NCAT
NSW Civil &
Administrative Tribunal
Consumer and Commercial Division

NOTICE OF ORDER

Owners Corporation SP68608
C/-Strata Specialist Lawyers
GPO BOX 1378
SYDNEY NSW 2001

File No: SC 17/35536
SC 17/24808
Quote in all enquiries
eNumber: 26256SZ70

Application to the Tribunal concerning 33 York Street SYDNEY NSW 2000 Australia - SP68608

Enclosed is a copy of the reserved decision on costs in this matter.

1 The proceedings constituted by File Nos SC 17/24808 and SC 17/35536 are dismissed.
2 The applicant, Diaspora Holdings Pty Ltd, and ClarkeKann Lawyers, jointly and severally, are to pay the costs of the respondent, The Owners - Strata Plan No. 68608, in both proceedings from 1 September 2017 on the indemnity basis as agreed or as assessed in accordance with the applicable costs assessment legislation; otherwise, the parties are to bear their own costs of both proceedings.

D Charles
Senior Member
04/09/18

For further information about your rights and obligations in relation to this order please read NCAT's Rights and Obligations Guideline available on the NCAT website at www.ncat.nsw.gov.au

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Civil and Administrative Tribunal
New South Wales

Case Name:	Diaspora Holdings Pty Ltd v The Owners – Strata Plan No. 68608
Medium Neutral Citation:	[2018] NSWCAT
Hearing Date(s):	16 January 2018 & 26 March 2018; Further written submissions (20 August 2018 & 3 September 2018)
Date of Orders:	4 September 2018
Date of Decision:	4 September 2018
Jurisdiction:	Consumer and Commercial Division
Before:	D G Charles, Senior Member
Decision:	1 The proceedings constituted by File Nos SC 17/24808 and SC 17/35536 are dismissed. 2 The applicant, Diaspora Holdings Pty Ltd, and ClarkeKann Lawyers, jointly and severally, are to pay the costs of the respondent, The Owners – Strata Plan No. 68608, in both proceedings from 1 September 2017 on the indemnity basis as agreed or as assessed in accordance with the applicable costs assessment legislation; otherwise, the parties are to bear their own costs of both proceedings.
Catchwords:	STRATA – one share proprietary company as applicant in two proceedings – prior bankruptcy of the shareholder and director – competency to bring the proceedings if power vacuum at Board level – whether the solicitors acting in the proceedings have a valid retainer – whether ratification can cure defects in authority COSTS – exercise of discretion – special circumstances – indemnity costs – costs awarded against a non-party
Legislation Cited:	Strata Schemes Management Act 2015 (NSW) Environmental Planning & Assessment Act 1979

(NSW)
Strata Schemes Management Act 1996 (NSW)
Strata Schemes (Freehold Development) Act 1973 (NSW)
Civil and Administrative Tribunal Act 2013 (NSW)
Corporations Act 2001 (Cth)
Bankruptcy Act 1966 (Cth)
Civil Procedure Act 2005 (NSW)

Cases Cited:

Wrigley v Owners Corporation SP 53413 [2017] NSWCATAP 100
Wood v Inglis (2008) 68 ACSR 420; [2008] NSWSC 1147
Tara Communications Group Pty Ltd v Simons Ravden Pty Ltd [2012] NSWSC 862
Amir Asharifinia v Mohammed Reza Asharifinia [2012] NSWCA 500
Hillig v Darkinjung Pty Ltd (No 2) [2008] NSWCA 147
Harry S Bagg's Liquidation Warehouse Pty Ltd v Whittaker (1982) 44 NSWLR 421
Pegler v Dale [1975] 1 NSWLR 265
Daemar v Industrial Commission of New South Wales (No 2) (1990) 22 NSWLR 178
Kuenigl v Donnersmarch [1955] 1QB 515
Boston Deep Sea Fishing & Ice Co v Farnham (Inspector of Taxes) [1957] 1 WLR 1051
Ghosen v Principle Focus Pty Limited [2008] VSC 574
Massey v Wales (2003) 57 NSWLR 718
Official Trustee in Bankruptcy v Buffier (2005) 54 ACSR 767
Hooker Investments Pty Ltd v Email Ltd (1986) 10 ACLR 443
Commissioner of Taxation v Patcorp Investments Ltd (1976) 140 CLR 247
Grant v John Grant & Sons Pty Ltd (1950) 82 CLR 1
Calabretta v Redpen Developments Pty Ltd (2010) 183 FCR 47
Samootin v Shea [2010] NSWCA 371
McEvoy v Body Corporate for No 9 Port Douglas Road [2013] QCA 168
Alexander Ward & Co Ltd v Samyang Navigation Co Ltd [1975] 2 All ER 424
Fox v Commissioner of Police [2016] NSWCATAD 77
Ruddock v Vardalis (No 2) (2001)115 FCR 229
Williams v Lewer [1974] 2 NSWLR 91
Mergerditchian v Kurmond Homes Pty Ltd [2014] NSWCATAP 120
CPD Holdings Pty Ltd t/as The Bathroom Exchange v Baguley [2015] NSWCATAP 21

	Citadin Pty Ltd (No. 2) v Eddie Azzi Australia Pty Ltd & General Pants Co Pty Ltd [2001] NSWADTAP 31 Obeita v Australian College of Professionals Pty Ltd [2014] NSWCATAP 38 at [81] Brodyn Pty Ltd v Owners Corporation – Strata Plan 73019 (No. 2) [2016] NSWCATAP 224 Oshlack v Richmond River Council [1998] HCA 11 Re Gardiner ex parte Orgill (1890) 16 VLR 641 Heath v Greenacre Business Park Pty Ltd [2016] NSWCA 34 Mendonca v Tonna [2017] NSWCATAP 176
Texts Cited:	JD Heydon and MJ Leeming, Jacob's Law of Trusts in Australia 8th Edition, LexisNexis Butterworths Australia 2016 Ritchie's Uniform Civil Procedure NSW, Lexis Nexis Butterworths Australia 2018
Category:	Principal judgment
Parties:	Diaspora Holdings Pty Ltd (applicant) The Owners – Strata Plan No. 68608 (respondent) ClarkeKann (Lawyers for Diaspora Holdings Pty Ltd)
Representation:	Counsel: E Peden (Diaspora Holdings Pty Ltd) D Knoll (The Owners – Strata Plan No. 68608) S Docker (ClarkeKann) Solicitors: ClarkeKann Lawyers (Diaspora Holdings Pty Ltd) Strata Specialist Lawyers (The Owners – Strata Plan No. 68608)
File Number(s):	SC 17/24808; SC 17/35536
Publication Restriction:	Unrestricted

REASONS FOR DECISION

Description of proceedings

1 There are two proceedings (File Nos. SC 17/24808 and SC 17/35536) before the Tribunal. They relate to a strata scheme created by the registration, on 30 August 2002, of Strata Plan No. 68608 located in York Street, Sydney.

2 These are Reasons for Decision in both proceedings.

3 On registration of the strata plan a body corporate was constituted styled "The Owners – Strata Plan No. 68608" (the "Owners Corporation"): see s 8(1) of the Strata Schemes Management Act 2015 (NSW) (the "SSMA 2015") and cl 5 of Sch 3 of the SSMA 2015.

4 The Owners Corporation is the respondent in both proceedings.

5 On 30 March 2007, the Owners Corporation obtained development consent from Sydney City Council to install and operate an automatic telling machine (ATM) on the basement level of the strata scheme adjoining Wynyard Station Concourse. Consent to operate the ATM expired on 30 March 2009 and no further development consent was sought or obtained under the Environmental Planning and Assessment Act 1979 (NSW), since the development consent had lapsed on 30 March 2009.

6 On or about 15 June 2010, Diaspora Holdings Pty Ltd ("Diaspora") the applicant in both proceedings, became the owner of lot 16 in the strata scheme. Lot 16 is a utility lot which is located within the basement levels of the strata scheme on parking level 1. The lot comprises a small office space and storage space. It has had conferred on it a right of exclusive use and enjoyment of two car spaces (spaces 8 and 34) in accordance with the by-laws of the strata scheme (specifically, by-law 40).

7 On 24 November 2011, following a special resolution of the Owners Corporation, by-law 46 was registered and granted to the owner of Lot 16, *inter alia*, a right of exclusive use and enjoyment of the common property of the strata scheme as shown on a plan forming part of the by-law ("ATM space") and the right to install and operate an ATM.

8 Until restrained by orders of an Adjudicator under the Strata Schemes Management Act 1996 (NSW) (the "SSMA 1996"), Diaspora operated an ATM, or allowed the ATM space to be used to operate an ATM. The ATM,

however, was not located wholly within the ATM space. It encroached upon RailCorp property; i.e. the Wynyard Station Concourse. Although demands had been made by Railcorp on the Owners Corporation for the removal of the ATM from in or about March 2015, the demands for removal became urgent in late 2016 during upgrade works by Railcorp on the Wynyard Station Concourse. These circumstances prompted applications by the Owners Corporation to an Adjudicator under the SSMA 1996 for interim orders and for substantive relief requiring the removal of the ATM. On 20 February 2017, orders of the Adjudicator were made including for the removal of the ATM and for Diaspora to make good the common property on which the ATM was installed.

