

SUPREME COURT OF QUEENSLAND

CITATION: *Body Corporate for Ocean Pacifique CTS 8379 v Pugliese & Anor* [2022] QSC 246

PARTIES: **BODY CORPORATE FOR OCEAN PACIFIQUE CTS 8379**
(applicant)
v
ELVIO PUGLIESE
(first respondent)
BODY CORPORATE FOR ORCHID 17 CTS 11906
(second respondent)

FILE NO/S: BS No 5963 of 2022

DIVISION: Trial Division

PROCEEDING: Preliminary Question

ORIGINATING COURT: Supreme Court at Brisbane

DELIVERED ON: 23 November 2022

DELIVERED AT: Brisbane

HEARING DATE: 4 October 2022

JUDGE: Cooper J

ORDER:

1. **The parties are to confer as to the form of order which should be made to reflect these reasons for judgment.**
2. **Direct that within 7 days:**
 - (a) **if agreement as to the form of order has been reached, the parties are to provide a copy of that agreed form of order to the associate to Cooper J; or**
 - (b) **if the parties are unable to reach agreement on the form of order, each party is to deliver to the associate to Cooper J the form of order for which that party contends, together with written submissions of not more than 4 pages in support of that form of order.**
3. **Direct that within 7 days the applicant file and serve written submissions of not more than 4 pages on the question of costs and any material it seeks to rely upon on that question.**
4. **Direct that within 14 days the respondents file and serve written submissions of not more than 4 pages on**

the question of costs and any material they seek to rely upon on that question.

- 5. Any issues remaining in dispute as to the form of order, or as to the question of costs, will be decided on the papers.**

CATCHWORDS: REAL PROPERTY – STRATA AND RELATED TITLES – MANAGEMENT AND CONTROL – BODY CORPORATE: POWERS, DUTIES AND LIABILITIES – OTHER CASES – where the applicant and second respondent are body corporates for neighbouring buildings – where the applicant and respondents were in dispute regarding, inter alia, water ingress and shared retaining wall – where the parties signed a deed of settlement in respect of the dispute – where the deed required the respondents to remedy the water ingress – where the applicant alleges that the respondents have failed to remedy the water ingress – where the applicant commenced proceedings by way of originating application seeking specific performance of the deed – where the respondents have challenged the validity of the deed – where an order was made that the question whether the deed is valid and binding be determined as a preliminary question – whether the deed is void by reason of it not having been validly executed because of invalidity of appointment of the applicant’s committee – whether the deed is void by reason of it not having been validly executed because of an alleged invalidity of a resolution on a motion circulated outside the applicant’s committee meeting authorising the affixation of the applicant’s seal – whether the applicant validly ratified the deed – whether the deed is valid and binding

Acts Interpretation Act 1954 (Qld), s 14(2)

Body Corporate and Community Management Act 1997 (Qld), s 2, s 3, s 4, 31, s 37, s 95, s 99, s 100, s 310, s 312

Body Corporate and Community Management

(Accommodation Module) Regulation 2008 (Qld), s 10, s 14, s 16, s 31, s 33, s 36, s 37, s 38, s 49

2 Elizabeth Bay Road Pty Ltd v The Owners – Strata Plan No 73943 (2014) 88 NSWLR 488; [2014] NSWCA 409, considered

Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue (2009) 239 CLR 27; [2009] HCA 41, cited

Aztech Science Pty Ltd v Atlanta Aerospace (Woy Woy) Pty Ltd (2004) 51 ACSR 147; [2004] NSWSC 967, cited

Chant v Curcuruto [2021] NSWSC 751, cited

Commonwealth Bank of Australia v Perrin [2011] QSC 274, cited

Electricity Generation Corporation v Woodside Energy Ltd (2014) 251 CLR 640; [2014] HCA 7, cited

Gladstone Area Water Board v AJ Lucas Operations Pty Ltd

[2014] QSC 311, cited
Levinge v Director of Custodial Services (1987) 9 NSWLR 546, cited
R v Byczko (No 2) (1977) 17 SASR 460, cited
Mount Bruce Mining Pty Ltd v Wright Prospecting Pty Ltd (2015) 256 CLR 104; [2015] HCA 37, cited
Perri v Coolangatta Investments Pty Ltd (1982) 149 CLR 537; [1982] HCA 29, cited
Petersen v Moloney (1951) 84 CLR 91, cited
Project Blue Sky Inc v Australian Broadcasting Authority (1998) 194 CLR 355; [1998] HCA 28, considered
R v Wassmuth; Ex parte Attorney-General (Qld) [2022] QCA 113, cited
The Owners Strata Plan No 57164 v Yau (2017) 96 NSWLR 587; [2017] NSWCA 341, cited
Zhu v Treasurer (NSW) (2004) 218 CLR 530; [2004] HCA 56, cited

COUNSEL: M D Martin KC, with G Radcliff, for the applicants
A Crowe KC, with M Bland, for the respondents

SOLICITORS: Radcliffs for the applicant
QBM Lawyers for the respondents

- [1] The applicant (**Ocean**) is the body corporate for a building situated at 19 Orchid Avenue, Surfers Paradise. The second respondent (**Orchid 17**) is the body corporate for the neighbouring building at 17 Orchid Avenue. The first respondent (**Mr Pugliese**) is the secretary of the committee for Orchid 17.
- [2] In 2019, Ocean and Orchid 17 were in dispute about various matters, including water ingress into the basement area of 19 Orchid Avenue through a retaining wall it shared with 17 Orchid Avenue. On 19 July 2019, the parties signed a deed of settlement in respect of the dispute (**the Deed**).
- [3] The Deed required, among other things, that Mr Pugliese and Orchid 17 do all things necessary to remedy the water ingress into the basement of 19 Orchid Avenue in accordance with recommendations made in a report prepared by an engineering consulting firm.
- [4] Ocean maintains that the respondents have failed to comply with their obligations concerning the water ingress and has brought proceedings by way of originating application seeking specific performance of the Deed. In response, Mr Pugliese and Orchid 17 have challenged the validity of the Deed.
- [5] On 27 July 2022, Hindman J ordered that the question whether the Deed is valid and binding be determined as a preliminary question before any other question in the proceeding. I heard argument on that preliminary question on 4 October 2022.
- [6] The preliminary question requires consideration of two issues arising from the respondents arguments that the Deed is invalid.

