

CITATION: *Siu and Anor v Body Corporate for Coniston CTS 23339* [2017] QCAT 113

PARTIES: Johnathan Siu and Catherine Siu as trustees for The Siu Family Trust (Applicant)
v
Body Corporate for Coniston CTS 23339 (Respondent)

APPLICATION NUMBER: OCL013-17

MATTER TYPE: Other civil dispute matters

HEARING DATE: 1 March 2017

HEARD AT: Brisbane

DECISION OF: **Senior Member Brown**

DELIVERED ON: 16 March 2017

DELIVERED AT: Brisbane

ORDERS MADE:

1. Upon the undertaking of Johnathan Siu and Catherine Siu as trustees for The Siu Family Trust as to damages, the Body Corporate for Coniston CTS 23339 (“the Body Corporate”) whether by its servants, agents, employees or otherwise is restrained from:
 - a. terminating or attempting to terminate the Management Agreement dated 30 June 1998 and the Letting Agreement dated 30 June 1998 (as varied and assigned) (“the Agreements”) between the Body Corporate and Johnathan Siu and Catherine Siu as trustees for The Siu Family Trust in reliance on:
 - i. any resolution of the Body Corporate to terminate the Agreements arising from the Extraordinary General Meeting held on 1 March 2017 (“the EGM”) (or at any adjournment of the EGM); or

- ii. the remedial action notices dated 17 October 2016 and 23 January 2017, the subject of these proceedings; or
 - b. giving any notice pursuant to section 126 of the *Body Corporate and Community Management Act 1997 (Qld)*;
until the earlier of:
 - i. The final determination of the proceeding;
 - ii. Order of the Tribunal;
 - iii. Agreement in writing between the parties.
2. The costs of and incidental to the application for interim orders are reserved.

CATCHWORDS:

REAL PROPERTY – STRATA AND RELATED TITLES – MANAGEMENT AND CONTROL – BODY CORPORATE: POWERS, DUTIES AND LIABILITIES – DUTY TO REPAIR AND MAINTAIN COMMON PROPERTY

PROCEDURE – CIVIL PROCEEDINGS IN STATE AND TERRITORY COURTS – MOTIONS, INTERLOCUTORY APPLICATIONS AND OTHER PRE-TRIAL MATTERS – Interim injunction – Whether body corporate should be prevented from terminating management agreement and letting agreement – Where there is a serious question to be tried – Where the balance of convenience favours the granting of the injunction – where damages are not an adequate remedy

Body Corporate and Community Management Act 1997 (Qld) s 94(2), s 100(5), s 149B(1)
Body Corporate and Community Management (Accommodation Module) Regulation 2008 (Qld) s 129(1), s 129(3), s 129(4)(b), s 129(4)(c)

Beachcomber Management Pty Ltd ATF Kafritsas Family Trust v Body Corporate for the Surfers Beachcomber CTS 10411 [2014] QCAT 453

Clarke v Japan Machines [1984] 1 Qd R 404
Johjen Pty Ltd v Body Corporate for Aegean
 [2013] QCAT 387
Luadaka v Body Corporate for the Cove
Emerald Lakes [2013] QCATA 183
Ralacom Pty Ltd v Body Corporate for Paradise
Island Apartments (No. 2) [2010] QCAT 412
Seed and Anor v Body Corporate for
Renaissance Golden Beach [2011] QCAT 246

APPLICANT: Mr Anthony Pitt, Solicitor, HopgoodGanim
 Lawyers

RESPONDENT: Mr Gary Bugden, Solicitor, Bugden Legal

REASONS FOR DECISION

- [1] The Applicant is the manager and letting agent of “Coniston”, a residential complex located in Woodridge. The body corporate for Coniston is seeking to terminate the management and letting agreements with the Applicant for what it says are breaches by the Applicant of the management and letting agreements. The Applicant seeks an injunction preventing the body corporate from taking steps to terminate the agreements.

A brief history of the dispute

- [2] The Applicant acquired the management and letting rights for Coniston in October 2014 by way of assignment of the original letting agreement and the original management agreement (the Deed of Assignment).¹ The terms of the agreements expire in June 2023. There is therefore a little over 6 years for the agreements to run.
- [3] Under the management agreement the remuneration payable by the body corporate to the Applicant is \$78,952.25 per annum which increases by 5% per annum on 1 July each year. Under the letting agreement the Applicant receives an average of \$1,450.00 per calendar month by way of commission.²
- [4] The funds used by the Applicant to acquire the management and letting rights came from a facility through Bank of Queensland Limited. Under that facility the bank has security over the family home of Mr Siu. The bank provided a business facility to enable the Applicant to access funds as required. The amount owing by the Applicant to the Bank of Queensland is approximately \$200,000.00.³

¹ Affidavit of Johnathan Chi Ngai Sui dated 24 February 2017 at [4].

