ADJUDICATOR'S ORDER

Office of the Commissioner
for Body Corporate and Community Management

CITATION:	*Watermark Residences* [2021] QBCCMCmr 202
PARTIES:	Brian Backshall and Robert Van Gaal (**applicant**)
	The Body Corporate (**respondent**)
	All owners (**affected persons**)
SCHEME:	Watermark Residences CTS 24536
JURISDICTION:	*Body Corporate and Community Management Act 1997* (Qld) (**Act**), sections 227(10(b) and 229(3)(a)
	Body Corporate and Community Management (Accommodation Module) Regulation 2008 (**Standard Module 2008**)
	Body Corporate and Community Management (Standard Module) Regulation 2020 (**Standard Module**)
APPLICATION NO:	0632-2020
DECISION DATE:	27 April 2021
DECISION OF:	S. Barry, Adjudicator
CATCHWORDS:	GENERAL MEETING – whether a meeting notice calling an extraordinary general meeting should be void for irregularity – whether a purported extraordinary general meeting should be void for irregularity
	MEETING RESOLUTIONS – whether some motions carried into resolutions at the AGM should be voided.
	SPENDING LIMITS – whether 2 quotations were required to comply with "the relevant limit for major spending" to engage a building manager.
	Act, ss 15, 16(1), 94(2), 100(5), 269, 276(1), Schedule 6 Dictionary; Standard Module 2008, ss 31, 70, 114, 116, 152.

ORDERS MADE:

1. The resolution passed on motion 4 at the extraordinary general meeting of Watermark Residences CTS 24536 held on 5 June 2020, was at all times void.
2. In all other respects, the application is dismissed.

I HEREBY CERTIFY this is a true copy of the order and reasons for decision.

Dated this 23rd day of April 2021.

S. Barry, Adjudicator

REASONS FOR DECISION[1]

Overview

[1] The dispute is based around a meeting, as many are which are referred to the Commissioner.

[2] In an interim application, I was asked by the applicants to prevent the body corporate from holding an extraordinary general meeting on 5 June 2020, which they called a "digital EGM" (**digital EGM**).[2] At that stage, the applicants argued they held concerns that lot owners did not:

> Have the proper opportunity to cast their vote or otherwise participate in the election as contemplated by Motion 5 of Agenda for the Digital EGM which the Body Corporate intends to hold on 5 July 2020 ("the Digital EGM"). [sic][3]

[3] The applicants, surprisingly to me back then (and still now), emphasised that the situation was exacerbated as they estimated that about 75% of lot owners are elderly. Without any evidence other than a wistful assertion, they contended that these owners did not "possess the adequate knowledge or experience required to be able to attend and participate in the meeting via conference call or video."[4]

[4] They provided an additional, unfounded allegation (as I saw it at that stage), that "the notice of Digital EGM did not provide the lot owners with any adequate instruction as to how to vote or otherwise conduct the "election" in Motion 5."[5] Motion 5 was related to electing a committee secretary for the scheme.

[5] I dismissed the application for an interim order. Without putting it in as many words, I think it was clear at that stage I was of the view that the applicants had not advanced a strong case, even at a prima facie stage, but as is often the case, parties will read into matters what they choose.

[6] The interesting issue for me is whether upon a deeper examination of the facts, the case is stronger than originally revealed, and whether other evidence has emerged that would support the making of final orders in the terms proposed by the applicants.

[7] The final orders sought by the applicants are:

a. order 1 - that the notice of the digital EGM is invalid, void and of no effect

b. order 2 - that the digital EGM is invalid, void and of no effect and that any motions purportedly passed at the meeting are also invalid, void and of no effect

c. order 3 - that the respondent must properly call and hold a valid EGM to either elect or appoint a secretary in a manner that is fair and reasonable

d. order 4 - that if I grant order 3, given another EGM would be required under the former section 30 of the Standard Module (now section 41), it would not be invalid simply because it will be held out of time

[8] The Commissioner in practice direction 14 stresses, in effect, that the obligation to prove a case falls to an applicant. My responsibilities are to observe the rules of natural justice,[6] to act quickly with as little formality and technicality as possible,[7] and when doing so, I am "not bound

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[1] This application was lodged on 29 May 2020. On 1 March 2021, the revised Standard Module commenced. In dealing with this dispute, I refer to the 'former' and 'new' section numbers of the Module in the text where possible, or in footnotes. Obviously the 2008 Module was in force when the events in this dispute occurred. Equivalent references are somewhat complicated in this matter as some meeting voting provisions in the Standard Module have been revised to formerly modernise them (e.g. electronic voting). I apologise if I have missed any equivalents, or made errors with the new or old section numbers.
[2] The applicants are represented by solicitors who filed detailed written submissions as part of the application, dated 29 May 2020, and also provided a number of annexures ('applicants' bundle').
[3] Applicants' outline, 29 May 2020, para 1.2. The incorrect date of 5 July was provided in the submission.
[4] Applicants' outline, 29 May 2020, para 1.3(a).
[5] Applicants' outline, 29 May 2020, para 1.3(b).
[6] Act, s 269(3)(a).
[7] Act, s 269(3)(b).

by the rules of evidence."[8] I "may make an order that is just and equitable in the circumstances … to resolve a dispute."[9] In doing so, I employ "a rational process of decision-making according to law",[10] utilising the three necessary stages of "fact-finding; rule-stating and rule application."[11]

[9] I make an order voiding motion 4 from the digital EGM, for the reasons provided. I otherwise dismiss the application for orders sought by the applicants.

Background[12]

[10] Watermark Residences is a community titles scheme situated at Kangaroo Point, in inner city Brisbane, and composed of 30 lots. It is administered under the provisions of the Standard Module.

[11] The body corporate scheduled its 2020 AGM for 30 March 2020 (**AGM**). The minutes for the AGM show there was an insufficient number of owners available to form a quorum for the meeting proceed. Although all 30 owners provided voting papers, no-one personally attended the meeting.[13] Generally, the legislation provides that at least 25% of voters must be present at a meeting for it to proceed. This can be in person, by proxy or by written or electronic voting paper. Some of the 25%, two in fact, must actually be present in person, if the number of voters for the meeting is three, or more.[14] This did not occur in this case.

[12] As a result, to again accord with the provisions of the Standard Module, the AGM was adjourned to "the same place, on the same day and at the same time", in the following week,[15] meaning, 6 April 2020. As far as I can tell, the applicants do not contest the accuracy and legality of the initial events.[16]

[13] The re-convened AGM proceeded on 6 April 2020, but the minutes record that although various people were nominated for committee positions, the position of secretary remained vacant.[17] An unfilled executive position such as this creates implications for any scheme.

[14] As the executive committee position of secretary remained vacant, the body corporate was required by the legislation to call an EGM within one month (and hold it within 2 months) with the intention of filling the position.[18]

[15] On 15 April 2020, the body corporate distributed nomination forms for the role of secretary.[19] As a result, on 20 April, a nomination form was sent to the body corporate manager (**BCM**), wherein Mr Backshall nominated Mr Van Gaal for the position of secretary.[20] The applicants say they are "reliably informed that there was also a second nomination received from Stacey Webb, the owner of apartment 303."[21]

[16] Mr Backshall attached the nomination form to an email to the office of the body corporate manager (**BCM**) on 20 April 2020. Ms Shambrook from the BCM's office acknowledged the email and forwarded it on to the committee members. In the email, she remarked to the

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[8] Act, s 269(3)(c).
[9] Act, s 276(1). This power has been said to be very wide, but of course is not unfettered, see: *Body Corporate for Palm Springs Residences CTS 29467 v J Patterson Holdings Pty Ltd* [2008] QDC 300, para 98; *Finger v Dickie* [2015] QCATA 113, paras 14, 15, 35, 36.
[10] *Kostas v HIA Insurance Services Pty Ltd* [2010] HCA 32, para 16.
[11] *Walden v Body Corporate for Broadwater Tower* [2015] QCATA 166, para 23.
[12] Mainly compiled from a letter from the applicants' solicitor of 15 May 2020 to their counterpart for the body corporate and the reply dated 22 May 2020.
[13] AGM minutes, 30 March 2020, p 2 – applicants' bundle - annexure 2, p 10.
[14] Standard Module, s 99(3)(b) (formerly s 82(2)(a)).
[15] Standard Module, s 100(2) (formerly s 82(3)).
[16] Letter from Chambers Russell Lawyers, 15 May 2020, para 1, applicants' bundle - annexure 6.
[17] AGM minutes, 30 March 2020, p 7 – applicants' bundle - annexure 2, p 17.
[18] Standard Module, ss 40, 41 (formerly ss 29, 30).
[19] Applicants' bundle - annexure 2, pp 19-20.
[20] Applicants' bundle - annexure 8, p 110.
[21] Applicants' outline, 29 May 2020, para 2.6.

committee, "could you please review the application and advise how you would like to proceed."[22]

[17] Lawyers for the applicants explain that at some stage the "applicant" was "forced" to engage a search of body corporate records to look for the committee nomination forms, which they had been told had been destroyed. That search resulted in a form apparently signed by Stacey Webb (lot 9), nominating herself for appointment as secretary.[23] A second form supplied to me shows in the top half Brian Backshall nominating himself for secretary (although this appears to have been crossed out) and in the lower half Mr Backshall nominating Rob Van Gaal for secretary.[24]

[18] Once the notice calling the EGM was issued, the applicants contend they contacted the respondent, arguing that a "new Notice of EGM" be circulated. They then caused a letter to be written by their solicitors to the committee, dated 15 May 2020, which raised their objections to the meeting taking place.[25] The 4 page letter outlined the concerns held by the applicants.[26] Solicitors for the respondent replied on 22 May, rejecting the arguments and proposed action sought by the applicants.[27]

[19] As I have indicated, I refused an interim application preventing the EGM from proceeding. Submissions regarding this final application refer to the meeting of 5 June 2020, indicating it did take place. This is supported in the final submission made on behalf of the body corporate, in which the minutes from the EGM are annexed.

[20] The applicants base their arguments underpinning the dispute on a number of grounds:

a. the notice of the digital EGM was at all times void and of no effect

b. if the EGM is void, "any motions passed at such a meeting would be invalid and deemed void"

c. motion 4 (authorising a "building management agreement") is invalid

d. motion 5 (election of a committee secretary) "cannot be carried into effect", as the "terms" of the motion:

   (i) were so vague as to make it completely impractical to put it into effect

   (ii) were misleading and confusing as the motion purported to authorise the conduct of an election for the position of Secretary and:

   - did not prescribe a method of conducting such an election that was fair and reasonable in the circumstances
   - the explanatory note suggested an open ballot would occur when in fact it was reserved to only the "persons present" at the time and there was no provision for how the open ballot would be facilitated, and

   (iii) made it much more likely than not that the election was not conducted in a fair and reasonable manner and that a large majority of potential voters were deprived of the right to participate in the ballot, which significantly and adversely affected the outcome of the ballot[28]

[21] In sum, the applicants argued at the interim stage:

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[22] Applicants' bundle - annexure 4, pp 21-23.
[23] Applicants' bundle - annexure 8, p 109.
[24] Applicants' bundle - annexure 8.
[25] Applicants' bundle - annexure 6.
[26] By Mr Nickless - Chambers Russell Lawyers.
[27] Mr Garsden – Mahoneys Lawyers. Applicants' bundle - annexure 7.
[28] Applicants' outline, 29 May 2020, para 6.1. The words in this paragraph are in many cases, but not entirely, direct quotes from the submissions made on behalf of the applicants.

> It is objectively unreasonable for the Body Corporate to hold a Digital EGM in the proposed manner, as to do so will directly and materially affect the outcome, and that it is just and equitable in the circumstances for an Order to be granted declaring the proposed Digital EGM to be void ...[29]

[22] The result is the applicants present their arguments framed around the following headings:

- Digital EGM issue
- Motion 4 being void and incapable of being carried into effect
- Motion 5 being incapable of being carried into effect

[23] I note the final orders sought by the applicants, which I describe above in paragraph 7, are not consistent with the arguments presented by them, outlined by me in paragraphs 20 and 22. What I mean is they challenge individual motions 4 and 5 in their submissions, but they do not specifically seek the voiding of those motions as outcomes, but rather a general voiding of all motions from the digital EGM. Given this distinction was put in the original application and then answered by the respondent body corporate, I will address motions 4 and 5 specifically in this decision.