- [7] First, whether the Deed is void by reason of it not having been validly executed by Ocean in circumstances where:¹
- (a) the appointment of four members to Ocean's committee on 16 July 2019 was invalid;
 - (b) the purported resolution on a motion circulated outside Ocean's committee meeting authorising the affixation of Ocean's seal to the Deed was invalid.
- [8] Secondly, whether as a matter of construction, the operative effect of the Deed was subject to Ocean validly ratifying the Deed within 90 days of the date of its execution.²

Reconstitution of Ocean's committee and execution of the Deed

- [9] Prior to 16 July 2019, Ocean's committee consisted of at least three people: Craig Duffy (**Mr Duffy**), Robert Fraresso and Gerald Pauschmann. There was a dispute between Mr Duffy and other members of Ocean as to whether three further people (Melanie Day, Satya Gupta and Geoffrey Foote) were also members of the committee.
- [10] Prior to the hearing of the preliminary question, Ocean admitted that Mr Fraresso, Mr Pauschmann, Ms Day, Mr Gupta and Mr Foote did not attend consecutive meetings of the committee held on 10 May 2019 and 16 July 2019.³ As a consequence, those persons' positions on the committee became vacant.⁴
- [11] The minutes of the meeting of Ocean's committee on 16 July 2019 record that at the meeting:⁵
- (a) Mr Duffy declared the positions of Mr Fraresso and Mr Pauschmann vacant and called for nominations for appointment to those positions from the floor;
 - (b) in response to that call, Calvin Duffy and Amanda Barnes were nominated and elected to the committee;
 - (c) Mr Duffy then declared the positions of Ms Day, Mr Gupta and Mr Foote vacant and called for nominations for appointment to those positions from the floor.
 - (d) in response to that further call, Yvonne Gay and Muhammed Faith Kara were nominated and elected to the committee.
- [12] On 17 July 2019, Mr Duffy sent an email to the replacement members of the committee attaching a resolution authorising the execution of the Deed. The replacement members of the committee voted in favour of that resolution.⁶

¹ Respondents' points of defence, paragraphs [3(A)] and [4]-[24] (Court document 13).

² Respondents' points of defence, paragraphs [3(B)] and [25]-[29] (Court document 13).

³ Affidavit of Justin James Mathews, exhibit JJM-4 at pages 2-4 (Court document 39).

⁴ *Body Corporate and Community Management (Accommodation Module) Regulation 2008* (Qld) (**BCCM Regulation**), s 33(2)(d).

⁵ Exhibit 1.18. Although these minutes do not expressly state that the meeting was of Ocean's committee (as distinct from a meeting of Ocean's members) that is how the meeting was described in Mr Duffy's affidavit evidence – for example, see the affidavit of Craig Francis Duffy filed 29 September 2022 at [10]-[13] (Court document 30). The hearing was conducted on the basis that the meeting on 16 July 2019 was a meeting of Ocean's committee.

⁶ Affidavit of Craig Francis Duffy filed 4 October 2022 (Court document 35).

[13] That same day, Mr Duffy met with Mr Pugliese.

[14] Mr Pugliese's account of the discussion at that meeting was as follows:⁷

“On 17 July 2019, I met with Mr Duffy at Sushi Avenue in Surfers Paradise to discuss the deed. I told him I knew he had sacked everyone on the Ocean Pacific committee and asked him how he had done it.

Mr Duffy told me his body corporate specialist Clayton Glenister at MBA Lawyers had come up with the idea of getting rid of the committee for missing two meetings. Mr Duffy said he had set them up and now had all his crew on board.”

[15] Mr Pugliese also stated that he told Mr Duffy he needed something to give his lawyer. In response to that, Mr Duffy called his office and a short time later Ms Barnes joined the two men and provided Mr Duffy with emails attaching the resolution referred to in [12] above.

[16] Although Mr Duffy recalled meeting Mr Pugliese on 17 July 2019 to show him the resolution authorising execution of the Deed, he did not recall informing him of any advice he might have received from MBA Lawyers and he would not ordinarily reveal the advice he or Ocean received from any lawyer.⁸

[17] On 19 July 2019, Mr Duffy and Ms Barnes signed the Deed under Ocean's seal.

The Deed's operative effect was subject to ratification in accordance with cl 3.4

[18] Although the parties' arguments focussed on the issues raised by the respondents' first argument (see [7] above), I have concluded that the Deed is, save for one exception, no longer valid or binding on the parties based on the respondents' second argument. That is, I have concluded that, save for an obligation on Ocean to repay a specified sum of money, the Deed ceased to have operative effect after 90 days from the date of its execution passed without the members of Ocean in general meeting lawfully resolving to ratify the Deed. I will set out my reasons for reaching that conclusion before returning to the argument based on the invalid appointment of members of Ocean's committee.

[19] The respondents' second argument arises from cl 3.4 of the Deed which states:

“It is acknowledged that [Ocean] may sign and enter into this Deed by resolution of the Committee of [Ocean]. If [Mr Pugliese] and [Orchid 17] have not received a copy of minutes of the General Meeting (signed by the Secretary of [Ocean] as a record of the resolutions passed at the meeting) at which [Ocean] lawfully resolved to enter into and/or ratify the Committee's resolution to enter into, of (sic) this Deed ('the Minutes'); within 90 days of the date of this Deed, [Ocean] must repay any of the Plumber Amount paid within 3 days of written demand by [Mr Pugliese] or [Orchid

⁷ Affidavit of Elvio Pugliese filed 30 September 2022 at [3]-[4] (Court document 31). I note that although this affidavit was not included on the list of material read by the respondents it was read by Ocean during the course of oral argument (see Transcript 2-34).

⁸ Affidavit of Craig Francis Duffy filed 4 October 2022 at [6] (Court document 35).

17]. Failure to repay the Plumber Amount shall be a fundamental breach of the terms of this Deed by [Ocean]. [Ocean] indemnifies [Orchid 17] and [Mr Pugliese] for any costs, loss or damage (including legal costs) incurred by [Orchid 17] or [Mr Pugliese] on account of the failure by [Ocean] to repay the amount due.”

- [20] In the events which followed the execution of the Deed, resolutions ratifying the entry into the Deed were passed at two annual general meetings of the members of Ocean held on 5 September 2019⁹ and 30 September 2019.¹⁰ Mr Duffy deposed to having emailed copies of those minutes to Mr Pugliese by 16 October 2019.¹¹
- [21] That two annual general meetings were held within the space of one month is explained by the existence of a dispute between Mr Duffy (and members of Ocean who supported him) and other members of Ocean. The nature of that dispute is described in two determinations issued by an adjudicator from the Office of the Commissioner for Body Corporate and Community Management on applications to have each of the annual general meetings declared void for irregularity.¹² It is not necessary to set out any detail of the dispute.
- [22] What is important for the purposes of this proceeding is that the adjudicator declared that both the annual general meetings held in September 2019 were void for irregularity. Further, the adjudicator declared that all resolutions purportedly passed at those purported annual general meetings were at all times void.
- [23] Those decisions by the adjudicator raise two issues: first, whether the declarations made in 2020 mean that the requirement set out in cl 3.4 was not satisfied; secondly, if the requirement in cl 3.4 was not satisfied what, if any, effect that had on the operation of the Deed. These issues concern the proper construction of the Deed.
- [24] The principles of contractual interpretation are well known. The rights and liabilities of the parties to a contract are to be determined objectively, by reference to the text of the contractual provision, its context within the contract as a whole and purpose. The meaning of the terms of a commercial contract is to be determined by asking what a reasonable businessperson would have understood those terms to mean, having regard to the language of the contract, the circumstances addressed by the contract and the commercial purpose or objects of the contract. Unless a contrary intention is indicated in the contract, a court is entitled to approach the task of interpretation on the assumption that the parties intended to produce a commercial result. This means a commercial contract should be construed so as to avoid it “making commercial nonsense or working commercial inconvenience”.¹³
- [25] I have extracted the text of cl 3.4 at [19] above. The context of that provision within the Deed is as follows:

⁹ Affidavit of Craig Francis Duffy filed 29 September 2022, Exhibit C (Court document 29).

