THE RIGHTS AND OBLIGATIONS OF LOT OWNERS AND BODIES CORPORATE: RECENT DEVELOPMENTS

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INTRODUCTION

There are currently over 33,000 community titles schemes in Queensland, with over 300,000 individual lots (units). As a result of this, more than a quarter of a million people in Queensland live or work in arrangements governed by the *Body Corporate and Community Management Act 1997* (Qld) (**the BCCMA**).

The BCCMA scheme[1] creates an ostensibly "democratic" voting structure for body corporate activities, broadly comparable to the position of shareholders in a company. Lot owners have certain entitlements and financial responsibilities concomitant with the size of their holdings, and a body corporate committee is elected with certain management functions comparable to a company's board of directors. As a unit in the most upmarket modern apartment buildings can run into the millions of dollars, while even less expensive units and townhouses are likely to be their owners' most significant investment, this structure appears to be a fitting way to manage these substantial assets. However, while the analogy with a company is often illuminating, it is also potentially misleading, and this paper will demonstrate that there are equally many significant differences.

This paper comprises three parts:

Part 1—An overview of the 2007 amendments to the BCCMA scheme;
Part 2—The procedure and principles for applying to review lot entitlements;
Part 3—The rights of minority lot owners in a body corporate.

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[1] Comprising the Act and the various Modules to the Act which are Regulations tailored to different types of body corporate, namely residential (the Standard Module), Commercial, Small Schemes, and Accommodation.

PART 1: AMENDMENTS TO REGULATIONS

Introduction of committee members' code of conduct

The *Body Corporate and Community Management and Other Legislation Amendment Act 2007* (**the Amendment Act**) came into force on 1 July 2007.

The Amendment Act created a new schedule 1A to the BCCMA, comprising a code of conduct for voting members of body corporate committees.[2] New section 101B provides that committee voting members under any of the modules are bound by the code, although the only remedy prescribed for breaching the code is removal from office under the regulations. The Explanatory Notes to the Amendment Bill remark that the code was introduced *"in response to the concerns of stakeholders about the conduct and expertise of body corporate committee members"*.

The code enumerates a number of responsibilities, which in some ways mirror company directors' duties. Briefly, the code provides that committee voting members must:

- Have a commitment to acquiring an understanding of the Act and the code, in so far as it is relevant to their role on the committee (cl 1);
- Act honestly and fairly in performing their duties as a member (cl 2(1));
- Not unfairly or unreasonably disclose information held by the body corporate, including lot owners (cl 2(2));
- Act in the best interests of the body corporate in performing their duties as a member (cl 3);
- Take reasonable steps to ensure compliance with the Act and the code in performing their duties as a member (cl 4);
- Not cause any nuisance or "otherwise behave in a way that unreasonably affects a person's lawful use or enjoyment of a lot or common property"—note that "a person" is not restricted to lot owners (cl 5);
- Disclose any conflict of interest in any matter before the committee—however, no specific requirement not to vote on the matter is created (cl 6).

[2] Non-voting members, are already bound variously by the *Code of conduct for body corporate managers and caretaking service contractors* (schedule 2) and the *Code of conduct for letting agents* (schedule 3).

On its face, the code is not as strongly worded as it might be, and indeed, some provisions verge on being unenforceable. For example, clause 1 may be contrasted with its counterpart in schedule 2 which provides that *"A body corporate manager or caretaking service contractor must have a good working knowledge and understanding of this Act, including this code of conduct, relevant to the person's functions"*. A body corporate could objectively assess whether such a criterion was met, and point to instances where the manager or service contractor was deficient in their knowledge in acting to remove them. However, by contrast, it is nearly impossible to demonstrate that a member does not *"have a commitment to acquiring an understanding"* of the Act and code.

Similarly, requiring only that "reasonable steps" must be taken to comply with the Act and code may be sufficient where it relates to control of employees,[3] but it seems to be an unnecessarily and undesirably low standard to apply to members' own conduct.

In particular, the code requirements appear light when coupled with the limited immunity for committee members:

101A Protection of committee members from liability

(1) A committee member is not civilly liable for an act done or omission made in good faith and without negligence in performing the person's role as a committee member.

(2) In this section—

act done or omission made*, does not include the publication of defamatory matter as mentioned in section 111A(1).*

The Explanatory Notes to the Amendment Bill state that this provision was designed to *"provide some balance with the duties and obligations imposed on committee members, including as a result of the proposed code of conduct"*. However, notwithstanding the additional requirements of *"in good faith and without negligence"*, it is submitted that this blanket protection is a far greater benefit to committee members than the code of conduct is a burden. As such, rather than achieving the Amendment Act's aim of

[3] Schedule 6, cl 6; schedule 3, cl 4.

increasing committee members' accountability, the new provisions may achieve quite the opposite.