² Ibid at [5].

³ Ibid at [8].

- [5] Both the management agreement and the letting agreement provide for the appointment of a nominee in the event that the manager is a corporation.⁴ Neither agreement contemplates the appointment of a nominee in the event that the manager is a trust as is the case with the present Applicant. By clause 4.1(b) of the Deed of Assignment, the body corporate approved Johnathan Siu as the nominee of the manager. During the hearing the body corporate raised a number of issues regarding the role of the nominee which I will address later in these reasons.
- [6] For the purposes of the present application it is sufficient to note the following facts:
- a) Between 15 October and 26 November 2014, and with the consent of the body corporate, Mr Ronnie Yeung acted as the trust's nominee;⁵
 - b) Between 13 April 2015 and 31 August 2016, and with the consent of the body corporate, Anthony and Sara Barthorpe acted as the trust's nominee;⁶
 - c) Between a date subsequent to August 2016 and January 2017, Anastasia Saab and Shannon Elliott acted as the manager's nominee.
- [7] The appointment of Ms Saab and Mr Elliott became a source of significant dispute between the parties. When Mr and Mrs Barthorpe ceased acting as managers and letting agents, the Applicant nominated Ms Saab and Mr Elliott to replace them. On 17 August 2016 the body corporate gave conditional approval for Ms Saab and Mr Elliott as the Applicant's nominees.⁷ As a result of what the body corporate says was the failure by the nominees to provide police employment checks, the conditional approval was withdrawn by the body corporate.⁸
- [8] The involvement of Ms Saab and Mr Elliott became an issue of dispute between the Applicant and the body corporate leading to the body corporate issuing two (2) Remedial Action Notices ('RANs') on 17 October 2016 (the 1st RANs).⁹
- [9] Two further, and more comprehensive, RANs were issued by the body corporate on 23 January 2017 (the 2nd RANs). The 2nd RANs were not limited to issues relating to Ms Saab and Mr Elliott. The 2nd RANs contained extensive lists of alleged breaches by the Applicant of the management and letting agreements, including permitting unlicensed persons to perform management and letting duties, misconduct by the nominees, threatening and intimidating behaviour by the nominees, failure by the Applicant to act in accordance with the Code of Conduct for Body

⁴ Management Agreement at [7.1]; Letting Agreement at [5.1].

⁵ Affidavit of Johnathan Chi Ngai Sui dated 24 February 2017 at [10].

⁶ Ibid at [13].

⁷ Affidavit of Helen Louise Seitam dated 1 March 2017 at [44].

⁸ Ibid at [45].

⁹ Affidavit of Johnathan Chi Ngai Sui dated 24 February 2017, exhibit JS1, document 13.

Corporate and Service Manager Providers and a failure by the Applicant to perform the letting and management duties personally.¹⁰

- [10] On 30 January 2017 the Applicant received notice of an extraordinary general meeting ('EGM') of the body corporate to be held on 1 March 2017. The meeting proposed to deal with only one substantive issue being the termination of the letting and management agreements.

The legislative framework and principles for granting injunctive relief

- [11] The *Body Corporate and Community Management Act 1997* (Qld) ('BCCM Act') and *Body Corporate and Community Management (Accommodation Module) Regulation 2008* (Qld) ('the Module') is the relevant enabling Act.

- [12] A body corporate may, if approved by ordinary resolution of the body corporate, terminate a person's engagement as a manager or service contractor, authorisation as a letting agent.¹¹ If a service contractor fails to carry out duties under an engagement the body corporate may terminate the engagement.¹² The body corporate must first give to the service contractor a remedial action notice.¹³ The notice must, among other things, set out details of the action sufficient to identify the duties the body corporate believes have not been carried out, and state that the person must carry out the duties within a specified period but not less than 14 days after the notice is given.¹⁴ If the service contractor fails to comply with the notice within the stated period, and approval is given by ordinary resolution of the body corporate, the body corporate may terminate the engagement.¹⁵

- [13] A body corporate must act reasonably in carrying out its functions under the BCCM Act and the community management statement.¹⁶ The committee for the body corporate must act reasonably in making a decision.¹⁷ The test for what is reasonable is an objective one requiring a balancing of factors in all of the circumstances.¹⁸

- [14] A party may apply to the Tribunal about a claimed or anticipated contractual matter, about the engagement of a person as caretaking service contractor or the authorisation of a person as a letting agent.¹⁹ The Tribunal may grant an interim injunction if it is just and convenient to do so.²⁰ An appropriate undertaking may be required by the Tribunal.²¹

¹⁰ Affidavit of Johnathan Chi Ngai Sui dated 24 February 2017, exhibit JS1, document 31.