[24] Parties, particularly those with legal representation, should ensure that orders sought by them in their application accord with the case advanced by them. The orders sought act as the 'relief sought', so to speak, and the grounds as the 'particulars'. I will not be in the habit of addressing issues that were not pleaded as 'orders sought'. This is not a court or a tribunal but structure is required and a basic tenet of natural justice is that a party should be put on clear notice about the case being pleaded against it.

[25] In the interests of providing structure around the applicants' arguments for this decision and given the onus of proof falls on them, I have adopted their headings in my analysis.

Analysis

Digital EGM issue[30]

[26] The applicants advance a number of what I might call 'technical arguments' about how the digital EGM was called and conducted. Of course, these types of disputes are often based on technical arguments, so that is perhaps not surprising. They submit:

a. the notice for the meeting is "void ab initio", as it failed to show a "place of the proposed general meeting"[31] – this meant, at least at the interim stage, "an anticipatory breach of the quorum requirements for General Meetings" that two people must be "personally present"[32]

b. the notice did not contain a secret voting paper and an envelope marked "secret ballot"[33]

c. the voting paper also failed to contain instructions as required by the former section 71(4)(f) (now section 88(5)(f) of the Standard Module) that a voter "may cast an electronic vote on each open motion to be decided at the meeting", instead simply providing "after signing the completed voting paper, forward it promptly to the Secretary at the address shown at the end of the Agenda"

d. they did not object 'in principle' to "utilising electronic voting methods", if such an approach had been properly supported by ordinary resolution under the former section 86(1)(d) of the Standard Module, as long as a reliable electronic voting mechanism was used and voting alternatives also are retained[34]

f. owners had a right to receive general meeting notices by post, and a:

[29] Applicants' outline, 29 May 2020, para 6.1.
[30] Applicants' outline, 29 May 2020, paras 6.3 – 6.12.
[31] Former Standard Module, s 70(2) (new s 87(2)).
[32] Standard Module, s 82(2)(a) (new combined effects of s 99(3)(b), 99(5)(a).
[33] Former Standard Module, ss 70(3)(d)(iii), 70(3)(d)(ii) (new ss 87(3)(d)(i)(B), 87(3)(d)(i)(C).
[34] The new s 104 has been substantially revised.

Right to participate in meeting in person and they have a right to cast their votes and participate in ballots using paper based forms and by writing in wet ink. Attending meetings and voting electronically should only be in addition to all other lawful ways of attending and voting.

g. 2 owners expressed an interest in the role as secretary, meaning the decision to determine the outcome needed to be decided by ballot, which was not "lawful" in this case

h. if motion 5 had failed to pass, a BCM would have to be engaged under the provisions of Part 5 of the Act, in accordance with Motion 6 – earlier, the applicants considered "this may be a preferable outcome, the reality exists that any motion purportedly passed at the Digital EGM would be unavoidably void for the reasons stated in this Application"

The respondent body corporate

[27] Directly quoting from the applicants' interim submission, the respondent notes that "the application provides in paragraph 1.2, and is premised on the basis, that lot owners did not "have the proper opportunity to cast their vote or otherwise participate in the election.""[35]

[28] Countering the applicants' general contentions about the meeting, the respondent points out:

a. the digital EGM "successfully" took place on 5 June 2021[36]

b. each digital EGM motion had 26 votes cast by owners, "a significant majority" (30 lots)

c. motions (other than to appoint a secretary) had 20 votes in favour of them

d. the motion to appoint a secretary had 19 votes provided by owners, 15 for Ms Stacey Webb, with 4 votes for Mr Van Gaal)

e. therefore, even if all the remaining owners cast a vote and voted against the resolutions or voted for a different nominee for secretary, the result would have remained unchanged, meaning "no detriment could have been suffered by any lot owners"

f. there was no way in which the digital EGM could have been called that met all legislative requirements and all government health directives, and the committee did its best in the circumstances

g. the applicants' proposed alternatives for the meeting were equally noncompliant with legislative requirements[37]

[29] Overall, argues the respondent, "it is now submitted that because of the No Detriment Suffered Position, there is even more justification for the final orders to be dismissed."[38]

[30] In regard to specific issues raised by the applicants regarding the digital EGM notice, the respondent:

a. admits no location for the meeting was provided, but no detriment to owners has been established by the applicants (it contends insubstantial irregularities are generally disregarded by adjudicators)[39]

b. submits the BCM confirmed that secret ballot papers were posted to owners on 8 May 2020,[40] the returning officer confirmed that 17 secret ballot papers were received (one from a nominee requiring verification and two declared invalid)[41] – Mr Van Gaal contacted the BCM on 26 May 2020 saying he had not received his secret ballot paper and he was sent a replacement on that date[42]

[35] Respondent's outline, 23 June 2020, paras 3.
[36] I am provided with the minutes of the EGM.
[37] Respondent's outline, 23 June 2020, paras 3-7.
[38] Respondent's outline, 23 June 2020, para 8.
[39] Respondent's outline, 23 June 2020, para 11(a).
[40] Email from BCM to Mahoneys Lawyers, 3 June 2020.
[41] Email from Peter Thornton (EGM Returning Officer) to BCM, 18 June 2020.
[42] Email from BCM to committee chairperson, 18 June 2020.

c. points out that the body corporate sent the required secret ballot material to owners, including the replacement to Mr Van Gaal[43]

The BCM

[31] At the interim stage, I asked the BCM whether they wished to be heard before I made a decision. At the interim stage, Ms Shambrook from Civium strata management argued the EGM should proceed, as:

a. delaying it would be detrimental to the body corporate as the committee was without a secretary and could not function under the legislation without one

b. committee members were "mindful of the current climate" at that stage, but contended they needed to act without delay, "for the good of all lot owners"

c. after speaking to the Commissioner's office before planning the meeting under COVID-19 restrictions:

> The digital voting was decided to be the most appropriate and fair way to address a ballot should more than one nomination [for the role of secretary] be received at the meeting. This would be no different to a physical meeting, in which only the lot owners present at the meeting vote on a preferred candidate if more than one nomination is received.

d. the body corporate passed a motion at its 2014 AGM to allow electronic voting, and the body corporate thought the upcoming EGM ensured "that all rights of the body corporate were addressed" and that it accorded with the legislation

e. the meeting was planned from information available on the Commissioner's website about holding general meetings, in particular, "encouraging other voters to submit written votes or participate in meetings remotely (e.g. by telephone or video conference) if the body corporate can facilitate such participation"

f. and finally, the committee took "every reasonable step" to ensure owners could attend the meeting on the day, whether digitally, "or to meet in the two lobbies of the building (while still maintaining social distancing)" where a committee was to be available to assist them – the BCM's office planned to have a second officer on standby to assist with any technical issues any owner may experience[44]

[32] Ms Shambrook also provided a submission following the meeting, regarding the application for final orders.

[33] The BCM reports that in her view, "the digital component of the meeting ran smoothly". Owners attended in various ways:

- 5 by telephone
- 2 by video conference
- 7 in person in the south tower
- 5 in person in the north tower
- 26 voting papers received
- no unfinancial owners, therefore all owners were eligible to vote

[34] Testing was conducted by Ms Shambrook and members of the committee of the digital methods to attend the meeting and she explains that a number of owners also contacted her to check the methods, and she assisted with the testing, independent of the committee.

[35] She stresses she listed motion 4 as requiring only an ordinary resolution, as "the Building Manager is being engaged as a Service Contractor and not as a Caretaker who holds letting

[43] Respondent's outline, 23 June 2020, para 11(b).
[44] Ms Susan Shambrook, interim submission, 2 June 2020.

rights". The former section 114 of the Standard Module, she explains, did not then require a secret ballot in such a case.[45]

[36] Ms Shambrook reminds me of the voting outcome for the role of secretary, and advises that votes for the open ballot were supervised in each tower of the scheme during the digital EGM.

[37] Ms Shambrook concludes her submission, emphasising

> I believe that this meeting was a success in that all owners who wished to attend and vote had a chance to attend the meeting in various ways (physical, video, phone or voting papers) and vote. This was, in fact more accommodating than any other meeting for the complex in which teleconference or video conferencing is not offered. No complaints were received from any lot owners that they could not join the meeting or cast a vote.[46]

Submitting lot owners

[38] As part of this process, all owners were provided with a copy of the application and an invitation was extended to them to provide a submission about this application and to 'have their say'. Of course, owners are not required to give a response and I understand there are often reasons why some owners may choose not to reply.

[39] The scheme has 30 lots and I was provided with 14 submissions, although in 4 cases the submissions are made by joint owners of lots, so 10 lots are represented in the submissions process. The applicants imply this is not a strong result and the duplicates are provided to create the impression of inflated numbers of owner opposition.[47] With a third of lots represented in a dispute, from my experience this is actually not the case. I am also more than capable of sifting through the material to weigh the value of it in such circumstances.

[40] Overall, <u>all</u> submitting owners oppose the application, strongly in some cases.

[41] I have formed the view that the general sentiments of the submitting owners are summed up in one submission, wherein the owner explains that:

a. they feel "the <u>EGM process was run very professionally"</u> by the committee and the BCM
b. all the meeting materials were provided in advance, <u>including voting papers, nomination forms, and secret ballots</u>
c. the <u>video link for the meeting worked effectively</u>
d. the committee and BCM <u>ensured all owners had an opportunity to understand the issues and processes</u> by which they could participate in the meeting
e. <u>over 20 voters were present</u> at the meeting, <u>including one of the applicants</u>
f. votes were counted and the wishes of owners were acted upon (my emphasis in this list)

[42] This owner concludes their submission with a word of support for the committee and "their hard work … during these difficult conditions" and:

> I believe that the Applicants are involved in spoiling activities that are a complete waste of our time and money. I am offended that the Applicants made comments regarding "elderly people" and made assertions regarding the capabilities of Watermark Residences owners. I am employed as Australian CEO of a multinational company and resent the comments.[48]

[43] Put another way by another lot owner:

> The applicants appear to be experienced litigators preying on a committee and waiting for any "gotcha" moment. It is a shame that the applicants' concern about the elderly not possessing the adequate knowledge or experience required to attend a digital EGM does not extend to an expectation that they read a 120 page Adjudication Application so that they can "have their say" in an informed submission.

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[45] New s 135.
[46] Ms Susan Shambrook, final submission, 22 June 2020.
[47] See paragraph 54 below.
[48] Mr Dall'Alba, lot 1.

