body corporate manager on behalf of Blue Raven Pty Ltd, advising that

> "Exclusive Use is hereby granted to Famestock Pty Ltd [the proprietor of Lot 16] for the sun-deck and common area outside and attached to this unit".

According to the letter, a copy of the plan highlighting the area to be made exclusive was enclosed, but it does not seem to have been produced to the adjudicator or QCAT. The manager was asked to note the body corporate records accordingly, but instead advised in response that an "exclusive use area allocation" could only be granted at a general meeting of the body corporate.

[8] On 12 January 1999, an annual general meeting of the unit owners was held. An amended voting paper was circulated in advance of the meeting; it included a motion that By-law 42 (which dealt with letting rights for the complex) be deleted and a new community management statement lodged noting the deletion. It contained no reference, however, to any grant of exclusive use. The complex held 18 units. The minutes of the annual general meeting record that Mr Loane, whose company retained three of the units, was present and held proxies in respect of four other units. Four other unit owners were present at the meeting. Ten votes were cast in favour of (and none against) a special resolution in these terms:

> "RESOLVED that by-law 42 as per the attached be deleted, and that the owner of Lot 16 be granted exclusive use for himself and his licensees of the sun deck and common area outside and attached to his unit, as identified as attached, and a new Community Management Statement be lodged with the Department of Natural Resources noting the deletion."

It may be seen that the resolution as passed was significantly different from that notified on the voting paper. No document which was attached to the minutes and which identified the exclusive use area has come to light.

[9] A week after the meeting, a request was submitted to the registrar of titles to record a new community management statement. The request noted that changes had been made to schedule C (which contained the by-laws) and that By-law 42 had been deleted. The amended community management statement forwarded for registration contained By-law 43, which read:

> "EXCLUSIVE USE – LOT 16
>
> The proprietor for the time being shall be entitled to the exclusive use for himself and his licensees of the sun-deck and common area outside and attached to his unit, as identified on the attached plan marked 'C'."

The evidence before the adjudicator and QCAT included a floor plan which had been marked "Plan C". That plan shows the third level of the unit complex, including Unit 16, with openings onto an external area marked "Terrace" and an adjoining rectangular area which, it may reasonably be assumed, is common property. None of those areas has any further marking which would identify it as the subject of exclusive use.

[10] The request to have the new community management statement recorded met with a requisition. It noted, among other things, that in respect of By-law 43 the exclusive use description had to be shown in a schedule, and that the exclusive use plan marked "C" did not comply with the registrar's requirements. It does not seem that the requisition was ever satisfied.

[11] At some point in the succeeding years, the ownership of the unit passed from Famestock Pty Ltd to the applicants. In August 2010, the applicants applied for adjudication of their claim to exclusive use of what they described as "about 200 sq metres of rooftop" adjoining unit 16. They asserted that they had only recently discovered that the community management statement with the by-law relating to exclusive use had not been recorded. Shortly after, apparently on advice from the Commissioner for Body Corporate and Community Management, the applicants made a formal request to the body corporate to register the new community management statement in accordance with the motion passed in January 1999. The request was not complied with, and the matter proceeded to adjudication under chapter 6 of the *Body Corporate and Community Management Act*.

The adjudicator's powers

[12] Section 276(1) of the *Body Corporate and Community Management Act* 1997 sets out the circumstances of dispute in which an adjudicator may make a "just and equitable" order:

> "**276 Orders of adjudicators**
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> (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—
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> (a) a claimed or anticipated contravention of this Act or the community management statement; or
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> (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—
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> (i) the engagement of a person as a body corporate manager or service contractor for a community titles scheme; or
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> (ii) the authorisation of a person as a letting agent for a community titles scheme."

Subsection (3) permits the adjudicator to make any of the orders listed in sch 5 to the Act; that list includes:

> "1 An order requiring the body corporate to lodge a request to record a new community management statement consistent with the statement for which the body corporate gave its consent.
>
> 2 An order requiring the body corporate to lodge a request to record a new community management statement, regardless of whether the body corporate consents to the recording."

The adjudicator's decision

[13] The adjudicator recorded the history of events as given by the applicants: Famestock's purchase of the unit, the exclusive use condition, the resolution to record a new community management statement and the failure of the body corporate manager to meet the registrar's requisition. In support of their application was a statutory declaration from Mr Loane, who confirmed that his company had agreed to transfer exclusive use of the area to Famestock Pty Ltd. Mr Loane also confirmed that the general meeting vote in relation to the owner of Lot 16's entitlement to exclusive use had occurred and that the motion as recorded had passed.