¹¹ Module, s 127(1) and (2).

¹² Ibid s 129(1)(b).

¹³ Ibid s 129(3).

¹⁴ Ibid s 129(4)(b) and (c).

¹⁵ Ibid s 129(1).

¹⁶ BCCM Act, s 94(2).

¹⁷ Ibid s 100(5).

¹⁸ *Luadaka v Body Corporate for the Cove Emerald Lakes* [2013] QCATA 183.

¹⁹ BCCM Act, s 149B(1).

²⁰ *Queensland Civil and Administrative Act 2009* ('QCAT Act'), s 59(1).

²¹ Ibid s 59(6)(a).

- [15] The Tribunal may order an interim injunction only if it is just and equitable to do so. This is a legislative statement of the general common law principle relating to the granting of injunctive relief. It will be just and equitable to grant an interim injunction if the Tribunal is satisfied that:
- a) There is a serious issue to be tried; and
 - b) The balance of convenience favours the granting of the injunction; and
 - c) Damages are otherwise not an adequate remedy.
- [16] The question of the adequacy of damages is sometimes considered a subset of the balance of convenience requirement.

What do the parties say?

- [17] The Applicant says that there are serious legal issues to be tried in the proceeding relating to:
- a) The validity of the 1st RANs and whether they comply with s 129(4) of the Module;
 - b) The validity of the 2nd RANs and whether they comply with s 129(4) of the Module;
 - c) The validity of the Notice of EGM to lot owners; and
 - d) The validity of the scheduled EGM.
- [18] The Applicant says that the 1st RANs:
- a) Require the Applicant to perform the management and letting agreements in a way that does not correspond with the express terms of the agreements; and
 - b) Fail to include details of the duties the Applicant is alleged to have failed to undertake or how those duties were not undertaken.
- [19] The Applicant says that the body corporate cannot rely on the 1st RANs to terminate the agreements because the Applicant has not breached the agreements as alleged or has otherwise, insofar as is possible, rectified the breaches such that they are not existing situations and do not have any ongoing effect.
- [20] The Applicant says that the 2nd RANs suffer from the same defects as the 1st RANs, however in addition says:
- a) The 2nd RANs are inconsistent, referring to two different periods within which the Applicant was required to remedy the breaches of 21 days and 14 days;

- b) The alleged conduct relates to past conduct all of which has been remedied and/or has not been repeated such that there is no conduct for the Applicant to remedy;
 - c) The 2nd RANs contain allegations, including allegations of conduct, that are factually incorrect;
 - d) The 2nd RANs refer to matters the subject of now resolved complaints to the Office of Fair Trading; and
 - e) The Notice and materials in respect of the EGM were issued within the time allowed in the 2nd RANs for the Applicant to remedy the breach and therefore did not allow the Applicant at least 14 days to remedy any breach.
- [21] The Applicant says that the body corporate is not acting reasonably and that the Applicant should be allowed to continue to discharge the duties of manager and letting agent without having to defend itself against what it says are the “baseless allegations” by the body corporate.
- [22] The Applicant says that the committee material accompanying the Notice of the EGM is false and misleading and does not give lot owners a fair and reasonable intimation of the proposal to be decided at the EGM nor fair warning of the risks to lot owners in proceeding with the resolution.
- [23] In relation to the balance of convenience consideration, the Applicant says that if the injunction is not granted it will suffer significant financial loss which the Applicant says is its investment in the management and letting business valued at \$393,000.00, the annual income it receives from the management agreement of \$78,952.25 (increasing at 5% per annum on 1 July each year for the term of the agreement), and the annual income from the letting agreement in the amount of approximately \$17,400.00.
- [24] The Applicant says that the body corporate will not suffer any detriment or prejudice if the injunction is granted as the Applicant will continue to discharge its duties under the agreements in addition to which the body corporate has been closely monitoring, and will continue to closely monitor, the discharge by the Applicant of its duties.
- [25] At the hearing of the application, Mr Pitt for the Applicant submitted that damages would not be an adequate remedy if the injunction was not granted and the Applicant was ultimately successful in the proceeding. The Applicant says that quantifying its loss if the agreements are terminated will be difficult as it will require some degree of speculation as to those future losses.
- [26] The body corporate says that the 1st and 2nd RANs go to the need for someone to be living within the scheme to discharge the duties required of the manager. At the hearing of the application Mr Bugden for the body corporate said that the commitment of the Applicant to be present in the

scheme was foremost in the mind of the body corporate when deciding to issue the RANs.

