SUPREME COURT OF QUEENSLAND

CITATION:	*Famestock Pty Ltd v The Body Corporate for No 9 Port Douglas Road Community Title Scheme 24368* [2013] QCA 354
PARTIES:	**FAMESTOCK PTY LTD** ACN 010 499 989 (appellant/cross-respondent) **v** **THE BODY CORPORATE FOR NO 9 PORT DOUGLAS COMMUNITY TITLE SCHEME 24368** (respondent/cross-appellant)
FILE NO/S:	Appeal No 11300 of 2012 SC No 48 of 2008
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeal
ORIGINATING COURT:	Supreme Court at Cairns
DELIVERED ON:	29 November 2013
DELIVERED AT:	Brisbane
HEARING DATE:	25 July 2013
JUDGES:	Chief Justice and Fraser JA and Douglas J Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**1. Appeal dismissed with costs.** **2. Cross-appeal allowed with costs.** **3. Set aside the orders made on 26 October 2012.** **4. In lieu, order that judgment be entered for the defendant with costs.**
CATCHWORDS:	CONTRACTS – GENERAL CONTRACTUAL PRINCIPLES – CONSTRUCTION AND INTERPRETATION OF CONTRACTS – IMPLIED TERMS – GENERALLY – where appellant held a restricted real estate licence as letting agent for the respondent – where that licence lapsed as a result of the appellant not renewing it – where appellant also breached agreements requiring it to hold such a licence – whether the implied duty to cooperate compelled the respondent to assist the appellant in seeking a new license – whether the implied duty to cooperate compelled the respondent to assist the appellant in seeking a new licence regardless of the appellant's breaches CONTRACTS – GENERAL CONTRACTUAL PRINCIPLES – CONSTRUCTION AND INTERPRETATION OF

CONTRACTS – IMPLIED TERMS – TERMS ESSENTIAL TO ENABLE PERFORMANCE – where appellant held a restricted real estate licence as letting agent for the respondent – where that licence lapsed as a result of the appellant not renewing it – where appellant also breached agreements requiring it to hold such a licence – where the appellant continued to act as letting agent for the respondent – where the appellant applied to the Office of Fair Trading to renew the restricted real estate licence so as to continue as letting agent – where the appellant sought assistance from the respondent in renewing the licence in the form of a letter to the Office of Fair Trading that asserted the agreement remained on foot – where the respondent did not assist in the terms requested by the appellant – whether the duty to cooperate was a continuing obligation – wether the respondent breached the implied duty to cooperate in not assisting the appellant to renew the licence

REAL PROPERTY – STRATA AND RELATED TITLES – MANAGEMENT AND CONTROL – OTHER MATTERS – where a committee of the respondent body corporate purported to resolve to terminate a management agreement – where the committee was not authorised to make such a resolution – whether the action resolving to terminate the agreement was *ultra vires* – whether such unauthorised action of a committee could be attributed to a body corporate – whether such action could amount to a repudiation of a contract by a body corporate

Auctioneers and Agents Act 1971 (Qld), s 18
Body Corporate and Community Management Act 1997 (Qld) Reprint 1F, s 92, s 201
Body Corporate and Community Management (Accommodation Module) Regulation 1997 (Qld), s 24, s 84
Property Agents and Motor Dealers Act 2000 (Qld), s 35(1)

ACN 096 278 483 Pty Ltd v Vercorp Pty Ltd [2011] QCA 189, cited
Asia Pacific Resources Pty Ltd v Forestry Tasmania [1997] TASSC 1, cited
Body Corporate for Palm Springs Residences CTS 29467 v J Patterson Holdings Pty Ltd [2008] QDC 300, considered
Butt v M'Donald (1896) 7 QLJ 68, followed
Cassatone Nominees Pty Ltd v Queenslandwide House & Building Reports Pty Ltd [2008] QCA 102, cited
Famestock Pty Ltd v The Body Corporate for No 9 Port Douglas Road Community Title Scheme 24368 [2012] QSC 129, cited
Famestock Pty Ltd v The Body Corporate for No 9 Port Douglas Road (No 2) [2012] QSC 339, cited
Francis v Municipal Councillors of Kuala Lumpur [1962] 1 WLR 1411; [1962] 3 All ER 633, considered
HL Bolton (Engineering) Co Ltd v TJ Graham & Sons Ltd

[1957] 1 QB 159, considered
Howard v Pickford Tool Co Ltd [1951] 1 KB 417, cited
National Power Australia LLC v Energy Australia [1998] NSWSC 466, considered
Northside Developments Pty Ltd v Registrar General (1990) 170 CLR 146; [1990] HCA 32, cited
Overlook Management BV v Foxtel Management Pty Ltd [2002] NSWSC 17, cited
Pianta v National Finance & Trustees Ltd (1964) 180 CLR 146; [1964] HCA 61, cited
Rakaia Pty Ltd v Body Corporate for "Inn Cairns" Community Titles Scheme 16010 [2012] QCA 306, followed
Secured Income Real Estate (Australia) Ltd v St Martins Investments Pty Ltd (1979) 144 CLR 596; [1979] HCA 51, cited
Vine v National Dock Labour Board [1957] AC 488, considered

COUNSEL: D L Savage QC, with L Stephens, for the appellant/cross-respondent
C L Francis for the respondent

SOLICITORS: Alexander Law for the appellant/cross-respondent
Hynes Legal for the respondent

[1] **CHIEF JUSTICE:** I have had the advantage of reading the reasons for judgment of Douglas J. I agree with the orders proposed by his Honour, and with his reasons.

