VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

VCAT REFERENCE NO. OC567/2019

OWNERS CORPORATIONS LIST

CATCHWORDS

Revocation of appointment of manager; validity of resolution by ballot challenged; ratification by owners corporation; resolution found to be valid; order to deliver up records and funds, *Owners Corporations Act 2006* ss 77, 83, 86, 94, 119, 127, 163, 165.

APPLICANTS	Colin Stuart Jenkins, Oaklok Investments Pty Ltd ACN: 007 287 372, Oakleigh Locksmiths Pty Ltd ACN: 005 945 415, M.O.D Investments Pty Ltd ACN: 054 606 325, Kitmar Pty Ltd ACN: 619 207 475
FIRST RESPONDENT	OCVM Commercial Pty Ltd as the trustee for 37 OC Unit Trust t/as 37 º Owners Corporation
SECOND RESPONDENT	6-14 Wells Road Developments Pty. Ltd
THIRD RESPONDENT	ADC Australia Pty. Ltd
INTERESTED PARTY:	Owners Corporation 1 Plan No. PS737383V
WHERE HELD	Melbourne
BEFORE	Member L. Rowland
HEARING TYPE	Hearing
DATE OF HEARING	9 July 2019
DATE OF ORDER	9 July 2019
DATE OF REASONS	31 July 2019
CITATION	Jenkins v OCVM Commercial Pty Ltd (Owners Corporations) [2019] VCAT 1078

ORDERS

1. That the name of the first respondent is amended to OCVM Commercial Pty Ltd as the trustee for 37 OC Unit Trust t/as 37 º Owners Corporation.

2. The applicants are authorised under s165(1)(ba) to institute and prosecute an application under s127 of the *Owners Corporations Act 2006* to recover the Owners Corporation's funds and records from the first respondent.

3. The Tribunal declares that Owners Corporation PS 737383V revoked the appointment of the first respondent as manager with effect from 8 January 2019.

4. By 16 July 2019 the first respondent must deliver up the records and funds relating to the owners corporation to the owners corporation.

5. By 16 August 2019 the applicants must file and serve amended points of claim.

6. **The proceeding is referred to a directions hearing on 28 August 2019 at 2.00pm.**

7. The first respondent must pay the applicants' costs of the application under s 127 and s165(1)(ba) of the *Owners Corporations Act 2006* to be assessed by the Costs Court on a standard basis in default of agreement.

8. The second and third respondents' costs of today are reserved.

9. Written reasons to follow.

MEMBER L. ROWLAND

APPEARANCES:

For the Applicants	Mr D. Free, solicitor
For the First Respondent	Mr T. Graham, solicitor
For the Second and Third Respondents:	Mr T. Greenway of counsel
For the Interested Party:	No appearance

REASONS

Background

1 The applicant lot owners, on behalf of the owners corporation, sought orders for return of the records and funds of the owners corporation from OCVM Commercial Pty Ltd, the first respondent and then incumbent owners corporation manager. The applicants contended that OCVM Commercial's appointment was revoked on 8 January 2019 following a ballot of lot owners. OCVM Commercial refused to return the records and funds because it contended that the resolution to revoke its appointment was void. I heard and decided the application on 9 July 2019, ordering return of the records and funds with detailed written reasons to follow. These are the reasons.

2 The subdivision concerns a recent commercial development of 62 factory lots in Oakleigh. The plan of subdivision was registered on 13 December 2017. The common property is a concrete driveway. The buildings are entirely owned by the lot owners. The inaugural meeting of the owners corporation took place on 15 December 2017 and was attended by Mr Jim Angelopoulous, a director of the second respondent developer, a representative of the third respondent, a maintenance contractor, and a representative of Procorp Australia Pty Ltd, an owners corporation manager.

3 The inaugural meeting resolved to appoint Procorp Australia Pty Ltd as owners corporation manager for a period of 5 years, to appoint the third respondent to provide a "24/7" site caretaker, cleaning, maintenance, security and landscaping service for a period of 10 years, and to appoint Mr Jim Angelopoulous as chairperson of the owners corporation. An annual budget of $170,720 was passed.