9 Diaspora originally owned another lot (not being a utility lot) in the strata scheme and until in or about April 2016 (when Diaspora sold the other lot), it had operated a private commercial car park business from Lot 16. The Owners Corporation objected to Diaspora operating the car park business on the basis that Lot 16 was a utility lot which was not being used by Diaspora in a manner consistent with the restrictions placed on utility lots under s 39 of the Strata Schemes (Freehold Development) Act 1973 (NSW) and also by reason of particular restrictions in favour of the Council of the City of Sydney (the "Council") under a Section 88B instrument affecting Lot 16 of the strata scheme.

10 On 20 February 2017, the Adjudicator ordered Diaspora to refrain from committing breaches of the restrictions on use of Lot 16 under s 39 of the Strata Schemes (Freehold Development) Act 1973 (NSW) and the restriction on use recorded in the relevant Section 88B instrument. The effect of the relevant restrictions is that if there is a lot for the use of a car parking space, then that space may not be used by the owner of a utility lot unless that owner owns another lot, not being a utility lot, in the strata scheme.

11 On 16 March 2017, a Notice of Appeal was lodged at the Tribunal's Appeal Panel Registry by ClarkeKann Lawyers on behalf of Diaspora which appealed

the Adjudicator's orders of 20 February 2017. On 23 May 2017, the Appeal Panel remitted the proceedings brought by the Notice of Appeal to the Consumer and Commercial Division of the Tribunal. Accordingly, the appeal from the orders of the Strata Schemes Adjudicator is now the subject of the proceeding in File No SC 17/24808. It is a proceeding to be dealt with as an external appeal to the Tribunal, within the meaning of s 79 of the Civil and Administrative Tribunal Act 2013 (NSW) (the "NCAT Act"), even though the Adjudicator's decision was made after the repeal of the SSMA 1996 on 30 November 2016: Wrigley v Owners Corporation SP 53413 [2017] NSWCATAP 100. The Adjudicator's decision is an external decision within the meaning of the NCAT Act for which the Tribunal has an external appeal jurisdiction pursuant to s 31 of the NCAT Act.

12 In the other proceeding lodged on 11 August 2017 (File No SC 17/35536) by ClarkeKann Lawyers on behalf of Diaspora as applicant, the applicant sought orders, pursuant to s 232 of the SSMA 2015, in or to the effect that:

(1) The Owners Corporation consent to the lodgement with the Council of an application to modify a development consent (D-01-00884), the proposed modification being to remove the restriction on lot 16 in the Section 88B Instrument;

(2) The Owners Corporation consent to the lodgement with the Council of another application to modify a development consent (D/2007/231) in respect of the installation of one ATM within the Wynyard Station entrance lobby;

(3) The Owners Corporation consent to the lodgement with the Council of a change of use in Lot 16 to an office for the hire of motor vehicles.

A History of the Parties' Disputes leading to the central contention in the Owners Corporation's case; i.e. that the appeal proceedings and the application are incompetent and cannot proceed

13 As referred to, from around December 2015, disputes had arisen between the Owners Corporation and Diaspora as to the operation of Diaspora's car parking business from Lot 16. One of the complaints of the Owners Corporation was that Diaspora had demolished a section of masonry wall adjoining common property between Lot 16 and the common property car park, without the authority of the Owners Corporation.

14 On or about 13 January 2016 and 21 January 2016, solicitors for the Owners Corporation wrote to Diaspora demanding cessation of the car park business. This correspondence referred to alleged breaches by Diaspora of the by-laws of the strata scheme (including damage to common property) and to allegations that Diaspora was operating a business from Lot 16 without development consent and without the consent of the Owners Corporation. These allegations were denied in correspondence dated 9 February 2016 from solicitors then acting for Diaspora.

15 At about this time, Diaspora and a related company had brought proceedings in the Supreme Court of New South Wales, Equity Division, Case number 2016/59505 ("Supreme Court proceedings") where it sought, amongst other things, the imposition of an injunction on the Owners Corporation to allow it to operate the car parking business from Lot 16.

16 ClarkeKann Lawyers were the solicitors acting for Diaspora in the Supreme Court proceedings. Those proceedings were withdrawn by Diaspora on the basis that it paid the costs of the Owners Corporation.

17 On 26 February 2016, the solicitors for the Owners Corporation had written to ClarkeKann Lawyers referring to Diaspora's interlocutory application on that day, which did not proceed in the Supreme Court proceedings. Relevantly, the letter (found at pages 218 – 219 of the tender bundle which became Exhibit A in these proceedings) stated:

"In this letter we explain why the (Supreme Court) proceedings should be dismissed, and ask that you show cause why your firm should not be required to pay the (Owners Corporation's) costs incurred to date.

As legal practitioners, you no doubt appreciate that a person is disqualified from managing corporations if the person is an undischarged bankrupt: Corporations Act 2001 (Cth), s 206B. It is an offence for a disqualified person to manage a corporation: Corporation Act 2001, s 206A.

Your firm cannot have been without knowledge that John Robert Preston was bankrupt and that the appointment of directors subsequent to his bankruptcy could only have been made as a matter of law by his trustee given that he was the sole shareholder in each of the Plaintiff companies. In respect of both companies, the trustee in bankruptcy stands in the shoes of the sole shareholder for each company, being John Robert Preston. It would, therefore, necessarily follow that the persons purporting to be directors and instructing you could not have been directors, again, as a matter of law. Subsequently to the bankruptcy Paul Robert Greig filed with ASIC a document pursuant to which he purported to become a director of the First Plaintiff, effective 5 January 2016 and, David Oliver Barnes Preston filed with the ASIC a document pursuant to which he purported to become a director of each Plaintiff, effective 14 January 2016.

Ordinarily, the director of a proprietary company who is its only director and only shareholder may appoint another director by recording the appointment and signing the record: Corporation Act 2001, s 201F(1). However, whereas here, the only director is disqualified by bankruptcy, that power passes to his or her trustee in bankruptcy: Corporation Act 2001, s 201F(3) and (4).

The trustee in bankruptcy has not made an appointment of any person to be a director of either Plaintiff company; nor has he consented to any such appointment. Your firm does not act for the trustee in bankruptcy and therefore does not have a client capable of correcting the absence of your instructions.

In the absence of action taken by the trustee, there can have been no valid appointment of director for either Plaintiff company: Wood v Inglis (2008) 68 ACSR 420; [2008] NSWSC 1147 at [80] – [86]. We observe that you were the solicitors found to have acted without a retainer in Wood v Inglis.

Anything done by a person purporting to be a 'director' on behalf of the company but who has not been appointed is not done by the company. This includes, for example, lodgement with ASIC of a notice of change of officeholders notifying the change or execution of a solicitors retainer: Wood v Inglis at [88], [92] – [93]; Tara Communications Group Pty Ltd v Simons Ravden Pty Ltd [2012] NSWSC 862 per Fullerton J at [11] (where a director purportedly appointed by an undischarged bankrupt was found to have had no authority to instruct on the company's behalf, the statement of claim was struck out and the solicitor was ordered to pay the costs on the indemnity basis).

Unlike in Amir Asharifinia v Mohammed Reza Asharifinia [2012] NSWCA 500 there was no urgency in obtaining instructions and commencing proceedings given that the dispute between our client and John Robert Preston (and entities associated with him) commenced last year.

It follows from the foregoing that:

1. Neither Plaintiff corporation has given instructions to commence the present proceedings;

2. You as the solicitors on the record for the Plaintiff corporations have commenced proceedings without a retainer from either Plaintiff company, and without instructions to commence proceedings;

3. Absent some reasonable excuse not known to the (Owners Corporation), you should be required to pay the (Owners Corporation's) costs on an indemnity basis up to the point where the proceedings are dismissed: Hillig v Darkinjung Pty Ltd (No 2) [2008] NSWCA 147 at [47] – [52] per Mc Coll JA (with whom Beazley and Giles JJA agreed); Harry S Bagg's Liquidation Warehouse Pty Ltd v Whittaker (1982) 44 NSWLR 421 at 430; and

4. The proceedings should now be dismissed, subject to you showing cause as to why they should not be required to pay costs as set out in the previous sub-paragraph."

18 In or about June 2016, Diaspora ceased operating the car parking business. This followed the discontinuance of the Supreme Court proceedings and the reinstatement by the Owners Corporation of the section of common property masonry wall which had been removed by Diaspora.

