[2013] QPEC 19

PLANNING AND ENVIRONMENT COURT

CIVIL JURISDICTION

JUDGE ROBIN QC

P & E Appeal No 537 of 2013

THE BODY CORPORATE LA PORTE D'OR **Appellant**

and

GOLD COAST CITY COUNCIL and ANOTHER **Respondent**

BRISBANE

12.26 PM, FRIDAY, 3 MAY 2013

DAY 1

CATCHWORDS

Adverse submitter appeal by the body corporate - those behind it reasonably believed the special resolution needed to authorise it had been obtained - co-respondent's research suggested the majority vote fell short of the two-thirds vote required - its application to strike out the appeal as incompetent adjourned for a week to await the outcome of a new extraordinary general meeting to consider ratifying the proceeding

Body Corporate and Community Management Act 1997 s106(3), 312(1)

HIS HONOUR: Before the court is an application filed in this appeal by the co-respondent developer on the 17th of April. It was said to be document 4 on the court file in the electronic index. There be no hard copy index on the physical file. Nor indeed is there any hard copy of document 4. There's no doubt it was filed, Ms Kefford, appearing for the co-respondent, having produced to the court a copy bearing the court's stamp. The document (unstamped) is on the file stapled to an affidavit of G.A. McCracken which was filed on the 19th of April 2013.

The application seeks dismissal of the appeal on the basis that it is incompetent. The co-respondent has obtained development approval authorising it to develop, on a site between the appellant's and the beach at Surfers Paradise, a 41 storey apartment building. The basis of the application is that the special resolution required under section 312 (1) of the *Body Corporate and Community Management Act 1997* to authorise the appeal has not been obtained.

The appellant's submission to the Council during public notification of the proposal was delivered by hand to the Council by Ms Fleming, together with others including her own. The court is told that the Council mislaid the Body Corporate's submission with the consequence that it was not considered as part of the common material which the Council's assessment manager ought to have considered in assessing the development application. Mr Batty for the appellant has explained that that is the basis of the application in pending proceeding filed by his client on the 18th of April 2013, seeking to have the development application returned to the decision stage consequent upon a declaration that the decision was challengeable for the Council's failure to consider the relevant submission.

That application and the co-respondent's came before the court on 19th of April when directions were given for a hearing of the co-respondent's application, which is plainly deserving of priority, as it may but an end to the entire proceeding. There is yet another application by the appellant seeking to have that application adjourned for a short period with a view to ascertaining whether the necessary special resolution to authorise the underlying appeal can be achieved at an extraordinary general meeting called for the 9th of May 2013, that is, six days away.

Ms Fleming's affidavit, which at the moment is unchallenged, indicates awareness of the necessity to obtain a special resolution authorising commencement of the appeal, and the reliance placed on an outside firm of body corporate managers to conduct the relevant process. Paragraph 23 of the affidavit records, "advice from SSKB that the special resolution had passed at the EGM held on 13 February 2013."

The principal of the co-respondent, on the basis that he was a, "buyer" of a unit in the appellant's building - as a person proposing to buy a unit and therefore an "interested person" from the point of view of provisions authorising access to body corporate information - obtained from the managers voting figures which showed that at the February meeting a special resolution had not been obtained, two-thirds of the votes cast being required to be in favour under section 106(3)(m)(ii), notwithstanding that a substantial majority voted in favour.