[44] That same owner "refutes" claims by the applicants that instructions for the meeting were unclear, and that so called "elderly" owners are unable to use electronic means to attend it. They point out that 20 of the 30 owners were represented in the votes and there is no evidence the remainder did not cast a vote or attend the event because they were elderly, lacked knowledge of digital technology, or lacked instructions about the meeting. She emphasises the average vote at all general meetings for the previous 2 years was actually lower than that for the digital EGM. She also submits that the secretary was chosen 15 votes to 4, so even if the remaining 10 owners voted all for the alternative candidate (one of the applicants), the result would be unchanged.[49]

[45] Another owner reiterates some points I have already summarised, by adding that the application "is without substance", that they are also insulted as an older person that they "are not capable of using a phone or to be part of a meeting link up", that the meeting was well attended and they:

> Cannot understand why the applicants wanted to object or delay this meeting as there is repair work that needs doing urgently in watermark. The meeting was to get approval to get this work commenced and after the EGM I am aware of another three leaks in our basement in the green pipes. The applicants are fully aware that this work is urgent, and it is in the best interest of the building to get this work done ASAP.[50]

[46] The co-owner of that lot argues that no owners were disadvantaged at the Digital EGM, it was well conducted, and he does not support the application. The matters considered at the meeting were generally urgent and "were passed with a significant majority and work has started already to repair green pipes and the roof." He is pleased with the work of the committee and the BCM generally and at the meeting and concludes by stressing, "this application is a frivolous attempt by Brian Backsall and Robert Van Gaal to try and discredit the current committee and attempt to get Robert Van Gaal appointed as secretary."[51]

[47] Two further co-owners of a lot and the single owner of another confirm they received their EGM material and voting papers and "further instructions on how to participate in the 'remote' EGM (due to COVID-19) were received by email, post and also via the Body Corporate customer liaison Ms. Susan Shamrock." Obviously they do not support the application. They are of the view the meeting was conducted fairly, was well organised and the decision to hold a "virtual" EGM was appropriate given the conditions. They go further expressing confidence and support in the appointment and work of Mr Lucht as building manager, arguing his "performance in this role to date has been excellent, and the complex is benefitting from his appointment." They "have every faith that the appointment process was carried out in a professional manner, and are grateful for the committee's efforts in retaining Mr Lucht's services."[52]

[48] Another owner simply wishes to point out to me that I consider "the numbers of voters and distribution of votes, as a fair reflection of the wishes of the residents of Watermark."[53]

[49] Yet another owner argues that the meeting process went well, that they support the committee and that the committee and BCM "went to great lengths to ensure that all owners could ask for help if needed" and "left nothing to chance and tested the phone systems to ensure everything was in order." They say, "it is sad and unfortunate to see the division and acrimony that has been caused by the above named applicants."[54] Her partner repeats what she says in her submissions but adds that the committee is doing a good job "against a backdrop of constant undermining and threats "to go to the Commissioner" or threatening legal action." He feels "the kind of nuisance" demonstrated by the applicants "leads to a destabilising effect on the

[49] Mrs Paterson, lot 4.
[50] Mrs Langdale-Hunt, lot 7.
[51] Mr Langsdale-Hunt, lot 7.
[52] Mr and Ms Hempenstall, lot 8; Mrs Webb, lot 9.
[53] Ms Filmer, lot 10.
[54] Mrs Sheahan, lot 11.

committee however the committee want this matter resolved." They are driven, he adds, by motives based on resentment about "anyone else being in charge."[55]

[50] Another owner takes "umbrage" concerning the applicants' comments regarding elderly people and they "question their ability to ascertain people's capabilities and knowledge, whatever age." The meeting was well organised and run and she contends that the significant majorities supporting the election of the secretary and 3 "urgent motions" only further supports her argument and in her "opinion the aforementioned Application is disingenuous."[56]

[51] I am provided with 2 submissions from co-owners of another lot, but with some different content. They both agree the meeting was fairly conducted and materials were received by them. One owner explains how he is "offended" by the applicant's comments regarding elderly people and their use of technology. He says he is able to use a telephone and a computer, that he tested the facilities for the meeting and found it "simple" to access. He was present in the lobby for the meeting and as far as he is concerned it went well "and owners used their democratic right to vote and participate. His partner repeats these arguments in substance in her own words.[57]

[52] Finally, the last two co-owners repeat many of the points and sentiments I have outlined from other owners. They describe the application as "frivolous" and "totally baseless and frustrating the good management by the newly appointed committee which could result in unwarranted future legal costs for all owners." Notice for the meeting was provided, voting papers distributed, and instructions about the meeting sent to owners by various means. The committee is comprised of "selfless individuals who are acting in good faith without compensation". Motions were passed "which have been validly executed" to comply with the legislation, including those to upgrade a hot water pipe, roof rectification works, appointing the building manager and secretary. They both conclude by submitting, "no owner has been detrimentally affected."[58]

The applicants in reply

[53] The applicants, not surprisingly, rely on the submissions originally made with the application.[59] In their final submission, they emphasise issues surrounding the failure to list a location for the meeting on its notice.

[54] They contend that "it appears that several of the lot owners' have attempted to lodge duplicate submissions as evidence that there is a large amount of opposition to the Application", and I should only regard the actual number of submissions as totalling 10.[60] My words above regarding the owners' submissions speak for themselves. I disagree with the unsupported allegation made on behalf of the applicants. It appears to me to be oppositional for opposition's sake. It does not progress their arguments. All owners are entitled to advance their view to me and I would never discourage co-owners from explaining their ideas, given they are individuals.

[55] Again on behalf of the applicants, it is submitted that:

> We also note that the Body Corporate's solicitors have made a submission and the Body Corporate Manager has made a submission. These submissions should only be taken as a duplication of the views and submission of the incumbent body corporate committee.[61]

[56] In my view, the BCM can think and speak for herself. I was the one who sought her views in the circumstances of this case, a case raised by the applicants. Her information is from a different perspective and the 'facts', which are not contested (e.g. numbers of votes), are something I have considered in my final determination of this matter. I am capable of taking

[55] Mr Sheahan, lot 11.
[56] Mrs Hackett, lot 15.
[57] Mr and Ms de Santana, lot 28.
[58] Harsha Bhoola and Suman Makan, Lot 29.
[59] Applicants' final outline in reply, 4 August 2020, para 1.
[60] Applicants' final outline in reply, 4 August 2020, para 2.1.
[61] Applicants' final outline in reply, 4 August 2020, para 2.2.

into account that she is engaged by the body corporate when weighing the value of her evidence. Much of it is apparently objective in nature, not based on opinion.

[57] The applicants might consider that in determining a matter, I am not bound by the rules of evidence and can inform myself how I see fit. It is not uncommon to hear from a BCM in a dispute. In any case, I fail to see how Ms Shambrook's evidence is a "duplicate" of that provided by the committee. I am also more than capable of assessing this evidence and determining its value in such a case.

My determination – digital EGM

[58] The former Section 70(2) of the Standard Module provided that a written notice "must state the time and place of the proposed general meeting."[62] The applicants refer me to a number of authorities. The thrust of the argument, as I understand it, is that section 70(2) was a mandatory provision and non-compliance is fatal, meaning the non-inclusion of a meeting place leads to an invalid meeting notice and an invalid meeting.

[59] I am referred to *Lido Place*,[63] in which the adjudicator noted the decision in *Wei-Xin Chen v Body Corporate for Wishart Village CTS 19482*,[64] wherein it was held that "non-compliance of an insubstantial nature should not be allowed to imperil the actions of bodies corporate or their committees."[65] This is of course an oft-quoted case on issues surrounding meetings and non-compliance with legislative provisions.

[60] The applicants go further, referring me to the High Court decision in *Project Blue Sky v Australian Broadcasting Authority*.[66] In that decision, Brennan CJ said, inter alia:

> The terms of the statute show whether a provision governs the manner of exercise of a general power, or is a condition on a power, or merely directs the doing or refraining from doing an act before a power is exercised. The distinction between conditions on a power and provisions which are not conditions on a power is sometimes difficult to draw, especially if the provision makes substantial compliance with its terms a condition. Then an insubstantial non-compliance with the same provision seems to give the provision a directory quality, although in truth such a provision would have a dual application: substantial non-compliance is a condition; insubstantial non-compliance is not.[67] (applicants' emphasis)

[61] They also refer to a section of a separate joint judgment in that decision:

> In our opinion, the Court of Appeal of New South Wales was correct in *Tasker v Fullwood* in criticising the continued use of the "elusive distinction between directory and mandatory requirements" and the division of directory acts into those which have substantially complied with a statutory command and those which have not. They are classifications that have outlived their usefulness because they deflect attention from the real issue which is whether an act done in breach of the legislative provision is invalid. The classification of a statutory provision as mandatory or directory records a result which has been reached on other grounds. The classification is the end of the inquiry, not the beginning. That being so, a court, determining the validity of an act done in breach of a statutory provision, may easily focus on the wrong factors if it asks itself whether compliance with the provision is mandatory or directory and, if directory, whether there has been substantial compliance with the provision. A better test for determining the issue of validity is to ask whether it was a purpose of the legislation that an act done in breach of the provision should be invalid. This has been the preferred approach of courts in this country in recent years, particularly in New South Wales. In determining the question of purpose, regard must be had to "the language of the relevant provision and the scope and object of the whole statute".[68] (applicants' emphasis – references removed)

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[62] New s 87(2).
[63] [2010] QBCCMCmr 132.
[64] Appeal 4080 of 2000, District Court Brisbane, 29 May 2001 (Unreported).
[65] Applicants' final outline in reply, 4 August 2020, para 4.2.
[66] [1998] HCA 28.
[67] *Project Blue Sky v Australian Broadcasting Authority*, para 39, per Brennan CJ.
[68] *Project Blue Sky v Australian Broadcasting Authority*, para 93, per McHugh, Gummow, Kirby, Hayne JJ.

[62] I am familiar with the case of *Project Blue Sky*. The Court was considering what the effect might be of non-compliance with section 160(d) of the *Broadcasting Services Act* on the Australian content standard.

[63] The effect of section 160 was that the Australian Broadcasting Authority had 'to perform' its functions in a manner consistent with four listed matters (including Australia's international obligations).

[64] I note the joint judgment of the Court also held:

> 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 with 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. Unfortunately, a finding of purpose or no purpose in this context often reflects a contestable judgment. The cases show various factors that have proved decisive in various contexts, but they do no more than provide guidance in analogous circumstances. There is no decisive rule that can be applied; there is not even a ranking of relevant factors or categories to give guidance on the issue.[69] (my emphasis – references deleted)

[65] The most important issue is assessing the significance of the statutory requirement in question. Non-compliance might affect the effectiveness of a decision if it is an essential element of a statutory scheme.[70] Other considerations such as public inconvenience were also relevant in that matter (but not so in the present case), as their Honours noted:

> Courts have always accepted that it is unlikely that it was a purpose of the legislation that an act done in breach of a statutory provision should be invalid if public inconvenience would be a result of the invalidity of the act.[71] (my emphasis – references deleted)

[66] The judges in the joint judgment held that section 160 of the *Broadcasting Services Act* merely regulated an existing function, which 'strongly indicate[d]' that a breach of section 160 should not invalidate a decision.[72]

[67] I am not of the view that the joint judgment gives much weight to the apparently mandatory language of the legislation under scrutiny.

[68] Consistent with principles enunciated by the High Court, like a substantial number of provisions in the legislative regime underlying community titles schemes, I am not aware of any express provision in the Act or Standard Module that deals with the consequences of non-compliance, or breaching the statutory requirement to name a location for a meeting in its notice. I think this is an important issue that is sometimes forgotten by those who deal with the legislation.

[69] The legislature realised that from time to time, non-compliance with some apparently mandatory provisions will occur. Non-compliance should not be a practice, it should not be encouraged and bodies corporate should take steps to avoid such incidents, but that is why there are dispute provisions and adjudicators to deal with such instances, when requested to do so.

[70] If I always strictly apply all provisions of the legislation in a literal sense, it would contradict the intentions of the legislative regime underpinning community titles schemes (e.g. of self-determination), legal precedent and the fact I "may make an order that is just and equitable in the circumstances … to resolve a dispute."[73] I am also conscious that with regard to the latter role:

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[69] *Project Blue Sky v Australian Broadcasting Authority*, para 91, per McHugh, Gummow, Kirby, Hayne JJ.
[70] *Project Blue Sky v Australian Broadcasting Authority*, paras 92-93, per McHugh, Gummow, Kirby, Hayne JJ.
[71] *Project Blue Sky v Australian Broadcasting Authority*, para 97, per McHugh, Gummow, Kirby, Hayne JJ.
[72] *Project Blue Sky v Australian Broadcasting Authority*, para 94, per McHugh, Gummow, Kirby, Hayne JJ.
[73] Act, s 276(1). This power has been said to be very wide, but of course is not unfettered, see: *Body Corporate for Palm Springs Residences CTS 29467 v J Patterson Holdings Pty Ltd* [2008] QDC 300, para 98; *Finger v Dickie* [2015] QCATA 113, paras 14, 15, 35, 36.