- [27] Mr Bugden conceded that there is a substantial dispute between the parties however submitted that the evidence was clear enough to resolve the factual issues in dispute in the body corporate's favour in the present application.
- [28] The body corporate says that the conduct of the Applicant amounts to unconscionable conduct and that the evidence is sufficiently clear for a finding to this effect to be made.
- [29] The body corporate says that it has no confidence that the Applicant will perform its duties and that the Applicant failed to honour an undertaking given on 22 December 2016 that Mr Siu would move in to the scheme in order to discharge the manager's duties.
- [30] As to the issue of the timing of the EGM, the body corporate says that the meeting was scheduled to be held after the expiration of the remedial action period referred to in the 2nd RANs. The different periods for compliance referred to in the 2nd RANs is explained by the body corporate by reference to the RANs actually comprising two (2) notices, one pursuant to s 129 of the Module and one pursuant to the agreements.
- [31] Addressing the balance of convenience, the body corporate says that the rental pool the subject of the letting agreement has reduced from 24 lots to 14 lots, thus impacting upon the Applicant's valuation of its asset. The body corporate also points to evidence it says suggests the questionable commerciality of the Applicant's business.²²
- [32] The body corporate says that the Applicant cannot be relied upon to perform its duties as required under the agreements as evidenced by its past conduct in failing to perform those duties other than for short periods. The body corporate says that the Applicant is contractually required to be on site at the complex for a substantial period referring to specific clauses in the management agreement.²³ The body corporate says that, despite the Applicant's assertions to the contrary, there is evidence that Mr Siu is not at the complex 3 days per week.
- [33] The body corporate says that if an injunction is granted, it should be subject to conditions including that Johnathan Siu is required to reside at the scheme for the duration of the injunction.

Discussion

- [34] At the EGM lot owners were asked to resolve to terminate the management agreement and the letting agreement as a result of the failure by the Applicant to remedy the 1st and 2nd RANs. It is the validity of

²² Affidavit of Helen Louise Seitam dated 1 March 2017, annexure "M".

²³ Management Agreement at 3, 4.1, 5.3, 7.2.

the RANs and the reasonableness of the actions of the body corporate that are at the centre of the present dispute between the parties.

[35] The requirements for valid RANs, and notices given pursuant to statutory authority generally, have been the subject of judicial and tribunal consideration.

[36] In considering the issue of the validity of remedial action notices generally, it is appropriate to refer to the decision of The Hon. James Thomas (formerly Justice Thomas of the Supreme Court of Queensland) in *Seed and Anor v Body Corporate for Renaissance Golden Beach*.²⁴

... the validity of a notice of default is to be determined objectively on the basis of what would be conveyed to a reasonable recipient with his or her background knowledge.

In considering whether there has been compliance with a statutory requirement for such a notice it is necessary that it be capable of permitting the recipient to understand with reasonable certainty what he or she is required to do.

It may also be relevant to consider whether the legislation has an objective such as affording an opportunity to the recipient to rectify a breach before the giver of the notice may proceed to exercise an extreme remedy (*Clarke v Japan Machines (Australia) Pty Ltd* above at 410 and 413). Both of these requirements seem to be necessary in the present statutory scheme.

...

It also seems to me that the statutory scheme contemplates an existing situation of which the Body Corporate fears a continuation or which still has some ongoing effect. I do not find it necessary to base my judgment on this particular point, but it is difficult to think that this statutory scheme contemplates past completed breaches that are over and done with.

...

It seems unlikely that contraventions that do not have some current or ongoing effect, or contraventions based upon contractual conduct that has been waived, were intended to confer such a right on the Body Corporate.

...

I am aware that a CCN²⁵ is a commercial document and is not to be construed as a pleading, but the above matters are relevant considerations in determining whether the notice satisfies the statutory requirements. Obviously if they are too vague to be capable of meaningful response they will fail to comply. It is to be remembered that very often in such cases the allegations will be denied, and that there will have to be a legal determination of such issues by an adjudicator or this tribunal. Such determinations would be impossible unless the issues were reasonably defined from the outset.

[37] In *Clarke v Japan Machines (Aust) Pty Ltd* referring to a notice given upon default by a mortgagee, Thomas J (as he then was) held:

²⁴ [2011] QCAT 246 at 4 [21], [22], 5 [24], 6 [29].

²⁵ A Code Contravention Notice.