[14] The owners of seven units in the complex also provided submissions. One who had been present at the January 1999 general meeting disputed the resolution as recorded in the minutes. A number of the submissions made the point that unit owners who had purchased over the following decade had done so in reliance on the original community management statement, believing that the roof area was common property.

[15] The adjudicator, noting the discrepancy between the wording of the resolution on the voting paper and the resolution actually passed, said that he was not satisfied that the body corporate had resolved to grant exclusive use of the common property. However, he accepted that the intention of the original owner had been to grant Famestock exclusive use over the common property, but as the result of errors, a new community management statement had not been registered. He referred to a decision, *Burrell v Body Corporate for Boulevard North*,[2] in which McGill DCJ observed that rectification might be available to correct a by-law. In *Burrell*, the developer, at a stage at which it was still the only lot owner, had executed a community management statement at a general meeting. Its intention was to give a particular unit two car parks, but it had inadvertently allocated one of the car parks to a non-existent unit. His Honour remarked that it might be 'just and equitable' to grant rectification of the current by-laws; but he decided on other grounds to set aside the decision of the adjudicator.

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[2] [2010] QDC 352.

[16] Taking McGill DCJ's observation in conjunction with the power in sch 5 to order the recording of a new community management statement, the adjudicator concluded that it was

> "just and equitable... to make an order requiring the body corporate to register a new Community Management Statement stating that the proprietor of lot 16 is entitled to exclusive use of the sun deck and common property area adjacent to lot 16. This will also involve the attachment of a plan clearly identifying the area of common property to which lot 16 is entitled to exclusive use."

The appeal to QCAT

[17] Section 289(2) of the *Body Corporate and Community Management Act* permits a person aggrieved by an adjudicator's order to appeal on a question of law to QCAT. The aggrieved person in this case, by virtue of s 289(d)(ii), was the body corporate. Section 312 of the Act permits the body corporate to start a proceeding only if it is authorised by a special resolution by the body corporate. However, it was the committee for the body corporate which resolved to appeal against the adjudicator's decision, the appeal then being brought in the body corporate's name.

[18] Section 100(1) of the Act makes a decision of the committee a decision of the body corporate, except, by virtue of s 100(2), where the decision is one on a restricted issue under the relevant regulation module. As the respondent conceded here, the decision to appeal was one on a restricted issue within the meaning of s 42 of the *Body Corporate and Community Management (Accommodation Module) Regulation* 2008; which meant, under s 100 (2), that the committee's decision to appeal was not the body corporate's decision.

[19] In their submissions to QCAT, the applicants asserted that the body corporate had not complied with s 312 by obtaining a special resolution. On that basis (as well as of other submissions seeking to support the decision of the adjudicator), they argued that the appeal should be dismissed. The QCAT member did not deal with that contention, and indeed made no reference at all to it in his reasons for decision.

[20] Instead, the QCAT member began his reasons with a review of the history of the matter. Importantly, he noted, there had been no challenge to the adjudicator's conclusion that, given the wording of the voting paper, he could not be satisfied that the body corporate had resolved to grant exclusive use of the common property; a finding which the tribunal member described as "central to the case... [made]... in this appeal". He observed that there was no material before either the adjudicator or himself which showed that the parties to the contract (the developer and Famestock) or the parties to the appeal (Mr and Mrs McEvoy and, at least in name, the body corporate) had ever agreed on the proportions or boundaries of the area of common property in respect of which exclusive use was contemplated. Of the amended By-law 43 and the plan lodged for recording by the registrar of titles, the member noted

> "[23] The proposed by-law does not describe the size of the area to be exclusively used, and the faxed photocopy had no helpful markings. The respondents stated to the Commissioner, in their letter dated 5 November 2010, that,
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> > 'the area marked 'C' is the 200sq metres adjoining Lot 16. I am not sure it is correctly 'marked' but....

> this area is the 'most probable' area as it is the only area on the plan marked 'C'...'
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> [24] That statement reveals two problems for the respondents. First, no marking 'C' is evident on the attached plan, and second, the respondents were - as at 5 November 2010 - unsure of the actual location of the area over which they asked for exclusive use."