19 In or about October 2016, Diaspora engaged consultants to arrange for a number of reports to support a modification application in respect of development consent for use of Lot 16.

20 When Diaspora attempted to lodge its application to modify the development consent (D-01-00884) affecting the use of Lot 16 on or about 20 December 2016, Diaspora was told that the consent of the Owners Corporation was required for lodgement. At the Annual General Meeting of the strata scheme on 19 June 2017, Diaspora's motions for the consent of the Owners Corporation were defeated.

21 Shortly thereafter, on 11 August 2017, ClarkeKann Lawyers lodged on behalf of Diaspora the application for orders in the proceeding constituted by File No SC 17/35536. In the meantime, Diaspora's appeal (File No SC 17/24808), remitted by the Appeal Panel to the Tribunal's Consumer and Commercial Division, had been fixed for hearing on 31 August 2017.

22 On 28 August 2017, the solicitors for the Owners Corporation sent a letter to ClarkeKann Lawyers stating that the application in File No SC 17/35536 and the appeal from the Adjudicator's orders in File No SC 17/24808 were incompetent, cannot proceed and must be dismissed with costs: see pages 150 – 153 of Exhibit A. Repeating the various matters put to ClarkeKann Lawyers in the letter of 26 February 2016 which had been sent in the context of the Supreme Court proceedings, the solicitors for the Owners Corporation also stated:

> "**No validly appointed directors**
>
> It is apparent from a review of documents downloaded from ASIC that your client's director does not appear to have been appointed by his hitherto trustee in bankruptcy. By operation of law, that trustee remains the owner of the share in what was his shareholding in the applicant company. Consequently, the shareholding is not John Robert Preston's property to vote or deal with. It is the property of his hitherto trustee in bankruptcy.
>
> In Pegler v Dale [1975] 1 NSWLR 265, Needham J held that property vested in a trustee continued to be so vested even after the discharge of a bankrupt. The shareholding did not revest in John Robert Preston: Daemar v Industrial Commission of New South Wales (No 2) (1990) 22 NSWLR 178.
>
> The earliest date upon which the shareholding in the Applicant could revest in John Robert Preston pursuant to subsection 129AA(2) & (3) of the Bankruptcy Act 1966 is six years after he was discharged from the bankruptcy.
>
> The only person who could appoint directors for the Applicant company remains the hitherto trustee. From the ASIC records, it would appear that the hitherto trustee did not make any appointment of directors.
>
> **Applicant could not and cannot proceed**

In the absence of validly appointed directors, the applicant could not and cannot proceed. Consequently, the application and notice of appeal should never have been filed and served.

Your firm is without instructions and has no valid retainer

By reason of the foregoing, the applicant cannot have given your firm instructions to file its application and its notice of appeal, and so, your firm, as the solicitors on the record for the applicant, have commenced proceedings without a valid retainer from the applicant, and are without valid instructions to do so.

Absent some reasonable excuse not known to the (Owners Corporation), your firm should be required to pay the (Owners Corporation's) costs on an indemnity basis up to the point where the proceedings are dismissed: Hillig v Darkinjung Pty Ltd (No 2) [2008] NSWCA 147 at [47] – [52] per Mc Coll JA (with whom Beazley and Giles JJA agreed); Harry S Bagg's Liquidation Warehouse Pty Ltd v Whittaker (1982) 44 NSWLR 421 at 430.

The appeal and the application should now be dismissed, subject to you showing cause as to why your firm should not be required to pay costs.

Ratification not possible

Further, it is not within the hitherto trustee's power to retrospectively appoint a director to ratify your firm's retainer. Even if it were permissible to do so, it is a well settled principle of law that no one can ratify or adopt an act which could not lawfully have been made or done at the time when the act was done: Kuenigl v Donnersmarch [1955] 1QB 515, 539.

Where a corporation is not permitted by law to make a contract or do an act, the same principle applies: Boston Deep Sea Fishing & Ice Co v Farnham (Inspector of Taxes) [1957] 1 WLR 1051, 1057 – 58.

The foregoing principle has been adopted in Australia: Ghosen v Principle Focus Pty Limited [2008] VSC 574 at [106].

It follows, therefore, that if the Applicant company had no directors validly appointed at the time the retainer was entered into and at the times it purported to file its application and its notice of appeal, then it was incompetent to enter into the retainer with your firm to be its solicitors and to commence the proceedings, and ratification cannot cure the incompetence."

23 On 31 August 2017, the Tribunal adjourned the hearing of the external appeal and the application. The Tribunal noted the Owners Corporation alleged that both proceedings were incompetently commenced, for the reasons outlined in the letter of 28 August 2017. The Tribunal also ordered Diaspora to provide all

documents, evidence and submissions on the position of the bankruptcy of John Robert Preston ("Mr Preston"). This was done on 15 September 2017 when Diaspora provided an affidavit of Chris Kintis sworn that date (pages 65 – 158 of Exhibit A) and Written Submissions also dated 15 September 2017. Diaspora argued that the Tribunal lacked jurisdiction in bankruptcy and any contest concerning competency arising out of bankruptcy issues required the Owners Corporation to obtain a declaration to that effect in a Court of competent jurisdiction. Further and in any event, Diaspora submitted s 129AA of the Bankruptcy Act 1966 had no application in the circumstances because immediately prior to his bankruptcy on 20 September 2013, Mr Preston held the only share in Diaspora (the "share") as trustee for the Diaspora Trust No. 2 ("Diaspora Trust"), with the result that the share did not vest in his trustee in bankruptcy upon him becoming bankrupt. In essence, it was argued that Mr Preston did not hold the share beneficially for himself at the time of bankruptcy.

24 On 4 October 2017, the Owners Corporation served its evidence including affidavit of Colin Cunio sworn that day and Written Submissions also dated 4 October 2017. The Owners Corporation submitted that the appeal and the application must be dismissed because Mr Preston was not validly appointed as the director of Diaspora and that Diaspora cannot validly have authorised the steps which have purportedly been taken on its behalf in the proceedings constituted by File Nos. SC 17/24808 (the appeal) and SC 17/35536 (the application). According to that submission, both proceedings are incompetent and cannot proceed due to an absence of *"a legal foundation"*: Fox v Commissioner of Police [2016] NSWCATAD 77 at [26], and must be dismissed under subsection 55(1)(b) of the NCAT Act.

25 Further, it is said that the solicitors, ClarkeKann Lawyers, had and have no authority to commence the proceedings in the appeal and the application on behalf of Diaspora; that they are without a valid retainer; and that the Tribunal should make an order for indemnity costs against the solicitors in both proceedings.

26 On 16 January 2018 and 26 March 2018 there was a hearing before me on the issues as to the competency of the proceedings and the Owners Corporation's application against the solicitors for indemnity costs. In essence, there was a hearing on preliminary issues only. There was no consideration of the substantive issues in either proceeding.

27 As a respondent to the Owners Corporation's application for indemnity costs, ClarkeKann Lawyers were separately represented by their own counsel. This was an appropriate course. As a matter of procedural fairness and good case management (see s 36 and s 38 of the NCAT Act), the solicitors had the right to be heard on the preliminary issues, because, although the solicitors were not joined as party to the proceedings, the Owners Corporation is seeking an order (specifically, an indemnity costs order) which if made would adversely affect the solicitors.

28 During the hearing, the parties' counsel relied on the joint tender bundle (Exhibit A) and written submissions dated 4 October 2017, 15 January 2018, 5 February 2018 and 26 March 2018 (in the Owners Corporations' case) and written submissions dated 15 September 2017, 15 January 2018 and 25 March 2018 (in the cases of Diaspora and ClarkeKann Lawyers). Counsel supplemented their respective cases with oral submissions.

Response to the Owners Corporation's Challenge to the Retainer of ClarkeKann to act for Diaspora

29 While accepting that Mr Preston was removed as a director of Diaspora on his bankruptcy and that Mr Preston's trustee in bankruptcy, Paul Gerard Weston, did not appoint Mr Preston as a director of Diaspora, Diaspora and ClarkeKann submitted that Mr Preston had nevertheless been validly appointed as a director of Diaspora for the purposes of providing instructions to commence the appeal and the application.