A question of fact and degree is involved in every case. The most relevant factors determining validity will be the extent of the error, and the capacity of the notice to give the mortgagor a reasonable opportunity to do what he is obliged to do.²⁶

[38] In *Johjen Pty Ltd v Body Corporate for Aegean*²⁷ the Tribunal, in considering the validity of five RANs, found that the principles adopted in *Seed* were also applicable to remedial action notices under section 129 of the Module including the requirement that a notice must be capable of permitting the recipient to understand with reasonable certainty what he or she is required to do to comply.

[39] In *Johjen Pty Ltd* the Tribunal held:

The purpose of such a notice²⁸ is to give a manager the opportunity to remedy its breach (such as misconduct, gross negligence, failure to carry out a duty, or contravention of the code of conduct) before the body corporate can terminate the manager's engagement. It cannot have been Parliament's intention to allow a notice to be given under section 129 in respect of a breach that can no longer be remedied.

That is not to say that a body corporate might not have some other remedy for a breach that has been and gone. The body corporate might, for example, be permitted to terminate the engagement under a term of the contract.²⁹

[40] The 1st RANs rely upon a number of alleged breaches of the Applicant's obligations under the management agreement including the failure by the Applicant to personally perform the duties under the agreement. The issue of whether the agreements require the Applicant to perform the duties personally or permit the Applicant to appoint a nominee is a point of significant dispute between the parties. The agreements make no provision for the appointment of a trust as manager and letting agent. Indeed, the agreements do not contemplate the appointment of a trust as the manager or letting agent. The Deed of Assignment specifically address the appointment of a trust as manager and letting agent. The Deed contains the body corporate's approval of Mr Siu as nominee of the Manager. The Deed also contains clause 5 which provides:

TRUSTEE PROVISIONS

This clause applies if the Assignee is a trustee, or at any time holds the Agreement as trustee, then whether or not the Body Corporate has notice of the trust: ...

[41] I do not understand it to be contested by the body corporate that it had knowledge of the Applicant's trust status and it difficult to see how it could given that the assignee under the Deed of Assignment is Mr and Mrs Siu as trustees of The Siu Family Trust. It is at the very least arguable that the Deed of Assignment varies the agreements insofar as the provisions

²⁶ *Clarke v Japan Machines (Aust) Pty Ltd* [1984] 1 Qd R 404 at 413.

²⁷ [2013] QCAT 387.

²⁸ *Ibid*, referring to a remedial action notice given under s 129 of the *Module*.

²⁹ *Ibid* 5 [15] - [16].

relate to the appointment of a nominee by the manager. If indeed the Applicant was entitled to appoint a nominee then it is also at the very least arguable that the 1st RANs were defective in requiring the Applicant to personally resume performance of the duties required under the agreements. It is also difficult to reconcile, on the basis of the evidence presently before me, the assertions by the body corporate that the Applicant was not permitted to appoint a nominee with the actions of the body corporate in actually permitting a nominee to perform the duties under the agreements and approving the appointment of such nominees.³⁰

- [42] The 1st RANs make no mention of specific duties or obligations the Applicant had failed to perform other than the general assertion that the Applicant had not been performing the duties personally. The 1st RANs are in part directed to the suitability, or otherwise, of Ms Saab and Mr Elliott as the Applicant's nominees. Those suitability issues, the alleged conduct of Ms Saab and Mr Elliott when dealing with members of the body corporate, and the failure by Ms Saab and Mr Elliott to hold a resident letting agent's licence, seemingly informed the body corporate such that it was satisfied the nominees were not respectable and responsible or appropriate persons to perform the duties under the agreements. Whether Ms Saab and Mr Elliott were appropriate persons to be appointed as nominees clearly involves the determination of a number of factual issues which are in dispute.
- [43] One such issue is whether or not the Applicant provided the body corporate with appropriate police checks. The form and content of the checks provided is disputed. The Applicant says the checks were provided and that the body corporate disputed the usefulness of the documents provided. Whether the body corporate acted reasonably in requiring the Applicant to provide police checks for the nominees, whether the Applicant complied with the request and whether the body corporate acted reasonably when it advised the Applicant that the documentation provided was inadequate are all factual matters in dispute.
- [44] Another factual issue for determination is whether the Applicant's nominees acted in the manner alleged by the body corporate in the 1st RANs. Whether, for example, Ms Saab and Mr Elliott conducted themselves inappropriately in their communications with members of the body corporate is not a matter that can be determined on an application for an interim injunction. Findings of fact will be required to be made on the evidence which the parties must be given the opportunity to test. Findings of fact on these issues will be relevant to findings as to the validity of the RANs and the reasonableness of the conduct of the body corporate.
- [45] The 2nd RANs are far more comprehensive in substance than the 1st RANs. The breaches relied upon by the body corporate include allowing unlicensed persons to perform letting duties, providing to unlicensed and unsuitable persons access to body corporate records, allowing persons to