(The last sentence was the subject of an appeal ground. The member's reference to "the respondents" is, of course, a reference to the applicants here.)

[21] The member referred to *Pukallus v Cameron*,[3] in which debate had arisen as to whether a particular area was within the boundaries of the land described in a contract of sale. Wilson and Brennan JJ adverted to the need, before rectification of the contract could be ordered, for precision in the identification of the area which the parties were said to have intended to include. In the present case, the member observed, there had been no evidence identifying the precise boundaries of the area over which the applicants were to have exclusive use. The parties to the contract had not agreed on any specific place or area, and the body corporate was not found to have agreed to do anything.

[22] In addition to the problem of uncertainty, the member noted, there was an unexplained delay by the applicants in their application for adjudication. Some unit owners had bought their units believing that the area was common property. In the absence of explanation for what the member described as a "decade of delay", the order should not be upheld. Accordingly, he set aside the adjudicator's order and dismissed the applicants' application.

The lack of authority for the QCAT appeal

[23] The draft ground of appeal relevant to the "preliminary point" was that the QCAT member "[e]rred in law in entertaining the appeal which was not authorised by the Body Corporate". As already noted, the respondent conceded that the decision to appeal to QCAT had not been made by it. However, as evidence of its adoption of the proceedings, the respondent pointed to the fact that it had taken steps to oppose the application to this court, a decision which it could make by committee resolution.[4] That may well be so; but since any such committee resolution is not in evidence, and there is no other material on the point, it is impossible to say how and when any such steps were taken. The applicants contended that the decision to resist the application must be beyond the committee's spending limits so as to require it to be put to a general meeting; but there was no evidence to support that argument either.

[24] Secondly, the respondent adduced affidavit evidence to show that at an extraordinary general meeting on 19 November 2012 (some four and a half months after the QCAT decision was given), the body corporate voted to ratify the decision of the committee to bring the appeal from the adjudicator's decision. The applicants, however, contended that in the absence of evidence that the unit proprietors knew of the material circumstances when they voted, this court would

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3 (1982) 180 CLR 447.

4 Defending a proceeding is not a restricted issue under s 42 of the *Body Corporate and Community Management (Accommodation Module) Regulation* 2008 (Qld).

not be satisfied that there was in fact ratification. They relied on a decision of the Full Court in *Victorian Professional Group Management Pty Ltd v The Proprietors "Surfers Aquarius" Building Units Plan No 3881*.[5]

[25] That case turned on its own facts. A management agreement for a set of units was found to be invalid because its execution was authorised by an invalidly convened general meeting of the body corporate. It was argued that the agreement should be regarded as having been ratified for two reasons: the minutes of the invalid meeting had been confirmed at a later general meeting, and the body corporate's budgets, which included provision for payment of the management fee, had been approved at general meetings. Not surprisingly, the court held that in the absence of any evidence that the proprietors were aware of any dispute as to the validity of the management agreement, those acts were not sufficient for ratification.

[26] In the present case, in contrast, the resolution was in clear terms: it was that the body corporate ratify the actions of the committee in instigating, on behalf of the body corporate, an appeal of the adjudicator's orders for the dispute, which the resolution identified by number and by reference to the fact that it concerned the grant of exclusive use. The reference to ratification was explicit and the act requiring ratification was clearly identified; the proprietors could not have been in any doubt as to what they were being asked to vote for.

[27] As to the implications of the QCAT appeal's having been commenced without authority, the applicants referred the court to its decision in *Sattel v The Proprietors – Be-Bees Tropical Apartments Building Units, Plan No 71593*.[6] In that case, the body corporate had proceeded with an appeal to this court without obtaining the special resolution necessary under the legislation as it stood at that time. It was suggested for the appellant there that the appeal be adjourned so that a special resolution ratifying its commencement could be obtained. The court declined to grant the adjournment, saying:

> "It appears to us that, where a party having no right to do so purports to begin an appeal in this Court, on the deficiency being brought to the Court's attention the appeal would ordinarily be dismissed or struck out. The circumstances of the present case, so far as they appear from the record, do not suggest that this is a case where justice requires that any other course be followed."[7]

As a statement of practice for Court of Appeal proceedings, this is entirely unremarkable, but it does not assist very much in determining the status of the QCAT proceedings in the present case, or what approach this court should take to orders made below where the issue was live and remained unaddressed.

