SUPREME COURT OF QUEENSLAND

CITATION:	*Morat Pharmaceuticals Pty Ltd v Hoft Pty Ltd & Anor* [2014] QCA 319
PARTIES:	**MORAT PHARMACEUTICALS PTY LTD** ACN 111 674 018 (applicant) **v** **HOFT PTY LTD** ACN 080 089 121 (first respondent) **BODY CORPORATE FOR FAIRTHORPE COMMUNITY** (second respondent)
FILE NO/S:	Appeal No 5123 of 2014 QCAT No 258 of 2013
DIVISION:	Court of Appeal
PROCEEDING:	Application for Leave *Queensland Civil and Administrative Tribunal Act*
ORIGINATING COURT:	Queensland Civil and Administrative Appeal Tribunal at Brisbane
DELIVERED ON:	2 December 2014
DELIVERED AT:	Brisbane
HEARING DATE:	7 November 2014
JUDGES:	Holmes and Muir JJA and McMeekin J Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**1. That the application for leave to appeal be refused.** **2. That the applicant pay the first respondent's costs of and incidental to the application.**
CATCHWORDS:	ADMINISTRATIVE LAW – ADMINISTRATIVE TRIBUNALS – QUEENSLAND CIVIL AND ADMINISTRATIVE TRIBUNAL – where the first respondent filed an application for adjudication under the *Body Corporate and Community Management Act* 1997 (Qld) seeking an order that a meeting of the body corporate or a resolution purportedly passed at that meeting be declared void or, in the alternative, an order that votes cast by two proprietors declared "unfinancial" at the meeting be admitted and counted – where the application to the Queensland Civil and Administrative Tribunal was dismissed – where the first respondent appealed to the Appeal Tribunal of QCAT, seeking an order that the adjudicator's order be set aside and that the resolution be declared void –where the QCAT appeal was allowed and the

subject resolution was declared void – where the applicant appealed to this Court against the Appeal Tribunal's decision – whether the Appeal Tribunal erred in law by misconstruing the adjudicator's reasons – whether the applicant was denied procedural fairness – whether the Appeal Tribunal erred in law by not taking into account relevant considerations – whether leave to appeal should be granted

Body Corporate and Community Management Act 1997 (Qld), s 242(2)(a), s 243(2)(b), s 244, s 276

Cominos v Cominos (1972) 127 CLR 588; [1972] HCA 54, cited
PMT Partners Pty Ltd (In liq) v Australian National Parks and Wildlife Service (1995) 184 CLR 301; [1995] HCA 36, cited
Smith v Federal Commissioner of Taxation (1987) 164 CLR 513; [1987] HCA 48, considered
Talga Ltd v MBC International Ltd (1976) 133 CLR 622; [1976] HCA 22, cited
Tooheys Ltd v Commissioner of Stamp Duties (NSW) (1961) 105 CLR 602; [1961] HCA 35, considered

COUNSEL: M M Stewart QC, with S J Carius, for the applicant
A Vasta QC, with P J Trout, for the first respondent
A Redburn for the second respondent

SOLICITORS: Warlow Scott Lawyers for the applicant
Dare Lawyers for the first respondent
Active Lawyers and Consultants for the second respondent

[1] **HOLMES JA:** I agree with the reasons of Muir JA and the orders he proposes.

[2] **MUIR JA**: **Introduction** The first respondent filed an application for adjudication under the *Body Corporate and Community Management Act* 1997 (Qld) (the Act) seeking an order that a meeting of the body corporate for Fairthorpe Community Titles Scheme 5820 ("the Body Corporate") or a resolution purportedly passed at that meeting be declared void. In the alternative, an order was sought that one or both of votes cast by two proprietors declared "unfinancial" at the meeting be admitted and counted. The application was dismissed.

[3] The first respondent appealed to the Appeal Tribunal of the Queensland Civil and Administrative Tribunal against the adjudicator's determination, seeking an order that the adjudicator's order be set aside and that "motion 2 of the Extraordinary General Meeting of the Body Corporate for 'Fairthorpe' Community Titles Scheme 5820 held 23 July 2012 be declared void". The appeal was allowed and the subject resolution was declared void.

[4] The applicant, Morat Pharmaceuticals Pty Ltd, was the second respondent to the appeal to the Appeal Tribunal from the adjudicator's decision. It appealed against the Appeal Tribunal's decision on grounds which will be convenient to consider after discussing the proceedings before the adjudicator and the Appeal Tribunal.