[2] **FRASER JA:** I have had the advantage of reading the reasons for judgment of Douglas J. I agree with those reasons and with the orders proposed by his Honour.

[3] **DOUGLAS J:** There are three issues raised by this appeal and cross-appeal. They stem from an agreement between the appellant and the respondent where the appellant had been the manager and caretaker for the unit development associated with the respondent body corporate. That relationship came to an end in disputed circumstances.

[4] The issues are:

1. Whether there had been a breach by the respondent of its implied duty to cooperate in doing what was necessary on its part to enable the appellant to have the benefit of the agreement;
2. Whether the respondent was liable in damages for commissions lost by the appellant and the loss of value of its business when it stopped acting as the respondent's agent;
3. Whether unauthorised conduct of the respondent's committee should be treated as behaviour of the respondent repudiating the agreement with the appellant.

[5] The bulk of the appellant's claim was dismissed by the learned trial judge on the basis that the respondent had not breached any implied duty to cooperate in assisting the appellant to obtain a new licence to act as a real estate agent. The appellant had allowed the licence it held when it first acted as a letting agent for unit holders in the respondent to lapse. His Honour found, clearly correctly in my view,

that the implied duty to cooperate did not require the respondent to assist the appellant to obtain a new licence where it had itself previously breached clauses of its caretaking and management agreement requiring it to obtain licences needed to enable it to conduct the business of letting units in accordance with the relevant statutes and subordinate legislation.[1]

[6] Nor did his Honour accept that the appellant had proved the claimed loss of commissions in the amount of $270,349.

[7] Those two aspects of his Honour's decision were challenged by the appellant. For reasons I shall develop it is my view that the appeal should fail.

[8] The third issue was raised by the argument on the respondent's cross-appeal that actions of the committee of a body corporate which were not authorised should not be attributed to the body corporate so as to amount to evidence that it had repudiated a contract. The cross-appeal by the respondent against his Honour's conclusion that it was liable to the appellant for lost management fees totalling $37,632.53 arising from its committee's unauthorised act should succeed.

The facts

[9] The management agreement between the parties was entered into in February 1998 and included the following clauses:

> "8.1.5 The Manager shall obtain all permits, consents or licences required by any local or other lawful authority to enable the Manager to conduct on the Parcel the business of letting the Units or provide any other services as may be mentioned in this Agreement.
>
> 8.1.6 The Manager shall conduct such business in accordance with all statutes, regulations, by-laws or ordinances in any way relating to such business ...
>
> …
>
> 10. This Agreement may be terminated by the Body Corporate by notice in writing to the Manager in any of the following events:
>
> …
>
> 10.1.2 If the Manager shall fail or neglect to carry out the duties of the Manager pursuant to this Agreement and such failure or neglect shall continue for a further period of fourteen (14) days after notice in writing shall have been given to the Manager specifying the duty which the Manager has failed or neglected to carry out and calling upon the Manager to perform such duty.
>
> 10.1.3 If the Manager shall be guilty of gross misconduct or gross negligence in the performance of the duties of the Manager hereunder."

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[1] See *Famestock Pty Ltd v The Body Corporate for No 9 Port Douglas Road Community Title Scheme 24368* [2012] QSC 339 at [69]-[85].

[10] The facts surrounding the dispute that developed between the parties were helpfully and uncontroversially summarised by his Honour as follows:[2]

> "[20] At or soon after the commencement of the agreement the plaintiff and Mrs McEvoy acquired restricted real estate agent licences from the licensing authority, which at that stage was the Auctioneers and Agents Committee (AAC). This was a requirement, under s 18 of the *Auctioneers and Agents Act* 1971 (Qld), of acting as a real estate agent, the definition of which includes a letting agent.
>
> [21] The licences, apparently only current for a year, expired on 9 June 1999, no renewal applications having been made. The plaintiff continued to act as a letting agent and was thus acting unlawfully and contrary to cl 8.1.5 and cl 8.1.6 of the letting agreement.
>
> [22] Charges of acting as an unlicensed real estate agent were laid against the plaintiff and Mrs McEvoy and they were found guilty and fined on 18 June 2001 in the Mossman Magistrates Court. Between being charged and dealt with, the plaintiff and Mrs McEvoy lodged new licence applications, on 21 May 2001.
>
> [23] Subsequently, on 27 June 2001, the AAC requested the plaintiff provide evidence of the body corporate approval to conduct the letting business. This request was required to assess the applications under the *Property Agents and Motor Dealers Act* 2000 (Qld) ('PAMDA'), which was to come into effect on 1 July 2001.
>
> [24] The defendant's manager, Mr Dan Moy, faxed a signed copy of the agreement to the Licensing Section (PAMDA) of the Office of Fair Trading, which was previously the AAC, on 3 August [2001].
>
> [25] On 6 August 2001, Mr Ross Hurst, now deceased, the then chairman of the defendant, allegedly telephoned the Office of Fair Trading and spoke to Ms Gwen Pusztay, an officer of the Licensing Section. Ms Pusztay's file note of 16 August 2001 recorded that:
>
> > 'I received a telephone call from the chairman of the body corporate on 6/8/01, advising that the body corporate considers that the above agreement is not now current or valid in consideration of the fact that the above clauses were breached, and ~~was~~ is in the process of taking further legal advice. I asked him to provide something to me in writing in relation to the matter, however I have not yet received anything.'

