

J.S. MUELLER & CO.

SOLICITORS & ATTORNEYS

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Our Ref: AM:DR:22012

19 April 2013

The Registrar
Consumer, Trader and Tenancy Tribunal
GPO Box 4005
SYDNEY NSW 2001

Dear Registrar

RE: Lot 158 -v- OWNERS CORPORATION STRATA PLAN 52948
FILE NO.: SCS 12/32675

We act for the respondent, Owners Corporation SP52948 (“owners corporation”).

On 15 April 2013 Deputy Chairperson Harrowell made orders concerning the preparation of further evidence and submissions in this appeal (“CTTT appeal”).

Pursuant to those orders, we **enclose** the statutory declaration of Peter Bone dated 19 April 2013 and set out below further submissions which address the question of the retainer of the owners corporation’s lawyer.

Submissions on Lawyer’s Retainer

Facts

1. The statutory declaration of the owners corporation’s strata managing agent, Peter Bone, sets out the relevant facts concerning the appointment of the owners corporation’s lawyer in the CTTT appeal. The relevant facts are as follows:
2. By a strata management agreement dated 26 May 1999 the owners corporation appointed Raine & Horne Strata – Sydney as its strata managing agent and delegated to the strata manager all of its functions and the functions of its executive committee and office bearers: see clauses 2.1 and 2.2 of agreement.
3. On 5 July 2012 the owners corporation’s lawyer (Adrian Mueller) emailed to its strata manager a letter estimating that he would charge “\$6,600 - \$12,100 to represent the owners corporation in the [CTTT] appeal”.
4. On 6 July 2012 the letter containing the lawyer’s costs estimate was emailed by the strata manager to the members of the executive committee of the owners corporation.

5. On 9 July 2012 the members of the executive committee held an emergency meeting at which it was "*unanimously resolved to appoint Adrian Mueller to represent the owners corporation at the directions hearing and to enter into an appropriate costs agreement noting that this may incur costs up to \$12,000 [in the CTTT appeal]*".
6. On 16 July 2012 the owners corporation's lawyer sent by email to the strata manager a costs agreement concerning the CTTT appeal with a cost disclosure estimating that the lawyer would charge the owners corporation \$11,550 to act in the CTTT appeal.
7. On 25 July 2012 the then strata manager of the owners corporation, Gary Webb, signed the lawyer's costs agreement on behalf of the owners corporation and the signed costs agreement was emailed to the lawyer by the strata manager on that day.
8. On 22 August 2012 the executive committee held its next meeting the minutes of which relevantly record the following: "*As minuted on 9 July 2012, Mr Adrian Mueller of JS Mueller & Co had been engaged to represent the OC at the CTTT hearing held on 8 August 2012. Lot 158 is appealing against the decision by CTTT to dismiss his application for orders against the OC. The lawyer estimated the OC legal costs may reach \$12,000.*"
9. On 5 December 2012 and 20 February 2013 the executive committee next held meetings. At each meeting there was discussion concerning the CTTT appeal.
10. On 28 March 2013 the executive committee made a written decision not to elect a representative to attend a mediation requested by the appellant, Lot 158.
11. On 19 April 2013 the executive committee passed resolutions ratifying (to the extent necessary) the:
 - (a) the decision of the executive committee to appoint Mr Mueller as the owners corporation's lawyer in the CTTT appeal; and
 - (b) the decision of the strata manager to sign and accept Mr Mueller's costs agreement on behalf of the owners corporation.
12. During the conduct of the CTTT appeal, the executive committee has been acutely aware that Mr Mueller has represented the owners corporation in the appeal and, through the strata manager, it has repeatedly given Mr Mueller instructions concerning the conduct of the appeal.

Analysis

13. Mr Mueller was appointed to represent the owners corporation as its lawyer in the CTTT appeal by the resolution passed by the executive committee on 9 July 2012.
14. The executive committee was able to make the decision to appoint Mr Mueller because at the time of the meeting it had Mr Mueller's letter estimating that his charges to represent the owners corporation in the appeal would be no greater than \$12,100.
15. Whilst that estimate was not a cost disclosure for the purpose of the *Legal Profession Act 2004*, it was able to be (and was) relied on by the executive committee to form an opinion that