The *Body Corporate and Community Management and Other Legislation Amendment Regulation (No. 1) 2007* (the **Amendment Regulation**) amends the various modules to the BCCMA to create a scheme for enforcing the code of conduct. Briefly, the body corporate may decide, by ordinary resolution, to give a committee member said to be in breach a written notice, setting out in 600 words or less the particulars of the breach, to which the member may reply in 600 words or less within 21 days. After expiry of the 21 day period, the body corporate must consider the removal of the committee member at the next general meeting. The meeting notice must attach the notice given to the member, though the regulations does not specify that it must attach the member's response—instead the member is entitled to distribute the response, and the body corporate is obliged to pay reasonable photocopying and postage charges if asked.

The question arises of whether the code of conduct is justiciable, other than through the means set out in the modules. A later portion of this paper will examine more thoroughly issues relating to the oppression of minority owners, but it is apposite to consider what might happen where a committee member who breaches the code of conduct does so with the tacit or open approval of a majority owner or owners. Because the legislation falls short of creating an *obligation* to remove a committee member who breaches the code, a majority can simply use their voting power to ensure that breaches are overlooked.

Conversely, and more concerningly, there is no statutory safeguard against lot owners serving baseless notices on committee members (other than the need for an ordinary resolution). As such, a majority owner or owners could use these mechanisms as a means to remove committee members, whose written responses need not actually be taken into account. In particular, this mechanism could be used to keep committee members in line with owners' wishes, or indeed to subvert orders of an adjudicator declaring persons to be committee members. The adjudicator's order considered recently in *Lee Parker Pty Ltd v Young* [2007] QDC 6 was such an order. While the order was set aside by the District Court, it was not decided that such a declaration was outside the power of an adjudicator under s 276(1) of the BCCMA.

Bearing in mind this paper's introductory remarks about the substantial nature of the holdings governed by the BCCMA, it is submitted that this element of the legislative scheme is manifestly inadequate to protect these holdings. Any prudent investor would be loathe to spend upward of a million dollars on shares in a company with such lenient standards governing the behaviour of its directors. Yet, frequently expensive units are being purchased under the regime, arguably without full understanding of the potential for adverse consequences. As the balance of this paper will illustrate, very considerable headaches can result for unfortunate lot owners.

Amendments to dispute resolution procedures

In an endeavour to streamline dispute resolution, the Amendment Act seeks to encourage informal processes, before the formal devices under the Act are invoked.

The Act as amended now permits a dispute resolution application to be made to the Commissioner only if the applicant "has made reasonable attempts to resolve the dispute by internal dispute resolution" (s 238(1)(b)), and requires that such efforts be detailed on the application forms (ss 239A(f) and 239B(f)). The schedule dictionary provides that:

internal dispute resolution *means the resolution of a dispute by the parties to the dispute using informal processes or the community titles scheme's body corporate processes.*

Examples--
by the parties communicating with each other
by writing to the committee for the body corporate
by presenting a motion for consideration at a general meeting of the body corporate

The Act does not set out any guidelines for when a matter should be permitted to proceed beyond internal dispute resolution, requiring only that *"a reasonable attempt"* be made in the opinion of the Commissioner.[4] However, it is submitted that establishing a test may have been unduly prescriptive, and perhaps created yet further avenue for litigation. The threshold will presumably be low, as it ought to be clear to the Commissioner when the parties to a dispute are intractable, and further processes are needed.

[4] BCCMA s 241(1)(c).

The new Chapter 6, part 5A also creates a regime for departmental conciliation of disputes. The Explanatory Notes to the Amendment Bill describe the rationale for the changes:

Departmental conciliation will facilitate prompt and informal resolution of disputes; encourage parties to disputes to arrive at their own resolutions and agreements in line with the "self management" focus of the BCCM Act; and improve communication between parties, their understanding of rights and responsibilities under legislation and in turn, minimise future disputes.

Subsection 241(3) also gives the Commissioner the power to waive the requirements for internal dispute resolution or departmental conciliation, if "*appropriate in the circumstances*". The examples of circumstances do not import a great deal of clarity: on its face, waiving requirements where *"the application is for a declaratory order"* may relate to much less urgent matters than *"authorisation for emergency expenditure"*. Waiver where *"there is a threat of violence between the parties to the application"* is entirely sensible; however, it would also be ostensibly appropriate where the hostility of parties, though not physical in nature, was sufficiently evident that no internal resolution or conciliation could be expected to yield results.