4 Most lots were purchased "off the plan" and settled in January 2018 with owners corporation fees to the end of 2018 paid on settlement.

5 By October 2018, lot owners became dissatisfied with the high owners corporation fees, lack of caretaking services and lack of service from the owners corporation manager. Some lots had unresolved issues with water ingress. In mid-October, Mr Daniel McMahon, the sole director of M.O.D. Investments Pty Ltd (the fourth applicant and owner of lot 36) engaged with a number of lot owners who expressed dissatisfaction with the owners corporation manager. Mr McMahon said 21 lots had expressed an interest in removing the owners corporation manager.

6 On 1 October 2018 the management agreement between the owners corporation and Procorp Pty Ltd was purportedly assigned to OCV Management Pty Ltd, who in turn immediately purported to assign the management agreement to OCVM Commercial.

7 On 29 November 2018 OCVM Commercial sent fee notices to all lot owners for the 2019 fees. An annual fee was levied and became due on 1 January 2019.

8 On 21 December 2018 Mr McMahon arranged a ballot of the 62 lot owners. The ballot relevantly read as follows:

> Pursuant to Section 119 of the Owners Corporation Act 2006, the Owners Corporation of plan No PS737383V resolve to revoke the appointment of OCVM Group and appoint AMJ Body Corporate as the new Owners Corporation Manager.

9 The ballot closed on 7 January 2019. 41 replies were received in favour with 0 against the resolution.

10 On 8 January 2019 the newly appointed manager, AMJ Strata Group emailed OCVM Commercial as follows:

> A Postal Ballot was conducted for the Owners Corporation PS737383V, 6-14 Wells Road, OAKLEIGH VIC 3166, on 21st December 2018.
>
> A quorum was declared and a resolution was passed to revoke the appointment of OCVM Group - 37 Owners Corporation as the current manager and appoint AMJ Strata Group as the new Owners Corporation Manager.
>
> Hereby, notice been given to OCVM Group - 37 Owners Corporation effective as of 28 days from today's date 8th January 2019, that all records, registers and funds as required under section 127 of the Owners Corporation Act 2006 be made available for collection or forwarded to AMJ Strata Group at 23 Milton Parade, MALVERN VIC 3144.

11 By letter dated 5 February 2019 the OCVM Commercial asserted that the ballot was void on numerous grounds. It contended that its appointment had not been validly revoked.

12 On 8 February 2019 AMJ Strata Group convened the annual general meeting. 17 lots were represented either in person or by proxy at the meeting. The developer and caretaker represented 3 lots. The meeting resolved 14 to 0 to:

- Set an annual budget for 2019 at $90,000 with an annual levy being paid in advance.
- Elect Mr D McMahon as chairperson and the first applicant and the directors of the remaining applicants to the committee
- Ratified the ballot of 7 January 2019.

13 As a quorum of 50 % of lots or lot entitlement was not achieved, the resolutions were passed as interim resolutions. In the absence of a petition against the resolutions, the interim resolutions became final resolutions under section 78 of the *Owners Corporations Act 2006* with

effect from 5 February 2019. OCVM Commercial did not challenge the validity of the annual general meeting or the resolutions made at that meeting.

14 On 7 March 2019 OCVM Commercial purported to hold the annual general meeting of the owners corporation. The developer and caretaker representing 3 lots were in attendance along with proxies for lots 34 and 50. The developer was not entitled to vote because it was in arrears of owners corporation fees. The resolutions of the meeting were purportedly passed, on an interim basis, 3 votes to 0.

15 On 7 March 2019 the applicants commenced this proceeding to recover the records and funds of the owners corporation.

16 By 20 March 2019 more than 25% of lot owners petitioned against the purported interim resolutions of the meeting convened by OCVM Commercial on 7 March 2019. The new manager, AMJ Strata Group emailed OCVM Commercial on 1 April 2019 stating:

> As a professional courtesy, we bring to your attention that Owners Corporation PS737383V has called a Special General Meeting for 17 April 2019 as a result of receiving more than 45% of lot entitlements in favour of the petition conducted on 20 March 2019, to object and dispute the invalid meeting and its minutes, that was convened by the revoked manager OCVM Group on 7 March 2019.