¹⁰ Affidavit of Craig Francis Duffy filed 29 September 2022, Exhibit B (Court document 29).

¹¹ Affidavit of Craig Francis Duffy filed 29 September 2022 at [2] and [3] (Court document 29).

¹² *Ocean Pacifique* [2020] QBCCMCmr 610; *Ocean Pacifique* [2020] QBCCMCmr 611.

¹³ *Mount Bruce Mining Pty Ltd v Wright Prospecting Pty Ltd* (2015) 256 CLR 104 at 116 [46]-[47] and [51] per French CJ, Nettle and Gordon JJ (citing *Electricity Generation Corporation v Woodside Energy Ltd* (2014) 251 CLR 640 at 657 [35] and *Zhu v Treasurer (NSW)* (2004) 218 CLR 530 at 559 [82]).

- (a) Recital D recorded the various matters in dispute between Ocean on the one part and Mr Pugliese and Orchid 17 on the other, including the water ingress issues. It defined those various matters as “the Dispute”;
- (b) Recitals E to H recorded: the existence of the shared retaining wall; Mr Duffy’s commissioning of a report by Jeffrey Hills & Associates on water ingress into the basement of 19 Orchid Avenue; the issuing of a report by Jeffrey Hills & Associates on those issues (referred to thereafter as the “JHA Report”); and the parties’ agreement, without any admission of liability, to settle the Dispute on the terms set out in the Deed;
- (c) Clause 1.1(g) defined the term “Settlement Payment” to mean the payment referred to in cl 3.1 of the Deed (inclusive of any GST);
- (d) By cl 2 of the Deed, the parties acknowledged and agreed that:
 - (i) the Deed was intended to be legally binding;
 - (ii) they had the power and authority to legally enter into the Deed;
 - (iii) they had freely entered into the Deed after having the opportunity to carefully consider its contents and to obtain legal advice on the matters in it;
 - (iv) the Deed superseded any prior agreements between the parties and constituted their entire understanding;
- (e) Clause 3 then set out the terms of settlement as follows:
 - (i) it commenced by stating the parties’ acknowledgement and agreement that at the time they entered into the Deed, Orchid 17 shall have already paid to Ocean the amount of \$17,831 (defined as “the Plumber Amount”) for the purpose of Ocean attending to the replacement of the pump and fire equipment in 19 Orchid Avenue according to a quote contained in the JHA Report;
 - (ii) clause 3.1 provided that Mr Pugliese and Orchid 17 agreed to promptly do all things necessary, at their cost, to remedy the water ingress in accordance with recommendations in the JHA Report and set out, without limitation, particular steps which Mr Pugliese and Orchid 17 had agreed to take;
 - (iii) clause 3.2 provided that Mr Pugliese and Orchid 17 agreed to provide evidence in writing to Ocean of all acts done and remedial work carried out in accordance with “clause 3.2 above” within 7 business days of the completion of that work;
 - (iv) clause 3.3 provided that “for the purpose of clause 3.1”, payments were to be made to Ocean by submitting a cheque payable to Ocean to Ocean’s body corporate manager;
 - (v) clause 3.4, which I have already set out, was the final sub-clause in cl 3;
- (f) Clause 4 set out mutual releases:
 - (i) in cl 4.1, Ocean’s release of Mr Pugliese and Orchid 17 from all claims arising from the Dispute was expressed to be “in consideration of and upon payment of the Settlement Payment”;

- (ii) by cl 4.2, Mr Pugliese and Orchid 17 released Ocean from all claims arising from the Dispute;
- (iii) clause 4.3 provided that the releases in cl 4.1 and 4.2 could be pleaded at any time as a bar to any action or civil proceeding.

- [26] Before turning to the construction of cl 3.4, it should be noted that cl 3.1 does not, by its terms, require Mr Pugliese or Orchid 17 to make any payment to Ocean. It does, however, require them to incur costs in taking steps to remedy the water ingress issues. This raises a question as to what the parties intended to refer to when they used the term Settlement Payment as defined in cl 1.1(g).
- [27] It seems to me that term might be given commercial sense in one of two ways. First, it might be read as being synonymous with the Plumber Amount that shall have already been paid by Orchid 17 to Ocean at the time the parties entered into the Deed. Secondly, it might be read as including both the Plumber Amount and the costs to be paid by Mr Pugliese and Orchid 17 to remedy the water ingress.
- [28] The reference in the text of cl 3.2 to “remedial work carried out in accordance with clause 3.2 above” indicates that a mistake occurred in the numbering of the sub-clauses of cl 3. The unnumbered sub-clause providing for the payment of the Plumber Amount was intended to be cl 3.1 and the next sub-clause providing for the performance and payment for works to remedy the water ingress was intended to be cl 3.2. This mistake in the numbering would also be consistent with the reference in cl 3.3 to payments being made by cheque for the purpose of cl 3.1. That reading of the numbering in cl 3 supports the first possible construction of the term Settlement Payment.
- [29] However, that construction would result in two defined terms – the Settlement Payment and the Plumber Amount – being used for the same sum. If that construction were adopted I can see no clear explanation why those different defined terms were used in different provisions of the Deed – the Plumber Amount in cl 3.4 and the Settlement Payment in cl 4.1. Finally, the fact that the release of Mr Pugliese and Orchid 17 in cl 4.1 was expressed to be granted in consideration of and upon payment of the Settlement Payment, and that a significant component of the obligations assumed by Mr Pugliese and Orchid 17 to settle the Dispute was to bear the cost of remedying the water ingress, suggests that the Settlement Payment comprises more than the Plumber Amount. On balance, given these matters, I prefer the second construction.
- [30] Turning then to cl 3.4. It seems to me that its commercial purpose was to provide certainty to the parties, but most particularly Mr Pugliese and Orchid 17, that the settlement terms set out in the Deed were legally binding upon Ocean. This was required to preclude the possibility that Ocean, perhaps represented by a differently constituted committee containing members in dispute with Mr Duffy, might later seek to challenge the effectiveness of the Deed, and in particular the release granted to Mr Pugliese and Orchid 17 under cl 4.1.
- [31] This purpose is consistent with the context of the Deed as a whole and can particularly be seen in the use of the word “lawfully” in cl 3.4 to describe the act of ratification required of the members of Ocean. That language emphasises that the requirement for the Deed to be ratified by the members of Ocean was no mere

formality. The act of ratification had to be legally effective to give the parties certainty that the Deed itself was legally effective and would not be the subject of later challenge.