[28] The fact that proceedings have been commenced without authority does not render them a nullity. As much was recognised by the House of Lords in *Russian Commercial and Industrial Bank v Comptoir D'Escompte de Mulhouse*.[8] In that case it was held that defendants wishing to dispute the authority of the manager of a branch of an expropriated Russian bank ought to have moved to have the bank's name struck out as plaintiff; it was not open for them to raise the issue by way of

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5 [1991] 1 Qd R 487.
6 [2001] 2 Qd R 331.
7 At 334.
8 [1925] AC 112.

defence to the action. By implication, the court was prepared to countenance the action's proceeding to judgment with the question of the plaintiff's authority to bring it unresolved. As Ferris J, sitting in the Chancery Division in *Re Oriental Gas Co Ltd*[9], remarked of the decision,

> "The court is thus prepared to contemplate the anomalous result that an action may be tried on its merits in a case where there was no authority to commence proceedings in the name of the plaintiff."

He went on to observe:

> "If the decision is in favour of the plaintiff this may cause no real problem, because those who have authority to give instructions on behalf of the plaintiff will be likely to adopt the favourable decision."[10]

[29] In the Australian context, in *Doulaveras v Daher*[11] the New South Wales Court of Appeal similarly held that a challenge to (in that case, a tutor's) authority to bring proceedings could not be raised in defence pleadings; instead, the court might, on a proper application or of its own motion, litigate the question of authority and take steps to bring any abuse of process entailed in unauthorised proceedings to an end.[12]

[30] It is well established that the commencement of proceedings without proper authority may be cured by subsequent ratification. In *Danish Mercantile Co Ld v Beaumont*,[13] an action was commenced in the name of a company without necessary approval by a general meeting or by the board of directors, but the action was adopted some months later by the liquidator appointed on the company's winding up. Subsequently, the defendants applied by motion to strike out the name of the company as a plaintiff. Jenkins LJ observed that the practice of the court in cases where there was dispute as to the authority for use of a company's name as a plaintiff was to adjourn any motion to strike out the company's name with a view to the holding of a meeting to determine whether the company adopted the bringing of the action. It was, Jenkins LJ said:

> "...open at any time to the purported plaintiff to ratify the act of the solicitor who started the action to adopt the proceedings, to approve all that has been done in the past, and to instruct the solicitor to continue the action."[14]

Similarly, in *Alexander Ward & Co Ltd v Samyang Navigation Co Ltd*[15] and *Presentaciones Musicales SA v Secunda*[16] it was held that proceedings taken without authority could be subsequently ratified; in the latter case, ratification was effective notwithstanding the expiration of the limitation period.

[31] In *Ox Operations Pty Ltd v Land Mark Property Developments (Vic) Pty Ltd (in liq)*,[17] Finkelstein J discussed and applied the English line of authority as to

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9 [1999] BCC 237.
10 At 250.
11 (2009) 253 ALR 627.
12 At 655.
13 [1951] 1 All ER 925.
14 At 687.
15 [1975] 1 WLR 673.
16 [1994] Ch. 271.
17 (2007) FCA 1221.

ratification of proceedings, as well as noting the practice, where an action had been brought without a company's authority, of permitting the company to convene a necessary meeting to consider whether it would adopt the action.[18] In *Victoria Teachers Credit Union Ltd v KPMG*[19] the Victorian Court of Appeal similarly recognised the principle that a client could, by subsequent ratification, validate the commencement of an action without authority, the ratification relating back "so as to be deemed equivalent to an antecedent authority."[20]

[32] The disinclination to characterise improperly constituted proceedings as a nullity is consistent with the approach of the High Court in *Berowra Holdings Pty Ltd v Gordon*.[21] Of particular significance to the QCAT proceedings here is the distinction the court made between an order made by an inferior court without a power which was a nullity and

> "an order... made within power but improperly, in which case, until set aside by a superior court, the order had to be obeyed."[22]

The order here was of the latter kind.

[33] The question of whether the bringing of a proceeding can be ratified after its conclusion is not, however, one on which I have been able to find any contemporary and direct authority; probably because a defendant seeking to take any point at that stage would generally be regarded as disentitled through delay, while a successful plaintiff is hardly likely to advance it. The peculiar feature of this case is the fact that the point was squarely raised by the applicants in the tribunal, but not dealt with.

