# DISTRICT COURT OF QUEENSLAND

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| CITATION: | Body Corporate for 'Surfers Waters' v Angland & Anor [2000] QDC 034 |
| PARTIES: | **BODY CORPORATE FOR "SURFERS WATERS" CDS 20377** (Appellant)<br>v<br>**MAURICE JOHN ANGLAND & GLORIA JUNE ANGLAND** (Respondents) |
| FILE NO/S: | Appeal 761/99 |
| DIVISION: | District Court |
| PROCEEDING: | Appeal to District Court from Adjudicator's decision |
| ORIGINATING COURT: | District Court Southport |
| DELIVERED ON: | 10 March 2000 |
| DELIVERED AT: | Brisbane |
| HEARING DATE: | 1st February 2000 |
| JUDGE: | P.D. Robin, Q.C., D.C.J. |
| ORDER: | **1. Appeal allowed**<br>**2. Adjudicator's order is set aside**<br>**3. Respondent to pay body corporate's cost of appeal** |
| CATCHWORDS: | Body Corporate and Community Management (Standard Module) Regulation 1997, s.51(2) – "personally" in s.51(2) held to refer to delivery of a written vote by the voter personally, rather than delivery (howsoever) to the secretary personally – appeal from adjudicator to District Court under s.237 of the *Body Corporate and Community Management Act* 1997 allowed – 15 written votes delivered to secretary by building manager held invalid – speech in Legislative Assembly in support of provision when first enacted used in aid of its interpretation – *Acts Interpretation Act* 1954 s.14A(1), s.14B(1)(a), s.14B(3)(g), s.39 |
| COUNSEL: | Mrs W Cull for appellant<br>Mr D MacIntosh (sol) for respondents |
| SOLICITORS: | Attwood Marshall for appellant<br>Short Punch & Greatorix for respondents |

[1] The outline of submissions provided to the court on behalf of the appellant body corporate states that this appeal concerns only one issue:

> "Does s.51(2) of the *Standard Module Regulation to the Body Corporate and Community Management Act* 1997 require written votes to be personally delivered by the voter to the secretary (if they are not posted or sent by facsimile)?"

[2] The standard module applies in respect of the appellant body corporate. Section 51 is, in part:

> "(1) A voter for a general meeting may vote on a motion personally, by proxy or by casting a written vote.
>
> (2) A written vote is cast by completing the voting papers as required by the accompanying instructions and giving them to the secretary (personally, by post or by facsimile) before the start of the meeting."

Subsection (3) deals with withdrawal by a voter of a written vote.

[3] As will be seen, the issue arises in a context which bears close parallels to the scenarios described by Mr Beattie in the Legislative Assembly in his speech on 18th November 1994 on the second reading of *the Building Units and Group Titles Bill* in respect of what became s.81 of the *Building Units and Group Titles Act* 1980 and is now reflected exactly in the wording in the standard module provisions set out above.

[4] The speech is listed among the "extrinsic material" mentioned in s.14B(3) of the *Acts Interpretation Act* 1954 which may be considered in the interpretation of the statutory language – "if the provision is ambiguous or obscure", to quote subsection (1)(a). There is ambiguity, reflected in the parties' opposed submissions, as to whether "personally" in s.51(2) refers to the secretary personally, or the voter personally. Reference ought also be made to s.14A(1) of the *Acts Interpretation Act* which requires that the interpretation that will best achieve the purpose of an enactment is to be preferred to any other interpretation. The speech, in my opinion, sheds light on the purpose.

[5] The question comes before this court on appeal under Chapter 6 Part 12 of the *Body Corporate and Community Management Act* 1997 (s.237ff), a procedure open only where the person aggrieved by an adjudicator's order is able to raise a question of law: s.237(2). It was the body corporate which invoked the jurisdiction of the adjudicator when it sought orders:

"(a) that motions 15, 16 and 17 considered at the annual general meeting of the Body Corporate held on 10th September 1996 be re-considered and an Extraordinary General Meeting convened for that purpose or that motions 15 and 16 be declared passed and motion 17 be lost.

(b) that the Management and Letting Agreement referred to in motion 17 is not capable of extension."