17 On 17 April 2019, 38 lots were represented at the special general meeting. The developer and caretaker were not represented at the meeting. The meeting passed a resolution with 35 votes in favour; 2 against (lots 34 and 50) and 1 abstention to declare the meeting of 7 March 2019 invalid. OCVM Commercial did not challenge the validity of the meeting or resolutions passed. Although no specific motion was passed to ratify the decision of 7 January 2019, by implication, the meeting ratified the decision to revoke the appointment of OCVM Commercial.

18 At the hearing on 9 July, the fourth applicant filed 32 proxies in favour of the fourth applicant. Together with the applicants who attended in person, the applicants demonstrated that 36 lot owners (out of 62) remained in favour of revocation OCVM Commercial's appointment as manager.

19 The applicants have clearly and repeatedly demonstrated that the majority of lot owners were and remain in favour of revoking the appointment of OCVM Commercial. OCVM Commercial state that they are willing to return the records and funds upon the owners corporation passing a valid resolution to revoke its appointment, even though only 5 lots have ever supported its retention as manager.

20 In the meantime, the owners corporation has been burdened with two owners corporation managers, neither of whom could properly provide management services to the owners corporation. The records and funds were being held by one manager and majority lot owners were giving

instructions to the other manager. It was an untenable situation which required urgent and immediate resolution.

Power to revoke appointment

21 The owners corporation has the statutory power to revoke the appointment of its manager under s 119(6) of the *Owners Corporations Act 2006* which provides:

> An owners corporation may revoke the appointment of a manager.

The statutory power to revoke the appointment of a manager permits an owners corporation to do so even if it breaks a contract of appointment when it does.[1]

22 The owners corporation resolved by ballot to revoke the appointment of the manager.

23 At the time the ballot was sent, all lot owners were financial with their fees paid up to 31 December 2018. By the time the ballot closed on 7 January 2019, only 10 lot owners had paid their current fees and were entitled to vote. The 52 lot owners who had not paid their fees were not entitled to vote. Nevertheless, the ballot was declared passed with 41 votes (of which only 6 were entitled to vote) in favour and 0 against. OCVM Commercial contended that the ballot decision was void.

Was the ballot void?

24 In short, I determined that the ballot was not void and subsequently ratified by the owners corporation, so that the decision to revoke the appointment on 8 January 2018 was effective.

25 The submission that the ballot was void was based on the following alleged breaches of the *Owners Corporations Act 2006:*

a A breach of section 85 to give at least 14 days' notice of the ballot;

b A breach of section 83 to be nominated by at least 25% of lot owners to arrange a ballot;

c A breach of section 86 to achieve the required quorum for the ballot.

These sections are contained in Part 4 - Meetings and Decisions of Owners Corporation - of the *Owners Corporations Act 2006*. Part 4 governs notice of meetings, conduct of meetings, ballots, proxies and voting. Part 4 provides a statutory framework for lot owners and volunteer lay committees to fairly and transparently make decisions by the owners corporation. The provisions ensure lot owners have the opportunity to participate in the decision making process of the owners corporation.

[1] Owners Corporation RP11571 v Walshe & Whitlock Pty Ltd (Owners Corporations) [2015] VCAT 1819

Less than 14 days' written notice of ballot

26 The ballot dated 21 December 2018 provided a closing date of 7 January 2019. There was no evidence of the date of posting but on the assumption that the date of posting was Friday 21 December 2018 by ordinary mail, the earliest the ballot could have been received by post would have been 27 December 2018, if only 3 business days were allowed for delivery. Even on the most favourable of assumptions, only 10 days' notice of the ballot was given to lot owners.

27 Section 85 provides:

> The person arranging a ballot must give notice in writing of the ballot to each lot owner at least 14 days before the closing date for the ballot.