[34] Nineteenth century English cases contemplated that an individual named as plaintiff could take the benefit of an unauthorised but successful action, providing he also bore its expenses: see *Hall v Laver*[23] and *Burge v Brutton*.[24] On the other hand, in *Bird v Brown*[25] it was held

> "that… ratification must take place at a time, and under circumstances, when the ratifying party might himself have lawfully done the act which he ratifies."[26]

The ratification in the present case would not meet those criteria, taken literally; in November 2012 the body corporate could not have commenced an appeal against the adjudicator's order, because QCAT had already ruled.

[35] *Bird v Brown* has been read down considerably, however. It was distinguished by Dillon LJ (with whom Nolan LJ agreed) and doubted by Roch LJ in *Presentaciones Musicales SA v Secunda,* in which the named plaintiff was held able to ratify a writ the issue of which he had not authorised, notwithstanding the expiration of the limitation period. Dillon LJ identified the ratio of *Bird v Brown,* and other cases which followed it, as that ratification could not apply if it had the effect of extending a time fixed by statute or by agreement for doing an act.

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18 At [2].
19 [2000] VSCA 23.
20 At 23.
21 (2006) 225 CLR 364.
22 At 370.
23 1 Hare, 572.
24 2 Hare, 373.
25 4 Ex. 787.
26 At [799].

[36] The decision in *Trident General Insurance Co. Ltd v McNiece Bros Pty Ltd*[27] suggests that the *Bird v Brown* approach is similarly unlikely to hold much sway in this country. In that case it was held that an agent's actions in taking out a policy of indemnity insurance could be the subject of ratification after the loss had occurred, on the basis that ratification was equivalent to original authority. However, the contended-for ratification, by commencement of an action seven years after the making of the policy and five years after the time for giving notice to the insurers of the event giving rise to the loss, was held not to have occurred within a reasonable period.

[37] The question of whether a concluded legal process could be ratified was raised in *Alexander Ward & Co Ltd v Samyang Navigation Co Ltd.* Two individuals acting in the name of, but without the authority of the former company (which at the time had no directors), obtained a warrant of arrestment of a ship which was duly executed on it in a Scottish shipyard, the effect being to give Scottish courts jurisdiction to try the proceeding which ensued between the company and the ship's owner. The company went into liquidation and the liquidator ratified the taking of proceedings. The ship's owner argued, among other points, that when ratification occurred the arrestment, the basis of jurisdiction, was spent and could not be revived. The court held, however, that the arrestment was properly to be regarded as a step in the action, validated by the liquidator's ratification of the proceedings. The question of what the situation would have been, had the arrestment been regarded as an entirely independent and completed process, was thus not resolved.

[38] In *Davison v Vickery's Motors Ltd (In liq)*,[28] Isaacs J emphasised that a principal's ratification was not an adoption of the agent's act but of the relationship of agency which had been assumed by the latter. If the agency relationship had been adopted, the further question was whether the law would regard the adoption as relating back to the beginning of the transaction.[29] The purpose of the fiction by which the principal's ratification was allowed to operate as if antecedent authority had been given was "to prevent a mischief or to remedy an inconvenience that might result from the general rule of law"; but such a fiction could not be allowed to work an injury on a third party.[30]

[39] The "fiction" described by Isaacs J was accepted as "a well settled rule of common law" by the High Court in *Federal Commissioner of Taxation v Sara Lee Household & Body Care (Australia) Pty Ltd*:[31]

> "where a principal ratifies the earlier act of a person acting as agent without authority, the ratification relates back to the date of the unauthorised act, and the principal is bound as if the agent had had authority at the earlier time."[32]

[40] In my view (although the point need not finally be resolved in order to determine whether leave should be granted), accepting the principle that the effect of ratification is to clothe the agent with authority for the purposes of the unauthorised act, the body corporate was able retrospectively to give the committee authority to

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27 (1987) 8 NSWLR 270.
28 (1925) 37 CLR 1.
29 At 21.
30 At 19.
31 (2000) 201 CLR 520.
32 At 533.

mount the QCAT appeal. That conclusion would be in keeping with the notion that ratification is designed to "remedy an inconvenience"; it seems clear enough that the body corporate wished to appeal, and that its failure to do so was the product of simple oversight as to the level of authorisation required. The applicants would not be deprived of any right by that result.