<u>*Amendments to procedure for reallocating lot entitlements*</u>

Section 5 of the 2007 Amendment Act amended s 48 of the BCCMA, which deals with the adjustment of a lot entitlement schedule. Whereas previously the District Court had coextensive jurisdiction with specialist adjudicators under part 6 of the BCCMA, the Court avenue has been replaced with recourse to the Commercial and Consumer Tribunal.

Subsection 48(2) provides that the respondent to any such action will always be the body corporate, and the previous provisions for other owners to elect to be joined, as well as the provision that parties pay their own costs, do not apply to the CCT, but only to adjudications. The CCT's own legislation makes provisions regarding parties and costs,[5] and the Explanatory Memorandum to the Amendment Bill notes that these are not displaced.

[5] *Commercial and Consumer Tribunal Act 2003* (Qld) ss 53, 71.

PART 2: LOT ENTITLEMENT DISPUTES

Overview of entitlements

Two types of lot entitlements are created by the BCCMA. The interest schedule lot entitlement (**interest entitlement**) enables the owner to calculate his or her share of common property and the unimproved value of that property, which is relevant to paying rates and taxes, as well as his or her entitlement to a share of the body corporate assets on termination of the scheme.[6]

The contribution schedule lot entitlement (**contribution entitlement**) has two purposes. It is the basis on which the body corporate can raise a levy against an individual owner.[7] Such levies are used to pay the costs of communal living for the property as a whole.[8] However, levies are also commonly raised to pay for unforeseen repairs such as weather related damage to roofs and other external elements.[9]

Contribution entitlements have another important purpose, as they are the basis for determining the value of the lot owner's vote for voting on an ordinary resolution when a poll is conducted.[10] As such, the appropriateness of the manner in which contribution entitlements are allocated is an issue of paramount importance to lot owners.

Robin QC DCJ notes in *Franklin v Body Corporate for La Porte D'Or* that:[11]

Setting aside those special situations in which voting control within the body corporate is important […] *it will normally suit a lot owner to have a higher interest schedule lot entitlement and a lower contribution schedule lot entitlement. Now that the Court or a specialist adjudicator may order adjustment of lot entitlement schedules under s 48 of the Act, the typical application encountered appears to be one for reduction of contribution schedule lot entitlements designed to reduce the applicant's proportionate responsibility for body corporate levies.*

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[6] BCCMA, s 47(3)
[7] BCCMA, s 47(2)(a)
[8] BCCMA, s 47(2)(a), Footnote 12.
[9] The "sinking fund" under, eg, ss 100-101 of the Standard Module.
[10] BCCMA, s 47(2)(b)
[11] [2004] QDC 154 at [8]; *Ciriello v Panitz Centre BUP 3894* (1999) 20 Qld Lawyer Rep 138 is cited as an example of the contrary position where the applicants in fact wished to have their contribution entitlements increased. See also *Sandhurst Trustees Ltd v Condah Bay Investments Pty Ltd* [2003] QDC 438 at [9].

The judge notes further that:[12]

A practice appears to have developed of applications such as the present becoming the occasion for a wholesale review of the relevant lot entitlement schedule, notwithstanding that the applicant's real interest and concern relates only to the applicant's own contribution (or interest) schedule lot entitlement, and that, for all that appears, other lot owners are content with the status quo.

Allocation and revision of entitlement schedules

Section 46 of the BCCMA sets out the basic principles by which entitlements are initially allocated:

(7) For the contribution schedule for a scheme for which development approval is given after the commencement of this subsection, the respective lot entitlements must be equal, except to the extent to which it is just and equitable in the circumstances for them not to be equal.

Examples for subsection (7) of circumstances in which it may be just and equitable for lot entitlements not to be equal--

1. *a layered arrangement of community titles schemes, the lots of which have different uses (including, for example, car parking, commercial, hotel and residential uses) and different requirements for public access, maintenance or insurance*
2. *a commercial community titles scheme in which the owner of 1 lot uses a larger volume of water or conducts a more dangerous or a higher risk industry than the owners of the other lots*

(8) In deciding the contribution schedule lot entitlements and interest schedule lot entitlements for a scheme mentioned in subsection (7), regard must be had to—

(a) how the scheme is structured; and
(b) the nature, features and characteristics of the lots included in the scheme; and
(c) the purposes for which the lots are used.

Similarly, the just and equitable criterion is employed in section 47 in relation to the adjustment of lot entitlements:

(6) For the contribution schedule, the respective lot entitlements should be equal, except to the extent to which it is just and equitable in the circumstances for them not to be equal.

