SUPREME COURT OF QUEENSLAND

CITATION:	*Oceana on Broadbeach Community Titles Scheme 24163 v Searle & Ors* [2003] QCA 238
PARTIES:	**OCEANA ON BROADBEACH COMMUNITY TITLES SCHEME 24163** (applicant/appellant) v **STEPHEN CHARLES SEARLE** (first respondent) **THE COMMISSONER FOR BODY CORPORATE AND COMMUNITY MANAGEMENT** (second respondent) **R A MEEK** (third respondent)
FILE NO/S:	Appeal No 2838 of 2003 DC No 931 of 2002
DIVISION:	Court of Appeal
PROCEEDING:	Application for Leave s118 DCA (Civil)
ORIGINATING COURT:	District Court at Southport
DELIVERED EX TEMPORE ON:	4 June 2003
DELIVERED AT:	Brisbane
HEARING DATE:	4 June 2003
JUDGES:	McMurdo P, Jerrard JA and Fryberg J Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**1. The application is struck out;** **2. The applicant is to pay the first respondent's costs of today's application for the adjournment;** **3. Material filed in this application is to be material filed in any further applications for extension of time and leave to appeal against the decision of his Honour, Judge Robin, QC, of 28 February 2003, filed on or before 13 June 2003;** **4. The costs of this application are the first respondent's costs of any such further applications;** **5. In the event that there are no such further**

applications, the applicant is to pay the first respondent's costs of this application for leave to appeal, to be assessed.

CATCHWORDS: APPEAL AND NEW TRIAL – RIGHT OF APPEAL – WHO MAY EXERCISE RIGHT - IN RELATION TO CORPORATIONS – where applicant/appellant filed for leave to appeal against decision of learned primary judge dismissing application for easement - where, pursuant to s 312 *Body Corporate and Community Management Act* 1997 (Qld) the applicant/appellant did not have appropriate authorisation to commence appeal – where applicant/appellant requests adjournment – whether application is incompetent and cannot be remedied by retrospective authorisation

Body Corporate and Community Management Act 1997 (Qld), s 312

Banks & Anor v Body Corporate "Noosa on the Beach" Community Title Scheme, 6417 [2002] QCA 146; Appeal No 11563 of 1999, 28 April 2000, considered
Sattell v The Proprietors – Be-Bees Tropical Apartments Building Units, Plan No. 71593 [2001] 2 Qd R 331, applied
Stone v ACE-IRM Insurance Broking P/L [2003] QCA 218; Appeal No 8623 of 2002, 6 June 2003, distinguished

COUNSEL: J Griffin QC, with C Carrigan for the applicant/appellant
G Gibson, with K Hayworth for the first respondent
No appearance by or on behalf of the second and third respondents

SOLICITORS: Short Punch & Greatorix for the applicant/appellant
Biggs & Biggs Lawyers for the first respondent
No appearance by or on behalf of the second and third respondents

THE PRESIDENT: This is an application by the Body Corporate for "Oceana on Broadbeach" Community Titles Scheme, for leave to appeal against a decision handed down on 28 February 2003, by his Honour Judge Robin QC, in the District Court, dismissing an appeal from the order of the Commissioner for Body Corporate and Community Management, refusing the applicant's application for an easement for the

purpose of window cleaning over the first respondent's penthouse unit in "Oceana on Broadbeach".

The application for leave to appeal was filed on 28 March 2003, the last day under the Rules for filing such an application. After that time, during April, both the applicant and the first respondent filed material relevant to the appeal in this Court.

On 15 May 2003, the applicant's solicitor notified the Registrar that it did not have the authorisation by Special Resolution of the Body Corporate to commence the appeal. Under s 312 of the Body Corporate and Community Management Act 1997 (Qld) a proceeding may only be started with such authorisation.

The applicant requests an adjournment of its application for leave to appeal until 16 June 2003, a date the Registry has confirmed is suitable to the Court for a hearing, by which time it hopes to have the necessary authorisation required under the Act. An Extraordinary General Meeting of the Body Corporate, has been called for 12 June 2003, when the Body Corporate hopes to achieve that authorisation.

The first respondent contends that the application is incompetent and cannot be remedied by retrospective authorisation and that the application should be dismissed or struck out, with costs.

That point was taken in Banks & Anor v. Body Corporate "Noosa On The Beach" Community Title Scheme, 6417; [2000] QCA 146, Appeal No 11563 of 1999, 28 April 2000. The application in that case was brought without the Body Corporate's authorisation, but by the time the application was heard, the authorisation had been obtained. This Court observed in Banks that, even accepting the application was originally incompetent, the appropriate course would be to permit the applicant to withdraw its earlier application and, after obtaining the necessary authorisation (which it by that stage had), apply for an extension of time within which to apply for leave to appeal and for leave to appeal.

In Sattell v The Proprietors - Be-Bees Tropical Apartments Building Units Plan No. 71593; [2001] 2 QdR 331, at 334, a similar point was raised. This Court held:

> "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 will 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."

This supports the striking out or dismissal of the application, rather than an adjournment, in circumstances where, as here, there are no pressing reasons in the interests of justice demanding an alternative course. If and when the applicant has the necessary authorisation of the Body Corporate, there is no reason here why it cannot then bring an application for an extension of time to apply

for leave to appeal and a fresh application for leave to appeal.

In reaching this conclusion, the Court is not determining that the application is a nullity, merely that, until the necessary authorisation has been obtained, this Court does not have jurisdiction: compare Stone v ACE-IRM Insurance Broking P/L; [2003] QCA 218.

In the circumstances, I propose the following orders:

1. The application is struck out;

2. The applicant is to pay the first respondent's costs of today's application for the adjournment.

3. Material filed in this application is to be material filed in any further applications for extension of time and leave to appeal against the decision of his Honour Judge Robin QC, of 28 February 2003, filed on or before 13 June 2003;

4. The costs of this application are the first respondent's costs of any such further applications;

5. In the event that there are no such further applications, the applicant is to pay the first respondent's costs of this application for leave to appeal, to be assessed.

JERRARD JA: I agree.

FRYBERG J: Subject to the point about jurisdiction, about which I would reserve my opinion, I also agree.

THE PRESIDENT: Those are the orders of the Court.