- [32] The object of providing certainty is also consistent with the evidence that, in the period immediately preceding the execution of the Deed, Mr Pugliese was aware that Mr Duffy had “sacked” previous members of Ocean’s committee and had replaced those people with “his crew” (see [14] above). He was sufficiently interested in that state of affairs to have asked Mr Duffy how he achieved it. Mr Pugliese’s knowledge concerning the change in the constitution of Ocean’s committee might have had the result that he and Orchid 17 could not obtain the protection afforded under s 310 of the *Body Corporate and Community Management Act 1997* (Qld) (**BCCM Act**) to persons who deal with a body corporate.¹⁴ A requirement that the members of Ocean in general meeting confirm the binding effect of the Deed by lawfully resolving to ratify it would address this issue.
- [33] In its submissions, Ocean relied upon the fact that it has steadfastly maintained that it is bound by the Deed and would now be estopped from asserting otherwise.¹⁵ That has no bearing on the proper construction of cl 3.4. The Deed must be construed at the time the parties entered into it.
- [34] Having regard to its commercial purpose, an objective reading of cl 3.4 reveals that Ocean would only have complied with its requirements if, within the 90 day period prescribed, the members of Ocean in general meeting lawfully resolved to ratify the Deed and evidence of that legally effective resolution, in the form of a copy of the minutes of meeting, was provided to Mr Pugliese and Orchid 17.
- [35] Although, as already noted, resolutions ratifying the Deed were passed at general meetings held on 5 September 2019 and 30 September 2019 and the minutes of those meetings were apparently provided to Mr Pugliese, that did not satisfy the requirements of cl 3.4. That is because, by reason of the irregularities which led the adjudicator to declare void both annual general meetings and all resolutions passed at those meetings, the members of Ocean did not lawfully resolve to ratify the Deed. To construe cl 3.4 as being satisfied by a legally ineffective resolution ratifying the Deed would be contrary to the wording of the clause and the commercial purpose discussed above.
- [36] The issue then becomes what effect Ocean’s failure to comply with the requirements of cl 3.4 had on the operation of the Deed.
- [37] If cl 3.4 was interpreted literally, the only consequence of such non-compliance would be that Ocean was required to repay the Plumber Amount. Mr Pugliese and Orchid 17 would still be obliged to undertake and pay for work to remedy the water ingress. Presumably, the releases in cl 4 would also remain effective as long as the effectiveness of the Deed was not challenged.

¹⁴ That section provides that a transaction with a member of the committee for a body corporate or a person who has apparent authority to bind the body corporate is valid and binding on the body corporate, but only in circumstances where the person who enters into the transaction with the body corporate does so honestly and (most importantly for present purposes) without notice of an irregularity.

¹⁵ Applicant’s submissions on preliminary question at paragraphs [1(d)] and [23] (Court document 34).

- [38] The difficulty with this construction is, absent Ocean having complied with the requirements of cl 3.4, Mr Pugliese and Orchid 17 could not be certain that Ocean would never challenge the effectiveness of the Deed. That is, Mr Pugliese and Orchid 17 might undertake and pay for remedial works to address the water ingress, only for Ocean to challenge the effectiveness of the release under the Deed and seek some further remedy in respect of the Dispute.
- [39] Having regard to the context of the Deed as a whole, and the commercial purpose of cl 3.4 discerned from that context, I am unable to accept that literal construction.
- [40] It seems to me that, on its proper construction, cl 3.4 had the effect that, save in one respect, the Deed operated conditionally until the requirements of the clause were satisfied or the period in which Ocean had to satisfy those requirements expired.
- [41] It is clear from cl 2.1 that the Deed had legal effect from the time it was executed. That was necessary because Ocean was immediately liable to pay the Plumber Amount. However, Ocean's compliance with the requirements in cl 3.4 was a condition precedent to performance by Mr Pugliese and Orchid 17 of the obligation to undertake and pay for remedial works.¹⁶ It was also a condition precedent to the releases in cl 4 taking effect.
- [42] Upon Ocean failing to satisfy the ratification condition within the 90 day period prescribed in cl 3.4, both the obligation to undertake remedial works and the release, which was given in exchange for (at least in part) the assumption of that obligation, ceased to have operative effect. In that circumstance, Mr Pugliese and Orchid 17 would lose the benefit of the release, but they would not be at risk of undertaking remedial works without having certainty as to the effectiveness of the release.
- [43] The reason cl 3.4 only addressed repayment of the Plumber Amount is that this was the only act of performance required during the period of conditional operation of the Deed prior to satisfaction of the requirement in cl 3.4. There was no need to address the cost of remedial work undertaken by Mr Pugliese and Orchid 17 because, in the event Ocean failed to satisfy cl 3.4, the obligation to perform that work would not arise.
- [44] In its submissions, Ocean also relied on the fact that Mr Pugliese and Orchid 17 have not purported to terminate the Deed.¹⁷ Again, that fact cannot affect the proper construction of cl 3.4 considered at the time the parties entered into the Deed. On that proper construction, it was unnecessary for the respondents to terminate the Deed. After Ocean's failure to satisfy the requirement in cl 3.4 within the prescribed period, the only operative obligation under the terms of the Deed was, and remains, Ocean's obligation to repay the Plumber Amount.
- [45] For these reasons, I find that the terms of the Deed are no longer valid and binding on the parties save for the obligation upon Ocean under cl 3.4 to repay the Plumber Amount.
- [46] In the event this is not the correct construction of cl 3.4, I will go on to consider the issues raised by the respondents' first argument.

¹⁶ *Perri v Coolangatta Investments Pty Ltd* (1982) 149 CLR 537 at 542 and 552.

¹⁷ Applicant's submissions on preliminary question at paragraphs [8] and [22] (Court document 34).

The effect of the invalid appointments to Ocean's committee

- [47] At the hearing, Ocean accepted that the process of declaring positions vacant and appointing replacement members of the committee in two stages (as described in the minutes of meeting referred to in [11] above) was not effective.
- [48] The true position at law was that, upon the meeting of 16 July 2019 commencing in the absence of Mr Fraresso, Mr Pauschmann, Ms Day, Mr Gupta and Mr Foote, Ocean's committee was reduced to Mr Duffy alone.¹⁸ This meant that Ocean's committee was no longer properly constituted as the required number of voting members for such a committee was at least three.¹⁹
- [49] Further, as the number of committee members had fallen below that required for a quorum,²⁰ Mr Duffy was required to call a general meeting of Ocean within one month of the committee positions becoming vacant to choose persons to fill the vacancies and reconstitute Ocean's committee with the required number of members.²¹ Mr Duffy did not have the authority to appoint the replacement committee members at the meeting on 16 July 2019.
- [50] The consequence of this is, as Ocean accepted,²² the appointment of the replacement committee members at the meeting on 16 July 2019 was not effective and Ocean's committee remained improperly constituted as it lacked the required number of voting members.
- [51] The respondents submitted that the improper constitution of Ocean's committee means that the execution of the Deed on 19 July 2019 was invalid.

Application of s 100(4) of the BCCM Act

- [52] Ocean relied upon s 100(4) of the BCCM Act as validating the decision to execute the Deed. That section provides:
- “If persons, honestly and reasonably believing that they are the committee for the body corporate, make a decision while purportedly acting as the committee, the decision is taken to be a decision of the committee despite a defect in the election of 1 or more of the persons.”
- [53] If that section applies, Ocean's execution of the Deed would not be invalid because:
- (a) a decision of the committee is a decision of the body corporate;²³ and
 - (b) the body corporate has power to enter into contracts.²⁴

¹⁸ Respondents' Points of Defence (Court document 13), paragraphs [7]-[8]; Points of Reply (Court document 14), paragraphs [8(e)(ii)B]-[8(e)(ii)D].