(7) For the interest schedule, the respective lot entitlements should reflect the respective market values of the lots included in the scheme when the specialist adjudicator or the CCT makes the order, except to the extent to which it is just and equitable in the

[12] [2004] QDC 154 at [13].

circumstances for the individual lot entitlements to reflect other than the respective market values of the lots.

Section 49 is entitled *"Criteria for deciding just and equitable circumstances"* and repeats the factors set out in subsection 46(8), though notes that the list is not exhaustive. The Court of Appeal gives a clear statement of principle in *Fischer v Body Corporate for Centrepoint CTS 7779* on how this section is to be interpreted:[13]

Although the Act gives no clear indication one way or the other, the preferable view is that a contribution schedule should provide for equal contributions by apartment owners, except insofar as some apartments can be shown to give rise to particular costs to the body corporate which other apartments do not. That question, whether a schedule should be adjusted, is to be answered with regard to the demand made on the services and amenities provided by a body corporate to the respective apartments, or their contribution to the costs incurred by the body corporate. More general considerations of amenity, value or history are to be disregarded. What is at issue is the "equitable" distribution of the costs.

The Court rejected the primary judge's finding that *"amenity and location were features or characteristics of apartments"*, and hence could form the basis for differentiating between lots. In this view, lots of equal size and with equivalent features located on different floors of a building would be ascribed different lot entitlements on the basis that those on higher floors would invariably be more valuable. Instead, the Court focused solely on the apportionment of service costs on a user-pays model, referring to extrinsic materials and concluding that:

These materials make it tolerably plain that the Act is intended to produce a contribution lot entitlement schedule which divides body corporate expenses equally except to the extent that the apartments disproportionately give rise to those expenses, or disproportionately consume services. That determination can only be made by reference to factors which have a financial impact or consequence on the body corporate. It cannot be affected by factors which go to an apartment's value or amenity.

As such, the matters in section 49(4) may be considered only to the extent that they bear on the cost of operating the CTS.

Section 49 also sets out matters that may not be considered in determining what is just and equitable:

[13] [2004] 2 Qd R 638 at [26].

(5) The specialist adjudicator or the CCT may not have regard to any knowledge or understanding the applicant had, or any lack of knowledge or misunderstanding on the part of the applicant, at the relevant time, about--

(a) the lot entitlement for the subject lot or other lots included in the community titles scheme; or

(b) the purpose for which a lot entitlement is used.

(6) In this section--

***relevant time** means the time the applicant entered into a contract to buy the subject lot.*
***subject lot** means the lot owned by the applicant.*

These provisions are self-explanatory.

What is just and equitable in relation to any particular CTS will depend on the facts and circumstances of the particular case.[14] The emphasis will be on demonstrating, by expert evidence, what proportion of the total expenditure of the body corporate ought to be borne by each lot owner.

At the same time, certain principles are being developed through the cases, which ought to underpin any case for redistribution of entitlements. For example, it was held in *Woodley v Proprietors of Quay West* that:[15]

Where there is access to the common property the costs should be shared equally, as the costs are equally beneficial to all of the lots in the scheme. Contributions in accordance with the interest schedule may reflect ownership of the common property and assets. It does not follow that ownership "has any correlation to the costs of repair and maintenance incurred for the common property and assets, particularly when all of the common property and assets are equally accessible by all occupiers and 'owners' are unable to place any restriction on usage or access".

Battin v Body Corporate for Amity CTS 17543 concerned a mixed-use commercial and residential development.[16] The applicant residential owners contended, briefly, that it was not just and equitable that they contributed equally to the maintenance of a public thoroughfare used primarily for accessing the commercial lots, and therefore of primary benefit to the shopowners. It was argued, in my view correctly, that the residential

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[14] *Re Kurilpa Protestant Hall Pty Ltd* (1946) St R Qd 170 at 183; cited in *Burnitt Investments Pty Ltd v Body Corporate for St Andrews Community Titles Scheme 20508* [2002] QDC 6; *Woodley v Proprietors of Quay West* [2006] QDC 277 at [11].
[15] [2006] QDC 277 at [16]; citing *Ciriello v Panitz Centre BUP 3894* (1999) 20 Qld Lawyer Reps 138 at 144 and *Cooloola Court* [2005] QBCCMCmr 319 at [66].
[16] [2006] QDC 278.

owners *did* benefit, as the creation of a high-quality shopping precinct which attracted and maintained commercial tenants increased the amenity of the area generally, and made the development a better place to live. Forde DCJ referred to a decision of an adjudicator and stated:[17]

That passage does illustrate that although a party may get little or no benefit from the condition of some item whether it be a carpet, a road or a garden, that equality in relation to maintenance is the primary position. The other position is where there is provision under the scheme for exclusive use. The cost of exclusive use of a lift or pool can be determined. Equality in that situation is not relevant. A different example is where members of the public use common areas seldom used by residents. For example, accessing a restaurant and using a car park which is part of a high rise building and which some residents may never use. The cost of maintaining the common areas which may be surrounded by landscaping is usually distributed equally. The present case is no exception.
[…]
The ready access to commercial lots and the walkways for both residents and their visitors in pleasant surroundings coupled with some security is part of the overall scheme for which someone has to pay.

