

Mahoneys secures costs for resident manager in landmark QCAT victory

By Mitchell Downes

Recently, Mahoneys acted for a resident manager in a termination dispute with the Body Corporate. The trial lasted 10 days. Our client, the resident manager, was successful in defeating the body corporate's attempts to terminate the management rights agreement.

In a landmark decision, the Queensland Civil and Administrative Tribunal (QCAT) ordered the Body Corporate to pay the resident manager's costs of the trial, fixed in a sum exceeding \$300,000.

Are costs automatically awarded in QCAT proceedings?

No. The normal position in matters before QCAT is that each party bears their own costs. A party must demonstrate to QCAT that the "interests of justice" require making a cost order. QCAT is empowered to take into account a broad range of matters when deciding if the interests of justice require a cost order. They include the manner in which the proceeding was conducted by a party and the respective financial position of the parties.

Why were costs awarded in this case?

In the trial judgment, QCAT found that the Body Corporate had set out to terminate the management rights because the Body Corporate perceived a financial advantage in doing so. In the cost judgment, QCAT held that a party who attempts to terminate a contract for a collateral purpose (e.g. a perceived financial advantage) and is unsuccessful in court proceedings should not escape a cost order.

The resident manager took out considerable loans to fund the proceedings. QCAT found that the resident manager should not be required to service and repay the loans in the wake of the Body Corporate's failed attempt to secure a termination.

The Member found that the Body Corporate unnecessarily disadvantaged the resident manager by ceasing to pay the resident manager's salary while the matter was awaiting trial. The resident manager successfully applied for a mandatory injunction to QCAT to require the body corporate to pay the resident manager's remuneration.

Why were costs fixed?

QCAT's legislation requires the tribunal to fix costs where it is appropriate to do so. Here, there was common ground on the evidence that 65% of the costs incurred by the resident manager was a good estimate of the amount that would be awarded in a cost assessment.

What are the consequences for Bodies Corporate?

Here, the Body Corporate spent around \$470,000 in legal fees to defend the termination attempt.

In total, the attempt to terminate the management rights has cost the body corporate around \$777,000.

A landmark victory for Mahoneys

The Mahoneys team, led by Mitchell Downes, Partner, secured a total victory for this resident manager. The cost order against the body corporate is particularly noteworthy given that QCAT has a statutory predisposition against costs.

Matthew Manz of our Gold Coast office will be presenting at a management rights seminar aimed at new entrants on Saturday, 23 March from 10am to 11:30am at the Burleigh Surf Club. He will be accompanied by other industry experts including a management rights banker, broker and accountant. If you know of anyone who may be interested in attending the seminar please either contact our office or have them register in accordance with the invite that can be found on our website.



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If you are considering a future in the Management & Letting Rights Industry, BOQ Burleigh Heads are very well respected and experienced Management & Letting Rights lenders, right here on the beautiful Gold Coast.

We invite you attend an informative Management & Letting Rights Seminar to be held on 23rd March 2019 followed by a complimentary morning tea.

Date: Saturday 23rd March 2019

Time: 10am to 11:30 am

Where: The Surf Club Burleigh Heads

As there are limited seats - Bookings are essential.

To secure your seat at this Premier Event contact us via the BOQ Burleigh Heads Branch email as per below. Or alternatively give us a call on 07 5569 7088 . Email burleigh.heads@boq.com.au

WHY A LOT OWNER DEED IS SO IMPORTANT

By John Mahoney

A recent decision of the Office of the Commissioner for Body Corporate and Community Management (OCBCCM) has highlighted the importance of complying with the 'lot owner deed provisions' of the Body Corporate and Community Management Act (Act).

In simple terms, section 116 of the Act requires that where the letting business is conducted from a lot in the scheme (other than one owned by the body corporate), then at all times either the letting agent must be the registered owner or lessee of the lot OR there must be a deed in place between the lot owner and the body corporate (as prescribed by the section and dealing with the transfer of the lot to a new letting agent). The deed is commonly known as a 'lot owner deed'. Section 116 goes on to provide that, without such a deed, the letting agent's authorisation as letting agent has no effect.

The principle in action at Allure Apartments, Townsville

The relevant facts in the case before the OCBCCM involving Allure Apartments Townsville were that the letting agent did not own or lease the lot containing the reception and that there was no lot owner deed in place. With the consent of the Body Corporate, the letting agent transferred the letting agreement to a new manager. The Body Corporate subsequently argued that the transfer was of no effect due to the absence of the deed.

The OCBCCM found in favour of the Body Corporate, ruling that the transfer of the letting agreement was of no effect and that the

committee's resolution consenting to the transfer was invalid. That was found to be the case even though the new letting agent complied with the requirements of the section.

The rationale for the decision was that, at the time of the transfer, there was no lot owner deed in place and so the letting agreement was of no effect. It could not be validly transferred and the committee could not validly consent to the transfer of such an agreement because there were no rights under the agreement which could be transferred.

Why trouble could have been avoided

Importantly, the OCBCCM indicated that it was open to a letting agent in a similar situation putting in place a lot owner deed and that doing so would rectify the defect.

The decision has been appealed and the outcome will not be known for some time. In the meantime, it is an important reminder to resident managers and their lawyers to make sure that at the time of an assignment they see to it that the incoming manager and outgoing manager BOTH comply with the requirements of the section.

Based on the decision, at least any defect on the part of the outgoing manager can be cured by putting in place a lot owner deed (or a lease over the lot) so that a valid agreement is transferred to the incoming manager.



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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.oestr.qld.gov.au>.

	Mar	Jun	Sep	Dec
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	111.4	112.3
2018	112.4	112.9	113.4	



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