[5] At an Extraordinary General Meeting held on 23 July 2012 a number of motions were put including the following:

> "Entry into Caretaking Agreement and Letting Authority
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> That the body corporate resolves to enter into a new caretaking agreement and letting authority with Morat Pharmaceuticals Pty. Ltd. CAN (sic) 111674018 for a term of 10 years commencing on 1 August 2012 and expiring on 31 July 2022, together with options of 10 years and 5 years respectively, with the remuneration under the caretaking agreement being $54,314.64 plus GST, in accordance with the caretaking agreement and letting authority circulated with this motion. Further, that the seal of the body corporate be affixed to the documents and signed by two members of the committee, one of whom must be the Chairperson or Secretary."

[6] In the papers sent to the proprietors giving notice of the Extraordinary General Meeting, the motion was accompanied by an explanatory note: "the committee has also reviewed the new agreements and recommends they be entered into".

[7] The motion was carried, there being 14 votes in favour of the motion and 13 votes against. The first respondent voted against the motion but his vote was deemed invalid on the ground that he was not a financial member at relevant times. Another proprietor's vote was also rejected on grounds that he or she was unfinancial because one cent of a body corporate levy remained unpaid. Six other proprietors did not vote.

[8] Ground 1 of the first respondent's adjudication application challenged the validity of the decision that he was unfinancial and not entitled to vote. Ground 2 complained that advice that he was a "financial" proprietor given to the first respondent by Body Corporate Services prior to the meeting was not adhered to. Ground 3 alleged that the late fee which led to the first respondent being declared unfinancial was excessive and thus illegal. Ground 4 challenged the decision that the proprietor who was one cent in arrears was not entitled to vote. Ground 6 stated:

> "The explanatory note to the motion declared that 'the committee has also reviewed the new agreements and recommends they be entered into entered into'. This was false. There was no prior meeting."

[9] The appellant is the body corporate manager under the caretaking agreement and the letting authority referred to in the above resolution.

The adjudicator's decision

[10] In the reasons for his decision, the adjudicator, under the heading "Background", quoted the subject resolution and summarised the first respondent's assertions in relation to grounds 1, 3 and 4. Under the heading "Submissions" the adjudicator noted that submissions were made by five owners who supported the first respondent's application. After referring at some length to the submissions made by the second respondent and others opposing the application, he stated that, in responding to such submissions, the first respondent "made additional claims regarding the validity of the resolution to enter into the new agreement". Reference was made to the contention that the explanatory note was false. The adjudicator then referred to a further contention that the vote of the proprietor of Lot 5, Mr Paul, was wrongly included because he owed money to the second respondent. He next addressed the applicant's submission that the first respondent, by raising these

matters, was introducing "new allegations not previously raised in the application" which were out of time.

[11] The adjudicator stated:

> "[12] Further, the body corporate says there is no evidence to support the allegation that Mr Morat was aware of any of the alleged irregularities. The committee had previously reviewed the contract and attempted to amend the relevant explanatory note, but was told by BCS that it was too late to do so. The chairperson therefore contacted as many owners as possible to inform owners that there was no such recommendation. Of the persons who voted, only the owners of lots 12, 19, 4 and 20 were not contacted."

[12] Under the heading "Analysis" the adjudicator dealt at some length with grounds 1, 2, 3 and 4. He then stated:

> "[17] … the applicant's 'reply' should have been limited to only those matters raised in submissions. I am therefore of the view that the additional issues raised by the applicant should have been the subject of a new application.
>
> … [The validity of the vote cast by the proprietor of Lot 5 was discussed.]
>
> [19] In any event, I am of the view that to the extent that the application can be considered to be amended by raising the new issue, the amended application ought to be considered out of time in accordance with section 242(2)(a) of the Act. That section provides that where an applicant seeks to avoid a resolution of a general meeting, the application should be made within 3 months of the date of the meeting. The purpose of this provision is to ensure that there is a degree of certainty and stability in the administration of the body corporate. While an adjudicator may waive non-compliance with the 3 month time limit in section 242(2)(a), he may only do so for good reason. In this regard it is relevant to note the comments of the adjudicator in the previous decision *Fairthorpe [2012] QBCCMCmr 570,* that under section 310 of the Act, it is probable that the body corporate would be bound by the new caretaking agreement and letting authority unless it could be demonstrated that the caretaker acted dishonestly or knew of an irregularity with the vote."