28 I find that the ballot was not served with 14 days' notice as required by the Act.

Nomination by 25% of lot owners

29 A lot owner must have nominations from 25% of lots by entitlement to arrange a ballot. Section 83(c) provides that a ballot can be arranged by:

> A lot owner nominated by lot owners whose lot entitlements total at least 25% of all lot entitlements for the land affected by the owners corporation.

30 OCVM Commercial contended that Mr McMahon did not prove he was nominated by at least 25% lot owners by entitlement. Therefore, he was not entitled to arrange a ballot and consequently, the ballot was void. I was satisfied 25% of lot owners by entitlement nominated Mr McMahon to arrange a ballot. Mr McMahon's affidavit listed 21 lots in support of the ballot. OCVM Commercial did not lead any evidence to the contrary. I find that Mr McMahon complied with section 83 in arranging the ballot.

Quorum requirements for a ballot

31 To pass a ballot, at least 50% of the total votes must be returned to achieve a quorum. The majority of the returned votes will pass a resolution, providing a quorum has been achieved. The ballot returned 41 votes out of 62, but at the time the ballot closed, only 6 of the 41 voting lot owners had paid their fees and were entitled to vote. OCVM Commercial contended that a quorum was not achieved and therefore the vote was void.

32 Section 77 defines a quorum as 50% of the votes or total lot entitlement. Section 94(1) disentitles a lot owner from voting on an ordinary resolution if the lot owner is in arrears of fees. The sections are as follows:

> 86(2) A resolution of the owners corporation by ballot is made as follows-
>
> (a) matters requiring an ordinary resolution must be passed by a majority of votes returned by the

closing date but the number of votes returned must be not less than the number needed for a quorum in accordance with section 77;

77 A quorum for a general meeting is at least 50% of the total votes or if 50% of the total votes is not available the quorum is at least 50% of the total lot entitlement.

94(1) Subject to subsection (2), a lot owner who is in arrears for any amount owed to the owners corporation is not entitled to vote, either in person, by ballot or by proxy, unless the amount in arrears is paid in full.

33 The Tribunal decision of *Owners Corporation SP37049J v Central North Holdings Pty Ltd [2011] VCAT 2301* considered the definition of quorum under section 77. In that case, 3 out of the 6 lot owners attended an annual general meeting. One of the lot owners' fees were in arrears, so that section 94(1) disentitled that lot owner from voting. However, the lot entitlement of the 3 lot owners exceeded 50% of the total entitlements. Senior Member Proctor, as he then was, held there was a quorum. His reasoning is set out in paragraphs 10 to 22 of the decision as follows:

> 19. Fifty percent of the total votes were not available, as Central Holdings was not eligible to vote as it had not paid its fees.
>
> 20. Therefore, section 77 provides an alternative 'test', which is whether at least 50% of the total lot entitlements were available. On this analysis of Section 77, a lot owner who has not paid fees may attend an AGM, be part of a quorum and contribute to the discussion, but cannot vote.
>
> 21. At the AGM, 54% of entitlements were available, being, as recorded in the minutes, Lot 4 (Entitlements 90), Lot 5 (Entitlements 120) and Lot 6 (Entitlements 170). The entitlements add to 380 of the total entitlements of 710.
>
> 22. Therefore there was a quorum. The situation was that only Lots 4 and 5 could vote. On the resolutions in question the votes were two in the affirmative, with no other valid votes made. Therefore, the resolutions about fees and Emerson Pty Ltd's appointment were validly passed.

34 If I adopt the reasoning of the learned Senior Member and apply it to the ballot process, a quorum was achieved, and a valid resolution was made. However, if I am wrong, and there was no quorum, then the resolution to revoke the manager's appointment breached the *Owners Corporations Act 2006*.

What is the effect of a breach of the Act?

35 The *Owners Corporations Act 2006* does not provide for a consequence for a breach of the notice and quorum sections of Part 4 of the Act. It does not specifically state that anything done, or any decision made in breach of the sections is void. It is therefore necessary to consider the proper

construction of the sections to determine the effect on a decision made in breach of the sections.

36 The New South Wales Court of Appeal considered a similar issue in two recent decisions involving the *Strata Schemes Management Act 1996* (NSW) (since repealed).