[41] There can be no doubt that the failure of the member of QCAT to deal with the submission put to him about the committee's lack of authority to bring the appeal was an error of law, but neither the proceeding nor his order were rendered invalid by that want of authority. Whether the error warrants the grant of leave to appeal requires consideration of whether substantial injustice has been caused by it; which in turn involves considering the practical consequences of the failure.

[42] Had the tribunal member addressed the question of authority, it would have been open to him, and, in view of the object in the *Queensland Civil and Administrative Tribunal Act* of dealing with matters in an "accessible, fair, just, economical, informal and quick"[33] way, would have been an appropriate exercise of power, to adjourn the hearing of the appeal to allow the necessary vote of the body corporate and general meeting to be taken. If the appeal on this ground were now to be heard and decided in favour of the applicants, the resulting orders would be the setting aside of the tribunal decision and the remitting of the matter for re-hearing, in circumstances where the committee's decision to bring the appeal to that tribunal had been ratified after the event. Even if that ratification were not regarded as effective, it would be difficult to argue that the body corporate should not be permitted to ratify the institution of what would then be pending proceedings. Given the ultimate unlikelihood of any different result purely on the basis of lack of authority for the tribunal appeal, I would not regard the applicants as having established a substantial injustice warranting a grant of leave to appeal on this ground.

The original owner's role

[43] The applicants' next proposed ground of appeal was that the tribunal member had

> "[e]rred in law in holding that 'exclusive use' could not be conferred upon a proprietor of a lot in a Community Title Scheme by the original owner during the "original owner control period" as defined by the *Body Corporate and Community Management Act* 1997 (Qld) notwithstanding until more than 50% of the lots in the Community Title Scheme are no longer in the ownership of the original owner there is no requirement to convene a first general meeting or elect a Committee to grant exclusive use."

The tribunal member did not in fact make any express finding that exclusive use could not be conferred by the original owner, although he did note that neither party had suggested any inaccuracy in the body corporate manager's advice to Mr Loane that the exclusive use had to be granted at a general meeting of the body corporate. But, in any case, having regard to the statutory requirements for a grant of exclusive use of common property, I do not think there is anything in the point.

[44] The *Body Corporate and Community Management Act* 1997, as it stood in 1998 when Famestock contracted to buy lot 16, contained no definition of "original

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[33] Section 3(b).

owner control period", although "original owner" was defined to mean each person who, before the scheme's establishment, was the registered owner of a lot which then became scheme land. Section 133(1) was in the same terms as s 170 in the Act in its present form; it identified an "exclusive by-law" as a by-law attaching to a lot which gave the occupier exclusive use of common property or a body corporate asset.

[45] Section 134(1)[34] required the common property or body corporate asset to which an exclusive use by-law applied to be specifically identified in the by-law itself or allocated either by the original owner or the original owner's agent authorised under the by-law to make the allocation; or (in an instance not applicable here) two or more lot owners under a reallocation agreement. Section 134(2) and (3) required the written consent of the lot owner before an exclusive use by-law could attach to his lot, that consent to be given before either the passing of the resolution for recording of a new community management statement incorporating the by-law or the allocation of the common property to which the by-law applied, as the case might be.

[46] It is plain that exclusive use could not be conferred on Famestock without the creation of a by-law. The *Body Corporate and Community Management Act* did not in 1998, and does not now, contemplate the conferring of a right of exclusive use attached to a lot except by means of an exclusive use by-law. The only role which the developer might have played was in allocating the common property if a by-law had authorised it to do so. There was no such by-law.

The January 1999 exclusive use resolution

[47] The applicants' next proposed appeal grounds turned around the exclusive use resolution passed at the January 1999 general meeting. They were, that the QCAT member had erred in: not finding the body corporate had intended to and had, in fact, granted exclusive use by its vote; taking into account that the new community management statement had not been registered when non-registration did not affect the grant of exclusive use; and overlooking the fact that the applicants had relied on the adjudicator's "factual finding... that a grant of exclusive use had been made". The last seems inaccurate; as the member observed, the adjudicator was not satisfied that the body corporate had resolved to grant exclusive use in the common property. In any event, I do not think any of these grounds have any prospect of success.