The decision of the Appeal Tribunal

[13] In his reasons, the Appeal Tribunal member referred to submissions on behalf of the second respondent to the adjudicator that the chairperson of the committee of the body corporate had contacted as many owners as possible to inform them that the committee did not make the recommendation in the explanatory note and, of the persons who voted, only the owners of Lots 12, 19, 4 and 20 were not contacted.

The Appeal Tribunal member observed, "notably, none of the owners of those lots was represented, in person or by proxy, at the meeting itself". It was then held that the adjudicator erred in law in failing to deal with the question whether the incorrect explanatory note was a good reason to declare the meeting or the resolution itself void.

[14] The Appeal Tribunal member proceeded to determine this issue on the evidence before him. His reasons in that regard are as follows:

> "[10] It is clear that the explanatory note was wrong and therefore misleading. A misleading statement that the committee recommended that the body corporate pass a resolution could well affect the decision of a lot owner to vote in favour of a resolution apparently recommended by the committee. Even if the chairperson of the body corporate had managed to contact all but four of the lot owners who voted (about which there was an assertion, but no supporting evidence), where those four persons who were not contacted voted by submitting a ballot paper without attending at the meeting, there is a real possibility that they were misled by the note and that their decision as to how to vote was affected, one way or another, by the apparent recommendation of the committee.
>
> [11] In these circumstances, where the motion was passed by a majority of only one vote, there is a real risk that the motion was passed, in part, on the basis of a misleading explanatory note and a non-existent recommendation of the committee. It seems clear to me, in those circumstances, that it is just and equitable to resolve the dispute by making an order declaring the resolution to be void.
>
> [12] The result is that the appeal should be allowed on this ground and the resolution should be declared void. Of course, this does not prevent the body corporate committee, if it sees fit, calling a meeting to put a motion that the entry by the body corporate into the caretaking and letting agreement be ratified by the body corporate in general meeting, or that a fresh agreement be entered into." (citations omitted)

[15] The Appeal Tribunal member found it unnecessary to determine the question concerning Lot 5 and whether the first respondent was aware that the explanatory note was misleading and arguably invalid so that the agreements between it and the second respondent were invalid or ought be set aside. He noted that none of those matters was properly raised in the application before him and that there was no application to set aside the agreements.

The reasons advanced by the applicant for the grant of leave

[16] The reasons advanced by the applicant in support of its application for leave to appeal are:

- the applicant has an arguable case;

- the caretaking agreement and letting authority confer valuable commercial rights on the applicant. If the motion is void "it may be used as a foundation to challenge the validity of the agreements or lead the parties in a state of uncertainty as to their contractual obligations". The applicant will suffer a substantial injustice if leave to appeal is not granted; and
- there is a considerable variation in the approaches taken by adjudicators and by the Tribunal in matters such as the one under consideration. There is a need for settled principles guiding the exercise of discretions in such cases.

The prospective grounds of appeal

[17] The first respondent, if successful on this application, will rely on three broad grounds of appeal. These were identified as follows:

1. Did the Appeal Tribunal err in law by misconstruing the adjudicator's reasons and thereby holding that the adjudicator erred in law in failing to "deal with" the first respondent's submissions on the explanatory note?
2. Given that the applicant was not a party to the adjudication order and given that its commercial interests were likely to be adversely affected by a re-exercising of the adjudicator's discretion, did the Appeal Tribunal err in law by not considering whether the matter ought to be remitted to the adjudicator to allow the applicant an opportunity to be heard on the merits?
3. Upon a proper construction of s 276 of the Act, did the member err in law by not taking into account the relevant considerations (other than the explanatory note) and, if so, how should the discretion properly be exercised?

[18] I will now address each of these proposed grounds of appeal.

Did the Appeal Tribunal misconstrue the adjudicator's reasons?

[19] The applicant submitted that the adjudicator found, correctly, that the first respondent's reply to the submissions filed by the applicant and others went beyond that permitted by s 244(3) of the Act. Section 244 applies, by virtue of sub-section (1), if one or more persons are invited under s 243(2)(b) to make submissions in response to an application. Section 244(2) requires the commissioner, where subsection (1) applies, to give written notice to the applicant for the adjudication containing a statement that the applicant's reply to any such written submissions "may only **relate to** issues raised by the submissions".[1] That notice was provided.