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[2] See *Famestock Pty Ltd v The Body Corporate for No 9 Port Douglas (No 2)* [2012] QSC 339 at [20]-[49] (footnotes omitted).

The breached clauses there referred to were cl 8.1.5 and cl 8.1.6, which relate to obtaining licences and conducting the business in accordance with all statutes and regulations.

[26] A further file note made 20 August [2001] records:

> 'Mr Hurst (body corporate chairman) telephoned today (20/8/01), and advised that there will be a body corporate meeting tomorrow night which will consider legal advice obtained. The advice was that Famestock Pty Ltd had breached the agreement by not ensuring it remained licensed, and therefore the agreement was no longer valid.
>
> The meeting will (he said) vote not to approve Famestock Pty Ltd as the letting agent.
>
> He will advise me in writing after the meeting.'

[27] On 31 August 2001, Ms Pusztay made an internal request for legal advice as to whether the agreement was at an end. The advice was received on 26 September 2001, the recommendation being that:

> ' ... the applications received from Famestock Pty Ltd and McEvoy for restricted letting agent's licences not be decided until such time as there is clarity as to (a) whether the agreement granting letting approval has been terminated, and (b) whether any other form of letting approval has been given by the body corporate.
>
> Should Famestock Pty Ltd and McEvoy require their application to be determined, the Office of Fair Trading should decide the matter according to the provisions of the Act. As such, and in the absence of any advice from the body corporate that the agreement has been terminated, it appears that the licences should be granted. If the agreement is later terminated, and if no other letting approval is given by the body corporate, action could be taken to revoke the licences.'

[28] On 4 October 2001, Ms Pusztay made a handwritten note that she had:

> 'Asked Mr Hurst (B/C) to advise in writing that they have applied to the BCCM adjudicator for a ruling re the agreement. Also asked him to advise outcome.'

[29] Mr Moy provided such confirmation on 5 October 2001.

[30] In a letter dated 8 October 2001, sent by facsimile the following day, Ms Pusztay, signing on behalf of the Office of Fair Trading, informed the chairman of the defendant that:

> 'It is understood that the caretaking and letting agreement dated 12 February 1998 between the body corporate and Famestock Pty Ltd is the subject of Body Corporate and Community Management adjudication as to its validity. That being the case, the Chief Executive would be unable to be satisfied that this agreement constitutes the required body corporate approval.
>
> If the body corporate wishes to give approval to Famestock Pty Ltd to carry on the letting business at No 9 Port Douglas Road, in order for the licences to be considered by the Chief Executive, it would need to provide unfettered documentary evidence of that approval.'

[31] On 19 October the defendant served two default notices on the plaintiff pursuant to c1 10.1.5. The first notice alleged a breach of cl 8.1.5 on the basis that the plaintiff did not hold a letting agent's licence. The second notice alleged a breach of special condition 2 of the agreement. The notices, in accordance with cl 10.1.5 required the plaintiff to remedy the breaches within 14 days.

[32] On 26 October 2001, the plaintiff gave notice to the owners of all units for which it acted as letting agent that it would cease letting their units from that day.

[33] Mr McEvoy, acting on behalf of the plaintiff, gave notice to Mr Hurst on 14 December 2001 that the plaintiff would cease acting as the letting agent for the unit holders.

[34] Between 21 and 28 December 2001 the owners of seven units, namely units four, five, seven, 10, 13, 14 and 17, gave notice to the plaintiff withdrawing its authority to let their units. The notices from each of the unit owners used language which in some paragraphs was strikingly similar. The irresistible inference is that there had been some sharing of common written information between them or with them by someone such as Mr Hurst. The writers called to give evidence refused to accept that they acted in concert however it is at least likely they were acting with knowledge of their mutual intentions. The plaintiff submits their evidence on this aspect lacked candour and that there was obviously some sharing of written information. However even if, as seems likely, those witnesses were knowingly acting with mutual intent there is nothing wrong

with that. Clause 8.2 of the Letting Agreement expressly acknowledged the owners of lots were free to elect to use another letting agent. That is, they had the right to withdraw their authority to let, regardless of whether they did so with knowledge others were doing likewise or in similar terms as others.