> The concept denotes the vesting of the relevant decision-maker with a discretion. This discretion is not unprincipled or unconstrained; the Legislature properly contemplated that the discretion would be exercised within the confines of the statute, common law and any applicable principles of equity.[74]

[71] McGill J once commented that "this regulation is as incomprehensible as it is over-prescriptive", when discussing aspects of the Accommodation Module.[75] In another appeal from an adjudicator's decision, Dr Forbes observed:

> The BCCMA is a lengthy, technical and complex instrument, with no fewer than six sets of subordinate and similarly complex '*module regulations*'. It cannot be the case that the legislature expected all, or even most committee members of a body corporate, small, large or very large, to be experts in corporate law, or masters of community management. Indeed, the BCCMA implicitly recognises that, if this legislation were at all times, and in all circumstances applied with the utmost rigour and most precious attention to detail, its objects and policies would be retarded by endemic disputation, rather than advanced. The direction that a '*body corporate must act reasonably*' in the performance of its '*general functions*' does not suggest that every minor irregularity should be pounced on to impede or paralyse the normal conduct of business.[76]

[72] The simple fact is that mistakes occur and they should not be always fatal to machinery processes under the Act or relevant Module. The circumstances facing committees and schemes in 2020 were unusual and challenging.

[73] It is important to recognise that the High Court has also held that the fact a statutory requirement is expressed by the use of 'must', is not always conclusive.[77]

[74] The High Court, for example, held with regard to a bankruptcy notice issued in accordance with section 306 of the *Bankruptcy Act 1966*, that:

> The use of the word "must" is significant, but it should be kept in perspective. A prescription as to a form to be followed will normally be expressed in language of obligation rather than of permission. That is the idea of a form. Such a prescription raises the question to be considered in the present case; it does not answer it.[78]

[75] The Court went on to explain:

> To describe an error or a deficiency in a bankruptcy notice as involving a failure to meet a requirement made essential by the Act is to state a conclusion reached after a consideration of the legislative purpose and an evaluation of the significance or importance of the error or deficiency in the circumstances of the case. That question is not answered by observing that there has been a failure to meet a requirement. … Furthermore, as noted earlier, the fact that the requirement is expressed by the use of the term "must" is not conclusive.[79] (my emphasis)

[76] The High Court acknowledged that other circumstances in a different context may lead to different outcomes.[80]

[77] Last, the applicants refer to *The Retreat Lakeside Currimundi*.[81] This decision was concerned with a situation where a full 21 day meeting notice period was not provided to owners and this was held to be a "fundamental breach of procedure that is fatal to the whole of the meeting". I wish to make 2 points about this argument before I move on. First, the notice period is a different issue to a failure to identify a meeting location. Second, this case should not be cited in isolation, as this is a simplistic view of the challenges involved in such cases. It presents a

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[74] *Finger v Dickie* [2015] QCATA 113, para 14, per Carmody J.
[75] *Body Corporate for Palm Springs Residences CTS 29467 v J Patterson Holdings Pty Ltd*, n10, p 8.
[76] *Carroll and Ors v Body Corporate for Palm Springs Residences CTS 29467* [2013] QCATA 21, paras 22-23.
[77] *Adams v Lambert* [2006] HCA 10, paras 14, 29, considering s 306 of the Bankruptcy Act 1966 (C'th).
[78] *Adams v Lambert*, para 14, per The Court.
[79] *Adams v Lambert*, para 29, per The Court.
[80] *Adams v Lambert*, n 25, p 12, per The Court: "In a different statutory context "must" will sometimes require an imperative interpretation: *SAAP v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 79 ALJR 1009 at 1014 [16], 1024 [70], 1035 [136], 1040 [173], 1046 [208]; 215 ALR 162 at 166-167, 180, 196, 203, 211."
[81] [2004] QBCCMCmr 234.

very narrow view of the interpretation which I argue is out of step with more recent thinking by adjudicators, including me.[82] In some ways, the same principles emerge here as well.

[78] The purpose of the provisions of the former section 70 of the Standard Module (entitled 'Notice of general meetings')[83] were clearly to ensure that owners are properly put on notice of a general meeting and they are fully informed of the agenda for the meeting and provided with necessary voting materials. In sum, that is the 'legislative purpose' of the section. At times, errors will occur.

[79] I cannot see why section 70(2) required an imperative interpretation absolutely, in all cases. Meeting notices should list the proposed meeting place. This makes logical sense. It denotes fairness. That does not mean that unusual circumstances or error might not lead to situations where upon examination and reflection, non-compliance cannot be excused. I suggest the rule is not absolute, but the circumstances will be uncommon.

[80] I would not always excuse such an occurrence, but as I say time and time again, provisions of the legislation pose questions that are often context and factually dependent. Otherwise, there would be no need for dispute resolution provisions and no adjudicators. Simple non-compliance would render an issue moot. My comments should not be seen as carte blanche to disregard the provision referred to here, or any others in the Act, or any Module for that matter.

[81] There is a dearth of adjudicators' orders regarding the issue of the non-inclusion of a date on a meeting notice.

[82] I am obviously aware that the most common scenario put to us regarding the former section 70 of the Standard Module[84] (or its equivalent in other Modules) is when an allegation is levelled that an insufficient meeting notice period was provided.[85] I have referred to that issue already. The only analogy from those matters is the use of the word 'must' in the provision.

[83] The applicants contest the claim by the body corporate that at the time the digital EGM was called, it did not adhere to all legislative and government requirements. I am referred to a list of possible issues a body corporate "may" consider when calling and conducting meetings (e.g. deferring a meeting, encouraging owners not to attend in person, and so on). The applicants also point to the "Queensland Government Public Health Direction (referred to as the Movement and Gathering Direction) published at 11.00am on 31 May 2020".[86]

[84] Strangely, in my view, the applicants submit:

> We also note that several lot owners congregated in person in both the South and North Tower lobbies for the EGM which seems to directly contravene the respondent's argument that it was not possible to call an EGM that met all legislative requirements and all government health directives.[87]

[85] In their view, "instead of specifying that the EGM was to be a "Virtual EGM", without stating a place for the meeting, the Body Corporate may have specified either the South or North Tower lobby and the EGM may have been properly called" within the scope of the legislation.[88]

[86] As I understand the applicants' reasoning, by its actions the body corporate encouraged a "congregation' of owners, risking social distancing. Instead, the body corporate should have held the meeting with no-one present, a "virtual EGM" by identifying a tower of the scheme as the meeting place on the notice, except no-one was to be actually present. I struggle to understand what 'ill' the applicants are trying to remedy. At first instance they claim to have held concerns that many owners were too elderly to be capable of using electronic means to

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[82] See my views in: *Ocean Pacifique* [2020] QBCCMCmr 610, paras 96-109.
[83] New s 87.
[84] New s 87.
[85] I myself have invalidated meetings on that basis when the circumstances justify it, see for example: *Ocean Pacifique* [2020] QBCCMCmr 610; *Ocean Pacifique* [2020] QBCCMCmr 611.
[86] Applicants' final outline in reply, 4 August 2020, paras 3.2-3.3.
[87] Applicants' final outline in reply, 4 August 2020, para 3.4.
[88] Applicants' final outline in reply, 4 August 2020, para 3.5.

attend the meeting, but then they contradict themselves. I am not sure they can have it both ways. To quote their words:

> The Applicant estimates that approximately 75% of the owners are elderly and do not possess the adequate knowledge or experience required to be able to attend and participate in the meeting via conference call or video.[89]

[87] Their final argument about what the body corporate should have done is to conduct an entire 'virtual meeting'. There is something circular and contradictory in these arguments.

[88] I am told by the applicants that their concern about the body corporate failing to identify the location for the meeting is not "simply a technical one". Instead:

> Our client is concerned that lot owners could be confused about the appropriate place for the EGM and furthermore it could set a precedent for future general meetings in the Scheme. There is a significant risk that based upon this precedent, the Body Corporate may notify lot owners of a general meeting without specifying a meeting place, and then at a later date of the Body Corporate's choosing, the Body Corporate may notify the lot owners of the meeting place.[90]

[89] I cannot seriously accept the argument that the committee may use the events of last year as a precedent. It is unsupported, speculative and detracts from an already fragile case. The committee through its own actions and via its BCM in follow-up communications ensured owners knew about the location of the meeting, ahead of the digital EGM. To suggest the committee may use this as a precedent for behaviour in years to come smacks of feelings of distrust or is simply a facile assertion. The 2021 AGM recently occurred and I have viewed the minutes from that meeting. I now have the benefit of hindsight to see the unrealistic fears of the applicants have not been realised.

[90] The applicants concentrate on an argument that the body corporate did not meet the requirements of substantial compliance,[91] and "fundamentally departed" from the legislative requirement that a notice "must" include details of a location for a meeting.[92] In failing to identify a meeting location, it has not departed from the requirements of the legislation "in a minor or insubstantial way."[93] As discussed, I am referred to a number of decisions, the applicants contend, support their argument.[94]

[91] I acknowledge it would have been simpler for all concerned if the body corporate had approached the location aspect of the meeting notice differently. I am not persuaded by the arguments made on behalf of the applicants, however, that I should invalidate the digital EGM. I have discussed the nature of section 70(2) and the authorities and I am not of the view that it has to be considered an imperative or mandatory provision from which non-compliance automatically results in a finding that a meeting was unlawfully convened in all cases. I repeat, compliance is a necessary goal, but I am not of the view that in the limited circumstances of this case where no disadvantage has been demonstrated, such non-compliance is fatal. I need to not just consider the issue of non-compliance in isolation in a mechanical way, I need to take into account the surrounding circumstances and any resulting outcomes or consequences.

[92] The applicants' case does not come up to proof. In fact, a number of factual findings I will now make (not exhaustive), work against the applicants' arguments:

a. there were no complaints before, during or after the meeting concerning the lack of a meeting date listed on the notice from any other owners, to the committee, or the BCM

b. not a single other owner (other than the applicants) has complained to me about the lead up meeting process, throughout the submission process

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[89] Applicants' outline, 29 May 2020, para 1.3(a).
[90] Applicants' final outline in reply, 4 August 2020, para 3.6.
[91] Applicants' final outline in reply, 4 August 2020, para 4.
[92] Applicants' final outline in reply, 4 August 2020, para 4.5. See former Standard Module, s 70 (new s 87).
[93] Applicants' final outline in reply, 4 August 2020, para 4.1.
[94] Applicants' final outline in reply, 4 August 2020, paras 4.2-4.4.

c. there have been no claims by the applicants that the meeting outcomes do not properly and fairly reflect the will of lot owners

d. claims made that older residents might have been confused by the nature of the digital EGM are speculative, baseless, and not supported by evidence of a single witness, including the applicants

e. submissions (14 in total) representing 10 lots strongly refute arguments made by the applicants and generally support the work of the committee and BCM, particularly in regard to the digital EGM

f. there is no evidence that any owner was not aware of the meeting

g. a number of owners exercised their right to attend the meeting in person, not perturbed by the process, or demonstrating confusion based on the contents of the meeting notice

h. there is no evidence any owner was prevented from exercising their voting rights

i. there is no evidence that any owner suffered prejudice, including the applicants who do not claim otherwise

j. the body corporate was required by legislation to hold a meeting to elect its secretary

k. the process to elect the committee secretary was according to law

l. the committee was attempting to deal with the challenges posed by COVID-19 restrictions and this is a necessary consideration

m. the committee and BCM communicated with owners in the lead up to the meeting (e.g. by email) to ensure the meeting date and arrangements to attend were clear and understood

n. there was high owner representation demonstrated by as many as 26 voting papers received from a total of 30 owners (a very high rate by my general experience), implying owners well knew and understood the meeting arrangements (a submitting owner informed me the rate of voting paper return was actually higher for the digital EGM than the general experience for the scheme)

o. voting was strongly supportive of the motions determined at the meeting, demonstrating the pointlessness of repeating the process

p. the body corporate would be put to unnecessary inconvenience and expense that is not proportionate to the facts and non-compliance

q. despite allegations by the applicants, there was substantial compliance, for the reasons I have provided

[93] To a small extent, I am conscious the scheme has already held its 2021 AGM. Owners have voted on new budgets, on electing a committee and other business. To return them back to the issues of the digital EGM from June 2020 seems unnecessary and not just and equitable.