30 Diaspora and ClarkeKann relied upon the evidence in the affidavits of Chris Kintis sworn 15 September 2017 and 11 October 2017 (at pages 65 – 177 of Exhibit A), to support the following propositions:

(1) On 20 November 2005 Mr Preston had executed a Deed of Settlement of Discretionary Trust for the Diaspora Trust;

(2) On 14 July 2013, Jeffrey Warwick Persson ("Mr Persson") held the share in Diaspora;

(3) On 15 July 2013, Mr Persson transferred the share in Diaspora to Mr Preston as trustee for the Diaspora Trust, pursuant to an Australian Standard Transfer Form (at page 119 of Exhibit A);

(4) On 20 September 2013, Mr Preston was made bankrupt and then ceased to be a director of Diaspora;

(5) However, at the time Mr Preston became bankrupt:

(a) He did not own the one share beneficially for himself;

(b) It was not property available for division among his creditors;

(c) The one share did not vest in his trustee in bankruptcy;

(d) Mr Preston held the one share on trust for the beneficiaries of the Diaspora Trust; and

(e) Mr Preston was not required to disclose ownership of the share held on trust to his trustee in bankruptcy;

(6) Although it was correct to say that Mr Preston ceased to be a trustee of the Diaspora Trust when he became bankrupt on 20 September 2013, it did not follow, in the submission of Diaspora and ClarkeKann, that

the share was transferred from Mr Preston upon him ceasing to be the trustee of the Diaspora Trust, i.e. the solicitors and Diaspora argued that Mr Preston remained the legal owner of the share until it vested in a new trustee and the right to appoint a director was part of an indivisible bundle of rights which remained with the legal owner of the share: JD Heydon and MJ Leeming, Jacob's Law of Trusts in Australia 8th Edition, LexisNexis Butterworths Australia 2016 at [15-49];

(7) On 18 August 2013, Mr Preston who was still trustee and appointer and not disqualified at that stage under the Trust Deed for the Diaspora Trust, appointed David Preston as an additional Trustee and Appointer pursuant to clauses 15.2 and 15.3.1 of the Trust Deed, so that when Mr Preston became bankrupt on 20 September 2013, and ceased to be a Trustee or Appointer of the Diaspora Trust, David Preston remained in those roles as the sole Trustee and Appointer;

(8) In the submission of Diaspora and ClarkeKann neither David Preston's appointment as trustee on 18 August 2013 nor Mr Preston ceasing to be a director of Diaspora on 20 September 2013 had the effect of vesting the share in David Preston, i.e. at all material times the share in Diaspora remained vested in Mr Preston and as the sole shareholder of Diaspora, Mr Preston was entitled as against the company to exercise the rights of a shareholder or member, which included appointing directors by resolution passed without a general meeting under s 249B(1) of the Corporations Act because Diaspora was a one member company and the resolution may be passed by the member recording it and signing it;

(9) On 20 September 2016, being the day Mr Preston was discharged from bankruptcy and therefore no longer disqualified from being a director, Mr Preston exercised the authority under s 249B(1) of the Corporations Act by passing a resolution to appoint himself the sole director of Diaspora;

(10) From 20 September 2016 onwards, as sole director of Diaspora, Mr Preston was able to give instructions to ClarkeKann on behalf of Diaspora.

31 Diaspora and ClarkeKann further argued that even if the appeal and the application were commenced without authority, such proceedings could be cured by ratification: Massey v Wales (2003) 57 NSWLR 718. In this regard, they relied upon Mr Preston's affidavit sworn 11 January 2018 (at pages 253 – 301 of Exhibit A) where he gave evidence that on 11 January 2018 Mr Preston ratified the proceedings and ClarkeKann's authority to represent Diaspora in the proceedings (at page 278 of Exhibit A) and confirmed his appointment as a director (at page 280 of Exhibit A).

32 Diaspora and ClarkeKann submitted that having regard to that evidence, the Owners Corporation had not satisfied the onus of proving the proceedings were not authorised by Diaspora, and the proceedings should therefore not be dismissed.

33 Further and alternatively, it was argued that if the Tribunal was satisfied the proceedings were not authorised by Diaspora, it should adjourn the proceedings to allow the proceedings to be ratified.

Subsequent Application to Adjourn the Appeal and the Application

34 After the Tribunal had heard the evidence and the parties' oral submissions as regards the preliminary issues in the appeal and the application, and the Tribunal had reserved its decision, the Tribunal then received a further written submission (dated 20 August 2018) from Diaspora asking the Tribunal to adjourn both proceedings until determination of proceedings brought in the Supreme Court of New South Wales by Mr Preston on 4 July 2018.

35 In the Supreme Court proceedings brought by Mr Preston, he seeks relief as follows:

(1) A declaration that John Robert Preston was validly appointed a director of Diaspora on 20 September 2016;

(2) A declaration that the appeal and the application before the Tribunal were and are validly commenced and authorised by Diaspora;

(3) Further and alternatively, an order under s 1322 of the Corporations Act that John Robert Preston was validly appointed as a director of Diaspora on 20 September 2016 and that the proceedings in the Tribunal were validly commenced and authorised by Diaspora.

36 The application to adjourn the appeal and the application pending the outcome of the Supreme Court proceedings brought by Mr Preston is opposed by the Owners Corporation. In its written submission received by the Tribunal on 3 September 2018, the Owners Corporation have attached an Interlocutory Process in the said Supreme Court proceedings which seeks the dismissal or stay of the later commenced Supreme Court proceedings to enable the earlier commenced and fully argued Tribunal proceedings (as to preliminary issues) to be determined.

37 Mr Preston's Originating Process and the Owners Corporation's Interlocutory Process are to be the subject of a directions hearing now scheduled for 28 September 2018. Mr Preston may wish to file and serve evidence in response to the Interlocutory Process and the supporting affidavit of Mr Cunio. As a timetable will need to be set by the Supreme Court, it is not possible to predict when the Originating Process and the Interlocutory Process will be heard.

What did the Tribunal have to decide?

38 The issues which have to be decided by the Tribunal are:

(1) Does the Tribunal have jurisdiction to determine the competency of Diaspora to bring the appeal and the application?

(2) Should the Tribunal adjourn the appeal and the application pending the outcome of the later commenced Supreme Court proceedings brought by Mr Preston?

(3) At all relevant times (including when both proceedings were lodged with the Tribunal), was Mr Preston validly appointed as a director of Diaspora?

(4) Do the solicitors, ClarkeKann Lawyers, have a valid retainer and did they act with proper authority in instituting the appeal and the application on behalf of Diaspora?

(5) If not, should the Tribunal adjourn both proceedings, not dismiss them, so as to allow the proceedings to be ratified?

(6) What costs order should be made in respect of the Owners Corporation's application that the appeal and the application are incompetent and ought to be dismissed?

39 My determination of the issues is on the basis of the written evidence at the hearing (the joint tender bundle of 312 pages, Exhibit A), the relevant legislation and the written and oral submissions of the parties' representatives. In these Reasons for Decision, I focus on the material that I consider is central to the consideration of the contested preliminary issues in the proceedings. To the extent that the Reasons may not refer to a specific piece of evidence or singularly deal with a submission, it should not be assumed that I have ignored that evidence or submission.

Jurisdiction

40 By its written submissions of 15 September 2017 (see paragraphs 13 to 19), ClarkeKann Lawyers (hereinafter referred to as either "the solicitors" or "ClarkeKann") argued there was a jurisdictional impediment associated with

the Owners Corporation's request that the Tribunal determine the issue of competency of Diaspora to bring the appeal and the application.

41 Even though the submission as to a jurisdictional impediment was not pressed by counsel for the solicitors at the hearing, nevertheless I have to be satisfied that the Tribunal has jurisdiction to determine the preliminary issue of the competency of the proceedings.

42 In the Owners Corporation's submission, the operation of s 129AA of the Bankruptcy Act 1966 referred to the earliest date for the re-vesting in Mr Preston of Diaspora's share. The Owners Corporation's request for the Tribunal to decide the competency of Diaspora to bring the appeal and the application does not ask for a determination "in bankruptcy". There are no issues before the Tribunal involving the supervision of the trustee-in-bankruptcy or otherwise which might affect the jurisdiction in bankruptcy exercised by the Federal Court of Australia and the Federal Circuit Court. Rather, the relevant question before the Tribunal is whether, given the existence of the bankruptcy of Mr Preston (as to which there is no dispute) and the application of the Corporations Act to that fact, together with the operation of the Deed of Settlement for the Diaspora Trust (if the share was held as trustee), the appeal and the application were incompetently commenced.

43 Before the Tribunal is an ancillary decision under the NCAT Act in subsection 29(2)(e). Pursuant to s 4 of the NCAT Act: an "ancillary decision":

> **ancillary decision** of the Tribunal means a decision made by the Tribunal under legislation (other than an interlocutory decision of the Tribunal) that is preliminary to, or consequential on, a decision determining proceedings, including:
>
> (a) a decision concerning whether the Tribunal has jurisdiction to deal with a matter;
>
> (b) a decision concerning the awarding of costs in proceedings.

44 In relation to an appeal from the decision of an Adjudicator, subsection 31(2) of the NCAT Act likewise gives jurisdiction: *"to make ancillary ... decisions of the Tribunal in the proceedings"*. As indicated, the present appeal is an "external appeal": Wrigley v Owners Corporation SP 53413.

45 In any event, the Tribunal has jurisdiction to dismiss proceedings under subsection 55(1)(b) of the NCAT Act if the proceedings are: *"frivolous or vexatious or otherwise misconceived or lacking in substance"*.

