

SUPREME COURT OF QUEENSLAND

CITATION: *Bottoms v Yorkeys Knob Boating Club Inc* [2021] QSC 22

PARTIES: **JOHN RAYMOND REIS BOTTOMS**
(applicant)
v
YORKEYS KNOB BOATING CLUB INCORPORATED
(respondent)

FILE NO/S: SC No 52 of 2021

DIVISION: Trial

PROCEEDING: Application

ORIGINATING COURT: Supreme Court of Queensland

DELIVERED EX TEMPORE ON: 5 February 2021

DELIVERED AT: Cairns

HEARING DATE: 5 February 2021

JUDGE: Henry J

ORDER:

- 1. The provisions of clause 24 of the rules of association of the respondent providing for the attendance and voting of members by proxy apply to special general meetings convened in accordance with clauses 9 and 21(c) of the rules to determine an appeal against a decision by the management committee of the respondent to reject an application for membership or a member of the respondent's membership.**
- 2. The time for filing and service of the application be abridged.**
- 3. The respondent pay the applicant's costs to be assessed on the standard basis, but limited to Counsel's costs and the filing fee**

CATCHWORDS: ASSOCIATIONS AND CLUBS – GENERAL MATTERS – MEETINGS – VOTING – where a member of the respondent appealed a decision of the club to terminate his membership – where this was to be decided at a general meeting – where the respondent determined proxy votes were not permitted at the meeting – whether proxy voting is permissible or whether the prospective vote is limited to those literally present at the meeting

Associations Incorporations Act 1981 (Qld), s 72, s 73

COUNSEL: C. Ryall for the applicant

C. Pocock (*sol*) for the respondent

SOLICITORS: Atherton Tablelands Law for the applicant
WGC Lawyers for the respondent

HENRY J: The applicant sought orders this morning pursuant to sections 72 and 73 of the *Associations Incorporations Act* 1981. The orders I then proceeded to give were that the Court declares that the provisions of clause 24 of the rules of association of the respondent (“the rules”) providing for the attendance and voting of members by proxy apply to special general meetings convened in accordance with clauses 9 and 21(c) of the rules to determine an appeal against a decision by the management committee of the respondent to reject an application for membership or a member of the respondent’s membership and that the time for filing and service of the application be abridged.

The application arose in circumstances where David Brown, a member of the Yorkeys Knob Boating Club Incorporated, appealed the decision of the incorporated club to terminate his membership. The rules of the association confer a right of appeal against such a decision on the relevant member, providing at rule 9(2):

“Upon the receipt of a notification of the intention to appeal against rejection or termination of membership the Secretary shall convene, within three months of the date of receipt by him of such notice, a general meeting to determine the appeal. At any such meeting the applicant shall be given the opportunity to fully present his case and the Management Committee or those members thereof who rejected the application for membership or terminated the membership, subsequently shall likewise have the opportunity presenting its or their case. The appeal should be determined by the vote of the members present in such meeting.”

Rule 9(2) contemplates the appeal is determined at a general meeting where both the applicant and the management committee will have the opportunity of presenting their cases. The application before me arises because of a determination by those convening the meeting, which is to be held tomorrow, that proxy votes will not be permitted at the meeting.

The complaint, in short, is that this will disenfranchise a number of members who cannot attend the meeting, particularly members who do not live locally. It appears the decision to not allow proxies was taken both because rule 9(2) contemplates the votes should be by the members present at such meeting and also because the interpretation requiring presence is consistent with providing the opportunity for the protagonists to present their

cases. As I apprehend the latter argument, it appears to be that the opportunity to be heard by those who will vote can only be achieved if those who vote are present to hear the presentation of the respective cases at the meeting.

It is necessary to touch upon a few other provisions in the rules before returning to the question of whether proxies are permissible or whether the prospective vote is to be limited to those literally present at the meeting.

Rule 21(c) obliges the secretary to convene a special general meeting on being given notice of intention to appeal against a decision of the management committee to terminate the membership of any person. Rules 22, 23 and 24 make provision for various aspects of process at any general meeting. They do not confine its language to exclude from the procedure for general meetings, the procedure to be adopted at special general meetings, presumably because the authors took the view that a special general meeting is nonetheless a general meeting.

Rule 24 relevantly provides:

“Unless otherwise provided by these rules, at every general meeting:

... (3) every question, matter or resolution shall be decided by a majority of votes of the members present...

(6) a member may vote in person or by attorney and on a show of hands every person who is a member or a representative of a member shall have one vote and in a secret ballot, every member present in person or by proxy or by attorney or other duly authorised representative shall have one vote.

(7) a member may vote by proxy only if he is in hospital, interstate, intrastate, or overseas and satisfies the secretary and the statutory declaration annexed to his proxy that he is unable to attend and vote for one of those reasons.”