[35] In addition, it seems the owners wanted to withdraw their authority for a number of reasons. They had concerns about the manner in which the advertising account was being run, the fact that the plaintiff was falling behind on its payments to TransMetro and the frequency of errors in their accounts. Apparently some owners also thought that it would be preferable to have a steady income from a permanent tenant. The other obvious reason why some owners withdrew their authority was that they had discovered that the plaintiff had been operating without a licence for some two years.

[36] Despite the withdrawals of authority, it appears that the plaintiff let out some units in January 2002, in particular units four, five, 10 and 13, and, it is alleged, retained the entirety of the proceeds from those rentals. In January 2002, the proprietors of units 10 and 14 discovered this, prompting the proprietor of unit 10 to make a complaint to the Office of Fair Trading.

[37] The defendant then purported to terminate the management agreement by various notices of termination dated 7 February 2002. That date precedes the committee meeting at which it was formally resolved to terminate, which was on 11 February 2002. This is explained by the fact that votes were actually submitted in writing prior to the meeting. The five members had all voted on or before 7 February.

[38] In total there were eight notices of termination. Each purported to terminate pursuant to a different ground. Three related to the failure to obtain the licence. One related to reg 84(e) of the *Body Corporate and Community Management (Accommodation Module) Regulation* 1997, another to c1 10.1.3 and the other on the basis that it was a fundamental breach of c1 8.1.5.

[39] There were also two notices of termination relating to an alleged failure to maintain and or audit trust account records as required by law. These termination notices were made pursuant to reg 84(c) and c1 10.1.3.

[40] Another notice terminated on the basis that the alleged breach of special condition 2 represented a fundamental breach of the contract. The remaining two notices were issued pursuant to c1 10.1.2 for the failure to remedy the breaches as contained in the October 2001 default notices.

[41] I have already found the committee of the defendant was not entitled to terminate the plaintiff's caretaking and letting agreement, that being a matter requiring the authority of a general meeting of the defendant.

[42] On 23 January 2002, Ms Pusztay made a handwritten file note recording:

> 'If B/C approval is provided, we will be looking for A/R up to time they stopped letting + possible police investigation, refer Gwen before proceeding.'

[43] Another handwritten note dated 12 February 2002 states:

> 'Rang Chair of B/C - Ross Hurst ... Famestock was apparently served with 10 termination notices on 8.2.02.
>
> Will send copies to this office.
>
> Would seem agreement is at an end and licence applications should be refused.
>
> However, await notices and then determine.'

[44] The Office of Fair Trading received the notices of termination on 22 February 2002.

[45] A few days later, on 25 February 2002 the application for licences made by the plaintiff and Mrs McEvoy were refused. The applications were refused on the basis that the eligibility requirements, namely the requirement that Mrs McEvoy have body corporate approval to carry on a business of letting lots in the building complex and for the plaintiffs application that the corporation had body corporate approval and that a director of the corporation was a restricted letting agent were not met under s 35(1) of the *Property Agents and Motor Dealers Act* 2000. The plaintiff was informed of this decision in a letter dated 7 March 2002.

[46] The plaintiff applied to an adjudicator for an order that the termination of the agreement was void. Ultimately, that application was dismissed on 29 May 2001 under s 201 of the *Body Corporate and Community Management Act* 1997 (Qld) on the basis that it should be dealt with in a court of competent jurisdiction.

[47] At an Extraordinary General Meeting of the defendant held on 22 August 2002 the McEvoys and associated entities exercised their lot entitlements to pass a series of resolutions, including for the removal of the current committee and chairperson.

> [48] With Mr McEvoy as chairman of the committee, the plaintiff entered into new caretaking and letting agreements with the defendant in May 2003.
>
> [49] The plaintiff did not resume letting the units but instead sold the letting and management rights to a third party in November 2004. The plaintiff claims that the letting pool at that time comprised nine units."

Implied duty to cooperate

[11] The appellant's argument that the respondent failed to perform its implied duty to cooperate to do what was necessary on its part to enable the appellant to have the benefit of the contract[3] focussed on the failure of the respondent through its then chairman, Mr Hurst, to inform the Office of Fair Trading in late 2001 that the agreement between the appellant and the respondent was still in existence. His Honour's conclusion on that factual issue was as follows:[4]

> "[64] The evidence suggests there was communication occurring between Mr McEvoy and Mr Hurst about a potential letter to the Office of Fair Trading in October but not in the terms pleaded.
>
> [65] In cross-examination the following exchange occurred:
>
> > 'MR RYALL: Now - excuse me. Mr McEvoy, you had discussions with Mr Hurst during October about trying to reach some agreement? -- Yes.
> >
> > And the idea of those discussions was that some accommodation be made between the body corporate and Famestock to allow Famestock to continue as caretaker and letting agent until it could sell its business to someone else?-- That's correct.
> >
> > At 19 October or so of 2001, Mr Hurst indicated to you that he was prepared to send a letter to the Office of Fair Trading, I think it was at that stage, to say that the agreement was on foot. Do you remember that?-- It was a - yes, I do.
> >
> > And that was followed by a letter, which I'll show you now and see if you recall? -- Yes.
> >
> > Yes. So, that's a letter to you from Mr Hurst on-----?-- Yes.
> >
> > And he signed it as the chairperson of the body corporate?-- Yes, he did.