37 In both cases the Court of Appeal found that the failure to comply with the *Strata Schemes Management Act 1996* (NSW) did not invalidate the decisions made by the owners corporations.

38 The first was *2 Elizabeth Bay Road Pty Ltd v The Owners – Strata Plan No 73943 [2014] NSWCA 409* in which the owners corporation commenced a legal proceeding in the absence of the required resolution of lot owners. The Court of Appeal determined that the failure to obtain the resolution did not render the proceedings void. The Victorian Supreme Court came to the same conclusion in *Burbank Australia Pty Ltd v Owners Corporation PS447493*.[2]

39 The second decision was *The Owners Strata Plan No 57164 v Yau [2017] NSWCA 341* which concerned a committee decision to settle a legal proceeding involving the Yaus. A committee meeting was called at short notice in the middle of a trial. The committee authorised a large sum in settlement of the Yaus' claim. A week after consent orders were filed with the Court, the Court of Appeal handed down its decision in *The Owners Strata Plan 50276 v Thoo*.[3] The *Thoo* decision seriously called in question the liability of the owners corporation to pay anything to the Yaus. By subsequent proceedings, the owners corporation sought to set aside the consent orders. The owners corporation claimed that the committee meeting authorising the settlement sum was void because insufficient notice of the meeting was given. The Court of Appeal found that insufficient notice in breach of the Act did not invalidate the meeting or decisions made at that meeting.

40 The NSW Court of Appeal applied the well-established principles of statutory construction to the *Strata Scheme Management Act 1996*. The Court of Appeal found that the purposes of the Act were not achieved by invalidating the decisions made in breach of the Act.

41 Potentially, there are two breaches of the *Owners Corporations Act 2006* in this proceeding; a failure to give 14 days' notice of the ballot and a failure to achieve a quorum. There is no stated consequence for the breaches. Specifically, it is not expressly stated that any decision made in breach of the Act is void. Only two sections in Part 4 of the *Owners Corporations Act 2006* provide a consequence for a breach of the relevant section. Section 87(7) provides that a manager's contract of appointment is voidable if made in contravention of section 87(4) and section 89 provides for a penalty of up to 60 penalty units for demanding a power of attorney or proxy.

[2] [2015] VSC 160
[3] [2013] NSWCA 270

42 It is necessary to interpret the *Owners Corporations Act 2006* to determine the consequence of a failure to comply with the Act where no consequence is stated.

43 The principles of statutory construction were conveniently summarised by the Court of Appeal *in David Joseph v Jayne Worthington & Anor*[4] by quoting Derham AsJ as follows (footnotes excluded):

> 18 Derham As J summarised the relevant principles of statutory construction succinctly and accurately by reference to High Court authority. They are encapsulated in the following statements.
>
> 19 In Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue, Hayne, Heydon, Crennan and Kiefel JJ emphasised the centrality of the words of the relevant statutory provision:
>
> > This Court has stated on many occasions that the task of statutory construction must begin with a consideration of the text itself. Historical considerations and extrinsic materials cannot be relied on to displace the clear meaning of the text. The language which has actually been employed in the text of legislation is the surest guide to legislative intention. The meaning of the text may require consideration of the context, which includes the general purpose and policy of a provision, in particular the mischief it is seeking to remedy.
>
> 20 In *Commissioner of Taxation v Consolidated Media Holdings Ltd*, French CJ, Hayne, Crennan, Bell and Gageler JJ said:
>
> > This Court has stated on many occasions that the task of statutory construction must begin with a consideration of the [statutory] text. So must the task of statutory construction end. The statutory text must be considered in its context. That context includes legislative history and extrinsic materials. Understanding context has utility if, and in so far as, it assists in fixing the meaning of the statutory text. Legislative history and extrinsic materials cannot displace the meaning of the statutory text. Nor is their examination an end in itself.
>
> 21 In *Project Blue Sky Inc v Australian Broadcasting Authority*, McHugh, Gummow, Kirby and Hayne JJ emphasised the importance of reading a statute as a whole:
>
> > The primary object of statutory construction is to construe the relevant provision so that it is consistent with the language and purpose of all the provisions of the statute. The meaning of the provision must be determined 'by reference to the language of the instrument viewed as a whole'. In Commissioner for Railways (NSW) v Agalianos, Dixon CJ pointed out that 'the context, the general purpose and policy of a provision and its consistency and fairness are surer