[94] The onus of proof falls on the applicants, and on balance they have not satisfied that onus. In fact, this was not a strong case from the beginning.

[95] I will not invalidate the meeting and this aspect of the application is dismissed. If it is not apparent, for the reasons discussed I am not of the view that the notice of the digital EGM is invalid, so I would not grant any orders concerning that aspect of the application. I will also not be directing the body corporate to call a new EGM, given my findings.

[96] I am sure this body corporate and others will ensure all future meeting notices comply with all aspects of the legislation. Even if a later complaint is not supported at adjudication, non-compliance may result in unnecessary expense and distraction for a community titles scheme. A fully compliant meeting notice is hopefully less likely to attract the notice of some owners and provide grist for a mill of disputation.

Motion 4 is void and incapable of being carried into effect

[97] The applicants argue motion 4 was at all times void, because it sought "authority to engage a service contractor, within the definition of that term in Section 15 of the BCCMA, by way of an open motion" … "instead of a secret ballot without the use of proxies as is required by Section 114(2) of the Standard Module."[95] Further, there were no details of the start date of the engagement, as required by section 114(2).[96] There are, therefore, 2 limbs to the argument.

[98] The minutes for the EGM record details for the resolution, entitled "Building Manager", resulting from motion 4 and that it was:

> RESOLVED that the Body Corporate resolves to enter into a Building Management Agreement with Derek John Lucht ABN 1897 849 2640 for a term commencing on (Date to be confirmed – day after EGM) and expiring 31 March 2022. The remuneration is to be $70,000 per annum. Further, the Building Management Agreement is to be signed under the seal of the Body Corporate by two members of the Committee, one of whom must be the Chairperson or Secretary. The Building Management Agreement is to be in the form circulated to owners with this motion. The Building Manager costs are included in the AGM approved 2020 Administration Budget. (my emphasis)

[99] The minutes also record that:

> During the meeting, the Chairperson advised that the note from Mr R Van Gaal also considered that the Chairperson must rule Motion 4 out of order because Mr R Van Gaal considered that it would be unlawful or unenforceable or in contravention of BCCMA or Regulations.

[100] The motion was carried into resolution by the scheme's lot owners, 20 votes to 6.

[101] The motion was proposed by the committee and the explanatory note provided to owners stressed:

> Derek John Lucht commenced with Watermark on 30 March 2020 for an initial period of 7 weeks. Derek settled in very well and is a good fit for Watermark. The Committee is happy with Derek's service and recommends extending the agreement to 31 March 2022, remuneration to be $70,000 per annum, paid fortnightly, pro-rata. Terms, conditions and duties to be in the form circulated to owners with this motion, similar to previous Building Manager Agreements for Watermark. Note: duties include pool cleaning and general cleaning of the buildings. The Building Manager Costs are included in the AGM approved 2020 Administration Budget.[97] (my emphasis)

[102] The body corporate argues the engagement is not unlawful, as section 114(2)(b) of the former Standard Module only required the use of a secret ballot to appoint a caretaking service contractor, who by definition is also a letting agent.[98] This was not the case at this meeting. The proposal was to appoint someone only as a building manager. Further, that the motion provided the start date of the engagement would be the day following the EGM.[99]

My determination – motion 4

[103] As I have said, there are 2 aspects to the applicants' case to void motion 4. First, that the motion required a secret ballot. Second, the motion did not detail a starting date for the agreement.

[104] I have looked at the proposed contract of appointment, connected with motion 4.[100] Some relevant points I draw from that document are:

a. Mr Lucht is referred to as "the Manager" in the agreement[101]

b. the Manager is said to be a "'service contractor' as that term is defined by section 15 of the BCCMA"[102]

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[95] New s 135(2).
[96] Applicants' outline, 29 May 2020, para 6.13.
[97] Applicants' bundle - annexure 5, p 93.
[98] New s 135.
[99] Respondent's outline, 23 June 2020, para 14(d).
[100] Applicants' bundle - p 65.
[101] Heading.
[102] Preamble, para D.

c. the Manager is defined as "an independent contractor of the Body Corporate",[103] including for such issues as income tax, superannuation, leave, workers compensation etc.,[104] and public liability insurance[105]

d. the Manager is responsible for 'Duties' set out in Schedule 2[106]

e. remuneration of $70,000.00 per year for 12 months[107]

f. duties are set out in Schedule 2 under headings such as 'security service', 'keys' (keep master key or keys for the scheme), 'works and specifications' (engaging independent consultants upon body corporate request), 'maintenance and management', 'observance of by-laws', advising the body corporate on various issues, arrange and supervise sub-contracted works, 'remain aware about general condition of the Scheme', 'improvements generally' (including installing fittings as required), 'incidental duties' – an additional 17 specific duties are listed (e.g. cleaning, swimming pool, car parking, drains, lighting)

[105] In my assessment, Mr Lucht was to be a 'service contractor', but as a building manager, for want of a better term.

[106] 'Service contractor' is defined in section 15 of the Act to be:

> A person is a service contractor for a community titles scheme if the person is engaged by the body corporate (other than as an employee of the body corporate) for a term of at least 1 year to supply services (other than administrative services) to the body corporate for the benefit of the common property or lots included in the scheme.

[107] Examples provided in section 15 are of someone providing "caretaking services" or "pool cleaning services".

[108] A letting agent is someone "authorised by the body corporate to conduct a letting agent business for the scheme",[108] whereas a 'caretaking service contractor' is a service contractor who is also a letting agent, or their associate.[109]

[109] The former section 114(2)(b) required a secret ballot to appoint a letting agent, a service contractor who is to be a caretaking service contractor, or when agreements with those people were to be amended.[110]

[110] I find the proposed appointment of Mr Lucht detailed in motion 4 was in the role of a service contractor as a 'building manager'. The duties he was to undertake set out in Schedule 2 of the proposed contract make it clear his appointment was not as a letting agent, or a caretaking service contractor.

[111] The provisions of the former section 114(2)(b) concerning requirements for a secret ballot were not applicable in this case.

[112] The body corporate is correct in the assertions it makes regarding the lack of a requirement for a secret ballot. The applicants have not proved to me, to the requisite standard, this aspect of the application concerning their case about motion 4.

[113] That leaves the second claim that no starting date for the agreement was specified in motion 4.

[114] The applicants refer me to *Waterways Apartments*,[111] and the following quotation regarding 'non-compliance' with section 114(2), and a passage from that decision wherein the adjudicator said, "I consider an engagement or authorisation under section 114(1) of the Standard Module

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[103] Clause 1.3.
[104] Clause 3.3.
[105] Clause 10.1.
[106] Clause 3.1.
[107] Schedule 1 – Remuneration 1.
[108] Act, s 16(1).
[109] Act, Schedule 6 Dictionary.
[110] New s 135(2)(b).
[111] [2015] QBCCMCmr 203.

requires strict compliance with section 114(2)."[112] A more detailed assessment of that case is required, to understand its facts and the reasoning of the adjudicator.

[115] *Waterways Apartments* involved a contest between two candidates for a "caretaking and letting agreement" with the scheme. A motion with alternatives was proposed, so that owners could choose between the two entities. The adjudicator noted:

> The EGM minutes record that the person chairing the meeting ruled Alternative B (Rouvas) out of order for noncompliance with section 114 of the Standard Module because: the agenda did not include a copy of the proposed agreement; the motion did not propose a start date and an end date; and the motion did not propose a "clear remuneration amount".[113] (my emphasis)

[116] The result was lot owners were left with a single option. The applicant in that case sought an order to void the motion. Perhaps not surprisingly, the committee argued the motion complied, or substantially complied, with section 114.[114] The adjudicator emphasised:

> In my view, a technical issue formed the basis of the chairperson's ruling. In and of itself, there is a legal basis for the ruling. However, when considering what is just and equitable in the circumstances, I am of the view it is relevant to note the clear intention to basically replicate the existing caretaking and letting agreement with Rouvas.

[117] There was support among owners for the contender who had been excluded from the process. The adjudicator found the chairperson should not have ruled the motion out of order to the extent of excluding an alternative. That is because:

> The ruling had the effect of changing the subject matter of the motion. This is because the original motion lost its identity. Alternative B was not a stand-alone motion. It was an integral part of Motion 7. The ruling materially altered the motion. A different substantive motion came into existence.
>
> The EGM minutes indicate the chairperson did not make the ruling on Alternative B until after Motion 7 had passed and prior to the declaration of the result of voting on the alternatives. It is apparent that Alternative A was then selected. For the reasons I have discussed, the body corporate decision is void.[115]

[118] The facts and circumstances in *Waterways Apartments* could not be more different to the current case. That aside, moving back to its relevance to section 114(2), the motion in *Waterways Apartments* was defective in several ways. A copy of the proposed agreement was not attached, the motion failed to show a start date and an end date, and it was unclear about the quantum of remuneration. That, of course, was not the ultimate question for the adjudicator. The non-compliance may have prompted the chairperson to rule the motion out of order, but it was his ruling that resulted in the motion being voided, as it irreparably changed the character of a motion with alternatives which became the significant point.

[119] The same adjudicator has decided a number of disputes, involving questions about the former section 114, to a lesser or greater extent.

[120] *Zaminder Court* was about a general meeting resolution designed to authorise the appointment of a body corporate manager.[116] Two options were put to owners, but a lot owner complained that not enough information was provided before the meeting, contrary to the requirements of the legislation.[117] The proposed contract for one provider was not supplied to owners, but the adjudicator acknowledged this was not required, although preferable as I think it meant that owners were apprised of the 'terms of the engagement'.[118] Neither the motion nor any other material provided the start and end dates of the agreement. The second alternative was itself confused in the detail it provided to owners.

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[112] New s 135.
[113] *Waterways Apartments*, para 2. New Standard Module, s 135.
[114] *Waterways Apartments*, para 7.
[115] *Waterways Apartments*, paras 14, 17.
[116] [2017] QBCCMCmr 13.
[117] *Zaminder Court*, paras 2-3.
[118] *Zaminder Court*, paras 20, 23. See: Former Standard Module, s 114(2)(c)(i) (new s 135(2)(c)(i).

[121] Adjudicator Rosemann commented that:

> Even if the legislation did not require the 'terms' of the engagement other than the details of its duration to be included in the meeting material, some fundamental information about the proposed engagement – particularly its cost – must be given to owners so that they are properly informed as to the nature and effect of the proposal and (in the case of a motion with alternatives) have sufficient information to compare the alternatives.
>
> …
>
> If owners are not informed about the cost of an engagement or at least basic details as to the nature and terms of the engagement, they may not be properly on notice of the proposed resolution.[119] (my emphasis)

[122] The adjudicator voided the motion, apparently not based on reasons surrounding the nature of the supplied meeting material, but rather that the issue was not properly put as a motion with alternatives, and no explanatory material was supplied.[120]

[123] The same adjudicator dealt with similar issues in *Riverview Gardens*.[121] The body corporate held an AGM and a motion with alternatives was put to owners to choose between 2 candidates to act as the body corporate manager.