46 I find that the Tribunal has jurisdiction to hear and determine the issue of the competency of Diaspora to commence the appeal and the application.

Should the Tribunal adjourn the appeal and the application pending the outcome of the later commenced Supreme Court proceedings brought by Mr Preston?

47 The Tribunal may adjourn proceedings to any time and place (s 51, NCAT Act). When considering whether to adjourn proceedings, the Tribunal has regard to the guiding principle of the NCAT Act: which is to facilitate the just, quick and cheap resolution of the real issues in the proceedings (s 36(1)).

48 I determine that an adjournment of both proceedings pending the outcome of the (later commenced) Supreme Court proceedings, as sought by Diaspora in the written submissions dated 20 August 2018, is not consistent with the Tribunal's guiding principle. As indicated, the said Supreme Court proceedings brought by Mr Preston's Originating Process and the Interlocutory Process filed for the Owners Corporation in response to the Originating Process are listed for directions only in the Supreme Court on 28 September 2018. It is not known when the Supreme Court proceedings, including the substantive issues in the Owners Corporation's Interlocutory Process, will be heard.

49 It is trite but nonetheless true to say that courts and tribunals should strive to avoid a multiplicity of proceedings addressing the same issues. In my opinion, there is no good reason for the proceedings commenced later not to give way

to proceedings commenced earlier particularly as the Tribunal proceedings are well advanced. There is no doubt that the appeal and the application before the Tribunal fall within the Tribunal's jurisdiction. I am not persuaded that there is any reason in the public interest or otherwise for the Tribunal to stay its hand. I consider that the Tribunal should exercise its special jurisdiction under the SSMA 2015 and proceed to determine the appeal and the application that are presently before it.

50 In any event, even if the Interlocutory Process in the Supreme Court proceedings was to be dismissed, any decision of the Supreme Court could not bind Diaspora because that company is not a party to the Supreme Court proceedings brought by Mr Preston.

51 The Supreme Court proceedings brought by Mr Preston are incapable of remedying any defect in Diaspora's authority. Proceedings under s 1322 of the Corporations Act necessarily need to involve the corporation to be affected by any order under that section. This is another reason for the Tribunal determining the appeal and the application as the appeal and the application affect Diaspora and the Owners Corporation but not Mr Preston, by reason of Mr Preston not being a party to the Tribunal proceedings.

Was Mr Preston validly appointed as a director of Diaspora?

The Effect of Mr Preston's Bankruptcy

52 At all material times, Diaspora was a single shareholder proprietary company. It is not disputed that Mr Preston was Diaspora's only director when he became bankrupt. From the date of bankruptcy, 20 September 2013, Diaspora had no directors because by reason of s 206B(3) of the Corporations Act Mr Preston was disqualified from acting as a director. The disqualification in s 206B(3) applies to an undischarged *bankrupt "managing corporations".*

53 Section 201F of the Corporations Act provides:

Special rules for the appointment of directors for single director/single shareholder proprietary companies

(1) The director of a proprietary company who is its only director and only shareholder may appoint another director by recording the appointment and signing the record.

Appointment of new director on death, mental incapacity or bankruptcy

(2) If a person who is the only director and the only shareholder of a proprietary company:

(a) dies; or

(b) cannot manage the company because of the person's mental incapacity;

and a personal representative or trustee is appointed to administer the person's estate or property, the personal representative or trustee may appoint a person as the director of the company.

(3) If:

(a) the office of the director of a proprietary company is vacated under subsection 206B(3) or (4) because of the bankruptcy of the director; and

(b) the person is the only director and the only shareholder of the company; and

(c) a trustee in bankruptcy is appointed to the person's property;

the trustee may appoint a person as the director of the company.

(4) A person who has a power of appointment under subsection (2) or (3) may appoint themselves as director.

(5) A person appointed as a director of a company under subsection (2), (3) or (4) holds office as if they had been appointed in the usual way.

54 Subsequently to the bankruptcy Paul Robert Greig ("Mr Grieg") filed with ASIC a document pursuant to which he purported to become a director of Diaspora, effective 5 January 2016 and, David Oliver Barnes Preston ("Mr David Preston") filed with the ASIC a document pursuant to which he purported to become a director of Diaspora, effective 14 January 2016.

55 The trustee-in-bankruptcy, Mr Weston, did not make an appointment of any person to be a director of Diaspora. Mr Weston did not consent to the purported appointments of Mr Grieg or Mr David Preston: Exhibit A pages 180 – 181.

56 A bankrupt shareholder cannot appoint replacement directors, as this would be *"flouting the disqualification in s 206B(3)"*: Official Trustee in Bankruptcy v Buffier (2005) 54 ACSR 767 at 778 [34]. If the trustee-in-bankruptcy does not appoint a director: *"there is in effect a power vacuum at board level"*: Buffier at 779 [41].

57 Subsections 201F(3) and (4) of the Corporations Act 2001 operate the same way regardless of whether the share is held beneficially by the shareholder or on trust. The trustee-in-bankruptcy only can make the appointment of a new director.

58 The term "shareholder" refers only to the person, or entity, registered on the relevant company's shareholding register. Beneficial ownership, without registration, does not make a person, or entity, a shareholder: Commissioner of Taxation v Patcorp Investments Ltd (1976) 140 CLR 247 at 295 per Gibbs J.

Section 201G of the Corporations Act

59 Counsel for ClarkeKann (the solicitors) argued that as the sole shareholder of Diaspora, Mr Preston was entitled as against the company to exercise the rights of a shareholder or member, which included appointing directors by resolution passed at an ordinary meeting under s 201G of the Corporations Act. Such a resolution may be passed without a general meeting under s 249A(2) of the Corporations Act if all shareholders sign it and state that they are in favour of it or, if the company has one member only, may be passed by the member recording it and signing it under s 249B(1). Reliance was placed upon the evidence in Mr Preston's affidavit sworn 11 January 2018 at [13] that he had appointed himself director of Diaspora by resolution on 20 September

2016, the day he was discharged from bankruptcy and was no longer disqualified from being a director. On that basis it was submitted Mr Preston was able to give instructions to ClarkeKann on behalf of Diaspora.

60 In my opinion, s 201G does not operate as a distinct and separate alternative to s 201F. The argument put on behalf of the solicitors is inconsistent with Official Trustee in Bankruptcy v Buffier where Campbell J was quite explicit in saying that he could not conceive of a legislative intention that the person who had become bankrupt: *"could, by flouting the disqualification in section 206B(3) come to acquire the capacity also to appoint his own replacement. I conclude that, even if the bankrupt had purported to appoint Mr Laughlin by recording the appointment and signing the record, under s 201F, that appointment would not have been effective"*: Buffier at [34].

61 By operation of the Corporations Act, a bankrupt cannot be a director, a bankrupt sole shareholder cannot appoint a director, as the power to appoint rests with her or his trustee-in-bankruptcy and where the trustee-in-bankruptcy makes no appointment under subsection 201F(3), there is a power vacuum at board level.

Alternative analysis if share not beneficially owned

62 Exhibited to the affidavit of Mr Kintis sworn 15 September 2017 at pages 13 – 45 of Exhibit CK – 1 is the "Deed of Settlement of Discretionary Trust – Diaspora Trust Number 2". According to that document, on 20 November 2005, Mr David Preston settled an initial trust fund of $100 on Mr John Robert Preston. Clause 22.11 defines the Trust Fund to include: *"all monies and investments and property found in or transferred to and accepted by the Trustee as additions to the Trust Fund"*. Mr Kintis states at paragraph 30 of his affidavit sworn 15 September 2017 by reference to page 46 of Exhibit CK - 1 that the share in Diaspora's capital held by Mr Persson was transferred on 15 July 2013 to Mr Preston *"as trustee for the Diaspora Trust Number 2"*.

63 The Deed of Settlement provides at subclause 15.3.3 (page 34 of Exhibit CK – 1) that if a sole Trustee is disqualified or ceases to act by operation of law, *"the power to appoint a new Trustee shall be exercised by majority vote of the Nominated Beneficiaries"*, namely Emma Jane Preston and Kate Elizabeth Preston.

64 The Deed of Settlement further provides at subclause 15.6.1.3 (page 35 of Exhibit CK - 1) that a Trustee and Appointor who is an individual (not a corporation) *"shall be disqualified from holding office"* if that individual *"becomes subject to bankruptcy laws"*.

65 I find the effect of clauses 15.3 and 15.6 of the Deed of Settlement was that on 20 September 2013, Mr Preston could no longer have held the share in Diaspora as Trustee under the Deed of Settlement. He could no longer exercise a power that came with the property in the share, such as the power to appoint a director of Diaspora.