The converse of this is potentially true as well: business operators benefit from well-maintained residential common areas which attract and retain tenants, who are potential customers. Such a position was examined by Robin QC DCJ in *Sandhurst Trustees Ltd v Condah Bay Investments Pty Ltd*.[18] In that case, commercial lot owners claimed it was inequitable to have to defray the cost of lifts in the residential tower, a swimming pool, and gardens, from which they derived no benefit. The judge firstly noted that:[19]

In my opinion, applications such as the present should not be approached on the footing that there is a single "just and equitable" solution. There may be many views open, subtly, even glaringly different, which could reasonably be seen as 'just and equitable." If there is very little to distinguish the lots – for example, they are units of like size in a "6 pack" – it is unlikely the equality principle could be displaced. Here, the lots are quite easily seen to fit into different categories.

Robin QC DCJ noted that, taking the applicants' argument further, it might be suggested that lower floors would pay less than higher floors toward the upkeep of a lift, or that a disabled resident would not contribute for a pool that they were incapable of using. The judge states that *"it is not going to be feasible to make adjustments periodically to implement what may be "just" or "equitable" as circumstances of this kind change"*—

[17] [2006] QDC 278 at [21]-[22] and [26]; citing *Surfers Hawaiian* [2003] QBCCMCmr 251 at [42].
[18] [2003] QDC 438.
[19] [2003] QDC 438 at [14].

lot entitlements should be set taking into account the long term, not the idiosyncrasies of the lot owners in the short term.[20] To some extent, the value of access to residential common areas and lifts by commercial tenants in this case was greater than it might otherwise be, as the body corporate was a holiday apartment building, and access enabled café owners to supply food and beverages poolside, and to guests' rooms, and to increase their business thereby. As such, some caution is advised in using this case as a precedent.

Recording amendments

Subsection 48(10) provides that the body corporate must lodge a request to record a new community management statement incorporating the changes. The Court of Appeal held in *Banks v Body Corporate for "Noosa on the Beach" CTS 6417* that it is the recording of this new CMS that creates the new lot entitlements, and not the judgment (or adjudication decision).[21] As such, an amendment cannot be made retrospectively. It was also argued in *Banks* that it would be unconscionable for a body corporate to rely on its own delay in having an amended CMS recorded to levy lot owners at pre-amendment rates in the meantime, and that an estoppel therefore should be found to exist. At [22], the Court of Appeal found that it had not been shown that any detriment flowing from this unconscionability had occurred, and hence declined to find an estoppel. While not considering the finer points of the legal argument in detail, the Court did appear, by rejecting the argument for evidentiary reasons only, to suggest that it may be sound in principle.

As a practical matter, such disputes can be avoided when lot entitlements are amended by seeking an order that the amended CMS be filed within a specified period. Such an order was given, to file a CMS *"as quickly as practicable (but not later than 21 days after the date of this order)"* by Forde DCJ in *Battin*.[22] Although the District Court no longer has jurisdiction, such an order could be sought in the CCT, and presumably also from an adjudicator.

[20] [2003] QDC 438 at [14]-[15].
[21] [2000] QCA 146 at [10]-[11].
[22] [2006] QDC 278 at Orders.

PART 3: RIGHTS OF MINORITY LOT OWNERS

However, while the statute requires that the body corporate must *"administer the common property and body corporate assets for the benefit of the owners of the lots included in the scheme"* and *"must act reasonably in anything it does"* (s 94), and likewise now requires the committee to act reasonably in making decisions (s 100, as amended), it is short on practical safeguards to ensure that *all* the owners are benefited.[23]

Commonly heard complaints about the body corporate include the following:

- passing of resolutions in general meetings that operate to the detriment of minority owners; for example, resolutions for levies used for improvements which do not benefit the minority owner[24]
- entering contracts with body corporate managers or service contractors without the agreement of the minority owners;[25]
- exclusion of minority owners from the voting process on a technical basis, such as the failure to pay levies or interest on levies;[26]
- taking common areas to the personal use of majority owners, for example a roof area;[27]
- use of common areas in a manner detrimental to the rights of minority owners; for example, use of a common area parking lot for commercial parking[28] or for placing advertising signs, rubbish bins or tables and chairs[29];
- procedural complaints such as insufficiency of notice for general meetings[30] or lack of a quorum;[31]