¹⁹ BCCM Regulation, s 10(3) and the definition of “required number” in Schedule 1.

²⁰ BCCM Regulation, s 49(1) provides that a quorum is at least half of the voting members of the committee. Read with s 10(3) this means that a quorum required at least two voting members to be present.

²¹ BCCM Regulation, s 38(1)(b) which applied by reason of s 36(1).

²² Applicant's submissions on preliminary question at [9] (Court document 34).

²³ BCCM Act, s 100(1).

²⁴ BCCM Act, s 95(1)(a).

- [54] The respondents submitted that s 100(4) does not apply for two reasons:
- (a) as a matter of statutory construction, the section operates where there has been a defect in the “election” of one or more of the relevant persons but not where the relevant persons have been invalidly appointed without an election;
 - (b) the evidence relied upon by Ocean does not establish that the persons who made the decision to execute the Deed honestly and reasonably believed that they were the committee for Ocean.

Construction of s 100(4) of the BCCM Act

- [55] The respondent contended that the BCCM Regulation distinguishes between the election of a member of the committee at an annual general meeting of the body corporate²⁵ and the appointment of a person to fill a vacancy on the committee.²⁶ Consequently, a defect in the appointment of a member or members of the committee (as occurred here) does not engage s 100(4).
- [56] The proper approach to statutory construction requires that the court’s consideration focus on the text of the provision, in context.²⁷ The task must begin with a consideration of the text itself, although the meaning of the text may require consideration of the context, which includes the general purpose and policy of the provision.²⁸
- [57] Although the text of s 100(4) uses the word “election”, the intended meaning of that word must be considered with reference to s 99 of the BCCM Act which is headed “Composition and election of committee” and provides:
- “(1) The committee must be composed in the way provided for in the regulation module.
 - (2) The members of the committee are chosen in the way provided for in the regulation module.
 - (3) The regulation module may also provide for—
 - (a) the term of office of a member of the committee; and
 - (b) vacancies on the committee, and the filling of casual vacancies.”
- [58] It is notable that s 99(2) refers to members of the committee being “chosen”. The word “chosen” has a potentially broader meaning than “election”. A body corporate might choose members of its committee through an election, but there might also be other means of choosing.
- [59] Regard must then be had to the heading of s 99 which refers to the election of the committee.²⁹ In my view, the legislature’s use of “election” in the heading in combination with the broader term “chosen” in s 99(2), suggests that the legislature

²⁵ BCCM Regulation, ss 17-28.

²⁶ BCCM Regulation, ss 31, 37 and s 38(1)(a)(i).

²⁷ *R v Wassmuth; Ex parte Attorney-General (Qld)* [2022] QCA 113 at [26].

²⁸ *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue* (2009) 239 CLR 27 at 46-47.

²⁹ *Acts Interpretation Act 1954* (Qld), s 14(2) provides that the heading of the section is part of the BCCM Act.

did not intend that the word “election” should be construed narrowly as suggested by the respondents. Instead, “election” should be read more broadly as including other means by which members of the committee might be chosen.

- [60] Section 100 then addresses the power of the committee to act for the body corporate: that is, the power of the members of the committee chosen in the way described in s 99(2).
- [61] Read in that way, the reference in s 100(4) to a defect in the election of one or more of the persons on the committee should, in my view, be understood as a defect in the way the person(s) were chosen as members of the committee pursuant to s 99(2).
- [62] This construction is supported by the structure and language used in the relevant parts of the BCCM Regulation which, as described in s 99(2), provide for the way members of the committee are chosen.
- [63] Part 2 of Chapter 3 of the BCCM Regulation deals with “Committee membership”. The relevant division within Part 2 is Division 2 which is headed “Choosing of a committee – Act, s 99”. It is divided into four subdivisions. The following three are relevant to the construction question:
- (a) subdivision 1 which is headed “Choosing of committee at annual general meeting”;
 - (b) subdivision 2 which is headed “Choosing of committee at extraordinary general meeting following annual general meeting”; and
 - (c) subdivision 4 which is headed “Filling casual vacancies on committee – Act, section 99”.
- [64] Section 14, which is in subdivision 1, provides:
- “14 When committee is chosen [SM, s 13]**
- (1) The choosing of the members of the committee must happen at each annual general meeting of the body corporate.
 - (2) Also, members of the committee may be chosen other than at an annual general meeting if they are chosen under subdivision 2 or 4. ...”
- [65] Section 16(1) provides that, where members of the committee are chosen at an annual general meeting, that must be done by an election in accordance with ss 17 to 28.³⁰ Section 16(6)(b) states that the requirement for an election does not apply to “a member of a committee chosen under subdivision 2 or 4”.
- [66] The provisions in subdivision 2 apply when, at an annual general meeting of the body corporate, at least one executive member position is not filled or the total number of voting members of the committee elected by the body corporate is less than three. In those circumstances, s 31 provides that at an extraordinary general meeting the body corporate may “appoint, without conducting an election, a person who is eligible to be a member of the committee to fill a vacancy on the committee”.

³⁰ Sections 17-28 comprise the balance of subdivision 1.

[67] In subdivision 4:

- (a) section 37 provides that, in circumstances where a member of the committee is removed from office by ordinary resolution of the body corporate passed at a general meeting, the body corporate may, at the general meeting where the resolution is passed, “appoint a person who is eligible to be a member of the committee to fill the vacancy” without conducting an election.
- (b) section 38(1) provides that, within one month of the position of a member of the committee becoming vacant under s 33(2):
 - (i) a quorate committee must “appoint a person who is eligible to be a member of the committee to fill the vacancy” or call a general meeting of the body corporate to “choose a person to fill the vacancy”;
 - (ii) an inquorate committee must call a general meeting of the body corporate to “choose a person to fill the vacancy”.

[68] It is clear then that the appointment of a person eligible to be a member of the committee to fill a vacancy (whether under ss 31, 37 or 38 of the BCCM Regulation) is one of the ways that members of the committee can be chosen for the purposes of s 99(2) of the BCCM Act and Chapter 3, Part 2, Division 2 of the BCCM Regulation.

[69] The question is whether the legislature intended to limit the operation of s 100(4) of the BCCM Act to cases involving a defect in the choosing of the relevant person(s) under subdivision 1 of the BCCM Regulation by an election, or for the provision to have a broader operation which also addressed a defect in the choosing of the relevant person(s) in a different way, including by appointment under subdivision 2 or 4.

[70] In considering that question, regard must be had to the objects of the BCCM Act which are set out in ss 2 to 4 as follows:

“2 Primary object

The primary object of this Act is to provide for flexible and contemporary communally based arrangements for the use of freehold land, having regard to the secondary objects.

3 How primary object is to be achieved

For the achievement of its primary object, this Act provides for—

- (a) the establishment of community titles schemes; and
- (b) the operation and management of community titles schemes.