66 Furthermore, there is no provision in the Deed of Settlement for a disqualified Trustee of the Diaspora Trust to resume the position of Trustee upon the cause of the disqualification coming to an end. As the Deed anticipates a new Trustee being appointed under clause 15.3, a disqualified Trustee could not resume an office in which he or she is anticipated by the Deed to have been replaced.

67 Even if it could be said as at 20 September 2013 that Mr Preston held the share in Diaspora as Trustee for Emma Jane Preston and Kate Elizabeth Preston, I am satisfied for the reasons given, that he ceased to be the Trustee in respect of the share on that date.

68 The ASIC records disclose no documents recording that anyone else had become the holder of the share in Diaspora. The affidavit of Mr Kintis sworn 11 October 2017 annexes documents stated to be the minutes of the Diaspora Trust. Annexure B bears the date 18 August 2013, and purports to record an action of David Preston and John Robert Preston, as *"the legal*

representative of the nominated beneficiaries", to make David Preston the Trustee and Appointor under the Trust Deed. Annexure C bears the date 20 September 2016 and purports to record an action of David Preston and John Robert Preston, as "*"the legal representative of the nominated beneficiaries*", to make John Robert Preston the Trustee and Appointor under the Trust Deed. These documents do not assist because there is no evidence that David Preston became the shareholder on the company register or on the ASIC register.

69 Neither David Preston nor the nominated beneficiaries can give instructions to commence or run proceedings or to take any step in the name of the company, Diaspora, having not appointed a replacement shareholder: Hooker Investments Pty Ltd v Email Ltd (1986) 10 ACLR 443.

70 If the share was held on trust by Mr Preston, he ceased to be the trustee on 20 September 2013, and no replacement trustee was appointed. Mr Preston continued as the registered shareholder of the share, and if the trustee-in-bankruptcy did not cure the power vacuum on Diaspora's board, neither did the nominated beneficiaries, Emma Jane Preston and Kate Elizabeth Preston.

71 Alternatively if the share was held on trust by David Preston, on the authority of Commissioner of Taxation v Patcorp Investments Ltd (1976) 140 CLR 247, as David Preston did not become registered as shareholder, he could not take any action to appoint a director.

Whether subsequent actions cure the invalidity

72 The solicitors and Diaspora also rely upon documents lodged with ASIC in 2016.

73 On 25 January 2016, Mr Greig filed with ASIC a document he signed on 16 January 2016 pursuant to which he purported to become a director of Diaspora.

74 However, for reasons already given, the power to appoint a director of Diaspora rested with Mr Preston's trustee-in-bankruptcy. I find that Mr Greig could not have been validly appointed to the position of director of Diaspora: see also Wood v Inglis (2008) 68ACSR 420 at [85].

75 Also on 24 September 2016, David Preston signed an ASIC Form 484, purporting to replace Mr Greig in the position of director of Diaspora with Mr Preston as a director. However, for the reasons given, Mr Greig was never a director of Diaspora, and David Preston did not have power to appoint Mr Preston as a director of the company.

76 Further, I am satisfied that Diaspora could not validly lodge a change of officeholders, as such lodgement must be signed by a person who is a director: s 351(1) of the Corporations Act.

77 Section 201M of the Corporations Act states:

> An act done by a director is effective even if their appointment, or the continuance of their appointment, is invalid because the company or director did not comply with the company's constitution (if any) or any provision of this Act.

78 However, I find that s 201M does not apply in the circumstances. That section cannot validate the acts of a person who has not been appointed as a director at all, for example acts undertaken by a person who was appointed to the board without proper authority by another person whose appointment as director had lapsed: Wood v Inglis (2008) 68 ACSR 420 at [80] – [86].

79 It also does not cure the invalidity of acts undertaken by a person whose appointment as director is void in law as the result of the absence of a power to make the appointment: Grant v John Grant & Sons Pty Ltd (1950) 82 CLR 1 at 34, 52-53.

80 Further, an act of a director whose appointment was terminated by bankruptcy is not validated by s 201M of the Corporations Act as that does not involve non-compliance with the Corporations Act or the company's constitution: Calabretta v Redpen Developments Pty Ltd (2010) 183 FCR 47.

81 I am satisfied that Mr Preston could not have authorised the appointment of Mr Greig or of David Preston to be a director or secretary of Diaspora because he was disqualified from being the shareholder when he became bankrupt on 20 September 2013.

82 In the particular circumstances of these proceedings, no-one else has ever been registered as the shareholder of Diaspora. It follows that the only person who could have authorised the appointment of any director of Diaspora was Mr Preston's former trustee-in-bankruptcy, and also that Diaspora continues to be without a Trustee shareholder and without a validly appointed director.

Further analysis if share beneficially owned

83 I also have to consider the position of Mr Preston holding the share in Diaspora but not as trustee of the Diaspora Trust.

84 In his capacity as the shareholder of Diaspora, Mr Preston had power to appoint a director of the company and this power to appoint was Mr Preston's property (even though not declared to his trustee-in-bankruptcy in Mr Preston's statement of affairs) at the date he became bankrupt. However, once Mr Preston became bankrupt, title to the share passed to the trustee-in-bankruptcy who thereafter stood and stands in the shoes of the sole shareholder: Bankruptcy Act, s 58(1). I find that the right to appoint a director, one of the property rights that normally inheres in a share (a statutory chose-in-action or power), by force of s 201F of the Corporations Act, went to Mr Preston's trustee-in-bankruptcy, and there is no provision for such statutory chose-in-action or power to return to the bankrupt upon discharge from bankruptcy.

85 Moreover, the shareholding in Diaspora could only re-vest in Mr Preston if he had disclosed it as his property to his trustee-in-bankruptcy, which he did not do. The Bankruptcy Act, in subsections 129AA(2) & (3), would enable such re-vesting six years after the bankrupt is discharged from the bankruptcy, if and only if such disclosure has been made.

86 As the share in Diaspora was not disclosed to the trustee-in-bankruptcy it cannot re-vest. In Pegler v Dale [1975] 1 NSWLR 265 Needham J held that property vested in a trustee-in-bankruptcy continued to be so vested even after the discharge of a bankrupt. Consequently, since Mr Preston became bankrupt on 20 September 2013 the shareholding in Diaspora has not been his property to vote in respect of or to deal with. The proprietary rights in the share remain vested in Mr Preston's former trustee-in-bankruptcy, even following the discharge in bankruptcy, by operation of law: Samootin v Shea [2010] NSWCA 371 at [117] – [118]. In Samootin's case, the discharged bankrupt wished to bring proceedings to vindicate rights relating to or arising from an equitable interest in property. That is, Ms Samootin wanted to exercise a right which she had lost by force of becoming bankrupt. The NSW Court of Appeal found that Ms Samootin could not exercise that right even after discharge from bankruptcy. She lacked standing and her proceedings in the Supreme Court and on appeal were incompetent.

87 As the trustee-in-bankruptcy did not appoint directors of Diaspora, the company is without validly appointed directors. It was and is incompetent at law to commence proceedings.

Whether ClarkeKann solicitors have a valid retainer

88 Prima facie, it would follow from my finding as to the incompetency of Diaspora at law to file and serve the present proceedings (i.e. the notice of appeal and the application) in light of the effect of Mr Preston's bankruptcy, that Diaspora was and is incapable of giving instructions to solicitors; that it could not validly execute a solicitors' retainer (Wood v Inglis at [88], [92] –

[93]); and that ClarkeKann are, and throughout have been, without instructions.

89 Nevertheless, counsel for ClarkeKann submits even if I find the present proceedings were commenced without authority, that such proceedings can be cured by ratification, even after they have been concluded: Massey v Wales (2003) 57 NSWLR 718; McEvoy v Body Corporate for No 9 Port Douglas Road [2013] QCA 168 at [33] – [40]. Relying upon the affidavit of Mr Preston sworn 11 January 2018 at [14] and s 249A & s 249B of the Corporations Act, counsel argued that on 11 January 2018 Mr Preston ratified the proceedings and ClarkeKann's authority to represent Diaspora in the proceedings, and for these reasons the proceedings cannot be dismissed because the Owners Corporation has not satisfied the onus of proving the proceedings are not authorised by Diaspora.

90 Further and alternatively, if I find that the Owners Corporation has proved Diaspora has not authorised (which includes not ratified) the proceedings, then the appropriate course is for me to exercise the Tribunal's power under s 51 of the NCAT Act to adjourn the proceedings so as to allow the proceedings to be ratified.

91 In my opinion, these submissions for ClarkeKann do not address the issues arising from the effect of Mr Preston's bankruptcy. For reasons as set out above, I have found that Diaspora was not competent to act when the proceedings were taken. This arose because Diaspora had no director and there was a power vacuum at board level. There was also no shareholder empowered to appoint a director. Even if a company has capacity to act it must also be competent to act. In this instance, I have found that Diaspora was incompetent because its shareholder had been divested of the right to make the appointment. The authorities relied upon by ClarkeKann's counsel (such as McEvoy's case) do not assist the Tribunal because they do not address, consistent with Boston Deep Sea Fishing and Ice Co. Ltd v Farnham (Inspector of Taxes) [1957] 1 WLR 1051 at 1057, the requirement that a

company can ratify an act only if it was competent to do so at the time the action was taken.

