



Newsletter

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QCAT permits termination

A big win for Bodies Corporate & the Rocks re-visited

Mathews Hunt Legal acts for a Body Corporate which has just won an important termination case, with QCAT upholding the Body Corporate's right to give effect to a resolution to terminate a long term grounds maintenance contract ('GMC') with its caretaker.

There have been very few cases which have provided guidance about how to successfully utilise the legislation and the caretaking contract to improve the unsatisfactory performance of caretaking contracts. This decision provides significant guidance.

Facts

The Body Corporate was beyond frustrated with the minimal effort being made by the caretaker. The situation was made worse by a GMC that contained no schedule of duties.

The Body Corporate retained an independent expert to inspect the scheme. The expert concluded that '*what we observed in some instances is clearly indicative of a long-term failure of compliance with contractual duties...It is our conclusion, based on the inspection criteria, that on the day of our inspection certain areas and facilities within [the scheme] did not meet standard industry expectations for a resort complex of this type*'.

A remedial action notice ('RAN') was issued to the caretaker in respect of the items identified in the expert's report.

Additionally, in order to redress the lack of specified duties, a series of carefully drafted directions were issued to try to improve the caretaker's performance. Those directions were ignored and the Tribunal found that '*there was a 'deliberate refusal ... [by the caretaker] to co-operate with the body corporate to seek information which it was entitled to have and which it was reasonable to pursue*'.

Remedial action notices ('RANs') were then issued based upon the failure to comply with the directions.

Fortunately for the Body Corporate, the GMC provided that if 3 valid RANs were issued in 6 months the GMC could be terminated.

The Tribunal noted that such a clause was designed to stop '*a contractor from continuously falling behind on its duties but then complying with a RAN at the last moment to avoid termination*'.

The owners voted overwhelmingly to terminate the GMC based on the provisions of the legislation, and also in relation to the terms of the GMC.

The decision

The Tribunal upheld the Body Corporate's argument that it was entitled to terminate the GMC based on the GMC's termination provisions, which were additional to those provisions in the legislation.

The decision opens up opportunities for Bodies Corporate to redress the imbalance in many agreements – although the caretaker needs to consent to any amendment.

The decision contains extensive guidance about RANs including that:

1. The RAN remains valid even though some allegations of default may be found to be trivial or not to be a breach;
2. The RAN must sufficiently identify the breach and how it must be remedied;
3. The RAN can give '14 days after today' to remedy a breach – this avoids numerous problems about timing caused by the previous QCAT decision in The Rocks;
4. The time given to the caretaker to remedy the RAN must be reasonable for the caretaker to remedy the RAN. Even if a Body Corporate grants longer than the minimum 14 days, the Tribunal may consider that the period is not sufficient to allow the caretaker to remedy the RAN. Therefore allow extra time if possible;
5. The Body Corporate's duty to act reasonably extends to its dealings with the caretaker, but it does not have to act uncommercially;
6. The Body Corporate has the onus of proof to show that there has been a breach of contract by the caretaker and that the Body Corporate has satisfied any contractual and legislative steps to validly terminate the contract;
7. The caretaker generally has the onus of proof to show that the Body Corporate acted unreasonably in terminating the contract;
8. It is open to infer from '*sufficiently strong circumstantial evidence that there was a breach*' – in this case repeated reports from an independent expert, ie photographs of filthy window sills; and

9. If there are painting contractors onsite or others causing extra rubbish then the caretaker needs to adjust its cleaning regime to comply with the standard required in the contract.

In conclusion, the termination process remains very complex and painfully slow, but at least there is another decision that helps a Body Corporate to ensure that its caretaker is performing the caretaking duties. We strongly recommend that any Bodies Corporate that wish to improve their caretaker's performance should obtain legal advice.

Caretakers concerned about their contracts should remember the words of McGill DCJ in the Palms Springs case when he said:

"...there is more to a caretaking agreement than simply a valuable asset for the caretaker; the fundamental purpose of such an agreement is to ensure that appropriate caretaking services are made available to the body corporate, for the benefit of all the lot owners. It is not immediately apparent to me why lot owners should be saddled with a caretaker who has underperformed for a substantial period of time merely because of a desire to preserve to the caretaker the benefit of the agreement. I would have thought the best way for a caretaker to preserve its valuable asset was to ensure that its obligations under the agreement were properly complied with. If a caretaker has allowed circumstances to arise where the body corporate is entitled to terminate the agreement, that option is available to the body corporate."

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About us

Peter Hunt commenced practice with Mathews Hunt Legal in July 2010 after 20 years in the law, including being a partner in charge of litigation at another firm. He is a Fellow of the Australian College of Community Association Lawyers ('ACCAL'), and a regular presenter of seminars to Body Corporate Managers and the Strata community.

MHL practices exclusively in the Strata Industry and we have seen every imaginable issue (and some unimaginable issues), so don't hesitate to give us a call if you require legal assistance.

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