There are further provisions within rule 24 regarding proxy voting. In particular, at 24(9) the form of the proxy vote appears. Its wording confers upon the person who inferentially will be present in order to cast the proxy vote at the meeting, an authority, in effect to cast the vote as instructed or as the proxy thinks fit. The opportunity for instruction arises by the format permitting the inclusion of the words “in favour of the resolution” or “against the resolution”. The upshot then is that the proxy vote arrangement contemplated allows for the proxy to give the bearer thereof at the meeting the discretion which way to vote or

allows the proxy to instead indicate whether the vote is to be cast in favour of or against the resolution.

The provisions contained within rule 24, particularly when subrules 3, 6 and 7 are read together, appear to contemplate that the “majority votes of the members present” referred to in rule 24(3) includes the votes which can be exercised at the meeting by a person present at the meeting and holding the proxy vote of a member. To interpret rule 24 otherwise would mean that those subrules dealing with proxy voting serve no purpose, for no proxy vote could be counted in determining the vote outcome.

Whether following a contextual or purposive approach to interpretation, the effect of rule 24 is that unless otherwise provided by the rules, at every general meeting, every question, matter or resolution shall be decided by majority of votes of the members present which includes members’ votes cast by proxy by persons present at the meeting and holding the proxy votes.

Rule 9(2) in referring to the appeal to be decided at the general meeting provides similarly to rule 24(3) that it should be determined “by the vote of the members present at such meeting”. This is not precisely the same as “decided by a majority votes of the members present” but I discern no relevant difference in meaning between the two. The main difference is reference to a majority, but the need for the vote to be a majority vote is, in any event, imposed by the operation of rule 24(3). There is nothing in rule 9(2) which purports to alter the effect of rule 24 as it relates to voting by proxy in general meetings.

Where rule 9(2) refers to “the vote of the members present at such meeting” it does not contradict the position relating to all general meetings arising from rule 24. That position is that the vote of members present is a reference to votes cast by members present at the meeting and members’ votes cast by proxy by persons present at the meeting. Either pathway requires presence at the meeting.

This only leaves the argument that rule 9(2) provides to the contrary by inference. The argument is that to permit proxies undermines natural justice, particularly the right to be heard, which is prescribed in rule 9(2). The right to be heard is not an absolute concept, it involves matters of degree. Plainly enough, one can be heard by an audience whose minds are closed to the argument advanced. That their minds may be closed of itself erodes the

benefit of the right. Such possibilities though would scarcely be asserted as having the consequence that there has not been a hearing.

Rule 9(2) guarantees a right to be heard, which right may be exercised at the meeting. The degree to which that right may be rendered less valuable if too few of those with a right to vote are actually at the meeting cannot sensibly be predicted in advance. I do not perceive the theoretical possibility of the right being so eroded as to in substance, exclude the right as illusory and force an interpretation that come what may, the right to be heard will not have been given if it is possible that there may be proxy voting and that, accordingly, rule 9(2) should be interpreted as providing by inference, contrary to rule 24, that proxy votes cannot be cast by those present at the meeting.

The interpretation which conforms with the ordinary meaning of the rules read in context compels the conclusion that valid proxy votes can be cast by those present at the meeting.

Whether in the end result the meeting fails to afford natural justice to the relevant appellant is, of course, a different question and is not the issue at hand.

I observe for completeness, that the issue with which the management committee had to grapple was the subject of advice from Clubs Queensland which advised it was of the view that proxy votes will not be allowed at the special general meeting. At least part of its reasoning involved reference to rule 22(2), which provides:

“No business shall be transacted at any general meeting unless a quorum of its members is present at the time when the meeting proceeds to business. For the purposes of this Rule “member” includes a person attending as a proxy or as representing a corporation which is a member.”

Those who provided the Clubs Queensland advice evidently saw significance in the fact that rule 22(2) specifically states that a member present includes a person attending as a proxy “for the purposes of this rule”. This seems to have fit into the ultimate advice given in an erroneous way. I say erroneous because the second sentence in rule 22(2) merely informs the meaning of the first sentence, which is that no business shall be transacted at any general meeting unless a quorum of members, which includes a person attending as a proxy of a member, is present at the time when the meeting proceeds to business. That rule would apply to all general meetings, which would include the

forthcoming general meeting. Far from undermining the interpretation I have arrived at, the obvious meaning of rule 22(2) conforms with that interpretation.

Putting it differently, it needs to be understood that unless the operation of the rules relating to special general meetings are contradicted or excluded, as the case may be, even if by inference by some other provision in the rules, then they govern the procedure for the forthcoming special general meeting. For the reasons I have already explained, rule 9(2) is not, insofar as the issue of proxy voting is concerned, a provision (to adopt the introductory language of rule 24) that provides otherwise than rule 24.

For the reasons given I accordingly ordered in the applicant's favour.

I record there was an objectively long delay in the bringing of the application. Though that delay was not pressed as bearing upon the end result, it seems to me the proper determination of a question so obviously favouring the applicant's position, would have overridden any concern I may have held by virtue of the objectively long delay.

I will hear the parties as to costs.

...

I order the respondent pay the applicant's costs to be assessed on the standard basis, but limited to Counsel's costs and the filing fee.