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[23] Part 3 of this paper is based on Lindsey Alford and Jasmine Sommer, 'Protection of minority owners in a Body Corporate' (2005) 11 *Australian Property Law Journal* 141.
[24] *Immer (No 155) Pty Ltd v Houghton*, Unreported, Supreme Court of New South Wales, Equity Division, Cowdroy AJ, 25 July 1996.
[25] *Tudor Rose Court* [2003] QBCCMCmr 19 (14 January 2003), Reference 0574-2002; *Manlee Lodge* [2002] QBCCMCmr 358 (4 June 2002), Reference 0131-2002; *Stratford Gardens* [2003] QBCCMCmr 69 (11 February 2003), Reference 0506-2002.
[26] *Immer (No 155) Pty Ltd v Houghton*.
[27] *Platt v Ciriello* [1997] QCA 033 (14 March 1997); *Immer (No 155) Pty Ltd v Houghton*.
[28] *One Park Road* [2003] QBCCMCmr 254 (5 June 2003), Reference 0361-2003, s 6 'Determination' .
[29] *Platt v Ciriello* [1997] QCA 033 (14 March 1997).
[30] *Stratford Gardens* [2003] QBCCMCmr 69 (11 February 2003), Reference 0506-2002.
[31] *Tudor Rose Court* [2003] QBCCMCmr 19 (14 January 2003), Reference 0574-2002; *Manlee Lodge* [2002] QBCCMCmr 358 (4 June 2002), Reference 0131-2002.

- appointment of associated companies at inflated rates as a contractor or manager;[32] and
- circumventing the by-laws.[33]

Case study: Immer's Case

The first significant authority on minority rights in bodies corporate is *Immer (No 155) Pty Ltd v Houghton*, heard in the New South Wales Supreme Court in 1996.[34] *Immer* was an application for an interim injunction by the owner of an auto repair shop. The owner's business was located on the ground floor of a building consisting of four additional floors above him and a fifth level with a commonly held roof area. A Dr. Houghton and Dr. Bates owned the lots on floors 2 to 5. They had bought the lots in 1992 with the objective of upgrading the whole building from an old commercial building to a building for residential use. In 1995 Dr. Bates sold his interest to a company called Glencora, owned by his wife and himself. The plaintiff had only *"a unit entitlement of one fifth in the Strata Scheme"* (20%); the balance was held by the respondents.

The plaintiff's claim arose out of several resolutions passed in an annual general meeting. One of the resolutions was intended to pass title to the commonly held roof area to another owner. To effect this transformation, it was proposed that two penthouse units be erected on the commonly held roof, and there was to be a new lift at a cost of $800,000. Further, a new Administration Fund, financed through a levy, was to be the source of almost $25,000 in reimbursements to the body corporate. Finally, a special levy of almost a million dollars would cover the cost of the transformation. The plaintiff objected and refused to pay the levies. Meanwhile, his solicitor, in a letter to the majority owners of the building, noted that not only had his client's dissent at the annual general meeting not been recorded, but that the notice he had been given of the meeting was deficient.

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[32] *Tudor Rose Court* [2003] QBCCMCmr 19 (14 January 2003), Reference 0574-2002.
[33] *Northcliffe* [2003] QBCCMCmr 10 (8 January 2003), Reference 0520-2002; *cf Platt v Ciriello* above n 26 at [9] per McPherson JA in which lack of a by-law invalidated exclusive use of common property.
[34] Upheld unanimously in the Supreme Court of New South Wales Court of Appeal, *Houghton v Immer (No 155) Pty Ltd* (1997) 44 NSWLR 46.

(a) Exclusion of minority vote

The following year, in the month of March 1993, an extraordinary general meeting was held. The plaintiff objected to the meeting being convened on the basis that the Notice did not comply with Schedule 2 of the Act. The chairman ruled that the meeting was valid and would continue. Furthermore, the chairman held that the plaintiff was unfinancial as he had not paid a levy under a special Sinking Fund struck in October of the previous year and, therefore, the plaintiff would be unable to vote.

At this EGM in 1993, a motion was carried that construction of the two penthouse units, which included the common area roof, would proceed upon the appropriate reports and approvals. The plaintiff objected stating that the construction was almost exclusively for the benefit of the other owners and excluded himself.

Two years later, in 1995, the plaintiff was again refused a vote in the general meeting on the basis that he was unfinancial. This time, the levy was for $990,200 and caused the plaintiff to seek an order that his contribution was excessive. Furthermore, the body corporate passed a new by-law giving themselves complete powers to undertake construction to transform the building, and to call for repair and maintenance.