[20] The falsity of the explanatory note was clearly raised by ground 6 of the adjudication application. The point was addressed in the first respondent's letter to the Body Corporate community management office dated 18 October 2012. The committee of the Body Corporate's submissions dealt with ground 6, going into the circumstances in which the inaccurate explanatory note had been left in the notices of meeting even though it was known to be erroneous. The erroneous explanatory note was addressed in a submission by a proprietor, Ms Dickson. The applicant's submissions were contained in a letter from its solicitors dated 27 November 2012 and an email of the same date. The submissions also dealt with the explanatory note, as did the submission made by the treasurer of the Body Corporate. Nevertheless, in his reasons the adjudicator treated the first respondent's allegations concerning the explanatory note as "additional claims."

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1 *Body Corporate and Community Management Act* 1997 (Qld), s 244(3).

[21] Contrary to the adjudicator's finding, the first respondent did not seek to "invalidate the resolution on additional grounds" by responding to submissions made in response to its adjudication application and its submissions in support thereof. Moreover, the first respondent's submissions in reply "relate" to issues raised by the submissions in response to his application. The adjudicator appears not to have had regard to the wording of s 244(3). If he did, it is apparent that he failed to appreciate the width of the words "relate to".[2] In *Tooheys Ltd v Commissioner of Stamp Duties (NSW)*,[3] Taylor J described the phrase "in relation to" as both "vague and indefinite". Toohey J in *Smith v Federal Commissioner of Taxation*[4] adopted a passage from a judgment of the Supreme Court of Canada in which it was said:

> "The words 'in respect of' are in my opinion, words of the widest possible scope. They import such meanings as 'in relation to', 'with reference to' or 'in connection with'."

[22] Insofar as the adjudicator considered what he regarded as "the new issue" it was to conclude, wrongly, that it was out of time in accordance with s 242(2)(a) of the Act and to put forward policy reasons as to why no extension of time should be given.

[23] The applicant referred to the adjudicator's mention of a submission by the Body Corporate to the effect that the subject voting was by secret ballot and it was therefore impossible to ascertain how lot owners cast their vote. This was said to be relevant as there was no evidence that any voting lot owner was in fact misled. This submission was dealt with, in my view, convincingly, by the Appeal Tribunal member in paragraphs [10] and [11] of his reasons.

[24] There is the additional consideration that there was no evidence that the six proprietors who did not vote had been informed that the explanatory note was inaccurate. The explanatory note was plainly intended to offer an assurance to the proprietors that they could safely vote in favour of the motion as it had the imprimatur of the committee. It is thus reasonable to suppose that there may have been proprietors who would have voted against the motion had they not been misled. It was not suggested that there was any other notified business at the meeting that was in any way controversial.

[25] The applicant submitted to the effect that the adjudicator's reasons should be construed generously and not subjected to close analysis. No matter how generously construed, the adjudicator's reasons reveal that he erred in failing to appreciate that the first respondent's submissions in reply related to issues raised by submissions in response to its application and in failing to duly consider the applicant's ground 6 and the submissions in support of it.

[26] This proposed ground is not reasonably arguable.

Was the applicant denied procedural fairness?

[27] The applicant argued that it was denied the opportunity of putting further evidence or submissions to "the Tribunal", which it could have done if the matter had been remitted rather than determined by the Appeal Tribunal. It was submitted that the Appeal Tribunal erred in failing to consider whether the applicant would be denied procedural fairness if the matter was not remitted.

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2 As to which, see eg *Smith v Federal Commissioner of Taxation* (1987) 164 CLR 513 at 533 and *PMT Partners Pty Ltd (In liq) v Australian National Parks and Wildlife Service* (1995) 184 CLR 301 at 328.

3 (1961) 105 CLR 602 at 620.

4 (1987) 164 CLR 513 at 533.

[28] The applicant was joined as a party to the appeal and filed written submissions. The notice of appeal sought orders that the adjudicator's order be set aside and that the subject resolution be declared void. It should have been apparent to the applicant that a possible outcome of the appeal was that it be allowed. The applicant had the opportunity of making submissions as to the orders the Appeal Tribunal should make and, in fact, sought an order that the first respondent pay its costs on an indemnity basis. It did not, however, seek to persuade the Appeal Tribunal to follow the course it now advocates. There was no denial of procedural fairness.

[29] This ground lacks merit.

Did the Appeal Tribunal err in law by not taking into account relevant considerations, other than the explanatory note, in exercising the Tribunal's discretion?

