Article Information

Authors: Mario Esera, Warren Jiear
Service: Property & Development, Strata & Community Title
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The price for being “unreasonable” – Body Corporate ordered to pay costs in management rights dispute

The Queensland Civil and Administrative Tribunal is ordinarily a “no cost” jurisdiction – meaning that parties to a dispute ordinarily bear their own costs regardless of the outcome. Costs may be awarded, but this happens rarely and only when the Tribunal is satisfied that the interests of justice require such an order.

On 11 September 2014, the Tribunal ordered the Body Corporate for the Surfers Beachcomber to pay costs arising out of a management rights dispute.

Beachcomber Management Pty Ltd ATF Kafritsas Family Trust v Body Corporate for the Surfers Beachcomber [2014] QCAT 453 (11 September 2014)

Background

Beachcomber Management Pty Ltd ATF Kafritsas Family Trust (Beachcomber) is the caretaking and letting agent for the Body Corporate for the Surfers Beachcomber (Body Corporate).

On 11 December 2013, 22 March 2014 and 27 March 2014, the Body Corporate issued Remedial Action Notices to Beachcomber following reports that they had (amongst other things) failed to maintain the common property, failed to report hazards and had engaged employees or agents without the Body Corporate’s consent (Notices).

On 26 July 2014, the Body Corporate passed a motion to terminate their caretaking and letting agreement with Beachcomber’s (Agreement), relying on their failure to remedy the Notices (Termination). The Body Corporate also notified lot owners that it intended to call an Extraordinary General Meeting on 13 September 2014 to pass further motions in respect of the Termination (EGM).

The Agreement was financed by a Suncorp-Metway Ltd (Financier). The Financier informed Beachcomber that they treated the Termination as an event of default under the terms of their security agreement, and that they intended appoint a receiver.

Beachcomber applied to the Queensland Civil and Administrative Tribunal seeking final relief that both the Notices and the Termination were invalid. To protect itself during the interim – in particular the appointment of a receiver by the Financier – Beachcomber also applied for an injunction restraining the Body Corporate from terminating the Agreement (Application), as well as special terms that would satisfy the Financier not to proceed to appoint a receiver (Special Terms).

On 28 August 2014, the Tribunal made directions (Directions) and set the Application down for a hearing on 10 September 2014 (Hearing).

Before the Hearing, the Body Corporate indicated that it would consent to the Application but not to the Special Conditions upon the basis they were (amongst other things) a “restricted issue” as defined by section 42 of the Body Corporate and Community Management (Accommodation Module) Regulation 2008 (Accommodation Module). As a result, the Hearing had to proceed, but the sole issue in dispute were the Special Conditions.
On 11 September 2014, the Tribunal granted the Application, including the Special Conditions, and ordered the Body Corporate to pay Beachcomber’s costs on a standard basis calculated on the District Court scale.

Basis for Costs Order

Pursuant to section 102 of the *Queensland Civil and Administrative Tribunal Act* 2009 costs will only be awarded if Tribunal is satisfied that interests of justice require it to make the order. As commented on by the Tribunal Member in this case, this is strong indicator against awarding costs. Unfortunately, that did not save the Body Corporate here.

When ordering the Body Corporate to pay Beachcomber's costs, the Tribunal Member paid particular attention to the following:

- the Body Corporate had failed to comply with Directions – notably filing 367 pages worth of material the day before the Hearing which was almost a week later than directed;
- the Special Conditions caused the Body Corporate "minimal, if any, grief"[2] whereas excluding them may cause significant prejudice to Beachcomber – namely losing control of their business to a receiver;
- the Body Corporate's "unnecessarily adversarial" opposition to the Special Conditions was disproportionate to the issue in dispute and had "unnecessarily escalated costs for both parties" as well as "unnecessarily incurred on the Tribunal's limited resources"[3]; and
- even if agreeing to the Special Conditions was a "restricted issue", that did not prevent the Body Corporate from neither consenting nor objecting to them – particularly given that they otherwise consented to the Application being granted.

The Tribunal Member expressed some regret that the Tribunal was required to make a costs order, identifying that the costs in question would likely be passed onto individual lot owners, most of whom were not responsible for providing instructions to the Body Corporate.

Lessons for other Bodies Corporate

Bodies Corporate engaged in any dispute need to be mindful of their statutory to act reasonably, as required by section 94 of *Body Corporate and Community Management Act* 1997. Arguably, all the criticisms levelled at the Body Corporate in this case stemmed from their failure to act in a reasonable way. Had the Body Corporate behaved more reasonably, they may have spared themselves the wrath of the Tribunal and the costs order that followed.

Also, Committees instructing solicitors on behalf of Bodies Corporate need to be more vigilant about what issues are and are not "restricted issues" for the purpose of the Accommodation Module or the Body Corporate and Community Management (Standard Module) Regulation 2008. Although the Tribunal did not make a finding on whether the Special Conditions constituted a "restricted issue" it is arguable that they were not as they did not change the rights, privileges or obligations of the owners of lots included in the Body Corporate, rather they simply maintained the status quo pending final determination of the matter.

If your Body Corporate is engaged in a management rights dispute or simply wants to discuss the matters raised in this article, please contact our property & development team.