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The Management Rights Lawyers
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A valuable lesson for caretakers. by Will Kenny

A recent decision of the District Court in Queensland has demonstrated the serious consequences of an under-performing manager. The decision of Sherwood Forest Corporation Pty Ltd v Body Corporate for Centenary Mews [2021] QDC 166, found in favour of a body corporate validly terminating a caretaking agreement due to the manager's failure to adequately remedy certain breaches of the agreement. The decision demonstrates that caretaking agreements can be terminated where a manager fails to perform.

The circumstances were that the body corporate served the manager with a notice to remedy nine alleged breaches of the caretaking duties. Of the nine breaches, the Court found that five of those were unsubstantiated and only the following four duties had actually been breached:

- The garden beds had not been adequately maintained;
- There was graffiti on the driveway near the visitor car park that was not removed;
- The boundary fence along the roadway had not been adequately maintained, with palings warping and becoming detached and not being repaired or replaced sufficiently frequently; and
- The fire hydrant in the complex had not been tested.

While the manager had made some attempts to address the breaches, the remedial works were not in accordance with what the notice required, including a failure to properly remedy the breaches and within the time required. Insofar as the graffiti removal which required the use of an electric grinder and fire hydrant testing, the manager argued that these duties fell under the definition of "Skilled Work" in the agreement and was not their responsibility to perform.

Skilled Work (as defined) required such work to be carried out by a skilled tradesman or a tradesman required to hold a licence and the work needed to be of such nature that would not usually be carried out by a caretaker having regard to the practice of other caretakers in south east Queensland. No evidence was given to the effect that it could only be carried out by a tradesman and the carrying out of such duty was not the practice of other managers. In the case of the fire hydrant inspection the Judge accepted this was Skilled Work but the manager had not arranged for it within the time specified in the breach notice.

The problems with the boundary fence were that palings were routinely warping and pulling away from the rails. The manager was responsible for the ongoing repairs and maintenance of the fence and to replace palings. Despite there only being a few defective palings at the end of the notice period, the Judge's sentiments were that the significant warping and failure to repair was indicative of the ongoing attitude of the manager to leave such repairs for too long as it had done in the past. The manager had further failed to perform this duty (amongst others) to a "high standard" required by the agreement.

In determining whether the notice was invalid, the manager argued that it was wrong for the body corporate to "throw up" any number of breaches, leaving it with the onerous task of working out which breaches were legitimate and those that were not. The body corporate's response was that an incorrectly alleged breach did not necessarily invalidate the notice, but rather only that it could not ultimately rely on the erroneous breaches as a basis to terminate. The Judge agreed that while the notice to some extent was deficient, it was clear enough to inform the manager of the matters it needed to attend to within the time allowed by the notice.

In the end, the Judge found that it was reasonable for the body corporate to terminate the agreement. The manager's past performance and its ongoing failure to satisfactorily carry out the duties made it entirely reasonable for the body corporate to terminate. The decision, for various reasons, is some cause for concern and a warning to all resident managers. The facts of the matter suggest that the manager was not acting maliciously and had made genuine attempts to remedy the breaches. Regrettably, those attempts were not up to standard and an indication of the manager not recognising the importance of complying with the notice.

Legal matters aside, if you are a resident manager, the takeaways from this decision are simple. Make sure you are attending to your duties both at the required frequency and with

the appropriate level of detail. It is vitally important that you understand what your duties require of you and when you can rely on contractors and tradesman alike. If you do receive a breach notice, engaging a solicitor experienced in management rights at the outset is essential. Otherwise, a failure to comply and address the breaches within time could see your agreement terminated.

Is your buyer made of the right stuff? by Amy O'Donnell

We are seeing plenty of transactions at the moment. But now, more than ever, you need to think about who you are selling to as bodies corporate take a greater interest in who is buying the management rights business.

It is important to remember that the body corporate consent process requires that buyers be prepared and suitably qualified. As you will likely already be aware, the body corporate is only required to provide consent to an assignment of the management rights agreements within 30 days of being provided with all of the relevant material needed to make a decision.

If the buyer is not prepared, or has not done their homework, then this time frame may not even start and consent will be delayed. This will result in settlement of your transaction also being delayed.

When acting for a seller, it is becoming more common to receive requests from the body corporate's lawyers that a potential buyer undergo some form of formal training or assessment – especially for first time buyers. We have seen transactions fall over where buyers were not keen to embrace such a request.

This is difficult to understand as there are very few industries which do not require some form of training for first time entrants. So while we do not think training should be an automatic requirement for managers with experience, it should not be met with resistance by first time managers.

In fact, if a buyer has already completed appropriate training and demonstrates an eagerness to learn, it is an opportunity to shine when meeting with the committee.

Accordingly, we recommend that our seller clients think about their buyer (and how they will present to the body corporate), even before signing a contract, and work with them to achieve the common goal of consent and settlement.

The more time a seller spends with their buyer training them onsite and preparing them (before presenting them to the committee) the easier it is for the buyer to actually show some knowledge and understanding of the tasks at hand and generally easier for a seller to obtain the required consent needed to sell.

So what should your buyer have ready? They will at least need:

- resumes;
- references;
- credit checks;
- police checks;
- qualifications which demonstrate they can carry out caretaking and letting duties;
- details of their financial position;
- evidence of any training (including onsite training with the seller); and
- anything else the agreements provide for.

The best way to smooth the process, as a general rule, is to have the buyer prepare all of this material (as opposed to providing minimum information in the hope that the body corporate does not ask for more). Even better, meet with your buyer and help them. You will be best placed to know your committee and have some ideas as to what will present well to gain a favourable/suitable outcome.