[30] The applicant's argument was to the following effect. The Appeal Tribunal was exercising the adjudicator's discretion pursuant to s 276 of the Act. It empowered the adjudicator to declare a meeting or motion void if it is "just and equitable" to do so. Such discretion, although broad, must be exercised in accordance with established principles, taking account of relevant considerations.[5] The Appeal Tribunal failed to take into account relevant considerations such as the impact of the decision on third parties and whether the invalidation of the motion would have any utility.

[31] The Appeal Tribunal noted in its reasons that the question of the validity, or otherwise, of the agreements entered into between the Body Corporate and the applicant were not raised in the application to the Appeal Tribunal and that there was no application to set aside the agreements.

[32] The focus of the appeal was on the explanatory note and to a lesser extent on: the owner of Lot 31's ineligibility to vote; the owner of Lot 5's eligibility to vote; and on whether an owner with an unpaid levy to the extent of one cent was entitled to vote. The last of those matters was disposed of by the Appeal Tribunal and there was no criticism of the findings in that regard.

[33] In its submissions to the Appeal Tribunal, the applicant made the following submissions which bore upon the exercise of the Appeal Tribunal's discretion:

> "Given the length of time since the motion was passed (23 July 2013) and the entry into the caretaking agreement and letting authority by the parties who have relied on it since its commencement on 1 August 2012, it would be unconscionable to now render null and void those arrangements."

[34] The Appeal Tribunal dealt with that submission by pointing out that the question of the invalidity of the caretaking and letting agreements was not one for its determination. The submissions did not ventilate the matters the applicant is now attempting to raise. The Appeal Tribunal properly recognised that the relief, if any, that should be given in respect of the agreements depended on factual issues well beyond the scope of the Appeal Tribunal's remit.

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5 *Cominos v Cominos* (1972) 127 CLR 588 at 599–600 per Gibbs J, at 608 per Mason J; *Talga Ltd v MBC International Ltd* (1976) 133 CLR 622 at 634.

[35] It is understandable that the primary focus of the Appeal Tribunal in deciding the appeal was on the explanatory note issue. It was a matter of obvious importance which had not been addressed by the adjudicator. The explanatory note was conceded by the Body Corporate Treasurer to be wrong. She stated that the "Chair agreed to instruct [Body Corporate Services] to leave [the explanatory note] out when the EGM documents were prepared and sent out. Unfortunately Body Corporate Services did not heed that instruction". She stated also that when the Committee voted "to allow the EGM to proceed" the explanatory note was not included in the motion before the committee.

[36] The Treasurer's statement was supported by the submission made to the adjudicator by the committee of the Body Corporate. That submission, however, explained that an officer of Body Corporate Services, who had been requested to remove the explanatory note, had stated that on advice from "the office of the Commissioner" and their own legal firm "according to the legislation the wording of the motion and note must be printed without amendment". Apparently, it did not occur to those engaged in the discussion that it was highly improbable that a statutory requirement would oblige the committee of a body corporate to include a false statement about a proposed motion in a notice of meeting.

[37] Proprietors of lots are entitled to expect that materials provided to them by the body corporate committee in respect of matters to be voted on at a body corporate meeting are accurate and not misleading in any way. Where there has been a breach of the committee's obligation in that regard and where it appears that the outcome of voting on a motion may have been affected, an obvious course to take by a tribunal having jurisdiction over the matter, is to set aside the tainted resolution so that the proprietors may have the opportunity of voting on the matter uninfluenced by tainted information.

[38] That is the course the Appeal Tribunal took, implicitly recognising the importance of insistence on scrupulous fairness and probity in the conduct of body corporate affairs.

[39] In the circumstances and having regard to the submissions made by the applicant to the Appeal Tribunal, I am not persuaded that the Appeal Tribunal erred as alleged.

Conclusion

[40] The course taken by the Appeal Tribunal was, with respect, justified and eminently sensible. Any prospects of succeeding on the proposed grounds of appeal are modest. Remitting the matter to the adjudicator, or another adjudicator, for a further hearing of the question whether setting aside the subject resolution on the just and equitable grounds would further prolong the litigation and may involve the parties in unnecessary expense. If a meeting is held to ratify the subject resolution or to consider a similar such resolution and a majority of proprietors voted in favour of it, the matter will be at an end. Moreover, important proprieties will have been observed and it will be clear that a false and misleading statement did not result in the passing of a resolution that would otherwise have failed.

[41] For the above reasons I would order that the application for leave to appeal be refused and that the applicant pay the first respondent's costs of and incidental to the application.

[42] **McMEEKIN J:** I agree with Muir JA and the orders his Honour proposes.