



PROXY OR POWER OF ATTORNEY?

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The Office of the Commissioner for Body Corporate and Community Management has handed down a decision distinguishing between the use of proxies and powers of attorney, which will have considerable impact on how votes are able to be cast at a general meeting.

The regulations provide numerous restrictions on the use of proxies at a general meeting. On the other hand, there are no restrictions on the uses of powers of attorney, which gave rise to this dispute.

THE FACTS

This application for an interim order was brought by the current body corporate managers (“**BCM-S**”), against the body corporate, challenging the validity of a motion, which was purportedly passed at the annual general meeting (“**AGM**”) on 16 March 2016.

The motion with alternatives concerned the appointment of a body corporate manager for the scheme located in Brisbane City. The motion provided three options; the re-election of BCM-S or the appointment of an alternative body corporate manager, **BCM-A** or **BCM-B**.

Prior to the AGM, an individual (“**Mr N**”) presented 27 documents to BCM-S, which were entitled “Power of Attorney”. Each of these documents had been signed by a lot owner. The powers of attorney were identical and appointed Mr N to, on behalf of each principal, do

anything the principal may lawfully authorise an attorney to do for the lot in relation to the AGM, including by not limited to obtaining all relevant information relating to the AGM, executing and delivering the documents for the AGM, and voting on behalf of the principal.

The motion was considered by the body corporate, where the appointment of BCM-A was carried with 33 votes in favour. The continuation of BCM-S received 10 votes, while BCM-B had no votes in favour.

THE DISPUTE

BCM-S challenged the validity of BCM-A’s appointment at the AGM. The Applicant argued that Mr N did not comply with the requirements of section 81 of the Accommodation Module to be validly appointed as the representative lot owners for which he purported to exercise votes pursuant to the powers of attorney.

Alternatively, the Applicant argued that the Mr N circumvented the requirements of the legislation by exercising votes via powers of attorney in circumstances where he would otherwise have been prohibited from exercising those same votes by a properly obtained proxy.

In response, the body corporate submitted that the votes made by Mr N were valid votes because the use of powers of attorney in voting is a valid method of lot

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owners exercising their vote and there is no limit on the number of powers of attorney that may be used for a meeting. Alternatively, however not relevant to this case's impact on proxies and powers of attorney, the orders sought by BCM-S cannot be made as if Mr N's votes were invalidated, a quorum for the AGM would not have been present.

WAS MR N A VOTER AND IS THERE A REQUIREMENT FOR WHEN POWERS OF ATTORNEY MUST BE GIVEN?

Mr N was not entered on the body corporate's roll as being a representative of the 27 lots he purported to vote for. BCM-S argued that in order for an individual to be considered a voter, that individual must have had its name entered on the body corporate's roll of lot owners.

The Adjudicator however, disagreed with the submission of BCM-S, whilst noting that there was no requirement under the Accommodation Module to provide the powers of attorney by a certain time, and no such requirement can be inferred from the wording of the Module when read as a whole.

Furthermore, the Adjudicator stated that the purpose of requiring a representative to give the document purporting to give them authority to vote is so that the chairperson can ascertain whether the person has genuinely been appointed by the owner.

THE PURPORTED CIRCUMVENTION OF PROXY PROVISIONS

BCM-S argued that even if Mr N was considered a voter, his votes should be invalidated on the basis that he had acted in circumvention of other legislative voting requirements.

The Applicant argued that the powers of attorney were obtained for the sole purpose of exercising votes on a lot owner's behalf at the AGM. As such, the limitations for proxies at a general meeting should apply equally to that of the powers of attorney, with the Applicant submitting that they are analogous. Two specific limitations were highlighted:

1. Section 105 of the Accommodation Module limited the maximum number of votes by proxy that one person may exercise to 10% of the number of lots in the scheme; and
2. Section 107(3)(f)(i) of the Accommodation prohibits voting by proxy on a motion approving the engagement of a body corporate manager.

Again, the Adjudicator disagreed with the Applicant's submission saying that the two relationships are entirely different and are intended to be treated differently.

Where the Accommodation Module specifically contemplated powers of attorney and does not place a limit on them, compared to specifically contemplating proxies and placing a limit on their use, it can be inferred that the purpose of the legislature is not to place any limit on the number of powers of attorney that may be exercised. If limits were to be placed on powers of attorney voting at a meeting, it would be inconsistent with allowing each voter to vote as part of the democratic body corporate decision making process.

WHAT DOES THIS MEAN FOR POWERS OF ATTORNEY AND PROXIES AT A GENERAL MEETING?

There is a significant difference between powers of attorney and proxies. While the use of proxies at a general meeting have numerous restrictions, powers of attorney are not subjected to any restrictions. Subsequently, there are no limitations place on the number of powers of attorney that an individual may exercise or no limitations on motions that a power of attorney can vote on.

There are no requirements under the Accommodation Module for when powers of attorney are to be submitted. The purpose of giving prior notice to the body corporate is for the chairperson to ascertain whether that individual has been genuinely appointed by the lot owner. It then follows that in circumstances where the chairperson or committee have doubts regarding the appointment of a power of attorney, steps should be taken to ensure the individual has been appointed.

FUTURE UPDATES

It is important to note that this decision was in relation to the application for an interim order; [2016] QBCCMCmr 117. These issues may be considered again in the context of a final order.

ClarkeKann will provide an update should the Applicant choose to proceed with the application for final orders.

FOR MORE INFORMATION, PLEASE CONTACT:



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