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3 See, eg, *Butt v M'Donald* (1896) 7 QLJ 68, 70-71; *Secured Income Real Estate (Australia) Ltd v St Martins Investments Pty Ltd* (1979) 144 CLR 596, 607-608.

4 *Famestock Pty Ltd v The Body Corporate for No 9 Port Douglas Road (No 2)* [2012] QSC 339 at [64]-[68].

> And he says there that he thought there was an agreement reached on Friday the 19th of October between you and he?-- Yes.
>
> That wasn't right, though, was it; you had a different proposal to put?-- There were discrepancies, yes.'

[66] The letter there referred to, of 26 October 2001 demonstrates that during the week prior there had obviously been discussions between Mr McEvoy and Mr Hurst working towards the plaintiff selling its management rights in an orderly manner. The letter explained an interim arrangement was agreed but later reneged on by Mr McEvoy:

> 'I am in receipt of your facsimile of 23 October. The contents of that letter are not acceptable to the Body Corporate committee.
>
> The agreement which I believed I had reached with you and which you confirmed to me as late as in our telephone conversation of Friday, 19 October was as follows.
>
> …
>
> 3. The Body Corporate would advise the Office of Fair Trading that although it regarded you as being in breech [sic] of the letting agreement it was prepared not to take any action for a period of three (3) months.
>
> 4. As a consequence of 3 the Office of Fair Trading would issue you with the appropriate licence for the limited period.
>
> …
>
> Your letter under reply indicates that you won't pursue this limited license [sic] and will accordingly not perform your obligations under the letting agreement.
>
> It must be obvious to you that your response is not acceptable to the Body Corporate committee.'

[67] In the light of this evidence I would not have accepted that the request occurred as and when pleaded even if Mr McEvoy's evidence had been that such a request occurred on 22 October. At that stage any request for a letter would obviously have related to a heavily qualified communication of the kind contemplated in numbered para 3 of the above quoted letter of 26 October 2001.

> [68] It is unsurprising that whether requested to or not the defendant did not provide a letter saying the agreement was still in existence in circumstances where the plaintiff had long been in breach of cl 8.1.5 and cl 8.1.6 of the letting agreement by operating unlicensed."

[12] The argument was that his Honour erred in those findings on the basis that he should have found that the respondent's breach was its failure to tell the Office of Fair Trading that the agreement was on foot when the implied duty to cooperate required it to say that. There was no evidence, however, as to what the attitude of the chief executive of the Office of Fair Trading would have been had the Office been told, for example, that the agreement was still on foot whether or not the parties were in dispute about it. One suspects that it may have treated such information as material to its decision but not determinative. The letter of 8 October 2001 set out at para [30] of the learned trial judge's decision referred to earlier makes it clear that the chief executive of the Office needed "unfettered documentary evidence" of the respondent's approval of the agreement. Given the body corporate's attitude to the breaches by the appellant such an approval was not forthcoming nor should it have been required to provide it.

[13] Therefore his Honour's conclusion that it was unsurprising that the respondent did not provide a letter, whether requested to or not, saying the agreement was still in existence, in the circumstances where the appellant was in breach of the agreement, is clearly correct. As Rolfe J said in the Supreme Court of New South Wales in *National Power Australia LLC v Energy Australia*:[5]

> "The Court will readily imply a term in any contract that the parties shall co-operate to ensure the performance of their bargain. The degree of co-operation required, however, is to be determined, not by what is reasonable, but by the obligations imposed - whether expressly or impliedly - upon each party by the agreement itself. If one party is in breach of its duty to co-operate, so that performance of the contract cannot be effected, the other will be entitled to treat itself as discharged.
>
> Similarly, if an agreement is entered into which can only take effect by the continuance of a certain existing state of circumstances, each party is under an implied obligation to do nothing of its own motion to put an end to that state of affairs, under which alone the agreement can become operative.
>
> As I understand it, it has never been suggested that these well recognised obligations go to the extent of requiring a party to, in effect, abandon looking after its own interests in relation to the contract at least in the sense of not pursuing, if such a remedy is available, the right to terminate the contract for failure on the part of the other party to comply with its obligations under it. Nor, as I would understand it, is there any obligation on a party not to pursue

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5 [1998] NSWSC 466 (Supreme Court of New South Wales, Commercial Division, 50036/1998; Rolfe J, 24 July 1998, BC9803545, unreported) at p 116. See also *ACN 096 278 483 Pty Ltd v Vercorp Pty Ltd* [2011] QCA 189 at [73] per Fraser JA; *Overlook v Foxtel* [2002] NSWSC 17 at [67] per Barrett J and *Asia Pacific Resources Pty Ltd v Forestry Tasmania* [1997] TASSC 1 (Supreme Court of Tasmania, No CV28/1996; Zeeman J, 15 January 1997 unreported, BC9700445) at p 29.

> any available remedies it may have under the contract by virtue of the breach of the other party. In the present case, of course, there is a positive obligation on the defendant to provide reasonable assistance."