³⁰

Affidavit of Helen Louise Seitam dated 1 March 2017 at [33].

continue to act as nominees in circumstances where the body corporate did not approve those nominees, the failure by the Applicants to inform the body corporate of its breaches of the *Agents Financial Administration Act 2014 (Qld)*, distributing defamatory material to lot owners, breaching an undertaking to move into the scheme and personally resume the performance of the duties under the agreements, refusing to personally perform those duties, failing to provide to the body corporate police employment checks for Ms Saab and Mr Elliott, appointing other persons to perform duties in breach of the undertaking given by the Applicant and in defiance of the requirement of the body corporate that the Applicant personally perform the duties, and failing to act with honesty, fairness and professionalism in accordance with the *Code of Conduct for body corporate managers and caretaking service providers*.

- [46] The 2nd RANs require rectification of the alleged breaches within 21 days. The manner of rectification is identified as the Applicant personally resuming performance of the duties including residing within the scheme. The management agreement requires that the Manager or the Manager's nominee is located at all reasonable times in Lot 1 of the complex or a lot in the buildings.³¹ The Manager is not obliged under the agreement to reside in the scheme. The letting agreement requires the Applicant to supervise the standard of tenants and to supervise the operation of the building.³² To require, as the 2nd RANs do, the Applicant to reside at the scheme is inconsistent with the express terms of the management agreement and the letting agreement. As such, the 2nd RANs are arguably invalid to the extent that they require the Applicant to do something beyond its contractual obligations. The apparent inconsistency raises issues as to the reasonableness of the actions of the body corporate in issuing the 2nd RANs.
- [47] The 2nd RANs largely refer to past conduct of the Applicant or the Applicant's nominees. The matters referred to are historical breaches of the Applicant's contractual obligations. At the time the 2nd RANs were issued, Ms Saab and Mr Anderson were no longer acting as the Applicant's nominees and Mr Siu says that he had moved back into the scheme.³³ It is not entirely clear whether and to what extent the body corporate says that this is not the case other than the argument by the body corporate that there is a dispute about the nature and extent of Mr Siu's presence at the complex. In any event, I do not understand it to be suggested by either party the Applicant has appointed, or has sought to appoint, a further nominee. Mr Siu says that he stays overnight in the complex 3 nights per week, and that at other times he can be contacted 24 hours per day by telephone. Whether the Applicant was discharging its duties in this fashion at the time the 2nd RANs were issued, and whether this manner of discharging the required duties was in accordance with the agreements, will involve the determination of questions of fact at a hearing

³¹ Management Agreement at 3.1(v).

³² Letting Agreement at 2.1(b) and 2.2.

³³ Affidavit of Johnathan Siu dated 24 February 2017 at [43].

when the parties have the opportunity to call evidence and test the evidence.

- [48] The 2nd RANs also refer to a failure by the Applicant to honour an undertaking to move back into the scheme. Reference is made in the 2nd RANs to the undertaking having been made “through (the Applicant’s) lawyer”.³⁴ Included in the bundle of material relied upon by the Applicant is a copy of a letter from the Applicant’s solicitors to the body corporate’s solicitors dated 22 December 2016. The letter relevantly states:

We confirm that Mr Johnathan Siu, the trustee of our client, will move into the Scheme on 13 January 2017, after Mr and Mrs Elliott have moved out on 12 January 2017, and will otherwise resume undertaking the duties under the Agreements.³⁵

- [49] The 2nd RANs refer to the deliberate failure by the Applicant to honour the undertaking. Aside whether the letter of 22 December 2016 contains an undertaking, and it is difficult to conclude that it does, it is unclear from the 2nd RANs in what way the alleged undertaking was said to have been breached by the Applicant. Presumably the body corporate is referring to what it says is the contractual obligation of the Applicant to reside full time at the scheme. As I have observed, the agreements do not require the Applicant to reside at the scheme but rather, in the case of the letting agreement, to supervise the standard of tenants and the operation of the building generally, and in the case of the management agreement, to be located at all reasonable times in the complex. Whether the Applicant complied with these contractual obligations involves, as I have also observed, a consideration of the evidence and the determination of factual issues at a hearing.
- [50] It is not necessary for me to deal with the issues raised by the Applicant in relation to the validity of the EGM. I am satisfied that there is a serious question to be determined at a hearing.

Balance of convenience and the adequacy of damages

- [51] The balance of convenience and adequacy of damages considerations will be dealt with together.
- [52] The Applicant says that if the interim injunction is granted it will continue to perform its duties under the agreements until the final determination of the proceeding. The Applicant says that the body corporate will suffer no prejudice as, effectively, the status quo will be maintained – the duties will be performed and the Applicant will be remunerated in accordance with the agreements.
- [53] The body corporate says that it will be prejudiced if it is restrained from taking steps to terminate the agreements. The body corporate says that, based on its prior conduct, the Applicant cannot be relied upon to perform

³⁴ 2nd RAN dated 23 January 2017 at 2F.