92 No person had been appointed a director of Diaspora by the trustee-in-bankruptcy when the notice of appeal and the application were lodged with the Tribunal by ClarkeKann, purporting to act for or on behalf of Diaspora. I find that the action of the shareholder, Mr Preston, on 11 January 2018, to make an appointment was incompetent. It was an action taken without due authority and cannot create legal rights or be the source of legal rights. The only person who could take action to appoint a director of Diaspora did not do so; accordingly, while the company might have had theoretical capacity to act in accordance with the Corporations Act, Diaspora did not have the competence with which to do so. It could not give instructions to the solicitors.

93 Nor can it be argued (see paragraph 22 of ClarkeKann's submissions dated 25 March 2018) the proposition that a company is incompetent to commence proceedings where there is no director is inconsistent with Wales v Massey [2003] NSWCA 212. Counsel for ClarkeKann quoted from the reasons for decision of Hodgson JA (with whom Meagher and Beazley JJA agreed) in Wales v Massey at [57] – [59] where his Honour distinguishes and declines to follow Alexander Ward & Co Ltd v Samyang Navigation Co Ltd [1975] 2 All ER 424. Alexander Ward was authority for the proposition that shareholders in general meeting can appoint directors or *"by authorising proceedings in general meeting which, in the absence of an effective board, has residual authority to use the company's powers"*. Hodgson JA disagrees in Wales v Massey at [59]. A deadlock on the board could not be resolved by a general meeting resolution to approve the commencement of litigation. At [71] Hodgson JA says: *"In my opinion, the general meeting on 6 May could have appointed additional directors, but did not have the power to ratify the commencement of legal proceedings"*, and the Court of Appeal found (at [77]): *"there was no effective ratification of the commencement of the proceedings; and in those circumstances an adjournment as sought before Master McLaughlin could have served no useful purpose."*

94 In the present case, a general meeting could not appoint directors. Diaspora was and is incompetent for so long as the trustee-in-bankruptcy does not exercise the statutory power to appoint a director. As that power has never come to be exercised the company remains incompetent.

95 In circumstances where the Tribunal cannot compel the trustee-in-bankruptcy to make an appointment to address the present power vacuum at board level (a precursor to any ratification), I decline to exercise the Tribunal's discretion under s 51 of the NCAT Act to adjourn the proceedings. In exercising that discretion, I take into account the circumstance that Diaspora has adduced no evidence that it or ClarkeKann (purporting to act on its behalf) has ever made any request to the hitherto trustee-in-bankruptcy to make an appointment.

96 For the foregoing reasons, the proceedings (i.e. the notice of appeal and the application) must be dismissed, pursuant to s 55(1)(b) of the NCAT Act. I accept the submission of the Owners Corporation that both proceedings were incompetently commenced and therefore lack a "legal foundation": Fox v Commissioner of Police [2016] NSWCATAD 77 at [26].

Costs

General Principles

97 An award of costs is discretionary. The discretion is broad and unfettered, save that it must be exercised judicially: see, for example, Ruddock v Vardalis (No 2) (2001)115 FCR 229 and also *"according to rules of reason and justice, not according to private opinion ... or even benevolence ... or sympathy"*: Williams v Lewer [1974] 2 NSWLR 91 at [95].

98 The usual proposition in litigation is that an unsuccessful party pays the costs of the successful party. However, the proposition that costs follow the event is substantially varied by s 60 of the NCAT Act, cl 10(2) of Sch4 of the NCAT Act and Rule 38 of the Civil and Administrative Tribunal Rules 2014 (NCAT Rules).

99 Section 60 of the NCAT Act provides:

(1) Each party to proceedings in the Tribunal is to pay the party's own costs.

(2) The Tribunal may award costs in relation to proceedings before it only if it is satisfied that there are special circumstances warranting an award of costs.

(3) In determining whether there are special circumstances warranting an award of costs, the Tribunal may have regard to the following:

(a) whether a party has conducted the proceedings in a way that unnecessarily disadvantaged another party to the proceedings,

(b) whether a party has been responsible for prolonging unreasonably the time taken to complete the proceedings,

(c) the relative strengths of the claims made by each of the parties, including whether a party has made a claim that has no tenable basis in fact or law,

(d) the nature and complexity of the proceedings,

(e) whether the proceedings were frivolous or vexatious or otherwise misconceived or lacking in substance,

(f) whether a party has refused or failed to comply with the duty imposed by section 36 (3),

(g) any other matter that the Tribunal considers relevant.

(4) If costs are to be awarded by the Tribunal, the Tribunal may:

(a) determine by whom and to what extent costs are to be paid, and

(b) order costs to be assessed on the basis set out in Division 11 of Part 3.2 of the Legal Profession Act 2004 or on any other basis.

(5) In this section:

costs includes:

(a) the costs of, or incidental to, proceedings in the Tribunal, and

(b) the costs of, or incidental to, the proceedings giving rise to the application or appeal, as well as the costs of or incidental to the application or appeal.

100 Rule 38 of the NCAT Rules relates to costs in this Division of the Tribunal, the Consumer and Commercial Division. Rule 38(2) says that despite s 60 of the NCAT Act the Tribunal may award costs in the absence of special circumstances warranting such an award if the amount claimed is more than $10,000.00 but not more than $30,000.00 and the Tribunal has made an order under cl 10(2) of Sch4 of the NCAT Act in relation to the proceedings, or the amount claimed or in dispute in the proceedings is more than $30,000.00

101 Diaspora did not seek payment of a monetary amount in either of the proceedings.

102 I find that no case for an order for costs arises under Rule 38 of the NCAT Rules.

103 Accordingly, the Tribunal may only award costs in relation to the proceedings before it, if it has jurisdiction to award costs, and it is satisfied that there are special circumstances warranting an award of costs: s 60(2) of the NCAT Act.

104 The authorities consistently state that 'special circumstances' are circumstances that are out of the ordinary; although they do not have to be

extraordinary or exceptional circumstances: see, for example, Mergerditchian v Kurmond Homes Pty Ltd [2014] NSWCATAP 120; CPD Holdings Pty Ltd t/as The Bathroom Exchange v Baguley [2015] NSWCATAP 21

105 Being successful in proceedings is not, of itself, a special circumstance. There must be some additional factors present in the case to justify an award of costs: Citadin Pty Ltd (No. 2) v Eddie Azzi Australia Pty Ltd & General Pants Co Pty Ltd [2001] NSWADTAP 31 at [6].

106 Even if there are special circumstances, it may still not be appropriate for the Tribunal to award costs for discretionary reasons: Obeita v Australian College of Professionals Pty Ltd [2014] NSWCATAP 38 at [81]; Brodyn Pty Ltd v Owners Corporation – Strata Plan 73019 (No. 2) [2016] NSWCATAP 224 at [24].

107 An award of costs to a party is to compensate it where that party has been put to expense in bringing or defending a claim: see Oshlack v Richmond River Council [1998] HCA 11; (1998) 193 CLR 72. An award of costs is made, not for the benefit of a losing party, but for the successful party. In Oshlack [1998] HCA 11, [67], McHugh J (in dissent but with the tacit agreement on this issue with other members of the Court) said:

> The principle is grounded in reasons of fairness and policy and operates whether the successful party is the plaintiff or the defendant. Costs are not awarded to punish an unsuccessful party. The primary purpose of an award of costs is to indemnify the successful party. If the litigation had not been brought, or defended by, the unsuccessful party the successful party would not have incurred the expenses which it did. As between the parties, fairness dictates that the unsuccessful party typically bears the liability for the costs of the unsuccessful litigation.

Whether the Tribunal has power to award costs against ClarkeKann solicitors (i.e. a non-party to the proceedings)

108 Counsel for the Owners Corporation submits that a costs order against Diaspora is unlikely to be honoured and it is appropriate given that ClarkeKann solicitors acted in bringing the proceedings on behalf of Diaspora

without a valid retainer for the Tribunal to make a costs order against the solicitors and further that the order should be for payment of costs on the indemnity basis up to the point where the proceedings are dismissed: Hillig v Darkinjung Pty Ltd (No. 2) [2008] NSWCA 147 at [47] – [52] per McColl JA (with whom Beazley and Giles JJA agreed); see also Harry S Bagg's Liquidation Warehouse Pty Ltd v Whittaker (1982) 44 NSWLR 421 at 430.

