Article Information

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Management Rights Update: Lender dodges a bullet in financed contract dispute

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Management rights are big business in Queensland. There are real estate agents specialising in buying and selling them, solicitors specialising in advising on them, and financiers specialising in lending money to purchase them. One lender is Suncorp-Metway Ltd and, like any financier, they desire security. The Body Corporate and Community Management Act 1997 provides a certain level of security to financiers, but clearly not as much as Suncorp believed, as they discovered recently in a case heard before the Queensland Civil and Administrative Tribunal.

Background

On 12 December 2007, the Body Corporate for Gallery Vie (**Body Corporate**) appointed Gallery Vie Management Pty Ltd (**Gallery Vie**) to be their caretaker under the terms of a Caretaking Agreement. It was (and is a standard term of Caretaking Agreements) that if the caretaker is wound up it may constitute a fundamental breach of the Caretaking Agreement and would entitle the Body Corporate to terminate.

On 31 October 2011, Gallery Vie assigned its rights under the Caretaking Agreement to Vie Management Pty Ltd (**Vie Management**).

On 24 September 2014, Suncorp-Metway Ltd (**Financier**) notified the Body Corporate that they were the Financier for the Caretaking Agreement.

On 15 December 2014, the Financier notified the Body Corporate that they intended to appoint receivers for the Caretaking Agreement (**Receivers**), and did so the next day.

On 19 December 2014, the Supreme Court of Queensland made orders (**Order**) including orders that:

- Vie Management be wound up, and
- a liquidator be appointed for the purpose of the winding up (**Liquidator**).

On 28 January 2015, the Body Corporate wrote to the Financier stating that it was entitled to terminate the Caretaking Agreement pursuant to:

- clauses 11(e) and 11(f) of the Caretaking Agreement which stated that the Body Corporate may terminate the Caretaking Agreement upon an order that Vie Management be wound up or the appointment of liquidators – both of which occurred upon making of the Order, and
- section 126(7) of the *Body Corporate and Community Management Act 1997* (**BCCMA**).

On 2 February 2015, the Financier responded by saying that section 126(7) of the BCCMA did not apply because neither the winding up of Vie Management nor the appointment of the Liquidator were “something done or not done” after the Financier had started to act.

On 23 February 2015, the Financier filed an application in the Tribunal seeking (amongst other things) a declaration that the Body Corporate was not entitled to terminate the Caretaking Agreement (**Application**).

On 13 May 2015, the Tribunal declared that:

- the making of the Order was "something done" after the Financier started to act within the meaning of section 126(7) of the BCCMA, and
- the appointment of the Liquidator was also "something done" after the Financier started to act within the meaning of section 126(7) of the BCCMA.

However, the Body Corporate was not yet entitled to terminate the Caretaking Agreement but only because it had failed properly notify the Financier in accordance with 126(1) of the BCCMA.

What is "something done or not done"?

The legislative nuances of the Tribunal's decision are quite complex. But in short, the Financier made their Application believing that they were protected by section 126(2) of the BCCMA which states that a Body Corporate cannot terminate a financed contract if, under arrangements between the financier and the contractor for the contract, the financier:

- is acting under the contract in place of the contractor, or
- has appointed a person as a receiver or receiver and manager for the contract.

Here, the Financier had appointed the Receivers under arrangements between the Financier and Vie Management, so from their point of view, section 126(2) provided them with comfort that the Body Corporate could not terminate the Caretaking Agreement.

However, section 126(7) states that section 126(2) does not operate to stop a Body Corporate from terminating a contract for "something done or not done" *after* the Financier started to act.

After the Financier started to act, the Order which wound up Vie Management was made. However, the Financier believed that neither the winding up of Vie Management nor the appointment of the Liquidator constituted "something done or not done" after they had started to act because:

- the Orders arose "by the acts of third parties" rather than the actions the Financier or Vie Management, and
- liquidation was not a thing "done or not done" but was rather a "condition" brought about by the Order.

The Tribunal disagreed finding that both the winding up and the appointment of the Liquidator were "something done" after the Financier had started to act and, because those things were in breach of clauses 11(e) and 11(f) of the Caretaking Agreement, the Body Corporate was entitled to terminate.

Comment

The Financier may have dodged a bullet in the short-term, but in effect the decision made by the Tribunal appears to only be a stay of execution.

On 23 April 2015, the Body Corporate purported to issue the Financier with a notice that complied with section 126(1) of the BCCMA (**Notice**). The Tribunal did not determine whether or not the Notice was valid. Instead, it restrained the Body Corporate from acting on the Notice for 21 days from the date it delivered its decision. That 21 days expired around 3 June 2015, meaning that the Body Corporate could take steps to terminate the Caretaking Agreement.

So far, however, the Caretaking Agreement remains on foot.

Lesson for Financiers

The first lesson for financiers is to understand that the section 126(2) of the BCCMA may not protect them from Bodies Corporate seeking to terminate a financed contract.

Second, financiers should ensure that they understand the material terms of their financed contracts – in particular those terms that may permit Bodies Corporate to terminate following an insolvency event.

But the main lesson here is this: lending money to purchase management rights businesses can be risky. Financiers need to understand these risks before getting themselves into the situation that Suncorp did in this case.

If you are in engaged in dispute arising out of a financed contract or you simply want to discuss the matters raised in this article, please contact Warren Jiear or Mario Esera.