(b) Gifting common areas to the majority

The annual general meeting of 1996 included resolutions for the subdivision of lots in the building, and the variation of unit entitlements. These subdivisions would include property which encompassed part of the common area, and it was to pass from the body corporate to Dr. Houghton and Glencora for consideration of one dollar. Furthermore, the roof area was to pass to Dr. Houghton and Glencora, also for consideration of one dollar, although the plaintiff believed the market value of the roof area exceeded $400,000. Of course, the plaintiff dissented, but the other members of the body corporate were deaf to his pleas.

By June of 1995, the plaintiff had felt compelled to seek an order that several by-laws be declared invalid and be repealed. His application was heard by the Strata Titles Board under the *Strata Titles Act 1973* (NSW), but no determination had been made by the time

of the annual general meeting in April 1996. However, the Board's determination was forthcoming just three months later in July 1996. It supported the application to the extent that a levy of $100,000 resolved at an EGM in August 1993, and another levy, also for $100,000 resolved in September 1993, were both declared invalid. But this relief was quite narrow. The broader equitable relief the plaintiff sought would not arrive until September 1996 and it would be through the jurisdiction of the Supreme Court.

(c) Findings on unconscionability and fraud on the minority

The plaintiff supported his argument before the Supreme Court on the twin pillars of unconscionability and fraud on the minority. In a judgment which has become a watershed in body corporate law, Cowdroy AJ acknowledged that although 'fraud on the minority' is a corporations law precept, it should have relevance to body corporate law as well.

Cowdroy AJ remarked that, *"In principle, there is no reason why such a doctrine should not have application to the proprietors of a body corporate*" and noted that the Act "*created an association of persons or corporations in an analogous way to that created by the companies legislation*." His Honour further commented that "*Parliament intended that the body corporate must act in the interest of all the proprietors and create a regime amongst proprietors analogous to shareholders*."

Furthermore, Cowdroy AJ held that:[35]

The council of the body corporate is in no different position to that of corporate directors, who owe fiduciary duties to their company. The council members of the body corporate are not entitled to make a present to themselves of property of the body corporate, in the same way as directors of a company cannot make a present to themselves of the company's shares.

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[35] Citing *Dutton v Gorton* (1917) 23 CLR 362 at 394-5; *Ngurli Ltd v McCann* (1954) 90 CLR 425; *Chan v Zacharia* (1984) 154 CLR 178.

Applying the decision in Immer's Case

Wilson SC DCJ considered the findings of an adjudicator under the BCCMA who had determined fraud on the minority to have occurred in *Dindas v Body Corporate for One Park Road CTS 2114*.[36] In particular, an owner who held an absolute majority of lots in a commercial building had appointed a company which she herself owned as building manager (at a price substantially higher than other companies had quoted for similar services), amongst other instances of conduct upon which the adjudicator found adversely.

Wilson SC DCJ refers to the principles enunciated in the New South Wales courts:

[29] Houghton v Immer (both at first instance and on appeal), upon which significant reliance was placed by the respondents, was a case in which the body corporate passed a resolution permitting some lot owners to sub-divide common property for their own benefit. In both courts it was held that because the common property had value, the special resolution of some lot owners was a fraud on the minority, voidable in equity; and, relevantly here, that the doctrine of fraud on a power is of general application and could be applied to bodies corporate under the NSW Strata Title Act 1973.

[30] As the judgment of Handley JA on appeal makes clear, however, the transposition of company law principles into this jurisdiction does not change their nature, which continues to rely on actual wrong doing. As he pointed out (at pp 52-53) the relief flowing from these principles will ordinarily attach where the party guilty of fraud or oppression has been motivated by a desire for some personal or particular gain which, in the words of Dixon J in Peters' American Delicacy Co. Ltd v Heath [1939] 61 CLR 457 (at 511) "…does not fairly arise out of the subjects dealt with by the power and is outside and even inconsistent with the contemplated objects of the power".

However, the judge considered that the adjudicator's findings fell short of determining the actual fraud which would have been required to invoke the doctrine. Rather, the adjudicator had determined the majority owner's conduct only to be *"unreasonable"*. While part of one order in relation to the building manager appointment was upheld as being the subject of sufficiently clear findings of fact, the balance of the adjudicator's orders were overturned.

[36] [2006] QDC 32.