[6] It has not been necessary for the court to know in any detail the substance of the contest which underlies the comparatively arid contest on the appeal. Suffice it to say that Mr and Mrs Angland, the respondents in the appeal, and before the adjudicator, hold the management and letting rights in respect of the "Surfers Waters" group title; it is an extensive canal type development which presently has some 136 lots, following extensive subdivision of six original lots. It is notorious, and perhaps more so in respect of high rise unit blocks, that "management and letting rights" may be very valuable.

[7] The motions referred to were as follows:

"**15. BODY CORPORATE MANAGEMENT**

That the body corporate resolves to terminate the services of the existing Body Corporate Managers giving, if required, 30 days notice and that under authority of Section 87(1) of the Body Corporate and Community Management (Standard Module) Regulation 1997, the body corporate engage Body Corporate Consultants Pty Ltd as its body corporate manager for the supply of administrative services to the body corporate commencing on 12 October, 1998 for a period of 1 year for $12,500 p.a. calculated on the basis of $90 per lot per annum, the terms of which are stated in the agreement attached to this meeting address.

Note: A second quotation was obtained from Steward Silver King & Burns for $14,175 p.a.

Note: Cost of disbursements not included in either quotation.

**16. VARIATION OF MANAGEMENT AND LETTING AGREEMENT**

Consideration of the following Motion be deferred to a later General meeting so that the Committee can seek legal advice regarding its effect and provide a discussion paper to enable owners to be fully informed when the Motion is considered.

Please read the enclosed cover information before voting.

**17. VARIATION OF MANAGEMENT & LETTING AGREEMENT**

*Proposed by: M & G Angland* *Lot No: 30*

The Body Corporate agrees to vary the Management and Letting Agreement date the 16th March, 1993 with Maurice John Angland and Gloria June Angland by insertion of the following clause:

"6A FURTHER OPTION

The Manager shall have the option of reappointment for a further term as Manager ("the Second Option Term") for a period of five (5) years from the date of expiration of the option term in Clause 6 ("the First Option Term") upon the same terms and conditions as set forth herein with the exception of Clause 6 and this clause. Such option can only be exercised by the Manager giving notice in writing to the Body Corporate not more than six (6) calendar months and not less than three (3) calendar months prior to the date of expiration of the First Option Term. The remuneration for the Second Option Term shall be as agreed upon between the parties, or failing agreement, at a remuneration being not less than the remuneration as if subjected to a further annual review under Clause 2.01(c) and thereafter shall be increased annually on the anniversary of the commencement date of the Second Option Term, such increase to be calculated in accordance with increases in the Consumer Price Index as defined in Clause 2.01(c)."

AND the Body Corporate shall execute a Deed of Variation with the Manager to provide for the terms of this Motion by affixing its common seal on the signatures of two members of the Committee.

NB: The Option term in Clause 6 of the Management and Letting Agreement (for five (5) years from the 11th March, 1998) has been exercised by the Manager. The Manager has requested that a further Option of five (5) years from the 11th March 2003 be added to replace the Option exercise."

[8] Motions 15 and 16 were lost, motion 17 passed. While it seems astounding that for no consideration the Manager should be given valuable rights for an additional five years, I was told from the bar table that legislation prevents a body corporate's obtaining consideration for the grant of such an option. The body corporate's case was that the respondents or a family member had canvassed lot owners for written votes, supplying facsimile copies of voting papers to persons entitled to vote, then collected the completed voting papers, some 15 of them, and delivered them to the

offices of the secretary, Anne Farrell; the consequence was said to be that the purported written votes did not comply with s.51(2).

[9] The court was told that resolution 17 has subsequently been revoked, but it is easy enough to imagine that it may be in the interests of Mr and Mrs Angland to establish that the resolution was originally validly passed.

[10] The body corporate's point before the adjudicator was that it had not been, because the 15 written votes had not been delivered by the voters (by themselves, personally) to the secretary.

[11] The adjudicator's written reasons of 31 March 1999 may be summarised by quoting the following paragraph:

> "I am not persuaded that the "bulk delivery" of votes by the manager's son was indicative of any sinister circumstance surrounding those votes. It is not necessary for owners to personally deliver their vote. As I have already stated, there has been no suggestion that any of the votes was obtained fraudulently. I do not accept that there should be any rejection of those votes simply because they were delivered to the secretary by the manger's son."