4 Secondary objects

The following are the secondary objects of this Act—

- (a) to balance the rights of individuals with the responsibility for self management as an inherent aspect of community titles schemes;

- (b) to promote economic development by establishing sufficiently flexible administrative and management arrangements for community titles schemes;
- (c) to encourage the tourism potential of community titles schemes without diminishing the rights and responsibilities of owners, and intending buyers, of lots in community titles schemes;
- (d) to provide a legislative framework accommodating future trends in community titling;
- (e) to ensure that bodies corporate for community titles schemes have control of the common property and body corporate assets they are responsible for managing on behalf of owners of lots included in the schemes;
- (f) to provide bodies corporate with the flexibility they need in their operations and dealings to accommodate changing circumstances within community titles schemes;
- (g) to provide an appropriate level of consumer protection for owners and intending buyers of lots included in community titles schemes;
- (h) to ensure accessibility to information about community titles scheme issues;
- (i) to provide an efficient and effective dispute resolution process.”

[71] The creation of a committee for a body corporate, and the conferral of power on that committee to make certain decisions on behalf of the body corporate, are important aspects of the operation and management of community titles schemes by which the Act is primary object, having regard to the secondary objects.

[72] In that context, s 100(4) should be understood as a remedial provision which is designed to avoid the expense and inconvenience that would follow for a body corporate if decisions of its committee were found to be invalid or of no legal effect due to a defect in the process by which one or more persons were chosen to be a member of that committee.

[73] I can see no reason why the legislature would have intended that s 100(4) should operate to avoid that expense and inconvenience in circumstances where the defect occurs in the election of the person(s) under subdivision 1 of the BCCM Regulation, but not in circumstances where the defect occurs in some other way of choosing the person(s), including appointment under ss 31, 37 or 38(1) of the BCCM Regulation.

[74] During oral argument,³¹ the respondents submitted that the legislative purpose in limiting the operation of s 100(4) in the manner they contend for is because the election of a person to be a member of the committee is an act of the body corporate

³¹ Transcript 2-31.

in general meeting. While the point made about the election is plainly correct it provides little support for the narrow construction of s 100(4) in circumstances where an appointment made under either ss 31 or 37 of the BCCM Regulation would also be an act of the body corporate in general meeting.

[75] The respondent also argued that the more complex procedure involved in the election of a person to be a member of the committee, when compared to the process of appointing a person to fill a casual vacancy, was another matter which explained the limited operation of s 100(4). While I accept that the procedure for an election might more often give rise to defects to be addressed by s 100(4), I am not persuaded that this indicates a legislative intention to limit the beneficial operation of the section to defects in elections. For example, it is possible to envisage a situation where an appointment of a person under s 37 of the BCCM Regulation is defective because the resolution removing a person from the committee (thereby creating the vacancy to be filled) is found to be invalid. That might well happen far less often than defects in the conduct of elections. But if it were to happen, the effect upon the body corporate if the committee's decisions are found to be invalid by reason of the defective appointment of the person would be no different than if the defect was in an election.

[76] In my view, the remedial nature of s 100(4) and the mischief it is evidently designed to remedy combine to indicate the need for a broad construction of the section. On that broad construction, s 100(4) can operate in respect of decisions made by persons purportedly acting as the committee where there is a defect in the appointment of one or more of the persons, whether that purported appointment be made under ss 31, 37 or 38(1) of the BCCM Regulation.

Honest and reasonable belief of persons purportedly acting as the committee

[77] In considering whether persons purporting to act as the committee honestly and reasonably believe that they are the committee the court must assess the state of mind of each person involved in the relevant act. That assessment must include both a subjective and an objective element. That is, the court must determine whether each person who purports to act as a member of the committee honestly believed that he or she, and each of the other persons involved, was a member of the committee at the time of the relevant act; and, if so, whether there a reasonable basis for that belief.

[78] Here the relevant act is the decision by Mr Duffy and the replacement members, who were (ineffectively) appointed to Ocean's committee at the meeting on 16 July 2019, to execute the Deed on behalf of Ocean.

[79] Turning to the evidence of the state of mind of the relevant individuals it is convenient to begin with the replacement members.

[80] Each of Calvin Duffy,³² Amanda Barnes³³ and Yvonne Gay³⁴ affirmed affidavits in which they:

³² Court document 37.

³³ Court document 38.

³⁴ Court document 36.

- (a) confirm that the minutes of the meeting on 16 July 2019 referred to at [11] above accurately record what occurred at the meeting;
- (b) depose to a belief, based on what occurred at that meeting, that they were on Ocean's committee.

[81] None of these deponents were cross-examined.

[82] I should not refuse to act on evidence which has not been the subject of cross examination unless that evidence is inherently improbable or that it is inconsistent with other evidence or is otherwise lacking sufficient cogency.³⁵ In the circumstances described in the minutes of the meeting on 16 July 2019, I do not consider there is any basis to reject the evidence of those persons as to the belief they each held.

[83] Further, although those affidavits do not address the deponents' belief as to the position of Mr Duffy and the other replacement directors, the stated belief as to their own position, the circumstances of the meeting on 16 July 2019, and each of the deponents' subsequent agreement to the resolution referred to in [12] above all support an inference that each of the deponents honestly believed that they were, together with Mr Duffy and the other replacement members, Ocean's committee when the decision was taken to execute the Deed.

[84] Mr Kara, the fourth of the replacement members, did not provide an affidavit. However, the form on which he nominated himself for a position as an ordinary member of the committee was tendered.³⁶ Further, Mr Duffy gave evidence that Mr Kara attended the committee meeting on 16 July 2019, along with Kalvin Duffy, Amanda Barnes and Yvonne Gay.³⁷ Mr Duffy also deposed to a conversation he had with Mr Kara on 17 July 2019, after circulating the resolution referred to in [12] above, during which Mr Kara told Mr Duffy that he agreed with the resolution to enter into the Deed.³⁸ The fact of that statement by Mr Kara to Mr Duffy, after Mr Kara had attended the committee meeting on 16 July 2019, nominated himself for a position as an ordinary member and apparently been appointed to that position, supports an inference that Mr Kara also held the required belief.

[85] I am satisfied that each of the replacement members honestly believed that they were, together with Mr Duffy and the other replacement members, Ocean's committee when the decision was taken to execute the Deed.

[86] I am also satisfied that the belief of each of Kalvin Duffy, Ms Barnes, Ms Gay and Mr Kara was objectively reasonable.

[87] Kalvin Duffy, Ms Barnes and Ms Gay sought impermissibly to depose to the reasonableness of their belief. Those statements have no bearing on the objective assessment. Nevertheless, admissible evidence of the basis for their belief, although not extensive, refers to the circumstances of the committee meeting on 16 July 2019 as recorded in the minutes of meeting. I accept that those circumstances provided

³⁵ *Levinge v Director of Custodial Services* (1987) 9 NSWLR 546 at 560; *R v Byczko (No 2)* (1977) 17 SASR 460 at 466; *Chant v Curcuruto* [2021] NSWSC 751 at [274]-[277].

³⁶ Exhibit 1.17.

³⁷ Affidavit of Craig Francis Duffy filed 29 September 2022 at [11] (Court document 30).

³⁸ Affidavit of Craig Francis Duffy filed 4 October 2022 at [3] (Court document 35).

an objectively reasonable basis for each of those replacement members to believe that they had been appointed to the committee, particularly where the affidavit evidence of Kalvin Duffy, Ms Barnes and Ms Gay was not challenged.