[14] This approach also puts paid to another argument of the appellant, that the learned trial judge erroneously decided that the duty to cooperate was limited to the outset of the contract and was not a continuing obligation. What his Honour actually said was:[6]

> "[78] The plaintiff submitted the implied term was 'to allow one to apply to renew or to keep one's licence during the term' and 'to keep people licensed'. The argument's premise seems to be that this was a situation where the plaintiff was seeking to renew or keep its licence. Under the duty to co-operate such a situation may have called for the defendant to do what was reasonably necessary to enable the plaintiff to have the benefit of the agreement by ensuring its existing licensed status did not lapse. But that was not the situation here. This was not an instance of an existing licence coming up for renewal. The plaintiff had no licence to renew. The reality was that the defendant had not held a licence for over two years in breach of the letting agreement.
>
> [79] The defendant conceded that the implied term would have required it to co-operate in the plaintiff's securing of a licence at the commencement of the agreement had it been necessary. That much may have been necessary to give business efficacy to the contract. However, there is an obvious distinction between that situation, when that which the parties had contracted for was being put in place, and the facts of this case. Here, the plaintiff was in material breach of the agreement in that it had been operating for over two years without a licence. It was no fault of the defendant that the licence lapsed and the plaintiff had been operating unlawfully and in breach of the agreement. The circumstances do not support an inference that there was a positive obligation on the defendant to co-operate with the plaintiff's attempts to procure a licence. Moreover, such an inference would run counter to the terms of the agreement.
>
> [80] The very nature of the agreement meant that the parties in entering the agreement would have contemplated the plaintiff would remain licensed. The agreement does not bespeak the implication of a duty to co-operate so broad as to require the defendant to assist the plaintiff to remedy its breach and secure a licence after having operated unlicensed and in breach of the agreement for over two years."

[15] His Honour was correct in concluding that there had been no breach established by the respondent in respect of the implied duty to cooperate. Where the appellant

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6 *Famestock Pty Ltd v The Body Corporate for No 9 Port Douglas Road (No 2)* [2012] QSC 339 at [78]-[80].

breached the agreement by failing to renew its own licence the respondent was under no duty to tell the Office of Fair Trading that the agreement was still on foot when it was considering its own position in the matter because of the appellant's breach of the agreement which had, by then, occurred more than two years before. His Honour did not decide that the duty to cooperate was not a continuing obligation but said that it did not apply here where the appellant was itself in breach of the agreement.

Loss of commissions

[16] His Honour concluded that the appellant's claim for loss of commissions was premised on the assumption that its letting pool was diminished in December 2001 because of the respondent's alleged breach arising from its alleged failure to comply with the duty to cooperate. In the absence of such a breach no liability in damages would follow.

[17] His Honour went on to conclude that, in any event, by the time the *ultra vires* termination notice of 7 February 2002 issued, the plaintiff was no longer conducting the business of letting units as contemplated by the agreement. It had, on 26 October 2001, given notice to the owners of all units for which it acted as letting agent that it would cease letting their units from that day. It also indicated on 14 December 2001 that it would cease acting as the letting agents for the unit holders. As his Honour said:[7]

> "[110] … Its dilemma, of its own making, was that it was unlicensed and therefore could not conduct the business contemplated by the letting agreement. Its cessation of that business and any consequent loss of commission occurred earlier than the repudiation of 7 February 2002 and was not caused by it."

[18] His Honour was also unpersuaded by the evidence that the plaintiff had proved any loss of commission resulting from the defendant's repudiation.

[19] The appellant's submission was that his Honour failed to take into account that the appellant lost the chance to redeem its position with the owners of units because of its special position as the letting agent in the building and its connection with a chain whose business was the letting of similar units. That lost chance should have been reflected in a loss in the value of the business which should have been assessed by his Honour.

[20] The respondent argued that, even if there was conduct amounting to a repudiation on the part of the respondent, the appellant did not accept the repudiation and did not terminate the agreement but rather affirmed it by urgently applying to an adjudicator for an order that the agreement remained on foot. Mr Francis for the respondent submitted that an unaccepted wrongful repudiation that is not in itself a breach does not give rise to a right in damages.[8]

[21] The evidence supports his Honour's conclusion that any loss of commissions by the appellant did not result from any breach of contract by the defendant. As the

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[7] *Famestock Pty Ltd v The Body Corporate for No 9 Port Douglas Road (No 2)* [2012] QSC 339 at [110].

[8] *Howard v Pickford Tool Co Ltd* [1951] 1 KB 417, 421, but see also *Cassatone Nominees Pty Ltd v Queenslandwide House & Building Reports Pty Ltd* [2008] QCA 102 at [20].

respondent pointed out, the evidence from lot owners was that they were unhappy with the performance of the appellant as a manager and Mr McEvoy, a director of the appellant, conceded in cross-examination that it had not applied for a restricted letting licence after he became chairman of a new committee of the respondent at an extraordinary general meeting on 22 August 2002 because, at least in part, it was his commercial judgment that none of the lot owners would want to use the appellant's services.[9] The evidence supported his Honour's factual findings about these issues.