Mr Batty raises questions about the propriety of Mr Howard's investigative exercise and whether the court ought to rely on the evidence obtained through it to support the application. It would be wrong to make any finding against Mr Howard on the basis of doubts that might be cast upon the genuineness of what he said without cross-examination challenging it. I think it's clear that, at some stage, whether or not there was a special resolution would have become an issue in the appeal. It is clear enough that the court may lack jurisdiction if the proceeding is without necessary authorisation; see *Sattel v Proprietors Be-Bees Tropical Apartments* [2000] QCA 496 and *Oceana On Broadbeach Community Title Scheme 24163 v Searle* [2003] QCA 238. In both of those matters jurisdiction was held to be lacking and the body corporates were refused the indulgence of an adjournment to permit the necessary resolution to be achieved, notwithstanding acceptance of the recognition in *Banks v Body Corporate for Noosa On the Beach CTS 6417* [2000] QCA 146 that a proceeding commenced without the authority of a resolution may be saved by a resolution effectively ratifying it obtained before the hearing. In the two later cases, it was acknowledged that the body corporates might or would be in a position, if they obtain the missing resolutions, to approach the Court of Appeal again seeking a necessary extension of time. I'm not sure whether there was any disposition to be sympathetic to such an application in the circumstances indicated.

In this court subsequently, the indulgence refused in the Court of Appeal has been granted - in particular, in *Body Corporate for Aleutian at Seaforth v The Lot Owners For Each Of The Applicant Bodies Corporate* [2009] QDC 52 by Judge Dodds and by Judge Devereaux in a subsequent proceeding which came before me in the *Body Corporate for the Watermark North Community Titles Scheme 33520 v Ferris* [2012]

QDC 223. Those cases and others in the District Court such as *Warren v Body Corporate for Buon Vista Community Titles Scheme 14325 (No 2)* [2006] QDC 398 and *Prins v Body Corporate for The Wave CTS 36237* [2013] QDC 66 recognise the possibility of retrospective ratification.

Ms Kefford points to what she says is a special circumstance here, namely that the body corporate, or more correctly, the faction therein which desired the special resolution, has already had a bite at the cherry, so far as achieving the special resolution is concerned. What is sought is a second bite which she submits ought not to be allowed. The voting figures revealed to the court suggest a solid faction against committing the body corporate's resources to an appeal such as the present. Without too much cynicism, I hope, it may be inferred that those are likely to be the lot owners whose views will not be impaired as greatly by the proposed new building as those of the majority. Its by no means certain that on the 9th of May the majority will achieve any greater success.

Although Ms Kefford submitted forcefully that it's not appropriate to grant the adjournment, I disagree. I agree with her submission that it can't be said there's no prejudice to her client from the delay which an adjournment forces on it, albeit a modest delay only. That arises in terms of holding costs. The week's holding costs involved

here pale into insignificance, one might think, compared with that caused by the Council's overlooking the body corporate's submission in the way that apparently happened. Notification of the decision eventually went out late to the body corporate which had the effect, of course, of extending the appeal period by several weeks. The Council, with the court's leave, has refrained from participating in the present spat.

I acknowledge that, speaking generally, the cases I've referred to do not involve a developer being delayed; however the dimensions of the delay and the resulting costs appear modest. It may be that, down the track some compensating balm may be available - albeit indirectly - by a costs order. I think it's in interests of justice that the body corporate, having, it seems, inaccurately been told that a special resolution had been obtained, be offered the chance to obtain a special resolution. The time sought for such an exercise is only six days, whereas in Judge Dodds' matter and Judge Devereaux's it was more than a month. Those behind this appeal appear to have proceeded in a reasonable way to try to ensure that it was properly instituted. Costs might be saved by allowing this appeal to continue for another week.

It's by no means a foregone conclusion that the earlier vote will be reflected in the outcome of the new one, which is what Ms Kefford was, in effect, suggesting. I understood Mr Batty to accept that failure to achieve a special resolution next Thursday might be the end of the appeal, although one could wonder whether there's not a possibility of some independent life in his client's first application in pending proceeding referred to above; assuming that the necessary authorisation can be obtained in future, it might be revived as an originating application not subject to the

strict time limit for appeals of 20 business days. The proposed special resolution obviously produces difficult time pressures upon a putative appellant which is a body corporate.

5 So the matter is adjourned to not before 1 pm on the 10th May 2013 before me. The unusal time's fixed in deference to another court obligation that Ms Kefford has on the day.