[48] Section 55(2) of the *Body Corporate and Community Management Act* 1997 required at the relevant time that assent to the recording of a new community management statement must be given in the form of a resolution without dissent. The requirements for voting papers and passage of resolutions were contained in regulations. The original community management statement was not in evidence in this case, so it is not known whether it identified the regulation model applying to the scheme. If it did, it would, presumably, have identified the *Body Corporate and Community Management (Accommodation Module) Regulation* 1997. If it did not, the *Body Corporate and Community Management (Standard Module) Regulation* 1997 would have applied. Both regulations required that a voting paper for a general meeting state each motion to be considered at a general meeting so as to enable any voter to cast a written vote.[35] A general meeting could pass a resolution

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34 The equivalent of s 171 of the Act in its present form.

35 *Body Corporate and Community Management (Standard Module) Regulation* s 42(3)(c); *Body Corporate and Community Management (Accommodation Module*) Regulation s 40(3)(c).

only if it were stated in a voting paper accompanying the notice.[36] That plainly did not occur in this case. The adjudicator was correct in his finding that there had been no valid resolution as to exclusive use.

The absence of a plan identifying the exclusive use area

[49] The next ground relied on was that the QCAT member erred in having regard to the asserted absence of a plan of the area of exclusive use when the body corporate had submitted the plan marked "C" to the registrar of titles. That, I think, misapprehends the member's reasoning: he accepted that there existed a plan with the letter "C" on it; the difficulty he identified was that the applicants, writing to the Commissioner Body Corporate and Community Management, had referred to "[t]he area marked 'C'" on the plan as the "most probable" area to be the subject of the exclusive use grant. That, as the member observed, raised two problems: that there was no area marked "C" on the plan (as opposed to the plan as a whole being marked "C") and that it suggested that the applicants were uncertain of the actual area the subject of their claim for exclusive use.

[50] The plan marked "C" did show an area adjoining lot 16 which was presumably common property, but it contained no marking which would indicate what part of that area was to be the subject of exclusive use. Whatever plan might have been attached to the contract of sale was no longer available. The QCAT member was correct in concluding that there did not exist any clear and contemporary identification of the proposed exclusive use area which could have been the subject of the adjudicator's order.

Rectification and delay

[51] The applicants' remaining proposed appeal grounds were that the member had erred in holding that they could not obtain an order requiring the body corporate to file a new community management statement recording the grant of exclusive use and in holding that they were disentitled from relief on discretionary grounds. In that regard, it was said that *Pukallus v Cameron* and *Burrell v Body Corporate for Boulevard North* both supported the case for rectification; that the member should not have considered that there was a limitation arising from the case law on the orders the adjudicator could make; and that the adjudicator's statutory power to resolve the dispute was not fettered by rules relating to rectification.

[52] As to the last, I doubt that the adjudicator did have the statutory power to resolve the dispute in the way he did. The relevant powers to make an order that is "just and equitable" under s 276 arise when there is a dispute about "a claimed or anticipated contravention of [the Act or] the community management statement" or about "the exercise of rights or powers, or the performance of duties, under [the Act or] the community management statement". No contravention of the Act, or exercise of rights or powers or performance of duties under it, was identified as being the subject of dispute; and the recorded community management statement did not confer any right of exclusive use about which the parties could be in dispute.

[53] However, the basis on which the adjudicator purported to act was not explored either before him or in the QCAT proceedings, so it is probably more to the point to say that the QCAT member was entirely correct in saying that there was no relevant

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36 *Body Corporate and Community Management (Standard Module) Regulation* s 52(5); *Body Corporate and Community Management (Accommodation Module) Regulaton* s 50(5).

agreement between the applicants and the body corporate and there was nothing to identify precisely what the area the subject of the exclusive use was supposed to have been. That state of affairs, as the statements of Wilson and Brennan JJ in *Pukallus* make plain, did not lend itself to rectification.

[54] The adjudicator himself referred to the doctrine of rectification as a guide to whether he should exercise his perceived power. But even if one considers the matter entirely independently of any principle attaching to rectification, it could hardly be just and equitable to make orders compelling the body corporate to confer on the applicants an exclusive use as to which there was no valid resolution, on the strength of the developer's promise, made to a different entity, to confer a right to use property not now capable of identification. There was no error in the member's approach.