[124] The chair ruled the motion out of order on the basis that it did not comply with the-then section 112 of the Accommodation Module (same terms as section 114 of the Standard Module).[122] The applicants to that dispute argued the chairperson should not have ruled the motion out of order, as it substantially complied with the legislation and he also failed to adequately provide reasons for his decision.[123]

[125] The adjudicator dismissed the application, arguing that section 112 "is prescriptive". In that case details of "when the engagement begins and ends" was omitted and the provisions of those details is a "mandatory" requirement of the legislation.[124]

[126] Again, in *Gold Coast Summer Waters Resort*,[125] the same adjudicator invalidated a resolution designed to engage a body corporate manager. In that matter, the applicant argued:

> Option A was invalid because it did not state the term of the agreement, the start and finish date, or how the fee would be calculated on a per lot basis, and the enclosed agreement did not have a start and finish date or fee calculation. The applicant asked the chair to rule Option A out of order but he declined to do so.[126] (my emphasis)

[127] Referring to *Zaminder Court*, the adjudicator noted:

> The failure to state when the term begins and ends is a fundamental defect. I have previously determined that a motion to engage a BCM that provided a copy of the proposed engagement, and stated that the engagement would be for three years, but did not include the start and end dates for the agreement in the motion or any of the material provided in the meeting notice, was not effective.[127]

[128] To reiterate, the applicants complain, "there are no details of the start date of the engagement, where [the former] 114(2) of the Standard Module specifically requires both the start and end date of the engagement to be."[128] They are aggrieved by only that aspect of the motion.

[129] Former section 114(2)(c) of the Standard Module began "the material forwarded to members of the body corporate" must include details, including "when the term of the engagement or

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[119] *Zaminder Court*, paras 24, 26.
[120] *Zaminder Court*, paras 32-36.
[121] [2017] QBCCMCmr 57.
[122] *Riverview Gardens*, para 2.
[123] *Riverview Gardens*, paras 4-5.
[124] *Riverview Gardens*, para 24.
[125] [2018] QBCCMCmr 65.
[126] *Gold Coast Summer Waters Resort*, para 4.
[127] *Gold Coast Summer Waters Resort*, para 29.
[128] Applicants' outline, 29 May 2020, para 6.13(b).

authorisation begins and ends".[129] The result is the details were not necessarily required in the motion itself, just in the "material forwarded to members".[130] The question I ask myself is whether the combined effects of the "material" in this case provided enough details to sufficiently inform owners in accordance with the legislation.

[130] I acknowledge that motion 4 might have been worded differently, with an unambiguous starting date for the agreement. The motion included other necessary details mentioned in the former section 114(2), and as part of those details, the motion provided the start "(Date to be confirmed – day after EGM) and expiring 31 March 2022".

[131] It is clear the body corporate provided a copy of the proposed agreement to owners, prior to the digital EGM. It also provided an explanatory note for motion 4.

[132] The explanatory note included, inter alia, that:

> Derek John Lucht commenced with Watermark on 30 March 2020 for an initial period of 7 weeks. Derek settled in very well and is a good fit for Watermark. The Committee is happy with Derek's service and recommends extending the agreement to 31 March 2022 …

[133] Owners could have been in no doubt when the agreement was to expire.

[134] The draft agreement provided to owners included at the outset "This agreement made on ____day of May 2020".[131]

[135] The digital EGM was held on 5 June 2020. Motion 4 authorised the agreement with Mr Lucht and so needed to be concluded following the meeting.

[136] I disagree with the applicants there are necessarily no details of the start date of the agreement provided. I have instead formed the view that multiple dates were provided and the date in the motion is unclear to the extent to render it as no real date. A date in May is alluded to in the draft agreement and motion 4 does not provide a definite date. "Date to be confirmed" and the "day after EGM" are in combination amorphous.

[137] I am left with the impression owners possibly knew the agreement was to be executed immediately after the meeting, but on balance, I remain unconvinced. It is clear the legislature inserted the requirements into the Module for a reason. Owners need to understand the terms of such an agreement, for example, its cost, its time span and when it begins and ends.

[138] The applicants make a valid point on this aspect of motion 4 and the agreement with Mr Lucht. Whether it needed to be made is another issue.

[139] I will void motion 4, with some reluctance.

[140] I have formed this conclusion about this outcome after reviewing all the evidence and applying necessary legislation. In the lead up to determining this overall dispute, another issue concerning motion 4 became apparent. Given the order I make regarding motion 4 the other issue is likely of little consequence, but in view of the inquisitorial path I followed utilising my investigative powers with the parties, I think in fairness to them it is appropriate to address it.

Choosing the building manager and body corporate spending limits

[141] A question was raised in my mind when reviewing the material in this matter about whether the body corporate proposed motion 4 in a legislatively appropriate manner. What concerned me was whether the body corporate was able to appoint a building manager, on the basis of a single quotation for services. The scheme resolved to engage a 'service contractor', and under the former section 114 of the Standard Module, it was required to supply information to owners ('form of engagement').[132] The Act provides:

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[129] Former Standard Module, 114(2)(c)(i)(A).
[130] This remain the same in the new s 135.
[131] Applicants' bundle - p 66.
[132] Standard Module, s 116. New slightly different s 75.

> A person is a service contractor for a community titles scheme if the person is engaged by the body corporate (other than as an employee of the body corporate) for a term of at least 1 year to supply services (other than administrative services) to the body corporate for the benefit of the common property or lots included in the scheme.[133]

[142] As I have said already, there is little doubt in my mind that the services provided by Mr Lucht (and into the future) mean he is a 'service contractor' within the terms of the Act.

[143] Former section 152 of the Standard Module provided that if the cost of engaging a service contractor exceeds "the relevant limit for major spending for the community titles scheme", then at least 2 quotations must be obtained by the committee and provided to owners and presented in what was called a motion with alternatives.[134] The Standard Module permits a single quotation if "exceptional reasons" exist and "it is not practicable to obtain 2 quotations",[135] something I will shortly discuss in more detail.

[144] We always have an obligation to ensure natural justice underlies our decisions. This is would the case whether the legislation explicitly stated it, or not. The unusual investigative provision of the Act in some ways repeats that obligation. Conversely, I am not here to 'make a case' for a party, particularly when they are legally represented.

[145] Member Howard of the Queensland Civil and Administrative Tribunal once noted:

> The failure by an Adjudicator to properly investigate under ss 269 and 271 of the BCCM Act may, in some limited circumstances, constitute a denial of natural justice. This may arise, for example, when there is a lack of logically probative evidence as a result of a choice of an Adjudicator not to further investigate. However, an Adjudicator may limit investigations to inviting submissions from interested parties and is not generally obliged to seek clarification or further information from a party which has provided '*apparently sensible*' submissions.[136] (references deleted)

[146] The issues raised about the number of quotations required was something that arose for me, before drafting this decision. I felt it necessary to investigate it further to determine its bearing, if any, on the outcome sought.

[147] Other adjudicators have said something about the quoting issue in other decisions, although I recognise cases are factually dependent.

[148] *Palmerston Tower*[137] was an interim decision concerning an impending extraordinary general meeting of that scheme. One motion to be considered was devoted to engaging a person "to provide caretaking services for the scheme (including trimming gardens and lawns, maintaining the pool and spa, and cleaning the car basement, driveway and pool surrounds) at a base cost of $60,000 and an initial term of three years."[138] There were arguments about whether the person would be a caretaking service contactor and so caught by the requirements of the former sections 114 and 116 of the Standard Module.[139]

[149] Of interest to me here, Adjudicator Dowling noted "at first glance there is a question as to the motion's compliance with [the former] section 152 of the Standard Module."[140] This was because the scheme wished to engage a service contractor and the cost was greater than the relevant limit for major spending for the scheme, which in the absence of other evidence was prescribed $10,000. This meant, argued Adjudicator Dowling, the owners proposing "the motion had to obtain at least two quotations for carrying out the work or supplying the

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[133] Act, s 15.
[134] Standard Module, s 152(1)-(3), 7. New s 173(1)-(3), 7.
[135] Standard Module, s 152(6). New s 173(6).
[136] *Walden v Body Corporate for Broadwater Tower* [2015] QCATA 166, para 21. Although I have omitted the Learned Member's references, she references *Hablethwaite v Andrijevic* [2005] QCA 336 as the authority for her final sentence in the paragraph.
[137] [2020] QBCCMCmr 222.
[138] *Palmerston Tower*, para 1.
[139] New ss 135, 137.
[140] New s 173.

services", and "the owner of each lot had to be given copies of those quotations." No reasons were offered for non-compliance with the provisions of section 152 of the Standard Module.[141]

[150] Adjudicator Dowling dismissed the application for an interim order. I am aware the application for a final order was withdrawn.

[151] In *Monte Carlo Court*, Adjudicator Rosemann was asked to consider the validity of an extraordinary general meeting and also a number of motions from the meeting.[142] Motion 3 was designed to seek support to appoint an "onsite body corporate manager/caretaker" for $88,000.00.[143] The adjudicator described the motion as "confusing".[144]

[152] After discussing relevant legislative requirements, the adjudicator found:

> Most significantly, the motion involved expenditure of $88,000 is clearly above the major spending limit for the scheme. Accordingly, two quotes were required to accompany the notice of meeting and the motion needed be included on the agenda as a motion with alternatives. It appears that two quotes were included in the EGM notice. However Motion 3 was not presented as a motion with alternatives and only allowed for the engagement of Daniel Gibson.[145]

[153] I must confess after reading the decision I am uncertain whether there was a single quote or more than one.[146] That does not matter with regard to the current matter. The issue of interest for me is whether major spending limits were adhered to, or forgotten, and what effect that might have on the outcome.

[154] The adjudicator noted multiple errors with the motion, including failing to attach a copy of the proposed agreement with the contractor, outlining dates spanning the agreement, and so on.[147]

[155] She did state that:

> Even if the motion had not failed in regard to these technical statutory requirements, I am of the view that the confusing and poorly worded motion and limited explanatory information (including whether the nature or term of the engagement) was inadequate to put voters clearly on notice as to exactly what [was] being proposed by the motion.[148]

[156] The adjudicator voided the meeting and its motions, for a number of reasons outlined in the decision. Whether the issue of obtaining 2 quotations was telling is not necessarily important. What was important is the adjudicator noted such non-compliance might be 'significant'. The same adjudicator has also considered these issues in some other decisions.

[157] On 25 January 2021, I wrote to the lawyers for both parties, seeking their views about the questions I raise here. I explained to the lawyers, inter alia:

> The proposal to further engage the building manager was for the fee of $70,000 per year. Unless I am mistaken, this would exceed the major spending limit for a general meeting for the scheme. Section 152 of the Standard Module applies to engaging a "service contractor" (relevant in this case) and consequently 2 quotations must be provided to owners.
>
> This is not dissimilar to a scenario that arose in *Palmerston Tower* [2020] QBCCMCmr 222. Although an interim application, Adjudicator Dowling refers to the issue at paragraph 17. There are other procedural issues raised in section 152(6)-(7), which may, or may not be then relevant.

[158] On 1 February 2021 I received a reply from Mr Garsden from Mahoney's Lawyers. In his response Mr Garsden makes 2 arguments.

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[141] *Palmerston Tower*, para 17.
[142] [2016] QBCCMCmr 390. The same adjudicator mentioned the issue of spending limits when choosing a body corporate manager tangentially in: *Zamindar Court* [2017] QBCCMCmr 13, paras 28-30.
[143] *Monte Carlo Court*, para 6.
[144] *Monte Carlo Court*, paras 64, 65.
[145] *Monte Carlo Court*, para 74.
[146] Compare paragraphs 6, 59, 68 74, for example.
[147] *Monte Carlo Court*, paras 68-74.
[148] *Monte Carlo Court*, para 76.