[12] Nothing turns on whether it might have been the managers themselves rather than their son who delivered voting papers to the secretary.

[13] The quotation in the short second sentence enshrines the adjudicator's view on a question of law which may properly now be brought before this court.

[14] It does not appear that the adjudicator was referred to Mr. Beattie's speech. The adjudicator may be forgiven for applying s.51(2) of the standard module in a practical, commonsense way, given the state of assurance reached that genuine voting intentions of persons entitled to vote were being given effect to and that by the means adopted, the voting papers reached the hands of the secretary personally before the meeting.

[15] Mr MacIntosh, who represented the respondents, Mr and Mrs Angland on the appeal submitted that "personally" refers to the secretary personally, relying on an analogy with various provisions in respect of service which may commonly be

treated as satisfied if there is service on the person intended to be served personally (as opposed to service by the person in whose interest service is to be effected personally) or by post or by facsimile or other means. See, in particular, s.39 of the *Acts Interpretation Act*, which applies whether legislation uses variants of serve, give, notify, deliver, send, or other expressions. The lack of any need to specify delivery to the secretary personally may well be an indication that, here, something is to be done by the voter personally.

[16] It seemed to me there was a disharmony, in Mr MacIntosh's approach, between the use of the word "personally" in subsection (1), where it plainly refers to the voter and the use of the word in subsection (2) in close proximity, where it also sensibly refers to the voter. Mrs Cull, for the appellant body corporate, went much further than that, submitting that where the legislature has permitted the person entitled to vote to do so by a "written vote" as well as by voting personally at a meeting or through a proxy who attends the meeting, it has insisted on strict satisfaction of conditions before a written vote is valid, which are set out in subsection (2). Mrs Cull referred me to a grammarian's categorisation of s.51(2) and like provisions as including a "dangling participle" in that it is nowhere expressed just who should do the "completing" and the "giving". She says, and I am inclined to agree, that it must be the same person, namely, the voter. She says, and again I agree, having regard to the contents of Mr Beattie's speech, among other things, that this is a "consumer protection" provision which is designed to protect all lot owners by creating an assurance that every written vote cast is a sincere and honest expression of the voter's views, as authenticated by the voter's taking the trouble personally to give the voting paper to the secretary if the alternative modes of transmission are not resorted to. That state of assurance, the argument runs, cannot be reached where some intermediary is interposed, who is the one who in the event gives a voting paper to the secretary.

[17] I turn to Mr Beattie's speech in Parliament, whose contents indicate that it comes within paragraph (g) of s.14B(3) of the *Acts Interpretation Act* rather than under paragraph (f), although some of it reads as though it might serve for a speech within (f). Speaking generally (and the court makes it clear nothing is being suggested regarding Mr and Mrs Angland) Mr Beattie said:

"**MR BEATTIE:** On a number of occasions, letting managers have assumed a position that they should not have assumed. For example, investment owners have been threatened that, if they do not vote in a certain way at a body corporate meeting, when it comes to allocating which units are to be rented then their units will not be included, or will be put down the list. That has the effect of severely limiting the monthly income or, indeed, the yearly income of those investment owners.

**Mr Davidson:** The returns

**MR BEATTIE:** Indeed – the returns. So we need to make certain – as this legislation does – that those letting managers cannot get away with going that. The mechanism they use for getting their own way at body corporate meetings is to get a proxy from investment owners. So they turn up with a bundle of proxies at the body corporate meeting and then run the show. That is a practice that I do not support.
…
The Motion going before the body corporate could include such self-interest matters as extending the letting manager's contract or providing the letting manager with an area of common property for his or her storage or other purposes. There is clearly a conflict of interest, and that needs to be dealt with in the legislation. As honourable members would understand, investment owners are not going to be terribly forthcoming about disclosing this sort of practice, because their financial return is on the line, and they would only disclose that sort of information if it was done in a confidential way and if there was no real threat to them. This legislation stops letting managers exercising the right to use a proxy vote from those investment owners at a body corporate meeting, nor can any of their associates. We are ensuring a lot more fairness and equity in the operation of body corporate meetings.
…
Quite a lot of elderly people live in those units. If a person is renting out a number of them for investment owners then elderly people are almost disfranchised. They have a vote, but then their letting manager comes in with a bundle of votes, he or she could dominate that body corporate meeting and make decisions in their own financial interest and decisions about the use of common property that may not necessarily be in the overall interests of all owners. I am delighted to see that provision.
…
There has been an extensive overhaul in this legislation of the legislative requirements regarding meeting procedures, the election of committees, financial management of body corporate funds, voting entitlements and arrangement, and the powers of the body corporate and its committee. The matters range over lengthening the time for convening a meeting, what constitutes a quorum, those expenditures that require tenders to be obtained, how proxies and