[22] Further, the respondent argued that, as a matter of law, the appellant had the benefit of the management agreement up until it was given a new agreement in May 2003 and the issue of the notices of termination had not resulted in its losing its restricted licence. It had lost that by its failure to renew it.

[23] In those circumstances and, having regard to my view that the appellant has not established that his Honour's finding in respect of any breach of the implied duty to cooperate has been established, I agree with his Honour's conclusion that the claim for lost commissions was not made out.

The committee's conduct

[24] The committee's conduct that was said to establish a repudiation of the agreement by the respondent was the issuing of the termination notices on 7 February 2002.

[25] The normal rule is that a disclosed principal is not bound by its agent's act which is outside the scope of the agent's actual, implied or apparent authority unless the principal in fact authorised the agent to do the particular act or ratified it.[10] The learned trial judge concluded in this case that, although the committee of the respondent body corporate was not entitled to determine the appellant's caretaking and letting agreement, the body corporate was still liable in damages to the appellant in respect of its loss of some management fees totalling $37,632.53 on the basis that the committee's conduct evidenced a repudiation of the agreement by the respondent.

[26] His Honour had, at the outset of the trial, decided as a separate question that the committee of the respondent was not entitled to determine the appellant's caretaking and letting agreement, that being a matter requiring the authority of a general meeting.[11] That was because s 92(2) of the *Body Corporate and Community Management Act* 1997 (Qld) provided at the time of the purported termination notices that the general statement in s 92(1) that a decision of the committee is a decision of the body corporate did not apply to a decision on a "restricted issue".[12]

[27] A "restricted issue", by s 24 of the *Body Corporate and Community Management (Accommodation Module) Regulation* 1997 (Qld), extended to decisions to change rights, privileges or obligations of the owners of lots included in a scheme. In this body corporate, community title scheme rights or privileges were conferred on the manager's lot, lot 1, including the right to use it for the purpose of caretaking. It also included the exclusive use of the office area in the lobby of the unit complex.

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9 See AR43 l 40 - AR44 l 12.

10 See *Bowstead and Reynolds on Agency* (19th ed, 2010) pp 359 and 400, articles 71 and 75 at paras 8-001ff and 8-067ff; *Pianta v National Finance & Trustees Ltd* (1964) 180 CLR 146, 151-152, 154, 158; *Halsbury's Laws of Australia* [15-260].

11 See *Famestock Pty Ltd v The Body Corporate for No 9 Port Douglas Road Community Title Scheme 24368* [2012] QSC 129.

12 *Body Corporate and Community Management Act* 1997 (Qld) Reprint 1F.

His Honour concluded that under the by-laws those rights and privileges were clearly those of the owner of lot 1 with the result that a decision to terminate a current property management agreement must have been a decision to change rights and privileges in as much as it would remove the rights and privileges the appellant otherwise enjoyed as an owner of a lot.[13] That conclusion was not challenged at the hearing of the appeal as the first ground of the notice of cross appeal was not pursued.

[28] In deciding that the unauthorised termination notices issued by the committee on 7 February 2002 did breach the agreement, his Honour considered whether the acts of the committee beyond its power could manifest an intention that was attributable to the body corporate. In considering that issue, he referred to the reasons of Denning LJ in *HL Bolton (Engineering) Co Ltd v TJ Graham & Sons Ltd*[14] where his Lordship said that the state of mind of the managers and directors of a company is the state of mind of a company and is treated by the law as such. The learned trial judge then went on to conclude that the committee's issuing of the termination notices had the effect of representing the company's intention not to be further bound by the agreement. He concluded that that was a repudiation on the part of the defendant, manifesting an intention that the respondent would no longer be bound by the agreement.

[29] The respondent's argument was that *HL Bolton (Engineering) Co Ltd v TJ Graham & Sons Ltd* was a decision concerned with establishing intention on the part of the body corporate, not what intention may have been communicated to third parties by agents of it. There was evidence that the appellant here knew at the time of the issuing of the notices to terminate that there had not been a general meeting that had considered the question of the termination of the agreement. It would be deemed to have known that because of its status as a member of the body corporate. The appellant owned or was associated with a significant number of units in the body corporate.

[30] Mr Francis argued that the appellant, therefore, knew from the outset that the body corporate had not formed an intention not to be bound by the agreement and that the communication from the committee in the form of the notices of termination was not representative of the intentions of the respondent. It followed, in his submission, that the actions of the committee would have been seen by a reasonable person in the appellant's position therefore not to be actions on the part of the respondent that evinced an intention not to be bound by the agreement at all, but only an ineffective attempt on the part of the committee to take a step they were not authorised to undertake.

[31] He argued that the learned trial judge erred in finding that the appellant, when receiving the notices, would have inferred that the body corporate's intention was not to be bound further by the agreement so that there should not have been a finding that the acts of the committee amounted to a repudiation of the agreement on the part of the respondent.

[32] In that context, he relied also on the terms of s 92 of the *Body Corporate and Community Management Act* to which I have referred previously. The relevant subsections were:

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13 *Famestock Pty Ltd v The Body Corporate for No 9 Port Douglas Road Community Title Scheme 24368* [2012] QSC 129 at [40].

