

Accepting instructions from strata corporations

By DAVID D. KNOLL AM

A recent case has relaxed the requirements for accepting instructions from strata owners' corporations.



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In *The Owners Strata Plan No 73943 v 2 Elizabeth Bay Road Pty Ltd (Elizabeth Bay Road)*, [2013] NSWSC 1769, Hammerschlag J departed from earlier decisions holding that a strata owners' corporation lacks capacity to give a solicitor instructions in the absence of compliance with s.80D of the Strata Schemes Management Act 1996 (NSW) at the time the instructions are taken. Section 80D provides that an owners' corporation "must not seek legal advice or the provision of any other legal services, or initiate legal action", absent the authorising resolution. In most instances, absence of capacity cannot be

cured by ratification, but in *Elizabeth Bay Road*, the court held that absence of compliance with s.80D could be cured by ratification.

Previously, solicitors accepting instructions from an owners corporation were at risk of an adverse costs order arising from commencing proceedings without confirming that they had lawful instructions to do so. Careful solicitors typically obtained a copy of the owners corporation's resolution passed under s.80D, or where applicable, the exemption under reg. 15 of the Strata Schemes Management Regulation 2010 (NSW). Even for non-litigious work, some

firms have required a copy of the owners corporation resolution upon acceptance of the costs agreement.

Background

In *Elizabeth Bay Road*, the plaintiff owners corporation instructed solicitors to commence proceedings under the *Home Building Act 1989* (NSW) concerning defective work carried out by a builder. Their solicitors moved quickly to avoid a time bar. Since the original estimated cost of the legal services was below the dollar threshold provided for in reg.15, the executive committee (rather than the owners corporation), resolved to retain the solicitors. Six months later, when it became clear that the expenses would exceed the regulatory threshold, the owners corporation ratified the retainer.

The defendant moved for an order that the proceedings be struck out or dismissed on the grounds that they were commenced "without lawful authority". Hammerschlag J characterised the defendant's position as "a windfall defence". It sought to rely on the fact that the ratification had occurred after the relevant limitation period had expired. His Honour departed from the conventional understanding of the decisions in *Owners SP No. 46528 v Hall*, [2009] NSWSC 278 (*Hall*) and *Owners Strata Plan No. 70798 v Bakkante Constructions Pty Ltd* [2013] 17 BPR 32,159 (*Bakkante*)¹ "that proceedings commenced absent compliance with s.80D(1) are a nullity".²

Instead, Hammerschlag J relied, in part, upon the reasoning of the Queensland Court of Appeal in *McEvoy v Body Corporate for 9 Port Douglas Road*, [2013] QCA 168, examining whether the

language of s.80D disclosed a legislative intention to "take away any common law right of the plaintiff or to curtail the jurisdiction of the court to entertain a claim".³ His Honour could find no such intent, and also held that: "the plain wording of s.80D(1) accommodates fulfilment by a resolution even if it is passed after the initiation of an action or the taking of legal advice, as the case may be."⁴

Departure from prior cases

This interlocutory decision arguably departs from the reasoning in *Hall* and *Bakkante*. The issue in *Hall* was not simply whether a resolution approving legal action could be passed subsequently by way of ratification. As Hammerschlag J noted: David Kirby J concluded that where proceedings were initiated by an owners corporation against a lot owner without compliance, the owners corporation "lacked the capacity to bring its action".⁵ In *Hall*, Kirby J considered both the heading to Div. 3 of Pt. 3 of the Act, and the Minister's second reading speech. Kirby J concluded that s.80D properly was characterised as a restriction on a power, and not simply a direction about the manner of its exercise.⁶

Similarly, in *Bakkante*, Pembroke J held that the natural corollary of the regime is that actions taken by an executive committee in contravention of s.80D, or without compliance with reg. 15 should be treated as invalid and unauthorised. "There is no halfway house; no reason for attempting to ameliorate the outcome because of the particular consequences in a given case of wasted costs or aborted legal action. Consequences such as those are the inevitable result of invalidity."⁷

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However, *Pembroke J* was not required to address whether ratification would be sufficient.

As a general matter of law, ratification cures an absence of authority where the principal granting the authority has capacity to act but fails to exercise it in time.⁸ But while ratification might cure lack of authority, it cannot cure lack of capacity.⁹

Consequently, this recent decision in *Elizabeth Bay Road* only makes sense if there has been a departure from *Hall's* central proposition that by virtue of non-compliance with s.80D, the owners corporation lacked legal capacity to bring its action.

The legal capacity of the client to contract with a solicitor "lies at the heart of the lawyer-client relationship".¹⁰ Solicitors are generally very careful about matters considering the duty to ensure the client's capacity to give such instructions.¹¹ Solicitors also are required to ensure that a

retainer legitimately can be executed before filing a statement of claim in any court. It is no longer uncommon for a solicitor to be compelled personally to pay costs incurred by other parties if steps taken in litigation are, in fact, unauthorised.¹² The Law Society's Client Capacity Issues Subcommittee has developed guidelines to assist lawyers who suspect that a client may not be competent to give proper instructions. Those guidelines, however, do not address statutory or corporate incapacity situations. As a matter of principle, and as recognised in *Hall* and *Bakkante*, where a corporation lacks capacity to engage a solicitor when the retainer is entered into, ratification cannot cure that lack of capacity.¹³

Elizabeth Bay Road's importance cannot be underestimated particularly if its reasoning is followed in preference to *Hall* and *Bakkante*. The decision arguably:

□ removes the risk of dismissal due to non-compliance with s.80D prior to the commencement of proceedings; and

□ relieves solicitors from accountability for accepting instructions without first confirming compliance with the *Strata Schemes Management Act 1996* (NSW). After *Elizabeth Bay Road*, such compliance can now be achieved by way of ratification in the event earlier actions were in breach of s.80D. In a practical sense, the only effect of such non-compliance by an owners corporation may be a stay of proceedings pending consideration of an appropriate resolution ratifying the decision to take legal action. Ultimately, the Court of Appeal will undoubtedly be called upon to resolve the varying approaches in *Elizabeth Bay Road*, *Hall* and *Bakkante*. Until then, some uncertainty will continue to govern these cases. □

ENDNOTES

1. It is understood that an appeal has been filed.
2. *The Owners Strata Plan No 73943 v 2 Elizabeth Bay Road Pty Ltd* [2013] NSWSC 1769 (*Elizabeth Bay Road*) at [20].
3. *Ibid* at [28].
4. *Ibid* at [32].
5. *Ibid* at [15].
6. *Owners SP No. 46528 v Hall*, [2009]NSWSC 278 at [56].
7. *Bakkante Constructions Pty Ltd*. [2013] 17 BPR 32,159 at [83].
8. *English v English*, [2010] EWHC 2058 at [50] (Ch); *Re Shephard*, [1953] Ch 728; *Ghosn v Principle Focus Pty Ltd* (No. 2) [2008] VSC 574 at [106].
9. *Kelner v Baxter* (1866) LR 2 CP 174.
10. Riley Solicitors Manual (online) at [3050] "Guidelines for determining capacity".
11. *Goddard Elliott v Fritsch* [2012] VSC 87 at [417]-[418].
12. *Hawksford v Hawksford*, (2005) 191 FLR 173 at 202[111];
13. *Hawksford v Hawksford* (2005) 191 FLR 173 at 190[56], and at 191 – 199[63] – [80]; *Nece Pty Ltd v Ritek Inc* (1997) 24 ACSR 38 at 42; *Massey v Wales* (2003) 57 NSWLR 718 at ¶¶9, 10, 13, 14, 18-22, 25, 26, 45 and 71. □



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