[159] First, that as the issue of the major spending limit was not raised by the applicants in their case, it "does not need to be addressed" by me.[149]

[160] Second, if I am of the view it is a live issue, then there are "exceptional reasons" why one quotation was obtained. Implicit in the response, I infer that the body corporate accepts that the former section 152(6) of the Standard Module is relevant and that in normal circumstances, to use my words, 2 quotations were necessary.[150]

[161] The exceptional circumstances pleaded on behalf of the respondent are:

a. in January 2020 the committee advertised for building manager roles on seek.com.au

b. the process yielded 63 applicants, 57 of whom "were determined to be unsuitable" and the body corporate shortlisted and interviewed 6

c. during the interview process, when more specific details of the role were provided, the 6 candidates withdrew their interest

d. the committee decided to:

   (i) readvertise the role on seek.com.au, and "carried out a head search and further interviews"

   (ii) interview Mr Lucht "who was considered to be the only suitable candidate", who maintained an interest in the role

   (iii) engage Mr Lucht on a short term, trial basis

   (iv) formalise the arrangement on a longer term basis at the digital EGM, as Mr Lucht's trial period "was successful" [151]

[162] It is submitted to me that the body corporate had "no alternative" to putting forward the current building manager, even after conducting an "extensive search". Therefore, "exceptional circumstances exist such that the Major Spending Limit Issue ought not to invalidate motion 4 of the general meeting on 3 June 2020."[152]

[163] I was also put on notice of the body corporate's intention to raise its major spending limit, to again engage the building manager and reappoint him, and ratify any necessary issues.[153]

[164] I received a reply dated 24 February 2021 from Mr Nickless from Chambers Russell Lawyers on behalf of the applicants. I had supplied a copy of Mr Garsden's letter to Mr Nickless, for completeness.

[165] In the reply, Mr Nickless refers me to section 152 and points out that the major spending limit for the scheme is only $10,000.00.[154] The contract price of $70,000.00 per annum to engage the services of Mr Lucht exceeds that limit.[155]

[166] It is submitted to me on behalf of the applicants that no exceptional circumstances existed, which prevented the body corporate from obtaining two quotations.[156] In fact, argue the applicants, "the committee failed to take the simple step of obtaining a quote from the previous building manager."[157]

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[149] Mahoney's letter, 1 February 2021, para 3.
[150] Mahoney's letter, 1 February 2021, para 4. New s 173(6).
[151] Mahoney's letter, 1 February 2021, para 5.
[152] Mahoney's letter, 1 February 2021, para 6.
[153] Mahoney's letter, 1 February 2021, para 7.
[154] Number of lots x $1,100.00 or $10,000.00, whichever the lesser.
[155] Chambers Russell letter, 24 February 2021, p 1.
[156] Standard Module, s 152(6) (new s 173(6)).
[157] Chambers Russell letter, 24 February 2021, p 2.

[167] According to the applicants, the previous building manager, Mr Cassar, saw the role advertised and "advised the committee he would be willing to accept the role for $50,000 per year", but a quotation was not sought from him.[158]

[168] Mr Cassar who it seems was the building manager from May 2019 to February 2020, says that Mr Lucht is a friend of the chairperson Mr Langdale-Hunt and "had no experience as building manager and not undertaken any caretaking duties previously." It is submitted on behalf of the applicants:

> The previous building manager states that he was advised the position had been filled by friend of the Chairperson (Paul Langdale-Hunt). Lawrence Cassar's view is that the building manager engaged by the Body Corporate had no experience as building manager and not undertaken any caretaking duties previously.[159]

[169] There is no evidence produced to support the assertions made by Mr Cassar. I am also not provided with details of his experience to show he is any greater or lesser qualified for the role than Mr Lucht and I have no idea about any connections (if any) between Mr Cassar and the applicants. Both men may be underqualified for the role, or overqualified for that matter. All-in-all, these assertions do not advance the case for the applicants, except to raise the issue there was another possible candidate for the role available, but conversely the body corporate says it has its reasons for not considering him for the role.

[170] In any case, the arguments for the applicants lead them to conclude that there were no "exceptional circumstances which should alleviate the need for two quotations to be obtained" and the scheme paid $20,000.00 too much for the transaction.

[171] Mr Nickless also attached the minutes of a scheme committee meeting held on 2 February 2021, at which motions to be considered at the impending 2021 AGM were considered. He also annexed the meeting notice and agenda for the AGM, scheduled for 17 March 2021. Committee motions 14 and 15, included on the agenda, were devoted to the issues I am discussing here.

[172] The proposed motion 14 provided, "that the Body Corporate set the relevant limit for major spending for the purposes of engaging a service contractor in a building manager or caretaking role to $70,000."

[173] Motion 15, in sum, sought support to terminate the agreement signed with Mr Lucht after the digital EGM and instead execute another commencing from 1 April 2021 for 1 year "substantially in the form of the agreement circulated with the motion". This would effectively rescind motion 4 under review here and make this application somewhat impotent.

[174] It is submitted on behalf of the applicants that it is inappropriate to raise the spending limit, but instead to provide 2 quotations, including one from Mr Cassar. Owners are then in a position to decide, instead of the committee attempting "to rectify the previous defective appointment that appears to have been engineered by the committee."[160]

[175] The final reply from Mr Garsden on behalf of the body corporate is dated 12 March 2021. On behalf of the body corporate, I am reminded that the issues surrounding the appointment of the building manage were not raised by the applicant "as part of the adjudication application of which the adjudicator has been asked to consider" and only relate to a general meeting held last year.[161]

[176] With regard to the issues of the appointment of Mr Lucht and not Mr Cassar, the body corporate submits:

a. the committee was not advised by Mr Cassar that he was prepared to accept the role

b. the email supplied to me from Mr Cassar was not provided earlier to the committee, but instead "is a self-serving email sent after the adjudicator made inquiries into the validity of

[158] Chambers Russell letter, 24 February 2021, p 2.
[159] Chambers Russell letter, 24 February 2021, p 2.
[160] Chambers Russell letter, 24 February 2021, p 2.
[161] Mahoney's letter, 12 March 2021, Para 5.

this motion which was sent to the Applicant's solicitors to support the Applicant's position, more than 12 months after the relevant decision was made."

c. the credibility and weight of the contents of Mr Cassar's email "ought to be scrutinised by" me

d. in any case, Mr Cassar's contentions are disputed:

(i) as the manager appointed before Mr Cassar was appointed a number of times by the earlier committee of which the applicants were members, without the availability of a second quotation

(ii) Mr Cassar was first appointed in approximately May 2019 while the applicants were members of the committee

(iii) Mr Cassar resigned from the role on 31 January 2020

(iv) it is "immaterial" he may have discussed renewed interest in the position with one of the applicants instead of the committee, as the committee was not to know of the situation and there is no evidence it did so know[162]

[177] The committee denies that prior to appointment, Mr Lucht was "a friend of a committee member" and is inexperienced in that type of work. Additionally, there is nothing "unlawful" in its approach to raise the spending limit to deal with the issue of appointing the building manager.[163]

[178] In sum, the respondent argues:

> The committee is concerned with the approach seemingly taken by the applicants where they simply wish to obtain orders to declare the committee's conduct to be unsatisfactory for reasons no other than being politically motivated. It is curious timing that the Cassar Email has been procured after the adjudicator's inquiries have been made.[164]

[179] The last 'piece in the puzzle' for me on this issue was the outcomes of the scheme's 2021 AGM. The meeting was held on 17 March 2021 and I sought and received the minutes from the meeting. The two motions of interest were 14 and 15.

[180] Motion 14 resolved to "set the relevant limit for major spending for the purposes of engaging a service contractor in a building manager or caretaking role to $70,000." It was passed into resolution 22 votes to 4, with no abstentions.

[181] Motion 15 proposed to terminate the agreement with Mr Lucht effective 31 March 2021 and instead to enter into a new agreement to commence on 1 April 2021 to 31 March 2020, so for one year. This motion was voted into resolution by owners, 21 votes to 3, with no abstentions.

[182] The result is the body corporate has now reconsidered its spending limit and also the agreement with Mr Lucht. I asked to see that material, but I do not intend to act upon it in this matter. The issues here have been complicated enough.

[183] One of the submitting lot owners pointed out to me in their submission to this dispute that:

> In relation to Motion 4, I note that the Applicants were part of the Committee Executive for many years and the process used for the Building Manager appointment is the same as was used by the Applicants for many years at the Watermark. [165]

[184] The submission raised an additional question in my mind that I thought required further investigation.

[185] I sought further information from the BCM about the original appointment(s) of Mr Lucht to his role and it was provided to me.

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[162] Mahoney's letter, 12 March 2021, Para 3a.
[163] Mahoney's letter, 12 March 2021, Para 3b-c.
[164] Mahoney's letter, 12 March 2021, Para 4.
[165] Ms de Santana, lot 28.

[186] On 30 March 2020 the committee met to consider a number of issues. Item 1 in the minutes shows committee support (6 votes to nil) to appoint Mr Lucht as the building manager. The terms of the resolution reveal an "initial period" of appointment from 30 March 2020 to 15 May 2020, at the rate of $1,346.15 per week, to be paid from the administrative fund. I am supplied with a copy of that agreement.

[187] On 25 March 2020 the committee wrote a single paged letter to all lot owners, explaining that Mr Lucht had been appointed to the position. The letter opened with thanks to Anne and Grahame Crossley who had also acted in the role for 2 months, until 3 April 2020. A short period of overlap was factored in to allow for a handover between the mangers. After explaining the reasons for the appointment, owners were invited to contact the chairperson on her supplied mobile telephone number if they wish to discuss the matter, or direct their enquiry to any committee member.

[188] Later, Mr Lucht was "engaged on week-by-week basis" between 16 May and 5 June 2020, pending the digital EGM held on 5 June 2020. The agreement for the period 6 June 2020 to 31 March 2022 was signed on 6 June 2020 and sealed on 12 June 2020, following the digital EGM.

[189] Whether there are valid questions to be answered about the processes to appoint Mr Lucht and the relevant spending limits, I wondered whether this was a complaint that could be levelled against recent committees, or whether this was a longstanding practice.

[190] I asked the BCM to supply the minutes of the last 4 occasions when the appointment of a building manager was authorised by owners at a general meeting.[166] There was nothing special in the request for 4 instances. I thought it might provide some relevant background, without going too far back into the scheme's history. It is more than 3, but not as many as 5.

[191] I was provided with minutes from the AGMs of 2012, 2014, 2016, and 2018. I note that in all 4 instances, the meetings were chaired by Mr Van Gaal, who is listed as the chairperson. The details are:

a. AGM 2012 – 21 March 2012

   Motion 8 – "Management Agreement" authorised with Mr Lamb for 2 years (1/4/12 to 31/3/14) at a cost of $49,250.00 per annum – passed 14 votes to 1.

   Mr Van Gaal elected as chairperson/treasurer, Mr Backshall elected as secretary

b. AGM 2014 – 19 March 2014

   Motion 13 – "Management Agreement" authorised with Mr Lamb for 2 years (1/4/14 to 31/3/16) at a cost of $49,250.00 per annum – passed 24 votes to nil.

   Mr Van Gaal elected as chairperson/treasurer

c. AGM 2016 – 30 March 2016

   Motion 14 – "Management Agreement" authorised with Mr Lamb for 2 years (1/4/16 to 31/3/18) at a cost of $53,000.00 per annum – passed 20 votes to nil.

   Mr Van Gaal elected as chairperson/treasurer, Mr Backshall elected as secretary

d. AGM 2018 – 21 March 2018

   Motion 14 – "Management Agreement" authorised with Mr Lamb for 2 years (1/4/1 to 31/3/20) at a cost of $53,000.00 per annum – passed 24 votes to nil.

   Mr Van Gaal elected as chairperson/treasurer, Mr Backshall elected as secretary

[192] I realise that minutes do not always capture the full nature of motions put to meetings (e.g. a motion with alternatives is sometimes not reflected as such in minutes). For completeness, I

[166] There was no particular reason to choose 4 occasions, it could have been 3 or 5, or 15, I wanted to gather a reasonable sample.

asked the BCM to supply the meeting notices and agendas for the 4 meetings.[167] It turns out that on each occasion the motion was proposed by the committee, as requiring an ordinary resolution, and only one option was put to owners.

[193] This means that on each of the 4 meetings I examined, the building manager was chosen in exactly the same overall manner as the current case. On each of those 4 occasions, the applicants were on the committee that proposed the 4 motions. On each of those 4 occasions, Mr Van Gaal actually chaired the meetings and did not rule them out of order. I can only conclude that both applicants were comfortable with the process to choose a building manager in earlier meetings.