14 [1957] 1 QB 159, 172.

> "92. **Power of committee to act for body corporate**
>
> (1) A decision of the committee is a decision of the body corporate.
>
> (2) Subsection (1) does not apply to a decision that, under the regulation module, is a decision on a restricted issue for the committee."

[33] He pointed out that the allegation by the appellant that these notices to terminate the agreement were in breach of s 92 had been made by the appellant since its pleading in August 2002 in circumstances where it was clear, because of the statute, that there was no actual or apparent authority in the committee to bind the body corporate. He referred to the decision in *Northside Developments Pty Ltd v Registrar General*[15] where Dawson J, when discussing Denning LJ's statement in *HL Bolton (Engineering) Co Ltd v TJ Graham & Sons Ltd* and speaking of the organic theory used to impose liability upon companies beyond that which could be imposed by the application of the principles of agency alone, said that that theory "merely extends the scope of an agent's capacity to bind a company and there must first be authority, actual or apparent. It is only then that a person may be regarded not only as the agent of a company, but also as the company itself - an organic part of it - so that '[t]he state of mind of [the agent] is the state of mind of the company'."

[34] Here there was no actual or implied authority. That was made clear by the terms of s 92 of the Act and the Regulation, the legislature having prescribed how "decision making power is to be distributed between the body corporate in general meeting and the committee."[16] The appellant must also have known from its own position as a unit holder in the respondent that there had been no resolution of the body corporate supporting the notices. So there was no apparent authority. Accordingly, in Mr Francis's submission, the conduct of the committee could not be treated as conduct of the respondent.

[35] At the trial the appellant referred his Honour to the decisions in *Vine v National Dock Labour Board*[17] and *Francis v Municipal Councillors of Kuala Lumpur*[18] as illustrations of the principle that a corporate entity can potentially be liable for the *ultra vires* acts of its committee. His Honour did not rely upon those decisions for the conclusion he reached but they were touched on by the appellant in the submissions. In the circumstances, it is appropriate to say something about them.

[36] In *Vine v National Dock Labour Board*, the respondent wrongfully delegated its power to dismiss a worker to a disciplinary committee instead of deciding the issue itself. It was that process of delegation to a committee which did not itself have the power to dismiss which led to the declaration that the termination of the appellant's employment was a nullity and that he was entitled to damages. That was an *ultra vires* act of the respondent itself. Here the purported termination notices were issued by the committee rather than by the body corporate which alone had the power to do that. There had been no attempt at delegation by the body corporate. It

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15 (1990) 170 CLR 146, 201-202.

16 *Rakaia Pty Ltd v Body Corporate for "Inn Cairns" Community Titles Scheme 16010* [2012] QCA 306 at [42] per Gotterson JA. See also *Body Corporate for Palm Springs Residences CTS 29467 v J Patterson Holdings Pty Ltd* [2008] QDC 300 at [46] per McGill DCJ.

17 [1957] AC 488.

18 [1962] 3 All ER 633; [1962] 1 WLR 1411.

is difficult to see why the consequences of the committee's independent, unauthorised behaviour should be sheeted home to the body corporate so as to make it liable in damages.

[37] In *Francis v Municipal Councillors of Kuala Lumpur*, there had been a dismissal of an employee by municipal councillors who were his employers. He could, however, only be dismissed by the President of the Council. In refusing declaratory relief, the Judicial Committee of the Privy Council decided that there had been a *de facto* dismissal of the appellant by his employers, the councillors, who were therefore liable in damages. Their Lordships took the view that it would be wholly unreal to accede to the declaratory relief claimed that the appellant continued to be an employee. They distinguished the different factual situation in *Vine v National Dock Labour Board*. There was no analysis whether the allegedly *ultra vires* actions of the councillors should insulate them from the consequences of their own actions in purporting to dismiss the appellant or be ascribed, for example, to the President. It does not seem to have been a case where there was any analysis of the question whether the unauthorised acts of an agent should be attributed to the disclosed principal, which is the aim of the appellant here. Neither of those decisions deals with the issue in this case.

[38] Mr Savage QC for the appellant argued in reply that it was the behaviour of the respondent in refusing to perform the agreement after the purported termination by the committee that deprived the appellant of its rights under the agreement and justified his Honour's conclusion that the respondent had repudiated. That was not the case pleaded which relied only upon the sending of the termination notices and the conduct complained of in failing to perform the agreement was not shown to be conduct of the respondent rather than the committee members.

[39] For the reasons expressed earlier, therefore, I have concluded that it was incorrect to attribute the behaviour of the committee in issuing unauthorised termination notices to the respondent body corporate. It was clear that they were not actually or impliedly authorised to issue them by the statute which governed the relationship between the parties on this issue. Nor, from the factual situation known to the appellant or which should have been known to it, was there a basis for concluding that the committee possessed apparent authority to do what was done.

Conclusions and order

[40] For these reasons, it is my view that the appeal should be dismissed and the cross-appeal allowed with costs, with the effect that the judgment below should be set aside and judgment there should be entered for the defendant with costs.