

PALM SPRINGS RESIDENCES

SPECIALIST ADJUDICATOR CONFIRMS TERMINATION OF CARETAKING AGREEMENT BY THE BODY CORPORATE

On 2 July 2009 Specialist Adjudicator Dorney handed down his much awaited decision in the application brought by the Caretaker to prevent the termination of his Caretaking Agreement with the Body Corporate.

The Body Corporate served a Notice to Remedy Breach on J Patterson Holdings Pty Ltd (“the Caretaker”) on 20 December 2006, which required various listed breaches to be remedied by 5 January 2007.

The Caretaker took no steps to remedy the breaches within the 14 day period and the Body Corporate called an EGM which was held on 11 February 2007 and passed a resolution to terminate the Caretaking Agreement.

The Caretaker sought an order to restrain the Body Corporate from terminating the Caretaking Agreement. The matter came before Specialist Adjudicator Bugden who sided with the Caretaker and ordered that the termination of the Caretaking Agreement was invalid (“Bugden’s Decision”).

The Body Corporate successfully appealed Bugden’s decision in the District Court (“the Palms Springs Case”).

Judge McGill in setting aside Bugdens decision found that Bugden was biased in taking the side of the Caretaker in determining the dispute. The approach and reasoning of Bugden in determining the dispute was that to terminate the caretaking agreement would cause an unfavourable result to the Caretaker by wiping away their valuable asset. This approach and reasoning appears to have been commonly held amongst Specialist Adjudicators prior to the successful appeal in the Palm Springs Residences Case.

His Honour Judge McGill observed that *“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.”*

In allowing the appeal His Honour remitted the matter back for Specialist Adjudication before a different Specialist Adjudicator to properly determine the matter. In particular the Specialist Adjudicator was directed to find if as a matter of fact the circumstances had arisen entitling the Body Corporate to terminate the Caretaking Agreement and further if they had was there any breach of fiduciary duty by the Committee in terms of the information given to lot owners which may have misled them.

Specialist Adjudicator Dorney examined the evidence and decided that the circumstances had arisen entitling the Body Corporate to terminate. He then determined that the information given by the Committee to lot owners was expressed to be a bona fide opinion and, even where some of the information may have been incorrect, was not a breach of the Committee's fiduciary duty.

Specialist Adjudicator Dorney, in examining the various breaches, found that the Caretaker had failed to confer with the Committee Representative within the 14 day period and considered that this was a breach entitling termination.

He referred to the decision of *Yedway Pty Ltd v Owners Corporation of Strata Plan 62871 [2009] NSWSC 8* saying that a refusal to act reasonably and constructively in the manner of conferral and communication with representatives of a Body Corporate is a failure to live up to the standards of professional conduct adopted or approved by property managers or caretakers of good repute.

Other breaches identified by the Specialist Adjudicator entitling termination were the failure or refusal of the Caretaker to attend to cleaning of the Pool and Spa as well as the refusal to provide the daily caretaking logs to the Committee.

Accordingly the Caretaker's application was dismissed and the Body Corporate was held to have validly terminated the Caretaking Agreement.

This decision should serve as a warning to all caretakers that where they refuse to comply with reasonable directions of the Committee or fail to remedy all breaches after having been given notice that they risk the termination of their Caretaking Agreements.

Robert Herd is the principal of Herdlaw – the Body Corporate Lawyers. Herdlaw represented Palm Springs Residences in the Palm Springs Residences Appeal and subsequent Specialist Adjudication. 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.