[4] [2018] VSCA 102]

> guides to its meaning than the logic with which it is constructed'. Thus, the process of construction must always begin by examining the context of the provision that is being construed.
>
> 22 Their Honours also endorsed the subsidiary principle that a court should strive to give meaning to every word of a statutory provision.

44 One of the main purposes of the *Owners Corporations Act 2006* is to provide for the management, powers and functions of owners corporations.[5] The following sections require consideration in this proceeding:

a. Sections 86(2) and 77 which ensure minimum participation of lot owners in a ballot so that any resolution of the owners corporation properly reflects the will of the lot owners;

b. Section 94(1) which disentitles non-financial members from voting on ordinary resolutions to encourage lot owners to pay their fees and to give paying lot owners a greater say in how the owners corporation operates;

c. The notice provision under section 84 which ensures lot owners are given proper notice of a ballot, to enable lot owners a reasonable opportunity to vote.

45 The provisions of Part 4 of the *Owners Corporations Act 2006* relate to the process of meetings and decisions of owners corporations. I do not perceive a legislative purpose to invalidate a decision of an owners corporation made in breach of Part 4 of the Act. Instead, I perceive a legislative purpose to set out a framework for volunteer committees and lot owners. I perceive a legislative purpose to provide a fair and transparent process to give lot owners the opportunity to participate in the decision-making process of the owners corporation. I do not consider invalidating every decision made in breach of the Act serves the purpose of Part 4. Where Part 4 intends for a specific consequence for a breach, it sets it out, as it did for sections 87 and 89 of the Act. If it were intended that any breach, of any section, would render a decision void, the Act would have expressly stated so.

46 In my opinion, the Act does not provide a consequence for a breach of the provisions of Part 4 (apart from sections 87 and 89), because the Act recognises that a breach may be substantial or trifling. Each breach needs to be examined in its own context to determine what remedy, if any, is fair.[6]

47 Instead of providing a consequence for a breach, the Act provides that an aggrieved person, entitled to do so, may make a complaint to the Owners

[5] Section 1 *Owners Corporations Act 2006*
[6] Owners Corporation PS407621Y v Grundl (Owners Corporations) [2017] VCAT 1550.

Corporation under Part 10 of the Act and/or apply to the Tribunal for any of the remedies set out under section 165 of the Act.[7]

48 The Tribunal may make any order it considers fair but must act within well-established principles of law[8]. Not every breach will justify a remedy. In deciding whether an order should be made the Tribunal may have regard to; the effect on the outcome of anything done in breach of the Act; whether any lot owner suffered prejudice; whether the decision has been ratified; the impact on third parties and any other relevant matter.

49 In conclusion, a meeting, resolution or decision made in breach of a provision of Part 4 of the *Owners Corporations Act 2006* does not automatically render it void and of no effect. Instead, an aggrieved person, entitled to do so under section 163 of the Act, may apply to the Tribunal for a discretionary remedy. The Tribunal will need to carefully consider the circumstances of each case to determine if a remedy is appropriate and fair.

Breach of notice provisions

50 I must now consider what remedy, if any, is appropriate for the failure to comply with the notice provision for the ballot. I have already found that the breach does not automatically render the ballot void. Instead the manager is entitled to apply to the Tribunal for a remedy. I would not make any order in favour of OCVM Commercial for the following reasons:

(a) OCVM Commercial did not suffer any prejudice because of the short notice; it was not entitled to vote in the ballot;

(b) OCVM Commercial did not prove it was fair to make an order because, for example, lot owners were prejudiced by the short notice. Instead, it merely proved a breach of the Act.