- the reasonably estimated costs for Mr Mueller to represent the owners corporation in the CTTT appeal may be “up to \$12,000”.
16. This enabled the executive committee to make the decision to retain Mr Mueller without needing to refer the decision to a general meeting pursuant to section 80D of the *Strata Schemes Management Act 1996*. That is, the decision to appoint Mr Mueller was a decision that fell within the exemption contained in clause 15 of the *Strata Schemes Management Regulation 2010* and was capable of being made by either the executive committee or strata manager.
 17. The minutes of the 9 July 2012 meeting refer to the appointment of Mr Mueller to represent the owners corporation “at the directions hearing”. But it cannot be doubted that the object of the resolution was to authorise Mr Mueller’s appointment to represent the owners corporation in the CTTT appeal. The resolution itself refers to the entry into an appropriate costs agreement that “may incur costs up to \$12,000”. Plainly the resolution intended to appoint Mr Mueller for the entire CTTT appeal at a cost of up to \$12,000, not just for the purpose of appearing at a directions hearing for a \$12,000 cost.
 18. Mr Mueller’s appointment as the owners corporation’s lawyer in the CTTT appeal was confirmed on 25 July 2012 when the strata manager of the owners corporation signed and returned to Mr Mueller a copy of his firm’s costs agreement (which estimated that the costs for representing the owners corporation would be \$11,550).
 19. The strata manager was authorised to sign and return the costs agreement, and to engage Mr Mueller, on behalf of the owners corporation by virtue of:
 - (a) the costs agreement containing a cost disclosure for the purpose of the *Legal Profession Act 2004* for less than \$12,500 – meaning the decision to accept the costs agreement and appoint Mr Mueller did not need to be made by the owners corporation in general meeting; and
 - (b) the executive committee’s resolution of 9 July 2012 appointing Mr Mueller and resolving “to enter into an appropriate costs agreement noting that this may incur costs up to \$12,000”; or
 - (c) the owners corporation having delegated to the strata manager all of its functions pursuant to the strata management agency agreement dated 26 May 1999.
 20. The strata manager’s decision to sign and return the costs agreement, and thereby appoint Mr Mueller as the lawyer of the owners corporation in the CTTT appeal, has the same effect as if it had been done by the owners corporation and is taken to have been done by the owners corporation: s 28(7) *Strata Schemes Management Act 1996*.
 21. Mr Mueller’s appointment as the owners corporation’s lawyer in the CTTT appeal was noted in some detail at the next executive committee meeting held on 22 August 2012. If it be necessary, the discussion concerning Mr Mueller’s appointment at that executive committee meeting, and the recording of that appointment in the minutes meeting (and the subsequent giving of instructions to Mr Mueller by the executive committee) can be viewed as the executive committee’s confirmation and implied ratification of the decision to appoint Mr Mueller made at its previous meeting on 9 July 2012 and by the strata manager.

22. To put the question concerning the validity of Mr Mueller's appointment beyond doubt, on 19 April 2013 the executive committee passed resolutions to ratify the decision to appoint Mr Mueller made, initially, by the executive committee on 9 July 2012 and, subsequently, by the strata manager on 25 July 2012.
23. Later acts of authorisation can and do ratify decisions which have been otherwise made without authority: *Leybourne v Permanent Custodians Ltd* [2010] NSWCA 78. Once an unauthorised act is ratified, the ratification acts retrospectively to cloak the person who carried out that act with authority which operates from the time the act was done.
24. The principle of ratification and its application to legal proceedings apply to an owners corporation: see *Banks & Anor -v- Body Corporate "Noosa on the Beach" Community Title Scheme 6417* [2000] QCA 146 where the Court accepted that a resolution in substance ratified legal action already commenced by a body corporate (without an initial authorising resolution as required by s 132 of the *Body Corporate and Community Management Act 1997* (Qld)) and rejected a submission that the application and appeal were incompetent.
25. To conclude, the owners corporation says that Mr Mueller was validly appointed and retained to represent the owners corporation in the CTTT appeal by reason of:
- (a) the executive committee resolution passed on 9 July 2012 to appoint Mr Mueller to represent the owners corporation in the CTTT appeal;
 - (b) the strata manager's acceptance and execution of the costs agreement appointing Mr Mueller as the owners corporation's lawyer in the CTTT appeal on 25 July 2012;
 - (c) the confirmation and implied ratification of Mr Mueller's appointment at the next executive committee meeting held on 22 August 2012 and subsequently; and
 - (d) the express ratification of Mr Mueller's appointment by the executive committee on 19 April 2013.
26. Finally, even if Mr Mueller was not validly appointed to represent the owners corporation in the CTTT appeal (which is denied by the owners corporation) that issue has no bearing on whether or not an order should be made for the appellant, Lot 158 to pay the costs of the owners corporation in the CTTT appeal.
27. Rather, that is an issue that would be relevant for the purpose of a costs assessor determining the amount of costs the appellant would be liable to pay the owners corporation pursuant to any costs order made by the Tribunal.
28. This is because even if the owners corporation is not liable to pay any of the fees charged by Mr Mueller (which is not the case), it may have other costs which would be recoverable pursuant to any costs order made by the Tribunal.

Yours faithfully



J.S. MUELLER & CO

Encl.