- [88] I can see no reason why, viewed objectively, a person in the position of the replacement members who nominated himself or herself from the floor of the meeting for appointment to fill a casual vacancy on the committee should have suspected that the committee was not properly constituted when the appointments were made. To draw such a conclusion would require attributing to the replacement members a level of knowledge of the requirements under the BCCM Regulation which govern how members of the committee can be chosen (either by election or appointment) beyond that which might reasonably be expected of them prior to going on to the committee.
- [89] The position of Mr Duffy is different. He deposed that from 16 July 2019 he believed he was the chairman of the committee for Ocean and that the replacement members of the committee had been lawfully elected and appointed such that the committee was able to execute the Deed.³⁹ That evidence was consistent with statements he made in an email which he sent to former committee members on the evening of 16 July 2019 informing them of the formation of the new committee at the meeting held that day.⁴⁰ Although he was cross-examined, the cross-examination did not touch upon this aspect of his evidence. It was never put to him that he did not honestly hold the belief he deposed to. I am satisfied that Mr Duffy honestly held that belief.
- [90] I turn then to the question whether that belief was objectively reasonable in the circumstances.
- [91] In the events which occurred at the meeting on 16 July 2019 it was Mr Duffy, acting as the sole member of Ocean's committee, who purported to appoint, in the first instance, Kalvin Duffy and Ms Barnes, as executive members of the committee. The subsequent appointments of Ms Gay and Mr Kara were premised on the effectiveness of the earlier appointments of Kalvin Duffy and Ms Barnes.
- [92] Unlike the position of the replacement members, a person in Mr Duffy's position at the meeting should have considered whether he or she had the authority to make the appointments. An objective assessment of the reasonableness of Mr Duffy's belief as to the effectiveness of the appointments involves consideration of the reason why Mr Duffy believed he had authority to make the appointments and whether that provided an objectively reasonable justification for him to believe he had the necessary authority.
- [93] On that basis, to demonstrate that Mr Duffy's belief as to the effectiveness of those appointments was reasonable, Ocean needed to establish that:
- (a) he turned his mind to the question whether, in the circumstances of the meeting, a single member of the committee had authority to appoint replacement members to fill the vacancies on the committee; and

³⁹ Affidavit of Craig Francis Duffy filed 29 September 2022 at [13] (Court document 30).

⁴⁰ Affidavit of Elvio Pugliese filed 30 September 2022, exhibit EP-13 (Court document 31).

- (b) circumstances existed from which, viewed objectively, he was justified in concluding that he had the necessary authority.

[94] I am not satisfied that the evidence establishes either of those matters.

[95] The full extent of Mr Duffy's explanation of the appointment process was as follows:⁴¹

“On 16 July 2019, I along with other lot owners (or their nominees) including Calvin Duffy, Yvonne Gay, Amanda Barnes and Muhammed Fatih Kara attended the committee meeting and the meeting proceeded. I did not consider the issue of quorum as I was under the belief that if committee members failed to attend two meetings in person or by proxy without leave of the committee, their positions were declared vacant in accordance with s33(2)(d) of the [BCCM Regulation]. I as the chairman subsequently called for nominations from the floor from the lot owners who attended the meeting, and they were elected.”

[96] That explanation gives no indication that Mr Duffy gave any consideration to the question whether he had authority to make the appointments. Even if he had, the justification he provides for acting as he did – that the positions of former members of the committee were declared vacant – does not, viewed objectively, give any basis for concluding that Mr Duffy acting alone had authority to make the appointments contrary to the provisions of the BCCM Regulation referred to in [48] and [49] above.

[97] The parties' arguments also addressed the contested discussion between Mr Duffy and Mr Pugliese on 17 July 2019 (see [13] to [16] above).

[98] Even if Mr Pugliese's account of his conversation with Mr Duffy was accepted, it takes the matter no further than explaining why positions on Ocean's committee became vacant at the meeting on 16 July 2019. It is not evidence of either of the two matters referred to in [93] above.

[99] No legal advice provided to Mr Duffy or to Ocean in advance of the meeting on 16 July 2019 was in evidence.

[100] On the evidence before me, I am not satisfied that Mr Duffy's belief that the replacement members were lawfully appointed to Ocean's committee was reasonable.

[101] Consequently, I am not satisfied that s 100(4) of the BCCM Act operates in the circumstances of this case, to make the decision taken by Mr Duffy and the replacement members, to execute the Deed, a decision of Ocean's committee.

Conflicts of interest

[102] The decision I have reached on the operation of s 100(4) in this case means I do not have to decide whether, as the respondents submitted, the validating effect of that provision falls away in circumstances where Mr Duffy, Calvin Duffy, Ms Barnes

⁴¹ Affidavit of Craig Francis Duffy filed 29 September 2022 at [11] (Court document 30).

and Ms Gay are said to have had a conflict of interest which precluded them from voting on the resolution to execute the Deed.⁴²

[103] The conflict was said to arise from Mr Duffy's intention, through a company he controlled, to establish a nightclub in the basement of 19 Orchid Avenue. The respondents' argument was based on:

- (a) Mr Duffy being the sole director and shareholder of the company which proposed to develop the nightclub;⁴³
- (b) Ms Gay being Mr Duffy's wife or de facto partner at the time the decision to execute the Deed was made;
- (c) Calvin Duffy being Mr Duffy's son; and
- (d) Ms Barnes being employed by the company which proposed to develop the nightclub at the time the decision to execute the Deed was made.

[104] Mr Duffy was cross-examined about those matters.⁴⁴ The effect of his evidence was:

- (a) it was his intention in July 2019 to apply for approval for his company to operate a nightclub in the basement of 19 Orchid Avenue;
- (b) his relationship with Ms Gay ended in 2016. Ms Gay was not his wife or de facto partner in July 2019;
- (c) Calvin Duffy is his son;
- (d) Ms Barnes was a self-employed contractor who provided bookkeeping services to numerous entities, including entities controlled by Mr Duffy.

[105] Even if I had found that the nightclub proposal meant that Mr Duffy had a conflict of interest (a matter which Ocean disputed), I would not have found on the evidence that the connection between Mr Duffy and each of the other three persons was sufficient to conclude that any of those persons had a direct or indirect interest in the execution of the Deed that would have precluded them from voting on the resolution. On that basis, the votes of at least four of the five people who voted on the resolution could not be impeached by reason of any conflict of interest.

[106] If I had found that s 100(4) was engaged in the present case, I would not have found that the decision to execute the Deed was otherwise invalidated by reason of the asserted conflict of interest.

Whether Ocean has ratified the decision to execute the Deed

[107] Ocean then argued that, if the decision to execute the Deed was defective due to the ineffective appointment of the replacement members of the committee, the Deed was nonetheless valid and binding because its members ratified that decision.

[108] This argument raises two issues. First, is the question whether the decision to execute the Deed is an act which is capable of being ratified by the members of

⁴² BCCM Regulation, ss 53(1), 53(2) and 54(5).

⁴³ Exhibit 1.6.

⁴⁴ Transcript 2-10 - 2-12.