³⁵ Affidavit of Johnathan Chi Ngai Sui dated 24 February 2017, exhibit JS1, document 31.

its duties under the agreements. The body corporate points to the very limited periods of time that Mr Siu has personally performed the duties since the Applicant became the manager and letting agent. The body corporate also relies upon what it says was the breach by the Applicant of the undertaking to move back into the scheme. In support of its contentions, the body corporate relies upon an affidavit by Ms Helen Seitam who is the chairperson and secretary of the body corporate. Ms Seitam refers to a number of “recent examples of the committee members living onsite having to perform the duties under the management agreement whilst the Manager attends to his other business ventures outside of the Scheme”.³⁶

- [54] The matters referred to by Ms Seitam relate to such things as non residents making use of the swimming pool, residents smoking, drinking and eating around the swimming pool, repairs being required to common property fencing, a tenant being menaced by a blue tongue lizard, issues with a pool pump, and a driveway gate malfunctioning. Annexed to Ms Seitam’s affidavit are a number of email communications and what appear to be transcriptions of other types of communications. Some of the issues complained of pre-date the 2nd RANs and none of the issues in Ms Seitam’s affidavit are referred to in the 2nd RANs. Presumably, the body corporate relies upon these instances as evidence of the Applicant’s failure to perform its duties and the prejudice the body corporate will suffer if the agreements are not terminated. Much of what is referred to in Ms Seitam’s affidavit is hearsay evidence upon which I can place no weight.
- [55] What is clear is that if the injunction is not granted the body corporate will take immediate steps to terminate the agreements. This is likely, in turn, to have consequences with the Applicant’s financier. Whilst it is not clear whether the agreements are a financed contract for the purposes of the BCCM Act³⁷ the evidence of the Applicant is that the Bank of Queensland financed the purchase of the rights under the agreements and has taken security over Mr Siu’s family home. The income received by the Applicant is used in part to repay the loan facility.³⁸
- [56] If the agreements are terminated the Applicant says that it will lose its investment in the management and letting rights, the income from those rights and the opportunity to sell the rights.
- [57] Whilst the body corporate has concerns about the performance by the Applicant of its duties and the discharge of its obligations, I am of the view that these are not sufficiently grave that they outweigh the factors in favour of granting the interim injunction.
- [58] As to whether damages would be an adequate remedy, the body corporate conceded at the hearing that the quantification of damages would be difficult but not impossible. The Applicant says that if the

³⁶ Affidavit of Helen Seitam dated 1 March 2017 at [65].

³⁷ BCCM Act, Chapter 3, Part 2, Division 4.

³⁸ Affidavit of Johnathan Siu dated 24 February 2017 at [8] and [9].

agreements are terminated it will lose the opportunity to sell the management and letting rights at some time in the future. Should the injunction not be granted and the agreements are terminated and in the event that the Applicant is successful in the proceeding, evidence will be required of the value of the rights at some future, and unknown, point in time. The Applicant, if successful in the proceeding, will also be required to adduce evidence of the loss of income up until any sale of the caretaking and letting rights. Again, this is all speculative and uncertain. There is no evidence before the Tribunal about whether the body corporate would be in a position, at some future point in time, to satisfy a damages award in an amount presently unknown. Whether lot owners would be required to be levied or would meet such a levy is unknown. These uncertainties lead me to conclude that damages would not be an adequate remedy.

Conclusion

- [59] Having concluded that there is a serious question to be determined at a hearing, that the balance of convenience favours the granting of the interim injunction and that damages would not be an adequate remedy if the interim injunction is not granted, it is appropriate for orders to be made restraining the body corporate from taking steps to terminate the agreements.
- [60] I have observed that it is unclear whether the BCCM Act, Chapter 3, Part 2, Division 4 applies in respect of the agreements. I will order that the body corporate is restrained from giving notice to any financier pursuant to s 126 of the BCCM Act. If in fact the financed contract provisions of the BCCM Act do not apply, the order will not be to the detriment of either party.
- [61] The body corporate submits that if the interim injunction is granted, any order should be made subject to the condition that the Applicant reside at the scheme for the duration of the interim injunction. I decline to make such an order. As I have found, the agreements do not expressly require the Applicant to reside at the complex. It would be neither reasonable nor appropriate to impose such a condition.