109 In Ritchie's Uniform Civil Procedure NSW at [s.98.26] in relation to s 98 of the Civil Procedure Act 2005 (NSW) there is reference to Re Gardiner ex parte Orgill (1890) 16 VLR 641. The authors of Ritchie's Uniform Civil Procedure NSW appear to be in no doubt that an order for costs can be made pursuant to s 98 of the Civil Procedure Act against a solicitor who commences proceedings without having valid instructions.

110 The question before me is whether, under s 60 of the NCAT Act, the Tribunal has power to do so.

111 There is a difference between the statement in subsection 98(1)(b) of the Civil Procedure Act that: *"The Court has **full power** to determine by whom, to whom and to what extent costs are to be paid"* (emphasis added), on the one hand, and the statement in subsection 60(4) of the NCAT Act that: *"If costs are to be awarded by the Tribunal, the Tribunal may (a) determine by whom and to what extent costs are to be paid"*, on the other hand.

112 Consistent with s 60(1) of the NCAT Act, the starting point in any costs application is that each party bears its own costs; whereas; under the Uniform Civil Procedure Rules (UCPR) the prima facie position is that costs follow the event. In the Tribunal an outcome whereby costs follow the event is exceptional. The exception arises where there are special circumstances, and special circumstances can arise by reason of any matter that the Tribunal considers relevant pursuant to subsection 60(3)(g). In this way the Tribunal cannot be said to have "full power" (as is the case with the UCPR) when the Tribunal's power arises by reference to "special circumstances".

113 Further, I find that the NCAT Act does not limit an award of costs to be made against a party only and that in consequence the Tribunal does have power to make a costs order against the solicitors even though they are not a party to the proceedings. Subsection 60(4) confers a power upon the Tribunal to determine: *"by whom and to what extent costs are paid"*. I respectfully adopt the NSW Court of Appeal's interpretation of that statutory language (also used in s 98(1)(b) of the Civil Procedure Act) as extending to non-parties: Heath v Greenacre Business Park Pty Ltd [2016] NSWCA 34 at [33].

Whether there are special circumstances

114 The solicitor from ClarkeKann with day-to-day carriage of the matter up to 15 August 2017, Ian Alexander McKnight, swore an affidavit on 22 December 2017 (at pages 241 to 252 of Exhibit A). The only step Mr McKnight took to check if his firm could take instructions from Diaspora, by and through Mr Preston, was to view an ASIC search dated 10 February 2017. His firm had purported to act for Diaspora in earlier Supreme Court of NSW proceedings (File No 2016/59505) at a time when Mr Preston was bankrupt. As referred to earlier, the Supreme Court proceedings were dismissed after the defect in Mr McKnight's retainer was pointed out to ClarkeKann on 26 February 2016. The correspondence of 26 February 2016 warned explicitly of the defects in the solicitors' authority by reference to s 201F of the Corporations Act.

115 Mr McKnight gave no evidence that he assured himself, before taking on another retainer for the same entity, that the person appointed as director was appointed validly under the Corporations Act.

116 I find that the solicitors' conduct was not reasonable in the particular circumstances of this case. The solicitors commenced the proceedings without diligently reviewing the Corporations Act to ascertain whether their corporate client had directors properly appointed. Moreover, the failure to undertake such due diligence was in circumstances where there had been prior proceedings between the same parties and also where the relevant

provisions of the Corporations Act had been expressly pointed out to the solicitors.

117 I am satisfied that a relevant special circumstance within s 60(3)(g) of the NCAT Act is established on the evidence in that the solicitors' conduct was unreasonable in commencing proceedings in the Tribunal without valid instructions.

Discretionary considerations

118 Counsel for Diaspora and the solicitors both argued that there were countervailing considerations in the exercise of the Tribunal's discretion as to the awarding of costs. Such considerations were occasioned by the Owners Corporation taking the point about the competency of the proceedings more than 5 months after the Appeal proceedings were brought and only three days before the date fixed for hearing.

119 It is also the case that the authorities relied upon by the Owners Corporation in support of its case for an indemnity costs order (Hillig v Darkinjung Pty Ltd (No. 2) & Harry S Bagg's Liquidation Warehouse Pty Ltd v Whittaker) were made by courts exercising a "full power" (in the UCPR context for costs orders) and indeed such was the case with the prior Supreme Court proceedings (2016/59505) involving the parties; whereas, in this instance, the Tribunal's power to award costs arises by reference to "special circumstances" under s 60 of the NCAT Act.

120 Furthermore, as the Appeal Panel has observed, the Tribunal's discretion to award indemnity costs is exercised in limited circumstances and it must be the subject of careful reasoning: see Mendonca v Tonna [2017] NSWCATAP 176 at [59] – [60], [62] – [64] and the cases cited therein by the Appeal Panel.

121 Even though for the reasons already referred to, the incompetency of the proceedings is a matter the solicitors and Diaspora ought to have considered before lodging the notice of appeal and the application, I have to take into

account the fact that after commencement of the Appeal proceedings the Owners Corporation did not raise the competency issue until three days before the date fixed for hearing. If an order for costs of the proceedings on the indemnity basis is made against ClarkeKann, this will include all of the Owners Corporation's costs of responding to the substantive issues in the Appeal proceedings, which likely would not have been incurred if the Owners Corporation had taken the competency point at the outset of the proceedings. While I accept it does not necessarily follow that Diaspora would have withdrawn the proceedings as it did in 2016 with the Supreme Court proceedings, it is reasonable to expect that a competency point raised by the Owners Corporation at the outset or at least on 1 June 2017 when the Tribunal made directions to list the Appeal Proceedings for a one day hearing, would have prompted the Tribunal to make appropriate directions apt to minimise unnecessary costs being incurred (e.g. a hearing on a preliminary point as to the applicant's standing to bring the proceedings), as this would have been consistent with the Tribunal's guiding principle in s 36(1) of the NCAT Act of the just, quick and cheap resolution of the real issues in the proceedings.

122 There is no explanation in the Owners Corporation's evidence as to why it delayed in taking the competency point until 28 August 2017. In fact the evidence establishes that the Owners Corporation had been aware of the competency issue since 2016.

123 In light of the competency issue being raised three days before the specially fixed hearing on 31 August 2017, the hearing was necessarily adjourned by the Tribunal with appropriate directions as to evidence and submissions on the competency issue. Relevantly also, on 25 August 2017 (i.e. six days prior to the hearing), the Owners Corporation had served its evidence as to the substantive issues in the proceedings which included 600 pages of written material and 491 video files. That evidence was lately served; in fact, it was due on 19 July 2017 pursuant to an order made extending time from 4 July 2017. In the absence of the competency issue, the fact that such evidence as

to the substantive issues in the proceedings was lately served and was to be relied upon by the Owners Corporation at the formal hearing, may well have formed a basis for adjournment of the specially fixed hearing but at the Owners Corporation's cost.

124 I find that the Owners Corporation's conduct of the proceedings and its delay in taking the competency issue was not consistent with its statutory obligation in s 36(3) of the NCAT Act to co-operate with the Tribunal in giving effect to the Tribunal's guiding principle of the just, quick and cheap resolution of the real issues in the proceedings. I consider that this is a relevant consideration in my exercise of the Tribunal's discretion on costs: see also s 60(3)(f) of the NCAT Act.

125 In my opinion, there are other considerations which militate against a costs order at least up until 1 September 2017. The Appeal proceedings arose out of an Adjudication application under the SSMA 1996 which ClarkeKann had conducted for Diaspora, including an application by Diaspora, which was fully litigated and the competency point was not taken. There is also evidence that the Owners Corporation, by its strata manager, had been dealing with Mr Preston in relation to Diaspora's lot in the strata scheme since at least April 2017: affidavit of John Preston sworn 11 January 2018 at [16] – [19] and Tabs 14 – 17 of JRP – 1. I accept the submission of Diaspora and ClarkeKann that such circumstance shows the Owners Corporation was prepared to deal with Mr Preston as an officer of Diaspora when it suited the Owners Corporation's purpose.

126 I find that the proper exercise of the Tribunal's discretion in the particular circumstances is to order Diaspora and ClarkeKann, jointly and severally, to pay the costs of the Owners Corporation on the indemnity basis from 1 September 2018; otherwise, each party is to bear their own costs of both proceedings.

Orders

127 The Tribunal's orders are:

(1) The proceedings constituted by File Nos. SC17/24808 and SC 17/35536 are dismissed;

(2) The applicant, Diaspora Holdings Pty Ltd, and ClarkeKann Lawyers, jointly and severally, are to pay the costs of the respondent, The Owners Strata Plan No. 68608, in both proceedings from 1 September 2017 on the indemnity basis as agreed or as assessed in accordance with the applicable costs assessment legislation; otherwise, the parties are to bear their own costs of both proceedings.

D. Charles

Senior Member

Civil and Administrative Tribunal of New South Wales

4 September 2018

I hereby certify that this is a true and accurate record of the reasons for decision of the New South Wales Civil and Administrative Tribunal.

Registrar

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