Ocean. Second, is the question whether the conduct relied upon by Ocean amounted to ratification.

[109] As to the question whether the decision can be ratified, the respondents referred me to the following statement on the effect of a failure to comply with a statutory provision in *Project Blue Sky Inc v Australian Broadcasting Authority*:⁴⁵

“An act done in breach of a condition regulating the exercise of a statutory power is not necessarily invalid and of no effect. Whether it is depends upon whether there can be discerned a legislative purpose to invalidate any act that fails to comply the condition. The existence of the purpose is ascertained by reference to the language of the statute, its subject matter and objects, and the consequences for the parties of holding void every act done in breach of the condition.”

[110] In *2 Elizabeth Bay Road Pty Ltd v The Owners – Strata Plan No 73943*,⁴⁶ Barrett JA drew a distinction between provisions of the *Strata Schemes Management Act 1996* (NSW) which indicated a lack of power or capacity of a body corporate to act (“cannot provisions”) and provisions which were directed to regulating the exercise of power (“must not”) provisions.

[111] The distinction is important. An act done by a body corporate that the body corporate has no power or capacity to do cannot be ratified by the members of the body corporate. The position is different where the body corporate has the power to do the act but the instrumentality by which it purportedly acted when exercising the power was not competent to exercise it. In this second type of case, the act in question can be ratified by a competent instrumentality, including the members of the body corporate in general meeting.⁴⁷

[112] On the basis of those principles, the respondents submitted that the evident purpose of s 38 of the BCCM Regulation was to deny the committee power to fill a vacancy where the number of members fell below a quorum and to reserve that power to a general meeting of the body corporate. So much can be accepted. It is the reason the purported appointment of the replacement members of was invalid and of no effect. However, in my respectful view, that submission does not focus on the critical act being the decision to execute the Deed.

[113] That decision was a purported exercise of the power conferred by s 100(1) of the BCCM Act on a committee to make decisions on behalf of the body corporate.

[114] In the language of the statement from *Project Blue Sky* extracted at [109] above, the condition regulating the exercise of that statutory power is that the committee be validly constituted according to the requirements of the BCCM Regulation. The relevant question is whether there can be discerned any legislative purpose to invalidate any decision taken or act done by a committee which is not validly constituted.

⁴⁵ (1998) 194 CLR 355 (*Project Blue Sky*) at 388-389 [91].

⁴⁶ (2014) 88 NSWLR 488 (*2 Elizabeth Road*) at [37] and [51]; applied in *The Owners Strata Plan No 57164 v Yau* (2017) 96 NSWLR 587 at [109].

⁴⁷ *2 Elizabeth Road* at [54]-[55].

- [115] As a matter of statutory construction, the inclusion of the validating provision in s 100(4) is inconsistent with such a purpose. Consideration of the objects of the BCCM Act (see [70] to [76] above) also tells against such a purpose.
- [116] In this case there is no doubt that Ocean had the power under s 95 of the BCCM Act to execute the Deed. What has occurred is that Ocean's committee, which purportedly acted under s 100 of the BCCM to exercise the power to execute the Deed, was, due to the ineffective appointment of the replacement members to the committee, not competent to exercise the power. In my view, applying the reasoning of Barrett JA in *2 Elizabeth Road*, the result is that there has been an act of a kind to which the power of Ocean as a body corporate extends but that act has been performed without Ocean's authority. Critically, however, the performance of that act is capable of being ratified by the members of Ocean in general meeting.
- [117] As to the question whether ratification occurred in fact, Ocean relied upon the passing of a special resolution at an extraordinary general meeting of the members of Ocean on 18 May 2022, in the following terms:⁴⁸
- “That ... [Ocean] resolve to apply to the District or Supreme Court of Queensland for an injunction and/or enforcement orders for [Orchid 17] comply with the [Deed] ...”
- [118] The respondents argued that the passing of this resolution, which was required by s 312 of the BCCM Act, did not mean that the members of Ocean in general meeting had determined to ratify the Deed.⁴⁹
- [119] In my view, that submission describes the concept of ratification too narrowly.
- [120] Ratification of an agent's unauthorised act may be express or implied. Express ratification occurs when a principal, by unequivocal language or conduct, acknowledges being bound by a contract. Implied ratification can occur when a principal, although not expressly acknowledging being bound by a contract, acts in a way that can only be explained on the basis of an acceptance of being bound.⁵⁰ It requires conduct that is “unequivocally referable to an intention to adopt and be bound by the transaction” or is “equivalent to a clear adoptive act.”⁵¹
- [121] While the special resolution passed on 18 May 2022 might not have amounted to express ratification it was, in my view, conduct that could only be explained on the basis that the members of Ocean accepted the Deed as binding upon them. The decision to bring proceedings to enforce the terms of the Deed evinced a clear intention to adopt and be bound by the Deed. It was a clear adoptive act.
- [122] Consequently, I am satisfied that by passing the special resolution on 18 May 2022 the members of Ocean in general meeting impliedly ratified the Deed. Ratification occurred before the respondents raised any issue about the enforceability of the

⁴⁸ Affidavit of Craig Francis Duffy filed 4 October 2022 at [2], Exhibit A (Court document 35).

⁴⁹ Transcript 2-27.

⁵⁰ *Aztech Science Pty Ltd v Atlanta Aerospace (Woy Woy) Pty Ltd* (2004) 51 ACSR 147 at 159 [49]. Although that decision was overturned on appeal ([2005] NSWCA 319), the appeal did not concern the statement of the principles of ratification.

⁵¹ *Commonwealth Bank of Australia v Perrin* [2011] QSC 274 at [146], citing *Petersen v Moloney* (1951) 84 CLR 91 at 101 and GE Dal Pont, *The Law of Agency* (2nd ed, 2008) at [5.31].

Deed.⁵² No question arises about the respondents withdrawing from the Deed before ratification occurred.⁵³

[123] On that basis, had I not reached the conclusion expressed in [45] above, I would not have found that the Deed is void by reason of it not having been validly executed by Ocean.

Conclusion

[124] The orders will be:

1. The parties are to confer as to the form of order which should be made to reflect these reasons for judgment.
2. Direct that within 7 days:
 - (a) if agreement as to the form of order has been reached, the parties are to provide a copy of that agreed form of order to the associate to Cooper J; or
 - (b) if the parties are unable to reach agreement on the form of order, each party is to deliver to the associate to Cooper J the form of order for which that party contends, together with written submissions of not more than 4 pages in support of that form of order.
3. Direct that within 7 days the applicant file and serve written submissions of not more than 4 pages on the question of costs and any material it seeks to rely upon on that question.
4. Direct that within 14 days the respondents file and serve written submissions of not more than 4 pages on the question of costs and any material they seek to rely upon on that question.
5. Any issues remaining in dispute as to the form of order, or as to the question of costs, will be decided on the papers.

⁵² That was first done in a letter from the solicitors for the respondents dated 9 June 2022 – see Affidavit of Justin James Mathews filed 11 July 2022, page 2 of exhibit JJM-1 (Court document 4).

⁵³ See *Gladstone Area Water Board v AJ Lucas Operations Pty Ltd* [2014] QSC 311 at [121].