(c) There was no evidence of prejudice to any lot owner;

(d) As a matter of common sense and practicality there is no purpose to be served in ordering a new vote because the same result would be achieved;

(e) The objects and purpose of the notice provision was met with 41 out of 62 lot owners responding to the ballot;

(f) The resolution was ratified by the owners corporation 3 times.

Consideration of Quorum provisions

51 Having regard to the purpose and context of the quorum provisions, I consider the interpretation of section 77 by the learned Senior Member in *Owners Corporation SP370495 v Central North Holdings Pty Ltd* is both preferred and correct. I find that the ballot did achieve a quorum with just

[7] Section 152 sets out who may make a complaint to the owners corporation and section 163 sets out who may apply to the Tribunal. A manager is entitled to make a complaint and apply to the Tribunal.
[8] Christ Church Grammar School v Bosnich [2010] VSC 476.

over 66% of lot entitlement responding to the ballot. A majority of available or eligible votes, in this case; 6 votes to 0 votes, passed the ballot. However, if I am wrong and there was no quorum for the ballot then I must consider the consequence of the owners corporation having failed to achieve a quorum.

52 In my opinion, the statutory quorum is a precondition to exercising the power to pass a resolution. If there was no quorum the consequence is that the ballot did not pass a competent resolution to revoke the appointment of the manager. Although the resolution was not competent, it was capable of ratification.

Ratification

53 For a ratification to take place the incompetent decision must have been a decision that the owners corporation was capable of making. A void decision cannot be ratified. The distinction was discussed by Barrett JA in *2 Elizabeth Bay Road Pty Ltd v The Owners – Strata Plan No 73943 [2014] NSWCA 4*09 in paragraphs 54 to 59 as follows:

> 54. A transaction purportedly undertaken by a corporation that the corporation has no power to undertake cannot be ratified. This rule is most often associated with *Ashbury Railway Carriage & Iron Co Ltd v Riche* (1875) LR 7 HL 653. It was stated by Vaughan Williams LJ in *Towers v African Tug Co Ltd* [1904] 1 Ch 558 (at 566) in these terms:
>
> > "[I]f an act is done by a company, which is *ultra vires*, no confirmation by shareholders - not even by every member of the company - can convert that which was *ultra vires* into something *intra vires*. It always must be *ultra vires*."
>
> 55. The position is different where the corporation has the necessary power but the instrumentality by which it purportedly acted when exercising the power was not competent to exercise it. In a case of that kind, the action in question can be ratified by a competent instrumentality.
>
> 56. An example is provided by the decision of the House of Lords in *Alexander Ward & Co Ltd v Samyang Navigation Co Ltd [1975] 1 WLR 673.* In that case, proceedings had ostensibly been brought by a company that had no directors. The constitution provided, in the usual way, that the business should be carried on by the directors and that they could exercise all powers of the company not reserved to the members in general meeting. The power to initiate proceedings rested with the directors. Some time after the commencement of the proceedings, the company went into liquidation. The liquidator, having become effectively the sole decision-maker, was granted leave to become a party and to continue the action. The original want of authority was thereby cured. The company was fully competent to take the steps that had purportedly been taken for it

by persons without authority and, since an official with authority to act (the liquidator) later adopted the steps so taken, the taking of the steps in the company's name was ratified. Lord Morris of Borth-y-Gest (at 676) stated the relevant principle thus:

> "If something which at the time when it is done is done without authority but is done in the name of and in the purported capacity as an agent for a principal who later ratifies all that was done the ratification relates back: retrospectively it clothes what was done with authority."

57. There will be no ratification unless the subsequent actor has the necessary authority. Thus, if, in the company context, the usual division of authority between the directors and the members in general meeting prevails, purported ratification by the members in general meeting of something exclusively within the province of the directors will not be effective: *Massepy v Wales* [2003] *NSWCA 212; 57 NSWLR 718*.

58. In the strata titles context, the reasoning in *McEvoy v The Body Corporate for No 9 Port Douglas Road* [2013] QCA 168 in relation to the Queensland legislation applies equally to the New South Wales legislation.