The minority owners relied to some extent on the following passage of Keane JA's judgment in *Hablethwaite v Andrijevic* (emphasis added):[37]

[33] The effect of the adjudicator's conclusion, which was upheld on appeal to the District Court, was that the applicants did not demonstrate that they would be adversely affected in the use and enjoyment of their rights as lot owners (other than their voting rights) either nullification of their voting rights on the motions in question. The adjudicator's statutory powers extend to making orders resolving disputes about the exercise of voting rights by lot owners. ***The statutory conferral of power upon the adjudicator to make an order which is "just and equitable in the circumstances" necessarily contemplates a decision by the adjudicator which may be "just and equitable in the circumstances" even though it overrides the exercise of voting rights by a scheme member.***

[34] Accordingly, the mere circumstance that voting rights of the owner of a lot in a scheme are overridden by a decision cannot, of itself, render the decision something other than "just and equitable". ***Insofar as the rights of a lot owner, other than voting rights, are not affected by the adjudicator's decision, it is impossible to see how the lot owner can be prejudiced in a way which could not be "just and equitable" simply by a decision to nullify his or her voting rights.*** *As I have already noted, the applicants did not seek to demonstrate to the adjudicator that the enjoyment of their rights as lot owners would be adversely affected by the nullification of their voting rights. As a result, there is no basis on which the applicants could seek to demonstrate that the adjudicator had erred in reaching his decision so as to entitle him to succeed on appeal to the District Court on a question of law".*

Wilson SC DCJ found as follows in relation to *Hablethwaite* as well as *McColl v Body Corporate for Lakeview Park CTS 20751*[38] which was also relied on (emphasis added):

[38] I do not think, with respect, that the statement in Hablethwaite appearing at the end of paragraph [33] was intended to extend to the notion that the discretion arising under s 276 empowers an adjudicator to ignore the voting rights associated with lot entitlements under the Act. The second and third sentences in paragraph [34] make it clear, I think, that the reference to overriding the exercise of voting rights is limited to the voting process itself, and was not intended to go further. That conclusion may be gleaned from the reference, in paragraph [34], to rights "…other than voting rights", and the implied acceptance that those further, extensive rights could not readily be destroyed by an adjudicator's decision. Here, the appellants have vigorously sought to demonstrate that the enjoyment of their other rights as lot owners would be adversely affected by the nullification of their voting rights.

[39] ***Neither decision is, then, authority for the proposition that the adjudicator's powers under s 276 to make a just and equitable order to resolve a dispute necessarily connotes the power to override other rights which lie behind, and form the basis of,***

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[37] [2005] QCA 336.
[38] [2004] QCA 44.

voting rights. *The legislation plainly contemplates and permits a majority (determined by reference to voting rights granted by the Act) to assert its will by the legitimate exercise of that voting power. The principle adumbrated in* *Hablethwaite* *is confined to circumstances surrounding the actual exercise of voting rights; it does not support the much broader proposition which the respondents propound.*

Rejecting the respondent's submissions that the ethos of the BCCMA scheme was one of 'democracy', wherein all owners' rights ought to be protected, Wilson SC DCJ found at [23] that:

The legislation is, in truth, however, a reversion to "democratic" principles applying at an earlier stage in the evolution of the voting process in democratic countries – i.e. one based upon property rights. Nothing could be clearer but that the "ethos" created under the legislation is not always one based upon an individual's right to vote, but upon the property rights which accrue to lot owners. That is a conclusion applying with particular force to schemes operating under the Commercial Module.

In principle, therefore, the decision in *Immer's Case* has been accepted as relevant under the BCCMA in Queensland, albeit only at the District Court level. It remains to be seen how broadly these principles may be applied.

CONCLUSION

Dindas' Case demonstrates the risk for minority owners of ostensible wrongs without available remedies under the BCCMA. It should be noted that the circumstances of *Dindas* were more extreme than in the typical body corporate; one owner actually controlled the absolute majority of lots in the development.

Nonetheless, the case demonstrates the imperfect analogy between bodies corporate and companies. One factor to which the judge drew attention is that the companies law doctrine of fraud on the minority only regulates votes that affect the shareholders rights *in relation to their shareholdings*, as opposed to their rights generally to have a say in the running of the company.[39] The proprietary right in shares in a company are, however, much less closely entwined with the running of that company than the proprietary rights of a lot owner are with the running of a body corporate.

As noted at the outset, a lot in a body corporate has a dimension of being an investment; equally, however, for many owners it is also their home or place of work. As such, it is respectfully argued that constraining remedies for fraud on the minority to situations of oppression in relation to property rights only may be an artificial exercise, and insufficient to cure the wrong at which it is directed.

Similarly, the steps taken by the legislature in creating the codes of conduct under the 2007 Amendment Act, while commendable, do not in my view go far enough to adequately safeguard the interests of lot owners in their valuable investments.

22 August 2008

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[39] *Dindas* at [25], citing B H McPherson, *Company Liquidation* (4th ed) at 177.