[194] I am not provided with evidence that the applicants complained about the processes they oversaw over the years, although they now take exception to the practice used by another committee of which they are not members. Their complaints to my opportunity to respond, then, appear self-serving. I cannot place any weight on their complaints, as they are now only of interest for them because I raised the matter.

[195] To reiterate, I have already indicated I will void motion 4 for the reasons provided, but here is my determination about one quotation being provided to lot owners in motion 4.

[196] Thinking rationally, the legislature wished to include safeguards to protect owners' interests. Spending is an important issue. Owners need to receive value for money and be provided with options and choices about their spending. Spending limits to protect those interests and to ensure propriety are just one precaution built into the legislative regime.

[197] I agree with the respondent in one aspect. The orders sought act as their 'relief sought' and their grounds, the 'particulars'. They are legally represented. The case was not put to me on the basis that the body corporate conduct might breach spending provisions of the legislation. I admit I am the one who pursued the issues with the parties, but the 'investigative' provisions of our legislation are peculiar. I acknowledge I pursued this matter, but I hope that it assists this body corporate and perhaps other schemes as well.

[198] That leaves the second issue about whether in fact two quotations were not necessary, as 'exceptional circumstances' existed.

[199] In our role, given the limited ways evidence is provided, it is often challenging to assess the veracity and weight of the evidence provided by people who are associated with a dispute, when I cannot see them, I cannot hear them, I cannot assess credibility on the basis of experience and cross examination. I am hesitant here to determine which version of the events I prefer surrounding the background to motion 4. The facts put by the body corporate do not appear inherently improbable. Given the voiding of motion 4 turns on other issues, I will not address the matter further.

[200] I will make one last point regarding the body corporate's ability to raise the spending limit for the purpose it took to the recent AGM. Again, that is not a question for me here to have to answer, but I will let another adjudicator express their opinion in a passing way on the issue.

[201] In *Monte Carlo Court*, an issue arose concerning the raising of the spending limit to deal with a service contract. Adjudicator Rosemann noted:

> The applicant seeks an order that the Body Corporate be restrained from considering any future motion that purports to increase the limits for committee or major spending. I do not consider that any such order would be warranted.
>
> The legislation specifically allows for a body corporate to pass an ordinary resolution to set the committee and major spending limits. The requirements for a body corporate to pass an ordinary resolution are provided for in the legislation, and does not contemplate the consent of any single owner for a motion to pass. I do not consider that it would be just and equitable for an adjudicator to prohibit a body corporate from ever passing a resolution that the legislation specifically allows it to pass.

[167] Included in email from Ms Shambrook, 22 February 2021.

> If the Body Corporate purported to decide to change the limits in future and failed to act reasonably in doing so, then that decision will be open to challenge. Whether the particular decision is unreasonable will be a matter for determination in the particular circumstances.
>
> I note that the role of an adjudicator is to resolve current disputes. An adjudicator cannot make orders about hypothetical future contraventions of the body corporate legislation.[168] (references deleted)

[202] The onus of proof falls on the applicants and on balance, they have satisfied that onus.

[203] I will void the resolution resulting from motion 4 from the digital EGM.

Motion 5 is incapable of being carried into effect[169]

[204] Motion 5 from digital EGM proposed "that an election for the position of Secretary occur at this meeting."

[205] The applicants refer to the former section 31(1) of the Standard Module, which provides that, "at an extraordinary general meeting called under this subdivision, 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."[170] They also point out that the legislation is silent on any procedure to achieve this outcome, but there remains overriding obligations on the body corporate and its committee to act reasonably.[171] The body corporate, explains the applicants, may even use an election to deal with the issue, which is of course what took place in the present case.[172]

[206] According to the applicants, motion 5 stated "that the method of choosing the Secretary", to quote from the meeting agenda, was "that an election for the position of Secretary occur at this meeting". The result was that the body corporate always intended to use an election process, so given the vagaries of the former section 31 of the Standard Module, "it would seem to be reasonable that it would need to be conducted in some way analogous to the other lawful ways in which an election is conducted by way of ballot."[173] In particular, "elections must be run so that all owners who are entitled to vote can do so and that their votes will be kept secure."[174] Section 99 of the Act prescribes that a committee must be composed in the way provided for and chosen in the way provided for in the relevant module.[175]

[207] What then should have occurred, is:

> The ordinary process for conducting an election at an EGM … or some alternative method that is fair and reasonable in the circumstances. Without the specification as to how the election in Motion 5 could lawfully and practically take place, it cannot be reasonably considered to constitute a fair and reasonable alternative.[176]

[208] Overall, argues the applicants, the problems surrounding motion 5 were such they had the "effect of depriving many lot owners of their right to vote and/or create[d] an unacceptable risk of serious errors and a lack of verification of votes cast" and the applicants list a number of points supporting their contention. Those points include that owners could not attend electronically, or were confused about the manner of the conduct of the election, or votes were not legally valid, or it was "likely" that it was "physically impractical to circulate, complete and facilitate a ballot (including deadlocks caused by equal votes) in a Digital meeting".[177]

[209] I acknowledge these concerns were raised before the meeting, but they are the arguments put forward as part of the final case here for the applicants and need to be considered. Whether

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[168] *Monte Carlo Court*, paras 93-96
[169] Applicants' outline, 29 May 2020, paras 6.14-6.24.
[170] Applicants' outline, 29 May 2020, para 6.14. New s 42(1).
[171] Act, ss 94(2), 100(5).
[172] Act, ss 94(2), 100(5). Applicants' outline, 29 May 2020, paras 6.14 – 6.15.
[173] Applicants' outline, 29 May 2020, para 6.16.
[174] Applicants' outline, 29 May 2020, para 6.18.
[175] Applicants' outline, 29 May 2020, para 6.19.
[176] Applicants' outline, 29 May 2020, para 6.17.
[177] Applicants' outline, 29 May 2020, para 6.21.

these issues or others actually emerged and whether they justify the orders sought are at the centre of the applicants' case.

[210] I am referred to *Chev-Elle*,[178] and whether the "will of the owners" was reflected in the EGM process.[179] In particular from that case, that "the ultimate purpose of voting on a matter is to ascertain the will of owners who wish to vote and, where possible and reasonable, to implement their wishes."

[211] According to the applicants:

> Had the body corporate genuinely intended to "appoint" a Secretary, without conducting an election, then (aside from the fatal Digital EGM issues) Motion 5 ought to have been a motion to appoint a particular eligible person, or a motion with alternatives to appoint one of a number of eligible persons. This would have facilitated inclusive voting where electronic and paper voting on that issue would have been possible and the voting rights of all lot owners would have been preserved.[180]

[212] The applicants say they are "cognisant of the difficulties raised by COVID-19 and its effect on Body Corporate meetings, however respectfully submit that the approach taken by the respondent is void and unreasonable, when there are various other ways in which a valid meeting" could have been conducted".[181]

[213] The applicants do not really suggest alternative approaches, but their repeated submission of complaint about this point remains. As is often the case in dispute applications, it can become a rather simple and convenient task to forensically criticise the actions of others in hindsight, at a different time and in other circumstances, simply to serve other underlying interests that have little to do with actual concerns about the meeting or its outcomes. The merits here are not strong and this is the inescapable conclusion I draw from the application and this aspect of it.

[214] I am also directed to a recent decision by an adjudicator dealing with a declaratory order driven by the early challenges provided by the COVID-19 pandemic, as an example of how meetings can be fairly organised under these complicated circumstances.[182] I am not certain that decision assists the applicants, and their lawyers may have referred to it for completeness (duty to disclose unhelpful authorities).

[215] The minutes for the digital EGM record details for the resolution entitled "Appointment of Secretary", resulting from motion 5 that:

> During the meeting, the Chairperson advised that the note from Mr R Van Gaal also considered that the Chairperson must rule Motion 5 out of order because Mr R Van Gaal considered that it would be unlawful or unenforceable or in contravention of BCCMA or Regulations.

[216] The body corporate argues the digital EGM and the voting process was lawful and that if there was any noncompliance it was minor and no owner was deprived of their right to vote, and "no owner suffered detriment". In particular:

a. the body corporate passed a motion at its 2014 AGM to permit electronic voting

b. an election for the position of secretary was not required pursuant to section 31 of the Standard Module:

> And the method in which the motion to appoint a secretary was conducted was fair and reasonable. This method ended up being carried out in a method very similar to how the applicants suggested the secretary issue be dealt with in paragraph 6.23 of the application.

c. owners could attend electronically

d. no owners apart from the applicants expressed any concern about the process

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[178] [2010] QBCCMCmr 125.
[179] Applicants' outline, 29 May 2020, para 6.22.
[180] Applicants' outline, 29 May 2020, para 6.23.
[181] Applicants' outline, 29 May 2020, para 6.24.
[182] *Gladstone City Centre* [2020] QBCCMCmr 19, Applicants' outline, 29 May 2020, para 6.24.

e. due to how the EGM took place, "it was not an impractical method of conducting the appointment process[183]

[217] I find the arguments provided by the respondent body corporate persuasive and I adopt them in this case, in addition to those in paragraph 27 above. I return to my earlier comments about voiding the entire digital EGM. The body corporate had a fair opportunity to vote on all issues at the digital EGM, including appointing a secretary to the vacant role. Just because one of the applicants failed to secure enough votes to secure the role is not a reason to void the result, and this is likely to be the underlying issue motivating the complaint here. The arguments lack merit.

[218] Simply put, the nominations were provided, a vote took place, there is no evidence provided by the applicants that any owner was disadvantaged, no other lot owner complains to me about the process and that their vote was not recorded and/or their nomination for the position of secretary was not considered. Two people were nominated, and the vote resulted in 15 votes for Ms Webb, and 4 votes for Mr Van Gaal.

[219] I am not of the view, for the reasons I discuss, that the body corporate did not act reasonably when a notionally reasonable committee/body corporate faced with the same issue could not have honestly and rationally approached the election in the manner outlined in this case.[184]

[220] I have already had enough to say about the way the meeting was organised and how it took place.

[221] The onus of proof falls on the applicants, and on balance they have not satisfied that onus regarding the voiding of the resolution resulting from motion 5.

[222] I will not invalidate the motion and this aspect of the application is dismissed.

[223] I note the body corporate has held its 2021 AGM and a new committee has been elected.

Conclusion

[224] This is an application that concentrates on a 'digital EGM' held on 5 June 2020.

[225] The applicants seek a number of final orders.

[226] The application sought 4 orders, although some relied on others for themselves to be considered.

[227] Given the arguments, and my assessment of the law and facts I:

a. refuse order 1 - that the notice of the digital EGM is invalid, void and of no effect

b. refuse order 2 - that the digital EGM is invalid, void and of no effect and that any motions purportedly passed at the meeting are also invalid, void and of no effect

c. given my first determinations, I refuse order 3 - that the respondent must properly call and hold a valid EGM to either elect or appoint a secretary in a manner that is fair and reasonable

d. this necessarily results in me refusing order 4 - that if I grant order 3, given another EGM would be required under the former section 30 of the Standard Module (now section 41), it would not be invalid simply because it will be held out of time

[228] In sum, the claims that the digital EGM should be invalidated (and the meeting notice should be voided) and that motion 5 to appoint a secretary to a vacant position all lack merit. The applicants have not sufficiently proved their case to the requisite standard, and I dismiss those aspects of this application.

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[183] Respondent's outline, 23 June 2020, para 14, 17.

[184] I recently provided a more detailed discussion of the principles related to sections 94(2) and 100(5) of the Act in: *19 Thorn* [2020] QBCCMCmr 549, paras 57-65. Given the length of this decision I will not repeat those principles here.

[229] I will make an order that motion 4 appointing the building manager is void, as the start date was not clearly provided to the lot owners, although this was a marginal decision.

[230] This has been a protracted matter and I wish to thank the BCM for their cooperation and prompt replies to my requests for further information. I also thank the lawyers from the respective firms for their considered responses to my multitude of requests. My concern at all times was to ensure both 'sides' had a full opportunity to be heard about what were clearly important issues for them.