[55] On the question of discretionary grounds, it was put that because there had been no assessment of the credibility of the lot owners' evidence of prejudice (in relation to their having purchased without knowledge of the exclusive use area) there was no evidence on which the member could hold that the applicants were disentitled from relief on discretionary grounds. The member noted that for it to be just and equitable to make the order effectively giving exclusive use to the owner of lot 16, "an explanation had to be given for a decade of delay"; and there had been none. The evidence included a letter of 7 May 2001 which the chairman of the body corporate sent to the applicants, informing them that the community management statement had not been registered. The application for adjudication was made in August 2010. As the member observed, there was no explanation for that delay. That feature was entirely relevant to consideration of what was just and equitable.

Conclusions

[56] I do not consider that any of the proposed grounds of appeal, other than that as to the lack of authority for the commencement of the QCAT appeal, could succeed. For the reasons already given, I do not consider that the member's error in failing to deal with the lack of authority point is such as to have caused substantial injustice warranting a grant of leave to appeal. I would refuse the application for leave to appeal.

[57] So far as the question of costs is concerned, there was, up to the point of the body corporate's ratification of the committee's decision to bring the QCAT appeal, a live question about the body corporate's intentions in that regard; had that ratification not occurred, the applicants would have been in a different position in arguing that a substantial injustice had occurred. I would order that the applicants pay the respondent's costs of the application incurred after 19 November 2012 (when it may be assumed that the applicants, as members of the body corporate, became aware of the ratification) on the standard basis.

[58] **DOUGLAS J:** I agree with the reasons of Holmes JA which I have had the significant advantage of reading in draft form. I merely wish to add a few words about the question whether the bringing of a proceeding can be ratified after its conclusion.

[59] Cases such as *Bird v Brown*[37] and *Alexander Ward & Co Ltd v Samyang Navigation Co Ltd*[38] are discussed in *Bowstead & Reynolds on Agency*[39] as relevant to the rule

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37 (1850) 4 Ex 786; 154 ER 1433.

38 [1975] 1 WLR 673.

39 19th ed (2010) at §2-089, Article 19(1).

formulated in that work that "ratification is not effective where to permit it would unfairly prejudice a third party, and, in particular -

> (1) where it is essential to the validity of an act that it should be done within a certain time, the act cannot be ratified after the expiration of that time, to the prejudice of any third party."

[60] That conclusion is consistent with the reference to third parties' rights by Isaacs J in *Davison v Vickery's Motors Ltd (In liq).*[40]

[61] In summarising the effect of their Article 19(1) on the limits of ratification, the learned authors of *Bowstead & Reynolds on Agency* say:[41]

> "But the workability of a rule that void acts cannot be ratified has already been doubted, and it may be better simply to proceed on the basis that certain acts are by their context required to be valid and effective when done, lest a time limit be extended or the party affected be in a state of uncertainty. Such a rule would require discrimination between situations. Thus although the unauthorised issue of a writ can apparently be ratified, an assignment probably cannot after action on the right assigned has been commenced by the purported assignee, nor a demand for payment or delivery, a notice of abandonment in marine insurance, a notice of dishonour of a negotiable instrument or a notice to quit. *It may be possible to say that a ratification will be given retrospective effect unless there are cogent reasons why to give it such effect would contravene the purpose of any time element involved or otherwise be unfair to the third party.*"[42]

[62] Here the situation is analogous to the unauthorised issuing of a writ. The failure to authorise the appeal appears to have been a simple oversight. There is no evidence, for example, that it reflected a division of opinion on the body corporate during the period of six weeks allowed for an appeal by s 290 of the *Body Corporate and Community Management Act* 1997 (Qld). That time limit may, in any case, be extended by order of the Queensland Civil and Administrative Tribunal, a course which would have been likely to occur in a case of this nature had the appeal been ratified before it was heard.[43] Giving effect to the ratification in such a case does not obviously contravene the purpose of the time limit established for the bringing of the appeal, that there be finality to litigation. Accordingly, there is no reason to refuse to give effect to the ratification. There is no evidence of any unfairness to a third party involved and no deprivation of any accrued right held by the applicants as Holmes JA has pointed out.[44]

[63] Accordingly, I agree with the proposed orders including the order as to costs.

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40 (1925) 37 CLR 1; [1925] HCA 47, 19-20, discussed by Holmes JA at [38] above. See also *Halsbury's Laws of Australia* at [15-140] and *Restatement of the Law of Agency, Third* (2006) at §4.05.

41 See above fn 39 at 97.

42 Footnotes omitted, emphasis added.

43 See s 61(1) of the *Queensland Civil and Administrative Tribunal Act* 2009 (Qld).

44 See at [40] above.