Costs

- [62] Both parties seek their costs of the application. The Applicant says that on 7 February 2017 it informed the body corporate that the RANs were invalid, that the Notice of EGM was invalid and that the Applicant would commence the current proceeding if the body corporate continued with the EGM. On 22 February 2017 the Applicant sought an undertaking from the body corporate that it would consent to orders restraining it from terminating or attempting to terminate the agreements in reliance upon a resolution by the body corporate or the RANs.
- [63] The Applicant says that in refusing to provide the undertaking, the body corporate failed to act reasonably and that it is in the interests of justice

that the Tribunal exercise its discretion and order the body corporate to pay the Applicant's costs of the application.

[64] The body corporate says that if the application for an interim injunction is successful that costs should be reserved.

[65] The starting point in considering any application for costs is s 100 of the QCAT Act. Other than as provided under the QCAT Act or an enabling Act, each party to a proceeding must bear their own legal costs.³⁹ The Tribunal may make an order requiring a party to pay all or some of the costs of another party if the interests of justice require such an order to be made.⁴⁰

[66] The circumstances relevant to the exercise of the discretion must point "so compellingly to a costs award that they overcome the strong contra-indication against costs orders in s 100".⁴¹

[67] The Applicant relies upon the decision of the Tribunal in *Beachcomber Management Pty Ltd ATF Kafritsas Family Trust v Body Corporate for the Surfers Beachcomber CTS 10411*.⁴² In *Beachcomber*, which involved an application by a manager for an interim injunction preventing the termination of caretaking and letting agreements, the Tribunal considered the circumstance relevant to the determination of costs as "the Body Corporate's adversarial position to terms (of the proposed injunction) that caused it minimal, if any, grief". In ordering the body corporate to pay the manager's costs of the application, the Tribunal found that the body corporate had undertaken a significant amount of preparation involving its solicitors and barrister and the filing and service of extensive material:

... to argue simply about whether to incorporate Beachcomber's financier into the injunction.⁴³

[68] The BCCM Act, the relevant enabling Act, does not provide for the awarding of costs in disputes before the Tribunal. The QCAT Act therefore governs any award of costs in this proceeding. I may have regard to a number of circumstances in deciding whether to exercise my discretion and award costs including:

- a) Whether a party is acting in a way that unnecessarily disadvantages another party;
- b) The nature and complexity of the dispute;
- c) The relative strengths of the claims made by the parties; or

³⁹ QCAT Act, s 100.

⁴⁰ Ibid s 102(1).

⁴¹ *Ralacom Pty Ltd v Body Corporate for Paradise Island Apartments (No. 2)* [2010] QCAT 412, 5 [29].

⁴² [2014] QCAT 453.

⁴³ Ibid 10 [37].

d) The financial circumstances of the parties.⁴⁴

[69] As I have found, the determination of the issues in dispute requires a consideration of all of the evidence and findings by the Tribunal on the relevant and admissible evidence. It was not unreasonable for the body corporate to oppose the application. The body corporate has expressed concerns about the conduct of the Applicant. It may be that some or all of these concerns are found, after a hearing, to have been substantiated. Whether the RANs, based on some of these concerns, are valid or otherwise is entirely another matter. Again, a hearing is required to enable the evidence to be heard and tested and for the parties to have the opportunity to make submissions as to the application of the relevant legal principles concerning, among other things, the validity of the RANs and the reasonableness of the actions of the body corporate.

[70] The appropriate order is that the costs of the application for an interim injunction are reserved.

[71] I order as follows:

1. Upon the undertaking of Johnathan Siu and Catherine Siu as trustees for The Siu Family Trust as to damages, the Body Corporate for Coniston CTS 23339 (“the Body Corporate”) whether by its servants, agents, employees or otherwise is restrained from:
 - a. terminating or attempting to terminate the Management Agreement dated 30 June 1998 and the Letting Agreement dated 30 June 1998 (as varied and assigned) (“the Agreements”) between the Body Corporate and Johnathan Siu and Catherine Siu as trustees for The Siu Family Trust in reliance on:
 - i. any resolution of the Body Corporate to terminate the Agreements arising from the Extraordinary General Meeting held on 1 March 2017 (“the EGM”) (or at any adjournment of the EGM); or
 - ii. the remedial action notices dated 17 October 2016 and 23 January 2017, the subject of these proceedings; or
 - b. giving any notice pursuant to section 126 of the *Body Corporate and Community Management Act 1997* (Qld);

until the earlier of:

 - i. The final determination of the proceeding;
 - ii. Order of the Tribunal;
 - iii. Agreement in writing between the parties.
2. The costs of and incidental to the application for interim orders are reserved.

⁴⁴ QCAT Act, s 102(3).

