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The Management Rights Lawyers
ManagementONE
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Lessons from The Rocks

By John Mahoney

Following the successful Court of Appeal decision relating to the resident manager at The Rocks Resort at Currumbin, it is appropriate to look at what lessons other managers and the industry generally can learn from the case.

To briefly recap, our client was prosecuted by the Office of Fair Trading (OFT) which alleged a manager could charge no more than the actual expenses of items like cleaning and Foxtel – so nothing for the manager's time and effort in arranging and supervising these things. Our client won in QCAT, lost at QCAT Appeal but won in the Court of Appeal.

So what are the lessons? First and foremost, make sure your letting appointments are in order and make sure you comply with them. As this case indicates you never know when the Office of Fair Trading might come knocking on your door wanting to inspect your letting appointments. It may be that a disgruntled owner or owners complain to the OFT (as happened to our client) or it may be that the OFT is conducting random checks. In many respects our client's letting appointments saved the day for our client – although not perfect they were adequate to justify our client charging for the services the subject of the OFT allegation.

Importantly make sure all of the charges you are making are included in the letting appointment. Make sure any increases are properly communicated to owners and unless your appointment allows for you to impose increases, ideally get your owners to confirm any increases.

Secondly, the OFT is not always right in its interpretation of the legislation. You should not accept blindly what you are told by the OFT, particularly if it is contrary to standard industry practice. Get sound legal advice if in doubt. The action of the OFT in prosecuting this case to the full extent was unusual. That office is generally receptive to arguments showing where it may not be correct and to giving a manager an opportunity to change business practices where they are clearly wrong.

Thirdly, recognise the benefits of being an ARAMA member. Fighting legal battles with OFT (or indeed anyone for that matter) can be an expensive exercise, especially when, like in this case, the services of a QC are required. Our client was fortunate to have the financial support of ARAMA to fund the bulk of the Court of Appeal legal costs.

On a related note, there are also benefits in following the ARAMA recommended POA form 6 letting appointment and addendum. Those forms had already dealt with some of the arguments put up by the OFT and since the case commenced these have been strengthened further.

Off the plan – off the boil?

By John Mahoney

With the huge number of new unit projects coming on line in the past couple of years, and more following, there have been many significant off the plan management rights transactions coming across our desks. We are though starting to see demand wane a little and buyers being able to negotiate more favourable terms and conditions.

Whilst we have an extensive checklist we use when advising potential off the plan management rights buyers and negotiating contracts, it has until recently not been uncommon for developers, swamped with offers in a very hot market, to reject many of the safeguards we like to put in place for our clients.

Where we and our clients have been able to incorporate some of the usual safeguards, our clients have reaped the benefits. One of the most important points is to ensure that you only pay for appointments from unit buyers who have actually completed their unit purchase. As defaulting unit buyers become more and more common this is an important protection for the off the plan management rights buyer.

It can be equally important to insist on there being a minimum number of appointments in place at settlement and if not have a right terminate. In one particular matter in which we were involved, the developer took little interest in assisting our client to procure letting appointments from buyers, many of whom were overseas residents. Come settlement time, despite our client's best efforts, our client had been able to secure less than half of the anticipated number of letting appointments. The contract allowed our client to terminate if there were not a specified minimum number of appointments at settlement (about half the anticipated number). Our client was able to trigger the termination clause and terminate the contract despite the developer's protestations.

These are just a couple of the examples of the safeguards we try and negotiate when acting for off the plan management rights purchasers. We like to spend time with our clients when negotiating an off the plan purchase so that we can take them through our extensive checklist and make sure they turn their minds to the myriad of matters they need to consider to protect themselves. We have also had to assist other buyers who had initially used other lawyers to negotiate their purchase only to find that many of our standard safeguards were missing and come to us to sort out the problems. It is much better if we can get involved at the outset and achieve as many of those safeguards as we possibly can.

Multiple versions of POA Form 6 causing unnecessary concern

By Nicole Cleary, Senior Associate

Most of our readers will be aware of the multiple versions of the POA form 6 that have been released by the Office of Fair Trading (**OFT**) since the from was first introduced when the Property Occupations Act (**POA**) commenced in 2014. We are already at version 5 in just 3 years – at one stage there were 3 changes in just a few months!

The problem has been compounded by there being no phase out time for the old versions. Unlike the old PAMD form 20a, the OFT did not allow any such phase out time so from the date the new version was introduced it was the version that had to be used and there was no grace period for use of the old version.

The multiple versions have been an issue for accountants conducting income verifications for management rights buyers and they have been reporting any noncompliance where old versions of the form 6 have been used. That in turn has led some lawyers to demand that old versions of the form 6 be replaced with new forms 6 using the correct version. Many managers have also been concerned about the validity of outdated versions of forms 6.

The concerns of accountants and managers arise because of the provisions of the POA which require that letting appointments be in the "approved form" – being the form approved by the chief executive of the OFT. At any given time the approved form will be the version of the form current at that time. The argument is that an outdated version is not the approved form with the consequence that the agent is in breach of POA and cannot charge commission.

The Court of Appeal considered a similar point in relation to a PAMDA form 21a (used for real estate sales) where an agent had used an outdated version. The Court found in the agent's favour by relying on a section of the Acts Interpretation Act which states that where a form is prescribed or approved under an Act, strict compliance with the form is not necessary and substantial compliance is sufficient. That expression means that where the form used was substantially in accordance with, and did not depart from, the prescribed form in any material respect, then that was sufficient compliance with the relevant Act.

This ruling, that strict compliance with the current version of the form is not necessary provided there is substantial compliance, has equal application to the various versions of the POA form 6. The differences between the versions are minimal. Each contains all of the information prescribed by the POA and a unit owner's interests are not adversely affected by any differences in the versions. It is therefore our view – and one that others are now following – that the use of an outdated version of the form 6 is of no consequence. Having said that we encourage all managers to use the current version whenever procuring new appointments.

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CPI increases

Most caretaking agreements provide for CPI increases. We often see that managers have not claimed these increases for several years! The following is a table of the Brisbane All Groups CPI figures.

For example, if your remuneration started at $100,000 in October 2010, the correct calculation for the October 2014 increase based on Brisbane All Groups CPI would be $100,000 x 106.5 (i.e. the last index figure before the review date) / 96.9 (i.e. the last index figure before the commencement date) = $109,907.

That would be increased by 10% GST if there is a GST escalation clause in your caretaking agreement. Managers should check that there is.

Mahoneys have assisted many managers in having their remuneration increased to market level. Up to date figures can be found at http://www.oesr.qld.gov.au.

	Mar	Jun	Sep	Dec
2004	78.7	79.1	79.4	80
2005	80.7	81.1	81.6	82.3
2006	83	84.5	85.2	85.1
2007	85.5	86.7	87.5	88.4
2008	89.6	91.1	92.4	92.2
2009	92.4	92.9	94.2	94.5
2010	95.2	95.9	96.9	97.4
2011	98.6	99.6	99.9	99.7
2012	99.9	100.5	101.6	101.9
2013	102.0	102.5	103.8	104.6
2014	105.2	105.8	106.5	106.7
2015	106.7	107.4	108.1	108.5
2016	108.5	109.0	109.7	110.2
2017	110.5	111.0		