

Management Rights: The right to terminate Finally a common sense decision!

On the 18th December 2008, the District Court on Appeal handed down a momentous and long overdue decision in the Appeal by the Body Corporate for Palms Springs Residences against the decision of Mr Gary Bugden Specialist Adjudicator in relation to the attempted termination of the Caretaker, J Patterson Holdings Pty Ltd's Management Rights Agreements. This decision has confirmed that a body corporate has the right to terminate management rights agreements where a caretaker has been found to be in breach of those agreements.

This may seem a basic and fundamental right where there has been a breach of a contract, however Bodies Corporate have been held to ransom by an unfair and biased system that has protected caretakers as the owners of management rights agreements from having their agreements terminated even where they have been found to be in breach of their agreements.

This system, imposed by the dispute resolution provisions in the Body Corporate and Community Management Act ("BCCMA"), has made it practically impossible for a Body Corporate to terminate its Caretaker despite blatant and persistent breaches of Management Rights Agreements.

For the first 10 years of operation of the BCCMA Bodies Corporate have been subjected to a regime of Specialist Adjudication that has been biased and prejudicial in favour of the owners of Management Rights.

The general approach of the Specialist Adjudicators, appointed by the Commissioner for Body Corporate and Community Management, has been to refuse to allow Bodies

Corporate to terminate Management Rights Agreements despite blatant breaches of the Agreements because of the unfavourable result that would accrue to a Caretaker in “wiping away their valuable asset”.

In the Palm Springs Case the Specialist Adjudicator denied the Body Corporate the right to terminate the Management Rights Agreements despite observing in his reasons for his decision that there was “clear evidence that for a substantial period of time the caretaker had underperformed” and that “the Default Notice may well have been justified”

Specialist Adjudicators have failed to recognise that the fundamental purpose of Management Rights Agreements is to ensure that caretaking services are made available to Bodies Corporate and not to provide an avenue for the owners of these management rights agreements to make substantial profits at the expense of the bodies corporate and owners that they are meant to serve.

The District Court in the appeal by the Body Corporate for Palms Springs has finally reversed this unfair and biased approach. His Honour McGill DCJ stated “*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.*” His Honour went on to say that “*I would of 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.*’

His honour observed that “*In any dispute about whether that entitlement has arisen, both parties to the dispute are entitled to an objective determination of the matter without partiality or prejudgement.*”

In the Palm Springs case the Judge found that the Specialist Adjudicator got it so wrong that the matter has to be remitted back to specialist adjudication for the matter to be properly determined. The Judge however found that Specialist Adjudicator, in the first instance was so predisposed to the position of the Caretaker and his views so firmly expressed adversely to the Body Corporate that he did not consider the rehearing could be conducted fairly before that Specialist Adjudicator. The Judge accordingly ordered that the matter had to be referred to a different specialist adjudicator.

As a result of this decision, a Body Corporate can now expect to have the duties under the Management Rights Agreements properly performed by a caretaker and in the event of default has the right to terminate those agreements.

This is the first step in the right direction after many years unsatisfactory and unfair results for Bodies Corporate who merely want and expect caretakers to perform the duties under their agreements for which they are paid substantial amounts of money.

This decision is a very big warning to Caretakers that they should perform the duties in their Management Rights Agreements or risk having those agreements terminated.

The clear message from the Palm Springs Appeal decision is that the days of Caretakers being protected by a biased and prejudicial adjudication system are over.

Finally, Caretakers are no longer immune from having their agreements terminated where they fail to perform.

Robert Herd is the principal of Herdlaw – the Body Corporate Lawyers. Herdlaw represented Palm Springs Residences in the Palm Springs Residences Appeal. The above is a summary from the case regarding the issue of a body corporate’s rights to terminate. This article is not intended and should not be taken as legal advice and a body corporate should obtain its own legal advice before attempting to terminate its management rights agreements.

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