59. Against that background, I return to s 80D of the SSM Act. If legal action is initiated by the executive committee in the name of the owners corporation without the resolution envisaged by s 80D having been passed at a general meeting, there is an act of a kind to which the power of the corporation extends but that act is performed without the authority of the corporation in whose name it purports to have been performed. The performance of the act is, however, capable of being ratified in accordance with the principles just discussed, that is, by a subsequent resolution passed at a general meeting of the owners corporation.

54 A failure to achieve a quorum does not render the decision to revoke the appointment of the manager void because it is a decision the owners corporation can make under section 119(6) of the *Owners Corporations Act 2006.* The owners corporation ratified the resolution made by ballot at the annual general meeting on 8 February 2019, at the special general meeting on 17 April 2019, and again at the hearing.

Two further grounds of alleged invalidity

55 The first ground is that the resolution within the ballot is void because the ballot refers to “OCVM Group” and “AMJ Body Corporate” instead of the correct legal entities. The wording of the ballot was as follows:

> Pursuant to Section 119 of the Owners Corporation Act 2006, the Owners Corporation of Plan No PS737383V resolve to revoke the appointment of OCVM Group and appoint AMJ Body Corporate as the new Owners Corporation Manager.

56 The correct legal entity for the manager was OCVM Commercial Pty Ltd as the trustee of the 37 OC Unit Trust trading as 37 º Owners Corporation.

57 I find that any confusion as to the precise legal identity of the incumbent manager was caused by OCVM Commercial's conduct in corresponding with the lot owners under the style "OCVM Group" and failing to clearly and precisely identify the exact legal entity of the incumbent manager. I am not satisfied that the technically incorrect naming of the manager on the ballot invalidated it. At all times the manager knew the name of the correct legal entity and although the numerous names and styles under which the "OCVM Group" operates is confusing, there was no doubt that the resolution was to remove the incumbent manager and appoint a new manager.

58 The second ground of invalidity is that there was no valid reason to revoke the appointment of the manager. The owners corporation does not need a reason to exercise the power under section 119(6).

Obligation to return records and funds

59 Finally, it is to observed that the manager's obligation to return the owners corporation's records and funds arises under property law. The owners corporation, as owner of the records and funds is entitled to possession of its property. The manager, as bailee of the records and funds is obliged to deliver up possession of the records and funds on demand. Section 127 of the *Owners Corporations Act 2006* extends the time within which the manager must return the records and funds of the owners corporation by up to 28 days from termination of its appointment. It provides:

> A manager of an owners corporation must, within 28 days of termination of appointment as manager, return to the secretary of the owners corporation all records relating to the owners corporation or funds of the owners corporation held or controlled by the manager.
>
> Penalty: 60 penalty units.

60 Section 127 does not entitle the manager to retain the records and funds on the grounds that a termination has not taken place. A demand for delivery up of the records and funds of an owners corporation must be complied with immediately, unless there has been a termination of appointment, in which case, the manager has up to 28 days to return the records and funds. A breach of section 127, attracts a penalty of up to 60 penalty units.

Authorising order under section 165(1)(ba).

61 I heard the application for an authorising order and the application under section 127 for return of the records and funds of the owners corporation concurrently. Having determined that the applicants would be successful

in their application under section 127 an authorising order followed as a matter of a practicality.[9]

Costs

62 I ordered costs against OCVM Commercial in favour of the applicants under section 109 of the *Victorian Civil and Administrative Tribunal Act 1998*. I considered subsections 109(3)(c) and (e) were engaged because OCVM Commercial acted in breach of the *Owners Corporations Act 2006* and its obligation to return the property of the owners corporation. The wrongful retention of the records and funds caused significant cost and inconvenience to the owners corporation. The Act recognises the seriousness of a breach of section 127 by providing for a penalty. OCVM Commercial comprehensively lost the technical arguments and in my opinion, a costs order was justified and fair in the circumstances.

MEMBER L. ROWLAND

[9] The factors as set out in Grima v Quantum United Management Pty Ltd (Owners Corporations) [2016] VCAT 1960 for the proper exercise of the discretion to grant an authorising order were met.