> written votes may be exercised, financial penalties against owners who do not pay contributions on time … and simplified voting procedures for multiple owners of lots, for example, husband and wife joint tenants."

[18] It seems the legislation allows for a number of anomalies, particularly if Mr MacIntosh is right about it. Thus, no person would be entitled to hold as many as 15 proxies, yet the letting manager is allowed to organise and deliver to the secretary written votes in far greater number. Reference might be made to the proxy provisions in the standard module, in particular in s.72, limiting the number of proxies that may be held by any person, and in s.75(4) and (5) which preclude proxy arrangements in favour of a person with a financial interest. The legislature has chosen to discriminate against letting managers, for whatever reason, as described by Mr Beattie. Having regard to s.14A of the *Acts Interpretation Act,* an interpretation which permits a person with a financial interest to achieve by canvassing for written votes something which can no longer be achieved by canvassing for proxies seems a curious one. It must be accepted that he said little specific regarding written votes.

[19] It may also be accepted that the use of the word "personally" in s.51(2) is clumsy and may lead to inconvenient or absurd consequences. If Mr MacIntosh is right, is it really necessary that votes be given over when the secretary is personally present or (as might indeed have happened here) should it be sufficient that they are left somewhere where the secretary will have access to them in due course? If (as I think to be the case) Mrs Cull is right and "personally" refers to the voter, it seems inconvenient in the extreme if the voter (who may use the services of Australia Post to give over a vote – see s.39A(2) of the *Acts Interpretation Act)* may not use the services of a relative, a friend or a courier service. There may be room for the use of such agents, and I would not wish to say anything to exclude it, but the risk is obvious. A voter who wishes to have a written vote counted would be wise to comply strictly with s.51(2); doubtless, shortcuts will be taken in emergency situations which may lead to further elicitation by adjudicators or judges. I think, at the least, that what the provision requires is a personal commitment by the voter to his or its vote to the extent of personal and particular steps being taken in relation to that voting paper to get it to the secretary in a way that indicates to the secretary the

voter's personal, considered imprimatur and implies a warranty to the secretary that the vote is an enthusiastic, free and genuine one.

[20] I would reach the same view even if I had not been made aware of Mr Beattie's speech. In my opinion, it is an eccentric interpretation which would apply "personally" to the voter in subsection (1) and to the secretary in subsection (2) notwithstanding that subsection (2) also deals with things to be done by the voter. The matter would be clearer if "(personally, by post or by facsimile)" came before "to the secretary" rather than after them. It appears to me that Mr MacIntosh's submission really gives no effect at all to the bracketed words, "personally" in particular.

[21] Mr MacIntosh did not submit the court could not have regard to Mr Beattie's speech, or seek to draw attention to any other passages from Hansard.

[22] For the foregoing reasons the appeal succeeds. The adjudicator's order dated at Brisbane the 1st of April 1999 that the body corporate's application be dismissed is set aside. Instead, it is ordered that the written votes for use at the annual general meeting of the body corporate for "Surfers Waters" CDS 20377 held on 10th September 1998 which were given to the secretary by the respondents or an associate of theirs are void and ought not to have been counted. It is said that the consequence is that motion 16 was resolved in the affirmative and motion 17 was lost. The respondents should have an opportunity to contend that the consequence is different, if so advised.

[23] I order the respondents to pay the body corporate's costs of the appeal.